[2017] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**ASHLEY SAMUELS (by her next friend ROSE ELLIS)**	**APPELLANT**
AND	**STEVE DALEY**	**RESPONDENT**

Gordon Robinson instructed by Mrs Winsome Marsh for the appellant

Mrs Ursula Khan and Charles Campbell instructed by Mrs Ursula Khan for the respondent

22 September 2016 and 6 December 2017

MORRISON P

[1] I have had the good fortune to read in advance the judgment prepared by Sinclair-Haynes JA. In general, I agree with her reasoning and conclusion that this appeal should be dismissed, with costs to the respondent to be agreed or taxed.

[2] As regards the particular point of emphasis which has led to an additional contribution from McDonald-Bishop JA, I agree that the evidence of Mr Daley (the owner of the car involved in the accident) was (i) admissible to prove his purpose in

allowing Mr McKenzie (the driver) to use the car at the material time; but (ii) could not go to prove the truth of what Mr McKenzie said that he actually used it for. To the extent that Sykes J appeared to suggest that the evidence was admissible for both purposes, I agree, for the reasons more fully stated by McDonald-Bishop JA, that he fell into error. But, in common with both my sisters, I also agree that the learned judge's lack of precision on this particular point cannot in any way invalidate his overall reasoning and conclusion on liability.

MCDONALD-BISHOP JA

[3] I, too, have read the draft judgment of my sister, Sinclair-Haynes JA and I do agree with her conclusion that this appeal should be dismissed. Except for one issue, on which I choose to say a few words of my own, I agree substantially with her reasoning.

[4] The facts of this case are adequately stated by my learned sister and I do not consider it necessary to repeat them for the limited purpose of my comment. I only wish to focus special attention on the issue discussed by my learned sister at paragraphs [27] to [30] below, in treating with ground (a) in relation to the issue of whether hearsay evidence was relied on by the learned trial judge. The evidence in issue relates to the purpose for which the car, owned by Mr Steve Daley, the respondent, was being driven by a third party, Mr Everton McKenzie, at the time of the collision that resulted in injuries to Ashley Samuels, the appellant.

[5] The evidence of Mr Daley was that he gave permission to Mr McKenzie (the tortfeasor) to drive his car on the day the collision occurred. In his effort to establish

that Mr McKenzie was not acting on his behalf and for his benefit at the material time, Mr Daley stated, at paragraphs 4 and 6 of his redacted witness statement (following certain portions being struck out as hearsay) that:

> "4. At the time of the said accident Everton McKenzie was driving my said vehicle with my permission**. I had lent it to him to pick up a friend in Gregory Park.** …
>
> 5. ...
>
> 6. … My mother was not in the car at the time of the accident. He was not doing anything for her at the time of the accident. He was not doing anything for me at the time of the accident." (Emphasis added)

[6] Mr Robinson in his submissions to this court on behalf of the appellant argued, as he did in the court below, that what Mr Daley said at paragraph 4 of his witness statement, emphasised above, is "[s]trictly speaking...inadmissible as dependent on hearsay". The learned trial judge rejected that submission and permitted that portion of the witness statement to stand. In my view, the learned trial judge cannot be faulted for doing so. The statement is not hearsay, when one examines the purpose for which it was elicited.

[7] The fact that Mr Daley gave permission to Mr McKenzie to use the car, as well as his reason for doing so, was relevant to the issue of whether the car was being used at the time of the collision in connection with Mr Daley's business or for his benefit. In other words, the reason for Mr Daley giving the car to Mr McKenzie, or the purpose for which he gave him the car to use on that day, was intimately connected to the question

of whether Mr McKenzie was acting as servant or agent of Mr Daley at the material time so as to render Mr Daley vicariously liable for the negligent driving of Mr McKenzie.

[8] What Mr Daley asserted in the impugned aspect of his evidence was the reason or the purpose for which he permitted Mr McKenzie to drive his car on the day in question. The grant of permission would have been based on what Mr McKenzie had told him, but his evidence was not admitted for the truth as to what Mr McKenzie had told him regarding the actual purpose of the trip, but rather to establish the fact that he lent the car to Mr McKenzie and the purpose for which he did so. The evidence would have served to establish the fact that Mr Daley gave permission to Mr McKenzie to drive the car for a specified purpose which was not for his (Mr Daley's) benefit. It was not to establish as a fact and, in truth, that Mr McKenzie was using the car for that purpose at the time of the accident.

[9] Mr Daley's evidence as to the purpose for which he had lent his car, even though implicitly conveying what he would have been told by Mr McKenzie, was original evidence and so was not inadmissible. He was the only one who could have given evidence as to the reason he had lent his car or the purpose for which he had lent it. That would have been the basis for the permission he gave to Mr McKenzie to drive the car on the day in question. For him to simply say, without more, that he gave Mr McKenzie permission to drive the car without being able to say his reason for doing so, would have been unfair to him in his effort to discharge the duty cast on him to rebut the presumption of agency or service to which the fact of his ownership of the vehicle

had given rise. He could have given permission to Mr McKenzie to drive the vehicle for his (Mr Daley's) benefit. This was a critical issue to be decided in the case and so his evidence as to the reason he gave the car to Mr McKenzie or for what purpose was relevant and probative.

[10] I therefore find it unobjectionable when the learned trial judge, in treating with Mr Robinson's submissions at paragraph [34] of his judgment, stated that:

> "[34] ...The court does not agree. As a practical matter, **how else would Mr Daley be able to state what was *his purpose* for lending the car to Mr McKenzie on the day in question? If he cannot say what *his purpose* was then who else can safely do so when that is actually one of the contested issues in the case?"** (Emphasis added)

[11] What I find to be objectionable in the learned trial judge's treatment of the evidence are some aspects of his reasoning at paragraph [33] of the judgment where he opined:

> "[33] **The problem with the latter submission is that there is no proper basis for me to reject Mr Daley's evidence regarding the trip taken by Mr McKenzie on the unfortunate day**. Mr Daley told the court quite candidly that he was too busy because of his political activities to take his mother to and from hospital and other business. He made arrangements for this and since Mr McKenzie would be doing this on a frequent basis he added his name as an authorised driver. Like the son in **Rambarran**, Mr McKenzie could drive the car at any time and also on his (McKenzie) business. Mr Daley, in this case, has gone further than the father in **Rambarran**: **he not only stated that the car was not on his or his mother's business at the material time but also stated the purpose of the trip, namely to pick up a friend of Mr McKenzie.**This evidence does double duty: first it states that the trip was not for Mr Daley's purpose and

second that the purpose of the trip was for the benefit of Mr McKenzie." (Emphasis added)

[12] In my view, the learned trial judge seemed to have treated Mr Daley's evidence as stating a fact as to the purpose of the trip at the time of the collision when he stated these things:

(a) **"...**there is no proper basis for me to reject Mr Daley's evidence **regarding the trip taken by Mr McKenzie on the unfortunate day"**; and

(b) "[Mr Daley] not only stated that the car was not on his or his mother's business at the material time **but also stated the purpose of the trip, namely to pick up a friend of Mr McKenzie.**" (Emphasis added)

[13] The learned trial judge seemingly relied on what Mr Daley stated in evidence as to the purpose for which he lent the car to Mr McKenzie as asserting, in truth, the purpose of the trip at the material time. However, without Mr McKenzie giving evidence, the learned trial judge could not have properly arrived at a positive finding as to the purpose of the trip at the material time merely on what Mr Daley stated. In this regard, therefore, the learned trial judge would have erred in law by using the evidence for a purpose that it could not properly have been used for and, that is, for the truth of the assertion that the purpose of the trip was to pick up a friend. On account of this finding, and to this extent only, I accept that the learned trial judge would have erred by relying on hearsay.

[14] The highest that Mr Daley's evidence could have been taken, once it was accepted as being credible, was to establish that he gave the vehicle to Mr McKenzie to be used for a purpose unconnected to his (Mr Daley's) interests and not for his benefit and so when the collision occurred, Mr McKenzie was not driving as Mr Daley's servant or agent but for his own benefit. This was a finding open to the learned trial judge on non-hearsay evidence, which he had before him.

[15] The error on the part of the learned trial judge does not affect the clear evidence from Mr Daley that Mr McKenzie was not engaged in any task at his behest or for his benefit at the material time. It was a matter for the learned trial judge to have ultimately determined, as a question of fact and on the totality of the evidence, whether he accepted Mr Daley as a witness of truth in this regard; he evidently did so. This court is in no proper position to disturb that finding of fact because the learned trial judge would have had the advantage of having seen and heard the witness that this court has not enjoyed.

SINCLAIR-HAYNES JA

[16] On 4 November 2002 whilst on her way from school with her sister and a friend, Ashley Samuels (the appellant) was lured by the sweets of a vendor to the other side of the road. That trip across the Gregory Park main road to purchase sweets proved to be a bitter experience for young Ashley Samuels who is now scarred and incapacitated as she was struck down by a motor car which was owned by Mr Steve Daley (the respondent), and driven by Mr Everton McKenzie.

[17] The appellant, by her mother and next friend Ms Rose Ellis, instituted proceedings against both Messrs Daley and McKenzie in the Supreme Court for compensation. Mr Daley was pursued as being vicariously liable for the negligence of Mr McKenzie. Her claim was that at the material time, the vehicle was being driven by Mr McKenzie as his agent. That claim was trenchantly resisted by Mr Daley, who asserted that at the material time, Mr McKenzie was driving the vehicle entirely on his own business. Mr McKenzie did not attend the trial. Sykes J rejected the claim against Mr Daley and entered judgment against Mr McKenzie as follows:

> "a. General Damages JA$6,450,000.00 at 3% from date of service of the Claim Form to the date of Judgment;
>
> b. Cost of future medical care - JA$598,268.58 and US$700.00 with no interest on either amount;
>
> c. Special damages - JA$317,505.00 and US$700.00 at 6% interest from November 2, 2002 to June 22, 2006 and 3% from June 23, 2006 to the date of judgment;
>
> … "

[18] The appellant is dissatisfied with the following orders of the learned judge:

> "The claim against Mr Daley is dismissed with costs to him to be agreed or taxed."
>
> "Costs awarded to Mr Daley to be paid by Mr McKenzie."

[19] She has consequently challenged the following findings of law and has filed following grounds of appeal.

Findings of law challenged

"i. The Respondent's evidence that he loaned his car to [Mr McKenzie] to pick up a friend was admissible evidence (paragraph 34 of the Judgment below);

ii. The Privy Council's decision in **Rambarran v Gurrucharran** that the stand alone testimony of the driver's father in that case was sufficient to rebut the presumption of agency has created a general principle that stand alone testimony in any case can rebut the presumption (Paragraph 36 of the Judgment below);

iii. The facts in this case were sufficiently distinguishable from the facts in the Court of Appeal case of **Princess Wright v Alan Morrison** [2011] JMCA Civ 14 so as to make the rational [sic] of the case irrelevant and not applicable to the current facts (paragraph 37 of the Judgment below)."

Amended grounds of appeal

"(a) The Learned Trial judge erred in accepting the admissibility of the Respondent's allegation as to the purpose of [Mr McKenzie] driving at the material time 'as a practical matter' when, as a matter of Law, the learned Judge had already struck out all other attempts in the Witness Statements to introduce similar evidence from [Mr McKenzie] as hearsay and this was an indirect method of introducing a hearsay statement by [Mr McKenzie] who was not a party or witness at the Trial and in relation thereto no notice had been filed to circumvent the hearsay rule under the EVIDENCE ACT.

(b) The Learned Trial Judge erred in taking the decision in **Rambarran v Gurruchurran** as creating a general principle that stand alone evidence would be enough to rebut the presumption of agency in these circumstances. In that case, the stand alone evidence came from the driver's father whose relationship with the driver was of a close familial type who could not be blamed for allowing his son to drive his car without knowing the specific purpose of the trip. In this case, the owner and driver were, for all practical purposes,

strangers which circumstance alone means that the owner's self serving, stand alone testimony ought not, save in exceptional cases of which this is not one, to be accepted as sufficient to rebut the presumption of agency.

(c) The Learned Judge erred in finding that the **Wright v Morrison** case was distinguishable because it was an obvious case of employer/employee 'and so the employer may well be expected to exercise greater control over the use of his vehicle' (paragraph 37) when there is no material distinction between that case and this one where the Respondent admitted that [Mr McKenzie] would never have driven his car except that he needed him to transport his mother in exchange for which he was allowed to drive the car allegedly on the driver's own business.

(d) The Learned Trial judge erred, even if the Respondent's evidence was accepted in its totality, in failing to find that, on the Respondent's own evidence, [Mr McKenzie] was merely carrying out an authorized act (driving the Respondent's car on the road) in an unauthorized manner (unknown purpose).

(e) The Decision of the Learned Trial Judge was unreasonable in light of the evidence."

Submissions in respect of grounds (a) and (b)

[20] Counsel Gordon Robinson, on behalf of the appellant, relied on the Privy Council case, **Rambarran v Gurrucharran** Privy Council Appeal No 2 of 1969; [1970] 1 All ER 749, for the proposition that evidence of ownership gives rise to a rebuttable presumption of agency which requires the owner to lead credible evidence of the purpose of the trip by the car so as to rebut the presumption. He also relied on **Eric Rodney v Alan Werb; Alan Werb v Eric Rodney and Patricia Philpotts** [2010]

JMCA Civ 43, a case from this court, which reiterated the principle. It was counsel's submission that Mr Daley proffered no evidence to rebut the presumption.

[21] Mr Robinson submitted that the judge relied on hearsay statement contained in Mr Daley's witness statement which was struck out regarding the purpose for which the vehicle was being driven at the material time. The only evidence, counsel submitted, as to the purpose the vehicle was being driven at the material time, was contained in Mr Daley's witness statement which stated that Mr McKenzie was "lent [the vehicle] to … pick up a friend in Gregory Park". Counsel contended that that evidence was also inadmissible as it was dependent on hearsay. It was also counsel's submission, that on the totality of the evidence, that evidence was not only less credible, but also vague and lacks cogency.

[22] It remains unknown, he posited, whose friend it was. Counsel also pointed out that Mr Daley's sister's evidence regarding the purpose of the trip at the time of the accident was struck out as being inadmissible because she was not an independent witness. Counsel postulated that on the totality of the evidence, there was no credible evidence to rebut the presumption of agency.

[23] No corroborative evidence was called by Mr Daley; although on his own evidence, he knew Mr McKenzie's address and communicated with him up to the time of the accident. His whereabouts therefore ought to have been known to him, counsel argued. Furthermore, counsel submitted, Mr Daley is a former policeman who was aware that the accident was investigated by the Gregory Park Police Station. He could

have obtained a police report and Mr McKenzie's statement from the said station. Mr McKenzie's statement could have been tendered by virtue of the statutory exceptions to the hearsay rule pursuant to the Evidence Act.

[24] Counsel submitted that Mr Daley's evidence was gratuitous and self-serving. His only evidence of his attempts to find Mr McKenzie, counsel indicated, was that "he had looked for [Mr McKenzie] in Clarendon". He pointed out that that was not included in his witness statement; it only emerged under the pressure of cross-examination. Counsel asked the court to take cognizance of Mr Daley's evidence that Mr McKenzie resided "off Maxfield Avenue", yet he was searching for him in Clarendon.

Submissions on behalf of Mr Daley

[25] On behalf of Mr Daley, Mrs Ursula Khan contended that the appellant not having challenged the learned judge's findings of fact, there were at least three of his findings which disposed of this appeal. Counsel listed them as follows:

> "1.1 That there is no proper basis to reject the evidence of [Mr Daley](paragraph 33) as his evidence was not discredited or shown to be untrue or unreliable (paragraph 36).
>
> 1.2 That there were none of the usual incidents of a contract of employment for the Court to conclude that there was a contract of employment (paragraph 20).
>
> 1.3 That [Mr] McKenzie had [Mr Daley's] general permission to drive and use the car if his mother did not require it (paragraph 5 of the witness statement of Steve Daley ... as accepted in paragraph 33 of the Judgment...)."

It was also her submission that the learned judge's application of relevant and existing law was not based on faulty reasoning.

Analysis

[26] The issues which arise on grounds (a) and (b) are:

a) whether the learned judge relied on hearsay evidence as to the purpose for which the car was being used at the material time; and

b) whether **Rambarran v Gurrucharran** created a general principle that stand alone evidence is sufficient to rebut the presumption of agency.

Was hearsay evidence relied on?

[27] Mr Daley's evidence as to what Mr McKenzie told him about the purpose of the trip was struck out. The following statement by him however remained.

> "4. At the time of the said accident Everton McKenzie was driving my said vehicle with my permission. **I had lent it to him to pick up a friend in Gregory Park. ..."(Emphasis added)**
>
> "6. … My mother was not in the car at the time of the accident. He was not doing anything for her at the time of the accident. He was not doing anything for me at the time of the accident."

[28] At paragraph [33], the learned judge said:

> "[33] The problem with the latter submission is that there is no proper basis for me to reject Mr Daley's evidence regarding the trip taken by Mr McKenzie on the unfortunate day. Mr Daley told the court quite candidly that he was too

> busy because of his political activities to take his mother to and from hospital and other business. He made arrangements for this and since Mr McKenzie would be doing this on a frequent basis he added his name as an authorised driver. Like the son in **Rambarran**, Mr McKenzie could drive the car at any time and also on his (McKenzie) business. Mr Daley, in this case, has gone further than the father in **Rambarran**: he not only stated that the car was not on his or his mother's business at the material time **but also stated the purpose of the trip, namely to pick up a friend of Mr McKenzie**. This evidence does double duty: first it states that the trip was not for Mr Daley's purpose and second that the purpose of the trip was for the benefit of Mr McKenzie." (Emphasis applied)

[29] Mr Robinson submitted that Mr Daley's evidence that the car was lent to Mr McKenzie to "pick up a friend in Gregory Park" was hearsay, and was inadmissible, because it depended on an assertion by Mr McKenzie about his purpose for wanting the car. That evidence, counsel pointed out, was struck out at the trial from paragraph 6 of Mr Daley's witness statement on the basis of hearsay. It, however, remained at paragraph 4. Having noted counsel's submission, the learned judge at paragraph [34] said:

> "[34] ...The court does not agree. **As a practical matter, how else would MrDaley be able to state what was his purpose for lending the car to Mr McKenzie on the day in question?** If he cannot say what his purpose was then who else can safely do so when that is actually one of the contested issues in the case?" (Emphasis applied)

[30] Mr Daley's evidence as to the specific purpose the vehicle was being used for constituted hearsay as he was only able to regurgitate what was told to him by Mr McKenzie. The learned judge apparently accepted the statement as proof that Mr McKenzie in fact went "to Gregory Park to pick up a friend". That error notwithstanding,

the evidence is that Mr McKenzie was about his own business. Whatever mission Mr McKenzie proposed to go on, had nothing to do with Mr Daley.

Was Mr Daley's stand alone evidence sufficient to rebut the presumption of agency?

[31] In rejecting counsel's contention as to the requirement for supporting evidence, the learned judge said: "There is no legal requirement that Mr Daley must produce corroborating or supporting testimony from any other source" (para [36]). In concluding that Mr Daley could not be vicariously liable for the negligence of Mr McKenzie, he distinguished **Princess Wright v Alan Morrison** [2011] JMCA Civ 14 on the basis that the **Princess Wright** case was an employer/employee relationship.

[32] The learned judge further found, by drawing an analogy between the facts of the **Rambarran** case and the instant case, that:

> "[36] … [I]f Mr Daley has not been discredited and in the absence of evidence showing that his testimony was untrue or unreliable, this court cannot see any reason [why] Mr Daley's stand-alone evidence regarding the circumstance Mr McKenzie took the car on the unfortunate trip is not sufficient to deflect liability from him. There is no evidence to show that Mr Daley or his mother had any interest or would benefit in any way from the trip to pick up the friend."

[33] The evidence which he accepted was that at the material time, Mr McKenzie "was not doing any business connected with Mr Daley". Mr Daley was therefore under no obligation to state the reason Mr McKenzie needed the vehicle. Lord Donovan in the **Rambarran's** case commented thus:

> "The appellant, it is true, could not, except at his peril, leave the Court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of the appellant. **Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that the assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant**. In any event the complaint that the appellant led no positive evidence of the purpose of Leslie's journey comes strangely from the respondent who could have found it out by making Leslie a co-defendant and administering interrogatories, or compelled his attendance as a witness and asked him questions about it. He did none of these things." (Emphasis applied) (page 753 para f-h)

[34] Lord Donovan referred to the dissenting judgment of Cummings JA with obvious approval:

> " '**In the instant case as in Hewitt v. Bonvin (supra) the Court was not as in Barnard v. Sully without further information**. There was ample information to justify the inferences drawn by the learned trial judge and his conclusion that the [respondent] had failed to establish the requirements as laid down in **Hewitt v. Bonvin**. Indeed I am myself unable to draw any different inferences or arrive at any other conclusion.' " (Emphasis applied) (page 753 para j)

[35] The onus rested on the appellant to disprove the assertion that Mr McKenzie was not driving the vehicle on Mr Daley's business. In the absence of any such evidence

undermining Mr Daley's evidence that Mr McKenzie was about his own business, the learned judge's right to accept Mr Daley's evidence as credible was inalienable. Lord Donovan's statement on behalf of the Privy Council in the **Rambarran** case makes that plain.

[36] In that case, the appellant was the owner of a motor car which he permitted three of his sons who were licensed drivers, to drive both on his business and on theirs. His son Leslie drove the said motor car in a manner which caused it to collide with another vehicle resulting in damage to that vehicle. On that occasion, Leslie was about his own business.

[37] The appellant was found by the majority of the Court of Appeal, which overruled the decision of George J, the trial judge, to have been vicariously liable for the negligent driving of Leslie. In arriving at its decision, the Privy Council reviewed a number of authorities on the matter. **Barnard v Sully** (1931) 47 TLR 557 was the first.

[38] Lord Donovan observed that in **Barnard v Sully**, Sully, the respondent, neither appeared nor was he represented. Lord Donovan quoted with approval Scrutton LJ's following statement with which, he noted, the other members of the court agreed:

> " '**No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners**...But, apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. **But it was evidence which was liable to be rebutted**

> **by proof of the actual facts.'** " (Emphasis applied) (page 751 para g-h)

[39] Lord Donovan, on the Board's behalf, expressed the view that:

> "Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords *some* evidence that it was being driven by his servant or agent. **But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence.**" (Emphasis applied) (page 751 para i)

[40] The Privy Council also examined **Hewitt v Bonvin and another** [1940] 1 KB 188 and the New Zealand Court of Appeal case, **Manawatu County v Rowe** [1956] NZLR 78, which had also considered the **Barnard v Sully** and **Hewitt v Bonvin** cases, together with New Zealand and Australian cases, which dealt with a similar issue. Lord Donovan observed, with approval, the principles the New Zealand Court of Appeal deduced from the authorities. Those principles are hereunder stated.

> "1. The onus of proof of agency rests on the party who alleges it.
>
> 2. An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words, that this fact is some evidence fit to go to a jury. **This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it.**
>
> 3**. It must be established by the plaintiff, if he is to make the owner liable**, that the driver was driving the car as the servant or agent of the owner and **not merely for the driver's own benefit and on his own concerns.**" (Emphasis applied) (page 752 para f)

[41] Endorsing those principles, Lord Donovan said:

> "In the present case it is clear that any inference, based solely on the appellant's ownership of the car, **that Leslie was driving as the appellant's servant or agent on the day of the accident would be displaced by the appellant's own evidence, provided it were accepted by the trial judge, which it was.** Leslie had a general permission to use the car. Accordingly it is impossible to assert, merely because the appellant owned the car, that Leslie was *not* using it for his own purposes as he was entitled to do. The occasion was not one of those specified by the appellant as being an occasion when, for one of the appellant's own purposes, a son would drive it for him." (Emphasis applied) (page 753, para b)

[42] The learned judge also observed that the appellant was ignorant of the fact that the car was driven by Leslie that day and he heard of the incident two weeks after. The Privy Council, in the words of Lord Donovan, concluded that:

> "In the face of this evidence the respondent **clearly did not establish that Leslie was driving as the appellant's servant or agent. He had to overcome the evidence of the appellant which raised a strong inference to the contrary**. **The burden of doing this remained on the respondent and the trial judge held that he had failed to discharge it. His conclusion on this point was one of fact and he had ample evidence to support it.**" (Emphasis applied) (page 753 paras b-c)

Is the principle enunciated in Rambarran v Gurrucharran of general application?

[43] Although in **Rambarrarran** the relationship between the appellant and the driver was familial, and so too in the cases **Hewitt v Bonvin**, **Manawatu County v Rowe** and **Barnard v Sully**, it was plainly not the court's intention, to limit the

application of the principle. There was no statement by the learned judge which could lend itself to the limited application which counsel ascribes to the principle.

[44] Undoubtedly, as was held in **Hewitt v Bonvin**, and noted with approval by Lord Donovan in **Rambarrarran,** "[u]ltimately the question of service or agency is always one of fact". His comment on Scrutton LJ's statement in **Barnard v Sully**, during his analysis in **Rambarran,** in my view, eradicates any lurking doubt.

[45] Although the fact of ownership raises a prima facie case that a vehicle is being driven by the owner's agent and or servant, that presumption is a rebuttable one based on the facts. Familial relationship might however be an important factor in determining the issue depending on the evidence presented to a court. In the absence of evidence as to the purpose for which the car was being driven, the issue must be determined on the totality of the evidence.

[46] In my view, the two complaints raised by the appellant in ground (b) have been disposed of by Lord Donovan's observations. The first, whether the principle enunciated in **Rambarran** is of general application and the second, whether Mr Daley's "stand alone evidence" is sufficient to rebut the presumption of agency.

Grounds (c) and (d)

[47] It is convenient to examine, grounds c and d together.

> (c) The Learned Judge erred in finding that the **Wright v Morrison** case was distinguishable because it was an obvious case of employer/employee "and so the employer may well be expected to exercise greater control over the use of his vehicle" (paragraph 37) when there is no material distinction between that case and this

one where the Respondent admitted that [Mr McKenzie] would never have driven his car except that he needed him to transport his mother in exchange for which he was allowed to drive the car allegedly on the driver's own business.

(d) The Learned Trial Judge erred, even if the Respondent's evidence was accepted in its totality, in failing to find that, on the Respondent's own evidence, [Mr McKenzie] was merely carrying out an authorized act (driving the Respondent's car on the road) in an unauthorized manner (unknown purpose).

Was Mr McKenzie Mr Daley's employee?

[48] In his witness statement Mr Daley stated:

> "5. In the latter part of 2002, my aged mother, Hyacinth Daley, aged 77, of the said 26b Galloway Road, Kingston 13 had to go to the Kingston Public Hospital three or four times weekly for treatment because of several illnesses including cancer, hypertension, diabetes, severe arthritis and others. I could not take her for treatment so often. I requested Everton McKenzie, whom I knew was a mechanic, to take her whenever she had to go, to wait for her and to bring her back home. I also instructed him to take her wherever she wished to go. He therefore regularly took her out. I also gave him permission to use the said vehicle whenever he wished to provided my mother did not need it. Because of this I had his name added to my insurance policy on September 26, 2002 as an authorized driver. Before that I was the only authorized driver and I found it inconvenient to take my mother out and about, as at that time I was heavily involved in politics."

[49] Under cross-examination, it was his evidence that at the material time, he also operated a bar. His evidence was that on the occasions Mr McKenzie was not transporting his mother, he could only drive the car with his permission. It was also his evidence that only Mr McKenzie drove that car. He, Mr McKenzie, was not paid and so he allowed him to drive the car "as a favour since he was doing so many things for us.

If mother did not need to be taken around McKenzie would have access to car to drive". His sister supported his evidence that Mr McKenzie assisted Mr Daley in transporting their mother to the hospital because his (Mr Daley's) involvement with politics kept him busy and unavailable.

[50] Sykes J scrutinized the evidence of Mr Daley and his sister and found that:

> "[20] From the evidence adduced there is nothing to say that Mr McKenzie was an employee of Mr Daley. ..."

He accepted the evidence of Mr Daley and his sister that Mr Daley was very busy and could not undertake the transportation of his mother as "when she needed and like all good sons he made alternative arrangements which worked quite well".

[51] The learned judge rejected Mr Robinson's submission that the payment to Mr McKenzie was the unlimited access to use the car whenever the respondent wanted. The learned judge concluded that "There [was] none of the usual incidents of a contract of employment" (para [20]).

[52] It was Mr Robinson's firm submission that the relationship between the respondent and Mr McKenzie in law is analogous to that of an employed driver and his employer, rather than a relationship between the parties in the cases referred to. He drew the court's attention to Mr Daley's evidence that he asked the Mr McKenzie to take his elderly mother to the hospital and wherever she had to go.

[53] Mr Daley's evidence, he pointed out, was that: "[he] gave [Mr McKenzie] permission to use the said vehicle whenever he wished". He was not paid to drive his mother. Counsel highlighted Mr Daley's evidence that Mr McKenzie:

i) would not drive the car were it not for the need to have him drive his mother;

ii) drove the car exclusively although he (Mr Daley) had/owned another car;

iii) was unemployed; and

iv) was not related to him.

[54] It was counsel's firm submission that Mr McKenzie was *de facto* employed to Mr Daley as his driver and his emolument was the use of car instead of cash. He likened the relationship between the parties to that of an employed driver who is permitted to keep his employer's car on weekends. For that proposition he relied on the case of **Wright v Morrison**.

[55] Counsel also directed the court's attention to **Kennesha Harris v Elaine Hall et al** (1997) 34 JLR 190. In that case, a garage owner allowed the body-man's apprentice to push cars which were blocking the parking area. The body-man's apprentice drove a customer's car and struck a girl. The garage owner was found liable although the apprentice:

i) had been forbidden/prohibited from driving cars;

ii) was not employed to their garage owner;

iii) had no driver's licence.

[56] It was nevertheless held that he was permitted to move the car; therefore in driving the car, he was doing that which he was authorised to do, that is to move the car in an unauthorised manner. Counsel submits Mr McKenzie was not only permitted to drive the car, he was added as an authorized driver to conduct Mr Daley's business; as a "perk" of his job, he was allowed to use the car for his own business.

[57] Counsel postulated that even if Mr McKenzie was on his own business, because of the relationship between the parties, Mr Daley would have retained sufficient control over the vehicle to render him vicariously liable for the accident. It was his further submission that if this court rejects the view that the relationship was not analogous to that of an employer and employee, Mr Daley has not provided the court with sufficiently cogent evidence to rebut the presumption raised in **Rambarran.**

[58] Mr Robinson also submitted that the appellant's mother, Ms Rose Ellis' evidence regarding Mr Daley's assumption of the appellant's expenses and his offer of kind is proof of admission of liability.

Submissions on behalf of Mr Daley

[59] Mrs Khan, on behalf of Mr Daley, postulated that in light of the express finding of fact of the learned judge that none of the usual incidents of a contract of employment were adduced in evidence, **Wright v Morrison** was inapplicable. She highlighted the learned judge's rejection of the appellant's submission that Mr McKenzie's unlimited access to the car constituted payment, and posited that the appellant's contention of *de facto* employment lacked factual basis.

[60] Counsel submitted that there was no evidence that Mr McKenzie kept the car, therefore, any inference which flows from such a circumstance is baseless. Counsel argued that there was no evidence which could support the appellant's claim that Mr McKenzie was merely carrying out an authorised act in an unauthorised manner. She submitted that the proof required for negligent driving is specific and vicarious liability has to be proven by evidence which accords with the law.

[61] The **Kennesha Harris** case, she submitted, was inapplicable. The apprentice in that case had a legal relationship with the garage owner based on contract and the garage owner had control over him. It was also her submission that there was no attempt in cross-examination to establish that Mr Daley retained sufficient control of the vehicle as submitted on behalf of the appellant.

Analysis

[62] In rejecting Mr Robinson's submission that Mr McKenzie was an employee, the learned judge opined:

> "[16] ... The only basis, it emerged from the evidence, for Mr McKenzie to have ready access to the motor car was that he was ready, willing and able to take Mr Daley's mother to the hospital whenever that was necessary. It seems to this court that Mr McKenzie would not have had this kind of access to the motor car if he was not available to take Mr Daley's mother to the hospital."

[63] The learned judge accepted the reasons advanced for that arrangement, that is, Mr Daley's involvement in political campaigns.The learned judge however said:

> "[17] ... [So]the services of Mr McKenzie were engaged to meet this need. So frequent was the use of the car by Mr McKenzie that his name was added to the list of authorised drivers for that motor car. In addition, Mr McKenzie was free to use the car, for his own business, as long as the mother did not need to be taken anywhere."

[64] As aforesaid noted, at paragraph [20] of his judgment, the learned judge opined that there was no evidence supporting the assertion that Mr McKenzie was an employee of Mr Daley. The learned judge's statement that the "the services of Mr McKenzie were engaged" would tend to support Mr Robinson's submission that Mr McKenzie was an employee.

[65] It is however manifest from the learned judge's reasoning that by the use of those words he was not asserting that the relationship was one of employer/employee. Indeed, he rejected the submission that "the payment to Mr McKenzie was unlimited access to use the car whenever he wanted". The learned judge formed that view because of the absence of what he said was, "[the] usual incidents of a contract of employment"; Mr McKenzie was not Mr Daley's employee. The appellant provided no evidence which could contradict that finding. There is therefore no basis for this court to interfere with the learned trial judge's finding.

[66] The learned judge then considered whether at the material time, Mr McKenzie was driving the car as Mr Daley's agent. He said:

> "[20] ... The court examines the evidence in order to determine whether the circumstances ground vicarious liability in Mr Daley on the basis that Mr McKenzie was acting as his agent at the material time.

> [21] Other than proof that Mr Daley was the owner of the car, the evidence on this aspect of the case comes from Mr Daley. He said that on the day in question, Mr McKenzie was driving on his own business. He said that Mr McKenzie was going to pick up a friend. In order to make Mr Daley liable it has to be shown that at the time of the collision Mr McKenzie was driving the car on Mr Daley's business or the trip was one in which Mr Daley would have an interest or benefit in some way (**Princess Wright v Alan Morrison** [2011] JMCA Civ 14 (unreported) (delivered April 15, 2011))."

[67] Assuming that Mr McKenzie was indeed Mr Daley's employee and his ability to drive the car constituted payment, could it be properly asserted that Mr Daley is vicariously liable for his negligence? The law in this regard has been further clarified in two recent English Supreme Court cases; **Cox v Ministry of Justice** [2016] UKSC 10 and **Mr AM Mohamud (in substitution for Mr A Mohamud (deceased)) v WM Morrison Supermarkets plc** [2016] UKSC 11. The proper approach in determining this issue is the application of the "close connection test" which has been unanimously sanctioned in both cases.

[68] In **Cox v Ministry of Justice**, Mrs Cox, a prison employee, was injured by the negligence of a prisoner with whom she worked in the prison's kitchen. The prisoner was employed pursuant to the Prison Rules which mandates that convicted prisoners are required to be engaged in useful work not exceeding 10 hours per day. By virtue of the Prison Rules, prisoners cannot engage in work unless such work is authorised by the Secretary of State.

[69] The Rules provide for payment of prisoners. They are however not entitled to the benefit of the National Minimum Wage Act 1998. Were it not for the work of the prisoners, the department in which he worked would have had to incur higher cost of either employing staff or securing the service of contractors. In considering whether the prison was vicariously liable, Lord Reed said:

> "2. The scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant? ... "

[70] In respect of that case, he found that the first question concerned that appeal although both questions, he said were "inter-connected". He however opined that the specific question was:

> "3. ... [W]hether the prison service, which is an executive agency of the appellant, the Ministry of Justice, is vicariously liable for the act of a prisoner in the course of his work in a prison kitchen, where the act is negligent and causes injury to a member of the prison staff."

[71] Lord Reed with whom the court agreed, at paragraph 30 said:

> "30. It is also important not to be misled by a narrow focus on semantics: for example, by words such as 'business', 'benefit', and 'enterprise'. The defendant need not be carrying on activities of a commercial nature: that is apparent not only from the cases *E* and the *Christian Brothers,* but also from the long-established application of vicarious liability to public authorities and hospitals. **It need not therefore be a business or enterprise in any**

> **ordinary sense. Nor need the benefit which it derives from the tortfeasor's activities take the form of a profit. It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests.The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. <u>The defendant must, by assigning those activities to him, have created a risk of his committing the tort</u>**." (Emphasis applied)

[72] In **Mohamud v WM Morrison Supermarkets plc**, the appellant, who at the time of the hearing of the matter was deceased, was assaulted by an employee of the respondent's business. The appellant had gone into the respondent's kiosk to inquire about printing some documents from a USB stick which he had in his possession. The employee was extremely rude and disrespectful in his reply. The appellant expressed his displeasure at the manner in which he was spoken to.

[73] The employee responded by ordering the appellant to leave. In so doing he used threatening, racist and vile language. Although the appellant went into his car, the employee followed him, opened the front passenger door and told him in threatening words not to return.

[74] Upon being instructed by the appellant to get out of the car and to shut his door, the employee administered a blow to the appellant's temple. The appellant switched off the engine and exited the vehicle in order to close the passenger door which was on the other side, whereupon he was brutally attacked by the employee. The employee's supervisor's instructions to the employee and attempts to stop him from brutalising the

appellant went unheeded. After the assault, the appellant left the premises to report the matter the police.

[75] The trial judge, although sympathetic to the appellant, found *inter alia,* that the employee's job was to serve and to help customers and members of the public. He consequently found that there was "not a sufficiently close connection between what he was employed to do and his tortious conduct for his employer to be held vicariously liable". The judge also considered the fact that the employee made the decision to leave the counter where he was assigned to follow the appellant outside.

[76] The judge's decision was upheld by the Court of Appeal which expressed the view that the employer was not liable because the appellant's claim for vicarious liability had failed the "close connection" test because his duties did not include confrontation nor was his work situation of a volatile nature.

[77] In **Cox v Ministry of Justice**, Lord Reed, with whom the court agreed, indicated that:

> "41 … **The criteria for the imposition of vicarious liability listed by Lord Phillips in the *Christian Brothers* case are designed, as he made clear at paragraphs 34, 35 and 47, to ensure that it is imposed where it is fair, just and reasonable to do so.**That was the whole point of seeking to align the criteria with the various policy justifications for its imposition. As I have explained, the criteria may be capable of refinement in particular contexts. **But in cases where the criteria are satisfied, it should not generally be necessary to re-assess the fairness, justice and reasonableness of the result in the particular case. Such an exercise, if**

> **carried out routinely, would be liable to lead to uncertainty and inconsistency**.
>
> 42. **At the same time, the criteria are not to be applied mechanically or slavishly.** As Lady Hale rightly observed in **Woodland v Swimming Teachers Association** [2013] UKSC 66; [2014] AC 537 at para 28, the words used by judges are not to be treated as if they were words of a statute. Where a case concerns circumstances which have not previously been the subject of an authoritative judicial decision, it may be valuable to stand back and consider whether **the imposition of vicarious liability would be fair, just and reasonable.** …" (Emphasis applied)

[78] In the instant case, the evidence, absent the hearsay portion, was that Mr Daley's mother was not in the car at the time of the accident. Mr McKenzie was, on the unchallenged evidence, not driving the vehicle on any assignment by Mr Daley. He was about his own business although the nature of the business is 'unknown'.

[79] At paragraph 45 of **Mohamud v WM Morrison Supermarkets plc**, Lord Toulson said:

> "Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt. To try to measure the closeness of connection, as it were, on ascale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. **Lloyd v Grace**, **Smith &Co**, **Peterson** and **Lister** were all cases in which the employer misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in **Warren**

> **v Henlys Ltd** any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant."

[80] If Mr McKenzie had been on his way to collect Mr Daley's mother, although she would not have been in the car, it could properly have been held that he was acting within the scope of Mr Daley's business or as his agent. The evidence, however, is that Mr McKenzie was about his own business. There is no evidence of any connection between Mr McKenzie's journey and that of transporting Mr Daley's ailing mother.

[81] Although he was engaged to transport her, Mr McKenzie was at liberty to use the vehicle for his personal business. The appellant has not provided evidence of any sufficient connection between the transporting of Mr Daley's mother and the purpose for which the vehicle was being driven at the material time. It cannot therefore be fair, just or reasonable in those circumstances to find Mr Daley to be vicariously liable for the negligent driving of Mr McKenzie. In light of the foregoing, the learned judge's decision was eminently reasonable.

[82] In the circumstances, I would dismiss this appeal.

MORRISON P

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.