1988 April 25

(MALACHTOS, DEMETRIADES, PIKIS, JJ.)

SAVVAS THEOFANOUS,

Appellant,

v.

1. COSMOS (CYPRUS) INSURANCE CO. LIMITED,
2. CHRISTODOULOS CHRYSOSTOMOU,

Respondents.

(Civil Appeal No. 7050).

Vicarious liability—Negligence of driver of a motor car involved in a road traffic accident—Ownership of car—Whether and to what extent fact of ownership raises a rebuttable presumption that owner is vicariously liable for the driver's negligence—Analysis of conflicting authorities.

Precedent, doctrine of—Decisions of Superior English Courts—Of high persuasive authority, but not binding on Cyprus Courts.

Common Law—Principles of—Applicable as a matter of statutory law (section 29(1)(c) of the Courts of Justice Law 14/60).

The appellant was defendant 1 in the action. The trial Court dismissed the plaintiff's claim against appellant's co-defendant 2 in the action on the ground that the plaintiffs failed to prove that such co-defendant was vicariously liable for the negligence of defendant 1, i.e. the appellant.

Counsel for the appellant submitted that the finding was erroneous because the police constable, who investigated the accident, testified that the two drivers told him that the said co-defendant was the owner of the car driven by the appellant. Ownership, counsel continued, raises a rebuttable presumption of vicarious liability. In support of this proposition, he cited the decision of the Privy Council in *Rambaran v. Gurruchanan* [1970] 1 All E.R. 749, but admitted that the decision of the House of Lords in *Morgans v. Launchbury* [1972] 2 All E.R. 606, is fatal to his submission.

Held, dismissing the appeal: (1) Cyprus Courts are not strictly bound by decisions of English Courts unless, of course, they reflect a principle of the common law, objectively identifiable by Cyprus Courts, in which case the principle of the common law is applicable in Cyprus as a matter of statutory law making the common law part of the law of the country (s.29(1)(c) of the Courts of Justice Law - 14/60).

(2) The presumption favoured in *Rambarran* is not of the magnitude or breadth suggested by counsel for the appellant.

(3) In *Morgans* the House of Lords reviewed the caselaw bearing on the subject, including *Rambarran* of ownership in juxtaposition to vicarious liability and concluded that at no stage did English Courts accept without further qualification the proposition that mere ownership of a vehicle raises a presumption of vicarious liability.

(4) *Rambarran and Morgan* involve no conflict of principle, but a divergence of opinion with regard to the evidential value of the fact of ownership of a vehicle.

(5) The evidence of the police constable was, as far as the second defendant in the action was concerned, hearsay and, therefore, inadmissible.

Appeal dismissed.

Cases referred to:

Rambarran v. Gurrucharran [1970] 1 All E.R. 749;

Morgans v. Launchbury & Others [1972] 2 All E.R. 606;

Manawatu County v. Rowe (1956) N.Z.L.R. 78;

Mouzouris and Another v. Xylophaghou Plantations Ltd. (1977) 1 C.L.R. 287;

Adamtsas Ltd (In Voluntary Liquidation) v. Republic (1977) 3 C.L.R. 181;

K. v. J.M.P. Co Ltd [1975] 1 All E.R. 1030.

Appeal.

Appeal by defendant 1 against the judgment of the District Court of Nicosia (Kallis, D.J.) dated the 30th September, 1985 (Action No. 10209/84) whereby he was adjudged to pay to plaintiffs 2 and 3 the sum of £767.70 cent damages due as a result of a traffic accident and the action against defendant 2 was dismissed.

E. Efstathiou with C. Kamenos, for the appellant.

St. Erotocritou (Mrs.), for the respondent.

Cur. adv. vult.

MALACHTOS J.: The judgment of the Court will be delivered by Pikis J.

PIKIS J.: To begin we must clarify the capacity and interest of the parties to this appeal. The appeal is made by Savvas Theofanous, defendant 1 at the trial. It is directed against a finding of the trial Court dismissing the claim of the plaintiffs (Cosmos (Cyprus) Insurance Co. Ltd. and 2 Others) against Christodoulos Chrysostomou. The averment of the plaintiffs that Christodoulos Chrysostomou was vicariously liable for the negligence of Savvas Theofanous, was found to be unsubstantiated and was dismissed. The plaintiffs did not challenge this finding. In fact, they were cited as respondents in the appeal alongside with Christodoulos Chrysostomou. The latter, despite his interest in supporting the judgment, did not appear in the proceedings. In the absence of a separate claim by the appellant against his co-defendant, it is doubtful whether the appellant had a legitimate interest to mount this appeal. None of his claims was dismissed. The finding of the trial Court affecting the liability of the second defendant solely concerned a claim of the plaintiffs. However, we need not explore further the subject of justiciability of the appeal in view of the inevitability of the dismissal of the appeal on grounds of substance.

The plaintiffs averred in the statement of claim that Christodoulos Chrysostomou was vicariously liable for the negligence of the appellant and on that account jointly liable for the damage occasioned to the vehicle of the plaintiffs, KF 424, sustained in the course of a collision with the vehicle driven by appellant. The trial Court dismissed the case against Defendant 2 «..... because no evidence whatever was adduced to establish the allegation of vicariously liable in paragraph 4 of the statement of claim»

Counsel for the appellant submitted that this was an erroneous view of the evidence in light of the testimony of police constable Loucas Michael (P.W.1) who investigated the accident. In his evidence the police constable stated that on his visit to the scene he met the drivers of the two vehicles who seemingly informed him that the

vehicle driven by the appellant belonged to Christodoulos Chrysostomou. In view of evidence establishing the ownership of the vehicle, it was argued, a rebuttable presumption of vicarious liability arose on the authority of the decision of the Privy Council in *Rambarran v. Gurrucharran**, which was wholly disregarded by the trial Court. In the absence of evidence to contradict it the trial Court ought to have held defendant 2 vicariously liable for the acts of defendant 1.

In the course of argument I drew the attention of counsel to the decision of the House of Lords in *Morgans v. Launchbury*** refuting the broader implications of the decision in *Rambarran*, supra, and denying the genesis of any presumption of vicarious liability upon mere proof of ownership of a car involved in a collision. Counsel for the appellant, while acknowledging that the decision in *Morgans*, supra, is fatal for the appeal, invited us not to follow it in view of the evidential presumption noticed in *Rambarran*, a presumption abounding in practical good sense.

In *Morgan v. Launchbury*, supra, the House of Lords, upon a review of relevant caselaw, including the case of *Rambarran*, concluded that ownership of a car does not raise a presumption of vicarious liability, rebuttable or otherwise. The acknowledgment of such a presumption would be a radical departure from the principles of agency tantamounting to judicial legislation. The Privy Council in *Rambarran*, supra, inclined to the view that ownership of a car affords prima facie evidence that the driver was the agent or servant of the owner. They found support for this proposition mostly in New Zealand and American cases. Nonetheless they allowed the appeal in that particular case in view of evidence tending to rebut the presumption of vicarious liability. A closer study of the judgment of the Privy Council suggests that the presumption does not arise automatically upon mere proof of the fact of ownership. Though such testimony is evidence fit to go to the jury and be pondered alongside with any other evidence bearing on the question of vicarious liability. It appears that in some States of the United States of America an evidential rule evolved from the early days of the invention of the car, as early as 1913, that a presumption of vicarious liability arose upon proof of ownership in cases where members of the family drove what came to be known as the «family car». In New Zealand a similar rule was

* *[1970] 1 All E.R. 749.*

** *[1972] 2 All E.R. 606.*

acknowledged in *Manawatu County v. Rowe** In Morgans, supra, the House of Lords reviewed the caselaw bearing on the subject of ownership in juxtaposition to vicarious liability and concluded that at no stage did English Courts accept without further qualification the proposition that mere ownership of a vehicle raises a presumption of vicarious liability. The acknowledgment of such a presumption would run counter to settled principles of English law affecting vicarious liability. Any departure from those principles would be beyond the authority of the Courts to undertake. It must be appreciated that Cyprus Courts are not strictly bound by decisions of English Courts** unless, of course, they reflect a principle of the common law, objectively identifiable by Cyprus Courts, in which case the principle of the common law is applicable in Cyprus as a matter of statutory law making the common law part of the law of the country (s.29(1)(c) of the Courts of Justice Law - 14/60). On the other hand, decisions of superior English Courts including the Privy Council, are of high persuasive authority in areas of the English common law that find application in Cyprus. As often proclaimed, the common law is a living organism that should not be stiffled by the past; its principles are intended to serve the ever changing needs of society and should be interpreted in a diachronic perspective. Moreover, in Commonwealth countries its application should reflect the particular needs of individual societies***.

The cases of *Rambarran* and *Morgan*, supra, involve no conflict of principle. Attribution of vicarious liability is dependent upon proof of facts and circumstances that render the principal or the master, as the case may be, vicariously liable for the acts of his servant or agent. At the highest there is a divergence of opinion with regard to the evidential value of the fact of ownership of a vehicle. As already explained, the presumption favoured in *Rambarran* is not of the magnitude or breadth suggested by counsel for the appellant. The mere reference to the fact of ownership would at best, even under the principle favoured in *Rambarran*, be evidence that could be referred to the jury. It does

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* *(1956) NZLR 78.*

** *(See, inter alia, Mouzouris and Another v. Xylophaghou Plantations Ltd. (1977) 1 C.L.R. 287; Adamtsas Ltd. (In voluntary Liquidation) v. Republic (Minister of Finance and Another) (1977) 3 C.L.R. 181. The subject is discussed in English common law - The Doctrines of Equity and their Application in Cyprus - by G. M. Pikis, 1981 (in Greek)).*

*** *(K. v. J.M.P. Co. Ltd. [1975] 1 All E.R. 1030 (C.A.).*

not, in the absence of any other evidence illuminating the circumstances under which the appellant assumed control of the vehicle, create the presumption suggested by counsel for the appellant. More importantly, reference to the ownership of the vehicle by the police constable was no evidence at all in that he was not the official having custody of motor vehicle records; knowledge of ownership derived, as we can safely infer, from a statement made to that effect by the appellant. As such, it was hearsay evidence, inadmissible against the owner of the vehicle, the second respondent in these proceedings. Hence the trial Judge was perfectly right to dismiss the claim for total lack of evidence to support it. That being the case it is unnecessary to offer a concluded opinion on the legitimacy of the presumption favoured in the case of *Rambarran,* supra. We are not oblivious to the position of an owner of a vehicle and his responsibility to his neighbours through use of his vehicle. The gravest risk is for the victim of an accident going uncompensated. Compensation, on the other hand, by the insurer is not dependent upon proof of vicarious liability of the owner but upon authorised use of the car by the direct or indirect permission of the owner. In the absence of circumstances tending to contradict the existence of authorised use the Court can legitimately infer in every case that the driver of a motor vehicle is in control of it with the direct or implied permission of the owner.

For all the above reasons the appeal is dismissed.

Appeal dismissed.