15/91

SUPREME COURT OF VICTORIA

MAURO TAXI SERVICES PTY LTD v ISRAPORT (SALES) PTY LTD

Marks J

26, 28 September, 8 October 1990 — (1990) 12 MVR 147

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – TAXI-CAB INVOLVED – WHETHER DRIVER SERVANT/AGENT OF OWNER – PRESUMPTION TO BE APPLIED – CAPABLE OF REBUTTAL.

1. Where there is evidence that a motor vehicle was owned by one person and driven by another, the inference which may be drawn is that the vehicle was driven with the owner's authority and, in the absence of evidence to the contrary, the owner is liable for damages occasioned by the driver's negligence.

***Jennings v Hannan & Anor* (No.2) (1969) 71 SR (NSW) 226; [1969] 1 NSWR 260, applied.**

2. The presumption of agency or employment may be rebutted by satisfactory and acceptable evidence that at the time of driving an arrangement or agreement (such as a Driver Leasing Agreement) was in force whereby the vehicle's owner was absolved from liability for the driver's negligence.

***Dillon v Gange* [1941] HCA 5; (1941) 64 CLR 253; (1941) ALR 94, referred to.**

MARKS J: [1] On 9 November 1988 a Mercedes 380 SEL motor vehicle owned by Israport (Sales) Pty Ltd ("the defendant") was struck in the rear by a taxi cab driven by Stephen John Butler ("Butler") and owned by Mauro Taxi Services Pty Ltd ("the plaintiff") in Chapel Street, South Yarra. The defendant was complainant on a summons returnable at the Magistrates' Court at Melbourne issued on 4 April 1989 against the plaintiff (who was defendant) claiming damages for negligence on the part of Butler. Butler was not named as a defendant.

On 28 March 1990 the Magistrate constituting the Melbourne Magistrates' Court ordered that the plaintiff pay to the defendant $2,982.84 together with $464.94 by way of interest and $1590.75 costs. He granted a stay of one month. The Magistrate found that the collision was caused by negligence of Butler for which the plaintiff was liable as his employer. On 23 April 1990 Master Williams granted an Order Nisi to Review the decision on three grounds which, on unopposed application to me, have been amended to read as follows:

> 1. The magistrate ought to have found that irrespective of the written agreement being Exhibit "LM 3" to the affidavit of Leo Mauro sworn on 19 April 1990, at the time of the happening of the accident on 9 November 1988, the relationship of the applicant and Stephen Butler was not that of employer and employee or principal and agent.
>
> 2. The magistrate did not give any or any adequate reasons for not accepting that part of the evidence of Leo Mauro that did not relate to the existence of the said written agreement at the time of the happening of the accident.
>
> **[2]** 3. The magistrate ought to have held that at the time of the happening of the accident on 9 November 1988, the relationship of the applicant and Stephen Butler was not that of employer and employee or principal and agent.

This is the return of the Order Nisi. There is no material difference in my opinion between grounds 1 and 3. Mr Dalton QC, I think, conceded as much, In any event, he was unable to point to any. Ground 2 is not capable of making good sense and in the end, I think, Mr Dalton QC conceded that this was so. At one point he said that the ground was not pursued but I am not confident that he formally abandoned it. Certainly, Mr Dalton QC did not seek to persuade me that ground 2 was made out or of any argument which might persuade me that it has been.

There is, I think, but the one issue namely whether there was evidence upon which the Magistrate was entitled to conclude that the plaintiff was liable (albeit vicariously) to pay the damages caused by negligence of Butler. This, I think, correctly expresses the issue although this expression of it was resisted by Mr Dalton QC who sought to rely on the language of the

Magistrate, in effect that Butler was a casual employee. He conceded however as is clearly the law that the defendant is entitled to maintain the order below if there was evidence upon which the magistrate might reasonably have come to the conclusion that he did. In *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232 the Full Court held that on a review the Supreme Court should treat the appeal with regard to a question of fact as if it **[3]** were an appeal from a verdict of a jury. At p351 the Court said:

> ".... it is not for this Court to make up its own mind upon the evidence, though giving weight if necessary to the fact that the tribunal below has seen the witnesses. This Court has merely to see whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come."

(See also *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at p11; (1972) 30 LGRA 19; *Heywood v Robinson* [1975] VicRp 55; [1975] VR 562 at p568; *Jansz v GMB Imports Pty Ltd* [1979] VicRp 59; [1979] VR 581 at p589.)

The material purports to disclose the reasons for decision given by the Magistrate but not satisfactorily. They are mentioned in the affidavits in support and in opposition. The material is unsatisfactory because "the reasons" have been reproduced in the form of short sub-paragraphs which perhaps are merely excerpts from what the Magistrate said rather than the text of his statement. It remains unclear for example, what words in what context were actually pronounced. The following is what appears in the affidavits. Paragraph 20 of the affidavit of Leo Mauro in support of the Order Nisi states:

> "The learned Magistrate made the following findings of fact.
> (i) That he could not be satisfied that the written Agreement was in existence at the date of the accident.
>
> (ii) That I had said in answer to a question put in cross-examination that I give the agreement to everyone who "comes to me for a job".
>
> **[4]** (iii) That the driver, Mr Butler was at best, nothing higher than a casual employee.
>
> (iv) That the written Agreement was used primarily as a method for working out the salary of the driver.
>
> (v) That the driver was not an independent contractor.
>
> Having found Mr Butler to be an employee, it followed that his employer, the Defendant, was vicariously liable for the damage caused by Mr Butler."

Paragraph 12 of the Affidavit of Michael Munzer in opposition states:

> "As to paragraph 20 I say that the Magistrate made the findings as set out in (i) to (v) thereof. The Magistrate further found that on the evidence before him:
> (a) the driver was not an independent contractor,
>
> (b) the agreement was designed for people who had another full time occupation and that the heading of the document that it was for a casual driver was indicative of the fact that the driver could not be said to be carrying on his own business. The Magistrate further stated that he was troubled by the fact that no term was specified and no vehicle was specified and he was not satisfied as to what relationship if any the document would have created had it been in existence at the date of collision."

In effect, the finding of negligence by the Court below is not under challenge but the finding that the plaintiff is vicariously liable for it is. In particular, Mr Dalton QC for the plaintiff argued with some force that there was no evidence on which the Magistrate was entitled to find that Butler was an employee of the plaintiff. The critical finding of the Magistrate was his non-satisfaction that "the written agreement" was in existence at the date of the accident. **[5]** Leo Mauro, the director of the plaintiff, gave evidence that Butler was not his agent or employee at the time of the collision but a lessee of the taxi pursuant to "the written agreement" to which the Magistrate referred and which Mauro produced.

This agreement is headed "Driver Leasing Agreement" and was signed by Butler and executed by the plaintiff. But the date had been altered to read "4 day of 5 1988", the registered number of the vehicle to which it purported to relate was not inserted and no commencement

or determination date was mentioned. It is not clear what was the date on the document before the alteration. If the agreement were accepted as operative between the parties at the time of the collision, the plaintiff's denial of liability for any negligence of Butler would have been supported by the High Court authority of *Dillon v Gange* [1941] HCA 5; [1941] 64 CLR 253; [1941] ALR 94 where a similar agreement was held to absolve the owner of a taxi from liability for the negligent driving of a lessee.

Mr Dalton QC however conceded that in this case he was unable to challenge the finding which cut this ground from under his feet. Mr Dalton went on to submit however, that although the Magistrate rejected the agreement as operative at the critical time there was no evidence to support the finding he purported to make that Butler was a casual employee. Further, Mr Dalton QC submitted that the Magistrate must be taken to have accepted other evidence of Mauro that Butler was not an employee, that Butler was not **[6]** obliged to work but could do so only if and when he chose, that the plaintiff had no control over how when and where Butler worked, that Butler had merely leased the taxi and was free to do with it as he chose, that all drivers for the plaintiff were lessees and entered into identical agreements, that the plaintiff paid no payroll tax on account of Butler, did not deduct P.A.Y.E. tax and/or pay holiday pay or other benefits to Butler and that Butler received remuneration as provided in the agreement namely fifty percent of takings.

As to this, it is not possible to say that all this evidence given by Mauro was accepted by the Magistrate as it was bound up with the claim of Mauro that the written agreement was in operation at the time of the collision. Moreover, the evidence was of a general nature and failed to particularise what was alleged to have been said and done between the plaintiff and Butler apart from entering into the written agreement. Once the Magistrate rejected the written agreement as in operation at the critical time I cannot be satisfied what other evidence, if any, of Mauro he accepted in the absence of his expression of specific findings. I am not satisfied that there was no evidence that Butler was the servant or agent of the plaintiff.

It was common ground that Butler was driving the taxi at the time of the collision and that the taxi was owned by the defendant. Such evidence allows the inference that the driver was the servant or agent of the owner. The inference, of course, may be negatived by evidence, indeed by evidence, if accepted, of the kind given by Mauro that Butler was a lessee **[7]** pursuant to a written agreement and therefore a bailee of the taxi. When, however, evidence to this effect was rejected or not accepted by the Magistrate the position was as if it had not been given. The Magistrate was left with the uncontradicted facts which enable the above inference.

What I have called an inference is sometimes said to be a presumption capable of rebuttal. In the present case any distinction is without significance. The law it seems is now settled. In *Jennings v Hannan & Anor (No.2)* (1969) 71 SR (NSW) 226; [1969] 1 NSWR 260 the trial judge held that proof that the defendant owned the motor vehicle involved in a collision was some evidence that the driver was driving it with that owner's authority and that in the absence of evidence to the contrary the owner was liable. His decision was upheld by the Court of Appeal, the judgment of which was given by Walsh JA as he then was. Walsh JA said (at p229):

> "... the basis of liability of an owner of a motor car, which by being driven negligently causes damage, has been extended .... it seems to be clear that the extension has occurred and that liability is no longer confined to cases where the driver is a servant in the ordinary sense of the term, nor is it any longer confined to cases in which it can be seen that there is actually a retention by the owner of the right and duty to control the method of driving the vehicle .... It appears to be a natural consequence of this widening of the ambit of liability imposed by the substantive law that it should be easier now than it was previously to draw an inference against the owner, in a case in which the proved facts do not show directly whether the required conditions for liability exist or not, that the car was being driven in circumstances which render the owner responsible for the negligence of the driver. In the case of commercial vehicles it appears now to have been clearly established, although this view was not always taken in earlier days, that **[8]** ownership is *prima facie* evidence, fit to be left to the jury, if the trial is with a jury, that a person who was driving a car at the time of the damage being cause was the servant or agent of the owner and was acting at least in part for the owner's purposes."

His Honour went on to discuss the authorities which were to an extent in conflict. He expressed the opinion, however, that the better course was to conform to the view he expressed

above. *Jennings* has undoubtedly been accepted as good law – by the High Court in *The Nominal Defendant (Queensland) v Taylor* [1982] HCA 38; 154 CLR 106 at p110; 41 ALR 244; 56 ALJR 698; 56 ALJR 698 at p699, and by the Privy Council in *Rambarran v Gurrucharran* (1970) 1 WLR 556; [1970] 1 All ER 749. See also *Milkovits v Federal Capital Press of Australia Pty Ltd* (1972) 20 FLR 311 and *Creedon v Measey Investments Pty Ltd* (1988) 91 FLR 318. In *Morgans v Launchbury & Ors* [1972] UKHL 5; [1973] AC 127 the House of Lords reversed the decision of the Court of Appeal to the effect that the owner of a motor vehicle was subject to a form of absolute liability for the negligence of the driver. No such proposition, of course, appears from *Jennings* and the decision of the House of Lords appears to go no further than emphasise that any presumption or inference from primary facts of the kind discussed in *Jennings* was capable of rebuttal.

In the present case, although it is unclear whether the Magistrate accepted any significant part of the evidence of Mauro it is clear that he rejected that part of his evidence which would, if accepted, on the authority of *Dillon v Gange*, clearly rebut the presumption of agency or **[9]** employment. This meant that the Magistrate was left without satisfactory evidence (which he was prepared to accept) as to the arrangement or agreement pursuant to which Butler was driving the taxi cab at the time of the collision. It is not to the point that the Magistrate might well have accepted that the arrangement or agreement included (but did not fully comprise) Butler being entitled to retain fifty percent or some other proportion of the proceeds as remuneration, his not being required to work set hours and his right to work when he liked.

These facts, even if accepted, do not, in my opinion, require the conclusion that the presumption that Butler was driving as the agent or employee of the plaintiff was rebutted. The reason is that these facts are also consistent with Butler being the driver of the taxi for a purpose of the plaintiff, namely a proportion of the takings. See *Ormond v Crosville Motor Services Ltd* [1953] 1 All ER 711, affirmed by the Court of Appeal (1953) 1 WLR 1120; (1953) 2 All ER 753 and considered by the House of Lords in *Launchbury*.

In *Launchbury* Lord Wilberforce at p135 said:

> "... I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty."

At p139 Viscount Dilhorne said:

> "Just as the inference may be drawn, from proof that the vehicle was owned by another, that the driver was driving as servant or agent of the owner (*Barnard v Sully* (1931) 47 TLR 557), so may a presumption arise, where it is proved that the driver at the time of the negligence was doing something which was in the interest of the owner or for his benefit, that the driver was then acting as a servant or agent of the owner. But **[10]** when the full facts are known as they were in *Hewitt v Bonvin* [[1940] 1 KB 188; 161 LT 360] and as they are in the present case, such an inference and presumption may be unwarranted."

(See also Lord Salmon at pp148-9.)

Once the Magistrate rejected that the arrangement or agreement pursuant to which Butler was driving at the time of the collision was not governed by the written agreement, he was left with evidence, which clearly he accepted, that Butler was driving a motor vehicle owned by the plaintiff and that the plaintiff had an interest in the driving to the extent that it was to receive some of the proceeds of hire. The inference to be drawn or the presumption raised by these bare facts were sought to be rebutted by evidence which the Magistrate did not accept, namely, evidence that Butler was a lessee or bailee under an agreement which on the authority of *Dillon v Gange* absolved the plaintiff from liability for any negligence of Butler.

The reasons given by the Magistrate are so unsatisfactorily reproduced that I am not satisfied that the Magistrate reached his conclusion that Butler was a casual employee by a different process of reasoning. It is to be observed that counsel made extensive submissions to the Magistrate in which heavy emphasis was placed on *Jennings* and the proposition for which it is authority. In any event, even if it were thought that the finding that Butler was a casual employee was improperly reached, there was, for the reasons I have given, evidence on which the

Magistrate was entitled to conclude as a matter of inference or presumption that Butler was an employee or agent. By virtue of his rejection of the evidence as to the **[11]** written agreement he was entitled to conclude that the inference or presumption was not negatived or rebutted.

If it does not appear from his reasons that the Magistrate reached his decision in this way or, for that matter, correctly, the defendant is nevertheless entitled, as was held by Smith J in *Preston Ice and Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371, to uphold the order of the Court below upon any ground which was open to it at the stage when that order was made. For the reasons I have given it was, in my opinion, open to the Magistrate on the evidence which he accepted to reach the conclusion which he did. The Order nisi is discharged with costs.

APPEARANCES: For the plaintiff Mauro Taxi Services. Mr RP Dalton QC with Mr RS Lancy, counsel. Adams Maguire & Sier, solicitors. For the defendant Israport: GL Rice, counsel. Pryles & Defteros, solicitors.
