GOOD NEWS FOR SOME MOTORISTS

MANAWATU COUNTY v. ROWE, [1956] N.Z.L.R. 78.

The recent judgment of the New Zealand Court of Appeal in Manawatu County v. Rowe (supra) on appeal from the judgment of Barrowclough C.J. (reported in [1955] N.Z.L.R. 165) is of considerable importance and of interest both to layman and lawyer. The questions for determination were first, the possible negligence of a driver in whose favour the right-hand rule operates and secondly, the responsibility of a car-owner for negligent driving when the owner is not the driver.

Respondent, plaintiff in the Court below, sought to recover compensation for the damage caused to his car when it collided with a road grader at the intersection of two roads. At the material time the car was being driven by the respondent's wife who had permission and authority to use it whenever she chose. The accident was primarily caused by the wife failing to observe the right-hand rule, that is, she failed to give way to the appellant's grader approaching on her right. However, it was held by the learned Chief Justice that both parties were negligent, the wife being seventy-five per cent. responsible for the accident. Therefore, in accordance with the provisions of s. 3 (1) of the Contributory Negligence Act 1947, if the wife on this occasion was held the agent of her husband so that her negligence could be imputed to him, the damages recoverable by the respondent would be reduced in proportion to the degree of his wife's negligence. But the Chief Justice found that the evidence did not establish that at the material time the respondent's wife was driving the car on his behalf or performing any duty delegated by him to her. Thus the negligence of the wife was not the negligence of the respondent, and he having no share in the responsibility for the damage was entitled to recover the full amount of the damages proved.

From this decision the defendant appealed on the grounds that the judgment was erroneous in fact and in law. The Court affirmed the findings of the Chief Justice.

The judgment of the Court of Appeal has two main points of interest:

(A) The Court's observations on the extent of the right-hand rule; and

(B) The burden of establishing the liability of the owner of a motor-car which has caused damage while under the control of another.(1)

A

The decision of the Court in this case establishes beyond doubt that the right-hand rule does not confer on the driver who has traffic approaching on his left the absolute right to proceed. Finlay J. in Buckley v. The King, [1945] N.Z.L.R. 531, 533, stated the position as follows:

> The true legal position, as I apprehend it, is that a driver entitled to the benefit of the right-hand rule is entitled to exercise the right to proceed, which the rule confers upon him, until that point of time at which he sees, or as a reasonably prudent driver he ought to see and appreciate, that if he continues to exercise the right and continues to proceed a collision will result.

It is clear that there is no right to rely on compliance with the right-hand rule, in spite of the absolute requirement of the regulation that a driver should give way to traffic on his right, for as McGregor J. observes in the case under review (at p. 91):

> In my view, the appellant's servant was guilty of negligence in a manner contributing to the accident. It is a cardinal duty of the driver of any vehicle to keep a proper look-out. While it is conceded he had a primary duty to any traffic that might have been approaching on his right, once having ascertained the road to his right was free from traffic and there being no preoccupation in regard to traffic approaching from any other direction, he had a duty to look to his left. [Emphasis added]

If the grader driver had not failed to keep a proper lookout he could have observed the car driven by the

respondent's wife and taken steps to avoid the consequence of her negligence on approaching an intersection. There is no legal basis for the layman's view that the responsibility for an accident always lies on the shoulders of one who infringes the right-hand rule. After attending to the primary duty to traffic in front and to the right, a driver should observe the state of the traffic on his left and ". . . avoid any traffic which ought to be avoiding him but is not taking steps to do so . . . as a reasonably prudent motorist, he ought to take that degree of care for his own safety and the safety of others": per Callan J. in Vaughan v. Page, [1938] N.Z.L.R. 461, 465. As a question of fact it must be determined by the Jury (or the Judge if sitting alone) whether and if so at what point of time a situation arose in which the driver, though having the right-hand rule in his favour, should not have proceeded further.

While legislative provision making absolute the requirement to give way to the right with consequent absolute liability for breach would in some instances work an injustice, care must be taken to ensure that the driver in whose favour the rule operates does not have his right whittled away by sympathetic juries.

B

At the time of the negligent act, was the wife of the respondent his agent, making him vicariously liable for her negligence? In determining this question the members of the Court of Appeal differed on the inference to be drawn from the facts. The majority held that the burden of proof of agency rested upon the party who as part of his case asserted the agency, and that on the evidence the wife was not shown to be the agent of the respondent.

The respondent was a farmer and stockbuyer who had one car supplied by the firm for which he worked, and a car of his own - the car involved in the accident - used extensively by his wife with his authority. On the day of the accident the respondent left home at 6 a.m. in the firm car. He did not know of his wife's intended journey in his car. At the time of the accident the respondent's wife, who had with her her father and daughter, was returning from doing some

personal shopping (its nature the evidence does not disclose) and had arranged a social function for a member of her family. Upon these facts it was sought to have the Court draw an inference that the car was being used for the joint purposes of the respondent and his wife, and that the respondent had that degree of interest in the performance of his wife's activities which would make him vicariously responsible for her negligence.

The idea that the owner should be responsible for the damage of which his property is the instrument is an idea suited to a primitive community, not to a modern state. If A suffers damage from the wrongful act of B and seeks to say that C is liable for that damage A must establish that B acted as the agent or servant of C: Hewitt v. Bonvin, [1940] 1 K.B. 188. Once C shows that he was not using the chattel when it caused the damage A, if he still wishes to hold C responsible for the act of B, must prove that C is vicariously liable. When A finds that it was B who was actually using the chattel, A should sue B, but if he wishes to sue C, he must prove C's liability. C will be held liable if A shows B to be either the servant or agent of C: Hewitt v. Bonvin (supra). However, when the general term "chattel" is replaced by "motor vehicle" it is found that judicial ingenuity has imparted a certain confusion into the above general propositions. The Courts appear to have thought that motor-cars being valuable were not freely lent by their owners and as a normal consequence the driver, when not the owner, must be the owner's servant or agent. They have tended to place on the owner the responsibility of proving that he is not liable. It is submitted that this assumption is wrong and has done nothing more than add confusion to well-founded principles. As Hutchison J. observes in Rose's case (at p. 87):

> A not unusual car-owning family would consist of the man, who owns the motor-car, his wife and one or more adolescent children; the wife and children all drive, and all use the motor-car for their own private purposes.

The confusion previously imparted into the law has now been clarified by the decision of the Court of Appeal in the case under review. However, the decision of the Court was not unanimous, being by a majority of two to one. All the judges relied substantially on the same case to reach opposing

conclusions. It is proposed to examine these authorities in an endeavour to show a shift of emphasis as regards the owner's responsibility for the driver of his motor vehicle. The position can conveniently be considered under three heads: (1) the inference to be drawn from ownership; (2) the burden of proving or denying vicarious responsibility; (3) the relationship of the driver to the owner.

Stanton J. was of the opinion that ownership of a car is sufficient to raise a presumption of agency when the driver is not the owner but that this presumption was liable to be rebutted by proof of the actual facts. In Barnard v. Sully (1931), 47 T.L.R. 557 (approved in Hewitt v. Bonvin, supra) Scrutton L.J. in delivering the judgment of the Divisional Court said (at p. 588):

> But, apart from authority, the more usual fact is that a motor car is driven by the owner or the servant or agent of the owner and therefore the fact of ownership is some evidence . . . that at the material time the motor car was being driven by the owner of it or by his servant or agent. But it is evidence which is liable to be rebutted by proof of the actual facts.

However the majority of the Court in Rowe's case held that evidence of ownership was merely evidence fit to go to the jury on the question of agency, that is, there is at the most a possible presumption of fact. McGregor J. (at p. 92) said:

> . . . although proof of ownership alone may be some evidence [of agency] the weight to be attached to such evidence depends on the whole circumstances of the particular case as adduced in the evidence and any explanation that may be tendered by the defendant.

The only two New Zealand decisions on the point prior to Rowe's case were Timaru Borough v. Squire, [1919] N.Z.L.R. 151; [1919] G.L.R. 75, a decision of Sim J., and Wood v. Freyne, [1930] N.Z.L.R. 353; [1930] G.L.R. 149, a decision of Reed J. Reed J. took the view that the ruling in the Timaru case (supra) required reconsideration, but thought it unnecessary for him to do so as the defendant had in the case before him discharged the onus if it rested upon him. Sim J.

in the Timaru case said (at p. 153 [73]):

> . . . it was proved that the respondent was the owner of the car in question, and that of itself appears to be sufficient prima facie evidence that the negligence which caused the collision was imputable to the respondent, without proving affirmatively that the person in charge was the respondent's servant. [Emphasis added]

That portion of Sim J.'s judgment that has been underlined provides, it is submitted, the clue to the confusion that existed in this branch of the law. In so far as Sim J. says that the plaintiff need not (initially) do more than prove the defendant's ownership he is perfectly consistent with the majority decision in Rowe's case. However at p. 155 Sim J. unmistakably shows that he thought proof of ownership changed the burden of proof and required the owner to disprove agency. The Magistrate, he said, appeared to have acted on the view that the onus lay on the claimant to prove affirmatively that the driver was her father's agent at the time of the collision. "The view that on proof of ownership the onus of proof was shifted on to the respondent does not appear to have been put before the Magistrate at all." Sim J. expressed his own view of the law as follows:

> . . . When it had been proved that the car belonged to the respondent the onus lay on him of proving that his daughter was not his agent at the time of the collision.

That is the view rejected by the majority of the Court of Appeal in Rowe's case. It is submitted that proof of ownership will only be, as is said in Barnard v. Sully (supra) -

> some evidence fit to go to the Jury that at the material time the motor car was being driven by the owner . . . or some servant or agent of his.

In so far as Sim J. in the Timaru case and Stanton J. in Rowe's case sought to weigh a possible presumption of fact with a burden of proof, they amalgamated and by amalgamation confused two distinct and separate branches of this problem. Once the presumption is neutralised by evidence of surrounding circumstances the defendant cannot be compelled without more

to disprove an agency or a master-servant relationship or else lose his case. It is the responsibility of the party seeking to hold the defendant liable to prove the defendant's liability, not for the defendant to prove his non-liability.

The majority of the Court of Appeal differed from the view expressed by Stanton J. concerning the burden of proof in these cases. Stanton J. poses the problem as follows:

> Does the fact that the defendant was the owner of the car give rise to a presumption that his wife was his agent so that the onus is on him to rebut that presumption?

In answering this question Stanton J. adopts the words of Williams J. in Flannagan v. Fellick (1883), N.Z.L.R. 2 S.C. 85, 87, where he said:

> . . . the horse was admittedly Flannagan's, and that in my opinion would be sufficient to throw upon Flannagan the burden of proving that the boy whose negligence was in issue was not his servant or agent.

On the authority of the Timaru case which followed Flannagan's case Stanton J. states that the question to be considered is whether the respondent has made out clearly that his wife was not his agent at the time of the accident. He concludes (at p. 86):

> . . . and with his full means of knowledge, it was for him to show that he had no interest or concern in this particular journey, and, in my view, he has not discharged that onus.

But Hutchison J., agreeing with McGregor J., divides the problem into its two distinct compartments when he says (at p. 89):

> My view is that if there is no evidence except that the defendant is the owner of the car, the inference may be drawn that the driver of the car was his agent; that that inference may be drawn, too, if there is some evidence which, however, does not, in the mind of the Court,

counterbalance the inference; but that, once the evidence counterbalances the inference, the person asserting the agency fails to prove his case.

The inference of agency may be counterbalanced or neutralised and when this is done the burden of proving the agency remains the responsibility of the party asserting the agency. The position may be summarized as follows:

(1) The person asserting the agency must prove the agency (that is, the onus is on the person asserting, and remains there), but

(2) the onus may be discharged by proof of ownership (in the absence of other evidence);

(3) if there is other evidence it is simply a question of what inference should be drawn from the evidence as a whole. The onus is still where it always was.

Though the evidence was sparse it was sufficient to neutralise the inference of agency against the owner, thus leaving the appellant with the undischarged burden of adducing evidence to support his contention of agency. That the burden should be upon the party asserting the agency is in accordance with the principles enunciated at the commencement of this article and with the current of authority.

Given the information that C is the owner but not the user of the chattel causing damage, and the further information that between B the user and C the owner there is some relationship, such as husband and wife or mother-in-law and son-in-law, is this relationship likely to create or strengthen any presumption or inference that the user is the servant or agent of the owner? It is submitted not. If A wishes to sue C as well as or instead of B he must prove C's vicarious liability. Mere relationship between B and C does not, it is submitted, change this fundamental principle. However, the fact of relationship appears to have had some bearing on the decision in the Timaru case and on the opinion of Stanton J. in Rowe's case. In Rowe's case Stanton J. on facts which he himself described as "scanty" appeared to place an added responsibility of disproving agency on the husband respondent.

After referring to the purpose for which the journey was undertaken he says (at p. 86):

> These seem to me to be family affairs, or, at any rate, are capable of being so considered, and with the onus resting on the defendant, and with his full means of knowledge, it was for him to show that he had no interest or concern in this particular journey . . . .

With a master-servant relationship one may more readily draw an inference from ownership, as a question of fact, than in the case where the relationship sought to be proved is a temporary agency: Laycock v. Grayson (1939), 55 T.L.R. 698. This view is adopted by McGregor J. in Rowe's case. But the relationship of husband and wife does not in law give rise to a presumption of agency. So too with other family relationships. There must be some evidence establishing that at the material time the user was using the chattel on behalf of the owner or in the performance of a task or duty delegated by the owner. Relationship between the parties is insufficient to raise a presumption of agency against the owner and is no more than some evidence fit to go to a jury that the person using the chattel was either the servant or the agent of the owner. In principle there must be no difference between evidence of ownership and evidence of relationship, for neither is sufficient by itself to establish vicarious liability. Proof of relationship does not convert an inference liable to be rebutted by proof of actual facts into a presumption casting upon the owner the burden of disproving agency. Once facts neutralising the initial inference have been given, the party asserting the agency must bear the burden of establishing an agency in fact if he is to succeed. That this is the position is recognized by McGregor J. at p. 94 in the case under review:

> It is agreed that the wife of the respondent had the right to use the car at any time she chose and that the wife was driving with the authority of the husband. This . . . while not necessarily satisfying the burden of proof which rests on the appellant, is evidence from which a tribunal of fact may draw an inference of agency.

In the final analysis the question is always one of fact. No relationship of master and servant arose in Rowe's case. Nor was the wife shown to the satisfaction of the Court to be performing any duty delegated to her by her husband. It would appear that the Court was loath to draw any inference whereby in the performance of normal household duties the wife was to be considered the servant of her husband. It further appears from Rowe's case that in the performance of some duties the wife may not be regarded as her husband's agent, unless he has knowledge of the duties undertaken. Even then, it is submitted, mere knowledge will not in all cases establish an agency. It appears that the Court must decide on the facts of each case whether those facts disclose the existence of an agency by way of performance of a duty delegated by the principal.

While establishing no new principle of law Rowe's case has at least put an end to the misapprehension evidenced by some earlier New Zealand cases that proof of ownership of a car raises a legal presumption of agency and places on the owner the burden of proving that there was no agency.

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(1) The principles discussed under this head apply only to property damage and do not apply to claims for personal injuries sustained by third persons: Transport Act 1949, s. 67. In relation to personal injuries the driver when not the owner is deemed to be the authorized agent of the owner.