IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 497 OF 2013

BETWEEN:

R F & G INSURANCE COMPANY LTD. **Claimant**

AND

LUIS GARCIA **1st Defendant**
OSMAN VALDEZ **2nd Defendant**

In Court: July 2 & 9, 2014.

BEFORE: Hon. Chief Justice Kenneth Benjamin.

Appearances: Ms. Naima Barrow for the Claimant.
Mrs. Magali Marin Young, SC for the First Defendant.

JUDGMENT

[1] On December 22, 2012 at about 11:00 p.m., there was a motor vehicular collision between a motor car owned and driven by Adan Cal and the motor pick up owned by the First Defendant and driven by his employee, the Second Defendant. Both vehicles were extensively damaged. The Claimant, as the insurer of Adan Cal's vehicle, indemnified him for his damaged vehicle which was a total loss. The Claimant now seeks to recover from the Defendants moneys paid to its insured, Adan Cal. The sole issue to be decided is whether or not the First Defendant is liable for the acts of the Second Defendant resulting in the said accident.

[2] The suit was commenced by Claim Form filed with a Statement of Claim on September 29, 2013 by the Claimant, by virtue of the subrogation clause in its contract of insurance with Adan Cal, entitling the Claimant in consideration of indemnifying its insured to all rights including the right to pursue a claim in its own name and for its own benefit any claim for damage.

AGREED FACTS

[3] By a Memorandum of Facts ordered by the Court and jointly subscribed to by Counsel on both sides, the following facts were stipulated:

> "1. By a contract of insurance dated 13th June, 2012 the Claimant insured Adan Cal against loss or damage to his 2009 Jaguar XF Car bearing license plate number BMP C-02772 (hereinafter called the "the car") in consideration of premiums paid by Adan Cal.
>
> 2. It was a term of the police that the Claimant would in consideration for indemnifying Adan Cal, be entitled to all rights of Adan Cal and to prosecute in the Claimant's name for its own benefit any claim for indemnity or damage or otherwise.
>
> 3. The First Defendant was at all material times the owner of a Green and Red 1984 pick-up bearing license plate numbered CY-C-24994 driven at the time by the Second Defendant.
>
> 4. The Second Defendant was in the employ (sic) of the First Defendant at the date of the accident.
>
> 5. At about 11:00 p.m. on the 22nd December, 2012 the Second Defendant was driving the Pick-up Truck on the Hummingbird Highway traveling from a southern to a northern direction when upon reaching between Miles 54 and 55 the Pick-up (which was traveling in an opposite direction) collided into the Car.

6. The said collision was caused by the negligence of the Second Defendant who

    a) Failed to keep any or any proper lookout or to have any or any sufficient regard for other users of the same road;

    b) Drove at an excessive speed;

    c) Failed to observe or heed the presence of the car;

    d) Failed to stop, to slow down, to swerve or in any other way to manage or control the said pick-up Truck to prevent the said collision;

    e) Drove on the wrong side of the road

7. By reason of the collision extensive damage was done to the Car and the Claimant had to indemnify its insured for the damage to his Car.

8. Pursuant to the terms of the policy, the Claimant paid the sum of $82, 250.00 in full settlement of the insured's claim under the policy and spent $84.38 to tow the car.

9. The Claimant recovered $20,000.00 for the First Defendant's insurers and sold the wrecked car for $5,000.00 and as such is out of pocket $57, 332.38.

10. The Claimant made several attempts to have the Defendants reimburse the sums paid but the Defendants have refused and/or failed to reimburse the Claimant on the aforesaid account stated."

[4] The Second Defendant was served with the Statement of Case by advertisement in a local newspaper. There being no acknowledgement of service or defence filed, judgment in default was entered against the Second Defendant. As a result, the Second Defendant played no part in the present proceedings.

THE DEFENDANT'S CASE

[5] There was no demur that the Second Defendant was at the time of the accident, on December 22, 2012 employed by the First Defendant. Further, it was not denied that he was driving the motor pickup owned by the First Defendant and used for his occupation. However, in his defence, the First Defendant pleaded that at the time of the accident "the 2nd Defendant was not acting in the course of his employment and was on a frolic of his own". The Defence stated that the First Defendant was not at the scene of the accident and hence no admission was made as to how the accident occurred and as to whether the collision was caused by the negligence of the Second Defendant.

[6] In the witness statements submitted by the First Defendant, no evidence was presented to counter the allegation of negligence made against the Second Defendant in the Claim. The issue of causation stood uncontroverted and was not an issue contested by the Defendants.

[7] The case for the First Defendant was directed at the only contentious issue, that is, whether the First Defendant was vicariously liable for the acts of his employee, the Second Defendant. In this regard his witness statement and those of his supporting witnesses addressed the policy relating to his vehicles and the known activities of the Second Defendant on December 22, 2012 before the time of the accident.

[8] It was averred in the Defence and detailed in the witness statement of the First Defendant that the two pick-up trucks owned by and used in his business, LCM Enterprises, were to be parked by 6:00 p.m. daily at specific locations depending on where the employees were working at the time. The main location for the parking of the vehicles was at Teakettle Village, Cayo District, of which property the Second Defendant was the caretaker at the time. Parking sites were located at Barry Espat's Garage or Buca Service Station for any vehicle then in use for work on the Hummingbird Highway. The remaining parking location was at the residence of the First Defendant at San Ignacio for any vehicle in use in or around San Ignacio. In their testimony, both the First Defendant and Ashley Martinez told the court that the policy was in force for some four years before the accident.

[9] On Saturday, December 22, 2012, LCM Enterprises was engaged in a sub-contract to do maintenance on the water systems at Gaia River Lodge on the Mountain Pine Ridge. On that day, the Second Defendant was driving the business' red and green 1984 pick-up truck (which subsequently was involved in the accident). On the instructions of Ashley Martinez, his supervisor, he delivered materials to the work site and left towing a trailer at 3:00 p.m. The trailer was left at the First Defendant's house at San Ignacio Town. There, the Second Defendant waited until Marco Tzib, an employee of the main Contractor, Eco Friendly Solutions Ltd. came with the payroll and paid him his wages. Marco Tzib instructed the Second Defendant to proceed to the farm at Teakettle Village, which was the main parking site and to park the pick-up truck there. In point of fact, the Second Defendant resided at the farm as the caretaker. Marco Tzib did not state the exact time that the Second Defendant left San Ignacio but it must have been at or before 5:30 p.m. when he called the First Defendant and informed him that the Second Defendant was on his way to Teakettle Village to park the pick-up.

[10] The chain of events can be gleaned from the witness statement of the First Defendant and those of Ashley Martinez, the main driver employed by LCM Enterprises, and Barry Espat. The pick-up was observed by Barry Espat being driven by the Second Defendant from the Maya Mopan area into the San Martin area in the City of Belmopan at about 6:30 to 7:00 p.m. Barry Espat stopped the pick-up in front of Chan's Store and inquired of the Second Defendant where he was headed. The response was that he was going home. At 7:30 p.m., Barry Espat telephoned Ashley Martinez and told him he had seen the Second Defendant driving the pick-up in the San Martin area. Ashley Martinez told him he was unaware as to what the Second Defendant was doing in that area and told him that he must instruct the Second Defendant to park the pick-up at his garage, which was an assigned parking site. Barry Espat again encountered the Second Defendant at 8:00 p.m. the same night coming out of a store on Constitution Drive in Belmopan carrying a bag containing beer. He relayed Ashley Martinez's instruction and offered to take him to the bus terminal after he parked the pick-up truck. The Second Defendant refused to abide by the instructions and stated that he was going home. The store is located three blocks from Espat's mechanic shop.

[11] In his witness statement, the First Defendant claimed that he received a call from Ashley Martinez relaying what he had been told by Barry Espat. He further stated that he thereupon telephoned the Second Defendant and asked him where he was. He said that the Second Defendant's reply was that he had gone to Foothills Farm on the Hummingbird Highway to pick up some equipment. He stated that he disbelieved what the Second Defendant told him and instructed him to park the vehicle at Barry Espat's garage. Ashley Martinez's evidence did not refer to any call being made to the First Defendant. Learned Counsel for the Claimant elicited in cross-examination from Martinez that he tried to call the Second Defendant but could not reach him. On the basis of this she cast doubt upon whether the First Defendant did call the Second Defendant and give him instructions as he claimed to have done.

[12] The evidence of the First Defendant was somewhat inconsistent. Although in his witness statement, he spoke of being informed by Ashley Martinez as to the Second Defendant having been seen by Barry Espat in the San Martin area, this was not borne out by the evidence of Martinez. When cross-examined, the First Defendant implied that Barry Espat called him on the night of December 22, 2012 because Espat was familiar with the policy as to the parking of the vehicles as his garage was a designated parking site. However, Espat did not state that he called the First Defendant that night. Indeed, the evidence suggests that he did not make such a call as in paragraph 12 of his witness statement he stated:

> "12. On the morning of 23rd December, 2012, I contacted Luis Garcia, Mr. Valdez's employer, and informed him of the whereabouts and condition of the pickup truck that was driven by Osman Valdez, and relayed that I had seen Mr. Valdez that previous day and that I reported it to Ashley."

The state of the evidence lent credence to the suggestion of learned Counsel for the Claimant. I am not satisfied that the First Defendant was being truthful and I do not believe that he received calls from Barry Espat or from Ashley Martinez on the night of the accident, far less did he make a call to the Second Defendant to give him instructions to park the vehicle.

[13] Later in the night at about 11:15 p.m., Barry Espat received a telephone call and drove his tow truck to the scene of an accident at between Mile 54 and Mile 55 on the Hummingbird Highway. He observed the vehicle belonging to Adan Cal and the First Defendant's pick-up truck which he last saw being driven by the Second Defendant earlier that night. Both vehicles were towed away from the scene by Barry Espat's tow truck. The First Defendant's pick-up truck was towed to Espat's garage. On the morning following, Espat spoke to the First Defendant, who went with Ashley Martinez to inspect the damaged pick-up truck. The First Defendant then visited the Police Station. The Second Defendant was detained there. The First Defendant was immediately dismissed by the Second Defendant and ordered to vacate the property at Teakettle Village.

[14] The Second Defendant was charged and arraigned at the Belmopan Magistrate's Court. He pleaded guilty on Monday, December 24, 2012 to the offence of driving without due care and attention and he was ordered to pay a fine. The Police Report of the accident dated January 4, 2013 was admitted into evidence by consent. The Report substantiated the facts of the accident and of both vehicles being extensively damaged.

[15] In cross-examination at trial, the First Defendant admitted that he was paid money by his insurance company in relation to the accident. He further admitted that in his report to his insurance company he did not mention that, at the time of the accident, the Second Defendant was not authorised to drive his vehicle. However, he said that this was mentioned in the report he made to the police. It was put to the First Defendant that he did not report his vehicle stolen and he agreed that he did not. These matters impinge on the credibility of the witnesses, Barry Espat and Ashley Martinez. Even ignoring the evidence of the First Defendant as to him receiving calls and giving instructions to the Second Defendant, there remained the uncontroverted evidence as to the whereabouts of the pick-up driven by the Second Defendant on the night in question and of the instructions relayed to him by Martinez through Espat.

THE CLAIMANT'S CASE

[16] The only testimony relied on by the Claimant was embodied in the witness statement of its Claims Manager, Alberto Balderamos. The paragraphs of the witness statement substantially repeated in Memorandum of Agreed Facts which was set out in extenso in paragraph 3 of this judgment. The final paragraph addressed an issue of re-insurance raised and responded to in the Defence and the Reply respectively. That issue was not raised at trial and it will not be addressed in this judgment.

[17] The only matter of evidence raised to substantiate the claim based on vicarious liability was the undisputed statement that the First Defendant was the owner of the pick-up and it was being driven by his employee, the Second Defendant, at all material times including the time of the accident.

THE LAW

[18] In the skeleton arguments, both sides relied on the textbook 'Commonwealth Caribbean Tort Law' by Gilbert Kodilinye (both 2nd and 3rd editions) and the following passages are apposite to the case:

> "(at page 315 – 3rd edition) the theory of vicarious liability which eventually emerged was that a master is liable for any tort committed by his servant in the course of the servant's employment irrespective of whether the master authorized or ratified the activity complained of and even though he may have expressly forbidden it. "… a master will be liable only for those torts which his servant committed during the course of his employment – that is, while the servant was doing the job he was employed to do."

The burden of proof lies with the Claimant, who is required to prove that while acting in his capacity as a servant in the employment of the master, the tort was committed by the servant.

[19] The starting point is the general principle at common law that in an employer-employee relationship, the employer is liable for torts of the employee where such torts are committed in the course of the employment. As stated earlier, the only relevant evidence put forward by the Claimant was that the Second Defendant was the employee of the First Defendant and that he was driving the pick-up truck belonging to the First Defendant at the time of the accident. The ownership of the vehicle provided prima facie evidence that the Second Defendant was acting as the servant of the First Defendant. However, that inference can be rebutted by evidence. This was the purport of the advice of the Privy Council in the case of **Rambarran v. Gurucharran [1970] 1 All E.R. 749**. The matter was put thus by Lord Donovan(at page 751) :

> "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."

The evidence adduced in the present case by the First Defendant has sought to rebut the inference of vicarious liability on his part. The court must examine the evidence in the round as each case must be determined on its own facts applying the applicable principles. The test as to the vicarious liability of employers has been reformulated by the House of Lords in the cases of **Lister v Hesley Hall Ltd. [2002] 1 AC 215** and **Dubai Aluminium Co. Ltd. V Salaam [2003] 2 AC 366** and adopted by the Privy Council in **Bernard v Attorney General of Jamaica [2004] UKPC 47** and **Brown v David Robinson et al [2004] UKPC 56**. In **Lister's** case, the question that was to be answered by the House of Lords was:

> "... Whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."

The case involved the sexual abuse of children resident at a school boarding house by the warden. The opinions of the Law Lords laid emphasis on the closeness of the connection between the tort under review and the tortfeasor's employment. The former test adopted from Salmond and Heuston, The Law of Torts 21st ed 1996, p 443 was departed from as being too restrictive in cases of intentional torts. The new test was put in this way by Lord Steyn in **Bernard v Attorney General of Jamaica** (supra) (at paragraph 18):-

> "The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable."

This was a restatement of the dictum of Lord Nichols of Birkenhead in the **Dubai Aluminium** case where he stated (at paragraph 23):-

> "Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and reasonably be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

In the **Dubai Aluminium** case, the issue before the House was whether a firm of solicitors was vicariously liable for fraud committed by one of its partners and others upon the appellant. The common thread running through these cases is that there must be some closeness in the connection between the nature of the employment and the tort in issue and the court must determine whether on the totality of the evidence it is just and reasonable to visit vicarious liability on the employer.

THE ARGUMENTS

[20] Learned Counsel for the Claimant relied upon the passage in Halsbury's Laws of England. (5th ed), Volume 97 at paragraph 684 where it is stated as follows:

> "The employer cannot escape responsibility where the act is otherwise one for which he is responsible, on the ground that he had forbidden the employee to do the act in the manner which produced the injury."

It was contended that the Second Defendant was authorised to use the First Defendant's vehicle thus rendering the First Defendant liable for the loss and damage caused by the accident for which the Second Defendant was culpable by his negligence. It was said that the policy merely set a limit as to the time when the vehicle was required to be parked and this did not operate to absolve the employer from vicarious liability for the acts of the employee.

[21] Reliance was placed on the case of **Canadian Pacific Railway Co v Lockhart [1942] 2 All ER 464**. In that case, the employee was required in the course of his employment to deliver a key. Although, there were company vehicles available for use, an employee was allowed to use his own vehicle provided that it was insured. The employee used his uninsured vehicle and a child was injured. The Privy Council held that the servant was acting in the course of employment and his driving an uninsured car was an authorised act carried out in an improper mode. It was argued that, in the present case, the Second Defendant was authorised to use the First Defendant's vehicle and there was no limitation as to his use but rather as to time when the vehicle could be used. It was also suggested that by not reporting the Second Defendant's unauthorised use of the vehicle to his insurers, the first Defendant had implicitly ratified such use.

[22] In response, learned Senior Counsel for the First Defendant contended that there being no evidence as to the terms of the First Defendant's insurance policy, the failure to inform his insurers as to the unauthorised use of the vehicle was not of any relevance to the case. It was emphasized that the solitary issue for determination was whether on the facts, the First Defendant was liable for the acts of the Second Defendant. The

central contention was that the Second Defendant was on a frolic of his own when the accident occurred, thus relieving the First Defendant of liability in his capacity as employer. It was asserted that the Second Defendant was not on his master's business and that this was the distinguishing feature of the present case from the **Canadian Pacific** case, where there was no dispute that the employee was at the time of the accident in the course of his employment.

[23] In her written submissions, learned Senior Counsel cited para. 6-40 from Clerk & Lindsell on Torts (12th ed) at p 377 where the learned authors wrote:

> "It is not enough that the misconduct should have occurred in the course of doing an act of a kind which the employee was usually authorised to do, unless at the time the employee was engaged on the employer's business and not merely on his own. However, deviations from the task to be performed, for the employee's own purpose, may still be within the course of employment. It is a question of degree at some point the deviation may be such that it can be regarded as a separate activity and the employee can then no longer be considered to be acting in the course of his employment. A totally unauthorised journey by a driver, on business of his own, will take him out of the course of his employment. However, as the court in **Storey v Ashton (1869) LR 4 QB 476** at 480 made clear, the extent-both spatial and temporal-of the detour is relevant. So the court contrasted "merely going a roundabout way home" with starting "an entirely new journey." The purpose of the deviation will be important."

In addition, the First Defendant's submissions adopted the guidelines set put in **Smith v Stages et al [1989] 1 All ER 833** (at p 851 c-f):-

> "The paramount rule is that an employee travelling on the highway will be acting in the course of his employment if, and only if, he is at the material time going about his employer's business. One must not confuse the duty to turn up for one's work with the concept of already being "on duty" while travelling to it.

1. ...
2. ...
3. ...
4. ...

5. A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of his employment.

6. Return journeys are to be treated on the same footing as outward journeys."

FINDINGS

[24] The case at bar has to be determined on its own facts based on the principles set out in the **Lister** and **Dubai** cases. The plain facts arising from the evidence are as follows:

(a) At the time of the accident the Second Defendant was employed by the First Defendant

(b) His duties included the driving of the First Defendant's vehicles when instructed to do so.

(c) The First Defendant's policy was that the vehicles were to be parked by 6:00 p.m. at one of three designated parking sites.

(d) The Second Defendant was driving the first Defendant's vehicle on December 22, 2012 at about 11:00 p.m. when a collision occurred with a vehicle insured by the Claimant.

(e) The Second Defendant's negligence was the cause of the accident.

(f) The Second Defendant was instructed sometime around 5:30 p.m. to drive the pick-up from San Ignacio and park same at Teakettle Village.

(g) The Second Defendant was seen driving the pick-up at two different locations in Belmopan at 6:30 – 7:00 p.m. and at 8:00 p.m. and one each occasion he claimed to be going home.

(h) The Second Defendant was told by Barry Espat to park the vehicle at his garage in Belmopan and he declined to do so.

The Second Defendant would have driven past Teakettle Village after leaving San Ignacio in breach of the policy and contrary to specific verbal instructions from Marco Tzib. He would then have journeyed into the city of Belmopan. He was seen driving the pick-up from the Maya Mopan area into the San Martin area. About an hour to 90 minutes later, he was again seen coming out of a store of Constitution Drive with a bag containing beer. The inference being that he had just made a purchase of the beer. On the second occasion, he was again told to park the vehicle at Espat's garage but he neglected to do so. Some three hours later, the accident took place between Miles 54 and 55 of the Hummingbird Highway in Belmopan. Between 8.00 p.m. and the time of the accident, the whereabouts of the Second Defendant with the vehicle were unknown but it can be discerned that the vehicle was not taken to a designated parking site. Obviously, the Second Defendant was not conducting any activity on behalf of the first Defendant. Indeed, the second Defendant had deviated from his required journey and had embarked on an excursion beyond Teakettle Village where he actually resided.

[25] Applying the guidelines set out in **Smith v Stages**, the second Defendant was not going about his employer's business when the accident occurred. There is no evidence as to where he was destined at the time. The deviation in the journey cannot be treated as being merely incidental but rather amounted to a deliberate flouting of instructions. It can be concluded that he commenced a new journey having passed the parking site at Teakettle Village. Such conduct was not part of what the Second Defendant was required to perform in the course of his employment.

[26] In the premises, the First Defendant cannot be held vicariously liable for the unauthorised journey upon which the Second Defendant embarked on the night in question. Accordingly, the Claim against the First Defendant shall stand dismissed with

costs to the First Defendant in the sum of $13,966.48 as prescribed by Appendix B of Part 64 of the Supreme Court (Civil Procedure) Rules, 2005,

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KENNETH A. BENJAMIN
Chief Justice