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J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 26/77

BEFORE: The Hon. Mr. Justice Zacca, P. (Ag.)
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Rowe, J.A.

BETWEEN	AVIS RENT-A-CAR LTD.	-	DEFENDANT/ APPELLANT
A N D	JOYCE MAITLAND (Executrix Estate Headley George Howell, deceased)	-	PLAINTIFF/ RESPONDENT

Mr. R. Williams, Q.C. and Mr. D. Scharschmidt for the appellant.

Mr. W. Frankson for respondent.

April 22, 23 & July 18, 1980

ZACCA, P. (Ag.):

On May 2, 1980 we allowed this appeal and set aside the judgment of the learned trial judge. We entered judgment for the appellant with costs of the trial below and costs of this appeal to be agreed or taxed. We promised to put our reasons into writing. This we now do.

This is an appeal from a decision of Parnell J. in which he gave judgment for the respondent against the appellant. In the court below the respondent had brought a claim against the appellant as first defendant and one Frederick Henry as second defendant arising out of a collision involving the appellant's car. The respondent brought the action as Executrix of the estate of Headley George Howell, deceased. An interlocutory judgment in default of defence was entered against the second defendant Henry.

The appellant is a company engaged in the business of hiring cars. On September 6, 1972, the appellant hired a motor car to Frederick Henry the second defendant. The hiring was for an unspecified period of time, but Henry was told to bring in the car for checking at the end of each week. He was also required to make a weekly payment for the hiring of the motor car.

On September 24, 1972, Henry was driving the car along the public road in the parish of Trelawny. He was on a mission carrying out private investigation work on behalf of an Investigation Agency. The deceased Headley George Howell was employed to Kane's Investigation and Security Services and went with Henry on his mission. The car got out of control, crashed and Howell was killed.

Parnell, J. found that the second defendant was negligent in the management and operation of the motor car. The learned trial judge also held, I quote -

> (1) "I am inclined to the view, and, I do hold that where a car rental firm hires a car to any person by way of business and under an arrangement as the one proved in this case, the hirer would not be driving merely for his own benefit and for his own concern. The driving of the car is of benefit to the firm renting the car. "
>
> (2) "I hold that on the facts as proved and which I have accepted the second defendant Henry was the agent of the first defendant at the time of the driving and as a result is jointly liable to the personal representative of the deceased for the damages sustained as a result of his death. "

The only issue raised on this appeal is whether the driver of the car could be said to be the agent of the appellant at the time of the collision. It was contented by the Attorney for the appellant that the law as to vicarious liability of an owner of a motor car was well settled and on the facts of this case, it could not be held that the driver of the car was the servant or

agent of the owner. On the other hand the respondent argued that (1) the driver of the car was driving not only for his benefit but also for the benefit of the owner, in that the owner would be making a profit whilst the car was being driven and that he was obliged to bring in the car once weekly for checking, and (2) the appellant delegated the task of driving of its vehicle to persons who hire it. In these circumstances, it was argued that Henry was the agent of the appellant.

In our view, the respondent's case must fail on the facts of this case. The fact that the appellant may be making a profit whilst the car was being driven by Henry does not mean that he was driving the car for the owner's purposes in pursuance of a task or duty delegated by the company to him. The Law is stated thus in Halsbury's Laws of England, 3rd Edition Vol. 28, paragraph 71 at page 71:

> "The owner is, however, responsible only where he has delegated to the driver the execution of a purpose of his own over which he retains some control and not where the driver is a mere bailee, engaged exclusively upon his own purposes."

Morgans v. Launchbury and Others, 1973, A.C. is the leading case on this question. The law is accepted as being well settled. At page 135 Lord Wilberforce states:

> "For 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. The substitution for this clear conception of a vague test based on "interest" or "concern" has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but is has never been held

" that mere permission is enough to establish vicarious liability........ I accept entirely that "agency" in context such as these is merely a concept, the meaning and purpose of which is to say "is vicariously liable," and that either expression reflects a judgment of value - respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well. They provide, if there is nothing more, a complete answer to the respondents' claim against the appellant."

At page 140 Lord Pearson states:

" My Lords, in my opinion, the principle by virtue of which the owner of a car may be held vicariously liable for the negligent driving of the car by another person is the principle qui facit per alium, facit per se. If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuance of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent."

It is to be observed that Lord Denning M.R. in his judgment in the Court of Appeal in the same case of Launchbury v. Morgans (1971), 2 Q.B. at page 255 had this to say:

" One word of caution, however, I must give about this principle. The words "principal" and "agent" are not used here in the connotation which they have in the law of contract (which is one thing), or the connotation which they have in the business community (which is another thing). They are used as shorthand to denote the circumstances in which vicarious liability is imposed. Stated fully the principle is as I stated in Ormrod v. Crosville

" Motor Services Ltd. 1953, 1 W.L.R. 1120, 1123, slightly modified to accord with the way in which Delvin J. put it, at p. 411, and approved by Diplock L.J. in Carberry v. Davies, 1968, 1 W.L.R. 1103, 1108.

> 'The law put an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of some-one else, no matter whether it is his wife, his servant, his friend, or any-one else. If it is being used wholly or partly on the owner's business or in the owner's interest, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern. ' "

When a company or an individual in the course of its business hires a motor vehicle to a person on terms that during the period of hire the vehicle should be driven by the servant or agent of the owner, responsibility for the negligent driving of that motor vehicle will in ordindary circumstances devolve upon the owner. Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd. (1947) A.C. 1. An entirely different situation arises in law when such a company or individual hires the motor vehicle on condition that the motor vehicle can be driven by the hirer for purposes exclusively determined by the hirer, in which the benefits of the venture accrue wholly to the hirer. In this second case there is no joint interest between owner and hirer in the outcome of the venture and the hireage is not dependent upon or affected by the profitability or otherwise of the venture. Such is the position in the instant case where the owner retained an interest in its motor vehicle charging a fee for wear and tear and stipulating for adequate maintenance but otherwise entirely uninterested in the purposes for which the motor vehicle was used. We accept the views on the law of vicarious responsibility expressed in Morgan's case as the correct

principles to be followed.

We are of the opinion that legislation is urgently necessary to protect members of the public who may suffer personal injury and damage due to the negligence of drivers of "U-Drive" cars. The legislature has the provisions of the Motor-Vehicles Insurance (Third Party Risks) Law which can act as a guide for future legislation and we are of the opinion as the court was in Morgan's case, supra, that it is too late now for the courts to extend the boundaries of agency to compensate one in the respondent's position for the injury done to him.

We hold that the appellant is not vicariously liable for the negligent driving of Henry. On the facts of this case Henry cannot be said to have been driving as the agent of the appellant.