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2005

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. CL 2000/G015 -

BETWEEN PAUL GRIFFITH CLAIMANT
AND RESORT DIVERS LTD DEFENDANT

Mr. Maurice Manning and Miss Catherine Minto instructed by Nunes Scholefield Deleon & Company for Claimant

Miss Sandra Johnson for Defendant

Heard: November 24, 25, 26, December 6, 2004 and January 28, 2005.

Sinclair-Haynes, J. (Actg.)

On the 30th September 1997 at about 8:15 a.m., Paul Griffith was driving along the Tower Isle main road. Clifton Hamilton, a diver, employed to Resort Divers, driving in the opposite direction, moved from behind a line of traffic and collided with Paul Griffith's vehicle. Mr. Hamilton died from the injuries he received. Mr. Griffith survived but sustained serious personal injuries and his vehicle was damaged.

The evidence of the Claimant as to how the accident occurred has not been challenged by the Defendant. I will therefore confine my deliberations to the liability of the Defendant for the deceased's negligence.

The Defendant contends that the deceased was at the time of the accident on two (2) days leave, which commenced the day before the accident.

It is, however, the Claimant's case that he was not. Mrs. Beryl Hamilton, the widow of Mr. Clifton Hamilton, testified that that morning he told her he was leaving for work.

The first question is, “Was he on leave or was he going to work?”

The evidence is that about 5:00 p.m., the afternoon before the accident, a friend of the deceased attended his house and invited him to go fishing. Sometime later that night, and after his wife left for work, he went fishing. He returned at 5:30 a.m. the day of the accident.

The unchallenged evidence is that the deceased was an extraordinarily disciplined, careful and attentive employee who rarely took leave. He worked almost seven (7) days per week because of his concern for the welfare of the tourist. There were three dives each day. The first began at 9:30 a.m., the second at 11:00 a.m. and the third at 1:00 p.m. The 9:30 a.m. dive was the deepest. There were various grades of divers. The highest grade was the dive master. The deceased was a dive master. As a dive master he was responsible for preparing the equipment and instructing the divers before the dives. It was a requirement that a dive master was present on the 9:30 a.m. dive because of its depth and the risk involved. There were four dive masters. Two worked at each location.

Mrs. Hamilton’s evidence

It is the evidence of Mrs. Hamilton that the deceased would leave the house for work as early as 6:00 a.m. depending on the number of tourists. He never left later than 7:00 a.m. because he lacked confidence in the other diver’s ability to protect them. That morning he left home at 7:00 a.m. The evidence, however, is that he was heading in the direction of his place of employment. The unchallenged evidence is that he overtook a line of traffic and lost control of the vehicle. The reasonable inference is that he was in a

hurry. His wife's testimony is that he is not a fast driver. Something impelled him that morning to hurry. What was it?

Mrs. Heron's evidence

Mrs. Laura Heron, a director of the Defendant gave evidence. Her testimony is that the deceased could not have been on his way to work as he normally reported to work by 7:30 a.m. to prepare for the first dive. It was her evidence that he needed to be at work by 8:30 a.m. to prepare the equipment, load them into the boat, interact with the guests and get them into the boat.

It was her evidence (and she was supported by Mr. Everton Suer) that the deceased would be required to travel at least one and a half hours from Harmony Hall where the collision occurred to get to Braco. He would be required to travel forty-five (45) minutes to get to Jamaica Jamaica. At 8:15 a.m. he was still at Harmony Hall. He would therefore not get to work for the first dive. Further, she testified, that the job, especially the first dive, was a technical one with dangerous physiological implications. He was required to dive at depth of 90 to 100 feet under water, which meant additional atmospheric pressure and increased inhalation of nitrogen. Those conditions necessitated a well-rested body.

A diver who was not well rested stood the risk of getting decompression sickness, which could result in serious injury such as paralysis or even death. Her evidence is that knowing he had gone fishing the night before and lacked sleep it would have been irresponsible of him to go to work. This behavior was uncharacteristic of him.

Assessment of the evidence

Mr. Hamilton's evidence is that he left home about seven the morning of the accident. Did he realize he was late and being the zealous worker he was he was in such a haste that he overtook the vehicles and lost control of his vehicle?

The contention of Mrs. Heron that he would not have been rested because he returned from fishing at 5:30 a.m. is flawed. The deceased was at home at least at 5:00 p.m. There is no evidence as to how early he got home that afternoon. On days unsuitable for diving they were allowed to leave as early as 1:30 p.m. In any event he could have rested before he went fishing. On the morning of the accident it is quite possible he was on his way to Jamaica Jamaica, which was forty-five minutes away or trying to get to Braco for the second dive. Mrs. Heron's evidence is that there were two dive masters assigned at each location and the divers worked out their own schedule. It was therefore not necessary that he should have going for the first dive. The Defendant has failed to produce any records to the court, which showed that the deceased was on leave at least on the previous day. On a balance of probabilities I find that the deceased was on his way to work.

Second question, "Who was the owner of the VW Golf at the time of the accident?"

Submissions

Miss Sandra Johnson submitted that the property in the vehicle passed to the deceased when he entered into the contract with the Defendant to purchase the vehicle. Consequently he was not driving as the servant and or agent of the Defendant.

Mr. Manning submitted that the intention was that the Defendant retained the property in the vehicle.

This, he submitted, was evident for the following reasons:

Transfer of the title was not effected to the deceased; the vehicle bore the company's logo signifying ownership. After the accident no effort was made to give the vehicle to the widow. It was licensed and insured by the Defendant.

Evidence of the Defence

Mrs. Heron's evidence is that it was important to her that he was early for work. He was provided the vehicle so that he would not have to rise at 4:30 a.m. She assumed he used the vehicle to get to work every day. It is important to quote her response to counsel verbatim,

"I never thought about him leaving the vehicle with his family and taking the bus to work. He could have done that. I expected him to come to work on time whether he used the vehicle to come to work was of no importance to me.... Vehicle was given to him to relieve him of taking the bus as early as 4:30 a.m. I assume he used the vehicle to get to work everyday."

The Law

Section 19 rule 1 of the Sale of Goods Act states:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1: Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or of delivery, or both is postponed."

The Court of Appeal in **Samuels v Olive Rose Johnson-Henry, Edwin Henry and Lloyd Johnson** (1987) 24 JLR152 makes it quite clear that the subject of the contract passes to the buyer unless a different intention appears.

In that case it was held that property in a motor vehicle did not pass to the purchaser where the handing over of the duplicate key for the motorcar and transfer of the title were contingent upon payment of the balance of the price. (See also **Re Anchor Line (Henderson Brothers) Ltd.** 1936 2ALL ER. 941).

The Defendant's evidence

The vehicle was sold to the deceased but it was insured and licensed by the company. The deceased reimbursed the Defendant for the insurance and registration payments. This was supported by Mrs. Hamilton's evidence that upon her return from England she gave the deceased money to pay for the licensing of the vehicle. The insurance was paid by them so as to benefit from group insurance. The sum of \$1,500.00 was deducted from the commission paid to the deceased. The deceased earned a salary and was paid every fortnight. However he was also paid commission on the number of tourists he took on dives. Mrs. Heron's evidence was supported by Mrs. Sandra Duncan, the clerk who was responsible for paying the deceased. Mrs. Hamilton's evidence, however is that she was unaware of such a payment.

I accept the evidence of both Mrs. Heron and Mrs. Duncan in this regard as being truthful. The evidence of Mrs. Heron is that he had full and sole control of the vehicle. Mr. Suer's evidence is that the deceased alone drove the vehicle. Mrs. Hamilton admitted

being driven in it by the deceased on a couple of occasions. She also admitted that he alone drove the vehicle.

It is the finding of the court that it was the clear intention of the Defendant to retain property in the vehicle until the deceased had completed payment of the purchase price. This is evident for the following reasons: title remained with the Defendant; the Defendant's logo remained on the car; it has been a number of years since the accident and no effort has been made to hand the vehicle over to the wife of the deceased.

Third Question: whether at the time of the accident he was driving the vehicle as the agent of the Defendant

Evidence of the Defence

Mrs. Heron's evidence is that it was important to her that he was early for work. She assumed he used the vehicle to get to work every day. It was not important to her whether he used the car to get to work. It was given to him to offer relief from the perennial early rising.

Mr. Manning submitted that in driving to work he was acting in the course of his employment for the reasons stated hereunder:

The vehicle was the Defendant's and the deceased was obliged to use the vehicle to get to work;

It was the concern of the Defendant that the deceased was where he was;

A travel allowance was paid to him by the Defendant;

He was employed to work at different locations, Braco and Jamaica Jamaica. The office was also in a different location.

The Law

In the absence of satisfactory proof to the contrary, proof that the Defendant is the registered owner of a motorcar is prima facie proof that the driver of the vehicle was his servant or agent. (See **Mattheson v G.O.Soltau** (1993) 3 JLR 72)

The Defendant was in the process of purchasing the vehicle. Indeed the sale was precipitated by the desire to relieve him from rising too early. It was parked at his yard and was for his sole use, both to get him to work and elsewhere. He had full and sole control of it. Upon full and final payment ownership would have vested in him.

In determining whether the driver was the agent of the owner, Forte J.A. as he then was, expressed the following in **Kennesha Harris (an infant by her mother and next friend Beverly Harris) v Elaine Hall and Anthony Morgan; and Rupert McIntosh and McIntosh Auto Repairs v Kennesha Harris (an infant by her mother and next friend Beverly Harris) and Anthony Morgan** (1997) 34 JLR 190

“It must be shown that the owner permitted him to drive the car for the purpose of performing some task or duty which is in the interest either solely of the owner, or for the joint interest or benefit of both owner and driver.”

Forte, JA cited the case of **Omrod v Crossville Motors Services** (1953) 2 ALL ER 753 in which the Court of Appeal of England reiterated Lord Denning’s principle that in such circumstances the owner of the vehicle escapes liability where the vehicle was used for purposes in which the owner has no interest or concern’

Was the vehicle being used for a purpose in which the Defendant had an interest or concern?

The answer is bound up in whether or not the deceased was acting in the course of his employment whilst he was on his way to work. The important question therefore is whether he was.

The Law

Lord Goff in **Smith v Stages and another** (1989) 1ALL ER 833 at page 836 stated the following:

“When a man is traveling to or from his place of work, he is not acting in the course of his employment. So the bank clerk who commutes to the city of London every day from Seven Oaks is not acting in the course of his employment when he walks across London Bridge from the station to his bank in the city. This is because he is not employed to travel from his home to the bank, He is employed to work at the bank, his place of work, and so his duty is to arrive there in time for his working day.”

Lord Lowry, in the same case adumbrated as follows:

“The paramount rule is that an employee traveling 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 traveling to it.”

In attempting to determine whether the deceased was acting in the course of his employment it is important to examine the ‘factual picture as a whole’. No one factor is conclusive.

Lord Lowry formulated six propositions which encapsulate the general law on the matter. The propositions are based on Lord Glidewell's statement of principle in the Court of Appeal where he sought to extract from various cases fundamental guidelines on the subject. The first is helpful in attempting to determine whether the deceased was indeed acting in the course of his employment.

“An employee traveling from his ordinary place of work, whatever the means of transportation and even if provided by the employer, is not on duty and is not acting in the course of his employment, but, if he is obliged by his contract of service to use the employer's transport will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so.”

Was the deceased obliged to use the vehicle to travel to work?

The evidence of Mrs. Heron is that the vehicle was sold to him to relieve him of rising too early to get to work and as a reward for his long and excellent service. The sale was effected after he had been in their employ for some time. There is no evidence that it was a part of his contract that he should use the vehicle. It was however important to her that he arrived at work early. It was however not important to her how he arrived as long as he got there early. She never expected him to leave the car at home and take the bus to work. That stance is quite understandable in light of the reason he was given the vehicle. It was sold to him for his own convenience. There is no evidence that prior to receiving the car lateness was a problem for him. In any event, even if that were so and the car was

sold to him so that he would get to work on time, that by itself would not determine that he was acting in the course of his employment.

Lord Goff in **Smith v Stages** gives an example of a man applying for a job but the journey from his home would be quite arduous and lengthy. This fact was a deterrent to him taking the job. In order to entice him to take the job he was offered extra hours pay. In such circumstances Lord Goff was of the view that such an employee would not be acting in the course of his employment while traveling to work as he was not obliged to make the journey, the extra pay was given in recognition of the fact that the journey was arduous.

In the instant case the deceased was under no obligation to travel to work in the car. It was sold to him for his own convenience.

There are, however, circumstances in which an employee will be held to be acting in the course of his employment if he has to travel to or from a place where his job is.

Lord Atkins in **Blee v London and North Eastern Railway Company** (1937) 4ALL ER 270 at page 273 lists some of these,

“The messenger boy, the post-man, the canvasser employed to travel on the streets...”

Lord Goff in **Smith v Stages** added to that list the perepathic logger who was traveling from his home to his destination and home again.

The second proposition enunciated by Lord Lowry clarifies the law:

“Traveling in the employers time between workplace (or in the course of a perepathic occupation whether accompanied by goods or tools or simply in order

to reach a succession of workplaces (as an inspector of gas Meters might do) will be in the course of the employment.”

The unchallenged facts of the instant case are that the deceased was employed to work as a diver at Braco or Jamaica Jamaica. The teams of divers were not changed on a daily basis. There were times however that he was required to attend the office, which was located at Salem. Mrs. Hamilton testified that the deceased was on his way to work at Braco that morning. Soon after however she told the court that she never knew where he was going. Her evidence, (the evidence which I accept) is that he was on his way to work. There is no evidence that he had gone to the office and was *enroute* to work. In those circumstances he would have already turned up to work and would therefore have been on duty whilst he was traveling to either Braco or Jamaica Jamaica. That however was not the evidence.

The deceased was paid a traveling allowance by the Defendant. The receipt of a travel allowance does not indicate that the employee is traveling on the employer’s time and for his benefit and acting in the course of his employment. Lord Lowry, in his third proposition states that the receipt of wages, but not the receipt of a travel allowance will indicate that the employee is so acting.

Upon an examination of the facts of this case I am firmly of the view that the deceased was not the agent of the Defendant, nor was he acting in the course of his employment at the time of the accident. Consequently, notwithstanding my sympathies for Mr. Griffith, I have no alternative but to find for the Defendant in this matter.