J A M A I C A

R.M. CIVIL APPEAL NO. 108/71

IN THE COURT OF APPEAL

BEFORE: The Hon. Mr. Justice Fox
The Hon. Mr. Justice Graham-Perkins
The Hon. Mr. Justice Robinson (Actg.)

GEORGE MCLEAN	-	Plaintiff/Respondent
v.		
GEORGE HEW	-	1st Defendant
GLEANER CO. LTD.	-	2nd Defendant/Appellant
LEROY RILEY	-	3rd Defendant

Norman E. Wright, Esq., for the appellant

Plaintiff/Respondent unrepresented.

2nd March, 1972.

FOX, J.:

This is an appeal from a judgment of the Resident Magistrate for St. Ann in an action of negligence in which he gave judgment in favour of the plaintiff against the three defendants.

The plaintiff was the owner of a minibus. On the 29th of September, 1970, it was parked along a street in St. Ann's Bay at about 8:30 a.m. The third defendant Leroy Riley rode a bicycle into the back of the bus causing the damage which gave rise to the plaintiff's claim. The negligence of Riley ~~who has~~ was admitted and no issue arises in this respect. Plaintiff sought to make the other two defendants vicariously liable.

The Magistrate found -

(i) that the bicycle was owned by the Gleaner Co. Ltd.;

(ii) that Riley was engaged at the time in selling Gleaners; and

/(iii)....

(iii) that the selling of Gleaners on that morning was something which touched and concerned the Gleaner Co. Ltd.....the selling of Gleaners by Riley was in the interest of the Company.

The Magistrate applied the principle which was stated by Denning, J. in Ormrod v. Crossville Motor Services Limited, [1953] 2 All E.R. at 753 which is stated at page 755:

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

The Magistrate found that the relationship of master and servant did not exist between Riley and the Gleaner Co. He applied the principle stated above so as to render the Gleaner Co. liable as the principal in a relationship of agency with Riley.

The first ground which renders the finding of the Magistrate untenable is the absence of evidence that the Gleaner Co. was the owner of the bicycle. There was no admission of this fact at the commencement of the trial. In the plaintiff's case there is no evidence to this effect. In the evidence of Riley he said under cross-examination by counsel for the plaintiff that "the bicycle is the Gleaner Co. bicycle." When re-examined it was clear that this statement was the result of something told to him and the evidence was therefore hearsay. The Magistrate's finding of ownership in the Gleaner Co. was based upon the evidence of Ronald Taylor, a supervisor of the circulation department in St. Ann who is employed to the Gleaner Co. This witness said:-

/"The.....

> "The persons with whom arrangements are made for distributing Gleaners are on the basis of a written agreement. There is an agreement whereby bicycles are provided by the Gleaner Co. for the person with whom the Gleaner has the arrangement. The Gleaner Co. does not control, hire or pay the persons who use the bicycles. These persons are not in the employment of the Gleaner Co."

In answer to a question by the Court the witness said further:-

> "When a youngster rides a bicycle and distributes the Gleaner or the Star newspapers, he is not acting in the interest of the Gleaner Co."

In my view this evidence is incapable of sustaining a conclusion that the bicycle being ridden on the occasion by Riley was the property of the Gleaner Co. This view is sufficient to render inapplicable to the facts of this case the principle stated by Denning, L.J., in Ormrod's case. It has not been established that the Gleaner Co. was "the owner of a (bicycle) who allows it to go on the road in charge of someone else."

There is a second ground which renders the principle inapplicable. It is based on the circumstance that there is no evidence that the Gleaner Co. had undertaken the task of delivering Gleaners by a bicycle, or that the Company had delegated to Riley the task of riding a bicycle for the delivery of Gleaners. Riley is in the same position vis-a-vis the Gleaner Co., as was the negligent porter to the defendant Company in Norton v. Canadian Pacific Steamships Ltd., [1961] 2 All E.R. 785. I can do no better than to read the concluding portion of the judgment of Pearson, L.J., at page 790:-

> "In my opinion the reasoning in Ormrod v. Crossville Motor Services Ltd. is based upon the same principle. The owner of a car, when he takes or sends it on a journey for its own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whether

/by...

> "by the owner himself or by any agent to whom he has delegated the driving, the owner is liable. There is the principle. How should it be applied to the present case? There is no evidence as to the existence or terms of any arrangement between the defendants and their passengers in respect of the conveyance of the luggage across the landing stage to the customs sheds, but if the defendants had in this respect assumed some obligation to the passengers, and had delegated the performance of it to the porters, the defendants would still be responsible only for the due performance of the obligation and not for any collateral negligence of the porters. The defendants have not assumed any obligation or undertaken any task of driving or using the bogies, and have not delegated the performance of any such obligation or task to the porters. The porters use the bogies, which have been placed at their disposal, when and where and as they think fit: they use them on their own behalf in their own business."

So as far as the legal liability of the Gleaner Co. is concerned the thinking in this passage is entirely relevant.

I would allow the appeal. I would vary the judgment of the Resident Magistrate to exclude the Gleaner Co. from liability. I would affirm the judgment in favour of the plaintiff against the first and third defendants. These two defendants did not appeal from the judgment and were not represented in these proceedings. I would give costs of the action to the 2nd defendant against the plaintiff. These costs should be taxed or agreed. I would award the costs of this appeal against the plaintiff McLean in favour of the Gleaner Co. and fix the sum for such costs at $40.

/.....

GRAHAM-PERKINS, J.:

I agree entirely with the judgment that is delivered.

ROBINSON, J.(Actg.):

I agree.

FOX, J.:

The order of the Court is therefore in the terms which I have put. The formal order is as follows:-

The appeal is allowed. The judgment against the second defendant, the Gleaner Co. Ltd. is set aside. A judgment is entered for the second defendant against the plaintiff with cost to be taxed or agreed. The judgment for the plaintiff against the first defendant George Hew and the third defendant Leroy are affirmed. The second defendant is to have the cost of this appeal against the plaintiff fixed at $40.

.....