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ST. LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1978

BETWEEN: BONNIE ZEPHERIN Plaintiff/Appellant

AND

1. THE GROS ISLET VILLAGE COUNCIL
2. AURELIEN AUGUSTIN Defendants/Respondents

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice N. A. Bourne (Ag.)

Appearances: K. Monplaisir for Appellant
P. Husbands for First Respondent
P. Bledman for Second Respondent

1978; May 22, 23
Nov. 20

J U D G M E N T

DAVIS, C.J.:

This is an appeal against the judgment of Renwick J in which he ordered that judgment be entered for the plaintiff against the second named defendant in the sum of $25,669.00 damages with costs to be taxed, and dismissed the claim against the first named defendant on the ground that they were not vicariously liable for the acts of the second named defendant.

The complaint of the plaintiff is set out in her grounds

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of appeal which are as follows:-

(1) The learned trial judge erred in law by holding that the first respondent was not liable for the act of the second respondent which caused loss and injury to the appellant. He so erred for the following reasons:

  (a) He misconstrued the limitations of the second respondent's employment.

  (b) He misapplied the principles that a master is made responsible for the acts of its employees where they are not authorised.

(2) The learned judge erred in law in that although he found that the appellant's recently begun business suffered badly he failed to determine or make any award in favour of the appellant for the same.

(3) The damages awarded by the learned judge was too low.

The appellant seeks the following relief:-

(a) An order that the judgment in favour of the First Respondent be reversed with costs.

(b) An order that the case be remitted to the High Court to determine an award as compensation for the loss of her recently begun business or alternatively the Court of Appeal should determine the same.

(c) An order that the damages awarded the appellant be increased.

At the hearing of the appeal Counsel for the appellant abandoned ground three.

By her Statement of Claim the plaintiff alleged negligence against the second defendant in relation to the manner of his driving the vehicle and gave particulars of such negligence. She also alleged that the first defendant was vicariously liable for the negligent driving of the second defendant. The second defendant denied the allegations of negligence and counterclaimed against the plaintiff on the ground that she was wholly to blame for the accident and the first defendant denied liability on the ground that at the material time the second defendant was not acting as their servant or agent.

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The facts are briefly as follows: The plaintiff is a married woman and carries on business in Castries. The first defendants are the owners of motor lorry No. 6658 and the second defendant is employed by them as the driver of the said motor lorry. The lorry was insured as a goods vehicle. His duties included the conveying of corpses for burial. On the 12th day of February, 1976 the second defendant was instructed by his employers to carry a corpse from the house of mourning at Monchy to Gros Islet for burial.

The driver had been expressly forbidden from carrying passengers in the tray of the truck. On 12th February, 1976, contrary to these instructions he took not only the corpse but also sixteen to twenty mourners in the tray of the truck and instead of parking the lorry outside the house of the clerk of the first named defendant at Gros Islet as he was bidden to do at the end of each day he left Gros Islet with the mourners in the tray of the lorry to return to Monchy, and on his way the lorry collided with the plaintiff who was riding a horse on the highway keeping well to the left side of the road. She was thrown to the ground and suffered serious personal injuries and the horse - a thoroughbred - was killed. She was hospitalised and could not walk for two months and was unable to return to her business until sometime in June.

She gave evidence of her medical expenses and the amount paid for extra domestic help and the employment of a chauffeur. She also gave evidence of orders which she could not supply because of her injuries and gave a figure of $1,800.

The second named defendant admitted in cross-examination that he was forbidden to carry passengers on the truck. He also

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said, "I do not consider it a proper vehicle to carry people. It is dangerous". He also admitted that it was a rule for him to park the truck at Mr. Pamphile's house and to leave the key there and that the truck always stay at Gros Islet.

Counsel for the plaintiff/appellant submitted that at the time of the accident the second defendant was acting in the course of his employment and referred the Court to the evidence of Augustine where he said, "The assistant clerk told me that they come to him about the corpse at Monchy, go and collect the dead and the people and take them down to Gros Islet". And again he said, "No one ever told me that I was not to take mourners to and from the funeral."

He further submitted that the second defendant in taking the mourners from Gros Islet back to Monchy should not be regarded as going on a frolic of his own but was acting in the interest of his employers. He cited the case of Rose vs. Plenty and another, 1976 (1) AER at page 97 and Kay vs. ITW Ltd. 1967 (3) AER, page 22; while counsel for the first defendant contended that at the time of the incident the driver of the lorry was not acting in the course of his employment. He had been instructed to convey the corpse from Monchy to the burial ground at Gros Islet and had the accident occurred on that journey, the first defendant would have been liable even though the driver was disobeying the orders of his employer by taking passengers along in the tray of the lorry. When he decided to take the mourners back to Monchy, however, he was then on a frolic of

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his own and his employers were not liable for what happened during that journey. He also reminded the Court of the evidence of Charles Louison who said in cross-examination, "The mourners would come down to the village on board another truck."

In support of his argument, counsel cited the following cases:

Baker vs. Snell, 1908 - 1910 AER (Rep.) 398

Twine vs. Bean's Express Ltd., 1946 (1) AER, 202

Hilton vs. Thomas Burton (Rhodes) Ltd. and Another, (1) WLR, 707.

In the case of Young vs. Edward Box and Co. Ltd., 1951 (1) TLR 789 at 793, Lord Denning had this to say: "In every case where it is sought to make the master liable for the conduct of his servant, the first question is to see whether the servant was liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant's liability."

In this case, the learned trial judge has answered the first question and there has been no appeal from his finding so that this appeal is concerned only with the second question.

The leading case on the question of vicarious liability is Limpus vs. London General Omnibus Co. (1) H & Co. 526. In that case, the drivers of omnibuses were furnished with a card saying they must not, on any account, race with or obstruct another omnibus. Nevertheless, the driver of one of the defendants' omnibuses did obstruct a rival omnibus and caused an accident

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in which the plaintiff's horses were injured. The trial judge directed the jury that if the defendants' driver did it for the purpose of his employer, the defendants were liable; but if it was an act of his own the defendants were not responsible. The jury found for the plaintiff and the Court of Exchequer Chamber held that the direction was correct. Despite the prohibition the employer was held liable because the injury resulted from an act done by the driver in the course of his service and for his master's purpose. As Lord Denning said in the case of Rose vs. Plenty and another, "The decisive point was that it was not done by the servant for his own purpose but for his master's purpose."

In Kay's case, the master was held liable because the servant in doing the wrongful act of starting the lorry was acting within the scope of his employment because he was attempting to return a fork-lift truck to the master's warehouse to which it was within the scope of his employment to return it. Similarly, in the case of Rose vs. Plenty and another, the employers, on appeal, were held liable because the Court found that although the milkman was guilty of disobedience, nevertheless, the milkman's conduct was within the course of his employment. In that case, the milkman - Plenty - was employed to distribute milk, collect the money and to bring back the bottles to the van. The employers had exhibited a notice at the milk depot which expressly

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prohibited the milkman from employing children for the purpose of his duties and from giving lifts on the milk-float. Contrary to these instructions he got or allowed a young boy, Leslie Rose, to do part of that business which was the employer's business. Whilst riding on the milk-float, the plaintiff, Rose, was injured when the milkman drove the float negligently.

In an action against the milkman and his employers, he obtained judgment against the milkman, but his claim against the employers was dismissed on the ground that the milkman had been acting outside the scope of his employment in employing the plaintiff and carrying him on the float contrary to the employers' instructions. The plaintiff appealed against this finding with the result mentioned above.

In Twine's case, the driver was expressly instructed that no one was to be allowed to travel on the van. Owing to the driver's negligent driving an accident occurred and T was fatally injured. It was contended by T's personal representative that since the accident happened while the driver was engaged on an authorised job the acts of the driver were done in the course of his employment notwithstanding that T was an unauthorised passenger and therefore, the employers were liable for the driver's negligence This contention was rejected and the Court held that T vis-a-vis Bean's was simply a trespasser on the van who came there in particular circumstances and they owed to him no duty to take

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care as to the proper driving of the van. They did not owe a duty to the world at large to take care but only to such persons who may reasonably be anticipated by them as likely to be injured by negligent driving of the van.

The case of Hilton vs. Thomas Burton Rhodes Ltd. and Another also shows that in order for the employer to be held vicariously liable it must be shown that the servant at the time of the accident was doing that which he was employed to do. In that case, the plaintiff's husband was killed when the van owned by his employers and driven by the second defendant in which the deceased was a passenger crashed after failing to negotiate a bend in the road. They had permission to use the van to go for refreshment and it was when they were returning from a cafe that the accident occurred. Nevertheless, it was held that although the second defendant was driving the van with the permission of his employers the first defendants were not liable. Diplock J, as he then was, posed himself the question, "Was the second defendant doing something that he was employed to do?" and answered, "If so, however improper the manner in which he was doing it, whether negligent as in the case of Century Insurance Co. Ltd. vs Northern Ireland Road Transport Board, or even fraudulently as in Lloyd's vs. Grace Smith & Co. or contrary to expressed orders as in Canadian Pacific Railway vs. Lockhart the master is liable. If, however, the servant is not doing what he is employed to do the master does not become liable merely

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because the act of the servant is done with the master's knowledge, acquiescence or permission. And he ended his judgment by stating, "The true test is, was he doing something that he was employed to do? I think on the facts of this case, he plainly was not."

Applying the law to the facts in the case before the Court, it is clear that the first defendant would have been liable had the accident occurred during the journey from Monchy to the burial ground at Gros Islet. When an act is done by a servant for his employer's business, it is usually done in the course of his employment even though it is a prohibited act. But in this case the accident did not occur then, but at a time when the second defendant was making the return journey to Monchy. Was this return journey an act done for his employer's business? It was not even suggested to the witnesses for the first defendant that the charge of $30 for conveying the corpse included the return journey to Monchy. Indeed, one of those witnesses deposed that the mourners would travel to the village by another truck. It may well be that the driver on previous occasions had taken mourners back to their homes and thought he could do so again. This was all very well so long as nothing happened. But when an accident occurs and it is sought to make the employers liable then different considerations must apply. I can find nothing in the evidence to warrant a finding that the employers in this case are liable. The dirvier was acting on his own. He was not

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performing an act for his employer's business. He should not have been on the road at that time and it does not matter whether he was conveying passengers or not.

There is one other matter to which I must give attention. The plaintiff gave evidence that because of her injuries she suffered loss in her business. She gave a figure of $1,800. This was not controverted, but the learned trial judge omitted to take this into account in assessing the damages.

I would therefore allow the appeal to the extent of increasing the award of damages by $1,800.

On the question of costs the appellant has failed on the major issue and has succeeded on a minor point. In the circumstances I would make no order as to costs.

(Sir Maurice Davis)
CHIEF JUSTICE

I agree

(N.A. Peterkin)
JUSTICE OF APPEAL

I also agree

(N.A. Berridge)
JUSTICE OF APPEAL (ACTING)