JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 42/2007

BEFORE:	**THE HON. MR. JUSTICE PANTON, P.** **THE HON. MRS. JUSTICE HARRIS, J.A.** **THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)**

BETWEEN	**THE NATIONAL TRANSPORT CO-OPERATIVE SOCIETY**	**1ST APPELLANT**
AND	**EVERTON MCGLASHAN**	**2ND APPELLANT**
AND	**THE TRANSPORT AUTHORITY**	**RESPONDENT**

Miss Audré Reynolds, instructed by Patrick Bailey & Co. for the Appellants

Mr. Garth McBean, instructed by Garth McBean & Co. for the Respondent

October 13, November 28 and December 19, 2008

PANTON, P.:

1. Having read in draft the judgment of Harris, J.A. I agree with her reasoning and conclusions. There is nothing further I wish to add.

HARRIS, J.A.

1. In this appeal, the 1st and 2nd appellants challenge a judgment of Pusey, J. in which he ordered that the 2nd appellant was not the agent of the

respondent, and the latter was not vicariously liable for an accident caused by the 2nd appellant.

2. The 1st appellant is a co-operative society registered under the Co-operative Societies Act and was an operator of a motor bus owned by the respondent, a corporation registered under the Transport Authority Act. On September 23, 1993 the 1st appellant and the respondent entered into an agreement whereby the respondent would lease to the 1st appellant a motor bus for a period of 6 years with an option for the 1st appellant to purchase the said motor bus on the expiration of the period of the lease.

3. The preamble to the lease agreement reads:

> "Whereas the Authority is desirous of operating a project for a school bus system in order to ease the difficulties experience (sic) by students in obtaining transportation to and from school;
>
> And Whereas the Operator has represented himself as being able to provide such a service."

4. So far as is relevant for the purpose of the determination of the appeal, the agreement provides as follows:

> "3 Insurance
>
> 3.1 In the first year of this Agreement the Authority shall be solely responsible for obtaining and maintaining comprehensive insurance coverage of the Unit and for all subsequent years the Operator shall repay to the Authority the cost of the said insurance in twelve (12) monthly instalments the first of

which becomes due and payable one (1) month after the commencement of the second year.

3.2 The operator shall pay to the Authority an amount equal to fifteen percentage (15%) of the chargable premium to cover the insurable excess for minor accidents and damages.

3.3 The operator shall ensure that at all times the subsequent to the (sic) allowance set out in para 3.4 below, the abovementioned percentage of the insurable premium is maintained at its maximum level.

3.4 The initial insurable excess may be paid in six monthly instalments.

...

5. Maintenance

5.1. The Authority shall be responsible for the establishment of guidelines for the maintenance and repair of the Unit.

Notwithstanding the above, the Operator shall during the Unit's period of warranty maintain the Unit in accordance with the manufacturer's instructions.

5.2. In ensuring that the said guidelines and instructions are observed the Authority or its designated representative shall be entitled to make periodic inspections of the Unit at a time and place convenient to both parties.

6. Schedule of Operation

6.1 The Authority with the Operator shall have the responsibility of establishing a Schedule of routes and times in respect of the operation of the service.

6.2 The schedule shall be deemed to include trips and other special journeys made by students which may fall outside the routes and times referred to in subclause 6.1. above.

6.3 The Operator shall purchase the tickets to be issued to the students, from the authority.

7. Independent operations

7.1 The operator shall be entitled to the said Unit for other purposes other than the transportation of students. Provided that such operations are conducted outside the hours of services specified in clause 6.1 and shall be on routes approved by the Transport Authority and shall in no way prejudice his obligation to provide transportation for students in the hours specified.

7.2. The operator shall be solely responsible for the cost of licences and other fees connected with the operations of the Unit.

7.3. The Operator shall submit to the Authority a monthly report outlining the number of passengers transported, revenue received, expenses incurred, major repairs effected to the Unit, accidents, if any and the general condition of the Unit.

...

10. Liability

10.1 It is expressly understood that the Operator is not an Agent of the Authority.

The Operator shall be answerable to and responsible for all passengers travelling on the unit."

5. On 13th April, 1995, the 2nd appellant, a driver employed by the 1st appellant, while operating the leased bus, injured one Evadne White who on the 14th February, 1996 commenced an action in negligence against the respondent. On the 11th October, 2004 the appellants filed an amended defence disclaiming liability. On the same date they also filed an ancillary claim claiming an indemnification by the respondent or alternatively, contribution.

6. On January 18, 2005 the respondent filed a defence to the ancillary claim disputing the appellants' claim on the following grounds:

> "1. The Ancillary Claim of the Second and Third Defendants for indemnity and contribution is barred by the Statute of Limitation in that more than six years has elapsed since this cause of action accrued.
>
> 2. As regards paragraph 2(a) of the Ancillary Claim the First Defendant admits that the agreement governing the operation of motor bus registration no. PP998H dated 23rd September 1993 provides at paragraph 3.1 that the First Defendant is solely responsible for obtaining and maintaining comprehensive insurance coverage of the said motor bus.
>
> 3. In relation to paragraph 2(b) of the Ancillary Claim the First Defendant denies that it is estopped from relying on an exclusion cause contained in paragraph 10.1 of the said agreement having regard to the following factors:
>
> (a) The Second and Third Defendants failed to report the said accident to the First Defendant in order that the First Defendant could comply with their

obligation under the contract of Insurance with United General Insurance Company to report the accident within a specified time in order for the said Insurers to offer indemnity in respect of the said accident.

(b) The occurrence of the said accident, which is the subject matter of the suit herein, first came to the First Defendant's attention upon their receipt on the 18th September 1995 of a letter dated 4th September 1995 from the Attorneys-at-Law for the Claimant.

(c) The said letter from the Claimant's Attorneys-at-Law was received five months and five days after the said accident occurred and at a date when the time for the First Defendant to comply with the said obligation under the contract of Insurance to report the accident had already elapsed. As a consequence the cause of the said Insurers not offering indemnity was the Second and Third Defendant's own negligence as aforesaid:"

7. The learned trial judge adjudged that the 2nd appellant was not the agent of the respondent. Liability was ascribed to the appellants. Damages were assessed in favour of Miss White. Judgment was awarded to the respondent on the claim and on the ancillary claim.

8. The following grounds of appeal were filed:

"1. The Learned Judge failed to consider and/or to properly consider the nature and the terms of the Agreement entered into by the First Appellant and the Respondent.

2. The Learned Judge erred and/or misdirected himself in failing to find that the purpose of the Agreement entered into by the 1st Appellant and the Respondent was the purpose of the Respondent's, who had agreed to allow the 1st Appellant to use for their own purpose on 'off periods' only.

3. The Learned Judge erred and/or misdirected himself in failing to appreciate that there was an overwhelming evidence of retension (sic) of control by the Respondent, and that in law, control may exist even when the owner is absent, and has delegated the task of driving to another.

4. Having failed to correctly consider the purpose of the use of the Encava Bus and the high level of control which the Respondent exercised on the use thereof, the Learned Judge erred and/or misdirected himself in failing to find that the Respondent was liable for the accident which resulted in the personal injury suffered by Evadne White, the Claimant and liable to indemnify and/or contribute to the damages to be paid to the Claimant."

9. Miss Reynolds submitted that the purpose of the agreement between the 1st appellant and the respondent was for the use of the bus to transport students. She argued that by providing transportation, a benefit accrued to the respondent as the Education Act imposes on the respondent a mandatory duty to ensure the attendance of children at school. She further argued that, the respondent ,having retained the ownership of the bus, the 1st appellant was the agent of the respondent in carrying out a task delegated by the respondent to achieve the objective of the agreement. She further submitted that in the

circumstances, the respondent was ultimately liable for the negligence of the 2nd appellant and the 1st appellant was entitled to be indemnified by the respondent or to receive a contribution from it.

10. Mr. McBean, on the other hand, argued that the purpose of the agreement does not affix the respondent with authority over the operation of the bus. Section 4 of the Transport Authority Act, he submitted, gives the respondent regulatory and monitoring rights over the transportation system but not to provide public transportation. To ascribe liability to the respondent, there must be evidence of an agency relationship between the parties, he argued. It was further submitted by him that there was no evidence that the respondent had control over the 2nd appellant or that he was driving the bus for the purposes of the respondent.

11. The issues which fall for determination are:

(a) Whether the object of the operation of the bus was for a purpose which inured to the benefit of the respondent.

(b) Whether the appellants were the respondent's agent at the time of the accident.

12. Can it be said that the transportation of students was for the purpose of the respondent? The answer to this question requires one to embark upon an inquiry into the function and responsibilities of the respondent. Section 4 of the Transport Authority Act outlines the respondent's role.

Section 4 (1) and (2) provides:

> "1. The functions of the Authority shall be to regulate and monitor public passenger transport throughout the Island and to perform such duties as immediately prior to the 8th day of July, 1987, were required to be performed by: -
>
> (a) Licensing Authorities or specially constituted Licensing Authorities under the Road Traffic Act;
>
> (b) the Public Passenger Transport (Corporate Area) Board of Control constituted under the Public Passenger Transport (Corporate Area) Act; and
>
> (c) the Public Passenger Transport (Rural Area) Board of Control constituted under the Public Passenger Transport (Rural Area) Act
>
> 2. The Authority may in carrying out its functions under subsection (1) –
>
> (a) charge and collect such fees as maybe prescribed;
>
> (b) borrow money in accordance with section 9; and
>
> (c) do such other things as may in its opinion, be conducive to an efficient passenger transport system."

13. The Section confers on the respondent a right to regulate and monitor the island's public passenger transportation system. In the execution of the duties as a regulatory and monitoring entity, the respondent may charge and collect fees, borrow money and do such things which lend themselves to the enhancement of the transport system. The Act does not impose on it a duty to provide transportation service for the public. Section 4 (2) (a), (b) and (c) of the Act entitles it to perform only functions which fall within the scope of the

subsection. The fact that the Education Act imposes on the government an obligation to ensure the attendance of students at school, this does not place a duty on the respondent to provide transportation for them. The respondent can only act within the parameters of the Act so far as it permits it so to do.

14. The duties of the respondent as defined by section 4 (1) and (2) of the Transport Authority Act do not enjoin it to provide transportation for members of the public, which clearly include students. In the performance of its role, the respondent may only act in a regulatory and monitory capacity. It is restricted to carry out only such acts as the statute permits it to do. It could not be said that the transportation of students was a purpose for which the respondent bore responsibility. As a consequence, the purpose for which the agreement was made would not have been for the transportation of school children.

15. There remains for consideration, the question of agency. In dealing with the question of agency the learned trial judge said:

> "The court finds therefore that at no time did the 2nd defendant act to fulfill any objective or purpose of the 1st defendant; that the 1st defendant had no control over the 2nd defendant or the operation of the bus save and except regulating and monitoring the schedule; consequently that there is no existence of an agency relationship sufficient to find the 1st defendant vicariously liable for the actions of the 3rd defendant."

16. There is no dispute that at the material time the respondent retained ownership of the bus. The fundamental question arising, therefore, is whether

the respondent's ownership of the bus is sufficient to assign to the parties a principal and agent relationship. Was there a relationship between the parties which would give rise to vicarious liability on the part of the respondent for the negligence of the 2nd appellant?

17. As a general rule, a principal is liable for the acts of his agent. Such responsibility relates to acts by a servant or agent which, in the course of employment, causes loss or injury to another. There can be no question that liability may be ascribed to an owner where he has delegated the performance of a duty for a purpose of his own. However, the circumstances must be such as to show that in carrying out the act of which a claimant complains, the defendant was acting in the capacity of an agent.

18. The use of a vehicle with the owner's consent does not necessarily impose liability for negligence on the owner. (**See Rambarran v. Gurrucharran** (1970) 1 All E.R 749). To assign vicarious liability to the owner of a vehicle it must be shown that the driver was using it for the owner's purposes under a task or duty delegated by the owner (See **Morgans v Launchbury** [1972] 2 All E.R. 606). Although consent, does not, without more, place liability on an owner, the purpose for which the vehicle was being used may operate to render the owner liable. In **Ormrod and Anor v. Crossville Motor Services Ltd. And Anor** (**MURPHIE**, Third Party) (1953) 2 All E.R 753, at page 754 Singleton, L.J. had this to say:

> "It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency, but the purpose for which this car was being taken down the road on the morning of the accident was either that it should be used by the owner, the third party, or that it should be used for the joint purposes of the male plaintiff and the third party..."

19. In order to decide whether the appellants were the agent of the respondent, it will be necessary to make reference to certain clauses of the lease. Clause 10 of the agreement states that no relationship of principal and agent between the 1st appellant and the respondent was created. The respondent thereby expressly disclaims liability. Miss Reynolds contended that although the clause seeks to exempt the respondent from liability, it is ineffective, as the purpose for which the bus was being used was for the transportation of students, and the appellants were the respondent's agents.

20. In support of this submission she cited Chitty on Contracts, Twenty Fifth Edition, Volume 1, General Principles paragraph 875 which reads as follows:

> "Exemption clauses must be expressed clearly and without ambiguity or they will be ineffective. Mere general words in an exemption clause do not ordinarily absolve the party seeking to rely on the exemption from liability for his own negligence or that of his employees. The clause must clearly express what its intention is."

21. In determining whether clause 10 is invalid, and of no effect, the rules of construction must be invoked. The cardinal rule of construction is that words are to be given their ordinary and natural meaning. The words in the clause are plain and unambiguous.

22. Although the words contained in the clause are undoubtedly plain, a further question to be decided, is whether the clause purports to restrict that which would otherwise be the respondent's duty. It cannot be disputed that where there is evidence disclosing the existence of a principal and agent relationship, the principal will not be permitted to avoid liability by introducing an exemption clause in an agreement if the circumstances so dictate.

23. An exclusion clause does not necessarily exonerate a party from liability. Exemptions from liability under a contract are construed strictly. In assessing the validity of an exclusion clause, the court is obliged to examine the agreement as a whole and determine whether the clause is sufficient to exclude liability.

24. In **Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association** (1966) 1 W.L.R. 287 at page 342, Lord Diplock said, the approach of the court is:

> "to look at the event, and to ascertain from the words and conduct of the parties which created the contract between them what their presumed intention was as to what should their legal rights and liabilities either original or substituted upon the occurrence of an event of this kind".

25. It is now necessary to examine the relevant clauses of the agreement to ascertain the intention of the parties. Under clause 3.1 of the agreement insurance payments for the bus were borne by the 1st appellant. Initially, the respondent bore the responsibility for obtaining and maintaining comprehensive insurance in the first year of the lease but the 1st appellant was required to repay this sum by twelve monthly instalments. In addition, under clause 3.2 the 1st appellant was obliged to cover insurance premium excess by paying the respondent 15% of the chargeable premium for minor accidents and damages.

26. Under clause 5.1 an onus was placed on the 1st appellant for the carrying out of the maintenance and repairs of the bus. The respondent's responsibility was restricted merely to the establishment of guidelines for maintenance and repairs of the bus.

27. By clause 6.1 the 1st appellant had a right to use the bus for its own use and benefit save and except during such periods within which it is being used for the transportation of students.

28. Although the ownership of the bus remained with the respondent, the use for which the bus was intended was to provide transportation for the public. The respondent, having not been mandated by the statute to provide transportation, it would not have been empowered to delegate to the 1st appellant a duty to transport students, as Miss Reynolds contends. There being

no obligation on the part of respondent to perform such duty it could not be said that the 1st appellant, in the operation of the bus, had been performing a function in fulfilment of the respondent's obligation under the lease.

29. The operation of the bus was exclusively the responsibility of the 1st appellant. It is of great significance that by clause 7.1 the 1st appellant was entitled to the use of the bus for its own purposes outside of the hours during which students are transported.

30. There is no dispute that the 2nd appellant was employed by the 1st appellant. There is nothing to show that the respondent participated in the selection of drivers or the selection or hiring of the 2nd appellant, nor did the respondent exercise any authority over the 2nd appellant.

31. Save and except for its mere involvement in the scheduling of the bus, the respondent had no control over its use or operation, as rightly submitted by Mr. McBean. There is no evidence that it had the right of or opportunity to control the 2nd appellant, or, that it had any control over his conduct. It would not therefore have had any control over the acts or omissions of the 2nd appellant to classify him as performing a duty delegated by the respondent when the accident occurred. It is clear that the appellants were not the respondent's agent as the learned trial judge correctly found. It follows that liability cannot be assigned to the respondent for the 2nd appellant's negligence. I would dismiss the appeal with costs to the respondent.

G. SMITH, J.A. (Ag.)

I too agree with the reasoning and conclusions of Harris J.A., there is nothing further I wish to add.

PANTON, P.:

ORDER

The appeal is dismissed with costs to the respondent to be agreed or taxed.