59/80

SUPREME COURT OF VICTORIA

JANSON v JONES

Crockett J

15 May 1980

CIVIL PROCEEDINGS – SPECIAL COMPLAINT – MOTOR CAR ACCIDENT – DAMAGES – REPAIRS TO MOTOR VEHICLE – VICARIOUS LIABILITY – WHETHER RELATIONSHIP OF MASTER AND SERVANT OR PRINCIPAL AND AGENT EXISTED – FINDING BY MAGISTRATE THAT OWNER OF VEHICLE VICARIOUSLY LIABLE – WHETHER MAGISTRATE IN ERROR.

Janson was the owner of a motor vehicle which when driven by H. collided with another vehicle driven by S. As a result of the collision a vehicle collided with a motor vehicle owned by Jones who later claimed damages from Janson, the driver H. and S. When H. was on holiday in Australia, Janson's employee allowed H. to drive the motor vehicle for the purpose of collecting some baggage. The question before the Magistrate was whether a relationship of master and servant or principal and agent existed to make Janson vicariously liable for H's negligence. The Magistrate acquitted S. of any negligence and found that H. was the sole cause of damage to Jones' car. The Magistrate also found that Janson was vicariously liable for H's driving. Upon appeal—

HELD: Order absolute. Order of Magistrate set aside.
1. The evidence was insufficient to permit a finding that the driver was carrying out a task or duty delegated by the owner.

2. The authorities establish that proof of ownership of a vehicle driven negligently by some person other than the owner, without more, may be sufficient evidence that at the time that the car was so negligently driven the relationship between the owner and the driver was one of principal and agent. Such a principle does no more than cast on the defendant an evidentiary onus. However, once this is accepted by a defendant and evidence is led as to the circumstances in which the driver came to be driving the vehicle, then it is the ultimate onus resting on the complainant to establish the existence of a relationship which would give rise to vicarious liability on the part of the owner that remains to be discharged.

3. It is clear that the evidence showed there was no express delegation. What had to be relied upon was a tacit delegation. It could be said that Janson had some interest or concern in the journey which H. was , but as the House of Lords pointed out in *Launchbury's case*, a mere interest or concern in the journey is insufficient. It must be the owner's purposes in some real sense, that are being served, even partially, by the journey. The service of a purpose is different from the possessing of some interest or concern in a journey. The evidence fell far short of establishing the service by the journey of any purpose of Janson's. Therefore, the evidence was insufficient to permit a finding that H. was carrying out a task or duty delegated.
***Morgans v Launchbury* [1972] UKHL 5; (1973) AC 127, applied.**

CROCKETT J: Miss Karen Jones was the owner of a motor car parked in a suburban street. At a point in the vicinity where her car was parked, a collision occurred at about 1.30 pm in the afternoon between a car driven by one Swan and a car driven by one Harrison. As a result of that collision, one of the vehicles careered across the road, striking Miss Jones' car and causing damage to it. Miss Jones took proceedings in the Magistrates' Court at Melbourne to recover the cost of the repairs to her car. The action she brought was taken against the drivers of the two cars, Swan and Harrison, and also one Janson. The claim against Janson was made on the basis that he was vicariously liable for Harrison's driving.

The Magistrate acquitted Swan of any negligence in relation to the accidents and found that the sole cause of the damage to Miss Jones' car was the negligent driving of Harrison. Harrison, in fact, did not appear, nor was he represented at the proceedings. However, the complainant was concerned also to obtain an order against the defendant Janson. So that that might be done, it was necessary to show a relationship of master and servant or principal and agent between Janson and Harrison. In the result, the Magistrate concluded that there was a relationship of principal and agent and, that accordingly, Janson was responsible vicariously for Harrison's negligence.

The applicant relied on the ground that on the facts as found by the Magistrate, it was not open to him to conclude as a matter of law, that Janson could be held vicariously liable for Harrison's negligence. It thus becomes necessary to rehearse to some extent, the facts, as they were found by the Magistrate, that related to this particular issue.

It appears the defendant, Janson, was, at the material time a racing-driver, who followed his profession in different countries. As part of his equipment, he owned a number of motor vehicles. These were kept on premises in Leeds Street, Melbourne which were rented by Janson. He employed men to work on those vehicles. No doubt they would have some qualifications as mechanics or technicians. However, at the material time, he also employed a 15 year old lad, who, of course, by reason of his age, was not licensed to drive a motor vehicle. His duties were to wash and keep clean the vehicles housed at Leeds Street.

On the day of the accident, Harrison, who was a New Zealander, was in the course of a holiday visit to Melbourne and was, apparently, about to leave for abroad. The vehicle which he was driving had been lent to him by the 15 year old employee of Janson. Janson knew Harrison who was, in fact, a racing car mechanic. It appears that on some earlier date, apparently on the occasion of this same visit to Victoria, Janson had some dealing with Harrison at the Calder Raceway. At all events, even prior to that Janson knew, or knew of Harrison by virtue of an acquaintanceship between himself and Harrison's father, who lived in New Zealand. In fact, the car in question was not owned by Janson. He had possession of it pursuant to a sponsorship agreement between him and some motor organisation that, as one of the conditions of the agreement, allowed Janson to have the use of the car. Therefore, Janson, at the material time, was the bailee of the vehicle.

Harrison did not work for Janson at any time but was, in fact, residing, during his holiday visit to Melbourne, at the Leeds Street premises. These apparently had provision for accommodation for people as well as for cars. As to the purpose of the journey in which Harrison was engaged at the time of the accident, the only evidence was a statement by Janson of his belief that it was to enable Harrison to collect some baggage shortly prior to his departure overseas. Although there was no evidence that such purpose was the fact, as the stated belief was uncontradicted, I should have thought it was open to the Magistrate to infer from it that such purpose was, indeed, the fact. At the time of the accident the youth who was an employee of Janson's was a passenger in the car being driven by Harrison.

In relation to the matters that were germane to the issue with which I am presently concerned, the Magistrate formulated these findings:

> 1. That Janson had access to a number of vehicles and that the 15 year old was one of a number of persons who "had standing authority within reason." (sic)
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> 2. That there was no relationship other than friendship between Janson and Harrison, and that if a relationship of agency existed, it therefore existed "via the 15 year old lad."
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> 3. That it was probable that the 15 year old lad as the delegate of Janson gave permission, "in the nature of a gratuitous loan to Mr Harrison" to drive the vehicle.
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> 4. That he (the Magistrate) would "bear in mind" the fact that the car was used for "Mr Harrison's purpose."
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> 5. That Janson had loaned vehicles to friends and that it was not improbable that the vehicle would be loaned out "between persons".

The authorities establish that proof of ownership of a vehicle driven negligently by some person other than the owner, without more, may be sufficient evidence that at the time that the car was so negligently driven the relationship between the owner and the driver was one of principal and agent. Of course, such a principle does no more than cast on the defendant an evidentiary onus. However, once this is accepted by a defendant and evidence is led as to the circumstances in which the driver came to be driving the vehicle, then it is the ultimate onus resting on the complainant to establish the existence of a relationship which would give rise to vicarious liability on the part of the owner that remains to be discharged.

In the present case the defendant Janson did give evidence of the circumstances as to how

Harrison came to be driving the vehicle at the relevant time. It is true that he chose not to call the 15 year old youth, nor was any explanation given for that person's absence from the witness box. The failure to call that person who might have been considered to be one who could have thrown some light upon the matters in contest would have enabled the Magistrate to have, with greater comfort, drawn inferences against Janson in relation to this particular issue. But that having been said, the fact remained that before Janson could be fixed with vicarious responsibility for Harrison's negligence it was for the Magistrate to be satisfied on the balance of probabilities on the whole of the evidence that Harrison was driving the vehicle as the agent of Janson.

The most authoritative recent statement of the relevant principles is to be found in a decision of the House of Lords in *Morgans v Launchbury* [1972] UKHL 5; (1973) AC at p127. At p135 Lord Wilberforce in explaining why the common law adopted the doctrine of *respondeat superior*, pointed out that the common law considered that the owner ought to pay because he has authorized 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. No one in the present case has suggested that the evidence would allow a finding that Janson authorised or requested Harrison's driving of the car of which Janson was the bailee.

What has been sought to be maintained on behalf of the respondent is that the finding of the magistrate amounted to a finding that Harrison was carrying out a task or duty delegated to him by Janson, and that the evidence was sufficient to permit such a conclusion being reached. A little earlier in the same page His Lordship pointed out that for it to be shown that a motor vehicle was being used by a person under delegation of a task or duty, it must be shown that the driver was using it for the owners' purposes. The argument before me has been designed to demonstrate that the evidence allowed a finding that Harrison was using the car of which he was the driver, for Janson's purposes. It may be conceded that he was at the same time using it to serve his own purposes in collecting his baggage. But, as Lord Pearson pointed out in the same case at p140 the fact that the journey is undertaken partly for the purposes of the agent as well as for the purposes of the owner, does not negative the creation of the agency relationship.

At the outset it should be said that it is, of course, clear that the evidence shows there was no express delegation. What has to be relied upon is a tacit delegation. However, what are the owner's purposes which it could be said the evidence establishes were being served at the time that Harrison was driving the vehicle so that it could be found that his driving was under delegation of a task or duty? I have considerable difficulty in understanding what were the owner's purposes that were being served according to the magistrate's description of those purposes.

It was said, some fortification for that view, is to be found in the fact that the evidence establishes that a little earlier after a race meeting at Calder Raceway, when Janson had no staff to return one of his trucks to the city, Harrison volunteered to drive the truck back to Melbourne, and the offer was gratefully accepted by Janson. I think it impossible to divine from the evidence any form of purpose that might be served for Janson by Harrison's journey.

The question is whether such a purpose, as I have endeavoured to formulate it, from a consideration of the evidence is sufficient to allow it to be said that the using of the car for such purpose amounted to a delegation tacitly to Harrison by Janson of a task so as to create the relationship of principal and agent between them.

I am of the view that it does not. At most it could be said that Janson had some interest or concern in the journey which Harrison was undertaking. But as the House of Lords pointed out in *Launchbury's case*, a mere interest or concern in the journey is insufficient. It must be the owner's purposes in some real sense, that are being served, even partially, by the journey. The service of a purpose is different from the possessing of some interest or concern in a journey. The evidence falls far short of establishing the service by the journey of any purpose of Janson's. I think therefore, that the evidence was insufficient to permit a finding that Harrison was carrying out a task or duty delegated.

Although the matter was not so ventilated in the Court below, counsel for the respondent sought to have the Magistrate's order upheld before me on the ground that the evidence was sufficient for it to be held that Janson was, at the material time, in control of Harrison's conduct.

Such control is ordinarily to he found demonstrated by the owner's presence in the car whilst it is being driven by some other person. The High Court in *Soblusky v Egan* [1960] HCA 9; (1960) 103 CLR 215 at p231; [1960] ALR 310 in a joint judgment said:

> "It means that the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it, and to do this on his behalf in circumstances where he can always assert his power of control. Thus it means in point of law that he is driving by his agent. It appears quite immaterial that Soblusky went to sleep. That means no more than a complete delegation to his agent during his unconsciousness. The principle of the cases cited is simply that the management of the vehicle is done by the hands of another and is in fact in law subject to direction and control."

In this case, of course, the bailee was not in the car at the time Harrison was driving it. But it is pointed out that Janson's employee was a passenger at the material time. It is suggested that the view is open to be taken that, as such an employee, the youth stood in the shoes of Janson, and thus was able to exercise control over the way in which the car was being driven on behalf of his employer. This proposition immediately runs up against the doctrine *delegatus non potest delegare*. But I think a more fundamental difficulty is that for a finding of control, so as to render Janson vicariously responsible by resort to such a proposition, proof is first required that the youth had included in his duties as Janson's employee the right himself to drive, or control the driving of, cars belonging to his employer.

So far from the evidence's allowing such a finding to be made in this case, it suggests or establishes the contrary. The only evidence on the matter is that of Janson who emphasised that the boy's duties included washing and cleaning the vehicles, but that, as he had no licence to drive a car, he himself had no permission to use a motor vehicle. Janson pointed out that it was only his "top employees" who had authority to use the vehicles "within reason". Accordingly, I am of the view on the alternative way in which the matter was argued on behalf of the respondent it is not possible to save the order entered against the defendant Janson in the court below.

For these reasons the order nisi will be made absolute. The order of the court below, insofar as it relates to the defendant Janson, will be set aside, and in lieu thereof the claim against the defendant Janson will stand dismissed with costs fixed at $185.00 to be paid by the complainant to the defendant Janson. The order below will be further varied to provide that the costs payable by the complainant to the defendant Janson are to be indemnified by the defendant Harrison and that that part of the order as to the costs payable by the complainant to tie defendant Swan being indemnified by the defendant Janson be quashed.
