O'FIACHAIN 1980 No 5585P

113

THE HIGH COURT

BETWEEN

EAMONN O'FIACHAIN

PLAINTIFF

AND

DERMOT P. KIERNAN, PETER ANTHONY KIERNAN AND MERCANTILE CREDIT COMPANY OF IRELAND LIMITED

DEFENDANTS

JUDGMENT delivered the 11th January, 1985 by Mr. Justice Keane.

The issue which has to be determined at this stage in these proceedings is whether a motor-car was being driven by the first-named defendant as the servant of the third named defendants wit in the meaning of section 118 of the Road Traffic Act 1961 on the occasion of the accident which gave rise to the proceedings. Most of the material facts which are relevant to the determinati n of that issue are not in dispute.

The third named defendants (whom I shall call "the Finance Company") were the owners of the car which was leased by them together with others to a company called O'Neill and McHenry (Donegal) Limited under the terms of a written leasing agreement dated the 15th July, 1976. On the 13th December 1976 that company informed the Finance Company that it had disposed of its interest in the business for which the cars were being used to a business in Dublin which was trading under the name of "Associated Trade Agencies". This business was not incorporated at the relevant times as a legal entity of any sort. The second-named

defendant was at the time of the accident an employee of that business.

On the 11th December, 1977 the second-named defendant was a passenger in the car which was being driven by the first-named defendant, who is his son, when it mounted the footpath in the vicinity of Vernon Avenue, Clontarf, and injured the plaintiff. The latter thereupon instituted the present proceedings claiming damages for negligence and breach of duty.

At the time of the accident, there was in force in respect of the motor-car a policy of insurance with the Shield Insurance Company Limited. A condition of the policy, however, excluded cover in respect of drivers under the age of 25 years, except where the insurers were notified and accepted cover. The first-named defendant was under the age of 25 when the accident occurred and cover had not been accepted by the insurers. They accordingly repudiated liability and the conduct of the defence was assumed by the Motor Insurers' Bureau of Ireland in accordance with the terms of their agreement with the Minister for the Environment.

The Finance Company applied by motion on notice for, inter alia, an order striking them out of the proceedings and this application was refused by Hamilton J. They then appealed to the Supreme Court and by consent it was ordered that an issue should be tried in the High Court on affidavit with liberty to call oral evidence. The issue was defined as follows by the Order:-

> "Whether the first-named defendant was the servant or agent of the third-named defendant at the time referred to in paragraph 5 of the Statement of Claim herein within the meaning of the Road Traffic Act 1961 and in particular

"section 118 thereof."

The Order also provided that the Finance Company was to be the plaintiff in the issue and the plaintiff and the first-named and second-named defendants were to be the defendants in the issue.

Mr. Kearns on behalf of the Finance Company accepted that, having regard to the agreed or admitted facts, and the decision of the Supreme Court in Buckley -v- Musgrave Brook Bond Limited (1969) IR 440, the onus was on them to establish that they had not consented to the driving of the car on the occasion in question by the first-named defendant. While conceding that the Finance Company had consented either expressly or by implication to the driving of the car by employees of the business known as Associated Trade Agencies and possibly members of their families whose driving would be covered by the policy of insurance in force in respect of the vehicle, he submitted that they had not consented either expressly or by implication to the driving of the motor-car by a person who was under the age of 25 years at the time of the accident and who was driving the vehicle without the knowledge or consent of the insurers. Mr. Quirke on behalf of the first-named defendant and Mr. Fitzsimons on behalf of the plaintiff submitted that since the Finance Company had consented to the driving of the motor-car by employees of Associated Trade Agencies, such consent clearly extended by implication to other persons driving with the consent of such employees and that, the Finance Company not having stipulated that such consent was to be conditional upon the person driving being covered, such a condition could not be implied in the consent given by them.

In support of his submission that any consent by the Finance Company should be treated as having been subject to the implied condition that the person driving the car would be covered by the policy of insurance, Mr. Kearns relied on two provisions in the leasing agreement of the 15th July, 1976, i.e. Clauses 4 and 10, the relevant portions of which are as follows:-

"4. USE. The lessee shall keep the equipment properly housed shall use the equipment in a careful and proper manner and shall comply with all requirements of law relating to the possession, use or maintenance of the equipment."

"10. INSURANCE. The lessee shall insure the equipment comprehensively against all the usual risks applicable to such equipment, but including loss or damage by fire, theft and accident and shall keep them insured against such risks. All such insurances shall be with a company or companies approved by the lessor. The proceeds of every such insurance shall be applied at the option of the lessor either:-

(a) towards the replacement, restoration or repair of the equipment or

(b) towards payment of the obligations of the lessee hereunder,

the lessees remaining liable for any loss or damage sustained by the lessor."

There was no evidence that these clauses, or indeed any of t

provisions of the leasing agreement, were drawn to the attention of any of the representatives of Associated Trade Agencies. The evidence established no more than that the rental payments due under the leasing agreement continued to be paid after O'Neill and McHenry (Donegal) Limited had informed the Finance Company that they had disposed of their interest in the relevant business; and that the insurance cover was maintained, subject to the restriction on drivers under 25. While Mr. Malcolm Brambell, the relevant official of the Finance Company said that he had mentioned the importance of having the motor-cars insured to a representative of Associated Trade Agencies, I am not satisfied as to the reliability of his recollection on this matter.

Section 118 of the Road Traffic Act 1961 provides that:-

> "Where a person (in this section referred to as the user) uses a mechanically propelled vehicle with the consent of the owner of the vehicle, the user shall, for the purposes of determining the liability or non liability of the owner for injury caused by the negligent use of the vehicle by the user, and for the purposes of determining the liability or non liability of any other person for injury to the vehicle or persons or property therein caused by negligence occurring while the vehicle is being used by the user, be deemed to use the vehicle as the servant of the owner, but only insofar as the user acts in accordance with the terms of such consent."

The section, which re-enacted with some modifications the provisions of section 172 of the Road Traffic Act 1933, is in unambiguous terms. It was clearly intended to effect a radical extension of the principles of vicarious liability in order to

ensure that the victim of a road accident was not confined by those common law principles in his remedy for damages to an action against a driver who might be uninsured. In the present case, it is conceded, as it had to be on the facts, that the Finance Company had consented to the driving of the motor-car by employees in the business styling itself "Associated Trade Agencies". I do not think that it could be seriously contended that that consent became inoperative when another person, such as a member of the employee's family, drove the motor-car with the consent of that employee. To treat the consent admittedly given as impliedly limited to driving by employees seems unreal in the case of a leasing agreement such as this. I think that it follows that the car was on the occasion in question being used by the first named defendant with the consent of the Finance Company within the meaning of section 118. Once that conclusion is reached, however, the fact (if it be the fact) that the owner did not consent to the actual mode of user is not material. It is, accordingly, not material that the Finance Company had not consented to the driving of the motor-car where the driving was not insured. This was stated to be the position at common law by Lord Thankerton giving the advice of the Judicial Committee of the Privy Council in Canadian Pacific Railway Company .v. Lockhart, (1942) A.C. 591, and it is, in my opinion, inconceivable that the Oireachtas intended in S.118 to narrow, in this context, the concept of vicarious liability as applied to victims of road accidents.

The section also expressly provides that the user is deemed to be with the consent of the owner only when the user acts in accordance with the terms of the consent. If the motor-car was being driven at the time of the accident by an employee of O'Neill and McHenry (Donegal) Limited who was not insured, it

might have been successfully contended that the user was not in accordance with the terms of the consent, having regard to Clause 4 of the leasing agreement. Since, however, in the present case the Finance Company had not established that any of the terms of the leasing agreement became binding on the employees of Associated Trade Agencies, it has not been established that the user was in breach of the terms of the consent within the meaning of section 118.

I will, accordingly, resolve the issue ordered to be tried by the Supreme Court by holding that the first-named defendant was the servant of the third-named defendant at the time referred to in paragraph 5 of the Statement of Claim within the meaning of S. 118 of the Road Traffic Act 1961.

Liam Kean