BAILII Citation Number: [1993] EWCA Civ 15

Case No.

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR. JUSTICE MAY

Royal Courts of Justice
29th January 1993

B e f o r e :

LORD JUSTICE DILLON LORD JUSTICE ROSE and
MR. JUSTICE PETER GIBSON

Between:

DAVID TOPP	**Appellant (Plaintiff)**
v.	
LONDON COUNTRY BUS (SOUTH WEST) LIMITED	**Respondents (Defendants)**

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Ltd., Room M104, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London WC2A 3RU)

MR. ROGER HETHERINGTON (instructed by Messrs Howell-Jones & Partners, Walton-on-Thames) appeared on behalf of the Appellant (Plaintiff).
MR. ANDREW PHILLIPS (instructed by Messrs Cripps Harris Hall, Tunbridge Wells, Kent) appeared on behalf of the Respondents (Defendants).

HTML VERSION OF JUDGMENT

LORD JUSTICE DILLON: This is an appeal by the plaintiff in the action, Mr. David Topp, from the decision of Mr. Justice May given after the trial of the action on 8th November 1991 whereby it was adjudged that the plaintiff's claim again the defendants, the London Country Bus (South West) Ltd., be dismissed.

The claim is a claim for damages arising out of the death of the plaintiff's wife, Mrs. Jacqueline Topp, on 25th April 1988. The basic facts are not in dispute and are clearly set out in the judgment of the learned judge. The defendant company runs a bus service in the region of Epsom, and one of its buses was hijacked by a third party (who has never been identified) at about 11 p.m. on the night of the 25th April. Very shortly afterwards the bus, driven by the hijacker, knocked down and killed Mrs. Topp as she was cycling home from work in Dorking Road Epsom.

The bus in question is what is called a minibus. We have a photograph of it in a Metropolitan Police Notice appealing for assistance after the accident. It is a fairly familiar type of small bus. It was described in evidence as a Leyland Sherpa van. It was based at the defendants' Leatherhead Depot. Its last journey before the accident was on Route E.1 from Epsom District Hospital, through the centre of Epsom, out in the direction of Tattenham Corner, and eventually back to the Epsom District Hospital. It was then, in accordance with the usual practice of the defendants, parked in a lay-by by the bus stop directly opposite the Epsom District Hospital and outside the White Horse Public House, as can be seen from the photograph in the police appeal for assistance.

In accordance with usual practice, the driver, Mr. Green, left the bus in that lay-by at the bus stop at about 2.35 p.m. on 24th April 1988. He left it unlocked, with the ignition key in it. He had then a 40 minute rest period before resuming his duties, driving a different bus. There was an arrangement under which the drivers could spend their rest period in the hospital. The expectation was that another driver, about eight minutes after Mr. Green had left the bus in the lay-by, would pick the bus up and drive the same route. But the other driver, who should have picked the bus up at about 2.43 p.m., did not do so because he was feeling unwell. His shift would have been non-compulsory overtime, and he did not report for his overtime. The bus therefore remained in the lay-by. Mr. Green saw it there later and reported that it was still standing there. Therefore, there is no doubt that the depot knew that the bus was there. But, possibly because of shortage of

drivers or available staff, nothing was done to pick the bus up that evening. It was taken by somebody who has never been traced just before 11.15 at night, driven for a relatively short distance until the point where Mrs. Topp was knocked down and killed, and it was abandoned round the corner from there.

In these circumstances, the plaintiff's claim is founded in negligence on the basis that the bus company, knowing that there must be a threat that a bus left ready to be driven away might be stolen and that whoever stole it, a joyrider, might drive dangerously and kill or injure someone else or damage property, was in breach of duty in failing to collect the bus or see that it was locked, without an ignition key and not capable of being driven away.

Mr. Hetherington has submitted that there was a particular danger because the lay-by was outside or near to a public house. I do not think he suggests that its proximity to the hospital added any particular danger. He puts his case in three ways. Firstly, that the bus was in a special category of risk, as a source of danger on the highway. Secondly, that even if it was not in a special category as a source of danger, there was a sufficiently high risk to attract a duty of care. Thirdly, that the judge, in seeking to apply the tests laid down in Caparo Industries Plc v. Dickman [1990] 2 AC 605 drew too rigid a line, instead of dealing with the case simply on its own facts and his reasons were flawed. But Mr. Hetherington has to accept the general proposition which is to be found in the speech of Lord Goff of Chieveley in Smith v. Littlewoods Organisation Ltd. [1987] AC 241, at page 272A-C that, "even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do". Lord Goff said that that may be read "as expressing the general idea that the voluntary act of another, independent of the defender's fault, is regarded as a novus actus interveniens which, to use the old metaphor, 'breaks the chain of causation'".

In so far as the case is put on the basis that to leave the bus unlocked and with the key in the ignition on the Highway near a public house is to create a special risk in a special category, it is pertinent to refer to a passage in the judgment of Lord Justice Robert Goff (as he then was) in P. Perl (Exporters) Ltd. v. Camden London Borough Council [1984] QB 342 at page 359E-F where he said:

> "In particular, I have in mind certain cases where the defendant presents the wrongdoer with the means to commit the wrong, in circumstances where it is obvious or very likely that he will do so - as, for example, where he hands over a car to be driven by a person who is drunk, or plainly incompetent, who then runs over the plaintiff ..."

But the sort of cases to which Lord Justice Robert Goff was there referring are far different from the present case. It may be added that that there is no evidence that the malefactor had been frequenting the public house that is shown in the picture; we do not know who he was, nor is there any evidence or presumption that persons who do frequent that particular public house are particularly likely to steal vehicles and engage in joy-riding.

As for the second way in which Mr. Hetherington puts his case, it seems to me, as it did to Mr. Justice May, that there is no valid distinction between the present case and a decision of another division of this court, comprising Lord Justice Stephen Brown, Lord Justice Nourse and Lord Justice Balcombe, in the case of Denton v. United Counties Omnibus Company Ltd. (C.A. Transcripts 1st May 1986) but, so far as I am aware, not reported. In that case, an omnibus owned by the defendant was unlawfully taken, by some person whose identity had never been discovered, in the early hours of the morning from the defendants' bus station in the centre of Northampton. It was driven about a mile from the bus station and it collided with the plaintiff's motor car, which he had parked in a road near to his dwelling house, causing substantial damage to the car. Fortunately for the plaintiff in that case, the consequences of the unlawful taking of the bus were not so grave as in the present case.

The bus station from which the bus was taken was in the centre of Northampton. It was open at either end, so that there were no doors or gates of any kind, at night, some 35 buses were garaged there in a condition that any one of them could be driven away, and without any attendant present to see that none was driven away without authority. It was held by this court that the bus company owed no duty of care to the plaintiff and that the plaintiff's claim for damages must therefore be dismissed. All these cases in a certain sense depend on their on facts, but it is inevitable that there should be careful consideration of what, if any, valid distinctions there may be between cases which it is said should be decided differently.

I cannot see any valid distinction between the present case and Denton's case. I do not think it matters that the bus station was private property, whereas the lay-by was part of the public highway. In each occasion the obvious presence of buses which could be easily found to be readily capable of being driven away was as much an allurement to an ill-minded person. I do not regard Denton's case as validly distinguishable from the present case.

Then it is said that the judge laid down too rigid a line and that his reasoning was flawed. I do not think he was laying down a rigid line to bind all future cases. He was applying the usual judicial process of deciding, according to principle and in the light of Denton's case, the particular case that was

before him. I note that in Smith v. Littlewoods Organisation Ltd Lord Mackay of Clashfern pointed out, at page 258F, that the determination of the question whether there was a duty of care to protect against the wrongful acts of third parties was a matter for the judges of fact to determine. He then said:

> "... Once it has been determined on the correct basis, an appeal court should be slow to interfere with the determination: ...".

I see no basis for interfering with the determination by Mr. Justice May, with which I agree, and I would dismiss this appeal.

LORD JUSTICE ROSE: I agree. I doubt whether, for my part, I would have found, as the judge did, that there was in the circumstances of this case a relationship of proximity between the defendants and Mrs. Topp. But I entirely agree with the learned judge that no duty of care is shown either in principle or having regard to the authority of this court in Denton v. United Counties Omnibus Co. Ltd. (C.A. Transcripts 1 May 1986), which seems to me, for the reasons given by my Lord, Lord Justice Dillon, to be indistinguishable from the present case. MR. JUSTICE PETER GIBSON: I also agree, and I share with my Lord, Lord Justice Rose, the doubt as to whether the learned judge was right in finding that the label of proximity could be attached to the relationship between Mrs. Topp and the defendants.

Order: Appeal dismissed, with costs.