24,1982

IN THE PRIVY COUNCIL No. 10 of ~~1982~~ 1981

ON APPEAL

FROM THE BERMUDA COURT OF APPEAL

BETWEEN:

GABRIEL MARRA (First Plaintiff) First Appellant

- and -

SONDRA MARRA (Second Plaintiff) Second Appellant

- and -

J.B. ASTWOOD & SON LIMITED (Defendant) Respondent

CASE FOR THE RESPONDENT

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1. The Appellants have brought this appeal to Her Majesty in Council with the leave of the Court of Appeal of Bermuda given conditionally on the 3rd July 1980 and finally on the 15th December 1980. pp. 136 - 139

The appeal is against the Judgment and Order of the Court of Appeal of Bermuda (Sir Alastair Blair-Kerr, President; Sir William Duffus, Justice of Appeal; Sir John Summerfield, Justice of Appeal) dated the 30th June 1980, by which the Court of Appeal of Bermuda allowed an appeal by the present Respondent against the judgment and order dated the 9th October 1979 of the Hnourable Mr. Justice Robinson sitting in the Supreme Court of Bermuda. (No. 28 of 1979) (No. 35 of 1978)

By his said judgment and order the learned Judge had adjudged that the present Respondent (then the Defendant) was in breach of contract and/or negligent in connection with the hiring of an auxiliary cycle to the First Appellant (then the First Plaintiff); had ordered that the present Respondent should pay to the First Appellant $188,442.15 and to the Second pp. 77 - 79 p. 88

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Appellant $1,400 as damages for respective personal injuries and consequential loss arising from an accident sustained while riding the said auxiliary cycle as driver and passenger respectively, together with interest and one-half present Appellants' taxed costs; and had dismissed the present Respondent's counterclaim against
p. 10 the First Appellant for an indemnity against the Second Appellant's claim.

p. 135 The Court of Appeal of Bermuda unanimously allowed the Respondent's said appeal, set aside the said judgment and order of the Honourable Mr. Justice Robinson and entered judgment in favour of the present Respondent with costs in the Court of Appeal and in the court below.

2. (a) The principal issue falling for consideration in this appeal, in the submission of the Respondent, is whether the Court of Appeal of Bermuda was right in concluding that the learned judge's findings of fact as to the condition of the auxiliary cycle and as to the
pp. 130 - 135 cause of the accident should not be allowed to stand.

(b) Further issues which, in the submission of the Respondent, arise if the Court of Appeal of Bermuda was wrong in its conclusions on the facts, and which the Respondent will argue, if required, are as follows:-

(i) Whether the term as to reasonable fitness for purpose, implied in the hiring of an auxiliary cycle in Bermuda, amounts to an absolute warranty of reasonable fitness for purpose, or is only a warranty of such reasonable fitness for purpose as the exercise of reasonable care and skill on
pp. 3, 71-72, 77-78, 89, 127. the part of the owner can make the machine;

(ii) Whether there is to be implied in the hiring of an auxiliary cycle in Bermuda, a term that the owner should give adequate instruction to the hirer as to
pp. 4, 72, 78, 91, 110-112 the proper use and control of the auxiliary cycle;

pp. 8, 23, 84. (iii) Whether any warranty or other duty of the owner as to the condition of the auxiliary cycle survived into the afternoon of the 26th July 1977, and whether the causative effect of any breach of duty (contractual or otherwise) came to an end by reason of the First Plaintiff, continuing to ride the auxiliary cycle that afternoon believing that it was not in the same apparent state as that in which it had been delivered to him the

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previous day.

(iv) Whether, upon the true construction of the contract of hire, all liability on the part of the owner for the First Plaintiff's personal injuries and consequential loss was excluded; and the owner was entitled to be indemnified by the First Plaintiff against the Second Plaintiff's claims in respect of personal injuries and consequential loss. — pp. 9-10, 81, 113-130, 140-145.

3. (a) The First Appellant, who was 48 years of age at the time of the accident, is a citizen of the United States. He was a professional musician and a hairdresser. The Second Appellant is his wife. Both journeyed to Bermuda for a week's holiday at the White Sands Hotel on the 24th July 1977. They had been to Bermuda before, in 1974, and on that occasion had hired two auxiliary cycles to carry themselves and their two children around the islands. — pp. 15-16

(b) These auxiliary cycles, as was well known to the learned judge and to the Court of Appeal, are common in Bermuda, and are widely hired by tourists as a means of conveyance. The Respondent carries on business at Front Street, Hamilton, Bermuda in the hiring of such auxiliary cycles, of which it owns a few hundred. One of these was ordered by the First Appellant through the hotel on the morning of the 25th July 1977 and was delivered to the hotel early that afternoon by a Mr. Robert Johnson, who met the First Appellant. The particular auxiliary cycle delivered to the First Appellant pursuant to his order was a low double seated Mobylette No. A967. The throttle control was of the rotating cylinder type, situated on the handlebar. On the Mobylette the throttle control was so constructed that it would return to the idling position of its own accord when released. — p. 34; pp. 15, 16, 21, 22.

(c) The First Appellant told Mr. Johnson that he had ridden before, and took a spin with the Mobylette on his own in front of the hotel. He then paid a deposit and signed the front and the reverse of a hire agreement (Exhibit 1). The Mobylette then worked normally. — pp. 16, 22; pp. 140-145; pp. 16, 22.

(d) The First Appellant then <u>in the afternoon of Monday, the 25th July</u>, took to the roads of Bermuda with the Mobylette, with his wife as pillion passenger. They went to Hamilton and back. At Lighthouse Hill the First Appellant had to apply both front and rear brakes in order to stop at the bottom of the hill. — p. 17

<u>On Tuesday morning the 26th July,</u> the First Appellant, with his wife as pillion passenger, went to St. George's. At Devil's Hole Hill the First Appellant

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had a similar experience to that at Lighthouse Hill. On the way back from St. George's, on a straight stretch of road at Harrington Sound the "bicycle seemed to be going
p. 17 of its own accord and seemed to increase in speed but I throttled down and it returned to normal and continued. I had no trouble at that point turning it off." The "throttle seemed to stick ... It did not automatically decelerate but did so without difficulty when hand was applied to
p. 23 it."

On the same journey, at Harbour Road, "It
p. 17 happened again ... a similar incident to Harrington Sound Road and it released when I throttled down."

Although the First Appellant knew, because he had specifically asked before taking ddivery of the
p. 16, line 10. Mobylette, that if anything went wrong he could get immediate repair, he did not report any of the above
p. 23, lines 22-30 incidents to the Respondent.

On Tuesday evening the 26th July, the First Appellant, with his wife as pillion passenger, was returning to the hotel from a swim at Horseshoe Bay Beach, having earlier had a swim at Warwick Bay. Approaching the
p. 17 first (left-hand) turn of an 'S' bend the cycle increased in speed. The First Appellant did not at first attempt to brake owing to sand on the road. While negotiating that turn the First Appellant was trying, without success, to throttle down. Before negotiating the second (right-hand) turn the cycle crossed over to the First Appellant's offside of the road towards a grassy area and shrubbery and the First Appellant applied both brakes, but the cycle was directed back from the grass area (which was
p. 26 in fact a low bank) into the road where it collided with
p. 131 an on-coming taxi which had stopped prior to the collision. The First Appellant suffered serious personal injury, loss and damage. The Second Appellant also suffered personal injury, loss and damage.

4. The Appellants claimed against the Respondent that there were implied terms in the cycle hire agreement that the cycle was reasonably fit for its purpose,
pp. 1-4 was without defect and in good, proper road-worthy condition; and that adequate instruction ought to have been given to the Appellants. In the alternative, the Appellants alleged negligence in supplying a defective cycle. By its Defence and Counterclaim the Respondent
p. 8 admitted the collision, but alleged that it was caused wholly or in part by the negligence of the First Appellant. The Respondent further alleged that the First Appellant was estopped from claiming against it by reason of his having signed the hire agreement/receipt which contained a clause saving the Respondent from

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liability. And in its Counterclaim the Respondent alleged that the First Appellant had agreed to indemnify them from the claim brought by the Second Appellant. The Appellants replied averring that the Respondent could not rely on the exemption clauses by reason of its fundamental breach of contract. pp. 9 - 11

5. The learned trial Judge, Robinson, J. heard the trial of the action on 16th, 17th and 18th July 1979, adjourned the case for consideration on 18th July and gave judgment on 9th October 1979. After considering the pleadings and evidence the learned Judge set out the issues and found in favour of the Appellants. p. 13 pp. 65-87

6. By its Notice of Appeal in the Bermuda Court of Appeal, dated 19th November 1979, the Respondent complained that the learned Judge fell into error in certain parts of his judgment, inter alia, as follows :- pp. 88-93

(1) In holding that there is to be implied in a hiring of an auxiliary cycle in the circumstances of this case a term that the vehicle is not defective and/or is as free from such defects as the Defendant's available skill can make it; and/or should be free from defects. (Judgment) pp. 65-88 (paras. 58, 81)

(2) In finding that the cycle had accelerated automatically when such allegation was against the weight of the evidence. (Judgment) (paras. 12, 13, 14, 57 and 84)

(3) In failing to give full weight to the evidence of Sergeant Pratt, on grounds which were not put to Sergeant Pratt at the hearing and with which the Respondent had had no opportunity to deal. (paras. 52, 53, 54, 55, 56)

(4) That the learned Judge should have found on the evidence that the only defect was the failure of the throttle to return to the resting position of its own accord, that is, without manual operation, and further should have found that that defect was not dangerous, and that it was not, on the evidence, present before the day following delivery. (para. 57)

(5) That there was no sufficient evidence for the learned Judge's finding that the cycle had not been tested by the Respondent and was not efficient. (paras. 42, 43 44, 45)

(6) In finding that the Respondent should have given instruction to the Appellants. (paras. 59, 60)

(7) In finding that the Respondent was in breach of the contract of hire or of any common law duty

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of care.

p. 8

(8) That the learned Judge failed to find that the accident was caused by the First Appellant's own negligence as set out in paragraph 7 of the Respondent's Defence, alternatively was contributed to by negligent riding and/or by his continuing to ride when he claimed to have found faults in the cycle; and that in any event the proportion of negligence contributed to the accident by the First Appellant was greater than 30%.

(Judgment) (paras. 83, 84, 95)

(9) That the learned Judge failed to find on the evidence that the Respondent had given adequate instruction on the controls of the cycle and that the Appellants were in any event estopped by operation of the exclusion clauses.

(10) That the learned Judge failed to find that the Second Appellant's claim had been indemnified by the First Appellant.

(11) That the learned Judge failed to find that the hire agreement/receipt was a contractual document binding on the First Appellant and on the Respondent.

(para. 70)

(Judgment) (paras. 80, 81)

(12) That the learned Judge failed to find that the Respondent could rely on the provisions of the said document and/or was wrong in holding that the Respondent was in such breach as to entitle the First Appellant to repudiate it.

(para. 62)

(para. 88)

(13) That the multiplier selected by the learned Judge was too high.

7. The appeal against the Order of the Supreme Court was heard before the Court of Appeal of Bermuda, Blair-Kerr, P. Duffus, J.A. and Summerfield, J.A., on 31st March and 1st April 1980. The main judgment was delivered by Blair-Kerr, P. on 30th June 1980. After outlining the circumstances giving rise to the hiring the learned President considered the full terms of the hire agreement/receipt (Exhibit 1) the pleadings and the notes of evidence in the Court below.

pp. 95-135

8. The Court of Appeal considered the principles enunciated by Lord Thankerton in Watt v. Thomas (1947) A.C. 484 :

p. 130

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of mis-direction of himself by the judge, an

appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

In considering the evidence the Court found the First Appellant's story as to the accident inherently improbable because crossing over to the right hand side of the road must have involved making a much sharper right-hand turn than would have been necessary if he had simply negotiated the right hand bend keeping to his own side of the road; and that far from negotiating the first left-hand bend successfully, the First Appellant was unable to do so because of the speed at which he was travelling with the result that he crossed to the right-hand side of the road, struck the grass bank, and veered off it into the path of the oncoming taxi. pp. 130 - 1

The Court also considered as important the question of whether the learned trial Judge erred in rejecting the evidence of Sergeant Pratt. Obviously the police were under a duty to examine the cycle carefully so that evidence would be available as to its condition. pp. 131 -22

He was not called by the Respondent because his evidence cut clean across that of the First Appellant in a number of material respects. His evidence was of the greatest assistance to the case for the Respondent Company because here was an independent public official who had nothing to gain or lose who testified that when he examined the cycle (which had been in police custody since the accident) he found that the brakes were properly adjusted and in good working order; and that the throttle did not return to the idling position automatically, but had to be operated manually in order to decelerate; that there was nothing inherently dangerous in the throttle control being in that condition and that he could not see how the throttle could have been stuck so that it could not have been pushed back. p. 132

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Moreover, having removed the throttle control and the carburettor from the cycle and having examined them in the workshop, he found them both in good working order.

p. 131 This evidence was vital when assessing the truth of the First Appellant's allegations that on a number of occasions during the two days (25th and 26th July,) including the few seconds involved in negotiating the S-bend at 7 p.m. on 26th July, the cycle seemed to increase in speed of its own accord, or as expressed in the Statement of Claim "of its own volition".

The Court also declared that there was nothing 10
p. 132 in the Record to suggest that the Judge did not accept Pratt as an expert, and no expert evidence contra was called by the Appellants. The evidence that the brakes were properly adjusted and in good working order had not been challenged by Counsel for the Appellants.

p. 132 In the Court's view the learned Judge erred in rejecting Sergeant Pratt's evidence. This evidence should have been carefully considered when assessing the credibility of the First Appellant as regards his allegation that when negotiating the S-bend just prior 20
to the collision, the cycle "increased in speed", "persisted in picking up speed", and that he tried to "throttle down with no success", and "nothing worked with the brakes or throttling down", allegations which could not possibly stand against the evidence of Sergeant Pratt. His examination of the carburettor and throttle cable revealed nothing to support the First Appellant's story of "automatic acceleration" and the throttle then sticking in the open position. Similarly, as regards the allegation of brake failure. 30

pp. 113-114 9. As to the terms of the hiring agreement (Exhibit 1) itself, the Appellants (then the Respondents) submitted that the learned judge had given three reasons as to why these did not assist the Respondent (then the Appellant company). These were :

(1) breach by the Respondent of a fundamental term of the agreement;

(2) that the Respondent had not proved that Exhibit 1 was a contractual document;

(3) that the exempting words were not clear as to 40
what liability was excluded.

In view of the reasons given by the House of Lords for allowing the appeal in Photo Production Ltd. v. Securicor Transport Ltd. 1980 A.C. 827 (speeches in which had been given on the 14th February 1980) Counsel for the

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Respondent did not rely on the first of those reasons. He did not press the second reason. The argument thus centred on the third reason.

10. The findings of the Court of Appeal were as follows :

(1) That the Respondent Company was under a duty to supply a cycle which was as reasonably fit for the purpose for which they knew it was required (namely to be driven on the roads of Bermuda) as reasonable skill and care could make it. p. 127

(2) That the learned Judge erred in rejecting Sergeant Pratt's evidence as to the mechanical condition of the brakes and throttle control of the said cycle. pp. 131 - 132

(3) That the learned Judge erred in concluding that there was no evidence that the cycle was tested or inspected for faults prior to being delivered. p. 133

(4) That in the circumstances, the evidence was that the Respondent's practice was that every hired cycle is tested thoroughly before delivery, that Cycle A967 was in good working order when the First Appellant accepted it on 25th July 1977, and that when the cycle was examined by the police after the accident, the brakes, the throttle cable and the carburettor were in good working order, and that although the throttle control did not then return to the idling position automatically it could be moved back manually.

(5) That in the premises the learned judge's findings of fact should not be allowed to stand. That the accident was caused not by any "errant behaviour" of the throttle control coupled with brake failure, but by either the negligent manner in which the First "(Appellant)" rode the cycle or by an error of judgment on his part occasioned by his limited skill and experience in riding motor cycles. p. 135

(6) That the Respondent Company was under no duty to give instructions to the Appellants or either of them so as to see that the Appellants were competent to operate the auxiliary cycle on the roads of Bermuda. pp. 111 - 112

(7) That the hiring agreement contained exemption clauses which were effective to save the

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pp. 129 - 130

Respondent from liability against the First Appellant and indemnified it against any claim by the Second Appellant.

Upon so finding the Court of Appeal set aside the judgment of the Court below and entered judgment in favour of the Respondent Company with costs in that Court and below.

11. The Respondent respectfully submits that this appeal should be dismissed with costs and that the judgment and order of the Court of Appeal of Bermuda should be affirmed for the following, among other

REASONS

(1) BECAUSE historically the implied warranty given by the owner of a chattel who lets it out on hire is only to the effect that the chattel is as fit for the purpose as reasonable care and skill on his part can make it.

(2) BECAUSE that implied warranty in the present case related to the auxiliary cycle at the time of delivery, in the state in which it was delivered and for the purpose for which it was delivered, namely to be used by the hirer in safety on the roads of Bermuda with a pillion passenger.

(3) BECAUSE the learned trial judge failed to attach any weight to the evidence as to the Respondent's practice on hiring such auxiliary cycles.

(4) BECAUSE the learned trial Judge failed to give proper weight to the evidence of Sergeant Pratt, the only independent expert in the case, as to the roadworthiness of the auxiliary cycle.

(5) BECAUSE, (as was argued in the Court of Appeal although not expressed in its judgment) the learned trial Judge misdirected himself both as to the sequence of events as recounted in evidence by the First Appellant, and as to the nature of the defects alleged by the First Appellant. By reason of such misdirection the learned trial Judge wrongly concluded (inter alia) that the auxiliary cycle had a tendency to accelerate automatically (that is without manual operation of the throttle control) and that such tendency first manifested itself on the afternoon of delivery of the cycle (namely 25th July).

pp. 69, 77, 83. (Judgment, paras. 11, 12, 13, 14, 57, 84)

(6) BECAUSE in the circumstances the Court of Appeal rightly concluded that the learned trial Judge had

not taken proper advantage of his having seen and heard the witnesses; that the matter was thus at large for them; that on the printed evidence the cycle was roadworthy at all material times; and that on the printed evidence the accident was caused not by any defect in the cycle but by the negligence or by the lack of skill and experience of the First Appellant.

(7) BECAUSE (as was argued in the Court of Appeal although not expressed in its judgment) the causative effect of any breach of duty on the part of the Respondent ceased when the First Appellant continued to ride the cycle after noticing an apparent tendency of the throttle control to fail to return automatically to the idling position and an apparent requirement to use both front and rear brakes when approaching the bottom of a hill with his wife as pillion passenger, especially when he had at the time of hiring sought and received an assurance from the Respondent that if anything was wrong with the cycle he could get immediate repair. Alternatively, by analogy with the principle as later stated by Lord Diplock in Lambert v. Lewis [1981] 2 W.L.R. 713, (a case arising from the sale of goods rather than hire), once the First Appellant continued to ride the cycle with knowledge of the claimed defects there was no longer any warranty by the Respondent Company of its continued safety in use on which the First Appellant was entitled to rely.

p. 16, lines 8 to 15.

(8) BECAUSE the Court of Appeal was right in concluding that, in the circumstances pertaining to the hiring of auxiliary cycles in the Islands of Bermuda, there is nothing unfair in requiring a visitor such as the First Appellant to sign a declaration that he has hired an auxiliary cycle on the terms set out in the hiring agreement (Exhibit 1) and is of the opinion that he is capable of riding it.

p. 128

(9) BECAUSE the Court of Appeal was right in concluding that, in the circumstances pertaining to the hiring of auxiliary cycles in Bermuda, in which Islands visitors are not required by law to take a driving test before driving or riding on the highway, it was not the duty of the Respondent Company to attempt to achieve, by instruction, the driving competence of the hirer.

p. 112

(10) BECAUSE the Court of Appeal was right in concluding that Clauses (h)(i) and (l) of Exhibit 1 were respectively and collectively clear in their meaning; that these clauses made it plain to the First Appellant that he should, if he so desired, arrange

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for further insurance cover (which might include insurance cover for personal injuries and consequential loss occasioned to himself or to his pillion passenger) beyond third party risks; and that these clauses were effective to relieve the Respondent Company of both contractual and tortious liability (if any).

(11) For the reasons appearing in the judgment of Sir Alastair Blair-Kerr, President of the Court of Appeal of Bermuda. 10

MICHAEL BURKE-GAFFNEY

WILLIAM GLOSSOP

G. R. BELL

No. 10 of ~~1982~~ 1981

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J.B. ASTWOOD & SON LIMITED (Defendant) Respondent

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