[2016] JMCA Civ 59

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 156/2009

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN	**LENA HAMILTON**	**APPELLANT**
AND	**RYAN MILLER**	**1st RESPONDENT**
AND	**MARLON TURNER**	**2nd RESPONDENT**
AND	**MARIE GERMAN**	**3rd RESPONDENT**

Miss Jamila Thomas instructed by Lambie-Thomas & Co for the appellant

Miss Danielle Archer instructed by Kinghorn & Kinghorn for the respondents

9 July 2015 and 20 December 2016

DUKHARAN JA

[1] I have read in draft the comprehensive reasons for judgment of McDonald-Bishop JA (Ag). I agree with them and there is nothing that I could usefully add.

BROOKS JA

[2] I also have read in draft the reasons for judgment of my sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA (AG)

[3] This is an appeal from the judgment of Daye J, delivered in the Supreme Court on 21 October 2009, in which he found the appellant vicariously liable in damages to the three respondents for injuries they sustained in a motor vehicle collision that occurred along the Bustamante Highway in the parish of Clarendon on 4 March 2005.

[4] The primary issue for consideration by the learned trial judge was whether the appellant, being the registered owner of the motor vehicle, which at the time of the accident was being driven by Eric Bartley, who was named as the 1st defendant in the proceedings in the court below, and who was found liable in negligence for the accident, was vicariously liable in damages to the respondents.

[5] On 9 July 2015, we heard the appeal and at the conclusion of the submissions of counsel for the parties, we ordered as follows:

> "1. Appeal allowed.
>
> 2. The judgment handed down in the lower court on October 21, 2009, is set aside.
>
> 3. Costs to be taxed if not agreed."

We promised then to put our reasons in writing; this is in fulfilment of that promise. The delay is regretted.

The background

[6] The respondents all filed separate claims between 3 June 2005 and 28 November 2005, seeking damages for personal injuries and losses they sustained as a result of the motor vehicle accident. At the time of the accident, they were passengers in a public passenger motor vehicle, which was owned by Hubert Morrison and being driven by Winston Smith who were named as 4th and 3rd defendants, respectively, in the proceedings below.

[7] The respondents' collective claim was that while they were proceeding along the Bustamante Highway in the parish of Clarendon, along a section of the road known as Rhule Pen/Drags District, Eric Bartley, the driver of the motor vehicle owned by the appellant, overtook a line of traffic and collided with the motor vehicle in which they were travelling, resulting in personal injuries to them. They averred, among other things, negligence against Eric Bartley and vicarious liability against the appellant, as the registered owner of the motor vehicle that was being driven by Eric Bartley.

[8] The appellant filed a defence against the claims of the respondents. The core of her defence was that at the time of the accident, the vehicle being driven by Eric Bartley had been sold and so Eric Bartley was not acting as her servant or agent at the time of the collision.

[9] On 16 January 2007, all three claims were consolidated by order of a judge of the Supreme Court and were subsequently tried together before Daye J (Ag).

The evidence of the appellant at trial

[10] The appellant, in her witness statement, which was permitted to stand as her evidence-in-chief at the trial, gave the following evidence in rebutting the respondents' claim that she was vicariously liable for the alleged negligence of Eric Bartley. In 2004, she sold the vehicle in question to Mr Fitzroy Wilson for $550,000.00. There was a written agreement evidencing the sale of the vehicle. However, both the agreement and the receipt issued for the purchase of the vehicle were kept by Mr Fitzroy Wilson. She did not transfer the vehicle into the name of Fitzroy Wilson because at the time of the sale, she could not find the original title. She reported the title as having been lost to the May Pen Police and upon receipt of a letter from them, used it to apply for a new title from the May Pen Collectorate of Taxes. Due to the fact that she had not received a replacement title in order to effect the transfer, and the insurance for the vehicle having not yet expired, she allowed Fitzroy Wilson to operate the vehicle with the insurance in her name.

[11] She subsequently became aware that Fitzroy Wilson had sold the vehicle to Lloyd Shakespeare. Lloyd Shakespeare came to her about the transaction and she met him then for the first time. Having met Lloyd Shakespeare, she again consented to the motor vehicle insurance continuing in her name until the title for the vehicle was 'sorted out'. When the replacement title was eventually ready for collection, she arranged for someone to collect it on her behalf, as she had sustained an injury to her leg, which caused her to be confined to a wheelchair. As a result, she signed the title and gave it to Mr Shakespeare to transfer the motor vehicle in his name.

[12] She only met Eric Bartley once; she does not know him personally; he was not driving the vehicle for her benefit or purpose; and at the time of the accident, she did not know where he was going.

[13] During the course of cross-examination, the appellant was shown a document (the record does not reflect the nature and full contents of the document). She agreed, however, to having signed the document. In that document, she evidently referred to Lloyd Shakespeare as her agent. Her explanation for having done so was that the title for the motor vehicle was still in her name. She explained it in this way:

> "[I] agree Lloyd Shakespeare was my agent because Mr. Shakespeare ask [sic] me. I say he was my agent at that time because the title was not transferred from my name."

[14] She further stated under cross-examination that she did not know the whereabouts of Fitzroy Wilson or Lloyd Shakespeare and that notwithstanding her efforts to contact Lloyd Shakespeare, she was unable to find him. Although Eric Bartley was named as the 1st defendant, he did not attend the trial. Lloyd Shakespeare and Fitzroy Wilson were not joined by way of third party proceedings.

The trial judge's findings

[15] The learned trial judge found that Eric Bartley caused the accident through negligently operating the vehicle he was driving and that the appellant was vicariously liable for his negligence. In coming to his decision that the appellant was vicariously liable for the actions of Eric Bartley, the learned trial judge reasoned:

"The driver of the coaster bus did not give evidence. No evidence to contradict the claimants and [sic] of Taxi driver. The registered owner of [sic] coaster bus is [the appellant]. Her evidence is that she sold the bus to one person who sold to another does not displace the fact that she is the registered owner.

She was aware that the title was lost. She was aware that it was necessary to transfer the title. She gave permission that the insurance should continue in her name from 1st purchaser to 2nd purchaser. She retained control and responsibility of the bus to that extent.

This raise [sic] the issue of vicarious liability on the ground that the driver at the time was her agent.

The present driver of the Toyota bus I found did not exercise due care and attention. He is therefore liable to the parties injured by this motor vehicle accident. The question is whether the registered owner is liable i.e vicariously liable for the action of this driver who she testify [sic] she has no connection with.

If the driver had no authority on [sic] factor in law to operate this bus on behalf of the registered owner then the registered owner would be excluded from liability. The circumstances suggest the driver had ostensible authority to operate the bus by the registered owner. The registered owner would have to rebut this prima facie inference to escape liability (see Motor Vehicle (Third Party) Insurance Act).

The explanation of the registered owner [the appellant] obliged her to join the person to whom the bus was sold to in the third party proceedings. She did not. At the end of the day I do not hold [sic] her explanation rebut [sic] the ostensible authenticity [sic] [authority?] the driver of the bus had from the registered owner of the vehicle and the person in whom [sic] name the insurance policy was issued. I therefore find [the appellant] vicariously liable."

The grounds of appeal

[16] The appellants filed five grounds of appeal, which were as follows:

> "(a) The learned trial judge at first instance erred in failing to appreciate the legal consequence that flowed from the Appellant's unchallenged evidence that she had sold the motor vehicle.
>
> (b) The learned trial judge at first instance erred in finding expressly or implicitly that the issue of vicarious liability was raised by the fact that the Appellant 'gave permission that the insurance should continue in her name from 1st purchaser to 2nd purchaser'.
>
> (c) The learned trial judge at first instance erred in finding that 'the circumstances suggest that the driver had ostensibly [sic] authority to operate the bus by the registered owner'.
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> (d) The learned trial judge at first instance erred in using ostensible authority as the basis upon which to find the Appellant vicariously liable and therefore failed to correctly apply the law relevant to the issue of vicarious liability.
>
> (e) The learned trial judge erred in finding that the 'explanation of the registered owner Lena Hamilton obliged her to join the person to whom the bus was sold in the third party proceedings.'"

The issue

[17] Having examined globally the appellant's five grounds of appeal, it was found that only two primary issues were essentially raised for consideration on this appeal. Those were:

(i) Whether the learned trial judge erred in law when he found that the appellant was vicariously liable on the basis that Eric Bartley had the ostensible authority to operate the vehicle at the time of the collision because, although the appellant had sold the vehicle, she remained the registered owner and consented to the insurance policy continuing in her name (grounds (a), (b), (c) and (d)); and

(ii) Whether the learned trial judge erred when he found that the appellant was obliged to join the persons to whom the bus was sold in third party proceedings (ground e).

Issue (i): grounds (a), (b), (c) and (d)

Whether the learned trial judge erred in law when he found that the appellant was vicariously liable on the basis that Eric Bartley had the ostensible authority to operate the vehicle at the time of the collision because, although the appellant had sold the vehicle, she remained the registered owner and consented to the insurance policy continuing in her name.

[18] Counsel for the appellant, Miss Thomas, submitted that, "the unchallenged and accepted evidence was that [the appellant] had sold the motor vehicle". To strengthen this submission, counsel relied on this aspect of the learned trial judge's reasoning:

> "…The registered owner of coaster bus is [the appellant]. Her evidence is that she sold the bus to one person who sold to another does not displace the fact that she is the registered owner.
>
> She was aware that the title was lost. She was aware that it was necessary to transfer the title. She gave permission that

> the insurance should continue in her name from 1st purchaser to 2nd purchaser. She retained control and responsibility of the bus to that extent."

[19] Miss Archer submitted that the fact that the appellant was the registered owner of the vehicle raised a *prima facie* case that at the time of the accident, Eric Bartley acted as her agent or servant, making her liable for his negligence. She argued that the onus was on the appellant to displace this presumption in order to absolve herself from liability. She further submitted that the evidence required to dispel this presumption was "satisfactory evidence to the contrary". The evidence of the appellant with respect to the sale of the motor vehicle was questioned by counsel on two bases. Firstly, that there was no documentary evidence before the court to corroborate that a sale had taken place and secondly, that when a person sells a vehicle the action is twofold: the agreement to sell and the transfer. Counsel submitted that, "until and unless the vehicle is transferred it cannot be said that the vehicle has been sold". As such, the appellant had failed to submit satisfactory corroborative evidence to dispel the presumption that Eric Bartley was her agent.

[20] Miss Archer stated further that the learned trial judge was properly guided to find that the appellant's failure to produce evidence to corroborate that there was in fact a sale, should result in the decision remaining undisturbed.

[21] Miss Archer's submissions concerning the evidence of the sale of the motor vehicle, or the lack thereof, would seem to suggest that the issue as to whether the motor vehicle was, in fact, sold was not determined by the learned trial judge in the appellant's favour due to lack of corroborative evidence of the sale. This, however, was

not the case. The learned trial judge had clearly accepted, as Miss Thomas contended, that the appellant had sold the motor vehicle. What he based his decision on was the fact that even though the motor vehicle was sold, the appellant had caused the title and insurance to remain in her name. The finding of fact that the appellant had sold the bus must remain undisturbed and so the question is what would be the legal significance of that fact, on the question of vicarious liability.

[22] The critical question that now arises for consideration is whether the mere fact that the appellant was the registered owner of the motor vehicle and the person to whom the insurance was issued was, in and of itself, sufficient to establish that at the time of the accident, Eric Bartley was acting as her agent, as found by the learned trial judge. In this connection, the learned authors of Halsbury's Laws of England, 2008, Volume 1, 5th edition, paragraphs 29 and 30 state:

> "The terms 'agency' and 'agent', in popular use, have a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act.
>
> The authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party."

[23] It is evident, therefore, that for the appellant to have been held liable on the ground that Eric Bartley was her agent, there ought to have existed a relationship between Eric Bartley and her that gave Eric Bartley the authority or capacity to create legal relations between third parties and her at the time of the accident. Eric Bartley would have had to have the authority to act on behalf of the appellant and he consented to so doing. This authority to act must have been expressly given or should be such as to be implied from the conduct of the appellant and Eric Bartley or from the relationship between them.

[24] It is clear that the learned trial judge did not find any express authority. He found instead that Eric Bartley had the ostensible authority of the appellant to act in the way he did, merely from the fact that she had remained the registered owner with the motor vehicle insurance continuing in her name. In examining the concept of ostensible authority, the learned authors of Halsbury's Laws of England Volume 1, 2008, 5th edition at paragraph 151 describes that a person has an ostensible authority to act in the following circumstances:

> "Where the act complained of is not expressly authorised by the principal, the principal is, while the agent is acting within the scope of his implied authority or within the scope of his apparent or ostensible authority, jointly and severally responsible with the agent, however improperor imperfectthe manner in which the authority is carried out."

[25] The learned authors cited the case of **Uxbridge Permanent Benefit Building Society v Pickard** [1939] 2 KB 248, as authority in support of this principle. Atkinson

J, in deciding whether an agent had an ostensible authority to act on behalf of his employer, held:

> "If a person is doing something he is employed to do though in a way he is not supposed to do it, the master is liable; but if he is not doing his master's business, the master is not liable."

[26] The facts of the case could prove useful in demonstrating the prinicple of ostensible authority. The defendant, Mr Pickard, was a solicitor practising in London, with a branch office in Slough. The office in Slough was at all material times managed by Mr Conway, as Mr Pickard's managing clerk. The plaintiffs were induced by a fraud to which, as the court found, Conway was a party, to advance money to a person alleged by Conway to be a client of the branch on mortgage of freehold property. The supposed title to the property was fictitious and the title deeds were forgeries. No allegation was made against Mr Pickard, but the plaintiffs claimed damages for fraud on the basis that Mr Pickard was responsible for the fraud of his agent. Sir Wilfrid Greene MR, in agreeing with the decision of Atkinson J that the Mr Pickard was liable for the action of Conway, held:

> "When a person is put in that position his actual authority and his ostensible authority are in one sense the same, because the ostensible authority of a solicitor's clerk put in such a position coincides with the actual authority which he is given. But the ostensible authority may go a little further, and for this reason, that it is not within his actual authority to commit a fraud. Nevertheless it is within his ostensible authority to perform acts of the class I have mentioned. So long as he is acting within the scope of that class of act, his employer is bound whether or not the clerk is acting for his own purposes or for his employer's purposes."

[27] The facts of the instant case renders the situation distinguishable from that which existed in **Uxbridge Permanent Benefit Building Society v Pickard**, as there the agent was the managing clerk in the office and was acting within the scope of his employment or within the scope of something he was authorised to do. In this case, there is no evidence of any prior relationship or dealings between the appellant and Eric Bartley from which a contract of employment could be found and the learned trial judge did not so find. In the absence of an employment relationship, he would have had to find an implied agency from the conduct of the parties, that is, within the context of their dealings outside the ambit of an employment contract. There was no evidence of any connection between them in relation to the motor vehicle or at all. This fact renders the finding of the learned judge that Mr Bartley had the appellant's ostensible authority to operate the vehicle unsustainable.

[28] The facts before the court were that at the time of the accident, the appellant was the registered owner of the vehicle and had agreed to have the insurance continued in her name, even though she said she had sold the vehicle. The facts revealed no connection between the apellant and Eric Bartley. In **Rambarran v Gurrucharran** [1970] 1 All ER 749, one of the leading cases on the subject of vicarious liability on the basis of agency, Lord Donovan said at page 751:

> "Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently

> known, then clearly the problem must be decided on the totality of the evidence."

[29] In that case, the appellant's car was being driven by his son. Due to his son's negligent driving, the car collided with the motor vehicle owned by the respondent and caused considerable damage to it. The appellant himself had no direct responsibility for the accident. The respondent nevertheless brought an action alleging that on the occasion in question, the appellant's son was driving as his servant or agent and that the appellant was thus vicariously liable to pay damages for the loss sustained by the respondent. Lord Donovan, in deciding whether the appellant was vicariously liable, held:

> "…any inference, based solely on the appellant's ownership of the car, that Leslie [his son] was driving as the appellant's servant or agent on the day of the accident would be displaced by the appellant's own evidence, provided it were accepted by the trial judge, which it was. Leslie had a general permission to use the car. Accordingly it is impossible to assert, merely because the appellant owned the car, that Leslie was *not* using it for his own purposes as he was entitled to do."

[30] The appellant also relied on the dictum of Clark J in **Mattheson v Go Soltau and WT Soltau** (1933) 1 JLR 72 that:

> "It is now accepted in our Courts that in the absence of satisfactory evidence to the contrary, this evidence is prima facie proof that the driver of a vehicle was acting as servant or agent of its registered owner. The onus of displacing this presumption is on the registered owner, and if he fails to discharge that onus the prima facie case remains and the plaintiff succeeds against him."

[31] The law, therefore, recognises that in order to establish a relationship of agency one has to look at the totality of the evidence, albeit that there is a presumption of agency that arises from the fact of ownership. The presumption is therefore rebuttable and the onus is on the registered owner to do so. It is not sufficient, therefore, to simply base the fact of agency on the mere fact that someone is the registered owner of a vehicle, when there is evidence establishing other facts that would throw light on the issue.

[32] In assessing the totality of the evidence that was before the learned trial judge, which was not rejected by him, the appellant stated that she sold the motor vehicle to one person who sold it to another. She retained the vehicle in her name and allowed the insurance to continue in her name because she was having problems with the title for a proper transfer to be effected. She signed a document that the last purchaser, Mr Lloyd Shakespeare, was her agent because of the fact that the papers were still in her name. The mere fact that she had parted with possession of the motor vehicle, with an intention to do so permanently, would show that she had no interest in the use of the vehicle for her personal purposes. Indeed, in this case, the person to whom she gave permission to use the vehicle, Mr Shakespeare, was not the driver. So general permission given by the appellant to Mr Shakespeare to use the motor vehicle, while it was registered in her name, did not translate, without more, to authority being given to Eric Bartley to drive it on her behalf and for her purposes. The relationship or dealing, if any, between Eric Bartley and her at the time the collision occurred, had to be examined before any finding of vicarious liability could have been made.

[33] With regards to Eric Bartley, she was told that he was the person driving the bus at the time of the accident. She does not know him personally; she only met him once. At the time of the collision, the motor vehicle was not being driven by him with her consent or permission. She did not know where he was going at the time of the accident and she had nothing to gain personally from his driving of the vehicle. Further, there was nothing to suggest he was acting within the scope of something he was ordinarily authorised to do on her behalf. In all the circumstances, it could not be said that there was any evidence before the learned trial judge to suggest a principal/agency relationship between Eric Bartley and the appellant, which could properly ground vicarious liability on the basis of agency.

[34] Indeed, even if for argument sake, it could be contended that Eric Bartley had the appellant's permission to drive the vehicle, the law is clear that permission, by itself and without more, does not give rise to an agency, especially in circumstances where it is accepted that there was no employment relationship.

[35] In **Morgans v Launchbury** [1973] AC 127, another important case on this subject, Lord Wilberforce stated at page 135:

> "For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has

> never been held that mere permission is enough to establish vicarious liability."

[36] In **Avis Rent-a -Car Ltd v Maitland** (1980) 32 WIR 294, Zacca P (acting), similarly, pointed out, in speaking on behalf of this court that:

> "The fact that the appellant may make a profit whilst the car was being driven by the second defendant does not mean that the second defendant was driving the car for the owner's purposes in pursuance of a task or duty delegated by the company to him. The law is stated thus in 28 *Halsbury's Laws of England* (3rd Edn) paragraph 71, page 71:
>
> > **'The owner is, however, responsible only where he has delegated to the driver the execution of a purpose of his own over which he retains some control and not where the driver is a mere bailee, engaged exclusively upon his own purposes**.'" (Emphasis added)

[37] On the totality of the evidence, which the learned trial judge was duty bound to consider, there was no evidence, as required by the authorities for vicarious liability to arise, that the appellant had delegated to Eric Bartley the execution of a purpose of her own over which she retained some control or, in other words, that he was using the motor vehicle for the appellant's purpose under delegation of a task or duty. On the strength of the authorities, the appellant had given evidence that would have rebutted the existence of an agency, actual or ostensible. It should be noted that this would have been the case even if the learned trial judge had rejected the evidence that the appellant had sold the motor vehicle because on the appellant's worst case, there was

clear and uncontradicted evidence that she gave a document to Lloyd Shakespeare, declaring him her agent, which, in actuality, meant that he had the motor vehicle with her general permission to use for his own purposes. The general permission that was given by the appellant to Lloyd Shakespeare did not translate to authority being given to Eric Bartley to be her agent at the material time, or at all, in relation to the use of the motor vehicle.

[38] It is abundantly clear from the evidence presented by the appellant, and which remained uncontradicted by the respondents at the end of the trial, that Eric Bartley, as the driver of the motor vehicle, did not have the appellant's permission to drive the vehicle at the material time, especially in the context where the appellant had parted with possession, custody and control of the motor vehicle under a purported contract of sale with a third party. This is a compelling fact that would have served to displace the presumption of agency to which the fact of ownership had given rise. It followed then that the appellant could not be held to have been vicariously liable.

[39] For all the foregoing reasons, it was found that there was merit in the appellant's contention in grounds (a), (b), (c) and (d) of the grounds of appeal that the learned trial judge erred when he concluded as he did, that the appellant was vicariously liable for the negligence of Eric Bartley. The appeal, therefore, succeeded on those grounds, without more. The remaining ground of appeal was, however, considered for completeness.

Issue (ii) - (ground (e))

Whether the appellant was obliged to join the persons to whom the bus was sold in third party proceedings.

[40] The appellant also complained that the learned trial judge fell into error when he found that "the explanation of the registered owner [the appellant] obliged her to join the person to whom the bus was sold to in the third party proceedings". According to counsel for the appellant, the appellant's defence was such that no question of an indemnity or contribution could arise and as such this was not relevant to the issue of vicarious liability.

[41] Rule 18.1(2)(b) of the The Civil Procedure Rules, 2002 (the CPR) states:

> "An '**ancillary claim'** is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and includes –
>
> (a)...
>
> (b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy;..."

[42] In circumstances, where the appellant's defence was a complete denial that there existed a relationship between herself and Eric Bartley, Fitzroy Wilson or Lloyd Shakespeare in relation to the operation of the motor vehicle at the material time, she was under no obligation to join them in third party proceedings. In fact, even if her defence was that she was connected to those persons, it was totally a matter for her in conducting her case to decide how to proceed. The fact that she did not join any other party was not one that was relevant to the question of liability and so it was not open

to the learned trial judge to attach any weight to her failure in bringing an ancillary claim.

[43] Whether or not an ancillary claim was brought, the question of vicarious liability would still have had to be resolved before any question of contribution or indemnity could have arisen in third party proceedings. There was thus no reason in law for the learned trial judge to have ascribed any significance to the failure of the appellant to initiate third party proceedings.

[44] It was concluded on this ground that the learned trial judge, in concluding that the appellant was vicariously liable, was wrong to hold that she was obliged to initiate third party proceedings. Ground of appeal (e) also succeeded.

Disposal of the appeal

[45] The appellant having succeeded on all the grounds of appeal in establishing that the learned trial judge fell into error in finding that the appellant was vicariously liable to the respondents in damages, I agreed with my learned brothers that the appeal should have been allowed and that the consequential orders stated in paragraph [5] be made.