[2011] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2008

BEFORE: **THE HON. MR JUSTICE PANTON P**
THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE DUKHARAN JA

BETWEEN	**PRINCESS WRIGHT**	**APPELLANT**
AND	**ALAN MORRISON**	**RESPONDENT**

Miss Carol Davis for the appellant

Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon & Company for the respondent

22 November 2010 and 15 April 2011

PANTON P

[1] I have read the reasons for judgment penned by my learned sister Harris JA. I am in substantial agreement with her and have nothing to add.

HARRIS JA

[2] In this appeal the appellant challenges a judgment of Gayle J, which he delivered in favour of the respondent.

[3] On 17 July 2004, the appellant was a passenger in a stationary motor car on the Hermitage main road. While there, a motor truck, owned by the respondent and driven by one Richard Connolly, collided with the car by virtue of which the appellant sustained injuries. The appellant instituted proceedings against the respondent and Connolly, claiming damages for negligence. A defence was filed by the respondent denying liability.

[4] Connolly was never served with the pleadings. At trial, evidence on the part of the defence was given by the respondent only. His evidence was that Connolly was employed as a driver to carry out errands for his, the respondent's, business from Monday to Friday each week and to transport his, the respondent's, children to and from school during the weekdays. Connolly was allowed to take the vehicle to his home at nights and on weekends. He stated that Connolly was not assigned any duties on the day of the accident and he had not granted him permission to use the vehicle on that day.

[5] The learned trial judge after giving consideration to the evidence and to the case of ***Rambarran v Gurrucharran*** [1970] 1 All ER 749 stated as follows:

> "It follows from the cases that in order to fix vicarious liability on the owner of the motor vehicle it must be shown that:
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> 1) The driver was using the car for the owner's purposes under the delegation of a task or duty.
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> 2) The owner 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.
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> 3) The car is being used wholly or partially on the owner's business or in the owner's interest.
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> Consequently, the owner will only escape liability when it is shown that the vehicle was at the material time being used for purposes in which the owner has no interest or concern."

[6] Two grounds of appeal were filed. They are:

> "a. The Learned Trial Judge erred in finding that the Respondent was not vicariously liable for the negligence of Richard Connolly.
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> b. That the finding that the Respondent was not liable for the negligence of Richard Connolly is against the weight of the evidence."

[7] It was Miss Davis' submission that there was no evidential basis for the learned trial judge's finding "that the vehicle was not being driven for the 1st defendant's purpose, interest or concern on 17 July 2004". Connolly, she argued, was employed as a driver and a bearer and was responsible for the transportation of the respondent's children to school and other activities,

including extra activities sometimes on weekends, and based on the admissible evidence before the court, the reason for which he was driving the vehicle was unknown. In the absence of such evidence, she contended, there cannot be a finding that the vehicle was not being driven for the respondent's interest or concern as the respondent has not rebutted the presumption that the vehicle was being used for his business. In support of her submissions she relied on ***Mattheson v Soltau*** [1933] 1JLR 72 and ***South v Bryan & Confidence Bus Service Ltd*** [1968] Gleaner LR 3.

[8] In the alternative, Miss Davis submitted that on the evidence, although the driver was engaged in a prohibited act, he was still in the course of his employment. He drove the vehicle on weekends within the scope of his employment and although at the relevant time he was driving without permission, he was doing that which he was employed to do, in an unauthorized way. She referred us to ***Canadian Pacific Railway Company v Lockhart*** [1942] AC 591 and ***Harvey v R. G. Odell Ltd et al*** [1958] 1 All ER 657.

[9] Miss Minto submitted that the learned judge was correct in finding as he had done, as it was in keeping with the law and the evidence. On the day of the accident no duty was delegated to be performed by the driver, accordingly, the vehicle should have been parked and the respondent gave cogent evidence to show why he could not have been on his, the respondent's business at the time, she argued. The mere ownership of a vehicle is not

sufficient to establish vicarious liability, it only raises a presumption which can be rebutted by evidence that the journey was unconnected to the employer's business and that at the time, the driver was on his own business. She cited, among others, ***Rambarran v Gurrucharran*** and ***Morgan v Launchury*** [1972] 2 All ER 606 in support of her submissions.

[10] The function of an appellate court is by way of a review of evidence taken in the court below. As a general rule, this court is reluctant to interfere with the findings of fact of a trial judge - see ***Watt v Thomas*** [1947] AC 484, and ***Industrial Chemical Co (Jamaica) v Ellis*** (1982) 35 WIR 303. Despite this, this court is armed with the authority to disturb such findings if satisfied that the judge was palpably wrong - see ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042.

[11] There is no dispute as to the ownership of the truck, nor has it been disputed that Connolly was employed to the respondent as a driver. The critical question however is, whether the driver, in making the journey on the day of the accident, was acting in the course of his employment so as to ascribe liability to the respondent. The resolution of this issue brings into focus the doctrine of vicarious liability and the question of its applicability to the circumstances of this case. The issue as to whether at the time of an accident a driver was a servant or agent of the owner is a question of fact. In establishing liability, it must be shown that a driver, using his employer's vehicle was at the time of an accident,

acting in the course of his employment. Once it is proven that the driver was so acting, then he is presumed to be an agent or servant of his employer. However, this presumption is rebuttable and may be displaced by the employer. In ***Mattheson v Soltau***, Clarke J said at page 74:

> "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."

[12] The law recognizes liability for negligence on the part of an owner of a motor vehicle, not only in circumstances where at the time of an accident, the vehicle was being driven with the owner's consent but also where it is driven without consent. Where there is consent, liability on the part of the owner may be rebutted by evidence that although the driver had the owner's general permission, the use of the vehicle was for his own purpose. In ***Rambarran v Gurrucharran***, the appellant's son had his general permission to drive his, the appellant's, motor car. The son, by his negligent driving, collided with another vehicle. On the day of the accident, the appellant was unaware that the son had used the car. The appellant was absolved from liability, it being proved that the son was not driving as a servant or agent of the owner. The purpose of his journey was irrelevant.

[13] An owner may be vicariously liable even where a wrongful act occurs by the fault of an employee acting contrary to the prohibition by the employer. In ***Canadian Pacific Railway Company,*** the respondent was injured by the negligent driving of the appellant's servant, who had embarked on a journey, using his uninsured motor vehicle for the purpose of and the means of carrying out work which he was employed to do, disregarding notices which barred employees from using privately owned motor cars for the appellant's business except the vehicles were adequately insured. It was held that the prohibition of the use of the uninsured vehicle simply restricted the way in which or means of which the employee should execute his work, that the means of transport was incidental to that which the servant was employed to do and the appellant was liable.

[14] The learned authors in Salmond & Heuston on the Law of Torts 21st edition 1996 acknowledged the principles governing the extent of a master's liability for acts authorized by him, at page 443, in the following context:

> "it is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them. In other words, a master is

> responsible not merely for what he authorizes his servant to do, but also for the way in which he does it. … On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it."

[15] A "close connection test" in vicarious liability, was introduced in ***Lister v Hesley Hall Ltd*** [2002] 1 AC 215, a case in which several children residing at a school boarding house were sexually abused by a warden. The school board was held liable in that there was a close connection between the wrongful act of the warden and his employer. In that case, Lord Steyn, in dealing with the extract from Salmond said at paragraph [15]:

> "15. For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master": *Salmond on Torts,* 1st ed (1907), p 83; and *Salmond and Heuston on Torts,* 21st ed (1996), p 443. Situation (a) causes no problems. The difficulty arises in respect of cases under (b). Salmond did, however, offer an explanation which has sometimes been overlooked. He said (*Salmond on Torts,* 1st ed, pp 83-84) that 'a master ... is liable even for acts which he has not authorised, provided they are *so connected* with acts which he has authorised, that they may rightly *be regarded* as modes - although improper modes - of doing them" (my

> emphasis): see the citation of Salmond with approval in ***Canadian Pacific Railway Co v Lockhart*** [1942] AC 591, 599 (*Salmond on Torts,* 9th ed, p 95) and in ***Racz v Home Office*** [1994] 2 AC 45, 53 (*Salmond and Heuston, Laws of Tort,* 19th ed (1987), pp 521-522; 20th ed (1992), p 457). *Salmond's* explanation is the germ of the close connection test adumbrated by the Canadian Supreme Court in ***Bazley v Curry***, 174 DLR(4th) 45 and ***Jacobi v Griffiths***, 174 DLR(4th) 71."

[16] He then carried out a review of several cases on the issue of vicarious liability and went on to say at paragraph 20:

> "20. Our law no longer struggles with the concept of vicarious liability for intentional wrongdoing. Thus the decision of the House of Lords in ***Racz v Home Office*** [1994] 2 AC 45 is authority for the proposition that the Home Office may be vicariously liable for acts of police officers which amounted to misfeasance in public office - and hence for liability in tort involving bad faith. It remains, however, to consider how vicarious liability for intentional wrongdoing fits in with Salmond's formulation. The answer is that it does not cope ideally with such cases. It must, however, be remembered that the great tort writer did not attempt to enunciate precise propositions of law on vicarious liability. At most he propounded a broad test which deems as within the course of employment 'a wrongful and unauthorised mode of doing some *act* authorised by the master'. And he emphasised the connection between the authorised *acts* and the "improper modes" of doing them. In reality it is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability. The usefulness of the Salmond formulation is, however, crucially dependent on focussing on the right act of the

employee. This point was explored in ***Rose v Plenty*** [1976] 1 WLR 141. The Court of Appeal held that a milkman who deliberately disobeyed his employers' order not to allow children to help on his rounds did not go beyond his course of employment in allowing a child to help him. The analysis in this decision shows how the pitfalls of terminology must be avoided. Scarman LJ said, at pp 147-148:

> 'The servant was, of course, employed at the time of the accident to do a whole number of operations. He was certainly not employed to give the boy a lift, and if one confines one's analysis of the facts to the incident of injury to the plaintiff, then no doubt one would say that carrying the boy on the float - giving him a lift - was not in the course of the servant's employment. But in ***Ilkiw v Samuels*** [1983] 1 WLR 991 Diplock LJ indicated that the proper approach to the nature of the servant's employment is a broad one. He says, at p 1004:
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> 'As each of these nouns implies' - he is referring to the nouns used to describe course of employment, sphere, scope and so forth - 'the matter must be looked at broadly, not dissecting the servant's task into its component activities - such as driving, loading, sheeting and the like - by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.'
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> Applying those words to the employment of this servant, I think it is clear from the evidence that he was employed as a roundsman to

> drive his float round his round and to deliver milk, to collect empties and to obtain payment. That was his job… He chose to disregard the prohibition and to enlist the assistance of the plaintiff. As a matter of common sense, that does seem to me to be a mode, albeit a prohibited mode, of doing the job with which he was entrusted. Why was the plaintiff being carried on the float when the accident occurred? Because it was necessary to take him from point to point so that he could assist in delivering milk, collecting empties and, on occasions obtaining payment.'
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> If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment."

[17] In **Bernard v The Attorney General of Jamaica,** Privy Council Appeal No. 30/2003 delivered on 7 October 2004, the Privy Council followed **Lister**. In **Bernard** the plaintiff went to the Central Sorting Office to make a telephone call and in the act of doing so, Paul Morgan, a police constable, disclosing that he was a policeman, demanded the use of the telephone to make a call and said to him "Boy leggo this". The plaintiff refused to deliver over the telephone to Morgan. Morgan slapped, shoved him and then shot him in his head with his

service revolver. The Board in applying the test laid down in **Lister** found that at the material time Morgan purported to act in the capacity of a policeman in the course of his employment "and the risks created by the police authorities reinforced the conclusion that vicarious liability was established". Lord Steyn delivering the speech of the Board and in making reference to **Lister** said the ultimate question is "whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable". He pronounced the requisite test to be as follows:

> "The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question, a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee. This strand in the reasoning in **Lister** was perhaps best expressed by Lord Millet who observed (para 83, at 250D):
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> > "…Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."

[18] Miss Davis submitted that **Bernard** refers to intentional wrongs and it is applicable to all cases of vicarious liability, including the instant case, where an employee is acting contrary to the employer's instructions. The "close connection" test, she argued, is applicable in cases in addition to intentional wrong. In the alternative, she submitted, the close connection test is applicable by the act of the employees, as his driving the vehicle without the owner's consent was intentional.

[19] It was Miss Minto's submission that in ***Bernard*** the Board made no reference to cases such as ***Rambarran*** or ***Morgan*** and it could not have been the intention of the Board to create such an inroad in the settled law on vicarious liability. The decisions of ***Bernard*** and ***Rambarran***, she argued, propose two tests which run concurrent to each other, as, the former embodies a test for the formula for vicarious liability in intentional torts while the latter embraces non intentional torts and that the application of the "close connection" test would lead to the same result in the present case.

[20] It cannot be denied that over the years, non intentional and intentional wrongs have been applied in determining vicarious liability. However, the "close connection test" does not introduce a new approach. Lord Steyn sought to put into perspective the application of Salmond's formula in relation to this approach. He indicated that in dealing with intentional torts, the issue as to

"whether an act is a wrongful and an unauthorized mode of doing some act authorized by the master" may produce an unjust and unfair result, as this formula may not invite an affirmative answer. The formula, he consigned to the question of terminology and he, referring to Scarman LJ's analytical review of the evidence in **Rose v Plenty,** demonstrated that the hidden danger of the use of certain terms must be avoided. He emphasized that the "close connection test" is not one which was plucked from the air, in the development of the law, but had its foundation in "a line of high authority", dating back to **Lloyd v Grace Smith & Co** [1912] AC 716. It must be understood that Lord Steyn, in emphasizing in **Lister** that the "close connection test" emanated from high authoritative decisions, would have obviously borne in mind leading cases on the issue of vicarious liability and of course, the decisions in cases akin to **Rambarran** and **Morgan** would, most likely, have been considered.

[21] The focus is the relative closeness of the connection between the nature of the employment and the wrongful act. In our judgment, the "close connection test" does not create a dual approach in determining vicarious liability as Miss Minto seems to suggest. To fully appreciate the intent and impact of the approach, the focal point must be the steps which are to be taken in making a decision as to an employer's liability for the acts of his employee's wrongful act.

[22] In applying the requisite principles, consideration must first be given to the relative closeness of the connection between the nature of the employment and the particular wrong. Thereafter, an inquiry should be made as to whether the circumstances dictate that it is just and reasonable to assign liability to the employer. In so doing, consideration should be given to the danger to others created by the employer, who assigned duties, as well as the tasks given to the employee. All these factors, when taken cumulatively, would certainly apply to all actions falling within the ambit of the vicarious liability doctrine. It follows therefore, that the necessity would not have arisen for Lord Steyn to have expressly, mentioned **Rambarran** and **Morgan**. In our judgment, the test propounded by him has not brought about a change in the approach in the law on vicarious liability. The "close connection test" does not displace the traditional test but rather, in widening its scope, it permits the court to adopt a broader perspective of the law.

[23] Was Connolly, at the material time, driving in the capacity of the respondent's servant and could the accident be said to have occurred in the scope of his employment so as to render the respondent vicariously liable? It cannot be denied that the facts in **Lister** and **Bernard** are dissimilar to those of the case under review. However, "the close connection" approach is indeed applicable to this case. In applying the test, several aspects of the instant case must be examined. It has not been denied that the respondent was the owner of the truck, that the driver was employed to run errands and to transport the

respondent's children to school and to other activities. The respondent, in his witness statement stated that he permitted the driver to keep the vehicle at nights and on weekends as it facilitated the collection of the children in the mornings.

[24] Significantly, in cross examination, the respondent stated that the driver would sometimes, on weekends, take the children to extra activities. The fact that with the respondent's permission, the driver was allowed to retain possession of the truck on weekends and at nights, invites the reasonable inference that the driver had general permission in order to facilitate the transportation of his children at any time, be it on a weekday or weekend. Even if, Connolly, at the time of the accident, had departed from that which he is permitted to do, little weight will be given to this. In ***Williams v A & W Hemphill Ltd*** 1966 SC (HL) 31, a driver of a lorry deviated from his route and met an accident. Lord Pearson said, "The more dominant are the obligations of the master's business with the lorry the less weight is to be attached to disobedient navigational extravagancies of the servant".

[25] In our view, the respondent is taken to have retained control of the vehicle at all times notwithstanding that it was in the driver's possession. It would have been reasonably foreseeable that the driver could have been involved in an accident. It was incumbent on the respondent to have ensured that the vehicle was not used in an unlawful manner. He would have known or ought to

have known that if the truck was used in an unlawful manner by the driver, some harm could come to a third party. Consequently, by permitting retention of the vehicle by the driver, the respondent created the risk of the appellant sustaining her injuries and therefore cannot escape liability. This leads to the conclusion that at the time of the accident Connolly was driving as the respondent's agent and with his consent.

[26] The appeal is allowed. The judgment of Gayle, J is set aside. Judgment is entered for the appellant. The matter is referred to the court below for an inquiry as to damages. The costs of the appeal and the costs of the court below are awarded to the appellant.

DUKHARAN JA

[27] I too agree with the reasoning and conclusion of my sister Harris JA and have nothing to add.

PANTON P

ORDER

Appeal allowed. The judgment of Gayle J set aside. Judgment is entered for the appellant. The matter is referred to the court below for an inquiry as to damages. The costs of the appeal and the costs of the court below are awarded to the appellant.