It must be remembered that there was no evidence as to loss of expectation of life or loss of future earnings, and the learned judge did not include those two items. With respect to the trial judge, in my opinion, the amount awarded was so inordinately high that it must be considered "a wholly erroneous estimate." I would, therefore, reduce the amount awarded for physical injury, etc., from £4,000 to £1,000 and that awarded for disfigurement and disablement from £7,000 to £2,000 and I consider these figures generous. The general damages are, therefore, reduced from £11,000 to £3,000.

Freetown
Nov. 15,
1962

Ames Ag.P.,
Bankole Jones
Ag.C.J.,
Dove-Edwin

[COURT OF APPEAL]

IBRAHIM JALLOH . . . . . *Appellant*

v.

C.F.A.O. LTD. . . . . *Respondent*

[Civil Appeal 18/62]

Tort—Negligence—Ferry carrying overloaded lorry sank in river—Whether driver employee of lorry owner or hirer—Effect of permission by head ferryman to put lorry on ferry—Law Reform (Law of Tort) Act, 1961 (*No.* 33 *of* 1961)—*Ferries Rules* (*Laws of Sierra Leone,* 1960, *Vol. VII, p.* 974), *r.* 4—*Court of Appeal Rules* (*Laws of Sierra Leone,* 1960, *Vol. VI, p.* 325), *rr.* 35, 36.

Appellant was the owner of a lorry which was hired by the respondent company to carry 30 drums of kerosene from Freetown to Kailahun. While crossing a river on a Government ferry, the ferry sank because of the combined weight of the lorry and kerosene. There were abitration proceedings, which ended in favour of the insurers of the lorry. Appellant then sued respondent in contract. The judge found that the lorry was on special hire by respondent at the time of the accident and that both respondent and the driver of the lorry were negligent. He also found that the driver was in the employment of appellant, held that the doctrine of "respondeat superior" applied and apportioned the negligence 50 per cent. to each party. The judge then directed that the matter be referred to the master and registrar for assessment of the loss. Against this judgment, appellant appealed.

Held, allowing the appeal, (1) that, at the time of the accident, the driver of the lorry was in the employment of respondent; and

(2) That the fact that the head ferryman allowed the lorry to be loaded on the ferry did not affect the question of negligence.

The court (Ames Ag.P.) said, obiter, that it was questionable whether the judgment appealed from was a final judgment; and that rules 35 and 36 of the Court of Appeal Rules would not enable the Court of Appeal to reverse a part of the judgment unfavourable to the respondent in the absence of a cross-appeal by the respondent.

Case referred to: *A. H. Bull & Co.* v. *West African Shipping Agency & Lighterage Co.* [1927] A.C. 686.

Cyrus Rogers-Wright for the appellant.

Claudius D. Hotobah-During for the respondent.

AMES AG.P. In June of 1959 a lorry, owned by the plaintiff/appellant, was on its way from Freetown to Kailahun with a load of 30 drums of kerosene. The journey necessitated crossing a river by Government ferry. Because of the combined weight of the kerosene and the lorry, the ferry sank, with the lorry and its load. There was arbitration proceedings, which ended in favour of the insurers of the lorry. The plaintiff then sued the C.F.A.O. Ltd. in contract. His case was that the company, as I will call the defendants/respondents, had chartered his lorry, and that they had overloaded it so much that the ferry sank. The company's case was that the plaintiff was a common carrier, and that he received the kerosene as such, and that there was no liability on the company.

The learned judge found the fact to be that the plaintiff was not a common carrier, and that " the lorry was on a special hire by Messrs. C.F.A.O. and was doing work for them in conveying their goods from Freetown to Kailahun." There was uncontradicted evidence which supported that finding of fact, and in my opinion, it makes the company the bailees of the lorry for the journey, as distinguished from a contract made by the company with the plaintiff for the carriage by the plaintiff of the goods of the company.

The law as to the liability of a bailee in a bailment of this sort is well settled, and is, as stated in Chitty on Special Contracts (22nd ed.) at para. 185:

> " The hirer is liable to pay the agreed hire, and to return the chattel at the expiration of the agreed period. The hirer is bound to take reasonable care of the chattel hired but he is not liable for its loss or injury unless he or his servant (acting in the course of his employment) was negligent."

The learned judge found that both the company and the driver of the lorry were negligent, and, because the driver was in the employment of the plaintiff, he held that the doctrine of " respondeat superior " applied and apportioned their negligence as 50:50. This shows that in the end the learned judge treated the matter as one of tort. (Anyhow, the law enabling damages to be apportioned in claims in tort, the Law Reform (Law of Tort) Act, 1961, was not in force at the time of the incident and had no retrospective effect. It came into force the dav before the writ was issued.)

There was no evidence as to the value of the vehicle at the date of its loss, and so the judge, having decided the 50:50 liability, directed that the matter be referred to the master and registrar " for assessment of the loss " and gave some directions for his guidance.

Against that judgment the plaintiff has made this appeal. The appeal has been made as if it were a final judgment. Whether it is or not may be questionable. But no question has been made. On the contrary, Mr. Hotobah-During, for the company, said that he accepted it as a final judgment.

The company have not made any cross-appeal. Nevertheless, Mr. During argued that no liability should have been put on the company. He submitted that rules 35 and 36 of the rules of this court enabled him so to argue and this court to reverse that part of the judgment, although not appealed against. In my opinion, those rules would not have enabled us, had we been minded, to do so.

I have said that the judge found the driver to be in the plaintiff's employment. So he was, generally speaking; but this was a particular occasion of

"special hire" and somewhat similar to the occasion in *A. H. Bull & Co.* v. *West African Shipping Agency & Lighterage Co.* [1927] A.C. 686. In that case the one company hired from the other company a lighter manned by two lightermen who were in the general employment of the latter company. Owing to the lightermen's negligence, the lighter got adrift in a strong current and eventually broke up on the shore. It was held that the two lightermen were the servants of the hiring company during the hiring. The case went as far as the Privy Council, who said at page 691:

> "Their Lordships think it only necessary to refer to *Donovan* v. *Laing, Wharton and Down Constructions Syndicate* for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say, a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer."

On this principle the driver's negligence was, in the circumstances, not that of the plaintiff but that of the company. Consequently, the company should have been held liable for the whole 100 of the 50:50, and not merely half of it.

By sub-rule (1) of rule 4 of the Ferries Rules (Vol. VI, p. 975):

> "No motor vehicle the laden weight of which exceeds five-and-a-half tons shall be permitted to make use of any ferry pontoon: Provided that the Director of Public Works or any officer authorised by him in that behalf may, by his consent in writing for a particular occasion or particular occasions and subject to such conditions as he may impose, exempt a motor vehicle from the provisions of this rule."

One of the particulars of negligence in the statement of claim was:

> "2. Failing to obtain the permission in writing of the Director of Public Works."

I do not understand this. The permission in writing would not have kept the ferry afloat: and if the truth of the proposed facts and figures had been stated in the application for the permission, no doubt permission would have been refused. The negligence was in putting the lorry and total load on the ferry instead of taking the load over in parts.

Sub-rule (2) of rule 4:

> "If, in the opinion of any head ferryman, the laden weight of any vehicle exceeds five-and-a-half tons, the driver of such vehicle, upon being requested so to do, shall cause it to be either partially or completely unloaded before driving it on to the ferry pontoon so as to make its laden weight less than five-and-a-half tons."

The driver was not a witness in the court below, but his evidence in the arbitration proceedings, which was put in evidence without objection, had been:

> "The head ferryman checked the contents of the lorry and found it to be 30 drums of kerosene. I was then called and went into the ferry."

How this affected the question of negligence was not gone into in the court below. It was touched on in this court. In my opinion, it does not affect the learned judge's findings as to negligence at all. This rule 4 (2) must be read with rule 4 (1), and is supplementary to it. Ferries are only intended for five-and-a-half tons. The ferrymen are not empowered (as is the Director) to permit heavier loads. What they are empowered to do is to refuse to take a load if, in their opinion, it is too heavy. If a dispute arises as to whether or not a load is too heavy, this rule enables the ferryman to have legally the last word and to refuse. It does not do more than that.

The case in the court below proceeded on the basis that the gross weight of the laden lorry was too much for the ferry, and the dispute was as to the liability. The exact gross weight did not appear. In the arbitration proceedings, it was said (by the company) that the kerosene weighed about five tons. The unladen weight of the lorry is nowhere mentioned. But if the load was too much for the ferry, it matters nothing by how much it was too much.

In my opinion, the appeal should be allowed and the decision, making the appellant liable for half the loss, should be set aside and the company made liable for the whole loss to be assessed by the master as directed by the court below.

[COURT OF APPEAL]

Freetown
Nov. 16, 1962

Ames Ag.P., Dove-Edwin J.A., R. B. Marke P.J.

DIVIN KOROMA, FODAY BANGURAH AND THOMAS FILLIE *v.* REGINA

[Criminal Appeals 21, 22, 23/62]

Criminal Law—Murder—Trial—Evidence—Incriminating statement which also denies guilt—Evidence consistent with guilt and with innocence.

Appellants were convicted of a murder which took place on October 17, 1961. On October 18, third appellant made a statement to the police which was not incriminating. On October 25, he made another statement to the police in which he started by incriminating himself but ended by denying that he had participated in the murder. ("... it is true that I am a member of the human baboon society but the day of the incident I was not among them and that day I was in the bush cutting sticks. ...") At the trial, there was some additional evidence but it was as consistent with the innocence of third appellant as with his guilt. He did not give evidence at the trial, but made a statement from the dock denying his guilt.

Held, allowing the appeal of third appellant, that where a defendant is convicted on the basis of a statement in which he both incriminates himself and denies his guilt, the conviction should not be allowed to stand.

The appeals of first and second appellants were dismissed.

Aaron Cole for the first and second appellants.
W. S. Marcus Jones for the third appellant.
Nicholas E. Browne-Marke (Acting Solicitor-General) for the respondent.