ELIAS *v.* JAFFA and SESAY

SUPREME COURT (Beoku-Betts, J.): March 31st, 1953
(Civil Case No. 206/52)

[1] **Employment—duties of employee—duty of care—employee must not negligently cause damage to employer or his property or to third party or his property:** The duty of an employee to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property, or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act (page 306, lines 11–16).

[2] **Employment—third parties—employer's liability to third party in tort—act must be in course of employment and scope of authority—wrongful and unauthorised mode of doing authorised act within scope of authority:** It is not sufficient to render an employer liable for the acts of his employee merely to show that the relation of employer and employee existed between the actual tortfeasor and the person sought to be made liable, or even that the act in the doing of which the third person was injured was done on the employer's behalf; the act must be shown to have been performed while the employee was acting in the course of his employment, that is, in the capacity of an employee engaged on his employer's business, and was doing an act which he was employed to perform, or at least one which was incidental to his employment; and such liability extends to a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing an authorised act (page 304, lines 12–32; page 305, lines 26–32; page 306, line 31—page 307, line 16).

[3] **Tort—damages—measure of damages—torts affecting person—matters to be considered in assessing damages:** In assessing general damages for personal injuries, the court has to consider the nature of the injuries suffered, the pain and suffering endured, past, present and future, the inconvenience and loss of enjoyment of life sustained, past, present and future, financial loss, actual and prospective, and loss of earning capacity (page 308, lines 19–24).

[4] **Tort—negligence—damages—measure of damages—personal injuries awards—matters to be considered in assessing damages:** See [3] above.

The plaintiff brought an action against the defendants to recover special and general damages for negligence.

The second defendant was employed by the first defendant to drive a lorry, and part of his job was to seek out business for his employer. When returning the lorry to the first defendant's premises

after failing to obtain custom for him, the second defendant took a longer route than usual; in the course of the return journey, as a result of a long-standing defect in the vehicle, it left the road and severely injured the plaintiff. The plaintiff instituted the present proceedings to recover special and general damages against both defendants for the second defendant's negligent driving.

The Supreme Court considered whether the second defendant was negligent; whether his negligence, if proved, caused the injury to the plaintiff; and whether the first defendant could be held vicariously liable for the second defendant's action in the circumstances of the case.

Cases referred to:

(1) *Canadian Pacific Ry. Co.* v. *Lockhart*, [1942] A.C. 591; [1942] 2 All E.R. 464, applied.

(2) *Century Ins. Co. Ltd.* v. *Northern Ireland Road Transp. Bd.*, [1942] A.C. 509; [1942] 1 All E.R. 491, *dicta* of Lord Wright considered.

(3) *Harris* v. *Bright's Asphalt Contrs. Ltd.*, [1953] 1 Q.B. 617; [1953] 1 All E.R. 395, *dictum* of Slade, J. considered.

(4) *Joel* v. *Morison* (1834), 9 C. & P. 501; 172 E.R. 1338.

(5) *McKean* v. *Raynor Bros. Ltd.*, [1942] 2 All E.R. 650; (1942), 167 L.T. 369, applied.

(6) *Mitchell* v. *Crassweller* (1853), 13 C.B. 237; 138 E.R. 1189, distinguished.

(7) *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476; 38 L.J.Q.B. 223, distinguished.

(8) *Warren* v. *Henlys Ltd.*, [1948] 2 All E.R. 935; (1948), 92 Sol. Jo. 706, applied.

R.W. Beoku-Betts for the plaintiff;
C.B. Rogers-Wright for the first defendant;
Miss Wright for the second defendant.

BEOKU-BETTS, J.:

The original action was against Rahid Jaffa. Later on Tame Sesay was added, and when the case was tried the claim was as between the plaintiff on one side and the first and second defendants on the other side. The amended statement of claim was that the first defendant was the owner of lorry No. PR 258 doing business in Freetown, and that the second defendant is the driver of the lorry

and the servant of the first defendant. It was alleged that the plaintiff was walking along the sidewalk on September 15th, 1951 when the lorry driven by the second defendant in the course of his duty and going in the direction of Wilberforce Street was driven in such a negligent manner that it left the main road, careered on to the sidewalk, and pinned the plaintiff against a pile of iron bars on the ground by the side of a house situate at the corner of the sidewalk. It is alleged that as a result of that the plaintiff suffered damage to both legs. He was taken to the Connaught Hospital where he was admitted and one of the injured legs was amputated. Special and general damages are claimed. The special damages are the following:

		£.	s.	d.
1.	Hospital fees	96	0	0
2.	Further hospital fees	12	12	0
3.	Amount deposited for artificial limb	50	0	0
4.	Cost of artificial limb	46	0	0
5.	Bill by Dr. W.M. Quinn for professional services	42	0	0
6.	Goods destroyed by bugs during absence of plaintiff	140	0	0
7.	Loss of business from September 15th, 1951 to February 2nd, 1952	483	0	0
8.	Loss incurred in two other of the plaintiff's shops at Tiama (during the same period) @ £30 per month	157	0	0
	[*sic*]	£1,027.	2s.	0d.

The defence, original and amended, is as follows: admission of the injury, denial of negligence, but a statement that the injuries were caused by inevitable accident, or alternatively that the plaintiff contributed to the accident by his own negligence.

If the case had been tried by a jury, the last ground of defence would not have been looked at, but as it is tried by a judge I am permitted to state that, alternatively and whilst denying liability, the defendant brings into court the sum of £650 and says that such a sum is sufficient to satisfy the plaintiff's claim, if any.

I have considered the evidence for the parties and the whole case may be divided into the following heads:

1. Was the second defendant negligent?

2. Was his negligence the cause of the accident, or was the cause the negligence of the plaintiff, contributory or otherwise?

3. Was the first defendant liable for the negligence of the second defendant, if any?

In other words was the second defendant a servant of the first defendant, and can the accident be said to have occurred while the second defendant was within the scope of his employment as a servant of the first defendant? The first question I have to consider is whether the second defendant was negligent.

In considering the whole of the evidence, I can come to no other conclusion than that the second defendant was negligent. I believe the evidence of Arthur Gilliver, the plaintiff's third witness, that a defective vehicle was driven along the road, and that defect was not sudden but should and could have been noticed. The vehicle left the road, went out of the path where vehicles pass and met the plaintiff on the sidewalk. The defence of inevitable accident cannot be sustained.

The defendant's fifth witness, Mohamed Hamoud, was called to minimise, I presume, the effect of the evidence of Gilliver. But if I were to choose between Gilliver and Hamoud, I would prefer the former for many reasons, the principal being that Gilliver is independent while Hamoud was involved in business relations with the defendant.

On the second question, I acquit the plaintiff from any negligence and I find that the negligence of the second defendant was the effective cause of the accident; the plaintiff was in no way contributory to the accident, and when the lorry met him with the results which we know of, the fact was due principally in my opinion to the second defendant driving a defective vehicle on the highway which naturally got out of control.

The question which arises is whether the first defendant was liable for the negligence of the second defendant. If one were to reach a logical conclusion from the evidence of Mr. Gilliver, it would be that the first defendant must have known of this defect. According to him a considerable number of miles must have been driven to cause the defect. What he saw was not the result of anything which could have happened suddenly. There is evidence that some action, criminal or quasi-criminal, was taken, and resulted in both defendants being acquitted. The records were not produced, and all the parties realise that I am not bound by any decision in any police case. I do not however base my decision on any inference

I may draw from the evidence of Gilliver on this point, but I will consider whether the first defendant can be made liable for the negligence of the second defendant. The ordinary principle is *respondeat superior*, but if it is shown that a servant acts out of the scope of his employment, then his master will not be liable for any damages. The first defendant and the second defendant stand in the relationship to each other of master and servant; but was the servant acting within the scope of his employment or can it be said that the accident happened while he was on a frolic of his own? The legal position is stated in 22 *Halsbury's Laws of England*, 2nd ed., at 225, para. 403, where the following is stated:

> "The master's liability depends upon the servant's failure adequately to discharge the duties which he is employed to perform. It is not sufficient to show that the relation of master and servant existed between the actual tortfeasor and the person sought to be made liable, or even that the act in the doing of which the third person was injured was done on the master's behalf. The act must be shown to fall within the scope of the servant's authority as being an act which he was employed to perform, or at least which was incidental to his employment . . . ."

It is further stated in *Halsbury*, at 226, para. 405:

> "It is further necessary to show that the servant, in doing the act which occasioned the injury, was acting in the course of his employment. For this purpose it is not sufficient merely to show that the act is one which falls within the scope of his authority; the particular act must be shown to have been done by him in the capacity of servant and purporting to be on his master's business. If at the time when the injury took place he was engaged, not on his master's business, but on his own, the relation of master and servant does not exist, and the master is not therefore liable . . . ."

On behalf of the defendant it was submitted that the second defendant deviated from his employment, and at the time that the accident happened the master was not liable. It was proved that the second defendant had a duty to drive the first defendant's lorry for the purpose of finding work for the first defendant. The first defendant stated that the second defendant should go on foot, but the second defendant himself stated that he went, and that he always went, in the defendant's lorry. When there was no load, he came down to the first defendant from Rock Street. On this

occasion he went by Sackville Street, Goderich Street, Wilberforce Street and East Street to the first defendant. He stated he passed through Wilberforce Street to tell someone that he was not going to the Protectorate that day. The way in which the first and second defendants gave their evidence as to what happened, and the discrepancy between them, left me with no other option than that I cannot believe them. In my opinion the second defendant came to the place where the accident took place while in the course of his employment, otherwise he would have come down East Street and not taken the longer road, as he himself said, when he had no load. Although vehicles with PR registrations cannot ply for hire in Freetown, the fact that drivers come to Freetown to find loads for their masters is evidence that they can drive through Freetown. If any accident happens while driving through Freetown, it cannot be said to be outside the scope of the owner's liability; the owner cannot escape liability.

Learned counsel for the defendants referred to two cases. The first was *Mitchell* v. *Crassweller* (6), in which it will be seen that the accident happened after the driver had finished for the day and wrongly retained the keys. The decision could be understood, as being that the driver was not at the time of the accident engaged in the business of his master; he had finished for the day.

The other case referred to was *Storey* v. *Ashton* (7), and the facts of this case also are quite different—the driver went in quite another direction from that he was required to go.

Counsel for the plaintiff drew my attention to the case of *McKean* v. *Raynor Bros. Ltd.* (5), which decided that where a person was doing an authorised act within the scope of his employment, although the act was done in an unauthorised way, the defendant was liable so long as the act was not prohibited. The other case referred to was *Joel* v. *Morison* (4), which states the general principles involved.

A few comparatively recent cases may be referred to to show the principle in operation. The first of these cases is *Century Ins. Co. Ltd.* v. *Northern Ireland Road Transp. Bd.* (2). This was a case where a man lit his cigarette and this caused a fire. The question was whether he could be said to be acting in the course of his employment. Lord Wright, after stating that each case must be decided on its particular facts, said, *inter alia* ([1942] A.C. at 519; [1942] 1 All E.R. at 497):

"On the other question, namely, whether Davison's negli-

gence was in the course of his employment, all the decisions below have been against the appellants. I agree with them . . . . The act of a workman in lighting his pipe or cigarette is an act for his own comfort and convenience and, at least generally speaking, not for his employer's benefit, but that last condition is no longer essential to fix liability on the employer: *Lloyd* v. *Grace Smith & Co.* Nor is such an act prima facie negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances in which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons and their property and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act."

Another case I shall refer to is that of *Canadian Pacific Ry. Co.* v. *Lockhart* (1). In that case, where a servant of the appellant company, in disregard of written notices prohibiting employees from using privately-owned motor cars for the purposes of the company's business unless adequately protected by insurance, used his uninsured motor car on a journey for the purpose of, and as a means of execution of, work which he was ordinarily employed to do, and by negligent driving injured the respondent, it was held that the means of transport was incidental to the execution of that which he was employed to do, and that the prohibition of the use of an uninsured motor car merely limited the way in which he was to execute the work, and that breach of the prohibition did not exclude the liability of the company. The Board stated ([1942] A.C. at 599; [1942] 2 All E.R. at 467):

"The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles, their Lordships agree with the statement in Salmond on Torts, 9th ed., p. 95, namely: '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 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 of it.'"

The last case to which I shall refer is that of *Warren* v. *Henlys Ltd.* (8). In that case the master was held not responsible but the principle was restated that a master was not responsible for a wrongful act done by his servant unless it was done in the course of his employment. It was deemed to be so done if it was either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master.

The whole case eventually resolves itself into one of fact. In this case I am of the opinion that the first defendant is liable for the negligence of the second defendant; the second defendant was the servant of the first defendant in the driving of the motor vehicle; the vehicle was taken out for the purpose of getting customers; and when the second defendant was returning the accident took place. It is said there was a detour. According to counsel for the first defendant, it consisted in the vehicle taking a longer course than it might have done. I do not think there was any deviation in this case. The second defendant drove his master's vehicle while in the employment of his master and informed his master after the accident.

I find for the plaintiff. What remains now is to determine the damages. The principles which should guide the court are stated in 10 *Halsbury's Laws of England*, 2nd ed., at 82, 93, 133, and intervening pages. The general principles of damages are well known and I need not refer to them at any length. In this case the damages are those which may be classified as special and general. These have been dealt with by both counsel and all that seems necessary is to state the amount allowed under each head.

As to special damages, the first head is the amount paid to the hospital, whether it is £90 or £76. The only receipt which I have seen is for £76, and I therefore allow £76.

There is no dispute about the next head, *i.e.*, £12. 12s. 0d. I therefore allow it.

Under the next two headings the sum of £50 was charged as a deposit for the artificial limb and £46 as the cost. On this head also I accept the defendants' figures as more in accord with that of the specialist and award the sum of £70.

The next item is the £42 bill of Dr. Quinn; that I allow.

The next item is £140, being the value of goods destroyed by bugs. The evidence as to this is not clear, and I cannot allow this item under special damages.

Then there is £483 for loss of business. In my opinion the plaintiff, a businessman, must have lost by the sudden dislocation of his whole business machinery. The fact that he had a wife, and that someone could have carried on, will not meet the case; but I do not think that the plaintiff can claim under special damages, or that I can allow this item under special damages on the evidence which was brought.

The last head is £157 as loss incurred by the plaintiff in two shops. These I consider remote and so do not allow them. The total of special damages is therefore a total of £200. 12s. 0d.

As regards general damages, the court has to consider the personal injuries suffered, the pain and suffering endured, past, present and future, the inconvenience and loss of enjoyment of life sustained, past, present and future. Under this head the court should also consider the plaintiff's financial loss, actual and prospective, and the loss of earning capacity: see *Charlesworth on Negligence*, 1st ed., at 505–508 (1938). In this case the personal injury was so great that one leg was amputated and there is evidence that the other leg was affected. We do not yet know whether the plaintiff has seen the end of his suffering. I do not consider that damages can ever be sufficient compensation to a normal man for the loss of a leg, and whatever I may allow is in my opinion not sufficient, but so far as is possible it is my duty to allow the plaintiff damages which may approach the loss he has sustained. In awarding damages, I am reminded of the words of Slade, J. in *Harris* v. *Brights Asphalt Contrs. Ltd.* (3), when he said ([1953] 1 All E.R. at 403):

> "I remember what I have been enjoined to remember by case after case in the higher courts, that no amount of damages would compensate him for what he has suffered, for what he has lost, for what he will continue to suffer and lose. I do not pretend to award a sum which will do so, but I have to award a sum for this terrible physical and mental suffering over the last two years and two months . . . and I assess it at £5,000."

[These words do not appear in the report of the case at [1953] 1 Q.B. 617.]

Up to today, over one year later, nearing two years in fact, the plaintiff is without a suitable leg. It is true one was got by the specialist, but it had to be sent back, and the plaintiff has to use crutches. I assess the damages at £2,700, and with the special damages of £200. 12s. 0d. that is a total of £2,900. 12s. 0d. The costs are to be paid by the defendants.

Judgment for the plaintiff.

KAMARA (or SUSU) *v.* REGINAM

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Verity, C.J. (Nig.) and Coussey, J.A.): April 24th, 1953
(W.A.C.A. Cr. App. No. 72/53)

[1] **Criminal Law—homicide—evidence—dying declarations—admissible to show cause of death and identify person responsible:** In a trial of homicide, a dying declaration by the deceased naming the person responsible is admissible to show the cause and circumstances of death (page 311, lines 6–8).

[2] **Evidence—dying declarations—admissible to show cause of death and identify person responsible:** See [1] above.

[3] **Evidence—res gestae—words accompanying res gestae—words identifying offender uttered during actual commission of crime admissible as part of res gestae:** Evidence of spoken words which would be otherwise inadmissible as hearsay will be admissible as evidence of the truth of what was said if the words were uttered while the crime was actually being committed and therefore form part of the *res gestae* (page 311, lines 3–6).

The applicant was charged with murder in the Supreme Court. At the trial the applicant was convicted on the evidence of one person who heard the words uttered by the deceased while the crime was actually being committed and another person who heard her dying declaration. Both declarations identified the person responsible as the applicant. On an application for leave to appeal, the West African Court of Appeal considered whether such evidence was admissible in the circumstances of the case.