JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NO. 60 & 61 OF 1981

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN	LULETTA FLO DOUGLAS (BY NEXT FRIEND LUCILLE DOUGLAS)	PLAINTIFF/APPELLANT
AND	KINGSTON AND ST. ANDREW CORPORATION	1ST DEFENDANT/RESPONDENT
AND	DAVID EMANUEL	2ND DEFENDANT/RESPONDENT
AND	ROBERT GORDON	3RD DEFENDANT/RESPONDENT

A N D

BETWEEN	MILTON DOUGLAS	PLAINTIFF/APPELLANT
AND	KINGSTON AND ST. ANDREW CORPORATION	DEFENDANT/RESPONDENT

Clinton Hines and Mrs. E. Hines for Appellants.

W. K. Chin-See, Q.C. and M. M. March for the Kingston and St. Andrew Corporation.

June 25, 26, 27, 28, 29, 1984; February 25, 26;
June 14, 1985

CARBERRY, J.A.:

This was an appeal from the judgment of Smith, C.J. delivered on the 25th September, 1981, in favour of the 1st defendant/respondent, The Kingston and St. Andrew Corporation, in these two actions which were tried together by consent.

Both actions arose out of the same set of circumstances, namely that on the 14th September, 1975 (a Sunday), a garbage truck owned by the Kingston and St. Andrew Corporation (hereinafter called the K.S.A.C.) was driven by Robert Gordon (a sideman on the truck) into the home of the Douglas family, where it caused extensive damage

to the house, furniture and motor car of Milton Douglas, and also grave and serious damage to his infant daughter Luletta, then a child of two years old.

Milton Douglas commenced his action against the K.S.A.C. by Writ dated the 10th September, 1976 (Suit No. C.L. D. 098 of 1976) claiming for the damage to the house, furniture and motor car.

Unfortunately the action on behalf of the infant Luletta was not commenced until Writ filed on the 5th December, 1979, (Suit No. C.L. 1979/D105). This is outside of the one year period prescribed by The Public Authorities Protection Act, and has resulted in an additional defence being filed to her claim, namely that it is barred by that Act. Luletta's claim was filed by a different attorney to that of her father. We have had no explanation given for the delay, but it seems a fair inference from the evidence that there was a considerable time lapse between her receiving the injury and the time when it began to be appreciated how severe it had in fact proved to be. The Act however makes no allowance for either the disability of infancy, or for circumstances in which an apparently superficial injury proves over the years to be one with devastating consequences.

On the 24th August, 1978 the conduct of Milton Douglas' claim was taken over by his present attorneys, who filed action on behalf of Luletta on the 5th December, 1979, along with the Statement of Claim in her case. On the 2nd September, 1980 Judgments in Default of Appearance were entered against the second and third defendants, David Emanuel and Robert Gordon, with orders that the damages be assessed and costs taxed.

David Emanuel was at the material time the K.S.A.C. driver of the truck, and Robert Gordon the head sideman on the truck, and the person who was actually driving it at the time of the accident.

The defence of the Public Authorities Protection Act was not put in until sometime in 1981, very late in the day, and in fact on the opening day of the trial.

As far as we are at present aware no formal step was taken by the plaintiffs or rather on behalf of Luletta to have the trial before Smith, C.J. treated as the assessment of damages against Emanuel and Gordon, and neither the Written judgment of Smith, C.J. nor the formal judgments entered in the two Suits deal with their position. They were not parties in the Milton Douglas Suit. Nor were they represented at the hearing before the Chief Justice, though they both gave evidence therein. Possibly any judgment against them would be brutum fulmen, in that there would be no real chance of ever enforcing it, even partially. Their position however remains in doubt. The substantial point argued at both the trial before the Chief Justice and the appeal before us was the liability of the K.S.A.C. for what had happened. No argument was addressed to us on the question of whether Emanuel and Gordon would themselves be entitled to the protection of the Public Authorities Protection Act.

This case turns on the question of whether the K.S.A.C. was vicariously liable for the damage inflicted on the Douglas family due to the negligent driving of their truck into the Douglas family home. The theories on which vicarious liability is said to rest have been discussed exhaustively in "Vicarious Liability in the Law of Torts" published in 1967 by Professor P. S. Atiyah (now Professor of English Law at Oxford University). He observes:

> "On the whole it seems doubtful whether much is to be gained by an examination of the 'true' basis of vicarious liability. The fact is that in the great majority of cases it makes no difference which view is adopted; and in those cases where it does make a difference the courts (at any rate in England) are much more likely to be influenced by pragmatic considerations, than by doctrinaire theories. Any attempt to adopt one theory rather than another, and then apply that theory in all circumstances is only too likely to lead to blind legalism....." (page 7)

He does however explore the theories and notes that ultimately the law in this arearests to a considerable extent on public policy, and the feeling that the person or body that creates the

situation out of which the risk of damage arises, ought to pay for that damage when it does arise. He discusses at length the passage from Salmond on the Law of Torts, which has been adopted by a great many judges and Courts as an accurate statement of the law on this topic. That passage, taken from the 17th Edition at page 465 reads thus:

> " § 176. THE COURSE OF EMPLOYMENT
>
> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised 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 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. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised 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."

As I understand the law, based on this passage and on the numerous cases which have been cited to us, it is necessary for a plaintiff who wishes to succeed against the K.S.A.C. to establish three things: (1) That the person whom they blame for the accident or incident has in fact committed a tort or actionable wrong; (2) That that person is a servant or employee of the K.S.A.C.; (3) That the wrongful act was one committed by him in the course of his employment to the K.S.A.C.

There are limits on the liability of employers, and this case turns on whether those limits have been exceeded or not.

The facts: Turning for the moment to the facts that emerged in the evidence in this case, they appear to be as follows:

On Sunday 14th September, 1975, the K.S.A.C. truck which caused the damage was driven from the Bumper Hall Headquarters by its driver David Emanuel to collect garbage along the Waltham Park Road, take the same to the garbage dump, and thence to return the truck with its tools and equipment to the Headquarters at Bumper Hall. Emanuel was the driver and person primarily in charge of the truck. Robert Gordon was one of the four loaders or sidemen, and apparently the chief loader, and personally responsible for checking back into the stores the shovels and tools taken out that morning for use by the sidemen. Having accomplished its primary task the truck was being driven back to its Headquarters (and the end of its day's work) by Emanuel, when he decided to deviate from his route and to stop in the vicinity of a club where patrons were apparently playing dominoes and enjoying a fried fish feed. The Chief Justice did not accept the reason given by the driver for this deviation (he had suggested that part of his normal route was blocked by road repair work). He found that the primary reason for the deviation was the driver's wish to participate in the entertainment offered at the place at which he stopped. Nevertheless he held that the deviation was not so extensive as to constitute the driver going off on a frolic of his own, and he cited Joel v. Morrison (1834) 6 C & P 501 (see Parke, B at 503) and Storey v. Ashton (1869) L.R. 4 Q.B. 476. No complaint is made as to this finding.

The driver stopped at the premises for a period of time which clearly exhausted the patience of Gordon the sideman, who wanted to have the truck returned to Headquarters so that he could hand in the tools for which he was responsible and then go off duty. The

truck had been left with its engine running, (and switch key in position) because it was giving trouble to start. The driver Emanuel left the sideman Gordon in charge of it, while he went off to the fish feed. Gordon appears to have called on Emanuel to resume his journey so that he could go off duty: Emanuel told him, he was coming, but did not come, and after a further period of time, Gordon puts the total delay at nearly two hours, Gordon's patience was exhausted. He put himself behind the wheel and drove off.

Unfortunately, after having driven some forty chains Gordon got into difficulties: he said that the accelerator of the truck stuck, though he was not going at any great speed he attempted to pull up the accelerator with one hand using the other to control the steering. The front wheel struck the curb wall and he lost control of the truck which crashed into the Douglas family home.

The Chief Justice records:

> "I find that the accident was caused by Mr. Gordon's negligence in employing an awkward manoeuvre to release the accelerator instead of using a safer means whereby to stop the truck, e.g. by neutralizing the gears and using the brakes. His negligence was the effective cause of the accident and not the defective accelerator."

The Chief Justice recorded other findings: He found that the accelerator was in the habit of sticking but that the K.S.A.C. had not been charged with fault in that respect. Emanuel the driver had denied that anything was the matter with the accelerator that morning, saying that all that was wrong was the difficulty in starting it with the switch key: this is his explanation for leaving the truck with the engine running and the switch key in it.

The Chief Justice found that Gordon was a licensed driver, and that he had driven the truck before, that Emanuel had been present when he had done so, and had given him permission on those occasions but he found as a fact that on this occasion Gordon drove off the truck without Emanuel's permission because he wanted to

return the tools to Headquarters and to go off duty and resented that he was kept waiting while Emanuel enjoyed himself.

What then was the situation in law, so far as Gordon was concerned? It is I think clear that of the three pre-conditions for liability on the part of the K.S.A.C. two had been met: (1) Gordon had been guilty of negligent driving, an actionable wrong; (2) Gordon was a servant of the K.S.A.C.; but (3) was this wrongful act committed in the course of his employment? Was it a wrongful act authorised by the master? or a wrongful and unauthorised mode of doing some act authorised by the master?

Before the Chief Justice the plaintiffs argued that Gordon was trying to return the truck, and more importantly the tools for which he was responsible to the Headquarters, and that within the principle of cases such as Poland v. Parr (1927) 1 K.B. 236 (C.A.) he had implied authority to protect his master's property in the emergency that had arisen due to Emanuel's delay. The Chief Justice rejected this argument: there was here no such emergency as would have justified Gordon in doing what he did. He was not employed to drive, and admitted in evidence "I was employed to load vehicle and that was the limit and extent of my job." In short Gordon's negligent driving was not committed within the course (or scope) of his employment.

In the argument before us it was conceded that this was so, and thereafter strenuous arguments were directed to pinning the blame for this accident on the shoulders of the driver Emanuel, for whose fault it was argued that the K.S.A.C. would be liable.

As far as Emanuel is concerned, in my view the plaintiff would once more be faced with the need to establish the three conditions for liability: (1) to show that Emanuel's conduct was at least an (if not the) effective cause of the accident; (2) he clearly was an employee or servant of the K.S.A.C.; but (3) could it be said that this negligent driving occurred in the course of his employment?

As to Emanuel the Chief Justice had this to say:

> "It was submitted that it was an act of negligence on Emanuel's part to leave the engine of the truck running and that knowing Mr. Gordon was a driver he should have exercised more care and not abandoned the truck leaving him in charge.
>
> Even if this submission is right, it is not a ground for making the defendant corporation liable, as ex-hypothesi, the negligence of the driver (Emanuel) was not the effective cause of the accident.
>
> The sideman Gordon, as I have found, was a competent driver and it was his negligence, as I have also found, which was the effective cause of the accident.
>
> I am not, however, convinced that the driver Emanuel was negligent in leaving the truck as he did, with the engine running nor can it reasonably be said that he abandoned the vehicle. It was not left unattended nor was it left in circumstances where it can reasonably be said that it was dangerous to do so.
>
> Even if it should have been in Mr. Emanuel's contemplation that Mr. Gordon may have driven off the truck, he knew him to be a competent driver."

Before us these finding were attacked and the case presented in a slightly different way to that in which it was put before the Chief Justice. As I understood the "revised" argument it was said that Emanuel ought to have contemplated that under the provocation he inflicted on Gordon, that Gordon would lose his patience and drive off the vehicle, and that it should also have been further contemplated that if he did so, he might drive negligently and cause an accident, and, as I understand it, that the negligent driving of Gordon is to be attributed to Emanuel, and so ground liability in the K.S.A.C.

This argument has been sufficiently attractive to commend itself to two members of this Court, but I regret that I cannot accept it, and like the Chief Justice I am compelled, with regret, to find the K.S.A.C. not liable.

I should add that the negligence alleged against Emanuel has, since the argument, been supported in part by a section of the Road Traffic Act discovered by one of my brethren

which reads thus:

> "S. 53 (2) The driver of a motor vehicle shall not leave the motor vehicle unattended without having stopped the engine and taken due precautions against it being moved or moving in his absence."

The section does I think encapsulate neatly the allegation against Emanuel, but I do not think that it adds anything to the common law rules on the subject, and I think it merely sets out the common law position, and adds that breach of it will be a criminal offence under the Road Traffic Act.

I suspect that the Chief Justice would have replied that Emanuel did not leave the motor vehicle unattended, he left Gordon in charge of it, and that in doing so he took precautions against its being moved or moving in his absence.

The revised version of the argument was supported by a great many cases which I think can be conveniently grouped into three heads: (a) cases in which the servant driver delegated his driving; (b) cases in which the servant driver left his vehicle unattended, and it was moved either by a stranger or a fellow worker; (c) more general cases in the law of negligence where defendants (or employers of them) have been held guilty because they have created a dangerous situation in which some other person has intervened and caused damage.

(A) Cases in which the servant driver delegated his driving:

Booth v. Mister (1835) 7 C. & P. 66 seems to be the earliest such case. Here the defendant's servant had entrusted the reins of the vehicle to another person riding in it with him. Defendant argued that it was not his servant who was driving at the time of the accident. Lord Abinger C.B.:

> "As the defendant's servant was in the cart, I think that the reins being held by another man makes no difference. It was the same as if the servant had held them himself."

This seems to indicate that in these circumstances, with the servant who delegated present, the Court regarded the negligent driving as that of the servant himself: A theme which runs through all of these cases.

Gwilliam v. Twist (1895) 2 Q.B. 84 (C.A.), here a policeman stopped the defendant's omnibus and ordered the driver off, being of the view that he was drunk: the bus was a mere quarter of a mile from its depot, and the driver and conductor acquiesced in a former employee driving the bus home. While he was doing this, plaintiff was run over by his negligence. Held the master was not liable. There was no necessity for the delegation. The Court did not enquire whether the original driver was present. It merely held he could not delegate.

Harris v. Fiat Motors Ltd. (1906) 22 T.L.R. 556 & (1907) 23 T.L.R. 504 (C.A.) - this is a somewhat inconclusive case: A driver was sent to deliver a motor car that had been repaired by the defendants, while on the way heard a peculiar noise from the back of the car and entrusted the driving of it to a chauffeur whom he knew and who was not in the defendant's employ, while he himself tried to trace the noise. There was an accident. The trial judge found for the plaintiffs who had been injured by the negligent driving of the substitute. The Divisional Court upset the judgment, not following Booth v. Mister (supra) and preferring Gwilliam v. Twist. The Court of Appeal reversed the decision and restored the trial judge's judgment, saying that the point had not been argued below.

Ricketts v. Tilling (1915) 1 K.B. 644 (C.A.), here, at the end of the journey, the driver allowed the conductor to turn the bus round for the return journey. With the driver present, the conductor drove negligently through some side streets and in so doing injured the plaintiff. Held that the proprietors of the bus were liable; or rather might be liable (a new trial was ordered). The potential liability was rested on the possibility that the driver had been at fault in permitting the conductor to drive and

failing to control his substitute's driving. See Pickford, L.J. at page 650:

> "Where a man is entrusted with the duty of driving and controlling the driving of a motor bus and is sitting alongside a person who is wrongfully driving and the motor bus is negligently driven and thereby an accident happens, there is evidence at any rate of the negligence of that driver in having allowed that negligent driving...."

Marsh v. Moores (1949) 2 All E.R. 27 indirectly involved this problem. Here one of the company's servants was driving a company car on company business, accompanied by his cousin, a girl of seventeen who had no licence. He took the opportunity to give her a driving lesson during which they were stopped by the police. The young lady had no licence and both were prosecuted for driving while uninsured, the prosecution arguing that the insurance coverage applied only to driving by a licensed driver. The Divisional Court dismissed the prosecution's appeal from an acquittal by the justices, and held, that had an accident occurred during the driving by the girl, the company would have been liable - not for her driving - but for the negligence of its employee in permitting a driver whom he knew to be inexpert to drive the vehicle, the Court followed Booth v. Mister (supra) and Ricketts v. Tilling (supra) citing the judgment of Pickford, L.J. who added, following the passage cited above:

> "It seems to me at any rate that there is evidence of negligence on his part, he being there and still having the duty of controlling and the driving of the omnibus, in allowing the omnibus to be negligently driven whereby the accident happened."

Lynskey, J. observed in respect of the delegating driver:

> "In my view he still retained the control and management of the vehicle. He still retained some power to control the driving of the vehicle by operating the handbrake and in instructing Patricia Moores as to how she should drive. In these circumstances, it seems to me that he still remained the driver of the car, and in allowing Patricia Moores to take the wheel under his directions he was acting within the scope of his employment, although in an unauthorised and improper way. If an injury was caused to a third

> "party while the vehicle was being so driven as the result of the negligent driving of the vehicle, John Moores would be, at least in part, responsible for such negligence, and the company as his employer, would in turn be responsible vicariously for the negligence of its servant acting within the scope of his employment."

Lynskey, J. then went on to observe that the insurance company would be liable, and so that the car was not being driven while uninsured.

Ilkiw v. Samuels (1963) 2 All E.R. 879 (C.A.) was another case in which the servant driver delegated to another the driving of his lorry or truck. He was inside a warehouse loading goods, and standing in the back of the lorry he needed that it should be moved forward a few feet to enable him to fasten the tarpaulin over his load, and to make way for another vehicle waiting to load. He allowed one of the warehouse staff who had been helping load the vehicle to start the lorry, showing him how to do so, and remaining in the back while this stranger drove it. The stranger had no licence, had never driven a lorry like that before and proved incompetent to manoeuvre this vehicle in the confined space of the warehouse. He moved forward, failed to stop the vehicle when told to do so, and ran it into the base of two conveyor belts where the plaintiff was standing seriously injuring him. Held that the employers of the lorry driver were liable, on the ground that the driver had been negligent in allowing, without making any enquiry as to his competence, this stranger to drive. Willmer, L.J. cited and followed Ricketts v. Tilling (supra). and also held that the driver had been acting within the course of his employment. What therefore happened was that the negligence of the substitute driver was attributed to the substantive driver, who had failed to control the driving of the substitute and so had himself been guilty of negligence that was one of the causes of the accident. Diplock, L.J. rested the liability of the employers:

> "... on the facts that the lorry was driven negligently while being used for the purposes of the defendants' business under the control of the defendants' servant. Waines, he being

> "their servant employed by them to take charge and control of the vehicle while engaged on the task which was being performed when the accident happened. In my view, their liability would have been the same if Samuels (the substitute driver) had been a highly experienced driver, provided that his negligent driving was the cause of the plaintiff's injuries......"

It is clear from the rest of the judgment of Diplock, L.J. that he too regarded the employers' liability as arising from the failure of the delegating driver to exercise proper control over the driving of the substitute.

East v. Beavis Transport Ltd. (1969) 1 Lloyds R. 302 (C.A.) was a case very similar to that of Ilkiw v. Samuels (supra). Here the delegation by the servant driver of the defendants was made to a dockworker on the docks where the vehicle was being loaded. The substitute driver drove negligently and injured the plaintiff. Once more the driver was held to have been negligent in failing to control the driving of the substitute, and his employers were therefore held liable through him. There was however an additional feature in this case, in that the employers of the substitute driver, the dock worker, were also sued, and held jointly liable with the employers of the lorry driver.

In my view these cases of a driver delegating his driving to another person who then drives negligently rest on the finding that the delegating driver was himself present, and was negligent in failing to control the substitute driver, and it is this finding that makes the employers liable. I do not think that these cases are of any assistance here, for the simple reason that it is clear on the evidence, and the findings of the Chief Justice that no delegation took place here. The Chief Justice found as a fact that Gordon drove off the truck without Emanuel's permission, and it is clear that that finding is unchallenged.

I would pause here to observe that we were also pressed with that line of cases in which an owner of a motor car has lent it to another who drives it negligently, and that on occasion the owner has been held liable for such negligence. This happened in

<u>Samson v. Aitcheson</u> (1912) A.C. 844 (car being demonstrated to a prospective purchaser whose son was allowed to drive, the owner being present). See too <u>Ormrod v. Crossville Motor Services Ltd.</u> (1953) 2 All E.R. 753; (1953) 1 W.L.R. 1120 (Owner of car asked a friend to drive it for him and to meet him at the conclusion of the Monte Carlo road rally: held liable for the negligent driving of the friend). These cases were recently the subject of review in <u>Morgans v. Launchbury et al</u> (1973) A.C. 127. They turn on the finding of fact that the friend was regarded in the circumstances of the case as being the de-facto servant of the car owner. Where such a finding was not possible no liability attached to the owner of the car as such: <u>Hewitt v. Bonvin</u> (1940) 1 K.B. 188 (C.A.) (mother allowing son to use father's car) <u>Rambarran v. Gurrucharran</u> (1970) 1 All E.R. 749; (1970) 1 W.L.R. 556 (Pr. C.) and see <u>Morgans v. Launchbury</u> (supra) (Husband using wife's car for a pub crawl: wife not liable).

<u>(B) Cases in which the servant-driver has left a vehicle unattended and this has furnished the opportunity for someone else to move, or cause the vehicle to move, injuring a third party.</u> In these cases the issue has been whether the servant or driver can be said to have been at fault, where his leaving the vehicle unattended has furnished an opportunity, usually to a stranger, to mischievously tamper with the vehicle and set it in motion to the injury of a third party; can it be said that the act of the stranger or intervener is a <u>novus actus interveniens</u> which will break the chain of causation? or can it be said that the servant was negligent in not anticipating that this might happen, and that therefore he remains liable, and his master or employer with him for injury suffered by the third party?

I think that in all of the cases in which the servant has been held to be at fault, and the master or employer liable therefor, it will be found that the intervention was one that could reasonably have been anticipated as likely to happen: where this is not the case no liability will accrue.

The earliest such case appears to be Illidge v. Goodwin (1831) 5 C. & P. 190. Here the servant left unattended on the street a horse and cart, (a scavenger's cart), and it backed into the plaintiff's shop window and broke a quantity of china. The defendant offered evidence to the effect that a passerby struck the horse which then backed into the shop window. The jury indicated that they did not believe the evidence, and Tindal, C.J. observed:

> "After all, supposing them to be speaking the truth, it does not amount to a defence. If a man choses to leave a cart standing in the street, he must take the risk of any mischief that may be done."

Lynch v. Nurdin (1841) 1 Q.B. 29; (1835-42) All E. R. 167 followed Illidge v. Goodwin (supra). Here the defendant's servant left a horse and cart unattended on the street for about half an hour. The plaintiff, a boy of seven, climbed onto the cart, while another boy led the horse on. The plaintiff was in process of getting down from the cart and fell when it started to move and had his foot crushed. The defence raised two issue: (a) contributory negligence, at that time an absolute bar; and (b) that the plaintiff's injury was due to the act of the second boy who caused the horse to move. As to (a) it was held that the plaintiff was not guilty of contributory negligence, and as to (b) Lord Denman, C.J. observed:

> "For if I am guilty of negligence in leaving anything dangerous in a place of where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first......
>
> It is then a matter strictly within the province of a jury deciding on the circumstances of each case. They would naturally enquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear or thronged with a noisy multitude; especially whether large parties of young children might reasonably be expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established......."

Though negligence had not yet been established as a separate tort as it is today, it is clear that Denman, C.J. was here addressing the fact of whether what took place was reasonably foreseeable as likely to happen.

Engelhart v. Farrant & Co. and T.J. Lipton (1897) 1 Q.B. 240 (C.A.), here the defendant employed a driver to drive the cart, and a boy of seventeen to ride on it with the driver and to make delivery of parcels to various customers. On the occasion in question the driver went to a house to get oil for the lamp on the cart, leaving the boy on the cart. The latter, meaning to turn the cart round drove it for some distance and ran into the carriage of the plaintiff and damaged it. The defendant argued that the driver had not been negligent and that even if he had been in leaving the cart with only the boy on it, it was not the natural consequence that the boy would drive the cart on. The Court of Appeal did not accept the argument. Lord Esher, M.R. expressed the view that the driver should have sent the boy for the oil; that he knew the boy could not drive the cart, and that the driver's negligence was "an effective cause" of the subsequent damage to the plaintiff.

> "Leaving that lad in the cart with the means of driving off at any moment makes what Mears (the driver) did an effective cause of what happened afterwards...."

Lopes, L.J. relied on Illidge v. Goodwin (supra) and observed:

> "Mears's carelessness in not anticipating what might not unreasonably happen would have been the real and effective cause of the mischief."

Rigby, L.J. relied on Lynch v. Nurdin (supra).

Once again the Court decided that what took place was reasonably foreseeable as likely to happen, and therefore the intervention of the delivery boy did not break the chain of causation. The negligence of the driver was an effective cause of the plaintiff's injury.

Beard v. London General Omnibus Co. (1900) 2 Q.B. 530 (C.A.) went the other way. Here the bus having reached its terminus, the driver went off to get his dinner. He fell sick and delayed his return for some time. In his absence the conductor whom he had left in charge decided to turn the bus around, and for this purpose drove through some side streets. In doing so he negligently ran over the plaintiff. The plaintiff offered no evidence to suggest that the conductor had any authority to turn the bus round. The Court of Appeal held that the master was not liable for the conductor's negligence; his driving was not within the course of his employment nor was any emergency suggested to warrant what had been done. Sympathetic to the unfortunate plaintiff the members of the Court offered advice as to what he ought to have tendered in evidence, and suggested that he should have explored the question of whether conductors had implied power to turn the bus around when it reached its terminus. The onus however lay on the plaintiff to establish that this driving was within the scope of the condutor's authority, and he failed to do so. The case is a useful contrast to Ricketts v. Tilling (supra).

Mc. Dowall v. Great Western Railway (1903) 2 K.B. 331 (C.A.), in this case railway workers had shunted some vans on to a siding which sloped down towards a road and rail level crossing. They left the vans or trucks securely braked; however some mischievous boys came onto the siding and released the brakes, uncoupling one van which then rolled down the incline onto the level crossing and there injured the plaintiff. The railway company knew of the mischievous acts of these boys, but hitherto their activity had been directed to breaking into the vans to steal apples, and they had never before this attempted to release the brakes of parked vans. There was evidence that it would have been possible to set the points on the siding away from the level crossing, and on this score the jury found against the company. On appeal the Court of Appeal allowed the appeal. Vaughn Williams, L.J. in his judgment

canvassed the question of whether the interference by the boys could reasonably have been anticipated and he observed:

> ".... it seems to me there is nothing in the past history of the conduct of those boys, as regards vehicles left on the rails at this point, to lead one to anticipate that they would go and uncouple a vehicle and let it down the incline as they did in the present instance.
>
> Under those circumstances it seems to me that there was no evidence to go to the jury upon which they could properly find that the danger of such interference causing injury to persons using the highway was known to the defendants at the time when the van was left and kept where it was, and might have been sufficiently guarded against by the exercise of reasonable care on the part of the defendants....."

The learned judge went on to observe that liability would only arise in these sorts of cases where the circumstances were such that any one of common sense having the custody of or control over a particular thing should recognise the danger of that happening which would be likely to injure others.

In short liability was rested on the foreseeability of the event as one likely to happen.

Romer, L.J. to like effect, observed:

> "... it does not appear to me that upon (the evidence) the jury could reasonably find that the railway company ought, under the circumstances in which they left this train, reasonably to have anticipated that the boys would do or might have done what they in fact did........"

I pause here to observe that in the case now before us there is no evidence that this type of situation had ever arisen before, or that a sideman (even this sideman) had ever taken over a truck from its driver and attempted to return it to the depot without him.

Ruoff v. Long & Co. (1916) 1 K.B. 148 was a similar case. Here the defendants servants parked their steam lorry outside a public house at which they were making a delivery of beer. They left it unattended for three minutes, and the evidence shows that to activate it, it would be necessary to manipulate no less than

three levers, and that no less than four operations were necessary to start the engine. In their absence two soldiers mounted it interfered with the levers and managed to start it, in reverse, and that it ran across the road and into the plaintiff's shop. The Divisional Court found in favour of the employers. Avory, J. observed that this was not a case of leaving a horse unattended in the street, and said:

> "It is impossible to say that those who leave standing unattended in a road a machine which will not move unless some person intentionally puts it in motion are prima facie guilty of negligence. But beyond this, in the present case, even assuming that such conduct amounts to negligence, there is the further question whether that negligence was an effective or proximate cause of the injury...
>
> Admitting that the accident would not have occurred but for the intervention of a third person, was such an intervention a thing which the defendants as reasonable men ought to have anticipated? (Emphasis supplied).

He held that it could not be said that the defendants as reasonable men ought to have foreseen that soldiers or other persons would mount the engine, pull out the safety pin and manipulate three different levers and set the lorry in motion.

In Ilkiw v. Samuels (supra) Lord Diplock observed that in these modern days when so many people can drive a motor car, the answer may differ, but what is I think clear is that the question remains the same, ought the defendants or their servants to have reasonably anticipated what happened as something likely to happen?

Lush, J. was more circumspect in his judgment. He said at p. 157:

> "We need not go so far as to hold that a person lawfully leaving a vehicle standing unattended in a highway can in no circumstances be held responsible for damage through the intervening act of a third party. The circumstances might be such that he ought to recognize that he was

"offering a temptation or invitation to another to set the vehicle in motion and that danger might result to third persons. The chain of causality may be complete although a link in the chain is the intervening act of a third person. But the act which causes the mischief must be one which he could properly anticipate."

Haynes v. Harwood (1935) 1 K.B. 146 (C.A.) is better known as a "rescue" case, or one dealing with voluntary assumption of risk. In this case the defendants' driver, in charge of a van drawn by two horses, left it unattended on a public street which sloped down towards the town centre, while he went to an office to pick up a receipt for goods delivered. He put on a sort of brake on the van, a chain that went through one of the back wheels. In his absence two boys came along and one threw a stone at the horses which caused them to bolt. Van and horses were running down hill towards an area crowded with women and children (just out of school) when the plaintiff, a policeman, saw them coming and ran out of the station and stopped them, getting badly injured in the process. In response to his claim for damages the defendants pleaded contributory negligence, voluntary assumption of risk, and denied responsibility on the ground that the cause of the accident was the mischievous act of the boy who stoned the horses.

Confirming the judgment in favour of the plaintiff, the Court of Appeal held the defendants liable in negligence for leaving horses unattended for even as short a time as three minutes in a place where mischievous children may be about. Greer, L.J. observed at p. 154:

"..... that there is no absolute rule that an intervening act of some third person who is not the defendant is in itself enough to break the chain of causation between the wrongful act and the damage and injury sustained by the plaintiff. ....

And at p. 156:

"If what is relied upon as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question

> "is whether or not, to use the words of the leading case, Hadley v. Baxendale, (1854) 9 Ex. 341, the accident can be said to be "the natural and probable result" of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence, it is only a step in the way of proving that the damage is the result of the wrongful act.
>
> There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act....." (Emphasis supplied).

I think that this case as do its predecessors such as Lynch v. Murdin rests on the finding that the defendants' servant ought to have anticipated as likely to happen the events that flowed from leaving the horses unattended on the street: such horses may run away, and if they do "it must quite obviously be contemplated that people are likely to be knocked down. It must also, I think be contemplated that persons will attempt to stop the horses and try to prevent injury to life or limb." (Maugham, L.J. citing Finlay, J. in the Court below).

In Fulwood House Ltd. v. Standard Bentwood Chair Coy. Ltd. (1956) 1 Lloyds Rep. 160 (C.A.) the problem created by an unattended truck came up for decision again. The truck driver here parked his truck in a cul de sac outside his employer's premises and went inside to the lavatory. He left the switch key in the truck in case the foreman wanted to move it in his absence. The foreman was not there that day. However a young boy employed to the company as a ware-houseman and who had no title or authority to drive at all took it on himself to try to turn the lorry around, and in doing so he damaged the doors of the plaintiffs' property which lay on the other side of the street. He was clearly acting outside of the course of his employment, but the plaintiff attempted to place the blame for the accident on the truck driver who had left the switch key in the

parked vehicle. The Court of Appeal after referring to many of the cases cited before, such as Ruoff v. Long and Engelhart v. Farrant, held first that in all the circumstances the driver had not been negligent, and secondly that what he did was not the proximate cause of the damage done. Birkett, L.J. said at page 163:

> "Speaking for myself, I do not think it is within the reasonable contemplation of a reasonable man in the circumstances of this case that Batson (the driver) should say: 'Now I must be on my guard against that young boy Ferbert. It is true that he is not anywhere in sight and it is true that I have never had the slightest ground for suspecting he has an ambition to drive this lorry or move it at all; I am only going to be away for a few minutes but I must take every possible precaution with regard to the ignition therefore I will remove the ignition key'. ....
>
> Therefore the conclusion to which I myself would come would be that the event in this case of Ferbert doing something he had never done before was not reasonably foreseeable..."

Romer, L.J. said:

> "In my judgment, it cannot be fairly held, in the circumstances of this case, either that it was negligent of this lorry driver to leave the key in the lorry for the two minutes or so that he was absent, or, on the assumption that it was negligent, that he ought to have anticipated and foreseen Ferbert's intervention."

(C) Negligence cases in which defendants have been held liable because they or their servants have created a dangerous situation in which some other person has intervened and caused damaged:

The modern concept of negligence as one of duty, breach of duty, and damage flowing from the breach emerged comparatively recently in the common law, and involves at least two elements turning on causation: first, in what circumstances and to whom is a duty owed, to which we now answer following on Lord Atkin's speech in Donoghue v. Stevenson that this depends on whether or not one can foresee that another may be injured by that which I do, or fail to do, (a formula which still does not cover all fields of conduct: e.g. trade competition), and secondly, and at a later stage the question of causation again arises when we ask did the damage flow from the breach of the duty? a matter subsumed under

the title remoteness of damage. It would appear that this second aspect is perhaps the one most commonly raised in the earlier cases.

Thus, in Sharp v. Powell (1872) L.R.7 C.P. 253 the defendant's servant, in breach of a local statute washed a van on the street. The waste water from this exercise would in the normal course of events have flowed from the road into a gutter and thence to underground drains. The weather however had been very severe, unknown to everyone the underground drains were blocked, and the water unable to get into it collected on the road surface and froze over. Plaintiff's horse slipped on this ice and was injured. The act of the defendant's servant was wrongful and in breach of the statute, the defendant argued however that the damage was too remote. The Court accepted this argument and held that the wrongful act was not the proximate cause of the damage. Keating, J. expressed it thus:

> "The damage in question, not being one which the defendant could fairly be expected to anticipate as likely to ensure from his act, is in my judgment too remote."

On the otherhand in Clark v. Chambers (1878) 3 Q.B.D. 327 (the chevaux de frise case) the defendant was held liable where to protect entry to his athletic grounds he had erected or placed in the roadway which passed thereby two wooden barriers armed with spikes, which some person moved out of the way, with the result that later on in the night plaintiff walking along the road came into contact with the spikes (the pole was now standing upright) and lost an eye. The defendant argued that the cause of the plaintiff's injury was the invervening act of the stranger who moved the pole. The Court accepted the plaintiff's argument that the defendant's act in placing a dangerous instrument on the road had been the primary cause of his injury by affording the occasion for some unknown person to remove it and place it on the footpath. The event that had happened was regarded as the likely consequence of the defendant's original act in blocking the highway by such an

obstruction. It is of interest to note that in reaching its conclusion the Court relied heavily on several of the cases already cited with respect to leaving unattended horses and carts on the highway. Reasonable foreseeability was made the test of liability.

One of the cases principally relied on by counsel for the K.S.A.C. was the case of Weld-Blundell v. Stephens (1920) A.C. 956; (1920) All E.R. 32. The facts there were a far cry from those in this case, but it did involve the problem of causation and the unexpected intervention of a stranger. Briefly, a firm of accountants or auditors asked to investigate the affairs of a company in which the plaintiff proposed to invest, went to the company's office and by mischance left there the client's letter of instructions, which contained the most caustic comments on the honesty of those who were then directors of the company. Realizing soon after that they had left this damaging letter behind, the auditors phoned and asked that the missing letter be sent at once unread to them. The manager of the company found the letter as a result of the call, read it, had it copied and sent it to his directors, who promptly sued the plaintiffs for libel and collected damages. The plaintiffs now sued the auditors to recoup this loss, arguing that they had been negligent in leaving the letter where they did, and were responsible for the plaintiff being sued for damages. The House of Lords was divided on the issue, but held, by a majority, that though the auditors had been negligent in leaving the letter where they did, the libel action and award of damages against the plaintiff was not the natural and probable consequence of their negligence, but was due to the plaintiff's own fault in having written the content of the letter in the first place, and that the act of the manager who found and circulated the letter was a novus actus interveniens. The dissenting members of the House were of the view that the fact that the damage was caused by the act of a third person, the manager who wrongly read

a private letter and circulated it did not prevent it being recoverable if his actions were the natural and probable consequence, even if wrongful. They relied on the cases dealing with the leaving of unattended carts and horses on the highway. The majority view, exemplified in the speech of Lord Sumner who remarked that a mere occasion was not to be identified in law with the cause. He said that the manager who picked up read and circulated the damaging letter was "an independent actor and a mischief maker." After a careful examination of the problems of causation and remoteness of damage, Lord Sumner observed:

> "... even though A is in fault he is not responsible for injury to C which B a stranger to him, choses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause..."

He added:

> "Remoteness of damage is a question of cause and effect, a different question. That a jury can finally make A liable for B's acts merely because they think it was antecedently probable that B would act as he did, apart from A's authority or intention, seems to me to be contrary to principle and unsupported by authority....."

Pressed with Weld Blundell v. Stephens counsel for the plaintiffs relied on The Oropesa (1943) P. 32; (1943) 1 All E.R. 211 (C.A.) a fatal accident case in which after a collision between two ships in extremely rough weather, the captain of the more damaged vessel got out a life boat and went in it with some of his crew to consult with the other vessel to see what could be done to salvage his ship. The life-boat overturned, and some of the crew were drowned. The parents of one of the drowned seamen sued the other ship in a claim under the Fatal Accident Acts. The defence was that his death was not due to the original collision but to the captain's decision to seek help from the defendants' ship, and that this was a novus actus breaking the chain of causation between the death and the original negligence. Lord Wright discussed the problem of causation and remoteness of damage. After observing that the Captain of the damaged ship had acted reasonably and in proper

discharge of his duty in the situation in which he had been placed, he observed at page 37:

> "There are some propositions beyond question in connexion with this class of case. One is that human action does not per se sever the connected sequence of acts. The mere fact that human action intervenes does not prevent the sufferer from saying that injury which is due to that human action as one of the elements in the sequence is recoverable from the original wrongdoer. ..."

And at page 39:

> "If the master and the deceased in the present case had done something which was outside the exigencies of the emergency, whether from miscalculation or from error, the plaintiffs would be debarred from saying that a new cause had not intervened. The question is not whether there was new negligence, but whether there was a new cause. I think that is what Lord sumner emphasized in The Paludina (1927) A.C. 16. To break the chain of causation it must be shown that there is something ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic."

The last sentence in the passage above is of course the passage most often cited, but it has to be read in the context of what went before, and in the context of the case. So read, it seems to me with respect, that there is all the difference in the world between what happened in the Oropesa and what happened in the case before us. In the Oropesa one had a captain making a difficult decision in a situation of peril and emergency, acting reasonably in the discharge of his duty. In the case before us we have an angry workman (whether justifiably angry or not) taking it into his own hands to teach his senior colleague a lesson by stepping completely out of the course of his employment and taking it on himself to drive the garbage truck back to the depot so that he could hand in his tools and go off duty and enjoy his Sunday afternoon.

A very typical case raising the problem with which we are dealing is the case of Stansbie v. Truman (1948) 2 K.B. 48; (1948) 1 All E.R. 599 (C.A.). In that case a painter engaged to paint a house, and left alone in it without a key to re-enter, found himself obliged

to go out for additional material. He therefore pulled back the catch of the yale lock on the front door, and went out, leaving the door closed but unlocked. He was away for some two hours, much more than he had expected to be as he had to go to more than one store in search of the material. In his absence a thief entered the house and stole jewellery belonging to the house-holder. The Court held the painter liable for the loss. It was clear that there was a duty of care owed by the painter to the house-holder, and that there had been a breach of that duty, but did the damage flow from the breach? or was it too remote? The defendant cited the passage from Lord Sumner's judgment which was quoted above, suggesting that though A may have given the occasion for the thief's mischievous activity, that activity was a new and independent cause. To this Tucker, L.J. responded:

> "I do not think that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present, where, as the learned judge points out, the very act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened. The reason why the (painter) owed a duty to the (householder) to leave the premises in a reasonably secure state was because otherwise dishonest persons might gain access to the premises, and it seems to me that if, as I think he was, the (painter) was negligent in leaving the house in this condition, it was a direct result of his negligence that the thief got in through this door which was left unlocked and stole these valuable goods....."
>
> (Emphasis supplied).

This case is an interesting one, but to rely on it the plaintiffs in the case before us have to predicate as normal a situation in which an angry workman, wanting to go off on a Sunday afternoon, will take it on himself to drive home the garbage truck which his senior the truck driver is responsible for, and which he was left to guard. It must be further predicated that though he holds a licence to drive trucks of that sort, and had driven that truck before, he was likely to get into an accident.

I can imagine a time and a country in which it would have been quite safe for the occupier or the painter to have stepped out of the house leaving it unlocked. These are not those days, unfortunately.

What happened could have been foreseen as likely to happen. The issue in the case before us is whether what happened here could have been foreseen in the same way.

Alford v. National Coal Board (1952) 1 All E.R. 754 (H.L.) was cited to us for an observation made by Lord Reid at page 759. He said:

> "In general, I do not think that a person is liable in damages because he has created an opportunity for another to break the law and thereby cause injury to a third person, but he may be liable if he ought to have known that it was likely that advantage would be taken of this opportunity." (Emphasis supplied)

The case itself is not of great assistance, but the passage cited above from the judgment of Lord Reid is apt to the circumstances of the case before us: it asks the same question that must be answered in this case.

A number of other cases were cited to us, all of interest and all applicable, in that they make the point that liability depends on whether the defendant ought to have foreseen the events that followed and should therefore have taken the steps appropriate to avoid them.

They include: Ellis v. Home Office (1953) 2 All E.R. 149 (C.A.) where it was held that prison officers have a duty of care to protect inmates from physical attacks by other inmates, but that that duty only arises where there was some reason to expect such an attack.

Carmarthenshire County Council v. Lewis (1955) A.C. 549, where it was held that an education authority owes a duty to see that nursery school children do not escape through unlocked gates on to the open road and cause injury to motorists forced to take evasive action to avoid running them over. Once again the central issue was whether what happened was reasonably foreseeable. This often proves a difficult question, and once again judicial opinion was divided, with the majority holding that the events were reasonably foreseeable and the education authority was liable.

Home Office v. Dorset Yacht Club (1969) 2 All E.R. 564; (1969) 2 Q.B. 413 (A.C.); (1970) 2 All E.R. 294 (H.L.) held that the Home Office was responsible for the failure of three prison officers in charge of a party of borstal trainees camping out on an island to properly supervise them, with the result that one night they broke out, seized a yacht that was moored nearby and in attempting to escape to the mainland drove the yacht into another nearby and damaged it. At issue was whether their escapade was reasonably foreseeable in the light of their past conduct. Held that it was. A few quotations from the judgment of Lord Reid may be helpful: He said:

> "So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendants' carelessness and the damage to the plaintiff...."
>
> (Distinguishing between inanimate links and those due to human conduct, Lord Reid continued):
>
> "At one time the law was that unforeseeability was no defence (Re Polemis and Furness Withy & Co. Ltd. (1921) 3 K.B. 560). But the law now is that there is no liability unless the damage was of a kind which was foreseeable (Overseas Tankship (UK) Ltd. vs. Morts Dock & Engineering Co. Ltd. (the Wagon Mound (1961) A.C. 388)."

Lord Reid then observes the difficulties caused where the chain consists in part of intervening human conduct, cites Lord Wright in the Oropesa (supra) and asks:

> "What then is the dividing line? Is it foreseeability or is it such a degree of probability as warrants the conclusion that the intervening human conduct was the natural and probable result of what preceded it?
>
> There is a world of difference between the two. If I buy a ticket in a lottery or enter a football pool it is foreseeable that I may win a very large prize - some competitor must win it.
>
> But, whatever hopes gamblers may entertain, no one could say that winning such a prize is a natural and probable result of entering such a competition."

Lord Reid then cited the passage already cited from the judgment of Greer, L.J. in Haynes v. Harwood;

> "If what is relied on as novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle involved in the maxim is no defence....."

Lord Reid concluded:

> "These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant."
>
> (Emphasis supplied)

The other speeches by their Lordships are valuable and illuminating, and as often happens in this field of law, there was a powerful dissenting judgment.

Finally we were referred to Knightley v. Johns et al (1982) 1 All E.R. 851 (C.A.). This case related to an accident that took plac place in the Queensway Tunnel Birmingham. The facts were complicated, but the overall picture presented once more the problem of how far the original actor's negligence was in law responsible for the injury which eventually resulted. Briefly, the original actor, driving through the tunnel (there were twin tunnels, each with two lanes, but one was closed at the time) due to his negligence over-turned his car and so blocked the tunnel then in use, and which was being used by cars going in both directions. The plaintiff was a motor cycle policeman who was early on the scene, as was a police inspector. It became apparent that the tunnel should have been closed to traffic, and though telephones to the controllers were available and there were established procedures for dealing with the situation, in the confusion of the moment these were not used by

the inspector, who instead directed the motor cycle policeman to ride back to the entrance and see that the traffic was diverted. He did so, riding in the "wrong" lane for speed, and unfortunately himself became involved in an accident with another car coming in the opposite direction. He was badly injured and action was brought against (a) the original actor or driver whose accident started the chain of events, (b) the police inspector and the chief constable as vicariously liable for the inspector. A number of issues arose: contributory negligence and voluntary assumption of risk on the part of the plaintiff were ruled out. Ultimately the question arose as to the liability in negligence of the original driver whose accident started this chain of events. Was he responsible for this second accident which had flowed consequentially from the original one? The Court of Appeal, in a long and careful judgment by Stephenson, L.J. found the police inspector had been negligent, and that the original driver though negligent in respect to his own accident was not responsible for the second accident to the plaintiff. Stephenson, L.J. cited the passages already quoted from the judgment of Greer, L.J. in Haynes v. Harwood (supra) as to novus actus interveniens, and a number of other "rescue cases", Lord Wright's observations in the Oropesa (supra), and the decision in the first Wagon Mound case, and the observations made by Lord Reid in Home Office v. Dorset Yacht Club (supra) distinguishing between a mere foreseeable possibility and something very likely to happen.

Stephenson, L.J. concluded:

> "The question to be asked is accordingly whether the whole sequence of events is a natural and probable consequence of Mr. John's negligence and a reasonably foreseeable result of it. In answering the question it is helpful but not decisive to consider which of these events were deliberate choices to do positive acts and which were mere omissions of failures to act which acts and omissions were innocent mistakes or mis-calculations and which were negligent having regard to the pressures and the gravity of the emergency and the need to act quickly. Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction.

> "Mistakes and mischances are to be expected when human beings however well trained, have to cope with a crisis; ...."

On the facts it was held that there were too many other things that went wrong to find that the negligence of the original driver was responsible for the second accident to the plaintiff.

Returning to the facts of the case before us the question to be asked is whether the whole sequence of events is a natural and probable consequence of Emanuels's deciding to stop and join the "fish feed" during his employer's time? Was what happened to Luletta and to the Douglas' family home a reasonably foreseeable result of Emanuels's conduct? The Chief Justice has held that it was not, and I agree with him.

There are many factors to be taken into consideration: Emanuel's conduct was provoking, and certainly as far as his employers were concerned was deplorable. He was using their time - no doubt at overtime rates - for his own personal amusement, not to speak of their gasolene or diesel fuel. But there was no emergency, no crisis. What Gordon did was a deliberate and positive act. Was it reasonably likely? To some extent one must consider as did the Court in the Fulwood House case the personality of the actors: Was Gordon the sort of person likely to go off with the truck he had been left to guard and certainly get both himself and Emanuel into trouble departmentally? There were so many other things he might have done. The Chief Justice had the opportunity, denied to us, of seeing and hearing both men give their account of what happened. Then again, even if one should find it likely that Gordon might have done just that, go off with the truck, is it a likely result that he should have got into the sort of accident that he did with it? He was a licensed driver, and the Chief Justice found him to be a competent driver, who had driven that truck before, and indeed for short periods on that very day. The competence of the driver is clearly a factor to be considered. It is not taken into account in the cases of delegated driving where the delegating

driver is present because the negligent driving of the substitute is attributed to him. It is not taken into account in the lending of a car to a friend cases because in those cases the law treats the friend as a servant of the motor car owner who then becomes liable in the normal way for the negligence of his servant in the course of his employment. But in this type of case the competence of the driver is at issue. Had this been a case where a child or youth had got into the truck and driven it off when Gordon went to call Emanuel and the truck had been left unattended by both men, then liability would have been clear. One would have said that leaving the truck with the engine running was an invitation to just that sort of folly. But in this case the truck was driven off by a competent driver, was it reasonable to foresee the likelihood of its accelerator sticking, and if so, that he would have dealt so incompetently with it? I think not.

Looking back at the phrases used in the cases reviewed, one sees Lord Denman in Lynch v. Nurdin speaking of it being "extremely probable" that some one will interfere with the unattended horses. The incompetence of the delivery lad in Engelhart v. Farrant & Co. was known to the driver, and it was reasonably foreseeable that he might attempt to turn the cart round. In McDowall v. Great Western Railway though the boys were known to be mischievous, nothing that had happened in the past suggested that they would go and do what they did there, deliberately uncouple the van and release the brakes.

In Haynes v. Harwood the Court asked itself was this the very sort of thing which ought to have been anticipated as likely to arise? Or put another way was what happened so much a part of the "agony of the moment" or so natural and foreseeable as not to constitute a novus actua interveniens, vide the Oropesa?

Lord Reid in the Dorset Yacht Club case points out that it is not merely a question of forseeability in the way that one might foresee winning on a lottery ticket, it must be something very likely to happen.

It seems to me that putting these questions to himself the Chief Justice rightly decided that as regards the plaintiffs it could not be said that Emanuel's conduct was a cause of the grievous injury that befell them. One has every sympathy with their sad position, but there are limits to the extent of the master's vicarious liability for the torts of his servants. It would seem very odd that the K.S.A.C. should not be liable for Gordon's negligence, but should be held liable for Emanuel's decision to dally at a fish fry during working hours.

As to the Public Authorities Protection Act and its effect on the action filed so late in respect to Luletta, I agree with the Chief Justice and my brethren that the act does not apply in these circumstances. As to Emanuel if he be negligent it can not be said that this occurred during the pursuance or execution or intended execution of any public duty; as to Gordon the Act is not necessary because all are agreed that his negligent act did not occur in the course of his employment so that the K.S.A.C. is not in any event liable through him, and as to his own personal position we have heard no argument addressed to us on his behalf.

I would close with one last thought: in England the insurance companies have set up a special fund to compensate victims of motor vehicle accidents in cases where no driver is held responsible. I do not know if the K.S.A.C. carries motor vehicle insurance, or, like the Government, is its own insurer. But the plaintiffs ought not to go uncompensated for the sad injury they have suffered.

CAREY, J.A.

The Douglas family lived at 17 Balmagie Avenue in St. Andrew and there are three (3) children. The youngest Luletta, was just two years old in September 1975 when an incident occurred which has unalterably shattered her life and not unnaturally affected the lives of her parents. Prior to this incident, little Luletta could articulate and according to her mother she could say "Mummy, want water", "want tea". Since this incident she became so mentally retarded as to be unable to formulate a sentence or to understand simple instructions. In the words of her mother:

> "She cannot bathe herself. She eats and feeds herself. Can't put on her clothes. Cannot manage toilet habits".

Her medical condition - is described as 'a typical petit mal'. The prognosis moreover is depressingly pessimistic: she is not likely to reach an adult age in her development. All this is consistent with brain damage caused in the incident.

On that Sunday afternoon in September, Mr. Douglas was at home in one of the rooms with Luletta, when his wife shouted that something was coming. There was the sound of a crash, and then he received a blow to his head and must have lost consciousness momentarily. The house had practically been bowled over by a truck owned by the Kingston & St. Andrew Corporation, and driven at that time by a loader employed by the Corporation, one Robert Gordon. Mr. Douglas and the other children finally emerged from the wreckage unaided, while a friend of the Douglas' eventually removed Luletta from the house. She appeared to have sustained some injury to her head and was seen to be in a weakened condition.

The events leading up to this unfortunate mishap, must now be outlined. The vehicle involved, was a garbage truck owned and operated by the Corporation. There was a driver,

David Emanuel, and four loaders, including Robert Gordon, assigned to it when it left its depot at Bumper Hall, St. Andrew at 6:00 a.m. on the relevant date. The schedule required it to be operated on a shift between the hours of 6:00 a.m. and 3:00 p.m. This schedule was followed and garbage collected was dumped at the 'tip'. During this period the driver Emanuel operated the vehicle. On completion of the day's routine, the driver, instead of returning the truck to Bumper Hall, departed from the normal route thereto, and went on to Penwood Road where he parked apparently in the vicinity of a club, in which persons were engaged in playing dominoes and apparently much eating and drinking was in progress: Gordon referred to the occasion as a 'fish feed thing'. The ignition key had been left in the switch of the truck and the engine left throttling. Gordon after some two hours wait, his patience doubtless exhausted, drove the truck off, intending to return it to its depot at Bumper Hall and to enable him also, to return the tools which were his particular responsibility and to go off duty. In the course of this journey the accelerator pedal stuck. He endeavoured to free it, but lost control; the truck mounted the curb and crashed into the Douglas' home with the consequences I have already detailed. Apart from the personal injuries to Luletta, and the damage to the house and furniture, Mr. Douglas' car also sustained some damage. The total special damage claimed in the writ filed on behalf of Mr. Douglas was put at $7,000.00.

The matter was heard before Smith, C.J., and in a considered judgment, he dismissed the claims of the respective plaintiffs. In the interest of completion, I would add that interlocutory judgments had been entered against both drivers, viz., Emanuel, the authorised driver and

Gordon, the loader. The learned Chief Justice was more than perturbed at the decision to which he was compelled to come and expressed himself thus at page 34:

> "I regret that the facts of the case and the principles of law applicable have compelled me to find for the defendant corporation on the question of liability. The Douglas family, particularly Luletta have suffered grevious damage and loss by the intrusion of the corporation's truck into their home on what must have been a quiet Sunday afternoon. It will be a tragedy if they have to go entirely without compensation".

It doubtless may come as something of a surprise to the layman that the owners of a vehicle driven by their employee on their business and albeit not the authorised driver who is negligent in its operation, can nonetheless be exonerated from liability. The intelligent layman might be pardoned for asserting in exasperation that the law is an ass.

There were two bases on which the learned Chief Justice rested his decision. The first was that Gordon, as loader, was acting outside the scope of his employment when he drove off the truck although intending to return the tools to the depot, and of course, to facilitate his timely arrival at home. The learned Chief Justice put it thus:

> "Mr. Gordon drove off the truck in his own interest because he felt that he was kept waiting by Mr. Emmanuel for an inordinately long time and he wanted to discharge his responsibility for the tools so that he could go off duty".

The second ground was that the authorised driver Emanuel, was not negligent in leaving the vehicle as he did. He held that "the vehicle had not been left unattended nor had it been left in circumstances where it can reasonably be said that it was dangerous to do so". The effective cause of the accident as found by the Chief Justice, was Gordon's

"awkward manoeuvre" in releasing the pedal by using one hand instead of "neutralizing the gears and using the brakes".

It was accepted by Mr. Hines on behalf of the appellants that the liability of the Corporation could not depend on the negligence of Gordon, the loader, unless it could be shown that he was acting in an emergency and so to speak "rescuing" the garbage truck. The learned Chief Justice having considered this aspect of the matter, correctly as I think, and as is now accepted by Mr. Hines, came to the conclusion that there was no question here of any emergency arising which would give the stamp of authority to his unauthorised act so as to make his employers liable. I have no doubt, that, if it were the fact, that the truck had been left as it was, and it had started creeping forward, or vandals had attacked the vehicle or attempted to steal the tools, and the sideman had assumed control, then, the result would be altogether different. Again, if it could be shown that Gordon was an agent of the Corporation, although not employed as driver, in the sense that the truck and its contents were entrusted to both driver and loader, then it is not doubted that the Corporation would be vicariously liable for its employees negligence.

Beard v. London General Omnibus Co. [1900] 2 Q.B. 530 is an apt illustration of the latter example. In that case, at the end of a journey, in the absence of the driver, the conductor of an omnibus belonging to the defendants, apparently for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets at a considerable pace, and while so doing negligently ran into and injured the plaintiff. Although the plaintiff's action failed on the ground that the plaintiff had not discharged himself from the burden cast upon him by

showing that the injury was due to the negligence of a servant of the defendant acting within the scope of his employment, there are valuable dicta which support the view I have expressed. Vaughan Williams, L.J., put it in this way -

> "It seems to me to be a sounder view that, where a driver and conductor are sent out in charge of an omnibus and the complaint is made of some act done by the conductor, it should be left to the jury to say whether that act so complained of was within the authority given to the conductor. It is all very well to say that one knows that the authority given to a driver is to drive, and that given to the conductor is to conduct, but it is incorrect to say that one is entitled to deal with the case on that hypothesis. I cannot myself say whether at the end of one journey and the beginning of the next the conductor has any duty with reference to the horses, or what that duty, if any, may be".
>
> [Emphasis supplied]

In that case, there was evidence that the omnibus was put in the charge of both employees, but that the conductor instead of merely turning the omnibus around, had driven it into a side street at an excessive speed. The act of turning the vehicle would have been within the scope of the conductor's employment, but galloping off into side streets would have the opposite effect.

Thus, in the present case, it would be necessary to see whether there was any evidence that the garbage truck and the tools thereon had been put in the charge of the driver and loader. But the evidence, such as there was, appears to be to the contrary. A Mr. Sydney McKain a Superintendent in the Public Cleansing Department of the Corporation made it abundantly clear that the loaders are responsible for the safe keeping and return of the tools of the depot. Mr. Gordon for his part, was not in least doubt that he was employed to load the garbage truck and acknowledged in the course of his evidence, that this was "the limit and extent of his job". So the driving of that

garbage truck by Mr. Gordon, albeit with the commendable desire to return his employer's tools to the proper storage point, was plainly not within the scope of his employment.

The search must, I fear, be continued elsewhere. Mr. Hines for the appellants, argued that the basis of the Corporation's liability was the negligence of Emanuel, the authorised driver. It was said that the driver's duty included not only the control of the vehicle and the protection of the Corporation's property, but the obligation to return the vehicle at the end of its assigned operations. By virtue of his employment, the driver had a duty to prevent or not to allow anyone to drive his employer's truck. It was further suggested that Emanuel had an additional duty as the person with the control of the vehicle, to ensure that it is in road worthy condition before it is taken on the road and where the vehicle is already on the road with mechanical defects which he knows or ought to have known, then he was obliged to remain in control of the vehicle until it was returned.

Mr. Chin-See for the respondent's argued that the learned Chief Justice was correct when he found that the authorised driver had not abandoned the vehicle or left it unattended or in such circumstances in which it could reasonably be said that it was left in a dangerous position. Alternatively, he contended that even if it could be said that Emanuel in leaving the vehicle with the engine running for an unduly long time, must have known that Gordon would have driven it off, that was a matter which went to culpability and not to damages. The court would then have to consider whether in all the circumstances, Emanuel ought reasonably to have forseen that the damage which occurred was likely. On the facts Gordon was a licensed driver who

had driven the truck before, and therefore, it was not reasonably foreseeable that a truck in the hands of a licensed driver, was likely to have resulted in damage.

It is long accepted that a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. This general principle of tortious liability was aptly stated in Marsh v. Moores [1949] 2 All E.R. 27 by Lynskey, J., when he said:

> "It is well settled law that a master is liable even for acts which he has not authorised provided that they are so connected with the acts which he has authorised that they may rightly be regarded as modes, although improper modes of doing them. On the other hand, if the unauthorised and wrongful act is not so connected with the authorised 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 within the course of his employment but has gone outside it".

To escape liability, the master, as is clear from this dictum, must show that the servant was on a frolic of his
Either the servant must be on a frolic of his own
own,/or, there must be some "novus actus interveniens", some break in the chain of causation, to enable the master to escape liability.

This general principle can be illustrated by referring to Ilkiw v. Samuels & Others [1936] 2 All E.R. 879 where the facts were these. The plaintiff was injured by a lorry which was then manoeuvring inside a warehouse where the plaintiff was working. The lorry had backed into the warehouse into a position under a conveyor belt which was in use for the purpose of delivering sacks of sugar to the lorry. The driver, whose name was Waines, was standing on the back of the lorry engaged in stacking the sacks of sugar in the ordinary course of his work. The moment came when the loading of the lorry had been completed, and it was then necessary to move it forward away from the conveyor belt.

At this point, Samuels (who was not employed to the lorry owner) offered to move the lorry for Waines. Waines allowed him to do so although he had strict instructions not to allow anyone else to drive the vehicle. He made no enquiry of Samuels' competence to drive the lorry but Samuels was in fact quite incompetent as events proved. Having started the lorry and moved it forward, he found that he was quite unable to stop it. The lorry ran forward and injured the plaintiff.

The learned judge found that the accident was caused by the negligent driving of Samuels, but that in allowing him to drive without inquiry, , Waines was negligent and that negligence caused the accident.

Before the Court of Appeal, it was argued on behalf of the lorry owners, against whom judgment was entered, that that finding just set out, was wrong. It was also contended that the judge ought not to have found and was wrong to have found that at the material time the defendant Waines was acting in the course of his employment, and he ought to have found and held that at the material time Waines was acting outside the scope of his employment so that the lorry owners were not liable in law for any negligence on his part. Two members of the court seemed to rest their judgment on the failure of the regular driver, Waines, to enquire whether Samuels was competent to drive, but Diplock, L.J., (as he then was) founded his judgment, on what I respectfully consider to be a secure base. He put it this way:

> "In my view, the (lorry owner's) liability does not depend on the fact that Samuels was an inexperienced driver who had never driven a lorry in a confined space before, but on the fact that the lorry was driven negligently while being used for the purposes of the defendant's business under the control of the defendant's servant Waines, he being their servant employed by them to take charge and control of the

> "vehicle while engaged on the task which was being performed when the accident took place. In my view their liability would have been the same if Samuels had been a highly experienced driver, provided that his egligent driving on this occasion was the cause of the plaintiff's injuries".

It should be observed that the competence or incompetence of the volunteer driver was not a relevant factor in ascertaining the liability of the owners. By delegating his functions to another, the authorised driver allowed the events to take place which ended in injury to the plaintiff. The volunteer driver was not on a frolic of his own; he was engaged in the pursuit of the lorry owner's business. But I think the important factor is, that there was an obligation on the part of the authorised driver to so control the lorry to ensure that it was driven with reasonable care, which must include the responsibility of ensuring that no unauthorised person controlled it.

An earlier case Englehart v. Farrant & C. & Another [1897] 1 Q.B. 240 demonstrates that this approach is of respectable age. The defendant employed two persons; a man to drive a cart with instructions not to leave it, and a lad, who had nothing to do with the driving but with delivering parcels to the customers of the defendant. The driver left the cart in which the lad was, and went into a house. While the driver was away, the lad drove on and came into collision with the plaintiff's carriage. It was held that the negligence of the driver in so leaving the cart was the effective cause of the damage and the defendant (owner) was liable. At page 243 Lord Esher, M.R., posed the important question, which is very relevant in the circumstances of the appeal before us, supplied the answer, and gave the reasons for the reply:

> "Now, for what is the defendant liable? He is liable for the negligence of Mears (i.e., the driver) if that negligence was 'an effective

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> " 'cause' of the subsequent damage to the plaintiff...."
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> "The question is, Was that negligence of Mears an effective cause of this damage to the plaintiff? It was argued that the mere fact of the second lad taking into his own hands to drive was sufficient to prevent the liability of the defendant, although Mears was negligent. That argument seems to me to be wrong. If a stranger interferes it does not follow, that the defendant is liable; but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is an effective cause of the accident. Now, if it is necessary to draw any inference about the probability, if Mears had done what he ought to do and had thought what was the probable result of his going away and leaving the cart with the lad in it, I think it is inevitable to come to the conclusion that he would have thought he was doing a dangerous thing. Leaving that lad in the cart with the means of driving off at any moment makes what Mears did an effective cause of what happened afterwards".

Whether the lad was competent to drive the cart or not, was again not a relevant consideration. Indeed it could not be, because the instructions to the driver was not to leave it. The lad, of course, had no authority to drive. In the present circumstances, Emanuel was the authorised driver and had no authority to delegate his functions. Gordon was employed to load the vehicle. Emanuel had effective control of the vehicle and would be required in the performance of his employment doubtless to leave it parked safely. That I suggest could not involve leaving it with the engine running while he attended a party. It is of course a question of fact and degree. And an important factor in the instant case is that he was away for a protracted period - some two (2) hours altogether. If he had thought about it, he would probably have thought that he was doing a risky thing. Leaving the loader whom he knew could drive, in the truck, with the means of driving it off, was in my view, as it was in the last case cited an effective cause of the accident.

When Englehart v. Farrant & Co. (supra) was decided, the test of foreseeability had not been determined: Overseas Tankships (U.K.) Ltd. v. Monts Dock & Engineering Co. Ltd. or the Wagon Mound [1961] 1 All E.R. 404 was far in the future. Nevertheless the test articulated by Lord Esher, M.R., in Englehart v. Farrant was a test of foreseeability. I have alluded to this test because of Mr. Chin-See's submission that even if Emanuel could reasonably have foreseen the probability of Gordon's driving the vehicle away, that went to culpability. In that, he was re-echoing a dictum of Lord Sumner in Weld Blundell v. Stephens [1920] A.C. 956 at page 984 where he said:

> "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation".

But that dicta was disapproved in the Wagon Mound (supra) and is no longer regarded as good law. On any fair reading of the opinion of the Board given by Viscount Simmonds, it is plain that in the law of negligence the test whether the consequences were reasonably foreseeable is a criterion alike of culpability and compensation. The learned Law Lord emphasized at pages 415-416 that:

> "Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is 'direct'. In doing so, they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in M'Alister (or Donohue) v. Stevenson (50):
>
> 'The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay'. It is a departure from this sovereign principle if

"liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done; cf. Woods v. Duncan (51). Thus foreseeability becomes the effective test. In reasserting this principle, their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Alderson, B., in Blyth v. Birmingham Waterworks Co. (52)".

Another illuminating case is McDowall v. Great Western Railway [1903] 2 K.B. 331 where Vaughan Williams, L.J., at page 337 provides some guidelines which in my judgment are very helpful in the present appeal. He expressed himself in this way:

"I do not think that Mr. Williams was wrong when he said that, in those cases in which part of the cause of the accident was the interference of a stranger or a third person, the defendants are not held responsible unless it is found that that which they do or omit to do--the negligence to perform a particular duty--is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense having the custody of or control over a particular thing would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury".

Seeing that the test is the foreseeability of consequences by a person in control, of, in this case the garbage truck, then as a reasonable man, Emanuel ought to have realised the risk of leaving Gordon in the truck for such a long time, especially bearing in mind that the loader Gordon had a responsibility to return the tools to the departure point. The risk was all the greater because Gordon had a licence to drive and to the authorised driver's

knowledge, could drive the vehicle, and indeed had driven it on previous occasions, and of course Emanuel had left the engine running.

The learned Chief Justice held that the effective cause of the accident was Gordon's negligent driving. Although this is a finding of fact, it does not depend on the advantage of seeing and hearing the witness, but on an inference to be drawn from certain primary facts. Such a finding is not sacrosanct: this court is in as good a position to come to a conclusion on the matter.

The Chief Justice in finding that Emanuel was not negligent, gave his reasons as follows at page 31:

> "I am not, however, convinced that the driver Emanuel was negligent in leaving the truck as he did, with the engine running nor can it reasonably be said that he abandoned the vehicle. It was not left unattended nor was it left in circumstances where it can reasonably be said that it was dangerous to do so. Even if it should have been in Mr. Emanuel's contemplation that Mr. Gordon may have driven off the truck, he knew him to be a competent driver".

In my judgment, the negligence of Emanuel was constituted by leaving the vehicle at risk so that a third party was able to use the opportunity to commit a negligent act producing the damage complained of, as I have endeavoured to show. Although following the dictum of Diplock, L.J., in Ilkiw v. Samuels (supra), Mr. Gordon's competence was immaterial, there was no evidence that he was a competent truck driver. In any event he was not authorised to drive. Emanuel could not have authorised him to drive as similarly was the case in Ilkiw v. Samuels & Others (supra). The effective cause of the accident in my view, contrary to the view of the Chief Justice, was the negligence of Emanuel in leaving the vehicle in the circumstances I have indicated.

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There is a provision in the Road Traffic Act which is of relevance in this regard. Section 53(2) of the Act provides as follows:

> "2. The driver of a motor vehicle shall not leave the motor vehicle unattended without having stopped the engine and taken due precautions against its being moved or moving in his absence".

This offence is merely a formulation of common law principles. In my view, it would be no answer for Emanuel to say, well although I have left the engine running, I did leave the sideman in the truck: the vehicle was not therefore left unattended. Surely, in leaving the vehicle with the engine not stopped and in the hands of a sideman whom he knew was able to drive for such an inordinately long time, could hardly be considered taking due precautions against the vehicle being moved. Indeed there was a time, as the evidence disclosed, when the sideman Gordon, left the vehicle to enquire of Emanuel how much longer he intended to be. What would the position be then if the vehicle had moved either by itself or by some other person? What constitutes negligence in any given case, will depend always on the particular facts and circumstances. The cases in the books provide examples of circumstances which courts have held constitutes negligence, but the cases do not in my view, lay down general principles of law applicable to any set circumstances; they can only be seen as helpful guide posts. I return to the provision to which I previously adverted. It shows that there is a duty cast upon the driver of a motor vehicle on a road to take sensible precautions to ensure that the vehicle (entrusted to his care) cannot be moved by anyone.

The Chief Justice in holding that Gordon's negligence was the effective cause of the accident based that on the fact that Gordon had adopted "an awkward manoeuvre to release

"the accelerator". This awkward manoeuvre would appear to me as proof positive of the lack of competence on Mr. Gordon's part. What is clear from the finding is that Gordon was negligent in his driving of the vehicle for whether he drove unreasonably fast or employed an awkward manoeuvre to release the accelerator pedal and thereby caused the accident, his act is nevertheless negligent. That act of negligence on his part can only be regarded as a "hovus actus interveniens" if it satisfies the test formulated by Lord Wright in The Oropesa [1943] p. 32 at p. 39 -

> "To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic. I doubt whether the law can be stated more precisely than that".

None of these pejorative terms applies in my view to the act of Mr. Gordon. What occurred was the sort of thing which might well have been anticipated as a reasonable and probable result of leaving the garbage truck for so long in the control of a man able to drive and who had a responsibility to take the tools back to the depot.

Mr. Hines did contend that the fact of the truck being in a defective condition, viz., that the accelerator often stuck, was a factor that added to the situation of risk created by Mr. Emanuel. It is unnecessary in my view to express any view on that submission except to point out that it was not pleaded against the Corporation.

I have come to the conclusion therefore that for the reasons I have rehearsed, the Corporation is liable for the negligence of its authorised driver. In the result I would allow the appeal by Mr. Douglas, set aside the judgment of the Chief Justice and enter judgment for Mr. Douglas in the

agreed sum of $4,000.00.

In so far as the appeal on behalf of Luletta is concerned, there is a plea that the action is statute-barred which remains to be considered. It was the contention of Mr. Chin-See for the Corporation that by virtue of the Public Authorities Protection Act the action was barred. The accident took place on 14th September, 1975 but the writ was not filed until 5th December, 1979, i.e., "not within one year next after the act, neglect on default complained of". He said that there was no evidence other than that the truck had been sent out on any duty, than a public duty, viz., to keep the city clean, pursuant to the Public Health Acts.

Mr. Hines, for his part, maintained that at the time the accident occurred, it could not fairly be said that the truck was being used in the performance of any duty envisaged by the Public Health Act. The effect of the Chief Justice's finding that Emanuel was not on a frolic of his own, meant that he was still an employee of the Corporation, but he was not engaged in any duty pursuant to the Public Health Acts. He referred to Edwards v. Metropolitan Water Board [1922] 1 K.B. 291 and Bradford Corporation v. Myers [1916] 1 A.C. 242.

This court in Abrahams & Another v. Attorney General & Another (unreported) C.A. 31/83, dated 4th April, 1984, approved dicta in the latter case which showed that a servant or agent of an authority may be acting properly as such, but the authority might not have been acting pursuant to any public duty or law in which event the Public Authorities Act does not avail. In Bradford Corporation v. Myers (supra) Lord Buckmaster, L.C., at page 248 put the matter in this way:

> "The act complained of arose because one of the servants of the appellants (the Corporation)

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> "acting in the course of an errand on which they had power to send him, but on which they were not bound in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens, caused damage by personal negligence. In my opinion an action for such negligence is not within the class of action contemplated by the statute".

Edwards v. Metropolitan Water Board (supra) is authority for the proposition that acts incidental to the performance of the Act, duty or authority are within the protection of the Public Authorities Protection Act. In that case, the negligent act occurred when the driver of the lorry owned by the Water Board, was on his return journey having delivered pipes pursuant to the Board's duty to maintain pipes. Scrutton, L.J., said at page 306:

> "I cannot distinguish between conveying pipes for repairs and oil for pumping engines; or between conveying full drums of oil to a store and removing empty drums for a store. Each of these acts seem to be a direct execution of the respondent's duty because in my view the direct execution of the duty includes all incidental acts reasonably necessary for the execution of the duty".

I do not think it is open to argument that any act of negligence committed by the authorised driver of the Corporation on his outward journey from the depot, during the period garbage was being collected and/or dumped, and in any journey back to the depot, would be protected by the Act. In the instant case, the garbage truck when it deviated from the normal route to the depot, was, I would agree with Mr. Hines, not being driven in pursuance of any duty cast upon the Corporation. The driver was not acting in the direct execution of the Public Health Act. I would incline to think that if the driver had stopped for lunch for example, the Corporation could still rely on the Public Authorities Protection Act, for in my judgment, a deviation for lunch, could be regarded, as an incidental act reasonably

necessary for the execution of the public duty. But I am of opinion that a deviation to go to a party does not fall within the phrase "an incidental act reasonably necessary for the execution of the public duty". The finding of the Chief Justice that Emanuel was not on a frolic of his own when he deviated from the normal route to the depot, is most important. Its effect is that Emanuel would, at the material time, be operating the vehicle within the scope of his employment. In my opinion therefore the argument of Mr. Hines is well founded and I would hold that the Public Authorities Protection Act cannot be prayed in aid in the circumstances of this case.

In the result, I would also set aside the judgment of the Chief Justice in the action filed on behalf of Luletta and enter judgment in her favour for the amount suggested in his judgment. The agreed special damages of $1, 000.00 and $93,500.00 general damages.

In the final result, I would allow both appeals and reverse both judgments in the court below.

WHITE, J.A.

I have had the advantage of reading the draft judgments of Carberry and Carey, JJ.A. In my view, the relevant matters have been adequately dealt with by Carey, J.A., and it is not necessary for me to elaborate the several points discussed therein.

I agree that the appeals should be allowed.