IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2011 HCV 00526

BETWEEN	**EGBERT GALLIMORE**	**CLAIMANT**
AND	**JUNIOR ANDRE THOMAS**	**1ST DEFENDANT**
	LEABURN ROBINSON	**2ND DEFENDANT**

Negligence – Motor vehicle accident – Vicarious liability – Whether 1st Defendant's actions within the course of employment – Car keys handed to 1st Defendant by 2nd Defendant - frolic- whether 2nd Defendant liable – damages - whiplash.

Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant
Phillip Bernard instructed by Zavia T. Mayne & Co. for the 2nd Defendant

HEARD: 2nd July 2014.

CORAM: BATTS J.

[1] This Judgment was orally delivered on the 2nd July 2014. At the commencement of the matter, Claimant's Counsel indicated that the 1st Defendant had not been served and the Claimant would not be proceeding against him.

[2] The Claimant's witness statement stood as his evidence in chief and cross-examination was quite brief. The 2nd Defendant's witness statement also stood as his evidence in chief. Exhibits 1, 2 and 3 (a) – (c) were admitted by consent being medical reports and related receipts. It may be stated at this point that there is no dispute as to the following facts:-

(a) That Mr. Egbert Gallimore, the Claimant, was the owner and driver of a motor vehicle registration # 1315 FC.

(b) That the 1st Defendant at the time of the incident was driving the motor vehicle registration # 6634 EX owned by the 2nd Defendant.

(c) That at all material times the 2nd Defendant was the employer of the 1st Defendant.

(d) The word "employer" is used in the Defence filed, however in the evidence given orally by the 2nd Defendant he said that he is an electrical contractor. Whenever he has a job he looks around and asks persons to come and work on it. This was the basis on which the 1st Defendant was retained that day.

(e) That the 2nd Defendant's vehicle was being driven by the 1st Defendant when it collided with the rear of the Claimant's moving vehicle. There is in short no challenge to the Claimant's account of how the accident occurred.

[3] The issue for my determination is whether the 2nd Defendant is or was at the material time vicariously liable for the acts or omissions of the 1st Defendant. This is of course a mixed question of law and fact.

[4] Insofar as the facts are concerned it is the 2nd Defendant's evidence that on the 14th December 2010 he went with his team to work at the National Commercial Bank (NCB) Portmore in the parish of St. Catherine. The 1st Defendant was a member of that team. The 2nd Defendant is as indicated earlier an electrical contractor. The 1st Defendant was a part of the team of electricians taken to the work site by the 2nd Defendant to do the job.

[5] The 2nd Defendant said further that at about 10:00 a.m. he left the work site with a potential customer to inspect a location in Chancery Hall. At the time he left the

work site he gave the keys to his motor vehicle to the 1st Defendant "to allow access for the workmen to retrieve tools and materials" from the motor vehicle.

[6] The 2nd Defendant denied that he gave the 1st Defendant permission to drive his motor vehicle. He says the 1st Defendant left his work site without his permission.

[7] When cross-examined he was emphatic about this and stated that the 1st Defendant had stolen his vehicle. When asked why that had not been reported to the police he said, upon arrival at the scene of the accident, the Claimant and the 1st Defendant had agreed to a settlement and therefore he decided to take the matter no further. He admitted having filed a claim against his insurer seeking indemnification. He admitted that his insurance policy covered persons driving with his permission.

[8] Mr. Kinghorn urged the court to find based primarily on the admitted claim against the insurance company that the 2nd Defendant is not being truthful when he said permission to drive was not given to the 1st Defendant. Interestingly however no document signed by the 2nd Defendant (whether a Claim Form or an Affidavit or witness statement) was put to the 2nd Defendant as contradictory of the assertion that there was no consent.

[9] Contrary to Mr. Kinghorn's submission, and having viewed the 2nd Defendant in the witness box, I accept him as a witness of truth. It is not only his demeanour that impressed. It is also that he was candid enough not to say, as well he might have, that he had instructed the 1st Defendant not to drive his car. The 2nd Defendant said that he never ever gave anyone permission to drive. That he handed the car keys to the 1st Defendant only because he was the worker nearest to him when he was leaving. He had in fact known the 1st Defendant for only 2 weeks prior to the incident. He had known the other 2 workers with him for a longer period. His sole purpose for handing him the car keys was to allow access to tools and material needed for the job at the work site in Portmore.

[10] The accident on the Claimant's evidence occurred at approximately 9:15am. The 2nd Defendant says he left the keys with the 1st Defendant at 10:00am. Clearly both times cannot be accurate. It is however fair to infer that the accident occurred not long after the 2nd Defendant left the car keys with the 1st Defendant.

[11] The primary fact for my consideration is whether in handing the car keys to the 1st Defendant the 2nd Defendant was giving him effective control and hence permission to use the vehicle. Alternatively was the 2nd Defendant negligent in so doing and did that neglect have the effect in law of rendering him liable for the acts or omissions of the 1st Defendant.

[12] Is it sufficient for the 2nd Defendant to say I did not employ the 1st Defendant as a driver, he is an electrician? When I gave him the key it was to allow access to tools and material only. Ought the 2nd Defendant to have taken more care to communicate to the 1st Defendant that he was not, under any circumstances, to drive the vehicle anywhere.

[13] The 1st Defendant is not here and gave no evidence. It seems to me however that in the absence of an express prohibition, the 1st Defendant may well have regarded the handover of keys as the giving of control. So that if for example some material was needed for the job which had to be purchased he might reasonably say that he had the authority to go and effect such purchase using the motor vehicle in whose control the boss had left it.

[14] There is no evidence as to the purpose for which the 1st Defendant was using the 2nd Defendant's motor car on the day in question. The accident happened on Brunswick Avenue in Spanish Town. Judicial note can be taken, that that is a long way from NCB in Portmore. However we do not know the purpose of the 1st Defendant's journey. The 2nd Defendant says it was unconnected to his employment as the 1st Defendant had left the work site without his consent.

[15] I find as a fact that the 1st Defendant left his work site without permission. I find as a fact also that he was at the material time using the motor vehicle for a purpose unconnected to his employment with the 2nd Defendant. However I find that in handing the keys to the 1st Defendant without an express prohibition the 2nd Defendant was handing over the care and control of the motor vehicle and therefore tacit if not explicit permission to the 1st Defendant to drive if necessary. Whatever may have been in the 2nd Defendant's mind when he handed over the keys, the 1st Defendant could reasonably infer that he now had care and control of the vehicle on behalf of his employer.

[16] These then being my conclusions of fact, what are the implications in law for the 2nd Defendant. Is he liable vicariously for the negligence of the 1st Defendant? Mr. Kinghorn submitted that the 2nd Defendant owned the vehicle and that he was the 1st Defendant's employer. The law he says, now placed liability on him in such circumstances. The inference is clear and if not his negligence, in leaving the keys with the 1st Defendant, will result in liability being imposed.

[17] Mr. Kinghorn relied upon written submissions and two authorities being **Campbell v National Fuels CL 1999 C-262** delivered by Sykes J and **Wright v Morrison SCCA 39/2008** a decision of the Court of Appeal.In both those cases the rogue employee was employed as a driver. The accident occurred whilst he was doing something unconnected to his employment and in one case diametrically opposed to his employer's intent, and yet in each case the employer was found liable. The earlier decision of Justice Sykes was not referred to in the later decision of the Court of Appeal. Harris JA in her analysis of the law did not prey in aid the "inherent risk" approach endorsed by Sykes J. Her analysis followed a more conventional approach. The close "connection test" being just an avenue or tool to assist in answering the question whether the employee was within the course of his employment. The Court of Appeal cited with approval Salmond on Torts,

> *"It is clear that the master is responsible for acts actively 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… 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 it."*

Justice of Appeal Harris stated,

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

In this case it is admitted on the pleadings that the 1st Defendant was an employee. I cannot find otherwise.

[18] The 2nd Defendant relied on the authorities of **Rambarran v Gurrucharan 15 WIR 212, Campbell v Flash 471/1997 (unrpted)12th July 2004 (a decision of**

Sykes J) and Samuels v Daley [2012]JMSC183 (unrpted 20th December 2012) another decision of Sykes J. These were all cases in which no employer or employee relation was established between the driver and the owner. The fact of ownership raised a presumption of agency, but this was rebuttable upon proof that the journey in question was not for the purpose or business of the owner. These authorities, with respect, are not of much assistance in the instant matter.

[19] Here, the relationship of employer and employee and hence agency is admitted. The question is whether at the time of the accident the employee's conduct was so closely connected to his duties that vicarious liability ought to be imposed on the employer.

[20] In my judgment, the 2nd Defendant is vicariously liable for the negligent manner in which the 1st Defendant drove the vehicle. In handing the car keys to the 1st Defendant the 2nd Defendant was giving care and control to the 1st Defendant who was therefore his agent for that purpose. In taking the vehicle on a frolic, the 1st Defendant was exercising that care and control in an improper manner. The 2nd Defendant ought reasonably to have been aware of the risk of that occurring when he handed the car keys to the 1st Defendant. I find therefore that there was a close connection to the duty owed to the 2nd Defendant, i.e. to keep care and control of the motor vehicle until his return. I therefore find that the 2nd Defendant is vicariously liable for the act of negligence of the 1st Defendant, which act it is admitted negligently caused loss and damage to the Claimant.

[21] As regards damages the medical reports indicate that the Claimant suffered the following:

a) Whiplash injury
b) Mild stiffness
c) Pain which was not persistent
d) No deformity
e) Full range of motion

The Claimant describes his pain and says it was intermittent. I find that it was not chronic or debilitating. Mr. Kinghorn submitted in writing for $1.1 million in damages. He relied on the authorities of **Milton Goldson v Buckley 2009 HCV 01260,** which I disregarded as no written judgment or report of the decision was placed before me and hence I am unable to say what findings as to injury or loss of amenity weighed on the judge's mind; **Trevor Benjamin et al v Nicholas HCV 02876/2005 (unrpted 29th March 2010)** and **Lawes v JUTC [2013] JMSC CIV 24 (unrpted 23rd January 2013).**

[22] The Defence did not address the question of damages in their written or oral submissions.

[23] I must nevertheless consider the submissions on damages critically. In this regard the Claimant's injury is not comparable to those in the cases cited by Mr. Kinghorn. Indeed in **Benjamin's** case save to say it was a "soft tissue" injury the judgment really does not assist much. However, this court must do what it can with the information it has. I find that an appropriate award in this case for Pain Suffering and Loss of Amenities is $450,000.00. The Special Damages claimed of $39,216.00 was not contested and was in any event adequately supported by receipts – Exhibits 3 (a) (b) and (c).

[24] There is therefore judgment for the Claimant against the 2nd Defendant in the amount of:

General Damages	$450,000.00
Special Damages	$39,216.00

Interest will run on Special Damages from the 14th December 2010 at 6% and on General Damages from the 25th May 2011 at 6%.

David Batts
Puisne Judge