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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00496/2006

BETWEEN	DAVID GILLESPIE	CLAIMANT
AND	CHIN'S CONSTRUCTION LTD.	1ST DEFENDANT
AND	ANDREW STAPLE	2nd DEFENDANT

Ms. Carol Davis for the Claimant

Mr. Heron Dale for 1st Defendant

Mr. Earl P. DeLisser for 2nd Defendant

Heard: November 17, 1 8, 2008, November 20, 27, 2009

Negligence - Vicarious Liability

Sinclair-Haynes J

On Monday, 20th November 2004, Mr. David Gillespie (claimant) a severely hearing impaired electrician was pressed against an old chassis whilst on premises of Chin's Construction Ltd., (first defendant) by a truck owned by the first defendant. The movement of the truck was caused by an act of Mr. Staple (second defendant). The accounts as to what transpired are divergent. Mr. Gillespie claims damages for personal injury and loss.

The salient questions are:

a. what act of Mr. Staple caused the backward movement of the truck which collided with Mr. Gillespie?

b. was Mr. Gillespie at that time acting as the servant and/or agent of the first defendant?

The Claimant's Version

Mr. Gillespie's account is that Mr. Staple; the first defendant's employee negligently reversed the truck on him. It is his evidence that on the 19th November 2004 Mr. Andre Chin invited him to the compound of Chin's Construction Limited to repair the starter of a truck. Whilst he was repairing that truck, Mr. Chin asked him to repair the rear lights of a Daihatsu truck. He returned to the compound the following day at 9:00 a.m. He completed work on the first vehicle at 6:00 pm. and completed the repairs to the lights of the Daihatsu truck at about 7:00 p.m. Whilst he was working on the second truck, Mr. Staple was hurrying him because he wanted to park the truck. Just as he completed working on the truck, he went behind it to pack his tool and told Mr. Staple he could have it. Mr. Staple went into the truck and reversed it. The truck moved backwards at a fast rate of speed. He realized the truck was coming at him when it was about two feet from him. He did not hear when Mr. Staple engaged the brake which is understandable because of his hearing disability. He, Mr. Gillespie ran backwards to avoid the collision but the truck collided with his middle section and pinned him to the chassis. It is also his evidence that the truck was about 13 feet from the chassis. His evidence is that he had seen Mr. Staple move trucks in the yard of the compound.

He testified that in order to test whether the lights and lamps were working he used a live wire and battery to bypass the switch. He did not have to turn the ignition

switch or engage the gears because he attached a live wire to the live side of the battery. He explained that the reverse light was found under the pedal and it was not necessary to turn on the ignition to see if they worked. He connected a live wire to current from the battery. He ran the wire to the switch and lamp in order to energize the system. He further explained that if the lights fail to come on when the live wire is applied, it means there is a problem in the circuit and something is not functioning properly.

Similarly, in order to determine whether the brake worked, the wire was placed on the switch of the brake lights. The brake switch can be by- passed without pressing the brakes. It was not necessary to put the vehicle in reverse in order to determine if the brake lights worked because he applied the live wire.

There was no need to turn the key to test the light because the live wire was used in place of the switch. If the switch is not working, the vehicle would start. It is his evidence that when the switch is turned off in the truck, current goes off in the ignition system but not the lights. The ignition switch does not work the lights; the lights remain on because they are operated by another switch by unscrewing the switch and pressing the tongue of the switch. The switch is found under the dashboard. If that switch is pressed and' bucked' it keeps sending current. He was able to 'stick the switch' and went to the rear of the truck to see if the lights worked.

It is also his evidence that it is true in a sense that in order to find out whether the reverse light is activated, the gear may be put in reverse. He also agreed that the normal way for the brake lights to come on is to have the ignition on and the brakes pressed. However, he explained that an electrician uses a live wire and operates manually because he uses a live wire to test the system; there was no need to put the gear stick in reverse.

Under cross-examination by Mr. DeLisser, he explained that he connected the raw end of the live wire to one terminal of the battery. He held the other end in his hand: the wire was about 20 feet in length. He tested the circuits at the back of the truck. The live wire was used to test if current was reaching the circuits. When he conducted his test, the lights did not come on because the wires were not connected. The circuits were working but all the wires were disconnected. He connected the current and connected the wires to the circuits.

Mr. Staple's Version

Mr. Staple's version is entirely contrary to Mr. Gillespie. His evidence is that he is a mechanic employed to the first defendant. He repairs trucks, tractors and diesel vehicles. At about 4:30 p.m. that Saturday, Mr. Gillespie, was doing electrical work on a Daihatsu six (6) wheeler truck which was parked about 4 feet in front of another vehicle. Mr. Gillespie asked him to start the truck for him. As a result, he stood outside and opened the right door of the vehicle and turned the key in the ignition. Mr. Gillespie had turned on the ignition and left the gear in reverse. The vehicle jumped backwards but did not start. Mr. Gillespie was behind the vehicle working on the rear lights and was squeezed between both vehicles. The driver put the vehicle in neutral and they pushed the truck off him. It is his evidence that the vehicle is a standard shift. It is also his evidence that he volunteered to help Mr. Gillespie. Mr Staple testified that he has been a mechanic for nine years and he has worked with the Chins for three years. He is not permitted by his employer to drive. He does not have a driver's licence and he does not know how to drive. He has never sat in a driver's seat. He does not know how to move a vehicle forward and he does not know how to steer a vehicle. It is his evidence that that

was the first time in the three years he worked with the Chins that he turned a key in a vehicle. He agrees that mechanics, in repairing vehicles test drive them to see if they work. However he does not test drive because he cannot drive.

Mr. Rodney Chin's Evidence

Mr. Rodney Chin's evidence is that Mr. Staple was not allowed to drive the vehicles. In driving the vehicle, he was not acting as his servant and/or agent. He testifies that he is a civil engineer but he is familiar with electrical workings in general. He did two electrical courses as a part of Physics course. He knows the theory and regarding the practical, he is able to do some 'simple things.' He is able to test the rear lights of the vehicle but according to him, he would not want to as he is equipped mentally but not physically. He understands the concept of attaching the wire to the battery in order to test the light. The use of a live wire can indicate if bulbs are working. His evidence is that that method it is like bypass surgery to see if the bulbs at the rear of the vehicle work.

To check if the brake lights are working, the brakes must be engaged because the lever presses a switch which closes the circuit. Alternately, the switch which is located under the dashboard and close to the brakes lever would have to be removed. The bottom could be manually pressed and it would be as if the brakes lever was pressed. That process is tedious because it requires going under the dash board and pulling it out. It also requires lying under the bottom of the vehicle. It is easier to have someone use his hand to press it from the outside.

It is his evidence that in order to determine whether the reverse lights work, the vehicle must be put in reverse to activate the switch and the ignition must be on. He agrees that the wire test can be applied to see if the bulbs work.

A similar result can be achieved by unscrewing the switch from the gear box and activating it manually. The reverse light is attached to the gear box. The gearbox is under the cab of the Daihatsu (which is where the driver sits). For the switch to be removed from the gear box the vehicle has to be jacked-up and it might require dropping the gear box and disengaging it from the engine. Also, it is his evidence that he has never examined the Daihatsu to see where the switch on the gear box is located. He is unable to say where it is located on the Daihatsu but according to him from his knowledge, that process is more tedious and would take fifteen (15) minutes to one (1) hour. He testifies that the same result can be achieved by putting the vehicle in reverse. It is also his evidence that this is the simplest method to check the reverse lights.

He also testifies that in order to test the indicator light, the ignition is turned on and the indicator switch is activated by using a lever. However, if the lever is not used it could be tested by screwing it off and operating it manually.

This witness also testifies that the vehicle would move about two (2) to six (6) feet if the vehicle's engine is disengaged; the vehicle is left in reverse and the ignition switch is turned to activate the engine. The distance the vehicle moves depends on the person's reaction time or if the person's hand slid off.

Mr. Andre Chin's Evidence

Mr. Andre Chin testifies that his father had always owned trucks and he has been around mechanics for 20 years. He himself owned a garage. It is his evidence that "I

kind of have an idea" how to test defective lights. It is also his evidence that he used to race cars and if his vehicle breaks down, he can help himself. He has tested defective lights and he knows how to use the live wire to check if the lights work.

It is his evidence that in order to test reverse lights, the vehicle must be in reverse. If the reverse light fails to come on, the bulb has to be tested to see whether it is working or whether it is the switch which goes into the gear that is defective. The only way to carry out those tests is to go under the truck and remove the switch. The switch is screwed onto the side of the gear box. He agrees that the brake lights can also be tested by removing the switch from under the dashboard but he states it is easier if someone presses the brakes by going into the vehicle or by remaining on the outside and using his hand. Upon re-examination, his evidence is that in order to check the reverse light, the gear box must be engaged in reverse.

It is his evidence that in checking whether the brake lights work, the bulb must be checked first. He, however, agrees that the brake lights can be tested by using the wire. He states that in order to do so, the switch would have to be removed from under the dash board. The easier method of testing is for someone to press the pedal either by going inside or remaining outside and using his hand. Under cross-examination, his evidence is that the wire will not cause the brake lights to come on. It must be run to the switch. It is also his evidence that in order to check if brake lights work, the brake pedal must be pressed.

Regarding, the testing of the indicator, it is his evidence that a live wire can be used to test the lights. However, for the lights to flash the switch must be on and the lever must be activated.

His evidence contradicts Mr. Rodney Chin's who testifies that they can also be tested manually.

He further testifies that after a live wire is used to check if the system is functional, there are other procedures. It is his evidence that when the truck was given to Mr. Gillespie, the lights were not working. After he received the truck all the lights were still not working.

It is also his evidence that Mr. Staple worked for the company for four (4) to five (5) years. Mr. Staple was not permitted to turn on the vehicle. He never saw him drive and he never knew whether Mr. Staple knew how to turn on the lights in a vehicle. His duty was not to park the vehicle. There were two (2) drivers employed for servicing the vehicles because not all mechanics are allowed to drive. He is very strict on that. It is his further evidence that there was no need to move the Daihatsu. In 2004, he owned about seven (7) trucks. There was no special parking area. The trucks were parked anywhere on the compound if they were not blocking a vehicle. It is also his evidence that the truck was parked about four to five feet from the chassis.

Submissions by Ms. Carol Davis for the Claimant

Ms. Davis submits that it is the incontrovertible evidence that the second defendant started (or attempted to start) the truck and that it came back on to the claimant. She submits that whether he reversed the vehicle or he turned the key causing it to jump back, the second defendant caused the truck to go back on to the claimant.

She also submits that the claimant's evidence, despite the most rigorous cross-examination was not shaken and he should be believed.

She submits that on 6:00 p.m. on a Saturday evening any employee would be anxious to go home. The second defendant's evidence is that he finished work at 4:00 p.m. He would not remain at his employer's workplace two (2) hours later, unless he had further responsibilities, that is, to park the truck as the claimant testified.

She also submits if the claimant's evidence is believed, the second defendant was acting within the scope of his employment. Even if he did not have permission to drive, he was moving a truck within his employer's compound for the benefit of his employer. He was not on a frolic of his own.

Mr. Staple, she submits was working as a mechanic for nine (9) years. It is not believable that he does not know how to drive (even if he does not have a licence). It is further not believable that he is required to call a driver whenever that he wants to move the vehicle, within the compound. She submits that the witnesses for the first defendant are not truthful in an effort to escape liability in this matter. None of the witnesses on behalf of the first defendant mentioned in their witness statements that Mr. Staple was not permitted to drive. She submits that if that were really so, it would have been the first thing that would come to mind.

Further, she submits that even if the defendants' account of the accident is accepted, the second defendant would still be acting in the course of his employment. The defendant's account is that the claimant requested the second defendant to start the vehicle for him. The second defendant did not start the vehicle, but turned the key so that the vehicle jumped back. The second defendant's evidence is that he had previously worked with the claimant when he was fixing vehicles. He is a mechanic. She submits that if the claimant did ask him to turn on the vehicle, such an act would have been part

of fixing the vehicle, which both claimant and Mr. Staple were employed to do and he would therefore have acted within the scope of his employment.

She submits that even if Mr. Staple was not permitted to drive and/or turn on an engine, Mr. Staple's own evidence was that he could turn on the vehicle although he could not drive it. In those circumstances, the turning on of the vehicle would have been a wrongful mode of doing what he was permitted to do, that is, assisting in fixing the vehicle.

It is her submission that if either the claimant's or Mr. Staple's account of the accident is accepted, the question of contributory negligence does not arise because the claimant was not negligent. The second defendant was known to the claimant as a mechanic who had assisted him in work before. The evidence is that the claimant had no knowledge that the second defendant was not permitted to drive vehicles. In any event, the allegation was that Mr. Staple was asked to start the vehicle. She submits that it is reasonable to consider that a mechanic would know how to start a vehicle.

Submissions by Mr. Heron Dale for the 1st Defendant

It is the submission of Mr. Dale that on a balance of probabilities the evidence of the defence is to be preferred for the following reasons:

(a) The claimant testifies that when he was working on the Daihatsu truck it was about 13 ft. from the chassis of the other vehicle. The defendant's evidence is that it was about 3 – 4 feet. There is evidence that if one turns the starter in a vehicle in gear it will jump and the distance depends on the reaction time of the person holding the starter. It is more probable that the vehicle jumped back as testified by the defence rather than that it was reversed at a fast speed as alleged by the claimant as a fast speed would have resulted in severe injury to the claimant if not death.

(b) If the truck was 13 ft. from the chassis and the second defendant was going to park the truck, the more likely direction was forward or sideways as the only obstruction was behind. Even if the driver did not realize the

vehicle was in reverse, as soon as he began releasing the clutch he would realize the vehicle was going backwards. He would not have had to travel 13 ft. before stopping it.

(c) If a driver was in the cab, as soon as he realized what had happened, he would have put the vehicle in forward gear and persons would not have had to come to push the vehicle off the claimant. It is the claimant's evidence that he saw the second defendant driving in the yard before which would presume the second defendant could drive and would have known what was required.

(d) It is to be noted that that the first defendant did not authorize the second defendant to assist the claimant. In fact the second defendant's evidence is that he assisted the claimant in the past to remove starter or generator at the request of the claimant and the claimant paid him. If an employee in the general employment of one person is temporarily in the employment of another it follows that that employee cannot claim from the general employer in respect of damage caused by the negligence of the employee whilst he was in his temporary employment. Conversely, if the employee, whilst he was in the service of the particular employer, negligently caused damage to the general employer, the employee is liable.

He relies on the following cases of **Societe Maritime Farncaise v Shanghai Dock & Engineering Co.** 1921 37 T.L.R. and **A. H. Bull & Company v West African Shipping Company** 1927 A.C.

He submits further that the following cases of **Dubai Aluminium Co. Ltd. v Salaam** (2003) A.C. 366, **Lister v Hesley Hall Ltd.** (2002) A.C. 215 and **Clinton Bernard v A.G. of Jamaica** P.C. Appeal No. 30 of 2003 relied on by Counsel for claimant are distinguishable and not applicable to this case. Those are cases in which the employees acted criminally or fraudulently in the course of their employment.

The principle to be gleaned from these decisions is that an employer who has an overriding responsibility or a statutory duty must ensure that the employee does not act in a negligent or criminal manner and this duty cannot be delegated.

He adopts the words of Lord Millett 2002 A.C. pg. 250 – "the law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry."

He further submits that the instant case is applicable in that where the employee acted outside the scope of his authority or the work was done by an independent contractor, the employer is not liable.

It is also his submission that the claimant, an independent contractor, used the second defendant to assist him, for which the first defendant would not be liable.

Submissions by Mr. Earl DeLisser for the 2nd Defendant

Mr. DeLisser submits that the account given by the second defendant is far more credible than that of the claimant for the following reasons:

(a) It would be totally foolhardy for the first defendant to risk his insurance coverage by utilizing a system whereby an unlicensed driver is used to drive vehicles on the compound when the first defendant has a designated driver for each vehicle.

(b) If it is accepted therefore that the second defendant had no authority to drive any vehicle and did so against the rules of his engagement then the principles outlined in the **Metropolitan Parks** case would provide an escape for the first defendant but not for the second defendant.

(c) The manner in which the evidence of the claimant unfolded showed a deliberate attempt to mislead the Court by an over-simplification of the technicalities involved in testing the lighting system at the rear of the vehicle. It is his evidence that with a wire attached to the battery he could use the other end to carry out all tests without any other human assistance. However, from the evidence of Mr. Rodney Chin who is an equally qualified person, it emerged that the claimant had over-simplified his own case.

(d) The distance between the rear of the vehicle and the stationary chassis on the balance of probabilities must have been much less than the 13 feet indicated by the claimant as at that distance the claimant would have had time to go sideways and out of the path of the vehicle. The fact that he was pinned would indicate that the vehicle was very close to him and

afforded him no time to 'back away' as he would want the court to believe.

(f) The many inconsistencies in the evidence of the claimant overall makes his evidence unreliable and on a balance of probabilities, he has failed to meet the required standard of proof.

Assessment

Mr. Staple is a vacillatory witness. His testimony is fraught with inconsistencies. In his witness statement he stated that Mr Gillespie asked him to start the truck. Under cross-examination he denied that he asked him to start the vehicle and insisted that he asked him to turn the key. However, later under cross-examination he again contradicted himself by stating that Mr Gillespie asked him to start the vehicle and he followed his instructions.

Mr. Staple, in his witness statement, makes a distinction between the status of his employment with Mr. Chin and Mr. Gillespie. He states that he is employed to the Chins as a mechanic while Mr. Gillespie is a contract worker.

However, in his oral examination-in-chief, he changes his evidence and states that he is a job worker and that he works for other people. He now supports the evidence of the Chins in light of his clear statement in his witness statement to the contrary that, Mr. Gillespie is a contract worker and he is employed to the first defendant as a mechanic. Mr. Andre Chin stated in his witness statement that Mr. Staple is employed as a mechanic to service the company's vehicles.

He, however, testifies that Mr. Staple "said he was employed to do job work." I find odd, the use of the word "said." On a balance of probabilities I find that he was not a job worker but was in the full employ of the defendant.

It is Mr. Staple's evidence that he completed his work at 4:00 p.m. and was "sticking around, drinking and watching TV and watching Mr. Gillespie who as far as he was aware was working on the back tail lights. He denies that he was hurrying Mr. Gillespie.

In his witness statement, he states that at 4:30 p.m., he was called by Mr. Gillespie to assist him. Under cross-examination, however, he denies it was 4:30 p.m. Upon being confronted with his statement, he confesses that parts of his statement are true but some parts are lies. He continues to deny that it was 4:30 p.m. However, upon seeing his certificate of truth, he states that his witness statement is accurate. He nonetheless, insists that he was not lying and the incident occurred at 6:00 p.m. Both cannot be true.

I find on a balance of probabilities, having ended at 4:00 p.m., while Mr. Gillespie was still working on the vehicle that he became impatient about going home and he indeed hurried Mr. Gillespie. I find also that Mr. Staple reversed the vehicle and it moved at a fast speed. I reject Mr. Staple's evidence that Mr Gillespie asked him to turn the key in the ignition.

It is Mr. Staple's evidence that Mr. Gillespie was not pinned right behind the chassis. He "just got bounced and eased back to it." Soon after he contradicts himself and agrees that he was squeezed against the chassis and not that he just leaned. Mr. Andre Chin testifies that after the accident, Mr. Gillespie was pinned between the truck and chassis and the truck had to be pushed off him.

Both Mr. Staple and Mr. Chin testify that the truck was parked about 4 feet from the chassis. I accept Mr. Gillespie's evidence that the truck was parked 13 feet away from chassis. That is the reason his injuries were not more serious.

Is Mr. Staple being truthful when he testifies that that he doesn't know how to move a vehicle forward and he never sat in a driver's seat? He agrees that mechanics test drive vehicles but he does not.

It is his evidence that in starting a vehicle that uses a gear stick if it is not in neutral, a foot must be placed on the clutch to ensure the gears are disengaged before starting the vehicle. He also knows that if a foot presses the clutch right down, it disengages the gears. He knows that if the gears are not disengaged the vehicle will jump if started. However, he does not know that in starting a gear stick vehicle a foot must be placed on the clutch to ensure that the gears are disengaged. His answer is that he doesn't know because he is not a driver. According to him, it was the first time he was turning a key in a vehicle in the three (3) years he worked for Mr. Chin. Mr. Gillespie, however, testified that he has seen him driving on the compound before. Mr. Staple has been a mechanic for nine (9) years. He is able to fix trucks, diesel and tractors. On a balance of probabilities I accept Mr. Gillespie's evidence that he has driven on the compound. I find that Mr. Staple drives vehicles on the compound.

According to Mr Staple, upon realizing that Mr Gillespie was pinned behind the truck, a driver put the truck in neutral and they pushed it off Mr. Gillespie. Since a driver was so readily available to put the truck in neutral, why wasn't he available to assist Mr. Gillespie? Why was it necessary for Mr. Gillespie to solicit the assistance of Mr. Staple? On a balance of probabilities I find that no driver put the vehicle in neutral, Mr. Staple was the driver. I find that he is a disingenuous witness whose answers are tailored to fit his case.

Mr. Rodney Chin is an engineer. He has some knowledge of electrical work but he is not an electrician. In fact, his evidence is that when he has electrical problem he calls an electrician to fix the problem. He has never examined the electrical system and wires of the Daihatsu truck. He is therefore not conversant with the electrical operations of the Daihatsu truck. He states that the removal of the switch from the gear box could take between fifteen (15) minutes to one (1) hour. However, he does not know where the switch is to be found. He lacks the practical experience. His evidence is therefore not reliable as to how long it would take to remove the switch.

Mr. Gillespie is an electrician. He is specially trained and has many years of practical experience. He actually worked on the Daihatsu truck. Mr. Rodney Chin did not. In the circumstances, wherever his evidence regarding the electrical systems of the truck conflicts with Mr. Gillespie's, on a balance of probabilities, I prefer Mr. Gillespie's.

I also find Mr. Gillespie's evidence regarding the use of the live wire to be more reliable than Mr. Andre Chin's. Mr. Andre Chin is not an electrician although he acquired knowledge of motor vehicles from having been around mechanics for approximately 20 years. Mr. Gillespie as stated before is an electrician with many years of experience. Both Messrs Rodney and Andre Chin testify that the method employed by Mr. Gillespie was more tedious. It is Mr. Gillespie's evidence that when he conducted his wire test, he discovered that the circuits were all working but the wires to the circuits were disconnected. It was therefore a matter of connecting them. In light of how long he worked on the vehicle on a balance of probabilities, it is quite likely that he in fact employed that method. He began working on that truck at about 6:00 p.m. and ended at 7:00 p.m.

Having seen and observed all the witnesses as they testified, in spite of Mr. Gillespie's severe handicap and his difficulty in hearing the questions, I find him to be the most credible.

Messrs Rodney and Andre Chin testify that Mr. Staple was not authorized to drive and that that there was no need to park the vehicle. I reject Mr. Chin's evidence that there was no need to park the vehicle, I accept, as stated earlier, Mr. Gillespie's evidence that Mr. Staple was hurrying him because he needed to park the vehicle.

I reject Messrs Rodney and Andre Chin's evidence that Mr. Staple never drove the vehicles. I also reject Mr. Staple's evidence that he never drove the vehicles. Mr. Andre Chin testified that two drivers were employed to drive the vehicles when they are being serviced. It is also his evidence that he is very strict that on his rule that only specified drivers are allowed to drive the vehicles. It is his evidence that Mr. Gillespie was never informed that he should not drive the vehicles. If he were so strict wouldn't he have enquired whether Mr. Gillespie was a licensed driver in light of his evidence that it is necessary for the vehicle to be turned on? Since it is his evidence that he always had two drivers available to drive the vehicles when they are being serviced why didn't he make a driver available to Mr Gillespie? On a balance of probabilities I accept Mr. Gillespie's evidence that on previous occasions he has seen Mr. Staple drive the vehicles on the compound. Mr. Staple was a mechanic. On a balance of probabilities I reject his evidence that he never sat in the driver's seat of the vehicles or that he never turned on the vehicles.

I accept Mr. Gillespie's evidence that he reversed the vehicle on him. I reject Mr Staple's evidence that he asked him to turn the ignition. I reject his evidence that he stood

outside and turned the switch. Also, I reject his evidence that Mr. Gillespie had left the gear in reverse.

Whether Mr. Staple was acting within the scope of his employment with Mr. Chin

The question is whether Mr. Staple was acting within the scope of his employment when he reversed the truck which collided with Mr. Gillespie.

I find the following statement of **Dancwerts LJ in East v Beavis Transport, Limited**; and Others (1969) 1LR 303 at page 304 helpful:

> *"The next question which arises, is assuming that both Rose and his employers and Sellars are to blame, are the respondents, the second third party, **W.E. Anderson & Co., Ltd.**, liable for the acts of Sellars in this connection? He was, of course, a docker. He was not employed, as has been pointed out, to drive vehicle, but he was doing something which was for the purposes of the job which he had, the job being to load the vehicles in question, and he was doing this in order to speed up the loading of the vehicles and therefore to carry out the work which he was employed to do about the docks.*
> *The principles, which have been approved by the Courts several times, are stated in **Salmond on Torts**, 14th ed. (1965), at p. 658. The heading is "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 mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. "In all these cases," said Willes J., delivering the judgment of the Court of Exchequer Chamber in* ***Barwick v English Joint Stock Bank*** *[(1867) L.R. 2 Ex 259, at p. 266], "it may be said that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.'"*

That principle of law is quite settled and has been approved by several courts. In **Ilkew v Samuels** (1963) 2 All ER 879 at 885 stated:

> *"...the mere fact that the act complained of was done in disobedience of expressed instructions is of no necessary materiality in deciding whether or not the act was within the course of the employment."*

See also **Percival Swaby v Metropolitan Parks and Market and Others** suit no. C.L. S123/2000.

Mr. Staple (even if he was not authorized to drive, which I reject) in attempting to park the vehicle was acting in the course of his employment. In the circumstances, the first defendant cannot escape liability. I therefore find both defendants liable.

Quantum of Damages

General Damages

Mr. Gillespie underwent immediate surgery. Lacerations were found to his mesentry (a fold tissue which supports and lines the small intestines) and blood in the abdominal cavity. The mesentry lacerations resulted in compromised blood supply to two (2) small segments. These areas were resected and the bowels repaired. He has a large abdominal scar. His post-operative course was somewhat stormy but he settled well and was fit enough for discharge on December 6, 2004. Dr. Kpormego reports that he suffers psychological trauma. He is at risk of developing adhesions and was discharged 12 days after surgery.

Ms. Davis relies on the case of **Mary Hibbert v Reginald Parchment** cited at page 191 of Ursula Khan's **Recent Personal Injury Awards** made in the Supreme Court of Judicature of Jamaica. In that case the claimant was a 22 year old helper who was shot on June 28, 1985 by her employer who mistook her for a burglar. She underwent surgery to repair the small bowel and a loop colostomy. She was discharged on July 6, 1985. Her colostomy was closed on July 15, 1985.

She developed faecal fistula and was transferred to the Cornwall Regional Hospital where the closure was repeated on November 19, 1985, some four months later. She wore the colostomy for five months and experienced pain, discomfort and embarrassment as a result of the injury. She was unable to perform her usual duties for sometime.

In November 1996, there were three (3) visible scars on her abdomen and there was no tenderness or signs keloid formation.

On May 6, 1999, an award of $900,000.00 was made, that sum today values $2,543,399.00. Ms. Davis also relies on the case of **Hopeton Wachope v Attorney General** which is also cited in Ursula Khan's work at page 193. The claimant in that case received gun shot wounds to the left side of his navel and left side of his chest. He became unconscious and upon regaining consciousness he found that he had tubes in his nose, stomach and penis. He was hospitalized for six months. Five months later, he underwent a second operation. An award of $1,000,000.00 was made. Today that award values $2,493,765.00.

Ms. Davis submits that an award of $3,000,000.00 is appropriate.

Gun shot injuries are more traumatic than the injuries sustained by Mr. Gillespie. Moreover, the injuries sustained by those two claimants were far more serious than Mr. Gillespie's injuries.

Mr. Heron Dale submits that a more appropriate case, is the case of **Pauline Douglas v Damion Dixon and Nicholas Williams** which is also cited at page 188 in Ursula Khan's work on **Recent Personal Injury Awards**, Volume 5.

In that case, a 42 year old woman sustained abdominal injuries after being struck by a motor cycle. Exploratory laparotomy was done and it was discovered that there was a 1.5 cm contused area of the distal jejumum which appeared to be compromised. It was excised and a primary anestomosis was done. The post operative period was uncomplicated and she was discharged. She was discharged on the sixth post operative day. An award of $650,000.00 was made on February 7, 2000. That award now values $1,782,780.00.

Mr. Dale submits that an award of $1.5 million is appropriate.

The instant claimant's condition was more serious and required more extensive surgery. In the circumstances an award of $1,890,000.00 is appropriate.

Handicap on the Labour Market

The complainant is now 71. It is his evidence which I accept that he still works. In the circumstances, I consider the sum of $150,000.00 to be reasonable for handicap on the labour market.

Loss of Income

It is the claimant's evidence that he earned approximately $65,000.00 per week. Letters confirming his income from four of his regular employers were tendered into evidence. The complainant does job work such as he did with the first defendant. It is his evidence that Income Tax is deducted by the persons for whom he works. On the occasions he does job work, he provides his employers with a bill and is duly paid. In the circumstances a deduction must be made for Income Tax.

His weekly income is therefore assessed at $45,000.00 per week. It is his evidence that he was unable to work for one year. Mr. Heron Dale submits that Dr. Phillip's report is more reliable than Dr. Kpormago. He submits that three months is a reasonable period for him to resume working because on January 3, 2005 when he was last seen, the doctor found him to be doing well.

The court is of the view that six months in light of the severity of his injuries is a reasonable period within which he could have resumed working.

In the circumstances, I make the following assessment:

1. General Damages in the sum of $1,890,000.00 at 6% per annum from June 21, 2006 and thereafter at 3% per annum to November 27, 2009.

2. Special Damages in the sum of $1,301,785.00 with interest at 6% per annum from November 20, 2004 to June 21, 2006 and thereafter at 3% per annum to November 27, 2009 on the Special Damages including loss of income.

a. Loss of income at $45,000.00 per week for 26 weeks amounting to $1,170,000.00.

3. Handicap on the Labour Market at $150,000.00.

4. Costs to be agreed or taxed.