NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 31 & 32/93; 65/93

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A. (AG.)

SUPREME COURT CIVIL APPEAL NO: 31 & 32/93

BETWEEN KENNESHA HARRIS PLAINTIFF/APPELLANT
(An infant by her mother
and next friend Beverley Harris)

AND ELAINE HALL 1ST DEFENDANT/RESPONDENT

AND ANTHONY MORGAN 3RD DEFENDANT/RESPONDENT

SUPREME COURT CIVIL APPEAL NO: 65/93

BETWEEN RUPERT McINTOSH 2ND DEFENDANT/APPELLANT
(t/a McIntosh Auto Repairs)

AND KENNESHA HARRIS
(An infant by her mother
and next friend PLAINTIFF/RESPONDENT
Beverley Harris)

AND ANTHONY MORGAN 3RD DEFENDANT/RESPONDENT

Gordon Robinson with Patrick Brooks & Miss Debra Newland instructed by Nunes Scholefield DeLeon & Co. for Plaintiff/Appellant

Alexander Williams with Miss Minnette Palmer instructed by Myers, Fletcher & Gordon for 1st Defendant/Respondent

Donald Scharschmidt, Q.C. instructed by Sonia Jones for 2nd Defendant/Appellant

5th, 6th, 8th November, 1996 & 28th April, 1997

FORTE, JA..

The facts of this case are unfortunate. Kennesha Harris, the plaintiff, a young girl of the tender years of seven at the time, while walking to school on the 1st October 1985, stopped to purchase sweets on the side walk of Laws Street, which at that spot intersected Highholborn Street. At that moment a car driven by the third defendant along Highholborn Street left its correct side of the street and came over to the right hand, continued onto the side walk and hit Kennesha, causing her to fall to the pavement. She became unconscious, and was taken to the Children's Hospital where on examination the following injuries were found:

(i) Abrasions over her right thigh

(ii) A 1.5 c.m laceration over her left eye

(iii) A 1.5 c.m. incised wound over her right hip

(iv) A 7.5 c.m. laceration 3 c.m. below her right hip

(v) An extensive gloving injury on her left leg from just below the knee joint to the ankle and proximal portion of the dorsum of the foot, involving both skin and muscle groups of the calf.

The doctor described "gloving injury" to be the stripping of the outer layer of the skin and subcutaneous tissues. She remained in hospital until the 6th December, 1985 but returned to the out-patient department for treatment for a period of three months thereafter and was finally discharged on the 13th August, 1986.

The injury to her leg resulted in "some gruesome scarring" and on the 28th May, 1987 when the doctor did a re-appraisal the scars had become even more gruesome. They were hypertrophied (heaped up) and had a "green lizard appearance". Plastic surgery was recommended.

Dr. Horace Anthony Jackson, a plastic and reconstructive surgeon saw and examined Kennesha, and testified to the grostesque nature of the injury to the leg. The method of repairing the appearance was by scar revision which called for tissue expansion which in turn necessitated the importation of special prosthesis from the United States of America.

Arising out of the accident the plaintiff by her mother and next friend Beverley Harris brought an action in negligence against the three named defendants. The first defendant, the owner of the car, had given her motor vehicle to the second defendant, the proprietor of McIntosh Auto Repairs at 16 Gold Street in Kingston, for the purpose of effecting repairs to the body of the car. It was while the car was in the custody of the 2nd named defendant that the 3rd defendant (hereinafter called the driver) drove it negligently (as conceded by all sides) and caused the stated injuries to the plaintiff. The 1st and 2nd defendants were sued as being vicariously liable for the negligence of the driver, the allegation being that he was, at the material time, the servant and/or agent of the 1st and/or the 2nd defendant.

The learned judge found in favour of the 1st defendant, and concluded that the 2nd defendant was vicariously liable. The driver entered no appearance, and default judgment was entered against him.

Before us, there were two appeals which were heard together.

The first, was that of the plaintiff who appealed the judgment of the learned judge entered in favour of the 1st defendant.

The second, was brought by the 2nd defendant in respect of the judgment entered against him. There was no complaint in respect of damages awarded to the plaintiff which were as follows:

(a) Special damages in the sum of $4,410.00 with interest at the rate of 3% per annum from the 1st day of October, 1985 to the date of judgment which said interest amounts to $933.69; and

(b) General Damages

(i) For pain and suffering and loss of amenities in the sum of $400,000.00 with interest at the rate of 3% per annum from the date of service of writ to date of judgment which said interest amounts to $62,983.60.

(ii) For Handicap on the labour market in the sum sum of $50,000.

(iii) For future medical treatment J$47,000.00 US $800.00

1. Plaintiff/Appellant's Appeal

The first defendant was sued in her capacity as owner of the car as being vicariously liable for the negligence of the driver whom it was alleged was her servant and/or agent.

A review of the circumstances revealed in the evidence is necessary in order to understand the issues raised in the case. The first defendant took her motor vehicle a Toyota Corona which was in need of repairs, to the 2nd defendant (the garage owner) for the purpose of having it repaired by him. The damages to the car were confined to the body, and consequently it needed only "body work and ducoing". She had discussions with him in that regard and as a

result left the car with him, handing him the keys which in her mind would only be used if there was some necessity to move the car within the premises. She was not asked and did not give permission for the car to be driven on the road. In the event however, it turned out that the garage owner operated his business on two different premises, the one on Gold Street where the 1st defendant (the owner) contracted with him, and on which the body-work on cars is done, and another on Highholborn Street where the cars are painted. That system was unknown to the owner, and she was never told this at the time of leaving her car for repairs. The garage owner placed the keys handed to him by the owner in an unlocked pan in an open verandah on the premises, to which everyone had access. The car was thereafter assigned to a man named Francis for the body work to be done. The body work having been completed, the car was being transferred to the premises on Highholborn Street for ducoing, when the accident occurred, coincidentally just outside the very premises to which it was being taken. On appeal, the appellant conceded that the driver could not have been found in the circumstances to be the servant of the owner of the car and, consequently, did not pursue that issue.

However, the questions which arise are:

(1) Was the driver of the car the agent of the first defendant, and

(2) Was there a breach of Statutory Duty by the 1st Defendant/Respondent, as was alleged in Statement of Claim i.e.

"(a) Giving her said motor vehicle to the second defendant qua repairer with her permission to drive the said vehicle without there being in force in relation to such user a policy of Insurance in compliance with the Section 4 of the Motor Vehicle Insurance (Third Party Risks) Act.

(b) Failing to insure the said vehicle to cover the driving of the said vehicle by the servants and/ or agents of the second defendant.

(c) Failure to prohibit the driving of the said vehicles by the servant and/or agents of the second defendant.

1 Was the driver the first defendant's agent?

In circumstances where accidents are caused by the negligent driving of a motor car, the owner of the motor car can be found to be vicariously liable for the negligence of the driver when it is shown that the driver is either his servant acting in the course of his employment or his agent.

In this appeal, there is no contention that the driver of the motor car was the servant of the owner. The appeal rests, in so far as this issue is concerned, on the determination of whether the driver was the agent of the owner. In order to conclude that he was, it must be shown that the owner permitted him to drive the car for the purpose of performing some task or duty which is in the interest either solely of the owner, or for the joint interest or benefit of both owner and driver.

As early as in 1912, in **Samson v Aitchison** [1912] A.C. 844 the Privy Council held that where an owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive it, this will not of itself exclude his right and duty of control; and, therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damages caused by the negligence of the person actually driving (see Headnote).

In delivering the opinion of the Board, Lord Atkinson stated:

> "I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right or is shown by conclusive evidence to have in someway abandoned it."

In **Hewitt v Bonvin and Another** [1940] 1 K.B. 188 the Court of Appeal in England following the Privy Council in the case of **Samson v. Aitchison** (supra) per MacKinnon, L.J. was of the following view:

> "The driver of a car may not be the owner's servant, and the owner will nevertheless be liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

Then in **Ormrod v. Crossville Motor Services** [1953] 2 All E.R. 753 the English Court of Appeal reiterated the principle per Denning, L.J. at page 755:

> "The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's behalf or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

See also **Launchbury v. Morgan** [1971] 1 All E.R. 642 at 645 and 646, where Denning M.R. repeated this principle.

The above dicta which are in accordance with my own opinion show that an owner of a motor vehicle who permits another to drive his car for his (the

owner's) purpose and/or the interest and/or benefit of the owner or the driver would be vicariously liable for damages caused by the negligence of the driver.

In the instant case, however, there is no evidence that could base a finding that the owner either expressly or impliedly permitted the driver to drive her car. In **Hewitt v. Bonvin** (supra) it was recognized that liability in such circumstances depended not so much on ownership but on the delegation of a task or duty; and in **Samson v. Aitcheson**, the Privy Council excepted owners who in some way had contracted themselves out of their right of control and had somehow abandoned it.

Here the owner had, at the time of leaving her car for repairs given over control and custody of the car to the garage owner who thereafter had the right and duty of control over it. The responsibility for any act of negligence in driving the car while it was in the custody of the garage owner, would not attach to the owner as those were circumstances in which the owner had abandoned her right and given up possession and control to the garage owner. The evidence accepted by the learned judge shows that the owner was unaware of the system at the garage, and was satisfied that all the repairs would take place at the site on Gold Street where she had turned over her car and its keys to the garage owner. She did not expect the car to be removed from the premises, and specifically, not knowing that the painting would take place elsewhere, did not give any permission for the car to be driven to those other premises. She did not know the driver, and consequently had never spoken to him, the only person she did her transaction with being the garage owner. In my view, on those facts the learned judge could come to no other conclusion but that she gave no

permission either impliedly or expressly for her car to be driven either by the driver or anyone else.

In the event, the learned judge came to the correct conclusion when he found that having left the car at the garage, in circumstances where the garage owner assumed possession of it as bailee, the owner had abandoned her right to control and, consequently, the driver was not at the relevant time acting as her agent.

2. Breach of Statutory Duty

For these propositions the plaintiff/appellant relies on section 4(1) of the Motor Vehicles Insurance (Third Party Risks) Act which states:

> **4.** -(1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act."

The section would create liability on the owner if she caused or permitted the driver to drive the car on the road, as not only was he an unlicensed driver, but in any event the policy of insurance covered only the owner i.e. the policy-holder.

A determination of this allegation depended, therefore, on the facts. In considering this aspect of the claim, the learned judge found the following:

> "When the first defendant contracted with the second defendant to repair her car, from the evidence nothing was said to her which would cause her to contemplate that her car would have to be driven on the road to complete the job. When she handed over the keys to him all she did was to give him possession of the car. She certainly gave him no permission to drive it

> wherever he wished. This second defendant knowing that the work had to be completed elsewhere should have sought permission from the first defendant. She would have the option then of taking the car to other repairers or insist that she be contacted when the driving was necessary so that she could do same herself."

On those findings which are supported by the evidence and with which there is no reason or basis to interfere, the learned judge was correct in coming to the conclusion that the plaintiff/appellant had failed to establish that the owner had caused or permitted the driver to drive her car onto the road. This ground also fails.

Second Defendant's Appeal

The second defendant/appellant (the garage owner) appeals on the basis that the learned judge, erred in finding that the driver of the motor vehicle was his servant and consequently that he was vicariously liable for the driver's negligence.

In his testimony the garage owner admitted that the car was left with him by the owner for him to effect repairs to the body and to have it thereafter ducoed. However, he maintained that he gave over the job to Mr. Tasman Francis, who was not employed to him, the job to be done on a "job basis, " the system being that Francis would be paid for each job that he does. The driver of the car at the relevant time i.e. the 3rd defendant was not employed to him but to Francis. He, however, admitted that his operation was carried out on two separate premises, the body work at Gold Street, and the ducoing at Highholborn Street where the vehicles would be taken from Gold Street. Only three persons, were permitted to drive the car between the two premises i.e. Francis, Mr. McFarlane the duco-man, and himself. However, at times when the

car could not be driven, the third defendant was permitted to assist in pushing the car to Highholborn Street. It appears to be conceded that at the time of the accident, the driver was taking the car from Gold Street where the body repairs had been completed, to Highholborn Street for the duco job to be done. It is on the basis of these facts that the issue came to be resolved.

The starting point in determining this issue must be to determine what in law constitutes a servant.

In the case of **Ready Mixed Concrete v. Minister of Pensions** [1968] 1 All E.R. 433 at page 439 in determining what was meant by the term "contract of service," Mackenna, J in his judgment opined that three conditions must be fulfilled for a contract of service to exist. These are:

> "(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (iii) The other provisions of the contract are consistent with its being a contract of service. "

The comments of Cooke, J on the conditions stated by MacKenna, J in the **Ready Mixed** case (supra) in **Construction Industry Training Board v. Labour Force Ltd** [1970] 3 All E.R. 220 at 224, demonstrate that though control by the employer over the employee is not the only criterion, it is important in assessing whether the contract is one of service. He stated thus:

> "These tests are now so familiar that in my judgment it is unnecessary to set them out in detail. I merely observe this. First that no list of tests which has been formulated is exhaustive

> and that the weight to be attached to particular criteria varies from case to case. Secondly, although the extent of the control which the alleged employer is entitled to exercise over the work is by no means a decisive criterion of universal application, it is likely in many cases to be a factor of importance."

In another case, in which Cooke, J gave judgment viz. **Market Investigations Ltd v. Minister of Social Security** [1968] 3 All E.R. 732, he also examined the subject of whether control was the only criterion.

He referred to the two following dicta which are relevant:

> (i) **Montreal Locomotive Works Ltd v. Montreal and A.G. for Canada** [1947] 1 DLR 161 at 169 where Lord Wright said the following:
> "In earlier cases a single test, such as the presence or absence of control was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss. Control in itself is not always conclusive."
>
> (ii) **Bank voor Handel en Scheepvaart** N.V. v. **Slatford** [1952] 2 All E.R. 956 where at p. 971 Denning L.J. stated thus:
>
> "... the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organization ..."

Having reviewed those decisions Cooke, J then offered the following opinion at page 737:

> "The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court in

> the U.S.A. suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

A determination of the status of the employee in my opinion, must as has been shown in the cited dicta with which I agree, depend on an examination of all the circumstances in which the employment exists.

The question of the control exercised by the employer must be an important consideration in determining the issue. The test suggested by Cooke J in the case of **Market Investments Ltd** (supra) i.e. whether the person

performing the services is in business on his own, is a good practical method of assessing the circumstances. If the employee is, indeed, a part of the organization to which he is employed, is subject to the control and has a duty to respond to the directions given by the employer, then in my view, he would be enjoying a contract of service and not a contract for services. If, however, he is in business on his own, in which he employs assistance, and he contracts with the employer to perform particular services, it would be an exceptional case in which he could be found to be a servant of the employer, and not an independent contractor.

In the instant case when the owner had given over the car to the garage owner for repairs the latter became the bailee of the car and assumed possession and control of the car. See (**Hondhary & another v. Gillot & orthers** [1947] 2 All ER 541) where the owner of a car had taken it to his garage for repairs but had requested and was allowed an employee of the garage company to drive him to the railway station. On the way to the station the car collided with a lorry and the plaintiff, the owner of the car was injured. In an action brought by the plaintiff against the garage it was held inter alia (p. 542) that having received the car for repairs, the company were at the time of the accident, in possession of it as bailees and so long as the bailment continued the owner had no right to control the owner's servant. It is on this basis then that the garage owner would be vicariously liable for the damages caused by the negligent driving of the driver, if it is established that the driver was his servant and/or agent. As can be seen from the testimony of the garage owner he maintained that the driver was never his servant and/or agent.

The learned trial judge, however, came to the conclusion that the driver was his servant, as recorded in his judgment as follows:

> " In support of her case the plaintiff called Corporal Mitchell who testified that he took a statement from the third defendant days after the accident in which he stated that he was employed to McIntosh Auto Repairs which the second defendant admits that he owns. In his defence the second defendant denies that the 3rd defendant was employed to him but admits he did some work at the garage assisting an employee Mr. Tasman Francis who was the particular job worker for the first defendant's car. He would check on Francis' work from time to time to ensure he did it properly. The second defendant admits that the car was under his control. It is reasonable therefore to infer that persons doing work on the car would also be under his control and within his employment which would confirm what the third defendant told Corporal Mitchell.
>
> I have no difficulty in determining therefore that the third defendant was the servant of the second defendant. ..."

The learned trial judge thereafter dealt with whether the driver was acting within the course of his employment at the relevant time, and relying on the case of **London County Council v. Cattermoles (Garages) Ltd [1953] 2 All E.R. 582** came to the conclusion that he was acting in the course of his employment.

The above cited passage indicates that the learned judge found that Tasman Francis was the servant (employee) of the garage owner, and this in face of the evidence from him that Francis was not his employee but only worked for him on a job basis. In order to determine the real status of the driver, the learned judge had first to determine the true status of Francis. This he did on the background of the credibility of the garage owner. Here is what he found

in that regard, after pointing to several discrepancies in the garage owner's testimony.

> "... His demeanour in the witness box was such as to make his evidence unreliable. He was discredited to the extent that one could not avoid the conclusion as suggested by counsel for the plaintiff, that he would do anything to escape responsibility for his servant's actions."

An examination of his testimony in the following passages, however, in spite of his contention that Francis was not his employee, demonstrates that given the principles herein before stated, the learned judge was, nevertheless, correct in coming to a contrary conclusion:

> "1... I directed Tasman to make sure the car was finished within the time I told Ms. Hall. I don't recall whether Tasman had other cars working on at the time. In any event, in accordance with my system, whatever he had working on would be jobs I gave him. I opened business at 8:00 and close at nightfall. I am at business most of the time. Bodyman has no special time to come to work. He normally comes about 8:30 a.m. or after and he works until the place closes, that is, at 16 Gold Street and nowhere else.
>
> 2. My bodyman is not permitted to take work from another repairer and take it to my shop and work. I don't pay my bodyman except he works and that is because, unless he is working on a car I have no money coming from a car to pay him. ...
>
> 3. I would check on Tasman's work to make sure he did it properly. If he had done something wrong I would point it out to him and make him do it the right way. Never had situation where Tasman refused to do work and I told him to do it. He always co-operate over the years. If I instruct him to do something a particular way he never ever refused. ...
>
> 4. I had operated 1980 - 1985 at Gold Street. Can't remember when Morgan worked for Francis. Say about 3 years. Tasman taught

> Morgan. Apprenticeship was for about three (3) years. Francis was with me up to 1985 for about 15 years. ...
>
> 5. When people brought cars to the business to be repaired they brought them to me. When they returned for their cars and payment made for work done, payment was made to me. ...
>
> 6. Duco-man provided all his material. ... This is not what happens at the body shop. Mr. Francis does not provide his own material - I provide Mr. Francis with material. Mr. Francis does not help to pay the rent."

An analysis of the above evidence shows that though the garage owner did not admit to the payment of a fixed salary to Francis, he, nevertheless, was in control of him in the sense that he was obliged to respond to his orders and, apart from providing his skills as a "body-straightner", Francis performed his duties under his scrutiny and with material supplied by him. It is clear, in my opinion, that Francis could not be said to be in a business of his own, as he was entirely dependent upon the garage owner's distribution of work to him, and was unable under the system to do work which he may have been able to obtain for himself. The evidence, in my view, establishes that Francis was a part of the organization, and had a duty to respond to the directions of the garage owner being under his control and would, consequently, be his servant. That being so, how does that affect the issue as to whether the driver was the servant of the garage owner who contended that the driver was employed by Francis and paid by Francis?

The finding of the learned judge, however, indicates that he did not accept the testimony of the garage owner as to the status of the driver. Consequently, he had to look to the other evidence to determine whether it was established that he was in fact a servant employed to the garage. The

evidence shows that he admitted that the 3rd defendant worked on his premises and on jobs that he gave to Francis. He also admitted that the driver helped on some occasions to transfer the cars from one premises to the other, albeit by pushing the vehicles. In those circumstances, it was open to the learned judge to conclude that the driver was a part of the organization of the garage owner and, consequently, also under his control and subject to his orders.

If then, the driver was the servant of the garage owner, was he at the time of the accident, acting in the course of his employment. On the basis of an admission by the garage owner that he sometimes permitted the driver to assist in transferring the cars from the body-shop to the duco-shop, the learned judge found that the driver was at the relevant time acting in the course of his employment, as he was then driving the car to the duco-shop for the purpose of having it ducoed in pursuance of the system of the garage. The learned judge quite correctly, in my view, applied the following dicta in **Canadian Pacific Railway Co. v. Lockhart** [1942] 2 All ER 464 at p. 467:

> "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 that 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."

Also in support the learned judge relied on the case of **London County Council v. Cattermoles (Garages) Ltd** [1953] 2 All ER 582 in coming to the following conclusion:

> " The instant case seems to be on all fours with the **Cattermoles** case referred to above. Not being the holder of a driver's licence, the 3rd defendant had no lawful authority to drive the car on the road. However, he had authority to push the car on the road. I find that his action of moving the car by means of its own engine instead of by pushing it, was within the scope of his employment, although a wrongful and unauthorised way of performing an act which he was authorised to perform."

In my view the reasons and conclusions of the learned judge in this regard cannot be faulted. In the event, I agree with his conclusion that the garage owner is vicariously liable on the basis that the driver was his servant at the relevant time.

Further the learned judge was correct in concluding that the driver was the agent of the garage owner, and on that basis also that the latter is liable for the negligence of the former. His admission that in general practice, the driver is sometimes allowed to assist in the transfer of vehicles, amounts, in my view, to his giving the driver such authority. As discussed earlier in this judgment where a person in control of a motor vehicle, be he owner or bailee, gives express or implied authority to another to drive that vehicle for a purpose which is in the interest and/or benefit of himself or both persons, the driver is, in law, his agent and he will be liable for damage caused by the negligent driving of such an agent.

I would dismiss both appeals and confirm the orders made below.

Bullock Order

I have had the opportunity of reading the judgement in draft of Downer J. A. and for the reasons stated therein I agree that Reckord J. correctly exercised his discretion in refusing to grant a Bullock Order.

In respect of the first appeal brought by the plaintiff, the 1st defendant/respondent will have the costs, to be taxed if not agreed.

In respect of the second appeal, the 2nd defendant/appellant will pay the costs, to be taxed, if not agreed.

DOWNER JA

In the court below, Reckord J found for the plaintiff Kennesha Harris, an infant against Rupert McIntosh and Anthony Morgan. Morgan was employed at McIntosh auto Repairs and one of the issues contested was whether in law he was an employee of McIntosh Auto Repairs or of Tasman Francis who was a job worker at McIntosh Auto repairs. The details of the accident need not detain us as Morgan did not enter an appearance and there was no defence on the issue of his liability. McIntosh has appealed and so it is pertinent to begin with this aspect of the case.

The case against McIntosh

The relevant paragraphs in the statement of claim were as follows:

> "3. The Second Defendant at all materials times operated McIntosh auto Repairs at premises at 16 Gold Street, Kingston and 44 High Holborn Street, Kingston and was at the material time in possession of the First Defendant said motor vehicle as bailee for the First Defendant and/or as the servant and/or agent of the First Defendant.

Then Morgan was brought into the picture thus:

> 4. The Third Defendant was at all material times the servant and/or agent of the First Defendant and/or Second Defendant and was at the material time driving the First Defendant's said motor vehicle from the Second Defendant's premises at Gold Street to the Second Defendant's premises at High Holborn Street."
>
> "5. On or about the 1st day of October 1985, at Gold Street in the parish of Kingston, the Third Defendant so negligently drove the First Defendant's said motor vehicle while it was in the care, custody and control of the Second

> Defendant as bailee for the First Defendant that the said vehicle collided with the Plaintiff." [Emphasis supplied]

Be it noted that while in paragraph 4 of the statement of claim McIntosh is described alternatively as a bailee or a servant or agent of Elaine Hall, by the time the pleader drafts paragraph 5 McIntosh is unequivocally described as a bailee.

How did McIntosh respond in his defence. Paragraph 3 of his defence reads:

> "3. Save that the second named Defendant admits he operated McIntosh Auto Repairs at 16 Gold Street, Kingston, and denies that at the material time the first named Defendant's motor vehicle was being driven and/or operated by him as servant or agent of the said first Defendant, paragraphs 3 and 4 of the Statement of Claim are denied."

As regards the crucial issue of Morgan's employment, paragraph 4 states:

> "4 Save that this Defendant admits that the first named Defendant's motor vehicle was in his care and control at 16 Gold Street, Kingston, paragraph 5 of the Statement of Claim is denied in so far as it relates to the third named Defendant driving the said motor vehicle as his servant or agent of this Defendant at the material time."

McIntosh's defence continues thus:

> "5. This Defendant further says that on the 1st of October 1985 or on any other day which the accident occured, the third named Defendant was not driving or operating the said motor vehicle with his consent or knowledge, nor was the said third Defendant engaged in any business venture or mission on the part of this Defendant."

It is in the light of these pleadings that the evidence must now be assessed to determine whether Reckord J was correct in resolving the issues.

There was a statement given to the police and admitted in evidence which has McIntosh saying:

> " I am an auto Body repairer age 56. Resides at 62 Martella Drive Harbour View and operates a Body Shop at 16 Gold street and a Duco shop at 44 High Holborn street Kingston."

The other relevant part of his statement was as follows:

> "... Anthony Morgan was not given permission by me or anyone to drive this car."

The crucial part of McIntosh's oral evidence is contained in the following passages in the learned judge's note:

> "At Gold Street I did body-work, straightened and repaired rotten areas. Ducoing was done at 44 Highholborn Street.
>
> If your vehicle can be driven, drive it up to duco shop. If not it is pushed or towed."

Then the following passage appeared:

> "I call the body-man, show him the areas to be done. At that time body-man was Tasman Francis. Tasman Francis would be paid at the completion of the job after examining the job. He was being paid on a job basis. I know Anthony Morgan. Anthony Morgan never worked for me. Anthony Morgan worked at 16 Gold Street. He works with Tasman Francis. For whatever work Anthony Morgan did, I never paid him. Tasman Francis paid Morgan for work he did. Whilst I was at Highholborn Street, did both body-work and ducoing there. When I removed to Gold Street, ducoing is still done at Highholborn Street."

As to the relationship between Tasman Francis and Morgan here is how it emerged:

> "... Tasman taught Morgan. Apprenticeship was for about three (3) years. Francis was with me up to 1985 for about 15 years - coming from North Street."

As for Morgan's role at the garage here is McIntosh's version:

> "All duco work goes to Mr. McFarlane. Duco work goes to him when the bodywork is finished. Three persons permitted to drive from Gold Street to Highholborn Street. Tasman, McFarlane and I. Morgan was allowed to do the pushing. If it needed to be pushed Francis would call the people there, including Morgan, and ask them to assist. ..."

The reasonable finding to be drawn from these passages was that Tasman Francis was a job worker employed to McIntosh and that Morgan was the mate to Tasman Francis. He took orders and was part of McIntosh's garage. Here is how this principle was stated per Denning LJ in relation to crown servants:

> "... the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."

(See **Bank Voor Handel En Scheepvaart N.V. Slatford** [1952] 2 All ER 956 at p. 971.) The principle applies equally to servants in private enterprise and the learned Lord Justice further cited **Cassidy v Ministry of Health** and **Stevenson Jordon & Harrison Ltd v McDonald & Evans** 69 RPC 10 [1952] 7 WN 7. The second case concerned an accountant in a company in the private sector.

Another equally important finding was that although Morgan's earnings were paid directly by Tasman Francis they came ultimately from McIntosh's pocket. McIntosh admitted that:

> " Tasmair (sic) Francis was the particular job worker for Miss Hall's job."

That Tasman was employed as a body worker is emphasised in this passage of McIntosh's evidence under cross-examination:

> "...I directed Tasman to make sure the job finished within the time. I can't recall if Tasman

> had other cars working on at that time. Whatever work he had was what work I gave him. My business open about 8:00 a.m. until night-fall. I there most of the time. Body-man has no special time to come to work. He usually comes about 8:30 a.m. or maybe there after until night fall. This is at 16 Gold Street - nowhere else. My body-man not permitted to take work from another repairer and take it to my shop and work on it. I don't pay my body-man except he works. Unless he is working on a car I have no money coming in to pay him. I could not afford to pay body-man on weekly or monthly basis. Whether or not he did any work at all, I could check Tasman work to make sure he did it properly."

The law on this is admirably summarised in Charlesworth & Percy on Negligence eighth edition at paragraph 2-228:

> "**Who is a servant?** A servant, according to *Salmond & Heuston on the Law of Torts* 9th ed. (1936) at p. 89 & 19th ed. (1987) at p. 511, may be defined 'as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done.' It must follow that a servant is one who is bound to obey any lawful orders given by the master as to the manner in which his work shall be done. The master retains the power of controlling him in his work, and may direct not only what he shall do, but how he shall do it. *Sadler v. Henlock (1855) 4 E. & B. 570, 578, per Crompton J.; Simmons v Heath Laundry Co. [1910] 1 KB* 543; *Yewens v Noakes* (1880) 6 Q.B.D. 530. Whether the employment is by the day or by the job, and whether the amount of wages or salary paid is great or small, is of little assistance in determing the existence of a contract of service. *Sadler v. Henlock supra; Performing Right Society Ltd. v. Mitchell and Booker (Palais de Danse) Ltd.* [1924] 1 K.B. 762. 'The test to be generally applied lies in the nature and degree of detailed control over the person alleged to be a servant.' per McCardie J. in the case last cited. In *Ferguson v. Dawson* [1976] 1 W.L.R. 1213 it

> was held that the plaintiff was a servant and not a sub-contractor, since he had no power to delegate his work to someone else to do for him. In ascertaining who is liable for the act of a wrongdoer, 'you must look to the wrongdoer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable.' Wills J. in *Murray v Currie* (1870) L.R. 6C.P. 24, 27."

On this basis McIntosh is the first person in the ascending line who is the employer and has control over the work done by Tasman Francis and his mate Anthony Morgan.

The next stage is to determine whether moving the vehicle to High Holborn Street was within the scope of Morgan's employment. The relevant principle is expressed in the headnote to **London County Council v Cattermoles Garages Ltd** [1953] 2 All ER 582:

> "his action in moving the van by means of its own engine, instead of by pushing it, was within the scope of his employment, being a wrongful and unauthorised way of performing an act which he was employed to perform; the excursion on to the highway was merely incidental to moving the van out of the way of other motor vehicles on the defendants' premises, the work for which P. was employed, and, therefore, although it was illegal for P. to drive on the highway as he had no licence, the fact that the accident occurred when he took the van off the garage premises on to the highway did not affect the result, and the defendants were liable in damages to the plaintiffs for P.'s negligence."

The evidence established that McIntosh arranged for the motor vehicle to be spray-painted at his other establishment. The car was on its way to that establishment at High Holborn Street when the negligent driving by Morgan

resulted in the accident. Here is an eyewitness account from an independent source:

> "Barrett: Living in area 30 years.
>
> Remember 1st October, 1985 at gate of 46 Highholborn Street talking to some friends. In relation to Highholborn Street and Laws Street there is a garage at corner. Garage is at 44 Highholborn Street. Talking to friends at about 7:30 - 7:35 saw car coming up Highholborn Street with speed and I said to my friends what a mad man a come up Highholborn Street so fast. I saw the car mount the sidewalk on the side I was standing up. Kennesha was standing there. She pushed her hand in her pocket and the car mount the side walk and hit her back and pushed her to the wall, i.e. the wall of the garage. At that time I think operator of garage was Mr. McIntosh. I know him but I don't talk to him. I known him by sight. He is here today (Points him out in Court). Mr. McIntosh operates two garages - one at Gold Street and one at Highholborn Street. They are far apart about a mile. Gold Street one is near Gold Street Police Station. She fell and crowd gather around. Cannot say who picked her up. She was picked up and taken to hospital. I went one side and cried. I thought she was dead. I had no conversation with the driver of the car. I saw man who drive the car but I really don't know him."

The account by her brother is equally cogent. It reads:

> "After it hit her she fell on the sidewalk. It happened in front of a garage. Car was travelling on Highholborn Street before it hit her. Kennesha and I were on sidewalk on Laws street. This was at the corner at Highholborn Street. Laws Street is East to West. Corner is Eastern corner that is at Laws Street and Highholborn Street. As you walk East along Laws Street, cornier is on left hand side of Laws Street. (They were on North Eastern corner). Car was coming on Highholborn Street heading North. Highholborn is North to South Street.

> Don't know if Highholborn is one-way. When first saw car it was driving on left hand side of Highholborn Street going north. The car went across the road and over the sidewalk that we were on and hit her against a wall, i.e. the wall to the garage.
>
> License No. of car FR 8409 which hit Kennesha."

Findings on Rupert McIntosh's appeal

The learned judge was correct to find McIntosh liable. In evidence McIntosh admitted that the car was entrusted to him and in law he was, therefore a bailee. He admitted Morgan worked at his garage and the evidence established that he was the mate of Tasman Francis a body work man who was employed on job basis by McIntosh. There was evidence that Morgan was called upon to push cars to Higholborn Street. Additionally, McIntosh gave evidence that the keys for the car were not secured so that access was easy. It is helpful to recount this aspect of the evidence:

> "I took it out of car and put it in a pan. This pan was in a locker inside the garage. If Tasman wants to drive the car when bodywork is finished, he would not necessarily have to ask me for the keys. He would go to the locker and take out the pan and take out the keys. That is the normal system in my place. The pan is not locked in any way. Locker I put pan in is not locked in any way. It does not have a door. Locker is not in my office, it is outside of my office in front of the office like a verandah. In same general area as yard where car is worked on and save that you would have to step up 18" to get to it. Bodywork on this (Ms. Hall's) car had been finished. I understand that at time of accident, car was on the way to the duco shop to be ducoed."

To my mind the learned judge's finding is based on the fact that McIntosh was vicariously responsible for Morgan as the mate of Tasman Francis. Further, as a bailee the evidence as to the manner in which the keys were kept established that he was negligent. The pleader averred that McIntosh was a bailee and paragraph 4 of his defence admitted that he was a bailee. It is true that there are no specific particulars as to the negligence of the bailee. However, under cross-examination, McIntosh revealed that there was no adequate security for the keys of the car. The case was conducted on that basis. In any event, McIntosh's liability was vicarious and that is an instance of strict liability.

So the appeal of McIntosh must be dismissed.

Kennesha's appeal

The pre-eminent role of insurance is fully revealed in the law of torts especially in negligence actions. The learned judge did not make any adverse finding against Elaine Hall, the 1st respondent. She was the lady who entrusted her car to McIntosh for bodywork repairs and to spray-paint. It may be that it was anticipated that McIntosh and Morgan might be men of straw who lacked the relevant insurance cover. So it was prudent to attempt to establish liability on the part of Elaine Hall.

That perhaps accounts for this aspect of the appeal. The common law principle which is applicable where a motor vehicle is entrusted to a bailee is neatly capsuled in two short sentences. Firstly in **Chowdhary & anor. v Gillot & ors.** [1947] 2 All ER 541 at pp. 545-546, Strentfield J said:

> "In his judgment which was approved by the Privy Council [1912] AC 849 the trial judge said in *Samson v. Aithenson*:
> '... No doubt if the actual possession of the equipage has been given by the owner to a third person - that is to say, if there has been a bailment by the owner to a third person - the owner has given up his right of control."

Secondly in **Nottingham v Aldridge & anor (The Prudential Assurance Co Ltd, third party)** [1971] 2 All ER 751 at p. 757 Eveleigh J said:

> "... It may be said that vis-a-vis the paid independent contractor I surrender my right of control: see *MacManus v Weibart* (11th May 1940) Post Magazine 621 where the defendant's car was collected by the repairers. Then am I not permitted, in that case, to inform my friend that I abandon all right of control in his favour and thus escape liability, irrespective of my interest in the operation?"

This principle has to be taken into account when considering the allegation of Kennesha that Elaine Hall was in breach of statutory duty pursuant to section 4 of the Motor Vehicles Insurance (Third-Party Risks) Act. If no control can be exercised when the motor vehicle is entrusted to a bailee for repairs, then can it be sucessfully contended that permission is given to use it on the road if that was necessary to effect repairs? Reckord J found for Elaine Hall on this aspect of the case.

The substance of the appeal

Mr. Gordon Robinson, on appeal, posed three questions for determination. They were as follows:

> "1. There are three narrow issues involved in this Appeal in which the First Defendant is the Respondent. They are -

> (a) was the Third Defendant/Respondent acting as the agent of the First Defendant/Respondent at the material time;
>
> (b) alternatively, was the First Defendant/Respondent in breach of her statutory duty not to cause or permit her motor vehicle to be driven without insurance coverage.
>
> (c) should the Learned Trial Judge have made a Bullock Order with respect to the First Defendant/Respondent's costs?"
>
> 2. The Plaintiff/Appellant's success in either (a) or (b) above will obviate the necessity to consider (c)."

The answer to (a) must be in the negative. Elaine Hall entrusted her motor vehicle to McIntosh an independent contractor. He was an admitted bailee. Morgan, his employee, she knew not.

As regards the question posed at (b) - how were the allegations made in the statement of claim?

> "6. In the alternative the First Defendant on or about the 1st day of October, 1985 acted in breach of her statutory duty under Section 4 of the Motor Vehicles Insurance (Third Party Risks) Act.
>
> PARTICULARS OF BREACH OF STATUTORY DUTY
>
> (a) Giving her said motor vehicle to the Second Defendant, qua, repairer with her permission to drive the said vehicle without there being in force in relation to such user a policy of insurance in compliance with the aforementioned Act.
>
> (b) Failing to insure the said vehicle to cover the driving of the said vehicle by the servants and/or agents of the Second Defendant.

> (c) Failure to prohibit the driving of the said vehicle by the servant and/or agents of the Second Defendant.
>
> 7. By reason of the matters aforesaid the Plaintiff sustained severe injuries and suffered loss and damage and incurred expense.

The material section of her Certificate of Insurance reads:

> "5. Persons or classes of persons entitled to drive
>
> (a) The Policyholder.
>
> The Policyholder may also drive a Motor Car
>
> (i) not belonging to him and not hired to him under a hire purchase agreement or under a car rental agreement.
>
> (ii) not belonging to or hired to his employer or his partner.
>
> (b) Any other person who is driving on the Policyholder's order or with his permission. Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the Motor Vehicle."

It is clear that this policy does not cover an unlicensed driver as Morgan.

The determination of Kennesha's appeal requires a careful construction of section 4 (1) of The Motor Vehicles Insurance (Third Party Risks Act) (the Act). Section 4(1) reads:

> "**4.**-(1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect

> of third-party risks as complies with the requirements of this Act."

The gist of the section so far as civil liability of owner is concerned is that the insurance policy must cover third-party risks. This is a mandatory provision. In any event, for Kennesha to invoke the provision of the Act against the insurer, she would have to rely on section 18 (1) of the Act which reads:

> "**18.-(1)** If after a certificate of insurance has been issued under subsection (9) of section 5 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsections (1), (2) and (3) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may, be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

Then the insurers would rely on 18 (2) (a) which reads:

> " (2) No sum shall be payable by an insurer under the foregoing provisions of this section -
>
> (a) liability for which is exempted from the cover granted by the policy pursuant to subsection (4) of section 5; ..."

On the criminal side a man of straw is responsible and will be punished. Accordingly the owner of the motor vehicle may not be liable criminally. That is what **John T Ellis Ltd v Hinds** [1947] 1 All ER 337 decided. Even so Lord Goddard CJ said at p. 338:

> " It was not disputed in this case that had there been an accident causing death or personal injury by negligence while the car was being driven by the servant of the company, unless the exceptions clause applied, their liability was covered by the policy,..."

It is against this background that it must be determined whether Elaine Hall caused or permitted her motor vehicle to be used on the road in contravention of the Act. The authorities referred to previously accepted that she had given up control of her car to McIntosh. How then could she be liable for use on the road while the car was in the control of McIntosh?

In this context, the purpose of the Act ought to be considered. This is how Grerr LJ expresses the purpose with regard to the circumstances of that case in **Monk v Warbey & ors.** [1935] KB 75 at p. 79:

> "... it had become apparent that people who were injured by the negligent driving of motor cars were in a parlous situation if the negligent person was unable to pay damages. ..."

Then the learned judge continued thus at p. 80:

> "... Consequently the Road Traffic Act, 1930, was passed for the very purpose of making provision for third parties who suffered injury by the negligent driving of motor vehicles by uninsured persons to whom the insured owner had lent such vehicles. How could Parliament make provision for their protection from such risks if it did not enable an injured third person to recover for a breach of s. 35? That section which is in Part II of the Act headed 'Provision against third-party risks arising out of the use of motor vehicles,' would indeed be no protection to a person injured by the negligence of an uninsured person to whom a car had been lent by the insured owner, if no civil remedy were available for a breach of the section. The Act requires every person who runs a car to have an insurance on the use of the car, and to provide himself with a certificate stating the terms of the

> insurance. Sect. 35, sub-s I, says that 'subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act.' "

As Elaine Hall had a policy which complied with the Act, she could not be in breach of statutory duty. Once, however, the policy complies with the Act, then the owner would have no right to indemnity where the policy contains exceptions, as here where the policy does not cover unlicensed drivers. The remedy for unfortunate cases like this in England is a private agreement between insurers and the Ministry of Transport to meet such claims through the Motor Owners Bureau.

Maugham LJ was equally instructive in **Monk v Warbey & ors.** (supra). Here is how he put the case at p. 83:

> " The facts are simple. Warbey was the owner of a motor car in respect of which he was insured as required by the statute against (inter alia) the probability of third party risks when he himself or a member of his family was driving; but admittedly he was not insured against third party risks if some uninsured person was permitted by him to drive the car. Out of the kindness of his heart, Warbey lent his car to the defendant Knowles. Knowles told Warbey that the third defendant May would drive the car and to that Warbey made no objection. Probably Warbey was unaware that neither Knowles nor May was insured against third party risks, and it does not appear that he made any enquiry on the subject. Unfortunately, the car being driven by May when neither he nor Knowles was insured against third party risks, this involved a breach of s. 35, and as damage resulted to the

> plaintiff, the latter brought his action in respect of the breach of the duty created by s. 35."

Then explaining the purpose of the Act the learned judge continued at p. 85:

> " On the whole, therefore, I have come to the conclusion that in this case there is nothing in the Act to show that a personal action is precluded by reason of the existence of the special remedy provided for a breach; and further that there is sufficient ground for coming to the conclusion that s. 35 was passed for the purpose of giving a remedy to third persons who might suffer injury by the negligence of the impecunious driver of a car. It is true to say that it is only if there is negligence in the driving of the car that the third party is given a right, but I cannot help thinking that when the Act was passed it was within the knowledge of the Legislature that negligence in the driving of cars was so common an occurrence with the likelihood of injury to third persons that it was necessary in the public interest to provide machinery whereby those third persons might recover damages."

Roche LJ also agreed with his brothers that the judgment of Charles J should be affirmed. As for how Charles' J judgment was treated by Greer LJ, the following passage is useful:

> " This appeal raises several questions of considerable public importance, and though I might be content to say that I have read and agree with every word of Charles J's judgment, I propose, having regard to the fact that other cases may be affected, to state my view in my own words.
>
> The appellant, Warbey, was the owner of a motor car in respect of which he had a Lloyd's policy covering damage caused by its use, <u>but it was conceded that the policy did not cover the events which happened</u>. The action was brought against Warbey alleging a breach by him of the statutory obligation imposed by s. 35 of the Road Traffic Act, 1930, and damage ensuing as the result of that breach.

> On behalf of the appellant, Mr. Monier-Williams has taken three points, first, that the judge was wrong in deciding that a breach of s. 35 was available for the benefit of the plaintiff. That contention is founded on the fact that very serious penalties are imposed for a breach of the section, and therefore that it cannot be supposed that the section was intended to create a right in a member of the public who was injured by reason of the breach. In my judgment this is a stronger case in favour of the plaintiff than *Groves v. Lord Wimborne [1898] 2 QB 402* and the case relating to a breach of statutory duty towards miners, such as *Britannic Merthyr Coal Co. v David* [1910] AC 74." [Emphasis supplied]

To reiterate, Elaine Hall was not in breach of statutory duty because she entrusted her car to a repairer who had control. To cause or permit connotes knowledge and she could never be liable for causing and permitting when she was unaware of what McIntosh or his servants were doing with her car on the road.

As for the existence of a policy, in **John T Ellis Ltd v Hinds** [1947] 1 All ER 337 at p. 341 Humphreys J said:

> " In the present case, the appellants, as the owners, had a policy which indemnified them against any liability which might be incurred by them in respect of death or bodily injury to any person arising out of the use on the road of the vehicle. The policy was, therefore, one which complied with the requirements of s. 36 (1) of the Act. ..."

The policy exhibited shows that it was comprehensive and section 11 referring to third party liability is compulsory by virtue of section 5(1) of the Act. That section reads:

> "5.-(1) In order to comply with the requirements of this Act the policy of insurance must be a policy which-
>
> (a) is issued by a person who is an insurer; and
>
> (b) subject to provisions of this section, insures such person, persons or classes of persons, as may be specified in the policy, against any liability incurred by him or them in respect of-
>
> (i) the death of, or bodily injury to, any person; and
>
> (ii) any damage to property, caused by or arising out of the use of the motor vehicle on the road." [Emphasis supplied]

The certificate of insurance shows that Elaine Hall has complied with the provision of the statute. Further, the policy reinforces that view. This is the compliance in the policy:

> " SECTION II - LIABILITY TO THIRD PARTIES
>
> 1. The Company will subject to the Limits of Liability indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of
>
> (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the Insured
>
> (b) damage to property other than property belonging to the Insured or held in trust by or in the custody or control of the Insured."

It seems to me that this provision in the policy is the basis on which Kennesha's claim must be based. Such a claim cannot succeed.

Reckord J expressed his views thus:

> " When the first defendant contracted with the second defendant to repair her car, from the evidence nothing was said to her which would cause her to contemplate that her car would have to be driven on the road to complete the job. When she handed over the keys to him all she did was to give him possession of the car. She certainly gave him no permission to drive it whereever he wished. The second defendant knowing that the work had to be completed elsewhere should have sought permission from the first defendant. She would have the option then of taking the car to other repairers or insist that she be contacted when the driving was necessary so that she could do same herself. This was not a case of that car being test driven to insure that the job was satisfactorily done.
>
> The plaintiff has therefore failed to prove to my satisfaction that the first defendant either caused or permitted the second or third defendants to use her motor vehicle on the road."

The learned judge could have added that once Elaine Hall's policy complied with section 5 (1) of the Act, then she could not be in breach of statutory duty. Kennesha's appeal fails against Elaine Hall.

Damages

There was no appeal against damages. The award was as follows:

> " The damages assessed against both the second and the third defendants are as follows.
>
> Special damages. $4,410.00 with interest @ 3% from the 1st of October, 1985 to the date of judgment.
>
> General Damages. For Pain and Suffering and loss of amenities $400,000.00 with interest

> @ 3% from date of service of writ to date of judgment.
>
> For Handicap on the labour market $50,000.00.
>
> For Future medical treatment J$47,000.00 plus US$800.00"

So on my findings, the appeal by McIntosh fails, the appeal by Kennesha also fails.

The Bullock Order

It is now necessary to consider this issue. Reckord J refused the application for this order but gave no reasons. Extracts from **The Supreme Court Practice** [1985] Vol 1 62/2/46 are useful in this context:

> "**Co-defendants**
>
> Where, in the opinion of the Court, it was reasonable, in all the circumstances, for the plaintiff to sue two defendants, making his claim against them in the alternative, and where he succeeds only against one of them, the Court has a discretion to order the unsuccessful defendant to pay the successful defendant's costs. This it may do either by ordering payment of these costs direct by the unsuccessful to the successful defendant, or by ordering the plaintiff to pay the latter's costs, and allowing him to include these costs in the costs payable to him by the unsuccessful defendant. Each of these two forms of order is commonly known as a Bullock order (from *Bullock v London General Omnibus Co.* [1907] 1 Q.B. 264, C.A.) but the former may be more accurately called a Sanderson order from *Sanderson v Blyth Theatre Co.* [1903] 2 K.B. 533, C.A."

Then the passage deals with the typical situation thus:

> "... The typical case for a Bullock Order is where a passenger in a vehicle is injured in a collision between that vehicle and another. One of the matters which the Court considers, in deciding whether it was reasonable to sue both

> defendants, is whether one was blaming the other; but the Court will look at all the facts which the plaintiff knew, or might by reasonable effort, have ascertained, at the time when the writ was issued, and it is entirely in the Court's discretion to make the order or not (*Besterman v British Motor Cab Co.* [1914] 2 K.B. 181; *Hong v A & R Brown Ltd* [1948] 1 K.B. 505, C.A.) and see *Mayer v Harte* above."

A further aspect which is relevant to the circumstances of this case is addressed thus:

> "... But a Bullock order will not be made where the plaintiff's doubt is as to the law, not the facts, or where the causes of action are separate and distinct, or the claims are not alternative, or are based on separate and distinct sets of facts (see *Poulton v Moore* [1913] W.N. 349; *Donovan v. Walters* (1926) 135 L.T. 12; *Mulready v. Bell, Ltd.* [1953] 2 All E.R. 215) and where owing to obscure regulations the Judge did not accede to the application for a Bullock order see *Donovan v Cammell Laird & Co.* [1949] 2 All E.R. 82."

I think Reckord J exercised his discretion correctly. The plaintiff's doubt was as to the law on the effect of the Motor Vehicles Insurance (Third Party Risks) Act. It was those doubts why Elaine Hall was sued. Further the claims were based on separate and distinct sets of facts. The plaintiff's claim against Elaine Hall was for breach of statutory duty which failed. The other claims against McIntosh and Morgan were for negligence and vicarious liability which succeeded. Consequently, Reckord J exercised his discretion correctly in refusing to grant a Bullock Order. Both appeals are dismissed. The orders below are affirmed. The appellants must pay the taxed or agreed costs of the respondents.

WALKER JA (AG.)

I have read in draft the judgments of my brothers (Forte and Downer JJ.A) and I agree with the reasons and the order proposed.