JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 18 of 1970

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

VERNAL HAYE - PLAINTIFF/APPELLANT

vs.

ROY BRUCE - 1st DEFENDANT/RESPONDENT

and

ELMER STEPHENSON - 2nd DEFENDANT

Dr. L.G. Barnett for Plaintiff/Appellant.

Norman Hill Q.C. for 1st Defendant/Respondent.

Heard: 23rd, 24th September, 1971
4th February, 1972

FOX, J.A.

This is an appeal from a decision of the Resident Magistrate, Saint Ann, in an action of negligence in which he gave judgment for the 1st defendant Roy Bruce against the Plaintiff, and for the plaintiff against the 2nd defendant Elmer Stephenson. Bruce is a lumber dealer living in Kingston. He is the owner of a motor truck. Stephenson was employed by Bruce to drive the truck. On the instructions of Bruce, and for the purpose of buying lumber, Stephenson drove the truck from Kingston to Lodge in Saint Ann on 7th November, 1966. Bruce did not go on the journey. Stephenson was accompanied by other men including sidemen. After collecting its load of lumber in the area surrounding the village of Lodge, the truck, now fully loaded, was driven by Stephenson to the square of Lodge. There the truck stopped and its occupants came out.

The Plaintiff is a farmer and a district constable living at Lodge. In November, 1966, he was employed as a watchman and a gardener for a home at Upton Country Club. He was at Lodge square when Stephenson drove up and stopped the truck. His case was that he asked, and Stephenson agreed to give him a drive on the truck as far as Upton Gate. Accordingly he entered the body of the truck and sat on the lumber. The truck was then driven off

by Stephenson. It was common ground that at that time, two men were with Stephenson in the cab, and two sidemen were in the body of the truck. When the truck reached Upton Gate, a sideman called out and it stopped a short distance beyond the gate. The plaintiff proceeded to alight from the truck. Whilst he was doing this, the truck drove off. He fell to the ground and broke his leg.

The Magistrate accepted the evidence of the plaintiff that he had entered the truck with the permission of Stephenson, and rejected the testimony of the defence to the contrary. He found that Stephenson was negligent in failing to satisfy himself that the plaintiff had safely alighted from the truck before driving off. He held further, however, that in the act of coming from the truck the plaintiff was also negligent by using the back wheel of the truck as a step in his descent to the ground. He took the view that "there was no necessity for the plaintiff to have put his foot on the wheel, a thing which rotates and therefore a source of danger." He concluded that "a prudent and reasonable man would not have stepped on the tyre at all but would have proceeded from the ledge" (outside the rails of the truck and above the tyre) "directly to the ground, a height of only four feet two inches." Mr. Hill conceded that in coming from the truck the plaintiff had acted reasonably. He did not attempt to support the finding of contributory negligence. I agree. On the evidence, the accident was entirely caused by the negligence of Stephenson and the finding of contributory negligence in the plaintiff must be reversed.

Bruce did not give evidence. The magistrate found that the plaintiff's travelling on the truck was the result of a personal arrangement between himself and Stephenson. He took the view that the position was analogous to a case in which a servant who is the driver of a motor vehicle goes off on a private frolic of his own. In giving the plaintiff a ride in the truck Stephenson had embarked on a personal and private venture. There was no evidence that Stephenson had Bruce's authority to give rides to passengers, and no room for the presumption that in giving the ride to the plaintiff, Stephenson was acting in the course of his master's business. In his reasons for judgment, the magistrate said:

> "In my view where the accepted evidence is that the servant clearly acted on his own initiative in an exclusively private arrangement and there is no evidence that the master either permitted or forbade the particular kind of act then the servant cannot be held to have performed the act in the course of his master's business."

The Magistrate therefore held that Bruce was not liable to the Plaintiff in negligence and gave judgment accordingly.

Dr. Barnett contended that this decision was wrong. He relied upon the circumstance that in stating the defence at the trial as required by section 184 of the Judicature (Resident Magistrates) Law Cap.179, Mr. Whitehorn, the solicitor who appeared for both defendants, admitted ownership and agency; the agency specifically admitted being "the agency of the defendant Stephenson as being the agent of the defendant Bruce." Dr. Barnett submitted that this admission recognized as an established fact, Stephenson's position as the servant of Bruce who was acting in the course of his employment at all times and on all occasions, including the taking up of the plaintiff as a passenger in the truck. The case was contested on that basis. The existence of a duty of care in Bruce towards the plaintiff was acknowledged. The single issue at the trial was whether the truck had been driven negligently, and whether as a result Bruce was vicariously in breach of his duty. This was in accordance with the only defence which was stated, and which was recorded in these terms "Neither defendant was negligent but if either was negligent there was contributory negligence on the part of the plaintiff." As a consequence, all the evidence led, and the submissions made on both sides were for the purpose of deciding that single issue and no other. Finally, Dr. Barnett stressed that in his closing address for the defence Mr. Whitehorn did not contend that Bruce was not liable for the reasons given by the magistrate. To the contrary Mr. Whitehorn had conceded that once it was proved that Stephenson had been negligent, the vicarious liability of Bruce was established.

In my view, these submissions of Dr. Barnett are unanswerable. Resident Magistrates' Courts are creatures of the Judicature (Resident Magistrates) Law, Cap.179. Actions are commenced in these courts, not by a writ of summons, but by the lodging of a plaint at the office of the clerk of the court. This plaint must state briefly the names and addresses

of the parties, and must set out "the nature of the claim made, or of the relief or remedy required in the action in such short form as may be prescribed ....." (s.143). The several sections which follow make provisions for continuation of the action, summonses and other process, miscellaneous matters before trial, and the mode and the actual trial of Causes. S.184 provides that on the day of the hearing,

> "the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint, and on answer being so made in Court, the Magistrate shall proceed in a summary way to try the cause, and shall give judgment without further pleading, or formal joinder of issue."

The defence stated pursuant to these provisions must be adequate. It must enable the plaintiff to understand what defence was being set up. The magistrate must not permit any defence to be conducted without a proper plea. All this was made clear by MacGregor C.J. in Wallace v. Whyte (1961) 3 W.I.R.521. At p.523 the learned judge concluded his opinion on the subject with this observation,

> "It is to be remembered that the Resident Magistrates' Courts are not courts of pleading. Except when a special defence is pleaded under s.150 of the Judicature (Resident Magistrates) Law, the plaintiff has no means of knowing what is the defence until the defendant states it in court at the opening of the trial of the action. It is the defendant's duty then to plead so that his defence is disclosed as if he was pleading to a statement of claim in the High Court."

Mr. Hill submitted that notwithstanding the admission of agency, the magistrate was at liberty to arrive at conclusions which were in keeping with the evidence. He relied upon a decision of the Court of Appeal in Fredco Estates Ltd. v. Bryant and another [1961] 1 All E.R.34. In that case, pursuant to a notice to admit facts, a landlord had admitted figures as to the rates payable on certain premises. These figures did not justify the amount of the increase of rent. They were erroneous in that they did not include figures which were admittedly paid for water rates. In a claim by the tenant against the landlord to recover amounts overpaid for rent, the figures for the water rates were not before the county court judge, but, on appeal, they were before the Court of Appeal. It was held, that notwithstanding the admission, the appeal would be decided on the true figures.

The case deals with a particular situation. It is no authority for a determination of the significance and the consequence of admissions made and defences stated at the commencement of a trial in a Resident Magistrate's Court. If Bruce intended to rely on the defence that Stephenson was not acting in the course of his employment when he permitted the plaintiff to come on the truck as a passenger, and that as a consequence Bruce did not owe a duty of care to the plaintiff, that position should have been made clear at the commencement of the trial. In this way, the plaintiff would have been alerted to the evidential burden upon him to establish the contrary. Not having done so, that particular defence was not available to Bruce. It was also not available to the magistrate as a reason for a decision in favour of Bruce, not only on account of the failure of the defence to identify it as an issue for the magistrate's determination, but even more so because of the unqualified admission of agency which was made by the defence before any evidence was given. That admission was intended to traverse the entire range of the legal incidents arising from the relationship of principal and agent, and to make absolute concessions in terms of those incidents in favour of the plaintiff's case. The evidence which was led and the submissions which were made were consistent with this accepted position, and any inadequacy in the proof of the vicarious responsibility of Bruce which the magistrate might have perceived in the evidence was irrelevant.

It is true that towards the end of his cross-examination, Stephenson is recorded as saying;

> "I have seen the plaintiff Haye. If he had that day asked me for a drive I would have refused it. The reason is that the boss Mr. Bruce had told me not to carry anybody that he dont know of."

This is a prime example of unnecessary and dangerous cross-examination of a witness. This statement by Stephenson is the only direct evidence in the case capable of supporting a finding that Bruce had expressly forbidden Stephenson to take up unauthorised persons on the truck. The point had not initially been raised and was not pursued by the defence. Stephenson was not re-examined. If these circumstances, together with the line along which the defence was conducted and argued had been properly evaluated by the magistrate, he should have perceived that the finding of fact whereby he released Bruce from liability, in addition to being irrelevant, was unreasonable.

In my view therefore, the finding of the magistrate that Bruce was not liable to the plaintiff in negligence must be reversed.

Before parting from this aspect of the case, I wish to reserve a point for future consideration. I do not accept the position which counsel on both sides were apparently prepared to assume, namely that if Bruce had expressly forbidden Stephenson to give lifts to unauthorised persons, Bruce could not be held vicariously liable to the plaintiff. The plaintiff was injured as a consequence of the negligent driving of Stephenson. On that occasion, Stephenson was driving the truck not only in the course of his employment as the servant of Bruce, but wholly for his purpose. Without a great deal more discussion of the point than took place before us, I would need to be convinced that, because Stephenson had acted outside the scope of his employment in giving the plaintiff a lift, Bruce was not vicariously liable to him. The plaintiff was not injured by this unauthorised act on Stephenson's part, but by his authorised act of driving the truck. Again, in so far as the plaintiff might have been a trespasser on the truck, this also, however material it would be in a claim based upon the unsafe condition of the vehicle, was irrelevant in a claim arising from the negligent manner in which it was driven. I am not unaware that this view conflicts with the existing position in England. (vide Twine v. Bean's Express Ltd. (1946) 62 T.L.R.458 and Conway v. George Wimpey & Co. Ltd. [1951] 2 K.B.266). The facts of this latter case are indistinguishable from the facts of the instant case. Nevertheless, with all due respect to the illustrious judges who decided those cases, it seems to me that the general principle which is enunciated in the judgments is deficient in that the considerations stated above were ignored. (For a detailed exposition of this criticism, vide The Modern Law Review, Vol.17 p.102). In addition, I venture to think that the decisions are based on a concept of the policy underlying vicarious liability which would now be regarded as too narrow. That policy springs from the demand of society that innocent sufferers should not be without redress. Over the years the clamour for justice in these terms has been made with a rising insistence. In cases of injury caused by the negligent driving of motor vehicles, the legislature responded to the social need by compulsory insurance against liability to third parties. Judges answered the challenge by widening the basis of vicarious liability. This development has been traced by Lord Denning M.R. in Launchbury v. Morgans [1971]

2 W.L.R. 602 at 606. In that case also Edmund Davies L.J. suggested at p.612 that

> "the law of agency in relation to motor cars calls for rethinking in the present complicated circumstances of crowded highways and the statutory requirement of third-party insurance cover".

However acceptable therefore, the principle in Twine and in Conway may have been in 1951, it is doubtful whether it is compatible with the especial responsibility which the law is now determined to put upon the owner of a motor vehicle who allows it to go on the road in charge of someone else. (For a statement of the principle which describes this responsibility, vide Lord Denning M.R. in Ormrod v. Crosville Motor Services Ltd. [1953] 1 W.L.R. 1120, 1123, approved by Diplock L.J. in Carbery v. Davies [1968] 1 W.L.R. 1103, 1108. In my view, that especial responsibility has been stated in terms which are sufficiently wide to dispose of the contention that a servant who gives a lift to a person in his master's motor vehicle contrary to the master's orders is on a "frolic of his own". In the absence of a decision of the Privy Council on this point, it may very well be that in an appropriate case this court would feel free to disregard the principle in the cases of Twine and Conway.

Dr. Bernard of Port Maria gave a medical certificate dated 23rd January, 1967 as to the injuries received by the plaintiff. It was received in evidence by consent. It stated that the plaintiff was examined by the doctor on the day of the accident, and was found to be then suffering from,

(a) shock with marked pain.
(b) Abrasions and swelling of the right leg.
(c) A fracture of the right fibula.
(d) Pain and tenderness on the right side of the chest.

The appellant had been admitted to the Port Maria Hospital and had remained there for one month and three days. In his certificate Dr. Bernard also stated that since his discharge from the hospital the appellant had been unable to work and that as a result of the fracture he would be out of work for a further three months.

The amount awarded for special damages was £134. 1. 0. This was not challenged. General damages were assessed at £105. 19. 0. The plaintiff complained that this figure was inordinately low. In his reasons for judgment the magistrate admitted, and in his submissions before us Mr. Hill conceded that it was. I agree. I would fix the figure for general damages at £250.

In the result the appeal should be allowed. The judgment of the magistrate should be varied. The order as to the apportionment of the damages between the Plaintiff and the Defendant Stephenson should be set aside and a judgment entered for the Plaintiff as against both defendants in the sum of £384. 1. 0. with Costs to be agreed or taxed. The appellant should have the costs of the appeal fixed at forty dollars.

SMITH, J.A.:

For the reasons given by Fox, J.A., I agree that because of the unqualified admission of agency made at the commencement of the trial it was not open to the learned resident magistrate to find, as he did, that the defendant Bruce was not liable to the plaintiff. The only defence stated at the trial was as follows:

> "Neither defendant was negligent but if either was negligent there was but contributory negligence on the part of the plaintiff."

The terms of this defence on behalf of Bruce is inconsistent with any contention that the defendant Stephenson was acting outside the scope of his employment in giving a lift to the plaintiff. It is entirely consistent with the unqualified admission of agency, thus leaving for the determination the sole issue whether or not the plaintiff was injured in circumstances in which Stephenson was solely to blame or whether the plaintiff should share the blame.

I agree that the appeal should be allowed and an order made in the terms proposed by my brother Fox, J.A.

GRAHAM-PERKINS, J.A.

I regret that I am unable to concur in the conclusion arrived at by Fox, J.A. and shared by Smith, J.A.

On the 1st February, 1967 the plaintiff, through his solicitor Mr. Gresford Jones, wrote a letter of demand to Bruce's insurers claiming compensation for injuries sustained and loss incurred as a result of being "hit down by a truck driven by your insured, Roy Bruce." The insurers denied liability. Thereafter the plaintiff filed an action in which he claimed damages for negligence against Bruce and Stephenson. The material particulars of his claim were as follows:-

> "The plaintiff's claim is against the defendants jointly and severally to recover ..... damages for negligence for that ... a truck belonging to the first named defendant Roy Bruce was so ... negligently driven, managed and/or operated by the said defendant himself, his servant or agent the second named defendant Stephenson as to cause the said truck to collide with the plaintiff...."

The record discloses that at some point during the hearing Mr. Jones applied to have the particulars of claim amended so as to abandon the allegation that the truck collided with the plaintiff, and to substitute therefor an allegation that Bruce or Stephenson so negligently drove the truck as to cause it to "throw down" the plaintiff.

It is, I think, important to note that neither in the plaintiff's letter of demand, nor in the original or amended particulars of claim, is there the vaguest suggestion that he was a passenger on Bruce's truck. To anyone reading these particulars the almost inevitable conclusion would be

/ that the .....

that the plaintiff's allegations involved no more than a very ordinary claim for damages consequent upon his being "run into or hit down" by Bruce's truck. They could not, in the ordinary use of language, be taken to involve a claim arising from injuries incurred at almost precisely the very moment he ceased to be a passenger on that truck. It must, I think,be noted too, that the operative cause of the plaintiff's injuries came into existence, as a matter of history, at a time when he was still technically a passenger. It was not until the plaintiff unfolded his version of the accident in the witness box that the particular allegation that he was a passenger on the truck became known to Bruce. But it was not to this ex post facto allegation that Bruce was required to state his defence at the commencement of the trial. S. 184 of the Judicature (Resident Magistrates) Law, Cap. 179 required him "to answer by stating **shortly** his defence to (the) plaint" lodged. That plaint, as distinct from the particulars of claim filed therewith, would have disclosed, so far as is relevant, no more than that the plaintiff's claim was for damages for negligence. I would observe, parenthetically, that the plaintiff is not required by S. 143 of Cap. 179 to file particulars with his claim. Indeed, S. 184 by its terms, contemplates a form of procedure that is essentially summary. Hence the rather imprecise obligation on a defendant to do no more than to state his defence shortly to the plaint lodged. This is precisely what Bruce did at the commencement of the hearing. The defence of both defendants was stated in the following terms:

> "Neither defendant was negligent but if either is negligent there was contributory negligence on the part of the plaintiff."

By so stating his defence to the plaint (and the allegations contained in the particulars) Bruce was doing what S. 184 sanctioned. Negligence had been alleged against him. He

denied that allegation. But Bruce did more than merely state his defence shortly. He proceeded to volunteer the three-fold admission that he owned the truck, that Stephenson was his agent, and that the court had jurisdiction to entertain the plaintiff's claim. At this point, as is fairly manifest from the record, an enquiry concerning the admission as to agency was directed to Mr. Whitehorne, the solicitor appearing for Bruce. It is not clear whether that enquiry came from Mr. Jones or from the learned Resident Magistrate. It seems probable, however, that that enquiry came from Mr. Jones since it is clear that the Magistrate could have had no reason for enquiring into the precise nature and extent of the agency being admitted. He would have assumed, if he had had any particular reason for directing his attention to the point, that the nature and extent of the agency being admitted involved no more than that Stephenson was Bruce's agent for the purpose of driving the latter's truck. He would, from the plaint and particulars as filed, have had no reason to enquire whether the agency admitted included any authority in Stephenson to carry passengers. In answer to the enquiry directed to him Mr. Whitehorne replied:

> "The agency admitted is the agency of the defendant Stephenson as being the agent of the defendant Bruce."

It appears that both the Magistrate and Mr. Jones were quite satisfied with this reply as no further enquiries were made of Mr. Whitehorne. I find it a little difficult, I confess, to appreciate that this reply by Mr. Whitehorne took the admission of agency any further than when it was first stated. It added precisely nothing. Be that as it may, it is clear that in volunteering that admission as to agency Bruce was not stating his defence. This he had done earlier. For this reason, among several others, I do not regard the obiter observations of McGregor, C.J. in Wallace v. Whyte (1961) 3 W.I.R. 521, at

/p.523 .....

p. 523, as having any relevance to the problem posed in this appeal. In any event there does not appear to have been any complaint on the part of Mr. Jones, nor, indeed, of the court, as to the defence of Bruce as stated.

In my view the critical question in this appeal is: What is to taken to be involved in an admission of agency in the particular circumstances of this case? That the matter was not regarded as free of all difficulty by the Resident Magistrate is reflected in the somewhat inelegant question he posed to Mr. Jones in the following terms:

> "Suppose the court were to accept the evidence of the plaintiff that Stephenson gave the plaintiff a lift, would that be an act making Stephenson a bailee of the plaintiff and absolving Bruce?"

I find it somewhat difficult to understand why the Magistrate considered the possibility of a relationship of bailor and bailee in the context of the evidence before him. It is, however, clear that he deemed it necessary to consider the true implications of the evidence given both by the plaintiff and Stephenson notwithstanding the admission as to agency. In his attempt at an answer to the question posed by the Magistrate Mr. Jones certainly did not indicate that it was not open to the Magistrate, either by reason of the defence stated by Bruce or the admission as to agency made by him, to find that by giving a lift to the plaintiff Stephenson was performing an act not authorised by that agency. Indeed Mr. Jones' answer was predicated on the hypothesis that since Bruce had not given evidence a finding that Stephenson was negligent would involve, as a necessary consequence, the application of a presumption adverse to Bruce. This, of course, was an obvious non sequitur. Indeed, Bruce was not obliged to give evidence; nor was there any room for the application of any such presumption, if there is indeed such a presumption. Stephenson in his evidence had said:

> "If (the plaintiff) had that day asked me for a drive I would have refused it. The reason is that the Boss Mr. Bruce had told me not to carry anybody that he don't know of."

True it is that the Magistrate found that Stephenson did give the plaintiff a lift, but he also found that in so doing Stephenson was acting outside the ambit of his authority. It is said that this finding was not open to the Magistrate. I do not agree. The term agency, although used rather loosely in actions for negligence, and more particularly so in Resident Magistrates' Courts, involves a very precise concept as a matter of law. It denotes that particular relationship which comes into existence when on person, called the 'agent', is authorised, either expressly or impliedly, to perform some particular act or function on behalf of another person, called 'the principal', and agrees to perform that particular act or function. See e.g. Samson v. Aitchison (1912) A.C. 844. An agent, as such, is not a servant, although it is true to say that a servant may be, and not infrequently is, for certain purposes, his master's agent. In any such case the extent of the agency would necessarily depend on the duties and, sometimes, on the position of the servant. Whether or not the relationship of principal and agent can be said to have arisen in a given situation must ultimately depend on the true nature and extent of that relationship as ascertained by any relevant evidence. See Samuel Bros. Ltd. v. Whetherely (1908) 1 K.B. 184.

When, therefore, Bruce admitted that Stephenson was his agent it was clearly open to the magistrate to take the view, on the basis of the allegations contained in the particulars, that that admission involved no more than the mere admission that Stephenson was duly and expressly authorised to drive his truck. Indeed, the magistrate has made it clear by his findings that that was the only legitimate view he could take of Bruce's admission. There was here no question

of agency by estoppel. For my part, I confess I would have been quite surprised if the magistrate, before hearing the plaintiff's evidence had sought to interpret this admission to embrace an authority given by Bruce to Stephenson to give lifts to passengers. No admission, as a matter of pleading, is made in vacuo. It is made in respect of a particular fact, or facts, alleged. The material fact alleged in the plaintiff's particulars was that Bruce's truck was driven by Stephenson. It is to that fact, and to that fact alone, that the agency admitted by Bruce was relevant. Its meaning cannot, by any logical process, be extended to embrace an admission to facts not alleged as a matter of pleading but proved as a matter of evidence. The view taken by the magistrate must have been confirmed when he heard and clearly accepted that part of the extract of Stephenson's evidence above referred to.

What is the objection to the magistrate's finding in favour of Bruce? It is said that the admission by Bruce was fatal in the particular circumstances of the case. From any such proposition I must record my considered dissent. Can it be permissible for a magistrate to hand down a judgment contrary to what the evidence he accepts dictates? If he finds, on the basis of evidence which he accepts or on the basis of eminently reasonable inferences which are open to him from facts found by him, that a particular situation exists, is he required to close his eyes to that particular situation and proceed to judgment on the hypothesis of the non-existence of that situation? Surely this must involve what can only fairly be describe as a judicial farce. In dealing with a not dissimilar problem involving Order xix r. 15 in <u>In re Robinson's Settlement, Grant v. Hobbs</u> (1912) 1 Ch. 717, Buckley, L.J. said at p. 728,

/"Where the .....

> "Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist. If in the course of the proceedings it was proved that the deed sued upon was a forgery and the defendant does not plead it or did not know it was a forgery, the Court would not give judgment upon the deed on the footing that it was a valid deed. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject matter for decision simply on the ground that it is not pleaded."

In my respectful view the observations of Buckley, L.J. apply mutatis mutandis to the requirement in s. 184 Cap. 179 on the part of the defendant "to answer by stating shortly his defence to such plaint." I would add one qualification to the observations of Buckley, L.J., namely, that in the Resident Magistrates' Courts of this country it is, in my considered view, always open to a magistrate, in a case such as this, to raise a point himself, even where an attorney, for one reason or another does not take it, so long as there is evidence on which a finding may be based. It may very well be that after the plaintiff had given evidence the magistrate was then in a position to fully appreciate the precise implications of the plaintiff's case. It had then become clear in the particular context of the plaintiff's evidence that, assuming a finding of negligence, the vicarious liability of Bruce depended on the answer to the question whether Stepehenson was expressly or impliedly authorised by Bruce to carry passengers as an incident of the former's agency. For this purpose it would

certainly have been expedient for the magistrate to direct Mr. Whitehorne's attention to the desirability or otherwise of an application to amend the defence as stated on behalf of Bruce so as to meet the case as advanced by the plaintiff, a case that would not have been apparent from the most careful examination of the letter of demand or of the plaint or particulars as filed. And there would have been no reason to assume that Stephenson had disclosed to Bruce the true picture as found by the magistrate. Indeed, Stephenson's case at the trial rather suggests the contrary. See the rather helpful observation of Lord Greene, M.R., in Leavey & Co. v. Hirst & Co. (1943) 2 A.E.R. 581 on the duty incumbent on a trial judge and on counsel on each side to see that proper applications for leave to amend are made, and to see that the record is kept in order and is dealt with modo et forma. Although I point to the desirability of taking these steps a failure to pursue them cannot, in my view, and for the reasons I have indicated, incur the consequence that the magistrate is hereby placed in a judicial straight-jacket. In any event, the magistrate was entitled by the clear mandate in s. 184 of Cap. 179 to "proceed in a summary way to try the cause," and to "give judgment without further pleading, or formal joinder of issue." This is precisely what he did. For this reason, too, I am not persuaded as to the correctness of the view of the court expressed by McGregor, C.J. in Wallace v. Whyte (supra). In the result I would dismiss the appeal so far as the magistrate's finding in favour of Bruce is concerned. On the question quantum I agree with the conclusion arrived at by Fox, J.A.

FOX, J.A.:

The order of the Court is therefore in the terms proposed in my judgment.