JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 107 & 108 of 1991

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	JOSEPH WONG KEN	2ND DEFENDANT/APPELLANT
AND	ANDREA NELSON	PLAINTIFF/RESPONDENT
AND	LINVAL HARROW	1ST DEFENDANT/RESPONDENT
BETWEEN	JOSEPH WONG KEN	2ND DEFENDANT/APPELLANT
AND	DESMOND FRANCIS	PLAINTIFF/RESPONDENT
AND	LINVAL HARROW	1ST DEFENDANT/RESPONDENT

Walter Scott for the appellant

Enoch Blake and Miss Donna Dodd
for the plaintiffs/respondents

December 13, 14, 1993 and February 10, 1994

WOLFE, J.A.:

This is an appeal from the judgment of Malcolm, J. delivered on December 12, 1991, in which he adjudged the second defendant/appellant vicariously liable for the negligence of the first defendant/respondent, Linval Harrow.

Harrow, it is common ground, was employed to the appellant as a driver. On the 12th day of September, 1987, Harrow was driving a Laredo Jeep lettered and numbered 7266 AF along the main road at Temple Hall in the parish of St. Andrew, when he collided with the plaintiffs/respondents while attempting to overtake another motor vehicle.

The only question before Malcolm, J. during the hearing was whether or not Harrow, the first named defendant/respondent, was acting in the scope of his employment at the time of the collision. The learned trial judge concluded that he was so

acting. It is that decision which has given rise to this appeal.

The appellant who was away from the island at the time of the accident had loaned to David Wong Ken, his nephew, the vehicle in question. On the day of the accident the first defendant/respondent requested David Wong Ken to loan him the vehicle so that he could drive it to Ocho Rios to procure a generator to repair a Mazda motor vehicle owned by the appellant, his employer. It was while he was engaged on this trip that the accident occurred. The appellant contended that Harrow was forbidden to drive the Laredo Jeep, which was a luxury vehicle, except with the express permission of the appellant or his wife.

Four grounds of appeal were argued before us. Principally, the appeal is concerned with the burden of proof in establishing whether or not a servant or agent was acting in the scope of his employment.

Grounds 1 and 2 of the original grounds were abandoned and leave was prayed and granted to argue the following grounds of appeal:

> "1. The learned trial judge erred in law in holding that a presumption in law was raised that the first named defendant/respondent LINVAL HARROW was acting in the course of or within the scope of his employment at the time of the accident.
>
> 2. The plaintiff at all times had the legal burden of proving that the first defendant/respondent was acting in the course of or within the scope of his employment.
>
> 3. The finding by the learned trial judge that the second defendant/appellant is vicariously liable for the negligence of the first defendant/respondent is against the weight of the evidence.
>
> 4. That the learned trial judge erred in law when he permitted counsel to intervene on behalf of the first defendant and cross-examine the second defendant's witnesses even though the first defendant had not entered any appearance nor filed any pleadings."

Grounds 1 and 2

The learned trial judge in making his findings is recorded as follows:

> "A presumption was raised that the first named defendant Linval Harrow was acting within the scope of his employment at the time of the accident on the 12th September, 1987 and the onus was shifted to the second named defendant Joseph Wong-Ken to prove that Mr. Harrow was acting outside it. The second named defendant has not rebutted the presumption or discharged the onus and I accordingly rule and adjudge that the said second named defendant is vicariously liable for the negligent driving of first defendant."

Mr. Scott for the appellant submitted that there was no known presumption in law that where a plaintiff in an action of motor vehicle negligence proves that damage has been caused by the defendant's motor car that the driver of the motor car if he is the servant or agent of the defendant was acting in the course or scope of his employment. (Emphasis supplied). He conceded, however, that there is a presumption in law that where a plaintiff in an action for motor vehicle negligence proves that damage has been caused by the defendant's motor vehicle, the fact of ownership, there being no other evidence to the contrary, is prima facie evidence that the motor car at the time of the accident was being driven by the owner or his servant and or agent.

Continuing, Mr. Scott submitted that the learned trial judge having misdirected himself as to the nature of the presumption he erred in assessing the evidence by placing a burden upon the appellant which the law did not require, namely, to prove that the driver was acting outside the scope of his employment. The only burden, he submitted, which rested upon the appellant was an evidential one to rebut that the driver was in the course of his employment. The ultimate legal burden resided with the plaintiffs/respondents to satisfy the court that the driver was acting in the course of his employment.

Did the learned trial judge misdirect himself as to the nature of the presumption? A careful examination of what the learned trial judge said clearly demonstrates that the submission that he misdirected himself is untenable. The judge found as a fact that the first defendant/respondent had authority to drive all the appellant's vehicles and that the authority was not limited to specific occasions and for specific purposes. He further found that he was acting within his authority when he borrowed the vehicle from David Wong Ken and that the purpose for which he borrowed the vehicle was to procure a generator to repair the Mazda pick-up which was owned by the appellant. Having made these findings of fact, the judge then went on to say that a presumption was raised that the driver was acting within the scope of his employment at the time of the accident. The driver was on his master's business. This is what the learned judge must be understood to be saying. There was the evidential basis to support such a finding.

David Wong Ken testified that the driver told him he wished to use the vehicle to go to Ocho Rios to take up a generator for the Mazda. Having found that there was the evidential basis to support a finding that the driver was on his master's business, the trial judge quite rightly, in our view, held that the onus shifted to the appellant to prove that Harrow, the driver, was not acting within the scope and course of his employment. The phrase "onus shifted" means no more than that the evidential burden shifted to the appellant to show that while so acting he was not within the scope of his employment. It is clear, therefore, that the judge is applying the correct test because he went on to say, "the second named defendant has not rebutted the presumption or discharged the onus" referring, of course, to the evidential burden resting upon the appellant.

In any event, the basis of the owner's liability for the negligence of the driver does not reside only in the fact that the driver is his servant and is acting in the course of his employment.

In **Ormrod v. Crossville Motor Services Ltd.** [1953] 2 All E.R. 753 Denning, L.J. opened his judgment with a caution expressed in these words:

> "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes."

Finally, to submit that there is a presumption in law that where a plaintiff in an action for motor vehicle negligence proves that damage has been caused by the defendant's motor vehicle the fact of ownership, there being no other evidence to the contrary, is prima facie evidence that the motor car at the time of the accident was being driven by the owner or his servant and/or agent but does not raise any presumption that the servant or agent was acting in the scope of his employment is indulging in semantics. The words "agent or servant" imply that the person is acting on behalf of his principal unless the contrary is proved.

Ground 3

Whether or not the driver was the servant or agent of the appellant at the time of the accident and was operating in the scope of his employment is a question of fact for the trial judge. There was ample evidence to support the finding of the court below that the driver was at the time of the collision acting in the scope of his employment or alternatively that he was driving the vehicle with his master's consent and on his master's business. A submission that such a finding is against the weight of the evidence is wholly misconceived.

Ground 4

A curious thing happened during the trial of this action. Mrs. Valerie Neita-Wilson sought and obtained the judge's permission to intervene and cross-examine witnesses called by the appellant. Her intervention was on behalf of the first defendant/respondent, Linval Harrow, the driver of the vehicle, who had not

entered any appearance or filed any pleadings in the proceedings. Mr. Scott quite candidly admitted that the outcome of this ground cannot in any way affect the result of the appeal.

Linval Harrow, the driver of the appellant's vehicle, was sued by the plaintiffs. He failed to enter an appearance and judgment in default of appearance was entered against him. In the trial of the issue of vicarious liability between the plaintiffs and the appellant the driver was not, in our view, entitled to participate and elicit any evidence for and on his own behalf. He was made a party to the action, and would have been entitled to appear had he entered his appearance and filed pleadings. Not having done so he forfeited that right. He ought not to have been allowed to participate without the other parties being able to cross-examine him. This was clearly irregular. Intervention is only allowed where a party can show that he ought to have been joined, which is not relevant in the instant case, or that his presence before the court is necessary, which was not shown. See **Gurtner v. Circuit** [1968] 2 Q.B. 587. This was, indeed, an irregular procedure and should not be followed in the future.

For the reasons set out herein, we order that the appeal be dismissed and that the judgment of the court below be affirmed. Costs of the appeal is awarded to the plaintiffs/respondents to be taxed if not agreed.

WRIGHT, J.A.:

I agree.

GORDON, J.A.:

I agree.

Case referred to:

(1) Ormrod v Crosville Motor Services Ltd (1953) 2 ALL ER 753

(2) Gurtner v Circuit (1968) 2 Q.B. 587