**BRITISH VIRGIN ISLANDS**

IN THE COURT OF APPEAL

CIVIL APPEAL No.4 of 1995

BETWEEN:

**R.E.M.S. CO. LTD**

Appellant

and

**KEVIN FRETT**

Respondent

| Before: | The Rt. Hon. Sir Vincent Floissac | - | Chief Respondent |
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| | The Hon. Mr. Satrohan Singh | - | Justice of Appeal |
| | The Hon. Mr. Albert Redhead | | Justice of Appeal (Ag.) |

Appearances: Mr. S. Bennett for the Appellant
Mr. Blackman with him
Mr. P. Dennis for the Respondent

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1996: January 19;
February 12.

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**JUDGMENT**

REDHEAD, J.A. (Ag.)

The respondent and his co-worker, Avery Hull, both trainee technicians were employed by the appellant company. On 31st July, 1990, they were travailing in a Suzuki pick-up owned by the appellant and driven by Avery Hull from Nanny Cay, from the appellant's work site to the office of the appellant at Port Purcell when the pick-up was involved in an accident on the Drakes' Highway public road. Avery Hull drove the vehicle so negligently that the pick-up collided with another vehicle whereby the respondent sustained a comminuted fracture of the right femur resulting in a permanent shortening of his right lower limb by approximately one inch.

The respondent brought an action against Avery Hull and the

appellant alleging that the appellant was vicariously liable for Hull's negligence. At the trial, it was the appellant's contention that at the time of the collision, the driver, Avery Hull was not acting as the servant or agent of the appellant company and further, that the vehicle had been taken by the respondent and Avery Hull without permission and that the pair were at the relevant time on a frolic of their own and that Hull was not driving in the furtherance of his duties as employee of the appellant.

The learned judge found that it was part and parcel of the duties of all technicians to drive company vehicles whilst on the job. The learned judge was inclined to the view that Hull had permission to drive the vehicle on that day. However, he was satisfied on a balance of probabilities that from the state of evidence that "he (Hull) was driving the company's vehicle, on company time, on company business and so was acting within the scope of his employment...This would therefore render the company vicariously liable."

In this action, the learned judge awarded damages in favour of the respondent against the appellant as follows $18,000 general damage, special damage $2,777 making a total of $20,777. (Judgment in default of appearance having been entered against Hull).

The sole issue for determination by this Court against judgment, is whether the learned judge was wrong in Law or in fact in holding that the appellant was vicariously liable for the negligence of Avery Hull.

Mr. Bennett learned counsel for the appellant contended that there are many circumstances in which a person may be driving a company vehicle, on company time and even purportedly on company business, is acting outside the scope of his employment.

In support of this

contention, he referred to **Alfred v Thomas and Another** (1983) 32 W.I.R. 183. Mr. Bennett argued that it is either the respondent and Hull had stolen the vehicle or the latter was driving it in response to his employers' orders.

At page 30 of the record, the learned judge said:

> "The crucial question to be decided as I see it is whether at the material time the defendant Avery Hull was driving the company's vehicle with permission."

Mr. Bennett argued that the judge never decided that question. Having regard to the issues which arose in this case, the crucial question to be determined was whether he was doing what he was authorised to do albeit in an unauthorized manner.

In **Rose v Plenty and Another** (1976) 1 All E.R. at page 97 a milkman was employed by his employers, a dairy company, to go round on a milk float delivering milk to the employers' customers, collecting empty bottles and obtaining payment for the milk. exhibited notices at the milk depot which expressly prohibited the milkman from employing children in the performance of his duties and. The employers from giving lifts on the milk float. Contrary to those prohibitions, the milkman invited the plaintiff, a boy aged thirteen, to assist him with the milk round in return for payment. The plaintiff rode on the milk float and helped to deliver milk and return empty bottles to the float. Whilst riding on the milk float, the plaintiff was injured when the milkman drove the float negligently. The plaintiff brought an action for damages for negligence against the milkman and the employers. He obtained judgment against the milkman, but his claim against the employers was dismissed on the ground that the milkman had been acting outside the scope of his

employment in employing the plaintiff and carrying him on the float contrary to the

employers' instructions. The plaintiff appealed against the dismissal of his claim against the employers.

On appeal, it was held that the employers' instructions only affected the milkman's mode of conduct with the scope of his employment. It followed, that although the milkman's act of employing the plaintiff and carrying him on the float were prohibited, they had been performed by the milkman within the scope of his employment having been performed for the purpose of the employers' business. Accordingly, the employers were vicariously liable for the milkman's negligence and the appeal therefore would be allowed.

At page 100 *Lord Denning, M.R.* said:

> "In considering whether a prohibited act was within the course of the employment it depends very much on the purpose for which it was done. If it is done for the employer's business, it is usually done in the course of his employment even though it is a prohibited act."

In **Smith v Stages and Another** (1989) 1 All E.R. at page 833, Machin and Stages were two experienced laggers employed by the second defendant at Drakelow Power Station, Burton-on-Trent. In August 1977, they were sent by their employers from Burton-on-Trent to Wales where there was an urgent job to be done at a power station. The job had to be completed by August 29.

The two employees were paid eight hours pay for the travailing time to Wales and eight hours pay for the journey back as well as the equivalent of the rail fare for the journey, although no stipulation was to the mode of travel. The two employees travelled to Wales in the first defendant's car. After working for hours without a break in order to

finish the job, they decided to drive straight back to the Midlands. On the way back, the car driven by the first defendant, left the road and crashed through a brick wall. Machin was seriously injured, he brought an action against the first defendant and against the employers alleging that they were vicariously liable for the first defendant's negligence since he had been acting in the course of his employment while driving back to the Midlands. Machin subsequently died from unrelated causes and his widow continued the action on behalf of his estate. The judge held that the accident had been caused by the first defendant's negligence but the employers were not liable because he had not been acting in the course of his employment at the time of the accident. The Court of Appeal reversed the decision of the trial judge and held that the employers were vicariously liable for the defendant's negligence. The employers appealed to the House of Lords.

It was held that the employee who for a short time was required by his employers to work at a different place of work some distance away from his usual place of work was acting in the course of his employment when returning to his ordinary residence after completing the temporary work if he travailed back to his ordinary residence in the employers' time which he would be doing if he was paid wages and not merely a travailing allowance for the time travailed notwithstanding that the time and mode of travel were left to his discretion. Accordingly, since the employees had been paid while driving back to the Midlands, they had been travailing in the employers' time and the employers were vicariously liable for the first defendant's negligence. The appeal would therefore be dismissed.

At page *838 Lord Goff* said:

> "I turn to Stages' journeyed back. Another ordinary working day, Tuesday *30* August was made available for the journey with the same pay, to enable him to return to his base in the Midlands to be ready to travel to work on Wednesday morning. In my opinion, he was employed to make the journey, just as he was employed to make the journey out to Pembroke. If he had chosen to go to sleep on the Monday morning and afternoon for eight hours or so, and then drive home on Monday evening so that he would have the Tuesday free (as indeed Mr. Pye expected him to do) that would not have detracted from the proposition that the journey was in the course of his employment. For this purpose, it was irrelevant that Monday was a bank holiday. Of course, it was wrong for him to succumb to the temptation of driving home on the Monday morning, just after he had completed so long a spell of work; but once again that cannot alter the fact that this journey was made in the course of his employment."

*Lord Lowry* stated six propositions when an employee travelling o the highway would be acting in the course of his employment. I refer to his second proposition, which to my mind, is apposite to this appeal under consideration.

At page 851 he said:

> "The paramount rule is that an employee travelling on the highway will be acting in the course of his employment if, and onlv if he is at the material time coins about his employer's business. One must not confuse the duty to turn up for one's work with the concept of already being on duty while travailing to it.
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> It is impossible to provide for every eventuality and foolish, without the benefit of argument, to make the attempt, but some prima facie propositions may be stated with reasonable confidence...
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> (2) Travelling in the employer's time between work places (one of which may be the regular work place), or in the course of a peripatetic occupation whether accompanied by goods or tools or simply in order to reach a succession of work places (as an inspector of gas meters might do), will be in the course of his employment ………….."

In **Canadian Pacific Railway Company v Lockhart** (1942) 2 All E.R. 464, a servant of a company who was employed as a carpenter and general handyman and whose headquarters was at West Toronto, was

required in the course of his employment to take a key to North Toronto. For this purpose, although there were three of the company's vehicles available, he used his own car which was uninsured and on his way he injured an infant. Previously, the company had issued two notices, to which the servant's attention had been drawn, prohibiting servants from using their own cars for purposes of the company's work, unless they were insured against public liability and property damage risks. *Held* - the servant was performing the journey for the purpose of his employment because the driving of an uninsured car was an authorised act although performed in an improper mode. The company was therefore liable in damages.

At page 467 *Lord Thankerton* quoted with approval the dictum of *Lord Dunedin* in **Plumb v Cobben Flour Mills Co. Ltd.** (1914) A.C. 62 when he said:

> "The principle is well laid down in some of the cases cited by the Chief Justice which decide that "when a servant does an act which he is authorised by his employment to do under certain conditions, and he does them under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act...." As regards all the cases which were brought to their Lordships' notice in the course of the argument, this observation may be made - They fall under one of three heads (1 ) one servant was using his master's time or his master's place or his master's horses, vehicles machinery or tools for his own purposes; then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again the master is not responsible for any mischief which he may do to a third party. Under head (3) some cases like the present, where the servant is doing some work which he is appointed to do but does it in a way which his master has not authorised and would not have authorised had he known of it. In these cases the master is, nevertheless, responsible."

There is nothing from the record to challenge the judge's finding that Hull at the time of the accident was driving the company's vehicle, on company time, on company business nor was there any argument or could there be any argument against that finding. There was not even the slightest suggestion from the evidence that the vehicle was used for any other purpose other than the employers' business.

I would therefore dismiss this appeal with costs to the respondent.

A.J. REDHEAD
Justice of Appeal (Ag.)

**SIR VINCENT FLOISSAC, C.J.**

This is a case of negligence by the appellant's employee (Avery Hull) during the performance of the act of driving and returning the appellant's vehicle from the appellant's work-site to the appellant's office. The act was an authorised act or an act within the scope of the employee's authority or employment with the appellant because it was an act which the employee had the appellant's actual (express or implied) authority to perform as servant of the appellant. The authorised act (the returning of the vehicle) was performed by the employee acting as servant of the appellant or acting in the course of his employment with the appellant because the authorised act was performed wholly or partially for or on behalf and for the purposes of the appellant and not solely for the purposes of the employee. The negligence or negligent driving was so

closely connected with or incidental to the performance of the authorised act as to be regarded as a mode (albeit an unauthorized mode) of performance of the authorised act.

In those circumstances, the appellant must be held to be vicariously responsible for the employee's negligence and the consequences thereof. For these reasons, I concur with the judgment of Justice Redhead dismissing the appeal with costs.

SIR VINCENT FLOISSAC
Chief Justice

I concur.

SATROHAN SINGH
Justice of Appeal