THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 250 of 2002

BETWEEN:

RUDOLPH HARRY

Claimant

V

NOEL DURRANT
VIVIAN JOHN

Defendants

Appearances:

Mr. Parnell Campbell Q.C. and with him Mr. MaCauley Peters for the Claimant
Mr. Joseph Delves for the first and second Defendants

2006: April 3
2009: September 18

JUDGMENT

BACKGROUND

[1] **BRUCE-LYLE, J.:** At the onset of this trial, it was agreed by Counsel to the parties that only the issue of liability would be determined by the Court and assessment of damages if any to be referred to the Master at a later stage. Counsel also agreed that the court was only being called upon to determine the only narrow issue of whether the second Defendant could be held to be vicariously liable for the actions of the first Defendant.

[2] The facts of the case as I found them are as follows. On Friday 28th July 2000 the Claimants motor car PB 401 was damaged in an accident caused solely by the negligent

driving of the First Defendant, who at the time was the driver of a truck T2540 owned by the second Defendant.

[3] The Claimant in his claim has alleged that at the material time, the first Defendant Noel Durrant, was driving the second defendants truck as servant or agent of the second defendant, and that consequently the second defendant ought to be found vicariously liable for the negligent driving of his servant or agent the first Defendant.

[4] The Defendant on the other hand, in answer to the claimants claim for damages says that he is not liable vicariously for the negligence of the first Defendant, and that the first Defendant was on a frolic of his own with the truck.

[5] Counsel for the Claimant has submitted that this defence as pleaded ought to be struck out, in that it violates the stipulations in C.P.R 10.5(4) and 10.5 (5) in that they mandate a defendant who denies any allegation in the claim form or the statement of claim to state reasons for the denial or to state reasons for resisting the allegation. He goes further to submit that the second defendant has not stated any credible reasons either in his pleadings or in his witness statement or in his oral testimony to support the assertion that the first defendant was "on a frolic of his own".

[6] I disagree with Learned Counsel for the Claimant on this leg of his submissions. In as much as he may have quoted the correct rules of the CPR 2000 to buttress his submission, it is not true of him to assert that the Defendants (second) has not stated any credible reasons either in his pleadings, his Witness statement or in his oral testimony to support the assertion pleaded that the first defendant was on a frolic of his own. I refer to the amended defence of the second defendant filed and dated 10th October 2003 particularly paragraphs 4, 5, and 6; the witness statement of the second Defendant Vivian John particularly paragraph 4, 5 and 6; and also the viva voce evidence of the second Defendant Vivian John under cross-examination by learned counsel for the Claimant. It is my view that reasons having been stated to support the denial is all that is required to be given by the Defendant. The credibility of the reasons for denial is what is now in issue

before the court at trial. That cannot be determined at any stage before trial. That cannot be determined at any stage before trial especially since it forms the crux of the issue before the Court.

[7] I find it passing strange, that this submission was not raised at any stage before trial, especially when the defence sought to amend their pleadings before the Master which was granted.

[8] I therefore dismiss this leg of the claimant's submissions without further ado.

[9] Aside from the facts mentioned as found earlier on in this judgment I also find as a fact that the first defendant was employed by the second defendant to drive truck T2540 exclusively; and that the truck T2540 was usually parked overnight in the yard of a relative Marky Phillips, who lived a good distance away from the second Defendant, but the first Defendant was permitted to retain the keys for the truck; that the first Defendant was employed by the second Defendant to drive the truck on Mondays to Fridays each week; that the second Defendant paid the first Defendant a flat fortnightly wage based on the rate of $55.00 per day; that the second Defendant gave instructions daily on mornings to the first defendant as to what work the truck was required to do each day; that on the 28th July 2000 the first defendant was instructed to carry loads of Rabacca sand from Georgetown to Amos vale; that the accident occurred along the Diamond Public road as per the evidence of the claimant Rudolph Harry at paragraph 3 of his witness statement and also at Paragraph 3 of the police report exhibited by the claimant filed on the 13th October 2003 along with the claimant reply to defence, in which the police state "The accident occurred on the Diamond Public Road".

[10] There is one issue of fact that concerned the Court – as to whether the Diamond Public Road is part of the road that connects Amos Vale to Georgetown, the second Defendant in cross-examination pretended not to be aware that Diamond lies between Georgetown and Arnos Vale and then tried to insinuate hear-say evidence to the effect that the accident occurred somewhere off the Diamond public road.

[11] Having regard to the totality of the evidence, including the police report and adhering to the maxim: "He who alleges must prove", there is no doubt in my mind and I so find that the Diamond Public Road is where the accident occurred, and that the Diamond Public road lies between Georgetown and Arnos Vale.

THE LAW

[12] Halsbury's Laws of England, 4th Edition, Volume 45(2) states as follows:

> "821. EMPLOYEE ENGAGED ON HIS OWN BUSINESS. In order to render to employer liable for employee's act it is necessary to show that the employee, in doing the act which occasioned the injury, was acting in the course of his employment.....
> .....where, however, the employee, whilst using his employers property in the course of his employment, embarks upon business of his own, and the injury is occaisioned afterwards, the employer's liability continues unless the employee in deviating from the business which he was employed to perform, can no longer be considered to be acting in the course of his employment, and must be regarded as engaged in a separate transaction" See also the cases of (a) Lloyd v Grace Smith and Co [1912] A.C. 716 (b) Canadian Pacific Railway Company v Lockhart [1942] A.C. 591 (c) Harrison v Michelin Tyre Co. Ltd [1985] A.U.E.R 918 – In this case it was held that for the purpose of determining vicarious liability, the test whether an employee was acting in the course of his employment was whether a reasonable man would say that either the employees act was part and parcel of his employment (in the sense of being incidental to it) even though it was unauthorized or prohibited by the employer, in which case the employer was liable, or that it was so divergent from his employment as to be plainly alien to his employment, and wholly distinguishable from it, in which case the employer was not liable....."

[13] In recent cases from the House of Lords and the Privy Council, the fundamental principles of vicarious liability have been revisited and reformulated, These were in the cases of (a) ***Lister v Hall*** [2002] 1A.C. 215 (b) ***Dubai Aluminium C. Ltd v Salaam*** [2004] 2.A.C.366 (c) ***Bernard v A.G of Jamaica*** [2004] U.R.P.C. 47 (d) ***Brown v Robinson*** [2004] U.K.P.C.56. In these cases the new formulation of the additional test is this – "Can the wrongful conduct be fairly and reasonably regarded as done by the employee while acting in the ordinary course of the employer's business?

[14] I agree that these cases are on all fours with the issues at hand and are relevant to this instant case. I also agree with Learned Counsel for the claimant in his analysis of the Jamaican case of ***Brown v Stamp*** (1968) 13.W.I.R 146 and its relevance to this instant case. In that case the Court of Appeal held that where there was no evidence as to the relationship between the owner and the driver of a vehicle at the material time, there was a prima facie presumption that the driver was the servant or agent of the owner.

[15] Learned Counsel for the claimant submits from this that where it has been established that the relationship of employer and employee existed in respect of the negligent driving by the employee of his employers vehicle which the employee had been employed to drive, these is also a prima facie presumption that the employer was vicariously liable for the employees negligence.

[16] Counsel further submitted that in the situation as posited above, the onus then shifts onto the employer to displace the presumption. He went on to the submit that the presumption can only be displaced by clear and compelling evidence by the employer that the employee was on a frolic of his own, giving details of the alleged frolic. I agree to this reasoning posited.

[17] Having pleaded that the first defendant was on a frolic of his own, it is in my view that the second defendant has failed to produce evidence of that assertion. He has failed to provide any evidence of that bald assertion. There are no further details or explanations of that bald assertion. This to my mind does not constitute credible evidence to which this Court could consider sufficient to justify a finding in his favour, especially when weighted against his own admissions and the rather uncontroverted evidence of the claimant.

[18] I have already earlier in this judgment found that the accident occurred on the Diamond Public road which lies between Georgetown and Amos Vale. It is my view that this court having made this finding based on the pleading of the Claimant, and deposed to in his witness statement and as corroborated by the police report, then any doubt as to the vicarious liability of the second Defendant fizzles into oblivion for the following reasons -

(a) The truck was owned by the second defendant;

(b) The first Defendant was driving the truck as a driver employed and paid by the second defendant to drive the very truck;

(c) The first Defendant was driving the truck on a day he was authorized to drive the truck, namely, on a Friday; and

(d) The accident occurred on a road which is along the route over which the first defendant, having been specifically ordered by the second defendant on the morning of the 28th July 2000 to bring Rabacca sand from Georgetown to Arnos Vale, was practically obliged to travel in the discharge of his obligations to his employer.

[19] In the light of the second Defendants admissions it is difficult to see how the second defendant can establish the allegation that the first defendant was on a "frolic of his own when the accident took place", from what I have said earlier in this judgment.

[20] Having regard to all the circumstances of the case and on a balance of probabilities and on the issue of liability judgment is hereby entered for the claimant against both defendants jointly and severally. Costs and damages to be assessed by the Master as agreed.

.....
Justice Frederick Bruce-Lyle
HIGH COURT JUDGE