[2017] JMSC Civ.88

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CLAIM NO. 2011HCV02898

BETWEEN	**CAROLE REID**	**CLAIMANT**
AND	**ANWAR MARK-ANTHONY WRIGHT**	**1ST DEFENDANT**
AND	**DAMION MARKLAND**	**2ND DEFENDANT**

Ms. Kerri-Ann Sewell for the Claimant

Mrs. Marvalyn Taylor-Wright instructed by Taylor, Wright and Co. for the First Defendant

Second Defendant absent and unrepresented

HEARD: May 10, and June 14, 2017

NEGLIGENCE – VICARIOUS LIABILITY - WHETHER EMPLOYEE OF OWNER ACTING WITHIN COURSE OF HIS EMPLOYMENT - CLOSE CONNECTION TEST

WINT-BLAIR, J (Ag.)

Facts

[1] I have been greatly assisted by submissions from both counsel appearing in the matter. In this judgment I will reference the evidence and submissions only to the extent necessary to explain my findings and decision. The parties should rest assured that in order to arrive at my decision I have considered all the evidence and submissions of counsel.

[2] The first defendant owned a bus registered PD5566. Carole Reid owned a motor car registered 1571EY, on 5th day of April, 2010 at 8:30 pm, the bus collided into

the rear of the Nissan Primera causing damage. At that time, the driver of the bus was Damion Markland, a driver, employed as a bus driver to the first defendant. The claimant made a report to her insurance broker who in turn appointed an assessor to examine her vehicle. The claimant claims damages in negligence against first and second defendant jointly and severally.

[3] There is no dispute as to the ownership of the bus registered PD5566, nor that Damion Markland was employed to the first defendant as a bus driver. The central question is whether the second defendant, Damion Markland was driving the bus that day and if so whether in making that journey he was acting in the course of his employment so as to ascribe liability to the first defendant.

[4] This is a question of fact to be found having regard to all the evidence. As a matter of law, in cases of this nature, to establish liability, the evidence must show:

1. That an accident occurred between the claimant's and defendant's vehicles;
2. That the driver was employed to the registered owner;
3. That the driver was driving his employer's vehicle at the time of the accident;
4. That the driver was acting in the course of his employment.

[5] Proof of items one to four will lead to the rebuttable presumption that the driver was the servant or agent of his employer. This presumption may be rebutted by the employer displacing the prima facie case against him by adducing satisfactory evidence to the contrary. This position was confirmed by the Court of Appeal in the case of **Eric Rodney v Allan Werb** [2010]JMCA Civ 43 (consolidated) where Phillips, J.A. having discussed the decision of the Privy Council in **Rambarran v Gurrucharran** [1970] 1 All E.R. 749 stated that:

> "… the court must be satisfied as to the credibility of the evidence adduced in order for the presumption to be rebutted…Mr. Rodney does not discharge his evidentiary burden by merely putting forward evidence as to the use of the vehicle at the material time,

> or otherwise, in order for the claimant to be required to discharge the legal burden of proof of agency. The presumption that the driver is the servant or agent of the owner must first be rebutted by satisfactory, credible evidence. This is a burden on the registered owner, and if that onus is not discharged, the prima facie case remains and the person alleging the agency succeeds."

[6] As indicated above, the evidence must lead to a rebuttable presumption that the second defendant was that servant or agent of the first defendant.

1. Was there a collision with the first defendant's vehicle and the claimant's vehicle?

[7] That question can be answered in the affirmative. The witness statement of Andrew Reid admitted as his evidence in chief, said that he was the driver of the claimant's vehicle on April 5, 2010 at about 8:30pm. At that date and time, he was driving her Nissan Primera motorcar registered 1571 EY in the vicinity of Manor Park Plaza in St. Andrew. He was in the right lane intending to proceed down Constant Spring Rd. He was stationary in traffic when he heard a loud noise, felt glass hitting his body and felt his car jerk. He looked back and saw that the front right section of a bus registered PD 5566 had collided with the trunk, bumper and quarter panel to the left rear section of the claimant's vehicle. This evidence was not rebutted by any evidence from the first defendant. His evidence was that he had no knowledge of an accident and could not provide any information to the court in this regard.

2. Was the driver of the bus employed to its registered owner?

[8] This question can also be answered in the affirmative. The witness statement of Andrew Reid at paragraph 5 says a man came from the bus and identified himself as its driver. He gave his name as Damion Markland. The registered owner of the bus was Anwar Wright.

[9] The witness statement of Anwar Wright, admitted as his evidence in chief says at paragraph 2 that he was the owner of the buses registered PD 5566 and PD5567. He went on at paragraph 7 to say he knew Damion Markland, he was the driver of bus PD5567 with no authority to drive bus PD5566.

3. Was Damion Markland, bus driver, driving a bus owned by Anwar Wright, his employer, at the time of the accident?

[10] The witness statements of both Andrew Reid and Anwar Wright so indicated that he was.

4. Was Damion Markland acting within the course of his employment at the time of the collision?

[11] None of the witnesses called by either side gave any evidence of the purpose for which Damion Markland was driving the bus. The purpose of the journey was therefore unknown.

[12] Anwar Wright's witness statement says that Damion Markland was not authorized to drive PD5566 which was the bus involved in the collision. Further, that Damion Markland should not have been driving the bus as April 5, 2010 was a public holiday, a day on which his buses were not to work and therefore the driver was given no authority to drive for him. He only learnt of the accident on March 30, 2012, when he was served with the amended claim form and particular of claim in this matter. Damion Markland had not informed him that he had driven the bus on April 5, 2010, that he had been in an accident nor had he observed any damage to his bus to suggest that it had been in a collision as alleged.

[13] There was also evidence from Carole Reid the owner of the claimant's vehicle. She had loaned her nephew Andrew Reid her car on the day in question, she went to her nephew when she learnt of the accident. She saw damage to the back of her car. She went with her daughter, Andrew Reid and Damion Markland to the Constant Spring police station. The next morning she made a report to the traffic section of the said police station. The day after, she made a report of the accident to her insurance broker. An assessor, namely Smiles Loss Adjusters was appointed and paid for by her insurance company.

[14] It is quite strange that though Carole Reid had made a report of the accident to her insurance brokers, Anwar Wright would not have learnt that his bus was

involved in a collision with her vehicle until he was served with the claim some two years hence. It would have been expected that his insurance company would have contacted him with regards to the accident reported by Carole Reid to her insurance company. In cross-examination, Mr. Wright was shown a document and it was suggested to him that the first time his insurers would have been informed about the accident was sometime after March 2012; he agreed. When it was put to him that he was not being truthful when he said in evidence that Damion Markland was on a frolic of his own on April 5, 2010, Mr. Wright responded I don't know. It stands to reason that it was not when this claim was served on Mr. Wright that he first learnt of the accident as he said to the court. It is also his case that he is not liable for the actions of his servant, if he did not know whether his servant was on a frolic, it would have been relatively simple to obtain that information before trial.

[15] It is equally strange that he would not have seen any damage to his bus. Mr. Wright did not lead any evidence of when next he had seen the bus after April 5, 2010. There was clear evidence of a collision between his and the claimant's vehicles which was unchallenged. The assertion by Mr. Wright that he not seen damage to his bus was not necessarily consistent with there being no accident.

[16] Additionally, Exhibit 1 was the damage assessment report from Smiles Loss Adjusters. This report was generated on April 29, 2010, some 24 days after the accident. It contained independent evidence of damage to the rear section of Carole Reid's vehicle. Although her witness statement gives the registration number of her vehicle as 1871 EY, I accept that it was 1571 EY as this was the registration number given by Andrew Reid and is the number of the registration plate in Exhibit 1.

The Law

The claimant's pleadings

[17] The defendant's submissions raise issues that attack the claimant's pleadings. A party has the right to amend his pleadings to present the case he thinks best.

Under the **Civil Procedure Rules** (CPR) a case should not fail for want of technical error as the court can apply its broad case management powers to rectify these. In the case at bar, any defects in the pleadings ought to have been brought to the notice of the case management or pre-trial judges by the defendant. At that stage, the defendant would have been permitted to amend his statement of case to answer any amendments sought.

[18] If sufficient particularity was not pleaded, then the other side could have sought further and better particulars to know what case he had to meet at trial.

[19] Then there was the option of seeking an order to strike out the pleadings for disclosing no reasonable cause of action. None of these options were exercised by the defendant and therefore, the case proceeded to trial. It is too late to make complaint of these issues in legal submissions at the end of the trial which had not been raised *in limine* before evidence was heard.

[20] It would seem to me that if the efficiency of trial proceedings are to be maintained, then objections of this nature must be made in pre-trial hearings. Having filed and exchanged pleadings to which no objection was taken, a party is entitled to prepare his case based on his opponent's position and is not to be taken by surprise at the end of the case. I hold that neither the letter nor spirit of CPR encourages litigation by surprise, accordingly I have not had regard to those matters which could have been raised in pre-trial hearings regarding the insufficiency of pleadings.

[21] In any event the pleadings clearly particularize a claim in negligence against the first defendant as owner and the second defendant as driver and servant and/or agent of the first defendant. The claimant has cast liability at the feet of the first defendant asserting a relationship between himself and the second defendant as either one of agency or one of service.

<u>What is vicarious liability</u>

[22] In order that the doctrine of vicarious liability may apply, there are two conditions which must co-exist:[1]

(a) The relationship of master and servant must exist between the defendant and the person committing the wrong complained of;

(b) The servant must in committing the wrong have been acting in the course of his employment.

> ***"****Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise": The Law of Torts, 9th ed* (1998), pp 409-410. (per Lord Steyn, **Lister v Hesley v Hall** [2002] 1 A.C. 215 at paragraph 14.")

[23] *"The expression vicarious liability signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship. The commonest instance of this in modern law is that liability of a master for the torts of his servants done in the course of their employment. The relationship required is the specific one of master and servant and the tort must be referable to that relationship in the sense that it must have been committed by the servant in the course of his employment."*[2]

Who is an employee

[24] *"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."*[3] *It must follow that an employee is one who is bound to*

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[1] Salmond & Heuston on The Law of Tort, 19th ed. (1982), p. 510.

[2] W.V.H. Rogers, Winfield & Jolowicz on Tort, 13th ed. (1989), p. 560.

[3] Salmond & Heuston on the Law of Torts, 20th ed. (1992), p. 448.

obey any lawful orders given by the employer as to the manner in which his work shall be done. The employer retains the power of controlling him in his work, and may direct not only what he shall do, but how he shall do it.[4] *Whether the job is assigned daily or by task is of no moment."*

[25] A servant 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 direction of his employer in respect of the manner in which his work is to be done. [5]

Course of employment

[26] *"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. (See* ***Ilkiw v Samuels*** *[1963] 1 W.L.R. 991). But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized 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 authorizes his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorized to do carefully, or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case*

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[4] Saddler v Henlock (1855) 4 E. & B. 570 at 578, per Crompton, J.
[5] Salmond & Heuston on the Law of Torts, 19th edn. (1989), p, 511

the servant is not acting in the course of his employment, but has gone outside of it."[6]

The learned authors of Charlesworth 2 Percy on Negligence stated:

[27] *"In determining whether or not an employee's wrongful act is done in the course of his employment, it is necessary that a broad view of all the surrounding circumstances should be taken a whole and not restricted to the particular act which causes the damage. There is no simple test which can be applied to cover every set of circumstances, so that it remains essentially a question of facts for decision in each case."*[7]

[28] This position has been confirmed by **Lister v. Hesley Hall** [2002] 1 A.C. 215. In which Lord Steyn defined the test for the vicarious liability of an employer for an act of its employee as whether there was a close connection between what the employee was employed to do and the employee's intentional and wrongful conduct.

[29] In the case of **Princess Wright v Alan Morrison**, [2011] JMCA Civ. 14, Harris, JA in delivering the judgment of the Court of Appeal stated at paragraph 12:

> *"The law recognizes liability for negligence on the part of an owner of a motor vehicle, not only in circumstances where at the time of an accident, the vehicle was being driven with the owner's consent but also where it is driven without consent. Where there is consent, liability on the part of the owner may be rebutted by evidence that although the driver had the owner's general permission, the use of the vehicle was for his own purpose."*

[30] At paragraph 13, Harris, JA went on to say:

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[6] This is the well known passage in Salmond which has been approved in myriad courts and described as the test.

[7] Charlesworth & Percy on Negligence, 10th ed. (2001), p. 136 citing Finnemore, J in Staton v N.C.B [1957] 1 W.L.R. 893 at 895.

> *"An owner may be vicariously liable even where a wrongful act occurs by the fault of an employee acting contrary to the prohibition by the employer. In Canadian Pacific Railway Company v Lockhart [1942] AC 591 in which the respondent was injured by the negligent driving of the appellant's servant, who had embarked on a journey using his uninsured motor vehicle for the purpose of and the means of carrying out work which he was employed to do, disregarding notices which barred employees from using privately owned motor cars for the applicant's business except the vehicles were adequately insured. It was held that the prohibition of the use of the uninsured vehicle simply restricted the way in which or means of which the employee should execute his work that the means of transport was incidental to that which the servant was employed to do and the appellant was liable."*

[31] The learned Judge of Appeal went on to cite the noted passage from Salmond & Heuston on Tort which stated that a master is liable for acts which he has not authorized provided they are so connected with acts which he has authorized that they may be regarded as modes of doing them albeit improper modes. The master was responsible for not only what the servant was authorized to do but also the way in which he does it.

[32] Harris, JA then adopted and cited the dictum of Lord Steyn in paragraphs 15 and 20 of **Lister v Hesley Hall** [2002] 1 AC 215 which established the close connection test as follows:

> *"15. For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a "servant" in the course of his employment if "it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master": Salmond, Law of Torts, 1st ed (1907), p 83; and Salmond & Heuston on the Law of Torts, 21st ed, p 443. Situation (a) causes no problems. The difficulty arises in respect of cases under (b). Salmond did, however, offer an explanation which has sometimes been overlooked. He said (Salmond on Torts, 1st ed, pp 83-84) that "a master ... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes--although improper modes--of doing them" (my emphasis): see the citation of Salmond with approval in Canadian Pacific Railway Co v Lockhart [1942] AC 591, 599 (Salmond, Law of*

Torts, 9th ed (1936), p 95) and in Racz v Home Office [1994] 2 AC 45, 53 (Salmond & Heuston on the Law of Torts, 19th ed (1987), pp 521-522; 20th ed (1992), p 457). Salmond's explanation is the germ of the close connection test adumbrated by the Canadian Supreme Court in Bazley v Curry 174 DLR (4th) 45 and Jacobi v Griffiths 174 DLR (4th) 71.

[33] And at paragraph 20:

*Our law no longer struggles with the concept of vicarious liability for intentional wrongdoing... It remains, however, to consider how vicarious liability for intentional wrongdoing fits in with Salmond's formulation. The answer is that it does not cope ideally with such cases. It must, however, be remembered that the great tort writer did not attempt to enunciate precise propositions of law on vicarious liability. At most he propounded a broad test which deems as within the course of employment "a wrongful and unauthorised mode of doing some act authorised by the master". And he emphasised the connection between the authorised acts and the "improper modes" of doing them**. **In reality it is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability. The usefulness of the Salmond formulation is, however, crucially dependent on focusing on the right act of the employee.** This point was explored in **Rose v Plenty** [1976] 1 WLR 141. The Court of Appeal held that a milkman who deliberately disobeyed his employers' order not to allow children to help on his rounds did not go beyond his course of employment in allowing a child to help him. The analysis in this decision shows how the pitfalls of terminology must be* avoided. Scarman LJ said, at pp 147-148:

*"The servant was, of course, employed at the time of the accident to do a whole number of operations. He was certainly not employed to give the boy a lift, and if one confines one's analysis of the facts to the incident of injury to the plaintiff, then no doubt one would say that carrying the boy on the float--giving him a lift - was not in the course of the servant's employment. But in **Ilkiw v Samuels** [1983] 1 WLR 991 Diplock LJ indicated that the proper approach to the nature of the servant's employment is a broad one. He says, at p 1004: 'As each of these nouns implies'--he is referring to the nouns used to describe course of employment, sphere, scope and so forth--'the matter must be looked at broadly, not dissecting the servant's task into its component activities--such as driving, loading, sheeting and*

the like--by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.'

"Applying those words to the employment of this servant, I think it is clear from the evidence that he was employed as a roundsman to drive his float round his round and to deliver milk, to collect empties and to obtain payment. That was his job ... He chose to disregard the prohibition and to enlist the assistance of the plaintiff. As a matter of common sense, that does seem to me to be a mode, albeit a prohibited mode, of doing the job with which he was entrusted. Why was the plaintiff being carried on the float when the accident occurred? Because it was necessary to take him from point to point so that he could assist in delivering milk, collecting empties and, on occasions obtaining payment.

If this approach to the nature of employment is adopted, it is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for the children."

[34] *In the view of the Privy Council in* ***Clinton Bernard v Attorney General****(2004) 65 WIR 245, the case of* ***Lister v. Hesley Hall*** *"…emphasized clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment."*

[35] In **Clinton Bernard**, Lord Steyn went on to state that the test of wrongful and unathorised mode of doing some act authorized by the master is not entirely apt in the cases of intentional wrongs. The correct approach is the close connection test between the nature of the employment and the particular tort, looking at the matter in the round. In deciding this question, the judge should look at the risks to others created by an employer who entrusts duties tasks and functions to an

employee. The cases point to the liability for an employer "for torts which can fairly be regarded as a reasonably incidental risk to the type of business he carried on."

[36] In **Allan Campbell v National Fuels & Lubricants Ltd et al** C.L. 1999/C-262 delivered 2nd November, 2004 a decision of Sykes, J (Ag.)(as he then was), my learned brother having conducted a comprehensive review of the authorities stated at paragraph 64 of his judgment that there was no such thing as principles of vicarious liability which were applicable to intentional torts as distinct from principles of vicarious liability applicable to other torts.

[37] While Lord Steyn is widely regarded as an expert in this area of vicarious liability, Lord Millett in **Lister v Hesley Hall** had much to say on the approach the court should take in respect of determining liability. I cannot hope to improve upon it and therefore I will quote extensively from his dictum.

> *"The classic **Salmond** test for vicarious liability and scope of employment has two limbs. The first covers authorised acts which are tortious. These present no relevant problem. Whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform. (See Diplock LJ above.) If the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within "the scope of his employment" and the employer is vicariously liable. If, on the other hand, the servant's employment merely gave the servant the opportunity to do what he did without more, there will be no vicarious liability, hence the use by Salmond and in the Scottish and some other authorities of the word "connection" to indicate something which is not a casual coincidence but has the requisite relationship to the employment of the tortfeasor (servant) by his employer: Kirby v National Coal Board 1958 SC 514; Williams v A & W Hemphill Ltd 1966 SC(HL) 31.*
>
> *My Lords, the correct approach to answering the question whether the tortious act of the servant falls within or without the scope of the servant's employment for the purposes of the principle of vicarious liability is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer. The second limb of the classic Salmond test is a convenient rule of thumb which*

provides the answer in very many cases but does not represent the fundamental criterion which is the comparison of the duties respectively owed by the servant to the plaintiff and to his employer.

One of these steps in this analysis could, I think, usefully be elided to impose vicarious liability where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment. Such a formulation would have the advantage of dispensing with the awkward reference to "improper modes" of carrying out the employee's duties; and by focusing attention on the connection between the employee's duties and his wrongdoing it would accord with the underlying rationale of the doctrine and be applicable without straining the language to accommodate cases of intentional wrongdoing.

But the precise terminology is not critical. The Salmond test, in either formulation, is not a statutory definition of the circumstances which give rise to liability, but a guide to the principled application of the law to diverse factual situations. What is critical is that attention should be directed to the closeness of the connection between the employee's duties and his wrongdoing and not to verbal formulae. This is the principle on which the Supreme Court of Canada recently decided the important cases of Bazley v Curry 174 DLR (4th) 45 and Jacobi v Griffiths 174 DLR (4th) 71 which provide many helpful insights into this branch of the law and from which I have derived much assistance.

Just as an employer may be vicariously liable for deliberate and criminal conduct on the part of his employee, so he may be vicariously liable for acts of the employee which he has expressly forbidden him to do. ***In Ilkiw v Samuels*** *[1963] 1 WLR 991 a lorry driver was under strict instructions from his employers not to allow anyone else to drive the lorry. He allowed a third party, who was incompetent, to drive it without making any inquiry into his competence to do so. The employers were held vicariously liable for the resulting accident. Diplock LJ explained, at p 1004, that some prohibitions limited the sphere of employment and others only dealt with conduct within the sphere of employment. In order to determine into which category a particular prohibition fell it was necessary to determine what would have been the sphere, scope, or course (nouns which he considered to amount to the same thing) if the prohibition had not been imposed. In a passage which is of some importance in the present case, he added:*

> *"As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities--such as driving, loading, sheeting and the like--by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would."*

[38] He reasoned that the job which the driver was engaged to perform was to collect a load of sugar and transport it to its destination, using for that purpose his employers' lorry, of which he was put in charge. He was expressly forbidden to permit anyone else to drive the lorry in the course of performing this job. That was not a prohibition which limited the scope of his employment, but one which dealt with his conduct within the sphere of his employment.

[39] The case was followed in **Rose v Plenty** [1976] 1 WLR 141 where despite strict instructions not to do so a milk roundsman employed a boy to help him deliver milk and let him accompany him on his float. The employer was held liable for injuries sustained by the boy when he fell off the float as a result of the roundsman's negligent driving. Scarman LJ agreed that the roundsman was certainly not employed to give the boy a lift, and that if one confined one's analysis of the facts to the incident which caused injury to the boy, then it could be said that carrying the boy on the float was not in the course of his employment. But quoting with approval, at pp 147-148, the passage cited above from the judgment of Diplock LJ in **Ilkiw v Samuels** [1963] 1 WLR 991, 1004 he adopted a broad approach to the nature of the roundsman's employment. His job was to deliver milk, collect empties, and obtain payment. Disregarding his instructions he enlisted the boy's assistance in carrying out his job. If one asked: why was the boy on the float? the answer was that it was because he was assisting the roundsman to do his job.

[40] So it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.

[41] Bearing in mind the dictum of Lord Millett in **Lister v Hesley Hall** (supra) and the reasoning of the Lord Steyn in **Clinton Bernard** (supra) this court has to consider what connection, there is if any, between the act in question and the employment. The act in question being the driving of the bus registered PD5567, the employment being the driving of the bus registered PD5566. If there is a connection, then the closeness of that connection has to be considered. To make that determination, the court must take into account whether the wrongful actions should be viewed as ways of carrying out the work the employer had authorised.

[42] Adopting a broad approach recommended by **Ilkiw v Samuels** (supra), the court should consider in deciding the closeness of the connection, the following factors:

1. The particular act complained of.
2. The purpose and nature of the act.
3. The time and place at which the actions occurred, within the context and circumstances in which it occurred.
4. In the circumstances, is it just and reasonable to assign liability to the employer.
5. What is the danger to others created by the employer who assigned duties to the employee

[43] These factors while relevant are not necessarily conclusive, as each case has to be decided on its particular facts. I hold that the close connection test is applicable to this case.

[44] In **Ilkiw v Samuels** [1963] 1 WLR 991, Diplock LJ encouraged a broad approach to what the duties of the employee were towards his employer and this approach was expressly approved by Scarman LJ in **Rose v Plenty** [1975] 1 WLR 141, 147-148.

[45] In the instant case, Ms. Sewell argued that the second defendant was employed as a driver, the reason he was driving the vehicle was unknown. Therefore, the absence of evidence of purpose should lead to a finding that the vehicle was being driven for the first defendant's business, as he had not rebutted the presumption that the vehicle was not so engaged.

[46] Mrs. Taylor-Wright submitted that on the material date, the bus should have been parked at premises on Waterloo Road as it was a public holiday. No duty had been delegated to the driver for that day. The bus was not to work on Sundays or public holidays as well as the driver was not authorized to drive PD 5566. The first defendant could therefore have had no business for which the second defendant was deployed and as such, the mere ownership of the vehicle cannot make him liable. The presumption was rebutted by evidence that the journey was unrelated to the first defendant's interest or concern. The second defendant had been about his own business.

[47] The system employed by the first defendant was to leave the buses and their keys with the security guard at a complex where his mother held real estate. The buses were not to work on Sundays or public holidays. The security guard was not called as a witness, it was not suggested that he worked for the first defendant. The first defendant entrusted the duty of ensuring that his bus was not used in an unlawful manner to the security guard. The first defendant could not have known then whether or not his bus was being used contrary to his instructions but he ought to have known. He did not ensure that he retained control of the bus when the driver should be off duty. The lax system of control over the movement of the buses was the fault of the first defendant.

[48] The instant case is distinguishable from that of **Trudy Deans v Howard Murray** [2017]JMSC Civ 2 in that the instant case involves the distinction of master and servant, it is not simply one of agency. As well as, on the facts of **Trudy Deans** case, there was a finding that the defendant's wife had taken particular precautions in respect of her car keys. She had tried to mitigate any risk to the registered owner by preventing the car being removed and failed.

[49] The case of **Lena Hamilton v Ryan Miller** et al [2016] JMCA Civ. 59 is also distinguishable on the facts from the case at bar. That case concerned the law of agency in the traditional sense, with a driver unconnected to the claimant except by an agreement for sale of the motor vehicle involved in the collision. There

was no relationship from which a close connection between the parties could be derived.

[50] In the instant case the driver had the authority to drive a particular bus belonging to the first defendant's There was no evidence of the first defendant taking any precautions at all. He exercised no control over the bus being removed from the custody of the security guard who was not employed to him. There was no evidence that the security guard was obliged to prevent the removal of any of the buses on the first defendant's case as presented. In fact, there was no evidence that the first defendant had any control over which bus Damion Markland drove save that he had assigned PD5566 to him and this was the only bus the first defendant expected him to drive.

[51] There was no evidence of any arrangement to prevent removal or secure placement and retention of the keys for the first defendant's buses. There was also, no evidence of how the first defendant was able to ensure that Damion Markland drove according to his instructions. The entire operation was left to the discretion of an unknown security guard whose evidence was not available to the court.

[52] Given this state of affairs, it was reasonably foreseeable that Damion Markland could have been involved in an accident. It was also reasonably foreseeable that in an accident, harm could befall a third party.

[53] The job the Damion Markland had been engaged to perform was to drive the public passenger vehicle, using for that purpose his employer's bus, of which he was put in charge. He was expressly forbidden to drive bus PD5566 on Sundays or public holidays in the course of performing this job. That was not a prohibition which limited the scope of his employment, but one which dealt with his conduct within the sphere of his employment. I find that the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment.

[54] The unathorised act of the driver breached the duty of care owed to Andrew Reid as a user of the road. This duty was broken by Damion Markland who caused the accident. The contractual duty of Damion Markland was to drive for his employer Anwar Wright. The accident was caused by a bus driver, driving a bus as he was employed to do. The only distinction being the day of the week which was a public holiday. I find that the tortious acts of the employee are so closely connected with the nature of his employment they may properly be regarded as being within the scope of his employment. There is a close connection established on the evidence between the nature of the employment and the tort.

[55] This leads to the conclusion that on a balance of probabilities at the time of the accident, Damion Markland was driving as the servant of the first defendant. The first defendant is therefore found liable in negligence.

[56] On damages, only the claim for special damages has been pursued. Exhibit 1 is accepted as itemizing the loss sustained by the claimant in the accident. The total repair cost was adjusted to $555,181.93. The assessors' fees were $10,590.13. This yields a total of $565,772.06. Though general damages were claimed, there was no evidence presented or submissions on this issue. The court therefore has no material before it on which to make a finding or an order.

[57] The court orders as follows:

Judgment for the claimant.

Special Damages in the amount of $555,772.06 with interest at 3% from April 5, 2010 to the date of trial.

Costs to the claimant to be taxed if not agreed.