Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1991/J283

BETWEEN	IMOGENE AMANDA JACKSON	PLAINTIFF
A N D	HIGH VIEW ESTATE	1ST DEFENDANT
A N D	NATHANIEL BYFIELD	2ND DEFENDANT

David Batts and Ransford Braham instructed by Messrs. Livingston, Alexander & Levy for Plaintiff.

Mrs. Ingrid Mangatal-Munroe instructed by Messrs. Dunn, Cox, Orrett & Ashenheim for 1st Defendant.

Leroy Equiano instructed by the Kingston Legal Aid Clinic for 2nd Defendant.

HEARD: 11th, 13th, 14th, and 27th February, 4th March and 4th July, 1997.

JUDGMENT

HARRISON P.J

By writ of summons filed on the 20th day of September 1991, the plaintiff claims against the defendants damages for negligence, namely, that on the 24th day of August, 1986, at Chatteau in the parish of Clarendon, the second defendant the servant and or agent of the first defendant controlled and or manoeuvred the first defendant's motor truck so violently, whilst the plaintiff was alighting from the said truck that the plaintiff fell from its step and sustained severe injuries and suffered loss and damages.

The first defendant admitted ownership of the truck, and that it was driven by the second defendant, but denied that he was its servant or agent "in the scope of his duties." Furthermore, it claimed that the plaintiff was negligent.

The second defendant admits that he was the driver, denies that he was negligent, but claims that the plaintiff's injuries were caused by her own negligence.

The facts, inter alia, are as hereunder:

On the 24th day of August 1986 at 5 a.m. the plaintiff was standing on the road at Bird's Hill, in the parish of Clarendon, having gone there the evening before to visit her relatives. Nathaniel Byfield, the second defendant, the driver of the first defendant's motor truck registerd CC 6241, allowed the plaintiff into the cab of the said truck in order to take her at her request to her home at Chatteau, three miles away; they had been on intimate terms. Whilst, driving in the truck the second defendant accused the plaintiff of promising someone to come to her house that night to sleep with her. On reaching Chatteau the second defendant drove the truck, a right-hand drive over onto the right hand side of the road, where the plaintiff's gate was, stopped the truck, turned off the engine and told the plaintiff to get out of the truck. She opened the left door of the cab of the truck and holding on to the handle on the cab and the door, she stepped onto the step of the truck, to leave. The left side of the truck was then "not fully in the middle of the road." The second defendant who had turned off the engine, re-started the engine of the truck and suddenly moved the truck forward and to its left, with the left front door still open and before the plaintiff had finally stepped onto the ground outside. The plaintiff fell to the ground and the wheel of the truck ran over her right side. The plaintiff became unconscious and was taken to the May Pen Hospital. On the 25th day of August 1986, feeling great pain, she was transferred to the University Hospital; there still in pain, she was treated, put "in traction", and in November of the said year, she was transferred to the Mona Rehabilitation Hospital. She remained there for one

year during which she was treated by Professor Sir John Golding. She cannot now walk, cannot bathe herself nor perform her domestic chores. She can raise her right hand and arm to shoulder level only; her fingers remain curled. In August, 1986, before the accident, she had been employed at Carreras Company carrying tobacco at a wage of $40 per week, and worked as a domestic getting $35 per week, for any week that she was not employed at Carreras. Since her incapacity she has had to pay $1,000 per week to someone to assist her, generally.

The said truck, on the day of the accident had a printed sign inside and outside of the cab, which read "no passengers allowed." The second defendant had been told by Leroy Levy, a director of the first defendant, when hiring him "one year and a couple of months" before the accident, that he was not to take up passengers, not to take up idlers, and that when travelling with chickens from the farm to the factory he was not to stop.

The first defendant was a party to a contract with Caribbean Broilers to transport chickens from Clarendon to Kingston in crates packed onto the truck, a flatbed. The second defendant was allowed to retain the truck from Sunday until Thursday, of each week, making five trips to Kingston, weekly. The crates would be packed on the truck up to a height of seven feet from the floor of the truck, which was however fitted with side mirrors.

On the morning of the accident the 2nd defendant at 5 a.m., was late and hurrying. It is unlikely that the plaintiff, who had seen him the evening before and had arranged to be driven from Bird's Hill to Chatteau on that morning, had asked to be taken to Kingston. It is also unlikely that the plaintiff took up the second defendant's shoes or that he left his driver's seat and went and stood at the left front door of the cab. If, on the second defendant's account, which the

Court rejects, while sitting in the driver's seat he was able to see the plaintiff standing outside the truck "about 2-3 yards on the left side", it would have been unnecessary for him to go and stand at the left door to speak to her. There is no evidence to suggest that the plaintiff was "Attempting to get on to the moving vehicle."

Mr. Batts for the plaintiff argued that the second defendant driver was within the course of his employment - driving off the truck, although improperly, as he was employed to do; that the status of passenger was terminated when the truck halted at the gate of the plaintiff - **Smith vs Smith [1989] 1 All E.R. 833.** Alternatively, the court can accept the second defendant's case that he put off the plaintiff and drove off when she was close by, and find both defendants liable in negligence - **Douglas vs St. Jago Cement Block Factory S.C.C.A. 60/89-March 1991;** alternatively that, even if the plaintiff was a passenger, the prohibition to the second defendant should be restrictively interpreted as not including a "wife" or "girlfriend" - **Adm. General vs. Tate [1968] 27 WIR 172;** alternatively, even as a passenger the prohibition should be viewed as a general one, and the second defendant in breach was still within the scope of his employment, because it was not the nature of, but only the mode of performance that was restricted, and the principle that the benefit accruing to the employer by the employee's breach of the prohibition which made the employer liable, is no longer a necessity to the fix vicarious liability, and the court should reject the "benefit" principle as being the law - **Hamilton et al vs Farmers' Ltd. et al. [1953] D.L.R. 382, Rose vs. Plenty [1976] 1 All E.R. 97,** and **Lloyd vs Grace, Smith & Co. [1911-13] All E.R. Rep. 51,** and find the employer vicariously liable; alternatively, even if the plaintiff, being a passenger in breach of instructions and deemed a trespasser, she was owed a duty of care by the employer to be humane while

she was disembarking and its breach made the employer liable in negligence - **Southern Portland Cement Ltd. vs. Cooper [1974] 1 All ER 87.**

Mrs. Mangatal-Munroe for the first defendant submitted that the second defendant was not at the material time the servant or agent of the first defendant nor acting within the scope of his employment having disobeyed instructions not to take up passengers; that the second defendant was, in any event not liable in negligence and therefore the first defendant was not vicariously liable - **Young vs Edward Box & Co. [1951] 1 T.L.R. 789, Rose vs Plenty, supra;** that the plaintiff was a trespasser to whom no duty of care was owed and that the injuries were caused by the plaintiff's own act of negligence in attempting to get onto a moving truck when she fell; that the vicarious liability of the first defendant cannot be resolved by applying the law relating to a trespasser i.e. occupier's liability but the law of the scope of employment of the second defendant, **Lloyd vs Grace Smith supra, Limpus vs. London General Omnibus Co. (18620 1 H.C. 526, (1861-73) All E.R. Rep.;** that taking up a passenger who is unconcerned with and not conferring a benefit on the business of the first defendant renders the second defendant as one not acting within the course of his employment and the court should follow Rose vs Plenty, supra, in preference to Hamilton et al vs Farmer's Ltd. et al., supra; that the court, may not find that the accident occurred other than as maintained by either party. Mrs. Mangatal-Munroe also relied on Charlesworth and Percy on Negligence, 7th Edition, paragraphs 2-96 and others, and the New Law Journal, 1976 Vol. 126, page 447.

Mr. Equiano for the second defendant submitted that the plaintiff was aware of the prohibition signs on the truck and the second defendant while on the course of business on behalf of the first defendant disobeyed the prohibition and

took on the plaintiff whose presence did not benefit the first defendant, but that disobedience was brought to an end at the plaintiff's gate; that the plaintiff's injuries resulted from her own action and the manoeuvre by the second defendant when the plaintiff came into contact with the truck and was run over and it was not a negligent act on his part; and that the court should accept the account of the second defendant who was accordingly not liable.

A person is liable in some circumstances not only for the torts committed by him but also for torts committed by persons acting on his behalf if he authorises or ratifies such torts or even if he does not authorise nor ratify such torts, but they are committed by his servant within the course of the latter's employment.

The author in **Charlesworth and Percy on Negligence, 7th edition, para. 2-112,** observed,

> **"A master is liable for the negligence of the servant, if committed in the course of his employment, but is not liable for negligence, which is committed outside the scope of his employment. As Lynskey J,(in Marsh vs. Moores [1949] 2 KB, 208) has stated: 'It is well settled law that a master is liable even for acts which he has not authorised provided that they are so connected with the acts that he has authorised that they may rightly be regarded as modes, although improper modes of doing them. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act the master is not responsible for, in such a case the servant is not acting in the course of employment, but has gone outside it'."**

The liability of an employer for the tort of his servant is therefore based on the principle of vicarious liability arising out of the contract of employment, and while the servant is engaged in the course of the employment. Accordingly, the employer's liability attaches remotely; he can correspondingly exclude his liability by imposing restrictions on his employee in his the employer's absence. As a general rule an employer is not liable, where his employee-driver of his motor vehicle, in disobedience to an express prohibition not to take up

passengers, does so, and as a result of his negligent driving the plaintiff is injured. However, in some circumstances the employer may be liable, for example, where he derives some benefit in the course of business from the very act of disobedience.

In **Limpus vs. London Genral Omnibus Co. [1861-73] All E.R. Rep. 556,** the driver of the defendant's omnibus had been instructed "not to hinder or obstruct the passing of other omnibuses." He deliberately obstructed the plaintiff's omnibus, pulling across the road, thereby preventing the plaintiff's omnibus from passing. The defendant was held to be vicariously liable to the plaintiff for the resulting damages, because the driver did the act in the course of his employment and for the benefit of his employer, in competition with the plaintiff.

In **Administrator General vs. Tate et al (1968) 27 WIR 172,** the first defendant who had given instructions that no passengers should be conveyed on his vehicles, was held liable in circumstances where, the deceased died from injuries received when he fell from a roller being conveyed on a trailer drawn by a truck driver by the first defendant's employee; the deceased was held not to be "a passenger" as contemplated by the prohibition issued by the first defendant employer.

The Court is **Twine vs Bean's Express Ltd. [1946] 1 All E.R 202, and Conway vs George Wimpey & Co Ltd. [1951] 1 All E.R.** held that the injured plaintiff, who had been a passenger on the defendant's vehicle in breach of a prohibition issued by the driver's employer, was a trespasser and could not recover because no duty was owed by the employer to a trespasser, In both cases it was intimated, that the employee was consequently acting outside the scope of his employment.

The legal principle that no duty of care was owed by an occupier of land to a trespasser was reversed in the case of **British Railways Board vs Harrington [1972] 1 All E.R. 749.** That decision, as a consequence, influenced later decisions on

the question of the duty owed to a trespasser, generally.

In Rose vs. Plenty [1976] 1 All E.R. 97, the second defendant employee milkman allowed the plaintiff a boy of 13 years to assist him deliver milk and collect bottles in breach of written directives not to take children onto the vehicles. The plaintiff was injured by the negligent driving of the first defendant. The Court of Appeal held, by a majority, that the employers were vicariously liable, reversing the learned trial judge on that point, because the first defendant was acting in the course of his employment. Lord Denning, Master of the Rolls, said that what was done was for the purpose of the employer's business, and the employer was therefore vicariously liable. Rejecting the trespasser approach he said, at page 100,

> **"... it was commonly supposed that occupiers of premises were under no duty to use care in regard to a trespasser. But that stern rule, has now been abandoned."**

The author, commenting in the New Law Journal, Vol. 126, dated the 29th day of April, 1976, on the decision in the Herrington case, said, at page 447,

> **"The effect of that decision was to considerably extend the circumstances in which an occupier of premises will owe a duty to a trespasser - the duty is not now one of merely refraining from showing a wilful or reckless disregard for the presence of the trespasser but one of showing a common humanity towards the trespasser.**
>
> **The duty owed by an employer to a trespasser on his vehicle must be treated ... as analogous to that owed by an occupier to a trespasser on his premises. Accordingly, as a trespasser is more likely to be owed a duty since Herrington, the fact that the plaintiff is a trespasser ceases to be a good explanation for not imposing liability on the employer."**

There are circumstances where the employee commits

a wrong and not for the benefit of the employer, but the employer is still liable. It was so held by the House of Lords in Lloyd vs. Grace Smith & Co. [1912] A.C. 716, where the defendant's managing clerk, who conducted their conveyancing work without supervision, falsely induced the plaintiff to convey her cottages to him and he dishonestly disposed of them. The clerk was deemed to be acting within the scope of that class of act which his employer authorised.

Even the criminal act of the employee may be held to be within the course of employment. In **Williams vs. The Curzon Syndicate Ltd. (1919) 35 T.L.R. 475,** the defendant employer was held liable for the theft by their porter in a residential club; the rationale was that the master is liable if he is negligent in the choice of his servant. An employer has a duty to select competent and honest staff.

Mr. Batts for the plaintiff relied greatly on the Canadian case of Hamilton et al vs Farmers Ltd., supra, in support of the argument that the true test is whether or not the employee was in fact within the course of his employment, that the giving of a lift in defiance of his orders, whilst engaged in his employment was merely a mode of performance which did not take him outside the scope of his employment and the conferment of a benefit to the employer by the passenger is not a condition to base liability. In that case, the milkman, driver who was expressly prohibited from taking up passengers or helpers on the milk truck, engaged the plaintiff, a boy, to assist him in his deliveries In return, the plaintiff was compensated by a chocolate bar or a drink. The plaintiff was injured when he was climbing into the truck, holding onto the truck with one foot only on the running-board, when the truck suddenly moved forward. In holding the employer liable, McDonald J. said at page 347,

> **"In my view the cases of Conway.... and Twine ....discussed by Doull, J., are inapplicable because they proceed on the basis of the violation of a restrictive prohibition which excluded the carriage of passengers having no relation to the master's work; whereas in this case, the prohibition went only to the mode of performance and did not exclude from the course of employment the carriage of persons helping the work being done for the master."** (Emphasis added)

Doull, J, in the said Hamilton case, reasoned that if the plaintiff made enquiries at the houses of the quantity of milk required while the driver employee remained in the truck, the operation of the truck would still be in the course of employment, and he continued at page 387,

> **"... it must not be forgotten that the negligence which caused the damage was in the operation of the truck and not in the employment of the plaintiff. The question is whether the notice and the disregard of the notice changed this employment carried on over the same territory, with the same stops and delivering, the same milk, into an independent venture of Schroeder's (the employee/driver) own."**

It seems to me that although the Hamilton case sought to fix the liability of the master based on the fact that the employee, at the time of the injury, was doing what he was employed to do, and consequently was acting in the course of his employment, both Doull and McDonald, JJ, referred to the plaintiff actively assisting the driver in the milk delivery operation. The benefit to the employer was still obliquely the factor that kept the activity "within the course of employment." I am not therefore convinced that the benefit factor is not a condition in considering the employer's liability to a prohibited passenger, as distinct from the employee being "within the course of employment," simpliciter.

In the instant case, the plaintiff was a prohibited passenger of a class which the employer, first defendant sought to exclude. She was not performing any act for the benefit of the first defendant and so give rise to liability. The

plaintiff was, for all practical purposes, as regards the first defendant, a trespasser.

With respect to the duty of "common humanity" towards trespassers, the author in the Law of Torts by Flemming, 7th Edition, states, at page 444,

> **"... a modified, uniform, standard for trespassers was adopted first by the House of Lords in Herrington (1972) ... But rather than adopting the standard of the reasonable man adapted to the individual circumstances of the trespass - they discovered his new cousin, the 'humane man with financial and other limitations'..."**

and at page 445,

> **"The limited case law under the new rule does not suggest that its touchstone, 'common humanity' will be interpreted in a narrow sense ..... Whether from a heightened sense of social responsibility or any other reason, the requirements of common humanity and due care seem to have become almost identical."**

It is now no longer the law as enunciated in the case of Twine vs Bean, supra, and others, that no duty is owed by the employer in circumstances where the plaintiff, a prohibited passenger, is injured by the act of the employee, for the reason that the plaintiff was a trespasser. The House of Lords, the highest authority on the common law, in the Herrington case so held. A duty is owed even to a trespasser not to cause harm to him and to exhibit towards him a duty of due care or common humanity.

It is spurious to query whether this principle applies to motor vehicles by analogy, because it has been consistently applied to motor vehicles since Twine's case, to peremptorily deny such a right to the trespasser.

Fox, J.A. in 1971 recognized the deficiency and in the case of **Haye vs. Bruce (1971) 18 W.I.R.** 313 was of the view that the Jamaican courts should decline to follow

Twine's case on policy grounds, because,

> **"..... however acceptable the principle in Twine 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." - page 317.**

When the second defendant took up the plaintiff into the truck at Bird's Hill, and while she travelled towards Chatteau she was not performing any services for the benefit of the first defendant; in that context the 1st owed no duty to the plaintiff although the second defendant was on his usual route of travel on his employer's business from his home to the farm.

On reaching Chatteau, the 2nd defendant drove the truck from the left hand side of the road over to the right where the plaintiff's gate was located. He told her to get out of the truck. He switched off the engine. Her journey as a passenger was decisively over. The 2nd defendant having terminated the plaintiff journey was now reverting to his employer's prohibition not to take on passengers. The plaintiff as a trespasser was owed a duty. The 2nd defendant was aware of the presence of the plaintiff, a disembarking trespasser, to whom he owed a duty,

(a) to give the plaintiff sufficient time and opportunity to disembark from the truck,

(b) not to manoeuvre the truck in such a manner as likely to cause harm or injury to the plaintiff.

(c) to behave in a humane and considerate manner to the plaintiff.

The second defendant was aware that it would take some time for the plaintiff to descend the three steps for the cab of the truck to the ground, especially since the third

step was missing. The 2nd defendant admitted in cross examination,

"That morning I late. I in a great hurry."

In addition, the second defendant was probably displeased. In his mind he was the less preferred lover to the plaintiff and consequently he was no longer kindly disposed to her. To be rid of her he told her to "get out" of the truck to hasten his departure. To continue on his journey, the second defendant would have to steer the truck to its left, that is, towarws the direction from which the plaintiff was disembarking with the left door of the cab still open. He must be taken to have been aware of the fact that the plaintiff was not then safely off and that some harm would have been caused to her. His action was reckless at its lowest and bordering on a deliberate act. He was eager to continue on his journey, urgently pursuing his employer's interests; he continued on the course of his employment. The first defendant, the employer is in the circumstances vicariously liable for the act of the second defendant. The absence and consequent lack of knowledge of the first defendant then, is irrelevant.

Although the second defendant states that he did not "feel it", it is unlikely that he was not aware when the truck ran over the plaintiff's right elbow, which was fractured, presumbly by being run over by the truck's wheel.

It is not without some significance to note that at the time the truck's wheel ran over the plaintiff she would then have been on the ground, completely off the truck. He would then be on his way, in the course of his employment, unencumbered by the restrictive fact of a prohibited passenger, riding on the truck at the invitation of a disobedient employee.

Where an employee engaged on a journey driving the motor vehicle of his employer, and was aware of the existence of a tresspasser thereon intentionally injuries the trespasser, the employer is vicariously liable because of a duty owed not to injure, even a trespasser.

The medical evidence, agreed on by the parties reveals that the plaintiff suffered a complete paralysis below the shoulder and involving the whole body and lower extremities.

The late Professor Sir John Golding, on examination of the plaintiff on the 21st day of August, 1986, found,

> "... a complete dislocation of the cerivical spine... a severe comminuted fracture of the right acromio clavicular joint."

The dislocation of the neck was treated with cervical traction and on the 3rd day of September, 1996 he "performed an open reduction of the cervical spine using a rib graft to ensure solid fusion."

Sir John Golding further certified that,

> "Miss Jackson made a good recovery from this surgery but on the 20th September a thrombophelebitis of the left lower extremity developed with considerable swelling. This slowly settled.
>
> Treatment to the right elbow resulted in a fair range of motion which was impeded by the lack of active movement in that area. On the 28th November, 1986, she was transferred to the Mona Rehabilitation Centre (from the University Hospital). On arrival it was found that she was very depressed and found it difficult to co-operate with her treatment. Fortunately this has considerably improved and her general attitude to the condition is now good.
>
> She has reached Maximum Medical Recovery and has a permanent disability amounting to 85% of the whole person taking into account the level of paralysis, the difficulty in using her right upper arm due to the fracture of the elbow and her complete dependence on outside support for the management of her bodily function..."

The plaintiff remained there until the 12th day of November 1987 when she returned home. She was again examined by Professor Sir John Golding on the 10th day of May 1988; he found her still suffering from a complete paralysis below the shoulders and she complained of "some residual weakness in her right elbow and left hand."

He certified that,

> "She had made good progress. She had no pressure sores. The strength of her left hand her right elbow has improved to 20 t0 90 degrees. There is still a level between the 8th cervical and 1st dorsal.
>
> In summary the assessment of her permanent disability remains unchanged from my original assessment."

The plaintiff is even now still in the said state of paralysis and with her permanent disability amounting to 85% of the whole person, she is totally dependent on others to assist her; she is now 33 years of age. She cannot look after her two teenaged daughters, one of whom was living with her at the time of the accident. She paid for the medical services but no evidence was led to support it. As a household helper she would now earn $800.00 per week.

I assess the damages as hereunder:

(1) **Loss of earnings:-**

24.9.86 to 30.6.94 - 404 wks @ $35 per week =	$14,140.00
July 1994 to June 1996 - 10 wks. @ $500 per week =	$52,000.00
July 1996 to June 1997 - 52 wks. @ $800.00 per week =	$41,600.00
	$107,740.00

Note!!! The minimum wage in 1996 was $500 per week.

(2) **Loss of future earnings:-**

$800.00 per week x 52 x 11 (multiplier) = $41,600.00 per annum x 11 = $457,600.00

Note: (i) No reduction for income tax is made in respect of a wage of $800.00 per week and

(ii) The multiplier of 11 is based on a working life to age 65 years.

(3) **Future help:-**

$1,000 per week x 52 x 13 (multiplier = $52,000 per annum x 13 = $676,000.00

Note!!! similarly,

(i) No reduction for income tax is made in respect of a wage if $1,000.00 per week and

(ii) The multiplier of 13 is based on a normal life span to age 70 years.

As a result of her injuries detailed in the medical reports, which were agreed, the plaintiff suffered greatly and was deprived of a functionally happy life. For the purpose of ascertaining the sum suitable for pain and suffering, comparable cases assist.

In the case of suit no. C.L. 1986-G8 **Grey vs. the Atty. General (1989),** Orr, J., Khan's Personal Injuries Vol. 3 at page 150, the plaintiff aged 24 years, suffered damage to the spinal cord, resulting in paraplegia with complete paralysis below the abdomen, incontinent and 60% permanent disability. The award for pain and suffering was $352,000.00.

In the case of Suit no. C.L. 1985-B252 **Brown vs. Patterson (1990)** Pitter, J., Khan's Personal Injuries, Vol. 3 at page 168, the plaintiff was shot and suffered injury to the spinal cord and consequent paralysis. The award for pain and suffering was $400,000.

On an examination of the above and other comparable cases, I am of the view that in the instant case by today's monetary values an appropriate award for pain and suffering is $2,600,000.00.

In the circumstances, for the reasons I have expressed it shall be judgment for the plaintiff against both defendants, as hereunder:-

Special damages:

$107,740.00 plus int. @ 3% from 24.8.86 to date.

General damages:

(i)	Pain and suffering	$2,600,000.00
(ii)	Loss of Future Earnings	457,000.00
(iii)	Future help	676,000.00
		$3,733,600.00

that is, $3,733,600.00 plus interest @ 3% on $2,600,000.00 from the date of service fo the writ to date and costs to be agreed or taxed.