IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. 1999/K-006

BETWEEN MARLENE KINLOCK PLAINTIFF

AND PORT SECURITY CORPS LTD DEFENDANT

Mr. Jeffrey S. Mordecai Attorney-at-Law for Plaintiff.

Miss Carleeen McFarlane Attorney-at-Law for the Defendant

Heard on September 9th, 2002,

Brown J. (Actg)

This was an application for leave to appeal. On the 25th day of February 2002 the defendant's application to set aside a **default judgment** was dismissed.

The application to set aside was made under the provisions of section 258 of the Judicature (Civil Procedure Code) Law which reads.

> *"258 any judgment by default, whether under this title or under any other provisions of the law may be set aside by the court or a Judge upon such terms as to costs or otherwise as such Court or Judge may think fit".*

This section gave the Judge an unconditional discretion whether or not to set aside a judgment in default of defence, and this was so whether or not the judgment had been regularly entered.

The primary consideration was whether or not the defence had merits to which the court shall pay heed. The defendant must show by his affidavit that he had a defence to the action on the merits. Secondly the question of undue delay by the defendant in bringing the application must also be considered. However in this case the delay was not an issue.

In Vann & Another v Awford and others, The Times 23 April 1986 at page 4 Dillion LJ said:

> *" In applications to set aside a judgment, I entirely agree with my Lord that the primary consideration is whether there is a defence on the merits, and the Judge should have considered that first before considering the question of the delay".*

The plaintiff in this case brought an action in negligence against her employer. She was employed to the defendant as a Resort Patrol Officer in Negril and by virtue of her employment she was appointed a Special District Constable. On the 23rd May 1997 she was a passenger in the defendant's bus driven by one of its servant when the accident occurred. She sustained injuries.

The Writ of Summons and Statement of Claim were served on the 18th March 1999 by registered post. Interlocutory judgment in default of appearance was entered on the 26th April 1999. An

appearance was entered on the 29th April 1999 and the defence filed eight (8) days later.

On the 9th of July 1999 the plaintiff filed a summons to proceed to assessment of damages. The summons to set aside the judgment was filed on the 26th August 1999. The plaintiff's summons was adjourned sine die pending the hearing of this summons.

It was the defendant's contention that at the material time the driver ***"was not authorized to drive that particular vehicle, nor was he assigned to that particular route and was in fact on a frolic*** **of his own,"** and was then acting outside the scope of his employment. They filed two affidavits in support of the summons and also exhibited the proposed defence.

The plaintiff opposed the application on the ground that the facts advanced established that the defendant was vicariously liable and the judgment should therefore stand.

Christopher Honeywell the defendant's managing director in his affidavit of 21st day of May 2001deponed that he ***"commissioned a full investigation of the accident and exhibited statements made by Special District Constable Fernando and Special Constable Nadine Thomas",*** and may be summarized as follows:

(1) That members of the Resort Patrol were transported from their base to the Negril Police Station in the defendant's bus driven by Willard Williamson to be detailed and dispatched on duty.

(2) The officers were then given their assignments and reboarded the bus to be transported to their respective locations.

(3) The duty driver Willard Williamson switched with Newton Barnes another driver as the former said he would be assisting the police.

(4) While the bus was been driven along the Norman Manley Boulevard the driver was instructed by Special Constable Barronett also a passenger to intercept a motorcar. They unsuccessfully chased the car for 5 to 10 minutes.

(5) Immediately after the driver informed them that he would be driving to Orange Bay to visit a friend. He then proceeded to Orange Bay with the officers on board.

(6) He remained at Orange Bay for about one hour. The other employees became angry and insisted that he return to Negril with them.

(7) On the return journey the vehicle overturned and collided with a utility pole.

(8) The passengers were injured. The driver Newton Barnes subsequently died.

The facts relied on by the defendant showed that Newton Barnes was employed to the defendant as a driver. He substituted with Willard Williamson the assigned driver to transport the officers to their respective assignment. In doing this he made a detour for his own purposes, and on returning to Negril the accident occurred.

It is settled law that a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment.

In General Engineering Services Ltd v. K.S.A.C. (1988) 36 WIR 331 at page 333. Ackner LJ said

> *"Further it is well established that the act 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".*

These general principles were stated in Salmon on Torts (19th Edition) at page 521 as follows"

> *"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 this. 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 the negligence, fraud or mistake. On the other hand, if the unauthorized and wrongful act of the servant is not so connected wit 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 the servant is not acting in the course of his employment but has gone outside it".*

Thus, an employee will make his employer liable for damages if he is negligent while driving his employer's motor vehicle on his employers business. This will be so even if the employee makes a detour for his own purpose. The employer will not be liable if the employee drove the vehicle without the former's permission and for his own purposes.

In Omrod v Crossville Motor Services Ltd (1953) 2 QBD 753 at page 755 Singleton LJ said.

"The law puts an especial responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is been used wholly or partly on the owners business or for the owners purposes the owner is liable for any negligence on the part of the driver. The owner escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern".

In A and W Hemphill Ltd v. Williams (1966) 2 Lloyds Report 101

the defendants sent their lorry and driver to fetch a party of boys. Some of the boys (not the plaintiff) persuaded the driver to make a detour when an accident occurred. The defendant denied that they were vicariously liable for the driver's negligent driving on the ground that he was acting outside the scope of his employment. It was held that the defendants were liable as the presence of the passengers whom the servant was charged to drive to their ultimate destination made it impossible (at all events, provided they were not all parties to the plan for deviation) to say that this was entirely for the servant's own purposes their presence and transport was a dominant purpose of the authorized journey and although they were transported deviously continued to play an essential part.

Counsel for the defendant submitted that the Resort Patrol Officers were assigned to Negril in the Parish of Westmoreland. The accident occurred in the parish of Hanover. The deviation by the driver took them out of their jurisdiction and therefore he was on a "frolic" of his own. I found this position to be untenable and preposterous. Firstly Negril is situated in both parishes. They were

assigned to keep the peace in the tourist resort. Secondly the passengers including the plaintiff were not attempting to execute any duty at the time of the accident. They were being transported to different locations to commence their duties. The driver advised them that he was going to look for a friend in Orange Bay. They were not parties to the driver's action. The defendant provided the driver and the vehicle. The dominant purpose of the journey was to transport the plaintiff to her assignment and this had not changed. The defendant's position would have been different had the accident occurred after he had completed his task and then proceeded to Orange Bay

The second issue raised by the defence was that the driver was not authorized to drive that particular vehicle. It is settled law that a master may be liable for his servants' act even though the act is expressly forbidden In Goh Choon Seng v Lee Kim Soo (1925) AC 550 Lord Phillimne said:

> *"The principle is well laid down in some cases which decide that when a servant does an act which he is authorized by his employment to do under certain circumstances and under certain conditions, and he does them under conditions which are unauthorized and improper, in such cases the employer is liable for the act.*

The cases fall under one of three heads:

(1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or torts 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 ranged the cases where the servant is employed only to a particular work or a particular class of work, and 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) come 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 authorized and would not authorized, had he known of it. In these cases the master is nevertheless responsible".

A distinction will be made between a prohibition that limits the sphere of the employment and one that merely deals with conduct within the scope of employment. Only a breach of the former will take the servant outside the course of his employment and relieves the master from liability. A breach of the latter will render the master liable. (Plumb v. Cobden Flour mills Co. Ltd (1914) (AC 62 at p. 67)

In Kay v. ITW Ltd. (1967) 3 ALLER 22

The defendants employed a man named Ord to drive small trucks inside their works. A large diesel lorry belonging to another company came to the works for loading and was parked on a ramp with its back facing the closed doors of a warehouse. The plaintiff (A store man in the defendants' employment) and the lorry driver were loading the lorry Ord came to the Ramp with forklift truck to take it into the warehouse where it was normally kept. Without asking or even looking for the driver he got into the cab of the lorry and turned the key to start the engine; his intention was to move the lorry had been

left in reverse gear and at once started backwards pinning the plaintiff *against the warehouse doors. The defendant's case was that he was acting outside the scope of his employment in trying to move the lorry: They conceded that he was entitled to move light or small obstruction held: Ord was acting in the scope of his employment and the defendant were liable, though his entering the cab and starting the engine was foolhardy and unnecessary the question was whether it was a mode, though an improper one, of doing the work he was employed to do.*

In the instant case the substitute driver was employed in the capacity of a driver. At the time of the collision he was driving his employer's vehicle for the purpose of transporting other employees to their assignments. However he was driving a vehicle that the employer now says he was prohibited from driving. Implicitly they are saying they would not have permitted him to do so if they had known. It is my view that this was not a prohibition that limits the sphere of the employment but one that deals with conduct within the scope of his employment. The wrongful and unauthorized act was connected with the authorized act. He was therefore doing what he was employed to do in an unauthorized manner. The defendant would be liable vicariously.

The defendant also argued that at the material time Newton Barnes was an unauthorized driver and therefore cannot be held vicariously liable for his negligence. In ILKIW v Samuels (1963) 2 All ER 879 the employer was held to be vicariously liable where the

authorized driver had permitted an unauthorized person who could not drive to drive his employer's vehicle. Wilmer, LJ at page 885 said:

> *" The driver of the vehicle, as I see it, Waines was employed not only to drive but also to be incharge of his vehicle in all circumstance during any such times he was on duty. That means to say that even when he was himself sitting at the controls, he remained in charge of the Lorry and in charge as his employer's representative. His employers must remain liable for his negligence so long as the vehicle was being used in the course of their business. As I understand the authorities, the employer escapes liability of it, but only if, at the time of the negligent act, the vehicle was being used by the driver for the purpose of what has been called a "frolic" of his own. This is not the case. Here, at the material time, this vehicle was in fact being used in the course of the defendant's business. In those circumstances it appears to me that there is no ground on which the defendant can escape liability for Waines' negligence".*

In the present case the bus was under the control of Willard Williamson. He was employed to take charge and control of the vehicle while engaged on the task being performed. He decided with Barnes to switch duties as he said he 'will be assisting the police'. At the time of the accident the vehicle was being used for the purposes of the defendant's business. The defendant remains vicariously liable for Williamson's negligence.

It was clear from the facts as advanced by the defendant that

the plaintiff was not a trespasser. They owed a duty to her to take care in the driving of the vehicle. She was being transported in the course of her employment when the accident took place. She was not a party to the deviation. She suffered serious injuries. The driver was negligent while acting in the course of his employment. I am of the opinion that there is no merit to the defence and the judgment ought to stand.

Leave to appeal is refused.