ADONIS KHOSA
versus
CARGO CARRIERS

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 28 and 29 June, 3 July
and 23 August 2006

Civil Trial

Mr *Mwonzora*, for plaintiff
Mr *Ahmed*, for defendant

UCHENA J: On the 8th October 1998 the plaintiff boarded the defendant's truck which was traveling to Harare on the Beitbridge/Masvingo Road. The defendant's truck overturned injuring the plaintiff in the process. The plaintiff was hospitalized for a long time at Masvingo, Bulawayo, Harare and finally Masvingo Hospitals. When he was finally discharged from Masvingo hospital he was wheel chair bound as his right leg had been amputated above the knee. He had also sustained a fracture of the right humerus. His right hand had been pinned for restoration hence his inability to use clutches. At the trial the pin had been removed. He was then able to use clutches but for short distances. He has been forced into this by the breakdown of his wheel chair and his inability to have it repaired. His right side has very limited use.

He now has further problems arising from injuries he sustained in the accident of the 8th October 1998. He experiences phantom pain. He feels pain on the toes and foot of the amputated right leg. He feels as if the amputated leg is still there and suffers pain from it. The bone in the amputated leg is out growing the amputation also causing pain. It has to be cut and the new amputation will need medical attention.

He now claims $1.5 Billion as general damages for pain and suffering. The figure was a result of amendments to the original claim of $500 000.00.

The first amendment increased it to $1 000 000.00. It was subsequently increased to $15 000 000.00. The last amendment was granted by consent at the pre-trial conference increasing it to $1.5 Billion.

At the pre-trial conference the parties agreed on the following issues:-

1. Whether or not the defendant is vicariously liable for the plaintiff's injuries arising out of the accident.
2. If so what is the quantum of damages arising from injuries sustained by the plaintiff.

The plaintiff gave evidence to the following effect. He waved down the defendant's driver who was driving the defendant's truck on the Beitbridge/Masvingo Road towards Harare. The defendant's driver stopped. The plaintiff asked for a lift. He was offered a lift and charged $10.00. The defendant's driver opened the door for him. He got into the truck and the driver closed the door. As they were taking off the driver drove with some wheels in a depression and others on higher level road surface and the truck overturned. The plaintiff's right side was trapped by the door when the motor vehicle landed on its side. He was subsequently taken to Masvingo Hospital. The plaintiff said he did not see any instruction prohibiting the carrying of passengers. He said he was allowed into the defendant's truck by the defendant's driver. He said the accident was due to the defendant driver's negligent driving.

He prior to the accident was employed by the Ministry of Transport as a supervisor and a driver. He was in charge of a section of the Beitbridge/Masvingo Road and his group was camped after Chivi turn off. On the day in question he had left his camp for the Mwenezi area. It was on his way back that he got a lift from the defendant's driver. At the time of his injury he was earning a salary of $10 000.00 per month. After his discharge from Masvingo Hospital he was not able to go back to work. His employer retired him on medical grounds. He now has no income and is not able to take up any other employment.

Doctor Edwin Godwin V. Sithole gave evidence for the plaintiff. He at the time the plaintiff was first admitted at Masvingo Hospital was a Government medical officer based at Masvingo Provincial Hospital. He was at the time the Acting Medical Superintendant. He recalls attending to the plaintiff after he had been involved in a road accident. He said the plaintiff came to Masvingo Hospital several times. He initially was referred to Bulawayo Hospital. He said the plaintiff had a traumatic amputation of his right leg above the knee. He also had a fracture of the right humerus. When he came back to Masvingo he was moving around in a wheel chair. He prepared a medical report for the plaintiff for purposes of his claim to Old Mutual. The report was produced as Exhibit 3. He got the information from the patient's file and the examination of the plaintiff at the time of compiling the report. In Exhibit 3 Dr Sithole said:-

> "The above was involved in a road traffic accident on 8 October 1998. He sustained fracture of the right humerus and traumatic amputation of right leg above the knee.
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> Because of the nature of his injuries he was retired on medical grounds. He has not been able to work since the day of injury and his condition will not improve."

Doctor Sithole also produced the report prepared by Dr Shamu. He said it reflects what he observed and it is an accurate record of the plaintiff's injuries. He agreed with the plaintiff's disability of 56%. He said any injury involving amputation above the knee entitles one to 50% disability. He then said if the injury to the right arm is considered 56% is a fair assessment of the plaintiff's disability.

Asked to comment on the pain the plaintiff says he feels on the limp which is no longer there, he said that is called phantom pain which is caused by the brain still functioning as if the limp is still there. He said phantom pain is a well recognised experience and is one of the complications of amputation. He also commented on the plaintiff's stump needing re-sectioning.

Doctor Sithole gave his evidence well. He is a qualified and experienced doctor. He gave detailed explanations on the plaintiff's condition now and his long and prolonged hospitalization, his being wheelchair bound and the current complications with phantom pain and the bone growing out of the amputation. His evidence fully supports the plaintiff's claim for pain and suffering during and after the accident and the pain and suffering he is going to suffer as a result of phantom pain and the growing bone which needs re-sectioning.

The defendant's defence is that its driver was on a floric of his own as he was under instruction prohibiting him from carrying passengers. The witnesses who gave evidence for the defendant said their trucks carry cargo and not passengers. They said their drivers are instructed not to carry passengers. They said drivers sign contracts with that instruction and are verbally instructed to that effect during the induction training. Mr Sam Hungwe the defendant's operations manager gave evidence to this effect and produced samples of driver's contracts. He did not produce the contract for the driver who was involved in the accident which caused the plaintiff's injuries. He denied the existance of that driver (Prosper Hita) in their company but later conceded that the personnel manager would be better placed to know whether or not they had or still have a driver by that name. When asked whether checks had been made on records for that accident he said the security manager would know. He seems to have very limited knowledge about personnel and the accidents their drivers have been involved in. He conceded that there are imperfections in the driver's contracts he produced. He in particular conceded that:-

1. The contracts were not signed by all persons who should have signed them.
2. Some have no employee numbers.
3. Some were not signed on the part to be signed by the employee.
4. Some were not signed by witnesses.

The documents left a poor impression on the efficiency of the defendant's company. Hungwe agreed that all the documents he produced were incomplete in one way or another. His evidence as supported by the documents does however leave no doubt that the defendant's drivers are prohibited from carrying passengers.

The contracts have on page 7 a provision on carrying of unauthorized passengers. It reads:-

> "It is against the company regulations and it is an offence by law to carry unauthorised passengers in a company vehicle. If a driver is found doing this he will be dismissed. He could also be legally fined or imprisoned for such an offence. The company will not assist the driver in any way should he be found guilty of this offence as we have no insurance covering passengers. If an accident occurs and the passengers are maimed or killed, the driver will be responsible for any legal fees if the passengers or their families decide to prosecute."

The provision though not elegantly formulated indicates that the defendant's drivers are generally instructed not to carry passengers. Though no contract was produced for Prosper Hita the driver in question I have no doubt that the prohibition applies to all of the defendant's drivers. In fact the plaintiff only mentioned this driver's name in court. The pleadings did not give this detail. The issue to be decided is what effect such an instruction to the driver has on the plaintiff's claim.

The next witness for the defendant was Lovemore Ndoro. He is the company's security manager. He also said the company's policy is that no passengers will be carried on their trucks as they only carry cargo. He though he has no direct involvement in the training of drivers understands that drivers are made to sign a document with such an instruction. He also said their trucks are written "No unauthorised passengers". He said if a driver carries passengers he will be dismissed.

Under cross-examination he said he is not involved in the training or instructing of drivers. He is not aware whether drivers have any discretion on whether or not to carry passengers. He was employed in 2001 after another officer had dealt with this case. He admitted that his company's

driver was involved in an accident on 8 October 1998 along the Beitbridge/Masvingo Road. He however could not find the file or the details of the accident. He said they then changed lawyers as they were not happy with the plea which admitted the accident. He attempted to deny that thy have or ever had a driver called Prosper Hita.

He said he did not know who the contact of the previous legal practitioners was. When it was put to him that paragraph 3 of defendant's plea prepared by the current legal practitioners admits that their driver was involved in an accident on 8 October 1998 he said "we denied that".

It is apparent that the witness is trying to absolve the company at any cost including giving misleading evidence.

In address Mr *Ahmed* said the only issues were as per the joint pre-trial conference minute. He specifically said he concedes that the accident occurred and that the joint pre-trial conference issues are what should concern the court.

I will therefore proceed on the basis that the plaintiff was injured while traveling in the defendant's truck driven by the defendant's driver who was prohibited from carrying passengers.

Mr *Mwonzora* submitted that the defendant was vicariously liable because the defendant's driver drove negligently and caused the plaintiff's injuries during the course of his duties. On the other hand Mr *Ahmed* submitted that as the driver was prohibited from carrying passengers he acted outside the sphere of his employment, therefore the defendant is not vicariously liable.

An employer can be vicariously liable for his employee's delicts if they are committed in the course of his employment. In the case of *Nott vs Zimbabwe African National Union* (*Patriotic Front*) 1983 (1) ZLR 208 at 210 E-F BECK JA said:-

> "The doctrine of vicarious liability of a master for such delictual acts of his servant as are committed in the course of the servant's employment is part of our law."

The issue in this case is not whether or not the plaintiff was injured due to the negligence of the defendant's employee but whether the defendant is liable as the driver was prohibited from carrying passengers and was therefore on a frolic of his own.

In the case of Nott v ZANU (PF) supra BECK JA at page 211 F-H said:-

> "The leading South African decision in which extensive consideration was given to the problem that is presented by the servant's delictual act committed when he has diverted from the immediate furtherance of his master's affairs is the case of *Feldiman (Pty) Ltd v Mall* 1945 AD 733. Two of the judgments in that case stress that it is the degree of the servant's deviation from the execution of his master's work, or looked at conversely, the degree of the servant's retention of his master's work, that is the determining factor."

WATERMEYER CJ at 742 said:-

> "If he does not abandon his master's work entirely but continues partialy to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party, which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work and not entirely to an improper management by the servant of his own affairs."

TINDALE JA put the matter this way at 756.

> "In my view the fact to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time it cannot reasonably be held that he is still exercising the functions to which he was appointed. If this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms. I can see no escape from the conclusion that ultimately the question resolves itself into one of degree in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."

In the *Nott Case* (*supra*) the defendant's driver deviated from his route by 7 to 8 kms but it was held he was still acting in the course of his duties as it was held not to reasonably be "so serious a departure from obedience to the instruction to return with the vehicle "chop chop" not forgetting the added injunction to interrupt the return journey by collecting the lawn mower.

In the present case there was no deviation from the route the driver was to use. He remained on the Beitbridge/Masvingo Road. He continued to drive towards Harare carrying his employer's cargo. His only digression was to carry the plaintiff against his employer's instruction. Can he be said to have ceased to exercise the functions for which he was appointed by the defendant.

In the case of *Gorah v Machona & Anor* 1984 (2) ZLR 102 at 108 H-109A BECK JA said:-

> "In situations where disobedience by a servant of his master's instructions is causally linked with the injury delictually inflicted by the servant on a third party, a useful test is whether the instruction that the servant disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within that sphere.....
>
> It would be altogether too narrow an approach and indeed wrong in principle to look only as Mr Paul invites us to do, at the more immediate cause of the injury to the third party, namely, the bad driving of the servant, and to ignore the servant's conduct in causing the third party to be a passenger exposed to the risk of injury by bad driving. These are two distinct aspects of the servant's behaviour looked at as a whole course of conduct. Both aspects of that conduct had to occur for the third party to be harmed if either of them had been absent the appellant would not have lost his leg. Unless both aspects of the servant's conduct can properly be said to be "acts done in the exercise of the functions to which the servant has been appointed" it must follow that he has not acted throughout as his master's servant in inflicting harm on the third party, and there is no room for the operation of the principle of vicarious liability of the master for the conduct of his servant. (emphasis added)

In the case of *Wentworth Wear v Zvipundu* 2000 (1) ZLR 281 (S) at 284 G-H GUBBAY CJ dealing with prohibited conduct by a servant said:-

> "In *Plumb v Cobden Flour Mills* [1914] AC 62 Lord Dunedin drew a distinction between two different types of prohibitions in the relationship between employer and employee."
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> He said at 67
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> "There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves

> the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

Later at page 285C the learned Chief Justice went on to say:-

> "It is clear to me that in driving the commuter omnibus – albeit for the apparent benefit of the respondent and in the hope that by so doing the latter would be prepared to retract what must have been viewed as a lawful dismissal – Chigariro disregarded a prohibition which limited the sphere of his employment, and not one which dealt only with the conduct within the sphere of his employment. As he was thus not acting within the course of his employment at the time of the collusion, the principles of vicarious responsibility for his negligence cannot be extended to embrace the respondent."

The cases of *Gorah & Wentworth Wear* (*supra*) establishes that our law does not extend vicarious liability to an employer if the employee's conduct is one outside the sphere of his employment. The court must therefore first determine the nature and effect of the prohibition before attaching vicarious liability to an employer.

Cases where the employee has been told not to perform acts for the employer because he has been dismissed as was the case in *Wentworth Wear supra* are easy to determine, while those were the employee is prohibited from doing a thing but is still employed call for careful consideration.

In the case of *Phillips Central Cellars P/L v Director of Customs and Excise* 2000 (1) ZLR 353 (H) at 358 GILLESPIE J (as he then was) said:-

> "An application of this test of degree becomes even more problematic where the employees' conduct involves behaviour that is forbidden him by the employer. Such as where the employee steals his employer's customer's property. Many considerations have been invoked by the courts in an attempt to reach a reasonable conclusion as to whether the employee's behaviour was sufficiently proximate to his appointed function. For instance, whether or not the employer had clothed the employee with powers that were abused, or whether goods stolen by an employee were entrusted to the particular care of the dishonest employee." (emphasis added)

However that difficulty does not arise in the present case because of the clear precedent set by the Supreme Court in the case of *Gorah* (*supra*) which is on all fours with the present case.

In the present case as in *Gorah* (*supra*) the defendant's driver was instructed not to carry passengers. He carried the plaintiff in disobedience of his master's instruction. It can not therefore be said in so doing he was acting within the sphere of his employment.

In *Gorah Supra* at 109 H BECK JA said:-

> "Instances of drivers negligently injuring unauthorised passengers on their master's vehicles are instances where part of the causation of the injury done has been the servant's disobedience to an instruction that limited the sphere of his employment." (emphasis added)

It is clear that once the prohibition limits the sphere of employment harm caused to a third party while the employee is disobeying the prohibition does not make the employer vicariously liable.

Exhibits 4 (a) – (i) clearly demonstrates that the carrying of passengers was prohibited. The defendant carries cargo. It uses trucks for that purpose. The prohibition against the carrying of passengers is consistent with the nature of its business. The evidence led makes it clear that the defendant's drivers are given such instructions. The disobedience is sanctioned by discharge. It therefore follows that it is a serious disobedience which limits the employee's sphere of employment.

In the result I find that the defendant is not vicariously liable for the delict of its driver who drove negligently after giving a lift to the plaintiff.

The plaintiff's claim is therefore dismissed with costs.

Mwonzora & Associates, the plaintiff's legal practitioners
Ahmed & Ziyambi, the defendant's legal practitioners