Sitaram Motilal Kalal

Vs

Santanuprasad Jaishankar Bhatt

Civil Appeal No. 615 of 1963

(K. Subha Rao, M. Hidayatullah, R. S. Bachawat JJ)

08.02.1966

JUDGMENT

SUBHA RAO, J.-

I regret my inability to agree.

Sitaram Motilal Kalal, hereinafter called the 1st defendant is in agriculturist having lands at Kathwada village. He owned a motor-car bearing registration No. BYD 316. He entrusted the said car to Mohammed Yakub Haji, hereinafter called the 2nd defendant, for plying the same as a taxi in Ahmedabad. The 2nd defendant ran the taxi, collected the fare, met the expenditure incurred connection with the said service, rendered account to the 1st defendant and remitted the balance to him. In short, the 2nd defendant was not merely the driver of the taxi but he was also in entire charge of plying the taxi in Ahmedabad. The 2nd defendant appointed the 3rd defendant as a cleaner for the taxi. Presumably because the 2nd defendant wanted another to assist him in driving the car during his absence from the city, he trained the 3rd defendant to drive the car and on April 11, 1940, the 2nd defendant took the 3rd defendant to the Regional Transport Authority for obtaining a licence for him. On that date a test was being conducted by the Regional Transport Officer on the capacity of the 3rd defendant to drive a car for the purpose of issuing to him a permanent licence for driving. At about 5 p.m. on that day, the plaintiff, who is a leader practising in the courts of the district of Ahmedabad, was going out of the compound of the office of the Regional Transport Authority. At that time, the 3rd defendant was driving the car towards Lal Darwaja side; without giving any signal, he took a sudden turn towards the gate of the Office of the Regional Transport Authority, accelerated the speed and dashed the car with great force against the pillar of the gate of the said office. In that process, the plaintiff's leg was pinned between the compound wall and the gate, with the result it was crushed and later on amputated. After recovering from a long illness, the plaintiff filed a suit, being Special Suit No. 66 of 1950, in the Court of the Civil Judge, Ahmedabad, for recovery of damages in a sum of Rs. 80,000 from defendants 1, 2 and 3 and the 4th defendant, the Indian Globe Insurance Company, Limited, with whom the said car was insured. All defendants denied their liability.

The learned Civil Judge held that the 3rd defendant was negligent in driving the taxi, that he was the servant of the 2nd defendant and not of the 1st defendant, and that even if he was the servant of the 1st defendant as a cleaner of the car, he did act within the scope of his authority when he drove the car and caused the accident. In the result, he gave a decree against defendants 2 and 3 in a sum of Rs. 20,000 and dismissed the suit against the 1st defendant; he also dismissed the suit against the 4th defendant, as the 1st defendant, who insured the car, was exonerated from liability. Against the said judgment and decree the plaintiff preferred an appeal to the High Court of Bombay in so far as the

decree went against him. A Division Bench of the said High Court came to the conclusion that the entire management of the car was given to the 2nd defendant, that in discharge of his duty as such manager he appointed the 3rd defendant with the consent of the 1st defendant and that by clearest implication the 1st defendant, in the circumstances of the case, must be regarded as having authorised the act of the 2nd defendant in training the 3rd defendant as a car-driver and that, therefore, he would be liable in damages for the accident caused by the negligence of the 2nd and 3rd defendants in the course of their employment. So far as the 4th defendant was concerned, the High Court held that in view of Section 96(1) of the Motor Vehicles Act, 1939, no decree could be directly passed against it, but the decree against the 1st defendant could be executed against it in terms of the said section. It raised the quantum of damages from Rs. 20,000 to Rs. 25,000. The suit was decreed in favour of the plaintiff against defendants 1,2 and 3 with costs. The 1st defendant, by certificate, has preferred the present appeal.

Mr. M. V. Goswami, learned counsel for the 1st defendant appellant, contended that the findings of the High Court that the 3rd defendant, the cleaner, was the servant of the 1st defendant and that the 2nd defendant was authorised to secure a licence for the cleaner to drive the car were vitiated by its reliance on two pieces of inadmissible evidence, namely, the alleged admissions found in the 3rd defendant's written-statement and in the reply notice given by him to that issued to him on behalf of the plaintiff. He further contended that the 1st defendant could not be made liable for the acts of either the 2nd defendant or the 3rd defendant committed outside the scope of their employment.

Mr. Pershad, learned counsel for the respondent, though at first made an attempt to sustain the admissibility of the said two pieces of evidence, later on clearly conceded that they could not be relied upon against the 1st defendant. But, he contended that even after the exclusion of the said two pieces of evidence, on the remaining evidence, the circumstances established and the probabilities arising therefrom it could be held, as the High Court did, that the 3rd defendant was the servant of the 1st defendant, that the 2nd defendant was authorised by the 1st defendant to train the 3rd defendant as a driver and get a licence for him so that he might assist him in driving the car during his absence, that the accident took place during the course of the employment of the 3rd defendant by the 1st defendant and that, therefore, the 1st defendant was liable in damages for the accident. That apart, he further argued that the 2nd defendant in discharge of his duty in the course of his employment negligently entrusted the car to the 3rd defendant for the purpose of assisting him in the discharge of his duty and, therefore, the 1st defendant would be liable for the accident.

Before we consider the problem presented to us, it will be useful to notice briefly the relevant aspects of the law of torts vis-a-vis the liability of a owner of a car for the acts of his driver.

The doctrine of constructive liability is in a process of evolution. It is a great principle of social justice. A court no longer need be overweighed with the old decisions on the subject given under radically different circumstances, for now the owner of a car in India is not burdened with an unpredictable liability as there is a statutory compulsion on him to insure his car against third-party liability and his burden within the framework of the Motor Vehicles Act is now transferred to the insurer.

The general principle is well settled and it is neatly given by Pearson, L.J., in Norton v. Canadian Pacific Steamships. Ltd. ((1961) 2 All. E.R. 785, 790) thus :

> "The owner of a car, when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from

> negligent driving of the car, whether by the owner himself or by an agent to whom he had delegated the driving, the owner is liable."

The limitation on this principle has been succinctly stated by Cockburn, C. J., Storey v. Ashton ((1868-69) L.R. 4 Q.B. 476, 479) thus :

> "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant."

A valuable test to ascertain whether a servant was negligent or not is found in Ricketts v. Thos. Tilling, Limited. (L.R. (1915) 1 K.B. 644, 646, 650). There the facts were : the conductor of an omnibus belonging to the defendants, in the presence of the driver, who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets so negligently that it mounted the foot pavement and knocked down and seriously injured the plaintiff. The Court of Appeal held that there was evidence of negligence on the part of the driver in allowing the omnibus to be negligently driven by the conductor. In so holding, Buckley, L. J., laid down the following test :

> "It is a question for the jury whether the effective cause of the accident was that the driver committed a breach of his duty (which was either to prevent another person from driving or, if he allowed him to drive, to see that he drove properly), or whether the driver had discharged that duty."

Pickford, L. J., said much to the same effect thus :

> "It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven."

This decision followed the decision in Englehart v. Farrant. ((1897) 1 Q.B. 240). There, the facts were : A man was employed by the defendants to drive a cart by which delivery was to be made of parcels. The cart was manned by a man and a boy. The man's duty was to drive; the boy's duty was to deliver the parcels. The boy had nothing to do with the horses. The man's instructions were not to leave the cart. The driver did in fact leave the cart, and while he was absent the lad drove on and came into collision with the plaintiff's carriage and injured it. The question was whether the defendant was liable. Lord Esher, M. R., in his judgment posed the question to be decided thus : "Now, for what is the defendant liable ?" and answered it as follows :

> "He is liable for the negligence of Mears (that was the driver) if that negligence was "an effective cause' of the subsequent damage to the plaintiff."

Then lower down the learned Judge said :

> "If a stranger interferes (with the driving) it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes, the defendant is not liable if the negligence of a servant of his is an effective cause of the accident."

The said decisions lay down the following two propositions : (1) An owner of a car would be liable in damages for an accident caused by his servant in the course of his employment; and (2) he would

also be liable if the effective cause of the accident was that the driver in the course of his employment committed a breach of his duty in either not preventing another person from driving the car or neglecting to see that the said person drove it properly. We are not concerned in this case with accidents caused by a driver or a third party outside the scope of the employment, for in this case whether the 3rd defendant was authorised to drive the car by the 1st defendant or not the accident was caused when the car was being driven for the purpose of efficiently plying the taxi for hire for which the 2nd defendant was employed by the 1st defendant.

Before considering the evidence in this case, at the outset some controversial ground may be cleared. The High Court relied upon the admissions made by the 3rd defendant in his written statement and the reply given by him to the plaintiff as evidence against the 1st defendant. As I have indicated earlier, learned counsel for the respondent fairly conceded that those pieces of evidence could not be relied upon as admissions against the 1st defendant. Indeed, the High Court, though it accepted the said two pieces of evidence, alternatively came to the same finding after excluding them from evidence. For the purpose of this judgment I am assuming that the said pieces of evidence are not relevant against the 1st defendant. Therefore, I will exclude the same from my consideration.

Now let me take the case of the 3rd defendant and ascertain his legal relationship with the 1st defendant. The 1st defendant was examined as D.W. 1. He deposed as follows : He had agricultural lands in Kathwada which he was personally cultivating and he resided at Kathwada; a year and a half before April 11, 1949, he had given his car to the 2nd defendant for plying the same as a taxi; the 2nd defendant had to manage it and he had full control over it; the 2nd defendant paid taxes for the car, spent for petrol, kept the said car always at the railway station stand, rendered accounts for the income he got from plying the said taxi whenever the 1st defendant went to Ahmedabad from Kathwada and met him; the 2nd defendant was paid Rs. 90 p.m. He admitted in the cross-examination that the 2nd defendant was a straightforward and honest man, that he managed the taxi on his behalf, that up to May 1949 he did not go beyond his instructions, that the car was plying for hire during day and night and that there were no fixed hours of service. He further stated that he entrusted the 2nd defendant with the duty of purchasing materials from Bombay. This witness no doubt denied that he had authorised the 2nd defendant to engage the 3rd defendant or permitted the 2nd defendant to teach the 3rd defendant car-driving. He also denied that there was debit of Rs. 30 as pay of the 3rd defendant in the accounts submitted to him by the 2nd defendant. But the accounts were not produced; and, therefore, an inference should be drawn against him to the effect that if they were produced they would show that a salary of Rs. 30 was paid to the 3rd defendant and he was the servant of the 1st defendant.

The plaintiff was examined as P.W. 1. He deposed that the 3rd defendant was the cleaner of the car and that he had personally seen the 3rd defendant cleaning the car in question. The evidence of this witness so far as he said that he had seen that 3rd defendant cleaning the car could be accepted particularly when it is consistent with the probabilities of the case.

From the said facts it can reasonably be held that the 2nd defendant appointed the 3rd defendant as cleaner of the car, trained him as a driver and on the day of the accident took him to the office of the Regional Transport Authority and permitted him to drive the car to obtain a permanent licence for him.

On the said evidence and the probabilities arising therefrom the following inference can reasonably be drawn : The 1st defendant, being the absentee owner of the car used as taxi, entrusted the entire

management of running the said car as taxi to the 2nd defendant. The 2nd defendant was not a mere driver of the 1st defendant's car, but was his manager to carry on the business of running his taxi. The 2nd defendant was, therefore, given the authority to do all things necessary to keep the taxi in a good condition and to run it effectively to earn profit. It is also implicit in the said arrangement that if for plying the taxi throughout day and night and during the absence of the 2nd defendant from the city an assistant was necessary to drive the car, the 2nd defendant could employ one. The 2nd defendant employed the 3rd defendant as a cleaner with the approval of the 1st defendant to keep the car in good condition. In that context, if the 2nd defendant in the interest of the employer, instead of engaging a third party as an assistant driver trained the 3rd defendant as such and sought to obtain a license for him, it is not possible to suggest that the 2nd defendant in doing so exceeded the authority conferred on him by the 1st defendant. I, therefore, find that the 2nd defendant did not exceed the authority conferred on him by the 1st defendant in employing the 3rd defendant as a servant and permitting him to drive the car in order to obtain a licence for assisting him as a driver. If so, it follows that the 3rd defendant was the employee of the 1st defendant in his capacity as an assistant to the driver. In that even the 1st defendant would certainly be liable in damages for the accident caused by the 3rd defendant's negligence during the course of his employment.

Though I am prima facie inclined to accept the second proposition also as correct and that the 2nd defendant's negligence in permitting the third defendant to drive the car was the effective cause of the accident, in view of my first finding it is not necessary to express my final opinion thereon.

Now let me turn to the other decisions cited at the Bar. The decision of the Court of Appeal in Donovan v. Laing. Wharton, and Down Construction Syndicate, Ltd. (L.R. (1893) 1 Q.B. 629) deals with a case where, though the man in charge of a crane in the working whereof an accident was caused was the general servant of the defendants, they had parted with the power of controlling him with regard to the matter on which he was engaged. They had lent to a firm which was engaged in loading a ship at their wharf the crane with a man in charge of it. It is, therefore, a case where when the accident took place the man, who was operating the crane, was not the servant of the defendants.

In Britt v. Galmoye and Nevill ((1927-28) 44 T.L.R. 294) the first defendant, who had the 2nd defendant in his employment as a van driver, lent him his private car after the day's work was finished to take friends to a theatre and the 2nd defendant by his negligent driving injured the plaintiff. It was held that the journey was not on the master's business and the master was not in control and, therefore, he was not liable for the servant's act. The principle of this decision is that a owner of a car will not be liable for the accident caused by his employee if it was caused outside the master's employment.

The decision in Girijashankar Dayashankar Vaidya v. The B.B. and C.I. Railway ((1918) 20 Bom. L.R. 126) turned upon the construction of Section 108 of the Indian Railways Act. The servants of the railway assaulted the plaintiff for pulling the communication chain. The Court held that the railway was not liable as the servants were not authorised under the statute to arrest the plaintiff for pulling the communication chain and, therefore, they were not liable for the assaults committed by their servants.

In Nalini Ranjan Sen Gupta v. Corporation of Calcutta ((1925) I.L.R. 52 Cal. 983) when a chauffeur, who was taking his master's car to a workshop for repairs, finding the lane leading to it impassable, left the car in charge of the cleaner, whose duty was only to clean the car and who was forbidden to drive it, and went to the workshop, and during his absence the cleaner drove it against and broke a municipal lamp-post, it was held on the facts of the case that the chauffeur was not

negligent and that the cleaner caused the accident outside the scope of his employment and, therefore, the owner was not liable.

The decision in Emperor v. Shantaram Ram Wadkar ((1932) 34 Bom. L.R. 89) turned upon the meaning of the word "allowed" in Section 6 of the Motor Vehicles Act, 1914, and is not of any help in deciding the present case. The decision in The Managing Director, R.U.M.S. Ltd., Rasipuram v. Ramaswamy Goudan (L.R. 1957 Mad. 513) followed Ricketts v. Thos. Tilling, Ltd., (L.R. (1915) 1 K.B. 644) and held that where the servant who was charged with the duty of driving a bus was responsible for allowing the conductor to drive and if he was so responsible he must be equally responsible for the negligent driving by the person who was permitted to drive. The last decision accepted the second proposition and applied it to the facts of the case before the court. The said decisions do not in any way detract from the view expressed by me.

Both the Courts below concurrently found on the evidence that the 3rd defendant was guilty of negligence in causing the accident. We did not permit the learned counsel for the appellant to question the correctness of the said finding. I accept it. No argument was advanced on the question of the quantum of damages.

In the result, agreeing with the High Court, I hold that the 1st defendant is liable in damages to the plaintiff for the accident caused by the 3rd defendant. The appeal fails and is dismissed with costs.

Hidayatullah, J. The facts need not be stated elaborately for there is little dispute about them. We shall therefore content ourselves with such facts as serve to introduce the reasons for our opposite conclusions.

The respondent sued three persons for damages for personal injuries which led to the amputation of one of his legs in a motorcar accident. The vehicle belonged to the appellant (first defendant) who had entrusted it to the second respondent for being plied as a taxi. We shall refer to the appellant as the owner of the vehicle or, shortly, owner. At the time of the accident, it was driven by the third defendant to whom it had been handed over by the second defendant for the purpose of taking a driving test to obtain a driver's licence. In fact, the motor inspector taking the test was by the side of the third defendant when he was driving. The second defendant was not present in the car but was present when the third defendant took the car and had given permission. The suit was defended by the owner of the vehicle for himself. The second defendant remained absent at the trial. The third defendant filed a written statement but took no further interest. The Trial Judge decreed a part of the claim against the second and third defendants, but held that the owner of the vehicle was not liable. On appeal to the High Court of Bombay, the owner of the vehicle was also held responsible and the decree of the court below was also enhanced. The present appeal is by the owner of the vehicle on a certificate of fitness granted by the High Court.

We are not concerned with the quantum of damages and the above facts therefore suffice for the purpose of our judgment. Since the responsibility of the owner of the vehicle is vicarious, the relationship between him and the other two defendants must be properly determined and something may now be said about that relationship. Admittedly the owner of the vehicle had handed it over to the second defendant to ply it on hire as a taxi in Ahmedabad. The second defendant drove the taxi, collected the fares, met the expenses and handed over the balance with accounts to the owner. The second defendant, of course, did not do this free. Either he was a servant or an agent. The different between a servant and an agent is that the principal has the right to order what should be done, but the master has an additional right to say how it should be done. The evidence does not establish that

the owner directed how the taxi should be run and the relationship would be that of principal and agent. The owner, however, stated that he paid Rs. 90 per month to the second defendant and this would show that the second defendant was his servant. We shall consider the matter under both heads.

The relationship between the third defendant (who was at the wheel when the accident happened) and the owner on the one hand and the second defendant on the other is in dispute. There is, however, evidence which has been believed that the third defendant used to clean the taxi. He was probably employed by the owner or on his behalf by the second defendant. In addition, it appears, that he was being trained to take out a driver's licence, presumably with the idea of taking a share in the driving of the taxi. There is nothing to show that in this arrangement, the owner had taken any part whatever. The trial Judge held that the third defendant was a servant of the second defendant and relied for this purpose on a statement (Ex. P-97) made by the second defendant to the police when proceedings were taken against the driver for negligently causing hurt to the respondent. The Trial Judge further held that the third defendant was not employed by the owner and the owner was not liable. Alternatively, he held that even if the third defendant was employed by the owner, the duty of the third defendant was to clean the car and not to drive it, and the owner was again not liable because the cleaner was not acting within the scope of his employment. The High Court relying on the reply of the third defendant (Ex. P-87) in answer to a notice from the respondent and on the written statement (Ex. 16) filed by him in the suit held that the third defendant was himself probably a servant and in any event, the second defendant as manager of the taxi was clearly authorised to allow the third defendant to drive it. The High Court therefore decreed the claim against the owner also and enhanced the amount of damages awarded by the court of trial.

The first question is whether Exs. 97, 87, and 16 are admissible against the appellant or not. Admission of the documents means admission of facts contained in the documents. The facts were not deposed to by any one and the truth of these statements was not in any way tested. To admit them would be prejudicial to the appellant and strictly speaking no provision of law makes the admissions admissible against a person other than the person making them. Unless such person can be said to be bound by the admission. This condition does not obtain here. Learned counsel for the respondent, although he attempted to do so at first, did not also rely upon them. We are of the opinion that these documents were inadmissible against the owner. With this evidence excluded there is nothing to show that the owner had employed the defendant to drive the taxi or given him permission to drive the taxi or asked him to take a test to obtain a driver's licence. There is also nothing to show that he had given any authority to the second defendant to employ strangers to drive the taxi or to take driving tests. The upshot thus is that second defendant was a of the owner and the third defendant was a servant of the second defendant or at best a cleaner of the taxi. There is evidence, however, to show that the second defendant was present when the vehicle was borrowed for taking the test and had willingly allowed the third defendant to drive the vehicle for the purpose. On these facts, the question is whether the owner of the vehicle can be held responsible.

The law is settled that master is vicariously liable for the acts of his servants acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In other words, for the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if he commits an accident. But it is equally well-settled that if the servant, at the time of the accident, is not acting within the course of his employment but is doing something for himself the master is not liable. There is a presumption that a vehicle is driven on the master's business and by his authorised

agent or servant but the presumption can be met. It was negatived in this case, because the vehicle was proved to be driven by an unauthorised person and on his own business. The de facto driver was not the driver or the agent of the owner but one who had obtained the car for his own business not even from the master but from a servant of the master. Prima facie, the owner would not be liable in such circumstances.

Ricketts' (L.R. (1915) 1 K.B. 644, 646, 650) case which was relied upon by the respondent is a case in which the driver of an omnibus asked the conductor to drive the omnibus and turn it round to make it face in the right direction for the next journey. The master was held liable vicariously, because the driver was negligent in the performance of the master's work. The driver was in fact seated by the side of the conductor at the time when the omnibus was turned round. In other words, the turning round of the vehicle was an act within the employer's business and not something outside it. When the driver asked the conductor to drive the omnibus for his master's business, he did the master's work in a negligent way. The master was therefore rightly held responsible. In Ricketts' (L.R. (1915) 1 K.B. 644, 646, 650), case all the three Judges expressed the opinion that there should be a new trial. As it was a jury trial and the driver was sitting by the side of the conductor and had control, the question was whether it should not have been found what was the "effective cause" of the accident, that is to say, that act of an utter stranger or that of a servant acting negligently in the course of his employment. It is significant that in Trust Co. Ltd., v. de Silva ((1956) 1 W.L.R. 376), Ricketts' case was cited but was not referred to by Lord Tucker pronouncing the judgment on behalf of the Judicial Committee. The reason was that the case before the Privy Council fell within the rule which was stated by Lord Tucker to be :

> "It is now well settled that the person in control of a carriage or motor vehicle..... though not actually driving..... is liable for the negligence of the driver over whom he has the right to exercise control."

The above principle is applicable when the person owning the vehicle is present. In Ricketts' (L.R. (1915) 1 K.B. 644, 646, 650) case the driver was present and he asked the conductor to do the work which he was employed to do and this negligence made the omnibus company liable. In Beard v. London General Omnibus Co. ((1900) 2 Q.B. 530) the conductor attempted to turn the omnibus on his own initiative and caused an accident. The company was held not liable, because it was not a part of the conductor's duty to drive the omnibus. It was not negligence in the course of his employment.

Similarly, in Engelhart's ((1927-28} 44 T.L.R. 294) case, two servants were engaged upon their master's business. One was to drive a cart and mind the horses and the other - a boy travelling in the cart was to deliver parcels. The driver left the cart unattended and the boy drove it to deliver the parcels and caused the accident. The master was held responsible. The driver ought to have known that if he left the cart the boy would drive it in the fulfilment of the work of the master. When the driver left the cart in the charge of the boy he acted negligently in the course of his master's business. No doubt, 'the effective cause' was the negligence of the servant which made the master responsible but that is not the whole of the matter.

In Ricketts' (L.R. (1915) 1 K.B. 644) and Engelhart's ((1897) 1 Q.B. 240) cases each servant was acting on the master's business at the time. If the two servants in the Engelhart's case ((1897) 1 Q.B. 240) had gone for a picnic or the boy had borrowed the cart to give a joy ride to his friends, the master would not have been liable although the effective cause would still have been the elder servant's negligence. The difference lies in this that in the two cases the negligent act took place in

the execution of the master's business and in the examples suggested by us, no question of master's business or the scope of the servant's or agent's employment arises, because the acts are clearly outside that scope. Going for a picnic or lending the cart so that the co-servant's friends may go for an outing is not in the course of the master's employment. Beard's case ((1900) 2 Q.B. 530) when compared with Ricketts' case (L.R. (1915) 1 K.B. 644) brings out the difference. In Britt v. Golmoye and Nevill ((1927-28) 44 T.L.R. 294) the master himself lent the car to the servant for the latter's private work and the master was not held responsible for the negligence of the servant in causing injury because neither was the journey on the master's account nor was the master in control at the time. Sir John Salmond (13th Edn. P. 124) has summed up the law thus :

> ".... a master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at a time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not be merely coincident in time with it."

The scope of employment of a servant need not of course be viewed narrowly, but the essential element that the wrong must be committed by the servant during the course of the employment, i.e. in doing the master's business ought always to be present. In Century Insurance Co. v. Northern Ireland Road Transport Board ((1942) A.C. 509), the driver of a petrol lorry while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette and throw it on the floor, and thereby caused a fire and explosion which did great damage. The masters were held liable because the negligence was in the discharge of the duty by the servant. Although the act of lighting the cigarette was something the driver did for himself and was by itself quite harmless, it could not be regarded in the abstract and was a negligent method of conducting the master's work. Similarly, in Smith v. Martin ((1911) 2 K.B. 775, 784) a school authority was held liable when a teacher, during school hours sent a girl aged 14 wearing a print pinafore to poke the fire and to draw out the damper in a grate in the teacher's common room and the child was burnt. It was held that the teacher's duty was to provide education in the widest sense and included expecting obedience from the pupils and this was an act of negligence in the discharge of such duty.

We know of no further extension of the doctrine of a master's liability for the act of his servants during the course of his employment which would cover this case. It cannot possibly be stated today that the master is responsible for the acts of his servant done, not in the course of employment, but outside it. In the present case, the third defendant was not doing the master's work nor was the second defendant acting within the scope of his employment when he lent the taxi. The third defendant had borrowed the taxi for a work of his own and the second defendant in lending it was not acting in the master's business. The second defendant was not present in the taxi so that he could be said to be in control on behalf of his employer when the taxi was driven.

The law with regard to agents is the same. As was observed by Lord Atkinson in Samson v. Aitchison ((1912) A.C. 884) it is a matter of indifference whether a person be styled a servant or agent since it is the retention of control which makes the owner or the principal responsible. Just as the tort must be committed by a servant either under the actual control of his master or while acting in the course of his employment, the act of the agent will only make the principle liable if it is done within the scope of his authority. By a process of ratiocination, the course have made a slight distinction by attempting to find a 'right of control' as the basis of the master's liabilities and have distinguished it from a 'right to control' in cases of simple agency to bring the two cases together. We find it simpler to state the law that an agent will make the principal responsible so long as the agent does the act within the scope of his authority or does so under the actual control of the

principal. We do not subscribe to the extension of the doctrine that the act of the servant or the agent must be for the master's benefit. This extension was made by Willes J. in Barwick v. English Joint Stock Bank ((1867) L.R. 2 Ex. 259). The word 'benefit' is vague and it is better to adhere to the words 'course of employment' or the 'scope of authority.' There is much institutional criticism of such extension. Similarly, we are doubtful whether the extension of the principle by the introduction of the doctrine of implied authority, which was relied upon in the school master's case referred to above, was quite correct. If the dictum is accepted, not only the master would be liable for what he may be supposed to have 'impliedly authorised' the servant to do (however illegal but also for all the servant's negligence not in doing his duty but in doing something on his own account when he should be properly acting for the master. The true rule in such cases is the one stated by Cockburn C. J. in Storey v. Ashton ((1868-69) 4 Q.B.D. 476) thus :

> "..... that the master is only responsible so long as the servant can be said to the doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant."

or as Lush J. put it,

> "The question in all such cases as the present is whether the servant was doing that which the master employed him to do."

There has been in recent years another extension of the responsibility of the principal for the act of an agent. In Ormrod and another v. Crosville Motor Services Ltd., and another ((1953) 2 All. E.R. 753) the owner was attending the Monte Carlo motor car rally. He asked a friend to drive the car from Birkenhead to Monte Carlo. The friend was carrying a suit case belonging to the owner. Later they were to go a holiday together in the car. While the motor car was being driven it collided with a motor omnibus and the owner of the car was held responsible for the damage. Singleton, L. J. observed :

> "It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency, but the owner to the use of a chattel is not proof of agency, but the purpose for which this car was being taken down the road on the morning of the accident was either that it should be used by the owner, the third party, or that it should be use for the joint purposes of the male plaintiff and the third party when it reached Monte Carlo."

Lord Denning (then Lord Justice) observed :

> "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. This is not correct. The owner is also liable if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes.
>
> ..... The law puts an especial responsibility on the owner of a 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. It is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only 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."

Even these dicta which make the owner or principal responsible when the vehicle is driven partly on their account and partly on the business of the driver, do not take the matter much further. The learned Judges found the agency from the desire of the owner that the friend should carry his suit case and keep the car ready at Monte Carlo for a holiday.

Applying the above tests to the facts of this case, we find that there is no proof that the second defendant was authorised to coach the cleaner so that the cleaner might become a driver and drive the taxi. It appears more probable that the second defendant wanted someone to assist him in driving the taxi for part of the time and was training the third defendant to share the task of driving. The owner stated on oath that he had not given any such authority to the second defendant. The trial Judges accepted that evidence. The High Court differed from the trial Judge by relying upon inadmissible evidence. Once the inadmissible evidence is rightly excluded, it is quite clear that this was an act done not on the owner's business but either on the business of the third defendant or that of the third and the second defendants together. It has not been proved to have been even impliedly authorised by the owner or to come within any of the extensions of the doctrine of scope of employment which we have noticed above. The High Court would probably not have passed a decree against the owner if it had not been persuaded to hold the three pieces of evidence to be admissible and relevant. In the absence of that evidence the acts of the second and the third defendants viewed separately or collectively were not within the scope of their respective or even joint employment and the owner was therefore not responsible. We would accordingly allow the appeal, in so far as the appellant is concerned but in the circumstances of the case would direct that there should be no order as to costs throughout.

ORDER

In accordance with the opinion of the majority the appeal is allowed in respect of the appellant. In the circumstances of the case there would be no order as to costs throughout.

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