TABUSASI HOLDINGS LIMITED V. ISABEL DEVELOPMENT COMPANY LIMITED

High Court of Solomon Islands
(Palmer ACJ)
Civil Case Number 194 of 2000

Hearing: 5th July 2001
Judgment: 11th January 2002

A. Radclyffe for the Plaintiff
Crystal Lawyers for the Defendant

Palmer ACJ: On 13th January 2000 a Nissan Navara vehicle registration number A8076 owned by the Plaintiff and insured by Tower Insurance Limited was involved in a road accident on the main highway near Kukum, Honiara at the Bahai road junction. The accident was caused by the negligent driving of the Defendant's employee, Richard Hou ("Hou") who was driving a vehicle owned by the Defendant at the time of the accident. Hou was an employee of the Defendant on the date of the road accident. He was terminated from employment shortly after the accident. Extensive damage was caused to the Plaintiff's vehicle, valued at $21, 463-22. Tower Insurance Ltd have paid for the cost of those repairs. The Plaintiff now comes to Court to claim damages against the Defendant for the negligent actions of its employee.

The issue for determination by this court is whether the Defendant is vicariously liable for the negligent actions of its employee.

The Plaintiff did not call any witnesses. The Defendant on the other hand called only one witness, its General Manager Joel Neusia ("Neusia"). Neusia stated that on the evening of 12th January 2000, Hou with others worked late loading one of the Plaintiff's ships. He stated that Hou and the Shed Supervisor Leonard Luiga ("Luiga") had been drinking that evening. Hou was not one of their company drivers although it appears he has a driving licence. He works as a Tally Clerk for the company, which entails the recording and tallying of all cargo at the Defendant's Shed. His job includes acting as an in-house driver when loading and stacking cargo in the Shed. Neusia states that Hou was not authorized to drive company vehicles. The company had its own drivers.

Under cross-examination it was adduced that Luiga could authorize other persons to drive company vehicles for company purposes when required. It appears Luiga had given the vehicle keys to Hou on the evening of 12th January 2000, after much persuasion. Neither Luiga nor Hou had been called to confirm how, why and for what reason or purpose the keys had been given to Hou. This court cannot speculate as to the reasons given. Neusia told this court during cross-examination that he believed the key was given only after Luiga had been convinced by Hou.

The accident occurred in the morning of 13th January 2000, which was a public holiday. Neusia maintained Hou was not authorized to drive company vehicle and that at the time he took the vehicle and the time of the accident Hou was not performing company business or authorized to drive the vehicle. It was not disputed as well that Hou as drunk at the time he was driving the vehicle.

The Plaintiff relies on the test used in the United Kingdom to determine vicarious liability. Salmond and Heuston have described that test in *The Law of Torts, 21st edn, (1996)* p 443 as:

> *"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (i) a wrongful act authorized by his master, or (ii) a wrongful and unauthorized mode of doing some act authorized by the master ...On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."*

See also Winfield and Jolowicz on Tort 9th Edition at page 534, where the learned authors say:

> *"A wrong falls within the scope of employment if it is expressly or impliedly authorized by the master or is an unauthorized manner of doing something which is authorized, or is necessarily incidental to something which the servant is employed to do."*

The crucial test is that the actions of the employee are those which had been authorized or within the scope of the authorized act. Any act on the other hand, separate and independent from the authorized act cannot be construed as coming within the scope of his employment.

The crucial issue for determination before this court is whether the driving of the Defendant's vehicle in the morning of 13th January 2000, within the range of activities authorized by the Defendant. Respectfully, this question must be answered in the negative. The evidence adduced is very clear. Hou was not authorized to drive the vehicle by the company for any particular purpose related to his job. I accept the proposition that as an employee of the Defendant, this raises a prima facie case that there may be vicarious liability. It is for the Defendant however, in those circumstances, to prove on the balance of probability that Hou was not driving in the course of his employment on said date (see *Harvest Pacific Limited v. The Attorney-General (Representing the Ministry of Works and Public Utilities) and Elaine Eddie [1990] SILR 207*). In my respectful view, Defendant had discharged the onus placed on it. Mere permission given by Luiga (to use the vehicle) does not of itself bring Hou's driving within an authorized act of the Defendant and consequently within the scope of his employment. He may have asked to use the vehicle to carry out a private purpose, such as carrying timber from a Ranadi timber yard to his house. If he gets involved in an accident, that does not imply he was acting within the scope of his employment merely because he had authority to drive the vehicle. There is clear authority in our jurisdiction on this; see *Harvest Pacific Limited v. The Attorney-General* (supra). In that case permission had been given to the employee Elaine Eddie to use the Government vehicle over the lunch break for personal purposes. She was involved in an accident when using the vehicle. His Lordship Ward CJ held that the Government was not liable.

Another case, which also dealt with the same issue but from Fiji, was the case of *Fiji Gas Company Ltd v. The Secretary for Labour (1975) 21 FLR 133* (this case was quoted extensively by Stephen Offei in *Law of Torts in the South Pacific, IJAL, University of the South Pacific 1997*). In that case a contrary conclusion was reached, but the facts were quite clear. The employee was employed as a local branch manager at his employer's branch office in Lautoka. He had gone to work on a Sunday using his employer's van and was returning home when he was involved in an accident. The Court held the employee was involved in the course of his employment as he was required to travel home in the van, which was used primarily for purposes of his employment. It was needed to attend to any urgent calls whether from his office or home. The court held that *"... it was in the employer's interest that the employee should travel home in the van. I feel he was at the time of the accident, doing that which was, to use Lord Dunedin's words supra, 'something which is part of the service to his employer'."*

The case authority *Kooragang Investments Pty Ltd v. Richardson and Wrench Ltd (1981) 3 All E.R. 65* at page 70 relied on by Mrs Samuels in her written submissions is consistent with the above conclusion. I quote per Lord Wilberforce:

> *"These cases have given rise to a number of fine distinctions, the courts in some cases struggling to find liability, in others to avoid it.... It remains true to say that, whatever exceptions or qualifications may be introduced, the underlying principle remains that a servant, even while performing acts of a class which he was authorized, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts."*

I am satisfied Hou was not authorized to drive the vehicle on 13th January 2000 and especially when it appears he was drunk. He had clearly departed from the scope of his employment and the driving was far removed, disconnected from the scope of acts authorized by his employer that the Defendant cannot be held liable for his wrongful acts. The driving of the Defendant's vehicle on 13th January 2000 was clearly an independent act. The claim of the Plaintiff thus must be dismissed.

ORDERS OF THE COURT:

Dismiss claim of the Plaintiff with costs.

THE COURT