*IN THE SUPREME COURT OF APPEAL*
*OF SOUTH AFRICA*

*Case No 122/99*
*REPORTABLE*

***MESSINA ASSOCIATED CARRIERS*** *Appellant*

*and*

***FREDERIK THEODORUS KLEINHAUS*** *Respondent*

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| *CORAM* | *:* | *SCOTT JA, et MELUNSKY, BRAND AJJA* |
| *HEARD* | *:* | *6 MARCH 2001* |
| *DELIVERED* | *:* | *27 MARCH 2001* |

*Vicarious liability of owner of motor car - not a passenger at time of accident*

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**J U D G M E N T**

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***SCOTT JA:***

**[1]** In the early afternoon of 10 April 1997 the respondent's vehicle, while being driven by the respondent's 19 year-old son near Messina in the Northern Province, was damaged beyond repair when it skidded, left the road and ultimately burst into flames. No other vehicle was involved in the accident. What caused it to skid was a relatively large deposit of coal-dust which had spilled onto the road the previous day and which had formed a layer on the left side of the road for vehicles travelling in the direction of Tshipise just beyond the crest of a blind rise and on a bend. The appellant is a cartage contractor which at the time was engaged in transporting coal-dust from a mine in the Tshipise area to Messina. The respondent instituted action against the appellant in the Transvaal Provincial Division for damages arising from the loss of his vehicle. He alleged that the appellant's employees had negligently allowed the coal-dust to spill onto the road from one of its trucks and thereafter, despite being warned of the danger, had negligently failed

to remove the coal-dust from the road.

**[2]** The appellant denied that the coal-dust had emanated from one of its trucks or that its employees had been negligent in any of the respects alleged. In the course of the trial, however, it amended its plea alleging in the alternative that the sole cause of the accident was the negligent driving of the respondent's son for whose negligence the respondent was vicariously liable. In the further alternative it alleged that the accident was caused by both the negligence of its servants and the respondent's son and that by reason of the respondent's vicarious liability for his son's negligence any damages to which he would otherwise become entitled fell to be reduced in accordance with the provisions of s 1 of the Apportionment of Damages Act 34 of 1956.

**[3]** It was common cause that respondent's son, to whom I shall refer as Gerrit, lived with his parents at Tshipise where the respondent was the proprietor of a garage and service station. On the date of the accident he had been given

permission by his mother on the respondent's behalf to drive to Messina in the respondent's motor car in order to hire video tapes. While there, he was also to do the banking for the garage business and to purchase some groceries for his mother. The accident occurred at about 2.45 pm on the return journey some 10 km from Messina. The only passenger in the vehicle at the time was Gerrit's 16 year-old friend, Shawn Cawood, who had accompanied him from Tshipise. The speed limit where the accident occurred is 120 km per hour. Gerrit frankly admitted in evidence that at the time he was travelling at a speed of between 130 and 140 km per hour.

**[4]** McCreath J in the Court *a quo* found that the coal-dust had fallen from one of the appellant's trucks and that the respondent's servants had been negligent in allowing it to happen and in failing to remove the coal-dust after being warned of its presence on the road and that it constituted a danger. The learned judge found, in addition, that there was a causal connection between the presence of the coal-dust on the road and the respondent's vehicle suddenly skidding and going out of

control. These findings were not disputed on appeal.

**[5]** No finding was made regarding Gerrit's alleged contributory negligence in view of the Court's decision on the question of whether the respondent could be held vicariously liable for Gerrit's negligence. McCreath J held that by reason of the respondent's non-presence in the vehicle the respondent could not be held so liable. In arriving at this conclusion the learned judge considered himself bound by *Braamfontein Food Centre v Blake* 1982 (3) SA 248 (T), a Full Court decision of two judges, and gave judgment in favour of the respondent for the sum of R265 350,00, being the full amount of the latter's claim. However, the judge expressed doubt as to the correctness of the decision in the *Braamfontein Food Centre* case and granted leave to appeal solely on the issues of vicarious liability and Gerrit's contributory negligence.

**[6]** The photographs handed in at the trial show the general topography of the area where the accident occurred. The road itself, which is clearly not a

major highway, is neither straight nor level. It winds its way round a series of hills and there are both rises and bends immediately before and after the point where the vehicle left the road. Furthermore, it has no hard shoulders or emergency lanes as they are sometimes called, and is boarded by what appears to be loose gravel. Gerrit himself described the point at which he lost control of the vehicle as just beyond the crest of a blind rise and on a bend. In my judgment one need do no more than look at the photographs to appreciate that a speed of between 130 and 140 km per hour was wholly inappropriate in the circumstances and not the speed at which a reasonable driver would drive on that road. The respondent sought to make something of the road-holding capability of his motor car and the ease with which it could negotiate the bends in the road at quite breath-taking speeds - he boasted that he had travelled on that same stretch of road at speeds of up to 200 km per hour. But that is not the point. The road is not a race track; it is used by all manner of vehicles travelling at different speeds. Untoward events occur and occur

frequently. A reasonable driver is mindful of this and regulates his speed accordingly. (Cf *Woods v Administrator Transvaal and Another* 1960 (1) SA 311 (T) at 314 C - 315 C.) What is a safe speed will depend upon the circumstances of each particular case but, as I have said, to drive on that stretch of road at a speed of up to 140 km per hour is to my mind quite clearly negligent.

**[7]** The coal-dust was spilt on the road at about 4 pm on 9 April 1997. The accident in question occurred some 23 hours later at about 2.45 pm the next day. The evidence revealed that during this period a number of vehicles travelling within the speed limit actually skidded as a result of the coal-dust. None, however, had left the road and there had been no accidents. By contrast, the respondent's vehicle, after skidding on the coal-dust, proceeded out of control down the hill and fortunately over a culvert, thereby avoiding what looks like a sloot, before leaving the road on the right hand side and proceeding uphill for an estimated distance of some 50 to 60 metres on rough terrain adjacent to the road. It finally stopped when

it hit some object, rolled and landed back on its wheels, whereupon it caught fire. Gerrit recalled that it all happened very quickly.

**[8]** In the circumstances described above, the probabilities are overwhelming, in my view, that Gerrit's excessive speed contributed causally to the accident and the extent of the damage sustained. Nonetheless the appellant must, I think, bear the major portion of the blame. It had been told the previous day of the spill and that it constituted a danger to vehicles using the road, but had done nothing about it until after the accident. I would apportion their respective fault at 25 : 75 in favour of Gerrit.

**[9]** The question that arises is whether the respondent is to be held vicariously liable for Gerrit's negligence.

**[10]** It is trite law that an employer is liable for the delicts of an employee committed in the course and scope of the latter's employment. The rule is based on 'considerations of social policy" (per Corbett CJ in *Mhlongo and Another NO*

*v Minister of Police* 1978 (2) SA 551 (A) at 567 H). Its origin lies no doubt in the need to provide the victim of a delict with a defendant of substance able to pay damages. But even in the absence of an actual employer-employee relationship the law will permit the recovery of damages from one person for a delict committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment, or as Watermeyer J put it in *Van Blommenstein v Reynolds* 1934 CPD 265 at 269, where "in the eye of the law" the one was in the position of the other's servant. In such a situation one is really dealing with an analogous extension based on policy considerations of the employer's liability for the wrongful conduct of an employee. (See *Boucher v Du Toit* 1978 (3) SA 965 (O) at 972 D - E). Over the years the elements of the legal relationship between employer and employee and the interest of the one in the conduct of the other have been isolated in order to determine

whether in the absence of such a relationship one person should, nonetheless, be held liable for a delict of another. This is particularly so in the context of a motor vehicle being driven negligently by someone other than the driver. Thus in *South African General Investment & Trust Co Ltd v Mavaneni* 1963 (4) SA 89 (D) at 91 E - G Fannin J formulated the inquiry as follows:

> "In South Africa the owner of a motor car is liable for the negligent driving of it by another person authorised by him to drive it if:
> (a) the vehicle is being driven on behalf of the owner, and
> (b) the relationship between the owner and the driver is such that the former retains the right to control the manner in which the car shall be driven."

The above passage has been repeatedly quoted with approval in subsequent cases. Nonetheless, the decisions in the various Provincial Divisions both prior and subsequent to *Mavaneni's* case are in many instances not reconcilable. The reason is largely attributable to a greater emphasis being placed on one or other of the elements referred to by Fannin J.

**[11]** In two reported judgments the requirement that there be the *right to* control was increased to a requirement that there be the *power to* control. The first was *Kinnear v Ruto Flour Mills (Pty) Ltd* 1968 (2) PH 051 (T). In that case the driver of a motor car was taking it to a garage to have it serviced and filled with petrol when the accident occurred. Whether he was doing so at the request of the owner, who was not present in the motor car, or whether he was doing so as a favour for the owner, was left unresolved. Of significance is that one of the grounds upon which Nicholas J held the owner not to be vicariously liable was that he was not present in the vehicle and therefore he -

> "was not in possession, and was not in a position to *exercise direct control* over the driving of the motor car". (My emphasis.)

The second was *Braamfontein Food Centre v Blake, supra,* which is the decision referred to by McCreath J in the Court below and by which the judge considered himself bound. In this case the driver of a truck involved in an accident was due

to become an employee of the truck's owner once the period of notice given to his existing employer had expired. As a favour he had offered to drive the truck to the owner's home. Since he did not know where the owner lived the latter drove ahead in another vehicle to show the way. The collision occurred during the journey. The issue was whether the owner was vicariously liable for the driver's negligence. Goldstone J, with whom Nicolas J concurred, referred to *Boucher*'s case, *supra*, and relying on certain *dicta* of Van Heerden J held that for the owner to be vicariously liable he had to have the "power to control" the driver and not merely the "right to control" him. Accordingly, although on the facts of the case the owner retained the power to determine the route to be followed, the time of departure and the approximate speed, this was held "not sufficient to have constituted the retention of control" by the owner necessary to render him liable (at 251 E). The learned judge doubted "whether this kind of liability can arise where the owner or other person sought to be held liable ... is not actually present in the

vehicle" (at 251F). On the basis of the Court's reasoning it is difficult to see how it could. Both decisions have been the subject of trenchant criticism. (See Cooper *Delictual Liability in Motor Law* 446.) Their correctness was similarly challenged by counsel for the appellant in this Court.

**[12]** It is important to bear in mind that the question in issue is the existence of vicarious liability, not personal (direct) liability. The former, of course, is not dependent on fault on the part of the person sought to be held liable. An employer who happens to be present in a vehicle may well incur personal liability if he exercises the right to control the manner in which his employee drives in such a way as to cause harm to another or if he fails to exercise it in order to prevent harm to another, for eg if he were to instruct the driver to drive at a dangerous speed or if he were to sit back and allow the driver to continue to drive in a dangerous manner. The same would be true of an owner-passenger in circumstances where the driver was not his employee. But direct control or the power to control has never been a

requirement of vicarious liability. (The references in the context of horse drawn carriages to “actual control” or the “party in possession” in early 19 century cases in England relate to the personal and not vicarious liability of the owner or employer. See Atiyah *Vicarious Liability in the Law of Torts* 125 - 126). The right to control, being an element of the employer - employee relationship, is regarded as an important factor in determining whether such a relationship exists, but once it is found to exist it is of no consequence that at the time the employee commits the delict the employer is not present to exercise his right of control. In these circumstances there would seem in principle to be no reaon why, in the case of an owner who is not the employer of the driver, the physical presence of the former and the power to control (as opposed to the right to control) should be introduced as a requirement for vicarious liability.

**[13]** It is true that in many, if not all, reported cases in which an owner (in the absence of an employer - employee relationship) has been held vicariously

liable, he has been a passenger in the vehicle when it was negligently driven. But that is no reason for requiring his presence in the vehicle as a rule of law. Such a requirement is not only difficult to justify on a rational basis but strikes me as likely to produce anomalous results. An owner who allows or instructs another to drive his motor vehicle undoubtedly has a right to give directions as to the manner in which it is to be driven. (Cf *Auto Protection Insurance Co Ltd v MacDonald (Pty) Ltd* 1962 (1) SA 793 (A) at 797 H - 780 D). Whether this right of control can always be equated with the right of control which an employer has, need not be decided. But once it is accepted that he has such a right there is no reason why his added presence in the vehicle should be treated as a *sine qua non* for vicarious liability. Owners have in the past been held vicariously liable when, although present in the vehicle, they were clearly incapable of exercising a "power of control", *viz* when they were drunk. (See for eg *Manickum v Lupke* 1963 (2) SA 344 (N), *Du Plessis v Faul en 'n Ander* 1985 (2) SA 85 (NK).) If these cases are

to be regarded as correctly decided and the mere presence of the owner is sufficient to satisfy the requirement, then it would serve no purpose. If, on the other hand, they are to be regarded as wrongly decided, the question that arises is in what circumstances would the requirement be met. In other words, where in the vehicle would the owner have to sit and what would he have to be doing in order to incur vicarious liability? (See Cooper *loc cit*.) Would it be sufficient if he were asleep or reading a newspaper on the back seat? Once again, if it were, the requirement would serve no purpose. If it were not, it would be anomalous to hold vicariously liable the alert owner sitting in the front passenger seat who is unable to prevent an accident caused by a moment's inadvertence on the part of a competent driver. No doubt the presence or absence of the owner in the vehicle, depending on the circumstances, may be an important consideration when deciding the issue of vicarious liability, but it is quite another thing to regard his presence (and a concomitant power of control) as an essential requirement. To do so would,

admittedly, render the inquiry simpler and the answer more predictable, but that in itself is no reason for adopting a hard and fast rule which is likely to produce anomalous results (cf *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 (3) SA 17 (A) at 23 H - J). It is interesting to note that although English law proceeds on a somewhat different basis, there is no requirement that the owner must be present in the vehicle in order to incur vicarious liability. (*Ormrod and Another v Crossville Motor Services and Another* [1953] 2 All ER 753 (CA).) In the United States of America vicarious liability has been imposed on owners who were not passengers both by way of statute and the development of judicial theories such as the "joint enterprise" and "family purpose" doctrines. (See Prosser Wade Schwartz *Cases and Materials on Torts* 7 ed at 696 *et seq*.)

**[14]** The other requirement referred to by Fannin J in the *Mavaneni* case, *supra*, is that the vehicle must be driven on behalf of the owner. Without this, the position of the driver could not approximate that of an employee, nor would he be

about the business of the owner. It is now well established that it is sufficient if the journey is partly for the purposes of the driver and partly for those of the owner. However, the interest of the owner must not be merely peripheral. (*Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) at 209 G - H). It would not be sufficient if the owner came along for the ride and to keep the driver company (see for eg *Cassiem and Another v Rohleder and Others* 1962 (4) SA 739 (C)).

**[15]** As important as the requirements identified in the *Mavaneni* case may be, they are, I think, in reality no more than *indicia* and should be recognised as such. Ultimately the true inquiry is whether the relationship between the owner and the driver and the interest of the former in the driving of the latter is sufficiently analogous to the case of an employee driving in the course and scope of his employment to justify the negligence of the driver being attributed to the owner. The answer will depend on not only a careful analysis of the facts of each case but also on considerations of policy. As I have indicated, depending upon the

circumstances the presence or otherwise of the owner in the vehicle may prove to be a determinative factor, but not necessarily so.

**[16]** Against this background it becomes necessary to revert to the facts. It appears that Gerrit completed his schooling at the end of 1996 but failed the examination in one of his subjects which he proposed rewriting. At the time of the accident he was assisting his father, the respondent, in the garage business by doing what the latter described as "odd jobs", but he was not being paid. (By the time the trial was held in February 1998 circumstances had changed and Gerrit was officially an employee of the business.) The odd jobs consisted in the main of driving the vehicle involved in the accident on various errands. An unqualified mechanic employed by the respondent had no driver's license. Typically, if he was required to perform work at some place other than at the garage, Gerrit would drive him there and back. He would also drive on his own to collect or deliver things when required. The banking for the business was normally done on a Monday. For this

purpose it was necessary to travel by motor car to Messina and back. The banking was frequently, but not always, done by Gerrit. In cross-examination the respondent readily conceded that he regarded himself as having the right to dictate the manner in which Gerrit was to drive the vehicle. Gerrit, in turn, acknowledged that if his father instructed him when, where and how to drive he would obey those instructions.

**[17]** It is quite clear that on the day in question the journey undertaken by Gerrit was at least partly for the purposes of the respondent, *viz* to do the banking. It is also clear that this was not an isolated incident; Gerrit regularly drove the respondent's vehicle on the latter's behalf and about his business. The evidence establishes, too, that by reason of the respondent's interest in the motor vehicle and the relationship between father and son, the former retained the right to control the manner in which the vehicle was to be driven by the latter. Viewed cumulatively, all these factors establish that the circumstances of Gerrit's driving at the time of the

accident were such as to render his position closely analogous to that of an employee driving in the course and scope of his employment, and, in my judgment, sufficiently so to justify his negligence being attributed to the respondent.

**[18]** It follows that in my view the respondent's damages in the agreed sum of R265 350 had to be reduced by 25 per cent in accordance with the provisions of s 1 of the Apportionment of Damages Act 34 of 1956. The Court *a quo* accordingly ought to have granted judgment in favour of the respondent for the lesser sum of R199 012,50, together with costs of suit.

**[19]** In this Court the appellant sought no more than to establish that the amount awarded to the respondent had to be reduced by reason of Gerrit's contributory negligence. In this it was successful and it is accordingly entitled to its costs of appeal.

**[20]** The following order is made:

(a) The appeal succeeds with costs.

(b) The order of the Court *a quo* is set aside and the following is substituted:

"Judgment is granted in favour of the plaintiff for R199 012,50 together with costs of suit."

**D G SCOTT**
**JUDGE OF APPEAL**

**CONCUR:**

***MELUNSKY AJA***
***BRAND AJA***