

WHY THE SUPREME COURT OF GHANA ERRED ON THE PROPER APPLICATION OF THE DOCTRINE OF VICARIOUS LIABILITY IN ITS RECENT DECISION IN KWADWO APPIAH V. KWABENA ANANE

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ABSTRACT

The Common law has evolved in leaps and bounds since the Normans Conquest of 1066. Certain areas of private law including the tort of negligence have developed into settled doctrines well known and generally followed in many common law jurisdictions. Vicarious liability is one of such well-developed doctrines with clear prerequisites for its deployment. The Supreme Court of Ghana is also required to follow the doctrine of vicarious liability unless there is a clear reason for a departure. The apex Court is mandated to justify any departure from its previous decisions with sound judicial analysis of the precedents vis-à-vis the case under consideration. In the case under review, the Supreme Court obviously ignored the established rules for the application of the doctrine of vicarious liability. The Court equally failed to justify the need for such a monumental departure from the tenets of the doctrine. The Supreme Court of Ghana invoked the doctrine of vicarious liability when the most basic of requirements for its applicability- such as the existence of an employment relationship or its analogous relationship between the tortfeasor and the Defendant-had not been established on the facts before the Court. The burden of this paper is to demonstrate that the Court erred when it failed to follow well-established principles for holding the defendant vicariously liable for a tort or breach of statutory duty by the tortfeasor. The paper expresses grave concern that unless the Supreme Court's decision is departed from by the Court there is going to be a monumental confusion in Ghana's Legal System as all other courts are bound to follow decisions of the Supreme Court.

Keywords: Negligence, Vicarious Liability, Judicial precedent, Ghana

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Introduction

The recent decision of Ghana's Supreme Court in the case of Kwadwo Appiah v. Kwabena Anane² undoubtedly has augmented the existing number of decided cases in Ghana on the law of tort and for that matter, vicarious liability. The decision has made enviable inroads and improved the scope of damages originally awarded by the courts as compensation for injuries arising from tortious conduct of tortfeasors. Nevertheless, the court in its seeming enthusiasm to put the injurious party in the position he was before the injury in line with the ideologies of corrective justice waded into the doctrine of vicarious liability and in the end exposed its misapplication of the doctrine. The principle of vicarious liability is considered by some writers³ as an anomaly and as such its application must only be allowed when the necessary conditions for it are present. Though the Supreme Court had previously applied the principle in similar cases, its conspicuous failure to refer to any of the previously decided cases and thereafter distinguish the present case from same appears strange. Of course, the Supreme Court is the apex court in Ghana and is not bound by its previous decisions, but it generally follows such decisions.⁴ The decisions of the Supreme Court are not only taken seriously but are religiously followed by all the other courts in the country. The decisions of the Supreme Court are binding on all the other courts and can only be varied or reviewed by the Supreme Court itself.⁵ The most senior of Judges sit at the Supreme Court. It is believed that due to the long-standing experience of these judges and their knowledge of the law, cases brought before the Supreme Court will be determined appropriately and rightly. However, the Supreme Court have on some occasions erred in its decisions and cannot therefore be placed above reproach.

The judicial powers of the Supreme Court are exercised in any of its recognized jurisdictions⁶. It has an original jurisdiction in matters relating to the interpretation and enforcement of the 1992 Constitution, an appellate jurisdiction, a supervisory jurisdiction, reference jurisdiction and review jurisdiction. In the case of Kwadwo Appiah v. Kwabena Anane, the Supreme Court was called upon to exercise its appellate jurisdiction after the Appellant was dissatisfied with the decision of the Court of Appeal

² Kwadwo Appiah v. Kwabena Anane [2020] Dennis Law Online Report (www.dennislawgh.com); [2020] 160 GMJ 1 (SC).

³ P Gilliker, 'Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective' (2011) Journal of European Tort Law, Vol. 2, Issue 1; S. Offei, *Law of Torts in Ghana Text, Cases and Materials* (2014).

⁴ Article 129 of the 1992 of the Republic of Ghana.

⁵ Ibid.

⁶ See Yin & Seiwah on access to justice in Ghana and Sierra Leone.

in an appeal from the High Court. The case emanated from a running down action involving the Appellant's vehicle which was driven by an unlicensed driver. The vehicle got involved in an accident and the Respondent suffered various degrees of injuries including a loss of the function of his genital organs. The case was initiated at the High Court, Kumasi, against the Appellant for damages for an alleged negligent conduct of the driver who was in charge of the vehicle at the time of the accident. Though the High Court held that the driver was not negligent at the time of the accident, the Appellant was held liable for allowing his vehicle to be put on the road without a road use certificate and insurance coverage as required by law. The assessment of damages by the High Court was found unsatisfactory by the Respondent and subsequently, he appealed to the Court of Appeal culminating in the enhancement of the damages awarded by the court below. Being irked by the decision of the Court of Appeal, the Appellant appealed to the Supreme Court which affirmed the Court of Appeal's decision but also further enhanced the damages.

The burden of this paper is to interrogate the Supreme Court's decision in the aforementioned case and explore the extent to which the apex court deviated from the well settled principles of negligence and vicarious liability without any explicit or tacit justification. The paper seeks to properly orient readers on the prerequisites on the application of the doctrine of vicarious liability as the courts have over the years been inconsistent in the deployment of the doctrine. We argue that the Supreme Court either failed to advert its mind to the requirements for the application of the doctrine of vicarious liability or erred in its appreciation of the key tenets of the doctrine. The writers submit that no rigorous analysis of the facts of the case was carried out vis-à-vis the principles of negligence and vicarious liability before the court came to the manifest non sequitur conclusion that the Defendant was liable for the alleged tort of the driver who was in charge of the vehicle at the time of the accident. The material facts of the case are as outlined in the next section.

The paper adopts a doctrinal and an arms-chair approach in arriving at its conclusions. The case in point is analysed on the basis of the rules and principles underpinning the doctrine of vicarious liability as handed down by the superior courts of Ghana. Secondary sources such as textbooks and journals are critically studied in aid of finding the philosophy behind the application of the doctrine of vicarious liability and how it has spanned out in Ghana since the receipt of common law into Ghanaian legal system.

Facts⁷

On 28th April 2009, the Plaintiff, a timber merchant of 39 years at the time of the incident, acting through his friend and business partner called Sammy hired the Defendant's truck numbered AS 5471-X to cart his timber logs from Diaso near Dunkwa to Mim in the then Brong Ahafo Region. On reaching a place called Kwabena Kumah, the vehicle was involved in an accident. The Plaintiff, Sammy and the driver of the vehicle sustained serious injuries and were sent to Goaso Government Hospital. Because of the seriousness of the injuries suffered, the Plaintiff was later transferred to the Komfo Anokye Teaching Hospital in Kumasi for further treatment where he received intensive care from 30th April, 2009 to 4th September, 2009 before being discharged to continue his treatment as an outpatient. The Plaintiff on 20th June, 2012, after seeking extension of time within which to file a writ sued the Defendant, owner of the vehicle for the sum of Gh¢400,000.00, special and general damages for the negligence of Defendant's driver, servant and employee resulting in the injuries suffered in the accident. According to the Plaintiff, the vehicle was not insured, did not have a roadworthiness certificate and the driver was also not licensed by law to drive the vehicle at the material time. The Defendant did not deny the fact that he owned the vehicle and that the road worthiness certificate and insurance had both expired. The Defendant, however, denied the fact that the driver in control of the vehicle at the material time of the accident was his driver or servant. According to the Defendant, one Kudjar Sumiala rented the timber truck for two days and gave him his driver to assist him with the carting of the logs. However, the said Kudjar Sumiala ended up using the truck for four days without his knowledge, consent, or approval. During the four-day period, Defendant's driver left the truck in the care of the hirer after the two days to attend to an emergency call concerning his mother's illness at the Sunyani Hospital. According to the Defendant, it was Kudjar Sumiala who failed to return the vehicle to him and rather asked a driver called Kwame Paul to drive the vehicle and continue with the carting of the logs. The Defendant, therefore, contended that the said Kwabena Paul was on a frolic of his own when the accident occurred and, therefore, he could not be held vicariously liable for the tort of Kwabena Paul. The Defendant also contended that he had no contract with the Plaintiff and that the Plaintiff neither rented the truck nor was he a paid passenger

⁷ Kwadwo Appiah v. Kwabena Anane [2020] Dennis Law Online Report (www.dennislawgh.com); [2020] 160 GMJ 1 SC.

at the time of the accident and at best could be described as someone on a frolic of his own.

The Decision of the High Court

After a full-blown trial, the High Court found that the accident was not caused by the negligent driving of the driver because the evidence of the police was that the vehicle developed a mechanical fault and fell. The trial judge, however, held that by permitting a vehicle to ply the road without valid documentation i.e., roadworthiness certificate and insurance as well as authorising an unlicensed driver to drive the truck, the Defendant should be held vicariously liable for the Plaintiff's claim. The trial Court's postulation of the doctrine of vicarious liability left much to be desired. If the decision is hinged on Defendant's failure to obtain road use certificate and insurance for his vehicle, is he not directly liable for that failure rather than being held vicariously liable in this case? The writers shall expatiate on this point in the critique of the Supreme Court's decision. Though the High Court's decision was in the Plaintiff's favour, he was not satisfied with the damages awarded and therefore appealed to the Court of Appeal for the enhancement of damages.

The Decision of the Court of Appeal

In reversing the High Court's decision on the issue of damages, the Court of Appeal awarded the Plaintiff non-pecuniary losses in the sum of Gh¢140,000.00, pecuniary loss to the tune of Gh¢10,000.00 and costs of Gh¢10,000.00. The Court of Appeal similarly reversed the High Court's opinion that the driver of the vehicle was not negligent but failed to pronounce on how he was negligent in this case. Similarly, the Court of Appeal failed to address the issue of whether or not the driver was the employee of the Defendant; and if he was, whether the injury caused to Plaintiff occurred in the course of his employment with Defendant. Unsurprisingly, the Defendant was dissatisfied with the decision of the Court of Appeal and pursued further to the Supreme Court on a number of grounds which resulted in the decision under review.

The Decision of the Supreme Court

In dismissing the Appeal of the Defendant, the Supreme Court affirmed the Court of Appeal's decision and stated as follows;

We have reviewed the evidence and the law on the tort of negligence. Our opinion is that the conclusion arrived at by the Court of Appeal holding the driver of the defendant liable in negligence cannot be faulted.⁸

The Court further stated as follows;

The laws forbid an owner and a person who has control or custody of a vehicle from permitting an unlicensed driver to drive a vehicle on the road. The law also bans the use of vehicles which do not have a road use certificate from plying a road.⁹

In further expatiating on the law regulating Road Traffic activities, the Supreme Court rendered itself as follows;

Laws passed by Parliament are there to be obeyed by all citizens and residents. Otherwise, they become useless, lose their significance and defeat the mischief the passage of the law sought to cure. Our society is regrettably plagued by indiscipline, impunity, and recklessness by drivers on the roads. This accounts for the reasons why this jurisdiction is classified as high risk in vehicular accident. It appears the defendant and his driver joined the bandwagon and flouted the mandatory laws regulating the use of vehicles on the road in the hope, possibly to escape the monitoring eye of the authorities. Unfortunately for the defendant, luck escaped him and he fell into the long arms of the law. He was fortunate to have escaped being banned from holding a driver's licence as provided for in the law and sentenced to pay only a small fine after his prosecution. Despite the criminal prosecution, **his liability under civil law was unaffected.¹⁰(emphasis ours)**

The phrase highlighted above is true in part. It is true to the extent that a person convicted of the offence of careless and inconsiderate driving may also be sued for damages in negligence. However, the conviction in the criminal trial is not an automatic entitlement to damages against the owner of the vehicle for injuries suffered. This is so because, a person may be convicted of careless and inconsiderate driving but without a prove of an employment relationship between him and the owner of the vehicle and that the accident occurred in the cause of his employment, his liability cannot be ascribed to

⁸ Ibid (n 4) p.6.

⁹ Ibid.

¹⁰ Ibid p.7.

the owner of the vehicle. The Supreme Court's statement in this case was too sweeping and extraneous as far as the evidence before it was concerned.

Similarly, the Supreme Court remarked further that:

The fact that the vehicle which caused the accident had no road use certificate implies its tyres, brakes, engine, lamps, mirrors, wheels, axles, steering, suspension, wings, fenders, mud guards, wheel, mud flaps and trailer among others have not been tested and certified to be worthy for use on the road. An owner or the person in control of such a vehicle who places it on the road endangers the motoring public and when an accident occurs cannot escape blame albeit caused by mechanical failure. In the absence of any explanation why the defendant's unlicensed driver drove a vehicle which was not road worthy, we will agree with the Court of Appeal and **hold the defendant vicariously liable for the tort of his driver.**¹¹ (emphasis ours)

It is deduced from the reasoning of the Court that its conclusion was based on the following;

1. The fact that the driver at the time of the accident had no driving licenses
2. The vehicle had no valid roadworthy certificate at the time of the accident
3. The vehicle had no valid insurance cover at the time of the accident.

It is worth noting that, though the Court held that the driver was negligent, it did not point to the piece of evidence on record establishing any negligent driving of the vehicle aside the fact that the driver had no license. No form of relationship in law was established between the driver and the Defendant and the issue of whether the driver was the employee of the Defendant at the time of the accident was not also addressed. How then did the Supreme Court hold the Defendant liable for the negligent act of the driver? The writers submit that the statutory non-compliances referred to by the Court are offences under the Road Traffic Act 2008¹² and the Defendant was duly charged, convicted, and sentenced on those offences. The imposition of civil damages on the Defendant for conduct which are offences under the Road traffic Act implies a conviction of the Defendant in a civil matter without the requisite criminal charges being brought to his attention for him to be heard on same. It also amounts to the Defendant been unjustifiably punished twice for the same act. In order to properly appreciate the error committed by the Supreme Court, it is apposite at this point to outline the relevant

¹¹ Ibid.

¹² Road Traffic Act, 2008 (Act 683) as amended.

provisions of the statutes which informed its decision before proceeding with the discussion.

First, according to section 94 of the Road Traffic Act, 2008 (Act 683) as amended;

- 1) A person shall not
 - a) drive or use; or
 - b) permit any other person to drive or use any motor vehicle on a road unless there is in force in respect of the motor vehicle a road use certificate provided for under this Act.

Subsection 2 of the same provision creates the offence and the penalty for non-compliance with the foregoing as follows;

A person who drives on a road or uses a motor vehicle in respect of which there is no valid road use certificate commits an offence and is liable on summary conviction to a fine not exceeding 25 penalty units or for a term of imprisonment not exceeding 2 months or to both.

The clear and plain meaning of subsection 2 is to the effect that driving or using a vehicle without road use certificate constitutes an offence and not a tort.

Similarly, it is stipulated under section 112(1) of Act 683 as follows;

A person shall not drive a commercial vehicle unless that person obtains in respect of that vehicle the relevant licence issued by the Licensing Authority.

Non-compliance with this provision constitutes an offence under subsection 3 which provides as follows;

A person who drives a commercial vehicle without a relevant licence under subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding 250 penalty units or to a term of imprisonment not exceeding 12 months or to both.

It is imperative to emphasize that there is no such offence as allowing a person without a driving licence to drive a vehicle as alluded to by the Supreme Court in its decision. The Owner of the vehicle may be charged with abetment to the crime of driving without licence if it is established that he knew or ought to have known that the driver at the

time of the accident had no valid driving licence. In any case, this will remain a criminal liability and not a tortious one. It is submitted that by no stretch of argument or interpretation can the offence of abetment to driving without licence be treated as the tort of negligence attributable to the owner of a vehicle involved in the accident.

Another statute relied upon by the Supreme Court in imputing negligence to the Defendant is the Motor Vehicles (Third Party Insurance) Act 1958 (No. 42).

It is provided under section 3 of the said Act as follows;

- 1) Subject to the provisions of this Act no person shall use, or cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of that motor vehicle by such person or such other person, as the case may be, such a policy of insurance or such security in respect of third-party risks as complies with the provisions of this Act.
- 2) Any person acting in contravention of this section shall be liable on conviction to a fine not exceeding two hundred pounds or to imprisonment for one year or to both such fine and imprisonment and a person convicted of an offence under this section shall be disqualified from holding or obtaining a driving licence.

The punishment for non-compliance with the Motor Vehicle (third party insurance) Act 1958 has expressly been stated in section 3. It appears the Supreme Court overlooked these sanctions for non-compliance with the relevant provisions and decided to create its own punishment in the case under review. Admittedly, some offences such as assault and battery also constitute a cause of action for a possible civil suit but in the present case the offences alluded to could not provide the basis for a civil liability. Noteworthy here is the fact that the manner of driving was not what informed the conclusion of the court that the Defendant was liable for the tort of negligence but rather the findings that the vehicle which caused the accident was not certified to be roadworthy and the driver at the time of the accident has no valid driving licence. Can the doctrine of vicarious liability be applicable in the above omissions identified?

The Doctrine of Vicarious Liability

The doctrine of vicarious liability is a strict liability principle that imposes liability on a third party who plays no role in bringing about a particular tort. Its application therefore is limited in scope and need not be strained because of the obvious injustice that is accompanied with it. The introduction of the doctrine into Ghana dates back to the colonial days when Ghana first encountered the Common law through the British. In

other words, the development of the doctrine in Ghana has a direct link with its development in England.

Ghana inherited most of its laws and legal principles from England due to the ties she shared with England as her former colonial master. The principles as espoused under common law were legally received and incorporated in Ghanaian law through the Supreme Court Ordinance of 1876 and under article 11 of the 1992 Constitution. Common law is one of the sources of laws in Ghana and is defined under the Constitution to include the principles under common law, equity, and customary law. Ghanaian courts have generally followed the position of the common law as far as the application of the doctrine is concerned.¹³ The legal theory underpinning vicarious liability has not received any thorough analysis by the Supreme Court since Ghana gained independence. Nonetheless, several cases have been determined by the Supreme Court and other courts of Ghana on the principles of vicarious liability.¹⁴ It is therefore imperative to look at the requirement for the application of the doctrine as enunciated under common law and applied in previous cases in Ghana.

a. Conditions for the application of the Doctrine of Vicarious Liability

The doctrine of vicarious liability seeks to hold a third party liable for the conduct or omission of an employee or servant. It is a strict liability doctrine which in itself is not a delict, but which allows persons injured by the tortious act of a tortfeasor to hold his employer liable for the tort. The principle is rationalized on two main strands; the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise¹⁵ and that the victim should enjoy fair and just compensation from the deepest pocket.¹⁶ It is believed that the employer will put in place measures to prevent injuries to third parties by the employee if it is made to bear the cost of the delict of the employee. This argument is pushed further with the suggestion that the employer is better able to take out insurance to cater for such losses.¹⁷ Other scholars have argued

¹³ *Attorney-General v. Dadey* (1971) 1 GLR 228; *Fynn v. Badu* (1971) 1 GLR 80; *Buobuh v. Ministry of Interior* [1973] 2 GLR 304; *Konadu v. Attorney-General* (1971) 1 GLR 130; *Guardian Royal Exchange Assurance Ltd v. Appiah* (1984-86) GLR 7.

¹⁴ *Packer v. Sekondi-Takoradi Municipal Council* (1960) GLR 259; *Aboaku v. Tetteh* (1962) GLR 165; *Laryea v. Annan* (1964) GLR 755; *Prudential Bank Ltd v. Appiah Boateng* [2019] 143 GMJ 175 @ 184 (CA).

¹⁵ J G. Fleming, *The Law of Torts* (1992) 367.

¹⁶ J W Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alta L Rev* 287.

¹⁷ *Ibid.*

that the doctrine seeks to distribute the losses as it is believed that the employer is better able to transfer part of the loss to customers through price increment.¹⁸ Of course, these reasons are greatly criticized and some discarded for failing to meet the test of time. For instance, it is argued that if the goal of the doctrine is to attach liability to the person with the deepest pocket, why limit the application of the doctrine to only employment or principal-agent relationships.¹⁹ Similarly, the loss distribution justification is attacked on the basis that its foundation is basically non-existent where the employer does not engage in consumer related activities.²⁰ It appears therefore that the doctrine is a rough and brute rule whose application is based on convenience.²¹ The doctrine is applied on certain strict requirements which the writers wish to interrogate. But as Lord Philips has posited, 'vicarious liability is on the move'²² and as such the traditional requirements underpinning the doctrine has gone through some evolvement. Lady Hale held the view that two elements must be shown before a person can be made vicariously liable for the torts committed by another. The first is, a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other.²³ Secondly, whether the conduct of the tortfeasor is related to the employment he is engaged in. The writers' critique of the case under review is not an indication that they are against the evolvement of the doctrine and its improvement. However, it is the view of the writers that such improvement should come with a thorough analysis of the existing precedent in the matter and justification for any modifications. It will be demonstrated later in this paper that the Supreme Court tacitly sought to modify the application of the doctrine without justifying the necessity of deviating from the settled requirements for the invocation of same. The following conditions are crucial for the doctrine of vicarious liability to be deployed;

i. Employment relationship

The doctrine hinges on the existence of an employer-employee relationship or a relationship akin to employment. In other words, the employer without prove of fault is held liable for the conduct of the employee by being the employer. Some scholars believe that there is no sound basis for the application of the doctrine in a system that is

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ S. Offei, *The law of Torts in Ghana; text, case and material* (2014).

²² Various Claimants v Catholic Child Welfare Society [2012] UKSC 56.

²³ Barclays Bank PLC v. Various Claimants [2020] UKSC 13.

principally fault based.²⁴ Though the doctrine is an anomalous rule in the midst of mostly fault-based torts system, its relevance cannot be underestimated.²⁵ The doctrine initially operated on the basis of a typical employer-employee relationship which is identified by using three main benchmarks: the employer must have control over the manner the employee carries out his work; the work of the employee must be an integral part of the employer's business; and the economic benefit and risk of the business must be borne by the employer. In the case of *Yewens v. Noakes*²⁶, the court defined "*an employee as follows; employee was anyone who was subject to the command of the master as to the manner in which he shall do the work*". In the case of *Viasystems (Tyneside) Ltd v. Thermal Transfer (Northern) Ltd*²⁷, Rix LJ postulated as follows;

... what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.

The strict requirement of an employment relationship has been whittled down by recent decisions in the UK and other jurisdictions. In the case of *Woodland v. Swimming Teachers Association*,²⁸ the court through Lord Sumption opined that;

The boundaries of vicarious liability have been expanded by recent decisions of the courts to embrace tortfeasors who are not employees of the defendant, but stand in a relationship which is sufficiently analogous to employment.

The application of the doctrine has expanded to include relationships which are akin to employment. The test for "sufficiently akin to employment" was explained further in the case of *E v. English Province of Our Lady of Charity*²⁹, by Ward LJ. It is submitted that the expansion of the employment requirement to include relationships akin to employment does not erode the distinction that exists between a contract of service and contract for service.³⁰ Upon establishing that there is a relationship of employment

²⁴ Karin Calitz, 'Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability' (2005) 2005 J S Afr L 215.

²⁵ J W Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alta L Rev 287.

²⁶ (1881) 6 QBD 530.

²⁷ [2005] EWCA Civ 1151.

²⁸ [2013] UKSC 66.

²⁹ [2012] EWCA Civ 938; [2012] WLR (D) 204.

³⁰ *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157, Singh LJ.

or one sufficiently akin to employment, the next hurdle is for the Plaintiff to prove that what the employee or agent did or omitted to do constitutes a tort. It is the tort of the tortfeasor that the employer is liable for and as such if a case cannot be successfully made against the employee in tort, the employer is not liable. In the present case, the tort that was identified by all the courts was negligence. Was the driver negligent in this case? This question can be answered after exploring the constitutive elements of the tort of negligence.

ii. Requirement of negligence

The case under review found that the driver of the vehicle was negligent and by virtue of that negligence, held the Defendant vicariously liable to the Plaintiff. It is trite that for there to be a case of negligence there must be a duty of care, a breach of the duty and an injury caused by the breach of duty. The rule on negligence since *Donoghue v. Stevenson*³¹ has always thrived on these three requirements. Lord Atkins' neighbour principle has always been the guiding rule i.e whether the relationship between the Plaintiff and Defendant is proximate enough for the Defendant to foresee his act affecting the Plaintiff. Secondly, the acts complained about must be matched against the standard of behaviour required of every reasonable man to ascertain whether same has been breached or not. Even if it is found that there is a breach of duty, a court is further required to ascertain whether the breach of duty is the cause of the Plaintiff's injuries or not. The Supreme Court of Ghana unfortunately did not take the pain of analysing the driver's conduct in the light of these requirements. Though a police report found that the accident was caused by a mechanical fault, the Court insisted on affirming the Court of Appeal's conclusion that the driver was negligent. Be that as it may, the mere finding of negligence against the driver does not automatically make the Defendant vicariously liable. The court ought to have interrogated further to find out whether the driver was the employee of the Defendant and that the said negligent conduct of the driver took place in the course of his employment with the Defendant.

iii. The act must be done in the course of the employment

The employer is not liable for every tort of the employee. The scope of liability of the employer is limited to torts committed by the employee in the course of his employment. The employer is not responsible for the tort of his employee unless it is done in the course of the employment. Salmond and Heuston explained that an act is done in the

³¹ [1932] AC 562.

course of employment if: “i) it is a wrongful act authorized by the master or ii) a wrongful and unauthorized mode of doing some act authorized by the master.”³²

In other words, if the employee carried out an unauthorized wrongful act not connected to the authorized act as to the mode of doing it, the employer will not be liable. In the case of *Listers & Ors v. Hesley Hall Ltd*³³, Lord Steyn propounded a test for the purpose of determining whether the conduct or act of the employee was within the course of employment or not as follows;

When determining whether an employer was vicariously liable for an employee’s wrongful act concentration should be on the relative closeness of the connection between the nature of the employment and the particular tort. Not just; i) whether the employee had done an authorized act or ii) used an improper mode to carry out an authorized act.

If upon such an interrogation, it is discovered that the employee was on a frolic of his own, the employer will not be liable. However, if the conduct of the employee is a mere detour (a slight deviation from the course of employment) the employer will still be liable. The doctrine has seen quite a number of applications in Ghanaian courts. At this point, we propose to embark upon a survey of cases decided by the Ghanaian courts on the basis of the doctrine of vicarious liability.

How Ghanaian Courts have Applied the Doctrine

There are several cases decided by Ghanaian Courts on the doctrine of vicarious liability. The Supreme Court has on various occasions pronounced on the doctrine of vicarious liability. It is therefore not in doubt that at the time the case under consideration was being considered, the Supreme Court had quite a number of precedents to rely on in determining the matter. However, the Court made no reference to any of its previous decisions and concluded on the matter as though no precedent existed. We shall at this point refer to some of the decided cases on the doctrine of vicarious liability.

The first opportunity the Supreme Court had to analysis a case in relation to the doctrine of vicarious liability was in the case of *Packer v Sekondi-Takoradi Municipal Council*³⁴, where the court through Granville Sharp JSC posited as follows;

³² Salmond and Heuston *The law of Torts*, (21st ed , 1996) p. 443.

³³ [2001] 2 All E.R. 969.

³⁴ (1960) GLR 259 (SC).

A servant is presumed to act in the course of his employment unless it can be shown that he acted in his own interest in his use of his master's property, surreptitiously, without the knowledge of his master and independently of orders from any superior whose orders he was bound to obey.

In that case, the Council was held liable for the negligent driving of its bus by one of its employees who was acting under the instructions of his superior. The court opined that since the superior has the express authority to so order the 1st Defendant therein, his order to be driven home in one of the buses of the Council of which the 1st Defendant obeyed makes the Council liable for the injuries the Plaintiff suffered in an accident caused by the 1st Defendant. Barely two years after this case was decided, the Supreme Court was again seized with another case inviting the application of the doctrine of vicarious liability. In the case of *Aboaku v. Tetteh*³⁵, Sarkodee-Adoo JSC rendered himself as follows;

...where a plaintiff in an action for negligence proves that damage has been caused by the defendant's motor-car, the fact of ownership of the motor-car is prima facie evidence that the motor-car, at the material time was being driven by the owner or his servant or agent. On the settled principles of vicarious liability, the second defendant could be held liable for the negligence of the first defendant whether or not he was in his employment and even if the relationship of master and servant strictly speaking does not exist.

This case saw a relaxed application of the doctrine and a departure from the traditional requirement of an employment relationship and the act happening in the course of the employment. It is interesting to note that as early as in the 1960s the Supreme Court recognized the fact that the doctrine was subject to modification and not static. In *Laryea v. Annan*³⁶, the respondent was injured when a lorry in which he was a paying passenger was involved in an accident due to the negligence of the driver, one Larbi Armah. The trial judge held that Larbi Armah was the appellant's servant (the appellant having admitted ownership of the lorry) and that they were jointly and severally liable to the respondent. On appeal, the Supreme Court in allowing the appeal through Mills-Odoi J.S.C stated as follows;

³⁵ (1962) GLR 165 (SC).

³⁶ (1964) GLR 755 (SC).

...the respondent's evidence at the trial merely showed that the appellant was the owner of the lorry and that Larbi Armah was the driver of the vehicle some time before and at the time of the accident. Since the evidence failed to establish whether the appellant had the power of controlling Larbi Armah's acts and dismissing him for disobedience of orders, the trial judge erred in holding that the relationship of master and servant existed between the appellant and Larbi Armah.

This case presented similar facts to the case under review. But as observed, the court in that case emphasized the requirement of master/servant relationship between the tortfeasor and the party being called upon to bear the liability before the doctrine is applicable.

Another case worth mentioning is the case of *Fynn v. Badu*³⁷ which was decided by the Court of Appeal but which at the time also sat as the highest court of Ghana. The appellant was held to have been vicariously liable, there having been a joint venture (the collection and payment of daily fares by K. to the appellant until the cost price of a vehicle had been fully paid) between K. and the appellant. On appeal, the Court of Appeal allowed the appeal and opined as follows;

It could not be said that K. was in any sense acting for the appellant, he was acting entirely for his own benefit and was driving the vehicle in his right as a purchaser. In the case of joint enterprise, joint possession or joint right to control is the basis of liability.

Apaloo J.A (as he then was) in an obiter stated as follows;

There is no sound policy reason peculiar to Ghana for imposing vicarious liability upon a person who either sells on credit or hires his vehicle to a third person to whom he relinquishes possession and control, simply because he retains in himself the bare legal title and is interested only in the balance of the purchase price or the hire-purchase rentals. If strong reasons of public policy require that vicarious liability should be imposed on an owner of a vehicle in such a case, it should be done by [enacted] not judicial legislation.

³⁷ (1971) 1 GLR 80-86 (CA).

This case per the obiter of Apaloo J.A admonished against holding a person vicariously liable for hiring vehicle to a third party or selling same on credit. Even though the case under review was also in relation to hiring a vehicle to a third party such as in the Fynn v. Badu, the Court made no mention of that case in its decision.

The Court of Appeal in a recent decision acknowledged the dynamic nature of the requirement of vicarious liability and posited as follows; *“[t]he question whether a wrongful act is within the course of the servants employment or scope of his authority is a question of fact and no simple test is appropriate to cover all cases”*.³⁸

The court stated further that,

It is trite that so long as a servant acts within the scope of the employment entrusted to him, his employer is vicariously liable for all the frauds committed by that servant, whether for the benefit of the employer or for his own benefit.

The cases referred to so far have always insisted on some form of wrongdoing by the servant and the fact that the act ought to be done in the course of the employment of the servant. In the absence of these requirements, any attempt at applying the doctrine of vicarious liability will be a strained application of same unless policy justification has been advanced for its modification. An assessment of the Supreme Court’s decision in the case under review will reveal failure of the Court to provide any justification for not adhering to the traditional requirements for the application of the doctrine of vicarious liability.

Implications of the Ghana’s Supreme Court Decision on the Doctrine of Vicarious Liability

The Court’s decision implies that a person who puts a vehicle on the road without a valid roadworthy certificate is considered negligent. Similarly, the import of the decision is that any injuries caused by a vehicle without a roadworthy certificate regardless of the cause of the accident implies negligence and consequently imputing liability on the owner of the vehicle. The Court seems to suggest per its decision that the owner of a vehicle without the necessary Road Traffic Regulations compliance is vicariously liable for any injury the driver of the vehicle may cause to a third party whether the driver is the employee of the owner of the vehicle or not. The Court’s decision also implies that the requirement of the driver driving the vehicle in the course of his employment is

³⁸ Prudential Bank Ltd v. Appiah Boateng [2019] 143 GMJ 175 @ 184 (CA).

irrelevant. This decision seems radical, and one would have expected the Supreme Court to acknowledge the existence of the established principles before veering off to make such tremendous departure from the settled conditions for the application of the doctrine of vicarious liability. The existing decided cases by the Supreme Court and other courts in Ghana point to the fact that the doctrine applies to employer-employee relationship or master-servant relationship and in instance where the employee committed the tort in the course of his employment with the employer.

Critique of the Decision

It is submitted that the Court erred when it disregarded the police report on the accident which found that same was caused by a mechanical fault and not negligent driving. In running down actions, the primary source of evidence as far as the cause of accident is concerned is the police accident report. Without any contrary evidence adduced at the trial, the Court had no basis for disregarding such a probative report. The Supreme Court which described the trial High Court Judge as confused about the issues rather ended up arriving at conclusions which are more confusing. The Court sought to reason that the Defendant was negligent for not taking up insurance and road use certificate in respect of the vehicle but failed to link that omission of the Defendant to the cause of the accident and how such an omission could make the Defendant vicariously liable. Per the evidence on record, the driver's only omission was driving without a licence. However, the Court failed to advert it mind to the fact that driving without licence is a criminal offence and not a tort. The rule of law which is trite is that the employer or master cannot be held vicariously liable for the crime of the servant unless it is established that he or she is an accomplice. The specific statutes the Court referred to prescribed punishment for the omissions alluded to. Indeed, the offences of driving without licence, road use certificate or insurance cover under the law have never been regarded as prima facie evidence of negligence and if there is any such rule, it does not take away the fact that an accident may still be occasioned by a mechanical fault.

Granted that it was proper to hold the driver liable for driving the vehicle without licence, was it established that the driver was the employee or servant of the Defendant and that the accident occurred in the course of his employment? It is admitted that driving without licence is an omission, but this omission is a breach of statute which constitutes the *actus reus* of an offence under the Road Traffic Act. The tort of negligence concerns itself with the manner the driver drove the car and not in relations to whether he has authorization from the authorities that issue driving licences. It may be argued that the omission to obtain a driver's licence is evidence of not having the ability or skill to drive

but this will be a mere speculation since the police report was specific as to the cause of the accident.

It is again observed that though the Defendant categorically stated that the driver at the time of the accident was not his employee, the Court failed to make any pronouncement on that issue but rushed to conclude that the Defendant was vicariously liable. Without scaling through this first requirement of employer-employee relationship, a court of law has no basis to make a person vicariously liable for the tort of another. Even if the Court took that requirement for granted or felt same goes without saying, it was pertinent for the Court to discuss the issue of whether the driver was acting in the course of his employment especially so when the Defendant had submitted that he hired out the vehicle to a third party with his own driver and not the driver being ascribed to him. The Defendant equally argued that he never hired the vehicle to the Plaintiff in the instant case and yet the court glossed over all these relevant information and ventured into a surface analysis of the evidence which led to the legal anathema under discussion. The Court's only reason for implying vicarious liability was on the basis of the following statement made by the High Court and repeated by the Court of Appeal;

It seems to me that the trial found the Respondent negligently liable by virtue of placing on the road a truck with no valid documents covering same, and issuing orders for an unauthorized driver to drive same; thereby rendering him vicariously liable.³⁹

This was the only statement made by the High Court and the Court of Appeal on vicarious liability. It is this same statement the Supreme Court affirmed and held the Defendant vicariously liable. But when you read the statement closely, it is discovered that the acts or omissions being referred to were omissions made by the Defendant himself and not the driver. How can the Defendant be vicariously liable for omissions directly made by him? At best the Supreme Court could hold Defendant liable for his own omissions but not in tort but rather in criminal law. Probably the Court glossed over the criminal nature of the Defendant's omissions because he had already been convicted and sentenced in respect of same. However, in the absence of a civil cause of action against the Defendant, the Supreme Court had no basis for concluding the way it did.

Conclusion

It is not in dispute that the Supreme Court of Ghana enjoys the privilege of not being bound by its previous decisions, however, it is required by law to generally follow its

³⁹ Ibid (n 4) p. 7 to 8.

previous decisions. The apex Court is mandated to justify any departure from its previous decisions with sound judicial analysis of the precedents vis-à-vis the case under consideration. In the case under review, the Supreme Court obviously ignored the established rules for the application of the doctrine of vicarious liability but equally failed to justify the need for such a monumental departure from the tenets of the doctrine. This attitude exhibited by the Supreme Court is unconventional and militates against the developmentalists approach to judicial decision making. The Court in the case under review seems to base its decision on perceived public frustration in the general indiscipline by drivers on the Ghanaian roads day-in-day-out. This is evidenced in the following remarks as contained in the judgment;

Our society is regrettably plagued by indiscipline, impunity and recklessness by drivers on the roads. This accounts for the reasons why this jurisdiction is classified as high risk in vehicular accident. It appears the defendant and his driver joined the bandwagon and flouted the mandatory laws regulating the use of vehicles on the road in the hope, possibly to escape the monitoring eye of the authorities. Unfortunately for the defendant, luck escaped him and he fell into the long arms of the law.⁴⁰

In as much as we share in the Supreme Court's concern about general indiscipline and reckless driving on the roads, it is submitted that a decision based on such general experiences and frustrations without any justification for deviating from the known requirements of the doctrine of vicarious liability can only be regarded as sentimental departure with no sound legal basis. Just as the Supreme Court in its opening statement admits that a court of law should determine cases devoid of emotions, sympathy, and sentiments⁴¹, it ought to have been mindful of not allowing sentimental reasoning influenced its opinion.

The writers hold the view that having failed to refer to established rules of the doctrine of vicarious liability and justify its departure from same, the Court did not only err in its decision but also determined the case per incuram. We recommend that the Supreme Court uses the earliest opportunity to set aside this bad precedent and develop the doctrine of vicarious liability if the need be, with justifications for any proposed modifications to same.

⁴⁰ Ibid (n 4) p. 7.

⁴¹ Ibid (n 4) p. 1.

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