

SUPREME COURT OF NIGERIA
10TH MARCH, 2000. SC. 74/1994
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC

IFEANYI CHUKWU OSONDU CO. LTD. ... PLAINTIFF/APPELLANT
AND
SOLEH BONEH (NIG.) LTD. DEFENDANT/RESPONDENT

JUDGMENTS - Appeal - Issues - An intermediate court should endeavour to resolve all issues put before it.

PRACTICE & PROCEDURE - Action - Parties - Joinder of - No cause or matter shall be defeated by reason of the non-joinder of parties - It is only where a person is a necessary Party that his joinder becomes essential.

PRACTICE & PROCEDURE - Actions - Tort - Joint tortfeasors - The person injured may sue any or both of the tortfeasors.

TORTS - Joint tortfeasors - The meaning and purport of.

TORTS - Joint tortfeasors - Action - Consequence of suing them separately.

TORTS - Vicarious liability - Doctrine of - The meaning and basis for the doctrine.

TORTS - Vicarious liability - Liability of the master - Requirements for such liability.

TORTS - Vicarious liability - Tortfeasors - The law regards both master and servant as joint tortfeasors.

TORTS - Vicarious liability - Management Enterprises v. Otusanya - The decision in that case is no authority - For the finding that the servant must first be successfully sued - Before the master could be held accountable for his servant's tort.

TORTS - Vicarious liability - Action - The plaintiff must establish the liability of the servant - In order to succeed against the master.

FACTS

In the High Court of Edo State holden at Abudu, the plaintiff/appellant sued the defendant/respondent claiming N64,521.00 damages as a result of an accident that occurred at Abudu in Bendel State (now Edo State) on 29th May, 1981. The accident involved the two vehicles of the parties. The plaintiff's vehicle Reg. No. IM 1673 G driven by its driver was a passenger coach, that of the defendant, Reg. No. OY 9065 AD was a trailer and was driven by one Mosudi Akanbi said to be the defendant's driver. The action was instituted against Mosudi Akanbi and the defendant. Following difficulties encountered in getting Mosudi Akanbi to be served with the Writ of summons, the action was withdrawn against him and his name was struck off the Proceedings. The case proceeded to trial at the end of which the learned trial judge in a reserved judgment found that Mosudi Akanbi is a necessary party whose non-joinder is fatal to the plaintiff's case; and that even if Mosudi Akanbi, the driver of the trailer was a party to the action, the plaintiff would still have lost as it failed to prove any negligence against him. Accordingly, he dismissed plaintiff's claim. Dissatisfied, the plaintiff appealed to the Court of Appeal (Benin Division) and set out three issues for the Court to consider. The Court of Appeal in its judgment addressed itself only to one of the issues. The appeal was dismissed without any pronouncements being made on the other issues canvassed. The plaintiff has further appealed to the Supreme Court raising only one issue

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in holding that failure (by the appellant) to join the respondent's driver as a defendant in the present

proceedings was fatal to the appellant's case."

HELD (Unanimously dismissing the appeal per lead judgment of **OGUNDARE JSC**)

Vicarious liability - Doctrine of

1. The general principle of law which has its roots in the earliest years of the common law is that a master is liable for any wrong even if it is a criminal offence or a tortious act committed by his servant while acting in the course of his employment. TURBERVILL V. STAMP (1697) 1 Ld. Raym. 264; DYER V. MUNDAY (1895) 1 QB 742. This is what is known as the doctrine of vicarious liability which is based on the principle of law enunciated by Sir John Holt CJ in HERN V. NICHOLS (c.1700), 1 Salk 289; The doctrine means that one person takes the place of another so far as liability for the tort is concerned - see: LAUNCHBURY V. MORGANS (1971) 2 QB 243, 253. It is the relationship of master and servant that of itself gives rise to this liability and not the old fiction that the master had impliedly commanded his servant to do what he did. (p. 659 E)

Vicarious liability - Liability of the master

2. The liability of the master is dependent on the plaintiff being able to establish the servant's liability for the tort and also that the servant was not only the master's servant but that he also acted in the course of his employment. In summary, to succeed against a master the plaintiff must

1. establish the liability of the wrongdoer, and prove -

2. that the wrongdoer is a servant of the master and

3. that the wrongdoer acted in the course of his employment with the master. See YOUNG V. EDWARD BOX & CO. LTD. (1951) TLR 789; 793. (p. 660 E)

Vicarious liability - Tortfeasors

3. The master is answerable for every wrong of the servant as is committed in the course of his employment - see: JAMES V. MIDMOTORS (supra); HOULDSWORTH V. CITY OF GLASGOW BANK (1874-1880)

All ER (Reprint) 333; (1880) 5 App Cas. 317. The law regards both master and servant as joint tortfeasors - see: JONES V. MANCHESTER CORPORATION (1952) 2 QB 852 at p. 870. (p. 661 E)

B Actions - Tort

4. Being joint tortfeasors, the person injured is at liberty to sue any one of them separately or may sue both jointly, their liability being joint and several. That their liability is joint and several is borne out by the case of BROOM V. MORGAN (1953) 1 QB 597. That the person injured may sue any or both of the tortfeasors is also borne out by Section 14 of the Torts Law, Cap. 164, Vol. VI, Laws of Bendel State, 1976 applicable in the case on hand. (p. 662 A)

D Actions - Parties

5. No cause or matter shall be defeated by reason of the non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. Failure to join as a party a person who ought to have been joined will not render the proceedings a nullity on ground of jurisdiction or competence of the court. It is only where a person is a necessary party in the sense that that person is likely to be affected by the result of the action that his joinder becomes essential. For the court ought to have before it such parties as would enable it to "effectually and completely adjudicate upon and settle all the questions" in the suit - see: UKU V. OKUMAGBA (supra).

Can it be said that Mosudi Akanbi is a necessary party who is likely to be affected by the result of the action against the defendant? I rather think not. Nor do I think that his presence is necessary in order to enable the Court "effectually and completely adjudicate upon and settle all the questions" in the action. I think the plaintiff could prove its case against the defendant without joining Mosudi Akanbi. (p. 666 D)

Torts - Joint tortfeasors

6. The learned authors of Salmond on the Law of Torts, 17th edition,

paragraph 167 at page 442 define who are joint tortfeasors in these words:

"Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort - that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases - namely, agency, vicarious liability, and common action, i.e. where a tort is committed in the course of a common action, a joint act done in pursuance of a concerted purpose In order to be joint tortfeasors there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage. The injuria as well as the damnum must be the same." See also The Koursk (1924) P.140, 156,159. (p. 667 D)

Joint tortfeasors - Action

7. Being joint tortfeasors, therefore, a plaintiff is at liberty to choose his victim; he may decide to sue either of the master and servant separately or both of them jointly - See: Salmond on The Law of Torts at 443. Where he sues one of them separately and succeeds, this is not a bar to an action against the other who would if sued, have been liable as a joint tortfeasor in respect of the same damage. The question that may arise is as to contribution between the joint tortfeasors. And this question is taken care of by (in the present proceedings) Sections 14 & 15 of the Torts Law, Cap.164, Laws of Bendel State of Nigeria, 1976. (p. 668 A)

Vicarious liability - Management Enterprises v. Otusanya

8. With profound respect to their Lordships of the two Courts below, I think they misconceived the true purport or meaning of the expressions - "successful action", "any judgment against the 2nd Defendant," "a verdict against the 2nd Defendant" used by the learned Justice of the Supreme Court in the passage. I believe that when Oputa, JSC., used those expressions in the passage in his judgment, he meant findings of fact of liability against the servant (the purported 2nd Defendant in the case) must be made before there could be a successful action against the

master (the 1st Defendant in the case). To suggest otherwise, would mean that this Court, per Oputa, JSC., was laying it down that in every case of vicarious liability, the servant must first be successfully sued before the action against the master or that both must be jointly sued and
 B a verdict entered against the servant before the master could be held accountable for his servant's tort. Such would not only be absurd and lead to injustice but would also run against the grain of all authorities - both Nigerian and foreign - on the point. A person who has suffered
 C damage as a result of the tort of the servant of a master would not be able to recover simply because the servant is dead or has absconded and disappeared into thin air. Such a situation would undoubtedly encourage a master to keep his servant out of the reach of the injured person. I do not think this Court meant to create such a state of injustice by its judgment in MANAGEMENT ENTERPRISES V. OTUSANYA, nor to alter the existing state of the law. It is interesting to note that the trial court, in that case found that the liability of the 2nd Defendant (the deceased driver) for the accident was not established. The conclusion I reach is that MAN-
 D AGEMENT ENTERPRISES V. OTUSANYA is no authority for the finding of law made by the two courts below. (pp. 669 E/670 A)

Vicarious liability - Action

F 9. From the welter of authorities on the point - statutory, judicial and academic - some of which I have cited in this judgment - it is a finding of liability against the servant that results in the master's liability. In other words, in an action against the master the plaintiff, to succeed, must
 G produce sufficient evidence from which the court makes a finding of fact to the effect that the servant is liable for the tort complained of. That is, the plaintiff must establish the liability of the servant in order to succeed against the master in an action. (p. 669 G)

Judgments - Appeal

10. Unless in the clearest of cases, an intermediate court should endeavour to resolve all issues put before it. (p. 671 E)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. A claim brought jointly and severally - Purport of

Where a claim is brought jointly and severally against defendant it means that each party is responsible jointly with each other and also severally B for the whole amount of damage caused by the tort irrespective of the extent of participation. See DOUGHERTY V. CHANDLER (1946) SR (N.S.W.) 370. Therefore a person injured may sue any one of them separately for the full amount of the loss; or he may sue all of them jointly in C the same action, and in this latter case the judgment so obtained against all of them may be executed in full against any one of them. (p. 674 A)

ONU JSC

2. Quantum of damage that may be awarded against tortfeasors

It is the law that although two or more tortfeasors may be joined as co-defendants in an action, only one sum can be awarded as damages and the sum must accordingly be the lowest sum for which any individual Defendant can be held liable. See CASSEL & CO. V. BROOME (1972) 1 E D All E.R 801. (p. 680 C)

3. How to plead negligence

From the legal propositions spun out hereinbefore in the two extracts in F the leading and concurring judgments (supra) set out above, what has emerged is that unless the liability of the principal actor or tortfeasor i.e. that of Mosudi Akanbi, unless established, the joinder of his master i.e the Respondent in this action would be of no avail. But one may ask, is this G the true statement of the law in Nigeria? As I said earlier on in this judgment, I think not. It is in this wise that I hold that the conclusions arrived at by the learned Justices of the Court below were wrong for the following reasons:-

H It is trite law that allegation of the precise breach of the duty owed must be made in the pleading. In other words, particulars must always be given in the pleading showing precisely in what respect, the Defendant was negligent. Indeed, persons are said to be joint tortfeasors when their

separate shares in the commission of the tort are done in furtherance of a common design. (p. 683 F)

4. Action in negligence - What must be proved

B It is worthy of note that an action in negligence will not necessarily fail because the servant or driver dies in the course of his duty. However, the following requirements need be proved for a cause of action in negligence to be complete or ripe, viz:-

- C
- (i) that the servant was negligent.
 - (ii) that he was the servant of the master.
 - (iii) that he acted in the course of his duty. (p. 685 G)

5. Duty of the trial court to award a notional sum where a plaintiff's case fails

By a long line of authorities this Court has laid down that, should a Plaintiff's case be dismissed by the trial Court a notional sum should be awarded for the assistance of the Appeal Court which may or may not affirm the decision thereon. See BELLO V. DIOCESAN SYNOD OF LAGOS (1973) 3 S.C.103; (1973) 1 All NLR 247. The trial Court and the Court of Appeal in the instant case failed to award such damages and in that regard flouted the direction of this Court. However, since the Appellant lost in both courts below, no more will be said on the dereliction.
F (p. 686 F)

IGUHJSC

6. When a master is liable for the tort of its servant.

G A master, which in an appropriate case may include a company or a corporation is liable for the tort, negligence or wrongful act of its servant or agent so long as the same is committed in the course of his employment, namely, the authorized master's business or the master's business
H which he was held out as authorized. (p. 692 F)

7. In the absence of proof of negligence no question of liability can arise

It thus seems to me in the circumstance that notwithstanding the resolu-

tion of the sole issue in this appeal in favour of the appellant, the matter must be viewed as of academic significance only. In the absence of proof of negligence by the appellant against the respondent, no question of liability can arise. (p. 695 G)

B

REPRESENTATION

A. O. Okeaya-Inneh for the appellant

A. O. Alegeh for the respondent

C

CASES REFERRED TO

JAMES V. MIDMOTORS (1978) 11-12 SC. 31 at p. 39

BENSON V. OTUBOR (1975) NSCC (Vol. 9) p. 49 at pp. 51 & 54

DYER V. MUNDAY (1895) 1 QB 742

JONES V. MANCHESTER CORPORATION (1952) 2 QB 852 at p. 870 D

LAUNCHBURY V. MORGANS (1971) 2 QB 243, 253

LAUNCHBURY V. MORGANS (1973) AC 127, at 135, 140

YOUNG V. EDWARD BOX & CO. LTD. (1951) TLR 789

SEMTEX LTD. V. GLADSTONE (1954) 1 WLR 947 at 949

E

TREACY V. ROBINSON & SON (1937)

STATUTES & RULES REFERRED TO

Torts law. Cap.164, Vol.VI, Laws of Bendel State, 1976; ss. 14 and 15
High Court (Civil Procedure) Rules, Cap.65, Laws of Bendel State of
Nigeria, 1976; 0.7 r.10 F

Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria, 1990;
S.22

G

BOOKS REFERRED TO

Clerk & Lindsell on Torts, 14th ed, para 237, P.238

Salmond on the Law of Torts, 17th ed, para 167; p.442.

Bullen and Leake and Jacobs precedents of pleadings, 12th ed. p.685 H

LEAD JUDGMENT BY OGUNDARE JSC

The main question arising for determination in this appeal is a question of law framed by the parties, as follows:

B *"Whether the Court of Appeal was right in holding that failure (by the appellant) to join the respondent's driver as a defendant in the present proceedings was fatal to the appellant's case."* (words in brackets mine)

C Following an accident that occurred at Abudu in Bendel State (now Edo State) on 29th May, 1981, the plaintiff (who is appellant in this appeal) sued the Defendant (now respondent) claiming N64, 521 damages it suffered as a result. The accident involved the two vehicles of the parties. The plaintiff's vehicle Reg. No. IM 1673 G driven by its driver was a passenger coach; that of the defendant, Reg. No. OY 906 5 AD was a trailer and was driven by one Mosudi Akanbi said to be the D defendant's driver. The action was instituted against Mosudi Akanbi and the defendant. Following difficulties encountered in getting Mosudi Akanbi to be served with the writ of summons, the action was withdrawn against him and his name was struck off the proceedings.

E Pleadings were filed and exchanged and, by leave of court, amended. By paragraph 15 of its amended statement of defence, the defendant pleaded thus:

F *" 15. Further, or in the alternative to paragraphs 5 to 8 and 10 to 15 hereinabove, defendant will at or before the trial contend on a point of law that even if all the averments in the Amended Statement of Claim are admitted (which is denied) the Amended Statement of Claim is bad in law in that it discloses no cause of action against the defendant.*

PARTICULARS

G (i) *The Writ of Summons originating this action was taken out against Mosudi Akanbi (Driver of Defendant's vehicle) as 1st defendant and the present defendant as 2nd Defendant:*

H (ii) *On the 24th February, 1984 the plaintiff discontinued the action as against the said 1st defendant;*

(iii) *The 2nd defendant's(now the sole defendant on record) liability is vicarious, by operation of law and cannot be established when Plaintiff has discontinued the action against the 1st defendant who is*

primarily liable;

(iv) *The original Writ of Summons is inconsistent with the Amended Statement of Claim."*

The case proceeded to trial at the end of which the learned trial Judge, in a reserved judgment, found:

1. *"that I agree entirely with Mr. Okonjo that Mosudi Akandi (sic) is a necessary party whose non-joinder is fatal to the plaintiff's caseI hold that Mosudi Akandi not being a party in this case I cannot pronounce any verdict against him for which the defendant company can be held vicariously liable. On this ground the plaintiff's action cannot succeed."*

2. *that even if Mosudi Akanbi, the driver of the trailer were a party to this action the plaintiff would still have lost as it failed to prove any negligence against him;*

3. *that there is no nexus between the plaintiff's vehicle Reg. No.IM1673G and exhibits B, C, D, E, F, G, & H (tendered in support of the claim for damages). The said Exhibits are not unequivocally referable to IM 1673 G.*

4. *"that the plaintiff, in the instant case, having tendered evidence of negligence on the part of the driver of OY 906 5 AD cannot rely on the doctrine of Rep Ipsa Loquitur to sustain his claims."*

He dismissed plaintiff's claims.

The plaintiff appealed to the Court of Appeal (Benin Division) upon two original and three additional grounds of appeal. The plaintiff in its written brief of argument in that Court set out three issues for the Court to consider, to wit:

(1) *Whether failure to join the respondent's driver as a defendant in this action against his master where it is alleged that the master is vicariously liable is fatal to the appellant's case.*

(2) *Whether having regard to the evidence adduced by both parties the learned trial Judge was right to dismiss the appellant's claim.*

(3) *Whether an appellate Court seised of the matter is competent to evaluate the whole evidence and award damages claimed in the lower Court."*

The Court of Appeal, in the lead judgment of Ogebe, J.C.A. with which the other Justices agreed, addressed itself only to issue (1) above and adjudged:

"From all these authorities which I respectfully follow, it is clear
 B that in an action for negligence as in the present case if the principal
 actor (the offending driver) is not joined as a party and his liability
 established there can be no question of finding the master liable vicari-
 ously. In other words, once the driver is not joined in the action the
 C action is incompetent ab initio and a trial court should not waste its time
going into the merits of the case." (underlinings are mine)

Akpabio, J.C.A. in his concurring judgment, wrote:

"I think that it must be repeated for emphasis that regardless of
 how gross the negligence of a driver might be, the liability of his master,
 D which is vicarious, cannot arise unless and until the servant (the princi-
 pal tortfeasor) who had driven the vehicle has been established in the
 court. The same goes for any insurance company who may have
 underwritten the liability. In the instant case, since the driver was never
 E made a party to the suit, the liability of his master can never arise."
 (underlining is mine)

The appeal was dismissed without any pronouncements being made on
 the other issues canvassed. The plaintiff has further appealed to this
 F Court on the only issue set out at the beginning of this judgment.

Both in the Appellant's brief and in oral arguments of plaintiff's
 learned counsel, it is submitted that it is unnecessary to sue a servant in
 negligence before making the master liable. It is contended that a master
 can be found liable in negligence with or without joining the servant. It is
 G learned counsel's submission that all that is required is that for the plain-
 tiff to succeed against the master he must establish the liability of the
 servant for the tort complained of. And this he can do with or without
 joining the servant in an action against the master, so submits learned
 H counsel. It is further contended that both the defendant and its driver are
 joint tort-feasors and being joint tort-feasors the plaintiff was at liberty to
 sue either or both. The following cases are cited in support: LENNARDS
CARRYING CO. LTD. V. ASIATIC PETROLEUM CO. LTD. (1914-15)

All ER 280 at 283; JAMES V. MIDMOTORS (1978) 11-12 SC. 31 at p. 39; BENSON V. OTUBOR (1975) NSCC (Vol. 9) p. 49 at pp. 51 & 54. It is submitted that CONSORTIUM STEEL PLANT ALADJA V. MRS. ANGELIKA AKINDEJOYE & ORS - CA/B/128/87 of 3rd Nov. 1989 (unreported) relied on by the Court below was wrongly decided and that ROSE V. PLENTY (1976) 1 All E.R. 99 also relied on by Court below is not apposite.

For the defendants, both in its brief and in oral arguments of its learned counsel, it is contended that in the light of paragraphs 5, 6 and 7 of the amended statement of defence, the presence of the driver of the defendant's vehicle became necessary. It is submitted that as a master is only liable vicariously for the tort of his servant where the liability of the servant has been established it follows that in the present case the liability of Mosudi Akanbi can only be established and determined when he is a party to the action. Learned counsel for the defendant supports the judgment of the Court below. He cites in support ROSE V. PLENTY (supra) and MANAGEMENT ENTERPRISES LTD. V. OTUSANYA (1987) 2 NWLR 179 and distinguishes BENSON V. OTUBOR (supra).

The general principle of law which has its roots in the earliest years of the common law is that a master is liable for any wrong even if it is a criminal offence or a tortious act committed by his servant while acting in the course of his employment. TURBERVILL V. STAMP (1697) 1 Ld. Raym. 264; DYER V. MUNDAY (1895) 1 QB 742. This is what is known as the doctrine of vicarious liability which is based on the principle of law enunciated by Sir John Holt CJ in HERN V. NICHOLS (c.1700), 1 Salk 289; - one of the earliest cases on the subject - wherein the Learned Chief Justice pronounced.

"Seeing somebody must be a loser by this deceit, it is more reason that he, that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger."

The doctrine means that one person takes the place of another so far as liability for the tort is concerned - see: LAUNCHBURY V. MORGANS (1971) 2 QB 243, 253. It is the relationship of master and servant that of itself gives rise to this liability and not the old

fiction that the master had impliedly commanded his servant to do what he did. A lot has been written over the centuries, both judicial and academic, on the basis for the doctrine of vicarious liability- see for example, KILBOY V. SOUTH-EASTERN FIRE AREA JOINT COMMITTEE, (1952) SC. 280,285. (Per Lord Cooper); STAVELEY IRON & CHEMICAL CO. LTD. V. JONES (1956) AC. 627, 643; LAUNGBURY V. MORGANS (1973) AC 127, at 135,140; Maitland in P & M Vol. (ii) at 533. Going by the judgments from Sir John Holt CJ in HERN V. NICHOLS (supra) to Lord Denning in NETTLESHIP V. WESTON (1971) 2 QB 691,700, it would appear that the doctrine is based on public policy or, as Lord Pearce put it in I.C.I LTD V. SHATWELL (1965) AC 656, 685 on "social convenience and rough justice". Viscount Dilhorn and Lord Pearson in LAUNGBURY V. MORGANS (supra) rationalized at p.140 that the phrase qui facit per alium, facit per se correctly expresses the principle on which vicarious liability is based. But see STAVELEY IRON & CHEMICAL CO. LTD. V. JONES (supra) per Lord Reid as to the qualified use of the latin maxim. On the authorities as a whole, the master is liable, though guilty of no fault himself.

The liability of the master is dependent on the plaintiff being able to establish the servant's liability for the tort and also that the servant was not only the master's servant but that he also acted in the course of his employment. The learned authors of Clerk & Lindsell on TORTS 14th edition, paragraph 237 at page 238 state the law thus:

"Liability of master for torts of servant. Where the relationship of master and servant exists, the master is liable for the torts of the servant so long only as they are committed in the course of the servant's employment. The nature of the tort is immaterial and the master is liable even where liability depends upon a specific state of mind and his own state of mind is innocent.

See also I.C.I. LTD. V. SHATWELL (supra) where Lord Pearce stated the law succinctly thus:

"Unless the servant is liable, the master is not liable for its acts; subject to this, that the master cannot take advantage of an immunity from suit conferred on the servant (BROOM V. MORGAN)."

It is not necessary for the purpose of this judgment to dwell into the question whether a wrongful act is done in the course of the servant's employment. For it is not disputed by the defendant in these proceedings that Mosudi Akanbi acted in the course of his employment when he was involved in the accident his vehicle had with the plaintiff's vehicle. **In summary, to succeed against a master the plaintiff must** B

- 1. establish the liability of the wrongdoer, and prove -*
 - 2. that the wrongdoer is a servant of the master and*
 - 3. that the wrongdoer acted in the course of his employment* C
- with the master.*

See YOUNG V. EDWARD BOX & CO. LTD. (1951) TLR 789; 793 where Denning L.J., said:

"In every case where it is sought to make a master liable for the conduct of his servant the first question is to see whether the servant was liable. If the answer is Yes, the second question is to see whether the employer must shoulder the servant's liability." D

The next point I need make is that **the master is answerable for every wrong of the servant as is committed in the course of his employment - see: JAMES V. MIDMOTORS (supra); HOULDSWORTH V. CITY OF GLASGOW BANK (1874-1880) ALL ER (Reprint) 333; (1880) 5 App Cas. 317.** Following from the above discourse I now come to the nature of the liability of the master vis-a-vis his servant. **The law regards both master and servant as joint tortfeasors - see: JONES V. MANCHESTER CORPORATION (1952) 2 QB 852 at p. 870** where Denning L.J. (as he then was) held: F

"In all these cases it is of importance to remember that when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant." G

Finnermore, J. in SEMTEX LTD. V. GLADSTONE (1954) 1 WLR 947 H at 949 expressed some reservation about this reasoning. See also TREACY V. ROBINSON & SON (1937) 1 R 255, 266. **Being joint tortfeasors, the person injured is at liberty to sue any one of them separately or**

may sue both jointly, their liability being joint and several. That their liability is joint and several is borne out by the case of BROOM V. MORGAN (1953) 1 QB 597 where the defendant, the licensee of a public-house employed both the plaintiff and her husband. The plaintiff was injured as a result of her husband's negligence committed in the course of his employment. She sued the employer, the licensee of the public-house. The Court of Appeal (England) held that she was entitled to hold the defendant vicariously responsible for her injury, even though she could not have sued her husband as the law then stood. That the person injured may sue any or both of the tortfeasors is also borne out by Section 14 of the Torts Law, Cap. 164, Vol. VI, Laws of Bendel State, 1976 applicable in the case on hand.

Both the trial Court and the Court below were of the view that as Mosudi Akanbi was not joined as a defendant in this case, the action as constituted was incompetent. They relied on some authorities the most important of which I shall now proceed to consider. It is MANAGEMENT ENTERPRISES LTD. & ANOR. V. OTUSANYA (supra), (1987) 4 SC. 367. In this case, there was a ghastly motor accident on the Benin-Ijebu-Ode road involving two vehicles travelling in opposite directions. One of the drivers, Dangana Musa died in the accident. The respondent in the appeal to this Court was a fare-paying passenger in one of the two vehicles. He was injured as a result of the accident and sued both the owners and the drivers of the two vehicles. In his pleadings, he blamed the two drivers for the accident which he attributed to the failure of the both drivers to give way, to steer clear or stop for each other; failure to exercise reasonable prudence in the circumstances; excessive speeding, plying the road with vehicles in unsafe and dangerous conditions and permitting their vehicles to get out of control. He also pleaded res ipsa loquitur. He pleaded in the alternative damages for breach by the defendants of Section 3(1) of the Motor Vehicles (Third Party Insurance) Act, Cap. 126, Laws of the Federation of Nigeria. Plaintiff in the course of proceedings withdrew the action against the owner and driver of the commercial vehicle in which he was travelling as passenger (that is, 3rd & 4th defendant) and the action proceeded against the 1st and 2nd defen-

dants (the owner and driver of the trailer vehicle). The 2nd defendant was the driver that died in the accident. Plaintiff did not, after withdrawing against 3rd and 4th defendants, amend his pleadings. The 1st and 2nd defendants in their statement of defence blamed the accident on the 4th defendant the driver of the commercial vehicle and denied liability under Section 3(1) of Cap. 126 and further pleaded, in respect of that claim, that it was statute-barred.

Oputa, JSC., who read the lead judgment of this Court put the issues arising in the case as being: (1) whose negligence caused the accident and (2) was there any breach by 1st and 2nd defendants of the statutory duty imposed by Section 3(1) of Cap. 126.

The trial court found that no admissible evidence was led in support of the alleged negligence against the two drivers and dismissed plaintiff's claims. On appeal to the Court of Appeal, the latter Court allowed the appeal and entered judgment for the plaintiff. On further appeal to this Court by the defendants, the incompetence of the action was raised for the first time. It is importance to set particulars of error complained of : They are:

"(a) The second defendant was not a juristic person because he was alive when the plaintiff/respondent instituted his action in 1972 under Suit HCJ/29/72 and no legal personal representative was appointed by the Court.

(b) The vicarious liability of the first defendant depended on the established liability of the second defendant.

(c) The service of the Writ of Summons in Suit HCJ/29/72 on the dead second defendant through the first defendant who was not appointed the legal personal representative of the second defendant, is void and all the proceedings of the trial court and those of the Court of Appeal are automatically void."

In the course of his consideration of the issue, Oputa, JSC., observed at pp. 387-388 of the second report:

" The Plaintiff's claim in the trial court was for damages for negligence. The negligence alleged was that of the 2nd defendant, Dangana Musa. The 1st Defendant/Company is the owner of the trailer

No.9801 driven by Dangana Musa on the 22nd April, 1969 - the day of the accident. The liability of the 1st defendant is not direct but consequential and vicarious . It rests on the successful action against the 2nd defendant." (underlining is mine)

B The learned trial Judge in this case on hand relied on the underlined portion of this passage in coming to his decision.

On the validity of service of the writ against the 2nd defendant on the 1st defendant, Oputa, JSC., held that the service was invalid and concluded at p.395:

C *"I hold that the Ijebu-Ode High Court lacked the necessary competence to carry on this case against the 2nd defendant. If then the trial court could not validly deliver any judgment against the 2nd defendant, and since the liability or otherwise of the 1st defendant depended wholly*
D *on a verdict against the 2nd defendant then the Court of Appeal was wrong in its judgment against the 1st defendant/appellant. My answer to Question No.1 for Determination is that the action against the 2nd defendant was a nullity not because he was dead when the Writ was issued,*
E *but because there was no application by the plaintiff for an order under Order 15, rule 6A/4 R.S.C. (England) for the Court to appoint someone else to carry on the action. The action was also and thereby a nullity because there was no proper service of the Writ against the 2nd defendant*
F *through his such representative appointed by order of Court." (underlining is mine)*

It is the underlined part of the passage above that the Court below, per Ogebe, JCA., relied on in arriving at its own conclusion which is being attacked in this appeal. I shall come back to this case later in this judgment.
G

The plaintiff has drawn our attention to JAMES V. MIDMOTORS (supra) where this Court considered the law of the liability of a principal for the act of his servant or agent. Aniagolu, JSC., who read the judgment of the Court observed at page 51 of the report:

"The general law has been stated that a corporation aggregate is liable to be sued for any tort provided that
(1) it is a tort in respect of which an action will be brought against

a private individual;

(2) the person by whom the tort is actually committed is acting within the scope of his authority and in the course of his employment as agent of the corporation; and

(3) the act complained of is not one which the corporation would not, in any circumstances, be authorized by its constitution to commit unless perhaps the corporation has expressly authorized the act. (See Volume 9, Halsbury's Law of England, 4th edition, paragraph 1374).

Among the acts for which a corporation can be held liable in tort is fraud. Not being a human person the corporation or company, of necessity, acts through human beings who are its agents or servants and the corporation or company, like every master, is liable for the fraud committed by its servant or agent in the course of its service."

It is interesting to observe that although the case was fought on the basis of the vicarious liability of a master for the tort (in the case, the tort of fraud) of his servant or agent, the servant or agent was never made a party to the case. This notwithstanding, this Court entered judgment against the master and in favour of the plaintiff. There are numerous other cases in the law reports both in this country and in other common law jurisdictions, where only the master was sued.

Coming now to the case on hand, the two Courts below held that the non-joinder in the action before them of Mosudi Akanbi, the defendant's driver was fatal to the plaintiff's action. Order 7, rule 10 of the High Court (Civil Procedure) Rules, Cap.65, Laws of Bendel State of Nigeria, 1976 (applicable at all times relevant to this case) provided:

"10. (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the parties may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

(2) The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as to the Court or a Judge may seem just order, that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants

who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions."

The effect of this rule has been determined by this Court in such cases as
 B PEENOK INVESTMENTS LTD. V. HOTEL PRESIDENTIAL LTD.
 (1982) 11-12 SC. 1; UKU V. OKUMAGBA (1974) 1 All NLR (Pt. 1) 475;
OKOYE V. NIGERIAN CONS. & FURNITURE CO. LTD. (1991) 5 LRCN
 1547; (1991) 6 NWLR 501; LAIBRU LTD. V. BUILDING & CIVIL
 C ENGINEERING CONTRACTORS (1962) 2 SCNLR 118; EKPERE V.
AFORIJE (1972) 1 All NLR (Pt.1) 220, (1972) ANLR 224. And that is
 that **no cause or matter shall be defeated by reason of the non-
 joinder of parties and the court may in every cause or matter deal
 with the matter in controversy so far as regards the rights and**
 D **interest of the parties actually before it. Failure to join as a party
 a person who ought to have been joined will not render the proceed-
 ings a nullity on ground of jurisdiction or competence of the court.**
 It is only where a person is a necessary party in the sense that that
 E **person is likely to be affected by the result of the action that his
 joinder becomes essential. For the court ought to have before it
 such parties as would enable it to "effectually and completely adju-
 dicate upon and settle all the questions" in the suit - see: UKU V.
 F OKUMAGBA (supra); PEENOK INVESTMENT LTD. V. HOTEL
PRESIDENTIAL LTD. (supra); PERFORMING RIGHTS SOCIETY
LTD. V. LONDON THEATRE OF VARIETIES LTD. (1924) AC. 1 at
 p.14 where Viscount Cave said:**

G *"Further, under Order XVI, r.11 [as it then was], no action can
 now be defeated by reason of the misjoinder or non-joinder of any party;
 but this does not mean that judgment can be obtained in the absence of a
 necessary party to the action, and the rule is satisfied by allowing parties
 to be added at any stage of a case."*

H See also: KUNSTLER V. KUNSTLER (1969) 2 All ER 673.

Can it be said that Mosudi Akanbi is a necessary party who is likely to be affected by the result of the action against the defendant? I rather think not. Nor do I think that his presence is nec-

essary in order to enable the Court "effectually and completely adjudicate upon and settle all the questions" in the action. I think the plaintiff could prove its case against the defendant without joining Mosudi Akanbi. It was for him to produce sufficient evidence to establish the liability of Mosudi Akanbi for the accident. It would be for the defendant to rebut the evidence for the plaintiff; thereby defeating its claim. If anything, it was the defendant who would need the presence of Mosudi Akanbi and ought to have moved the trial court to join him or call him as a witness. I cannot see how plaintiff's case could be defeated by the failure of the defendant to do so.

Looking at the question on hand from another angle, the master and his servant are joint tortfeasors. The learned authors of Salmond on the Law of Torts, 17th edition, paragraph 167 at page 442 define who are joint tortfeasors in these words:

"Persons are to be deemed joint tortfeasors within the meaning of this rule whenever they are responsible for the same tort - that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases - namely, agency, vicarious liability, and common action, i.e. where a tort is committed in the course of a common action, a joint act done in pursuance of a concerted purpose In order to be joint tortfeasors there must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage. The injuria as well as the damnum must be the same."

See also The Koursk (1924) P.140, 156,159. A master is always treated as a joint tort-feasor with the servant for whom he is vicariously liable - JONES V. MANCHESTER CORPORATION (supra); DOUGHERTY V. CHANDLER (1946) S.R. (N.S.W) 370, 375 where Jordan C.J. stated:

"If a number of persons jointly participate in the commission of a tort, each is responsible, jointly with each and all of the others, and also severally, for the whole amount of the damage caused by the tort, irrespective of the extent of his participation."

Being joint tortfeasors, therefore, a plaintiff is at liberty to

choose his victim; he may decide to sue either of the master and servant separately or both of them jointly -

See: Salmond on The Law of Torts at 443. Where he sues one of them separately and succeeds, this is not a bar to an action against the other who would if sued, have been liable as a joint tortfeasor in respect of the same damage. The question that may arise is as to contribution between the joint tort-feasors. And this question is taken care of by (in the present proceedings) Sections 14 & 15 of the Torts Law, Cap.164, Laws of Bendel State of Nigeria, 1976 which provide:

"14. Where damage is suffered by any person as a result of a tort (whether a crime or not) -

(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would if sued, have been liable as a joint tort-feasor in respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered or for the benefit of the estate or of the wife, husband, parent or child of that person, against tort-feasor liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgment given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

15. In any proceedings for contribution under this Part the amount

of the contributions recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity." B

I now return to MANAGEMENT ENTERPRISES V. OTUSANYA (supra) where Oputa, JSC., is reported to have said:

"The liability of the 1st defendant is not direct but consequential and vicarious. It rests on the successful action against the 2nd defendant I hold that the Ijebu-Ode High Court lacked the necessary competence to carry on this case against the 2nd defendant. If then the trial Court could not validly deliver any judgment against the 2nd defendant, and since the liability or otherwise of the 1st defendant depended wholly on a verdict against the 2nd defendant then the Court of Appeal was wrong in its judgment against the 1st Defendant/Appellant." C D

It is this passage that the two courts below relied on in holding that the plaintiff's failure to join the defendant's driver in the present proceedings was fatal to his case. **With profound respect to their Lordships of the two Courts below, I think they misconceived the true purport or meaning of the expressions - "successful action", "any judgment against the 2nd Defendant," "a verdict against the 2nd Defendant" used by the learned Justice of the Supreme Court in the passage. From the welter of authorities on the point - statutory, judicial and academic - some of which I have cited in this judgment - it is a finding of liability against the servant that results in the master's liability. In other words, in an action against the master the plaintiff, to succeed, must produce sufficient evidence from which the court makes a finding of fact to the effect that the servant is liable for the tort complained of. That is, the plaintiff must establish the liability of the servant in order to succeed against the master in an action.** E F G H

I believe that when Oputa, JSC., used those expressions in the passage in his judgment, he meant findings of fact of liability

against the servant (the purported 2nd Defendant in the case) must be made before there could be a successful action against the master (the 1st Defendant in the case). To suggest otherwise, would mean that this Court, per Oputa, JSC., was laying it down that in every case of vicarious liability, the servant must first be successfully sued before the action against the master or that both must be jointly sued and a verdict entered against the servant before the master could be held accountable for his servant's tort. Such would not only be absurd and lead to injustice but would also run against the grain of all authorities - both Nigerian and foreign - on the point. A person who has suffered damage as a result of the tort of the servant of a master would not be able to recover simply because the servant is dead or has absconded and disappeared into thin air. Such a situation would undoubtedly encourage a master to keep his servant out of the reach of the injured person. I do not think this Court meant to create such a state of injustice by its judgment in MANAGEMENT ENTERPRISES V. OTUSANYA, nor to alter the existing state of the law. It is interesting to note that the trial court, in that case found that the liability of the 2nd Defendant (the deceased driver) for the accident was not established.

The conclusion I reach is that MANAGEMENT ENTERPRISES V. OTUSANYA is no authority for the finding of law made by the two courts below. And as that finding is inconsistent with the existing law, I find no hesitation in concluding that it is wrong. Equally so, I must hold, and do hold, that the case CONSORTIUM STEEL PLANT ALADJA V. MRS. ANGELIKA AKINDEJOYE - CA/B/128/87 decided by the Court of Appeal on 3rd Nov. 1987 was wrongly decided. I, therefore, resolve the question put before us in plaintiff's favour and set aside the decisions of the two courts below on it.

This, conclusion, however, is not the end of this appeal. The learned trial Judge went into the merits of the case and after proper evaluation of the evidence before him found as a fact that negligence was not proved against Mosudi Akanbi. Nor were the damages claimed proved either. In the result he dismissed the suit on its merits. There was an appeal against

this part as well of the judgment of the trial court to the Court of Appeal but the latter Court made no pronouncements on that part of the appeal to it. The plaintiff did not appeal to this Court complaining against the refusal or failure of the Court below to give a verdict on its complaints against the trial court's findings of fact on the merits of the case. But the defendant is seeking in this appeal an order remitting the case to the Court of Appeal for the appeal to be considered on its merits. B

Before I proceed further I like to comment briefly on the course taken by the Court of Appeal in this case. Ogebe, JCA., in his lead judgment said: C

"The answer to the first issue is a capital YES. Since this issue disposes of this appeal, I shall not engage in an academic exercise in discussing the other issues."

This approach to the issues placed before the Court is, to say the least, D
unfortunate. The course taken, while permissible with the final Court of Appeal is not always the proper course for an intermediate court to take. **Unless in the clearest of cases, an intermediate court should endeavour to resolve all issues put before it.** There are decided cases of this Court which enjoin a trial court even where it has dismissed an action, to consider and pronounce on the quantum of damages to be awarded in the event of the plaintiff finally succeeding. In ODUNAYO V. THE STATE (1972) 8-9 S.C. 290 at 296, Sowemimo, JSC., (as he then was) F
delivering the judgment of this Court observed:

*"Although Mrs. Solanke's argument before the appeal Court, was on a different aspect from that raised by Mr. Adedeji, the learned counsel who defended the appellant at the Ado-Ekiti High Court, nothing was said in the judgment of the Appeal Court about the points she had raised. G
The result of this was that, on a further appeal before us, learned counsel had to address us on the decision of the High Court as 'Confirmed by the Western State Court of Appeal.' In a capital offence, there is the right of a further appeal from the decision of the Western State Court of Appeal H
to this Court. Such appeal should in normal circumstances be directed against the decision of the Western State Court of Appeal. As no reasons were given why they rejected the new points raised before them by Mrs.*

Solanke, this Court had to embark upon a consideration of the evidence and judgment of the court of trial on the basis that the judgment of that Court had been adopted by the Appeal Court. There must be, and there are a number of cases where it is most desirable, especially in the case of an intermediate Court of Appeal, that the final Court of Appeal, which is the Supreme Court of Nigeria, should have the benefit of the opinion of that Court on points raised before it, should it come up for further consideration by this Court. We did not have that benefit in this case and so we have had to have recourse to the evidence and judgment at the High Court."

Considering that this simple case of negligence commenced in March 1983, I think justice will be met if this Court rather than send the case back to the Court below for the resolution of issues (2) & (3) placed before it, exercise its powers under Section 22 of the Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria, 1990 and rehear the case on the printed record. After going through the evidence led at the trial and the arguments proffered in the briefs of the parties in the Court below, I am satisfied that the findings of fact made by the learned trial Judge on the merits of the case are adequately supported by the credible evidence before him. I have no reason to fault those findings. And in the light of those findings of fact, I am of the view that plaintiff's case was rightly dismissed.

Although the issue canvassed in this appeal is resolved in plaintiff's favour, this is of little comfort to the plaintiff. Having regard to the conclusion I have just reached, this appeal must be and is hereby dismissed by me. I make no order as to costs.

BELGORE JSC

This appeal is a costly adventure in that the fate of the suit had been decided at trial court on important findings of fact made against the plaintiff. The appeal before the Court of Appeal was based on narrow issue of joinder leaving out the vital and all-embracing issue of liability in negligence. In this Court the victory won on issue of non-joinder of the

servant is a pyrrhic one. I therefore agree with the conclusions in the judgment of my learned brother, Ogundare, JSC., that the case could be tried without the servant being joined in this case based on vicarious liability and that the plaintiff/appellant on the printed records to this Court never proved his case.

B

MOHAMMED JSC

I agree. No cause or matter shall be defeated by reason of misjoinder or non-joinder of parties, and the parties may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. See Order 7 Rule 10(1) of Bendel State High Court (Civil Procedure) Rules applicable to Edo State. The answer to the question; whether the failure to join the defendant's driver as a defendant where it was alleged that the master was vicariously liable is fatal to the Appellant's case shall therefore be in the negative.

The legal concept of vicarious liability requires three parties: the injured party, a person whose act or default caused the injury and a person vicariously liable for the latter's act or default. BOYLE V. KODAK (1969) 1 W.L.R. 661. There is no dispute over the fact that Mosudi Akanbi was a servant of Soleh Boneh (Nigeria) Limited (respondent in this appeal) and was driving the Company's vehicle when the accident occurred. Respondent is therefore vicariously liable for the negligence of Mosudi Akanbi if proved.

The issue in dispute is whether the respondent could be found liable when Mosudi Akanbi has not been made a party to the action. The court below held that the driver who is alleged to have caused the injury is a necessary party. If he is not joined as a party and his liability established there can be no question of finding the master liable vicariously. The Court of Appeal cannot be correct in this decision. By this finding it means that if the driver who caused the injury dies during the accident the injured party cannot claim against the master of the deceased driver.

In this case the claim filed by the appellant against Mosudi Akanbi

and the respondent has been made jointly and severally. Where a claim is brought jointly and severally against defendant it means that each party is responsible jointly with each other and also severally for the whole amount of damage caused by the tort irrespective of the extent of participation.

B See DOUGHERTY V. CHANDLER (1946) SR (N.S.W.) 370. Therefore a person injured may sue any one of them separately for the full amount of the loss; or he may sue all of them jointly in the same action, and in this latter case the judgment so obtained against all of them may be executed in full against any one of them.

C The 1st defendant, in this case, Mosudi Akanbi, jumped bail during the criminal trial against him. Since the appellant can sue any one of the tortfeasors for the loss caused to him he can proceed against the respondent. The Court of Appeal is therefore wrong to hold that the
D respondent could not be found liable when Mosudi Akanbi has not been made a party to the action.

However, it is clear from the evidence adduced before the trial court that the appellant had failed to prove its claim against the respondent at the trial High Court based on the negligence of Mosudi Akanbi. I therefore agree with my learned brother, Ogundare, J.S.C. in his judgment that the appellant's claim was rightly dismissed by the High Court. For the reasons I have given above and the fuller reasons in the lead
F judgment, I allow the appeal against the judgment of the Court of Appeal and set aside that judgment. I however restore the judgment of the High Court in which the claim of the appellant was dismissed. Parties to bear own costs.

G

ONU JSC

I have been privileged to read in draft form the judgment of my learned brother, Ogundare, J.S.C just read. I am in entire agreement with
H him that the appeal lacks substance and therefore fails.

In expatiating on the case, I wish to observe as follows:-

In his writ of summons brought in the High Court at Abudu, Edo State on 22nd March, 1983, the Appellant as plaintiff sued the then two

defendants, but later only against the 2nd defendant (now respondent) as follows:-

"The plaintiff claims against the defendants jointly and severally the sum of N64,521 (Sixty four thousand, five hundred and twenty one Naira) being special and general damages suffered by the plaintiff on 29th day of May, 1981 at Abudu Judicial Division when the first named defendant the servant or agent of the second named defendant in the course of his employment so negligently drove managed and controlled a motor-vehicle Registration number OY 9065 AD a trailer, the property of the second-named defendant along Benin-Abudu Road, Abudu; that he caused or permitted the same violently to collide with the Plaintiff's vehicle a coach registration number IM 1673 G which was being driven along the same road in the opposite direction."

The suit was against one Mosudi Akanbi and the respondent for negligence. By an Amended Statement of Claim dated 26th may, 1986, the Appellant dropped Mosudi Akandi as 1st Defendant in the case and proceeded against the Respondent alone, finding it ostensibly difficult to have service effected on the former. The case as transpired, was later transferred from Abudu Judicial Division (Coram Akhigbe, J.) to Benin Judicial Division where Ohiwerei, J. upon the completion of amended pleadings, heard the evidence of witnesses for both sides and after the addresses of Counsel, dismissed the Appellant's Claim in its entirety founded upon, the following reasons among others:-

"Applying the principle in the above mentioned case (to wit: MANAGEMENT ENTERPRISES LTD. V. OTUSANYA (1987) 2 NWLR (Pt.55) 179 supra) I hold that Mosudi Akanbi not being a party in this case I cannot pronounce any verdict against him for which the Defendant Company can be held vicariously liable. On this ground the Plaintiff's action cannot succeed."

.....I agree with Mr. Okonjo that there is no nexus between IM 1673 G and Exhibits "B, C,D,E,F,G, & H." The said Exhibits are not unequivocally referable to IM 1673 G

Mr. Okonjo, relying on MANAGEMENT ENTERPRISES LTD. case, (supra), submitted that Res Ipsa Loquitur doctrine pleaded by the Plain-

tiff is inapplicable. In the same case too the Supreme Court at page 191 stated as follows:-

"In Relying on res ipsa loquitur, a Plaintiff merely proves the resultant accident and injury and then asks the court to infer therefrom negligence on the part of the Defendant. The doctrine will not apply where:-

(i) the facts proved are equally consistent with accident as with negligence;

C (ii) there is evidence of how the accident happened and the difficulty (as in this case) arise (sic) merely from an inability to apportion blame between two negligence drivers.

If there is evidence of how the occurrence took place there an appeal (sic) to res ipsa loquitur is misconceived and inappropriate. There again the question of the Defendant's negligence must be determined on the available evidence. In other words, the doctrine of "Res ipsa loquitur" is not meant to supplement inconclusive evidence of negligence on the part of Plaintiff. Rather, it is meant to apply where there is no other proof of negligence than the accident itself.

It is clear from the above that the Plaintiff, in the instant case, having tendered evidence of negligence on the part of the driver of OY 9065 AD cannot rely on the doctrine of Res Ipsa Loquitur to sustain his claim." (underlining and parenthesis supplied by me).

Being dissatisfied with the said decision of the trial court, the Appellant appealed to the Court below where the three issues submitted as arising for determination are:-

G "1. Whether failure to join the Respondent's driver as a Defendant in this action against his master where it is alleged that the master is vicariously liable is fatal to the Appellant's case.

2. Whether having regard to the evidence adduced by both parties the learned trial Judge was right to dismiss the Appellant's Claim.

H 3. Whether an Appellate Court seised of the matter is competent to evaluate the whole evidence and award damages claimed in the Lower Court."

I have set down the above three issues by the Appellant for determination

in the Court below as opposed to the lone issue proposed by them in this Court as arising and to which I will soon come because it is, in my respectful opinion, restrictive and inadequate to effectually dispose of this straight forward and simple case of negligence when it asks:-

"Whether the failure to join the Defendant's driver as a Defendant, where it is alleged that the master is vicariously liable, is fatal to the Appellant's case."

By casting one's mind back to the three earlier issues, they will in my view, be of assistance as guide for the final and better resolution of the matter at stake in this appeal, having regard to the lone deficient issue hereof. In adopting the three issues, I think I am in order having regard to this Court's decision in LAWRENCE ADEBOLA OREDUYIN & ORS. V. CHIEF AKALAA ROWOLO (1989) 4 NWLR (Pt.114) 172 at page 211 paragraphs E-F (per Oputa, JSC.), by citing therefrom the following passage:-

"An appeal is not the inception of a new case. No, far from that. An appeal is generally regarded as a continuation of the original suit rather than an inception of a new action. That being so, an appeal should normally and generally be confined to consideration of the record which came from the Court below with no new testimony taken or new issues raised in the Appellate Court. This is the broad view of an appeal. An appeal to the Court of Appeal should be a complaint against the decision of the trial court An appeal is an invitation to a Higher Court to find out whether on proper consideration of the facts placed before it and the applicable law, that Court arrived at a correct decision....." See also THOMAS V. THOMAS (1947) A.C. 484 at 487; FATOYINBO V. WILLIAMS (1956) 1 FSC. 8 and AKIBU V. OPALEYE (1974) 1 All NLR 344 at 356.

In their unanimous decision, the Court below (Ogebe, J.C.A. writing the leading judgment) held inter alia as follows:-

"From all these authorities which I respectfully follow, it is clear that in an action for negligence as in the present case, if the principal actor (the offending driver) is not joined as a party and his liability established there can be no question of finding the master liable vicari-

ously. In other words, once the driver is not joined in the action, the action is incompetent ab initio and a trial court should not waste its time going into the merits of the case." (Underlining is mine for emphasis).

Akpabio, J.C.A. in his concurring judgment on the other hand, held as follows:-

"I think that it must be repeated for emphasis that regardless of how gross the negligence of a driver might be, the liability of his master, which is vicarious, cannot arise unless and until the liability of the servant (the principal tortfeasor) who had driven the vehicle has been established in the Court. The same goes for any Insurance Company who may have underwritten the liability. In the instant case, since the driver was never made a party to the suit, the liability of his master can never arise." (underlining is also supplied by me for emphasis).

I will now proceed with the consideration of the issues commencing with Issue No. 1 which asks:-

"1. Whether failure to join the respondent's driver as a Defendant in this action against his master where it is alleged that the master is vicariously liable is fatal to the Appellant's case?"

In answering this question, the learned Counsel for the Appellant relied on the authority of LEONARD'S CARRYING CO. LTD V. ASIATIC PETROLEUM CO. (1914-15) All E.R. 280 to the effect that an action can succeed without making the employee a party (in the instant case, Mosudi Akanbi, the Respondent's driver).

Reliance was also placed on AYODELE JAMES V. MID-MOTORS (1978) 11-12 S.C 31 at 68, where the principle of law set out by Aniagolu, J.S.C. is as follows:-

"The evidence by which the act is to be proved against the Company will be the conduct of the agent or servant." (Underlining above is supplied by me).

It was the Appellant's further submission that if the servant and his master (or principal) are joint tortfeasors, the Appellant may at his option sue the servant or the master or both. Heavy reliance was also placed on the case of BENSON V. OTUBOR (1975)3 S.C. 9 and (1975) NSCC 49 at 51. The contention is supported by the provisions of Order 7, Rule 4 of

the Defunct Bendel State High Court (Civil Procedure) Rules which were then in operation and which provided thus:-

"All persons may be joined as Defendants against whom the right to any relief is alleged to exist, whether jointly or severally or in the alternative; and any judgment may be given against such one or more of the Defendants as may be found to be liable according to their respective liabilities."

In BENSON V. OTUBOR (supra), the Plaintiff there claimed against the Defendant in the sum of #750 as special and general damages suffered by him in a motor accident on the Carter Bridge, Lagos, as a result of the negligence driving of the Defendant's driver in the course of his employment. The Plaintiff alleged that, immediately after the accident, the Defendant's driver came down and apologized to him saying that, being a stranger to Lagos, he was not aware that he should not be driving in the third lane from Lagos facing Ebute-Metta. The driver also gave him particulars of his Insurance Company and of his employer, the Defendant in that case. When the Plaintiff wrote to the Defendant, the latter asked him, to get in touch with his Insurance Company for settlement. Later, when the plaintiff obtained no satisfaction from the Defendant, he brought an action against the defendant, who then denied any knowledge of the driver as his employee. On appeal to the Supreme Court; it was held inter alia:-

(1) That as the Defendant had impliedly accepted liability for his driver in the letter he wrote and signed to the Plaintiff asking the latter to obtain settlement from the Insurance Company, he should not be allowed later to deny knowledge of the driver and thereby repudiate responsibility for his negligence;

(2) That the Defendant should not be allowed to deny the negligence of his driver in the special circumstance of the case, but should be regarded as being vicariously liable for the tort of his servant at the material time.

Be it noted that persons are said to be joint tortfeasors when their separate shares in the commission of the tort are done in furtherance of a common design. See The Koursk (1924) P.140 per Bankes L.J. citing

Clerk & Lindsell on Torts, 7th Edition, P.59, where it was held that where the master and servant are joint tortfeasors, it is settled that the release of one joint tortfeasor from liability operates as the release of the other. See also CUTLAR V. PHILL (1962) 2 Q.B. 292; OGUNSAN V. IWUAGU B (1968) 2 All NLR. 124 at 128 and DUCK V. MAYER (1899) 2 Q.B. 511 at 513 (per A.L. Smith, L.J.)

C It is the law that although two or more tortfeasors may be joined as co-defendants in an action, only one sum can be awarded as damages and the sum must accordingly be the lowest sum for which any individual Defendant can be held liable. See CASSEL & CO. V. BROOME (1972) 1 All E.R 801 and CHUKUKA OSSAINWABUEKEI V. FRANCIS IWENJIWE & ORS. (1978) 2 S.C. 61; ALHAJI V. EGBE (1986) 1 NWLR (Pt.16) 364 and AIYETAN V. NIFOR (1987) 3 NWLR (Pt. 59) 148. D Regarding the necessity to examine the capacity of a corporation to be sued, the learned author of Salmond on the Law of Torts, 13th Edition, page 70 had this to say:-

E "Inasmuch as a corporation is a fictitious person, distinct in law from its members, it is not capable of acting in propria persona but acts only through its agents or servants All the acts, and therefore all the wrongful acts of a body corporate are in fact, the acts of its agents or servants though imputed in law to the corporation itself. The liability F of a body corporate is therefore in all cases a vicarious liability for the acts of other persons It is now well settled, however, that the liability of a corporation for the torts committed by its agents or servants is governed by the same rules as those which determine the liability of any other principal or employer."

G The author's view quoted above were precisely what the Court in the case of Ayodele James (supra) decided vide page 68 of the Report. Rule 10(1) of Order 7 of the Defunct Bendel State High Court (Civil Procedure) Rules further provided as follows:-

H "No cause or matter shall be defeated by reason of misjoinder or non-joinder of parties, and the parties may in every cause or matter deal with the matter in controversy so far as regards the rights and the interests of the parties actually before it."

What then one may ask, was the matter in controversy before the trial Court and what were the rights and interests of the parties before the Court? The answers to these questions can be found in the Amended Statement of Claim (pages 15-19) of the Record especially at paragraphs 5,6 and 10 thereof as in the Amended Statement of Defence (at pages 20-24) especially in paragraphs 4,5,6,7 and 9 thereof. The matter set out above vide paragraph 2 (supra) the controversy as the pleadings disclosed and the case was fought by both parties before the Court on the basis that the Respondent was being charged vicariously for the negligent driving of its vehicle by its named servant, Mosudi Akanbi, who was not a party before the Court. Ogebe, J.C.A. in his leading judgment gave "a Capital Yes" answer, which with utmost due respect, was the same issue 1 in the Court below as well as in this court for determination without adequately considering the case in Ayodele James (supra) where Anigolu, J.S.C. said, rightly in my view, that:-

"Where a company is said to have done an act by the very fact of a company not being a human being, it can only do the act through its human agents or servants: Where the agent or servant has committed an act, the company may rightly be said to have committed the act since in law, by the principle of vicarious responsibility the act of the agent or servant is the act of the company. The evidence by which the act is to be proved against the company will be the conduct of the agent or the servant. In this regard, there does not appear to be clearly discernible difference, in terms of a corporation's liability between the two classifications submitted by Chief Williams. Whether it is stated that the Corporation itself did the act which constituted the action through its agents or that the act or omission was done by a servant of the Corporation in the course of his employment and therefore the corporation was vicariously liable for the tort, amounts practically to the same thing, for, in each case, the corporation is being charged with liability vicariously. What a plaintiff has to make sure about (and this must be make clear in the pleadings is whether he is holding the servant or agent personally liable or the corporation liable vicariously. Ideally, the pleading should indicate that the company is being charged with liability vicariously by the

act of its named agent or servant." (underlining is mine).

It was next the Appellant's submission that from the pleadings it was clear that the Respondent was being charged with liability vicariously, adding that the Amended Statement of Defence which met the Appellant's averments on the basis that the Respondent was being charged with vicarious liability, he was not thereby taken by surprise by being vicariously liable to the Appellant for the negligent driving of its servant, Mosudi Akanbi. It was further contended that having regard to the provisions of Order 7 Rule 10(1) quoted above, non-joinder of the offending driver will not be fatal to the Appellant's case citing in support thereof the cases of PEENOCK INVESTMENT LTD. V. HOTEL PRESIDENTIAL (1982) 12 S.C. 1 at 21-24. and 35-40; LAIBRU LTD. V. BUILDING & CIVIL ENGINEERING CONTRACTOR (1962) 2 S.C. NLR 118 EKPERE V. AFORIJE (1972) 1 ANLR (Pt. 1)220; OKOYE V. N.C.F.C. LTD. (1991) 5 LRCN 1547; (1991) 6 NWLR (Pt.199) at pages 529-530.

Relying on this Court's decision in MANAGEMENT ENTERPRISES LTD. V. OTUSANYA (supra) they held at page 395 particularly at page 398 of the Report as follows:-

" If then the trial Court could not validly deliver any judgment against the 2nd Defendant, and since the liability or otherwise of 1st Defendant depended wholly on a verdict against the 2nd Defendant, then the Court of Appeal was wrong in its judgment against the 1st Defendant/Appellant."

I respectfully agree with learned Counsel for the Respondent to the effect that their Lordships wholly misconceived the purport of the judgment, it was clearly a case of misjoinder of parties to have sued a non-juristic person along with his master and service effected through the master. The trial Ijebu-Ode High Court was accordingly presiding over a case where one of the parties being a non-juristic person and having died at the scene of the accident, could incur no liability. Infact, the Ijebu-Ode High Court, was by its act presiding over a case where one of the parties, being a non-juristic person, lacked capacity to sue or be sued, thus rendering the whole proceedings a nullity. In this regard, Oputa, J.S.C at page 389 of the Report held as follows:-

"Was the Ijebu-Ode High Court competent to entertain the alleged action against the 2nd Defendant? Was the case against the 2nd Defendant initiated by due process of the law? Was the 2nd Defendant a legal person, a juristic person who could be sued? If proceedings in HCJ/29/72 will be a nullity and it does no matter how well conducted and how well decided that suit was: MADUKOLU & ORS. V. NKEMDILIM (1962) 1 ANLR, 587 at 595. If Suit HCJ/29/72 is a nullity vis-a vis the 2nd Defendant then the vicarious liability of the 1st Defendant will not arise." His Lordship continued at page 390:-

"Now the real problem is - can the Plaintiff sue a dead Defendant Dangana Musa? The Common Law view was that dead men are no longer legal personae as they laid down their legal personality at death. Thus, being destitute of rights, duties or interests they can neither sue or (sic) be sued."

And at page 391 of the report His Lordship concluded:-

"If there is no 2nd Defendant, there can hardly exist any question in controversy between the Plaintiff/Respondent. Jonathan Otusanya and the 2nd Defendant."

From the legal propositions spun out hereinbefore in the two extracts in the leading and concurring judgments (supra) set out above, what has emerged is that unless the liability of the principal actor or tortfeasor i.e. that of Mosudi Akanbi, unless established, the joinder of his master i.e the Respondent in this action would be of no avail. But one may ask, is this the true statement of the law in Nigeria? As I said earlier on in this judgment, I think not. It is in this wise that I hold that the conclusions arrived at by the learned Justices of the Court below were wrong for the following reasons:-

It is trite law that allegation of the precise breach of the duty owed must be made in the pleading. In other words, particulars must always be given in the pleading showing precisely in what respect, the Defendant was negligent. See EDOK-ETER MANDILAS LTD. V. ALE (1985) 3 NWLR (Pt.11) 43; EMUDJE V. AWAJENE (1975) 9-11 S.C. 115 at 166 and Bullen and Leake and Jacobs Precedents of Pleadings, 12th Edition, page 685. Indeed, persons are said to be joint tortfeasors when

their separate shares in the commission of the tort are done in furtherance of a common design. See The Koursk (1924) P.140 per Bankes L.J. citing Clerk & Lindsell on Torts, 7th Edition, P.59 in support thereof.

In HEWITT V. BONVIT & ANOR (1940) 1 K.B. 188, a son had obtained from his mother, who had authority to grant it, permission to drive his father's car. The son wanted the car for his own purposes in order to drive two girl friends home. The girl friends were not known to the parents and it was no concern of either of the parents that the girls should be driven back home. On the way back, through his negligence, the car was overturned and a road accident occurred in which a friend who had accompanied the party was killed. The administrator of the estate of the deceased man took action against the father, the owner of the car. It was held on appeal, that the son was not driving the car as his father's servant or agent or for his father's purpose and that therefore the father was not liable for his negligence. In the course of his judgment in the Court of Appeal, du Parcq, L.J. stated at Page 194 of the report thus:-

"The Appellant was admittedly the owner of the car, and the son's negligence has been established. The question in dispute is whether the evidence proved that the son was driving in circumstances as to make the Appellant liable for the consequences of his negligence..... The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority express or implied, to drive on the owner's behalf such liability depends not on ownership but on the delegation of a task or duty." (Underlining above is mine for emphasis).

In the case on hand, liability against the Respondent was not established and so the Appellant's case against the Respondent failed not because of Appellant's failure to join Mosudi Akanbi per se in the action and so rendered the Respondent vicariously liable to the Appellant, but because the latter's case against the respondent had not been proved on the balance of probabilities. It is little wonder then that, after due consideration of the facts of the case before him, the learned trial Judge, rightly in my view, said inter alia as follows:-

"The driver of the bus is an interested party whose uncorroborated

evidence must be taken with a grain of salt. I therefore hold that even if the driver of the trailer were a party to this action the plaintiff would have failed to prove any negligence against him.

I agree with Mr. Okonjo that there is no nexus between IM 1673 G and Exhibits "B, C,D,E,F, & H,. The said Exhibits are not unequivocally referable to IM 1673 G. Mr. Okonjo, replying on MANAGEMENT ENTERPRISES LIMITED case, (supra) submitted that Res Ipsa Loquitur doctrine pleaded by the Plaintiff is inapplicable to the Plaintiff's action. Mr. Esekody relying on cases who (sic) do not supply appropriate answer to Mr. Okonjo's submission, says that res ipsa loquitur is applicable."

As I have demonstrated hereinbefore, the Court below, especially as Ogebe and Akpabio, JJ.C.A., predicated their decision on the non-joinder of the driver of one of the vehicles, Mosudi Akanbi. With due respect, I do not agree with them. This is more glaring as some rules of court I have considered hereinbefore clearly show that misjoinder or non-joinder of parties (whether as tortfeasors or not -See THANK BROTHERS LTD. V. LANDED PROPERTIES LTD. & ANOR. (1962) 2 All E NLR 22), do not necessarily defeat such cases of negligence. There was thus a complete misconception by the Court below of the principles established in the case of CONSORTIUM STEEL PLANT ALADJA V. MRS. ANGELIKA AKINDEJOYE, Case No. CA/B/128/87 of 3/7/89. On the authority of decided cases, it is now settled beyond doubt that the driver or servant need not be sued along with the master.

It is worthy of note that an action in negligence will not necessarily fail because the servant or driver dies in the course of his duty. However, the following requirements need be proved for a cause of action in negligence to be complete or ripe, viz:-

- (i) that the servant was negligent.
- (ii) that he was the servant of the master.
- (iii) that he acted in the course of his duty.

In the instant case, as the driver, Mosudi Akandi, was withdrawn from the suit and the Appellant had failed to established the Respondent's liability, his case failed.

Issue 1 is accordingly answered in the positive. As my answers to Issues 2 & 3 are bound to be purely academic or subsumed in Issue 1 already given full consideration in my judgment above, I will decline to say more on them.

B Be that as it may, much as I am of the firm view that for the peculiar circumstances of this case Mosudi Akanbi is not (and would not be a necessary party) (see GREEN V. GREEN (1987) 3 NWLR (Pt.61) 480) for the effectual adjudication of matters in difference between the parties to this action, he having been initially joined to the Respondent as joint tortfeasor, albeit withdrawn before trial was embarked upon
C In this wise, I can neither visualize his playing a second role by being called to enhance the Appellant's case nor would the Respondent, in my view, consider it its duty to do so for the purpose of defeating the Appellant's claim. It is unthinkable for the Appellant's case to be defeated by his failure to join the Respondent's servant (his driver) to testify, the law being indisputable that once a servant is found liable in negligence while performing his master's duty, the master is ipso facto liable.

E A word about damages. By a long line of authorities this Court has laid down that, should a Plaintiff's case be dismissed by the trial Court a notional sum should be awarded for the assistance of the Appeal Court which may or may not affirm the decision thereon. See BELLO V. DI-OCESAN SYNOD OF LAGOS (1973) 3 S.C.103; (1973) 1 All NLR 247.
F The trial Court and the Court of Appeal in the instant case failed to award such damages and in that regard flouted the direction of this Court. However, since the Appellant lost in both courts below, no more will be said on the dereliction.

G From the foregoing, the principles stated by Ayodele James (supra) remain the position of the law which is binding on the Court below and they are in no way affected by the Otusanya Case (supra) which was decided on its peculiar facts. For similar but distinguishable reasons, the case of CONSORTIUM STEEL PLANT ALADJA V. MRS. ANGELIKA AKINDEJOYE (supra) was wrongly decided in my view.

H It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother, Ogundare, JSC., that I, too,

dismiss this appeal and make no order for costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree entirely with the reasoning and conclusions therein.

The plaintiff's claim against the defendant as endorsed in the writ of summons is as follows:-

"The plaintiff claims against the defendants jointly and severally the sum of N64,521.00 (Sixty four thousand, five hundred and twenty one Naira) being special and general damages suffered by the plaintiff on 29th day of May, 1981 at Abudu in the Abudu Judicial Division when the first named defendant, the servant or agent of the second-named defendant, in the course of his employment so negligently drove, managed and controlled a motor vehicle Registration number OY 9065 AD, a Trailer, the property of the second-named defendant along Benin/Abudu Road, Abudu that he caused or permitted the same violently to collide with the plaintiff's vehicle, a coach registration number IM 1673 G which was being driven along the same road in the opposite direction."

It is apparent that two defendants were originally sued in the motion. However, the plaintiff, before the commencement of the actual hearing of the suit, applied and obtained the leave of court to withdraw its claims against the 1st defendant who was described as the driver, servant, agent and /or employee of the 2nd defendant at all material times.

At the close of pleadings, the case proceeded to trial and both counsel subsequently addressed the court.

The main submission of learned counsel for the defendant was that the plaintiff's action was not properly constituted or maintainable without the joinder of the driver of the defendant's Trailer number OY 9065 AD. His contention was that from the moment the plaintiff discontinued the claims against the 1st defendant, its action became incompetent as the court under such circumstance became unable to determine the question of the vicarious liability of the defendant which ought other-

wise to have arisen for consideration in the suit. It was further argued that at all events the plaintiff had failed to establish any case of negligence and/or consequential damages against the defendant.

B For the plaintiff, it was contended that the issue of negligence involved in the suit could be determined effectually and completely without proceeding against the driver of the defendant. It was submitted that a case of negligence was established on the evidence against the defendant.

C In upholding the submission of learned counsel for the defendant, the trial court observed:-

"I must say that I agree entirely with Mr. Okonjo that Mosudi Akande is a necessary party whose non-joinder is fatal to the plaintiff's case."

D It went on:-

".....I hold that Mosudi Akandi not being a party in this case I cannot pronounce any verdict against him for which the defendant company can be held vicariously liable. On this ground the plaintiff's action cannot succeed."

The learned trial Judge then went into the question of damages for negligence and was of the view that this was not established either. Said he:-

F *".....The time given by Mr. Okoli suggests very strongly that he was not an eye witness of the collision and that he was never present at the scene. The driver of the bus is an interested party whose uncorroborated evidence must be taken with a grain of salt. I therefore hold that even if the driver of the trailer were a party to this action the plaintiff would have failed to prove any negligence against him."*

G Dissatisfied with this judgment of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Benin City Division which court in a unanimous decision the appeal. Dealing with the issues for determination as framed by the parties, the Court of Appeal per the H leading judgment of Ogebe, J.C.A. with which Akpabio, J.C.A., as he then was, concurred observed thus:-

"In my view, the only issue that disposes of this appeal is whether the failure to join the defendant's driver as a defendant in this action

where it is alleged that the master is vicariously liable is fatal to the appellant's case. It is the first issue raised in both briefs."

It then decided as follows:-

".....It is clear that in an action for negligence as in the present case, if the principal actor (the offending driver) is not joined as a party B and his liability established, there can be no question of finding the master liable vicariously. In other words, once the driver is not joined in the action, the action is incompetent ab initio and a trial court should not waste its time going into the merits of the case."

It concluded:-

"The answer to the first issue is a capital YES. Since this issue disposes of this appeal, I shall not engage in an academic exercise in discussing the other issues. In the result, I find no merit in this appeal D and hereby dismiss it. I affirm the decision of the trial court."

Aggrieved by this decision of the Court of Appeal, the plaintiff has further appealed to this court. I shall hereinafter refer to the plaintiff and the defendant in this judgment as the appellant and the respondent respectively. E

Before us, the lone issue canvassed was whether the Court of Appeal was right by holding that failure to join the respondent's driver as a defendant in the present action is fatal to the appellant's suit.

Learned counsel for the appellant, Mr. A O. Okeaya-Inneh, in his F submissions contended that the Court of Appeal fell into a serious error in its finding to the effect that failure to join the respondent's driver in the present case is fatal to the proceedings. Citing the decisions in LENNARDS CARRYING CO. LTD. V. ASIATIC PETROLEUM CO. LTD. (1914) All E.R. 380 at 383, JAMES V. MID-MOTORS LTD. (1978) 11-12 S.C 31 G at 39 and BENSON V. OTUBOR (1975) 9 N.S.C.C. 49 at 51, he submitted that a servant, in the present case the driver of the respondent, needs not be joined in this action before his master, the said respondent may be held liable. He argued that a master and servant being joint tortfeasors, it H is permissible in law to sue any or both of them. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. A.O. Alegeh, relying on

the decision of this court in MANAGEMENT ENTERPRISES LTD. V. OTUSANYA (1987) 2 NWLR (Pt.55) 179 argued that in-as-much-as the claim against the respondent is not one of direct liability but merely vicarious, such vicarious liability of a master can only arise where the liability of the servant has been established. He submitted that the liability of the respondent's driver, in any case, can only be determined or established where and only when he is joined as a party to the action. Not having been joined in the present action, the driver's liability and consequently that of his master, the respondent, was therefore not an issue for determination by the trial court. In his view, the trial court was perfectly in order when it refrained from pronouncing any verdict against the said driver since he was not a party before the court. Learned counsel finally submitted that at all events, the finding of the trial court that no evidence of negligence was established by the appellant in the case rendered the entire appeal an academic exercise. He therefore urged the court to dismiss the appeal.

The principle of law is more than firmly established that where the relationship of master and servant is established, the master is vicariously liable for the negligent act or the tort of the servant so long only as it is committed in the course of the servant's employment. See BROOM V. MORGAN (1953) 1 Q.B. 597 at 612 per Hodson, L.J. in other words, it is not sufficient to show that the relationship of master and servant existed between the actual tortfeasor and the person sought to be made vicariously liable, the act must be shown to have been performed while the servant was acting within the scope of his employment. Unless this is established, any action against the master is bound to fail. In this regard, it must be emphasized that the nature of the negligent act or tort complained of is immaterial and the master will still be liable vicariously for the tort of his servant committed in the course of his employment even where liability depends upon a specific or given state of mind and it is established that his own state of mind at all material times is innocent. If, however, the servant is not liable, the vicarious liability of the act or omission complained of cannot arise whatever his own personal liability may be.

In determining whether or not the appellant's present action is incompetent, improperly constituted and not maintainable without the joinder of the appellant's driver, as both courts below propounded, it may be desirable to examine briefly the nature of a master's liability in this class of cases. This without doubt, has provoked definite controversy. B
The question in dispute is whether a master whose liability in damages is occasioned by the negligence of his servant in the course of his employment is liable per se on ground of the commission of the tort by his servant or whether his liability stems from the fact that he himself is in C
breach of a duty which he personally owes to the injured party.

The latter approach was the view of Denning, L.J. in BROOM V. MORGAN (supra) at 609 when he made bold to pronounce as follows-

"The masters liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to see that the work is properly and carefully done." (Underlining D
supplied for emphasis).

However, in STAVELEY IRON & CHEMICAL CO. V. JONES (1956) A.C. 627, the House of Lords unanimously rejected this view of Denning, L.J. and held that if a master is vicariously liable, it must be upon E
the ground that the servant has committed a tort in the course of his employment. See too IMPERIAL CHEMICAL INDUSTRIES LTD V. SHATWHEEL (1965) A.C. 656 at 670 (H.L.) Indeed in STAVELEY IRON F
& CHEMICAL CO. V. JONES, (supra) at 643, the House of Lords per Lord Reid put the matter most succinctly in the following term -

"It is a rule of law that an employer, though guilty of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment." G

Reference must also be made to the decision in AYODELE JAMES V. MID-MOTORS (NIGERIA) CO. LTD (1978) 11 & 12 S.C. 31 where this court per the leading judgment of Aniagolu, J.S.C. made the clearest H
possible exposition of the principle under consideration as follows-

"Where a company is said to have done an act, by the very fact of a company not being a human being, it can only do the act through its human agents or servants. Where the said agent or servant has commit-

ted an act, the company may rightly be said to have committed the act since in law, by the principle of vicarious responsibility, the act of the agent or servant is the act of the company. The evidence by which the act is to be proved against the company will be the conduct of the agent or
 B *the servant. In this regard, there does not appear to be clearly discernible difference, in terms of a corporation's liability, between the two classifications submitted by Chief Williams. Whether it is stated that the corporation itself did the act which constituted the action through its agents or*
 C *that the act or omission was done by a servant of the corporation in the course of his employment and therefore the corporation was vicariously liable for the tort, amounts practically to the same thing. For, in each case, the corporation is being charged with liability vicariously. What a*
 D *plaintiff has to make sure about (and this must be made clear in the pleadings) is whether he is holding the servant or agent personally liable or the corporation liable vicariously. Ideally, in order not to appear to take the company by surprise, the pleading should indicate that the company is being charged with liability vicariously by the act of its named*
 E *agent or servant."*

Accordingly, a master, which in an appropriate case may include a company or a corporation is liable for the tort, negligence or wrongful act of its servant or agent so long as the same is committed in the course
 F of his employment, namely, the authorized master's business or the master's business which he was held out as authorized.

It is crystal clear from the case on hand that the respondent was being charged with liability vicariously for the tort of its servant in the course of his employment. The respondent, on the other hand, fought
 G the issue on the basis that it was not vicariously liable to the appellant for the negligent driving of the driver of its trailer. There was clearly no question of the respondent having been taken by surprise in respect of the real issue before the court.

H The term, vicarious liability has, rightly in my view, been defined to mean the case of one person taking the place of another in so far as liability is concerned. See LAUCHBURY V. MORGANS (1971) 2 Q.B. 245 at 252. Accordingly, in motor traffic cases, the driver of the offend-

ing vehicle may be sued together with the owner of the vehicle if it can be established that the driver was at the material time driving the vehicle in the course of and within the scope of his employment. See WILLIAM IKO V. JOHN HOLT & CO. LTD. & ANOR. (1957) 2 F.S.C. 50. They need not, however, be sued together. The owner of the vehicle may properly be sued alone in his capacity as the master of the offending driver and consequently vicariously liable for the negligence of his said driver in the course of his employment. I cannot, with the greatest respect, subscribe to the decision of both courts below to the effect that once the driver of an offending vehicle is not joined in this class of cases along with the owner, the action automatically becomes incompetent, improperly constituted and not maintainable. C

The Court of Appeal in coming to its erroneous decisions reasoned that the liability of the driver can only be established if he is made a party to the action and that where, as in present case, the driver is not joined in the suit, no liability may be ascribed to him thus rendering the action incompetent. Again, with profound respect, I cannot accept this proposition of law as will founded. It is plain to me that question of the liability of the servant is purely an evidential issue which can easily be established by cogent and acceptable evidence before the court and it would make no difference whether or not the driver of the offending vehicle is joined in the suit. Indeed, to suggest otherwise would mean that in all motor accident cases, where an offending driver dies in the collision, no action in negligence based on vicarious liability of the owner of the vehicle may ever arise. This, with respect, is not and cannot be the state of the law. D E F

So in BENSON V. LAWRENCE OTUBOR (1975) N.S.C.C 49 at 54, Elias, C.J.N. in a motor accident case before this court had cause to observe as follows:- G

"We think that the learned trial Judge was right in his finding that negligence had been established against the driver and that the appellant was vicariously liable for the driver's tort committed against the respondent in the course of his employment." H

The significance of this observation lies in the fact that the offend-

ing driver in that case was not sued or joined as a party in that proceeding. None-the-less the liability of the appellant, in that case, the master of the driver, was accordingly upheld by this court.

B Reliance was also placed by the Court of Appeal on the decision of this court in MANAGEMENT ENTERPRISES LTD V. JONATHAN OTUSANYA (1987) 4 S.C. 367 at 395. I need only state that I entirely agree with the analysis and treatment of that case in the leading judgment of my learned brother, Ogundare, J.S.C. and I do not propose to add anything thereto.

C There is one final point I desire to make in connection with the question under consideration. This concerns the issue of joint tortfeasors.

D It is beyond dispute that an agent who commits a tort on behalf of or on the instruction of his principal is along with the said principal joint tortfeasors in law. The same is true where a servant commits a tort in the course of his employment. He and his master are in law equally joint tortfeasors as the law, in appropriate cases, imputes the commission of the same tort or wrongful act to both of them jointly.

E Where several persons are jointly liable, the plaintiff is at liberty to select and sue any one or any number of them and he can recover his claim in full from those he sued; the issue of contribution among such persons to meet the claim is their internal affair. Additionally, there is the provision of Order 7 Rule 10(1) of the Bendel State High Court (Civil Procedure) Rules which provides thus:-

F *"No cause or matter shall be defeated by reason of mis-joinder or non-joinder of parties and the parties may in every cause or matter deal with the in controversy so far as regards the rights and the interests of the parties actually before it."*

G It therefore seems to me a correct proposition of law that ordinarily non-joinder of a party, in the present case the driver of respondent's vehicle, cannot by itself defeat the action, having regard to the provisions of the H said Order 7 Rule 10(1) aforementioned unless, of course, a statutory enactment makes provision to the contrary. See ONAYEMI V. OKUNOBI & ANOR. (1966) NWLR 50. See too PEENOK INVESTMENT LTD. V. HOTEL PRESIDENTIAL (1982) 12 S.C. 1 at 21-27 and 35-40.

The conclusion I therefore reach is that the lone issue for determination in this appeal must be resolved in favour of the appellant. In my view, the court below slipped into a grave error by holding that failure to join the respondent's driver as a defendant in this suit is fatal to the appellant's action and rendered the same incompetent and unmaintainable. The law, B as I have always known it to be, is that a master may be properly sued without his servant and may be adjudged liable for the wrongful act or the tort of his servant so long as it is committed in the course of the servant's employment but he cannot be liable for the wrongful act or tort C which is committed outside the scope of such employment.

On the issue of negligence, there is the clear finding of the learned trial Judge that this was established by the appellant against the driver of the respondent. Said the learned trial Judge:-

"The time given by Mr. Okoli suggests very strongly that he was D not an eye witness of the collision and that he was never present at the scene. The driver of the bus is an interested party whose uncorroborated evidence must be taken with a grain of salt. I therefore hold that even if the driver of the trailer were a party to this action the plaintiff would E have failed to prove any negligence against him."

It thus seems to me in the circumstance that notwithstanding the resolution of the sole issue in this appeal in favour of the appellant, the matter must be viewed as of academic significance only. In the absence of F proof of negligence by the appellant against the respondent, no question of liability can arise.

This appeal accordingly fails and the same is dismissed but with no order as to costs.

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