REPORTABLE

CASE NO: 379/2001

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

L F BEZUIDENHOUT NO **APPELLANT**

and

ESKOM **RESPONDENT**

CORAM: HOWIE, STREICHER, MPATI JJA, HEHER and LEWIS AJJA

DATE OF HEARING: 7 NOVEMBER 2002

DELIVERY DATE: 29 NOVEMBER 2002

Summary: Delict - vicarious liability - liability of employer for damages suffered by unauthorised passenger.

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JUDGMENT

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HEHER

AJA

HEHER AJA:

[1] Louis Louis Roux, aged 19 years, worked as a learner mine official at Thabazimbi. Wishing to spend the weekend at home in Tshipise, some 520 kilometres to the north-east, on 11 April 1997 at about 16h00 he hitched a ride from Thabazimbi in a white bakkie driven by a person unknown to him, which was travelling in the direction of Messina. At about 07h00 the following day Roux was discovered unconscious in the veld 15 metres off the road between Tom Burke and Swartwater four kilometres beyond the first-named hamlet. His body lay 30 metres past the shattered remains of a light truck owned by the respondent. Wedged in the cab of the vehicle was the driver, Oelofse, a distribution official employed by the respondent. Both men were removed to hospital. Roux suffered severe head injuries.

[2] In May 1998 Roux's father instituted an action against the respondent in which he claimed R2 483 307,30 as damages on behalf of his minor son. He

alleged that Roux was a passenger in or on the vehicle at the time of the incident and relied upon the negligence of Oelofse as its cause.

[3] The case came to trial before Van der Merwe J in the Pretoria High Court. The respondent conceded the negligence of the driver. The first problem for the plaintiff was that Oelofse denied having ever seen or met Roux, and he, although able to testify, had suffered a total loss of recall of the events between leaving Thabazimbi and recovering consciousness in hospital. The second difficulty was that the respondent pleaded that Oelofse was not, at the time of the incident, driving within the course and scope of his employment with it.

[4] The initial stage of the trial was by agreement in terms of rule 33(4) limited to two issues-

1. Whether at the time of the collision Oelofse was driving the vehicle within the scope of his employment with the respondent and whether the respondent was vicariously liable to the plaintiff.

2. Whether the injuries and damages which Roux suffered in the accident were foreseeable by Oelofse and/or the respondent in so far as Roux was or was not a foreseeable plaintiff.

[5] After hearing evidence from both parties the trial judge found that Roux was travelling in the respondent's vehicle at Oelofse's invitation at the relevant time. However, because Oelofse had been conveying him in the face of express instructions against offering lifts to members of the public and as the conveyance had nothing to do with the carrying on of Oelofse's employment the learned judge concluded that Oelofse had not been acting within the scope of his employment at the time of committing the delict. He relied on the precedent of *South African Railways and Harbours v Marais* 1950 (4) SA 610 (A), a case in which the judgments of Watermeyer CJ (Centlivres JA concurring) (at 620 H) and Greenberg JA (at 623 E - G) bear out the reliance which he placed on them. He accordingly held that the respondent was not vicariously liable to the plaintiff.

[6] The learned judge answered the second question in favour of the plaintiff in accordance with his finding that Roux had been invited to travel in the vehicle.

[7] Subsequently the Court *a quo* granted the present appellant (Roux's curator *ad litem*) leave to appeal to this Court against his finding that the respondent was not vicariously liable. He also granted the respondent leave to cross-appeal against his finding that Roux was a foreseeable plaintiff.

Vicarious liability

[8] The facts relevant to a determination of this issue are the following-

1. Oelofse was employed by the respondent to attend to repairs to electrical equipment. He was supplied with transport which he was required to use in the carrying out of his duties, a truck with a canopy under which the tools of his trade and replacement parts were kept. He was expressly prohibited from giving lifts to any person without the permission of his superiors.

2. During the night of 11 - 12 April Oelofse was driving home in his employer's vehicle after performing a duty call-out (albeit after a delay of several hours caused by a deviation to enable him to enjoy the delights of the annual Marula Festival at Tom Burke); he had returned to the route which his work required; while driving he was in fact on duty in the sense that he was subject to call-out at any time during the weekend and could be contacted in his vehicle for that purpose.

3. Oelofse offered a lift to Roux which was accepted (This 'fact' is contested and depends on the finding in the cross-appeal which is answered below in the appellant's favour.) This could have occurred on his way to the festival, at the grounds, or by stopping on the main road after he had started home.

4. The truck was clearly identified as the respondent's property by the

name and markings painted on it. Roux could not have been under any illusion that Oelofse was driving his own vehicle.

5. Oelofse negligently fell asleep and lost control of the vehicle which left the road and somersaulted.

[9] Counsel for the appellant accepted that the facts in this appeal rendered his case analogous to that which confronted this Court in *SAR&H v Marais* (*supra*). If the appeal is to succeed, therefore, we must be satisfied that the majority judgment was clearly wrong. The judgments delivered in *SAR&H v Marais* have been criticized by text-book writers in this country. See W E Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 170 - 6; W E Cooper *Delictual Liability in Motor Law* 394 - 8. The principles on which the judgments are based, although in conformity with English and American cases, have not found favour either. See particularly Professor F H Newark '*Twine v Bean's Express Ltd*' (1954) 17 *Modern Law Review* 102; Glanville Williams *Vicarious Liability: Tort of the*

Master or the Servant? (1956) 72 *Law Quarterly Review* 542 - 3; P S Atiyah *Vicarious Liability in the Law of Torts* (1967) 246 - 51, and the South African authors cited earlier. The submissions put forward by appellant's counsel adopted these criticisms. It is, in consequence, necessary to record what that case decided and why.

[10] Marais was a passenger travelling in the guard's van of a mixed passenger and goods train. During a stop he was invited by the engine driver to join him on the footplate, in contravention of standing orders. There the two of them and the fireman drank brandy supplied by Marais. *En route* the engine left the rails due to the negligence of the driver and all three died of burns sustained in the accident. Marais' wife applied for leave to sue the administration *in forma pauperis* for damages. She was successful at first instance but lost in this Court. In giving the judgment of the majority the Chief Justice referred to authorities in American, English and Scots law and to *Middleton v Automobile Association of South Africa*

1932 NPD 451 and *Rossouw v Central News Agency* 1948(2) SA 267 (W). He concluded

'These decisions seem to me to be in agreement with the result at which I have arrived and it is satisfactory to find that so many other Courts, when dealing with the difficult subject of a master's liability for the acts of his servant, should have come to the conclusion that, when a driver of a vehicle gives a lift to a friend, such act being outside the scope of his employment, the master is not responsible if the friend is thereafter injured through the negligent driving of the vehicle while being carried on the vehicle.'

[11] The judgment of the Court of first instance had turned, as I read it, on the application of a passage in *Feldman Ltd v Mall* 1945 AD 733 at 736-

'Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained.'

That Court held that the engine driver had not abandoned entirely his master's work to attend to his own affairs when he invited Marais on to the footplate. Of this Watermeyer CJ said (at 619)

'I cannot agree with that reasoning. The work entrusted to the driver was to drive the engine and he had to do it in such a manner as not to injure anyone by negligence in driving it. It was not the work of the administration to transport passengers on the engine and if the driver chose to do so he was acting outside the scope of his employment. It cannot be said that transporting a passenger on the engine was a negligent manner of driving the engine: it had nothing to do with

engine driving . . . The transportation of Marais upon the engine was in my opinion entirely the driver's own act. It was not done for the purpose of furthering his master's interests and was wholly outside the scope of his employment.'

[12] It is clear from this passage that the Chief Justice was conscious of the fact that the act which gave rise to the delict, *viz* the driving of the engine, was the essence of the work entrusted to the driver but considered that a determination of whether he actually acted within the scope of his employment in so far as Marais was concerned at the time of committing the delict required a broader perspective which took account of other facts that cast light on the relationship between the employee and the employer at the time of the delict. (I shall return to this aspect.) It was in support of this approach that he invoked (at 620 B- G) the authority of the *American Restatement of the Law of Agency*, s 242, Lord Greene's reasoning in *Twine v Bean's Express Ltd* 175 LT 131 at 132 and *Docherty v Glasgow Tramway & Omnibus Co.* 32 Sc LR 353 at 354 - 5. The passage in *Twine* has proved particularly contentious:

'He (the driver) was employed to drive the van. That does not mean . . . that because the deceased man was in the van it was within the scope of the driver's employment to be driving the deceased man. He was in fact doing two things at once. He was driving his van from one place to another by a route which he was properly taking when he ran into the omnibus, and in driving the van he was acting within the scope of his employment. The other thing which he was doing simultaneously was something totally outside the scope of his employment─namely giving a lift to a person who had no right whatsoever to be there.'

[13] Greenberg JA adopted the view of Watermeyer CJ

'that the transportation of Marais upon the engine was entirely the driver's own act and was wholly outside the scope of his employment'

(at 622 H). The learned judge however justified his own reliance on that view on the basis that

'it was not competent to the driver, by an act beyond the scope of his employment, to enlarge the category of persons to whom the appellant would be liable as a result of his negligent driving of the train (cf *Twine v Bean's Express Ltd* (1946(1), A.E.R. 202, at p. 204 D.)); the deceased was not one of the persons who fall within the category of those to whom a duty of care was owed by the appellant...' (at 623 B - C)

[14] The criticisms by the writers to whom I have referred earlier have their genesis in Newark's article *op cit* where, among many criticisms of the judgments in *Twine's* case, the author says (at 114) the following concerning the judgment of

Lord Greene MR in the Court of Appeal:

'It may be conceded at once that the driver was not acting within the scope of his employment in giving Twine a lift yet it can be objected that it was not the giving of the lift but the subsequent dangerous driving which brought about the death. The argument that if the servant had not gone outside the scope of his employment and given the deceased a lift the latter would not have been present and that therefore the lift was the cause of the injury has been criticized as "another application of the fallacious 'but for' doctrine". (See 21 *Columbia Law Review* 79, where there is an acute criticism of the *Twine v Bean's* type of case.)

It was, perhaps, to meet this unexpressed objection that Greene MR suggested the notional splitting of the servant's activities: the servant driving his master's van along the road is *qua* most people acting within the scope of his employment, but *qua* Twine he is on a frolic of his own. Ordinarily one would say that the proposition "He is a servant acting within the scope of his employment yet his act is outside the scope of his employment" would be appropriately placed among the more inscrutable assertions of the Athanasian creed, and this novel approach sends one running to the reports to see if there are other cases of servants with a dual personality who have managed to act within and without the scope of their employment at one and the same moment.'

Finding none directly in point, the author continues (at 115 *in fine*)-

'In Salmond on *Torts*, 10th ed. 97, it is stated that "if the servant is really engaged on his master's business, the fact that he is at the same time engaged on his own is no defence to the master, even though it was the competing claims of the servant's business which caused him to perform his master's negligently." Even stronger must be the case, as in *Twine*'s case, where the servant's negligence was quite severable from the private venture.'

[15] Also of significance in the article of Newark (because of its bearing on what

I shall say later about the effect of policy) is the author's conclusion (at 116):

'However much the above remarks may have convinced that *Twine'*s case was wrongly decided there must still remain a feeling that neither Twine nor his widow should in point of justice have recovered against the employers. How, then, are we to base this intuitive feeling on sound legal grounds?'

(The author disposed of *volenti non fit iniuria* and settled for a contractual exemption which fell outside the pleaded case.) In summarising his conclusions the author says:

'In so far as the plaintiff in *Twine's* case failed because the servant acted outside the scope of his employment in giving *Twine* a lift, the decision is wrong because *Twine* was not injured by this act but by the subsequent negligent driving of the servant.'

[16] Atiyah *op cit* deals with the same subject under the heading '*Unauthorised Invitation Cases*'. He too reasons that in circumstances of such cases

'the negligence is not committed in the course of an unauthorised act. The tort is the negligent driving of the vehicle, and it is this act of negligence which is the cause of the plaintiff's injuries. *Prima facie* it seems clear that the servant will have been acting within the scope of his authority in driving the vehicle, and if he commits a tort in the course of that act the master should be liable. So it is plain that if in this sort of case a pedestrian were injured in the accident at the same time as the unlawful passenger, there could be no defence to an action against the master by the pedestrian.'

The author notes that the passage from *Twine v Bean's Express Ltd* in which Lord Greene puts forward his 'dual capacity' rationalisation has been criticised by a

Canadian Court (*Hamilton v Farmers Ltd* [1953] 3 DLR 382, SCNS at 389, 390, 398) as 'difficult to understand' and as doing violence to the basic concepts of vicarious liability. He also notes, however, that 'many courts have reached the same conclusion' (as that in *Twine*) citing Canadian and Scots authority. Once again the author's concluding remarks (at 249 - 50) are telling:

'Although there is therefore reason to be dissatisfied with the reasoning which has so far led English Courts to deny liability to the unauthorised passenger in these cases, it does not follow that they could not be justified on other grounds. It has been said that:

"The widespread refusal to allow recovery in these cases seems to respond to a fairly prevalent belief that the passenger has so far identified himself with the servant's disobedience that it would be unfair to subject the master to liability." (Fleming, *Law of Torts*, 3rd ed. p. 351) It is thought that this deep-seated belief can be legally justified on grounds which are not, perhaps, so dissimilar from those used in *Twine's* case as to preclude their adoption on the grounds of precedent. This is that the tort of negligence does not consist solely of an act of negligence, but depends on the existence of a duty of care and a breach of that duty . . . The duty of care which is owed by the driver to the passenger is a duty which the servant has imposed on himself outside the scope of his authority. This being so, the *tort* of negligence which the driver commits against the passenger does not arise out of the performance of an authorised act. Although the breach of duty does so, the duty itself does not.'

[17] Cooper *op cit* takes the criticisms which I have referred to above and applies them to an analysis of the South African cases, particularly *Middleton v Automobile Association, Rossouw v Central News Agency* and *SAR&H v Marais*,

(*supra*). There is no need to repeat the arguments.

[18] Scott *op cit* voices criticisms similar to those raised by Cooper. The author suggests that the meaningful answer to the 'vagueness and inconsistency' of the rules relating to the unauthorised conveyance of passengers is to place the emphasis on whether the presence of the passenger in the vehicle is reasonably foreseeable (presumably, by the employer). It follows, he suggests, that the nature of the employee's work (the driving of a vehicle) increases the potential for committing the delict (negligent driving) and renders the course of events, causally, reasonably foreseeable. The difficulty I have with this line of reasoning is that the delict is that of the employee not the employer. Whether the foresight of the employer is relevant must be doubted.

[19] Although many of the criticisms to which I have referred appear logical in relation to the application of the standard test for vicarious liability, that however does not mean that they are right or that the approach adopted by the majority in

SAR&H v Marais is wrong. Drawing the lines is a matter of social policy ('reasons which commend themselves to the people at large' per Lord Denning MR in *Launchbury v Morgans* [1971] 2 QB 245 (CA) at 253 G - 255 G); *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685; *Mhlongo & Another NO v Minister of Police* 1978(2) SA 551 (A) at 567 H; *Midway Two Engineering & Construction Services v Transnet Bpk* 1998(3) SA 17 (SCA) at 22 B - F) and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001(1) SA 372 (SCA) at 379 F.

The standard test

'adequately serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person who might otherwise not be recompensed. While one cannot gainsay the difficulty of applying the standard test in certain cases, the indeterminacy of the elements of the proposed alternatives suggests that their adoption would not make the task of determining liability any easier.'

Kumleben JA in *Minister of Law and Order v Ngobo* 1992(4) SA 822 (A) at 833 H.

[20] Since the negligent act is the driving of the vehicle and driving is the very activity for which the employee is employed, how can the passenger's claim be

successfully resisted by a denial that the driver drove in the course and scope of the employer's business? It seems to me that there are several acceptable reasons why such a defence is viable.

[21] First there is what I believe to be the true ratio for the judgment of Watermeyer CJ *viz* that in determining the scope of employment one should not look narrowly at the particular act which causes the delict but rather at the broader scope of which the particular act may only represent a part. This, I think, was also the view of Diplock LJ in *Ilkiw v Samuels* [1963] 2 All ER 879 (CA) at 889:

'As each of these nouns implies [those used as analogous to the "course" of employment such as "scope" or "sphere"] the matter must be looked at broadly, not dissecting the servant's task into its component activities-such as driving, loading, sheeting and the like─by asking: What was the job on which he was engaged for his employer? and answering that question as a jury would.'

(I am aware that this dictum was uttered in the interest of a more liberal approach toward the protection of third parties. Nevertheless the employer must necessarily enjoy the benefit in cases where the approach works to his advantage.)

See also *Lister v Hesley Hall Ltd* [2001] 2 All ER 769 (HL) at [42] - [43] per Lord

Clyde and at [60] per Lord Hobhouse.

In *Twine v Bean's Express Ltd*, *SAR&H v Marais*, and in the case under appeal, the employment as it related to the operation of the vehicles required (a) that the employee did not operate his vehicle while carrying unauthorised passengers and (b) that he drove his vehicle without negligence. Inasmuch as none of the drivers complied with the first requirement and because that requirement placed a limitation on the scope of employment and was not merely an instruction as to the manner of performing the master's business, the conclusion that the negligent driving of a vehicle carrying a passenger exceeded the bounds of the driver's employment was and is unavoidable. In this regard I respectfully agree with Clerk & Lindsell on *Torts* 18 ed para 5 - 27 in regard to the analogous facts of *Twine v Bean's Express*, *supra*, that

'The better reason for this decision must be that giving the lift was "an act of a class which [the driver] was not employed to perform at all".'

[22] The dual capacity postulated by Lord Greene is, notwithstanding the scorn

heaped on the idea by fine intellects, a true description of the employee's position in the circumstances. Take the following example raised in the course of argument in this Court: The driver of a tanker is prohibited by his conditions of employment from carrying passengers. He nevertheless stops his vehicle when he sees a friend hitchhiking. He says to the friend, 'Despite my employer's ban on passengers I successfully operate this vehicle as a taxi when the opportunity arises. I am on my way to discharge my load at X. I will take you there for R10.' The friend accepts the invitation. The driver's negligence causes an accident in which the friend and a pedestrian are injured. Can the passenger possibly be heard to say that he was injured by the conduct of the employee driving in the course and scope of the employer's business? The pedestrian, of course, has no such problem. Yet there was one act of negligent driving. That the same conduct may be lawful towards one person but unlawful towards another is accepted in our law: *Government of the Republic of South Africa v Basdeo and Another* 1996(1) SA 355 (A) at 367.

[23] The determination of whether an act falls within or without the scope of employment is a question of fact and often one of degree. The court, which is seeking to achieve the balance to which the remedy is directed, must have regard to all matters relevant to the question. These would include the proven fact that the driver, aware of the prohibition, invited the passenger into the vehicle and the passenger, even if unaware of the prohibition, had no reason to believe that he was in the vehicle with the consent of the owner or to expect that the owner owed him any duty in the circumstances. In so far therefore as a line must be drawn by the court around the employer's liability, the circumstances of *Marais'* case and of the present case favour the employer. On this basis also it is easy to understand why the passenger and the pedestrian should be treated differently. In the specific circumstances of *SAR&H v Marais* (and those of the present case) it would be unfair to hold the employer liable to a passenger who has associated himself, albeit innocently, with the forbidden conduct of the employee, and who, in effect,

assumes the risk of the association.

[24] Moreover, application of the elements of the standard test which are perhaps more prominently applied today than in 1950, namely the subjective state of mind of the employee, and the objective test of a sufficiently close link between the servant's acts in his own interest and for his own purposes and the business of the master, *Minister of Police v Rabie* 1986(1) SA 117 (A) at 134 D - E; *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002(5) SA 649 (SCA) at 659 B - F, would both point to conduct on the driver's part which fell beyond the scope of his employment: the driver knew perfectly well that he was prohibited from allowing Marais on to the engine and had no intention of furthering his master's affairs by doing so, and the reality was that Marais' presence added nothing to the interest of the administration in the proper operation of its service - the 'close connection' was demonstrably absent. (The same is true of the roles played by Oelofse and Roux in the present case.)

[25] Some further comments are warranted regarding the policy of exonerating the employer in the given circumstances or, put differently, of not categorizing the conduct of Oelofse as having been performed within the course and scope of his employment as far as Roux was concerned. As Watermeyer CJ pointed out (and as Newark readily conceded four years later) there was, by 1950, a substantial body of case law which supported the conclusion reached in *SAR&H v Marais*. Since that time the number of such cases has increased in America (see the cases on s 242 of the Restatement of the Law, Agency 2d, Appendix Vol 5 p 527; *ibid* Vol 8 p 400; and particularly the cases of *Klatt v Commonwealth Edison Company* 211 NE 2d 720 (1965), *Hottovy v United States* 250 F Supp 315 (1966), *Hall v Atchison, Topeka & Santa Fe Railway Company* 349 F Supp 326 (1972) and *Reisch v M & D Terminals Inc* 180 *Ariz* 356 (1994). *Sed contra Meyer v Blackman* 59 Cal 2d 668 (1963) which rejects s 242 as contrary to long-established Californian law. The conclusion in *Twine v Bean's Express*, *supra*, was implicitly approved by both Lord

Denning MR and Scarman LJ in *Rose v Plenty* [1976] 1 All ER 97 (at 101 b and 105 a - c respectively). Interestingly, para 831 of the German Civil Code has been interpreted so as to exclude vicarious liability in circumstances analogous to those presently being considered.[1] See NJW 1965, 391 a decision of the Bundesgerichtshof (Sixth Civil Division); a translation of the reasons for the decision appears in Markesinis, *The German Law of Torts*, 3 ed 744. While it is the coincidence in policy to which I wish to draw attention, the reasons are not without interest:

'In the present case, the first defendant had ordered the second defendant to *transport goods* and has expressly forbidden him to carry persons other than those connected with the business in his lorry. Having regard to the circumstances of the journey it was not reasonable either for O to assume, without making further enquiries, that the first defendant would agree to it that O would be carried in his lorry over a considerable distance at night. O entrusted himself exclusively to the second defendant, who was an acquaintance of his. In these circumstances the employer of the driver, and owner of the lorry, cannot be held liable for the personal safety of O. If the functions of the driver have been restricted by his employer, these restrictions are also effective in relation to such a user. Consequently a direct connection between the activity entrusted to the driver and the damage cannot be said to exist, even if the journey itself was not undertaken

1 BGB § 831 reads
(1)A person who employs another for work is obliged to make compensation for the harm which the other inflicts unlawfully on a third party in the carrying out of the work. The duty to compensate does not arise if the employer observes the care necessary in the affairs of life in the choice of the person employed and, insofar as he has to provide apparatus or implements or to supervise the carrying out of the work, in such provision or supervision; or if the harm would still have arisen despite application of this care." (Translation from Raymond Youngs, *Sourcebook on German Law*, 489)

outside the scope of employment. Even if in the absence of exoneration (para 831 I first sentence BGB) the first defendant would be liable to a person in the street who had been injured owing to the negligence of the second defendant, irrespective of the fact that the latter had deviated from the timetable fixed by the office, it does not follow that the first defendant is similarly liable to an unwanted passenger. His position is different; in so far as he is concerned the employee entrusted with the execution of tasks allotted to him has exceeded his function, a fact which is relevant in excluding liability, seeing that the passenger's damage falls outside the operational risk attracting liability under § 831 BGB.'

The authorities accordingly show the wisdom of the result in *Marais v SAR&H*.

[26] It follows that the appeal must fail.

The foreseeable plaintiff

[27] The cross-appeal attacks the finding of the court *a quo* that Roux was a passenger in the cab of the vehicle. The evidence relied on by the respondent was that of one Pretorius, a friend of Roux. He testified that at a party during August 1998 he had asked Roux what had happened at the time of the accident. Roux told him that he was tired that evening and had climbed on to a vehicle and that was the last he could remember. The court *a quo* did not reject this evidence but it found cogent reasons for seriously doubting the reliability of Roux in relation to the

admission. It also adjudged Oelofse's denial that he had offered Roux a lift to be untrue. There were serious grounds for mistrusting his credibility and the court *a quo* having observed him at length in the witness-box was unimpressed. Despite counsel's submissions to the contrary I can find no good reason to differ from the trial judge's assessment in either respect. As to the probabilities, the only one which transcended speculation was the strong unlikelihood that Roux would, without the driver's permission, have climbed into the back of an Eskom truck (under the canopy among the tools and equipment) and fallen asleep without knowing where it was bound and when. This probability decisively affected the finding of the court *a quo* and, I think, rightly so. Counsel for the respondent submitted that the fact that a young man was prepared to hitchhike on a long journey over country roads starting late in the afternoon was indicative of a recklessness which was consistent with the sort of risk involved in entering an unknown vehicle to rest. I do not necessarily agree that preparedness to hazard the

first presupposes a readiness to expose oneself to the second. Even if it does, it is insufficient to elevate the possibility to a probability. I am not persuaded that the trial judge erred in his finding that Roux was a passenger in the cab of the vehicle.

[28] The appeal is dismissed with costs. The cross-appeal suffers the same fate except that the costs are to include those attendant upon the employment of two counsel.

J A HEHER
ACTING JUDGE OF APPEAL

STREICHER JA)Concur
MPATI JA)
LEWIS AJA)

HOWIE JA

HOWIE JA:

[29] I have had the benefit of reading in draft the judgment of my learned Colleague, Heher AJA. As far as the appeal is concerned I agree with his conclusion that the overwhelming weight of the relevant case law, particularly the *Marais* case, warrants a finding adverse to the appellant.

[30] However, the answer to the appeal lies to my mind in what is stated by PS Atiyah, *Vicarious Liability in the Law of Torts* (1967) in the second of the two passages from his work which are quoted in para [17] of my learned Colleague's judgment. The vital part of that passage - and I repeat it here for convenience - reads as follows:

> "... the tort of negligence does not consist solely of an act of negligence, but depends on the existence of a duty of care and a breach of that duty ... . The duty of care which is owed by the driver to the passenger is a duty which the servant has imposed on himself outside the scope of his authority. That being so, the *tort* of negligence which the driver commits against the passenger does not arise out of the performance of an authorised act. Although the breach of duty does so, the duty itself does not."

[31] Cast in the language of South African law, the delict alleged here consisted of fault coupled with a legal duty to act without causing harm to

another. Obviously a delict was committed against Roux by Oelofse and the driving *per se* was within the scope of Oelofse's employment. Equally obviously, it was the negligent driving which caused Roux's injuries. But those considerations do not by themselves in the present case establish vicarious liability on the part of the respondent. What the appellant also had to show in order to succeed was that the legal duty which Oelofse's negligent driving served to breach, was a duty which arose within the scope of his employment. This is where the prohibition against passengers makes its impact. Their conveyance was forbidden. Accordingly, although Oelofse owed a legal duty to Roux to drive without harming him, that duty only arose because he was accepted as a passenger outside the scope of Oelofse's employment. For the appellant's success, as I have said, that duty had to have arisen within the scope of Oelofse's employment. A crucial element of the cause of action was absent.

[32] In my view this is the legal *ratio* of the reasoning in the majority judgment in *Marais'* case and the answer to critics such as Cooper, *Delictual Liability in Motor Law* 394 - 8 who contend that where, as in a case like this, it is the negligent driving that causes the injury, vicarious liability must follow once that driving occurs within the scope of the driver's employment.

[33] It follows that I agree that the appeal must fail. I also agree with my learned Colleague's reasons for dismissing the cross-appeal, and with the orders he proposes.

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CT HOWIE
JUDGE OF APPEAL