


24, 1942

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In the British Council.

No. 52 of 1942. 

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY ... (*Defendant*) *Appellant*,

AND

LEONARD LOCKHART, suing by his next friend

JOSEPH LOCKHART (*Plaintiff*) *Respondent*.

CASE FOR APPELLANT.

1. This is an appeal by the Defendant from a judgment of the Supreme Court of Canada dated the 4th April, 1941, allowing the Plaintiff's appeal from a judgment of the Court of Appeal for Ontario, dated the 15th December, 1939, which had dismissed the Plaintiff's appeal from the judgment of the Chief Justice of the High Court dated the 12th July, 1939, in favour of the Defendant.

Record.

p. 356.
p. 288.

p. 261.

2. The appeal raises a difficult question as to the liability of the Appellant for injuries received by the Respondent as a result of the negligent operation of a motor car owned and driven by one Stinson, employed by the Appellant as a carpenter and general handy-man.

p. 98,
ll. 14-26.

3. The essential facts can be stated shortly. On 18th July, 1938, Stinson asked for and received permission from his immediate superior, the Appellant's Bridge and Building foreman, to go from West Toronto shops, where he worked, to the North Toronto Station in order to fit a key which he had made for a lock at that station. The shops and the station were about five miles apart, and were connected by the Appellant's line of railway. The Appellant provided its servants with three means of transportation for such a journey, to wit, rail "speeders," track motor cars, and rail hand cars, and also paid the fares of its servants by tram car when it was convenient for them to make such a journey by that means rather than by the railway; but

p. 99,
ll. 6-41.p. 101,
ll. 20-41.
p. 110, l. 35,
to p. 111,
l. 12.

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INSTITUTE OF ADVANCED

LEGAL STUDIES.

25, RUSSELL SQUARE,

LONDON,

W.C.1.

Record. Stinson chose for his own convenience to use his own private motor-car, without the knowledge of the said foreman, who assumed that he would travel by rail. Whilst he was so travelling, exercising his right as a member of the public to drive his own car along the public highway, he drove into and injured the Respondent.

p. 100, l. 38;
p. 104, l. 40,
to p. 105, l. 9.
p. 191, l. 36,
to p. 192,
l. 12.

pp. 106-108. 4. Some months prior to the accident the two following circular notices from the Superintendent of the Bruce Division of the Appellant's railway system (in which the said shops and station lie) had been posted up, and had also been read to the employees in the shops, including Stinson :—

p. 251. " CANADIAN PACIFIC RAILWAY COMPANY 10
" BRUCE DIVISION.
" Toronto, December 28, 1937.

" ALL CONCERNED :

" The use by employees of their own cars in connection with the Company's business has been forcibly brought to our attention by possible heavy claims against the company in recent accidents, and, after a checkup of the situation it develops that a large number of such employees do not carry public liability or property damage insurance. As a continuance of this practice is likely to seriously involve the Company, privately owned automobiles are not to be used in connection with the Company's business unless the owner carries insurance against public liability and property damage risks. 20

" Please be governed accordingly.

" S. W. CRABBE,
" Superintendent."

p. 252. " CANADIAN PACIFIC RAILWAY COMPANY
" BRUCE DIVISION
" Toronto, March 21st, 1938.

" ALL CONCERNED :

" Referring to my circular letter of December 28, 1937, regarding the use of privately owned automobiles not covered by insurance in the execution of Company's business. 30

" Since then, several instances have come to notice where employees had used unprotected automobiles contrary to the instructions. In one case, a telegraph messenger undertook to use an automobile while his bicycle was undergoing repairs, and had the misfortune to strike and injure a prominent citizen. As a result, a heavy claim has been preferred against the Company on the grounds that the messenger was transacting Company's business at the time.

" It is a serious matter to involve the Company in expenditures of this nature, and all concerned must clearly understand that auto- 40

THESE ARE THE ONLY PAPERS AVAILABLE IN
THIS APPEAL.

Privy Council Office,
Downing Street,
LONDON, S.W.1.

“ mobiles not adequately protected by insurance must not be used in the execution of Company’s business. Record.

“ Will you kindly take whatever steps are necessary to see that the instructions in this regard are being adhered to.

“ S. W. CRABBE,
“ Superintendent.”

5. Stinson was well aware of these notices and in addition on one occasion some weeks before the accident, when it had come to the knowledge of the said foreman that Stinson had used his own car to travel in connexion with the Appellant’s business, the said foreman expressly warned him that the terms of the circulars must be observed and that he must not use his car when on the Appellant’s business unless it was insured (which was not in fact the case). p. 105,
ll. 22-42.
p. 109,
ll. 14-18.
p. 109, l. 44,
to p. 110,
l. 21; p. 184,
ll. 20-26.

6. The Respondent and his father Joseph Lockhart, as Plaintiffs, instituted this action on the 23rd August, 1938, against Stinson and the Appellant, claiming damages for negligence. p. 1.

7. The case was tried before Chief Justice Rose in January, 1939. The jury found that the accident was caused by Stinson’s negligence and assessed the damages at \$10,000.00 to the Respondent and \$500 to the said Joseph Lockhart. No question was left to the Jury as to whether Stinson was acting in the course of his employment by the Appellant. The learned Judge on the 19th January, 1939, directed judgment to be entered against Stinson for that amount, and reserved judgment on the question of the liability of the Appellant. pp. 225-6.

p. 249.

8. On 12th July, 1939, the learned Judge gave judgment on the question of the Appellant’s liability, dismissing the action as against the Appellant on the ground that the driving of the motor car was not in the course or within the scope of Stinson’s employment by the Appellant. pp. 254-260.

9. On 21st July, 1939, the Respondent appealed from the judgment in favour of the Appellant to the Court of Appeal for Ontario (Middleton, Masten, Fisher, McTague and Gillanders J.J.A), which on 15th December, 1939, dismissed the Appeal, McTague J.A. dissenting. pp. 262-287.

10. The Respondent appealed to the Supreme Court of Canada and the appeal was heard in November, 1940, before Duff C.J., Rinfret, Crocket, Davis and Kerwin J.J. The Appeal was unanimously allowed, and on 14th April, 1941, judgment was directed to be entered for the Respondent against the Appellant for the amount awarded by the jury. The judges of the Supreme Court, whilst regarding the case as one of considerable difficulty, thought that Stinson was not acting wholly outside his employment, but was doing what he was employed to do, although in a manner which was prohibited by the Appellant, and that the Appellant was therefore liable for his negligence. pp. 327-355.

Record.

11. The Appellant humbly submits that no liability should fall upon it in this case. Stinson was not employed by it to drive a motor car; the accident was caused not by his doing in a wrong way an act of a class which he was employed to do, but by his doing an act which he was not in any sense employed to do; although no doubt he was acting "during" his employment, he was not acting within the scope thereof; he was not, it is submitted, under the Appellant's direction or control at the time. The Appellant, it is submitted, is no more liable than it would be if Stinson had made the journey by tramcar and had negligently knocked a pedestrian over as he stepped off the tramcar.

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pp. 251, 2.

With reference to the notices set out in paragraph 4 hereof, the Appellant humbly submits that they cannot be interpreted as impliedly conferring any authority on Stinson, who was not employed to drive a motor-car on the Appellant's business, to drive a car (whether insured or uninsured) on its behalf.

p. 212,
ll. 31-46.

12. The jury was not asked to make and did not make any finding as to whether Stinson was acting in the course or within the scope of his employment, because the learned Trial Judge felt the question to be one to be determined by him on undisputed facts, and he found the answer in favour of the Appellant. The learned Judges in the Court of Appeal treated the question as one of fact. In the Supreme Court the Chief Justice of Canada and Mr. Justice Davis held that the question was an issue of fact for the jury, whereas Mr. Justice Crocket held that it was purely a question of law. The Appellant submits that if the question is one of fact the case should have been sent back for this issue to be tried by a jury.

p. 333, l. 32,
to p. 334, l. 4.
p. 347, l. 43.
to p. 348, l. 2.

13. The Appellant submits the judgment of the Supreme Court of Canada should be set aside, and the judgment of the Chief Justice of the High Court restored, or alternatively that a new trial should be directed for the following among other

REASONS.

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1. Because Stinson was not acting in the course of or within the scope of his employment.
2. Because there is no finding that he was so acting.
3. Because the learned Judge presiding at the trial found he was not so acting and in the circumstances he was entitled so to find.
4. Because Stinson was exercising his right as a member of the public to drive his motor car along the public highway.
5. Because the judgment of the learned trial Judge was right and should be restored or alternatively there should be a new trial.

D. N. PRITT.

J. Q. MAUNSELL.

In the Privy Council.

No. 52 of 1947.

ON APPEAL FROM THE SUPREME
COURT OF CANADA.

BETWEEN

CANADIAN PACIFIC RAILWAY CO.

(Defendant) Appellant,

AND

LEONARD LOCKHART, suing by his next
friend, JOSEPH LOCKHART

(Plaintiff) Respondent.

CASE FOR APPELLANT.

BLAKE & REDDEN,

17, Victoria Street, S.W.1.