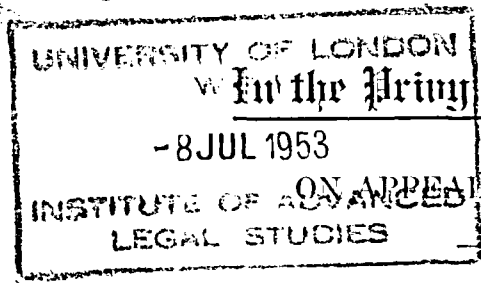


24, 1942

30024



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.

INSTITUTE OF ADVANCED
 LEGAL STUDIES,
 25, RUSSELL SQUARE
 LONDON,
 W.C.1.

Case for the Respondent.

RECORD

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 4th April, 1941, allowing an appeal from a judgment of the Court of Appeal for Ontario dated the 15th December, 1939, which had dismissed the appeal of the Respondent and his father from a judgment of the Honourable Chief Justice Rose dated the 12th July, 1939, which had dismissed their action against the Appellant.

p. 356

p. 288

p. 261

2. The action of the Respondent and his father, begun by writ issued the 23rd August, 1938, was against one Stinson, a servant of the Appellant, and against the Appellant as his master in respect of Stinson's negligent driving of his own motorcar whereby he caused serious personal injuries to the Respondent (then under 6 years of age) and involved the Respondent's father in expense. The case was tried by a jury which found Stinson negligent and assessed the damages at \$10,000 for the Respondent and \$500 for his father. Judgment was thereupon on the 19th January, 1939, entered against Stinson for these sums and judgment was reserved on the question of the Appellant's vicarious liability for Stinson's negligence. Stinson did not appeal from the judgment against him, and steps were taken in an attempt to enforce it. In the Court of Appeal for Ontario and in the Supreme Court of Canada the Appellant contended that the signing of judgment against Stinson and the steps taken to enforce it debarred the Respondent from recovering judgment against the Appellant; that the Respondent and his father had not proved negligence; that the damages were excessive, and that the learned trial Judge ought not to have allowed an amendment of the statement of claim after verdict to increase the amount claimed by the Respondent to the \$10,000 awarded by the jury. In seeking special leave to appeal to His

p. 1, 1.12

p. 218, 1.34;
p. 225, 1.3
p. 225, 1.9
p. 253

p. 253, 1.20

p. 12
p. 268, 1.33-
p. 269, 1.9;
p. 319, 11.5-16

pp. 358-36

p. 341, 11.24-28 Majesty in Council the Appellant, however, did not raise these points, and accordingly the only point now arising for decision is the vicarious liability of the Appellant to the Respondent for Stinson's negligence. No question of liability to the Respondent's father arises since, by reason of the amount awarded to him, he had no right of appeal to the Supreme Court of Canada and his position is therefore governed by the decision of the Court of Appeal for Ontario.

p. 98, 1.34-
p. 99, 1.41

3. On the 18th July, 1938, the Respondent was knocked down by Stinson's motorcar driven by Stinson while Stinson was travelling from the Appellant's shops at West Toronto to North Toronto station in order to fit a key which he had made at West Toronto for a lock at North Toronto station. Stinson was a carpenter and general handyman regularly employed by the Appellant at an hourly wage under the foreman of the Appellant's bridge and building department at West Toronto. His duties took him to various premises and he was paid for the time spent in travelling to them. He was authorised to travel by a rail speeder, rail motorcar or rail handcar on the Appellant's railway or by tramcar, and if he travelled by tramcar the Appellant paid his fare or reimbursed to him the amount thereof. His authority to travel in his own motorcar is in dispute. The Appellant was well aware that a number of its servants used their own motorcars while travelling on the Appellant's business, and in December, 1937, the Appellant issued a notice, which was brought to the attention of Stinson and other servants, that privately owned motorcars were not to be used in connection with the Appellant's business unless the owner was carrying insurance against public liability and property damage risks. In March, 1938, another notice was issued, and brought to the attention of Stinson, pointing out that since the former notice instances had come to the knowledge of the Appellant of its servants using unprotected motorcars contrary to the instructions, one instance resulting in a heavy claim against the Appellant. This notice repeated that motorcars not adequately protected by insurance must not be used in the execution of the Appellant's business. Stinson and his motorcar were uninsured, but nevertheless and in spite of a specific warning by his foreman on a previous breach of the instructions, Stinson used his motorcar in the execution of the Appellant's business and was so using it, as much the quickest way to reach North Toronto station, when he injured the Respondent.

p. 98, 11.10-26
p. 100, 11.6-10
p. 97, 1.27-
p. 98, 1.13
p. 98, 11.29-33
p. 100, 1.9

p. 110, 1.35-
p. 111, 1.22

p. 251
p. 109, 11.14-18

p. 252

p. 109, 1.44-
p. 110, 1.26

p. 190, 1.32-
p. 192, 1.20

p. 212, 11.24-34

pp. 254-260
p. 254-
p. 256, 1.18
p. 256, 11.19-34

p. 259, 11.5-23

4. At the trial the learned Chief Justice did not ask the jury to determine whether Stinson, at the time of the accident, was or was not acting in the course of his employment, as he regarded the question as one of law on facts not in dispute. On the 11th July, 1939, he delivered his reasons for judgment on this question. After stating the facts he directed his mind to the point whether Stinson's negligence was in the course of doing in a wrong and unauthorised way what he was authorised to do or whether it was in the course of doing what he was not authorised to do at all. He came to the conclusion that the driving of a privately owned uninsured motorcar did not fall within the class of acts which Stinson was authorised to perform and that therefore Stinson's negligence in the handling of such a motorcar even at a time when

he was engaged in his master's business did not bring his master under liability.

5. An appeal by the Respondent and his father to the Court of Appeal for Ontario was argued on the 16th and 17th November, 1939, and was dismissed on the 15th December, 1939, McTague, J.A. dissenting.

p. 262, 1.13
p. 288
p. 283, 1.15

6. In his reasons for judgment Middleton, J.A. concurred in the judgment of Masten, J.A. and only dealt fully with the effect of judgment having been signed against Stinson and with the amendment of the pleading.

pp. 262-265

7. Masten, J.A. set out the learned Chief Justice's statement of the facts and a passage (omitting therefrom two questions and the answers) from Stinson's cross-examination in which Stinson said that he used his own motorcar because it was more convenient to do so. Masten, J.A. then considered whether Stinson's negligence occurred in the course of his employment in such manner and in such circumstances as to render the Appellant liable. After setting out the contentions of the parties he held that the scope of a servant's authority is to be determined by the hiring agreement the terms of which must be ascertained with precision. In the learned Judge's view the general principle is that of two innocent persons, the master and the third party, it is proper that the master who for his own purposes employed the tortfeasor should suffer, but he should not be held liable where the servant's tortious act is not incidental to the employment. Masten, J.A. thought that when Stinson entered on his journey on the day of the accident in his prohibited uninsured motorcar he stepped outside the limit which bounded the sphere of his employment, for driving a motorcar was no part of his employment and both Stinson and the Appellant contemplated that he would get to his various places of work otherwise than by motorcar. Masten, J.A. considered that from the time the foreman reprimanded Stinson for using an uninsured motorcar the scope of his employment excluded with Stinson's consent any right to travel to his work in his own motorcar while it was uninsured, the prohibition not being incidental to the making of the journey but excluding the use of an uninsured motorcar from the scope of Stinson's authority, so that Stinson was acting not as the Appellant's servant but as a stranger engaged on his own enterprise. Masten, J.A. further considered that the learned Chief Justice was entitled to reserve the question to himself although Masten, J.A. inclined to the view that the conclusion was an inference of fact resulting from the application of well-settled law to undisputed facts.

pp. 265-275
p. 268, 11.17-30;
p. 191, 1.36-
p. 192, 1.15

p. 269 et seq.

p. 269, 1.44-
p. 270, 1.15

p. 270, 11.19-32

p. 273, 11.19-35

p. 273, 1.36-
p. 274, 1.7

p. 274, 11.8-47

p. 275, 11.1-29

8. Fisher, J.A. held that Stinson's duties extended only to acts done by his own hands and confined to the Appellant's property, and the use of an uninsured motorcar in the prosecution of his work was to his knowledge prohibited. In his view Stinson's disobedience to his instructions had severed the relationship of master and servant and had placed Stinson outside his master's control; and in such circumstances he was not acting within the scope of his employment even if the Appellant would benefit by the shortening of the time taken in going to North Toronto station.

p. 275, 1.35-
p. 276, 1.12

p. 276, 1.13-
p. 277, 1.35

p. 277, 1.37-
p. 278, 1.39

9. Gillanders, J.A. agreed with Masten, J.A. Apart from the two notices it could not, in his opinion, be argued that Stinson had any authority express or implied to drive his private motorcar on the Appellant's business, and the driving of his motorcar did not fall within the class of act for which he was employed nor had the Appellant or any of Stinson's superiors winked at the non-observance of the rule laid down in the notices. In his view the notices should not be read as extending the scope or sphere of Stinson's employment. Gillanders, J.A. then examined authorities which he thought supported his conclusion.

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p. 279, 11.1-12

p. 279, 1.13-
p. 282, 1.13

pp. 283-287

10. McTague, J.A. dissented. Stinson was authorised by the foreman to go to North Toronto and it was while he was carrying out the foreman's instructions that the accident took place. The notices showed that the Appellant was aware of a practice of servants using their own motorcars in the Appellant's business and the Appellant did not seek to prohibit the practice but only to limit it to the use of insured motorcars. The notices, however, could not delimit or exclude liability, which rests on the proper application of the doctrine *respondent superior*. He wished that the question had been left to the jury as it is one of fact in each case. Stinson did not because of his mode of transportation divest himself of the character of a servant and become a stranger, but merely disobeyed an injunction that he should insure his motorcar. This was the result which McTague, J.A. reached by applying common law cases. He then dealt with the points not raised in this appeal.

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p. 283, 1.35-
p. 284, 1.14

p. 284, 11.14-18

p. 284, 1.19-
p. 285, 1.29

p. 285, 1.30-
p. 286, 1.2

p. 286, 1.3-
p. 287, 1.13

p. 356

11. The appeal of the Respondent to the Supreme Court of Canada was heard by Duff, C.J.C. and Rinfret, Crocket, Davis and Kerwin, JJ. on the 20th and 21st November, 1940, and by judgment dated the 4th April, 1941, the appeal was allowed.

pp. 327-340

12. The judgment of the Chief Justice and Davis, J. was delivered by the Chief Justice who summarised the facts and said that the question was one of considerable difficulty. The general principle was, he thought, best stated in the passages from Story quoted by Lord Macnaghten in *Lloyd versus Grace Smith & Co.* [1912] Appeal Cases 716. As authorities show, an act may be within the class of act for which a master is responsible although it constitutes a breach of the master's orders or of the authority as defined by such orders, and although the servant is acting against his master's interests and for his own convenience and benefit. A servant while engaged in his employment may at the same time do an act having no relation to his employment, but as a rule where a servant purports to be acting in the course of his service it is immaterial that the master did not authorise or know of the misconduct, or forbade or disapproved of it. The question is one of fact for the jury. Stinson at the time of his negligent act was engaged in his master's business, and the notices indicate that servants of the Appellant had been using their own motorcars, uninsured, when engaged in the Appellant's business. The second notice shows that the first had been disregarded. Both Stinson and his foreman understood from the notices that a servant might use his own motorcar if it was insured. The foreman did not know until after the accident that Stinson was not insured and no enquiry on the point had been addressed to Stinson. There was no evidence that

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p. 327, 1.40-
p. 328, 1.25

p. 328, 1.26-
p. 329, 1.38

p. 329, 1.39-
p. 330, 1.23

p. 330, 11.24-30

p. 330, 1.31-
p. 332, 1.28

p. 332, 1.28

p. 332, 11.29-39
p. 332, 1.40-
p. 333, 1.3

p. 333, 11.4-17

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- breaches of the rule were penalised or that Stinson had ever used the rail vehicles or tramcars for travelling on the Appellant's business, though he had previously used his motorcar. On those facts a jury could properly find that it was left to each servant himself to observe the rule as one of the duties of his service and that the Appellant regarded the servant in driving his motorcar, though uninsured, as using it, though improperly, in the execution of the Appellant's business. In view of the course of the case below, the Chief Justice did not think it necessary to consider directing a new trial because
- 10 the judgments below rested on Stinson's intentional disregard of the order, whereas the evidence pointed to the conclusion that the Appellant's officers were indifferent to the observance of the order, and Stinson was not doing an act which was, in the pertinent sense, outside his employment. The Chief Justice then cited authority to show that Stinson's disregard of the order was immaterial because his disobedience was an act in violation of one of the duties of his employment. Rejecting the argument that Stinson by his improper use of his motorcar had put himself beyond the Appellant's control and that therefore the Appellant was not liable for his negligence,
- 20 the Chief Justice commented upon three cases upon which the Appellant relied and held that they either were not analogous to the present case or supported the view that the Appellant was liable. The Chief Justice then dealt with the effect of judgment having been entered against Stinson.
13. Kerwin, J. delivered the judgment of himself and Rinfret, J. After stating the facts and the course of proceedings Kerwin, J. examined authority on the test to be applied and thought that the Supreme Court, having all the facts before it and being entitled to draw all proper inferences, should apply the test. One proper
- 30 inference was that Stinson had not severed his relations with the Appellant, for Stinson in going to North Toronto was not exercising his right as a citizen to use a public highway but was performing his duty to the Appellant, and the Appellant had the right to dictate the manner of doing it. Kerwin, J. then dealt with the points not raised in this appeal.
14. Crocket, J. regarded the point as one of law. After setting out the facts he stated the problem to be whether the Appellant's liability was to be determined by the fact that at the time of the accident Stinson was using his motorcar to perform a
- 40 duty appertaining to the Appellant's business or by the fact that in using his motorcar for this purpose he was disregarding the Appellant's instructions and so exceeding the limits of his authority. Crocket, J. disagreed with the courts below in holding that the restriction on Stinson's authority as to the use of his own or any motorcar in the performance of his work necessarily limited the scope of his employment, and Crocket, J. thought that none of the cases justified such a conclusion. He then considered the cases and criticised their application by the Court of Appeal. At the material time Stinson was engaged in his master's business, and that was the
- 50 governing factor. The master could not escape liability for the servant's negligence while so engaged upon the ground that he had prohibited him from doing a particular act unless the prohibition was such as to sever the relation of master and servant during the critical time. Crocket, J. further held that the notices authorised
- p. 333, 11. 8-27
- p. 333, 1.27-
p. 335, 1.4
- p. 335, 1.5-
p. 336, 1.22
- p. 336, 1.23-
p. 337, 1.4
- p. 337, 1.21-
p. 339, 1.42
- p. 340, 11.1-15
- pp. 340-347
p. 341, 1.29-
p. 345, 1.12
- p. 345, 11.12-27
- p. 345, 1.28-
p. 347, 1.13
- p. 347, 1.24-
p. 348, 1.2
p. 348, 1.43-
p. 349, 1.4.
- p. 349, 11.8-20
- p. 349, 1.21-
p. 354, 1.15.
p. 354, 11.16-30
- p. 354, 11.30-39
- p. 354, 1.40-
p. 355, 1.25.

the use of privately owned motorcars by the Appellant's servants in connection with the Appellant's business, and the purely conditional or contingent prohibition could not have the effect of so curtailing the scope of Stinson's employment as to transform his act in using his uninsured motorcar for his master's business into an act undertaken wholly for his personal gratification and having no relation to his employment.

15. The Respondent respectfully submits that the unanimous judgment of the Supreme Court of Canada was right and should be affirmed for the following amongst other 10

REASONS.

1. Because the Respondent was injured by the negligence of the Appellant's servant Stinson while acting within the scope of his employment.
2. Because Stinson's employment required him to go from West Toronto to North Toronto and he was allowed to choose the method of travel.
3. Because at the material time Stinson was doing work which he was instructed to do even if he did it in a way which the Appellant had not authorised and would not have authorised if the Appellant had known of it. 20
4. Because Stinson's disobedience to an order did not terminate his employment but merely was an incident of his carrying out what he was instructed to do.
5. Because the prohibition of the use of a motorcar if it were uninsured dealt only with Stinson's conduct within the sphere of his employment and did not limit the sphere of his employment.
6. Because of the other reasons given by the Chief Justice of Canada, Mr. Justice Kerwin, Mr. Justice Crocket, and 30
Mr. Justice McTague.

FRANK GAHAN.

In the Privy Council.

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 the Respondent

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