

Canadian Pacific Railway Company - - - - Appellant

v.

Leonard Lockhart - - - - Respondent

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST, 1942

Present at the Hearing:

VISCOUNT MAUGHAM

LORD THANKERTON

LORD RUSSELL OF KILLOWEN

LORD MACMILLAN

LORD ROMER

[Delivered by LORD THANKERTON]

This appeal concerns solely the responsibility of the appellant for injuries received by the infant respondent owing to the negligent driving of a motor car owned and driven by one Stinson, employed by the appellant as a carpenter and general handy-man. The action, which was directed against Stinson and the appellant, was tried before Rose C.J. and a jury 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 his father. No question was left to the jury as to the liability of the appellant, and the learned Judge directed judgment to be entered against Stinson, and reserved judgment as to the appellant's liability; on the 12th July, 1939, the learned Judge dismissed the action as against the appellant, holding that the driving of the motor car was not in the course or within the scope of Stinson's employment by the appellant. An appeal by the respondent was dismissed by the Court of Appeal for Ontario on the 15th December, 1939, by a majority of four to one. On a further appeal by the respondent, the Supreme Court of Canada, on the 4th April, 1941, unanimously allowed the appeal, and directed judgment to be entered for the respondent against the appellant for the amount awarded by the jury. Hence the present appeal by the appellant.

Their Lordships are content to take the material facts, which are not in dispute, from the judgment of Rose C.J.H.C., who tried the case, as follows:—

“ The defendant Stinson had been for many years in the defendant Company's service. It is in the course of his employment to make repairs of many kinds to the Company's property, movable and immovable. His immediate superior is the foreman of the bridge and building department at the Company's works at West Toronto, and his own headquarters are at those works, but his duties take him from time to time to other premises of the Company in and out of Toronto, all of which can be reached by the Company's lines of rails.

At West Toronto, Stinson had made a key for use in a lock in the station at North Toronto. He had made it from a pattern, and he was authorised or instructed by his foreman to go to North Toronto and try it in the lock. He is paid by the hour, and would have been paid for the time occupied in the journey.

The Company keeps at West Toronto vehicles of three types for the use of the employees in connection with their work; a 'speeder', a 'track-motor', and a 'hand-car', all of which run on the Company's rails; and, sometimes, when it is more convenient, a man proceeding from one part of Toronto to another is instructed or permitted to travel by tram-car and is furnished with tickets. On this occasion nothing was said as to how Stinson was to get to North Toronto; but the track-motor and the speeder were in the shop, available for use, and the foreman assumed that the track-motor would be used. Stinson, however, had a motor car of his own nearby, and, without communicating his intention to anyone, he decided to use it. He did use it, and on his way to North Toronto he injured the infant plaintiff.

The Company, by its divisional superintendent, and over his signature, had issued two notices concerning the use by its employees of privately owned motor cars in connection with the Company's business. The first, dated December 28, 1937, was as follows:—

' 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 check up 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.

Please be governed accordingly.'

and the second, dated March 21, 1938 (i.e., just less than four months before the accident which gave rise to this action), was as follows:—

' ALL CONCERNED :

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

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 expenditure of this nature, and all concerned must clearly understand that automobiles not adequately protected by insurance must not be used in the execution of Company's business.

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

Copies of these notices had by the foreman at West Toronto been read to his men, including Stinson, and had been posted up and left posted in a prominent place for all to see; and Stinson's attention had very directly been called to the order on one occasion when an act of disobedience on his part had come to the foreman's attention. This one breach of the order by Stinson seems to have been the only breach on the part of any of the men who were under the orders of the foreman at West Toronto which had come to his (the foreman's) attention and there is no possibility of finding that the Company or any of Stinson's superiors in the Company's service had winked at the non-observance of the rule. Had there been evidence upon which such a finding could be based, a question as to the fact would have been submitted to the jury. Stinson carried no insurance, and when he set out for North Toronto in the uninsured car he knew he was doing what he had been forbidden to do."

After reviewing the authorities, the learned Judge said:—

" In the present case, to say that it was the duty of the defendant Stinson to go to North Toronto, that he went negligently and by his negligence caused damage, and therefore that his master is liable, is to make a plausible but, in my opinion, an inaccurate statement. After much consideration, my opinion is that the driving of a privately-owned and uninsured motor car was not an act falling within the class of acts which Stinson was authorised to perform, and, therefore, that his negligence in the handling of such a car, even at a time when he was engaged in his master's business, does not bring his master under

liability. It may be—indeed, it seems probable—that from the notices posted up there is to be inferred a permission to drive insured cars; but I do not think that the case can be dealt with upon the footing that there was a general authority to drive motor cars, coupled with an instruction to see to it that every car driven was adequately covered. The Company having provided means of transport, I think it was not in the course of Stinson's employment to provide other means which he happened to prefer; and that, even if, from the notices, a permission to drive an insured car was to be inferred, that permission was not effective to bring the driving of an uninsured car within the scope of the employment."

The learned Judge accordingly dismissed the case as against the defendant Company, and an appeal by the plaintiffs was dismissed by the Court of Appeal for Ontario on the 15th December, 1939, by a majority of four Judges to one. Masten J., in whose judgment on this point Middleton and Gillanders J.J.A. concurred, said, after a reference to the two circular notices, which were brought to Stinson's attention ([1940] O.R. at pp. 152-3):—

"Some time later Stinson, without placing insurance on his car, used it again in disobedience of the respondent's prohibition. This occurrence came to the notice of McLeod, and Stinson was summoned by McLeod and reprimanded. The details of that interview do not appear in the evidence. He was not dismissed but remained in the respondent's employ. McLeod had not authority to discharge him. But if Stinson, at that interview with his superior officer, had refused to be debarred from going to work in his uninsured motor, there could have been only one result, viz., his dismissal. There can be only one inference drawn from the continuance of his employment, viz., that the scope of his employment was thereafter, by his consent, definitely limited by excluding any right to travel to his work in his own motor so long as it remained uninsured. . . . When on the date of the accident in question he set out for his work by driving his uninsured car, he violated the terms of his implied agreement, disobeyed the prohibition of his employer, and was guilty of wilful misconduct for his own convenience and purpose. In my opinion, the act of setting out on his journey in his uninsured car placed Stinson outside the scope of his authority so that he was acting not as a servant of the railway, but as a stranger engaged on his own enterprise."

Fisher J.A. held that Stinson, by disobedience to his instructions, in operating his uninsured motor vehicle out in the street clearly placed himself during that period out of the control of his master, and his act was in truth his own act, and not his master's, and his act was not only outside the course and scope of his employment, but had the effect of placing himself beyond the control of his master. McTague J.A., who dissented, after a review of the cases, stated:—

"In applying the principle to the present case, it seems perfectly clear that in transporting the key from West Toronto to North Toronto Stinson was about his master's business. Did he, because of the mode of transportation which he used, divest himself of the character of servant and become a stranger to his employer? I do not think so. If in the course of his trip he had gone off on a venture of his own and injured someone, it might well be said that in doing that he had lost his character of servant. On the occasion in question here he was not using a means of transportation which in itself was prohibited. He was merely disobeying an injunction of his employer that he should insure his car and, thus, at his own expense, provide practical indemnity to his employer for liability to third persons. Disobedience by the servant may be a cause for dismissal by the master, but *in se* is not a defence to liability of the master to third persons under the doctrine of *respondeat superior*."

On appeal, this decision was unanimously reversed by the Supreme Court of Canada, on the 4th April, 1941, and judgment was entered against the Company, who obtained special leave to appeal therefrom to His Majesty in Council. The opinion of Duff C.J. and Davis J. was delivered by the learned Chief Justice, who held that the evidence, as it stood, all pointed to the conclusion that the Company's officers were indifferent to the observance of the order contained in the circular notices, and that Stinson,

in using his automobile in the Company's service on the occasion in question, had no idea that he was not acting in the Company's service, and, after a discussion of the cases, stated:—

" Here Stinson was not only engaged in his master's service at the time he was driving his motor car, he was performing a duty of the service in getting himself conveyed to the place where it was his duty to go. He was on his master's business in conveying himself there by his car, unless the respondent's contention is sound that by reason of the order and the absence of insurance his act in driving his car on the Company's business was of such a character, as already observed, as to sever the relationship of service. That I have dealt with."

The judgment of Rinfret and Kerwin JJ. was delivered by Kerwin J., who held that he was entitled to draw the inference from the facts that Stinson had not severed his relations with his employer, the railway company, that he was performing his duty to his master in going to North Toronto, and was using a conveyance of a kind at least impliedly authorised and was acting within the scope of his employment. Crocket J., after referring to the cases, says ([1941] S.C.R. (Can.) at pp. 315-6):—

" If the question were not concluded by the undisputed and indeed the admitted fact that Stinson was using his car in journeying to the North Toronto Station in connection with and in furtherance of his master's business, I should have thought that the only possible inference from the district superintendent's circular letters, on which the judgment *a quo* is entirely based, was that he and all other employees in the Toronto district were thereby authorised to use their own or any other privately owned cars in connection with their master's business, provided that they were insured against public liability and property damage. It was thus in no sense a definite prohibition against the use of motor cars in connection with the respondent's business, but a purely conditional or contingent prohibition, apparently made for no other purpose than that of transferring from the master to the automobile insurance companies the obligation of paying for injuries resulting to third persons from the negligence of its servants while engaged in the prosecution of its business, and one which clearly recognised the right of the respondent's employees to use motor cars so insured for that purpose. I should have had no hesitation in holding that a prohibition of such a character could not, under the law as recognised by this Court in accordance with the principles laid down by the House of Lords and the Judicial Committee of the Privy Council, have the effect of so curtailing the scope of Stinson's employment, in the capacity of a permanent general repairs man, as to transform his act in using his uninsured car solely for the purpose of his master's business on the occasion in question into an act undertaken wholly for his own personal gratification the servant was using his master's time as his master's servant."

Their Lordships agree with the decision of the Supreme Court, and, in particular with the reasons given by Crocket J., as also with the reasoning of McTague J. A. in his dissenting judgment in the Court of Appeal, in the passages already quoted. There is little dispute as to the facts, but their Lordships prefer to proceed on the statement of the learned Trial Judge that there was no evidence on which it could be found that the Company had winked at the non-observance of their prohibition, rather than on the view expressed by some of the learned Judges of the Supreme Court to a contrary effect.

The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmond on Torts (9th ed.), p. 95, viz.:—

" It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts that he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. . . . On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

The well-known dictum of Lord Dunedin in *Plumb v. Cobden Flour Mills Company Limited*, [1914] A.C. 62, at p. 67, that "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment," may be referred to. Their Lordships may also quote passages from the judgment of this Board in *Goh Choon Seng v. Lee Kim Soo*, ([1925] A.C. 550, which was delivered by Lord Phillimore, at page 554:—

"The principle is well laid down in some of the cases cited by the Chief Justice, which decide that 'when a servant does an act which he is authorised by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorised and improper, in such cases the employer is liable for the wrongful act. . . .' As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised had he known of it. In these cases the master is nevertheless responsible."

In *Goh Choon Seng's* case the appellant's servants had been employed by him to burn vegetable rubbish collected on his land, and they burnt some of it by lighting fires on Crown land left waste and uncultivated, which was wedged in between the appellant's land and that of the respondent, with the result that the fires spread to the respondent's land and caused damage to his property. The appellant was held liable to the respondent.

In the opinion of their Lordships, the present case does not fall under the first head of Lord Phillimore's classification. That the use of his own motor car for the journey might be the more convenient means of transport for Stinson does not alter the fact that he was performing the journey for the purpose of, and as a means of execution of, the work which he was employed to do. In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment. In the present case Stinson was employed to work as a carpenter and general handy-man and for that purpose he required to go from his headquarters at West Toronto Station to other railway buildings of the Company throughout Toronto and district. The means of transport used by him on these occasions was clearly incidental to the execution of that which he was employed to do. He was not employed to drive a motor car, but it is clear that he was entitled to use that means of transport as incidental to the execution of that which he was employed to do, provided the motor car was insured against third-party risks. If the prohibition had absolutely forbidden the servant to drive his motor car in course of his employment, it might well have been maintained that he was employed to do carpentry work and not to drive a motor car, and that, therefore, the driving of a motor car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which or by means of which the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties.

Their Lordships are therefore of opinion that the appeal fails, and they will humbly advise His Majesty that the appeal should be dismissed with costs as between solicitor and client and that the judgment of the Supreme Court of Canada should be affirmed.

In the Privy Council

CANADIAN PACIFIC RAILWAY
COMPANY

v.

LEONARD LOCKHART

DELIVERED BY LORD THANKERTON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1942