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Co-Operators Insurance Association v. Kearney, [1965] S.C.R. 106

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NEGLIGENCE

Co-Operators Insurance Association v. Kearney, [1965] S.C.R. 106.

MOTOR VEHICLES — LIABILITY TO GRATUITOUS PASSENGER — MASTER AND SERVANT — COMMON EMPLOYMENT — COURSE OF EMPLOYMENT.

In the recent Ontario case of the *Co-Operators Insurance Association v. Kearney,*[1] the Supreme Court of Canada took another look

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[34] *Supra,* footnote 2, at p. 478. In deciding that the coroner's inquest is a criminal court the Canadian courts have relied heavily on English authorities. (See the leading case of *R. v. Hammond* (1899), 29 O.R. 211.) As there are now a number of significant differences between inquests in England and Canada, the value of English authorities should be questioned. In England, for example, a person charged by the verdict of a coroner's court could be tried without being brought before a justice. Should not the test of determining whether a procedure falls within the legislative jurisdiction of the Federal or Provincial Parliaments depend upon the nature of that procedure as it exists in Canada today? It is submitted that the functional approach adopted by the Saskatchewan Court of Appeal would produce the most sensible solution to this problem.

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[1] [1963] 2 O.R. 1, 38 D.L.R. (2d) 290 (Ont. H.C.); [1964] 1 O.R. 101, 41 D.L.R. (2d) 196 (Ont. C.A.) Aff'd; [1965] S.C.R. 106, 48 D.L.R. (2d) 1.

at the ramifications of s. 105(2) of The Highway Traffic Act[2] and how it is affected by the concept of vicarious liability. The facts were as follows. The plaintiff, Kearney, conducted a real estate and insurance business and was an agent of the defendant company "in soliciting insurance and servicing policy-holders". Whenever a claim was made by any policy-holder to whom the plaintiff had sold a policy, it was the general practice of the defendant to send its own adjuster into the area. Part of the plaintiff's duty was to introduce this adjuster to the policy-holder and to accompany them both while the loss was being adjusted.

On November 26, 1957 one of the defendant company's adjusters, Livesey, came to the plaintiff's office and asked him to make arrangements for meeting with one Sewell for the purpose of adjusting a claim. The plaintiff was busy with some real estate matters at the time and did not want to be disturbed, but, on Livesey's insistence, he agreed to go. Having introduced the adjuster to his client and accompanied them to the garage where the damaged vehicle was located, Kearney, anxious to return to his office and his real estate deal, asked Livesey to drive him to his office, which was only a few blocks away. On the way, the plaintiff suffered serious injuries when the automobile in which they were riding, owing to Livesey's negligence, collided with a train.

At trial, Haines J. found both the Co-Operators Insurance Association and Livesey liable to the plaintiff for a total of $16,800. The Court of Appeal exonerated Livesey but maintained the liability of the insurance company. In the Supreme Court of Canada, Mr. Justice Spence delivered a strong majority opinion and Cartwright and Ritchie JJ. gave two equally adamant dissenting judgments. As the issues involved are, to a degree, separable, they will be treated under broad headings and their progress will be traced from the trial court through the Supreme Court, with various comments made along the way.

I. The Highway Traffic Act, s. 105(2)[2]

Haines J. said that the courts have construed s. 105(2) so as to limit the special liability imposed on the owner and driver of the motor vehicle by s. 105(1)[3] to that as owner and as driver. It is not a bar to a right of action due to some other relationship. The dis-

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[2] R.S.O 1960, c. 172, s. 105(2). "Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle."

[3] "The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner."

appointing feature about this judgment is that Haines J. finds the defendant Livesey liable without giving any concrete reasons for this liability. Although he does say that the plaintiff's right of action arises independently of The Highway Traffic Act and therefore cannot be taken away by it, he nowhere shows *why* it arises independently of the Act as far as Livesey is concerned.

In the Court of Appeal, Aylesworth J.A. makes virtually no comment on this omission, but just seems to take it as an established fact that the driver was not liable by virtue of s. 105(2). This is a little mystifying, since it is normal for a judge in granting an appeal to explain in detail his reasons. The only conceivable explanation is that, since Haines J. did not give any reasons for his course of action, Aylesworth J.A. could not rebut them.

The Court of Appeal held that the effect of s. 105(2) "is not to condone a wrongful act by the driver of the motor vehicle *qua* driver but simply to bar the cause of action with respect to that act. The Legislature . . . [barred] a certain cause of action against a wrongdoer without in any way affecting the legal result of the wrongful act with respect to someone else liable for that wrongful act upon some principle of the common law."[4] Thus the contention of the insurance company, that because s. 105(2) exonerated Livesey they too should be freed from liability, was to no avail.[5]

The case which attracted most attention on the part of the various judges who tried this matter was *Harrison v. Toronto Motor Car Ltd. & Krug.*[6] Mr. Justice Judson based his whole decision on this case and said that if this case were overruled, then his decision would have to be altered. Mr. Justice Cartwright severely attacked the *Harrison* precedent and if his voice had prevailed, the result in the instant case would have been reversed.

In *Harrison,*[7] the plaintiff was a registered nurse, who was at all relevant times in the employ of the deceased, Albert E. Krug. Owing to his physical and nervous condition, Krug needed medical and nursing attention and the plaintiff therefore accompanied him on a long motor trip to the Maritimes and back. Krug had his own car but had arranged with the Toronto Motor Car Ltd. to supply him with chauffeur's services. The motor company sent one McKenzie, who drove Krug's car. Unfortunately, near the end of the trip, McKenzie got on the wrong side of the road and hit another car head on, killing Krug and seriously injuring Miss Harrison. She then brought an action against Krug's estate and the motor company, claiming damages for her injuries.

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4 *Supra,* footnote 1, at p. 198 (D.L.R.).
5 This finding by the Court of Appeal follows a line of cases to the same effect. See, for example, *Smith v. Moss et al.,* [1940] 1 K.B. 424 and *Broom v. Morgan,* [1953] 1 Q.B. 597.
6 [1945] O.R. 1, [1945] 1 D.L.R. 286.
7 *Ibid.*

Section 47(2) (predecessor of 105(2)) of The Highway Traffic Act[8] was unsuccessfully relied upon by the plaintiff in an attempt to prove that, when involved in the accident, the vehicle was being operated in the business of carrying passengers for compensation. If this line of argument did not work in the *Harrison* case,[9] it certainly would be doomed to failure in the case under analysis.

In interpreting s-s. 2, Gillanders J.A. said that the literal wording of the sub-section should not be taken at face value but the intention of the Legislature should be sought out. He arrived at the same conclusion as Haines J. namely, that the provisions of s-s. 2, directed as they are to the liability of the owner and the driver, should be restricted to their liability *qua* owner and *qua* driver and should not necessarily bar a right of action arising out of some other relationship. As a result, if the plaintiff has a cause of action against his employer by reason of the negligence of its servant, s-s. 2 does not take it away even though at the time it arose, the employee was being carried in his employer's vehicle. If this reasoning and the conclusions based upon it are valid, they apply *verbatim* to the *Kearney* case.[10]

Mr. Justice Cartwright thought he had found the "intention" of the Legislature in s. 2(2) of The Negligence Act.[11] His Lordship maintained that this subsection indicates the Legislature intended that driver and owner should be grouped together for the purpose of determining liability. Therefore, when the driver is excused from liability the owner should be as well.

In Mr. Justice Cartwright's words:

> In my view the effect of s. 105(2) is not merely to afford a personal or procedural defence to the driver but to take away the passenger's right of action founded upon the driver's negligence. I am unable to impute to the Legislature the intention to free from liability the one person

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8 R.S.O. 1939, c. 165.

9 *Supra*, footnote 6.

10 On the other hand, J. D. Morton, in a searching article in (1958), 36 Can. Bar Rev. 414, at pp. 416-417 contends that the finding of liability does not depend on the relationship of master and servant existing between the parties (here Kearney and the Co-operators Insurance Association) but rather on the relationship of master and servant which exists between the driver (i.e. Livesey) and the employer Co-operators Insurance Association. Thus, the relationship existing between Kearney and the C.I.A. was immaterial to the finding that s. 105(2) did not save the defendant; the defendant, being liable vicariously for the negligence of its servant, Livesey, it mattered not whether Kearney was a stranger or in some legal relationship to him.

11 R.S.O. 1960, c. 261, s. 2(2). "In any action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from a motor vehicle other than a vehicle operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle that the injured or deceased person was being carried in, or upon or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages are, and no contribution or indemnity is, recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action."

> whose negligence was *fons et origo mali* and at the same time to impose liability upon those, morally innocent of any wrongdoing, who would have been required to answer vicariously for the driver's negligence had he remained liable.[12]

Throughout his judgment, Cartwright J. expresses an obvious dissatisfaction with s. 105(2), but says that "if the words of the subsection are plain and unequivocal the Courts must give effect to them although they bring about what, in the eyes of the common law, appears to be a grave injustice."[13]

To rebut Cartwright J.'s contention that the *Harrison* case had misinterpreted what is now s. 105(2), Mr. Justice Spence, in the majority opinion, stated that the *Harrison* case was well known to every lawyer and Judge in Ontario and yet The Highway Traffic Act had been revised twice in the nineteen years between the cases and not a word had been changed in the subsection under consideration. Also, the *Harrison* decision had been applied in several subsequent Ontario cases.[14]

The supposed *raison d'être* of s. 105(2) is to reduce the incidence of fraud by the family and friends of people injured in automobile collisions. Apparently, insured people would admit negligence on their parts where none in fact existed in order to help their friends collect from the insurance companies. It does seem strange that this problem is confined to Ontario. Surely a more efficacious scheme could be devised which does not arbitrarily deprive over 41% of the persons injured in motor vehicle mishaps[15] of any hope of recovery.[16]

II. Common Employment

At common law the defence of common employment had been recognized since the leading case of *Priestly v. Fowler*.[17] The provisions of The Workmen's Compensation Act[18] have restricted its application greatly in recent years. In the *Harrison* decision, it was held that to establish the defence of common employment it must be shown not only that the employees concerned are in the service of a common master, but are engaged in what may be termed, broadly speaking, a common undertaking.

Thus, in the *Harrison* case, a professional nurse, engaged to care for a patient, is not in common employment with such patient's chauffeur whose negligence caused her to become seriously injured.

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12 *Supra*, footnote 1, at p. 6 (D.L.R.).

13 *Ibid.*, at p. 4.

14 *Barclay v. Taylor*, [1946] O.W.N. 737 (H.C.); *Wiksech v. General News Co.*, [1948] O.R. 105 (Ont. C.A.); *Lemieux v. Bedard*, [1952] O.R. 500 (H.C.); *Aldridge v. Van Patter*, [1952] O.R. 595 (H.C.); *Duchaine v. Armstrong and Legault*, [1957] O.W.N. 251 (Ont. C.A.); *Chenier v. Morin*, [1958] O.R. 610 (H.C.).

15 The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965), ch. 4, p. 7.

16 For a lucid discussion of the various techniques used by the Courts to side-step s. 105(2) see, A. M. Linden, Note (1962), 40 Can. Bar Rev. 284.

17 (1837), 3 M. & W. 1, 150 E.R. 1030.

18 R.S.O. 1960, c. 437.

On the surface, the fact situation in the *Kearney* judgment seems to fill the prerequisites of common employment as laid down in the *Harrison* case. However, at trial, Haines J. held that the defence of common employment was not available to the defendants by reason of the provisions of Part 2 of the Workmen's Compensation Act, s. 125(1).[19] This viewpoint was confirmed by Spence J. in the Supreme Court of Canada. This did not mean that the employer had to guarantee the absolute safety of his servants but simply that he must take reasonable care. The Court decided that the negligence of Livesey constituted a breach of that duty and a breach for which the insurance company, as employers of Livesey, was responsible in law.

III. Course of Employment

One of the claims of the defendants and the one on which Mr. Justice Ritchie based almost his entire judgment, was that Kearney was under no obligation to ride back to his office with Livesey. He could easily have walked the three or four blocks after the business transaction with the client was completed. Thus, this line of reasoning goes, he was not injured in the course of his employment and therefore did *not* have a right of recovery under s. 124 of The Workmen's Compensation Act[20] for damages which occurred "by reason of the negligence of . . . any person in the service of his employer [*i.e.* Livesey] acting within the scope of his employment."

In his dissenting judgment Mr. Justice Ritchie applies *St. Helens Colliery Co. v. Hewitson*[21] to show that Kearney was not in the course of employment when injured. In this case Lord Wrenbury said:

> The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a *right* and there is no *obligation* binding on the man in the matter of his employment, there is no liability.[22]

The *St. Helens Colliery* case was followed in Canada by *Dallas v. Hinton & Home Oil Distributors Ltd.*[23] and *Hoar v. Wallace.*[24] In the *Dallas* case a saleman used his own car for company business, but the company paid the costs of operation whether it was used for company or private purposes. He had attended a meeting at the company's request and was on his way home when he negligently struck and injured the plaintiff. The Court held that, after the meeting, his day's work was done; he was free to do as he pleased and free to go home without any further control or direction from his

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[19] "A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow workmen and contributory negligence on the part of the workman is not a bar to recovery by him or by any person entitled to damages under *The Fatal Accidents Act* in an action for the recovery of damages for an injury sustained by or causing the death of the workman while in the service of his employer for which the employer would otherwise have been liable."

[20] *Supra*, footnote 18.

[21] [1924] A.C. 59.

[22] *Ibid.*, at p. 95. Italics mine.

[23] [1938] 2 D.L.R. 673 (S.C.C.).

[24] [1938] 4 D.L.R. 774 (Ont. C.A.).

master as to the route, mode of transportation or otherwise. His only obligation was to be at work on time the next morning. Thus he was under no control by his employer and, therefore, the latter was not liable for his negligence.

The Ontario Court of Appeal said that Kearney was not a free agent as the individuals had been in these other cases: "He had been transported to the place where the work of adjustment occurred in the car of the defendant Livesey and for the very purpose of engaging in that endeavour."[25] Thus Aylesworth J.A. held that "he was entitled, as part of their joint work as employees of the other defendant [*i.e.* Co-Operators Insurance Association], to be returned in the same vehicle to the place whence he came; his employment in that endeavour . . . continued until that had been done."[26] In the Supreme Court of Canada, Mr. Justice Spence concurred with this holding. In the other two Canadian cases, the employee, having completed the errand of his employer, was in charge of his own transportation and free to go whither he desired.

However, Mr. Justice Ritchie shows that the fact patterns in these three cases are very similar and that, to be consistent, the Supreme Court would have to find that Kearney *had* to go back to his office with Livesey. The evidence does not show this to be true and it is obvious that if the plaintiff had wanted to return to his office by some other mode of transportation or if he had desired to stop and shop, he could have done so. Livesey was just giving him a ride to be friendly and, also, it was the natural thing to do. Thus, there was no obligation binding on Kearney to return with Livesey and thus, according to the *Dallas* and *Hoar* precedents, the defendants were not liable.

Unfortunately, it is only Mr. Justice Ritchie who stressed this point as Cartwright J. placidly accepted the opinion of the Court of Appeal. Mr. Justice Cartwright observed that there appears to be great force to the argument that Kearney was not in the course of employment when the accident occurred, by virtue of the fact that he was free to go back to his office in whatever fashion he desired. Then he stated that since Aylesworth J.A. had dealt with this matter on appeal and had decided in a certain way, he would "assume, without deciding, that the . . . view taken by the Courts below is correct."[27] It is to be regretted that the learned Justice failed to take a stand as we are therefore deprived of a definitive precedent on this very important point.

Conclusion

Co-Operators Insurance Association v. Kearney[28] leaves as many questions unanswered as it resolves. Mr. Justice Judson's opinion is

25 *Supra,* footnote 1, at p. 197 (D.L.R.).
26 *Ibid.*
27 *Supra,* footnote 1, at p. 3 (D.L.R.).
28 *Supra,* footnote 1.

very superficial and stands or falls on the *Harrison* precedent. The dissenting judgments are, in some places, logically sound but, in others, display an unhealthy placid acceptance of lower court's reasoning. The one recurring theme throughout all the judgments is the universal dissatisfaction with s. 105(2) of The Highway Traffic Act.[29] If this man-made barrier to the logical application of equitable principles had not been present, a large segment of the artificiality in the reasoning of the Courts would have been eradicated. This subsection has resulted in untold injustice and needless suffering and it is to be hoped that the Ontario Legislature will shortly awaken to its responsibilities and repeal this odious subsection which has been called one of the "most vicious pieces of legislation which an active insurance lobby was able to foist on an unsuspecting public."[30]

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