1953 *Present :* **Gratiaen J. and H. A. de Silva J.**

T. H. I. DE SILVA, Appellant, *and* TRUST CO., LTD., Respondent

S. C., 229—D. C. Colombo, 23,098

Delict—Master and servant—Distinction between "servant" and "independent contractor"—Servant vested with discretion as to how he should carry out his duties—Negligence—Scope of master's liability—"Course of employment".

An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties. In distinguishing between a servant and an independent contractor, "the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done".

The owner of a vehicle may be responsible for the consequences of the negligence of a person who was driving it if the owner had an interest in the journey being undertaken, i.e., if the vehicle was "being used wholly or partly on the owner's business or for the owner's purposes".

Plaintiff, when he was travelling in a motor car belonging to the defendant insurance Company, was seriously injured when the car went off the road in consequence of the negligent driving of one of the occupants of the car. There was evidence that the car had been placed by the Company at the disposal of an employee under a "contract of loan" but that, at the time of the accident, the employee was travelling in the car together with the plaintiff on the Company's business. There was also evidence that the Company had vested in the employee a discretion as to how he should carry out his duties.

Held, that the defendant Company was liable to compensate the plaintiff for the injuries which he sustained in the accident.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the plaintiff, appellant.

H. V. Perera, Q.C., with *P. Navaratnarajah* and *W. D. Gunasekera*, for the defendant, respondent.

Cur. adv. vult.

October 29, 1953. GRATIAEN J.—

The plaintiff is a medical practitioner. On 27th April, 1950, he was travelling from Colombo to Jaffna in a Ford motor-car belonging to the defendant Company which does business in life insurance. The other occupants of the car were J. A. Pereira (an employee of the Company performing the duties of a "field-officer"), E. Holsinger (a free-lance insurance "canvasser") and a chauffeur directly employed by Pereira. Pereira, Holsinger and the chauffeur took turns at driving and, shortly

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before the car reached Anuradhapura, when Holsinger was driving, it suddenly went off the road and the plaintiff was seriously injured. Holsinger had apparently fallen asleep at the wheel.

It is no longer disputed that Holsinger's negligence was the effective cause of the accident. The learned District Judge assessed the damages payable to the plaintiff (in the event of the Company being held liable) at Rs. 50,000, and no complaint has been made against this assessment. The only issue which therefore calls for our decision is whether or not, in the circumstances of this case, the Company is vicariously responsible for the consequences of Holsinger's negligence.

The plaintiff had since about November, 1949, been engaged from time to time to examine persons proposing to take out policies of life insurance with the Company. He was paid a fee of Rs. 15 by the Company for each case, and as a general rule the examinations were carried out in his own place of business.

The plaintiff alleged in his plaint that the Company had "*engaged (his) services to proceed to Jaffna to examine certain prospective (clients)*" and that the accident occurred while he was being conveyed in the Company's motor-car for that purpose. The Company in its answer admitted "that the plaintiff went to Jaffna on the day in question for the purpose of examining certain prospective (clients) in the Northern Province for the defendant Company", but denied liability. In particular, it pleaded that the car belonged in truth to J. A. Pereira who was "in control and possession of it" at the relevant time and that the driver (i.e., Holsinger) was "under the employ of Pereira". With regard to the terms on which the plaintiff was engaged to examine the Company's proposed clients, the Company alleged that "the plaintiff *had to proceed to their residences at his own cost and expense*", and that on this particular occasion "Pereira had *lent the car to him, together with a driver, in order that the plaintiff's travelling expenses might be reduced as much as possible*".

The vital issues on which the parties went to trial on the question as to the disputed liability of the Company were as follows :

"4. Was the defendant Company the owner of the car on the day in question ?

2 (*a*) Was the said car at the time being driven by an employee of the defendant Company ?

2 (*b*) (as eventually amended). Was the said employee acting in the course of and within the scope of his employment and for the benefit of the said Company ?"

The learned District Judge answered these issues against the plaintiff upon the evidence placed before him, and took the view that the case was on all fours with that which came before the Court of Appeal of South Africa in *Colonial Mutual Life Insurance Co. v. Macdonald* [1]. The plaintiff's action was accordingly dismissed with costs.

[1] *(1931) S. A. A. D. 412.*

The version of each party as to the circumstances in which the plaintiff happened to be a passenger in the motor-car, and as to the relationship between the Company, Pereira and Holsinger in regard to the driving of the motor-car, was placed before the trial Judge, and it is implicit in his judgment that Holsinger's evidence has been rejected wherever it came into conflict with that of the plaintiff. Pereira himself, although available as a witness, was not called to support the plea that he had lent the car to the plaintiff for the purposes of the journey.

Certain questions immediately call for an answer. For instance, what was the precise relationship between the Company on the one hand and Pereira and Holsinger respectively on the other ? What were the circumstances in which the Company's car was placed at the disposal of Pereira ? And what were the circumstances in which the plaintiff was a passenger in the car at the time of the mishap ? It is conceded that Pereira had authorised Holsinger to drive the car. Did he do so in circumstances which rendered the Company liable to compensate the plaintiff for the injuries which he sustained in the accident ?

The Secretary of the Company has explained how its business affairs were conducted during the relevant period. There was a Board of Directors, but no Managing Director. The Secretary supervised the work in the office, and the " field work " was entrusted to three persons designated " field officers ", one of whom was Pereira. These " field officers " were salaried employees, and each of them received as additional remuneration an " over-riding commission " on the amount of business introduced by him. They were " answerable to the Secretary " in a general way, but were given " complete discretion as to the manner in which they set about bringing in business, and . . . . complete discretion to employ canvassers on a commission basis ". Holsinger was one of the canvassers whom Pereira had engaged in the exercise of this authority. Among the duties of a " field officer " was that of " supervising and controlling " the work of canvassers engaged by him.

A medical certificate was required in the case of every person proposing to insure his life with the Company, and, explained the Secretary, " field officers were told that they should select doctors who would examine carefully in the interests of the Company ". The plaintiff was one of the doctors selected by Pereira and Holsinger to examine cases introduced by them, and, whenever he was professionally engaged by them for any particular case, he was brought into contractual relationship with the Company for that occasion.

It is clear enough, I think, that Holsinger could not, *in relation to his functions as a canvasser*, be regarded as a servant of the Company. Although he was liable, in a certain sense, to be " supervised and controlled " by Pereira, he was nevertheless his own master. He was in truth an independent contractor, so that the Company could not, under normal circumstances, be held responsible for any torts committed by him *qua canvasser*. His position was similar to that of the commercial traveller in *Eggington v. Reader* [1].

[1] *(1936) 52 T. L. R. 212.*

The learned District Judge took the view that " even Pereira was not a servant of the Company in the sense in which that term is used in order to fix liability upon the master ". The reason given for this conclusion was that " no instructions were given to field officers as to where the proponent is to be examined and who the doctor to be employed is ; that was entirely within their discretion ". The judgment proceeds as follows on this issue :

> " . . . . it is quite clear that all that the Company was concerned with was the results of Pereira's efforts. They had no control over the manner in which he set about his employment or the means by which he accomplished the results obtained. "

With respect, I do not accept this line of reasoning. An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties—*Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.* [1]. " It is true ", said Lord Porter, " that in most cases no orders as to how a job should be done are given or required : the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but *who is entitled to give the orders as to how the work should be done* ". Applying this test, I would hold that the functions of Pereira, *qua* " field agent " of the Company, were those of a servant under a " contract of service " as distinguished from those of an independent contractor under a " contract for services ". He was answerable to the Secretary of the Company, and the unlimited discretion or authority which he was given as to how he should perform his " field duties " for the benefit of his employer could have been withdrawn or curtailed at any moment. It has not even been suggested that the Company had contracted itself out of its right to give him particular directions (if it so desired) as to how he should discharge his duties in the future. In my opinion, the learned Judge misdirected himself as to the true relationship between Pereira and the Company.

I shall now examine the circumstances in which the Company's motor-car was made available to Pereira. The Secretary admitted, and it is obvious, that " a field officer cannot function efficiently without a car ". Accordingly, the Company purchased this particular vehicle and " loaned " it to Pereira " with a view to helping him to discharge his obligations (as a field officer) "—*vide* the formal agreement D2 dated 30th July, 1948, in terms of which Pereira was handed possession of the car.

The question at once arises whether the Company could under any circumstances have been held responsible for the negligence of a person driving the vehicle at a time when it was in Pereira's possession under the " contract of loan " D2. The learned Judge seems to have thought that no such liability could ever attach because " the control . . . . remained with Pereira and to all intents and purposes Pereira was the owner ". In my opinion, this proposition goes too far. The authorities

[1] *(1947) A. C. 1.*

indicate that, in certain instances, the Company might well be liable for the negligence of the driver of the car because of the special relationship subsisting between Pereira and the Company. The judgment of the Privy Council in *Canadian Pacific Railway Co. v. Lockhart* [1] establishes that, if the motor-car had been negligently driven on any occasion in the course of a journey "*for the purposes of, and as a means of execution of the work of*" *Pereira as an employee of the Company*, the Company would have been liable to compensate a third party injured by reason of that negligence. Pereira's general duties as a field officer necessitated and involved his presence as the Company's representative in many places, and if he was travelling in the car in order to perform any of these duties, "the means of transport used by him was clearly incidental to the execution of that which he was employed to do". In *Lockhart's case*, the car belonged to the servant and not to the employer. In addition the servant had been expressly forbidden to use a vehicle which was not insured against third-party risks. Nevertheless, the employer was held responsible for the servant's negligence while driving an uninsured vehicle in the course of and for the purposes of his employment, because "the prohibition did not limit the sphere of his employment". How much stronger would be a situation in which Pereira was engaged in travelling on the Company's business in a motor-car which had primarily been placed at his disposal for that very purpose ?

A recent decision of Devlin J. in *Ormrod v. Crossville Motor Services Ltd. et al.* [2], which was upheld by the Court of Appeal—(*1953*) *2 A. E. R. 753*—illustrates that the owner of a vehicle may be responsible for the negligence of a person who was driving it if the owner had (or even shared with that other person) *an interest in the journey being undertaken*—or, as Denning L.J. put it, if the vehicle was "being used wholly or partly on the owner's business or for the owner's purposes".

I concede that Pereira was not precluded by the terms of the "contract of loan" from using the vehicle for his private purposes if he so desired. If, therefore, the car were negligently driven while Pereira was travelling to his golf-club, the Company could not have been held responsible. But if, on the other hand, an accident occurred while he was engaged on the Company's business in the performance of his legitimate duties as the Company's employee, the position would have been entirely different.

Let me now examine the circumstances in which the plaintiff happened to be travelling in the motor-car at the time of the accident. On that issue, the trial Judge had before him only the conflicting versions of the plaintiff and Holsinger. Pereira's exclusion from the witness-box is significant, and it is not unreasonable to presume that if the Company had chosen to call him as a witness, he could not have truthfully carried the defence any further. The difficult questions which the learned Judge was called upon to resolve would not have arisen at all if he believed that the plaintiff had merely borrowed the car for his own exclusive benefit in order to fulfil an undertaking to travel to Jaffna at his own cost and expense. Indeed, Mr. H. V. Perera conceded that the acceptance

[1] (*1942*) *A. C. 591.*

[2] (*1953*) *1 W. L. R. 409.*

of the plaintiff's evidence on this aspect of the case is implicit in the judgment under appeal. I shall therefore summarise this evidence, which is to the following effect :

On earlier occasions, Pereira and Holsinger had (except in one instance) taken the plaintiff in this identical car to the proposed client's residence if it was not convenient to bring the client to the plaintiff's place of business. The arrangement arrived at with Holsinger, *in the presence and with the approval of Pereira*, was " for the Company to provide the transport ". With regard to the particular journey with which this case is concerned, Holsinger who had previously gone to Jaffna with Pereira on a canvassing tour, wrote a letter P 2 dated 19th April, 1950, on business note paper belonging to the Company, saying " We are at present working at Jaffna, and as promised we are going to give you all the business up here, which would be a very large number of exams. You will have to spend four days with us as the volume of work is going to be large ". In due course, Holsinger and Pereira arrived at the plaintiff's house and took him away in the car. It was in the course of this journey that the accident occurred by reason of Holsinger's negligence.

The plaintiff expressly denied that he had " borrowed " the car from Pereira for the purposes of the trip, and explained that, if he had undertaken to provide his own transport (which he did not) he could very well have used his private motor-car. On the contrary, he said, he had made it clear that he would not go unless he was provided with transport " because it was not worth while to go in my car "—the distance involved being 248 miles each way.

It seems to me that, upon the facts as I have set them out, the Company's liability has been clearly established. The resemblance between the present case and that which was considered in *Colonial Mutual Life Insurance Co. v. Macdonald* (*supra*) is only superficial, and disappears when one appreciates (*a*) the true relationship between Pereira and the Company, and (*b*) the responsible part which Pereira had himself played in the transaction. He had a discretion as to the selection of the doctor who was to examine the cases in Jaffna ; he exercised that discretion in favour of the plaintiff. He was a party to the negotiated arrangement that, as a term of the plaintiff's engagement to examine the cases in Jaffna, he should be provided with transport ; and he did in fact provide the transport. He had a right to select the person who should drive the car during any stage of the journey ; he selected Holsinger. He had the right to decide whether or not, in the Company's interests, no less than in his own, he should accompany Holsinger and the plaintiff on the trip ; and he accompanied them.

At no relevant stage had Pereira divested himself of his character as a servant authorised by the Company to act on its behalf. Throughout the journey, therefore, the car was, through Pereira's instrumentality, being used *on the Company's business*. If through Holsinger's negligence, a pedestrian had been injured during the course of the trip, the Company would have been liable. For, in addition to the contractual arrangement to convey the plaintiff to Jaffna, the car was without doubt being used

as " a means of transport which was clearly incidental to the execution of that which (Pereira) was employed to do ". He was engaged *on the Company's business* while he was travelling to Jaffna.

The duty which was owed to the plaintiff as a passenger in the car cannot logically be placed on a lower plane. He had stipulated that he should be conveyed to Jaffna by the Company, which, through its accredited representative, had engaged him to undertake professional work on its behalf at the other end. Even if that accredited representative, i.e., Pereira, had (unknown to the plaintiff) been prohibited expressly from agreeing to provide such transport, it would have made no difference whatsoever, because a master is responsible for the " unauthorised act of a servant done in the course of an authorised employment "—*Citizens Life Association Co. v. Brown* [1].

In my opinion the judgment under appeal should be set aside. It has not been argued that the learned Judge's estimate on the issue of damages is excessive. I would therefore enter a decree in favour of the plaintiff for Rs. 50,000 with costs in both Courts.

H. A. DE SILVA J.—I agree.

Appeal allowed.