T. G. BRIGHT & COMPANY LTD. (DEFENDANT) .... APPELLANT;

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* June 15, 16.
* Dec. 12.

AND

SARAH JANE KERR, ADMINISTRATRIX OF THE ESTATE OF JOHN TODD KERR, DECEASED (PLAINTIFF) .... RESPONDENT;

AND

WILBERT SINCLAIR AND LESLIE SINCLAIR (DEFENDANTS).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Master and servant—Principal and agent—Company manufacturing and selling wine in Ontario—Delivery of parcels to its customers by an individual—Motorcycle used by latter striking pedestrian—Question as to liability of the company—Relationship between the company and the individual—Liquor Control Act, Ont., and regulations—Question whether judgment taken at trial against individual precluded plaintiff from proceeding further against company.

Appellant was a company licensed to manufacture and sell wine throughout Ontario, and had a retail store on Yonge St., Toronto. Its deliveries up to 4 o'clock p.m. were made by a certain delivery service. In the evening one S. would telephone inquiring if there were parcels to deliver, and if so would call for them and make delivery (within the time prescribed by regulations under the *Liquor Control Act*), collecting payment and securing signatures to orders and receipts. He was paid a stipulated sum per parcel, payment being made weekly. While delivering parcels as aforesaid, the motorcycle which he was driving struck K. who died as the result. The question on this appeal was appellant's liability for damages by reason of the accident (in an action brought under the Ontario *Fatal Accidents Act*). At the trial, which was had with a jury, the trial judge, on motion at close of plaintiff's case, dismissed the action as against appellant. The Court of Appeal for Ontario (Middleton J.A. dissenting) ([1937] O.R. 205) set aside said dismissal and ordered a new trial between plaintiff and appellant, confined to the question of liability of appellant and assessment of damages. Appellant appealed to this Court.

Held: Appeal allowed and judgment at trial restored. (Duff C.J. and Davis J. dissenting).

Per Crocket J.: This was a clear case of casual or collateral negligence on the part of a private carrier for hire. In the operation of the motorcycle, S. was not appellant's servant within the meaning of the rule which makes a master liable for the acts of a servant in the performance of his duty as such—he was not subject to appellant's control or direction, he was entirely his own master; his negligence, therefore, cannot properly be attributed to appellant. Also, neither the agreement under which S. was entrusted with the custody of the wine for delivery, nor any of the regulations made under the *Liquor Control Act* imposed any responsibility upon appellant for the injury of third persons by the negligent operation of the motorcycle. It is

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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only upon the basis of appellant's employment of S. to make this particular delivery by means of a motorcycle in itself involving such danger to third persons that the accident might reasonably have been foreseen that appellant could properly be fixed with responsibility for K.'s death. In that case appellant's responsibility would really rest upon its own direct negligence in employing S. to make the delivery by that means rather than upon the so-called doctrine of vicarious responsibility (*City of Saint John* v. *Donald,* [1926] S.C.R. 371, at 383-4); it cannot be said that the delivery of parcels on occasion by means of a hired motorcycle is inherently dangerous.

Per Kerwin J.: A person employing another is not liable for the latter's collateral negligence unless the relation of master and servant exists between them. It may be assumed that appellant knew that the delivery would be made by motorcycle, and that it therefore authorized delivery by that means. But, while appellant had the right to take the work out of S.'s hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. S. was the agent of appellant so as to make appellant liable for anything done by S. with its authority; but appellant was not liable for S.'s negligence in driving the motorcycle, as that was a casual or collateral matter which appellant did not authorize expressly or by implication. Not being subject to appellant's control as to the manner of driving, S. was not its servant. There was no evidence of any authority in S. to drive negligently and there was, therefore, nothing to leave to the jury.

Hudson J. adopted the reasons of Middleton J.A. (dissenting) in the Court of Appeal ([1937] O.R. at 228-232).

Per Duff C.J. and Davis J. (dissenting): There was evidence on which a jury might reasonably find that, in the management of his motorcycle while driving it at the place and time in question, S. was acting in appellant's business in execution of his duty as its agent; that being so, plaintiff's case should have been submitted to the jury. The jury might not unreasonably find that in the circumstances in which the wine was placed in S.'s custody for delivery, the only practicable means of carriage was by some kind of motor vehicle; and, having regard to the practice, that on the occasion in question the goods were entrusted to and received by him on the tacit understanding that carriage would be effected by motorcycle; and that it was well understood that he must drive through the public streets. By force of the regulations made under the *Liquor Control Act,* S., who was not a common carrier within their meaning, could only lawfully be in possession of the parcels as appellant's agent; and a jury would be entitled to find as a fact that appellant's store manager was familiar with the purport of the regulations governing the sale of wine at the store, and, moreover, as a consequence, that S. was entrusted with the wine in the only capacity in which (not being a purchaser or approved carrier) he could lawfully be entrusted with it, namely, as appellant's agent. (Inclination expressed to the opinion that, under the principle stated in *In re Hallett's Estate,* 13 Ch. D. 696, at 727, it was not competent either to appellant or S. in an action of this character to deny that the wine was in fact entrusted to S. for carriage and delivery as appellant's agent). The parcels having been placed in S.'s custody as agent, obviously it was his duty as agent to take reasonable care for the safe carriage and delivery, and it would be clearly open to the jury to find that, as

incidental to that duty, he was under an obligation to his principal in respect of the management of the motorcycle; and it would be incumbent upon the trial judge to instruct them that if they thought S.'s duty as agent embraced the duty to manage his motorcycle in such a manner as not to risk the loss of the wine or any part of it, it was for them to say whether the management of the motorcycle generally was a matter incidental to the functions expressly entrusted to him.

The rule *respondeat superior,* and its ground, discussed, and authorities referred to. The rule does not rest upon any notion of imputed guilt or fault. The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in matters incidental to the doing of the acts.

The fact that the damages were assessed against S. (who did not appear and was not represented at the trial) and judgment taken against him did not preclude the plaintiff, in the special circumstances of this case [discussed by Rowell, C.J.O. below in [1937] O.R. at 223, 224], from proceeding further against appellant.

APPEAL by the defendant company from the judgment of the Court of Appeal for Ontario (1) allowing the plaintiff's appeal from the judgment of Honeywell Co. C.J. dismissing the action as against the defendant company.

The plaintiff was the widow of, and the administratrix of the estate of, John Todd Kerr, deceased, who died as the result of being struck, on March 20, 1936, on Avenue Road, Toronto, Ont., by a motorcycle owned by the defendant Leslie Sinclair and driven by the defendant Wilbert Sinclair, who at the time of the accident was delivering parcels of wine to customers of the defendant company, which was a duly incorporated company, licensed to manufacture and sell native wine throughout the province of Ontario and had a retail store on Yonge street, Toronto.

The action was brought under the *Fatal Accidents Act* (Ont.) on behalf of the plaintiff and her infant children to recover damages by reason of the death of the said deceased. The defendants Sinclair did not appear at the trial nor were they represented by counsel. At the trial, at the close of the plaintiff's case, on motion by counsel for the defendant company, the trial judge dismissed the action as against it. It was then agreed between counsel that the trial judge should dispose of the action as against the other defendants without reference to the jury. He fixed the damages at $12,000, and gave judgment against

(1) [1937] O.R. 205; [1937] 2 D.L.R. 153.

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the defendants Sinclair for that sum. Upon appeal by the plaintiff to the Court of Appeal for Ontario from the dismissal of the action against the defendant company, the Court of Appeal (Middleton J.A. dissenting) allowed the appeal, set aside the judgment below, and ordered that a new trial be had between the plaintiff and the defendant company, at which trial the issues should be confined to the question of the liability of the defendant company for the negligence of the defendant Wilbert Sinclair and to the assessment of damages as against the defendants (1). Middleton J.A., dissenting, would dismiss the appeal. The defendant company appealed to the Supreme Court of Canada.

The defendant Wilbert Sinclair was not a common carrier within the meaning of the regulations made under the Ontario *Liquor Control Act*.

In the course of his reasons for judgment the trial judge stated as follows with regard to the facts:

> This company [defendant company] had its regular delivery service during the day time, and after hours had its parcels delivered by various carriers. It was shown that the defendant Wilbert Sinclair had applied to the [defendant company] for the privilege of delivering parcels, and stated that he could deliver by motorcycle or by car. It was not shown that the [defendant company] made any stipulation as to how he was to deliver. Sinclair was not under any obligation to deliver. He would call up in the evening by telephone and ask if they had any parcels to deliver. If they had, he would come to their store, 223½ Yonge street, receive the parcels, and proceed to deliver them. With the parcels there went a bill on a form provided by the Liquor Control Board, which, among other things, required on delivery of the parcel the signature of the purchaser, the address, the driver's signature, and a line for entry of the method of delivery. On none of the forms was the method of delivery specified. There was no written agreement between the [defendant company] and the defendant Sinclair. The instructions, according to the evidence of the manager, were to take a parcel to the address, take the form or bill, and have it signed by the person getting it. On C.O.D. orders cash was to be received before turning over the parcel. The manager did not know that Sinclair did not have a licence. He was paid every Saturday 25 cents for delivering each parcel within Toronto, and 35 cents outside of Toronto. When he met with difficulty he would phone in for instructions. Sometimes the defendant Sinclair did not phone up, or did not come for parcels, and the [defendant company] had to obtain someone else to make the delivery. There was no control over Sinclair as to route or time. There was no specification as to how he was to deliver, whether by motorcycle, car or street car.

(1) [1937] O.R. 205; [1937] 2 D.L.R. 153.

In the course of his reasons for judgment in the Court of Appeal, Rowell, C.J.O., stated as follows with regard to the facts:

According to the evidence, the procedure adopted by the defendant company was as follows: an order was received by telephone and the name of the purchaser, his address and the quantity of wine required was entered upon the order form by Johnston or the clerk in the office who received the order. The order was then filled and ready for delivery. All deliveries up to four o'clock in the afternoon were made by Eddy's Delivery Service, but they made their last call at four o'clock, and orders received after that hour were delivered by the defendant Wilbert Sinclair, who called for the parcels or cartons at six or half past six o'clock in the evening. It was his duty, before delivering the wine to the purchaser, to secure the purchaser's signature to the original order, which must be forwarded by the company to the Liquor Control Board. He must also secure payment of the purchase price and a receipt for the wine on delivery. He could not deliver the wine without securing the signature to the original order, or without payment of the purchase price, and delivery had to be made within the time prescribed by the Regulations. If the residence of the purchaser was an apartment house, boarding house or rooming house or hotel, he must hunt out the purchaser and make delivery directly to him. If any difficulty arose in making delivery in accordance with his instructions, it was his duty to telephone to Mr. Johnston and receive special instructions and to act on those instructions. He was required to return to the company the following day the original order for purchase duly signed and the purchase price. Having regard to the time within which delivery must be made to comply with the regulations, it could only be made by motor-cycle or motor car, and it appears quite clear from the evidence that Johnston knew and approved of the use of the motor-cycle for delivery of the wine. Sinclair was paid twenty-five cents a carton for deliveries within the city limits and thirty-five cents outside the city, the payments being made weekly.

By the judgment now reported the appeal to this Court was allowed (with costs of both appeals) and the judgment of the trial judge restored. The Chief Justice and Davis J. dissented.

T. J. Agar K.C. for the appellant.

E. L. Haines for the respondent.

The judgment of the Chief Justice and Davis J. (dissenting) was delivered by

THE CHIEF JUSTICE.—I agree with the conclusion of the Court of Appeal and in substance with the reasoning of the Chief Justice of Ontario. The new trial ordered by the judgment of the Court of Appeal is limited to the issue of the responsibility of the appellants for the negligence of Wilbert Sinclair and the damages.

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The question now to be decided is whether there was evidence upon which a jury might reasonably find that, in the management of his motorcycle while driving it through the public streets on the evening in question on his way to make delivery of the parcels entrusted to him, Sinclair was acting in the business of the appellants in execution of his duty as their agent. If there was such evidence, the plaintiff's case ought to have been submitted to the jury.

The jury might not unreasonably find that in the circumstances in which the wine was placed in Sinclair's custody for delivery, the only practicable means of carriage was by some kind of motor vehicle; and, having regard to the practice, that on the particular occasion with which we are concerned, the goods were entrusted to Sinclair and received by him on the tacit understanding that carriage would be effected by motorcycle; and, moreover, that it was well understood he must drive through the public streets.

When Regulations numbered 57 to 62 are read with those numbered 113, 119 and 120, it appears that carriage of beer from a brewery or warehouse to the residence of a purchaser (except by a purchaser) is regulated in this sense, that the liquor must be carried by the brewer, by his agent or by a common carrier sanctioned by the Board, unless authority to make such carriage otherwise is given by the Board. These provisions with regard to the carriage of beer are, by force of s. 103, applicable to native wines.

By force of these regulations, Sinclair, who, admittedly, was not a common carrier within the meaning of the Regulations, could only lawfully be in possession of the parcels of wine he was carrying as agent of the appellants. I am inclined to think that, under the principle stated by Sir George Jessel in *Re Hallett* (1), it is not competent either to the appellants or to Sinclair in an action of this character to deny that the wine was in fact entrusted to Sinclair for carriage and delivery as the agent of the appellants:

Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilized countries, than this, that

(1) *In re Hallett's Estate; Knatchbull* v. *Hallett*, (1880) 13 Ch. D. 696, at 727.

where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

In any case, a jury would be entitled to find as a fact that the manager of the appellants' store was familiar with the purport of the Regulations governing the sale of the wine at the store and, moreover, as a consequence, that Sinclair was entrusted with the wine in the only capacity in which (not being a purchaser or approved carrier) he could lawfully be entrusted with it, namely, as the agent of the appellants.

The parcels having been placed in Sinclair's custody as agent, obviously it was his duty as agent to take reasonable care for the safe carriage and delivery of the wine and it would be clearly open to the jury to find that, as incidental to that duty, he was under an obligation to his principal in respect of the management of the motorcycle; and it would be incumbent upon the trial judge to instruct them that if they thought Sinclair's duty as agent embraced the duty to manage his motorcycle in such a manner as not to risk the loss of the wine or any part of it, it was for them to say whether the management of the motorcycle generally was a matter incidental to the functions expressly entrusted to him.

It would appear to be necessary to make some reference to the ground upon which the responsibility of a principal for the acts of his agent rests.

Respondeat superior is a rule which does not rest upon any notion of imputed guilt or fault. The fallacy that it does was responsible for the difficulty that great lawyers of the last century felt (Bramwell B., for example) in admitting the liability of a corporation for the fraud of its agents. In *Hern* v. *Nichols* (1) the point in issue was the responsibility of a merchant for the deceit of his factor

(1) (circa 1700) 1 Salkeld 289.

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beyond the sea. Holt C.J. states the broad ground of responsibility thus:

> * * * for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.

In *Hall* v. *Smith* (1), Best C.J. says:

> The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.

The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and, to adapt the language of Henn Collins M.R. in *Hamlyn* v. *Houston* (2), it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in "matters incidental to the doing of the acts, the performance of which has been entrusted to him."

The rule has been precisely explained in the House of Lords in two modern cases in which Story's statement of it has been adopted. In *Percy* v. *Corporation of the City of Glasgow* (3), Lord Haldane said:

> As was laid down by Story in a passage adopted in an earlier case by Blackburn J. and approved in this House in *Lloyd* v. *Grace, Smith & Co.* (4), "the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment,* although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.'" The limitation is that "'the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any other matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.'"

In *Lloyd* v. *Grace, Smith & Co.* (5) mentioned by Lord Haldane, these passages from Story were made part of the reasoning of Lord Macnaghten's judgment in which Lord Loreburn, Lord Atkinson and Lord Shaw concurred. They had previously been quoted by Lord Blackburn (Blackburn J. as he then was) with apparent approval in delivering the judgment of the Queen's Bench (Cock-

(1) (1824) 2 Bing. 156, at 160.
(2) [1903] 1 K.B. 81, at 85-86.
(3) [1922] 2 A.C. 299, at 306.
(4) [1912] A.C. 716, 737.
(5) [1912] A.C. 716.

burn, C.J., Blackburn, Mellor and Lush JJ.) (1). Story's statement of the law having been thus adopted and acted upon by the House of Lords, it is, I think, binding upon this Court (*Robins* v. *National Trust Co.*) (2).

An argument was addressed to us by the appellants based upon the allegation that Sinclair and the appellants being joint tortfeasors and the respondent, in default of appearance by Sinclair, having had the damage assessed against Sinclair and taken judgment against him, is precluded from proceeding further against the appellants. I agree with the learned Chief Justice of Ontario that, in the special circumstances of this case, the appellants cannot succeed on this ground.

The appeal should be dismissed with costs.

CROCKET J.—I agree with Middleton J.A. and also with my brother Kerwin that this is a clear case of casual or collateral negligence on the part of a private carrier for hire in the operation of the motorcycle which he used for the purpose of making delivery of the package of wine to the purchaser's residence, and that the driver, not being subject to the control or direction of the appellant in the operation of the motorcycle, was not its servant within the meaning of the rule which makes a master liable for the acts of a servant in the performance of his duty as such. Sinclair, to my mind, was entirely his own master as regards the operation of the motorcycle and his negligence, therefore, cannot properly be attributed to the appellant.

I am also of the opinion that neither the agreement, under which Sinclair was entrusted with the custody of the wine for delivery to the purchaser's residence, nor any of the regulations made under the provisions of the *Liquor Control Act* concerning the delivery of liquor or wine to private residences imposed any responsibility upon the appellant for the injury of third persons by the negligent operation of the motorcycle. It is only upon the basis of the appellant's employment of Sinclair to make this particular delivery by means of a motorcycle in itself involving such danger to third persons that the unfortunate

(1) *McGowan & Co.* v. *Dyer*, (1873) L.R. 8 Q.B. 141, at 145.

(2) [1927] A.C. 515, at 519.

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accident might reasonably have been foreseen that the appellant could properly be fixed with responsibility for the death of the intestate. In that case the appellant's responsibility would really rest upon its own direct negligence in employing Sinclair to make the delivery by that means rather than upon the so-called doctrine of vicarious responsibility. See judgment of Anglin, C.J., in *City of Saint John* v. *Donald* (1), at bottom of p. 383 and top of p. 384. For my part, I am not prepared to hold that the delivery of parcels on occasion by means of a hired motorcycle is inherently dangerous—any more so than their delivery by a hired motor car or motor truck. Accidents to strangers, of course, are always possible in the operation of either motor cars or motorcycles, and, indeed, in these days very probable if due care is not exercised by those in charge of them. I do not feel justified, however, in acceding to the suggestion that a merchant or any other person by the mere act of hiring a motor truck, motor car or motorcycle on occasion to make delivery of goods by such means assumes liability for any negligence of which the driver of the hired vehicle may be guilty.

In my opinion the learned County Court Judge (Honeywell) had no other recourse upon the undisputed facts than to dismiss, as he did, the action as against the appellant.

I would, therefore, allow the appeal and restore the trial judgment with costs throughout.

KERWIN J.—The facts are set out in the reasons for judgment of the members of the Court of Appeal for Ontario (2) and need not be repeated. The only question in this appeal, to my mind, is whether the relationship of master and servant existed between the appellant and Wilbert Sinclair whereby the former would be rendered liable for the collateral negligence of the latter.

Lord Blackburn in *Dalton* v. *Angus* (3) states:

> Ever since *Quarman* v. *Burnett* (4) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them.

Omitting all reference to circumstances where the employer owes a duty which he cannot avoid by hiring another, I

(1) [1926] S.C.R. 371.
(2) [1937] O.R. 205; [1937] 2 D.L.R. 153.
(3) (1881) 6 App. Cas. 740, at 829.
(4) (1840) 6 M. & W. 499.

do not read any of the decisions that are binding on this Court and that are usually cited for the purpose, as altering the law as thus set forth and in effect Pollock and Salmond in their books on Torts treat this statement to be the result of the cases.

In the Thirteenth Edition of Pollock, at page 82, the author points out that the rule being that a master is liable for the acts, neglects and defaults of his servants in the course of the service, it is necessary to define "servant," and states as to this point that "it is quite possible to do work for a man in the popular sense, and even to be his agent for some purposes, without being his servant." That part of the text which follows, and which I transcribe, was approved by McCardie J. in *Performing Rights Society* v. *Mitchell and Booker* (1):

> For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery.

To the same effect is the Eighth Edition of Salmond which at pages 88 and 89 draws the distinction between the case of a principal who is liable only for those acts of his agent which he expressly or impliedly authorized but which rule is subject, so far as here applicable, to an exception which governs the particular form of agency which exists in the case of master and servant.

In the case at bar it may be assumed that the appellant knew that the delivery of wine would be made by motorcycle and that it, therefore, authorized the delivery by that means. But while the appellant had the right to take the work out of Sinclair's hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. In thus paraphrasing another extract from the judgment in the *Performing Rights* case (1), I have not overlooked the fact that McCardie J. was there considering the test to be applied in deciding whether a man is a servant or an independent contractor, but I think the test is also the proper one as to when a man is that particular class of agent defined as servant. Indeed it is but an elaboration of the definition given by Lord Justice Bramwell in *Yewens* v. *Noakes* (2), where

(1) [1924] 1 K.B. 762. (2) (1880) 6 Q.B.D. 530, at 532.

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he says, "a servant is a person subject to the command of his master as to the manner in which he shall do his work."

The matter is discussed in the Fourth Edition of Bevan on Negligence, at page 713, where the author, after quoting this definition, also gives the evidence of Lord Justice Bramwell taken before the First Committee of the House of Commons on Employers' Liability, and then continues:

> Once again, the distinction between a servant and an agent is the distinction between serving for and acting for. An agent as contrasted with a servant has a discretion as to the time and manner of performance, and sometimes as to acting or not acting.

In my judgment, Wilbert Sinclair was the agent of the appellant so as to make the latter liable for anything done by him with its authority. But the appellant is not liable for Sinclair's negligence in driving the motorcycle, as that was a casual or collateral matter which the appellant did not authorize expressly or by implication. Not being subject to the appellant's control as to the manner of driving, Sinclair was not its servant. There was no evidence of any authority in Sinclair to drive negligently and there was, therefore, nothing to leave to the jury. I would allow the appeal with costs in this Court and the Court of Appeal and restore the judgment at the trial.

HUDSON J.—I think this appeal should be allowed and the judgment at trial restored for the reasons given by Mr. Justice Middleton in the court below

Appeal allowed with costs.

Solicitors for the appellant: *Hughes, Agar & Thompson.*

Solicitor for the respondent: *T. B. Horkins.*