1958

SHORTT v. MACLENNAN

Judson J.

Solicitor for the defendant, appellant: W. J. S. Knox, Sarnia.

Solicitors for the plaintiffs, respondents: MacEwen & Pearson, Sarnia.

1958

*Nov. 19, 20
Dec. 18

JOHN THOMAS ANDREWS AND ALBERT GAUTHIER (*Defendants*) ..... APPELLANT;

AND

THEODORE CHAPUT (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Master and servant—Automobile—Accident—Taxi driver using employers' car to drive son to school, on payment of fare—Damages caused to third party—Liability of owner—Art. 1054 of the Civil Code.

A taxi driver asked his employers, the defendants, for permission to use his taxi-cab to bring his son back home for the opening of school. The fare for the trip was fixed in advance and the driver paid 60 per cent. of it to his employers and retained the balance. The driver was usually paid 40 per cent. on fares when working for the defendants. He was involved in an accident and the third party sued him and the defendants. The trial judge allowed the action against the driver and dismissed the action against the defendants. This judgment, however, was reversed by the Court of Appeal, which held that the driver was in the performance of the work for which he was employed.

Held: The appeal should be allowed and the action against the defendants dismissed.

The legal inference which must be drawn from all the facts is that on the day in question the driver was not operating the car as a taxi-cab at the request of a patron and for the benefit of his employers but was using it for his own purposes. This inference can be drawn particularly from the fact that permission to make the trip was sought and obtained from the defendants, in advance, that further permission was obtained from the manager, and that the amount agreed upon was paid to him before the trip was undertaken, and that the driver was given the right to use the car as he saw fit throughout the entire day.

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*PRESENT: Taschereau, Rand, Fauteux, Abbott and Judson JJ.

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ANDREWS AND GAUTHIER v. CHAPUT

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Ferland J. Appeal allowed.

H. Hansard, Q.C., and *W. S. Tyndale*, for the defendants, appellants.

J. Duchesne, for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Respondent's claim is one in damages arising out of a collision between a car owned and driven by respondent and a taxi-cab owned by appellants, being driven at the time of the accident by an employee Disnard.

The facts are not in dispute, the amount of damages, $4,067.50, is not now in issue, and before this Court it was conceded that the accident was due to the fault of appellants' said employee. The sole question in issue here is whether at the time of the accident Disnard was in the performance of the work for which he was employed by appellants within the meaning of art. 1054 of the *Civil Code* so as to engage the vicarious responsibility of appellants.

The facts relevant to the determination of this issue are as follows.

At the time of the accident and for some time prior thereto, Disnard had been employed by appellants as a chauffeur to drive taxi-cabs owned and operated by them in the city of Montreal. He was not paid a salary but received a commission consisting of 40 per cent. of the total receipts from his operation of cars belonging to appellants. The accident occurred near St. Bruno at about 6.45 on a Saturday afternoon in September 1951, when Disnard was returning from Actonvale where he had gone in order to bring his young son back to his home in Montreal for the opening of school. Disnard appears to have left Montreal for Actonvale sometime in the morning, accompanied by two young friends of his son who had gone along for the ride. It is also in evidence that Disnard's wife had contributed $5 towards the cost of the trip.

[1] [1958] Que. Q.B. 425.

The appellant Gauthier testified that at some time prior to making this trip to Actonvale, Disnard had informed him that he wanted to go there in order to bring back his son and that he Gauthier, had told him to go whenever he wished to do so. Gauthier's evidence on this point is as follows:

D. Avant cet accident, avez-vous eu connaissance d'un voyage par monsieur Disnard? R.—Il m'avait parlé qu'il voulait aller chercher son petit garçon. J'ai dit: "Tu iras quand tu voudras, quand cela te fera plaisir."

It was agreed that Disnard would pay Gauthier $10 for the trip, this amount being approximately 60 per cent. of the regular taxi fare on a flat rate basis from Montreal to Actonvale. Prior to leaving for Actonvale Disnard also took the matter up with one Pellerin, a co-driver and appellants' manager (to whom he had also spoken concerning the trip about a week before), obtained his permission to make the trip on the day in question and paid him the $10 agreed upon. The only time limit put on Disnard's use of the taxi-cab appears to have been that he was to return it to his employers' garage in time for the car to be used by the night chauffeur.

The evidence establishes that the regular taxi-cab fare for a trip from Montreal to Actonvale on a flat rate basis is $16.40 and had this been a regular trip, I can see no reason for Disnard having to obtain permission in advance from the appellant Gauthier nor is it likely that in such event payment for the trip would have been made in advance. Moreover, as I read the evidence, the arrangement made by Disnard with his employers was that he, Disnard, would be free to use the car as he pleased during the whole of the day upon payment of the $10 agreed upon, subject only to his returning it to his employers' garage in time for it to be available for use by the night chauffeur.

Upon these facts the learned trial judge held that at the time of the accident Disnard was not in the performance of the work for which he was employed. This finding was unanimously reversed by the Court of Queen's Bench[1] but with respect I am unable to agree with the conclusion reached by the learned judges in the Court below.

[1] [1958] Que. Q.B. 425.

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Abbott J.

The legal inference which in my opinion must be drawn from all these facts and in particular from the following facts, namely, (1) the permission to make the trip sought for and obtained in advance from appellants; (2) the further permission obtained from Pellerin and the payment to him in advance of the $10 agreed upon and (3) the respondent's right to use the car as he saw fit throughout the entire day, is that on the day in question Disnard was not operating the car as a taxi-cab at the request of a patron and for the benefit of his employer but was using the car for his own purposes.

For these reasons I would allow the appeal with costs here and below and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Attorneys for the defendants, appellants: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

Attorneys for the plaintiff, respondent: Page, Beauregard, Duchesne & Renaud, Montreal.