1964
*June 22
Nov. 19

CO-OPERATORS INSURANCE ASSOCIATION (*Defendant*) ..... APPELLANT;

AND

ROBERT HENRY (BERT) KEARNEY (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Car owned by insurance company in collision with train—Passenger and driver fellow servants of company and acting in course of their employment as such servants—Driver negligent—Liability of company for injuries to passenger—Driver immune from liability—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 50(2) [now R.S.O. 1960, c. 172, s. 105(2)]—The Workmen's Compensation Act, R.S.O. 1960, c. 437, ss. 123-125.

The plaintiff, who conducted a real estate and insurance business, was an agent of the defendant company in soliciting insurance and servicing policyholders. In the event of a claim being made by any policyholder to whom the plaintiff had sold a policy, it was the general practice of the company to send its own adjuster into the area and it was recognized to be part of the plaintiff's duty to introduce this adjuster to the policyholder and assist on the adjustment. On such an occasion, while returning to his office, the plaintiff suffered serious injuries when the automobile in which he was riding collided with a train. The automobile was owned by the company and was being driven with its consent by its adjuster, one L. The collision was caused solely by the negligent driving of L. The trial judge gave judgment against the company and L; on appeal, the Court of Appeal affirmed the judgment against the company but dismissed the action against L. Both Courts proceeded on the view that at the moment of the collision the plaintiff and L were fellow servants of the company and acting in the course of their employment as such servants. A further appeal by the company was brought to this Court.

Held: (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per curiam: Part II of *The Workmen's Compensation Act,* R.S.O. 1960, c. 437, did away with the defence of common employment in this case.

Per Taschereau C.J. and Spence J.: The relationship between the plaintiff and the defendant at the time of the accident was, for the limited purpose of the adjustment and on the limited occasion, not solely that of insurance agent and insurance company but was that of master and servant. The defendant owed a duty by implied term of contract to the plaintiff to take reasonable care to provide for his safety when he was engaged in the course of his employment, and there was by the negligence of L a breach of that duty, a breach for which the defendant as the employer of L was responsible in law.

Also, s. 124 of *The Workmen's Compensation Act* gave the plaintiff a statutory right of action for damages which occurred "by reason of

*PRESENT: Taschereau C.J., Cartwright, Judson, Ritchie and Spence JJ.

the negligence of any person in the service of his employer (*i.e.*, L) acting within the scope of his employment". There was no doubt that L at the time was certainly acting within the scope of his employment. The plaintiff, therefore, was entitled to succeed either on the basis of the common law liability of his employer or on the basis of the statutory liability created by s. 124 of *The Workmen's Compensation Act*.

The argument that s. 50(2) of *The Highway Traffic Act*, R.S.O. 1950, c. 167 (now R.S.O. 1960, c. 172, s. 105(2)) barred the right of the plaintiff to recover was rejected. If the plaintiff had a cause of action against his master by reason of the negligence of the master's servant, subs. (2) did not take it away, even though at the time it arose the plaintiff was being carried in his employer's motor vehicle. *Harrison v. Toronto Motor Car Ltd. and Krug*, [1945] O.R. 1, approved. All that s. 50(2) of the Act did was to bar recovery against an owner or driver. The action upon the tort was not barred against the employer.

Per Judson J.: The appeal should be dismissed in view of the decision in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, which could not be distinguished from the present case and unless the Court was ready to overrule that case, it must govern.

Per Cartwright J., *dissenting*: If, as argued by the plaintiff, it was decided in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, that although the liability for the injury caused directly and solely by L's negligence was taken away as against him the result was that, while L could not be sued, the liability remained and could be enforced against the defendant, then that decision was wrong and ought not to be followed.

The effect of s. 50(2) of *The Ontario Highway Traffic Act*, R.S.O. 1950, c. 167 (now R.S.O. 1960, c. 172, s. 105(2)), was 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.

Where the only breach of the duty to take care for the safety of the passenger, whether owed by the driver or the employer of the driver or the employer of the passenger, consists of negligent driving on the part of the driver and liability to the passenger for that negligence is negatived (not because of some personal immunity from suit possessed by the driver because of a particular relationship such as that of husband and wife existing between the passenger and the driver but by an express statutory provision applying to the case of every passenger who is being carried gratuitiously) the passenger's right of action is gone because the negligent act, liability for which is negatived, is as much an essential part of the passenger's cause of action against his own employer and of his cause of action against the employer of the driver as it is of his cause of action against the driver.

Per Ritchie J., *dissenting*: By reason of the provisions of s. 105 (2) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, the driver's act which occasioned the injury did not constitute a breach of duty giving rise to liability against him and accordingly the defendant could not be held vicariously liable for this act under the rule of *respondeat superior* because, as was said in *Staveley Iron & Chemical Co. Ltd. v. Jones*, [1956] A.C. 627, "Where the liability of the employer is not personal but vicarious . . . if the servant is immune so is the employer".

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The plaintiff was not in the car when the accident occurred pursuant to any obligation which was binding on him in the matter of his employment; therefore there was no direct personal duty resting on the defendant with respect to the safe carriage of the plaintiff.

The effect of s. 124 of *The Workmen's Compensation Act* was to make an employer responsible to an injured employee for the negligent acts of a fellow servant done in the course of his employment which caused such injury in the same way that the employer was responsible to the rest of the world for such negligent acts. That section did not have the effect of creating a personal liability in the employer if the injured employee was not acting in the course of his employment at the time when he sustained the injury.

[*Hughes v. J. H. Watkins & Co.* (1928), 61 O.L.R. 587; *Dufferin Paving and Crushed Stone Ltd. v. Anger et al.*, [1940] S.C.R. 174, distinguished; *Lewis v. Nisbet & Auld Ltd.*, [1934] S.C.R. 333; *Jarvis v. Oshawa Hospital*, [1931] O.R. 482; *Humphreys v. City of London*, [1935] O.R. 295; *Wiznoski v. Peteroff*, [1938] 2 D.L.R. 205, applied; *Smith v. Moss et al.*, [1940] 1 K.B. 424; *Falsetto v. Brown et al.*, [1933] O.R. 645; *Wilsons & Clyde Coal Co. v. English*, [1938] A.C. 57; *Jurasits v. Nemes*, [1957] O.W.N. 166; *Priestly v. Fowler*, 150 E.R. 1030; *Radcliffe v. Ribble Motor Services Ltd.*, [1939] A.C. 215; *Broom v. Morgan*, [1953] 1 Q.B. 597; *Staveley Iron & Chemical Co. v. Jones*, [1956] A.C. 627; *Harvey v. R. G. O'Dell Ltd. et al.*, [1958] 1 All E.R. 657; *The King v. Anthony*, [1946] S.C.R. 659; *St. Helen's Colliery Co. v. Hewitson*, [1924] A.C. 59; *Dallas v. Home Oil Distributors Ltd.*, [1938] S.C.R. 244, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Haines J. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

B. O'Brien, Q.C., and *E. Sabol*, for the defendant, appellant.

J. D. Arnup, Q.C., and *J. J. Carthy*, for the plaintiff, respondent.

The judgment of Taschereau C.J. and Spence J. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] given on September 11, 1963, which dismissed the appeal from the judgment of Haines J. given on February 25, 1963, whereby he awarded damages of $16,800 in favour of the plaintiff.

The following questions arose and must be answered for the determination of the judgment herein:

1. Was the finding of the learned trial judge that at the time of the accident the plaintiff Kearney was in a position

[1] [1964] 1 O.R. 101, 41 D.L.R. (2d) 196.

where the defendant and its servants, including Livesey, owed to him a duty to carry him with due care correct? Haines J., at trial, found the plaintiff was in such a position, and continued:

> If, however, it is necessary to put a label on the relationship, I find that for the limited purpose of adjusting the loss there was a master and servant relationship.

2. Alternatively, was there a liability upon the appellant on the basis that Livesey was the appellant's servant no matter whether the plaintiff was or was not such servant or was s. 50(2) of *The Highway Traffic Act,* R.S.O. 1950, c. 167, intended to take away the action of a gratuitous passenger against the master for the negligence of the servant? This alternative need only be considered if it is determined that the plaintiff was not in a position where he could require that he be carried with reasonable care, *i.e.,* if proposition number 1 were decided against the plaintiff.

3. Has the plaintiff an independent cause of action under s. 124 of *The Workmen's Compensation Act,* which independent cause of action was not barred by the provisions of *The Highway Traffic Act, supra?*

Proposition one entails a finding that Kearney was a servant of the appellant and that *Harrison v. Toronto Motor Car Ltd. and Krug*[1] was correctly decided. I am of the opinion that the finding that Kearney was a servant is very largely a finding of fact and a finding of fact which the trial judge expressly made upon what he described as conflicting evidence. That finding has been expressly approved by Aylesworth J.A. in his reasons in the Court of Appeal. Counsel for the appellant in this Court sought to avoid the effect of concurrent findings of fact below by purporting to put his case only on the evidence given by the plaintiff Kearney and by those witnesses called on his behalf. This still does not lessen the invulnerability of the finding of fact, which may be determined by a trial judge's scrutiny of a witness's testimony and particularly his testimony on cross-examination, so that the trial judge considering evidence as a whole comes to his opinion as to the facts and inferences which should be drawn from that testimony. In so far as the proposition entailed the finding of law, I am in agreement that the test of whether a master and servant relationship

[1] [1945] O.R. 1.

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existed has been rightly put in many cases, and may be taken from Halsbury, 3rd ed., vol. 25, p. 452:

> In general, the distinction between a contract of service and a contract for work and labour or for service is similar to that which exists between a contract of service and a contract of agency, namely, that in the case of a contract of service the master not only directs what work is to be done but also controls the manner of doing it whereas in the case of a contract for work and labour or a contract for service, the employer is entitled to direct what work is to be done but not to control the manner of doing it.

The evidence established that Kearney was an insurance agent employed by the appellant under a contract which contract was filed as exhibit 2. Paragraph 6 of that contract provided that the agents agreed "to service policyholders satisfactorily and to report to home office promptly any new information affecting the desirability of a risk". The evidence established that, probably under the direction and insistence of the former district manager Lang, the plaintiff and others under contract as agents with the appellant company were constantly required to attend policyholders, discuss with them the settlement of claims, and as to certain types of claims actually adjusting the losses themselves. It is true that the plaintiff and other agents of the appellant company were insurance agents holding licence under *The Insurance Act,* R.S.O. 1950, c. 183, and that various sections of that Act entitled persons so licensed to "carry on business in good faith as an insurance agent" but I am of the opinion that a person holding such licence may nonetheless at any rate on a specific occasion and for a specific purpose become the servant of the insurance company. It is also true that Aylesworth J.A. in *Baldwin et al v. Lyons et al.*[1], at p. 691, said:

> It is quite clear, I think, and indeed no one has made any submission to the contrary, that so far as this agreement is concerned, the position of Lyons was that of an independent contractor. In my view, therefore, it would require cogent and unequivocal evidence to demonstrate that the parties in fact changed that relationship into one of master and servant.

It must be remembered that the plaintiff, when Livesey, the acting district manager of the appellant company, attended his office in Meaford and requested the plaintiff to accompany him to interview the policyholders, demurred pointing out that he was expecting to be engaged in some transactions in reference to his business as real estate agent.

[1] [1961] O.R. 687.

Livesey insisted, however, and the plaintiff not only accompanied Livesey to the policyholder's place of work but then accompanied Livesey and the said policyholder to the garage where the automotive vehicle, the subject of the claim, had been taken, there remained present during the interview between Livesey and the garage keeper, then returned with Livesey and the policyholder to the latter's place of work and there obtained from the policyholder his proof of loss.

Before the Court of Appeal, it was evidently argued that upon the latter duty having been completed, the service, if any, ceased and that therefore the plaintiff was not in the course of employment when he was injured as he was driven back to his own place of business. Aylesworth J.A., in his reasons, said:

> . . . 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; he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle to the place whence he came; his employment in that endeavour continued, in our view, until that had been done.

I agree with that statement.

In this Court, it was argued that the plaintiff was not a servant because he could have performed his task of servicing the policyholder in reference to the adjustment by driving his own automobile. I am of the opinion that the evidence refutes that suggestion. The district manager Livesey did not know where the policyholder's place of work was situated and had not met the policyholder. For the plaintiff to use his own automobile would have entailed the silly performance of two cars being driven down the odd few blocks to that place of work, one containing the district manager and the other containing the plaintiff who was to introduce the policyholder to the district manager. Similarly, as the same two men left that factory and proceeded to the garage, with whom was the policyholder to ride, the district manager whom he did not know, or the plaintiff whom he did know? I am of the opinion that the procedure of riding in the automobile driven by the district manager was the efficient way by which the plaintiff could carry out the duties which the district manager then and there directed him to carry out and that it was intended by the district manager that the said duties should be so carried out.

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Fleming in his valuable text on the law of Torts, 2nd ed., at p. 328, states:

> Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an 'organization' test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordinational control as to 'where' and 'when' rather than 'how', [citing Lord Denning in *Stevenson, Jordon & Harrison Ltd. v. Macdonald,* [1952] 1 T.L.R. 101 at 111.]

Applying such an organizational test to the present case, it is noted that Haines J. in his reasons for judgment said:

> Exhibit 8 is a selection of correspondence collected recently by the plaintiff. While it is written after the accident it indicates that in dealing with policyholders, the company referred to the plaintiff from time to time as "our Meaford area representative, Bert Kearney" and "your C.I.A. representative", or "your C.I.A. field underwriter Bert Kearney". No significance can be attached to the fact that these letters were written concerning claims several years after the accident. Prior to the accident the plaintiff did not have a stenographer and the company files which would contain similar correspondence have been closed long since. The plaintiff says that he has always been held out by the company in this manner and I accept his evidence.

In short, the respondent was part of the appellant's organization; his work was subject to co-ordination control as to "where" and "when" and in the case of the present action, as to "how".

For these reasons, I do not believe that the finding of fact made by the learned trial judge and affirmed in the Court of Appeal, that at the time of the accident the plaintiff-respondent was, for the limited purpose and on the limited occasion, the servant of the appellant insurance company, should be disturbed. The fact that the respondent was a servant of the appellant, in my view, on the particular occasion while in other circumstances he may well have been an independent contractor is not fatal to his claim. Fleming, *op. cit.* says at p. 328:

> The employment of a servant may be limited to a particular occasion or extend over a long period; it may even be gratuitous.

See *Smith v. Moss et al.*[1] to which further reference will be made hereafter.

The respondent certainly was injured by the negligence of his fellow servant Livesey, both being in the course of their employment at the time.

[1] [1940] 1 K.B. 424.

Section 50 of *The Highway Traffic Act*, R.S.O. 1950, c. 167, provided:

50.—(1) 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.

(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.

It was argued at trial, in the Court of Appeal, and in this Court, that s. 50(2) barred the right of the plaintiff-respondent to recover. Certainly, the vehicle was not "operated in the business of carrying passengers for compensation". Then under the words of the section, it would appear that neither the owner nor the driver of the motor vehicle was liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in or upon or getting on to or alighting from the motor vehicle. However, in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, the Court of Appeal for Ontario considered a claim by a servant, Harrison, for damages caused to her when injured in the course of her employment riding with her employer Krug in an automobile driven by his employee McKenzie, due to the negligence of the said McKenzie. The same statutory provision, then s. 47(2), R.S.O. 1937, c. 288, was urged in defence. Gillanders J.A., giving the judgment of the Court, said at p. 10:

The contention that, in any event, the subsection is only intended to relieve the owner *qua* owner, from the statutory liability imposed by subs. 1, is a much more substantial contention.

And at p. 13, after examining the defence carefully, said:

The provisions now being considered, being directed to the liability of the owner and driver, should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

The decision awarding Miss Harrison damages against her employer has been followed in the Courts of Ontario since that date. In the meantime, the section was re-enacted

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in 1950 as s. 50 and in 1960 as s. 105. It is true that *The Interpretation Act,* R.S.O. 1950, c. 184, s. 19, provided:

> The Legislature shall not, by re-enacting an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similiar language.

But in *Studer et al. v. Cowper et al.*[1], where a like provision of the Saskatchewan *Intepretation Act* was considered, it was held that it merely removed the presumption that existed at common law and that in a proper case it will be held that the legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it. It cannot be doubted that the effect of the decision in *Harrison v. Toronto Motor Car Ltd. and Krug* was known to every lawyer and to every judge in the Province of Ontario from the date of its decision on and it is difficult to understand how the frequent statutory amendments to *The Highway Traffic Act* between 1945 and the present date and the re-enactment of the very section in identical words in both the Revisions of 1950 and 1960 would have occurred if the decision in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* has not represented the intention of the legislature. The case has been cited and either adopted or distinguished in many judgments at trial and in the Court of Appeal. I am, therefore, of the opinion that this Court is entitled to consider the fact that the decision has remained unchallenged for 19 years and that the legislative provision upon which it depends has been twice re-enacted in considering whether the decision is incorrect.

Counsel for the appellant argued that the decision is contrary to that of the Court of Appeal itself in *Hughes v. J. H. Watkins & Co.*[2] and the decision of this Court in *Dufferin Paving and Crushed Stone Ltd. v. Anger et al.*[3] Gillanders J.A. considered that exact argument. Both of those decisions were decisions holding that the limitation section in *The Highway Traffic Act* applied generally and would bar an action in the case of *Hughes v. J. H. Watkins & Co.* by a pedestrian brought after the limitation period, and in the case of *Dufferin Paving and Crushed Stone Ltd. v. Anger* by a land owner whose property had been damaged by the vibration caused by the driving of trucks. Both of those

[1] [1951] S.C.R. 450.

[2] 61 O.L.R. 587, [1928] 2 D.L.R. 176. [3] [1940] S.C.R. 174, 1 D.L.R. 1.

decisions turned on the words of the limitation section, and are not decisions which require a general and all-inclusive effect to be given to the provisions of s. 50(2) of *The Highway Traffic Act* as it existed in 1957 and it still exists. I agree with the view of Gillanders J.A. in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* where he said at p. 13:

> I incline to the view that the essential difference between the limitation sections considered in the *Watkins* and *Dufferin Paving* cases and the section with which we are here concerned is that the limitation sections in the cases mentioned were of general application, affecting all actions "for the recovery of damages occasioned by a motor vehicle", while the subsection now under consideration only affects the liability of the owner or driver to a *certain type of action.* (The italicizing is my own.)

In my view, the history of the enactment of what is now s. 105 of *The Highway Traffic Act* and which was at the time of the accident in question in this action, s. 50(2) is significant. There was not, of course, at common law, any liability upon the owner of a motor vehicle for damages caused by the negligent driving of that vehicle when the driving was not that of the owner or of his servant. That liability was imposed in the Province of Ontario in the year 1930, by the Statutes of Ontario 1930, c. 48, which added s. 41(*a*) substantially in the same terms as s. 50(1) of the statute as it existed in the 1950 Revised Statutes of Ontario. In 1935 by the Statutes of that year, c. 26, s. 11, a second subsection was added to the then s. 41 which is in substantially the same terms as s. 50(2) of the Revised Statutes of Ontario 1950. During the intervening five years, *Falsetto v. Brown et al.*[1] came before the Courts. There, an accident had occurred on August 17, 1932, in a collision between a vehicle owned by one Brown and being driven by McMaster with the consent of the owner. In the vehicle were two passengers, Miss Falsetto and Hernden, both gratuitous passengers. Miss Falsetto, by her next friend, commenced an action against Brown and McMaster, the owner and driver of the automobile in which she had been a gratuitous passenger and against the owner of the truck with which that vehicle had come in collision, and at trial she was awarded judgment against all defendants. The owner of the truck alone appealed, and the majority judgment in the Court of Appeal held that the negligence of the driver of the automobile had been the sole cause of the collision so

[1] [1933] O.R. 645, 3 D.L.R. 545.

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the appeal of the owner of the truck was allowed. The liability of the owner of the automobile to the gratuitous passenger founded upon s. 41(*a*) of the 1930 Statutes of Ontario, c. 48, and which had not been the subject of appeal was the situation which the amendment of 1935 was intended to cure. Gillanders J.A. in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* was of the opinion that it was the only situation which the amendment was intended to cure. I have come to the conclusion that he was correct when he said, at p. 13:

> If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

The question arises then, did Kearney in this case have a right of action against his employer by reason of the negligence of the employer's servant Livesey? It is my intention to consider the matter, firstly, apart from the doctrine of common employment and the provisions of *The Workmen's Compensation Act.* Clerk and Lindsell on Torts, 12th ed., at p. 783, said:

> At common law a master owes a duty to his servant to take reasonable care for his servant's safety . . . This duty was described by Lord Herschell as "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and . . . so to carry on his operations as not to subject those employed by him to unnecessary risk." The classic statement of the duty is to be found in the speeches of Lord Wright and Lord Maugham in *Wilsons & Clyde Coal Co., Ltd. v. English,* [1938] A.C. 57 at 78 and 86.

At p. 86 of that case, Lord Maugham said:

> The first proposition is that, subject as next mentioned, the employer is responsible to an employee for an accident caused by the negligence of any other employee acting within the scope of his authority. The maxim respondeat superior applies: *Smith v. Baker,* [1891] A.C. 325.

Schroeder J.A. in giving judgment in the Court of Appeal in *Jurasits v. Nemes*[1], at p. 174 said:

> At common law a master did not warrant the safety of the servant's employment. He bound himself to do no more than to take reasonable care to protect the servant against accidents.

Lord Abinger C.B., in *Priestly v. Fowler*[2], at p. 1032 said:

> He [the employer] is, no doubt, bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief.

I am, therefore, of the opinion that there is a duty by implied term of contract to the servant Harrison in the case of *Harrison v. Toronto Motor Car Ltd. and Krug* and to the

[1] [1957] O.W.N. 166.

[2] 150 E.R. 1030.

plaintiff-respondent in this case, to take reasonable care to provide for the safety of that servant when he is engaged in the course of his employment and that there was by the negligence of the defendant Livesey in this case, a breach of that duty and a breach for which the appellant insurance company as the employer of Livesey is responsible in law.

The question then arises whether the appellant is protected by the doctrine of common employment. That doctrine was first enunciated by Lord Abinger C.B. in *Priestly v. Fowler, supra.*

The defence was carefully defined and limited in *Radcliffe v. Ribble Motor Services Ltd.*[1], where Lord Wright said at p. 247:

> But the limitations which I have explained and which for purposes of this opinion I wish to emphasize are based on the fundamental principle that there must be an actual contract between the employer and employee so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees.

And at p. 249:

> But it is clear on the authorities in this House that there is always the limit, however expressed, that it must be the same work in which the workmen are employed. They must be employed in common work, that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other.

Gillanders J.A. in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* cited this and other authorities and was able to come to the conclusion that the plaintiff Harrison and the chauffeur McKenzie were not engaged in "common work" involving "juxtaposition, local or causal", and exposure of the risk of negligence of one affecting the other and that therefore the defence of common employment did not apply.

The learned justice in appeal proceeded, however, at p. 16 to say:

> If I am right in concluding that common employment is not applicable under the circumstances, it is not necessary to consider whether or not the appellant comes under Part II of The Workmen's Compensation Act, in which case in any event, by virtue of s. 122 of that Act, common employment would have no application. It is, however, probably desirable to express my view on this point.

And then having considered the matter, at p. 17, said:

> Under the circumstances here, the appellant, I think, falls within the provisions of Part II of the Act.

[1] [1939] A.C. 215.

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In the present case, this Court is faced with the problem of whether the defence of common employment has been barred by the provisions of the said *Workmen's Compensation Act*. Haines J. said in his reasons for judgment (at trial):

> As for the defence of common employment I find that it is not available to the defendants by reason of the provisions of Part II of the Workmen's Compensation Act, R.S.O. 1960, ch. 437, sec. 125.

In the Court of Appeal, Aylesworth J.A. said:

> Here, but not in those decisions, the plaintiff was not a free agent as to his movements after completion of the work of adjustment upon which he and Livesey were engaged; 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; he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle to the place whence he came; his employment in that endeavour continued, in our view until that had been done.

I am of the opinion that in this particular case the two employees, the plaintiff Kearney and the defendant Livesey, were jointly engaged in the very same work. Of necessity they were in such juxtaposition as might involve one in the consequence of the negligence of the other. In short, the situation was the exact one in which the defence of common employment as outlined by Lord Wright in *Radcliffe v. Ribble Motor Services Ltd., supra,* would apply. That defence, of course, is no longer available in the United Kingdom because of the provisions of the various employers' liability acts. The defence is, however, available in Ontario unless it is barred by the provisions of *The Workmen's Compensation Act*. That statute now appears as R.S.O. 1960, c. 437, and the sections are word for word those in effect at the date of the accident. Firstly, it should be noted that s. 1 provides:

> (*j*) "industry" includes establishment, undertaking, trade and business; and
>
> (*u*) "workman" includes a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes a learner and a member of a municipal volunteer fire brigade, but when used in Part I does not include an outworker or an executive officer of a corporation.

And ss. 123 to 125 provide:

> 123. Subject to section 126, sections 124 and 125 apply only to the industries to which Part I does not apply and to the workmen employed in such industries, but outworkers and persons whose employment is of casual nature and who are employed otherwise than for the purposes of the

employer's trade or business, who are employed in industries under Part I but who are excluded from the benefit of Part I, are not by this section excluded from the benefit of sections 124 and 125.

124.—(1) Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer or by reason of the negligence of his employer or of any person in the service of his employer acting within the scope of his employment, the workman or, if the injury results in death, the legal personal representatives of the workman and any person entitled in case of death have an action against the employer, and, if the action is brought by the workman, he is entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury, and, if the action is brought by the legal personal representatives of the workman or by or on behalf of persons entitled to damages under *The Fatal Accidents Act*, they are entitled to recover such damages as they are entitled to under that Act.

(2) Where the execution of any work is being carried into effect under any contract, and the person for whom the work is done owns or supplies any ways, works, machinery, plant, buildings or premises, and by reason of any defect in the condition or arrangement of them personal injury is caused to a workman employed by the contractor or by any subcontractor, and the defect arose from the negligence of the person for whom the work or any part of it is done or of some person in his service and acting within the scope of his employment, the person for whom the work or that part of the work is done is liable to the action as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of this Act, but any such contractor or subcontractor is liable to the action as if this subsection had not been enacted but not so that double damages are recoverable for the same injury.

(3) Nothing in subsection 2 affects any right or liability of the person for whom the work is done and the contractor or subcontractor as between themselves.

(4) A workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect or negligence that caused his injury, be deemed to have voluntarily incurred the risk of the injury.

125.—(1) 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 a 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.

(2) Contributory negligence on the part of the workman shall nevertheless be taken into account in assessing the damages in any such action.

It will be seen that the determination of whether the respondent is entitled to plead the provisions of s. 125 as barring the defence of common employment depends on whether the respondent is a "workman". Section 125 applies only to an *industry* to which Part I does not apply. Then,

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was the business of the appellant Co-operators Insurance Association an "industry"? In *Lewis v. Nisbet & Auld Ltd.*[1], at p. 345, Crocket J., giving judgment for a majority of this Court and in dealing with some of the words in the present s. 124 "by reason of any defect in the condition or arrangement of the ways, works, machinery, plant buildings or premises . . .", said:

> It will be seen at once that the enactment is a special one which was clearly passed to extend the liability of the employer in favour of the workman. It is an enactment, therefore, which ought not to be narrowly construed against the workman. No court has any right to add to it any condition which its language does not clearly express or necessarily imply. Rather is it the duty of a court, as said by Brett, M.R., in *Gibbs v. Great Western Ry. Co.* (1884) 12 Q.B.D. 208, at p. 211, in construing a section of the Imperial *Employers' Liability Act* (1880) to construe it "as largely as reason enables one to construe it in their (the workmen's) favour and for the furtherance of the object of the Act."

I accept that as a proper canon of interpretation in order to construe the meaning of the words "workman" and "industry", and I am of the opinion that that course has been followed by the Courts of Ontario in construing this statute. In *Jarvis v. Oshawa Hospital*[2], Raney J. held that a hospital was an "industry" within the words "establishment, undertaking, trade and business" and that a pupil dietitian employed at the hospital at a salary of $8 a week was a "workman".

In *Humphreys v. The City of London*[3], Middleton J.A. in the Court of Appeal considering the question of whether a relief recipient required by the municipality as a term of obtaining relief to perform duties as directed by the municipal officers was a "workman" said at p. 301:

> The Workmen's Compensation Act is intended to apply to *all workmen* and *all employees,* save in a case of farming or domestic or menial servants. These are excepted from the operation of the Act by sec. 122. Sec. 118 provides that secs. 119 to 121, that is practically Part II, shall apply only to the industries to which Part I does not apply and to workmen employed in such industries. (The italicizing is my own.)

In *Wiznoski v. Peteroff*[4], the Court of Appeal of Ontario held that a bakery employing less than five persons and therefore, excluded from Part I of the Act by the order of

[1] [1934] S.C.R. 333.

[2] [1931] O.R. 482.

[3] [1935] O.R. 295.

[4] [1938] 2 D.L.R. 205.

the Board was nonetheless an "industry" to which Part II applied. At p. 206, Middleton J.A. said:

> I think this argument is fallacious, because by s. 1(*i*) of the Act "industry" is defined to include not only the enumerated classes of industries, but establishments, undertaking, trade and business; that is to say, it includes not only the generic but the specific.

I am of the opinion that the enterprise operated by Co-operators Insurance Association is certainly an "undertaking, trade or business" and that therefore it is an "industry" as defined in *The Workmen's Compensation Act*. Similarly, I can see no reason why the respondent who I have held had at the time of the accident entered into or worked under a contract of service which was oral or implied is not a "workman" as defined by s. 1(*u*) of the said Act. It should be noted that the service may be by way of manual labour or otherwise and that by s. 123 "outworkers and persons whose employment is of a casual nature are not by that section excluded from the benefits of ss. 124 and 125 so that if the respondent were considered to be a person whose employment was of a casual nature in that he was only from time to time required to act as a servant in servicing the policyholder, he is nonetheless not excluded from the benefits of ss. 124 and 125.

I have therefore come to the conclusion that the respondent is a "workman" in an industry to which Part II of *The Workmen's Compensation Act* applies and that therefore by the provisions of s. 125(1) of that statute the defence of common employment is barred to the appellant.

The respondent also asserts a right of action by relying upon the provisions of s. 124 of *The Workmen's Compensation Act*. That matter is not referred to in the reasons for judgment either at trial or upon appeal but the respondent has asserted such right in his factum while the appellant, in its factum, confines its reference to the statue to an allegation that it has no application to the relationship between an insurance agent and an insurance company.

For the reasons which I have set out above, I have found that the relationship between the respondent and the appellant at a limited time and for the limited purpose of the adjustment was not solely that of insurance agent and insurance company but was that of master and servant. I find that the respondent was at that time a workman in an industry and I am of the opinion that s. 124 of *The*

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Workmen's Compensation Act gives to the respondent a statutory right of action 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". There is, of course, no doubt that Livesey at the time was certainly acting within the scope of his employment. He was engaged actively in the duty of adjusting a claim which was one of his main duties. I am therefore of the opinion that the plaintiff is entitled to succeed either on the basis of the common law liability of his employer or on the basis of the statutory liability created by s. 124 of *The Workmen's Compensation Act*. Therefore, I do not find it necessary to deal with the alternative submission of counsel for the respondent that the appellant is liable for the negligence of its servant Livesey on the doctrine of *respondeat superior* whether or not the respondent was also the servant of the appellant. That theory entails a startling explanation of the principle enunciated in *Harrison v. Toronto Motor Car Ltd. and Krug, supra,* and one which in my opinion this Court should not make at the present time.

There remains to be dealt with the submission of the appellant that when the action against the defendant Livesey is barred by statute, *i.e.*, s. 50(2) of *The Highway Traffic Act,* then there can be no liability of his employers. This submission was dealt with by Aylesworth J.A. in giving the reasons of the Court of Appeal in the following words:

> The appellants took one other point upon which some observations might properly be made. In appellants' submission the master is excused if the servant who did the wrongful act to the plaintiff is excused. We cannot accede to that submission with respect to the case at bar for the simple reason that in our view the effect of section 105, subsection 2 of The Highway Traffic Act is not to condone a wrongful act by the driver of a motor vehicle qua driver but simply to bar the cause of action with respect to that act. The legislature, in our view, is quite free to do what it has done in a case such as this, namely, to bar a certain cause of action against a wrong-doer 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.

With that view, I am in agreement and I am of the opinion that it is in accord with established jurisprudence. In *Smith v. Moss, supra,* Charles J. considered the case of a wife who sued her mother-in-law as the owner of an automobile in which she was riding as a passenger when she was

injured by the negligence of the driver who was her husband. Charles J. held that at the time of the accident the husband was driving the car in the capacity of agent for his mother. At p. 425, the learned trial judge said:

> It is said that the plaintiff cannot recover against her mother-in-law because the accident was caused by the negligence of her husband, and a husband cannot commit a tort on his wife. Strictly, that is right, but I cannot conceive that, if a husband, while acting as agent for somebody else, commits a tort, which results in injury to the wife, the wife is deprived of her right to recover against the principal who is employing the husband as agent. To take an extreme case, suppose that the plantiff had been in the habit of hiring a car from a garage the proprietors of which employed, among a number of other men, the plaintiff's husband as a chauffeur. Suppose, too, that on a particular day, when the plaintiff had telephoned for a car, the husband should be sent out as driver of that car. If an accident happened, for which the husband was responsible, could it then be said that the plaintiff was deprived of her right to recover against the owners of the car? I do not think so, because the active operator in the tort, the husband, would have two capacities, (1) that of husband and (2) that of agent. In the present case the husband was, at the time of the accident, acting in the capacity of agent for his mother and it was his negligence alone, I hold, which caused the accident. Therefore, the plaintiff is entitled to succeed against her mother-in-law, the second defendant.

It is, of course, realized that Charles J. was not considering a case in which any such statutory provision as s. 50(2) of *The Highway Traffic Act* barred action against the actual wrongdoer. *Smith v. Moss* is cited merely to illustrate the proposition that an action may lie against the master even when it is barred against the servant.

The judgment in *Smith v. Moss, supra,* was considered in *Broom v. Morgan*[1], in the Court of Appeal. There, husband and wife were both employed by the defendant in a public house, the husband as manager the wife as helper. Owing to the negligence of the husband in the course of his employment as manager, the wife was injured. Denning L.J. said at p. 607:

> It is said by Mr. Thompson that the liability of the employer is only a vicarious liability—that is to say, that it is a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another, and it cannot exist if that other is not liable.
>
> I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it. The law has known cases of a true vicarious liability; for instance, in the old days when a wife uttered slanders at a tea party with her friends, the husband was answerable for her wrongdoing, although it was no concern of his. I do not regard the liability of master and servant as coming into this category. The master is not liable when a servant does something "on a frolic of his own." He is liable only when the servant is acting in the

[1] [1953] 1 Q.B. 597.

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course of his employment. The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. Take the case of a master who sends a lorry out on to the road with his servant in charge. He is morally responsible for seeing that the lorry does not run down people on the pavement. The master cannot wash his hands of it by saying, "I put a competent driver in charge of the lorry," or by saying, "It was only the driver's wife who was hurt." It is his lorry, and it is his business that it is on. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty not only by the driver himself, but also by the master.

Denning L.J. repeated his view in *Staveley Iron & Chemical Co. Ltd. v. Jones*[1]. In that case Sellers J. at trial considering an action by a workman against his employer for damages caused by an accident occurring in the course of employment had applied *Caswell v. Powell Duffryn Associated Collieries Ltd.*[2] to find that the plaintiff had not been guilty of contributory negligence and then applied the same standard to find that the defendant company's servant also was not guilty of negligence, and in consequence dismissed the action. In the Court of Appeal (Denning, Hodson and Romer L.JJ.) it was decided that the crane operator, the defendant company's servant, had been negligent in her conduct and that therefore the employer was liable for the damage caused to her fellow employee, the plaintiff Jones.

Denning L.J. said, in the course of his judgment:

> He [i.e., the employer] acts by his servant; and his servant's acts are, for this purpose, to be considered as his acts. Qui facit per alium facit per se. He cannot escape by the plea that his servant was thoughtless or inadvertent or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled. . . . It is for this reason that the employers' responsibility for the injury may be ranked greater than that of the servant who actually made the mistake: see *Jones v. Manchester Corpn.*, [1952] 2 Q.B. 852, and he remains responsible even though the servant may for some reason be immune: see *Broom v. Morgan*, [1953] 1 Q.B. 597. . . .

In the House of Lords Lord Morton expressed disagreement with that statement and continued at p. 639:

> My Lords, what the court has to decide in the present case is, was the crane driver negligent? If the answer is "yes" the employer is liable vicariously for the negligence of his servant. If the answer is "no" the employer is surely under no liability at all.

[1] [1956] A.C. 627.

[2] [1940] A.C. 152.

And Lord Reid said at p. 644:

> In *Broom v. Morgan*, [1953] 1 Q.B. 597, a husband and wife were fellow servants, and the wife was injured by the negligence of the husband. She recovered damages from her employer although she could not sue her husband. But although the husband could not be sued, his injuring his wife was a wrongful act on his part, and again this case is to my mind no authority for a master being liable for an act *which it was not wrongful for a servant to do.* (The italicizing is my own.)

I am of the view that the last statement of Lord Reid supplies the answer to the appellant's argument that when the action against the defendant Livesey is barred by statute there can be no liability on Livesey's employer. The employer is being held liable for an act of Livesey's which was wrongful and the employer is being held because Livesey did that act in the course of his (Livesey's) employment. The actual words of the statutory bar of action against Livesey are significant:

> 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.* . . . (The italicizing is my own.)

There is in these words no declaration that the act is in any way a rightful as distinguished from a wrongful act and, of course, a negligence is quite plainly a tort. All the statute does is to bar recovery against an owner or driver for part of the damage which may flow from the tort. It would be interesting to speculate what would occur if a gratuitous passenger had on his knees a precious object of art which was destroyed in a collision due to the driver's negligence although the passenger was unharmed. The action upon the tort is not barred against the employer.

After the decision of the House of Lords in *Staveley Iron & Chemical Co. Ltd. v. Jones, supra,* McNair J. in *Harvey v. R. G. O'Dell Ltd. et al.*[1], considered an action by one servant against his master based on the negligence of a fellow servant and gave judgment for the plaintiff despite the circumstance that the period of limitations had run out against the personal representative of the deceased servant so she could not be sued nor made the subject of a claim for indemnification by the employer. Therefore, McNair J. came to the same conclusion as to the existence of the master's liability despite the servant's representative's protection

[1] [1958] 1 All E.R. 657.

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from liability as did the learned trial judge and the Court of Appeal in the present case did, in my opinion, correctly.

For these reasons, I would dismiss the appeal with costs.

CARTWRIGHT J. (*dissenting*):—The relevant facts out of which this appeal arises and the conclusions arrived at in the Courts below are set out in the reasons of my brother Ritchie and those of my brother Spence. The questions of difficulty are not as to the facts but as to the law.

The following facts are undisputed. The respondent suffered serious injuries when the automobile in which he was riding collided with a train. The automobile was owned by the appellant and was being driven with its consent by its employee Livesey. The collision was caused solely by the negligent driving of Livesey.

The Courts below have proceeded on the view that at the moment of the collision Kearney and Livesey were fellow servants of the appellant and acting in the course of their employment as such servants. For the purposes of this appeal, I accept the view that at the time mentioned, Livesey was a servant of the appellant and acting in the course of his employment. Counsel for the appellant argues that the relationship between the appellant and Kearney was not that of master and servant at any time and alternatively that if it did exist while Kearney was engaged in assisting Livesey to adjust the policyholder's claim it had terminated, before the occurrence of the collision, when Kearney had done everything that was required of him by the appellant and was free and anxious to return to his office to deal with the real estate transaction which was awaiting his attention. There appears to me to be great force in this argument but for the purposes of this appeal I will assume, without deciding, that the contrary view taken by the Courts below is correct.

The judgments below are founded upon the judgment of the Court of Appeal for Ontario in *Harrison v. Toronto Motor Car Ltd. and Krug*[1]. In this Court counsel for the appellant submitted that the *Harrison* case was wrongly decided and alternatively that the case at bar can be distinguished from it on the facts.

The *Harrison* case dealt with the predecessor of s. 50 of c. 167 of R.S.O. 1950, which was in force at the date when

[1] [1945] O.R. 1.

Kearney was injured and which is now s. 105 of R.S.O. 1960, c. 172. Section 50 read as follows:

50.—(1) 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.

(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.

Neither in the *Harrison* case nor in the case at bar was the automobile in which the injured passenger was being carried "a vehicle operated in the business of carrying passengers for compensation" and we are not concerned with the numerous decisions in which the scope and meaning of that phrase have been considered.

At common law the driver of an automobile owes a duty to a passenger being carried gratuitously in the automobile to use reasonable care for his safety and if as a result of negligent driving the passenger is injured the driver is liable to him for the damages suffered. If the automobile belongs to someone other than the driver that person is not liable at common law merely because he is the owner; his liability, if it exists, must be found in a relationship between him and the driver which renders him liable for the latter's negligence or in a relationship between the owner and the passenger which imposes on the former a duty to take care for the safety of the latter.

Subsection (1) of s. 50 of *The Highway Traffic Act* subjects the owner to liability, which did not exist at common law, if his automobile is being driven with his consent; that liability is "for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway". The foundation of this statutory liability is negligence in the operation of the automobile. The effect of subs. (2) which was enacted after subs. (1) had been in force for about five years, was to provide, subject to the exception with which we are not concerned, that neither the owner nor the driver should be liable for loss resulting from bodily injury to or the death of a passenger caused by negligence in operating the automobile. If the words of the subsection are plain and unequivocal the Courts must give effect to them

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although they bring about what, in the eyes of the common law, appears to be a grave injustice.

In the *Harrison* case, the defendant Krug, who was in poor health, decided to go on a long motor trip. He employed the plaintiff Miss Harrison to accompany him as a nurse on that trip. The car was owned by Krug and driven by one McKenzie who was held to be Krug's servant. Miss Harrison was injured in a collision caused solely by the negligent driving of McKenzie. It was held by the Court of Appeal (i) that although the predecessor of s. 50(2) relieved Krug from liability *qua* owner it did not relieve him from liability *qua* employer, (ii) that Krug as employer owed a duty (the precise nature of which is not discussed) to Miss Harrison, (iii) that this duty was breached by the negligent driving of McKenzie, (iv) that the defence rested on the doctrine of common employment was not available to Krug, and (v) that consequently Krug was liable.

I agree with the conclusion of my brother Spence that, on the assumption I have made above as to the relationship of the parties at the time of the collision, the appellant is deprived of the defence of common employment by the terms of ss. 124 and 125 of *The Workmen's Compensation Act*. The relevant wording of those sections as applicable to the facts with which we are dealing are as follows:

Section 124:

> Where personal injury is caused to a workman (in this case Kearney) by reason of the negligence of . . . any person (in this case Livesey) in the service of his employer (in this case the appellant) acting within the scope of his employment, the workman . . . is entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury . . .

Section 125:

> A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow workmen. . . .

The effect of these sections is to deprive the employer of a defence which was available to him at common law and to render him liable to his injured employee for the negligence of another of his servants acting within the scope of his employment to the same extent as he would have been liable to a person who was not employed by him but not to any greater extent. The foundation of his liability is the negligence of his servant who has caused the injury.

Assuming, as I do, for the purposes of this appeal that Kearney and Livesey at the moment of the collision, were

fellow servants of the appellant and acting in the course of their employment as such servants, it is clear that but for the provisions of s. 50(2) both Livesey and the appellant would be liable to Kearney. Counsel for the respondent, rightly in my opinion, took the position in the Court of Appeal and in this Court that Livesey is not liable to Kearney. Such a liability is expressly negatived by s. 50(2). It is argued, however, that although the liability for the injury caused directly and solely by Livesey's negligence is taken away as against him the result is that, while Livesey cannot be sued, the liability remains and can be enforced against the appellant. If this was decided in the *Harrison* case then, in my respectful opinion, that decision was wrong and ought not to be followed.

The error in the reasoning in the *Harrison* case arose, in part at least, from considering the effect of the words in s. 50(2) relieving the owner from liability rather than the effect of the words relieving the driver from liability. Gillanders J.A. said at p. 13:

> The provisions now being considered, being directed to the liability of the owner and driver, should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, subs. 2 does not take it away, even though at the time it arose she was being carried in her employer's motor vehicle.

He does not appear to me to have given adequate consideration to the effect upon the liability of the employer, as such, of the act of the legislature doing away with all liability of his employee.

In my view the effect of s. 50(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 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.

Such cases as *Smith v. Moss et al.*[1] and *Broom v. Morgan*[2] do not appear to me to assist the respondent. They were cases in which a particular personal relationship prevented

[1] [1940] 1 K.B. 424.

[2] [1953] 1 Q.B. 597.

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the injured person from suing the individual driver. The nature of the immunity possessed by the driver was described by Denning L.J. in the last-mentioned case in the passage from his judgment (at pp. 609 and 610) quoted in the reasons of my brother Ritchie:

> It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action.

This may be contrasted with the terms of s. 50(2) whereby it is liability which is expressly negatived.

In *Dyer v. Munday et al.*[1] both the servant and his employer were originally liable to the plaintiff for the damages caused by the assault committed by the servant. The conviction of the servant for common assault merely provided him with a personal defence.

Some assistance in arriving at the intention of the legislature may be derived from considering what is now s. 2(2) of *The Negligence Act,* R.S.O. 1960, c. 261. This reads as follows:

> (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.

This subsection was first enacted by Statutes of Ontario 1935, c. 46, s. 2(2) which received Royal Assent on the same day as c. 26 of the same Statutes, by s. 11 of which the predecessor of subs. (2) of s. 50 of *The Highway Traffic Act,* R.S.O. 1950, c. 167, was first enacted.

The two provisions are clearly *in pari materia.* The terms of s. 2(2) of *The Negligence Act* appear to me to indicate an intention on the part of the legislature, for all purposes of determining whether liability exists, to identify a passenger who is being carried gratuitously with the negligent driver of the vehicle in which he is being carried. It appears to me improbable that the legislature would intend that

[1] [1895] 1 Q.B. 742.

such identification should operate to the advantage of a wrongdoer whose negligence in driving another car is one of the causes of the passenger's injuries but not to the advantage of the employer of the driver of the car in which the passenger is riding when such employer is morally free from any blame.

Where the only breach of the duty to take care for the safety of the passenger, whether owed by the driver or the employer of the driver or the employer of the passenger, consists of negligent driving on the part of the driver and liability to the passenger for that negligence is negatived (not because of some personal immunity from suit possessed by the driver because of a particular relationship such as that of husband and wife existing between the passenger and the driver but by an express statutory provision applying to the case of every passenger who is being carried gratuitously) the passenger's right of action is gone because the negligent act, liability for which is negatived, is as much an essential part of the passenger's cause of action against his own employer and of his cause of action against the employer of the driver as it is of his cause of action against the driver.

If the judgments below are upheld it appears to me that the plain purpose of s. 50(2) will be defeated as the appellant will be entitled to sue Livesey for indemnity in respect of the damages it is required to pay to Kearney. Such a right of indemnity appears to me to be recognized by the decision of the Court of Appeal for Ontario in *McFee v. Joss*[1] and in that of the House of Lords in *Lister v. Romford Ice and Cold Storage Co. Ltd.*[2] As the question of the existence of a right of indemnity does not arise directly on this appeal I refrain from examining the other relevant authorities. A number of them are examined and discussed in an article by Mr. Glanville Williams in (1957) 20 Modern Law Review at pp. 220 and 437.

It is interesting to speculate on the result which would flow from this Court upholding the rule laid down in the *Harrison* case if a case where the facts are similar should arise in a province where the right of recovery of a passenger who is being carried gratuitously is not taken away altogether but is limited to cases in which the driver is guilty of gross negligence. Suppose it is found as a fact that

[1] (1924), 56 O.L.R. 578.

[2] [1957] A.C. 555.

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the driver was negligent but not grossly negligent, the result presumably would be that the injured passenger could recover from his employer who is also the driver's employer but not from the driver, and the employer in turn could recover indemnity from the driver. In my respectful view we should not uphold a rule which brings about such anomalous results.

As, for the reasons given above, I agree with the submission of appellant's counsel that the *Harrison* case was wrongly decided and that the right of action which the respondent had at common law is taken away by the terms of s. 50(2) it becomes unnecessary for me to consider the question, so fully argued before us, whether the case at bar can be distinguished on its facts from the *Harrison* case.

I would allow the appeal, set aside the judgments below and direct that judgment be entered dismissing the respondent's action. I agree with my brother Ritchie that having regard to all the circumstances there should be no order as to costs in any Court.

JUDSON J.:—I agree with Spence J. that this appeal should be dismissed. My agreement is founded solely upon the judgment of the Ontario Court of Appeal in *Harrison v. Toronto Motor Car Ltd. and Krug*[1], which cannot be distinguished from the present case and unless we are ready to overrule this case, it must govern.

On the findings made both at trial and on appeal, Kearney was injured in the course of his employment by the negligent driving of his fellow servant Livesey, who was driving a car owned by the common master, Co-operators Insurance Association. Although Kearney cannot succeed against the driver because of the provisions of s. 105(2) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, as a servant injured in the course of his employment he still has a right of action against his master and this right of action is not taken away by s. 105(2).

Part II of *The Workmen's Compensation Act* does away with the defence of common employment in this case. Co-operators Insurance Association, the master and owner of the car, is liable to its first servant for the negligent driving of its second servant. There is a master and servant relationship between both passenger and driver and the owner of

[1] [1945] O.R. 1.

the car, as there was in the *Harrison* case. The passenger-servant is the plaintiff. He retains his right of action against the master notwithstanding the statute. I refrain from expressing any opinion on what would happen in any other relationship.

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing the appeal of the Co-operators Insurance Association from a judgment rendered at trial by Haines J. whereby the respondent was awarded damages in the amount of $16,800 in respect of personal injuries sustained by him while he was travelling in an automobile allegedly owned by the appellant and driven by its servant, one Edward George Livesey. The learned trial judge gave judgment against both the appellant and its servant, but the action against Livesey was dismissed in the Court of Appeal and it was assumed for the purpose of this appeal that he was not liable for any of the damage sustained by the respondent.

The respondent conducts a real estate and insurance business in the town of Meaford and at all times material hereto was an agent of the appellant "in soliciting insurance and servicing policyholders . . . ." under the terms of a written contract which was executed on July 2, 1955. In the event of a claim being made by any policyholder to whom the respondent had sold a policy, it was the general practice of the appellant to send its own adjuster into the area and it was recognized to be part of the respondent's duty to introduce this adjuster to the policyholder and to accompany them both while the loss was being adjusted. On these occasions the respondent was primarily concerned with maintaining good relations between himself and his company on the one hand and the policyholder on the other. The actual work of adjusting the loss was conducted by the company's adjuster. The learned trial judge has found:

> . . . that both the company and the plaintiff considered it the plaintiff's duty to accompany the adjuster on request in the adjusting of losses *with the policyholder.* (The italics are mine.)

On November 26, 1957, Livesey, who was one of the appellant company's adjusters, drove to Meaford for the purpose of adjusting a claim for collision damage to the automobile of one Sewell who had been insured by the

[1] [1964] 1 O.R. 101, 41 D.L.R. (2d) 196.

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appellant through the agency of the respondent. On his arrival Livesey went to the respondent's office and asked him to make arrangements for meeting the insured and visiting the garage where the damaged car was. It appears that the respondent 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 leave the office and, although his own car was available, he went with Livesey so that they could discuss the claim before meeting the insured, and they drove a few blocks to the F. Stanley Knight Manufacturing Co. where Sewell was employed. When Sewell came out, Kearney introduced him to the adjuster and the three men drove together to the garage where Livesey discussed the damage with the garage proprietor and after making an arrangement for repairs, which appears to have been satisfactory to the insured, he drove with Sewell and the respondent back to the Knight Manufacturing Co. where Sewell signed a claim form and returned to his work.

Having performed the function of introducing the adjuster to his client and having accompanied them both to the scene of the adjustment where the insured appeared to be satisfied, the respondent was anxious to get back to his office and his real estate deal, and although his office was only a few blocks away he asked Livesey to drive him back there. It was on the way back to Kearney's office that the accident occurred.

The respondent's claim is framed on the assumption that the accident occurred after the work of adjustment had been completed and that the appellant was under a duty to provide safe transportation for the respondent while he was returning from the investigation after he had discharged his obligation to the company in respect of the Sewell claim.

By paras. 6 and 7 of the statement of claim it is alleged that:

> 6. The Plaintiff on the 6th day of November, 1957, in company with the Defendant, Edward George Livesey, attended to adjust an insurance claim for the Defendant, Co-Operators Insurance Association, in the east part of the Town of Meaford, in the County of Grey. *Upon completion of the investigation by the plaintiff and defendant, Edward George Livesey,*

the Defendant, Edward George Livesey, drove the Plaintiff in his motor vehicle in a westerly direction on Boucher Street, in the Town of Meaford, and negligently failed to observe a railway train approaching from the south to cross Boucher Street and collided with great force with the said railway train.

7. The Plaintiff alleges that the Defendants were under a duty to provide safe transportation to the Plaintiff while attending at *and returning from the said investigation.* (The italics are my own.)

The allegation that Livesey was driving "his motor vehicle" at the time of the accident is not denied in the pleadings and in the Court of Appeal Aylesworth J.A. referred to the vehicle as "the car of the defendant Livesey". The case was, however, argued before us on the basis that the appellant was the owner and in any event it will be seen that the disposition of this appeal does not, in my view, turn on any question of the ownership of the motor vehicle, but rather on the question of whether or not, after the investigation of the claim had been completed, the respondent was under a duty to the appellant which required him to return to his office in the Livesey car and which therefore gave rise to a concomittant duty on the part of the appellant to ensure his safe carriage to his destination.

By way of defence the appellant pleaded the provisions of s. 105(2) of *The Highway Traffic Act* of Ontario as relieving him from all liability for any loss or damage resulting from bodily injury to the respondent, and in the alternative, pleaded that Livesey and the respondent were engaged on a joint mission on behalf of the appellant at the material time so as to give rise to the defence of common employment.

The relevant sections of *The Highway Traffic Act* read as follows:

105.—(1) 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.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers

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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.

I agree with both the Courts below that under the authority of the case of *Harrison v. Toronto Motor Car Ltd. and Krug*[1] (hereinafter referred to as the *Harrison* case), s. 105(2) does not have the effect of exempting the owner of a motor vehicle from the personal duty which rests on him as the employer of a servant who is injured while a passenger in a motor vehicle in which he is required to drive in the discharge of a duty arising out of his contract of employment.

In the present case the learned trial judge found the driver Livesey to be liable and if this were indeed the case it would seem to me to follow that, in view of the provisions of s. 125 of *The Workmen's Compensation Act,* the appellant would be vicariously liable to Kearney for the actionable negligence of his fellow employee while acting in the course of his employment. The Court of Appeal has however found, and it is now conceded, that by reason of s. 105(2), the driver Livesey is not liable and this gives rise to the question of whether and if so under what circumstances an employer may be held liable for the acts of its servant when that servant himself is for some reason immune from liability. This question was argued before us at length and appears to me to be one of some difficulty and importance.

Until the decision of Charles J. in *Smith v. Moss et al.*[2], it was widely accepted as a general rule, at least in England, that vicarious liability did not attach to an employer unless his servant had committed an actionable tort. This is frequently referred to as "the traditional view of true vicarious liability", *e.g.* (see Salmon on Torts, 13th ed., 1961, p. 109; Winfield on Tort, 7th ed., 1963, p. 759). In *Smith v. Moss,* however, the plaintiff was injured as the result of the negligence of her husband in the operation of his mother's car and Charles J. held that although under *The Married Women's Property Act* the wife could not sue her husband for a tort, he was at the time of the accident

[1] [1945] O.R. 1. [2] [1940] 1 K.B. 424.

acting as his mother's agent, and that she was therefore liable. The judgment is a short one and the conclusion appears to be based on an analogy which Charles J. drew between the circumstances before him and the supposed case of a plaintiff being driven by her husband in a car which she had hired from a garage where the husband was employed as a driver.

The difference between the supposed case and the facts with which Charles J. had to deal is that the wife in the supposed case had entered into a contract of hire with the garage proprietor whose liability would therefore not have been vicarious but personal, whereas in the *Smith* case no such personal liability rested on the mother-in-law, and under the traditionally accepted view of the matter she would not have been held liable unless her son had been liable also. Some commentators treat this case as authority only for the proposition that the position of a husband and wife under *The Married Women's Property Act* constitutes an exception to the general rule of vicarious liability, (see Powell's Law on Agency, p. 240), while others explain it on the ground that the wording of that Act, *i.e.* "No husband or wife shall be entitled to sue the other for a tort", recognizes that there can be a tort between husband and wife but simply establishes a procedural bar to suit on behalf of either of them and that the mother-in-law Smith was therefore vicariously liable for Smith's tort, although his wife was prevented from suing him for it. The decision might also be treated as an application of what has come to be known as "the master's tort" doctrine which will hereafter be discussed, but as has been indicated, the judgment of Charles J. was not fully reasoned and he made no reference to any of these propositions.

Notwithstanding the wide implications which have since been attributed to the decision of Charles J. in *Smith v. Moss, supra, which was delivered at nisi prius apparently on the day of the trial, (see 56 T.L.R. 305), it is, in my view,* highly unlikely that the traditional course of the development of the law of master and servant would have been in any way affected by such a "side wind" had it not been for

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the subsequent decision of the Court of Appeal in the case of *Broom v. Morgan*[1], where the husband and wife were fellow employees and the wife, having been injured through the negligence of the husband, in the course of his employment, brought action against their common employer.

In that case the trial judge, Lord Goddard, based his decision (reported in [1952] 2 All E.R. at p. 1007) in great measure on "the master's tort" doctrine of liability, which he expressed in the following language at p. 1009:

> . . . although it is common to speak of the master's liability as vicarious, it is nonetheless regarded as the liability of a principal. The master is just as much liable as though he commits the tort himself because the servant's act is his act.

Lord Goddard also referred to the decision of Cardozo C.J. in the New York Court of Appeals in *Schubert v. Schubert Wagon Co.*[2], where that distinguished judge said, at p. 43:

> A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity . . .

In the Court of Appeal, Denning L.J., (as he then was) in dismissing the appeal also relied primarily on the "master's tort" doctrine. At the beginning of his judgment, at p. 607, he observed:

> I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it.

After developing this point at some length, the learned judge concluded at p. 609 by saying:

> My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.

Lord Denning then proceeded to develop an alternative argument to the effect that the immunity afforded by *The*

[1] [1953] 1 Q.B. 597.

[2] (1928), 164 N.E. 42.

Married Women's Property Act was a mere rule of procedure and not a rule of substantive law. At pp. 609 and 610 he said:

> It is an immunity from suit and not an immunity *from duty or liability*. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action.

The uncertainty raised by the above cases as to the true basis of the doctrine that a master is vicariously responsible for the tort of his servant committed in the course of his employment, was clarified by the House of Lords in *Staveley Iron & Chemical Co. Ltd. v. Jones*[1], hereinafter referred to as the *Staveley* case, and although what was there said in this regard was *obiter*, the decision is nevertheless widely regarded as having decisively rejected the "master's tort" approach to the question. (See Winfield on Tort, 7th ed., 1963, at p. 761). I agree with this view.

In the *Staveley* case, the plaintiff, who was an employee of the appellant, had been injured as the result of an act of the appellant's crane operator and the trial judge, Sellers J., dismissed the action by applying an extension of the rule in *Caswell v. Powell Duffryn Associated Collieries Ltd.*[2] and holding the crane operator's act to have been nothing more than an error in judgment not amounting to negligence. It was the unanimous opinion of the Court of Appeal[3] that the crane operator's act constituted negligence on the part of a servant of the company acting in the course of her employment, and on this ground the majority of the Court found the company to be vicariously liable, but Denning L.J., in a passage which received no support from the other members of the Court, went out of his way to restate the "master's tort" theory of liability. He put this part of his decision on the ground that the fault was the fault of the employer who, having taken the benefit of such a machine as the crane, must accept the burden of seeing that it is properly handled, and he then said, at p. 480:

> It is for this reason that the employer's responsibility for injury may be ranked greater than that of the servant who actually made the mistake: see *Jones v. Manchester Corp.*, [1952] 2 Q.B. 852, and he remains

[1] [1956] A.C. 627. [2] [1940] A.C. 152. [3] [1955] 1 Q.B. 474.

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responsible even though the servant may, for some reason, be immune; see *Broom v. Morgan*, (*supra*). (The italics are my own.)

In the House of Lords this phase of the matter was only dealt with in the decisions of Lord Morton of Henryton and Lord Reid. Lord Morton's reasons were concurred in by three other members of the Court, but Lord Reid was speaking only for himself. In expressly rejecting Lord Denning's reasoning as disclosed in the last-quoted passage, Lord Morton said at p. 639:

> My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is "Yes", the employer is liable *vicariously* for the negligence of his servant. If the answer is "No", the employer is surely under no liability at all.

I pause here to say that in my view the learned law Lord was here using the word "negligence" in the sense of "actionable negligence". Lord Morton continues:

> Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute. In the latter type of case the employer cannot discharge himself by saying: "I delegated the carrying out of this duty to a servant, and he failed to carry it out by a mistake or error of judgment not amounting to negligence." To such a case one may well apply the words of Denning L.J.: "[the employer] remains responsible even though the servant may, for some reason, be immune." *These words, however, are, in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a case if the servant is "immune", so is the employer* . . . This passage in the judgment of Denning, L.J. receives no support in the judgments of Hodson and Romer L.JJ., and I cannot find that the decisions in the cases cited by Denning L.J. lend any support to it, though it may be that the passage is to some extent supported by certain dicta in the first two of these cases. (The italics are mine.)

The distinction between direct personal liability and vicarious liabilty of a master has been most clearly expressed by Rand J. in a much quoted passage from his judgment in *The King v. Anthony*[1], where he says:

> There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the

[1] [1946] S.C.R. 569 at 572.

servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior*; the former does not.

By reason of the provisions of s. 105(2) of *The Highway Traffic Act*, the driver's act which occasioned the injury does not constitute a breach of duty giving rise to liability against him and accordingly, in my view, the appellant cannot be held vicariously liable for this act under the rule of *respondeat superior* because, as Lord Morton has said in the *Staveley* case, *supra*, "Where the liability of the employer is not personal but vicarious . . . . if the servant is immune so is the employer".

In the present case the Courts below did not base their decision on any application of the rule of *respondeat superior* but rather, in finding that the circumstances were governed by the *Harrison* case, they decided that the appellant was in breach of a direct personal duty which it owed to its injured servant, the existence of which was dependent upon it being found that Kearney was in the vehicle at the time of the accident in the discharge of a binding obligation to be there which arose out of his contract of service and which in turn gave rise to a concomitant obligation on the part of the appellant to carry him with due care.

That the decisions of the Courts below were predicated on the existence of such a duty appears to me to be made plain by the following excerpts from their judgments. In this respect, the learned trial judge said:

> I think it sufficient if I find that in the circumstances as they existed between the parties, that the plaintiff became a passenger pursuant to an obligation he owed the defendant company and the defendant company and its servants owed to the plaintiff a duty to carry him with due care. This I so find.

In the course of the reasons which he delivered on behalf of the Court of Appeal, Aylesworth J.A. put the matter even more forcefully when he said:

> We think such cases as the *Dallas* case reported in [1938] S.C.R. 244 and the *Hoar* case reported in [1938] O.R. 666 are quite distinguishable from the case at bar upon their respective facts. Here, but not in those decisions, *the plaintiff was not a free agent as to his movements after completion of the work of adjustment* upon which he and Livesey were

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engaged; 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; *he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle* to the place whence he came; his employment in that endeavour continued, in our view, until that had been done. (The italics are my own.)

In deciding that the appellant's liability was dependent upon the respondent having been obliged to be in the vehicle at the time of the accident, the Courts below appear to me to have been following the principle established in relation to the English *Workmen's Compensation Act, 1906* in the case of *St. Helen's Colliery Co. v. Hewitson*[1], where it was held that before an employee can recover from his employer for personal injuries it was necessary for the injured employee not only to establish that he was in the course of his employment in the sense of being on his master's business at the time of the accident, but also that he was in the place where the accident occurred because his contract required him to be there. In this regard, Hudson J. speaking on behalf of himself and Duff C.J., Crockett, Davis and Kerwin JJ., in *Dallas v. Home Oil Distributors Ltd.*[2] quoted with approval the language of Lord Wrenbury in the *Hewitson* case at p. 95 where he 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.

The fact that the Courts below based their decision on the existence of such a direct personal duty and that they at the same time found the present case to be governed by *Harrison v. Toronto Motor Car Ltd. and Krug,* is understandable having regard to the fact that in the *Harrison* case Miss Harrison was under an obligation arising out of her contract of employment to be in the Krug vehicle at the time the accident occurred and Mr. Krug was accordingly under a direct personal duty with respect to her safe carriage which arose under the same contract.

[1] [1924] A.C. 59. [2] [1938] S.C.R. 244.

With the greatest respect for the members of the Court of Appeal, I am unable to find any evidence to support the inference that "the plaintiff was not a free agent as to his movements after completion of the work of adjustment". It appears to me to be established by the pleadings and the evidence that at the time of the accident the respondent was no longer under any obligation to the appellant arising out of the Sewell adjustment and it is apparent that the parties directly concerned did not treat the matter of Kearney driving back to his office as a passenger in the Livesey car as being something which he did in the discharge of a duty which he was obliged to perform under his contract. Kearney's evidence in this regard is that:

> Mr. Livesey was going back up to Lon Smith's garage, and I asked him to leave me back up to my office, because I was anxious to be back there.

Livesey's evidence is to the same effect. He says of the conversation with Kearney after dropping Sewell:

> Then I said to him: "Well do you want to come back—come up to Lon Smith's with me or shall I drop you at your office?" which I felt was the only polite thing to do and he said: "No, drop me at the office" and I would say 45 seconds later there was no car.

In light of all the evidence and having regard to the sequence of events outlined in the last-quoted passages, I am of opinion that Kearney was not in the car when the accident occurred pursuant to any obligation which was binding on him in the matter of his employment, and I am therefore unable to find that in the circumstances of the present case there was any direct personal duty resting on the appellant with respect to the safe carriage of the respondent.

I agree with Mr. Justice Aylesworth that Kearney "was entitled" to be returned from whence he came in the Livesey vehicle if he wanted to use it, but if he had preferred to walk the few blocks over to his office or to go and call on a nearby friend, I am unable to see how it could be said that he was bound by any obligation to the appellant which would have prevented him from doing so.

I agree with the Courts below that the doctrine of common employment is of no assistance to the appellant in view

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of the provisions of s. 125 of *The Workmen's Compensation Act*, R.S.O. 1960, c. 437, but I am of opinion that the effect of s. 124 of that Act is to make an employer responsible to an injured employee for the negligent acts of a fellow servant done in the course of his employment which caused such injury, in the same way that the employer is responsible to the rest of the world for such negligent acts. I do not think that the section has the effect of creating a personal liability in the employer if the injured employee was not acting in the course of his employment in the sense above referred to at the time when he sustained the injury.

Like the Court of Appeal, I have confined my consideration of the relative duties of Kearney and his employer to the period of the return journey when the accident took place, but if it were necessary to do so, I would hold that although Kearney had the right to be driven to the garage by the company's adjuster, he was not under any compelling duty to do so arising out of his contract and would not have been in breach of any obligation owing by him to the company if he had travelled in his own vehicle.

In view of all the above, I would allow this appeal, but having regard to all the circumstances, I would make no order as to costs.

Appeal dismissed with costs, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitors for the defendant, appellant: Phelan, O'Brien, Phelan & Rutherford, Toronto.

Solicitors for the plaintiff, respondent: McKay & Scheifele, Meaford.