1956

*May 1, 2
*May 24

RANDOLPH J. KING (*Plaintiff*) .....APPELLANT;

AND

COLONIAL HOMES LIMITED, ROBERT RENDALL, WESLEY OBEN, CHRISTOPHER O'DWYER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Automobiles—Collision—Driver not owner—Company's truck driven without permission—Jury trial.

A truck owned by the respondent company and driven by its employee, O'D., damaged the appellant's parked car. It is not disputed that the driver was negligent. The respondent R. was an employee of the company and authorized to drive the truck, to keep it at his house overnight and there was no objection to his using it for purposes of his own in the evenings. On the night of the accident, at the conclusion of a party held at R.'s home, R. permitted O., another employee, to use the truck to drive home. O. gave O'D. a lift to O.'s house, where they parted company. O. went into his house, leaving the truck outside with the keys either on the seat or above the sun-visor. He gave no permission to O'D. to take the truck and had no intimation that he would do so. R. at no time gave O'D. any permission to drive the truck.

In the course of the trial, the fact of insurance was voluntarily disclosed by a witness for the respondent company. The trial judge discharged the jury and gave judgment against O'D. and dismissed the action as against the other respondents. The Court of Appeal dismissed the appeal but granted special leave to appeal to this Court for a decision as to whether in the circumstances it had been a proper exercise of the trial judge's discretion to try the issues without a jury against the will of the appellant.

Held: The appeal should be dismissed.

Not only was the decision of the trial judge on the question of liability right, but it would have been impossible for any properly instructed jury acting reasonably to have come to a different conclusion.

The right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons. But a new trial should not be directed by reason of a trial judge deciding to discharge the jury and complete the trial himself, even if the appeal court were satisfied that the trial judge was wrong in law, if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment at trial.

H. G. Steen, Q.C. for the appellant.

W. B. Williston, Q.C. and *K. H. MacDiarmid* for the respondent.

*PRESENT: Kerwin C.J., Rand, Locke, Cartwright and Nolan JJ.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought by special leave granted by the Court of Appeal for Ontario, from a judgment of that Court dismissing an appeal from a judgment of His Honour Judge Forsyth, who had awarded the appellant judgment for $656.73 against the defendant O'Dwyer and dismissed the action as against the other respondents. O'Dwyer did not defend the action and did not appeal from the judgment given against him.

There is little, if any, conflict in the evidence and the relevant facts may be briefly stated. About 9 p.m. on November 30, 1951, the appellant's automobile was parked on a street in Toronto when a truck, hereinafter referred to as "the truck", driven by the defendant O'Dwyer ran into it. It is not disputed that the damages suffered by the appellant amounted to $656.73 or that they were caused by the negligence of O'Dwyer. The issue at the trial was as to the liability of the other defendants. While it was questioned in the pleadings, it was admitted at the trial that the truck was owned by the respondent, Colonial Homes Limited, which was apparently a subsidiary of Lin-Wood Manufacturing Limited; the two companies were under the same management and the witness Lindal was president of both.

The respondent Rendall was employed by Lin-Wood; one of his duties was to drive the truck to carry employees of that company from the end of the street-car line to the company's plant in the morning and to take them back to the street-car line in the afternoon. The appeal was argued on the basis that, in respect of the truck, Rendall was the chauffeur of Colonial Homes Limited within the meaning of s. 50(1) of the *Highway Traffic Act*.

The defendant Oben was employed by Colonial Homes Limited as a salesman. He owned an automobile which he drove from time to time on the company's business. The defendant O'Dwyer was also employed by Lin-Wood as a nailer; there is no suggestion that he was ever employed as a chauffeur by either company and in fact he had no licence to drive a motor vehicle.

The arrangement between Rendall and his employer was that the former should keep the truck at his house over night. On the view of the evidence most favourable to

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the appellant, no objection was raised to Rendall using the truck for purposes of his own in the evenings, but he had no express authority to loan it to anyone, and he had been warned, as had all other drivers employed by Colonial or Lin-Wood, never to allow anyone but a chauffeur to drive a company vehicle.

On the night of the accident the respondent Oben went to Rendall's home where there was a small social gathering at which those present were drinking beer. The guests included the defendant O'Dwyer. Oben, who had driven to Rendall's house in his own car, agreed to lend his car for the night to Jack Guest, one of those present; and Rendall, in turn, agreed to loan the truck to Oben for the purpose of driving home, on the understanding that it would be brought back to Rendall's house early the following morning.

When Oben decided to leave Rendall's house he offered to give O'Dwyer a lift and drove him to Oben's house. On arrival at Oben's house, O'Dwyer said, "I better take a bus home"; he then said good-night and Oben last saw him "saying good-bye and walking away from the truck." Oben went into his house leaving the truck outside with the keys either on the seat or above the sun-visor. He gave no permission to O'Dwyer to take the truck and had no intimation that he would do so. Rendall at no time gave O'Dwyer any permission to drive the truck.

The plaintiff had served a jury notice and the trial of the action commenced before His Honour Judge Forsyth and a jury. In the course of the examination in chief of Lindal by counsel for the defendants the following appears:—

Q. And what were his (Rendall's) instructions as far as loaning the truck was concerned?

A. He could not loan it, and he was very definitely instructed on that, *because of our insurance situation.* He could not loan the truck unless he loaned it to another chauffeur, with permission to do so, and he was impressed with that fact, and he was aware of the fact that it had to be another chauffeur.

* * *

Q. And what if any instructions were given, by yourself, or to your knowledge were given to Mr. Rendall about the use of the truck after he had delivered the passengers, and picked them up at the end of the car line, if any?

A. The instructions were that the car was to go into the garage and stay there over night. And I admit I was aware that he probably took it out, and maybe took it along to the grocery store or something, but I did not worry too much about that, *if it was not used for anything that the insurance did not cover.*

It will be observed that the words which I have italicized in the above answers would indicate to the jury that insurance was carried on the truck. At the conclusion of the evidence the court adjourned for an intermission at 11.35 a.m. and there was a discussion in the judge's room between him and counsel. On the court resuming the record reads as follows:—

COURT RESUMED at 12.05 p.m.

THE COURT: Gentlemen of the Jury, during recess I have determined, with the consent of Counsel to take this matter away from you.

MR. HOLLAND: I would not consent to that, Your Honour.

THE COURT: You still think I should proceed, with the Jury?

MR. MACDAIRMID: I do not think there is any doubt about it.

THE COURT: Gentlemen of the Jury, there was some discussion with Counsel on this matter, and there has been some reference to matters in this case that should not have been made to you. Also I think the case is one which should not be left to the Jury to determine. I think it is entirely a matter of law, and a matter which should not be left in your hands. I am therefore taking it away from you, and I will handle the case by myself, and you can go now. You have nothing further to do with the case. You are dismissed till to-morrow morning. (The Jury retires.)

THE COURT: Do you wish to proceed now with argument?

MR. HOLLAND: I understand that my friend is admitting that the truck in question was owned by Colonial Homes Limited, and I ask that my friend acknowledge that for the purposes of the record.

MR. MACDAIRMID: It is true, Your Honour.

MR. HOLLAND: Presents argument.

MR. MACDAIRMID: Presents argument.

MR. HOLLAND: Presents argument in reply.

The learned judge gave judgment at the conclusion of the argument in the manner mentioned in the opening paragraph of these reasons. In the course of his reasons the learned judge says:—

There is considerable dispute as to the chain of responsibility in this matter. In fact that is the only question in dispute. Any questions to be decided involve matters of fact and law. Moreover there was some reference to insurance, which might have prejudiced the jury. I therefore took the case from the jury.

The question of responsibility in this matter is not so easy to determine. However, I think the facts were that when Oben and O'Dwyer left Rendall's house, the truck was being driven by Oben, with the consent of Rendall. I think when the truck left Oben's house the truck was being driven by O'Dwyer, without the consent of Oben. O'Dwyer was intoxicated

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at the time, and he had no driver's license, and I do not think that he had any permission to drive the truck at the time of the accident. I think the defendants Colonial Homes Limited, Rendall and Oben, have satisfied the Court that O'Dwyer was driving the truck without their knowledge or consent.

The plaintiff appealed to the Court of Appeal for Ontario, the main grounds of appeal being, (i) that the trial judge should have held that the defendants had failed to satisfy the onus cast upon them by s. 50(1) of the *Highway Traffic Act;* and (ii) that the learned trial judge erred in law in taking the case from the jury. The appeal was dismissed, the unanimous judgment of the Court being delivered by Laidlaw J.A. at the conclusion of the argument.

In giving the reasons of the Court for granting special leave to appeal Pickup C.J.O. says in part:—

> Among the questions which counsel for the plaintiff desires to be submitted to the Supreme Court of Canada is the question as to whether in the facts of this case, where one of the defendants voluntarily disclosed the fact that he was insured, it was a proper exercise of the judicial discretion vested in the trial Judge to proceed to try the issues involved without a jury against the will of the plaintiff. This Court is of the opinion that this question is one that ought to be submitted to the Supreme Court for decision and leave to appeal is therefore granted.

In the view that I take of the whole case it becomes unnecessary to decide the question whether the learned trial judge erred in dispensing with the jury and whether, if he did so err, the circumstances are such as to warrant interference by an appellate court. The reason for this is that, in my opinion, not only is the decision of the learned trial judge on the question of liability right, but it would have been impossible for any properly instructed jury acting reasonably to have come to a different conclusion.

Counsel for the appellant argues that under s. 50(1) of the *Highway Traffic Act* the onus of proving that at the moment of the collision the truck was in the possession of someone other than the owner or its chauffeur, was upon the respondent Colonial Homes Limited, that the jury would have been free to disbelieve all the evidence in the record, although uncontradicted, bearing on that question and to find that this onus had not been satisfied and could therefore have held that O'Dwyer, at the time of the accident, had possession of the truck with the consent of the respondent Colonial Homes Limited.

It appears to me that such a finding would be contrary to all the direct evidence particularly that of Lindal, Rendall and Oben none of which was shaken on cross-examination; and that it would be inconsistent with all the circumstances disclosed in the evidence.

As an alternative, counsel for the appellant submits that the jury might have found that at the moment of the accident the truck was in the possession of Rendall, the chauffeur of the owner. The evidence makes it clear, however, not only that Rendall had not consented to O'Dwyer driving the truck but that he had no knowledge or reason to suppose that O'Dwyer would do so. A finding that the truck was at the moment of the collision in the possession of anyone other than O'Dwyer would be in direct conflict with the judgment of this Court in *Marsh* v. *Kulchar* (1).

This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons; but I cannot think that a new trial should be directed by reason of a trial judge deciding to discharge the jury and complete the trial himself, even if the appellate court was satisfied that the course followed by the trial judge was wrong in law, if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge.

Since, in my view, if the jury had found for the appellant the Court of Appeal must have set aside their verdict it is unnecessary to express an opinion as to whether the learned trial judge was right in discharging the jury.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hughes, Agar, Amys, Steen & Bassel.*

Solicitors for the respondents: *Timmins & MacDiarmid.*

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(1) [1952] 1 S.C.R. 330.