40/93

SUPREME COURT OF VICTORIA

WIGHT v STATE ELECTRICITY COMMISSION of VICTORIA

Hayne J

14, 18 December 1992 — (1992) 17 MVR 243

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – DAMAGED IN COURSE OF EMPLOYMENT – VEHICLE DRIVEN ON UNMADE ROADS UNKNOWN TO DRIVER – DAMAGED WHEN OVERTURNED – WHETHER DRIVING OUTSIDE TERMS OF CONTRACT OF EMPLOYMENT – WHETHER DRIVER ENTITLED TO INDEMNITY CLAIMED.

A driver, by virtue of his contract of employment, was indemnified against any claim for loss or damage to property provided the vehicle involved was "being used in the course of (his) employment" and was not used "for other than (the employer's) purposes without proper authority". Whilst driving his employer's vehicle, W. chose to take a different route for the return journey down unknown and unmade roads. The vehicle failed to take a sharp corner in the road, rolled over and sustained damage. When the employer sought to recover the cost of repairs from W., W. contended that he should be indemnified against any loss because he was not using the vehicle without proper authority or for other than his employer's purposes. The magistrate held that W. was not entitled to the indemnity claimed. Upon appeal—

HELD: Appeal dismissed.
It was open to the Magistrate to conclude that W. was acting in breach of the terms of the authority he had been given to use the vehicle. Accordingly, the indemnity provisions of the contract of employment did not apply to assist W.

HAYNE J: [1] Mark Wight was employed by the State Electricity Commission of Victoria ("SECV") as an apprentice boilermaker. On 30th October 1990 his leading-hand, Wayne Lapham, gave Wight, and a fellow apprentice, Michael Robinson, permission to use a Suzuki utility to drive from the Loy Yang Power Station to the Coal Production Unit in order to pick up some tools. No express direction was given to Wight or to Robinson about the route that they should take. The power station is about four kilometres from the Coal Production Unit. Robinson drove the vehicle to the Coal Production Unit. The road that he took was a sealed road. Wight, then aged about 19 years, took over the driving after they had picked up the tools at the Coal Production Unit and he decided to take a different route from the one taken to arrive at the Coal Production Unit. After driving about three kilometres (apparently on an unsealed road) Wight came to a section of the road where they were not able to proceed because a new conveyor had been constructed across the road. He did not retrace his steps to the Coal Production Unit but said later that he decided to return to the Coal Production Unit along a different route again. In fact this route was to take him directly away from the power station which was his ultimate destination. He drove about another three kilometres still on unsealed roads but he then failed to take a sharp left-hand corner in the road and the vehicle rolled over, sustaining significant damage.

SECV brought proceedings against Wight to recover the cost of repairs to the vehicle. Wight denied that he had been negligent and contended that SECV was bound to **[2]** indemnify him against any loss or damage occasioned by his negligence. In this respect he relied on the terms of an SECV "Driver Manual - Instruction for Drivers of Commission Vehicles". That document (which appears to have gone through several editions but not to have changed in any relevant respect in the two editions produced in evidence below) provided, so far as presently relevant that;

> "The Commission indemnifies Commission drivers against any claims made against them for loss or damage to property or personal injury resulting from motor vehicle accidents involving Commission vehicles being used in the course of their employment.
>
> Any employee of the Commission who has an accident whilst driving or in charge of a Commission vehicle while they;
> – are under the influence of alcohol or drugs to such an extent as to be incapable of having proper control; or

> – have a blood alcohol level in excess of the prescribed legal limit; or
> – are using the vehicle for other than Commission purposes without proper authority;
> may, along with other disciplinary action, be required to bear the total cost of all loss or damage arising from the accident."

The Magistrate held that Wight was negligent and that at the time of this accident his use of the vehicle was not authorised and that accordingly he was not entitled to the indemnity that he claimed. Wight now appeals on a point of law alleging that it was not open to the Magistrate to hold that his use of the vehicle was not authorised and that SECV was precluded from making the claim which it did by the provisions I have mentioned or by operation of a term implied in the **[3]** contract of employment at common law. Wight did not challenge the finding of negligence.

There having been no transcript taken of the proceedings below, the record of evidence given and findings made by the Magistrate is necessarily imperfect. Piecing together the accounts of the findings that are given on behalf of the appellant and the respondent it seems that the Magistrate found that at the time of the accident Wight's use of the vehicle was not authorised because he had not retraced his path from the point where the road was cut by the conveyor belt but had taken a different route back to the Coal Production Unit. Although authorised to use a Commission vehicle to drive from the power station to the Coal Production Unit in order to pick up tools he found that Wight was "vague in his evidence and was determined to take a different route back to the power station. He found that [Wight] made a decision to drive down a roadway that was diametrically opposed to where he was supposed to be going". Having found in terms that it is unnecessary to consider that Wight was negligent in his driving the Magistrate found that Wight was not entitled to any indemnity contained in the terms of his contract of employment and that he was liable for the damage that was caused to the SECV's vehicle.

The argument on the appeal proceeded on the basis that the terms in the driver's manual formed part of the contract of employment of Wight. No argument was directed to this aspect of the matter and I therefore say no more about it. Similarly, although the clause, when it speaks of indemnity clearly is directed primarily to the case in **[4]** which an employee incurs liability to a person other than his employer, the argument assumed that if the circumstances were such as would have bound the SECV to indemnify Wight in respect of any liability to a third party then Wight was not liable to the Commission for the loss sustained as a result to the damage to the motor vehicle.

The appeal was argued on the basis that the principal questions for determination were whether on the evidence below the vehicle was being used in the course of Wight's employment or "for other than Commission purposes without proper authority". Counsel for the appellant put three submissions:

> – that because the appellant had been picking up tools and was intending to return with those tools to his place of work he fell within the protection of the clauses;
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> – that on its true construction the terms of the contract of employment meant that an employee lost the benefit of the terms if and only if he was using a vehicle not for Commission purposes and without proper authority; and lastly
>
> – that so long as Wight believed that he was taking a direct route back to his place of work he was entitled to the benefit of the protection of the terms and that that benefit was not to be lost simply by making a navigational error.

No substantial argument was directed to the implication of any term in the contract of employment; the argument focussed upon the construction of the express term. **[5]** In the course of cross-examination Wight accepted that he knew that when a vehicle was given to an employee to use to go to a destination, the employee was to travel along the safest and most direct possible route, returning along the same route as soon as possible. Wight said that this was common knowledge within the SECV. In the light of that evidence it was open to the Magistrate to hold that the authority given to Wight to take a vehicle from the Power Station to the Coal Production Unit was an authority to do so using the safest and most direct route for both the outward and the return journey. It was also open to the Magistrate to hold that Wight broke that authority not only by choosing to follow a different path for the return journey from the one taken for the outward journey but by choosing a path that necessarily took him down unmade roads in the

overburden dump area compared with the sealed road used for the outward journey. Moreover, it was open to the magistrate to hold that Wight broke the authority when, upon being confronted by the conveyor across the road, he chose to press on with an unknown route back to the Coal Production Unit rather than retrace his steps and set out for the Power Station by the route originally taken by Robinson.

It is clear that the Magistrate made the last of the three findings that I have described. It may be that he also made the first two findings for so much may be said to be implicit in his findings that Wight "was determined to take a different route back to the power station" and that Wight "made a decision to drive down a roadway that was diametrically opposed to where he was supposed to be going". Not only were the explicit **[6]** findings made by the Magistrate open so too were the further findings that I have mentioned.

Once it is accepted that it was open to the Magistrate to conclude that Wight was acting in breach of the terms of the authority that he had been given to use the vehicle it follows in my view that the terms set out in the driver's manual did not apply to assist Wight. The terms use three different expressions – "in the course of their employment", "other than Commission purposes", and "without proper authority". Clearly, if possible, that part of the terms which deals with the employee's right to indemnity should be read in a way that is consonant with the other part of the clause referring to circumstances in which an employee may be required to bear the total cost of all loss or damage arising from an accident.

In particular it would not be right to attempt to construe the expression "in the course of their employment" divorced from the particular context in which it stands – a context in which liability is to be imposed on an employee if that employee is "using the vehicle for other than Commission purposes without proper authority". The appellant submitted that the two expressions "other than Commission purposes" and "without proper authority" should be read as separate cumulative requirements to be established before liability could be imposed on an employee. I do not read them in this way. Examples can readily be identified in which an employee may be using a vehicle for Commission purposes but may be doing so without proper authority just as can examples be multiplied in which the employee is using the vehicle with proper authority but for other than Commission purposes. **[7]** It would be a strained and unnatural reading of the clause to read it as dealing only with the limited class of cases in which the employee is not only acting without proper authority, he is acting other than for Commission purposes. The clause applies if the employee uses the vehicle "for other than Commission purposes" or if he uses it "without proper authority".

In the present case it may be said that Wight had authority to use the vehicle to pick up tools and in that sense, as the appellant contended, he had proper authority but the authority he had was hedged about by conditions and he had broken those conditions. In those circumstances I consider that it was open to the Magistrate to hold, as he did, that Wight was using the vehicle without proper authority scil. without authority for the particular use to which he was putting it – driving along the named roads in the overburden dump area.

Other circumstances may very well apply if Wight had made a navigational error and simply became lost. But in the present case the Magistrate found that he intended to deviate from the path taken to the Coal Production Unit and thus that he had consciously chosen to act in breach of what he knew to be the basis upon which authority to use the vehicle was given.

Although reference was made in the course of argument to some of the vicarious liability cases concerning what Fleming refers to as "frolic and detour" (Fleming, *Law of Torts*, 7th ed. p352), those cases offer only limited assistance, for it is a question of construction of the contract of employment which is raised **[8]** in the present matter. It is enough to say that it was open to the Magistrate to conclude that Wight's conduct would constitute a frolic. See e.g. *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74; [1961] 1 WLR 705.

Finally, it is not necessary to consider whether the principles stated in *Lister v Romford Ice and Cold Storage Co* [1956] UKHL 6; [1957] AC 555; [1957] 1 All ER 125; [1956] 2 QB 180 apply in contracts of employment today (cf. *Rowell v Alexander Mackie College of Advanced Education* (1988) 25 IR 87; [1988] Aust Torts Reports 80-183 (67727); (1988) 7 MVR 157; (1988) 25 AR 87.

The relationship between this employer and its employees was regulated by express terms; no question arises of what terms should be implied in the contract. The appeal should be dismissed.

APPEARANCES: For the applicant Wight: Mr JB Richards, counsel. Holding Redlich, solicitors. For the respondent State Electricity Commission: MG Klemens, counsel. John Matthey, solicitor.
