16/75

SUPREME COURT OF VICTORIA

CANTERBURY TIMBERS PTY LTD v LAMBERT; CROSS (3rd Party)

Harris J

23 April 1975

CIVIL PROCEEDINGS – MOTOR VEHICLE ACCIDENT – CLAIM BY EMPLOYEE FOR DAMAGES FOR NEGLIGENCE – IMPLIED TERM AS TO INDEMNITY FOR NEGLIGENCE BY EMPLOYEE – WHETHER EMPLOYEE ENTITLED TO BE INDEMNIFIED BY THE EMPLOYER.

Complaint for damages for negligence as a result of motor car accident. The employee-driver joined his employer as third party, claiming he was driving as a servant and agent and in the course of his employment. That it either was an express term of employment that he was entitled to indemnity from his employer for any damage he incurred whilst in the course of his employment; or else that his employer, by warranty or representation, implied such indemnity by the fact of such employment. There was insufficient evidence to justify an express term.

HELD:
1. There was no basis for the implication by the Magistrate of any term which would result in the third party (the employer) being under an obligation to indemnify the defendant for the negligent conduct of the defendant in the course of his employment.

2. There was authority for the proposition that, at all events where the employee was employed in the capacity of a driver, the employer did have a right of indemnity against the employee for the employee's negligence in the course of his driving when he had been driving in the course of his employment.
***Lister v Romford Ice and Cold Storage Co Ltd* [1956] UKHL 6; (1957) AC 555; [1957] 1 All ER 125, applied.**

3. In the light of that authority, it was quite impossible to make out a cause of action on the particulars. Paragraph 4 of the particulars could have sustained a cause of action if the defendant had established a contract under which it was an express term that the third party would indemnify the defendant; but there was no such express term.

HARRIS J: ... Mr MacKay submitted to me that the grounds of the order nisi were made out. He put it that there was no evidence of any express term in the contract of employment between the defendant and the third party to justify the Magistrate's conclusion. He also put it that there was no basis for the implication of any term which would result in the third party being under an obligation to indemnify the defendant for the negligent conduct of the defendant in the course of his employment. He referred to and relied upon the decision of the House of Lords in *Lister v Romford Ice and Cold Storage Co Ltd* [1956] UKHL 6; (1957) AC 555; [1957] 1 All ER 125, and he indicated by his argument that he had looked into the matter to see whether there had been any later developments or other cases which would tell against the strength which he drew from that decision of the House of Lords. He referred me to two decisions which did not tell against the strength of the submission that he put.

Mr Roach put a submission to me which was, in general terms, that by virtue of the circumstances that exist these days when motor cars are articles in everyday use, that there should be implied into a contract of employment that an employer would indemnify an employee for any negligent conduct of the employee for which the employee was held liable at all times, insofar as that negligence consisted in the negligent driving of a motor vehicle when the employee was not employed specifically as a driver. I may say that in this case it is not clear to me whether he was employed as a driver or not. It was clear that the evidence showed that he was driving in the course of his employment. Mr Roach conceded that he was unable to support his proposition by any legal decision. Not only was he not able to support his argument by any legal decision, but there is a uniform and immensely impressive weight of authority against it.

The litigation in *Lister v Romford Ice and Cold Storage Co Ltd* was a litigation that was

contested on a great number of points on all levels. It was a case that attracted very considerable interest at the time. It was heard at first instance by a single Judge. The case went on appeal to the Court of Appeal and then went on appeal from the Court of Appeal to the House of Lords. What might be regarded as the main point in the case was whether the employer, who had been held vicariously liable for the employee's negligence, had a right to be indemnified by the employee.

The case is authority for the proposition that, at all events where the employee was employed in the capacity of a driver, the employer did have a right of indemnity against the employee for the employee's negligence in the course of his driving when he had been driving in the course of his employment.

But in the case the defendant took a number of defences. These included a defence which was expressed in paragraph 4 of the defence. It is set out at p582 of (1957) AC in the course of the speech of Lord Morton of Henryton. It reads as follows:-

> '4. It was an implied term of the Defendant's contract of employment with the plaintiffs that the plaintiffs would indemnify him against all claims or proceedings brought against him for any act done by him in the course of his said employment. In the premises the plaintiffs are not entitled to bring these proceedings against the defendant.'

The plaintiffs succeeded at first instance before Ormerod J (see *Romford Ice and Cold Storage Co Ltd v Lister* (1956) 2 QB 182, 184.) There does not appear to be any report of that decision, but it must follow from the fact that the plaintiffs succeeded that Ormerod J held that paragraph 4 did not make out a good defence.

In the Court of Appeal the appeal was dismissed by a majority (see *Romford Ice and Cold Storage Co Ltd v Lister* (*supra*)). The two Judges who held that the appeal should be dismissed were Birkett LJ, and Romer LJ. The fact that they so held carried by necessary implication that they held that paragraph 4 of the defendant's defence did not make out a good defence. Denning LJ (as he then was) was the third member of the Court. He would have allowed the appeal. He took the view that there was an implied term in the contract of employment that, if the employer was insured, he would not seek to recover contribution or indemnity from the servant (see (1956) 2 QB at 192). From this and from the absence of any reference in his judgment to the defence raised by paragraph 4 of the defence, it must follow that he was not prepared to hold that such a wide term as was alleged in that paragraph should be implied into the contract of employment.

When the appeal went to the House of Lords, the appeal was dismissed by a majority of three Lords to two. The three Lords who held that the appeal should be dismissed all rejected the defence in paragraph 4 of the defence (see (1957) AC at p574, per Viscount Simonds; at p584, per Lord Morton; and at p593, per Lord Tucker). The two Lords who would have allowed the appeal (Lord Tucker and Lord Somervell) based their reasons on grounds relating to insurance, but there is nothing in their reasons to suggest that they would have been prepared to decide the appeal on the basis of implying the term that was alleged in paragraph 4 of the defence. It seems to me that they were not prepared to do that, because if they had been, it would not have been necessary for them to go into the matter with respect to insurance in the way in which they did.

Thus, there are at least six Judges out of the nine Judges who heard the case of *Lister v Romford Ice and Cold Storage Co Ltd* who have expressed definite views against the cause of action which the defendant seeks to rely upon in this case as against the third party, and the other three Judges almost certainly took the same view on the point as those six.

In the light of that authority, it is, in my opinion, quite impossible to make out a cause of action on the particulars. Paragraph 4 of the particulars could have sustained a cause of action if the defendant had established a contract under which it was an express term that the third party would indemnify the defendant. At least it seems to me that it would have. Certainly the claim would have had a clearly arguable basis; but there was no such express term.

For the reasons which I have indicated, there is no implication in law that under the contract of employment the third party would indemnify the defendant in respect of any liability for damage incurred by the defendant in the course of his employment by the third party.

Paragraph 5 of the 3rd Party notice: (that it was a term of employment that the Third Party would cause or arrange for the defendant to be so indemnified), looks as if it might have been intended to raise in some way a question based upon insurance. It does not say so and there is no evidence about the insurance position, that is to say, there is no evidence that the third party was insured and would have been covered for the risk that was involved in this case. Whether that would have advanced the defendant's position any further is, I think, a matter of very considerable doubt but, at all events, there is nothing in this case which enables the defendant to make out a case based on paragraph 5 of the particulars.

Paragraphs 6 & 7 are really only the same thing as is said in 4, but putting it rather differently: They are not made out either. The Magistrate seems to have acted on the view that because the accident occurred in the course of the defendant's employment, that was all that mattered. In so doing he was in error. Perhaps he got somewhat confused. No doubt he was familiar with the common situation, where a complainant sues an employer as defendant alleging that the act of negligence was an act by the employer's employee done in the course of his employment. In such circumstances, of course, the plaintiff could make out a cause of action on the ground that the defendant was vicariously liable for what the employee had done in the course of his employment. That, however, was not this case.
