H. C. OF A. 1955-1956.

TOZER KEMSLEY & MILLBOURN (A'ASIA) PTY. LTD. v. COLLIER'S INTERSTATE TRANSPORT SERVICE LTD.

opinion that it cannot be supported. An action for money lent or money paid or money had and received may be in a sense "based on contract", but it is certainly not an action for damages for breach of contract, and quite different considerations apply. I agree generally with the views expressed by Mr. *R. Lowenstern* in an article in the Australian Law Journal (1): see also *John* v. *Coles* (2), and cases there cited.

The appeal should, in my opinion, be allowed. It was agreed that the value of the iron at the material time was £2,096. There should be judgment for the plaintiff for that amount.

KITTO J. I agree with the judgment of my brother *Fullagar* and have nothing to add.

Appeal allowed with costs. Discharge judgment of Supreme Court and in lieu thereof enter judgment for the plaintiff in the action for £2,096 and costs including costs of pleadings, interrogatories, discovery, if any, and shorthand notes.

Solicitors for the appellant, *Lynch & MacDonald.*
Solicitors for the respondent, *Pavey, Wilson, Cohen & Carter.*

R. D. B.

(1) (1928) 2 A.L.J. 191.

(2) (1931) S.A.S.R. 254.

[HIGH COURT OF AUSTRALIA.]

WRIGHT . . . . . APPELLANT;
PLAINTIFF,

AND

ATTORNEY-GENERAL FOR THE STATE OF TASMANIA AND OTHERS . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1954.

HOBART, *Mar.* 16-18;

MELBOURNE, *June* 1.

Webb, Fullagar and Kitto JJ.

Master and Servant—Hire of private truck by public department—Cartage of gravel etc. for roadmaking—Hire paid at hourly rates adjusted by mileage allowance—Negligence of owner-driver engaged on cartage—Responsibility of department for injury so caused—Owner-driver servant of department or independent contractor.

W. was killed as the result of a collision between a car in which he was a passenger and a truck driven by L. W.'s widow brought an action under the *Fatal Accidents Act* 1934-1943 (Tas.) against, *inter alios*, the Attorney-General for the State of Tasmania as representing the Crown, claiming, *inter alia*, that the collision was caused by the negligent driving of L., who was alleged to be a servant of the Crown. At the time of the collision L., who was the owner of the truck, was engaged in carrying gravel and petrol in connection with a work of road construction being carried out by the Public Works Department of Tasmania. The evidence showed that it was the practice of the department to hire out trucks from private owners for the cartage of gravel, sand, petrol and other materials. These trucks were to be driven by the owners or by drivers supplied by them, who were paid by the owners and could be dismissed only by them. The owner of the truck was responsible for petrol and oil and for the maintenance of the truck. The truck owners were reimbursed by the department in accordance with a "Schedule of Rates for the Hire of Privately Owned Trucks", the rate payable being an hourly rate adjusted by a mileage allowance over certain mileages specified. If a breakdown occurred, no payment was made while the truck was out of action. The practice was for the foreman of the work to tell the drivers what was to be picked up, where it was to be picked up, and at what time and where it was to be taken. It was left to the driver to adopt whatever route he chose.

H. C. OF A. 1954.

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Held, that the proper finding on the evidence was that L. was an independent contractor; and, accordingly, the claim against the Crown failed.

Humberstone v. *Northern Timber Mills* (1949) 79 C.L.R. 389, applied.

Decision of the Supreme Court of Tasmania (Full Court), affirmed.

APPEAL from the Supreme Court of Tasmania.

On 31st March 1950, a collision occurred between a motor car and a truck driven by one Lee on a public road under construction on King Island in Bass Strait. As a result, Keith Simpson Wright, who was a passenger in the car, was killed. His widow brought an action under the *Fatal Accidents Act* 1934-1943 (Tas.) (*Lord Campbell's Act*) in the Supreme Court of Tasmania against the Attorney-General for the State of Tasmania, Reuben Stellmaker, who was the foreman of the road construction work, and Lee, alleging that the accident was caused, firstly, by the negligent driving of Lee, for which she alleged the Crown was liable, and, secondly, by negligence in and about the carrying out of road construction. The case is reported only on the first ground relied upon, and the facts relating thereto appear sufficiently in the headnote and the judgments.

The trial judge (*Gibson* J.) held that the collision was not caused by negligence in and about the carrying out the work of road construction, but by the negligent driving of Lee, and that Lee was an independent contractor and not a servant of the Crown. His Honour gave judgment against Lee in the sum of £3,000 and dismissed the action as against the other two defendants. An appeal by the plaintiff to the Full Court of the Supreme Court of Tasmania (*Morris* C.J. and *Green* J.) was dismissed.

From that decision the plaintiff appealed to the High Court.

O. N. Waterworth (with him *F. M. Neasey*), for the appellant. The respondent Lee was a servant and not an independent contractor. The interrogatories show the extent of the power of control exercised over him by the Public Works Department. *Humberstone* v. *Northern Timber Mills* (1) is distinguishable in a number of ways. The remuneration of Lee was not on a weight-mileage basis, but was according to hours worked, and the system would be unworkable unless the supervisor had power to direct the route to be taken by Lee. [He referred to *Federal Commissioner of Taxation* v. *J. Walter Thompson (Australia) Pty. Ltd.* (2).] The cases of *Dowd* v. *W. H. Boase & Co. Ltd.* (3) and *Nicholas* v. *F. J. Sparks & Sons* (4) are distinguishable.

(1) (1949) 79 C.L.R. 389.
(2) (1944) 69 C.L.R. 227.
(3) (1945) K.B. 301.
(4) (1945) 61 T.L.R. 311.

F. M. Neasey. The State of Tasmania was liable for the negligence of Lee even if he was an independent contractor, because it was under a duty of care in respect of the work it was doing on the highway which it could not delegate. The work was such that it would in the natural course of things give rise to danger to other persons using the highway unless precautions were taken. [He referred to *Dalton* v. *Henry Angus & Co.* (1); *Penny* v. *Wimbledon Urban District Council* (2); *Holliday* v. *National Telephone Co.* (3); *Torette House Pty. Ltd.* v. *Berkman* (4).] The question was whether the work was inherently dangerous. [He referred to *Hardaker* v. *Idle District Council* (5); *Padbury* v. *Holliday & Greenwood Ltd.* (6).] The negligence was not casual or collateral: *Hole* v. *Sittingbourne Railway Co.* (7).

S. C. Burbury Q.C. (Solicitor-General for the State of Tasmania) (with him *D. M. Chambers*), for the respondent the Attorney-General for the State of Tasmania. The terms of the contract itself, as spelt out from the memorandum of charges and all the circumstances, show that this was a contract between a principal and an independent contractor and not a contract of employment. If this appears from the terms of the contract, there is no need to go further and apply other tests, such as the test of the measure of control: *Humberstone* v. *Northern Timber Mills* (8); *Performing Right Society Ltd.* v. *Mitchell & Booker (Palais de Danse) Ltd.* (9); *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (10); *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (11). [Counsel also cited *McArthur* v. *Auckland Harbour Board* (12); *Poulson* v. *Jarvis & Co. Ltd.* (13); *Chowdhary* v. *Gillott* (14); *Dayman* v. *Gleader* (15); *Hewitt* v. *Bonvin* (16).] There are six features of this contract which indicate that it is a contract between a principal and an independent contractor:—(a) The contract is with the owner of the vehicle *qua* owner and not driver. The contract is the same whether the owner is the driver or whether he employs a driver. The emphasis is on mechanical traction. (b) The payment is not a wage but a payment for the use of the truck. (c) The owner of the truck may drive it himself or may employ any driver and may substitute one driver for another. That is

(1) (1881) 6 App. Cas. 740.
(2) (1899) 2 Q.B.D. 72.
(3) (1899) 2 Q.B.D. 392.
(4) (1940) 62 C.L.R. 637.
(5) (1896) 1 Q.B. 335.
(6) (1912) 28 T.L.R. 494.
(7) (1861) 30 L.J. Exch. 81 [158 E.R. 201].
(8) (1949) 79 C.L.R. 389.
(9) (1924) 1 K.B. 762.
(10) (1945) 70 C.L.R. 539, at p. 552.
(11) (1952) 85 C.L.R. 237, at p. 298.
(12) (1948) N.Z.L.R. 29.
(13) (1919) 122 L.T. 471.
(14) (1947) 2 All E.R. 541.
(15) (1939) S.A.S.R. 277.
(16) (1940) 1 K.B. 188.

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inconsistent with a contract of service. (d) Remuneration is only payable so long as the truck is working. If the truck breaks down, the driver is not paid by the Public Works Department. (e) The owner is responsible for the maintenance of the vehicle. (f) The contract is terminable at will; it is not a contract of service determinable by appropriate notice under any industrial award. If it is necessary to go beyond these features of the contract, the findings of the trial judge show that the Public Works Department was not exercising the kind of control over the truck driver sufficient to establish the relationship of master and servant. The only control exerciseable was as to what work was to be done—what things were to be transported and where. There was no control exerciseable as to the manner of doing the work, i.e. driving the truck. No one can be vicariously liable for the conduct of a driver driving a motor vehicle or for the condition of the vehicles unless he has the right to control the driving of the vehicle or its maintenance. There have been numerous cases where vehicles, cranes, etc., have been hired from an owner who provides drivers and third persons have been injured as a result of negligent operation. Questions have arisen whether the driver's general employer is liable, or whether the hirer is liable. The inquiry in this case is: What is the relation between the hirer and the driver? Is it the hiring of the man or the vehicle? : *Mersey Docks & Harbour Board* v. *Coggins Ltd.* (1).

Cur. adv. vult.

June 1. The following written judgments were delivered :—

WEBB J. This is an appeal from an order of the Full Court of Tasmania (*Morris* C.J. and *Green* J.) dismissing an appeal from a judgment of *Gibson* J. who gave judgment for the respondents, the Attorney-General of Tasmania and Reuben Stellmaker, a foreman of road construction, in an action in the Supreme Court tried without a jury and in which the respondents and one Lee, a truck owner, were the defendants. The action was for damages for negligence arising out of a collision on 31st March 1950, between Lee's truck and a motor car on a public road under construction on King Island in Bass Strait, resulting in the death of one Keith Simpson Wright. The action was brought by the appellant, the widow of the deceased Wright, under the Tasmanian *Fatal Accidents Act* 1934-1943 (*Lord Campbell's Act*) for the benefit of herself and her two children by the deceased. *Gibson* J. found the defendant Lee guilty of negligence causing the collision and the deceased's

(1) (1947) A.C. 1.

death and gave judgment against Lee for £3,000 " for what it is worth ", as his Honour observed. His Honour found that Lee was an independent contractor and not a servant of the State of Tasmania. He also found that the accident was not due to the state of the public road at the point of collision. The road was under construction at that point and Stellmaker was foreman in charge of the work.

Two questions arise :—(1) whether Lee was an independent contractor or a servant of the State at the time of the collision ; and (2) whether in any event the State was responsible for the accident having regard to the condition of the road at the point of collision.

As to (1) : Lee was the owner of a " four to five ton " International tip truck. On the day of the accident and for some time before he was engaged carrying gravel and petrol in that truck, but mainly gravel used in the construction of the road. He was one of several truck owner-drivers employed on the work together with drivers of government-owned trucks. He was paid at an hourly rate adjusted by a mileage allowance over certain mileages specified in a form in general use. He was not paid by the weight of the load carried ; although the contrary was said to be the case in the reasons for judgment of the Full Court, and also of *Gibson* J. It was, however, the duty of the overseer or of the leading hand to ensure that a full paying load was carried wherever possible. The truck-hire rates ranged from 10s. 6d. to 19s. 3d. per hour for an eight hour day, varying with the mileage run and the capacity of the truck. There was provision for drivers' overtime rates which Lee was paid. Payments were fortnightly. But unlike the drivers of government trucks engaged on this work Lee was not entitled to holiday pay, accommodation or other privileges provided under an award for the drivers of government-owned trucks. Moreover Lee, like the other truck owners, had the right to substitute another driver for himself, and he claimed that he had the right to select the route when conveying materials from one point to another. However Stellmaker admitted in cross-examination that, contrary to the respondents' answer to interrogatory 17 tendered by the appellant and relied on by her, he " could have asked " Lee to take another road if the one usually taken was unsafe—that he " could have told " Lee. Lee as owner was responsible for the maintenance of the truck and he provided the petrol and oil. He claimed he was also responsible for the manner of driving the truck.

Pausing here, it would seem, if nothing more appeared, that his Honour could properly have found, as I understand he did, that

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Lee was as much an independent contractor as was the owner-driver of the truck in *Humberstone* v. *Northern Timber Mills* (1). In that case the owner-driver was paid on a weight-mileage basis; but the weight factor does not render that case distinguishable. The discrimen adopted by *Dixon* J. (as he then was) does not involve that factor. That appears from the following passages in his Honour's reasons for judgment:—" The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplied. The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents. In essence it appears to me to have been an independent contract and I do not think that it was open to the Board to find otherwise " (2).

However the appellant relies on the respondents' answers to interrogatories as indicating that Lee was subject to the control of the respondents to the extent required to make him a servant of the State at the time of the accident. In answer to interrogatory 17 it was stated, among other things, that: " The practice was for the defendant Stellmaker to instruct the defendant Lee where to pick the gravel up and where to cart it to. Lee was not given specific instructions every morning but only if there was any change in the work being done. The practice was for the defendant Stellmaker to tell the defendant Lee what place to take his load to and *it was left to Lee as to what route he took* ". (My italics.) Then interrogatory 19 asked: " If the officer of the Public Works Department in charge of the work disapproved of the manner in which any of Lee's work was done could such officer direct Lee as to the same? " The answer was: " Yes, insofar as the officer of the Public Works Department in charge of the work had the opportunity of directing the defendant Lee as to the manner in which any of Lee's work was to be done but the terms of the defendant Lee's engagement with the Public Works Department contained no specific reference to the right of such officer to give any such directions ".

(1) (1949) 79 C.L.R. 389.

(2) (1949) 79 C.L.R., at pp. 404, 405.

Gibson J. declined to act on answers on the point of the extent of the control of Lee as being "incautious". His Honour may have thought that these answers were of a general nature and not intended to qualify answers, such as that to interrogatory 17, on specific points, and that this should have been indicated in the general answers. If so I respectfully agree with him that the latter answers should be accepted as correct, subject to any effect that should be given to the other sworn testimony. The opportunities referred to in answer to interrogatory 19 would hardly include opportunities to control Lee as to his manner of driving on a route selected by Lee. So regarded the answers do not distinguish *Humberstone's Case* (1) which I think the learned trial judge was at liberty to apply on the facts which he could properly find.

As to (2): The road work being done at the time of the accident presented no unusual features calling for special safeguards. Enough of the road was left open and without obstruction to enable vehicles carefully driven to pass along it without mishap. The accident occurred shortly before noon and the condition of the road and the extent of the passageway left clear and unobstructed were clearly visible for a considerable distance back on each side of the point of collision. The sole cause of the accident was Lee's negligent driving. It could not properly be said that either the road or the road work was a cause of the accident. There was nothing in the nature of a trap. The state of the road was a *causa sine qua non* but not a *causa causans*. Moreover Lee was not engaged in conveying gravel to and from the road at the time of the collision. He was proceeding to pick up petrol on a boat some miles away.

Discussion of cases referred to in the argument is not required to elucidate a position so clear; and so I will not deal with them.

I would dismiss the appeal.

Fullagar J. This is an appeal from a judgment of the Supreme Court of Tasmania (Full Court) affirming a judgment of *Gibson* J. in an action under the *Fatal Accidents Act* (Tas.). The plaintiff was the widow of Keith Simpson Wright, who suffered fatal injuries in a collision between a car in which he was a passenger and a truck driven by a man named Lee. The collision took place on a road in King Island known as the Mount Stanley Road. This road was at the time in the course of construction by the Public Works Department of the State of Tasmania, and Lee was engaged in work connected with that construction. The Crown in Tasmania is liable in tort. The plaintiff sued three defendants, the Attorney-

(1) (1949) 79 C.L.R. 389.

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General as representing the Crown, the driver Lee, and another man named Stellmaker, who was in charge of the construction work. It was alleged that the collision was caused by the negligent driving of Lee, and that he was a servant of the Crown, which was responsible for his negligence. It was also alleged that the collision was caused by negligence in and about the carrying out of the work of road construction, and that the Crown was therefore liable even though he was not its servant. The learned trial judge held that the collision was not caused by any negligence in or about the work of construction. He held that it was caused by negligent driving on the part of Lee, but that Lee was an independent contractor and not a servant of the Crown. He accordingly gave judgment against Lee for damages, which he assessed at £3,000, but he dismissed the action as against the other two defendants. An appeal by the plaintiff to the Full Court was dismissed, and she now appeals to this Court.

Two points were argued on the appeal. It was said in the first place that the only proper finding on the evidence was that Lee was a servant and not an independent contractor. It was said, in the second place, that the evidence established that a material cause of the collision was negligence in and about the carrying out of the work of road construction. Since on both these points I agree with what has been said by *Gibson* J., and by *Morris* C.J. for the Full Court, I will state my view very briefly.

The work of road construction necessitated the use of motor trucks for the cartage of gravel, sand, petrol and other material. The trucks used on the job (about six in number) were not owned by the Public Works Department but were hired from private owners. Each such truck might be driven either by its owner or by a driver engaged for the purpose by its owner. Lee had at one time—some time before the fatal accident—been employed by the department as a driver of a machine described as a "front-end loader", but for some time before 7th February 1950 he had been working on the job as the driver of one of two trucks which were owned first by a man named Lancaster and later by a man named Keith. He was employed and paid by the owner of the truck, who alone could dismiss him. It was suggested in argument that the driver of a hired truck, though engaged and paid by the owner of the truck, became, while working on the job, a servant of the department, but such a view could not be reconciled with *Mersey Docks & Harbour Board* v. *Coggins Ltd.* (1).

On or about 7th February 1950 Lee bought from Keith the truck which he had been driving. Before 7th February 1950 Lee had

(1) (1947) A.C. 1.

been paid wages first by Lancaster and then by Keith, and the Crown had no direct concern with him. After 7th February 1950, when Lee informed Stellmaker that he had bought one of Keith's trucks, Lee was paid fortnightly on "voucher form A", a form of claim appropriate to a contractor with the Government of Tasmania. Persons in the employment of the Government were listed on a wages sheet which showed (*inter alia*) rate of pay, number of dependants and amount of wages. Lee's name did not appear on a wages sheet after he commenced to drive for Lancaster. The amount claimed and paid under voucher form A to Lee was arrived at in accordance with a "Schedule of Rates for the Hire of Privately Owned Trucks", on what has been not quite accurately described as a "weight-mileage basis". In fact the rate payable is an hourly rate depending on the capacity of the truck and the mileage travelled per day. Drivers' overtime rates are, according to this schedule, payable in addition to the full hourly hire rates. This presumably applies only to the case where an owner employs a driver, the purpose being to provide for reimbursement to the owner of overtime paid by him to the driver. The important thing is that the payment is made as for the hire of a truck and not as for work done. The truck is to be driven by its owner or by a driver supplied by him, but the owner of the truck is responsible for petrol and oil and for the maintenance of the truck. If there is a breakdown, no payment is made to anybody while the truck is out of action.

Mr. *Burbury* argued that the nature of the contract proved was conclusive to show that Lee was an independent contractor, but the degree of control exercised *de facto* over drivers of trucks was investigated at the trial. As to this *Gibson* J. said :—"The practice was for the foreman to tell Lee and the other drivers what was to be carried, where it was to be picked up, and at what time and where it was to be taken. It was left to the driver to adopt whatever route he chose". This finding is entirely in accord with the evidence. If *de facto* exercise of control is relevant in a case where the contract is so clear, it seems enough to say that the only directions given were directions to produce a result, e.g. to carry material from its site to the scene of operations or from the wharf to a depot—and not as to the detailed manner in which that result was to be produced. The fact that the driver commonly loaded and unloaded—or assisted in loading and unloading—the material carried does not appear to me to affect the substance of the case. Counsel for the appellant relied on certain answers to interrogatories delivered by the plaintiff for the examination of the defendants, but I find it sufficient to say that I agree with the learned judges who composed