MOROKA v. McEWEN.

1910. *April* 1, 5. MAASDORP, C.J.

Appeal.—Negligence.—Servant.—Control.

Where A had let a wagon and also a driver, D, to B, and A had paid D's wages and guaranteed him to be qualified for the work, and had given B no authority to interfere with D or instruct him as to the mode of his driving, and one M sued B for damages sustained through a collision due to D's negligent driving, *Held*, on appeal, that B was not D's master, and therefore was not liable in damages.

Chatwin v. *Central South African Railways* ([1909] T.H. 33) followed.

This was an appeal from a decision of the Resident Magistrate of Thaba'Nchu. The facts sufficiently appear from the judgment.

Fichardt, for the appellant (plaintiff in the court below).

Blaine, K.C., for the respondent: The authorities are agreed that an important test of the responsibility for a servant's tort is the question as to who had the power of the selection and dismissal of the servant. See *Chatwin* v. *Central South African Railways* ([1909] T.H. 33); *Quarman* v. *Burnett and Another* (9 L.J. N.S. Exch. 308; 55 R.R. 717); *Moore* v. *Palmer* (2 T.L.R. 781); *Stephen* v. *Thurso Police Commissioners* (Ruling Cases, vol. 19, p. 183); *Dewar* v. *Tasker* (95 L.T.R. 87; 23 T.L.R. C.A. 259).

Fichardt, in reply: The question is whether the respondent had control and direction of the servant. The respondent had the power to tell the servant how to drive the wagon. See Addison on *Torts* (7th ed.), p. 99; Campbell on *Negligence*, pp. 137 and 142; *Donovan* v. *Laing* (63 L.J. Q.B. 25; [1893] 1 Q.B. 629); *Rogerson* v. *Moe Bros.* (21 N.L.R. 295); *Shires* v. *Potgieter* (F.N.D. (Natal), 1860).

Cur. adv. vult.

Postea (April 5):—

MAASDORP, C.J.: In this case the plaintiff, now appellant, sued the defendant, now respondent, in an action for £25 as damages sustained by her through the negligence of one Jan, a native in defendant's employ, by allowing a wagon in defendant's employ to negligently and maliciously collide with plaintiff's cart, thereby causing the damage complained of.

To this claim the defendant pleaded a plea in abatement, to the effect that the wrong party had been sued—that the boy was not in defendant's employ, nor was the wagon defendant's property; and in order to establish this plea the evidence of the defendant and the driver Jan was taken. This evidence is not very full, and it is quite possible that, if it had been more detailed and complete, the judgment of the magistrate and of this Court might have been different. The Court can, however, only decide upon the evidence as it stands. From this evidence it would appear that the wagon in question had been let, together with a driver and leader, by one McMaster to the defendant at a lump sum per day. The object of this hiring was for the purpose of carting wheat from defendant's farm to Tweespruit, and the wagon was at the time of the accident actually engaged in such cartage. The decision of the question as to what wheat had to be carted and at what time was entirely in the hands of the defendant, who was at liberty to keep the wagon lying idle if he pleased, provided he paid the hire, but for the purposes of the cartage of the wheat the boys had to take their instructions from the defendant's agent, Burger.

This being the evidence, we must take it that McMaster let to the defendant a wagon which, in the eye of the law, he guaranteed to be fit for the work it was to perform, and also a driver and leader whose wages he himself paid and whom he guaranteed to be qualified to do the work which they would be called upon to do. Unless, therefore, he gave the defendant special authority to interfere with the driver and to give him instructions as to the mode of his driving, of which there is no evidence, it must be taken that the driver was sent, as an appurtenance of the wagon, to do the cartage, but, as to the

mode of his driving, was left perfectly free from interference by defendant, and merely bound, over against his employer, McMaster, to exercise the diligence and skill of a competent driver. The defendant had no authority to give him directions as to his driving, a business of which he, the defendant, might himself have been perfectly ignorant, and he cannot therefore be held liable for an accident alleged to have been caused by the negligent driving of the driver, which he had no power to prevent either by giving him orders or by dismissing him from his service. The person who is responsible for the negligence of the driver is clearly McMaster, who, in the words of Baron PARKE in *Quarman* v. *Burnett and Another* (9 L.J. N.S. Exch. 308; 55 R.R. at p. 726), "stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

This view is in accordance with the decision in the case of *Chatwin* v. *Central South African Railways* ([1909] T.H. 33) and a number of English cases there cited, and the appeal must therefore be dismissed with costs.

Appellant's Attorneys: *Gordon Fraser & McHardy;* Respondent's Attorney: *G. A. Hill.*