

Lister Vs. Romford Ice and Cold Storage Company Limited

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Court : House of Lords

Decided On : Dec-20-1956

Judge : Lord Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker, Lord Somervell of Harrow

Appeal No. : No.

Appellant : Lister

Respondent : Romford Ice and Cold Storage Company Limited

Judgement :

Viscount Simonds

My lords,

The facts in this case are not seriously in dispute, but they give rise to questions of considerable difficulty and importance.

The Appellant, Martin Alfred Lister, was, in January, 1949, in the employment of the Respondent Company as a lorry driver. He was then some twenty-seven years of age and had, apart from an interval during the war, been in that employment since he was seventeen. He had previously for a short time been employed by them as a general labourer. On the 28th January, 1949, accompanied as mate by his father, also named Martin Alfred Lister, whom I will call "Lister senior", he drove his lorry into a slaughter-house yard off the Old Church Road, Romford, to collect

some waste. In the yard he backed his lorry and in doing so knocked down and injured Lister senior, who had previously alighted from it.

In June, 1951, Lister senior issued a writ against the Respondents claiming damages for the personal injuries suffered by him, alleging that they were due to the negligent driving of the Appellant and that the Respondents as his employers were vicariously liable. This action was tried by Mr. Justice McNair on the 29th January, 1953, and that learned Judge held that the Appellant had negligently driven the lorry in reverse without looking where he was going but that Lister senior was also at fault in failing to take proper care for his own safety, the relative responsibility being two thirds for the Appellant and one third for Lister senior. The responsibility of the Respondents was purely vicarious. The damage was assessed at 2,400 and judgment was entered for Lister senior for 1,600, two thirds of that amount, and costs.

On the 26th January, 1953, three days before the trial of Lister senior's action, the Respondents issued the writ in the action, in which this appeal is brought, claiming against the Appellant damages or in the alternative "... payment by way of indemnity or contribution in respect of such damages as may be adjudged or agreed to be paid to Lister senior in the first action and the Respondents' costs of that action."

On the 12th May, 1953, the Respondents delivered their Statement of Claim in the present action. They pleaded the facts that I have stated, including the judgment which had by then been given; they alleged that they had paid the damages of 1,600 and were liable to pay the costs and that they had suffered loss and damage to the extent of such damages and costs by reason of the Appellant's negligence. They pleaded further or alternatively that it was an implied term of the contract of service of the Appellant that he would carry out his duties with reasonable care and skill and that he had failed to do so whereby they had suffered loss and damage. They claimed an order that they might be indemnified by the Appellant in respect of the sums they had paid to Lister senior and their costs of defending the first action and alternatively damages for negligence "and/or breach of contract". I understand the first head of claim to be for a contribution of 100 per cent., that is,

in effect an indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, which I will call "the 1935 Act", and the second head of claim to be founded alternatively on tort or the breach of a contractual duty of care.

The Defence of the Appellant, to which I must refer somewhat fully, put in issue the question of his negligence. It alleged that he was present in Court throughout the trial of the first action and was ready to give evidence on behalf of the Respondents but that they did not allow him to do so, and that the judgment against them was, therefore, not due to his negligent driving but to their failure to call him as a witness. I do not think that your Lordships will take this plea very seriously. It cannot by any means be sustained.

Something more formidable follows, raising, I think, a question of general importance. For it was then pleaded that it was an implied term of the contract of service that the Respondents would indemnify the Appellant against all claims or proceedings brought against him for any act done by him in the course of his employment, and, in the alternative, that it was an implied term that he would receive the benefit of any contract of insurance effected by the Respondents and covering their liability in respect of the first action, that the Respondents had in fact effected such insurance and that he claimed the benefit thereof. And it was further pleaded that there was no such implied term of service as the Respondents alleged, that he would carry out his duties with reasonable care and skill, but that on the contrary the Respondents by engaging him to drive a lorry on their behalf impliedly accepted him with all such faults and failings as he might possess and without any right or claim against him in respect of negligent acts arising out of and in the course of his employment. It was in this state of the pleadings, though they were amended when the case was heard by the Court of Appeal, that the matter came before Mr. Justice Ormerod for trial.

I will at once state the conclusions to which that learned Judge came. After stating that the case had been put by counsel for the Respondents (Plaintiffs in the action) in two ways, first that upon the ordinary law of contract the servant was liable to his master for damage suffered by him for the servant's breach of contract, it being an implied term of his contract that he would use reasonable care in the

performance of his work, and, secondly, that he was as a joint tortfeasor entitled to contribution under section 6 (1) (c) of the Act of 1935, the learned Judge said that he was constrained by the words of Lord Justice Denning in the case of *Jones v. Manchester Corporation and Others* ([1952] 2 Q.B. 852 at p. 868) to consider the case from the point of view of the Act of 1935. He found as a fact that the Appellant had been guilty of negligence, rejected the contention that the claim for contribution could only be raised in the original action, and then proceeded to deal with what he regarded as the substantial defence, namely, that the contract of service was subject to the implied terms to which I have already referred. As to this he held, following the decision of Mr. Justice Finnemore in *Semtex, Ltd. v. Gladstone* [1954] 2 A.E.R. 206 (a case, I will interpolate, which was in my opinion rightly decided) that, while it must be an implied term that the employer would not require the servant to do any-thing illegal and therefore would comply with the provisions of the Road Traffic Act, 1930, in respect of insurance, there was no evidence to support any further implication. He rejected also the plea that the writ was prematurely issued, and upon a consideration of the circumstances held that the Respondents were, under the Act of 1935, entitled to a contribution which would amount to a complete indemnity. He gave judgment for the Respondents accordingly.

There has, I think, been some confusion in the course of the case between two wholly separate torts, (a) the tort for which the Appellant and, vicariously, the Respondents might be made liable to Lister senior and in respect of which the Respondents could claim contribution under the Act of 1935, and (b) the tort for which the Appellant might be made liable to the Respondents in respect of his breach of the common law duty of care. But I do not think that this now affects the issue, for, as I shall try to show, the deciding factor, whatever the cause of action, is whether or not certain terms are to be implied in the contract of service between the Appellant and the Respondents.

The Appellant appealed to the Court of Appeal. At the outset of the hearing in that Court the Appellant took the preliminary point that the issue of the writ was premature, inasmuch as the liability of the Respondents to Lister senior had not been established: this was said to follow from the decision of this House in *George*

Wimpey and Co. Ltd. v. British Overseas Airways Corporation [1955] A.C. 169. The Respondents' answer was that at any rate it was not premature so far as it was founded on breach of contract whatever might be the position in regard to the claim to contribution under the Act of 1935. The Court of Appeal, in order that all the substantive matters in the appeal might be argued and decided, gave leave for a second action to be brought and consolidated with the first, the pleadings and evidence in the first action to stand as if they had taken place in the second action. This was duly done.

Before I state the result of the appeal it is necessary to note that the Appellant was allowed to make substantial amendments of his Defence and, as they formed the basis of much argument in this House, I will remind your Lordships that by paragraph 7. A it was pleaded that it was an implied term that the Appellant would not be required to do anything unlawful and in particular would not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity required by section 36 (1) of the Road Traffic Act, 1930, and by paragraph 7. B that it was an implied term of the contract that the Respondents' motor insurance should cover the Appellant against any third party liability which he might personally incur arising out of his driving the Respondents' vehicles in the course of his employment, and by paragraph 7. C that in breach of these implied terms or one of them the Respondents required the Appellant to drive a vehicle without there being in force in relation to his user thereof a policy which provided him with any indemnity either as required by the Road Traffic Act, 1930, or at all. The Appellant was also allowed to amend his defence by adding a plea that the accident whereby Lister senior suffered damage was solely caused or contributed to by the negligence of the Respondents. This plea had no substance whatever and I shall say nothing more of it.

In order to explain the Appellant's defences which rested on the implied terms in regard to insurance and the Road Traffic Act, 1930, I refer to section 35 (1) of that Act, which provides that subject to the provisions of that Part of the Act it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle

by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of that Part of the Act. Section 36 (1) states these requirements and, so far as material to this appeal, provides that such a policy must be a policy which insures such person or persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road, but contains the proviso that such a policy shall not be required to cover liability in respect of the death arising out of and in the course of his employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment.

It appears that in fact the Respondents had taken out just such a policy as the Act required excluding such death or injury as the proviso that I have read authorised it to exclude. The policy also provided that the indemnity given thereby should, subject to the provisions thereof, be extended to any person in the employ of the Respondents driving the vehicle on their order and for their purposes. They had also taken out a policy insuring them against their liability as employers. This fact is relevant only because the policy contained a term authorising the underwriters to prosecute in the name of the Assured for their own benefit any claim for indemnity or damages or otherwise, and it has not been concealed that this action was brought by the underwriters in the name of the Respondents, who, if it lay with them, would never have brought it. I say that this fact is not otherwise relevant because the action remains the action of the Respondents and their rights are not greater or less than they would be if they were un-insured.

Upon the appeal being heard the Court was divided, Lord Justice Denning being in favour of allowing the appeal and Lord Justice Birkett and Lord Justice Romer of dismissing it. It was accordingly dismissed.

It will be convenient to discuss first the question which divided the Court of Appeal, namely, what, if any, were the terms to be implied in the contract of service between the parties.

It is, in my opinion, clear that it was an implied term of the contract that the Appellant would perform his duties with proper care. The proposition of law stated by Willes, J. in *Harmer v. Cornelius*, 5 C.B.N.S. 236 at p. 246, has never been questioned: When a skilled labourer, he said, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—*Spondes peritiam artis*. Thus, if an apothecary, a watchmaker or an attorney be employed for reward they each impliedly undertake to possess and exercise reasonable skill in their several arts. . . . An express promise or express representation in the particular case is not necessary. I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which driven without care may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case: on the contrary possess and exercise are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for "skill" is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty.

I have already said that it does not appear to me to make any difference to the determination of any substantive issue in this case whether the Respondents' cause of action lay in tort or breach of contract. But in deference to Lord Justice Denning I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.

I conclude, then, the first stage of the argument by saying that the Appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the Respondents thereby suffered damage and they

are entitled to recover that damage from him, unless it is shown either that the damage is too remote or that there is some other intervening factor which precludes the recovery. I should note in passing that it was urged on behalf of the Appellant that the Respondents had not proved the quantum of damage suffered by them by proving only that judgment had been given against them and that they had paid or were liable to pay the amount of the judgment and costs. This plea could not be sustained. It appears to me to be against reason and authority: see, for example, *Green v. New River Co.* 4 Term Rep. 589.

What, then, is to deprive the Respondents of their remedy? I do not think it can be said that the damages are too remote, for the injury to a third party and the ensuing liability of a master are events which the exercise of proper care is intended to avert. It is upon the implication of some implied term that the Appellant must rely, and to this question I now turn.

My Lords, I cannot but be aware that any decision upon this question which has divided learned Judges in the Courts below and upon which your Lordships are also divided, in opinion may have far-reaching consequences, and I have myself had great difficulty in reaching a conclusion.

I will refer first to the implied terms pleaded in the reamended Defence, for at the end of the day the argument for the Appellant was founded not upon them but upon the original pleas, or at least upon something very like them: the amended pleas can be shortly disposed of. As to paragraph 7. A, the valid answer was made, in general, that the Appellant was not required by the Respondents to do anything unlawful, and, in particular, that the Road Traffic Act, 1930, does not require that a policy of assurance shall be taken out which provides the driver of a vehicle with an indemnity against all the consequences of his own negligence. And as to paragraph 7. B, it was answered that a policy taken out by the Respondents in fact covered the Appellant against third party claims but that it was not a third party claim that faced the Appellant in this action. No more need be said of these pleas, except that the variety and multiplicity of the suggested terms were naturally contrasted with the general principle that an implication must be precise and obvious. I return, then, to the original pleas. These, I remind your Lordships, were

contained in paragraphs 4 and 5 of the Defence and were alternatives. Paragraph 4 pleaded an implied term that the Respondents would indemnify the Appellant against all claims and proceedings brought against him for any act done by him in the course of his employment. Were it not that at one time this term appeared to hold first place in the Appellant's favour I should have thought that it might be summarily dismissed. It is all-embracing in its scope: whatever the degree of negligence, even of criminality, in his act: whether the Respondents were covered by insurance or not, whether the act gave rise to a third party claim, which ought by law to be covered, or not; in every case the Appellant would go free and the Respondents bear the burden. I can neither accept an implication in such general terms nor put into the mouth of the pleader qualifications which might make the plea less unacceptable. It was in paragraph 5 that the implied term was pleaded which has appeared to me most worthy of consideration. It was that the Appellant would receive the benefit of any contract of insurance effected by the Respondents and covering their liability in respect of the action brought by Lister senior. It would, it was said, be inconsistent with this term if the Respondents, having effected a policy and having been indemnified under it, then sought to recover damages from the Appellant either for breach of his contractual duty of care or under the relevant provisions of the Act of 1935. This is the plea which found favour with Lord Justice Denning, and the argument was put so simply and cogently by him that I venture to quote his judgment:

Take this very case, he says, where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say: 'Why are you suing me? Surely you 'have got the money from your insurance company. So you cannot sue 'me.' This natural comment between master and man throws a flood of light on the implied understanding of the parties. And a little later he says: This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant.

It will be observed that the implied term which thus commended itself to the learned Lord Justice is limited in its scope. The driver is to be relieved from liability

if his master is covered by insurance against the claim. If he is not covered, for instance, because the accident takes place not on a road but on private premises and the law does not require him to insure against such a risk, and he has not done so, then under this plea the driver must bear the consequences of his negligence if he is himself sued. This consideration led counsel to yet another variation of the plea. This was that the driver was entitled to be indemnified not only if the employer was in fact insured or was required by law to be insured, but also if he ought as a reasonable and prudent man to have been insured against the risk in question. It was in this final form, which approximates nearly to the plea in paragraph 4, that after much travail the implied term was submitted to your Lordships. No qualification of this general proposition was suggested. The driver might owe a duty of care to his employer, but for any dereliction from duty he was to be absolved from all responsibility.

Nor was it suggested that in the present case there were any features which distinguished the relation of the Appellant and the Respondents from that of any other driver and his employer. That is why at the outset of this Opinion I said that this appeal raises a question of general importance. For the real question becomes, not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction or course of business; we have to take a wider view, for we are concerned with a general question, which, if not correctly described as a question of status, yet can only be answered by considering the relation in which the drivers of motor vehicles and their employers generally stand to each other. Just as the duty of care, rightly regarded as a contractual obligation, is imposed on the servant, or the duty not to disclose confidential information (see *Robb v. Green* [1895] 2 Q.B. 315), or the duty not to betray secret processes (see *Amber Size and Chemical Company, Limited v. Menzel* [1913] 2 Ch. 239), just as the duty is imposed on the master not to require his servant to do any illegal act, just so the question must be asked and answered whether in the world in which we live today it is a necessary condition of the relation of master and man that the master should, to use a broad colloquialism, look after the whole matter of insurance. If I were to try to apply the familiar tests where the question is whether a term should be implied in a particular contract in order to give it what is called business efficacy, I should lose

myself in the attempt to formulate it with the necessary precision. The necessarily vague evidence given by the parties and the fact that the action is brought without the assent of the employers shows at least ex post facto how they regarded the position. But this is not conclusive; for, as I have said, the solution of the problem does not rest on the implication of a term in a particular contract of service but upon more general considerations.

My Lords, undoubtedly there are formidable obstacles in the path of the Appellant, and they were formidably presented by counsel for the Respondents. First, it is urged that it must be irrelevant to the right of the master to sue his servant for breach of duty that the master is insured against its consequences: as a general proposition it has not, I think, been questioned for nearly two hundred years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded: see, for example, *Mason v. Sainsbury*, 3 Douglas 61. And this general proposition, no doubt, applies if A. is a master and B. his man. But its application to a case or class of case must yield to an express or implied term to the contrary, and, as the question is whether that term should be implied, I am not constrained by an assertion of the general proposition to deny the possible exception. Yet I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.

Next-and here I recur to a difficulty already indicated-if it has become part of the common law of England that as between the employer and driver of a motor vehicle it is the duty of the former to look after the whole matter of insurance (an expression which I have used compendiously to describe the plea as finally submitted), must not that duty be more precisely defined? It may be answered that in other relationships duties are imposed by law which can only be stated in general terms. Partners owe a duty of faithfulness to each other; what that duty involves in any particular case can only be determined in the light of all its circumstances. Other examples in other branches of the law may occur to your Lordships where a general duty is presented and its scope falls to be determined partly by the general custom of the country which is the basis of the law and partly perhaps by equitable considerations. But even so, the determination must rest on

evidence of the custom or on such broad equitable considerations as have from early times guided a Court of Equity.

In the area in which this appeal is brought there is no evidence to guide your Lordships. The single fact that since the Road Traffic Act of 1930 came into force a measure of insurance against third party risk is compulsory affords no ground for an assumption that an employer will take out a policy which covers more than the Act requires; for instance, a risk of injury to third parties not on the road but in private premises. There is in fact no assumption that can legitimately be made what policy will be taken out and what its terms and qualifications may be. I am unable to satisfy myself that with such a background there can be implied in the relationship of employer and driver any such terms as I have indicated. And though, as I have said, I feel the force of the argument as presented by Lord Justice Denning, I must point out that at least in his view the indemnity of the driver was conditional on a policy which covered the risk having in fact been taken out. It may be that this was because his mind was directed to a case where such a policy was taken out and that he would have gone on to say that there was a further implication that the employer would take out a policy whether required by law to do so or not. But here we are in the realm of speculation. Is it certain that, if the imaginary driver had said to his employer: Of course you will indemnify me against any damage that I may do however gross my negligence may be, the employer would have said: Yes, of course! For myself I cannot answer confidently that he would have said so or ought to have said so. It may well be that if such a discussion had taken place it might have ended in some agreement between them or in the driver not entering the service of that employer. That I do not know. But I do know that I am ever driven further from an assured certainty what is the term which the law imports into the contract of service between the employer and the driver of a motor vehicle.

Another argument was at this stage adduced which appeared to me to have some weight. For just as it was urged that a term could not be implied unless it could be defined with precision, so its existence was denied if it could not be shown when it came to birth. Here, it was said, was a duty alleged to arise out of the relation of master and servant in this special sphere of employment which was imposed by

the common law. When, then, did it first arise? Not, surely, when the first country squire exchanged his carriage and horses for a motor car or the first haulage contractor bought a motor lorry. Was it when the practice of insurance against third party risk became so common that it was to be expected of the reasonable man or was it only when the Act of 1930 made compulsory and therefore universal what had previously been reasonable and usual?

Then, again, the familiar argument was heard asking where the line is to be drawn. The driver of a motor car is not the only man in charge of an engine which, if carelessly used, may endanger and injure third parties. The man in charge of a crane was given as an example. If he, by his negligence, injures a third party who then makes his employer vicariously liable, is he entitled to assume that his employer has covered himself by insurance and will indemnify him however gross and reprehensible his negligence? And does this depend on the extent to which insurance against third party risks prevails and is known to prevail in any particular form of employment? Does it depend on the fact that there are fewer cranes than cars and that the master is less likely to drive a crane than a car?

It was contended, too, that a term should not be implied by law of which the social consequences would be harmful. The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Lord Justice Romer. It cannot be disregarded.

Finally, it was urged that the implication of the suggested term in the contract between employer and driver would have the effect of denying to the insurer the

right of subrogation given to him either expressly by the policy of insurance or by the implication of law. This would no doubt be the result. But I do not attach much importance to this. For if the implied term is imposed by law, not in respect of a particular contract but as a legal incident of this kind of contract, the insurer may be assumed to know it as well as anyone else. It may surprise him, but he should study the law.

My Lords, I have come to the conclusion that the considerations which I have discussed do not permit me to imply a term such as is pleaded in any of the alternative forms adopted in the original and amended Defence or advanced in argument at the bar, and that the appeal so far as it is founded on an implied term in the contract of service must fail. I do not find it necessary to discuss at any length the alternative claim under the Act of 1935. If under the first head of claim the Respondents can recover damages for breach of contract, they can do no more. I will only say that I see no reason to doubt that under the Act, and probably apart from the Act (see *Pearson v. Skelton*, 1 M. and W. 504, *Adamson v. Jarvis*, 4 Bing. 66), the Respondents would be entitled to recover contribution from the Appellant to the extent of 100 per cent. *Ryan v. Fildes and Others* [1938] 3 A.E.R. 517, was, I think, rightly decided. But, if the Respondents cannot recover damages for breach of contract, they are, in my opinion, precluded from obtaining contribution from the Appellant; if they claim under the Act, by its express language (see section 6(1) (b)) and, if they claim apart from the Act, by the principles upon which the rule in *Merryweather v. Nixan* (8 T.R. 186) has been consistently applied.

In the result, the appeal, in my opinion, cannot succeed and must be dismissed.

Lord Morton of Henryton

MY LORDS,

I believe your Lordships are all of opinion that this appeal must fail unless the Appellant can make good one or more of the special pleas set out in paragraphs 4, 5 and 7. A, B and C of the reamended Defence, delivered as reamended on the 4th July, 1956. For this reason I shall deal briefly with the other issues in the

action, though they are of considerable importance, and shall then turn to the pleas just mentioned.

The Appellant injured his father and fellow-worker by reversing a motor lorry when his father was behind it. Ormerod, J. found as a fact that the Appellant was negligent in the way in which he reversed that motor lorry, and that this negligence was responsible for the injuries which his father suffered. That finding of fact clearly could not be successfully challenged in your Lordships' House, and in my opinion the Appellant was under an implied contractual obligation to take reasonable care in driving the vehicle which he was employed to drive. I agree entirely with the views already expressed on this point by the noble and learned Lord on the Woolsack and by Birkett and Romer, L.JJ. in the Court of Appeal. Prima facie, therefore, the Appellant is liable in contract to pay to the Respondents any damages which they have suffered as a result of his failing to take reasonable care on the occasion in question.

The next question which arises is, was there evidence before Ormerod, J. establishing that the Respondents had suffered damage, by reason of the negligent act of the Appellant, to the amount of 1,600 and costs; that being the sum for which McNair, J. gave judgment for the Appellant's father in the action which he brought against the Respondents. The Respondents called evidence of negligence which satisfied Ormerod, J. but they relied solely upon the judgment of McNair, J. to establish the damage which they had suffered. Counsel for the Appellant submitted that that judgment was not relevant evidence, in the present action, of the quantum of damage; the Appellant was not a party to the action brought by his father, and the decision of McNair, J. was in no way binding upon him. Counsel for the Respondents pointed out that by paragraphs 5 and 6 of their Statement of Claim in the present action the Respondents pleaded the judgment of McNair J. and the fact of payment of the damages awarded against them, and these paragraphs were admitted by the Appellant. He did not contend that the judgment and payment were conclusive evidence as against the Appellant of the quantum of damage suffered by the Respondents; but he submitted that they were at least prima facie evidence, and no rebutting evidence was given by (he Appellant.

My Lords, I feel no doubt that this submission is correct, and it is supported by the observations of the Court in *Green v. New River Company*, 4 Term Rep. 589 at 590 med. and of Baron Parke in *Yeomans v. Legh*, 2 Meeson and Welsby 419 at p. 421. In the latter case the defendant was sued, in an action on the case, for negligent driving by his servant whereby the plaintiff suffered injury. The servant was called as a witness, and the question was whether he was a competent witness without a release. Baron Parke said: "I think the witness was competent without a release. The effect of the clause in the Statute" (3 and 4 William IV Cap. 12 section 26) "is to make the witness competent, where the only interest is that the verdict may be used for or against the witness. In this case there is no interest, except that the verdict might be used against him in an action by his master, to show the amount of the damages recovered.

It was further submitted by counsel for the Appellant that the damages now claimed are too remote to be recoverable. My Lords, in my view there is no substance in this argument. The liability of the Respondents to pay damages to the Appellant's father arose directly out of the negligent act of the Appellant which constituted the breach of his contract with the Respondents.

If I am right so far, it is clear that, in the absence of the special pleas already mentioned, this appeal must fail, since the Respondents would be entitled to receive, as damages for breach of contract, the sum awarded to them by Ormerod, J. and the Court of Appeal. In considering these pleas I find it convenient to turn first to paragraphs 7. A, B and C of the reamended Defence, which are as follows:-

"7.A. It was an implied term of the Defendant's employment that he should not be required by the Plaintiffs to do anything unlawful".

So far, my Lords, I would agree-see *Gregory v. Ford and Others* [1951] 1 A.E.R. 121, but the paragraph continues-

"and in particular that he should not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity which Sec. 36 (1) of the Road Traffic Act 1930 requires.

The said term is to be implied by law."

This part of the paragraph seems to be based on a misconception. The Road Traffic Act, 1930, does not compel the employer to provide an indemnity for the driver personally. See *John T. Ellis v. Walter T. Hinds* [1947] 1 K.B. 475 at p. 484 and *Lees v. Motor Insurers Bureau* [1952] 2 A.E.R. 511.

Paragraphs 7. B and 7. C are as follows: -

"B. Further it was an implied term of the Defendant's employment that the Plaintiffs' motor insurance should cover the Defendant against any third party liability which he might personally incur arising out of his driving the Plaintiffs' vehicles in the course of his employment.

C. In breach of the aforesaid implied terms or of one of them the Plaintiffs required the Defendant to drive the said vehicle without there being in force in relation to his user thereof any policy which provided him with any indemnity either as required by the Road Traffic Act or at all.

I need not consider whether or not paragraph 7. B is well-founded, for it does not appear that any third party has made any claim against the Appellant. The only claim against him is the employer's claim in the present action.

I now come to the alleged implied terms set out in paragraphs 4 and 5 of the reamended Defence, which are 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.

5. In the alternative it was an implied term of the said contract that the Defendant would receive the benefit of any contract of insurance effected by the Plaintiffs and covering their liability in respect of the action above referred to. The Plaintiffs have effected such insurance and have been fully indemnified and the Defendant claims

the benefit thereof.

Counsel for the Appellant sought to find some justification for implying one or other of these terms in the particular circumstances of the Appellant's employment with the Respondents, but I can find nothing in these circumstances which should differentiate the Appellant from any other young man who, having passed the necessary driving test, is employed to drive a motor lorry. I add that the Appellant had been driving motor lorries for the Respondents for about ten years before the accident happened.

If any such term is to be implied in this case, it must surely be implied in all cases where an employee is employed to drive any kind of vehicle which might cause damage to third parties. And the implied term cannot be limited to cases where the vehicle is being driven on a public highway, for the accident in the present case occurred in a yard. Surely it must logically extend to cases such as a crane driver in factory premises, and many other cases come to mind which cannot logically be distinguished from the present case.

Such an obligation might have been imposed on the employer by statute, and it is perhaps of some significance that the Legislature did not take this course when the law was so strikingly altered by the Road Traffic Act, 1930. It cannot be said, in my view, that the implication of either of these terms is necessary in order to give to the transaction such efficacy as both parties must have intended that at all events it should have. (The Moorcock, 14 P.D. 64 at p. 68).

Turning now to another branch of the argument for the Appellant, I cannot see that any events which have occurred in modern times, such as the passing of the Road Traffic Act, 1930, could justify your Lordships in holding it to be the law today that one or other of the implied terms now under discussion forms part of every contract whereby a man is employed to drive a vehicle. No provision of the Act of 1930 suggests to me that the terms to be implied in such a contract immediately after the Act became law should differ in any respect from the terms to be implied immediately before the Act became law. This matter is fully dealt with in the Opinion about to be delivered by my noble and learned friend Lord Tucker, which I have read, and I need only say that I entirely agree with his views upon it.

Counsel for the Appellant finally suggested that some such term ought to be implied because in its absence the employee was placed in a most unfortunate position. It is, however, your Lordships' task to decide what the law is, not what it ought to be. In saying this I am far from suggesting that either of the terms now under discussion ought to be implied.

As to paragraph 4, the words all claims or proceedings would seem wide enough to cover, for instance, a fine imposed on the Appellant under the Road Traffic Act, 1930; and the words "any act" would appear to cover reckless as well as careless acts. So read, this alleged term might well be void as being against public policy. I shall, however, assume in favour of the Appellant that the term should be construed more narrowly, so as to read "would indemnify the Appellant against any civil "liability for accidental injury or damage done by him in the course of his said employment". Even so, it seems to me hardly consistent with the duty of a driver to take reasonable care in driving his employer's vehicle. That duty has been recognised in many cases, but no such implied term was ever suggested. As I have said, such a term is not necessary to give efficacy to the contract, and indeed it seems to me doubtful if an employer would agree to it. If so it cannot be implied.

My reasons for rejecting the implied term set out in paragraph 4 of the reamended Defence apply also to the implied term set out in paragraph 5, with one exception; I do not think that the latter term, or any possible construction of it, could be held to be void as against public policy. It has, however, this somewhat surprising result-insurers who had paid the employer in a case of this kind would apparently be deprived of their right of subrogation by reason of an implied term in a contract to which they were not a party.

The result is, my Lords, that I am unable to accept any of the implied terms which have been pleaded, and I apprehend that no other implied term comes before your Lordships' House for consideration.

I feel, my Lords, that I ought not to end without making further reference to the judgment of Ormerod, J. That learned Judge felt himself bound by authority not to decide the Respondents' claim for damages for breach of contract. His decision in

favour of the Respondents was given in the exercise of his discretion under section 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935. In the eyes of the law the Respondents were joint tortfeasors with the Appellant, since the Appellant was their employee and his negligent act was done in the course of his employment. Ormerod, J., therefore, had to consider whether the Respondents ought to recover contribution from the Appellant, and if so, what the amount of the contribution should be. After considering and rejecting submissions by counsel for the Appellant that the contribution should be reduced by reason of certain defects in the lorry provided by the Respondents, he said: I am afraid here that the negligence was the negligence of the Defendant, and in those circumstances he is not entitled to anything by way of mitigation, and there must be a contribution here for the full amount. The learned Judge and I have thus arrived at the same result, although by a different route. I think it is only right to say that in my opinion this alternative route was open to the Respondents in the present case, the reasoning of the learned Judge was correct, and his exercise of his discretion was entirely proper.

I would add that there may have been yet another route by which the Respondents might have achieved success. Counsel for the Respondents submitted that his clients could have sustained an action in tort against the Appellant, apart altogether from the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, notwithstanding the well-known decision of Lord Kenyon, C.J. in *Merryweather v. Nixan* (1799) 8 Term Rep. 186. He referred to *A damson v. Jarvis* (1827) 4 Bingham 66, *Pearson v. Skelton* (1836) 1 M and W. 504, and *Palmer v. Wick and Pulteneytown Steam Shipping Company, Limited* [1894] A.C. 318. and to observations of Lord Coleridge, in *W. H. Smith and Sons Ltd. v. Clinton and Harris* ;(1908) 99 L.T. 840. In the first of these cases Best, C.J. said, in regard to the rule laid down in *Merryweather v. Nixan*: From reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act; and this saying was approved by Lord Herschell, L.C. and other Members of this House in the third of the cases just mentioned. Counsel for the Respondents submitted that his clients, though joint tortfeasors with the Appellant in the eyes of the law, were only liable

vicariously for the wrongful act of their servant and were not debarred at common law from bringing an action for damages against him. My Lords, this is an interesting point, which may some day fall for decision by this House; but I express no opinion upon it, as it has not been considered in the Courts below and I am of opinion that the Respondents are entitled to succeed upon other grounds.

I would dismiss the appeal.

Lord Radcliffe

My lords,

In my opinion the appeal ought to be allowed and an order made dismissing the Respondents' action. Although the argument of the case necessarily travelled over a number of interesting points, there are only two issues which present themselves to me as essential to its decision. I confine myself to them accordingly. The first question is: Did the Appellant incur any and, if so, what liability to the Respondents by virtue of the fact that while acting as their employee he drove their lorry negligently and thereby injured a third party? The second is: Are the Respondents entitled to enforce any such liability by legal action against the Appellant, having regard to the circumstances of his employment and in particular the statutory scheme of compulsory insurance against third party risks which related to his employment?

On the first point I think it plain that the law does impute to an employee a duty to exercise reasonable care in his handling of his employer's property. It is the fact of such employment that places the property within his control; and if, as must be the case, he owes a general duty to all concerned not to be negligent in his exercise of that control, it would be a surprising anomaly that merely because there was also a contractual relationship between himself and his employer the standard of his obligation to his employer were to be some-how lower than the standard of his obligation to the outside world.

I cannot see any good reason why we should uphold the existence of such an anomaly. If the contract of employment is viewed as a general legal relationship in

which the law imputes certain rights and responsibilities to each side, it would assign a very undignified position to the employee to suppose that the employer takes him with all faults and that the employee does not by virtue of his engagement impliedly undertake to use all reasonable care in the conduct of his employer's affairs. To say this is to say nothing new in the law. I am satisfied that from early times the law has consistently recognised the existence of this duty. I need not lengthen my Opinion by reciting the authorities, some of which are noticed by others of your Lordships.

Nor does any different result appear if we attend to the circumstances of this particular employment. Certainly the Appellant was a youth of seventeen when he began to drive for the Respondents. But he was required to take and did take his driving test before he took up the job, and there is nothing in the relationship which excludes an expectation of reasonable skill and care. Actually, I should regard the implications of his present employment as being determined by the circumstances in which he was re-employed after the end of the late war. He came back as a full-time driver.

It was much canvassed in argument before your Lordships whether, if there was some such duty on the Appellant, it was anything more than the general duty he owed the world to avoid the tort of negligence. On one view of the case this would indeed be a question of some importance in respect of costs. Since I take a different view as to the proper result of the case anyway, I do not need to dwell on this part of it. It is perhaps sufficient if I say that in my view this question is a somewhat artificial one. The existence of the duty arising out of the relationship between employer and employed was recognised by the law without the institution of an analytical inquiry whether the duty was in essence contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, express or implied. Since in any event the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it

seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other.

I have said this much out of respect to that part of the judgment of Denning, L.J. in the Court of Appeal which deals with this topic. I do not agree with him that "the action against a servant must be founded on "tort", and I do not think that his citation of authorities proves this point.

When I turn to the second issue with which I wish to deal it seems unlikely that any decided authority will be of direct assistance. For the critical point is that we have to deal with an employment which it was illegal for the employer to authorise or for the employed to pursue unless insurance cover had been provided against third party liability. What are the necessary consequences of that legal requirement upon the respective rights and liabilities of employer and employed?

That there were some consequences has been common ground throughout this case. It is accepted that the law must impute a term to the effect that the employee could not be required to carry out any order that would involve him in doing something that was illegal, even, though, but for the illegality, the thing required would have been within the normal scope of his duties. Put into non-theoretical language, that means that because of the Road Traffic Act, 1930, the Appellant could not be employed to drive the Respondents' lorry for them on the road unless there existed a policy of insurance complying with the conditions of the Act and so providing cover to indemnify any third party who might suffer actionable damage from the Appellant's driving of the lorry.

Now the insurance policy required could not come into existence of its own motion. One of the two parties, employer and employed, had to assume responsibility for taking it out or keeping it running and for paying up the necessary premiums to buy the cover. To which of them ought we to attribute that responsibility, having

regard to the relationship of the parties? In my view, to the employer. I cannot suppose that, short of special stipulation, any other answer would be given in such a case. So far as it is relevant, all the evidence given at the trial, both by the Appellant and by Colonel How is, the Respondents' managing director, confirms that this would be the right answer.

Is it, then, consistent with such an arrangement that, if the driver does cause third party damage by negligence and the person injured sues and recovers damages from the employer on the ground of his vicarious responsibility for the act of his servant, the employer should be able to recover over the damages that he has had to pay by suing the driver? In my opinion that is the simple question on which this appeal turns, but, of course, it is in practice impossible to keep it simple owing to the complications which emerge in any well-argued case. I will try briefly to notice some of them. It is not that I do not think that they involve difficulties, but the difficulties do not present themselves to me as being such as should affect the final result.

In the first place I do not think that it matters whether the employer is really or only ostensibly the plaintiff. In this case we know, because no secret has been made of it, that the real plaintiff is one of the two insurance companies concerned. But the defendant's point, if it is a good one at all, is equally good whether it is his employer who is claiming against him or the insurers by subrogation. To each his reply is the same- I and my employer recognised that a fund of money had to be secured by insurance to take care of any third party liability that my driving might involve us in, and we arranged that he should pay for and provide the insurance policy that would produce the money. It follows from that that he cannot now look to me to find all or part of that money ". If that answer is a good reply to the employer, it is good against insurers who are subrogated to him. I do not at all understand the idea that it is somehow hard on the insurers that they should be affected by an implied term that bound the person to whose rights they are claiming to be subrogated.

Secondly, it is, I think, true that it would not have been illegal in the circumstances of this particular accident if there had been no insurance policy against third party

liability. I assume, though we did not have any detailed argument about it, that the yard in which the accident took place was not a "road" within the meaning of the Road Traffic Act, 1930; and also that the Act does not make it compulsory to provide insurance against injury caused to another servant of the same employer. But if we take it, as in my view we must, that the existence of compulsory insurance under the Act involved that it was a term of the employment that the driving should be covered by a policy against third party liability, I do not think that the term postulated should be tied down to all the complications and qualifications which arise on a strict interpretation of the Act. What mattered to the parties was that while the lorry was being driven on the employer's business someone might be injured in circumstances that entitled him to recover damages from either employer or employee or both of them. From that point of view it did not signify whether the accident occurred on a road or in a yard that turned off it or whether the person injured was or was not in the employer's service. Any other view would leave it to the employee to take out his own policy to cover the residual risks, and this does not seem to me a reasonable arrangement to impute to the parties.

In fact, as we know, the employer provided insurance at his own expense by means of two separate policies, and these between them secured cover without excepting accidents off a road or injury to a fellow employee. Moreover, the motor vehicle policy took what is certainly not the uncommon form of including a Third Party Extension, the effect of which was that the driver was equipped with his own direct right to call for indemnity from the insurers if he became liable to a third party for damages caused while driving the Respondents' lorry.

I must call attention to this last point because it illustrates the almost intolerable anomalies which are involved in the Respondents' argument. The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employee or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has bought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can

control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is in the end the one who foots the bill. I should be very much interested to know how the premium required by an insurance company is adjusted to the risk of these alternative situations.

My Lords, on this part of the case I take the same view as that taken by Denning, L.J. I agree with what he says at p. 192 of his judgment as reported in L.R. [1956] Q.B. 180 *Romford Ice and Cold Storage Company Limited v. Lister*, and I do not think it possible to escape the force of his reasoning. If we assume any understanding at all between the Appellant and Respondents as to insurance against third party liability, to the Appellant's enquiry as to who was to provide it the Respondents must have answered: We will see to that and the expense of providing it will fall on us: but the result of this appeal depends upon which of the following alternatives they must be taken to have added. One would be to this effect- but, of course, you understand that although we are going to secure the monies required to pay the injured person in the first instance, you will have to make them good ultimately, either to us or to the insurance company. The other would be- and, of course, it is understood that, since we are providing for the fund that will indemnify the injured person, that closes any question of our calling upon you at any time to contribute to that fund. I can only say that to me the first alternative seems a contradiction of what is involved in the Respondents' undertaking to pay for and provide the fund. The second seems to be the natural exchange to take place between the company and their lorry driver.

I am, therefore, in favour of allowing the appeal. I think it a very difficult point and I well understand the difference of approach that leads us in this House to different conclusions. I ought, however, to say something about two considerations which have been advanced on behalf of the Respondents but which are to me unpersuasive. It is said that to imply such a term as I propose is in effect to contradict the general duty of the employee to exercise reasonable care in

carrying out his employer's work. I do not think that this is so. The general duty remains and it will have its legal effect on all acts of the employee which do not touch this question of insurance against third party liability. It is the special system whereby this form of insurance is a necessary condition of the employment which brings about the special result.

Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act, 1930, if it did not exist before it? My Lords, I do not know because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as if it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity. If such actions are now to be the usual practice I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionised by the growth of all forms of insurance. No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.

Lord Tucker

MY LORDS,

I am of opinion that a servant employed to drive a vehicle in the course of his employment by his master owes a duty to his master to take reasonable care in the driving and management of the vehicle, that for breach of this duty an action founded on contract can be brought by the master against the servant, and that damages which have been awarded against the master by reason of the servant's negligence or breach of this duty are not too remote to be recoverable in the master's action against his servant claiming damages for breach of contract.

The reasons for reaching these conclusions, which are in accord with the views of the majority of the Court of Appeal, have already been stated. I agree with them and do not wish to add anything thereto.

I will accordingly confine myself to the question of the terms which the Appellant contends should be implied in his contract of service which, if accepted, would have the result of relieving him from the financial consequences of his breach of his contractual duty in so far as such breach might result in injury to the person or goods of a third party when he was driving a motor vehicle on his master's business.

My Lords, the terms which it is alleged are to be implied in this contract are to be found in the Appellant's Defence after amendment and reamendment. Throughout the hearing of this appeal counsel for the Appellant has been content to adhere to the terms as pleaded and has not sought leave to make any further amendment notwithstanding various alternatives tentatively suggested by some of your Lordships during the hearing. In these circumstances I propose, and indeed I feel myself bound, to confine my observations to the implied terms which have been pleaded. They are as follows: -

Paragraph 4 of the Defence: 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.

Paragraph 5: "In the alternative it was an implied term of the said contract that the Defendant would receive the benefit of any contract of insurance effected by the Plaintiffs and covering their liability in respect of the action above referred to. The Plaintiffs have effected such insurance and have been fully indemnified and the Defendant claims the benefit thereof."

Paragraph 7. A: " It was an implied term of the Defendant's employment that he should not be required by the Plaintiffs to do anything unlawful and in particular that he should not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the

indemnity which Section 36 (1) of the Road Traffic Act 1930 requires. The said term is to be implied by law.

Paragraph 7. B: "Further it was an implied term of the Defendant's employment that the Plaintiffs' motor insurance should cover the Defendant against any third party liability which he might personally incur arising out of his driving the Plaintiffs' vehicles in the course of his employment.

Apart from the difficulty on general principles, to which I shall refer later, of accepting any implied terms of this kind, those pleaded seem to me on their face to be open to serious objection. Paragraph 4 is far wider than anything which could reasonably be required on any view and would result in completely nullifying the effect of the duty of care which the servant owes to his master and to give him a licence to be as negligent as he liked.

Paragraph 5, to be effective, must purport to deprive the insurance company of their right on payment of the claim to be subrogated to the rights and remedies of their insured, which right exists independently of any express term in the contract of insurance. Alternatively, it may mean that the insured who has paid damages to the injured person out of his own pocket and received payment by way of indemnity from his insurance company must pay out of his own pocket the same sum to his servant to enable him to meet a claim brought against him by the insurance company by virtue of their right of subrogation.

Paragraph 7. A is based on the erroneous assumption that the Road Traffic Act, 1930, imposes an obligation on the employer to take out a policy which will cover the personal liability of the servant while driving in the course of his employment- cf. *John T. Ellis v. Walter T. Hinds* [1947] 1 K.B. 475, and *Lees v. Motor Insurers Bureau* [1952] 2 A.E.R. 511, the correctness of which decisions has not been challenged.

Paragraph 7. B seeks to impose contractually a wider obligation than Parliament thought fit to impose when the Road Traffic Act, 1930, was passed.

But, my Lords, apart from these objections which make it impossible for me to accept any of the pleaded implied terms, the case raises questions of importance going beyond the precise language used in this case by the pleader.

Some contractual terms may be implied by general rules of law. These general rules, some of which are now statutory, for example, Sale of Goods Act, Bills of Exchange Act, etc., derive in the main from the common law by which they have become attached in the course of time to certain classes of contractual relationships, for example, landlord and tenant, innkeeper and guest, contracts of guarantee and contracts of personal service. Contrasted with such cases as these there are those in which from their particular circumstances it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their minds to the contingency which has arisen. These are the " officious bystander " type of case, to use Lord Justice Mackinnon's well known words. I do not think the present case really comes in that category, it seems to me to fall rather within the first class referred to above.

Without attempting an exhaustive enumeration of the duties imposed in this way upon a servant, I may mention:

1. the duty to give reasonable notice in the absence of custom or express agreement;
2. the duty to obey the lawful orders of the master;
3. the duty to be honest and diligent in the master's service;
4. the duty to take reasonable care of his master's property entrusted to him and generally in the performance of his duties;
5. to account to his master for any secret commission or remuneration received by him;
6. not to abuse his master's confidence in matters pertaining to his service: cf. *Robb v. Green* [1895] 2 Q.B. 1 and 315.

It would, I think, require very compelling evidence of some general change in circumstances affecting master and servant to justify the Court in introducing some quite novel term into their contract, for example, a term absolving the servant from certain of the consequences of a breach of his recognised duty to take care, or as to the provision of insurance covering the servant's liability to third parties or his master. I find it difficult to understand what, if any, are the limitations of this theory. Is it to be confined to the relationship of master and servant with reference to motor cars, or is it to extend to all those employed in industry or transport who, in the very nature of things, are engaged on work in which negligence on their part may result in widespread and grievous damage amounting to thousands of pounds for which they may be liable to their employers and in respect of risks which it was customary for the employer to insure against long before the advent of the motor car?

It is said that the passing of the Road Traffic Act, 1930, has created the new situation which gives rise to the necessity for these implied terms. It is common knowledge that for many years before 1930 the great majority of prudent motor car owners protected themselves by insurance. Sections 35 and 36 of the Act were not passed for the protection of the bank balances of car owners, or the life savings of their employees, but simply and solely to ensure that persons injured by the negligent driving of motor cars who established their claims in Court might not be deprived of compensation by reason of the defendants' inability to satisfy their judgments.

Again, it is said that the passing of the Act has admittedly resulted in the introduction of one implied term, namely, that the servant shall not be required to drive a motor vehicle the user of which has not been covered by insurance as required by the Act. This is merely the application of an existing term to the situation created by the Act. It has always been an implied term that the master will indemnify the servant from liability arising out of an unlawful enterprise upon which he has been required to embark without knowing that it was unlawful. When the Road Traffic Act required the user to be covered by insurance, a journey which would previously have been lawful became unlawful in the absence of the required cover. My Lords, I cannot accept the view that the impact of this Act on the

previously existing obligation of the master is in any way comparable to the implied terms which it is now sought to introduce into the contract of service.

On the question of these alleged implied terms I find myself in complete agreement with Mr. Justice Ormerod and Lords Justices Birkett and Romer. I do not think there is any substance in the subsidiary matters relied upon by counsel for the Appellant with regard to the claim not having been made by way of third party procedure or as to the inadmissibility in evidence in the present action of the judgment for damages in the suit by the injured man against the present Respondents.

In the result I would dismiss the appeal.

Lord Somervell of Harrow

MY LORDS,

The Defendant, hereinafter called the driver, was a lorry driver employed by the Plaintiffs, hereinafter called the employers. On 28th January, 1949, the driver, while driving in the course of his employment, injured his father who was in the same employment. The father, whom I will call the third party, claimed damages from the employers based on the alleged negligence of the driver. The claim succeeded though the third party was held also to have been negligent. Judgment was entered against the employers for 1,600 and costs. The employers in the present proceedings claim (1) an indemnity or contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935; (2) the 1,600 and costs as damages for breach (a) of an implied term of the contract of service that the driver would exercise reasonable care, (b) of a duty at common law to take care.

It is not now disputed the driver was negligent. As an answer to all or any of these claims the driver relied on an implied term that the employers would cover his, the driver's, liability to third parties and other damage by insurance, and that the present claim seeking to make him personally liable for the damages due to the third party was inconsistent with that term. There were other issues, some of which are not now maintained and some which do not arise on the view which I take.

Ormerod. J. held in favour of the employers on the 1935 Act. This was affirmed by the Court of Appeal, Denning, L.J. dissenting. He held that servants were not normally under a contractual duty to their masters to exercise reasonable care in the performance of their duties. That left a liability in tort. But for the Act of 1935 the employer could not as a joint tortfeasor claim indemnity or contribution. He can claim under that Act. Denning. L.J. held, and I am summarising, that the employer being insured there was an implied term that he would not seek to recover contribution or indemnity from the servant.

On the alleged contractual duty to carry out the duties of his employment with reasonable care, cases were cited to us which were not, I think, cited to the Court of Appeal. The earliest I need refer to is *Green v. The New River Company*, 4 Ter. R. 589. The Plaintiffs house had been damaged by the bursting of one of the Defendant's pipes. Lord Kenyon held that negligence must be proved. A witness was called who said that some hours before the burst he had drawn the attention of the Defendant's turncock to oozing water, the suggestion being that the turncock was negligent in failing to attend to the matter. The Defendant's counsel offered to call the turncock. The Plaintiff objected to his giving evidence without a release. Lord Kenyon was of opinion that the turncock was an incompetent witness as he came to disprove his own negligence, which, if established by the verdict, would be the ground of an action against himself by his employers. The failure to attend to the matter would be, I think, a contractual and not a "tortious" failure.

In *Harmer v. Cornelius*, 5 C.B.N.S. 236, 246, Willes, J. said: When a skilled labourer, artisan or artist, is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task 'he undertakes-spondes peritiam artis. Thus, if an apothecary, a watch maker or an attorney be employed for reward, they each impliedly under take to possess and exercise (my italics) reasonable skill in their several arts.

It was suggested that in this passage Willes, J. was laying down that a servant warranted only possession of skill and was not undertaking to exercise it with reasonable care. I think this is wrong. The learned Judge is saying that the skilled

labourer of the first sentence is under the same contractual obligation to his master as those mentioned in the sentence are to their customers or clients. The obligation to exercise reasonable care is assumed.

There is, however, no authority binding on your Lordships' House.

Most of the statements against too readily implying terms are in judgments in cases where one party is seeking to imply a term into a written and often detailed contract which is effective and covers the obligations of the parties in normal circumstances without the addition of the term sought to be implied. The position is different when the contract, written or oral, is silent as to matters which have to be settled one way or the other if the contract is to be effective. In the past, as today, goods are often sold, the parties dealing expressly only with the identification of the goods physically or by description and the price. The buyer claims that the goods are defective. The Court has in such a case to imply terms. It would be doing so if it had allowed no exceptions to the warning caveat emptor. Sections 12 to 14 of the Sale of Goods Act, 1893, set out the terms which over the preceding years the Courts had implied when the parties were themselves silent. Other examples of this process can be found in the terms to be implied in tenancies. A classic example of the process is Holt, C.J.'s judgment in *Coggs v. Bernard*, 2 Lord Raym, 909.

It may be that in the case of sales of goods and tenancies the ground has been covered. I would not expect the ground to have been covered in the case of weekly wage earners who would seldom be worth suing. In any case, new circumstances may present new problems which have to be dealt with in the same way.

I think it is right to imply a duty on the part of the servant to take reasonable care in the carrying out of his duties. There would be a breach although there were no damage, and happily most acts of negligence do not cause damage. In the case of a chauffeur it would not, of course, be confined to driving, but would apply to the care of the car and other matters.

I therefore accept the submission on behalf of the employer that there is normally a contractual duty on a servant to take care. I now turn to the implication submitted on behalf of the driver as to the personal liability of the driver of a lorry or car for damage caused by negligent driving.

Soon after motor cars came into use it became obvious that the risk of accidents due to negligence causing serious injuries and damage was very much greater than when vehicles were drawn by horses. Many years before 1930 no reasonable man allowed himself to be in a position where if negligent he would be liable to pay out of his own resources third party damages. He insured. Though this case is concerned only with third party liability it would, I think, be found that the normal policy also covered damage to himself and his car.

When a man is engaged as a chauffeur or a lorry driver the question whether his resources are at risk should he cause damage through his negligence is as important to him as it is to an owner driver. Nothing was said in this case and I dare say nothing is usually said. If when such a contract was being negotiated the question had been raised, it is obvious, I think, that the driver would have stipulated for the usual cover that an owner driver provides for himself. If nothing is said it is, in my opinion, for the employer to see that the driver's resources are protected by insurance. It is inconsistent with such an obligation that the employer should seek by action to make the driver personally liable as in the present case.

I instanced during the argument the case of an owner who drives himself at times and at other times employs a chauffeur. Unreasonable would be too mild an epithet if the owner had protected his own resources if he was negligent but had failed to ensure the protection of his driver or, of course, made it clear to him that he must insure himself. If the present claim succeeds that would be the position.

I find it easier to imply this term than the obligation of the driver to take care. This term seems to me to be necessary for the efficacy of the contract. No driver would undertake the work if he was told his resources might be liable for damage caused by a negligent act or omission.

It is suggested that such a term would not be precise. It would, I think, be as precise as the "i" or the "f" in a c.i.f. contract. The policy tendered in a c.i.f. contract must be upon the "terms current in the trade" - *Biddell Brothers v. E. Clemens Horst Company* [1911] 1 K.B. 214, 220. If a policy is taken out in the ordinary terms that is sufficient.

I have not referred to the provisions of the Road Traffic Act, 1930, which makes third party insurance obligatory. This greatly strengthens the arguments for the term which I have implied, but I think myself the arguments would have been strong enough apart from that Act, which was directed to protecting the public.

I think the term which I have implied is covered by the pleadings.

I must say a word about *Digby v. General Accident Fire and Life Assurance Corporation, Limited* [1943] A.C. 121. It was assumed in the earlier proceedings before *du Parcq, J.* that the owner could bring an action against her driver for damages caused to the owner. The driver then claimed against the insurance company in respect of his liability to his owner. It is not, at any rate, clear that the owner was seeking to make the driver personally liable. It may have been that the driver was sued in order that the damages, if any, against him could be ascertained in order to test the liability of the insurers. In any event, the point does not appear to have been taken in the proceedings before *du Parcq, J.* Lord Atkin at p. 138 says that the proceedings against the driver were no doubt taken with a view of eventual recovery from the insurance company.

It is fair to the Plaintiffs to state that these proceedings are brought in their name but without their knowledge or, I think, approval. They are brought by an insurance company, which ultimately paid the third party, under alleged rights of subrogation contractual or in law.

It was suggested that the term which I have implied is unenforceable unless agreed to by the insurers of the employer. This point was not pleaded and I cannot think it is right. The insurer, when he has paid, succeeds to such rights as the assured possesses. The assured is not, as I see it, fettered in any way as to the terms on which he contracts with his driver.

A good deal of argument was based on the fact that there were two insurances, one being an employer's liability policy and the other a motor vehicle policy. The former paid the third party, the latter making, I think, a payment said to be ex gratia of 200. There was a dispute, but this cannot throw any light on the contract between employer and driver.

It follows that in my opinion *Semtex Limited v. Gladstone*[1954] 2 A. E.R. 206 was wrongly decided.

The implied term is an answer to the claim for damages and also to the claim for indemnity or contribution under the 1935 Act. Both claims seek to make the driver personally liable in respect of damages to a third party, which is plainly of the kind to be anticipated and covered.

It is said that this would have far-reaching consequences. So, I think, would the decision of the Court of Appeal. With respect, I think that decision is not only far-reaching but also anomalous. One may take as an example an accident causing damage which is within the compulsory provisions of the Road Traffic Act, 1930. If a driver was sued direct it seems clear the insurers would have to pay and there would be an end of it. If, however, the employer is sued the insurers again pay but can by subrogation recover against the driver and levy execution on his savings. This would, I think, be anomalous. It would also mean that any driver who realised what the law was would have to take out a policy to cover this risk.

Romer, L.J. at the end of his judgment said that it was not in the public interest that drivers should be immune from the financial consequences of their negligence. The public interest has for long tolerated owners being so immune, and it would, I think, be unreasonable if it was to discriminate against those who earned their living by driving. Both are subject to the sanction of the criminal law as to careless or dangerous driving. The driver has a further sanction in that accidents causing damage are likely to hinder his advancement.

The terms which I have implied might, I agree, apply to other cases. The question would be whether the damage sought to be recovered from the servant was damage which any reasonable person would cover by insurance. There would be

the further question whether the employment was such that the servant, if nothing was said, was entitled to assume that the master would arrange the insurance. This is plain enough in car or lorry cases, as the owner has to have a policy under statute. In other cases it might be a question of evidence.

Other points were argued which do not arise on the view which I have formed.

I would allow the appeal.

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