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[Original pagination shown in bold brackets.]

WINTERBOTTOM *v.* WRIGHT (1842)

10 *Meeson & Welsby* 109 (1842); pages 109-116

COURT OF EXCHEQUER -- TRINITY TERM, June 6, 1842

[p. 109:]

> A. contracted with the Postmaster-General to provide a mail-coach to convey the mail bags along a certain line of road; and B. and others also contracted to horse the coach along the same line, B. and his co-contractors hired C. to drive the coach:--Held, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction.

CASE.--The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also not, on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and **[p. 110:]** his

co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter, or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and, in consequence of injuries then received, had become lamed for life.

To this declaration the defendant pleaded several pleas, to two of which there were demurrers; but as the Court gave no opinion as to their validity, it is not necessary to state them.

Peacock, who appeared in support of the demurrers, having argued against the sufficiency of the pleas,--

***Byles,* for the defendant, objected that the declaration was bad in substance.--** This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that **[p. 111:]** wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue: *Tollit v. Sherstone,* 5 M. & W. 283. If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle. For example, every one of the sufferers by such an accident as that which recently happened on the Versailles railway, might have his action against the manufacturer of the defective axle. So, if the chain-cable of an East Indiaman were to break, and the vessel went aground, every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller also of the iron. Again, suppose a gentleman's coachman were injured by the breaking down of his carriage, if this action be maintainable, he might bring his action against the smith or the coachmaker, although he could not sue his master, who is the party contracting with him: *Priestly v. Fowler,* 3 M. & W. 1. There is no precedent to be found of such a declaration, except one in 8 Wentworth, 397, which has been deemed very questionable. *Rapson v. Cubitt,* 9 M. & W. 710, is an authority to show that the

party injured by the negligence of another cannot go beyond the party who did the injury, unless he can establish that the latter stood in the relation of a servant to the party sued. In *Witte v. Hague*, 2 Dowl. & Ry. 33, where the plaintiff sued for an injury produced by the explosion of a steam-engine boiler, the defendant was personally present managing the boiler at the time of the **[p. 112:]** accident. *Levy v. Langridge*, 4 M. & W. 337, will probably be referred to on the other side. But that case was expressly decided on the ground that the defendant, who sold the gun by which the plaintiff was injured, although he did not personally contract with the plaintiff, who was a minor, knew that it was bought to be used by him. Here there is no allegation that the defendant knew that the coach was to be driven by the plaintiff There, moreover, *fraud* was alleged in the declaration, and found by the jury: and there, too, the cause of injury was a weapon of a dangerous nature, and the defendant was alleged to have had notice of the defect in its construction. Nothing of that sort appears upon this declaration.

***Peacock*, contrà.--** This case is within the principle of the decision in *Levy v. Langridge.* Here the defendant entered into a contract with a public officer to supply an article which, if imperfectly constructed, was necessarily dangerous, and which, from its nature and the use for which it was destined, was necessarily to be driven by a coachman. That is sufficient to bring the case within the rule established by *Levy v. Langridge*. In that case the contract made by the father of the plaintiff with the defendant was made on behalf of himself and his family generally, and there was nothing to show that the defendant was aware even of the existence of the particular son who was injured. Suppose a party made a contract with government for a supply of muskets, one of which, from its misconstruction, burst and injured a soldier: there it is clear that the use of the weapon by a soldier would have been contemplated, although not by the particular individual who received the injury, and could it be said, since the decision in *Levy v. Langridge*, that he could not maintain an action against the contractor? So, if a coachmaker, **[p. 113:]** employed to put on the wheels of a carriage, did it so negligently that one of them flew off, and a child of the owner were thereby injured, the damage being the natural and immediate consequence of his negligence, he would surely be responsible. So, if a party entered into a contract to repair a church, a workhouse, or other public building, and did it so insufficiently that a person attending the former, or a pauper in the latter, were injured by the falling of a stone, he could not maintain an action against any other person than the contractor; but against him he must surely have a remedy. It is like the case of a contractor who negligently leaves open a sewer, whereby a person passing along the street is injured. It is clear that no action could be maintained against the Postmaster-General: *Hall v. Smith*, 2 Bing. 156; *Humphreys v. Mears*. 1 Man. & R. 187; *Priestly v. Fowler*. But here the declaration alleges the accident to have happened through the defendant's negligence and want of care. The plaintiff had no opportunity of seeing that the carriage was sound and secure. [*Alderson, B.*--The decision in *Levy v. Langridge* proceeds upon the ground of the knowledge and fraud of the defendant.] Here also there was fraud: the defendant represented the coach to be

in a proper state for use, and whether he represented that which was false within his knowledge, or a fact as true which he did not know to be so, it was equally a fraud in point of law, for which he is responsible.

LORD ABINGER, C[hief] B[aron].-- I am clearly of opinion that the defendant is entitled to our judgment. We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. This is an action of the first impression, and it has been brought in spite of the precautions which were taken, in the judgment of this Court in the case of *Levy v. Langridge,* to obviate any notion that such an action **[p. 114:]** could be maintained. We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favour; for there the gun was bought for the use of the son, the plaintiff in that action, who could not make the bargain himself, but was really and substantially the party contracting. Here the action is brought simply because the defendant was a contractor with a third person; and it is contended that thereupon he became liable to everybody who might use the carriage. If there had been any ground for such an action, there certainly would have been some precedent of it; but with the exception of actions against innkeepers, and some few other persons, no case of a similar nature has occurred in practice. That is a strong circumstance, and is of itself a great authority against its maintenance. It is however contended, that this contract being made on the behalf of the public by the Postmaster-General, no action could be maintained against him, and therefore the plaintiff must have a remedy against the defendant. But that is by no means a necessary consequence--he may be remediless altogether. There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or tenant. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the **[p. 115:]** commission of the public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had released the defendant? that would, at all events, have defeated the claim altogether. By permitting this action, we should be working this injustice, that after the defendant had done every thing to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.

ALDERSON, B[aron].-- I am of the same opinion. The contract in this case was made with

the Postmaster-General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favour of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. Then it is urged that it falls within the principle of the case of *Levy v. Langridge.* But the principle of that case was simply this, that the father having bought the gun for **[p. 116:]** the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There, a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of misrepresentation or fraud in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

GURNEY, B[aron]., concurred

ROLFF, B[aron].-- The breach of the defendant's duty, stated in this declaration, is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended, (and in that sense the word is evidently used,) there was none. This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque injuriâ; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but, by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.

Judgment for the defendant.

See *Pilmore v. Hood*, 5 Bing. N.C. (35 E.C.L.R. 43,) decided on the authority of *Levy v. Langridge.*

NOTE: "The medieval courts met during four periods of the year, and the nineteenth-century reforms in 1831 preserved the names of the four medieval terms while giving them fixed spans of time as follows:
1) Hilary, 11 - 31 January;
2) Easter, 15 April - 8 May;
3) Trinity, 22 May - 12 June;

4) Michaelmas, 2 - 25 November."
Arthur Hogue, *Origins of the Common Law*, Liberty Fund: 1966, 1985), page 159 ; Hogue cites C. R. Cheney (ed.), *Handbook for Students of English History*, Royal Historical Society: 1955), pp. 65-69.