CASE AND COMMENT

GAGNON v DEROY

MOTOR VEHICLES — NEGLIGENCE — PASSENGER INJURED — USE OF CAR PERMITTED ON CONDITION THAT IT BE DRIVEN BY OWNER'S CHAFFEUR — WHETHER OWNER LIABLE AND WHETHER CHAUFFEUR IN THE PERFORMANCE OF THE WORK FOR WHICH HE WAS EMPLOYED — ART. 1054 C.C.

In the case of *Gagnon v Deroy*[1] the Supreme Court of Canada maintained an action against an employer for damages caused by his chauffeur "in the performance of the work for which he was employed." This judgment was based upon the last paragraph of article 1054 of the Quebec Civil Code which stipulates that all "masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

In the following discussion it is the intention of the writer to respectfully submit that the majority decision of the Supreme Court of Canada was an erroneous one. It is interesting to note that in this case all three judges of the majority[2] were from the common law system, whereas the two dissenting judges[3] were of the Quebec civil law system. In the opinion of this writer, the principal reasons for the erroneous judgment are twofold. In the first place, the common law judges of the Supreme Court failed to understand the full effect and impact on the last paragraph of article 1054 of the Quebec Civil Code of the distinction between a "temporary employer" or what the French writers call "patron momentané" and the "regular employer" or "patron habituel". Secondly, it is the respectful contention of this writer that the majority, in their judgments, overlooked the distinction which Quebec jurisprudence and doctrine has drawn between "dans l'exécution de ses fonctions" or "in the performance of his work" and "à l'occasion de ses fonctions" or "on the occasion of the work for which he is employed".

The facts of the case under discussion are, for the most part, not in dispute. One Gaston Bernard planned to take a fishing party to a lake out of town. He himself was not qualified to drive and asked his uncle, Edouard Gagnon (the defendant-appellant) for the loan of his car. The defendant told Bernard that he would lend him his car provided that his chauffeur was willing to drive and asked Bernard to make the necessary arrangements himself with the chauffeur. The defendant's chauffeur agreed to drive the car for Bernard although the day was Sunday and he was neither paid nor required to work.

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[1] [1958] S.C.R. 708.
[2] Locke, Cartwright, and Judson JJ.
[3] Taschereau and Fauteux JJ.

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Les problèmes qui se posent sont nombreux. Comme je l'ai indiqué au début de cette leçon, des listes ont été établies sous forme de questions (plus de cent différentes). Il en existe dans le précieux *"Guide to the Study of Space Law"* de M. Hogan, dans la préface au *"Symposium of Space Law"* préparée par Miss Eilene Galloway, dans le *"Survey of Space Law"* de M. Spencer M. Beresford, dans l'article de M. Myres McDougal sur les *"Perspectives for a Law of Outer Space"* et en diverses autres publications.[44]

Depuis la conférence que j'ai faite à Montréal au lendemain du Sputnik II,[45] dans laquelle j'énumérais certaines dispositions qu'il était, à mon avis, essentiel d'incorporer dans un premier accord sur l'espace, les conditions ont évolué. Le problème de l'exploration et de l'exploitation de l'espace s'est considérablement élargi; les progrès réalisés ont souvent dépassé les prévisions[46] et ne s'arrêteront pas; le facteur de coopération internationale que représentait l'Année géophysique internationale a disparu et n'a pas été complètement remplacé; les Nations Unies ont été saisies du problème tout entier.

C'est en tenant compte de ces éléments nouveaux qu'il convient aujourd'hui d'orienter nos recherches. Au cours des prochaines leçons nous examinerons plus particulièrement les problèmes qui paraissent nécessiter une étude immédiate en vue d'une solution à brève échéance; mais dès maintenant je tiens à indiquer qu'à mon avis, toute solution susceptible d'être acceptée doit tendre d'abord à

- — faciliter la continuation sans incident de l'exploration de l'espace, y compris l'exploration des mondes sidéraux, et sur une base de coopération réellement internationale,
- — sans nuire toutefois
  - — ni à la circulation aérienne conventionelle,
  - — ni à la sécurité et au bien-être de l'humanité,
- — et surtout sans porter atteinte à la sécurité nationale des nations afin de diminuer cette psychose de peur qui existe en certains pays.

Si tous les Etats y mettaient quelque bonne volonté, — et il est permis de dire qu'il y va de leur intérêt, — il ne serait pas nécessaire de perdre un temps précieux à discuter du statut juridique de l'espace, de la souveraineté dans l'espace ou d'autres notions sans application pratique pour le but recherché.

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[44]Des juristes soviétiques ont même mentionnées certains points qui pourraient faire l'objet d'accords.

[45]Voir note 14 ci-dessus.

[46]Ainsi, la *British Interplanetary Society* prévoyait, en 1953, que le premier satellite serait lancé en 1965, que les premiers essais pour s'approcher de la lune auraient lieu en 1985: le premier alunissage est prévu pour l'an 2000 et aura peut-être lieu auparavant. (Spaceflight, octobre 1958, p. 303).

The chauffeur took the party to the lake, left them there, and drove back to the city. In the evening of the same day the chauffeur returned to pick the party up and while they were driving home collided with another vehicle.

An action in damages was taken by one of the passengers in the defendant's car for injuries suffered as a result of the accident. The honourable Justice Girouard of the Superior Court,[4] maintained the action in damages against the three defendants, Edouard Gagnon, Georges Doyon (owner of the other vehicle) and Alphonse Gagnon, the chauffeur, condemning them to pay jointly and severally the sum of $8,795.00 with interest and costs. The only defendant who appealed from the judgment of the trial judge was Edouard Gagnon, the owner of the vehicle that the chauffeur was driving. The Quebec Court of Queen's Bench (Appeal Side)[5] dismissed the appeal by a majority judgment (two to one) with Mr. Justice Hyde dissenting.

The one fact in dispute was whether the arrangements for the chauffeur to drive were made by the uncle himself or by his nephew. In an examination on discovery the uncle testified that the arrangements were made by his nephew and that he had never asked his chauffeur to drive the car the day of the accident. On the other hand, in his testimony given in court the chauffeur claimed that it was his employer, the uncle, who had spoken to him about driving the car for the nephew.

In the majority judgment of the Supreme Court delivered by Judson J., no view is expressed as to what testimony the judges have accepted. However, in this respect, Judson J. did say that he believed that the contradictory evidence was of no importance to the action, since, in any case, it was left to the chauffeur himself to decide whether or not he wished to drive that day.

> ". . . I do not think that it makes any difference who asked him to make the trip. The fact is that the car would only be available for the transport to Gaston Bernard and his party if Alphonse was willing to drive and Alphonse was free to accept or refuse."[6]

According to Judson J. the important fact in the case was that the uncle was furnishing transportation to his nephew and his fishing party by permitting the use of his car, to be driven by the chauffeur who ordinarily drove it. Thus it was held by the three common law judges that at the time of the accident, the chauffeur was "in the performance of the work for which he was employed," namely, driving his master's car. In the opinion of the majority the governing factor in the case was the insistence by the uncle that his regular chauffeur drive the car for the nephew. It was also their opinion, agreeing with Taschereau J. of the Quebec Court of Appeal, that the case could not be distinguished in its essence from *Grimaldi v Restaldi*,[7] a case where a car and chauffeur were also provided for a guest.

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[4]Unreported.

[5][1957] Que. Q.B., 704.

[6]*Supra*, footnote 1, at p. 714.

[7][1933] S.C.R. 489; [1933] 4 D.L.R. 647.

The dissenting judgment of Taschereau J. in the Supreme Court is based primarily on the fact that the driver was driving in the interest of another person and was not acting for the profit or advantage of his employer. Taschereau J. emphasizes the fact that it was a pleasure trip in which the defendant didn't participate and which was not arranged in his interest. Thus Taschereau J. concludes that in view of the foregoing facts the chauffeur, at the time of the accident, was not "in the performance of the work for which he was employed".

It is interesting to note that Taschereau J., unlike his common law colleagues of the Supreme Court, seems to attach some importance to whether or not the arrangements with the chauffeur were made by the uncle himself or by the nephew. For, in delivering his judgment, Taschereau J. cites parts of the uncle's testimony given in the examination on discovery which established that arrangements were made by the nephew and not by his uncle. Thus, Taschereau J. appears to have accepted the testimony of the uncle as opposed to that of the chauffeur.

In his judgment Fauteux J. applies the same line of reasoning as that of his Quebec colleagne. Moreover, for Fauteux J., what was significant was the fact that the chauffeur had never worked for the defendant on Sundays and had never been paid by him for that day. In answer to what is the basic argument in the majority decision, Fauteux J. contends that even if the evidence could show that the permission of the uncle to use the car depended on whether or not his chauffeur would consent to drive it, it does not mean, in view of the circumstances of the case, that this assertion of authority by the uncle was sufficient to create a relationship of master and employee between the defendant and the chauffeur.

Finally, Fauteux J., like Taschereau J., also appears to have accepted the testimony of the uncle as opposed to that of the chauffeur. In this respect he said the following:

> ". . . En somme, il a assujetti la permission donnée à son neveu d'utiliser son camion, à l'établissement d'une entente entre ce dernier et Gagnon, entente à laquelle lui-même entendait rester étranger et suivant laquelle Gagnon pouvait participer à l'expédition au même titre que Bernard ou en devenir le préposé."[8]

Neither Taschereau J. nor Fauteux J. consider as a possible argument for the defendant the distinction between the "temporary employer" and "regular employer". It is respectfully submitted by this writer, however, that a strong argnment can be made for the defendant on the ground that at the time of the accident the nephew was the "patron momentané" or "temporary employer", and therefore, it was the nephew and not the defendant who was responsible for the damages caused by the chauffeur. This distinction between "temporary" and "regular" employer which we have inherited from the French authors is fundamental to the construction of the "employer-employee" clause of article 1054 C.C. A master or employer is responsible under 1054

[8] *Supra*, footnote 1, at p. 718.

C.C. because he is one of those having a right of control. This point is important when the necessity arises of deciding, which of the two masters or employers is responsible for the damage caused by a servant or workman — the "temporary" or "permanent" master. The jurisprudence and doctrine in Quebec have held that the "temporary" master or employer is responsible for the damages caused by the servant if, at the time of the accident, the latter had effective legal control within the meaning of 1054 C.C. Effective legal control has been defined by the jurisprudence and doctrine as the right to give orders and instructions to the employee and to have over him exclusive authority. Hence, if at the time of the accident the "temporary" employer had exclusive authority over the servant or workman who caused the damage, then that employer is responsible and the "regular" employer is exonerated of all liability.

The two outstanding cases on this very point which our Courts have closely followed are *Bain v Central Vermont Railway*[9] and *Quebec Liquor Commission v Moore*.[10]

In the first case[11] the principle of "temporary" and "regular" employer was laid down by Cross J. in his judgment rendered in the Quebec Court of Appeal and reaffirmed by Lord Dunedin who delivered the judgment of the Law Lords of the Privy Council. Lord Dunedin said at pages 415 and 416:

> ". . . it is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously), or sub-contracted. In such a case, it is the 'patron momentané' and not the 'patron habituel' who is responsible . . .
> . . . In the words of the judgment reported by Sirey you are to look to the 'patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive au moment de l'accident.' It is nothing to the purpose that there may be at the same time a sort of residuary and dormant control of the 'patron habituel.'"

In the second case[12] cited by this writer, Mignault J. in his judgment expounded the same principle of "temporary" and "regular" employer. In his discussion of the responsibility of the master for the damage caused by his employee, Miguault J. said the following at page 913 of the Dominion Law Reports:

> ". . . if a third person takes control for the time being, whether by agreement with the employer, or by interference in the conduct of an enterprise, he becomes liable for the tort of the servant just as if he were the employer. The distinction lies between the 'patron habituel' (regular employer) and the 'patron momentané' (employer for the time being) which often allows the regular employer to escape all responsibility."

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[9][1921] 2 A.C., 412.

[10][1924] S.C.R. 540; [1924] 4 D.L.R. 901.

[11]*Supra*, footnote 9.

[12]*Supra*, footnote 10.

Finally, the principle of "patron momentané" and "patron habituel" is succinctly expounded by André Nadeau[13] who says that if an employer puts his employee at the disposition of a third person, it is essential to discover to which of the two he belongs at the time of the damageable act. There would only be a displacement of the responsibility of the employer to a third person if the former had abandoned to the latter the authority and right to give instructions.

It is to be noticed that, in the case under discussion, at no time was the chauffeur instructed by the uncle to drive his nephew. Whether the arrangements were made by the uncle or by the nephew, it was left to the chauffeur himself to decide whether or not he wished to drive that day. The fact that the uncle might still have had, at the time of the accident, what Lord Dunedin in *Bain v Central Vermont Railway*[13a] referred to as "dormant or residuary control", is of no consequence. What is important to know is who, at the time of the accident, had the right to give instructions to the chauffeur and who had authority over him. It is the respectful submission of this writer that it was the nephew who had such control at the time of the accident; and therefore, as "patron momentané", the nephew, and not the uncle, was responsible for the damage caused by the chauffeur. The fact that the uncle insisted that the chauffeur drive his car has no bearing in this case on the determination of responsibility. The legal control at the time of the accident, and at no other time, is what is important in the determination of the responsibility. Fauteux J. made this same point in his dissenting judgment.[14]

Finally the fact that the chauffeur was not paid by the nephew is also of no consequence. For, as Nadeau points out in his treatise,[15] the payment of salary of an employee is not the criterion for the determination of responsibility. In *Bain v Central Vermont Railway,* Lord Dunedin said the following about salary:[16]

> ". . . Payment is not everything; it is a circumstance pointing to who is the employer but the real test is control, . . ."

Although the majority of the Supreme Court does not explicitly refer to the principle of "patron momentané" and "patron habituel" there is no doubt that they had considered it as a possible argument for the defendant. However, they indirectly dispose of it by their contention that the case under discussion and the *Grimaldi v Restaldi*[16a] case are in principle indistinguishable from one another. In this respect the writer respectfully disagrees with the majority of the Court, and contends that the two cases can, in fact, be distinguished.

In the *Grimaldi v Restaldi* case the defendant placed his automobile at the disposal of the plaintiff, his physician, and instructed his chauffeur to drive

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[13]Nadeau, André, *Traité de Droit Civil du Québec,* t. 8, p. 359.

[13a]*Supra,* footnote 9.

[14]*Supra,* footnote 1, at p. 717.

[15]Nadeau, *op. cit.,* t. 8, p. 364.

[16]*Supra,* footnote 9, at p. 416.

[16a]*Supra,* footnote 7.

the plaintiff to such places as he might direct in order that he might make some professional calls before making a similar call on the defendant himself. The plaintiff was subsequently injured by the negligent driving of the chauffeur and sought to recover damages against the latter's employer. In this case it was held unanimously by the judges of the Supreme Court, confirming the judgments of both the Quebec Court of Appeal[17] and trial court,[18] that the plaintiff was not at the time of the accident the "patron momentané" of the defendant's chauffeur. The Court held that the plaintiff was merely a guest in the defendant's car and had no control over the chauffeur or the right to give him instructions. Thus the action was maintained against the defendant on the ground that the chauffeur was "in the performance of the work for which he was employed."

In *Grimaldi v Restaldi* it was established that the master, who was owner of the automobile, had given explicit and precise instructions to his chauffeur and that the latter was acting in his interest. There is no indication at all that the patient (the defendant in the case) had intended to transfer the right to give instructions to his chauffeur to the doctor (the plaintiff). It was the defendant himself who suggested that the plaintiff should use his automobile and chauffeur. The plaintiff gave the addresses to the chauffeur who took him in succession to each of them according to the instructions received from his master. It is true that the doctor had to give to the chauffeur the necessary indications so as to be taken to the places agreed upon, but this did not mean he had authority to give orders to the chauffeur. The words of Rinfret J. who delivered the unanimous judgment of the Supreme Court in *Grimaldi v Restaldi* were as follows:[19]

> ". . . There would have been no difference in the case if the appellant (defendant) had sent his car to fetch the respondent (plaintiff) and bring him directly to the appellant's home. The different calls made before the visit to the appellant's residence had been agreed upon and the chauffeur was driving the respondent according to the instructions he had received from the appellant . . .
> . . . In such circumstance, there was no substitution of control or supervision and the appellant remained responsible for the acts of his chauffeur who, in fact, was carrying out his orders at the time of the accident."

In the opinion of the writer, from the foregoing it can be seen that the *Grimaldi v Restaldi* case and the case under discussion are in many respects very different from one another. In the first place, as Tachereau J. himself points out in his dissenting judgment,[20] the facts in the case under discussion happened on a Sunday, a day on which the chauffeur had never before worked for his employer. Secondly, in the case being discussed, at no time were there any instructions given by the uncle to his chauffeur nor did the chauffeur

[17](1933), 54 Q.B. 197.
[18]Unreported.
[19]*Supra*, footnote 7, at pp. 649, 650 of the D.L.R.
[20]*Supra*, footnote 1, at p. 713.

drive the nephew according to the instructions he had received from his master. Hence, at the time of the accident, the chauffeur was not carrying out any orders of his master. In fact, if we accept the testimony of the uncle, as Taschereau and Fauteux JJ. do, then all arrangements with the chauffeur were made by the nephew himself. Thus no contact at all was made between the chauffeur and uncle on the day of the accident. Surely this is sufficient proof of the inexistence of any legal relationship between the uncle and his chauffeur at the time of the accident.

As a subsidiary argument for the defendant, the writer respectfully submits an important distinction which was referred to at the very outset of the discussion. This is the difference between "dans l'exécution de ses fonctions" or "in the performance of the work" and "à l'occasion de ses fonctions" or "on the occasion of the work for which he is employed" The distinction is based upon the difference between the French version of article 1054 of the Quebec Civil Code which states "dans l'exécution des fonctions" and the corresponding provision (article. 1384) of the Napoleonic Code which reads "dans les fonctions". The doctrine and jurisprudence in Quebec have held that this substitution by the Codifiers of "dans l'exécution des fonctions" has some significance.

The tendency in France is to hold the master or employer liable for damage caused by his servant or employee even, *on the occasion* of the work for which he is employed or *with the aid of facilities* furnished by his master or employer.[21] In Quebec, however, in view of the difference in texts, it is generally admitted that the responsibility of the master or employer is not so extensive. Mignault says the following about this distinction:[22]

> "La formule de notre code est plus exacte que celle du Code Napoléon, qui dit que les maitres et commettants sont responsables du dommage causé par leurs domestiques et préposés *'dans les fonctions* auxquelles ils les ont employés'. Les maîtres et commettants ne sont pas, en effet, responsables, dans tous les cas, du dommage que causent leurs domestiques et préposés *pendant* qu'ils exercent leurs fonctions: car il se peut que le dommage qu'ils font ait une cause autre que l'exercice des fonctions qui leur sont confiées."

Nadeau reaffirms Mignault's view:[23]

> ". . . En France, la responsibilité du maître paraît s'étendre, en certains cas, au dommage causé par son préposé simplement à l'occasion de ses fonctions, ce qui n'est pas le cas chez-nous."

The jurisprudence in Quebec has followed this distinction. In *The Governor and Co. of Gentleman Adventurers of England v Vaillancourt.*[24] Duff J., in his judgment, had this to say about the distinction, at page 416:

> ". . . In France this doctrine has been widely accepted and has more than once been affirmed by the highest tribunal that the employer is responsible for the acts done by his employee *à l'occasion* of his service. It cannot be insisted upon

[21]Nicholls, *Responsibility for Offences and Quasi-Offences,* (1938) at p. 69.
[22]Mignault, P.B., *Le Droit Civil Canadien,* t. 5, p. 337.
[23]Nadeau, *op cit.,* t. 8, p. 367.
[24][1923] S.C.R. 414.

> too strongly that an act done by an employee *à l'occasion* of his service may or may not be one for which the employer is responsible under article 1054 C. C., depending in every case upon the answer to the question: 'Was the act done in the execution of the employee's service or in the performance of the work for which he was employed?'"

In *Curley v Latreille*[25] Mignault J., in discussing the differences between the "employer-employee" clause of article 1054 C.C. and the corresponding provision of the French Code, said, at page 492 of the Dominion Law Reports:

> ". . . Thus in the Province of Quebec the master and employer are responsible for damage caused by their servants and workmen *in the execution of the functions for which the latter are employed,* or to cite the English version of art. 1054 C.C., *'in the performance of the work for which they are employed.'* This clearly appears to me to exclude the responsibility of the master for an act done by the servant or workman on the occasion only of his functions if it cannot be said that this act was done in the execution of his functions."

In *Moreau v Labelle*[26] the same principle was applied where it was held that in interpreting the meaning of the last paragraph of 1054 C.C., it would be an error in law to assimilate to an offence committed by a servant or workman "in the performance of the work for which they are employed", a similar offence committed "during the period" of that work. Thus, on the basis of the fact that the nephew of the defendant (in the *Moreau v Labelle* case) had deviated from the direct route he was supposed to take in bringing the defendant's car home, it was held that at the time of the accident the defendant's nephew was not "in the performance of the work" which had been entrusted to him. Rinfret J., delivering the unanimous judgment of the Supreme Court, discussed in great detail the cases of *The Gentlemen Adventurers* and *Curley v Latreille,* to which the writer has already referred. It was, in effect, on the basis of these two cases that the judgment of the Supreme Court in *Moreau v Labelle* was finally reached.

Finally, this distinction between "in the performance of" and "on the occasion of" seems to be the very point upon which a very recent judgment of our Supreme Court[27] was based. In this case, a taxi driver asked his employers (the defendants) for permission to use his taxi-cab to bring his son back home for the opening of school. The fare for the trip was fixed in advance and the driver paid 60% of it to his employers and retained the balance. The same per cent was retained by the driver whenever he worked for the defendants. The driver was involved in an accident and a third party took an action against the defendants and driver. The trial judge allowed the action against the driver and dismissed it against the defendants. The Quebec Court of Appeal,[28] however, allowed the action against the defendants on the ground that the driver was "in the performance of the work for which he was employed" The Supreme Court reversed the judgment of the Court of Appeal, dismissing the action against the defendants.

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[25](1920), 60 S.C.R. 131; (1920), 55 D.L.R. 461.
[26][1933] S.C.R. 201.
[27]*Andrews and Gauthier v Chaput,* [1959] S.C.R. 8.
[28][1958] Q.B. 425.

The principal factors which led to the unanimous judgment of the Supreme Court were twofold. In the first place, it was held that the taxi driver, at the time of the accident, was not using the cab for the benefit of his employers but for his own purposes. The taxi driver's right to use the car as he saw fit throughout the entire day was a most significant factor. The Court concluded that on the day of the accident the driver was not operating the car as a taxi-cab at the request of a patron and for the benefit of his employer. Secondly, there was the fact that permission to make the trip was first sought and obtained from both the manager of the defendants and the defendants themselves. Thus, in the light of the foregoing facts, the Court found that at the time of the accident the taxi driver was not "in the performance of the work for which he was employed."

The writer feels that the above case is an excellent illustration of the line that must be drawn in our law between "in the performance of the work" and "on the occasion of the work or service" for which a servant is employed. It is the contention of this writer that the same line should have been drawn by the majority of the Supreme Court in the case under discussion. In their dissenting judgments both Taschereau and Fauteux JJ. implicitly drew the line when they held the chauffeur was not "in the performance of the work for which he was employed."

It was established in the present case that the regular duties of the chauffeur were to drive the vehicle for transportation of other employees to and from work in the woods and, when he was not doing this, to work as a logger. It is the view of this writer that driving the nephew on an off-duty day was not part of the chauffeur's regular duties which would place it into the category of the "performance of the work for which he was employed". If driving the car had any relationship whatsoever to the regular functions of the chauffeur, it was simply "à l'occasion de ses fonctions."

Moreover, the driving of the car on that day was in the sole interest of defendant-appellant's nephew and his friends and in no way was the trip arranged for the uncle's benefit or in his interest, Thus, on this basis, which also was the principal ground on which the action in *Andrews and Gauthier v Chaput* was dismissed, the appeal in the case under discussion should have been rejected by the Supreme Court.

In summary, the writer feels that the action against the defendant, in the case under discussion, should have been dismissed on two grounds: in the first place, that in the circumstances of the case the nephew was the "patron momentané" or "temporary employer" at the time of the accident, making him alone responsible for damages caused by the chauffeur; secondly, as a subsidiary argument, that the chauffeur, at the time of the accident, was not "in the performance of the work for which he was employed" but, if anything, simply "on the occasion of his services" for the defendant.

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