# CASE NOTES

## DARLING ISLAND STEVEDORING & LIGHTERAGE CO. LTD. V. LONG[1]

*Breach of Statutory Duty—Existence of Civil Right of Action—Vicarious Liability of Employer of Person in Breach*

The respondent L was a wharf labourer who, while in the employment of the appellant stevedoring company, was injured by a falling hatch beam in the course of unloading a ship. He sued the appellant for £10,000 damages, alleging that the accident had occurred during operations which were under the supervision of an employee of the appellant, and that the appellant had failed to comply with the requirements of regulation 31 of the Commonwealth Navigation (Loading and Unloading) Regulation with regard to the securing of hatch beams during unloading, as a result of which a beam fell and the respondent was injured. There was no dispute over the facts, but the appellant demurred and several questions of law were raised, which may be summarized as follows: (1) whether the Commonwealth Navigation Act 1912 gives power to the Governor-General to make regulations that give rise, on their breach, to private rights of action in the class of persons whom they are intended to protect; and if this be so, whether regulation 31 does in fact give rise to a private right of action correlative with the duties it imposes; (2) if it does, whether the duty created by the regulation was imposed directly on the appellant company; and (3) if this were not so, whether the appellant company was nevertheless liable for the breach of the regulation committed by its servant in the course of his employment.

It was unanimously held by the High Court, allowing the company's appeal from an order of the Supreme Court of New South Wales,[2] that although a civil right of action did exist in the respondent L for breach of the duty imposed by regulation 31, yet that duty lay exclusively on the servant of the appellant company as the 'person-in-charge' of unloading, and the appellant was not vicariously liable for this breach of statutory duty by its servant acting in the course of his employment.

With the exception of Fullagar J., the court had little hesitation in holding that regulation 31 gave rise to a civil right of action in the respondent L to sue for the breach of the duty it imposed. Kitto J.

[1] [1957] Argus L.R. 505. High Court of Australia; Williams, Fullagar, Webb, Kitto and Taylor, JJ.

[2] Roper C.J. in Eq. and Manning J.; Ferguson J. dissenting.

was content simply to assume this point, and Taylor J. agreed without comment. Williams and Webb JJ. readily accepted the principle stated by the present Chief Justice in *O'Connor v. Bray*[3] that where there is 'a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty is laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or the scope of the legislation of which it forms a part, a contrary intention appears'. They also agreed that this principle applies equally to statutes and to regulations made under the authority of statutes, and they rejected the argument on behalf of the appellant that Parliament, in delegating the prescription of penalties for breaches of the regulations to the Governor-General, had shown an intention that the latter should not be authorized to make regulations that could be enforced by any but the means he prescribed. As regulation 31 was clearly within the species of protective provision contemplated in the principle set out above, and was designed to protect a class of persons of which the respondent L was one, Williams and Webb JJ. therefore acknowledged L's civil right of action for breach of the duty imposed by regulation 31.

Fullagar J., while reaching the same conclusion, expressed considerable doubt as to the intention of Parliament in the Navigation Act to give 'power to create by regulation duties enforceable by action at the suit of a person injured by a breach thereof'.[4] He seemed opposed to the principle of imputing to the legislature an intention to grant to its delegate a power to create liabilities for damages, especially where the delegate's powers to prescribe sanctions or remedies are expressly dealt with; but he felt compelled to accept this 'unsatisfactory position' in face of a line of authorities commencing with *Atkinson v. Newcastle Waterworks Co.*[5] Hence he also held both that regulation 31 creates a duty for breach of which an action may lie, and also that the creation of such a duty is authorized by section 425 of the Navigation Act.[6]

The next question for the court's decision was upon whom the duty set out in regulation 31 was imposed. Their Honours were again unanimous in holding that it was imposed upon 'the person-in-charge', as defined in regulation 4; that is to say, 'any person directly or indirectly in control of the persons actually engaged in the process of loading or unloading' a ship. Interpreting this definition, Their Honours agreed that it could not include the appellant company. Williams J. observed that 'there is no sufficient indication of intention in the regulations as a whole or in particular in regulation 31 that

[3] (1937) 56 C.L.R. 464, 478.
[4] [1957] Argus L.R. 505, 513.
[5] (1877) 2 Ex. D. 441.
[6] [1957] Argus L.R. 505, 514.

duties imposed upon the person-in-charge should be imposed upon any person except the person actually in control of the work of loading or unloading the ship'.[7]

The court having thus found that no statutory duty rested upon the appellant company, the only recourse for the respondent lay in showing that the appellant was liable to him in damages for the breach, by its employee, the person-in-charge, of the statutory duty which was undoubtedly imposed upon him by regulation 31. This raised the important question as to whether an employer can be sued for a breach of statutory duty committed by his employee in the course of his employment where there is no statutory duty on the employer. More simply, can an employer be vicariously liable for his employee's breach of statutory duty? To this question the High Court unanimously answered 'No', but in doing so two clearly separate lines of reasoning were employed, by Williams and Fullagar JJ. on the one hand, and Kitto and Taylor JJ. on the other. In the process, it became plain that two quite different views were held amongst these four members of the court (Webb J. did not really commit himself) as to the principles underlying the rule of vicarious liability.

Both Kitto and Taylor JJ. held that the appellant was not liable for the injury caused by its servant's breach of duty for the simple reason that, in Their Honours' opinion, a master could never be liable for his servant's breach of duty, be it a statutory or a common law duty, unless the same or a similar duty were owed personally by the master himself to the person injured. Kitto J., with whom Taylor J. agreed, criticized the view that a master is to be held responsible for his servant's liabilities or torts, and argued with considerable force that it is only the physical acts of the servant which should be imputed to the master, devoid of any quality of wrongfulness which they might be held to have in an action against the servant. Having imputed only the servant's acts to the master, it must then, His Honour contended, be asked whether the master was under any separate personal duty, of which the imputed acts could constitute a breach. On this analysis, both Kitto and Taylor JJ. had no hesitation in holding that, since the statutory duty lay solely upon the respondent employee, and there was no duty resting separately upon the appellant company, no liability for the damage resulting from the breach of regulation 31 fell upon the appellant, and consequently the facts alleged disclosed no cause of action in the respondent against the appellant.

Williams and Fullagar JJ. on the other hand, found the fact that the duty in question was a statutory and not a common law one was decisive in favour of the appellant. Their Honours were strongly of

[7] *Ibid.*, 511.

the opinion that, to quote from Williams J., an 'employer could not be made liable for the breach by his servant of a duty imposed by statute or regulation on the servant and not on the employer'.[8] Williams J. pointed out that 'to make the employer liable in such a case would be to enlarge the scope and operation of the statute or regulation.'[9] Fullagar J., having stated that a plaintiff in an action for breach of statutory duty must find, in order to succeed, 'not merely a statutory duty, but a statutory duty imposed on the defendant',[10] went on to castigate the term 'statutory negligence'. He justifiably observed that 'It is a misuse of a term with a long established meaning to call a breach of a statutory duty a "tort". Duties of the kind now under consideration are imposed without regard or reference to the common law standard of reasonable care, and a breach of such duty may or may not, according to the circumstances, amount to negligence.'[11] Thus he was in full agreement with Williams J. that the respondent had a cause of action only if the regulation could be found to impose a duty directly on the appellant, which it was unanimously agreed it did not.

With due deference, it is submitted that the approach of Williams and Fullagar JJ. is the correct one. For it would seem that Kitto and Taylor JJ. err in their opinion that in all cases of vicarious responsibility, that is, in cases of breach of a common law duty as well as a breach of a statutory duty, there must be a separate and personal duty of care upon the master before he can be held responsible for the acts of his servant in the course of his employment. This view is strengthened by Mr Justice Fullagar's analysis of the basis of a master's liability for his servant's torts. Having pointed out that the common law rule of vicarious liability was adopted rather 'as a matter of policy' that as 'an exercise in analytical jurisprudence', His Honour states that, in his opinion, 'the rule is rightly stated, as it always is, in terms of liability and not in terms of duty. The liability is a true vicarious liability; that is to say, the master is liable not for a breach of duty resting on him and broken by him, but for a breach of duty resting on another and broken by another.'[12]

This, it should be noted, is not to say that a master is responsible only for his servant's torts (that is those acts of the servant which in fact involve the servant in tortious liability) for a master will be liable for any wrongful act or breach of common law duty on the part of his servant, even if the servant is procedurally immune from action and thus cannot be said to have committed a tort. An example of this situation is found in *Broom v. Morgan*[13] where a wife was injured through the negligence of her husband, whom she was legally barred

[8] *Ibid.*, 512. [9] *Ibid.* [10] *Ibid.*, 514.
[11] *Ibid.*, 515. [12] *Ibid.* [13] [1953] 1 Q.B. 597.

from suing, yet recovered from her husband's employer as being vicariously liable for the husband's wrongful act.

In that case, as in most cases of vicarious liability, it could not reasonably be argued that there was any common law duty resting on the master himself; his responsibility arose simply because a master is automatically liable for any breach of common law duty or other wrongful act on the part of his servant. It would seem extremely artificial to argue, as Kitto J. does, that in the common case of a person being injured by the careless driving of a servant on a highway, the master of that servant himself owes a duty of care to the injured person, when he might at the time of the accident have been working in his office hundreds of miles away.

The only true authority put forward by Kitto and Taylor JJ. in support of their theory is an excerpt from the judgment of Uthwatt J. in *Twine v. Bean's Express,*[14] but the decision in that case can be explained on the basis of the servant concerned having acted outside the scope of his employment, so that the rule of vicarious liability could not be invoked. Opposed to this, as Fullagar J. points out, is the unanimous consensus of opinion in the recent decision of the House of Lords in *Stavely Iron & Chemical Co. Ltd. v. Jones.*[15] Lord Reid recognized that: 'It is a rule of law that an employer, *though guilty of no fault himself,* is liable for the damage done by the fault or negligence of his servant acting in the course of his employment',[16] and Lord Tucker distinguished between cases of 'personal negligence' on the part of an employer and vicarious responsibility for the acts of a servant.[17] Lord Morton said it must be asked whether the servant (in the case before the House) was negligent, and continued: 'If the answer is "No", the employer is surely under no liability at all. Cases such as this (that is, cases of common law negligence) are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute.'[18] Thus it would seem quite incorrect to say with regard to cases of common law negligence that before a master can be liable for the negligence of his servant, he must personally have owed a separate duty of care to the person who suffered from the servant's negligence. All that is required to saddle the master with liability is to show that the damage was caused by the negligence of his servant whilst the latter was acting in the course of his employment.[19]

[14] [1946] 1 All E.R. 202, 204.

[15] [1956] A.C. 627. See the interesting note on this decision in (1956) 72 *Law Quarterly Review* 158. [16] *Ibid.*, 643. [17] *Ibid.*, 646, 647. [18] *Ibid.*, 639.

[19] The same conclusion is reached in a very good article by G. J. Hughes and A. H. Hudson: 'The Nature of a Master's Liability in the Law of Tort,' (1953) 31 *Canadian Bar Review,* 18 and 317. On the other hand, Glanville Williams has recently, in a comprehensive analysis, shown a preference for the view held by Kitto and Taylor JJ.: 'Vicarious Liability: Tort of the Master or of the Servant?', (1956) 72 *Law Quarterly Review,* 522.

As has already been seen, of course, the fundamental and very significant divergence in Their Honours' views on the basis of the vicarious liability rule did not bring about a split decision in the instant case. It cannot be predicted just what would be the attitudes of Kitto and Taylor JJ. on the question of whether a master may be vicariously liable for his servant's breach of statutory duty, if they were forced by weight of authority to relinquish their argument that a master cannot be liable for his servant's misdeed unless some duty is laid on the master personally. But the fact remains that the High Court in the instant case unanimously decided that an employer cannot be held vicariously liable for a breach of statutory duty committed by a servant in the course of his employment, where no such duty is imposed upon the master himself. In this respect it is a decision of no mean importance.

A. G. HISCOCK

## THE QUEEN v. McKAY [1]

*Criminal Law—Justifiable Homicide—Prevention of a Felony or a Felon's Escape*

The appellant shot at and killed a nocturnal intruder whom he caught stealing fowls from a family poultry farm on which he lived as caretaker with his wife and family. Fowls had frequently been stolen both from this farm and from others in the district. He was convicted of manslaughter before Barry J. and a jury; his substantive appeal to the Full Court was dismissed,[2] although his sentence was reduced.

The appeal raised many of the less certain aspects of justifiable homicide. The trial judge had directed the jury that 'a man is entitled to use such force as is reasonable in the circumstances to prevent the theft of his property, but he is not permitted under the law to take the life of a thief . . . when the thief has not shown violence or an intention to use violence'. He had also referred to the right of a citizen to apprehend a felon and to use reasonable force in so doing, provided that 'he must not use that occasion to give expression to spleen or feelings of revenge or resentment' so that if he does use the occasion for the satisfaction of some private grievance, and in so doing kills, he will be guilty of murder. If however he uses more force than is reasonably necessary and kills, but acts honestly, he only commits manslaughter.[3]

The appellant sought to argue in the main that (a) the trial judge

[1] [1957] Argus L.R. 648. Supreme Court of Victoria; Lowe, Dean and Smith, JJ.
[2] Smith J. dissenting.
[3] [1957] Argus L.R. 648, 650-651 *per* Lowe J.