THE EMPLOYER'S DUTY TO INSURE
LISTER v. *ROMFORD ICE AND COLD STORAGE CO. LTD.*

The House of Lords, in the recent decision of *Lister* v. *Romford Ice and Cold Storage Co. Limited*[1] dealt with two matters of vital interest to both employers and employees. They were, firstly, the employee's duty of care arising out of the contract of service and, secondly, the employer's duty to insure his employees against claims made on them for injuries suffered by fellow employees or third parties.

The appellant was a lorry driver employed by the respondent Company. While reversing the lorry the appellant ran over and injured his father, also an employee of the Company. The father recovered damages[2] against the Company[3] in respect of the appellant's negligent act. The Company, however, held two insurance policies, a Lloyd's employer's liability policy and a motor vehicle third party insurance policy. The latter policy was of no benefit to the Company in the present case[4] but the Lloyd's policy covered them against claims such as the father had made. The insurance company paid the damages awarded to the father and, exercising the express power of subrogation contained in the policy,[5] sued the appellant in the Company's name. It claimed contribution from the appellant as a joint tortfeasor under the Law Reform (Married Women and Tortfeasors) Act, 1935[6] or alternatively damages for breach of an implied term in the appellant's contract to use reasonable care and skill in driving the lorry.

Judgment was given for the respondent Company on the latter ground by Ormerod, J. and this decision was affirmed in the Court of Appeal[7] (Denning, L. J. dissenting). The House of Lords dismissed the present appeal affirming the existence of an implied term in the contract that the appellant would perform his duties with proper care, and denying that there was any obligation cast on the employer to insure his employees against risks of financial loss. However, with great respect, the House appears to have adopted an unsatisfactory approach in its solution of these problems.

(i) *The Contract of Service and the Implied Term of Reasonable Care.*

The House of Lords held unanimously that there was implied, in the contract of service, a term that the driver would perform his duties with proper care. It decisively rejected Denning, L. J.'s proposition[8] that the servant did not owe a contractual duty of care to his master but that actions

[1] (1957) 2 W.L.R. 158.

[2] McNair, J. found the father one-third to blame and the son two-thirds. Total damages were assessed at £2,400 and judgment entered for the father for £1,600 and costs.

[3] The Company was only vicariously liable. Had there been any evidence of negligence on the Company's part then the situation could have been quite different. However, the present Note is limited to circumstances where the employer is only vicariously liable.

[4] The third party policy did not cover the employer since it did not provide insurance against injury caused by one servant to another servant of the same employer as this was not compulsory under the Road Traffic Act, 1930. Furthermore it is doubtful whether the policy could have been invoked had the injured person been a third party and not an employee since the accident occurred in a yard and not on a "road" within the meaning of the Act.

[5] Condition 2 of the policy gave the underwriters power "to prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise, and full discretion in the conduct of any proceedings and in the settlement of any claim . . . ".

[6] Section 6; The provision is similar to s. 5(1)(c) of the Law Reform (Miscellaneous Provisions) Act (N.S.W.), Act No. 33, 1946.

[7] (1955) 3 All E.R. 460 (C.A.).

[8] *Supra* at 465.

such as this must be grounded in tort.[9]

Their Lordships' view, although apparently well-established in law,[10] may prove most unsatisfactory to the employee. Viscount Simonds and Lord Somervell of Harrow both relied on the test propounded by Willes, J. in *Harmer* v. *Cornelius*,[11] namely, that every employee impliedly warrants that he is of a skill reasonably competent for the task he undertakes. Viscount Simonds asserted that this test, as a proposition of law, had never been questioned. *Harmer* v. *Cornelius*, however, was decided almost one hundred years ago and it is submitted that the test applied in that case cannot by analogy be made the criterion at the present time. The magnitude of responsibility cast on machine operators or drivers is so vast that a mere distraction or momentary slip can give rise to a claim by a third person, running to thousands of pounds. It seems inconceivable that the employee should, on the basis that he has breached his contract, be held liable for heavy damages arising in this way.[12] Their Lordships, moreover, seem to take the view that any injury caused by the employee is evidence of lack of skill, a view which is quite incompatible with the present industrial system.

(ii) *The Problem of Insurance.*

Whereas the House of Lords was unanimous in relation to the first problem, there was a division of opinion as to the duty cast on the employer to insure the employee against claims for injuries suffered by third parties as a result of lack of proper care by the employee in the course of his employment.

The majority (Viscount Simonds, Lord Morton of Henryton and Lord Tucker) denied the existence of any term in the contract of service whereby the driver was entitled to be indemnified by the Company if it was insured, or if, as a reasonable and prudent person, it ought to have insured.[13]

The minority (Lord Radcliffe and Lord Somervell of Harrow), on the other hand, claimed that there was an implied term in the contract to the effect that the employee would be insured against any third party liability. Accordingly they held that neither the employer nor the insurers could sue the driver.

The majority of the House was primarily concerned as to whether a term could be implied in the contract of employment entitling the employee to the benefit of any contract of insurance effected by the employer and covering his liability to third parties or to other employees.

Viscount Simonds rejected such a notion, however, considering it irrelevant to the master's right to sue the servant (for breach of contract) that he was insured against the consequence of the servant's wrongful acts. His Lordship cited *Mason* v. *Sainsbury*[14] as authority for this proposition.[15] That case, however, was decided almost two hundred years ago, and in relying on such old authority Viscount Simonds would appear to have neglected the changed nature of modern industrial conditions. In particular, he may be

[9] "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 breach of that duty founds an action for damages for breach of contract" *per* Viscount Simonds (1957) 2 W.L.R. 157 at 165.

[10] This principle has been applied by the N.S.W. Full Supreme Court in *Davenport* v. *Commissioner for Railways; Cuthbert, Third Party* (1953) 53 S.R. (N.S.W.) 552.

[11] (1858) 5 C.B. (N.S.) 236 at 246.

[12] It seems that two different standards of proof could arise depending on whether the employee was sued in tort for negligence or in damages for breach of contract. Apparently any injury caused by an employee would be in breach of his contract since he would not be exercising the skill which he had undertaken to possess.

[13] This was the main plea raised by the appellant.

[14] (1782) 3 Dougl. 61.

[15] "In determining the right *inter se* of A and B the fact that one or other of them is insured is to be disregarded". *Per* Viscount Simonds (1957) 2 W.L.R. at 168.

said to have overlooked the virtual necessity for employers to insure themselves against claims by third parties for injuries caused by their employees. Even if he had accepted the existence of such an implied term, Viscount Simonds would have limited its application to cases where the employer was actually insured and would not have regarded it as imposing any duty on the employer to insure his employees against the consequences of their wrongful acts. But today's complex industrial conditions have in actual fact brought in their wake a very real need for employers to insure themselves against heavy financial losses resulting from their employees' negligence. Whilst the employer's liability policy is not a compulsory form of insurance, there would be few employers today who were not so covered. It is difficult, therefore, to comprehend why the employee should not be entitled to claim the benefit of such insurance in the light of present-day industrial circumstances and of the ever-growing importance of insurance as a means of warding off possible financial ruin.

Indeed, this would appear to have been the attitude of the respondent Company in the present case. It is quite clear that their name was used only as a formal party, the true plaintiff being the insurance company, yet Lord Morton of Henryton[16] and Lord Tucker[17] denied an implied term of "benefit of insurance" on the very basis that it would defeat the insurer's right of subrogation. Their view raises the question whether, in the present case, the insurer's right of subrogation was not extended beyond its true limits. It is submitted that the relationship of employer and employee is a special one since the employer is insuring himself against any possible claims arising out of his employee's acts. It is a contradiction in terms to say that the employee should not be entitled to claim the benefit of such insurance, but that he should be left to the insurer's mercy.

Lord Radcliffe was of the opinion that the employee was entitled to be protected by insurance for any third party liability and that such insurance should not be limited by a strict interpretation of the Road Traffic Act. Moreover, both employer and employee fully realised that a sum had been set aside to cover this liability and in this case it would not be unfair to bind the insurers to such a term, since the person to whose rights they were subrogated had recognised the existence of such a fund. It is to be noted that Lord Radcliffe was limiting the protection of insurance to the special case of third party liability; he did not seek to extend the principle to cover all acts of the employee which did not touch the question of third party liability.

Lord Sommervell of Harrow was of opinion that the employer should protect the employee's resources by insurance in order to make the contract operative in the light of present-day conditions. He did not state that the implied term was to be limited to third party liability and it would seem that in his view such a term could be extended to cover any liability resulting from the employee's acts in the course of his employment.

In the course of their dissenting judgments, Lord Radcliffe[18] and Lord Somervell of Harrow[19] both drew attention to the anomaly which existed in relation to the third party policy, a factor which the majority did not consider. That policy contained a "third party extension" giving the driver a direct call for indemnity from the insurers, if he became liable to a third party for damages arising from his driving. If the employee were sued first he could call on the insurers to provide the fund for the damages required but if action were first brought against the employer the insurer could claim any amount paid by him from the employee. The policy was not applicable in the present case[20] but it would appear that were a term of "benefit of insurance" implied in the contract of service this anomaly would disappear

[16] (1957) 2 W.L.R. at 174. [17] *Supra* at 182. [18] *Supra* at 179.
[19] *Supra* at 188. [20] See *supra* n.4.

and the employee would be adequately protected.

Lister's Case[21] could have the result of placing the employee's resources in a very precarious position were similar actions to be brought in the future by insurance companies. Professor Parsons[22] has suggested that the decision would be used as a bargaining weapon to induce employees to accept workers' compensation rather than seek damages at common law since the latter course could expose the fellow employee to risks of heavy financial outlays. A more likely result is that insurance companies might use their right of subrogation very sparingly for fear that the unions might resort to widespread industrial action to protect their members' finances.[23]

The majority felt that to imply any term of protective insurance in the employee's favour would create a feeling of irresponsibility on the part of the employee. However, until the present case, insurance companies had never exercised this right of subrogation against employees and it could not be said that there was any general feeling of complacency among the working community. There are in existence certain sanctions such as the threat of dismissal, the loss of character and the difficulty of obtaining fresh employment which are, no doubt, sufficient restraints on the employee.

The decision, however, is a marked victory for the insurance companies. It was not unanimous and it may well be that the question will be raised again in the near future. The recent elevation of Lord Denning to the House of Lords has given supporters of enterprise liability hope that the decision in this case will be applied very restrictively. It must remain for the Legislature, however, to eradicate this unsatisfactory aspect of the law of employer and employee.

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SUBMISSION TO THE JURISDICTION OF A FOREIGN COURT

IN RE A. LUND & CO. (BILDEN TEXTILES) LTD. A. LUND & CO. (BILDEN TEXTILES) LTD. v. *WEMBLEY WEAR PTY. LTD.*

One of the broad rules of English and New South Wales private international law is that a court has jurisdiction in an action *in personam* if the defendant has been served within its jurisdiction or if he has submitted to its jurisdiction. Conversely, we (in England and in New South Wales) recognise that a foreign court has jurisdiction in the international sense if the defendant was served within its jurisdiction or submitted to it,[2] no distinction being drawn between what constitutes a submission to our own court's jurisdiction (apart from any special domestic legislation) and what constitutes a submission to a foreign court's jurisdiction.[3] The problem thus arises as to what constitutes a submission.

Analogous questions have arisen in other branches of the law and been satisfactorily answered. One example is drawn from the old group of cases which discussed the situation arising when a plaintiff obtained a rule for a special jury, and a common jury panel was returned together with a special jury panel, but, no special jurors appearing, the cause was tried before a common jury. This situation arose in *R.* v. *Franklin*[4] where it was held that if

[21] (1957) 2 W.L.R. 158.

[22] R. W. Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 *A.L.J.* 714 at 719.

[23] The attitude of the Transport Workers' Union could be well imagined were actions of this kind consistently taken against its members.

[1] N.S.W. Supreme Court, not yet reported; heard at first instance before Kinsella, J. in May 1956 and on appeal to the Full Court (Street, C. J., Owen and Walsh,, JJ.) on 18th June, 1957.

[2] G. C. Cheshire, *Private International Law* (4 ed. 1952) 97-103.

[3] *Id.* 602-609.

[4] Cited (1793) 5 T.R. 456.