VICARIOUS LIABILITY AND THE STANDARD OF CARE

C.E. DANIELL LTD. v. VELEKOU, [1955] N.Z.L.R. 645, C.A.

A master is bound to exercise "the care which an ordinary prudent employer would take in all the circumstances": per Lord Oaksey in Paris v. Stepney Borough Council, [1951] A.C. 367, 384; but what standard of care are workmen (for whom a master is vicariously liable) bound to exercise towards one another in the course of their employment? C.E. Daniell Ltd. v. Velekou (supra) involved a consideration of the proposition that the standard of care owed by a master towards his servants is higher than the standard of care required of workmen towards one another in the course of their employment.

A workman was employed as a millhand. While assisting in the operation of a breaking-down saw he slipped on the bench in such a manner that the saw cut into his right foot causing substantial injury. The workman alleged that his employer was negligent in not providing a safe system of work. It was further alleged that the headman working on the bench with the plaintiff was negligent in not withdrawing the bench far enough away from the saw.

It was sought to hold the master responsible in two ways, first for his own negligence and secondly for the negligence of his servant. The problem of the case was to determine what standard of care should be applied in regard to each of these grounds of liability. In other words, what test is to be applied in determining the standard of care required of a master towards his servants, and what standard of care are the workmen bound to exercise towards each other? The first is a question of a duty that is personal to the employer, the second is a question of vicarious liability. In the words of Lord Morton of Henryton in Staveley Iron and Chemical Co. Ltd. v. Jones, [1956] A.C. 627, 639:

> Cases such as this where an employer's liability is vicarious, 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.

In the present case it was sought to place liability on the employer on both grounds. At the trial Fair J. directed the jury that an employer was bound to exercise a high standard of care, and by implication directed them that the standard of care incumbent on a servant (for whose conduct the employer was vicariously liable) was the same.

In the judgment of the Court of Appeal (Cooke and Turner JJ.) a distinction is drawn between the master's sphere of responsibility and the servant's sphere. It is difficult to know where to draw the line between these two spheres, but if the act is one which is commonly repeated in the course of the day's work it is not within the employer's sphere. It was held that the standard of care is higher within the master's sphere than within the servant's sphere.

Cooke J., in whose judgment Turner J. concurred, said at 667:

> . . . I think the evidence plainly shows that Fisher's failure to see that on this occasion the log was withdrawn to that distance was a failure to do something in an operation that is commonly repeated many times daily and that must, in the circumstances, be regarded as a matter falling within the servant's province of duty rather than within the master's province of duty, and, therefore, as a matter that could have constituted nothing more than what is known as casual negligence.

Later Cooke J. said:

> In order, however, to determine whether he was negligent or not, the jury was invited to apply the "high" standard already referred to. This standard could, I think, be applicable only to an act that Fisher was performing in the execution of his employer's duty to

provide and maintain a safe system, that is to say, to an act that fell within the employer's province of duty. It was too strict a standard to apply to an act that could not constitute anything more than casual negligence.

Support for this view was found in Winter v. Cardiff Rural District Council, [1950] 1 All E.R. 819, where Lord Oaksey drew a distinction between the "master's sphere" and the "servant's sphere". Winter's case was, however, a decision on the doctrine of common employment. It is respectfully submitted that the terms "the master's sphere" and "the servant's sphere" were incorrectly applied in the case under review.

In Wilson and Clyde Coal Co. Ltd. v. English, [1938] A.C. 57, it was laid down by the House of Lords that a master's common law duties were three-fold: (1) to provide proper plant and appliances; (2) to provide a safe system of work, and (3) to provide a competent staff of men. It was further held that the employer could not escape this responsibility by delegating it to a servant. The duty was personal to him, and if there had been a breach of that duty the employer was responsible.

The problem in Winter's case (supra) was to determine whether the negligence complained of could be regarded as a delegation of the master's personal duty. It was held by the House of Lords that the accident resulted from a "casual act" of negligence for which the employer was not responsible. Lord Oaksey drew a distinction between the "master's sphere" and the "servant's sphere" of responsibility. He applied the test referred to earlier, namely, that where the act is one which is commonly repeated by a workman in the course of his duty then that act is not the employer's responsibility. The use of these terms was no more than a convenient means of distinguishing a breach of the employer's common law duties, for which he was liable, from casual acts by servants for which he was not.

Winter's case (supra) becomes clearer on an examination of the doctrine of common employment. Before 1936 in New

Zealand, and before 1948 in England, an employer was not liable to his employee for injury caused by the negligent act of another of his employees where the accident arose out of common employment. The basis of the doctrine was that a worker was taken to have consented to the risks, incidental to working with other men. This was an implied term in the contract of service. Some of the rigours of the rule were overcome by judicial ingenuity, but it nevertheless stood firm as part of the common law. Section 18 (1) of the Law Reform Act 1936 provided:

> Where any injury or damage is suffered by a servant by reason of the negligence of a fellow-servant, the employer of those servants shall be liable in damages in respect of that injury or damage in the same manner and in the same cases as if those servants had not been engaged in common employment.

The section thus abolished the defence of common employment and made an employer liable for any negligent act of an employee where another workman was injured. It is respectfully submitted that the need to distinguish between the "master's sphere" and the "servant's sphere" has vanished with the defence of common employment. If Lord Oaksey's dictum is retained and with it the consequences attached to it by the learned Judges in the case under review the doctrine of common employment will be with us in a new guise. "But if the law were now to begin to make allowances for the mistakes of fellow workmen . . . we should soon have the doctrine of common employment back again in a new dress. That cannot be right": per Denning L.J. in Jones v. Staveley Iron and Chemical Co. Ltd., [1955] 1 Q.B. 474, 480.(1)

Prior to the Law Reform Act 1936, a master was liable vicariously for the negligent acts of his servants where a stranger was injured but not where another servant was injured. With the abolition of the doctrine of common employment servant and stranger are in the same position. Support for the view being advanced can be found in Salmond on Torts (11th ed.), 131:

> The reason for drawing a distinction between a failure to take reasonable care to provide proper plant and a

> safe system of work (for which the master was personally responsible) and an isolated act of negligence by a fellow-servant (for which the master was not) has disappeared with the defence of common employment itself. The master is now vicariously liable for all negligent acts of his servants and it seems irrelevant that the plaintiff is a fellow servant and not a stranger.

It is submitted that the master's liability in respect of acts of his servants reduces itself to a question of negligence. Does the servant's act which brought about the accident amount to negligence? If it does, the employer is vicariously liable.

It may now be asked what test is to be applied in determining whether a servant has been negligent. In conformity with the ordinary rules of negligence the test is this: is the act one which a prudent or reasonable servant would have done in the circumstances? If not, the workman has been negligent, and for this negligence the employer is vicariously liable. The fact that the relationship between the person who was negligent and the person who was injured is that of fellow workmen, is irrelevant. It seems to be well settled that what the law requires is such care as is reasonable in the circumstances and it is submitted with great respect that there is no reason why that test should not have been applied in the case under review.

A considerable amount of difficulty was experienced in the case under review with Lord Porter's dictum in Winter's case (supra). Lord Porter in that case said (at p. 822):

> The duty cast on the master is, of course, not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. As the law stands, that duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adopted to meet the particular circumstances of the case. Undoubtedly, such an obligation may be imposed on the employer if the circumstances require it. . . .

As has been said earlier Fair J. directed the jury that an employer was bound to exercise a "high" standard of care. Finlay J. in the Court of Appeal held that the summing-up would lead the jury to believe that, in determining what was reasonable in any of the circumstances giving rise to liability, they should fix a standard sufficiently exacting to justify the application to it of the adjective "high". That might be a standard higher than a reasonable standard. This, he held, constituted a misdirection in law. Finlay J. thus held that there was in law no high standard of care such as was alluded to by Fair J. in his direction to the jury. He then said (at p. 658):

> That was not, I apprehend, what Lord Porter meant by his use of the word "high" in the course of his judgment in Winter v. Cardiff Rural District Council, [1950] 1 All E.R. 819. There was no intention on his part, I am sure, to establish any new standard of care or any standard of care beyond the ordinary. The phrase "high standard" as used by the learned Law Lord seems to me to have been used descriptively in respect of the ordinary standard required by law.

Later Finlay J. said:

> As a matter of definition, [the standard] is neither higher nor lower today than when Smith v. Baker & Sons, [1891] A.C. 325 was decided. More may be required to satisfy the standard, but the standard remains the same.

Cooke J. did not find it necessary to consider the effect or meaning of the word "high" as used by Lord Porter in Winter's case (supra). He apparently held, however, (at p. 668) that the current of authority contains much to support the view that the exercise of such care as is reasonable in all the circumstances of the case is the standard that still holds the field. This is rather surprising for he also holds that the "high standard" of care applies to the employer's but not to the employee's sphere of responsibility. There are thus two conflicting statements and it would seem that it is impossible to reconcile them. It is submitted that Cooke J.'s view that the standard of care is one of reasonableness in all the circumstances of the case is

preferable to his former statement that a "high" standard of care applies in the master's sphere of responsibility.

Lord Porter seems to have been the only Law Lord to use the phrase "high standard" in Winter v. Cardiff Rural District Council. The members of the House simply held that the standard was one of reasonable care. In his judgment in the case under review, Finlay J. is at pains to show that no new standard has arisen and that it is still one of reasonableness. It is submitted that the correct view is that expressed by Lord Oaksey in Paris v. Stepney Borough Council, [1951] A.C. 367, quoted at the beginning of this note, that a master is bound to exercise the care which an ordinary prudent employer would take in all the circumstances.

Instead of two spheres of responsibility, one for employer and one for employee, it is submitted that since the abolition of the defence of common employment there is but one question, and that is one of negligence. Has the employer or the employee (for whom the master is vicariously liable) been negligent? If so, the master is responsible. The test in determining whether a master or servant has been negligent, it is submitted, is the same: the standard of care that the law requires is such care as is reasonable in all the circumstances of the case.

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(1) There is a discrepancy between the Queen's Bench Report quoted here and the All England Report [1955] 1 All E.R. 6, 8. The discrepancy is not, however, material to the meaning of the words quoted.