THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

CASE AND COMMENT

MASTER AND SERVANT—LIABILITY OF MASTER FOR TORTS OF SERVANT—RIGHT TO CONTROL.—In a recent comment in this REVIEW on a master's liability for the torts of his servant, it was stated that "while the English cases insist that the 'right to control' along with 'scope of employment' are the two elements which must be considered in the imposition of liability, it is doubtful whether the control test can be satisfactorily applied in many cases."[1] A number of cases, lately reported in Canada and in England, are of considerable interest in this connection.

In *Tulley* v. *Genbey and Bank of Toronto*,[2] G caused a collision in endeavouring to pass a truck in which the plaintiff was riding. For some three years the manager of a branch of defendant bank had been in the habit of calling G when it was necessary to send messengers to the main office for cash for use in the branch. G used his own car which he drove himself. He would drive to the branch to meet some of its employees and drive them to the main office. There he would wait for them to come out and drive them back. It was while G was engaged on one of these trips that the accident happened. McPherson C.J. gave judgment against both defendants. He held that G was hired by the bank, was subject to dismissal by it and subject to its instructions while in its employment, and that it was while performing the services of his employment that he damaged plaintiff through his negligence.[3] It is arguable, however, that

[1] C. A. W[right] (1937), 15 Can. Bar Rev. 285, 291.

[2] [1938] 3 D.L.R. 410 (Man. K.B.).

[3] In *Driscoll* v. *Towle*, 181 Mass. 416, defendant who hired a horse and driver was held liable for damages caused by the driver. *Cf. Kerr* v. *Bright & Co.*, [1937] O.W.N. 121, [1937] 2 D.L.R. 153, discussed in 15 Can. Bar Rev. 285.

G was engaged in an enterprise of his own (he was paid a certain amount for each time that he was engaged by the bank manager) and that the defendant bank should not have to respond for his negligence any more than a person who hires a taxi should have to respond for the negligence of the taxi driver,[3A] unless there has been an understanding or agreement that the taxi driver should, even *qua* driving, be deemed to be in the passenger's employment.

This approach is indicated in *Clelland* v. *Edward Lloyd, Ltd.*[4] E. Co. were the electrical contractors on a new power house which was being erected by defendants. Defendants told their electrical apprentices to work with E Co. One of them, M, worked under the orders of J, a foreman of E Co. Plaintiff was injured because a scaffolding put up by M on J's instructions contained a defective plank. The important question for decision was whether M was, at the time of the accident, the servant of the defendants or of E Co.[5] Goddard J., pointed out :[6]

> In one sense it is perfectly true to say in the present case that the person who had the control of the doing of the act at the material time was J. who was in the employ of the E. Co., but . . . . . in all the cases that have been decided upon this point, when one examines the facts one finds that there has been a bargain or agreement, although it may be a gratuitous one, for the servant of one person to be employed by another person.

There was no evidence that E Co. asked for M either by name or by asking for the services of another man. Defendants were really using J "as a means of carrying out their duties of instructing their apprentice M. They sent M to work alongside J, and of course M did what J told him."[7] Accordingly, M remained defendants' servant.

[3A] The taxi company must be taken to expect that its driver will be subject to certain incidental orders of the hirer, but the driver is nevertheless on the business of the taxi company. *Cf. Quarman* v. *Burnett* (1840), 6 M. & W. 499.

[4] [1938] 1 K.B. 272.

[5] Per Goddard J. at p. 27: "It is quite true that there are authorities which say that if one man lends his servant to another, even gratuitously, then, for the purpose of responsibility arising out of the servant's acts, the person who has control of the servant at the time, that is to say, the contractor, the employer, or the master, whichever word you like to use, to whom the servant is lent, is responsible for that servant's act." *Bain* v. *Central Vermont Ry.*, [1921] 2 A.C. 412; *Donovan* v. *Laing Syndicate*, [1893] 1 Q.B. 629.

[6] [1938] 1 K.B. 272, 277.

[7] *Ibid.* The *Bain* and *Donovan Cases, supra*, note 5, were distinguished accordingly. *Cf. Jones* v. *Scullard*, [1898] 2 Q.B. 565, where defendant, owner of a brougham, hired a driver who wore his livery at the material time. It was held that the driver was defendant's servant.

The *Clelland Case* may be compared with *Willard* v. *Whiteley, Ltd.*[8] In this case, defendants, for the purposes of their business, hired a lorry with a driver from the plaintiff. They paid a lump sum for the hiring and could order the driver to go where they wanted him to go and at times they desired. They had no power to dismiss him, however, and any complaints were to be made to the plaintiff who continued to pay his wages. The hired lorry driven by the hired driver met with an accident. The County Judge, in determining whose servant the driver was, applied the test of whether or not defendants were entitled to dismiss the driver. On appeal to the Court of Appeal, Greer, L.J. said :[9]

> One of the tests is whether at the time the alleged master could have discharged the servant. If he was only entitled to complain to his real master, it seems to me to go a long way towards showing that he remained the servant of his general master, and was not lent to [defendants] as their servant.

The conclusion was that defendants had no power to discharge the driver and had no right of control over him.[10] The decision amounts to saying, however, that the plaintiff for his own purposes instructed his servant to obey the orders of defendants, but it was the plaintiff who had ultimate authority over him.[11] Although defendants had "control" over the driver's physical acts, they were not obliged to answer for damage caused by him. On the other hand, in *Cannon* v. *Donnacona Paper Co.*,[11A] the owner of an automobile was held responsible for the negligent driving of a chauffeur whom he had hired from a garage to drive his car. The chauffeur was paid his regular salary by the garage and the owner paid the garage for the services. There is difficulty, therefore, in applying the "control" test in those cases where an individual, in carrying out an enterprise of his

[8] [1938] 3 All E.R. 779.

[9] *Ibid.*, at p. 780.

[10] Greer L.J. declared that if there was anything inconsistent in *Leggott* (G. *W.*) *& Son* v. *Normanton* (*C. H.*) *& Son* (1928), 98 L.J. K.B. 145, he disagreed with it. In that case, defendants hired an engine and trailer with driver from plaintiffs. The driver was to take orders from defendants. Owing to his negligent driving, the engine and trailer became stuck in a tunnel under an aqueduct, and a cement-mixer belonging to defendants, which was being carried on the trailer to a village, under defendants' instructions, was damaged. Plaintiffs claimed expenses incurred in respect of the engine and trailer and defendants counterclaimed for damages to the cement mixer. It was held that although the driver was the general servant of plaintiffs, he was at the time of the accident in the defendants' control. *Quaere?* Was not the driving an incident of plaintiffs' business?

[11] *Cf.* Goodhart, *Hospitals and Trained Nurses* (1938), 54 L.Q. Rev. 553, 567.

[11A] (1937), Q.R. 57 S.C. 349. *Cf. Quarman* v. *Burnett* (1840), 6 M. & W. 499.

own, subjects himself or a servant of his to the temporary direction of another whose business also benefits from the services given.[12]

In *Jarry* v. *Pelletier*,[13] the Supreme Court of Canada dealt with a Quebec "automobile salesman" case.[14] B was employed by appellants on commission. It was their custom to supply salesmen with used cars which the salesmen were to try to sell. Appellants looked after repairs but the salesmen paid for the gasoline. B and other salesmen were engaged to drive around (practically day and night) to demonstrate the qualities of used cars in order to sell them to persons who, in the course of these rounds, could be interested and become prospective purchasers. B sold a car belonging to D to one T, and while driving T in appellant's car to D's place, to put on the license plates which had been procured, an accident occurred. The trial Judge found that B had not been prohibited from selling cars other than those of appellants.[15] In dismissing an appeal from a decision affirming a judgment that appellants were liable for the damage caused by B, Cannon J, for the Court, held that at the time of the accident B "was actually the agent of the appellants whose car he was driving in the course of his duties. It cannot be said that he was using it exclusively for his own purposes; and besides, it seems evident that the appellants allowed him the most absolute discretion as to the use he could make of the car."[16]

The decision of the Supreme Court of Canada in *Dallas* v. *Hinton and Home Oil Distributors, Ltd.*,[17] may be contrasted

[12] See HARPER on TORTS, sec. 291, p. 640: "The principle which imposes liability upon the master for tort done while the servant is acting within the range of the employment is based primarily upon the social policy of putting the burden of an enterprise upon him for whose *immediate* benefit the project is being carried out and such person's superior ability to administer the risk. These burdens include risks from all tortious acts incident to the means and agencies which are employed to bring about the master's desires."

[13] [1938] 2 D.L.R. 645.

[14] Article 1054 of the Quebec Civil Code reads: "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."

[15] The Supreme Court of Canada held that even if this defence had been received it would be necessary to make the distinction pointed out by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.*, [1914] A.C. 62, 67: "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

[16] [1938] 2 D.L.R. 645, 649.

[17] [1938] S.C.R. 244.

with the *Jarry Case.* In the *Dallas Case* the salesman drove his own car in carrying out his duties of selling his employer's products, while in the *Jarry Case* he was supplied with a car which he was to sell.[18] H was employed to sell defendant company's products in New Westminster district. The company's office was in Vancouver where H reported during the week, and generally he phoned daily. His hours were from 8.30 a.m. to 5 p.m., and the company did not, as a rule, ask its salesmen to work after hours. H used his own car, but his employers paid for his license and for necessary repairs, and supplied him with gasoline and oil. A message was left for H at the company's office informing him that certain lectures were to be given in the evening of named days and "that you are expected to attend." The evidence was that attendance was desirable but not compulsory. H drove to Vancouver to attend a lecture and on his way home, after 9 p.m., became involved in an accident. The Supreme Court of Canada affirmed the judgment of the British Columbia Court of Appeal, exonerating the company from liability. Hudson J., speaking for the Court, used the following language :[19]

> In our opinion, the question we have to consider is whether or not H. was on *his master's business* at the moment of the accident. He had gone to the lecture on his master's invitation and, at least to some extent, for his master's benefit. The area of his business was some miles away and he had to return there in order to resume his work, but his home was also in the area of his business. It was a place of residence of his own choice, not that of his master. After leaving the meeting his day's work was done; he was free to do as he pleased and free to go home without any further control or direction from his master as to the route, mode of transportation or otherwise. His only obligation was to be at work in New Westminster the next morning at 8.30 a.m. Under these circumstances *we cannot hold that H. was under any control of his masters* so as to render them liable for his negligence. . . . .[20]

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[18] *Cf. Duffield* v. *Peers* (1916), 37 O.L.R. 652.

[19] [1938] S.C.R. 244, 252.

[20] Most of the authorities cited by Hudson J. in support of his decision, were workmen's compensation decisions. "Scope of employment" in relation to a claim for compensation under a statute may be quite a different question than "scope of employment" for the purpose of determining a master's liability to third persons. And while it would seem that a more liberal construction should be put on the term in respect of statutory compensation, the (English) cases cited by Hudson J. do not indicate this. For example, Lord Atkin stated in *Blee* v. *London and Northeastern Ry.*, [1938] A.C. 126; "There can be no question that had the workman been going to his ordinary work in the morning he would not have been entitled to compensation for injury suffered from street risks incurred in transit. His time in such a case is his own; he arrives at the scene of his labours as he pleases; and though it is his duty to present himself at the appointed time, yet his 'employment' does not in ordinary circumstances begin for the purposes of the [Compensation] Act until he

His Lordship's inquiry as to whether H was "on his master's business", and his conclusion that it could not be held that H was "under any control of his masters" appear to suggest that the test of "control" is merely a conclusion or an *ex post facto* explanation based on a delimitation of the "scope of employment" or the acts which the Court includes as risks assumed by the employer in hiring another as his servant.[21]

From an elementary point of view, two questions seem always to be involved in deciding whether one person should answer for damage occasioned by another. First, is that other a servant? This question assumes a classification under which persons who are servants, as distinguished from independent contractors, make their employers liable for their physical acts.[22] Second, for what acts of his servant must the employer respond? The answer to this question has come to depend not only on a formal analysis of the duties which the servant is engaged to perform but also on an investigation of the social desirability of placing the burden on the employer or the innocent injured party (assuming, as is nearly always the case, that the servant is financially irresponsible).[23] The *Dallas* decision seems questionable in this respect. Undoubtedly, however, the Court was troubled by the problem of where a master's liability would stop if it should be held not only that the servant's trip from his home to the area of his business but also his trip therefrom

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reaches the place where he is employed." Lord Russell declared in *Alderman* v. *Great Western Ry.*, [1937] A.C. 454, 461: " . . . . . there is no case in the books, or at all events none was cited, in which such an one meeting with an accident when merely on his way to or from his work has been held entitled to compensation. In order to entitle him to compensation in such a case some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred." After discussing the compensation cases, Hudson J. remarked ([1938] S.C.R. 244, 252): "The question whether the given act of an employee is within the scope of his employment, in the sense in which that phrase is used for the purpose of determining the employer's liability to third persons, is, strictly, not the same question as the question whether an injury by an employee at a given moment in given circumstances was an injury received in the course of his employment for the purposes of applying the Workmen's Compensation Act. Nevertheless, judicial reasoning in respect of the latter class of questions may be, and in the circumstances of this case is, valuable and illuminating."

[21] *Cf.* C. A. W[right] in (1937), 15 Can. Bar Rev. 285, 292: ". . . control is a legal conclusion which follows from a decision on wider grounds." This was said in reference to a statement in SALMOND on TORTS, 9th ed., 92, made in criticising *Parker* v. *Miller* (1926), 42 T.L.R. 408, as follows: "For control means that the journey is the journey of the principal."

[22] See (1937), 15 Can. Bar Rev. 285, 289.

[23] *Cf.* Rowell C.J.O. in *Kerr* v. *T. G. Bright & Co.*, [1937] O.W.N. 121, 127.

to his home were risks of the master.[24] That such a holding would lead the way towards bringing more remote acts within the ambit of the master's responsibility is obvious, but that alone would not justify its rejection. Certainly there is much to warrant the holding in a case where the employer encourages the use of automobiles by his salesmen by contributing to their maintenance. Ordinarily he would not do so unless he believed that his business would benefit, and moreover, the expense entailed is generally passed on to the public.

A majority of the Ontario Court of Appeal found that the *Dallas Case* relieved them from a likely difficulty in arriving at a decision in *Hoar* v. *Wallace*.[25] W, an engineer, was employed by defendants, The Viking Sprinkler Co., for automatic sprinkling instalation and was paid a weekly salary. Generally he performed his duties in the office of the company in Toronto; his hours were from 9 a.m. to 5 p.m. Often, however, he was sent out of the city. In such cases he used his own car, having an arrangement with the company to be paid ordinary railway fare to and from his destination. The company sent him to Peterborough on business. He drove there in his car, completed the work assigned and set out on the return trip in the afternoon of a certain day. At 5.10 p.m., while still some distance from Toronto, he damaged plaintiff's car. Riddell J.A., Henderson J.A. concurring, felt that the *Dallas Case* was conclusive in favour of the company. Since W had finished his work, he might do as he pleased in getting home; his only obligation was to be at work next morning. Fisher J.A. dissenting, pointed out that had the accident not happened W would have reached Toronto 5 p.m. and 6 p.m. He was justified in leaving for home since he reasonably expected to arrive by 5 p.m. or shortly thereafter. Accordingly, he had a right to continue his journey until he reached Toronto, although it be after 5 p.m., and that until he did reach it, he was acting in the ordinary course of business. It was incidental to W's mission that he was to return and report the result to his employers. Conceding the correctness of the *Dallas Case* that the employers involved in it had no control over H after the lecture or when and how he should go home, Fisher J.A. distinguished the case at hand on the ground

[24] *Cf. Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150; *Battisoni* v. *Thomas*, [1932] 1 D.L.R. 577; *Riley* v. *Standard Oil Co.* (1921), 231 N.Y. 301.

[25] [1938] O.W.N. 41. Per Riddell J.A., Henderson J.A. concurring, at p. 401: "If it were not for the judgment of the Supreme Court of Canada in *Dallas* v. *Hinton & Home Distributors, Ltd.*, [1938] S.C.R. 244, there might have been difficulty in arriving at a decision, a difficulty which is now removed by an authoritative statement of the law."

that it was not a matter of indifference to the company as to when and how W should return. The company had sent W on an outside job in the performance of which he might have to do something beyond 5 p.m. It knew that, and knew too that it was W's duty to return to Toronto in ordinary course and to report the result of his mission, and if after 5 p.m., at 9 a.m. the next day. Fisher J.A. concluded :[26]

> It seems idle for The Viking Company to argue, that if W. had completed his duties at Peterborough, say at 11 a.m. or 12 noon . . . . , it was not his duty to return until the next day, or if the person with whom W. was negotiating the business of the company detained him for say half an hour after five o'clock in order to complete the job that he would not during that half hour be engaged and acting in the ordinary course of his employment.

To relate the return journey to the working day of the employer invites technicality in decision. As Fisher J.A. suggested, if the employee acts reasonably, the sole question that remains is whether the employer should be charged with liability for the employee's act as an incident of the business on which the employee was sent. From this point of view, the decision in *Hoar* v. *Wallace*, if not also in *Dallas* v. *Hinton and Home Oil Distributors, Ltd.*, might well have been the other way.

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NEGLIGENCE — MANUFACTURER'S LIABILITY TO ULTIMATE CONSUMER — RES IPSA LOQUITUR. — *Daniels* v. *White & Sons*[1] comes as a surprise to those who thought that the decision of the Privy Council in *Grant* v. *Australian Knitting Mills, Limited*[2] had disposed of the obiter of Lord Macmillan in *Donoghue's Case*[3] and had established the principle that in actions of tort by a consumer against a manufacturer, for injuries caused by a latent defect in the latter's product, the defendant had to prove not only that his system of manufacture was efficient but that no employee of his had blundered.[4]

In *Daniels* v. *White* the plaintiff bought a sealed bottle of White's lemonade from a retailer, took it home and shared it with his wife. It was subsequently established that the bottle contained, in addition to the lemonade, a quantity of carbolic acid. *Donoghue's Case* decided, in the words of Lord Atkin

[26] *Ibid.*, p. 405.
[1] [1938] 4 All E.R. 258.
[2] [1936] A.C. 85.
[3] *McAlister (or Donoghue)* v. *Stevenson*, [1932] A.C. 85.
[4] Underhay, *Manufacturers' Liability* (1936), 14 Can. Bar Rev. 283.

which were quoted with approval by Lord Wright in *Grant's Case*, that,

> A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

From this statement it has been argued that if the manufacturer establishes that his system is modern and efficient he has satisfied his duty to take reasonable care. This apparently was the view taken by Lewis J. in the instant case when he dismissed the action against the manufacturer though giving judgment, with regret, against the retailer under section 14(2) of The Sale of Goods Act.[5] "I have to remember," he said, "that the duty owed to the consumer, or the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury." After describing the method of washing the bottles he continued : "That method has been described as fool-proof, and it seems to me a little difficult to say that if people supply a fool-proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity."

Contrast this with the statement of Lord Wright in *Grant's Case*.

> According to the evidence, the method of manufacture was correct. The danger of excess sulphites being left was recognized and was guarded against: the process was intended to be fool-proof. If excess sulphites were left in the garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances; even if the manufacturers could by apt evidence have rebutted that inference they have not done so.

As pointed out by Underhay[6] this brings the maximum *res ipsa loquitur* into play or, in other words, it forces the defendant to offer a reasonable explanation of how the defect in the particular article which damaged the plaintiff could exist without himself or his employees being negligent. In the instant case

[5] In Ontario, R.S.O. 1937, c. 180, s. 15(b).
[6] *Op. cit.*

the learned Judge did not go this far. "The only way," he said, "in which it might be said that the fool-proof machine was not sufficient was if it could be shown that the people who were working it were so incompetent that they did not give the fool-proof machine a chance." He then reviewed the evidence and concluded that there was adequate supervision of the bottle-washers and that this, plus the fool-proof method was sufficient to discharge any onus which might lie on the manufacturer to establish that they had exercised reasonable care. It is submitted, with respect, that employing competent persons and providing adequate supervision should not alone be sufficient to discharge the onus laid on the manufacturer if it is assumed that the presence of carbolic acid in the bottle establishes a prima facie case of negligence. An employer of bottle-washers is not in the position of, say, a hospital, which is not liable for the negligence of a surgeon employed by it if it has used reasonable care in choosing the surgeon. The employer of a bottle-washer is liable for the negligent acts and omissions of the bottle-washer and to rebut the presumption of negligence in a case such as the present the employer must surely show not only that he himself, in providing an allegedly fool-proof system was not negligent, but that all his employees who took part in the operation were not negligent. This, of course, would be practically impossible, and we are left with the proposition that the manufacturer must offer an explanation of how the defect could have arisen without himself or his employees being negligent.

Shandloff v. *City Dairy and Moscoe*[7] is the nearest comparable Ontario case, but the question whether the manufacturer must show that someone other than himself or his servant might have been negligent was not decided inasmuch as, in the words of Middleton J.A. who delivered the principal judgment, "The learned trial Judge himself inspecting the plant located the point in the course of manufacture where he thought sufficient care was not exercised." Taking the case as a whole, however, the impression is left that the court would have followed the *Grant Case* to its logical conclusion had it been necessary so to do.

It should be pointed out that in *Daniels* v. *White, Grant* v. *Australian Knitting Mills, Limited* was not referred to by the learned trial Judge, nor, apparently, was it cited to the Court by counsel. In view of the discussion which the case has provoked in English legal literature this seems amazing.

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[7] [1936] O.R. 579.