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Harvey v. R. G. O'Dell Ltd.

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HARVEY V. R. G. O'DELL LTD. — VICARIOUS LIABILITY — JOINT TORTFEASORS — MASTER'S RIGHT TO INDEMNITY FROM SERVANT — In the recent English case of *Harvey v. R. G. O'Dell Ltd.*,[1] it was held that a master has a right to be indemnified by his servant for losses incurred as a result of the servant's torts.

In this case, Galway, a servant of the defendants who were in the business of building and repairing, was employed as a storekeeper. He was instructed to choose a fellow workman and travel out of town to carry out certain repairs. Galway chose the plaintiff to accompany him. They travelled to their place of employment on Galway's motorcycle and sidecar which Galway had used on other occasions for his master's benefit. After working several hours, the pair went to the nearest town to get tools and have lunch. On their return trip, an accident occurred in which Galway was killed and the plaintiff was seriously injured. The accident occurred as a result of Galway's negligence. The plaintiff brought

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21 *Supra*, footnote 15.

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1 [1958] 2 Q.B. 78, also reported at [1958] 1 All E.R. 657, [1958] 2 W.L.R. 473.

this action against the defendants, whom he claimed to be vicariously liable for the negligence of Galway. The defendants added Galway's administratrix as a third party, claiming indemnity. Judgment was entered for the plaintiff against the defendants who were given judgment over against the third party, for complete indemnity.

In the case of *Lister v. Romford Ice & Cold Storage Co. Ltd.*,[2] a servant, who was expressly hired to drive a truck, injured his father who was working with him. The accident occurred while the father was giving directions to the servant who was backing-up the truck. The House of Lords held that the servant was under a contractual obligation to his master to use due care in the performance of his duties. As a result, the master's insurers were entitled, by their right of subrogation, to recover from the servant the damages they had to pay owing to his breach of duty. Their Lordships implied a term in the master-servant contract, whereby the servant was obligated to use due care while carrying out the duties for which he was employed.[3]

However, in the fact situation of the *Harvey* case, the master could not be indemnified on the basis of the decision of *Lister v. Romford Ice* since Galway was hired as a storekeeper and not as a

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[2] [1957] A.C. 555, [1957] 1 All E.R. 125; see also the case comment in 73 L.Q.R. 283, by R. E. Megarry.

[3] The implications of the *Lister* case were studied by the Inter-Departmental Committee appointed by the English Minister of Labour in 1957. Noted (1959), 22 Mod. L. Rev. at page 652.

In the *Lister* case, the insurers by their right of subrogation were able to indemnify themselves from the servant, Lister. The anomaly in that case was, that if Lister had been sued personally he would have been indemnified by the insurers, since the insurance was to cover both the master and his servants, and as a result they would have no claim against him, but since it was the master who sued and not Lister, the insurers were able to claim indemnity from Lister.

The Committee found that in general, masters and insurers do not seek indemnity from the servant but took notice of certain "gentlemen's agreements" to the effect that the insurers would not seek indemnity without the master's consent. Admittedly, all masters are not insured and not all insurers will be parties to this agreement. However, in the result, the Committee felt that the problem was not pressing and legislation to correct the situation was not immediately required.

In the alternative, the Committee recommended a greater use of the "gentlemen's agreement" by all the insurers. This would not include the uninsured employer. It was also recommended that Trade Unions, through collective bargaining, should secure this insurance coverage and protection for their members. This would increase membership in unions since those who were not members would not have this favourable protection.

The "gentleman's agreement" is interesting in that it shows the master's intention that indemnity is not to be claimed by himself or by the insurer from the servant. From this intention it is not too great a step to imply a term in the master-servant contract to the effect that the master will not claim indemnity from the servant. Perhaps Denning L.J., as he then was, was more correct in implying a term to this effect than the majority of the Court of Appeal in the *Lister* case.

This report is important because it recognized the problem of indemnity and the possible hardship on the servant. Also, it conveys the impression that there should not be indemnity in these situations although the problem has not yet reached that state of urgency which would demand a legislative remedy.

driver. The fact that he had made his motorcycle available for his employer's benefit, and was acting in the course of his employment, did not result in there being implied into his contract of employment a term that Galway would be bound to indemnify his employers against liability arising out of his negligent driving.

Indemnity from Galway was achieved through the Law Reform (Married Women & Tortfeasors) Act, 1935,[4] which conferred a right to contribution between joint tortfeasors. Section 6, so far as material, provides:

> (1) Where damage is suffered by any person as a result of a tort . . .
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise. . . .

At the trial, McNair J. said:[5]

> The first defendants and Galway are in law joint tortfeasors . . . and inasmuch as the first defendant's liability on the facts found is purely vicarious, the claim for contribution by Galway if good in law, should, in my view, be for 100 per cent.

This statement involves a fiction. In the first place, the finding that the master and servant are joint tortfeasors stems from the concept that the tort of the servant is imputed to the master for the purposes of vicarious liability. This "master's tort" theory regards both the master and the servant as tortfeasors.[6] In the second place, if the master is entitled to 100 per cent. indemnity or contribution, this implies that there is no fault on his part. How then, can he be regarded as a tortfeasor when he is not at fault?

The result, then, is that in England, a master could be entitled to indemnity on two grounds. The first ground can be found, as in the *Lister* case, in contract where there is an implied term in the master-servant contract that the servant will use reasonable care in performing the duties for which he is hired. The second ground can be found in the right to contribution between tortfeasors as given by the Law Reform (Married Women & Tortfeasors) Act, as exemplified by the *Harvey* case.

How would these cases apply in Ontario? In *Harrison v. Toronto Motor Car & Krug*,[7] the plaintiff was a nurse employed by Krug and while riding in his car which was being driven by a chauffeur, also employed by Krug, she was injured, because of the

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[4] 25 & 26 Geo. V, c. 30. See also The Negligence Act, R.S.O. 1950, c. 252, s. 2(1): Where damages have been caused or contributed to by the fault or neglect of two or more persons . . . but as between themselves in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

[5] *Supra*, footnote 1, at p. 107.

[6] For a fuller discussion see G. Williams, *Vicarious Liability: Tort of the Master or of the Servant?* (1956), 72 L.Q.R. 522.

[7] [1945] O.R. 1.

negligence of the chauffeur. Krug was held liable in spite of section 50(2) of the Highway Traffic Act[8] which says:

> . . . The owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon or entering, or getting on to, or alighting from such motor vehicle.

From the decision, it would seem that if the chauffeur had been sued, he would not have been liable because of section 50(2) of the Highway Traffic Act, and if Krug, the master, had been sued as driver or as owner, he too would have been exonerated for the same reason. However, the court held that section 50(2) of the Act did not apply to a vicarious liability situation such as this. Thus, the plaintiff was able to succeed against the owner, Krug, in his capacity as master.

Could Krug have recovered indemnity from the chauffeur McKenzie? Probably not, since section 2(2) of the Ontario Negligence Act[9] provides that in any action for damages brought by a gratuitous passenger in a motor vehicle, if the "owner or driver" of such motor vehicle is found at fault:

> . . . No damages, contribution or indemnity shall be recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver.

Dr. Wright in his case comment on *Harrison v. Krug* says:[10]

> The subsection [of the Highway Traffic Act] undoubtedly contemplated a situation in which, for example, the car in which the plaintiff was a gratuitous passenger collides with another car and the effect of the section is to reduce the passenger's recovery by the percentage of fault of his driver. The words of the section, however, are quite clear that no damages are to be recovered for the portion of loss caused by the fault of the driver. We would like to see an explanation of the manner in which this statutory enactment could be made consistent with the judgment in the *Harrison* case. Even assuming that such language does not apply to the situation where the plaintiff is suing a master for the fault of his servant, apart from section 2(2) of the Negligence Act the master should have been able to collect indemnity from the servant. The language of that Act would also seem to be clear that such indemnity can no longer be recovered.

It must be emphasized that section 2(2) of *The Negligence Act* will only preclude an employer from being indemnified in actions where the plaintiff is a gratuitous passenger. In other areas of tort liability, if the English cases are followed in Canada, it would appear that a master may claim indemnification against his servant where the master has been made vicariously liable for damages resulting from his servant's negligence.

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8 R.S.O. 1950, c. 167.

9 R.S.O. 1950, c. 252.

10 (1945), 23 Can. Bar Rev. 344, at p. 346.

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