AUSTRALIAN SHIPPING BOARD v. WALKER[1]

Indermaur v. Dames—Applicability of Apportionment Legislation—Statutory Duty

An action was brought by the respondent under Part III of the Wrongs Act 1928 on behalf of herself and her children, against the Melbourne Stevedoring Company Pty Ltd and the appellants, for damages resulting from the death of her husband. The claim was based ultimately on an alleged breach of common law duty under the rule in *Indermaur v. Dames*,[2] and the duty imposed by the Commonwealth Navigation (Loading and Unloading) Regulations made under the Commonwealth Navigation Act 1912-1956 and especially regulation 37 (2).[3] The deceased was a foreman stevedore employed by the Melbourne Stevedoring Company to unload, in a twilight shift, a ship 'occupied' by the Australian Shipping Board[4] and was killed by a fall through the hatch of a lower hold, at a time when unloading operations had finished in that hold. The lower deck was not lit at the time, the hatch was unguarded and uncovered, there were cleats on the deck on which one might slip, and sugar was scattered on the deck. The ship was to sail in ballast and the hatch was left uncovered to save expense at the port of destination. At first instance the jury answered 'No' to the question whether the death of the deceased was caused, or contributed to, by the defendant Melbourne Stevedoring Company Pty Ltd.[5] To the question whether 'the death of the deceased Walker was caused or contributed to by the failure of the defendant Australian Shipping Board to take reasonable care to prevent harm being occasioned to him by unusual danger existing aboard the vessel *Bikutta*' the jury answered 'Yes'. Question 3 asked whether the deceased caused or contributed to the cause of his death by reason of any negligence on his own part and the answer was 'Yes'. Damages were assessed at £6,000 but reduced by £3,000 as a result of the finding of contributory negligence. Pursuant to leave reserved, counsel for the appellant moved for judgment on the ground that there was no evidence on which the jury could properly find that there was an unusual danger. Herring C.J. entered

[1] [1959] V.R. 152. Supreme Court of Victoria; Gavan Duffy, Sholl and Adam JJ.

[2] (1866) L.R. 1 C.P. 274.

[3] 'All openings in the decks of holds open for purposes other than loading or unloading operations shall be effectively railed off or lighted while those operations are in progress. Penalty, on the master or owner: £50.'

[4] Constituted under the National Security (Shipping Control) Regulations 1942, No. 423. It has been substituted by a new body under the Australian Coastal Shipping Commission Act 1956.

[5] In the statement of claim the plaintiff did not claim a failure to provide a safe system of work as such, but simply joined his employers in every plea. There was an addition allowed to pleadings on the first day of trial, which alleged a failure to provide a torch. Again there was no mention of a safe system of work. It is submitted that, despite the decision of the House of Lords in *Smith v. Austin Lifts* [1959] 2 W.L.R. 100, the plaintiff could not have recovered here on that basis. *Smith's* case is important in that it finally settles the controversy as to the liability of employees where they have no control over the premises where damage occurred. The force of its authority is increased in that Viscount Simonds concurred even though he 'deprecated any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and an imbecile child'. The case was distinguished by Lord Parker C.J. in *Mace's* case [1959] 2 W.L.R. 504 on the ground that the employers had no notice of the danger. This distinction would apply equally to the instant case.

judgment for the plaintiff in accordance with the verdict, holding also that regulation 37 (2) was not infringed by the defendants. It is from this decision that the appeal was brought. The grounds of appeal were (a) that there was no sufficient evidence of unusual danger, and (b) if such unusual danger existed there was insufficient evidence for the finding of the jury that the appellant had failed in its duty to prevent harm from it. The Full Court dismissed the appeal, holding that there was sufficient evidence for the findings, and that contributory negligence on the part of the invitee is not a complete bar to recovery from the invitor. It was held further, disapproving the decision of Herring C.J., that the appellants were in breach of regulation 37 (2). Gavan Duffy and Adam JJ., however, thought (Sholl J. dissenting) that the deceased was not within the class of persons who, on construction of the regulations, had a private right of action against the appellant for breach of his statutory duty.

The most important aspect of this case is that it is the first direct decision that contributory negligence does not prevent recovery under the rule in *Indermaur v. Dames*. There has been a divergence of opinion on this question. From the formulation of the rule by Willes J. it would appear that contributory negligence does in fact preclude recovery. This is the view taken by Lord Parker in *Horton's* case[6] where he states *obiter* that 'contributory negligence . . . would destroy his claim'. Street[7] also regards the duty as conditional upon the invitee taking reasonable care. On the other hand, such eminent authorities as Salmond[8] and Lord Wright[9] assume that apportionment is now applicable to such a case and this view is supported by the statements of some of their Lordships in *Smith v. Austin Lifts*,[10] especially Lord Denning.[11] Lord Parker C.J. in *Mace's* case[12] apportioned damages between the plaintiff and defendant, and must be taken to have decided the case both on statutory duty and the rule in *Indermaur v. Dames*. As the court pointed out in the instant case, the rule should not be treated as if it were a statute, and it should be borne in mind that at the time of *Indermaur v. Dames* contributory negligence was a complete answer to any claim in tort. Thus, the Full Court is not without support when it states that

> since the change in the law effected by the Wrongs (Contributory Negligence) Act 1951, there would seem to be no reason in principle or authority for denying to an invitee whose own negligence was responsible only in part for his injuries a cause of action against his invitor whose negligence also contributed to the injuries.[13]

Some further points were raised in the case, which may prove vital in future litigation. The Chief Justice, at first instance stated expressly,[14] and the Full Court seem to agree, that on the evidence an uncovered hatch by itself was not an 'unusual danger' for stevedores. The test adopted by all the learned judges is that from *Horton's* case,[15] namely, whether it would be an unusual danger for the class of people to which

6 [1951] A.C. 737, 745.
7 *The Law of Torts* (1955) 203.
8 *Salmond on the Law of Torts* (12th ed. 1957) 496.
9 'Invitation' (1953) 2 *University of Western Australia Law Review* 543, 556.
10 [1959] 2 W.L.R. 100, 105, 109, 118.
11 *Ibid.*, 119.
12 [1959] 2 W.L.R. 504, 510.
13 [1959] V.R. 152, 159.
14 *Ibid.*, 155.

the plaintiff belongs. At the same time Herring C.J. took great care to reject the argument of counsel for the respondent that the unlocked hatch-door, the lack of notice, the lack of lighting and the scattered sugar, should be taken into consideration in relation to unusualness. These matters, said His Honour, are only relevant to the 'reasonable care to prevent damage' part of the rule. It is therefore surprising to find Herring C.J. basing his finding of 'unusual danger' on the combination of the open hatch and lack of guarding.[16] Guarding, it will be remembered, is mentioned in the rule in relation to 'reasonable care', along with lighting and notice. Gavan Duffy and Adam JJ. held that an 'uncovered and unguarded'[17] hatch constituted an unusual danger, whilst Sholl J. thought that an 'open but unguarded and unlighted 'tween decks hatch would be an unusual danger'.[18] The division of evidence into matters proving 'unusual danger' and matters proving 'reasonable care' is based on the formulation of the rule in *Indermaur v. Dames*. This distinction was propounded in *Horton's* case,[19] where it was held that knowledge of danger by the invitee did not prevent the danger from being unusual. Professor Fleming[20] thinks the distinction between matters giving rise to the duty and matters which discharge it is 'devoid of practical significance'. It is respectfully submitted that it is of immense practical and theoretical significance. If in the instant case the guarding were not regarded as pertaining to unusualness the plaintiff would have failed from the outset. The importance of allowing evidence of guarding, *etc.*, in relation to unusual danger is, therefore, that it may help to bring the action on its feet when it shows the non-existence of such matters. It may be argued that the Court should have ruled in the instant case that guarding and lighting are irrelevant; it should, however, be borne in mind that the rule is not a statute, and that *Horton's* case only dealt with knowledge. Knowledge pertains to the state of mind of the person, and not the state of the premises. It is submitted therefore that guarding and lighting, as distinct from knowledge, are relevant both to the unusualness of danger and the taking of reasonable care to prevent that danger. The Court must be taken to have affirmed this contention.

The appellants argued that even if the danger was unusual they had taken reasonable care to prevent damage resulting from it. It was said that negligence connotes foreseeability and the appellants could not foresee an experienced stevedore entering in the darkness, without a light or a torch, in which case the danger would have been obvious to him. All the members of the Full Court thought highly of the argument, but found that on the evidence it could not be said that a reasonable jury could not find lack of care. It may be argued that it is open to doubt whether foreseeability of actions of the invitee has any relevance once an 'unusual danger' finding is made, except in relation to contributory negligence. On the objective test in *Horton's* case it may be said that the finding of 'unusual danger' for the class of stevedores connotes that it can be foreseen that if a reasonable stevedore, acting normally in the

[15] [1951] A.C. 737. [16] [1959] V.R. 152, 155. [17] *Ibid.*, 159.
[18] *Ibid.*, 164. [19] [1951] A.C. 737. [20] *The Law of Torts* (1957) 451.

course of his work, goes down to the hold, he will be injured. There are purely semantic difficulties in saying that care has been taken by doing absolutely nothing. A danger may however exist, but it does not mean that injury will follow. The duty is not to prevent damage but to take reasonable care to prevent damage. 'If the danger is bound to become so obvious when approached by an invitee in the only circumstances in which it is reasonable to anticipate that he will approach it' reasonable care calls for no action.[21] This, however, does not put an end to the matter. The argument, it should be noted, depends on knowledge rather than voluntary assumption of risk. Lord Denning in *Smith v. Austin Lifts*[22] distinguishes *Horton's* case on the ground that in that case knowledge of the plaintiff was so complete that it implied *volenti,* and that the plaintiff was not allowed to plead his contract of service to deny that he was *volens.*[23] If this be accepted, then the defendant must prove *volenti* to shed liability, without doing anything to prevent damage. Knowledge is only a factor in considering whether the risk has been voluntarily accepted. The other members of the House did not express an opinion on this distinction, but they stressed that knowledge in this context is subjective and must be complete to relieve from liability. The appellants in the instant case argued that, acting as a reasonable man, the deceased should have had knowledge; the only relevant question is whether he did have knowledge. The man from the Clapham 'bus has vanished as far as 'knowledge' is concerned in this context. The decision of the House of Lords was given subsequently to the Victorian decision. It is submitted that no argument like this can now have any standing in a court bound by the authority of the House of Lords.

A point further worth noting is that Sholl J. thought that an invitor is not liable for failure to take care, not only when he does not 'know or ought to know' of the danger, but also that the danger would be unusual for the invitees.[24] Does this mean that the invitor should know all the complex law on the test of 'unusualness'? When will it be said that he ought to know? Knowledge of facts alone is enough in the case of licensors to impute knowledge of danger to them,[25] and yet the duty of invitors is higher than that of licensors. It is submitted with deference that when an invitor knows or ought to know of the danger he will be found liable if the danger is in fact unusual.

Regarding statutory duty, the Full Court followed the principles set out by Dixon J. (as he then was) in *O'Connor v. J. P. Bray Ltd.*[26] These principles were also applied in *Darling Islands Stevedoring and Lighterage Co. Ltd v. Long*[27] by the High Court. The only differences in the decisions in the instant case were based on construction of the regulations.

P. MUNZ

[21] [1959] V.R. 152, 165 *per* Sholl J. [22] [1959] 2 W.L.R. 100, 118.

[23] On this basis all the criticism of *Horton's* case, in that it made an unwarranted change in the law, has no foundation. See: *Salmond on the Law of Torts* (12th ed. 1957) 501; Lord Wright, *op. cit.*, (n. 9); Fleming, *The Law of Torts* (1957) 448 ff.

[24] [1959] V.R. 152, 164.

[25] *Hawkins v. Coulson and Purley Urban District Council* [1954] 1 Q.B. 319.

[26] (1937) 56 C.L.R. 464, 477-478.

[27] [1957] Argus L.R. 505 (noted, (1958) 1 *M.U.L.R.* 396).