EMPLOYER'S LIABILITY FOR DEFECTIVE EQUIPMENT

DAVIE v. *NEW MERTON BOARD MILLS LTD.*

In the continuing debate whether the trends towards strict liability and away from the theory of no liability without fault are to be welcomed, the House of Lords' decision in *Davie's Case*[1] is notable as upholding the principle of fault and emphatically refusing to extend the tort liability of employers towards workmen beyond its present boundaries.

The appellant was a maintenance fitter in the employ of the respondent company. He was knocking out a metal key by means of a drift[2] and hammer when at the second blow of the hammer a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift which had been provided for his use by the respondents, although apparently in good condition, was of excessive hardness and this was the sole cause of the accident. The tool had been negligently manufactured by a reputable firm of manufacturers, who sold it to a reputable firm of suppliers, who in turn sold it to the respondents. No intermediate examination of it between the time of its manufacture and the time of its actual use was reasonably to be expected, and there was no negligence in the respondent's system of maintenance and inspection. The appellant, not satisfied with judgment against the manufacturers as directed by the Court of Appeal[3] (Parker and Pearce, L.JJ., Jenkins, L.J. dissenting), brought a further appeal by which he sought to make his employers liable also.

The appellant contended, in effect, that the respondents were liable not only for personal negligence but for the negligence of anyone in any way concerned with the provision of the drift, and that therefore they were liable to him in damages because of the negligence of the manufacturer's servants. Lord Moreton of Henryton[4] regarded this as a contention that every master warrants the safety of every tool or other appliance provided by him for the use of his employees, and is therefore liable if such appliance turns out to be unsound and an employee sustains injury in consequence. The appellant denied that his submission meant that the master's liability was absolute. Lord Reid in a paraphrase of this denial said:[5]

> It is not said that the mere fact that the tool was unsafe and that this caused the accident is enough to make the respondents liable: but it is said that it is enough, to make the respondents liable, to show that the unsafe condition of the tool was the result of some person's negligence, whether or not there was any relation between the negligent person and the respondents. In some cases the negligent person might be the manufacturer who sold the article direct to the employer. . . . In other cases the negligent person might be the person who supplied parts or materials to the manufacturer, who in turn incorporated them in the article sold to the employer. In some cases the employer in buying the article might rely on the reputation of the manufacturer. In other cases he might rely on the reputation of the merchant from whom he bought. That is all said

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giving the benefit of any real doubt to the prisoner." *Curwood* v. *The King* (1944) 69 C.L.R. 561, 580, *per* Starke, J., W. Paul, "*Curwood* v. *The King* (Suggested Amendment of the Law)" (1946) 20 *A.L.J.* 166, suggests an amendment of the Victorian law (which, as we have seen, expressly confers a discretion on the judge) to confer wider powers on the trial judge to ensure that he may more effectively discharge his responsibility in this regard.

[1] (1959) 2 W.L.R. 331, (1959) 1 All E.R. 346.

[2] A bar of metal about one foot long for shaping or enlarging holes in metal.

[3] (1958) 1 Q.B. 210, (1958) 2 W.L.R. 21, (1958) 1 All E.R. 67.

[4] (1959) 2 W.L.R. 331, 345.

[5] *Id.* at 346.

to be immaterial: all that matters is that some person somewhere in the chain was negligent, and that that negligence was the cause of the damage. This,[6] as Viscount Simonds observed, still left the question to be determined in each case: for whose negligent acts will the employer be liable "in the long chain which ends with the supply by him of a tool to his workman but which may begin with the delving of the raw material of manufacture in a distant continent"?[7] In this case the chain began with the manufacturers whose negligence was proven—a short enough chain, but even to them the respondents stood in no contractual relationship because the tool was bought from a supplier. The result of the appellant's contention, Viscount Simonds went on,[8] "cannot commend itself to reason; for, if indeed it is the law, every man employing another and supplying him with tools for his job acts at his peril: if someone at some time has been careless, then, for any flaw in the tools, it is he who is responsible, be he himself ever so careful". Their Lordships seemed to be unanimous in their opinion that it would have been unreasonable and contrary to common sense to find for the appellant. However, as reason and common sense are fickle guides, especially if authority can be cited to the contrary, it is to be noted that there was a singular lack of authority on the particular point raised in this case.[9] The House unanimously upheld the majority decision in the Court of Appeal, and dismissed the appeal.

In rejecting the respondent's submission their Lordships were not, of course, called upon to formulate any statement of principle determining the occasions when the employer *is* liable for the negligence of others. But some of the Lords did express opinions as to what they thought might be the correct principle. Viscount Simonds thought that the employer would be liable only for the negligence of persons to whom he had delegated a duty to perform; and he admitted that this would include, in certain cases, his agents and independent contractors.[10] Lord Reid thought that the master's liability was probably wider than a liability for the acts of his servants in the strict sense. "It appears," he said,[11] "that an employer is liable for the negligence of an independent contractor whom he has engaged to carry out a personal duty of the employer and whose work might normally be done by the employer's own servant—at least if the negligent workmanship is discoverable by reasonable inspection." Lord Keith of Avonholm expressed the view[12] that the master's duty could not be placed higher than a duty to exercise reasonable care to see that plant or material was safe for the purpose for which it was intended, and he could not be liable except in a proper case of delegated performance for the negligence of someone other than himself in the provision of that plant or material. Exactly what were occasions of delegated performance he did not say. He was content to deny that purchase by an employer from a wholesale or retail merchant without more was an instance of delegation of the employer's duty.

It was clear on the facts of the present case that that manufacturer was not a servant, agent or independent contractor of the employer in any sense in

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[6] For this contention the appellant relied heavily on dicta of Lord Wright and Lord Maugham in *Wilson & Clyde Coal Co. Ltd.* v. *English* (1938) A.C. 37, 80-81 and 87-88 respectively. Viscount Simonds (338-341) and Lord Reid (347-351) went to great lengths to demonstrate clearly that it was authority for no such proposition.

[7] (1959) 2 W.L.R. 331, 335.

[8] *Id.* at 335.

[9] The point had been decided in only two prior cases: *Donnelly* v. *Glasgow Corporation* (1953) S.C. 107 and *Mason* v. *Williams & Williams Ltd.*, (1955) 1 W.L.R. 549; it was fully argued and the employers held liable. In *Donnelly's Case* the want of care or skill was one step nearer to the employer in that there was no intervening supplier, but the House in *Davie's Case* was not prepared to accept the reasoning of the Lord Justice-Clerk who regarded the manufacturer-supplier and the master as one. The House purported to overrule *Donnelly's Case* even though it was a Scottish decision. *Mason's Case*, where Finnemore, J. on facts almost identical with *Davie's Case* had held that the employer was not liable, was approved.

[10] (1959) 2 W.L.R. 331, 337.

[11] *Id.* at 359.

[12] *Id.* at 366.

which their Lordships were prepared to understand those words. Nor could it be said that the employer had "delegated" any duty to him. However, their Lordships indicated that their decision would have been the same even if the employer had purchased the drift direct from the manufacturer. In such a case there would, at least, have been a contractual relationship, but it seems to follow from their Lordships' reasoning, that no liability would exist because there would still in their view be no delegation of any duty to such a manufacturer. But if their Lordships were prepared to admit that the employer could be liable for the negligent acts of "agents" and "independent contractors" to whom he has "delegated" performance, it would be hard to understand their rejection of liability for the negligence of the manufacturer-supplier. Lord Morton of Henryton said simply that there was no liability in such a case because purchase directly from the manufacturer was not a "delegation" of the master's duty to take reasonable care.[13] It is submitted with respect that the rejection of liability in such a case is not such an easy conclusion as the Lords seemed to think it was. Perhaps an artificial line may be drawn between such a manufacturer and the agent or independent contractor to whom a duty has been delegated, but no sensible line can be drawn when the position is judged in terms of any intelligible policy.

Once it is assumed that the master's liability extends beyond his own negligence and that of his servants in the strict sense, it may be that it is impossible to formulate any principle of liability for the acts of others which can show any justification in policy. The employer who simply purchases a drift direct from a manufacturer who has some already in stock is not liable for that manufacturer's negligence, but if he orders a drift from a manufacturer who is temporarily out of stock and who agrees to run his production specially to meet the order, it may well be that the employer *will* be liable.

In *Davie's Case* the House of Lords has missed a valuable opportunity to state a principle which would express the liability of the employer to his employee for the negligence of persons other than his servants in the strict sense. Certainly their Lordships had no desire to extend the employer's liability in this field any further, and they had no hesitation in refusing to make the respondents liable in the present case. To have done so would, in their view, have meant the imposition of an absolute liability. They have however, left the formulation of any principle for another day. The significance of the case is that the House has set its authority against any prevailing trend towards absolute liability in this field, although it cannot be said that the case involves any real reversal of this trend, because there was too little in existing authority to support the appellant. However, Viscount Simonds refused to draw any inferences from the suggestion by counsel for the appellant that the House should have taken into consideration the fact that probably the employer would, but the employee would not, be covered by liability insurance. His Lordship said:[14] "It is not the function of a court of law to fasten upon the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie upon him."

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CHARITABLE TRUSTS

LEAHY & ORS. v. ATTORNEY-GENERAL OF NEW SOUTH WALES & ORS.

The notoriety of the law of charities for its obscurities and complexities

[13] *Id.* at 345.
[14] *Id.* at 343.