MINISTRY OF LABOUR
AND NATIONAL SERVICE

Lister v. The Romford Ice and Cold Storage Company Limited

Report of the Inter-Departmental Committee

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Lister v. The Romford Ice and Cold Storage Company Limited

INTER-DEPARTMENTAL COMMITTEE

I. Introductory

1. We were appointed in March, 1957, by the Minister of Labour and National Service with the following terms of reference:

> " To study the implications of the judgments in the case of Lister *v.* The Romford Ice and Cold Storage Company Limited as they might affect the relations between employers and workers."

2. The Committee met on eight occasions. Assistance was sought from interested organisations including Government Departments, organisations representing the two sides of industry, associations of local government authorities, and representatives of the insurance market. A list of organisations which supplied written evidence to the Committee is to be found in the Appendix to this Report. The Committee met representatives of the British Insurance Association and Lloyd's on 2nd December, 1957, to discuss certain technical points.

II. The case of Lister v. The Romford Ice and Cold Storage Company Limited

3. The case arose from an accident the details of which, briefly, are as follows. In January, 1949, Lister, a lorry driver employed by the Romford Ice and Cold Storage Company, reversed his lorry in a private yard and knocked down and injured his father, who was also employed by the Company, and was acting as his mate.

4. In June, 1951, Lister senior issued a writ against the Company claiming damages for personal injuries suffered as a result of Lister junior's negligence for which the Company as his employers were vicariously responsible. Lister senior obtained judgment for damages of £1,600 and costs. In 1953 the Company's insurers, by exercising their rights of subrogation, and without obtaining the consent of the Company, successfully brought an action against Lister junior in order to recover the damages and costs they had paid under an employers' liability policy. Lister junior appealed without success against this judgment both to the Court of Appeal and the House of Lords. It was held by all the judges in the House of Lords that a servant owes a contractual duty of care to his master and that Lister junior was in breach of this contractual duty of care to the Company. It was further held by a majority of three to two that no implied term could be read into the driver's contract of service under which the employer would protect the driver by insurance against any third party liability arising in the course of his duties. The House of Lords' decision is reported in [1957] A.C. 555; [1957] 1 All E.R. 125.

5. An alternative basis for the claim by the Romford Ice and Cold Storage Co., against Lister junior was that the Company and Lister junior were joint tortfeasors and that the Company could, therefore, under the Law Reform (Married Women and Tortfeasors) Act, 1935, claim a contribution against Lister junior towards the damages which they were liable to pay Lister senior. In fact, the Judge in the court of first instance awarded the Company a full indemnity under the Act of 1935 and, by a majority of the Court of Appeal, was held to have done so rightly. Although the House of Lords did not find it necessary to pronounce on this point, it seems clear from such references to this aspect of the case as occur in their opinions that the Act of 1935 is applicable

in these circumstances. The existence of this alternative basis for a claim by an employer to be indemnified by his employee may be important, as appears from the case of *Harvey v. R. G. O'Dell Limited. Galway (Third Party).* [*1958*] *2 Q.B. 78.* In that case an employee was driving his own motor cycle combination and carrying as a passenger a fellow employee. As a result of the negligence of the first employee, an accident occurred causing the death of the driver and an injury to the passenger. In an action brought by the passenger against the employer, McNair J. held that the accident occurred in the course of the employment of the employee who was driving the vehicle but that having regard to the nature of his employment, which was that of storekeeper, a term could not be implied that the latter was bound to indemnify his employer against liability arising from his negligent driving, and in this respect the case was distinguished from Lister's case. The Judge held, however, that the employer was entitled to a contribution from the estate of the deceased employee under the Act of 1935 and awarded an indemnity under that Act. It is understood that the object of the claim for a contribution was to establish the liability of the deceased's insurers.

III. The implications of the Judgment of the House of Lords in the Lister case

6. The effect of the House of Lords' decision has been to confirm that, as the law stands at present, if an employee, while acting in the course of his employment, is negligent and a third person suffers damage in consequence, the employee may find that he is held liable for that damage not only on a direct claim made against him by the third person, but also on a claim made by his employer or his employer's insurers to recover damages which either have had to pay to the third person. The significance of the decision, therefore, does not result from the enunciation of any new principle of law, but from the attention which it has focussed upon the liability of the employee personally to pay for any damages which may be awarded to a third person or to his employer as a result of his negligence, and this notwithstanding that the employer may have insured himself in respect of his liability to the third person or for the damage which he has himself suffered. Finally, although a lorry driver was involved in this particular case, the liability of the servant to pay for loss or damage resulting from his negligence is applicable to the whole field of employment.

7. It is apparent, therefore, that under the law as it stands, whenever an employee is negligent in the course of his employment and as a result his employer becomes liable to pay damages to a third person, the employee is exposed to the risk that his employer will require him to pay the damages out of his own pocket and it makes no difference that the employer may have covered his own liability by insurance. It is clearly this possibility which has led to our being asked to consider the implications of the decision in the Lister case, and, therefore, the first point to which we have directed our attention is to what extent this possibility raises a problem of significance in regard to the position of employees and relations between employers and employees.

8. There can, we think, be no doubt that if there were any real possibility of employees regularly being called upon to pay out of their own pockets damages resulting from acts of carelessness or inattention occurring in the course of their employment, a situation would be created for which some remedy would have to be provided. Although in some fields of employment employees could probably meet this situation for themselves by taking out insurances which would cover them against this eventuality, it is evident that this solution would not be appropriate to the whole field of employment. We have, therefore, considered whether this risk is a real one.

9. As we have already indicated, the decision in the Lister case did not enunciate new doctrine but merely affirmed that an employee who is under a duty of care remains personally responsible for the consequences of his failure

to exercise such care, and this situation has always existed without it being felt that it gives rise to any difficulty. The particular issue in the Lister case upon which the views of the judges differed was whether, where it is customary for an employer to insure himself against the kind of liabilities to which a failure by his employees to exercise due care may give rise, a term could be implied in the contract of employment which would preclude the employer from seeking to recover from the employee. Nothing in the decision of the House of Lords affects the principle that the employee remains directly responsible to an injured third party who makes his claim directly against the employee, nor does it appear from the opinions of Lord Radcliffe and Lord Somervell that any term which might be implied in the contract of employment would protect the employee from a claim over against him by the employer in cases where the employer had not effected an insurance and where it was not customary to do so.

10. We have emphasised that the decision in the Lister case has not placed a new liability on employees but has merely illustrated a long-existing liability, because we think it important to bear in mind that it has not, hitherto, been thought to raise any problem of general significance or to call for any alteration of the law. The reasons for this are not far to seek. Third parties who have been injured by employees acting in the course of their employment have naturally made their claims not against the employee but against the employer, who will have the funds to pay, though in some cases for technical reasons they may have brought proceedings against both the employer and the employee. Moreover, in the vast majority of cases, employers have met such claims (and in many cases will have been covered by insurance) and neither they, nor their insurers, will have bothered to consider recouping themselves by seeking to make their employees indemnify them or contribute to what they have had to pay. If the negligence of the employee has been of the kind which must be expected to occur from time to time, no reasonable employer is likely to think it right to visit its consequences upon the employee personally; on the other hand, if the negligence has been such as to amount to serious or wilful misconduct, the employer has probably got rid of his employee, and not wasted time in trying to make him pay for its consequences. We think that practical considerations have similarly operated to make insurers reluctant to recoup themselves by exercising their rights of subrogation against employees save in exceptional circumstances.

11. Considerations of the kind we have just mentioned seem to us to make the problem a theoretical rather than a practical one. That this is so, seems to us borne out by the circumstance that there are only a few reported cases where employers have been awarded damages against employees or contributions or indemnities arising out of an act of negligence by the employee for which the employer has been held responsible to third parties. Moreover, although we sought to obtain from the various organisations to whom we wrote information about the existence of other cases in which employees have been called upon to pay for or contribute towards the damages incurred by their employers as a result of negligence by the employees in the course of their employment, the results suggest that such cases have been exceedingly infrequent. The reported cases are as follows:

(i) In *Ryan v. Fildes*, [*1938*] *3 A.E.R. 517*, the managers of a boys' school were awarded a contribution of 100% under the Law Reform (Married Women and Tortfeasors) Act, 1935, against a school mistress in respect of damages for which the managers and the school mistress were held liable as a result of the school mistress having boxed a boy on the ear and caused him to become deaf.

(ii) In *Jones v. Manchester Corporation*, [*1952*] *2 Q.B. 852*, a hospital board were awarded a contribution against a doctor employed by them in respect of damages which were awarded against both the Board and the doctor

for the death of a person in circumstances for which both the Board and the doctor were held responsible.

(iii) In *Semtex Ltd. v. Gladstone*, [*1954*] *2 A.E.R. 206*, employers were held entitled to recover from an employee, whom they employed to drive his fellow workmen to and from their place of work, the damages—amounting to over £9,000—which the employers and the employee were held liable to as a result of an accident due to the negligence of the employee. In the Semtex case it is apparent that the object of the proceedings taken by the employer was not to obtain recoupment from the employee but to establish liability against insurers who were liable to indemnify the employee, and it may be that in some of the other cases the claim against the employee was not intended to put the employee to personal expense.

(iv) The case of *Harvey v. R. G. O'Dell Limited. Galway* (*Third Party*). [*1958*] *2 Q.B. 78*, details of which are set out in para. 5 above.

12. The information we have received as to the existence of other cases is as follows:

(i) A case was heard at Liverpool Assizes in October, 1952, in which a machine-operator had started a machine while the setter still had his hand in it. The setter brought an action against the employer who joined the machine operator as a third party. It was found that there had been negligence by the machine operator and contributory negligence by the setter and that both were equally responsible. Half the full damages were awarded against the employer who was given the right to recover that amount against the operator.

(ii) A case was heard at Sunderland County Court in 1953 in which a driller was injured through the negligence of a crane-driver and damages of £110 were awarded. The employer obtained an order that the negligent crane-driver should pay off this amount at the rate of £1 per month.

(iii) It is understood that the National Coal Board, who carry their own insurance, have taken civil proceedings against a few workmen in cases of gross negligence; it is hardly necessary to stress the supreme importance attached to safety precautions in coal-mines, by employers and trade unions alike.

13. It will thus appear that there is little indication that employers, or insurers of employers, have been taking advantage of their right to obtain recoupment from their employees in cases where negligence on the part of the latter occurring in the course of their employment has resulted in employers having to pay damages to third parties. It appears, moreover, from information with which the Committee have been supplied that both insurers and employers are already aware that, should they make a practice of proceeding against employees to recover damages paid as a result of negligence of the latter, this would have a most serious effect upon good industrial relations, and upon the general relations between insurers and their assured.

14. As a result certain voluntary action has already been taken which has further reduced the likelihood of employees being asked to contribute to damages paid to fellow employees as a result of their negligence. In 1953 certain members of the British Insurance Association engaged in the employers' liability insurance market entered into a "gentleman's agreement" under which they undertook that claims would not be instituted against the employees of an insured employer in respect of damages paid to fellow employees without the prior consent of the employer. It was considered that an employee should not be freed from responsibility where there was evidence of collusion or wilful misconduct. The Committee have been assured that this agreement is accepted by the great majority of employers' liability insurers. Information received from Lloyd's has shown that the British Insurance Association's "gentleman's agreement"

is in practice acted upon by those Lloyd's underwriters who specialise in the issue of employers' liability policies. It is not possible, however, to give a precise estimate of the proportion of underwriters who accept the agreement since employers' liability policies may be written by underwriters who do not specialise in this form of policy.

15. The Committee's enquiries have also revealed certain voluntary action which has been taken by employers. In 1955 the British Employers' Confederation approached representatives of the Accident Offices' Association and the Mutual Insurance Companies' Association and received an assurance that rights of subrogation against an employee of the insured employer would not in future be exercised without the previous agreement of that employer. The replies from nationalised industry and certain local government associations have revealed that a considerable proportion of these employers have either adopted the practice of not seeking to recoup themselves for any damages which they have been forced to pay as a result of their employees' negligence or have made arrangements with their insurers similar to those described in the last paragraph.

16. From the study of the evidence before us we do not see much likelihood of employers or insurers exercising their right to recover from employees the damages paid as a result of the employee's negligence, save in cases of wilful misconduct or suspected fraud. We do not, therefore, feel that the House of Lords' judgment in the Lister case has exposed a practical problem. Nevertheless it may be said that if there is any risk of employers and insurers acting in this way the employee should be protected to ensure that this does not happen and in case it should be thought desirable at some future date to provide additional protection to the employee, we have considered the following possible measures.

IV. Legislation

17. *Legislation could be passed which would relieve an employee of any liability for his negligence in the course of his employment, including both liability to third persons and to his employer. Such legislation could cover either all or only specific forms of employment, and provision could be made to exclude all cases in which there was evidence of criminal wrongdoing.*

18. Although such legislation would certainly remove the liability of the employee there are serious objections to it. First, it seems plainly wrong that in order to protect an employee from having to make good to his employer (or to his employer's insurers) the damages which his employer has had to pay because of the employee's negligence, the person injured by that negligence should be deprived of his right to sue the employee if he wishes to do so (e.g., if the employer is insolvent). If it were thought desirable to protect the employee from the employer (and the employer's insurers) it would not seem right to do so in a manner which would deprive the injured person of any of his existing remedies. Secondly, it seems important in the public interest and the maintenance of industrial safety that employees should not be relieved from the consequences of failure to exercise that duty to take care in relation to third parties which rests upon all members of the community.

19. *Legislation could be passed which would compel the employer to take out insurance, or provide some similar guarantee, to protect the employee from the consequences of his negligence in the course of his employment.*

20. Again there are serious practical difficulties in the way of such a proposal. First, it would be impossible to enforce. Secondly, it would create difficulties for insurers, the most obvious being that some form of cover would have to be provided for employees who were considered to be " bad risks " and for employers who were not acceptable to insurers and who would thus stand to be put out of business. It is of interest to note that the possibility of compulsory

insurance in a narrower field was examined in connection with the Mines and Quarries Act, 1954, and the Agriculture (Safety, Health and Welfare Provisions) Act, 1956, and in both cases was rejected as impracticable.

21. *Legislation could be passed to provide that where the employer has in fact insured himself against a third party risk the policy should inure for the benefit of the employee to the extent to which the employee is, under the law as it stands, under any liability in respect of any act or omission which may make his employer liable to a claim which is covered by the policy.*

22. This solution would have the merit of not only protecting the employee from a claim being made against him at the instance of the insurer but also of providing him with cover in the event of the third party claiming directly against him. The principal objection to this proposal is that it would not protect the employee of the uninsured employer. The proposal might also give rise to practical difficulties if the injured third party were to make his claim directly against the employee. The insurer would in such a case be obliged to consider whether the claim was one for which the employer would be liable before he, the insurer, could decide whether he should deal with the claim on behalf of the employee and this might involve the determination of a preliminary issue between the insurer and the employee.

23. *Finally, legislation could be passed to vary to such extent as might be thought suitable the legal relationship between an employer and employee so as (i) to prevent the employer from claiming an indemnity from the employee for the consequences of negligence by the latter in the course of his employment and possibly also (ii) to require the employer to indemnify the employee against any liability the latter might incur to third parties for such negligence.*

24. Of the possible remedies which involve legislation this is the one which is open to the least objection. Legislation on these lines was suggested to us by the Trades Union Congress. How far such legislation would have to go in varying the legal relationship between employer and employee would depend upon the extent to which it was thought desirable to protect the employee from the possibility of having to meet claims by his employer or in his name by the employer's insurer arising out of the negligence of the employee in the course of his employment. It might appear at first sight that such legislation should be confined to precluding the employer from bringing a claim against the employee where he, the employer, had become liable to a third party as a result of the employee's negligence, because this would not only protect the employee from a claim by the employer but also, of course, from a claim made in his employer's name by his employer's insurers. On the other hand, an employee is not likely to see much difference between having to pay his employer in a case where the injured third party has claimed against the employer, and having to pay (without any right of recovery from his employer) the injured third party in a case where the latter has made his claim directly against the employee. (For an example of such a claim see *Adler v. Dickson* [*1955*] *1 Q.B. 158.*) It would seem, therefore, probable that the legislation would have to extend to requiring the employer to indemnify the employee against liability for the latter's negligence in the course of his employment so as to cover the possibility of a third party making his claim directly against the employee. The legislation might even have to be extended to protect the employee from claims by the employer for damages for negligence which had resulted in injury to the employer or damage to the employer's property, on the view that if an employee requires to be protected from the consequences of his negligence in the course of his employment, where this has resulted in a third party claim, he ought to be similarly protected if his negligence has exposed him to a substantial claim by his employer for damage he has caused to his employer's property. The recommendation by the Trades Union Congress for legislation on these lines appeared to us to be directed to covering all the possibilities referred to above.

25. There are, however, a number of objections to legislation on these lines. First, to the extent to which the employee would be relieved from having to pay for harm caused by his negligence, the legislation could be regarded as a form of statutory exemption from liability and, therefore, open to some of the objections mentioned in paragraph 18 above. It is clear that many people would consider it objectionable that an employer should be expected positively to indemnify his servant against the consequences of a breach by the latter of his contractual duty to exercise care in performing his duties.

26. Secondly, the framing of such legislation would give rise to a number of problems. Should it apply to all employments or only to specified classes of employment, and, in the latter case, to what classes of employment ? Would it be right to protect an employee from claims by his employer in cases where the employee is a person employed in a professional or executive capacity who is well able to afford the premiums necessary to take out a policy to cover him against liability for his negligence ? It would also be necessary to decide whether the protection to be afforded should be subject to any exception covering cases where the employee had been guilty of gross negligence or wilful or criminal misconduct and how such an exception should be defined. Consequential problems would arise from cases where a servant is lent by one person to another, cases where a servant is liable but his employer is not because the employer has contracted out of liability (*as in Adler v. Dickson, u.s.*) and cases where a servant is already entitled to indemnity under a policy covering him. Finally, there would be the question whether the protection should be absolute or subject to any agreement to the contrary which might be entered into between the employer and the employee. No doubt provision could be made to meet these difficulties but the result might well be to create new problems of interpretation and new fields of litigation.

V. Action not requiring legislation

27. *Extension of the British Insurance Association's " gentleman's agreement "*

Mention has already been made, in paragraph 14 above, of the British Insurance Association's " gentleman's agreement ". An agreement such as this is no doubt likely to limit the cases in which, as a result of action taken by insurers, employees have to pay or contribute towards the damages which their employers have had to pay because of the employee's negligence. Considered from this point of view, however, the value of the existing agreement is reduced by the fact that it applies to employers' liability policies only and that even in this field it is not subscribed to by the whole of the market. Clearly, the effectiveness of an agreement of this kind would be increased if it were accepted by all insurers, and extended to cover all cases in which there was an insurance covering a third party claim against the employer. Its effectiveness would be even greater if the undertaking by insurers were made independent of the employer refusing his consent, and if it were written into the policies issued to employers. How far it would be possible to extend the agreement in this way is a matter which could be considered with insurers if this were thought desirable. The discussions between the Committee and representatives of the British Insurance Association and of Lloyd's have suggested that, while it might well be possible to secure a virtually universal acceptance of the existing agreement in the employers' liability field, its extension so as to apply to all insurances in so far as they cover third party claims might present difficulties. Presumably any proposal to dispense with the requirement that the employer should give his consent or to reflect the undertaking by suitable provisions in the policies issued would also encounter difficulties.

28. *Encouragement might be given to trade unions to secure where necessary, by process of collective bargaining, assurances from employers that neither they themselves nor their insurers would attempt to recover from employees damages*

paid out as a result of their negligence, with a suitable exception for cases of intentional wrongdoing or recklessness.

29. A course of action of this kind has already been proposed as a method of securing protection in a narrower field by the I.L.O. Committee of Experts who examined the protection of employed drivers against civil law claims arising out of their employment. The great advantage of this proposal is its flexibility. Not only would protection be restricted to industries which had shown a need for it, but the form of protection could be modified to suit the industry concerned. The most serious objection to this proposal, however, is that it does not provide protection for unorganised employees.

VI. Conclusions

30. The decision in the Lister case shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think that employers and insurers, if only in their own interests, will not so exploit their rights and the evidence we have received as to the action taken by the British Employers' Confederation and the Insurance Industry seems to us to support this view. We do not therefore think that the decision in the Lister case has exposed a practical problem or that there is any need for legislation at present. If in future it should appear that employers or insurers were exploiting their rights unreasonably, the problem would, we think, have to be reviewed; in that event further consideration might be given to the possible legislative measures which we have mentioned in our Report and the various objections to them. Our conclusion does not, however, rule out any further effort to deal with the matter by voluntary methods, such as an extension of the " gentleman's agreement " within the insurance field, or by collective bargaining in any individual industry.

31. The Committee wish to express their great appreciation of the services of Mr. W. R. B. Robinson and Mr. D. J. Sullivan, both of the Ministry of Labour and National Service, who have successively acted as their Secretary, and have greatly assisted the Committee in all aspects of their work.

APPENDIX

This appendix contains the names of the organisations from whom the Committee sought information, or who offered information to the Committee.

I. The Committee wrote to the following organisations for information:

Admiralty
Air Ministry
Association of County Councils in Scotland
Association of Municipal Corporations
Ministry of Agriculture, Fisheries and Food
The British Employers' Confederation
The British Insurance Association
The British Transport Commission*
Colonial Office
Commonwealth Relations Office
The Convention of Royal Burghs
The County Councils' Association
Board of Customs and Excise
Ministry of Defence
Ministry of Education
Foreign Office
Ministry of Health
Home Office
Ministry of Housing and Local Government
Board of Inland Revenue
Law Officers' Department
Lloyd's
London County Council
Lord Advocate's Department
The Lord President of the Council
Metropolitan Boroughs Standing Joint Committee
National Assistance Board
Ministry of Pensions and National Insurance
Post Office
Scottish Counties of Cities Association
Scottish Office
Her Majesty's Stationery Office
Ministry of Supply
Board of Trade
Trades Union Congress
Treasury
Treasury Solicitor's Department
Urban District Councils' Association
War Office
Ministry of Works

II. The following organisations offered information to the Committee:

National and Local Government Officers' Association
The National Federation of Sub-Postmasters
The Standing Joint Committee of the R.A.C., A.A., and R.S.A.C.

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*The reply from the British Transport Commission reported not only on the position in the Commission, but also in British Overseas Airways Corporation, the Central Electricity Generating Board, the Gas Council and the United Kingdom Atomic Energy Authority. The National Coal Board replied separately.

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