CASE NOTES

COMMISSIONER FOR RAILWAYS (N.S.W.) v. SCOTT[1]

Negligence—Action per quod servitium amisit—Injury to person other than domestic servant

R, an engine-driver in the service of the appellant, suffered a nervous breakdown after averting a level crossing accident. The respondent, a motor-cyclist, was negligent in attempting to cross the line, and his negligence caused R's condition. Because of his condition, R was unable to perform his duties for a period of time, and the appellant was obliged (by section 100B of the N.S.W. Government Railways Act 1912-1952) to pay R not less than the salary of his classification and length of service as well as his medical expenses. He did so, and sued the respondent in the District Court for the sum paid out. The Judge found for the appellant and the respondent appealed to the Full Court of the Supreme Court of New South Wales on grounds raising only the question whether the relationship of the driver and the appellant would support an action *per quod servitium amisit*. The Full Court (Owen J. dissenting) allowed the appeal[2] and the appellant appealed to the Full High Court, which by a majority[3] restored the District Court verdict and judgment.

The action *per quod servitium amisit* is generally expressed as permitting recovery in respect of the loss of services consequent upon an injury to a servant of the plaintiff. Recent cases on the subject have established that the relationship of the holder of a public office[4] and the state which he is said to serve[5] is not a relation which can be described, for the purposes of the action, as a master-servant relation. In the *Policeman's Case,* the Privy Council warned the courts not to 'extend' the action's operation,[6] but the case itself did not make clear what limitations (if any) there were on the status of the injured person in respect of whom a plaintiff could claim except that the injured person must be his (the plaintiff's) servant.

Menzies J., in the present case,[7] considered that the Privy Council (which referred to 'the ordinary master and servant relation')[8] had approved the definition of 'service' given by Kitto J. in the High Court, one summed up in the present case as 'the doing of work by one man for the benefit of another and in obedience to the orders of that other'.[9] All the judges in the present case (save Menzies J.)[10] had little difficulty in concluding that if this were the only test then the appellant would succeed. Kitto J. pointed out that the Commissioner was empowered to

[1] [1959] Argus L.R. 896. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ. [2] (1958) 76 W.N. (N.S.W.) 242.
[3] Kitto, Taylor, Menzies and Windeyer JJ.; Dixon C.J., McTiernan and Fullagar JJ. dissenting.
[4] *E.g.*, a member of the Air Force *(Commonwealth v. Quince* (1944) 68 C.L.R. 227) or a police constable *(Attorney-General for N.S.W. v. Perpetual Trustee Co. Ltd* (the *Policeman's Case)* [1955] A.C. 457). [5] [1955] A.C. 457, 489. [6] *Ibid.* 490.
[7] [1959] Argus L.R. 896, 923. [8] [1955] A.C. 457, 489.
[9] [1959] Argus L.R. 896, 922 *per* Menzies J. [10] *Ibid.* 924.

'employ' officers,[11] (that is, to enter into a personal relation with them) so that R was his servant, and not the holder of a public office.[12] However it was his opinion that had the Railways been run by an ordinary government department and not by a statutory body with a power to 'employ', then the reasoning in the *Policeman's Case* might apply.[13]

But in *Inland Revenue Commissioners v. Hambrook*,[14] the Court of Appeal decided that the plaintiff, acting on behalf of the Crown, could not recover sick pay paid to a tax officer following an injury to the officer caused by the defendant's negligence. The decision can be supported by describing the officer as a holder of a public office, as Kitto J. might have done, and as Lord Goddard C.J. sitting at first instance in the case, did do.[15] But the actual reason for the decision is directly applicable to the present case. The Court there considered that by the end of the eighteenth century the action was limited to compensating masters for injuries to 'menial servants'[16] and that it has remained so limited.[17] In obedience to the *Hambrook dicta* this was also stated to be the law in *Metropolitan Police District Receiver v. Croydon Corporation*.[18] In the present case R was plainly not the Commissioner's menial or domestic servant. Consequently to justify their reaching the conclusion which they did the majority here had to show first that prior to the twentieth century cases the action was not limited to menial or household servants and, second, that those cases (especially the *Policeman's Case*) did not impose such a limitation on it. Of the dissentients, McTiernan and Fullagar JJ. appear to have accepted the reasoning of the Court of Appeal in the *Hambrook* case in its entirety.[19] However, Dixon C.J. agreed with the majority that there had been no such limitation before the twentieth century.[20]

> The remedy of trespass *per quod servitium amisit* has, it seems to me, been judicially limited in its scope under the influence of two conceptions; and both conceptions touch its origins. One is that it belongs to a state of society that has passed and possesses no relevance to our times. The other is that when the scope of the remedy was settled it was natural and inevitable that it should be restricted to the household.[21]

This is clearly true of the 'arguments from history' expressed in the *Hambrook* case. The action originated in the days when a servant was regarded as his master's chattel. By the eighteenth century the only servants who bore any resemblance to the master's property were household servants. Consequently the action should be limited to them.[22] After an exceptionally

[11] Government Railways Act (N.S.W.) 1912-1958, s. 70.

[12] [1959] Argus L.R. 896, 911-912. In New South Wales police constables are 'appointed' by the Commissioner of Police and not 'employed' by him. (Police Regulation Act (N.S.W.) 1899-1957, s. 6 (1).) It is suggested that 'appointment' does not carry the personal connotation of 'employment'.

[13] *Ibid.* 911.

[14] [1956] 2 Q.B. 641.

[15] [1956] 2 Q.B. 641, 645. The decision of the Court of Appeal was accepted in the present case on this footing: [1959] Argus L.R. 896, 923.

[16] [1956] 2 Q.B. 641, 663 *per* Denning L.J.

[17] *Ibid.* 666 *per* Denning L.J.

[18] [1957] 2 Q.B. 154, 162 *per* Lord Goddard C.J.

[19] [1959] Argus L.R. 896, 902 *per* McTiernan J., and 903 *per* Fullagar J.

[20] *Ibid.* 897.

[21] *Ibid.* 898 *per* Dixon C.J.

[22] [1956] 2 Q.B. 641, 660-664 *per* Denning L.J.

careful piece of research, Windeyer J. was able to show that this argument was historically unsound, and an oversimplification of the position. Perhaps it was true that the action (and other related actions) arose even before the Middle Ages out of the protection given the household in a patriarchal society,[23] and perhaps then servants were considered to be the property of the master. But it is clear that by the time of Bracton (the early thirteenth century) there were permanent hired servants *(famuli)* some of whom lived in the household and some of whom did not, as well as villeins (who may have been to some extent the lord's property)[24] and by the time of the Black Death the action lay for both types of servants.[25] In fact the action in the Middle Ages had its rationale in the loss of *services* in which the master had property,[26] rather than in any property in the servant's *person.* So the majority refused to accept the first premiss of the historical argument in the *Hambrook* case. Because the action involved compensation for loss of services there was no need to confine it to the household.[27] Holdsworth considered that the concept of property in services was originally related to the status of servant[28] and not to a contract of service; but even if it could be argued that the status of servant was restricted in the Middle Ages to those in the household, the transition of service from status to contract prevented this limitation from operating definitively.[29] Windeyer J. preferred the view that this was such a gradual transition that any limitation imposed by the status concept on the action disappeared before the contract of service evolved.[30]

In his treatment of the history of the action, Windeyer J. concluded that there was no historical reason why this state of the law should have changed before the eighteenth century. The action survived the transition from an agricultural society to a partially industrialized one—the cases are only concerned with whether the person injured was a servant or not.[31] But the Court of Appeal did not rest its decision solely on what its members thought the law should have been in terms of history by the eighteenth century. If the authorities which they cited laid down a rule of law, then it was immaterial if it were historically unsound. But they were limited to a *dictum* of Eyre C.J. in *Taylor v. Neri,*[32] a case which was 'little discussed, was a decision at *nisi prius,* and does not appear to have undergone much consideration',[33] the declaration in *Bennett v. Allcott,*[34] which described the plaintiff's daughter in a seduction action as a menial servant,[35] and passages from Blackstone.[36] The majority refused to accept the interpretation given these passages by Denning L.J.

[23] [1959] Argus L.R. 896-898, 899 *per* Dixon C.J.

[24] Even this has been doubted. 'They are unfree, but . . . the law does not treat them as things, it treats them as persons. . . .' Maitland, *Constitutional History* (1908) quoted by Windeyer J. [1959] Argus L.R. 896, 933. [25] *Ibid.* 899 *per* Dixon C.J.

[26] Holdsworth, *History of English Law* (1925) viii 429; [1959] Argus L.R. 896, 910 *(per* Kitto J.), 913 *(per* Taylor J.), 921 *(per* Menzies J.), and 932 *(per* Windeyer J.).

[27] [1959] Argus L.R. 896, 910 *per* Kitto J. [28] Holdsworth, *loc. cit.*

[29] [1959] Argus L.R. 896, 913-914 *per* Taylor J. [30] *Ibid.* 934.

[31] *E.g. Hart v. Aldridge* (1774) 1 Cowp. 54; *Taylor v. Neri* (1795) 1 Esp. 385; cited [1959] Argus L.R. 896, 937 *per* Windeyer J. [32] (1795) 1 Esp. 385, 386.

[33] *Lumley v. Gye* (1853) 2 E. & B. 216, 244 *per* Wightman J. [34] (1787) 2 T.R. 166.

[35] This description was explained consistently with the present decision. [1959] Argus L.R. 896, 928. [36] 1 Comm. 425 ff.

in the *Hambrook* case, Kitto J. pointing out that the interpretation was made on the erroneous assumption that the action was based on property in the servant.[37] However the greatest obstacle to deciding that the action lay for menial servants only in the eighteenth century was that, if it had been the rule, all the declarations in cases on the actions could have been demurred, since no reference was made to *domestic* servants. But none of them was so dealt with. In fact some declarations were, even after *Taylor v. Neri,* positively inconsistent with the rule.[38]

Dixon C.J. did not agree with the second part of the majority's reasoning. He thought that, if the appellant were to recover, the Court would be reverting to concepts upon which he based his reasons in the *Policeman's Case.*[39] The Privy Council did disagree with this view that *Quince's* case was wrong (by accepting the public-private relations distinction).[40] But this did not mean that they refused to accept his expressed view[41] that the action should not be limited to servants of low degree. In fact 'much of' this *dicta* was expressly approved by the Judicial Committee.[42] The majority's view was that because the Privy Council considered that probably *Martinez v. Gerber*[43] was an advance on *Taylor v. Neri* (if one were needed) and because the *Policeman's Case* was chiefly concerned with the public-private relations distinction, the case was in their favour.[44] It is submitted that this view is not inconsistent with the Privy Council's warning not to extend the action; the action has always covered the field to this extent.[45] At least the fact that the Privy Council chose to investigate the special position of a constable rather than decide the case on the broad ground (the point was argued before them)[46] indicated that they could not readily accept the contention.

But the Chief Justice admitted that the *Hambrook* and *Croydon Corporation* cases did go beyond the *Policeman's Case,* even though they largely depended on it,[47] and to a certain extent therefore must be taken to have regarded the *dicta* of the Court of Appeal as settling the law. It is difficult to see how this could have occurred in so short a time. It is submitted that Windeyer J. is correct in applying to this case the principle that a pronouncement professedly based on history should have its historical foundations tested before being followed,[48] especially since the High Court can refuse to follow *decisions* of the Court of Appeal when they appear manifestly wrong.[49] To follow the *Hambrook* case would

[37] [1959] Argus L.R. 896, 910. Blackstone himself considered that the action was based on property in services *(op. cit.* 429).

[38] *Randle v. Dean* (1691) 2 Lut. 1496 *(Servientes laborantes et negotiantes); Hodsoll v. Stallebrass* (1840) 11 Ad. & El. 301 (apprentice); *Martinez v. Gerber* (1841) 3 Man & G. 88 (traveller).

[39] [1959] Argus L.R. 896, 902.

[40] [1955] A.C. 457, 490.

[41] (1952) 85 C.L.R. 237, 248.

[42] [1955] A.C. 457, 485.

[43] (1841) 3 Man. & G. 88.

[44] [1959] Argus L.R. 896, 909.

[45] See Lord Parker in *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38, 43.

[46] [1955] A.C. 457, 468.

[47] [1959] Argus L.R. 896, 897.

[48] *Ibid.* 930.

[49] Brett, 'High Court—Conflict with Decisions of Court of Appeal' (1956) 29 *Australian Law Journal* 121 and 'Consortium and Servitium: A History and Some Proposals, Part III' *ibid.* 428-430; Parsons, 'English Precedents in Australian Courts' (1949) 1 *University of Western Australia Annual Law Review* 211; and cases cited therein.

only produce a 'uniformity of error'. The attitude of the majority is more consistent with the greater independence given itself by the High Court recently from the decisions of English judges.[50]

The different conclusions reached by the majority and the dissentients are largely (and admittedly) affected by the place which the individual judges consider the action being discussed should occupy in modern society. Fullagar J. considered (correctly) that the existence of the action qualifies the rule that the fact that a person is deprived of a benefit by reason of an injury to a third party does not give the former an action against the wrongdoer.[51] It also qualifies the rejection in *Bourhill v. Young*[52] of the concept of derivative negligence. His view was that the action is so inappropriate to modern conditions that it should be abolished or at least restricted as far as possible. And of course an acceptance of the *Hambrook* reasoning here would be greatly restrictive. But Dixon C.J. and the majority agreed that even if the action did disturb symmetry in the law, its limitation would involve further anomalies and problems, largely because of the difficulty of applying the medieval criterion of *intra moenia* (whatever it means) to present day employees.[53] Furthermore, a remedy based on recognizable principle had ceased to be of little economic significance and had come to provide a just redress.[54] Previously the action was only important in times when labour was scarce; it is only recently that employers have been made liable to pay medical expenses and sick pay.[55] On any theory of loss distribution (especially in view of the decision in *Lister v. Romford Ice and Cold Storage Co. Ltd*[56] in favour of the employer) the employer would be compensated. But without this action being available, it is submitted that not all employers would be compensated. They would be forced to rely on a duty of care owed by the tortfeasor to them, a duty based on foreseeability. Here a wrongdoer should have to take the injured employee as he finds him (that is, as the plaintiff's employee) and not what he *could* foresee him to be. The action, protected by this case from the *Hambrook* case,[57] is peculiarly suited to such a purpose.[58]

That this decision will clarify the employer's right enunciated above is subject to one qualification. The question whether sick pay or pensions paid out either represents loss of *servitium* or is consequent upon loss of

[50] *E.g.* in *Brown v. R.* [1959] Argus L.R. 808, 814 (a decision handed down only two months before the judgments in the present case were delivered) the Full High Court had no difficulty in stating that evidence of uncontrollable impulse alone could support a defence of insanity to a criminal charge, a view plainly inconsistent with the view of the Privy Council expressed in *Sodeman v. R.* [1936] 2 All E.R. 1138, 1140 and of the English Court of Criminal Appeal in *R. v. Thomas* (1911) 7 Cr. App. Rep. 33, *R. v. Kopach* (1925) 19 Cr. App. Rep. 50 and *R. v. Flavell* (1926) 19 Cr. App. Rep. 141.

[51] [1959] Argus L.R. 898, 903. [52] [1943] A.C. 92, 108, *per* Lord Wright.

[53] [1959] Argus L.R. 896, 924, 938. [54] *Ibid.* 901 *per* Dixon C.J.

[55] In N.S.W. and in other jurisdictions workers' compensation paid is recoverable from anyone whose tortious act causes compensable injury; Workers' Compensation Act (N.S.W.) 1926-1954, s. 64. [56] [1957] A.C. 555. [57] [1956] 2 Q.B. 641.

[58] For other views, see Parsons, 'Damage in Actions for Personal Injury; the Problem of Converging Loss-Distribution Systems' (1957) 30 *Australian Law Journal* 616, 622 and Brett, 'Consortium and Servitium; A History and Some Proposals, Part III' (1956) 29 *Australian Law Journal* 428, 433-434.

servitium has not been finally settled. It was not raised in the appeal, although some of the judges adverted to it. Fullagar J. (with whom Taylor J. agreed on the point), concluded both here[59] and in the *Policeman's Case*[60] that these payments were consequent on an antecedent obligation to pay them and not upon loss of *servitium*, and that neither were they a measure of damages.[61] However, Windeyer J. and the Chief Justice were of opinion that these payments were consequences of the loss of services.

It is submitted that this is a correct approach. The employer is antecedently obliged to make the payments, but they need only be paid on the occurrence of a condition, that is, when a servant is so injured that he cannot carry out his duties.

A. A. BROWNE

R. v. TEITLER[1]

Criminal law—Evidence of accomplices—Warning as to corroboration—Miscarriage of justice—Application for separate trials

T (Teitler) and Z (Zucchi) were charged jointly with unlawfully and maliciously setting fire to a dwelling-house, one A (Anderson) being therein. The Crown alleged that T procured A and F (Tommasi) to assist him in the enterprise. F was given an indemnity against prosecution and turned Queen's evidence against T and Z. At the trial, counsel for T applied for separate trials. This application, being opposed by the prosecutor, and by counsel for Z, was dismissed by the judge. During the course of the trial, Z and F both gave evidence on oath implicating T. The trial judge warned the jury that F was an accomplice and that it was dangerous to accept his evidence unless it was corroborated; but he did not explicitly refer to the fact that Z also was an accomplice. Both T and Z were convicted. T applied for leave to appeal on the grounds, *inter alia*, that: (1) the trial judge was in error in refusing to order separate trials; (2) the jury was not warned against accepting the evidence of Z who, the verdict shewed, was an accomplice of T, or told that Z's evidence could not be regarded as corroboration of that of F. The Full Court refused the application for leave to appeal, holding: (1) that the ordering of separate trials is entirely within the discretion of the trial judge, and no reason was here shewn why his exercise of the discretion should be disturbed; (2) that the jury should be warned against accepting the evidence of an accomplice in cases where that accomplice is a co-accused, as well as where he is called as a witness for the prosecution; but although there had here been no such specific warning, warning in substance had been given (Sholl J. dissenting); and even had it not, the application should be dismissed because *(per* Lowe and O'Bryan JJ.) there

[59] [1959] Argus L.R. 896, 904. The dissenting judgment of Kellock J. in *R. v. Richardson* (1948) 4 Can. S.C.R. 57, 71-72 was cited to support this view.

[60] (1952) 85 C.L.R. 237, 289 ff.

[61] As Denning and Parker L.JJ. considered in *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 667, 673.

[1] [1959] V.R. 321. Supreme Court of Victoria; Lowe, O'Bryan and Sholl JJ.