[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

MUNICIPAL CORPORATION OF LIMASSOL,
Appellant-Defendant,

v.

AGATHANGELOS CONSTANTINOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 4712).

Master and Servant—Master's vicarious liability to third persons for negligence of his servant—When a servant is acting in the course of his employment—Test applicable—Servant employed by the appellant Municipality as labourer on refuse truck—Accident occurring when servant was crossing the road to seek shelter from rain in a coffee-shop, soon after he had alighted from the truck to be picked up on truck's return journey after emptying the refuse—Held that servant was not acting in the course of his employment so as to make the master vicariously liable—In that he, the servant, was not doing then that which he was employed to do or anything incidental thereto.

Vicarious liability of master—To third persons for negligence of his servants—When a servant can be said to be acting in the course of his employment—Test applicable.

The facts sufficiently appear in the judgment of the Court whereby they allowed this appeal by the defendant Municipality, holding that in the circumstances of this case this servant cannot be said to have been acting at the material time in the course of his employment ; and that, therefore, the Municipality was not (vicariously) liable for the negligence of their said servant.

Cases referred to :

Crook v. *Derbyshire Stone, Ltd. and Another* [1956] 2 All E.R. 447 ;

Harvey v. *R.G. O' Dell, Ltd. and Another* [1958] 1 All E.R. 657 ;

Hilton v. *Thomas Burton (Rhodes), Ltd. and Another* [1961] 1 All E.R. 74 ;

Staton v. *National Coal Board* [1957] 2 All E.R. 667.

1972
June 27
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MUNICIPAL CORPORATION OF LIMASSOL
v.
AGATHANGELOS CONSTANTINOU

Appeal.

Appeal by defendant against the judgment of the District Court of Limassol (Vassiliades, D.J. and Ioannides, Ag. D.J.) dated the 28th March, 1968, (Action No. 2799/63) whereby the defendant was ordered to pay to the plaintiff the sum of £800 for damages suffered by plaintiff as a result of the negligent driving of defendant's servants.

J. Potamitis, for the appellant.

R. Michaelides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P.: The judgment of the Court will be delivered by Mr. Justice L. Loizou.

L. LOIZOU, J. : The appellant was defendant No. 3 in an action instituted by the respondent against it and two other persons who were the servants of the appellant claiming damages for negligence.

Defendant No. 2 in the action was the driver of a refuse truck and defendant No. 1 was a labourer who assisted in the collecting and emptying of the dustbins in the truck.

The respondent, who was plaintiff in the action, is a mechanic and on the 11th December, 1963, while he was driving a land rover along the main Paphos-Limassol road, just outside Limassol, he was involved in an accident as a result of which he sustained injuries and suffered loss. Before the hearing of the action plaintiff's damage was agreed at £2,000 on a full liability basis and the trial proceeded on the issue of liability only.

The trial Court found that both the plaintiff and the defendant No. 1 were negligent and apportioned their liability at 60% and 40% respectively. The trial Court further found that the third defendant, the Municipal Corporation of Limassol, appellant herein, was vicariously liable for the negligence of its servant, the first defendant, and gave judgment for the plaintiff against defendants No. 1 and No. 3 jointly and severally in the sum of £800.

This appeal is against that part of the judgment which found the appellant vicariously liable for the negligence of its servant.

The facts, in so far as they are relevant for the purposes of this issue, are as follows :

On the 11th December, 1963, at about 11.30 a.m. a refuse truck under registration No. 8632, the property of the Municipal Corporation of Limassol, was driven by defendant No. 2 in the action along the main Limassol–Paphos road in the direction of Paphos for the purpose of emptying the refuse from the truck at the refuse dump outside Limassol. There were two labourers engaged by the municipality for the purpose of collecting and emptying the dustbins into the truck and they were both accompanying the driver on his way to the refuse dump. One of these labourers, one Arestis Onisiforou (D.W.5), who was not a party to the action, was seated on the only available seat next to the driver. The other labourer was defendant No. 1 in the action, Ioannis Aristodemou, and he had to stand on a step on the nearside of the truck. It was raining at the time and at the request of defendant No. 1 the driver pulled up near a coffee-shop, so that this man might alight and take refuge in the coffee-shop the idea being that they would pick him up on their return journey. The coffee-shop in question was on the other side of the road so that the first defendant had to cross the road in order to go to the coffee-shop. It may be added that this was the last journey of the truck and that after dumping the refuse and taking the truck back to the sanitary department the duty of those three employees would be over for the day.

After the defendant No. 2 made sure that the first defendant had alighted safely he started off on his way to the refuse dump. At about this time the plaintiff was driving the land rover from the opposite direction and it was soon after the two vehicles passed each other that the accident occurred.

After analysing the evidence adduced the trial Court found that the plaintiff driving at an excessive speed on a wet road saw defendant No. 1 hurrying across the road from a distance of between 60 and 140 feet, he applied his brakes and swerved to his left in an endeavour to avoid the accident but in doing so he went off the road and hit a eucalyptus tree as a result of which his vehicle overturned and came to rest on its side, on his legs. As stated earlier on the trial Court found both the plaintiff and the first defendant guilty of negligence, the first to the extent of 60% and the second to the extent of 40% ; it further found that the driver of the truck, the second defendant, was in no way to blame for the accident. But this part of the judgment is not appealed against and we need say no

more about it. The only issue in this appeal is whether the first defendant was at the time acting in the course of his employment so as to make his master vicariously liable.

Our law on this point is section 13 of the Civil Wrongs Law, Cap. 148, which reads as follows :

" 13. 1—For the purposes of this law a master shall be liable for any act committed by his servant—

(*a*) which he shall have authorised or ratified, or

(*b*) which was committed by his servant in the course of his employment :

2—An act shall be deemed to have been done in the course of a servant's employment if it was done by him in his capacity as a servant and whilst performing the usual duties of and incidental to his employment notwithstanding that the act was an improper mode of performing an act authorised by the master ; but an act shall not be deemed to have been so done if it was done by a servant for his own ends and not on behalf of the master.

3. . . .

4. . "

The trial Court in considering the issue of vicarious liability referred to the cases of *Crook* v. *Derbyshire Stone, Ltd. and Another* [1956] 2 All E.R. 447 and *Harvey* v. *R. G. O' Dell, Ltd. and Another* [1958] 1 All E.R. 657.

In the first case T., a lorry driver, was permitted by his employer to stop during long journeys to obtain refreshment. One morning, having drawn up the lorry on the side of a road, he proceeded to walk across the road to reach a cafe. While crossing the road, he was involved, partly through his own negligence, in a collision with the plaintiff, who was driving a motor cycle. The plaintiff who was injured in the accident, claimed damages against T.'s employer on the ground that, at the time of the accident, T. was acting in the course of his employment.

It was held that T.'s employer was not liable to the plaintiff for the consequences of T.'s negligence, because, although T. was employed at the time of the accident and was permitted to obtain refreshment, yet the obtaining of refreshment was not something that he was employed to do and, therefore, he was not discharging his duties to his employer when the accident occurred.

Pilcher, J., in the course of his judgment had this to say : (at p. 448).

> " It was common ground that the accident occurred during the second defendant's working hours, in the ordinary sense of the term, and counsel for the plaintiff contended that the second defendant, in walking across the road as he did and for the purpose which he did, was doing something which his employers knew that their driver did, and did reasonably. Counsel contended that the second defendant, in so crossing the road to get refreshment for his own purposes, was doing an act which was incidental to his employment, and that, in those circumstances, in law the first defendants, as his employers, were vicariously responsible for any act of negligence which he might commit while engaged in this incidental act.
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> While an employer is, no doubt, vicariously responsible for the negligent acts of his servants committed in the course of their employment, he is not, in my view necessarily responsible for the consequences of acts committed by his servants during their period of employment, unless the particular act which is negligently performed was an act which the servant was employed to perform. If the second defendant had been employed by the first defendants to deliver some goods at the cafe and had, through his own negligence, sustained exactly the type of accident which he did sustain and had done the injuries to the plaintiff which he did do, the contention of counsel for the plaintiff in this case would, no doubt, be almost bound to succeed. Assuming that it was reasonable for the second defendant to draw up his lorry where he did and to cross the road at the place where he did, if he had done that negligently in the course of delivering goods to their destination, his employer would, no doubt, have to answer for the consequences of his negligence, because he was actually engaged in doing what he was employed to do. In the present case, the second defendant was not, in any sense of the word, ' employed ' to cross the road. He did it primarily for his own purposes, although, no doubt, with the complete approval of the first defendants. He had left his lorry and was no longer engaged, in the ordinary sense of the term, on his employers ' business ".

In the *Harvey* case the plaintiff and one Galway were employed by the first defendants, who were builders and

repairers of barges and also undertook work of general repair. The first defendants' works were at Battersea. When their workmen were allocated for work elsewhere, they were either conveyed in the first defendants' lorry or made their own travelling arrangements and were reimbursed the cost of travel by public transport whether or not they used it. Travelling time to and from work on an outside job was paid as working time, and, if the men had to travel some distance to get a meal while out on a job, they would normally be paid their fares to and from their meal place. Galway, who was employed as a storekeeper at the works owned a motor cycle combination which he used from time to time for his employers' purposes. On February 29, 1952, Galway acting on instructions of the defendants, went to Hurley to do repair work, taking the plaintiff with him. They travelled, as they were authorised to do, in Galway's motor cycle combination. The repair work was a day's work. After they had worked for some hours, they went to Maidenhead (some five miles from Hurley) to get some more tools and materials and to obtain refreshments. While they were returning to Hurley in the motor cycle combination, there was a collision between the motor cycle and a motor car, due partly to the negligence of Galway. The plaintiff was injured and Galway was killed in the accident.

In an action by the plaintiff against the first defendants, alleging that they as Galway's employers were vicariously liable for Galway's negligence, it was held that the first defendants were vicariously liable to the plaintiff for Galway's negligence, because, on the facts, the journey between Maidenhead and Hurley was within the scope of Galway's employment whether his purpose was to get tools or to get a meal, the journey being in either case incidental to the work which Galway was instructed to do.

The trial Court quoted the following passage, made obiter, from the judgment of McNair, J., (at p. 665) :

> " In my judgment, while not attempting to lay down any general principle, I am satisfied that, on the particular facts of this case as I have found them, the journey to Maidenhead and back, even if no question of tools had arisen, should be regarded as fairly incidental to the work which Mr. Galway and the plaintiff were instructed to do. It was an all-day job ; no instructions were given by Mr. Hudson that the men should take food with them ; Mr. Galway told the plaintiff that they would get their dinner out."

In the light of the above authorities the trial Court came to the conclusion that the action of defendant No. 1 in alighting from the refuse truck and crossing the road to seek shelter from the weather was so closely connected with the actual work he was employed to do and was doing at the time, that it was incidental thereto ; and found defendant No. 3 vicariously liable for the negligence of its servant.

Defendant No. 3 appealed against that judgment. The notice of appeal contains three grounds as follows :

> " The Court was wrong in law in deciding that the defendant No. 3 were vicariously liable for the negligence of defendant No. 1, for, *inter alia*, the following reasons :
>
> (*a*) At the time of the accident the defendant No. 1 was not acting in the course of his employment with the defendant No. 3.
>
> (*b*) The defendant No. 1 at the material time was not doing any work which he was employed to do by defendant No. 3.
>
> (*c*) The defendant No. 1 was not at the material time doing an act connected with the work he was employed by defendant No. 3 to do or any work he was doing nor was any such act incidental to his employment with defendant No. 3 or to the work he was employed to do."

In the course of the hearing of the appeal learned counsel for the appellant, quite rightly, stated that all three grounds boiled down to the same thing and the one issue was whether defendant No. 1 was at the material time acting in the course of his employment ; and the appeal was argued on behalf of defendant No. 3 on the ground that the finding of the Court was wrong.

On the part of the plaintiff it was argued that the first defendant was still on duty and acting in the course of his employment when he alighted from the truck to shelter from the rain because he did so with the consent of the driver of the second defendant and also because his work commenced with the collection and emptying of the dustbins and did not come to an end until after the dumping of the refuse.

We think it will be of assistance if we refer to one or two of the cases cited by counsel on both sides in support of their respective submissions.

In *Hilton* v. *Thomas Burton (Rhodes), Ltd. and Another* [1961] 1 All E.R. 74 it was held that the test whether the employer was liable for his servant's negligence was whether the servant was doing at the time something that he was employed to do.

The plaintiff in that case, Janet Hilton, was the widow of John Hilton who was employed as a foreman by the first defendants who were demolition contractors. The second defendant was a fellow workman of the deceased. The hours of work were from 7.30 a.m. to 5.30 p.m. starting and ending at the employer's premises, and it was the usual practice for the demolition workers to be driven in the employer's van to and from the site on which they were working. Any workman who had a driving licence was authorized by the employer to drive the van and the workmen were permitted to use the van for any reasonable purpose of their own, such as going to get refreshments while out on a job. On the day of the accident the deceased, H. and five other men were working on a site which was about thirty miles from the employer's premises. At about 12.20 p.m. the deceased, H. and another man went to a public house near the site for drinks, sat there for about an hour, and, on returning to the site, ate their lunches, which they had brought with them. At about 3.30 p.m., these three men and another man decided to go to a cafe, which was about seven miles away, for tea. They started off in the employer's van, with H. driving, but when they were approaching the cafe (called Cora's Cafe) they realized that there would not be time to go in, as they would have to return to the site to pick the other men before returning to the employer's premises. As they were returning to the site, the van overturned at a curve owing to the negligent driving of H. and the deceased was killed. His widow claimed damages against the employer as being vicariously responsible for H's negligence. On these facts the Court found that the employer was not liable because the driver was not at the time doing anything that he was employed to do.

Diplock, J., in dealing with the issue of whether the first defendants were vicariously liable for the second defendant's negligence, having found as a fact that the accident which caused the death of the deceased was the consequence of the negligent driving of the first defendant's van by the second defendant said this : (At p. 76).

> " I think that the true test can best be expressed in these words : Was the second defendant doing something that he was employed to do? If so, however

improper the manner in which he was doing it, whether negligent as in *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, or even fraudulent, as in *Lloyd* v. *Grace, Smith & Co.*, or contrary to express orders, as in *Canadian Pacific Ry. Co.* v. *Lockhart*, the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence, or permission."

and later in his judgment he referred to the *Harvey* case and had this to say : (At p. 77) :

" Counsel relied on the judgment of McNair, J., in *Harvey* v. *R. G. O'Dell, Ltd.*, where the learned Judge (it is true obiter) expressed the view, that, where an employee was injured by the negligent driving of a fellow employee when being taken to obtain refreshment during working hours, that was done in the course of the employment which the employee was employed to do, and, accordingly , the master was vicariously liable. McNair, J., expressed that view obiter, making it quite plain that he was not attempting to lay down a general rule, and I do not doubt that there may be circumstances in which a master is vicariously liable for injury to an employee, or to anyone else, where his vehicle is being driven for the purpose of obtaining refreshment by his servants while out on work. Indeed, he may expressly or impliedly instruct one of them to drive the others for that purpose.

However that may be, I have to look at the realities of the situation. What were the circumstances, and what was the purpose for which this journey to Cora's Cafe and back was taken? Looking at the realities of the situation, it seems to me to be clear beyond a peradventure that what happened was this. The four men, having taken the view that they had done enough work to pass muster, were filling in the rest of their time until their hours of work had come to an end. After sitting and chatting on the job for some time, they decided to go to the cafe to fill in the time until they could go back to the first defendants' depot and draw their pay. This seems to me to be a plain case of what, in the old cases, was sometimes called going out on a frolic of their own. It had most tragic consequences, but it does not seem to me that it is possible to hold (though I would like to do so if I could) looking at the realities of the situation, that on the

course of that journey the second defendant was doing anything that he was employed to do. It may be that he was using his master's vehicle with his master's permission, but as *Higbid* v. *R. C. Hammett, Ltd.* shows that is not enough."

In *Staton* v. *National Coal Board* [1957] 2 All E.R. 667 an employee who was required by his employers to collect his week's wages from the pay office on the defendants' premises and met with an accident, through his own negligence, on his way to the pay office after he had finished his work was held to have been acting in the course of his employment and that, therefore, his masters were vicariously liable for his negligence.

There is indeed a wealth of authority on this subject and we would like to sum up by quoting a passage from Clerk & Lindsell on Torts, 13th ed., paragraph 218 under the heading " Course of the Employment." It reads as follows :

> " The question whether a wrongful act is within the course of a servant's employment, or, as it is sometimes put, whether it is within the scope of his authority, is ultimately a question of fact, and no simple test is appropriate to cover all cases. That most frequently adopted is given by Salmond, namely, that a wrongful act is deemed to be done in the Course of the employment, 'if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. It is clear that the master is responsible for acts actually authorised by him : For liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them."

Having considered the general principles relevant to this issue we now have to apply them to the facts of the present case in a common sense way.

Having given the matter our best consideration we are of the view that the first defendant was not, at the material time, acting in the course of his employment so as to make his master vicariously liable for his negligence. It seems

to us that it would be wholly unrealistic to hold that when the first defendant alighted from the bus and proceeded to the coffee shop he was still doing that which he was employed to do or anything incidental thereto even though what he was doing may have been coincident in time.

In view of the conclusion that we have reached this appeal will be allowed and the judgment of the trial Court varied to the extent that the appellant-defendant No. 3 should be exonerated of all liability.

With regard to costs we think that in the circumstances of this case we should make no order as to costs.

Appeal allowed. Judgment of the District Court varied accordingly. No order as to costs.