1978 January 26

[STAVRINIDES, L. LOIZOU, A LOIZOU, JJ.]

ANDREAS TSIOPANIS

*Appellant-Defendant,*

*v*

GEORGHIOS AVRAAM, MINOR THROUGH HIS FATHER AND NEAREST FRIEND AVRAAM CHRISTODOULOU,

*Respondent-Plaintiff*

(*Civil Appeal No* 5221)

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*Negligence—Drum containing inflammable substance—Attempt to cut or weld with electro-welder—Risk of explosion—No need for a warning by carrier of drum against such risk—Within reasonable contemplation of welder that possibility of explosion could reasonably be anticipated—Due care should have been taken against it*

*Master and Servant—Vicarious liability—Ostensible authority of senior employee—Apprentice acting on instructions of such employee—Who was the person giving instructions to him during the master's absence—Act done at premises of master, during working hours and of a kind connected with the work of the master—Performed within the scope of employment of the employees—Whether master would be liable if authority of apprentice was not conferred upon him by the master but by the senior employee, acting on behalf of the master to whom the master had directly or indirectly delegated the supervision of the apprentice and if senior employee in giving instructions exceeded his own authority*

The respondent, an apprentice carpenter at a workshop opposite that of appellant, was injured as a result of an explosion which occurred whilst an apprentice of the appellant was in the process of cutting a drum into two by means of the electro-welding machine of the appellant who is a blacksmith.

The trial Court found that the appellant had never given instructions to his employees prohibiting them from carrying

out minor works in his absence; that it was on the instructions of the superior servant (Georghios Yianni) and in his presence that the apprentice attempted to cut the drum; and that the apprentice was receiving instructions from Georghios Yianni who was the apprentice's superior. The trial Court also found that the drum contained an inflammable substance which exploded when it got into contact with the electro-welder; and that the failure of the apprentice or appellants' said superior servant to ask the person who brought the drum, or try to find out themselves, what its contents were amounts to negligence. The trial Court concluded that this negligence was committed whilst the apprentice and the said Georghios Yianni were acting within the scope of their employment and for this reason the appellant (defendant) was held vicariously liable and was adjudged to pay damages to the respondent.

The defendant appealed and challenged both the finding of negligence and vicarious liability:

*Held, dismissing the appeal,* (1) if it is attempted to cut or weld a drum with an electro-welder there is a risk, if it contains inflammable substances and it is closed, for the inflammable substances exploding, and as against such a risk there was no need for a warning to be given by the carrier who brought the drum, as it should have been within the reasonable contemplation of the welder that such a possibility could reasonably be anticipated and therefore due care should have been taken against it. In the circumstances, therefore, the conclusion of the trial Court that the explosion was caused by the negligent act of the appellant's employee was a proper one.

(2) Considering that the superior servant (Georghios Yianni) was the person giving instructions to the apprentice as to what to do when the appellant was away from the foundry; and considering, also, the nature of the work done, which is not of a kind unconnected with that of an ironsmith and bearing in mind that it was done at appellant's premises during working hours and with the use of the equipment of the employer, the appellant, we have no difficulty in upholding the conclusion of the trial Court that this was work performed within the scope of the employment of the employees of the appellant.

(3) The apprentice was acting within the scope of his employment even if his express authority was not conferred upon him

by the master directly but by the superior servant acting on behalf of the employer to whom the employer has directly or indirectly delegated the supervision of the servant in question; and even if the superior servant in giving instructions to the apprentice exceeded his own authority because so far as the apprentice was concerned the superior servant had ostensible authority to give him those instructions—p. 34–35 of the judgment post (See *Irwin* v. *Waterloo Taxi-Cab Co. Ltd.* [1912] 3 K.B. 588; and Antiyah on Vicarious Liability in the Law of Torts, 1967 p. 204).

*Appeal dismissed with costs.*

Cases referred to:

*Philco Radio Ltd.* v. *J. Spurling Ltd. and Others* [1949] 2 All E.R. 882;

*Canadian Pacific Railway Company* v. *Lockhart* [1942] 2 All E.R. 464 at p. 468;

*Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550;

*Municipal Corporation of Limassol* v. *Agathangelos Constantinou* (1972) 1 C.L.R. 119;

*Irwin* v. *Waterloo Taxi-Cab Co. Ltd.* [1912] 3 K.B. 588;

*Hancke* v. *Hooper* [1835] 7 C. & P. 81;

*Clelland* v. *Edward Lloyd, Ltd.* [1938] 1 K.B. 272.

**Appeal.**

Appeal by defendant against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Papadopoulos, S.D.J.) dated the 20th June, 1973 (Action No. 61/70) by virtue of which he was adjudged to pay to plaintiff the sum of £482.– as damages, having been found vicariously liable for the negligence of his employees committed with in the scope of their employment.

*E. Vrahimi* (*Mrs.*) for the appellant.

*M. Zambakidou* (*Miss*) with *D. Savvidou* (*Mrs.*) for the respondent.

*Cur. adv. vult.*

STAVRINIDES, J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU, J.: The appellant was adjudged to pay £482.– as damages, out of which £82 were agreed special damages,

and costs on that scale, having been found vicariously liable for the negligence of his employees committed within the scope of their employment.

The facts as found by the trial Court are shortly these:

The respondent, a minor, suing through his father and nearest friend, was an apprentice carpenter at a workshop at Aristofanous Street, Nicosia, which was opposite that of the appellant, who is a blacksmith and maker, *inter alia*, of iron bars, frames, etc., and who, at the material time, had in his employment one Georghios Yianni and an apprentice, Costas Theofanous.

In the afternoon of the 16th December, 1969 an employee of a certain Andreas Georghalli called at the workshop of the appellant who was away at the time at Morphou, and asked them if a drum that he brought with him could be cut into two halves and handles welded on it for use as a dustbin. Costas Theofanous, with the knowledge and express authority of Georghios Yianni, tried to cut the drum with a cutter, but as he could not do it in that way, he with the consent of Georghios Yianni, took his master's electro-welding machine from inside the shop out into the yard, where the drum was, and switched it on, so that he could use it for the purpose. As soon as he approached the nozzle of the machine to the barrel there was an explosion that forcibly threw away its bottom which hit the respondent, whilst, at the same time, its contents caught fire which spread to the latter's clothes.

There was no expert evidence before the trial Court as to what caused the explosion of this drum, but when the attempt to cut it was made, its cap was closed, and, according to the evidence of the appellant himself, if a drum contains inflammable substances and is closed and one attempts to cut it or weld it with an electro-welder, there is a risk of the inflammable substance exploding.

The trial Court having rejected the version of the defence and relying on the version of the plaintiff and witness Theofanous came to the following conclusions:

> " On this evidence we feel that we can safely arrive at the conclusion that the drum contained some kind of inflammable substance which when it got in contact with the

electrowelder, it exploded. There is ample evidence before us which comes both from P.W. 2 and D.W. 2 that when the drum was brought to the premises of the defendant, neither the first witness nor the second asked that person what it contained nor did they try to find out what its contents were and if it was safe to proceed to cut the drum. P.W. 2 proceeded to cut it on the instructions and with the consent of D.W. 2 and in our view his failure or their failure to find out what the drum contained amounts to negligence. This negligence was committed whilst the witnesses were acting within the scope of their employment and for this reason we hold that defendant is vicariously liable.

In the result, we find that the defendant is liable for the injuries received by the plaintiff."

Both conclusions are challenged by this appeal. It has been argued that it was the duty of the person that brought the drum to the appellant's workshop to inform the appellant's employees about its contents, and not the duty of the apprentice to inquire as to the contents of the drum before he started work on it with fire.

In support of this proposition we were referred to Charlesworth on Negligence, 4th Ed. p. 323, para. 696 which deals with explosive substances, where it is stated that, " The duty in the case of explosive materials is similar to that already explained in connection with firearms. If they are delivered to a person competent to understand and profit by a warning, a warning should be given", and we were referred to the case of *Philco Radio Ltd.* v. *J. Spurling Ltd. and others* [1949] 2 All E.R., 882, a case where by mistake a carrier delivered celluloid scrap to a factory where it was not expected without giving any warning as to its dangerous character and an employee in the factory, a typist, in ignorance of the explosive nature of the scrap set it alight with a cigarette, thereby causing an explosion and where the carrier was held liable. It was not in dispute in Philco's case that the defendants were negligent in delivering this highly inflammable material at the wrong address without any kind of warning or indication of its dangerous nature, but the defendants contended that the damage which took place to the plaintiff's premises was not a natural and probable result

of their negligence but that it was due to a novus actus interveniens on the part of the typist, namely, her act of conscious volition in intentionally setting light to this material. But this is not our case. Here we have a drum entrusted for some sort of industrial process at a workshop. Admittedly, if it is attempted to cut or weld a drum with an electro-welder there is a risk, if it contains inflammable substances and it is closed, for the inflammable substances exploding, and as against such a risk there was no need for a warning to be given by the carrier who brought the drum, as it should have been within the reasonable contemplation of the welder that such a possibility could reasonably be anticipated and therefore due care should have been taken against it. In the circumstances, therefore, the conclusion of the trial Court that the explosion was caused by the negligent act of the appellant's employee was a proper one.

It remains now to consider the second ground of appeal, namely, that the act complained of was not within the scope of the employment of the appellant's employees and, therefore, the appellant was not vicariously liable for the damage caused thereby.

It was argued on behalf of the appellant that this was a case where the servant, employed to do a particular work or a particular class of work only, did something outside the scope of his employment and in such a case the master is not responsible for any mischief which the servant may cause to a third party.

In support of this proposition we were referred to the case of *Canadian Pacific Railway Company Ltd.* v. *Lockhart* [1942] 2 All E.R. 464, and in particular at p. 468, where a passage is cited from the judgment of the Privy Council in *Goh Choon Seng* v. *Lee Kim Soo* [1925] A.C. 550:

> " As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged

the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and could not have authorised, had he known of it. In these cases the master is, nevertheless, responsible."

It was argued that the present case falls within the second category of cases.

The question of vicarious liability to third persons for the negligence of one's servants came up for consideration by this Court on a number of occasions and useful reference may be made to the case of *Municipal Corporation of Limassol* v. *Agathangelos Constantinou*, (1972) 1 C.L.R. p. 119, where at p. 128 the Court cited with approval a passage from Clerk and Lindsel on Torts, 13th Edn. para. 218, regarding the test as to whether a wrongful act is deemed to be done in the course of one's employment. The test formulated by Salmond in his Law of Torts and adopted in the above passage is:

" 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."

Of course the time and place at which an act is committed are important factors and in a proper case may show clearly if the servant has been acting in the course of his employment.

The findings of the trial Court were very clear on the evidence. Georghios Yianni was the person giving instructions to the apprentice as to what to do when the appellant was away

from the foundry. It rejected the allegation that the appellant had prohibited his employees from carrying out minor work in his absence, and support for that finding was found in the evidence of Yianni himself; and the Court found that it was Yianni who told the apprentice to cut the drum.

Considering the nature of the work done, which is not of a kind unconnected with that of an ironsmith, and bearing in mind that it was done at the premises during working hours and with the use of the equipment of the employer, the appellant, we have no difficulty in upholding the conclusion of the trial Court that this was work performed within the scope of the employment of the employees of the appellant.

However, the case was not decided merely on this ground. The conclusion of the trial Court that the work was done within the scope of the employment of the appellant's employees was drawn from the fact that the apprentice acted on the instructions and with the consent of Georghios Yianni. On this point the trial Court made clear findings--

(a) that the appellant had never given to his employees instructions prohibiting them from carrying out minor work in his absence; (b) that it was on the instructions of Georghios Yianni and in his presence that the apprentice attempted to cut the drum, rejecting the evidence of Yianni to the contrary, and gave for those findings a clear reasoning; and (c) the apprentice was receiving instructions from this Yianni who was the apprentice's superior.

It has, therefore, to be considered, what is the legal position in the case where the express authority of a servant is not conferred upon him by the employer directly but by the superior servant acting on behalf of the employer to whom the employer has directly or indirectly delegated the supervision of the servant in question. Further, if a superior servant in giving instructions to the subordinate exceeds his own authority the question arises whether the subordinate servant in carrying out these instructions acts within the scope of his express authority. The point arises in *Irwin* v. *Waterloo Taxi-Cab Co. Ltd.*, [1912] 3 K.B. 588 C.A., where the law was stated by Fletcher Moulton, L.J. to be -

> " If a master directs a servant to take his orders in respect of matters within his contract from A.B., such orders

when given, become the orders of the master. A master can always delegate his authority and he does so when either expressly or impliedly he designates a person as authorised to give orders for him and on his behalf. In the present case the fact that Black was the general manager implied that it was the duty of a servant in the position of Bird to obey the orders given to him in the ordinary matters of his service. His driving the car on this occasion was thus in fulfilment of his duty of obedience to his masters, the defendant company, and, therefore, he was at the time their servant doing what he was engaged upon by their orders. Nothing more than this is needed to make the principle respondeat superior apply."

The comment to be found in Atiyah on Vicarious Liability in the Law of Torts, 1967, at p. 204, is that the reason why it was within the scope of the servant's authority to obey even the unauthorised instructions of his superior in that case was that, so far as the subordinate servant was concerned, the superior servant had ostensible authority to give him those instructions. He was held out by the master as being the person whose instructions had to be obeyed, and as in all cases of holding out, it mattered not that the superior servant was acting against express orders or entirely for his own purposes in giving the instructions. We subscribe fully to these principles and comments.

In our case, on the facts as found by the trial Court, the superior servant was not acting outside his authority when he instructed the apprentice to carry out the work in question. But even if it was to be taken that he acted outside his authority, against express orders or entirely for his own purpose, in giving instructions, there is nothing in the evidence to show that there did not exist this ostensible authority of the superior servant.

Needless to say that for the purposes of the law relating to vicarious liability, it appears never to have been doubted that an apprentice is a servant. (See *Hancke* v. *Hooper* [1835] 7 C. & P. 81 and *Clelland* v. *Edward Lloyd, Ltd.*, [1938] 1 K.B. 272).

For all the above reasons the present appeal is dismissed with costs.

*Appeal dismissed with costs.*