1956 *Present :* Gunasekara, J., and Sinnetamby, J.

V. NADARAJA, Appellant, *and* THE ATTORNEY-GENERAL *et al.*, Respondents

S. C. 97 (Inty.)—D. C. Colombo, 26,071

Delict—Crown—Liability to be sued—Applicability of English Law—Civil Law Ordinance (Cap. 66), s. 3.

The Crown is not liable to be sued in tort for the acts of its servants. The statute law (Crown Proceedings Act) now prevailing in England is not applicable in Ceylon.

APPEAL from an order of the District Court, Colombo.

S. Sharvananda, for the plaintiff-appellant.

V. Tennekoon, Crown Counsel, with *A. E. Keuneman*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 27, 1956. SINNETAMBY, J.—

The facts of this case are shortly as follows : A railway train belonging to the Ceylon Government and driven by the 1st defendant struck and injured a lad by the name of Ravindran who subsequently on the same day, viz., 5/4/51 succumbed to his injuries. The plaintiff who is the father of Ravindran and had also been appointed the Administrator of

his Estate instituted the action against the 1st defendant and the Government of Ceylon as 2nd defendant for the recovery of damages alleging negligence on the part of the 1st defendant in driving the said railway train and a failure on the part of the second defendant to fulfil its duty to take reasonable care to avoid acts and omissions it can reasonably foresee.

When issues were being framed at the commencement of the trial in the Court below learned Counsel for the appellant suggested *inter alia* the following issues :—

Issue 5. Was the 1st defendant at the relevant time acting as the agent of the 2nd defendant ?

Issue 6. If issue 5 is answered in the affirmative is the 2nd defendant liable ?

Issue 7. If issue 6 is answered in the affirmative to what damages is the plaintiff entitled (*a*) as Administrator of the Estate of the late Ravindran, (*b*) personally against the second defendant ?

Objection was taken at the trial to the word " Agent " in issue 5 by learned Crown Counsel and in consequence these words were deleted from that issue. The proceedings do not show that the word " servant " was substituted in its place as was obviously intended but issue 13 and the pleadings framed by learned Crown Counsel make it clear that the case proceeded to trial on this basis. Issue 13 is as follows :

" Is the Crown liable in damages for the acts of negligence of its servants ? "

In para 2 of the amended plaint the basis on which the plaintiff seeks redress against the 2nd defendant is set out and is as follows :—

" The 1st defendant was a servant of the Government of Ceylon : he was an engine driver and he drove train No. 589 within the scope of his employment on 5th April, 1951."

and again para 26 is in the following terms :—

" The Government of Ceylon as carriers by land are subject to the liabilities in respect of negligence of its servants causing damage while they were carrying and acting for their master. "

Even at this early stage Counsel appears to have appreciated that a distinction does not exist between a " servant " and an " Agent ".

Among the defences raised in the answer of the 2nd defendant the most important one was that the Crown was not liable to be sued in tort in Ceylon. The learned District Judge on the invitation of Counsel decided to take up issue 13 and certain other issues relating to the constitution of the action as preliminary issues. After hearing argument the learned Judge answered issue 13 in favour of the Crown and dismissed plaintiff's action as against the 2nd defendant. It is against this finding that the appeal has been preferred.

Ever since the decision in *Colombo Electric Co. v. The Attorney-General* [1] the law in regard to the liability of the Crown to be sued in tort has been regarded as authoritatively settled. In that case the Supreme Court after reviewing all the earlier decisions came to the conclusion that by virtue of the Royal Prerogative an action of tort is not maintainable against the Government of Ceylon and that even under the Roman Dutch Law there is no authority for the proposition that the Crown is liable to be sued in tort.

The argument advanced in the appeal, however, was that the law in this respect has undergone a change since the enactment in England of the Crown Proceedings Act in 1947. The argument proceeded on the following lines :—

Under the Civil Law Ordinance (Cap. 66), Section 3, the law applicable in all questions or issues relating to Principals and Agents shall be " the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England " ; the relationship of master and servant is the same as that of Principal and Agent ; the law applicable to the liabilities of the master must therefore be the law administered in England at the corresponding period ; in consequence, since 1947 the Crown in Ceylon would be liable in the same way as in England for the negligence of its servants.

We are indebted to learned Counsel for their exhaustive and helpful arguments which have been of great assistance to us in arriving at a decision. The question that immediately arises for consideration is whether the liability of the master for the tortious acts of his servant arises from some principle relating to the Law of Agency or is it quite independent of any such principle ?

Who then is an Agent ? For the purpose of a contract " Agency " has been defined to be the relationship that exists when one man represents another as being employed by him for the purpose of bringing him into legal relations with a third. (Anson, 20th Ed. p. 386). Dealing with Principal and Agent, Salmond in his text book on the Law of Torts (9th Ed.) Section 24 p. 86 observes :

> " Any person who authorises or procures a tort to be committed by another is responsible for the tort as if he had committed it himself . . . . Principal and Agent therefore are jointly and severally liable as joint wrong doers for any tort authorised by the former and committed by the latter. "

It will thus be seen that the relationship of Principal and Agent can not only exist in regard to contracts but also in regard to torts. In regard to torts committed by an Agent not expressly authorised or subsequently ratified by his Principal the general rule as stated by Salmond is as follows (p. 86) :

> " Speaking generally a Principal is liable only for those acts of his Agent which he actually authorises. He is not in general liable for unauthorised torts committed by the Agent in the course of his agency. "

[1] *(1913) 16 N. L. R. 161.*

McKerron dealing with the same subject puts it in this way (4th Ed. p. 119/120) :

> " But for the unauthorised act of an Agent, i.e., a person having express or implied authority to represent or act on behalf of another person who is called his Principal, the Principal is not in general responsible, even though the act was committed by the Agent in the execution of his employment. To this rule there are two chief exceptions. The first is where the act complained of was committed by the Agent acting in his capacity of Agent. . . .
>
> The second exception is where the relationship of Principal and Agent is that of Master and Servant. "

The subject is dealt with exhaustively and with much clarity in the Restatement of the Law of Agency published by the American Law Institute. Under the heading " Torts of Agents who are not Servants " (Vol 1, Section 250, P559) the law with special reference to physical injury is stated as follows :

> " Except as stated in Section 251, a principal is not liable for physical harm caused by the negligent physical conduct of an Agent, who is not a servant, during the performance of the principal's business unless the act was done in the manner directed or authorised by the principal or the result was one intended or authorised by the principal. "

Section 251 deals with cases where the principal becomes liable for the acts of an Agent which the principal is under a duty to perform with care, examples of which are given under section 214, p. 472. In this case we are only concerned with physical harm to another and the law is thus stated : the principal is liable if the agent is negligent in performing "an act which the Principal is under a duty to have performed with care ".

All the text writers, may be somewhat loosely, deal with the Rights and Liabilities of Master and Servant under the heading of " Principal and Agent ". Bowstead, however, in his book on Agency does not devote any particular chapter to this subject. Salmond for instance says :

> " If we use the term Agent to mean any person employed to do work for another, we may say that Agents are of two kinds distinguishable as (1) servants and (2) independent contractors. "
>
> (9th Ed. p. 89)

In the Restatement of the Law of Agency the learned authors comment as follows (p. 11) :

> " A master is a species of principal and a servant is a species of agent . . . . . The word ' servant ' is used in contrast with ' Independent Contractor ', a term which includes all persons who contract to do something for another and who are not servants with respect thereto. "

Regarding the servant as a species of agent the next question that arises is whether the master's liability for his servant's torts is the outcome of the relationship between Principal and Agent which would in that event

be common to all types of agency or is it something special and peculiar to the relationship of master and servant quite independent of the principles governing the Law of Agency. I may be excused for repeating that on the answer to this question would depend the question of whether the law now prevailing in England in regard to the liabilities of the Crown to be sued in tort obtains in Ceylon or not.

If the liability of the master for the tortious acts of his servants can be traced to some principle governing the Law of Agency the English law it seems to me would apply even to such incidental matters as the correct Court in which the action should be brought or the correct party to be sued. I am confirmed in this view by the decision of our Courts in regard to matters of a similar nature, e.g., it has been held that recourse may be had to the principles of English Law to decide the correct Forum in which an action for the recovery of the purchase price on a contract of sale of goods should be brought. Section 58 of the Sale of Goods Ordinance provides for the application of the English Law in regard to matters on which the Ordinance itself is silent. In *Dias v. Constantine* [1] the Supreme Court took the view that an action for the recovery of the purchase price on a contract for the sale of goods could be brought in the Court within whose jurisdiction the creditor resides. According to English Law the Debtor should seek out the Creditor and pay while under the Roman Dutch Law the converse is the case. Similar considerations influenced our Courts in deciding that the absence of consideration invalidated a promissory note though under the Roman Dutch Law causa would have been sufficient to render a promise valid.

In regard to the law governing the Rights and Liabilities of Master and Servant in relation to third parties it would, I think, be correct to say that our Courts have adopted the English doctrine of employers ' liability. McKerron in his book on the Law of Delict explains the furthest limit to which the Roman Dutch Law went in the following words (Section 34, p. 121, 4th Ed.) :

> " In Roman Law a person might in certain circumstances be held liable for the wrongs of his servants, but, except where the servant was a slave there was no general principle of liability. The Roman Dutch writers speak with uncertain voice on the subject. Some of them deny the existence of any general rule of liability ; others would appear to affirm it. But it would seem that the furthest that the authorities go is to hold the master liable for the wrongs committed by his servants (*famuli*) in the course of carrying out some duty or service *specifically* entrusted to them. "

What then is the principle or principles on which the liability of the master for the torts of his servant is based. In the Restatement of the Law of Agency the learned authors observe as follows :

> " The liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of his agent who is not a servant. " (pp. 10 and 11.)

[1] *(1918) 20 N. L. R. 338.*

With the advance of civilisation, with new inventions and labour saving devices, and with a new outlook on the obligations of one class or section of society to another, it is but natural that the law which was once considered sufficient to meet all needs should with the passage of time be found wanting. It had accordingly to be modified and extended to meet new situations as they arose. There thus developed in the relationship of master and servant a set of obligations which was peculiar to that relationship which cannot be traced to any previously recognised principle of law. The master was held liable for all wrongs committed by the servant within the scope of his employment. Even the meaning of the term " within the scope of his employment " has from time to time been extended to cover new concepts and new ideas. These had no relationship to the Law of Agency though from time to time various attempts have been made to explain them by bringing them within one or other recognised legal principle. McKerron in dealing with this question states (p. 122) :

> " Many reasons for the rule have been advanced. Perhaps the best explanation is given by Pollock. ' I am answerable ' he says ' for the wrongs of my servant or agent, not because he is authorised by me or personally represents me but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others. ' But this proposition cannot be accepted without considerable qualification. The truth would appear to be that the doctrine of employers' liability cannot be justified on purely logical grounds, but must be regarded in the ultimate analysis as based upon consideration of social policy. "

The later and more recent decisions of the English Courts make it reasonably clear that the liability of the master for the torts of his servants is based upon the peculiar relation that exists between master and servant and does not come within any recognised principle of the Law of Agency. Winfield in his textbook on the Law of Torts traces the history of this particular instance of vicarious liability (pp. 137 & 138, 6th Ed.). According to him in the early Norman period liability of the master existed only when there was a command or consent on the part of the master to the servant's wrong. Subsequently the need for an express command gave way to a rule that the master was liable if an implicit command could be inferred from the general authority he had given to the servant. " Trade " says Winfield " has become far too complicated to allow the *particular command* theory, which suited the old simple relation of master and servant well enough, to cover persons like factors or agents who were not accustomed to take their orders like a slave or a private soldier. Of course this does not explain why the master should be liable at all, and for the rule various reasons—all unconvincing—were given by the lawyers . . . . . " During the 19th century the Implied Command theory was displaced by the " scope of employment " theory which is now the rule. Winfield continues :

> " A scientific reason for the rule is hard to find. It seems to be based on a mixture of ideas—the master can usually pay while the

servant cannot; that a master must conduct his business with due regard to the safety of others; that the master profits from the servant's employment and by employing the servant has set the whole thing in motion."

The basis of the masters' liability came up recently for consideration before the Court of Appeal in *Broom v. Morgan* [1]. If the liability was "vicarious" then the master's liability would arise only if the servant himself was liable to the third party. In this particular case the plaintiff and her husband were employed by the defendant to work in a beer and wine house. Plaintiff was injured through the negligence of her husband—a wife cannot sue her husband in tort under the English Procedural Law—and it was argued that where the servant, in this case the husband, was immune no vicarious liability can arise. The Court of Appeal held that despite the legal immunity of the husband plaintiff was liable, and Denning, L.J. made the following observations:

"I am aware that the employer's liability for the acts of his servant has often been said to be a vicarious liability but I do not so regard it . . . The reason for the master's liability is not the economic reason that the employer usually has money and the servant has not. It is the sound normal reason that the servant is doing the master's business and it is the duty of the master to see that his business is properly and carefully done."

The judgment of Denning, L.J., it will be seen proceeded on the footing that there was a breach on the part of the master of the duty which the law imposes on him to take care that his business is conducted without negligence. There was no question of an express or implicit authority coming in and the servant's act was regarded as the master's act. Denning, L.J. continued:

"You may describe it as a vicarious act if you please but not as a vicarious liability. My conclusion in this part of the case is that the master's liability for the negligence of the servant is not a vicarious liability but a liability of the master himself owing to his failure to see that his work was properly done."

Though the observations of Lord Justice Denning may be regarded as *obiter* they nevertheless set out a basis on which the master's liability for the act of his servant can be explained. With the views of this learned Judge I do with great respect agree.

I am therefore of the opinion that the liability of the master for the negligent act of his servant is not based on any principle relating to the Law of Agency but rather to the special relationship existing between master and servant which makes the act of the servant the act of the master provided it is done within the scope of his employment.

I shall now deal with one other proposition of law which learned Counsel for the appellant advanced though with some diffidence in support of his appeal. He contended that the Crown was indivisible, that there is

[1] *(1953) 1 A. E. R. 849.*

only one Queen, and if the immunity of the Crown to be sued in tort ceases to exist in England it also ceases to exist in every other part of her domain. In support he relied on the case reported in 1905 A. C. p. 551.[1] In that case it was held that where a Colonial Government had entered into a contract with the respondent for military service any money paid by the Imperial Government was in part discharge of the moneys due under the contract. The judgment proceeded on the basis that the contract of service was with the Crown and payment whether by the Mother Country or the colony was payment on behalf of the Crown. It must be remembered that this decision was as far back as 1905 when the concept of the Commonwealth of Nations was unknown and also legislation for the colonies was still in the hands of the Imperial Government. The position of a Dominion Government vis-a-vis the Imperial Government is entirely different to that of a Colonial Government.

As Paton puts it (Textbook of Jurisprudence, p. 281) :

> "The principle that the Crown is one and indivisible is very important and significant from a political point of view. But when stated as a legal principle it tends to dissolve into verbally impressive mysticism."

The Crown in its various dominions acts through its Ministers and in each unit governs through a separate Dominion Parliament. Claims by one Dominion against another are not unknown. This would not be possible if the old concept of the Queen being unitary and indivisible is carried to its logical conclusion for then the Queen cannot make a claim against herself. As Paton puts it :

> "In spite of historical theory the Crown is now a symbol of free association of nations each with an individual and international personality."

It follows that the Queen can in one dominion forego or place restrictions by Act of Parliament on her rights and Prerogatives without such right or prerogative being in any way affected in another dominion. That fact therefore that in England by virtue of the Crown Proceedings Act the Queen has foregone the immunity of being sued in tort should not in any way affect her privileges elsewhere. Indeed the Act itself specifically provides that it shall only apply to the United Kingdom and not to Northern Ireland, and section 40 (2) provides that nothing in this Act shall apply to the Crown except in respect of Her Majesty's Government in the United Kingdom. Quite apart from other considerations by virtue of the specific provisions in the Act itself it cannot be possibly made to apply to the dominions merely by reason of the theory, which can no longer be held to be applicable, of the unity and indivisibility of the Crown.

There is yet another and more important limitation imposed by the Crown Proceedings Act. Section 2 (1) (*a*) refers to the Crown's liability in respect of Agents and Servants—we are in this case concerned with

[1] *(1905) A. C. 551.*

servants. Section 2 (6) restricts the Crown's liability to acts of an " officer of the Crown " who is paid out of the " Consolidated Fund of the United Kingdom, monies provided by Parliament, the Road Fund or any other Fund certified by the Treasury. Section 38 (2) defines " officer of the Crown " to include any servant of the Crown. It will thus be seen that any servant of the Crown who is not paid out of the United Kingdom Fund, &c., does not come within the definition, and for torts committed by them the Crown would not be liable.

I am therefore of the opinion that the Crown Proceedings Act has in no way changed the law in Ceylon in regard to the liability of the Crown to be sued in tort. The judgment of the learned District Judge is affirmed and the appeal dismissed with costs.

GUNASEKARA, J.—I agree.

Appeal dismissed.