THE ELEMENT OF CONTROL IN VICARIOUS LIABILITY

MINIHAN v. B.A.L.M. (N.Z.) LTD., [1952] N.Z.L.R. 955.

The plaintiff, who had agreed to play for a cricket club formed amongst the employees of B.A.L.M. (N.Z.) Ltd., was injured while travelling to a match. The driver's negligence caused the accident. The plaintiff alleged that as the company owned the car, had fostered the club and had given it material support from time to time, the company should be responsible for the driver's negligence. The company contended unsuccessfully that it had no interest in the club, and had no control over its management, and that the request to borrow the vehicle had come from the officers of the club in their capacity as such. The jury held that at the time of the accident the driver was acting on behalf of the company, with the result that the company was held liable for his negligence.

This decision evokes comment on the question of "control". In cases of vicarious liability this is a matter which often does not receive its due attention. This word is not capable of precise definition, but denotes a set of operative facts giving rise to vicarious liability. Its significance as the basis of such liability is often overlooked, causing difficulty in reconciling decisions. In all cases of vicarious liability there is a common factor, although the tendency is to regard vicarious liability under one or another of several separate heads. The common factor, here called control, is really some form of authority, either express or implied, known at present by varying names.

This matter is most obvious in the relationship (normally contractual) of principal and agent. There, the basis of liability is authority which may be express or implied, or, alternatively, the act may be ratified, giving retroactive authority. Partnerships, being a particular example of the principal and agent relationship, also depend on authority. Such authority is only one example of control, but where it exists the acts of the agent will be imputed to the principal and thus provide the necessary connecting factor to make him liable. As regards

master and servant, two questions fall to be considered, as a master is liable only (a) where the wrongdoer is his servant, and (b) where the servant is acting in the scope of his employment. As Salmond observes, the first depends on the amount of control and direction retained by the master, i.e. the servant must be under his authority; while the second depends upon the act itself being authorized (although the mode of performing it may be unauthorized) (1). In all cases where a master is held liable for the acts of an independent contractor it is either (a) because he authorized a wrongful act, or (b) because the act of delegation itself was wrongful. It is only with the former case that we are here concerned as in the latter the master is directly at fault. Therefore, before a master is liable vicariously he must be in control of the act.

Where a servant is lent, liability is based directly on control. It is he who was in control of the wrongdoer at the time of the wrong complained of, who is held liable, although once a master-servant relationship is established, the onus of proving that he was not in control at the material time is placed on the general employer. Two tests of this control have been postulated; see Century Insurance Co. Ltd., v. Northern Ireland Road Transport Board, [1942] A.C. 509 per Lord Wright at 515, 516; and Nicholas v. F.J. Sparkes and Son, [1945] 1 K.B. 309, 312.

Winfield maintains (2) that there is a further separate class of liability which he terms liability for "acts of casual delegation". This also is based directly on control and Winfield includes within the definition those acts where there is neither any legal contract of agency, nor any real master-servant relationship. However, it is submitted that this refinement is unnecessary, for if a principal has sufficient control of an act to be liable under Winfield's definition, he would also be liable under Salmond's definition of master and servant which is wide enough to include more than would normally be described as such. That Winfield's theory is not as affirmatively established as he suggests, is shown by Ormrod v. Crossville Motor ServicesLtd., [1953] 1 All E.R. 711. This would be a typical act of casual delegation but liability was established on the broader and more general ground of agency.

Without making an exhaustive survey, it is apparent that there is, in all cases of vicarious liability, some common

link (whether it is termed authority, direction, control, or acting on behalf of some other person) between the wrongdoer and the person held responsible. Here that common factor is called control, and it is because of this link that vicarious liability exists. The realisation that this is the basis of, and that it is vital to, such liability, has gradually appeared. Although each method may achieve the same end, the approach should be: "As the principal is in control he should be liable", rather than "This man is an agent, therefore his principal is liable." In Samson v. Aitchison, [1912] A.C. 844 at 850 the Judicial Committee expressed the principle thus:

> . . . if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury.

It follows that once control over a wrongful act is established, liability will result.

Control in the sense in which it is used here is not a term which can be easily explained. It is a symbol covering the existence of particular facts and circumstances which may lead to responsibility for the wrongful act of another. Perhaps the word "link" best conveys its task. It is not present only where there is a legal contract of agency or a master-servant relationship, as reference to recent cases will show. All that can safely be stated is that where some person is acting with the knowledge or authority of another, in a matter in which that other has an interest then there may be control. The knowledge or authority need only be constructive or implied, and there need be no specific order or request.

Despite the stress placed on control, in many instances the simplest way to prove this link is to establish a legal contract of agency, or a master-servant relationship, where control is known to be present. This course (particularly in cases involving motor vehicles) is often not open to counsel, and control must be proved from the particular facts and circumstances. Therefore, unless its importance is appreciated, the vital

factor to establish liability, or the essential ground upon which it may be resisted, may be overlooked. The test to be applied is not who had physical control, but who had the right to control; see Parker v. Miller (1926), 42 T.L.R. 408. If the defendant is found to have had that right, liability for the wrongful act must follow. However, unless such an answer is forthcoming, the plaintiff has failed to make out his case. Further, in motor vehicle cases, ownership may be prima facie evidence of control; see Barnard v. Sully (1931), 47 T.L.R. 557. But this presumption may readily be displaced by evidence.

Reference to the principle, as expressed in several recent decisions, may clarify the matter. In Hewitt v. Bonvin, [1940] 1 K.B. 188, a leading English decision, du Parcq L.J. states (at 194):

> The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.

He adds (at 196) that such a duty need only be moral or social. In other words, control may be based on the implied delegation of a purely social or moral duty. Such an allegation failed in that particular case.

The case of Ormrod v. Crossville Motor Services Ltd. (supra), provides an interesting illustration of a moral or social obligation. Devlin J. there states (at 712):

> It is clear that there must be something more than the granting of mere permission in order to create liability in the owner of a motor-car for the negligence of the driver to whom it has been lent, but I do not think that it is necessary to show a legal contract of agency. It is in an area between the two that this case is to be found, and it may be described as a case where, in the words of du Parcq L.J. there is a "social and moral" obligation to drive the owner's car.

In Australia the principle has been expressed in Christmas v. Nicol Bros. Pty. Ltd. (1941), 41 S.R. (N.S.W.) 317 at 320 per Jordan C.J. that:

> . . . in order to fix with vicarious liability a person other than the negligent driver himself, it is necessary to show that the driver was at the time an agent of his, acting for him and with his authority in some matter in respect of which he had the right to direct and control his course of action. If this is proved, liability is established on the part of the other person, and it is immaterial whether he is the owner of the vehicle or has begged, borrowed or stolen it. [Italics inserted]

The important feature is control and direction. Ownership is important only insofar as it affords inferences of agency, i.e. agency used in a wide sense.

If there is as much importance in the fact of control as has been alleged, it is surprising to note that the matter was hardly raised in Minihan's case. Gresson J. stated (at 961):

> Upon this question of control the evidence is either silent or inconclusive.

Where, as in that case, there was no legal contract of agency, nor any definite relationship of master and servant, some attention should have been given to the presence or absence of control. Had the poing been fully argued, it is possible that the jury would have arrived at a different verdict; for, although there was some evidence to support their finding, the matter was by no means free from doubt, and it is difficult to distinguish the relationship subsisting in that case from one of mere bailment. However, the finding of the jury that the company was in control must be accepted as correct, and once that is done the case is directly in line with authority, for liability follows from control.

Many consider that Minihan's case is wrongly decided and inconsistent with the body of law on the subject. As has been pointed out in the preceding paragraph, when the jury's finding is accepted that view cannot be maintained, and as that finding is one of fact, it is of little use comparing that case

with others. Whichever view is taken of Minihan's case, many will agree with Gresson J. who, in his summing-up to the jury said (at 958) that to hold the company is liable "is going a long way.".

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(1) Salmond, The Law of Torts (11th ed. 1953), 97, 98, 105.

(2) Winfield on Tort (6th ed. 1954), 144.