THE WELFARE STATE AND THE LAW OF TORT IN NEW ZEALAND

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1. The line of research discussed hereunder has been to endeavour to ascertain whether the advancement in New Zealand over the period (roughly) from 1930 to 1950 of the "welfare" state has resulted in any significant trend in relation to the law of tort. At the outset, it is abundantly apparent that in the whole field of tort, the policy of keeping in line with English decision and precedent is paramount. Such changes as may have been ascribed to the social development of the state along a particular line have, with perhaps one exception to be mentioned later, followed English precedent to such a degree as to render it impracticable to distinguish whether a law reform was indeed effected as a result of internal demands or the desire to achieve conformity with English principle.

2. It is surprising to realise that so little, if any, original contribution has been made in a growing society but that view is fortified by such comment as the following:

> As will be seen, the Courts have to a greater extent than in England abdicated any claim to be an agency of law reform. In consequence, the whole work of adapting the law to the needs of a rapidly developing and mobile society has been thrown on Parliament. Although hampered by an excessive regard for English precedent, Parliament has on the whole performed this task surprisingly well. Outside such traditional categories as tort and contract where departure from English precedent has been slight and hesitant New Zealand law is probably as advanced as any in the world.(1)

Where, therefore, the whole attitude in regard to the law of tort has been "hesitant" it is difficult to assert with any confidence that such development as there has been resulted from any particular influence: this excepts always the influence exercised by the Courts and legislative enactments of England.

3. In this latter regard, the list of statutes enacted in apparent pursuance of the desire to follow English advances in the law is both impressive and far-reaching: this list includes the Law Reform Act 1936, the Contributory Negligence Act 1947, the Limitation Act 1950, the Crown Proceedings Act 1950 and the Defamation Act 1954. But each of these is modelled upon an English counterpart and none derives its enactment in New Zealand from any original desire to reform: at most it can be said that the presence of the welfare state concept of government afforded a suitable climate to the introduction of the reforms made by those Statutes. The Statutes referred to comprise practically the whole of the legislative activity of any magnitude affecting the substantive law of tort, save those in the field of master and servant relationship to which specific reference is later made. The conclusion therefore is reached in regard to the results of legislation that such legislation is no evidence of any significant trend due to social development and the so-called welfare state in New Zealand, as affecting the law of tort. It would be idle to deny the possibility and, indeed, likelihood that similar social influences as were present in New Zealand over the period were also at work in England, so as to affect the introduction of the statutes mentioned but the predominating influence in New Zealand appears to have been the desire to follow English precedent: in consequence the significance of social influences in New Zealand is sufficiently obscured to render it impossible to assert that there was any trend discernible.

4. The Courts in New Zealand have ever been loath to depart from English precedent and there is no decision over the years in question to which reference can be made as breaking new ground or establishing a new principle (at least in relation to tort). Perusal of the many judgments dealing with questions of negligence and the like shows to what extent the Judges have felt constrained to follow and apply English precedent. It is not to be assumed that this statement involves any criticism whatever but merely indicates that it appears an inevitable corollary to such approach to the legal principles involved that there be little or no room for expansion of the law otherwise than within the bounds of precedent. That changing conditions

and changing local requirements may have necessitated a departure from English precedent is not a view that has been readily recognized but, by the same token, it is fair to add that there does not appear to have been any strong necessity for such departure. The view of the Courts generally towards departure from settled law is perhaps summarized in the dictum of the present Chief Justice in Perkowski v. Wellington City Corporation, [1957] N.Z.L.R. 39, at 63, where he said:

> The law as to the duties of occupiers towards those who come upon their premises needs restating, though I should doubt the wisdom of restating it along the lines that appear to have been suggested in some of the more recent cases. Just how it should be restated in this Dominion is not a matter for this Court but for the New Zealand legislature: and we have no right to determine the present case in accordance with our own views as to what the law should be or in accordance with our forecast of what the law may be when Parliament decides to amend it.

As to the desirability of the Court of Appeal in New Zealand differing from English Court of Appeal decisions, it will suffice to cite portion of the judgment of the Court of Appeal (N.Z.) delivered by Cooke J. in Union S.S. Co. v. Ramstad, [1950] N.Z.L.R. 716, 727:

> It was laid down many years ago by the Privy Council that, in the construction of a section of a statute in force both in England and in the Colonies, the Court in the Colony should follow the decision of the Court of Appeal in England: Trimble v. Hill (1879), 5 App. Cas. 342 and R. v. Carswell, [1926] N.Z.L.R. 321, 329; and, in the case of conveyancing decisions of long standing, a similar principle exists: Staples & Co. Ltd. v. Corby (1899), 17 N.Z.L.R. 734. The New Zealand revenue legislation differs in many respects from that in force in England, and it cannot be suggested that the principle laid down in Trimble v. Hill applies in terms to the present case; but we think that, even in cases that fall outside the above principles, this Court should, and always will, hesitate long

> before differing from a decision of the English Court of Appeal and particularly so where such a decision relates to a matter that arises in the day-to-day practice of the common law. Even, therefore, if we were doubtful as to whether the decision in Billingham v. Hughes, [1949] 1 All E.R. 684, were right, we would take the view that this Court should follow it: cf. Thomas Borthwick and Sons (Australasia) Ltd. v. Ryan, [1932] N.Z.L.R. 225, 278.

It is perhaps significant that the decision so followed (Billingham v. Hughes) was subsequently overruled by the House of Lords in British Transport Commission v. Gourley, [1955] 3 All E.R. 769, which in turn resulted in Ramstad's case being overruled by the New Zealand Court of Appeal in Smith v. Wellington Woollen Manufacturing Co. Ltd., [1956] N.Z.L.R. 491.

Again, therefore, the conclusion is reached that adherence to precedent results in there being in reported judgments no significant trend capable of appreciation in relation to the law of tort as a result of social development. This adherence to precedent being one related to English decisions, such developments as are evident are not related to any New Zealand causes.

5. There is one field, however, in which it is difficult to assess the position but in which there must be considered to have been an effect directly traceable to the social conditions of the period. At the end of 1935 a Labour Government took office for the first time in this Dominion and applied itself energetically to the promotion of social legislation. Contained in the Law Reform Act 1936 was a provision (s. 18) repealing s. 67 of the Workers' Compensation Act 1922 (which abolished the defence of common employment but imposed a statutory limit of £1000 upon the damages recoverable in respect of negligence of a fellow servant) and re-enacting that section without the statutory limit as to damages. In the result, the way was then open to claims by injured workmen in respect of negligence by their fellow employees and such claims rapidly multiplied in number; this, coupled with the extension of benefits under the Workers' Compensation Acts (now consolidated

in the Workers' Compensation Act 1956), the compulsory requirements of insurance against liability thereunder, and the extension of duties imposed by statute and regulation upon employers, have greatly extended the field of master and servant liability. As was said by Mr H.W. Dowling in a paper presented to the New Zealand Legal Conference in 1954(2):

> Theoretical principles of negligence remain fairly constant; but their practical application has become so extended that, in some views, it is sufficient to allege negligence for it to be almost a practical certainty that a jury will find a general verdict on that ground with which the Court finds the utmost difficulty in interfering.

That paper was directed to running down and industrial accident cases, and it is pertinent to note that in a supporting paper it was pointed out that it was not until 1936 that trial by jury became the order of the day by virtue of s. 29 of the Judicature Amendment Act of that year.

Thus it is significant that in the first year of government of a party elected primarily to represent the interests of the worker, two enactments virtually placed the right of determination as to the recovery of damages for the injured servant in the hands of the jury to an unlimited amount (subject, always, to the Court's power to order a new trial in accordance with the Rules of Procedure). Thus the common jury has become, and many urge rightly so, the body which fixes the standard of care demanded of an employer not only for his personal acts or omissions but also vicariously in respect of the acts or omissions of his servants. And the result is urged by Mr White in his supporting paper(3) as follows:

> It is fair to say that, to all intents and purposes a jury's verdict in a master-and-servant case stands if a non-suit argument cannot be maintained; and the Court of Appeal has found itself unable to put right manifest injustices perpetrated by juries. Let there be no doubt about it, the result is that we have in New Zealand a special form of liability - closely allied to absolute liability - for personal injury cases where insurance companies pay.

Reference cannot of course be made to anything which confirms the views expressed as to the attitude of juries in such master and servant cases other than possibly statistics. That there is a pronounced tendency to impose almost impossible standards of care by finding negligence proven is the common experience of every counsel experienced in jury work: the statistics of the Supreme Court show that in every year from 1945 to 1955 the number of jury actions brought to trial has been in the vicinity of ten per cent of all actions commenced and approximately one-third of the cases tried without jury. It is not unreal to deduce that, as experience has shown year after year, a substantial proportion of jury cases are settled without trial and a great number of those solely because of "jury risk".

Thus, it must be conceded that in the field of master and servant liability there is a very real trend apparent in practice: a trend towards the imposition ultimately of absolute liability in industrial accident cases. Whether this should be encouraged or not does not fall for consideration at the moment. But at the present stage it is fair to say that the mind of the layman at least as evidenced through the operations of the common jury is imbued with the thought that the injured workman should receive full and adequate damages for his injury: whilst paying lip service to the principles enunciated by the trial judge as to considerations of liability, in general the common juryman will see that he does receive compensation.

Conclusion: The law of tort in New Zealand therefore can be said to have shown no significant trend during the years in question: the application of the law has, however, in its relation to running down and industrial accident cases, been subject to an approach by juries which appears likely to have as its end result in such cases, absolute liability.

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(1) B.J. Cameron, "Law Reform in New Zealand", (1956) 32 N.Z.L.J. 72.
(2) H.W. Dowling, "Reform of the Jury System in Running-Down and Industrial Accident Cases", (1954) 30 N.Z.L.J. 140, 141.
(3) Ibid., 143, 145.