FOURTH REPORT

to

THE ATTORNEY-GENERAL

RELATING TO ABOLITION OF THE RULE IN

LISTER v. ROMFORD ICE & COLD STORAGE CO.LTD. (1957) 1 All E.R. 125

DARWIN

MARCH 1980

Members of the Northern Territory Law Review Committee:

The Honourable Mr Justice Toohey (Chairman), the Honourable Mr Justice Muirhead, I. Barker Q.C., Mr R.I. Pauling S.M., Messrs G.R. Clark, T.F. Coulehan, J. Dorling, P.G. Howard, D. Mildren, A.R. Miller, M. Maurice, T. Riley.

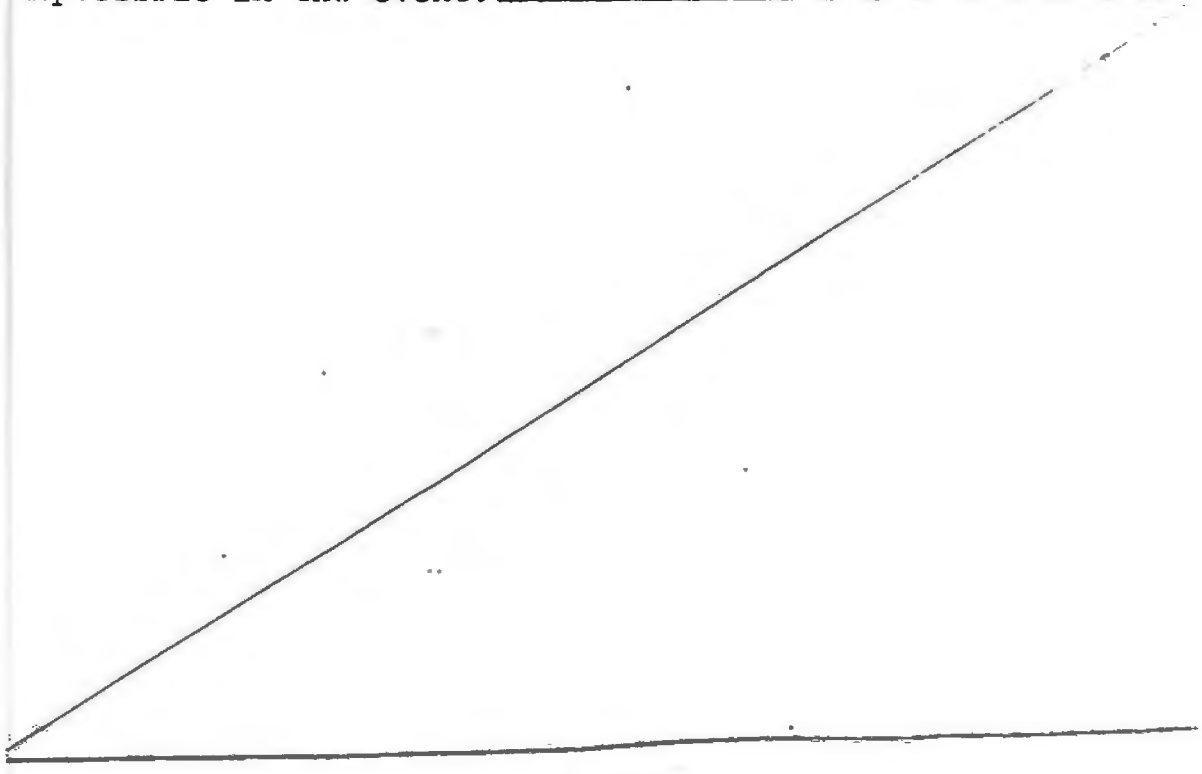
REPORT OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE - RELATING TO ABOLITION OF THE RULE IN LISTER V. ROMFORD ICE & COLD STORAGE CO. LTD. (1957) 1 All E.R. 125.

To: The Hon. P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia

Sir,

In September 1979 Mr Dean Mildren presented his Report and recommendation in respect of the particular application of the principle of vicarious liability applied in Lister's case.

Mr Mildren's Report and the recommendations therein made were respectively received and endorsed by the Committee and we have the honour to present it to you hereunder. It had been hoped that the Committee would have been able to produce draft amending legislation but this has proved impossible in the event.



Report to the Northern Territory Law Review Committee
prepared by Dean Mildren, Esq.

"In Lister's case, the Respondent, Romford Ice & Cold Storage Co. Ltd. had been found liable for damages for negligence when Mr. Lister, who was a lorry driver employed by the Respondent, negligently ran into and injured his father. The father sued the Respondent relying on the principle of vicarious liability. The Respondent's insurers acting in the Respondent's name brought an action against Lister Jnr. for damages for negligence alleging a breach of duty to drive their motor vehicle with due care.

Lister Jnr. alleged that it was an implied term of his contract of service that the Respondent would indemnify him against all claims and proceedings brought against him for any act done in the course of his employment, or alternatively, that he received the benefit of any contract of insurance effected by the Respondent. This matter was considered by the House of Lords comprising Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow. By a majority of 3/2, the House of Lords held the Appellant had been in breach of his duty to his employers and that the Respondent was entitled to recovery for damages the amount for which they had been liable to the father.

Lord Radcliffe and Lord Somervell both dissented.

The effect of the decision of the House of Lords is that where a workman who is driving a motor vehicle in the course of his employment injures a third party, and that third party

brings an action against the workmen's employer for Common Law damages the employer may recover any damages which the employer has had to pay from the workman.

However, the principle is not confined to actions arising out of the use of motor vehicles. If an employee suffered an injury at work due to the negligence of a fellow employee, the same result would occur.

Prior to the 1st July, 1979, at least in the case of motor vehicle accidents, the workman was protected by Section 52 ss 1(b) of the Motor Vehicles Ordinance. That Section provides that a third party policy shall insure both the owner as well as the driver of a motor vehicle.

There is, however, no similar provision in the Workman's Compensation Ordinance, even though that Ordinance introduces into the Law of the Territory a mandatory requirement that each employer must take out an Employers' Indemnity Policy with a Common Law cover of not less than $40,000 (see S.18 (1)of the Act.)

On the 1st July, Section 52 of the Motor Vehicles Act was repealed.

It is also clear that under the provisions of the Motor Accidents (Compensation) Act, 1979, an action for damages at Common Law still lies in respect of an accident arising out of the use of a motor vehicle in certain instances - e.g. where the plaintiff is not a Territory resident or where the accident did not take place on a public street.

The position, therefore, is that an employee whose negligence causes an accident has no cover at all under the present law of this Territory except in so far as he may be given indemnity under Section 6 of the Motor Accidents (Compensation) Act. This means that such a person is at risk in having an action for damages brought against him where his employer has been found liable for his negligence to a third party.

In practical terms, I am not aware of any actual case where an employer, or insurer, acting under its rights of subrogation under a policy of indemnity granted to an employer, has in fact brought any action of the kind referred to. However, that does not mean that such an action might not be taken in the future, and as there are many employees whose assets would be worth pursuing, it is by no means beyond the bounds of possibility that some person one day will find himself sued in these very circumstances.

In South Australia, the rule in Lister v. Romford Ice has been abolished by virtue of Section 27 (c) of the Wrongs Act. That section reads in effect that the employee is entitled to be indemnified by the employer in respect of his negligent acts which may give rise to a claim by a third party. There is, however, a proviso in the South Australian Act which is rather curious and which reads as follows:

"Where an employer is proceeded against for the negligence of his employee, and the employee is entitled pursuant to a policy of insurance or contract of indemnity to be indemnified in respect of liability that he may incur in respect of the tort, the employer shall be subrogated to the rights of the employee under that policy or contract in respect of the liability incurred by him (the employer), arising from the commission of the tort."

The purpose of this provision in the South Australian Wrongs Act was to leave the law as it was in so far as the rights between two insurers were concerned.

One of the areas of the law in which Lister's principle is occasionally put into effect has been the situation where the employer has been covered by both a third party policy and by an employers' indemnity policy - in other words, in certain cases involving questions of doublt insurance.

It is believed in certain legal circles that the end result, where an employer is insured both by a third party policy and

by an employer's indemnity policy is that the third party insurer must meet the whole of the loss. The reason for this is because if the employer's indemnity insurer makes a payment under the policy, it may bring an action based upon the principle of Lister's case against the employee who is entitled to indemnity under the third party policy, but not entitled to indemnity under the employer's indemnity policy. Consequently the third party insurer ends up paying the whole of the damages and the usual rules of doublt insurance between the insurers are circumvented. Cases which discuss this sort of problem are C. & G. Insurance Co. Ltd. v. G.I.O. (N.S.W.) 129 CLR 374, Dawson v. Bankers & Traders Insurance Co. Ltd. (1957) VR 491, Northern Assurance Co. Ltd. v. Coalmines Insurance Pty. Ltd. 91 WN (N.S.W.) 293, Albion Insurance Co. Ltd. v. G.I.O. (N.S.W.). 121 C.L.R. 342.

The direct question of whether Lister v. Romford Ice is still the law in Australia has never been specifically decided by the High Court. There are, however, dicta in C. & G. Assurance Co. Ltd. v. G.I.O. (N.S.W.) which suggest that the High Court may well take a different view of the Common Law were the matter to be directly raised before it.

The problem of double insurance between insurers is probably not a matter which should greatly concern this Committee. I have mentioned the problem only for the sake of completeness and in any event, it would appear to have less significance today in view of the fact that most actions for Common Law damages (arising out of a motor vehicle accident) have in fact been abolished since the 1st July.

A further interesting development is the decision of Ash J in Kashemiji Stud Pty. Ltd. v. Hawkes (1978) 1 N.S.W. L.R. 143.

The effect of that case, as I understand it, is that because of Section 45(1) of the N.S.W. Act (its equivalent is S.27(1) of the Workmens' Compensation Act N.T.), the workman is precluded from having to repay to his employer any damages which the employer has had to pay. This case has been appealed, and the final decision may not be known for quite some time. Accordingly, it is my recommendation that in the whole of the circumstances, a workman should not be in the position whereby damages paid by his employer can be recovered against him and I would recommend the appropriate amendments be made to the Workmens' Compensation Ordinance and/or the Motor Vehicles Act to ensure that such actions can no longer be brought."

The foregoing has been adopted as a Report of this Committee and is presented for your consideration.

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Chairman
J.H. Muirhead

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Executive Member
A.R. Miller

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Member
T.F. Coulehan