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# OCCUPIER'S LIABILITY AND INDEPENDENT CONTRACTORS

*Datuk Bandar Dewan Bandaraya Kuala Lumpur* v
*Ong Kok Peng & Anor*[1]

A principal[2] is generally not liable for the negligent acts of his or her independent contractor.[3] Unfortunately, this seems to be a rule which is honoured more in its breach than its observance, so much so that the line between servant and independent contractor is threatened with extinction. The recent Malaysian case of *Datuk Bandar* provides yet another illustration of this. However, it is submitted that the reasoning by which the Supreme Court of Malaysia found the defendant liable is confused and somewhat doubtful.

The facts in *Datuk Bandar* are uncomplicated. The defendant owned a block of flats. The plaintiff went at 6 am to collect some keys from a tenant at the flats. After trying the lifts on the ground floor without success, the plaintiff climbed the stairway. On the fifth floor, he saw a partly open lift door illuminated by light from the stairway. There were no lights in the lift. The plaintiff opened the lift door and stepped inside. Unfortunately, there was no lift behind the door and the plaintiff fell down the shaft. There was no warning sign or barricade outside the lift door. Maintenance of the lift was carried out by the defendant's independent contractor, and the lack of a sign or barricade was a breach of the maintenance agreement. It was also clear that the independent contractor was negligent. The plaintiff sued the defendant for damages[4] and the defendant claimed an indemnity from the independent contractor.[5]

1 [1993] 2 MLJ 234 (*Datuk Bandar*).

2 The term "principal" is used to distinguish it from the term "employer", which is commonly used in discussions of the employer-servant relationship in the context of vicarious liability.

3 *Quarman* v *Burnett* (1840) 6 M & W 499; *Honeywill & Stein Ltd* v *Larkin Brothers Ltd* [1934] 1 KB 191, 196 *(Honeywill)*; *Torrete House Proprietary Limited* v *Berkman* (1940) 62 CLR 637, 647 *(Torrete House)*; *Salsbury* v *Woodland* [1970] 1 QB 324, 336.

4 While the judgment does not reveal the cause of action on which the plaintiff relied, it was presumably based on occupier's liability.

5 There were other facts which related to the defendant's claim for indemnity which for our purposes are not relevant. The trial judge found for the independent contractor at first instance but this was reversed on appeal.

The trial judge found for the plaintiff, holding that he was an invitee of the defendant and that the defendant had breached his duty of care to the plaintiff. On appeal, this decision was confirmed by the Supreme Court, albeit for quite different reasons.

The Supreme Court first acknowledged that the case belonged in the realm of liability of occupiers for dangerous premises at common law and concluded, on the authority of *Fairman* v *Perpetual Investment Building Society,*[6] that, while the plaintiff was an invitee of the tenant, he was only a *licensee* of the defendant. Further, the court held that the circumstances in which the plaintiff entered and fell down the lift shaft constituted a trap, *ie*, something "which involves the appearance of safety under circumstances cloaking a reality of danger,"[7] and that the plaintiff had not been warned of the trap. The court then accepted the concept that, while a principal is generally not liable for the acts of his or her independent contractor, one of the exceptions to the rule is the situation where the act or omission in question involves an extra-hazardous activity.[8] Having accepted this, the court held that the situation facing the plaintiff was created by such an extra-hazardous act or omission, for which the defendant must be held liable even though the damage was caused through the acts of his independent contractor.

With respect, the Supreme Court seems to have confused and fused two separate heads of liability, and the writer submits that the defendant should not have been found liable on either of these heads.

The first head of liability, as the court initially indicated, is that of occupiers for dangerous premises at common law. The writer has no quarrel with the court's finding that the plaintiff was a licensee. Since the decision in *Fairman*, it has generally been accepted that a visitor of the tenant of a flat is only the licensee of the landlord.[9] The writer also agrees that the condition of the lift can reasonably be described as a trap. At this point, the court could have held the defendant liable by finding that the defendant

6 [1923] AC 74 *(Fairman)*. Unlike in England, where this area is governed by the Occupier's Liability Acts (UK) 1957 and 1984, the common law still applies in Singapore and Malaysia as evidenced by cases like *Mohd Sainudin bin Ahmad* v *Consolidated Hotels Ltd & Anor* [1991] 1 MLJ 271; *Lim Seow Wah & Anor* v *Housing Development Board & Anor* [1991] 1 MLJ 386.

7 *Supra,* note 1, at 239, adopting the definition of a trap as stated in *Latham* v *Johnson & Nephew Ltd* [1913] 1 KB 398, 415.

8 *Supra,* note 1, at 239, citing *Salsbury* v W*oodland* and *Honeywill, supra,* note 3.

9 There was a suggestion by Scott LJ in *Haseldine* v *CA Daw & Son Ltd* [1941] 3 All ER 156, 164-166 that the pronouncements in *Fairman* were *obiter* and were not binding. Therefore, Scott LJ held that the plaintiff in the case before him was an invitee of the defendant. This question was settled in *Jacobs* v *London County Council* [1950] AC 361 by Lord Simonds, who, after observing that Scott LJ's view in *Haseldine* had not received any support, decided that the pronouncements in *Fairman* were *ratio*.

had breached his duty to the plaintiff by failing to warn him of the trap. There would then have been no further need to consider the liability of the defendant for the negligence of his independent contractor.[10]

It is, however, submitted that, even if the court *had* decided the case on this ground and found that the defendant had breached his duty (as occupier) to the plaintiff (as licensee), this would have been wrong at law. The duty owed by an occupier to a licensee was stated in *Robert Addie & Sons (Collieries) Ltd* v *Dumbreck*[11] as follows:

> the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but *which is known – or ought to be known – to the occupier*. (Emphasis added.)

It is submitted that, in this case, this duty was fulfilled by the defendant. On the facts, there was a trap, but it was not created by the defendant. There is no evidence to show that the defendant *actually knew* of the trap. Should the defendant have known of the trap? The defendant had employed an independent contractor, whose competence was not disputed, to maintain the lifts. Clause 4 of the maintenance agreement specifically provided for the "display at every landing door of the lift, [of] a notice or cordon or a reasonable signboard indicating that the particular lift [was] out of order."[12] Although the defendant may have known that the lifts were not working, there was no reason to doubt that this safety provision was not being complied with.

A similar fact situation was considered in *Morgan* v *Incorporated Central Council of the Girls' Friendly Society*.[13] In deciding whether an occupier ought to have known of the condition of a lift as a trap, Horridge J said:[14]

> it is said that [the defendants] ought to have found the defect out. I do not agree. They employed people who knew better than they about lifts ... [no] concealed danger existed of which they knew or ought to have known, because they employed competent people to advise them.

[10] It is clear from the case that the court was not merely considering this second matter as an alternative ground. The impression one gets is that had the lift not been considered an extra-hazardous activity, then no liability could have been imposed.

[11] [1929] AC 358, 365 *per* Lord Hailsham LC.

[12] *Supra,* note 1, at 237.

[13] [1936] 1 KB 404 *(Morgan)*. This case does not seem to have been brought to the attention of the court in *Datuk Bandar*.

[14] *Ibid,* at 405.

On the facts as they appear in the judgment, it would not have been reasonable to expect the defendant to have known of the trap. It follows from this that there was no breach of duty by the defendant (as occupier) to the plaintiff (as licensee). As indicated earlier, the court made no finding on this point. After deciding that the lift was a trap, it went on to consider the liability of the defendant for the negligence of his independent contractor.

By going on to consider this second head of liability, the court has blurred the distinction between the two separate heads of liability. Liability of the defendant as occupier is for defective premises, and the duty owed is a limited one, varying according to the nature of the entrants. As discussed earlier, there can be no liability under this head as the defendant had not breached his duty as occupier to the plaintiff as licensee.

The second head of liability is based on the ordinary principles of negligence. Liability of the defendant does not depend on him or her being an occupier, just as the plaintiff's cause of action does not vary according to the nature of his or her entrance to the premises. Liability is based either on the defendant's actual negligence, or, if his independent contractor was negligent, on whether the activity fell into one of the exceptions to the general rule excluding liability for principals.

On this second head of liability, it was clear that the defendant's independent contractor was negligent. For a principal to be liable for his or her independent contractor's acts, the activity must, *inter alia*, be extra-hazardous. While the court did not state this expressly, the relevant activity in this case was presumably the maintenance of the lift. However, the court seems to have equated the dangerous nature of the lift with the activity in question being extra-hazardous. With respect, this is wrong. It is clear that an activity is not extra-hazardous merely because what is to be done will involve danger to others if negligently done.[15] Principals are liable only where the activity is inherently dangerous. There is therefore a distinction between danger arising from the conduct of the activity (not extra-hazardous) and danger arising from the character of the activity (extra-hazardous).[16]

It is submitted that there is nothing inherently dangerous about the maintenance of a lift *if it is properly done*. If the independent contractor had put up signs and barricades, the plaintiff would not have been injured. The danger in this case arose because the independent contractor was negligent in not taking these simple safety measures. For this, the defendant should not have been held liable. This is again consistent with *Morgan*'s case, where the court did not consider that the condition of the lift satisfied any of the exceptions to the general rule excluding principals from liability

[15] For further discussion, see *Honeywill, supra,* note 3, at 197.
[16] For further discussion, see *Torrete House, supra,* note 3, at 648.

for the negligence of independent contractors.[17] It is therefore submitted that the defendant should not have been found liable on this head either.[18]

Courts are far too willing to hold a principal liable for the negligent acts of his or her independent contractor, to the extent that liability seems to be the rule rather than the exception. This willingness is a disturbing trend,[19] and one which should be curbed. The problem may not be as obvious where the principal is a large corporate entity with its own insurance. However, where the principal is an individual, the incidence of liability becomes critical. This principal may not be insured, whereas the independent contractor, apart from being the wrong-doer, is more likely to be a firm with resources and insurance. This is particularly significant in the Singapore context, where many home-owners hire independent contractors to carry out all manner of construction works. Further, although the principal may obtain an indemnity from the independent contractor, there may still be legal costs in recovering the money.[20]

It is clear that, in this case, the sympathies of the court were with the plaintiff. Unfortunately, in its eagerness to compensate the plaintiff, the court seems to have traversed a somewhat doubtful path to ascribe liability. It is submitted that, save in truly exceptional circumstances, liability should be imposed on the actual wrong-doer, the independent contractor. It is submitted that the time has come for the line between servant and independent contractor to be resasserted.

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17 *Supra,* note 13, at 405.

18 While the Supreme Court affirmed the trial judge's decision for this reason alone, it is necessary for completeness to mention that the Supreme Court considered that the defendant would also be liable for breach of statutory duty imposed by the Factories and Machinery Act (Malaysia) 1967 (Act 139). The writer does not propose to deal with this issue as, first, the decision did not turn on this, and, secondly, it involves a statute which may not be relevant in the Singapore context.

19 See G Williams, "Liability for Independent Contractors" [1956] CLJ 180. The most troubling example of this trend is how *Spicer* v *Smee* [1946] 1 All ER 489 can be interpreted to impose liability on a principal for an independent contractor's act of nuisance.

20 Williams, *supra*, note 19, at 195.

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