applicant left, by the testamentary disposition which the testator made, without adequate provision for his proper maintenance and support. It was not essential to jurisdiction that the testator should be worthy of censure on moral grounds.

This attitude to the "moral obligation" argument was also adopted by Williams J. and Fullagar J., who dissented however as to the conclusion to be drawn from it. With respect, it is suggested that this view is clearly right. The real question at issue is as to the meaning of the language of the legislation, and not as to the consequences to be drawn from a gloss upon the language. Then despite certain reasons of convenience for preferring the date of the application, it seems, as Kitto J. remarked, that the condition of jurisdiction is that the testator has exercised his power of testamentary disposition in such a manner that he has omitted to make adequate provision for the applicant in his will, and not that the applicant is found to be inadequately provided for notwithstanding any provision made for him by the testator's will; and "the question whether such an omission occurred can hardly be intended to admit of a different answer at an interval after the death from that which would have been given to it immediately upon the death."

KEVIN RYAN.*

TORTS.

Master's Right to Indemnity from Servant.

The decision of the House of Lords in *Lister v. Romford Ice Co.*[1] that, where an employer has been rendered vicariously liable in respect of the negligent act of an employee, such employer can recover in damages from such employee the amount for which he has been held so responsible, is one that has aroused considerable controversy.

The facts were simple. The defendant was a lorry driver employed by the plaintiffs and negligently drove the lorry into and injured his father, who was a co-employee. The latter obtained judgment against the plaintiffs. The insurers of the plaintiffs satisfied the judgment and caused action to be brought in the name of the plaintiffs against the defendant, acting under a clause of the contract of insurance enabling them to do so and without consulting the plaintiffs. The trial judge, Ormerod J., purporting to act under the *Law Reform (Married Women and Tortfeasors) Act*

1. [1957] 2 W.L.R. 158.

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1935,[2] (hereinafter called "the Tortfeasors Act") gave judgment for the plaintiffs, in effect ordering a complete indemnity under that Act. This judgment was affirmed by the Court of Appeal[3] by a majority, with Denning L.J. (as he then was) dissenting, but primarily on the basis of contract. The majority held that the defendant was in breach of an implied term in his contract of employment that he would drive with reasonable care and skill. The majority then went on to hold that the claim of the plaintiffs was not defeated by the fact that they and the defendant were technically joint tortfeasors; they thought that the rule in *Merryweather v. Nixan*[4] excluding contribution or indemnity did not at common law apply where the tortfeasor seeking it was morally blameless in the matter. It was not necessary, therefore, to invoke the Tortfeasors Act (which would make the award of an indemnity a matter for the discretion of the Court), but the majority also stated that the trial judge exercised his discretion correctly under that Act.

The House of Lords affirmed the decision of the Court of Appeal, Lords Radcliffe and Somervell dissenting. All the learned law lords, including the dissentients, agreed that there was an implied contractual obligation resting on the employee to use due care in the performance of his duties. In fact, Denning L.J. was alone, in both tribunals, in thinking that the only liability could be in terms of tort.

The judgments of the two dissentients in the House of Lords were based on the notion of certain counter-implications in the contract of service which would provide an indemnity in favour of the negligent servant. It is impossible to avoid the conclusion that the rejection of the suggested implied terms by the majority was very much motivated by the complete lack of precision surrounding them. There appear to have been at least three alternate implications suggested. There was first the submission that there was an implied term that the plaintiffs would indemnify the defendant against all claims against him for any act done by him in the course of his employment. This was rejected by the House of Lords as being impossibly wide. Secondly, there was the view, acted on by Denning L.J. in the Court of Appeal, that there was an implied term that if the employer was insured against the liability he would not seek to recover contribution or indemnity against the employee. In actual argument before the House of Lords, however, counsel preferred to seek a wider principle than this and reliance was placed on insurance under the Road Traffic

2. cf. Part III of the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of* 1952 (Queensland).
3. [1956] 2 Q.B. 180. 4. (1799) 8 Term Rep. 186.

Act rather than on the general tort liability insurance effected by the employer. The Road Traffic Act provided *inter alia* that it should not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there was in force in relation to the user a policy of insurance against third party risks in terms of the Act. The plaintiffs here had taken out such a policy which did not, however, cover injury to a fellow employee by the driver and by the Act was not required to do so. Moreover, there was some doubt whether this accident occurred "on a road" within the meaning of the Act. Consequently, as Viscount Simonds pointed out,[5] counsel was led to "yet another variation of the pleas", viz. that it was an implied term of the employment contract that the driver was entitled to be indemnified not only where the employer had insured him under the Road Traffic Act, but also where he ought as a reasonable and prudent man to have insured him, even though that Act might not have called for insurance against the actual contingency which operated. In fact, the argument was not limited to the applicability of the Road Traffic Act to the particular situation at all. Lord Radcliffe in substance stated the position as being that where it was understood between employer and employee that the employer would take out a policy against third-party liability under the Act (or, in the words of Viscount Simonds, would "look after the whole matter of insurance") there is an implied term in the contract of employment that the employer would not seek indemnity from the servant.[6]

In general the majority rejected all the various suggested implications on the basis, firstly, that their inclusion was not necessary to give such business efficacy to the transaction as the parties must have intended that it should and, secondly, on certain *ab inconvenienti* considerations. In particular they rejected the argument based on the Road Traffic Act inasmuch as the object of that Act was not the "protection of the bank balances of car owners or the life savings of their employees, but simply and solely to ensure that persons injured by the negligent driving of motor cars who established their claims in Court might not be deprived of compensation by reason of the defendant's inability to satisfy their judgments."[7] It appears rather remarkable that counsel for the defendant did not rely more on the ground that found favour with Denning L.J., viz. the implication to be drawn from the fact of existing insurance against liability rather than the argument based on the Road Traffic Act which postulates a much wider implication.

5. [1957] 2 W.L.R. at 167.
6. *Ibid.* at 178-9.
7. *per* Lord Tucker, *ibid.* at 183-4.

One point left very obscure is the question of the right of the master to damages independently of the doctrine of the implied term. Lord Morton of Henryton regarded Ormerod J. as quite correct in deciding the matter on the joint tortfeasor basis under the Tortfeasors Act. This seems obvious, but it leaves the matter of an indemnity discretionary. He also thought that the plaintiff could have succeeded on the joint tortfeasor basis independently of the Act on the view that the rule of *Merryweather v. Nixan* only applied where the tortfeasor seeking indemnity or contribution knew he was doing an unlawful act.[8] This question is very obscure. Some of the law lords seemed to be of the view that any non-contractual common law right of the employer would be based not on his position as a joint tortfeasor but on the notion that the servant in being negligent committed a tort *against the employer*.[9]

On the other hand, Viscount Simonds expressed the view that if the plaintiffs could not recover damages from the defendant for breach of contract they were precluded even from recovering contribution against him whether they claimed under the Act or outside it.[10]

Another point left doubtful is the status of the previous decision in *Jones v. Manchester Corporation*[11] where it was held that in a situation where the employer was also negligent the latter could not obtain a complete indemnity against the servant; there was a right to contribution only within the discretion given by the Act. Is this still the situation where the cause of action is breach of implied contract? Hodson L.J., who dissented in the *Jones* case, was of the view that the employer's claim to indemnity was based on breach of contract and therefore fell outside the Tortfeasors Act.[12] Whether this is so or not is not decisively answered by the *Lister* case; the statement of Hodson L.J. may well be ambiguous in itself. In any event it may well be that the contributory negligence apportionment legislation[13] applies to claims for breach of contract.[14] Another possible view would be that the implied term in favour of the employer is subject to an exception if the employer was himself negligent, but this would seem to lead to the result that no liability at all would pass to the employee in such a case.

8. *Ibid.* at 175.
9. *Ibid.* at 177 (Lord Radcliffe); cf. Denning L.J. [1956] 2 Q.B. at 190.
10. [1957] 2 W.L.R. at 170.
11. [1952] 2 Q.B. 852.
12. *Ibid.* at 876-877.
13. The Queensland legislation is Part III of the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of* 1952.
14. See Glanville Williams: *Joint Torts and Contributory Negligence*, s. 80, pp. 328-332.

The central principle of the *Lister* case is undoubtedly the implication of the term that the employee will not cause damage to his employer by his negligence. From the viewpoint of strict lawyer's law, some doubt may well be entertained whether such implication is really any more necessary to give business efficacy to the contract, especially if the employee is aware of the fact of insurance, than were the suggested counter-implications in favour of the employee which were rejected by the House of Lords.

The decision has, however, been more criticised on social grounds. The implication of the term in favour of the employer may by some be deplored as a retrograde step in view of the increasing tendency to regard the employer's vicarious liability as merely part of the cost of production and something against which insurance cover is habitually taken out. Some apprehension may also be felt at the possibility of the life savings of employees being applied to meet the consequences of some error of judgment committed during the high pressure of employment duties. Another view is that the fact that the insurer may take the proceedings by virtue of the principle of subrogation, or cause them to be taken by virtue of express terms in the policy as in the *Lister* case, without approaching the employer, may tend to the prejudice of good labour-management relationships. At the same time there is point in the submission of Jolowicz[15] that employees should not be placed in a position where they can assume that they are always free from responsibility for their negligence. Nor could a principle contrary to that of *Lister* be applied in all cases of vicarious liability. It does seem, for instance, to be socially unjust that a master held vicariously responsible for the intentional wrongdoing, *e.g.* fraud, of a servant should not be able to recoup his loss. Even where the wrongdoing is merely negligent, considerations may well apply to small scale employment different from those applicable to large industrial establishments. Any legislation designed to alter the *Lister* principle would need to keep these considerations in mind.

Breach of Statutory Duty: the Nature of Vicarious Liability.

Another important decision bearing on the master-servant relationship was that of the High Court in *Darling Island Stevedoring Co. v. Long*.[16] Here regulations made under the *Navigation Act* required certain precautions to be taken in connection with the loading and unloading of cargo on wharves. The Regulations cast the duty upon the "person in charge" representing a stevedoring firm. A wharf labourer claimed damages for an injury alleged to be sustained from a breach of the regulations by the "person in

15. See article in 1957 Camb. L.J. 21.
16. [1957] Argus L.R. 505.

charge", who was the foreman of the defendant stevedoring company. He sued the company for damages for breach of statutory duty. The High Court held that the regulation created a right of civil action for its breach in spite of the fact that the penalty for breach was imposed by the Regulations and not by the Act. They held, however, agreeing on this aspect with the Full Court of New South Wales, that the statutory obligation was cast upon the "person in charge", not upon the employer. The matter, however, did not rest here as the New South Wales Court had held that, although the obligation was placed by the statute upon the foreman, yet the employer was liable because the statutory default of the foreman was committed in the course of employment. The High Court held unanimously that this was wrong. The liability of the foreman flowed from statute; the vicarious liability of an employer for the acts and omissions of his servants was based on common law. To hold that the employer was vicariously responsible for a statutory duty cast upon an employee would amount to finding a duty which did not exist at common law and hence could only exist by virtue of the statute which in the present case obviously did not intend to create it.

This reasoning commits the High Court to the view that the employer himself must be in a duty situation, that the concept of vicarious liability is not that the employer is liable for the "torts" or "wrongs" of his servant, but only that the master is answerable for acts of his servant which are done in the course of the employment *and* depart from a standard which happens to be obligatory upon *both* master and servant. The result is that the master is held liable, not for the servant's breach of a duty of care which he, the servant, owed to the stranger, but for a breach of a duty of care which the master himself owed to the stranger. This, in fact, forms the basis of the decisions in *Twine v. Bean's Express Ltd.*[17] and *Conway v. George Wimpey & Co.*[18] Such view, which is contrary to the tenor of the articles by Professor R. W. Baker previously published in this Journal,[19] opens up some of the difficult questions discussed in *Broom v. Morgan.*[20] It is expressed clearly only in the judgments of Kitto and Taylor JJ. and does not appear to be consistent with what Fullagar J. said.[21] It may also be difficult to reconcile it with the remarks of certain members of the House of Lords in *Stavely Iron & Chemical Co. v. Jones.*[22] It appears, however, that what was said in the latter case was uttered to combat certain views of Denning L.J. that the whole liability

17. (1946) 62 T.L.R. 458.
18. [1951] 2 K.B. 266.
19. See 2 U.Q.L.J. 1, 156.
20. [1953] 1 Q.B. 597.
21. [1957] Argus L.R. at 515.
22. [1956] A.C. 627 at 639 (Lord Morton), 643-4 (Lord Reid).

of the master was based on some degree of fault on his part, and amounts to no more than this, viz. that in cases of vicarious liability, as distinct from cases of original liability such as the failure to provide a safe system of work, the "fault" is the fault of the employee, not the employer, and that the employer could not be held responsible in a case where the employee was not guilty of negligent or wrongful conduct. This is quite consistent with a view that vicarious liability exists only when there is a *duty* to take care on the part of the master. It is broken then by the negligence of the employee which by reason of the course of employment theory is imputed to the master. Usually the master's duty and the servant's duty co-exist, but there may be cases where the servant is under a duty but the master is not. The question whether the converse position may possibly also exist would take us too far into *Broom v. Morgan*.[23]

Occupiers' Liability.

The decision of Havers J. in *Ashdown v. Samuel Williams & Sons Ltd.*,[24] noted in the last issue of this Journal,[25] has, so far as the liability of the occupier is concerned, been affirmed by the Court of Appeal.[26] Whilst it was possible to interpret the decision of Havers J. as being merely that the duty to the plaintiff as a licensee was fulfilled by reason of the notice acting as a warning of danger and, in fact, this was the view adopted in the previous note, it is obvious that the Court of Appeal proceeded on the ground that the notice operated as a term of the permission given to the plaintiff to use the path on the property. As she read part of the notice and the Court held that the defendant did what was reasonably sufficient to give her notice of the rest of it, the Court thought that the decision in *Parker v. South Eastern Railway*[27] applied, with the result that she was bound by the whole notice and her permission to enter was one on the terms of that notice. On this basis it seems that the decision would be the same even if the plaintiff were an invitee and the decision will be good law in England even after the passing of the new *Occupiers' Liability Act*. Whether it is based upon contract or upon the *volens* maxim may well be a matter of doubt.

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23. [1953] 1 Q.B. 597.
24. [1956] 2 Q.B. 580.
25. 3 U.Q.L.J. 97.
26. [1957] 1 Q.B. 409.
27. (1877) 2 C.P.D. 416.