[HIGH COURT OF AUSTRALIA.]

DEATONS PROPRIETARY LIMITED . . APPELLANT;
DEFENDANT,

AND

FLEW . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 22; *Dec.* 12.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Master and Servant—Assault by servant—Barmaid—Scope of employment—Liability of master.

Upon the hearing of an action of assault brought by F. against D., a company, and B., a barmaid employed at a hotel owned by D., F. said he went into the hotel and addressed to B. a polite question as to the whereabouts of the licensee whereupon she first threw into his face beer out of a glass and then threw the glass at him with the result that he lost the sight of one eye. B.'s evidence was that F. was in an intoxicated condition; struck her and used filthy expressions to her, and she, in the heat of anger and resentment, threw the beer into his face and the glass accidentally slipped out of her hand. The trial judge directed the jury that if they believed F.'s evidence there should be a verdict against both D. and B., but if they believed the defendants' evidence to the effect that B. was merely retaliating for a personal affront there should be a verdict against B. but for D. The jury found for F. against D. and B. The Full Court directed a general new trial. On appeal by D.,

Held that B.'s act was an independent personal act which was not connected with or incidental in any manner to the work which she was either expressly or impliedly authorized to perform, therefore although the verdict against B. should stand, D. was as a matter of law entitled to a verdict.

Decision of the Supreme Court of New South Wales (Full Court): *Flew* v. *Deatons Pty. Ltd.*, (1949) 49 S.R. (N.S.W.) 219; 66 W.N. (N.S.W.) 98, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by him in the Supreme Court of New South Wales, Mark Waterford Flew claimed from Deatons Pty. Ltd. and Opal Ruby Pearl Barlow the sum of £3,000 as damages.

It was alleged in the declaration that Deatons Pty. Ltd. carried on the trade or business of hotel proprietor and employed Mrs. Barlow as a barmaid in that business and that the defendant company by itself, its servant and agent Mrs. Barlow and the defendant Mrs. Barlow assaulted and beat the plaintiff whereby he was wounded and permanently injured by the loss of the sight of one eye and he was otherwise damnified.

The defendants pleaded not guilty and denied the allegations that the defendant company carried on the trade or business of hotel proprietor and employed the defendant Mrs. Barlow as a barmaid in that business.

Evidence was given for the plaintiff to the following effect. The plaintiff said that shortly after two o'clock on Saturday afternoon, 9th November 1946, he went into the saloon bar at the defendant company's hotel, the Hotel Manly, and remained there until about 5.20 o'clock p.m. and whilst there consumed about nine or ten middies of beer. He and a friend then went to get something to eat and returned to the saloon bar of the hotel at about 5.45 o'clock p.m. and had some more beer. Ten minutes later he proceeded to the public bar and asked the barmaid, the defendant Mrs. Barlow, for Mr. Deaton, the publican. The next thing he remembered was that he was hit in the face with something and he woke up in the eye hospital. In cross-examination he said that he remembered knocking over a glass of beer, that it was quite likely that he called the barmaid foul names (which reflected upon her chastity and parentage), but he did not remember striking her. Two witnesses called by the plaintiff gave evidence to the effect that they saw him come into the public bar somewhat drunk, in a quarrelsome aggressive mood, and have an altercation with some men against whom he had pushed. He was making a nuisance of himself. He went up to the bar and leaned over it talking to the barmaid. She moved away down the bar to another tap and filled a glass with beer. The plaintiff followed her and was speaking to, or " arguing " with her. The witnesses did not see him strike the barmaid, but they saw her in two definite movements first throw the beer in his face and then throw the glass in his face.

For the defendants, evidence was given by the defendant barmaid that she had been employed as a barmaid at the Hotel Manly for about four years. Just before six o'clock of the afternoon of the

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day in question the plaintiff, who seemed to be "pretty full," came into the public bar, asked her where Mr. Deaton was, and asked her for a bottle of rum. She informed the plaintiff that Mr. Deaton was in the saloon bar and that he, the plaintiff, could obtain the rum in the bottle department. He knocked over some glasses with beer in them that she had just served to other customers. When he did that she said to him "Will you please go away." He thereupon called her foul names and then struck her a severe blow on the right side of her face. She was filling a glass at the tap as he did so, and she endeavoured to throw the beer in his face, but her hands were wet and the glass slipped out of her hand, with the result that he was struck by the glass as well as the beer. She did not throw in two motions. In cross-examination the barmaid said that she did not fear any further violence from the plaintiff. When she threw the beer she was too upset to think what he might do. She admitted that just after the incident a senior female employee who witnessed it, said to her "You wicked girl." A police officer gave evidence that immediately after the incident the barmaid had an abrasion on the right side of her face, which was bleeding. A customer who was in the bar said in evidence that he had seen the plaintiff rush across the bar, heard him use foul language, and saw him strike the barmaid in the face. He then saw her throw the glass of beer in a single motion, not in two motions.

A result of the incident was that the plaintiff lost the sight of his left eye.

In his summing up the trial judge gave the jury the following directions: "It seems to me that on the evidence there are two possible views open to you, and it is your function to decide which you think is the correct one. If you accept the case put before you on behalf of the plaintiff, it would appear that he was the victim of an entirely unprovoked and totally unjustified assault. The case that he puts to you is that he went up to the bar counter in order to ask a perfectly legitimate question as to the whereabouts of the licensee of the hotel, that he asked that question of Mrs. Barlow, and that without more ado she thereupon threw the contents of a glass of beer in his face and not content with that, deliberately and intentionally followed it up by throwing the glass at him hitting him in the face and thus inflicting the injuries which he sustained. If you take the view that that is what happened, then the plaintiff is entitled to a verdict against both defendants, and I do not doubt that in that event you would award him very substantial damages." The judge added that if the jury accepted

the evidence given on behalf of the defendants: "then the defendant company, the employer, is entitled to a verdict in the claim against it, because in that event the barmaid was in no way acting in the course of her employment but was merely retaliating for some personal affront; but the plaintiff in those circumstances would be entitled to a verdict against Mrs. Barlow because the throwing of the contents of the glass in his face is a technical assault." In conclusion the judge said: "If you think that this glass was thrown deliberately by Mrs. Barlow then there must be a verdict for the plaintiff against both defendants. . . . If, however, you accept the view of the case put to you on behalf of the defendants, you should find a verdict for the plaintiff against Mrs. Barlow, awarding the plaintiff in that event such damages as you think he justly deserves." Upon it being submitted by counsel for the defendants that these directions were wrong in law, the judge said: "I will not change my direction. If your case is correct, that she was stung into retaliation by the customer's conduct her employer is not liable. But if the plaintiff's case is correct, the defendant is liable for her act. I will not alter my directions."

The jury returned a verdict for the plaintiff against both defendants for the sum of £750.

The Full Court of the Supreme Court directed a new trial generally (*Flew* v. *Deatons Pty. Ltd.* (1)).

From that decision the defendant company, by leave, appealed and the plaintiff cross-appealed to the High Court.

N. A. Jenkyn K.C. (with him *P. L. Head*), for the appellant. There was not any evidence to show that it was in the course of the barmaid's employment to throw the glass into the customer's, that is, the respondent's face. The barmaid had no authority, either express or implied, to do any such thing. The act of throwing the glass was not one directly incidental to the performance of any class of work which she was either required or permitted to perform in her capacity as a barmaid. Nor was there anything to show that that act was a mode, even though an unauthorized or irregular mode, of performing some class of act which she was authorized, expressly or impliedly, as a barmaid to perform. Her duties, according to the evidence, consisted solely of selling and handing liquor to customers. There was not any evidence to show that the act complained of was in any way intended by the barmaid as a performance or an intended performance of her duties. The act was dictated by a desire purely personal to the barmaid and was not

(1) (1949) 49 S.R. (N.S.W.) 219; 66 W.N. 98.

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related to the performance of her duties. It was an act of caprice on her part; an irresponsible urge to injure the respondent (*Warren* v. *Henly's Ltd.* (1)). It is not shown or suggested that she acted in self-defence, or to maintain order. As a matter of principle the result cannot be attributed to the employer unless the act can be directly related to an intended performance by her of her duties. *Lloyd* v. *Grace, Smith & Co.* (2) is distinguishable because in that case there was a holding out by the employer; the servant was doing the class of work he was employed to do. The act of the barmaid was not "for the master's benefit": *Pollock* on *Torts*, 14th ed. (1939), pp. 61 et seq., 75, 78.

[DIXON J. referred to *Bugge* v. *Brown* (3).]

The appellant relies upon the statement of *Isaacs* J. in that case (4).

[McTIERNAN J. referred to *Citizen's Life Assurance Co. Ltd.* v. *Brown* (5).]

That case shows that the members of a jury may, under some circumstances, act upon their own general knowledge of business and affairs. That would include the management of a hotel. *Bonette* v. *Woolworth's Ltd.* (6) is a similar case. The principle by which it is to be decided whether the act was one which came within the scope of the barmaid's employment is shown in *Canadian Pacific Railway Co.* v. *Lockhart* (7). In *Power* v. *Central S.M.T. Co. Ltd.* (8) the act complained of might have been accompanied by a desire on the part of the conductress concerned to cause the omnibus to proceed, or by a private desire to cause injury to the plaintiff in that case, but she was doing an act within the ordinary scope of her employment. There is a limit beyond which one cannot go and still claim that the act is within the scope of employment (*Poland* v. *John Parr & Sons* (9)). In *Petterson* v. *Royal Oak Hotel Ltd.* (10) it was found as a fact that when the barman committed the act complained of he was carrying out the duty of keeping order. An employer is not liable unless it be shown that when he committed the act complained of the employee acted within the scope or in the course of his employment (*Radley* v. *London County Council* (11)). An employee is entitled on his own account to protect himself from any unprovoked assault. The position as to the entering of a verdict by an appellate court is shown in *Hocking* v. *Bell* (12).

(1) (1948) 2 All E.R. 935.
(2) (1912) A.C. 716.
(3) (1919) 26 C.L.R. 110, at pp. 116-120.
(4) (1919) 26 C.L.R., at p. 118.
(5) (1904) A.C. 423.
(6) (1937) 37 S.R. (N.S.W.) 142, at p. 150; 54 W.N. 57.
(7) (1942) A.C. 591, at pp. 599, 600.
(8) (1949) Scot.L.T. 302.
(9) (1927) 1 K.B. 236.
(10) (1947) 48 N.Z.L.R. 136.
(11) (1913) 109 L.T. 162, at p. 164.
(12) (1945) 71 C.L.R. 430, at pp. 440, 441.

[McTIERNAN J. referred to *South Maitland Railways Pty. Ltd.* v. *James* (1).]

Decisions under the *Workers' Compensation Act* are not of any application to the principle of scope of employment in master and servant cases (*Bugge* v. *Brown* (2)). A verdict should be entered in favour of the appellant.

E. Lusher, for the respondent. The inference cannot properly be drawn that the respondent referred to the barmaid in foul terms. It was competent for the jury to find, both on the evidence and from their own experience of business and affairs (*Bonette* v. *Woolworth's Ltd.* (3)) that a duty of the barmaid was to serve customers ; that at the time of the act complained of she was in fact serving a customer ; that she was employed to deal with and answer reasonable and legitimate inquiries from customers ; that she would have authority to deal with customers who might be in various stages of intoxication ; that she would have authority to a limited degree to keep order in her own immediate vicinity of the bar ; and that in respect of all these matters she would have authority to exercise her own discretion in the discharge of her duties. The barmaid was placed in that position, and clothed with that authority by the appellant. The respondent was invited by the appellant to deal with the barmaid in that capacity. The invitation carried with it, tacitly, the implication that, if he availed himself of the invitation, she would conduct herself reasonably and properly in the discharge of her duties. The inquiry addressed to the barmaid by the respondent was reasonable and legitimate. Although she answered such inquiry in an improper and unreasonable way it was nevertheless done in the course of her employment. The master is liable if the servant does some act which may be regarded as a mode even if it is not connected with the employment but becomes a separate act for the personal convenience of the servant herself (*Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board* (4) ; *Petterson* v. *Royal Oak Hotel Ltd.* (5)). The last-mentioned case followed *Jefferson* v. *Derbyshire Farmers Ltd.* (6) and preferred the minority judgments in *Williams* v. *Jones* (7). In *Lloyd* v. *Grace, Smith & Co.* (8) a person employed to do something in an honest way did it in a dishonest way, but it was still within the scope of his employment. In *Dyer* v. *Munday* (9) it was held

(1) (1943) 67 C.L.R. 496, at p. 501.
(2) (1919) 26 C.L.R., at p. 132.
(3) (1937) 37 S.R. (N.S.W.), at p. 150 ; 54 W.N. 57.
(4) (1942) A.C. 509, at pp. 514, 519.
(5) (1947) 48 N.Z.L.R. 136.
(6) (1921) 2 K.B. 281.
(7) (1865) 3 H. & C. 602 [159 E.R. 668].
(8) (1912) A.C. 716.
(9) (1895) 1 Q.B. 742, at pp. 745, 747, 748.

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that the master was liable in respect of an assault committed by an employee whilst repossessing furniture for the master. That case followed the direction in *Bailey* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1) and *Limpus* v. *London General Omnibus Co.* (2). To the extent that the act upon which an employee was engaged was regarded as a mode of doing what he was required to do, the mere fact that independently of his employment he had some private motive for doing what he did does not affect the matter. *Croft* v. *Alison* (3) and *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board* (4) are still consistent to the extent that the lighting of a cigarette by an employee is regarded as a mode of performing something on behalf of his master. *Croft* v. *Alison* (3) illustrates the proposition that where there is not any authority, either actual or apparent, the master is not liable for the wilful or deliberate act of his servant: see *Salmond* on *Torts*, 10th ed. (1945), p. 95. In *Seymour* v. *Greenwood* (5) and *Bailey* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1) the employees concerned were doing something they were employed to do. The appellant did not plead self-defence, only the general issue. The barmaid's act arose out of an altercation which was connected only with her employment. Having regard to the fact that she was employed to deal with and attend to people similar to the respondent and that the respondent was invited to regard her as a person who would attend to him in a reasonable fashion, the assault itself was a breach of that duty (*Petterson* v. *Royal Oak Hotel Ltd.* (6)).

[LATHAM C.J. referred to *Bugge* v. *Brown* (7).]

That is accepted as a test. If an employee does deliberately and negligently something which is within the scope of her authority to do properly the employer is liable (*Power* v. *Central S.M.T. Co. Ltd.* (8); *Lloyd* v. *Grace, Smith & Co.* (9) and this is so even if the employee's act be accompanied by malice (*Limpus* v. *London General Omnibus Co.* (10)). The barmaid acted in her capacity as barmaid in a situation which confronted her in that capacity. All that was asked for on behalf of the appellant at the trial was a verdict. No other direction was sought.

(1) (1872) L.R. 7 C.P. 415; (1873) L.R. 8 C.P. 148.
(2) (1862) 1 H. & C. 526, at p. 541 [158 E.R. 993, at p. 999].
(3) (1821) 4 B. & Ald. 590 [106 E.R. 1052].
(4) (1942) A.C. 509.
(5) (1861) 7 H. & N. 355 [158 E.R. 511].
(6) (1947) 48 N.Z.L.R. 136.
(7) (1919) 26 C.L.R., at pp. 117, 118.
(8) (1949) Scot.L.T. 302.
(9) (1912) A.C. 716.
(10) (1862) 1 H. & C. 526 [158 E.R. 993].

Jenkyn K.C., in reply. Objections to the direction of the trial judge to the jury were made and rejected, as also were directions sought on behalf of the appellant. A direction by the trial judge that if the barmaid's evidence be true then the jury must find in favour of the appellant, was not objected to on behalf of the respondent. *Dyer* v. *Munday* (1) does not assist the respondent, because the assault complained of was a part of, directly connected with and in intended furtherance of the very acts the employee was employed to perform. Nor does *Century Insurance Co. Ltd.* v. *Northern Ireland Road Transport Board* (2) assist the respondent. The cause of action in that case was negligence and it was not based on trespass or assault. The test is whether the act which is the subject of complaint was an act done by the employee with her mind directed towards the use of that particular act by way of performance or furtherance of the duties she was called upon to perform (*Bugge* v. *Brown* (3)). Instinctive resentment or natural resentment cannot bring within the scope of employment acts which are not otherwise expressly or impliedly authorized. Instinctive or natural resentment is just as personal to the person entertaining that resentment as is personal vengeance or personal spite: see *Clerk & Lindsell* on *Torts*, 10th ed. (1947), p. 117.

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order made by the Full Court of the Supreme Court of New South Wales for a new trial in an action in which Mark Waterford Flew sued Deatons Pty. Ltd. and Opal Ruby Pearl Barlow for damages for assault. The jury found for the plaintiff against both defendants for £750 damages. The company appeals from the order for a new trial, asking for a verdict, and the plaintiff cross-appeals, asking that the verdict in his favour be restored.

Mrs. Barlow was a barmaid employed by the defendant company in an hotel. The plaintiff came into the hotel and spoke to Mrs. Barlow and she threw a glass of beer in his face. According to the plaintiff's evidence, he asked her a polite question as to the whereabouts of the licensee and the barmaid first threw the beer in his face and then threw the glass at him, with the result that he lost the sight of one eye. According to Mrs. Barlow's evidence the plaintiff was in an intoxicated condition, struck her, and made an

(1) (1895) 1 Q.B. 742.
(2) (1942) A.C. 509.
(3) (1919) 26 C.L.R. 110.

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abusive and insulting observation to her, and she, in the heat of anger and resentment, threw the beer into his face and the glass accidentally slipped out of her hand.

The learned trial judge directed the jury that if they believed the plaintiff's evidence there should be a verdict against both of the defendants but that if they believed the defendants' evidence to the effect that the barmaid was merely retaliating for a personal affront there should be a verdict against the barmaid but for the company. The Full Court held that it was open to the jury to find that the barmaid had some implied authority to maintain order in the bar; but that if without any reason connected with her employment she threw the glass in the plaintiff's face with intent to injure him the employer would not be liable for her act. But the court also held that the jury could find that the barmaid's action was an instinctive act of self-defence against an assault, and that then the employer could be found to be liable. The jury, however, could, it was said, infer that throwing the glass was neither a means of inducing the plaintiff to leave the bar nor an act of self-defence, but that it was an independent act of personal retribution, and in that event the jury should have given a verdict in favour of the employer. As these various inferences were considered to be open to the jury a new trial was ordered against both defendants.

It is clear that the barmaid committed an assault and was liable therefor.

The liability of the employer depends upon the scope of employment of the barmaid and the authority which her employment conferred upon her, such authority to be exercised on behalf of the employer. An employer is liable for the act of his servant only if the act is shown to come within the scope of the servant's authority either as being an act which he was employed actually to perform or as being an act which was incidental to his employment. The law is clearly stated to this effect in *Canadian Pacific Railway Co.* v. *Lockhart* (1). In the present case it is not suggested that the barmaid was employed to throw beer in customers' faces, but it is contended that the throwing of the beer was incidental to her employment as a barmaid in that she was placed in the bar to deal with customers and to answer such questions as customers might naturally ask. It was said that throwing the beer was an act incidental to employment in that it was a method, though an improper method, of responding to an inquiry made by a customer. It was also suggested that it was a means of keeping order in the

(1) (1942) A.C. 591.

bar as to which the barmaid might be presumed to have at least some degree of authority. But throwing beer in the face of a customer simply was not a means of keeping order, nor in my opinion can it be said that such an action is incidental to the work which the barmaid was employed to do. Upon the plaintiff's evidence the throwing of the beer was a gratuitous, unprovoked act which had nothing at all to do with the performance of the duties of the barmaid. Upon the evidence given for the defendant the act was an act of personal resentment and was not in any way performed as on behalf of the employer. It was not done even in supposed furtherance of the interests of the employer. In doing what she did the barmaid was, as *Isaacs* J. said in *Bugge* v. *Brown* (1) acting so " as to be in effect a stranger in relation to (her) employer with respect to the act (she) has committed, so that the act is in law the unauthorized act of a stranger." In my opinion the act of the barmaid was not expressly authorized, it was not so connected with any authorized act as to be a mode of doing it, but was an independent personal act which was not connected with or incidental in any manner to the work which the barmaid was employed to perform. Accordingly in my opinion there was no evidence to go to the jury as against the defendant company and the defendant company was as a matter of law entitled to a verdict. I am accordingly of opinion that the appeal should be allowed, the order of the Full Court set aside, that judgment should be entered for the defendant company and that there should be judgment against the individual defendant (who has not appealed) for £750.

DIXON J. The question upon which this appeal appears to me to turn is whether the jury might properly find that an assault upon the plaintiff by the defendant Barlow, a barmaid in the employ of the defendant Deatons Pty. Ltd., was committed in the course of her employment. The contents of a glass of beer, and the glass, left the hand of the barmaid and struck the plaintiff in the face. This is the assault. It resulted in the plaintiff's losing one eye.

The plaintiff's case was that he went into the public bar and asked by name for the publican. Thereupon the barmaid threw first the beer into his face and then the glass. According to his case it was an unprovoked and unjustified assault and his case was so left to the jury.

The case made for the defendants was that the plaintiff, who was drunk, did ask for the publican, that the barmaid said that he was in the saloon bar, that the plaintiff then pushed his way through

(1) (1919) 26 C.L.R., at p. 118.

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the customers in the wrong direction upsetting a number of glasses of beer, that the barmaid then asked him to go away, whereupon he used filthy expressions and struck the side of her face. She then threw in his face the beer in a glass she was holding, but the glass slipped out of her hand and also hit his face. The jury found a verdict against both defendants, the barmaid and the company employing her. On either version of the assault the barmaid would be liable. She made no case of self-defence and on the facts she could not make one. The provocation may have been great but that is no answer to the plaintiff's cause of action, whatever effect it might have upon damages.

In my opinion, however, it is clear that, upon the case made for the plaintiff, a finding could not be supported that the barmaid acted in the course of her employment so that the defendant company would be vicariously liable. For upon the plaintiff's case the assault was as unexplained as it was unprovoked and might have proceeded from private spite on the part of the barmaid or from some other cause quite unconnected with her occupation or employment. So far as the plaintiff's case went to show, nothing occurred which would in any way relate her action to the duties of her office or explain it by reference to anything incidental to what she was employed to do. As the jury had been instructed that the plaintiff was entitled to recover against both defendants if they took the view that the assault occurred as the plaintiff put his case, the Full Court of the Supreme Court set aside the verdict and rightly so.

But their Honours did not enter a verdict for the defendant company because, though not without considerable doubt, they thought there was evidence upon which a jury might find against the defendant company upon a basis described in the following passage from the judgment of *Jordan* C.J., viz. :—" If a reasonable inference was that the barmaid's action was an instinctive act of self-defence against an assault made upon her whilst she was doing, and because she was doing, what she was employed to do, I think that it would be open to the jury to find that the employer was liable. A master who employs a servant in a capacity which exposes her to the risk of brutal violence may fairly be regarded as impliedly authorising her to defend herself against such violence " (1). In my opinion it would not be possible to support a verdict against the employer upon this basis. The circumstances were not such as to allow of the inference that the barmaid acted, however instinctively, through any motive of defending herself. She was behind

(1) (1949) 49 S.R. (N.S.W.), at p. 222; 66 W.N., at p. 99.

the bar, and the man was lurching about drunk among a crowd of men. Plainly she retaliated for a blow and an insult. She says her retaliation was limited to the contents of the glass and that she did not mean to throw the glass itself. But in either case it was a retort and not an act of self-protection.

It may be that acts of self defence may so arise out of a servant's acts done in furtherance of his master's interests as to be considered incidental to the performance of his duties and so in the course of his employment. But from its nature self-defence is hardly a thing done by a servant on behalf of his master and I am not prepared to adopt the phrase in the foregoing passage which speaks of the master as impliedly authorizing the servant to defend herself against violence. However, for the reason I have given, it does not appear to me to fit the facts of this case. There is not in my opinion any other ground on which it could be found that the barmaid threw the beer or the glass or both in the course of her employment. The suggestion that it was her mistaken or improper manner of responding to an inquiry and that she was employed, among other purposes, to respond to inquiries is quite untenable.

There is scarcely any better foundation for the suggestion that a barmaid must take her part in keeping order in the bar and that she was doing in her own way. She did not throw the beer or the glass in the course of maintaining discipline or restoring order. Moreover she was not in charge of the bar. Over her there was another woman who was behind the same bar, and, it may be added, who at once said "You wicked girl." In the saloon bar close at hand was the publican.

The general and somewhat indefinite position was relied upon that the barmaid was there to deal with customers and with situations and this was the manner in which she dealt with the plaintiff and the situation which he caused. It is not a case of a negligent or improper act, due to error or ill judgment, but done in the supposed furtherance of the master's interests. Nor is it one of those wrongful acts done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master (see *Lloyd* v. *Grace, Smith & Co.* (1); *Uxbridge Permanent Benefit Building Society* v. *Pickard* (2)).

The truth is that it was an act of passion and resentment done neither in furtherance of the master's interests nor under his express

(1) (1912) A.C. 716. (2) (1939) 2 K.B. 248.

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or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid.

I think that the appeal should be allowed with costs and a verdict entered for the defendant company, which should have its costs of the action. The cross appeal should be allowed against the respondent Barlow with costs and the verdict and judgment against her restored.

McTIERNAN J. I agree the appeal should be allowed and a verdict and judgment entered for the appellant.

The relation between the appellant and Mrs. Barlow was master and servant at the time she committed the assault upon the plaintiff. The evidence is that she was a barmaid in the appellant's hotel. In point of law she had an implied authority to do everything that was necessary for the fulfilment of the duties of the position of barmaid in that hotel in the circumstances existing from time to time. There is no evidence that she had any further authority than that of a barmaid. The responsibility of the appellant for the consequences of the assault depends upon the question whether the barmaid assaulted the plaintiff in the course of fulfilling any duty which the appellant entrusted to her. The assault could not possibly be a manner of fulfilling any duty which the jury was entitled to find that the appellant entrusted to the barmaid. There was no evidence that the assault was in the course of the employment.

The scope of the implied authority of a manager of a bar and a manager of a public house respectively was discussed in two cases. In *Abrahams* v. *Deakin* (1) the court decided that the manager of a bar of a public house had no implied authority by reason of his position to give a person whom he followed into the street into custody upon a charge of attempting to pass spurious coin in the bar in payment for liquor. *Kay* L.J. said (2): "The evidence is only that Nunney was the manager of the bar. There is no evidence that the manager of a business of this kind requires a larger authority than the manager of any other business. There is no evidence of any custom in this particular trade that a manager shall have a larger authority. There is no evidence that in this business attempts to pass false coins are more frequently made than in others; there was only a suggestion to that effect made by the learned judge.

(1) (1891) 1 Q.B. 516.

(2) (1891) 1 Q.B., at pp. 522, 523.

The evidence simply comes to this, that Nunney was the manager of the bar of a public house. . . . If a servant has an implied authority to arrest a man who, as he thinks, has attempted to pass false coin, in order to prevent other people from attempting to commit a similar offence, he must equally have an implied authority to do almost any other illegal act—for instance, to assault the supposed offender, or to libel him by publishing in a newspaper that he is a thief. Whatever the servant did for the purpose of frightening other people, and thus preventing possible injury to his master's property, the master would be liable for it. That would be clearly contrary to the decisions. . . .". *Hanson* v. *Waller* (1) was a case in which the manager of a public house was under the mistaken impression that the plaintiff was stealing whisky from the cellar and gave him into custody. *Kennedy* J. said (2): "Moseley was merely the manager of a public house: it was not within the sphere of his duty to arrest people, or to decide as to their arrest."

In directing the jury the trial judge said that if they accepted the plaintiff's evidence "he was the victim of an entirely unprovoked and totally unjustified assault" and if they accepted the defendants' evidence "the barmaid was retaliating for some personal affront." If the jury accepted either view, there was no exigency in which the barmaid had implied authority by reason of her position as barmaid to commit a trespass against the plaintiff.

In my opinion there is no evidence upon which a jury could properly find that Mrs. Barlow assaulted the plaintiff in the course of her service.

WILLIAMS J. The scene of the action, the subject of this appeal, is the public bar of Deatons Hotel, Manly, shortly before 6 p.m. on Saturday, 9th November 1946. It opens with the entry into this somewhat crowded bar at about this time of the plaintiff, the respondent on this appeal, who had during the afternoon, so he said, confined his drinking to ten or eleven middies of beer in the course of over three hours spent in the saloon bar of another hotel. There are two defendants, Mrs. Barlow, one of the barmaids serving in the bar, and Deatons Pty. Ltd., the owner of the hotel and the employer of Mrs. Barlow. The plaintiff gave evidence that on entering the bar, his condition being one of sobriety, he politely asked a barmaid, who it is clear was Mrs. Barlow, where the publican Mr. Deaton was, and that after that he only remembered being hit in the eye with something and waking up in the eye hospital. He was a patient of the hospital first as an in-patient and later as an

(1) (1901) 1 Q.B. 390. (2) (1901) 1 Q.B., at p. 394.

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out-patient for several weeks and suffered the loss of the sight of one eye.

Other evidence called for the plaintiff was to the effect that he was seen leaning over the bar and arguing with Mrs. Barlow in a quarrelsome and aggressive way while she was filling a glass of beer from one of the taps. He evidently annoyed her for, according to this evidence, she threw first the contents of a glass of beer and then the glass itself in his face.

Mrs. Barlow gave evidence that the plaintiff who seemed to be pretty full, to use her expression, rushed up to the counter and asked for Mr. Deaton and was told that he was in the saloon bar. He asked her for a bottle of rum and was told to go into the bottle department for it. He upset some glasses full of beer and was asked to go away. He then called her some particularly foul names and struck her just under her glasses on the right side of her cheek and nearly stunned her. She retaliated by attempting to throw a half-full glass of beer at him, but her hands were wet and the glass slipped and the glass and the beer both struck him in the face.

The jury returned a verdict for the plaintiff for £750 against both defendants. Mrs. Barlow did not appeal but the present appellant appealed to the Full Supreme Court of New South Wales. That court ordered a general new trial. The same appellant has now appealed to this court by leave and contends that the Supreme Court should have entered judgment for it. There is a notice of intention to cross appeal and the respondent contends that the order of the Supreme Court should be set aside and the verdict of the jury against both defendants restored.

The action is an action of trespass to the person. The appellant took no part in the assault. The assault was that of Mrs. Barlow, and the question is whether the appellant as her employer is vicariously liable in law for that assault. We were referred to a large number of cases but we cannot do better, I think, than rely, like *Jordan* C.J., on the statement of the law in the passage from *Salmond* on *Torts*, 9th ed. (1936), p. 495 cited with approval in the judgment of the Privy Council in *Canadian Pacific Railway Co.* v. *Lockhart* (1). "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may be regarded as modes—

(1) (1942) A.C. 591, at p. 599.

although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

In New South Wales a Court of Appeal can only enter a verdict for a defendant in a common-law action where there is no evidence on which the jury could reasonably find a verdict for the plaintiff, and in the present case this means that the appeal can only succeed if we are satisfied there was no evidence on which the jury could reasonably find that Mrs. Barlow, when she committed the assault, was acting in the course of her employment. No express evidence was given of the duties that Mrs. Barlow was employed to perform, so that her authority must be inferred from the whole of the circumstances (*Poland* v. *John Parr & Sons* (1)). In *Dyer* v. *Munday* (2), Lord *Esher* M.R. said: "if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable." In *Poland* v. *John Parr & Sons* (3) *Scrutton* L.J. said: "to make an employer liable for the act of a person alleged to be his servant, the act must be one of a class of acts which the person was authorized or employed to do." In *Warren* v. *Henlys Ltd.* (4), *Hilbery* J. defined in the course of employment to mean in the course of doing an act which was one of the class of acts which the servant was authorized or employed to do.

Jordan C.J. thought that a new trial should be ordered because it was open to the jury to find that, in the absence of any male employees in the bar, barmaids have implied authority to maintain order in the bar and that indeed it is their duty to do so as far as reasonably possible, for example, by refusing to supply further drink to a person who is obviously intoxicated, or by requesting anyone who is misbehaving himself to leave the premises. He said that a master who employs a servant in a capacity which exposes her to the risk of brutal violence may fairly be regarded as authorizing her to defend herself against such violence. He concluded his judgment by stating that the case was close to the line and he felt considerable doubt as to whether there was evidence sufficient to justify a finding of responsibility on the part of the employer, and

(1) (1927) 1 K.B., at p. 242.
(2) (1895) 1 Q.B., at p. 746.
(3) (1927) 1 K.B., at p. 243.
(4) (1948) 2 All E.R. 935, at p. 938.

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whether there should not be a verdict by direction for the appellant, but that on the whole he thought that the better course would be to direct a general new trial of the whole action against both defendants.

I agree with him that the case is close to the line, but I have formed the opinion that there was no evidence on which the jury could find that Mrs. Barlow threw the glass at the plaintiff in the course of doing an act which she was employed to do. It was not, I think, reasonably open to the jury to infer that it was part of Mrs. Barlow's duties to keep order in the bar. The only reasonable inference is that her duties were to serve customers with drinks in the public bar and as incidental thereto to answer reasonable inquiries as to the drinks for sale there and their prices. There is no evidence that the plaintiff had ordered a glass of beer and that Mrs. Barlow threw the glass at him in the course of serving him with the beer. If the jury believed the evidence for the plaintiff, as apparently they did, the beer was first thrown at the plaintiff and then the glass. The damage to the plaintiff was done by the glass. A barmaid who throws an empty glass at a customer is not doing an act of the class which she is employed to do. To throw the beer, much less the glass, at a customer is not a mode, although an improper mode, of serving a customer with beer, and even less a mode, although an improper mode, of answering his request for a glass of beer. A barmaid is also authorized and indeed bound like any other servant to take reasonable steps to protect her employer's property. But on the plaintiff's version no property of her employer was in jeopardy. The glass was not thrown in the performance of her duty to protect her employer's property. The immediate property of her employer involved was the glass itself and its use as an implement could hardly be said to be a way of protecting it. On the defendant's version the beer (and the glass which accompanied it by accident) was thrown by Mrs. Barlow to avenge an insult to herself. On this version the assault is a merely collateral trespass and not an act done in the course of Mrs. Barlow's employment or for the purpose of protecting the property of her employer. On the plaintiff's own story that he asked her politely where he could find Mr. Deaton, the violence of the reply, in the words of *Scrutton* L.J. in *Poland* v. *John Parr & Sons* (1) was so excessive as to take the act out of the class of authorized acts. Assuming that it was Mrs. Barlow's duty to answer general inquiries from customers relating to the hotel, it would be impossible to find that her act was a mode, although an improper mode, of doing or performing an

(1) (1927) 1 K.B., at p. 243.

authorized act. But the plaintiff's story was so improbable that it is unlikely that any jury would have believed it and the jury probably believed the watered-down account given by his witnesses. Their account is in law the most favourable way of putting the case for the respondent against the appellant. But, this is not evidence, on which, in my opinion the jury could reasonably find that Mrs. Barlow was acting in the course of her employment. The only reasonable inference to be drawn from this evidence, and *a fortiori* from the evidence as a whole, is that the beer and glass, whether thrown at the plaintiff separately or together, were thrown to gratify the private but natural spite and rage of Mrs. Barlow caused by the plaintiff's insulting conduct. The cases relied on by counsel for the respondent, *Croft* v. *Alison* (1); *Seymour* v. *Greenwood* (2); *Limpus* v. *London General Omnibus Co.* (3), and *Ward* v. *General Omnibus Co.* (4) were all cases where the servant misconducted himself in the course of his master's employment. In the present case the only reasonable inference from the evidence is that the glass was thrown for a purpose of Mrs. Barlow's own and was an independent act on her part not so connected with any act which she was authorized to do as to be a mode of doing it, and not an act of excess and violence in the course of her employment not justified by the occasion.

For these reasons I would allow the appeal and dismiss the cross-appeal against the appellant. In the case of Mrs. Barlow, the cross-appeal should be allowed.

WEBB J. A barmaid employed by the appellant company assaulted the respondent in the appellant's bar. The jury awarded the respondent £750 damages against both the barmaid and the appellant company. The appellant company appealed to the Full Court of New South Wales for judgment in the action but that court granted a new trial. The appeal to this Court is against the order for a new trial and for judgment for the appellant. There is a cross-appeal by the respondent to restore the judgment in his favour in the action.

The respondent's case was that the barmaid while serving customers, but not the respondent, and when the respondent made an inquiry of her about a Mr. Deaton, deliberately threw at the respondent a beer glass and injured and caused the loss of his eye. *Owen* J. directed the jury that if they believed the respondent they

(1) (1821) 4 B. & Ald. 590 [106 E.R. 1052].
(2) (1861) 7 H. & N. 355 [158 E.R. 511].
(3) (1862) 1 H. & C. 526 [158 E.R. 993].
(4) (1873) 28 L.T. 850.

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should enter judgment against both the barmaid and the appellant company. He did not tell them they could do so in any other circumstances. The jury found against both. It should, I think, be assumed that they observed the judge's direction, and so must have believed the respondent. Moreover it is unlikely that they believed the barmaid's story that the respondent had grossly insulted her in vile language and that thereupon she threw beer at him but did not intend to throw the glass, which she said slipped out of her hand. No jury would be likely to award heavy damages to a truculent, foulmouthed ruffian—an expression employed by *Jordan* C.J.—who in filthy, obscene language questioned the chastity and parentage of a decent woman, as on the evidence this barmaid appears to have been, even if she retaliated by destroying both his eyes. Counsel for the appellant company requested his Honour to re-direct the jury that if they believed the respondent's account they should find for the appellant company. I think the jury should have been so re-directed. The authorities make it clear that the appellant company would have been civilly liable for the consequences of any exercise by the barmaid of her express or implied authority as barmaid, even if she had employed an improper mode of exercising it, and even had committed a crime in so doing. But I cannot see how in assaulting the respondent in the circumstances described by him she was in fact exercising any authority she had as barmaid. She was not serving the respondent with liquor. She did not injure him as a result of her negligence when serving another customer. It could not reasonably be found that she was answering his inquiry, or that she was keeping order in the bar. She appears to me to have been doing nothing at all in the discharge of her duties when she committed the assault, and so no liability attached to the appellant company for the injuries she caused to the respondent.

I would allow the appeal.

Appeal allowed with costs. Order of Full Court set aside. Enter verdict and judgment for defendant company with costs of action. Plaintiff to pay defendant's costs of appeal in Supreme Court. Cross-appeal dismissed as against defendant company and allowed against defendant Barlow. Verdict and judgment with costs against defendant Barlow restored.

Solicitors for the appellant, *Hunt & Hunt.*
Solicitors for the respondent, *Mervyn Finlay & Co.*

J. B.