QBE European Operations

Technical claims brief

Insight into vicarious liability | September 2013

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Introduction

Claims based on an employer's vicarious liability have kept the courts increasingly busy in recent years, with claimants endeavouring to push the boundaries, with some success. However, in this edition of the Technical Brief we consider a number of judgments in which the trend of judicial opinion, in recent years tending to favour the extension of an employer's liability for the actions of their employees, has more recently been reversed, to establish a more robust position from which employers can defend such claims.

Weddall v Barchester Health Care Ltd and Wallbank v Wallbank Fox Designs Ltd (CA 2012)

We begin with two cases that were heard together by the Court of Appeal in 2012 and which, although superficially factually similar, resulted in widely contrasting outcomes for the claimant.

Mr Weddall, a manager at a care home, was attacked by Mr Marsh at the work premises after he called and asked him to come in and cover a night shift. It was known that the two men did not get on and Mr Marsh, who was drunk, did not like the request. He cycled to the work premises and attacked his manager. Criminal proceedings were brought against him to which he pleaded guilty and was sentenced to 15 months in prison.

The Court of Appeal upheld the County Court decision and ruled that Mr Marsh could have refused the shift. He was not carrying out his employment duties and had acted personally and for his own reasons. The Court considered the location of the assault, being the workplace, as to some extent coincidental. The employee was likely to have assaulted the claimant wherever he saw him.

Mr Wallbank, a manager at a bed frame manufacturing factory questioned his employee Mr Brown about some inefficiencies in his working practices and was punched in the face and thrown against a table 12 feet away. Mr Wallbank sustained a fractured vertebrae and Mr Brown was dismissed for gross misconduct and convicted of grievous bodily harm. The County Court ruled that his employer could not be held liable because he was not acting in the course of his employment but the Court of Appeal disagreed. They found that whilst the use of aggression was not part of the job role, was spontaneous and irrational, it happened with such close proximity of time and distance to the request made by his manager that the employer could be held liable.

> *These cases highlighted the importance of the 'sufficiently close connection' test between the act and the violence and suggested that as the assault on Mr Wallbank happened in a factory environment where instant instructions and reactions are required these can lead to frustrations and violence. Because Mr Brown had violently reacted instantly to instructions he was given he was 'acting in the course of his employment'*

Allen & Ors v Chief Constable of Hampshire (CA 2013)

The claimant alleged that after she commenced a relationship with another police officer, a third female officer had begun a campaign of harassment against her. The alleged complaints included the receipt of abusive anonymous letters, telephone calls made suggesting she move out of the area, an arson attack on her home and criminal damage to her car. The claimant reported the arson and the female officer's alleged involvement and a criminal investigation was referred to the CPS, who ultimately decided not to prosecute. Further, a disciplinary investigation against the officer was discontinued on the basis of no evidence to support misconduct. The claimant claimed that the chief constable was vicariously liable for the acts of the other officer by virtue of the *Police Act 1996 s.88* and that the inadequate investigation into the female officer's wrongdoing breached the State's investigative duties under the *European Convention on Human Rights 1950 art.3*. The claimant's claim was struck out at first instance on both grounds, so she appealed.

It was held that the claimant's claim for vicarious liability had no realistic prospect of success. The Court of Appeal referred to the two-stage test; firstly, there must be a relationship between the individual tortfeasor and the party said to be vicariously liable. Secondly, the tort committed must be sufficiently connected with that relationship. Whilst the police officers' working relationship was capable of giving rise to vicarious liability, the facts did not reveal a close connection between the acts alleged and the police officer's position. The letters were anonymous so could not be said to have come from a police officer, the telephone calls did not establish that the officer was acting as a police officer and the acts of arson and criminal damage could not be connected to the performance of police duties or functions. If proved, the female officer was pursuing a personal vendetta or frolic of her own and that would not satisfy the test.

Further, the criminal investigation and disciplinary proceedings had been taken against the female officer and the outcome of those was irrelevant for the determination of this claim. The chief constable's investigative obligations had been satisfied by the legal mechanisms available to the claimant and the court had been right to strike out the claim.

> *The case is an important reminder that the wrongdoing of a colleague must be sufficiently connected with the professional relationship in order for vicarious liability to be established. Decisions will be fact sensitive and it is only when they are correctly applied to the law that a claim should be accepted. Part of the decision making process may be determined by the contemporaneous investigations and disciplinary proceedings undertaken by the employer. Whilst the outcome may be irrelevant for the determination of the claim, the information and evidence gathered may not.*

Vaickuviene & others v J Sainsbury PLC [2013]

The employer, supermarket giant J Sainsbury, could not be vicariously liable for the tragic murder of one employee by another.

The deceased had worked for the defenders as a shelf-stacker since 2008. He was a Lithuanian national. Mr McCulloch, with whom the deceased worked regularly on nightshift, was a member of the British National Party and 'known' to hold 'extreme and racist views about Eastern European workers coming to the UK'. Mr McCulloch had told the deceased that he did not like immigrants and that the deceased should go back to his own country. The deceased was distressed by the incident and wrote a letter of complaint to his team leader which was passed on to the nightshift manager. No action was taken in response to the complaint, of which Mr McCulloch became aware. In April 2009, the deceased was working on nightshift with Mr McCulloch. An argument broke out between them, when Mr McCulloch took exception to the deceased sharing his table. Shortly afterwards, a further argument took place between them in the staff toilets and punches were thrown. At around 3.00am, fellow employees noticed McCulloch behaving strangely, pacing up and down and talking to himself. At around 3.15am, Mr McCulloch removed a kitchen knife from the kitchenware section of the supermarket and attacked the deceased in one of the aisles. The deceased sustained fatal stab wounds.

The deceased's estate argued that such conduct could be characterised as harassment under the 1997 Act and that an employer could be vicariously liable. The murder, it was argued, was ***'closely connected'*** with the ***'employment situation'***. Sainsbury's countered that the circumstances were not closely connected with the employee's work duties and that the shelf stacking job did not carry a risk of violence or harassment. Instead, when the employee in question committed the fatal assault, he did so on a ***'purely private venture'***. The employee's actions could not be regarded as closely connected to his responsibilities at work and vicarious liability should not attach.

The Scottish Inner House heard Sainsbury's appeal to strike out the claim and applied the requirement of close connection and said there has to be a 'strong' connection between the duties the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. The employer then must have 'significantly increased' the risk of harm by requiring their employee to carry out such tasks. In this case, the court was not prepared to find that employing employees to stack shelves 'significantly increased' the risk of them becoming the victims of a fatal assault.

The Court also questioned the appropriateness of seeking to characterise the harmful event in this particular case, the murder, as harassment under the 1997 Act, although such reasoning was not central to its decision.

> *This is a particularly sensitive and tragic case. However, it does demonstrate that while the limits of vicarious liability are reasonably easy to define, there have been occasions when it has been difficult for the lower courts to apply them properly. In this instance, it took the appellant court to confirm that it is not enough for the employment to have merely provided the opportunity for the wrongful acts to take place - the claimant must prove a strong and close connection.*

Sophie Poole v David Abbott & Ors (CA 2013)

The claimant suffered catastrophic injuries after her scarf became entangled in the moving parts at the rear of the go-kart she was driving. She brought a claim in negligence against, among others, the karting-centre operator and the owner of the kart.

On the day in question the claimant and her boyfriend decided to visit the owner of the kart, who was a friend of her boyfriend. It was decided that they and three others would go to a car park nearby and use two of his karts. Before one of them started to drive the kart, the owner told the claimant to take off the long coat she was wearing in case it got trapped in the moving parts of the kart. The kart was a former racing kart which the owner had acquired from the karting-centre over six months before the accident occurred. The kart's moving parts were guarded only by chain strips; the kart was not subject to regulations made in 2005 which required the installation of a more comprehensive guard.

The Court of Appeal was firstly required to decide whether the directors of the karting-centre owed a duty of care to the claimant as a future user of the kart. The answer was no. It could not be said that the risks associated with the lack of guarding of the kart ought reasonably to have been foreseen by the directors.

The court went on to say that while the relationship between them and the claimant may have been sufficiently proximate to give rise to a duty of care if the other necessary ingredients had been present, that was not the case here: she was a member of an indefinite group of an indeterminate number, all remote from the directors. Nor would it would be fair, just or reasonable to impose such a duty on them.

Nor was the kart owner liable in negligence. The claimant was one of a small group of people whom he had invited to drive his karts. However, it was not the case where he and the claimant were in the type of relationship where a duty of care would usually exist. The accident happened in a purely social situation when a number of adults met for recreational purposes. The owner permitted his friends and acquaintances to use his karts without financial reward. It might well be that, even in a social situation, an owner of equipment which had a potentially dangerous defect which would not be readily apparent to another person to whom he lent the equipment would be held to owe a duty of care to that other person to warn him of the defect. However, that was not the case here. The accident kart had no hidden defect. The fact that it had moving parts which were unguarded and would be in close proximity to a driver seated in the kart was plain for all, including the claimant, to see. Finally, the scarf did not give rise to a risk of entanglement that should reasonably have been foreseen by the owner. When the claimant got into the kart, her scarf was neither trailing nor loose, nor was there any reason to believe that it would become loose.

> *In circumstances where there was no 'hidden defect', the court were not prepared to impose a duty of care where leisure equipment was provided by an individual in a social setting for the enjoyment of other adults without any form of reward. Such a duty would impose an undue burden of legal responsibility on those who wished to share such equipment with others who might wish to use it. The imposition of such a burden would have potentially far-reaching consequences for those engaging in recreational activities with friends and acquaintances.*

Summary

These decisions come as a timely reminder that the courts are ready, willing and able to restrict the scope of claims based on the alleged vicarious liability of an employer. It is hoped that the future development of this area of law continues to provide greater certainty for employers and their liability insurers.

Completed 29 August 2013 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Jonathan Coatman (contact no: 0113 2906713, e-mail: jonathan.coatman@uk.qbe.com).

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