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March 2016

PERSONAL INJURY BRIEFING

In the latest edition of the 1 Chancery's Lane Personal Injury Briefing Ian Miller looks at two recent decisions of the Supreme Court on Vicarious Liability

Vicarious Liability: extension, extension, extension

The Supreme Court has revisited the basis of and test for vicarious liability in two judgments. In broad terms vicarious liability requires a relationship between the defendant and the wrongdoer (the first limb) and a sufficiently close connection between that relationship and the wrongdoer's act or default, such as to make it just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct (the second limb). The Supreme Court considered the first limb in *Cox v Ministry of Justice* [2016] UKSC 10 and in *Mohamud v WM Morrison* [2016] UKSC 11 it considered the second.

Cox was concerned with the requirements of the relationship between the defendant and the wrongdoer for the purposes of vicarious liability. Most commonly the requirements are met where that relationship is one of employment: the court can move to consider the second limb of the test for vicarious liability. However there have been a number of recent cases in which the courts have had to consider relationships which have not been in the employment context. In *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 (*"the Christian Brothers case"*) an unincorporated association supplied teachers to a school which employed them. In *Cox* the relationship was between a prison and a prisoner who was working in the prison kitchen.

The facts of Cox are as follows. Whilst working in the kitchen, a prisoner dropped a sack of rice and Mrs Cox bent down to prop it up and prevent a spillage. Whilst doing so a prisoner, Mr Inder, dropped a sack of rice onto her back and injured her. The judge at first instance found that the relationship between Mr Inder and the prison service was not akin to that between an employer and employee in that employment was a voluntary relationship in which each party acted for their own advantage whereas the prison authorities were legally required to offer work to prisoners. The Court of Appeal allowed the appeal on the basis that the work performed by Mr Inder was done on behalf of the prison service and for its benefit. In fact the circumstances of Mr Inder's work made the relationship if anything closer than one of employment: it was founded not on mutuality but compulsion.

In the *Christian Brothers case* Lord Phillips identified five policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer, namely:

"(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer." (paragraph 35)

He added (at paragraph 47):

"… I have identified those incidents of the relationship between employer and employee that make it fair, just

and reasonable to impose vicarious liability on a defendant. *Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'"*

In *Cox* the Supreme Court found that not all of these factors are equally significant. Insurance was singled out as of little importance or relevance although the Court was unwilling to rule out the possibility that there might be circumstances in which it might be relevant. The control exercised by the defendant was also found not to have the significance which it was considered to have had in the past. The absence of even a "vestigial degree of control would be liable to negative the imposition of vicarious liability" although it was not likely to be a factor of "independent significance" in most cases. The remaining three factors were:

(1) The tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant

(2) The tortfeasor's activity is likely to be part of the business activity of the defendant, and

(3) The defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed by the tortfeasor

The Court considered that these factors were interrelated and were not confined to a special category of cases, such as the sexual abuse of children. They formed the basis for identifying the circumstances in which vicarious liability might be imposed outside relationships of employment. The aim was expressed of extending the scope of vicarious liability beyond employment relationships without imposing liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party. The Court also said that a consequence of extending the scope of vicarious liability was to enable the protection of the law to be maintained in the context of modern legal relationships between enterprises and members of their workforces. Importantly in the context of *Cox*, the Court emphasised that the defendant did not need to be carrying on activities of a commercial nature and the benefit derived from the tortfeasor's activities did not need to take the form of profit. It was sufficient that the defendant's interests were being furthered by the tortfeasor.

Applying the *Christian Brothers* criteria to the case of *Cox* the Supreme Court found that activities assigned to prisoners such as the provision of meals were not commercially motivated but were an integral part of the activities which the prison service carried on in furtherance of its aims. Mr Inder was placed by the prison service in a position where there was a risk that he may commit a variety of negligent acts within the field of activities assigned to him. He also worked under the direction of prison staff. Accordingly it was held that the prison service was vicariously liable for Mr Inder's negligence.

The second of the Supreme Court cases was concerned with the second requirement for vicarious liability (the second limb). In *Mohamud* the Claimant enquired at a petrol station whether he could print some documents from a USB memory device. The attendant said 'no' in colourful and offensive language and ultimately ended up attacking and injuring the claimant on the forecourt. The recorder found there was an insufficiently close connection between what the attendant was employed to do and his tortious conduct for there to be vicarious liability. The Court of Appeal upheld that decision on the basis that the attendant's duties were circumscribed, he was not given duties involving the possibility of confrontation or placed in a situation where violence was likely. The fact that his employment involved interaction with customers was not enough to make his employers liable. The argument raised by the Claimant/Appellant in the Supreme Court was that the courts should jettison the 'close connection' test set down in *Lister v Hesley* Hall [2002] 1 AC 215 and instead apply a broader test of "representative capacity". It was argued

the attendant was his employer's representative and it was sufficient that the employer had created the setting for the tort. The Supreme Court refused to change the established test, however, noting that it had been affirmed many times and, insofar as it might be said to be 'imprecise', this was "*inevitable given the infinite range of circumstances where the issue of vicarious liability arises*". Nonetheless, the Supreme Court elaborated upon the application of the test explaining that the court has to consider two matters. First, what functions or "field of activities" have been entrusted by the employer to the employee; put another way, what was the nature of his job? Critically, this had to be addressed broadly. The second matter the court had to decide was whether there was a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable: the cases in which the necessary connection had been found were cases in which the employee used or misused the position entrusted to him in a way which injured the third party.

When applied to the facts of the case, the Supreme Court took a different view from the courts below and allowed the appeal. The Justices considered that the attendant's foul mouthed outburst was 'inexcusable' but 'within the "field of activities" assigned to him'. Although he stepped out from behind the counter and attacked the Claimant on the forecourt this was a 'seamless episode'. He told the Claimant that he was not to return to the premises, purporting therefore to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers.

The surprise in this case is not so much the Supreme Court's conclusion but the conclusion of the courts below. The decision of the House of Lords in *Lister* represented the big shift away from the use of Salmond's often cited formula which involved consideration of 'modes' – albeit 'improper modes' - of doing some act authorised by the employer. Child abuse could never sensibly be considered an improper mode of doing an authorised act and therefore the House of Lords changed and broadened the test. With a test broad enough to find an employer could be found to be vicariously liable for an employee's sexual abuse of a child it seems extraordinary on the facts of this case that the recorder and Court of Appeal did not find the attendant's employer vicariously liable.

When considering the merits of cases, both sides will want to examine carefully whether the wrongdoing takes place outside the "field of activities" assigned to the employee. The difficulty for defendants is that a "broad approach" means that the courts have shown themselves very ready to make the link. In *Mohamud* the initial response by the attendant can easily be seen as within the attendant's "field of activities" but the connection with the attack which followed on the forecourt is not obvious: it was justified as "follow up" to what had been said and on the grounds that the attendant told Mr Mohamud not to return to the premises. The readiness of the courts to find a link was seen in the decision of the Court of Appeal in *Mattis v Pollock* [2003] 1 W.L.R. 2158 where a humiliated nightclub bouncer went back to his flat, obtained a knife, returned to the club and stabbed the Claimant in the back in revenge: the Court of Appeal found a "direct link to the events".

The Supreme Court distinguished the case of *Warren v Henlys* [1948] 2 All ER 935 where a customer at a petrol station had an angry confrontation with an attendant who had suspected him of trying to make off without payment. The customer returned with a police officer and indicated that he would make a complaint whereupon he was attacked by the attendant. The Supreme Court said that misbehaviour by the attendant "qua pump attendant" was past history by the time he assaulted the claimant. It is doubtful that such a conclusion would be reached were the case to be heard now: applying the "broad approach" it would not be difficult to find direct link or to find that responding to a complaint by a customer fell within an attendant's "field of activities".

For all the difficulties that defendants will face in avoiding a finding of vicarious liability, there may be narrow circumstances where, even applying the "broad approach" courts will find that wrongdoing takes place outside the employee's "field of activities". Likewise the Supreme Court seemed to suggest that if the wrongdoing results from "something personal between" the wrongdoer/employee and the victim then an employer would not be vicariously liable. However the scope for running even this argument is relatively narrow given that Lord Toulson observed that it looked "obvious that he [the attendant] was motivated by personal racism rather than a desire to benefit his employer's business" but considered that this was "neither here nor there." Given the stringency of the law on vicarious liability, employers will want to be very careful as to who they employ.

About the Author

Ian specialises in personal injury and clinical negligence,