

Lister v Hesley Hall Ltd
[2001] UKHL 22, [2002] 1 AC 215, [2001] 2 WLR 1311, [2001] 2 All
ER 769 HL

Summary

The defendants ran Axelholme House, which was attached to Wilsic Hall School in Doncaster. Local authorities would send children to the school and they would board at Axelholme House. The defendants employed Mr and Mrs Grain to run the house and maintain discipline. The claimants stayed at Axelholme House between 1979 and 1982. During that time they were sexually abused by Mr Grain. They sued the defendants, claiming that the defendants were vicariously liable in respect of the torts committed by Mr Grain when he sexually abused the claimants. The Court of Appeal dismissed the claimants' actions on the grounds that Mr Grain was not acting in the course of his employment by the defendants when he sexually abused the claimants. The House of Lords reversed the Court of Appeal's decision, holding that because there was a "close and direct" connection between what Mr Grain was employed to do and Mr Grain's sexual abuse of the claimants, the defendants were vicariously liable in respect of the torts committed by Mr Grain when he sexually abused the claimants.

Comments

It is not an understatement to say that this is the most important decision on vicarious liability ever handed down by the House of Lords. It's unfortunate, then, that the decision is so badly flawed. Two criticisms may be made. First, the reasoning underlying the decision is sloppy, to say the least. Second, the decision is productive of huge uncertainty in the law. Let's take each criticism in turn.

(1) *The first criticism.* Let's begin by making clear the distinction between *personal liability* and *vicarious liability*. If A commits a tort in relation to B and as a result is held liable to pay damages to B, we say that A is *personally liable* to pay damages to B. If A commits a tort in relation to B and as a result an innocent third party, C, is held liable to pay damages in relation to B, we say that that C is *vicariously liable* to pay damages to B; or we say that C is *vicariously liable* in respect of A's tort. So if I beat you up and am held liable to pay you damages, that is an obvious example of personal liability. And if you beat someone else up and I am held liable to pay damages to that someone else then that is an obvious example of vicarious liability.

Now – consider this situation. You ask me to look after some valuables of yours while you go away on business. I agree to look after them but then – because I have to go on holiday – I hand them over to T and ask him to look after them. T takes delivery of the valuables and then he carelessly loses them. Okay – in this situation, you'll be entitled to sue me for damages. Is this an example of personal liability or vicarious liability? It looks like vicarious liability, doesn't it? I'm being held liable not because I committed a tort in relation to you, but because T committed a tort in relation to you when he carelessly lost the valuables. Wrong – it's an example of personal liability. I'm held liable to pay you damages because *I* committed a tort in relation to you in this situation.

How come? Well, when I agreed to look after your valuables I owed you a duty to take reasonable steps to ensure their safety. Now this duty is what's called *non-delegable*. What that means is that if I hand your valuables over to someone else to look after them – if I, in other words, delegate the job of looking after the valuables to someone else – and as a result of that someone else's carelessness the valuables are lost, I am treated as though *I* carelessly lost the valuables. In other words, I'm held to have breached the duty *I* owed you to take reasonable steps to safeguard your valuables and am held liable in the normal way to pay you damages to compensate you for the result of *my* breach. So, in the situation we've been considering – where T carelessly lost your valuables that you gave me to look after and that I gave T to look after – when I'm held liable to pay you damages, I'm *personally liable* to pay you damages. I'm held liable to pay you damages because *I* committed a tort in relation to you in the situation we're considering – I breached the duty *I* owed you to take reasonable steps to safeguard your valuables. The law on vicarious liability is completely irrelevant here – I'm not held liable to pay you damages because T committed a tort in relation to you for which I'm vicariously liable.

The same analysis holds if T steals the valuables, rather than carelessly losing them. I'm held liable to pay you damages but I'm *not* held liable to pay you damages because T committed a tort in stealing the valuables and I'm vicariously liable in respect of that tort. No – I'm held liable to pay you damages because I breached the duty I owed you to take reasonable steps to safeguard your valuables. That duty was a non-delegable one; I gave the job of looking after the valuables to T; and when T failed to take reasonable steps to safeguard the valuables (quite the opposite: he stole them), he put me in breach of the duty I owed you to take reasonable steps to safeguard your valuables.

Now – it seems that the House of Lords in *Lister* was completely incapable of grasping this point; that my liability in the situations considered in the last two paragraphs is an example of *personal liability* rather than *vicarious liability*. So – they considered: What is the position if A gives some goods to B to look after and B entrusts them to his employee, C, and C steals the goods? Well – B will be held liable to pay A damages. Why? Because he's vicariously liable in respect of the tort committed by C in stealing the goods. (Wrong: he's held personally liable because C put B in breach of the non-delegable duty that he owed A to take reasonable steps to safeguard A's goods.) Why is he held vicariously liable? Well – because there's a "close and direct" connection between what C was employed to do and the tort committed by C in stealing the goods. Conclusion: an employer will be held vicariously liable in respect of a tort committed by an employee if there is a "close and direct" connection between what the employee was employed to do and the tort committed by the employee. Computer programmers have a term for this – 'garbage in, garbage out' ('GIGO' for short). The House of Lords reached a garbage conclusion in *Lister* (that an employer will be vicariously liable in respect of a tort committed by his employee if there was a "close and direct" connection between what the employee was employed to do and the tort committed by the employee) because their reasoning was based on a garbage premise (that B's liability in the above situation is an example of vicarious liability rather than personal liability).

(2) *The second criticism*. Now – before *Lister* was decided the way it was, the traditional test for determining whether an employer would be vicariously liable in respect of a tort committed by his employee was this: the employer would be vicariously liable if the employee did something he was employed to do by

committing that tort. (This is the ‘Salmond test’ for vicarious liability.) (Of course, on this test, there was no way the defendants should have been held vicariously liable in respect of the torts committed by their employee, Mr Grain, in sexually abusing the children in his care – there’s no way Grain did something he was employed to do by sexually abusing the children.)

Lord Steyn criticised the traditional test on the ground that “it does not cope ideally” with cases of intentional wrongdoing. Lord Millett expressed much the same criticism when he said that the test was “not happily expressed if it is to serve as a test of vicarious liability for intentional wrongdoing”. Okay – that may be right. However, the one thing you could say in favour of the traditional test is that it was fairly straightforward to apply – even in cases of intentional wrongdoing which did not involve deceit. So, for example, in *Poland v John Parr & Sons* [1927] 1 KB 236, a carter, an employee of the defendants, was walking beside one of the defendants’ wagons as it transported sugar through the streets of Liverpool. Thinking that the plaintiff was trying to steal some sugar from the wagon, the carter hit the plaintiff. Were the defendants vicariously liable in respect of the carter’s battery? Applying the traditional test, the answer is: yes, they were – the carter did something he was employed to do (defend the defendants’ property) by hitting the plaintiff. In *Keppel Bus Co v Sa’ad bin Ahmed* [1974] 3 WLR 1082, a bus conductor – who was employed by the defendants – hit a passenger who told him off for abusing another passenger. Were the defendants vicariously liable in respect of the bus conductor’s battery? Applying the traditional test, the answer is: no they weren’t – the bus conductor didn’t do anything he was employed to do by hitting the passenger.

Now – thanks to the decision in *Lister* – we should no longer ask: Did the employee do something he was employed to do by committing the tort in question? We should ask: Was there a sufficiently “close and direct” connection between what the employee was employed to do and the tort committed by the employee? Does anyone seriously think that this test is going to be as straightforward to apply as the traditional test? How do you tell whether there was a sufficiently “close and direct” connection between the bus conductor’s battery in the *Keppel* case and what he was employed to do? The House of Lords in *Lister* provided very little guidance on how we should apply the test. All their Lordships were agreed that the fact that an employee was given the opportunity to commit a tort by virtue of the fact that he was employed to do what he was employed to do would not be enough to give rise to a “close and direct” connection between the employee’s tort and what he was employed to do. Lord Clyde remarked of Mr Grain: “the opportunity to be at the premises [where he committed his acts of sexual abuse] would not in itself constitute a sufficient connection between his wrongful actings [sic] and his employment”. Lord Millett made the same point: “In the present case [Mr Grain’s] duties provided him with an opportunity to commit indecent assaults on the boys for his own sexual gratification, but that in itself is not enough to make the school liable”.

So what was it about the case in *Lister* which meant that there *was* a sufficiently “close and direct” connection between the torts committed by Mr Grain and what he was employed to do. This is what Lord Steyn said: “The question is whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House”. Lord Clyde said this: “[Mr Grain’s] position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he

committed and the work which he had been employed to do". And this is what Lord Millett had to say: "[Mr Grain] did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys".

This is woeful stuff: what sort of guidance will this provide future courts that have to decide whether there was a sufficiently "close and direct" connection between what an employee was employed to do and a tort that was committed by the employee? Lord Steyn suggested in *Lister* that anyone wanting guidance on how the "close and direct" connection test should be applied should look at the Supreme Court of Canada's decisions in *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71 in which this test for vicarious liability was first formulated and applied. But that is hardly reassuring: in *Jacobi v Griffiths*, the judges of the Supreme Court of Canada divided four to three on how to apply their "close and direct" connection test for vicarious liability to a case where an employee who worked in a children's club sexually assaulted two members of the children's club at his home. Four of the judges thought there wasn't a sufficiently "close and direct" connection between what the employee was employed to do and his sexually assaults on the children to find the owners of the children's club vicariously liable in respect of the employee's sexual assaults. Three of the judges thought there was.

All in all, the new test for vicarious liability propounded by the House of Lords in *Lister* – and it *is* new, however much their Lordships might try to pretend otherwise (see paras [15] and [69] of the *Lister* decisions for some spectacular abuses of language perpetrated by Lords Steyn and Millett respectively in an attempt to convince us that their test for vicarious liability is nothing new) – can only be productive of massive uncertainty and a great deal of litigation in future years.

(3) *What should the House of Lords have done?* So – how *should* the House of Lords have decided the *Lister* case? Well – they should have retained the traditional test for determining whether an employer is vicariously liable in respect of a tort committed by his employee and dismissed the vicarious liability claim on the ground that there was no way Mr Grain did something he was employed to do by sexually abusing the claimants.

But they could then have found the defendants *personally liable* to compensate the claimants for the sexual abuse that they suffered at the hands of Mr Grain. They could have reasoned in the following way. When the defendants took the claimants in, they owed them a duty to take reasonable steps to ensure their safety. This duty was non-delegable in nature. They entrusted the job of seeing that the claimants would be safe and well to Mr Grain. He failed to take reasonable steps to ensure the claimants' safety (quite the opposite: he sexually abused the claimants). In so doing, he put the defendants in breach of the duty they owed the claimants to take reasonable steps to ensure their safety; and the defendants are personally liable in the normal way to pay damages to the claimants to compensate them for the losses suffered by them as a result of that breach.

Now – if you read Lord Hobhouse's judgment in the *Lister* case, it closely tracks the above line of reasoning. But because he too does not grasp the distinction between *vicarious liability* and *personal liability* set out above, his reasoning goes as follows. He says: the defendants are *vicariously liable* to compensate the claimants for sexual abuse that they suffered at the hands of Mr Grain because – when they took

in the claimants, they owed them a duty to take reasonable steps to ensure their safety, they gave the job of ensuring the claimants' safety to Mr Grain, and Mr Grain, in sexually abusing the claimants, failed in his responsibility to ensure the claimants' safety.

So the House of Lords' conclusion in the *Lister* case – that the defendants were liable to the claimants – can be justified. However, the House of Lords reached that conclusion by the wrong route – via the law on vicarious liability – and in so doing they have created a huge amount of confusion and uncertainty in the law on vicarious liability. The House of Lords could, and should, have done much better.

Nick McBride

Attorney General of the British Virgin Islands v Hartwell
[2004] UKPC 12, [2004] 1 WLR 1273 PC

Bernard v Attorney General of Jamaica
[2004] UKPC 47 PC

Brown v Robinson
[2004] UKPC 56 PC

Summary

Attorney General of the British Virgin Islands v Hartwell

PC Laurent was the sole police officer stationed on the island of Jost Van Dyke in the British Virgin Islands. As the officer in charge of the Jost Van Dyke substation, Laurent had access to a revolver and ammunition. On 2 February 1994, Laurent left Jost Van Dyke, taking with him the revolver and ammunition. He travelled to the nearby island of Virgin Gorda, where his partner – Lucianne Lafond – was working in a bar. Laurent walked into the bar and saw Lafond in conversation with another man. Laurent fired his revolver four times in the general direction of Lafond and the man who was talking to her. One of the shots injured the claimant. The claimant sued the defendants, Laurent's employers, for damages.

The Privy Council held that the defendants were not vicariously liable for Laurent's actions in shooting the claimant. At the time he shot the claimant, he was embarked on a 'frolic of his own' (at [17], per Lord Nicholls, who delivered the judgment of the Privy Council). However, the Privy Council went on to rule that 'when entrusting a police officer with a gun the police authorities owe to the public at large a duty to take reasonable care to see the officer is a suitable person to be entrusted with such a dangerous weapon lest by any misuse of it he inflicts personal injury, whether accidentally or intentionally, on other persons' (at [39]). The Privy Council went on to find that the police authorities had breached this duty. At the time of the shooting the defendants had received a complaint that Laurent had assaulted a man who happened to be in Lafond's apartment and were aware of one time when Laurent had gone out on duty armed with a gun. In light of these two incidents, they had not done enough to inquire into whether Laurent was a suitable person to have access to a gun; had they done so 'warning bells [would have started] ringing' (at [44]), the defendants would have taken steps to deprive Laurent of access to his police service revolver and the claimant would never have been injured. The defendants were therefore liable in negligence to compensate the claimant for his injuries.

Bernard v Attorney General of Jamaica

The claimant was using a public phone in Jamaica when a police constable – PC Morgan – interrupted him and demanded that the claimant hand over the phone. Even though Morgan identified himself as being a police officer – and it was normal for the police in emergencies to commandeer public phones – the claimant refused to let go of the phone. Morgan then slapped and shoved the claimant, and when the claimant

still refused to let go of the phone, Morgan took out his gun, took two steps backwards and shot the claimant point blank in the head. Incredibly, the claimant was not killed, but he was severely injured. Even more incredibly, while the claimant was in hospital, Morgan arrested him for assaulting a police officer in performing his duties – though that charge was later dropped and Morgan was dismissed from the police force.

The claimant sued the defendants, Morgan's employers, for damages on the basis that they were vicariously liable for Morgan's actions in shooting the claimant. The Privy Council allowed the claimant's claim. Four features of the case led them to reach the conclusion that the defendants were vicariously liable for Morgan's actions (see paras [25] – [27] of the judgment, delivered by Lord Steyn): (1) the shooting incident followed immediately upon Morgan's announcement that he was a policeman; (2) the shooting incident only occurred because the claimant was unwilling to yield to Morgan's purported assertion of police authority; (3) the fact that Morgan arrested the claimant in hospital for assaulting a police in performing his duties was evidence that Morgan was in fact acting on police business in attempting to use the phone; (4) the defendants had created a risk that policemen like Morgan would do what Morgan did by routinely allowing policemen like Morgan to walk about with loaded service revolvers, even when they were off duty.

Brown v Robinson

The claimant in this case was in a line of people queuing at a gate to get into a football match in Jamaica. The first defendant was a security guard on duty at the gate; he was employed to work as a security guard by the second defendant. The football match had already started and people in the line became impatient and began pushing. The first defendant tried to maintain control by striking some people in the line with his baton. The claimant responded to this by pushing the first defendant and then ran off. The first defendant pulled out a gun and chased after the claimant. The first defendant caught up with the claimant in a parking lot. The claimant put up his hands, saying that he had done nothing wrong. The first defendant shot the claimant at almost point blank range, seriously injuring the claimant.

The claimant sued the defendants for damages, claiming that the second defendant was vicariously liable for the first defendant's actions in shooting the claimant. The trial judge held that the second defendants were vicariously liable for the first defendant's actions because the first defendant had shot the claimant in an attempt to reassert his authority (which the claimant had challenged by pushing the first defendant) and to ensure that 'thereafter good order would prevail' (at [12], quoted by Lord Carswell, delivering the judgment of the Privy Council). The Privy Council upheld the trial judge's finding on this point, holding that the first defendant's actions did not fall 'on the side of the line that would make it an act of revenge or "private retaliation"' (ibid).

Comments

The findings of vicarious liability in *Brown* and *Bernard* are unexceptionable, but the decision in *Hartwell* raises two points that are worthy of comment.

(1) *Why was there no finding of vicarious liability in Hartwell?* The Privy Council in the *Bernard* case was careful to say (at [27]) that it would be ‘going too far’ to say that the use ‘of a service revolver by a policeman would without more make the police authority vicariously liable.’ The decision in *Hartwell* shows that this is the case – but why isn’t a police authority *always* held vicariously liable when a police officer misuses a firearm issued to him by the police authority? After all, in the Canadian cases of *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570, it was suggested that an employer should be held vicariously liable in respect of a tort committed by one of his employees if there was a *special risk* associated with the type of work the employee was employed to do that he would commit that kind of tort. One would have thought this requirement would be satisfied in the case where a policeman misuses a service revolver issued him by his police authority. Despite this – and despite the fact that Lord Steyn in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 made it clear (at [27]) that the decisions in *Bazley* and *Jacobi* should form the ‘starting point’ of any inquiry into whether an employer was to be held vicariously liable in England for a tort committed by one of his employees – the Privy Council felt able to rule in *Hartwell* that it was ‘clear cut’ that the defendants in that case were not vicariously liable for PC Laurent’s actions (see *Hartwell*, at [16]). Why was the matter so ‘clear cut’? Well – ‘Laurent’s activities had nothing whatever to do with any police duties, either actually or ostensibly’ (at [17]). But post-*Lister* this cannot, surely, be the end of the matter. After all, the caretaker’s acts of sexual abuse in *Lister* had nothing to do with his duties, either actually or ostensibly – but that did not stop the caretaker’s employers being held vicariously liable for his acts of sexual abuse. The ruling in *Hartwell* almost represents a reversion to the state of the law *before* the decision of the House of Lords in *Lister v Hesley Hall Ltd* – where an employee’s tort would not be held to have been committed in the course of his employment unless it amounted to an authorised or unauthorised mode of performing one of his (actual or ostensible) duties as an employee. Of course, we are not suggesting for a second that the Privy Council intended in *Hartwell* to depart from or to question the ruling in *Lister v Hesley Hall Ltd* – but the impression given by the *Hartwell* decision is that the judges are still at sixes and sevens over the implications of the *Lister* decision and that certainty in this area is still a long way off.

(2) *The duty of care point in Hartwell.* In *McBride & Bagshaw, Tort Law*, we say that ‘If A is in possession of a...loaded firearm...and [a reasonable person in A’s position would know] that B is incapable of handling that [firearm] properly, A will normally owe B and anyone else who might be harmed by the [firearm’s] improper use a duty not to entrust it to B’s care.’

On the basis of this statement, we would have decided the issue of whether the police authority in *Hartwell* was liable in negligence for the injuries suffered by the claimant by asking: Would a reasonable police authority in the position of the police authority in *Hartwell* have realised that PC Laurent was likely to misuse his substation’s revolver in the way he did? If so, then the police authority owed the claimant a duty not to allow PC Laurent access to the substation’s revolver. Given the couple of incidents mentioned in the summary of the *Hartwell* case it is plausible to think that a reasonable police authority in the position of the police authority in *Hartwell* would have realised – once it had made reasonable inquiries into the incidents – that PC Laurent was unstable and was not an appropriate person to have access to a revolver. So the police authority did owe the claimant a duty not to allow

PC Laurent access to the substation's revolver. It obviously breached that duty and was rightly held liable in negligence to compensate the claimant.

The Privy Council approached the issue in a slightly different way. Instead of saying that the defendant police authority will *only* have owed the claimant a duty of care *if* it were reasonably foreseeable that PC Laurent would misuse the substation's revolver if he were allowed access to it, the Privy Council ruled that the defendant police authority *always* owed the claimant – and everyone else – a broad duty to take reasonable steps to inquire into whether PC Laurent was an appropriate person to have access to the substation revolver, and to deny him access if their inquiries revealed that he was not an appropriate person to have such access. The Privy Council went on to rule that the defendant police authority had breached this duty of care – they failed to make adequate inquiries in light of the incidents that PC Laurent was involved in – and that it was therefore liable in negligence for the claimant's injuries.

Same conclusion, different route. But we would submit our approach is better. Our approach makes it easier to see *why* the defendant police authority owed the claimant a duty of care. *Of course* the defendant police authority owed the claimant a duty of care *once* it became reasonably foreseeable that PC Laurent was likely to misuse the substation revolver – why wouldn't they? The duty of care that the Privy Council found that the defendant police authority owed the claimant is more controversial – as the Privy Council itself acknowledged when it somewhat defensively observed (at [39]): 'If this duty seems far-reaching in its scope it must be remembered that guns are dangerous weapons. The wide reach of the duty is proportionate to the gravity of the risks. Moreover, the duty imposes no more than an obligation to exercise the appropriately high standard of care to be expected of a reasonable person in the circumstances.' On our approach, the finding of a duty of care in *Hartwell* seems like no more than common sense; whereas the Privy Council's approach is more likely to court controversy and possible disrepute.

Nick McBride

Maga v Trustees of the Birmingham Archdiocese
of the Roman Catholic Church
[2010] EWCA Civ 256, [2010] 1 WLR 1441 CA

Summary

The claimant was sexually abused by a Roman Catholic priest, Father Clonan, between the ages of 12 and 13. They met when the claimant was admiring Fr Clonan's car. Fr Clonan invited him along to some discos that were held at the local Catholic church, the Church of Christ the King in Coventry, and subsequently paid the claimant to do some odd jobs for him. Most of the acts of sexual abuse that Fr Clonan committed on the claimant were carried out in the presbytery (priests' residence) attached to the Church of Christ the King, where Fr Clonan lived. The claimant once complained to Fr McTernan, the priest in charge of the Church of Christ the King, about being abused by Fr Clonan, but Fr McTernan dismissed his complaint: 'Don't be so silly: I will tell your mother you have been playing up.' All this happened in 1975-1976. The claimant took no action against Fr Clonan or the church at the time, but sued in 2006 after he saw a TV programme in which it was reported that another man had recovered damages for the sexual abuse he had suffered at Fr Clonan's hands when he was a boy, and that complaints about Fr Clonan's behaviour had been made to the church as long ago as 1974.

The claimant's claim for damages against the defendant Archdiocese was dismissed at first instance on the ground that the defendants were not vicariously liable for Fr Clonan's acts of sexual abuse, and were not liable in negligence for their failure to act on the reports they had received about Fr Clonan's behaviour. On appeal, the Court of Appeal held that:

(1) The defendant Archdiocese was vicariously liable for Fr Clonan's acts of sexual abuse on the basis that there was a sufficiently close connection between those acts of abuse and what Fr Clonan was employed to do. A number of factors (set out in [45]-[50], per Lord Neuberger MR, at [84], per Longmore LJ, and at [94]-[95], per Smith LJ) led the Court to reach this conclusion: (i) Fr Clonan was wearing his priest's clothes when he met the claimant and this gave him a degree of 'general moral authority'; (ii) one of Fr Clonan's jobs as a priest was to evangelise the Gospel, and so he was 'ostensibly performing his duty as a priest...by getting to know the claimant'; (iii) Fr Clonan had a special responsibility for doing youth work in the parish, and so was ostensibly performing this duty when he got to know the claimant; (iv) Fr Clonan got to know the claimant better by inviting him to some church discos; (v) Fr Clonan got to know the claimant even better by getting the claimant to clean up after the discos were over; (vi) the claimant subsequently did some jobs for Fr Clonan in the church presbytery; (viii) a number of the acts of sexual abuse committed by Fr Clonan were carried out in his room in the church presbytery, when part of his job might have involved 'spend[ing] time alone with people who were seeking for truth' in his room.

(2) Once a complaint had been made to the Archdiocese about Fr Clonan's behaviour, the Archdiocese did owe boys like the claimant a duty of care in negligence 'to keep a look out for, and to protect, young boys with whom Father Clonan was associating' (at [73]), and the Archdiocese breached that duty of care by failing to act on the complaints they had received about Father Clonan's behaviour, and were accordingly liable for the harm suffered by the claimant as a result of that breach of duty of care.

Comments

Lord Neuberger MR remarked (at [52]) that ‘I accept the court should not be too ready to impose vicarious liability on a defendant’, noting ‘the deleterious effect on schools, and charities and social clubs aimed at the young of too readily imposing such liability for sexual abuse of children by their employees’. So how bad is this judgment going to be for such organisations? The answer is, ‘Pretty bad’. Ultimately, the finding that the church in this case was vicariously liable for what Father Clonan did seems to have come down to this: Father Clonan’s job gave him an excuse for being alone with the claimant. All of the three judges who decided the case agreed that that factor was crucial:

(1) Lord Neuberger MR, at [50]: ‘[T]he fact that Father Clonan was spending time alone with the claimant for illegal sexual purposes is [irrelevant]: the opportunity to spend time along with the claimant, especially in the presbytery, arose from Father Clonan’s role as a priest employed by the Archdiocese’.

(2) Longmore LJ at [84]: ‘the progressive stages of intimacy were...only possible because Father Clonan had the priestly status and authority which meant no one would question his being alone with the claimant. It is this that provides the close connection between the abuse and what Father Clonan was authorised to do.’

(3) Smith LJ at [94]-[95]: ‘I do not think that, if a priest or pastor of a non-evangelical church had the ostensible authority to befriend and develop intimacy with a young person by reason of his pastoral duties and if he then abused the opportunities given by that ostensible authority, the position of that church would be any different from the position of the Roman Catholic Church in this case. All cases of this type will be fact sensitive. It will be necessary to examine with what ostensible authority the church clothes its priests or pastors and for what legitimate purposes. The legitimate purposes might or might not include the duty of evangelisation; the duties might be purely pastoral. But if those legitimate purposes clothe the priest or pastor with the ostensible authority to create situations which the priest or pastor can and does then subvert for the purposes of abuse, I see no reason why that church should not be vicariously liable for the abuse.’

But the same could be said of *any* employee who is employed in *any* kind of responsible position by an organisation that deals with children. Given this, the *Maga* decision could easily have the effect of closing down *many* charities, churches, schools and clubs that do immensely valuable work with children. If, at some point in the past, an employee of an organisation that works with children abused a child that he was allowed to befriend because of his position as an employee of that organisation, the *Maga* decision will leave the organisation little choice but to settle any claim for compensation that the victim of abuse makes, as well as covering his or her (no doubt substantial) legal costs. If, once it has done this, the organisation does not have enough money left to carry out its ordinary functions, it will have to close down. Doubtless some people would say ‘let justice be done, though the heavens fall’, but does justice *require* a finding of vicarious liability in these kinds of cases? We don’t *have* to find vicarious liability in situations such as the *Maga* case; the courts are making a *choice* to find such liability those situations. But it is hard to see why they are making that choice. Of course, finding the Archdiocese liable in this case may do some good for Mr Maga, and those in a similar position to him – but should we not also take into account the far greater harm that will almost certainly be done to society as a whole by finding that there is vicariously liability in cases like this?

Nick McBride

JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust
[2012] EWCA Civ 938

Summary

JGE claimed that when she was a young girl she had been sexually abused by Father Baldwin. JGE argued that the Bishop of Fr Baldwin's parish was vicariously liable for Fr Baldwin's acts of sexual abuse; it was accepted on all sides that if he was, then the defendant trustees would be liable to compensate JGE in the Bishop's place. The defendants argued that the Bishop could not have been vicariously liable for Fr Baldwin's acts of sexual abuse because Fr Baldwin was not employed by the Bishop. Instead, the defendants argued, Fr Baldwin merely occupied an office within the Roman Catholic Church – that of a parish priest – that was supervised by the Bishop of the parish within which he worked. (It could not be claimed that Fr Baldwin was an employee of the Roman Catholic Church as the Roman Catholic Church enjoys no legal personality in English law.)

At first instance, MacDuff J held that even if Fr Baldwin was not an employee of the Bishop of his parish, the Bishop should still be held vicariously liable for Fr Baldwin's acts of sexual abuse because there was a 'sufficiently close connection' between Fr Baldwin and the Bishop as to make it fair and just that the Bishop should be held vicariously liable for what Fr Baldwin did.

On appeal, the Court of Appeal unanimously rejected as legally unfounded and unprincipled MacDuff J's attempt to transpose the *Lister* test for when an employee's tort would be held to have been committed in the course of his employment into a test as to when someone should be held vicariously liable for a tort committed by a non-employee. The Court of Appeal also unanimously agreed that it would be wrong to say that Fr Baldwin was an employee of his Bishop at the time he committed his acts of sexual abuse. However, the members of the Court of Appeal disagreed over whether the Bishop of Fr Baldwin's parish could still be held vicariously liable for Fr Baldwin's acts of sexual abuse despite the fact that Fr Baldwin was not the Bishop's employee.

Ward and Davis LJ thought that the Bishop *could* be held vicariously liable on the basis that there existed a relationship that was 'akin to employment' between the Bishop and Fr Baldwin. In reaching this conclusion, Ward LJ argued (at [72]) that in trying to determine whether the relationship between the Bishop and Fr Baldwin was 'akin to employment', four factors needed to be considered: (1) how much control the Bishop exercised over Fr Baldwin's work; (2) how central Fr Baldwin's work was to the activity or 'business' carried on by the Bishop, and by extension the Roman Catholic Church; (3) whether Fr Baldwin's position was integrated into an organisation that the Bishop ran; (4) whether Fr Baldwin was in fact operating as his own little business, where he took the risks and profits resulting from how he ran his own business. Looking at these four factors, Ward LJ held (at [81]) that 'Father Baldwin is more like an employee than an independent contractor.' Davis LJ adopted a simpler test for determining whether the relationship between the Bishop and Fr Baldwin was 'akin to employment'. He simply focussed on: (1) how much control the Bishop exercised over Fr Baldwin (at [123]); and (2) whether Fr Baldwin's work sought to further the aims or purposes of the Roman Catholic Church which the Bishop represented.

Tomlinson LJ dissented. He argued (at [94]) that in cases where a tortfeasor was not the employee of the defendant, the defendant would normally only be held vicariously liable for the tortfeasor's tort if there existed some kind of relationship of agency between the tortfeasor and defendant, where the tortfeasor was acting for the defendant's benefit or representing the defendant in some way. He pointed out (at [105]) that there was no agency relationship here between Fr Baldwin and the Bishop: 'If Father Baldwin can properly be regarded as

undertaking his ministry for the benefit of anyone I should have thought that it was for the benefit of the souls in his parish. I do not think that it is sensible to describe either the church or the Bishop as having derived a benefit from the activities of its or his priests within the diocese.’ Tomlinson LJ went on to argue (at [109]) that there was no ‘coherent principle’ on the basis of which the Bishop of Fr Baldwin’s parish could be held vicariously liable for Fr Baldwin’s torts. It might have been justifiable to hold the Bishop vicariously liable for Fr Baldwin’s acts of sexual abuse if it could be shown that appointing someone to the position of a parish priest materially increased the risk that he would go on to commit acts of sexual abuse. In such a case, the risk that people like Fr Baldwin would commit acts of sexual abuse could be seen as an incident of the Roman Catholic Church’s enterprise of seeking to save souls, with the result that the Church could be justly held liable through its Bishop when that risk materialised. However, Tomlinson LJ argued (at [98]-[100]) that there was no evidence that appointing someone to the position of parish priest materially increased the risk that they would go on to commit acts of sexual abuse.

Comments

And still the throbbing wound inflicted on our legal system by the decision of the House of Lords in *Lister v Hesley Hall Ltd* (2001) grows ever larger. One wonders where it will all end. In discussing the decision of the Court of Appeal in *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* (2005) – a decision which Ward LJ took as imposing vicarious liability on a non-employer (though the case itself was decided on the basis that the employee in that case had *two* employers for the purposes of the law on vicarious liability, and is presented as such in *McBride & Bagshaw*) – Ward LJ said (at [60]) that the decision ‘will, I believe, come to be seen as something of a William Ellis moment where, perhaps unwittingly, their Lordships picked up the ball and ran with it thereby creating a whole new ballgame – vicarious liability even if there is strictly no employer/employee relationship.’ William Webb Ellis is supposed to have picked up a football and run with it in a game played at Rugby School in 1823. The first set of rules governing the game of rugby were put together by three Rugby schoolboys in 1845. I’m not sure we can afford to wait 22 years for the courts to get their act together on when exactly someone will be held vicariously liable for a tort committed by someone else. And there is no sign that they are anywhere near making this area of law reasonably certain and predictable in its application. Instead, there is much talk in *JGE* of decisions as to when one person will be held vicariously liable for another’s tort as resting on ‘policy’ considerations (mentioned 46 times in the judgments). But nowhere was there any attempt to identify why public policy demands that we make the Bishop of Fr Baldwin’s parish vicariously liable for Fr Baldwin’s acts of sexual abuse. The Bishop (and by extension, the Roman Catholic Church) was not making any money out of Fr Baldwin’s work as a parish priest, and – according to Tomlinson LJ – the mere fact that Fr Baldwin was appointed to work as a parish priest did not materially increase the risk that he would end up sexually abusing children like *JGE*. So why should the Bishop be held vicariously liable for Fr Baldwin’s acts of sexual abuse? Ultimately, it must come down to deterrence – that the Court of Appeal thought that the only way of ensuring that Bishops would feel any pressure to exercise their powers of control to stop acts of sexual abuse such as those committed by Fr Baldwin is to make them vicariously liable when those acts of sexual abuse occur. But if we are now making people vicariously liable for the torts of others simply on the basis that those people were in a good position to stop those torts occurring, then the law on vicarious liability is going to extend very far indeed.

Nick McBride

Weddall v Barchester Health Care
Wallbank v Fox Designs Ltd
[2012] EWCA Civ 25

Summary

This note is about two cases that were decided by the Court of Appeal at the same time, having been heard as conjoined appeals.

Weddall v Barchester Health Care

Weddall was the deputy manager at a care home operated by the defendants. He called one of the assistants at the care home, Marsh, at home to ask him if he wanted to come in and fill in for a missing member of staff. When Marsh received the call at 6 pm in the evening, he was drunk, having had a row at home. Marsh and Weddall had never gotten on, and Marsh felt that Weddall was mocking him during the call. He decided to resign his position and went to the care home to do this. When he arrived at the care home, he saw Weddall and attacked him, knocking Weddall to the ground and kicking him.

At first instance, the judge found that Marsh had not been acting in the course of his employment in attacking Weddall. The Court of Appeal upheld the judge's decision. The Court of Appeal found that there was little connection between Marsh's being asked to come in to do an extra shift, and Marsh's attacking Weddall: the fact that Weddall had asked Marsh to come into work was a mere pretext for Marsh's taking out his long-standing feelings of resentment towards Weddall. The fact that Marsh had been trained to use force on patients at the care home was of no relevance here, as there was no connection between that training and what Marsh did to Weddall.

Wallbank v Fox Designs Ltd

Wallbank was employed by Fox Designs Ltd, a company of which he was the sole shareholder and which manufactured bed frames. Wallbank reprimanded another employee, Brown, for doing his job inefficiently. When Wallbank went to show Brown how he should be doing his job, saying 'come on', Brown threw him across the room, fracturing a vertebra in Wallbank's lower back.

At first instance, the judge found that Brown had not been acting in the course of his employment in attacking Wallbank. The Court of Appeal reversed the judge's decision, holding that there was a sufficiently close connection between Brown's tort and what he was employed to do as to make it fair and just for Fox Designs to be held vicariously liable for Brown's tort. Brown's tort, the Court found, was not 'only closely related to [his] employment in both time and space, it was [also] a spontaneous and almost instantaneous, if irrational, response to an instruction' (at [52]). The Court of Appeal made it clear that it did *not* think that any act of violence that was committed in response to an instruction from a superior would be held to have been committed in the course of employment. However, it thought (at [54]) that it would be fair and just to hold employers vicariously liable in cases where an employee spontaneously reacted in a violent way to an instruction from a superior:

The possibility of friction is inherent in any employment relationship, but particularly one in a factory, even a small factory, where instant instructions and quick reactions are

required. Frustrations which lead to a reaction involving some violence are predictable. The risk of an over-robust reaction to an instruction is a risk created by the employment. It may be reasonably incidental to the employment rather than unrelated to or independent of it.

Brown's violent act in *Wallbank* was an example of an 'over-robust reaction to an instruction' that could be regarded as 'reasonably incidental' to his employment by Fox Designs, and Fox Designs were accordingly vicariously liable in respect of that violent act.

Comments

Some might find it difficult to see the distinction between *Weddall* and *Wallbank*. The Court of Appeal seemed to see two differences between the cases.

First, the spontaneity of the violence in the two cases: Brown reacted *immediately* to Wallbank's instruction to 'Come on' while Marsh only attacked Weddall some time after Weddall telephoned him.

Secondly, Marsh's act of violence seemed only contingently related to Weddall's telephoning him, and seemed to have much more to do with Marsh's long-standing dislike of Weddall. In contrast, Brown's attack on Wallbank seems to have been triggered not by any animosity that he felt towards Wallbank but because he did not like being told what to do.

Both of these factors do create some space between the two cases, but it is not clear whether the space is sufficiently large to justify the Court of Appeal's decision to find vicarious liability in *Wallbank* but not *Weddall*. All of the judges in the Court of Appeal placed great weight on the fact that in *Wallbank* Brown was reacting adversely to an *instruction* that he had received from Wallbank, an instruction that it was part of his job to receive and follow. But what instruction did Brown receive? Brown was falling down in his job because he hadn't ensured that a conveyor belt that fed bed frames into an oven was loaded up with bed frames. So a lot of the heat produced by the oven was being wasted as nothing was going through the oven. Wallbank walked over to the conveyor belt to put more bed frames on it, and said 'Come on' to Brown – basically telling him to come and help Wallbank while they both did Brown's job. But what if Wallbank hadn't said 'Come on'? What if Wallbank, after spotting that Brown was failing to ensure a proper supply of bed frames to the oven, had simply sighed loudly, and gone over to the conveyor belt to load more bed frames on, and Brown had been provoked by that implicit indication of disapproval to attack Wallbank? Would Brown's battery have been held *not* to have been committed in the course of his employment simply because Wallbank had not said 'Come on' to Brown in going over to the conveyor belt?

It would be very difficult to justify refusing to find vicarious liability in *Wallbank* in my alternative scenario, just because Wallbank failed to say the magic words 'Come on'. And in fact the Court of Appeal's reasoning in deciding *Wallbank* could easily justify a finding of vicarious liability in my alternative scenario. The fact that employees are required to follow instructions is not the only potential source of violence-triggering frustration in the workplace. Being exposed to the judgment and disapproval of superiors is also something that creates a predictable risk of violent outbreaks by employees in the workplace; and as that risk is predictable, it might be thought that it is only fair and just that employers be held vicariously liable when that risk materialises. But if we go that far, might it not also be argued that there is another feature of life as an employee that creates a predictable risk of violence in the workplace – that one is contractually required to turn up to work day after day and work alongside people who you might not like very much, and who might get on your

nerves so much that you are frequently tempted to hit them? If the risk of that kind of violence is regarded as a predictable risk of employing people to work for you, then might it not also be fair and just to hold employers vicariously liable for that kind of violence? And if it is, then wasn't that exactly the kind of violence that occurred in *Weddall*, where you had two employees who didn't get on, who disagreed with each other about how they should do their work, and whose dislike for each other eventually culminated in one attacking the other? Given this, it may be that the Court of Appeal should have found that the employer was vicariously liable in *Weddall*, as well as *Wallbank*. While the two cases were different, they weren't so different as to justify reaching a different result in deciding them. Had the Court of Appeal focussed on the frustrations generally incident to working as an employee, they would have seen that the violence in *Weddall* was just as much a result of Marsh's status as an employee as the violence in *Wallbank* was a result of Brown's being an employee.

Nick McBride

Various Claimants v Catholic Child Welfare Society
[2012] UKSC 56, [2012] 3 WLR 1319

Summary

A large number of claimants (170) alleged that they were abused, sexually or physically, whilst at St William's, a residential institution for boys, located in Market Weighton, Yorkshire. The abuse occurred between 1958 and 1992. During the first part of this period, up until 1973, St William's was an 'approved school' for the detention of boys up to the age of 17 who had been convicted of custodial offences. After 1973 it was an 'assisted community home' for children in the care of the local authority. The present case concerned whether the Institute of the Brothers of the Christian Schools ('the Institute'), sometimes called the De La Salle Brothers, could be held vicariously liable for this abuse. The basis for seeking to hold the Institute vicariously liable was that several of the teachers at St William's who were alleged to have abused the claimants, including Mr Carragher, who was the headmaster from 1976 until 1990 (and known as Brother James), were members of the Institute, and had been sent to work there by the Institute. Being a member of the Institute involved becoming a lay brother of the Catholic Church; members made vows to live in accordance with the rules of the Institute, to go where they were sent and do the tasks that they were assigned, and to hand their earnings to the Institute which would then provide them with food, accommodation and the like. St William's did not belong to the Institute, and the members of the Institute who were teachers at it were employed by other defendants (or by those now represented by other defendants). In practice, however, these other defendants ('the owners') effectively delegated the running of St William's to the Institute. In particular, the owners left it to the Institute to designate one of its members to act as the headmaster of St William's. Moreover, the Institute continued to control the life of those of its members who were employed at St William's.

At first instance, Judge Hawkesworth QC, sitting as a judge of the High Court, held that the owners, who formally employed the teachers at St William's, including those teachers who were members of the Institute, was vicariously liable for the abuse, but the Institute was not. The Court of Appeal upheld this conclusion, but the owners appealed to the Supreme Court, arguing that the Institute should also be held vicariously liable. Their appeal was upheld.

Lord Phillips gave the sole judgment. (Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed.) He held that: (1) a defendant could be held vicariously liable for a tort committed by another even if it did not employ him or her, provided that the relationship it had with him or her was sufficiently akin to an employment relationship; (2) a defendant could be held vicariously liable for a tort committed by another even if that other was employed by a further party if that other was 'so much a part of the work, business or organisation of both employers that it is just to make both employers' answer for his or her torts; (3) when judging whether acts of abuse were sufficiently closely connected to the perpetrator's 'employment' by a defendant so as to make it fair to hold the 'employer' vicariously liable for the abuse it is always likely to be important whether the defendant's 'employment' of the perpetrator 'created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse' (at para [86]); and (4) in this case, it *was* fair, just and reasonable to hold the Institute vicariously liable, alongside the owners, for the abuse committed by its members at St William's.

Comments

(1) *A problem of language.* McBride & Bagshaw has always been very careful to point out that English law allows a defendant to be held vicariously liable for a tort committed by a tortfeasor *outside* situations where the defendant was the tortfeasor's employer. So McBride & Bagshaw explains that the partners of a firm can be held vicariously liable for a tort committed by one of their fellow partners; the chief constable of a particular area can be held vicariously liable for a tort committed by a police officer working in that area; and a defendant can be held vicariously liable for a tort committed by someone with whom he is engaged in a joint venture. So, in principle, there is absolutely no problem with the UK Supreme Court's adding a new category – as they have in the *Various Claimants* case – to this list of situations where a defendant can be held vicariously liable for a tort committed by someone who was not an employee of the defendant. This new category applies where the relationship between the defendant and the tortfeasor was 'akin to that between an employer and an employee' (at [47]). In practice we may expect the new category to be particularly significant in cases where institutions rely on workers who are not formally employees, such as volunteers, interns, and apprentices, as well as in cases involving priests (like *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938) and lay brothers (like *Various Claimants*).

This is all well and good – but recognising that a defendant can be held vicariously liable for a tort committed by a tortfeasor where their relationship was 'akin to that between an employer and an employee' creates a problem of language. In the case where the defendant and tortfeasor were employer and employee, it has to be shown that the tortfeasor's tort was committed in the course of his employment before we will find that the defendant was vicariously liable for that tort. What do we say is required in the case where the defendant and tortfeasor were in a relationship which was 'akin to that between an employer and employee'? The tortfeasor's tort must have been committed in the course of...what? We can't say employment, because the tortfeasor is not an employee. The best we can come up with is '*quasi-employment*' – so in the case where a defendant and a tortfeasor were in a relationship that was 'akin to that between an employer and an employee', the defendant will only be held vicariously liable for the tortfeasor's tort if that tort was committed in the course of the tortfeasor's *quasi-employment* by the defendant. But this formulation doesn't make much sense and prompts the following thought. If it has become impossible to set out the law on vicarious liability in normal English, surely that is a sign that the law on vicarious liability has been stretched beyond the bounds of intelligibility, and that it is time for the courts to stop and think about what they are currently doing to the law on vicarious liability instead of blindly pressing on with expanding it even further?

(2) *Akin to employment.* So how do we tell whether the relationship between a defendant, D, and a tortfeasor, T, is 'akin to that between an employer and an employee'? In para [47] Lord Phillips says that D and T's relationship will be 'akin to that between an employer and an employee' if their relationship possesses the same 'incidents' that make it 'fair, just and reasonable' to make an employer vicariously liable for the torts committed by an employee when the employee was acting in the course of his employment.

Lord Phillips further says that those ‘incidents’ are set out in para [35] of his judgment. They are: (i) D is more likely to have the means to compensate the victim of T’s tort than T, and can be expected to have insured against that liability; (ii) T’s tort was committed as a result of activity being taken on by T on behalf of D; (iii) T’s activity was part of some business activity engaged in by D; (iv) D, by engaging T to engage in that activity, created the risk that T would commit the tort that he committed; and (v) T will have been, to a greater or lesser degree, under D’s control.

Of these, it is hard to imagine that much weight will be attached to (i), since it is hard to imagine a court looking at how wealthy D is in order to determine whether or not the relationship between him and T was ‘akin to that between an employer and an employee’. Perhaps the most that we can say is that it will be relevant whether D is a ‘substantial enough’ enterprise for it to be reasonable to expect it to have ‘employees’. Incident (iv) also seems to be of no real assistance because it raises a factor that does not tell us about the relationship between D and T, but instead about the more about the connection between that relationship and T’s tort. Can we attach much significance to incident (iii) (whether D’s activity is a ‘business activity’) given that in *Various Claimants* the Institute was held vicariously liable for the acts of its members even though it was not engaged in any kind of *profit-making* ‘business activity’? It seems we must read ‘business’ in a broad way: Lord Phillips thought that this incident was satisfied in *Various Claimants* because the members were directed to teach at St William’s in order to achieve the Institute’s *objective*: ‘The business of the Institute ... was to provide Christian teaching for boys. All members of the Institute were united in that objective. The relationship between individual teacher brothers and the Institute was directed to achieving that objective’ (at [59]). With regard to incident (v), Lord Phillips emphasized, at [36], that the sort of ‘control’ that is most often found today is a power in D to direct what T does, not how he or she does it.

Thus it seems that the three ‘incidents’ that will be most influential when we are deciding whether D and T’s relationship was ‘akin to that between an employer and an employee’ will be: (1) whether D is a ‘substantial enough’ enterprise; (2) whether the work T was doing on behalf of D was directed towards achieving some objective (‘business’) of D’s, and (3) D having power to control, to a greater or lesser degree, what T does. Now it’s an elementary mistake to read a paragraph in a judgment like it’s a statute – so we need to look at the rest of Lord Phillips’ judgment to flesh out when these three ‘incidents’ will point towards the relationship between D and T being ‘akin to employment’. Paras [36], [43] and [56]-[57] of Lord Phillips’ judgment suggest that he attached particular importance to the facts that the Institute was a large enterprise that exhibited a hierarchical structure and conducted its activities as if it were a corporate body, its members undertook teaching at St William’s in order to advance the Institute’s objectives, the Institute had power to direct what tasks they undertook, and through their vows also controlled their actions to an even greater extent.

Some critics of the decision in *Various Claimants* doubt whether reference to the incidents identified by Lord Phillips will make the law sufficiently predictable. Indeed, some have suggested that the law has now become so ‘flexible’ (a term used by lawyers who want to put a positive spin on the features that lead to unpredictability!) that there is nothing to prevent the courts in future making a defendant vicariously liable for the acts of its independent contractor on the basis that the relationship between the defendant and the contractor was ‘akin to that between an employer and an employee’. Is this concern justified? Even in a paradigm example of a small business hiring an independent contractor, for example a café proprietor hiring

a plumber to refurbish the washrooms, it seems that incidents (1) ('substantial enough' enterprise) and (3) (proprietor has some power to control what the plumber does) will be fulfilled. So even in such a paradigm case it will all come down to whether incident (2) is satisfied; that is, and whether the Court finds the work was directed towards achieving some objective ('business') of the proprietor's (D's). It's certainly very difficult to tell at what point a court will find that an independent contractor's work has become so much part and parcel of the 'business' of the defendant that it would be right to say that that the defendant should be potentially vicariously liable for negligence on the part of the contractor in the course of the work. Certainly where a contractor is regularly called in to do a particular type of work for a defendant (such as servicing the coffee machine used by a café proprietor, or running training sessions for the proprietor's employees), one could predict that a court might well be tempted to conclude that the defendant and contractor's relationship was 'akin to that between an employer and an employee'.

(3) *Dual vicarious liability*. Of course, once you embrace the idea of a defendant, D, being held vicariously liable for a tort committed by a tortfeasor, T, on the basis that their relationship was 'akin to that between an employer and an employee', then you also have to embrace the idea of dual vicarious liability. This is because at the time he committed his tort, T might well have employed by E, as well as having a relationship with D that was 'akin to that between an employer and an employee'. The result is that both D and E might be vicariously liable for T's tort – D on the basis that T's tort was committed in the course of his quasi-employment by D, and E on the basis that T's tort was committed in the course of his employment by E. This was the case in *Various Claimants* itself – as the teachers at St William's who were also members of the Institute were employed by the owners of St William's and enjoyed a relationship 'akin to that between an employer and an employee' with the Institute, both the owners of St William's and the Institute could be held vicariously liable for the teachers' acts of abuse.

Predictably, then, the UK Supreme Court enthusiastically endorsed the idea – first advanced in *Viasystems v Thermal Transfer (Northern) Ltd* [2006] QB 510 – that more than one person might be held vicariously liable in respect of someone's tort. However, in so doing, the UK Supreme Court also changed the law on who will be held liable in a 'borrowed employee' situation where T is employed by E, and D borrows T from E so that T does some work for D. Under the old law – as set out in the current edition of *McBride & Bagshaw* – the position was that it was presumed that when T worked for D, he was still doing so as E's employee so that if T committed a tort while working for D, the only person who could be held vicariously liable for T's tort was E. This presumption would be displaced if D had the power to control how T did his work. In such a case, the courts would look at who had the power to control how T did his work when he worked for D. If it was just D, then D and not E would be treated as being T's employer when T was working for D – with the result that only D, and not E, could be held vicariously liable for a tort committed by T while working for D. But if D and E shared the power to control how T did his work while working for D, then both D and E would be held to have been T's employer when T was working for D – with the result that both D and E might be held vicariously liable for a tort committed by T while working for D.

All this has gone after the decision in *Various Claimants*. The position now is that when D borrows T from E so that T does some work for D, there is no presumption as to who will be held vicariously liable for a tort committed by T while

working for D. Instead ‘it is necessary to give independent consideration to the relationship of the tortfeasor with each defendant in order to decide whether that defendant is vicariously liable. In considering that question in relation to each defendant the approach of Rix LJ [in the *Viasystems* case] is to be preferred...’ (at [45]). According to Rix LJ, the crucial question – in assessing whether a particular defendant is to be held vicariously liable for a tort committed by T while working for D – is whether T was ‘so much a part of the work, business or organisation [of the defendant] that it is just to make [that defendant] answer for his [tort]’ (*Viasystems*, at [43]). So if, looking first at the relationship between E and T, one concludes that T – while working for D – was still part of E’s ‘work, business or organisation’ then E might be held vicariously liable for T’s tort. But it might also be the case that T – while working for D – had become part of D’s ‘work, business or organisation’; and if that is the case then D might *also* be held vicariously liable for T’s tort.

If this is the way we are supposed to approach ‘borrowed employee’ cases from now on, it is very likely that in almost all cases where an employee is borrowed for a substantial period of time (or regularly) we will end up finding *both* the lending employer and the borrowing employer to be vicariously liable for a tort committed by an employee while working for the borrowing employer – and indeed, Lord Phillips held (at [46]) that it was arguable that in *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18 and *Biffa Waste Services Ltd v Maschinenfabrik* [2009] QB 775 the Court of Appeal should have held *both* the borrowing employer *and* the lending employer vicariously liable in those cases for the tort committed by the employee while working for the borrowing employer, instead of just holding the borrowing employer liable in *Hawley* and holding the lending employer vicariously liable in *Biffa Waste*.

(4) *Creation of risk*. Lord Phillips’ judgment in *Various Claimants* seems to endorse the idea that in determining whether a tortfeasor’s tort was committed in the course of his employment/quasi-employment by the defendant, a crucial factor to consider (outside routine cases where the tortfeasor’s tort was committed in order to do whatever the defendant was employing/quasi-employing the tortfeasor to do) is whether the relationship between the defendant and tortfeasor materially increased the risk that the tortfeasor would commit the tort that he ended up committing. At para [86] Lord Phillips said:

Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, had done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse.

The English is a tad over-compressed here: what Lord Phillips is saying is that in a case where a tortfeasor has sexually or physically abused a claimant, a defendant will be held vicariously liable for the tortfeasor’s acts of sexual or physical abuse if the defendant used the tortfeasor to carry on its business or to further its own interests in a manner which created or significantly enhanced the risk that claimant would be sexually or physically abused by the tortfeasor.

In *McBride & Bagshaw* we point out how difficult it is to draw a line between cases where D’s employment of T has materially increased the risk that T will commit a particular kind of tort, and cases where D’s employment of T has merely given T the opportunity to commit a particular kind of tort. Lord Phillips’ judgment does nothing to encourage us to think that parties to legal disputes involving potentially substantial

sums will find it easy to predict where the law will fix the line between these two types of cases. In both paras [84] and [85], Lord Phillips talks about vicarious liability arising where D's employment of T 'facilitated' T to commit a particular tort – but what is the difference between 'facilitating' someone to commit a tort and giving them the opportunity to commit a tort? At para [92], Lord Phillips observed that the boys at St William's were 'triplely vulnerable' to being abused: 'They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in a school (especially those who attended St William's when it was an 'approved school', before 1973); and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed.' But it is not clear how these facts show that by assigning people to teach at St William's, the Institute materially increased the risk that those people would commit acts of abuse – or if they do, why they would not also work to show that a company that regularly sent gardeners along to St William's to tend its grounds did not also materially increase the risk that those gardeners would commit acts of abuse on the children who lived in the school as prisoners and would be unlikely to be believed if they claimed that they had been abused by a particular gardener. (You will recall that in *Lister v Hesley Hall* [2002] 1 AC 215 Lord Millett distinguished (at [82]) between the position of a warden at a residential school, whose position presumably 'facilitated' his opportunity to commit sexual abuse, and the position of a groundsman or school porter at the same establishment.)

Nick McBride and Roderick Bagshaw

Cox v Ministry of Justice [2014] EWCA Civ 132

Summary

Susan Cox was the catering manager at HM Prison Swansea. She was injured when a prisoner – who was given the job of loading food supplies to the prison onto trollies so that they could be transported to the prison’s kitchens – tripped over her. She sued the Ministry of Justice (MoJ) for damages, on the ground that the MoJ was vicariously liable for the negligence of the prisoner.

The Court of Appeal applied the criteria identified by Lord Phillips in para [35] of his judgment in *Various Claimants v Catholic Child Welfare Society* (2012) to find that there existed a relationship ‘akin to employment’ between the MoJ and the negligent prisoner who tripped over Cox: (i) the MoJ was obviously better able to compensate Cox for her injuries than the prisoner; (ii) the prisoner committed his tort as a result of his dealing with food supplies delivered to the MoJ’s prisons; (iii) the prisoner was dealing with that food for the benefit of the MoJ, which had an obligation to feed its prisoners and would – in the absence of labour provided by its prisoners – have to pay people to deal with the food delivered to its prisons; (iv) by engaging the prisoner to deal with its food supplies, the MoJ created a risk of the kind of accident occurring in which Cox was injured; (v) the prisoner was obviously under the control of the MoJ in dealing with the food supplies delivered to the prison.

As there existed a relationship ‘akin to employment’ between the prisoner in this case and the MoJ, the Court of Appeal had no difficulty finding that the MoJ was vicariously liable for the tort committed by the prisoner in the course of his ‘quasi-employment’ by the MoJ.

Comments

The decision in *Cox* might be thought to have been almost inevitable, once one admits that there can be vicarious liability arising in situations where a tortfeasor is in a relationship ‘akin to employment’ with the defendant. There are a lot of parallels between the situation of an employee and the situation of a prisoner. They are both under the control of someone else. They both have to spend a certain amount of time under that person’s control. They both have to do their time themselves, and cannot have someone else do the time for them. However – and there always has to be a however with these cases that expand the reach of the law on vicarious liability – two points about this decision should give us pause before endorsing it.

First, this decision is yet another that seems to put a nail in the coffin of the idea that the new law on vicarious liability can be justified by appeal to some principle of ‘enterprise liability’ where someone who exposes others to a risk of harm in order to make money for himself is held liable when those risks materialise on the basis if he wants to take the benefits of his activity then he should shoulder the costs inherent to that activity as well. The MoJ is not in the business of making money.

Secondly, some might try to nullify the first point by appeal to McCombe LJ’s observation (at [45]) that ‘The work carried out by the prisoners in the present case relieved the [MoJ] from engaging employees at market rates of pay...’. So the MoJ did in some way profit from the work of the prisoner in this case. But the idea that vicarious liability might be justified whenever T does work for D that relieves D of an otherwise necessary expense

threatens to expand the realm of vicarious liability far beyond anything anyone could have anticipated when *Lister v Hesley Hall Ltd* was decided just over 10 years ago. If the fact that you have saved money by having someone do work for you may be enough to justify vicarious liability, why wouldn't there be vicarious liability whenever D has an independent contractor do work for him on the basis that that is a cheaper option than employing someone to do that work? The fact is no one knows the answer to this question. We have no idea where this area of law is going, other than that it is nowhere good.

Nick McBride

Cox v Ministry of Justice
[2016] UKSC 10, [2016] AC 660

Mohamud v Wm Morrison Supermarkets plc
[2016] UKSC 11, [2016] AC 677

Summary

Cox

The facts of *Cox* and the decision of the Court of Appeal in the case are set out overleaf. The UKSC upheld the Court of Appeal's decision.

Mohamud

The claimant, Mr Mohamud, called in at a petrol station at one of the defendant's supermarkets. He asked the staff in the petrol station kiosk – including a Mr Amjid Khan – whether he could print off some documents that he had on a USB stick. Khan told the claimant, 'We don't do such shit' and started to berate the claimant, using foul, racist language, telling him to leave the kiosk. The claimant went back to his car and got into it, but Khan followed him, opened the front passenger side door, and told the claimant never to come back. When the claimant told Khan to get out and shut the door, Khan punched the claimant, and then beat the claimant up when the claimant got out of the car and attempted to shut the passenger side door. Khan's supervisor rushed out and tried to stop Khan beating the claimant. The claimant sued the defendant, arguing that the defendant was vicariously liable for Khan's tort.

The claimant's claim was dismissed both at first instance and by the Court of Appeal. However, the UKSC ruled that there was a 'sufficiently close connection' between Khan's tort and what he was employed to do so as to make it 'fair and just' to find the defendant vicariously liable for Khan's tort. Lord Toulson gave the principal judgment (with which Lord Neuberger, Baroness Hale, Lord Dyson MR, and Lord Reed agreed). The only relevant part of his judgment was paragraph 47:

47 In the present case it was Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and ordering him to leave was inexcusable but within the field of activities assigned to him. What happened thereafter was an unbroken sequence of events. It was argued by the [defendant] and accepted by the judge that there ceased to be any significant connection between Mr Khan's employment and his behaviour towards the claimant when he came out from behind the counter and followed the claimant onto the forecourt. I disagree for two reasons. First, I do not consider that it is right to regard him as having metaphorically taken off his uniform the moment he stepped from behind the counter. He was following up on what he had said to the claimant. It was a seamless episode. Secondly, when Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting 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. His employers entrusted him with that position

and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it.

Comments

The decision in *Cox* was obvious, given the precedent set in the *Various Claimants* case, and it is amazing that the UKSC thought it worth their while to hear the appeal in that case. There is nothing to add to the comments overleaf on the Court of Appeal's decision in *Cox*. By contrast, the decision in *Mohamud* is hugely important – certainly the most important decision since *Lister v Hesley Hall Ltd* on when an employee will be held to have committed a tort in the course of his employment for the purposes of the law on vicarious liability. But one of the puzzling aspects of *Mohamud* is that it is unclear whether the UKSC really recognised just how significant and groundbreaking its decision is.

No matter how imprecise the *Lister* test for determining whether an employee was acting in the course of his employment is, no one thought that it could be stretched as far as the UKSC stretched it in *Mohamud*. In the 5th edition of McBride & Bagshaw we made a valiant effort to come up with some categories of situation where an employee (E) would be held to have committed a tort in the course of his employment under the *Lister* test even though E was *not* doing anything he was employed to do by committing that tort (in which case E would straightforwardly be held to have been acting in the course of his employment, even under the old Salmond test). We came up with three categories of situation: (1) where E's job equipped him with special skills that enabled him to commit his tort; (2) where E's job meant that he occupied a special position of trust and confidence that enabled him to commit his tort; and (3) where E's job carried with it certain aggravations and annoyances that meant E was very likely to commit his tort. The facts of *Mohamud* did not fall within any of these situations. Some might say that *Mohamud* has simply added a fourth category of situation to the above three: (4) where there was an 'unbroken sequence' or 'seamless' connection between E's doing something he was employed to do and E's committing his tort. However, this reading of *Mohamud* must be rejected. Situations (1), (2), and (3) all have this in common: we can fairly say in each of these situations that E's job carried with it a special risk that E would commit the tort that E committed. *Mohamud* is not a case where we can say the nature of Khan's employment carried with it any kind of risk that he would carry out a racist, unprovoked assault on a customer. In ruling that Khan's assault *was* committed in the course of his employment, the UKSC has broken with the idea that *Lister* gave effect to a form of 'enterprise risk' liability, where a business enterprise would be held liable for special risks of loss associated with the existence of that enterprise, and it has broken with the principles laid down by the Canadian Supreme Court in *Bazley v Curry* [1999] 2 SCR 534, and *Jacobi v Griffiths* [1999] 2 SCR 570 for determining when an employer would be held vicariously liable for an employee's tort – principles which Lord Steyn promised in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, at [27] would form 'the starting point' for any such inquiry. No longer, it seems. Instead of asking whether E's job carried with it a special risk of E's committing a particular tort, it is very hard to resist the impression that if E's tort was committed in the workplace then E's tort will be held to have committed in the course of his employment – no matter how egregious, gratuitous or unrelated to what he was employed to do E's tort might have been.

And yet... one wonders whether the UKSC really knew what it was doing in *Mohamud*. Lord Toulson's judgment is bizarre and gives the impression of having been thrown together without very much thought. There are 29 paragraphs devoted to running through a large number of cases on vicarious liability that were decided *before Lister* was

decided. There are eight paragraphs dealing with the decision in *Lister* and ‘The present law’, and within those paragraphs, no detailed discussion of any of the post-*Lister* cases (mostly Court of Appeal cases) which have attempted to grapple with the issue of when an employee could be said to have been acting in the course of his employment in committing a tort. There are precisely zero paragraphs that refer in any way to academic discussion of this issue. Most of the substantive discussion in both Lord Toulson’s and Lord Dyson’s supporting judgment is devoted to rejecting the suggestion by counsel for the claimant that the UKSC abandon the *Lister* ‘sufficiently close connection’ test for determining whether an employee’s tort was committed in the course of his employment and instead adopt a ‘representative capacity’ test, under which an employee would be held to have committed a tort in the course of his employment if at the time the employee was committing his tort, a reasonable observer would think that he was acting as a representative of his employer – see paras [9] and [46] of Lord Toulson’s judgment, and paras [51]-[56] of Lord Dyson’s judgment. Counsel for the claimant must have thought that the claimant would lose if the UKSC stuck to the *Lister* test precisely because the *Lister* test for determining whether an employee committed his tort in the course of his employment seemed to focus on the issue of whether there was a special risk attached to the employee’s job that the employee would commit that kind of tort. (Though it is hard to see how switching to a ‘representative capacity’ test would have helped the claimant – no reasonable person could have thought, watching Khan kicking the claimant while he lay on the ground, ‘Ah, he’s doing that as a Morrison’s employee.’) In retaining the *Lister* test while still finding in favour of the claimant in *Mohamud*, the UKSC seems to have set the UK law on vicarious liability on a new course, and into uncharted waters. But whether they did so deliberately or through sheer carelessness, it is very hard to tell.

Nick McBride