

Employers and Employees Liability

Two recent attempts in the Court of Session to extend the scope of vicarious liability of employers for the actions of employees have failed.

In **Jelena Vaickuviene & others v J Sainsbury plc**, the relatives of a man who was murdered by a colleague while at work sued the employer, claiming that the perpetrator's conduct fell under the terms of the Protection from Harassment Act 1997 and as such, the employer was liable. Both men were employed as supermarket shelf stackers on nightshift. There was a history of bad blood between them. Two days before the murder, the deceased made a complaint to his line manager about a racist remark made by the other man. No action was taken in response but the perpetrator became aware of the complaint. On the night of the murder, an argument broke out in the staff canteen between the two men. The perpetrator took a kitchen knife from the kitchenware area of the store, and attacked the deceased. He was subsequently convicted of murder.

In dismissing the case, their Lordships stated that the mere bringing together of two people as employees is not sufficient to impose vicarious liability on the employer for the actions of one towards the other. The perpetrator was employed to stack shelves in a supermarket. Looking at this in the broadest possible context, the Court could see no connection between his duties and the murder of the deceased. While his employment provided the opportunity to carry out a personal campaign of harassment, that did not make his employers vicariously liable for his actions. In doing so, the court distinguished the case from cases relating to sexual abuse of children by social workers and carers, because in such cases, the employers had materially increased the risk of the abuse occurring, by putting the employees in a position whereby they could commit the harm.

In **Helen Shields v Crossroads**

(**Orkney**), the Pursuer sued the operators of a Carer's Centre. She was referred to the Centre by social services for support in coping with difficulties she was experiencing as a carer for her husband and son. She had a history of mental health problems in the past, of which the Defenders were aware. She claimed that the manager of the centre, a registered social worker, encouraged, pressurised and persuaded her into embarking on an extramarital affair with him, which he subsequently suddenly ended. She claimed that she suffered further mental health problems as a result of his conduct. She made a complaint to the Defenders, who referred the complaint to the Social Services Council. The manager admitted professional misconduct and his name was struck off the register of social workers. The Pursuer claimed that the Defenders were vicariously liable for the actions of the manager, and that they were also directly liable for a number of reasons including failing to adequately monitor or supervise him, for failing to implement safeguards for the protection of vulnerable service users.

The Judge, Lord Pentland, could find no basis for imposing a duty on the Defenders to prevent the Pursuer, a consenting adult of full capacity, from entering into a relationship with the centre manager, nor was there any duty upon him not to enter into such a relationship. It was recognised that it was not appropriate for him to have such a relationship with a client, but he had been disqualified from practice by his professional body and as such the public interest had been served. It was also clear that his conduct was outside the scope of his employment so there could be no vicarious liability on his employers.

These decisions are welcome reminders that employers cannot be held responsible for all actions of their employees due to the mere fact of their employment.

Claire White cwh@bto.co.uk

In this edition

Jelena Vaickuviene & others v J Sainsbury plc and Helen Shields v Crossroads (Orkney)

Two failed attempts in the Court of Session to extend the scope of vicarious liability of employers for the actions of employees :

Mr Ian Heary v Mr Michael Phinn T/A

Useful discussion of occupiers common law

Nicholls v Ladbrokes Betting & Gaming Ltd

Risk assessments and their purpose

Starks v Chief Constable

Chief Constable in Mini roundabout collision.

Licensing of Private Investigators

New law coming into force in 2014

Nicholls v Ladbrokes Betting & Gaming Ltd



The English case of *Nicholls v Ladbrokes Betting & Gaming Ltd* involved a betting shop where the claimant worked as a cashier. Whilst working one evening, a robbery occurred. Two men entered the shop and one pointed a gun at the claimant. He ordered her to open the safe, which she did.

The claimant subsequently claimed that she had sustained a psychiatric injury due to the incident. It was claimed that the defendants were responsible for her injuries for failing to carry out a risk assessment for potential criminal activity, and for failing to have a policy in place for operating a magnetic lock fitted to the front door, at all times in the hours of darkness.

At first instance the Judge found in favour of the claimant. However, the defendants successfully appealed. The Court of Appeal considered the Judge at first instance had failed to take sufficient account of the unchallenged evidence of the defendants' security expert concerning the shop being situated in a low crime area with no history of violent incidents.

The Judge had concluded that the defendants had acted negligently in failing to instruct staff to lock the front door in the hours of darkness. However, the Court of Appeal found there to be no evidence upon which to reach that conclusion. The claimant presented no evidence as to the standards adopted by a reasonably prudent employer in the betting industry. It was also not industry practice to install magnetic locks on betting shop front doors. Accordingly, by having such a device, the defendants were taking steps over and above those of their competitors. The case provides useful comment on claims based on the duty on employers to carry out risk assessments. Although the defendants were unable to produce a written risk assessment in this case, their witness evidence of having conducted an assessment of the risk of attack at that particular store, was accepted by the Court.

This case serves as a useful reminder that the inability to produce a written risk assessment is not necessarily fatal to a defence. The decision also highlights that it is not enough for a claimant to simply point out that a risk assessment had not been completed in establishing a breach of duty. They need to go further and show what that risk assessment would have revealed, and how it might have avoided the injury, to establish that a defendant has failed in their duties.

Calum Fife cfi@bto.co.uk

Starks v Chief Constable of Hertfordshire



In the case of *Starks v Chief Constable of Hertfordshire*, the Court of Appeal considered an appeal relating to a decision to apportion liability for an accident involving a collision between two vehicles at a mini-roundabout. Both the claimant and the defendant, a police officer driving a police vehicle, were injured in the accident. The claimant had reached the roundabout very shortly before the defendant, and began taking a right turn, across the top of it. He was deemed to be driving at around 15mph. The defendant was looking to pass straight over the roundabout and struck the claimant's vehicle. She was considered to be driving at around 30mph, and collided with the claimant's vehicle in the centre of the roundabout.

The Judge at first instance plumped for a split of liability of 55/45 in favour of the defendant, however, failed to provide any reasoning for this. The claimant appealed and the Court of Appeal determined that liability should be shared on a 65/35 split, in favour of the claimant. It was commented that the rules on priority at mini-roundabouts, in circumstances where vehicles are approaching from either side, are not black and white, and it is for the drivers to exercise their judgement based on the circumstances that present themselves.

The Court of Appeal was critical of the defendant for ignoring that the junction was a roundabout by driving straight over the top of it, finding her in breach of paragraph 188 of the Highway Code which states that vehicles "must pass round the central markings" of a roundabout. They also criticised her for failing to slow down as she approached the junction. Accordingly, she was considered more to blame.

Calum Fife cfi@bto.co.uk

Licensing of Private Investigators



The Home Office has recently announced a new system of licensing for private investigators, to come into force in Autumn 2014. At present, anyone can set themselves up as a private investigator. However, under the new system it will be a criminal offence to carry out surveillance and other investigations into persons or property without a licence.

The penalties for engaging in such activities without a licence will be a fine of up to £5,000, or imprisonment up to 6 months.

Licences will be issued by the Security Industry Authority, following background checks and a competency exam. The Home Office has already announced that anyone convicted of a data protection offence can expect to have their licence application refused.

Michael Collins mco@bto.co.uk

Update

The Scottish Government's Programme for Scotland 2013 – 2014 includes both the Damages Bill and Courts Reform Bill.

The Damages Bill sets out proposals to extend the limitation period which applies to actions for personal injury; (the Scottish Law Commission recommended that the period be extended to five years); set out a non-exhaustive list of factors for the court to consider when asked to exercise its discretion to allow a case to proceed out with that limitation period; enable courts to impose at the conclusion of a case a periodical payment order instead of a lump sum award of damages, without the consent of the parties.

The Courts Reform Bill is intended to provide the legal framework for implementing many of the recommendations proposed following the consultation that took place earlier this year in relation to the proposed reform of the civil justice system designed to implement many of the recommendations made by Lord Gill, in the Scottish Civil Courts Review .



<http://twitter.com/btosolicitors>

If you wish to be removed from this mailing list, please email marketing@bto.co.uk with your name and company name, and type in the subject box: "Remove from bto Insight Mailing List". Thank you.

The material in this publication contains general information only and does not constitute legal or other professional advice.

Mr Ian Heary v Mr Michael Phinn T/A Phinn



Occupiers' Liability (Scotland) Act 1960

The gate and parking area were communal and used by other business. The Defenders were, however, regarded as being in partial control of the gate at the material time. They were key holders and able to exercise control over who entered the premises. They were therefore 'occupiers' for the purposes of the 1960 Act. Control does not need to be exclusive.

However, the Pursuer's statutory case under the Occupiers' Liability Act failed as there was nothing due to the premises or the state of the premises that could be regarded as constituting a 'danger'.

It was held that it was reasonably foreseeable that if someone was locked in or trapped they would try to escape. The Defenders owed a common law duty of care to the Pursuer. They failed in their duty by only performing a perfunctory check of the premises before leaving and locking up.

Contributory Negligence

The award was reduced by 50% as the Pursuer had contributed to his own injuries. His actions were inherently risky and the Pursuer ought to have appreciated this.

Angus Gillies agi@bto.co.uk

Dundee Sheriff Court, Case No. PD 69/12 (19 June 2013)

Interesting recent decision from Dundee Sheriff Court. Quite useful discussion of the occupiers' common law and statutory duties of care and the issue of control.

Facts

The Pursuer entered the Defenders yard to pick out replacement parts for his car. He was instructed by the Defenders' employees to search for these items himself. Whilst the Pursuer was looking about the yard, the employees left the premises and locked the gate behind them.

After discovering he had been locked in, the Pursuer attempted to escape by climbing over the gate. He injured himself in the process.