

Vicarious liability even without employment contract

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Personal Injury analysis: What sort of relationship has to exist between a tortfeasor and a defendant for the latter to be vicariously liable? The Supreme Court's answer to that question in *Cox v Ministry of Justice* is examined by Robert Weir QC, of Devereux Chambers.

Original news

Cox v Ministry of Justice [2016] UKSC 10, [2016] All ER (D) 25 (Mar)

*The Supreme Court, in dismissing the Ministry of Justice's appeal, held that the prison service was vicariously liable for the negligence of a prisoner who, while carrying on activities assigned to him by the service, had accidentally injured one of its employees. The court reached that conclusion by applying the test in *Various claimants v Catholic Child Welfare Society and others* [2012] UKSC 56, [2013] 1 All ER 670 (the *Christian Brothers case*) for when a defendant would be vicariously liable for a tortfeasor who was not its employee.*

What were the main issues arising?

The Supreme Court had to determine just the single question: whether the relationship between the prison service and a prisoner at work in the prison catering department was one which could make the prison service vicariously liable for negligence by the prisoner at work.

Vicarious liability depends on:

- 1 there being a certain type of relationship between tortfeasor and defendant
- 2 the tortfeasor's act being sufficiently connected to that relationship

This appeal was concerned only with the first issue because it was common ground that the prisoner's negligence occurred in the course of his work in the catering department. The appeal in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] All ER (D) 19 (Mar), by contrast, was concerned only with the second issue because the tortfeasor was an employee of the defendant and the employment relationship is the paradigm relationship to which the principle of vicarious liability attaches.

What test for vicarious liability did the Supreme Court apply?

The Supreme Court applied the test which Lord Phillips laid down in the *Christian Brothers* abuse case. In *Cox*, Lord Reed, giving the only reasoned judgment, held that the test Lord Phillips formulated in *Christian Brothers* applied as a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment. It was in no way confined to abuse cases.

Lord Phillips had articulated five relevant factors to determine whether the relationship was one to which the principle of vicarious liability could apply. In *Cox*, Lord Reed rather dismissed the first, namely that the defendant had the means to compensate the victim. He, like Lord Phillips, also recognised that the control exercised by defendant over tortfeasor did not go to the heart of the issue—it was rather the case that the absence of any control would negative the application of vicarious liability.

Lord Reed noted that the other three factors identified by Lord Phillips were inter-related. They are that:

- 3 the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant
- 4 the tortfeasor's activity is likely to be part of the business activity of the defendant, and
- 5 the defendant, by employing the tortfeasor to carry on an activity, will have created the risk of the tort committed by the tortfeasor

Where the harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit, and where the commission of the wrongful act is a risk created by the defendant by assigning those activities, then the relationship can give rise to vicarious liability.

Provided the relationship has those characteristics, it should not generally be necessary to ask the broader question whether it is fair, just and reasonable to impose the principle of vicarious liability on the defendant.

In taking this approach, Lord Reed did not alter the test applied by Lord Phillips so much as expand upon it and make clear that it was to be applied across the board to any situation in which a party wished to contend that the principle of vicarious liability should apply.

What did the Supreme Court decide and why?

The Supreme Court decided that the relationship between a prisoner at work and the prison service was one which gave rise to the application of the principle of vicarious liability. Prisoners were selected by the prison service to work in the catering department. The fact that prisoners were required to work did not matter. The prisoners were fulfilling one of the prison service's functions, namely providing food for the prisoners. They were integrated into the catering department, hence their being inducted in the same health and safety training as civilian catering staff. Having put them in the kitchens where the prisoners were liable to commit a variety of negligent acts, the prison service had to take the burden of vicarious liability.

The Supreme Court reached this decision by an application to a novel situation of the principled approach to the modern law of vicarious liability developed by Lord Phillips in *Christian Brothers*.

Does the decision leave any grey areas?

The test is clear enough but its application to other situations is bound to lead to difficult decisions for the courts. What, for instance, of the prisoner who is contracted out to a third party? Or one who is working inside the prison but not in the catering department, such as a prisoner who is cleaning out his own prison cell?

Outside of prison cases, there will be numerous situations arising to be resolved in due course, such as a charity's vicarious liability for a volunteer in its shop.

What are the practical implications of this decision?

What is clear is that the Supreme Court has endorsed a more generous approach to vicarious liability than was previously understood.

Lord Reed was particularly impressed by the desire to protect members of today's workforce who do not have a contract of employment but are, in practice, working for others. Unless the tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of their own or of a third party, then the person for whom the tortfeasor is, in substance, actually working is likely to be rendered vicariously liable.

So defendants who have got around actually employing staff will not be able to shield themselves from vicarious liability based upon technicalities. If the reality is that the worker is working on the defendant's behalf and for the defendant's benefit, vicarious liability will follow. Those engaging staff on contracts which are not employment contracts should beware!

This article should be read in conjunction with Vicarious liability—a more liberal Lister application for a complete picture of the Supreme Court's approach to vicarious liability.

Robert Weir QC appeared for the respondent in this case.

Interviewed by Robert Matthews.

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