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Court of Appeal

Bellman v Northampton Recruitment Ltd

[2018] EWCA Civ 2214

2018 July 19;
Oct 11

Irwin, Moylan, Asplin LJJ

B

Vicarious liability — Employment — Course of employment — Managing director of small company assaulting employee at early hours drinking session after company Christmas party — Whether sufficient connection between director's position and assault — Whether company vicariously liable for assault

C

The defendant company organised a Christmas party for its 11 staff members, their partners and a few guests. When the party ended, just over half of those present took taxis to a local hotel. The group then sat together talking in the hotel lobby. More alcohol was consumed, the majority of which was provided at the defendant's expense. At around 2 a.m., conversation turned to work, including plans for the company for the following year. The managing director, who was the directing mind and in overall charge of the company, became annoyed at the discussion, particularly at being questioned about the appointment of a new employee, and proceeded to lecture the remaining employees about his managerial authority. At about 3 a.m., he assaulted the claimant employee, causing him serious injury. The claimant claimed damages, contending that the defendant was vicariously liable for the managing director's actions. The judge dismissed the claim, holding that there was insufficient connection between the position in which the managing director was employed and the assault for the defendant to be held vicariously liable.

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E

On the claimant's appeal—

Held, allowing the appeal, that, as the directing mind and will of a relatively small company, the managing director's remit and authority were both very wide; that, despite the time and the place at which the assault occurred, the managing director was purporting to act as managing director of the company and, his managerial decision-making having been challenged, was purporting to exercise his authority over his subordinates; that the managing director's position of seniority persisted and was a significant factor, his dominant position and supervisory role enabling him to assert his authority over the staff who were present and to re-assert that authority when he thought it necessary; and that, accordingly, there was sufficient connection between the managing director's field of activities and the assault to render it just that the company should be vicariously liable for his actions (post, paras 24–29, 32, 34–37).

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Mohamud v Wm Morrison Supermarkets plc [2016] ICR 485, SC(E) applied.

G

Warren v Henlys Ltd [1948] 2 All ER 935 considered.

Per Irwin LJ. This case arose because of the way in which the managing director chose to exert his authority, indeed his dominance as the only real decision-maker in the company. Hence there is liability. This combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about work matters between colleagues, which leads to an assault, even when one colleague is markedly more senior than another (post, paras 39–40).

H

Decision of Judge Cotter QC sitting as a judge of the Queen's Bench Division [2016] EWHC 3104 (QB); [2017] ICR 543 reversed.

The following cases are referred to in the judgment of Asplin LJ:

Bernard v Attorney General of Jamaica [2004] UKPC 47; [2005] IRLR 398, PC
Deatons Pty Ltd v Flew (1949) 79 CLR 370

- Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366; [2002] 3 WLR 1913; [2003] 1 All ER 97; [2003] 2 All ER (Comm) 451, HL(E) A
- Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] ICR 665; [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] 2 All ER 769, HL(E)
- Lloyd v Grace, Smith & Co* [1912] AC 716, HL(E)
- Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441; [2010] PTSR 1618, CA
- Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11; [2016] ICR 485; [2016] AC 677; [2016] 2 WLR 821; [2017] 1 All ER 15, SC(E) B
- Radcliffe v Ministry of Defence* [2009] EWCA Civ 635, CA
- Rose v Plenty* [1975] ICR 430; [1976] 1 WLR 141; [1976] 1 All ER 97, CA
- Warren v Henlys Ltd* [1948] 2 All ER 935
- Weddall v Barchester Healthcare Ltd* [2012] EWCA Civ 25; [2012] IRLR 307, CA

The following additional cases were cited in argument:

- Bazley v Curry* [1999] 2 SCR 534; 174 DLR (4th) 45 C
- Blue v Ashley (No 2)* [2017] EWHC 1928 (Comm)
- Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, Ct of Sess
- Cercato-Gouveia v Kiprianou* [2001] EWCA Civ 1887, CA
- Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47; [2015] ICR 665, CA
- Gravil v Carroll* [2008] EWCA Civ 689; [2008] ICR 1222, CA D
- Ilkiw v Samuels* [1963] 1 WLR 991; [1963] 2 All ER 879, CA
- Keppel Bus Co Ltd v Ahmad* [1974] 1 WLR 1082; [1974] 2 All ER 700, PC
- Mattis v Pollock (trading as Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] ICR 1335; [2003] 1 WLR 2158; [2004] 4 All ER 85, CA
- Vaickwiene v J Sainsbury plc* [2013] CSIH 67; 2014 SC 147; 2013 SLT 1032, Ct of Sess
- Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1; [2012] 3 WLR 1319; [2013] 1 All ER 670, SC(E) E
- Weir v Chief Constable of Merseyside Police* [2003] EWCA Civ 1111; [2003] ICR 708, CA
- Wilson v Exel UK Ltd (trading as Exel)* [2010] CSIH 35; 2010 SLT 671, Ct of Sess

The following additional cases, although not cited, were referred to in the skeleton arguments:

- AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507; [1999] 2 All ER 299, CA F
- Fletcher v Chancery Supplies Ltd* [2016] EWCA Civ 1112, CA

APPEAL from Judge Cotter QC sitting as a judge of the Queen's Bench Division

By a claim form issued on 14 October 2014 the claimant, Clive Bellman, a protected party by his litigation friend, Susan Thomas, claimed damages against the defendant company, Northampton Recruitment Ltd, on the ground that it was vicariously liable for an assault on the claimant by its managing director, which caused serious injury to the claimant. On 1 December 2016 Judge Cotter QC [2016] EWHC 3104 (QB); [2017] ICR 543 dismissed the claim. G

By an appellant's notice filed on 12 January 2017 and pursuant to permission granted by the Court of Appeal (Hamblen LJ) on 30 October 2017, the claimant appealed on the grounds that the judge was wrong to hold that there was insufficient connection between the position in which the managing director was employed and his wrongful conduct to make it right that the defendant should be liable under the principle of social justice, and H

A that the judge had failed to take account of certain considerations including the nature of the managing director's job.

The facts are stated in the judgment of Asplin LJ, post, paras 2–10.

Robert Weir QC and *David Sanderson* (instructed by *Slater and Gordon UK Ltd*) for the claimant.

B *Derek O'Sullivan QC* (instructed by *Kennedys Law llp*) for the defendant.

The court took time for consideration.

11 October 2018. The following judgments were handed down.

ASPLIN LJ

C 1 This is an appeal from the order of Judge Cotter QC dated 13 December 2016. It raises the issue of the scope of vicarious liability in circumstances where an employee's wrongful conduct occurs outside the workplace and outside office hours. The judge dismissed the claimant's claim having decided that the defendant company was not vicariously liable for the conduct of its managing director, Mr John Major. The citation for his judgment is [2017] ICR 543. I take the essential facts from that judgment.

Background

2 The claimant, Mr Clive Bellman, was employed by the defendant, Northampton Recruitment Ltd ("NR") as a sales manager. NR is a company which runs franchise offices for Drivers Direct, a national HGV drivers' agency. Mr Bellman's responsibilities included recruiting drivers to the agency and placing them with clients. NR had three directors and shareholders: Mr Major, who was also its managing director; Mrs Major, who worked in the office; and Mr Geoghegan, who took no part in day to day operations. In fact, Mr Major was the directing mind of NR and was authorised to act on behalf of NR with a wide remit. He saw himself as in overall charge of all aspects of NR's undertaking and things were done "his way" subject only to the limitation of the Drivers Direct franchise agreement. Mr Major would also have seen the maintenance of managerial authority as a central part of his role: see the judgment at para 67. In fact, the judge found at para 65:

G "It is artificial to categorise the position as either a job with set hours or one whereby [NR] had control qua employee over Mr Major as regards his method of carrying out his work; as in effect he was not only the managing director but also the directing mind and will of this small company (which ran a round-the-clock driving operation, such that there was always an employee of [NR] on call). I suspect that for much of his week Mr Major was either directly working on company business or available for consultation or direction. The result is that much of what Mr Major did during the average working day was directly or indirectly connected to [NR] and could be considered within his role as the managing director of this relatively small company."

H The judge also stated that he had no doubt that Mr Major viewed the motivation of employees as part of his job, that part of such motivation was a Christmas party at company expense and that Mr Major took decisions about company expenditure: see para 66 of the judgment.

3 In fact, on 16 December 2011, NR held a Christmas party for its office staff and their partners at the Collingtree Golf Club in Northampton. All members of staff were invited. The party was attended by ten of the 11 members of staff, including Mr Major, and their partners. The party was also attended by two guests who had been invited. They were the owner of Drivers Direct and a Mr Blakesley, both of whom brought their partners. Mr Major's two children also attended. There were 24 people present in total. The judge found that Mr Major would have seen it as part of his role to oversee the smooth running of the party and that he was not just an "attende"e". He arranged for NR to pay for the food and drink (subject to a financial limit behind the bar) and for taxis and accommodation for most of the guests at the nearby Hilton Hotel: see para 66 of the judgment.

4 At around midnight, as the party was drawing to a close, Mr Major paid for taxis to take all those who wanted to go to the Hilton Hotel for further drinks. This was not a pre-planned extension of the party at the golf club. However, between 13 and 15 of the original 24 party attendees, including five or six of NR's 11 staff, took up the offer. They arrived at the hotel between 12.30 and 1 a.m. Most but not all of them were staying at the hotel overnight at NR's expense, in any event. Mr Bellman and his partner, Ms Thomas, went to the hotel for further drinks but were not staying there.

5 On arrival the group sat in the hotel lobby and most continued to drink alcohol and to discuss a variety of topics. The majority of the drinks were paid for by NR. After a while, Mr Major's two guests and their partners went up to bed, leaving Mr Major in the lobby with four other employees and their partners. They included Mr Bellman and his partner Ms Thomas, who is now his litigation friend.

6 At around 2 a.m., the conversation amongst the remaining employees turned to work, including NR's plans for the following year. In fact, at all times after 2 a.m. the conversation was focused on NR's business. At around 2.45 a.m., a group of six including Mr Major and Mr Bellman went outside. They stood together and continued to discuss NR's business. Mr Bellman mentioned a Mr Steven Kelly, a new NR employee. Mr Kelly had been the subject of conversation in the office and it was understood that he was being paid substantially more than anyone else. Mr Major became annoyed at being questioned about Mr Kelly's appointment and pointedly returned to the hotel lobby. Once inside, he "summoned" the remaining company employees and began to lecture them on how he owned the company, that he was in charge and that he would do what he wanted to do; that the decisions were his to take and that he paid their wages: see the judgment at para 41. The judge also records at that paragraph that the "now probably significantly inebriated Mr Major was in the process of losing his temper". Where relevant, the details of what happened next are set out at paras 42 and 43:

"42. . . . By this time Mr Major was swearing and Mr Tomlin (the night porter whose evidence is agreed) heard him say 'Fucking Steven Kelly is in the right fucking place'. [Mr Bellman] in a non-aggressive manner, challenged this stating that it would be better if he were based at Nuneaton. Mr Major moved towards Mr Bellman stating 'I fucking make the decisions in this company it's my business. If I want him based in Northampton he will be fucking based there' and punched Mr Bellman who fell down.

A “43. Mr Bellman got back up, bleeding from his left eye area, holding
out his hands in a gesture of surrender and said, ‘John, what are you
doing? Don’t do this’. However, Mr Major appears to have lost all
control by this stage. Mr Hughes and Mr Harman pushed John Major
back and tried to hold him, but, as the CCTV coverage shows, he broke
free, ran back over and hit [Mr Bellman] again with a sickening blow with
B his right fist, knocked him out such that he fell straight back, hitting his
head on the ground.”

7 Mr Bellman sustained a fracture to his skull, subdural and
subarachnoid haemorrhages and a left frontal lobe contusion. These injuries
led to traumatic brain damage. He suffers from headaches, anosmia,
fatigue, low mood, deficits in verbal reasoning, verbal memory and word
finding and speech and language impairment. He is a protected party in this
C litigation and lacks the capacity to manage his own affairs.

Judge’s conclusions

8 Having considered the relevant authorities to which his attention
had been drawn, the judge turned to apply the principles to the facts. He
addressed Mr Major’s field of activity at paras 65–67 of his judgment and
D came to the conclusions about Mr Major’s role and authority to which
I have referred at para 2 above. The judge concluded, at para 68:

“However it cannot be right that the effect of such a wide range and
duration of duties is that Mr Major could always be considered to be on,
or potentially on duty, solely because he was in the company of other
employees regardless of circumstances.”

E 9 He went on to consider the connection between Mr Major’s
employment and his serious assault of Mr Bellman and set out the factors
which he considered to be of particular importance: see paras 70–80. In
summary, the judge relied upon the following matters and came to the
following conclusions: the assault was committed at impromptu drinks and
there was both a temporal and a substantive difference between the drinks and
F the Christmas party; the drinks were not a seamless extension of the
Christmas party and the drinks were attended by “hotel guests, some being
employees of [NR] some not, having a very late drink with some visitors”
(paras 70–72); there must be a limit to the effect of a discussion about work-
related issues and proper account must be taken of the time and place at which
the discussion takes place (paras 73–77); the extent to which the employment
relationship put Mr Bellman at increased risk at the material time was a
G significant factor when considering the closeness between the relationship
between Mr Major’s employment and the act in question. The consumption
of alcohol at the party which NR had paid for passed without event but that
what arose at the hotel was “in the context of entirely voluntary and personal
choices”, and any increased risk of confrontation arising from the additional
alcohol at the hotel, even assuming that it was paid for by NR, cannot
properly support a finding of vicarious liability as the circumstances were so
H far removed from employment (paras 78–79, and para 79 in particular).

10 At para 80 the judge reviewed the circumstances broadly and
concluded at para 81 that there was insufficient connection between the
position in which Mr Major was employed and his wrongful conduct to
render NR liable under the principle of social justice. As paras 80–81

contain the culmination of his reasoning, I will set them out, where relevant, in full: A

“80. Standing back and considering matters broadly, what was taking place at 3 a.m. at the hotel was a drunken discussion that arose after a personal choice to have yet further alcohol long after a works event had ended. Given the time and place, when the conversation was, as it was for a significant time, on social or sporting topics, no objective observer would have seen any connection at all with the jobs of those employees of [NR] present. That it then veered into a discussion about work cannot provide a sufficient connection to support a finding of vicarious liability against the company that employed them. It was, or without any doubt became, an entirely independent, voluntary, and discreet early hours drinking session of a very different nature to the Christmas party and unconnected with [NR’s] business. To use a hackneyed expression akin to ‘a frolic’ of their own. B

“81. . . . Indeed I think [the circumstances of this case are] a world away from circumstances which [Holt CJ] and Lord Millett would have considered proper for loss distribution based on social or economic policy. The rule must have proper boundaries; it is not endless. To use Fleming’s phrase, to find its application here would be to foist the defendant, in reality its insurer, with an undue burden and would effectively make it what as McLachlin J in *Bazley v Curry* [1999] 2 SCR 534 described as ‘an involuntary insurer’.” C D

Grounds of appeal

11 The grounds of appeal are that the judge was wrong to hold that there was insufficient connection between the position in which Mr Major was employed and his wrongful conduct to make it right that NR should be liable under the principle of social justice. Further, in coming to that conclusion the judge failed to take account of: the nature of Mr Major’s job as managing director and the power and authority entrusted to him over subordinate employees; the fact that the wrongful conduct was triggered by a challenge to his managerial authority; whether the conduct was personal rather than connected to Mr Major’s employment; that the risk of the wrongful conduct was enhanced by NR’s provision of alcohol; and that he wrongly concluded that the imposition of vicarious liability for conduct in such circumstances would be potentially uninsurable and would place an undue burden on the employer. E F G

Mohamud v Wm Morrison Supermarkets plc

12 It is common ground that the most recent and authoritative distillation of the relevant legal principles to be applied in this area of the law is to be found in the judgment of Lord Toulson JSC in the Supreme Court in *Mohamud v Wm Morrison Supermarkets plc* [2016] ICR 485; [2016] AC 677. The preceding case law, although illustrative of different circumstances, must be seen through that prism. *Mohamud’s* case was a case in which an employee, whose job it was to see that the petrol pumps and kiosk were kept in good running order and to serve customers, left the kiosk and assaulted a customer on the forecourt of the petrol station. Having analysed the existing H

A case law on vicarious liability, under the heading “The present law” Lord Toulson JSC went on:

“44. In the simplest terms, the court has to consider two matters. The first question is what functions or ‘field of activities’ have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly: see in particular the passage in Diplock LJ’s judgment in *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 included in the citation from *Rose v Plenty* [1975] ICR 430; [1976] 1 WLR 141, 147–148 (at para 38 above), and cited also in *Lister v Hesley Hall Ltd* [2001] ICR 665 by Lord Steyn at para 20, Lord Clyde at para 42, Lord Hobhouse at para 58 and Lord Millett at para 77.

“45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt CJ’s principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. *Lloyd v Grace, Smith & Co* [1912] AC 716, *Pettersson v Royal Oak Hotel Ltd* [1948] NZLR 136 and *Lister v Hesley Hall Ltd* were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in *Warren v Henlys Ltd* [1948] 2 All ER 935 any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant.”

13 It was held that the conduct in question, which was inexcusable, fell, nevertheless, within the field of activities assigned to Mr Mohamud and that there was sufficient connection between that field of activities and the wrongful act. Lord Toulson JSC expressed his conclusion in the following way:

“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 respondent 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 the 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.

"48. Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there."

Nature of the exercise to be undertaken

14 Mr Weir QC, on behalf of Mr Bellman, made clear that he does not seek to challenge the facts as found by the judge. His criticism is of the way in which the judge applied those facts, or more accurately failed to apply those facts, when carrying out the evaluative judgment necessary to determine whether there was sufficient connection between Mr Major's field of activity and his wrongful conduct to make it right that NR be held liable.

15 We were taken to a number of authorities as to the nature of the exercise which the court is required to undertake in circumstances such as these. Although Mr O'Sullivan QC, on behalf of NR, submitted that the question is one of fact which might, in previous times, have been left to the jury and that, accordingly, the judge's findings should be respected unless his conclusions were not capable of being derived from the primary facts, he did not press the matter with a great deal of vigour.

16 In the end, it seems to me that, if one looks at the previous case law through the prism of Lord Toulson JSC's analysis in *Mohamud's* case, which is essential, the answer is clear. The question of whether there is a sufficient connection between the position in which the wrongdoer is employed and his wrongful conduct so as to make the employer liable under the principle of social justice requires the court to conduct an evaluative judgment. It is a question of law based upon the primary facts as found: *Mohamud's* case, paras 50 and 54, per Lord Dyson MR; *Weddall v Barchester Healthcare Ltd* [2012] IRLR 307, para 68, per Aikens LJ; *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441, para 43, per Lord Neuberger of Abbotsbury MR, and *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, para 24, per Lord Nicholls of Birkenhead. In my view, it is not clear that either Lord Millett in his dissenting judgment in the *Dubai Aluminium* case at para 112 or Scarman LJ in *Rose v Plenty* [1975] ICR 430, 436-437, quoted in *Mohamud's* case [2016] ICR 485, para 38, had in mind the equivalent of Lord Toulson JSC's second question in *Mohamud's* case. Lord Millett was concerned with whether the actions were legally capable of being performed within the course of the person's employment when he stated that the question was one of fact and Scarman LJ was considering what the servant was employed to do when he stated that the question should be answered "as a jury would".

A *Field of activities*

17 Applying Lord Toulson JSC's analysis, the first question is what the functions or field of activities entrusted to Mr Major by NR were. As Lord Toulson JSC put it: what was the nature of his [Mr Major's] job? There is no doubt that that question must be addressed broadly.

B 18 It is clear from the judge's findings, that Mr Major's functions were widely drawn. The judge found that Mr Major was the directing mind and will of NR, had a wide remit, was in overall charge of all aspects of NR's business, did not have set hours, had the authority to control his own methods of work, that much of what Mr Major did during the "average working day" was directly or indirectly connected to NR and that for "much of his week" he was either directly working on company business or available for consultation or direction. He also found that Mr Major would have viewed the maintenance of his managerial authority as a central part of his role and that NR had a "round-the-clock" business, such that there was always an employee on call: see paras 65–67 of the judgment.

C 19 However, given the context, the place and the circumstances, was Mr Major acting within the field of his activities assigned to him as managing director of NR when the assault took place or was he present in the lobby of the hotel merely as a fellow reveller? Was he acting within the field of the activities assigned to him by NR when he lectured a group of people including NR employees at 3 a.m. in the morning in a hotel lobby when both he and they were seriously inebriated and when he then went on to assault Mr Bellman?

D 20 We were encouraged by Mr O'Sullivan on behalf of NR to reach the conclusion that Mr Major was a mere reveller and was not acting within the course of his employment, to use the terminology adopted in the older cases. Mr O'Sullivan drew our attention to the emphasis placed upon context and the circumstances in which the act occurred by Lord Clyde in his speech in *Lister v Hesley Hall Ltd* [2001] ICR 665, paras 43 and 44. The relevant passages are:

E 43. If a broad approach is adopted it becomes inappropriate to concentrate too closely upon the particular act complained of. Not only do the purpose and the nature of the act have to be considered but the context and the circumstances in which it occurred have to be taken into account. The particular act of lighting a cigarette and throwing away the match, if viewed narrowly, may not in itself be an act which an employee was employed to do. But viewed more broadly it can be seen as incidental to and within the scope of his employment . . .

F 44. Secondly, while consideration of the time at which and the place at which the actings occurred will always be relevant, they may not be conclusive. That an act was committed outside the hours of employment may well point to it being outside the scope of the employment. But that the act was done during the hours of the employment does not necessarily mean that it was done within the scope of the employment. So also the fact that the act in question occurred during the time of the employment and in the place of the employment is not enough by itself . . .

G 21 Mr O'Sullivan urged us to use the yardstick of actual authority to arrive at the conclusion that Mr Major's field of activities did not extend to conducting a meeting or to seeking to impose his authority/exercise

discipline at 3 a m in the morning in a hotel lobby when there were people other than employees present and it can be assumed that everyone was inebriated. He submitted that the judge did not decide that Mr Major was expected to or could exercise managerial authority 24 hours a day, whatever the circumstances or the context.

22 I agree that context and circumstances are important, and the mere opportunity of being present at a particular time or place does not mean that the act is within the relevant field of activities: see *Lister v Hesley Hall Ltd*, para 45, per Lord Clyde. However, it seems to me that actual authority is not the right yardstick to apply. If it were, Lord Toulson JSC would have expressed himself differently in *Mohamud's* case [2016] ICR 485. He made it clear that the question of the field of activities entrusted to the employee must be addressed broadly. The question is “what is the nature of the job?” It is not a question of what the employee was expressly authorised to do. If one focuses upon actual authority one eschews a broad approach altogether. In fact, many of the cases before *Mohamud's* case would also have been decided differently if it were appropriate to look at the question through the lens of actual authority. For example, the milkman in *Rose v Plenty* [1975] ICR 430 had no actual authority to carry a child on his milk float. As Lord Toulson JSC put it in *Mohamud's* case at para 36: “The expression ‘within the field of activities’ assigned to the employee is helpful. It conjures a wider range of conduct than acts done in furtherance of [the employee’s] employment.” In fact, the touchstone of authority had already been rejected by Lord Nicholls in the *Dubai Aluminium* case [2003] 2 AC 366: see paras 22 and 23. As Mr Weir pointed out, if one is not hidebound by actual authority, it is irrelevant whether Mr Major’s contract of employment was sufficiently widely drawn, for example, to include the scope for him to call a meeting outside office hours. Instead, it is necessary to consider the field of activities assigned to the employee in a broad sense and to look at the matter objectively taking account of the position in which the employer has placed the wrongdoer. Such an approach is consistent with the way in which Lord Toulson JSC analysed some of the older case law in *Mohamud* [2016] ICR 485, paras 20–30, including, for example, *Lloyd v Grace, Smith & Co* [1912] AC 716, a case in which a solicitor’s clerk entrusted with managing a conveyancing department, defrauded a client by carrying out the very tasks with which he was entrusted but for his own benefit: see *Mohamud*, at para 24.

23 Such an approach is also consistent with Lord Toulson JSC’s explanation of the approach to be taken to the second matter to be considered. He stated that the cases in which there is sufficient connection between the position in which the person is employed and his wrongful act to make it right that his employer should be held liable under the principle of social justice are ones in which the employee has “used or misused the position entrusted to him in a way which injured the third party”: see *Mohamud*, at para 45. Such a formulation is inconsistent with a limitation imposed by the employee’s actual authority. It is more consistent with the circumstances in which the employee would be held to have ostensible authority. Although an approach based on ostensible authority appears to have found favour in the *Dubai Aluminium* case [2003] 2 AC 366, para 28, per Lord Nicholls, and is consistent, for example, with Lord Toulson JSC’s analysis of the Australian case of *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 in *Mohamud*, at para 30, it is not clear to me that it is appropriate to rely

A rigidly upon such a concept in the post-*Mohamud* world. The court is required to look at the question of the field of activities “broadly”. Adherence to an additional or secondary test necessarily limits the first. Although it is natural to seek certainty and precision and to adopt additional criteria or yardsticks in order to do so, as Lord Dyson MR pointed out in *Mohamud*, at para 54, imprecision is inevitable and “to search for certainty and precision in vicarious liability is to undertake a quest for a chimaera”.

B 24 To return to Mr Major’s field of activities, the judge found that Mr Major was managing director and directing mind and will of a relatively small company, that he had responsibility for all management decisions including the maintenance of discipline and that he would have seen the maintenance of his managerial authority as a central part of his role. He was entrusted by NR with authority to issue instructions to more junior employees and generally had a wide remit. The judge also found that NR was a round-the-clock operation, that Mr Major did not have set hours and had authority to control his own methods of work and that “for much of his week, Mr Major was either directly working on company business or available for consultation or direction” and that “much of what Mr Major did during the average working day was directly or indirectly connected to the defendant [NR] . . .” Accordingly, looking at the matter objectively, on the facts as found, both Mr Major’s remit and his authority were very wide.

Sufficient connection?

E 25 Was the judge right, nevertheless, to conclude that there was insufficient connection between Mr Major’s field of activities and the assault in the hotel at 3 a.m? In my view, he was not. It seems to me that, despite the time and the place, Mr Major was purporting to act as managing director of NR. He was exercising the very wide remit which had been granted to him by NR. His managerial decision-making having been challenged, he took it upon himself to seek to exercise authority over his subordinate employees. The lecture itself was concerned with the nature and extent of his authority in relation to NR’s business and the exercise of that authority over his fellow employees. He chose to wear his metaphorical managing director’s hat and to deliver a lecture to his subordinates. He was purporting to use his position and drove home his managerial authority, with which he had been entrusted, with the use of blows. Looked at objectively, he was purporting to exercise his authority over his subordinates and was not merely one of a group of drunken revellers whose conversation had turned to work. It seems to me that the attack arose out of a misuse of the position entrusted to Mr Major as managing director. He asserted his authority in the presence of around 50% of NR’s staff and misused that authority. It was not merely a discussion leading to an altercation between hotel guests and visitors, as the judge described them.

H 26 It follows that I disagree with the judge’s overall conclusions about the context and circumstances of the assault and their significance in relation to whether there was sufficient connection between Mr Major’s field of activities and the assault: see para 80. I agree with him that the unscheduled drinking session was not a seamless extension of the Christmas party: see paras 70–72. The venue had changed, there was a temporal gap between party and drinks, albeit relatively short, and attendance at the drinking session was voluntary. However, it seems to me that the drinking session

must be seen against the background or in the context of the evening's events. It was not just an impromptu drinks party between work colleagues which might happen on any night of the week after work. The drinks occurred on the same evening as the work event which had been paid for and orchestrated by Mr Major on behalf of NR. Mr Major had already been fulfilling his managerial duties for a large part of the evening. Having orchestrated the party, he organised and paid for the taxis to the hotel and continued to provide drinks which were to be paid for by NR. Viewed objectively in that context, although the party and the drinking session was not a single seamless event and attendance was voluntary, it seems to me that Mr Major was not merely a fellow reveller. He was present as managing director of NR, a relatively small company, and misused that position, discussion having been focused on business matters for between 45 minutes and an hour before his managerial decision-making was challenged.

27 Even if Mr Major had taken off his managerial hat when he first arrived at the hotel, it seems to me that he chose to don it once more and to re-engage his wide remit as managing director and to misuse his position when his managerial decisions were challenged. He purported to exercise control over his staff by "summoning" them and expounding the extent and scope of his authority. In the light of the breadth of his field of activities, NR's round-the-clock business and Mr Major's authority to do things "his way", it seems to me that NR's employees who took part in the drinking session can have been in no doubt at that stage, that Mr Major was purporting to exercise managerial control over them. Given the context in which the drinks occurred, it seems to me that the nature of the interchange outside and inside the hotel lobby was naturally an assertion or a re-assertion of that managerial role. There is no suggestion in the judgment, nor were any submissions made to us to the effect that Mr Major's behaviour arose as a result of something personal. He delivered a lecture about his managerial authority in relation to NR as a whole, as a result of a challenge to that authority.

28 The facts as found are a very long way from the example given by the judge of a social round of golf between colleagues during which conversation turns to work: see para 77. The judge's example is based on a different premise. All participants are equal and attend as casual friends and golfers. One can readily see that in such circumstances, even if discussions turn to work and a golfer who happens to be a more senior employee assaults another golfer who is a junior colleague, looked at objectively, they have all attended qua social golfers. The participants in the drinking session on the other hand, had attended the Christmas party qua staff and managing director. As I have already mentioned, just because the drinking session was unscheduled and voluntary, I do not consider that their roles changed or if they did, that on the facts of this case, the role of managing director was not re-engaged.

29 The position in this case, is more closely analogous with that in *Mohamud v Wm Morrison Supermarkets plc* [2016] ICR 485 than *Warren v Henlys Ltd* [1948] 2 All ER 935. It was Mr Major's job to take all managerial decisions and to enforce his authority, his remit was wide and he had the ability to decide when and where he would work. He followed up on the discussion about NR in the coming year and the challenge to his managerial decisions with a lecture and blows just as, in *Mohamud*, Mr Khan followed up on what had been said earlier when he left his kiosk and confronted the customer on the forecourt. In just the same way,

A Mr Major's lecture, followed up by blows, was not personal. He was purporting to act about NR's business: see *Mohamud*, at para 47.

B 30 In *Warren v Henlys Ltd*, the interchange between employee and customer had ceased and the customer chose to return to the petrol station with a police constable to complain about his treatment earlier. The assault occurred at that stage and Lord Toulson JSC explains in *Mohamud*, at para 45, that "any misbehaviour by the petrol pump attendant qua petrol pump attendant was past history by the time that he assaulted the claimant". In his earlier analysis of the case, he had also explained, at para 32:

C "at the time of the incident the relationship between the plaintiff and the attendant had changed from that of customer and representative of the petrol company to that of a person making a complaint to the police and the subject of the complaint."

In this case, on the facts as found, after a relatively prolonged discussion about NR's business and a challenge to Mr Major's managerial responsibility, Mr Major asserted his authority as managing director. There was no change in relationship between the parties or, alternatively, there was a re-assertion of their former roles before the assault occurred. The relationship of managing director and staff was not "history" by the time the assault took place.

D 31 The judge considered *Warren v Henlys Ltd* [1948] 2 All ER 935 at paras 74–76 and took the view, at para 76, that the rationale of that case, as explained by Lord Toulson JSC, was that there was "a temporal gap and the change in nature of the subject matter making it, in effect, a different interchange to that which had previously taken place". It seems to me that, although there was a temporal gap in that case, it was merely a factor underpinning the change in relationship to which Lord Toulson JSC referred. To the extent, therefore, that the judge relied upon the temporal gap between the Christmas party and the drinking session as a decisive factor, I consider that it was misplaced.

E 32 In summary, it seems to me that, given the whole context, and despite the time and place at which the assault occurred, Mr Major's position of seniority persisted and was a significant factor. He was in a dominant position and had a supervisory role which enabled him to assert his authority over the staff who were present and to re-assert that authority when he thought it necessary. Of course, his position was different from that of the police officer in *Bernard v Attorney General of Jamaica* [2005] IRLR 398 and the army officer in *Radclyffe v Ministry of Defence* [2009] EWCA Civ 635. In the former case, although it was not known whether the police officer was on duty when the shooting occurred, it was common ground that he was allowed to exercise his powers outside his assigned hours of duty: see para 14. Nevertheless, it was considered to be of prime importance that the shooting incident followed immediately upon the officer's announcement that he was a policeman, which was probably calculated to create the impression that he was on police business: see para 25. In the latter case, the duty of care of a more senior officer led to the conclusion that the Ministry of Defence was vicariously liable for a breach of duty which led to the permanent injury of a more junior officer, even though everyone was off duty at the time the incident occurred. The military relationship and the discipline involved extended to occasions such as the off-duty swimming party which had taken place during an adventure training exercise: para 23, per Sir Anthony May P.

33 Although both those cases are extreme examples and, inevitably, turn on very different facts, they illustrate the principle that misuse of authority can occur out of hours or when the parties are off duty, particularly by someone in a senior position. A

34 In all the circumstances, therefore, as a matter of law, having conducted an evaluative judgment based upon the primary facts as found, there is sufficient connection between Mr Major's field of activities and the assault to render it just that NR should be vicariously liable for his actions. It follows that I disagree with the judge that such an outcome is to render NR an "involuntary insurer". B

35 For all the reasons set out above, I would allow the appeal.

MOYLAN LJ

36 I have had the opportunity to read the judgments of both Asplin and Irwin LJ and agree with both of them. C

IRWIN LJ

37 After some hesitation, I also agree, although I wish to emphasise how unusual are these facts, and how limited will be the parallels to this case.

38 The critical reasons why it seems to me that this very experienced judge was wrong are those expressed by Asplin LJ in paras 27–29 above. In my view the "field of activity" of Mr Major was almost unrestricted in relation to the affairs of NR, and exercised at almost any time. I consider that the judge was right that the drinking session at the hotel was separate from the firm's Christmas party. What was crucial here was that the discussions about work became an exercise in laying down the law by Mr Major, indeed an explicit assertion of his authority, vehemently and crudely expressed by him, with the intention of quelling dissent. That exercise of authority was something he was entitled to carry out if he chose to do so, and, however unwise it may have been to do so in such circumstances, it did arise from the "field of activity" assigned to him. D

39 It cannot of course be the test that there must be actual authority to commit the tort complained of. This case arose because of the way in which Mr Major chose to exert his authority, indeed his dominance as the only real decision-maker in the company. Hence there is liability. E

40 I do emphasise that this combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about work matters between colleagues, which leads to an assault, even when one colleague is markedly more senior than another. This case is emphatically not authority for the proposition that employers became insurers for violent or other tortious acts by their employees. F

Appeal allowed.

FRASER PEH, Barrister

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