



Vicarious liability

Clare S Harrington and Richard Owen-Thomas consider the *Majrowski* decision and the accompanying recent case law on vicarious liability

THE COURT OF APPEAL'S DECISION IN

Majrowski v Guy's and St Thomas's NHS Trust [2005] EWCA Civ 251 heralds a new and important advance in the concept of vicarious liability in employment law.

An employer may now be vicariously liable for a breach of duty by its employee whether that breach is of a statutory or common law duty.

The test to be applied by the court is the new broader test of vicarious liability, namely that of fairness and justice. The outcome of that test is dependent upon the circumstances of each case, the sufficiency of connection between the breach of duty and the employment and/or whether the risk of such a breach was one reasonably incidental to it.

In cases of an alleged breach of statutory duty, for which the claimant seeks to establish an employer's vicarious liability, the court will examine the statute in detail. The claimant must show that the statute in question does not exclude such liability "either expressly or on its proper construction, the latter guided, where appropriate, by considerations of policy".

Majrowski

In *Majrowski*, the appellant claimed under the Protection from Harassment Act 1997, alleging that his manager's conduct amounted to harassment for which the Trust, as the manager's employers, was liable.

The behaviour complained of included excessive criticism by the manager of the appellant's time-keeping, the imposition of unrealistic targets for performance and threats of disciplinary action if the appellant did not achieve them.

The Court of Appeal agreed with the appellant that the Trust could be held vicari-

ously liable for the acts of its employees under the Act, despite the fact that the statutory duty was only imposed by the Act on the Trust's employees and not on itself.

In particular, the Court of Appeal was influenced by the new jurisprudence (considered below) which accepted the general proposition that vicarious liability is not confined to common law claims. Of importance is the closeness of connection between the offending conduct of the employee with the nature and circumstances of the employment.

Protection from Harassment Act 1997

Following the Court of Appeal's ruling, a claimant may now bring a claim for damages for any anxiety caused by more than one act of harassment perpetrated by a fellow employee.

The benefits in bringing a claim under the Act, in an employment context, are significant. It is possible to qualify for an award of damages for any anxiety caused by the harassment, there being no requirements for an identifiable psychiatric injury. Furthermore, it is unnecessary for the injury to have been a foreseeable consequence of the breach of duty (another requirement in stress at work claims). Finally, s 6 of the Act disapplies the three year limitation period applicable in personal injury cases so that the limitation period under the Act is six years.

This extension to an employer's liability, described by Scott Baker LJ in his dissenting judgment in *Majrowski*, as substantial and "as it were, by a side wind", does give rise to significant concerns for employers.

How are employers to insulate themselves from claims brought by employees, alleging they have suffered distress from,

for example, a manager who has been repeatedly critical of an employee's poor performance?

In *The Law on Torts* 9th ed (1998), John Fleming commented that the concept of vicarious liability represented:

"A compromise between two conflicting policies: on the one hand, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on a business enterprise."

The burden most recently foisted on the employer is the requirement to strike a balance between protecting all employees from harassment and ensuring managers may manage or discharge their duties of monitoring the work output and efficiency of junior employees without fear of reprisal. This is a far from straightforward exercise, with the line between 'managing' and 'harassing' a subordinate employee well camouflaged.

By contrast, the economic consequences of failing to find the correct balance are easily identifiable. To many employers this will be of particular concern following the observation in *Majrowski* that it is unlikely that the majority of employers' standard insurance policies will cover claims for anxiety due to harassment. This is something less than cases of bodily injury or disease for which insurance is currently compulsory (see, the Employers Liability (Compulsory Insurance) Act 1969).

To combat these concerns, the Court of Appeal identified a number of safeguards in place for the benefit of employers, which it considered would act as control mechanisms to prevent a swathe of possible claims.

Fundamentally, the claimant must establish to an objective standard that the course of conduct complained of amounts to harassment, usually in the sense of its being likely to alarm or cause the claimant distress.

Harassment is purposely not defined, in order for the Act to cover a variety of circumstances from neighbour disputes to cases of stalkers. The focus instead is on the effect of the harassment upon the victim (see s 7(2), which states that harassing a person includes alarming the person or causing the person distress). However, the Court of Appeal was keen to emphasise the serious nature of the conduct required. The conduct has to be calculated, in an objective sense, to cause distress and has to be oppressive and unreasonable. It has to be conduct that the perpetrator knows or ought to know amounts to harassment and conduct that a reasonable person would think amounted to harassment (see s 1(2)).

In addition, in assessing what conduct will amount to harassment, the court placed significance on the sanctions provided for within the Act, in particular the provisions for criminal sanctions (including imprisonment and/or a fine) and injunctive remedies. This was taken as a clear indication of the need for conduct to be of a serious nature. As May LJ said, a court in the civil context:

“... will be alive to this fact when considering whether what is alleged really does amount to harassment.”

The effectiveness of the additional control mechanisms cited by the court is questionable. For example, pursuant to s 1 of the Act, it is necessary for there to have been a ‘course of conduct’ amounting to harassment. In other words, more than a single act of an employee in the course of his employment is required. It is arguable that this is likely to be the case in any event in most managerial contexts.

The court will also have to accept that the risk of harassment was reasonably incidental to the employment. It is yet to be seen how difficult a hurdle this is for the claimant, but the comments in *Majrowski* provide an indication. The Court of Appeal noted that harassment in the workplace is widespread and can occur not only between employees, but by an employee against an outsider, such as a customer or third party, with whom work brings him into regular contact:

“[I]t is thus often likely to be a risk incidental to employment.”

The onus is now squarely – but arguably not fairly – on employers to be alert to any behaviour in the workplace that could con-

stitute harassment. It is therefore vital for employers to have in place policies designed to reduce such harassment. In most circumstances this will take the form of a harassment policy, embodying a code of conduct for employees and procedures to be followed in cases where a complaint of harassment is made.

The *Concise Oxford English Dictionary* definition of harassment is to “vex by repeated attacks; trouble, worry”. It is undeniably a good thing for the protection afforded to the victims of harassment to be increased. However, the control mechanisms outlined in *Majrowski* may not be sufficient to prevent the floodgates opening with claimants wishing to invoke the protection of the Act for instances of behaviour, in an employment context, which have led them to be vexed, troubled or worried – emotions many of us regularly experience and consider as inherent in modern working life.

Banks v Ablex Ltd

Two further recent cases also have an impact in this context.

Firstly, the Court of Appeal judgment in *Banks v Ablex Ltd* [2005] EWCA Civ 173; [2005] IRLR 357; (2005) 149 SJ 269.

This case concerned a personal injury action brought against the employer, seeking to hold it liable for the behaviour of a fellow employee.

It was alleged by Mrs Banks that for some months before her employment with Ablex ceased, another employee, Chris Briggs, had been aggressive and abusive towards her. In particular, she alleged that on 13 and 14 October 1998, he had assaulted her, by putting in fear of being struck. This allegation was struck out and replaced with a contention that Briggs’ conduct amounted to the statutory tort of harassment. (Alongside this there was an allegation of straightforward negligence which is not considered here.)

As set out above, the Protection from Harassment Act 1997 created a cause of action when a person pursues a course of conduct that amounts to harassment against another and which he knows or ought to know amounts to harassment of the other. The test of whether the alleged tortfeasor knew or ought to have known that his conduct harasses another is an objective test.

It was admitted that Briggs sometimes shouted and swore, and indeed he had been given a formal warning for swearing and threatening behaviour. Another colleague described seeing Briggs lose his temper over a machine, and the general thrust of his

behaviour was “a volatile character ... who could often be frustrated with his work”.

In addition, two incidents on 13 and 14 October 1998 were alleged to be particular examples of harassment. Since the statutory provisions require a course of conduct to involve at least two occasions (s 7(3)), these two occasions were pleaded. The judge found that there was a minor altercation on 13 October which could not amount to harassment and so “even if Briggs’ conduct on 14 October could [amount to ‘harassment’] ... the statutory tort was not proved because the misconduct amounting to harassment of the claimant did not occur on two occasions”.

From this it is clear that the judge (the Court of Appeal concurring) did not find that the volatile behaviour was directed at the claimant so as to “amount to harassment of another”. Nor did he find that Briggs either knew or ought to have known that his ill-tempered outbursts might harass the claimant. The judge further found that “[Briggs’] concerns ... were to give vent to his own frustrations, not to cause alarm or distress to others”.

Ingenious submissions by the claimant’s counsel included a suggestion that a ‘course of conduct’ could be proved by acts carried out even when the claimant was not involved and even if there were no proven intent to harm the claimant.

The court disagreed with the first submission. The Court of Appeal decided that the same person must be the victim on each occasion when harassment is alleged to have occurred. Clearly, this does not stipulate that the victim must be present, but it would be hard to argue that conduct was targeted at some absent person, harder still to suggest that the reasonable person would think it amounted to harassment of another.

As to submission two, this seems self-evident, and received tacit approval from Kennedy LJ.

This unusual case came about because of an amendment made to the claim, after judgment was given, to include the tort of harassment. Consequently, this was not in the minds of the judge, lawyers or parties when evidence was being given, and more importantly, when findings were being made on the facts in the first judgment. For obvious reasons, the judge was not prepared to reopen the evidence at the second hearing. The significance of this case, therefore, is really limited to reiterating the essential ingredients of the tort. When pleading this cause of action, at least two identifiable

events should be included, both of which were directed at the claimant.

In *Banks*, the fact that the employer would be vicariously liable for the acts of the employee, although ultimately irrelevant, would appear to have been assumed. An important case on the scope of vicarious liability was also reported on this month.

Bernard v Attorney General of Jamaica

In *Bernard v Attorney General of Jamaica* [2004] UKPC 47; [2005] IRLR 398; (2004) 148 SJ 1281, the Privy Council has built upon the well established principles in *Lister v Hesley Hall* [2001] IRLR 472 HL.

The facts of the case, whilst mildly interesting, are not worth repeating here. The essence of the case was: when is someone acting in the course of their employment? *Lister* told us that the employer will be held liable for an employee's torts when they "were so closely connected with his employment that it would be fair and just" to do so.

This was developed further a year later in *Dubai Aluminium Co Ltd v Salaam* [2003] IRLR 608, where Lord Nicholls stated that "the wrongful conduct must be so closely con-

nected with the acts the employee... was authorised to do [that] the wrongful conduct may fairly properly be regarded as done... while acting in the ordinary course of... the employee's employment".

Whilst *Salaam* was authority for "the proposition that an employer ought to be liable for a tort which can be fairly regarded as a reasonably incidental risk to the type of business carried on by the employer", the Privy Council in *Bernard* went further by stating that the correct approach "is to concentrate on the closeness of the connection between the nature of the employment and the tort, and to ask whether, looking at the matter in the round, it is just and reasonable to hold the employers vicariously liable".

Interestingly, in connection with claims brought under the statutory tort of harassment, the Privy Council have approved the Canadian decision of *Bazley v Curry* [1999] 174 DLR (4th) 45 Canadian Supreme Court. In this case, McLachlin J stated that "the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of

the wrong (and is thereby fairly and usefully charged with its management and minimisation)".

Conclusion

This would seem to make it clear that bringing together a potential harasser and victim for the purposes of conducting the employer's business will always be introducing a risk of harassment. What remains to be seen is the necessary knowledge the employer must have of a potential harasser's propensity. However, given the decision in *Bernard*, it must be likely that the principle of vicarious liability will be established even in the absence of any knowledge. Few of us could seriously submit that an employer is not usefully charged with the management and minimisation of inter-employee harassment.

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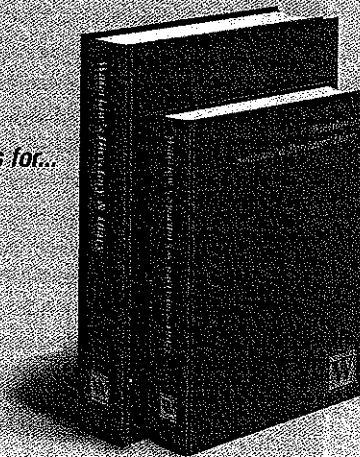
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