Case Law Update – Autumn 2013 to Summer 2014

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Liability

Vicarious Liability – Employer

Ahmed Mohamud v WM Morrison Supermarkets [2014] EWCA CIV 116

The Claimant entered the Defendant's petrol filling station. He approached the kiosk and was served by the Defendant's employee. The Claimant then (perhaps strangely) asked to use a printer, he believing that this was a service the Defendant could offer him. Rather than receiving a polite 'no', he was greeted with a flurry of racist abuse from the Defendant's employee,. It got worse. The Claimant left the kiosk and was followed outside by the same employee who began punching the Claimant.

The Claimant claimed that the Defendant was vicariously liable for the acts of the employee.

It was argued on behalf of the Claimant that the K was representing the Defendant in a customer facing role. He was clothed by the Defendant. There was no doubt that he was the Defendant's representative. His actions, it was argued, were linked to his employment not simply in terms of proximity but also by dint of the fact that he was employed in a position that was likely to sometimes involve provocative and/or difficult situations, which in turn would involve friction with customers. It was argued that this was not a random assault, but in fact an assault that arose out of the interaction between the claimant as a customer and K as an employee.

The defendant responded that the critical question was the closeness between (a) the nature of the employment and (b) the tort in question. That was the only question that required answering. Mere interaction (it was argued) was insufficient, and an additional factor was needed in order for the claim to succeed.

Held: The claim was dismissed. If the test was one of 'fairness' then there would be strong grounds for allowing the appeal. That however, was not the test. The test was how closely connected was the nature of K's employment with the tort committed. On the facts held by the first instance Judge, the connection in this case was insufficient.

Comment: Reading the judgment, one cannot help but feel that the decision to dismiss the appeal was reached with reluctance. It was readily acknowledged that if the question was simply one of 'fairness' then the claim might well succeed. It is unsurprising therefore that the claimant has sought leave to appeal from the Supreme Court, and it will be interesting to see whether their Lordships will consider any extension to the doctrine of vicarious liability.

Non-employer but vicarious liability

Cox v Ministry of Justice [2014] EWCA Civ 132

Cox worked at HM Prison Swansea as catering manager. Whilst unloading a consignment of food under her supervision, a prisoner dropped a sack causing the food to spill. The Claimant told all the prisoners to stop working until the spillage had been cleared. X (a prisoner under the Claimant's supervision), continued to work and as a result dropped a sack on the Claimant's back, causing her injury.

On appeal, Cox claimed that: a) D was vicariously liable for the actions of the prisoner, and/or b) D was in breach of personal duties owed to Cox as her employer.

D submitted that there could be no vicarious liability in this situation since: i) there was no contract of employment, ii) the only reason for the prisoner performing the task was that under statute the prison

had to provide work. This was not a case of the prison choosing to offer work and the prisoner choosing to accept it; iii) there was no intention to create legal relations; iv) any 'control' exercised or 'payment' made were part of a penal policy and not the running of a commercial activity or enterprise, and v) the court should look at the reason for the activity and any control exercised – to find vicarious liability in these circumstances would be to impose too wide an obligation since D could be liable for negligence committed while on training courses or performing other general tasks under the 'control' or guidance' of prison officers.

Lord Justice McCombe delivering the lead judgement found there to be vicarious liability. It was instructive that the prisoners were performing a task "essential to the functioning of the prison" and that had to be performed by someone. It was different in nature to training, etc which was principally for the benefit of the prisoner and not a task that would be performed by an employee.

The court was keen to emphasise and relied wholly upon the test of Lord Phillips in *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56 (CCWS). It is the features noted at paras 56 to 58 that are to be regarded as the touchstone for the existence of a relationship from which vicarious liability can arise.

Non-employer, No vicarious Liability, but non-delegable duty of care

Woodland v Essex County Council [2013] UKSC 66

Cl was 9 and attended at a swimming lesson with her school. She was assigned to a group under the direction of M and B. Neither were employed by the local education authority. Their services had been provided to the authority by Mrs S. She was an independent contractor who carried on an unincorporated business under the name of "Direct Swimming Services" and had contracted with the education authority to provide swimming lessons to its pupils.

At some point Cl got into difficulties and was found hanging vertically in the water. She was resuscitated but suffered a serious hypoxic brain injury. Cl alleged negligence on the part of B and M.

The issue for the Supreme Court was whether the Defendant education authority owed Cl a non-delegable duty of care since there could be no vicarious liability; B and M were in every way independent contractors. Langstaff J struck the claim out on the ground that on the pleaded facts the defendant could not be said to have owed a non-delegable duty of care. The Court of Appeal affirmed his decision (2v1).

The Supreme Court held that in these circumstances the authority owed to Cl a non-delegable duty of care. Observing that such a duty was not unknown (citing employment cases and dicta in X v Bedfordshire that a hospital owed such a duty to a patient independent of any vicarious liability for its employees), Lord Sumption set out the criteria which would give rise to the existence of a non-delegable duty:

a) The claimant was a patient or a child or for some other reason especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners or residents of care homes;

b) There is an antecedent relationship between the claimant and defendant, independent of the act or omission, which places the claimant in the charge, custody or care of the defendant and from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such a relationship that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren;

c) The claimant has no control over how the defendant chooses to perform those obligations (i.e. whether personally, through employees, or through third parties);

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d) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed toward the claimant, and the third party is exercising, for the purpose of the function thus delegated to him the defendant's custody or care of the claimant and the element of control that goes with that;

e) The third party has been negligent not in some collateral respect but in respect of the very function assumed by the defendant and delegated by the defendant to him.

Their Lordships considered the case of *A v MoD* [2005] QB 183 and clarified that the question of control was not control *over the environment* in this type of case but rather control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility.

Homeowner and assumption of responsibility

The Personal Representatives of the Estate of Cyril Biddick v Morcom [2014] EWCA Civ 182

The Claimant/Appellant ('M') was an experienced 'multi-skilled' tradesman. His parents lived next door to Mr Biddick ('B'). M often did work around B's home; sometimes for payment, sometimes voluntarily. He agreed to affix insulation to B's loft hatch. The hatch was opened by means of inserting a hook at the end of a pole into a locking mechanism and turning the same which then caused the hatch to fall allowing a ladder to be accessed. M climbed in to the loft and the hatch was shut behind him to enable him to fix the insulation to the hatch. B, of his own volition, offered to stand underneath the hatch holding it in position with the pole. B felt that there was a risk that the vibration caused by drilling necessary to affix the insulation might cause the hatch locking mechanism to come free. After 5 or 10 minutes things went quiet. B then heard his phone ring. He left the hatch and answered his phone. He was talking on the phone for a couple of minutes when he heard a terrible crash. B returned to find the hatch open and M on the floor having fallen from the loft. M sustained significant injury and claimed damages against B (B later passed away, hence the defendant being his estate).

The following findings of fact were made at first instance and approved/recited by the Court of Appeal:

- M agreed that B was not qualified to conduct a risk assessment;
- M was a competent tradesman well able to appreciate the risks this task would bring. He determined how the task should be performed;
- M knew the hatch, even when closed and 'locked', was not strong enough to take his weight;
- M did not think the risk of the lock opening as a result of vibration to be especially great. Had B not mentioned it, the risk would not have occurred to him;
- M was not relying on B to take his weight on the pole;
- B's involvement did not alter the method or means by which M chose to do the job.

Significantly, the judge also found that B, on leaving his post, had caused the locking mechanism to be turned from fully locked. The cause of the accident was M overreaching when attempting to put screws into the loft hatch cover and placing some weight on the hatch through his screwdriver. The hatch then gave way. The finding was challenged on appeal but upheld.

The Court of Appeal were asked to consider whether B owed a duty of care. At first instance the judge held that the act of B in involving himself in the task was such that he had assumed a duty of care, which was breached when he caused the locking mechanism to become partially open such that it failed. On appeal it was argued that as M had placed no reliance upon B AND M knew that the loft hatch would not take his weight, B could not owe a duty of care to M. On behalf of B it was submitted that for a duty of care to arise there must be reliance. In essence, any failure to take reasonable care on the part of B was merely incidental.

The Court of Appeal held that in this scenario there is no need to import any element of 'reasonable reliance' in order to lead to the existence of a duty of care. It was enough that B had chosen to involve himself to a limited, but important extent, in the potentially hazardous activity being conducted by M. His undertaking was to keep the hatch locked. It was entirely foreseeable that should he fail to do so the hatch might fall open whether through vibration or pressure. That was enough.

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Nor did it matter that B could not have prevented M falling through the hatch if M had landed with his full weight against the hatch which on the evidence was a real additional risk.

The Court of Appeal also upheld the finding at first instance of contributory negligence of 66%.

Landowner and no assumption of responsibility

Yates v National trust [2014] EWHC 222 (QB)

The Defendant engaged a tree surgeon (Joe Jackman) to take down a diseased tree. That tree surgeon in turn engaged the Claimant to work within his team. During the course of his work, the Claimant climbed a tree using a rope and fell from a height of around 50 metres. The Claimant contended that: a) the defendant owed him a duty to take reasonable care to see that the methods of the tree surgeon were competent and safe, and b) that the Defendant had been negligent in its choice of the tree surgeon as a contractor, since he did not hold the appropriate qualifications for dismantling operations.

Held: The Defendant did owe a duty to the Claimant under the Occupiers' Liability Act, but that was not relevant in this case since the accident was not caused by 'the state of the premises'. It was caused by the activity of a tree surgeon.

The Claimant argued that NT owed a duty of care to the Claimant arguing by analogy with the case of *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575. In that case the Defendant cricket club hired a pyrotechnic two man stunt team to organise a display. The Claimant (a member of the public) was asked to assist during the display when an explosion of gunpowder caused him significant burns. In Bottomley, the Court of Appeal, without recourse to the OLA 1957, confirmed that the Defendant owed the claimant a duty of care citing the decision of *Ferguson v Welsh* [1987] 1 WLR 1553 in which Lord Keith had said that there might be special circumstances in which an occupier might be liable for things done or not done on his premises if he did not take reasonable steps to satisfy himself that the contractor was competent and the work was properly done. The Claimant further argued that even had reasonable care been taken in appointing the contractor, *Honeywill v* Larkin [1934] 1 KB 191 permits liability to attach where the occupier has used reasonable care in choosing an independent contractor but an unsafe method of work has nonetheless been adopted. Liability is then established if the work is 'extra-hazardous'.

Mr Justice Nicol rejected the Claimant's arguments. He noted that Honeywill remained good law albeit that the same had been the subject of extensive judicial and academic criticism. However, Bottomley concerned a case involving an exceptionally dangerous operation, and exceptionally dangerous not only to the Claimant but to all visitors. Tree felling could be distinguished. Moreover, there is no control exercised by NT over the activities of Joe Jackman or his team and, on the facts, NT had taken reasonable care in appointing Joe Jackman to perform the activity.

Finally, the Claimant's claim under the Work at Height Regulations 2005 also failed. Although the Regulations imposed a duty on a non-employer, that duty was dependent on exercising control over the worker (the Claimant). On the facts of the case the Defendant did not have the requisite control over the Claimant for the Regulations to apply.

Assumption of Responsibility...cont

Mark Webley (a protected party who sues through his son and litigation friend Karl Webley) v The Metropolitan Police [2014] EWHC 299 (QB)

The Claimant was a protected party. He was involved in a disturbance, was arrested and was detained at a Police station where he was kept under constant watch. His behaviour was described as 'obviously disturbed'. He was assessed and subsequently 'sectioned' under Section 2 of the Mental Health Act to a nearby Hospital. On leaving the station, he attempted to run away, and on arriving at the Hospital he suffered a fit. On admission he was placed in a special cubicle with a security detail. Whilst under the protection of that security detail the claimant escaped and ran into the road, colliding with an oncoming car and suffering a serious brain injury as a result.

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Held: The police could not be liable on the facts. They had disclosed to the Trust the full and proper information about the claimant's behaviour, and that was as far as any duty of care extended. The Trust, however, was well aware of the risk of absconding and they had therefore failed in their duty of care towards the Claimant since there were no 'sufficient safeguards' to protect against a risk that they were well aware of and could foreseeably lead to injury.

Harrison v Technical Sign Co [2013] EWCA CIV 1569

The fascia of a shop became detached from a building and fell onto the pavement, causing serious injury those below. Proceedings were brought against the company who had provided the sign (D1), the proprietor of the shop (D2), the company who carried out the remodelling of the shop (D3), and surveyors who had previously surveyed the shop (D4). A number of Part 20 claims were made between the defendants. At first instance it was held (amongst other things) that D3 and D4 were liable to the claimants and therefore were also liable to indemnify D1. D3 was therefore entitled to a contribution from D4. D4 appealed, contending that it owed no duty of care towards the claimants.

Held: A duty of care did not exist between D4 and the claimants since, on the facts of the case, they lacked the requisite degree of proximity. Their involvement as surveyors had nothing to do with the safety of passers-by. Similarly, D4 did not owe a duty of care to D1, since the nature of the particular relationship was adversarial. D4 were approached as agents of the landlord in a situation where D1 had previously wished to make a claim against the construction works of the same landlord, and in respect of the awning only (not as to the shop front generally). The adversarial nature of that relationship was inconsistent with an assumption of responsibility.

<u>Fraudulent / exaggerated claim – Committal for Contempt</u>

Mitsui Sumitomo v Khan [2014] EWHC 1054 (QB)

MK was involved in a genuine accident when he was knocked from his bicycle sustaining a serious head injury. He claimed he had significantly impaired cognitive function resulting in a need for 24 hour care. He advanced a schedule in excess of £1.4M. His father (AK) acted as litigation friend. His wife produced a statement confirming MK's profound disabilities. Surveillance revealed him to be functioning and at what appeared to be an entirely normal level. All three admitted contempt of court. MK accepted an offer of £75,000.

It was significant that the first medico-legal report in which the claims were made (and the Schedule based upon) was prepared in May 2010 and the fraud was uncovered through surveillance in October 2010.

The maximum sentence available is 2 years. Both MK and AK were sentenced to 9 months imprisonment while MK's wife was sentenced to 7 months suspended for 2 years.

The sentencing guidelines in *South Wales Fire and Rescue v Smith* [2011] EWHC were expressly approved and relied upon. A must read for anyone with or considering contempt proceedings following a fraudulent claim(s).

<u>Travel Law</u>

Cox v Ergo Versicherung [2014] UKSC 22

The Claimant was the widow of H, an officer who whilst serving in the British Army in Germany, was killed by a German national in a road traffic accident. Liability was admitted, and the claimant brought her claim against the defendant insurer in England.

The accident was pre-Rome II and therefore the Private International Law (Miscellaneous Provisions) Act 1995 applied. The Court had to decide whether either the Fatal Accidents Act 1976 or its German equivalent should apply to the assessment of damages. The significance was that the claimant had had two children by a new partner after H's death. Under the FAA 1976, any benefits flowing from that

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relationship would be disregarded under section 4. However, the German equivalent would take those benefits into account, and therefore reduce the claim substantially.

The Supreme Court held that the substantive law was the law of the place where the accident occurred (the lex causae) unless there was a much more significant connection with England. The relevant rules in this case were clearly substantive because they determined the scope of the defendant's liability. German law therefore applied.

The FAA 1976 only lays down rules once the Act itself applied, which it did not since this was an action to enforce a liability where the applicable substantive law was German. The only thing that might change this would be if there was something in the Act itself to suggest that it was intended to have extra-territorial effect. There was nothing in the FAA to suggest that that was the case.

Wall v Mutuelle De Poitiers [2014] EWCA CIV 138

The Claimant was injured in a motorcycle accident whilst in France. The driver was French and insured by the Defendant. Liability was admitted and the Claimant brought his claim in England against the said insurer. It was accepted by both parties that under Rome II French law applied. When the Claimant applied for permission to rely on several experts, the Defendant contended that the matter of expert evidence was a matter of 'law' and not 'evidence and procedure'. As a matter of 'law' therefore, it was said that such evidence should be governed by French law, the effect being that the Claimant would be limited one medical expert only, with possible input from two or so 'sapiteurs' (sub-experts).

The Court of Appeal upheld the High Court decision, namely that the matter of expert evidence was a matter of 'evidence and procedure' and therefore fell to be determined by the law of the forum. The defendant's submission that Rome II was designed to arrive at uniformity outcome was wholly rejected. The aim of the regulation was certainty of outcome, not uniformity of outcome. They were two very different things. If uniformity of outcome were the aim then there would be no need for the exception under Article 1 (3) for 'evidence and procedure' to be governed by the law of the forum at all.

Comment: The Court's judgment is interesting not merely because of what they say about procedure, but also because of what is meant by the term 'applicable law'. Lord Justice Jackson held that there were both pragmatic and jurisprudential reasons for construing the term in a broad, rather than narrow sense, which meant that (for example) that customs, guidelines and practices would be included. For a more in depth analysis see the article written by James Bentley on the Chambers' website.

Bloy v Ireson v MIB [2013] EWCA CIV 1543

The Claimants were injured in a road traffic accident in Lithuania. The accident had been the fault of a Lithuanian national who was uninsured. As the UK compensation body for the purposes of Directive 2009/103, the MIB was obliged to pay compensation and would be entitled to then claim a reimbursement from its Lithuanian equivalent. However, under Lithuanian law the MIB's counterpart capped awards at €500,000. The MIB argued that it was only liable to pay compensation assessed in accordance with Lithuanian law, and therefore the same cap applied. Even if English law applied then the regulations (it was submitted) nevertheless limited liability to the maximum recoverable under Lithuanian law, i.e. €500,000.

Finding against the MIB, it was held that the assessment of compensation came under the provision of Regulation 13 of the Motor Vehicles (compulsory insurance) Regulation 2003. It was held that Regulation 13 (2) (b) was a 'deeming provision' with all the consequences that followed, meaning that the assessment of compensation was governed entirely by the law of the UK.

In any event the cap was a matter of procedure, since it was a simple monetary limit on recoverable compensation. It therefore was distinguishable from substantive law, which would (for example) dictate heads of loss.

<u>Limitation</u>

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Davidson v Aegis [2013] EWCA CIV 1586

The claimant brought a claim against his employers following a back injury sustained during a medical training course. However, the claim was not served in time. After instructing new solicitors, new claim forms were issued and served with a Section 33 application. The first instance judge applied the dictum in *McDonnell v Walker* [2009] EWCA Civ 1257, that it should not be easy for a claimant to simply commence second action and therefore obtain a disapplication of the limitation period.

The claimant appealed on the grounds that McDonnell was inconsistent with *Aktas v Adepta* [2010] EWCA Civ 1170 (which held that the judge had not taken into account that any professional negligence claim would be for a loss of a chance and therefore unsatisfactory). Furthermore, it was submitted that it was wrong to say that there had been prejudice to the defendant.

It was held that there was no conflict between McDonnell and Aktas. What was important was that the judge followed the guidance in *Cain v Francis* [2008] EWCA Civ 1451, the leading authority on disapplication of limitation. Although a loss of a chance claim was indeed second best, it was something that Judge usually should take in to account. As to the prejudice suffered by the defendant, the judge had properly considered all the usual factors (i.e. that memories become less reliable the more stable an action became).

Comment: The case provides clarification of the apparent conflict perceived by some commentators between McDonnell and Aktas, and re-affirms the importance of Cain v Francis as the first port of call for anyone looking at a Section 33 application.

Nemeti v Sabre Insurance [2013] EWCA CIV 1555

The claimants were Romanian nationals who were injured in a car crash in Romania. The driver was killed in the crash and the claimants suffered personal injuries as a consequence. The car was owned by the driver's father and was insured by the defendant. The claimants brought a claim against the defendant just before the limitation period expired. It transpired however that the defendant had taken the car without permission. The European Communities (Rights against Insurers) Regulations 2002 therefore did not apply, and the defendant therefore sought to strike out the claims.

In response, the claimants sought to add and/or substitute the driver's estate to the litigation. The Master held that the claims against the estate which were brought in negligence were essentially the same as pursuing the statutory route, since both were claims for damages following personal injuries. The defendant successfully appealed that decision and the claims were struck out. The claimants appealed.

Held: Section 35 (3) was clear that there was no power to amend except as provided for by the Act or by rules of court (e.g. CPR). The reason why the claimants could not bring themselves within

35 was that the original cause of action was a statutory one (under the regulations), and that the cause of action they wish to pursue was one in negligence against the alleged tortfeasor. Therefore it was not the same claim, and the two were indeed different. The proposed substitution was designed to launch a new claim against a new party, and not to maintain the original claim itself. On that basis, the appeal was dismissed

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Quantum

Haxton v Phillips Electronics [2014] EWCA CIV 4

The appellant's husband passed away as a result of contracting mesothelioma. However, she too had contracted music mesothelioma as a result of coming into contact with asbestos when she washed her husband's work clothing. Proceedings in H's capacity as a widow and the administratrix of her husband's estate were already settled by consent. However, she had also issued proceedings in her own right, in which liability was conceded and damages largely agreed.

However, it was denied that she could recover what would've been her future dependency claim in the action she brought as the widow and administratrix of her husband's estate (that had settled by consent). She argued that but for the defendant's negligence, her life would not have been cut short, and therefore the assessment of her dependency claim in the original action would have been significantly greater. The question was whether the common law dependency claim in her action could amount to a recoverable head of loss.

The court held that there was no reason either in principle or policy why the claimant should be deprived of recovering damages which represented the loss she had suffered due to her life being cut short by the defendant's negligent actions. In the claim under the FAA 1976 she could not recover any more than was her actual loss, meaning that she could not recover the 'but for' dependency claim in that action. However, there was no reason why the common law could not step in to compensate for the diminution in the value of her statutory rights. In the same way that a loss of a contractual right might be recoverable, it should also be the case that the reduction in the dependency claim was a loss actually suffered.

The fact that the source was statutory and not contractual was immaterial.

The personal dependency claim in question was not too remote. It was reasonably foreseeable that if her life was curtailed her claim would be diminished. The claimant was therefore entitled to an additional £200,000.

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