

Recent developments in EL/breach of statutory duty

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Conjoined appeals of **Weddall v Barchester & Wallbank v Wallbank** [2012] EWCA Civ 25

Weddall

Mr Weddall and Mr Marsh worked for the same care home. M and W did not get on. On one evening when short-staffed W telephoned M to ask if he could come in to work. M, who was very drunk, took offence at the way in which he was asked and refused.

M cycled to the home and attacked W knocking him to the ground and punching and kicking him. M was subsequently sentenced to 15 months imprisonment.

Wallbank

Mr Wallbank was the MD and sole shareholder of the Defendant Company. Mr Brown was a fellow employee. When working together on the day of the assault W criticised B for a particular task and then said to B “come on” (which the court found was said in a manner expressive of his intention to help B with the task). B walked to W and pushed him resulting in W falling and sustaining a fracture of a vertebra. B was convicted of GBH and ordered to pay £600 compensation.

Court of Appeal

- For the employer to be vicariously liable there must be a ‘sufficient connection’ between the employment and the violent act;
- In terms of understanding the proximity between the employment and the act it would be “unwise for this court to attempt to identify any one of the expressions or concepts that have been previously used by this court or the House of Lords or the Privy Council as embodying the definitive test of when a tort was committed by an employee tortfeasor in the course of his employment. The various different formulations have to be considered in the context of the particular facts in hand.” (per Aikens LJ).

Weddall

Claim failed. The following factors were identified as germane:

Per Pill LJ:

- The violence was a response to a routine and proper request. When he received the request Marsh was at home;
- He attacked Mr Weddall 20 minutes after receiving the request;
- This was an independent venture of Marsh separate and distinct from his employment;
- *“This case is far from the use of modest force by way of spontaneous reaction to an instruction at the workplace, which I have found to be a much more difficult issue. It is of course an irony that it is the outrageousness of Marsh’s conduct that deprives Weddall of a remedy against his employer but the doctrine of vicarious liability, which is policy based, must be kept within limits.”*

Per Moore-Bick LJ:

- The assault merely happened to occur in the workplace but was otherwise unconnected.

Per Aiken J:

- Mr Marsh was not on duty at the time;
- It was the spontaneous act of a drunken man.

Wallbank

Claim succeeded:

Per Pill LJ:

- Moderate force was used in a spontaneous but deliberate reaction to a lawful instruction;
- The circumstances in which vicarious liability might be established are not closed;
- The violence was closely related to the employment in time and space. It was a spontaneous if not irrational response;
- The risk of an over-robust reaction is one which is inherent in the employment. It may reasonably be incidental to it rather than unrelated or independent of it.

The decision(s) leave unanswered a number of questions with the factors identified by the Court of Appeal not easy to square with other claims, in particular *Mattis v Pollock* (the case where the bouncer left the nightclub where he worked, fetched a knife and stabbed the Claimant). For example, how can 'proximity' to the workplace be a crucial distinction between *Weddall* and *Wallbank* when in *Mattis* the bouncer went away from his workplace? Was his act not simply coincidental to rather than closely connected with his workplace? If the 'robustness' of the reaction is a touchstone (Pill LJ's reference to the irony flowing from Marsh's outrageous conduct would suggest so) how does this fit with *Mattis* where the force was at the far end of the scale? If Mr Marsh had agreed to come into work (albeit drunk) and had then changed his mind and assaulted Mr *Weddall*, would his claim have succeeded? Are we nearing a situation where a violent response to any legitimate instruction might lead to vicarious liability (Pill LJ rejected the notion that it always will but Claimant's counsel felt confident in making the submission)?

The circle is probably only squared when one views the concept of vicarious liability in these sorts of claims as one of pure policy and thereby variable according to the justice of the situation. As Moore-Bick J observed, the doctrine has its origins in principles of loss distribution which, I would suggest, is by its nature an intangible construct. Trying to find consistency in the authorities is something that, sadly, is not possible. As Lady Clark put it in *Vaickuviene v Sainsbury* [2012] CSOH 69:

"My general comment about the case law is that there appears to be an acknowledgement in some of the case law that the principles which have been developed are not entirely consistent, that the cases are very fact dependent, and that policy considerations have been and remain a major influence..."

The development of vicarious liability has been policy driven, the categories in which the law will recognise vicarious liability are not closed and the lines which have been drawn in cases which are fact dependent are not always easy to recognise or reconcile."

Or, for now at least, one might be able to develop some feel for when liability will and will not be established by simply ignoring *Mattis*, viewing it as a unique case and a successful effort to ensure that a man left with life-changing injuries incurred by a thug of a bouncer (known to be a thug by his employer) was not left without a remedy.

Also note:

Section 40 Equality Act 2010:

- (1) An employer (A) must not, in relation to employment by A, harass a person (B)....
 - (a) who is an employee of A's;
 - (b) who has applied to A for employment;
- (2) the circumstances in which A is to be treated as harassing B under subsection (1) include those where;
 - (a) a third party harasses B in the course of B's employment, and
 - (b) failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.
- (3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.
- (4) a third party is a person other than;
 - (a) A, or .
 - (b) an employee of A's.

Harassment is defined by s26 and is termed by reference to a protected characteristic.

The Government is considering repealing the provision. A consultation is underway which closes August 2012.

Al Ghaith v Indesit [2012] EWCA Civ 612

A factually straightforward manual handling case. The Claimant was performing repetitive tasks with no specific risk assessment. The court found that the Defendant increasing the number of breaks would have been a reasonably practicable step to take. Despite there being no evidence that this would have made a difference to the risk of that Claimant sustaining that injury, the court found liability to be established. The comments regarding causation are interesting (going too far? wrong?):

Per Longmore LJ at paragraph 23:

“Causation - This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level reasonably practicable. If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the injury would still have occurred e.g. if the injury was caused by a freak accident or some such thing; but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury.”

The judgment would appear to suggest that, once a breach has been established, the employer will be liable without more regardless of whether that breach can, on evidence, be shown to have caused the injury or not. A curious comment and one that clearly was the subject of some consideration. But does this effectively reverse the 'traditional' view of causation?

Just over two weeks earlier a differently constituted Court of Appeal set out what appeared to have been the (as I thought) commonly held view on causation in *Costa v Imperial* [2012] EWCA Civ 672 at paragraphs 16 and 17:

“[The trial judge found causation made out] and he said no more than this:

“I accept [Claimant's counsel's] submission that refresher training on a regular basis would have prevented or at least reduced the risk of the Claimant pulling the bed from the wall in the way that she demonstrated at trial.”

Pausing there, that is the wrong test. It is not enough that any breach of the regulation would have reduced the risk of injury; the Claimant has to demonstrate that the breach was a cause of the injury...

One must be prepared for *Al Ghaith* to be raised by the Claimant's solicitors when arguments regarding causation are abound. I would suggest that, on the face of it, the comments are incorrect and do not fit well with the explanation of causation set out in leading texts such as Munkman. With the greatest of respect to Lord Justice Longmore, it may be that the causation section of the judgment conflated the issue of causation with breach of statutory duty. It may also be that, given causation was never put in issue by Defendant's counsel, the court thought that it was a non-issue. Whatever it may be Costa provides what I would suggest is the correct test to be applied.

The judgment has raised further snippets of interest. The judgment of Longmore LJ concluded with (at para 26):

"It is a great pity that Indesit did not pursue the option of mediation rightly encouraged by Toulson LJ when he gave permission to appeal. [Defendant's counsel] informed us that it was not pursued because the costs had already exceeded the likely amount in issue. This is an inadequate response to this Court's encouragement of mediation since a full day in this Court will inevitably result in a substantial increase in costs. Indesit's reaction is all too frequent and the court has, since April of this year, decided that any claim for less than £100,000 will be the subject of compulsory mediation. It is devoutly hoped that such mediation will mean that these comparatively small claims will not have to be adjudicated by this court so frequently in future."

The above is unfortunately not correct and the choice of the underlined words is unfortunate. A pilot scheme has been introduced to run until April 2013 but it is not 'compulsory'. PI and contract claims worth less than £100,000 will be recommended for mediation unless a judge "exceptionally directs otherwise" and a recommended case can expect to enter the mediation system unless a party asks otherwise. However, while not compulsory, a party who refuses to mediate but is liable to face a significant costs sanction at the conclusion of the appeal hearing (win or lose? We wait and see).

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