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#HardwickeBrew
Your Takeaway Cup

These notes follow the #HardwickeBrew given by Hardwicke's Clinical Negligence and Personal Injury Team on 21 July 2020 which looked at recent cases on Vicarious Liability.

Update on Court Openings:

- The MOJ has announced the opening of 10 'Nightingale Courts'. Whilst the government has branded this move as helping to *"avoid any delays getting criminals behind bars"*, they will primarily be used for civil and family hearings.
- The list of Courts and MOJ statement is here: https://www.gov.uk/government/news/10-nightingale-courts-unveiled
- There is an outline proposal for 'extended operating hours', with the possibility of evening sittings from 4:30pm – 8:00pm on 2 or 3 days a week, and Saturday listings. For civil cases, it is thought that this will be aimed at small claims and fast track cases. The Law Society has a place on the civil working group. It's not known when a decision will be made.

Vicarious Liability in 2020:

It is a longstanding principle that there are 2 pre-conditions to the doctrine of vicarious liability:

1. A relationship between 2 persons that makes it proper in law for one to pay for the fault of the other (e.g. employer/employee).
2. A sufficiently close connection between that relationship and the wrongdoer's act or omission, such that it is just that the defendant is liable.

There have been a number of developments in recent years, including *'Christian Brothers' [2012] UKSC 56, Cox v MOJ [2016] UKSC 10*, and *Armes v Nottinghamshire CC [2017] UKSC 60*. These cases generally expanded the scope of vicarious liability to include relationships broadly 'akin to employment', and in cases involving intentional torts.

Various Claimants v VM Morrison Supermarkets PLC [2020] UKSC 12

- Cs brought claims after an employee (Mr Skelton) of the supermarket deliberately and maliciously published personal information about 9,000 other employees on the internet.
- The employee was part of the internal audit team, and he had been tasked with providing personal payroll data of the employees to the external auditors.
- The employee took a number of steps to disguise his act, but was detected and convicted. His aim was to undermine the interests of the supermarket.
- At first instance and in the Court of appeal, it was held that the supermarket was vicariously liable for the deliberate wrongful acts of the employee, with an unbroken chain from entrusting him with the confidential information, tasking him to provide it to a third party, and the disclosure.
- All of this was held to be within the course of the employment.
- However, the Supreme Court held that the supermarket was not vicariously liable.
- **TAKEAWAY POINTS –**
    - Clarification was provided of *Mohamud v WM Morrison Supermarkets PLC [2016] UKSC 11*. Part of the test was to identify the 'field of activities' that an *"employee was authorised to do"* when looking at the sufficient connection.
    - The key point is that the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.
    - The disclosure of the data on the internet did not form part of Skelton's functions or field of activities.
    - The fact of an unbroken chain of causation was less relevant and not determinative.
    - The motive of the employee and whether he was acting for purely personal reasons was relevant. Skelton was acting out of a vendetta.
    - A distinction between this case and other cases (e.g. abuse) where vicarious liability was found is that the employee actively attempted to harm the employer's interests. In the abuse cases, it was the conferral of authority on the employee over the victims which was a highly relevant factor.
    - The fact that employment might provide an opportunity to commit the wrongful act is not relevant.
    - Where the employee is engaged solely in pursuing his own interests he is on a 'frolic of his own'.

Various Claimants v Barclays Bank PLC [2020] UKSC 13

- Cs brought a claim following alleged historic sexual assaults by a doctor (Dr Bates).
- The doctor would carry out medical examinations for prospective new employees of the bank.
- He was paid a fee for each report and was not paid a retainer. He had a number of other patients and clients, and was free to refuse work for the bank.
- The bank required the doctor to fill in their forms and address particular health issues of their employees.
- At the trial, it was held that the bank would be vicariously liable for any assaults proved. This was upheld by the Court of Appeal [2018] EWCA Civ 1670.
- The Supreme Court overturned the decision. Barclays was not liable for the vicarious acts.

- **TAKEAWAY POINTS –**
    - Dr Bates not an employee of Barclays, he was not *"anything close to an employee"*: on the facts he was clearly an independent contractor. Barclays were therefore not vicariously liable for his actions.
    - Weight was placed on the facts that the doctor was free to refuse work, and that he had a number of other clients.
    - The doctor was held to be in the same legal position as the bank's independent auditors or window cleaners.
    - Whilst the law of vicarious liability has been expanded in recent years, it remains the case that the employer of an independent contractor is, in general, not liable for their torts.
    - The degree of 'control' is still an important factor in determining whether there is a relationship akin to employment.
    - The claimants argued that vicarious liability should therefore apply in respect of the wider statutory category of 'workers', who are not engaged under a contract of employment. The Supreme Court declined to rule that 'workers' were necessarily within the scope of vicarious liability as a matter of principle.

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