

EMPLOYERS' LIABILITY UPDATE



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39 ESSEX STREET

Enterprise & Regulatory Reform Act 2013, section 69

- A Game-changer
- Amends s.47 HSWA so that no breach of statutory duty is actionable unless Regulations so provide
- Even in the case of future express provisions, Regulations may provide for a defence to be available (s.47(2)(b) of HSWA as amended)

EFFECTIVE DATE

- ▣ Applies to all accidents that occurred on or since 1.10.13
- ▣ Criminal proceedings unaffected

EXCEPTIONS SO FAR

Narrow to
say the
least

HSWA 1974 (Civil
Liability) (Exceptions)
Regs 2013



Mothers & Expectant Mothers

- ▣ A woman who is compelled by her employer to work during the 2 weeks following giving birth and who can prove she has suffered actionable damage
- ▣ New & expectant mothers who suffer actionable damage as a result of breaches of ss.16-17A of the Management of Health & Safety at Work Regs 1999 (failure to carry out risk assessments & make particular arrangements for new & expectant mothers to protect their health & safety).

The Spotlight turns

▣ VICARIOUS
LIABILITY



Cox v Ministry of Justice

[2014] EWCA Civ 132

- ❑ Claimant was Catering Manager, HM Prison Swansea
- ❑ Supervising delivery of sacks of rice being carried by prisoners assigned to kitchen work
- ❑ Lift had broken down so C instructed prisoners to carry the sacks up the stairs to the kitchen
- ❑ A prisoner dropped one bag, which split. C instructed all prisoners to stop whilst rice cleared up. She kneeled down to support the remains of the split bag. Another prisoner named Inder disobeyed that instruction and carried on. He lost his balance as he passed by the kneeling C and one of the sacks he was carrying fell off his shoulder and landed on C's back.

Bases of C's claim

- By reason of the failure to keep the lift in proper repair, D was in breach of Reg 5 of Workplace (Health, Safety & Welfare) Regs 1992 and of Reg 5 of PUWER
- D in breach of its direct duty of care to C to provide her with a safe system of work, a safe place of work and safe staff and equipment.
- D was vicariously liable for the negligence of Inder.

First instance Judge's findings

- ▣ Rejected the breach of statutory duty claim. No appeal against that, so we don't know why. **But post 1.10.13, can't bring that claim anyway**
- ▣ Rejected claim based on direct duty of care on grounds of causation – no amount of training would have prevented Inder from ignoring an obvious risk and disobeying an express instruction. CA agreed with that. **Not unusual**
- ▣ Rejected vicarious liability claim. Inder not engaging in voluntary paid employment and his work was not furthering a business undertaking. Nature of D's control of instruction of prisoners totally different from control of employer over employee. CA disagreed. **C wins on this ground.**

Branching out of doctrine of vicarious liability

- ❑ Doctrine has come a long way since that described by Salmon on Torts, viz:
- ❑ A wrongful act is deemed to be done in the course of employment if it is either:
 - ❑ (a) a wrongful act authorised by the master; or
 - ❑ (b) a wrongful and unauthorised mode of doing some act authorised by the Master
- ❑ Driving force in the change has been the series of actions brought against bodies who run or control schools where staff sexually abused pupils

Two stage test (a “synthesis” between the two)

- ▣ Is the relationship between the primary wrongdoer and the person alleged to be liable capable of giving rise to vicarious liability?
- ▣ If so, whether D should be held vicariously liable is determined by whether the tort was so closely connected with that working relationship that it would be fair, just and reasonable to hold D vicariously liable (*Lister v Hesley Hall Ltd* [2002] 1 AC 215)

Relationship

- ▣ Provided that the tortfeasor was acting for the common purpose of the D body, the relationship between them is sufficient to satisfy Stage 1.
- ▣ If so, whether D should be held vicariously liable is determined by whether the tort was so closely connected with that working relationship that it would be fair, just and reasonable to hold D vicariously liable (*Lister v Hesley Hall Ltd* [2002] 1 AC 215)

“Control”

- ▣ *“The courts had, however, imperceptibly moved from using the test of control as determinative of the relationship of employer and employee to using it as the test of vicarious liability of a defendant”*
- ▣ *(Various Claimants v Catholic Child Welfare Society & ors [2013] 2 AC 1, per Lord Phillips)*

“Touchstones”

(in fact rationale not guidance)

- ❑ Employer more likely to have the means to compensate – likely to be insured
- ❑ Tort will have been committed as a result of activity being taken by the employee on behalf of the employer
- ❑ Employee’s activity is likely to be part of the business activity of the employer
- ❑ Employer, by employing the employee, will have created the risk in the first place
- ❑ Employee will have been under employer’s control to a greater or lesser degree

How far the doctrine has moved

- ▣ Now possible for unincorporated associations to be liable for the tortious acts of its members (In *CCWS*, the D Institute of Brothers simply nominated the headmaster and teachers for appointment by the diocesan authorities)
- ▣ Can be vicarious liability even though the tortfeasor's act involves a violation of a duty owed by the tortfeasor to the Defendant and even if the act in question is a criminal offence
- ▣ Is possible for 2 different defendants to be vicariously liable for the single tortious act of a tortfeasor (the employee on loan to another company – see ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2006] QB 510 (CA)**)

The new test in action

- ▣ *Cox v Ministry of Justice* [2014] EWCA Civ 132 (19.2.14) – touchstones satisfied
- ▣ *Mohammed v WM Morrison Supermarket* [2014] EWCA – customer subjected to physical assault by employee at petrol station kiosk. CA held mere fact that employee's duties included contact with a customer not sufficient. Must be some further factor, such as bouncer (*Mattis*) and rugby punch cases (*Gravel*) where there is an inherence of friction or confrontation

How far can vicarious liability go

- ❑ *E v English Province of Our Lady of Charity* [2013] 2 WLR 959 (CA)
- ❑ C claimed she had been systematically sexually abused by the parish priest whilst she was placed for 2 years in a RC children's home.
- ❑ Macduff J found the priest was not an employee of the D but was a holder of ecclesiastical office governed by canon law. D had no control over him and did not pay him anything (he lived entirely on offerings from local parishioners).
- ❑ CA reversed. Ward LJ referred to the CA judgment in *Viasystems* where "the actual contract of employment was treated as no more than an irrelevant distraction. Function triumphed over form".
- ❑ Vicarious liability should apply where "the tortfeasor bears sufficiently close resemblance and affinity in character to a true employee that justness and fairness dictates that end.

Independent contractors

- ▣ Supposed to be trite law that an employer is not vicariously liable for torts of their independent contractors.
- ▣ But if the law of vicarious liability is going in the direction of excising the need to ask whether there is a contract of employment or something at least akin to it and, instead, focusing on the substantive characteristics of a relationship, why should there not be vicarious liability for the tort of an independent contractor?
- ▣ Especially, when no breach of statutory duty claim.

Non-delegable duties

- ▣ *Woodland v Essex County Council* [2013] 3 WLR 1227 (SC)
- ▣ School pupil nearly drowned in a swimming pool and rendered severely brain damaged
- ▣ Pool run by another local authority and lesson was supervised by a teacher and lifeguard employed by a private company.
- ▣ D found liable by reason of owing C a non-delegable duty of care, having assumed responsibility for C's care within school hours. Fair, just and reasonable to hold D liable for injury caused by negligence of independent contractor.

Mesothelioma Act 1914

- Received Royal Assent on 30.1.14
- Provides for the establishment of the Diffuse Mesothelioma Scheme, whereby claimants, who cannot trace the workplace insurance policy of a past employer, are able to receive compensation if they were first diagnosed with diffuse mesothelioma on or after 25th July 2012
- Scheme is intended to begin making payments by summer 2014
- Under the Scheme, claimants will receive 75% of the compensation amount they would have been awarded by a court.
- Lord McKenzie has suggested the possibility of 100% payouts in the future as the number of claims levels off

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Employers' Liability Insurance Register

- ▣ Anyone carrying UK commercial lines EL insurance must register policies entered into or renewed after 1.4.12.
- ▣ Information to be registered:
 - ❖ Policy number, inception date and end date
 - ❖ Name, address, HMRC employer reference number, Companies House reference number of all employers covered by the policy
 - ❖ All names by which employer known
 - ❖ Name of original insurer – if policy transferred

Obvious risks

- ▣ Hardening of courts' attitude towards obvious risks
- ▣ Swimming pool cases (*Risk v Rose Bruford College*, *Cockbill v Riley*)
- ▣ *Johnson v Warburtons Ltd* [2014] EWCA Civ 258 (12.3.14)

D held not liable for injuries sustained by an employee when he slipped down some steps as he was leaving the cargo area of a lorry. Despite the fact that there was no purpose-build handrail attached to the steps, there had been no need for D to carry out a risk assessment or to provide training to its employees on how to use the steps because the need to take care was obvious.

Future fertile areas?

- ▣ “Chrono-chaos” caused by night work. Mistimed sleep leads to over 97% of rhythmic genes going out of sync.
- ▣ A study published by the Proceedings of the National Academy of Sciences found that employees who regularly carry out night work could cause long-term damage to their bodies.
- ▣ Similar studies have shown that shift workers getting too little sleep at the wrong time of the day may be increasing their risk of Type 2 diabetes and obesity. Other analyses have suggested that heart attacks are more common in night workers

In vogue areas

- ▣ Significant spike in noise induced hearing loss claims. Said to be the “new whiplash”
- ▣ “The lucrative area of noise-induced hearing loss has seen a significant spike in claims. This looks set to continue, and whilst repudiation rates are high, the sheer volume of claims presents significant challenges. A new battleground is forming”.