

The Supreme Court reconsiders employer's liability

02 MARCH 2016

Christina Morton

PROFESSIONAL SUPPORT LAWYER | UK

CATEGORY:

[ARTICLE](#)

The question of when an employer can be held liable for the acts of individuals who are working in its business or organisation has been vexing the courts for as long as employment relationships have existed. It has now been considered again by the Supreme Court in two cases, *Cox v Ministry of Justice* and *Mohamud v WM Morrison Supermarkets plc*. In both cases the Supreme Court has found the employers liable for the wrongdoing of workers.

The Court makes two main points:

- The type of relationship that can give rise to vicarious liability is widening, which is a reflection of the changing nature of contemporary working patterns;
- The circumstances in which employers can be held liable for the actions of their workers depends on whether there is connection between the worker's job and the wrongful conduct that is sufficiently close to make it just to hold the employer liable. This 'close connection' does not need to be replaced by a new test and on the facts of both these cases it was just to hold both employers liable.

Cox v Ministry of Justice concerned an incident in 2007. While working as the catering manager at HMP Swansea, Mrs Cox was injured in an accident caused by the negligence of a prisoner carrying out paid work under her supervision in the prison kitchen (the prisoner lost his balance and dropped a 25Kg sack of rice onto her back). She claimed that the Prison Service (and, by extension, the Ministry) were vicariously liable for the negligence of the prisoner. The Court of Appeal, overturning the decision of the judge, held that the Prison Service was vicariously liable.

The Ministry appealed to the Supreme Court, arguing that its relationship with the prisoner working in the prison kitchen was not one that justified imposing vicarious liability. The Supreme Court unanimously dismissed the appeal and held that the Ministry was liable, given all the circumstances in which the prisoners were doing the work. Prisoners working in kitchens are integrated into the operation of the prison. The activities assigned to them form an integral part of the activities the prison carries on in the furtherance of its aims, in particular the provision of meals to prisoners. The prison service places these prisoners in a position where there is a risk that they may commit negligent acts in carrying out their activities, which is recognised by the provision of health and safety training. The prisoners work under the direction of prison staff. Mrs Cox was injured as a result of a prisoner's negligence in carrying on activities assigned to him, and the prison service is therefore vicariously liable to her.

The Court referred to a set of factors that affect the question of whether it is just to impose vicariously liability whether or not the relationship is one of employer and employee in the conventional sense. These factors were set out in a previous Supreme Court decision arising out of sexual abuse of children by brother-teachers at a boys' school (*Catholic Child Welfare Society and others v Various Claimants and others*). They are:

- i. the fact that the employer is more likely to have the means to compensate the victim than the employee and can be expected to have liability insurance (although the Court thought this was not a significant factor)
- ii. the wrongdoing will have been committed as a result of activity being undertaken by the employee on behalf of the employer;
- iii. the employee's activity is likely to be part of the business activity of the employer;
- iv. the employer, by employing the employee to carry on the activity will have created the risk of the wrongdoing committed by the employee;
- v. the employee will, to a greater or lesser degree, have been under the control of the employer.

This final factor – control – no longer has the significance that it once did, according to the Court. The 'modern theory' is that a relationship other than one of employment can give rise to vicarious liability. It may do so where harm is done by an individual who carries on activities as an integral part of the employer's business for the employer's benefit and where the risk of potential harm arises because the employer has given the individual those activities to do. The key distinction is between this situation, in which the employer directs what the worker is to do and one in which activities are decided upon by an independent business either of the individual himself or of a third party.

Mohamud v WM Morrison Supermarkets plc concerned the test for vicarious liability of an employer for his employee's violence to a customer. Mr Mohamud stopped at a Morrisons petrol station. Having made an enquiry to a staff member, Mr Khan, about whether he could print some documents from a USB stick, he was subjected by Mr Khan to an unprovoked and violent assault. Mr Mohamud sued Morrisons, but the County Court and the Court of Appeal both held that Morrisons was not vicariously liable because Mr Khan's actions were outside the scope of his

employment.

Mr Mohamed appealed to the Supreme Court arguing that the 'close connection' test needed to be updated and replaced by one concerned with whether a worker is acting in a 'representative capacity'. The Supreme Court did not accept that the close connection test needed to be reconsidered, but held that on the facts of Mr Mohamud's case there was a close connection between the employment and the wrongdoing and it was just to hold Morrisons liable for Mr Khan's actions. Mr Khan was employed to attend to customers and answer their queries. The inexcusable way in which he went about acting towards Mr Mohamud was nevertheless within the field of activities that Morrisons had asked him to carry out. There was an unbroken sequence of events between Mr Mohamed's request for assistance and Mr Khan's assault on him. There was therefore on the facts a sufficiently close connection between the work Mr Khan was employed to do and his attack on Mr Mohamed.

Lessons for employers

These two decisions clarify and confirm existing principles rather than taking the law in a new direction. They therefore underline the need for high quality training, for not only for employees but for a wider group of workers for whose actions the employer might be vicariously liable. They also highlight the need for robust disciplinary sanctions for workers who depart from expected standards of conduct and competence.

The key message from the decision in *Cox* is that the Courts continue to show themselves to be willing to extend the reach of vicarious liability into relationships that would not fit the conventional 'employer-employee' mould.

Where individuals are doing what the employer has asked them to do but are left to their own devices in how they go about it, risk management becomes more complex. The Supreme Court recognised that even in employment relationships, employers often determine what is done, but not how it is done, but this limited control can be an even more marked feature of relationships with consultants, 'freelancers' and others who whilst not actually running their own businesses, have a relationship with the employer in which control plays a limited role.

Employers therefore need to think about how to impart good practice standards to their general workforce – not only those with conventional employment contracts.

Cox also raises interesting questions about where liability might lie if a contracted out workforce is integrated into a business and decisions as to what the worker does are a product of discussion between the client and the contractor. This is a matter that should be addressed in the contractual terms on which third parties are engaged.


Mohamed suggests that the Courts are increasingly reluctant to find that a worker who acts wrongfully during the course of work is 'on a frolic of his own' so that it would not be just to hold the employer liable. The Court of Appeal in *Mohamed* had in fact agreed with the trial judge by finding that Mr Khan's actions were so egregious and removed from anything that Morrisons could have authorised him to do, that it was not just to hold Morrisons liable. The Supreme Court, in overturning that decision, has returned to a test driven by public policy and the theory that those who stand to profit or benefit from their activities must also bear the risks associated with them.

Authors

Christina Morton

PROFESSIONAL SUPPORT LAWYER | LONDON

Employment

 +44 20 7597 6654

 christina.morton@withersworldwide.com