A fine line between genius and insanity

An update on breach of duty of care at common law

Steve Laing, Advocate

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Claimant suffered a head injury
- Attended A&E Department
- Busy night in A&E
- Receptionist told him he'd be seen in 4-5 hours (average waiting time for treatment)
- Should have told him that triage nurse would see him within 30 minutes
- Clinical guidelines - head injury patient should be assessed by a clinician within 15 minutes of arrival
- Experts accepted that 30 minutes would also be appropriate on busy night
- Left hospital after 19 minutes without treatment

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Had he realised that he would be seen by a triage nurse, he would have stayed
- Condition deteriorated at home
- Suffered a left hemiplegia, with long term problems
- Would have been prevented had he received prompt treatment
- Court of Appeal held that no breach of duty of care by failure to examine him within 15 or 19 minutes on a busy night in A&E when his presentation on arrival didn't merit priority triage

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Failure of A&E receptionist to give accurate information about waiting times?
- Court of Appeal also held (2:1) that no general duty on receptionists to keep patients informed about likely waiting times
- Nor fair, just and reasonable to impose a duty not to provide inaccurate information about waiting times
- Even if there was a duty to provide the information, the scope of the duty could not extend to liability for consequences of a patient alking out without telling staff he was about to leave

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Duty of care had been imposed on ambulance service after errors by telephone staff - Kent v Griffiths (No3) 2001 QB 36
- But A&E receptionists different from ambulance service telephonists
- Patients waiting for ambulances needed to decide whether to stay where they were or arrange own transport to hospital
- Ambulance service telephonist requires to pass on correct information
- A&E receptionist record details of new arrivals and pass on details to triage nurse

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- McCombe LJ dissenting
- Patients needed to know that initial assessments would occur sooner than average waiting time for treatment
- If hospital had a duty not to misinform patients, the duty was not removed by interposing non-medical reception staff as first point of contact

FB v Princess Alexandra Hospital NHS Trust 2017 EWCA Civ 334

- History taking is a basic skill that all hospital doctors expected to possess
- No difference in standard of care required of an A&E senior house officer as compared to a more senior doctor in the context of taking a patient history in A&E

Honeyman v Babcock Design & Technology Limited (11/1/17 ASPIC)

- Surveyor slipped and fell while descending internal staircase on a ship which he'd been surveying
- Handrail on left hand side only
- Argued that failure to provide a second handrail on right hand side caused his injuries
- Sheriff McGowan held that the law did not require employers to respond to apparent risks rather than real risks
- Evident that stair designed for one way traffic
- A person descending on the right hand side could easily hold onto the handrail on the left hand side
- Absence of handrail on right hand side was not a negligent omission

AB v Pro-Nation Limited 2016 EWHC 1022 (QB)

- Man leaving defendant's bar with group of friends after "6 or 7 drinks"
- 19th century building but staircase leading to street built in 2010
- Fell down staircase, resulting in serious brain injury
- No handrail on left side when descending Claimant's expert also argued that the design of the handrail on the right hand side didn't comply with Building Regulations or British Standards
- Defendant's expert argued that handrail on right hand side provided adequate grip

AB v Pro-Nation Limited
2016 EWHC 1022 (QB)

- Court held that handrails should be spaced away from the wall and rigidly supported in a way to avoid impeding finger grip
- Handrail fell well below standard of reasonable provision for a staircase built in 2010
- Particularly so in context of use of premises for consumption of alcohol, due to obvious increased risk of falling when users had been drinking
- Had there been an adequate handrail, claimant would have been able to steady himself

Brown v Abercorn Estates
2017 NIQB 5

- Claimant at birthday party at castle owned by defendant
- Castle hired out for functions
- Lost balance in dining room and dislodged antique vase from stand, causing it to fall and break
- She fell on broken pieces
- Court held that there was no foreseeable danger in a dining room accommodating 30 guests, many of whom had been drinking, of vase becoming detached from its stand
- No failure by defendant in not securing vase to its stand or weighting it down with suitable material or removing it

Burton v Butlins Skyline Ltd (6/12/16 Reigate County Court)

- Bar in holiday park
- Customer carrying tray of drinks
- Refused entry to VIP lounge by member of staff
- Walked away and bumped into claimant, dropping tray of drinks
- Head-butted claimant, then attacked him with glass wine bottle
- Defendant had “no glassware” policy due to risks of slips and trips
- but only covered drinking glasses, bottles of beers and alcopops (sold large numbers of them in a single night but only a few bottles of wine)

Burton v Butlins Skyline Ltd (6/12/16 Reigate County Court)

- Court held that too far-reaching to say breached duty of care by not banning wine bottles
- Precautions taken due to volumes of glasses and bottles of beer used
- Customer didn't present an immediate risk that he would carry out a violent act
- Not enough that speaking in an aggressive way and was drunk

"The law of vicarious liability is on the move….It has not yet come to a stop"

Cox v Ministry of Justice 2016 UKSC 10
per Lord Reed

Scope of vicarious liability? Dependant on answers to two questions

1. What sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual?

2. In what manner does the conduct of that individual have to be related to that relationship in order for vicarious liability to be imposed on that defendant?

Cox v Ministry of Justice 2016 UKSC 10

- A relationship could give rise to vicarious liability even in absence of a contract of employment

- Employer should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not

Cox v Ministry of Justice 2016 UKSC 10

- Need not be carrying on activities of a commercial nature where benefit derived from tortfeasor is in form of profit- eg "brothers" in school, local authorities, hospitals

- Sufficient for vicarious liability where Defendant is carrying on activities in "furtherance of its own interests"

- Individual must be carrying out activities assigned by Defendant as integral part of its operation and for its benefit

- Vicarious liability can arise in situations "akin to employment"

Lister v Hesley Hall Ltd
2001 1AC 215

Lord Clyde's guidance:-

1. a broad approach should be adopted; the context of the act complained of should be looked at and not just the act itself

2. time and place will always be relevant but may not be conclusive

3. the fact that the employment provides the opportunity for the act to occur at a particular time and place is not necessarily enough

Mattis v Pollock trading as Flamingos Nightclub
2003 EWCA Civ 887

- Unlicensed doorman at nightclub
- Defendant (nightclub owner) encouraged aggressive and intimidatory behaviour by doorman
- Violent incident occurred inside nightclub - doorman assaulted two customers; claimant tried to intervene

Mattis v Pollock trading as Flamingos Nightclub 2003 EWCA Civ 887

- Doorman fled club with group of customers in pursuit
- Claimant left club and met up with customers outside
- Several minutes later, doorman returned with a knife and stabbed claimant in back
- Claimant rendered paraplegic

Mattis v Pollock trading as Flamingos Nightclub 2003 EWCA Civ 887

- Incident had developed in stages

- But too narrow an approach to treat stabbing in isolation

- Doorman's behaviour had included an element of personal revenge

- But broad approach meant that defendant's responsibility for doorman's actions at time of stabbing was not extinguished

- vicariously liable

Vaickuviene v J Sainsbury plc 2013 CSIH 67

- Romasov (Lithuanian) employed as shelfstacker in supermarket
- Co-worker (McCulloch) frequently worked on same shift as deceased and made racist comments about him; Member of BNP
- Following arguments, attacked in supermarket aisle with knife
- Knife taken from shelf in kitchenware section
- Inflicted fatal stab wounds
- Action by relatives of Romasov

Vaickuviene v J Sainsbury plc 2013 CSIH 67

- Neither Defenders' retail business in general or their engagement of persons to stack shelves in particular carried any special or additional risk that persons so engaged (such as the deceased) would either be harassed or otherwise come to harm as a result of deliberate and violent actings of co-employees

- Mere bringing together of persons as employees not sufficient to impose vicarious liability

Vaickuviene v J Sainsbury plc 2013 CSIH 67

- Not just and reasonable for all employers to become vicariously liable for all acts of harassment solely on the basis of engagement

- Employer may be vicariously liable for harassment where an employee in a dominant role (eg supervisory role) harasses an inferior worker in an attempt to enhance productivity or enforce discipline

Somerville v Harsco Infrastructure Ltd
2015 SCEDIN 71

- Yard Manager had "a light-hearted exchange" with forklift driver about going to shop for rolls for morning break
- Manager responded to some comments - "I will teach you to speak to your manager like that"
- Threw a claw hammer towards forklift driver
- Pursuer 30 feet checking scaffolding boards
- Hammer hit Pursuer on head

Somerville v Harsco Infrastructure Ltd 2015 SCEDIN 71

- Manager did not intend to throw hammer at Pursuer nor attract his attention
- Throwing hammer was frolic and unconnected with what he was employed to do
- Unconnected with duty to instruct an employee about work of Defenders
- Not done as manager of the yard or its employees
- Consistent with assault on a fellow employee in course of a prank
- Not vicariously liable

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

- Claimant stopped at petrol station and asked employee at sales kiosk if he could print off documents from a USB stick
- Employee refused in an offensive manner
- Used racist, abusive and violent language and ordered claimant to leave
- Followed claimant to car and subjected him to a serious violent and unprovoked physical attack

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

- "Close connection" - two matters to consider:-

1. Broadly, what functions had been entrusted by employer to employee?

and

2. whether there was sufficient connection between employee's wrongful conduct and the position in which he was employed

- Did the assault fall "within the field of activities" assigned to employee?

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

- Not personal between them
- Seamless episode between response to initial inquiry of claimant and following onto forecourt
- Order to keep away from employer's premises which reinforced with violence
- Gross abuse of his position but sufficient connection with employer's business

Bellman v Northampton Recruitment Ltd
2016 EWHC 3104 (QB)

- Claimant was sales manager
- Company director (John Major) was longstanding friend of claimant
- Christmas party in golf club
- then onto a hotel for more drinks
- 3am argument about higher wages of new employee
- director hit claimant twice, knocking him to floor
- claimant sustained serious brain injury

Bellman v Northampton Recruitment Ltd
2016 EWHC 3104 (QB)

- Employer not liable for assault merely as it occurred during working hours

- Employer not free from liability simply because it occurred outwith normal working hours

- Question - Was there sufficient connection between position of employee and his wrongful conduct to make it right for employer to be liable under principle of social justice?

Bellman v Northampton Recruitment Ltd
2016 EWHC 3104 (QB)

- Broad approach
- Fact-specific evaluation
- Context and circumstances in which conduct occurred
- Time and place relevant but not conclusive
- Director's job to oversee smooth running of party
- But temporal and substantive difference between party at golf club and spontaneous drinks at hotel

Bellman v Northampton Recruitment Ltd
2016 EWHC 3104 (QB)

- Merely raising a work-related topic at a social event does not change interraction between colleagues into something in course of employment
- Any increased risk of confrontation arising from additional alcohol consumed in hotel too far removed from employment
- No objective observer would have seen connection between situation in hotel and the jobs of employees, notwithstanding fact that the conversation turned to work issues
- Employer not vicariously liable

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