Compass Chambers

So you won the case and now someone is trying to take that away

Where do you stand and what is the law?

Geoff J. Clarke QC

Compass Chambers

Introduction

- It is submitted that there are strong policy reasons of policy
- as to why appellate courts ought not to interfere with matters which are
- highly fact sensitive,
- that depend on impressions gleaned in the course of the proof and
- fall within the province of the proof judge

Compass Chambers

Lord Hope of Craighead in *Thomson v Kvaerner Govan Limited* 2004 SC (HL) para 7

- It can, of course, only be in the rarest of occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.

Compass Chambers

McGraddie v McGraddie 2015 SC (UKSC) 45

- Neuberger
- The reasons justifying that approach are not limited to the fact…. that the trial judge is in a privileged position to assess the credibility of witnesses' evidence.

Compass Chambers

Anderson v City of Bessemer, 470 U.S. (1985), pp.574—575

- The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility.

Compass Chambers

Anderson

- The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.

Compass Chambers

Anderson

- Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Compass Chambers

Anderson

- In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one;
- **requiring them to persuade three more judges at the appellate level is requiring too much.**

Compass Chambers

As the Court has stated in a different context -

- the trial on the merits should be ‘the “main event”
- rather than a “tryout on the road.”’

Compass Chambers

For these reasons -

- review of factual findings under the clearly erroneous standard
- is the rule, not the exception.

Compass Chambers

Anderson; **Canadian Supreme Court in Housen v Nikolaisen**

- **The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence.**
- **The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper**
- **than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.**

Compass Chambers

Lord Hoffman in *Piglowski v Piglowska* [1999] 1 WLR 1360

- **This is well understood on questions of credibility and findings of primary fact.**
- **But it goes further than that.**
- **It applies also to the judge's evaluation of those facts.**

Compass Chambers

Piglowski quoting Biogen Inc. v Medeva

- **The need … is based upon much more solid grounds than professional courtesy.**
- **It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement**
- **of the impression which was made upon him by the primary evidence.**

Compass Chambers

What does he mean?

- **His expressed findings are always surrounded by**
- **a penumbra of imprecision**
- **As to**
- **emphasis, relative weight, minor qualification and nuance**
- **of which time and language do not permit exact expression**

Compass Chambers

Stick with Hoffman

- **The second point follows from the first.**
- **The exigencies of daily court room life are such that**
- **reasons for judgment will always be capable of having been better expressed.**

Compass Chambers

Unreserved or ex tempore judgements

- Apply with caution to fuller opinions
- **These reasons should be read on the assumption**
- **unless he has demonstrated the contrary**
- **the judge knew how he should perform his functions and which matters he should take into account.**
- **An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.**

Compass Chambers

An awkward question from Lord Drummond Young

- But that is simply an example of Lord Hoffman's language cynicism
- He thinks no one can perfectly summarise evidence and its relative importance
- Many might think that is rather insulting to judges

Compass Chambers

A possible answer?

- There is no criticism of the judge's ability to express him or herself
- But that is clarity of expression of conclusion
- Not of analysis of evidence

Compass Chambers

Lord Reed in *Henderson v Foxworth Investments Limited* 2014 SC (UKSC) 203

- there may be some value in considering the meaning of [plainly wrong]
- The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion
- What matters is whether the decision under appeal is one that no reasonable judge could have reached

Compass Chambers

Carloway S v S

- The court does not understand Lord Reed to be seeking to depart from the familiar and long-settled approach of the Scottish courts hitherto in appeals on matters of fact. Although some of the wording (*supra* , para 62) might, if looked at in isolation, be taken to suggest an approach redolent of the high test applicable in cases of judicial review

Compass Chambers

S v S

- In an appeal which seeks to challenge findings in fact, an appellate court must have due regard to the limitations of an appeal process, with its '[narrow focus] on particular issues as opposed to viewing the case as a whole
- When considering reversing a first instance judge's findings in fact, therefore the appellate court should confine itself to situations where it can categorise the findings as incapable of being reasonably explained or
- Mere disagreement with the findings at first instance will not suffice.

Compass Chambers

Housen v Nikolaisen [2002] 2 RCS 235

- the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses
- this is not the only area where the trial judge has an advantage over appellate judges

Compass Chambers

Housen

- factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence
- inimitable familiarity with the often vast quantities of evidence
- the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact
- [There are] compelling policy reasons supporting a deferential approach to inferences of fact

Compass Chambers

Have the Scottish Courts learned this?

- In Wagner v Grant
- There is a cryptic reference,
- as well as the three learned articles on the function of an appellate court in 2015 SLT

Compass Chambers

Remember Piglowski?

- **An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.**
- In Wagner -
- The Lord Ordinary rejected a submission that Contributory negligence should be less than he awarded in a previous similar case
- He did not record that he rejected the submission that it should be much higher
- The Division held this was an error and so interfered with the proportoinal split

Compass Chambers

What can you do if this happens?

- Some reason to think that the Supreme Court consider interference with factual findings to be an error which it is in the public interest to sort out
- Expense
- Only way to avoid an appeal
- Is to settle

Compass Chambers

Contact

Compass Chambers
Parliament House
Edinburgh
EH1 1RF
DX 549302, Edinburgh 36
LP 3, Edinburgh 10
www.compasschambers.com

Geoff Clarke QC
Mobile: 07768 377988
Geoff.clarke@compasschambers.com

Gavin Herd
Practice Manager
Phone: 0131 260 5648
Fax: 0131 225 3642
gavin.herd@compasschambers.com

Frolics and detours of both judges and servants - Part II - a vicarious liability update

Compass Chambers

Geoff Clarke QC &
Steve Laing, Advocate

"Origins of the doctrine of vicarious liability are obscure, its basis uncertain"

Wilson v Exel UK Ltd 2010 CSIH 35 per Lord President

Baird v Hamilton (1826) 4S 790
per Lord Robertson (at p799)

"It is necessary for the safety of the lieges that masters should be bound to employ servants of such character as will conduct their carts with safety to the public"

"The law of vicarious liability is on the move"

Cox v Ministry of Justice 2016 UKSC 10 per Lord Reed

Traditionally, test for vicarious liability :-

- *Salmond on Law of Torts (1907)* - a wrongful act done "in the course of employment" by the servant if "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by that master"

Lister v Hesley Hall Ltd
2001 1AC 215

- Sexual offences of warden at school boarding house
- Fair and just to hold those running the school to be vicariously liable for his actions
- “Close connection” with the job

Lister v Hesley Hall Ltd
2001 1AC 215

- 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?

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

Cox v Ministry of Justice 2016 UKSC 10

- Catering manager in prison
- Prisoners on prison service pay
- Bag of rice spilled
- Instructed prisoners to stop work until rice cleared
- One prisoner ignored instructions and attempted to get past
- Dropped a heavy bag of rice on her back

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

- Fair, just and reasonable to impose vicarious liability

- Akin to employment

Ward v Scotrail Railways Ltd 1999 SC 255

- Pursuer was a train ticket inspector
- Suffered sexual harassment by another employee (Kelly) working at the same station
- Kelly made Pursuer aware that he was tracking her daily train route, staring at her and swapping shifts so as to work alongside her
- Not acting in course of his employment but unrelated, independent venture motivated by personal emotions

Wilson v Exel UK Ltd t/a Exel 2010 CSIH 35

- Supervisor pulled ponytail of another employee and made a “ribald” remark
- Not suggested on averment that the employee’s conduct was in any way connected with performance of his assigned work as supervisor nor with his responsibility for health and safety
- Not “sufficiently close connection” with supervisor’s employment as to mean employer vicariously liable
- Supervisor was on a “frolic” of his own

Weddall v Barchester Healthcare; Wallbank v Wallbank Fox Designs Ltd 2012 EWCA Civ 25

Appeal One

- Deputy manager of care home (Weddall) asked employee (Marsh) to carry out additional shift
- Marsh refused; cycled to care home in drunken state and attacked Weddall
- Spontaneous criminal act of a drunken man who was off duty
- No vicarious liability

Weddall v Barchester Healthcare; Wallbank v Wallbank Fox Designs Ltd 2012 EWCA Civ 25

Appeal Two

- Managing director of small company (Wallbank) gave routine instruction to an employee (Brown)
- Claimant assaulted by Brown
- Tort flowed from superior employee giving instructions
- Vicarious liability

Weddall v Barchester Healthcare; Wallbank v Wallbank Fox Designs Ltd 2012 EWCA Civ 25

- Irony that outrageousness of Marsh's conduct deprives Weddall of a remedy against employer
- Vicarious liability is policy based - keep within limits
- Possibility of friction is inherent in any employment relationship Risk of an over-robust reaction to an instruction is a risk created by the employment
- May be reasonably incidental to the employment rather than unrelated to or independent of it

Vaickuviene v J Sainsbury plc 2013 CSIH 67

- Relatives of deceased murdered by a co-employee (McCulloch)
- McCulloch frequently worked on same shift as deceased and made racist comments about him
- Following arguments, attacked in supermarket aisle with knife taken from shelf in kitchenware section

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

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

GB v Stoke City Football Club Ltd 2015 EWHC 2862 (QB)

- Claimant was former apprentice footballer
- Subjected to practice known as “gloving” by a professional footballer
- Commonly used on apprentices as form of punishment for failing to perform menial tasks (eg cleaning the kit)
- A gloved finger covered in hot ointment and inserted into the rectum

GB v Stoke City Football Club Ltd 2015 EWHC 2862 (QB)

- Professional footballer had no express or implied power or duty conferred upon him by the club to discipline or chastise the apprentices

- In absence of formal duties or powers conferred on professional players in relation to the apprentices, alleged incidents were deliberate and intentional or reckless conduct involving a serious assault outside the course of the employment relationship

Graham v Commercial Bodyworks Ltd 2015 EWCA Civ 47

- Two employees in car body repair shop required to use highly inflammable thinning agent

- One employee deliberately lit a cigarette lighter in vicinity of claimant causing serious burning injuries

- Employers created a risk by requiring employees to work with thinning agent

- But action of employee did not further employer's aims; no friction inherent in employer's enterprise

- Not vicariously liable for the frolicsome but reckless conduct

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 by forklift driver with "I will teach you to speak to your manager like that"
- Threw a claw hammer towards forklift driver
- Pursuer was 30 feet checking scaffolding boards
- Hammer hit Pursuer on head
- Manager did not intend to throw hammer at Pursuer nor attract his attention

Somerville v Harsco Infrastructure Ltd
2015 SCEDIN 71

- 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

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 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

- Seamless episode between response to initial inquiry of claimant and following onto forecourt with order never to return which reinforced with violence

- Gross abuse of his position but sufficient connection with employer's business

Geoff Clarke QC
Compass Chambers
email: geoff.clarke@compasschambers.com

Steve Laing, Advocate
Compass Chambers
Email: steve.laing@compasschambers.com