Vicarious Liability

Chell v Tarmac Cement and Lime Limited [2022] EWCA Civ 7

An update in relation to the above case reported in the July 2022 update.

Issues:

In September 2022, the Supreme Court refused the Claimant permission to appeal. The case related to the question of the extent of vicarious liability of an employer for personal injuries sustained following the Defendant's employee performing a dangerous practical joke which injured the Claimant.

The Supreme Court's refusal therefore confirms the narrow scope of establishing vicarious liability for employers in relation to "horseplay" incidents by their employees. It affirms the need for foreseeability in relation to such incidents to be able to hold the employer vicariously liable.

Therefore, there remain circumstances where an employee carries out an unauthorised and unforeseeable act causing harm to another for which the employer will not be directly liable.

Negligence – assumption of responsibility - statutory duty

HXA v Surrey CC; YXA v Wolverhampton City Council [2022] EWCA Civ 1196

Facts:

Claimants HXA & YXA had been subjected to abuse and neglect as children whilst living with their families whilst the social services departments of the Defendant local authorities had oversight.

Claimant HXA was listed on the Defendant local authority's child protection register and the Defendant's social services team had undertaken 5 investigations under s.47 Children Act 1989; H remained living with her family despite concerns about sexual abuse from her mother's partner.

Claimant YXA was supported by the Defendant local authority under s.20 Children Act 1989 (voluntary accommodation) where he lived with his family but spent periods of time in respite foster care, eventually being permanently accommodated away from his family, and following a final care order, he remained in long-term foster care.

The Claimants argued that the Defendant local authorities (and the social workers for whom they were vicariously liable) had assumed responsibility for their welfare by providing child protection services, so owed them a duty of care at common law. At first instance their claims were struck out and the Claimants appealed, first to the High Court where Stacey J upheld the strike out decisions, then to the Court of Appeal.

Issues:

The Claimants were successful on appeal in overturning the decisions to strike out their claims. This was not a decision on the merits, and both cases would therefore proceed to trial. This is a case emphasising the need for caution in striking out cases where the law is evolving and highlights this changing area of the law.

Baker LJ confirmed that this was an emerging area of law, and a duty of care *might* arise in relation to looked-after children to whom statutory duties were owed under s.22 Children Act 1989. This duty *might* arise during periods which extend beyond the specified period when a child is accommodated away from their family (paragraph 94).

Another circumstance in which a duty of care *may* arise is where a local authority, acting in accordance with its statutory or regulatory duty has taken, or resolves to take, a specific step to safeguard or promote a child's welfare, which amounts to an assumption of responsibility for the child (paragraph 96).

Baker LJ is clear in his judgment that the question of whether a duty has arisen will depend upon the specific facts of the case, and even where there is a duty, the Claimant must then establish a breach of that duty and that the breach has caused damage. He emphasised that this is a high hurdle.

He urges caution in relation to cases of assumption of responsibility, indicating that this area of law is evolving and the line for establishing the duty of care has not yet been clearly drawn and requires, *"careful and incremental development of principles through decisions reached after full trials on the evidence"* (paragraph 105).

Vicarious Liability

MXX v A Secondary School [2022] EWHC 2207 (QB).

Facts:

The Claimant was a 13-year-old pupil at the Defendant's co-educational secondary school. PXM, a former pupil then aged 18, undertook a work experience placement at the school as he hoped to qualify as a PE teacher.

It was agreed that PXM had committed sexual assaults (torts of assault and battery) against the Claimant, all of which occurred after the work experience placement had ended.

Issues:

The question for the Court was whether the Defendant was vicariously liable for PXM's actions. It is a useful illustration of how the Courts consider Lord Phillips' 2-stage test for vicarious liability from *The Catholic Child Welfare Society v Various Claimants & the Institution of the Brothers of the Christian Schools* [2012] UKSC 56, as refined by the Supreme Court in a number of subsequent cases.

Stage One – Was the relationship between the Defendant and PXM capable of giving rise to vicarious liability?

PXM was not an employee or independent contractor, so HHJ Carmel Wall (sitting as a High Court judge) considered whether the relationship was one that was, "akin to employment". She considered the "5 incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a Defendant" from *Catholic Child Welfare Society* concluding that it would be artificial to describe PXM as performing a teaching role and he had no independent responsibility for any aspect of the Defendant's undertaking, so it would not be fair, just and reasonable to impose liability.

Stage Two – "close connection test"

The judge also considered the close connection test (approved in *Mohamud v Wm Morrison Supermarkets PLC* [2016] UKSC 12) and rejected the argument that there could be a close connection in this case, on the basis that no wrongdoing occurred during the period where PXM was undertaking work experience with the Defendant. On the facts, the tortious behaviour did not begin until many weeks after. Analysing the nature of PXM's role, she concluded that, *"the most that can be said about the relationship between the Defendant and PXM was that it provided an opportunity for PXM to meet the Claimant. That is not sufficient for the second stage of the test."* (paragraph 243).

As a result, this case, whilst an interesting example of the application of the 2-stage test, does not expand the vicarious liability of employers to the acts of those undertaking work experience placements when the tortious acts take place after the work experience placement has finished.

Trespass / Nuisance / Right to Protest

High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)

Facts:

The Claimant is responsible for the construction of the government-funded project HS2 (High Speed Two), a high-speed railway line between London and the North of England. The Claimant had been given wide powers, by a legislative scheme, to acquire and take temporary possession of land in order to construct and maintain the line. The Claimant brought a claim to prevent protesters from trespassing on the HS2 land and causing a nuisance by obstructing roads and disrupting the ongoing construction work, including by creating and occupying tunnels beneath the ground.

The Claimant sought an injunction to apply along the full length of the HS2 route, to prevent named and unnamed Defendants from:

- entering the land,
- obstructing or interfering with vehicles entering or leaving the land and
- from interfering with perimeter fencing or gates.

Issues:

The High Court held that damages would be inadequate as a remedy, and the balance of convenience favoured making a proportionate injunction preventing deliberate obstruction and interference.

Trespass and Nuisance

Julian Knowles J held that the Claimant had sufficient title to the HS2 land, in order to sue for trespass, even though it may be based upon temporary statutory powers of possession. It did not matter that the Claimant had yet to take possession of some of the sites on the route, as actual occupation was not required, the Claimant merely had to establish that they had a better right to possession than the protestors; *Manchester Airport plc v Dutton* [2000] QB 133.

The judge held that there was plentiful evidence of trespass and that the unlawful interference with the Claimant's right of access to its land via the public highway can be a private nuisance, where that land adjoins a public highway; *Cuadrilla Bowland Ltd. V Persons Unknown* [2020] 4 WLR 29.

ECHR Rights – Articles 10 & 11 ECHR

Knowles J affirmed the importance of the right to peaceful and lawful protest as guaranteed by Articles 10 & 11 of the ECHR and the HRA 1998. He considered the *Zeigler* questions (from *DPP v Ziegler* [2021] UKSC 23) and concluded that there would be no unlawful interference with those rights by an injunction because:

a) there is no right to protest on private land; and
b) there is no right to cause the type and level of disruption which would be restrained by the order; and

c) the interference with any protest that takes place on the public highway or other public land, would be proportionate.

The injunction would be an interference by a public authority with those rights, but that interference is prescribed by law and would be proportionate and in pursuit of a legitimate aim to enable the construction of a national infrastructure project which Parliament deemed to be in the public interest.

Precautionary Injunction – including against persons unknown

The Claimant had satisfied the requirement that there was an imminent and real risk of the trespass and nuisance continuing, unless restrained by way of injunction. The Court has the power to make such an injunction against persons unknown in accordance with the principles in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303. This group of protestors was evolving and fluctuating, and the group of Defendants impacted was defined by reference to the forms of activity to be restrained, which were sufficiently narrow to avoid impact on innocent or inadvertent trespassers.

Defamation - Defences

Riley v Murray [2022] EWCA Civ 1146

Facts:

The Claimant brought a libel action and was awarded £10,000 damages at trial, in respect of a tweet posted by the Defendant which alleged that the Claimant had stated that former Labour party leader Jeremy Corbyn deserved to be violently attacked, denounced her as dangerous and suggested that others should never engage with her.

The context of this claim is that the Claimant posted what came to be known as the "Good Advice Tweet (GAT)", which was viewed 1.5 million times (it can be found annexed to the Court of Appeal's judgment):

It was to this tweet that the Defendant responded with what was termed "the Reply Tweet" which included the text of the Good Advice Tweet (this reply was not the basis of the libel claim):

> *"You are publicly encouraging violent attacks against a man who is already a target for death threats. Please think for a second about what a dangerous and unhealthy role you are now choosing to play in public life."*

She then posted a further tweet (which did not reply or quote the GAT) which was the basis of the Claimant's libel claim:

> *"Today Jeremy Corbyn went to his local mosque for Visit My Mosque Day, and was attacked by a Brexiteer. Rachel Riley tweets that Corbyn deserves to be violently attacked because he is a Nazi. This woman is as dangerous as she is stupid. Nobody should engage with her. Ever."*

Nicklin J determined that the single natural and ordinary meaning (from *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB)) of the Defendant's Tweet was that:

1) Jeremy Corbyn had been attacked when he visited a mosque
2) The Claimant had publicly stated in a tweet that he deserved to be violently attacked.
3) By so doing, the Claimant has shown herself to be a dangerous and stupid person who risked inciting unlawful violence. People should not engage with her.

Nicklin J held that points 1 and 2 are statements of fact ("the Factual Allegation"), whereas point 3 is an expression of opinion ("the Opinion") and that points 2 and 3 were defamatory (paragraph 13).

Nicklin J rejected the defences of truth (s.2 Defamation Act 2013), honest opinion (s.3) and publication on a matter of public interest (s.4).

The Defendant appealed this decision.

Issues:

The Court of Appeal considered in depth the 3 defences in this case, and ultimately dismissed the appeal.

Truth - s.2 Defamation Act 2013:

In relation to the defence of truth, Nicklin J had found that the Good Advice Tweet was ambiguous, and Warby LJ in the Court of Appeal proceeded on the basis that this was correct but confirmed that this ambiguity did not make the Defendant's tweet substantially true. *"When deciding whether the Factual Allegation is **substantially** true, the fact that the GAT could be taken to imply such a meaning is relevant but not conclusive."* (paragraph 37).

Honest opinion - s.3 Defamation Act 2013:

The Court of Appeal accepted that the Defendant could establish the first 2 conditions of the defence of honest opinion, that the statement was one of opinion under s.3(2) Defamation Act 2013 and that the basis of the opinion was indicated under s.3(3) Defamation Act 2013. The third condition of objective honesty under s.3(4) failed. This was because the opinion was expressly based upon the truth of the Factual Allegation, so when that failed to meet the defence of truth, the honest opinion defence also failed.

As Warby LJ summarised, *"It has long been the law that a defamatory opinion cannot be defended if it expressly stated a basis which was wholly untrue."* (paragraph 61).

Publication on matter of public interest - s.4 Defamation Act 2013:

Again, the Court considered the elements of the defence. The Court of Appeal agreed with Nicklin J at first instance, that the Defendant's tweet was on a matter of public interest (s.4(1)(a) Defamation Act 2013), it was about, *"the conduct of the claimant, a well-known celebrity and political activist, in publishing to her hundreds of thousands of followers a provocative tweet relating to matters of political significance…"* (paragraph 74).

The Court of Appeal upheld Nicklin J's ruling that the Defendant's belief, though honest, was unreasonable. Warby LJ reiterated that, *"although the Defendant reasonably believed the GAT to convey the Factual Allegation, it was nevertheless unreasonable for her to believe that it was in the public interest to say what she did…".* (paragraph 76). This conclusion was based upon the judgment that it was unreasonable for the Defendant to characterise the GAT as she did, given that it should have been apparent to her that there was a different and much less damaging interpretation of it available.

Defamation – Serious Harm & Public Interest Defence

Banks v Cadwalladr [2022] EWHC 1417 (QB).

Facts:

The Claimant is a businessman and founder of Leave.EU a pro-Brexit group. The Defendant is a freelance journalist who alleged that the Claimant had lied about his relationship with the Russian government, this allegation being made within a TED Talk and on Twitter in a tweet with a link to that talk. The Defendant had 311,000 followers on Twitter.

The statements made were:

- TED Talk: *"And I am not even going to go into the lies that Arron Banks has told about his covert relationship with the Russian Government."*
- Tweet (with hyperlink to the TED Talk): *"Oh Arron. This is too tragic. Nigel Farage's secret funder Arron Banks has sent me a pre-action letter this morning; he's suing me over this TED talk. If you haven't watched it please do. I say he lied about his contact with Russian govt. Because he did."*

The Claimant brought a claim in defamation, alleging that the statements were false and defamatory, seeking damages and an injunction to stop ongoing publication.

A preliminary issues trial before Saini J (reported in *Banks v Cadwalladr* [2019] EWHC 3451 (QB)) found that the single meaning of the publications was that,

> *"On more than one occasion Mr Banks told untruths about a secret relationship he had with the Russian government in relation to acceptance of foreign funding of electoral campaigns in breach of the law on such funding"*.

The Defendant did not put forward a defence of truth but argued that she had a defence of publication in a matter of public interest and labelled this claim a SLAPP suit (SLAPP is a Strategic Lawsuit Against Public Participation) designed to silence and intimidate her.

Issues:

The Honourable Mrs Justice Steyn DBE found in favour of the Defendant, although determined that this was not a SLAPP suit as the Defendant had no defence of truth and the public interest defence only succeeded in part.

Public interest defence - s.4 Defamation Act 2013:

The Defendant was able to successfully make out her defence of publication in a matter of public interest in relation to the original publication of the TED talk in April 2019. However, from April 2020, there was a significant change of circumstances following a "Joint Statement" from the Claimant and the Electoral Commission in which the Commission confirmed it found no evidence of the Claimant committing any criminal offences or receiving third party funding. The Court decided that once that statement had been made the public interest defence no longer applied.

Serious harm requirement – s.1 Defamation Act 2013:

The Claimant must establish that the publications would cause or be likely to cause "serious harm" to his reputation. There was negligible evidence of adverse impact on the Claimant's reputation and business prospects, so his case focused upon drawing inferences from the extent and scale of publication and the seriousness of the imputation of the allegations.

TED Talk:

Steyn J accepted that given the extent of the publication, the gravity of the meaning and the credibility of the Defendant and the TED Talk, it could be inferred that the Defendant's reputation would be lowered in the eyes of a, *"sizeable number of people"* (paragraph 86).

However, the public interest defence applied initially, meaning that the claim prior to April 2020 failed. After the publication of the Joint Statement, although the public interest defence was not effective, Steyn J took an unusual approach, considering all views prior to the Joint Statement as one assessment, and all subsequent views as a separate assessment. This moved away from the Courts' usual approach to consider each view on the internet of a video or tweet as constituting a separate publication, then looking at the aggregate impact of all the views. Steyn J decided that the serious harm threshold, whilst crossed for the first period prior to the Joint Statement, had not been crossed after that statement for the continuing publication as viewing figures had peaked and were at that point at one tenth of the previous level.

Tweet:

Steyn J accepted that the gravity of the imputation was the same as for the TED talk, however she inferred that the publication was to the Defendant's 311,000 followers on Twitter and that access to it will have peaked at or shortly after its initial publication, so there was no probability of future harm. On the question of whether it had caused serious harm, her inference was that the publication of the tweet was primarily to, *"persons within (the Defendant's) own echo chamber"* and likely to consist of, *"people whose opinion of the claimant was of no consequence to him"* (paragraph 93), and so serious harm was not established.

Publication	Serious Harm Threshold crossed?	Public Interest Defence applies?	Defamatory?
TED Talk: 15th April 2019 to 29th April 2020	Yes – inferred from combination of gravity of imputation and extent of publication	Yes	Yes – but with a good defence
TED Talk: continuing publication after 29th April 2020	No – inferred that extent of publication had diminished, gravity of imputation was unchanged	No (after Joint Statement)	No
Tweet: 24th June 2019	No – gravity of imputation was unchanged, no serious harm due to nature of viewers of the publication	No	No

Defences – Illegality/Ex Turpi Causa Non Oritur Actio

Lewis-Ranwell v G4S Health Services (UK) Ltd & Ors [2022] EWHC 1213 (QB).

Facts:

The Claimant killed 3 men whilst suffering from delusional beliefs and was acquitted of murder by reason of insanity. The jury's verdict was that he knew the nature and quality of his actions when he killed the men but did not know that his actions were unlawful. The Court made a hospital order, and he was detained.

The Claimant sought damages from G4S, an NHS trust, police and county council for negligence in their treatment of him. The Defendants sought to strike out these claims on the grounds of illegality.

Issues:

Garnham J rejected the application to strike out, as a verdict of not guilty by reason of insanity is a verdict that the Defendant is not guilty of the criminal offence charged, so was not criminally responsible for the deaths of the 3 men. Therefore, whilst the Defendants could show that the Claimant acted deliberately, there was no criminal responsibility so the Defendants could not point to, *"…a turpidinous act, an act of knowing wrongfulness"* (paragraph 135).

Whilst it would be possible for the illegality defence to apply in situations where there was no criminal responsibility, there would need to be *"…quasi-criminality, conduct that raises similar public interest objections to those prompted by criminality"* (paragraph 134). The law is not condoning wrongdoing, because the insanity verdict of the jury showed that there was none.

The Court highlighted that permitting this claim would not involve the Claimant profiting from his own wrongdoing, which is the policy basis of the defence of illegality, this is because the jury's verdict of not guilty by reason of insanity means that there was no wrongdoing. Referring to Lord Hoffman's speech in *Gray v Thames Trains* [2009] 3 WLR 167, Garnham J considered whether the claim would offend public notions of the fair distribution of resources, but noted that what would be potentially offensive would be compensating the Claimant for the consequences of his own criminal conduct. In this case the Claimant has been found not guilty of any criminal conduct and bore no responsibility for his action, so no offence could be caused.