

Vicarious Liability for Intentional Wrongful Acts

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Prince Alfred College Incorporated v ADC [2016] HCA 37

Summary

In *Prince Alfred College Incorporated v ADC* the High Court, in a decision handed down on 5 October 2016, considered whether a general principle or approach for determining whether an employer is vicariously liable in cases involving intentional wrongdoing could now be established, following the divergent approaches suggested 13 years ago by the former members of the court in *New South Wales v Lepore*.

In developing a new approach, the High Court again returned to the guidance offered in the seminal 1949 High Court case of *Deatons Pty Ltd v Flew*. The new approach requires us to consider any special role assigned to the employee and the position in which the employee is thereby placed in relation to the victim before determining whether the apparent performance of such a role gave rise to the occasion for the wrongful act. In that analysis particular features of the role may be taken into account, including authority, trust, power, control and the ability to achieve intimacy with the victim.

Facts

The plaintiff was a 12-year-old boarder at Prince Alfred College in 1962 when he was repeatedly sexually abused by a housemaster. He claimed damages on the basis that he was suffering PTSD.

He was the respondent on the appeal to the High Court following a decision by the Supreme Court of South Australia to grant him an extension of time under the statute of limitations.

Decision

The College succeeded in its appeal to the High Court, where it was held that the Supreme Court had erred in granting the extension of time. The reasoning for this finding turned on the particular circumstances of the case and depended in part on the trial judge finding real deficiencies in the available evidence because of the effluxion of time, particularly the evidence concerning the role the College had conferred on the housemaster.

The more interesting aspect of the case is the High Court's consideration of vicarious liability, which it dealt with in relation to the question of extension of time. The availability of an extension of time depended in part upon whether a fair trial would now be possible, so many years having passed since the relevant events, and it was necessary to examine the law of vicarious liability to define the issues that would arise at trial.

Vicarious Liability

The first parameter mentioned in any discussion of vicarious liability is the requirement that the relevant act of the employee is one committed in the course or scope of employment. The High Court observed in this regard that while it 'remains a touchstone for liability', this requirement raises its own questions – 'it is to some extent conclusionary and offers little guidance as to how to approach novel cases'¹.

There was also some discussion in the High Court of the way the UK and Canadian courts have approached the subject. There was criticism in this regard of a tendency to apply a "fair and just" measure in an examination of whether there was a sufficient connection between the employee's tort and his employment.

The High Court in the majority judgment in the present case drew guidance from *Deatons Pty Ltd v Flew* and the judgment of Gleeson CJ in *New South Wales v Lepore* [2003] HCA 4 and developed an approach for

determining whether intentional wrongdoing by an employee will result in a finding of vicarious liability – the relevant passage from the judgment is as follows²:

...as Gleeson CJ identified in *New South Wales v Lepore* and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim. (citation removed)

81. Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.

In their separate, joint reasons for dismissing the appeal, Gageler and Gordon JJ, observed that the above approach drew heavily from the various factors identified in the UK and Canadian cases involving sexual abuse of children. Their Honours did not endorse the new approach and cautioned that 'decisions concerning vicarious liability for intentional wrongdoing are particularly fact specific.'³ Their Honours also cautioned that while the new approach is authoritative and will now be applied in Australia, it 'does not mark out the exact boundaries of any principle of vicarious liability'.⁴

Implications

Disputes involving injury, loss or damage caused not by an employer's negligent conduct but by the wrongdoing of an employee are common. Cases involving assault on patrons on or around licensed premises are particularly common. The employer may be held vicariously liable in such cases where the longstanding principles of vicarious liability require us to ask whether the employee's act (a)

is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer.

The bouncer cases regularly fall into the latter category. Such cases exemplify that even where unauthorised acts are committed, an employer might be held vicariously liable if the unauthorised acts are so connected with authorised acts that they may be regarded as modes, although improper modes, of doing them.

The more difficult cases involving the prospect of a finding of vicarious liability are generally those in which the injury, loss or damage was caused by an intentional, criminal act of the employee. Apart from personal attacks on a victim there are situations involving property crime, such as theft and arson. The common law has to date struggled to produce the principles by which such cases can be determined objectively and predictably.

As a result of this decision of the High Court we now have an approach by which these more difficult or novel cases can be determined. In short, we are to examine the features of the employment role with a focus on authority, trust, power, control and intimacy and consider whether the employee was placed vis-à-vis the victim to exercise or take advantage of the role to give rise to the occasion for the commission of the wrongful act.

¹ Joint judgment of French CJ, Kiefel, Bell, Keane and Nettle JJ at [41].

² Joint judgment of French CJ, Kiefel, Bell, Keane and Nettle JJ at [80] – [81].

³ Joint judgment of Gageler and Gordon JJ at [128].

⁴ Joint judgment of Gageler and Gordon JJ at [131].

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