"You're only supposed to blow the bloody doors off!"

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Abstract

Many employees are authorised to use physical force. Some use force without permission. Alex Glassbrook examines employers' vicarious liability for the torts of violent employees. *AG*

Introduction

The title of this article (to remind those of us for whom Sunday afternoon television is but a distant, happy memory) comes from *The Italian Job*, the cosily-jingoistic 1969 film in which a loveable bunch of English thieves rob a gold bullion convoy in grid-locked Turin under cover of an England v Italy international football match. Amongst the many wonderful aspects of the film[2] is the scene in which the gang's explosives "experts", under the supervision of ringleader Charlie Croker (Michael Caine), practise the removal of the armoured van's doors and, in their zeal, accidentally blow the entire van to pieces.

The legal liability of kingpin Mr Bridger for the destruction wreaked by Charlie and his acolytes must remain the subject for another, more entertaining article than this. The legal responsibility of more conventional employers for the violent actions of their employees is a real and serious issue. Following the House of Lords' leading judgments on vicarious liability in *Lister v Hesley Hall Ltd*[3] and *Dubai Aluminium Co Ltd v Salaam*,[4] the courts have on several occasions dealt with vicarious liability for the actions of violent employees.

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[2] My favourite is the anecdote, hopefully true, that the Italian car company Fiat gave permission for the filmmakers to use its roof-top test track during part of the long car-chase scene, under the impression that this would provide good publicity for Fiat. When released, the film showed Italian police Fiats repeatedly stuttering to a halt as British Minis leapt over roofs, tore down stone steps and traversed a weir.

[3] [2001] 1 A.C. 215.

[4] [2003] 2 A.C. 366.

Vicarious liability—a reminder

The judgments in *Lister* and *Dubai Aluminium* entrenched the following principles.

Vicarious liability is a species of strict liability. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee.[5] It is no answer to a claim against an employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of the employer's duty.[6]

A wrongful act is deemed to be done by an employee in the course of his employment if it is either:

- a wrongful act authorised by the master; or
- a wrongful and unauthorised mode of doing some act authorised by the master. A master is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes—although improper modes—of doing them.

  Salmond, *The Law of Torts*, cited with approval by Lord Steyn in *Lister* at 223h.

Lister was a case in which the warden of a school had sexually abused children in his care (although the judgments did not limit the application of the *Lister* principles to sexual abuse cases[7]). At issue was the vicarious liability of the defendant for the abuse committed by the warden, its employee. The House of Lords, reversing the Court of Appeal, held that the conditions of Salmond's second category (the category most frequently at issue in other cases) were satisfied. Lord Steyn held (at 224g) that an "intense focus" on the connection between the nature of the employment and the nature of the employee's tort was necessary[8].

Lord Steyn held on the facts of *Lister* (at 227c-d) that:

> "the employer undertook to care for the boys through the services of the warden and . . . there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also caring for the children."

Lord Millett, referring to the particular proximity of carers and their wards in boarding schools, prisons, nursing homes, etc., put it thus: "The School was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden."[9]

The question that will determine vicarious liability where a tort has not been directly authorised by an employer is therefore as follows: "Was the employee's tort so closely connected with his employment that it would be fair and just to hold his employer vicariously liable?"

Further guidance on the closeness of the link required between tort and employment to establish vicarious liability was offered by the other Law Lords' judgments in *Lister* and in *Dubai Aluminium*. The following points are pertinent to a case involving violent conduct:

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[5] Lord Millett in *Lister* at 243de.
[6] Lord Millett in *Dubai Aluminium* at 399f.
[7] See Lord Clyde in *Lister* at 236h.
[8] See also 229gh, considering vicarious liability for non-sexual assaults: "concentrate on the *relative closeness* of the connection" (writer's italics).
[9] *Lister* at 250b.

1. When considering the scope of employment, "a broad approach should be adopted . . . not dissecting the servant's task into its component activities—such as driving, loading, sheeting and the like—[but] by asking: what was the job on which he was engaged for his employer? And answering that question as a jury would."[10]
2. That the act was done within the hours of employment does not necessarily mean that it was done within the scope of the employment.[11]
3. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.[12]
4. Acts of passion and resentment or of personal spite *may* fall outside the scope of the employment (writer's italics).[13]
5. The vicarious liability of an employer does not depend on the employee's authority to do the particular act which constitutes the wrong. It is sufficient if the employee is *authorised to do acts of the kind in question* (writer's italics).[14]
6. In assault cases, a sufficiently close connection between the assault and the job is only established if an assault is a risk inherent in the employee tortfeasor's duties, or if an assault can be said to be incidental to or a consequence of anything that the employee was employed to do: for example, if the employee was employed to keep order.[15]

Assault cases after *Lister* and *Dubai Aluminium*

Since *Lister* and *Dubai Aluminium*, the Court of Appeal and the Privy Council have considered vicarious liability for assaults committed by employees in several cases. These cases may be split into three categories—cases involving:

1. police;
2. private security staff (including "bouncers"); and
3. employees not permitted to use force.

The third category is the most nebulous.

Police cases

The key to the police cases is "authority": was the tortfeasor purporting to exercise his authority as a police officer or not?

In *Weir v Bettison (sued as Chief Constable of Merseyside)*,[16] a police constable "borrowed" a marked police van, without permission, in order to help his girlfriend to move home. As the van was not being used for police purposes, it was no longer covered by the relevant insurance policy.

[10] Lord Clyde at 234f and Lord Millett in *Lister* at 248b, approving Diplock L.J. in *Ilkiw v Samuels* [1963] 2 W.L.R. 991 at 1004.
[11] Lord Clyde in *Lister* at 235c.
[12] Lord Millett at 244b. See also Lord Clyde at 235g, approving *Heasmans v Clarity Cleaning Co Ltd* [1987] I.C.R. 949.
[13] Lord Clyde in *Lister* at 235e.
[14] Lord Millett in *Dubai Aluminium* at 399gh.
[15] Lord Millett in *Lister* at 249b-h.
[16] [2003] I.C.R. 708.

Whilst helping his girlfriend to move, the constable became involved in a confrontation with a local youth, which resulted in the constable detaining the youth in the marked police van and the youth sustaining injuries. The constable admitted in interview that he had punched the youth. The youth claimed that the constable had also threatened to take him to the police station. The chief constable averred that the constable had been acting on a frolic of his own, which had nothing to do with the police. The judge agreed. In allowing the youth's appeal, the Court of Appeal held that the youth had to show more than the mere fact that the tortfeasor was a police officer; he had to show that the tort was committed at a time when the officer was purporting to act in his capacity as a constable. The Court of Appeal held that, from the time that the constable started to put the youth out of the building, he was apparently exercising his authority as a constable.

In *Clinton Bernard v Attorney General of Jamaica*,[17] the Jamaican AG was held vicariously liable for the actions of a Jamaican policeman who, whilst off-duty, shot the claimant with his service revolver and then purported to arrest the Claimant for interfering with his duties as a policeman. The evidence indicated that the policeman had purported to act as such even whilst off-duty. The Jamaican Court of Appeal had failed to apply *Lister*. Holding that vicarious liability was established (largely on the basis of the constable's purported reliance upon his authority as a constable, and invoking *Weir*), Lord Steyn reiterated that "the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong".[18] He warned that "the principle of vicarious liability is not infinitely extendable".[19]

That was illustrated by the earlier decision of the Privy Council in *The Attorney General v Craig Hartwell*.[20] In that case a probationary policeman on Jost Van Dyke Island in the British Virgin Islands, PC Laurent, had, whilst on duty, quit his post in possession of a loaded police revolver taken from a box in the police station (Virgin Islands police not being routinely armed). He travelled to another island within his jurisdiction, to a bar where his former partner worked. Laurent burst into the bar in search of his former partner's lover and opened fire, injuring bystanders including the claimant, Mr Hartwell. In contrast to the conduct of the Jamaican policeman in *Bernard*, the probationary constable in *Hartwell* did not hold himself out as acting with the authority of his badge at the time of the shooting. In Lord Nicholls' judgment:

> "Laurent's activities had nothing whatever to do with any of his police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost Van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of "a frolic of his own."

The distinction between this result and that in *Weir* is that PC Laurent never invoked his authority as a police constable when committing the tort.

The Attorney's victory on vicarious liability was short-lived, however, as the Privy Council went on to find the police authorities directly negligent for having entrusted a loaded gun to a man with Laurent's history of recklessness.

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[17] [2004] UKPC 47.
[18] At p.13, para.23, quoting McLachlin J. in *Bazley v Curry* [1999] 174 DLR (4th).
[19] *ibid*.
[20] [2004] UKPC 12.

Private security staff

Here, the issue is determined not by the question of whether or not the tortfeasor invoked the authority of his office (as in the police cases), but by a broader examination of whether the employer authorised the tortfeasor "to do acts of the kind in question".[21]

In *Mattis v Pollock*,[22] a doorman employed by the defendant nightclub owner became involved in a dispute with a customer. He left the club, went to his home, collected a knife and returned to the area of the club where he stabbed another customer. Central to the Court of Appeal's finding that the employer was vicariously liable for the battery committed by his employee was the evidence that the employer had employed the doorman in question because he *knew* the doormen to be capable of and willing to use violence *and* because the employer *encouraged* the doorman to perform his duties in an aggressive and intimidatory manner that was very likely to lead to the use of violence. It is significant that the Court of Appeal in *Mattis* was at pains to limit its finding of vicarious liability for assault by a doorman to the facts of that particular case. *Mattis* does not establish strict vicarious liability for every injury caused by a doorman's use of force.

The High Court and Court of Appeal have dealt with other bouncer cases since *Lister*, though neither addressed the scope of vicarious liability for bouncers. The vicarious liability question in *Hawley v Luminar Leisure*[23] turned upon the identity of the employer at the time of the assault (held to be the nightclub on the basis of temporary deemed employment, rather than the agency supplying the bouncer) whilst in *Payling v Naylor*,[24] the question was whether a nightclub owed the public any duty to ensure that a bouncer working as an independent contractor had adequate public liability insurance (no such free-standing duty was held to exist).

In *Brown v (1) Robinson & (2) Sentry Service Ltd*,[25] the appellant's son was shot dead by David Robinson, an employee of Sentry Service, a security company in Jamaica. Robinson had been on duty at the entrance gate to a football stadium. He was armed with a pistol and a baton. There were scuffles between Robinson and members of the crowd as the latter attempted to enter the stadium, during which Robinson used his baton. After one such scuffle, between Robinson and the appellant's son, Robinson chased the appellant's son into the car park where Robinson threatened him at gunpoint then, whilst the appellant's son had his hands up, shot him. He subsequently died in hospital. The vicarious liability issue was whether or not the security company was liable for Robinson's actions.

The judge at first instance, applying the Salmond test, found that Robinson's act had been an unauthorised act which was within the scope of his duty to preserve order at one of the gates to the stadium and found the security company vicariously liable for Robinson's actions. The Court of Appeal of Jamaica disagreed, holding that the security company "would not have authorised him either expressly or impliedly to give chase to Reid and to shoot him in the circumstances of this case. This was an excessive act done outside the course of his employment". Characterising Robinson's act as one of private retaliation, the Court of Appeal allowed the employer's appeal.

The Privy Council disagreed, holding that, in contrast to Laurent's actions in *Hartwell*, Robinson's actions were sufficiently closely connected to the job that he was engaged to do to establish vicarious liability. In the Privy Council's view, this fell on the other side of the line to

[21] Lord Millett in *Dubai Aluminium* at 399gh.
[22] [2003] 1 W.L.R. 2158.
[23] [2005] EWHC 5 QB.
[24] [2004] EWCA (Civ) 560; *The Times*, June 2, 2004.
[25] [2004] UKPC 56.

"private retaliation". The facts of the case (particularly the threats by Robinson, the use of the weapon with which he was provided by his employers and the general impression that he was performing his job with an excess of zeal) plainly support that conclusion.

Employees not permitted to use force

This category is more distant from its predecessors, since it deals with the position of employees whose jobs do not authorise them to use force, but in whose jobs the risk of the use of excessive force might be said to be "an inherent risk".

The pre-*Lister* case of *Fennelly v Connex South Eastern Ltd*[26] is relevant in this regard. The Court of Appeal held that a railway ticket inspector who placed a customer who had refused to produce his ticket in a headlock had been acting in the course of his employment, such as to make his employer vicariously liable for his actions. The *Fennelly* judgment was approved by the House of Lords for its broad approach to the vicarious liability question, which anticipated the *Lister* and *Dubai Aluminium* principles set out above. Of particular interest in the *Fennelly* case is the fact that the tortfeasor was not permitted to use physical force. At most, he was permitted to "block the onward movement of passengers by standing in front of them or the like". Physical contact was not allowed.

One can appreciate the inherent risk of force being used in such a situation. If an employee is asked to stand impassively in front of an angrily-protesting customer, the risk of violence is not far away. Experience unfortunately shows that conflict between passengers and staff on public transport is not rare.

However, this category of cases has been extended even further, into the wider world of relationships in the workplace. In *Cercato-Gouveia v Kyprianou*,[27] the subject matter was an assault by a hotel restaurant manager on a waiter in the course of a discussion regarding the waiter's alleged misbehaviour. That discussion culminated in the assault and the termination of the waiter's employment. The vicarious liability of the hotel was held not to be appropriate for determination on summary judgment. However, Dyson L.J. held that, although a judge may find that the manager acted outside the scope of his employment when striking his subordinate, it could not be said, for the purposes of a summary judgment, that the claimant had no real prospect of proving that the assault was incidental to the manager's duties.

This takes us into new territory. It might now be said that the risk of violence bubbles beneath the surface of many employment relationships, regardless of whether those jobs envisage the use of any force at all. Is this notion to be confined to relationships between managers and waiters, in judicial recognition of the wisdom of TV reality shows such as *Hell's Kitchen*? Or is this a sign that, after *Lister* and *Dubai Aluminium*, the scope of vicarious liability may not be as limited as the Privy Council has suggested?

Conclusion

In order to establish vicarious liability for an assault committed by an employee, a claimant must show a sufficiently close connection between the nature of the employment and the nature of the

[26] [2001] I.R.L.R. 390, CA.
[27] [2001] EWCA Civ 1887.

tort. In cases against the police, this is achieved by showing that the tortfeasor invoked his authority as a police officer when committing the tort. In claims against private security firms, an examination of the whether the tortfeasor was authorised to do acts of the type in question has been adopted. There is now a tension as to the degree to which the doctrine of vicarious liability can be stretched further, into situations in which the use of force was never contemplated.