BROADLEY REES HOGAN

PAYING THE PRICE FOR EMPLOYEE MISTAKES

The importance of properly defining employee roles and acceptable behaviours

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FEBRUARY 2018

The importance for employers of properly defining employees' roles and acceptable behaviours cannot be understated.

Not only does it make it much easier for employers to manage underperformance and misconduct, but employers will be liable where an employee, in the scope of their employment, causes harm to another (vicarious liability).

Accordingly, if the scope of the role and acceptable behaviours are not well defined, it will be easier for third parties to successfully bring claims against employers for the acts of their employees.

Some important considerations for employers include:

- What is within each employee's scope of work and where is it defined?
- When is an employee "at work" and not "at work"?
- Whether their policies and procedures clearly define what behaviours are and are not authorised?
- What risks are insured and uninsured?

Why does vicarious liability exist?

The rationale for vicarious liability bases itself upon the historical "master and servant" relationship.

A master chooses and trusts the servant to perform the work and the master has control over the servant's behaviour. Consequently, the common law has long held that the master should be prepared to suffer the servant's wrongs, rather than an innocent stranger.

A more cynical reason for vicarious liability, quoted by the High Court of Australia is that, *"in hard fact, the real reason for employers' liability is the damages are taken from a deep pocket"*[1].

How is vicarious liability established?

Vicarious liability is established if the act or omission which caused the harm was undertaken in the scope or course of the wrongdoer's employment.

If vicarious liability is established an employer will be jointly liable for the damage caused for their employee's act.

Further, where injury is caused in a workplace, employers can also be prosecuted by Workplace Health and Safety Queensland for breaches of the *Work Health and Safety Act 2011.*

Examples of vicarious liability

Defending employers from claims that they are vicariously liable for the acts of their employees is often made more difficult than it need be because employers do not take the simple step of defining employee roles in writing or implementing even the simplest of policies or codes of conduct.

Some examples of where an injured party has sought that an employer be held vicariously liable include:

- **Where a barmaid threw a glass at an annoying patron's head** – the employer was held not to be vicariously liable for the patron's loss of his eye due to the personal nature of the attack, which was unconnected to the barmaid's duties. [2]
- **Where a teacher engaged in predatory sexual behaviour towards a student** – the employer can be held to be vicariously liable where the abuse or criminal behaviour arose out of the employee's role and position, in relation to the victim. [3]
- **Where an employee purported to bully another employee using a private Facebook account** – the employer was held not to be vicariously liable because there was no evidence the Facebook posts were made with the employer's permission or were incidental to the alleged bully's employment. [4]
- **Where a CEO habitually sexually harassed an employee despite complaint** – the employer could be held to be liable in the event complaints to the employer's human resources department fall on deaf ears. In this case, David Jones Limited settled a $37M claim against it by its former publicity coordinator for $850,000, where inappropriate touching, comments and innuendo occurred by the CEO. [5]

Recent Queensland decision

In *Cincovic v Blenner's Transport Pty Ltd*[6] the plaintiff was successful in his claim against his former employer for a workplace incident caused by a co-worker.

The plaintiff was a truck driver who would attend at his employer's depot to load and unload from his truck. In the course of moving a pallet jack from one point to another the plaintiff rode the pallet jack like a scooter. During which, a fellow co-worker approached the plaintiff from behind and kicked the pallet jack, causing the plaintiff to fall off and strike his head and back on the concrete floor. The plaintiff suffered serious back and head injuries.

The employer firstly claimed as a defence that it did not contribute to the accident because the plaintiff was engaged in horseplay at the time, which was expressly against the employer's Code of Conduct and training. This argument was rejected by Justice Boddice, who found that the employer knew that employees rode pallet jacks like scooters and failed to establish a system of work which prohibited such conduct.

Secondly, the employer claimed it was not vicariously liable for the spontaneous kick of the pallet jack by its employee. His Honour found that while the kicking of the pallet jack was not authorised by the employer, the act occurred while the pallet jack was being moved for the purpose of shifting it to a desired location. The act was deemed to be within the scope of the employee's employment, as the kick was not necessarily designed to harm, but rather as an act in assisting the pallet jack on its way.

The plaintiff was awarded damages in the sum of $874,669.70.

If this article has raised any concerns for you or your organisation please do not hesitate to contact either of the authors for advice specific to your circumstances.

We can also help advise you in relation to appropriate position descriptions and policies regulating workplace behaviour.

For assistance or more information about these matters or any matters regarding employment services, please contact Jamie Robinson.

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1 Hollis v Vabu Pty Ltd [2001] HCA 44, per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, [35].

2 Deatons Pty Ltd v Flew (1949) 79 CLR 370.

3 Prince Alfred College Inc v ADC (2016) 258 CLR 134, [81]–[84] where vicarious liability in circumstances of intentional wrongful conduct of employees was revisited by the High Court and the "relevant approach" was applied. This approach assesses the authority, power, trust, control and intimacy a perpetrator is able to gain by means of their employment to the victim. This test extends the "scope of employment" requirements for vicarious liability in circumstances of wrongful or criminal acts by employees. Compare to New South Wales v Lepore (2003) 212 CLR 511, per Gleeson CJ, [78] and Gummow and Hayne JJ, [243] where employers would not be liable for an employee's sexual behaviour as it was not within the scope of their employment.

4 Robinson v Jane Pty Ltd [2017] QDC 266, [121].

5 Sexual Harassment Costs and Consequences: the David Jones Case, [2011] EqTimeNSWADBNIr 2.

6 [2017] QSC 320.