

Insurance & Personal Injury

Employer Found Vicariously Liable for Assault Committed by Their Employees

Introduction

In our previous newsletter "[Employer's Liability Towards Unauthorized Act of Employees](#)", we have outlined the "close connection test" formulated by the Court of Final Appeal¹. In gist, the Court will look at whether a close connection is found between the employee's unauthorised tortious act and his employment to make it fair and just to hold his employer vicariously liable. Close connection is the basic criteria for employer's vicarious liability in regard to all torts committed by an employee during an unauthorised course of conduct.

In this newsletter, we will discuss a recent Court of Appeal decision on the employer's liability towards the assault committed by one employee against another employee in the course of their employment.

Background

In *Yeung Mei Hoi v Tam Cheuk Shing and Kai Shing Management Services Limited*², the Plaintiff was assaulted by his co-worker, Tam Cheuk Shing ("Tam") (the 1st Defendant) in the course of their employment with Kai Shing Management Services Limited ("Kai Shing") (the 2nd Defendant). Kai Shing managed a residential estate in New Territories (the "Estate") while the Plaintiff and Tam were assigned to work at the Estate. Tam was a security guard and a subordinate of the Plaintiff, who was a customer service supervisor.

On 27 August 2006, a taxi with a suspected drunken passenger on board entered the Estate without properly passing the guard at the main gate. When the Plaintiff questioned Tam on the incident, Tam reacted rudely with some swearing. At the same time, the Plaintiff noticed that Tam was not properly dressed up in his uniform. The Plaintiff took that as a breach of Tam's duty and decided to take a photograph of Tam in order to report the matter to Kai Shing, Tam became agitated. He tried to snatch the Plaintiff's camera and hit him with his fist. In the heat of the argument, the Plaintiff's head was struck by Tam with a walkie-talkie. As a result, the Plaintiff sustained head injuries and subsequently commenced proceedings against Tam and Kai Shing.

¹ Ming An Insurance Co (HK) Ltd v. Ritz-Calton Ltd [2002] 3 HKLRD 844

² CACV 136/2014 and HCPI 901/2011

Decisions of the Court of First Instance

Tam did not contest the claim. Judgment on liability was entered against him. In respect of Kai Shing's liability, the Court held that it cannot fairly be said that Tam carried out the assault in the course of execution of his duties as a security guard. Tam's outburst and act of violence to his superior was not expected in the discharge of his own duties as a security guard and subordinate. Further, Tam's act cannot be interpreted as advancing interest or purpose of Kai Shing. Therefore, the court held that it is unjust to hold Kai Shing vicariously liable for the act of Tam against the Plaintiff.

The Plaintiff also alleged that Kai Shing was negligent and/or has breached its duties as employer. In this regard, the Court has to determine whether Kai Shing has failed to provide a safe system of work. It was held that Kai Shing could not have known or reasonably foreseen that the Plaintiff would be exposed to the danger of violence by Tam at work. Therefore, Kai Shing was not under a duty to take precautionary steps to guard the Plaintiff from such danger. In the circumstances, the Court held that Kai Shing was neither in breach of its duty as employer nor in breach of general duty of care towards the Plaintiff and dismissed the Plaintiff's claim against Kai Shing.

Court of Appeal's reasoning

The Plaintiff appealed against the dismissal of his claim against Kai Shing. Applying the close connection test, the Court of Appeal has to decide: (1) whether there was a close connection between the employee's unauthorised act and his employment and (2) whether such connection was so close to make it fair and just to hold his employer vicariously liable.

In respect of whether there was a close connection, the Court of Appeal considered that the lower court's approach on the scope of employment was too narrow. Reference was made to the English House of Lords decision in Lister v Hesley Hall Ltd³, which held that the servant's task shall not be dissected into its component activities and the sphere of employment must be looked at broadly. Several other examples were also considered in which employers have been held vicariously liable in appropriate circumstances for assault committed by their employees.

In the present case, Tam was on duty when he suddenly lost his temper and assaulted the Plaintiff. Specifically at that moment of time, Tam's scope of employment required him to be subject to the supervision and discipline of the Plaintiff. Therefore, the Court of Appeal held that there was sufficient connection between Tam's employment and his unauthorised act of

³ [2002] 1 AC 215

assault. The Court of Appeal held that the outburst by Tam was part of the incident wholly connected with his employment and therefore satisfies the close connection test.

In respect of whether it was fair and just to hold the employer vicariously liable, the Court of Appeal considered that Kai Shing managed the Estate and provided security service in the form of security guards. The system of supervision has been put in place by Kai Shing, which carried a risk that the subordinate may react in an unauthorised way in the course of being disciplined by his superior officer. The Court of Appeal held that it was fair and just to hold Kai Shing vicariously liable because this risk can be insured against by the employer.

In the circumstances, the appeal was allowed and Kai Shing was held liable for the damages awarded to the Plaintiff in the Court of First Instance.

Implications

It should be noted that whether or not a close connection exists for an employee's unauthorised tortious act is very much a contextual consideration and each case is fact sensitive. It would appear from the Yeung case that the Court is prepared to adopt a broad approach in determining whether a close connection exists. Further, it appears that for policy reasons, the Court is inclined to hold that it is fair, just and reasonable to impose vicarious liability on the employer, as the employer is more likely to have the means to compensate the victim than an employee and can be expected to have insured against that liability.

For enquiries, please contact our Insurance & Personal Injury Department:

E: insurance_pi@onc.hk
W: www.onc.hk

T: (852) 2810 1212
F: (852) 2804 6311

19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong

Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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