

Liability of the employer for sexual harassment

Vicarious liability of employer of harasser

Liability of employer of victim for harassment by non-employees

Requirements for vicarious liability

- Employment relationship
- Wrongful act
- Within scope of employment (fairness towards employer)

Courts have struggled with 'scope of employment' in cases of intentional wrongdoing (deviation cases)

Salmond rule: If act unauthorised, employer may still be liable if the act is **so connected** with authorised acts that acts may be regarded as mode albeit a wrongful mode of doing what he was authorised to do

Development in common law countries

- Canada: *Bazley v Curry*: abuse of children in home for children with emotional problems
- J McLaghlin: courts should not stick to semantics: 'in and out of scope', 'wrongful mode of doing', etc
- Policy basis for vicarious liability (no legal basis)
 - Adequate compensation & deterrence
 - Twin goals served if employer enhanced risk and there is close connection with risk and act of employee
- *Lister v Hesperley Hall* (UK) – also close connection but factual connection, no risk principle
- *Bazley* followed in *Grobler v Naspers* (C) – emphasis on risk

Grobler v Naspers (C):

- Secretary harassed by trainee manager “blue-eyed boy” of co.
- Eventually serious incident lead to post-traumatic stress syndrome
- Cape High Court: Seriousness of sexual harassment in modern times necessitates development of common law doctrine. Employer liable in terms of
 - **US:supervisor test** –hostile environment, no action taken by employer to prevent and correct
 - **Canada:closely connected** with **risk** of enterprise
 - **Constitutional rights** of victim infringed-crts must develop

Media 24 v Grobler(SCA)

- Court did not deal with vicarious liability
- Employer found liable-employer had duty to ensure safety of employees(not only physical but also psychological)-negligent

NK v Minister of S&S(CC)

- Girl raped by 3 policeman on duty-SCA: outside scope
- CC-Common law doctrine should be developed
- Constitutional issue: rights of victim, duties of employer(police)
- Not only factual issue, cannot sterilize vicarious liability from normative influence of Constitution
- Follow test in Rabie v Minister of Police
 - subjective intention of employee=factual question. IF intention to do work of employer (even if deviated from instruction) employer will be liable
 - If there is a subjective intention to act in own interest but objectively nevertheless a close connection between act and enterprise, employer will be liable

Development of close connection test in NK

- Develop vicarious liability in terms s 39(2) of Constit
- Objective stage of test,(close connection between act and enterprise) not only factual, but mixed question of fact and law
- The question of close connection must be approached with spirit, purport and objects of the Constitution in mind
- Minister held liable
- In terms of this test- employer in Media 24 could have been held vicariously liable

Liability of employer for harassment by non-employees

- Piliso v Old Mutual (LC)
- Employee harassed by unknown person at workplace
- Employee could not prove that harasser is co-employee
- Could thus not base claim on vicarious liability or sec 60 of EEA
- Labour Court found employer infringed constitutional right to fair labour practices
- Judgment criticised: should not rely directly on constitutional right
- Alternatives: breach of duty of employer(Media 24)/direct liability for discrimination i.t.o the EEA?

United States

- USA: if the employer knew or ought to have known of harassment by non-employee and did not take corrective measures, liable for discrimination (Title VII)
- *Lowry v Powerscreen* same facts as *Piliso*: employer promptly distributed s.h. policy, interviewed shift workers to try and find perpetrator-escape liability as a result of prompt and remedial corrective action

United States (2)

- In *Windermere v Little* (9th cir) the employee was raped by client after business meeting
- Employer refrained from taking action due to importance of client
- Court: Only one incident, no indication that would happen, but employer directly liable based on negligence
- Employer's inaction reinforced the hostile work environment
- Thus : employer held liable for refraining to take corrective measures even after a single incident and even in the absence of any indication that such incident could take place

United Kingdom (1)

- EAT held employer liable for racial harassment of waitresses in *Burton and Rhule v De Vere Hotels*: Harassment by “blue” comedian Bernard Manning and male audience:
 - An employer subjects employee to harassment if he permits harassment to occur under circumstances which he can control
 - Harassment was sex and race specific: therefore no need for claimants to prove that employer treated them less favourably
- Focus on **control** rather than the **negligence** standard applied in the US

UK (2)

- *Burton* overturned by House of Lords in *Pearce v Governing Body of Mayfield School*:
- Discrimination by comedian and guests in *Burton* cannot be regarded as discrimination by employer
- Employer only liable if reason for refraining to protect is less favourable treatment based on race
- In *Pearce* the House of Lords held that employer did not discriminate by not taking action to protect a teacher against name calling such as "lesbian", "dyke," "lemon"
- No evidence that male homosexual would be treated differently, thus could not prove that harassment was based on her sex
- Court: No escape from the need to resort to a comparator

UK (3)

- 2008 SDA amendments (to implement Equal Treatment Directive) : employer liable for harassment of employee by third parties
- Employer must take reasonably practicable steps to prevent 3rd party harassment
- Employer only liable for 3rd incident if he knew about other two incidents (not necessarily the same harasser)
- Is Bernard Manning back in fashion?

Australia

- No provision in SDA for liability of employer for harassment by non-employees, but
- HREOC guidelines: employer will be held directly liable as failure to protect will be seen as less favourable treatment
- *Smith v Sandalwood Motel*: two singers were sexually harassed by patrons of motel
- The mere omission to protect was held to amount to less favourable treatment by employer , thus direct discrimination
- Courts strict on **implementation** of policy

South Africa

- No specific provision for liability of employer of victim for harassment of employee by non-employee
- Direct liability for discrimination in terms of sec 6(1) of EEA?
- Direct liability for failure to take measures against co-employee (*SATAWU obo Finca v Old Mutual*) could also be extended to discrimination by non-employees
- Employer should be required to take steps to prevent (policy and implementation) **and** to take corrective measures

Conclusion

- Fact that complaints not taken seriously in *Piliso* and *Windermere* had a profound impact on the dignity and well-being of victims
- If employer regards complaint as serious and endeavours to resolve the matter will go a long way to eradicate the hostile environment created by the harassment