PARTY LINES

Matthew White examines the vicarious liability issues following injury at an office party

In *Shelbourne v Cancer Research UK* the claimant (C) was physically lifted up, and dropped, when on the dance floor at the Christmas party at her workplace. She sustained spinal injury.

She claimed against her employer (D) alleging (a) inadequate organisation / supervision of the party; and (b) that the employer was vicariously liable for the actions of the individual (B) who lifted the claimant.

She lost at first instance and on first appeal. The Court of Appeal have now refused her permission for a second appeal.

This article considers both the allegations against D as organiser of the party, and the allegation that D was vicariously liable for B.

Factual background

The defendant (D) is a well known charity. It had a research institute in Cambridge.

A Christmas party was organised by a team of volunteers to be held in the lobby / canteen of the research institute building.

A volunteer organiser had risk assessed the party, and had noted the risk of partygoers returning to labs after the consumption of alcohol.

Guests were required to sign a 'disclaimer' confirming that they would not attempt to work in the labs after consuming alcohol.

Security guards were present, in particular to stop people going back to the labs. Alcohol was available. There was food, a ceilidh, giant games and a disco.

There had been no issues arising from the consumption of alcohol at similar events (over at least five years).

There was some dispute about B's behaviour leading up to the incident. The trial judge found that he appeared to be 'drunk, but not very drunk'. He was acting in a disinhibited manner.

He had lifted other women, including one of the organisers (who had earlier allowed him to bring his own small bottle of vodka into the party), before attempting to lift C.

After the incident, there was an investigation which led to recommendations: (1) amend the declaration signed by guests to include saying that they would act responsibly; (2) send an email in advance of the event encouraging responsible behaviour; (3) ask anyone behaving inappropriately to leave immediately (which was said to be 'unwritten policy' in any event).

Spot the difference

To illustrate the dispute here, I am going to put the facts in two different ways. Every one of the facts set out below is accurate. Spot the difference.

1) The risk from drinking at the party had been identified, but the only *written* concern was to stop people returning to the labs.

   Indeed, the risk assessment used was one suitable for lab work, because that was the only

type of risk assessment that the assessor had any training in. He had no training in how to run or risk assess a party.

B, who had been allowed to bring his own alcohol into the party, got drunk and lifted other women, including one of the party organisers, who had done nothing about it.

Tickets could be sold to anyone. The organisers were not trained to organise or risk assess this sort of event.

The security guards were not trained how to look after an event like this. After the incident, an internal investigation found that steps should be taken to ensure that guests behave responsibly.

2) The party was not paid for by the employer. It was organised by volunteers from within the workforce in their own time.

It was not compulsory (or expected) that people would attend. Attendees could be expected to be connected to the research institute (working there or guests of those who work there).

There had never been a problem with alcohol consumption at this party before. The volunteers had risk assessed the party (how often do you see that?), had arranged security guards to be present, and attendees were expected to sign a declaration confirming that they would not attempt to do lab work after drinking.

The claim in negligence

The allegations of negligence were wide-ranging, but cut down to their essence were:

1) There ought to have been warnings or advice to attendees about their behaviour;
2) There ought to have been a policy about alcohol consumption;
3) There ought to have been a policy to intervene if any attendee(s) became intoxicated;
4) The party should have been more closely monitored / supervised to spot and deal with intoxicated guests;
5) B ought to have been spotted and thrown out.

Some of these allegations were plainly based on the post-incident report.

The judge at first instance (Recorder Catford) found that there was a foreseeable risk of harm such that D owed a duty of care in negligence, and that that duty could in certain circumstances extend to the actions of a third party.

However, he also found that there was no breach of the duty.

The judge was influenced by *Everett & Another v Comojo (UK) Ltd (t/a Metropolitan) & Others* [2012] 1 WLR 150.

Factors of particular influence were that attendees were limited to those connected with the research institute, and there had been no incidents over previous years.

The judge regarded the steps taken to prevent access to the labs by people who had been drinking as a reasonable response to risks arising from alcohol consumption in the circumstances.

He was also satisfied that nothing was seen or reported about B's behaviour on the night which ought to have required him being spoken to or asked to leave.

Overall the judge was satisfied that D had taken reasonable care. On appeal, Lane J agreed.

Vicarious liability

So far, so good. But B was obviously in breach of duty to C; if D were vicariously liable for that, then C's claim would succeed.

Vicarious liability has had a lot of attention in recent years.

The modern starting point has to be the twin cases of *Cox v Ministry of Justice* [2016] AC 660 and *Mohamud v. WM Morrison Supermarkets PLC* [2016] AC 677 in which the Supreme Court set out the current approach: (1) consider whether the relationship between wrongdoer and defendant is such that defendant can be made vicariously liable; and (2) consider whether or not the conduct of the wrongdoer relates to the relationship sufficiently that vicarious liability is imposed.

The first instance decision

The judge found that while B was not employed by D, his role as a visiting scientist meant that he was sufficiently integral to the business of D for D to be at least *potentially* vicariously liable. That is, the first of the above two questions (the 'Cox' question) was answered against D.

However, the judge also found that C could not get past the second of the issues identified by the Supreme Court.

The judge referred to Lord Reed in *Cox* (para 30) and the requirement that assigned activities must have created the risk of the wrongdoer committing a tort. Providing mere opportunity is not enough (*Lister v Hesley Hall* [2002] 1 AC 215).

The judge expressed the test (quoting Lord Toulson in *Mohamud*) as 'whether there is sufficient connection between the wrongdoer's employment and his conduct towards the claimant to make the defendants legally responsible', or alternatively (quoting Lord Steyn in *Lister*) as whether the conduct was 'so closely connected to his employment that it would be fair and just to hold the employers vicariously liable'.

The judge said: 'It is a matter of judgment to decide on which side of the line any case lies, in terms of being sufficiently closely connected with assigned activities.

'The cases involving assault by employees of members of the public where they are employed to engage with the public will often fall on the side of liability. The acts often take place during or immediately following on from their employed duties.

'In those cases, it may be said to be artificial to divorce the wrongful act from what the assailant was employed to do.

'In my judgment, the present case falls on the other side of the line, where there is insufficient connection. In my judgment, his role with [D] did nothing more than provide an opportunity for this unfortunate accident.'

The judge said the case was akin to *Graham v Commercial Bodyworks*

[2015] ICR 665 (in which the claimant's overalls were deliberately sprinkled with highly flammable thinning agent in a workshop, and a lighter then used near him); and that rather than the dance floor lift being connected with his duties, B was engaged on a 'frolic' of his own.

This, of course, is not the only Christmas party case to be heard recently. Readers will be aware of *Bellman v Northampton Recruitment*. That case had been decided at first instance ([2017] IRLR 2124, HHJ Cotter QC sitting as a High Court Judge) before the first instance judgment in *Shelbourne* was given. It is the first instance decision that is mentioned in Recorder Catford's judgment.

The facts of *Bellman* were that staff were expected to attend the Christmas Party. At an after-party at a hotel later that evening, the managing director punched a sales manager in a dispute about work. HHJ Cotter QC found that the employer was not vicariously liable for the punch.

That decision was overturned by the Court of Appeal ([2018] EWCA Civ 2214). The essential part of the Court of Appeal decision is that the 'field of activity' of the managing director was almost unrestricted, and the punch was an assertion of his authority, thus sufficiently connected with the field of activity entrusted to him.

The appeal

On appeal it was argued that B's field of activity should be cast wide.

It was contended by C that the relevant field of activities on the night in question was 'to interact with fellow partygoers in alcohol-infused revelry, leading to the setting aside of the ordinary boundaries of social interaction; all of which was authorised by [D] since it stood to gain from the enhancement of its employee's morale.'

Lane J observed that 'In this scenario, it is the employer's self-interest in organising the office or works Christmas party that is key. In it, the employees are invited by the employer into an environment where alcohol will encourage them to greater intimacy, with resulting risk of injury, for which the employer will be liable.'

Lane J considered that this was going too far: 'I do not consider that this description of the average office or works Christmas party is one that the archetypal reasonable person would recognise as representing reality.'

The party was voluntary and was in no real sense connected with the work that B was engaged to do.

It was noted that in *Bellman*, the Court of Appeal had not considered that the fact that the employer put on a Christmas party that led to a (voluntary) late-night drinking session was sufficient to impose vicarious liability. Rather, it was the managing director's control of proceedings in relation to what he perceived to be a challenge to his authority as managing director which made the company vicariously liable for his actions.

The attempted second appeal

The Court of Appeal (Leggatt LJ) rejected C's application for permission for a second appeal to the Court of Appeal.

By combination of CPR 52.5 and s.54(4) of the Access to Justice Act 1999, that on paper decision is the end of the line for C. The days of an oral permission hearing in the Court of Appeal following rejection of permission on paper are gone.

Leggatt's LJ's refusal of permission on the claim in negligence was based on the simple observation that this was a fact specific evaluation by the trial judge.

His refusal of permission on the vicarious liability claim observes that C's case that B's conduct was sufficiently connected with his work as a visiting scientist was founded on the suggestion that B's attendance at the party was an activity entrusted to him as part of his role.

His view was 'In circumstances where, on the facts found, attendance at the party, which was organised by volunteers, was entirely voluntary and open to those workers who chose to buy tickets and their invited guests, this suggestion is unreal.'

That is a refreshingly blunt observation. It is hard to see how voluntarily attending a party, even one held at the workplace and organised under the banner of the employer's name, is a part of the job that a scientist is employed to do.

It seems that the court will continue to limit the scope of vicarious liability.

Where next?

In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, Lord Phillips said at [19] that 'The law of vicarious liability is on the move'. In *Cox* (above) at [1]

Lord Reed said that 'It has not yet come to a stop', but in *Mohamud* (above) at [56] Lord Dyson said that 'there is no need for the law governing the circumstances in which an employer should be held vicariously liable for a tort committed by his employee to be on the move'.

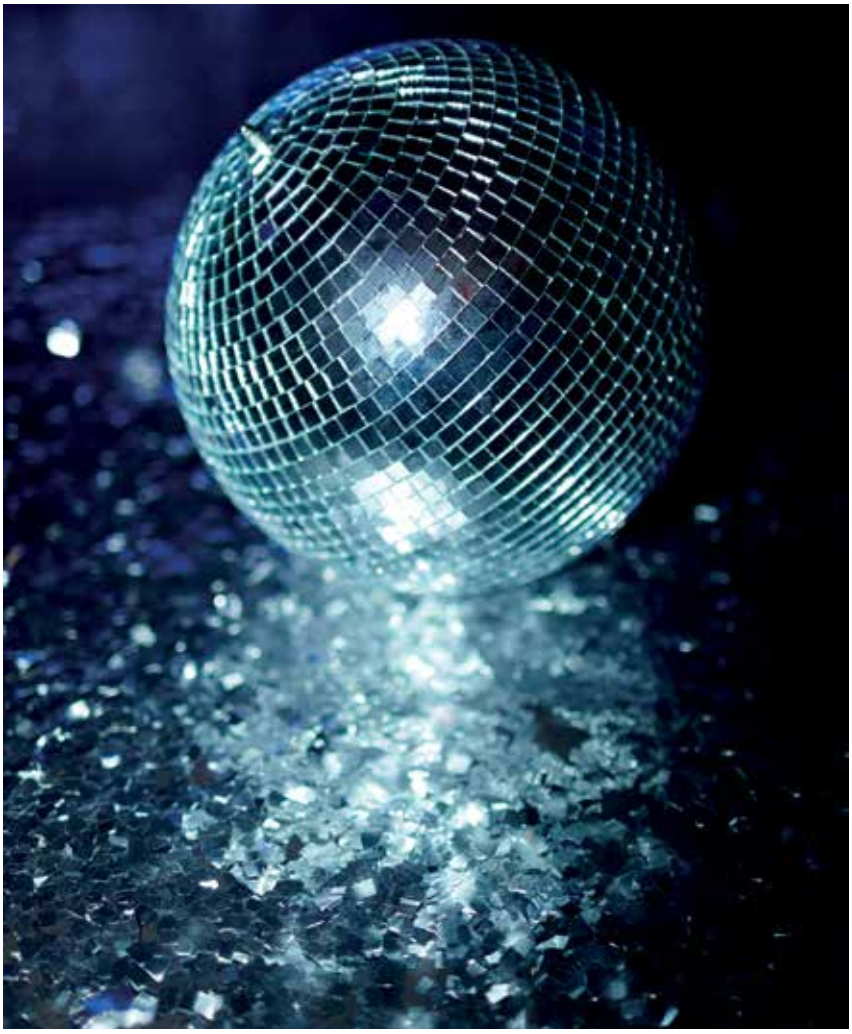
Shelbourne is a case of a tort committed by a quasi-employee. According to Lord Dyson, there is no need for the law of vicarious liability in such context to change.

Shelbourne shows that there *is* (as there always was) a line. For an employer to be vicariously liable for a wrong, it will not suffice for a claimant merely to show some connection between the wrongdoer / wrong and work or the workplace, no matter how tenuous.

'Field of activities' can cover a wider range of conduct than acts done in furtherance of employment, but attention must be focussed on what the 'field of activities' entrusted to the employee really were.

Perhaps the enquiry can be put no better than it was put by Diplock LJ in *Ilkiw v Samuels* [1963] 1 WLR 991 (quoted in *Mohamud* at [38]): 'the matter must be looked at broadly, not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer? And answering that question as a jury would'.

Of course, 'answering the question as a jury would' is not something that gives rise to only one possible answer in every case. More litigation in which the boundaries of an employer's vicarious liability are tested can be expected.



Concluding note

One can only feel sympathy for C here. She did nothing wrong, yet was assaulted at a Christmas party.

It is not known to the author why she did not pursue B. Perhaps it was thought that he had no money and no insurance (although as a visiting scientist at a lab of this nature, it might be expected that one day he would have been good for the money).

It is also not known whether or not C had her own insurance to cover her for unsatisfied judgments. Such clauses in household policies are relatively common, and always worth looking for if a defendant appears to be a man of straw.

Matthew White is a barrister at St John's Chambers and acted for Cancer Research in the above case