

LAWS1114 SEMESTER 2 2008 FINAL EXAMINATION

QUESTION 4

John works three nights a week as a bouncer at a night club in central Brisbane. He gets to choose the hours he works and if he cannot make a particular night, the understanding is that he will simply find someone to step into his shoes. He can take unpaid holidays whenever he wants, but is obliged to give two weeks' notice if he wishes to do so. When he is working, he wears a sweat-shirt displaying the night club's logo, which he was required to purchase when he started the job. He is paid a generous fortnightly remuneration, but out of this he has to bear the costs of any professional accreditation and safety training courses. He has been given clear instructions by his supervisor as to how to handle problematic customers and has been expressly told to leave any incidents occurring outside the club premises to be dealt with by the police.

One night, a local man, Terry, is causing trouble on the club dance-floor. He is drunk and wildly out of control. When John asks him to leave, he uses foul and abusive language of a highly personal nature, which greatly angers John. The two get into a scuffle. Terry is finally ejected from the club. John tells Terry in no uncertain terms that he had "better not cross [his] path again, or things will get really nasty".

When John finishes his shift later that night and heads home, he notices Terry hanging around the queue outside the club and suspects he is trying to push his way back in. The personal altercation resumes. John drags Terry angrily from the queue, pulls him into an alleyway and stamps repeatedly on his face. Francine, a close friend of Terry's, witnesses this from the other side of the street. She has a phobia about blood and is of sensitive disposition. At the sight of Terry's bloodied face, she suffers a violent, long-term emotional reaction.

John has admitted committing the tort of battery upon Terry. Advise the club whether it is vicariously liable for this tort. Also advise Francine whether she has any personal claim against John for the separate tort of negligence.

EXAMPLE ANSWER ONE

John v Club

The issue in this case is whether the club is vicariously liable for the harm that John caused Terry. Vicarious liability is a tool by which the law makes one party liable for another's negligence. An employer will only be held vicariously liable for acts committed by an employee, not an independent contractor. There are 2 things the plaintiff must prove before the employer will be liable:

1. That they are an employee. In deciding this the courts now use a multiple factor approach (*Stevens v Brodribb*; *Hollis v Vabu*) in which the following factors are taken into account:
 - a) control (*Humberstone v Timber Mill*)
 - b) how the worker is remunerated (wage or per job)
 - c) whether they provide their own equipment
 - d) who determines holidays and how
 - e) whether they are free to delegate work
 - f) whether the "employer" is obligated to provide work
 - g) whether income tax is deducted by the "employer"
 - h) is the worker specially skilled?
 - i) is there any public representation that the worker is employed ?
2. A tort must be committed within the course of employment.

The first thing to decide is whether John constitutes an employee. The fact he chooses the hours he works, is free to delegate work, is able to take holidays when he wishes, all point against him being an employee (*Stevens v Brodribb*). On the other hand, there appears to be some element of control by the club, as he does have a supervisor. For the club's control to be significant, it must have retained control over the way the work is carried out (*Zuijs v Wirth Bros*) and a supervisor would have the power to do this. In addition to this, John is paid fortnightly wage and wears the club logo on his t-shirt (*Hollis v Vabu*). Although it is possible to argue the point either way, the fact that he wears the club t-shirt probably constitutes a representation by the club that he is an employee. In these circumstances, the mere fact that he bears the cost of training and of buying his own shirt would not deprive him of employee status. In *Hollis v Vabu*, the courier paid for his own bike, and was wearing a uniform. He was held to be an employee. Thus it is most likely that John does constitute an employee.

The second thing to establish is whether the tort was committed within the scope of John's employment. The mere fact that he was expressly told to leave any incidents to the police does not take him outside his employment (*Bugge Brown*). If the act is authorised it does not matter whether it is done in an improper way (*Century Insurance v NI*). However, the fact that this was an intentional criminal activity might take him outside the scope of employment (*Deatons v Flew*). One modern approach is to ask whether there is a sufficiently "close connection" between the act and employment (*Lister v Hesley Hall*)(HL).

In addition to this, the court may look at whether the employee is furthering the employer's interests (*Sprod v Public Relations Security*). In the current case, the test of close connection does not really assist. Whether John is furthering the club's interests is a more relevant question. It is most likely that this is not furthering the employer's interests and the case can be distinguished in this way from *Sprod*. Even though the assault takes place outside the club, it is at the end of John's shift. Also, because John was motivated by so much personal anger at Terry during the assault, this is likely to take him outside the scope of his employment.

Therefore, in conclusion, it is most likely the club would not be vicariously liable for the criminal actions of John.

Francine v John

In order for Francine to claim for pure psychiatric harm, she must be suffering from a recognisable psychiatric illness (*Hinz v Berry*). This is because “sorrow does not sound in damages” (*Mount Isa Mines v Pusey*). The basis of establishing a duty is one of reasonable foreseeability of the psychiatric injury, in which the following is taken into account:

1. Relationship of P to the victim (*Gifford*)
2. Proximity in time and space
3. Sudden shock
4. Normal fortitude
5. Relationship of P to D
6. Relationship of D to victim

Whether Francine’s suffering is a long-term emotional reaction amounting to a recognisable psychiatric disorder will depend on expert evidence. The court must be satisfied that the D is suffering a “clinically valid mental illness” although it sometimes appears that it does not have to be classified as such (*Swan v Williams*). The court, not medicine, has the final say on this question.

In order for there to be a sufficient relationship between Francine and Terry, she must prove it is “close and loving”. This is because a friendship does not fall under any of the cases giving rise to a presumption of “close tie of love and affection” identified in *Gifford*. Proximity in time and space is not an issue, as Francine had contemporaneous perception and was close to the scene of the assault. Although this is no longer a requirement (*Annetts*), it remains important with relationships that are not as close. The next thing to consider is normal fortitude. It is likely that owing to the phobia about blood, Francine is not someone of normal fortitude, however this is no longer an absolute requirement (*Tame- the majority view*), merely a factor to consider in assessing whether the harm was reasonably foreseeable or in assessing the steps a person has to take to avoid being held to be in breach.

It is possible Francine may be able to recover for psychiatric harm if she is suffering a recognisable psychiatric illness. The fact that she is not of normal fortitude does not necessarily exclude her from recovering (*Tame*), however it may be important because of the absence of any prior plaintiff/defendant relationship (the case is distinguishable from *Annetts* in this respect) and because of the unclear nature of her relationship with Terry. If she fails to establish a close and loving relationship with Terry, she seems unlikely to recover.

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EXAMPLE ANSWER TWO

I have been asked to advise the nightclub whether it is vicariously liable for John (J's) actions upon Terry (T) and whether Francine (F) has a claim against J.

1. Is the club vicariously liable for John's actions?

Relevant law

To prove vicarious liability, it has to be established that J was an employee of the club, and not merely an independent contractor and that his tort was committed within the course of his employment.

Application of the law to the facts

The employment issue:

The club had control over J. It did not merely have control over what he did, but also, importantly, over the way his task was performed (*Humberstone*). It is stated that he had been given clear instructions on how to handle problematic customers, which shows a close degree of control over this aspect of his behaviour. There was also no special skill involved in the task he was asked to do, so that it cannot be said that the club lacked control over the way he did the job (*Zuijs v Wirth Bros*).

Applying the test in *Stevens v Brodribb*, there are a number of relevant factors in considering J's status. Firstly, remuneration. J was receiving a regular fortnightly wage, although it unclear whether he gets taxed at source on this. There are no tools and equipment to speak of. He is also able to delegate work: someone can step into his shoes if he cannot work on a particular night. This might suggest he is an independent contractor. His hours are also flexible and he can take unpaid holidays whenever he wants. This also points to this independence. It is unclear whether the club is obliged to give him work opportunities over a sustained period of time. On the other hand, he is publicly represented to be an employee of the club, as his sweatshirt displays the club's logo. The importance of such representations can be seen in the case of *Hollis v Vabu*, where the court held that there was indeed an employment relationship and that the employer was vicariously liable.

Overall, it is probable that J was an employee. Although some factors suggest otherwise, the informal nature of the job of a bouncer may mean that the fact that he is able to delegate to others or to be flexible in his working hours is less significant than it otherwise might be. Some forms of employment are simply more flexible than others. Furthermore, the club controlled the "concrete" aspects of his job, such as the way in which the job was done and it paid him a regular wage.

Was the tort committed in the course of employment?

J has not merely performed an authorised act in an improper manner, as in *Limpus v London Omnibus*. In fact, his tort of battery, excluding the scuffle, was committed entirely outside the club premises. The club had also expressly told him to report any such incidents to the police and not to get involved. While cases like *Limpus* and *Iqbal* indicate that disobeying express instructions doesn't always take an employee outside the course of employment, another contributing factor here was the fact that J merely *suspected* that T was trying to push his way back in to the club. The suspicion may have been unfounded if T was already leaving, in which case there was clearly no official reason for J to intervene.

J's tort was also an intentional and criminal one. Thus, the reasoning of the court in *Deatons v Flew* is applicable. It can be safely argued that the act of battery was not in furtherance of the employer's interests. The intervention was definitely not done with the employer's authority (it had specifically told him not to deal with problematic customers) and was not done in consequence of anything he

was specifically employed to do. The altercation, as in *Deatons*, was purely the result of personal animosity.

In *Sprod v Public Relations Security*, the court considered the nature and seriousness of the assault and the existence of personal animosity as important matters. In this case, both these factors point against the club being liable: J stomping on T's face was extremely serious and there was clear personal animosity involved, in view of the altercation in the club. In this way, the case is definitely distinguishable from *Sprod*. On the other hand, it could be argued that there was a "close connection" between J's job and the assault (as mentioned in *NSW v Lepore, Lister*). The physical activities associated with a bouncer's job could facilitate the tort committed.

Conclusion

Despite a possible "close connection" argument, it is probable that J was acting outside the course of his employment. Therefore the club is not vicariously liable for his actions. The personal criminal intention of J was a major factor, given his personal threats to T in the club. The fact that he is an employee is then irrelevant.

2. Does F have an action against J for pure psychiatric harm?

Relevant law

F must be suffering from recognisable psychiatric illness (RPI) (*Hinz v Berry*), as "sorrow does not sound in damages" (*Mount Isa Mines v Pusey*, per Windeyer J). The damage must also be reasonably foreseeable. Other factors, whilst not determining requirements, may be taken into account: such as normal fortitude (*Tame v NSW*), a direct perception of an accident's immediate aftermath (*Jaensch v Caffey*); closeness of relationship between plaintiff and primary victim (*Annetts, Gifford*) and any prior relationship between the plaintiff and defendant (*Annetts*).

Application of law to the facts

It is unclear whether F is suffering from an RPI, as it is merely stated that she is suffering from a "violent long-term emotional reaction". This would have to be directly proven by medical evidence. Also, she has a phobia of blood and is of a sensitive disposition, thus indicating that she is not of normal fortitude. She may have directly perceived the immediate aftermath of the assault and suffered sudden shock. The fact that she was close friends with T might also help her position, though she will normally have to prove that friendship amounted to a close and loving relationship (*Gifford*). There are some *obiter* comments by McHugh J in *Gifford* suggesting that friendship or even being a mere bystander might be enough if there is direct perception of a particularly distressing event accompanied by shock.

Conclusion

The fact that F is not of normal fortitude and that her potential RPI is yet to be proven, diminishes the chances of a successful action. In *Tame v NSW*, although the factor was rejected as a requirement by the majority (4:3), it still is a viable and important factor. She may argue that the horrendous nature of the incident (stomping on the face) was an important additional element and that the harm suffered by her was therefore reasonably foreseeable, given the extreme severity of the beating and her direct perception of it (*Gifford*, per McHugh J). However, the authority for this is weak and the court is still unlikely to find for her in any claim. In terms of the structure of negligence law in general, she was not owed any duty of care by J, hence the first of the four stages of the negligence analysis (duty, breach, causation, remoteness) cannot be satisfied.

GRADE AWARDED: 7

EXAMINERS' FEEDBACK AND MARKING GUIDE:

Substantive and Methodological Errors:

On the whole, the question was done well in terms of demonstrating knowledge of the substantive law. The main failure was in the application of that knowledge – many students cited the law, the tests from *Brodribb* etc, but didn't spend enough time applying that to the particular situation in the problem.

The methodological error which loomed largest was a complete lack of any structure. Many answers took the form of a long paragraph without any spaces, breaks or headings.

Outline of Main Issues:

Terry v The Club: Vicariously Liability for Battery

The sole issue here was whether the club was vicariously liable. Students did not need to discuss the requirements of battery since John admitted it. There were two main questions.

- (a) Whether John was an employee of the club (or an independent contractor): students needed to identify and apply the various factors flowing from *Bodribb*, *Hollis* and *Sweeney* closely to the facts reaching a balanced conclusion and identifying any further information that might be useful in resolving residual uncertainties.
- (b) Whether John was acting in the course of his employment. Students needed to consider the principles in *Deatons v Flew*, *Canterbury Banktown*, *Lepore*, and *Sprod*. The key issues under these approaches appears to be whether the criminal act was done (i) *in furtherance of the master's interests*, (ii) *under the employer's express or implied authority* or (ii) *as an incident of anything the employee was employed to do*. (*Flew*) An alternative approach adopted by some members of the HCA in *Lepore* is to ask (iv) whether there is a *sufficient connection* between the job and the wrong to justify holding the employer responsible. The degree of violence, the existence of any personal enmity and the timing of the attack were all relevant factors to consider. Grounds for applying or distinguishing *Sprod* should have been considered.

Francine v John: Negligence

The key issue here was whether Francine was owed any duty of care by John. Students needed to consider the following authorities: *Wilkinson v Downton*; *Jaensch v Coffey*, *Tame*, *Annetts*, *Gifford*. Relevant questions were:

- (a) whether her friendship with Terry was close enough relationship to make harm to F reasonably foreseeable;
- (b) whether psychiatric harm to a mere bystander can be reasonably foreseeable
- (c) whether it mattered that F was of a sensitive disposition;
- (d) whether she has actually suffered a recognizable psychiatric condition (*Hinz v Berry*, *MIM v Pusey*)