Article

COVID-19, Employment Practices Liability Insurance, and Vicarious Liability: an Offshore Perspective

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COVID-19 and Employment Practices Liability insurance claims

There have now been over 6 million confirmed cases of COVID-19 infection globally, and over 370,000 deaths. As the numbers still increase, many insurance lawyers have started to predict the legal challenges and coverage claims that property and business interruption insurers, trade credit insurers, life and healthcare insurers, travel and event insurers, D&O insurers, and reinsurers are likely to face in the months and years ahead.

The UK's Financial Conduct Authority ('the FCA') has recently announced its intention to bring a test case before the High Court of England and Wales on an expedited basis (leading up to a High Court hearing in July 2020), to consider the scope of coverage for COVID-19 related losses that may be available under Business Interruption Insurance policy wordings, governed by English law, issued by insurers such as Arch, Hiscox, MS Amlin, QBE, Royal & Sun Alliance, and Zurich.

But what of Employment Practices Liability (EPL) insurance claims, relating to COVID-19?

COVID-19 is likely to result in an increasing number of EPL claims, in the US and internationally, including in the following contexts:

- Alleged wrongful termination or discrimination in the context of redundancies, layoffs, furloughs, and reduced work hours;
- Alleged mistreatment or harassment of employees due to illness, or suspicion of illness;
- Alleged provision of substandard or unhealthy workplaces or working conditions;
- Unauthorised disclosure of an infected employee's identity or private medical information;
- Alleged discrimination and/or retaliation relating to inconsistent application of company policies such as paid time off, paid sick leave, working from home, quarantine, personal travel and the exercise of unemployment rights.

Willis Towers Watson's recent scenario analysis of the COVID-19 Pandemic, published on 1 May 2020, has predicted that EPL claims in the US market alone may amount to US$3.6 billion (compared to US$4 billion for D&O claims, and US$27 billion for General Liability claims).

Although every EPL insurance policy wording (and its applicable governing law) will require careful analysis, common policy wordings (including those governed by English law, Cayman Islands, or Bermuda law) often define an Employment Practice Wrongful Act as an actual or alleged act, error or omission committed or attempted by an employer or an employee for whom the employer is held vicariously liable relating to any actual or alleged (1) wrongful, unfair or constructive dismissal, discharge or termination of employment; (2) breach of written or implied contract of employment; (3) employment related misrepresentation; (4) wrongful deprivation of a career opportunity, failure to grant tenure or negligent employee evaluation; (5) harassment, unlawful discrimination or failure to provide adequate employee procedures and policies; (6) retaliation; or (7) defamation or invasion of privacy, arising solely as a result of the employment or non-employment by an employer of any current or former employee, or the treatment of any volunteer whilst undertaking work for an employer under its control and supervision.

The importance of establishing vicarious liability

One of the key features of coverage under an EPL insurance policy governed by English, Cayman or Bermuda law is that the employer must be held vicariously liable for the relevant wrongful act or omission committed by its employee, unless the employer is directly liable or strictly liable in any event.

What of those cases, therefore, where the employee has been acting on a pure 'frolic of his own', or is not an employee but an independent contractor?

Between 2012 and 2019, there were a number of English Court decisions that suggested that the English common law of 'vicarious liability' was 'on the move', and that the law was becoming more favourable to claimants that had suffered substantial losses through the acts of 'rogue' employees (or quasi-employees).

One notorious example was the case of *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214, in which an employer was held by the English Court of Appeal to be vicariously liable for its managing director's drunken assault on another employee after an office Christmas party.

Recent appellate decisions on vicarious liability under English, Cayman Islands, and Bermuda law

Three recent appellate decisions from the United Kingdom Supreme Court and the Cayman Islands Court of Appeal may now provide some assurance to the London, Bermuda, and Cayman Islands insurance markets that the English and offshore Courts are likely to take a more conventional approach, at least at first instance, to the assessment of 'vicarious liability' allegations, whether applying English, Bermuda or Cayman Islands law.

Rogue Employees

In its recent decision in *WM Morrison Supermarkets plc v. Various Claimants [*2020] UKSC 12, delivered on 1 April 2020, the United Kingdom Supreme Court has decided that WM Morrisons Supermarkets plc was not vicariously liable as an employer for the actions of a rogue employee, a senior internal auditor who had leaked the personal payroll data of 98,998 co-workers in a 'frolic of his own', while pursuing a personal vendetta.

In a judgment delivered by Lord Reed, the Supreme Court unanimously overturned a 2018 judgment of the English Court of Appeal, allowing Morrisons' appeal against vicarious liability claims relating to breach of statutory duty under the UK's Data Protection Act 1998, misuse of private information, and breach of confidence.

In its judgment, the Supreme Court found that Morrisons was not vicariously liable for the data breaches committed by its rogue employee, because the rogue employee's "wrongful conduct was not so closely connected with acts which he was authorised to do".

The Court confirmed that the general principle in establishing vicarious liability on the part of an employer is that "the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment".

The Court also held, however, that the UK's Data Protection Act 1998 did not, in theory, exclude the potential imposition of vicarious liability: although its reasoning in this respect was only 'obiter dicta', and the 1998 Act has now been repealed. It is debatable, therefore, whether the same interpretation would be applied under the General Data Protection Regulation (GDPR) and the UK's newer Data Protection Act 2018, or under the Cayman Islands' Data Protection Law, 2017 and Data Protection Regulations, 2018 (which came into force on 30 September 2019).

The UK Supreme Court's decision is likely to be treated as highly persuasive by a Cayman Islands Court, and it is consistent with earlier decisions of the Privy Council (on appeal from Jamaica and the British Virgin Islands), which are binding in jurisdictions such as Bermuda and the Cayman Islands.

In giving its judgment, the Supreme Court expressly approved the Privy Council's decision in *Attorney General of the British Virgin Islands v. Hartwell [*2004] UKPC 12, in which the BVI police force was not found to be vicariously liable for the wrongful use by a probationary policeman of a service weapon, after he had abandoned his post and embarked on a personal vendetta[1]. The Supreme Court pointed out that the Hartwell case could be clearly contrasted with the Privy Council case of *Bernard v. Attorney General of Jamaica* [2004] UKPC 47, where a shooting was carried out by a police officer with his service weapon, while purportedly acting in the execution of his duties, and vicarious liability was held to be established.[2]

[1] Separately, however, the Privy Council went on to find that the police authorities were directly negligent for having entrusted a loaded gun to a man with such a history of recklessness.

[2] See also Brown v Robinson [2004] UKPC 56, in which the Privy Council held that a security guard's acts of shooting a crowd member that he had chased into a car park were sufficiently closely connected to the job that he was engaged to do, so as to attract vicarious liability on the part of the employer.

The UK Supreme Court's approach is consistent with the approach taken by the Bermuda Courts in recent years.

In *Hill-Cross v. Bermuda Hospitals Board* [2015] Bda LR 4, for example, the Supreme Court of Bermuda declined to hold the Bermuda Hospitals Board liable for certain injuries caused by 'stupid and dangerous horseplay' in the form of a misconceived practical joke performed by one employee against another. Although the events in question took place within the workplace, the Court did not accept that the employee's misconduct was 'so closely connected with the acts which she was authorized to do' so as to establish vicarious liability on the part of the employer.

Similarly, in *Bermuda Restaurants Ltd v. Daspin and Convergex Global Markets Ltd* [2009] SC Bda 7 Civ, the Supreme Court of Bermuda declined to hold an employer liable for an allegedly defamatory email sent by its managing director from a work email account, acting on a 'frolic of his own'.

Independent contractors

In a separate decision also handed down on 1 April 2020, in the case of *Barclays Bank plc v. Various Claimants [*2020] UKSC 13, the United Kingdom Supreme Court has confirmed that an employer would not ordinarily be liable for the acts or omissions of an independent contractor, but only for the acts or omissions of an employee, or a person performing a role that can properly be described as 'akin' to, or 'analogous' to, that of an employee.

The question for any Court, therefore, in considering allegations of vicarious liability for the torts of a quasi-employee is whether the tortfeasor is carrying on business on his own account, or whether he or she is in a relationship 'akin' to, or 'analogous' to, employment with the defendant.

In doubtful or borderline cases, the Court may need to take into account a number of factors in assessing whether the agency relationship is sufficiently analogous to employment to give rise to vicarious liability: but this will be a fact-sensitive enquiry, based on the details of the relationship. If it is clear that the tortfeasor is carrying on his own independent business, then that will ordinarily be conclusive of the fact that he has been acting as an independent contractor.

On the facts arising in the Barclays Bank case, the Court was asked to determine whether Barclays Bank was liable for the alleged sexual assaults committed by a GP medical examiner during medical examinations of prospective employees and employees. The Supreme Court held that the GP was clearly an independent contractor, however, and that, as a result, Barclays Bank were not vicariously liable for his actions.

Professional directors

In an unreported judgment dated 30 April 2020, *Steven Goodman v. DMS Governance Limited*, the Cayman Islands Court of Appeal has held that a corporate services provider and fund governance firm that employed an individual to serve as a professional independent director on the Board of a number of companies and funds would not be vicariously liable for any acts or omissions committed in that person's individual or personal capacity as a company director or officer of a client company, as opposed to acts or omissions committed in that person's separate capacity as an employee of the corporate service provider.

In reaching its conclusion, the Cayman Islands Court of Appeal considered that it was obliged, as a matter of precedent, to follow and apply an earlier decision of the Cayman Islands Court of Appeal (*Paget-Brown & Co Ltd v. Omni Securities Ltd* [1999] CILR 184) and an earlier decision of the Privy Council (*Kuwait Asia Bank EC v. National Mutual Nominees Ltd* [1991] 1 AC 187, on appeal from New Zealand), notwithstanding certain factual differences between the various cases, and the fact that that they were decided nearly 20 to 30 years ago[3].

The Cayman Islands Court of Appeal acknowledged, however, that it would be open to the Cayman Islands' Legislative Assembly to revisit the issue of directors' duties and liabilities in due course. It would also be open to the Privy Council to revisit these issues in the event that there were to be any further appeal to the Privy Council, whether on the facts of this case, or another one.

There is, for example, arguably some tension between the Cayman Islands authorities and certain judgments of the US Courts, such as *In re Sunbeam Securities Litigation 89 F. Supp. 2d 1326* (S D Fla 1999), *Pension Committee of University of Montreal Pension Plan v. Banc of America Secs LLC* 446 F Supp 2d (S D NY 2006), and *Krys v. Aaron (Re Refco Inc Securities Litigation)* 826 F Supp 2d 478 (S D NY 2011).

The New Zealand High Court has also suggested, in obiter dicta, that there should be an appellate re-examination of the issue of vicarious liability in the case of directors that are also employed by those that nominate them, in light of commercial realities and other socio-economic and public policy considerations: see *Dairy Containers Ltd v. NZI Bank Ltd* (1995) 13 ACLC 3211, in which Thomas J predicted that, "in the fullness of time, the House of Lords or the Privy Council will advise that the Kuwait case is no longer to be regarded as good law".

[3] Those authorities were also cited by Chief Justice Smellie in Re Sphinx Group of Companies [2009] CILR 28, in considering whether or not to order a trial of various preliminary issues in a dispute between a fund's liquidator and its former administrators, who were alleged to be vicariously liable for the acts of a senior employee that had been nominated to serve as a director of the fund.

Conclusion

As in other classes of insurance business, there are likely to be an increasing number of COVID-19-related EPL claims that test the boundaries of traditional EPL insurance, in circumstances where many employees, or quasi-employees, will have worked remotely from home on an unsupervised basis for an extended period of time.

The offshore insurance industry may at least take some small measure of comfort from the fact that English, Cayman Islands and Bermuda law on 'vicarious liability' is now as settled as can be, subject to the facts of any particular case.

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