

# Vicarious Liability of Employers For Intentional Criminal Acts of Employees

By Paul Angus, Partner | July 2006

GAVIN PATRICK RYAN v ANN ST HOLDINGS PTY LTD<sup>1</sup>.  
JUDGMENT: 16 JUNE 2006.

A recent decision of the Supreme Court of Queensland is a timely reminder to employers and insurers of the possibility that an employer will be held vicariously liable for the deliberate and criminal conduct of their employees if the conduct had a sufficient "closeness of connection" with the duties the employee was engaged to perform.

## The Facts

The plaintiff was a patron at the Beat Nightclub in Fortitude Valley in Brisbane in January 2002. He entered the nightclub with a friend, at about midnight and they left at 5.25a.m the next morning affected by alcohol but still in control of themselves. While on the footpath outside the nightclub, first his friend and subsequently the plaintiff were beckoned back into the nightclub by an employed security guard under the pretence of the security guard requiring their assistance to escort an apparent acquaintance of theirs who was having "trouble" leaving the nightclub. When the friend went inside the club, he was verbally abused by the security guard and slapped about the face three times before being pushed back out the front door. Subsequently the plaintiff, unaware this had gone on, was called into the nightclub by the same security guard under the same pretence. Once inside the club the security guard hit the plaintiff heavily on the right side of the face knocking him unconscious. The bar manager arrived and saw other security guards standing near the plaintiff and was told by the security guards that the plaintiff had "slipped over". There was no evidence as to any provocation by the plaintiff or his friend against the security guard.

## At First Instance

The Magistrates' Court found in favour of the plaintiff and, while the trial judge found that the security guard had intentionally committed a criminal act when he hit the plaintiff, the defendant was found vicariously liable for the conduct of the security guard on the basis that the security guard acted in apparent discharge of his duties and that there was no apparent reason for the attack that would lead a court to find that the security guard was not attempting to conduct the business of his employer at the time of the incident. The court awarded the plaintiff damages of \$37,502.

## On Appeal

The Court of Appeal dismissed the appeal and upheld the trial judge's findings.

The Court of Appeal found that it was clear that a security guard employed by a hotel had authority to use reasonable force in certain circumstances and that there was no doubt that an employer would be liable if

a security guard in carrying out his duties acted overzealously or overenthusiastically in applying force to a patron. However, the question to be considered was whether the security guard was acting in the course of his employment if he gratuitously assaulted a patron and therefore whether the hotel could be held vicariously liable for that gratuitous assault.

In answering this question the Court of Appeal applied the position of the High Court set out in *New South Wales v Lepore*<sup>2</sup>. The critical test emerging from *Lepore* involved a comparison between the intentional wrongful conduct and the type of conduct the employee was engaged to perform. The High Court found, and the Court of Appeal adopted, that if a sufficiently close connection existed, and the more authority an employer allows an employee to do things of a similar nature, the easier it will be for a court to draw a conclusion that the wrongful act was done in the course of employment. The majority referred with approval to the statement in *Dubai Aluminium Co Ltd v Salaam*<sup>3</sup>:

“The circumstances in which an employer may be vicariously reliable for his employees’ intentional misconduct are not closed. All depends on the closeness of the connection between the duties which, in broad terms the employees are engaged to perform and is wrongdoing”

The majority found that the close connection between the assault and the scope of the security guard’s employment was such that it was clearly open to the trial judge to find that the hotel was vicariously responsible for the conduct of the security guard.

Despite the apparent lack of motivation from the security guard to attack the plaintiff, other than personal gratification, the Court found that the security guard was acting in the apparent course of his employment. As the defendant called no evidence that the security guard had acted contrary to his instructions or in excess of the authority given to him, the test set down in *Lepore* was satisfied, and the employer was vicariously liable.

The appeal was unanimously dismissed.

## Implications

The finding of the Court of Appeal of Queensland is a timely reminder that both employers and host employers can be held vicariously liable for the apparent independent and malicious criminal conduct of an employee or labour hire employee when the conduct in question is of sufficiently close connection with the job the person was engaged to do. Apparently, criminal conduct of authorised activities could also possibly be characterised in a manner in which the occupier or host employer could be held vicariously liable despite the act at first instance appearing significantly outside the scope of employment or engagement.

While the decision has obvious ramifications for owners of licensed premises, any business that engages third party security guards could potentially be held vicariously liable for the unpredictable acts of a rogue employee who takes it upon themselves to commit a criminal act apparently outside the contract of employment or hire.

Of significance in this case was the absence of detailed instructions given by the employer to the security guards as to the extent of their authority and the admission by the hotel that the security guard had implied ostensible authority on their behalf to perform the acts alleged by the plaintiff. Employers and host employers should be specific in their directions to employees about the conduct of their roles, and possibly include setting limits for their authority or conduct.

## End notes

<sup>1</sup> [2006]QCA 217

<sup>2</sup> (2003) 212 CLR 511

<sup>3</sup> (2003) 2 AC 366

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