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Cumberland Ellis victory proves there is a limit

Richard Collier-Wright explains how Cumberland Ellis persuaded the Court of Appeal not to widen the concept of vicarious liability

Cumberland Ellis acting on behalf of an Order of religious Brothers recently succeeded in persuading the Court of Appeal to refuse to widen the legal concept of “vicarious liability” in the important case of *Various Claimants v The Catholic Child Welfare Society & Others*.

The classic relationship which gives rise to vicarious liability is that of employment. If an employee commits a wrongful act, then the employer is responsible if the act was carried out “in the course of employment”. The victim of that act does not have to prove it was the employer’s fault. The main policy reason for this principle has been to “spread the load” of paying compensation from a potentially impecunious individual to include an employer who can and often will insure against any such claim. This kind of “no-fault” liability is known as “vicarious liability”. However, vicarious liability is not confined to an employer/employee relationship.

The claims before the Court of Appeal related to allegations of historic abuse made by some 150 former pupils against members of staff at St William’s, a reform school/home in Yorkshire. The claimants sued two children’s societies of a Roman Catholic Diocese associated with the running of the school, but also brought a claim against the Order on the basis that it was vicariously liable for the acts of the

individual alleged abusers (some of whom were Brothers of the Order). The individuals would not be in a position to pay compensation. The Order was alleged to have been jointly or solely responsible for running St William’s even though they were not the employers of the staff. The claimants and the children’s societies referred to the control exercised by the Order over Brothers working at St William’s and the fact that the Headmaster was a Brother.

At first instance, the judge in the High Court rejected the claims that it was the Order that ran St William’s and that it should be vicariously liable for the acts of members of staff. He also decided that the Order was not vicariously liable for the acts of its Brothers. He accepted that there was no suggestion that the trustees of the Order knew or had any reason to suspect that the abuse had occurred. Even though there was no knowledge or suspicion, the claimants and the children’s societies argued before the Court of Appeal that the concept of vicarious liability should be widened in this situation to make the Order liable for the alleged abuse because they exercised control over the Brothers.

Such an extension of the principle of vicarious liability would have been a very significant development of the law as it would have opened up the possibility of new categories of

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Worldwide wills: home truths about assets abroad

Ann Stanyer considers how those owning property internationally need to plan very carefully when making a will

HMR&C report that as at March 2009 there were 103,000 people claiming non-domicile status in the UK and of those some 74,000 were resident in the UK. These figures point up the need to think about how their assets should be controlled and organised after their death to take account of the law where the assets are held: should clients have a single worldwide will or individual wills to deal with different jurisdictions?

If the foreign property in question is situated in former Commonwealth common law jurisdictions like Australia or New Zealand then the simple procedure of resealing an English Grant of Probate to a worldwide estate would suffice to deal with the foreign property. However, holiday homes in France, Italy and Spain are not now uncommon and countries with such civil law systems will probably require a separate will dealing with the assets in that country. Any such foreign will ought to be checked to make sure that it is limited to the assets in the foreign jurisdiction only, that it does not revoke all pre-existing wills and that any liabilities arising in that country are paid out of those assets.

In England and Wales we are used to the concept of real property (land) and personal property. However, in civil law countries different concepts apply including that of the division between “immovables” and “moveables”. Similarly, they apply a test of habitual residence rather than our concept here of “domicile”. This means that any immovable property in the civil law country will be subject to the jurisdiction of that country and any moveables in that country will be subject to the jurisdiction of the country where the deceased was last domiciled. A “chose in action” (something like a shareholding) is treated as being situated in the country where the share register for the company involved is kept.

Succession taxes in civil law countries in Europe are applied to individual beneficiaries in accordance with degrees of blood kinship rather than to

the estate itself. This could cause problems where, for example, an English worldwide estate is left to trustees on trust. Such trustees would have no degree of kinship to the deceased and potentially could lead to the highest rate of succession duty being applied.

In view of these issues anyone with a worldwide estate should think very carefully about how their worldwide estate will devolve on their death, the taxes and succession laws applicable and the persons who will have responsibility for dealing with the estate in a particular jurisdiction.

For further advice on these issues please contact
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Students may rely on the bank of Mum or Dad

Divorced parents need to plan for funding children through university says Richard Adams

So your child has completed their UCAS application, but now for the hard part – how to fund their studies? Parents who are separated or divorced should think about the following issues when thinking about their options:

- If **maintenance** is paid through the Child Support Agency, this will stop when the child is 16 or on completion of their secondary education. If a parent wants to ensure that maintenance is paid through university, this must be provided for in the court order at the time of, or within one year of, the separation or divorce or in a binding agreement that specifically covers this situation.
- **Timing.** If any court order only provides for maintenance to be paid until the end of secondary education, the parent seeking payment needs to apply to extend that through university before the existing order expires.
- Are payments required through any **gap year?** If the child does not immediately go to university after completing A levels, then the maintenance order could expire upon finishing secondary school. If this is not intended, make sure

an application is made before the child leaves school.

- **Tuition fees.** Many students make use of the loans available to them, but if a parent agrees to be responsible for tuition fees, there may be uncertainty about the amount the parent is to pay, particularly given the intended



rise in fees or if their child studies abroad. If there is a dispute, the court may say that the parent should pay, even though loans were and are available.

- A child over 18 may be able to apply to the court for the **maintenance paying parent to**

fund them through university.

This option will not, though, be available if there was an order for maintenance in force on the child's 16th birthday. Many parents will also pay part of the funds directly to the child and part to the other parent to cover expenses in the holidays.

It is better to be safe than sorry when planning funding your child through university, so if in doubt please contact a member of the Cumberland Ellis Family team for advice.
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organisations being sued for damages in respect of harm caused by an individual. If the argument had succeeded, then any body that could be said to have been able to exert some kind of control over a member could have been potentially liable for the acts of a member. This would have applied even if the body was innocent of any knowledge or suspicion of the harmful acts of the member and even though such acts were carried out in the course of the member's employment by a different organisation.

The Court of Appeal rejected this argument and concluded that the limited nature of the Order's involvement was insufficient to make it liable for any abuse suffered at St William's.

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Be workplace environmentally aware

Suzanne Eva highlights new provisions in the Equality Act relating to harassment in the workplace

The Equality Act 2010 puts into one piece of legislation all relevant law relating to discrimination. All previous discrimination legislation will, in time, be superseded by the new Act.

Although the Act protects the same groups as previous legislation, it extends that protection to some groups that have hitherto not been protected, such as people who are not disabled themselves, but who are discriminated against because they are "associated" with someone who is.

It is also worth noting that employees are now able to complain of harassment, even if harassing behaviour is not directed at them, provided they can demonstrate that the harassment creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

One part of the legislation stands out as being of particular risk for employers whose staff come into contact with third parties (from

care providers, retailers, hospitality industry providers to lawyers and accountants). From 1 October 2010 if a member of your staff is "repeatedly" harassed by a third party (which could be a customer, supplier or even a member of the public), you as an employer could be treated as having harassed that member of staff if you do not take reasonably practicable steps to prevent it happening again. All it takes is for a customer, for example, to behave in such a way as could be deemed to be harassment towards an individual more than twice and for you to be aware of this repeated harassment, and you could have an expensive claim under section 40(2) of the Equality Act 2010 on your plate.

What can you do to limit the risk of such a claim? The answer can be found in two steps: documentation and training.

An employer must take "reasonably practicable" steps to prevent repeated harassment of its

staff by third parties. Training and putting suitable policies in place coupled with a sensible attitude to reducing the risks posed by problematic customers/clients, suppliers and other third parties may well provide a sufficient defence to a claim under section 40(2). If there is little that you can do about the behaviour of your customers/clients, then the only protection is to prepare your staff for the worst. A programme of training for all staff will prepare them for the environment in which they work and will assist them in dealing with difficult third parties.

All employers need to review their equality and diversity policies in the light of the new Act to ensure that they are fit for this purpose. For help with this and with providing training courses for your staff you should contact the Cumberland Ellis Employment team.

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In brief



The price of love?

Did you see the one about the German heiress Ms Radmacher and her French banker husband Mr Granatino? They litigated about the financial provision on divorce. The outcome of the ruling by the Supreme Court was that, even without new legislation, the court should uphold a prenuptial agreement that is (1) entered into freely, (2) where both parties understand its implications (which means having had advice on the law as well as on the extent and nature of the finances), (3) not affected by any changing circumstance that applies at the time of divorce. Romance is not dead, it is just better informed.

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Impact of the government's cuts on the family unit

John Salton highlights some of the effects of the spending review for families

The coalition government has announced a series of public spending cuts and the following is a brief summary of the cuts and changes that could impact on you and your family:

- Tax relief on **pension premiums** has been reduced, for employees and the self-employed. From April 2011 the annual allowance will be reduced from £255,000 to £50,000, with a tax charge on any premiums paid above the reduced limit and rules to prevent artificial use of the higher limit before 5 April 2011. If you have plans to pay pension contributions in excess of £50,000 you should contact your financial advisor to ensure you do not lose relief or attract the tax charge.
- **Student fees** have been restructured so that universities can now charge £6,000 per annum and, in special circumstances this can be increased to £9,000.
- From January 2013 **child benefit** will be withdrawn from families with a higher rate taxpayer.
- For **working tax credits**:
 - the basic and 30 hour elements

- of the entitlement will be frozen for three years. The 30 hour element is currently set at £790 per annum and the basic element at £1,920 per annum.
- from April 2012 couples with children must work a total of 24 hours with one of them working 16 hours to enable them to become eligible for the working tax credit.
- the proportion of costs covered under the child care element will be reduced to 70% from the current rate of 80%.

- **Housing benefits** are to be cut and in some cases there will be a cap on the maximum amount that can be claimed by a dual or family group. This will affect landlords with relevant tenants as well as the tenants themselves.
- **State pension age** where both male and female will commence receiving pension at age 65 is to be brought forward to November 2018 and by April 2020 the pension age will be increased to 66. For example a woman born on 1 January 1965 will reach her state pension age when she is 66 years old.

Cumberland Ellis's tax manager John Salton provides a full range of personal taxation services. If you require more information please contact johnsalton@cumberlandellis.com



Leeway for landlords

The recent case of *Tiensia v Universal Estates* in the Court of Appeal has clarified the circumstances in which landlords will have to pay a penalty of three times the deposit taken from their tenant if they do not protect the deposit with one of the tenancy deposit scheme providers and provide required information to the tenant. It had been thought that even if landlords remedied a failure to comply with these steps (which are to be taken within 14 days of the deposit being received) prior to the court proceedings being issued by the tenant or between issue of the court proceedings and the hearing date, the landlord may still be ordered to pay the three times deposit penalty to the tenant. The Court of Appeal's decision on 11 November 2010 now makes clear that provided the landlord has remedied the failure prior to the hearing of the tenant's claim then all the tenant will be entitled to is payment of his reasonable costs.

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International Bar Association Annual Conference

Jeremy Lederman (head of the Commercial Dispute Resolution department) and Michael Sinha (head of the Property Group) attended the International Bar Association Conference held in Vancouver in October. As well as attending a series of sessions dealing with international aspects of work undertaken at Cumberland Ellis, Jeremy and Michael were able to strengthen and renew relationships with lawyers in other jurisdictions.



Employment Conference Speech

Mark Shulman (head of the Employment department) was a guest speaker at a business conference sponsored by HR Go plc, specialists in recruitment and business services. The event at Chilston Park in Kent on 17 November attracted 65 delegates and Mark spoke about the practical ways in which the law can help businesses to create a high performance workforce.



Brussels Credit Symposium

At the end of October David Foster, a member of the Commercial Dispute Resolution team, attended the Inaugural European Symposium in Brussels sponsored by the Association of International Credit and Trade Finance Professionals where many friendships and business connections were renewed with credit controllers and other senior finance professionals in attendance.



Mannheim Conference

Hazel Wright (head of the Private Client group) and Adam Edwards (head of the Commercial group) attended the annual meeting of Lawyers Cooperation, an international grouping of law firms, in Mannheim, Germany at the end of October. With so many of Cumberland Ellis's clients having international connections, it was a good opportunity to meet and discuss issues common the firm and its clients. At the meeting, Adam was elected to the board of Lawyers Cooperation.



New York Trip

Helen Robinson (partner in the Company Commercial department) and Jenny Cutts (partner in the Private Client department) travelled to New York in October. Historically Cumberland Ellis has strong links to American lawyers through its clients with US interests. This trip helped to cement relationships with US-based clients and US lawyers and professionals so Cumberland Ellis can offer a complete transatlantic professional service.

CHRISTMAS GREETINGS FROM CUMBERLAND ELLIS

Cumberland Ellis sends season's greetings to all our clients and contacts, with all best wishes for the New Year. This year, instead of sending greetings cards, Cumberland Ellis will again be making donations to charities supported by the firm. Cumberland Ellis's supported charities include Find Your Feet (a charity working to tackle hunger, poverty and discrimination in India and Malawi), Help for Heroes, Macmillan Cancer Support and Breast Cancer Care.



Family partner Conrad Adam is presenting a series of seminar roadshows on Divorce and the Family Business. An essential update for senior client facing professional advisers, the seminar covers wealth protection issues including the recent landmark Radmacher pre-nuptial agreement decision. Commenting on the initiative Conrad said "These days training has become a real currency and we see it as adding real value to our professional relationships with intermediaries. Demand for the seminar has been strong with bookings in the diary this side of Christmas and into the Spring". The seminar is free and delivered in-house at contacts' offices. For further information please contact conradadam@cumberlandellis.com

Office news

Cumberland Ellis is pleased to announce the appointment of Beth Youngs as credit control officer. The firm also welcomes Michèle Mullen as Receptionist. Congratulations to Elizabeth English in the Private Client department on becoming a member of the Society of Trust and Estate Practitioners.

Cumberland Ellis

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