The Bermuda Islands blow ‘sweet & sour’ on employers’ liability for Internet libel

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ABSTRACT

The Bermudian Supreme Court (at first instance) recently ruled in Bermuda Restaurants Limited (t/a ‘Chopsticks’) v. Jonathan Daspin and ConvergEx Global Markets Ltd. (Civil Jurisdiction 2008: No. 134 (to be reported)) on the issue of whether an employer (here, a company) should be held liable for an allegedly libellous email publication by its employee, the managing director. The Judge was asked by the employer company to determine two issues of law which exposed the company and which centred on its vicarious liability for its employee’s actions, including whether the use of the company’s email system, during working hours, made it complicit in the publication. The Court held, applying principles of English and Canadian law, that the company was not vicariously liable and by extension that it was not the email’s publisher.

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1. Background to Bermuda’s system of common law vis-à-vis the legal system of England and Wales

Bermuda (officially, ‘the Bermuda Islands’ or ‘Somers Isles’) is the oldest self-governing dependant territory of the United Kingdom (‘UK’). Although Bermuda is not an independent country from the UK, Bermuda’s Courts are no more subsidiary to England than the Courts of those other independent countries which maintain the Privy Council as their final appellate Court.

Unless the relevant common law authorities and statutes were in effect at the given date of Bermuda’s formal settlement, on 11 July 1612,2 Bermuda’s Courts are not bound by decisions of English Judges and UK statute law does not enjoy automatic force of law. Nonetheless, Bermuda’s Judges recognise the experience and legal scholarship of the UK’s House of Lords, the consequence of which is that Bermuda’s Courts will generally regard declarations of the common law by the Law Lords as binding and the decisions of the English Court of Appeal as being highly persuasive.

1 Bermuda is itself a politically stable jurisdiction with a stable monetary system (a currency on par with the US Dollar) and a high sovereign debt rating. Bermudians enjoy a GDP 50% higher than the USA giving it the highest GDP per capita in the world. Bermuda has a highly educated and skilled local and expatriate work-force, facilitative regulation of its key industries (namely, foreign ‘exempt’ companies including insurance and reinsurance companies) and is itself a most pleasant jurisdiction in which world class bankers, local and expatriate lawyers, accountants, actuaries and (re)insurance risk management professionals live and work. It benefits from close proximity to East Coast USA (2 hours to New York and Boston etc.) and also the EU (7 hours to London). Bermuda celebrates the 400th Anniversary of its discovery in 2009.

2 Section 15 of the Supreme Court Act 1905 states that: “Subject to the provisions of any Acts which have been passed in any way altering, amending or modifying the same, and of this Act, the common law, the doctrines of equity and the Acts of the Parliament of England of general description which were in force in England at the date when these Islands were settled [11th July, 1612] shall be, and are hereby declared to be, in force within Bermuda.”
Therefore, in the field of Internet defamation to which this case note relates, the UK’s Defamation Act 1996, including its statutory offences and defences to publication, and any subsequent body of case law that has arisen in respect of it, has no force of law in Bermuda.

Common law principles of libel, including vicarious liability for such intentional torts and questions of complicity in ‘publication’ have not been addressed significantly by the Bermuda Courts (theoretically, to fully research Bermuda’s libel laws would first require an examination of English libel law dating back to when Bermuda was first settled). As a result (and as is common practice in Bermuda dispute resolution), counsel in this case had almost exclusive reliance on English common law principles—and, as will be seen, on Canadian and US authority as well.

Bermuda’s statute law has also not been kept current along with the introduction of the Internet as a key medium of communication. Bermuda’s own ‘Libel Act 1857’ legislates only for mitigation of damages through published apology and also libel through “newspaper” publication.

This is in contrast with Bermuda’s early adoption of e-commerce legislation. The Electronic Transactions Act 1999, which is based on the UNCITRAL Model Law on e-commerce, is functionally similar to the UK’s Electronic Communications Act 2000 and Regulation of Investigatory Powers Act 2000, for the legal recognition of digital signatures and providing basic civil and criminal law regulation of the public key infrastructure. Legal remedy for defamatory communication using such e-commerce networks is still determined by aged common law, however.

2. The facts

During May 2008, the managing director of a Bermudian incorporated company, ConvergEx Global Markets Limited (“ConvergEx”), received an email, the text of which he amended so as to contain serious allegations concerning a local Chinese restaurant based in Hamilton and operated by the Plaintiff company, trading as ‘Chopsticks’ restaurant.

The allegations made by the director were to the effect that the restaurant had been closed down by the Corporation of Hamilton after a service worker had attended the basement of the restaurant and discovered rats being cut into pieces, so as to simulate cooked chicken, with a view to these being served by the restaurant. The email contained nine or so photographs.

The managing director then sent the email to a number of individuals. As with other such errors in judgement over the past 10 years or so, and which quickly enter urban myth, the email came to be circulated (and republished therefore) by email quickly and very widely, to the point of being reported in the press within days.

Chopsticks commenced legal proceedings against the managing director and also his employer, ConvergEx, pleading that the managing director “and/or” ConvergEx “alternatively the [managing director] on behalf of the [ConvergEx] sent an electronic communication to various third parties and published the following words defamatory of the Plaintiff and/or its said restaurant ...” ConvergEx, in its defence, denied that it had sent the email and also denied that its managing director had sent the relevant electronic communication on its behalf.

Subsequently, ConvergEx was granted permission to expedite the determination of the Plaintiff’s case against it by way of a Hearing of two key issues of law (for the purposes of the Hearing, it was accepted that the email was libellous). The two issues of law were as follows:

- firstly, whether ConvergEx is vicariously liable for the employee’s publication of the email; and
- secondly, whether ConvergEx was a legal publisher of the email.

3. The Plaintiff’s arguments

In respect of both preliminary issues of law, the plaintiff restaurant argued that as the employee director was the ‘managing director’, and the most senior authority figure in Bermuda, with day-to-day control over the company and its employees, he was indistinguishable from his employer, the incorporated company itself. In other words, he was the de facto company.

If this premise was correct, it was submitted that any and all actions performed by the managing director were fully attributable to the company, ConvergEx, irrespective of whether those actions were outside the narrow parameters of the director’s employment contract and the ancillary terms of ConvergEx’s office protocol, which restricted the use of office email systems for personal communication (both the employment contract and the office manual were put in evidence before the Court).

The plaintiff found additional support for its argument from the email having been sent using a ConvergEx email account and office computer equipment during normal office hours.

4. ConvergEx’s arguments

4.1. The managing director was not the de facto company

In arguing that its managing director, an employee, was not its alter ego, ConvergEx relied upon the House of Lords decision in Meridian Global Funds Management Asia Ltd. v. Securities Commission [1995] A.C. 500, where Lord Hoffmann explained the legal basis upon which the actions of human beings (i.e. natural persons) may be attributable to corporations (i.e. fictitious persons) via “rules of attribution” which should be applied first. He said (at p. 506B-C):

“Any proposition about a company necessarily involves reference to a set of rules. A company exists because there
is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called ‘the rules of attribution.’”

In that case, Lord Hoffmann went on to distinguish the rules of attribution in which the actions of human employees/agents (who can never be considered as the company itself) are attributable to the employer company (at p. 506C et seq. and separated into discrete points as follows):

- “The company’s primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as ‘for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company’ or ‘the decisions of the board in managing the company’s business shall be the decisions of the company...’”;
- There are also primary rules of attribution which are not expressly stated in the articles but implied by company law...”;
- The primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company’s primary rules of attribution, count as the acts of the company...”
- And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.”

4.2. Vicarious liability for the employee/managing director’s alleged intentional tort

ConvergEx further argued that it was not vicariously liable for the email’s publication by its employee.

The test for vicarious liability, in the context of intentional torts such as libel, has been recently restated by the House of Lords in *Lister v. Hesley Hall Ltd* [2002] 1 A.C. 215, at p. 245 (per Lord Millett) and also at pp. 223–224 and 230 (per Lord Steyn) where his Lordship stated that:

“The test is whether [the person concerned] torts are so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.”

The question in that case for the House of Lords was, “whether as a matter of legal principle the employers of the warden of a school boarding house, who sexually abused boys in his care may ... be vicariously liable for the torts of their employee.” at p. 220B, per Lord Steyn.

The House of Lords held unanimously (reversing the Court of Appeal and overruling *Trotman v. North Yorkshire County Council* [1999] LGR 584) that the respondent company was vicariously liable for the torts of its employee, notwithstanding the fact that these were plainly unauthorised by and unknown to the Company, criminal in nature and committed for the purpose of the employee’s personal gratification. Lord Steyn, who gave the leading speech, concluded as follows (at p. 230C-D):

“... I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.”

ConvergEx also cited the subsequent House of Lords decision in *Dubai Aluminium Co Ltd v. Salaam* [2003] A.C. 366, at p. 377E, per Lord Nicholls, who noted that:

“the wrongful conduct must be so closely connected with the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the [employee] while acting in the ordinary course of... the employee’s employment.”

Lord Nicholls there cited with approval two alternative formulations of the test by, respectively, the Supreme Court of Canada and a leading academic:

“The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation).” *Bazely v. Curry* (1999) 174 DLR (4th) 45, at p. 62 (per McLachlin J). [emphasis added]

From these authorities, ConvergEx argued that it was not vicariously liable as there was no connection between, on the one hand, the managing director’s sending an email concerning a local Chinese restaurant and, on the other, his employment. He was, after all, not employed as a restaurant critic and in sending the email, to use a lawfuley colourism in support of the above recent case law, he had been ‘off on a frolic of his own’.
5. **ConvergEx actively participated in, authorised, or knew of the Managing Director’s email publication**

This was the second limb of the case against ConvergEx which had been accelerated for early determination before the Court, namely, ConvergEx could only be liable for its employee’s email publication (including amendment of the email’s written content by the director), if it had actively participated in the publication.

ConvergEx argued that it had merely provided a connection to the Internet through its corporate network equipment and service subscription. Its role in the email being first manipulated and secondly disseminated, however, had been completely passive throughout.

By way of analogy, ConvergEx directed the Court to the decision of Mr Justice Eady in *Godfrey v. Demon Internet Ltd* [2001] QB 201, in which “the defendant was not merely a passive owner of an electronic device through which postings were transmitted. It had actively chosen to receive and store the news group publication. It was within its power to obliterate the posting, then a fortiori the passive corporate owner of the computer network and subscriber to an Internet connection service cannot be liable as a publisher at common law.”

The Court was also directed to Eady J.’s conclusion that, “for a person to be held responsible [as a publisher] there must be knowing involvement in the process of the publication of the relevant words. It is not enough that a person plays a passive instrumental role in the process.”

ConvergEx further argued that *Bunt v. Tilley* should be distinguished from *Godfrey v. Demon Internet Ltd* [2001] QBD 746 (one of the American authorities considered by the English High Court in *Godfrey v. Demon Internet Ltd*):

> “The telephone company’s role is merely passive and no different from any company which leases equipment to another for the latter’s use ... in order to be deemed to have published a libel a defendant must have had a direct hand in disseminating the material whether authored by another, or not ... It could not be said, for example, that International Business Machines, Inc., even if it had notice would be liable were one of its leased typewriters used to publish a libel. Neither would it be said that the Xerox Corporation, even if it had notice, could be held responsible were one of its leased photocopy machines used to multiply a libel many times.” (At p. 749, per Gabrielli J.)

6. **The Court’s decision**

On the basis of these submissions, the Bermudian Judge, Mr Justice Bell, held in favour of ConvergEx.

On the question of vicarious liability, the actions of the managing director were clearly unconnected to his employment. The fact that the director was the most senior ConvergEx employee on the island who set office procedure did not mean his actions were either the actions of the company or could be attributed to ConvergEx under the English common law principles of attribution.

Importantly (and regrettably), as the plaintiff had not argued that ConvergEx, as a separate entity to its managing director, had clearly “participated in, secured or authorised the publication” of the Internet email, the Court held that it did not need to consider the burgeoning principles stated in the Internet-ISP legal authorities cited by ConvergEx.

7. **Comment**

The Court’s decision was clearly the correct one. As a matter of vicarious employer liability, a director (no matter how considerable his ego) is not the alter ego of the company. As ConvergEx’s lead Counsel noted to the Court, “Louis XIV’s famous observation, ‘Mois, je suis l’état’ is not a maxim applicable to company law”.

Many of the analogous Internet libel cases which are commented on in useful practitioners’ texts such as the 1996/7 dispute between Western Provident v. Norwich Union, are actually reported settlements, reached before judgement, and are not useful legal precedent. They serve as warnings only. Other limited authorities such as Takenaka (UK) Ltd & Anor v. Frankl [2001] EWCA Civ 348, address other aspects of intentional libel via the Internet (such as obtaining data/document Court Orders to ascertain the identity of libellers using unauthenticated web-based email).

The decision, if read as widely as these past reported settlements have been, could prompt employers (and their liability insurers) to restrict absolutely their employees’ personal use of corporate Internet accounts. Limited permission for personal use of an employer’s email system (as opposed to webmail) is often found in written email protocols for employees. Even limited personal use could cause an employer to be exposed to “having introduced the risk of the wrong” and be “...thereby fairly and usefully charged with its management and minimisation” (as per the Canadian case of Bazely v. Curry, as cited by Lord Nicholls in the House of Lords decision in Dubai Aluminium Co Ltd v. Salaam).

Although the decision turns on its facts, given the notable dearth of legal authority on issues concerning vicarious liability for email publication using corporate equipment (as opposed to the previously considered question of innocent/passive publication via the ISP as a mere conduit), the decision of the

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Bermuda Supreme Court provides welcome guidance for employers in common law jurisdictions whose IT equipment can be used to commit libel.

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