

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2013] CSIH 67

PD1080/11

OPINION OF LORD CARLOWAY,

the LORD JUSTICE CLERK

Lord Justice Clerk

in the reclaiming motion

Lord Brodie

JELENA VAICKUVIENE and OTHERS

Lord McGhie

Pursuers and Respondents;

against

J SAINSBURY PLC

Defenders and Reclaimers:

Act: Campbell QC, McNaughtan; Digby Brown LLP

Alt: Young QC, A Cowan (Solicitor Advocate); Simpson & Marwick

11 July 2013

Introduction and Averments of Fact

[1] The pursuers are the relatives of the deceased Roman Romasov. He was murdered, whilst employed with the defenders, by a co-employee, namely Robert McCulloch, in the defenders' supermarket at Berryden Road, Aberdeen on 15 April 2009. Mr McCulloch pled guilty to the murder and, on 28 July 2009, was sentenced to life imprisonment.

[2] Two matters require to be highlighted at the outset. The first is that the pursuers' claim proceeds only on the basis of the defenders' vicarious liability for the actings of Mr McCulloch, which are said to constitute harassment in terms of section 8 of the Protection from Harassment Act 1997 (article 9 of condescendence). There is no claim of direct liability against the defenders based upon, for example, their negligence in employing, or continuing to employ, a dangerous (in the sense of violent) person "known" to have racist views and a specific dislike of immigrant workers, such as the deceased. There is no direct claim grounded upon any failure by the defenders to have in place appropriate procedures to identify and deal with the harassment of employees. There is no claim of vicarious liability based upon the failure of the defenders' management to respond urgently to the deceased's complaints of aggression, abuse and threats by Mr McCulloch in the days immediately before the murder.

[3] The second is that the action proceeds upon abbreviated pleadings in terms of chapter 43 of the Rules of Court. A motion to withdraw the cause from the procedure under that chapter, and for it to proceed as an ordinary action (RC 43.5), was refused by the Lord Ordinary on 28 July 2011. This is regrettable, given the nature of the case, in so far as it may have resulted in a lack of proper specification of potentially important information; not least averments about what Mr McCulloch was employed to do (beyond being a nightshift worker) and about what both the deceased and Mr McCulloch were engaged upon at the time of the murder. That having been said, however, the pursuers confirmed expressly that all facts to be founded upon after

proof had been averred. The court was asked to assume that both were at least supposed to be stacking shelves when the murderous attack took place (see *infra*).

[4] On 26 April 2012, the Lord Ordinary refused the defenders' motion to dismiss the cause as irrelevant and allowed the parties a proof before answer ([2012] CSOH 69). The defenders have reclaimed that decision.

[5] The averments, such as they are, disclose that the deceased had worked for the defenders as a shelf-stacker since 2008. He was a Lithuanian national. Mr McCulloch, with whom the deceased worked regularly on nightshift, was a member of the British National Party and "known" to hold "extreme and racist views about Eastern European workers coming to the UK". There had been "bad blood" between the deceased and Mr McCulloch for some time. Mr McCulloch had frequently made racist comments and was aggressive and argumentative. In the days immediately prior to the murder, fellow employees had discussed hearing a threat by Mr McCulloch to the effect that he was going to kill the deceased. Neither the threat nor its timing are averred as fact.

[6] On 13 April 2009, Mr McCulloch had told the deceased that he did not like immigrants and that the deceased should go back to his own country. The making of racist comments was a disciplinary offence in terms of the defenders' policies. The deceased was distressed by the incident and wrote a letter of complaint to his team leader which was passed on to the nightshift manager. No action was taken in response to the complaint, of which Mr McCulloch became aware. On 15 April 2009, the deceased was working on nightshift with Mr McCulloch. During a break, at around 1.00am, an argument broke out between them, when Mr McCulloch took exception to the deceased sharing his table. Shortly afterwards, a further argument took place between them in the staff toilets and punches were thrown. At around 3.00am, fellow employees noticed McCulloch behaving strangely, pacing up and down and talking to himself. At around 3.15am, Mr McCulloch removed a kitchen knife from the kitchenware section of the supermarket and attacked the deceased in one of the aisles. The deceased sustained fatal stab wounds.

[7] The conduct of Mr McCulloch towards the deceased is said to have amounted to harassment in terms of section 8 of the Protection from Harassment Act 1997. On that basis, it is averred without further elaboration, the defenders are vicariously liable for that harassment.

Opinion of the Lord Ordinary

[8] The defenders sought dismissal of the action on the basis that, albeit there may be vicarious liability for harassment under the 1997 Act, the pursuers had failed to make relevant averments of a "close connection" between the wrongful actings of Mr McCulloch and his duties as an employee. Under reference in particular to *Wilson v Exel UK* 2010 SLT 671, it was said that the averred facts and circumstances did not reveal a necessary and critical connection between Mr McCulloch's job and the murder. There were no averments that Mr McCulloch had any special role in relation to the deceased as was present in sexual abuse cases (eg *Lister v Hesley Hall* [2002] 1 AC 215). The pursuers countered by contending that Mr McCulloch's awareness of the complaint was important. The pursuers' case was indistinguishable from *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224. Under reference especially to *Gravil v Carroll* [2008] ICR 1222 (Sir Anthony Clarke MR at para 21) and *Cercato-Gouveia v Kyprianou* [2001] EWCA Civ 1887 (Dyson LJ at para 17), it was said that everything about the harassment, including the murderous assault and the taking of a knife from the place of work, was connected with "the employment situation". There were sufficient averments to satisfy the "close connection" test for vicarious liability. The case was particularly "fact-sensitive" and it could not be said, without hearing the evidence, that the pursuers would necessarily fail.

[9] Having considered certain general material on vicarious liability, the Lord Ordinary expressed the view (Opinion, para [24]) that:

"The development of vicarious liability has been policy driven, the categories ... are not closed and the lines which have been drawn in cases which are fact dependent are not always easy to interpret or reconcile ...
[T]he development of vicarious liability is an ongoing process which may take us rather far from some of the

earlier cases as the law reflects changing ideas about responsibilities as between employer and employee and who should bear the burden".

The Lord Ordinary observed (para [26]) that the pursuers accepted that they had to aver facts from which it could be inferred that the conduct of Mr McCulloch in harassing the deceased was "in the course of his employment as that concept has been developed in case law such as *Lister* and in subsequent cases". Both parties accepted that the "close connection" test as stated by the Lord President (Hamilton) in *Wilson v Exel* (*supra*) at para [7] was "between the task with which the employee had been charged and the conduct complained of...".

[10] The Lord Ordinary considered, however, that the pursuers' case was distinguishable from *Wilson* (*supra*) and plainly influenced by *Majrowski v Guy's and St Thomas's NHS Trust* (*supra*). In the context of the general policy considerations which she had noted, and their analysis in *Majrowski* (Lord Nicholls at paras 28 and 30), the Lord Ordinary recognised the need for employers developing codes of practice and discipline to regulate employees' behaviour. She then stated (para [35]):

"I consider that the type of behaviour which might be encompassed in a harassment case may be very different from an isolated or unexpected outbreak of aggressive behaviour by one employee to another. I do not consider that the case law dealing with individual assaults with employees who have molested or assaulted third parties are determinative of the situation in the present case."

At the same time she acknowledged (para [36]) that, following *Majrowski* (*supra*):

"...there are good policy reasons for extending the scope of vicarious liability to harassment cases which satisfy the general principles of vicarious liability. That includes satisfaction of the close connection test."

[11] Nevertheless, the Lord Ordinary concluded (para [39]):

"I read the averments of the pursuers as indicating that the way in which McCulloch carried out his work on a day to day basis in his interactions with the deceased as a fellow employee was infected by the racist BNP views of McCulloch who did not wish to work with a fellow employee from Eastern Europe. Further in the knowledge that the deceased had invoked the disciplinary procedures of the defenders, McCulloch reacted to that with escalating violence resulting in aggression and assault, followed by murder. Looking at the matter broadly, I consider that the pursuers' averments go well beyond averments which merely state these events occurred between employees at their place of work during working hours. The averments in this case are, in my opinion, capable of being construed as entirely connected with McCulloch's work in the way he responded to the defenders' choice of fellow employee and in his reactions to the deceased's invocation of the employer's disciplinary process."

The Lord Ordinary drew a particular distinction (para [40]) between the present case and:

"a straightforward situation in which one employee has assaulted a fellow employee in the course of a "prank" as Lord Carlway concluded had occurred in *Wilson v Exel* (*supra*)".

Grounds of appeal and submissions

Defenders and reclaimers

[12] The defenders maintained that the "close connection", which had to be established in order to found vicarious liability, was between the harmful act and the wrongdoing employee's duties. The Lord Ordinary had proceeded, erroneously, on the basis that it was sufficient to establish a connection between the murder and Mr McCulloch's employment in the broader sense. The close connection test involved asking whether Mr McCulloch's specific employment duties created or significantly enhanced the risk of harm occurring (*Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319, Lord Phillips at paras 86 - 87). This was the single clear test that must now be applied in all vicarious liability cases, whether involving negligent acts or intentional wrongdoing. The Lord Ordinary had failed to consider this test. It did not alter,

but merely clarified, the effect of the existing case law, including *Lister (supra)*; see Lord Clyde at para 36 under reference to Salmond: *Law of Torts* (1st ed) at 83). It was not sufficient to examine the broad risk created by the working environment; the focus must be on how the employee's contractual powers and duties created or increased the risk of harm occurring (*EB v Order of the Oblates of Mary Immaculate* 2005 SCC 60). It was necessary, first, to examine the connection between the duties of Mr McCulloch and what was done to the deceased (*Wilson (supra)*, LP (Hamilton) at para [12], Lord Carloway at paras [24] - [25]). If there was any doubt as to whether or not the requisite connection existed, it was necessary to go on to consider whether the employee's duties created or increased the risk of the harm occurring.

[13] As in *Wilson (supra)* (Lord Carloway at para [32]), Mr McCulloch had been engaged upon a purely "private venture" unconnected with his duties in pursuing his employer's enterprise. There was nothing in his duties that involved confrontation with other persons or the creation of a risk by way of, for example, the supply of a lethal weapon (cf *Bernard v Attorney General of Jamaica* [2005] IRLR 398, Lord Steyn at paras 25-27). *Wallbank v Wallbank Fox Designs* [2012] IRLR 307, which held employers vicariously liable for the violent reactions of an employee to an instruction, had been wrongly decided (cf *Weddall v Barchester Healthcare op cit*). The pursuers had not attempted to aver what Mr McCulloch had been employed to do or what he had been doing at the material time. Shelf stacking did not carry with it any risk of violence. The pursuers' case therefore fell at the first hurdle. All that *Majrowski (supra)* had said was that an employer could be liable vicariously for an employee's harassment of another. The close connection test still applied (Lord Nicholls at para 30).

Pursuers and respondents

[14] The pursuers submitted that the Lord Ordinary's opinion had been careful and thoughtful. Her judgment had been exemplary (see Fulbrook: *The Outer Limits of Vicarious Liability etc.* [2012] JPIL 201). She had been correct to distinguish *Wilson (supra)* from the present *Majrowski* type of case, involving harassment by one employee of another, over a substantial period of time, perpetrated only in the workplace, and focussed particularly on the victim's employment. The Lord Ordinary had applied the correct "close connection" test and the pursuers' averments offered to prove that connection. "[A] broad approach should be adopted. Thus the context of the act complained of should be looked at and not just the act itself" (*Wilson (supra)*, Lord Carloway at para [28] under reference to Lord Clyde in *Lister (supra)* at para 43). The court should not dissect the nature of the particular duties of the employee (*Ilkiw v Samuels* [1963] 1 WLR 991, Diplock LJ at 1004, quoted by Lord Clyde in *Lister (supra)* at para 42). Instead, it should consider the way in which Mr McCulloch had carried out his duties over a significant period of time, particularly as the pursuers had averred a "course of conduct" constituting harassment under the 1997 Act. Such circumstances were particularly fact-sensitive (*Weddall v Barchester Healthcare (supra)*, Moore-Bick at para 60; *Cercato-Gouveia v Kyprianou (supra)*, Dyson LJ at 23).

[15] The whole course of conduct of Mr McCulloch, if it had been investigated by the defenders, would have been found to have materially increased the risk to the deceased. In that context, harassment and even murder were reasonably incidental risks of the type of business carried on by the defenders (*Bernard v Attorney General of Jamaica* [2005] IRLR 402, Lord Steyn at paras 19 and 24). It was not necessary to show an obvious element of confrontation inherent in the business (*Rodgers v Kemper Construction Co* (1975) 124 Cal Rptr 143). The close connection was established because the deceased and Mr McCulloch had worked together and the harassment had been solely in the employment context. Harassment was part of the way in which Mr McCulloch carried out his work as a shelf stacker. It was the way in which he performed his duties. He harassed people. His violence had been a reaction to the disciplinary process.

[16] The case was "on all fours" with *Majrowski (supra)*, which demonstrated the circumstances in which vicarious liability would be imposed in respect of harassment in the workplace. Had there been no prospect of success on the merits in *Majrowski*, the House of Lords would have not have allowed it to proceed to proof. In what is a developing area of the law, the merits of the present case should not be decided without evidence (see eg *Weddall v Barchester Healthcare (supra)*). The court ought to adhere to the Lord Ordinary's interlocutor allowing a proof before answer.

Decision

[17] It is not disputed that an employer may be vicariously liable for harassment carried out by an employee in the course of his employment. One obvious example of this would be where an employee in a dominant position, perhaps involved in a supervisory role, harasses an inferior worker in an attempt to enhance productivity or enforce discipline. Although describing an act of murder as forming part of a course of harassment may seem somewhat artificial, that is what the pursuers offer to prove. For present purposes, the court must proceed on the assumption that they will succeed in demonstrating that it was the culmination of that course of conduct.

[18] Since the early part of the nineteenth century it has been recognised that an employer is vicariously liable for the actings of his employee, but only when the employee is acting "in the course of his employment". Thus, as early as *Baird v Hamilton* (1826) 4 S 790, Lord Glenlee was able to state (at 791) the distinction thus:

"The master is liable for the carelessness of his servant. It is essential, however, that the damage should arise from the way and manner of doing the master's work. For, suppose a servant takes offence at another man, and horsewhips him, though at the time he is conducting his master's cart, yet the damage is not inflicted in the doing of it - he is acting for himself, and the master is not liable".

Society has moved on but, at least until recently, the principles in this area remained reasonably well established and understood. There was particular enthusiasm for the laudably succinct summary of the law in what was originally Salmond on the *Law of Torts* (1st ed, 1907), that an act occurs in the course of employment where it is:

"either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master" (1st ed at 83; see now Salmond & Heuston: *Law of Torts* (21st ed) at 443).

This passage was approved by the Lord President (Clyde) in *Kirby v National Coal Board* 1958 SC 514 (at 533, following Lord Thankerton in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 at 599).

Salmond had gone on to explain (1st ed at 83-84) that:

"a master...is liable for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - though improper modes - of doing them".

This explanation is a gloss on the extent of the liability for a wrongful mode of doing an authorised act and not a separate third category of liability.

[19] The court had occasion to revisit the relevant principles recently in *Wilson v Exel UK* 2010 SLT 671, in which it was stressed (see eg Lord Carloway at para [25]) that the test remained one of whether the actings of the employee were "within the scope of his employment". The court noted the developments which had occurred in the child abuse cases, especially the various, and to a degree differing, *dicta* in *Lister v Hesley Hall* [2002] 1 AC 215. The judges in *Lister* had analysed the Canadian jurisprudence in *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71, which had developed Salmond's reference to "connection" into a "close connection" test.

[20] In *Lister*, Lord Steyn, with whom Lords Hutton and Hobhouse agreed, delivered a judgment based firmly on the idea of practical justice rather than "conceptualistic reasoning" (para 16). As was expressly noted in *Wilson* (paras [26] *et seq*), Lord Steyn approved (para 18) of the "frolic of his own" approach, as exemplified by *Williams v A & W Hemphill* 1966 SC (HL) 31, and the usefulness of the Salmond formulation as a "broad" and "practical" test (para 20), albeit within the overarching concept of whether it was "just" for the law to impose vicarious liability in a given set of circumstances. On that basis, he considered that the connection between the abuse of children and the work of their carers, acting as such for the defendants, was

"very close" and thus liability attached. Lord Clyde referred (at para 34) to the Lord President's (Cooper) view in *Kilboy v South Eastern Fire Area Joint Committee* 1952 SC 280 (at 285) that the expression "*respondeat superior*" had degenerated from being a legal principle into a rule of expediency. He too focussed (at para 37) on the Salmond formulation and rephrased it thus:

"What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection then the closeness of that connection had to be considered. The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised".

Again as was observed in *Wilson* (at para [28]), Lord Clyde provided helpful guidance on how to approach the issue. First, it had to be done broadly, taking into account the context of the act complained of and not just the act itself. Secondly, whilst time and place were always relevant, they were not conclusive. Thirdly, the fact that the employment provided the opportunity for the act to occur at a particular time and place was not necessarily enough for the imposition of liability.

[21] In *Wilson*, the court noticed the view of Lord Millett in *Lister* concerning the risks inherent in the particular employment. In light of subsequent *dicta* (*infra*), it is worth expressly revisiting what Lord Millett said (at para 65) under reference to passages from Fleming: *The Law of Torts* (9th ed) (at p 410) and Atiyah: *Vicarious Liability in the Law of Torts* (at 171):

"These passages... are based on the more general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. That fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business".

This analysis was still concerned with answering the question of whether a particular act was committed "in the course of the employment" (para 66) and Lord Millett too placed great weight on the Salmond formulation, with all its blemishes (para 67). Ultimately, all the members of the court considered that the employee's abuse of the children had been committed in the course of the employment. They therefore overruled the approach of Butler-Sloss and Chadwick LJ in *Trotman v North Yorkshire County Council* [1999] LGR 584 (at 591 and 592-3) to the effect that such criminal actings could not be regarded as unauthorised modes of carrying out the employee's duties. Put the other way, the abuse was an unauthorised mode of carrying out the duty of caring for children.

[22] The law in relation to the sexual abuse of children has been re-analysed by the United Kingdom Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319. It is not entirely unreasonable to comment that the reasoning of the Court in that appeal seems to be rather different from that adopted by most, if not all, of the judges in *Lister*. Lord Phillips, with whom the other judges agreed, initially isolated (at para 21), as a particular (second) question, what the connection was that linked the employee/employer relationship with the wrongdoing. He endorsed (para 62) the traditional approach of asking whether the act was committed in the course of the employment. However, he went on to quote McLachlin J in *Bazley* (*supra* at para 42) that:

"there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks" (McLachlin J at para 42).

This may be described as the introduction of the "enterprise risk" (Lord Phillips at para 65), or "creation of risk" gloss on the imposition of vicarious liability (Lord Phillips at para 72).

[23] Creation of risk was seen by Lord Phillips (paras 74, 86) as a significant, but not decisive, element in the establishment of the necessary "close connection" at least in abuse cases. This approach may be contrasted with earlier *dicta* to the effect that it was a policy consideration justifying liability rather than a criterion for liability. Thus, for example, in *Brown v Robinson* [2004] UKPC 56, Lord Carswell, delivering the judgment of the Privy Council (at para 11) and under reference to Lord Hobhouse in *Lister (supra)* at para 60), had stressed that risk was not a criterion and that the test remained that which had been set out in *Dubai Aluminium Co v Salaam* [2003] 2 AC 366 (Lord Nicholls at para 23); notably, whether the wrongful act was so closely connected with what the employee was authorised to do that it could "fairly and reasonably" be regarded as done in the ordinary course of the employer's business or employee's employment (see also Lord Millet at para 107). In *Bernard v Attorney General of Jamaica* [2005] IRLR 398, however, Lord Steyn, after analysing the South African Court of Appeal's reaction to the *dicta* of Jansen JA in *Minister of Police v Rabie* 1986 (1) SA 117, suggested (para 20) that the creation of *special* risks could be a relevant factor. Similarly, in *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441, Lord Neuberger applied the "close connection" test (paras 38 and 55) set out in *Lister (supra)*. Whilst stressing the need for the application of vicarious liability to be "reasonably circumscribed" (para 52), he considered that it was relevant that there was a "material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm" (para 53).

[24] Against this background, it may be said that it is now easier than hitherto to impose vicarious liability in the situation where the employer's business creates (in the sense of materially increasing) a general risk of harm or, perhaps more accurately, where that part of the business for which the particular employee was engaged, created such a risk. However, this may not be materially different from observing, as appeared to be part of the *ratio* in *Lister (supra)* that, where such a risk exists, it is easier to affirm that what the employee has done was an unauthorised manner of doing what he was engaged to do. Certainly, an analysis that approaches the matter primarily on the basis of increase of risk is otherwise in danger of confusing direct with vicarious liability (see *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273, Lord Nicholls at paras 17 and 46). Indeed, this confusion may be present in the mind of the pleader in this case given the quantity of averment which seems potentially relevant to a case of direct fault but not obviously so to one based solely on vicarious liability.

[25] The present case ought to be approached in a similar manner as the court viewed the facts averred in *Wilson v Exel UK (supra)* at para [25]), by noticing that the general question of whether vicarious liability attaches ultimately depends on whether the wrongdoing employee's actings were so closely connected with his employment that it would be "fair and just" to find the employer liable (*Lister (supra)*, Lord Steyn at para 28). From a practical point of view, it will not be necessary for the court to address that question in the vast majority of cases. It will almost always (if not always) be presumed to be fair and just to impose liability if the employee's actings are within the scope of, or in the course of, his employment. It is thus neither necessary or desirable to reconsider what is fair and just in every such circumstance.

[26] An employer, it is said, ought to be liable for wrongs which are reasonably incidental to the activities which he has instructed the employee to carry out. It may be relevant to ask in that context, therefore, whether the wrong is incidental in terms of the risks inherent in those activities (see for a similar, but not identical formulation, *Gravil v Carroll* [2008] ICR 1222, Sir Anthony Clarke MR at para 21). Rephrasing this slightly, the court requires to determine whether there is a connection, and if so whether it is a close one, between what the wrongdoing employee was asked to do and the wrong he committed, having regard (following the approach in *Various Claimants (supra)*) to the risks involved in the employee's work. Once more, however, it is equally possible to achieve the same result from a practical point of view simply by reverting to the traditional formula of asking whether the wrongful actings were, on the other hand, a "frolic" of the employee's own devising and execution and thus unconnected with what he was employed to do. The word "frolic" in this context does not connote triviality. There is no reason to suppose that a different answer would emerge, even in the sexual abuse cases, if this approach was, following *Lister (supra)*, taken.

[27] Although the courts do require to react to changing social circumstances, it is important that they do not subvert the democratic process. In this regard, it is worth noting that, whatever the position in relation to the sexual abuse of children in care may be, the carrying out of violent acts by an employee during working hours and/or on the employer's premises, is neither a new nor an unrecognised phenomenon. Harassment may be a novel term of art, but aggressive and bullying behaviour has been recognised in the employment context for generations.

[28] The incidence of liability for violent attacks was canvassed in *Wilson* (*supra* at para [31]) under reference to the cases cited to the court which involved assaults: (i) by stewards (bouncers) (*Mattis v Pollock* [2003] 1 WLR 2158, *Brown v Robinson* [2004] UKPC 56); (ii) in the course of physical sports (*Gravil v Carroll* (*supra*)); (iii) as modes of discipline (*Cercato-Gouveia v Kyprianou* [2001] EWCA Civ 1887); and (iv) by the police (*Bernard v Attorney General of Jamaica* (*supra*) and the army (*Ministry of Defence v Radclyffe* [2009] EWCA Civ 635). These were contrasted with the "frolic" cases (eg *Deatons Pty v Flew* (1949) 79 CLR 370) where the actions of the employee involved, in the words of Lord Reed in *Ward v Scotrail Railways* 1999 SC 255 (at 264), "an unrelated and independent venture of his own: a personal matter, rather than a matter connected to his authorised duties". There are, as also noted in *Wilson*, several Scottish cases dealing with assaults in the course of employment. For the sake of brevity, some of these are cited in Walker: *Delict* (2nd ed) (494 at footnotes 1 and 2), notably those involving pursuers alleged to have been travelling without a proper ticket (eg *Power v Central SMT Co* 1949 SC 376, see Lord Keith at 381).

[29] *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 was referred to in *Wilson*, albeit *en passant*. For present purposes *Majrowski* is authority only for the proposition that vicarious liability may attach to an employer whose employee commits harassment whilst acting "in the course of his employment" (Lord Nicholls at para 17). The harassment must still meet the "'close connection' test" (*ibid* at para 25). That much remains clear and, for the reasons outlined above, if, in contrast, the harassment is an "unrelated and independent venture" of the employee, rather than one connected to his authorised duties, vicarious liability will not attach.

[30] In attempting to apply these principles to the limited facts averred by the pursuers, what can be said is that, no matter how broadly the context of Mr McCulloch's employment is looked at, it is not possible to hold that either the defenders' retail business in general or their engagement of persons to stack shelves in supermarkets in particular carried any special or additional risk that persons so engaged, such as the deceased, would either be harassed or otherwise come to harm as a result of the deliberate and violent actings of co-employees. The risk is no greater than that involved when engaging any two or more employees to work together. The court has been provided with no basis upon which it could hold it just and reasonable for all employers to become vicariously liable for all acts of harassment solely on the basis of such engagement. Using Lord Millett's formula in *Lister* (*supra*, at para 65), which found favour with the court in *Various Claimants* (*supra*, Lord Phillips at para 72), the defender's objectives did not carry with them a serious risk of their employee committing the kind of wrong which he in fact committed.

[31] The mere bringing together of persons as employees is thus not sufficient to impose vicarious liability for all the actings of each employee towards the other. The Lord Ordinary may well be correct in considering that there may well be a need for employers to develop codes of practice and discipline to regulate the behaviour of employees, but that does not carry with it any requirement for the imposition of vicarious, as distinct from direct, liability should they have failed to do so. It is primarily a matter for Parliament to decide whether to impose strict liability for all, or particular categories of, acts of harassment in the work place. It has not done so, as yet. Should such a radical change be proposed, it is appropriate that there be due public consultation and debate rather than sudden judicial law making.

[32] In analysing the particular facts of the deceased and Mr McCulloch, an attempt has been made to find the averments which might bring either the harassment generally or the act of murder specifically, but within the harassment context, within the scope of Mr McCulloch's employment by reason of its "close connection" with what the court has been told were Mr McCulloch's duties as a shelf stacker. These averments cannot be

found. Whichever variant of the Salmond formulation is adopted, including one with a close connection or risk enterprise gloss, it is not possible to categorise Mr McCulloch's actings as so closely connected with what he was employed to do that they can be seen as ways of carrying out the work which he was authorised to do.

[33] The fact that Mr McCulloch had a known propensity to be violent to immigrant workers is not relevant to the issue of vicarious liability, although it may well have been in the context of a direct liability case based upon the duty of an employer to take reasonable care to employ competent staff and to supervise their activities whilst on their premises. The pursuers attempted in oral argument to build a case around contentions, which are not in the pleadings, that Mr McCulloch somehow stacked shelves, or otherwise carried out his work, in a manner infected by racist views. How that differed from how shelves would normally be stacked was not made clear.

[34] The pursuers attempted also to suggest, perhaps in light of *Wallbank v Wallbank Fox Designs* [2012] IRLR 307, that Mr McCulloch's violence was a reaction to the deceased's institution of a disciplinary complaint. Although this too is not averred, the Lord Ordinary appears to have accepted it. On that basis, she has held that there is a connection between the harassment and Mr McCulloch's work. However, that is not the test. It is not enough that the harassment was conducted by one employee against another and that there was thereby a connection with the employees' work, or even just with the wrongdoing employee's work. The question is still whether there is a connection between what the employee was engaged to do by the employer (ie the employment) and the wrongdoing.

[35] It is also not enough to say that the defenders brought Mr McCulloch and the deceased together as fellow employees, as alluded to by the Lord Ordinary (Opinion, para [35]). Nor is it addressing the correct issue to ask whether Mr McCulloch's racist views dictated how he carried out his day-to-day duties (Opinion, para [39]). The relevant connection, which requires to be identified for the purposes of vicarious liability, is not that between Mr McCulloch's racist views and his wrongdoing, but that between Mr McCulloch's employment duties and that wrongdoing.

[36] Even if it were necessary to consider the issue in the particular circumstances, it cannot be said that the harassment of the deceased by Mr McCulloch was so closely connected to the nature of his employment that it would be fair and just to hold the employer responsible. Mr McCulloch was engaged to stack shelves in retail premises. Looking at the matter in as broad a context as possible, there is no connection between the harassment and/or murder of the deceased on the one hand and the stacking of shelves by either employee of the retail of goods to the public on the other.

[37] Contrary to the suggestion of the Lord Ordinary, the decision in *Wilson (supra)* is not to be interpreted so narrowly as to be applicable only to conduct in the nature of "pranks". The use of the expression "frolic" in that case (at paras [30] - [34]) is, as already noted, not indicative of triviality with respect to the wrongful acts in question. The principles set out in that case may be taken to be of general application in cases of intentional wrongdoing. Whilst the pursuers have sought to distance themselves from the "random attack" by characterising the deceased's murder as part of a course of conduct amounting to harassment, there is no basis for departing from the court's analysis of the law in *Wilson (supra)*. Referring as a whole to Mr McCulloch's conduct from 13 to 15 April, being the period over which the harassment is alleged to have occurred, does not remedy the fact that there is no connection between the harassment and what McCulloch was employed to do. Rather, McCulloch's employment simply provided him with the opportunity to carry out his own personal campaign of harassment with tragic consequences.

[38] Whilst this was a particularly shocking and shameful example of xenophobic behaviour, the courts should resist any perceived need to provide a remedy merely by virtue of the sensitive nature of an individual case. As Lord Steyn said (in *Bernard (supra)* at para 23):

"The principle of vicarious liability is not infinitely extendable."

In the circumstances of the present case, there appears to be no logical or other justification for adopting any more generous an interpretation of the general test for the imposition of vicarious liability simply because the wrongful conduct is said to be part of a course of racially motivated harassment. Parliament has legislated specifically in this field (eg Equality Act 2010 section 26) and provided employers with the benefit of a statutory defence where strict liability might otherwise apply (*ibid*, section 109). It has also recognised elsewhere the need for a compensation scheme in respect of the criminal actings of impecunious persons. In all these circumstances, the courts must be careful to ensure that the future development of the law, particularly in an effort to deal with particular controversies such as child sex abuse, does not undermine too deeply the need for certainty in the field of employers' liability in general.

[39] The reclaiming motion should therefore be allowed and the action dismissed as irrelevant.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2013] CSIH 67

PD1080/11

OPINION OF LORD BRODIE

in the reclaiming motion

JELENA VAICKUVIENE and OTHERS

Pursuers and Respondents;

against

J SAINSBURY PLC

Defenders and Reclaimers:

Lord Justice Clerk

Lord Brodie

Lord McGhie

Act: Campbell QC, McNaughtan; Digby Brown LLP

Alt: Young QC, A Cowan (Solicitor Advocate); Simpson & Marwick

11 July 2013

[40] I respectfully agree with the views expressed in the opinion of his Lordship in the chair and with his conclusion that the reclaiming motion should be allowed and the action dismissed. There is very little that I wish to add.

[41] Both parties invited the court to consider this case on the basis that the pursuers have relevantly pled that the conduct of McCulloch towards the deceased amounted to harassment in terms of section 8 of the Protection from Harassment Act 1997. While on one view that might be so and it may not matter very much because on any view the death of the deceased was caused by the fault of McCulloch, I cannot refrain from observing that it is not harassment of the deceased which has given rise to the pursuers' damage, it is the killing of the deceased. The court had to consider the meaning of the statutory concept of "harassment" in *Marinello v City of Edinburgh Council* 2011 SC 736. At para [11] the court expressed its agreement with the following observations by Rix LJ in *Iqbal v Dean Manson, Solicitors* [2011] EWCA Civ 123:

"In my judgment, the Act is concerned with courses of conduct which amount to harassment, rather than with individual instances of harassment. Of course, it is the individual instances which will make up the course of conduct, but it still remains the position that it is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct. That is so both as a matter of the language of the statute, and as a matter of common sense. The Act is written in terms of a course of conduct: ... In the case of a single person victim, there have to be 'at least two occasions in relation to that person'... but it is not said that those two occasions must individually, i.e. standing each by itself, amount to harassment. The reason why the statute is drafted in this way is not hard to understand. Take the typical case of stalking, or of malicious phone calls. When a defendant, D, walks past a claimant C's door, or calls C's telephone but puts the phone down without speaking, the single act by itself is neutral, or may be. But if that act is repeated on a number of occasions, the course of conduct may well amount to harassment. That conclusion can only be arrived at by looking at the individual acts complained of as a whole. The course of conduct cannot be reduced to or deconstructed into the individual acts, taken solely one by one."

The purpose of enacting section 8 was to create a new civil right to be free of harassment and consequently a new actionable wrong of breaching that right. As is explained by Rix LJ, this reflects a recognition on the part of the legislature that there are certain single acts which, if considered individually, might not be wrongful, but which when repeated as part of a course of conduct, can be deeply distressing and very harmful to the victim. This is not a consideration that applies to an assault. A single assault (by which, with an eye to the language of section 8, I mean an assault on one occasion whether it involves one blow or more than one blow) is wrongful and may

be prosecuted criminally or be the subject of a civil action for damages without reference to any statute. That is not to say that one or more assaults cannot form part of a course of conduct amounting to the statutorily created wrong of harassment but, in contrast to some acts which might, when repeated, amount to harassment, each individual assault constitutes an actionable wrong. A single assault, however, does not amount to harassment. The pursuers' averment, at page 10C of the Reclaiming Print, "repeatedly stabbing a man to death is properly to be regarded as one of the ultimate forms of harassment" is not only an infelicitous use of English, it is an unsound proposition in law.

[42] The pursuers' averments as to the specific conduct of McCulloch towards the deceased are these:

"There was an incident between McCulloch and the deceased on 13th April 2009 when McCulloch abused the deceased racially. He had told him he did not like immigrants, and that he should go back to his own country. He was insulting and aggressive. The deceased was distressed thereby ... On 15th April 2009 ...the two men were on shift together. During the shift break shortly after 1 am, there was an argument between them, McCulloch having taken aggressive exception to the deceased being at the same staff table as he was. Shortly thereafter there was a further argument between them, involving aggression including punches being thrown, in the staff toilets. ...At about 3.15 am [McCulloch] removed a kitchen knife from the kitchenware section in the store and attacked the deceased in one of the supermarket aisles. The deceased sustained multiple stab wounds ...the deceased was eventually pronounced dead at the scene of the crime."

I entirely accept that the various acts on the part of McCulloch which are narrated in this passage: racial abuse, aggression, assault by punching and a fatal assault by stabbing, can be regarded as a course of conduct amounting to harassment but it is not the course of conduct which has given rise to the pursuers' damage. What has given rise to the pursuers' damage is the final fatal assault and only the final fatal assault. To describe this action as founded on breach of the deceased's right to be free from harassment, as provided by section 8 of the 1997 Act, would therefore seem at best artificial and at worst misleading.

[43] I say misleading because if, as the pursuers accept is the case, it is necessary for them to satisfy a "close connection" test if they are to establish that the defenders should be vicariously liable for the wrongful act or acts of McCulloch, it has to be determined, with as much precision as is possible, just what are the things that must be closely connected. Counsel for the pursuers provided an answer to that in the course of his

submissions by his reference to and reliance upon what was said by Lord Nicholls in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at para 10. The relevant connection must be between, on the one hand, "the wrong" and, on the other, "the acts the employee is authorised to do". In context, "the wrong" can only mean the unlawful act or acts which have caused the harm and consequent damage in respect of which it sought to establish vicarious liability. In the present case the wrong that caused the harm in respect of which the pursuers sue, and therefore the relevant wrong, is the murderous assault at about 3.15am on 15 April 2009. What preceded that may have been wrongful and it may have been harmful but it did not cause the harm in respect of which the pursuers sue. It may be correct to say that the relevant wrong and what preceded it can be regarded as forming a course of conduct amounting to harassment, as that term is to be understood under reference to section 8 of the 1997 Act, but for the reasons that I have set out above, it was not a course of conduct constituting harassment that caused the death of the deceased, it was the fatal assault. I do not suggest that that of itself means that the defenders cannot be vicariously liable; there are any number of instances in the authorities of employers being found liable for the deliberate criminal conduct of their employees, but I do not consider that the process of analysis is assisted by treating the case other than as one of a single murderous assault. Properly focused, I would see the relevant question as being whether, on the facts, there can be said to have been such a close connection between that assault and the duties which the defenders employed McCulloch to perform that it would be fair and just to hold the defenders, as McCulloch's employers, vicariously liable. However, whether one asks that question or the somewhat different one that must be formulated in order to accommodate parties' position that regard should be had to the whole course of McCulloch's conduct, in my opinion, agreeing with your Lordship in the chair, the pursuers' averments provide no basis upon which the defenders can be said to be vicariously liable for the deceased's death.

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2013] CSIH 67

PD1080/11

OPINION OF LORD McGHIE

in the reclaiming motion

JELENA VAICKUVIENE and OTHERS

Pursuers and Respondents;

against

J SAINSBURY PLC

Defenders and Reclaimers:

Lord Justice Clerk

Lord Brodie

Lord McGhie

Act: Campbell QC, McNaughtan; Digby Brown LLP

Alt: Young QC, A Cowan (Solicitor Advocate); Simpson & Marwick

11 July 2013

[44] I agree with the conclusion of the Lord Justice Clerk that the reclaiming motion should be allowed and the action dismissed. I share the doubts cogently expressed by Lord Brodie as to the relevance of the case

based on harassment but, like him, am content that matters be dealt with on the basis of treating the murder as if it was the end point of a course of harassment. That puts the case at its highest for the pursuers.

[45] The Lord Justice Clerk has carried out a full analysis of the authorities and I make no attempt to add to that. It is clear that determination of where vicarious liability arises requires careful consideration of the facts. The present case does raise difficult issues. It is tolerably clear not only that the murder was the end act in a course of hostile conduct but that this conduct was intimately connected with the men's relationship as fellow employees. It is not difficult to see a sense in which the fatal outcome was intimately connected with the business of the employer. Had Mr Romasov encountered McCulloch's abuse in any other context, he would probably have been able to remove himself from it. Had McCulloch met Mr Romasov in a social context, he might have had little occasion to nurse his racist grievances. There is no doubt that the concept of vicarious liability can be viewed as a developing one and it might seem tempting simply to adopt Mr Campbell's contention that the expression "in the course of his employment" should now be treated as equivalent to "at work". He did not resist the proposition that his argument could be reduced to saying that the harassment took place "in the employment context". He contended that it was not necessary to look at the nature of the assailant's duties. It was enough to show a connection with the employer's business. However, for the reasons fully set out by the Lord Justice Clerk, I am satisfied that the test of vicarious responsibility remains one based in a connection with the guilty employee's employment. It is potentially misleading to pray in aid the role of the victim and the connection with his work.

[46] Mr Campbell placed some reliance on the decision in *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224. He contended not only that the facts of that case were on all fours with the present but that the decision of the House of Lords should be seen as showing that their Lordships were satisfied that a finding that vicarious liability could be established on such facts. However, the appeal was solely concerned with the question of whether an employer could be vicariously liable for an employee's breach of the duties placed on him by the Protection from Harassment Act 1997. It is clear that the decision went no further than finding that such liability could arise if the breach arose in the course of the employee's employment and nothing in the dicta could safely be relied on as giving an indication of any view on the merits of the case there pled. That said, I think it is also clear that the plaintiff's averments in that case provide a good example of something more than simply acting in the place of work during working hours. The short summary, at para 2, shows that the complaints were of harassment in the way the victim's departmental manager treated his work. It was alleged that the manager was excessively critical of his timekeeping and work, that she imposed unrealistic performance targets and threatened him with disciplinary action if he failed to meet them. Such acting could very well be found to come within the course of the manager's employment. On the face of it, the employment must have required a direct relationship between victim and assailant. Confrontation and criticism, where necessary, would be part of the manager's duties. Mr Campbell's assertion that the facts were on all fours can only be understood in light of his submission that there was no need for any context of confrontation. On any other view, the facts are quite different.

[47] I consider that this example goes to the heart of the present case. On a traditional analysis, the duties of the supervisor requiring her to become directly involved in appraisal of the victim's work would have been seen as an important connection between her acting and her employment. The absence of any such connection in the present case is a major hurdle for the pursuers. In light of the approach taken by the Court in *Wilson v Exel* 2010 SLT 671 I am not persuaded that modern developments have gone far enough to allow that to be overcome.

[48] The Lord Ordinary referred to the difficulties she faced in the unusual circumstances of this case. She set out her consideration of the material detail (at para [39]) of her Opinion. She referred to the behaviour in question as taking place during working hours at the assailant's place of work. However, reference can be made to the discussion in *Wilson v Exel* as explaining why such a test would be inadequate and the Lord Ordinary appeared to rely on two additional factors. The first was that the averments indicated that the way in which McCulloch "carried out his work in his interactions with the deceased as a fellow employee" was infected by his racist views. However, Mr Campbell disclaimed any attempt to assert that the victim and

assailant were engaged in work which required any interaction between them. Both appear to have been stacking shelves in the same building but it was not being suggested that the way Mr Romasov carried out his work had any bearing on the work McCulloch required to do. There is nothing in the pleadings to explain how "the way in which he carried out his work" involved any "interactions with the deceased". The Lord Ordinary was carrying out an assessment of the implications at procedure roll and, on that basis, was plainly prepared to take a broad approach. However, we have been assured that no further relevant material was expected to emerge at proof. McCulloch was employed to stack shelves. There is no justification for a finding that the way he carried out his work was infected by his racist views.

[49] The other factor relied on by the Lord Ordinary was that the assailant had reacted to the deceased's use of the disciplinary procedures. It can be recognised that there might have come a stage in these procedures where the deceased would have been required to respond. It might possibly be said that his murderous reaction was, in some sense, simply an unauthorised way of carrying out an authorised duty. However, the matter was not presented in this way and it may fairly be assumed that any authorised response would have required to be made to someone other than the complainer. Properly analysed, the reference to the deceased's use of the disciplinary procedures amounts to no more than saying that the assailant did not like the victim and did not like the way the victim had acted in the course of his own employment. While the handling of the complaint might, possibly, have been the basis of some other case against the defenders, I do not think that the fact of a complaint having been made by the victim can properly be regarded as bringing McCulloch's harassment within the scope of his employment.

[50] In short, I am not persuaded that it is possible to categorise McCulloch's actings as sufficiently closely connected with his employment to give rise to any vicarious liability on the part of the employers.