ROMERO
GROUP

VICARIOUS LIABILITY FOR DOOR STAFF:

WETHERSPOONS v. BURGER

You could be forgiven for thinking that any legal case that features the words 'Wetherspoons' and 'Burger' is almost certainly going to be about someone doing something awful with (or to) the competitively-priced fare at your local music-free fizzy lager saloon. However on this point you would be completely wrong, because this is a case that instead relates to door staff at a competitively-priced fizzy lager saloon, and the only Burger involved is the name of the claimant, who got his hip yoinked out of place by the timeless interaction of 'Doc Marten' and 'groin'.

But (you may ask) why should I care about some disagreement between a purple-headed lunatic with anger issues and a tax-dodging, bean-eating student dressed (probably) as Dumbledore? Well I'll tell you. The reason is that the aforementioned coming-together of shoe and crotch ultimately led to a court case that assessed how much Wetherspoons, who had hired the door staff via an independent company for their venue, were vicariously liability for the actions of the excitable bouncer on that night.

1. THE NIGHT OF...

- On 5 August 2018, the unfortunate Mr Burger was 'restrained' by two door supervisors employed by Risk Solutions at a Wetherspoons pub. He suffered a dislocated hip, requiring emergency surgery and a three-night hospital stay.
- Mr Burger claimed damages for personal injuries against both Risk Solutions AND Wetherspoons.
- Wetherspoons took umbrage at this action and defended the claim, on the basis that the door staff were employed by an independent company, and, regardless, it was highly unlikely that the management would have directed the venue security to go all John Wick on Mr Burger's most delicate areas.

2. LET'S TALK ABOUT VICARIOUS LIABILITY

The legal principles of vicarious liability, where an employer is held liable for the torts (or 'cock-ups') of an employee, have evolved significantly over time.

Initially, the principle would hinge on direct control/direction by the employer – so in the current situation Wetherspoons would, according to the early legal definition of vicarious liability, have been entirely exempt from any considerations of responsibility.

Then, from the 20th Century onwards, everyone became very excited by the idea of 'frolics' (I'm not making this up) and how they differed from 'detours' when it came to the responsibilities that attach to a job role. In essence, a detour was an act that was closely connected to the job itself and potentially enabled by said job, whereas a frolic was something utterly unconnected. So, if a security guard stole some laptops from a business premises he was patrolling, this would be a detour. If, however, the same security guard stole a KitKat on his lunch, this would be a 'frolic'. *And what a frolic that would be.*

This particular legal landscape developed to a point where questions had to be asked regarding whether the relationship of a 'tortfeasor' (ie. the cocker-upper) to a defendant was so closely akin to employment that a vicarious liability could attach to a company even if they did not directly employ the individual who committed the heinous whoopsie. This led to the recognition of a two-stage inquiry: Stage 1 asked whether the relationship between the defendant and the tortfeasor was akin to employment, and Stage 2 asked whether there was a sufficiently "close connection" between these two parties. Both stages had to be satisfied.

Needless to say, this legal landscape was refined over time via a series of well-known court cases, although I won't bore you with all their details now. Suffice to say, it slowly became apparent that, even if you worked at Morrisons and unilaterally took it upon yourself to duff someone up on the petrol station forecourt, your employer was going to be held liable *(Mohamud -v- W M Morrison Supermarkets PLC (2016) UKSC11)*.

However, what was also regularly affirmed was that an employer of a ***truly independent contractor*** was generally not liable for that contractor's gaffes, flubs, or even booboos. As you might imagine, the various competing legal principles left the field wide open for disagreement, especially in the event that, like the High Court judges in this case, one were to find oneself vexed by the question of the role of door staff in relation to the venue that they might be securing. Obviously security personnel do not just wander around all day securing things, they have to have a venue with a door to staff - as such the venue must stand in some kind of master/servant relationship to their door staff, even if these door staff are not direct employees. In the current scenario, if Wetherspoons employees had said to their security chaps "don't let that person in", it seems unlikely that the big muscly lads on the door would have overruled them. As such, the question was raised as to how 'independent' a security contractor could possibly be in circumstances such as these.

3. THE JUDGEMENT

Looming over the current case was a previous ruling in *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, where vicarious liability was imposed on a nightclub operator for the actions of a doorman employed by a security firm. However while Hawley has similarities to Wetherspoon v Burger, in that former case the degree of control exercised by the nightclub management over the doorman was significantly greater than in the present case. In Hawley the nightclub management was in overall charge of security – all doormen, including the head doorman took orders from the venue manager, and nothing was done without the instruction of said manager. However in Wetherspoon v Burger the contract between the security company and the venue asserted the former's independence, and it seems that general practice was to allow relative autonomy to the security when they were on site.

Given this was the case, the High Court concluded that the evidence in this case, viewed in light of the established legal principles concerning independent contractors, did not support a finding that the relationship was akin to employment. As such Mr Burger added to the pain of his dicky hip with the knowledge that he could not pursue Wetherspoons and their insurers for financial restitution.

4. CONCLUSION

The interesting thing is how closely this judgement seems to align with questions that come up in other scenarios regarding bonafide or labour only sub-contractors. In essence, the Court in *Wetherspoon v Burger* was looking to do the same thing that we often have to do on liability cases involving builders, wherein a relationship 'akin to employment' is investigated. This question frequently hinges on issues of 'independence', which was the nub of the judgement reached, although clearly what seems to be quite a straightforward question often has shades of grey in scenarios such as these. Happily, the Court seems to have reached a reasonable conclusion on this point, although no doubt future claimants will seek to impress on the court that their own case is more akin to *Hawley v Luminar Leisure* than this recent ruling.

Regardless, I would say that judgement in *Wetherspoon v Burger* 'feels' right, in the sense that door staff can not perform their 'independent operations' without a hospitality establishment to stand outside of. In that sense, door staff businesses are 'parasitic' on the hospitality industry despite being independent companies – as such, there will always be a level of interaction between the venue and the security provided in a way that might not exist in other contractor/sub-contractor relationships. Consequently, if a security company is going to have any discrete liability at all then there must be a way of affirming that legal independence attaches to said company even in the midst of the general, fluid 'on the ground' communication between the venue and the door staff.