



Detours and Frolics: Exploring Vicarious Liability

BY Graeme McFarlane

IT'S A COLD, DARK WINTER MORNING. You braved the traffic to the office and are settling into the work day. Your computer beeps, signaling the arrival of an e-mail message. You look at the browser and see that it's a message from your controller attaching a file. When you open it, your heart sinks – your company is being sued together with one of your employees. As you read through the Statement of Claim, you become further concerned. The claim is for the incredible actions of your employee when he was away on a sales trip. Your company is being sued as his employer and as responsible for his actions.

How can this be? Surely the company cannot control every action of an employee. How can an employer be liable for the unreasonable conduct of every single employee? You call your litigation advisor and learn the bad news. Employers can certainly be liable for the actions of misbehaving employees. You're in for a difficult and expensive ride.

The concept of vicarious liability is not new. Employers are liable for the negligent acts of their employees. However, for such liability to occur, the employee must be acting in the course of the employer's business. Unfortunately, whether or not someone's behaviour can be linked to the business operations is a difficult question. Not surprisingly, employers are often named in lawsuits because they are viewed to have deeper pockets from which to pay damages.

Take the current case of *Smith v. Gates Canada Inc. et al.* One of Gates' employees was allegedly in an intoxicated state during a business trip. After normal work hours, this employee is alleged to have broken into Mr. Smith's hotel room and assaulted him. Mr. Smith has brought an action for damages against the employee, Gates and the owner of the resort. With respect to Gates' liability, the court will have to determine whether the employee's actions (if they occurred) happened in the "course of his employment."

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If an employee is actually working when an event occurs, it will be difficult for an employer to avoid vicarious liability. However, when things happen after work hours or during the commute to and from work the liability question becomes more difficult. When analyzing this question, the Courts have adopted a colourful distinction between a "detour" and a "frolic." If the employee is engaged on a "detour" the employer remains liable, if the employee has embarked on a "frolic" it is not.

A detour is something that does not distance the activity from the employee's

obligations to work. For example, if an employee on a break stops by the bank machine before carrying on her way, she is likely only to have been engaged in a detour. However, if that same employee then goes to a building supply store and spends three to four hours choosing kitchen cabinets, tiles and fixtures, she has probably taken a frolic. In the second example, the employee has removed herself from a straightforward business linked activity. She has essentially converted that activity into personal business. Any events occurring during that time will not likely cause the employer liability.

Going back to the Smith case, the court will have to determine whether the employee's alleged drunken escapades were linked to his employment duties. If that employee imbibed during a work function, and if he was staying at the specific resort only for work reasons, the Court may be persuaded that he was not on a frolic and liability may flow to the employer.

Employers may take steps to protect themselves from such unfortunate results. Codes of conduct can specify certain work permitted behaviour. These documents can further contain provisions that acknowledge that certain activities fall outside of the employment relationship. Such documents can help insulate employers from the inappropriate actions of their employees and avoid nasty surprises. **1**

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