

Who is responsible and who is insured?

By CHRISTOPHER BRIERLEY and MICHAEL NGUYEN

A recent case, which in the end found the plaintiff failed to show the insured was vicariously liable, considered the context in which a court may decide the principal of a firm has breached their duty of care by failing to supervise and control the day-to-day conduct of employees.

Many an insured firm principal may find themselves in a situation where an allegation of breach of duty arises through their employment of a solicitor whose conduct has been placed in question.

A recent case, currently on appeal, is useful for its restatement of the law and examination of the issues, facts and circumstances a court will consider to determine whether an insured has discharged their duty of care by properly supervising and controlling their employed solicitors.

It also provides a valuable lesson to all employed solicitors with a restricted practising certificate that they are only insured when working under the auspices of their insured firm and cannot safely provide legal advice outside the contract of employment.

Facts

The principal of the firm (the insured) employed a young solicitor (the solicitor), who was still on a restricted practising certificate, to assist with the day-to-day conduct of the practice and perform general duties around the office. The solicitor performed her duties under the supervision and control of the insured.

She was approached by the plaintiff, via contact with her brother, to assist with various loan transactions. Initially, she declined to assist, but, under great pressure from her brother and the plaintiff, agreed to provide assistance. She helped the plaintiff to enter into a number of loan transactions over the course of

the year. Due to a third party defaulting on repayments to the plaintiff, he defaulted on a loan to a lending institution, and subsequently the lending institution sold his house, which had been put up as security for the loan.

The plaintiff then commenced proceedings against the brother and the insured, seeking loss and damages. It was alleged that through the conduct of the solicitor the insured had breached his duty of care to the plaintiff by failing to act and advise the plaintiff about the loan transactions and failing to properly or adequately supervise and control the solicitor's conduct.

The solicitor had agreed to assist the plaintiff in her capacity as a family friend and had not disclosed her involvement with the plaintiff to the insured.

The plaintiff was advised that the insured had no knowledge of the circumstances giving rise to the plaintiff's loss, that the solicitor had acted outside the scope of her employment with the insured and, in those circumstances, the insured was not liable as alleged, or at all, to the plaintiff.

The solicitor was subsequently joined as a separate defendant to the proceeding but was not indemnified by LawCover (the insured was indemnified) as she was not considered to be acting within her employment.

Judgment

In her defence, the solicitor asserted she had only agreed to assist the plaintiff as a family friend and not in her capacity as a solicitor.

Regardless of whether she

acted in her capacity as a solicitor, she also asserted she had warned the plaintiff not to proceed with his loan to the third party, she had discharged any duty of care she owed to the plaintiff and that any negligence on her part was not causative of the plaintiff's loss.

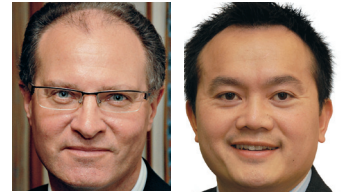
In his defence, the insured asserted the solicitor had withheld her dealings with the plaintiff from him and had acted outside the scope of her employment, which the insured could not reasonably be expected to supervise and control, and for which he ought not to be found liable.

He added that the solicitor had been properly trained and repeatedly advised and instructed not to perform any tasks without the insured's express permission, and that he could not be held responsible when she did so.

Withholding dealings

Evidence was taken over the course of four hearing days. In respect to the insured, emphasis was placed on the nature and extent of the instructions, guidance and supervision given to the solicitor by the insured, whether the solicitor was aware of the cause and effect of her dealings with the plaintiff and the fact she was withholding her dealings with the plaintiff from the insured. The roles and responsibilities of the insured and his employed solicitors in the day-to-day management of the office and the processes and procedures the insured had in place to ensure the solicitor was properly supervised and controlled were also examined.

In finding for the insured on all grounds, the trial judge



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emphasised the uncontested evidence of the witnesses that the plaintiff was not aware of the insured, the plaintiff had always believed the solicitor to be his solicitor, and the fact that all communications and meetings between the solicitor and the plaintiff occurred outside of office hours, at the solicitor's family residence and via the solicitor's private mobile telephone.

Specifically, the trial judge found an absence of evidence of any relationship between the plaintiff and the insured or any retainer between the plaintiff and the insured to create a duty of care. The trial judge also found the plaintiff had failed to show the insured was vicariously liable for the acts of the solicitor.

The trial judge found that the acts of the solicitor were not committed in the course of her employment, were not committed in intended pursuit of the insured's interests or in intended performance of her contract of employment.

Accordingly, the solicitor was not acting in the ostensible pursuit of the insured's business or in execution of the authority the insured had held out the solicitor as having.

The solicitor was held to be liable in her capacity as a solicitor but not as an employee of the insured and therefore bore the judgment personally without any insurance coverage. □

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