



Vicarious Liability and Insurers: The Decision in *Ong Han Ling v American International Assurance Co Ltd* [2017] SGHC 327

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Introduction

In this case, the High Court held that American International Assurance Co Ltd (“AIA”) and its Singapore-incorporated entity (collectively the “AIA Defendants”) were vicariously liable to an Indonesian couple (the “Plaintiffs”) for the fraud committed by one of AIA’s insurance agents, (the “Agent”)

The Agent had managed to induce the Plaintiffs into purchasing a bogus life insurance policy named the AIA Thank You Policy (the “TYP”), causing them to remit US\$5,060,900 to AIA in November 2002. She then caused AIA to use this remittance to purchase six actual AIA life insurance policies in the Plaintiffs’ names (the “Unauthorised Policies”).

The Plaintiffs had previously sued the Agent in her personal capacity, but were only able to recover a portion of their loss. As such, they sought to recover the balance of their loss (amounting to S\$1,597,250.69) from the AIA Defendants by claiming that the AIA Defendants were either vicariously liable for the Agent’s fraud or negligent in failing to detect the Agent’s fraud.

The Court found in favour of the Plaintiffs on the issue of vicarious liability and dismissed their other claims.

Vicarious Liability

The Plaintiffs had argued that AIA should be held to be vicariously liable for the Agent’s tort of deceit either as a principal or employer as there was a close connection between the Agent’s fraud and the acts she performed for the AIA Defendants.

The Court emphasised the finding in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* that there are two policy considerations underlying the doctrine of vicarious liability – (a) effective compensation for the victim and (b) deterrence of future harm by encouraging the employer to reduce the risk of similar harm in the future.¹ These considerations must be taken into account when determining the question of whether the imposition of vicarious liability would be fair, just and reasonable.

The Court also summarised the two-stage test for the imposition of vicarious liability as endorsed by the Court of Appeal in *Ng Huat Seng v Munib Mohammad*:²

1. The relationship between the tortfeasor and the defendant must be capable of giving rise to a finding of vicarious liability; and
2. The tortfeasor’s conduct must possess a sufficient connection with the relationship between the tortfeasor and the defendant.

In applying the first stage of this test, the Court considered whether a special relationship existed between AIA and the Agent, and whether that relationship was capable of giving rise to vicarious liability.

In this regard, relationships that give rise to vicarious liability were found to be those which “possess the same fundamental qualities as those which inhere in employee-employer

¹ [2011] 3 SLR 540 at [160]

² [2017] SGCA 58.

relationships”³ or those “akin to that between an employer and employee.”⁴

Despite the express provision in the Agent's contract with AIA stating that she was not an employee, the Court held that the relationship between the Agent and AIA possessed certain qualities that made it capable of giving rise to vicarious liability.

The Court came to that conclusion due to the following reasons:

1. Insurance agents (like the Agent) are AIA's representatives and its insurance business is operated almost entirely through agents and relies on these agents to promote its policies and to bring prospective policyholders to AIA. The Agent had a wide range of responsibilities as an AIA insurance agent, namely, delivering policies from AIA, advising policyholders, and obtaining instructions from prospective and existing policyholders. Correspondingly, AIA would accept what its insurance agents (like the Agent) say are policyholders' instructions without further verification. This practice created an environment where the Agent could induce the Plaintiffs to 'pay for' the bogus TYP, then use such money to purchase the Unauthorised Policies.
2. AIA was able to exercise a good measure of control over the Agent. This was done by disallowing her to represent any other insurance company, by regularly coaching her on compliance with AIA's rules and regulations and by taking away certain benefits from her should she contravene these guidelines. As such, the Court was of the view that AIA's control over the Agent was similar to that of an employer training, managing, supervising and disciplining its employees.
3. The life insurance industry is regulated in a manner that emphasises the closeness of

the relationship between AIA and the Agent and expects AIA to take responsibility for managing its agents. Section 10 of the Financial Advisers Act (Cap 110, 2007 Rev Ed) requires financial advisors like AIA to take out professional indemnity insurance against liabilities arising from the performance of financial advisory insurance, however, section 10 does not require representatives like the Agent to take out such indemnity insurance. The Court took that as an indication of the legislature's intention to make financial advisers accountable for the acts of its representatives and that it would be inconsistent if it were to be found that AIA and the Agent's relationship did not give rise to vicarious liability.

These characteristics in the relationship between AIA and the Agent led the Court to find that it was capable of giving rise to vicarious liability.

In applying the second stage of this test, the question that had to be answered was whether there was a sufficient connection between the Agent's fraud and the activities that AIA entrusted her with, and whether AIA created or enhanced the risk of the Agent's fraud.

The Court considered the following:

1. AIA's practice was to accept an agent's word as the instructions of prospective and existing policyholders without further verification. In addition to this, it was common practice for policyholders to seek advice from their agents and rely on their agents to submit their requests to AIA. It is this business model of allowing insurance agents (like the Agent) to act as the intermediary between AIA and policyholders (like the Plaintiffs) that afforded the Agent the opportunity to abuse her functions as an insurance agent. Further, it gave the Agent near exclusive control over the AIA documents and information received by the Plaintiffs,

³ *Ng Huat Seng v Munib Mohammad* [2017] SGCA 58 at para 64.

⁴ *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 at para 47.

which materially increased the risk of the Agent's fraud by giving her the opportunity to forge documents from AIA and represent them as genuine to the Plaintiffs.

2. It was the Agent's conduct which directly led to deceiving the Plaintiffs into remitting money to purchase the TYP and the purchase of the Unauthorised Policies. It was held that such conduct fell within AIA's aims of selling insurance policies via agents.
3. The Agent's conduct was related to the intimacy with policyholders that is inherent in AIA's business model. AIA expected agents to develop strong personal relationships with policyholders in order to ensure that policyholders continue to engage them.

In the circumstances, the Court held that the Agent's conduct and fraud was committed within the framework that AIA encouraged – which was to develop close relationships with high net-worth policyholders with little intervention. Thus, the Court found that there was a sufficient connection between the Agent's fraud and her relationship with AIA such as to justify the imposition of vicarious liability.

In this case, the Court also found that imposing vicarious liability on the AIA Defendants was fair, just and reasonable because it was consistent with the public policy aims underlying the doctrine and enterprise risk. Furthermore, the Court found that the Agent's fraud was of a type that was clearly within AIA's contemplation as in AIA's own internal rule book, it had warned agents against using unapproved marketing material, making misleading statements regarding a product and forging policyholders' signature etc.

Conclusion

This case in particular highlights the approach of the Singapore courts – one of substance over

form. With more businesses seeking an effective way of structuring their legal relationships in order to manage risk, the Court has also recognised the need for a middle ground, as opposed to relying on the more traditional distinction between independent contractors and employees.

Merely stating that a person is 'not an employee' or that he is an 'independent contractor' may no longer be sufficient to prevent a business enterprise from being vicariously liable for acts committed by such persons.

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