

Collective responsibility at work

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When is an organisation collectively responsible for the actions of the individuals who work for it? How does this principle work in practice? What are the key considerations driving public policy in this area? Why is whistleblowing helpful?

These questions make us look at how law, policy, organisations and people work together in practice. They involve considering issues that illustrate and define where we are as a society in the complex relationship between the individual and the group. In the context of collective responsibility in the workplace, these issues include influence and responsibility; control and delegation; blame and accountability; prevention and cure. While this topic merits a book, I address it in this short paper by way of three examples that came my way as I began to think about what I had to say.

When I slipped off home early to jot down my initial thoughts, I called in at a local grocery store in Stoke Newington, north London. It's usually very busy, offering a huge array of fresh and cheap foods. Run by a Turkish Cypriot family with no more than eight staff, I've never seen it closed, day or night, in more than 10 years. This time, maybe for the first, I was the only customer. As I was paying for my food, a middle-aged male customer came in. Not well dressed, he looked like he might have had too much to drink. No sooner had he moved for the beer in the fridge, than the assistant serving me told him to stop and a colleague of hers then escorted him out of the shop.

When I asked the assistant if he had caused trouble before, she shook her head and said the shop didn't sell alcohol to people who were drunk. Whether or not the safety of staff or customers were factors in the policy, here was a business forgoing a sale that it saw might cause more harm than good. There were no notices trumpeting the policy and the quizzical look my question prompted on the assistant's face seemed to wonder why it was my or anyone else's business. Here was corporate citizenship in action.

But what if the man hadn't been drunk at all? What if, say, he suffered from Tourette's syndrome? What if the shop assistant had got the call badly wrong, leading to a commotion or worse? In such a situation, her manager would get involved. Should we judge him a good manager if (a) he backed the shop assistant and ushered the customer out, or (b) he considered the issue afresh and apologised? And if it were all to go wrong and end up in the press or the courts, should the unfortunate error of judgment be the responsibility of the assistant, the shop or both?

The position at law

As to the last question, the thinking behind the legal position was set out in the important case of *Majrowski* that the law lords decided this summer:

Vicarious liability is a common law principle of strict, no-fault liability. Under this principle a blameless employer is liable for a wrong committed by his employee while the latter is about his employer's business. The time-honoured phrase is 'while acting in the course of his employment'. It is thus a form of secondary liability. The primary liability is that of the employee who committed the wrong.

This principle of vicarious liability is at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.

Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. ... Stated shortly, these factors are that all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise.

*This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees. For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment.*¹

The facts were that Bill Majrowski started work as an audit co-ordinator at an NHS hospital in November 1996. In April 1998 he complained that for over a year he had been criticised, isolated and abused in front of colleagues by his manager, Sandra Freeman, because he was homosexual. His complaint was made under the hospital's anti-harassment policy – a policy that it had not been legally required to have, but had introduced as a good employer. The hospital investigated the complaint, found it was proven and suspended Mrs Freeman, who then resigned. In June 1999 the hospital dismissed Mr Majrowski for unrelated reasons. Nearly four years later Mr Majrowski brought a claim seeking compensation from the hospital for Mrs Freeman's bullying.

In their decision this summer, the law lords ruled that employers are now liable to pay compensation when one employee harasses another. As it is irrelevant under this law what steps the employer took to avoid or stop the harassment and what action it took against the harasser, it is unclear how it will encourage "good practice". Rather, it seems more likely the ruling will undermine employers' commitment to tackling bullying at work, as whenever an employee successfully invokes a workplace anti-harassment policy, the employer itself is liable to pay damages – damages that can result from events years before and that require no supporting medical evidence. It is also unclear how the decision will help instil in an employee a sense of responsibility for his conduct when, if he does something bad behind his employer's back, it is not him but his employer who is in the frame. So what were the policy considerations behind this decision?

Mr Majrowski brought his claim under the Protection from Harassment Act 1997 (the 1997 Act). The 1997 Act created new and strong criminal controls that can be taken against stalkers. It also included a provision allowing victims of stalking to bring a civil claim for compensation. By coincidence, it was at the very time that Mr Majrowski was starting at the hospital that the then Conservative Government introduced this legislation. It wanted a bill to "put a stop to the fear and misery caused by stalkers, nuisance neighbours and racial abuse" before the forthcoming election. The rush was such that, incredibly, the Bill was prepared in less than two weeks and completed its passage through the House of Commons in one day, on 17 December 1996. After it had been considered and amended by the House of Lords, the Bill was passed and became the 1997 Act.

Surprising reason for the decision

In their decision, the law lords ruled that Parliament had intended the 1997 Act to impose no-fault liability on employers for workplace bullying. This is surprising, as there was no mention of the issue in the parliamentary debates on the bill. Insofar as Hansard is a guide, no minister or legislator then or since indicated that parliament had intended to make employers strictly liable for workplace harassment under this anti-stalking law. And when one realises that, in the run-up to the 1997 election, neither business nor unions nor the political parties said anything publicly for or against such a bold, new law, it seems scarcely credible that this had been the intention of Parliament.

When, in 2003, Parliament did introduce protection against homophobic bullying in the workplace, it provided employers with a defence where they "took such steps as were reasonably practicable" to prevent one employee from harassing another because of their sexual orientation. The law lords' ruling under the 1997 Act, where there is no such defence, removes that incentive for employers to tackle bullying in the workplace.

So if the legislators did not back such a policy, why did the law lords rule as they did? Usually in such circumstances, judicial decisions are based on public policy and are reached after carefully considering the pros and cons. In this case, however, the law lords did not like the public policy

¹ *Majrowski v Guy's & St Thomas' NHS Trust* (2006) UKHL 34, Lord Nicholls, paras 7-9

either: only one of the five law lords² said he supported the decision on these policy grounds. So who determined the policy and how did they weigh up the public policy issues?

As the QCs were running through their arguments about public policy, they were interrupted by the law lord, Lord Hope. He had just seen that one of the sections dealing with Scotland expressly mentioned the liability of employers. Although the Act was only a few pages long, no lawyer had noticed the reference beforehand, and so the case took an unexpected turn. The law lords said that such an explicit reference meant that parliament must have intended that employers were liable under the Act. And because “parliament must be presumed to have been aware”³ of the general law of vicarious liability, the law lords decided that parliament must have intended the Act to make employers vicariously liable for workplace harassment.

On this analysis, Parliament had considered and decided the public policy issues and so the law lords did not have to consider the implications. Though a majority of the law lords are clear they would have decided the case the other way given the chance, they felt they had no option but to defer to the sovereignty of Parliament. And on this occasion, as explained below, the sovereignty of Parliament was determined by the error of a hard-pressed, if not harassed, lawyer. Effectively – and, ironically, as the case was about collective responsibility – the law lords’ decision was built on the premise of an infallible class of administrators for whose actions a vigilant parliament was strictly liable.

A drafting error

It seems that what had happened was that in the rush to get the Bill ready, a draftsman dealing with the parts of the Bill affecting Scotland had cut and pasted an earlier statutory provision to deal with a minor point on time limits, and it was in this section that the reference to employers appeared. Lord Hope⁴ was confident that the lawyer who did the cut and paste would have shown it to the Parliamentary draftsman who, in turn, would have removed the reference if it had been contrary to the Home Office’s instructions. If it was not contrary to the instructions, it was what the minister had wanted (and not just for Scotland). If so, as the minister was the promoter of the Bill, this was the way the courts should determine Parliament’s intention. The fact that nobody in Parliament had said a word to contradict this assumption seemed only to confirm the point.

When a series of errors like this happens in ordinary life and causes damage, people will ask: does responsibility fall on one or more of the individuals who made a mistake? If so, is the responsibility also that of their employer or institution? Where the mistake (as with this legislative drafting error) is not unique, they also ask: is the problem a systemic one? And if so, does it require some structural change?

Turning to the bullying suffered by Mr Majrowski, people will ask: should the employer have to pick up the bill for the anxiety Mrs Freeman’s bullying caused him? If so, will it make it more or less likely that employers will tackle bullies in the workplace? Should the employer be able to pass the buck back to the bully – the hospital could have joined Mrs Freeman to the legal proceedings, so the courts would allocate responsibility between it and her – and, if so, what would the courts say? Should the same rules apply to the small grocery in Stoke Newington as to a big publicly funded hospital? Is it right that the law sets responsibility in this area on the basis of what is fair, rather than what is just?

Should it be what’s fair or what’s just?

While pondering this last question, Public Concern at Work, the whistleblowing charity where I work, took a call from an employee seeking advice. He worked in a factory where a colleague had lost his arm in a tragic incident. Apparently the colleague had tried to repair a piece of machinery while it was still running. The isolating device in the machine (similar to the device that stops a microwave when you open the door) had not been working for some weeks and this meant that the machine

² Ibid, Lord Hope (para 43), Baroness Hale (paras 65-70) and Lord Brown (para 81) made clear they did not support the policy effects of the decision. Lord Carswell did not express a view. Lord Nicholls supported the decision on public policy grounds.

³ Ibid, Baroness Hale (para 74)

⁴ Ibid, see Lord Hope (paras 50 and 58)

had to be switched off manually before any repairs or maintenance could be undertaken safely. The caller said that while he and his colleagues would switch the machine off manually – which involved getting down on one's hands and knees – the injured man had got into the habit of not doing this. Because he was much more experienced and senior than everybody else, nobody had been willing to question or challenge him about his folly.

While the caller expressed every sympathy for his colleague, he thought it was unjust that the company was being blamed by the Health & Safety Executive for the accident and unfair that he and colleagues had been slated by senior management for allowing such poor safety practices to develop. When I asked him why he and his colleagues had not blown the whistle on the danger or the fact that the isolating switch was broken, he said that just wasn't the way people did things where he worked.

Was the company or the victim responsible for this accident or is this something they should share? Assuming it is agreed that fairness to the victim dictates that he should be compensated, should this fact also determine how the law allocates responsibility? What about the colleagues who walked on by? Will it help if employees are required to blow the whistle?

Prevention not cure

There is no general legal duty on an employee to blow the whistle (and I do not believe there should be). What the Public Interest Disclosure Act 1998 does is to make it clear that the law will stand by a worker who raises a public concern – broadly, one about wrongdoing that threatens the interest of others, as distinct from a grievance or complaint that is about a threat to one's self – in good faith. It seeks to deter organisations from shooting the messenger and encourages managers to solicit and address employee concerns about real risks to the legitimate interests of others.

One of the drivers behind the whistleblowing legislation and Public Concern at Work was a trilogy of disasters in the late 1980s. These were the ferry that capsized off Zeebrugge, the explosion on the Piper Alpha oil rig and the rail crash at Clapham Junction. Respectively 192, 167 and 35 people were killed. The official inquiries found in each case that staff who worked there had been aware of the danger, but had either said nothing or raised the matter in the wrong way or with the wrong people. Subsequent inquiries have found that similar breakdowns in communication severed lines of accountability and lay at the heart of other disasters. Most recently, the Chair of the Shipman Inquiry observed that “the willingness of one healthcare professional to take responsibility for raising concerns about the conduct, performance or health of another could make a greater potential contribution to patient safety than any other single factor”.

Looking at this underlying issue from the perspective of how best to avoid such a disaster or accident – rather than to determine liability after the event – Public Concern at Work was set up. Its approach is that if someone is genuinely concerned about a danger to health and safety or about a threat to others, they should be encouraged to raise the concern in an open and constructive way and be reassured that there is in practice a safe alternative to silence.

The Public Interest Disclosure Act avoids prescription: it does not require either workers to blow the whistle or employers to introduce whistleblowing policies. The reasoning was that a culture of individual responsibility and organisational accountability would better be fostered if law and practice in this area encouraged people to think about the issues rather than told them what to do. The approach is that where an individual finds himself in a potential whistleblowing situation, it is in the interests not only of society but of any half-decent organisation that we try to foster in him a sense of responsibility and consideration for others.

While the whistleblowing legislation encourages concerns to be raised and addressed internally, it also protects workers who alert regulators to real risks and those who make wider disclosures that are both justified and reasonable. These stepped disclosure options provide a powerful incentive for organisations to solicit public concerns and to address properly any such concern that is raised internally.

It is inevitable that some knaves try to use the whistleblowing law for their own ends and that some lawyers like to test its boundaries. Nevertheless, the Public Interest Disclosure Act retains the

welcome support of business, unions and regulators, because it is helping to deter and detect wrongdoing, foster responsibility and encourage openness in the workplace.

Approaching a tipping point?

As I said at the outset, collective responsibility in the workplace merits a book. Ideally, such a book will approach the issue with an open, enquiring mind – heeding the words of John Smith that “We are living at a time of great change, a time of enormous challenge and opportunity ... We are the architects of the 21st century [and] if we are to provide a blueprint for a better future, we must be ready to change and to think how things could be different. And instead of asking ‘why?’, ask ‘why not?’”.⁵ In this spirit, I start with one observation on the balance of the law in this area.

While there are sound reasons why legal policy in this area has evolved as it has, I think we are approaching a tipping point. First, the law on vicarious liability now seems to be set on a course to expand collective responsibility in the workplace at the very time that society is becoming ever more individualistic. Second, the *Majrowski* case is not the only far-reaching development in this area⁶ that was the product of a drafting error rather than of circumspect consideration of the policy issues. Such mistakes are the results of an increase in the quantity and a decrease in the quality of legislation, and of a growing lack of coherence and comprehension among the law, the civil service, government and Parliament. Third, the law in this area has evolved and survived – notwithstanding misgivings about its inefficiency – because it has been based on responsibility and fairness. If it loses sight of these guiding lights, as it appears to be doing, it will lose its way and risk losing public confidence.

More generally, on the basis of our experience at Public Concern at Work, I offer some observations on responsibility in the workplace. I am clear that the example set by organisational leaders has much more influence on the conduct of people than any staff manual, regulation or law. As to how an organisation operates collectively and effectively, my view is this depends on how it reconciles – and is able to thrive on – the competing obligations it owes to its workers, customers, owners and the community.

Shifting from the organisation to the individuals working with it, I have two observations. From our helpline, one cannot but be struck by the enormous range and variety of people who help to make up organisations – each with his own mix of abilities, ambitions, anxieties and attitude. Second, people at work assume that their manager is the embodiment of the organisation, and this can allow the interests of the organisation to become confused with those of the manager. It is this confusion that can often cause things to go wrong – to the detriment of the organisation as well as those it serves. If we are to focus more on prevention rather than cure, we need to remember that in practice it is the action of individuals (be they employees or managers) that is the determining factor, and so their own responsibility should be part of the equation.

It is for this reason that a more open workplace culture should be encouraged. If someone at work reasonably suspects a danger or threat to others, they or their manager should deal with it if they have the authority and ability to do so. If neither of them does, they should both be encouraged to notify those above or outside who do. Though some still view this approach as novel, the fact is that all those we deal with at Public Concern at Work – be they workers, business, public bodies, regulators or policy makers – see the sense of it. For this reason if no other, this practical approach should be recognised as law and policy develops on collective responsibility in the workplace.

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⁵ John Smith Memorial Trust; quote from speech on 6 November 1992

⁶ A second example can be found by googling “Speak Up or Pay Up”.