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EMPLOYERS' LIABILITY

COMMON LAW DUTIES

The employer's duty to his employees is commonly dealt with under four headings, the provision of: (a) competent staff; (b) a safe place of work; (c) proper plant and equipment; and (d) a safe system of work. These are simply aspects of the broader duty to see that reasonable care for the safety of employees is taken.

Note: under the doctrine of common employment (which is mentioned in some of the cases below) at common law a master was not liable for the negligent harm resulting from the action of one of his servants towards a fellow-servant engaged in a common employment at the time of the accident. The doctrine was abolished by the Law Reform (Personal Injuries) Act 1948, s1(1).

The employer's duty to his employees is personal and non-delegable. He can delegate the performance of the duty to others, whether employees or independent contractors, but not responsibility for its negligent performance:

Wilsons & Clyde Coal v English [1937] 3 All ER 628

COMPETENT STAFF

The employer has an obligation to select competent fellow employees, and a correlative duty to give them proper instruction in the use of equipment. For the practical joker cases, compare:

Smith v Crossley Bros (1951) 95 SJ 655
Hudson v Ridge Manufacturing [1957] 2 All ER 229
Harrison v Michelin Tyre Co [1985] 1 All ER 918

If an employer knows or can foresee that acts being done by employees might cause physical or psychiatric harm to a fellow employee, it is arguable that the employer could be in breach of duty to that employee if he did nothing to prevent those acts when it was in his power to do so. See:

Waters v MPC (2000) 27 July

The ill-treatment or bullying cases referred to by Lord Slynn in *Waters* were:

Veness v Dyson Bell (1965) Times LR, 25 May
Wetherall v Lynn [1978] 1 WLR 200
Wigan BC v Davies [1979] ICR 596

SAFE PLACE OF WORK

An employer must take such steps as are reasonable to see that the premises are safe. Although this was not mentioned by Lord Wright in Wilson & Clyde Coal (above), it has been accepted by the courts, eg Lord Greene MR in:

Davidson v Handley [1945] 1 All ER 235, 236

As for the extent of the duty, see:

Latimer v AEC Ltd [1953] 2 All ER 449

The employer is also under a duty with respect to the premises of a third party even though he has no control over the premises, but the steps required to discharge this duty will vary with the circumstances. See:

Wilson v Tyneside Window Cleaning Co [1958] 2 All ER 265
Cook v Square D Ltd [1992] ICR 262, 268 and 271

A duty may be also owed under reg.5 of the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 3004).

ADEQUATE PLANT AND EQUIPMENT

An employer has a 'duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition' (per Lord Herschell, *Smith v Baker* [1891] AC 325, 362). If necessary equipment is unavailable and this leads to an accident he will be liable, although he is not necessarily bound to adopt the latest improvements and equipment (*Toronto Power Co v Paskwan* [1915] AC 734).

If the employee would not have used the safety equipment if it had been supplied the employer's breach of duty is not the cause of injury (*McWilliams v Sir William Arrol & Co* [1962] 1 All ER 623).

Section 1(1) of the Employers' Liability (Defective Equipment) Act 1969 (which reversed the decision of the House of Lords in *Davie v New Merton Board Mills* [1959] AC 604) makes an employer liable if an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by the employer, and the defect is attributable wholly or partly to the fault of a third party, whether identifiable or not.

An employer will not be liable if a worker fails to make proper use of the equipment supplied, nor where the employee acted foolishly in choosing the wrong tool for the job, assuming that, where necessary, the employee has been given adequate instruction in the use of the equipment. See:

Parkinson v Lyle Shipping Co [1964] 2 Lloyd's Rep 79
Leach v British Oxygen Co (1965) 109 SJ 157

SAFE SYSTEM OF WORKING

It is a question of fact whether a particular operation requires a system of work in the interests of safety, or whether it can reasonably be left to the employee charged with the task. It is usually applied to work of a regular type where the proper exercise of managerial control would specify the method of working, give instruction on safety and encourage the use of safety devices. See:

Speed v Thomas Swift & Co [1943] 1 All ER 539
General Cleaning Contractors v Christmas [1952] 2 All ER 1110

Although normally thought of in terms of physical safety, it is clear that the obligation to provide a safe system of work also extends to an employee's mental health. See:

Petch v Customs and Excise Commissioners [1993] ICR 789
Walker v Northumberland County Council [1995] 1 All ER 737

There is also scope for arguing that the employee has voluntarily accepted the risk:

Johnstone v Bloomsbury Health Authority [1991] 2 All ER 293

If an employee suffers psychiatric harm as a result of witnessing a 'shocking event' for which his employer is responsible, then the ordinary rules for such claims apply. The employee must bring himself within the category of a 'primary victim' or satisfy the restrictive criteria applied to 'secondary victims':

White v Chief Constable of the South Yorkshire Police [1999] 1 All ER 1

Where an employer has followed a general practice of a particular trade or industry the claimant will have some difficulty in establishing that the practice was negligent. See:

Thompson v Smiths Shiprepairers Ltd [1984] 1 All ER 881

In some cases a warning of the danger to a skilled employee will be sufficient to discharge the employer's duty, and in others it may be reasonable to expect experienced workers to guard against obvious dangers. See:

Wilson v Tyneside Window Cleaning Co [1958] 2 All ER 265 (above)
Baker v T. Clarke Ltd [1992] PIQR 262, 267
Rozario v The Post Office [1997] PIQR P15

There are two aspects to the provision of a safe system of work: (a) the devising of a system; and (b) its operation. Even if the system itself is safe a negligent failure to operate the system, whether by another employee or an independent contractor, will render the employer liable. See:

McDermid v Nash Dredging Co [1987] 2 All ER 878

STATUTORY DUTIES

Breach of statutory duty is an entirely separate tort from an action in negligence, but it is particularly important in the realm of employers' liability. Indeed, industrial safety legislation, which is penal in nature, is the one area where the courts have consistently allowed such common law actions.

Regulations made under the Health and Safety at Work etc. Act 1974 have gradually been replacing the variety of statutes which governed specific types of premises, such as the Factories Act 1961, the Mines and Quarries Act 1954 and the Offices, Shops and Railway Premises Act 1963. The 1974 Act imposes a number of very general duties in relation to safety at work, breach of which does not give rise to a civil action (s47(1)). Breach of the regulations that the Secretary of State is empowered to make under the 1974 Act to replace this legislation is actionable before the civil courts, except where the regulations provide otherwise (s47(2)).

Regulations have been introduced to comply with EC health and safety directives (most particularly the EC Framework Directive on Health and Safety – Council Directive 89/391), including:

- the Noise at Work Regulations 1989
- the Workplace (Health, Safety and Welfare) Regulations 1992
- the Health and Safety (Display Screen Equipment) Regulations 1992
- the Construction (Health, Safety and Welfare) Regulations 1996
- the Provision and Use of Work Equipment Regulations 1998
- and the Control of Substances Hazardous to Health Regulations 1999
- the Management of Health and Safety at Work Regulations 1999

The amount of protection given by an action for breach of statutory duty depends, not only on the wording of the statute, but more importantly on the interpretation of the courts.

See further, *Winfield & Jolowicz*, p272-6 or *Textbook on Torts*, p260-3.

DEFENCES

VOLENTI NON FIT INJURIA

An employee's knowledge of the existence of a danger does not in itself amount to consent to run the risk. See:

Smith v Baker [1891] AC 325
Baker v James Bros [1921] 2 KB 674

As a matter of public policy *volenti* is not a defence to an action for breach of statutory duty brought by a worker against his employer. See:

Wheeler v New Merton Board Mills [1933] 2 KB 669

A limited exception was admitted (per Lord Pearce) in:

Imperial Chemical Industries v Shatwell [1964] 2 All ER 999

The claimant's own wrongful act may put the employer in breach of statutory duty:

Ginty v Belmont Building Specialists [1959] 1 All ER 414

This defence will apply only where the claimant is the *sole* author of his own misfortune.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is a defence both to an action in negligence and breach of statutory duty. In general, however, the carelessness of employees as claimants is treated more leniently than the negligence of employers, even where liability rests upon the vicarious responsibility of the employer for the negligence of another employee. See:

Flower v Ebbw Vale Steel Iron & Coal Ltd [1936] AC 206, 214
Staveley Iron & Chemical Co v Jones [1956] 1 All ER 403

EXAM QUESTIONS

1. Examine the obstacles that have to be overcome by an employee claimant before succeeding in a claim against his employers for:

(a) "Stress at work", noting the distinction between overwork and bullying.

(b) "Post traumatic stress" as exemplified by the case of White v Chief Constable of South Yorkshire Police (1999).

(ILEx Part II, Q7 June 2000)

2. See Q4 June 1999

3. See Q1 June 1997