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VICARIOUS LIABILITY

INTRODUCTION

Employers are vicariously liable for the torts of their employees that are committed during the course of employment.

Reasons for vicarious liability

According to Michael A. Jones, *Textbook on Torts*, 2000, p379, several reasons have been advanced as a justification for the imposition of vicarious liability:

(1) The master has the 'deepest pockets'. The wealth of a defendant, or the fact that he has access to resources via insurance, has in some cases had an unconscious influence on the development of legal principles.
(2) Vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others.
(3) As the employer makes a profit from the activities of his employees, he should also bear any losses that those activities cause.

Liability

Three questions must be asked in order to establish liability:

(1) Was a tort committed?
(2) Was the tortfeasor an employee?
(3) Was the employee acting in the course of employment when the tort was committed?

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Employers/masters will only be liable for the torts of their employees/servants. They will not usually be liable for the torts of their independent contractors (see below). It is therefore necessary to establish the status of the tortfeasor.

The intention of the parties is not necessarily conclusive. Contrast, for example:

- *Ferguson v Dawson Partners* [1976] 3 All ER 817 – a building worker who at the time of hiring was expressed to be a 'labour only subcontractor' was held to be an employee because in all other respects he was treated as an employee. The statement had been made for tax and national insurance purposes.

- *Massey v Crown Life Insurance* [1978] 2 All ER 576 – there was a detailed written contract and the parties' intention prevailed.

Various tests for establishing an individual's employment status have been developed through the cases:

(a) The control test

This was the traditional test. In *Collins v Hertfordshire CC* [1947] 1 All ER 633, Hilbery J said: "The distinction between a contract for services and a contract of service can be summarised in this way: In one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done, but how it shall be done."

But in *Cassidy v Ministry of Health* [1951] 1 All ER 574, Somervell LJ pointed out that this test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. He went on to say: "One perhaps cannot get much beyond this 'Was the contract a contract of service within the meaning which an ordinary person would give under the words?'"

(b) The nature of the employment test

One accepted view is that people who have a 'contract of service' (an employment contract) are employees, but people who have a 'contract for services' (a service contract) are independent contractors (*Ready Mixed Concrete v Minister of Pensions and NI* [1968] 1 All ER 433).

(c) The 'integral part of the business' test

This test was proposed by Lord Denning in *Stevenson, Jordan and Harrison Ltd v McDonald and Evans* [1952] 1 TLR 101: 'It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.'

(d) Allocation of financial risk/the economic reality test/multiple test

Lord Wright suggested a complex test involving (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161). In a later case, Cooke J referred to these factors and said that the fundamental test was: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer is yes, it is a contract for services; if no, it is a contract of service. There is no exhaustive list of considerations relevant to determining this question, and no strict rules about the relative weight the various considerations should carry in a particular case. Factors which could be of importance were: (i) whether the person hires his own helpers; and (ii) what degree of responsibility for investment and management he has (*Market Investigations v Minister of Social Security* [1968] 3 All ER 732).

These factors were considered to be significant in:

- *Ready Mixed Concrete v Minister of Pensions and NI* [1968] 1 All ER 433 – 'owner-drivers' who delivered concrete in vehicles purchased on HP from an associated company, painted in company colours and which could not be used for private purposes or other haulage business, were employed under a contract of carriage than of service. Ownership of the assets (the vehicle), the chance of profit and the risk of loss were the driver's. These factors were inconsistent with a master-servant relationship.

Lending an employee

If an employer lends an employee to another employer on a temporary basis, as a general rule it will be difficult for the first employer to shift responsibility to the temporary employer. See:

- *Mersey Docks & Harbour Board v Coggins Ltd* [1946] 2 All ER 345 – the Board was liable for the negligence of a crane driver hired, along with a crane, to Coggins. The contract provided that the driver was to be the servant of Coggins but the Board continued to pay his wage and had the power to dismiss him. Coggins had immediate control over what the driver should do, but no power over how the crane should be operated. The HL held that the driver remained the servant of the Board.

THE COURSE OF EMPLOYMENT

An employer will only be liable for torts which the employee commits in the course of employment. There is no single test for this, although Parke B famously stated in *Joel v Morison* (1834) 6 C&P 501 at 503, that the servant must be engaged on his master's business, not 'on a frolic of his own'.

An employer will usually be liable for (a) wrongful acts which are actually authorised by him, and for (b) acts which are wrongful ways of doing something authorised by the employer, even if the acts themselves were expressly forbidden by the employer (*Salmond & Heuston on the Law of Torts*, 1996, p443). Liability for criminal acts will also be considered.

Authorised acts

If an employer expressly authorises an unlawful act he or she will be primarily liable.

Wrongful modes of doing authorised acts

In the following cases it was held that the employer was vicariously liable for torts of the employee:

- *Limpus v London General Omnibus Co* (1862) 1 H&C 526 – bus drivers racing, despite a prohibition, caused a collision.

- *Bayley v Manchester, Sheffield and Lincolnshire Railway Co* (1873) LR 8 CP 148 – a porter, believing a passenger was on the wrong train, violently pulled him off, causing injury.

- *Century Insurance Co v Northern Ireland Transport Board* [1942] 1 All ER 491 – a petrol tanker driver, smoking a cigarette threw away a match, causing an explosion.

- *Rose v Plenty* [1976] 1 All ER 97 – a milkman, contrary to express instructions, employed a 13-year-old assistant, injured by the milkman's negligent driving. The act here was done for the employers' business.

In the following cases it was held that the employer was **not** vicariously liable:

- *Beard v London General Omnibus Co* [1900] 2 QB 530 – a bus conductor drove a bus injuring a pedestrian.

- *Twine v Bean's Express Ltd* [1946] 1 All ER 202 – a hitchhiker had been given a lift contrary to express instructions and was fatally injured. Lord Greene MR said that the servant was doing something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there.

- *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74 – workmen drove seven or eight miles for tea, immediately after finishing their lunch in a pub. The van overturned and a passenger was killed

Criminal acts

An employer will not usually be liable for the criminal acts of employees. For example:

- *Keppel Bus Co v Ahmad* [1974] 2 All ER 700 – a passenger who objected to a bus conductor's treatment of another passenger and then insulting language was assaulted by the conductor. The employer was held not liable by the Privy Council. Lord Kilbrandon said that insults to passengers are not part of the due performance of a conductor's duty.

- *ST v N. Yorkshire CC* [1999] IRLR 98 – a deputy headmaster of a special school, responsible for caring for a handicapped teenager on a foreign holiday, sexually assaulted him. Butler-Sloss LJ said that this was not an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it was a negation of the duty of the council to look after children for whom it was responsible.

However, if the employee performs their duties in a criminal manner, an employer may be liable. See:

- *Morris v Martin Ltd* [1965] 2 All ER 725 – a fur coat sent to cleaners was stolen by the employee whose job it was to clean the coat. The cleaners were liable for the theft.

- *Nahhas v Pier House Management* (1984) 270 EG 328 – a porter entrusted with keys by a tenant, entered her flat and stole jewellery. The employers were liable for negligently employing a 'professional thief' and breaching a duty to protect the plaintiff's flat.

- *Vasey v Surrey Free Inns* [1996] PIQR P373 – the plaintiff was attacked by two doormen and a manager employed by the defendant after he had kicked a door, breaking glass. The CA held the defendants vicariously liable because the attack was a reaction to the damage to the door for the protection of the employer's property and was not a private quarrel unrelated to the employer's duties.

THE INDEMNITY PRINCIPLE

There is a term implied at common law into contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. An employee who is negligent is in breach of such a term and the employer who has been held vicariously liable for the tort may seek an indemnity from the employee to make good the loss.

- *Lister v Romford Ice* [1957] 1 All ER 125. A father was knocked down by his son, who was employed by Romford Ice, while backing his lorry in a yard. The employers were vicariously liable for the son's negligence and their insurers met the father's claim. The insurers sued the son in the company's name, exercising their right of subrogation under the contract of insurance. By a majority, the House of Lords held that the son was liable to indemnify the employer and consequently the insurers.

This case lead to controversy about insurers forcing employers to sue employees, which would lead to poor industrial relations. Employers' liability insurers later entered into a 'gentleman's agreement' not to pursue such claims unless there was evidence of collusion or wilful misconduct (See further: Gardiner (1959) 22 MLR 552; Hepple & Matthews, *Tort: Cases and Materials*, 1991, p881).

LIABILITY FOR INDEPENDENT CONTRACTORS

In *Alcock v Wraith* [1991] 59 BLR 16, Neill LJ stated: "where someone employs an independent contractor to do work on his behalf he is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work …

The main exceptions to the principle fall into the following categories:

(a) Cases where the employer is under some statutory duty which he cannot delegate.
(b) Cases involving the withdrawal of support from neighbouring land.
(c) Cases involving the escape of fire.
(d) Cases involving the escape of substances, such as explosives, which have been brought on to the land and which are likely to do damage if they escape; liability will attach under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330.
(e) Cases involving operations on the highway which may cause danger to persons using the highway.
(f) Cases involving non-delegable duties of an employer for the safety of his employees.
(g) Cases involving extra-hazardous acts."

Neill LJ then examined whether there was a further exception which could be relied upon in cases of nuisance. He referred to *Matania v National Provincial Bank* [1936] 2 All ER 633, where the Court of Appeal was concerned with a claim for damages for nuisance caused by dust and noise during building operations; Slesser LJ concluded that the work did constitute a hazardous operation within the exception to the general rule. Neill LJ then stated that both the general rule and the exceptions apply whether the action is framed in negligence or nuisance. Furthermore, he was not aware of any different approach being adopted in an action for trespass.