

Master or servant –
who is responsible for
the irresponsible April Fooler?

A vicarious liability update



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“Origins of the doctrine of vicarious liability are obscure, its basis uncertain”

Wilson v Exel UK Ltd 2010 CSIH 35 per Lord President

Baird v Hamilton (1826) 4S 790
per Lord Robertson

“It is necessary for the safety of the lieges that masters should be bound to employ servants of such character as will conduct their carts with safety to the public”

“The law of vicarious liability is on the move....It has not yet come to a stop”

Cox v Ministry of Justice 2016 UKSC 10 per Lord Reed

Traditionally, test for vicarious liability :-

- *Salmond on Law of Torts (1907)* - a wrongful act done “in the course of employment” by the servant if “either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by that master”

“The law of vicarious liability is on the move....It has not yet come to a stop”

Cox v Ministry of Justice 2016 UKSC 10 per Lord Reed

Lister v Hesley Hall Ltd 2001 1AC 215

- Sexual offences of warden at school boarding house
- Fair and just to hold those running the school to be vicariously liable for his actions
- “Close connection” with the job

“The law of vicarious liability is on the move....It has not yet come to a stop”

Cox v Ministry of Justice 2016 UKSC 10 per Lord Reed

Various Claimants v Catholic Child Welfare Society
(“Christian Brothers” case) 2012 UKSC 56

- Sexual offences of children by members of Institute of the Brothers of the Christian Schools, an unincorporated association
- Institute did not employ “brothers” who were employed by another organisation
- Institute vicariously liable for abuse

Scope of vicarious liability? Dependant on answers to two questions

Cox v Ministry of Justice 2016 UKSC 10 per Lord Reed

1. What sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual?
2. In what manner does the conduct of that individual have to be related to that relationship in order for vicarious liability to be imposed on that defendant?

Cox v Ministry of Justice

2016 UKSC 10

- Catering manager in prison kitchen
- Prisoners on prison service pay
- Bag of rice spilled - Instructed prisoners to stop work until rice cleared
- One prisoner ignored instructions
- Dropped heavy bag of rice on her back
- Defender vicariously liable for prisoner

Cox v Ministry of Justice

2016 UKSC 10

- A relationship could give rise to vicarious liability even in absence of a contract of employment
- Employer should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not
- Need not be carrying on activities of a commercial nature where benefit derived from tortfeasor is in form of profit- eg “brothers” in school, local authorities, hospitals

Cox v Ministry of Justice

2016 UKSC 10

- Sufficient where Defendant is carrying on activities in “furtherance of its own interests”
- Individual must be carrying out activities assigned by Defendant as integral part of its operation and for its benefit
- Vicarious liability can arise in situations “akin to employment”
- But does that cover independent contractors?
- Not vicarious liability if “tortfeasor’s activities are entirely attributable to the conduct of a recognisably independent business of his own or a third party”

Lister v Hesley Hall Ltd

2001 1AC 215

Lord Clyde's guidance:-

1. a broad approach should be adopted; the context of the act complained of should be looked at and not just the act itself
2. time and place will always be relevant but may not be conclusive
3. the fact that the employment provides the opportunity for the act to occur at a particular time and place is not necessarily enough

Fletcher v Chancery Lane Supplies Ltd

2016 EWCA Civ 1112

- Claimant cycling in cycle lane
- Plumbing business shop/office
- Shop assistant due to finish shift at 12pm
- Lived 10 minutes from shop
- Employee wearing work clothes, including a logo shirt
- Crossed road towards shop at 12.45pm
- Collided with cyclist
- No evidence as to why employee left shop
- No evidence that he'd agreed to work later that day
- Impossible to know if crossing road had been sufficiently connected to his work at the time to make it reasonable to hold the company vicariously liable

Ward v Scotrail Railways Ltd

1999 SC 255

- Pursuer was a train ticket inspector
- Suffered sexual harassment by another employee (Kelly) working at the same station
- Kelly made Pursuer aware that he was tracking her daily train route, staring at her and swapping shifts so as to work alongside her
- Not acting in course of his employment but unrelated, independent venture motivated by personal emotions

Mattis v Pollock trading as Flamingos

Nightclub

2003 EWCA Civ 887

- Unlicensed doorman at nightclub
- Defendant (nightclub owner) encouraged aggressive and intimidatory behaviour by doorman
- Violent incident occurred inside nightclub - doorman assaulted two customers; claimant tried to intervene
- doorman fled club with group of customers in pursuit
- claimant left club and met up with customers outside
- several minutes later, doorman returned with a knife and stabbed claimant in back
- rendered paraplegic

Mattis v Pollock trading as Flamingos Nightclub 2003 EWCA Civ 887

- Incident had developed in stages
- But too narrow an approach to treat stabbing in isolation
- Doorman's behaviour had included an element of personal revenge
- But broad approach meant that defendant's responsibility for doorman's actions at time of stabbing was not extinguished
- vicariously liable

Bernard v Attorney General of
Jamaica
[2004] UKPC 47

- Claimant using public telephone
- Off duty police officer announced “police” and demanded the phone
- Claimant refused
- Police officer shot him at point blank range in head with police revolver
- Claimant awoke in hospital where he was surrounded by police officers (including shooter)
- Claimant arrested by shooter for assaulting a police officer

Bernard v Attorney General of Jamaica [2004] UKPC 47

- Employer could be vicariously liable notwithstanding that employee acting exclusively for his own benefit
- Was unlawful shooting so closely connected to employment?
- Announcement that he was a policeman probably calculated to create impression acting on police business
- Subsequent arrest showed that police officer considered that claimant had interfered with execution of duties
- Vicariously liable
- Creation of risk by providing revolver at home reinforced vicarious liability conclusion

Wilson v Exel UK Ltd t/a Exel

2010 CSIH 35

- Supervisor pulled ponytail of another employee and made a “ribald” remark
- Not suggested on averment that the employee’s conduct was in any way connected with performance of his assigned work as supervisor nor with his responsibility for health and safety
- Not “sufficiently close connection” with supervisor’s employment as to mean employer vicariously liable
- Supervisor was on a “frolic” of his own

Weddall v Barchester Healthcare; Wallbank v Wallbank Fox Designs Ltd 2012 EWCA Civ 25

Appeal One- Weddall

- Deputy manager of care home (Weddall) asked employee (Marsh) to carry out additional shift
- Marsh refused; cycled to care home in drunken state and attacked Weddall
- Spontaneous criminal act of a drunken man who was off duty
- Weddall's request was just pretext for the assault
- No vicarious liability

Weddall v Barchester Healthcare;
Wallbank v Wallbank Fox Designs Ltd
2012 EWCA Civ 25

Appeal Two- Wallbank

- Managing director of small company (Wallbank) queried manner in which work was being carried out and gave routine instruction to an employee (Brown)
- Claimant assaulted by Brown
- Spontaneous, immediate but irrational unjustified assault
- Tort flowed from superior employee giving instructions
- Vicarious liability

Weddall v Barchester Healthcare;
Wallbank v Wallbank Fox Designs Ltd
2012 EWCA Civ 25

- Vicarious liability is policy based - keep within limits
- Possibility of friction is inherent in any employment relationship
- Risk of an over-robust reaction to an instruction is a risk created by the employment
- May be reasonably incidental to the employment rather than unrelated to or independent of it

Vaickuviene v J Sainsbury plc

2013 CSIH 67

- Romasov (Lithuanian) employed as shelfstacker in supermarket
- Co-worker (McCulloch) frequently worked on same shift as deceased and made racist comments about him; Member of BNP
- Following arguments, attacked in supermarket aisle with knife
- Knife taken from shelf in kitchenware section
- Inflicted fatal stab wounds
- Action by relatives of Romasov

Vaickuviene v J Sainsbury plc

2013 CSIH 67

- Neither Defenders' retail business in general or their engagement of persons to stack shelves in particular carried any special or additional risk that persons so engaged (such as the deceased) would either be harassed or otherwise come to harm as a result of deliberate and violent actings of co-employees
- Mere bringing together of persons as employees not sufficient to impose vicarious liability

Vaickuvienne v J Sainsbury plc

2013 CSIH 67

- Not just and reasonable for all employers to become vicariously liable for all acts of harassment solely on the basis of engagement
- Employer may be vicariously liable for harassment where an employee in a dominant role (eg supervisory role) harasses an inferior worker in an attempt to enhance productivity or enforce discipline

GB v Stoke City Football Club Ltd 2015 EWHC 2862 (QB)

- Claimant was former apprentice footballer
- Subjected to practice known as “gloving” by a professional footballer
- Commonly used on apprentices as form of punishment for failing to perform menial tasks (eg cleaning the kit)
- A gloved finger covered in hot ointment and inserted into the rectum

GB v Stoke City Football Club Ltd 2015 EWHC 2862 (QB)

- Professional footballer had no express or implied power or duty conferred upon him by the club to discipline or chastise the apprentices
- In absence of formal duties or powers, alleged incidents were deliberate and intentional or reckless conduct involving a serious assault outside the course of the employment relationship

Graham v Commercial Bodyworks Ltd

2015 EWCA Civ 47

- Car body repair shop using highly inflammable thinning agent
- One employee deliberately lit a cigarette lighter in vicinity of claimant causing serious burning injuries
- Employers created a risk by requiring employees to work with thinning agent
- But action of employee did not further employer's aims
- Not vicariously liable for the frolicsome but reckless conduct

Somerville v Harsco Infrastructure Ltd

2015 SCEDIN 71

- Yard Manager had “a light-hearted exchange” with forklift driver about going to shop for rolls for morning break
- Manager responded to some comments - “I will teach you to speak to your manager like that”
- Threw a claw hammer towards forklift driver
- Pursuer 30 feet checking scaffolding boards
- Hammer hit Pursuer on head

Somerville v Harsco Infrastructure Ltd

2015 SCEDIN 71

- Manager did not intend to throw hammer at Pursuer nor attract his attention
- Throwing hammer was frolic and unconnected with what he was employed to do
- Unconnected with duty to instruct an employee about work of Defenders
- Not done as manager of the yard or its employees
- Consistent with assault on a fellow employee in course of a prank
- Not vicariously liable

Mohamud v Wm Morrison
Supermarkets plc
2016 UKSC 11

- Claimant stopped at petrol station and asked employee at sales kiosk if he could print off documents from a USB stick
- Employee refused in an offensive manner
- Used racist, abusive and violent language and ordered claimant to leave
- Followed claimant to car and subjected to a serious violent and unprovoked physical attack

Mohamud v Wm Morrison
Supermarkets plc
2016 UKSC 11

- “Close connection” - two matters to consider:-
 1. Broadly, what functions had been entrusted by employer to employee?
and
 2. whether there was sufficient connection between employee's wrongful conduct and the position in which he was employed
- Did the assault fall “within the field of activities” assigned to employee?

Mohamud v Wm Morrison
Supermarkets plc
2016 UKSC 11

- Not personal between them
- Seamless episode between response to initial inquiry of claimant and following onto forecourt
- Order to keep away from employer's premises which reinforced with violence
- Gross abuse of his position but sufficient connection with employer's business

Bellman v Northampton Recruitment Ltd

2016 EWHC 3104 (QB)

- Claimant was sales manager
- Company director was longstanding friend of claimant
- Christmas party in golf club
- then onto a hotel for drinks
- 3am argument
- about higher wages of new employee
- director hit claimant twice
- knocked to floor
- sustained serious brain injury

Bellman v Northampton Recruitment Ltd

2016 EWHC 3104 (QB)

- Employer not liable for assault merely as it occurred during working hours
- Employer not free from liability simply because it occurred outwith normal working hours
- Sufficient connection between position of employee and his wrongful conduct to make it right for employer to be liable under principle of social justice?

Bellman v Northampton Recruitment Ltd

2016 EWHC 3104 (QB)

- Broad approach
- Fact-specific evaluation
- Context and circumstances in which conduct occurred?
- Time and place relevant but not conclusive
- Director's job to oversee smooth running of party
- But temporal and substantive difference between party at golf club and spontaneous drinks at hotel

Bellman v Northampton Recruitment Ltd

2016 EWHC 3104 (QB)

- Merely raising a work-related topic at a social event does not change interaction between colleagues into something in course of employment
- Any increased risk of confrontation arising from additional alcohol consumed in hotel too far removed from employment
- No objective observer would have seen connection between situation in hotel and jobs of employees, notwithstanding conversation turning to work issues
- Employer not vicariously liable