CHAPTER 5: VICARIOUS LIABILITY:

Introduction

Every person is obviously liable for his own wrongful acts. Liability in this case is personal. In certain circumstances, however, a person may assume responsibility for torts or wrongful acts committed by another person, e.g. an employer may be held responsible for the torts of his employee. Liability in this latter case is categorized as vicarious liability. So it is the liability of one person on the behalf of the other person.

1. There must be Master/Servant relationship between the parties concerned.

2. The Servant must have been acting in the course of his employment at the material time.

Once it is established that the wrongdoer was at the material time acting as a servant of some other person, and that he was then acting in the course of his employment, his master will be liable for any tort that may have been committed during that time. This explains why employers often find themselves being sued for torts committed by their employees.

Century Insurance Co. v. N.I. Road Transport Board, (1942)

The driver of a petrol tanker, whilst transferring petrol from the lorry to an underground tank, struck a match to light a cigarette. He threw the lighted match on the floor, and this resulted in a fire and an explosion that caused considerable damage. Held: The driver's employers were liable for his negligence in the discharge of his duties.

Cases like the one given above are straightforward and present no problem in determining whether the wrongdoer is or is not a servant. Sometimes, however, it is difficult to tell whether a particular person is a servant.

Who is a Servant?

Ordinarily, the nature of a servant's work should present no problem. Unfortunately, problems arise from the need to distinguish a servant from an independent contractor.

A servant is a person employed under a contract of service and acts on the orders of his master. The master therefore controls the manner in which the servants work is done. On the other hand, an independent contractor is employed under a contract for services and himself determines the manner in which the work in question is done. An independent contractor therefore does not act on the orders of his employer and is his own master as regards the execution of the work he is employed to do. Thus, if A owns a vehicle and employs B to drive it for him, B is A's servant; but where A is not the owner of the vehicle and engages B (the owner or driver) on special hire to drive him to some place(s), B is not a servant but an independent contractor. Again where A engages B to build a house for him, and A himself directs the manner in which the work is to be done, supervising the work to

ensure that his directions are complied with, B is a servant; but where A engages B, a professional builder and relies on his expertise and refrains from interfering with the construction work, B is in this case an independent contractor.

The distinction between a servant and an independent contractor is important because an employer is liable for the wrongful acts of his employee only if the latter is his servant; he is not liable where the employee is an independent contractor. An independent contractor is personally liable for his own wrongful acts.

Course of Employment:

An act is said to have been done by a servant in the course of employment where it is proved to have been authorized or sanctioned by his master. Thus, where the master authorizes his servant to do a wrongful act or where the servant is authorized to do a particular act in a proper manner, but does it in a wrongful and unauthorized manner, the master is still responsible for the consequences of the act. What is important is the fact that the act was authorized by the master. Once the master's authority is proved it is considered as the responsibility of the master and he is declared as liable for this tort.

Indeed, the fact that the master has expressly prohibited a particular act is of no consequence at all, as long as the servant has the master's general authority to act in the matter in question.

Limpus v. London General Omnibus Co., (1862)

An accident was caused by the one of the defendant's drivers who drove across the road so as to obstruct a rival omnibus. The defendant pleaded in defence that he had issued to each and every one of its drivers a card which stated that they "*must not on any account race with or obstruct another omnibus"* Held: The defendant was liable and it was no defence that it had issued specific instructions to its drivers not to race with or obstruct other vehicles.

Rose v. Plenty, (1976)

Plenty was employed as a milk rounds man, and his work required the use of a vehicle called a "*milk float*". His employment contract contained the following prohibition: "*Children and young persons must not in any circumstances be employed by you in the performance of your duties*." Plenty nevertheless employed the plaintiff, a 13-year old boy to help him distribute the milk. On one occasion the plaintiff was sitting with his foot dangling down so that he might be able to jump off the vehicle quickly. Plenty was driving negligently and a wheel caught the plaintiff's leg and broke it. Held: Plenty's employer was liable because plenty, by employing the plaintiff, did so for his employer's business and the disregard of the prohibition did not take the employee outside the course of his employment.

(Note: In the above case plenty himself was also held liable to the plaintiff).

It is important to note that a master is liable for the tort of his servant only if the tort was committed while the servant was acting in the course of his employment. It sometimes happens, however, that a servant may do an act which is completely outside the scope of his employment, e.g. a conductor may decide on his own to drive his master's vehicle. In this case the servant is said to be on a frolic of his own and the master is not liable for his wrongful acts:

Beard v. London General Omnibus, (1900)

The conductor of an omnibus belonging to the defendant company decided, at the end of a journey, to turn it round for the return trip. This was in the absence of the driver. As a result of the conductor's negligence, a collision occurred. Held: The defendant company was not liable as the conductor's act was neither authorized nor a manner of performing a conductor's duties.

Storey v. Ashton, (1869)

A driver was sent by his employer to deliver wine and collect empty bottles. On the return trip, he obliged a friend by driving off in another direction. Held: The driver's employer was not liable for damage caused by the employee while driving in the other direction, because he had started on an entirely new journey, given that every step he drove took him away from his duty.

But it must be observed that not every detour by a driver necessarily takes him outside the course of his employment; a particular detour may be reasonably incidental to it, depending on the circumstances.

Vicarious Liability in Practice:

Besides Employer/Employee relationship (including Government/Servant relationship) there are certain other instances in which the principle of vicarious liability applies. One of these is to be found in the law of agency: a Principle is liable for torts committed by his Agent, where such torts are committed in the course of the Agent's duties. Parent/Child relationship, too, may give rise to vicarious liability on the part of the Parent. But a parent or guardian is generally not liable for torts committed by his child unless he has been negligent in permitting his child to use a dangerous thing or in failing to exercise proper control and supervision of the child:

Newton v. Edgerloy, (1959)

A father allowed his 12-year old son to use a shotgun. He ordered the son never to use it in the presence of other children but failed to ensure that his order was obeyed. While the son was using the shot-gun, he injured the plaintiff. Held: The father was vicariously liable for the son's tort.

Also since a corporation is an artificial person, most of its tortious liability is of a vicarious nature.

Liability for Independent Contractors:

An employer is not liable for the torts of an independent contractor or of any servant employed by the contractor. This rule has been based on the fact that the employer does not have strict right of control over the method used by the contractor. But there are some exceptions to this rule. It means an employer will be still liable for the actions of an independent contractor in the following cases:

(a) Where the employer retains his control on the contractor.

(b) Where contract made is itself a tort e.g. a nuisance.

(c) Where the Rule in *Rylands v. Fletcher*, (1866) applies

CHAPTER 5: VICARIOUS LIABILITY

Outline

5.1 Introduction

An employer is vicariously liable for torts committed by an employee in the course of his employment. The expressions "employer" and "employee" will be used here instead of the traditional terms "master" and "servant".

If a claimant wishes to take advantage of the principle, he must show that a tort was committed by a person who was an employee (as opposed to an independent contractor) and that the tort was committed in the course of the tortfeasor's employment.

Vicarious liability is strict in the sense that the employer need not be guilty of personal fault. Vicarious liability should therefore be contrasted with the personal duty of care which the employer owes to the claimant who is one of his employees

Various reasons have been advanced for the imposition of vicarious liability. For example, it has been suggested that the employer is in control of the behaviour of his employee or that the employer is liable on the basis of causation. The modern approach, however, is essentially pragmatic. The imposition of vicarious liability is based on the employer's greater ability to pay. The employer can pass his costs on to the customers in the form of higher prices and in any case is likely to be insured.

It has also been pointed out that the risk-creating activity arises from the pursuit of the employer's business interests and that the doctrine may have the effect of encouraging the employer to effect accident prevention procedures. Yet another rationale could be that since the employer acquires a benefit from the work of his employees (usually some financial gain), the employer should also bear the burden of accidents which arise out of that work.

5.2 Who is an employee?

A legal distinction is drawn between an employee for whom the employer is liable and an independent contractor for whose torts he is not vicariously liable (see **5.5**). Various tests have been used to determine what distinguishes an employee from an independent contractor. The question is one of law and the parties themselves may be mistaken as to the true nature **of** their contractual relationship. Traditionally, a distinction was drawn between a contract of service made with an employee and a contract **for** services made with an independent contractor, but this does not explain how a judge will determine which is which.

At one time the sole test was whether the employer retained control over the performance of the work by telling the worker what to do and how to do it. That worker would be an employee. This test is now outdated, as most employees are skilled and the employer may not have any or all of those skills. A manager in the National Health Service will not be able to tell a consultant surgeon how to carry out a particular operation. The element of control is still relevant in the relationship of employer-employee but it must now be considered alongside other aspects of the relationship.

An integration test has been suggested under which a person is an employee if his work is an integral part of the business. It is therefore possible to distinguish between a chauffeur (employee) and a taxi driver (independent contractor); a staff reporter (employee) and a freelance journalist (independent contractor). Even this test does not solve all problems and more complex criteria have been suggested.

In ***Ready Mixed Concrete v Ministry of Pensions and National Insurance [1968]*** the following criteria were put forward:

(i) the employee should agree that, in consideration of a wage or some other remuneration, he will provide his own work and skill in the performance of some task for his employer;
(ii) the employee agrees expressly or impliedly to be subject to his employer's control;
(iii) the other provisions of the contract should be consistent with it being a contract of service or employment.

In this way the court can look at all the aspects of the contract and the relationship which may have a bearing on the decision, including the economic reality of the situation.

In the end the court will take a pragmatic approach to the employment relationship. In ***Hawley v Luminar Leisure plc [2006]*** the defendant was the owner of a nightclub and he used a security services company to provide doormen for the club. The defendant, however, exercised detailed control not only over what the doormen were to do but how they were

to do it. A doorman assaulted the claimant and the defendant was found by the Court of Appeal to be the employer for the purposes of vicarious liability.

Changes in patterns of employment and social trends may also be relevant. The questions of control, integration and economic reality must be asked in the context of responsibility for the overall safety of the worker. A builder/ roofer who had traded as a "one-man firm" for 10 years was nonetheless an employee of the defendants at the critical time of his accident. In answer to the question "Whose business was it?", the Court of Appeal decided that it was the employer's: ***Lane v Shire Roofing [1995].***

It has now been decided that no employment or apprenticeship contract is formed between a pupil barrister and the pupil master: Edmonds v Lawson [2000]. As a consequence, the pupil has no duty to "work" and cannot claim the minimum wage.
Where an employee is lent to another employer, it may be necessary to determine who is the employee's employer for the purposes of vicarious liability. A term in a contract is not decisive and the burden is on the permanent employer to show that he had divested himself of control. Where labour only is lent it is easier to infer that the hirer is the employer.

Where labour and plant are lent it is more difficult to rebut the presumption that the permanent employer retains control. In ***Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd [1947]***, Lord Porter gave his view as to the most satisfactory test in this context:

> *" …… to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it."*

McDermid v Nash [1987] should also be considered. In ***McDermid*** the employer remained personally (not vicariously) liable to his employee who was injured when an independent contractor failed to operate a safe system of work created by the general employer. The general employer may, however, be entitled to a full indemnity as against the temporary employer where the latter's negligence caused the accident in which their "loaned" employee was injured: ***Nelhams v Sandells Maintenance Ltd [1996].***

The question whether two different employers could be held vicariously liable for an employee was raised in ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005]***. The claimant had engaged a company to install air conditioning in his factory and that company had then sub-contracted with a second company who sub-contracted with a third company to provide fitters on a labour-only basis. A fitter's mate supplied by the third company, working under the supervision of the second company, negligently caused

flooding. The issue was which company should be held vicariously liable for the negligent workman. The third company argued that it was not legally possible for there to be dual vicarious liability.

The Court of Appeal considered that an employer for the purposes of vicarious liability was someone who exercised control over the worker. The enquiry should focus on the negligent act and whose responsibility it was to prevent it. On the facts of this case, both defendant companies had been entitled to prevent the worker's negligence. Although it has always been assumed to be the law that, where an employee who was lent by one employer to work for another was negligent, liability had to rest on one employer or the other but not both, the foundation on which that rested was a slender one and the contrary had never been pr6perly argued. There was no authority binding on the court to hold that dual vicarious liability was legally impossible. Both companies were held to be vicariously liable for the worker's negligence.

The legal position of agency workers has been clarified by the Court of Appeal in ***James v London Borough of Greenwich [2008*]**. It is common for the worker to have a contract with the agency and there is also a contract between the agency and the firm or company (the end-user), to which the worker is being sent, but there is usually no contract between the worker and the end-user. The Court of Appeal held that the agency-supplied worker, James, was not an employee of the end-user. On the facts, James was described in the contract with the agency as self-employed in relation to each assignment; she received no sick pay or holiday pay from the defendants. Every case must be determined on its own facts but the general principle, that a contract will only be implied where it is necessary to do so, is as relevant in this context as in others. If the facts indicate that the business reality of the relationship between the agency worker and the end-user is consistent with a contract of employment then such a contract may be recognised in law. The **Temporary and Agency Workers (Equal Treatment) Bill** may prove to be the means whereby the adverse effects of ***James*** are counteracted and agency workers will be given equal treatment rights after as little as twelve weeks in a job.

5.3 Tort committed by the employee

Vicarious liability is a means whereby, in appropriate circumstances, one person is made liable for the tort committed by another person. It is sometimes easy to overlook the pre-requisite that a tort must have been committed by an employee of the defendant for the question of vicarious liability to arise. In ***Ministry of Defence [2007]*** the claimant, a serving member of the RAF, was raped in her room by G, who had been invited back to the claimant's accommodation block by a mutual friend. Both G and the friend were also members of the RAF and all three of them had been drinking together at a nightclub. The claimant sought to establish that the first defendants should be vicariously liable for her

friend's failure to escort G off the premises. The trial judge found no vicarious liability and also no breach of any personal duty of care owed by the first defendants to the claimant regarding the standard of locks at the accommodation block or failure to enforce the rules relating to male visitors leaving the premises. Those in residence at the accommodation blocks were adults and not children. The claimant's friend did not owe a duty of care to the claimant and there was no tort for which the Ministry of Defence could be "vicariously" liable.

This essential principle, that an employer is vicariously liable for the tort of an employee committed in the course of his employment, was affirmed by the House of Lords in ***Generale Bank Nederland NY v Export Credits Guarantee Department [1999].*** The claimant must establish all the features of the particular tort allegedly committed by the employee and that the tort was committed in the course of that employee's employment. The problem arose from the fact that the defendant's employee had, as part of his job, underwritten guarantees, which lent credibility to another tortfeasor's fraudulent practices. Both the employee and the fraudster could have been sued by the claimant as jointly and severally liable for their torts but both were dead and the claimant was seeking to recover compensation from the employer through vicarious liability. Lord Woolf declared *" ... one could not combine the actions of the [employee] in the course of his employment with the actions of the [fraudster], which, if done by [the employee alone] would have been outside the course of his employment, and say that the Department was vicariously liable".* Further, there was no separate, discrete tort of *"procuring a third party to commit a tort*".

5.4 Course of employment

The employer will only be responsible for torts committed in the course of employment by the employee. This is a question of fact but the courts have often used Salmond's definition that an act is in the course of employment if it is either:

- a wrongful act authorised by the employer; or
- a wrongful and unauthorised mode of doing some act authorized by the employer. (When an employee is outside the course of employment he is said to be on a "frolic of his own".)

It is possible for an employer to be liable for an act which he has prohibited if the prohibition applies to the way in which the job is done rather than the scope of the job itself. An employer of a bus driver was liable when the driver raced other buses contrary to instructions: ***Limpus v London General Omnibus Co [1862].*** A dairy company was vicariously liable when a milkman, contrary to orders, carried on his milk float a child who was injured as a result of the milkman's negligent driving: ***Rose v Plenty [1976].*** The employer of a tanker driver was liable for a fire caused by the driver throwing a lighted match on the floor while he delivered petrol: ***Century Insurance Co v Northern Ireland Road Transport Board [1942].***

In all these examples it could be said that the negligent employee was still doing what he was employed to do, that is, driving the bus on the prescribed route (***Limpus),*** delivering milk ***(Rose***) and delivering petrol (***Century***). The employer wanted the task to be accomplished in a particular way, that is, no racing ***(Limpus***), no children on the float (***Rose***) and no smoking near the petrol tank ***(Century***), but the prohibition did not affect the type of work which the employee was paid to do.

In contrast, a wine merchant who diverted from his delivery route to visit a friend was found to be on a "frolic of his own" and his negligence was found tobe outside the course of his employment: ***Storey v Ashton [1869]***. A bus conductor who attempted to drive a bus acted outside the course of his employment: ***Beard v London General Omnibus CO [1900]***; it was held that "driving" was not a mode of doing his job as a conductor even though he was turning the bus to make it ready for the return journey. It should be noted, however, that it is more common nowadays for adults to be able to drive. ***Kay v ITW [1968]*** suggests that the reason for driving a vehicle without authority may now be investigated. The Court of Appeal considered that an employee who was instructed to drive a fork-lift truck had implied authority to move a five-ton diesel lorry which was obstructing access to the place where he needed to work.

The test laid down in ***Harrison v Michelin Tyre Co [1985***] was whether a reasonable man would say either that the employee's act was part and parcel of his employment even if unauthorized or prohibited, or that it was so divergent from his employment as to be clearly alien to it and distinguishable from it.

Problems are often encountered when a driver deviates from his prescribed route and is involved in an accident. In such a case the employee may be on "a frolic of his own". If the employee merely uses an unauthorised route but is still on the employer's business he is within the scope of his employment:
Hemphill v Williams [1966*]**.If the employee is on an unauthorised journey, this may take him outside the scope of his employment. Further problems are caused if an accident happens on the way to work or returning from the workplace. The House of Lords considered "travelling time" in ***Smith v Stages [1989]. Stages and a fellow employee were returning to their homes in the Midlands after completing an urgent job in South Wales. The two men had worked virtually without a break for 24 hours and Stages crashed the car in which they were travelling. Both men were seriously injured. No other car was involved. The employer paid the equivalent of the rail fare for the travelling involved but made no stipulation as to the mode of transport actually used. In addition, the men received wages for the days on which they travelled. Accordingly, on their return journey, the two men had been travelling in the employer's time and were in the course of employment. It was stated *per incuriam*, however, that an employee travelling on the public highway will be in the

course of employment only if he is going about his employer's business. Most employees who travel from work to home by car will no longer be in the course of their employment on that journey.

> "*So a bank clerk who commutes to the City of London every day from Even Oaks is not acting in the course of his employment when he walks across London Bridge from the station to his bank in the City. This is because he is not employed to travel from his home to the bank: he is employed to work at the bank - his place of work) and so his duty is to arrive there in time for his working day ... likewise, of course, he is not acting in the course of his employment when he is travelling home after his day's work is over"* (Lord Goff).

An employer may be liable for the employee's criminal conduct. In ***Lister v Hesley Hall [2001],*** the claimants alleged that they had been sexually abused whilst in the care of an employee of the defendants, whilst he was a warden at **Hesley Hall School**. The argument that an employer should be liable for the criminal activities of an employee presents particular problems and tests the robustness of the rationale which underpins the principle of vicarious liability. The House of Lords ruled in the claimants' favour that, where the employee's conduct is not expressly authorized, the test for vicarious liability should focus on the close connection between the work the employee was employed to do and the tort which had been committed. On these facts the boys were entrusted to the care of the warden**.** Lord Millett in ***Lister*** said that the employer will be liable *"where the unauthorized acts of the employee are so connected with acts which the employer has authorized that they may properly be regarded as being within the scope of his employment*". Lister reinforces the policy that liability should fall into the enterprise of the employer and Lord Millett expressly describes the concept as a "loss-distribution device".

Lister has been applied in ***Balfron Trustees Ltd v Petersen [2001],*** in which the application by a firm of solicitors to strike out a claim against them was refused. It was alleged that funds had been misappropriated by an employee of the firm from the pension fund run by the claimant trustees. The judge held that it was necessary to determine whether or not the firm owed a duty to the trustees and for whom it was acting through its employee. ***Lister*** was also applied in ***Dubai Aluminium Co Ltd v Salaam [2003]*** in which a firm of solicitors needed to show that it was liable for the dishonest acts of one of their partners in order to claim a contribution from another party to the fraud under the provisions of the **Civil Liability (Contribution) Act 1978.**

Lister was applied by the Court of Appeal in ***Mattis v Pollock [2003]*** to find that the owner of a nightclub was vicariously liable for an aggressive attack by the nightclub doorman during the course of a fight with a visitor to the club. The doorman had left the club and gone home to arm himself with a knife before returning to attack the claimant outside the club. The Court of Appeal held that where an employee was expected to use violence when

carrying out his duties, the likelihood of establishing that an attack of violence fell within the scope of employment was greater. Similarly, in ***Clinton Bernard v The Attorney-General of Jamaica [2005],*** the claimant was injured when he was shot by a policeman after refusing to hand over his telephone. The Attorney General was held vicariously liable by the Privy Council because the assailant was purporting to be a policeman when the attack occurred and the employer had created the risk by permitting policemen to carry loaded guns.

Majrowski v Guy's and St Thomas's NHS Trust [2005] raised the question whether an employer could be held vicariously liable for an employee's infringement of the **Protection from Harassment Act 1997 (PHA 1997).** At first instance it was held that **PHA 1997** did not create a statutory tort for which an employer could be held vicariously liable, but the Court of Appeal held that vicarious liability was not restricted to common law claims. An employer could be held liable for the breach of a statutory duty by an employee provided there was a close connection between the employee's offending conduct and the nature of his employment and as long as it was fair and just to impose vicarious liability (applying ***Lister***). The House of Lords has shown its agreement with the thinking of the Court of Appeal in ***Majrowski v Guy's and St Thomas's NHS Trust [2006****].* In part, the many and varied policy reasons for recognition of vicarious liability meant that there was "*no coherent basis for confining the common law principle of vicarious liability to common law wrongs" per Lord Nicholls.* He also went on to acknowledge that Parliament had created *"a new cause of action, a new civil wrong*" in the wording of **s3 PHA 1997.** More information on harassment can be found in **4.8**.

5.5 Employer and independent contractor – non-delegable duties

In principle, an employer is not liable for the torts of his independent contractor. There are some situations, however, in which the employer remains **primarily** responsible even though the incident in question was caused by the act of an independent contractor.

The employer will be primarily, as distinct from vicariously, liable where the employer has a non-delegable duty which cannot be discharged by an independent contractor, for example, the employer's duty of care to his own employees. Such a non-delegable duty might arise where the employer hires an independent contractor to undertake a task which is inherently dangerous. This was made clear in ***Honeywill and Stein v Larkin Bros [1934]*** and confirmed in ***Bottomley v Todmorden Cricket Club [2003*****],** where the owner of the cricket club was held liable for the negligence of independent contractors putting on a pyrotechnics display at the club. A non-delegable duty will also arise where an independent contractor has been hired to undertake a task on or adjoining a highway which puts at risk persons in a public place: ***Padbury v Holliday [1912].***

The scope of potential liability of an employer for the negligence of an independent contractor will be considerably narrower than the scope of potential liability of an employer for the negligent acts of an employee. The employer of an employee will be liable for any negligence committed within the course of employment in a wide sense, to include casual negligence incidental to the employee's work. The employer of an independent contractor, however, will only be liable for those acts of the contractor which are an essential part of the work which the contractor was hired to do and not for collateral negligence (negligence incidental to the performance of the work). In ***Padbury*** the independent contractor was hired to install a window on the outside of a house and in the course of his work he placed a spare tool on the window sill. The tool fell and injured a passer-by on the street. This was found to be collateral negligence because the tool was not essential to the work that the independent contractor was hired to do. Fletcher Moulton LJ explained that for the employer to be liable the task must be "*work the nature of which, and not merely the performance of which, cast on the superior employer the dust of taking precautions".*

A hospital also owes a non-delegable duty to its patients, such that the hospital will remain liable for negligence of hospital workers who are not employees of the hospital, such as agency workers: ***Cassidy v Minister of Health [1951***].

5.6 Principal and agent

The employer is vicariously liable for the torts of his employees committed in the course of employment because of the relationship between employer and employee, out of which the incident involving a third party arises. Another special type of relationshi p recognized by law is that between principal and agent. There are some situations where liability for the torts of an agent will be attributed to the principal for whom the agent is acting. The following two cases can be compared in this context. In the first, ***Ormrod v Crosville Motor Services Ltd [1953],*** Denning LJ stated:

"*The owner [of a car] is ... liable the driver is his agent, that is to say, the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes ... The law puts a special responsibility on the owner of a vehicle who allows it out on the road in the charge of someone else no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver*:"

On these facts the owner was liable. In ***Morgans v Launchbury [1972]***, however, the House of Lords established that the necessary interest or concern of the owner in his car, and the use of it, must be more than a natural desire to have the safe return of the vehicle. In ***Morgans*** a husband and wife shared the use of a car. The husband normally took the car to drive to and from his work, but the car belonged to his wife. They had an understanding that

if Mr Morgans wanted to have a drink or two after work, he would arrange for someone else to drive the car home. Unfortunately, on such an occasion Mr Morgans chose a companion who was no more sober than he was to drive the car. A serious accident was caused by the negligent driving of the friend and two people were killed, one of them being Mr Morgans. The House was asked to decide whether Mrs Morgans was liable for the negligence of the driver (Mrs Morgans being an insured party). Could it be said that he was acting for her in attempting to return her car and her husband? The House of Lords held that her husband was using the car for his own purposes and not hers and that the driver was not the agent of Mrs Morgans.

The performance of a contract may involve the provision of a service which can only be carried out by an agent. Where the contract between a holidaymaker and a tour operator contained an implied term that the services provided would be carried out with reasonable skill and care, the tour operator remained liable for the negligent performance of a service rendered by an agent: ***Wong Mee Wan v Kwan Kin Travel Services [1995].***

5.7 Summary

(1) The main application of vicarious liability in tort law is in relation to liability of employers for tortious acts of employees. An employer is liable for tortious acts of employees committed in the course of employment.

(2) Whether the claimant is an employee will be determined by looking at:

- how much control the employer had over the worker;
- the extent to which the worker was part of the employer's organisation;
- other practical information, such as the contract and method of payment.

(3) Whether the employee is acting in the course of employment will bedetermined by looking at:

- what the employee was employed to do;
- whether the employee was doing generally what he was employed to do at the time of the tortious act;
- whether the employer benefited from the employee's tortious act;
- the degree of connection between the employment and the act;
- whether the employer had prohibited the tortious act and the nature of that prohibition;
- whether the employee was on a "frolic of his own".

(4) In certain circumstances an employer might be held primarily liable for the tort of an independent contractor. This will be the case where there is a "non-delegable" duty owed by the employer. This will be particularly so when:

- the employer is a hospital and the claimant is injured by the negligence of someone working in the hospital;
- the employer has employed the independent contractor to carry out a task that was particularly dangerous;
- the employer has employed the contractor to work on or adjoining a public highway;
- statute imposes a non-delegable duty.

6. Employers' Liability

Outline

6.1 Introduction
6.2 Employer's personal duty of care
6.3 Breach, causation and remoteness
6.4 Defences
6.5 Summary

6.1 Introduction

The employer's liability in tort for the safety of his employees may take one of three forms:

1. The employer may be vicariously liable for the tort of an employee which leads to the claimant employee (or a third party) being injured. Liability here is strict in the sense that the employer need not be personally negligent. (See **Chapter 5**.)

2. The employer may be in breach of a statutory duty and the claimant employee suffers injury as a result.

3. The employer may be in breach of the personal duty of care which he owes to the employee. Liability here is in negligence. See **5.2** for the essential distinction between an employee and an independent contractor.

The same tests are applicable in the current context, since the duty of care arises from the contract of employment itself.

Consider a building site of which X is the occupier. Those workmen who are employees of X can sue for breach of personal duty of care which X owes to them, but other workers, who are independent contractors, or employees of Z, cannot take advantage of the personal duty of care owed by X to his **own** employees. These other workers may, however, be able to argue vicarious liability if it is one of X's employees who causes an accident. X may, in addition, incur liability as occupier of the site and Z will have a duty of care to his **own** employees.

6.2 Employer's personal duty of care

6.2.1 Duty to take reasonable care for the safety of employees

The classic exposition of the duty was laid down by the House of Lords in ***Wilsons & Clyde Coal v English [1938]****:* the employer must provide competent staff, adequate materials, a proper system of work and adequate supervision. Although the duty can be divided in this

manner, it is best observed as a single duty to take reasonable care for the safety of employees in the course of their employment. The employer argued that it had complied with the relevant statute by appointing a qualified manager to control the technical management of its mine. The accident occurred when haulage plant was set in motion incorrectly. Lord Wright gave the classic definition of the non-delegable duty of care which exists at common law:

> *"I do not mean that employers warrant the adequacy of plant, or the competence of fellow employees or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill."*

The Court of Appeal has considered the responsibilities of the Ministry of Defence for the safety of a naval airman who died after a bout of very heavy drinking. It was held that an employer had no duty to protect an employee against his own weakness but that a responsibility arose on the facts of the case when the serviceman returned to the base and went into a drunken coma. On the facts there was evidence of a lack of reasonable care but also a finding of two-thirds contributory negligence on the part of the deceased: ***Barrett v Ministry of Defence [1995].***

Students should note that, even if a duty of care is established, an employee may fail in a claim against an employer because he cannot prove breach of duty and causation of damage in fact and law. Such a situation arose in ***Pickford v ICI plc [1998].*** The claimant worked as a secretary for the defendant and spent long hours typing on a word processor without breaks. She alleged that her employer, ICI, should have warned her of the need to take regular breaks and that she was suffering from repetitive strain injury caused by her conditions of work. ICI appealed to the House of Lords following the claimant's success in the Court of Appeal. The Law Lords held that the claimant was required to prove that the condition from which she suffered was organic and caused by typing. On the evidence she could not prove that the condition was reasonably foreseeable in the light of the freedom which she had to vary the pattern of her work and take breaks from typing as she chose.

The duty is extensive and general principles of negligence liability apply. In ***Jebson v. Ministry of Defence [2000]*** a soldier was injured when he fell from the back of an army lorry in which he was travelling. He and his colleagues were returning from an evening out in the nearby town and the transport had been organised 'by the commanding officer. The claimant, who had been drinking, had tried to climb out over the tailgate of the truck and on to the roof. The Court of Appeal regarded the defendant as having a responsibility to provide appropriate transport and there were foreseeable risks associated with the drunken state of the soldiers by the end of the evening. The judges went on to hold that the injury was foreseeable in that it arose from just such drunken behaviour as would give rise to that type of incident but they also held the claimant to be 75% contributory negligent.

6.2.2 Duty to non-employees?

In ***Maguire v Harland & Wolff plc [2005]*** the Court of Appeal considered whether the employer's duty of care extended to the employee's family. The deceased claimant was the wife of an employee who had been regularly exposed to asbestos dust when working for the defendant. The claimant was exposed to asbestos dust when her husband came home wearing dust-infested clothing and she developed mesothelioma. On the facts the claim failed, as the employer could not have been expected to know at the time of the employment that there was a risk of the dust causing harm to the family of the employee. Where, however, the employer was aware of such risk, or where such risk was foreseeable, the duty could extend to persons foreseeably put at risk by the breach of duty to the employee.

6.2.3 Duty does not extend to pure economic loss

The duty does not extend to protecting the economic well-being of employees by taking out insurance on their behalf or warning them of the need for insurance cover. In ***Reid v Rush and Tompkins [1989]*** the claimant was injured in a road accident whilst engaged on his defendant employer's business in Ethiopia. The tortfeasor could not be identified and the claimant was without compensation. The Court of Appeal would not extend the general duty of care owed by employers to their employees (regarding the physical safety and well-being of those employees) to cover protection from economic loss. Even though the defendant employer knew of the risks involved in working in Ethiopia, there was no implied term in the contract of employment to protect against such losses. If a duty to protect from economic loss were to arise, it would have to be based on an express or implied term in the specific contract of employment Equally, an employer has no general duty to advise on pension matters: ***Outram v Academy Plastics [2000]***, A specific duty might arise if the terms of the contract included such an obligation but it would not be fair, just and reasonable to impose a general duty of responsibility for the economic interests of the employee.

6.2.4 Duty in relation to work stress

The decision of the House of Lords in a case arising from the Hillsborough tragedy concerned the basis of an employer's liability to employees who suffer psychiatric damage. In ***White v Chief Constable of South Yorkshire Police [1999]*** a majority of the Law Lords held that an employee should be in no better position by virtue of the contract of employment than a non employee regarding recovery of compensation for psychiatric damage. **Lord Steyn** said:

> *"It is a non sequitur to say that because an employer is under a duty to an employee not to cause him physical injury, the employer should as a necessary consequence of that duty (of which there is no breach) he under a duty not to cause the employee psychiatric injury ... The rules to he applied when an employee brings an action*

against the employer for harm suffered at his workplace are the rules of tort. One is therefore thrown hack to the ordinary rules of the law of tort which contain restrictions on the recovery of compensation or psychiatric harm."

In ***Hatton v Sutherland [2002]*** the court was asked to consider conjoined appeals brought by the employers of four separate employees - two of the employees being teachers, one being an administrator in local government and the fourth being a factory worker. Neither of the teachers had alerted their respective employers to their deteriorating health, the administrator had complained to her employer but there had been no improvement in her working conditions and the fourth employee had sought medical advice and had been advised to change his job, but this information had not been passed on to his employer.

The Court of Appeal held that there are no special control mechanisms which apply to claims for psychiatric illness or physical injury arising from work. All work creates stress to some extent and the employer is entitled to assume that an employee can cope with routine pressure inherent in doing the job. The key question is whether the particular damage to the health of the specific employee was foreseeable and this could only be answered by reference to what the employer knew or ought to have known about the employee's particular vulnerability. Further, no occupations were so intrinsically dangerous to psychiatric well-being as to create exceptions to this general rule. When these conclusions and general principles of breach of duty and causation were applied to the facts of the four appeals identified above, only the appeal by the employer of the local government administrator was dismissed and the appeals of the other employers were allowed.

After ***Sutherland*** there were many work-related stress claims, giving courts the opportunity to apply the ***Sutherland*** principles. By way of illustration, in ***Bonser v RJB Mining (UK) Ltd [2004],*** an employee claimed damages for psychiatric injury which she said resulted from an increasing and unmanageable workload. The claimant had a pre-existing vulnerability to stress-induced illness but the employer was not aware of this, nor had the claimant exhibited any signs of impending illness. The Court of Appeal held that, following Sutherland, foreseeability of psychiatric illness was crucial to the success of the claim. It was not enough that the employer could foresee stress; the employer must foresee that illness would follow. The claimant must establish that the defendant knew the claimant was being overworked and also that the defendant knew that the claimant was particularly vulnerable to stress-induced illness or was manifesting signs of impending illness.

This was not established on the facts of this case. In ***Pratley v Surrey County Council [2003]*** the claimant had twice complained to her employer of stress caused by her excessive workload and the employer had promised to reorganise the work allocation. While it was foreseeable to the employer that over a future period the workload might have led to

stress-induced illness, the risk of the claimant's immediate collapse was not foreseeable. The two were different. Failure to prevent long-term stress illness did not give rise to liability for failure to prevent immediate collapse.

The issue of the liability of an employer for work-related stress came before the House of Lords in ***Barber v Somerset County Council [2004].*** The case involved an appeal from an unsuccessful claimant in ***Sutherland***. A teacher with a heavy teaching and administrative load began to suffer stress at work. He complained to senior managers but nothing was done and he thought it pointless to complain further. He eventually had to retire because of the stress he suffered.

The House of Lords in ***Barber*** refined the principles set out in ***Sutherland***. It was held that the law imposes a duty on employers to do all that a reasonable and prudent employer, taking positive thought for the safety of his employees in the light of what he knows or ought to know, would do to protect employees (approving ***Stokes v Guest, Keen and Nettlefold [1968]).*** There was a duty on employers to keep up-to-date with developing knowledge on occupational stress and a duty derived from the **Management of Health and Safety at Work Regulations 1999** to carry out risk assessments as to the conditions for health. Once the employer knew of a stress injury there was a duty to monitor that stress and to do all that he could to help the employee. Employers were required to take sick leave for stress seriously and to make further enquiries. The responsibility did not lie on the employee to be forceful in his complaints; all complaints should be listened to sympathetically and any bullying styles of leadership could be taken into account in determining breach of duty.

This litigation did not, however, finish with Barber. ***Hartman v South Essex Health and Community Care NHS Trust [2005]*** dealt with six further appeals and the Court of Appeal was required to consider the application of the Barber principles. The court gave some clarification of the principles to be applied:

1. claims for psychiatric injury are no different from claims for personal injury; an employer will not be liable where the immediate psychiatric injury was not foreseeable, even if long-term psychiatric injury might have been foreseeable. There must be a foreseeable real risk of a breakdown;

2. unless the employer knows of some particular problem or vulnerability, he is usually entitled to assume that the employee is coping with the work and is entitled to take what the employee has told him at face value;

3. there is nevertheless a duty on employers to keep abreast of developing knowledge on workplace stress;

4. it is not sufficient for an employer to devise a system for an employee's return to work to reduce stress: the employer has a duty to take reasonable care to see that that system has been adopted.

Barber has been applied again by the Court of Appeal in ***French v Chief Constable of Sussex Police [2006]*** Police officers who were involved in events that led to the shooting of a suspect sued their Chief Constable alleging lack of proper training as to how to deal with such disturbing events and their aftermath, The Police Complaints Authority had investigated the shooting; some officers had been charged with criminal offences and later acquitted; and some had disciplinary charges brought that were later dropped, The Court of Appeal held that the psychiatric injury suffered by the claimants was not caused by stress at work nor was it analogous to the stress at work cases. In addition, since none of the claimants had actually witnessed the shooting, it followed that (applying ***White***) they could not succeed by arguing that they should be treated as secondary victims. The trial judge had been correct to strike out their claim.

New situations giving rise to claims relating to stress at work are frequently coming before the courts.
In ***Daw v Intel Corpn (UK) Ltd [2007]*** an employee was required to do excessive amounts of work over a period of time with little support from her line managers. Her health deteriorated and eventually she tried to commit suicide. Her employers hoped to rely on the fact that they provided short-term counselling for their employees but the trial judge found a failure of management leading to the claimant's breakdown. The employers' appeals against both liability and quantum were dismissed by the Court of Appeal.

The underlying principles in ***Barber*** were again applied in ***Deadman v Bristol City Council [2008]*** to a situation in which the employee was claiming breach of duty of care in the context of his employer's insensitive methods of following its own procedures when investigating allegations of sexual harassment A female employee of the defendant council made allegations of sexual harassment against the claimant, who worked in a managerial role in another department of the same local authority. The claimant became depressed and unable to continue his work The trial judge found for the claimant on the basis that there had been a breach of his contract of employment, into which the procedures had been incorporated and that these procedures included a duty to investigate allegations of harassment sensitively. The local authority's appeal was allowed by the Court of Appeal, in part on the basis that, whilst a sensitive approach to the investigation of alleged harassment was certainly a desirable method of pursuing any such investigation, it was not a term of the contract in itself.

6.2.5 Competent staff

An employer may be liable where an employee with insufficient experience or training is used and a fellow employee is injured.

The abolition of the doctrine of common employment in 1948 rendered this element of the duty of comparatively little importance. Under the doctrine, the employer was not liable where an employee was injured by the negligence of a fellow employee. Now, in such situations, the employer will usually be vicariously liable.

Competent staffs remain of importance where an employee uses violent conduct or practical jokes. The employer is unlikely to be vicariously liable, but if he is aware of the employee's propensity to this kind of behaviour, he may be personally liable: ***Hudson v Ridge Manufacturing Co [1957]*** There may be other situations "there the employee who causes the accident is on a "frolic of his own" and the doctrine of vicarious liability will not help the accident victim (see **5.4**).

6.2.5.1 Plant and appliances

The employer should provide the necessary plant and equipment and maintain it in reasonable condition.

This is not a guarantee of the equipment's safety and at common law the employer could not be liable for a latent defect which could not be discovered with reasonable care. The **Employers' Liability (Defective Equipment) Act 1969 (EL(DE)A 1969**) provides, however, that where an employee suffers personal injury as a result of a defect in equipment due wholly or partly to the fault of a third party, the injury is deemed attributable to the negligence of the employer. This relieves the employee of the necessity of identifying and suing the manufacturer of the defective equipment. The employer can then claim an indemnity from the retailer or manufacturer.

The House of ***Lords in Knowles v Liverpool City Council [1993]*** has given a wide interpretation to the word "equipment" in **s1(I) EL(DE)A 1969** and has held that a flagstone, which broke and injured the claimant whilst he was manhandling it, came within the definition.

6.2.7 Premises

This aspect of the duty of care applies to the premises at which the employees work. ***Latimer v AEC [1953]*** illustrates that the employer is not required to prevent all accidents, but rather to take reasonable precautions to guard against accidents occurring. After a flood at the defendant's factory, the floor surfaces were slippery. Sawdust and other materials were put on the floor to absorb the oil and enable the workforce to go back into the factory. The claimant slipped and injured himself in an area of the building where these precautions proved ineffective. The alternative for the defendant employer would have been to keep

the factory closed until all the floors had been thoroughly cleaned. The financial burden this would have caused was too great compared with the small risk of injury to an employee, given the very practical steps taken to reduce the risk of injury. The employer was not in breach of its duty of care to Latimer.

Whether an accident occurs at the workplace, or on a separate site at which the work is being undertaken, it is possible that the injured worker will have a separate and additional claim against the occupier of the site or the premises.

In many cases the worker's employer will also be the occupier of the premises in question but in ***Gray v Fire Alarm Fabrication Services Ltd [2007]*** none of the defendants was the occupier of the premises on which his fatal accident occurred. Gray worked as a fire alarm installation engineer and he was employed by the first defendants, who were themselves engaged as subcontractors by H, the main electrical contractor, to install fire alarms on T's premises. In order to do his work, Gray went onto the roof of adjacent premises and fell to his death through a skylight. The first defendants settled the claims brought by Gray's estate and his dependants but then sought contribution from Hand T. The Court of Appeal found no duty was owed by either H or T to Gray. Neither T nor H was aware that G's employer would use a system of work that required its employees to go onto an adjoining roof. The maintenance of equipment, plant and premises is also covered in numerous statutory duties, such as those in the **Provision and Use of Work Equipment Regulations 1998.**

6.2.8 Safe system of work

The employer must devise a safe and suitable system of work, instruct the employees what to do and supply any implements required. He must take care to see that the system is complied with and account for the fact that workmen are often careless for their own safety.

In ***General Cleaning Contractors v Christmas [1953]*** a window cleaner was injured when he fell from the building to which he had been sent to clean windows. The nature of the task required him to balance on a small sill only six inches wide. His employers had provided him with no tool to keep one of the sash windows open as he cleaned the glass. During the cleaning process, one of the windows closed and the cleaner was left with no means of holding on to the building, from which he fell. The House of Lords found the employers to be in breach of their duty of care.

In ***McDermid v Nash [1987]*** (see **5.2**) the House of Lords considered the safe system of work provision. It was held that the requirement was for both **devising** a safe system of work and **operating** it. On the facts a safe system did exist, but the operation of the system had been delegated and the system was not operated as it should have been. The person to whom the operation of the system of work had been delegated was not an employee but an

independent contractor. No vicarious liability would, therefore, arise out of his negligence in operating the system of work. The defendant employers, however, remained personally liable to their injured employee, a young man with limited experience of the work.

This duty of care is owed to employees personally and known characteristics of an employee will have a bearing on what constitutes reasonable care in the circumstances. Where a health authority sent a young and inexperienced worker on a camping holiday with patients from a home for the disabled, it was responsible for failing to train and instruct her in the use of certain very basic equipment. On the facts the worker was 30 per cent contributory negligent as she appreciated the inherent danger in her act of changing a gas cylinder on a camping stove near the naked flame of a candle. She was put in this position by her employer, however, who had failed to provide batteries for the torch: ***Fraser v Winchester Health Authority [1999].***

Many employees find themselves travelling home after periods of demanding and tiring work. In ***Eyres v Atkinsons Kitchens & Bedrooms Ltd [2007]*** Eyres was employed as a kitchen fitter and he lost control of the vehicle he was driving on the M1 whilst returning home to Bradford from a site on the south coast, where he had been working. The van rolled over and both Eyres and his passenger, Atkinson, who was also his managing director, were injured. Eyres claimed that he had fallen asleep after working for nearly 19 hours with only one break. He also said that Atkinson had refused his request to stay in a hotel overnight, but this was disputed. It was agreed that Eyres had been sending text messages on his mobile phone before the accident. The trial judge found that an unsafe system of work could lead to an employee driving when too tired to do so carefully. However, because in his view, the claimant's loss of concentration was probably attributable to the use of the mobile phone and not his employer's failure to provide a safer system of work regarding breaks for sleep, there was no liability. The Court of Appeal found that it was more likely that the cause of the accident was that Eyres had fallen asleep and that there would have been some period of time when he himself realized that he was very sleepy and when he should have decided to stop driving. His contributory negligence in this situation was determined to be 33 per cent. Here, the Court of Appeal is recognizing some contributory negligence which contributes to the cause of the accident itself as well as some fault which contributes to the damage suffered by the claimant. They did not decide on two separate allocations and then add them together. Rather, they looked at the overall share of responsibility on the part of the claimant compared with that of the defendant.

6.3 Breach, causation and remoteness

Performance of the duty of an employer to an employee is discharged by the exercise of due care and skill. Breach of duty is determined by reference to what the reasonable employer, of that type and in that line of work, would be expected to do to keep the employee safe. Causation and remoteness of damage are determined in the same way as for negligence.

6.4 Defences

Both *volenti non fit injuria* and contributory negligence can be raised by the employer in his defence. The courts are, however, conscious of the dulling effect on a worker of repetitive tasks in noisy conditions and the lapses which can occur when the routine of work is too familiar. Proportions of contributory negligence will usually be low. *Volenti* is rarely successful in this context and consent to a risk should not be inferred from the apparent willingness of the employee to continue in the job. Many pressures, including economic ones, influence a worker to keep a job, however inherently dangerous it may be: ***Smith v Baker [1891]*.**

6.5 Summary

(1) An employer owes a particular duty to take care for the safety and welfare of employees.

(2) The duties of an employer to an employee are recognised at common law as:

- the duty to provide a safe place of work;
- the duty to provide competent fellow employees;
- the duty to provide safe appliances and equipment;
- the duty to provide a safe system of work.

(3) The duty may include a duty to protect against psychiatric harm resulting from occupational stress. The employer is required to do all that a reasonably prudent employer, taking positive care for the safety and well-being of his employees, would do to monitor and protect against occupational stress.

(4) Where the claimant is arguing that the employer has breached the duty to provide a safe place of work, competent employees and a safe system of work, the standard of care will be that of the reasonable employer in that line of business.

(5) Where the claimant is arguing a breach of the duty to provide safe appliances and equipment, statute has imposed strict liability provided that the equipment was negligently manufactured.

(6) The defences to negligence will apply, although the court will take into account the balance of power between the parties when applying the defences.