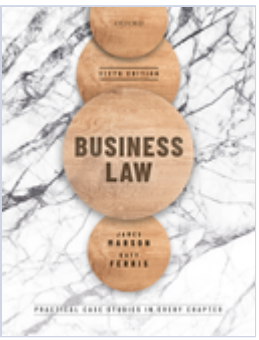

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James Marson and Katy Ferris

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13. Responsibilities of Employers for the Torts of Employees and Statutory Duties

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Published in print: 07 May 2020
Published online: September 2020

Abstract

This chapter identifies the doctrine of vicarious liability and its potential impact on employers. An employer faces vicarious liability when an individual engaged by it to perform some function for the business commits a tort; if this occurs within the course of employment and the individual engaged has the employment status of an employee, the employer may be jointly liable with the tortfeasor. The doctrine was developed, through the courts, to ensure that injured persons are compensated for losses sustained as a result of a negligent or wrongful act, with the obligation being placed on the employer to compensate and further to prevent any future torts being committed. The chapter considers the liability of those producing, supplying, marketing, and importing goods that contain defects which cause damage or loss.

Keywords: vicarious liability, tort, employer, tortfeasor, course of employment, employment status

An employer will engage an individual to perform some function for their business and may give specific guidance as to how the tasks are to be completed. An employer, however, would be unlikely to engage the individual to commit a tort, but if this occurs in the course of employment, and they have the employment status of an employee, the employer may be jointly liable with the tortfeasor. This is referred to as the vicarious liability of an employer. The chapter identifies the doctrine of vicarious liability and its potential impact on employers. It also considers liability of those producing, supplying, marketing, and importing goods that contain defects and cause damage/loss. Many businesses will be involved in some form of trading in this capacity and hence they may be subject to a claim for damages as the liability in this jurisdiction of law is strict (it does not require the claimant to prove negligence). Businesses also occupy land and premises and

must ensure that visitors (and even trespassers) are safe from injury, and various statutory duties are imposed that may lead to those in business being subject to claims where a person has been injured or suffered loss. As such, the extent of these areas of the law will require most employers/managers and those in business to have a knowledge of the principles underlying the imposition of liability, and to develop strategies to avoid tort actions.

Business Scenario 13

Aki, a milkman, drives a milk-float for Curdles Dairy Ltd. He is an employee of the firm. The dairy make it clear to all their employee that no-one, especially children, is to be allowed to help them in delivering milk. Aki, however, regularly allows Arthur, aged 10, to assist him in his delivery round. The delivery round includes the house of Aki's sister Sayo. One day, whilst doing his round accompanied by Arthur, Aki stops the milk-float outside Sayo's house, and Sayo calls Aki and asks him to help her move a heavy piano. Arthur offers to move the milk-float a few doors down the road whilst Aki is in Sayo's house. Aki agrees, but when Arthur releases the brake, he is unable to stop the milk-float from running down the road. The vehicle collides with Tori's brand new Porsche motor car, injuring Tori and her husband.

Advise Tori. In the event of Curdles Dairy being found liable, what action might they take against Aki?

Learning Outcomes

- Offer a definition of the doctrine of vicarious liability (**13.2**)
- Identify the rationale and justification for the development of the doctrine (**13.3**)
- Apply the tests to establish vicarious liability (**13.5–13.5.2.4**)

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- Explain, with common law examples, how the courts identify 'course of employment' (**13.5.2–13.5.2.4**)
- Demonstrate the extension of vicarious liability to independent contractors (**13.6–13.6.2**)
- Explain the protection to the consumer through legislation (**13.7–13.7.4**)
- Identify the obligations imposed on the owners and occupiers of land under the common law and through statute (**13.8–13.8.4**)
- Explain potential liability established through a breach of a statutory duty (**13.9–13.9.2.3**).

13.1 Introduction

Vicarious liability occurs where one party has responsibility for a wrong committed by someone else. In a business context, vicarious liability is a doctrine where an employer will be held liable for the torts of their employee. The employer may have to compensate the injured party for any damage sustained to property or injuries suffered by the wrongful or negligent actions of their employee. The doctrine was developed, through

the courts, to ensure that injured persons are compensated for losses sustained as a result of a negligent or wrongful act, and the obligation be placed on the employer to compensate and, further, to prevent any future torts being committed. These tests begin with the employment status of the worker (who generally must be considered an 'employee') and require that the tort was committed in the course of their employment. As concepts such as '**course of employment**' are broad, common law examples are considered.

Further, the chapter considers the protection afforded consumers when defective products cause them injury. The Sale of Goods Act 1979 and other statutory protections provide remedies where goods fall below the required standard; however, they do not compensate where an individual suffered loss (such as damage to themselves or their property) due to the defect in the product itself. The Consumer Protection Act 1987 enables claims on such a basis.

Obligations are also placed on the occupiers of land and property that are accessible by the public (including, of course, shops and factories—pertinent to businesses). These obligations extend to visitors and non-visitors (such as trespassers) and identification of the potential liability in this area, and which mechanisms may reduce the instances of breaches are significant in a business context. The chapter concludes by considering statutory duties and how these may enable claims when the duty is breached.

13.2 Vicarious liability—a definition

Vicarious liability was succinctly defined by the Court of Appeal in the case of *Hudson v Ridge Manufacturing* as 'a doctrine whereby an employer will be held liable for the torts of his employees'. The doctrine does not require that the employer has actively participated in the commission of the tort, only that there is some relationship between them and the tortfeasor that will enable the law to hold the employer responsible. Whilst the employer is held jointly liable with the employee tortfeasor, if a claim is successfully made against the employer they may in turn bring an action to recover from the employee under the Civil Liability (Contribution) Act 1978. As such, it is important to remember that even though vicarious liability involves the employer being held accountable, this does not remove the liability or fault from the employee who committed the tort. ↵

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Consider

Aki has allowed a child to move a works vehicle under his control, against the rules of his employment, and this has caused loss to a third party. The question identifies an expensive vehicle as being damaged to illustrate the point that a milkman will typically be unable to satisfy Tori's claim for the cost of repair and any injury to her and the occupants of her car. Employees also do not generally carry their own insurance for accidents that may occur at work (they rely on insurance of their employer). Therefore the question is of the potential vicarious liability of the employer.

13.3 Rationale for the doctrine

As vicarious liability is a doctrine that holds an employer liable for the torts of someone else (i.e. their employee), the theoretical justification and rationale for imposition of the liability has been the subject of controversy and academic comment for many years. One overriding explanation for the doctrine has been that the employer had expressly or impliedly authorized the employee's action (as identified in *Tuberville v Stamp*) and therefore should satisfy any claims on the basis of damage or injury as a consequence. The employer may have employed a negligent employee or have failed in their duty to adequately control the employee and hence 'set the whole thing in motion' (as stated by Brougham LJ in *Duncan v Findlater*). Further arguments to justify the doctrine have been that as the employer derives financial benefit from the work of the employee, they should be responsible for losses (referred to as 'enterprise risk'). The employer also has 'deeper pockets' than the employee and as such is in a better financial position to satisfy claims, as increasingly the employer is no longer an individual but a corporation. It also avoids the situation where the employee is made the 'scapegoat' for any injuries/losses sustained due to the tort. A corporation may be able to distribute any losses more successfully than would a private individual, where a claim could lead to significant financial losses. A corporation may be able to reduce dividends to shareholders, reduce payments to staff or management, and so on, to generate the revenue to pay any claim. Private individuals do not have such options. Compulsory insurance is also required of employers. This ensures damage caused to employees will be compensatable. Again, private individuals may possess house and car insurance, but are unlikely to carry insurance in the event of their causing any damage or injury whilst in the course of employment. Therefore, it appears logical, if perhaps a little 'unfair' to hold an employer liable.

A major rationale for vicarious liability's justification has been the concept of accident/tort prevention. In both *Limpus v London General Omnibus* and *Rose v Plenty* (see **13.5.2.1**), the employees were authorized to perform an act, but performed this act in an unauthorized way (although see Lawton LJ's dissenting opinion in *Rose v Plenty* regarding the act of the employee being the performance of an act which he was not employed to perform and as such the employer should have borne no responsibility for the injury). In so doing, they caused injury or damage through their negligence. As the courts in each case held the act had been committed in the course of their employment, the employer was held liable. However, the option for the employer in such instances is to consider the action as a fundamental breach of the contract of employment and dismiss the
p. 321 employee. Further, ↵ it would have been prudent following these judgments for the employer to conduct 'spot-checks' to ensure no other employee was breaking the rules and if they did, to apply whatever sanction necessary to prevent further breaches and potential negligent acts.

Holding an employer financially liable for the torts of an employee provides an effective incentive for their proactive approach to ensure safe systems of work are in place and the employees are controlled to an extent that will limit, as far as possible, any torts being committed. However, despite the justifications forwarded for the doctrine, it continues to be quite restrictively applied—'I accept that the court should not be too ready to impose vicarious liability on a defendant. It is, after all, a type of liability for tort which involves no fault on the part of the defendant, and for that reason alone its application should be reasonably circumscribed.' (Lord Neuberger in *Maga v Archbishop of Birmingham*, see **13.5.2.4**).

13.4 For what is the employer liable?

For the employer to be held liable for the torts of their employee, the tort must have been committed whilst 'in the course of employment'. Evidently, this will cause consternation to rational thinking people, as no employer would engage a person to commit a tort. Course of employment, in the legal sense, is a term that establishes the liability an employer will have if the employee has acted in one of the following ways:

1. the employee acted negligently in an act that they were authorized to do with care;
2. the act was necessarily incidental to something that the employee was engaged to do;
3. the employee acted in a wrongful way that was authorized by the employer.

Such examples can of course be difficult to identify in the abstract and hence it is important, as an aid to understanding, to review case law that has created and exemplified these principles.

13.5 The qualifications to establish vicarious liability

For an employer to be liable for the torts of their employees two conditions are required:

1. the worker must be considered an 'employee';
2. the tort must have been committed in the 'course of employment'.

Consider

The question has identified Aki as an employee. Therefore we know the first test of vicarious liability is satisfied with no need for further consideration. However, the existing common law must be examined to determine whether his actions will be held as occurring during the course of his employment.

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13.5.1 Employee Status

The tests to establish a worker as an employee or an independent contractor are considered in **Chapter 19** and therefore this chapter will not replicate the discussion provided there. Note, however, that in vicarious liability, it is increasingly evidence of control exercisable by the employer, rather than the existence of a contract of employment, that will lead to an employer's liability.

Most recently, the Supreme Court has developed the law on what constitutes 'course of employment'. It demonstrates the evolution of the test when relating to, first, the action of a non-employee but the application of liability to an employer, and secondly, of the criminal actions of an employee when this was beyond the scope of their employment.

Cox v Ministry of Justice (2014)

Facts:

The claimant, a catering manager at a prison, was injured when an inmate working in the kitchen dropped a sack of food on her. She brought an action for damages against the Ministry of Justice. The accident was caused by the negligence of a prisoner, but the court agreed that the law of vicarious liability had moved beyond the confines of a contract of service—the prisoner was, generally speaking, under the control of the employer (akin to an employment relationship).

Authority for:

It was held that the prisoner's work was done on behalf and at the request of the Ministry, and this established a sufficiently close relationship to create the employer's vicarious liability. An important aspect of the case was that, when reviewing the five factors which determine whether a relationship will give rise to vicarious liability, the control test (so crucial in determining employment status) is increasingly seen as less relevant and almost a remnant of the past.

13.5.1.1 Liability for 'loaned' employees

Employers may at times loan an employee to another business where, for example, the other business has a temporary increase in demand or the loan is through an agency. Where this occurs, and the loaned employee commits a tort, which employer retains the responsibility (and may be held vicariously liable)? In *Mersey Docks & Harbour Board v Coggins and Griffiths (Liverpool) Ltd* the House of Lords held that the control exercisable by the employer is the determining factor. This, in most cases, will rest with the original employer. However, where it can be demonstrated that the control is actually exercised by the employer that has taken the loan of the employee, they will assume responsibility.

Hawley v Luminar Leisure Ltd (2006)

Facts:

The employer operated a nightclub and had hired a 'bouncer' from another business, under a contract
p. 323 to provide security services. The bouncer was directed by Luminar in ↵ the tasks to be performed and the way that they were to be carried out. The bouncer assaulted a customer in the course of his duties.

Authority for:

For the purposes of liability, the employer was held to be Luminar. When the bouncer assaulted a customer, Luminar was vicariously liable for the tort as his 'temporary deemed employer'.

These cases identified where either the original employer, or the employer the employee was loaned to was held vicariously liable for the employee's tort. There may further be situations where both employers have to share responsibility, for example where both employers were held liable for the tort of the employee as each could have prevented the employee's action (see *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*).

13.5.2 Course of Employment

To hold an employer liable for the torts of their employee, the employee must have been employed in the employer's business and be performing their job. As evidenced in *Joel v Morison* 'the servant must be engaged on his master's business and not off on a frolic of his own'. To identify how the courts will conclude what amounts to the course of employment it is necessary to examine the common law. Note that the following are examples and do not seek to establish a comprehensive list.

Consider

Aki was helping his sister to move a piano and at this point the accident occurred. Was this a 'frolic of his own' or an act incidental to employment?

13.5.2.1 Authorized acts conducted in unauthorized ways

- *Express prohibitions:* In an attempt to limit potential liability, employers may specifically instruct their employees to act in a certain way, or seek to prohibit certain actions that may likely lead to torts being committed. The employer is seeking to limit their exposure to risk of harm to property and persons, but the success or failure of such instruction may be viewed from the perspective of whether the employee had been expressly told not to do something and contradicted this instruction (no vicarious liability); or whether the employee is told not to perform an authorized task in an unauthorized way (liability may be established). These two instances may be seen in the following cases:

Limpus v London General Omnibus (1862)

Facts:

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Limpus was injured in an accident involving one of London General Omnibus's vehicles. The driver of the defendant's bus was, at the time of the accident, racing with a driver from ↵ a rival bus company to reach a bus stop, and drove across the road in an attempt to block the other driver's route. There had been previous acts of such reckless actions between rival bus companies and as a consequence London General Omnibus had instructed its drivers not to engage in racing. When Limpus was injured, the claim was brought against the bus company rather than the driver of the vehicle. The defence raised against the vicarious liability action was that London General Omnibus had expressly instructed the drivers not to take the action that led to Limpus's injury, and hence the driver acted outside of the 'course of his employment'. The court rejected this argument as the driver was acting for his employer in an unauthorized manner.

Authority for:

An employer merely instructing an employee to refrain from action will not enable the employer to escape liability. Insofar as the employee is performing an authorized task, albeit in an unauthorized manner, the employer will remain vicariously liable.

The ruling can be contrasted where the employee does act outside their employment.

Iqbal v London Transport Executive (1973)

Facts:

A bus conductor was expressly forbidden by the employer to drive buses, and was informed that he should request an engineer to move a bus. However, he moved the bus himself and as he did, committed a tort. The injured party attempted to recover damages from the employer.

Authority for:

The claim failed as the conductor was not employed to drive buses. In order for the test of 'course of employment' to be satisfied the employee must be performing the obligations for which they were employed, and in this case driving buses was outside of the conductor's responsibilities.

- *Providing lifts:* It is important to identify when an employer may be held liable for an employee's tort when giving lifts as part of their driving responsibilities. This is particularly relevant when the employer has informed the employee not to provide lifts or carry passengers in works' vehicles. The first case discussed (*Twine v Bean's Express*) demonstrates the courts' reluctance to impose liability on an employer in such situations, but when compared with the second case (*Rose v Plenty*), the courts may be willing to hold an employer liable. In doing so, they ensure employers proactively reduce the possibility of negligent acts by their employees (accident prevention) and ensure their workers, and the public, are more effectively protected.

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Twine v Bean's Express Ltd (1946)

Facts:

The defendants provided a commercial van and a driver (Harrison) to be used by a bank with the condition that the driver remained the employee of the defendants. There was a further agreement between the defendants and the bank that the defendants accepted no liability for any persons, other than their own employees, riding in the van. The driver of the van had been expressly told that no one was to be allowed to ride with him in the van, and there was also notice to this effect on the dashboard. The driver allowed an employee of the bank to ride with him, at his own risk, and in the course of this journey the employee died in an accident caused by Harrison. The employee's widow brought a claim for damages against the defendants. It was held by the Court of Appeal that only the defendants' employees were permitted to travel in the van and the deceased man was not one of these persons. Harrison, in giving the lift, was not acting in the course of his employment, and hence the defendants were not liable for the actions of the driver.

Authority for:

An unauthorized act performed by an employee will allow the employer to escape liability.

It is necessary to look to the judgment of Lord Greene MR for the rationale for the decision:

> **[The driver was] employed to drive the van. That does not mean that because the deceased man was in the van it was within the scope of his employment to be driving the deceased man. He was in fact doing two things at once. He was driving his van from one place to another by a route that he was properly taking when he ran into the omnibus, and as he was driving the van he was acting within the scope of his employment. The other thing that he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there.**

This case can be compared with *Rose v Plenty*. The difference between the decisions may be due to the nature of the employee's action. In *Twine*, the employee was providing a lift to the bank's employee that was of no use to the employer and could in no way be associated with acting in the course of employment. However, in *Rose v Plenty*, the action of the milkman and the child assistant was to carry out the task required by the employer, albeit again, in an unauthorized manner.

Rose v Plenty (1975)

Facts:

The case involved a milkman who had employed a 13-year-old child to assist him on his milk round, despite a direct order from his employer that no one was allowed to ride on the milk-float with the delivery drivers. The child was assisting the milkman when there was an accident and he was injured. The parents of the child brought an action against the milkman's employer for damages and the Court
p. 326 of Appeal held that the employer was ↵ liable. Despite the employer informing the drivers that they should not take passengers, this did not prevent their liability.

Authority for:

An employer may be held vicariously liable for a tort committed by their employee who is performing an authorized task in an unauthorized manner.

If, by providing an express instruction not to commit a tort, the employer's potential liability could be circumvented, the protection the doctrine sought to provide would be removed. The milkman was 'doing his job' when the accident occurred, and the employer should have been more proactive in ensuring the employees adhered to the work rules. However, Lawton LJ dissented and considered that this case fell into the same category as *Twine v Bean's Express*, where the employee was not 'doing his job' albeit in an unauthorized manner, rather they were doing something completely different. This may be an example of vicarious liability being a doctrine of 'rough justice'. Mechanisms exist through employment law to take action against employees who fail to follow work rules, and it is in the enforcement of these rules that such accidents (and their consequent tort actions) will be prevented.

Consider

Aki's actions are very similar to those in *Rose v Plenty*. Whilst the employees were not supposed to give lifts to anyone or accept help in the course of their duties, the employer was not controlling Aki with sufficient care. Employers are not allowed to disregard their duties by merely instructing employees to behave in a given way. They must actively ensure employees correctly follow lawful instructions to ensure they are not carried out in a wrongful way.

13.5.2.2 Acts incidental to the employment

The courts have had to determine whether an employer should be liable for an act by their employee that is not what they were engaged to perform, but rather is incidental to their employment.

Crook v Derbyshire Stone Ltd (1956)

Facts:

A lorry driver had stopped at a lay-by near to a café. He crossed one section of the dual carriageway on foot to get to the café when a collision occurred between the driver and a motorcyclist, due to the driver's negligence, in which the motorcyclist was injured.

p. 327 **Authority for:**

It was held that as the tort occurred during the driver's hours of employment the employer was liable. The tort being committed during the employee's 'break' did not stop him being in the course of his employment.

In *Smith v Stages* the House of Lords established rules that would identify where journeys incidental to the employment would create liability for an employer:

1. when an employee was travelling between his ordinary residence and work by any means of transport whether or not provided by his employer he was not acting in the course of his employment unless contractually obliged to do so;
2. travelling between workplaces was in the course of employment;
3. when an employee was paid for travelling in his employer's time the fact that the employee could choose the time and mode of transport did not take the journey out of the course of his employment;
4. when an employee was travelling from his ordinary residence to an unusual place of work or to an emergency the employee would be acting in the course of his employment;
5. a deviation or interruption of a journey would for that time take an employee out of the course of his employment.

Consider

Using the rules outlined in *Smith*, would you consider the dairy to be liable for the loss to Tori?

A particularly infamous case when considering the extent of vicarious liability and the responsibility of employers occurred in *Century Insurance Co. Ltd v Northern Ireland Road Transport Board*.

Century Insurance Co. Ltd v Northern Ireland Road Transport Board (1942)

Facts:

Mr Davison was employed to deliver 300 gallons of petrol in a tanker. At the garage he inserted the nozzle of the delivery hosepipe into the manhole of the garage's tank and turned on the stopcock of the tanker. Whilst the petrol was flowing into the tank Mr Davison lit a cigarette and threw away the lighted match igniting material on the floor of the garage, which caused a fire. The proprietor of the garage used a fire extinguisher in an attempt to put out the fire and instructed Mr Davison to turn off the stopcock. Instead, ↵ he began to drive the tanker away from the garage, stopping when he reached the street. Mr Davison exited the tanker and whilst the fire had been extinguished at the manhole, it had travelled up the delivery hose into the tanker where a 'very violent' explosion occurred. The explosion destroyed the tanker, the motorcar of the proprietor of the garage, and several houses in the vicinity were also damaged.

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Authority for:

The House of Lords held that Mr Davison was employed to deliver petrol and as such his tort was committed in the course of his employment. He was careless in discarding the lighted match, but he was performing his duties and consequently the employer had to accept the liability.

13.5.2.3 Deviation from a task

Having demonstrated where the tort of an employee, whilst committed during their working hours or travelling to and from work, may lead to the vicarious liability of the employer, a further area of import is where the employee has deviated from their employment. It is the extent to which the employee has deviated from their task that will establish liability.

Storey v Ashton (1869)

Facts:

Storey (a six-year-old child) was injured when delivery drivers for Ashton ran him over. Ashton was a firm of wine merchants that had sent their delivery driver and clerk to deliver a consignment of wine to Blackheath, and bring back empty bottles from the drop point. Having delivered the wine and picked up the bottles the driver was returning to Ashton's offices as instructed. However, about a

quarter of mile from the destination, instead of returning to the offices, he was persuaded by the clerk to drive in another direction on the business of the clerk. It was on this journey that the accident occurred. The High Court held that the employer was not liable for the injury to Storey. The driver had been negligent, but he was not acting in the course of his employment as he was driving in a different direction, taking a different route, than where he was instructed.

Authority for:

For an employer to escape being held vicariously liable, the employee must have sufficiently deviated from their task for the tort not to have occurred in the course of employment.

Consider

Was Aki's deviation from his task sufficient for the authority in *Storey* to apply? He was on his route and delivering milk (as was his job) but he did go into his sister's house. Does it matter that he went to help her move a piano?

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13.5.2.4 Criminal acts

It is very important to identify whether an employer will be held liable for the criminal acts of their employees that are committed during their employment. Where the employee's act was outside of their duties and employment, there has been no liability for the employer.

Heasmans v Clarity Cleaning Ltd (1987)

Facts:

A cleaner unlawfully used the phone of a client to make international calls (at a cost of £1,411). This was held by the Court of Appeal to be a criminal act wholly outside of the scope of their employment.

Authority for:

Merely because the employer provided the 'opportunity' for the commission of the act did not make them vicariously liable for the loss.

However, when the employee's action was taken in the course of their employment, the employer has been held jointly culpable (*Lloyd v Grace, Smith & Co.*).

Daniels v Whetstone Entertainments and Allender (1962)

Facts:

A steward (bouncer) employed at a dance hall assaulted a customer within the dance hall. The persons involved in this disturbance were removed to outside of the premises and the steward was informed by his employer to remain inside the dance hall and continue his duties. Instead, he proceeded to go outside in an attempt to find a second man involved in the disturbance, found the original victim of the steward's assault, and assaulted him again.

Authority for:

It was held that the first assault was within the steward's course of employment, but the second assault was not.

When determining if an employer should be held vicariously liable for the torts of their employees, the test of establishing whether the employee's act was a wrongful or unauthorized method of performing an authorized act is not always of use when assessing intentional torts. Rather, it is more apt to consider the closeness of the connection between the wrong committed by the employee and the nature of their employment, and to determine whether it is just and reasonable in those circumstances to hold the employer vicariously liable (*Bernard v The Attorney General of Jamaica*). A very significant judgment was provided by the House of Lords in
p. 330 *Lister v Hesley Hall*. ↵

Lister v Hesley Hall (2001)

Facts:

Lister and two others brought an action against the employer of a warden at a residential school for boys with behavioural problems, of which they had been resident. In 1995, the warden was convicted of several sexual offences (including physical abuse) against children in his care, including the claimants. They brought an action for personal injury, alleging the employer was vicariously liable for these acts.

Authority for:

Lord Steyn followed the reasoning from judgments of the Canadian Supreme Court (*Bazley v Curry* and *Jacobi v Griffiths*) where, in determining an employer's vicarious liability in such actions, there must be a 'close connection' between the act and the employer's authorization. In essence, an employer is liable for acts which they have not authorized, provided they are so connected with acts which they have authorized that they may rightly be regarded as, albeit improper, modes of doing them. The

employer should have been aware of the possibility and risk of sexual abuse by employees in positions of authority (but not perhaps of other employees) and hence it had not taken sufficient precautions to avoid the act(s).

This aspect of an employer's liability has also been applied in relation to a statutory right.

Majrowski v Guys & St Thomas' NHS Trust (2006)

Facts:

A clinical audit coordinator who had been bullied and subject to rude and abusive behaviour by a departmental manager was successful in claiming against his employer under the Protection from Harassment Act 1997, s. 3. The House of Lords held that where there had been a close connection between the course of conduct of the employee and the circumstances of their employment, it was no defence for the employer to claim that they did not authorize the conduct, or the consequences of the actions were not foreseeable (a point confirmed in *Jones v Ruth*—the statute does not require proof of foreseeability).

Authority for:

The implications of this statutory right offer an 'easier' route for employees to claim damages for bullying and stress-related claims against their employer as the claimant does not have to establish a psychiatric injury but rather distress/anxiety.

In the case *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* the Court of Appeal
p. 331 determined the extent of the vicarious liability of the Roman Catholic Church for sexual abuse by a priest.
↵

Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church (2010)

Facts:

The appellant (M) alleged that when he was about 12–13 years old a Roman Catholic priest sexually abused him over a 6–12-month period. The issue of whether the Archdiocese (the Church) was vicariously liable for the acts of the priest centred on whether those actions could constitute a sufficiently close connection to his employment. The first court held there was no sufficiently close connection to make the imposition of liability fair and just (according to *Lister v Hesley Hall Ltd*). Neither M, nor his parents, were of the Roman Catholic faith or participated in its activities, the priest

had not attempted to convert them to Catholicism, and the sexual abuse was (of course) not part of the priest's duties. The employment undertaken by the priest merely provided him with the opportunity to come into contact with young boys. The case was appealed.

Authority for:

The Court of Appeal held that there was sufficient evidence that M had been sexually abused, but it disagreed with the first court holding that the Church was not vicariously liable for the priest's actions. On reflection, it found there were a number of factors that established a sufficiently close connection between the priest's actions and his employment (seven factors were outlined by Lord Neuberger MR).

What is most interesting, and equally perplexing in this case, is that the court did not give any further detailed broad instruction which could help in establishing the boundaries (and thereby limitations) of the doctrine. In *Lister* (which significantly extended the close connection test), the abuse occurred at a residential home and the actions were essentially authorized in some misguided sense of discipline. Here, no such instruction or relationship existed, such as would be the case had M been an altar boy. The priest and M entered the relationship through M attending discos and other events arranged by the priest in his role of working with local children, and later by M undertaking additional paid work for the priest. The outcome of the case appears to be the extension of the scope of vicarious liability, and hence employers need to be ever more vigilant to control the actions of their employees, and have a structure/policies in place to effectively supervise their activities. Indeed, Lord Neuberger expressly noted in the judgment the 'inappropriately casual' approach taken by the priest's superior in relation to two complaints that the priest had been involved in sexual abuse.

A detailed review of the law on vicarious liability was recently provided by the Supreme Court:

Mohamud v WM Morrison Supermarkets PLC (2014)

Facts:

The case involved a customer, visiting the petrol station of a branch of the supermarket chain, who was seriously assaulted by an employee of Morrison. The court at first instance and the Court of Appeal held against the claimant, deciding that the actions of the employee were beyond the course of
p. 332 his employment. However, the Supreme Court, ↵ having reviewed the doctrine, focused on two issues: 1) the functions/activities which the employer had entrusted the employee with; and 2) the existence of a sufficient connection between the employee's position at work and his wrongful conduct (compare this decision with the judgments of the Court of Appeal in *Graham v Commercial Bodyworks* and of the Inner House in *Vaickuviene v J Sainsbury PLC*).

The key issue for the Supreme Court was that the employee was issuing an instruction for the customer to stay away from the employer's premises, and he furthered this instruction with a violent attack. This was an abuse of the job he was instructed to perform, but it was connected with the job as

the employee did have dealings with customers.

Authority for:

The claimant had urged the court to replace the 'close connection' test with one of 'representative capacity'—that the question to be asked was whether a reasonable observer would have thought the employee was acting in the capacity of a representative of the employer whist carrying out the tortious act. The Supreme Court would not change the test but here found the employee's actions in the 'field of activities' of his role and employment. As the employer entrusted the employee with this role, it was also responsible for the potential for the employer to abuse the position.

13.6 Liability for independent contractors

Whilst the general rule exists that an employer is liable for the torts of employees but not of independent contractors, as the latter have their own insurance to satisfy claims and there does not exist the same level of control exercised over their actions as the former, the law provides for exceptions. In the following examples, an employer may still be held liable for torts committed by an independent contractor if they authorized the tort, or in situations where responsibility cannot be delegated. In **non-delegable duties** the employer is liable for negligent acts whether committed by an employer or independent contractor. The imposition of liability may involve a degree of public policy where the employer should not be allowed to remove their responsibility for health and safety (e.g.) of workers or the public, or where statute has imposed a specific responsibility on the employer.

13.6.1 The Fault of the Employer

An employer may be held liable for the torts of an independent contractor where the tort was ratified or authorized by them. In such a situation, both the employer and the independent contractor may be held liable as joint tortfeasors.

Ellis v Sheffield Gas Consumers Co. (1853)

Facts:

p. 333

The defendants employed a contractor (without authority) to excavate a trench in the street for the purpose of accessing gas pipes. The trench was dug but the contractors ↵ negligently left the rubble from the trench in a heap on the footpath over which Ellis stumbled and sustained an injury. In attempting to avoid potential liability, the employers stated the contractors were at fault and as they were not employees any claim had to be made against them.

Authority for:

The court held that the agreement with the contractors amounted to an illegal act, and the employer could not delegate its responsibility to a contractor. As a consequence the employer was responsible for the damage sustained.

13.6.2 Non-Delegable Duties

The term 'delegated' duty is meant in the sense that the task required of the employer has been delegated to an independent contractor who is competent to perform the task. Consequently, the employer has a lower duty to take care in these situations of 'delegable duties' rather than the higher duty to take care in non-delegable duties. There are no definite rules to establish when an employer will be held liable for torts committed by an independent contractor, but examples include:

1. if the duty on the employer involves some extra-hazardous act (*Dodd Properties v Canterbury City Council*);
2. where the employer owes a duty for the health and safety of their employees (in *Wilsons and Clyde Coal Co. v English* the House of Lords held that an employer had a duty to provide competent staff, adequate material, a safe system of work, and effective supervision);
3. if the law imposes a duty on the employer (such as through statute), this cannot be delegated (*Smith v Cammell Laird & Co.*);
4. if substances are brought onto land which are dangerous (e.g. explosive materials) and would be likely to cause damage if allowed to escape (known as the rule in *Rylands v Fletcher*).

Rylands v Fletcher (1866)

Facts:

The case involved strict liability and is a form of private nuisance. The defendant occupied land near to the claimant's coal mine, whose mines extended below the defendant's land. These mines had been cut off and had become disused and the defendant obtained permission to construct a reservoir to provide water for his mill. Fletcher had employed competent contractors. However, during their work they discovered the mineshaft, and that it was connected to another mine, but did not inform Fletcher or attempt to block it. When the reservoir was put into action the water entered the old mine shafts and consequently flooded Rylands' mine, who successfully claimed for the damage caused. The defendant was liable even though not vicariously liable nor negligent in his actions.

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Authority for:

As per Blackburn J, 'the person who for their own purpose brings onto his lands … anything likely to do mischief if it escapes, must keep it at his peril and is *prima facie* answerable for all the damage which is the natural consequence of its escape'.

Whilst this is not an exhaustive list, these situations demonstrate that a tortious act by an independent contractor may still be the responsibility of the employer, who will have to satisfy any claims.

An important clarification (and arguably an extension) to the law on non-delegable duties was established in the following case.

Woodland v Essex County Council (2013)

Facts:

The appellant, a child aged 10 at the time of the incident, was a pupil at Whitmore Junior School. The school, through the local authority, engaged an independent, external, contract to provide swimming lessons—Direct Swimming Services. During a lesson, the child got into difficulties and, whilst attended to at the scene by the on-duty lifeguard and resuscitated, had suffered a serious brain injury. A claim was brought against the local authority in charge (and swimming teacher and lifeguard) under negligence. The key issue in respect of this aspect of the case was the argument by the appellant that the local authority had a non-delegable duty of care to the child and hence was liable for the damages sustained. In both the High Court and the Court of Appeal, it was held that no delegable duty existed in relation to the (negligent) actions of an independent contractor (unless of course the selection of that contractor was itself negligent). Unlike vicarious liability (which was not part of this claim) where liability can be imposed on a person on the basis of acts or omissions of others, liability in negligence is fault-based and the responsibility of the tortfeasor alone. Therefore, the appellant was seeking an exception to this general rule of law.

Lord Sumption explained in the judgment that the expression 'non-delegable duty' had become a conventional way of describing situations where the duty extends, beyond merely taking care, to procuring the careful performance of work delegated to others. Lord Sumption identified five features which would typically justify the fault-based limitation of liability being departed from and give rise to the existence of a non-delegable duty:

1. the claimant is a patient/child/prisoner or some otherwise vulnerable/dependent person;
2. an antecedent relationship exists between the claimant and defendant which places the claimant in the care of the defendant and from which it is possible to assign a duty (and positive obligation) for the defendant to protect the claimant from harm;
3. the claimant has no control over the defendant's performance of this obligation;

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4. the defendant has delegated this function (or some part of it) to a third party—which has assumed care (involving control) of the defendant;
5. this third party has been negligent in the exercise of the delegated power/function (at para. 23).

Evidently, had the Supreme Court followed the rules as stated above, there would have been no liability of the local authority due to the traditional interpretation of point 4 and the lack of control by the defendant (local authority) through the outsourcing of the function to the third party (Direct Swimming Services). However, significantly, Lord Sumption provided that the interpretation of control here was related to control over the claimant for the purpose of performing a function for which the defendant had assumed responsibility. Essentially, liability will only be imposed where public authorities have assumed a duty to perform a function, and this function, which has traditionally been performed by members of its own staff, has been outsourced—thereby re-establishing a form of vicarious liability to protect the claimant.

Authority for:

Providers of a public service are faced with an additional burden when choosing to outsource functions to third parties. However, a non-delegable duty will only be imposed where it is 'fair, just, and reasonable' to do so. Public authorities undertake the personal responsibility to ensure that tasks generally under its responsibility are performed with care.

13.7 The consumer protection act 1987

Where a business produces goods, and those goods contain a defect which results in damage/injury being sustained, unless a defence as identified under the Consumer Protection Act (CPA) 1987 is available, the producer, importer, marketer, or supplier will be liable. Proof of negligence is not required; simply the existence of the defect and the damage (over £275 in value) will allow the claimant to succeed. As such, knowledge of CPA 1987 is crucial to businesses that produce, import, market, or supply goods.

CPA 1987 was enacted to fulfil the requirements of the EU Product Liability Directive (85/374/EEC) and sought to assist consumers when claiming against defects in products. CPA 1987 enables claimants to seek damages if they were injured through the property, or if it had caused damage, and it adds to existing common law rights. Claims for injuries or damage to property would generally be made under the tort of negligence (see **11.5**), but this is fraught with difficulties and CPA 1987 makes such claims much easier in relation to products. Part I of CPA 1987 imposes a civil liability that enables a claim for injuries due to an unsafe product, Part II was repealed, and Part III (misleading prices) was superseded by the Consumer Protection from Unfair Trading Regulations 2008 (see the online resources for additional content on the Regulations).

13.7.1 Protection Through the Act

CPA 1987 protects those individuals who may have suffered injury as a result of the product they purchased, or
p. 336 where the product caused damage to their property. The Sale ↵ of Goods Act (SOGA) 1979 enabled those with a contractual relationship with a retailer to have their money returned, or be provided with a repaired item or a replacement in the event of a product failing one of the sections (ss. 12–15). However, what if the defective product purchased caused injury to the buyer, or had damaged their property? The law of contract entitled the claimant to protection against a faulty product *not* for any losses attributed to this (as part of the concept of remoteness of damage). In such an event, the injured party would have to sue the defendant under negligence. Proving a breach of the duty of care owed to a consumer may be very difficult and expensive, and may dissuade potential claimants from seeking redress. Therefore, the legislation was drafted to provide a justiciable remedy.

13.7.2 The Strict Liability Under the Act

The importance of CPA 1987 in assisting claimants is by establishing the **strict liability** of the manufacturer. The claimant does not have to prove intention or negligence on the part of the defendant, only that there is a causal link between the product and the damage sustained by the claimant. This liability is only removed if a defence can be made under CPA's provisions.

13.7.3 Claims Under the Act

To be successful the claimant must bring their claim within three years of the awareness of the damage or defect in the product (Limitation Act 1980, s. 11A), and they must establish the following criteria:

1. the product contained a defect;
2. the claimant suffered damage;
3. the damage was caused by the defect;
4. the defendant was either a producer, a marketer (own-brander), an importer, or a supplier into the European Union (EU) of the product.
    - *The claimant:* Section 5 defines a claimant as any person who suffers injury to themselves or damage to their private property (CPA 1987 does not extend to business property).
    - *The product:* Section 1 defines a 'product', as the item itself, the packaging, and any instructions; therefore it covers a broad range of claims. However, it must be a product that is ordinarily used for private consumption.
    - *Manufactured products:* This definition includes the components of other products.
    - Substances won or abstracted: The products under this section include electricity, water, and gas.
    - *Industrial or other processes:* This includes agricultural products that have been subject to some industrial process.

13.7.3.1 Damage

The types of damage that are included in CPA 1987 are death, personal injuries sustained, and any damage to property that the claimant uses as part of their private consumption. However, CPA 1987 also requires that the damage must exceed a value of £275, which does not include the damage to the product itself. This is to ensure that the courts are ↵ not overwhelmed by voluminous cases, and there is a restriction on claims for pure economic loss.

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13.7.3.2 The defect in the product

The defect in the product must make it unsafe ('not such as persons generally are entitled to expect'—s. 3) and thereby causes damage to the claimant or their property.

Abouzaid v Mothercare (UK) Ltd [2000]

Facts:

The case involved a child of 12 attempting to fasten a child's sleeping bag to a pushchair manufactured by Mothercare. In attempting to fasten the sleeping bag, Abouzaid had let go of one of the straps (which had a metal buckle on the end) and this caused the strap to retract and the buckle to hit him in the eye. The resulting injury caused him to lose his sight in the eye due to severe damage to his retina. Mothercare attempted to defend the claim on the basis that technical knowledge in the form of accident reports were unavailable at the time, but the Court of Appeal held that this lack of knowledge was irrelevant, and Mothercare was liable.

Authority for:

A defect in a product, for the purposes of s. 3, will be present where there is an identifiable risk, and the defendant could have discovered the danger and the lack of safety of the product before the victim's injury.

In order to be unsafe the product must fall below the standard which a reasonable man would be likely to expect and can be demonstrated in the following:

- *The ordinary use of the product:* The nature of products clearly result in their use being intended, perhaps, for a specific group of the population and the nature of it being unsafe is consequently tested against what may be expected from this group. For example, toys designed for young children would have to include safety considerations of non-toxic paint, sharp edges, and whether the toy contains parts that may be placed in the child's mouth and hence be dangerous. These considerations would be different for products aimed at the adult market, and therefore manufacturers may place age groups on the packaging to limit their potential liability. By stating that a product is intended for '3 years and above', if the product is given to a child below that age and some harm is caused, the manufacturer has a potential

defence. If, for example, a child is allowed to have access to dishwasher powder, and they ingest this, then save for a fault with the packaging (such as the child-resistant cap on the bottle), there is unlikely to be a successful claim under CPA 1987. An adult, who the product is marketed at, would appreciate that the item was not to be eaten, and the adult with responsibility for the child would have to bear the responsibility of enabling access to this material. In *Tesco Stores Ltd v Pollard* the Court of Appeal considered the failures of a claim made under CPA 1987 and the forseeability test where the claim is made through negligence.

- *Packaging and warnings:* Products in isolation may be safe, but if used incorrectly or joined with other products, have the potential to cause injury. An example may be provided through the use of medicines which if used when the claimant is taking other medicines may react badly and cause harm, or if used by a claimant with an allergy to the medicine could lead to serious consequences. Therefore, the defendant will have needed to include instructions and warnings with the product to ensure the claimant was sufficiently aware of any risks or dangers.

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- *The issuing of the product:* If the product was issued when it was safe, but it later becomes known that the product is unsafe (such as with drugs which are later known to cause injuries), then the manufacturer will have a defence that at the time of issue the product was deemed safe. It is also the case where products are sold and a shelf life or 'best before' date is included. Using or consuming the product after this date may be at the claimant's own risk.

13.7.3.3 Supply of the product

The product may be supplied through a sale, hire, or gift, or through barter. The supplier must have been acting in the course of their business when doing this, but CPA 1987 clearly extends protection further than the remit of SOGA.

13.7.3.4 The defendant

Section 2 outlines that the following persons may be liable for injury or damage caused wholly or partly by a defect in a product:

- *The producer:* The manufacturer of the product, or the person responsible for the abstracting of the product will constitute a defendant under CPA 1987.
- *The importer:* An importer is the party who has initially imported the product into the EU.
- *The marketer:* An organization that has produced goods with its company name on the label will be treated as a producer of the good.
- *The supplier:* A supplier of a product will be liable if they fail when requested to identify the manufacturer, producer, or importer.

13.7.4 Defences Under CPA 1987

Section 4 outlines the possible defences that can be raised in the event of a claim under CPA 1987:

- *compliance with the law:* if the product complies with the relevant safety standards established in English and EU law, and the defect can be attributed to the standards;
- *non-supply of the product:* if the defendant did not supply the product in the course of their business (if making a product for sale was, e.g., a pastime or hobby);
- *the defect did not exist at the time of supply:* if at the time of the supply of the product the defect did not exist then there will be no liability on the part of the defendant;
- *acceptable risks in development:* there exists a special defence for those defendants who release new products onto the market, and who have used all available research and expertise to minimize any potential risk to the claimant. If, despite these safety standards, the claimant is still injured or property is damaged, the defendant will be able to raise this defence to the action. The rationale for the defence is to allow the producer/manufacturer the ability to develop innovative products which may be of benefit
p. 339 to the public/economy, who would otherwise be dissuaded to do so in fear of a liability action. It remains, however, a very controversial defence, as drugs (e.g.) have entered the market and caused significant health problems for the users, who, if this defence were accepted, would have no recourse under CPA 1987.

13.8 The occupiers' liability acts

The Occupiers' Liability Act(s) 1957 and 1984 provide that the occupier of premises owes a duty of care to visitors and to trespassers. Injuries sustained to these visitors due to the failure of the occupier to protect their safety may lead to liability. As most businesses will occupy some premises, the legislation is particularly relevant to them.

There exist obligations (duties to take reasonable care) for occupiers of premises to both lawful visitors and to trespassers. The duty of care (which is a statutory duty rather than in negligence) is to ensure, as far as is reasonable, that the visitor will be safe in using the premises for the purposes for which they are invited to be there. Therefore, the premises have to be reasonably safe, and any claim against the occupier based on this legislation will be assessed in light of the danger that they were exposed to at the premises. In determining this danger, the test of reasonable foreseeability of the risk of injury to the (specific) claimant in the (reasonably expected) use of the premises is adopted (see *Simonds v Isle of Wight Council*).

The legislation relevant to occupiers of premises in this regard is the Occupiers' Liability Act(s) (OLA) 1957 and 1984. The 1984 Act was more restrictive than the 1957 Act in providing that the duty of care to those other than the occupier's visitor was restricted to a danger that the occupier of the premises knows of, or ought to know exists. Further, the occupier must know or ought to know that the trespasser is likely to come onto their land.

13.8.1 The Occupier

The definition of an occupier is provided in OLA 1957, s. 1(2), 'as the persons who would at common law be treated as an occupier'. The common law provides that it is the person who has control over the premises that will be considered the occupier. Lord Denning stated in *Wheat v Lacon* that the occupier may be any person

with a degree of control over the state of the premises.

Section 1(3)(a) of OLA 1957 further provides that liability may also be imposed on the occupier of a fixed or moveable structure, and this extends to vessels, vehicles, and aircraft. The liability under this section applies to the danger involved with the structure itself rather than activities associated with the structure. In the event that injury is sustained in the course of activities associated with the structure, then the claim should be made through negligence.

13.8.2 Occupiers' Duties to Visitors

OLA 1957 requires that the occupier of premises takes reasonable care to ensure that a visitor to their premises will be reasonably safe. A visitor is a person who comes onto premises with the express or implied permission of the occupier. Express permission is determined on a question of fact, and simply because the person has been invited onto the premises does not mean that they are invited to all parts of the premises. The lawful visitor may also become a trespasser if they wrongfully use the premises. As expressed by Scrutton LJ in
p. 340 *Owners of SS Otarama v Manchester Ship Canal Co*.: 'When you invite a person into your ↵ home to use the staircase, you do not invite him to slide down the banisters, you invite him to use the staircase in the ordinary way in which it is used.' Implied permission may be provided to persons such as those who need access (e.g. reading utility meters) and others, such as postmen, have permission whether expressly invited or not.

The duty to take care provided through OLA 1957, s. 2(2) is 'to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there'. The duty of care required by OLA 1957 and 1984 is tested in accordance with the Compensation Act 2006, ss. 1 and 2. Therefore, the duty is taken with regard to the activities that the visitor is permitted to be on the premises to perform. Examples of the reasonable use of premises have been demonstrated in *Tomlinson v Congleton BC*, and a key feature of the recent judicial decisions has been an expectation of the person to exercise common sense and to take care of their own safety (*Lewis v Six Continents Plc*).

Clearly, the obligation to protect the safety of children visiting premises is greater than adults (s. 2(3)(a)), and the occupier has a duty to ensure that warning notices and barriers offer a sufficient deterrent against danger (s. 2(4)(a)). Where the visitor to the premises does so as part of their job, such as tradesmen (builders, electricians, and so on), they are deemed to have a better understanding of the inherent risks in the pursuit of that activity, than would an ordinary visitor. In *Roles v Nathan (t/a Manchester Assembly Rooms)* two chimney sweeps were killed by carbon monoxide poisoning from a sweep-hole that they were sealing. The sweeps had been warned by the occupier of the premises and an expert employed by him, of the danger from the gas. They had been told not to stay in the hole for too long, and were even physically removed by the expert, but despite this, they sealed the hole while the fire was alight, and subsequently died. The widows of the sweeps brought an action against the occupier, but it was held by the Court of Appeal that they had been given sufficient warnings as to the danger, and this was a danger that they could have been expected to guard against. The occupier may also escape liability where they have reasonably entrusted work to an independent contractor and in the execution of this work the contractor's actions led to the danger that caused loss (s. 2(4)(b)).

Claims under OLA 1957 may be made in respect of personal injury, losses, or damage to property (insofar as it satisfies the requirement of reasonableness). The occupier may raise the defence of contributory negligence (as it is fault-based liability) and *volenti* to an action, but simply because the claimant agrees to a notice or contract term that purports to exclude the defendant's liability will not amount to acceptance of the inherent risk (UCTA 1977, s. 2(3)).

13.8.3 Occupiers' Duties to Non-Visitors

A major extension through the enactment of OLA 1984 was to broaden the common law duty owed to trespassers. It imposes a duty of care on the occupier to trespassers and persons entering land without the permission or consent of the occupier. These are known as non-visitors. This protection is restricted to those exercising a private right of way rather than a public right. The rationale for the legislative protection is that trespasser or not, persons entering land require protection from the hazards and dangers on it, and common humanity required the occupier of premises (who knew or ought to know that trespassers would enter the land) to ensure that the trespassers would not be injured due to the condition of the premises.

The obligation on the occupier is to take reasonable care to ensure that the non-visitor is not injured due to
p. 341 any danger on the premises (s. 1(4)). The obligation may be removed ↵ through adequate warnings (s. 1(5)) and protective measures being taken to identify (and minimize) the risk. The occupier owes the duty where:

- they are aware of the danger, or ought reasonably be aware that a danger exists;
- they must be aware, or have reasonable grounds to believe, that the non-visitor is in the vicinity of the danger and may enter the premises (regardless of any lawful right to be in the area);
- the danger must be of a type that it is reasonable to expect the occupier to protect against (s. 1(3)).

The last stage in this list provides the most difficulty in establishing liability and will be tested on the circumstances of each case. The occupier may seek to avoid liability through *volenti* where the injured non-visitor willingly accepts the risks of their actions (s. 1(6)), and s. 1(8) expressly prevents actions for liability in respect of loss or damage to property.

13.8.4 Reducing the Risks

A breach of the legislation may lead to prosecution and, as with breaches of health and safety legislation (of which this may also be a facet), there may be a consequent damage to the reputation of the owner of the premises. As such, the owner of the premises should conduct risk assessments and identify any specific dangers, and the preventative measures that have been taken. For example, the workplace may display notices/signs warning of risks to visitors such as hot water, slippery floors, and low ceilings (marked with highlighting tape).

Depending upon the severity of the defect or the immediacy of the danger, it may be advisable to section off the area to prevent visitors using the affected area(s) and placing themselves in danger. Notices and/or guards could be utilized to prevent accidents (and also it is important to be aware of any visitors to the premises who

may suffer a disability and hence the most appropriate measures to protect their safety must be implemented). Examples of mechanisms that could be invoked include the following:

- *Warnings:* The type of danger and the risks can be brought to the attention of visitors through warning signs and notices. These should be clearly displayed and impart the relevant information as simply as possible.
- *Provide information to all workers:* An employer is responsible for the health and safety, not only of their employees, but also any independent contractors who are working at the premises.
- *Maintain buildings:* Ensure that buildings are in a good state of repair, that floors leading into buildings that may become slippery during damp weather have mats/carpeted areas to dry the feet of visitors, that outside routes are kept clear. Keep indoor and outdoor areas suitably lit, provide hand-rails where appropriate, maintain access and exit routes, and so on.
- *Consent:* OLA 1957 enables an occupier to restrict or exclude their duty through an 'agreement or otherwise'. Section 2(1) reads 'An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.' Other exclusions of liability, for example restricting liability for damage to property, may enable the exclusion of liability insofar as it satisfies the requirements of UCTA 1977, s. 2(2).

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13.9 Breach of statutory duty

Whilst it has been identified that the claimant may establish an action in damages against an employer for negligent acts or omissions, and in cases of vicarious liability, they may also have a right to base a claim if the defendant (e.g. an employer) breaches a statutory duty. A typical example of a statutory duty is to protect the health and safety of employees. The employer, under a statutory duty, has an obligation to take actions (such as the duties outlined in the Health and Safety at Work Act (HSWA) 1974) and their failure will enable the employee to establish a plea. It may be possible for a claim by an employee of both **breach of statutory duty** and negligence for breach of the employer's general duty of care, and to claim damages for consequential losses.

13.9.1 Establishing a Claim

The tests to establish a claim of breach of statutory duty are quite similar to those used in negligence:

- the statute places an obligation on the defendant that they owe to the claimant(s);
- the defendant has breached this duty;
- the claimant has suffered a loss as a consequence of the defendant's breach;
- the damage suffered was of a kind contemplated by the statute.

Dryden and Others v Johnson Matthey (2018)

Facts:

The claimants had been negligently exposed to chemicals by the employer in breach of statutory and common law duties. This caused them to develop symptoms which, in order to protect the claimants, led the employer to move them to less well-paid jobs. The claimants sought damages on the basis of either their loss of amenity or the economic losses they suffered.

Authority for:

Actionable personal injury occurs when a physical change makes a claimant appreciably worse off in respect of their health or capability, and which may affect their physical capacity of enjoying life. Importantly, it can be hidden and symptomless but continues to be actionable. The fact that the employer caused the physiological change in the claimants and this resulted in them losing their capacity to work led to their successful claim for damages.

For a claim to succeed, the statute has to provide the right for the claimant to seek damages under the civil law (e.g. the Congenital Disabilities (Civil Liability) Act 1976 enables a child, born disabled as a result of an occurrence before their birth, to bring an action in damages against the person(s) who caused the occurrence). Breaches of health and safety regulations generally allow a claim for breach of a statutory duty. However,
p. 343 HSWA 1974, s. 47 outlines breaches of duties, such as the general duties identified in ss. 2–8, that do not ↵ allow a civil law claim for damages. Previously, regulations such as the Provision and Use of Work Equipment Regulations 1998 created a strict liability (Reg. 5) but this has since been removed through the enactment of the Enterprise and Regulatory Reform Act 2013.

An example of these rules impacting on a claim of breach of statutory duty was addressed in *Gorringe v Calderdale MBC* (see **11.5.2.2**). It was held that in a road traffic accident the defendant Council had a statutory obligation to maintain the roads (under the Highways Act 1980) and whilst this was applied to all road users, it could not be used to impose a private duty (from the existing wider public duty) for a specific individual. There was no obligation under the statute that placed a duty on the Council to the claimant, and as such the Council's lack of action could not amount to a breach.

13.9.2 Defences Available

As with any claim for damages, defences may be available to reduce any compensation awarded or defeat the claim in its entirety.

13.9.2.1 The defendant was not negligent

Facing a claim for compensation, the defendant may raise the defence that they were not negligent and had performed the duties as required by law. The most obvious example of this defence was seen in *Latimer v AEC* (see **11.5.2.2**).

13.9.2.2 Contributory negligence

This defence involves the defendant being at fault, but further that the claimant also acted in a way that placed themselves in danger (and as such they contributed to the negligent act). For example, an employer has an obligation to protect the safety of employees, but the employee also has a duty to protect their own safety at work. Employees have to use their common sense so as not to injure themselves or others, or place themselves in unnecessary danger (see *O'Reilly v National Rail and Tramway Appliances*). If the employee has contributed to any accident at work, the employer may seek to have any award of compensation reduced. This reduction will be assessed to reflect the claimant's responsibility for their injuries/damage.

13.9.2.3 Consent

The defence of *volenti non fit injuria* may be raised in claims of breach of statutory duty, as it may be raised in cases of negligence. If a claimant consents to the risk of being injured, they may not be permitted to claim if they do actually sustain an injury. This defence is available in 'general' negligence cases, but is less available in employment relationships where the employee is required to perform duties at work (see *ICI v Shatwell* discussed in **11.6.2**).

Conclusion

This chapter concludes the topic of torts law and demonstrates the importance of an employer being aware of their responsibilities for actions taken during work of employees and even independent contractors engaged for a specific task. Further, employers/managers must have knowledge of their obligations when producing or distributing goods, and their obligations to persons visiting or coming on to business land/property. Substantial claims may exist under the law of torts and a sound understanding of the employer's obligations are required to insure against, and as far as possible limit, such damages actions.

p. 344 ↵ Part 7 of the book moves the discussion to the regulation of the employment relationship and has links with vicarious liability, in defining employee status and how courts have identified the key criteria in determining this issue.

Summary of main points

Vicarious liability

- Vicarious liability involves a party's responsibility for the torts committed by another.
- In torts law, this generally refers to an employer being held responsible for the torts of their employees.
- An employer is liable for:
  - an employee acting negligently in an act that they were authorized to do with care;
  - an act necessarily incidental to something that the employee was engaged to do;
  - an employee acting in a wrongful way that was authorized by the employer.
- Employers have also been held liable for overtly criminal acts committed by the employee.
- Specific rules identify where vicarious liability will be effective:
  - where the tortfeasor has 'employee' status; and
  - so long as the tort was committed in the employee's 'course of employment'.
- 'Course of employment' has been held to include:
  - providing lifts in works' vehicles;
  - smoking whilst delivering petrol;
  - committing a fraud wholly during employment.
- There is generally no vicarious liability for the torts of independent contractors.
- Exceptions to the rule include:
  - where the employer authorizes or ratifies the tort of the independent contractor;
  - where the employer may not delegate their duty.

Consumer Protection Act

- This Act imposes a strict liability on producers, importers, marketers, and suppliers of goods that are faulty and result in loss or damage.
- That the product has a fault establishes a prima facie case and the defendant has to demonstrate a defence under the Act to avoid liability.
- It establishes much greater protection for consumers than attempting to claim through negligence.

Occupiers' Liability Acts 1957 and 1984

- Occupiers of land owe a duty to take reasonable care to ensure visitors and non-visitors will be safe and not exposed to unreasonable danger.
- The visitor must use the premises for the purposes for which they are invited and must have regard for their own safety.
- Owners/occupiers must ensure that material does not leave their premises that could cause loss/damage (such as smoke obscuring the visibility on the highway).
- Owner/occupiers should use warning signs, physical restrictions, and so on to prevent danger to visitors and non-visitors.

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Breach of a statutory duty

- Employers may face claims for damages where they have breached a statutory duty.
- Claims have to satisfy the following tests to be successful:
  - the statute places an obligation on the defendant that they owe to the claimant(s);
  - the defendant has breached this duty;
  - the claimant has suffered a loss as a consequence of the defendant's breach;
  - the damage suffered was of a kind contemplated by the statute.
- Defences to such an action include:
- that the defendant had performed their duties as required by law (a complete defence);
  - contributory negligence (a partial defence);
  - consent.

Summary questions

Essay questions

1. With specific reference to case law, explain the rules establishing the doctrine of vicarious liability. Identify the justifications for the doctrine and assess how many are still appropriate to businesses in the modern era.
2. 'Owners/occupiers of land have unfair responsibilities when it comes to trespassers. If an adult trespasses on land, they take responsibility for their own action and the owner/occupier should not be placed under additional duties to seek their protection.'

In relation to the duties imposed on owners/occupiers of land by statute and the common law, critically assess the above statement.

Problem questions

1. Nigella wishes to develop her cooking skills and consequently decides to purchase a microwave oven. She visits the Electrical Superstore and purchases a new microwave, which she uses successfully for the first time to cook a meal for her family. The second time she uses the microwave she uses the timer feature. Nigella puts on the timer for 30 minutes, as per the manufacturer's instructions, and leaves her home to visit a friend. When she returns the microwave has set on fire destroying the oven and the food. The fire has also badly damaged the kitchen units on which the microwave oven was placed and her flat screen television (worth over £800). The kitchen is also going to require redecorating due to the smoke from the fire.

Advise Nigella as to her legal position.

2. Wanda works as an employee at Crazy Hair—a hairdressing salon owned by Jason. Alec comes into the salon to have his hair cut and styled by Wanda. As Wanda begins to dye Alec's hair she accidentally puts too much peroxide in the solution and as it is applied to Alec's hair his scalp is burned, which causes him pain and discomfort. Alec later has a severe reaction to the solution used by Wanda and is hospitalized, which results in Alec missing several days of work as a consequence of the expensive medical treatment he requires.

Advise Alec of his rights. Advise Wanda and Jason of their liability and any action Jason may take against Wanda.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-13-indicative-answers-to-end-of-chapter-questions?options=name>*.

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Further reading

Books and articles

Brodie, D. (2007) 'Enterprise Liability: Justifying Vicarious Liability' *Oxford Journal of Legal Studies*, Vol. 27, No. 3, p. 493.

Chapman, S. (1934) 'Liability for the Negligence of Independent Contractors' *Law Quarterly Review*, Vol. 50, p. 71.

Faure, M. and Van den Bergh, R. (1989) 'Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses' Maklu: Antwerpen.

Howes, V. (2007) 'Liability for Breach of Statutory Duty—Is there a Coherent Approach?' *Journal of Personal Injury Law*, No. 1, p. 1.

Laski, H. J. (1916) 'The Basis of Vicarious Liability' *Yale Law Journal*, Vol. 26, No. 2, p. 105.

Netto, A. M. and Christudason, A. (2000) 'Of Delegable and Non-delegable Duties in the Construction Industry' *Construction Law Journal*, Vol. 16, No. 2, p. 88.

Stevens, R. (2007) 'Vicarious Liability or Vicarious Action?' *Law Quarterly Review*, Vol. 123, January, p. 30.

Websites and Twitter links

http:www.legislation.gov.uk/ukpga/Eliz2/5-6/31/contents *<http://www.legislation.gov.uk/ukpga/Eliz2/5-6/31/contents>*

The Occupiers' Liability Act 1957.

http:www.legislation.gov.uk/ukpga/1984/3 *<http://www.legislation.gov.uk/ukpga/1984/3>*

The Occupiers' Liability Act 1984.

http://www.legislation.gov.uk/ukpga/1987/43 *<http://www.legislation.gov.uk/ukpga/1987/43>*

The Consumer Protection Act 1977.

Online Resources

Visit the online resources *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-13>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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