Law of Torts and Consumer Protection Act

Vicarious Liability

Introduction

- Generally speaking, one cannot be held responsible for the commission of torts by other.
- However, a person may be liable in respect of wrongful acts or omissions of another in three ways: -
- Liability By Ratification;
- Liability By Relation;
- Liability By Abetment.

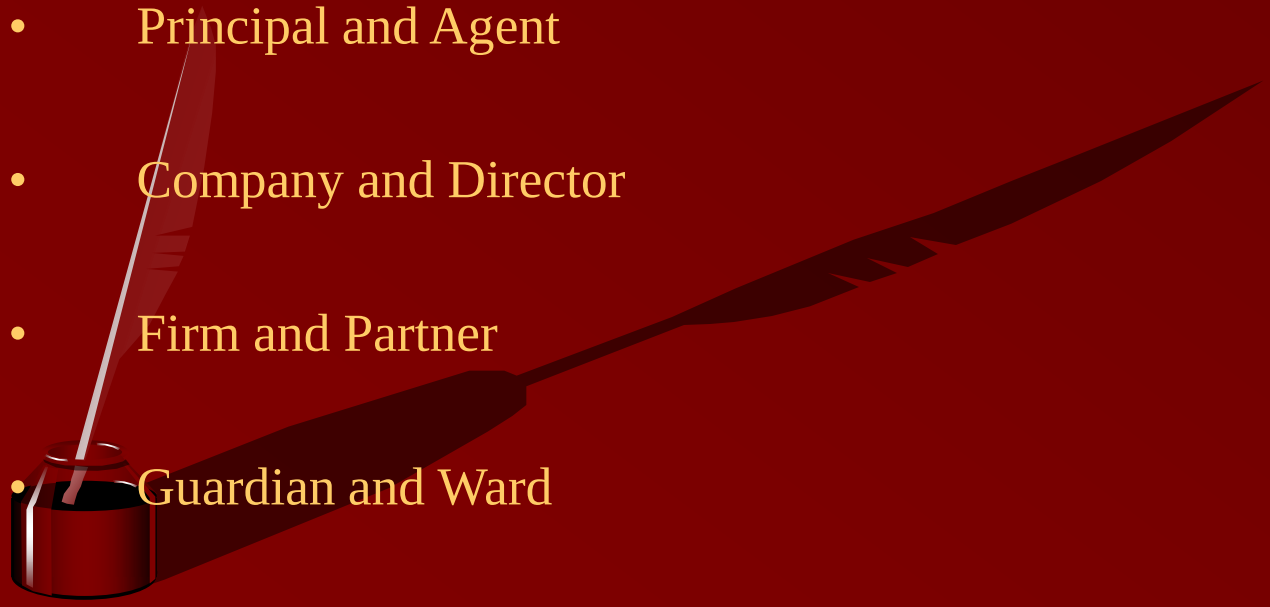
1. Liability by ratification

- An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority, whatever, becomes the act of the principal, if subsequently ratified by him.

- It is based on the maxim, ***"Omnio Ratihabitio Retrorahitur Et Mandato Priori Oequiparatur",*** which means that 'every ratification of an act relates back and thereupon becomes equivalent to a previous request'.

2. Liability by relation

- Master and Servant
- Employer and Independent Contractor
- Principal and Agent
- Company and Director
- Firm and Partner
- Guardian and Ward

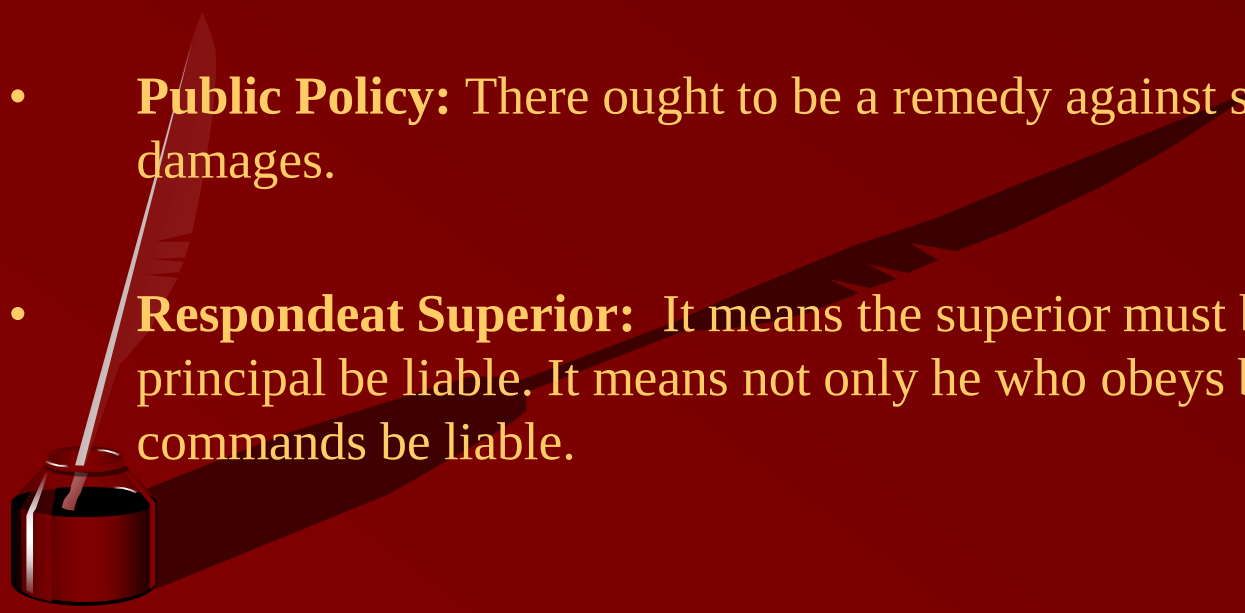


3. By Abatement

Basis of the Liability of Master

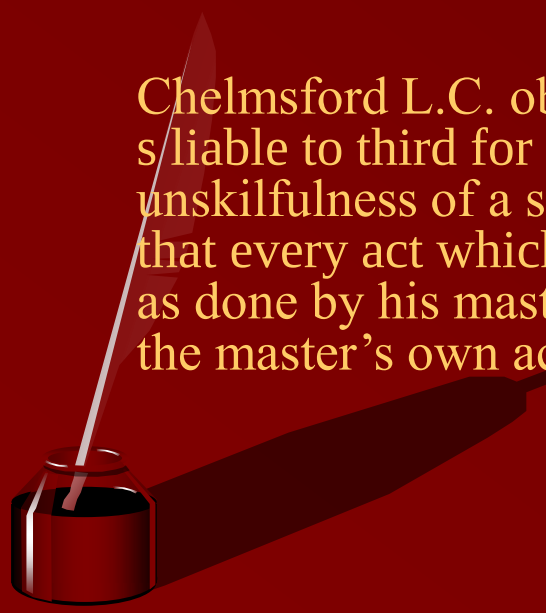
- Why should a master be held liable for the torts committed by his servant in doing his business even when his conduct is not blameworthy and he has used greatest possible case in choosing the servant?

- There are following four reasons:
- **Holmes Common Law Notion**: Servant's personality was merged in that of his family head i.e. master, survived the era emancipation.
- **Public Policy:** There ought to be a remedy against someone who can pay the damages.
- **Respondeat Superior:** It means the superior must be responsible or let the principal be liable. It means not only he who obeys but also he who commands be liable.



- **Qui Facit Per Alium Facit Per Se**
- It means ‘he who acts through another is deemed in law as doing it himself’.
- **Bartonshill Coal Co. v. McGuire**, (1858) 3 Macq 300

  Chelmsford L.C. observed: “It has long been the established law that a master s liable to third for any injury or damage done through the negligence or unskilfulness of a servant acting in his master’s employ. The reason of this is, that every act which is done by a servant in the course of his duty is regarded as done by his master’s orders, and, consequently it is the same as if it were the master’s own act, according to the maxim qui facit per alium facit per se.”



A. Master and Servant

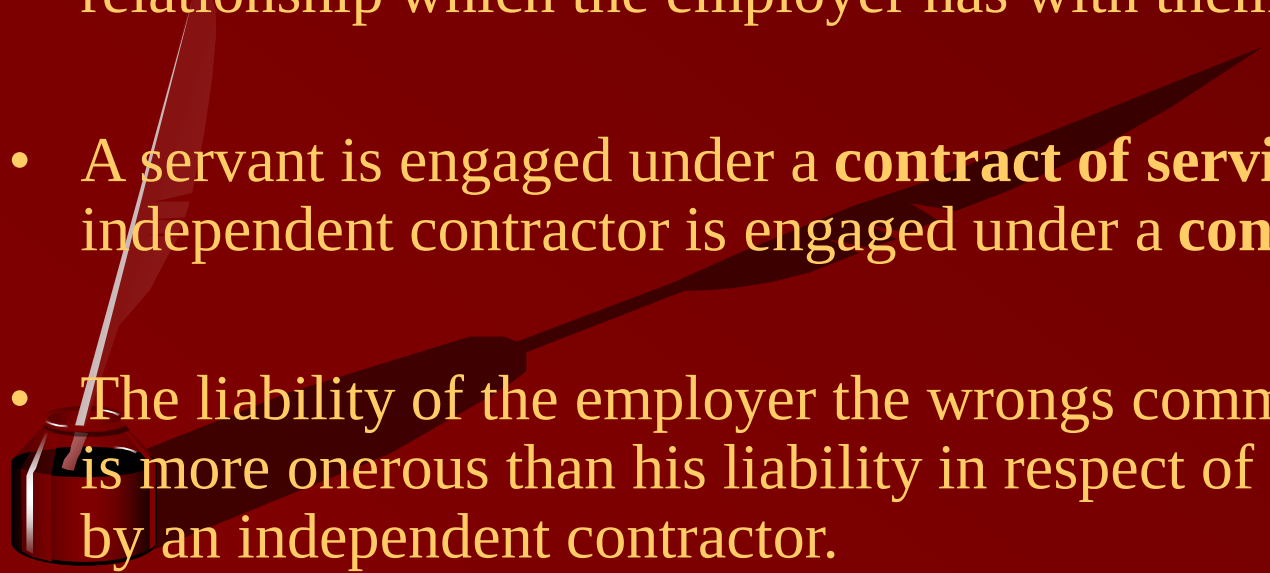
- To make the master liable for the torts committed by the servant, following conditions should be satisfied:

- Tort is committed by the servant;

- The servant committed the tort while acting in the course of employment of his master

Who is a servant?

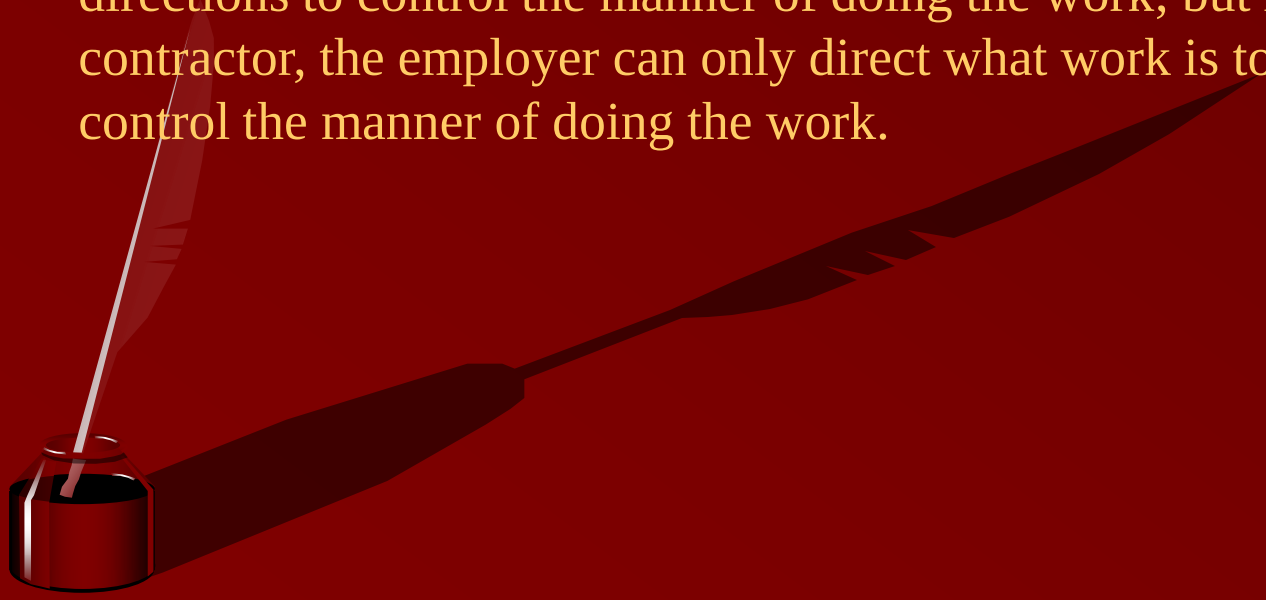
- Servant and Independent Contractor
- A servant and independent contractor are both employed to do some work of the employer but there is a difference in the legal relationship which the employer has with them.
- A servant is engaged under a **contract of service** whereas an independent contractor is engaged under a **contract for services**.
- The liability of the employer the wrongs committed by his servant is more onerous than his liability in respect of wrongs committed by an independent contractor.



Why is it so?

- **Traditional View**

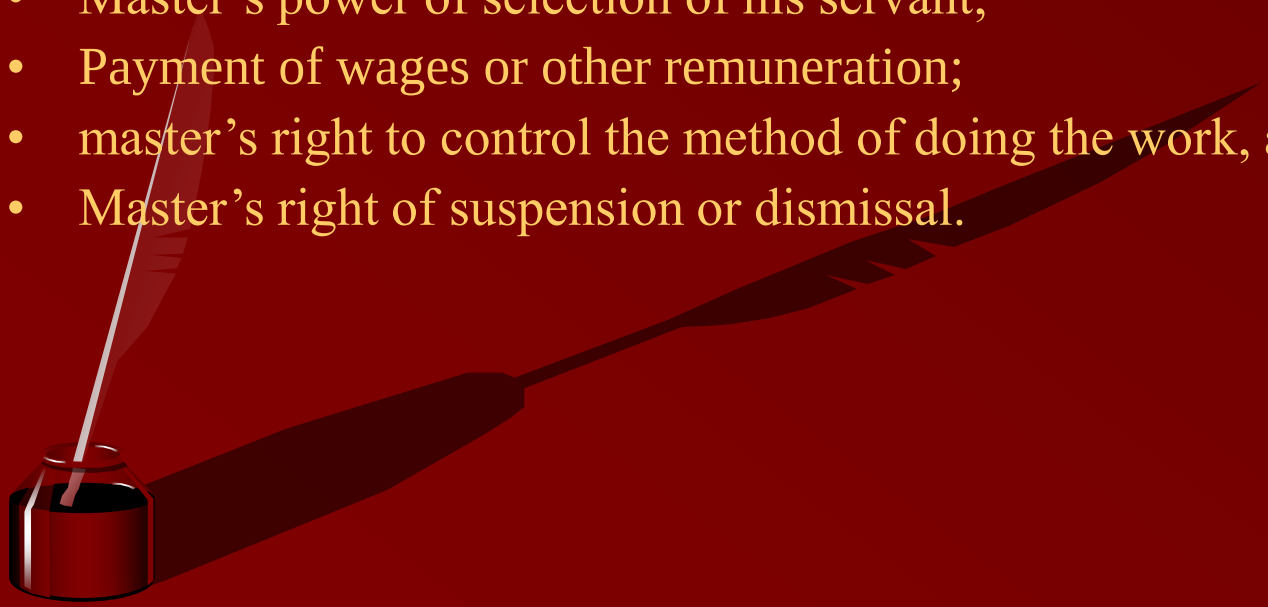
- The traditional mode of stating the distinction is that in case of a servant, the employer in addition to directing what work the servant is to do, can also give directions to control the manner of doing the work; but in case of an independent contractor, the employer can only direct what work is to be done but he cannot control the manner of doing the work.



- **Short V. J. & W. Henderson Ltd.**, (1946) 62 TLR 427 (HL)

- ***Lord Thankerton*** pointed out four indicia of a contract of service:

- Master’s power of selection of his servant;
- Payment of wages or other remuneration;
- master’s right to control the method of doing the work, and
- Master’s right of suspension or dismissal.



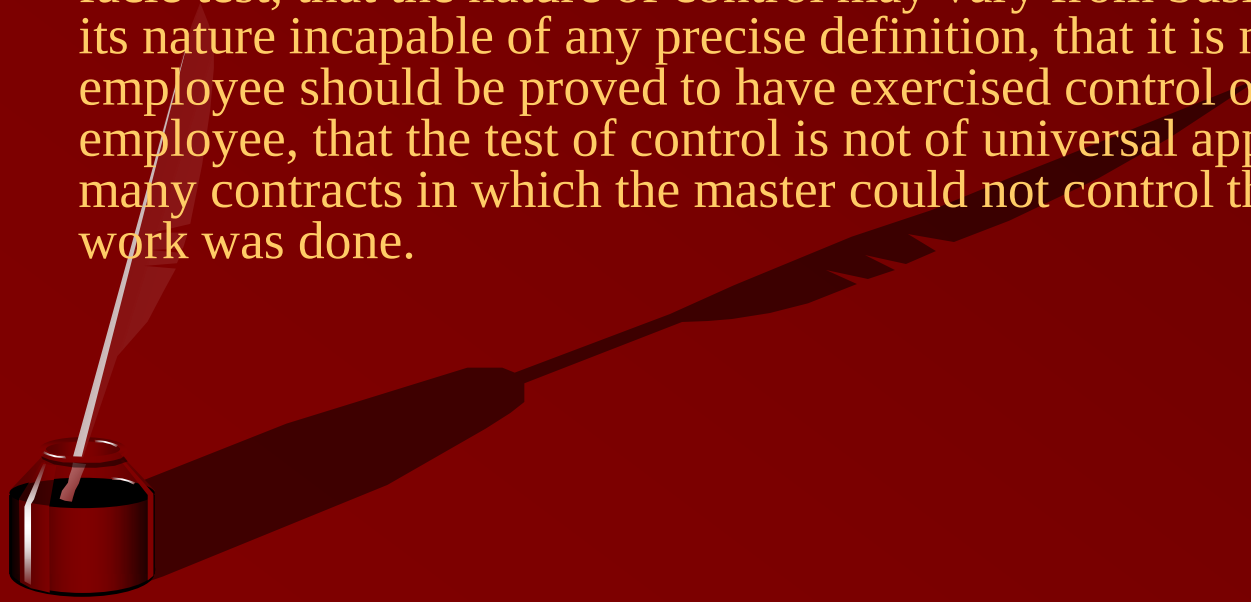
- **Modern View**

- The test of control as traditionally formulated was based upon the social conditions of an earlier age and “was well suited to govern relationships like those between a farmer and an agricultural labourer, a craftsman and a journeyman, a householder and a domestic servant and even a factory owner and a unskilled hand.”

- When it comes to skilled and particularly professional work, it has been not treated as an exclusive test.

- **Dharangadhara chemical Works Ltd. v. State of Saurashtra**, AIR 1957 Sc 264

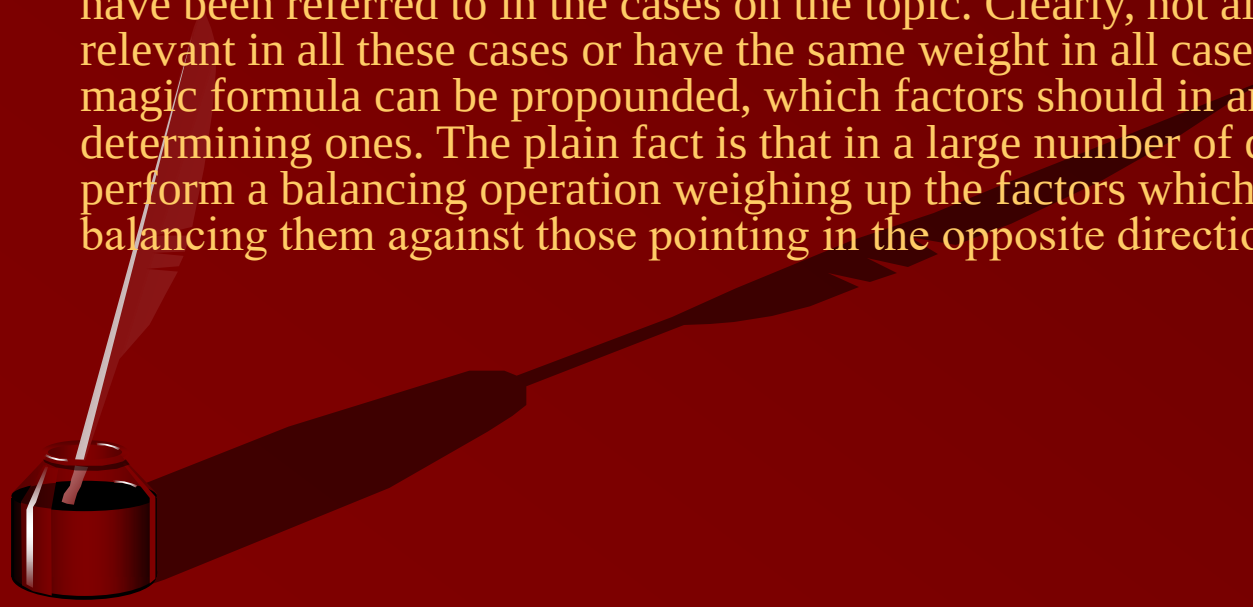
- The Supreme Court laid down that the existence of the right in the master to supervise and control the execution of the work done by the servant is a prima facie test, that the nature of control may vary from business to business and is by its nature incapable of any precise definition, that it is not necessary that the employee should be proved to have exercised control over the work of the employee, that the test of control is not of universal application and that there are many contracts in which the master could not control the manner in which the work was done.



Silver Jubilee Tailoring House v. chief Inspector of Shops, (1974) 3 SCC 498

- The Supreme Court observed:

- “In recent years the control test as traditionally formulated has not been treated as an exclusive test. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the Court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction.”



- Consistent with the control test which was earlier followed; in **Hillyer v. St. Bartholomew's Hospital**, (1909) 2 KB 820, a hospital authority was not held liable for the negligence of its staff in matters requiring professional skill.

- However with the change in situation that the control test is not decisive in all cases and it breaks down when applied to skilled and professional work, in

- **Gold v. Essex County Council**, (1942) 2 KB 293;
- **Collins v. Hertfordshire County Council**, (1947) KB 598;
- **Cassidy v. Ministry of Health**, (1951) 2 KB 343;
- **Roe v. Minister of Health**, (1954) 2 QB 66;
- **Amalgamated Coal field Ltd. v. Mst. Chhotibhai**, (1973) ACJ 365,
- Hospital authorities are held liable for negligence of its professional staff and distinction earlier drawn between professional duties and ministerial or administrative duties has been disapproved.

- In **Santa Garg v. Director National Heart Institute**, (2004) 8 SCC 56,

- The Supreme Court with approval the following proposition form Denning L.J.'s Judgment in Cassidy's case observed:

- "The hospital authority is liable for the negligence of professional men employed by the authority under contract for service as well as under contract of service. The authority owes a duty to give proper treatment-medical, surgical, nursing and the like-and thought it may delegate the performance of that duty to those who are not its servants, it remains liable if the duty be improperly or inadequately performed by its delegates".

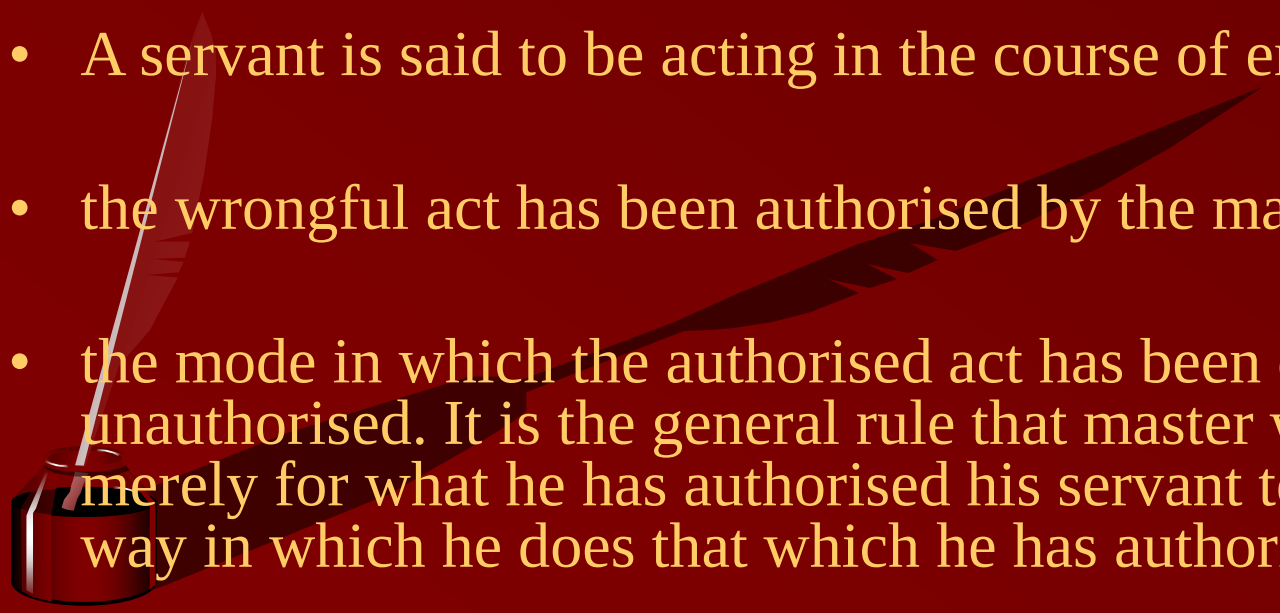
Extent of Liability

- The law is settled that a master is vicariously liable for the act of his servants acting in the course of employment. In other words, unless the act is done in the course of employment, the servant's act does not make the employer liable.

- A servant is said to be acting in the course of employment if:

- the wrongful act has been authorised by the master; or

- the mode in which the authorised act has been done is wrongful or unauthorised. It is the general rule that master will be liable not merely for what he has authorised his servant to do but also for the way in which he does that which he has authorised to do.



- **Olga Hall v. Kingston and Andrew Corporation**, AIR 1941 PC 103

- A Municipal Corporation was held liable for the negligence of its servant in driving a car belonging to the Corporation on the Corporation's business.

- **Subbiah Reddy v. T. Jordan**, AIR 1945 PC 168

- The owner of a car was held liable for the negligence of his son, who was employed in the owner's business, in driving the car which at the time of the accident was being demonstrated to one about to join the business.

- **Amita Bhandari v. Union of India**, AIR 2004 Guj 67

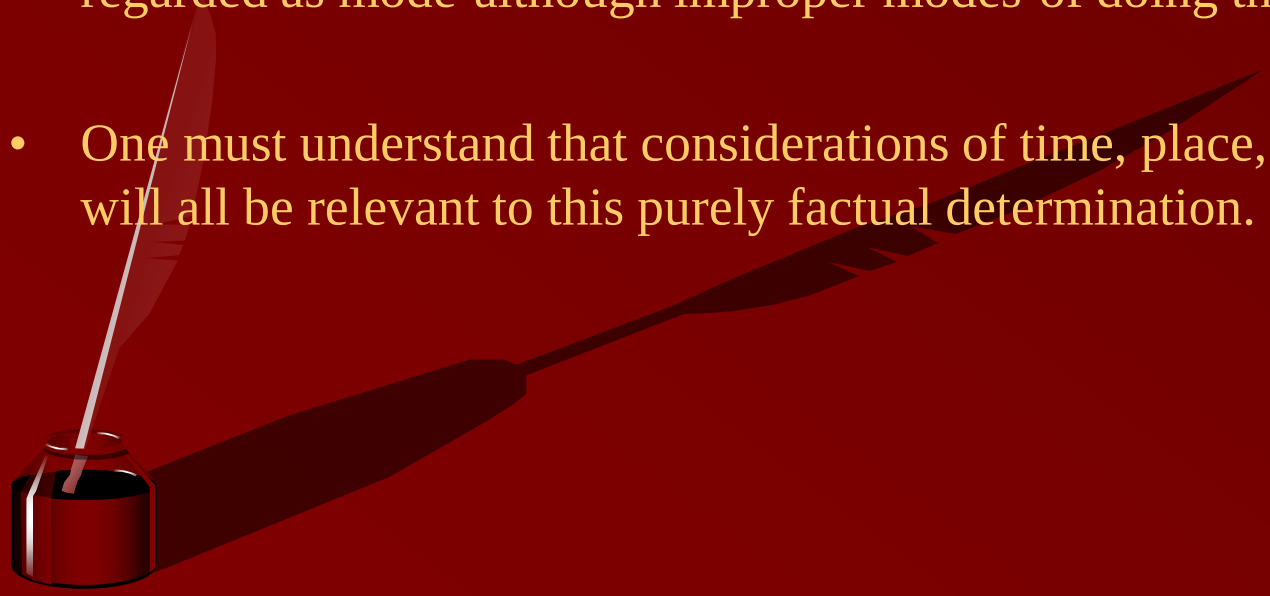
- A Bank was held liable when a security guard on duty by mistake shot a customer believing that he would steal the cash box which had just arrived.

Liability of Master for Servant's Unauthorised Acts

- **Salmond**

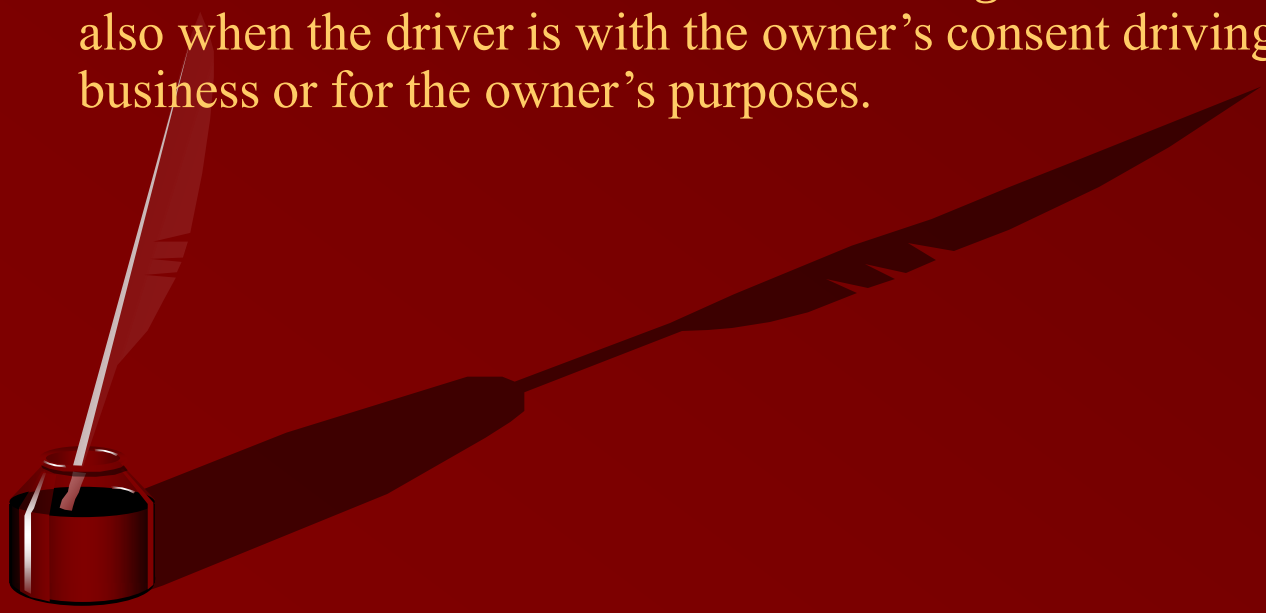
- "A master is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as mode-although improper modes-of doing them.

- One must understand that considerations of time, place, equipment and purpose will all be relevant to this purely factual determination.



- **Pushpabai Purshottam Udeshi v. M/S Ranjit Ginning & Pressing Co. Pvt. Ltd.** AIR 1977 SC 1735,

- The Supreme Court held that the owner is not only liable for the negligence of the driver if that driver is his servant acting in the course of his employment but also when the driver is with the owner's consent driving his car on owner's business or for the owner's purposes.



- **State of Maharashtra v. Kanchanmala Vijaysing Shirke**, AIR 1995 SC 2499

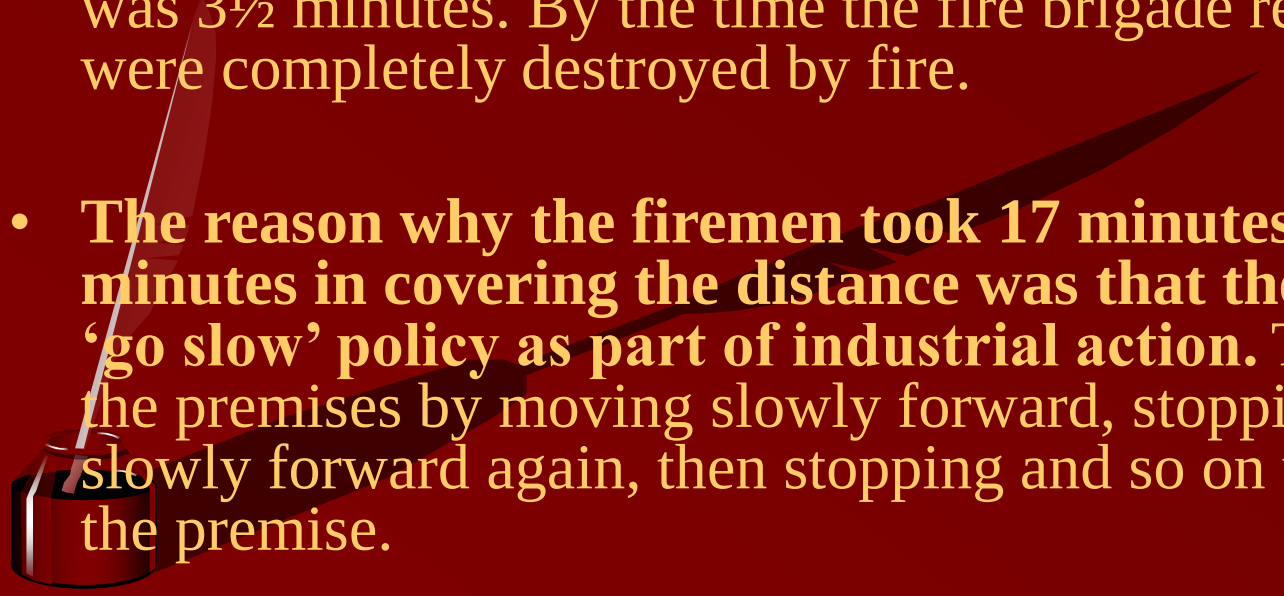
- It was held by the court that if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of the employment but has gone outside of it.

- E.g. A, master, allows, B, servant to take his vehicle so that he can come early and join duties. B while at home allows his son C to drive. C negligently injures D, a passer-by. In this case, A can not be held liable as he only authorised taking of the vehicle so that he returns early to work.

General Engineering Services Ltd. v. Kingston and Saint Andrew Corporation, (1988) 3 All ER 867

- The appellants owned certain premises at Kingston, Jamaica. A fire broke out in the said premises on which the premises the appellants promptly informed the local fire brigade. The fire brigade took 17 minutes in reaching the appellants' premises which was at a distance of 1½ miles. The normal time for covering this distance was 3½ minutes. By the time the fire brigade reached, the premises were completely destroyed by fire.

- **The reason why the firemen took 17 minutes instead of 3½ minutes in covering the distance was that they were operating a 'go slow' policy as part of industrial action.** They had driven to the premises by moving slowly forward, stopping, then moving slowly forward again, then stopping and so on until they reached the premise.



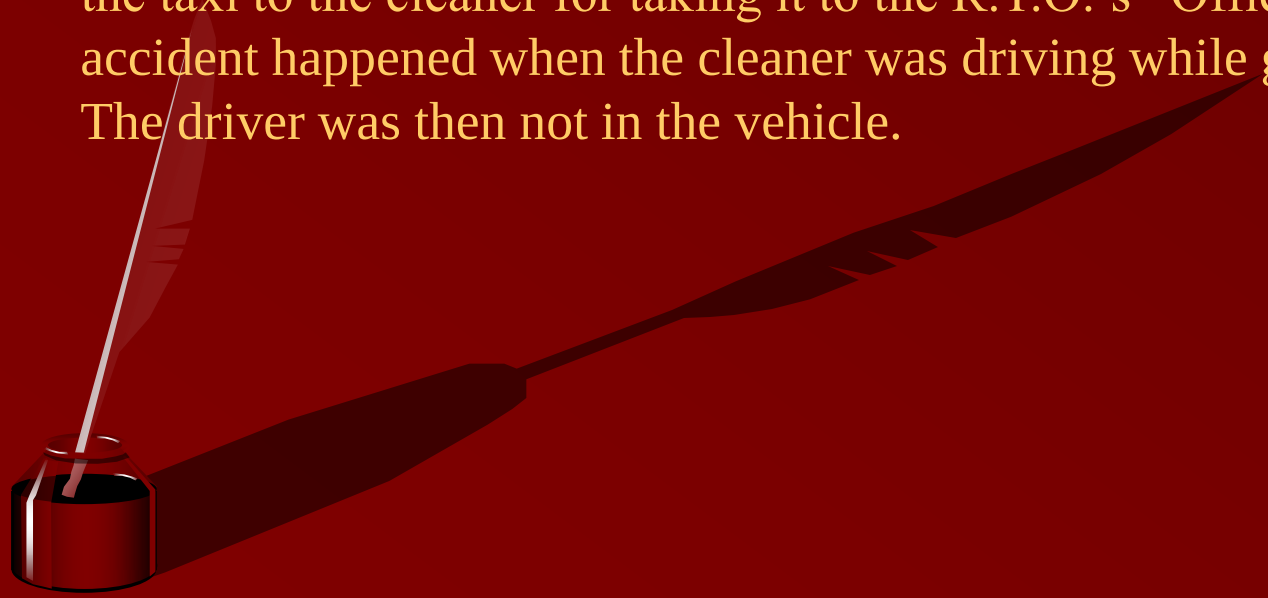
- Questions were whether the respondent, as employers of the firemen, were vicariously liable to the appellants or whether the firemen acted in the course of employment.

- **The Privy Council observed**:

- “Their (the firemen’s) unauthorised and wrongful act was to prolong the time taken by the journey to the scene of the fire, as to ensure that they did not arrive in time to extinguish it, before the building and its contents were destroyed. Their mode and manner of driving, the slow progression of stopping and starting, was not so connected with the authorised act, that is driving to the scene of the fire as expeditiously as reasonably possible, as to be a mode of performing that act.”

- **Sitaram Motilal Kalal v. Santanuprasad Jaishankar Bhatt**, (1966) ACJ 89 (SC)

- The owner had entrusted his car to a driver for plying it as a taxi. The driver lent the taxi to the cleaner for taking it to the R.T.O.'s Office for driving test. The accident happened when the cleaner was driving while giving the driving test. The driver was then not in the vehicle.

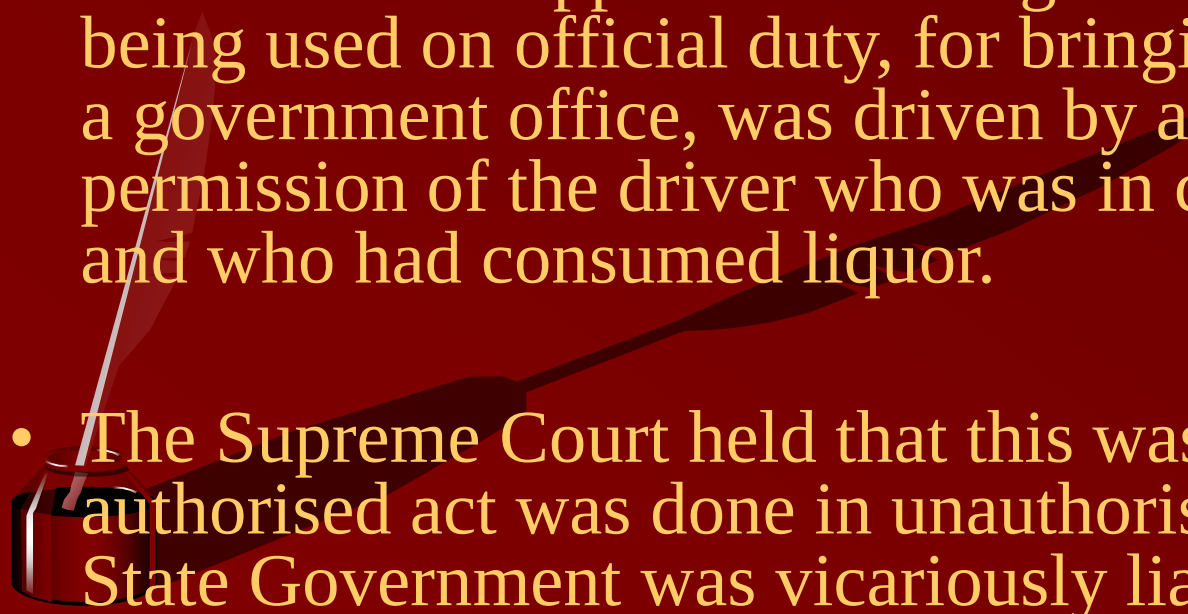


- It is clear from the fact that at the time the accident happened, the car was not being used as a taxi for the owner’s business. The car was then engaged in the work of the cleaner which had no connection whatsoever with the owner’s business. The driver in lending the car to the cleaner for taking a driving test did an act which he was not employed to perform and thus clearly acted beyond the scope of his employment which was to drive the car as a taxi. The owner was, therefore, held not liable.

- **State of Maharashtra v. Kanchanmala Vijaysing Shirke**, AIR 1995 SC 2499

- The accident happened when a government jeep while being used on official duty, for bringing the employees of a government office, was driven by a clerk with the permission of the driver who was in charge of the vehicle and who had consumed liquor.

- The Supreme Court held that this was a case where an authorised act was done in unauthorised manner and the State Government was vicariously liable.



- **Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan**, (1987) 2 SCC 654

- The driver of a truck while on masters business left the truck with the engine running in charge of the cleaner and went to a nearby shop for bringing snacks and the accident happened while the cleaner was on the wheels, the master and the insurance company were both held liable.

- In the absence of any prohibition, it may be possible from the circumstances to infer authority in the servant to do certain acts not covered by any positive direction. Thus acts done within the implied authority will obviously be in the course of employment.

- **Pushpabai Purshottam Udeshi v. Ranjit ginning & Pressing Co. Pvt. Ltd.** AIR 1977 Sc 1735

- The manager of the defendant company was driving a car of the company on its journey from Nagpur to Pandhurna on the Company's business. The manager took one Purshottam as a passenger in the car. The car met with an accident because of the negligence of the manager in driving the car and Purshottam died.

- The High Court negatived the claim of the dependants of the deceased against the Company on the reasoning that the manager in taking the deceased as a passenger was not acting in the course of employment.

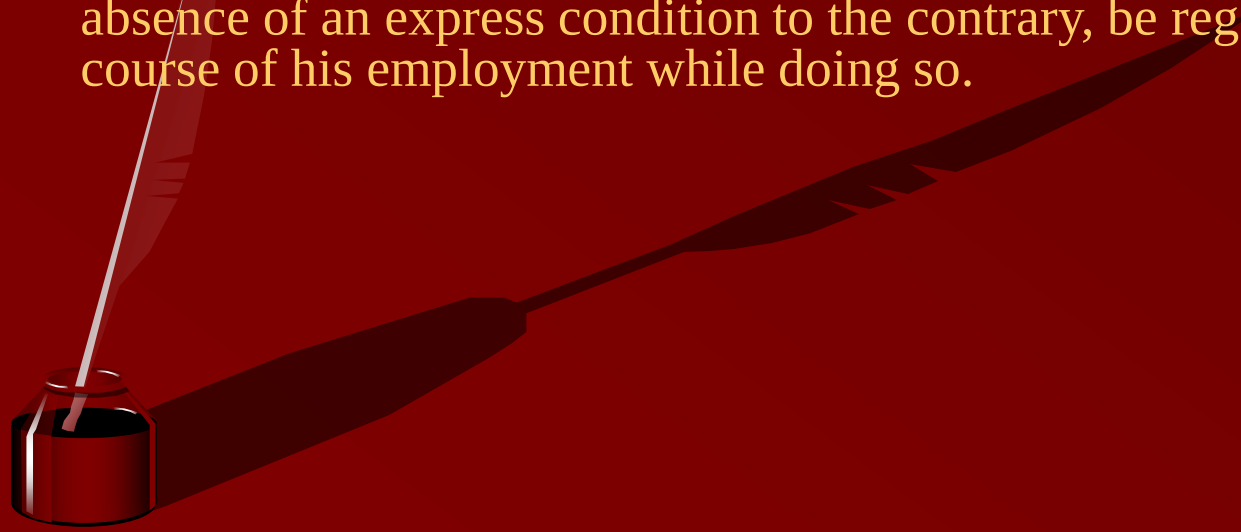
- The Supreme Court reversed the High Court's Judgment and observed:

- "In the present case a responsible officer of the Company, the manager, had permitted Purshottam to have a ride in the car. Taking into account the high position of the driver who was the manager of the Company, it is reasonable to presume, in the absence of any evidence to the contrary that the manager had authority to carry Purshottam and was acting in the course of employment."

Whether a servant while going to the place of work or returning therefrom acts in the course of his employment

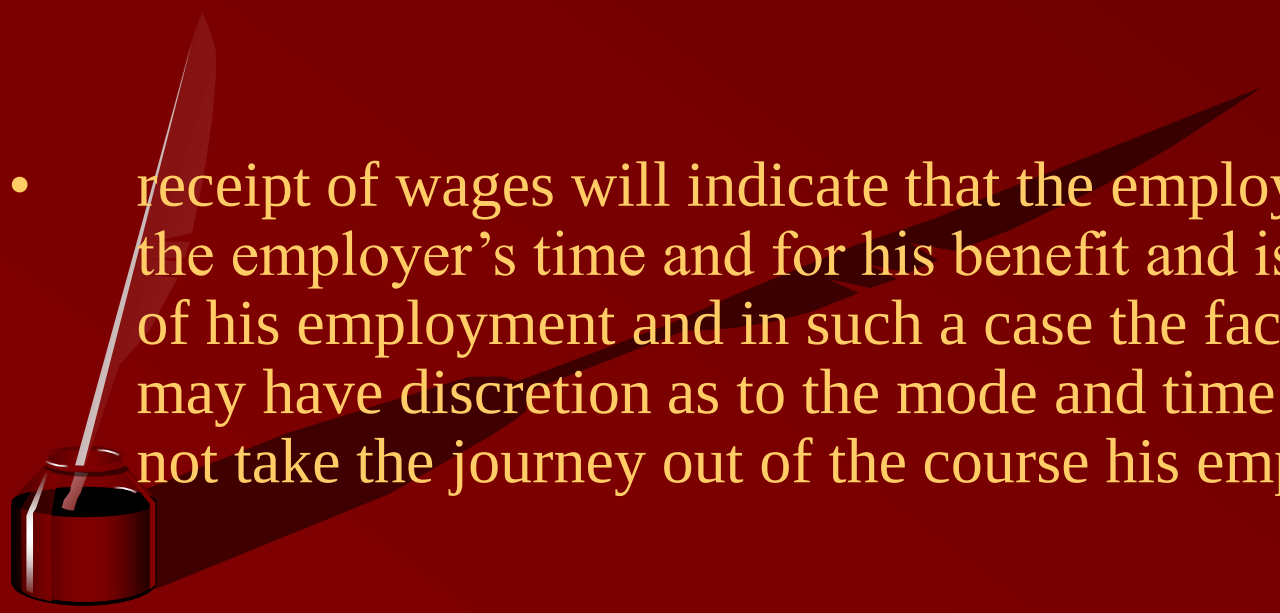
- In **Smith v. Stages**, (1989) 1 All ER 833 (HL), the House of Lords has formulated some general principles to these questions.

- an employee travelling from his ordinary residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment. But if he is obliged by his contract of service to use the employer's transport, he will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so.



- Travelling in the employer’s time between workplaces or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces, will be in the course of employment.

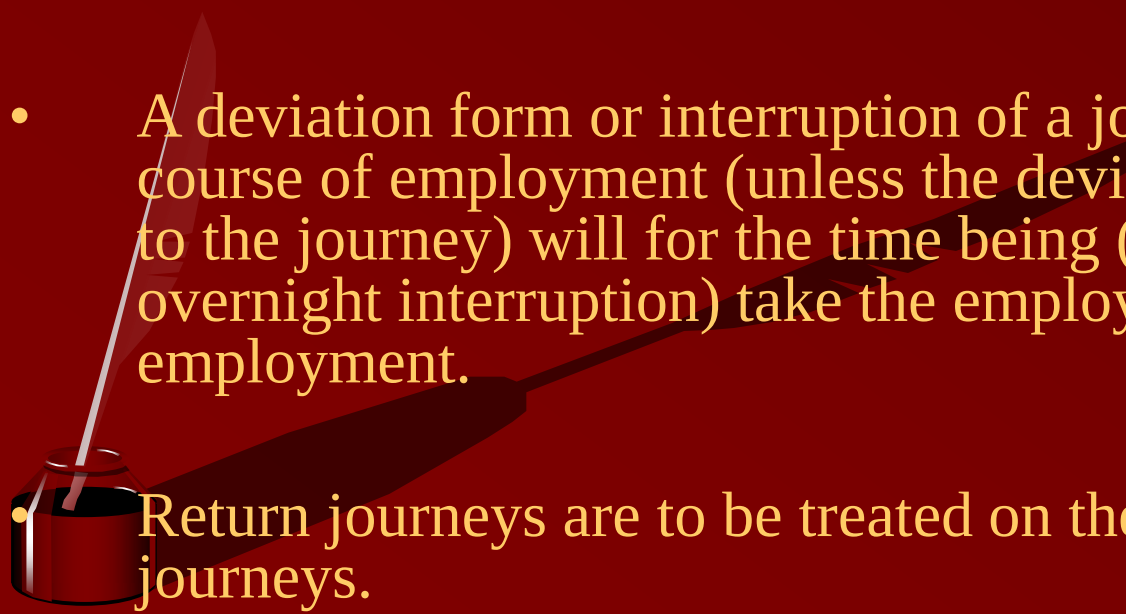
- receipt of wages will indicate that the employee is travelling in the employer’s time and for his benefit and is acting in the course of his employment and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course his employment.



- An employee travelling in the employer’s time from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to the scene of an emergency, such as fire, an accident or mechanical breakdown of plant, will be acting in the course of employment.

- A deviation form or interruption of a journey undertaken in the course of employment (unless the deviation is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of employment.

- Return journeys are to be treated on the same footing as outward journeys.



- **The above general propositions are subject to any express arrangements between the employer and the employee or those representing his interests. Further they are not intended to define the position of salaried employees, with regard to whom the touchstone of payment made in the employer's time is not generally significant.**

- **Regional Director E.S.I. Corporation v. Francis De Costa**, AIR 1997 SC 432

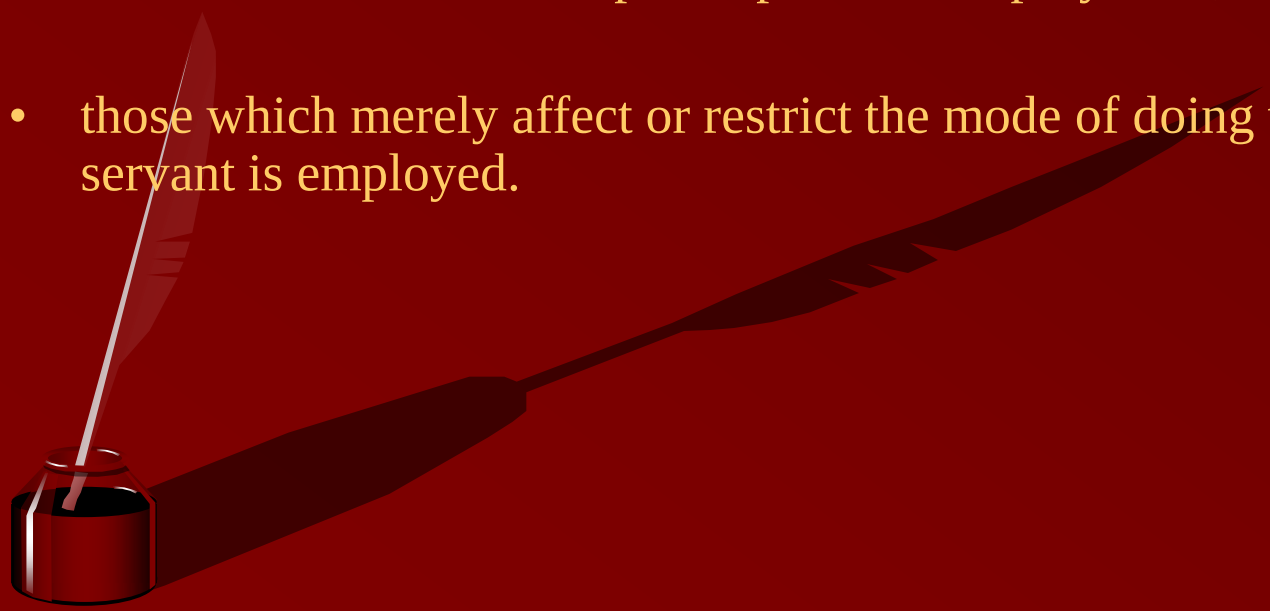
- An employee met with an accident while he was on his way the place of employment to join his duty. The accident occurred about one K.M. away from the factory when the employee riding a cycle was hit by a lorry of the employers. In a claim for disablement benefit under the Employee's State Insurance Act, 1948, it was held that the accident did not arise in the course of employment of the claimant and he was not entitled to disablement benefit under the Act.

Effect of Prohibition

- It is now the law that whenever a servant does an act which his employer has prohibited him from doing, the act so done falls outside the course of employment. Prohibition falls under two categories: -

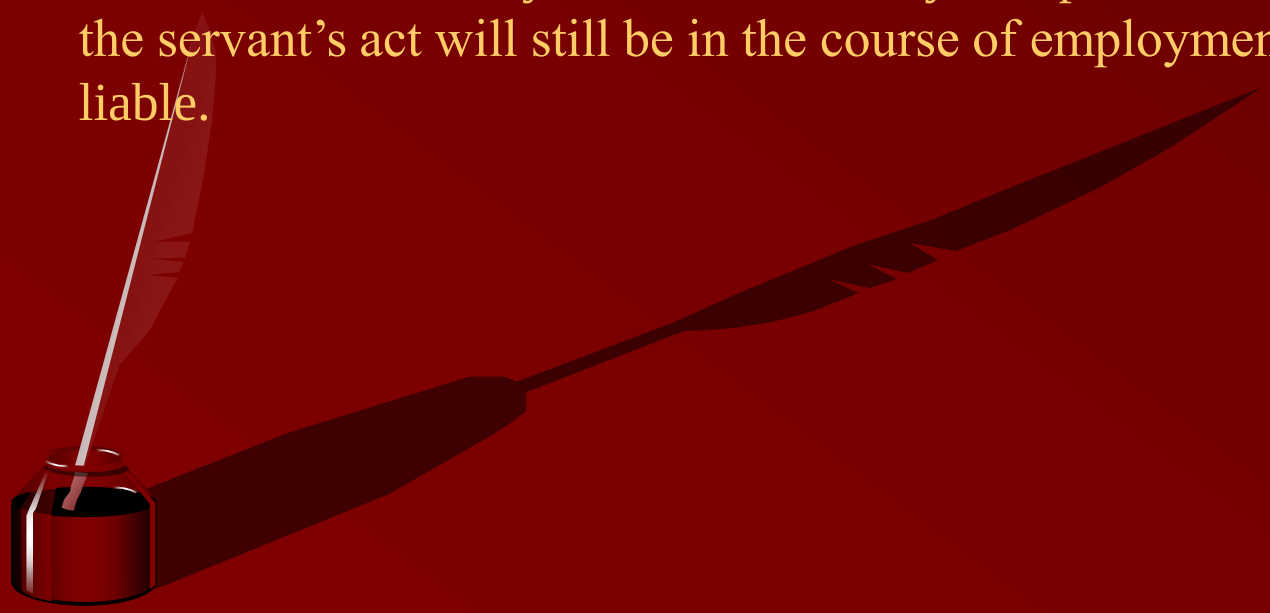
- those which limit the scope or sphere of employment; and

- those which merely affect or restrict the mode of doing the act for which the servant is employed.



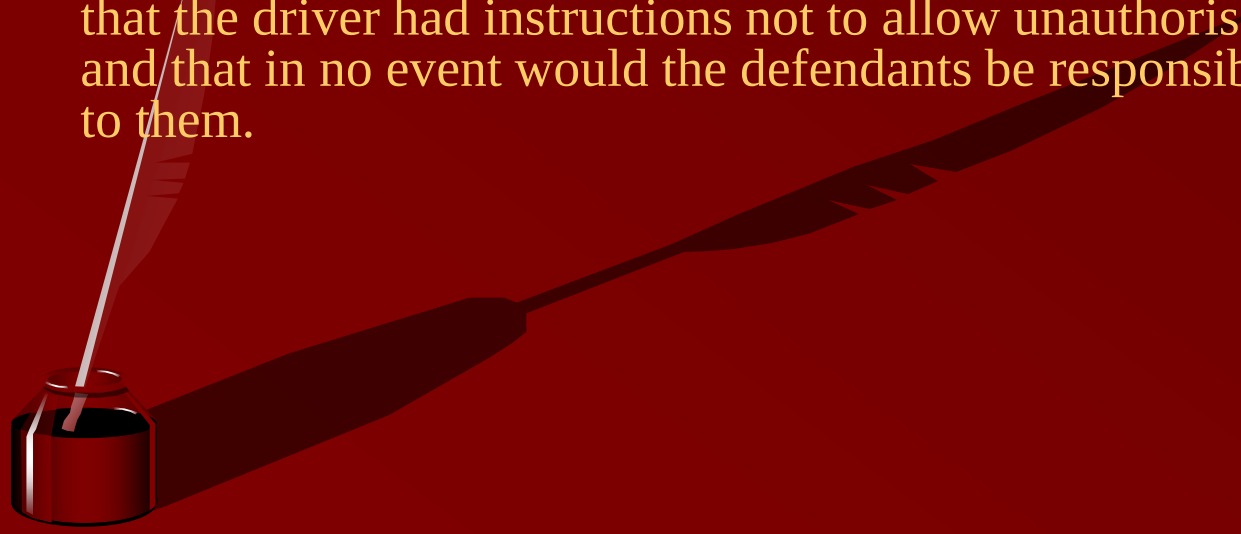
- If a servant violates a prohibition of the first category, his act will be outside the course of employment and the master will not be vicariously liable.

- But if the violation by the servant is only of a prohibition of the second category, the servant's act will still be in the course of employment making the master liable.



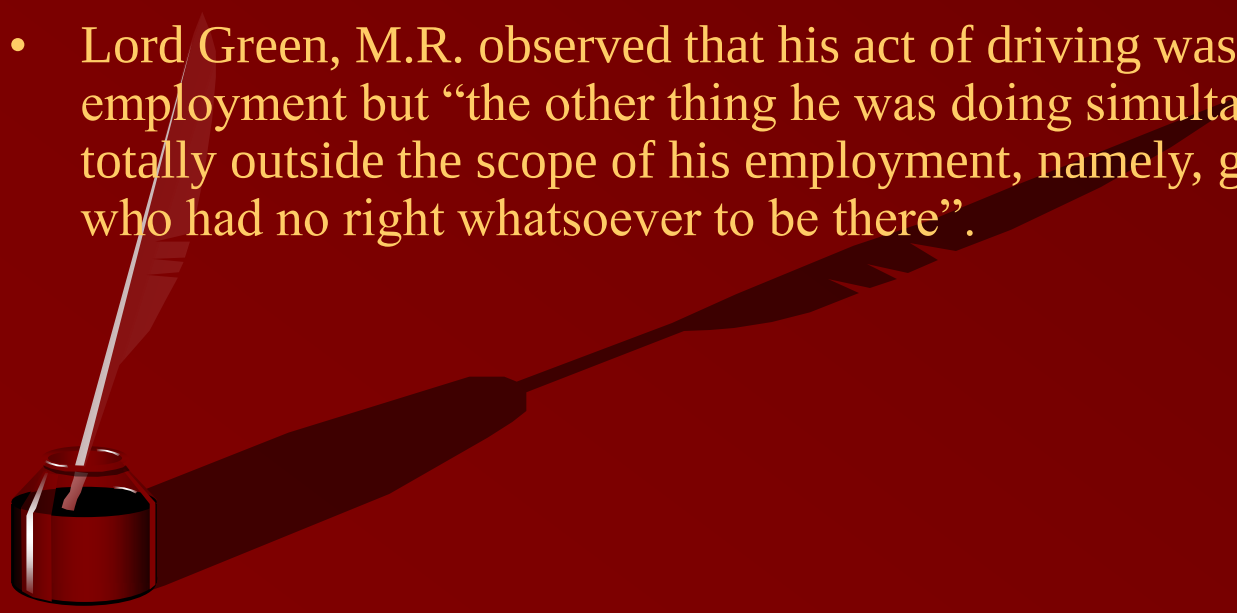
- **Twine v. Bean's Express Ltd.** (1946) 62 TLR 458

- The defendants provided for the use of a bank a commercial van and a driver on the terms that the driver remained the servant of the defendants and that the defendants accepted no responsibility for injury suffered by persons riding in the van who were not employed by them. There were two notices in the van, one stating that no unauthorised person was allowed on the vehicle, and the other, that the driver had instructions not to allow unauthorised travellers on the van, and that in no event would the defendants be responsible for damage happening to them.



- One person who was not authorised to ride in the van got a lift in the van with the consent of the driver. Owing to the negligence of the driver, there was an accident and that person was killed.

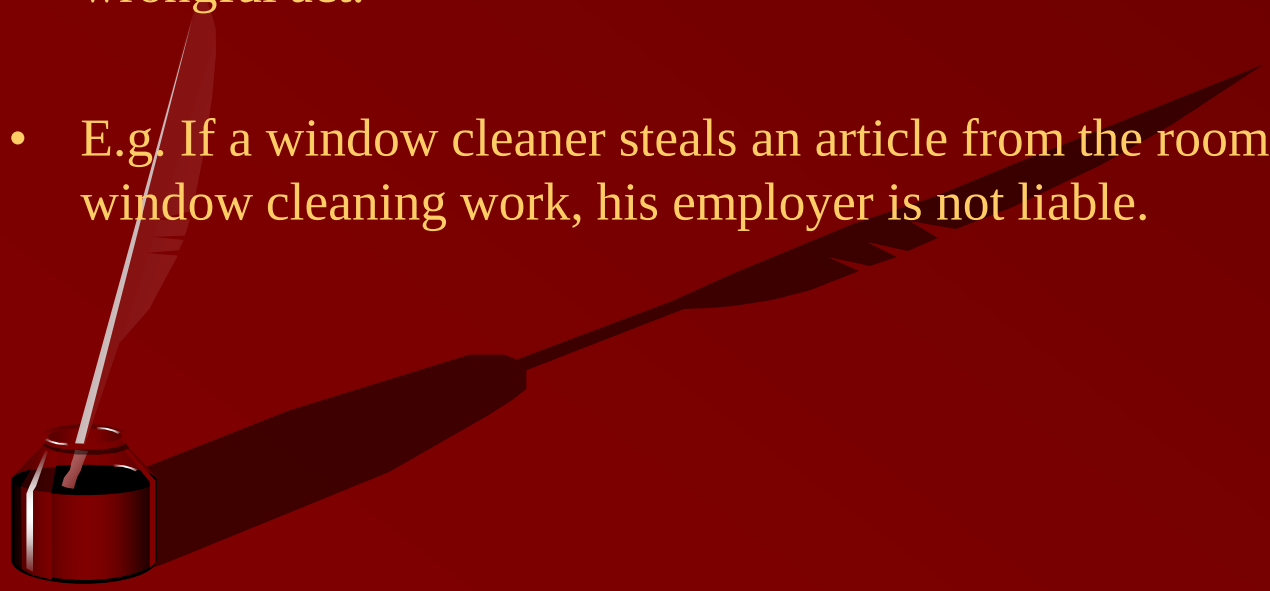
- Lord Green, M.R. observed that his act of driving was no doubt in the course of employment but “the other thing he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there”.



Dishonest and Criminal Acts

- A master is not liable for a dishonest or criminal act of his servant where the servant merely takes the opportunity afforded by his service to commit the wrongful act.

- E.g. If a window cleaner steals an article from the room where he is doing the window cleaning work, his employer is not liable.

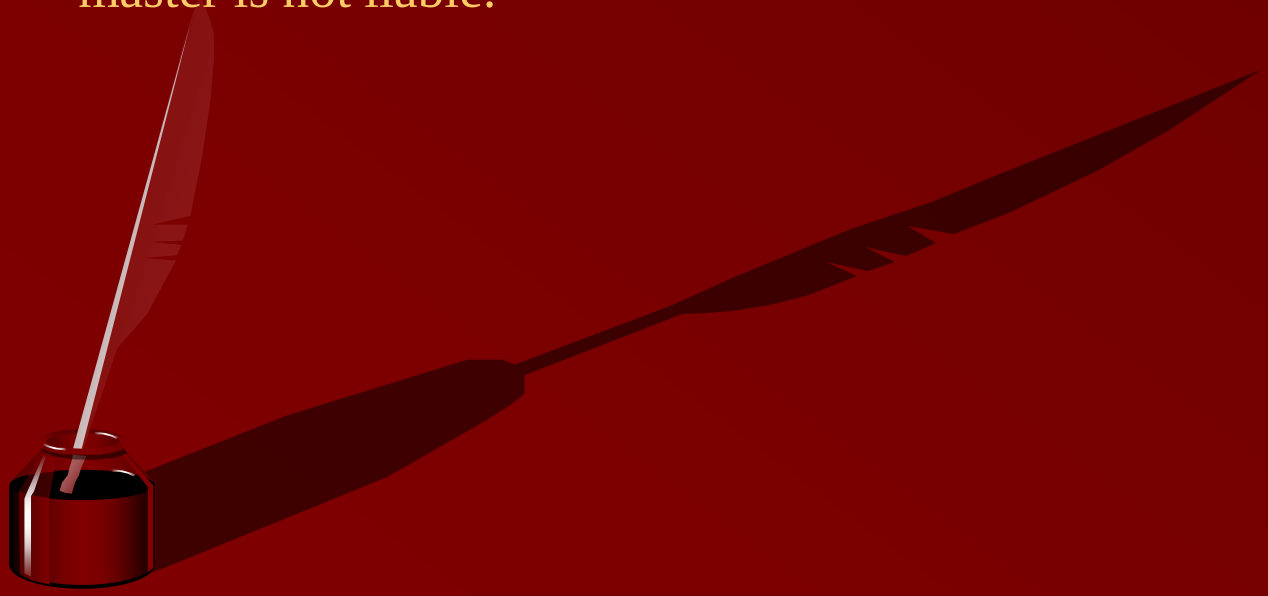


- **Barwick v. English Joint Stock Bank**, (1867) 2 Exch. 259

- The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master is proved.

- **Warren v. Henlys Ltd.** (1948) 2 All ER 935

- When a servant assaults another, whom he meets in the course of his work, out of personal vendetta, and the assault has no relation to the master’s work, the master is not liable.



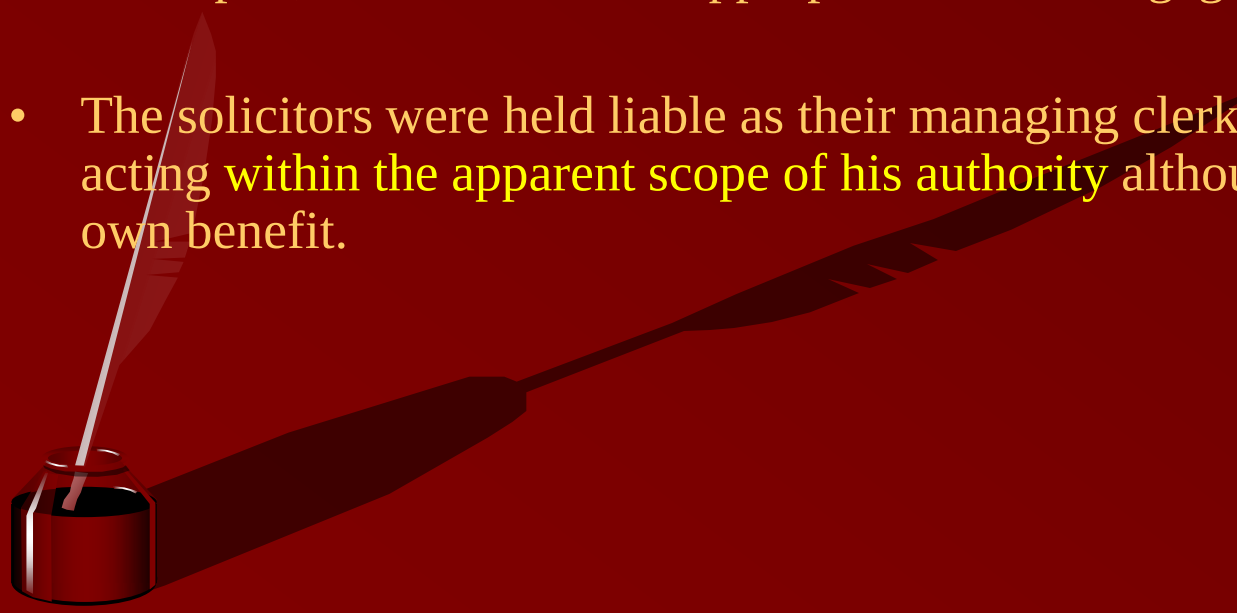
When is master liable for servant's dishonest and/or criminal acts?

- If the wrongful act is committed **for the benefit of the master** and while doing his business, the master is liable.
-
- The master will also be liable if the servant while doing the wrongful act was acting within the apparent scope of his authority even though the act was done for his own benefit or for the benefit of some person other than the master.

- **Lloyd v. Grace, Smith & Co.** (1912) AC 716

- The managing clerk of a firm of solicitors induced a client of the firm to transfer a mortgage to him by fraudulently representing the nature of the deed and, thereupon, obtained and misappropriated the mortgage money.

- The solicitors were held liable as their managing clerk in accepting the deed was acting within the apparent scope of his authority although fraudulently for his own benefit.



State Bank of India v. Shyama Devi, AIR 1978 SC 1263

- The plaintiff who had a saving bank account with the Bank, handed over a cheque and cash to an employee of the Bank who was a neighbour and friend of the plaintiff's husband with a letter of instructions and pass book for being credited to her account. The employee misappropriated the amount and made false entries in the pass book. The employee was not in the charge of the savings bank counter and the cheque and cash were not handed over to the counter clerk concerned.

- The Supreme Court held that the Bank was not liable for the fraud of the employee. The employee concerned here had no actual or apparent authority to accept on behalf of the Bank cheque or cash for being deposited in savings bank accounts and the money was not received by him in the normal course of business of the Bank.

- **Morris v. C. W. Martin & Sons Ltd.** (1965) 2 All ER 725

- The plaintiff delivered her mink stole to one Bedser for getting it cleaned who with the permission of the plaintiff delivered it to the defendants for that purpose. The defendants' servant who was entrusted with the job instead of cleaning it stole it. The defendants were held liable for the theft of the article as it was in the course of employment.

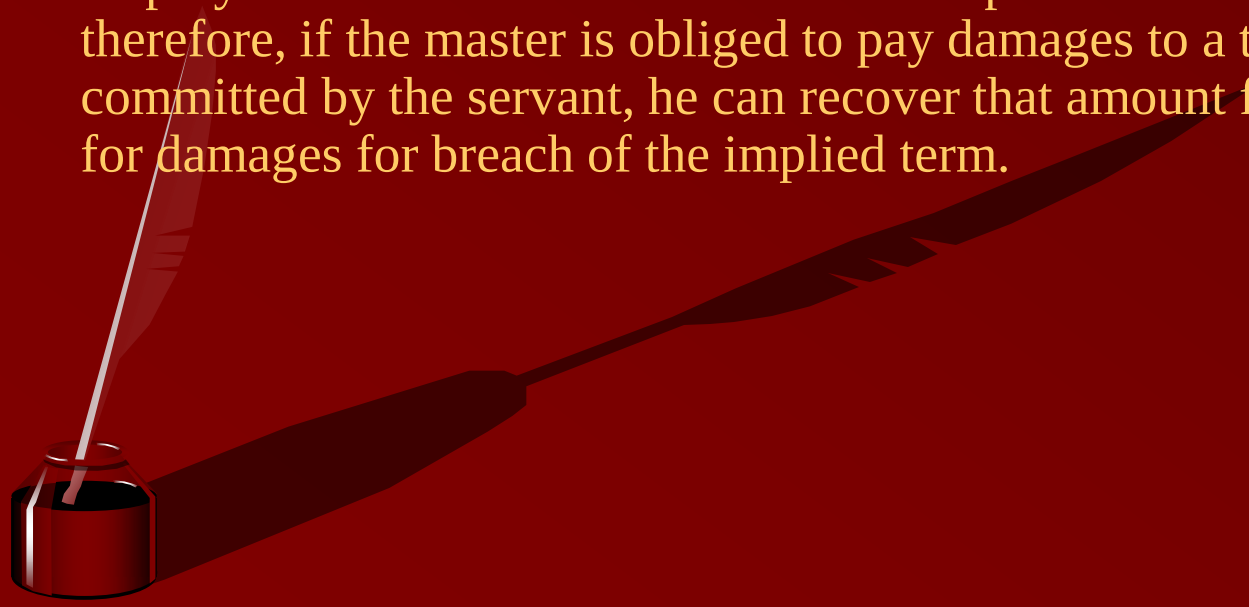
Lister v. Hesley Hall Ltd. (2001) 2 All ER 769 (HL)

- The plaintiffs were resident for a few years at a school for boys with emotional and behavioural difficulties, owned by the defendants who employed a person to take care of the boys as warden of the school's boarding house. The warden systematically sexually abused the plaintiffs while they were resident at the school.

- In holding the defendants vicariously liable the court held that the defendant had undertaken to care for the boys through the services of the warden and there was a very close connection between his employment and his torts which were committed in the premises of the defendants while he was busy caring for the children in performance of his duties.

Master’s right to recover damages from servant

- The law implies a term in contract between employer and employee that the employee will exercise reasonable care in performance of his work and, therefore, if the master is obliged to pay damages to a third party for wrongs committed by the servant, he can recover that amount from the servant in a suit for damages for breach of the implied term.



- **Lister v. Romford Ice and Cold Storage Co. Ltd.** (1957) AC 555

- A lorry driver employed by a company took his father, a fellow servant, with him as a mate. In backing the lorry, he injured his father by negligent driving. The father recovered damages in an action against the company for the negligence of the driver. The company then brought an action against the driver claiming that, as joint tortfeasor, it was entitled

- 1. to contribution from him under section 6 of the Law Reform (Married Women and Tortfeasor's) Act, 1935 and
- 2. to damages for breach of an implied term in his contract of service that he would use reasonable care and skill in driving .

- The House of Lords held that the driver was under a contractual obligation of care to his employer in the performance of his duty as a driver and that the Company was entitled to recover from the driver damages for breach of that contractual obligation even if the employer had insurance cover against his liability to the party injured by the negligence of the servant.

- **Lucknow Development Authority v. M.K. Gupta**, AIR 1994 SC 787

- The Supreme Court held that when an officer of the government or a public authority acts maliciously and oppressively causing harassment and agony to the plaintiff, the government and authority made liable for damages must recover the amount from the officers who are responsible.

- The real reason is that when the government or a public authority is made to pay damages the burden really falls on the citizens as taxpayers and there is no justification for burdening them for malicious and oppressive conduct of the officers.

Employer and Independent Contractor

- **Who is an independent contractor?**

- An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result.

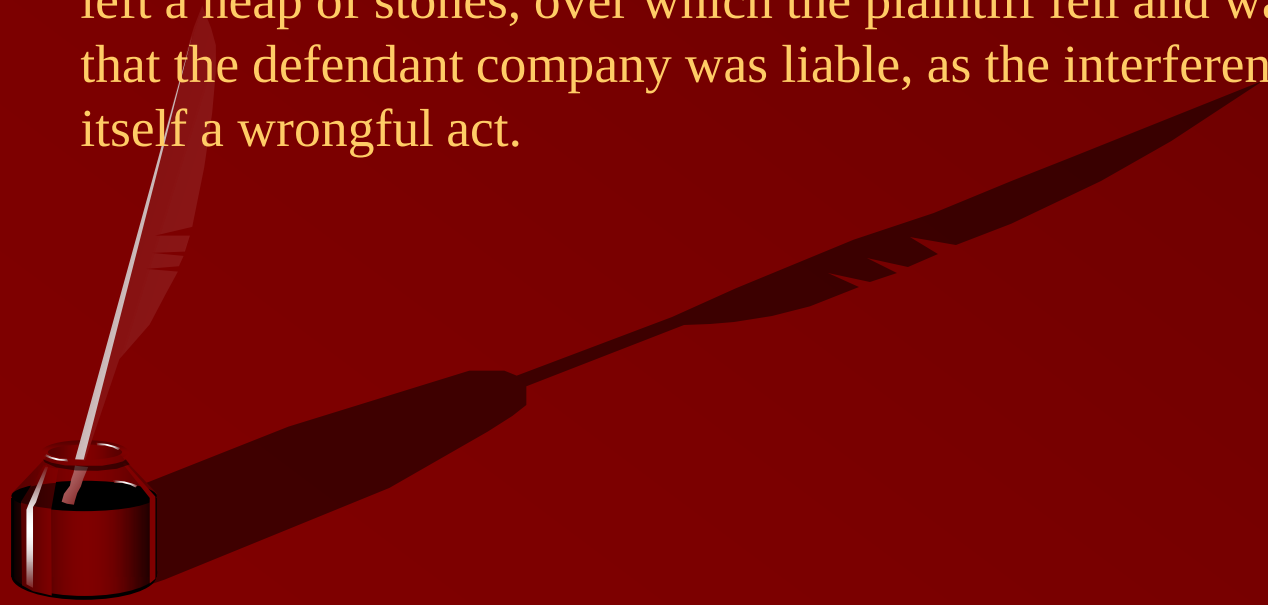
- Generally speaking, an employer is not liable for the torts of his independent contractor. There are following exceptions: -

- Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act which occasion the damage;

- Where the thing contracted to be done is itself wrongful. In such case the employer is responsible for the wrong done by the contractor or his servants, and is liable to third persons who sustain damage from the wrong doing.
- e.g. If a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house.

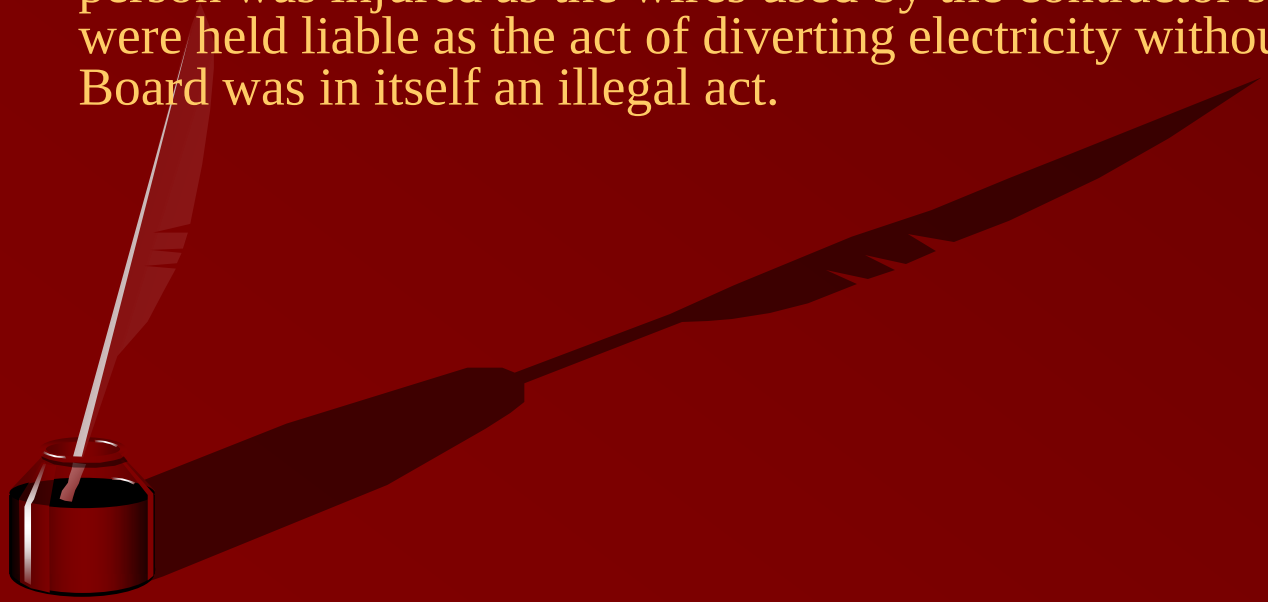
- **Ellis v. Sheffield Gas Consumers Co.** (1853) 2 E & B 767

- A gas company, not authorised to interfere with the streets of Sheffield, directed their contractor to open trenches therein. The contractor's servant, in doing so, left a heap of stones, over which the plaintiff fell and was injured. It was held that the defendant company was liable, as the interference with the streets was in itself a wrongful act.



- **Patel Maganbhai Bapujibhai v. Patel Ishwarbhai Motibhai**, AIR 1984 Guj 69

- The trustees of a temple employed a contractor to get electric connection for use of lighting and mike arrangements in the temple from the well of an agriculturist without informing and obtaining the permission of the Electricity Board. A person was injured as the wires used by the contractor snapped. The trustees were held liable as the act of diverting electricity without permission of the Board was in itself an illegal act.

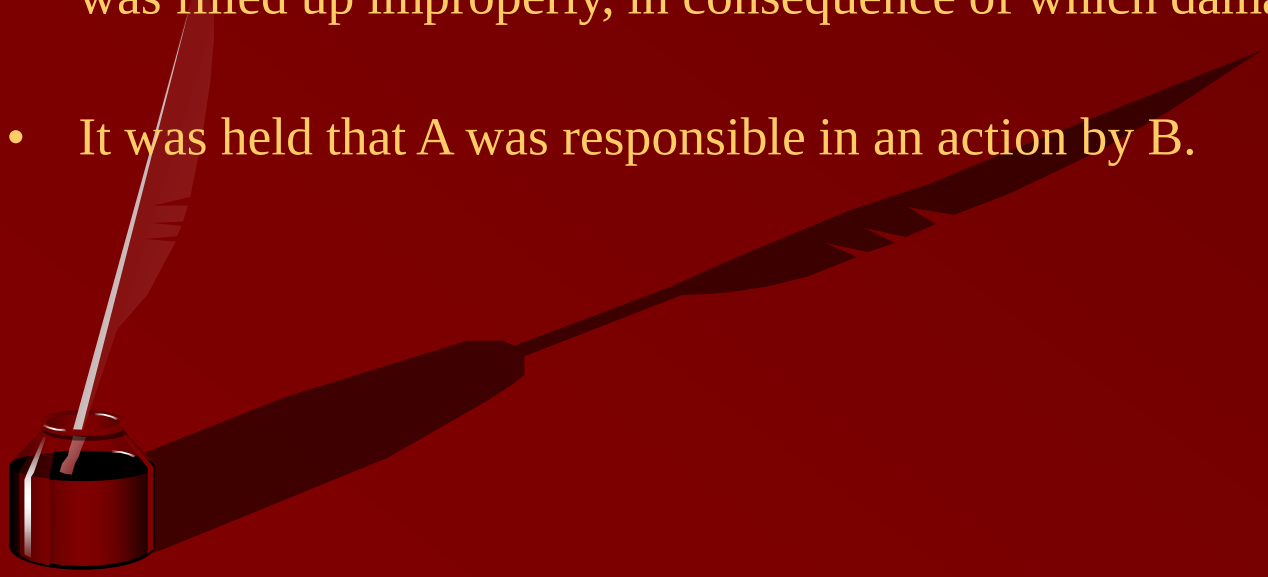


Where the legal or statutory duty is imposed on the employer, he is liable for any injury that arises to others in consequence of its having been negligently performed by the contractor.

- **Gray v. Pullen**, (1864) 5 B & S 970

- A was empowered under an Act to make a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B.

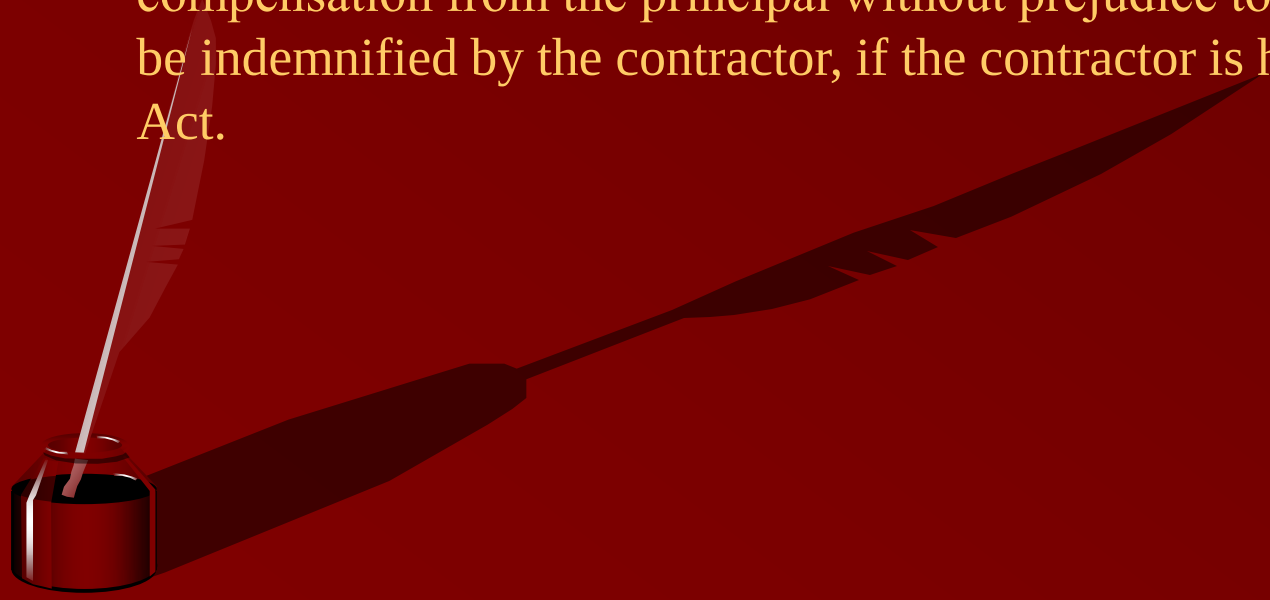
- It was held that A was responsible in an action by B.



- Where the work contracted to be done is from its nature likely to cause danger to others, in such cases there is a duty on the part of the employer to take all reasonable precautions against such danger, and if the contractor does not take these precautions, the employer is liable.

- Where liability is imposed by statute

- e.g. Under the provisions of the Workmen's Compensation Act, 1923, if the principal employs a contractor, such contractor's servants are able to recover compensation from the principal without prejudice to the principal's right to be indemnified by the contractor, if the contractor is himself liable under the Act.



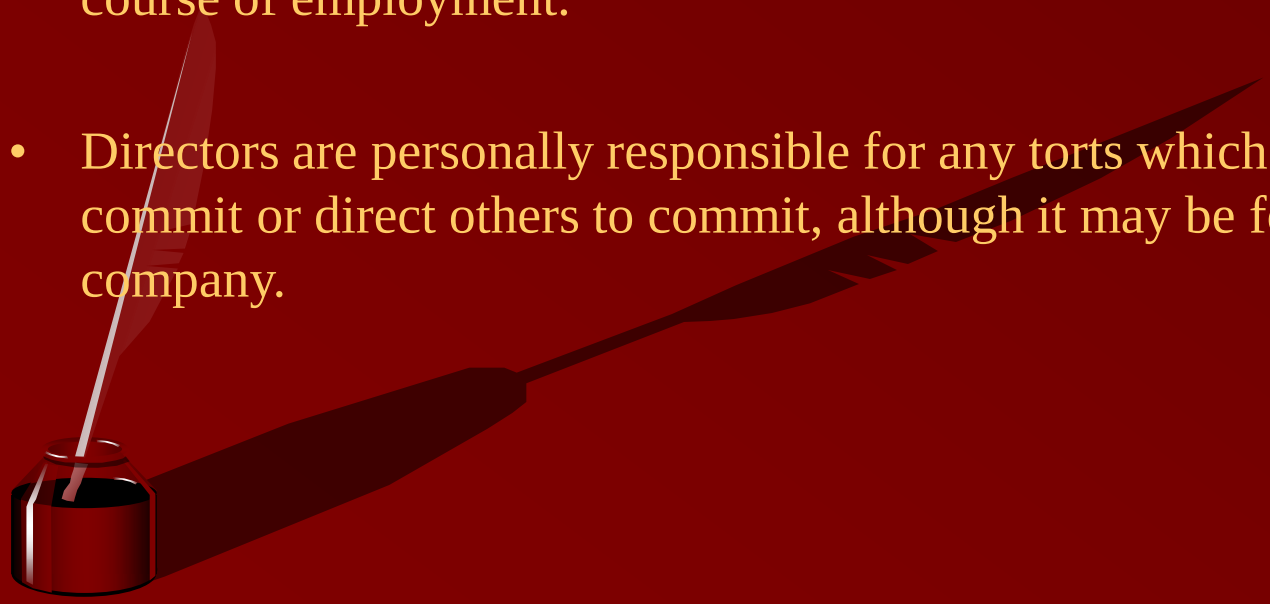
- **Principal and Agent**

- There is no special rules dealing with the liability of the principal for the torts committed by the agent and the rules discussed earlier in the context of master's liability for the torts of his servant apply here also.

- **Company and Director**

- The ordinary principles of agency apply to companies which are consequently liable for the negligence of their servants, and for torts committed by them in the course of employment.

- Directors are personally responsible for any torts which they themselves may commit or direct others to commit, although it may be for the benefit of their company.



- **Firm and Partner**

- Both under English and Indian Law, a firm is liable for torts committed by a partner in the ordinary course of the firm. The relation of partners inter se is that of principal and agent, and therefore each partner is liable for the act of his fellows.

- **Guardian and Ward**

- Guardian are not personally liable for torts committed by minors under their charge.

Thank You!