

# Vicarious Liability and Non-Delegable Duties

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**WHO IS  
ACCOUNTABLE**





# I Vicarious Liability

## A. Introduction

A person is liable not only for torts committed by himself, but also sometimes for the torts of others via his vicarious liability. That is: D pays for a tort committed *by* X against C.

This is the purest form of strict liability we have in tort law.

Traditionally, vicarious liability applies in respect of the acts committed by one's employees and not in respect of the acts committed by one's independent contractors.

The doctrine can be of immense importance in practical terms: imagine someone who is the victim of a botched medical operation in a public hospital.

## *Theoretical and Historical Excursus*

There are two basic ways in which vicarious liability can be understood:

- \* The master's tort theory (employee's **acts** are imputed to the employer)
- \* The servant's tort theory (employee's **liability/torts** are imputed to the employer)

The old authorities point both ways.

*Beaulieu v Finglam* (1401) YB Pas 2 (servant's tort)

“A man is bound to answer for his **servant's act**”

*Cf Bartonshill Coal Co v McGuire* (1858) 3 Macq 300 (master's tort)

“It has long been the established law of this country that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant ... [because] every act which is done by a servant ... is the same as if it were the master's own act”. (Lord Chelmsford)

It is clear that the **servant's tort** understanding is the one the courts now follow.

*Ministry of Social Security v White & Carter* (1962) 1 AC 914





## B. Law on the Move

*Catholic Child Welfare Society and Others v Various Claimants* [2013] 2 AC 1

Lord Phillips said “the law of vicarious liability” is on the move. Two orthodoxies have been under challenge.

- \* vicarious liability is imposed only for the torts of *employees*
- \* vicarious liability is imposed only in respect of acts done in the course of employment.

Lord Phillips however said that nowadays we go about it using a 2-stage approach

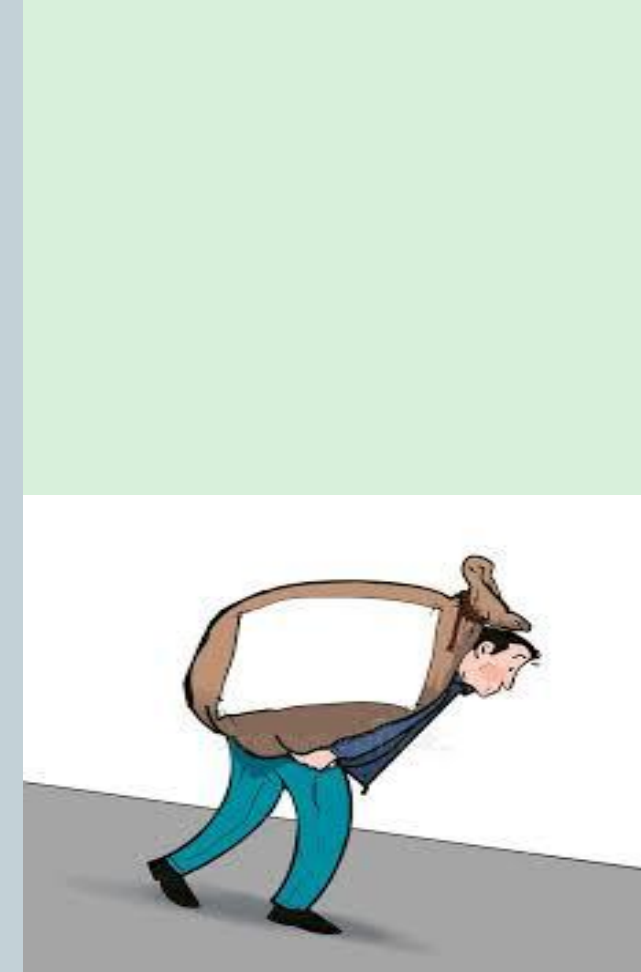
- \* consider the relationship of D1 & D2: is capable of giving rise to VL?

And

- \* consider the connection that links *the relationship between D1 and D2* and the act or omission of D1.

*Cox v Ministry of Justice* [2016] AC 660

“The scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?” (Lord



## C. Which Relationships Warrant the Application of VL? (stage 1)

There is no simple answer to this.

However, one certain relationship to which it applies is that of employer/employee.

### 1. Relationship of Employer and Employee

Although not the only relationship to which vicarious liability can be attached, the employer/employee relationship is still the *classic case*.

No single test is of universal application, but in Hong Kong the question of who is an employee was tackled by the privy council.

*Lee Ting Sang v Chung Chi Keung* [1990] 1 HKLR 764

“The fundamental test to be applied is this: “Is the person who has engaged himself to perform these services performing them as a person in business on his own account?” (Lord Griffiths.)



# How do we know when someone is in business on their own account?

*Poon Chau Nam v Yim Siu Cheung* [2017] HKCU 417

“to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person’s work activity ... [It] can only be appreciated by standing back ... making an informed, considered, qualitative appreciation of the whole”. (Ribeiro PJ.)

The courts look at all the relevant factors that go towards the “big picture”.

*Lai Wing Shun v Shun Shing Decoration Co Ltd* [2016] HKCU 403 (single biggest factor: control)

Control can refer many aspects of the job which may not all point the same way.

*Wong Wai Ming v FTE Logistics International Ltd* [2008] HKCU 1328

“the court is concerned with substance and not form ... my overall impression is that the Applicant was employed as an express delivery worker, and the fact that he used his own Motorcycle in his work and ... [the fact that the contract] contained descriptions suggesting he was an independent contractor are insufficient to dissuade me from the above conclusion as to the Applicant’s true capacity. (Ng J)

## 2. Partnership and agency

### 3. Relationship Akin to a Contract of Employment

An extension beyond the confines of an employee/employer relationship was established by the Supreme Court in 2013.

*Catholic Child Welfare Society and Others v Various Claimants* [2013] 2 AC 1

“Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is akin to that between an employer and an employee”. (Lord Phillips.)

*What are the ‘same incidents’?*

- \* One of these, mentioned by Lord Phillips, was the fact that D can direct what X does.
- \* Another: is what the tortfeasor does for the benefit of the defendant’s organisation?
- \* Did the immediate tortfeasor’s activity form an integral part of D2’s activities/purposes?

The *akin to contract* of employment approach has been used elsewhere, too.

*E v English Province of Our Lady of Charity* [2013] WLR 958

*Cox v Ministry of Justice* [2016] AC 660



## 4. Some Independent Contractors?

It has long since been established that the appropriate device to use in the case of an independent contractor's negligence is that of the non-delegable duty of care (see later).

*Barclays Bank v Various Claimants* [2020] UKSC 2013

Lady Hale said that there was...

“[nothing in the previous cases] to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand [had been abandoned]”.

## 5. Summary

After *Cox* (and the other case law mentioned), it is no longer possible to confine vicarious liability to master/servant and principal/agent scenarios.

To know if the relationship attracts the application of VL, we instead apply the stage 1 test.

This test, *per Cox*, states that a relationship akin to employment will do *as long as it is fair, just and reasonable to impose VL*.

The fair, just and reasonable issue was said to be judged in accordance with the five incidents of an employment relationship identified in the *Catholic Child Welfare* case.

## The five policy factors in *Cox*

- (i) D2 is more likely to have the means to compensate V than the immediate wrongdoer, D1 (because D will usually be insured);
- (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of D2 (who will usually be an employer);
- (iii) D1's activity is likely to be part of the business activity of D2 (usually an employer);
- (iv) D2, by employing D1 to carry on the activity, will have created the risk of the tort committed by D1; and
- (v) D1, to a greater or lesser degree, will have been under the control of D2.

*Armes v Nottinghamshire CC* [2017] UKSC 60

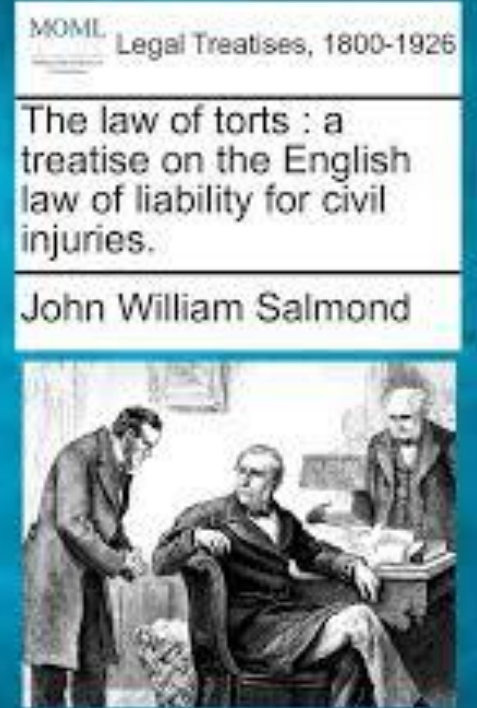
## D. Which Acts will attract the application of VL? (stage 2)

Traditionally, we applied a thing called the Salmond test to decide this. And the question was as follows:

Was this tort committed in the course of D1's employment?

The question received a positive answer if the act in question was either:

(1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act [that has been] authorised by the master.



## Stage 2 Contd.

Even though we have this new approach, the courts won't ignore or reverse key previous cases.

As such they can be useful analogical guides:

### 1. Some Notable Cases

*Whatman v Pearson* (1867-68) LR 3 CP 422

*Storey v Ashton* (1868-69) LR 4 QB 476

**NB** Prohibitions can (but do not necessarily) impact upon the present question.

*Rose v Plenty* [1976] 1 WLR 141

*Young Conqueror Co v Commercial Union Assurance Co* [1992] 2 HKC 486

“The fact that he picked up a girlfriend may be some evidence tending to disprove the third defendant's assertions but that fact alone does not mean that the third defendant had ceased to be acting in the course of his employment if, as he says, he asked her to help him look for a parking space ... the situation would be similar to the facts in *Rose v Plenty*.” (Gladys Li QC.)





## 2. Connection between D1's Tort and the Relationship between D1 and D2

The first major move away from the Salmond test came with the 'Close Connection Test'.

*Lister v Hesley Hall Ltd* [2002] 1 AC 215

*Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11.

“[t]he first question is what functions or ‘field of activities’ have been entrusted by the employer to the employee [or in other words] what was the nature of his job?” (Lord Toulson)



Against the background of the answer to this question, the second question was whether...

“there was a sufficient connection between the position in which he [the employee] was employed and his wrongful conduct to make it right for the employer to be held liable under the principle [of vicarious liability].” (Lord Toulson)

# Some applications of the *Lister* approach

*Ling Man Kuen v Chow Chan Ming* [2006] HKCU 1408

“The assault was in my view so closely connected with the employment of the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant and the employment of the Plaintiff by the 2<sup>nd</sup> Defendant that it is ‘fair and just’ to hold the employer, the 2<sup>nd</sup> Defendant, vicariously liable.” (Chan J.)

*WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12

“[His] disclosure of the data on the internet did not form part of...[his] functions or field of activities ... it was not an act which he was authorised to do”.

“[His] wrongful conduct was not so closely connected with acts which he was authorised to do that ... it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment”.



The close connection test works where the Salmond test runs out of road, but it has its own problem: imprecision.

*Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366

“This “close connection” test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close ... It provides no clear assistance on when ... an incident is to be regarded as sufficiently work-related, as distinct from personal ... This lack of precision is inevitable.” (Lord Nicholls)

## **Lister approach not confined to trespass torts**

*Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* (2002) 5 HKCFAR 569

“the “close connection” criterion impresses me as inherently just and fair for all cases of tort ... It would be odd if the employer ever escaped vicarious liability even though there was ... so close a connection between the employee’s tort and his employment as to make it fair and just to hold the employer vicariously liable.” (Bokhary PJ.)



Finally, it is also clear that the close-connection test can be applied to acts of fraud perpetrated by an employee.

*Ronia Ltd v Clarke* [2005] HKCU 261

“applying the ‘close connection’ test, this is a case where Tsang’s wrongful acts were so closely connected to his employment that it is fair and just to hold the defendant vicariously liable. In other words, I find the defendant liable on the grounds of vicarious liability.” (Chung J.)



## **E. Dual Vicarious Liability**

In some case, the courts are unable to decide which of employer A or employer B should be held vicariously liable.

*Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] 4 All E.R. 1181

*Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319

## II Non-Delegable Duties

One who engages independent contractors isn't usually liable for the torts they commit while doing their work. But it is possible to be held liable if one negligently engaged incompetent contractors or supplied an insufficient team of workers.

*Shan He Electronics Components Co Ltd v Skybo International Food Co Ltd* [2002] HKCUI 212

“[T]he employer of an independent contractor is not [generally] responsible for a tort committed by the contractor ... But [he may be] ... [if] he has negligently engaged an incompetent contractor, or employed too few men, or has interfered with the way the work had to be carried out or has authorized or ratified the negligent act.” (Deputy J Gill)

Employers can also be held liable where they can be said to have been in breach of a non-delegable duty.

In such cases, P's entitlement to sue hangs on the fact that although D effectively delegated the task, he was *unable to delegate the legal responsibility* for the performance of the task.

*Cassidy v Ministry of Health* [1951] 2 KB 343

“Where a person is himself under a duty to use care, he cannot get rid of it by delegating the performance of it to someone else.” (Denning LJ)

It is a question of law whether a non-delegable duty is owed.





Unfortunately, a universally accepted theory about non-delegable duties is missing. I have written about them (and so as Christian Witting: see Word document for details).

My argument (accepted in Australia in *Leichhardt Municipal Council v Montgomery* (2007) HCA 6) is roughly:

- (1) Assumptions of Responsibility (understood in the same way as extended *Hedley-Byrne* cases are understood), PLUS
- (2) The presence of an affirmative duty, AND
- (3) I don't think that they invariably impose strict liability:

*Woodland v Swimming Teachers Association* [2013] 3 WLR 1227

\* In a lengthy paragraph, Lord Sumption said something very similar (but gave me no acknowledgement)

*Armes v Nottinghamshire CC* [2017] UKSC 60

**NB** In HK, most of the non-delegable duty cases tend to centre on things going awry on buildings adjacent to roadways where work is being done by contractors.

*Tse Lai Yin v Incorporated Owners of Albert House* [1999] HKEC 825

“As the owner of the canopy, the 1st defendant owes a strict duty to the plaintiffs and the deceased ... Whilst the 1st defendant may delegate that duty to another (in this case the 2<sup>nd</sup> defendant), if that duty is not fulfilled by the 2nd defendant, then the 1st defendant's duty is not discharged by such delegation ... the 1st defendant's duty is non-delegable”. (Suffiad J.)





That's it from me...

Next up...

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