

Vicarious Liability and Non-Delegable Duties

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.

- Important as it relates to real life tort cases
- It is not itself a tort but a principle of tort law, part of tort law but not a tort
- Principle that allows A to sue C (someone other than the immediate wrongdoer) for a tort committed by B (the immediate wrongdoer)
- Peculiar in a way that tort should be focusing on the wrong that committed by the wrongdoer & a pure form of strict liability
- E.g., getting hit by a truck during his delivery of goods to Welcome, can sue the employer Mr. Welcome of his employer's vicarious liability instead of the truck driver; Strict liability that it applies even outside business hour, regardless of one being in fault
- Practically useful in that: (1) Enable a victim to get fair compensation (employer can pay the victim well); (2) P with evidential difficulty (especially in harm happened in the workplace)

Cassidy v Ministry of Health [1951] 2 K.B. 343

Facts	Customer after operation, patients to get check-ups, patient does not know the operation was conducting negligently or in any of the process someone is negligent
Issue	If need to prove who is the one that has the negligent act > difficult to sue
Held	Relying on the principle of vicarious liability: each of everyone of the hospital could be liable, can sue the employer (that he is liable for your employees) of his vicarious liability

Expected complexity:

- (1) feels profoundly unfair to make other liable for actions done by others (but people with pockets are the ones who get lawyers to argue their case about the nuances > increase the complexity of cases)
- (2) old cases can be contradictory to modern ones

Theoretical and Historical Excursus [revisit]

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)
 - Idea that law be seen as the tort of the employer (tort of the person who is being sued) i.e., Mr. Welcome's tort)
 - Relevant for the employee to have a defence (whether the employer has the defence, as it is transferring only the act but not the liability)
- **The servant's tort theory** (employee's liability/torts are imputed to the employer)
 - Transferring the liability from servant to the employer; employer responsible for employee's act
 - Prospect of suing the employer may be dashed by reference to any defence available to the employee
 - Q being whether the employer has the defence, as it is only the liability that is transferred; suing the lorry driver vs the employer
 - A faculty to sue the employer, but can sue the actual wrongdoer (the employee) at the same time (as a matter of law entitled to sue both)

The old authorities point both ways. (both points accepted, not overruled)

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

A man is bound to answer for his **servant's act**, as for his lodger's act, in such a case. For if my servant or lodger puts a candle on the wall and the candle falls into the straw and burns the whole house, and also my neighbour's house, in this case I shall answer to my neighbour for the damage which he has suffered.

- Relevant to ask whether the employee has any valid defence

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 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 is the same as if it were the master's own act, according to the maxim, *qui facit per alium facit per se*.

- Legally speaking, situation of an agency (acting as an agent to another, independence status of one another); **Doctrine of unity** applied here (e.g., cannot get evidence from a wife against her husband, as they are treated as a unity)

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

Majrowski v Guy's and St Thomas' NHS Trust [2007] 1 AC 224 (VL involves servant's tort)

B. Law on the Move

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

Facts	Sexual abuse of child by members of a religious member, the organisation is not a business but a charity
Issue	charitable organisation, no profit (does not fit into the orthodoxy)
Held (HL)	<p>Lord Phillips said “the law of vicarious liability” is on the move.</p> <p>According to orthodoxy: but in this case, it is not employment, does not fit into the orthodoxy</p> <p>(i) vicarious liability is <u>imposed only for the torts of employees</u></p> <p>(ii) vicarious liability is <u>imposed only in respect of acts done in the course of employment.</u></p> <p>Lord Phillips however said that nowadays we go about it using a 2-stage approach</p> <p>The <u>first stage</u> is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (D1 the immediate wrongdoer, D2 whom to be transferred the liability)</p> <p><i>And that</i></p> <p>What is critical at the <u>second stage</u> is the connection that links the relationship between D1 and D2 and the act or omission of D1.</p> <ul style="list-style-type: none"> - E.g., a cleaner left floor wet, employment relationship with the university to make university liable vs cleaner himself punched a guy as he lose his debt, unrelated to the employment • sufficient similarity in the relationship between any given <u>Christian brother and the religious order</u> & the <u>employer-employee relationship</u> (doing things on behalf of the religious order) • No reason to rule out the application of vicarious liability based on the similarity • Can <u>reject the classic understanding that it only applies in the context of employer and employee, in employment</u> • Take a more flexible approach, the organisation held vicariously liable for the tort committed by the member
Note	<p>Explanation behind:</p> <ul style="list-style-type: none"> - (1) legally presupposed agency (e.g., parent-child relationship) - (2) Justified on ground of fairness: situations where employers makes profits from the work of their employees, it would be fair enough for employers to be responsible to any acts done by the employee

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 Reed.)

Facts	A prisoner doing daily task, dropped a bag of rice on an employee and injured him; prisoner was not technically an employee (despite being paid, but arguable on the nature)
Issue	whether there is liability even though there is no employment
Held	<ul style="list-style-type: none">• Court <u>rejected the argument of employment</u>; principle of contract: voluntariness, but no voluntary component in imprisonment• Can apply the principle: as the relationship is as akin to a contract of employment

C. **Which Relationships Warrant the Application of Vicarious Liability? (stage 1)**

There is no simple answer to this. But, one certain relationship to which it applies is that of employer/employee.

- No absolute clear answer to the definition of employee
- **independent contractor is not an employee**, law of vicarious liability does not apply
- statutory intervention can be of assistance: **employee's compensation ordinance**

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.)

Facts	Claim for compensation for injury under a thing called employee's compensation ordinance (not strictly a vicarious liability case)
Held	Made clear that anyone who want to make claim under the ordinance, required to be qualified as an employee , applying English case principle: <ul style="list-style-type: none"> employee's statue should be referred to the question: whether somebody doing the thing on his account, but not of other who directed him

This answers the basic question, but it poses another, namely, **how do we know when someone is in business on their own account?**

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

In order 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** ... The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back ... by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect. (Ribeiro PJ.)

The courts determining the question, will look at **all the relevant factors** that go towards building up the "big picture".

- Look at different factors to answer the question; take a holistic overall common-sense approach, not a specific test

Single biggest factor: control

The key lay in the different **amounts of control exercisable over them by the employer**.

- One big factor to look at, but not decisive
- E.g., employee can be doing their act when there is no exercise of control (e.g., surgeon exercising their act of operation without hospital manager who has no expertise in)

Lai Wing Shun v Shun Shing Decoration Co Ltd [2016] HKCU 403.

Facts	Company director, control the company but as still an employee of the company
Note	Example of having control does not mean one is the employer

Control can refer to all sorts of aspects of the job, and the relevant indicators need not all point the same way (one simply takes a balance of indicia approach, in such cases).

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

In assessing the relationship between the parties, **the court is concerned with substance and not form**. From the above analysis, 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.)

Facts	Delivery worker, signed a contract that said “doing the work as a self-employed person”, on surface to be he is doing business on his account, but evidence goes another way, that he was paid wages that telling the exact hours he will be working, requirements during delivery (putting on company logo)
Issue	Self-employed or as an employee?
Held	Treated as an employee, due to the substance of his work; despite contract term suggested another way
Note	Not always predictive that one is an employee, cases are always arguable on both ways; there could well be policy concern to hold companies liable (see article by Neyers Alberta: A theory of vicarious liability)

2. **Partnership and Agency**

In the *Cox* case, the Supreme Court made clear that:

- a principal will be liable for the torts of his or her agent.
- a partnership (eg, of solicitors) can be liable for the torts of fellow partners.

3. **Relationship Akin to a Contract of Employment (where just and reasonable)**

An extension beyond the strict 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.)

- No formal contract of employment, no partnership, mere relationship akin to contract

What are the 'same incidents'?

One of these, mentioned by Lord Phillips, was the fact that **D can direct what T does**. (Similar to control)

Another was the fact that what **the tortfeasor does is for the benefit of the defendant's** (ie, D2's) **organisation**. (organisation getting profits bc of T)

A third was the fact that **the immediate tortfeasor's (ie, D1's) activity forms an integral part of D2's activities or 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

Facts	Catholic priest, sexual abuse case
Held	Recognised that the relationship between the priest and the charity is akin to contract of employment

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 13

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].

Facts	Doctor engaged by the bank as an independent contractor for health check-up of employers, doctor took advantages of female employees
Held	Not an employee, CA: law is on the move, not need to stick to ancient rule Supreme court (Lady Hale): never recognised the liability in the context of independent contractor
Note	suggesting that she thinks the law was on the move and it needs to stop moving; the expansion of law stops at independent contractor

Rationale behind? Possibly:

- Different level of control: independent contract not under the same kind of control compared to employer over employee
 - Employers having control over employees, employers to ensure e.g. the use of safe truck
 - But this thinking does not play out in the case? But could be one plausible factor
- Issue of ongoing liability (e.g., contractor with sub-contractor...), a line to draw

Murphy:

- **Role of Supreme court:** only in exceptional circumstances overturn cases, knowing that the long-term effect of the judgement lay down
- **Vicarious liability is odd in itself** (in the sense that someone else is liable for the act not committed by him)
 - hard to justify so in the first place; the law has gone far enough; start from the starting principle first

[revisit, check readings]

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
 - the control point, whether giving D1 the job material to giving rise to the risk
- (v) D1, to a greater or lesser degree, will have been **under the control of D2**.

Armes v Nottinghamshire CC [2017] UKSC 60

It is impossible to draw a sharp line between the activity of the local authority ... and that of the foster parents, whom they recruited and trained, and with whom they placed the child... it can properly be said that the torts committed against the claimant were committed by the foster parents in the **course of an activity carried on for the benefit of the local authority**. (Lord Reed, on factor (ii))

The local authority's placement of children in their care with foster parents **creates a relationship of authority and trust** between the foster parents and the children ... and so renders the children particularly vulnerable to abuse. (Lord Reed on factor (iv))

The local authority exercised **powers of approval, inspection, supervision and removal** without any parallel in ordinary family life. By virtue of those powers, the local authority exercised a significant degree of control over both what the foster parents did and how they did it. (Lord Reed on factor (v))

The foster parents provided care to the child as **an integral part** of the local authority's organisation of its child care services. (Lord Reed on factor (iii))

Vicarious liability is only of practical relevance in situations where (1) the principal tortfeasor cannot be found or is not worth suing, and (2) the person sought to be made vicariously liable is able to compensate the victim of the tort... local authorities which engage ... [foster parents] can **more easily compensate the victims of injuries**. (Lord Reed on factor (i))

Facts	Girl taken into local authority care, child abuse case
Held	Lord Reed appointed to the five policy factors allured in Cox case <ul style="list-style-type: none">• Similar view as Lady Hale's, court to take considerations in form of question of whether it is just and reasonable to impose vicarious liability

D. Which Acts will attract the application of Vicarious Liability? (stage 2)

- Linking the act itself to the relationship between the tortfeasor and D2
- Original test: in course of employment
- Salmond test to determine whether someone did sth in the course of their employment

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.

- (1) e.g., delivery asking the driver to speed to get the delivery (a wrongful act)
- (2) e.g., employee doing the act, careless driving by himself, a wrongful way to do the thing asked to do, not that the employer asked him to do > employer still liable

The courts won't, however, reverse key previous cases; so they can still be useful/instructive:

- But now no longer as this test, as the law moves
- Cases applying the test is still good law, in its logical analysis, as platform to argue analogically; new test simply takes another view on the acts
- Salmond test > close connection test

1. Some Notable Cases

Whatman v Pearson (1867-68) LR 3 CP 422 [**unauthorised mode**, but an authorised act]

Facts	A guy has horse and cart that goes a <u>slightly longer route</u> , doing what he is asked to do to the destination in an unauthorised way; horse bolted, cause damages
Held	Can sue employer for damages, he is in charge of the horse, but doing this negligently, employer can be held liable
Note	See tutorial question

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

Facts	Driving a car, in the <u>exact wrong direction</u> , doing this <u>outside of work hours</u> (not that the employer requested him to do)
Held	Employer not liable; Outside work hours > outside course of employment

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

Rose v Plenty [1976] 1 WLR 141 (on the **effect of a prohibition**)

Facts	Employer stating not to do certain thing = unauthorised act Milkman delivering milk, told not to employ children to deliver milk
Held	Employer still has liability, milkman is still delivering milk (authorised act), the prohibition is related to the methods of the delivery only, but not the delivery way ; Employee Only doing this in an unauthorised way

Young Conqueror Co Ltd v Commercial Union Assurance Co Plc [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.)

- Does not change the fact that he is still doing what he is engaged to do, with aid of someone else **does not change the fact that the act is connected to his employment**
- As long as D is broadly speaking doing the act engaged by the employer to do

[March 20]

- **Deficiency of this test:** In course of employment can never endorsed unlawful act > **difficult to encompass the unlawful act** (e.g., **intentional tort**, a criminal law rung)
- An innate sense of justice: law driven to protect the innocents, connection test born of necessity (a means by which innocent victims consume employers of individual who commit intentional torts)

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'.

- Close being a relative concept: how close?

Lister v Hesley Hall Ltd [2002] 1 AC 215

Facts	Guy works as a warden in children's home, child abuse case
Held	<ul style="list-style-type: none"> • Act perpetrated and the relationship between D1 and D2 • The access to these kids is by way of letting him to the ward (the job he is offered) > <u>sufficiently close relationship between the guy's act and his relationship with the employer</u> (close relationship)
Note	Policy driven move of law, expansion of vicarious liability

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

Facts	P went to a supermarket, employee tells P to go away in racist term > violence explosion
Held	<p>[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?</p> <p>Against the background of the answer to this question, the second question was whether:</p> <p>there was a sufficient connection between <u>the position in which he [the employee] was employed</u> and <u>his wrongful conduct</u> to <u>make it right for the employer to be held liable</u> under the principle [of vicarious liability].</p> <p>(Linking the act complained of and the relationship that exists between the employee & the employer)</p> <p>Supermarket vicariously liable</p> <ul style="list-style-type: none"> - Handling customers > unbroken chain of events in which the attack was intimately bound up with the tortfeasor demand P to leave the premises & the occurrence of violence - The person was never not doing the act they are told not to do - It has never stopped his work of handling customers - Not sth personal between them, but keep P from employer's premise
Note	<p>Murphy: right logic but difficult decision to accept, arguable on the close connection</p> <ul style="list-style-type: none"> - as the assault is quite personal, if someone hold powerful racist opinions) - If dubious about the test > the better test in Dubai case applied (a suitable law to apply)

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

Facts	Employed as engineer, P attacked by a fellow employee, dispute between the two
Held	The assault was not pre-meditated but came about as a result of the interaction of the parties. The assault took place while the <u>1st Defendant and the Plaintiff were engaged in duties at the very time and place demanded by his employment.</u> (reference to the act someone is engaged to do) The assault was in my view so closely connected with the employment of the 1 st Defendant by the 2 nd Defendant and the employment of the Plaintiff by the 2 nd Defendant that it is 'fair and just' to hold the employer, the 2 nd Defendant, vicariously liable. (Chan J.)
Note	employees (unlawful act to be better dealt with close connection test), applied also in HK

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

Facts	Data controller, data of the supermarket, post private info of the employees; tort of disclosure of the data
Held	Entrusted to handle data, but should not post private into to public domain; nothing to do with his job > No VC
Note	Compared the supermarket case above, arguably there is a closer connection in this case (data transferred from one system to the other, now D has access of the data and abusing it now, can say that there is related to the nature of his work)

The close connection test has solved one problem, namely, that of what we can do where T's tort cannot possibly squeezed within the Salmond test (usually, a trespass tort).

However, it has also created **another problem**: one of an **imprecise touchstone of liability**.

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.

One thing that is clear, however, is that it is **not a test that is confined cases involving employees who commit intentional 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.)

Facts	Tort of negligence, D engaged as a doorman, duty involved parking customers’ cars; D used the car for his own purpose and crashed it
Held	Applied close connection test
Note	Originally born out of VC, now can be applied to other torts too

And, finally, it is also clear that the close-connection test can be applied to **acts of fraud perpetrated by an employee.** (deceit cases > can apply close connection test)

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.)

- Clerk defrauded one of D’s clients > Expansion of the application of VC

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.

- Another incidence of the law on the move: both the employee and employer can be liable

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

Facts	Construction industry, common practice of loaning employees from employer A to employer B; manual worker lent to another employers; individual employer negligently caused damages
Issue	Who/which employer to be liable for the damages
Held	Fair to say employee of both employers, both can be held liable on dual VC

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

- Endorsement of this principal of HL in this case but obiter

II Non-Delegable Duties

The person paying for work to be done is not ordinarily liable where his or her **independent contractor** commits a tort in the course of their employment *simply by virtue of the fact that that person was working as an independent contractor*.

- Independent contractor: Outside the employee-employer relationship
- See Lady Hale's view (VC might have been on the move, but nothing has changed)
- Another device that makes it look like the person engaging as independent contractor liable for VC; **but not a case of VC**; only looks like VC as material facts centred around what the independent contractor did

Reason employer is held liable:

- they **themselves in breach of that non-delegable duty**; employer as the person that **engaged the independent contractor**; self-induced harm, although envisaged by him; personal duty owed by the person engaged the independent contractor

Difference between VC and non-delegable duties:

- **In VC**: 3 parties in view, employee, employer & P;
- **in non-delegable duties**: only two parties, D who owes the duty & breach of this duty, and P

He may be liable if he has negligently engaged incompetent contractors or supplied an insufficient team of workers.

- (1) true that employers won't be VC liable for the torts of independent contract
- (2) but should not take the msg that they are never be able to be liable, as there could be breach of personal duty

It would be **wrong to think an employer is generally immune from liability**.

An **employer**, as noted, **can be liable** for damage caused by the acts of his independent contractors where there was some **obvious negligence** on the part of the employer.

This is particularly so if he can be said to have acted **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 (supra)

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)

- hospital owes non-delegable responsibility to patients, assumed responsibility to look after patients; cannot delegate the duty

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

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

Generally the rule is that the employer of an independent contractor is not responsible for a tort committed by the contractor ... But that may be displaced ... where for instance, 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.**

Facts	D's IC, breaking water pipes > caused flood affecting P > P complained
Held	Recognition that you can still do sth wrong, e.g., if negligently engage the IC; negligent in entrusting them & giving the work to the independent contractor > in breach of personal duties <ul style="list-style-type: none"> - e.g., provide too few staff to a task; If interfere the way of job being done > can be in breach of personal duty
Note	<ul style="list-style-type: none"> - Relates back to the rule employer's duty owed to employees; positive obligation to do things e.g., provide safe system of work...

Sidenote: where the rule came from

- **doctrine of common employment** (employer can never be liable on VC basis for the tort committed by one employee against another employee,
- as they are both under common employment
- e.g., voluntarily signed up for the job for the pay, even if it is a dangerous place to work & the kind of ppl one would be working with); in sense that one willingly takes certain risk > waving right to have an action against the person who did the wrongful act

Idea coming from *Wilsons and Clyde Co v English* [1938] AC 57

Facts	P worked in a mine pit, trapped by machinery and caused him dead; D claimed it is P's own negligence
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Held	<ul style="list-style-type: none"> recognised that the choice of an employee is not a “genuine choice” the duty lies with the employer to provided competent staff & safe work environment (P not to sue the other employee but the employer to prevent such thing from happening) this duty could not be fully delegated to another employee (non-delegable duty)
Note	<ul style="list-style-type: none"> opinion that it involves 3rd party, as a disguise of VC ? > WRONG: But here from legal analysis point of view, only involves 2 parties (only a person complaining against the employer) the relevant wrongdoing rests with the person who employed the person who did the act > tort of the employer

General Cleaning Contractors v Christmas [1954] AC 180

Facts	window cleaner sued the employer for giving unsafe means for doing the job;
Held	The defendants as an employer had not provided a safe system of work for their employee. It should not be down to individual workers to identify and take precaution against dangers in the workplace and the employer has a duty to provide safety instructions.
Note	<ul style="list-style-type: none"> no 3rd party in the case > not VC; only suing employer in breach of personal duty > non-delegable duties non-delegable duties: can delegate the task/performance of the duty but not the duty imposed by law on you

Unfortunately, a clear theory of when and where such duties arise has been largely ignored.

J Murphy, “Juridical Foundations of Common Law Non-Delegable Duties” in Neyers *et al*, (eds), *Emerging Issues in Tort Law* (2007)

J Murphy, “The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting” (2007) 30 *University of New South Wales Law Journal* 86-102.

I argued that non-delegable duties seemed to turn on: [revisit, read papers?]

- (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:**

A rival suggestion is that these kinds of duty – often confused with vicarious liability – always involve strict liability.

C Witting, “Breach of the Non-delegable Duty: Defending Limited Strict Liability in Tort” (2006) 29 *University of New South Wales Law Journal* 38.

Leichhardt Municipal Council v Montgomery (2007) HCA 6
- Australian High Court: in favour of Murphy’s view

Woodland v Swimming Teachers Association [2013] 3 WLR 1227

(1) The claimant is a patient or a child, or for some other reason is **especially vulnerable** ... (2) There is an antecedent **relationship between the claimant and the defendant** ... (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the **assumption of a positive duty** to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant... (3) **The claimant has no control over how the defendant chooses to perform those obligations**, *ie* whether personally or through employees or through third parties. (an elaboration, relate to & overlaps with the 1st point, placing trust and reliance on the claimant) (4) The defendant has delegated to a third party some function which is an **integral part of the positive duty** which he has **assumed** towards the claimant; and the third party is exercising ... (assumption of a positive duty) **the defendant’s custody or care of the claimant** and the **element of control** that goes with it. (5) **The third party has been negligent** ... *in the performance of the very function assumed by the defendant* and delegated by the defendant to him. (Lord Sumption, emphasis added).

Facts	Swimming lesson given to children, delegated swimming instructor (IC)
Held	characteristics of non-delegable duties Non-delegated duty applied
Note	“negligent” as one of the elements > not strict liability tort

Armes v Nottinghamshire CC [2017] UKSC 60

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 2nd defendant), if that duty is not fulfilled by the 2nd defendant, then the 1st defendant’s duty is not discharged by such delegation ... In that sense, the 1st defendant’s duty is non-delegable. (Suffiad J.)

- Murphy: it is possible that the court may be prepared to entertain a claim against the employer on the basis of a non-delegable duty, which seems **to turn upon assumed responsibilities** where those who are **in reliance** on those who have **assumed the responsibilities** are **vulnerable**

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