**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.

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 mater’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**, 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.

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*. (Lord Chlemsford).

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

Lord Phillips said “the law of vicarious liability” is on the move.

According to orthodoxy:

(i) vicarious liability is imposed only for the torts of *employees*

(ii) 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

The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability.

*And that*

What is critical at the second stage is 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 Reed.)

**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.

**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.)

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”.

**Single biggest factor: control**

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

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

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.)

**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.)

*What are the ‘same incidents’?*

One of these, mentioned by Lord Phillips, was the fact that D can direct what X does.

Another was the fact that what the tortfeasor does is for the benefit of the defendant’s (ie, D2’s) organisation.

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

*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

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))

**D. Which Acts will attract the application of Vicarious Liability? (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.

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

**1. Some Notable Cases**

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

*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 (on the effect of a prohibition)

*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.)

**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)

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

The assault was not pre-meditated but came about as a result of the interaction of the parties. The assault took place while the 1*st* Defendant and the Plaintiff were engaged in duties at the very time and place demanded by his employment. 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.)

*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. (Lord Reed)

[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. (Lord Reed)

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. (Lord Nicholls)

One thing that is clear, however, is that it is not a test that is confined cases involving employees who commit intentional torts against the person.

*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.)

And, 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.

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

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

**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*.

He may be liable if he has 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

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.

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* [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 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:

(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

*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. (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 … 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).

*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.)

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