

Duties of Care and no fault liabilities

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Duties owed

1. Direct liability: D is liable for his own breach of a duty owed to C
2. Non-delegable duty of care: D is liable for a breach of his duty to C by a third party

The law does not in the ordinary course impose personal (as oppose to vicarious) liability for what others fail to do. ... The expression "non-delegable duty" has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others (*Woodland* §5)

3. Vicarious liability: policy imposes liability upon D for breach of a third party's duty to C

Where a defendant is vicariously liable for a tort of another, he commits no tort himself and may not even owe the relevant duty, but is held liable as a matter of public policy for the tort of another. ... But it has never extended to the negligence of those who are truly independent contractors (*Woodland* §4)

Woodland v Essex County Council [2014] AC 537: Non-delegable duties



Facts

1. C is pupil at the School
2. Swimming lesson arranged by school at different venue
3. Independent contractor “Direct Swimming Services” employs or contracts with life guard/swimming teacher
4. C drowns and alleges delay in saving her
5. If anyone at fault it is swimming teacher and/or life guard
6. C alleges non delegable duty by LEA for IC
7. D applies to strike out and succeeds at 1st instance and in the CofA

Woodland v Essex CC [2014] AC 537



Lord Sumption’s 5 features:

1. C is vulnerable person (child, patient or prisoner)
2. Antecedent relationship which:
 - a) Puts C in D’s charge or care and so D has control
 - b) From which can assume positive duty to protect
3. C has no control over how D performs obligations
4. D has delegated to IC some function which is an integral part of the positive duty assumed towards C; for the purpose of that function IC is exercising D’s control and custody over C
5. IC negligence is not collateral but in the performance of the very function assumed by D and delegated

Razumas v Ministry of Justice



1. C in prison (driving offences, dishonesty and robbery)
2. Has a sacral tumour in his left lower leg
3. Seeks medical attention from prison GPs but fail to diagnose or refer him for an urgent orthopaedic appointment
4. When tumour finally diagnosed so infiltrated calf muscles that has an above the knee amputation
5. Healthcare in prisons arranged by PCTs and delivered by private contractors. None admit liability
6. C brings claim against MoJ for breach of non-delegable duty and vicarious liability for healthcare providers
7. MOJ denies responsibility for healthcare in prisons – transferred to NHS to fulfill principle of 'equivalence'

Razumas: non-delegable duties



1. Primary care in prisons transferred to NHS in 2003
2. PCT's have a duty to provide rather than arrange under section 83 of the NHS Act 2006
3. When considering non-delegable duty need to carefully examine the relations between D and C
4. Patient doctor relationship depends upon consent not control and reliance of the patient on the doctor's treating skill

Vicarious liability: the direction of travel



“The law of vicarious liability is on the move” (Lord Philips in **Various Claimants [2013] 2 AC 1**).

“It has not yet come to a stop. This appeal, and the companion appeal in **Mohamud v W Morrisons Supermarkets Plc [2016] UKSC 11** provide an opportunity to take stock of where it has got to so far” (Lord Reed in **Cox v Ministry of Justice [2016] UKSC 10**).

The brakes have now been firmly applied by the Supreme Court in **Various Claimants v Barclays Bank [2020] 2 WLR 960** and **Various Claimants v Morrisons Supermarkets Plc [2020] 2 WLR 941**.

Vicarious liability: 2 stage test



Stage 1: Does D1 employ D2?

Stage 2: Is D2's breach committed in the course of his employment?

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

“The test requires a synthesis of the two stages. 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. ... What is critical at the second stage is the connection between that links *the relationship between D1 and D2* and the act or omission of D1, hence the synthesis of the two stages.

Vicarious liability: akin to employment (stage 1)



E v English Province of our Lady of Charity and another [2013] 3 WLR 958

1. Abuse by RC priest who all accept is not an employee
2. MacDuff J: “akin to employment”
3. Ward LJ: 5 stage test:
 - a. Degree of control by employer over tortfeasor
 - b. Control of tortfeasor over the organisation of his work
 - c. Organizational test (how central the activity is to the enterprise)
 - d. Integration test (function provided for the business or by the business)
 - e. Is the tortfeasor in business on his own account

Vicarious liability: akin to employment (stage 1) continued:



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

Para 35 – Fair just and reasonable for employer to be vicariously liable for employee because:

1. Will be able to compensate or insured
2. Tort will be committed by employee undertaking activity on behalf of the employer
3. Employee’s activity part of the business activity of the employer
4. Employer by employing the employee to carry out task creates the risk
5. Employee under control of employer

Para 47 – 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” “akin to employment”

Cox v Ministry of Justice: Facts

1. C was employed in a prison kitchen
2. C was injured when a prisoner working under her supervision negligently dropped a bag of rice on her back
3. Prisoners are required to work under the Prison Rules 1999 for nominal remuneration. D saved money by using prisoners rather than employees or contractors to carry out work within the prison
4. D is alleged to have been vicariously liable for the prisoner. Although he is not employed the relationship is akin to employment
5. Fails at 1st instance but succeeds in CofA. MoJ appeals to UKSC

Cox v Ministry of Justice: Lord Reed

Considers the test from **Various Claimants** and discards (1) and (5)

1. Wealth is not in itself a ground for imposing liability "*As for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves*" (20)
2. Control by itself is unlikely to be a factor, "It is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee;"
3. The question is, can the employer direct what the tortfeasor does rather than how he does it. This might now be better expressed as **integration** – only where there is complete independence will the absence of formal control be relevant: i.e. independent contractor/in business on his own account

Cox v Ministry of Justice: Lord Reed



Focus instead is on the extent to which the tortfeasor is integrated into D's business: Phillips 2nd, 3rd and 4th tests

- a. Identify the activity that gives rise to the harm or opportunity for wrongful act
- b. Is this integral to D's business activity
- c. Is that activity performed for D's benefit (financial or otherwise) by the tortfeasor
- d. Does that activity give rise to the risk that materialised and so caused harm

Cox v Ministry of Justice: Lord Reed



Justification for this approach is that it provides justice in a modern economy

“By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities” (29).

It will also cover voluntary organisations where employment is not an issue

Armes: facts

1. Ms Armes was taken into LA care under the Child Care Act 1980 and placed in both children's homes and foster care.
2. Males J finds that her foster parents, Mrs Alison and Mr Blakely, respectively physically and sexually abuse her
3. These foster placements are made under section 21 and 22 of the Act and subject to the Boarding Out Regulations 1995
4. Causes of action against LA include (1) breach of direct duty of care (2) breach of non-delegable duty and (3) vicarious liability for Mrs Alison and Mr Blakely

Armes: Lord Reed's approach

1. Consider non-delegable duty first
There cannot, however, be any rationale for imposing vicarious liability on a defendant where he is directly liable for the harm caused by the third party (30)
1. No need to consider fair, just and reasonable (36)
 - a) If 5 features identified in **Woodland** present it will be fair, just and reasonable to impose a non-delegable duty
 - b) If 5 criteria for vicarious liability made out (**Various Claimants** and **Cox**) no need to consider fair, just and reasonable

Armes: Non-delegable duty of care

LA does not owe a non-delegable duty for foster parents

1. Responsibility can be assumed voluntarily or created by statute; if the later, everything turns on the particular statute (38) One could similarly ask in the present case whether the local authority had a statutory duty to provide the children with day-to-day care, or only to arrange, supervise and pay for it (38)
2. Section 21(1) of the 1980 Children Act
A local authority shall discharge their duty to provide accommodation and maintenance for a child in their care in such one of the following ways as they think fit, namely, - (a) by boarding him out on such terms as to payment by the authority and otherwise as the authority may, subject to provisions of this Act and regulations thereunder determine

The proper construction is that the nature of this statutory requirement is to arrange care of the child (accommodation and maintenance) not to provide it and so the 4th **Woodland** criteria is not met (47)

Armes: vicarious liability (1)

Are the 5 features identified in **Various Claimants & Cox** present?

1. Are foster parents acting on behalf of LA's? –
Foster parents engaged in an activity on behalf of the LA, they are recruited, selected, trained and monitored by the LA to look after children in care. This role is integral to the provision of childcare by the LA and so foster parents, "*cannot be regarded as carrying on an independent business of their own*" (59).
2. Is fostering part of the LA's business activities?
One needs to stand back from the "minutiae of daily life and consider the LA's responsibilities and the manner in which they were discharged". Foster parents provide family life and so ensure the welfare of children in care, which the LA by statute has to provide

Armes: vicarious liability (2)

3. Does the activity create the risk of abuse?
Those who care for children are given control over them, a relationship that involves authority and trust and gives rise to the risk of abuse (61)
4. Does the LA exercise control over foster parents?
While the LA does not exercise control over the function that they deliver, the provision of family life, through the Boarding Out Regs it exercises powers of approval, inspection, supervision and removal so that they can ensure that a child's needs are met (62)
5. Ability to satisfy an award for damages?
This is only relevant 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" (not reconcilable with **Cox**). Foster parents unlikely to have insurance or be able to meet a substantial claim

Various Claimants v Barclays Bank Plc [2020] 2 WLR 960

1. Barclays contract with Dr Bates to carry out medical examinations of its employees
2. Such examinations were a term of employment which was often conditional upon a clean bill of health
3. The examinations were conducted at consulting rooms at Dr Bates house
4. Dr Bates was paid per examination but Barclays directed when he reported on and the form of his reports
5. Dr Bates had died in 2009. He was uninsured and his Estate had been distributed
6. During the course of medical examinations for Barclays Dr Bates sexually abused bank employees or prospective employees
7. C alleges vicarious liability
8. D pleads that Dr Bates was an independent contractor

Barclays Bank: Supreme Court – Baroness Hale



1. The law must develop incrementally not by reference to the policy reasons underlying the rationale for a particular legal rule (§16)
2. None of the previous cases had eroded “the classic distinction between employment relationships and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand” (§24)
3. Question is “whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant” (§27)
4. In doubtful cases the 5 incidents “may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair just and reasonable to impose vicarious liability” (§27), e.g. in deciding whether technically self-employed or agency workers are effectively part and parcel of the employer’s business.
5. The key will usually lie in understanding the details of the relationship (§27)

Where does this leave claimants?



1. There may be a non-delegable duty for a truly independent contractor if the *Woodland* features are present.
2. Dr Bates was a truly independent contractor because Barclays was buying in an external service outside its business.
3. In the commercial sphere there is likely to be vicarious liability for labour only subcontractors, agency workers or the technically self-employed: e.g. ***Viasystems v Thermal Transfer [2006] QB 510*** where the employee is part of the work, business or organization of the employers that both should answer for his negligence.

Where does this leave claimants?

4. Grey area will be where both D1 and D2 are engaged in the same business but D2 appears to be working solely for himself, e.g. Uber. **Armes** may be of help here: focus on the level of integration of D2 into D1's business
 - a) Is D2 acting on behalf of D1
 - b) Is D2 involved in delivering D1's business activity rather than an external service so that he is integrated into D's business
 - c) Has D1 created the risk by engaging D2 to perform that task
 - d) Does D1 exercise any control over D2 or is there a complete absence of control

Vicarious liability: (stage 2)

1. No liability for criminal acts – not in the course of employment
Trotman v North Yorkshire CC [1999] LGR 584
2. Reversed in **Lister v Hesley Hall Ltd [2002] 1 AC 215**: a “close connection” or “within the scope of employment”
 - a. In the scope of employment: opportunity given
 - b. Role that provides opportunity is to further employer's undertaking; unauthorized way of performing an authorized act
 - c. Distinguishes where employment merely provides an opportunity

Mohamud v WM Morrison: Facts



1. D employed Khan whose job was to serve customers and keep the station in 'good running order'.
2. C went to kiosk and an argument developed with Khan. Khan followed C back to his car and assaulted him. This was despite Khan's supervisor trying to intervene.
3. Trial judge and CofA dismiss claim because the assault was not closely connected to Khan's employment, which involved no more than serving and helping customers.

Mohamud v WM Morrison: Lord Toulson



Allows C's appeal

1. Close connection in **Lister** still the correct test: 2 stages
 1. What functions or "field of activities" have been entrusted to the employee – to be interpreted broadly
 2. Was there a sufficient connection between those functions and the wrongful conduct: cannot be measured but is a matter of fact
2. Khan's behaviour while wrong was within the "field of activities" assigned to him by D. The behaviour arose out of "serving and helping customers", particularly as it was an unbroken sequence of events from serving C to assaulting him

Various Claimants v Morrison Supermarkets Plc [2020] 2 WLR 941



1. Skelton was a senior auditor in Morrison's internal audit team, disciplined for misconduct
2. He had responsibility for sending payroll data to external auditors KPMG
3. Creates a false email account and uploads payroll data to public website
4. Alerts newspapers that employee data was publicly available
5. Convicted and sentenced to 8 years
6. Employees bring class action for breach of s4(4) of Data Protection Act
7. Morrisons liable (1st instance and CofA) "seamless and continuous sequence" or "unbroken chain of events" and that "motive is irrelevant"

Various Claimants: Lord Reed



1. Incremental approach (§ 24)
2. 2 stage test
 - a) The field of activities entrusted by the employer to the employee
 - b) Whether there was sufficient connection between those acts and the wrongful conduct to make it just for the employer to be held liable
3. This is not dependent upon either (i) a temporal or (ii) a causal connection
4. Motive is important if it distinguishes between an act taken on behalf of the employer as oppose to an act personal to the employee
5. Skelton was "not engaged in furthering his employer's business" but was "pursuing a personal vendetta, seeking vengeance for disciplinary proceedings"