

## Practice questions for Chapter 16 – Vicarious liability

### Essay question

Is it justifiable to impose liability on an employer for the tortious acts of his employee? How have the courts limited the scope of when vicarious liability can be imposed?

### Introduction

- As part of the introduction you may want to briefly discuss what vicarious liability is and how it operates.

### Justifying vicarious liability

- Initially, it may seem unfair that an employer may be held liable for the tortious acts of his employee, especially given that the employer is often blameless. However, there are several reasons why it is correct that employers be liable for their employee's torts.
- First, employers' are likely to have access to greater funds than their employees and are therefore more likely to be able to pay compensation. This is known as the 'deep pockets' argument. Related to this is the fact that the employer can better absorb the loss of paying compensation, either by passing on such costs to its customers, or by obtaining insurance.
- Second, as employers bear an economic benefit from the activities of their employees, it is appropriate that they should also bear the liabilities that derive from such activities.
- Third, it is argued that the imposition of vicarious liability encourages employers to monitor their employees and ensure that they act in a suitable manner. However, this justification has been criticized. McBride and Bagshaw have argued that, if this justification were a valid one, an employer would only be vicariously liable in instances where it could have prevented the employee's tortious act,<sup>1</sup> yet the law has never imposed such a limitation.
- Fourth, it could be argued that the imposition of vicarious liability simply provides for the fairest apportionment of loss. Fleming notes that vicarious liability provides a compromise between two competing policies, namely (i) the desire to furnish innocent tort victims with a remedy, and (ii) the hesitation to avoid imposing unfair liability on businesses.<sup>2</sup>

### Limits on the imposition of vicarious liability

- Accordingly, justifications do exist for imposing vicarious liability on a blameless employer for the tortious acts of his employee. However, as noted, vicarious liability involves a compromise and the courts are conscious of imposing undue legal burdens on businesses. Accordingly, the courts have limited the scope of vicarious liability by requiring three conditions to be satisfied.
- The first requirement is that there must be a certain relationship between the tortfeasor and party upon whom vicarious liability may be imposed. In the vast majority of cases, the relationship will be one of employer and employee, but other relationships can result in the imposition of vicarious liability (e.g. principal and agent).
- The second requirement is that a tort must have been committed by the employee, agent etc.

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<sup>1</sup> NJ McBride & R Bagshaw, *Tort Law* (3<sup>rd</sup> edn, Pearson, Harlow, 2008) 653.

<sup>2</sup> JG Fleming, *The Law of Torts* (9<sup>th</sup> edn, LBC, Sydney, 1998) 409-10.

- The third and final requirement is that the tort was committed in the course of the relationship in question. In the majority of cases, this will mean that the tort must be committed in the course of the tortfeasor's employment. This requirement indicates that the fact that an employer/employee relationship exists is not enough per se to establish the imposition of vicarious liability. There must be a sufficiently close link between the tort and the employer's enterprise to justify making the employer liable. Accordingly, employees who commit a tort outside the scope of their employment will be personally liable, and their employers will not be vicariously liable (e.g. see *Beard v London General Omnibus Co*).<sup>3</sup>

### Problem question

Discuss whether or not liability can be imposed in the following cases:

- Charlotte is employed as a courier for Regal Mail plc. On a Sunday, she uses a company van to give her friend a lift to the airport. On the return trip home, she decides to make a number of deliveries to locations between the airport and her house. After making one such delivery, she negligently crashes into a car being driven by Pat.
- The lifts at BioTech's main office have begun to malfunction. BioTech engages LiftFix Ltd to repair and service the lifts, solely on the ground that LiftFix claimed they could repair and service the lifts for 50 per cent of the cost of any of their rivals. The contract between BioTech and LiftFix states that LiftFix are to be regarded as independent contractors. LiftFix repairs are negligently performed and, as a result, one of the lift cables snaps and the lift plummets to the bottom of the lift shaft, killing its occupant, Damian. After investigating further, BioTech discovers that LiftFix has been sued on several occasions for negligence.
- Charles is employed as a doorman by Lion Lion plc, a company that owns a chain of nightclubs throughout the UK. One night, whilst working at one of Lion Lion's clubs, he is alerted to a drunken customer who has been kicking the toilet doors and has caused substantial property damage. Charles ejects the customer, but in doing so, he breaks the customer's arm. Would your answer differ if Charles had been expressly prohibited from manhandling troublesome customers?

**Charlotte is employed as a courier for Regal Mail plc. On a Sunday, she uses a company van to give her friend a lift to the airport. On the return trip home, she decides to make a number of deliveries to locations between the airport and her house. After making one such delivery, she negligently crashes into a car being driven by Pat.**

- In order for Regal Mail to be vicariously liable for Charlotte's negligence, three requirements will need to be satisfied. First, there must be an employer/employee relationship between Regal Mail and Charlotte. This requirement has clearly been met. Second, it must be established that Charlotte has committed a tort. We are told that Charlotte's driving is negligent, so it would appear that this requirement has also been met.
- The third requirement is more problematic. It must be shown that Charlotte's negligence was engaged in whilst she was in the course of her employment with Regal Mail. If this requirement is not met, Regal Mail will not be vicariously liable, but Charlotte will be personally liable (e.g. see *Beard v London General Omnibus Co*).<sup>4</sup>
- As noted in *Card & James'*, there are two tests used by the courts to determine if the third requirement has been met, namely the Salmond test (established in *Salmond's Law of Torts*)<sup>5</sup> and the

<sup>3</sup> [1990] 2 QB 530 (CA).

<sup>4</sup> [1990] 2 QB 530 (CA).

<sup>5</sup> J Salmond, *Law of Torts* (Sweet & Maxwell 1907) 83.

'close connection' test (established in *Lister v Hesley Hall Ltd*).<sup>6</sup> Where the tort is committed intentionally, the latter test is the preferable, if not the exclusive, test. However, for other torts, the courts tend to apply the Salmond test first and, if it is not met, to then apply the close connection test. As we are dealing with negligence, you should discuss both tests.

- Under the Salmond test, the third requirement will be met if the tortious act was either:
  - a) A wrongful act authorized by the employer, or
  - b) A wrongful and unauthorized mode of doing some act authorized by the employer.
  
- Charlotte's act of negligence will not come within the first part of the Salmond test, but it could come within the second part. She is authorized to drive the van to make deliveries – the problem arises is that she was using the van also to give her friend a lift, and it occurred on a Sunday. The question that arises is whether or not this would amount to a 'frolic' of Charlotte's that takes her outside the scope of the employment. This will be heavily dependent upon the facts of the case, but you may want to discuss other cases involving employee's frolics (e.g. *Harvey v RG O'Dell Ltd*<sup>7</sup> and *Hilton v Thomas Burton (Rhodes) Ltd*).<sup>8</sup>
- The close connection test asks whether or not the tort was so closely connected with the employee's employment, that it would be fair and just to hold the employer vicariously liable. Again, the facts are all relevant. If Charlotte's contract provides that her hours of work are Monday to Friday and that the company van is only to be used for work-related business, then one might argue that she is not acting within the course of her employment. However, the tort occurred when she was engaged in work business, not when she was giving her friend a lift. Accordingly, the court might feel there was a sufficient closeness between the employment in question and the tort in order to impose liability on Regal Mail.
- Both arguments are valid and, as no clear answer emerges, you should discuss both sides' arguments.

**The lifts at BioTech's main office have begun to malfunction. BioTech engages LiftFix Ltd to repair and service the lifts, solely on the ground that LiftFix claimed they could repair and service the lifts for 50 per cent of the cost of any of their rivals. The contract between BioTech and LiftFix states that LiftFix are to be regarded as independent contractors, and not as employees. LiftFix repairs are negligently performed and, as a result, one of the lift cables snaps and the lift plummets to the bottom of the lift shaft, killing its occupant, Damian. After investigating further, BioTech discovers that LiftFix has been sued on several occasions for negligence.**

- In order for BioTech to be vicariously liable for LiftFix's negligence, three requirements will need to be met. The first requirement is that there is an employer/employee relationship between the tortfeasor (LiftFix) and the purported employer (BioTech). In other words, employers are only vicariously liable for the acts of their employees – an employer is not liable for the acts of its independent contractors.
- It should be noted that, the mere fact that a contract provides that a person is to be an independent contractor, will not provide a conclusive classification.<sup>9</sup> However, the parties' classification is relevant and, in the absence of other factors indicating the legal status of the purported employer, the classification is likely to be important. Given how little information you are given, you may assume that the classification will be adhered to and therefore vicarious liability will not be imposed.

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<sup>6</sup> [2001] UKHL 22.

<sup>7</sup> [1958] 2 QB 78 (QB).

<sup>8</sup> [1961] 1 All ER 74.

<sup>9</sup> *Ferguson v John Dawson & Partners Ltd* [1976] 1 WLR 1213 (CA).

- However, this does not mean that BioTech cannot be made liable. Whilst an employer cannot be *vicariously* liable for the acts of its independent contractors, an employer can be *personally* liable for the acts of its independent contractors. In particular, an employer can be liable for the acts of its independent contractor if the employer fails to take reasonable care in the selection or instruction of that contractor.<sup>10</sup>
- Pat could argue that BioTech, in engaging LiftFix based solely on the low quotation, it failed to take reasonable care in the selection of independent contractor, and therefore personal liability should be imposed.

**Charles is employed as a doorman by Lion Lion plc, a company that owns a chain of nightclubs throughout the UK. One night, whilst working at one of Lion Lion's clubs, he is alerted to a drunken customer who has been kicking the toilet doors and has caused substantial property damage. Charles ejects the customer, but in doing so, he breaks the customer's arm. Would your answer differ if Charles had been expressly prohibited from manhandling troublesome customers?**

- In order for Lion Lion to be vicariously liable for Charles' trespass to the person, three requirements will need to be satisfied. First, there must be an employer/employee relationship between Lion Lion and Charles. This requirement has clearly been met.  
Second, it must be established that Charles has committed a tort. Charles is likely to have committed the torts of battery and/or trespass to the person.
- The third requirement is where the discussion arises. It must be shown that Charles' battery/trespass to the person was engaged in whilst he was in the course of her employment with Lion Lion. If this requirement is not met, Lion Lion will not be vicariously liable, but Charles may be personally liable (e.g. see *Beard v London General Omnibus Co*).<sup>11</sup>
- As noted in *Card & James'*, there are two tests used by the courts to determine if the third requirement has been met, namely the Salmond test (established in *Salmond's Law of Torts*)<sup>12</sup> and the 'close connection' test (established in *Lister v Heselley Hall Ltd*).<sup>13</sup> Where the tort is committed intentionally, the latter test is the preferable, if not the exclusive, test. However, for other torts, the courts tend to apply the Salmond test first and, if it is not met, to then apply the close connection test. As we are dealing with intentionally committed torts, you should discuss the close connection test.
- The close connection test asks whether or not the tort was so closely connected with the employee's employment, that it would be fair and just to hold the employer vicariously liable. Clearly, there is a similarity between the facts of our case and the case of *Mattis v Pollock*,<sup>14</sup> where the Court of Appeal found the employer of a doorman vicariously liable, stating that the doorman's attack was sufficiently close to his employment to justify imposing vicarious liability.
- You may wish to briefly set out the facts of *Mattis*, but it is important to note some important differences:
  1. The doorman in *Mattis* was encouraged to act in a threatening and intimidating manner.
  2. In *Mattis*, the doorman's attack was committed over 100 metres away from the nightclub that employed him.
  3. In *Mattis*, the doorman attacked the customer as an act of personal vengeance.
- It would be thought that the above facts of *Mattis* would persuade the Court that vicarious liability would not be imposed, but this was not the case. Given that none of these factors are present in our

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<sup>10</sup> *Pinn v Rew* (1916) 32 TLR 451 (DC).

<sup>11</sup> [1990] 2 QB 530 (CA).

<sup>12</sup> J Salmond, *Law of Torts* (Sweet & Maxwell 1907) 83.

<sup>13</sup> [2001] UKHL 22.

<sup>14</sup> [2003] EWCA Civ 887.

case (or at least, we are not told that such factors were present), it is reasonable to conclude that Charles' actions are so closely connected to his employment that vicarious liability will be imposed upon Lion Lion.

- In *Gravil v Carroll*,<sup>15</sup> Sir Anthony Clarke MR stated that the court should look at the nature of the employment and the closeness of the connection between that employment and the tort. The nature of a doorman's employment is to deal with rowdy customers and this will involve physically manhandling such customers. Accordingly, it is likely that the court would conclude that the nature of Charles' employment is sufficiently closely connected to the tort to justify the imposition of vicarious liability on Lion Lion. In *Lister v Hesley Hall Ltd*, Lord Steyn stated that 'the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties...' One must conclude that the breaking of the customer's arm was also interwoven with the doorman's performance of his employment.
- Would Lion Lion be able to avoid vicarious liability if it had expressly prohibited Charles from manhandling troublesome customers? One might think that, if an employee disobeys an express prohibition, he would not be acting within the course of his employment, but this is not the case. The question to ask is has the employee's disregard of the express prohibition distanced his act from his employment to such an extent that it would be unfair to make his employer vicariously liable.
- The courts make a distinction when answering this question. If the prohibition limits the scope of the employee's duties then, should the employee disregard the prohibition, his act will be outside the scope of his employment and vicarious liability will not be imposed on his employer. However, if the prohibition does not limit the scope of his employment, but merely limits the manner in which the employer should perform his duties, then disobeying the prohibition will not take the act outside the scope of the employment and vicarious liability can be imposed. The case of *Limpus v London General Omnibus Co Ltd*<sup>16</sup> provides a good example of this.
- The prohibition placed upon Charles not to manhandle customers does not limit the scope of his employment, but merely limits the manner in which his employment is to be performed. Accordingly, disobeying the prohibition will not avoid the imposition of vicarious liability upon Lion Lion.

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<sup>15</sup> [2008] EWCA Civ 689.

<sup>16</sup> (1862) 1 H & C 526 (CA).