# WORKSHOP ANSWERS

# VICARIOUS LIABILITY – WHERE'S THE BLAME?

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**1. At the trial of the action, in respect of the assault on Carl by X, what hurdles will Carl need to overcome in order to establish liability?**

There are a number of hurdles that Carl will need to overcome in order to succeed with his cases. These include showing that the Defendant failed to provide a safe system of work, that Carl was exposed to a foreseeable risk of injury and causation. In addition, the Claimant will need probative expert evidence to establish causation.

The issues of causation and the importance of supportive expert evidence are dealt with in the case of *Vaile v London Borough of Havering* [2011] All ER (D) 124 (Mar). This case involves the assault of a teacher at a school for children with learning difficulties. See also the first instance approach of Hughes J in *Millward v Oxfordshire County Council* [2004] EWHC 455 (QB).

A primary difficulty in establishing liability is proving that the breach of duty caused the harm to the Claimant. This is a recurring problem in cases where the breach consists of a failure to provide adequate information or training. As assaults tend to occur quickly and unexpectedly it is difficult to prove that a suitably informed and trained Claimant would not have been assaulted anyway.

Longmore LJ in *Vaile* quoted Toulson LJ at paragraph 28 of the case of *Drake v Harbour* [2008] ALL ER (D) 283: *"Where a Claimant proves both a Defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the Claimant is unable to prove positively the precise mechanism."* In other words, common sense can be applied to the facts of a case and a Claimant can establish causation by inference.

**2. On what basis do you think that the School might be vicariously liable for the actions of Bob, Ellie and Carl?**

<u>Employees, agents and independent contractors</u>

When considering the issue of vicarious liability, a distinction has to be drawn between employees, agents and independent contractors.

An employee is employed under a contract of service. In the well-know case of *Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance* [1968] 2 Q.B. 497 MacKenna J held that a contract of service existed if the following applied:

(i) The employee agreed that, in consideration of a wage or other remuneration, he would provide his own work and skill in the performance of some service of his employer;

(ii) He agreed, expressly or by implication that, in the performance of that service, he would be subject to the other's control in a sufficient degree to make that other employer; and

(iii) The other provisions of the contract were consistent with it being a contract of service.

The position has been reviewed since in the cases of *Lane v Shire Roofing Co. (Oxford) Ltd,* The Times, 22 February 1995*,* CA *and Lee Ting Sang v Chung Chi-Keung* [1990] 2 A.C. 374.

The issue of control is of real significance. In *Mersey Docks and Harbour Board v Coggins & Griffith* (Liverpool) Ltd [1947] A.C. 1, the House of Lords re-emphasised the test of control. It was suggested that it was necessary to examine who had the right to control the way in which the negligent act was performed.

It is clear from the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Limited* [2006] 2 W.L.R. 428, CA, that more than one employer can be vicariously liable for the negligence of an employee under the direction of another.

An independent contractor is a person who carries on an independent business on his own account, in the course of which he contracts to do certain work (see the *Ready Mixed Concrete* case). Independent contractors generally include any self-employed person carrying on a separate business.

An agent is a person who is authorised to act on behalf of another. There does not need to be a contractual relationship, like that present between an employer and an employee. For example, friends, a spouse and the children of the principal, have all been found to be agents. In the case of *S v Walsall Metropolitan Borough Council* [1985] 1 W.L.R. 1150, CA, where a child in the care of the Local Authority had sustained personal injuries as a result of her foster parents' negligence, the Local Authority was held not to be liable vicariously for such negligence because there was no relationship of principal and agent between them.

- It is clear on the facts that Bob is not an employee. Also, as a university student doing a voluntary workplace observation, you may think that there is no evidence to suggest that Bob was an agent of the school as Alan did not authorise Bob to act on the school's or Alan's behalf.

Accordingly, as a volunteer/observer, the school cannot be held liable to Carl for the action of Bob in throwing the book.

If Bob had been an employee of the school this would clearly have made a difference. Furthermore, a volunteer teaching assistant would probably be classed as an agent.

In terms of borrowed employees there is a presumption that liability rests with the general employer. Much will depend on the construction of the contract between the general and temporary employer. Consider also who had the right to control the way in which the negligent act was performed, who is paymaster, who can dismiss, how long the alternative service lasts and what machinery is employed (*Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1). The implication here is that Ellie was working at Alan's school for some time and was under his direction and control. Whether or not she was acting in the course of her employment, however, is considered below.

The self employed actor would presumably be an independent contractor for whom no vicarious liability would attach.

"The Course of Employment"

The question of whether a particular action will be deemed to be in the course of employment is fact specific and a question of judgement.

The traditional test of whether the employee was performing an unauthorised act or an authorised act in an unauthorised way is no longer decisive, particularly in cases involving deliberate wrong doing. The correct test is whether the tort is so closely connected to the employment that it is just and fair to find the employer vicariously liable (*Lister v Hesley Hall Ltd* [2002] 1 AC 215 and *Gravil v Carroll and Redruth Rugby Football Club* [2008] EWCA Civ 689.

It is, therefore, necessary to focus closely on the connection between the employment and the tort. The court will have to consider whether the employment provide a mere opportunity to commit the wrong or whether the employee can go further than this and demonstrate a close connection with work such that it is just and reasonable to find the employer vicariously liable. In *Lister* the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the boarding house. In *Gravil* a punch thrown by a rugby player in a melee which presented itself after a scrum had broken down was found to be a reasonably incidental risk to the business, the employer carried on and thus the club were vicariously liable for the actions of their player.

In this case:

- The sword fight took place in working hours on the school premises. It appears to be an improper mode of carrying out a permitted activity i.e. an English lesson. Thus it appears to be very closely connected with Carl's employment.

- The hot pebble massage appears to be entirely unrelated to the school activities. The job provided Ellie with the opportunity to commit the Tort but no more.

- The assault is more borderline. Did the very nature of the employment (looking after children with special educational needs) give rise to the risk of a teacher losing control? As such was the assault reasonably incidental to the employment? It could be argued that Bob was charged with caring and managing difficult children and in effect managed the difficult children badly (by throwing a book at them). This is different from an assault which occurs as a result of a personal vendetta or unpredictable loss of control.

  Of course, the employer could be directly (rather than vicariously) liable for the assault if this was reasonably foreseeable because he knew or ought to have known that his staff were not up to the job (either because they had a proven propensity to lose their temper or because of inadequate training).

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