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## A2 GCE LAW

**G158/01/RM** Law of Torts Special Study

**SPECIAL STUDY MATERIAL**

*G132030113*

**Duration:** 1 hour 30 minutes

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# G158 LAW OF TORTS

## SPECIAL STUDY MATERIAL

### SOURCE MATERIAL

### SOURCE 1

**Extract adapted from *Tort Cases & Materials*. 5th Edition. Hepple, Howarth & Matthews. LexusNexus Butterworths. Pp.1017.**

The individual defendant in a tort action is often a man of straw. The typical modern way of ensuring that claimants actually receive the compensation to which they are entitled is through the device of compulsory insurance. But there is also an older legal mechanism which enables the claimant to fix responsibility on someone other than the impecunious actor. This is the principle of vicarious liability. The actor and the person to whom responsibility is imputed are jointly liable to the plaintiff. The person who actually pays may be able to recover that payment from the actor; but so far as his liability to the plaintiff is concerned, liability is imposed regardless of personal fault. The justification for this principle is controversial. The most widely accepted theory is that the person with the power of control and direction over the actor is usually the best fitted to absorb the loss: this is likely to be an enterprise which can pass on liability costs to consumers of its products in the form of higher prices, to shareholders in the form of reduced dividends, and to employees in the form of lower real wages. If all those who committed torts were adequately insured there would be no need for a doctrine of vicarious liability. So goes the theory. Another theory says that the first theory cannot explain why organisations with even greater resources, the banks, for example, or the government, are not fixed with liability instead. According to this theory, employers are liable because they are in the best position to determine the risk attaching to their use of particular employees. Employers are in the best position to find out about the characteristics of their employees and re-train, move to other duties or, ultimately, dismiss employees who are unreasonably risky. All the theories have their critics, and it is clear that there is no particular connection between present-day justifications for vicarious liability and the historical development of the doctrine.

It is clear, however, that an important underlying problem in this field is how to attribute legal responsibility to organisations, rather than to individual people. The adaptation of legal doctrines based on personal responsibility to a world dominated by impersonal organisations, and within which responsibility is dispersed, has been no easy task.

**SOURCE 2**

**Extract adapted from *Beard v London General Omnibus Company* [1900] 2 QB 530.**

Smith LJ:

It appears that the plaintiff, while riding a bicycle, was run over by an omnibus belonging to the defendants. He brings an action against the company for the negligence of the person who was driving the omnibus. I agree that on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negligence, there would be a *prima facie* case that the omnibus was being driven by an authorised servant of the company within the scope of his employment. But that is not this case, for it was expressly opened to the jury as a case in which the omnibus was not being driven by the driver who was employed to drive it, but by the conductor. When a case is so opened, that negatives the presumption that the omnibus was being driven by the authorised agent of the company, because *prima facie* it is not the duty of the conductor to drive any more than it is the duty of the driver to take fares. My brother Romer, in the course of the argument, put the illustration of an omnibus being driven by a stranger to the defendants. In such a case it would be impossible to say that the proof that the omnibus was being driven by a stranger would raise any case against the company. The plaintiff must in such a case have gone on to show that the stranger was driving with the consent or approval of the company, or on such an emergency that their consent must be implied. There was no evidence on either of these points as regards the conductor; and therefore Lawrence J. came to the conclusion – and, in my opinion, rightly – that the plaintiff had not made out a prima facie case. I think, therefore, that the appeal must be dismissed.

[This case was described by one of the other judges (Vaughan Williams LJ) as being 'on the border line'. It is certainly inconsistent with numerous other decisions which confirm that an employer is vicariously liable for authorised acts done in an unauthorised or negligent way and even where the employer has expressly forbidden a practice. In particular, the case does not sit well with the case of *Limpus v London General Omnibus Co Ltd* where there was vicarious liability in circumstances where a bus was being driven in a recklessly dangerous manner.]

**SOURCE 3**

**Extracts adapted from *Bazley v Curry* [1999] 2 S.C.R. 534.**

Pursuant to the *Salmond* test, employers are vicariously liable for both employee acts authorized by the employer and unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing authorized acts. In determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles.

First, they should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".

Second, the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of the provision of an adequate and just remedy and of deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

Third, in determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
(d) the extent of power conferred on the employee in relation to the victim; and
(e) the vulnerability of potential victims to the wrongful exercise of the employee's power.

[T]rial Judges are required to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing.

**SOURCE 4**

**Extract adapted from *The Evolution of Vicarious Liability in Tort in Respect of Deliberate Wrongdoing*. Paul T Rose QC.**

A third part of the analysis in *Bazley* was acknowledged by the English Courts as being of assistance in determining issues of vicarious liability in the decision of *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] IWLR 2158 a decision of the Court of Appeal. The facts were as follows:

[T]he claimant and a friend visited a nightclub run by the defendant. For no good reason they were refused entry by a doorman C, who acted at the behest of the owner. C was the eventual assailant of the claimant. C was aggressive and the court found that there had been an earlier serious incident involving C when he threw a customer across the floor. C was specifically employed to intimidate – he was 6′ 8″ and weighed 20 stone. He was unlicensed. On the day of the assault the claimant attended the club again. After he had arrived his friend from the earlier visit also visited the club. C on seeing the friend told him he was not allowed in the club and put his arm around him and pulled him towards C. A scuffle broke out, C was himself struck by a bottle. The claimant had at one point attempted to pull C away from attacking one of his friends. Because C was outnumbered he fled the club. He returned to his flat which was about 500 ms from the club and armed himself with 2 knives. About 15 to 20 minutes after C had fled the club he reappeared about a 100 ms away from the club where he saw the claimant and others. He ran up to the claimant and stabbed him in the back, severing his spinal cord.

The judge dismissed the claim against the club owner holding that the time elapsing between C leaving the club and the incident meant that the events were not one incident and there was an insufficiently close connection between C's employment and the assault.

The Court of Appeal overturned the decision. The reasoning is of interest. At para 20, Judge LJ said: having posed the close connection test:

"In answering this question we have borne in mind the further clarification of several important features of the principles relating to vicarious liability conveniently summarised by Lord Millet in the *Dubai Aluminium* case [2002] 3 WLR 1913, 1941–1942 para 12. It is no answer to claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal. Or that he was acting exclusively for his own benefit, that he was acting contrary to instructions, or that his conduct was the very negation of his employer's duty … vicarious liability is not necessarily defeated if the employee acted for his own benefit".

**SOURCE 5**

**Extract adapted from *Lister v Hesley Hall Ltd* [2001] UKHL 22.**

*Lord Clyde at para 31:*

Between 1979 and 1982 while the appellants were in their early teenage years they attended a school for maladjusted and vulnerable boys which was owned and managed by the respondents. During the course of that period they were the victims of repeated sexual and physical abuse by the warden of a boarding house in which they were resident as students of the school. The warden was employed by the respondents to look after and care for the students resident in the house. The warden was later tried and convicted for a large number of offences against the appellants and other boys. The appellants have claimed damages from the respondents for personal injury. It is not now contended that the respondents had failed to take reasonable care in selecting or supervising the warden. The claims now rest on the basis that the respondents are vicariously liable for the acts of their employee.

*and further at para 50:*

[T]he particular acts which he carried out upon the boys have to be viewed not in isolation but in the context and the circumstances in which they occurred. Given that he had a general authority in the management of the house and in the care and supervision of the boys in it, the employers should be liable for the way in which he behaved towards them in his capacity as warden of the house. The respondents should then be vicariously liable to the appellants for the injury and damage which they suffered at the hands of the warden.

*Lord Millett at para 65:*

[V]icarious liability is a species of strict liability. It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss-distribution device[.] … The theoretical underpinning of the doctrine is unclear. Glanville Williams wrote:

"Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends".

Fleming … indicated that it should be frankly recognised as having its basis in a combination of policy considerations, and continued:

"Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise …"

**SOURCE 6**

**Extract adapted from *Making a Connection*. Charles Pigott. New Law Journal. 2 April 2010.**

In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 the Court of Appeal has concluded that the Archdiocese was vicariously liable for acts of child abuse committed by one of its priests, even though the claimant was not a Roman Catholic and had nothing to do with the church to which the priest was attached. The claim arose from acts of abuse committed in the mid-70s by Father Clonan, a priest working at a Roman Catholic church in Coventry. Father Clonan was in his early 30s when he began work at the church. He focused particularly on youth work, running discos and social clubs and coaching a number of football teams. He lived at the presbytery next to the church, which was owned by the Archdiocese and housed a number of other priests. He had additional income from running a construction company and owned a number of houses in the Coventry area as well as a succession of sports cars.

The claimant, now in his late 40s, has learning difficulties and suffers from epilepsy. When he was in his early teens he first met Father Clonan while admiring his sports car, a Triumph Stag. After that he was invited to the church disco on a number of occasions. Father Clonan then paid him to do various odd jobs unrelated to church activities. The abuse first occurred in the presbytery, but then took place in a number of other places including in one of the houses Father Clonan owned and in his car. Father Clonan left the church abruptly in 1992, shortly before the sexual abuse he had committed was first uncovered, and has not been heard of since.

The claimant issued proceedings in 2006, having heard reports that another person who had been abused by the priest as a boy had recovered damages against the Archdiocese. His claim was allowed to proceed because it was accepted by the trial judge that he continued to be under a disability for the purpose of section 28 of the Limitation Act 1980.

The significance of this case derives from the claimant's appeal against the trial judge's ruling that even though the abuse did occur, the Archdiocese was not vicariously liable. The starting point for deciding this question was the House of Lords' decision in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. Lister broke new ground because the Court of Appeal had decided a few years earlier, in *Trotman v North Yorkshire County Council* [1999] LGR 584, that no vicarious liability could attach for sexual abuse because it could not be regarded in any sense as a mode of carrying out the employee's duties. The House of Lords responded by developing a new test for vicarious liability. … Lord Steyn, … said the question to answer was whether the employee's wrongdoing 'was so closely connected with his employment that it would be fair and just to hold the employers vicariously liable'.

Lord Neuberger, who gave the leading judgment in *Maga*, pointed out that at first sight the claimant's case was weaker than the claim in Lister because of his absence of connection with the Catholic Church. However, Lord Neuberger went on to list a number of factors which persuaded him that the Archdiocese should be liable. These included the moral authority associated with a priest, Father Clonan's particular responsibility for youth work and the fact that he was able to develop his relationship with the claimant by inviting him to church discos.

Lord Neuberger also laid emphasis on Father Clonan's duty to evangelise, which meant that part of his role as a priest was to befriend non-Roman Catholics and to gain and be worthy of their trust.