Liability Update

July 2021

James Harvey
Partner,
T +44 (0)121 633 6622
E james.harvey@blmlaw.com

David Thompson
Partner,
T +44 (0)121 234 6133
E david.thompson@blmlaw.com

Vicarious Liability

Morrisons v Various Claimants [2020]

Facts- A senior auditor (Mr Skelton) in Morrison's internal audit team held a longstanding grudge against the company and resolved to damage it. He was assigned the task of collating and transmitting payroll data to the company's statutory auditors, KPMG. The payroll data was provided to Mr Skelton so that he could carry out this task. Skelton transmitted the data to KPMG as he had been instructed to do. However, he also copied the data from his work laptop to a personal USB stick and later uploaded a file containing the data of nearly 100,000 employees to a publicly-accessible file-sharing website. Mr Skelton then sent CDs containing the files anonymously to three UK newspapers, purporting to be a concerned member of the public who had found the file on the file-sharing website. Mr Skelton was arrested and subsequently convicted of a number of offences and sentenced to eight years' imprisonment.

A substantial number of current and former Morrisons' employees brought claims against Morrisons. The claim included vicarious liability of Morrisons for the employee's actions.

Held- The lower courts, up to the Court of Appeal found Morrisons were liable on a vicarious liability basis for the employee's actions. They found that the employee's actions were "within the field of activities assigned by Morrisons", and that his vengeful motive was irrelevant.

The decision was appealed to the Supreme Court on whether Morrisons was vicariously liable for the employee's actions. The Supreme Court ruled unanimously that Morrisons were not vicariously liable. They found that the High Court and the Court of Appeal had misunderstood the principles of vicarious liability, in particular:

- The lower courts had defined "field of activities" too widely – the Supreme Court ruled that the disclosure of data on the internet did not form part of the employee's functions or field of activities, it was not an act he was authorised to do; and
- The employee's motive was relevant – indeed the Supreme Court held that it was highly material.

The mere fact that Mr Skelton's employment gave him the opportunity to commit the wrongful act would not be sufficient to warrant the imposition of vicarious liability. The general requirement to establish employer vicarious liability is therefore that *"the wrongful conduct must be so closely connected with acts the employee was authorised to do that … it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment."*

It was said that "the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts."

Impact- This decision provides reassurance that employers will not usually be vicariously liable in the exceptional circumstances where employees commit wrongful acts when pursuing personal vendettas or acts of revenge. It emphasises that the application of vicarious liability is limited to circumstances where the actions of the employee were carried out in pursuing the business of the employer. Also, that the mere fact that an employee's job provides them with the opportunity to commit wrongdoing is not sufficient to establish vicarious liability. The Supreme Court has reinstated the orthodox legal position, which is a narrower application of vicarious liability under English law. There had been a trend in recent past

judgments for courts to find employers vicariously liable in circumstances where previously the employee's acts were considered to be outside the scope of their employment. Arguably, the decision of the Supreme Court in the *Morrisons* case, by restating the law redresses the balance.

Vicarious Liability and Independent Contractors

Barclays Bank Plc v Various Claimants [2020]

Facts- Dr Gordon Bates was engaged by Barclays as an independent contractor to conduct pre-employment medical examinations. Dr Bates was often referred to as "the bank's doctor" or "our doctor". The examinations took place in the doctor's home, and many of those subject to examination were young, female and attended on their own. It was alleged that a number of individuals were assaulted during their examinations. The doctor has since died and his estate been distributed, so the only option for claimants was to sue Barclays on a vicarious basis.

Held- The lower courts considered that the appropriate test to determine whether Barclays was vicariously liable for the medical examinations performed by Dr Bates was the two stage test handed down in *Cox v Ministry of Justice* and *Mohamud v WM Morrisons Supermarkets.*

The two stage test can be summarised as follows:

1. Is the relevant relationship between Dr Bates and Barclays one of employment or "akin to employment"?
2. If so, was the act sufficient to closely connect with that employment or quasi-employment?

To determine the first stage of the test, the trial judge and Court of Appeal approved the five criteria identified by Lord Phillips in *Catholic Child Welfare Society v Claimants* [2012]. It was concluded that the two stage test and each of the five criteria were satisfied and the relationship with the doctor was "akin" to employment. They considered that the extent of control (the fifth criterion in the first stage) was perhaps the most critical factor. The fact Dr Bates organised his own professional life and undertook other medical activities did not negate an argument that he was under the control of the bank. Nor did the fact he conducted examinations within his own home. An important factor in this case was the fact that Barclays directed and identified the questions to be asked and the physical examinations to be carried out by the doctor for the purposes of completing the template form.

The decision was appealed to the Supreme Court who allowed the appeal and held that Barclays were not vicariously liable for any wrongdoing of Dr Bates.

The Supreme Court acknowledged that the definition of 'worker' was shifting in employment law, but that this shift should not undermine the distinction between employees and independent contractors. They considered that as far as vicarious liability is concerned, there was still a distinction between employment and relationships akin to employment, on the one hand, and the role of independent contractor, on the other. In their view, the statutory concept of "worker" and the common law concept of vicarious liability were developed for a very different set of reasons and there was no justification for aligning the two concepts.

They ruled that the doctor was in an independent contractor relationship and was not in a relationship with the bank "akin" to employment. He was a part time employee of the health service. The fact that the Bank sent him the forms to complete and made arrangements for the examinations was not sufficient to establish a relationship akin to employment.

Impact- The judgement likely gives comfort for those engaging the services of independent contractors to know that there is still an independent contractor's defence. The decision confirms that the facts of a case could override any express agreement between the parties if on those facts the relationship between those parties made it fair, just and reasonable to impose vicarious liability. With reference to vicarious liability, the decision can also be seen as a rejection by the Supreme Court of the suggestion that the increase in worker status cases had eroded the definition of employment for vicarious liability purposes. The lower courts appear to have moved towards expanding the concept of vicarious liability and the Supreme Court has corrected this.

Vicarious Liability and Seconded Employees

NatWest Markets Plc v Bilta (UK) Ltd [2021]

Facts- The claim was brought by various companies in liquidation and their liquidators against NatWest Markets Plc on the grounds of dishonest assistance and fraudulent trading in assisting a VAT carousal fraud in the carbon credit market.

The matter also concerned whether the employer and host employer were vicariously liable for two seconded employees' alleged dishonest assistance and knowing participation in the fraudulent trading.

Held- The Court of Appeal upheld the High Court decision ruling that both the employer and host employer were vicariously liable for the two seconded employees. This was on the finding that the seconded employees were so much a part of the work, business or organisation of both their employer and the host company that it was just to make both employers vicariously liable.

The Court of Appeal judgement notes that the test is whether the seconded employee can be said to be so much of a part of the work, business and organisation of the relevant employer so as to make that employer vicariously liable for the employee's tortious actions.

The court rejected the argument made by the employer that the "loan" of the traders in this case was "so effective and complete that only the host employer should be held responsible for their tortious acts". The court warned that it will be very rare to have circumstances giving rise to such a complete shift from the actual employer to the organisation to which the employee is loaned. The court also noted that there has been no recorded case that has come to this conclusion.

Impact- The decision is a reminder that cases on vicarious liability are highly fact sensitive. Also, that in most instances the employer will remain vicariously liable for its employee.

Public Liability and Deliberate Acts

Burnett or Grant v International Insurance Company of Hanover Ltd [2021]

Facts- In 2013 the victim was kicked out from an Aberdeen bar by a door steward. An altercation ensued and the door steward applied a neck hold to the victim. This resulted in his death by asphyxia.

The victim's widow claimed against the door steward, his employer (Prospect Security Ltd) and the operating company of the bar. Prospect Security Ltd later went into liquidation, and the widow claimed against Prospect Security Ltd's insurer under its public liability policy by way of the Third Party (Rights against Insurers) Act 2010.

Held- At first instance the victim's widow was successful in her claim against the insurer and it was held that the insurer was obliged to indemnify Prospect Security Ltd in respect of their liability to the respondent, with this right to indemnity vested in the respondent under the Act. The decision rested on the interpretation of an exclusion in the policy in respect of 'deliberate acts' ("*Liability arising out of deliberate acts wilful default or neglect by* […] *any* […] *EMPLOYEE of the INSURED*").

The insurer appealed to the United Kingdom Supreme Court, which was asked to consider the same issues as asserted in the previous hearings. One of which was whether the victim's death was brought about by a 'deliberate act' by the door steward within the terms of the exclusion. The Supreme Court unanimously dismissed the appeal, rejecting the insurer's case.

The critical issue was the interpretation of the phrase 'deliberate acts'. The insurer's case was that the act (i.e. the causing of injury) must have been intended to cause injury or carried out recklessly as to whether it would cause injury. The insurer also argued that the "deliberate acts" exclusion separated "deliberate acts" from "wilful default or neglect", but the intention was that both "acts" and "default or neglect" (i.e. omissions) should be interpreted similarly. Therefore, since there was case law which determined that "wilful" included "recklessness", the whole exclusion should be interpreted as only requiring recklessness for both acts or omissions.

The respondent's case was that the act must have been intended to cause the specific injury which resulted (in this case, death or serious injury), which in any event did not include reckless acts.

As regards the door steward's "intention to injure", the Supreme Court referring to the lower court, held that "not only there is no express or implied finding of intention to injure, but Lady Wolffe's conclusion that what was done was not "badly motivated" is inconsistent with there being such an intention."

Impact- The Supreme Court's decision emphasises the approach taken by the courts in relation to policy interpretation where the commercial context of the policy is given its full weight. It was an important factor in the court's decision that if merely reckless acts could suffice for the "deliberate acts" exclusion to apply, it would be a "commercially unlikely exclusion" in view of the nature of the insured's business – described in the policy as "manned guarding and door security contractors". The Supreme Court observed that if "deliberate" included recklessness, the policy coverage would be stripped of much of its content.

It is also supportive of the courts' general approach to construing exclusions narrowly.

Further, the decision is helpful for policyholders in demonstrating that conscious performance of an act with intention to cause insured damage must be established, in order to trigger a deliberate acts exclusion. Mere recklessness will not suffice. Whilst recklessness will be enough to prove breach of a reasonable precautions condition insurers face a higher evidential threshold in relation to 'deliberate acts'.

Vicarious Liability and Horseplay (no VL)

Chell v Tarmac Cement and Lime Limited [2020]

Facts- The claimant was employed as a site fitter by Roltech Engineering Limited. He was contracted out to the defendant, Tarmac Cement and Lime Limited, working alongside Tarmac's own fitters on site which Tarmac controlled and operated. The claimant alleged there had been increased tensions between the Roltech fitters and those employed by the defendant. Mr Heath was those employed by the defendant. Whilst carrying out some work, the claimant bent down to pick up a length of steel. Mr Heath placed two pellet targets he had brought to the site on a bench close the claimant's ear, and then used a hammer to hit them. The resulting explosion caused the claimant to suffer a perforated right eardrum; noise induced hearing loss and tinnitus.

The claimant issued a claim alleging that the defendant was vicariously liable for Mr Heath's actions.

The defendant denied liability submitting that 'horseplay' was not part of Mr Heath's employment, and Mr Heath's actions were "*of his own volition without any sufficient connection to his employment*'. They also denied knowledge of any rising tension.

Held- At first instance the claim was dismissed.

The trial judge held that the requirement of a close relationship between Tarmac and Mr Heath was established because of Mr Heath's employment by Tarmac. However, there was an insufficiently close connection between that relationship and Mr Heath's act to make it just that Tarmac should be held responsible for that act. He ruled that *"there was not a reasonably foreseeable risk of injury from a deliberate act on the part of Mr Heath or any Tarmac employee to the claimant such as to give rise to the duty to take reasonable steps to avoid that risk"*.

The reasons for that finding were that:

1. The pellet target was brought on to the site and was not work equipment;
2. It formed no part of the Tarmac fitter's work to use let alone hit pellet targets with a hammer at work;
3. What he did was unconnected to any instruction given to him in connection with his work;
4. He had no supervisory role in relation to the claimant's work and at the index time he was meant to be working on another job in another part of the site;
5. The striking of the pellet targets with a hammer did not in any way advance the purposes of Tarmac; and
6. In all those circumstances, work merely provided an opportunity to carry out the prank that he played, rather than the prank in any sense being in the field of activities that Tarmac had assigned to its fitter.

The claimant appealed. He argued that Tarmac had failed to supervise Mr Heath and that no reasonable system was in place to maintain discipline. The first instance decision was upheld, and the appeal dismissed. The judge held that the trial judge's conclusion was correct, namely that:

1. The existing site health and safety procedures which included a section on general conduct stating 'no one shall intentionally or recklessly misuse any equipment' was sufficient given the multifarious ways in which employees could engage in horseplay, ill-discipline or malice and nothing more specific could reasonably be expected; and

2. Increased supervision to prevent horseplay, ill-discipline or malice was not a reasonable step to expect this employer to have identified and taken.

Impact- The ruling confirms that in order for liability to be established, the wrongdoer's actions must be within the field of activity entrusted to him by his employer. If the wrongdoer is on a "frolic of his own", his employer will not be held responsible. It is, therefore, unlikely that vicarious liability will arise in circumstances where a claimant has been injured as a result of a practical joke.

Vicarious Liability and Horseplay (found VL)

Levitt v Euro Building & Maintenance Contractors Ltd and Another [2019]

Facts- The claimant and Fowler (the attacker) were engaged on a construction site by the first defendant. The claimant and Fowler became involved in an argument concerning their work. The incident started as a verbal altercation. However, it escalated with Fowler striking the claimant violently over the head with a scaffolding pole. The claimant sustained a right-sided subdural haemorrhage, a subarachnoid haemorrhage, and extensive skull fractures as a result.

The claimant brought a claim arguing that the first defendants were vicariously liable for the actions of Fowler. The second defendant was the insurer of the first defendant.

Held- The claimant was successful and the defendants were vicariously liable for the actions of their employee, who here was the attacker.

The first defendant had sought to argue, as is common in the building industry; both the claimant and Fowler were self-employed. On that basis, it denied that it was vicariously liable for the attacker's actions.

The court rejected this argument, ruling instead that the relationship between the first defendant and Fowler was closely akin to that of employer and employee.

They went on to note that the conduct of Fowler was proximate to the "field of activities" that had been entrusted to him. The reasoning being that:

1. The assault was by one (quasi) employee on another (quasi) employee;
2. The assault occurred during working hours at a site where the defendants were engaged;
3. The background to the assault was an argument about work and the requirement for work materials;
4. The assault occurred within minutes of the initial argument there being an unbroken sequence of events; and
5. The weapon which was used was work equipment.

Although the attacker's wholly disproportionate and extremely violent reaction was not foreseeable, it had arisen in a work situation.

Impact- This matter was before *Morrisons* and *Barclays* and appears to show an extension in the law of vicarious liability in cases where it is difficult to find a close connection between the tort and the job of the tortfeasor.

Manual Handling

Lee Walsh v CP Hart & Sons [2020]

Facts- The claimant was working for the defendant as a delivery driver to make deliveries in a vehicle. The vehicle being used had a shuttered style rear door with a tail lift which could be opened, then folded out, and raised or lowered to lift items into or out of the van. The claimant was positioned inside the van. He lowered the tail lift containing a pallet for delivery then awaited the return of the pallet pump truck. This would be raised on the tail lift to collect the next pallet from the lorry. Whilst the tail lift was still in the lowered position the claimant either stepped backwards or lost his footing, falling approximately one metre to the ground. As a consequence, he sustained a serious head injury.

The claimant argued that the defendant was in breach of the regulations 4 and 6 of the Work at Height Regulations 2005, and contended that measures should have been in place to ensure that the tail lift was always raised if a worker was in the back of the lorry.

Held- In the first instance, the claim was dismissed and judgement was given in favour of the defendant. It was ruled that there were no breaches of the regulations. The judge performed a simple balancing exercise, concluding that it would not have been reasonably practicable for the defendant to raise the tail lift when the back of the vehicle was occupied. This was despite the same being a measure adopted by the defendant following from the accident.

The claimant appealed and was successful.

The judge ruled that the first instance judge wrongly treated the test of reasonable practicability as involving a simple balancing exercise. The correct approach was to begin with the issue of practicability. If the measure is practicable, the question of reasonableness arises. A measure is said not to be reasonably practicable only if there is gross disproportion between the quantum of risk and the sacrifice involved in taking that measure.

As to the raising of the tail lift, on appeal it was said that it was "perhaps surprising that the learned judge found that it would not have been reasonably practicable for the defendant to have taken this measure pre-accident, when they had done so post-accident." The court found that the judge at first instance had erred in making the factual finding that the risk of falling from the bed was low, in making such a determination he had overlooked, or misunderstood, the failure of the defendant's risk assessments to adequately address the risk.

Impact- The judgment on appeal reaffirms the law relating to the 'reasonably practicable' test. Namely that judges should ask whether a measure would have been "grossly disproportionate", rather than merely asking on the balance whether the measure would have been proportionate. It also reaffirms the position that proving a measure to be unreasonable is an "onerous duty" on defendants. The test does "not provide the employer with an easy escape avenue but rather a "long stop" defence in very limited circumstances."

Manual Handling

Needle v Swallowfield Plc [2020]

Facts- The claimant was employed by the defendant as an engineering technician. His job was very varied and some tasks were unplanned as his role was to repair machinery which had broken down.

In February 2013 he sustained a fracture to his left fourth metacarpal bone when handling a disused dispensing pump. The pump weighed approximately 48 kilograms. When standing upright it rested upon four short metal legs. The machine was of irregular shape; its weight was not evenly distributed.

The pump had been out of service for some time and needed to be fixed in order to be used to fulfil an order. The claimant's task was to fix the pump and in doing so he submitted that he injured his left hand due to the manual handling involved.

The claimant alleged that the manual handling task involved a foreseeable risk of injury and could have been avoided. In the event that the task could not have been avoided, the defendant failed to undertake an appropriate risk assessment.

Held- At first instance the claim was dismissed. The judge concluded that there was no real or sufficient possibility of risk of injury to the hands or wrists when turning or pushing the dispensing pump as long as employees were warned of the need to apply their skill and experience and undertake a dynamic risk assessment. It was found that the task in question was unique but was within the claimant's capability and expertise. The claimant had been trained to undertake a dynamic risk assessment and there was nothing *"inherently or uniquely dangerous"* to have required further warning or a risk assessment to have been carried out by the defendant in respect of that specific tasks.

The claimant appealed and his appeal was dismissed. The judge had not erred in finding that the handling of the pump had not involved a foreseeable risk of personal injury. His conclusion was not *"… irrational or contrary to common sense"*. He had rightly identified the claimant's skill, training and expertise and had correctly analysed the risk of injury in this context. The judge had not been wrong to place little or no weight on the modest changes and emphasis in working instructions in the light of the accident.

The judge had correctly analysed the risk of injury in the context of the claimant, his place of employment and the particular manual handling operation. He had identified the relevant context, being the claimant's skill and training, and had identified that no relevant risk existed provided that he was warned of the need to apply his skills and experience when undertaking his own dynamic risk assessment.

The judge had incidentally commented that if a task-specific assessment had been undertaken under regulation 4(1) of the Manual Handling Operations Regulations 1992, this would have yielded no further advice, warning or other action over and above the claimant's dynamic risk assessment.

Impact- Appellate courts will not interfere with first instance decisions unless there is an error of law or fact. Here it was found that the judge had rightly considered the risk of injury taking into account the claimant's skill, training and expertise. It was noted that the claimant had been told to undertake a dynamic risk assessment and if a task-specific assessment had been carried out by the defendant, this would not have identified anything different.

The defendant was successful in this case as it was found that there was no foreseeable risk of injury from carrying out the task in question if employees with the relevant skill and expertise were warned of the need to carry out a dynamic risk assessment.

It should be noted that there was nothing out of the ordinary with the task in question. The weight, height and manoeuvrability of the dispensing pump were not of any note and it was accepted that the claimant was a "problem shooter" who had the requisite knowledge and skill to be able to undertake a suitable dynamic risk assessment.

Occupier's Liability and Slips

Wilson v B&Q Plc, Clerkenwell County Court [2020]

Facts- The claimant alleged that she slipped and fell on ice when visiting one of the defendant's stores. It was not disputed that it had been a very cold day and the claimant submitted that the temperature had been somewhere between one and three degrees at the time of her accident. The claimant's accident occurred when she was in the outdoor garden centre of the store. She claimed that the ice should not have been there and the defendant had failed to have an adequate system in place to ensure that the pathways were safe to use.

Liability was denied by the defendant on the basis that they had a reasonable system for gritting outside areas and had in use appropriate signage.

Held- The claim was dismissed on the basis that the claimant was unable to show that there was ice on the ground at the time of her accident. If the claimant had shown that there was ice on the ground, the claim would still have failed as the defendant had reasonable systems in place by way of gritting and the use of appropriate signage.

The first factual issue for determination was whether or not there was ice on the ground. In considering this issue, the judge noted that the claimant had stated that she slipped backwards and landed on her wrist but could not recall seeing any wet floor signs or any rock salt on the ground.

It was accepted that the claimant would have been cautious because she suffered from spina bifida. However, the defendant had a record of the specific checks that were to be made by the duty manager at certain times of the day and the details of the action taken if any issues were identified as a result of those checks being undertaken. This record noted that there was ice in the garden centre, which needed to be dealt with and showed that rock salt was used to help thaw and melt the ice. It also recorded the use of wet floor signs and although there was no specific times provided, the judge noted that this was *"… good evidence of the fact that all this was done."*

Although the accident report recorded that the claimant *"… did not realise that the area was icy…"* The judge was satisfied that the member of staff was simply recording what the claimant had reported. In addition, the judge was not convinced that the use of the words "slip or trip: ice or snow" in the accident book entry was anything other than recording by way of drop down options what the claimant had reported.

The judge was persuaded by the witness evidence of the duty manager who was on shift on the day of the accident. It was accepted that he had attended the area where the accident occurred and was absolutely clear that he saw puddles of water rather than ice. It was held that this was entirely consistent with rock salt being used to thaw and melt the ice on the ground.

In addition, the judge noted that the claimant had stated that her trousers were soaked which, on balance, supported that there was water on the ground rather than ice. He specifically did not accept that the claimant landing and sitting on the ice would have caused it to melt and soak her trousers as she had stated.

Impact- The defendant had done everything reasonably possible to ensure that the claimant would be reasonably safe when visiting their store. It was clear that they had in place a system for gritting outdoor areas when icy conditions were identified. In addition, the judge commented that the signing used was appropriate.

Interestingly, the judge noted that although rock salt was "piled on" by the defendant's employees after the accident due to a knee-jerk reaction, this did not undermine the fact that rock salt had been put down previously. Although the judge was sympathetic towards the claimant and did not dispute the fact that a genuine accident had occurred; all the evidence pointed towards the area having been gritted and, on balance, ice not being present at the time of the claimant's fall.

Occupier's Liability

James v The White Lion Hotel (A Partnership) [2021]

Facts- The deceased, upon returning to his hotel room after attending a wedding, opened a sash window and sat on the sill. Due to there being a fault with the window, he had to hold the lower sash open in order to keep the window open. The claimant fell from the window. At the time of the incident, the windowsill was 46cm above floor level which was different to the modern standard minimum height of 80cm.

The appellant (defendant) pleaded guilty on an agreed basis to offences contrary to the Health and Safety at Work etc. Act 1974 (1974 Act) having accepted that there was a low risk of someone falling from the window which should have been addressed.

Held- The respondent (the deceased's widow) successfully claimed damages on the basis that the appellant was in breach of section 2 of the Occupiers' Liability Act 1957 for failing to ensure that the premises were reasonably safe for visitors. A 60% reduction was made as a result of the deceased's contributory negligence.

The decision was appealed on the basis that the trial judge had made an error in failing to apply the principle that someone who chose to run an obvious risk could not pursue an action on the basis that the defendant had either permitted him to run that risk or had prevented him from doing so.

The appeal was dismissed.

The judge had correctly taken into account the relevant factors: the deceased was a lawful visitor, there was a foreseeable risk of injury due to the state of the premises, there was not any social value as a result of the particular state of the premises and the costs of repair was low.

What a claimant knew and should have reasonably appreciated about any risk s/he was running was relevant to the factors for consideration by the judge and in some cases this might be decisive. In other cases, such as the case in hand, a conscious decision by a claimant to run an obvious risk might not outweigh the other factors such as the lack of social utility of the particular state of the premises from which the risk arose and the low cost of remedial measures (here, the cost of repair was £7-£8) to eliminate the risk of an accident occurring even if the risk was relatively low.

Here, there was a defect with the sash window and it was found that a risk assessment would have made a critical difference in respect of identifying the defect, which would have led to remedial action being taken.

The judge had found that the deceased had chosen to sit on the windowsill and had accepted the risk that, if he leant too far, he might fall. However, this did not mean that there had been a finding that the deceased knew and accepted the risk that had been created by the appellant's breach of duty.

Impact- In respect of assessing whether an occupier has acted reasonably, consideration will be given to the following:

1. Whether the danger and/or hazard was obvious;
2. The degree of harm likely to result from the danger and/or hazard;
3. The age and competence of the visitor;
4. The purpose of the visit and the sort of behaviour to be expected of the visitor;

5. The presence of any warnings or whether any instruction was given in respect of the presence of the danger and/or hazard;
6. The cost or desirability of removing the danger and/or hazard and the resources available;
7. The social and public benefit in respect of the activity taking place or premises being used in a certain way – the courts will carry out a balancing exercise of weighing public and private interests.

As demonstrated in this case, consideration will be given to what a risk assessment would have shown, whether the measures in that risk assessment would have prevented the accident and whether those measures were reasonable.

Workers

Uber BV and others v Aslam [2021]

Facts- Former Uber drivers took Uber to an employment tribunal in 2016, arguing they worked for Uber. Very specific points were considered. Firstly, whether Uber owed the drivers holiday pay under the Working Time Regulations 1998 and secondly whether Uber under-paid the drivers by reference to the National Minimum Wage.

Uber said its drivers were self-employed and it therefore was not responsible for paying holiday pay nor any minimum wage.

The employment tribunal held that the drivers were workers, finding that Uber's business was to provide taxi services rather than to generate leads for drivers to grow their own businesses.

Uber appealed to the Court of Appeal. The CA, by a majority, held that Uber drivers are workers, not self-employed contractors. Two of the judges found that Uber exerted a high degree of control over drivers, which they held was sufficient to qualify them as workers. They were also sympathetic to the position advanced by the drivers that being logged into the Uber app and ready to work was enough to constitute working.

Held- Uber's final appeal was to the Supreme Court who unanimously dismissed Uber's appeal and ruled that Uber drivers are workers and not self-employed.

The two key questions answered by the Supreme Court were:

1. Did the drivers work for Uber under workers' contracts or did they provide services as independent contractors?
   Answer – Uber drivers on 2016 contractual terms are 'limb (b)' workers, and not self-employed contractors as Uber has long asserted.

2. If the drivers are workers, what qualified as "working time" for the drivers? Uber drivers' "working time" is not limited to time actually driving passengers but includes any period when a driver was logged in and ready and willing to accept trips.

Impact- This decision is another reminder that categorising staff as self-employed contractors does not determine their status if, in practice, those "contractors" are treated as employees or workers.

An employer's contracts may say that staff are self-employed contractors. However, if the reality of the situation is that staff are properly employees or workers, the contracts will not, on their own, prevent staff from being found to be employees or workers. Moreover, the Supreme Court's judgment calls into question the validity of any terms which purport, directly or indirectly, to exclude or limit UK statutory employment protections. Broadly speaking, the more control a business has over how a service is provided by someone it calls a contractor, the less likely it is that that someone is a contractor in practice.

Applying this to litigation for the employer's common law duty of care, all workers, including agency workers, are entitled to health and safety at work. The HSE also state that when dealing with an agency 'worker' the employment agency and the hirer must take reasonable steps to identify any known risks concerning health and safety and satisfy itself that the hirer has taken steps to prevent or control the known

risks. The decision of the Supreme Court suggests the possibility of an expansion of employers' liability at common law in the context of personal injury. It may be inevitable that courts will recognise that employers owe a duty of care to those who are not, strictly speaking, "employees" as such but who would fall within the definition of "worker" in the employment context'.

Workers

Addison Lee Ltd v Lange and Others [2021]

Facts- A claim was brought against Addison Lee by Mr Lange and two colleagues claiming that drivers for Addison Lee were 'workers' under the Employment Rights Act 1996.

Within their roles as drivers, Mr Lange and his colleagues had contracts with Addison Lee which stated they were 'independent contractors', were allocated jobs when they logged onto Addison Lee's system (and were subject to sanctions if they refused a job) and were told that they could expect to work around 50 to 60 hours a week (although there was no promise of hours).

Held- Employment Tribunal held that Mr Lange and his colleagues were within the definition of 'workers' under the Employment Rights Act 1996. Addison Lee's subsequent appeal was dismissed by the Employment Appeal Tribunal.

Addison Lee then applied for permission to appeal against the Employment Appeal Tribunal decision. The Court of Appeal granted permission, but stayed the appeal pending the Uber case decision. Following the decision in the Uber case, the Court of Appeal refused Addison Lee permission to appeal on the basis that Addison Lee's appeal had no reasonable prospects of success.

Addison Lee had sought to distinguish the case from the Uber case on the basis of differences in the contractual documentation. However, the Court of Appeal considered that Mr Lange and his colleagues had an express contract with Addison Lee that negated any mutuality of obligation as they could be subject to sanctions for refusing jobs.

The Court of Appeal also considered that the Uber case confirmed that a tribunal should disregard any contractual provision that does not reflect reality. The Court of Appeal considered that it was an 'unappealable finding of fact' that an Addison Lee driver undertook to accept jobs allocated to them when they were logged on.

Addison Lee also sought for the Court of Appeal to reconsider the Employment Tribunal's decision that when drivers were logged on, this satisfied the definition of working time as they were at Addison Lee's disposal. The Court of Appeal confirmed this case did not throw any doubt on the Tribunal's finding in this case.

Impact- This case, and again the Uber case, reminds employers that a tribunal and court will look to the reality of a relationship and will not be bound by language used in documentation when determining worker status and rights.

Workers

Pimlico Plumbers Ltd v Smith [2018]

Facts- The case centred on the employment status of Gary Smith, a plumber who worked on a self-employed basis with Pimlico for approximately six years over 2005-2011.

Held- Both the employment appeal tribunal and the Court of Appeal supported Mr Smith's position that he was a 'worker' with limited (but often valuable) employment rights, including holiday pay.

Pimlico Plumbers appealed the case to the Supreme Court and lost that appeal, with the Supreme Court supporting previous rulings that key aspects of Mr Smith's working conditions meant he cannot be classed as an independent self-employed contractor for employment law purposes.

In the Supreme Court's view, the fact that Pimlico exercised tight administrative control over Mr Smith, imposed conditions around how much it paid him and on his clothing and appearance for work, and restricted his ability to carry out similar work for competitors if he moved on from the company, all supported the conclusion that he was a 'worker' and not genuinely self-employed. It also noted that the dominant feature of his relationship with the company was that he would do the work personally, rather than pass it on to a substitute contractor, even though he did have the option to pass work to another Pimlico operative.

Smith v Pimlico Plumbers Ltd [2021]

Facts- Mr Smith claimed he was due employment rights and holiday pay, as he received payment for jobs he did through the company.

Held- Mr Smith lost at the employment tribunal and it was held that he will not receive any of the £74,000 worth of holiday pay he claimed is owed to him.

PPE

R (on the application of the Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions [2020]

Facts- The Independent Worker's Union of Great Britain (IWGB) represents many workers in the 'gig economy', including couriers and drivers. Earlier this year the union received a high number of queries relating to COVID-19 issues, including reports of employers failing to provide PPE.

The IWGB brought High Court proceedings on the basis that it did not consider UK health and safety legislation to adequately protect workers against health and safety risks, since it only applies to 'employees' and not 'workers'. It sought a declaration from the court that the UK had failed to properly implement the applicable European Directives into domestic law.

Held- The High Court ruled that the UK has failed to properly implement the EU Health and Safety Framework Directive (89/391/EC) and the Personal Protective Equipment Directive (89/656/EC). The court accepted the IWGB's argument that the reference in the directives to 'workers' imposed obligations to protect a much broader category of individuals than just 'employees'.

Impact- This decision has significant consequences for both employers and many frontline workers who have not been given adequate protection during the COVID-19 pandemic, but will of course apply to other health and safety considerations beyond the current situation. It means that workers will be protected from any detriment for leaving or refusing to return to a workplace in circumstances of serious and imminent danger, or for taking appropriate steps to protect themselves or others from the danger.

Subject to any appeal, the Government will now be under pressure to take action to amend the existing legislation to extend these protections to all 'workers'. Pending this, an affected worker may bring a claim against the Government for any loss suffered as a result of the failure to implement EU law properly. Although private sector employers will only be affected once the law is amended, reputational considerations particularly during the COVID-19 pandemic may mean that employers who currently provide PPE to their employees should consider doing the same for their limb (b) workers prior to this becoming obligatory.