

**INSURANCE UPSKILL**

# The New Normal: a vicarious liability minefield

by  
**Jeff Heasman MABP, PGCert CELTA, LL.B (Hons), LL.M**

Certified Practitioner Member of the Academy of Modern Applied Psychology  
Member of the Association for Business Psychology

[linkedin.com/in/jeffheasman](https://www.linkedin.com/in/jeffheasman)

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## Learning outcomes

By the end of this webinar, participants will be able to:

- identify the key principles of vicarious liability as they apply to the hybrid workplace.
- understand how liability may arise in light of changing working practices.
- implement a strategy to mitigate the risks of vicarious liability arising.

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## Some definitions

- New normal: a previously unfamiliar or atypical situation that has become standard, usual or expected (OUP).
- Hybrid workplace: a combination of working environments (home/office).
- That's the easy bit! Now let's look at vicarious liability ...

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## Vicarious liability

- An employer is liable when:
  1. A **tort** is committed.
  2. By an **employee**.
  3. In the **course of employment**.
- Distributive justice.
- A judge's own sense of justice?

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## Why are we seeing so many judgments in this field?

- The gig economy: a labour market of short-term or freelance workers. Traditionally treated as independent contractors.
- Prevalence of a "false gig economy" is becoming a socio-economic concern.
- 4.7 million workers.
- 1 in 10 adults of working age earn through platforms related to the "gig economy".
- Rapid changes in working practices.

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## Who is an employee?

- *Cox v Ministry of Justice* [2016] UKSC 10 – a move towards relationships that are "akin to employment".
- *Armes v Nottinghamshire County Council* [2017] UKSC 60 – is the activity an integral part of the business activities?
- *Various Claimants v Barclays Bank* [2020] UKSC 13.



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➤ In the *Barclays* case, the Supreme Court looked at the following objective evidence:

- Not on a retainer. Paid per report.
- Employed part-time by the NHS.
- Free to refuse work. No set number of patients.
- Carried his own medical liability insurance.
- Had a portfolio of patients and clients, of which the bank was only one.
- Yes, the bank set the questions and made arrangements but much would be the same for their “window cleaners” and “auditors”.



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**STOP PRESS!!**



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## Employment Rights Act 1996

➤ A worker is defined in section 230(3)(b) as someone who doesn't have a contract of employment and works under:

“any other contract, whether *express or implied* and (if it is express) whether *oral or in writing*, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”



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## ***Aslam & Farrar v Uber BV [2021]***

### **UKSC 5**

- Uber contended drivers were “independent contractors”. If there was a principal/agent relationship, then Uber was the agent and the drivers were the principal.
- In essence, the Employment Appeal Tribunal, the Court of Appeal and now the Supreme Court, have ruled that the drivers are “workers” and fall within the definition of section 230(3)(b).
- The key is the reasoning behind this.
- Warning: don’t try to draft contracts around laws! The objective evidence is the key!



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- The Supreme Court looked at the following factors:

- 1) Control over remuneration (freedom to fix rates).
- 2) Contractual terms (reality vs. documents).
- 3) Freedom to choose work (penalties for refusal).
- 4) Delivery of service (subordination/rating systems).
- 5) Communication with end customer (restrictions).



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“It is unlikely that many drivers ever read these terms or, even if they did, understood their intended legal significance. In any case there was no practical possibility of negotiating any different terms.”

- paragraph 77

“... there is no legal presumption that a contractual document contains the whole of the parties’ agreement and no absolute rule that terms set out in a contractual document represent the parties’ true agreement just because an individual has signed it ... [and] any terms which purport to classify the parties’ legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker’s contract are of no effect and must be disregarded.”

- paragraph 85



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“The question...is not whether the system of control operated by Uber is in its commercial interests, but whether it places drivers in a position of subordination to Uber. It plainly does.”  
- paragraph 97



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## Other authorities on “worker” status

- There is a definite trend in the Employment Appeal Tribunal towards “worker” status within the “gig economy”:
  - Cycle couriers. *Dewhurst v Citysprint UK Ltd & Gascoigne v Addison Lee Ltd*
  - Minicab drivers. *Lange v Addison Lee Ltd*
- In Spain, food delivery companies have faced similar claims and the “workers” have been successful.



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## Various Claimants v WM Morrisons [2020] UKSC 12

- In the Court of Appeal:
  - “Seamless and continuous sequence ... an unbroken chain.”
  - “The solution is to insure against such catastrophes: and employers can likewise insure against losses caused by dishonest or malicious employees.”
  - “The availability of insurance is a valid answer to the doomsday or armageddon arguments put forward on behalf of Morrisons.”



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➤ In the Supreme Court:

- Motive. Pursuit of a private vendetta. Not furthering the business of the employer.
- In Mohamud, the employee was purporting to be issuing orders from the employer.
- Even if away from the premises, if purporting to be acting on behalf of the company or furthering their business, liability can attach.
- This was a case where the employee’s actions were “designed to specifically harm the employer”.



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Warning!!

- Sexual abuse claims:
  - it seems that the Supreme Court is saying that this is a separate category, based upon “conferral of authority on the employee over the victims.”
- Data protection:
  - there is vicarious liability under the law for data controllers. However, in this case, the employee had essentially become the data controller himself.



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The impact on current working practices.

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## Data protection

- There is vicarious liability for data controllers.
- An employee can become a data controller in their own right.
- Action: assessment and review of cyber policies.



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## Work times and meetings

- In the Uber test case, the Supreme Court said that the drivers were “working” when they were “logged in”.
- Action: Restrict working times to agreed schedules. Set ground rules.
- Approval for physical meetings away from main workplace.



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## Social media

- It is not enough to simply say in a headline that the views are your own.
- If there is a suggestion that it is furthering the business of the employer, you could get into hot water.
- Action: review policies and reinforce.



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## Trust and contact

- Employee mental wellbeing.
- Don't allow employees to become isolated.
- Action: key points of contact for work-related issues and emergency situations.



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## "Workplace" setup

- Homes are now "workplaces".
- There could potentially be liability for defective work equipment, or hazards in the "workplace" that cause injuries to others.
- Action: risk assessments and visits if possible.



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## The impact on practical and underwriting considerations

- We need to be clear with definitions around who or what is an "employee", an "independent contractor" or a "worker".
- Can we define when someone is "working"?
- Widened scope of cover. Will this lead to an increase in claims? Vicarious liability extended?
- Misrepresentation of risk: people now considered as workers may not have been included in a presentation. There needs to be a review of proposal forms.



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- There is now also an opportunity to offer cover to those currently “uninsured” or where gaps exist: a policyholder may mistakenly believe they are sub-contracting. Think about construction sites.
- The gaps must be filled!
- Think of the impact on disclosure of wage rolls etc. Risks need to be reviewed.
- The Insurance Act 2015 requires fair presentation but it is our duty to ask probing type questions and to provide guidance.
- The allocation of rights has extended to the duty of care. This is a significant impact on underwriting considerations.




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- Assess all relationships using the objective approach adopted by the Supreme Court in their recent decisions.
- Reinforce data protection policies. Use the Morrisons case to reinforce potential personal risks for those working for you.
- Reinforce job roles and authorities: what orders can be issued and can you define what is “furthering business”?
- Systems for regular contact. Create a relationship of trust and support.




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## Restatement of learning outcomes

During this webinar, we have:

- identified the key principles of vicarious liability as they apply to the hybrid workplace.
- understood how liability may arise in light of changing working practices.
- learnt how to implement a strategy to mitigate the risks of vicarious liability arising.

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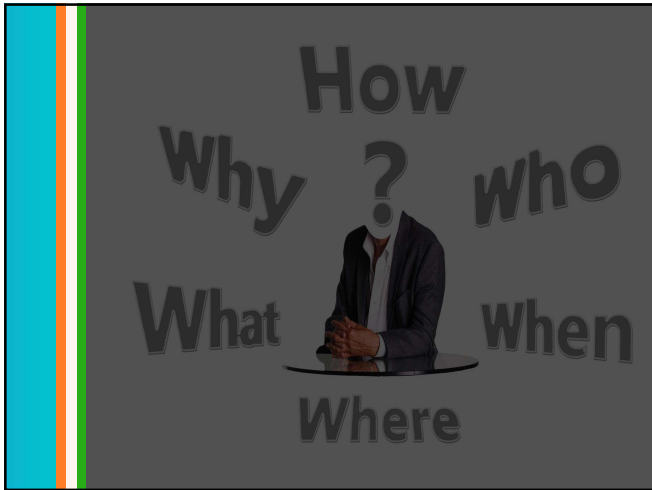
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