

Birmingham Insurance Institute

Lunchtime Lecture:

Vicarious Liability on the Move

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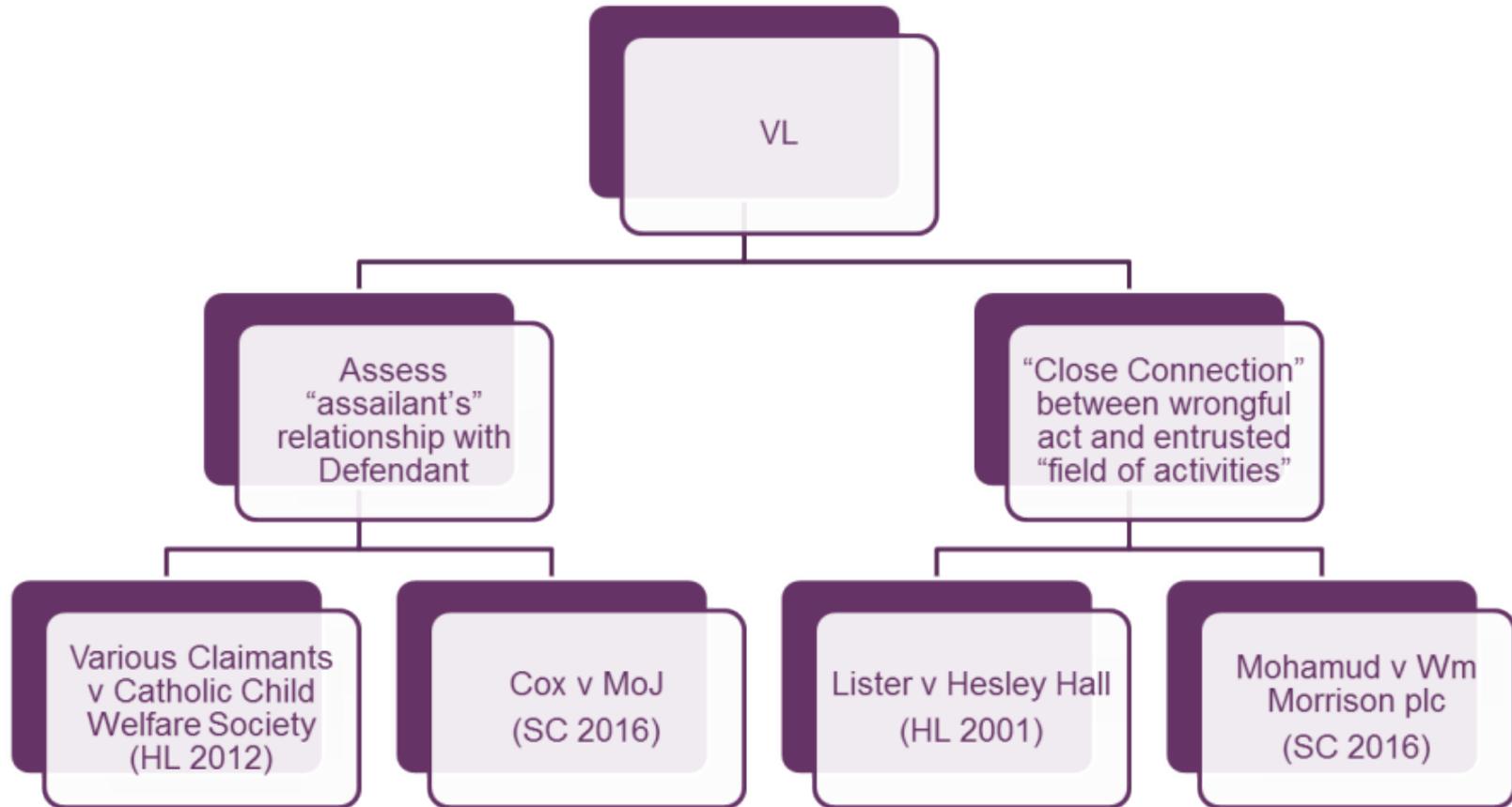
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Fundamentals of Vicarious Liability



Basic Principles

- VL = strict liability
- Employer need not be at fault
- Traditional test: Employer liable if “*employee acting in course of employment*” (Salmond *Law of Torts* 1907)
- Modern reasoning: C needs to establish:
 - Nature of relationship between tortfeasor and defendant (“akin to employment”?)
 - Whether/how closely tortfeasor’s conduct is connected to the relationship with the defendant (“work”?)

Nature of the relationship?
(who is my “employee”?)



Cox v Ministry of Justice (SC 2016)

o Facts

- C = catering manager HMP Swansea
- C supervised prisoners (20) working alongside civilian staff (4)
- Instruction and training given (food hygiene, H&S, work equipment)
- Training record kept
- Received nominal wage (£11.55 p/w) for work undertaken
- Prison Service obliged to feed all prisoners
- C instructed prisoners to transfer kitchen supplies to stores
- Prisoner accidentally dropped sack of rice onto C's back causing injury

Cox v Ministry of Justice cont'd

- First instance decision (HHJ Keyser QC, Swansea Ct Ct)
 - Prisoner had been negligent
 - Prison Service not VL
 - Relationship **not akin** to employer/employee
 - Employment is a “voluntary relationship”
 - Prison authorities legally obliged to offer prisoners work
 - Required by statute to make payment for that work
 - Not a voluntary enterprise but expression of penal policy
 - Working prisons a matter of rehabilitation
- Any thoughts?

Cox v Ministry of Justice cont'd

- o Supreme Court ruling

- Qualifies but endorses five “factors” to be applied in assessing whether “relationship” is *akin to employment*.
- Confirms there may be many modern day exceptions to the “traditional” employment model but that will fix “employer” with VL
- Acknowledges the antiquated nature of “control” over how the employee does his work as an indication of the necessary relationship

Cox v Ministry of Justice cont'd

- The five unequal “relationship” factors determining VL;
 - Tort committed as result of “activity” on behalf of Defendant?
 - Activity of tortfeasor likely to be part of Defendant’s “*business activity*”?
 - By “employing” the tortfeasor the Defendant has created the risk that the tort will be committed?
 - Defendant is more likely to have funds for compensation?
 - Defendant controls activity of tortfeasor ?

As set out in *Various Claimants v Catholic Child Welfare Society* [2012]

Cox v Ministry of Justice cont'd

- Prisoners akin to employees? SC Ruling:
 - Prison service has aims and its activities further them
 - No commercial motivation but not a bar to imposing VL
 - Prisoners integrated into operation of prison
 - Activities assigned to prisoners integral to furthering D's aims
 - Risk of negligence arises from position prisoners have been placed in
 - Work under direction of prison staff
 - Pay not commercial, mere motivator, and *not essential element*
 - D vicariously liable for actions of prisoner while working in prison kitchen.

Thoughts...

- “Exceptional case” putting new circumstances before SC
- Malleable “factors” determine relationship/employment rather than any strict test/criteria
- Reflects societal changes & fluid “employment” models
- Potential for future extensions of “*relationship akin to employment*” to other sectors and scenarios
- Implications for
 - underwriters,
 - risk management advisers and
 - Claims professionals and investigators

Mohamud v Wm Morrison “Close connection” test laid bare...



Mohamud v Wm Morrison plc [SC 2016]

o Facts

- Customer attends petrol kiosk at Morrisons Small Heath
- Seeks assistance with printing a document
- Attendant employed to “see that pumps kept in good running order and serve customers”
 - o Racially abuses customer
 - o Pursues customer out of the kiosk into car and punches CI in face
 - o Seriously assaults and then kicks CI while on ground
- Supervisor remonstrating with assailant not to pursue Claimant
- Assailant’s tirade includes warning “never come back to this petrol station again”

Mohamud v Wm Morrison plc

- First instance decision – Birmingham Ct Ct
 - Sympathy for Claimant
 - Assailant’s **job involved some interaction** with customers but only **to serve and help them**
 - Assailant made positive **decision to come out from behind counter contrary to instructions** he was being given
 - **NOT a sufficiently “close connection”** between what assailant was employed to do and the tortious assault warranting any VL

Mohamud v Wm Morrison plc

- Unanimous Court of Appeal decision: No VL
 - Each case turns on its own facts
 - **No inherent** risk of **friction** and no liability
 - Mere fact of **interaction with customer** in course of employment **NOT sufficient to make employer liable** for any assault he might inflict
 - Assault was while assailant on duty (relevant but not conclusive)
 - Assailant had **no responsibility for keeping order**
 - Committed assault **purely for reasons of his own**
 - **Instructed not to engage in confrontation** with customer

Mohamud v Wm Morrison plc

- o Unanimous Supreme Court Decision...



Mohamud v Wm Morrison plc – SC Decision

- Foul mouthed response by Mr Khan inexcusable but **within the “field of activities”** assigned to him.
- **Unbroken sequence** of events thereafter
- Stepping out from behind counter was to **“seamlessly” follow up** on what he had said
- When out on forecourt Mr Khan told CI in threatening words **“never come back to this petrol station”**
- **Not something personal** between them
- Order to **keep away from employer’s premises** reinforced by violence
- **Purporting** to **act about his employer’s business**
- Gross **abuse of position** but **connection with business** employed to do
- Employer entrusted him with that position
- **Just that employer should be responsible for employee abuse of trust**

Mohamud & Social Justice: what
this is really about?



Mohamud & Social Justice

- Who was acting for Claimant?
 - Bar Pro Bono Unit
- What shape is the Defendant?
 - 2015/16 Preliminary Report
 - Turnover £16.1bn
 - Profit £302m
 - PL cover to £10m?

Mohamud & Social Justice...

- *“For seeing that somebody must be a loser by this deceit, it is more reason that he who employs and puts trust and confidence in a deceiver should be a loser than a stranger”*
Holt CJ in *Hern v Nichols* [1700]
- *“The master at his peril ought to take care what servant he employs; it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen”*
Holt CJ in *Sir Robert Wayland’s Case* [1706]

Mohamud v Wm Morrison plc – Some thoughts...

- Acknowledges “earlier case law is not entirely consistent”
- Sweeps aside “acting in course of employment” test and conflicting decisions in lower courts
- Massive openness and transparency of reasoning
- Abandons reference to “abuse of authority or power”
- No need for inherent friction, confrontation or intimacy
- **Principle of “social justice” laid bare**
 - **Employer and victim equally innocent; who should bear the loss?**
- “Close Connection” test will control liability but involves broad-based assessment of “field of activity”

Close Connection Test – the filter

- Two-fold “close connection” test
 - What functions or “field of activities” entrusted to the employee?
 - Must be addressed BROADLY
 - Is there a “sufficient connection” between the position in which they are employed and their wrongful conduct?
- So...if actions fall within “field of activities” and “sufficient connection” exists between position and wrongful conduct then right for innocent employer to be held liable under principles of social justice.

Ouch!

- Does the insured's "business" incorporate "activity" of people not directly employed by it but not employed by anyone else?
 - Parent/guardian supporting school trip
 - Volunteer participating in charitable event as part of CSR policy
- How well does the Insured know its staff?
 - Racists?
 - Bigots?
 - Violent and unhinged tendencies?
- Potential VL is going to be a difficult message to carry...

Would earlier case law still stand?

- Throwing a punch at the end of a rugby match?
 - Club liable despite contractual prohibition on fighting (**Gravill v Carroll**) [CA 2008]
- Coming back to work when drunk to assault a colleague on the night shift?
 - “An independent venture of his own” – No Liability. (**Weddall v Barchester Healthcare**) [CA 2012]
- Throwing colleague 12ft over table “reacting” to instruction?
 - Possibility of friction inherent (especially in a factory)
 - Risk of “overly-robust reaction” is a risk created by employment
 - Employer vicariously liable (**Wallbank v Wallbank Fox Designs** CA 2012 reversing first instance decision)

Earlier decisions...

- Setting colleague alight after spraying with thinners and lighting cigarette lighter
 - No liability to employee for “reckless but frolicsome” conduct - (**Graham v Commercial Bodyworks**) [CA 2015]

And in Scotland?

- Health and safety supervisor pulling CI's pigtail
 - No liability as performing a “prank” and not part of duties
(Wilson v Excel UK Ltd) [CoS 2010]
- Shop floor worker engaged in sustained racial abuse of colleague at work culminating in murder on shop premises
 - No liability for what was a “personal campaign” even though employment provided the opportunity for it
(Vaickuviene v J Sainsbury plc) [CoS 2013]

Conclusions:

- *“Out of the crooked timber of humanity no straight thing was ever made” (Emanuel Kant). People cannot be trusted!*
- If a “ticking bomb” has inadvertently been employed, high likelihood employer will be liable when it “goes off”
- Risk transfer or “social justice” is the explicit force behind SC in Mohamud

Conclusions cont'd...

- Employment a fluid concept and “relationship” rather than formality is key to determining who Insured may have VL for
- Minority of cases (already seen some claims) but hugely difficult to “risk manage”, or for u/w to assess on presentation of risk

Case study if there is time...

- Employee bakes cake at home
- Brings in to office to celebrate a birthday
- Custom, practice and tacit authorisation by employer
- Eggs weren't quite fresh; 17 people suffer salmonella
- Consider:
 - What functions or “field of activities” entrusted to the employee?
 - Must be addressed BROADLY
 - Is there a “sufficient connection” between the position in which they are employed and their wrongful conduct?

Any Questions?

thank you



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