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Employer's Primary Liability at Common Law

Parties, tort, loss, claimant is employee, duty of care, breach, causation, remoteness, defences

- Example of the practical use of the law of negligence, not distinct area of law
- Employer's primary liability = breach of duty of care to **employee** (not other workers, such as independent contractors)
- Employer's secondary (vicarious) liability = employer held responsible for fault of employee

Establishing employee status

- See Vicarious Liability
- Economic reality, composite test (*Ready Mixed Concrete v Minister of Pensions*)
 - Remuneration in exchange for personal service and mutuality of obligations
 - Control
 - Contractual factors consistent with employment relationship (*Warner Holidays* for list)
- Where employee negligent to another employee, 3 actions:
 1. Action vs employee for incompetent breach
 2. Action vs employer for breach of primary duty of care to injured employee
 3. Action vs employer vicariously for breach of duty by employee

Employer's Duty of Care

- Employers owe their employees a duty of care (*Wilsons v English*).
- The duty on employers is personal and non-delegable; performance of the duty can be delegated, but **not** liability for its breach (*McDermid v Nash Dredging*)
- Burden of proof on C + easier to prove if alongside breach of statutory duty

Standard of care

- The standard of care is of a reasonable competent employer (*Latimer v AEC*).

Breach of this standard

- Employer's duty is to take '**reasonable care for the safety of his workmen**' (Lord Wright, *Wilson and Clyde Coal Co Ltd v English*) ~ this **single duty** comprises (**not exhaustively!**):
 1. Safe and competent employees
 2. Safe place of work, equipment and plant
 3. Safe systems of work, with adequate supervision and instruction
- Term implied into all contracts of employment – reasonable care will be taken to ensure health and safety of employee (*Johnstone v Bloomsbury*)
 - Cannot be excluded by reference to express contract terms (s 2(1) Unfair Contract Terms Act 1977)
- Compulsory for employers to have insurance to cover claims for breach of this duty (Employers' Liability (Compulsory Insurance) Act 1969 + Regulations 1998)
- Common law duty is independent of statutory duty = compliance with statutory duty does not imply compliance with common law duty (*Bux v Slough Metals*)

#1 Safe and Competent fellow employees

- Duty to select, employ and deploy competent staff
 - Incompetent person employed / deployed to do a job of which they are not capable = BoD (*Black v Fife Coal Ltd*)
- Duty to dismiss / redeploy staff posing a **continuing risk to safety** of others
 - Where employee's habit of playing practical jokes known, or ought to be known, could be BoD
 - *Hudson v Ridge Manufacturing Company Ltd* ~ habitual practical joker = BoD
 - *Smith v Crossley Bros* – one-off prank ≠ BoD; but vicariously liable when in course of employment
 - Liable for failing to take action when it is known that someone bullies OR likely to/actually sexually harass (*Harrison v Lawrence Murphy & Co, The Chartered Secretary*)

#1.1 Duty of care against foreseeable risk of psychiatric illness – fellow employees' obligation (management) to take steps to alleviate

The provision of safe and competent staff extends to ensuring management are sufficiently trained and able to take steps to alleviate a reasonably foreseeable risk of psychiatric illness to a specific employee (*Barber v Somerset CC*)

Barber v Somerset CC

- Teacher under excessive workload
- Absence of 3 weeks due to stress and depression + meeting with management re: need for change
- Was development of a psychiatric illness by the particular employee (not by a person of ordinary fortitude) reasonably foreseeable?
- Trial Judge + HoL (CoA overturning trial judge) = duty arose to take action after period of absence and meeting following this = breach

Walker v Northumberland CC

- W responsible for 4 teams
- Suffered mental breakdown (spending 4 months off work) following repeated warnings by W that staff numbers needed to increase / work prioritisation needed to change – not liable because not reasonably foreseeable to NCC that there was a material risk of mental illness (must be **materially substantial risk**)
- No additional support on return + subsequent breakdown, leading to dismissal on grounds of permanent ill-health = BoD, as **materially substantial risk of return of mental illness**
- Action for failure to avoid exposing him to health-endangering workload succeeded

Hartman v South Essex Mental Health and Community Care NHS Trust

- **Higher standard of alertness to the risk of psychiatric illness on employers where occupation involves a high risk of such issues arising**
- Here, nursing auxiliary in a centre for children with learning difficulties
- Foreseeable harm – employer aware of pre-existing vulnerability to mental illness (**no need for period of absence**, although this is obviously indicative of vulnerability) + complaints of staff shortages

#2 & 3 To provide a safe place of work, equipment and plant

- Duty to take **reasonable steps** to make working premises safe (remoteness) (*Latimer v AEC*)

- Safe premises
 - *Wilson v Tyneside Cleaning Co* – Extends to third-party premises (e.g. window cleaner cleaning other premises), with lower standard recognizing ability of employer to check third-party premises
 - Window handles on a third-party premises rotten
 - No BoD as impractical for them to be responsible for all buildings employees worked on

 - Factors to consider as to whether reasonable in all the circumstances (*Cook v Square*):
 - i. Place of work
 - ii. Nature of building
 - iii. Experience of employee
 - iv. Nature of work
 - v. Degree of control of employer
 - vi. Employer's knowledge of premises

- Safe machinery, plant and equipment
 - Includes necessary safety features of equipment + protective clothing (*Qualcast v Haynes*)
 - Here, discharged duty by providing protective boots, even though it did not oblige workers to wear them
 - Ditto in *Bux v Slough*, with provision of goggles but failure to ensure they are worn

 - *Yorkshire Traction Co Ltd v Walter Searby* – C bus driver stabbed; failure to put up protective screens ≠ BoD, as many had been removed by drivers as dangerous due to reflection of light at night + risk in area low

- Employers' Liability (Defective Equipment) Act 1969 – employers liable for injuries by reason of defective equipment provided by employer for the purposes of their business, even where the defect arose from negligence of third parties (s 1)
 - Equipment includes 'any plant and machinery, vehicle, aircraft and clothing' (s 1(3))
 - *Coltman v Bibby Tankers*: ship
 - *Knowles v Liverpool CC*: flagstone

- There are further statutory duties under other acts, inc. The Health and Safety at Work Act 1974

#4 To provide a safe system of work

- Duty to provide a safe system of work cannot be delegated (*Wilson and Clyde Coal v English*)
 - Employers had delegated their duties to a qualified manager, and it was found unsafe to operate haulage plant at time miners were leaving work (leading to C being crushed)
- Parent company can owe a duty to provide a safe system of work to employees of subsidiary where (*Chandler v Cape Plc*):
 - a) Businesses of parent + subsidiary in a relevant respect the same
 - b) Parent had or ought to have had superior knowledge of health and safety in industry
 - c) Subsidiary's system of work unsafe as parent company knew / ought to have known
 - d) Parent knew or ought to have foreseen that subsidiary / employees would rely on superior knowledge for protection of employees

Bux v Slough Metals

- **Duty to:**
 - 1. Create a safe system of work**
 - 2. Operate a safe system of work (instruction, equipment + supervision)**

#4.1 Creating a safe system

- 'Safe system of work' – system for whole job, inc. any **modifications required by circumstances for part of job**; includes, or may include (*Speed v Thomas Swift Co Ltd*):
 - Physical layout of the job
 - Setting of the stage
 - Sequence (and method) in which work carried out
 - Provision of warnings / notices (+ supervision – *Bux*)
 - Issues of special instruction
- When devising safe system of work, duty to take account of individual employee's characteristics (*Paris v Stepney Borough Council* – C only having one eye)
 - Only reasonable steps need to be taken (*Withers v Perry Chain Co* – no steps short of dismissal could have protected employee with extremely sensitive skin)

#4.2 Operating a safe system

Instruction (+ equipment)

- There should be **an agreed safe system of work, with safety instructions as would be given by a reasonably careful employer who had considered the problem presented by the work** (*General Cleaning Contractors Ltd v Christmas*)
 - Here, training of method for window cleaning, with use of wedges to hold open sash windows – could be viable methods of making the job reasonably safe
- *Bux v Slough Metals*
 - C splashed with molten metal losing an eye
 - Statutory duty to provide goggles complied with
 - Common-law duty = **provide reasonable safety instruction (persuasion or insistence depends on nature and risk of harm)** as to wearing of goggles as part of a safe system of work
 - Where **employees refuse ≠ negligent**

Supervision

- Employers must consider that workmen may have disregard for own safety and (*General Cleaning*):
 - Minimise danger of carelessness
 - Take reasonable care to ensure employees comply with safety instructions

Cases to be used in all answers for comparison

- What amounts to reasonable care (*Latimer v AEC*) is a question of fact. Here, this is more akin to...
 - *Clifford v Charles Cullen and Son Ltd* – employer failed to keep protective substances against dermatitis on site + failed to supervise usage = negligent
 - *Woods v Durable Suites Ltd* – protective cream available + foreman told C when, how and why to use cream

Causation

- Factual causation: use 'but for' test as usual (*McWilliams v Sir William Arrol*)
 - Provision of safety equipment ~ possibly no liability where can show that even if equipment / instruction provided, employee would not have used it

Remoteness

- *Wagon Mound (No 1)* test of reasonable foreseeability of type of harm (inc. mental harm – *Walker v Northumberland CC*)
- Injury must be of recognised kind (*Mughal v Reuters Ltd* – repetitive strain injury not recognised in 1993, so dismissed; now recognised (*Pickford v ICI plc*))

Defences

- General defences apply
- *Volenti* – The court is slow to find *volenti* due to pressure of employment relationship to consent (*Bowater v Rowley Regis Corporation + Smith v Charles Baker*)
 - It can only be successfully argued in extreme circumstances (*ICI Ltd v Shatwell*)
- Contributory negligence is a partial defence under Law Reform (Contributory Negligence) Act 1945, s 1(1), with damages reduced in accordance with what is just and equitable (*Jones v Livox*).
 - Self-induced intoxication (*Barrett v MoD*)
 - *Bux*: 40% claimant liability, as went against **encouragement** to wear goggles, but should have been **insistence**
 - *Clifford*: 50% – ditto (+ failure of employer to provide cream on site)
 - *Sherlock v Chester City Council* – joiner's damages reduced by 60%, as although employer failed to operate safe system of work (instructions lacking), **joiner was very experienced** so could have taken safety precautions himself