Employment torts: information guide

Sociology, Empowerment

September 16, 2006 Worksheet 1 EMPLOYMENT TORTS Employer’s Liability 1. Introduction The basis of the liability of an employer for negligence inrespectof injury suffered by his employee during the course of the employee’s work is twofold: 1. He may be liable for breach of the personalduty of carewhich he owes to each employee; 2. He may be vicariously liable for breach by one employee of the duty of care which that employee owes to his fellow employees. The action against the employer for damages by the employee who suffers personal injury on the job is only one of the methods available for compensation for workplace accidents. . Common Law Duties of the Employer There are essentially implied terms of the contract of employment – ‘ It is quite clear that the contract between employer and employed, involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk…” per Lord Herschell in Smith v. Baker This was later refined in Wilsons and Clyde Coal Co v. English and in Davie v.

New Merton Board Mills Ltd. The duty is now regarded as four-fold and is non-delegable. In sum, the employer must take reasonable care to provide: 1. A competent staff of workers; 2. Adequate plant and equipment; 3. A safe system of working; and 4. A safe place of work. The common law duty of an employer to his employees was enunciated in Davie v. New Merton Board Mills Ltd [1959] 1 All ER 346 as a duty to take reasonable care for their safety i. e. you owe an employee a duty of care not to cause them damage.

In that case, in 1946 an old-established firm of toolmakers made a drift (a tool consisting of a tapered bar of steel about one foot long) which had a latent defect, viz, excessive hardness of the steel due to negligent heat treatment. In July, 1946, the manufacturers sold the drift to B & Co Ltd reputable suppliers of tools of this kind, from whom, in the same month, the employers of D bought at a reasonable price a batch of drifts, including this tool. The defect in the drift was not discoverable on inspection and no intermediate examination by the employers between the times of its manufacture and of its use was reasonably to be expected.

Between July, 1946, and March, 1953, the drift was seldom, if ever, used, but in March, 1953, D used it in the course of his employment as a maintenance fitter. Owing to the defect in its manufacture, a piece flew off the drift when it was struck with a hammer by D in the course of using it, and destroyed the sight of his left eye. There was no negligence in the employers' system of maintenance and inspection and the accident was solely due to the defect in the drift.

HELD: -The employers were not liable to D for the injury caused to him by the defective drift, because they had fulfilled their duty to him as their servant, namely, a duty to take reasonable care to provide proper appliances, and were not responsible for the negligence of the manufacturers, who had no contractual relationship with the employers and in manufacturing the tool were not acting as persons (whether servants, agents or independent contractors) to whom the employers had delegated the performance of any duty that it was for the employers to perform.

Per Lord Tucker: in my view, it would have made no difference if the drift had been purchased [by the employers] direct from the manufacturers. An employer may, however, render himself liable to his servant for injury suffered by him by reason of a faulty specification prepared by the employer for the manufacturer, or where the manufactured article may require inspection or test after delivery. The duty is not an absolute one and can be discharged by the exercise of due are and skill, which is a matter to be determined by a consideration of all the circumstances of the particular case. It is well established that every employer has a duty at common law to provide: 1. A competent staff of men; 2. Adequate plant and equipment; 3. A safe system of working, with effective supervision; and 4. A safe place of work. Wilsons and Clyde Coal Ltd v English [1937] 3 All ER 628

In an action by a miner against his employers for damages for personal injury alleged to be due to the negligence of the employers in that they had failed to provide a reasonably safe system of working the colliery, questions were raised (1) whether the employers were liable at common law for a defective system of working negligently provided or permitted to be carried on by a servant to whom the duty of regulating the system of working had been delegated by the employers, the employers' board of directors being unaware of the defect, and (2) if they were liable, whether the employers were relieved of their liability in view of the prohibition contained in the Coal Mines Act 1911, s2(4), against the owner of a mine taking any part in the technical management of the mine unless he is qualified to be a manager.

HELD: - It was held by the House of Lords that (1) the employers were not absolved from their duty to take due care in the provision of a reasonably

safe system of working by the appointment of a competent person to perform that duty. Although the employers might, and in some events were bound to, appoint someone as their agent in the discharge of their duty, the employers remained responsible. (2) the doctrine of common employment does not apply where it is proved that a defective system of working has been provided. To provide a proper system of working is a paramount duty, and, if it is delegated by a master to another, the master still remains liable.

Lord Wright stated (at p644A) that the whole course of authority consistently recognises a duty which rests on the employer, and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations (at p644A). The obligation is threefold, " the provision of a competent staff of men, adequate material, and a proper system and effective supervision" (at p640C). 1. COMPETENT STAFF OF WORKERS An employer will be in breach of this duty if he engages a workman who has had insufficient training or experience for a particular job and, as a result of that workman’s incompetence, another employee is injured.

Competence here usually relates to qualifications, training and experience. It may also include the disposition of the employee. Ifill v. Rayside Concrete Workers Ltd (1981) 16 Barb. LR The plaintiff and J were employed by the defendants as labourers. They were both known by the defendants to have a propensity for ‘ skylarking’ at work, and had been warned on at least two occasions not to do so. One day, J picked the plaintiff up and cradled him in his arms, saying he was ‘ light as a baby’ and singing ‘ Rock-a-bye-baby’. As

J carried the plaintiff forward, he tripped over a pipeline and both J and the plaintiff fell into a cement mixer, which was only partly covered, both of them sustaining injuries.

The plaintiff brought an action against the defendant for: (a) breach of statutory duty; and (b) negligence at common law. HELD: -(a) the cement mixer was a ‘ dangerous part of machinery’ within what was then s 10(1) of the Factories Act, Cap 347, and the defendants were in breach of their absolute statutory duty to fence it securely; (b) the defendants were in breach of their duty at common law not to expose the plaintiff to risks of danger emanating from indisciplined fellow employees, and were liable in negligence; (c) the plaintiff was guilty of contributory negligence and his damages would be reduced by 50%. Douglas CJ said: ...it is obvious that the plaintiff and the second defendant each had a marked propensity for skylarking.

They persisted in it, in spite of warnings...in my view, mere warnings were totally inadequate for such serious cases of indiscipline...Rayside was negligent in exposing its employees, including the plaintiff, to the risk of injury from the second defendant’s skylarking...the plaintiff was contributorily negligent in participating in the skylarking activity which caused his injury. “...upon principle it seems to me that if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies...on the employers to remove that source of danger...” Hudson v. Ridge Manufacturing Co Ltd [1957] 2 QB 348 The defendants had had in their employ, for a period of almost four years, a man given to horseplay and

skylarking. He had been reprimanded on many occasions by the foreman, seemingly without any result.

In the end, while indulging in skylarking, he tripped and injured the plaintiff, a fellow employee who sued his employer for failing to take reasonable care for his safety. HELD: -Straetfield J said: This is an unusual case, because the particular form of lack of care by the employers alleged is that they failed to maintain discipline and to take proper steps to put an end to this skylarking, which might lead to injury at some time in the future…the matter is covered not by authority so much as principle. It is the duty of employers, for the safety of employees, to have reasonably safe plant and machinery. It is their duty to have premises which are similarly reasonably safe.

It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen…it seems to me that if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger. Smith v. Crossley Bros Ltd (1951) 95 SJ 655 Injury was done to the plaintiff, a 16 year old apprentice, by inserting in him, in horseplay, compressed air. At first instance, it was held that the employers had not exercised adequate supervision over the apprentices and that lack of supervision constituted negligence.

HELD: -on appeal, it was held that the evidence disclosed no negligence on the part of the employers, because the injury to the plaintiff resulted from what was wilful misbehaviour by the other boys and a wicked act which the employers had no reason to foresee. There was no history of childish

behaviour – the employers did not know or ought to have known about the defendant’s propensity for skylarking. 1. ADEQUATE PLANT & EQUIPMENT An employer must take the necessary steps to provide adequate plant and equipment for his workers, and he will be liable to any workman who is injured through the absence of any equipment which is obviously necessary or which a reasonable employer would recognise as being necessary for the safety of the workman.

The employer must take reasonable care to ensure that damage is not caused to the employee by the absence of necessary safety equipment such as goggles, safety helmets, shoes etc. or by the presence of unsafe machinery. Sammy v. BWIA (1988) High Court, TT, No 5692 of 1983 (unreported) The plaintiff, who was employed by the defendant as a mechanic, was sent to repair a vehicle which had broken down on a ramp at Piarco Airport. While attempting to start the vehicle, it caught fire. No fire extinguishers were provided either in the vehicle being repaired or in the service vehicle and, in attempting to put out the fire with a cloth, the plaintiff suffered burns.

HELD: - Gopeesingh J held the defendant liable for breach of its common law duty to the plaintiff to take reasonable care for his safety,…by not exposing him to safety to any unnecessary risk during the performance of his duties as an employee…By failing to provide fire extinguishers on these vehicles, the defendant clearly exposed the plaintiff to unnecessary risk when the fire started on the vehicle…The defendant was under a duty to provide proper safety appliances on these vehicles to safeguard the plaintiff in the event of such an occurrence. Morris v. Point Lisas Steel Products Ltd (1989) High

Court, TT, No 1886 of 1983 (unreported) The plaintiff was employed as a machine operator at the defendant's factory. While the plaintiff was using a wire cutting machine, a piece of steel flew into his right eye, causing a complete loss of sight in that eye. Holding the employer in breach of its common law duty of care in failing to provide goggles; HELD: - Hosein J said that...since the risk was obvious to the defendant and not insidious, the defendant ought to have made goggles available and also given firm instructions that they must be orn, and the defendant ought to have educated the men and made it a rule of the factory that goggles must be worn, since, if an accident did happen, the probability was likely to be the loss of sight of one or both eyes. Forbes v. Burns House Ltd (2000) Supreme Court, The Bahamas, No 432 of 1995 (unreported) An office worker was injured at the workplace when a swivel chair on which she was sitting collapsed. HELD: - the employer was in breach of its duty to inspect and maintain office equipment, including the chair. McGhee v. National Coal Board [1972] 3 All ER 1008 The appellant was sent by the respondents, his employers, to clean out brick kilns.

Although the working conditions there were hot and dirty, the appellant being exposed to clouds of abrasive brick dust, the respondents provided no adequate washing facilities. In consequence the appellant had to continue exerting himself after work by bicycling home caked with sweat and grime. After some days working in the brick kilns the appellant was found to be suffering from dermatitis. In an action by the appellant against the respondents for negligence the medical evidence showed that the dermatitis had been caused by the working conditions in the brick kilns. The evidence

also showed that the fact that after work the appellant had had to exert himself further by bicycling home with brick dust adhering to his skin had added materially to the risk that he might develop the disease.

It was held in the Court of Session that the respondents had been in breach of duty to the appellant in failing to provide adequate washing facilities but that the appellant’s action failed because he had not shown that that breach of duty had caused his injury, in that there was no positive evidence that it was more probable than not that he would not have contracted dermatitis if adequate washing facilities had been provided. On appeal, HELD: - A defender was liable in negligence to the pursuer if the defender’s breach of duty had caused, or materially contributed to, the injury suffered by the pursuer notwithstanding that there were other factors, for which the defender was not responsible, which had contributed to the injury. Accordingly the respondents were liable to the appellant, and the appeal would be allowed, because— (i) (per Lord Reid, Lord Wilberforce, Lord Simon f Glaisdale and Lord Salmon) a finding that the respondents’ breach of duty had materially increased the risk of injury to the appellant amounted, for practical purposes, to a finding that the respondents’ breach of duty had materially contributed to his injury, at least (per Lord Wilberforce) in the absence of positive proof by the respondents to the contrary; (ii) (per Lord Kilbrandon) on the facts found, the appellant had succeeded in showing that, on a balance of probabilities, his injury had been caused or contributed to by the respondents’ breach of duty 2. SAFE SYSTEM OF WORKING An employer must organise a safe system of working (includes a duty to take reasonable

precautions to protect employees from attacks by armed bandits) and must ensure as far as possible that the system is adhered to.

In addition to supervising workmen, the employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness. This has been described as "...the sequence in which the work is to be carried out the provision in proper cases of warnings and notices and the issue of special instructions..." per Lord Greene MR Legall v. Skinner Drilling (Contractors) Ltd (1993) High Court, Barbados, No 1775 of 1991 (unreported) The defendant company was engaged in oil drilling. The plaintiff was employed by the defendant as a derrick man, one of his duties being the removal of nuts and bolts from the rigs as part of the ' rigging down' operation. In order to remove a bolt from a rig platform about 10 ft from the ground, the plaintiff was given an empty oil drum to stand on.

The drum toppled over and the plaintiff fell to the ground and was injured. HELD: - the defendant, by failing to ensure that its workers used ladders to reach high platforms and to warn the plaintiff of the danger of standing on the oil drum, was in breach of its common law duty to provide a safe system of work. Bish v. Leathercraft Ltd. (1975) 24 WIR 351 The plaintiff was operating a button pressing machine in the defendants' factory when a button became stuck in the piston. While attempting to dislodge the button with her right index finger, the plaintiff's elbow came into contact with an unguarded lever, which caused the piston to descend and crush her finger.

HELD: - The Jamaican Court of Appeal held that the defendants were in breach of their common law duties to provide adequate equipment and a safe system of work, in that: (a) the button had not been pre-heated, which

was the cause of its becoming stuck in the position; (b) no three inch nail, which would have been effective to dislodge the button, was provided for the plaintiff's use, with the result that the plaintiff had to resort to using her finger; and (c) the lever was not provided with a guard, which would most probably have prevented the accident which occurred. Qualcast v. Haynes [1959] AC 743 Hurdle v. Allied metals Ltd. [1974] 9 Barb LR 1 3. SAFE PLACE OF WORK An employer has a duty to take care to ensure that the premises where his employees are required to work are reasonably safe. The duty exists only in relation to those parts of the workplace which the employee is authorised to enter.

An employee who enters an area which he knows to be ' out of bounds', will generally be treated as a trespasser. As the occupier, in most cases, of the workplace, the employer is under a duty to the employee (a lawful visitor) to take reasonable care to see that the premises are reasonably safe for the purpose of doing the job. Where the employer is not the occupier of the workplace, there is still a requirement that he take reasonable care to ensure that the worker is reasonably safe. This will vary with the circumstances. A significant question is whether the employer knew of or ought to have been aware of the danger and what steps were to be regarded as reasonable in providing a safe place of work. Alcan (Jamaica) Ltd v.

Nicholson (1986) Court of Appeal, Jamaica, Civ App No 49 of 1985 (unreported), per Hall J A welder, during his lunch break, left his area of work at a bauxite installation and entered a location called a ' precipitation area', in search of cigarettes. There, he suffered a serious eye injury when caustic soda, which was stored in tanks, splashed into his eye. HELD: - the

employer/occupier was held not liable for the injury, since the welder was a trespasser in the area who knew he had no right to be there and was well aware of the dangers of caustic soda. Watson v. Arawak Cement Co Ltd (1998) High Court, Barbados, No 958 of 1990 (unreported) The plaintiff was employed by the defendant as a general worker. He was sent to work on a ship which was in the possession of a third party.

While attempting to leave the ship at the end of his day’s work, the plaintiff fell from an unlit walkway inside the ship and sustained injuries. HELD: - Chase J held the defendant liable on account of itsfailureto provide a suitable means of egress from the ship and to instruct the plaintiff as to the method of leaving the vessel. Another aspect of the employer’s duty to exercise reasonable care and not to expose his servants to unnecessary risk in his duty to provide a reasonable safe place of work and access thereto. This duty does not come to an end merely because the employee has been sent to work at premises which are occupied by a third party and not the employer. The duty remains throughout the course of his employment.

General Cleaning Contractors Ltd v. Christmas [1953] AC 180 The plaintiff, a window cleaner, was employed by the defendants, a firm of contractors, to clean the windows of a club. While, following the practice usually adopted by employees of the defendants, he was standing on the sill of one of the windows to clean the outside of the window and was holding one sash of the window for support, the other sash came down on his fingers, causing him to let go and fall to the ground, suffering injury. On a claim by him against the defendants for damages; HELD: - it was held by the House of Lords that even assuming that other systems of carrying out the work, e. g. by the use of

safety belts or ladders, were impracticable, the defendants were still under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the defendants had not discharged their duty in this respect towards the plaintiff; and, therefore, they were liable to him in respect of his injury. Per Lord Reid: Where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required.

Since the employer’s liability is merely another form of negligence, the employee must establish not only the breach of the duty of care owed to her, but also that it legally caused the resultant damage, and that such damage was not too remote. Walker v. Northumberland [1995] 1 All ER 737 The plaintiff was employed by the defendant local authority as an area social services officer from 1970 until December 1987. He was responsible for managing four teams of social services fieldworkers in an area which had a high proportion of child care problems. In 1986 the plaintiff suffered a nervous breakdown because of thestressand pressures of work and was off work for three months. Before he returned to work he discussed his position with his superior who agreed that some assistance should be provided to lessen the burden of the plaintiff's work.

In the event, when the plaintiff returned to work only very limited assistance was provided and he found that he had to clear the backlog of paperwork

that had built up during his absence while the pending child care cases in his area were increasing at a considerable rate. Six months later he suffered a second mental breakdown and was forced to stop work permanently. In February 1988 he was dismissed by the local authority on the grounds of permanent illhealth. He brought an action against the local authority claiming damages for breach of its duty of care, as his employer, to take reasonable steps to avoid exposing him to a health-endangering workload.

HELD: - It was held in the QBD that where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pressures of his workload, the employer was under a duty of care, as part of the duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform. On the facts, prior to the 1986 illness, it was not reasonably foreseeable to the local authority that the plaintiff's workload would give rise to a material risk of mental illness. However, as to the second illness, the local authority ought to have foreseen that if the plaintiff was again exposed to the same workload there was a risk that he would suffer another nervous breakdown which would probably end hiscareeras an area manager.

The local authority ought therefore to have provided additional assistance to reduce the plaintiff's workload even at the expense of some disruption of other social work and, in choosing to continue to employ the plaintiff without providing effective help, it had acted unreasonably and in breach of its duty of care. It followed that the local authority was liable in negligence for the plaintiff's second nervous breakdown and that accordingly there would be

judgment for the plaintiff with damages to be assessed. Sutherland v. Hatton [2002] IRLR 263 The claimant in this case was a secondary schoolteacherwho suffered fromdepressionand a nervous breakdown and was initially awarded ? 90, 765.

HELD: - The CA found that Hatton gave the school she worked for no notice that she was growing unable to cope with her work. She had suffered some distressing events outside of work, which the school could reasonably have attributed her absence to, particularly as other staff did not suffer from health problems as a result of restructuring in the school, and the fact that she did not complain. The court held that as teaching cannot be regarded as intrinsically stressful; the school had done all they could reasonably be expected to do. It was unnecessary to have in place systems to overcome the reluctance of people to voluntarily seek help. The guidelines set up by the CA are as follows: 1.

There are no special control mechanisms relating to work-related stress injury claims; ordinary principles of employers' liability apply. 2. The " threshold" question is whether this kind of harm to this particular employee was reasonably foreseeable. 3. Foreseeability depends on what the employer knows or should know about the individual employee. Unless aware of a particular problem or vulnerability, the employer can usually assume that the employee can withstand the normal pressures of the job. 4. The test is the same for all occupations; no occupation is to be regarded as intrinsically dangerous to mental health. 5. Reasonable foreseeability of harm includes consideration of: · the nature and extent of the work whether the workload is much greater than normal · whether the work is particularly

intellectually or emotionally demanding for that employee · whether unreasonable demands are being made of the employee · whether others doing this job are suffering harmful levels of stress · whether there is an abnormal level of sickness or absenteeism in the same job or department. The employer can take what the employee tells it at face value, unless it has good reason not to, and need not make searching enquiries of the employee or his or her medical advisors. 6. The employer can take what the employee tells it at face value, unless it has good reason not to and need not make searching enquiries of the employee or his/her medical advisors. 7. The duty to take steps is triggered by indications of impending harm to health, which must be plain enough for any reasonable employer to realise it has to act. 8.

There is a breach of duty only if the employer has failed to take steps that are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of that harm, the costs and practicability of preventing it and the justifications for running the risk. 9. The employer's size, scope, resources and demands on it are relevant in deciding what is reasonable (including the need to treat other employees fairly, for example in any redistribution of duties). 10. An employer need only take steps that are likely to do some good; the court will need expert evidence on this. 1. An employer that offers a confidential advice service, with appropriate counselling or treatment services is unlikely to be found in breach of duty. 2.

If the only reasonable and effective way to prevent the injury would be to dismiss or demote the employee, the employer will not be in breach in allowing a willing employee to continue working. 3. In all cases, it is

necessary to identify the steps that the employer could and should have taken before finding it in breach of duty of care 4. The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress caused the harm; it must be linked with the breach. 5. Where the harm suffered has more than one cause, the employer should only pay for that part caused by its wrongdoing, unless the harm is indivisible. 1.

Assessment of damages will take account of pre-existing disorders or vulnerability and the chance that the claimant would have suffered a stress-related disorder in any event. Hudson v Ridge Manufacturing [1957] 2 All ER 229 The plaintiff, while at work, was injured through a foolish prank played on him by Chadwick, a fellow workman. Over a period of about four years C had been in the habit of indulging in horseplay during his work, at the expense of the plaintiff and the other workmen. The employers knew about C's conduct and had frequently reprimanded him and warned him that someone might one day be hurt, but, although he paid no heed to their reprimands, he was allowed to remain in their employment.

In an action by the plaintiff against the employers, claiming damages for negligence at common law; HELD: - it was held at Manchester Assizes that the employers were liable to the plaintiff in damages for breach of their duty at common law to provide competent workmen, because, if a workman, by his habitual conduct, was likely to prove a source of danger to his fellow workmen, it was the employers' duty to remove that source of danger, and the plaintiff's injury was sustained as a result of the employers' failure to take proper steps to put an end to C's horseplay or to remove him from their

employment if he persisted in it. Smith v Crossley Brothers Ltd ((1951) 95 Sol Jo 655) considered. Wilson v Tyneside Window Cleaning Co [1958] 2 All ER 265

A master's duty to his servant to take reasonable care so to carry out his operations as not to subject his servant unnecessary (see Smith v Baker & Sons [1891] AC at p362) is one single duty applicable in all circumstances, though it may be convenient to divide it into categories (as was done by Lord Wright in Wilsons & Clyde Coal v English [1937] 3 All ER at p640) when dealing with a particular case. So viewed, the question whether the master was in control of the premises, or whether the premises were those of a stranger, becomes merely one of the ingredients, albeit an important one, in considering the question of fact whether, in all the circumstances, the master took reasonable care.

A skilled and experienced window cleaner, who knew that he should not trust the handles on windows without first testing them, was frequently sent by his employers to clean the windows of a particular customer. The employers did not inspect the customer's premises each time when they sent the window cleaners there, nor did they specifically warn the window cleaner of particular dangers; but they did instruct him to leave uncleaned any window which presented unusual difficulty and which he was in doubt whether he could clean safely, to report the fact to them and to ask for further instructions. There was no evidence of any practice in the trade either of inspecting premises for safety before work or of repeatedly warning workmen of the dangers.

While cleaning the outside of a kitchen window, the woodwork of which appeared to the window cleaner to be rotten, of which he knew the sash to be stiff and of which one of the two handles was missing, the window cleaner attempted to pull the window down by the remaining handle. The handle came away in his hand, causing him to lose his balance, fall and sustain severe injuries. In an action by the window cleaner against the employers for alleged negligence exposing him to unnecessary risk; HELD: - it was held by the Court of Appeal that the employers had taken reasonable care not to subject the plaintiff to unnecessary risk, because the danger was an apparent danger, the plaintiff was very experienced at the work, and they had instructed him not to clean windows which it might not be safe to clean; the employers, therefore, were not liable. DEFENCES 1.

Volenti non fit injuria is a defence for an employer against an employee. It could apply where an employee is so negligent that it could be said that the employee is completely at fault. 2. An employee's knowledge of the existence of a danger does not in itself amount to consent to run the risk. 3. Contributory negligence is also a defence that an employer may utilise against an employee. However, the courts are reluctant to apply this doctrine. This doctrine does not completely exonerate an employee but in fact reduces the amount of damages (apportionment) given to the employee. 4. Contributory negligence is a defence both to an action in negligence and breach of statutory duty.

In general, however, the carelessness of employees as claimants is treated more leniently than the negligence of employers, even where liability rests upon the vicariousresponsibilityof the employer for the negligence of another

employee. Smith v. Baker [1891] AC 325 When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control - the danger being created or enhanced by the negligence of the employer - the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has undertaken the risk so as to make the maxim " Volenti non fit injuria" applicable in case of injury.

The question whether he has so undertaken the risk is one of fact and not of law. And this so both at common law and in cases arising under the Employers Liability Act 1880. The plaintiff was employed by railway contractors to drill holes in a rock cutting near a crane worked by men in the employ of the contractors. The crane lifted stones and at times swung over the plaintiff's head without warning. The plaintiff was fully aware of the danger to which he was exposed by thus working near the crane without any warning being given, and had been thus employed for months. A stone having fallen from the crane and injured the plaintiff, he sued his employers in the County Court under the Employers Liability Act 1880.

HELD: - the House of Lords, reversing the decision of the Court of Appeal (Lord Bramwell dissenting), that the mere fact that the plaintiff undertook and continued in the employment with full knowledge and understanding of the danger arising from the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that the plaintiff did not voluntarily undertake the risk of injury; that the maxim " Volenti non fit injuria" did not apply; and that the action was maintainable.

ICI v. Shatwell [1965] AC 656 G and J who were brothers, were certificated and experienced shotfirers employed by ICI Ltd.

By their employers' rules, and by reg 27(4) of the Quarries (Explosives) Regulations 1959, G and J were required to ensure that no testing of an electric circuit for shotfiring should be done unless all persons in the vicinity had withdrawn to shelter. The statutory duty was imposed on G and J, not on their employers. The risk, which had been explained to G and J, was of premature explosions. On the day of the accident, while a third man had gone to fetch a longer cable so that a shotfiring circuit, which had been made in the course of their employment, could be tested from shelter, G invited J to proceed with him to make a test in the open. G and J were injured by the resulting explosion.

On appeal from an award of damages to G (both negligence and breach of statutory duty by J being found at the trial, and the award being of an amount reduced in respect of G's contributory negligence) in an action by G against the employers as vicariously responsible for J's breach of duty; HELD: - the House of Lords said that although J's acts were a contributing cause (Viscount Radcliffe dissenting as regards causation) of G's injury, the employers were not liable because - (1) the employers not being themselves in breach of duty, any liability of theirs would be vicarious liability for the fault of J, and to such liability (whether for negligence or for breach of statutory duty) the principle volenti non fit injuria afforded a defence, where, as here, the facts showed that G and J knew and accepted the risk (albeit a remote risk) of testing in a way that contravened their employers' instructions and the statutory regulations. (2) (per Viscount Radcliffe) each of

them, G and J, emerged from their joint enterprise as author of his own injury, and neither should be regarded as having contributed a separate wrongful act injuring the other.

Per Lord Pearce (Viscount Radcliffe concurring): the defence of volenti non fit injuria should be available where the employer is not himself in breach of statutory duty and is not vicariously in breach of any statutory duty through neglect of some person of superior rank to the plaintiff and whose commands the plaintiff is bound to obey, or who has some special and different duty of care. [Editorial Note - There was no breach of statutory duty by the employers: the defence of " volens" was admitted against vicarious responsibility only ... The defence is not available to an employer on whom a statutory obligation is imposed as against liability for his own breach of that obligation.] Staple v. Gypson Mines Ltd [1953] AC 663 The plaintiff claimed damages on behalf of her husband. There had been a mining accident. A roof fell in the section of the mine where the deceased was working and he was crushed.

The deceased and another colleague had been told to bring the rest of the roof down; however, they left part of the roof hanging and then continued working. HELD: - The House of Lords held that the employer was vicariously liable as Mr. Staple consented to continue working and such consent amounted to 80% contributory negligence. Fagelson (1979) 42 MLR 646 Flower v. Ebbw Vale Steel Iron & Coal Ltd [1934] 2 KB 134 The plaintiff brought an action for personal injury alleged to have been sustained by a workman through his employers' breach of their statutory duty under s10 of the Factory and Workshop Act 1901, in not securely fencing a machine for

rolling metal sheets in their factory. The workman in the course of his duty was cleaning the machine.

To enable this to be done the rollers are set in motion. The safe and simple way to clean them is to take one's stand at the back of the machine and apply emery-cloth or engineers' waste over the iron bar to the upper part of the rollers; for then all the seven rollers are revolving away from the operator. There was some evidence that he had been told to use this method, but it was of a vague and general kind. The employers pleaded that the alleged injury was caused solely by the workman's own negligence in attempting to clean the machine at a wrong part, and omitting to take reasonable care to prevent his left hand from coming into contact with the rollers.

The judge held that the machine was dangerous and that it was not sufficiently fenced; but that the workman had acted in disobedience to his orders without any good reason for so acting, and that his disobedience was the proximate cause of the accident. The judge also held that the defence of contributory negligence was open to the employers. Accordingly he gave judgment for the employers. The workman appealed to the Court of Appeal, which affirmed the judgment of the trial judge. HELD: - The House of Lords held that judgment be entered for the employee. The decision of the Court of Appeal was reversed on the ground that the only contributory negligence relied on was disobedience to orders, and that the evidence at the trial was insufficient to prove that the alleged orders were ever given.

Consideration was given by Lord Wright (at p214-5) of the circumstances in which contributory negligence may be pleaded as a defence to an action by

a workman for personal injuries through a breach by his employers of their duty under s10 (1) (c) of the Factory and Workshop Act 1901, to fence securely all dangerous parts of the machinery in their factory. Per Lawrence J – “ It is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that [he] ought to be held guilty of contributory negligence… 3. Breach of Statutory Duty (Employment) An employer may be under a statutory duty to provide safety equipment to protect his employees from injury, especially where they are operating dangerous machinery.

Generally, where a statute provides a criminal penalty for an infringement of one of its provisions, the penalty is normally treated as the only liability to which the offender is subject, and no civil action is usually maintainable infringement against him by the victim of his criminal conduct. However, it has for long been recognised that the statutory duties imposed on an employer to enhance the safety of it employees may form the basis of an action for damages by an injured employee for breach of statutory duty. See Factories Act An employer who fails to provide equipment as required by statute will be liable for breach of statutory duty. An employee who is injured as a consequence of a breach of statutory duty must show: 1. That the act which caused the damage was regulated by the statute; 2.

That he was one of the persons whom the statute was intended to protect; and 3. That the damage suffered was of a kind that the statute was intended to prevent. The first two requirements are normally easy to satisfy, but the third may be problematic. Gorris v. Scott (1874) LR 9 Ex 125 A ship-owner was required by statute to provide pens for cattle on board his ship. He failed

to do this, with the result that the plaintiff’s cattle were swept overboard. HELD: - that the ship-owner was not liable for the loss, because the damage that the statute was intended to prevent was the spread of contagious diseases, not the sweeping overboard of the cattle. Close v. Steel Co of Wales Ltd [1962] AC 367

It was held that a workman who is injured by a dangerous part of machinery which flies out of a machine and injures him cannot base a claim on the statutory obligation that dangerous parts of machinery ‘ shall be securely fenced’, because the purpose of the statutory duty is ‘ to keep the worker out, not to keep the machine or its product in’. Morris v. Seanem Fixtures Ltd (1976) 11 Barb LR 104, High Court Barbados The plaintiff was employed by the defendants as a shop-hand and fitter. Without being authorised or directed to do so by the defendants, she operated a ‘ planer’ at the factory, and in attempting to remove some wood shavings from the machine while it was still in motion, sustained injuries to her hand when it became caught in the machine’s rotating blades. She brought an action against the defendants for negligence and breach of statutory duty.

HELD: - (a) the claim in negligence failed, since the plaintiff had not been directed or authorised to use the machine; (b) the claim for breach of statutory duty succeeded. The cutting rotor of the planer was a dangerous part of a machine and the defendants were in breach of the duty imposed by s 10(1) of the Factories Act, Cap 347, in failing to fence or to provided some other safety device to prevent contact; (c) the plaintiff was guilty of contributory negligence and her damages would be reduced by two-thirds. Walker v. Clarke (1959) 1 WIR 143, Court of Appeal, Jamaica The

plaintiff/respondent operated a dough-brake machine in the course of his employment at the defendant’s/appellant’s bakery. The machine had a revolving turntable to feed the dough to rollers, but, as this did not work atisfactorily, the respondent, on the instructions of the appellant, fed the dough to the rollers by hand. While attempting to remove some foreign matter from the machine whilst it was in motion, the respondent put his hand too close to the rollers and his fingers were crushed. HELD: - the rollers were a dangerous part of the machine and, as they were not securely fenced, the appellant was in breach of his statutory duty. Bux v. Slough Metals Ltd [1974] 1 All ER 262 Nimmo v. Alexander Cowan & Sons Ltd [1968] AC 107 4. Occupational Health & Safety Legislation This type of legislation applies to all forms of employment with only few exceptions, whereas the Factories legislations apply to only such establishments.

Essentially, these Acts provide for the general duties of employers to their employees and to persons other than their employees; the general duties of employees; therights of employeesto refuse to perform dangerous work; administrative and criminal sanctions for contravention of its provisions and specific duties in respect of the safety, health and welfare of those in the establishment. R v. Associated Octel Co Ltd [1997] IRLR 123 R v. Swan Hunter Shipbuilders Ltd [1981] ICR 831 R v. Gateway Foodmarkets Ltd [1997] IRLR 189 October 07, 2006 Worksheet II VICARIOUS LIABILITY Employers are vicariously liable for the torts of their employees that are committed during the course of employment. The expression ‘ vicarious liability’ refers to the situation where D2 is liable to P for damages caused to P by the negligence or other tort of D1.

It is not necessary that D2 should have participated in the tort or have been in any way at fault. D2 is liable simply because he stands in a particular relationship with D1. That relationship is normally one of ‘ master and servant’, or in modern parlance ‘ employer an employee’. DEVELOPMENT OF VICARIOUS LIABIITY In early medieval times a master was held responsible for all the wrongs of his servants. Later as the feudal system disintegrated, the ‘ command theory’ emerged, under which a master was liable only for those acts of his servants which he had ordered or which he had subsequently ratified. Later still, with the development and expansion of industry and commerce, the ‘ command theory’ fell into disuse for two main reasons: 1.

Under modern conditions it was no longer practicable for an employer to always control the activities of his employees, especially those employed in large businesses; and. 2. The greatly increased hazards of modern enterprises required a wider range of responsibility on the part of employers than that which had been imposed in earlier times. The theory of vicarious liability which eventually emerged was that a master is liable for any tort committed by his servant in the course of the servant’s employment, irrespective of whether the master authorized or ratified the activity complained of, and even though he may have expressly forbidden it. The modern theory of vicarious liability is based on considerations of social policy rather than fault.

It may seem unfair and legally unjustifiable that a person who has himself committed no wrong should be liable for the wrongdoing of another, on the other hand, it may be argued that a person who employs others to advance

his economic interests should be held responsible for any harm caused by the actions of those employees, and that the innocent victim of an employee’s tort should be able to sue a financially responsible defendant, who may in any case take out a policy against liability. The cost of such insurance will, of course, ultimately be passed on to the public on the form of higher prices. However, care should be taken not to hamper business enterprises unduly by imposing too wide a range of liability o employers. Therefore there is a requirement that a master will only be liable for those torts hich his servant committed during the course of his employment-that is, while the servant was doing his job he was employed to do. According to Michael A. Jones, Textbook on Torts, 2000, p379, several reasons have been advanced as a justification for the imposition of vicarious liability: 1. The master has the 'deepest pockets'. The wealth of a defendant, or the fact that he has access to resources via insurance, has in some cases had an unconscious influence on the development of legal principles. 2. Vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others. 3.

As the employer makes a profit from the activities of his employees, he should also bear any losses that those activities cause. Three questions must be asked in order to establish liability: 1) Was a tort committed? 2) Was the tortfeasor an employee? 3) Ws the employee acting in the course of employment when the tort was committed? SERVANTS AND INDEPENDENT CONTRACTORS A person who is employed to do a job may be either a servant or an independent contractor. It is important to decide which

category he comes into, for whilst an employer is liable for the torts of his servants, he is generally not liable for those of his independent contractors.

Various tests for establishing an individual's employment status have been developed through the cases: (a) The control test This was the traditional test. According to ‘ Salmond and Heuston on the Law of Torts’: A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer: an independent contractor is one who is his own master. A servant is a person engaged to obey the employer’s orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it – he is bound by his contract, but not by his employer’s orders.

A servant is employed under a contract of service, whereas an independent contractor is employed under a contract for services: In Collins v Hertfordshire CC [1947] 1 All ER 633, Hilbery J said: " The distinction between a contract for services and a contract of service can be summarised in this way: In one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done, but how it shall be done. ” But in Cassidy v Ministry of Health [1951] 1 All ER 574, Somervell LJ pointed out that this test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship.

He went on to say: " One perhaps cannot get much beyond this 'Was the contract a contract of service within the meaning which an ordinary person would give under the words? ’” However, although the control test may be

satisfactory in the most basic domestic situations, it has proved to be quite inadequate in the context of modern business enterprise, where large organisations commonly employ highly skilled professional persons under contracts of service, and yet do not or cannot control the manner in which they do their work. (b) The Organisation Test A useful alternative to the control test, and one which is more in keeping with the realities of modern business, is what may be called the ‘ organisation test’.

This test was explained by Denning LJ in Stevenson, Jordan and Harrison Ltd v. Macdonald and Evans Ltd as: Under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it. Examples of servants of the organisation under this test include: hospital doctors and nurses, school teachers, airline pilots, office clerical staff and factory workers. Examples of independent contractors include: freelance journalists, attorneys, architects plumbers and taxi drivers driving their own vehicles. (c) The ‘ Multiple’ or ‘ Mixed’ Test

The three conditions suggested by MacKenna J in Ready Mixed Concrete (South East) Ltd v. Minister of Pensions, for the existence of a contract of service of employment are: 1. the employee agrees to provide his work and skill to the employer in return for a wage or other remuneration; 2. the employee agrees, expressly or impliedly, to be directed as to the mode of performance to such a degree as to make the other his employer; and 3. the other terms of the contract are consistent with there being a contract of

employment. In applying this test, the courts do not limit themselves to considering just those three factors.

They consider a wide range of factors including: the degree of control over the worker’s work; his connection with the business; the terms of the agreement between the parties; the nature and regularity of the work; and the method of payment of wages. LENDING AN EMPLOYEE/SERVANT If an employer lends an employee to another employer on a temporary basis, as a general rule it will be difficult for the first employer to shift responsibility to the temporary employer. Mersey Docks & Harbour Board v Coggins Ltd [1946] 2 All ER 345 The appellants employed Y as a driver of a mobile crane. They hired out the crane, together with Y as driver, to the respondents, a stevedoring company, for use in unloading a ship.

The contract between the appellants and the respondents provided that Y was to be the servant of the respondents, but Y was paid by the appellants, who alone had the power of dismissal. Whilst loading the cargo, Y was under the immediate control of the respondents, in the sense that they could tell him which boxes to load and where to place them, but they had no power to tell him how to manipulate the controls of the crane. The House of Lords had to decide whether it was the appellants or the respondents who were vicariously liable for Y’s negligence, and the answer to that question depended upon whether he was the respondents’ or the appellants’ servant at the time of the accident. HELD: - The House of Lords held that the driver remained the servant of the Board and thus the appellants were vicariously liable.

Lord Porter said that in order to make the respondents liable, it was not sufficient to show that they controlled the task to be performed: it must also be shown that they controlled the manner of performing it. And, ‘ where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance, since it is his crane and the driver remains responsible to him for its safe keeping’. These principles were applied in the Bahamian case of Joseph v. Hepburn (1992) Supreme Court, The Bahamas, No 762 of 1989 (unreported). H engaged an independent contractor, S Ltd, to clear his land of bush.

In the course of clearing the land, A, a tractor driver employed by S Ltd, encroached upon the plaintiff’s adjacent land and destroyed a number of fruit trees. The main issue in the case was whether S Ltd, as general employer of A, was liable for A’s tort, or whether, as S Ltd alleged, the responsibility for the tort had been shifted to H as special employer. The contractual arrangement between H and S Ltd showed that H had identified the general area in which work was to be done and S Ltd arranged for its project manager to accompany H to the site to see what was required. S Ltd had delegated the tractor driver, A, to take instructions from H, but A’ wages were paid by S Ltd.

HELD: - Thorne J said that whether A was to be regarded as the servant of the general employer, S Ltd, ‘ or whether he became pro hac vice the servant of his particular employer [H] is a question of fact and depends upon an interpretation of the agreement made between [S Ltd and H]’. His Lordship held that S Ltd had ‘ failed to discharge the heavy burden on it to

shift to [H] its prima facie responsibility for the acts of the driver, and so [A] remained the servant of [S Ltd]. ‘ What was transferred was not the servant but the use and benefit of his work’. Thorne J ultimately held that H had been negligent in his failure to give clear instructions to A with respect to the extent of his boundaries, and S Ltd was entitled to recover from H 10% of the damages that it was liable to pay to the plaintiff. COMMISSION OF A TORT BY THE SERVANT

For the master to be vicariously liable, the plaintiff must first prove the commission of a tort by the servant. As Denning LJ explained…to make a master liable for the conduct of his servant, the first question is to see whether the servant is liable. If the answer is ‘ yes’, then the second question is to see whether the employer must shoulder the servant’s liability. In other words, vicarious liability of the master arises only on the primary liability of the servant. RES IPSA LOQUITOR Sometimes, it may be difficult or impossible to prove affirmatively which one of several servants was negligent. As far as the liability of hospitals is concerned, it was established in Cassidy v.

Ministry of Health that, where the plaintiff had been injured as a result of some operation in the control of one or more servants of a hospital authority, and he cannot identify the particular servant who was responsible, the hospital authority will be vicariously liable, unless it proves that there was no negligent treatment by any of its servants; in other words, res ipsa loquitor applies. In the absence of authority to the contrary, there seems to be no reason why this principle should not apply to other master/servant relationships. THE COURSE OF EMPLOYMENT/SCOPE OF EMPLOYMENT An

employer will only be liable for torts which the employee commits in the course of employment. There is no single test for this, although Parke B famously stated in Joel v Morison (1834) 6 C&P 501 at 503, that the servant must be engaged on his master's business, not 'on a frolic of his own’. A tort comes within the course of the servant’s employment if: 1. t is expressly or impliedly authorised by his master; or 2. it is an unauthorised manner of doing something authorised by his master; or 3. it is necessarily incidental to something which the servant is employed to do. Although this definition is easy enough to state, the second and third circumstances in particular have proved to be very difficult to determine in practice, and it is now accepted that the question of whether a servant’s act is within the course of his employment is ultimately one of fact in each case. Some relevant factors which the courts take into account when considering the question include: 4. Manner of doing the work the servant was employed to do

A master will be liable for the negligent act of his servant if that act was an unauthorised mode of doing what the servant was employed to do. The classic example is: Century Insurance Co Ltd v. Northern Ireland Road Transport Board There, the driver of a petrol tanker, whilst transferring gasoline from the vehicle to an underground tank at a filling station, struck a match in order to light a cigarette and then threw it, still alight, on the floor. HELD: - His employers were held liable for the ensuing explosion and fire, since the driver’s negligent act was merely an unauthorised manner of doing what he was employed to do. Beard v. London General Omnibus Co [1900] 2 QB 530

The employers of a bus conductor who took it upon himself to turn a bus around at the terminus and, in so doing, negligently injured the plaintiff, were held not liable because the conductor was employed to collect fares, not drive buses, and his act was entirely outside the scope of his employment. 5. Authorised limits of time and place A relevant factor in determining whether or not a servant’s tort is within the course of his employment is the time or place at which it is committed. As regards time, where a tort is committed during working hours or within a reasonable period before or after, the court is more likely to hold the employer liable for it.

Thus, in Ruddiman and Co v. Smith (1889) 60 LT 708, where a clerk turned on a tap in the washroom 10 minutes after office hours and forgot to turn it off before going home, his employers were held liable for the consequent flooding of adjoining premises. The use of the washroom by the clerk was an incident of his employment and the negligent act took place only a few minutes after working hours. As regards the place where the tort is committed, a difficult question which has frequently come before the courts is whether a driver/servant is within the course of his employment where he drive negligently after making a detour from his authorised route.

The principle to be applied in these cases was laid down by Parke B in Joel v. Morrison (1834) 172 ER 1338: If he was going out of his way, against his master’s implied commands, when driving on his master’s business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master’s business, the master will not be liable. Whether a detour by the servant amounts to a ‘ frolic of his own’ is a question of degree, and both the extent of the deviation and its purpose will be taken

into account. Dunkley v. Howell (1975) 24 WIR 293 R was employed to drive Mrs W in the defendant/appellant’s car to May pen and thereafter to Mrs.

W’s home at Mocho, where the car was to be garaged. On reaching May pen, Mrs. W remained there, but R drove the car to Thompson Town for his own private purposes. On his way back from Thompson Town, R negligently ran into the back of the plaintiff