

ASPECTS OF CONTRACT AND NEGLIGENCE FOR BUSINESS



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Lesson 9



- ASPECTS OF CONTRACT AND NEGLIGENCE FOR BUSINESS
- LO 2: Understand principles of liability in negligence in business activities
- September – November 2014

The Basic Syllabus



- Understand the essential elements of a valid contract in a business context.
- Be able to apply the elements of a contract in business situations.
- Understand principles of liability in negligence in business activities
- Be able to apply principles of liability in negligence in business situations.

LEARNING OBJECTIVES



- At the end of the class, students should be able to:
 - Explain how a business can be liability

OVERVIEW



Liability law is the very broad area of law involving fault. The areas of liability law most relevant to personal injury cases are products liability law and landowner or premises liability law. Landowner liability law governs fault for injuries incurred on a landowner's property, such as slips, falls, exposure to hazardous materials, or accidents caused by faulty construction. Products liability law, on the other hand, involves personal injury lawsuits concerning defective and dangerous products.

EMPLOYERS LIABILITY



- The basis of the liability of an employer for negligence in respect of injury suffered
- by his employee during the course of the employee's work is twofold:
- (a) he may be liable for breach of the personal duty of care which he owes to each employee;
- (b) he may be vicariously liable for breach by one employee of the duty of care which that employee owes to his fellow employees.
- PERSONAL DUTY OF EMPLOYER AT COMMON LAW
- The common law duty of an employer to his employees was enunciated in *Davie v New Merton Board Mills Ltd*² as a duty to take reasonable care for their safety. The duty is not an absolute one and can be discharged by the exercise of due care and skill, which is a matter to be determined by a consideration of all the circumstances of the particular case. The duty is a non-delegable one, and the employer is accordingly not absolved
- from his responsibility by the employment of an independent contractor.⁴The common law duty of an employer to his employees was enunciated in *Davie v New Merton Board Mills Ltd* as a duty to take reasonable care for their safety. The duty is not an absolute one and can be discharged by the exercise of due care and skill, which is a matter to be determined by a consideration of all the circumstances of the particular case.
- The duty is a non-delegable one, and the employer is accordingly not absolved
- from his responsibility by the employment of an independent contractor.

EMPLOYERS LIABILITY



- It is well established that every employer has a duty at common law to provide:
 - (a) a competent staff of men;
 - (b) adequate plant and equipment;
 - (c) a safe system of working, with effective supervision; and
 - (d) a safe place of work.
- **Competent staff of men**
- 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. An employer will similarly be liable where he continues to employ a man who is known by him to be a bully, addicted to practical jokes or 'skylarking', or is in other respects a danger to his fellow workmen, and another employee is harmed by the man.

EMPLOYERS LIABILITY



- **Adequate plant and 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. For instance, the employer should ensure that dangerous machinery is fitted with the necessary safety devices, including fencing, and that goggles are provided for those types of work in which there is a risk of eye injuries.

EMPLOYERS LIABILITY



- He must also take reasonable steps to maintain plant and equipment, and he will be liable
- for harm resulting from any breakdown or defect which he ought to have discovered by reasonable diligence.

EMPLOYERS LIABILITY



- **Safe system of working and effective supervision**
- An employer must organise a safe system of working for his employees and must ensure as far as possible that the system is adhered to. A system of work has been defined as:
- *...the physical layout of the job; the setting of the stage, so to speak; 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. A system may be adequate for the whole course of the job, or it may have to be modified or improved to meet the circumstances which arise. The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus, in addition to supervising the workmen, the employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness.*

EMPLOYERS LIABILITY



- **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. It appears that this duty is greater than that owed by an occupier to his visitors or invitees, since it is not limited to unusual dangers, nor is it necessarily discharged by giving warning of the danger. But the employer's duty is not absolute; it is sufficient that the premises are maintained 'in as safe a condition as reasonable care by a prudent employer can make them', and if the employer 'has an efficient system to keep (the workplace) clean and free from obstruction, that is all that can be reasonably demanded from him'.

EMPLOYERS LIABILITY



- At one time, it was thought that where an employee was sent to work at premises over which the employer had no control, the employer would owe no duty in respect of those premises; but the modern view is that whether the employer is relieved of the duty will depend upon the nature of the premises. For instance, if an employer sends his technician to install cable television in a private house, the employer will not be required to inspect the house to ensure that there are no potential hazards; but an employer who sends a stevedore onto a ship may be required to inspect the ship for potential dangers, such as defective hatches, and to ensure that any necessary remedial action is taken.

VICARIOUS LIABILITY



- The expression ‘Vicarious liability’ refers to the situation where D2 is liable to P for damage 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 and employee’.

VICARIOUS LIABILITY



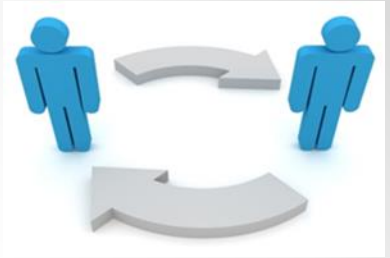
- The theory of vicarious liability which eventually emerged was that a master is liable for any tort committed by his servant in the course of the servant's employment, irrespective of whether the master authorised or ratified the activity complained of, and even though he may have expressly forbidden it.
- The modern theory of vicarious liability is based not on fault but on considerations of social policy.

VICARIOUS LIABILITY



- 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 own 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 an insurance policy against liability.

VICARIOUS LIABILITY



- **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. The traditional test for determining this question is that of control:
- 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 his 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.

VICARIOUS LIABILITY



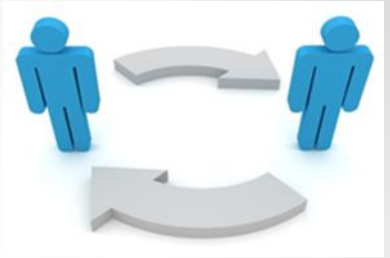
- A servant is employed under a contract of service, whereas an independent contractor is employed under a contract for services:
- The distinction between the contract for services and the contract of service can be summarised in this way: in the one case the master can order or require what is to be done; while in the other case he can not only order or require what is to be done but how it shall be done.

VICARIOUS LIABILITY



- It is important to distinguish between a contract of service (employment) and a contract for services (independent contractor). Each type of contract has different rules for taxation, health and safety provisions, protection of contract and vicarious liability in tort and contract.
- A contract of service is distinguished from a contract for services usually because the parties express the agreement to be one of service. This does not always mean that an employee will not be treated as an independent contractor by the court, however; much depends on the three tests.
- • **Control test;** The court will consider whether the employer has control over the way in which the employee performs his duties

VICARIOUS LIABILITY



- **Integration test:** The courts consider whether the employee is so skilled that he cannot be controlled in the performance of his duties. Lack of control indicates that an employee is not integrated into the employer's organisation, and therefore not employed.
- **Economic reality test:** Courts also consider whether the employee was working on his own account and require numerous factors to be taken into account.

HEALTH AND SAFETY ISSUES



- The key legislation under which an employer has a duty to his employees with regard to health and safety is the Health and Safety at Work Act 1974, which has been augmented by subsequent regulations, notably the Health and Safety at Work Regulations 1999.
- This duty includes the following issues:
 - Provide and maintain plant and systems of work which are safe and without risk
 - Make arrangements to ensure safe use, handling, storage and transport of articles/substances
 - Provide adequate information, instruction, training and supervision
 - Maintain safe places of work and ensure that there is adequate access in and out
 - Provide a safe and healthy working environment

HEALTH AND SAFETY ISSUES



- The contract of employment contains an implied right not to be subjected to detriment by the employer on grounds of health and safety: s 44(1). Specifically, the employee has a right not to be subjected to
 - detriment on the ground that he intended to or did:
 - Carry out activities designated to him in connection with preventing/reducing health and safety risks at work
 - Perform duties as a representative of workers on issues of health and safety
 - Take part in consultation with the employer under the Health and Safety (Consultation with Employees) Regulations 1996
 - Leave his place of work or refused to work in circumstances which he reasonably believed to be serious or imminent and he could not reasonably be expected to avert
 - Take appropriate steps to protect himself or others from circumstances of danger which he believed to be serious and imminent

HEALTH AND SAFETY ISSUES



- The Working Time Regulations 1998 provide broadly that a worker's average working time in a 17 week
- period, (including overtime) shall not exceed 48 hours for each 7 days period, unless the worker has
- agreed in writing that this limit shall not apply.

REVIEW QUESTIONS



- ***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 satisfactorily, 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. The resident magistrate concluded that the machine was dangerous and that the appellant was in breach of his duty under reg 3 of the Factories Regulations 1943 (made under the Factories Law, Cap 124) to fence the machine.

REVIEW QUESTIONS



- Held, upholding the decision of the resident magistrate, 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.
- **MacGregor CJ said:**
 - Regulation 8 of the Factories Regulations, which are to be found at p 125 of the Jamaica Gazette 1943, reads as follows:
 - Every dangerous part of any machine shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced.
 - This regulation is almost the same as s 14(1) of the Factories Act 1937 (UK), except that this latter has, in addition, a proviso.
 - In our judgment, the learned resident magistrate correctly stated the questions which arose for his decision. They are:
 - (1) are the rollers a dangerous part of the machinery? If the answer to question (1) is 'yes', then
 - (2) is that dangerous part securely fenced? If the answer to that question is 'no', then
 - (3) is the machine in such a position or of such a construction as to be as safe to every worker as it would be if securely fenced?

REVIEW QUESTIONS



- **1.Cook v Square D Ltd [1992] ICR 262**
- The plaintiff, an electronics engineer, worked for a company based in the UK. He was sent on an assignment to complete the commissioning of a computer control system in Saudi Arabia. His work there was carried out in a control room housing the computers. The area had a specially constructed floor, each tile being removable so that access could be obtained to the wires and cables beneath. The employee, having almost completed his work on the system, was instructing others on the use of the system, when he slipped as a result of a raised tile that had been left unguarded and injured his knee.
- It was held by the Court of Appeal that the employers had a duty, that could not be delegated, to take all reasonable care to ensure the safety of the employee whilst he was working overseas; that to hold the employers responsible for the daily events on a site in Saudi Arabia, owned and managed by reliable companies, lacked reality and that the circumstances clearly established that the employers had not delegated their responsibility and that the accident to the employee had not been caused by any breach of duty on their part.

REVIEW QUESTIONS



- Per Farquharson LJ. It may be that in some cases where, for example, a number of employees are going to work on a foreign site or where one or two employees are called on to work there for a considerable period of time that an employer may be required to inspect the site and satisfy himself that the occupiers were conscious of their obligations concerning the safety of people working there.

REVIEW QUESTIONS



- 2. Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) 1947
- The facts: Stevedores (dockworkers) hired a crane with its driver from the harbour board under a contract which provided that the driver (appointed and paid by the harbour board) should be the employee of the stevedores. Owing to the driver's negligence a checker was injured. The case was concerned with whether
- the stevedores or the harbour board were vicariously liable as employers.
- Decision: It was decided that the issue must be settled on the facts and not on the terms of the contract.
- The stevedores could only be treated as employers of the driver if they could control in detail how he did
- his work. But although they could instruct him what to do, they could not control him in how he operated the crane. The harbour board (as 'general employer') was therefore still the driver's employer.

REVIEW QUESTIONS



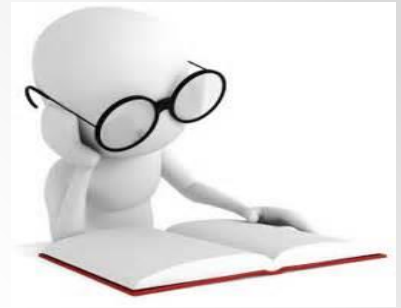
- 3.Charles saw a sign advertising vacancies at a local building site. He contacted the foreman and was told
- that he would be required but that, because work depended on the weather conditions, he would not be
- given an employment contract – he would be accountable for his own income tax and National Insurance.
- The foreman added that he would be provided with tools and that at the beginning of each day he would
- be told which site he would work on that day. Lateness or theft of materials would lead to his dismissal.
- Is Charles an employee?

REVIEW QUESTIONS



- In relation to employment law:
 - (a) Explain why it is important to distinguish between contracts of service and contract for services.
 - (b) State how the courts decide whether someone is an employee or is self-employed.

Further readings



- **-Commonwealth Caribbean Tort Law –Gilbert Kodilinye**
- **ACCA F4**
- **<http://www.lawteacher.net/>**