

**Vicarious Liability Is On The Move.  
What Is The Final Destination?**

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**Learning objectives**

By the end of the session, participants will be able to:

- understand how the law relating to vicarious liability has developed.
- critically analyse recent decisions of the Court of Appeal and Supreme Court.
- assess how the insurance industry can adapt its practices to ensure the best outcome possible in light of recent decisions.



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**The basic ingredients**

The employer will be liable when:

1. a tort is committed;
2. by an *employee*;
3. in the *course of employment*.



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## The 'justifications' for vicarious liability

- The employer profits from the work of the employee and therefore they should also bear the risk of potential losses.
- The employer 'controls' the work and so can best manage the risk.
- The employer normally has the deepest pockets!



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## Distributive justice

- Public policy plays a major role in the development of this area of law, including the idea of distributive justice.
- The extent to which the availability of insurance should be taken into account has increasingly been the focus of attention in the courts.



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- Lord Griffiths in *Smith v Eric S Bush* (1990) observed:

"There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of loss."

- Some commentators blame the so-called 'compensation culture' on such views.



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## Who is an *employee*?

- Cox v Ministry of Justice [2016] UKSC 10 – a move towards relationships that are “akin to employment”.
- Armes v Nottinghamshire County Council [2017] UKSC 60 – is the activity an integral part of the business activities?



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## What is *in the course of employment*?

- Century Insurance v Northern Ireland Transport Board [1942] AC 509 – course of employment.
- Lister v Heselley Hall [2002] 1 AC 215 – close connection.
- Mohamud v WM Morrison Supermarkets Plc [2016] UKSC 11 – field of activities.



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## Combining Cox & Mohamud

- Is the relevant relationship one of employment or is it “akin to employment?”
- Was the tort sufficiently closely connected with that employment or quasi-employment?



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**5 criteria for assessing cases**

1. The employer is more likely to have the means to compensate the victim and can be expected to have insured against that liability.
2. The tort will have been committed as a result of activity being taken by the employee on behalf of the employer.
3. The employee's activity is likely to be part of the business activity of the employer.
4. The employer, by employing the employee to carry on this activity will have created the risk of the tort being committed by the employee.
5. The employee will, to a greater or lesser degree, have been under the control of the employer.



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**A glimmer of hope?**

- Kafagi v JBW Group [2018] EWCA Civ 1157
- Widely worded contract.
- Insurance required + personal bond.
- Freedom to sub-contract and work for others.



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**Various Claimants v Barclays Bank [2018] EWCA Civ 1670**

- A decision that reflects the “gig economy”. It was never claimed the doctor was an employee but rather it was a relationship “akin to employment”.
- It is no longer valid to ask whether the tortfeasor was an independent contractor.



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“Operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control. Such patterns are evident in widely different fields of enterprise, from construction, to manufacture, to the services sector.”



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“It is clearly understandable that a “bright line” test, such as is said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business cannot displace or circumvent the principles now established by the Supreme Court.”



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- The criteria must be considered as at the time of the litigation.
- The Cox/Mohamud questions should form the basis of the analysis.



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## James-Bowen & Others v Commissioner of Police of the Metropolis [2018] UKSC 40

- The calm after the storm?
- Employers do not owe a duty of care to employees over the way they defend claims.
- It would undermine attempts to settle and create satellite litigation.
- You must make clear to employees that you are speaking to them as witnesses and not clients.



16

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## What can we do?

- Be more pro-active with risk management advice.
- Review current risks and policies.
- Be very clear from the beginning about your role with any employees who have been potentially implicated in the allegations of negligence.



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## Summary /restatement of learning objectives

During this session, we have:

- understood how the common law has developed over time in line with the principles of distributive justice.
- critically analysed recent court decisions to assess the direction the courts are taking in light of modern working practices.
- assessed how the insurance industry needs to be more proactive with risk management advice in light of these recent decisions.



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**Any questions?**



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**Thank you and please stay in touch**

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