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# Insurance surgery: Working under cover

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## Sarah Wilkinson examines vicarious liability

Following two recent Supreme Court decisions, employers will be advised to closely review the fine detail of their liability cover. Against the backdrop of the rulings in *Cox v Ministry of Justice* [2016] UKSC 10, [2016] All ER (D) 25 (Mar) and *Mohamud v WM Morrison Supermarkets* plc [2016] UKSC 11, [2016] All ER (D) 19 (Mar) it is essential that employers ensure vicarious liability is clearly defined and included in their policy wording to confirm that the policy covers all situations for which a business maybe be held vicariously liable.

The Supreme Court has re-examined the two-stage test for vicarious liability and has provided updated guidance on the development and application of the legal principle. While the court specifically sought not to open the floodgates, it has adopted a more liberal approach to the circumstances when an employer may be vicariously liable for the acts of an employee who has been negligent.

The boundaries have been pushed to allow the doctrine to reflect the realities and complexities of the modern workplace. It has long been recognised that a relationship can give rise to vicarious liability in the absence of a contract of employment. In *Cox* the court made it abundantly clear that it will be willing to adopt an even wider approach. Where possible, businesses which operate outside traditional employment relationships should seek appropriate indemnities from contractors and agents etc.

Employers will be keen to limit their exposure and should highlight any particular risks in their business, ensure employees are adequately trained and review employee policies and recruitment procedures. However, as *Mohamud* demonstrates, it is impossible to eliminate the possibility of wrongdoing by employees and employers may ultimately find themselves liable in situations outside their control.

### *Cox v Ministry of Justice*

The claimant, the catering manager at HMP Swansea, was injured in an accident caused by the negligence of a prisoner carrying out paid work under her supervision in the prison kitchen. It was claimed the Prison Service was vicariously liable to Mrs Cox for the negligence of the prisoner. The question before the Supreme Court was whether this relationship was capable of giving rise to vicarious liability?

It was argued that the relationship between compulsory prison workers and the Prison Service was not akin to employment; prisons are obliged to provide work for the benefit of the prisoner rather than the prisoner working for the benefit of the prison.

The court unanimously dismissed the appeal, relying on *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2012] All ER (D) 238 (Nov). Vicarious liability can in principle arise outside employment relationships where an individual carries out activities assigned to him by the defendant as an integral part of its operation and for its benefit. The defendant must, by assigning those activities, have created a risk of his committing the tort. Lord Reed stressed that words such as "business", "benefit" and "enterprise" should not be taken too literally. The defendant need not be carrying out activities of a commercial nature, or for profit. It is sufficient that there is a defendant which is carrying on activities in furtherance of its own interests.

## *Mohamud v WM Morrison Supermarkets plc*

The claimant, Mr Mohamud, stopped at a petrol station and had asked whether he could print some documents from a USB stick. The employee, Mr Khan, responded with abuse and ordered the customer to leave. He then followed him onto the forecourt where he told him to keep away and subjected him to an unprovoked violent assault.

The Supreme Court was asked to consider the "close connection test", ie was there sufficient connection between the wrongdoer's employment and his conduct towards the claimant to make the defendant legally responsible?

In his lead judgment, Lord Toulson restated the "close connection" test laid down in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] All ER (D) 37 (May). Khan's job was to attend to customers and to respond to their inquiries. His aggressive response and ordering Mohamud to leave was inexcusable but within the "field of activities" assigned to him. What happened thereafter was an unbroken sequence of events. There was no break in the chain by Khan when he followed the claimant onto the forecourt. He ordered Mohamud never to come back to the petrol station, it was not something personal between them, it was an order to keep away from his employer's premises, which he reinforced with violence. In giving such an order he was purporting to act about his employer's business.

Interestingly, while the Supreme Court recognised this was a gross abuse of Khan's position and motivated by personal racism rather than a desire to benefit his employer's business, they found his actions were in connection with the business in which he was employed to serve customers. His employers had entrusted him with that position. It was therefore just that they should be held responsible for their employee.

Going forward, the decision in this case will make it harder for employers to argue the actions of employees are not connected to his or her employment.

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