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**BUSINESS LAW**  
**Analysis of the Case Blake v J R Perry Nominees Pty Ltd**

[Name]

[Course Title]

[University]

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## **Question 1:**

Discuss 'vicarious liability' in the context of employment. In your answer, where possible, make reference to the case as well as relevant legal principles and literature to support your discussion. Research beyond the set case is expected (20 marks).

### **The Concept of Vicarious Liability**

Vicarious liability represents a secondary indirect form of liability for the tort committed not by the defendant himself, but which renders the defendant liable for the torts committed by another person. The imposition of vicarious liability is strictly dependent on the relationship between the tortfeasor and the defendant. The relationship between the two must be such to put the defendant ultimately responsible for the actions of the tortfeasor. A prime example is that of an employee and the employer. Under all common law systems of the tort law, an employer can be held liable for the wrongful acts of the employee if they are conducted during the course of the employment (Giliker, 2010). So when an employee commits a tort during the course of employment, say through negligent performance of the duties assigned to him, the injured or aggrieved person can claim damages from the employer on the grounds that employer is 'vicariously' liable for the acts of employee committed in the course of employment.

### **The Underlying Legal Principles behind the Vicarious Liability**

The doctrine of vicarious liability is based on the legal recognition of the personal non-delegability of certain duties of care owed to people. When a person owes a non-delegable duty to someone he has to take reasonable care by himself and not rely on other to do so (Burnie Port Authority v General Jones P/L, 1994). The doctrine of vicarious liability is also based on the legal principle of Respondeat Superior according to which an employer may be liable for the acts of employee under certain circumstances. This is also called "Master-

Servant Rule" and is widely recognised in legal jurisdictions. The principle comes into force when the employee commits a civil wrong, misdeed or a tort within the course of his/her employment, even though the master may not be involved in the wrongful act. Another example would be of doctors and surgeons who need to be careful and advise anaesthetists and other supporting staff accordingly (Regan & Regan, 2002). Based on these legal principles, an employer would not be able to simply rely on the defence that another person had been appointed to carry out the task. Employer has a duty to appoint competent staff for which several factors need to be considered so that only the person most fit for the task required to be carried out is selected. Consideration of these facts is the responsibility of employer who may be held vicariously liable if anything goes wrong later (Harpwood, 2008).

### **Justification for the Doctrine of Vicarious Liability and the Causal Link**

Generally, the tort law holds a person liable on the basis of committing tort or civil wrong against another person. It requires the establishment of causal link between the wrongful act and the defendant. Based on the corrective justice principle a liability is imposed to rectify the injustice, but how does making one person responsible for another's wrongful act provide justice? Vicarious liability has been explained as a principle of justice as: "those on whom it is imposed can blame themselves, at the very least, for weakness, others for bad choices, all for negligence" (Treichard, 1803) Thus it is justifiable on these grounds to impose liability on specific parties such as employers who may have placed confidence on the incompetent employees in the pursuit of profit. The initial fault is in the appointment of the employee and the causal link in the tort law is thus established as such. The doctrine of vicarious liability therefore restricts the employers to divest themselves of the liability for negligent performance of duties by the employees within the course of their employment.

It should be noted that the employer's vicarious liability is restricted only for such acts that are authorised by the employer and that are conducted in the normal course of employment. Whether the employers are liable for the unauthorised acts of the employees is largely uncertain grey area of law that needs to be explained by higher courts of law (Giliker, 2010). However, judgments in several recent cases have tried to explain this issue in more detail, such as *Blake v J R Perry Nominees Pty Ltd* [2012] VSCA 12.

### **Limits to Vicarious Liability**

The general rule is that an employer is liable for vicarious liability only for the acts that are unauthorised by him and that are performed in the normal course of employment. An employee is liable for the unauthorised acts of employee only to the extent that those acts are necessarily performed for fulfilling the duties assigned to employee or as a mode of performing the assigned tasks of employment. Employee shall also not be liable for the acts done by employee beyond the defined scope of employment (Mahoney, JA in *Bugden v Rogers*, 1993). The decision in the *Blake v JR Perry Nominees Pty Ltd* [2012] VSCA 122 has also held that an employer shall not be liable for the unauthorised acts of employee if:

- the wrongful act was unnecessary for the conduct of the duties assigned to employee, such as workplace pranks that are often done by the employees. If something goes wrong, employer would not be liable.
- beyond the reasonable control of the employer, and
- not executed for the employer's interest.
- The employer is not aware of the risk associated with the job assigned. The decision in *McLean v Tedman* (1984) 155 CLR 306 clarified that the greater the risk associated with the job and easier the remedial measures that can be put in place to

mitigate the risk, the higher would be the burden on the employer to employ controls to eliminate the risk of injury and tort.

This is discussed in further detail later. In *Deatons v Flew*, the High Court of Australia did not hold the hotel owner vicariously liable for the barmaid's assault on customer for retribution. The basis of grounds on pp. 381-382 states:

"An act of passion and resentment done neither in furtherance of the master's interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do. It was a spontaneous act of retributive justice. The occasion for administering it and the form it took may have arisen from the fact that she was a barmaid but retribution was not within the course of her employment as a barmaid" (*Deatons v Flew*, 1949).

### **Analysis of the Case *Blake v J R Perry Nominees Pty Ltd***

Keeping in view the doctrine of vicarious liability and the underlying legal principles discussed above, the analysis of the aforementioned case is provided below.

#### ***The Incident and Identification of the Parties to Lawsuit***

The plaintiff, Blake was a truck driver employed by JR Perry – the defendant. Jones was Blake's fellow truck driver employed by the same company. The tot took place on October 16, 2001 at the Portland Docklands in Melbourne. The drivers arrived at the spot to refill the oil tankers early in the morning. However, the tankers didn't arrive in time and both drivers were left waiting in the truck for about 18 hours with nothing to do. At some point of time

during their 18 hour stay, Jones hit Blake very hard on the back of his knees; he fell down and suffers severe injury on his back.

### ***Plaintiff's Claim and Facts***

Blake submitted that the Jones's act to inflict injury was motivated by boredom which was a result of the employer not being able to provide sufficient entertainment to prevent such incidents from happening. A hard struck on the back was described as a 'practical joke' by the employee. The plaintiff therefore held that the employers are vicariously liable for the injury sustained by him because the incident wouldn't have occurred but for the boredom caused because of inactivity for several hours, causing Jones to play a practical joke on him. The case seems a little too remote at first but it is a duty of employer to provide safe, secure and healthy workplace and to reasonably exercise their non-delegable duties. Duties that cannot be delegated include those that are imposed by the statute or the common law. These common law duties of make it obligatory on employer to make special application of the ordinary duty of care, hence they are required to take positive actions to protect their employees. If it can be proved that JR Perry failed to do so, they may be vicariously held liable to compensate the plaintiff for the injuries sustained by him.

### ***Court Rulings and Findings***

The court ruled out the notion of providing adequate entertainment facilities as 'absurd' as it would be ridiculously unreasonable for the employer to do so. It was also found by the trial judge that it was a normal practice for the truck drivers to play such practical jokes on each other during the prolonged periods of inactivity. However the court didn't find any evidence to support the claim that Jones was motivated out of boredom/frustration to suddenly attack Blake (paragraph 21, Blake v J R Perry Nominees Pty Ltd, 2012).



### ***The Basis of Court Decision***

In order to determine whether vicarious liability of employers exists, the court applied 4 different tests to the facts of the case. The **first test** was based on the decision presented in McLachlin J in *Bazley v Curry* (1999) 174 DLR (4th) 45. It was to determine “*whether the wrongful act is sufficiently related to conduct unauthorised by the employer to justify the imposition of vicarious liability*” (paragraph 52, *Blake v J R Perry Nominees Pty Ltd*, 2012). Since it cannot be proved that the feeling of boredom/frustration enhanced the risk of the wrongdoing conducted by the employee, a relation cannot be established.

The **second test** was based on a judgment presented in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. The question to ask here is whether the torts committed by the employee ‘were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable? (Paragraph 6, *Blake v J R Perry Nominees Pty Ltd*, 2012)”. It was held by the court that Jone’s attempt at humour cannot be said to be closely connected with his duties as it was not at all necessary to fulfil his employment duties.

The **third test** was the principle of estoppel which states that the “he person against whom liability is asserted is estopped from asserting that the person whose acts are in question was not acting as his or her servant, agent or representative when the acts occurred” (paragraph 60, *Blake v J R Perry Nominees Pty Ltd*, 2012). According to Gaudon J this was the only principle upon which the employer may be held vicariously liable.

The fourth and the **final test** was based on an earlier lawsuit decision by Gummow and Hayne JJ. They stated that, “vicarious liability may exist if the wrongful act is done in

intended pursuit of the employer's interests or in intended performance of the contract of employment. Secondly, vicarious liability may be imposed where the wrongful act is done in ostensible pursuit of the employer's business or in the apparent execution of authority which the employer holds out the employee as having” (paragraph 61, *Blake v J R Perry Nominees Pty Ltd*, 2012).

### ***Conclusion of the Case***

Based on the results of the tests described above, it can be safely said that even though the acts of striking and hitting the fellow drivers were not expressly discouraged by the employer in the case under study, there was no evidence as to suggest that the employer had condoned or encouraged this behaviour. Hence it was decided that the action of Jones was not pursued either expressly or ostensibly for the execution of Jones’s business duties and for the interest of the employer. The employer is therefore not liable vicariously for the practical joke/prank of one employee played on another.

## **Question 2:**

Your text book makes reference to ‘minimum entitlements’ in employment. Explain what this phrase means and in your answer make reference to relevant cases, legislation and literature to support your answer (15 marks).

### **Minimum Entitlements in Employment**

For the regulation of fair workplace environment, the legislation imposes minimum entitlement regulations on most of the industries. As a result of this, employers cannot pay less than the set remuneration limits to their employees. Minimum entitlement regulations prevent exploitation of labour force and encourage fair pay. Besides setting minimum wages, minimum entitlement for any employment also encompass such matters as:

- Maximum work hours i.e., the maximum hours an employee can be asked to be present at work for duty during a week.
- Annual and community service leaves including the calculation thereof.
- Provision of notice of termination
- Meal breaks and rest breaks
- Modern awards
- Public holidays
- Maternal leaves and related entitlements
- Requests for arranging flexible workplace

Federal and State industrial laws and awards provide these minimum entitlements based on the category of employment. An award is a legal document that sets out minimum wages and conditions for an industry or occupation. Modern awards, which began on 1 January 2013, cover most employers and employees in the national workplace relations system. Modern awards mostly cover minimum wages entitlements. Fair Work Act 2009 governs most of the

Australian workplaces. Eligibility for particular entitlements depends thereon. Main minimum entitlements are discussed below.

### **Minimum Wage**

Minimum wages are annually set by the Minimum Wages Panel of the Fair Work Commission for employees that are neither covered by awards nor any agreement. Its responsibility is to set the national minimum wage for the year, special minimum wage for disabled employees, trainees and junior employees, and employees with training arrangements, and casual loading. The current national minimum wage is \$16.87 per hour before deduction of taxes long with 25% casual loading. Annual wage review and the minimum wage order are governed by the sections 285–299 of the Fair Work Act 2009 (Fair Work Ombudsman, 2014).

### **Maximum Weekly Hours**

National Employment Standards (NES) of Australia sets the maximum weekly hours an employee is legally obliged to work and also define the circumstances in which an employee may refuse to comply with an order requiring him to work additional hours. Rules of averaging out work hours for various awards are also set by them. According to the set rules, an employer shall not request the employees to work for more than 38 hours a week or in case of part time employee the lesser of:

- 38 hours a week
- Ordinary hours of work during the week

An employee has the right to refuse to work additional hours if they seem to be unreasonable.

An employee may average out the work hours over weeks. For example he may work 20 hours in week 1 and 40 hours in week 2. In such cases, usually the averaging arrangement

determines whether the additional hours requested by the employer are reasonable (Fair Work Ombudsman, 2014).

### **Annual Leave**

NES apply to all employees covered by the national workplace relations system.

Requirements of NES override anything contained in the employment contract or instrument.

NES establishes the minimum entitlements related to annual leaves, the rate at which employees should be paid during leaves, and the circumstances in which a leave may be requested by the employee. Every Australian employee is entitled to have 4 weeks of paid leaves a year. These leaves accrue perpetually as the employee works hours during the week.

An employee who is a 'shift worker' may have 5 weeks of annual paid leaves if the following conditions are fulfilled:

- He is a part of organisation where shift workers work 24 hours day for the whole week
- He is regularly requested by the employer to work during shift hours
- He regularly works on Sundays and public holidays (Fair Work Ombudsman, 2014).

Encashment of annual leaves is permissible if it is a general practice in the profession and the employment agreement or award allows it. In addition to annual leaves, employees are also entitled to sick leaves, parental leaves, community service leaves and the related entitlements.

In contrast to full time employees, casual employees do not have a full time ongoing employment of fixed time frame. They work in irregular working patterns and time shifts. These employees are not entitled to annual or casual sick leaves. However, they are paid at a wage rate higher than that of full time employees. This is called casual loading. They are also paid 2 days leave per each occasion.



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