the absence of the violation of such legal right is known as *damnum sine injuria*. Furthermore, a person who suffers *damnum* cannot receive compensation on the basis of *injuria* suffered by another. The concept of *damnum sine injuria* is not the same as that concerning whether there is a law of tort or a law of torts because under the concept of *damnum sine injuria* a person may suffer harm and have no claim even though the harm was suffered *as a result of a known tort.*

*Best* v *Samuel Fox & Co Ltd*, 1952 – No proprietary right in a spouse (**265**)

*Electrochrome Ltd* v *Welsh Plastics Ltd*, 1968 – Loss but no damage to the claimant's property (**266**)

## Malice

The fact that the defendant acts with malice, i.e. with the intention of injuring his neighbour, does not give rise to a cause of action unless a legal right of the claimant is infringed (see 'Motive' below). On the other hand, whenever there is an invasion of a legal right, the person in whom the right is vested may bring an action and recover damages (though these may be nominal) or, what may be more important, obtain an injunction, although he has suffered no actual harm. For example, an action will lie for an unlawful entry on the land of another (trespass) although no actual damage is done. Furthermore, in *Ashby* v *White* (1703) 2 Ld Raym 938, it was held that an elector had a right of action, for a form of nuisance or disturbance of rights, when his vote was wrongly rejected by the returning officer although the candidate for whom he tried to vote was elected. This is known as *injuria sine damno*.

## Motive

The law of torts is concerned more with the effects of injurious conduct than with the motives which inspired it. Hence, just as a bad intention will not necessarily make the infliction of damage actionable, so an innocent intention is usually no defence unless a bad intention can be imputed. However, there are circumstances in which malice is important. Thus where a person puts in motion the criminal law against another, this is actionable if malice is shown to be present and is known as the tort of malicious prosecution. Furthermore, the question of malice may be raised when certain *defences* are pleaded. Thus in the law of defamation the defences of qualified privilege and fair comment are allowed only where the defendant has not been malicious. Finally, in regard to the tort of nuisance, certain acts which would not necessarily be a nuisance may be regarded as such if they are exercised unreasonably. Malice is sometimes regarded as evidence of conduct which is unreasonable (see *Christie* v *Davey* (1893) Chapter 21).

*Bradford Corporation* v *Pickles*, 1895 – Effect of bad intention (**267**)

*Wilkinson* v *Downton*, 1897 – Effect of innocent intention and imputation of intention (**268**)

# Parties in the law of torts

It is now necessary to consider certain categories of persons whose capacity in connection with tortious acts is limited.

## Minors

A minor can sue in tort as a claimant in the ordinary way except that, as in contract, he must sue through an adult as litigation friend. He cannot compromise his action except by leave of the court, unlike an adult, who does not require such permission.

At common law there was a doubt as to whether a child had a cause of action for personal injuries caused before its birth. The matter is now covered by the Congenital Disabilities (Civil Liability) Act 1976. Section 1 establishes civil liability where a child is born disabled in consequence of the intentional act or the negligence or the breach of statutory duty of some person before the child's birth. There can be no liability unless the child is born alive. Section 44 of the Human Fertilisation and Embryology Act 1990 extends the 1976 Act to cover children conceived following infertility treatments.

It was held in *C* v *S* [1987] 1 All ER 123 that a foetus has no right of action unless it is subsequently born alive. If it is stillborn, the parents might have an action, e.g. for nervous shock. Causation must be proved which may be difficult in the case of pre-natal injuries. A mother cannot be liable under s 1 for causing injury to her child by her own negligence, except where the injury is caused by the mother's negligence in driving a motor vehicle when she knows, or ought reasonably to know, that she is pregnant. Barristers and judges, among others, have been strongly opposed to children being given a cause of action against their mothers, recognising the danger of inter-family disputes, and, subject to what has been said about motor vehicle liability where the action is in effect against an insurance company and not really against the mother, their view has prevailed in the Act. The liability of a father is not, however, excluded and he can be liable to his child for injuries caused by his own negligence.

The section also distinguishes between matters arising *before* conception (where the injury can be to *either* parent) and matters arising when the child's mother is pregnant or during the actual process of childbirth (where the injury can *only* be to the mother). Thus the injury could result, for example, from irradiation which damages the progenitive capacity of the father. It also covers physical damage to the child during childbirth as by the negligent handling of instruments by those attending the mother. The injuries must be caused during the pregnancy and there could be problems in dating the beginning of this in some cases. The defendant is presumed to take the mother as he finds her and thus cannot say that he did not know she was pregnant nor that the damage to her child was not foreseeable.

The common-law defence of *volenti non fit injuria* is applicable and in this sense if the mother is *volenti* so is the child. It is recognised that this may penalise the child but it was thought that any other solution would prejudice the position of women in society because organisations worried that a woman might be pregnant may refuse to enter into a wide variety of contracts with her. Incidentally, so far as the consent which the child is deemed to give results from an exemption clause in a contract made by the mother, then s 1 creates a new exception to the doctrine of privity of contract. Section 1 also provides that the child's damages awarded against the defendant are to be reduced by any contributory negligence of the mother. Finally, s 1 provides that professional persons, such as doctors, are under no liability for treatment or advice given according to prevailing professional standards of care. This codifies the common-law rule in *Roe* v *Minister of Health* (1954) (see Chapter 21).

Section 3 clarifies the compensation provisions of the Nuclear Installations Act 1965, where damage results from a nuclear incident and provides for compensation under the Act in the case of a child born subsequently with disabilities attributable to the incident.

A minor is liable as defendant for all his torts except in a limited number of instances. Where the tort alleged requires a mental ingredient, the age of the minor (in cases of extreme infancy) may show an inability to form the necessary intent. In cases of negligence, a very young child cannot be expected to show the same standard of care as an older person.

Basically children are liable for their own torts, but a father may be liable vicariously, if the relationship of employer and employee exists between him and the child or if there is the relationship of principal and agent. Simply as a father he is not liable unless the injury is caused by his negligent control of the child and so when he is liable, it is really for his own tort, i.e. negligence in looking after the child. Such a liability may extend to other persons (not being parents) who have control of children, e.g. teachers and education authorities, and, if such persons or authorities act negligently, they may be held responsible for the harm caused by children under their care or control. Nevertheless, the basis of the action is negligent control or supervision.

*Williams* v *Humphrey*, 1975 – A minor is sued for negligence (**269**)

*Donaldson* v *McNiven*, 1952 – Parental control: no negligence (**270**)

*Bebee* v *Sales*, 1916 – Where a parent is negligent (**271**)

*Carmarthenshire County Council* v *Lewis*, 1955 – Negligent control by a local authority (**272**)

*Butt* v *Cambridgeshire and Ely County Council*, 1969 – A local authority is not negligent (**273**)

## Persons suffering from mental disorder

In criminal law a person of unsound mind has considerable exemption from criminal liability (see Chapter 25), but these rules have never been applied to civil injuries. This is understandable if it is borne in mind that the aim of the law of torts is to compensate the injured party, not to punish the offender. In the light of this, any exemptions accorded to a person of unsound mind should be narrow, and he should be liable unless his state of mind prevents him having the necessary intent (where a mental ingredient is part of the tort) and in extreme cases where no voluntary act is possible.

*Morriss* v *Marsden*, 1952 – Mental patients in tort (**274**)

## Husband and wife

The rule used to be that a married woman was liable for her torts only to the extent of her separate property and that beyond this the husband was fully liable. Since the Law Reform (Married Women and Tortfeasors) Act 1935, the wife is fully liable for her torts and the husband as such is no longer held responsible, unless, as in the case of a minor, there is a relationship of employer and employee or principal and agent.

The old common-law rule whereby one spouse could not sue the other in tort has now been altered. The Law Reform (Husband and Wife) Act 1962 provides that each of the parties to a marriage shall have the like right of action in tort against the other as if they were not married, but where the action is brought by one of the parties to the marriage against the other during the subsistence of the marriage, the court may stay the action if it appears:

(*a*) that no substantial benefit would accrue to either party from the continuation of the proceedings; or

(*b*) that the question or questions in issue could more conveniently be disposed of on an application made under s 17 of the Married Women's Property Act 1882. (This provides for the determination of questions between husband and wife regarding title to or possession of property by a summary procedure.)

Those who have registered a civil partnership under the Civil Partnership Act 2004 are able to bring claims against each other.

It should also be noted that under s 2(a) of the Administration of Justice Act 1982 a husband has no right of action against a person who by a tortious act deprives him of the society and services of his wife, i.e. loss of consortium. A wife has no such right by reason of case law in respect of loss of consortium. (See *Best* v *Samuel Fox & Co Ltd* (1952), above.) The above rules apply also to civil partners.

## The Crown and its servants

Prior to 1947 the Crown had considerable immunity in the law of tort and contract stemming from the common-law maxim: 'The King can do no wrong.' We have already seen that, by the Crown Proceedings Act 1947, the Crown is, in general, now liable in the same way as a subject (see further Chapter 8).

The Crown is not liable for torts committed by the police nor is the local authority which appoints and pays them. However, the Police Act 1996, s 88, provides that the chief officer of police for any police area is liable for the torts of police officers, e.g. wrongful arrest. The Act also provides that any damages and costs awarded against the chief officer shall be payable out of police funds.

## Postal and telecommunications authorities

The Post Office is a public authority but is not an agent of the Crown. It is liable, subject to limitations set out in s 91 of the Postal Services Act 2000, for loss of or damage to inland registered postal packets. Apart from this, neither the Post Office nor any of its servants, officers or sub-postmasters is liable for anything done or omitted to be done in regard to anything in the post or for failure to collect the post (s 90 of the 2000 Act). Thus in *Harold Stephen & Co Ltd* v *Post Office* [1978] 1 All ER 939, the Court of Appeal refused under earlier legislation to grant an injunction against the Post Office to companies in the Cricklewood area of London whose businesses were in jeopardy because they were receiving no mail through the Post Office closing the local sorting office and suspending post office workers who refused to handle mail in support of workers employed in the private sector.

Persons engaged in the carriage of mail or their servants, agents or sub-contractors, are not liable for loss or damage in regard to the post (s 90 of the 2000 Act). Thus in *American Express Co* v *British Airways Board* [1983] 1 All ER 557, the claimants gave a postal packet containing travellers' cheques to the Post Office for delivery abroad. The Post Office gave it to the defendants and it was stolen by one of their employees. The claimants sought damages for breach of bailment. Lloyd, J held that the defendants were not liable; they were exempted by a similar provision in earlier legislation.

Since the enactment of the Telecommunications Act 1984 (see now Communications Act 2003) British Telecom provides its telecommunications service under standard service contracts and is liable in the ordinary way for breach. However, the contracts concerned have exclusion clauses, e.g. in the case of failure to repair equipment during an industrial dispute.

## Judicial immunity

A judge has absolute immunity for acts in his judicial capacity. Section 51 of the Justices of the Peace Act 1997 extends this immunity to magistrates and their clerks, the intention being that they should be put in the same position as other judges. Counsel and witnesses have immunity in respect of all matters relating to the cases in which they are concerned. This is mainly of importance in connection with possible actions for slander.

## Foreign sovereigns and ambassadorial staffs

These persons have immunity from actions in both contract and tort. However, it should be noted that if they remain in this country after finishing their duties, they may become liable even if the tort was committed before. They may, of course, voluntarily submit to the jurisdiction of our courts, since immunity is from suit and not from liability.

*Dickinson* v *Del Solar*, 1930 – Ambassadorial staff are immune from suit not liability (**275**)

## Aliens

Enemy aliens, including British subjects who voluntarily reside or carry on business in an enemy state, cannot bring an action in tort, although they themselves can be sued. Other aliens have neither disability nor immunity.

## Corporations

A corporation can, as a claimant, sue for all torts committed against it. Obviously certain torts, such as assault, cannot by their nature be committed against corporations, but a corporation can maintain an action for injury to its business.

Section 32 of the Companies Act 2006 provides that unless a company's articles specifically restrict the objects of the company its objects are unrestricted. The *ultra vires* (beyond the powers) rule has no application to such a company. There will, however, be companies that wish to restrict the company's objects and will carry these in the articles. The ability of the directors to overcome lack of capacity in contract does not apply in tort and it is necessary therefor to examine the effect of the *ultra vires* rule here.

**(a) *Intra vires* activities.** Where an employee or agent of the corporation commits a tort while acting in the course of his employment in an *intra vires* activity, the corporation is liable. Although it has been said that any tort committed on behalf of a corporation must be *ultra vires* (since Parliament does not authorise corporations to commit torts), this view is fallacious since a corporation can have legal liability without legal capacity. A corporation is liable under the principles of vicarious liability for the torts of its employees or agents committed on *intra vires* activities.

**(b) *Ultra vires* activities.** Here we have to distinguish between express and non-express authority. A corporation will not be liable if an employee engages in an *ultra vires* activity without express authority. Thus, if a corporation has not got authority and has not given it, you cannot infer it. On the other hand, where a tortious action is *ultra vires* but has been expressly authorised, the courts have taken the view that the *ultra vires* doctrine is irrelevant, and the corporation is liable for it.

*D & L Caterers Ltd and Jackson* v *D'Anjou*, 1945 – An action by a company (**276**)

*Poulton* v *London and South Western Railway Co*, 1867 – An *ultra vires* act (**277**)

*Campbell* v *Paddington Borough Council*, 1911 – Is *ultra vires* relevant if act authorised? (**278**)

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## Unincorporated associations and trade unions

These have already been considered in Chapter 8 and their position in tort is set out there.

## Joint tortfeasors

Formerly there was no right of contribution between joint tortfeasors, but under the Law Reform (Married Women and Tortfeasors) Act 1935, it was laid down that, if one joint tortfeasor was sued and paid damages, he could claim a contribution from fellow wrongdoers. The relevant provisions are now contained in the Civil Liability (Contribution) Act 1978. However, there can be no contribution where the person claiming it is liable to *indemnify* the person from whom it is claimed. For example, an auctioneer is entitled to be indemnified by a client who has instructed him to sell goods to which, as it subsequently appears, the client does not have a title (*Adamson* v *Jarvis* (1827) 4 Bing 66). Therefore, if the true owner sues the client for wrongful interference and the client pays the damages, he has no right to a contribution against the auctioneer although the auctioneer is also liable for wrongful interference because the auctioneer is a person whom the client would have had to indemnify if the true owner had chosen to sue the auctioneer. The amount of the contribution is settled by the court on the basis of what is just and equitable given the responsibility of each party for the injury and may be the full amount of the damages originally awarded against the person claiming the contribution.

In connection with the right of contribution, the Law Reform (Husband and Wife) Act 1962 has an important effect. Where a spouse A is injured by the joint negligence of the other spouse B and of a third party C, e.g. in a car accident, if C is sued by A, he can now claim a contribution from the negligent spouse B, since B is now a person liable for the purposes of the Act of 1978.

## Executors and administrators

### *General effect of death*

Section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (as amended by the Law Reform (Miscellaneous Provisions) Act 1970) provides that all causes of action subsisting against or vested in a person at the time of his death shall survive against or, as the case may be, for the benefit of his estate.

This does not apply to actions for defamation. Furthermore, damages recoverable in an action by the representatives of the deceased shall not include exemplary damages (see further p 521). The right of a person to claim for bereavement under s 1A of the Fatal Accidents Act 1976 (see below) does not survive for the benefit of his estate (s 4(1) of the Administration of Justice Act 1982, amending s 1(2)(a) of the Act of 1934). No damages may be awarded for loss of income in respect of any period after the death of an injured person (s 4(2)(b) of the Administration of Justice Act 1982, amending s 1(2)(a) of the Act of 1934).

Under the Proceedings Against Estates Act 1970 all actions against the personal representatives of a deceased person, whether founded in contract or tort, are now subject to the normal three-year (personal injuries) or six-year (other injuries) limitation period.

Provisional damages which may be awarded where there is a recognised risk that the claimant may develop a further disease or deterioration (see further later in this chapter) are dealt with in the context of fatal accidents by s 3 of the Damages Act 1996. This provides that an award of provisional damages made during an injured person's lifetime does not prevent his dependants from claiming further damages if the injury results in death.

It was held by the Court of Appeal in *Hunger* v *Butler*, *The Independent*, 2 January 1996 that a widow could not claim as damages for dependency under the 1976 Act sums which her deceased husband would have earned by 'moonlighting' employments which he would not have declared because they would have affected his entitlement to social security benefits.

### Fatal accidents

If, as a result, e.g., of negligence, a person is killed, there are two sorts of claim against the person responsible. The executors of the deceased may wish to go ahead with any claim *which the deceased would have had if he had lived*. There may also be relatives who wish to claim because they have suffered as a result of the death.

**(a) Claims by the estate.** As we have seen, under the Law Reform (Miscellaneous Provisions) Act 1934, most causes of action in tort subsisting at the time of a person's death survive for (or against) his estate.

As regards a fatal accident, the estate can claim damages for the period between the injury and death, e.g., for pain and suffering and loss of amenity, as where an arm is amputated before death. Damages may be awarded for earnings lost and medical expenses incurred up to the time of death.

There is no claim for loss of expectation of life (Administration of Justice Act 1982, s 1(1)(a)), nor is there a claim for lost earnings in respect of the period between the actual death and the cessation of notional working life (i.e. the lost years). Section 4(2) of the 1982 Act now states that no damages may be awarded for loss of income after death.

If the injured person died immediately the estate has no claim except for funeral expenses (s 1(2)(c) of the 1982 Act). If, e.g., a relative pays the funeral expenses but was not dependent on the deceased and so has no general claim under the Fatal Accidents Act 1976, the relative may claim those funeral expenses under the 1976 Act.

**(b) Claims by dependants.** These are brought under the Fatal Accidents Act 1976. The claim is independent of the one made by the estate under the 1934 Act (as amended). Two awards of damages may therefore be made, one for the executors on behalf of the estate, and the other to the executors collectively for the dependants.

Under the provisions of the Fatal Accidents Act 1976 a person whose negligence has caused the death of another may be liable to certain relatives of the deceased who have suffered financial loss because of the death. The following persons are entitled to claim *but only if they were dependent on the deceased* – husband, wife, children, grandchildren, parents, grandparents, brothers, sisters, aunts, and uncles, and their issue; the relationship may be traced through step-relatives, adoption, or illegitimacy, and relatives by marriage have the same rights as the deceased's own relatives. However, dependency ceases on adoption (*Watson* v *Willmott* [1990] 3 WLR 1103). Under s 1(3)(b) of the 1976 Act, as amended by the Administration of Justice Act 1982, any person who was living with the deceased in the same household for two years or more (including civil partners), immediately before the death and was living for all of the time as the husband or wife of the deceased may claim. This allows unmarried cohabitants to claim.



A single action must be brought on behalf of all eligible dependants and the total damages apportioned according to their dependency. The action may be brought by the personal representatives of the deceased, but if there are none, or they fail to bring the action within six months of the death, the dependants may bring it.

The Court of Appeal stated in *Gully* v *Dix* [2004] 1 WLR 1399 that the requirement of 'immediately before death' should not be construed literally. A woman who had lived with the deceased for 27 years and had been maintained by him was allowed to claim even though she had left him three months before his death. There was, it seemed, an intention to return, as she had always done when she had left in the past. Her right to make a claim was

challenged by the deceased's brother who would have received more from the estate if her claim had been turned down.

If the deceased was guilty of contributory negligence or was a volunteer (see later in this chapter), the damages awarded will be reduced or extinguished, according to the degree to which the deceased was at fault or was a volunteer. In addition, there can be no claim where the deceased made a full and final settlement with the potential defendant before the death: ruled by the House of Lords in *Jameson* v *Central Electricity Generating Board* [1999] 1 All ER 193. Ordinarily, also, if more than three years have elapsed between injury and death, no Fatal Accidents Act claim can be brought (Limitation Act 1980, s 11(1)). However, it is open to the personal representatives to ask the court to exercise the discretionary provisions of s 33 of the Limitation Act 1980 to override the limitation period (see further Chapter 18). Furthermore, if the claimant dies before the limitation period has expired, a new limitation period runs under s 11(5) of the Limitation Act 1980. This period is three years from either the date of death or the date of the personal representative's knowledge that there is a cause of action, whichever is the later.

The probability of pecuniary loss is a matter for the claimant to prove and the court to decide as a matter of fact. However, it should be noted that the object of the Fatal Accidents Act is to provide maintenance for relatives who have been deprived of maintenance by the death.

There is also now an award of £10,000 for bereavement (Fatal Accidents Act 1976, s 1A(3), as amended by the Administration of Justice Act 1982). This sum will be increased as appropriate by statutory instrument, the current figure being contained in SI 2002/644. It is in favour of a wife or husband or the parents of the deceased but in the case of parents only if he or she was under 18 at the time of death and unmarried, or the mother of a child under 18 at the time of death and unmarried who was illegitimate (Fatal Accidents Act 1976, s 1A(2)(b)). No proof of dependency is required.

Section 4 of the Fatal Accidents Act 1976, as amended by the Administration of Justice Act 1982, provides that in assessing damages any benefits which have arisen, or will arise, or may arise, to any person as a result of the death are to be disregarded. Thus, friendly society or trade union benefits, pensions or gratuities accruing to a relative would be ignored, even though the pecuniary loss was in a sense thereby reduced.

Finally, it is interesting to note that relatives have no right to sue for non-fatal accidents to relatives, even if they are a dependant. The action must be brought by the living relative who has been injured (see *Robertson* v *Turnbull* (1981) *The Times*, 6 October – a decision of the House of Lords).

### Partners, principals and agents generally

Partners in ordinary and limited partnerships are jointly and severally liable for the torts of other partners committed in the ordinary course of business, or with the authority of co-partners. The position of members of a limited liability partnership is different and is considered at p 255. A principal is liable for the torts of his agent committed within the scope of his authority, whether by prior authority or subsequent ratification.

## Vicarious liability

While the person who is actually responsible for the commission of a tort is always liable, sometimes another person may be liable although he has not actually committed it. In such a case both are liable as joint tortfeasors. This is the doctrine of vicarious liability, and the

greatest area of this type of liability is that of master and servant. A master (employer) is liable for the torts of his servant (employee) committed in the course of his employment, and so wide is the risk that it is commonly insured against. Under the Employers' Liability (Compulsory Insurance) Act 1969, an employer *must* insure himself in respect of vicarious liability for injuries caused by his employees to their colleagues. Insurance is not compulsory in respect of injuries to persons other than employees.

There is a comparison to be made with contract because whether an employer is bound as a party to a contract made by the employee depends upon whether the employee has the *authority to make the contract* on behalf of the employer and not simply whether the employee was *acting within the course of employment* which is the basic tort test (*Director-General of Fair Trading* v *Smiths Concrete* (1991) *The Times*, 26 July).

## Who is an employee?

According to *Salmond on Torts* (a leading text), an employee may be defined as 'any person employed by another to do work for him on the terms that he, the [employee], is to be subject to the control and direction of his employer in respect of the manner in which his work is to be done'. This definition was approved by the court in *Hewitt* v *Bonvin* [1940] 1 KB 188. In most cases the relationship is established by the existence of a *contract of service*, which may be express or implied and is usually evidenced by such matters as, for example, the power to appoint, the power of dismissal, the method of payment, the payment of national insurance by the employer, the deduction of tax under PAYE, and membership of pension schemes (if any).

It must be borne in mind that many of the defining principles, including those based on case law and statute, were laid down in a different day and age from our own. The words appearing in judgments and/or statutes cannot be altered because we must set out what the judge or Parliament actually said, and in some cases the expression 'servant' not 'employee' will be used.

### The control test



However, in deciding whether the relationship of employer and employee exists, the courts have not restricted themselves to cases in which there is an ordinary contract of service but have often stated that the right of control is the ultimate test. In *Performing Right Society Ltd* v *Mitchel and Booker* (*Palais de Danse*) *Ltd* [1924] 1 KB 762 at p 767, McCardie, J said:

> The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is paid, the powers of dismissal, and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question. But it seems clear that a more guiding test must be secured. . . . It seems . . . reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered but it is usually of vital importance.

The learned judge then went on to decide that the defendants, who employed a dance band under a written contract for one year, were liable for breaches of copyright, which occurred when members of the band played a piece of music without the consent of the holder of the copyright, because the agreement gave the defendants 'the right of continuous, dominant and detailed control on every point, including the nature of the music to be played'.

The existence of the control test means that where an employer (X) lends out his employee (Y) to another employer (Z), then Z may be liable for the wrongs of Y even though there is no contract of service between Y and Z, though such liability is rare.

An employer also owes certain duties to his employees, e.g. to provide proper plant, equipment and premises, and this is a further reason for deciding whether Z has become the master by virtue of the control test. There is a presumption that control remains with X and the onus is upon him to prove that control has passed to Z. The burden is a heavy one and the temporary employer will not often become liable. Nevertheless, transfer of control may be more readily inferred where an employee is lent on his own without equipment or where he is unskilled.

Transfer of control is often a convenient method of making the temporary employer liable to, and for, the employee and does not affect the contract of service. A contract of service is a highly personal one and it cannot be transferred from one employer to another without the consent of the employee. However, where there is a contract for hire of plant and the loan of an employee to operate it, the contract of hiring may provide that the hirer shall indemnify the owners for claims arising in connection with the operation of the plant by the employee.

*Garrard* v *Southey*, 1952 – The control test: a transfer of employer (**279**)

*Mersey Docks and Harbour Board* v *Coggins and Griffiths*, 1947 – A situation of no transfer (**280**)

*Wright* v *Tyne Improvement Commissioners*, 1968 – Effect of contractual indemnity (**281**)

The control test was an appropriate one in the days when an employer could be expected to be superior to his employee in knowledge, skill and experience. However, in modern times it is unreal to say that all employers of skilled labour can tell employees *how* to do their work. Accordingly, the test has been modified in recent cases, the court tending to look for the power to control in incidental or collateral matters, e.g. hours of work and place of work. The existence of this sort of control enables the court to decide whether a person is part of the organisation of another, and it might be called a '*when and where*' test.

The control test also gives rise to difficulties in the case of the employees of companies. Subordinate employees are controlled by superior employees and some control is obviously present if the management is regarded as 'the company'. However, when one considers the position of directors and top management it is difficult to see how the company, being inanimate, can exercise control. In the case of 'one-man' companies, where the managing director is also virtually the sole shareholder, the reality of the situation is that the servant controls the company and not vice versa. Nevertheless, directors of companies, even 'one-man' companies, are regarded as employees, presumably because the usual incidents of a contract of service are present and despite the absence of genuine control.

However, as we have seen in Chapter 19, a controlling shareholder may not according to circumstances be an employee for the purposes of employment legislation in terms, e.g., of a claim for redundancy (see *Buchan* v *Secretary of State for Employment* (1997) 565 IRLB 2).

Although control is the ultimate test in establishing the relationship of employer and employee, it is also necessary to deal briefly with other circumstances which may be taken as evidence of the existence of the relationship. In *Short* v *J W Henderson Ltd* (1946) 62 TLR 427, Lord Thankerton regarded the power to select or appoint, the power to dismiss, and the payment of wages, as relevant in establishing the existence, or otherwise, of a contract of service.

*Cassidy* v *Ministry of Health*, 1951 – An organisation test (**282**)
*Ferguson* v *John Dawson & Partners*, 1976 – A 'when and where' test (**283**)
*Lee* v *Lee's Air Farming Ltd*, 1960 – Directors and senior employees (**284**)

## Dual vicarious liability

The Court of Appeal has ruled that two parties can be jointly and individually liable for an employee's negligence where both have a degree of control over the employee concerned. Either can be sued for the full amount of the damage but the loss can be recovered only once.

Thus in *Viasystems (Tyneside) Ltd* v *Thermal Transfer (Northern) Ltd* [2005] 4 All ER 1181 a sub-contractor and a main contractor were held jointly and equally liable for the negligence of the sub-contractor's employee because his work had been supervised by both an employee of the main contractor and an employee of the sub-contractor.

***Comment*** If one employer is sued, he or she would be able to join the other employer in the action and each would contribute 50 per cent to the loss.

## The power to select or appoint

The absence of a power to select or appoint may prevent the relationship of employer and employee arising. Thus, in *Cassidy* v *Ministry of Health* [1951] 2 KB 343 Denning, LJ, as he then was, made it clear that a hospital authority is not liable for the negligence of a doctor or surgeon who is *selected* and *employed* by the patient himself. The employer need not make the appointment himself, and an appointee may be an employee even though the employer *delegated* the power of selection to another employee, or even an independent contractor, such as a firm of management consultants, or was *required by law to accept* the employee, e.g. Ministers of State often have power to appoint members of statutory bodies who become the employees of those bodies.

## The power to dismiss

An express power of dismissal is strong evidence that the contract is one of service. Many public bodies have a restricted power of dismissal in the sense that rights of appeal are often provided for, but such rights do not prevent a contract of service from arising, nor does the fact that these authorities cannot dismiss certain of their employees without the approval of the Crown or a Minister.



## Payment of wages or salary

A contract of service must be supported by consideration which usually consists of a promise to pay wages, or a salary. Where the amount of remuneration or the rate of pay is not fixed in advance, this suggests that the contract is not one of service, but is for services. The employer usually pays his employees directly, but in *Pauley* v *Kenaldo Ltd* [1953] 1 All ER 226 at p 228, Birkett, LJ said 'a person may be none the less a servant by reason of the fact that his remuneration consists solely of tips'.

An employee may be employed on terms that his remuneration is to consist wholly or partly of commission which the employer pays directly, the commission being a method of assessment of the amount of the remuneration.