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Introduction

The modern law relating to the vicarious liability of employers is almost unrecognisable from the common law of the 1950s, even down to the very labels we attach to persons then known almost invariably as 'masters' and 'servants'. Despite a general trend (at least until this year) toward considerably increased liability, one area where there have been remarkably few legal developments is cases involving practical jokes or 'horseplay' amongst employees. Successful claims, brought either in vicarious liability or directly as a matter of employers' primary liability, are almost absent from the law reports. In light of the continuing debate over the limits of vicarious liability, to which the Supreme Court returned earlier this year in *WM Morrison Supermarkets Plc v Various Claimants*,¹ horseplay cases provide a clear example of the limitations of the concept of 'the course of employment'.

Two recent High Court decisions, coming either side of the Supreme Court judgment in *Morrison*, throw these issues into particular relief. In *Shelbourne v Cancer Research UK*² a Christmas party gave rise to a claim,³ after one employee (a Mr Beilik) tried to lift another on the dancefloor but dropped her, causing a serious back injury as a result. Meanwhile in *Chell v Tarmac Cement and Lime Ltd*⁴ the claimant was working on site when a fellow employee attempted a practical joke which went seriously wrong, leaving the claimant with hearing loss and tinnitus. The two cases were brought, in part, in both vicarious liability and directly against the employer in negligence; but both claims were unsuccessful on both counts. In order to analyse these cases, it is first necessary to review the development of the law up to this point. It will then be argued that the application of the modern law relating to vicarious liability in cases of horseplay has, thus far, been unnecessarily restrictive. Given that wider developments in society may well lead to a considerable increase in claims for injuries caused by practical jokes, it is suggested that this area is ripe for reinterpretation and that in this area, *Morrison* is actually authority for a broader approach.

Vicarious Liability

¹ [2020] UKSC 12; [2020] 2 WLR 941.

² [2019] EWHC 842 (QB) [2019] PIQR P16.

³ See PILJ 2020, 185(May), 7–9 for a consideration of the wide range of liability that these events seem to attract.

⁴ [2020] EWHC 2613 (QB).

Development of Vicarious Liability for 'horseplay'

An early example of an attempt to find vicarious liability for horseplay can be found in *Coddington v International Harvester Co of Great Britain*.⁵ Here, the claimant was injured when a man named Malton, 'an unconventional, possibly eccentric, man, full of talk and backchat, no respecter of persons in his manners...' kicked a burning tin in his direction⁶. Under the 'Salmond test'⁷ the fact that 'the evidence [did] not establish that Malton was acting carelessly or inadvertently' was fatal for the claim. That Malton intended to do the act which caused the harm took the case outside of the traditional understanding of the scope of employment (making the act a 'frolic of his own') and therefore no vicarious liability could arise.⁸

A rather different approach was taken in *Harrison v Michelin Tyre Co*.⁹ In this case, the tortfeasor was an employee who, while wheeling a hand truck past the claimant, turned the truck toward the claimant as a joke, causing the duckboard the claimant was balancing on to fall and the claimant to be injured. Comyn J noted that this, 'was a joke which hardly merits the description 'joke''.¹⁰ Despite 'a comprehensive search into this subject from the days of Parke B. onwards...for some basic principle running through the cases'¹¹ Comyn J did not apply the 'Salmond test' and instead felt bound by the extremely broad approach taken in *Century Insurance Co Ltd v Northern Ireland Road Transport Board*.¹² *Century Insurance* involved an employer being vicariously liable for the employee operator of a petrol tanker lighting a cigarette while connecting his tanker to a garage tank. The House of Lords held that this was within the course of employment. The point was most fully discussed by the then-Lord Chancellor, Viscount Simon. He highlighted that the employee was carrying out his duties when he connected the tanker and would have been carrying out his duties when he disconnected the nozzle once the tank was full. In the interim his duty (and thus what was within the course of his employment) was to stand and supervise the process.¹³ While some of the reasoning in *Harrison* is hard to follow—especially the concluding statement that, 'though this may be regarded as a frolic and a very nasty

⁵ (1969) 6 KIR 146.

⁶ *Ibid* at 150.

⁷ The test is taken from Salmond, *The Law of Torts: A Treatise on the English law of Liability for Civil Injuries*, 1st edn (1907) 83-84 and holds that an employee would only be considered to be acting in the course of employment (and thus vicarious liability could attach) if their act was 'either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master'.

⁸ Ironically in recent cases the very lack of deliberate intent has arguably been the handicap for the claimant, see below.

⁹ [1985] 1 All ER 918.

¹⁰ *Ibid* at 919.

¹¹ *Ibid* at 920.

¹² [1942] AC 509.

¹³ At 514 Viscount Simon quoted Milton to emphasise the point: 'they also serve who only stand and wait.'

type of frolic, it was not a frolic of his own'—¹⁴ the outcome, liability, is hardly unjustifiable. While not quite taking the 'close connection' approach that courts in more recent years have developed, the judge did advocate an approach based on acts 'part and parcel of the employment *in the sense of being incidental to it*'.¹⁵

The Master of the Rolls, Sir John Donaldson, did not agree, adding to the judgments in *Aldred v Nacanco*¹⁶ (where the Court of Appeal rejected a claim from a claimant injured at work when another employee pushed an insecure washbasin against her in order to startle her) "solely because I have become concerned...at the use which could be made of the test of liability formulated by Mr Justice Comyn."¹⁷ Instead he there affirmed the primacy of the 'Salmond test'. The same restrictive approach was also taken in the Scottish courts, where *Ward v Scotrail Railways Ltd*¹⁸ considered vicarious liability in the context of the sexual harassment of one employee by another. Lord Reed, then a Judge of the Outer House, held on a preliminary plea that the 'present law' (a prescient phrase) in the form of the Salmond test essentially doomed any claim in vicarious liability where there was deliberate wrongdoing. At the turn of the present century, it seemed unlikely that vicarious liability would attach where an employee chose intentionally to engage in 'horseplay' with fellow employees.

The law changed considerably as a result of the decision in *Lister v Hesley Hall Ltd*.¹⁹ In *Lister* the House of Lords decided that a school could be vicariously liable for deliberate sexual abuse carried out by the warden of one of the school boarding houses. *Lister* established the 'close connection' approach to the question of whether an act was in the course of employment. No longer did the claimant need to demonstrate the act was authorised or at least an unauthorised mode of doing an authorised act – if a close connection between the wrongdoing and what had been authorised could be found (and it was fair, just and reasonable to do so) vicarious liability could be imposed.²⁰ This widened the scope of vicarious liability to encompass intentional wrongdoing, as with the sexual abuse in *Lister* itself. However, some of their Lordships were quick to point out that more was needed than the 'mere opportunity to commit the act'.²¹ Lord Hobhouse perhaps put the principle most clearly: 'In order to establish a vicarious liability there must be some greater connection between the tortious act of the

¹⁴ At 923.

¹⁵ At 920, emphasis added. This language also appears in Lord Clyde's judgment in *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 AC 215 (discussing the 'broad approach' at 234).

¹⁶ [1987] IRLR 292.

¹⁷ At 295.

¹⁸ 1999 SC 255.

¹⁹ [2001] UKHL 22; [2002] 1 AC 215.

²⁰ For a detailed examination of how the test operates see P Case, 'Developments in vicarious liability: shifting sands and slippery slopes' PN 2006, 22(3), 161-175.

²¹ Per Lord Clyde at 235.

employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded.'

Despite the seismic impact of *Lister* on the wider law of vicarious liability²², there has not been a flood of reported cases applying the 'close connection' test to practical jokes in the workplace. Returning to Scotland once again, the decisions in *Wilson v Exel UK*²³ and *Vaickuviene v J Sainsbury Plc*²⁴ showed the Court of Session taking a restrictive approach to vicarious liability in the wider context of injuries caused by one employee to another.

In *Wilson* the claim again involved a prank gone wrong, namely pulling another employee's ponytail and pulling her head back, causing her injury. Given that the (male) tortfeasor had made a ribald remark to the (female) claimant at the time and had on previous occasions been known to 'pat [another (female) employee's] bottom'²⁵ there were, in the words of the Lord President Hamilton, at least possible 'sexual overtones'.²⁶ At first instance and on appeal it was held that the actions were not closely connected with any authorised duties. Much of the court's analysis relied on cases predating *Lister* but the Court of Session clearly believed that *Lister* had only allowed for liability where the tortfeasor's actions were (closely) connected with their employer's business²⁷. In *Lister* there was a close connection between what the tortfeasor was employed to do, look after the children, and the abuse. Here, the tortfeasor was on a frolic of his own: 'acting purely on a private venture unconnected with his work'.²⁸

Vaickuviene involved a considerably more serious set of facts, where an employer was pursued for vicarious liability after the murder of one employee by another. Overturning the decision of the Lord Ordinary, the Court of Session mentioned *Wilson* 20 times in their judgment and held that the principles set out in *Wilson* were of general application (not restricted to pranks but of application in cases of intentional wrongdoing). Clerk LJ warned 'the courts must be careful to ensure that the future development of the law, particularly in an effort to deal with particular controversies such as child sex abuse, does not undermine too deeply the need for certainty in the field of employers' liability in general.'²⁹

²² See eg P Giliker, 'Lister revisited: vicarious liability, distributive justice and the course of employment' LQR 2010, 126(Oct), 521–524.

²³ [2010] CSIH 35; [2010] SLT 671.

²⁴ [2013] CSIH 67; 2014 SC 147.

²⁵ At 673.

²⁶ Ibid.

²⁷ See in particular paragraphs 24–30 of Lord Carloway's judgment, at 676

²⁸ At 677

²⁹ At 160. The action was dismissed on these grounds.

Taken together, *Wilson* and *Vaickuviene* would appear to suggest that most intentional wrongdoing remains beyond the scope of vicarious liability, even if it takes place in the workplace. The closeness of the connection is the crucial matter and it could be argued that such an interpretation in many ways rephrases the Salmond test rather than substantively widening liability substantively. Yet given that the House of Lords was clear in *Lister* that the existing law was not sufficient in situations of intentional wrongdoing, the decision in *Wilson* is still problematic in that it relies so heavily on the language of the pre-*Lister* law. Furthermore, a workplace practical joke, which is quite likely to involve use of work equipment or to be played on someone in the course of the victim carrying out their workplace tasks, is surely by no means excluded per se from even this narrow view of the *Lister* principle?

The narrow margins in deciding quite what is a sufficiently close connection when there is intentional wrongdoing were clearly illustrated south of the border, when the Court of Appeal cited *Wilson* in deciding joined appeals, both involving one employee assaulting another.³⁰ The claimant's appeal failed in *Weddall* on the grounds that the wrongdoer came to the workplace solely to carry out the assault, having become enraged by a telephone conversation, but succeeded in *Wallbank* where the assault was an immediate reaction to a perceived slight. All three judgments acknowledged the difficulty of deciding quite where the boundaries of vicarious liability lay.³¹ These cases each emphasised that the 'close connection' test is only useful when considered on a case-by-case basis. While not cases of 'horseplay', these decisions demonstrate that it is not practical to assume or to create general rules about how the close connection test will apply to any particular subset of cases (here, cases of assaulting a fellow employee).

Despite this, in *Graham v Commercial Bodyworks Limited*.³² Longmore LJ expressly spoke of a 'group of cases...[which] arise from intentional acts at the workplace (whether horse-play or rather more serious conduct) and do not usually give rise to vicarious liability.'³³ Such a stark assertion of the principle appears to affirm what could already be seen from courts in both England and Scotland³⁴ – that *Lister* had not extended liability relating to horseplay dramatically. This may be at least partly explained by the treatment of practical joke cases in the judgments in *Lister*. There, Lord Clyde cited

³⁰ *Weddall v Barchester Healthcare Ltd; Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25; [2012] IRLR 307.

³¹ See also discussion of these cases in Walden, 'Vicarious liability for intentional and wrongful acts by employees: the case of *Vaickuviene* - highlighting lacunae in the 'close connection' test?' *Bus LR* 2014, 35(6), 207-210

³² [2015] EWCA Civ 47; [2015] ICR 665.

³³ At 671-672.

³⁴ See also *Somerville v Harsco Infrastructure Ltd* 2015 GWD 38-607 and placing the case in the wider context Campbell, 'Somerville v Harsco Infrastructure Ltd: transferred intent and the scope of vicarious liability' *Edin LR* 2016, 20(2), 211-216.

*Aldred v Nacanco*³⁵ as an example of an independent act not sufficiently connected with the employment.³⁶ Given that this reference came only in the context of making clear that not *all* acts in the working day would be within the course of employment, this by no means suggests that the close connection approach cannot lead to liability in other horseplay cases. The problem with *Graham* as a decision is that it took the principles from *Wilson*, *Weddall* and *Wallbank* relating to intentional attacks, added to them that no liability was found in *Aldred v Nacanco* (using the by now outdated Salmond test) and came to the conclusion that horseplay did not give rise to vicarious liability. As the above discussion shows, even assuming all of those cases were correctly decided, they simply do not support the contention that vicarious liability cannot be owed in horseplay cases post-*Lister*. Indeed, in the same paragraph of his judgment in *Lister* Lord Clyde speculated that ‘acts of passion and resentment...or of personal spite may fall outside the scope of employment.’ Yet the Supreme Court decision in *Mohamud v Wm Morrison Supermarkets Plc*³⁷ directly contradicted this prediction and seemed to expand the *Lister* principle still further.³⁸ One of the most controversial elements in *Mohamud* was the reliance on an ‘unbroken sequence of events’.³⁹ In horseplay cases, the practical joke is invariably performed at the workplace, often during working hours. If the wrongdoer in *Mohamud* was not regarded as having ‘metaphorically taken off his uniform the moment he stepped from behind the counter’⁴⁰ and seriously assaulted a customer, it is arguably hard to see how an employee who decides to play a prank on their colleague has in fact managed to do so.

Cases such as *Bellman v Northampton Recruitment Ltd*⁴¹ suggested that in practice, *Mohamud* could justify a wide interpretation of the ‘scope of employment’.⁴² There the Court of Appeal found that the High Court had been wrong to deny vicarious liability where the managing director attended a company party; left that party with some fellow employees for further drinks at a nearby hotel; and then assaulted one of those employees outside of the hotel at around 3 o’clock in the morning following an argument. It is important to note that Lord Reed expressly approved the outcome of *Bellman* in *Morrison*.

³⁵ [1987] IRLR 292

³⁶ At 235

³⁷ [2016] UKSC 11, [2016] AC 677.

³⁸ While professing to simply be reiterating the *Lister* test, the Court held that a racially-motivated assault by an employee fell within vicarious liability, on the basis that there was a sufficiently close connection between the employee’s duties (dealing with customers) and the assault.

³⁹ Per Lord Toulson delivering the sole judgment, at 693.

⁴⁰ At 694.

⁴¹ [2018] EWCA Civ 2214; [2019] 1 All ER 1133.

⁴² In the words of Asplin LJ at 1139, previous case law ‘must be seen through that prism’.

Shelbourne and Chell

Bellman and *Shelbourne* appear at first glance to have common elements. However, *Bellman* was distinguished in *Shelbourne* on the basis that in that case the wrongdoer was in ‘control of proceedings, at all material times, and his reaction to what he perceived to be a challenge to his authority as managing director [was what] made the company vicariously liable for his actions.’⁴³ There is a clear theme to the decision in *Shelbourne* involving what the judge described as the ‘social reality’.⁴⁴ Lane J emphasised that a balance must be struck between allowing for compensation where required and the wider social consequences of extending the doctrine of vicarious liability too far. Given that the claimant’s lawyers appear to have taken a somewhat extreme position in wider argument,⁴⁵ suggesting *inter alia* that staff should have signed a written declaration promising to behave prior to the party, have been supervising one another throughout and given specific training in dealing with issues arising from the consumption of alcohol, the decision to deny liability is unsurprising. *Shelbourne* is to horseplay what *Weddall* was to intentional assault: an act that was only really connected to the tortfeasor’s employment in the sense that it occurred on company property, but that otherwise was not even part of the working day. Yet given both the social context of *Shelbourne* and the fact that the harm occurred outside of the usual work environment, it does not answer the question as to whether *Lister* and in turn *Mohamud* have widened liability in horseplay cases where the prank or misbehaviour has a closer relationship with the tortfeasor’s usual duties.

The more recent decision in *Chell* may go some way to providing an answer here. The claimant was working as a site fitter when the wrongdoer, Mr Heath, placed a ‘pellet target’ on a bench close to where the claimant was working. Mr Heath then struck the target with a hammer, causing a loud explosion close to the claimant’s right ear. The claimant suffered a perforated right eardrum, hearing loss and tinnitus⁴⁶. At first instance, HHJ Rawlings found that ‘work merely provided an opportunity to carry out the prank that he played, rather than the prank in any sense being in the field of activities’ of the employee at fault.⁴⁷ An entirely unrelated act that happens to take place on the employer’s premises or during the working day is considered to have provided the perpetrator with the ‘mere opportunity’ to commit the act, but do the facts of *Chell* fit into that category? Both the prankster and the victim were not only at the premises when the prank occurred, but the prank was carried out during the working day, taking advantage of the victim being absorbed in his work, and the hammer

⁴³ At P314.

⁴⁴ At P315 and elsewhere in the judgment there is even mention of that dread phrase, ‘health and safety gone mad’, albeit in the mouth of counsel for the respondent (see P306).

⁴⁵ Described at P315 as ‘*dirigiste*’ by Lane J

⁴⁶ [2020] EWHC 2613 (QB). The facts are given in paragraph H3.

⁴⁷ As quoted by Spencer J at paragraph 17.

used was, presumably, a tool that the tortfeasor used to carry out his own working duties. Were the correct interpretation of *Lister* to be that the wrongdoing itself must be part of the tortfeasor's field of activities, then the law remains the Salmond test in all but name, with the need to show some form of 'authorised act'.

On appeal, the claimant thus argued that this was an overly narrow interpretation of the 'close connection' test. Importantly, before that appeal was heard, judgment was given in *Morrison*. This case (along with *Barclays Bank Plc v Various Claimants*)⁴⁸ has once more attempted to clarify when vicarious liability will attach and has generally been received as contracting, or at least no longer expanding, the scope of liability.⁴⁹ The Supreme Court reiterated that the close connection test should not be decided on a matter of timing alone.

In rejecting the appeal in *Chell* on this ground, Spencer J emphasised the same principle, concluding on vicarious liability point that regarding 'the temporal connection....I do not consider that this should have been taken by the learned judge as a significant factor in his evaluation of the situation'.⁵⁰ This does not, however, address the more basic problem with the application of the test at first instance. As accepted by Lord Reed at para 25 of the judgment in *Morrison* and referred to by Spencer J at para 34 in *Chell*, the close connection test provides a two-step process: first, the court identifies the field of activities entrusted by the employer to the employee, *then* the court considers whether there is a sufficiently close connection between these activities and the wrongdoing itself. The wrongdoing does not need to be 'in the field of activities' (and it clearly was not); it needs only be closely connected to them. The question should not have been whether 'Mr Heath's actions in hitting the two pellet targets with a hammer were within the field of activities assigned to him'; it should have been whether his actions were *closely connected* to the field of activities assigned to him.

In *Morrison* the Supreme Court did curb the wider interpretation of *Lister* that had been applied in the court below, but this does not bar the analysis suggested in the above. As noted, *Morrison* focused on rejecting the temporal approach ('the close connection test is not merely a question of timing or causation'⁵¹) and it is crucial that *Bellman* was upheld in the Supreme Court decision. To quote from Lord Reed's judgment:

'Although in some respects the judgment in Bellman adopted a similar approach to Mohamud to that adopted by the Court of Appeal in the present case, the conclusion reached was correct.

⁴⁸ [2020] UKSC 13; [2020] AC 973.

⁴⁹ On which see J Lee, 'The Supreme Court, vicarious liability and the Grand Old Duke of York' LQR 2020, 136(Oct), 553–558.

⁵⁰ Paragraph 36.

⁵¹ [2020] UKSC 13; [2020] AC 973 *per* Lord Reed at 1016–1017.

Notwithstanding that the assault occurred outside working hours and away from the workplace, there was clearly a very close connection between the managing director's authorised activities as an employee and his commission of the assault: it was committed while he was purporting to act in the course of his employment as the managing director by asserting his authority over his subordinates in relation to a management decision which he had taken. Unlike the cases of Hartwell and Warren, this was not a case in which the employee was pursuing 'a personal vendetta of his own' or 'an act entirely of personal vengeance'.

While comparing the facts of cases is dangerous territory, it is surely at least arguable that a practical joke carried out inside working hours, at the workplace, using work equipment and on a victim at that moment engaged in their work has just as close a connection to the defendant's authorised activities. The immediate facts in *Morrison* can be distinguished from cases such as *Chell* for the same reason that they were found not to have a close connection by the Supreme Court: the employee there copied data from his work laptop to a USB stick, then set up a fake email account using a pay-as-you-go mobile phone, then intentionally leaked the data online. None of those steps had any connection whatsoever with his authorised activities of collating and forwarding the data internally. While Lord Reed's speech does not refer to the 'mere opportunity' principle the point was argued by counsel and *Morrison* is a good example of where that doctrine does have a part to play. The employee merely took advantage of an opportunity (having access to the data) provided by his work, then did something completely unrelated to his field of activities (leaked the data). Meanwhile *Bellman* fell the other side of the line because the wrongdoing was connected to the tortfeasor's field of activities. The court in *Bellman* was right to not require a late night drunken assault to be in itself part of the director's field of activities; what was required was a close connection between the assault and the director's activities, which included asserting authority over subordinates.

The strict approach, limiting vicarious liability for horseplay, has survived both *Lister* and *Mohamud* and following the decision in *Morrison* it can only be assumed that the lower courts will not be any more likely to extend liability in this area, as *Chell* demonstrates. *Harrison* remains the only instance of the senior courts recognising vicarious liability for horseplay and is hardly the strongest of authorities on which to base a claim, given the criticism of it in *Aldred v Maconco*. For the claimant injured at work by a practical joke gone wrong, there is little hope of success on the basis of vicarious liability. Before considering whether this area is ripe for reinterpretation, it is important to also consider the availability of an alternative claim in employers' primary liability.

Employers' Primary Liability

Assuming that the a vicarious claim may well not succeed, the main alternative is a claim that the employer is directly in breach of the duty to provide reasonably competent fellow staff.⁵² In both *Smith v Crossley Brothers*⁵³ and *Hudson v Ridge Manufacturing Co*,⁵⁴ injury was caused through some form of practical joke carried out at work. In *Crossley*, the claim failed on the grounds of a lack of foreseeability of harm,⁵⁵ while in *Hudson* the claimant was successful. As Streatfield J explained in his admirably straightforward judgment in *Hudson*, 'it is a matter of degree. Nobody would say that if Chadwick had merely tripped somebody up for the first time and had been at once reprimanded by the foreman and then did not do it again, that was such conduct, on an isolated occasion by a man, as would put upon the employers the duty of taking the extreme course of dismissing that workman in case he should do it again...[but this] is a case where there existed, as it were in the system of work, a source of danger, through the conduct of one of the defendants' employees, of which they knew, repeated conduct which went on over a long period of time, and which they did nothing whatever to remove...'.⁵⁶

This requirement of foreseeability has remained crucial through subsequent case law. *Coddington*,⁵⁷ where Ormerod J's judgment focused on vicarious liability, was also brought as a claim against the employer directly. Despite his earlier characterisations of the offending Malton⁵⁸ who he went on to also describe as 'clearly, given to playing the fool with other men' the judge held that this case fell 'on the...*Crossley Brothers*...side of the line.' Ormerod J interpreted *Hudson* as requiring not just the playing of a practical joke to be foreseeable, but that it would be one with an element of danger.⁵⁹

The case of *Bowden v Ministry of Defence*⁶⁰ had facts remarkably similar to those in *Coddington*— a group of workmen were congregated, warming up (this time with a mug of tea) and then the fateful event occurred. In this case it was a boiling kettle which was thrown across the room, injuring the claimant. Despite the factual similarities to *Coddington*, the claimant was successful, both at first

⁵² *Wilson and Clyde Coal v English* [1938] AC 57.

⁵³ (1951) 95 SJ 655.

⁵⁴ [1957] 2 Q.B. 348

⁵⁵ *Per* Singleton LJ: 'The defendants had no reason whatever to anticipate that the two apprentices in question would use [the air pipe] in that way', the pipe having being inserted into a certain part of the claimant's anatomy by his fellow apprentices.

⁵⁶ At 350–51.

⁵⁷ (1969) 6 KIR 146.

⁵⁸ See above.

⁵⁹ 'I do not think that the defendants ought to have foreseen that Malton might be a potential danger in the foundry. There was nothing in his previous conduct to suggest that he might endanger any other man's safety in the foundry although he obviously might annoy some and amuse others.'

⁶⁰ [1982] 5 WLUK 134.

instance and in the Court of Appeal. O'Connor LJ emphasised the crucial distinction – a supervisor was present in the room and knew of the history of bad blood between the employees involved.⁶¹ Therefore *Bowden* was decided (at least on appeal) on these grounds of immediate foreseeability rather than any long-held tendency. The decision perhaps deserves to be better known as a potential route to liability where a supervisor or manager is present and has an opportunity to prevent the 'horseplay'. Primary liability (at least from this angle) appears not to have been pleaded in *Graham v Commercial Bodyworks Limited*, potentially a tactical error considering that the judge at first instance went on to find that 'Just prior to the mid-morning break the defendants' bodyshop supervisor saw Mr Graham and Mr Wilkinson 'mucking around, chasing each other, flicking green putty'. He did not regard that as serious enough to warrant any intervention on his part.' (as referred to in the judgment of Longmore LJ at 667).

Yet in the absence of a negligent failure to intervene by a superior, foreseeability remains a considerable stumbling block. *Aldred v Nacanco*⁶² has already been considered as re-establishing the orthodox approach to vicarious liability for practical jokes and also deserves mention here. Sir Frederick Lawton and Glidewell LJ both stressed that foreseeability was the crucial element – and that whether the act of the practical joker was deliberate or unintentional was immaterial.⁶³ A differently constituted Court of Appeal also relied on the lack of foreseeability to deny liability three years later in *Wakefield v Basildon and Thurrock Health Authority*⁶⁴ a case notable for not involving any fault at all on the part of the employee alleged to be responsible for the claimant's injuries. In fact, the employee had lost consciousness because of an epileptic fit and the claimant was hurt while trying to go to her aid. At first instance, the judge found that the case was analogous to *Hudson* in that 'the defendants knew they had in Miss Fleming a potential source of danger not only to people working with her but to anyone employed in the hospital.'⁶⁵

The Court of Appeal did not necessarily disagree insofar as finding that this engaged the duty to provide competent fellow staff. However, all three judges decided that the judge had been wrong to also consider that duty breached. *Bolton v Stone*⁶⁶ was referred to repeatedly and clearly the court felt that the accident (where Miss Fleming had fallen in a particular way next to a spring-loaded door

⁶¹ At paragraph 29: '[This case] falls on the side of *Hudson -v- Ridge Manufacturing* not because of the long course of conduct, but for the reason that Mr Job [the supervisor of the workmen involved]...knew of the trouble between the two employees; he was in the room and there was evidence from which the learned Judge could properly find that the trouble between them had reached a pitch which called for Mr Job's interference.'

⁶² [1987] IRLR 292.

⁶³ See especially Lawton LJ at 294 and Glidewell LJ at 295.

⁶⁴ [1990] 6 WLUK 315.

⁶⁵ As referred to by Stocker LJ at paragraph 41.

⁶⁶ [1951] AC 850.

which caused the injury) was a freak occurrence. Furthermore, as all three judgments pointed out, if the *Hudson* principle was interpreted widely as creating liability whenever it is remotely foreseeable that an employee's characteristics could in certain circumstances, however unlikely, lead to harm coming to a fellow worker, 'That line of reasoning leads speedily to the absolute conclusion, which I find repugnant, that no employer could safely and without negligence employ any epileptic.'⁶⁷ This is an important point for two reasons. Firstly, it demonstrates that wider considerations of justice and public policy may prevent the extension of liability in this area. Take for example the immature nineteen-year-old employee who plays a prank that goes wrong – a judge would be wary that any decision against the employer could potentially be a decision against the employment of young people. Secondly, it seems unlikely that the courts will want to delve much further into how employees are selected and recruited – existing law already requires a degree of reasonableness and it is difficult to see how much likely a reasonable company would be to pre-emptively discover a predilection for playing practical jokes.

In the wake of *Lister*, primary liability seemed to have been almost forgotten in the context of horseplay, perhaps demonstrating just how difficult a claim is to bring without 'prior form' on the part of the tortfeasor. However, in both recent High Court decisions examined above, *Shelbourne* and *Chell*, the claim was brought on the basis of primary liability and vicarious liability. *Shelbourne* is again easily dealt with – both the claim and the appeal were based on a standard of care that surely exceeded reasonable expectations. In any event, considering that the defendant had risk-assessed the party in advance and that there was no prior behaviour on the wrongdoer's part to give rise to foreseeability, there were no substantial grounds on which to allege breach.

In *Chell*, the claimant argued that the negligence lay not in failing to prevent the risk of the practical joke being played, but in failing to specifically risk-assess that risk. This ingenious argument also failed, again, nothing had happened up to the incident that could have made the reasonable employer foresee the risk of harm being caused in this way. As Spencer J commented on appeal, without any evidence of a particular risk, 'it is expecting too much of an employer to devise and implement a policy or site rules which descend to the level of horseplay or the playing of practical jokes'. The claim based on primary liability appears to be a propitious route where there is either a supervisor present who fails to take an opportunity to prevent the fateful act; or where there is a history of like behaviour,⁶⁸ with the latter of particular note in the related-context of sexual harassment. Yet in most situations

⁶⁷ Per Dillon LJ at paragraph 84.

⁶⁸ Given the comments below relating to social media, foreseeability could potentially be easier to demonstrate if there is digital evidence of an employee carrying out a string of pranks, although that leads to wider questions beyond the scope of this article relating to how far an employer can (or indeed should) be aware of an employee's actions on personal social media.

there will not be the clear evidence of the foreseeability required and a claim directly against the employer will likely fail.⁶⁹

Conclusions

A claim against an employer for an injury caused by horseplay is unlikely to succeed whatever its foundation. But has this particular type of claim simply suffered from falling between two areas of liability? After all, employers have been held vicariously liable for their employees deciding to steal,⁷⁰ to intentionally assault a co-worker,⁷¹ and to defraud a client,⁷² along with many cases involving abuse that followed *Lister*. Meanwhile, employers have been held directly liable for injuries caused by gang attacks,⁷³ robbers,⁷⁴ psychiatric patients,⁷⁵ and soldiers of a hostile foreign power.⁷⁶

There are reasons to suspect that 'horseplay' may well be on the rise. The 'office prank' is hardly new, but there is a clear appetite for videos of such pranks on social media, particularly on short video sharing services such as Tiktok. One study found that more than 3% of a sample of Tiktok videos involved 'Pranks'⁷⁷ – given that Tiktok's official Transparency Report suggests at least 8.9 billion videos have been uploaded to the platform,⁷⁸ this could be a very large number indeed. The study also noted that 'Pranks' content was frequently 'highly liked' and 'highly shared', as well as notable for being popular among both male and female creators.

While most judgments clearly take the matter seriously, the concept is still in danger of being taken lightly, with even the word 'horseplay' calling up images of good-natured frolics rather than the serious injuries many of these claimants suffered. There are sound policy reasons for taking a more generous view as to liability in this area. The employer, not the employee, controls who the employee

⁶⁹ In Australia a wider view has been taken of foreseeability. In *Macquarie Area Health Service v Egan* [2002] NSWCA 26 involved an injury caused by horseplay between nurses at a hospital. The court took particular note of evidence that practical jokes were common within the hospital, establishing foreseeability. Taking into account factors such as the magnitude of the risk and the minimal cost of precautions the majority of the New South Wales Court of Appeal found that the trial judge had been justified to find liability.

⁷⁰ *Brink's Global Services Inc v Igrox Ltd* [2010] EWCA Civ 1207,

⁷¹ *Levitt v Euro Building and Maintenance Contractors Ltd* [2019] EWHC 2926 (QB).

⁷² *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614 [2020] Ch 129.

⁷³ *Rahman v Arearose Ltd* [2001] QB 351.

⁷⁴ *Charlton v Forrest Printing Ink Co Ltd* [1980] IRLR 331.

⁷⁵ *Cook v Bradford Community Health NHS Trust* [2002] EWCA Civ 1616.

⁷⁶ *Longworth v Coppas International (UK) Ltd*, 1985 SLT 111.

⁷⁷ Shutsko A. (2020) User-Generated Short Video Content in Social Media. A Case Study of TikTok. In: Meiselwitz G (eds) *Social Computing and Social Media. Participation, User Experience, Consumer Experience, and Applications of Social Computing*. HCII 2020. Lecture Notes in Computer Science, vol 12195. Springer, Cham.

⁷⁸ <https://newsroom.tiktok.com/en-gb/h-2-2020-transparency-report>. Last accessed: 16th March 2021

will work alongside and how those people will be trained and managed. In many of the more historic cases, one reason to deny liability was the idea that employers had only two options – to ignore dangerous behaviour or to dismiss employees for any levity at work whatsoever. This is no longer (if it ever was) the case. There is a considerable spectrum of measures an employee can take to minimise the likelihood of dangerous practical jokes. Most companies are well-used to providing training and promoting health and safety, so could relatively easily add warning against the risks of horseplay to existing structures. Even leaving aside the ‘deep pockets’ argument, the likelihood of insurance that may cover the loss is another reason for employers to be potentially liable in such cases. From the employer’s own perspective, it could also be argued that a greater focus on preventing such injuries could be beneficial, as often the result of the practical joke gone wrong is not one but two valuable members of staff no longer available, one being injured and the other being dismissed.

A more generous approach would not need to mean opening the floodgates. It has already been demonstrated that employers’ primary liability will only be found in two specific situations: where the damage is foreseeable due to knowing of the propensity for horseplay; or where a supervisor fails to stop a dangerous situation developing. What is needed is for claims falling outside of these two situations to be looked at in the true spirit of the test established by *Lister* and clarified in *Morrison*. The current law appears to treat horseplay as distinct from other types of wrongdoing (as suggested in *Graham v Commercial Bodyworks*) and this amounts to an unstated assumption in the law that such cases will be outside the course of employment. *Graham* was cited in *Chell* to exactly this effect.

No departure from the leading cases would be needed if the courts at first instance instead took a more inclusive approach, based as explained above on clearly delineating the two stages of the *Lister* test. The first question must be what the employee’s field of activities is, and this must be interpreted broadly. Only then should the court consider whether the practical joke giving rise to the claim was closely connected to that field of activities. At no point should the court ask whether the practical joke was itself in the field of the employee’s activities.

Vicarious liability remains a contentious area with indistinct boundaries, as has been demonstrated in the two Supreme Court decisions in 2021.⁷⁹ Brodie has already pointed out the decision in *Morrison* may allow for retrenchment rather than any further expansion of liability, especially given the already strict approach to liability in horseplay cases.⁸⁰ It is understandable, but nonetheless unfortunate, if

⁷⁹ *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12; [2020] 2 W.L.R. 941 and *Barclays Bank Plc v Various Claimants* [2020] UKSC 13; [2020].

⁸⁰ Brodie, ‘Vicarious liability and practical jokes’ Rep B 2020, 156, 5-7.

judicial concerns about where to 'draw the line' on intentional wrongdoing inadvertently continue to unduly limit liability for horseplay.