

What purposes are served by the doctrine of vicarious liability? Are these purposes adequately reflected in the current law?

Vicarious liability is a system whereby A is liable to C for damage caused to C by B. The most commonplace scenario which arises in case law is the one in which A is B's employer, and B is in legal terms A's 'servant'. In such situations there is deemed to be a 'special relationship' between A and B, which renders A liable for B's tortious acts. The criteria for establishing liability is as follows: A must stand in a particular relationship to B, B must commit a tort, and the tort must be referable in a certain manner to that relationship. A himself need not have participated in the tort, nor breached any duty of care to C.

The legal theory behind the doctrine is complex. It is too simplistic to say that an employer is liable just because his servant is liable – examples can be found of cases where A is held liable despite the fact that had C sued B his claim would have failed. Note *Broom v Morgan*, where B and C were husband and wife who were employed by the same firm (A); B negligently injured C at a time when the law did not allow wives to sue their spouses, but A was held liable for the injury nonetheless. See also the Canadian case of *Buckley v Smith Transport* where the question was raised as to whether an employer could be held liable for acts committed by an insane employee, providing no conclusive or authoritative answer.

Furthermore, as Winfield and Jolowicz point out in *Tort 17th ed.*, the traditional justifications have been heavily criticised – '*respondeat superior*' ('let the master answer') as being merely a bald statement of the principle, and '*qui facit per alium facit per se*' ('he or she who acts through another, acts personally') as a superficial and fictional explanation of it. In short, the theoretical reason *why* vicarious liability is imposed is unclear – is it because the employee is liable, or because the acts and state of mind of the employee are attributed to the employer, or because the acts are attributed to the employer who would be liable if he had carried them out himself?

Consequently, it may be argued that a far more effective way to analyse the concept would be to identify and evaluate the *purposes* served by its implementation, and then turn to the case law to see how far they are adequately reflected in the current law.

There are three main distinct purposes served by the doctrine of vicarious liability. The first is underpinned by the 'deep seated and intuitive idea' that someone who sets a force in motion generally for his own benefit, should take responsibility for its consequences. If there were no vicarious liability, then there would be no incentive for employers to minimise the risks created in the course of business.

The second purpose is based on practicality. It is a compelling argument that the employer will have the 'deeper pocket', and is therefore the most practical person to sue from the point of view of the claimant, the employee, and the law itself. The claimant is more likely to receive any damages awarded, the employee does not have to insure himself against liability (which would inevitably have a detrimental effect on the economic and employment structures within society), and the law of torts is prevented from becoming stultified and impracticable. It also solves the problem of assigning responsibility and identifying the correct defendant (i.e. in cases that involve multiple contracts along a line of subcontractors), and maximises the efficiency of employees, who can work safe in the knowledge that their liability is covered and they do not have to be constantly looking over their shoulders.

Its final purpose is economic: the facilitation of the 'loss distribution theory'. The employers most likely to be caught by the doctrine are those who employ large workforces, and who are in turn probably supplying products or services to a vast consumer body. The cost of the employer's potential liability is reflected in the prices which it charges, effectively insuring the employer against claims by incrementally increasing the cost of said products or services to its customers. This means that there is always an adequate source from which the claimant can seek compensation, the employer does not end up disabling itself through having

to make huge payouts on behalf of an indeterminate number of negligent employees, and the employees are not hit with legal penalties which they are financially unable to meet.

So how adequately does the current law allow the doctrine to fulfil these purposes? In *Mersey Docks and Harbour Board v Coggins and Griffith Ltd*, A hired a crane and a driver, B, and let them to X through a contract of hire. Under the contract, B was X's employee, and X could tell him what work was to be undertaken, but he was paid and liable to be dismissed by A. When B negligently injured C, the court held that A was vicariously liable. Lord Porter's reasoning was an acknowledgment of the practical and economic purposes of the doctrine; he emphasised the importance of certainty – B may perform tasks for a number of different people each day, and be under a contract of hire with each of them, but it would be impractical for a claimant to have to go after all of these potential defendants, and for the courts to decide which should be held liable/how liability should be apportioned. A test of control – in this case, not the party who sets B his tasks, but the one who can instruct B *how* to operate the crane – is used to identify a general employer who shoulders liability in an action in tort against B. He also highlighted the importance of giving C someone worth suing – why should the claimant suffer if A chooses to make a precarious and unknown contract with X? Or for that matter, with W or with Y or with Z, or any number of parties?

The 2005 decision in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* reinforced the role of vicarious liability in bringing certainty to the law. It was held that where more than one party had control over B's work, and where this work was equally a part of the business of both parties, it was fair and just to make them both liable. This avoids situations where the claimant may make the wrong decision as to who to sue. The importance of vicarious liability as an instrument for procuring certainty was also highlighted in *Cassidy v Ministry of Health*, where it was held that as long as it was found that at least one of the employer's servants had been negligent, it did not matter if the individual tortfeasor could not be identified – the employer was still vicariously liable.

The 'scope of employment' test has also been broadened through common law in order to allow the doctrine to operate in a wider range of scenarios, hence rendering it more effective in fulfilling its intended purposes than previously. In *Morris v C.W. Martin and Sons Ltd*, it was held that it no longer mattered if B was acting for his own benefit, as long as the tort was committed within the scope of employment in the *technical* sense of the word – that is, did the position which his employment put him in facilitate B's act? Atiyah described this decision as "a striking and valuable extension of the law on vicarious liability", and it has been followed in the more recent cases of *Lister v Hesperley Hall Ltd* and *Mattis v Pollock*. In my opinion, the law's stance in this area effectively imposes strict liability upon an employer not just for the negligence or carelessness of his servants, but also their wilful wrongs – a threat which is likely to result in employers taking extra care when considering job applications (i.e. checking criminal records, following up references etc.)

Finally, the doctrine has been further extended by the 2006 decision in *Majrowski v Guy's and St. Thomas' NHS Trust*, where it was held that it was not confined to common law but was also applicable to equitable wrongs and statutory breach. This further reinforces the doctrine's adequacy in fulfilling its purposes – earlier decisions increased its scope so that it was equipped to apply to a wider range of possible circumstances, and this decision now renders it operative in more *types* of cases.

In conclusion, the trend in case law seems to be to extend the ambit and hence the adequacy of the doctrine of vicarious liability. I believe that it is indisputable that the purposes which it is designed to serve are highly valuable – a fact which is recognised even in foreign jurisdictions which do not possess the doctrine in its purest form, but have gone to considerable lengths to create a form of liability without fault in practice (i.e. German law does this through an extension of contractual liability; the employer is liable unless he can show that he exercised due care in choosing and supervising the servant.)

However, there is still some room for improvement. Fleming described the principle as “a compromise between two conflicting policies; the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant, and a hesitation to foist any undue burden on business enterprise.” It could be argued that current law is far more adequate in pursuing the first policy than it is the second. Furthermore, developments in the way businesses are being run is creating a need for further concurrent development in the law to make sure the proportion of the workforce for which employers are vicariously liable does not decrease. Is the privatisation of activities formerly carried out by an organisation’s internal workforce, and the increased use of casual and part-time workers, calling for a modification of the current distinction between servants and independent contractors? Cases such as *Salsbury v Woodland* have established the principle that an employer is not liable for the negligent acts of an independent contractor – but as the commercial use of independent contractors becomes more widespread, I feel that review of this principle is necessary in order to prevent the adequacy of the doctrine of vicarious liability from waning.