VICARIOUS LIABILITY

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Employers are said to be vicariously liable for torts committed by their employees in the course of their employment. Vicarious liability means that employers would be held liable to third parties with whom they have had no contact simply because it was their employees that committed a tort against the third party.

This rule may be considered to be particularly harsh and it appears to contradict the fault principle. It is also based on the legal fiction that employers have more control over the actions of their employees. But of recent the rule has found a more pragmatic justification. This justification stems from the fact that an employer is thought to be more financially equipped in order to compensate the injured third party.

Large corporations usually take out an insurance policy against these kinds of liability. In some instances, they are usually their own insurance. The question of who has an insurance cover may be used by the courts in determining who the employer is. See: ***British Telecoms vs. James Johnson and Sons (1998).***

A peculiar advantage of vicarious liability is the fact that even if the employee who committed the tort cannot be located, the corporation he works for can easily be located. Thus, an action can be brought against the corporation if the employee is nowhere to be found.

It should however be noted that vicarious liability only limited to employers and employees, it doesnâ€™t apply to husbands and wives, parents and children, landlord and tenants etc.

In the case of ***Hussain vs. Lancaster CC 1998*** the court held that vicarious liability would not apply to a council and a tenant. ***Â***

In order to establish a case of vicarious liability, two questions must be asked:as the tortfeasor an employee?

1. as the tortfeasor an employee?

2. Was the employee acting in the course of his employment when the tort was committed?

The following are some of the determinants that are needed in order to establish a case of vicarious liability:

- Employee/Independent contractor.
- Course of employment.

Employee/Independent Contractors

Employers would be liable for the torts of their employees. They are however not liable for the tort of independent contractors. Thus, in order to establish vicarious liability, the nature of the employment has to be determined.

Various means have been developed by the court over the years in order to determine whether a person is an employee or an independent contractor. It is however necessary for the courts to follow the practice of listening to all relevant facts.

An employerâ€™s liability can extend well beyond his place of business. See: ***Fraser vs. Winchester[1].***

In the case of *Carmichael vs. National Power (2001),* the court held that casual staff engaged on an (as required basis) to serve as security guards at a power station were not employees. This was due to the facts that they were not guaranteed that the work would be available and they were not obliged to work whenever the work is offered to them. The following are two tests that are used to determine whether a worker is an employee or an independent contractor:

- The nature of employment test.
- The control test

The Nature of the Employment test

In determining the nature of the employment, one has to consider whether the contract of employment was a contract of service of a contract for service. If it is a contract of service, then such person is an employee. If it is a contract for service, then such person is an independent contractor.

In most cases, the employment contract usually states the nature of the employment. However, it is open to the court to determine the precise nature of the employment.

The Control Test

Another question used in determining whether a person is an independent contractor or an employee is â€œhow much control did the employer have over the manner in which the work was done?â€ If the employer tells the worker exactly how the work is to be carried out, then it is would be an ordinary employment contract and such person would be regarded as an employee.

It should be noted that this test would not apply in a situation in which an employee is a very skilled professional who has been employed for his expertise while the employer is just an entrepreneur or a government official.

Course of Employment

A master would only be liable for torts which the employee commits in the course of employment although this is usually a question of fact. Judges are usually influenced by considerations of policy which fall outside the fact. It is there extremely difficult to state the law simply.

There are two line of cases in this regard, the one in which acts of the employee are held to be within the scope of employment and the one in which acts of the employee are held to be outside that scope. Attempting to examine these line of cases in order to arrive at general principles would be quite futile.

However, it appears that an employer is liable for wrongful acts which are expressly authorised by him. Also, he is responsible for acts which are wrongful ways of doing something authorised by him even if those wrongful acts have been expressly forbidden by the employer.

Authorised Acts

If an employer expressly authorises an unlawful act, such employer would be held liable. The problem comes up in determining whether an employer would be held liable when it comes to acts that are impliedly authorised by him.

Wrongful Modes of doing Authorised Acts

In the following cases, the court held that the employer was vicariously liable for the tort of his employee:

- ***Limpus vs. London General Omnibus Company:*** In this case, bus drivers were in the habit of racing amongst themselves, a practice which was strictly prohibited by the employer. In the course of one of such races, the claimant was injured. The court held that the employer was liable since the racing was merely an unauthorised way of performing the job of driving their buses.
- ***Rose vs. Plenty:*** In this case, a milkman was prohibited from allowing boys to ride on the milk float and aid him in the selling of milk. While doing this prohibited act, a 13 year old boy was injured partly due to the driverâ€™s negligence. The court held that the employer was vicariously liable since the act was a prohibited way of doing his job of selling milk.

Â References

[1] ***HA 1999 (914)***