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How to establish vicarious liability?

Vicarious Liability is one of the defences that can be used by a tort-feasor, by which another person can be made liable for the tort committed. This principle can be applied in situations when a superior is in charge of the actions of the subordinate.¹ Usually this defence is used by an employee, so that the employer is held liable for the torts committed by the employee. The concept of vicarious liability therefore moves away from imposing punishment based on primary liability and making a secondary person liable for the action. The use of this defence is rationalised on the grounds that

- The employer is economically stronger than the defendant, as it would be easier for her to access resources like insurance or pay compensation²
- The employer is in control of the actions of the employee³
- The system provides a mechanism which ensures that employers take preventive action to minimise accidents committed by their employees⁴
- Since the employer benefits also from the profits of the activities of the employees it is only morally justifiable that she takes responsibility for any of the losses caused.

This rationale was further articulated in the case of *Dubai Aluminium Co. Ltd v. Salaam*⁵ that “vicarious liability is a loss distribution device based on the grounds of social and economic policy. Its rationale limits the employer’s liability to conduct occurring in the course of the employee’s employment.’ Since the principle could hold someone who is not at fault liable, it has a higher threshold that has to be satisfied.

Therefore, in order to bring a successful defence of vicarious liability in the court, the following have to be established

- a) Employer- Employee Relationship
- b) The action of a tort committed during the course of employment.

- a) Establishing employer-employee relationship

This step is essential for vicarious liability, as the relationship between tort-feasor and the employer forms the core for its application. The principle applies to an employer to be vicariously liable for the employee in the course of their employment. It precludes liability for the actions of independent contractors. In recent times with the emergence of more non-traditional forms of employment contracts, it has become difficult for courts to determine the true nature of the relationship between the employer and the employee. The courts have also

¹ Justia, ‘ Vicarious Liability/ Respondeat Superior’, <https://www.justia.com/injury/negligence-theory/vicarious-liability-respondeat-superior/>, last accessed on 10 July 2017.

² Michael Jones, Textbook on Torts (2000), p. 379.

³ John Cooke, Law of Tort (10th ed. 2011), p. 510.

⁴ Jones, supra n. 2.

⁵ [2003] 2 AC 366.

grappled with questions on what constitutes to classifying a person as an employee. As a result of various case-laws, many tests have evolved to assist judges and lawyers for determining the employer-employee relationship between the parties. But a caveat is that none of these tests is considered to be mandatory, rather they are indicative of how one may proceed to establish a relationship of employment.

i) Control Test

The test was developed in the case of *Collins v. Hertfordshire CC*⁶ wherein Hilbery J. distinguished between contract of service and contract for service. In instances of a contract of service, it was observed that the employer can order or require the employee as regards to how the employment need to be carried out. This test was observed to be outdated as it relied on the assumption that the owner would also possess technical knowledge and skill of the work that is carried out. In *Cassidy v. Ministry of Health*,⁷ Somervell LJ observed that control test cannot be applied universally, as he rightly pointed out that there are many contracts of service where the employer is unable to give directions to the employee of the manner in which a work has to be done.

ii) Business Integration Test

Limitations of control test eventually led the judges in *Stevenson, Jordan and Harrison Ltd v. McDonald and Evans*⁸ to put forward a different test called business integration test. Lord Denning in his judgment observed that a person would be an employee if their work forms an integral part of the business. Thus, an independent contractor was distinguished on the basis that the person worked only for the business and was not integral to it. But this test was criticised in the case of *Market Investigations Ltd. V. Minister of Social Security*⁹ as being vague to determine the nature of employment.

iii) Nature of Employment Test

In *Ready Mixed Concrete (South East) Ltd v. Ministry of Pensions*¹⁰ it was discussed that the nature of employment can be traced to the type of contract between the employer and employee. If the contract was a 'contract of service' then there is an existing employer-employee relationship. A contract of service is established when the employee agrees to provide their skills for works for a wage or remuneration and to be under the instruction of the employer along with other terms of contract, which are consistent for a contract of employment.

The Courts have acknowledged limitations of these tests in identifying the employer-employee relationships in many cases. One instance is when the employees are borrowed as in the case of *Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd*.¹¹ In such instances it is observed that the aforementioned tests could not assist in determining vicarious liability. Therefore, in a situation where labour is lent, it would be easier to establish that the hirer is the employer. Whereas in cases when labour as well as plant are hired, it would be

⁶ [1947] 1 All ER 633.

⁷ [1951] 1 All ER 574

⁸ (1952) 1 TLR 101

⁹ (1969) 2QB 173

¹⁰ (1968) 2 QB 497

¹¹ [1947] AC 1

difficult to establish that the hirer would have the control over the labourer as well as to how the plant is being operated.¹² Then there are cases where an apprentice or a trainee commits a tortious act of negligence, but it is observed in the case of *Wilshire Police Authority v. Wynn*¹³ these workers are precluded from....

¹² Cooke, supra n. 2 , p. 11.

¹³[1980] ICR 401.