



# Vicarious Liability As A Point Of Convergence Between The Law Of Contract And Tort

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## ABSTRACT

Vicarious liability is a rule of responsibility which renders the defendant liable for the civil wrong committed by another. The classic example is that of employer and employee relationship. Here the employer is rendered strictly liable for the torts of his employee, provided that they are committed in the course of the tortfeasor's employment. In such circumstances, liability is imposed on the employer, not because of his own wrongful act, but due to his relationship with the tortfeasor. To discuss vicarious liability in contract it will be appropriate to know and understand the meaning of contract which is an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties. Tort is a private or civil wrong or injury, including action for bad faith breach of contract for which the court will provide remedy in the form of an action for damages. On the other hand, convergence is a meeting point where two things or entities develop similar values. Though the legal nature of vicarious liability is not expressly found in contract yet by the nature of contract between the parties vicarious liability could be inferred from the responsibility of the parties to each other. The objective of this work is to discuss the legal nature of vicarious liability as a point of convergence in the laws relating to contract and tort, pointing out their similarities and differences and the extent to which it applies to each branch of law. The research methods for this work will include the following: historical, primary and secondary methods, comparative approach and doctrinal. In conclusion, effort is made to emphasize the need to bring to the fore the legal nature of vicarious liability on the areas under study with special emphasis on the law of contract where the doctrine is sturdy or not very clear and perhaps ambiguous. Finally it is recommended that vicarious liability is of vital importance in the law of contract and tort so that the employer will be held responsible for the liability of his employee in the course of his business/employment

**Keywords:** Vicarious Liability, Convergence, Contract, Tort

## 1.0 INTRODUCTION

Vicarious liability is a legal doctrine that assigns liability to an injury to a person who did not cause the injury but who has a particular legal relationship with the person who acted negligently. It is also referred to as imputed negligence. Legal relationship that can lead to imputed negligence include the relationship between parent and child, husband and wife, owner of a vehicle and driver, and employer and employee. However, it must be underlined that ordinarily the independent negligence of one person is not imputable to another person<sup>1</sup>. Other theories of liability that are premised on imputed negligence include; *respondent superior* doctrine and the family car doctrine<sup>2</sup>. The doctrine of *respondent superior* (Latin for "let the master answer") is based on the employer-employee relationship. The doctrine makes the employer responsible for a lack of care on the part of an employee in relation to those whom the employer owes a duty of care. For *respondent superior* to apply, the employee's negligence must occur within the scope of his or her employment<sup>3</sup>. The employer is charged with legal responsibility of the negligence of the employee because the employee is held to be an agent of the employer. If a negligent act is committed by an employee acting within the general scope of her or his employment, the employer will be held liable for damages. For example, if the driver of a gasoline delivery truck runs a red light on the way to a

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<sup>1</sup> Dictionary, thefreedictionary.com/vicarious+liability</>. Accessed 24 October, 2015.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

gas station and hits another car, causing injury, the gasoline delivery company will be responsible for the damages if the driver is found to be negligent. This is because the company will automatically be found liable if the driver is negligent, *respondent superior* is a form of strict liability<sup>4</sup>. Another common example of imputed negligence is attributing liability to the owner of a car, where the driver of the car committed a negligent act. This type of relationship has been labeled the family car doctrine. The doctrine is based on the assumption that the head of the household provides a car for the family's use and, therefore, the operator of the car acts as an agent of the owner<sup>5</sup>. When for example, a child drives a car, registered to a parent, for the family purpose, the parent is responsible for the negligent act of the child at the wheel. Liability can also be imputed to an owner of a car who lends it to a friend. Again, the driver of the car is acting as the agent of the owner. If the owner is injured by the driver's negligence and sues the driver, the owner can lose the law suit because the negligence of the driver can be imputed to the owner, thereby rendering him contributory negligent. This concept is known as imputed contributory negligent<sup>6</sup>. Vicarious liability can sometimes be called imputed liability<sup>7</sup>, attachment of responsibility to a person for harm or damages caused by another person is either a negligence lawsuit or criminal prosecution. Thus an employer of an employee who injures someone through negligence while in the scope of employment (doing work for the employer) is vicariously liable for damages to the injured person<sup>7</sup>. The doctrine of Vicarious liability lies at the heart of all common law systems of torts law. It represents not a tort, but a rule of responsibility which renders the defendant liable for the torts committed by another. The classic example is that of employer and employee, the employer is rendered strictly liable for the tort of his employee, provided that they are committed in the course of the tortfeasor's employment. In such circumstances, liability is imposed on the employer, not because of his own wrongful act, but due to his relationship with the tortfeasors. The claimant is thus presented with two potential defendants: the individual tortfeasor and a third party likely to be with means and/or insured, and usually clearly identifiable in circumstances where it may be difficult to identify the actual culprit in question. Any study of Vicarious liability cannot therefore avoid consideration of its role in determining who ultimately bears the burden of paying compensation<sup>8</sup>.

### 1.1 Vicarious Liability: Historical Perspective

Before the emergence of states, which could bear the high cost of maintaining national policing and impartial court system, local communities operated self-help systems to keep the peace and to enforce contracts. Until the thirteenth century, one of the institutions that emerged was an involuntary collective responsibility for the actions committed by one of the group. This was formalized into the Community Responsibility System (CRS) which was enforced by a fear of loss of community reputation and of retaliation by the injured community if the appropriate compensation was not paid. In some countries where the political system supported it, collective responsibility was gradually phased out in favour of individual responsibility. In Germany, and Italy, collective system were in operation as late as the sixteenth century. While communities were relatively small and homogenous, CRS could work well, but as population increased and merchants began to trade across ever wider territories, the system failed to march the emerging societies' need for personal responsibility and accountability. In England Henry I allowed London to opt out of the CRS and to appoint a sheriff and justices in 1133, and between 1225 and 1232, Henry III assured the merchants of Ypres that none of them will be detained in England nor will they be partitioned for another's debts. Nevertheless, the idea of imposing on another despite a lack of culpability never really disappeared and courts have developed the principle that an employer can incur liability for the acts and omissions of an employee if committed by the employee in the course of employment and if the employer has the right to control the way in which the employee carries out his or

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> The Guardian 29<sup>th</sup> July, 2014

<sup>7</sup> West's Encyclopedia of America Law, edition 2, Copyright 2008. The Gall Group, Inc. All rights reserved. Accessed October 24 2015

<sup>8</sup> *Vicarious liability in Tort: A comparative perspective*, by Paula Gillker 9780521763370 Cambridge University, <http://www.cambridge.org/asia/catalogue.asp?isbn=978>. Accessed 28 October 2015.

her duties (respondent superior). Imposition of vicarious liability in these circumstances has been justified on the following grounds.

**Exercise of control:** If penalties are serious enough, it is assumed that national employers will take steps to ensure that the employee avoids injuring third parties. On the other hand, national employers may choose to rely on independent contractors for risky operations and processes so as to guard incurring liability vicariously.

**Risk spreading:** Many consider it socially preferably to impose the cost of an action on a person connected to it, even if a degree removed, rather than on the person who suffered injury or loss. This principle is also sometimes known as the “deep pocket” justification.

**Internalizing the social cost of activities:** The employer usually (though not always) passes on the cost of compensating injury or loss to the customer and clients. As a result, the private cost of the product or service will better reflect its social cost.

This justification may work against one another. For example, instrument will increase the ability to do risk spreading, but will reduce incentives for excise control.

### 1.2 Modern Vicarious liability

The general rule in the criminal law is that there is no vicarious liability. This reflects the general principle that a crime is composed of two elements namely, an *actus reus* (the Latin tag for guilty act) and a *mens rea* (the Latin tag for guilty mind) that a person should only be convicted if he or she is directly responsible for causing both elements to occur at the same time. Thus the practice of holding one person liable for the actions of another is the exception and not the rule in criminal law. The primary exception arises through statutory interpretation where the verb used to define the action in the *actus reus* is both the physical action of the employee and the legal action of the employer. For example, the activity of “driving is purely a physical action performed by the person behind the wheel. But when a cashier takes money as payment for goods, this is only the physical activity of selling. In default, the customer would commit the *actus reus* of theft. So the owner sells the goods at the same time that the employee takes the money. Similarly, only the holder of rights can grant a license to another or permit another to do something that would otherwise have been unlawful. The verb “possess”, “control”, and “use” may also have deal relevance depending on the context. Many of these are strict liability or regulatory offences, but the principle has been used to impose liability on a wide range of activities undertaken in a business or commercial environment.

### 1.3 Vicarious Liability in Nigeria

In the modern Nigeria business environment, there are countless issues arising in law from the relationship between the employer and the employee. One of such is the issue of vicarious liability. Many employers cringe at the thought of the role as it is perceived as a rule that protects the interest of third parties to the disadvantage of the employer. In time past, it was unreasonable to make an employer vicariously liable for the wrongs of an employee. Now, the Nigerian legal system has imbedded in itself its rule of law<sup>9</sup>. The term vicarious liability basically means that employers are liable for the sort of their employees, committed during the course of employment. A tort is a wrongful act or an infringement of a right (other than under contracts) leading to legal liability. This settled rule demands that employers will be liable to third parties with whom they have had no prior or direct contact in situation where the employer cannot be said to have any blame, or to have caused the tort committed by the employee. The rule has a pragmatic basis because in most cases employers as opposed to employees can best afford to bear the cost of compensating injured third parties in the event that a tortuous wrong is committed by the said employee<sup>10</sup>. It is the duty of the employer, for not only will it be beneficial but also necessary for him, to understand this rule only applied to tortuous actions and omission committed by employees in the course of employment. An employer will only be liable if the plaintiff can first of all prove the commission of the tort by the employee. Lord Denning explained this in the case of *Young v Box and co Ltd*<sup>11</sup>.

<sup>9</sup> The Guardian Newspaper 29<sup>th</sup> July, 2014

<sup>10</sup> Ibid.

<sup>11</sup> *Young v. Box & Co Ltd CA 1951 Swarb Co,Uk/Young-v-edward box and-Co-Ltd-ca-1951*

*To make a master liable for the conduct of his servant the first of question to ask is whether the servant is liable. If the answer is yes the second question is whether the employer must shoulder the servant's liability*

Hence, every employer has to realize that two important questions to be asked by the court in determining liability are:

1. Who is an employee?
2. Was the employee acting in the course of employment when the relevant tort was committed?

In early times the difficulty test was that of answering the question who is an employee? By a plethora of cases that question has been answered. In most basic situation, an employee is a person whose mode and method of work is controlled by the employer, especially when and where the job is done. The degree of control exercised by an employer over the way and manner a person's job is to be done in precise term usually determines the status of the person employee/servant or independent<sup>12</sup> contractor. It is good to note that in certain circumstances, control solely will not be determining factor. An independent contractor is one who exercises control over the way and manner he does his job. Thus while an employer is liable for the tort if the former, he is not liable for the tort of the later. Employers should also note that while an employee/servant is employed under a contract of service, the independent contractor is employed under a contract for service.

The test was explained by Lord Denning in the case of *Stevenson, Jordan and Harrison v MacDonald*<sup>13</sup> and *Evans limited* thus

*“Under a contract of service a man is employed as part of a business and his work is done as an integral part of the business, whereas under a contract for service, his work, although done for the business, is not integral into it but is only an accessory to it”*

In the Supreme Court case of *Ssco Ltd v. Afropak Nig Ltd*<sup>14</sup> the court held that in determining what kind of contract of employment that parties have entered into, the following has to be considered

- a. If payments are made by way of wage or salary, then it is an indication that it is a contract of service. If it is a contract for service the independent contractor receives his payment by way of fees.
- b. Where the employer supplies the tools and other capital equipment, then there is a strong likelihood that the contract is one of service and not for service. An independent contractor has to invest and provide capital for the work in progress.
- c. In a contract for service/employment, it is inconsistent for the employee to delegate his duties under the contract. Thus where the contract allows a person to delegate then it is a contract for service.
- d. Where the hours of work are not fixed then it is a contract for service<sup>15</sup>
- e. Where an offence accommodation and a secretary are provided by the employer, it is a contract of service<sup>15</sup>

#### **1.4 Employee in the course of the Employer's Business**

It is trite law that for an employer to be liable for the tort of his employee, the employee must be in the course of his employer's business, even if the act was an unauthorized mode of doing what the employee was employed to do. The time and place of the commission of the tort is also to be considered in determining if an employee was within the course of his employment when the tort was committed. The principal to be applied in such situations was laid down by Parke B in *Joel v. Morrison*<sup>16</sup>.

<sup>11</sup> Young v. Box & Co Ltd CA 1951 Swarb Co,Uk/Young-v-edward box and-Co-Ltd-ca-1951

<sup>12</sup> Tokunbo Orimobi, vicarious liability: What an Employer Needs to know, in the Guardian Newspaper.

<sup>13</sup> *Stevenson, Jordan and Harrison v MacDonald and Evans* (1952) ITLR 10 (it is a UK labour law case, concerning the right of employees to intellectual property in the work they produce.

<sup>14</sup> *Ssco Ltd v. Afropak Nig Ltd* 18 NWLR Pg 9497 the Court held in the determining what kind of contract of employment. Employer should note that in certain circumstances they can only be held liable for the tort of their independent contractor

<sup>15</sup> Ibid.

<sup>16</sup> *Joel v. Morrison* (1834) EWHC KB J39. This is the case in English tort law concerning the scope of vicarious liability of an employer for the acts of his employee.

*“If he was going out of his way, against his masters implied commands when driving on his master’s business, he will make his master liable, but if he was going on a frolic of his own” without being at all on his master’s business, the master will not be liable”.*

Time and place of commission of torts on determining liability is mostly applicable to vehicle owners and their casual agents such as drivers. It should be noted also that even though an act is expressly prohibited by the employer, he will still be liable for the tort of his employer if it is committed in the course of his employment. This rule is applicable because an employee will only have to issue specific orders to the employee forbidden negligence in order to escape liability for the employee’s negligence. Employers can now have a sigh of relief as it has been established that express prohibition is a factor to be taken into account in any given case in determining liability. The court will consider two scenarios, whether the prohibition only limits the sphere of employment. Employers have to note that while they will not be liable in the former scenario, the employer’s liability is unaffected under the later<sup>17</sup>.

Where an employee improperly delegates his task to an unqualified third party the employer will not be liable for any negligence of that third party but will be liable for the negligence of the servant in allowing an unqualified third person to act, for the employer to be liable, it must be shown that employee did delegate his duty to the unqualified third party<sup>18</sup>.

### **1.5 Vicarious Liability for the crime of an Employee**

In earlier times under common law a company could not commit a crime. That is because, it was believed that a company being an artificial person lacks the ability to exhibit *mens rea* (mental element) and *actus reus* (actionable element) the pillars on which criminal liability rests. Today an employer can be liable for the fraud, theft or crime committed by the employee whether or not it is solely for the employee’s benefit unlike in time past when that was not the case.

The trend in Nigeria, a reflection of the development in England is to hold an employer criminally liable for the acts of his employee even if the company had no knowledge of such commission. Statutes have been specially enacted to accommodate this trend. Such statutes include the Food and Drugs Act<sup>19</sup>, Standard Organization of Nigeria Act, (SON)<sup>20</sup> Weights and Measures Act<sup>21</sup>, The Companies and Allied Matters<sup>22</sup>, The Consumer Protection Council Act<sup>23</sup>, National Environmental Standards Regulation & Enforcement Agency<sup>24</sup> and a host of other statutes. The Consumer Protection Council Act seeks to safeguard consumers from the hands of unscrupulous companies, firms and trade, etc.

Section 9(1) of the Act states that,

“It shall be the duty of the manufacturer or distributor of a product, on becoming aware after such a product has been placed on the market of any unforeseen hazard arising from the use of the product to notify immediately the general public of such risk or danger and cause to be withdrawn from market such product.

Section 9(2) also states that;

“Any person who violates the provision of sub-section of this section is guilty of an offence and liable on conviction to N50,000.00 fines or imprisonment for five years or both<sup>25</sup>

This Act therefore makes an employer criminally liable for the crimes of their employees, as if the employee was instructed by the employer to commit the crime or the crime was committed under duress. Employers should also note that in certain circumstances they can also be held liable for the tort of their independent contractors under the following circumstances.

<sup>17</sup> Ifeanyichukwu Osondu & Co Ltd, Solehbonah Nig (200) 3SCN 18, or (200) 5 NWLR (part 656 (2000) 3 SC 42.

<sup>18</sup> Ibid.

<sup>19</sup> Food & Drug Act 1974 cap F32 laws of federation 2004.

<sup>20</sup> Standard Organization Act (SON) 1971 cap S9 laws of federation 2004

<sup>21</sup> 1974 cap W3 Laws of federation 2004

<sup>22</sup> Cap C20 laws of federation 2004

<sup>23</sup> 2002 cap C5 laws of federation 2004.

<sup>24</sup> National Environmental Standards Regulation & Enforcement Agency (Establishment) Act 2007.

<sup>25</sup> The Consumer Protection Council Act

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- a. If the tortious wrong was expressly authorized by the employer, both the employer and the independent contractor will be held liable.
- b. In tort of strict liability such as nuisance or trespass, the employer may be liable for the tort of the independent contractor
- c. An employer will be liable for his own negligence if he hires an incompetent contractor and also fails to include on his contract with him that (the contractor) has to take proper precaution where he foresees risks of harm,
- d. In certain circumstance the duty of an employer to take care is non-delegate. Such duties arise where the projected work is intrinsically dangerous or hazardous and involves a high risk of requiring special precautions. Hospital authorities fall into such categories, they cannot delegate their duty to care for patients to the staff and as such they are liable for the negligence of independent contractors such as visiting consultant doctors etc.

## **1.6 Recognized Relationships Establishing Vicarious Liability**

### **a. Master/Servant**

The classic relationship that generates vicarious liability is that of master and servant. A master will be vicariously liable for the tort of his or her servant committed during the course of the servant's employment. The categorization of a person as a servant is critical in this context as a master will not be liable per se for the tort of an independent contractor<sup>26</sup>. The fundamental distinction between a servant and an independent contractor is that a servant is employed under a contract of service whilst an independent contractor is employed under a contract for service. Another essential difference is that an independent contractor acts on his or her own behalf as principal, not on behalf of the employer. It is not always easy to distinguish between the two relationships.

The High Court mostly recently considered this issue in *Hollis v. Vabu*<sup>27</sup>. The facts were that an unidentified courier cyclist had negligently injured a pedestrian during the course of his couriership activities. The pedestrian sued the courier company (the respondent) who engaged the courier. Under traditional principles, the respondent could only be liable if courier were considered to be employees of the respondent and not independent contractors. Therefore the High Court had to consider the nature of the courier's engagement and whether this constituted an employment relationship or an independent contractor relationship. A strong majority of the court<sup>28</sup> found that on the facts, the couriers were employees of the respondent and consequently the respondent was vicariously liable for the tort of its employee. Whilst there were factors which indicated the existence of an independent contractor relationship, these were outweighed by other factors evidencing an employment relationship.

## **1.7 The "Car Cases"**

The owners of motor vehicle have in certain circumstance, been found to be vicariously liable for the acts of persons driving their motor vehicle. The basis of liability has ostensibly been on the ground that the driver was the agent of the owner. In *Soblusky v. Egaa* the owner of a vehicle was asleep in the passenger's seat at the time the driver negligently caused an accident. Another passenger sued the owner on the basis of vicariously liability. After receiving a line of earlier English cases, the court held that the owner of the car is vicariously liable for the negligent act of his drives. And the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control<sup>29</sup>.

<sup>26</sup> Vol. 4. NO 2 (QUTJI) vicarious liability in the Agency context

<sup>27</sup> (2001) 207 CRL 21

<sup>28</sup> Gleeson CJ, Gummow Kirby and Hayne J.J in point judgment. Mc Hugh concurred in the result but not the reasoning Callinan J. dissented

In *Morgan v. Launchbury* the House of Lords held that in order to affix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was using the car at the owner's request, expressly or impliedly, or on his instruction, and was doing so in performance of the risk or duty delegated to him by the owner. The fact that the driver was using the car with the owner's permission and that the purpose for which the car was being used was on that in which the owner had an interest or concern, was not sufficient to establish vicarious liability.

In the light of even the broadest definition of agency considered earlier, the use of the concept of agency in this context to found liability has been criticized as artificial and wrong in principle. Bowstead submits that liability does not in truth, stem from agency principle<sup>30</sup>. After a detailed review of the development of the law in this area, Keeler concluded that agency principles do not support the imposition of liability in this context and that the pragmatic explanation is that liability has been imposed upon the basis of the availability of insurance<sup>31</sup> for the owner. More generally Fridman notes that in discussing agency in relation to tortious liability, the idea that an agent is one who has power to effect legal relation between his principal and third parties must be taken to mean legal relation in the sense of liability in tort, as well as contractual and proprietary rights and duties. In *Scott v. Davis*<sup>32</sup> the respondent owned an aeroplane. During a birthday party at his property, a guest asked if his son could have a joy ride. The respondent arranged for another guest at the party, who was a licensed pilot, to conduct the flight. Due to the negligence of the pilot the plane crashed, seriously injuring the appellant and killing the pilot. Whilst this was not the paradigm case of vicariously liability, on the basis of the High court decision in *Soblusky v. Egan*<sup>33</sup> it was argued that the respondent was vicariously liable. These were different opinions and views emanating from *Scott v. Davis* and *Soblusky v. Egan*. Based on this, McHugh remarked that the resort to agency principles to impose liability is terminus at best. He submitted that if liability is to be imposed, for policy or any other reason, it would be best to formulate a *sui generis* principle for liability of drivers of motor vehicle, rather than attempting to rely on agency principle.

Agent represents a principal in transaction with third parties. Another generally accepted line of cases involving vicariously liability are those where an agent represents a principal in a transaction with a third party.

## **1.8 Convergence of Contract and Torts**

### **What are contract laws? What are Torts laws?**

Contract law is that body of rules that govern contracted agreements between two parties or merchants. A contract is basically an agreement between parties outlining their duties and responsibilities to one another. Contract can be formed for nearly any type of interaction. It can also include remedies if a party breaches contractual duties<sup>34</sup>

In contract, torts laws govern situation where one person has harmed or injured another person. Torts law cover violations where the party intentionally harassed the other person, such as in battery chain. Torts laws also address incidents where the party may be held liable even if they did not act intentionally, such as in negligence claims or strict liability chains<sup>35</sup>.  
Torts laws

<sup>29</sup> J. Keeler *Driving Agents: to vicarious liability for (some) family and friendly assisted* (2000)B Tort Law Journal 1

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> *Scott v. Davis* (2000) 204 CLR 333

<sup>33</sup> *Soblusky v Egan* (1960) 103 CLR 215

<sup>34</sup> J.K.C. Onyemere, *the law of contract & contractual relationship* Odesaa Educational Books (NIG) Publishers Owerri 2012 (pg 2)

<sup>35</sup> Ibid

usually result in the liable party the victim monetary damages to compensate for their losses or injuries.

### 1.9 **Similarities between law of Contract and Law of Torts**

Contract laws and tort share many similarities. At the basic level both deal with a duty that has been breached.

With contract violations, the breach has to do with the duties that have been named in the contract. For example, a contract may state one party has the duty to pay the other for repair services, and the other party has the duty to perform the services. If either party fails to perform their duties, contract laws will prescribe a suitable remedy for the breach. Most tort violations also involve some sort of breach of duty. For instance, personal injuries usually occur because the liable party has breached his duty not to harm another person. Other types of relationships may create a duty of care, such as when shopkeepers have a duty to maintain their premises so that they are safe for patrons.

Damages awards can be obtained in both contract and tort violations. These are monetary payments made by the liable party in order to make up for any losses that result from the breach.

### 1.10 **Differences between Contracts and Torts Laws**

There are several fundamental differences between contract and tort laws. One of the most important differences is the issue of consent. In a contract, the parties must enter into the agreement knowingly and without being coerced. In order for the contract to be valid, each party must consent to the outcome of the contract as stated in the document or agreed orally by the parties. This means that one party cannot force the other to enter into the contract without his consent. Therefore damages in a contract claim usually have to do with a mistake or a misunderstanding between the parties, or deliberate refusal to act as agreed since they are typically aware of what they are dealing with in the contract.

On the other hand, the interaction in a tort is never based on consent. Torts generally involve an intrusion by one party into the safety, health, profit or privacy of the victim. In fact, if the victim consents to the tortious conduct, it can serve as a defense that will prevent him from recovering damages. For contracts, the purpose of damage award is to restore the parties to their position before the breach occurred. In torts claims, the damages are usually awarded to compensate the victim for his loss or injury. Punitive damage is rarely awarded in a contract claim<sup>36</sup>

### 1.11 **Vicarious Liability in Tort**

Vicarious liability is the tort doctrine that imposes responsibility upon a person for the future of another, with whom the person has a special relationship (such as parent and child, employer and employee, or owner of vehicle and driver, to exercise such care as a reasonable prudent person would use in wider similar circumstance. It is important to draw a distinction between primary liability and vicarious liability. This can be illustrated by the medical negligent cases. A health authority may be vicariously liable for the tort of its employer and it may also be primarily liable where it fails to provide adequate levels of staffing in one of its hospitals and an accident results. The commonest example of vicarious liability in tort is that of an employer for the tort of his employee. Two things are necessary for such liability to arise. There must be a particular relationship between the employer and the employee. A distinction is drawn here between employee and independent contractors. The employer is liable for the tort of the (former) (employee) and not those of the latter (independent contractor). Secondly, the tort committed must be referable to the employment relationship. This is expressed by saying that the tort must be committed in the course of employment<sup>37</sup>.

<sup>36</sup> Peter Clarke, legal match content manager

<sup>37</sup> J. Cooke *Laws of Torts* (3<sup>rd</sup> Edn. London: Financial Times Pitman Publishing, 1997) p. 289



### **1.12 Rationale for Imposition of Liability**

It appears generally accepted that there is no sound theoretical/legal basis for the imposition of vicarious liability, even in the master/servant context. In *Hollis v. Valu*<sup>38</sup>, all members of the High court (with the exception of Callinam J, who did not address the point) acknowledged that there was no sound legal rationale for the imposition of vicarious liability but rather, it was grounded in vicarious policy consideration<sup>39</sup>, therefore since vicarious liability is not founded upon fundamental legal doctrine. It may be that it is appropriate for courts to fashion it so that it applies in the agency context, but the difficulty will be whether it applies generally, or only in specific circumstance. However, before addressing this issue, it is necessary to consider exactly what are the policy considerations behind vicarious liability.

The Queensland Law Reforms Commission has in a recent review of the law relating to vicariously liability, identified a number of policy reasons for the imposition of vicarious liability in the master/servant context.

The commission identified the following main factors

- a. The plaintiff can obtain compensation from someone who is financially capable of satisfying a judgment. It is likely that an employer will have greater financial resources from the employee.
- b. A person or corporation who employs others to advance their own economic interest should in fairness, be placed under a corresponding ability for losses incurred in the course of the enterprise
- c. Vicarious liability promotes a wide distinction of tort losses as an employer can pass the costs on through insurance and higher prices.
- d. The imposition of vicarious liability promotes deterrence of tortious conduct. It provides incentives for employers to encourage employees to perform well on the job and to discipline those that do not

It was not doubted that the availability of insurance also played a significant role in the development of the law relating to vicarious liability<sup>40</sup>

### **1.13 Scope of Liability**

The liability of the master is the dependent on the plaintiff being able to establish the servant's liability for the tort and also that the servant was not only the master's servant but that he also acted in the course of his employment. In other words, where the relationship of master and servant exists, the master is liable for the tort of the servant so long only as they are committed in the course of the servant employment. The nature of the tort is immaterially and the master is liable even where liability depends upon a specific state of mind and his own state of mind is innocent<sup>41</sup>.

A master which is an appropriate case may include a company or a corporation is liable for the tort, negligence or wrongful act of its servant or agent so long the same is committed in course of his employment, namely, the authorized master's business or the master's business which has he held out as authorized<sup>42</sup>. Where the agent or servant of a company has committed an act, the company may rightly be said to have committed the act since in law, by the principle of vicarious responsibility the act of the agent or servant is the act the company<sup>43</sup>.

On the assumption that there is a general principle of liability of principal for the tortious acts of their agent. It is necessary to consider what, if any, are the difference in scope between a master's liability and a principal liability. As noted above, a master will be liable for the tort of his employees committed in the course of their employment. A principal will be liable for the tort of his or her agent committed whilst the agent is acting within the scope of his or her authority.

<sup>38</sup> *Hollis v. Valu* (2001) 207 CLR 21, 37-38.

<sup>39</sup> *Ibid.*

<sup>40</sup> Queensland Law Reform Commission, *Vicarious Liability*, Report No 56 (2001) 9.13

<sup>41</sup> *Ifeanyichukwu Osondu Ltd v. Solehboneh Ltd* (2000) 5NWLJ (Pg. 335)

<sup>42</sup> *James v. Mid-Motors Nig Ltd* (1978) 11.12 SC 31.

<sup>43</sup> *Ibid.*

Given the potential overlap between an employment and an agency relationship, if either has a wider scope of liability, then, it could be advantageous in appropriate circumstances to seek to classify the relationship as one type of relationship rather than the other. However, most (if not all) commentators who address the issue suggested that there is little or no practical distinction in the scope of liability<sup>44</sup>. Many commentators have given credence to the above. This is business it will be difficult to conceive a situation where an action occurred within the scope of an agent's authority, but not (if he or she was an employee) within the scope of his or her employment, if there is a difference in scope then it is slight.

#### 1.14 **Justification for Imposing Vicarious Liability**

Although the doctrine of vicarious liability is accepted in English law there is no clear and convincing rationale for its imposition. A number of theories have been put forward to explain the deviation from the prevalent fault based theory of liability. They therefore include the following.

It has been suggested that the employer is in control of the behavior of his employee. Again suggestion have included the fact that the employer may have been careless in selecting the employee, however, liability is not based on this premise and a perfectly competent employee is capable of behaving negligently at some stage in his employment. The modern approach is entirely pragmatic and is based on social convenience and rough justice. The imposition of liability is based on the employer's greater ability to pay any damages and the fact that this involves loss spreading.

The employer is the best insurer against liability and any extra cost to the employer can be passed on to the public in the form of higher prices. This may cause accident prevention as a firm which raises its price too high will go out of business. The doctrine can be justified on a moral basis as the employee inflicts loss on the plaintiff while pursuing the employer's interest. As the employer obtain a benefit from the employee's work, he should also bear the cost of accidents arising out of it<sup>45</sup>

The basis of the tort of vicarious liability flows from the fact that the purpose of employment is allow the employee to benefit from the employer's work and so it seems feasible and logical that the employer should also bear the burden of such employment<sup>46</sup>

#### 1.15 **CONCLUDING REMARKS**

The common law rule of vicariously liability has come to stay whether employers feel it is fair or not. As at today, the rule is deeply imbedded in our legal system and employers will do well to understand and have good understanding of it. A saving grace for employers is the implied term a common law in contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. If an employee is in breach of such term, the employer who has been held vicariously liable for his tort could seek indemnity from the employee to make good the loss.

In *Lister v. Rumford Lee and Cold Storage Ltd*<sup>47</sup>, a father whose son was an employee of the respondent, was injured by the said son, the court held the employers vicariously liable and the father's claim was not upheld. The company exercised their right of subrogation under the contract of employment. Conclusively, it is recommended that vicarious liability remains a meeting point from the law of contract and tort.

<sup>44</sup> J. Swanto, *master's liability for the willful Tortuous conduct of his servant* (1985) 16: Western Assistant Law Review 1, 20-21

<sup>45</sup> Ibid.

<sup>46</sup> C.C. Ani, *Understanding Legal Concepts in Nigeria* Vol.2 CIDJAB Press Ltd Enugu 2020 pg. 261

<sup>47</sup> *Listers v Rumford ice storage Co. Ltd* (1957) AC 555