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PUNISHING THE INNOCENT? A CRITICAL ANALYSIS OF VICARIOUS LIABILITY IN CRIME

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1. Introduction :

The general principle in criminal law is liability is personal, not vicarious. This means that one person cannot be held liable for the crimes of another (other than where a person has aided, abetted, counselled or procured the act of another). However, while prima facie, a principal is not to be made criminally responsible for the acts of his servants, yet the legislation may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. Vicarious liability, also known as imputed liability, is when a principal party is responsible for the actionable conduct of their agent based on the relationship between the two parties. Vicarious liability falls under the *respondeat superior* doctrine and is thus a type of strict liability because the principal is in control of the agent and the agent's actions represent the principal. The three elements that must be met for vicarious liability are:

- i. the wrongful act must have been committed by an employee or other agent,
- ii. the employee or other agent must have been acting within the scope of his or her employment or agency, and
- iii. the employer or other person must have had the ability to control the employee or agent.

Vicarious liability is a foundational doctrine in tort law under which one person is held liable for the wrongful acts of another, even though the former may not have personally committed the tort. The doctrine is rooted in the idea that the person who controls or benefits from another's actions should also bear the responsibility for the harm caused.

Initially, vicarious liability applied **only to employer–employee relationships**. Employers were held liable for wrongful acts committed by employees in the course of employment. Modern courts, especially the UK Supreme Court, have broadened the scope. In *Various Claimants v Catholic Child Welfare Society (Christian Brothers case)*¹ the liability was extended to relationships similar to employment, even without a formal contract. The key test applicable for vicarious liability was whether the relationship is “akin to employment” and

¹ [2012] UKSC 56

there must be a sufficient connection between the relationship and the wrongful act.² Vicarious liability originated in early English common law in master–servant relationships and has evolved significantly over time. Initially limited to acts expressly authorized by the employer, its scope expanded during the Industrial Revolution as businesses grew, holding employers responsible for employees’ actions. A major development came in *Lister v. Helyar*,³ where the court introduced the “close connection” test, making employers liable even for unauthorized acts if closely linked to employment duties. Today, vicarious liability commonly applies in employer–employee and principal–agent relationships, focusing on whether the wrongful act is sufficiently connected to assigned responsibilities. Emerging legal trends have prompted courts to address vicarious liability in contexts like the gig economy, where independent contractors may act in ways that involve the platform or employer.

This article will discuss under the light of growing independent activity of crime should vicarious liability be relaxed. Many incidents involving gross misconduct in eyes of law in situations like outsourced crime, independent contractors-workers , complex corporate structures, cybercrime it is important to discuss whether the old model be applied in present scenario. It will be unjust to punish a person (like an employer or director) for a crime they did not authorize, participate in, or have knowledge of. When a person commits a crime for personal reasons or when an employee has significantly deviated from employers business or service for any personal reasons consequently relieving the employer of any sort of vicarious liability, it is argued that the employer should not be held responsible. Modern procedural criminal laws unpretentiously deal with vicarious liability principle even if the employee acted in good faith or had no involvement in the act. Punitive bodies frequently take the path of least resistance, reflexively applying vicarious liability to implicate employers without interrogating the individual fault.

2. Current Landscape in Torts vs Crime

It is most important to differentiate between tort and crime. As we all know that, law is an overreaching framework of rules while tort is a specific branch within that framework which involves a civil wrong. Tort become crime when an act is wrongful enough to pose a serious threat on public safety and order, and not on individual interest. A tort transitions into or overlaps with a crime when there is presence of *mens rea* or guilty mind. Most torts require

² <https://www.private-law-theory.org/2024/01/15/marianne-tutin-vicarious-liability-an-ever-expanding-concept-2/>

³ [2002] 1 AC 215

only negligence, but a crime almost always requires a "guilty mind" (*mens rea*) or criminal intent. For example, hitting someone accidentally is a tort (negligence); hitting them on purpose is both a tort (battery) and a crime (assault). Secondly, there is a grave societal impact that cause massive social harm, such as large-scale environmental pollution or acts of violence, are criminalized by the state to protect public interests. And lastly, an act becomes a crime when the legislature specifically defines it as such in a penal code or statute.

The doctrine of vicarious liability in tort law has undergone a **significant expansion** beyond its traditional master–servant framework. Originally, liability was confined to acts of an employee committed “in the course of employment.” However, modern courts—especially in cases like *Lister v Hesperley Ltd*⁴ have broadened both **who can be liable** and **when liability arises**. Courts went on to recognize that liability is not limited to formal contracts of service. It extends to relationships that are *akin to employment*. **Courts now go on to consider the factors like control over the act, integration in the act and benefits to the employer.**

As it is evident, that the key difference between torts and crime is that, tort cases do not require criminal intent; negligence or breach of duty is sufficient, whereas criminal cases require a guilty mind (*mens rea*). Liability in tort is often determined based on negligence or fault, while criminal liability requires proof beyond a reasonable doubt. *In a criminal context, vicarious liability assigns guilt, or criminal liability, to a person for wrongful acts committed by someone else. Under criminal law, a person can only be criminally liable for the acts of another if they are a party to the offense. An innocent master is not criminally liable for acts of servants where mens rea is lacking or any criminal intent is not prima facie visible. The doctrine of vicarious liability is gradually turning to be flawed and slowly it needs to be viewed with different perspective in cases of crime. Instances where the employee/agent acts on their own initiative; the act may be criminal or unauthorized or it may deviate from assigned duties, sometimes significantly. Then in aforesaid cases vicarious liability, if strictly invoked, will lead to serious malfunction of execution of legal codes. Whether a reasonable person held vicariously liable could predict or anticipate the an act? Let the consequences of the act be discussed later. For example - A school appoints a hostel warden to supervise students in a residential facility. Two inmates commit an act of sodomy totally in absence of any knowledge of warden. Up to what extent the school/warden is held liable when the act was totally independent and personal. In many cases harm is not foreseeable, therefore, no liability arises.*

⁴ Ibidem

3. Challenges Posed by “Independent Activity of Crime”

Modern legal systems are noticing a growing cases of intentional criminal acts where application of vicarious liability should be interpreted liberally. If a delivery driver hits a pedestrian while on their route, the company is liable but if that same driver deviates 20 km off-route to settle a personal grudge and commits an assault, the activity is considered "independent." In most jurisdictions, the employer is then shielded from liability. Or the same driver in effect of alcohol meets with an accident and injures the same pedestrian then? It would constitute a grave injustice if an accused employer/superior/licensee who is innocent of the crime committed by his/her subordinate and has no knowledge of the commission of the crime is punished through custodial or pecuniary sanctions, especially where an attempt to appreciate the principle of loss distribution involves long term jail sentence or exorbitant fines or both. In similar situations, what if the employer is unable to afford the fine, this would lead to him suffering from an action which is not of his own making. Thus, it shows that a person may be liable where they are not at fault and have exercised all reasonable care. The courts and executive authorities held directly liable rather than applying the theory of vicarious liability. It is important to distinguish vicarious liability from direct liability. It is presumptuous that ownership creates a **presumption of control but sometimes there is no control over the mannerism of work.** Students are **not employees or agents** of the school in the legal sense, even though, the principal or school authority are held directly liable despite the fact they are **not automatically vicariously liable** for acts of students. Similarly, suicide is a **voluntary act** involving personal agency and complex mental states — making causation tenuous. Unless direct provocation or sustained harassment by an employee/teacher/or anyone else is proved, attributing liability to the school may dilute the principle of *fault-based liability*. Even under criminal law (Sec. 108 BNS- abetment to suicide) demands intent; tort law should not bypass this by imposing blanket institutional blame. The independent activity like, peer rivalry or unknown stress or personal grudge, should not involve the application of vicarious liability rule where no employee/teacher/or anyone else’s wrongful act is established or proven without doubt.

4. Should the Doctrine Be Relaxed (or Adapted) in Crime Cases?

As we have discussed that the direct liability earlier, the authorities impose regulatory or precautionary responsibility on the institution which in turn comes out to mental trauma. Actions which are often preventive in nature aimed to maintain public safety turns out to

punitive for the employer or as the case may be. If there is no breach or foreseeability there should not be any vicarious liability, let the direct liability be left alone. The expanding vicarious liability in criminal law risks eroding the foundational principle that **liability should follow personal culpability**. Imposing criminal consequences on employers or heads of institutions for acts they neither committed nor could reasonably foresee can lead to **over-criminalisation** and unfair stigma. It may also encourage **defensive over-regulation**, where institutions prioritize paperwork over genuine safety. Most importantly, criminal law's moral force diminishes if punishment is detached from fault. The vicarious liability doctrine is widely applied in crime, but it needs to be **carefully adapted in limited contexts**.

5. Conclusion

It would constitute a grave injustice if an accused employer/superior/licensee who is innocent of the crime committed by his/her subordinate and has no knowledge of the commission of the crime is punished through custodial or pecuniary sanctions, especially where an attempt to appreciate the principle of loss distribution involves long term jail sentence or exorbitant fines or both. In similar situations, what if the employer is unable to afford the fine, this would lead to him suffering from an action which is not of his own making. Thus, it shows that a person may be liable where they are not at fault and have exercised all reasonable care. Courts have inclusively included the factors like duties which are non delegable in nature like safety of students and patients in schools and hospitals respectively and any hazardous activity in progress. Adding to the injury, even **personal wrongdoing** may fall within liability if linked to employment duties. Protection of vulnerable victims like children, patients, residents, detainees have also come under the ambit of the expansion of the doctrine of vicarious liability. Any educational institution/ company or enterprise may be vicariously liable for a person's suicide or peer-inflicted harm only where such institution, through its employees/ representatives, failed to discharge a duty of care that a reasonably prudent institution would owe in similar circumstances. Imposing vicarious liability, primarily rather than applying the concept of **direct negligence** where a staff member's failure to supervise or intervene can be specifically proven, will be contemptuous to the victim. The law seeking to **prevent abuse, ensure accountability, and provide effective remedies to the vulnerable have encroached and mutilated the own legal concept that liability is personal not vicarious**.