INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

DISCLAIMER

ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ISSN: 2582-6433

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

www.ijlra.com
Volume 2 Issue 7 | Jan 2024
ISSN: 2582-6433

TRACING ORIGINS OF DOCTRINE OF VICARIOUS LIABILITY

AUTHORED BY - HARIHAR JAGANNATH
2ND SEM LL.M
GOVT LAW COLLEGE, ERNAKULAM

Introduction

We are well aware of the English courts and those far superior judges, who used to propound certain rules in absence of any law, exercising discretionary powers to overcome absurdity. It is also known to us as "Common Law"[1] which used to govern certain aspects and the society through the sanctity of precedents. One such Common Law principle is known to be **Vicarious Liability**, where the maxim *"Qui facit per alium facit per se"*[2]. When we are thrown into a situation as such, today, we have the know-hows and predict as to how the outcome of the case would be. Did the principle come into existence in its finest form as we have it today, or had it undergone a process of evolution? What was the situation before the principle was in play and how were the disputes resolved before? The article tries to throw light on the matter.

What is Vicarious Liability?

Generally, when any sort of breach or tort is committed, the person who commits that wrong is liable for the damages. This is the general trend, but in the case of Vicarious liability, the whole idea takes a backseat as, the tort maybe committed by one person, who is acting on behalf of another. So, the person for whom the tort-feaser was acting, will be liable for the damages. Basically, there should be a relationship in existence, between the two. And by such an act, a third person suffered. For example, if a driver of a car commits an accident, the owner of the car would be liable for such an act of the driver.

In this scenario, two maxims are in play:

(i) ***Qui facit per alium facit per se*:** Which means that one who has acted through another is

[1] Body of law created by judges and quasi-judicial authorities, creating precedents
[2] Conveys that he who does an act through another is considered to have done that act by himself

ISSN: 2582-6433

said to have acted on his own. This would give effect as if act tort was committed by the person himself and he is personally liable.

(ii) ***Respondeat Superior*:** It means that the superior must be held liable for the act of the subordinate, that is the principle or the master should be held liable for the act of agent or the servant.

Origin of the Concept

Writers like Holmes contented that the doctrine of vicarious liability originated from Roman Law, others like Wigmore opined that it originated in Germany. Still, some other scholars like Baty made light of the origin but concluded tht the doctrine came into English law at the close of 17th century. Long back, during the early days of 1300s, the concept took its form pioneer form. Initially, wrong done by the servants were completely extended to their masters regardless of the action, direction etc. Gradually, stepping into the 14th century, we saw changes. **The command theory** was derived, wherein masters were only liable for the tort committed by the servants if there was a command given by the masters and the servants acted in accordance with the command but would have resulted in some wrong owing to damage **[that is, the position of absolute-liability of masters was shifted to that of masters being liable, only where there is an express command].** In such cases, the nexus among the tort and the command was taken in for consideration. If there was any such connection, and the servant hadn't acted arbitrarily, instead has abided the master, master was made liable. However, express commands were essential under this theory.

This was the practice for very long period, until the early 17th century, where Sir John Holt established the concept of **Implied Command Theory**. Here the master was made liable not only for the express commands but also under the command which is implied. This change in view was becoming essential, as masters had begun to wash their hands off, with the strict application of command theory. And they'd content that, they hadn't given any express command to their servant, and used to escape the liability. Servants had to bear the brunt, even if they had been influenced by their masters. Also, there was expansion of trade and commerce, due to which the command theory could not withstand the test of the time, resulting in the enlargement of the ambit of vicarious liability.

ISSN: 2582-6433

In ***Tumberville* v *Stampe (1697)***[3], the employee or the servant of the defendant negligently began a fire and it caught up to the neighbour's land, burning down their house. Master argued that he was not responsible because he was not personally at fault and didn't accept liability as he claims that he had instructed for a safe way to handle fire. Nevertheless, judge held that under **implied command**, master was made liable for the actions of his employee.

In ***Nicholas* v. *Herne (1700)***[4], plaintiff brought an action against the defendant, Plaintiff had brought several parcels of silk in view that it was a different variety of silk due to the fraudulent representation by defendant's factor. The factor was operating overseas. There was no evidence on part of the defendant for the deceit committed by the factor. Nevertheless, it was held that the employer must be liable for the acts of the employee.

In ***R* v. *Huggins and Barnes (1730)***[5]**,** the case was such that Huggins was the prison warden. Barnes was the deputy of Huggins. Arne was a prisoner. Barnes had put him in an untidy and a cell without a fire, up close to a sewer. Due to this Arne died. A case was initiated in the Kings Bench and it was found that Barnes was independently liable, but Huggins having no information about the same and so is not guilty. Although Barnes is deputed by Huggins, here the master-servant relationship doesn't work out as this is a criminal case. Such principles may only be applied in the Civil front but not in the case of Criminal cases. He cannot be held liable unless that act was through the express command of the principal. **(Criminal cases proceed with express commands only)**

Gregory* v. *Piper (1829)[6]**,** Gregory owned a pub which had a stable-yard in the back which could be accessed from the Old King's yard behind Gregory's stable yard. Now King's yard could be accessed by Gregory to pass through into stable yard. Piper questioned the same. Piper employed a servant to obstruct the pathway with rubbish. In a way, the rubbish rolled over and touch Gregory's wall. Gregory asked Piper to remove the same and he refused. Gregory brought in an action of trespass against Piper. It was held that the master was liable as the servant was acting according to the orders of and the end result was probable and foreseeable.

[3] (1697) 91 ER 1072
[4] [1700] 1 Salkeld 289
[5] (1730) 2 Str 883
[6] [1829] 9 B & C 591

ISSN: 2582-6433

***Duncan* v. *Findlater (1839)*[7],** Scotland - Turnpike Roads within county of Perth was managed by trustees in 1835. As per General Road Act, the trustees may appoint any such persons for the maintenance and upkeep of the road. There are provisions which also mentions that the trustees will be sued for the misconduct of such persons. Findlater a coal merchant, while driving a gig at night along the Turnpike Road comes in contact with a heap of stones which was laid partly on road and on footpath. The road was not illuminated nor was anyone posted on road as a warning mechanism. Findlater gets considerably injured in the accident. Findlater's son gets seriously injured succumbs to death soon. Road trustees were sued through their Treasurer Thomas Duncan for the misconduct, who appropriated the trustees' fund. Although in lower courts it was held that the persons appointed by such trustees will be liable and shall pay such amount as compensation from the trustees fund.

Later when the matter was appealed by Duncan, House of Lords reversed the judgement of court of sessions saying that the road trustees on a public road are not liable for any injury which may take place to the passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or by the officers of trustees, when engaged in any operation performed under the authority of the trustees.

***Bayley* v. *Manchester, Sheffield & Lincolnshire Railway Co. (1873)*[8],** wherein the plaintiff was travelling in a train and a porter who works under the defendant pulled out plaintiff with a belief that he was travelling in a wrong train. Plaintiff suffered injuries. Defendant was held liable for the act of porter. It was held that defendant **will be liable even if the act is lawful and which he is authorized to do.** Wrong committed willfully by a servant with the intention of serving purpose of master.

Modern View

In modern times the command or the theory of control could not be extended upon to vicarious liability. So newer methods were to be adopted. Eventually, the 'course of employment theory' emerged to the effect tat a master took over the liability of the servants, regardless of the fact that master had authorised or ratified it or manifestly forbade it, provided that the wrongful act complained of occurred in the servant's course of employment. Thus by 19th century, vicarious

[7] (1839) 6 C. & F. 894
[8] (1873) L.R. 8 C.P. 148

ISSN: 2582-6433

liability had assumed a modern outlook in England.

It is founded not on the principle of fault, rather consideration of social policy, driven by the need to ensure an effective system of compensation to the victims of torts occasioned by employees in the course of their employment, as in the course of their employment. It is based on the idea that, a person wrongfully injured should not be left without a claim, or at best, a hollow claim.

Whenever a person commits a tort or any such act and if such an act was part and parcel of the contract of service then the principal or the master maybe held liable for such commission of the act. If the act wouldn't fall under the contract of service, then principal cannot be made liable.

That is if one is the owner of a Television repair station and he knows how to do it. He has several employees working for him. So, he can direct them what should be done and how it should be done. That is how the contract of service of a servant would be.

In case of an independent contractor, for example if the Air Conditioning in the office of TV repair station arose. The owner has to employ an independent contractor who knows how to repair the A.C. So, the employer can instruct what to do but not how to do.

This is how the contract of service works and based on these the cases will be decided. If employer asks the independent contractor to work according to his instructions and if some grave accidents happen, the employer will be held liable because independent contractor acted upon the instructions of the employer.

Also, there were certain tests that were developed during the 19th century, in order to find out if there is in reality, a vicarious liability arising:

(i) **Tortfeasor's Liability Test** – The plaintiff must establish that the servant (tortfeasor) is first and foremost, liable for the tort.
(ii) **Special Relationship Test** – The purposts of this test, is that there must exist some kind of relationship recognized by the law between the wrongdoer and the master. Generally, this relationship is classically one of employment.
(iii) **Course of Employment Test** – For an employer to be liable for the tort of his employee, the tort must have been committed by the employee in the course of his employment.

ISSN: 2582-6433

Limpus* v. *London General Omnibus Co. Ltd (1867)[9], here the defendant's company owned buses. Their drivers raced to compete with other omnibuses and obstructed them in services which was expressly prohibited by the defendant. Despite the warning of the owner, driver raced with omnibus of the plaintiff. Due to the negligent driving in the course of employment, unwanted happenings unfolded. Defendant was held liable for the negligence of the driver as it happened in the course of employment and he was carrying out the employment according to master's purpose. Hence, **master was made liable** for such tort committed by **servants in their course of employment**.

Brickett* v. *Postal Telegragh Company (1905)[10]**,** here an agent was employed by the defendants who was also the manager overcharged the plaintiff for telegraph and appropriated excess amount of approximately over $2500. After such an act, the agent absconded. Plaintiff sued the company for damages.

Company claims that the agent was given additional charges but in this particular instance he has went in excess of the powers that were granted upon him. He acted on his own and not under the command of the company, and hence they are not liable for the damages due. The court held that the principle liable because no matter what the act of the agent is, he represents the principle. The plaintiff cannot be blamed for not checking the trustworthiness of the agent as the plaintiff acted bona fide. Hence the defendants were made liable.

Peterson* v. *Royal Oak Hotel Ltd. (1948)[11]**,** here a customer who was drunk and asked for more alcohol was denied by the bartender of the hotel. In rage the customer throws a glass at him which fell on the bartender's foot and broke. The bartender takes a broken piece and throws back which unfortunately hits another's (plaintiff) eyes. Plaintiff sues the defendant hotel. Court held that the servant acted recklessly and willfully in the course of the employment. So, the defendant hotel was liable for the same.

[9] (1862) 1 H. & C 526
[10] (1905) 107 A.D. 115
[11] [1948] NZLR 136

ISSN: 2582-6433

Conclusion

Doctrine of Vicarious liability has taken its form much earlier in time and it has been a significant principle making the superior responsible for the acts of the servant. We have seen how it has come a long way until the modern day. The basic idea here is that the third party who has suffered the damage must be compensated in a just and fair way. In order to make this happen, the one who is more capable is being pursued. The servant may not be the right candidate from whom the damages maybe sought, as he could be in a financially weaker position. But the tort that he has committed has injured a third party, which cannot be overlooked. Hence, making the master responsible, would solve the issue. The master has a responsibility towards the society and he ought to keep his servant under supervision. Servant's conduct must be kept under control of the master so that they do not create problems. If such a situation is to happen, master will be prosecuted as he was entrusted with a moral and legal duty to care for others. This doctrine is so relevant that, we follow this even today.