

Below is an example research proposal – this is not prescriptive and is for information only.

Introduction

Since the establishment of vicarious liability in 18th century,¹ the doctrine has been a fluid one.² The law encompassing it has been criticised as founded on the unclear theoretical basis³ and envisaged as ‘the creation of many judges who have had different ideas [...] about its justification or social policy, or no idea at all’.⁴ The courts have recently dramatically amplified the remit of this doctrine ignoring its normative rules.⁵

Vicarious liability is a form of strict liability imposed ‘for a tort committed by an employee not based on any fault of the employer’.⁶ It goes against the jurisprudential framework of tort law that the claimant should be compensated by the wrongdoer himself,⁷ therefore, it requires a convincing justification.⁸

Literature review

Generally, the philosophical basis of tort law is underpinned by the concept of corrective justice, as developed by Aristotle.⁹ Its objective is to do justice between individuals, thus, it is ‘interpersonal or bipolar justice’.¹⁰ However, vicarious liability seems to be an exception to this, as it is governed by the philosophical drivers of distributive justice.¹¹ Distributive justice is concerned with the distribution of benefits and burdens in society.¹² Inherently, it is connected with economic theories of internalisation, deterrence and loss spreading.¹³ The research will scrutinise these philosophical theories in depth. This will aid to find the convincing basis and rationale for vicarious liability.

Additionally, the justifications for vicarious liability are largely based on policy: the compensation¹⁴ or ‘deep pockets’,¹⁵ loss distribution, enterprise liability, risk and control arguments.¹⁶ These policy reasons, as the judges have expressed, underlie the doctrine of vicarious liability.¹⁷ They are not to be treated as legal rules, but only as reasons for shaping them.¹⁸ However, it is argued that these policy reasons differ in credibility, as they have unequal weight.¹⁹ In response, J.W. Neyers closely reviewed each justification.²⁰ However, the analysis lacks a comprehensive discussion of the appropriateness of each in the English case law. The policy arguments will be explored and critically analysed regarding each

¹ Peter Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge 2013) 228

² Paula Giliker, ‘Vicarious Liability beyond the contract of service’ (2012) 4 PN 291, 293

³ Paula Giliker, ‘Rough Justice in an Unjust World’ (2002) 65(2) MLR 269, 272

⁴ Glanville Williams, ‘Vicarious Liability and the Master's Indemnity’ (1957) 20 MLR 220, 231

⁵ Claire McIvor, ‘The Use and Abuse of the Doctrine of Vicarious Liability’ (2006) CLWR 35 4 (268)

⁶ *Bernard v Attorney-General of Jamaica* [2004] UKPC 47, [2005] 2 LRC 561

⁷ Rachael Mulheron, *Principles of Tort Law* (1st edn, Cambridge 2016) 9

⁸ Christine Bauermann, ‘A Case Study in the Failure of General Principles?’ (2017) 3 PN 179, 187

⁹ Joel Feinberg, Hyman Gross, *Philosophy of Law* (5th edn, Wadsworth Publishing 1995) 375

¹⁰ Allan Beever, ‘Corrective Justice and Personal Responsibility in Tort Law’ (2008) 28 OJLS (3): 475, 477

¹¹ Tony Honoré, *Responsibility and Fault* (1st edn, Hart Publishing 1999) 81

¹² Tom Campbell, *Justice* (1st edn, Macmillan Education 1988) 19

¹³ Stephen R. Perry, ‘Tort Law’ in Dennis Patterson (eds), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing 1999) 58

¹⁴ *Catholic Child Welfare Society and ors v Various Claimants and ors* [2012] UKSC 56 [35] (Lord Phillips)

¹⁵ Glanville Williams, ‘Vicarious Liability: Tort of the Master or of the Servant?’ (1956) 72 Law Q. Rev. 522

¹⁶ *Catholic Child Welfare Society and ors v Various Claimants and ors* (n 14) [35] (Lord Phillips)

¹⁷ *Ibid* [34] (Lord Phillips)

¹⁸ *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 [60] (Lord Hobhouse)

¹⁹ Giliker (n 3).

²⁰ Jason W. Neyers, ‘A Theory of Vicarious Liability’ (2005) 43 Alta. L. Rev. 287 1, 5

requirement for vicarious liability. Moreover, these policy issues seem to correspond with the mentioned philosophical arguments. Therefore, the dissertation will attempt to combine them in determining whether they rightly or wrongly shape vicarious liability.

Issues with the Employer-Employee Relationship

The first requirement for vicarious liability is the existence of the employer and the employee relationship²¹ or of the 'akin to' employment relation which is a new development in vicarious liability.²² The issue with the former is that there is no strict test for it: various tests derive from the employment law,²³ the law relating to social security,²⁴ etc. The courts have devised the control test to distinguish between an employee and an independent contractor,²⁵ as the employer is liable for the acts of the employee.

The control test is the employer's right to control the employee's method of work.²⁶ In the modern climate, it is argued that the questions about the mode are more of fiction than of fact.²⁷ It is criticised as leading to employers eschewing actual control to circumvent liability.²⁸ Morgan counterpoints that the above criticism is not well founded and states that the control theory is discredited by focusing on a narrow dimension, i.e., using examples of a hospital surgeon of a ship's master.²⁹ As an alternative, an integration test was proposed by Rix LJ.³⁰ There have been debates involving these two tests,³¹ however, there remains a lack of an in-depth analysis of the practical impact of each. Also, the academics have referred to additional tests, for instance, the substitution test³² or the mutual obligations test.³³ The dissertation will evaluate each test in terms of its appropriateness in the modern legal and social context.

Above the Employment Contract

In the modern employment, problems arise regarding agency workers, self-employed,³⁴ voluntary workers³⁵ and individuals not bound by employment contracts.³⁶ The courts have expressed their concerns about the status of persons who secure work via employment agencies.³⁷ They have applied the relevant control and other tests to determine the employer

²¹ Michael A. Jones, Anthony M. Dugdale and Mark Simpson, *Clerk & Lindsell on Torts* (21st edn, Sweet & Maxwell 2014) 6-04

²² *Catholic Child Welfare Society and ors v Various Claimants and ors* (n 14) [47] (Lord Phillips)

²³ *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] ICR 819

²⁴ *Market Investigations v Minister of Social Security* [1969] 2 QB 173 (QB)

²⁵ *Yewens v Noakes* (1880) 6 QBD 530, 1 TC 260 (CA)

²⁶ Jones, Dugdale and Simpson (n 21) 6-08

²⁷ Edwin W. Peel and James Goudkamp, *Winfield and Jolowitz on Tort* (19th edn, Sweet & Maxwell 2014) 645

²⁸ Jennifer Arlen and W. Bentley MacLeod, 'Beyond Master-Servant: A Critique of Vicarious Liability' (2005) New York University, Research Paper 1/2005, <http://lsr.nellco.org/nyu_lewp/1> accessed 2 November 2017

²⁹ Phillip Morgan, 'Recasting Various Liability' (2012) 71 CLJ 615, 645

³⁰ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and ors* [2005] EWCA Civ 1151, [2006] QB 510 [79] (Rix LJ)

³¹ Claire Mclvor, 'Vicarious liability and child abuse' (2013) 1 PN 62, 63

³² *Byrne Brothers Ltd v Baird and ors* [2002] IRLR 96 (EAT)

³³ *Nethermere (St Neots) v Taverna and Gardiner* [1984] IRLR 240 (CA)

³⁴ Mulheron (n 7) 978

³⁵ Morgan (n 29)

³⁶ Mulheron (n 7) 978

³⁷ *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, [2004] IRLR 358

for the purposes of vicarious liability. An examination will be conducted to discern what factors are considered to find the employment in the absence of precise rules.³⁸

The expansion of the voluntary sector currently comprising 14.2 million people who volunteer at least once a month³⁹ raises an issue of their classification as employees. Thus, the law concerning vicarious liability shall be revised regarding this point.⁴⁰ The Law Reform Commission in Ireland has stressed that volunteers require an appropriate level of protection.⁴¹ The dissertation will analyse the law concerning volunteers and conclude whether they could be classed as employees to offer protection from crushing liability.

Methodology

The research will be conducted using a socio-legal methodology which is an interdisciplinary subject⁴² not confined within legal boundaries.⁴³ It explores 'the impact of the law in action, and the key role played by ideological factors, including public policy'.⁴⁴ The law of vicarious liability is arguably based on social policy; therefore, the socio-legal methodology is the most pertinent. This methodology will allow the research to examine jurisprudential, policy and moral issues underpinning the law, and the economic and social impact of vicarious liability on modern society.

Research Question

The formulated question which the dissertation will attempt to answer is: 'A Critical Analysis of Vicarious Liability as a Deviation from the Principle of Corrective Justice and the Economic and Social Impact of its Recent Developments'.

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³⁸ *Dragonfly Consultancy Ltd v Revenue and Customs Commissioners* [2008] EWHC 2113, [2008] All ER (D) 17 (Sep)

³⁹ UK Civil Society Almanac, 'Volunteering Overview' (8 May 2017)

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⁴⁰ Morgan (n 29)

⁴¹ Law Reform Commission of Ireland, *Civil Liability of Good Samaritans and Volunteers* (Law Ref Com No 93, 2009) 3.55

⁴² Dawn Watkins and Mandy Burton, *Research Methods in Law* (1st edn, Routledge 2013) 35

⁴³ Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (1st edn, Hart Publishing 2005) 1

⁴⁴ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (1st edn, Pearson 2007) 119

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