LIABILITY FOR EMPLOYEE ACTIONS IN NIGERIA: AN ANALYSIS OF VICARIOUS LIABILITY IN EMPLOYMENT CONTEXTS

BY

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Abstract

This paper examines the doctrine of vicarious liability in Nigerian employment law, focusing on the liability of employers for employee actions. Usually, the relationship of an employer and their employee is special and particular to the object of the employment. The employee is contracted to execute a certain task. During this existing relationship, the employer may be called upon to answer question(s) for an act or conduct of his employee. The paper delves into the legal principles, case laws and statutory provisions that govern vicarious liability in employment relationships in Nigeria whilst considering other jurisdiction. It explores the evolution of vicarious liability, its underlying rationales, and circumstances under which employers may be held liable for employee misconduct. The research employed the doctrinal method. It adopted the analytical approach to comb through primary and secondary sources. The research analyzes the similarities and differences between the Nigerian and Canadian approaches to vicarious liability. The finding of this research is that in many cases, the tort of vicarious liability is considered without the socio-economic conditions of the people. It recommended, among others, a relaxation of the strict interpretation of "in the course of employment".

Keywords: Vicarious Liability, Employment, Master, Servant, Tort.

1.1 Introduction

In early medieval times, a master was held liable for all the wrongs of his servants. Later, the "Command theory" of Austin emerged under which a master was liable only for those acts of his servants which he had ordered or which he has subsequently ratified.[2] With the increasing complexity of commerce and industrialization, it became obvious that it was no longer practicable for an employer to always control the acts of his servants, particularly those employed in large businesses.

The modern theory of vicarious liability is based not on fault but on consideration of social policy.[3] It may seem unfair and legally unjustifiable that a person who has himself committed no wrong should be liable for a wrongdoing of another. On the other hand, it may be argued that a person who employs others to advance his own economic interests should be held liable for any harm caused by the activities of those employees,[4] and that

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2 G. Kodilinye and O. Aluko, The Nigerian Law of Torts, *Spectrum Law Series, Revised Edition*

3 I.C.I Ltd. V. Shatwell (1965) A.C. 656, at p. 686

4Duncan v. Finlater (1839) 7 E.R. 934, at p. 940, per Lord Brougham.

the innocent victim of the employee's tort should be able to sue a financially responsible defendant[5], who can always take out an insurance policy against liability.[6] In most cases, the employee will not have the resources to pay the plaintiff's damages, and so will not be worth suing.It is against this background that this long essay seeks analyze the different employment relations and the extent of the liability of the employer for the wrongs of the employee.

2.1 The Tort of Vicarious Liability

The Black's Law Dictionary defines vicarious liability as liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties. According to Malemi, it is any situation where one person is liable for the conduct, or tort of another person, because of a relationship existing between them and the wrongdoer. Vicarious liability holds an employer liable for the wrongs committed by his/her employees, otherwise known as 'helpers' in the course of their employment.

The courts have also given judicial interpretation to the concept of vicarious liability. In *Launchdury v Morgans*[7] the court posited that vicarious liability means one person takes the place of another as far as liability is concerned. Also, in the Nigerian case of *Sharon Paint &Chemical Co. Ltd v Ezenwa*[8] the court held that vicarious liability is an indirect legal responsibility, such as the liability of an employer for the act of an employee, or a principal for torts of an agent. It is the master that must be responsible for the actions of the servant. It cannot be otherwise since the law cannot operate inversely.

The doctrine of vicarious liability enables the innocent victim to sue the person that has the financial capacity to pay for damages. Being aware of potential damages because of tort committed by his/her employees, the employer most times ensures against this liability and the cost of insurance is reflected in the cost it charges its customers. Also, vicarious liability is usually rationalized based on who is the superior (let the superior answer to the claim) and *qui facit per aliumfacit per se* (he who does a thing through another, does it himself).

In the United Kingdom Supreme Court in a unanimous decision reiterated the accurate position that liability in law of tort depends upon proof of a personal breach of duty but to that principle, there is at common law only one true exception, namely vicarious liability. Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty but is held liable as a matter of public policy for the tort of the other.

5*Ibid*. (n. 1)

6*Ibid.*

7 (1973) AC 127

8 (2001) FWLR (Pt. 43) 290

It is a rule of convenience. Although the primary tortfeasor is personally liable for his negligence, the claimant will however have the choice to sue the employer because he has the deeper pocket. The modern theory of vicarious liability is based not on fault but on consideration of social policy. A person who has employed others to advance his own economic interest should be held responsible for any harm caused by the activities of those employees and that the innocent X action should be able to sue a financially responsible defendant who can always take out an insurance policy against liability.

The vicarious liability of an employer is limited in application. To establish vicarious liability, the claimant must show:

a. The employee committed a tort.
b. The existence of an employer/employee relationship.
c. The employee acted in the course of employment when committing the tort.
d. Commission of a tort by a servant

Similar provisions are contained in the Torts Law of Anambra State. Section 19 of the Torts Law of Anambra State deals strictly with vicarious liabilities. It provides that a master shall be liable for all torts committed by his agent if:

1. He expressively authorized his agent to commit the tortuous act.
2. He subsequently ratifies the tortuous act, or
3. The agent committed the tortuous act while acting within the scope of the general authority given to him by his principal.

The vicarious liability of the master arises only on the primary liability of the servant. Where it is impossible to prove affirmatively which one of several servants was negligent as far as liability of hospitals is concerned it has been established in *Cassidy v. Ministry of Health*[9] that where the plaintiff has been injured as a result of some operation in the control of one or more servants and which the particular servant responsible cannot be identified, the hospital will be vicariously liable unless absence of negligence can be proved. The claimant must prove that the employee's conduct satisfies all the requirements of the tort in question.

a. The Employee Committed a Tort

It must be established that the employee committed the said tort. This entails some overt acts carried out by him or her.

b. The Existence of an Employer/Employee Relationship

The court draws a distinction between a contract of service or employment and a contract for services where a person is employed as an independent contractor. Generally, an employer is not vicariously liable for the tort of independent contractor. Several factors are used by the courts which include:

9 (1951) 2 KB 343

(1) The terms of the contract

The courts have stated that they will not be governed by the wordings of the contract but will examine the substance of the contract. In it was agreed between the parties that workers employed on the building site would be "self-employed labour only sub-contractor". The plaintiff haven been injured on the defendant" s building site sued for breach of statutory duty. The court held that the relationship was one of employer and employee and the defendants were liable. The defendants could dismiss, move, tell them what work to do and provided then with tools thus were employees and not independent contractor.

(2) Control

The traditional test for determining this question is that of control. A servant or is a person employed by another to do work on the terms of his employer whereas a independent contractor is his own master. A servant is to obey the employee's orders from time to time while a independent contractor exercises his own discretion as to the mode and time of doing it. He is bound to the contact but not by his employer's order. In *Collins v. Hertfordshire*[10], Hilbery J., held that in a contract for services, a master can order what is to be done while in a contract of service, a master cannot only order what is to be done but how it shall be done. In an advanced technological age, employees are frequently expected to exercise discretion and initiative in their performance. Professionals with skill and experience do not expect to be told what to do and how to act each working day. E.g. Doctors, Pilots, etc Cooke J in *Market Investigations v. Minister for Social Security*[11] said that control will no doubt always have to be considered although it can no longer be regarded as the sole determining factor.

(3) Organizational Test

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 services, his work, although done for the business is not integrated into it but is only accessory to it.

(4) The Relationship as a Whole/Multiple Test

The court must take into consideration several factors in addition to the terms of the contract and the control test. They include: (a) payment of wages and National Insurance contribution (b) an indefinite term of employment (c) a fixed place and time of performance (d) provision of equipment/materials by employer and degree of financial risk/investment taken by the worker (f) whether the worker can profit from his/her performance (g) whether the worker must hire his own assistants (h) whether the work is integrated or accessory to the business (i) whether there are mutual obligations on both parties. A contract of employment is indicated where there is an obligation on the employer to provide and pay for work and an obligation on the worker to be ready and willing to work. In *Stephenson*

10 (1947) 1 All ER 633

11 (1969) 2 QB 173

v. Delphi Diesel Systems Ltd[12], Elias J., stated that the mutuality is to determine if there is a contract in existence or not while control is to determine the type of contract (of/for) services.

In answering the question on whether a contract is one of service or for service, the SC in *Shena Security Ltd v. Afropak (Nig) Ltd*[13]., where there were two separate oral contract whereby Afropak subsequently terminated the contract unilaterally, the SC held that where there is a dispute as to kind of contract the parties enter, the factors which usually guide a court include:

(i). If payments are made by way of "wages"/" salaries" or by way of "fees"/ "commission".

(ii). Where the employer supplies the tools and other capital equipment, there is a strong likelihood that the contract is that of employment service. But where the person engaged has to invest and provide capital for the work to progress.

(iii). Whether the contract allows a person to delegate his duties.

(iv). Where the hours of work are not fixed, it is not a contract of employment.

(v). A contract which allows the work to be carried out outside the employer's premises is more likely to be a contract for service.

(vi). Where an office accommodation and a secretary are provided by the employer, it is a contract of service.

Lending a Servant

Where X, the general employer of Y, agrees to lend Y to Z and whilst in the temporary service of Z, Y commits a tort, the general employer will remain liable unless he can prove that at the time the tort was committed, he had divested himself of all control over the servant. *In Mersey Dock &Harbour Board v. Coggins & Griffith Ltd*[14], the appellants employed Y as a driver of a crane and hired him together with crane to the respondent. In course of loading a ship, Y negligently handled the crane and injured a third party. It was held that it is not sufficient to show that the respondents controlled the task to be done but the manner it is to be done and where a man driving a mechanical device such as a crane, is sent to perform a task it is easier to infer that the employer continues to control the method of performance. The appellants were vicariously liable. In *Rotimi v. Adegunle*[15] where the appellant hired a lorry along with a driver from the respondent to convey some logs from Ibadan to Abeokuta and in the course of the journey due to the negligence of the driver, the lorry collided with a tree thus injuring the appellant. It was held that the respondents were vicariously liable.

Lord Porter in *Mersey Dock & Hawley v. Luminar Leisure*[16], a night club was found to be vicariously liable for a doorman hired under a contract for the provision of security services where the doorman could be shown to be acting under the orders of the night club manager.

12 (2002) 11 WLUK

13 (2008) 18 NWLR (Pt. 1118) 77 SC

14 (1947) AC 1

15 (1959) 4 FSC 19

16 (2006) EWCA civ 18

In *Viasystems (Tyneside) Ltd v. Thermal Transfer Ltd*[17], the court held that where both employers exercised some form of control over the employee then both might be liable. The court outlined three alternatives. The general employer, the temporary employer or both employers are jointly liable.

c. The Employee Acted in the Course of Employment

It has been established that the employer cannot simply argue that the employee was not employed to commit torts and was therefore acting outside the course of his employment as it would undermine the whole concept of vicarious liability. The employee is held to be acting in the course of employment if his conduct is authorized by the employer, is an unauthorized means of performing the job for which he or she is employed (actions closely connected to the job for which the *tortfeasor* is employed). The course/scope of employment will depend on the facts of each case. In *Century Insurance v. NI Road Transport Board*[18], a driver of a petrol lorry was held to be acting in the course of employment when he discarded a lighted match which he used to light a cigarette while delivering petrol which caused an explosion. Lighting a cigarette was held to be an act of comfort and convenience which would not be treated as outside the scope of employment. A deviation or interruption from a journey taken in the course of his employment will unless incidental, take the employee out of the course of employment for the time being.

In *Whatman v. Pearson*[19] where the employee had against strict instructions chosen to travel home for dinner by horse and cart. His employers were held liable for the damage caused when the horse escaped due to the employee's negligence. In *Storey v. Ashton*[20], the court held that an employee who after business hours had driven to a friend's house was not in the course of employment thus the employer was not liable for injuries suffered by the plaintiff due to the employee's negligent driving.

Even if conduct is expressly prohibited by the employer, it does not mean an employee has acted outside the scope of employment. Where the prohibition limits scope of employment, there is no vicarious liability. Where the prohibition limits the conduct in the course of employment, the employer will still be vicariously liable.

In *Limpus v. London General Omnibus Co*[21], the company's instructions not to race with or obstruct other buses had been disobeyed by one of its drivers which led to a collision with the plaintiff's bus. The court held the company vicariously liable for the driver's negligent actions as it was an improper and unauthorized mode of doing an act which he was authorized to do. In *Rose v. Plenty*[22], where a milkman had been warned not to allow children to assist him nor to allow passengers on his float. He however engaged the plaintiff

17 (2006) 2 WLR 428

18 (1942) AC 509

19 (1868) LR 3CP 422

20 (1869) LR 4 QB 476

21 (1862) 158 ER 993

22 (1976) 1 WLR 141

aged 13, to help him who was injured due to the milkman's negligence. The court held that the purpose of the prohibited act was to further the employer's business, therefore the act was in the course of employment.

Employers have been found liable for crime such as assault, theft and fraud which are also torts. In *Poland v. John Parr & Sons*[23], where the defendants were found liable for their employee assaulting a boy whom he believed had stolen a bag of sugar from his employer's wagon. In Lloyd v. Grace, Smith & Co, a firm of solicitors was found vicariously liable for the fraudulent activities of its managing clerk who had defrauded a widow of her property as they had given the employee actual or ostensible authority. In *Lister v. Hesley Hall Ltd*[24], a warden of a home for boys with emotional and behavioral difficulties had systematically sexually abused some of the boys under his care. The employers were held vicariously liable as the intentional tort was closely connected to the work the perpetrator was employed to do. To establish a close connection, the court examined the nature and purpose of the job as well as the circumstances and context in which the act took place.

In *Mattis v. Pollock (Flamingo's Nightclub)*[25], the court found the employers vicariously liable when a guest at a nightclub was stabbed by the bouncer outside the club. The court held that since the employee had been encouraged by his employer to keep order by violent behavior, the employers were vicariously liable for assault linked to the incident in the nightclub. In *Att.-Gen of the British Virgin Island v. Hartwell*[26], where a policeman shot at his partner and her companion after abandoning his post and duties in a fit of jealous rage. The court held that the police authorities were not vicariously liable for the vendetta.

3.1. Comparative Analysis of Canadian Vicarious Liability Law

The Supreme Court of Canada considered the doctrine of vicarious liability in the context of two sexual abuse cases involving employees. The Supreme Court of Canada decisions in *B. (P.A.) v. Curry*[27] and *T. (G.) v. Griffiths*[28] provide important guidelines to be used in assessing whether an organization will be vicariously liable for its employee/volunteer's actions.

An employer will be held vicariously liable for the acts of an employee or volunteer in two circumstances: (1) where the employee's actions were authorized by the employer; and (2) where the employee's unauthorized acts are so connected with his or her authorized acts that they can be characterized as modes of conducting the employer's business. Finding liability in the first instance is merely a matter of establishing whether the act was authorized. Where it is clear that the act was unauthorized, the court's task is a bit more

23 (1927) 1 KB 236

24 (2002) 1 AC 215

25 (2003) 1 WLR 2158

26 (2004) 1 WLR 1273

27 [1999] S.C.J. No. 35

28 [1999] S.C.J. No. 36

complicated. Where the employee's acts are unauthorized, the court must first look at previous cases decided on similar facts. Where the previous cases are inconclusive, the court must go on to consider the policy that underlies the doctrine of vicarious liability. The policy can be summarized as:

(a) Providing a remedy for the harm committed, and
(b) To deter future harm.

The policy is bolstered by the "enterprise risk" created by the employer that is the extent to which the employer's enterprise has introduced or aggravated the risk that such harm would happen. To find liability on policy grounds, a strong connection must be established between the employee's authorized and unauthorized acts. Relevant factors in reaching this conclusion include:

(a) The opportunity given to the employee by the enterprise to abuse his or her power;
(b) The extent to which the unauthorized acts may further the enterprise's aims;
(c) The extent of power conferred on the employee in relation to the victim;
(d) The extent to which the act was related to friction, confrontation or intimacy inherent in the employer's enterprise; and
(e) The vulnerability of the potential victims.

The fact that the unauthorized acts took place while the employee was working, or on the employer's property, is an insufficient connection on its own.
The Supreme Court of Canada was clear that an exemption from vicarious liability is not available to non-profit organizations. That said, the majority in *Griffiths* did indicate that the policy reasons for imposing vicarious liability are weakened in such circumstances, indicating that there may be a higher standard in establishing a strong connection where a non-profit organization is involved.

The facts of the case before the Supreme Court of Canada in *Curry* involved the sexual abuse of a boy living in a residential facility run by the Children's Foundation, a non-profit organization. The abuse was perpetrated by one of the Foundation's employees who was authorized to act as a parental figure for the boy, and specifically to care for the child in doing everything a parent would do. The employee's tasks included general supervision, as well as bathing and tucking in at bedtime. The Foundation was held to be vicariously liable. Right on the heels of the Curry decision, the Court released its decision in *Griffiths*. This case involved the sexual abuse of children by a Program Director at the Boys' and Girls' Club, a non-profit recreational group for children. The Program Director developed relationships with his victims at the Club; however, all but one of the incidents of abuse took place off the Club premises and outside of his work hours. The Program Director was authorized to act as a mentor to the children, but it was not part of his job to be alone or in close physical contact with the children. In a split decision, the Supreme Court of Canada held that the Club was not liable for the Program Director's unauthorized acts. The fact that the Court split in reaching this decision demonstrates the difficulties in applying the test which was set out in Curry.

These Supreme Court of Canada decisions in *Curry* and *Griffiths* do not provide any easy answers. The split-decision in *Griffiths* demonstrates that the difficulties in predicting the outcome of cases based on vicarious liability will continue. That said, the decisions provide a useful framework in which to consider cases involving vicarious liability and clarify the policy reasons which underpin this complicated doctrine.

The recent decision in *Dagenais v. Pellerin*[29] was upheld by the Court of Appeal. The trial judge found that the employer failed to demonstrate that they were not vicariously liable for the motor vehicle accident. The employee had been instructed by his supervisor to travel to a job site two hours away. While travelling, the employee stopped for a coffee along the way. As the employee returned to his vehicle and continued his journey, he struck another vehicle. The stop taken by the employee was found to have no basis or interference. The tort of vicariously liability in Nigeria and Canada shares a similar approach. However, the Canadian jurisdiction appears more advanced and holistic. Firstly, its policy considerations are such that seek to attach liability to the one who is most deserving of same. In cases involving express prohibition, the Canadian courts maintain that the fact that the unauthorized acts took place while the employee was working, or on the employer's property, is an insufficient connection on its own. In Nigeria, express prohibition avails the employer only where the prohibition is as to the scope of the work to be done, not in the manner of the work. Again, it is clear in the Canadian jurisdiction that an exemption from vicarious liability is not available to non-profit organizations. Understandably, this flows from the fact that such organizations exist for public good. As such, it is not expected that it should turn around to harm the people and plead exemption from vicarious liability.

4.1 Conclusion and Recommendations

Based on the findings of this research, the following recommendations are proffered:

1. First, to avoid potential liabilities as much as possible, employers should carry out thorough due diligence while selecting or hiring their employees. They should ensure that employees with the right competence, experience, and expertise in their duties are hired. And for no reason should priority be given to race, colour, religion above merit and competence. This is because any tort committed or negligence towards third parties by these employees will ultimately be borne by the employers. Taking this step by the employer will go a long way in drastically mitigating their vicarious liabilities.
2. The court in Nigeria should adopt an approach that tends in favour of the employee in appropriate cases especially with the inhuman use of labour even among independent contractors.
3. Again, in order to make the employees more careful in their dealings with third parties, where it is so obvious that the tort was negligently or intentionally committed, though the employer will still be vicariously liable, the employee can be made to bear the brunt of the financial implications of their negligence. This

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can be achieved by allowing employers to bring in the negligent employees into the suit. This should be contained in their conditions of service. Where this is not possible, such an employee's appointment can be terminated without benefit.

4. There should also be incentives put in place by the employees to avoid acts that could make their employers vicariously liable. There should be prerequisites like an accident- free bonus and other valuable incentives for drivers that have not recorded an accident over a specific period. This will make him more careful in his manner of driving. Incentives matching various jobs should also be given to the employees concerned. Provision of incentives has a way of boosting the morale of employees. It gives the employees the feeling that they are being appreciated and it helps motivate them to always do more.
5. Furthermore, the phrase *in the course of employment* should be reasonably construed to the benefits of both the employers and the employees by the lawmakers. It should not be too broad to make the employer vicariously liable in virtually all situations, and it should not be too narrow to make the employer escape vicarious liability to the detriment of the employee. After all, the reason for the employer-employee relationship is to be mutually beneficial and not to be parasitic.
6. Also, employers should be relieved from some criminal acts of the employees where monetary compensation may be inadequate or irrelevant, such as assaults, sexual harassment or murder. However, they can be responsible for theft and falsification of records by their employees when such are committed in the course of duties. The rationale relied upon by the judiciary that most employers are negligent in hiring their employees cannot hold water because employers are not angels who will know the secret intents of a man's mind. After standard procedures have been applied in the process of hiring employees, they (the employees) should be made personally liable for any crime committed irrespective of whether it is committed in the course of duties or not. Employers should only be made liable if they are the ones that authorized the crime, as it appears unreasonable if the employer is held liable for the crimes committed by his employee just because the latter is a servant of the master and he committed the crime in the course of his duties. Employees can refuse to obey unlawful order of the employer, such as the cases of commission of a crime, since what the law generally requires from employees is obedience to lawful instructions of their employers. The consequences of crimes should be personally borne by the criminals.
7. With respect to Vicarious Liability and Digitization while many employees continue to work from home, residential homes will often be shared with those who do not work for the same company and may even work for competitors. This means employers don't have the same level of control and cannot easily ensure the same standard of data security that applies as in a traditional office environment. Confidential documents or conversations may be easily accessible to others who you would not normally allow into your office. Employees may also make personal use of technology, exposing the company to security risks. As

working from home continues for the foreseeable future, employers should take steps to minimize these risks; for example, by asking employees to:

a. use headphones and/or a separate workspace for particularly sensitive calls.
b. use privacy screens where appropriate.
c. shred confidential documents.
d. lock computer screens and not share technology computers with others; and
e. take part in data security training refreshers – with a requirement to confirm compliance with guidelines.