

MODERN APPROACH TO THE DOCTRINE OF VICARIOUS LIABILITY

*By Bizibrains Okpeh**

Introduction

Vicarious liability is a species of torts that consists in fixing an employer with liability for the tort committed by his employee while the latter is in the course of his employment. The mechanics of vicarious liability may be illustrated thus; where 'A' employs or engages 'B' to work in 'A's vineyard, and 'B' in so doing intentionally or negligently causes injury to 'C'. 'A' will be liable to 'C' in damages for the injury inflicted by 'B' upon 'C' while working for 'A'; provided that 'B' would have been otherwise liable.

Based on social justice and of universal acceptance, more so in common law regimes, it is adapted to the specific needs and peculiar circumstances of each jurisdiction, so that even within the same jurisdiction, though the core of the doctrine may remain unchanged, specific facts and circumstances may necessitate a variation in the interpretation of its elements by the courts, to broaden or limit liability, whichever is desirable in the circumstances. Thus, it is the need to enquire into the complexities of this legal phenomenon, respecting how it has developed, what stage it has reached, and whether it requires significant change (in Nigeria) as well as to demystify the various hypothesis inherent in the operation of the doctrine that forms the crux of this work.

Finally, this work concludes that the modern approach to vicarious liability is expansive and progressive and leans towards ensuring adequate compensation to victims of torts committed by employees in the course of their employment. It recommends a broader or wider approach to the doctrine in Nigeria.

Meaning of Vicarious Liability

The concept of vicarious liability has no one universally accepted definition that is conclusive enough to preclude all other definitions. The matter is made worse when we consider that there appears to be no statutory definition of the concept. What follows hereunder are the various attempts by text writers and judicial formulations aimed at defining the concept.

The Black's Law Dictionary¹ 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.' On its part, the Oxford Dictionary of Law² defines vicarious liability as the legal liability imposed on one person for torts or crimes committed by another although the person made vicariously liable is not personally at fault. According to Malemi,³ 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. Making his contribution, Nwoke⁴ posited that 'Generally speaking, vicarious liability is a term used in describing situations in which a person is held liable for damage caused either by the negligence or other act of another.' Vicarious liability holds an employer liable for the wrongs committed by his/her employees, otherwise known as 'helpers' in the course of their employment.⁵

The courts have also given judicial interpretation to the concept of vicarious liability. In *Launchdury v Morgans*⁶ 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*⁷ 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.⁸

This study, therefore, conceives vicarious liability as the liability of an employer for the wrongs of his employee in the course of his employment aimed at ensuring a workable compensation to the objects or victims of such wrongs. It is usually asserted that the doctrine of vicarious liability has the legal effect of totally exonerating a servant from liability for torts occasioned by his

*Okpeh is a lawyer, researcher and analyst. Reach him at bizibrains@gmail.com

¹Garner, BA (ed). 9thedn (Minnesota: West Publishing Co., 2009) p.998

²Martin, EA & Law, J (eds). 6thedn (New York: Oxford University Press Inc., 2006) p.564

³Ese, M. *Law of Tort* (Lagos: Princeton Publishing Co., 2008) p.287

⁴Nwoke, FC. *Law of Torts in Nigeria* (Jos: Mono Expressions Ltd, 2003) p.474

⁵Bell, J. ' The Basis of Vicarious Liability ' (2013) 72 Issue 01 *The Cambridge Law Journal* p.17

⁶ (1973) AC.122 at 135, per Lord Denning

⁷ [2001] FWLR (pt.43) 290 at 312; *Nduka v Ezenwaku* (2006) 6 NWLR (pt.809) 494

⁸See *Sharon Paint & Chemical Co. Ltd v Ezenwa* (*supra*) at 312

See also *IfeanyiChukwu (Osondu) Ltd v Soleh Boneh Nig. Ltd* (2000) 5 NWLR (pt.656)322 at 366; *Thenor Nig. Mechanical Ltd v Ogunbanjo* (2000) 1 NWLR (pt.639) 60 at 127

negligent act or omission during the course of his service under a master.⁹With respect, it is submitted that this view may be misleading. This is because the servant must be liable to ground the liability of the master.¹⁰ In other words, the employer's liability rests, at all times, on the liability of the employee and the former cannot arise without the latter. The master only shoulders the liability of the servant.¹¹

Origin and/or History of Vicarious Liability

It appears text writers are not settled on the origin of the doctrine of vicarious liability. While writers like Holmes contended that the doctrine of vicarious liability originated from Roman law, others like Wigmore opined that it originated from Germany. Still, some other scholars like Baty made light of the origin but concluded that the doctrine came into English law at the close of the 17th century.¹² According to Holdsworth,¹³ during the middle ages, a master was held liable at civil law for all the torts of his servant, and later for only those mischiefs of his servant done by his command and consent.

However, following the expansion of commerce and industry in the 17th century, the ‘command theory’ could no longer stand the test of time, resulting in the enlargement of vicarious liability.¹⁴ The reason for this was two-fold. First, under modern conditions, it was no longer practicable for an employer always to control the activities of his servants, especially in large corporations.¹⁵ Secondly, the increasing complexities of modern business with its attendant hazard meant a wider spectrum of responsibility on the employers than that which they hitherto bore.¹⁶ Eventually, the ‘course of employment theory’ emerged to the effect that a master shouldered the liability for the

⁹ Moor, K. *Vicarious Liability and its Application in Nigeria* (unpublished) A Long Essay Submitted to the Faculty of Law, Benue State University, Makurdi, November, 2011, pp. 5,41

¹⁰ See *Sharon Paints & Chemical Co. Ltd v Ezenwa* (*supra*)

¹¹The fact that the master can sue the employee to claim indemnity does not support Moor’s view. This is because the right of the master to claim indemnity from the servant is grounded on the latter’s liability for the tort occasioned by him to a third party, in which tort the master had hitherto made good. If the servant were to be totally exonerated from liability as Moor would have us indulge him, then such claim for indemnity from the servant would have been baseless. But as already noted, this is far from being the position of the law in Nigeria and England.

¹²Ikwue, EA. *The Application of the Principle of Vicarious Liability in Nigeria* (unpublished) A Project Submitted to the Faculty of Law Benue State University, Makurdi, August, 1999, p.5

¹³Holdsworth, WS. cited in *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11 at 5, per Lord Toulson

¹⁴*Ibid*

¹⁵Kodilinye, G. & Aluko, O. *The Nigerian Law of Torts* 2ndedn (Ibadan: Spectrum Law Publishing,1996) p.235; Ogbaegbe, KN. ‘Vicarious Liability of Persons Working in Hospitals: An Appraisable Critique’ (2010) 2 pt.2 *Confluence Journal of Private and Property Law* p.42

¹⁶*Ibid*

torts of his servants, whether or not the master authorised or ratified it, or manifestly forbade it, provided that the wrongful act complained of occurred in the servant's course of employment.¹⁷ Thus, by the 19th century, vicarious liability has assumed a modern outlook in England. And in this guise, it is founded not on fault but consideration of social policy,¹⁸ driven by the need to ensure an effective system of compensation to victims of torts occasioned by employees in the course of their employment, as in the words of Abdulkarim,¹⁹ a person wrongfully injured should not be left without a claim, or at best, a hollow claim.

Under Nigerian law, the doctrine of vicarious liability is relatively nascent. Following its development in England, the doctrine was eventually exported to Nigeria as part of the received English law.²⁰ Since the reception, therefore, the doctrine of vicarious liability was incorporated into our legal system has remained part of our law.

Rationale and/or Justification for Vicarious Liability

The rationales for vicarious liability are not far-fetched. According to Ghandi,²¹ vicarious liability can be justified on the grounds of policy considerations and social insurance. The policy considerations are what Lord Simonds referred to as the product of social necessity²² and to Sir John Holt, it is public policy.²³ Thus, Lord Pearce concluded that the doctrine has not grown from any very clear logical or legal principle but social convenience and rough justice.²⁴

Also, as a scheme of social insurance, it is usually asserted that the doctrine of vicarious liability enables the innocent victim to sue the party most probable to ensure compensation.²⁵ Knowing of potential liability for the torts of his/her servants, the employer ("usually") insures against these liabilities and the cost of insurance is reflected in the price it charges to its customers. Thus, the employer is the most suitable channel for passing the losses on through liability insurance and higher prices.²⁶ Also, vicarious liability is usually rationalised based on *respondent superior* ("let

¹⁷*Ibid*

¹⁸*I.C.I. Ltd v Shatwell* [1965] A.C 656 at 686; *Mohamud v WM Morrison Supermarkets Plc (supra)* at 12

¹⁹Abdulkarim, I. 'The Philosophy Behind the Concept of Vicarious Liability (2007-2009) 2 & 3 *Journal of Private and Comparative Law* p.76

²⁰ See the Interpretation Act CapI23 Laws of the Federation of Nigeria, 2004 Section 32(1)

²¹Ghandi, MB. cited in Abdulkarim, *Op cit* p.82

²²*Ibid*

²³*Mersey Docks and Harbour Board v Coggins & Griffiths* (1947) A.C. 1 at 8

²⁴See *Mohamud's case (supra)* at 6

²⁵Kodilinye & Aluko, *Op cit* p.235; Ogbaegbe, *Op cit* p.42

²⁶Abdulkarim, *Op cit* p.83

the superior answer”) and *qui facit per alium facit per se* (“he who does a thing through another, does it himself”).

In *Various Claimants v Catholic Child Welfare Society*,²⁷ Lord Phillips summarized the rationale to the effect that (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability, (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer, (iii) the employee’s activity is likely to be part of the business activity of the employer, (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee, and (v) the employee will to a greater or lesser degree, have been under the control of the employer. These factors are not all of equal importance.²⁸

Relationships That May Give Rise to Vicarious Liability

As a tort, vicarious liability requires a special relationship between the defendant and the wrongdoer.²⁹ In other words ‘vicarious liability in tort is imposed upon a person in respect of the act or omission of another individual, because of his relationship with that individual.’³⁰ This relationship includes employer/employee relationship,³¹ principal/agent,³² employer/independent contractor,³³ car owner and casual agent,³⁴ parent/child,³⁵ partnership relationships,³⁶ *inter alia*. Note, however, that the principle of casual agency may be presumed.³⁷

Tests for Vicarious Liability

²⁷ [2012] UKHL 56; [2013]2 ACI (“the Christian Brother Case”) at 11; *Cox v Ministry of Justice* [2016]UKSC10 at 7; See also Bell, J. ‘The Basis of Vicarious Liability’ (2013) 72 Issue 01 *The Cambridge Law Journal* p.18

²⁸ See *Cox v Ministry of Justice* [2016] UKSC 10 at 7-8, per Lord Reed.

²⁹ See *Mohamud v WM Morrison Supermarkets Plc* (*supra*) at 1; *Cox v Ministry of Justice* (*supra*) at 6

³⁰ *Cox v Ministry of Justice* [2016] UKSC 10 at 6, per Lord Reed (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson agreed)

³¹ *Ibid*

³² See *Iyere v B.F.F.M Ltd* (*supra*) at 329

³³ *Okechukwu v Anigbogu* (1973)3E.C.S.L.R 159

³⁴ See *Omrod v Crossville Motor Services Ltd*[1953]1WLR 1120 at 1122, per Lord Denning; *Akinsanya v Longman* [1996] 3 NWLR (pt.436) 303 at 313; *Garba v Gaji* [2002] FWLR (pt.84) 1 at 7, per Mukhtar, JCA; *Odebunmi v Abdullahi* [1997] 2 NWLR (pt.489) 526 at 529

³⁵ *Abdulkarim, Op cit* p.85

³⁶ See the Partnership Law Cap119 Laws of Benue State of Nigeria, 2004 Sections 10 &13

See also *Cox v Ministry of Justice* (*supra*) at 6

³⁷ See *Akinsanya v Longman*(*supra*) at 318

In *IfeanyiChukwu v Soleh Boneh Ltd*³⁸ the Supreme Court held that for a plaintiff to succeed in a claim for vicarious liability, he must establish the existence of three elements, to wit (i) that the wrongdoer is liable for the tort (ii) that the wrongdoer is the servant of the master and (iii) that the wrongdoer acted in the course of his employment with the master.

Tortfeasor's Liability Test

For vicarious liability to lie the plaintiff must establish that the servant (tortfeasor) is first and foremost liable for the tort.³⁹ In the recent case of *Iyere v B.F.F.M Ltd*⁴⁰ the Supreme Court held that 'for the plaintiff to succeed in an action against the master, he must produce sufficient evidence from which the court makes a finding of fact to the effect that the servant is liable for the tort complained of.' Although the liability of the master is founded on that of the servant, the master cannot take advantage of immunity from suit conferred on the servant.⁴¹

Special Relationship Test

Yet another element that must be established by the plaintiff to succeed in an action for vicarious liability is that of a special relationship.⁴² The purport of this test is that there must exist some kind of relationship between the wrongdoer and the master, being a relationship recognized by law as capable of fixing the master with the liability for the tort committed by the servant in the course of his employment.⁴³ Generally, this relationship is classically one of employment.⁴⁴ But who is an employer or an employee? The Labour Act⁴⁵ defines an employer⁴⁶ as 'any person who has entered into a contract of employment to employ any other person as a worker...'⁴⁷ On the other

³⁸ [2000] FWLR (pt.27) 2046 at 2065, per Ogundare, JSC

³⁹See *Obi v Biwater Shellabear (Nig.) Ltd* [1997] 1 NWLR (pt.484) 722 at 735-736, per Orah, JCA

⁴⁰*Supra* at 332; [2001]7NWLR (pt.711) 76 at 86, per Rowland JCA; *IfeanyiChukwu Ltd v Soleh Boneh Ltd* [2000] FWLR (pt.27) 2046 at 2065, per Ogundare, JSC; *Afribank (Nig) Plc v Shanu* [1997] 7NWLR (pt.514)601 at 635-636

⁴¹*IfeanyiChukwu Ltd v Soleh Boneh Ltd (supra)* at 2065, per Ogundare JSC

⁴²*Ibid*

⁴³*Cox v Ministry of Justice (supra)* at 6; *Mohamud v WM Morrison Supermarkets Ltd (supra)* at 2

⁴⁴*Ibid*

⁴⁵CapL1 Laws of the Federation of Nigeria, 2004 Section 91

⁴⁶ An employer is variously referred to as a master. Though the latter term is old fashioned, gives the notion of slavery, and there is a tendency to abandon its use, both terms may be used interchangeably in this study.

⁴⁷See also the Employee's Compensation Act, 2010 Section 73

hand, the Act⁴⁸ also defines a worker⁴⁹ as ‘any person who has entered into or works under a contract with an employer...’⁵⁰ From the above statutory definitions, it is shown that the employer/employee relationship arises out of a contract of employment.⁵¹

Notwithstanding the above statutory definitions, certain difficulties may arise in an attempt to categorize the employer/employee relationship. Thus, at common law, three tests have evolved over a period of time in determining the relationship of master/servant. These tests include the control test,⁵² the organisation test,⁵³ and the multiple tests.⁵⁴

Course of Employment Test

For an employer to be liable for the tort of his employee, the employee must have committed the tort in the course of his employment.⁵⁵ In the recent case of *B.P.E (Nig.) Ltd v Roli Hotels Ltd*,⁵⁶ the Court of Appeal, adopting the definition of the Black’s Law Dictionary defined scope of employment as the range of reasonable and foreseeable activities that an employee engages in while carrying out employer’s business. The difficulty with the course of employment test has so much to do with the phrase itself as much as the activities that could come within it. This difficulty is manifested in the various tags that are associated with the test including but not limited to ‘scope of employment test,’⁵⁷ ‘close connection test,’⁵⁸ ‘field of activities test’⁵⁹ and ‘sphere of

⁴⁸CapL1 Laws of the Federation of Nigeria, 2004 Section 91

See also *Shena Security Co. Ltd v Afropak (Nig) Ltd* [2008] 18 NWLR (pt.1118) 77 at 94; *Iyere v B.F.F.M Ltd* [2008] 18 NWLR (pt.1119) 300 at 325-326

⁴⁹ The term ‘employee’ is variously referred to as servant, worker, or workman and may be so used in this study

⁵⁰ See also the Employee’s Compensation Act, 2010 Section 73

⁵¹ The Labour Act, Cap L1 Laws of the Federation Nigeria, 2004 Section 91 defines a contract of employment as any agreement, whether oral or written, express or implied whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker.

See also *Shena Security Co. Ltd v Afropak (Nig) Ltd (supra)* at 94; *Iyere v B.F.F.M Ltd (supra)* at 325-326

⁵² See *Union Bank Nig. Ltd v Ajagu* (1990) 1 NWLR 328 at 343

⁵³ See *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* (1952) 1 TLR 101, Lord Denning L.J

⁵⁴ See *Performing Right Society Ltd v Mitchell & Broker* (1924) 1 KB 762 at 767, per McCredie J

⁵⁵ See *B.P.E (Nig) Ltd v Roli Hotels Ltd* [2006] All FWLR (pt.314) 238 at 277, per Ngwuta, JCA

⁵⁶ *Supra* at 276, per Amaizu, JCA

⁵⁷ See *B.P.E (Nig) Ltd Roli Hotels Ltd (supra)* at 276; *Various Claimants v Catholic Child Welfare Society* [2012] UKHL 56; [2013] 2 AC

⁵⁸ See *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] AC 215; *Dubai Aluminium Co. Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, per Lord Nicholls; *Bernard v Attorney-General of Jamaica* [2004] UKPC 47; *Brown v Robinson* [2004] UKPC 56; *Majrowski v Guy’s & St. Thomas’s NHS Trust* [2006] UKHL 34; [2007] 1 AC 224

⁵⁹ This phrase seems to have been first used by Lord Cullen in the English case of *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co.* 1925 SC 796. It was followed by the United Kingdom Supreme Court in the most recent case of *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11

employment test.⁶⁰ Though these phrases appear to be similar, yet each may have far-reaching legal implications distinct from the other.⁶¹

Although various phraseologies are used in determining when an activity is within the scope of employment of the employee, these are far from being conclusive. In the recent case of *Julius Berger (Nig) Plc v Ogundehin*⁶² the Court of Appeal held that a servant's wrongful act is deemed to be in the course of his employment if it is 'a wrongful and unauthorized mode of doing some act authorized by his master' or a wrongful act authorized by the master.⁶³ Perhaps, a very controversial area⁶⁴ of this test is the effect of an express prohibition upon an employee not to act in specified ways in the course of his employment. This prohibition may limit the sphere of employment in which case the employer will not be liable, or may deal only with conduct within the sphere of employment in which case the employer will not escape liability.⁶⁵ Where an employee commits the tort complained of outside the scope of his employment, he is said to be on a frolic of his own,⁶⁶ and whether a tortfeasor's conduct amounts to a frolic of his own is a question of degree.⁶⁷

Vicarious Liability of Juristic Persons

A juristic person (artificial person) is an entity such as a corporation that is recognized as having a personality, that is, it is capable of enjoying and being subject to legal rights and duties, it is contrasted with a human being, who is referred to as a natural person.⁶⁸ It is also called a juridical or moral person.⁶⁹ Generally, at law and in equity a 'person' subsumes both natural and artificial person.⁷⁰ Therefore, like natural persons, juristic persons are subject to the operation of vicarious

⁶⁰See Mohamud's case (*supra*) at 12; *plumb v Cobden Flour Mills Co. Ltd* [1914] AC 63;

⁶¹In *Mohamud v WM Morrison Supermarkets Plc* (*supra*) at 12, the United Kingdom Supreme Court, per Lord Toulson held to the effect that the phrase 'within the field of activities' conjures a wider range of conduct than acts done in furtherance of employment.

⁶²[2013] All FwLR (pt.676) 497 at 532, per Ndukwe Anyanwu, JCA

See also *N.BN Ltd v T.A.S.A Ltd* (1996) 8 NWLR (pt.468) 511; *U.B.N Ltd v Ajagu* (1990) 1 NWLR (pt.126) 328; *Awachie v Chime* (1990) 5 NWLR (pt.150) 302; *Afribank (Nig) Plc v Adigun* [2009] 11 NWLR (pt.1152) 329 at 349

⁶³See *Iyere v B.F.F M Ltd* (*supra*)

⁶⁴Iweoha, PI. 'Master and Servant Relationship: Scope and Application of the Doctrine of Vicarious Liability in Nigeria' (2010) 4 N0.1 Nigerian Journal of Labour Law and Industrial Relations p.17

⁶⁵*Plumb v Cobden Flour Mills Co. Ltd* (*supra*) per Lord Dunedin

⁶⁶*Cox v Ministry of Justice* (*supra*) at 11, per Lord Reed

See also Ese, M. *Law of Tort* (Lagos: Princeton Publishing Co.,2008) p.300

⁶⁷Ese, M. *Ibid* pp.300-301

⁶⁸Oxford Dictionary of Law, Martin, EA & Law, J (eds). 6thedn (New York: Oxford University Press Inc., 2006) p.299

⁶⁹Black's Law Dictionary, Garner, BA (ed). 9thedn (Minnesota: West Publishing Co., 2009) p.1258

⁷⁰Interpretation Act CapI23 Laws of the Federation of Nigeria,2004 section 18

liability both civilly and criminally. While the former has long been accepted, the latter is still approached with a lot of skepticism.⁷¹

Concerning vicarious civil liability, in *IfeanyiChukwu Ltd v Soleh Boneh Ltd*⁷² the Supreme Court of Nigeria made it undoubtedly clear that a corporation is a fictitious person distinct from its members, it is not capable of acting in *propria persona* but acts only through its agents or servants. Thus, the liability of a body corporate is, therefore, in all cases a vicarious liability for the act of other persons.⁷³ On vicarious criminal liability, earlier at common law, a corporation was held criminally liable with respect to nonfeasance which later included misfeasance acts.⁷⁴ Today, a juristic person may be held criminally liable vicariously for all offences with such exceptions as assault, manslaughter, murder perjury, and rape.⁷⁵

However, under English law, a juristic person may be held liable for corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act.⁷⁶ There have been several convictions under the Act.⁷⁷ Under Nigerian law, the position remains that of the common law.⁷⁸ Although the Corporate Manslaughter Bill⁷⁹ is at the National Assembly since 2010, it is yet to see the light of the day. Furthermore, various statutes create strict liability offences under which a corporation may be held strictly liable, albeit vicariously for the criminal acts of its agents or servants.⁸⁰

Ultimate Bearer(s) of the Burden of Vicarious Liability

⁷¹Alschuler, AW. Cited in Iyidiobi, CN. 'Rethinking the Basis of Corporate Criminal Liability in Nigeria' (2015) 13 *The Nigerian Juridical Review* p.107

⁷²*Supra* at 2081, per Onu, JSC

See also *Iyere v B.F.F.M Ltd* [2001]7 NWLR (pt.711)76 at 86, per Rowland, JCA

⁷³*Ibid*

⁷⁴Erhaze, S. & Momodu, D. 'Corporate Criminal Liability: Call for a New Legal Regime in Nigeria' (2015) 3 N0.2 *Journal of Law and Criminal Justice* p.65

⁷⁵See *Moore v Bresler Ltd* [1944] 2 All ER per Stable, J

⁷⁶ See the Corporate Manslaughter and Corporate Homicide Act, 2007 sections 1 & 9

⁷⁷See *R v Cotswold Geotechnical Holdings Ltd* [2001]1 Cr. App; *R v JMW Farm Ltd* [2012]NICC 17;*R v Murray*[2013] NICC 15; *R v Princes Sporting club* [2013] Westminster Crown Court, 375;*R v Pyranba Mouldings Ltd*[2014] EWCA Crim. 533

⁷⁸Iyidiobi, *Op cit* pp.116-117

⁷⁹The Corporate Manslaughter Bill, 2010

⁸⁰In Nigeria, such statutes include but not limited to, the Consumer Protection Council Act CapC25 Laws of the Federation of Nigeria,(LFN)2004 section 9(2); the Companies and Allied Matters Act CapC20 LFN,2004; the Food and Drug Act CapF32 LFN,2004; the Standard Organization of Nigeria Act CapS9 LFN,2004; the Weight and Measures Act CapW3 LFN,2004; the Federal Environmental Protection Agency Act CapF10 LFN,2004; the Failed Bank (Recovery of Debts) and Financial Malpractice in Banks Act CapF2 LFN,2004, *etcetera*.

The popular rhetoric shared by many legal writers is that the employer bears the burden of vicarious liability and *a fortiori* the burden of insurance.⁸¹ While this submission is generally true, it may not always stand the test of legal scrutiny. Thus, the possibilities exist that the burden of vicarious liability may crystallise on any one or a combination of the following, that is, an employer, employee, insurer, and/or the public (consumers or taxpayers).

Employer (insured)

The general notion that the employer answers for the tort of his employee occasioned in the course of his employment and consequently bears the burden of insurance to cover for such liabilities may not always be true. The reasons for this are not far-fetched. First, the claim that the employer bears the burden of insurance is only in theory. This is because, in concrete realities, the employer passes the cost of insurance to the general public, who are the ultimate consumers and from whom he recoups the premium he may have paid on the insurance policy.

Secondly, though statistics are hard to come by in Nigeria, available data suggests overwhelmingly that most employers in Nigeria hardly undertake any liability insurance policy. For instance, as of 2016, Popoola quoting Nigerian Insurance Industry Database (NIID) reported that out of the over 16 million vehicles on Nigerian roads only about 4.3 million have valid auto insurance cover with 12 million having fake motor insurance policies.⁸² This includes both private and commercial drivers, some of whom are employed by transport companies and other employers of labour cutting across various businesses.

Although this is with respect to auto insurance, it may be submitted that it fairly represents the attitude of employers towards liability insurance in Nigeria. Eventually, the employer may resort to his common law remedy of indemnity against the employee to recoup, in whole or part, whatever loss suffered on account of the employee's intentional or negligent torts.⁸³ Under these circumstances, therefore, it can hardly be said (without some measure of arbitrariness or simplification) that the employer is indeed the true bearer of the burden of vicarious liability.

⁸¹See Kodilinye & Aluko, *Op cit* p.235

⁸²Popoola, N. '12 Million Nigerian Motorists Carry Fake Insurance Papers' The Punch Newspapers February 8, 2016 available at <http://punchng.com/12-million-nigerian-motorists-carry-fake-insurance-papers> accessed on 9th January, 2017

⁸³ See *Lister v Romford Ice & Cold Storage Co.*(1957) AC 555

Employee (Tortfeasor)

The employee may eventually bear the cost of his own tort, if not completely, at least partially. This is especially so where the employer brings an indemnity action against the employee.⁸⁴ This position appears to be supported by statute.⁸⁵ Thus, the legal reality that the employer can recover damages both at common law and under statute from his employee for torts committed in the course of his employment only buttresses the eventual ‘personal liability’ of the employee for his own tort. Therefore, whether by complete indemnity or partial contribution, the employee shares some kind of burden for the employer’s vicarious liability.

However, it is humbly submitted that this is not good law. It may have the effect of enriching the insured or the insurer⁸⁶ at the expense of the employee, as against placing a burden on them.⁸⁷ Thus, it is on this note that the modern approach leans towards limiting the employer’s right of indemnity against the employee. A very good example is the position in the Australian State of New South Wales (NSW).⁸⁸

Insurance Company (Insurer)

One of the social effects of insurance on society is that it changes who bears the cost or burden of injuries. Where the employer insures against vicarious liability, the effect is that the burden to compensate any victim of the employee’s torts committed in the course of his employment passes to the insurer (to wit the insurance company) provided that the employer is up to date with his premium in accordance with the policy undertaken.⁸⁹

However, the question is; to what extent can this claim stand? For a start, while in theory, the insurer accepts to shoulder the risk of vicarious liability, when the risk eventually ripens to a loss in practice, the insurer may contest his liability to pay so much so that sometimes, it is actually

⁸⁴*Lister v Romford Ice & Storage Co. (supra)*; *Semtex v Gladstone* (1954)1 WLR per Finmore J; *Saheli v Commissioner of Police* AIR 1990 S.C 513

⁸⁵See the Labour Act Cap L1 Laws of the Federation of Nigeria, 2004 Section 5(1) which seems to support the employee’s liability to indemnify the employer by providing to the effect that the employer may deduct from the employee’s wages or salaries where he suffers any loss as a result of the employee’s negligence.

⁸⁶By the principle of subrogation, the insurer assumes the rights of the insured (employer).

⁸⁷Ikwue, *Op cit* p.47

⁸⁸The (New South Wales) Employee Liability Act,1991 Sections 3 & 5; the Insurance Contract Act,1984 Section 66

⁸⁹See Halsbury’s Statutes vol.22 4thedn (London: Butterworths,1991) p.2

absolved of any such liabilities.⁹⁰ In circumstances such as this, which are quite in abundance, considering that there are insurance litigations as much as there are insurance policies, it is the insured (employer) rather than the insurer (insurance company) that eventually shoulders the burden.

Also, by the principle of subrogation, the insurer may institute an indemnity claim against the employee, who may be liable to indemnify the insurer where the action succeeds.⁹¹ Thus, the insurer gets to retain the reward of the action for indemnity or contribution as well as the premium paid on the policy. This certainly does not look like a bad business nor does it resemble a great burden.⁹²

Consumers (Tax Payers)

One of the palliative measures available to the employer to cushion the effect of vicarious liability is to conveniently pass the burden to the insurance company upon the payment of premium, which premium he is to recover by inflating the prices of his goods and/or services.⁹³ If the 'premium' which the employer pays on the policy to absolve himself of the burden of vicarious liability by passing it to the insurer represents the burden on him, then by increasing the prices of his goods and/or services to recover the same premium, that same burden may be said to have been equally passed to the consumer. Thus, in effect, the consumer bears the burden as much as the insurer. Again, where the State is held vicariously liable, it satisfies the judgment debt using taxpayers' money. In this guise, it may be concluded that consumers (taxpayers) bear the burden of vicarious liability for the liability of the State is in effect the liability of taxpayers.

From the generality of the foregoing, it may be submitted that it is an oversimplification to claim that the employer or the insurer bears the burden of vicarious liability without due regard to other stakeholders, such as the employee and taxpayers or consumers who are equally in the vicarious

⁹⁰See the United States case of *Public Service Mutual Insurance Co. v Camp Raleigh Inc.* 233 A.D.2d 273 (1996); 650 N.Y.S.2d 136 where a motion to an action against the insurer for indemnity claim failed.

⁹¹Ivamy, H. *General Principles of Insurance Law* 6th edn (London: Butterworths, 1993) pp.501-502

⁹²The principle of subrogation is a protective device, not for the employee but the business interest of the insurer, so much so that the insurer may benefit twice over under the policy and not otherwise.

See Ward, A. & McCormack, G. 'Subrogation and Bankers Autonomous Undertakings' (2000) 116 *The Law Quarterly Review* p.125

⁹³See Kodilinye & Aluko, *Op cit* p.235

liability chain and may, in appropriate circumstances bear or share in the burden of vicarious liability.

Immunity and/or Derogation from Vicarious Liability

Vicarious liability, being a common law principle has long been established to operate both under Nigerian and English Jurisprudence. However, in recent times, the doctrine has suffered great distortions in the guise of immunity, absolute or qualified from any legal processes granted to certain entities. This includes but is not limited to Crown/State immunity,⁹⁴ trade unions immunity,⁹⁵ and United Nations/associated institutions immunity.⁹⁶ Foreign governments also enjoy immunity from legal processes in certain respects in Nigeria.⁹⁷ The ultimate effect of these immunities is that these entities cannot be held vicariously liable for the torts occasioned by their employees in the course of their employment.

Modern Approach to the Doctrine of Vicarious Liability

A review of available cases and statutes, especially in Australia and England, tends to show that there has been a progressive and expansive development on the operation of vicarious liability. This is in sharp contrast with the situation in Nigeria. This work will explore this recent development by examining notable pronouncements of Nigerian and English courts on vicarious liability, especially in respect of the special relationship and course of employment tests.

Pronouncements on Special Relationship Test

⁹⁴ See the Petitions of Rights Act, 1964 Section 3; the English Crown Proceedings Act, 1947 Section 2(5)(6)

See also *Ransome-Kuti v Attorney-General of the Federation* [2001] FWLR (pt.80) 1637 at 1683-1686

⁹⁵ See the Trade Unions Act Cap T14 Laws of the Federation of Nigeria, 2004 section 24(1)(2)

See also Otuturu, GG. 'Trade Unions and Economic Torts' (2010)4 N0.4 *Nigerian Journal of Labour Law and Industrial Relations* p.59; Hassan, AR. 'Liability in Torts of a Trade Union and its Members' (2010) 4 N0.2 *Nigerian Journal of Labour Law and Industrial Relations* p.22

⁹⁶ See the Charter of the United Nations, Article 105 (1); the Convention on the Privileges and Immunities of the Specialised Agencies, 1947; the Diplomatic Immunities and Privileges Act Cap D9 Laws of the Federation of Nigeria, 2004 Section 11; the Diplomatic Privileges (United Nations and International Court of Justice) Order section 3; the Motor Vehicles Insurance (UNICEF) (Exemption) Order, Order 2

See also Zechariah, M. & Bulus, LM. 'Legal Personality and Immunity of United Nations: Nature, Scope and Conundrums' (2014) 5 N0.1 *Benue State University Law Journal* pp.14-141

See the Motor Vehicles (Third Party Insurance) Act CapM22 Laws of the Federation of Nigeria, 2004 Section 5(a); the Schedule of the Motor Vehicles (Foreign Governments) (Exemption) Order; This subsidiary legislation appears to exempt the United States Government from the effect of the Motor Vehicles (Third Party Insurance) Act CapM22 Laws of the Federation of Nigeria, 2004 Section 3 (which is to the effect that an owner of a motor vehicle must insure it against third-party liability) and *a fortiori*, vicarious liability due to losses which may be occasioned by the use of such uninsured motor vehicles.

Although many relationships may give rise to vicarious liability, the relationship is classically one of master and servant.⁹⁸ The question as to what constitutes a master/servant relationship has already been discussed above.⁹⁹ What remains to be examined is the approach of Nigerian and English courts in determining when a master/servant relationship exists. Under English law, the present position is that for there to be an employer/employee relationship, there need not necessarily be a contract of employment. The epicenter of this ‘legal quake’ in England is traceable to the decision of the United Kingdom Supreme Court in the case of *Various Claimants v Catholic Child Welfare Society*¹⁰⁰ which was further magnified by the same court in the case of *Cox v Ministry of Justice*.¹⁰¹

This expansive approach to the relationship test beyond the delineation of a contract of employment is, according to Lord Phillips, to ensure fairness and justice so that once the relationship is not strictly one of employer-employee properly so-called, but it is, nevertheless, ‘akin’ to it, then it will be just and reasonable to impose vicarious liability on the employer.¹⁰² The reason being that such a situation binds the tortfeasor into a closer relationship with the defendant than would be the case for an employee, thereby strengthening, rather than weakening the case for imposing vicarious liability.¹⁰³

To Lord Reed, the import of the extension lies in the guarantee that the law shall protect the victims of torts irrespective of any variations in the legal relationship between businesses and members of their workforces.¹⁰⁴ The Law Lord concluded by stating that the purport of the modern approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liabilities where harm is wrongfully done by an individual who carries on activities as an integral part of the employer’s business.¹⁰⁵

⁹⁸ See *Cox v Ministry of Justice* [2016]UKSC10

⁹⁹See chapter two, paragraph 2.5.2

¹⁰⁰[2012] UKSC 56; [2013]2 AC 1 (The Christian Brothers Case)

See also *Province (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006]QB 510; *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013]QB 722

¹⁰¹ [2016] UKSC 10, per Lord Reed (with whom Lord Neuberger, Lady Dyson and Lord Toulson agreed). This case followed the Christian Brothers Case to the fullest effect.

¹⁰²*Cox v Ministry of Justice* (*supra*) at 7

¹⁰³*Cox v Ministry of Justice* (*supra*) at 13, per Lord Reed

¹⁰⁴*Ibid* p.11

¹⁰⁵*Ibid* p.9

This modern approach by English courts, with its wider tentacles, seems to be in sharp contrast with the law and practice of vicarious liability in the modern Nigerian legal system.¹⁰⁶ Perhaps, the Court of Appeal's decision in the case of *Shell Petroleum Development Co. (SPDC) v Dino*¹⁰⁷ vividly illustrates this contrast. In that case, the court stated that 'facts as to a master/servant relationship are matters in the realm of contract between the parties, which except as provided by statute, cannot be said to be of such notoriety to justify being judicially noticed.'¹⁰⁸

Again, the court considered sections 2, 18, 19, 20 and 21 of the Police Act Cap 359 (now sections 142, 21, 22, 23 and 24 of the Police Act 2020¹⁰⁹) and came to the ultimate conclusion that the supernumerary police officers whose services were withdrawn by the appellant in accordance with the law continued to be officers of the Nigerian Police Force until their appointments are eventually determined by virtue of section 22(1) of the Police Act (now section 25(1)).¹¹⁰ The court further held that having regards to the relevant statutes, the trial court wrongly found the appellant vicariously liable for the alleged tort of the supernumerary police officers committed within the scope of the officers' statutory powers.¹¹¹ The court also held that at any rate, had the respondents made out their case, the officers of the force would remain liable for their wrongful conduct rather than the appellant. The officers were not the appellant's servants.¹¹²

In Cox's case,¹¹³ the court had found that when prisoners work in the prison kitchen or elsewhere, they are integrated into the operation of the prison.¹¹⁴ And that the fact that the prison service is under a statutory duty to provide prisoners with useful work, is not incompatible with the imposition of vicarious liability. The legislation does not itself exclude the imposition of vicarious

¹⁰⁶ In the recent case of *Iyere v B.F.F.M Ltd*, (*supra*) the Nigerian Supreme Court reiterated the present position of the law in Nigeria thus, 'the legal basis of employment (relationship) (by whatever means) remains the contract of employment between the employer and the employee.'

¹⁰⁷[2007] All FWLR (pt.362)1942, per Muhammad JCA; This case shares some similarities with the English case of *Cox v Ministry of Justice* (*supra*) in that it also largely involves the question of the relation between a public authority performing statutory functions for public benefit, on one hand, and an individual whose activities were alleged to form part of the means by which the authority performs its functions, albert in this case, the nature of the functions were also called into question.

¹⁰⁸*Ibid*

¹⁰⁹ Note that the Police Act 2020 is yet to be gazetted. When this is done, there may be slight changes in terms of arrangement of sections, *inter alia*.

¹¹⁰ Cap 359 Laws of the Federation of Nigeria, 1990 (now the Police Act 2020).

¹¹¹*Ibid*

¹¹²*Ibid*

¹¹³*supra*

¹¹⁴*Ibid*

liability.¹¹⁵ If these submissions were to be reconciled with the Nigerian case of *SPDC v Dino*,¹¹⁶ one would be inclined to think that a police officer attached to a firm, who acts for and on behalf of the firm, and for the firm's benefit, and upon the general instructions or directions of the firm stands in such circumstances that his activities can be said to be analogous to one which is integral to the firm's business as long as such activities subsist.

Of course, it may be argued that Cox's case¹¹⁷ is distinguishable from the SPDC's case¹¹⁸ as the former involves prisoners who were at all times subject to their terms of service in the prison service and the latter involves police officers who may from time to time be withdrawn from the service of the appellant company, the Christian Brothers case¹¹⁹ undoubtedly sweeps aside this argument. More so, the Police Act¹²⁰ does not in itself exclude the imposition of vicarious liability.

Pronouncements on Course of Employment Test

The meaning of course of employment and what constitutes same have already been treated above. Here, the concern is to trace the present position of the law under Nigerian and English legal regimes. There has been a remarkable development in respect of the course of employment test in England. This development has the effect of broadening the field of activities within which an employee could be said to be acting in the course of his employment. This landmark decision was delivered by the United Kingdom's Supreme Court in the case of *Mohamud v Morrison Supermarkets Plc*.¹²¹

The court considered a host of cases that ultimately manifested vicarious liability as an area of law continually on the move¹²² and the expansive nature of the course of employment test, to wit *Central (Glasgow) Ltd v Cessnock Garage and Motor Co*,¹²³ *Lister v Hesley Hall Ltd*,¹²⁴ and *Dubai*

¹¹⁵*Ibid*

¹¹⁶*supra*

¹¹⁷*supra*

¹¹⁸ *supra*

¹¹⁹ *supra*

¹²⁰ Cap 359 Laws of the Federation of Nigeria, 1990 (now Police Act 2020).

¹²¹ [2016] UKSC11, per Lord Toulson (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Reed agreed).

¹²² It must however be stated that the notion that vicarious liability is on the move is far from being a consensus. See *Mohamud v Morrison Supermarkets Plc* (*supra*) at pp.18 -19, per Lord Dyson.

¹²³ *Supra*; where Lord Cullen first used the phrase 'within the field of activities,' which Lord Toulson in *Mohamud's* case (*supra*) interpreted to conjure a wider range of conduct than acts done in furtherance of the employee's employment *simpliciter*.

¹²⁴ *Supra*

Aluminium Co. Ltd. v Salaam,¹²⁵ *inter alia*. Thus, by holding the respondent supermarket liable in damages to the appellant the court, per Lord Toulson, gave it yet its most expansive interpretation.¹²⁶ The law Lord rejected the notion that an employee who commits a tort outside the immediate environment of his employer's business has 'removed his uniform' and thus acted outside the scope of his employment.¹²⁷

What then is the present position of the law in Nigeria? It may be doubtful to suggest that Nigerian courts have given the test such an expansive scope.¹²⁸ Although cases on vicarious liability in Nigeria do not come as frequently as they do in England, with the expansion of the course of employment test in the latter, it remains to be seen how Nigerian courts would approach the test going forward. Whether they will be inclined to be persuaded by Mohamud's case¹²⁹ is a speculative venture that only time will reveal.

This being what it is, the recent case of *Buildwell Plant Equipment (B.P.E) (Nig.) Ltd v Roli Hotels Ltd*.¹³⁰ may further shed some light on the approach of Nigerian courts to the course of employment test. In that case, the Court of Appeal was of the opinion that since the defendants (employees) worked from 8am and closed by 5pm, as trailer drivers, lighting a candle in a hotel room where

¹²⁵*Supra*; In that case, Lord Nicholls (with whom Lords Slym and Hutton agreed) held, '... [1]t is a fact of life, and therefore to be expected by those who carry on business, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong.'

¹²⁶ Formulating the present position of the law in England the law Lord stated thus, 'in the simplest terms, the court has to consider two matters. The first question is what functions or *field of activities* have been entrusted by the employer to the employee, or in everyday language, what was the nature of his job ... [T]his must be addressed broadly. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct ...' [Italics mine]

see *Mohamud v Morrison Supermarkets Plc (supra)* at 16

¹²⁷ See Mohamud's case (*supra*) at 17

¹²⁸ It appears Nigerian courts have always been loath to view this test broadly. In the old case of *Meniru & Ors v Igwe & Anor* [1963] NSCC, the Federal Supreme Court, per Taylor, FJ upholding the decision of the trial court to the effect that the 2nd defendant was not vicariously liable for the tort of the 1st defendant held that an employee who disobeys his employer's order is acting outside the scope of his employment and the employer cannot be held liable for the employee's performance of an act which he was not employed to perform, such an act being outside the employee's scope of employment. *Confer (cf.) Rose v Plenty* [1976] 1WLR141, where the English Court of Appeal held to the opposite effect.

¹²⁹*supra*

¹³⁰*Supra*

they were accommodated and leaving it unattended had nothing to do with their employment, as they at that moment were on a frolic of their own.

Thus, the court impliedly referred to the respondents as ‘gold-diggers’ as ‘the claim appears to be an exercise intended to convert the unfortunate fire incident to a gold-digging venture.’¹³¹ But it may well be asked, what has taken the defendants to the hotel? Were they there on their own account or in furtherance of the appellant’s business, being a contract won in Koko? Is this connection too remote a conclusion to draw? These questions illustrate the difficulties associated with the course of employment test and the seeming restricted interpretation thereof by Nigerian courts.¹³²

However, it must be noted that in the recent case of *Anambra State Environmental Sanitation Authority (ASESA) v Ekwenem*¹³³ the Court of Appeal did show some inclination of giving the test a wider interpretation. Although this case did not turn on the scope of employment test, the Court of Appeal upheld the judgment of the trial court to the effect that the appellant was vicariously liable for the destruction and theft of the respondent’s property by the appellant’s employees. It is only a pity that this progressive interpretation of the scope of employment test was subsequently distorted by the same court in the case of *Buildwell Plant Equipment (Nig.) Ltd v Roli Hotels*.¹³⁴ Whatever the case, it may be concluded that under the English law, the course of employment test has been given its most expansive interpretation yet,¹³⁵ and it is doubtful if the same can be said of the test under Nigerian jurisprudence.

Conclusion

In the main, this work examined the contemporary approach to vicarious liability. It found that, while vicarious liability in Nigeria appears to be restrictive or narrow and inclined to ‘classical vicarious liability,’ modern approach to vicarious liability appears to be progressive and expansive. It is, therefore, recommended that judicial and legislative actions in Nigeria should be geared

¹³¹*Ibid* p.277, per Ngwuta, JCA. Again, this position of the Nigerian Court of Appeal contrasts sharply with the English position as re-emphasised by Lord Porter in the old English case of *Weaver v Tredegar Iran & Co. Ltd* (1940) AC. 955. In that case, Lord Porter reiterated that a man’s work does not only consist in the task which he is employed to perform but that it also includes matters incidental to the task.

¹³² See *B.P.E v Roli Hotels Ltd* (*supra*)

¹³³[2001] FWLR (pt.51) 2034 at 2054

¹³⁴*Supra*

¹³⁵ See Mohamud’s case (*supra*)

towards a progressive interpretation of vicarious liability to bring Nigerian jurisprudence up to speed with modern legal development.