

Vicarious Liability—Is It Fair?

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ABSTRACT

We are now well into the 21st century, and the practice of medicine is almost unrecognizable from what it was a generation ago. New drugs, new surgical techniques and new genetic technologies that aid in the diagnosis and treatment of disease are the order of the day. However, this evolving practice of medicine has been matched by a rapidly growing awareness of patient's rights and the responsibilities of the current generation of medical practitioners towards their patients. As a result of this, the medico legal environment in the Caribbean is becoming increasingly litigious as patients are becoming more concerned about and more educated to, their rights. This is in large part due to increasing familiarity and exposure to the Internet, as well as American cable television. Cases of medical malpractice are becoming more common in Trinidad, Jamaica and Barbados, and it is against this backdrop that the doctrine of vicarious liability in the Caribbean requires urgent reexamination.

Keywords: Liability, medical law, vicarious.

INTRODUCTION

The doctrine of vicarious liability is not a new invention. Indeed, it has been in existence since the 17th century. In *Boson vs Sandford* in 1691, Chief Justice Holt famously remarked that 'for whoever employs another is answerable for him, and undertakes for his care to all that make use of him' (1). While its aims remain laudable even in modern day society, it is a policy that runs counter to the basic principle of tort law, *ie*, that a person should only be held accountable for the wrongs that he/she commits against another. The law normally imposes liability on the wrongdoer himself. Vicarious liability on the other hand renders a defendant liable for the misconduct of *another* party. The seminal example is between employer and employee. Here, the employer is liable for the torts of his employees, provided that they have been committed in the course of the employee's employment. Any claimant thus has two potential defendants: the individual who has committed the harm and his employer.

It is precisely because the concept of vicarious liability runs against the grain that an inherent tension in existing law is produced when decisions are to be made. A lack of understanding, even amongst the judiciary, has

contributed to a variety of mixed results in recent years (2). The extension of the doctrine in these cases, which in some has led to the imposition of liability on faultless defendants for acts by those for whom they are held responsible, has led many to question just how fair it is to make innocent parties bear the burden of harm caused by miscreants whose behaviour they strongly abhor.

History

The common law development of vicarious liability can be traced to early medieval times and the concept of the master and servant (or craftsman and apprentice). Here, the master, as employer, possessed all the technical knowledge and gave the servant all the instructions as to how the labour should be carried out. However, the advent of the Industrial Revolution altered this relationship considerably, not only in terms of accident causation and the anonymity of the actual culprit, but the rise of insurance companies and the increasing technological knowledge of the 'servant'. It has long been the norm that medical professionals exercise initiative and discretion in their day-to-day performance of their duties without direct supervision from their employers.

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Thus, the doctrine has been forced to evolve with the times and does so even to this day.

The legal framework for vicarious liability

In order for vicarious liability to be established, three common factors must be present:

- (1) The need for a specific type of relationship, *eg*, that of employer/employee.
- (2) A wrongful act.
- (3) A victim that is harmed in the course of employment or a specific task.

Hence, the doctrine is only confined to acts that are committed within the course of employment. As we shall see later, defining 'the course of employment' can be problematic. Vicarious liability also does not mean that the person at fault is not personally liable; on the contrary, he and the employer are held *jointly* liable. The employee can still be sued directly by the claimant and, in theory, the employer is entitled to recover any damages from the employee. In practice, however, this so-called indemnity right is limited because (a) the employee usually does not have the financial means to indemnify the employer, (b) the employee may simply be dismissed as a result of his actions and (c) it is in keeping with good industrial relations.

In the United Kingdom, a gentleman's agreement exists between insurance companies and employers not to pursue actions against negligent employees, except in cases of willful misconduct (3). Australia has gone a step further by putting this agreement into statutory form (4). Equally, in the United States, all government employees acting within the scope of their employment are protected from any personal liability (5).

Tests used to identify the employer/employee relationship

The control test

In examining the validity of the employer/employee relationship and whether it gives rise to vicarious liability, the starting point has generally been one of control and the ability to exert authority over the employee (6). The archetypal employment relationship was therefore one where the employer could control the employee's work, instruct him what work to undertake and how it should be performed. The appeal of the control test lies in its dual role; it determines for *whom* the defendant will be liable and *why*. The test has been seen not only as one of the existence of the conditions for liability but also as a justification for imposing it (7).

However, by the latter half of the 20th century, changes in employment practices, increasing use of technology and the rise of the professional have served to render the test less useful, except in straightforward cases. Doctors frequently work without direct supervision and would not be expected to be told what to do and how to do it every working day. The control test therefore needs to be reappraised in its relation to modern employment practices.

The totality of the employment relationship test

The common law has gradually moved towards a multi-faceted approach, where it is recognized that the concept of control is no longer absolute but represents one factor out of many in determining whether a contract of employment exists. Other factors may include whether one provides his own equipment, the degree of financial risk taken and the opportunity for profit in the performance of the task. For this reason, the test is also known as the 'composite or economic reality/entrepreneur test' and this is applied in the common law up to the present time.

Determining the scope of vicarious liability

Once it has been established that the correct type of relationship exists, *eg*, that of an employer and employee; it remains to be seen to what extent will the employer be held responsible for his employee's wrongful actions. It is important to note that the employer is not liable for *all* wrongful acts committed by an employee but only those that take place within the course of employment. In medieval times, this was not the case; indeed, a person was liable for all wrongs committed by his servant (8). A change was seen from the 1800s, when in a number of cases courts determined when employees would be on a so-called frolic of their own and the employer was not held to be liable (9). However, even to this day, the distinction between a 'frolic' and being within the course of employment remains problematic.

In determining the scope of liability, there must be a delicate balance. Too restrictive an interpretation will reduce the incentives for an employer to undertake preventative measures and will diminish the ability of a victim to seek redress from a wealthier defendant. Too broad an interpretation will impose an undue financial burden on defendants. In practice, the common law has found it difficult to achieve such a balance between the three members of the vicarious liability triangle: the victim, the employee and the employer. What is clear though is that in all cases the courts focus on the specific

facts of each case and adopt a flexible approach to the course of employment test in each case, guided as they are by the policy of ensuring victim compensation and reaching a just and fair decision.

When determining the course of employment test, the traditional starting point has been the so-called Salmond test (10).

'A master is not responsible for a wrongful act done by his servant unless it is done in the course of employment. It is deemed to be done if it is either (a) a wrongful act authorized by his master, or (b) a wrongful and authorized mode of doing some act authorized by the master.'

Hence, an employee is held to be acting in the course of employment if his conduct is authorized by the employer or is considered to be an unauthorized means of performing the job for which he is employed. So if an anaesthetist intubates the oesophagus, fails to recognize it and the patient subsequently dies of hypoxia, this is considered an unauthorized means of performing the job. Likewise, if a surgeon leaves a swab in the abdomen, this is also considered unauthorized.

However, in recent years, the usefulness of the Salmond test has come under increasing scrutiny. Whilst it is possible to portray a negligent act as being akin to an unauthorized mode of doing one's job, it is not so straightforward when situations of *intentional* wrongdoing arise. The problem is that if one is to deem a serious criminal offence as an unauthorized mode of performing one's tasks, this requires distorting the Salmond test to include acts that most employers would never dream of condoning.

The close connection test

The Supreme Court of Canada pioneered what is known today as the 'close connection' test. In *Bazley vs Curry*, the Salmond test was rejected in favour of a policy-based approach to vicarious liability, *ie*, the provision of a just and practical remedy for any damage suffered, as well as the deterrence of future harm (11). Thus, it is fair and just to place liability on an employer when the employer puts into place an enterprise that carries certain risks (so-called enterprise risk). The advantages of this test are (a) its flexibility in adapting to each factual situation and (b) it focuses on the rationale for applying vicarious liability and extends it to cover intentional misconduct. However, flexibility can be misinterpreted as uncertainty, and this leads to a divergence of views

amongst the judiciary on application to broadly similar situations.

The British approach to identify a more general test for close connection has been a more composite one, mirroring that of the course of employment test. It was best stated as: 'Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the employee was authorized to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment.' (12) In *Bernard vs Attorney-General of Jamaica* (13), the need for a composite approach was also recognized by Lord Steyn. He noted that 'The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter.....it is just and reasonable to hold the employers vicariously liable.a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee.' Although they have avoided adopting the 'enterprise risk' test in its entirety, it is noticeable that it still forms part of the considerations of the British courts. Three key facts are examined by the latter: (a) the specific facts of each case, (b) the employee's purpose and (c) the policy interest in ensuring victim compensation.

CONCLUSION

Vicarious liability is a doctrine that has evolved over time. From the justification of fault in pre-Industrial Revolution times to the welfare considerations of the compensation of innocent victims in a post-Industrial Revolution age, it now exists where the skilled, independent professional works hand in hand with technological advancement and a strong insurance market. For vicarious liability to exist, there must be a specific act, a specific type of relationship, and that act must be committed within the course of employment. Tests to determine the last two factors have metamorphosed to become composite in nature. As ever, the courts are driven in their search for what is a fair and just solution, and vicarious liability represents a compromise; a mechanism that seeks to provide a balance between the needs of innocent victims and the risks posed to society by an employer's enterprise, industrialization and technological advancement.

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