

1 What is vicarious liability?

1.1 Introduction

The doctrine of vicarious liability lies at the heart of all common law systems of tort law. It represents not a tort, but a rule of responsibility which renders the defendant liable for the torts committed by another. The classic example is that of employer and employee: the employer is rendered strictly liable for the torts of his employees, provided that they are committed in the course of the tortfeasor's employment. In such circumstances, liability is imposed on the employer, not because of his own wrongful act, but due to his relationship with the tortfeasor. The claimant is thus presented with *two* potential defendants: the individual tortfeasor and a third party, likely to be with means and/or insured and usually clearly identifiable in circumstances where it may be difficult to identify the actual culprit in question. Any study of vicarious liability cannot therefore avoid consideration of its role in determining who ultimately bears the burden of paying compensation.

Nevertheless, it is a principle at odds with tort's traditional focus on general principles of individual responsibility. Traditionally described as 'the law of civil wrongs', a basic formulation of tort law may be summed up as rendering the tortfeasor liable for committing a wrong which has caused harm to another.¹ A more sophisticated analysis may be stated in terms of corrective justice: 'Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another.'² Vicarious

¹ As succinctly captured by the French Civil Code in Article 1382: 'Any act which causes harm to another obliges the person whose fault caused the harm to make reparation.'

² E. J. Weinrib, 'Corrective justice in a nutshell', *University of Toronto Law Journal*, 52 (2002), 349, who refers to its classic formulation in Aristotle's treatment of justice in *Nicomachean Ethics*, Book V. See also A. Beever, *Rediscovering the law of negligence* (Oxford: Hart Publishing, 2007) who argues that the law of negligence is best understood in terms

liability breaks this causal link. It is, as Lord Nicholls commented in the House of Lords, 'at odds with the general approach of the common law. Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.'³ Neither is it consistent with the core principles of fault found in civilian systems. Article 1382 of the French Civil Code imposes liability on the basis of proof of fault (*faute*) by the defendant.⁴ Equally, the German Civil Code imposes liability in damages on 'a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person'.⁵ In all these systems, fault is seen as the core basis for liability. Clearly the existence of and justification for vicarious liability require some explication.

Yet, this is a topic which has attracted surprisingly little theoretical interest, despite the fact that it runs counter to the basic principle of tort law which maintains that a person should only be held accountable for the wrongs he or she commits against another. In recent years, this lack of theoretical understanding has become increasingly problematic. During the last ten years, the House of Lords (from 2010 the Supreme Court) of England and Wales, the Supreme Court of Canada, the High Court of Australia and the New Zealand Court of Appeal have, in leading cases, sought to understand and explain the nature of this doctrine, with mixed success.⁶ The extension of the doctrine in these cases, which has in some cases resulted in the imposition of strict liability on faultless defendants for acts of sexual abuse and violent assaults by those for whom they are held responsible, has led many to question the current operation of this doctrine and how far innocent parties should be expected to bear the burden of the harm caused by miscreants whose conduct they may strongly abhor.

of a relatively small set of principles which represent an aspect of morality called corrective justice.

³ *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at para. 8.

⁴ G. Viney and P. Jourdain, *Traité de droit civil: les conditions de la responsabilité*, 3rd edn (Paris: LGDJ, 2006), N° 439.

⁵ § 823, German Civil Code/*Bürgerliches Gesetzbuch* (hereafter BGB). Translations of the BGB are taken from the German Ministry of Justice website: www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html

⁶ See, notably, *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (UK); *Bazley v Curry* (1999) 174 DLR (4th) 45; and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71 (Canada); *New South Wales v Lepore* (2003) 212 CLR 511, 195 ALR 412 (Australia); and *S v Attorney-General* [2003] 3 NZLR 450 (New Zealand).

The English case of *Lister v Hesley Hall Ltd*⁷ provides an excellent illustration of the tension in existing law. Here the defendants, a private company, owned and managed a school and boarding annexe dealing with children who, in the main, had emotional and behavioural difficulties. The institution was run by a warden, Mr Grain, who was responsible for discipline and for supervising the boys when they were not at school. The claimants were boys resident at the home between 1979 and 1982, who had been systematically sexually abused by Grain. Grain was subsequently sentenced to seven years' imprisonment for multiple offences involving sexual abuse, but the victims sought civil compensation. A claim for negligence against the defendants had been rejected at first instance and was not appealed. The House of Lords was therefore asked whether the defendants should be held vicariously liable for Grain's acts. In finding such acts to be covered by vicarious liability,⁸ the House of Lords accepted that the doctrine could extend to wilful misconduct which was the very antithesis of the duties for which Grain had been employed and regardless of the absence of any evidence that the employer should have detected misconduct or that greater preventative measures could have stopped the abuse. In extending the doctrine beyond previously accepted limits,⁹ one might expect that the House of Lords would provide a detailed explanation of the nature of vicarious liability, thereby fulfilling its role of providing guidance to the lower courts in future cases. Instead, five opinions were delivered, which not only blurred the distinction between primary and vicarious liability, but gave limited and, at times, contradictory advice to future courts. The result is a doctrine which seems harsh, difficult to justify and problematic to apply. Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam*¹⁰ commented that the decision 'provides no clear assistance' and subsequent case law has sadly demonstrated the truth of this statement, both in England and Wales and in the Commonwealth generally.¹¹

Such concerns are not confined to common law systems. French law demonstrates an increasing willingness to utilise ideas of vicarious

⁷ [2002] 1 AC 215.

⁸ Notably by confirming that such acts were in the course of Grain's employment: see Chapter 6.

⁹ See *Trotman v North Yorkshire County Council* [1999] LGR 584.

¹⁰ [2002] UKHL 48, [2003] 2 AC 366 at para. 25. See also A. Dugdale and M. A. Jones (gen. eds.), *Clerk & Lindsell on torts*, 19th edn, (London: Sweet & Maxwell, 2006), 6-01: 'rather vague test'.

¹¹ See, in particular, Chapter 6.

Cambridge University Press

978-1-107-62748-2 - Vicarious Liability in Tort: A Comparative Perspective

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Excerpt

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liability to ensure that victims obtain access to compensation. Indeed, the breadth of the French doctrine of liability for the acts of others may be startling to a common lawyer, but has not been achieved without considerable doctrinal debate. The French Supreme Court has struggled for many years to establish clear principles of vicarious liability and its most recent attempts have not escaped considerable criticism from the Commission appointed to reform the French Civil Code.¹² German law provides an obvious contrast. In its Civil Code, vicarious liability is rejected in preference for fault-based principles. Subsequently, however, the courts have devised a variety of means to circumvent the relevant provisions, leading to many calls (as yet unheeded) for reform of the Code.

The uncertainty created by such judgments renders a study of the operation of the modern doctrine of vicarious liability increasingly important. This book seeks to explain the operation of the doctrine, setting out not only its application but examining its theoretical basis. At present, it is a doctrine which, like so many principles of the common law, is more relied upon than understood. In re-examining the rationale and practical application of vicarious liability in modern law, the book will focus on English law, but utilise comparative law as a means of both criticising and re-evaluating the law. English law, by virtue of its long history and ongoing influence on Commonwealth law, provides an obvious focus for the study. However, in view of the current muddled state of English law, there is much to be gained from a study of other legal systems, which provide alternative perspectives of the application and role of vicarious liability in a modern market economy. A study of other legal systems gives one access to a wealth of research, case law and analysis which is capable of throwing fresh light on the operation of this doctrine.

Indeed, traditionally, a study of this kind would utilise comparative examples, but limit its focus to the common law. The leading monograph of Professor Atiyah adopts the conventional approach of analysing English law in its common law context.¹³ However, much has changed since 1967. The United Kingdom is part of the European Union and the

¹² P. Catala, *Avant-projet de réforme du droit des obligations et de la prescription* (Paris: La Documentation française, 2006); translation by S. Whittaker and J. Cartwright: www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf

¹³ P. S. Atiyah, *Vicarious liability in the law of torts* (London: Butterworths, 1967). Baty, however, in his 1916 work examined both civil and common law systems: see T. Baty, *Vicarious liability* (Oxford: Clarendon Press, 1916), ch. IX, Scotland and foreign countries.

laws of contract and tort are increasingly influenced by European law. As will be discussed in Chapter 9, proposals for harmonisation of European private law in both these fields indicate a growing convergence of common and civil law systems which a modern text should not ignore. Despite the apparent perils of common and civil law comparative work,¹⁴ it would be arrogant to neglect legal systems which have, despite obvious structural differences, much in common both economically and politically with English law. What is immediately striking in examining comparative perspectives of vicarious liability (or, in civil law terms, liability for the acts of others) is the similarity of the formulations adopted in both common and civil law jurisdictions. To ignore such sources in a modern examination of vicarious liability would be to neglect an area of scholarship which, we will see, is both challenging and thought-provoking.

This book will therefore examine the three major legal families of Western law: the common law (including Canada, Australia, New Zealand and, to a limited extent, the United States), the Romanistic (here, France) and Germanic (here, Germany). This is a doctrine which crosses legal boundaries and an area of law where the most obvious examples of the Romanistic and Germanic systems provide the most fruitful studies.

In examining the role of vicarious liability in these post-industrialised States, a number of points should be noted. First, it is important to clarify the question of terminology. The term 'vicarious liability' derives from the common law, and civilian systems will generally refer to 'liability for the acts of others'. This latter term is, however, more inclusive and will extend to strict liability in both contract and tort, and even liability for actions not amounting to torts. On this basis, this book will use the term 'vicarious liability' in a neutral transsystemic sense to signify rendering one person/body strictly liable for the *torts* of another in the law of tort. Liability in contract law will not be covered, except where it is necessary to distinguish it from the law of tort. Chapter 5, for example, will consider the law of agency which renders the principal liable for the *torts* of its agent in order to distinguish such liability from that arising in the law of tort. Reference to contractual liability for the *torts* of others may be found in general texts on contract law. Secondly, less attention will be given to the German legal system, which, as will be seen, still

¹⁴ See J. Stapleton, 'Benefits of comparative tort reasoning: lost in translation', *Journal of Tort Law*, 3 (2007).

retains in its Code the provision that ‘vicarious’ liability is based on fault, albeit fault is presumed against the defendant. In contrast, the common law and French legal systems have embraced a strict liability principle and the focus of this book will be primarily on the scope of this strict liability principle in a system based fundamentally on fault-based liability. Finally, the aim of this book is to identify core legal principles which underlie vicarious liability and gain from the interpretative experience of the courts covered by this survey. It is not therefore to present a practitioners’ guide to each legal system, but to use comparative law to explain the current legal position and help the reader understand the perplexing doctrine which is vicarious liability.

This first chapter will provide a basic introduction to the nature of vicarious liability in terms of its legal characteristics, relationship with primary liability and its significance in modern legal systems. It will commence with a brief outline of the historical background to vicarious liability, although a more detailed discussion of the relevant case law will be undertaken in later chapters. The book will then focus on its practical operation: providing a general framework for liability (Chapter 2), describing its operation in relation to employers (Chapters 3 and 4) and other defendants (Chapter 5) and the degree of connectedness needed between the parties’ relationship and the tort committed (Chapter 6). Chapter 7 will consider whether English law should, in line with its European counterparts, impose a special form of liability on parents for the torts of their children: a category not yet acknowledged by the common law courts. Chapter 8 will finally examine the rationale for the doctrine, considering the justifications given for the existence of this rule of strict liability at the heart of the law of civil wrongs, drawing together the conclusions reached in earlier chapters. Finally, Chapter 9 will examine proposals for the harmonisation of vicarious liability in European Union Member States, assessing the potential impact of such proposals on the future development of European private law.

1.2 Vicarious liability: an historical overview

The idea of liability for the torts of others may be traced back to Roman law. Although Roman lawyers did not consider this problem as a whole nor reach any general statement of principle,¹⁵ specific examples of

¹⁵ K. Zweigert and H. Kötz, *Introduction to comparative law*, 3rd rev. edn (Oxford: Clarendon Press, 1998), p. 630.

liability of a superior for the wrongful acts of an inferior may be found. The most significant is the personal liability of the head of the family (the paterfamilias) for the delicts of his child or slave. If the child or slave committed a tort (delict), the paterfamilias would be liable to pay damages on their behalf unless he chose to hand over the culprit to the victim (the doctrine of noxal surrender).¹⁶ It is questionable, however, to what extent Roman law has, in fact, influenced the modern doctrine of vicarious liability.¹⁷ Lawson comments that ‘the whole notion of a master’s liability for the wrongs of his free servant committed in the course of his employment is alien to Roman ideas’¹⁸ and the broad principles of vicarious liability found in modern law bear no relation to such specific provisions.¹⁹

The background history of vicarious liability is therefore best understood in the context of nineteenth-century codifications. Although historians have traced the common law doctrine back to medieval times,²⁰ the nineteenth century represents a time of significant development. Economic and technological advances indicate the growing importance of the employer/employee relationship, distinct from an earlier focus on craftsmen and apprentices as seen in the (pre-industrial) French Civil Code of 1804. The rise of corporations, the impact of the Industrial

¹⁶ The noxal surrender of daughters became obsolete in the Republic, but continued for sons until its abolition by Justinian: A. Borkowski and P. du Plessis, *Textbook on Roman law*, 3rd edn (Oxford University Press, 2005), p. 115. See, generally, J. A. C. Thomas, *Textbook on Roman law* (Amsterdam: North-Holland, 1976), ch. XXXIII.

¹⁷ Even Zimmermann concedes that ‘Vicarious liability provides an example of a vigorous modern institution created on extremely slender Roman foundations’: R. Zimmermann, *Roman law, contemporary law, European law: the civilian tradition today* (Oxford University Press, 2001), p. 123. Holdsworth also notes some influence filtering into the common law through the court of Admiralty and mercantile custom, but acknowledges that this was not a major influence on the law: W. S. Holdsworth, *A history of English law* (London: Methuen, 1966 reprint), vol. VIII, pp. 475–6.

¹⁸ F. H. Lawson, ‘Notes on the history of tort in the civil law’, *Journal of Comparative Legislation and International Law*, 22 (1940), 136 at 139. Holmes notes, however, that innkeepers and shipowners were made answerable for their free servants by the praetor’s edict: see O. W. Holmes, ‘Agency’ *Harvard Law Review* 4(1891), 345 at 350. Holmes is noticeably far more forthright on the influence of Roman law on modern principles of agency and vicarious liability.

¹⁹ David Johnston, for example (see ‘Limiting liability: Roman and the civil law tradition’ *Chicago-Kent Law Review*, 70 (1995), 1515, 1528–32), argues that the idea of a functional limit on employers’ liability was developed by Roman jurists only in the case of contractual agency and was introduced into delict by subsequent commentators such as Pothier in his *Traité des obligations* (Paris: Chez Debure, 1768).

²⁰ See D. J. Ibbetson, *A historical introduction to the law of obligations* (Oxford University Press, 1999), pp. 69–70.

Revolution (both in terms of accident causation and the anonymity of the actual culprit) and political change render the question of liability of interested and, towards the end of the nineteenth century, insured third parties more and more relevant. As will be seen in Chapter 8, such factors impact not only on the growth of vicarious liability, but on its underlying rationale, thereby changing its role and significance in the law of tort.

Although the drafters of the French Civil Code were influenced by natural law ideas favouring a general notion of fault,²¹ some provision was made for vicarious liability in the 1804 Code, albeit linked to presumptions of fault. Article 1384, since amended, stated that:

- (1) A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.
- (2) The father, and the mother if the father is deceased, are liable for the damage caused by their minor children who live with them.
- (3) Masters and employers, for the damage caused by their servants and employees in the functions for which they have been employed.
- (4) Teachers and craftsmen, for the damage caused by their pupils and apprentices during the time when they are under their supervision.
- (5) The liability above exists, unless the father and mother, teachers or the craftsmen prove that they could not prevent the act which gives rise to that liability.

Express provision is thus made for the imposition of liability on parents, masters, employers, teachers and craftsmen for the acts of persons under their care or tutelage.²² Liability is based on a presumption of fault. All, bar employers,²³ may rebut the presumption of negligence by showing that they exercised reasonable care. In this way, fault is maintained as the central principle. The preparatory works to the Civil Code assist our understanding of the motives of the drafters. Liability on one party for the acts of another was explained as a principle of justice: ‘those on whom it is imposed can blame themselves, at the very least, for weakness, others

²¹ See J. Domat, *Les lois civiles dans leur ordre naturel* (1689) (Paris: David, 1756).

²² Article 1384, French Civil Code.

²³ Although Eörsi reports that the preliminary draft of the Civil Code contained a possibility for exemption in Article 19(5), which allowed the employer a due diligence defence, this was subsequently rejected on the basis that if the exemption was upheld, the employer might avoid liability for damages caused during his absence; described by Eörsi as ‘rather irrelevant reasoning’: G. Eörsi, ‘Private and governmental liability for the torts of employees and organs’ in A. Tunc (chief ed.), *International encyclopedia of comparative law* (Tübingen: Mohr, 1983), vol. XI, ch. 4, para. 4–8.

for bad choices, all for negligence'.²⁴ This presumed negligence thus justifies imposing liability on specified parties; the most significant being that imposed on employers which, in the pursuit of profit, have wrongfully placed confidence in employees who have harmed others.²⁵ On this basis, an irrebuttable presumption of fault is imposed on employers, justified by the assumption that fault must exist for such an event to occur.²⁶

Two points should be noted. First, the French Civil Code does not impose a general head of liability for the acts of others. Specific categories are stated, which are supplemented by strict liability for damage caused by animals (Article 1385)²⁷ and collapsing buildings (Article 1386).²⁸ Secondly, liability is justified by reference to fault in all cases. As will be discussed in later chapters, this early focus on presumed fault has since been lost. This reflects a movement in tort law generally towards a more objective interpretation of fault based on ideas of social risk. Although the wording of the Civil Code has changed little since 1804, its interpretation today bears little resemblance to the intentions of its drafters, whose objectives were influenced by natural law and the age of reason.

In contrast, the German Civil Code (BGB) of 1896 rejected any notion of responsibility without fault. § 831 of the Code thus provides that:

- (1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.

²⁴ Treihard, who contributed to the drafting of the Civil Code, whose comments of 1803 are reported in P. A. Fenet, *Recueil complet des travaux préparatoires du code civil* (1827) (Osnabrück: O. Zeller, 1968), vol. XIII, p. 468.

²⁵ See Bertrand de Greuille, *rapporteur* to the *Tribunat*, whose statement of 1803 is also reported in Fenet, *Recueil complet*, p. 476.

²⁶ Carbonnier notes that the provision was initially read as based on an assumption of fault by the employer for his negligent choice or supervision of employee: J. Carbonnier, *Droit civil 4, les obligations*, 22nd edn (Paris: Presses Universitaires de France, 2000), p. 243.

²⁷ 'The owner of an animal, or the person using it, during the period of usage, is liable for the damage the animal has caused, whether the animal was under his custody, or whether it had strayed or escaped.'

²⁸ 'The owner of a building is liable for the damage caused by its collapse, where it happens as a result of lack of maintenance or of a defect in its construction.'

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- (2) The same responsibility is borne by a person who assumes the performance of one of the transactions specified in subsection (1) sentence 2 for the principal by contract.

This imposes a rebuttable presumption of fault on the principal – liability is assumed unless the principal can prove that he is not at fault or could not have prevented the injury. Paragraph 2 seeks to deal with the hierarchical organisation of a large enterprise and provides that the presumption of fault will also apply to the ‘immediate boss’ of the tortfeasor, for example, a foreman instructed to select personnel. Although such provision may seem to resemble the early French interpretation of the Code, outlined above, it should be remembered that even in 1804 the French were not prepared to allow employers to avoid liability so easily. Whilst it may seem extraordinary that a Code, promulgated on the first day of the twentieth century, should reject vicarious liability, Zweigert and Kötz note opposition by nineteenth-century theorists to the notion of liability without fault and that, although specific statutory provision was made for accidents deriving from industrialisation,²⁹ this view survived to influence the draftsmen of the German Civil Code.³⁰ Brüggemeier notes that a debate did indeed occur during the drafting process, but that despite arguments in favour of rendering industry liable for the risks caused by its activities, the majority of the Second Drafting Commission, consisting of older officials, predominantly scholars of the *Gemeines Recht*³¹ who favoured the principle of no liability without fault, was not convinced.³² Concern of overburdening small businesses in a developing economy in the face of strong lobbying from trade, industry and agriculture, combined with the fault-based reasoning of the influential legal theorists, the pandectists,³³ thus led the codifiers to question the need for a general principle of vicarious liability.³⁴

²⁹ For example, the Imperial Law of Liability of 1871 (*Reichhaftpflichtgesetz*): strict liability on railway companies for death or personal injury caused through the operation of the railways.

³⁰ Zweigert and Kötz, *Introduction to comparative Law*, pp. 630–1.

³¹ German common law based on the sixth-century codification of Roman law put in force by the emperor Justinian: Encyclopædia Britannica online: www.britannica.com/EBchecked/topic/228063/gemeines-Recht

³² G. Brüggemeier, *Haftungsrecht: Struktur, Prinzipien, Schutzbereich* (Heidelberg: Springer, 2006), p. 121.

³³ So-called because of their use of the Digest. See H. Coing, ‘German “Pandektistik” in its relationship to the former “ius commune”’, *American Journal of Comparative Law*, 37 (1989), 9.

³⁴ See H. H. Seiler, ‘Die deliktische Gehilfenhaftung in historischer Sicht’, *JuristenZeitung* (1967) 525 and MünchKommBGB/Wagner, 5th edn (Munich: C. H. Beck, 2009), § 831, para. 1.