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The Nexus Between Vicarious Liability of Employers and the Acts Committed "*in the Cause of Employment*" By The Employees: A Discourse

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Abstract

Vicarious liability makes employers accountable for the wrongful negligent or intentional tort actions of their employees, while acting in the course of their employment. The scope of this paper excludes other relationships between the employer and those considered not to be employees, such agents or independent. Depending on the case, an injured third party can sue both the employee (as the actual person responsible in law) and the employer (deemed by the law to be indirectly, or vicariously, responsible for the same injury).Indeed, the employer's liability is founded upon the doctrine that an act or omission of the employee in the course of his employment is that of the employer so that the employer may be made liable in tort. This paper aims at putting in right perspective, the limitation of employers' vicarious liability for the wrongful acts of their employees. It combines both doctrinal and non-doctrinal approaches in its research methodology. It finds out, among others, that employers should not be vicariously liable for criminal acts of their employees unless such are ordered by them. It also answers some pertinent questions, such as: What is the extent of the employer's liability for the wrongful acts of his employees? What is the meaning of "in the course of employment" and its connection with the employers' "vicarious liability"? It recommended that employers are vicariously liable to the extent of the closeness or nexus of the wrongful acts to the employees' duties, and base its conclusion on this and related issues.

Keywords: Vicarious Liability; 'In the cause of Employment'; Employers; Employees.

1.0 Introduction

The doctrine of 'vicarious liability,' generally termed 'liability for the acts of others,'[1] has been found to be controversial in common law. The term, believed to be invented by the English jurist Frederick Pollockin the 1880s,[2]is itself confusing and fails to distinguish clearly between secondary liability[3] and the original tortfeasor. Some cases (*Lister v Hesley Hall Ltd,*[4]*Bazley v. Curry,*[5] *New South Wales v Lepore*[6] *and S v Attorney-General*[7]) of the superior courts of England and Wales, Canada, Australia, and New Zealand respectively considered the scope and

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[1] This definition is usually ascribed to civil lawyers.

[2] See MD Howe (ed), Holmes-Pollock Letters, vol 1 (1942) 233.

[3] This is commonly assumed to be the correct interpretation of the law: Staveley Ironand *Chemical Co Ltd v Jones* [1956] Appeal Cases (AC) 627; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656.

[4] [2002] 1 AC 215.

[5] (1999) 174 Dominion Law Reports (DLR) (4th) 45, conjoined with Jacobi v Griffiths (1999) 174 DLR (4th) 71.

[6] (2003) 212 Commonwealth Law Reports (CLR) 511.

[7] [2003] 3 New Zealand Law Reports 450.

underlying rationale of this doctrine. The context of these cases –whether an institution or government department should be held vicariously liable for sexual abuse by adults entrusted to care for vulnerable children–perhaps indicates both their contentious nature. Lord Justice Long more, in a recent English Court of Appeal decision, expresses much of the frustration of the common law courts: 'Is it that the law should impose liability on a person who can pay rather than another who cannot? Or is it to make employers more vigilant than they would be as far as a duty of care is concerned? Better still, can it be presumed to be a weapon of distributive justice? There are divergent views among academic writers, and the House of Lords in *Lister's* case failed to give any definitive guidance to lower courts.'[8] These are some of the gaps that this paper intends to fill.

In this modern time, most of the things we do daily are done, at least partly, by engaging other people, who are either employees or agents.[9] The comfort of having others do one's work on one's behalf, however, comes with its challenges. Among them is the possibility that the employees will not do the work with all the care and attention that one would have taken if one is to personally do the work; that there might be injury to third parties and their property; and that one may be held responsible for such injury.

Generally, a lot of issues are arising in law from the relationship between the employer and the employee. One of them is the issue of vicarious liability. Many employers frowned at the rule as it is perceived as protecting the interest of third parties to their own disadvantage and make them liable for wrongdoings not directly caused by them. Before now, it was thought unreasonable to make an employer vicariously liable for the wrongs of his employee. Presently, however, the Nigerian Legal system has imbedded in itself, this rule of law. The pertinent questions that engage our minds in this article are: Who is an employer, and who is an employee for the purpose of incurring vicarious liability? To what degree is the liability of the employer for the wrongful acts of his employees? What is the meaning of "in the course of employment"? What is the nexus or connection between the phrase "in the course of employment" and 'vicarious liability' of the employer? How can the vicarious liability of the employer be mitigated? These are the questions dealt with in this paper, which ended with recommendations and conclusions.

2.0 What Is Vicarious Liability?

Black Law Dictionary, Eighth Edition, on page 934, 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." It further states that:

> *The vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer for his own torts. An employer*

[8]Maga v Birmingham Roman Catholic Archdiocese Trustees [2010] England and Wales Court of Appeal, Civil Division (EWCA Civ) 256, [2010] 1 Weekly Law Reports (WLR)1441, para81(the case itself concerned the potential responsibility of the Roman Catholic Church for sexual abuse by priests of non parishioners).Comment: P Giliker (2010) 126 Law Quarterly Review (LQR) 521.

[9] In this paper, we shall only concentrate on the relationship between employers and employees to the exclusion of agents and independent contractors are outside the scope of this article.

> *whose employee commits a tort may be liable in his own right for negligence in hiring or supervising the employee. If, in my business, I hire a truck driver who has a record of drunk driving and on whom one day I detect the smell of bourbon, I (along with my employee) may be liable for negligence if his driving causes injury. But that is not 'vicarious' liability-I am liable for my own negligence in hiring that employee or letting him drive after I know he has been drinking.*[10]

The above definition and illustration of what vicarious liability is, and what it is not, will be our starting point. Generally, Vicarious liability is a legal doctrine that imposes strict liability on employers for the wrongdoings of their employees. However, for the employer to be liable for this type of tort, the wrongdoing must have been committed in the course of employment. A person who employs another will be held liable for any tort committed while in the cause of employment.[11] In *Lister v Hesley Hall Ltd*[12] the Court has expanded such liability to cover intentional acts like sexual assault and deceit. In the past, it was held that most intentional wrongdoings were not *in the course of ordinary employment*. Recently, case laws suggest that where there is a close nexus between the acts committed and the duties of the employees, an employer would be liable in such instance.[13]

2.1 Rationale for Vicarious Liability

There are at least three rationale for this rule. Vicarious liability holds employers responsible for the wrongful negligent or intentional tort actions of their employees while acting in the course of their employment:

(i) by hiring employees, the employer assumes the risk of harm to third parties by the negligence of its employees. Where it benefits by using the employees, the employer should also accept the entire risk accompanying those benefits;

(ii) it makes employers to exercise great care in the selection, training, and supervision of all employees. "In the course of employment" liability should be seen as one of the many costs of doing business;[14] and

(iii) most employers have "deeper pockets" than their employees, thus, if the employee is financially incapacitated to pay for the injury, as it is in most cases, the employer's stronger economic position will ensure adequate compensation to the injured party.

Some employers are, however, not as financially buoyant to withstand all liabilities they might have vicariously liable for, and this is why some of them insure against some types of risks associated with the tortuous act of their employees. Vicarious liability is aimed at obtaining a just and practical remedy for the victim as much as possible and to deter future harm. Whether the wrongful act of the employee was "sufficiently related" to actions authorised by the employer is another rationale. Thus, to hold an employer vicariously responsible, it must be shown that there

[10] *Kenneth S. Abraham, The Forms and Functions of Tort Law 166 (2002).*
[11] Markesinis, Johnston, Deakin, p. 665.
[12] *Lister v Hesley Hall Ltd [2002] 1 AC 215.*
[13] Steele, p. 578.
[14] An employer can insure against the risk of injury at a lower cost than the victim. The rule also instills a sense of social responsibility.

is "a significant connection (nexus) between the cause or enhancement of a risk and tortious act." In this regard, here are some relevant factors:

a) the opportunity given by the employer to the employee to abuse his power;

b) the extent to which the employee's wrongful act has furthered the employer's business;

c) the extent of the relationship between the wrongful act and friction, confrontation or intimacy inherent in the employer's business;

d) the power conferred on the employee over the injured; and

e) the vulnerability of potential victims to wrongful exercise of the employee's power.

In *Bazley's* case,[15]a Children Foundation based in Canada hired Curry to act as a substitute parent for troubled children, not knowing that he was a paedophile. He worked as an actual parent would, including bathing and tucking the children in. Unfortunately, he took advantage of his position by sexually abusing a young boy, Bazley. The Foundation was found vicariously liable for Curry's action because the wrongful act arose from his job of tucking in children for the night. While the vicarious liability of the employer might be apparent, the rogue employee may equally be directly liable for the same wrong, both civilly and criminally, if the wrongful act is a criminal offence.

Vicarious liability also covers a situation where an employer is held liable for the actions of third parties like clients during the duration of an employee's engagement in the work of the employer. There are some reasons why the scope of vicarious liability has been widened. First, as usual in the law of tort, those injured by the acts of the concerned employees should be compensated. The employers are in a better financial position to pay such compensations and not the employees that committed the act. This is what is called deep pocket compensation.[16] Secondly, the tort is usually committed under the instruction of an employer. Since the employer is the eventual beneficiary of the duties the employee was carrying out when the wrong was committed, he should, as well, be ready to bear the consequences of such wrongdoings. Lastly, it is a way of reducing risks taken by employers, as well as ensuring that precautions are adequately taken while conducting business.[17]

As recent as 2016, the UK Supreme Court held, in the case of *Mohamud v WM Morrison Supermarkets* plc [2016] UKSC 11,[18] thus:

> *The question of whether an employer was vicariously liable "in the simplest terms," involved the consideration of two matters. The first question is what functions or "field of activities" had been entrusted by the employer to the employee. The second question is "whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make*

[15]*Supra*, note 6.
[16]*Steele, Jenny (2007). Tort Law: Text, Cases, &Materials. Oxford University Press. ISBN 978-0-19-924885-8*, p.567.
[17]Flannigan, p. 26.
[18] See *https://www.supremecourt.uk/cases/docs/uksc-2014-0087-judgment.pdf]*, visited 30 April, 2020.

> *it right for the employer to be held liable under the principle of social justice, which goes back to Holt CJ.*[19]

Just last year (2020), the same UK Supreme Court further considered some underlining principles of vicarious liability in *WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondents).*[20]We shall extensively review this case to buttress our stand on vicarious liability. In that case, Morrisons employed a senior auditor who was instructed to provide the records of the supermarket's personnel to their auditors, KPMG. While carrying out this instruction, the employee secretly downloaded the personnel files of 126,000 employees and uploaded it to an internet file-sharing site. Following this tortious act, 9,263 employees and former employees of Morrisons commenced proceedings against the company, alleging a breach of statutory duty under section 4(4) of the Data Protection Act 1988, misuse of private information, and breach of confidence, on the basis that Morrisons was vicariously liable for the employee's conduct.[21] At the Court of first instance, as well as the Court of Appeal, it was held that Morrisons was vicariously liable, on the ground that:

> *"the tortious acts in sending the claimants' data to third parties were, in our view, within the field of activities assigned to him by Morrisons."*[22]

Lord Reed of the UK Supreme Court held that while the judge at the lower courts had "applied what they understood to be the reasoning of Lord Toulson in Mohamud [2016] AC 677," they had "misunderstood the principles governing vicarious liability in several relevant respects." He cited, with approval, the judgement of Lord Nicholls in *Birkenhead Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48*[23] which he summarised as follows:

> *The wrongful conduct must be so* ***closely connected***[24] *with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.*

In his submission, Barrister Kevin Holder explained that:

> *The question was whether the employee's wrongful disclosure of data was so closely connected with the collation and transmission of the data to KPMG that, for the purposes of the liability of his employer to third parties, the disclosure may fairly and properly be regarded as made by him while acting in the ordinary course of his employment.*[25]

Also, in his contribution, Lord Reed held:

> *It is obvious that the employee was not engaged in furthering his employer's business when he committed the wrongdoing. Rather, he was seeking vengeance for the disciplinary proceedings meted on him some months earlier. In situations*

[19]Kevin Holder, "Data Protection and Vicarious Liability", 1st April 2020.
[20] [2020] UKSC 12. See also, https://www.supremecourt.uk/cases/docs/uksc-2018-0213-judgment.pdf.
[21]Kevin Holder, "Data Protection and Vicarious Liability", 1st April 2020.
[22]*Ibid*.
[23]https://www.bailii.org/uk/cases/UKHL/2002/48.html.
[24] Emphasis mine.
[25] We shall, in due course, explain in details, the meaning of the phrase "in the course of employment".

> *like this, if the test laid down by Lord Nicholls in Dubai Aluminium's case is applied, his wrongful conduct was not so closely connected with acts which he was authorised to do, and so, for the purposes of liability of Morrisons to third parties, it can fairly and properly be regarded as an act done by him while acting in the ordinary course of his employment.*

It was evident from the foregoing, that the next relevant question to ask is the time that the liability can be said to have arisen.

3.0 When does a Vicarious Liability Arise?

This was the central question in the case of *IfeanyiChukwu (Osondu) Co. Ltd v. Soleh Boneh (Nig.) Ltd*.[26] For emphasis, the facts of the case are stated: The plaintiff brought an action against the defendant for damages it suffered as a result of an accident involving two vehicles belonging to the parties-a passenger coach (the plaintiff's) and a trailer (the defendant's). The action was initially brought against the defendant's driver as the 1st defendant, and the 2nd defendant (*Soleh Boneh*) jointly. However, the 1st defendant was subsequently struck off the proceedings when he could not be served with the writ of summons. The action thereafter proceeded against the defendant. The 2nd defendant argued that there was no cause of action against it, since their liability was only vicarious, unless the 1st defendant who was primarily liable was first prosecuted. The trial judge reasoned along this line and dismissed the action. Dissatisfied, the plaintiff applied to the Court of Appeal and lost. Still not satisfied, the plaintiff applied to the Supreme Court. The Court took the time to explain the nature and scope of this liability. The Supreme Court said:

The general principle of law is that a master is liable for any wrong, even if it is a criminal offence[27] or a tortious act committed by his servant while acting in the course of his employment.[28] This is the doctrine of vicarious liability based on the principle of law enunciated by sir John Holt CJ in *Hern v Nichols* (c.1700), 1 Salk 289; -one of the earliest cases on the subject-wherein the learned Chief Justice pronounced:

> *"Since somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger."*

Vicarious liability is based on the fact that one person is substituted for another as far as liability for the tort is concerned.[29] It is the master-servant relationship that gives rise to vicarious liability. It is not the old fiction that the master had impliedly ordered the servant to do what he did. A lot had been written, both judicial and academic, on the rationale for the doctrine of

[26] [2000] 12 W.R.N 1.

[27] Our position here is that employers should be excused from criminal offence committed by their employees. The penalty for such offences should be personally borne by the criminal and not the employer. Thus, vicarious liability of the employer should only be limited to the tortuous acts and not criminal acts of the employees.

[28] *Tubervill v. Stamp(1697), 1 LdRaym,. 264, Dyer v Munday* (1895), 1 QB 742. See also, Agomo C.K. in "Nigerian Employment and Labour Relations Law and Practice, Lagos: Concept Publications Ltd, 2011 at p. 137.

[29] Launchbury v Morgan (1971) 2 QB 245, 253.

vicarious liability. Going by the judgment from Sir John Holt CJ in *Hern v. Nicholas*…to Lord Denning in *Nettleship v. Weston,*[30]it would appear that the doctrine is based on public policy, or, as Lord Pierce put it in *I.C.I. Ltd v Shatwell*[31] on "social convenience and rough justice." On the authorities generally, the master is liable, though guilty of no fault himself."[32]

Justice Ogundarein *IfeanyiChukwu (Osondu) Co. Ltd v. Soleh Boneh (Nig.) Ltd*[33]stated that the liability of the master is dependent on the plaintiff being able to establish that the servant is primarily liable for the tort and also, that the servant was not only the master's servant but also, acting in the course of his employment. It is not necessary to join the servant as a defendant in an action against the employer.[34] The claimant is at liberty to choose whom he wants to sue, contrary to the rulings of the lower courts. Going through the authorities on the subject, Ogundare JSC held that both master and servant are joint tortfeasors in such cases; that it is not necessary to join the driver; rather, what the claimant needs to establish to succeed are-the liability of the wrongdoer and prove that the offender is a servant of the master and that the wrongdoer acted in the course of his employment and with the master.[35] The correct position, according to him, is that ordinarily, non-joinder of a party cannot by itself defeat the action unless a statutory enactment makes provision to the contrary.[36]

The liability of an employer thus arises either personally through his negligence, or vicariously through the negligence of his employee. The doctrine of vicarious liability raises a problem of every day's nature, namely: Under what circumstances can an employer be held liable for the torts of another who is his employee and so under his control?[37] Although, the employee is personally liable for his torts, it is more convenient, as can be seen from *IfeanyiChukwu's* case, for the third party to sue the employer because he invariably is better positioned to meet any judgement debt either personally or through insurance. The vicarious liability doctrine can, therefore, be explained as an aspect of public policy which seeks to make the party who has placed another party in a position where he is likely to cause injury to a third party, liable for the consequences of such negligence, particularly since that employer is better placed to redistribute the cost involved through insurance.

4.0 Who is an 'Employee' and who is an 'Employer'?

These questions become pertinent because they are the basis upon which the employer can incur vicarious liability as a result of the tortuous act or omission of his employee. Simply put, an employer is a person, agency, or organization that engages or hires the services of another person call the employee for the purpose of furthering or advancing the business or vocation of the employer. In other words, the employer will derive benefits from the services rendered for him

[30] (1971) 2 QB 691, 700.
[31] (1965) Ac 656, 685.
[32] Per Ogundare, JSC at p.12.
[33]*Supra*, note 28.
[34]Cp position under Motor Vehicles (Third Party Insurance) Act Cap 126 LFN 1958; *Management Enterprises Ltd & Anor v Otusanya* (1987) 4 SC 367; (1987) 2 NWLR (Pt 55) 179.
[35] At p.13.
[36] At p.39.
[37]*Iyere v. Bendel Mill*; see also *U.A.C. v Saka Owoade* 13 WACA 207; *Rose v Plenty* [1976] 1 ALL ER 97.

by the employee. Generally, an employer will evade vicarious liability if the person that commits the act is not his employee in the strict legal sense of the definition of 'employee.' Thus, it is imperative to further determine who an employee is for the purpose of determining vicarious liability. Several tests have been judicially employed to provide an answer to the question of who an employee is. Some of these tests are the integration test, the control test, the nature of the employment test,[38]the economic hardship test and so on. If it can be determined that the person that commits the act or omission is not an employee *per se*, for instance, an agent, then such agent will be personally liable for his acts and not the employer. For instance, on the basis of **control test**, the commonest of all the tests, the relevant question will be: "how much control did the employer have over the manner in which the work was done?" If the employer instructs the employee exactly how he must carry out the work, then it would be a contract of service, and the employer will be vicariously liable for the torts of his employee. To establish a case of vicarious liability, therefore, two questions must be asked: Is the tortfeasor an employee? Was the employee acting in the course of his duties when the tort was committed? Once the questions can be answered affirmatively, considering the facts and circumstances of the case, and foreclosing any other facts that may vitiate these two essential questions, then the likelihood of the employer incurring vicarious liability is very high.

5.0 Establishment of Vicarious Liability in Employer-Employee Relationship

Vicarious liability means that employers are liable for the torts of their employees, committed during the course of employment. An inference from this is that the torts of an employee committed **out of the scope of his duties** or when **on a frolic of his own[39]** would excuse the employer from liability. A tort is a wrongful act leading to legal liability. This means that employers will be liable to third parties, in situations where the employer appears blameless or not responsible for causing the tort committed by the employee. This rule seems harsh on the employers because it appears to contradict the fault principle. It is equally based on the legal fiction that employers have more control over the actions of their employees. However, the recent rule has found a more pragmatic justification in that an employer is more financially equipped to compensate the injured third party. Once the relationship between an employer and the employee is ascertained, the next issue for determination is to ascertain the nature of the relationship-the employer's liability for the wrongful acts of the employee.

5.1 Liability for the Acts of His Employees

The basis of the liability of an employer for the wrongful acts of his employee is stated by Lord Brougham in *Duncan v Finlath*:[40]

> *The reason I am liable is this, that by employing him, I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it.*

[38]It is important to determine whether the contract of employment was a contract of service of a contract for service. If it is the former, then such person is an employee. If it is the latter, then such person is an independent contractor. Mostly, the employment contract usually states the nature of the employment. However, it is open to the court to determine the precise nature of the employment.

[39] Emphasis mine.

[40](1839), 6 Cl. & F. 894, 910.

Salmond, contributing, said: "vicarious liability is based on 'social convenience and rough justice."[41] It is necessary to qualify the explanation of the doctrine as given by Lord Brougham. Firstly, a master may be liable even though the act or default is not for his own benefit,[42] and even though he has expressly forbidden it.[43]Secondly, it may be that the right of the master to control is merely a criterion of the existence of the relationship which gives rise to vicarious liability, and not in itself a justification of that liability.[44] Finally, the possibility exists that the courts, in laying down the rules of vicarious liability, might have been tremendously influenced by the facts that the 'master is usually more able than the servant to satisfy claims by injured persons and to pass on the burden of liability by way of insurance. Also, that the imposition of strict liability on the master makes him take more exceptional care and thereby prevents accidents.[45]

5.2 Employer's Liability to his own Employees.

The common law has always held that a master is obligated to take reasonable care for the safety of his servant. The contract of employment involves, on the part of the employer, the duty of taking reasonable care to provide proper appliances, maintain them in a proper condition, and also, to carry on his operations as not to subject his employees to unnecessary risk. The employer is liable for his own breach of that personal duty and for the breach thereof by an employee to whom the employer delegates its performance. This duty is customarily expounded under the threefold heading of the provision of a competent staff of men, adequate material, and a proper system of work. These three duties can be summed into one, which is a duty to take reasonable care.[46]

5.3 Employer's Liability to Third Parties for the Acts and Omissions of His Employee.

The most common instance of a master's liability to third parties for the acts and defaults of his servants is vicarious liability under the maxim of *respondeat superior*. The basis of such liability is that it is the employer who places the employee into action. Arguably**,** vicarious liability is justified on grounds either of moral reparation, or of deterrence, because of a presumption of the employer's fault. The "control" theory of liability also leads to the same conclusion. While control may have some legal value in establishing the employer-employee relationship, it is not (as it is some- times treated") in itself a basis of vicarious liability- except through the manufacture of yet another principle of natural justice. The control theory makes sense only by linking it to the presumption of fault.

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[41]Salmond on Tom (14th ed. 1965), at 644, quoting from *l.C.I Ltd. v Shatt.Dell*, (1964) 3 W .L.R. 329, 348, per Lord Pearce.

[42]*Lloi, v S mtth& Co.*, (1912) A.C. 716; 81 L.J.K.B. 1140.

[43]Salmond on Tom (14th ed. 1965), at 662-663.

[44]Salmond on Tom (14th ed. 1965), at 647. The basis is control of and the right of selection of servants at least in Quebec law: See *Curlei, v Latreille* (1919), 60 S.C.R. 131, 152-154.

[45] Salmond on Tom (14th ed. 1965), at 645.

[46]See *Canadian Perlcmnino Right Society Limited v Ming Yee*, 11943) 3 W.W.R. 268. Responsibility for such acts is not vicarious liability, but. rather, a direct liability; the acts of the agent are not his own, but that of his principal.

If the employer is at fault, why is the plaintiff not left to an ordinary action against him for personal negligence? The answer generally given is that it is difficult to prove negligence, mainly where the proof requires the evidence of employees of the master. The impulse of loyalty, not to say self-interest, is strong, and can completely distort the truth. Another reason is that the plaintiff may not even know which servant committed the tort. However, it may be clear that one of the defendant's servants must have done so and must have been negligent, and there may be an unprovable possibility that the master also was negligent. If the master were not liable, in the absence of positive evidence of personal fault, not only would there be no incentive for him to take the initiative in discovering which of his servants was at fault, but there would be no incentive for him to take steps to prevent it recurring.

Generally, an employer is under strict liability for torts committed by employees. Thus, the courts must find a sufficient relationship to this effect, when and where the issue of vicarious liability is raised. Generally, no one test can adequately cover all types and instances of employment. Therefore, the peculiarities of individual cases play a vital role in the overall determination of the case.[47] The general tests have been finding a control between an employer and an employee, in a form of master and servant relationship.[48]The rationale for this is stated in the case of *Yewens v Noakes*,[49]where Bramwell LJ said:

> *"...a servant is a person who is subject to the command of his master as to the manner in which he shall do his work."*

Generally, where '**control**' can be established, the employer will be liable because he dictated the work to be done, and the manner it should be done.[50] This is the root of the control test, and it is applicable where precise instructions are dictated by an employer. In these instances, the employer should be seen as the causal link for any resulting harm.[51] Also, if an employer is not the one determining how an act should be done, such a relationship would be that of employer and independent contractor.[52] Recently, however, as the duties of employees continue to grow, it becomes quite challenging to establish a pure master-servant relationship where the professional skills of the servants or employees are involved.[53] In a bid to address this problem, different formulations of the test have been proposed. One of these is an employer's ability to specify where and when tasks are to be carried out, and with whose equipment and materials.[54] Another test of employment is the one proposed by Lord Denning, which is **integration** of an individual to a business or organisation.[55] Also, another test based on the **economic relationship** between

[47]*Cooke, John (2005). Law of Tort. Longman. ISBN 978-1-4058-1229-0, p.463.*
[48]Markesinis, Johnston, Deakin, p. 668.
[49]*Yewens v Noakes* (1880) 6 QBD 530.
[50]Flannigan, p.31.
[51]*Ibid,* p. 38.
[52] The relationship of the employer and agent or independent contractor is, however, outside the scope of this paper.
[53] For instance, that a hospital administrator controls the method and actions of a professional doctor, despite liability having been clearly established in such cases. See Ellis v Sheffield Gas Consumers Co (1853) 2 E & B 767.
[54]Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497.
[55] Stevenson Jordan & Harrison v McDonnell & Evans [1952] 1 TLR 101.

an employer and employee have found favour in subsequent cases, notably the case of *Market Investigations Ltd v Minister of Social Security*.[56]

6.0 The Meaning Of '*In The Course Of Employment*.'

The meaning of this phrase becomes important since it is the basis of vicarious liability of the employer for the tort committed by his employees. Anew area of law has developed out of the phrase "arising out of and in the course of employment". These words link the cause of the accident and the employment. To arise out of the employment, there must be a nexus or linkage between the wrongful act and the employment. "In the course of employment" means that the employee is promoting or adding value to the employer's business goals when the injury or accident or wrongdoing occurred.

Course of employment, sometimes called the scope of employment, refers to a situation where a person is deeply involved in an employment task at a particular time, usually when an accident occurs, causing injury to a third party. Also, to make an employer vicariously liable, one may have to show that the employee was in the course of employment when the incidence occurred. The rationale is whether the actions of an employee further or add value to the employer's business and are not personal business, thereby making an employer liable for damages due to such actions under the doctrine of respondent superior. For instance, if a driver is en route to deliver goods at a designated place and makes a detour to do a personal errand, any accident occurring while on the personal errand is not in the course of employment, and the employer is not liable.

That an employee is in the course of employment or not, is a question of fact in each case. A driver involved in an accident while he was on his way to eat food in the course of his doing overtime was held to have been acting in the course of his duty.[57] In *C.S. Adeleke v Kenneth Rhand & Briscoe Helicopters*,[58] the first plaintiff was said to be in the course of his duty while driving negligently and caused an accident resulting in serious injuries to the appellant. It was presumed that he must have had the permission of the employer to drive the vehicle. However, an employer may not be liable for injury caused to a passenger where the employee is expressly forbidden from giving lifts,[59] as this, in our view, would amount to being on *a frolic of his own*.

Generally, the *locus classicus* on the meaning of 'in the course of employment' is established in Joel v Morison,[60]where it was held that:

> *The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.*

[56] Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173.
[57]*Iko v John Holt Ltd.* {1957} 2 FSC 50.
[58] See Agomo C.K. 4 J.P.P.L.
[59]*Conway v George Wimpey Ltd*. [1951] 1 ALL ER 363.
[60] [1834] EWHC KB J39 at 5.

The meaning of 'in the cause of employment' becomes clearer from the above pronouncement. It means the employer is not liable if the tort is committed when the employee is 'on a frolic of his own'. The phrase 'frolic of his own', appears to be the direct opposite of 'in the course of employment', as it connotes situations in which the employee is not in the course of employment, having disobeyed the master's instruction. An employer could only be liable for torts committed by his servant in the course of employment. An employer's liability can as well extend beyond his place of business.[61]Judges are, however, usually influenced by considerations of policy which fall outside the fact. There are two variant of cases in this regard: one in which the employee's acts are held to be within the cause of employment and, the other being situations where the employee's acts are outside that scope. Generally, an employer is liable for wrongful acts which he expressly authorised. Also, he is responsible for acts that are wrongful ways of doing something authorised by him, even if he has expressly forbidden those wrongful acts. It appears unfair, however, if an employer is still held liable for the way the employee does he has expressly forbidden.

7.0 Disconnection Of Employer From Vicarious Liability.

Some questions are germane here. Can someone who is officially on leave and commit a tortuous act against a third party be said to have done so in the course of employment? Also, if an employer specifies the jurisdiction within which an employee on leave can spend the holiday for whatever reason, and the employee is within the prescribed jurisdiction during his holiday when he committed the tortuous act, can he be said to be in the course of employment? It appears the answer is neither 'yes' nor 'no,' but will depend on the facts in each case and the closeness of the tort committed to the duty of the employee. If the tort is too remote or not connected with the nature of the employee's duties, it seems the employer will not be liable. A unique advantage of vicarious liability is that even if the employee who committed the tort cannot be located, the person or corporation he works for can easily be located. Thus, an action can be brought against such person or corporation if the employee is at large.

For an employer not to be vicariously liable, the wrongdoing must not fall within the scope of the employee's duties. This was the decision in *Beard v London General Omnibus Company*.[62] Once it can be established that there is an employer-employee relationship, any tort committed by the employee in the cause of employment will make the employer to be vicariously liable.[63] Generally, there is no one test that sufficiently establishes which acts employers are vicariously liable for. It all depends on the facts in each case. A preferred test of the courts formulated by John William Salmond, states that an employer will be liable for either a wrongful act he has authorised, or a wrongful and unauthorised mode of an act that was authorised.[64] This is because if an employer could simply issue detailed and long prohibitions on what an employee cannot do, they would never be found vicariously liable for the wrongdoings of their employees.[65] However,

[61]*Fraser v Winchester.*
[62]*Limpus v London General Omnibus Company,* 158 ER 993.
[63]Markesinis, Johnston, Deakin, p. 678.
[64]*Heuston, R.E.V.; Buckley, R.A. (1996). Salmond and Heuston on the Law of Torts. Sweet & Maxwell. ISBN 978-0-421-53350-9.*, p. 443.
[65]Markesinis, Johnston, Deakin, p. 683.

one can differentiate between prohibited acts, and acts that take employees out of the course of their employment? The test can be explained by two contrasting cases, *Limpus v London General Omnibus Company*[66] and *Beard v London General Omnibus Company*.[67] The two cases involved road collisions. In *Limpus* case, a driver pulled in front of another rival omnibus to obstruct it. Notwithstanding that the employer has expressly prohibited this act, he was still found liable. This was just an unauthorised way of the employee carrying out his duties (driving), and not an entirely new activity.[68]By contrast, in *Beard's* case, London General Omnibus Company were not liable where a *conductor,* employed for the collection of fares from the passengers, negligently chose to *drive* the vehicle instead; this was obviously outside of his duties.[69]

The facts here are very important in deciding whether an act is in the course of employment or not. For instance, in *Century Insurance Co v Northern Ireland Road Transport Board,*[70]an employee set alight to a petrol station by carelessly throwing a match away while refuelling a petrol tanker. This was held as an act done in the course of his employment. We have had different judgments where employees have given lifts in their vehicles, during official hours, in determining the vicarious liability of their employers. Two similar cases are apt here. The first, *Conway v George Wimpey & Co Ltd*[71]involved a driver, who, despite express prohibitions by the employer, gave a lift to an employee of another firm and negligently injured him in an accident.[72] The employer was not held liable, as this was deemed to be an act done outside the course of employment. One can compare this to the case of *Rose v Plenty*,[73] where liability was imposed when a small boy got injured in a road accident when he was assisting a milkman on his rounds. These two decisions appearunre concilable.[74]However, Lord Denning justified the distinction in *Rose v Plenty*, when he held that by allowing the boy to assist him, the employee was not acting outside the scope of his employment but rather, in furtherance of it.[75]

Further problems arise where detours and leave from duty take an employee out of the course of his employment.[76] It is possible that an employer will only be found liable where an employee is carrying out his duties in a standard way. For instance, a minor detour is incapable of taking an employee out of the course of his employment, but a 'frolic of his own', which did not at all involve his duties, would.[77]Journeys to and from work, and whether these are regarded as being in the course of employment, were considered in *Smith v Stages*.[78]With respect, we disagree with the decision of the court that employees are not in the course of employment travelling to and

[66]*Limpus v London General Omnibus Company,* 158 ER 993.
[67]*London General Omnibus Company* [1900] 2 QB 530.
[68]158 ER 993, p. 999.
[69][1900] 2 QB 530, p. 534.
[70]*Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509.
[71]*Conway v George Wimpey & Co Ltd* [1951] 2 KB 266.
[72][1951] 2 KB 266, p. 268.
[73]*Rose v Plenty* [1976] 1 WLR 141.
[74]Cooke, Supra, p. 434.
[75][1976] 1 WLR 141, p. 144.
[76]Markesinis, Johnston, Deakin, p. 685.
[77]*Joel v Morison* [1834] EWHC KB J39.
[78]*Smith v Stages* [1989] AC 928.

from work, except their transport is provided by their employer.[79] It is not all employers that can provide transportation. Secondly, the essence of embarking on those journeys was to facilitate the performance of the employees' duties for the benefits of the employer's business. Also, travelling to either an alternative place of work or to the workplace, during the employer's time, has been held to be in the course of employment.[80]

8.0 Intentional Torts of Employees

Is it legal to hold an employer's liable for the intentional torts of their employees? As usual, the answer is: it depends. In the past, most actions alleging vicarious liability for intentional torts did not succeed because the general view was that no employer would deliberately employ a person to commit crimes.[81]There are, however, some exceptions to this view. In *Morris v CW Martin & Sons Ltd*,[82]for example, the employer was vicariously liable for the thefts by an employee, where there is an implied duty to keep the claimant's possessions safe.[83] However, such liability was limited to torts committed in the course of employment. The significance of Salmond's test was neglected until *Lister v Hesley Hall Ltd*, a case involving vicarious liability for sexual abuse. In the case of *Bazley v Curry*,[84]the House of Lords established a newer test for finding liability in cases of intentional torts. This is where a tort committed by an employee is closely connected to their duties; their employer may be found liable.[85] We shall now examine some specific intentional torts to drive home our point.

8.1 Assault

Unlike other intentional torts that are mostly premeditated, liability for assault has been found in many cases before that of *Lister v Hesley Hall Ltd*. *Poland v Parr & Sons*[86]where an employee assaulted a boy, believing him to be attempting to steal his employer's goods. Vicarious liability was imposed on the employer based on the employee's implied authority to protect the goods of his master.[87] There was also liability where a tram conductor - in his duties - pushed a passenger out a tram when he refused to pay for his fare.[88] Assault involving personal vengeance and spite was, however, not found to result in liability, as in *Warren v Henlys Ltd*.[89] See also the case of In *Mattis v Pollock*[90]in this regard.

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[79][1989] AC 928, p. 956.
[80]*Ibid*.
[81]Markesinis, Johnston, Deakin, p. 687.
[82]*Morris v CW Martin & Sons Ltd* [1966] 1 QB 716.
[83][1966] 1 QB 716, p. 732.
[84]*Bazley v Curry* (1999) 174 DLR.
[85][2001] UKHL 22, at 24.
[86]*Poland v Parr & Sons* [1927] 1 KB 236.
[87][1927] 1 KB 236, p. 242.
[88]*Smith v North Metropolitan Tramways Co* (1891) 55 JP 630.
[89]*Warren v Henlys Ltd* [1948] 2 All ER 935.
[90] [2003] 1 WLR 2158. Here, a bouncer for a nightclub was involved in a dispute with a customer. He subsequently went home and returned with a knife, stabbing the customer, causing serious injuries. The employer was held liable, despite the bouncer's intent on revenge, due to the close connection of the tort to the bouncer's employment and duties. It was of particular importance that the bouncer was employed to act in an aggressive and tough manner.

8.2 Theft

Liability for theft has been found through a non-delegable duty of employers to ensure that a third party's goods are secured.[91] The statement of Lord Denning in *Morris v CW Martin &Sons Ltd*, involving an employee who stole a fur coat from a dry cleaner, is significant on this subject matter.[92]Vicarious liability for theft is also linked to poor or wrong selections of employees by the employer, as in *Nahhas v Pier House Management*.[93] Here, the Management company of a luxury block of flats hired a porter, who was an 'ex-professional thief,' to manage their building. A tenant entrusted him with her keys, and was subsequently robbed of expensive jewellery.[94]The management company was held liable for their negligence in hiring the porter because they did not carry out sufficient checks on his background, address, or obtaining a written reference. The reason why employers are found vicariously liable for some crimes committed by their employees is that such employers have been 'professionally negligent' in the recruitment process. They were not doing enough due diligence to ensure they were hiring an employee of good character.

8.3 Sexual assault

Until recently, employers were not held vicariously liable for sexual assault, despite the particular vulnerability of children, and special care in selecting employees.[95]The Appeal Court held in *T v North Yorkshire CC*[96]that a headmaster's sexual abuse of children on a field trip was outside the scope of his employment. In the past, this was a criterion for vicarious liability.[97]This rule was reversed in the case of *Lister v Hesley Hall Ltd*, which effectively establish liability for sexual assault, where it is close linkage with an employee's duties.[98] While upturning *T v North Yorkshire CC*, the Court held that the relative close connection between the sexual abuse and the

[91]*Devonshire, Peter (1996). "Sub-bailment on terms and the efficacy of contractual defences against a non-contractual bailor". Journal of Business Law (July).*, p. 330.

[92][1966] 1 QB 716, p. 726. Lord Denning said "*'Once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged, whilst they are in his possession, he is liable unless he can show - and the burden is on him to show - that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty*.

[93]*Nahhas v Pier House Management* [1984] 1 EGLR 160.

[94][1984] 1 EGLR 160, p. 160.

[95]This notion was reflected upon by Lord Steyn during his judgment of *Lister v Hesley Hall Ltd*, [2001] UKHL 22, at 25.

[96]*T v North Yorkshire CC* [1999] LGR 584.

[97]Markesinis, Johnston, Deakin, p. 690.

[98][2001] UKHL 22, at 25. Here,a warden of a boarding house sexually abused several children over the course of three years. Initially, it was held (under the precedent of T v North Yorkshire CC) that such acts could not have been in the course of his employment. However, the House of Lords overruled the earlier case, with Lord Steyn stating: The reality was that the county council were responsible for the care of the vulnerable children and employed the deputy headmaster to carry out that duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment. The connection between the employment and the torts was very close.

duties of the warden established liability.[99] The mere opportunity to abuse children was not the reason for liability.[100]

8.4 Fraud

For long, employers have been responsible for the fraudulent misrepresentations of their employees.[101] This liability was extended to cover fraudulent actions which were not of benefit to the employer, a previous requirement.[102]Thereafter, the test for vicarious liability of fraud was whether it was within an employee's authority (either actual, or outwardly appearing) to carry out the fraudulent actions that he did.[103] The fact that an employee merely asserted that he had implied authority is insufficient, the defrauded must have been assured or made to believe by the employer (or have inferred through standard dealings) that the employee in question had it.[104]

8.5 Employers and insurers

Large corporations usually take out an insurance policy against these kinds of liability. The Court may use the party that has an insurance cover to determine who the employer is. The case of *Lister v Romford Ice and Cold Storage Co*[105]created a controversial principle at common law, to the effect that where employers are found vicariously liable for employees' actions, they are entitled to recover indemnity from them, to cover such losses.[106]The House of Lords accepted that there might be an implied term in the contracts of employees, which requires the exercise reasonable care and skill in their work. Such principles have knocks and kudos for various reasons.[107] The emergence of widespread insurance of employers has led to the abandonment of recovery of indemnities, as illustrated by the British Insurance Association entering into a gentlemen's agreement not to utilise the rule.[108]

9.0 Summary and Conclusion

Lord Denning has said that: "It is right and just that the person who creates a risk bears the loss when the risk ripens into harm."[109]While it appears that dominant philosophy of vicarious

[99][2001] UKHL 22, at 24.

[100]*Levinson, Justin (2005). "Vicarious liability for intentional torts". Journal of Personal Injury Law (4).*, p. 305. Here, it was suggested that if it were a grounds man who had carried out the abuse,liability would not have occurred.

[101]*Barwick v English Joint Stock Bank* (1866-67) LR 2 Ex 259.

[102]*Lloyd v Grace, Smith & Co* [1912] AC 716.

[103]Markesinis, Johnston, Deakin, p. 689.

[104]per Lord Keith, in *Armagas Ltd v Mundogas SA* [1986] AC 717, pp. 781-782.

[105]Williams, p. 220.

[106]*Ibid*.

[107]Advocacy of the indemnity features on rules of principal liability; the person to commit a tort and to cause damage should pay damages arising from it.[107] Critics state that the recovery of an indemnity is contrary to equity, due to lack of wealth of employees and servants.

[108]"Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer regarding the death of or injury to a fellow-employee, unless the weight of evidence clearly indicates (i) collusion or (ii) wilful misconduct on the part of the employee against whom a claim is made in the case of Morris v Ford Motor Co Ltd [1973] QB 792, at 799. Thus, indemnities are not pursued from employees. The decision in *Lister* was eventually reversed by the dicta of Lord Steyn in *Williams v Natural Life Health Foods Ltd*.

[109]*Bazley v. Curry, 1999 CanLII 692 (SCC).*

liability that will satisfy everybody is the one based on 'public policy; or 'social necessity,' this position is not always true. Vicarious liability has been criticised on the ground that it is too wide in attributing wrongdoings of all employees to the employer, and it is too narrow in leaving no opportunity to explore the employer. Mostly, the trend of judicial decision on vicarious liability has been pro-plaintiff. Vicarious tortious liability arises because of a legal or equitable relationship between the parties. Employees know that their employers would be held vicariously liable to third parties for their wrongs. While being held personally liable for their wrongs, rogue employees know, as a matter of fact, that it is the employer who will pay for it, and the employee has less incentive to avoid the harm.

We conclude with this tragic example from Canada, which challenges the consistent application of the doctrine. There was a strike at Giant Mine, one of Royal Oak's mines, which aggravated into violence. Royal Oak, desirous of keeping the mine open, hired Pinkerton's security, together with replacement workers. The workers were represented by CASAW Local 4, a local union and part of CASAW National. There have been some minor incidents, including explosions. In 1992, one of the miners on strike, Roger Warren, slipped into one of the mine shafts and planted explosives, killing nine miners in the process. The families of the deceased sued. They were subsequently awarded $10.7 million in damages.[110] The companies involved were also found jointly and severally liable. Warren was charged and convicted of murder under the Canadian *Criminal Code*. CASAW National was initially held vicariously liable for its local union CASAW Local 4. It appealed, and the decision was reversed. The union was found *not* vicariously liable for Warren's action because the unions "are distinct legal entities which are not generally liable at law for the actions of others." Here, only the employer could incur vicarious liability, not another party such as a union. CASAW Local 4 equally successfully appealed the ruling that it was vicariously liable. Despite Warren having done an act on his job relating to mining, he was adjudged acting as a "rogue" member of the union. The Court said his union was not liable for that, but it seems clear that Curry was a "rogue" employee too.

10. 0 Recommendations

First, to avoid potential liabilities as much as possible, employers should carry out thorough due diligence while selecting or hiring their employees. They should ensure that employees with the right competence, experience, and expertise in the area of their duties are hired. This is because any tort committed or negligence towards third parties by these employees will ultimately be borne by the employers. Taking this step by the employer will go a long way in drastically mitigating their vicarious liabilities.

Secondly, in order to make the employees more careful in their dealings with third parties, where it is so obvious that the tort was negligently or intentionally committed, though the employer will still be vicariously liable, the employee can be made to bear the brunt of the financial implications of their negligence. This should be contained in their conditions of service to avoid possible litigation. Where this is not possible, such an employee's appointment can be terminated without benefit. There must be in the Employees' handbook, gross negligence occasioning harm

[110] See the case of *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 (CanLII), [2010] 1 SCR 132.

or injury to third parties as one of those things that constitute gross negligence, the penalty of which shall be termination or dismissal without benefit. However, the relevant labour laws must be strictly adhered to. There should also be incentives put in place by the employees to avoid acts that could make their employers vicariously liable. There should be perquisites like an accident-free bonus and other valuable incentives for drivers that have not recorded an accident over a specific period. This will make him more careful in his manner of driving. Incentives matching various jobs should also be given to the employees concerned.

Furthermore, the phrase *'in the course of employment'* should be reasonably construed to the benefits of both the employers and the employees by the lawmakers. It should not be too broad to make the employer vicariously liable in virtually all situations, and it should not be too narrow to make the employer escape vicarious liability to the detriment of the employee. After all, the reason for the employer-employee relationship is to be mutually beneficial and not to be parasitic. For instance, the '*going to and coming from work rule'* must be revisited. The rule states that employees that are injured either going to or coming from work are not entitled to compensation in some jurisdictions, such as the New York State in the USA.[111] We submit that this rule has no justifiable basis as the purpose of embarking on the journeys are in furtherance of the employees' work to the benefit of the employer. Non-provision of transportation or pay for same is immaterial.

Lastly, employers should be relieved from some criminal acts of the employees where monetary compensation may be inadequate or irrelevant, such as assaults, sexual harassment or murder. However, they can be responsible for theft and falsification of records by their employees when such are committed in the course of duties. The rationale relied upon by the judiciary that most employers are negligent in hiring their employees cannot hold water because employers are not angels who will know the secret intents of a man's mind. After standard procedures have been applied in the process of hiring employees, they (the employees) should be made personally liable for any crime committed irrespective of whether it is committed in the course of duties or not. Employers should only be made liable if they are the ones that authorised the crime, as it appears unreasonable if the employer is held liable for the crimes committed by his employee just because the latter is a servant of the master and he committed the crime in the course of his duties. Employees can refuse to obey unlawful order of the employer, such as the cases of commission of a crime, since what the law generally requires from employees is obedience to lawful instructions of their employers. The consequences of crimes should be personally borne by the criminals.

[111]Retrieved from http://www.wcb.ny.gov/content/main/TheBoard/glossary.jsp visited 5th May, 2021.