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The doctrine of vicarious liability provides that an employer is vicariously or indirectly liable for all delicts or violations of the law committed by his or her employees when they are acting in the course and within the scope of their employment at the time when a delict is committed. In simple terms it is law that imposes liability on employers for the wrong doings of their employees. Some of the reasons why it has been justifiable to have this doctrine in the Law of delict, is because employers have greater financial stamina to offset any losses caused by employees and employees work under the instruction of the employer just but to mention a few.

The requirements for a vicarious liability case state that an employee must not be an independent contractor and that the employee must have been acting in the course of his employment when a delict arises. In order to establish vicarious liability, it is not sufficient that an employee committed a delict during his or her ordinary work hours. If an employee does something which is entirely for his or her own benefit and which does not form part of his or her duties as an employee in that business, the employer will not be held liable. The same applies even if the employee has been permitted by the employer to use the employer’s property for personal interests. Even when the employee does the delict with the intention of benefiting his or her employer and not himself, the employer will still not be liable if the employee is doing something which is neither part of his or her employment duties nor reasonably incidental thereto.

As regards the concept of “course of employment”, it has been ruled in a series of cases that the fact that the employee *deviates* from the course of employment will not necessarily mean that there is no longer vicarious liability. Considerations of social justice have led the court to adopt the approach that the degree of deviation from the course of employment has to be of a major extent before it will hold that an employee is no longer in the course of his or her employment (Reid, 1999). If the employee, whilst about his or her employer’s business, temporarily diverts from that business to do something for his own purposes, the court will ask if the deviation was of such a degree *in terms of time and distance* that it cannot reasonably be said that he or she was still exercising the functions for which he or she was employed. In*Nott v ZANU (PF)***1983 (2) RLR 208 (S)**the court held that the employer was nonetheless vicariously liable because in terms of time and space the deviation was not major and had not seriously interfered with the exercise of the driver’s duties. The deviation was not such as to lead to the conclusion that the driver had abandoned his functions.

In*Biti v Minister of State Security***1999 (1) ZLR 165 (S)** on appeal the court held that the standard test for vicarious liability requires that the court decide whether a wrongdoer was engaged in the affairs or business of the employer when he committed the delict. Although the driver had deviated from his authorised route, the deviation, in terms of time and space, was not such as to convert it into “a frolic of his own.” The improper mode of exercising his duty of keeping the vehicle safely overnight was still done within the course of his employment and the Ministry which employed him was vicariously liable.

More so, the rational of the doctrine of vicarious liability revolves around a number of policy considerations. The doctrine is justified on the basis that an employer who employs others to advance his own economic interests should in fairness be placed under a corresponding liability for losses incurred in the course of running a business. Through instructing employees to take up various roles within a company, an employer tacitly takes up a risk that the employees may cause harm to others and the employer also has the capacity to control his or her workers’ activities.

The doctrine of vicarious liability is also couched on the premise that an employer is by far in a far better financial position to compensate an injured third party as compared to the employee who will often not have the financial resources to pay compensation in the unfortunate event that a delict arises during the scope of employment. Consequently, it is therefore, unfair to expect an employee to pay compensation for a delict arising out of performing work on behalf of the employer.

More so, the doctrine of vicarious liability is justified due to the fact that an employer is more often than not an enterprise which is financially on a better footing as compared to that of an individual employee. Thus, an employer can by far financially absorb the losses incurred in a delictual claim that arises during the scope of an employee exercising his contractual employment duties. In **Gwatiringa***v Jaravaza & Anor***2001 (1) ZLR 383 (H)** it was held that “there is a compelling social policy behind the concept of vicarious liability. Corporations or large employers carry out extensive operations which they conduct through employees. Thus the employer must, in an appropriate case, answer for the faults of his or her employees, as long as they are committed in the course of and within the scope of their employment”.

In*NSSA v Dobropoulos & Sons (Pvt) Ltd***2002 (2) ZLR 617 (S)** the Supreme Court stated that “the rationale behind holding employers vicariously liable for the acts of their employees, even where they have deviated from the strict course of their duty, is that it is right and proper, where one of two innocent parties has suffered a loss arising from the misconduct of a third party, that the loss should fall on the one of the two who could most easily have prevented the happening or the recurrence of the mischief”. This approach does not depend upon a creation of risk theory, but uses the customary test for determining the existence of vicarious liability which serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person who might otherwise not be recompensed.

There is, however, a limit to the exercise of the doctrine of vicarious liability. An act done by an employee solely for personal interests and purposes, unrelated to the work of the employer and outside his authority, will not be protected by the doctrine of vicarious liability. In*Gorah v Mahona***1984 (2) ZLR 102 (S)** it was held that when instructions have been given to an employee and he or she disobeys these instructions, the vital question is whether the instructions limited and defined the**actual sphere of employment** or whether they merely sought to**regulate** the**conduct** of the employee**within his sphere of employment**.

Another exception is that there is no vicarious liability for the delicts committed by independent contractors. An independent contractor is a person employed to do work who is not subject to the control and direction of the employer as to the manner he does the work. The crucial test is whether there is a right to exercise control over the manner of performance of the work. Persons with special expertise such as architects, engineers and lawyers are usually employed as independent contractors and delicts committed by such are not protected under the scope of vicarious liability. In*Banda v Gamegone (Pvt) Ltd & Anor***HH-133-03** it was held that “the vicarious liability of employers for the delicts of employees does not extend to independent contractors. The test as to whether a person is an employee or an independent contractor is the existence of a right of control over the person in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer whereas an independent contractor is one who is his own master.

Succintly, it can be deduced from the above arguments that the law of vicarious liability imposes accountability on employers for the wrong doings of their employees. Some of the reasons why it justifiable to have this doctrine in the Law of delict is because employers have greater financial stamina  to offset any losses by employees, it is under the instruction of the employer that the delict is committed and including it in the law of delict helps reduce the taking of bad illegal risks by employers. The essay above has outlined the doctrine of vicarious liability while justifying its existence in the law of delict.

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