

## SPECIAL RELATIONSHIPS IN VICARIOUS LIABILITY

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### INTRODUCTION

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The genesis of tort law in India is the English common law of wrongs, derived from the Latin word “tortum” which implies “twisted as opposed to straight”.<sup>2</sup> The law of tort is an expansive mixture of rights, obligations, and fixes associated through the courts in common methods. It offers solutions to help the people who have suffered a setback or harm due to the unjust or thoughtless activities of others as “monetary compensation”.

Vicarious Liability, an essential part of tort law, is the liability of one person arising out of the wrongs committed by another person with whom he/she has a special relationship. It is derived from the Latin word “vice”, which means ‘in place of’.<sup>3</sup> Although in torts law, it is a general principle that one is liable only for his misdeeds, however, the doctrine of vicarious liability serves as an exception to this. It is thus based on two legal maxims – “*Qui facit per alium facit per se* (he who does an act through another does it himself)” and “*Respondent Superior* (let the principal be liable)”.<sup>4</sup>

During the period of the early Anglo-Norman, the idea of establishing a complete liability on the master for wrongs of servants began to change to liability only in cases of consent or direct command. Hence, until much of the 17th century, the liability of the master was restricted to only the acts that he has particularly instructed to be done. However, under the case of *Hern v. Nichols* in England, Sir John Holt (Chief Justice, 1688-1710) declared that “the master was liable not only for acts done at his express command but also for those done by his implied command”.<sup>5</sup>

To constitute the tort of vicarious liability in special relationships, certain conditions must be fulfilled. *First*, there should exist a special relationship between the joint tortfeasors (Example: master-servant, principal-agent, etc). *Second*, the wrong committed should be

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<sup>2</sup> Purna Deep, *The Door Left Ajar: Evolution of Law of Torts in India*, 1 IJLMH, ISSN 2581-5369 (2018).

<sup>3</sup> Dr. Vaishali V. Jadhav, *Principle of Vicarious Liability- Nature, Scope and Justification*, 2018, p.1.

<sup>4</sup> Law of Torts: Vicarious Liability of State, LEXLIFE INDIA (May 13, 2020), <https://lexlife.in/2020/05/13/law-of-torts-vicarious-liability-of-state/>.

<sup>5</sup> *Hern v Nichols*: 1700, [1700] 1 Salkeld 289 (Mar. 17, 2019), <https://swarb.co.uk/hern-v-nichols-1700/>.

related to the special relationship between the two persons. *Third*, the wrong should be committed within the “course of employment” and not in one’s capacity.<sup>6</sup>

Although the application of imposing and holding people to be vicariously liable may seem to turn the burden of liability completely on the master, the person who had committed the tort cannot escape from his liability entirely and is still made legally responsible and answerable to his actions. In other words, the doctrine of vicarious liability established a “joint liability” on both the master and the servant irrespective of whether the master was at fault or not.

### **WHY IS THE MASTER HELD LIABLE?**

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The master is held vicariously liable for the acts of his servants for various reasons. These reasons have been put forward as “justifications” to the tort of vicarious liability.

Firstly, the master is believed to have the “deepest pockets” which allows him to defend himself in the court as opposed to a servant who is a mere worker under his discretion. The wealth of the master and his access to resources is the reason why he is made liable for the acts of his servant.

Secondly, the tort of vicarious liability acts as an aid to prevent accidents due to negligence of the servant by allowing the master to have a “financial interest” in the acts of the servants and therefore ensuring the safety of others in the hands of the servant.

The third and final justification provided is under the belief that since a master makes use of his servant to earn profits, he should also be the ultimate one to incur losses that may have been committed by the servant in his duty to complete the task during his/her employment.

### **WHO IS A MASTER AND WHO IS A SERVANT?**

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A master is believed to be any person who is in a position to lawfully employ another person under certain terms and conditions to work for him. This master-servant relation bases its existence on the fact that a master can not only direct/command what work needs to be done but also decide how the work needs to be done.

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<sup>6</sup>Preeti Singh, Vicarious Liability in India, LEGAL SERVICE INDIA, <http://www.legalservicesindia.com/article/1634/Vicarious-Liability-in-India.html#:~:text=Generally%2C%20a%20person%20is%20liable,of%20another%20person%2C%20may%20arise.>

In the case of *Hewitt v. Bonvin*<sup>7</sup>, a son was driving a car that belonged to his father to drop his friend home. However, due to the son's negligent driving, the third party (friend) had suffered an injury and was killed. The court in an action against the father held that he cannot be held vicariously as his son was neither his servant nor his agent.

A servant is believed to be a person who "voluntarily" agrees to be lawfully employed by another, either for wages or some other reason, and works under the direction and command of his employer/master.

## **SERVANT VS. INDEPENDENT CONTRACTOR**

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While both two are employed by someone who is the head to do specific work, the legal relations that they have with the master are different. In general terms, a servant is said to be hired under a "contract of services" whereas an independent contractor is hired under a "contract for services". The liability of a master does not arise in the case of an independent contractor since he is not under the direct control of the master and may do things at his discretion.

In the case of *Morgan v. I.C.C*<sup>8</sup>, the defendant was acquitted as the injury caused to the plaintiff by falling from an open lift as the work was being done under an independent contractor and it was his duty/obligation to warn the plaintiff or keep the lift safe. On similar grounds, in the case of *B. Govindarajulu v. G. Madaliar*<sup>9</sup>, a motor lorry was sent for repair by the plaintiff and one of the employees of the repair shop drove away with it and met with an accident. The Madras High Court, in this case, held that the owner of the repair shop cannot be held liable since the person who drove away with the lorry was an independent contractor.

## **DETERMINATION OF A MASTER-SERVANT RELATION**

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The evolution of various tests over some time helps us in understanding and determining a master-servant relationship. These tests can be divided based on two views – Traditional View and Modern View.

### **Traditional View – Control Test:-**

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<sup>7</sup>Hewitt v. Bonvin [1940] 1 K.B. 188, C.A.

<sup>8</sup>Morgan v. Incorporated Central Council 1936 1 ALL ER 404.

<sup>9</sup>B. Govindarajulu v. G. Madaliar, AIR 1966 Mad. 332.

This test lays its basis on two basic conditions –

- That the person-in-charge should be in the scheme of things of what work ought to be done
- That the person-in-charge should have the knowledge of how the work needs to be performed by a servant

However, the control test cannot be used in instances of skilled work requirements such as one being a doctor because the owner of the hospital cannot dictate how to operate or do treatment of a patient. In the case of *Dharangadhara Chemical v. the State of Saurashtra*<sup>10</sup>, the SC believed that the authority over the type and mannerism of doing tasks by a servant on the face of the whole thing means, that the nature of control may vary and that there are many instances where a master may not be able to exert direct control over his servant. Hence, the control test cannot be applied universally to all. This led to the development of the modern view of determination.

### Modern View:-

#### (A) The “Integral Part of the Business” Test

In *Stevenson Jordan v. Macdonald & Evans (1952)*<sup>11</sup>, the court held that work done under a contract of service (servant) was an integral part of the business whereas the work done under a contract for service (independent contractor) was not an integral part of the business.

#### (B) Multiple Test

This test laid a distinction between persons working under a contract of service (servants) and persons working under a contract for service (independent contractors). In *Ready Mixed Concrete v. Minister of PNI*<sup>12</sup>, it was held that three necessary conditions must be fulfilled to establish a “contract of service” -

- The person taking on the task (servant) should agree that he/she has the will in selling his/her skills in working and doing the task for the master in the hope of getting paid or getting some form of benefits as a stipend.

<sup>10</sup>Dharangadhara Chemical Works Ltd. v. State of Saurashtra, AIR 1957 SC 264.

<sup>11</sup>Stevenson Jordan & Harrison Ltd. V Macdonald & Evans (1952) 1 TLR 101.

<sup>12</sup>Ready Mixed Concrete v. Minister of Pensions and National Insurance, [1968] 2 QB 497.

- He voluntarily agrees to be subjected to the control and supervision of the person in charge of the service.
- The rest of the schedules are consistent with the contract of service

## WHEN CAN A MASTER BE HELD LIABLE?

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### 1. Wrong committed under the directions of the master

Any act which is done by the directions of the master, and such act results in the committing of a tort by the servant, then the master will be declared guilty even if proper care was taken while doing the work. In the case of *Gregory v. Piper (1829)*<sup>13</sup>, the defendant had directed his servant to lay down some garbage on a path to prevent the plaintiff from using it. While the servant took the utmost care to ensure that the garbage did not touch the plaintiff's property, it eventually slid and entered into the premises of the plaintiff, who sued the defendant for trespass. Although the servant took due care, the one who was defending himself was still held guilty as the thing he did was done in his direction.

### 2. Wrong due to Negligence

A master can be declared guilty for the acts of the servant which he may do negligently or without taking proper care. In *Pushpabai P. Udeshi v. Ranjit Ginning*<sup>14</sup>, the dependents of the deceased person held the respondent company liable as their manager was driving negligently which ultimately led to the death of the deceased. The Supreme Court held that the manager was driving negligently during his course of employment which makes the respondent company liable.

### 3. Wrong committed due to the "fraudulent" acts of the servant

In the case of *Lloyd v. Grace Smith*<sup>15</sup>, the plaintiff had asked the manager of the defendant company to sell her mortgaged property but he ran away with the money after selling it. The court, in this case, held that the company shall be held guilty for fraudulent acts of the person who manages things because although the act itself was not authorized, their manager was still allowed to take the plaintiff's consent, and hence it falls under the course of employment.

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<sup>13</sup>Gregory v. Piper (1829) 9 B & C 591.

<sup>14</sup>Pushpabai Purshottam Udeshi & Ors vs Ranjit Ginning & Pressing Co. (P) 1977 AIR 1735.

<sup>15</sup>Lloyd v. Grace Smith & Co. (1912) A.C. 716.

#### 4. Wrong due to “excess or mistaken execution of a lawful authority”

In *Bayley v Manchester*<sup>16</sup>, a person who picked up the luggage of people on the station and was associated with a company in a haste pulled out the opposition party from a right carriage believing him to be in the wrong carriage because of which he had suffered injuries. The company was held guilty as the thing was performed during employment and no liability would have arisen had the plaintiff been in the wrong carriage.

#### CONCLUSION

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Every individual in society is entitled to appropriate legal remedies in cases of infringement of rights. To compensate the victim, the tort law establishes remedies that help in punishing the perpetrator and providing justice to the injured party. However, often a party who had themselves not committed a wrong may be held vicariously liable for the acts of another. Although it is sometimes believed to be unjust for the employer or master to bear losses due to acts of another, various justifications have been provided for the same. After due analysis of the essentials of establishing the tort of vicarious liability and the cases where it has been previously applied, it can be well understood that the courts have succeeded in providing justice to the sufferer for the wrongs committed by a person for acts either authorized or unauthorized. However, in India, we also see a window of misuse of this provision by intentionally trying to make the master/employer liable by the servant. Hence, such loopholes must be addressed by the courts while dealing with the cases of vicarious liability. Furthermore, it can also be seen that despite the development of the Modern tests, the courts still heavily bank on the Traditional control test which doesn't have much relevance in the modern context of employment.

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<sup>16</sup>Bayley v Manchester S&L Railway (1873) LR 8 CP 148.