

**Limiting the application scope of the doctrine of vicarious liability
in deviation cases within labour law context: Comparative
Appraisal**

By

SHIRINGANE Philemon

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SUPERVISOR: Mr. R.M MATSHETA

Abstract

The employment contract comes with both benefits and liabilities for both employers and employees. For example, employers in South Africa often suffer from financial liability when their employees commit misconduct that causes damages to third parties. This occurs with the application of the principle of vicarious liability. This principle holds employers liable for the misconduct of their employees. The purpose of this study is to critically analyse the scope of application of the principle of vicarious liability in deviation cases while considering its reasonableness and the financial damages employers suffer due to it in South Africa. The study made use of the desktop method of data collection to find primary sources and secondary sources of law. The study analysed the case of *Stallion Security (Pty) Ltd v Van Staden* [2019] whereby the scope of the principle of vicarious liability was extended by the Supreme Court of Appeal (SCA) to also hold employers liable for conduct committed by off-duty employees. The SCA in this case reasoned that as long as employment duties granted an off-duty employee an advantage to commit misconduct, an employer should be liable. A point of concern from this precedent is the implications it has on the liability of employers in the sense that employers in South Africa will have to defend against claims brought in terms of the doctrine of vicarious liability. The study considered fairness to be important and after comparative analysis, found that the United Kingdom courts apply the principle of vicarious liability with fairness and reasonableness such that employers are still afforded some protection. It was recommended that courts in South Africa should learn from UK law to limit the scope of application of the principle of vicarious liability. In addition to this, employers should also rely on liabilities such as piercing of corporate veil and liability for breaching a fiduciary duty to make employees such as directors and senior executives liable for their misconduct.

Keywords: vicarious liability, deviation cases, wider scope, South Africa, United Kingdom, limiting the scope of application.

Declaration

I PHILEMON CLERANCE SHIRINGANE hereby declare that this research is submitted as part of the fulfilment of my master's degree in Labour Law at the University of Limpopo.

I hereby confirm that this work has never been submitted before to any University and that this is my effort.

I further declare that all sources cited in this study are acknowledged and listed in the reference list.

List of Acronyms

BCEA – Basic Conditions of Employment Act

CC – Constitutional Court

CEO – Chief Executive Officers

LRA – Labour Relations Act

PELJ – Potchefstroom Electronic Law Journal

SABC – South African Broadcasting Corporation

SCA – Supreme Court of Appeal

SALJ – South African Law Journal

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I thank God for giving me this opportunity and strength to take up this mammoth task.

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CHAPTER 1 – INTRODUCTION AND BACKGROUND

1.1. Introduction

The South African labour law regulates the labour relations between employers and their employees, whereas even the common law also regulates employer-employee relations.¹ The common law principle of vicarious liability is the main focus of this study. The employer-employee relationship is often shaped by the benefits it provides to both parties, although there can be some drawbacks.² The negative side on the other hand emanates from the principle of vicarious liability which causes employers to suffer financial damages due to misconduct committed by their employees.³ Vicarious liability is a legal principle that holds one party liable for the actions of another party. The principle originated from English law and it was influenced by the Latin principle of *Qui facit per alium facit per se* which means that "he who acts through another does the act himself".⁴

Holding employers liable in terms of the principle of vicarious liability occurs in two forms, namely standard cases and deviation cases.⁵ In standard cases, employers are held vicariously liable for their employees' misconducts that are committed within the scope and course of their employment.⁶ In deviation cases, employers are held vicariously liable even when their employees committed misconduct while acting

¹ The Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and Employment Equity Act 55 of 1998. See also, Wallis M, 'The LRA and the common law' (2005) 9 *Law, Democracy & Development* 81, where it is discussed that the reference to common law in labour matters causes nightmares to legal practitioners in South Africa.

² Benefits such as profits for employers and remunerations for employees. See, Grogan J *Workplace law* 11th edition (Juta & Co Cape Town 2014) 27.

³ Botha M.M and Millard D, 'The past, present and future of vicarious liability in South Africa' (2012) *De Jure* 227.

⁴ Shekhawat D, 'Vicarious liability in medical negligence' (2021) 1 *Law Colloquy Journal of Legal Studies* 5.

⁵ Calitz, K, 'The close connection test for vicarious liability, (2007) *Stellenbosch Law Review* 454.

⁶ Botha and Millard (2012) *De Jure* 227; See also Barlow T.B *The South Africa Law of Vicarious Liability* (Juta & CO 1969) 12 & 13.

outside their scope and course of employment.⁷ The standard cases are not problematic hence this study focuses on deviation cases.

Previously, the scope of application in deviation cases required that employers be held vicariously liable only when there is a close connection between the employer's business and the employee's wrongful act.⁸ Therefore, the causal chain between the employer's business and the employee's misconduct was essential for holding employers vicariously liable in deviation cases.⁹ This implies that employers could be held liable only when their employees have committed misconduct during their course of employment but while acting outside their scope of employment.

This scope appears to have been extended by the Supreme Court of Appeal (SCA) in the case of *Stallion Security v Staden*.¹⁰ The SCA in this case held the employer liable even when its employee committed misconduct when the employee was off duty, thus acting outside the scope and also not during the course of employment. The SCA reasoned that there is a close connection such that the employer's business granted the employee the opportunity to commit the misconduct.¹¹ This, however, opened a loophole making employers, mostly the government and private entities suffer substantial damages due to their employees' misconduct. Therefore, employers find themselves spending more money on legal suits than on improving the quality of services in the public sector and spending on new developments and job creation in the private sector.

This phenomenon is due to a wider scope of the application of vicarious liability in South Africa which makes employers suffer more than necessary and reasonably. Employees such as company directors, police officers, and senior managers often abuse their powers and commit misconduct and their employers are held vicariously

⁷ *Minister of Police v Rabie* [1985] ZASCA 134C-E.

⁸ Basson A, Le Roux P.A.K & Strydom E.M.L, *The New Essential Labour Law Handbook*, 7th Edition (LexisNexis South Africa 2019) 32–35.

⁹ *Ibid.*

¹⁰ ZASCA 127 at 21, 22 and 36. (Hereafter referred to as *Stallion Security*).

¹¹ *Stallion* at 21, 22 and 36.

liable.¹² Some scholars and legal practitioners even described the application of the doctrine of vicarious liability in South Africa as the employers' worst nightmare and that it leaves employers with no defense at all.¹³ Furthermore, this point will be substantiated through the comparative analysis. The comparative study intends to articulate that the scope of application of the doctrine of vicarious liability in the United Kingdom (UK) is much more reasonable and leaves employers with a defense to rely on as compared to South Africa.

In UK law, if employees acted outside both the scope and course of employment but gained access to commit misconduct using his/her employer's business, the UK courts consider whether it is reasonable under all circumstances to hold employers liable or not.¹⁴ This scope of the application appears to be reasonable and employers can escape liability when it is reasonable to do so. Thus, the study analyse the scope of application of the doctrine of vicarious liability in South Africa and intends to prove that it is wider than reasonable and therefore causes employers to suffer financial and reputational damages unreasonably. The comparative study shall be done considering the UK scope of application of the principle of vicarious liability in deviation cases.

1.2. Problem statement

The rationale for this study is the unavoidable burden placed by courts on employers in South Africa regarding legal suits brought against employers in terms of the doctrine of vicarious liability. The scope of application of the doctrine of vicarious liability in South Africa is wider than reasonable to the extent that employers have no legal defense at all against lawsuits in terms of the principle of vicarious liability for their employees' delicts in deviation cases. This is the case when employees commit

¹² *Minister of Police v Rabie* [1985] ZASCA 134C-E, *Stallion Security (Pty) Ltd v Van Staden* [2019] ZASCA 127, *NK v Minister of Safety and Security case and F v Minister of Safety and Security* 2012 (1) SA 536 (CC) and *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

¹³ Calitz K, "Vicarious liability of employers: reconsidering risk as the basis for liability" (2005) *TSAR* 215 – 235; Coetzer N and Wingfield C (2020) *Vicarious liability – Worst nightmare* <https://www.labourguide.co.za/recent-articles/2748-vicarious-liability-an-employer-s-worst-nightmare> accessed 15 April 2023.

¹⁴ *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12.

misconduct while acting outside their scope and course of employment but there is a connection between the employers' business, employees' duties, and employees' misconducts. The courts in South Africa do not consider what is reasonable and fair before holding employers liable. As compared to UK precedents, employers are left with legal defense in deviation cases where their employees committed misconduct while acting outside the scope and course of employment. Thus, the scope of application of vicarious liability in deviation cases in South Africa causes employers to suffer immense financial damages unreasonably.

1.3. Research questions

- What is the scope of application of the principle of the doctrine of vicarious liability in respect of deviation cases in South Africa?
- To what extent do employers in South Africa suffer financial damages due to their employees' misconducts committed while employees acted outside their scope and course of employment?
- Is the scope of application of the principle of vicarious liability reasonable in South Africa as compared to the scope of application in the UK in respect of deviation cases?

1.4. Aims and objectives

1.4.1. Aim

The main aim of this dissertation is to critically analyse the scope of application of the principle of vicarious liability in deviation cases while considering its reasonableness and the financial damages employers suffer due to it in South Africa.

1.4.2. Objectives

- Seeks to expound the extent of the scope of the principle of vicarious liability in deviation cases in South Africa.
- Strives to determine the reasonableness of the scope of the principle of vicarious liability in deviation cases in the South African legal system.
- Seeks to provide clear insights about the financial damages suffered by employers due to legal suits brought in terms of the principle of vicarious liability regarding deviation cases in South Africa.
- To compare the scope of application of the doctrine of vicarious liability in South Africa and the United Kingdom in deviation cases.

1.5. Literature review

1.5.1. The essence of the doctrine of vicarious liability

The essence of the principle of vicarious is that it is a strict liability without fault doctrine in terms of which an employer is held liable in circumstances wherein a third person has suffered damages due to the unlawful conduct of an employee.¹⁵ For the employer to be held liable, some requirements should be met or proved during legal proceedings. According to Neethling et al, the requirements for vicarious liability in South Africa are that there should be an employer-employee relationship, an employee must commit misconduct, an employee's conduct must cause damages to a third person and lastly, an employee's misconduct should be committed while an employee was acting within the scope and course of employment.¹⁶ These are requirements for standard cases. Regarding deviation cases, the principle of vicarious liability encompasses all requirements above but there are changes in the last requirement

¹⁵ Calitz K (2005) *TSAR* 215.

¹⁶ Neethling J, Potgieter J and Knobel J.C, *Law of Delict* 7th edition (LexisNexis South Africa 2016) 50, 143 & 147.

above. Calitz states that the last requirement in deviation cases consists of an employee acting outside the scope and sometimes even outside to course of his/her employment when committing misconduct.¹⁷

1.5.2. The test for vicarious liability in deviation cases

The test for vicarious liability has been developed by the Appellate Division (AD). currently he SCA has established the test for vicarious liability in the South African legal system in the oldest cases of *Feldman (Pty) Ltd v Mall*¹⁸ and *Minister of Police v Rabie*.¹⁹ In these cases, the AD developed the close connection for deviation cases to employers' vicarious liability when there is a close connection between the misconduct of an employee and the business of an employer.²⁰ The close connection test for vicarious liability was recently applied by the Constitutional Court in the case of *F v Minister of Safety and Security*.²¹ In this case, Mogoeng J stated that the deviation test applies when the employee has committed wrongful conduct whilst he was serving his interest and not acting within his scope and course of employment.²² According to Tshoose and as held in *Feldman* and *Rabie* cases, the test in deviation cases entails determining if there is a close link between a wrongful act of an employee and the business of an employer.²³ Thus, this test is called the close connection test.²⁴

1.5.3. The extent of employers' vicarious liability and financial risk

Employers do not primarily face risks of physical, psychological, or mental harm, but rather the financial risk of lawsuits under the doctrine of vicarious liability. According to Bracher, vicarious liability exposes employers to financial risks due to the

¹⁷ Calitz (2007) *Stellenbosch L. REV* 454.

¹⁸ *Feldman (Pty) Ltd v Mall* 1945 AD 733.

¹⁹ *Minister of Police v Rabie* 1986 (1) SA 117 (A) 134C-E.

²⁰ *Booyesen v Minister of Safety and Security* [2018] ZACC 18 at 11.

²¹ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

²² *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) at 41; Calitz K, "The Close Connection Test for Vicarious Liability" 2007 *Stellenbosch Law Review* 451 – 468.

²³ Tshoose I "The Employers' Vicarious Liability in Deviation Cases: Some Thoughts from the Judgment of *Stallion Security v Van Staden* 2019 40 *ILJ* 2695 (SCA)" (2020) *Speculum Juris* 34(1) 48.

²⁴ *Booyesen v Minister of Safety and Security* (CCT25/17) [2018] ZACC 18 para 11.

unavoidable misconduct of their employees that results in harm to third parties.²⁵ Scholars supported this view, describing vicarious liability in South Africa as an employer's worst nightmare due to the broad scope of its application and the financial losses it can impose on employers.²⁶

Numerous cases have seen employers incur financial losses due to employee misconduct that occurred outside the scope of their employment. One example is from 2017, when the South African government was ordered to pay R10.5 million in damages to the families of 144 psychiatric patients who died after being transferred from a public hospital to unlicensed facilities.²⁷ The court found that the government was vicariously liable for the actions of its officials who had authorized the transfers.

In *Ndlovu v Fidelity Security Services*,²⁸ a security company called Fidelity was ordered to pay R4 million in damages to a man who was shot and paralyzed by one of its guards. The court found that the company was vicariously liable for the actions of the guard. *K v Minister of Safety and Security*,²⁹ in this case, the South African Police Service was held vicariously liable for the actions of its officers, who had unlawfully arrested and assaulted a man for personal reasons and while acting outside the scope and course of employment. In the case of *MEC, Department of Health, Gauteng v DZ obo WZ*,³⁰ the Gauteng Department of Health was held vicariously liable for the actions of its employees, who had negligently caused a child to suffer brain damage during childbirth.

²⁵ Bracher P (2019) *Vicarious Liability for creating risk* <https://www.financialinstitutionslegalsnapshot.com/2019/11/vicarious-liability-for-creating-a-risk> accessed 15 April 2023.

²⁶ Coetzer N and Wingfield C (2020) *Vicarious liability – Worst nightmare* <https://www.labourguide.co.za/recent-articles/2748-vicarious-liability-an-employer-s-worst-nightmare> accessed 15 April 2023.

²⁷ *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v. National Minister of Health of the Republic of South Africa and Others*, arbitration (March 19, 2018). award, Justice Dikgang Moseneke (March 19, 2018); Durojaye E and Agaba D.K, 'Contribution of the Health Ombud to Accountability: The Life Esidimeni Tragedy in South Africa' (2018) 20(2) *Health Human Rights* 161.

²⁸ *Ndlovu v Fidelity Security Services (Pty) Ltd* (2018) ZALMPH 27.

²⁹ *K v Minister of Safety and Security* (2005) ZACC 4.

³⁰ *MEC, Department of Health, Gauteng v DZ obo WZ* (2017) ZACC 37.

The Supreme Court of Appeal (SCA) has elevated the corporate risk by how it has applied the doctrine of vicarious liability in the case of *Stallion Security (Pty) Limited v Van Staden*.³¹ The SCA unanimously held that the security company is vicariously liable to pay an amount of R1 680 000 for claims of loss of support as the appellant's employee murdered a co-employee when the perpetrating employee was committing a crime of theft for his interests. What makes the Stallion case quite different is that the employee was on sick leave when he committed the wrongful acts (theft and murder) but used the advantage that he was a site manager and had keys to access the workplace. Employers were supposed to escape liability in cases where it is not fair and reasonable for them to be held accountable in terms of the principle of vicarious liability in deviation cases.³² However, the Stallion case makes it an unavoidable liability in deviation cases whereby legal claims are brought in terms of the principle of vicarious liability.

1.5.4. Mitigation of the employer's vicarious liability

This study seeks to argue that the scope of application of vicarious liability is unreasonably wider in South Africa and should be limited for the sake of mitigating the financial risks to South African employers. However, besides this, there are other avenues employers may consider to limit the financial risks. This is in terms of section 77(6) of the Companies Act 71 of 2008 relating to the liability of directors of companies. Section 77(6)(a) of the Companies Act states that "a director of a company may be held personally liable, in terms of the principle of the common law of breach of fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach of the principle of fiduciary duty".³³ Employers can hold their negligent directors liable for damages such directors caused while acting outside the scope and course of employment but made their employer suffer financial damages. However, the risks remain intact and unresolved regarding employees who

³¹ *Stallion Security (Pty) Limited v Van Staden* [2019] ZASCA 127.

³² Calitz (2007) *Stellenbosch L. REV* 461; Neethling, JJ 'Risk-creation and the vicarious liability of employers' 2007 THRHR 527 – 539.

³³ Davis D and Geach, W (eds), *Companies and other business structures in South Africa* 3rd edition (Oxford University Press South Africa 2013) chapter 6 (e-book).

are not directors, like employees such as security guards, police officers, receptionists, administrators, and managers.

1.5.5. Comparative analysis: United Kingdom and South African law

The comparative analysis in this dissertation is based on the English law of vicarious liability in the United Kingdom (UK) and the South African common law doctrine of vicarious liability. The comparative study essentially focuses on the analyses of the test for vicarious liability determined in the UK case of *WM Morrison Supermarkets plc v Various Claimants*.³⁴ In *Morrison*, the court held that to determine the employers' liability in deviation cases, it should be considered; "firstly, what functions or field of activities had been entrusted by the employer to the employee. Secondly, whether there was a sufficient connection between the position in which he was employed and his wrongful conduct to make it fair and reasonable for the employer to be held liable".³⁵ In the case, although there was a connection between the employer's business and the employee's wrongful conduct, the employer was excused from liability since it would not be reasonable and fair to be held vicariously liable. This judgment shall be critical for comparative analysis.

1.6. Research methodology

Research methodology refers to an overarching approach that the researcher will use to collect data and analyse data and also cover the type of data the researcher will collect. The researcher in this study uses a desktop qualitative research method, which focuses on collecting and analysing contextual or non-statistical data (non-numeric) such as case law, legal journal articles, Acts of Parliament, and internet sources. This method entails finding and analysing information available on the internet and in libraries. The researcher uses relevant textbooks, journal articles, online articles, legislation, and case law about deviation cases in application of the vicarious liability

³⁴ *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12.

³⁵ *Ibid.*

doctrine. The study is primarily a critical analysis of the South African state of affairs and then the comparative study is done considering the United Kingdom, which is primarily the study of common law development done through recent case law in both respective countries.

1.7. Scope and limitation of the study

Vicarious liability generally is about two types of cases, namely the general cases and deviation cases. In general cases, the standard test for vicarious liability applies while in deviation cases the adequate connection test applies. The scope of this research is based on deviation cases only and does not cover standard cases. This therefore causes the research to be limited only to adequate connection tests and does not extend to standard tests for vicarious liability. In addition, the research considers the United Kingdom's vicarious liability to the exclusion of other countries while also focusses on deviation cases in the UK. The limitation in methodology is that the research conducts a desktop qualitative method, which is based on analysing the already existing information in the form of case law, legislation, literature, and policies, but does not collect primary data such as through interviews and surveys.

1.8. Chapter outline

Chapter 1 – Background and introduction

This is the first chapter of the study and gives the introduction and background of the study. The chapter provides the research aim, objectives, and problem statement for the study. The chapter also provides a literature review of the study and a methodology for data collection and analysis.

Chapter 2 – Theoretical framework: Vicarious liability in South Africa

The chapter focuses on the nature and historical background of the vicarious liability doctrine. The chapter also discusses the elements of the doctrine of vicarious liability.

Chapter 3 – The limitation of the application of the principle of vicarious liability

The chapter focuses on discussing the main aim and problem statement of the study, which is the limitation of the application of the principle of vicarious liability. The chapter focuses on discussing the test and scope for the doctrine of vicarious liability while also discussing the limitation of the scope of vicarious liability.

Chapter 4 – Comparative analysis: United Kingdom

This chapter focuses on studying vicarious liability in the United Kingdom. The chapter also makes a difference between the South African scope of vicarious liability and the United Kingdom's scope of vicarious liability. The chapter also draws lessons from the United Kingdom to develop South African law.

Chapter 5 – Conclusion and Recommendations

This chapter provides conclusions and recommendations for the study. The chapter looks at the discussions in the previous chapters of this study to draw conclusions and recommendations.

CHAPTER 2 – THEORETICAL FRAMEWORK: VICARIOUS LIABILITY IN SOUTH AFRICA

2.1. Introduction

This chapter is the theoretical framework and thus provides discussions about the legal essence of the principle of vicarious liability in South Africa. To appropriately evaluate the scope of application of vicarious liability in deviation cases, this chapter will discuss the legal nature, the historical background since it originated, the four main elements of the doctrine as well as the test established for the principle of vicarious liability.

2.2. The essence of the principle of vicarious liability

The principle of vicarious liability originates from English law and was adopted in South Africa through common law as part of the English labour law principle.³⁶ The vicarious liability in English law was applied the same way it applies in South Africa. The vicarious liability in the UK, as it does in South Africa, creates a secondary liability by which a principal entity is held liable for the wrongdoings of its subordinate. From a labour law perspective, it confers liability to employers not at factual fault for the delictual conduct of their employees who are the ones at factual fault.³⁷

Thus, employers are held liable for the misconduct of their employees when such misconduct is committed by an employee acting within the course and scope of employment.³⁸ Employers can still however be held vicariously liable even when their employees committed wrongdoing when they acted outside the scope and sometimes outside the course of employment. When employees acted within the scope and course when they committed misconduct, a standard case arises. When employees

³⁶ Botha & Millard (2012) *De Jure* 227.

³⁷ *K v Minister* case at 21.

³⁸ Neethling, *Law of Delict* 50.

commit misconduct when they act outside the scope and sometimes the course of employment, deviation cases arise.³⁹ This research focuses on deviation cases.

Two grounds serve as the rationale for holding employers vicariously liable for the misconduct of their employees instead of holding employees liable since they are the ones who directly committed misconduct. The first legal basis is that employees carry out tasks outlined in their employment contracts purely to serve their employers' commercial interests.⁴⁰ The second legal basis is that employers have the authority to supervise their workers' behaviour and provide instructions on how they should carry out their employment duties.⁴¹

Consequently, it would not be just to hold employees accountable for wrongdoings they commit while doing tasks for their employers. For an employer to be held legally responsible for the wrongdoings of their workers, the employee's wrongdoing, whether through an act or an omission, must fall within a certain scope and course of employment.⁴² When an employee's actions are outside the scope of their employment, a third party must prove on balance of probabilities that there is a sufficient link between the employee's wrongdoing and the operations of their employer.⁴³ This is the test for deviation cases to determine if an employer should be held vicariously liable or not.⁴⁴

This is called the adequate connection test (close connection test).⁴⁵ The adequate connection test applies in deviation cases to determine if an employee's misconduct, which was committed outside the scope, and sometimes even the course of employment, is adequately lined with an employer's business.⁴⁶ The close connection

³⁹ Calitz (2005) *TSAR* 215; Larsen "Data privacy protection in South Africa: An analysis of vicarious liability in light of the Protection of Personal Information Act 4 of 2013" 35.

⁴⁰ Basson *et al* *The New Essential Labour Law* 28;

⁴¹ *Ibid*; *F v Minister* case para 45, the Constitutional Court stated that "employees are extensions of their employers."

⁴² Neethling, *Law of Delict* 447; Wagener 2014 *The South African Law Journal* 179.

⁴³ This was emphasised by the Constitutional Court in the *Rabie* case.

⁴⁴ Calitz (2007) *Stellenbosch Law Rev* 451; Nana (2008) *Journal of African Law* 253.

⁴⁵ Calitz (2007) *Stellenbosch Law Rev* 451.

⁴⁶ *F v Minister* at 41.

test found significant justification in the case of *K v Minister of Safety and Security*. The Constitutional Court in this case explained the close connection test to mean circumstances within which an employer's business allowed an employee to commit a misconduct that caused damages to a third person.⁴⁷

For example, a close connection arises when a security guard uses his or her access as a security to enter a building he or she is guarding to steal. Under this example, an employee gained the advantage of stealing because of his or her work duties. Thus, even though an employee's conduct is outside the scope of employment, his or her work duties afforded him or her access to the building to steal and it makes sense to infer that there is a close connection between such misconduct and employer's business. This is because an employee would not have gained access to the building to commit theft if he or she was not working as a security guard.

The principle of vicarious liability has been relevantly applied in countless instances and is essentially a component of South African labour law, agency law, and delict law. The employer-employee relationship, unlawful conduct, damage, and conduct within the scope and course of employment are the components of the vicarious responsibility theory.⁴⁸ These elements are explained below under sub-heading 2.3.

2.3. The historical background of the principle of vicarious liability

The doctrine of vicarious liability originated from the English law of torts and was later adopted in the South African legal system in the form of common law.⁴⁹ The origins of vicarious liability in English law were influenced by the need to outstretch the application of the law of agency maxim of "*qui facit per alium facit per se*" into other areas of law including the law of delict and employment law. The maxim of "*qui facit per alium facit per se*" literally entails that, "he who acts through another, acts

⁴⁷ *F v Minister* at 41.

⁴⁸ Neethling, *Law of Delict* 445–453.

⁴⁹ Botha & Millard 2012 *De Jure* 227; Du Bois 2010 *Tulane European & Civil Law Forum* 2.

himself".⁵⁰ The legal effect of the maxim of "*qui facit per alium facit per se*" on the law of agency is that the principal entity is held accountable for the authorized conducts of its agent if such an agent was either expressly, verbally, or impliedly authorized by the principal to act on behalf of the latter.⁵¹

Rather than saying that the notion of vicarious liability was not known in Roman law and Roman-Dutch law, it is much better to say that vicariously liability was rarely considered in labour-related matters and was only limited to the liability of masters for delicts committed by their servants and slaves in Roman law.⁵² In Roman law, the strict liability of one person for the delicts committed by another person was limited only to cases involving the wrongdoings of a slave and a third person had a right to rely on *noxel actio* to sue a master for the damages caused by his slave.⁵³

Taking into account that a slave had no legal capacity by then, a third person was entitled to institute *noxel actio* to sue a master of a slave and such a master would be liable to pay a momentary compensation not exceeding that value of his slave or surrender his slave to a person the slave has injured.⁵⁴ In Roman-Dutch law, the recognition of the principle of vicarious liability was overshadowed by the fact that the Roman-Dutch writers heavily relied on the notion that fault should be present to hold a person liable for the damages caused to another person and thus, it was only on the rare occasion where a master would be liable for delicts committed by his servants.⁵⁵ In English law, the principle of the *respondeat superior* applied to hold an employer or the principal liable for the delictual acts or omissions of his employees or agents.⁵⁶ The notion of the *respondeat superior* meant that employers had to take liability for all delictual acts and omissions of their employees. In practice, wronged third persons would sue the superior or master for the delicts committed by its employees but

⁵⁰ Shekhawat D, 'Vicarious liability in medical negligence' (2021) 1 *Law Colloquy Journal of Legal Studies* 5.

⁵¹ Harold (1916) *Yale Law Journal* 109.

⁵² Small *Re-evaluating the law of vicarious liability in South Africa* 8.

⁵³ Barlow *The South Africa Law of Vicarious Liability* 12-13.

⁵⁴ Brandsma 2015 *Cambridge University Press* 9-30.

⁵⁵ Small *Re-evaluating the law of vicarious liability in South Africa* 13.

⁵⁶ *F v Minister* at 40.

subject to a condition that employees should have committed a delict while performing their work duties and during working hours.⁵⁷

It is not a mystery to infer that and understand why the South African doctrine of vicarious liability resembles the essential legal basics of the English doctrine of the *respondeat superior*. The adoption of vicarious liability into South African law dates back to 1945 in the *Feldman case*⁵⁸ wherein the Appellate Division (now the SCA) sought guidelines from the English law of torts and referred to the English law principle of *respondeat superior*. The Appellate Division held an employer liable for the wrongful acts committed by its employee, who during the ordinary course of work used the employee's motor vehicle for a personal errand, drank alcohol along the way and consequence collided with another motor vehicle due to the employee's negligent and reckless driving.⁵⁹

The doctrine attained more fundamental recognition through the judgment of the *Rabie* case whereby the then Appellate Division developed the test to apply when determining the employer's vicarious liability.⁶⁰ The doctrine further attracted legal criticisms from both legal scholars and legal practitioners after the delivery of the judgment of *K v Minister* whereby the Constitutional Court deviated from the ordinary interpretation of the requirement that employees ought to act in accordance with their scope and during the course of work.⁶¹ The Constitutional Court outstretched the ambit of holding employers vicariously liability to also cover the delicts committed by employees who acted outside the scope of their work duties insofar as an adequate causal connection has been established between an employer's business and employee's commission of the delict.⁶²

⁵⁷ Neethling et al, *Law of Delict* 365-371.

⁵⁸ *Feldman (Pty) Ltd v Mall* 1945 AD 733.

⁵⁹ Kobrin L 2017 *De Rebus* 28.

⁶⁰ *Rabie case* para 134C-E. The court had to decide whether an employer had to be liable for a wrongful act committed by its employee who by his actions contracted his scope of work but during employment course. The Court then developed and applied the "close connection test" to an employer liable for its employee's delictual conduct.

⁶¹ *K v Minister* at 46 and 57.

⁶² *K v Minister* at 56, 57 and 58.

2.4. Elements of the principle of vicarious liability

The principle of vicarious liability consists of four elements, which third parties are required to prove on the balance of probabilities for successful claims based on vicarious liability. These elements are the employer-employee relationship, wrongful conduct, damages, and scope of employment.⁶³ These elements are half-sided in labour law (employer-employee relationship and scope of employment),⁶⁴ and also the law of delict (damages and wrongful).⁶⁵ This is because vicarious liability applies both in labour law and the law of delict although this study focuses on the labour law perspective of vicarious liability. These elements of the principle of vicarious liability are expatiated under the below sub-headings.

2.4.1. Employer-employee relationship

The element of employer-employee relationship is recognised to cover a wider range of employees and different kinds of employment relations. The International Labour Organisation (ILO) defines the 'employer-employee relationship' as the relation that exists between the persons referred to as an employee and employer whereby an employee renders his services or performs work for furtherance of the interests of the employer in exchange for remuneration.⁶⁶ In addition, Budd and Bhavé define employment relationship as a relationship between an employer and employees whereby employees renders their labour to employers.⁶⁷ Thus, it is clear that employer-employee relationship entails the existence of a valid employment contract.

This also could mean that the existence of an employer-employee relationship is created through an employment contract between an employer and employee. Thus, an employer should be liable only when misconduct is committed by its employee as

⁶³ Neethling et al, *Law of Delict* (2016) 50, 143 & 147.

⁶⁴ Grogan, *Workplace law* 25-79.

⁶⁵ Neethling, *Law of delict* 33–127 and 221–263; Larsen "Data privacy protection in South Africa: An analysis of vicarious liability in light of the Protection of Personal Information Act 4 of 2013" 36.

⁶⁶ ILO, *The employment relationship* 3.

⁶⁷ Budd, J.W and Bhavé D, *The Employment Relationship* 51 in Wilkinson A, Bacon, N, Snell S, et al, *Handbook of Human Resource Management* (2nd Edition, Wilkinson: The SAGE, 2019).

aligned with the LRA and not any other person.⁶⁸ However, there is a difference between an employee and a worker in South Africa whereby certain kinds of work relationships do not meet the LRA requirements for being recognised as an employee but they are nonetheless recognised as workers in terms of section 23 of the Constitution of the Republic of South Africa, 1996. As such workers may not be employees, and yet they serve the interests of another person and thus acting on behalf of such person, vicarious liability on the side of the law of delict or law of agency may apply to vicariously hold liable whom they work for.⁶⁹

This submission is made despite the definition by ILO although it can still be argued that even an employer-employee relationship may exist between a worker and someone who hired a worker. This is because a worker (although not an employee) also renders his services or performs work for furtherance of the interests of the employer in exchange for remuneration. However, in advance of arguing in favour of the submission, it should ideally not mean that even all people who engage in conduct to further the interests of another person should be regarded as employees or workers. This is because there are illegal workers such as drug dealers who serve the interests of people who hired them for monthly/weekly remuneration (like employees) and may be regarded as workers and not employees and should thus benefit from the LRA. Issues of such kinds of workers should not meet the employer-employee relationship but should be dealt with by the law of delict or the law of agency.

The definition by the International Labour Organisation further denotes that an employment relationship does not only exist where there is a written employment contract between an employee and employer but also exists where there is a tacit and verbal agreement for employment between an employer and employee.⁷⁰ Therefore, regardless of the type of employment contract entered, insofar as a valid agreement for employment exists between an employer and employee, such an agreement for

⁶⁸ Labour Relations Act 66 of 1995. Most conditions that are mostly entrenched in employment contracts have been regulated and incorporated in the BCEA, such as the nature and conditions of employment, remunerations and working hours.

⁶⁹ *Kylie v CCMA* 2010 4 SA 383 (LAC) – it was held workers that are not employees have the rights in terms of section 23 of the Constitution even though they are not employees in terms of the LRA.

⁷⁰ ILO, *The employment relationship* 23.

employment suffices as the establishment of the employer-employee relationship.⁷¹ Grogan defined an employment contract, as “an agreement between two parties in terms of which one party (the employee) works for another (the employer) in exchange for remuneration”.⁷² Thus, it is easy to determine if a person is an employee if there is a written contract of employment. The issue arises in cases of verbal and tacit contracts of employment.

The LRA can aid in determining if a certain person should be recognised as an employee in case of tacit and verbal contracts of employment. This is because the LRA provides a definition of an employee and also incorporates the common law presumption of an employee.⁷³ Section 213 of the LRA defines an “employee” as,

[a] “Any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive any remuneration and

[b] Any person who in any manner assists in carrying on or conducting the business of an employer”.⁷⁴

To determine the fundamental differences between an employee and an independent contractor, one need not just rely on section 213 of the LRA because both parties provide their contractual services in exchange for remuneration.⁷⁵ Therefore, to further strengthen the meaning of section 213 of the LRA and designate a wrongdoer as an employee or independent contractor, it is imperative that parties additionally rely on the requirements enshrined in section 200A of the LRA.⁷⁶

Regardless of the type of contract formed or whether it was expressly or tacitly entered, section 200A of the LRA establishes a presumption about who is an employee. A person who works for or provides services to another person is deemed to be an

⁷¹ ILO, *The employment relationship* 3.

⁷² Grogan *Workplace law* 27. Parties to employment agreement can conclude their contract verbally, in writing or tacitly.

⁷³ Definition in terms of section 213 of the LRA and presumptions in terms of section 200A of the LRA.

⁷⁴ Section 213 of the LRA.

⁷⁵ Grogan *Workplace law* 61.

⁷⁶ Tshoose 2020 *Speculum Juris* 45.

employee, regardless of the kind of contract, until the opposite is shown. According to section 200A(1) of the LRA, if any one or more of the following conditions are met:

- (a) how the person works is subject to the control or direction of another person,
- (b) the person's hours of work are subject to the control or direction of another person,
- (c) in the case of a person who works for an organization, the person forms part of that organization,
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months,
- (e) the person is economically dependent on the other person for whom he or she works or renders services,
- (f) the person is provided with tools of trade or work equipment by the other person or
- (g) the person only works for or renders services to one person".⁷⁷

A person's eligibility to be considered an employee is determined by a set of common law judicial criteria, which are legislatively incorporated into section 200A. In common law, the control test, the organisation test, and the dominant impression test are the three judicial tests.⁷⁸ The control test focuses on how employers assign tasks to their staff and monitor that staff member's adherence to the assigned tasks.⁷⁹ This is therefore incorporated in section 200A(1)(a) of the LRA. According to the control test, an employment relationship cannot exist if an employer has no control or oversight over the job that employees conduct, according to the ruling made by the Appellate Division in the *Colonial Mutual Life Assurance Society Ltd v Macdonald* case.⁸⁰

In addition, the court determined in *LAD Brokers v Mandla*,⁸¹ that an independent contractor cannot be controlled or monitored concerning the quality of work, hours

⁷⁷ Section 200A of the LRA.

⁷⁸ Basson *et al* *The New Essential Labour Law* 61-69.

⁷⁹ Wagener 2014 *The South African Law Journal* 181.

⁸⁰ *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 paras 434 and 435 (Hereinafter as *Colonial Mutual* case)

⁸¹ *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (hereinafter as *LAD Brokers* case)

worked, or manner in which the job is to be completed due to the nature of *locatio conductio operis*.⁸² Thus, the difference is clear that an employer has control over its employee but an independent contractor is not controlled. Sometimes even when a person is being controlled by another person still cannot be an employee in terms of the LRA. As stated above, such a person can be a worker entitled to section 23 Constitutional rights.⁸³

Even though they are not subject to any control or monitoring by their employer, senior managers and directors of a firm operate autonomously without oversight or job instructions.⁸⁴ Thus, the control test is insufficient to distinguish between an independent contractor and an employee, and this is where the organisation test comes into play. The case of *SABC v McKenzie*⁸⁵ supports this, whereby the Labour Appeal Court clarified that the organisation test suggests that an individual is considered an employee of a certain organisation if such an employee is part of such an organisation.⁸⁶ With this test, executive managers and Chief Executive Officers (CEO) are also recognised as employees of an organisation they work for although they are not being controlled.

The dominant impression test's core can be logically linked to section 200A of the LRA in this section 200A of the LRA also enshrines the factors that the dominant impression test depends upon to determine whether an individual is an employee or an independent contractor. The *Smit v Workman's Compensation Commissioner*⁸⁷ precedent has demonstrated that the organisation test and control test both take into account several criteria that are not included in the dominating impression test.⁸⁸ What matters most is that, regardless of the type of the employment contract, there should

⁸² Contract for service undertaken by the independent contract.

⁸³ Such as right to fair labour practice.

⁸⁴ Basson *et al* *The New Essential Labour Law* 62.

⁸⁵ *SABC v McKenzie* (1999) 1 BLLR 1 (LAC) (hereinafter referred as *SABC v McKenzie*)

⁸⁶ *SABC v McKenzie* at 5.

⁸⁷ *Smit v Workman's Compensation Commissioner* 1979 (1) SA 51 (A) at 62D–G (hereinafter as *Smit case*)

⁸⁸ *Smit case* at 62D–G.

have been one between the employer and the offender at the time the plaintiff or a third party was the victim of a wrongful act.

In short, sections 213 and 200A of the LRA are the core pillars of determination of the employer-employee relationship element. Third parties should be careful to distinguish between an employee and an independent contractor whilst they also should be careful to recognise the existence of workers that are not regarded as employees. In addition, the development of non-standard workers and workers who are not employees should be considered, and considering that they are not the core focus of this study, they should thus be dealt with in future studies. The same applies to whether a worker that is not an employee should be recognised in a manner that should fall within the application of the principle of vicarious liability in labour law.

2.3.2. The employee's conduct must be wrongful

This element is from the law of delict. An act or an omission are the two categories into which the legal term "conduct" can be separated.⁸⁹ The terms "act" and "omission" relate to an individual's acts or their "positive conduct," respectively, and indicate that an individual has acted or has abstained from acting in situations in which they were required by law to act. Therefore, both actions and inactions have the potential to unjustly result in damages for a third party, and as a result, they both qualify as wrongfulness.⁹⁰ The details of each case must be considered when determining whether an employee's behaviour or inaction resulted in harm to a third party.

⁸⁹ In the case of *Van Eeden v Minister of Safety and Security* 2003 1 SA 398 (SCA) 400, whereby by the state was held liable for failing to or omitting to take reasonable measures to prevent a dangerous criminal from escaping from custody and claims were based on the fact that the criminal escaped and caused damage to third persons. "The plaintiff sued the state vicariously for negligently failing to prevent the escape of her assailant from police custody as they have the state had a legal duty to do so. The factual background of the matter did not however establish a specific policeman responsible for the failure but rather the SAPS generally and the court held that the state should be held liable."

⁹⁰ *Snyman CR Criminal Law* 51; *Neethling, Law of Delict* 365-371; *Loubser et al Law of delict in South Africa* 785;

When assessing whether an employee's actions are wrongful, two questions should be asked: "(a) Is there a legally recognised interest that the employee has violated, and (b) was the legally recognised interest violated wrongfully or unreasonably".⁹¹ If the answers to the above two questions are in the affirmative, then the behaviour was improper. The few instances in which there may be a legal defense, such as "private defense, necessity, provocation, consent, official capacity, statutory authority, and execution of an official command," would be an exemption to the need for "wrongfulness".⁹²

2.3.3. The employee's conduct must cause damages to a third person.

A third party must have suffered damages to approach the court; otherwise, it would be deemed unreasonable for the third party to do so hence the claim would lack value.⁹³ Vicarious liability does not extend to potential damages hence court interdicts would suffice for potential damages and would not be necessary to drag vicarious liability. Thus, damages should be suffered first before claims based on vicarious liability can be instituted.

This is because there should be apportionment and determination of the value of damages especially where damage is committed by employees from different employers. To recover damages for wrongdoing by an employee, a third party must file a legal action against the employer.⁹⁴ Technically, the harm incurred can be demonstrated or calculated by estimating the third party's evidence of damages. Physical harm, financial loss, and/or psychological harm are all possible forms of damage.

Damage suffered is the element borrowed from the law of delict but just necessary for the effective application of the principle of vicarious liability. In essence, the amount owed to the claimant is determined by the losses incurred. The foundation of

⁹¹ Neethling, *Law of Delict* 50 and 143.

⁹² Snyman 2014 *Criminal Law* 95–144.

⁹³ Neethling et al, *Law of Delict* 213.

⁹⁴ Neethling, *Law of Delict* 147.

the employer's vicarious liability is that it acts as an effective remedy for the harm suffered by the claimant and encourages employers to take reasonable measures to prevent their employees from causing harm to society, as confirmed by the Constitutional Court in the case of *NK v Minister of Safety and Security*.⁹⁵ Depending on the kind of damage sustained, the claimant may seek satisfaction or compensation. Damages include both patrimonial and non-patrimonial damages.⁹⁶

2.3.4. The scope and course of employment

The conduct of an employee is always expected to be essentially interpreted in line with the Latin maxim of "*quit facit per alium per se*", which dictates that any person who instructs another to act on his behalf, the instructing person acted himself although the action was taken by the instructed person.⁹⁷ This is because employees take instructions from their employers, whereby such instructions are regarded as the scope of work duties and sometimes the course of work. The scope of an employee's duties is mostly entrenched within the contract of employment and the course of work means an employee is on duty and performing his work.

The difficulty arises in cases where an employee negligently or intentionally deviates from the contractual ambit of his work duties as seen in the *Rabie* case.⁹⁸ The worst form of absurdity faced by litigants in practice is establishing the ambit of employment in the instances where the employment relationship was established by way of the verbal employment contract. The complications of proving this element extended their weight of being more problematic in practice in the sense that it is typically difficult to prove that an employee deviated from his ordinary duties of employment in cases where the duties were unclear. The intentions of an employee were not known at the

⁹⁵ *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC) at 21.

⁹⁶ Neethling et al, *Law of Delict* 213.

⁹⁷ Shekhawat D, 'Vicarious liability in medical negligence' (2021) 1 *Law Colloquy Journal of Legal Studies* 5.

⁹⁸ Tshoose (2020) *Speculum Juris* 46 and 47.

time of deviation.⁹⁹ It is also difficult to prove whether or not the employee was acting during work in cases involving employees working from home, taking into account during the times of coronavirus and lockdown regulations whereby many employees are performing their work duties while at home and mostly with no determined working hours. It is also difficult to determine the course of work for drivers.¹⁰⁰

The fact that an employee deviated from his scope of employment at the time when he committed the delict does not exempt or preclude employers from being vicariously liable. Courts usually apply the adequate connection test to determine whether the employer will be liable or not when called upon to adjudicate deviation cases.¹⁰¹ The adequate connection test holds an employer vicariously liable for damages caused by its employee even if such an employee deviated from his scope of employment but there was nevertheless a “sufficient close link” between the employee’s wrongful conduct and the business of his employment.¹⁰²

2.4. Conclusion

The main aim of this chapter is to discuss the nature, history, and elements of the doctrine of vicarious liability. The chapter indicated that the principle of vicarious liability is a legal notion that applies to hold an employer liable for the wrongdoings of its employee. It was also discussed that this principle was inherited from the United Kingdom law during colonisation in South Africa. At its roots, the vicarious liability principle stems from the law of agency and is adopted in labour law to ensure that third parties are protected and that the right persons are liable. The elements of vicarious liability were discussed and presented a few issues, such as differentiating the application of vicarious liability on a worker and employee. This is an issue that should be addressed in further studies such as doctoral studies and journal articles.

⁹⁹ It should be noted that an employee’s intention does not form part of the required elements but however required mostly to determine whether to apply deviation test or standard test to determine employer’s liability.

¹⁰⁰ As in the case *Feldman case*.

¹⁰¹ *Calitz (2007) Stellenbosch L. Rev 459*.

¹⁰² *Booyesen case* at 11.

CHAPTER 3 – THE LIMITATION OF THE APPLICATION OF THE PRINCIPLE OF VICARIOUS LIABILITY

3.1. Introduction

Chapter 3 of this study discusses the scope for limitation when courts apply the doctrine of vicarious liability. The study delves into critical analysis of the mentioned aspect hence the primary aim of this study is to examine the limitation of the application scope of the vicarious liability principle in South Africa. The chapter discusses the test for vicarious liability, the scope of vicarious liability, and the limitation of the scope of vicarious liability.

3.2. The test for vicarious liability

The principle of vicarious liability has existed for a while in South Africa and its test for deviation cases can be traced from the old cases of the *Feldman* case and *Rabie* case.¹⁰³ The principle of vicarious liability has over the years been evolving especially on the side of the test on deviation cases. The Appellate Division (now the SCA) was the first court to develop the objective test for deviation cases in matters of vicarious liability and the standard of the 'close connection' test was introduced in the *Feldman* case¹⁰⁴ and the *Rabie* case.¹⁰⁵

The close connection test has been recently applied in various cases. For example, it was explained in the *NK v Minister of Safety* that employers ought to be held vicariously liable in deviation cases if there is a close connection between an employee's access to commit misconduct and an employer's business.¹⁰⁶ The close

¹⁰³ *Feldman (Pty) Ltd v Mall* 1945 AD 733; *Minister of Police v Rabie* 1986 (1) SA 117 (A) 134C-E.

¹⁰⁴ *Feldman case* at 733.

¹⁰⁵ *Rabie case* at 134C-E.

¹⁰⁶ *NK v Minister* at 21.

connection test was also explained recently in the *Stallion Security* case that a close connection arises when an employer's business through work duties delegated to an employee allows such an employee to commit misconduct that causes damages to third parties. This means that there are higher probabilities that an employer can almost in every case held vicariously liable when the close connection test is applied.

It appears from the close connection test that employers often do not have any defense against vicarious liability claims unless they can prove that the person concerned is not their employee. Besides proving the absence of employment contracts, employers are held accountable for the misconduct of their employees even in deviation cases. This is owing to the close connection test applying in a sense that does not give employers in South Africa some legal defense. It is quite obvious that proving that an employee gains an advantage to commit misconduct because he or she was assigned to certain work duties automatically establishes a close connection.

This however necessitates the need to determine the limits regarding the scope of application of the principle of vicarious liability in South Africa hence this issue became the rationale for this study. A point of limitation of the scope of application has been stated in the case of *NK v Minister*,¹⁰⁷ where it was stated that "damages should not be borne by employers in all circumstances, but only in those circumstances in which it is fair to require them to do so". This explains that under certain circumstances, (when it is not fair) an employer may not be held vicariously liable for misconduct of its employee. This makes the test for deviation cases somehow complex hence the close connection test is not as straightforward as the test for standard cases some legal practitioners described the deviation test as a simple principle to understand but difficult to practice.¹⁰⁸ This is because of how the close connection test has been designed while the misconduct of employees is not predictable. This study therefore demonstrates that the test of the principle of vicarious liability in deviation cases should

¹⁰⁷ *NK v Minister of Safety and Security* 2005 ZACC 8 at 21.

¹⁰⁸ Coetzer N and Wingfield C (2020) *Vicarious liability – Worst nightmare* <https://www.labourguide.co.za/recent-articles/2748-vicarious-liability-an-employer-s-worst-nightmare> accessed 15 April 2023.

be developed to include instances where an employer will not be held vicariously liable even though its employee committed misconduct.

3.3. The scope of vicarious liability in South Africa

Despite the idea of vicarious responsibility, which combines the law of delict and labour law, employers have only ever had very few defenses at their disposal. Most employers once argued that they shouldn't be held vicariously accountable for wrongdoings done by their employees when engaging in their own autonomous and personal frolics.¹⁰⁹ In the *Stallion Security* case, the SCA rejected the argument that there was not a sufficient relationship between the wrongdoing done and the employer's operations since the employee did not do the wrong thing while on the job.¹¹⁰ The SCA enlarged the need for an acceptable relationship between the employee's work obligations and the employee's unlawful behaviour by substantially relying on the causal link standard typically used in criminal law matters.¹¹¹

The Constitutional Court in the case of *F v Minister of Safety and Security* held that the objective test or the deviation test applies when the employee committed the wrongful conduct while he was serving his interests outside or within the course of work.¹¹² This therefore denotes that the deviation test applies in circumstances wherein an employee was not acting within the ambit of his work duties and sometimes outside the course of work.¹¹³ It is a requisite according to the deviation test that there should be an adequate close link between the employee's wrongful conduct and the business of his employment so that an employer may be held vicariously liable in the deviation cases.¹¹⁴ The SCA in the *Stallion Security* case has extended the scope of the close connection test and held that the close connection

¹⁰⁹ *F v Minister* at 22; Larsen "Data privacy protection in South Africa: An analysis of vicarious liability in light of the Protection of Personal Information Act 4 of 2013" 35.

¹¹⁰ *Stallion Security* case at 36.

¹¹¹ *Stallion Security* case at 13, 21, 26 and 27. In all the mentioned paragraphs of the *Stallion Security* judgment, the court upheld the adequate causal connection as the High Court ruled.

¹¹² *F v Minister of Safety and Security* at 41.

¹¹³ *F v Minister* at 41.

¹¹⁴ *Booyesen v Minister* at 11.

between the employment duties of the employee and damages committed does suffice to hold the employer vicariously liable.¹¹⁵

The extension of the scope of the close connection test may be understood in the sense that the law should hold employers liable if the employee's work duties granted him an advantage or placed him in a position to commit the delict.¹¹⁶ For example, a fraud committed by a bank accountant whose work duties allow him/her to access clients' accounts. The causal link question established by the SCA was that would the employee have nevertheless had access to commit the wrongful act if his work position did not grant him any access and advantageous position to commit the wrongful act as he did?¹¹⁷ If the answer is in affirmative then the close connection has been established and if the answer is 'NO' there is no adequate connection, which means the claims for the employer's vicarious liability fail and will be dismissed.

This South African legal position substantially differs from the legal position in the United Kingdom as the application of the *respondeat superior* principle is not extended to the extent the SCA did.¹¹⁸ Employers in the United Kingdom are protected from legal claims emanating from the wrongdoings their employees committed not within the course of employment. The Supreme Court of the United Kingdom has decided in the case of *WM Morrison Supermarkets plc v Various Claimants*¹¹⁹ that it cannot be reasonable and fair to hold employers vicariously liable for the delicts their employees committed when off duty notwithstanding the close connection between the delict committed and the business of the employer.¹²⁰

¹¹⁵ *Stallion Security* case at 22. The SCA developed the judicial tests for vicarious liability and it introduced the causal link test that if an employee's work duties afforded him/her an opportunity to commit a wrongful conduct, an employer of such an employee will be held liable; see *Stallion Security case* para 36; see also Tshoose 2020 *Speculum Juris* 48, Prof Tshoose elaborating more on the causal link developed in *Stallion Security case*.

¹¹⁶ *Stallion Security case* at 36.

¹¹⁷ *Stallion Security case* at 21 and 22.

¹¹⁸ This will be articulated in chapter 4 of this dissertation.

¹¹⁹ *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 (hereinafter referred as the *Morrison Supermarkets case*)

¹²⁰ *Morrison Supermarkets* at 47.

The only hope for employers may be ascertained in the case of *NK v Minister* whereby the Constitutional Court stated that not always liability for damages should be paid by the employer, but it should be only in those circumstances in which it is fair to require them to do so".¹²¹ In the *Stallion Security* case, the SCA held that, for the employer to be held vicariously liable for delicts committed by its employee acting not within the course of employment, it is required that there be more than just a causal link between the delicts committed and employer's business. Moreover, the court further held that the extent and reasonableness of the employee's conduct matters most in deciding the case.¹²²

Besides raising a defense that the employee did not act within the course of employment, some employers even raise the defense that the party claimed to be its employee is not its employee but was an independent contractor. Therefore, disputing the lack of employer-employee relationship, taking into account that independent contractors are personally liable for their all actions. The defense that there is no employer-employee relationship was successfully raised in the case of *Groenewald v Irvin & Johnson Ltd*¹²³ where it was successfully argued that the person who committed the delict was hired as an independent contractor and the first defendant cannot be held vicariously liable for any wrongful act committed by the person in question.¹²⁴

Some defenses purported to dispute the elements forming part of labour law may include contending and proving that there is no sufficient connection between the employee's wrongful conduct and the employer's business or that the wrongdoer was not an employee of the sued employer.¹²⁵ On the other hand, defenses purported to dispute elements forming part of the law of delict may require strict real evidence and

¹²¹ *NK v Minister* at 21.

¹²² *Morrison Supermarkets* at 28.

¹²³ *Groenewald v Irvin & Johnson Ltd* [2017] ZAWCHC 62 (hereinafter as *Groenewald case*).

¹²⁴ *Groenewald case* at 16.

¹²⁵ *Rabie case* at 134C-E.

such defenses include grounds for justification of wrongfulness, such as necessity, private defense and consent to mention few.¹²⁶

3.4. Discussion on the financial loss due to vicarious liability

The kind of risk faced by employers is not a risk of physical, psychological, or mental harm but rather a risk of financial loss through lawsuits brought in terms of the doctrine of vicarious liability. Bracher opines that the principle of vicarious liability creates financial risks to employers due to unavoidable misconduct of their employees that causes harm to third persons.¹²⁷ This was supported by Coetzer and Wingfield who described the principle of vicarious liability in South Africa as the worst employers' nightmare considering the principle's scope of application and its implications for financial losses employers suffer.¹²⁸

There are many cases whereby employers have suffered financial damages due to their employees' misconducts committed while acting outside the scope and course of employment. For example, in 2017, the South African government was ordered to pay R10.5 million in damages to the families of 144 psychiatric patients who died after being transferred from a public hospital to unlicensed facilities.¹²⁹ The court found that the government was vicariously liable for the actions of its officials who had authorized the transfers.

In *Ndlovu v Fidelity Security Services*,¹³⁰ a security company called Fidelity was ordered to pay R4 million in damages to a man who was shot and paralyzed by one

¹²⁶ Neethling et al *Law of Delict* 365 - 371.

¹²⁷ Bracher P (2019) *Vicarious Liability for creating risk* <https://www.financialinstitutionslegalsnapshot.com/2019/11/vicarious-liability-for-creating-a-risk> accessed 15 April 2023.

¹²⁸ Coetzer N and Wingfield C (2020) *Vicarious liability – Worst nightmare* <https://www.labourguide.co.za/recent-articles/2748-vicarious-liability-an-employer-s-worst-nightmare> accessed 15 April 2023.

¹²⁹ *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v. National Minister of Health of the Republic of South Africa and Others*, arbitration (March 19, 2018). award, Justice Dikgang Moseneke (March 19, 2018); Durojaye E and Agaba D.K, 'Contribution of the Health Ombud to Accountability: The Life Esidimeni Tragedy in South Africa' (2018) 20(2) *Health Human Rights* 161.

¹³⁰ *Ndlovu v Fidelity Security Services (Pty) Ltd* (2018) ZALMPPH 27.

of its guards. The court found that the company was vicariously liable for the actions of the guard. *K v Minister of Safety and Security*,¹³¹ in this case, the South African Police Service was held vicariously liable for the actions of its officers, who had unlawfully arrested and assaulted a man for personal reasons and while acting outside the scope and course of employment. In the case of *MEC, Department of Health, Gauteng v DZ obo WZ*,¹³² the Gauteng Department of Health was held vicariously liable for the actions of its employees, who had negligently caused a child to suffer brain damage during childbirth.

The Supreme Court of Appeal (SCA) has elevated the corporate risk by how it has applied the doctrine of vicarious liability in the case of *Stallion Security (Pty) Limited v Van Staden*.¹³³ The SCA unanimously held that the security company is vicariously liable to pay an amount of R1 680 000 for claims of loss of support as the appellant's employee murdered a co-employee when the perpetrating employee was committing a crime of theft for his interests.

The *Stallion Security* case concerned a security guard who was not on duty due to being on sick leave but decided to go to his workplace to fulfill his intention to commit robbery.¹³⁴ Since the security guard was promoted to the position of the site manager, he was entrusted with an override key giving him unlimited access, and had a right to show up at the workplace anytime and without making prior announcements.¹³⁵ The employee then went to his workplace and accordingly committed the robbery and also murdered a warehouse manager.¹³⁶

The employer (appellant) of the security guard was sued in terms of the doctrine of vicarious liability for loss of support due to murder committed by its employee (security guard). The SCA confirmed that the employer should be held vicariously liable despite the employee being off duty (as he was placed on sick leave) when he committed the

¹³¹ *K v Minister of Safety and Security* (2005) ZACC 4.

¹³² *MEC, Department of Health, Gauteng v DZ obo WZ* (2017) ZACC 37.

¹³³ *Stallion Security (Pty) Limited v Van Staden* [2019] ZASCA 127.

¹³⁴ *Stallion Security* case at 2-11.

¹³⁵ *Stallion Security* case at 6.

¹³⁶ *Stallion Security* case at 12.

murder and robbery.¹³⁷ The SCA substantiated its decision by stating that there was an adequate connection between the employee's work duties, wrongful acts committed, and the employer's business. Two circumstances established the adequate connection: firstly, the site managers were given the authority to visit the workplace at any time without announcements, therefore making the perpetrator's presence at the workplace less suspicious.¹³⁸ Secondly, the overriding key gave the perpetrator unlimited access to enter any place including offices, and thus allowed him to even enter the office where he purported to commit the robbery.¹³⁹

3.5. Limiting the scope of application for vicarious liability for company directors

The Constitutional Court has made a significant statement in passing that may be reasonably considered as a gleam of hope for employers to mitigate the employer's corporate risk caused by the doctrine of vicarious liability. The Constitutional Court made the statement in the case of *NK v Minister*, that seems to give hope to employers as the then Chief Justice Mogoeng stated that "employers should not bear damages in all circumstances, but only in those circumstances in which it is fair to require them to do so".¹⁴⁰ Therefore, there are certain circumstances whereby it cannot be reasonably ruled or expected that employers be held vicariously liable due to intentional wrongful conduct of their employees. These circumstances could be incidents whereby the employee's deviation from the scope and course of employment is to such an extent that it would be unreasonable to hold the employer vicariously liable and the employee must account personally.¹⁴¹

The circumstances where an employer may not be reasonably held vicariously liable is when the delict is committed not within the course of employment and there is no close connection between the employee's wrongful conduct and the business of the

¹³⁷ *Stallion Security* at 38 and 39.

¹³⁸ Tshoose 2020 *Speculum Juris* 44.

¹³⁹ *Stallion Security* at 36 and 37.

¹⁴⁰ *NK v Minister* at 21.

¹⁴¹ *F v Minister* at 48.

employer. A clear example may be ascertained in the United Kingdom case of *Morris v CW Martin & Sons Ltd*¹⁴² whereby the employees of the well-known dry-cleaning company stole the client's (applicant, Morris) coat, and the employer (defendant, CW Martin & Sons Ltd) was sued on the claim that it should be held vicariously liable since the coat was stolen by the defendant's employees.¹⁴³

This claim was rejected by the United Kingdom Supreme Court for the reasons that, the defendant took a reasonable duty of care and safeguarded the coat, and the theft of the coat by the defendant's employees was not committed during employment. The application was dismissed and held that the defendant cannot be held vicariously liable for the wrongful conduct of its employees, since those employees personally committed the theft of the coat and such wrongful conduct cannot under reasonable circumstances be held to be closely connected with the employer's business.¹⁴⁴

Employers might utilise one of two legal strategies to lessen the danger to their firm posed by the vicarious liability concept. Liability for violation of fiduciary obligation and penetrating the corporate veil are these two legal procedures. The ultimate objective of both legal strategies is to make the offender accountable for his actions on a personal level rather than the corporation being held vicariously liable. Directors, senior managers, and professional staff who can operate independently, command subordinates, and appear to have the capacity to act independently on the company's behalf are the ideal candidates for the two legal processes.¹⁴⁵ The relevance of these two legal mechanisms is established on the ground that directors and senior employees owe their employers a fiduciary duty to engage in conduct that will benefit the business of the employer.

¹⁴² *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (hereinafter referred as *Morris* case)

¹⁴³ *Morris* case at 717.

¹⁴⁴ *Morris* case at 718.

¹⁴⁵ Nethavhani *The business judgment rule: undue erosion of director's duty of care, skill and diligence* 19.

3.5.1. Liability for breach of fiduciary duty

Section 76(3)(c) of the Companies Act 71 of 2008, which addresses breaches of fiduciary responsibility, lays forth the rules that directors of companies must follow while working on the company's behalf. They must also refrain from abusing their apparent power granted by their employer. According to section 76(3)(c) of the Companies Act, a director acting on behalf of the company is required to exercise the powers and carry out the duties of a director with the care, skill, and diligence that could be reasonably expected of a person by carrying out the same duties as the director and possessing the general knowledge, expertise, and experience of that director.

Regarding the level of competence needed of company directors, several instances have clarified and upheld the validity of section 76 of the Companies Act. As to the ruling in *Treasure Trove Diamonds Ltd v Hyman*, holding a directorship entails holding a fiduciary position towards the company. Therefore, the director must legitimately employ their powers for the benefit of the company and not for personal gain.¹⁴⁶ The court held in the *Fisheries Development Corporation of SA Ltd v AWJ Investments* case that although the director's responsibilities and qualifications have not been explicitly stated as being on par with those of auditors or accountants, they are still expected to exercise the care that is reasonable for someone with their level of expertise.¹⁴⁷

Employees also have a fiduciary obligation and a reasonable degree of expertise in addition to the directors' duty of care, skill, and diligence. It was declared in *Daewoo Heavy Industries v Banks* that an implied fiduciary responsibility exists in the majority if not all, contracts of service, including employment and agency agreements. Therefore, if an employee violates their fiduciary obligation, they might all face personal liability.¹⁴⁸ In addition, directors and prescribed officers are accountable for crimes committed in violation of the fiduciary obligation specified in section 76 of the

¹⁴⁶ *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 479.

¹⁴⁷ *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W).

¹⁴⁸ *Daewoo Heavy Industries (Pty) Ltd v Banks* [2004] 2 All SA 530 (C) at 9 (Juta).

Companies Act under section 77 of the Companies Act. According to section 77(6)(a) of the Companies Act, a director of a company may be held personally accountable for any losses, damages, or expenses incurred by the business as a result of any breach of the common law's fiduciary responsibility notion.

In accordance with section 77(6)(a) of the Companies Act, the third party who has suffered losses may, subject to certain conditions, sue the person who committed the misconduct individually for damages and not the employer to reduce the financial risk arising from the theory of vicarious responsibility. Furthermore, under section 77(6)(a) of the Companies Act, the employer in issue may demand payment from its employee for the money it paid to the third party if the third party files a lawsuit against the employer under the theory of vicarious responsibility. When an employee conducts recklessly or in bad faith, section 77 applies to both directors and specified officers.

The South African court precedent about the employer's right of recourse against its employee may be observed in the *Van Der Westhuizen v Minister of Safety and Security*¹⁴⁹ case, wherein a police officer (employee) committed a crime for which the first defendant and its employee were sued jointly. The applicant was unjustly arrested and detained by the police officer, who misused his official authority.¹⁵⁰ Defamation and unjustified arrest and imprisonment were the claims filed against the accused. The employee was required to reimburse the employer for the full amount of money that was given to the claimant, according to the court's ruling, and the employer must bear vicarious liability for the total amount of money claimed.¹⁵¹

In a nutshell section 77(6) of the Companies Act,¹⁵² which outlines the statutory obligations of directors and specified officers of a company, and firmly establishes the employer's statutory right of recourse regarding the responsibility of violation of fiduciary duty. If an employer was found vicariously liable for the negligent or willful misconduct of its directors and prescribed officers that resulted in a delict to a third

¹⁴⁹ *Van Der Westhuizen v Minister of Safety and Security* (2012) ZAGPJHC 207. (Hereafter referred as *Van Der Westhuizen*).

¹⁵⁰ *Van Der Westhuizen* at 1, 2 and 3.

¹⁵¹ *Van Der Westhuizen* at 167.

¹⁵² Companies Act 71 of 2008.

party, the employer may be entitled to recourse against its directors and prescribed officers by claiming all the money lost due to lawsuits.

3.5.2. Liability: piercing of the corporate veil

The piercing of the corporate veil is the principle in commercial law that can be used to also alleviate the financial damages and liabilities that employers can suffer due to the application of the principle of vicarious liability. The piercing of the corporate veil entails that a company's separate personality is set aside and people who abuse such separate personality of a company are held personally liable.¹⁵³ The separate entity of a company entails that any legally incorporated company can act on its own and can be held liable for misconduct.¹⁵⁴ Since a company does not have a physical body to act, it acts through its employees. Therefore, a company can be held vicariously liable for the misconduct of its employees.

The separate legal existence of a company can however be limited and set aside under various circumstances, most especially when the separate legal existence of a company is being misused by shareholders or directors of a company. This has been confirmed in the case of *Dadoo v Krugersdorp Municipal Council*,¹⁵⁵ whereby the court stated that it is possible and legal to disregard a company's distinct juridical personality under numerous circumstances. The circumstances to warrant the piercing of the corporate veil were mentioned in the case of *Shipping Corporation of India Ltd v Evdomon Corporation*,¹⁵⁶ where the court held that piercing a corporate veil can be invoked under the circumstances of "reckless trading, fraud or dishonesty or other improper conduct in the establishment or the use of the company or the conduct of its affairs".¹⁵⁷

¹⁵³ *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 paras 337–340 – confirmed the separate personality of a company that a company is an independent entity separated from its shareholders and directors.

¹⁵⁴ *Salomon case* at 337–340.

¹⁵⁵ *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 (hereinafter as *Dadoo*).

¹⁵⁶ *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) (hereinafter as the *Shipping Corporation*).

¹⁵⁷ *The Shipping Corporation* at 43 and 44.

The piercing of the corporate veil has also been legislated in section 20 of the Companies Act of 2008 (the Act). If a court determines, upon application from an interested party or during any proceedings in which a company is involved, that the incorporation of the company, any use of the company, or any act by or on behalf of the company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, then the court may pierce the corporate veil in accordance with section 20(9) of the Act.

One may read section 20(9) of the Act in conjunction with section 70 of the same law (Companies Act, 2008). The latter part, on the other hand, concentrates on the individual accountability of prescribed officers and directors who violated their fiduciary duties. From a legal point the notion of "piercing the corporate veil" means that anybody with a legitimate claim that a company's legal personality has been used for improper purposes may petition the court to have the corporate veil lifted. When a corporation's corporate veil is successfully transgressed, its directors and/or shareholders may be held personally accountable for their deliberate misconduct in abusing the company's legal personality, particularly when it comes to crimes against the order, such as money laundering and corruption, fraud, and so forth.¹⁵⁸

In the process, the court may rule that, concerning any right, duty, or liability of the business, a shareholder, a member, or another individual named in the declaration, the company shall be deemed not to be a juristic person. No other exception would apply to non-profit businesses. To give effect to a pronouncement considered in paragraph (a), the court may issue any additional orders it deems necessary. This then can ensure that a company as an employer does not suffer unjustifiably in cases where it is not fair to do so.

¹⁵⁸ *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A).

3.6. Conclusion

From the explanation above, it is clear that employers in South Africa have very little chance of avoiding being held vicariously accountable for the wrongdoing or delictual conduct committed by their employees. The only reason workers have limited defenses against claims based on the idea of vicarious liability is that courts have applied vicarious liability widely. As stated, the broad application of the vicarious liability theory makes employers accountable even in situations where workers violated company policy yet there is a sufficient link between the employer's operations and the employee's wrongdoing. The idea underlying the broad application of the vicarious liability notion is that the employer should be held accountable vicariously if their business gave an employee an avenue to commit an act of misconduct.

CHAPTER 4 – COMPARATIVE ANALYSIS

4.1. Introduction

This chapter provides a comparative analysis of the principle of vicarious liability in the United Kingdom (UK) and South Africa regarding deviation cases. The chapter starts by expatiating the nature and scope of vicarious liability in the UK regarding deviation cases. The chapter then continues by making a comparison by providing comparison and contrast between the Application of vicarious liability principle in UK and South Africa. Lastly, the chapter draws lessons that can be extracted from the comparative analysis.

4.2. The basic principle of vicarious liability in the United Kingdom

The principle of vicarious liability in the United Kingdom originally applied in the law of agency and was justified through the Latin principle of "*qui facit per alium facit per se*" which entails that any person who instructs another person to act on his behalf does act himself (instructor)".¹⁵⁹ An employee is considered to be an agent of their principal whereas the employer is considered to be a principal. It is considered that an employee has obvious authority to act on behalf of his employer, or principal¹⁶⁰

The basic principle is that it makes sense to hold employers liable insofar as employers act through their employees and they should pay for all damages their employees cause to their parties.¹⁶¹ This is not surprising since the latter country has inherited its doctrine from the former country's legal system.¹⁶² The principle of vicarious liability generally applies the same way it does in South Africa, but it is quite ideal to also

¹⁵⁹ Etsebeth 2006 *Journal of South African Law* 571. Shekhawat D, 'Vicarious liability in medical negligence' (2021) 1 *Law Colloquy Journal of Legal Studies* 5 - famously worded as "*he who acts through another does the act himself.*"

¹⁶⁰ Larsen "*Data privacy protection in South Africa: An analysis of vicarious liability in light of the Protection of Personal Information Act 4 of 2013*" 58 & 66.

¹⁶¹ Calitz (2005) *TSAR* 215.

¹⁶² Botha & Millard (2012) *De Jure* 227.

extensively study how UK courts applied the scope of vicarious liability in deviation cases.

The judgment of *Lister v Hesley*¹⁶³ in the UK has made a remarkable interpretation of deviation from the general rule that employers should be held liable only for the torts their employees commit when acting during employment and within the assigned scope of work. The parliament of the United Kingdom known as House of the Lords also relied on the 'close connection test' to determine the employer's vicarious liability in the incidents of intentional acts of sexual harassment or any other intentional deviation from the scope of employment.

The standard rule that stipulates employers should only be held liable for torts committed by their employees while they are on the job and within the defined area of their tasks has a major exception according to the UK's *Lister v Hesley* case. The Parliament also relied on the "close connection test" to determine the employer's vicarious liability in circumstances of intentional sexual harassment or any other intentional deviation from the conditions of employment. For the misconduct to be taken into consideration, it must be adequately connected to the worker's duties. When determining whether there is a close relationship between an employee's job responsibilities and the torts they have committed, the primary question in the UK is whether there is a sufficient connection for the employer to be held vicariously liable for the torts their employee has committed.¹⁶⁴

The judgment of *Lister v Hesley* was followed with approval in the two recently reported cases, namely, the *Catholic Child Welfare Society v Institute of Brothers of the Christian Schools*¹⁶⁵ and the *Mohamud* case.¹⁶⁶ The *Catholic Child Welfare* case concerned a matter of sexual abuse and assault by the members of the applicant.¹⁶⁷

¹⁶³ As the court referred to many foreign cases to determine the adequate connection test in deviation cases.

¹⁶⁴ *Lister v Hesley* (2002) 1 AC 215 at 28.

¹⁶⁵ *Catholic Child Welfare Society v Institute of Brothers of the Christian Schools* [2012] UKSC 5 (hereafter referred as *Catholic Child Welfare case*).

¹⁶⁶ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11.

¹⁶⁷ *Catholic Child Welfare case* at 1, 2, 3 and 4.

Lord Phillips, the appeals court's presiding officer, affirmed that it is not standard English law that, even in cases where an employee deviates from his employment duties, the employer may still be held vicariously liable for the wrongdoings committed by the employee as long as there is a sufficient link between the employee's tortious conduct and the employer's operations.¹⁶⁸

4.2.1 Comparative Perspective of Scope limitation in deviation cases

This part provides the comparative on deviation cases between deviation cases are sometimes difficult to adjudicate hence determining the extent of the scope of vicarious liability can be difficult to apply.¹⁶⁹ Deviation cases arise from situations in which an employee violates the terms of their employment contract and thus such an employee harms a third party, provided that there is an adequate link between the employee's job responsibilities, the employer's business, and the delictual conduct.¹⁷⁰

In the South African legal system, an employee must dedicate his/her time and energy to advancing rather than impeding his/her employer's company. In the *F v Minister of Safety* ruling, the Constitutional Court defined a deviation case as one in which an employee departs from the work scope assigned to him by his employer and engages in improper behaviour towards a third party while acting in the employee's best interests rather than those of his employer.¹⁷¹ The same also applies in the UK legal system hence in the case of *Lister v Hesley Hall Ltd*¹⁷² it was stated that deviation cases arise when an employee commits a delict when he or she acting outside the scope of employment duties and sometimes even outside the course of employment.¹⁷³ However, the fact of employees deviating from their scope of employment is not an issue, but an issue is when employees deviate from their scope of employment while not acting within the course of employment but there is a close link between damage caused to third parties and their employer's business. The extent

¹⁶⁸ *Catholic Child Welfare Society* case at 93.

¹⁶⁹ As transpired in the *Stallion Security* case, *Booyesen v Minister* case and *K v Minister* case

¹⁷⁰ *F v Minister* at 41.

¹⁷¹ *Ibid.*

¹⁷² *Lister v Hesley Hall Ltd* (UKHL) 22 [2002] (AC) (hereinafter referred as *Lister v Hesley*).

¹⁷³ *Lister v Hesley* at 18 and 19.

of the scope of vicarious liability becomes somehow challenging to apply when an employee has committed a delict while outside both the scope and course.¹⁷⁴

The sufficient connection test is a key component of the legal systems in both the UK and South Africa when determining an employer's vicarious culpability in deviation instances. The "adequate connection test" was originally introduced into the South African legal system by the Appellate Division (now the SCA) in the *Feldman* case. This test examined whether there was a strong connection between the employee's wrongdoing and the employer's company, which caused damages to third parties.¹⁷⁵ In the *NK v Minister of Safety* decision, the Constitutional Court advanced the criteria, confirming the accuracy of the rulings in the *Feldman* and *Rabie* cases. If an employee violates the job description, the employer may still be held vicariously accountable for the employee's actions.¹⁷⁶

The current position for the application of vicarious liability in deviation cases in the UK was determined in the case of *Mohamud*. *Mohamud's* case concerned the wrongful assault of the appellant by the on-duty employee's defendant.¹⁷⁷ The court in this case stated that determining the application of vicarious liability in deviation cases is dependent upon asking two questions as the main questions.¹⁷⁸ The first question was "what functions or field of activities" had been entrusted by the employer to the employee?¹⁷⁹ The second question is "whether there was a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable"?¹⁸⁰ The UK courts on ordinary deviation cases apply the connection test in the same fashion as the South African courts.¹⁸¹ This is

¹⁷⁴ *Lister v Hesley* at 16, 17, 18 and 19.

¹⁷⁵ *Feldman case* at 733.

¹⁷⁶ Calitz (2007) *Stellenbosch L. REV* 456; Nana 2011 *Journal of African Law* 95.

¹⁷⁷ *Mohamud case* at 3, 4 and 5.

¹⁷⁸ *Mohamud* at 43 – 44.

¹⁷⁹ *Mohamud* at 1, 44 and 45.

¹⁸⁰ *Ibid.*

¹⁸¹ *Morrison Supermarkets case* at 31 and *Stallion Security case* at 38.

because courts in both countries require that there should be a close connection between the duties of an employee and the misconduct committed.¹⁸²

However, the matter of consideration that the study sought to critique from the start is applying a deviation test for vicarious liability in exceptional cases. Non-exceptional cases ensue when an employee commits misconduct while acting within the course of work but just not within the scope of employment. The exceptional could be matters such as facts in the *Stallion Security* case and *Morrison Supermarkets* case where employees commit misconduct while acting outside both the course of employment and scope of duties. This is a challenging issue in South Africa hence it is not easy to formulate a defence against claims based on vicarious liability. This is because employers in South Africa are left with almost no defense as long as the close connection test is applied successfully although it may sometimes not be fair to apply the close connection test alone. Thus, sometimes it is necessary to apply the close connection test while considering the need to be fair to all parties hence a good lesson can be drawn from UK case law.¹⁸³ This is because fairness is still due even though the close connection test is applied, but in circumstances where an employee committed a delict outside working hours (while off-duty) and acted outside the scope of employment.

For example, in the United Kingdom, the case of *Morris* is the one that laid the first judicial precedent that served as the employers' salvation against claims based on the doctrine of vicarious liability.¹⁸⁴ In the *Morris* case, a dry cleaner's employee who was off duty stole a client's coat (the applicant, Morris) and the employer (the defendant, CW Martin & Sons Ltd.) was sued. In this case, an employee used the access and information she had about the dry clean to gain access to steal the client's coat.¹⁸⁵ The UK court held that the company should not be held vicariously accountable for the theft committed by its employee because the employee were not acting in the

¹⁸² Ibid; Calitz (2007) *Stellenbosch L. REV* 454.

¹⁸³ *Morrison Supermarkets* case para 31; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48.

¹⁸⁴ *Morris* case at 716.

¹⁸⁵ *Morris* case at 717.

course of their job and were therefore off duty, thus acting on their own.¹⁸⁶ The judgment in the *Morris* case had a fundamental impact and was cited in most parts of the case of *Dubai Aluminium Co Ltd v Salaam*.¹⁸⁷

It should be noted that the facts in the *Morris* case are related to the facts in the *Stallion Security* case. The off-duty employees in both cases acted outside the scope of employment when they committed the misconducts respectively and they used their employment duties to gain advantage to commit the misconducts. However, it was held in the *Morris* case that the vicarious liability cannot apply since an employee was acting on her own while in the *Stallion Security* case it was held that the close connection test should apply to hold an employer vicariously liable.

In addition, the UK courts have strengthened their precedent in the *Dubai Aluminium* case. In the *Dubai Aluminium* case, one of the law firm partners committed fraud while the other partners of the law firm were not aware of the fraud and were all innocent although they benefited from the fraud. A lawsuit was filed jointly against the perpetrating defendant individually and the law firm on the grounds of vicarious liability.¹⁸⁸ The UK Supreme Court held that for the law firm to be vicariously liable for its employee's delict, the employee's delict should have happened in the normal course of business even when the other partners were not aware of it.

The principle of vicarious liability according to the House of Lords, acknowledges the risks incurred by companies to third parties, and when "those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged".¹⁸⁹ As a result, whether an employee's behaviour happens in the "ordinary course of employment" is to be given an "extended scope".¹⁹⁰ As a result, the firm was deemed vicariously accountable for the harm caused by the partner's

¹⁸⁶ *Morris case* at 718.

¹⁸⁷ *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48 (hereinafter referred as *Dubai Aluminium*).

¹⁸⁸ *Dubai Aluminium* at 1-4.

¹⁸⁹ *Dubai Aluminium* at 21.

¹⁹⁰ *Dubai Aluminium* at 22.

deception.¹⁹¹ However, what is important in this case is the test laid by the court a quo which was also followed in the recent judgment by the UK Supreme Court.

In the court a quo ruling, Lord Nicholas established a test to be used in determining whether the vicarious liability doctrine should be applied in situations where an employee has committed a crime while off the job, but there is still an adequate link between the wrongful act and the employer's operations. The test was designed with just one question, and that question was, "Is the wrongful conduct closely connected to the acts that the employee was authorized to perform, for 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?"¹⁹² If the response is affirmative, then the employer should be vicariously liable and if the response is negative, the employer should not be vicariously liable.¹⁹³

The most recent instance *Morrison Supermarkets* case, adhered to the test outlined above in the *Dubai Aluminium* case. The *Morrison Supermarkets* case involved an employee who publicly revealed the private and sensitive information of 12,000 current and former workers in an attempt to get revenge on his company.¹⁹⁴ The personal and confidential data included names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank sort codes, bank account numbers, and salary of each member of staff.¹⁹⁵ The appellant's employee was the offender; he was resentful of his employer for opening a disciplinary investigation against him for very minor infractions.¹⁹⁶ The employee who committed the violation exposed the workers' private and sensitive information to the public by posting it to a file-sharing website and disseminating the link to it across other websites.¹⁹⁷ The worker received

¹⁹¹ *Dubai Aluminium* at 36.

¹⁹² *Dubai Aluminium* at 23; *Lister v Hesle* at 69.

¹⁹³ *Dubai Aluminium* at 36.

¹⁹⁴ *Morrison Supermarkets* at 44, 46 and 47.

¹⁹⁵ *Morrison Supermarkets* at 4.

¹⁹⁶ *Morrison Supermarkets* at 3 and 47.

¹⁹⁷ *Morrison Supermarkets* at 7 and 8.

access to this information when it was given to him to carry out his job, which involved gathering and sending payroll information to the London authorities (KPMG).¹⁹⁸

By the time the employee used his phone to disclose data, he was at home and it was not during work hours. The employee withheld his identity from the public when releasing the material to avoid accountability.¹⁹⁹ Of the injured parties, only 9,263 workers and ex-workers of the appellant filed a lawsuit against the appellant, claiming that the appellant was vicariously liable for the wrongdoing of its employees and breached statutory duties under section 4(4) of the Data Protection Act,²⁰⁰ improper use of confidential data, and failure to maintain confidence.²⁰¹ The appellant, Morrison Supermarkets, was held vicariously accountable for the wrongdoing of its employees, according to rulings from both the court of first instance and the appeals court. Because the employer was the one who gave the employee the information necessary to perform the tasks that the employer has assigned him, both courts concluded that the employer is vicariously liable because there was a sufficient relationship between the employee's responsibilities, the employer's operations, and the unlawful act.²⁰²

The appellant contended that it is not vicariously responsible since the employee did not act in the course of his employment when he committed the illegal act, but both the court of first instance and the Appeal Court rejected this argument.²⁰³ The rulings of the Appeal Court and the Court of first instance were overturned by the court that heard the appeal. The *Dubai Aluminium* case precedent, set by Lord Nichollas, was a major source of support for the Supreme Court. According to Lord Nicholas, for the employer to be held liable to third parties, the wrongdoing must be directly related to the acts that the employee was authorised to perform for it to be reasonably and

¹⁹⁸ *Morrison Supermarkets* at 6.

¹⁹⁹ *Morrison Supermarkets* at 7.

²⁰⁰ See Section 4(4) of Data Protection Act 2018.

²⁰¹ *Morrison Supermarkets* at 9.

²⁰² *Morrison Supermarkets* at 11.

²⁰³ *Morrison Supermarkets* at 12.

correctly considered that the employee was acting in the regular course of his employment.²⁰⁴

The Supreme Court concluded the case by reasoning that the court ought to ask itself this issue to decide whether or not the employer should be found vicariously accountable. The issue is whether the employee's improper disclosure of information was sufficiently linked to the collection and transmission of the information to KPMG for vicarious liability to be reasonably and properly regarded as having been made by him while acting in the regular course of his employment, thereby subjecting his employer to be held liable.²⁰⁵ The court further found the employee would not have been able to reveal if he had not been given access to sensitive information necessary to fulfill his obligation to compile and send data to KPMG. This provides sufficient evidence linking the employee's job responsibilities to his improper behaviour.²⁰⁶

The court used the *Morris* judgement to depart from the rigorous application of the adequate connection test,²⁰⁷ and *Lister v Hesley*, where it was decided that the employer could not be held vicariously accountable just because the employee had the chance to disclose sensitive information through work-related activities.²⁰⁸ The court also cited *Joel v Morrison*, a case in which an employee strayed from work to partake in independent and personal activities. In the Joel case, there were allegations of personal injury brought on by a driver who violated his employment contract by striking a third party with a defendant's (employer's) cart. According to the court's decision in Joel's case, the master is only accountable when the servant is acting in the course of his job. If he drove on his master's business while defying his implied orders, the master would be held accountable; but, if the servant was only taking a personal trip and not doing business as usual, the master would not be held accountable.²⁰⁹

²⁰⁴ *Dubai Aluminium* para 23; *Various Claimants* at 35.

²⁰⁵ *Morrison Supermarkets* at 33.

²⁰⁶ *Morrison Supermarkets* at 34.

²⁰⁷ *Morris case* at 716 and 737.

²⁰⁸ *Morrison Supermarkets* at 35.

²⁰⁹ *Joel case* para 503. Also, *Morrison Supermarkets* at 37.

The Supreme Court followed the precedent laid in *Joel's* judgment and applied the test laid in the *Dubai Aluminium* case²¹⁰ they concluded that the employee's improper behaviour could not be credibly linked to the tasks they were authorised to carry out to hold the appellant vicariously liable.²¹¹ The Supreme Court ordered that the appeal be upheld and the appellant should not be vicariously liable for the torts committed by its employee.²¹² The *Morrison Supermarkets* case in the United Kingdom and the *Stallion Security* case in South Africa differ in that the employee in the former case committed the offense while he was at home, while the employee in the latter case committed the offense while he was at the workplace. The fact that the workers in the Morrison and Stallion instances were not on duty when they committed the crime and were given the chance to do so by their employer is what unites these two examples. In addition, in the *Morrison Supermarkets* case, the court upheld the ruling that an employer should be held accountable for the wrongdoings of its employees, but in the *Stallion Security* case, the SCA maintained the company's liability.²¹³

The aforementioned examples make it clear that under English law, companies are exempt from culpability for the crimes their workers commit while not on the job and when they are not following a set scope of work.²¹⁴ Employers should only be held vicariously accountable where it is just and reasonable to do so to reduce the commercial risk, which the English law courts have referred to as the enterprise risk.²¹⁵ In South Africa, however, things are different since the Supreme Court of Appeal (SCA) decided in the *Stallion Security* case that the causal connection between an employee's job responsibilities and committing a crime is crucial.²¹⁶ The SCA concluded that if an employee's job obligations put them in a position to commit a crime, then the employer should be held vicariously accountable even if the crime was not committed while employee were working. In contrast to South African law, it is reasonable to argue

²¹⁰ *Dubai Aluminium* at 23; *Joel case* at 503.

²¹¹ *Morrison Supermarkets* at 47.

²¹² *Morrison Supermarkets* at 56.

²¹³ *Stallion Security* case at 38 and 39; *Morrison Supermarkets* at 56.

²¹⁴ *Morrison Supermarkets* at 47 and 56.

²¹⁵ Tshoose 2020 *Speculum Juris* 49.

²¹⁶ *Stallion Security* case at 13, 21 and 38.

that English law imposes less corporate risk on employers due to the vicarious responsibility theory.

The SCA in South Africa has decided the legal position in the Stallion Security case, where the employee did not operate within the allocated area of work because he was not on duty at the time of the wrongdoing.²¹⁷ The Morris case, one of the first instances in the United Kingdom, and the *Morrison Supermarkets* judgement, a recent ruling, established the legal position.²¹⁸

4.5. Lessons to be learned from English law

The English law did not deviate from the general application of the doctrine of vicarious liability on the exceptional case but the English Supreme Court had to limit the application of the doctrine of vicarious liability in the cases where it is reasonable to do so.²¹⁹ Limiting the application of the doctrine of vicarious liability purported to protect the interests of employers in circumstances whereby it cannot be reasonably inferred that employers should be held vicariously liable for the delictual conduct of their employees.

The United Kingdom's law of agency and law of torts served as the model for the English law that gave rise to the South African theory of vicarious responsibility.²²⁰ The concept of vicarious responsibility, also known as the respondeat superior principle in English law, is a component of both the law of agency and the law of torts, sometimes referred to as the law of delict in South Africa. Thus, it would be acceptable to compare the vicarious responsibility concept as it exists in South Africa with the respondeat superior principle, which governs vicarious liability in English law in the United Kingdom. As a result, this chapter offers a comparative examination of the vicarious responsibility principle's implementation in South Africa and the UK. This

²¹⁷ *Stallion Security* case at 7 and 9.

²¹⁸ Larsen "Data privacy protection in South Africa: An analysis of vicarious liability in light of the Protection of Personal Information Act 4 of 2013" 66.

²¹⁹ *Morrison Supermarkets* at 47 and 56.

²²⁰ Botha & Millard (2012) *De Jure* 227.

study solely focuses on deviation cases since the comparison study will only focus on deviation instances, not standard cases.

4.6. Conclusion

The purpose of this chapter was to conduct a comparative study between the application of the principle of vicarious liability in South Africa and the United Kingdom. The study found that there is a major difference between how courts in South Africa and courts in the United Kingdom apply the vicarious liability principle in deviation cases. The difference exists in the instances where an employee neither acted within the scope of employment nor during employment. The difference exists in the sense that employers in South Africa hold employers vicariously liable even in cases where an employee acted outside the scope and course of employment. However, the United Kingdom courts developed a test that is based on fairness, justifiability, and reasonable. With this test, employers cannot be held liable in cases where it is not fair, reasonable, and justifiable to do so when an employee acted outside the course and scope of employment.²²¹ Thus, employers in the United Kingdom are protected more than employers in South Africa when courts apply the principle of vicarious liability.

²²¹ *Morrison Supermarkets* at 47 and 56.

CHAPTER 5 – CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

This dissertation analysed the scope of application of the principle of vicarious liability in deviation cases in South Africa. The main objectives of the study were to determine the extent of the scope of application of the principle of vicarious liability in deviation cases in South Africa. Secondly, the study sought to determine the reasonableness of the scope of the principle of vicarious liability in deviation cases in the South African legal system. Lastly, the study sought to make a comparative analysis between the scope of application of the doctrine of vicarious liability in comparison to UK in deviation cases.

The study articulated that the principle of vicarious liability is a legal mechanism that serves as a secondary or strict liability that holds principal entities liable for the wrongful conduct of their agents.²²² In the labour law sense, principal entities are employers and agents are employees. The elements of vicarious liability principle (employer-employee relationship, wrongful conduct, damage to third parties, and scope of employment) should be present to hold employers liable for the wrongdoings of their employees.²²³ However, the study concludes that employers in deviation cases should be held vicariously liable when it is fair and reasonable to do so as held in the *NK v Minister* case.²²⁴

The above conclusion however does not neglect the critical analysis of South Africa case law especially the recent case of *Stallion Security*. The basic conclusion regarding the scope of application in the principle of vicarious liability is that employers in South Africa can only escape liability when the elements of vicarious liability are shortfall. For example, where there is no employer-employee relationship, where a third person did not suffer damages, or where an employee's conduct was not wrongful. However, it is clear from the *Stallion Security* judgment that employers can still be held vicarious

²²² Millard and Botha (2013) *Obiter* 478; Boonzaier (2013) *South African Law Journal* 330.

²²³ Neethling, *Law of delict* 33–127 and 221–263.

²²⁴ *NK v Minister* at 21.

liable even when an employee did not act within the course and scope of employment. This therefore makes the scope of application of the principle of vicarious liability envisaging a wider scope of application and thus, leaves employers in South Africa with no adequate protection.

However, there are situations in which it is inappropriate to hold an employer vicariously accountable for the wrongdoings of its employees. These situations may also restrict the amount of business risk that an employer faces as a result of the vicarious liability principle. This has been proven with the comparative study conducted between the case law of South Africa and the United Kingdom. This is a consequence of the simple reason that the vicarious liability tests in the UK have been established in an approach that does not adversely affect employers' business hence they make employees liable personally for misconduct when it is appropriate to do so.²²⁵ The study generally concludes that employers in South Africa are at higher commercial risk due to a wider application scope of the principle of vicarious liability as compared to employers in the United Kingdom. This is because there are far fewer possibilities for employers in South Africa than in the UK to avoid liability for claims made under the vicarious liability notion.²²⁶

5.2. Recommendations

This study thus recommend that the South African courts should develop the scope of the doctrine in a manner that promotes reasonable limitations for the application of the doctrine of vicarious liability. To advance this, South African courts should learn from the United Kingdom courts regarding the application of the principle of vicarious liability. This recommendation necessitates that South African courts develop the South African scope in a manner that is aligned to *Dubai Aluminium* case and the *Morrison Supermarkets* case.

²²⁵ As developed in *Dubai Aluminium* case, *Joel* case and *Morrison Supermarkets* case.

²²⁶ This is due to the court in *Stallion Security* case extending the scope of employer's vicarious liability where in contrast the court in *Morrison Supermarkets* case rejected such extension involving interpretation of causal link but instead developed a judicial test that lessen the employer's corporate risk.

Moreover the doctrine of vicarious liability should apply hand-in-hand with other liability remedies such as liability for breach of fiduciary duty and piercing of the corporate veil. This means that employers should be liable to a certain limited extent and their liability should be apportioned based on their fault. In cases where employees breached a fiduciary duty or they acted in a manner that warrants piercing of the corporate veil, employers can recover monies lost due to vicarious liability. In addition, employers and employees can be apportioned liability based on their contributory fault.

These recommendations would necessitate that employers are held vicariously liable when it is appropriate to do so and if not, employees should be held personally liable for their misconduct. This would prevent employees from committing financially costly misconduct and hide under the name of employers. This would further create a system of employees who are accountable and responsible when they make decisions relating to employment.

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