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LEGAL TOPIC: VICARIOUS LIABILITY

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INTRODUCTION:

Under the doctrine of vicarious liability a person who is not personally at fault may be held liable for the wrongful act of another simply because of his relationship with that person. The most common instance of vicarious liability is when an employer is held vicariously liable for the tort of his employee. Vicarious liability is based on considerations of social policy and not on fault: ***Imperial Chemical Industries Ltd. v Shatwell [1965] AC 656.***

While it may seem unreasonable and unfair that a person, who has himself committed no wrong, should be liable for the wrongdoing of another, it is argued that a person who employs others to advance his own economic interests should be held responsible for any harm caused by the actions of those employees, and that the victim of an employee's wrongful action should be able to sue the employer who would be the financially responsible Defendant and who may in any case have taken out an insurance policy against such liability.

However, in the interests of ensuring that businesses are not hampered unduly by the imposition of too wide a range of liability on

employers, there is the requirement that an employer will only be liable for those torts which his employee committed during the course of his employment.

ELEMENTS THAT MUST BE ESTABLISHED TO RENDER AN EMPLOYER VICARIOUSLY LIABLE FOR THE TORTS OF AN EMPLOYEE:

- The person who committed the tort must be an employee of the employer;
- The tort must be indeed committed by the employee; and
- The tort must have been committed during the course of his employment.

1. **Determining whether the person who committed the tort is an employee:**

An employee is a person who has a contract of service and is employed to do work subject to the control and directions of the employer. An employee is ordered by an employer as to what is to be done and how it is to be done. An Independent Contractor on the other hand is a person who has a contract for services and such a person is his own master and exercises his own discretion as to the mode and time of his work. An employer is only liable for the torts of his employees and is generally not liable for those of his Independent Contractors: ***Quarman v Burnett [1835-42] All ER Rep 250.*** This is particularly important in a Trinidad & Tobago context in terms of water companies, electricity companies, cable companies and internet and telephone companies who may sub-contract and outsource installations utilities and other services to private Contractors who may come to your homes. If the Technician doing the installation does some damage to your property or equipment through Negligence, then the question of who is liable, will be determined by the issue of whether Vicarious Liability can apply and in that context it will be important to determine whether the Technician was an Employee of the utility company, or Independent Contractor.

Tests to distinguish between an Employee and an Independent Contractor:

a. **The Control Test**: This test was originated from the Feudal System and according to this test an employee is a person who is under the control of his

employer as to *what* he is to do, and *how* he is to do it. On the other hand, an Independent Contractor is under the control of his employer only as to *what* he is to do. While in a primitive society the control test was sufficient, in a modern society this test is not workable and is inadequate because in a modern society an employer cannot control professional employees as in the case of doctors, in terms of telling them what to do or when. It has to be left to their considered Professional judgment, and unfortunately, in such circumstances, the Hospital as the Employer, can become vicariously liable for the Negligence of the Doctor, even though he may not have been a full-time Employee or an Employee at all of the Hospital. Once the Hospital was found to have had him working there, even as an Independent consultant, then the Hospital has to assume responsibility and Liability for his acts, including any acts of Negligence. In ***Cassidy v Ministry of Health [1951] 2 KB 343*** a hospital authority was found vicariously liable for *"the negligence of professional men employed by the authority under contracts of services as well as contracts for services."* In a Trinidad & Tobago scenario, this is particularly important to note in the case of Hospitals, Nursing Homes or Private Medical Clinics, as whether or not the Doctor was an employee of the Hospital or Nursing Home or Clinic, once the yhad him performing any part of your Medical and clinical treatment and he was negligent, then the Institution overall, is the one which usually has to take the Liability in a claim for Medical Negligence.

b. **The 'Organization/Business' Test**: This test is an alternative to the control test, and one that is more in keeping with the realities of modern businesses. As per Denning LJ in ***Stevenson, Jordan & Harrison v MacDonald [1952] 1 TLR 101***-"A man is employed as part of a business and work is done as an integral part of a business." In this case, Denning LJ explained that under a contract of service a man is employed as part of the business, whereas, under a contract for service, his work, although done for the business, is not integrated into it, but is only an accessory to it. There is a difficulty in the application of this test as it does not cover part-time workers. This difficulty was discussed in the case of ***Ready Mixed Concrete (SE) Ltd. v Minister of Pensions [1968] 2 QB 497*** by

MacKenna J, who suggested a third test to differentiate between an Employee and an Independent Contractor.

c. **The Mixed/Composite Test**: According to this test there are three conditions as suggested by MacKenna J in ***Ready Mixed Concrete (SE) Ltd. v Minister of Pensions (supra)*** for the existence of a contract of service or employment which are:

i. the servant agrees to provide his work and skill to the master in return for a wage or other remuneration;
ii. he agrees expressly or impliedly, that he will be subject to the master's control; and
iii. the other terms of the contract are consistent with there being a contract of employment.

In applying this test, the Courts do not limit themselves to the three listed factors but rather they consider a wide range of factors including:

- the degree of control over the employee's work;
- his connection with the business;
- the terms of the agreement between the parties;
- the nature and regularity of the work;
- the method of payment of wages.

Lending/Borrowed Employees: Where a general employer agrees to lend his employee to another for a particular job, and during the course of the job the employee commits a tort, the general employer will remain liable, unless he can prove that at the time the tort was committed, he had temporarily divested himself of all control over the employee: ***Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd [1947] AC***. In ***Texaco Trinidad Inc. v Halliburton Tucker Ltd. (1975) CA T&T***, the Court of Appeal emphasized that "There is a presumption against there being a transfer of a servant so as to make the temporary employer responsible for his acts, and a heavy burden rests upon an employer who seeks to establish such a transfer. The test has sometimes

been concisely expressed as being whether the servant or the benefit of his work was transferred."

2. **The tort must have been committed by the employee:**

In order for an employer to be vicariously liable, the plaintiff must first prove that the employee committed the tort. Denning LJ explained in ***Young v Box and Co Ltd [1951] 1 TLR 789***: '. . . to make a master liable for the conduct of his servant, the first question is to see whether the servant is liable. If the answer is "yes", the second question is to see whether the employer must shoulder the servant's liability.'

On this point, the Learned author Kodilinye in his book, Commonwealth Caribbean Tort Law, 3rd edition, stated as follows:

"Sometimes, it may be difficult or impossible to prove affirmatively which one of several servants was negligent. For instance, if the plaintiff complains of negligent treatment during an operation in hospital, it may be impossible for him to show which one or more of the team of surgeons, anesthetists and nurses involved in the operation were careless. As far as the liability of hospitals is concerned, it was established in Cassidy v Ministry of Health that, where the plaintiff has been injured as a result of some operation in the control of one or more servants of a hospital authority, and he cannot identify the particular servant who was responsible, the hospital authority will be vicariously liable, unless it proves that there was no negligent treatment by any of its servants; in other words, res ipsa loquitur applies. In the absence of authority to the contrary, there seems to be no reason why this principle should not apply to other master/servant relationships."

3. **The Employee must act in the course of his employment:**

An employer will not be vicariously liable for his employee's tort unless the act was done during the course of his employment. A tort comes within the course of the employee's employment if:

(a) **it is expressly or impliedly authorized by his employer** (this will be self-evident in the circumstances);

(b) **the employee was doing something authorized by the employer in an unauthorized manner;**

For example in ***Century Insurance v Northern Ireland Road Transport Board [1942] AC 509***, the employee was the driver of a petrol tanker and while he was transferring gasoline from the vehicle to an underground tank he struck a match to light a cigarette and then threw it, still alight, on the floor. His employers were held liable for the ensuing explosion and fire since the driver's negligent act was merely an unauthorized manner of doing what he was employed to do which was to deliver gasoline. Now this decision is very interesting from the perspective of Employers because it would seem to be an act of obvious recklessness for an Employee to throw a lighted cigarette in an area where he is delivering gasoline, but without more, in this case, the Employer was still held vicariously liable. According to Parke B in ***Joel v Morrison (1834) 172 ER 1338*** "If he (an employee) was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." So to put this in a simple example, if a truck driver in the course of his employment is to deliver goods from Port of Spain to San Fernando and speeds while doing so, to the extent where he causes a major accident; then his employer will normally be the one held liable for the accident and all consequential loss and damage. This would be the case even though the Employer may have impliedly and/or expressly warned its drivers against excessive speed; the Employer will normally still be the one held liable for the Driver's Negligence in such a case. If however, that same driver employed to carry goods from Port of Spain to San Fernando, goes off on a frolic of his own and ends up in Sangre Grande and causes an accident up there with the Employer's truck, then in such a case, the Employer should be able to successfully escape vicarious Liability, because in now reasonable way could

it ever be argued that being up in Sangre Grande, was part of your normal course of employment to drop goods from Port of Spain to San Fernando.

(c) <u>it is necessarily incidental to something which the employee is employed to do</u>.

A relevant factor in determining whether or not an employee's tort is within the course of his employment is whether the act was incidental to something which the employee was employed to do. Where a tort is committed during working hours or within a reasonable period before or after, the Court is more likely to hold the employer liable for it: ***<u>Ruddiman and Co. v Smith (1889) 60 LT 708; Smith v Stages [1989] 1 AER 833</u>***.

<u>Effect of Express prohibitions:</u>

An employer may be liable for his employee's act even though he expressly prohibited such act because if this were the case then "the employer would only have to issue specific orders not to be negligent in order to escape liability for his servant's negligence."(per *<u>Brazier, Street on Torts</u>*, 9th edition). A distinction is drawn between prohibitions which limit the sphere of employment and prohibitions which merely deal with conduct within the sphere of employment. Only a breach of the first type of prohibition will take the employee outside the course of his employment, and thus relieve the employer from liability: ***<u>Plumb v Cobden Flour Mills Co Ltd [1914] AC 62.</u>***

Generally though, the Law leans more in favour of making Employers vicariously lieble rather than having them escape liability. Thus it is important for Employers to rigorously and religiously enforce and insist upon safety standards and best OSHA workplace practices so as to basically have the Employees guard themselves against Negligent acts ab initio, because generally, once they do commit these acts of negligence, more often than not, the Vicarious Liability falls upon the Employer.

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