ABSTRACT

Vicarious liability has lacked the agreeable and undisputable rationale which can legally justify imposing this liability. The main obstacle which all justifications have been confronted with is that this liability is imposed regardless of any fault or negligence on the part of the employer. This distinguishing characteristic apparently conflicts with the foundations of tort law which is fault-based. In this paper, the authors discuss the absence of agreeable justification for vicarious liability and try to offer a solution. But first, the historical background of this kind of liability should be reviewed, which will help to understand rationales offered during historical periods. Secondly, the research will try to analyse current theories according to which scholars try to justify imposing this liability so that we can find the reason of their failure in giving an acceptable reason for imposing vicarious liability.

Keywords: vicarious liability, legal justification, tort liability,
INTRODUCTION

Tort law is based on the misconduct of tortfeasor. The general rule is said to be that if no wrongful act is intentionally or negligently conducted by an individual, then there is no liability on the said individual.

One departure from this general rule, however, is that it is widely accepted that an employer is held liable when his or her employee commits what causes damage to an outsider. In this case, there is no room to exonerate the employer even if it can be proved that he or she has committed no sin, as this liability falls under the doctrine of vicarious liability.

Vicarious liability is a liability for the misconduct committed by others; the liability of an employer for his or her employees' wrongdoing is the current application for this liability which originated as a liability for all the actions of those within an individual’s keep such as one’s family. Vicarious simply means indirect, and this generally indicates that this sort of liability is in contrast to personal liability, whereby a person is liable for his own misbehaviour. It has been claimed that this term was coined by Sir Frederick Pollock (Pollock 1882, 116)

To hold an employer liable, three prerequisites must be satisfied. Firstly, there must be an employment relationship. Secondly, there must be a wrongdoing committed by the employee. Thirdly, the act must have been committed, during the course of employment (Strong and Williams 2008, 373)

Speaking historically, it has been asserted that the doctrine of vicarious liability is not a creation of our time; there were applications for it in Roman law as well as in ancient German law. The application in both of these two legal systems has created a disagreement about the origin of the common law rule which holds an employer liable for damages caused by his employees.

To support his hypothesis that this liability has a Roman origin, Holmes relied on the premise that Romans held housemasters liable for the misconduct of their families, and later, Roman law extended this liability based on the misconduct of Roman slaves (Holmes1891, 8).

On the other hand, Wigmore suggested that the English judicial practice in the context of vicarious liability finds its historical roots in German law which had a similar rule whereby the landmaster was held liable for all wrongdoings conducted by his house members (Wigmore 1894, 330).
Indeed, both sides may not contradict each other at all, as there are many principles, rules, and doctrines in the German legal system were taken from Roman law and vice versa. Therefore, we can, without undue burden, see a considerable amount of multi-origin theories in any legal system and this supports the notion that vicarious liability has been derived from both of the two legal systems.

Nevertheless, neither the Roman rule of the liability of householders nor the ancient German liability of landlords is comparable with the case of a modern employer's liability since they were not secondary liabilities which merely supported the liability of a wrongdoer. Furthermore, the reasons which pushed the judiciary to create the ancient liabilities are different from those in modern liability. Finally, there has been a historical gap in which the old Roman-German liability has disappeared. This has instead been changed into a fault-based liability that depends on a rebuttable presumption of fault from the part of the master who can exonerate himself from this liability through abolishing this presumption (Wigmore 1894, 335). However, it can be argued that those old liabilities might help in constituting a solution to the modern problem of justifying vicarious liability.

It has been asserted (Cane 2002, 187) that modern vicarious liability appeared for the first time in common law in the case of *Hern v. Nichol* (1 Salk 289 [91 ER 256]). Since this case, the doctrine has recurrently been adjusted to become a widely-accepted doctrine in common law. However, this acceptance has lacked a coherent and agreeable basis which justifies its use, in contrast to tort liability which bears no fault and is the best base for imposing tortious liability. The absence of an accepted rationale for modern vicarious liability has been a key reason why many researchers have suggested different justifications for this liability, although no one theory has overcome its critics.

In this paper, a new basis will be offered which does not label this doctrine as a liability at all. It will be argued in the next few pages that this doctrine is nothing but a tool to protect consumers and outsiders from having, practically, lost their compensation or at least suffered to obtain it. However, ahead of this justification we should analyse the justifications which have been set forth. These theories can be categorised into two main directions. Firstly, there have been fault-based justifications which, expressly or impliedly, relied on some sort of sin on the part of the employer. On the other hand, there
have been other rationales which avoided fault as a basis for vicarious liability. Consequently, these two directions are going to be critically analysed before offering a new justification.

**FAULT-BASED JUSTIFICATIONS**

The doctrine of *respondeat superior* and *qui facit per alium facit per se* were the traditional justifications for imposing vicarious liability; the former means “let the master answer” (*Oxford dictionary law* 2009, 476) whereas the English translation to the latter is “he who acts through another does the act himself” (*Oxford dictionary law* 2009, 448). The doctrine *respondeat superior* was derived from the notion of the responsibility of harmful results upon which the owner of the damage-causing instrument and the master of the slaves which caused harm must be held liable because he is the owner or the master (Young 1990, 600). On the other hand, *qui facit per alium facit per se* resulted from the extension of the representation notion which was applied between principal and agent in contractual relationships (North 1997, 287).

Both of the two doctrines are just explanations for vicarious liability rather than justifications. As Baty claims, “‘Qui facit per alium facit per se’is a simple untruth, except so far as it expresses the truism that one who deliberately carries out a design through the instrumentality of another is the active agent throughout. It certainly is not true that what your agents do, you do yourself. Neither in law nor in morals are the unauthorized acts of employees attributable to the employer. ‘Respondeat superior’ is the maxim which has really done the mischief. It is here proposed to examine how.” (Baty 1916, 7) If a master has a chance to prove the absence of his supervision in the wrongdoing committed by his servant, there would be no room to apply these doctrines as they rely on the premise of the supervision of an employer, hence logically there is no liability when there is no supervision (Laski 1916, 107). Besides, they are attempts to apply a fiction which cannot be a legal rationale. If we follow the logic of these doctrines, the assent of the master must be proven to hold him liable for his or her servant’s tort (Laski 1916, 109). However, they do not tell us why an employer is not liable for the acts of an independent contractor as they explain the rule without reasoning. (Pollock 1882, 117)

In the 19th century, there was an attempt to put forth a logical reason for imposing this liability by suggesting that the master is liable because of his control over his servant who, under this control,
committed a tortious act. For example, Lord Brougham in the *Duncan v. Findlater* case tried to outline what has been called the control test([1839] 7 ER 934.940). This justification may have taken its base from the origin of vicarious liability, which was based on the ‘hypothesis’ that an employer has control over his employees thereby he must be held liable if they commit any wrong action (Turner and Hodge 2004, 491).

However, this test has been criticised for different reasons. Foremost, the control rationale presumes that an employer failed in his control, which makes liability based on the fault of the employer, thereby rendering it as a personal liability which cannot be imposed regardless of the employer's fault. However, Lord Nicholls argued in the *Dubai Aluminium Co. Ltd. v. Salaam* case that this liability is not a personal liability but a substitutional liability ([2003] 2 AC 366 at 383). Moreover, there would be a case for vicarious liability despite the absence of control in the case of skilled employees like surgeons in hospitals who cannot be under the control of their managers (Turner and Hodge 2004, 491). Finally this theory does not explain imposing vicarious liability in cases where the employer has taken all the necessary measures to avoid the accident in contest (Harper and James 1974, 1368-69).

Another suggestion that has been used to justify this liability is the selection theory. According to this theory, an employer can be sued for selecting his negligent employee in the first place, as the one held liable should be the one who has selected the agent rather than the outsider (Brocklesby v. Temperance Permanent Building Society [1895] A. C. 173.). This rationale was asserted as a ground for imposing this type of liability because the master has put his trust and confidence in his servant and thereby invites others to do the same thing. This argument relies on the notion that vicarious liability, from its inception, has been constituted upon the basis that who “employs and puts a trust and confidence in the deceiver, should be a loser, than a stranger.”(*Hren v. Nichols* 1 Salk .289, 91 Eng. Rep.256 (1709))

Analogous to the control test, the selection test has been criticized on the grounds that both of them base liability on the employer's fault which leads to confusion (Harper and James 1974, 1369). It was mentioned in *Staveley Iron & Chemical Co. Ltd. v. Jones* that if there was negligence on the part of the employer, his liability would be deemed personal ([1956] AC 627(HL)). Furthermore, in many cases, an employer cannot choose his employee, but that does not preclude the employer from being held liable
and this is predominantly the case in large companies and governmental institutions (Laski 1916, 110). This is because, like control justification, this justification makes no differentiation between an employee and an independent contractor despite both being analogously selected by an employer, who incontestably cannot be held liable for the misconduct of independent contractors (Neyers 2005, 297).

Benefit - burden is one of the justifications for this liability under which the law puts the burden on the enterprises involved because of the risk which they cause to society (Steele 2007, 565). In *Broom v. Morgan*, Lord Denning stated that the person who "takes the benefit of the work when it is carefully done… must take liability of it when it is negligently done …"([1953] 1 Q.B 597, 607).

Plainly, this theory has not adopted a financial or economic basis, but has been based on its own justifications on social and moral foundations (Steele 2007, 565). However, it can be asserted that the benefit-burden rationale has ignored the fact that an employer pays for the benefits of both his employee and society through taxes (Howarth 1995, 632). In addition, it does not explain why the employer is not held liable for the wrongdoing committed by an independent contractor despite this individual offering comparable benefits through his work (Steele 2007, 566). This rule also does not explain why vicarious liability is imposed on charitable organisations which do not seek to benefit like some governmental organisations do (Bride and Bagshaw 2005, 639). Finally, this justification constitutes a very scary rule which is whoever benefits from any risk must pay for the damages caused by this risk. As a consequence, this might broadly extend tortious liability into multiple aspects of human activities in society.

Nevertheless, some have offered another solution which claims that the vicarious liability doctrine aims to push an employer to take all tolerable measures to prevent damage and he will be held liable if he fails to do so (Fleming 1998, 410). It was asserted that this liability is “founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not and another thereby sustains damage, he shall answer for it” (*Farwall v. Boston and Worcester railroad corporation*. 45 Mass. (4 Met.) 49 (1842)).

This reasoning thus considers an employer’s failure in taking preventive procedures as a personal liability because an employer’s failure in taking reasonable measures is another expression for his fault.
and he would thus be liable for his own wrongdoing rather than the misconduct of others (Steele 2007, 567). In *Rose v. Plenty* ([1976] 1 All E.R 97,103), it was held that the employer was liable despite having taken all reasonable and preventive measures to avoid the damage. Besides, this theory does not justify why an employer is held liable in the case of unavoidable accidents (Steele 2007, 566).

It can be argued that all aforementioned rationalizations lack a path to solve the crux of the problem which is why vicarious liability is imposed without a question about whether or not an employer has committed a sin. All these theories have been based on express or implied failure on the part of the employer which leads to a discussion on the employer’s fault in cases at hand, but which factually has not occurred. Courts do not question this and express aversion towards questioning employer misconduct, subsequently cultivating the trend to hold an employer liable regardless of his actual fault.

**NON-FAULT BASED JUSTIFICATIONS**

To avoid criticism in relation to employer's fault, modern jurisprudence has tended to offer some justifications based on two fundamental categories: financial and social reasons (Harper and James 1974, 1371).

The so-called deep pocket is one of the modern justifications which relies on the economic and financial premise that an employer is in a financial position in which he can pay a compensation; this saves the plaintiff from the undesirable effect of being left without fixing the damage caused by his employee's insolvency (Markesinis and Deakin 1994, 497).

Even so, it has been argued that it is an injustice to force an employer to pay compensation solely because of his financial ability, which is also applicable to others like the government, as the claimant needs to fix his damage or harm regardless of the source which the compensation comes from (Neyers 2005, 292). Furthermore, this theory eliminates the differentiation between employee and independent contractor when the latter is not able to pay compensation to the plaintiff, and if this justification was followed, it would properly be extended to the employer-independent contractor relationship (Flannigan 1987, 27). Finally, it can be argued that if this rationale was the true basis of why law requires that the wrongdoing must be committed in the course of employment, it can be broadened to all wrongdoings committed by an employee (Bride and Bagshaw 2005, 638).
Others suggest that an employer can spread his loss to his customers by adding it into the costs of his products. This justification, along with the deep pocket theory, is the dominant rationale amongst American writers (Steele 2007, 567). In recent cases, the pure less spread theory, which is financially based, has been combined with social and moral justifications (Steele 2007, 567).

However, this theory cannot explain why this liability is imposed in cases where the spread of the loss is not possible. For example, it is in conceivable how non-profit entities can spread their loss (Neyers 2005, 297), and again it does not clarify why the wrongdoing must be committed in the course of the employment (Bride and Bagshaw 2005, 640). Additionally, imposing vicarious liability on the grounds that an employer can spread his loss does not explain why he is not liable for the misconduct of an independent contractor (Flannigan 1987, 28).

In *ICI v. Shatwell*, another justification was offered which has been called rough justice. Lord Pearce stated that “[t]he doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it” ([1964] All ER 999).

It can be asserted that this rationale is not a legal principle, but rather, social convenience, and rough justice is an applicable basis for multiple legal rules. As such, we should differentiate between sociological justifications which try to describe a phenomenon in the social context and legal justifications which vouchsafe a legal framework for the phenomenon. The debate at issue is thus about the sort of justifications which were not offered in Lord Pearce’s statement.

Another attempt to constitute a basis for vicarious liability was made by Laski who contended that imposing vicarious liability comes from public policy rules (Laski 1916, 111). An employers’ duty, according to this stand, is to serve the public who “…bear the burden of his servant’s trots even when he is himself personally without fault, it is because in a social distribution of profit and loss the balance of least disturbance seems thereby best to be obtained (Laski 1916, 112).
In some cases, this rationale can be linked to the benefit-burden justification when it relies on the premise of *social distribution of profit and loss*, hence it can be criticised on the grounds of the same arguments that apply to the failings of the benefit-burden theory. Likewise, analogous to rough justice, it does not offer a legal mechanism which can legally justify this doctrine, as the public policy conception is an unduly broad conception which embraces unlimited rules and principles.

There was an attempt to solve the problem by considering vicarious liability as a mechanism of social insurance under which the employer is seen as the insurer of a plaintiff’s loss (Cooke 2007, 462) as the plaintiff can sue his insurer.

This solution does not take into account the differences between the insurance system and vicarious liability. Firstly, the claimant can directly sue the person who is vicariously liable but he cannot sue the insurer in ordinary cases, and secondly, an employer can recover his losses by suing his employee after paying compensation, but the insurer cannot (Cane 2002, 189-190).

By restructuring vicarious liability, a new rationale has been offered. According to this theory, the common mistake in all forgoing justifications is that they looked into the relationship of the plaintiff-employer while the solution actually occurs in the employer-employee contractual relationship or employment contract, and according to this rationale, has an implied term of employee’s indemnity against liability on misconduct committed in the course of employment (Neyers 2005, 304-05).

Despite truly being the first theory that has shifted the direction of vicarious liability to become a contractual issue, it seems that this ‘indemnity theory’ is not one we can completely adopt for two reasons. Firstly, the employee does not have an indemnity because he is liable under personal liability, and secondly, even if the claimant chooses to sue the employer, the latter will have the right to recover through suing tortfeasor (his employee) as was demonstrated in *Lister v. Romford Ice and Cold Storage* ([1957] AC 555). Thus, the opportunity for an employer’s recovery is contradictory with this justification.

Apart from indemnity theory, by monitoring non fault-based rationales, it can be asserted that these theories rely on social, moral, or financial foundations which, even if they are true, lack a legal rule which embraces these ideas.
OUR PROPOSAL

In many cases, it can be seen that human activities in the social context may create phenomena which trigger a challenge for the legal system. The solution for this problem must always come from legislature or courts as they shine the spotlight on the practical issue at hand rather than theoretical issues. From there, we have to base this solution on legal and logical foundations. The rationale will thus be based upon one of the well-known legal principles or rules borrowed from one area to another. Sometimes, solutions can be offered by tracing legal history and enlivening an ancient principle which can be accepted as a justification or basis for the new solution. In many cases, a modification to the old principle might be attempted, whereby it will be a similar principle which can serve as a well-settled justification for the solution. In other words, the creation of a solution will be without any worry over its theoretical basis, and in many instances, the given solution will be based on an old rule, although deriving a new rule from an old one does not mean that they are the same principle or application to the same principle.

In vicarious liability, the reason of creation of Roman law and German law is entirely different from the cause under which modern liability has been regenerated. Indeed, the old form of vicarious liability was because some people who may have committed a tortious act do not have a legal personality, thereby cannot be sued or do not own a property and thus the compensation will not be in the hands of their victims.

The cause under which the modern vicarious liability has been created is different, and this liability has developed because of the emerging role of industries and commerce in modern life which has caused three factors:

1- There has been an increasing role of enterprises in modern life, which has created many human activities which can affect society negatively through different sorts of dangers which may cause loss or injuries or even the death of innocent persons. These enterprises employ people to fulfil organisations’ goals but involve what might cause damage to the people who deal with the employer. Victims will then ordinarily seek to recover their losses.
2- The compensation which is sought may entail a huge amount that cannot be afforded by the person who directly caused the damage, the ‘employee’, and in many cases, this individual’s financial position is weak so the victim will unjustifiably find himself without any compensation.

3- Modern life has enabled much potential damage and it is impossible to blame anyone for their errors; on the other hand, there are beneficiaries who get massive benefits from these activities.

These elements, which have been dealt with in some theories especially non-fault based ones, as justifications in one way or another, cannot be seen as the legal justification for holding an employer vicariously liable as we are still in need of putting this doctrine in a legal framework and on a coherent basis.

The main features in this liability should have previously been outlined; particularly those that have blocked the road to justify this liability. Suing an employer without fault is not the sole thing which is different in this doctrine, and at least two other characteristics render this liability distinguishably different from tort liability.

Firstly, vicarious liability is not a personal liability but a substitutional liability (Dubai Aluminium Co. Ltd. v. Salaam [2003] 2 AC 366 at 383). This tells us that there are two liabilities which both rely on one action and each of them has its own scope and requirements. However, employer’s liability is dependent on an employee’s liability.

Secondly and of much importance, there has been an acceptance for the recovery of the employer from his employee if he paid the compensation especially in the case of intentional tortious actions (Strong and Williams, 2008, 382) and the question that has to be answered is what exactly is the nature of this recovery, as the tort legal system does not give the liable person the chance to recover simply because he is liable6.

The major obscurity is not imposing liability without fault, but rather the crux of the contradiction lies in the second and third features, as the difficulty is to imagine the existence of two different liabilities for two individuals in the same context. There is no more than one liability from one action, combined with a recovery relationship which raises another question mark about the doctrine; there is no rule applicable for recovery here.
Fittingly, Neyers suggested that eyes should be turned to the employer-employee relationship rather than the claimant-employer relationship (Neyers 2005, 304-05), especially with regards to the discussion about implied terms in the employment contract that was put on the table in *Lister v. Romford Ice and Cold Storage* ([1957] AC 555, 574). Nevertheless, Neyers ineptly tried to modify the rule according to the propositions of justifications.

There is a notion that should be brought to mind that when trying to justify rules of law, especially those that have been created as a response to practical problems, we might not find any pre-existing legal doctrine that is thoroughly applicable, and in such cases, we should pay (deleted ‘our’) attention to the most comparable framework which can, even after being modified, be applied.

In the rule at issue, tortious liability, which relied on the above-motioned conflicts, is not the nearest legal framework which could be a basis for imposing this kind of liability, despite it being held in the context of tort.

Speaking historically, the basis for imposing modern vicarious liability was to protect outsiders from a fraud committed by an employee, and the reason for that was not to enforce an employer to pay for his conduct; it was rather to assist the victim by supplying an extra debtor. This liability has been imposed to achieve a secure performance with regards to the victims’ debts rather than merely asking the employer to pay for his or her fault. We can conclude that this doctrine is no more than a tool to protect outsiders. Nonetheless, this tool of protection still needs a legal framework.

The closest system to the vicarious liability doctrine might lie in the contractual guarantee system, under which the guarantor can be an additional debtor to the creditor. Consequently, employer’s liability for misconduct of his employee is categorised under the term ‘liability with extra debtor (Dam 2007, 258); it is not disputed that the guarantee may give the creditor the right to optionally sue the granter or the original debtor. There are multiple similarities between the nature of surety’s liability and employer’s liability; both of them are secondary liability which cannot take place without another liability (Andrews and Millett 2005, 209), but the employer, in an analogous position to a guarantor, can, after payment, sue the original debtor (principal /employee) (Andrews and Millett 2005, 256). The guarantee term may be an
implied term in the employment contract and it can be implied in law rather than implied in fact. Under this term, the employer will have to pay compensation as a guarantor.

Moreover, in vicarious liability, there are two liabilities to one creditor who may sue any of them, and analogously, there are certain cases in guarantee “where there is a primary and secondary liability of two persons for the same debt, they will stand in the relationship to each other of principal and surety even though there is no express contract suretyship” (Andrews and Millett 2005, 1-2). It should be noted that despite using terms ‘debtor’ and ‘creditor’ in the guarantee, the guaranteed liability might be a non-contractual one (Andrews and Millett 2005, 3), and likewise, the guarantee may be unlimited in period and may cover any liability that may arise in the future (Andrews and Millett 2005, 9 and 109).

Another point worth discussing is that considering vicarious liability as a contractual issue may render it subject to the terms of employment agreement which can expressly exclude such an ‘implied term’. To answer this, we should take into account that there are some terms in the contact that cannot be excluded by the will of the parties involved.

Also, there may be one cause for inconsistency and it is that the guarantee agreement must be written, because neither the vicarious liability doctrine nor the guarantee should be modified. As we explained earlier, our life creates many phenomena with each having their own characteristics which render their organising rules distinguishable from their pre-existing counterparts.

**CONCLUSION**

It is widely accepted that an employer is vicariously liable for his employee’s misconduct towards an outsider. Despite this acceptance, however, this rule has existed without an agreeable justification which can be relied upon to impose this liability.

There have been many theories and proposals which have offered foundations for this sort of liability and these offered rationales have been categorised into two main groups: fault based justifications and non-fault based justifications. However, not one of them has met the challenges of conflict between this liability and tort law foundations.

In this paper, a new proposal has been presented to adapt this doctrine that has relied on denying its tortious nature and rendering it as a sort of consumer protection by presuming a guarantee term which
is implied in the employment agreement by which the employer is liable for his employee. And, if the victim optionally sues the employer, the latter will have the right, as in the guarantee system, to recover from his employee.

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1 Lord Reid observed in *Staveley Iron & Chemical Co. Ltd. v. Jones* [1956] AC 627(HL), at 643 that “qui facit per alium facit per se” gives “a fictional explanation of it(vicarious liability).”

2 in *Bazley v Curry*[1999] 2 SCR 534 , it was said that “employers are often in the position to reduce accident and intentional wrongs by efficient organisation and supervision...” at 32
Scarman L.J said the employer is liable “because it is a case in which the employer having put matters into motion should be liable if the motion that he has originated leads to damage to another”

Although Neyers criticises the ‘recovery right’ for numerous reasons, it is still a widely accepted rule which should be borne in mind before any justification for vicarious liability.

One can argue that the absence of property, as a justification, may be comparable with deep pocket justification in modern vicarious liability. To clarify this confusion a distinction should be drawn between the two situations. In Rome, family members were, legally, unable to own property even if they could practically do so, whilst the case in modern liability is different because employees are not barred from owning property but they might financially be incapable.

Straightforwardly, insurance relationship is not applicable here because it is inconceivable that the employee the insurer for his or her employer.

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