RECENT DEVELOPMENTS IN THE APPLICATION OF THE DOCTRINE OF VICARIOUS LIABILITY BY UNITED KINGDOM COURTS*

Abstract
Tort law may qualify as a soft national constitution guided to fill gaps in rights discourse but with the primary objective of monetary compensation. Vicarious liability is an addendum to the law of torts. It used to be an addendum to the tort of negligence but recent decisions in the Commonwealth, particularly the United Kingdom now indicate otherwise. In many commonwealth jurisdictions, tort law has developed as core judge-driven law. A comparative approach to its application and development is therefore of immense benefit. As a majorly judge driven law, it is also contextualised in a socio-economic framework.

Key Words: Tort Law, Vicarious Liability**,** Comparative Law, Social Cohesion, Judicial Precedents.

1. Introduction

In *Woodland* v. *Essex County Council*[1] the United Kingdom Supreme Court in a unanimous decision reiterated the accurate position that liability in law of tort depends upon proof of a personal breach of duty but to that principle, there is at common law only one true exception, namely vicarious liability.[2] Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty, but is held liable as a matter of public policy for the tort of the other.[3] A few cases, novel in scope, before the United Kingdom Supreme Court necessitated a review of the content, scope and development of the principle of vicarious liability. In the first of these cases, *The Catholic Child Welfare Society & Ors*. v. *Various Claimants & Ors.* (*Christian Brothers*)[4] the Supreme Court in a unanimous judgement commended the judgement of Ward L.J in *JGE* v. *The Trustees of the Portsmouth Roman Catholic Diocesan Trust*.[5]The Lord Justice had reviewed the principle of vicarious liability drawing insights from case law and academic literature. In terms not too far, Ayoola JSC noted the positivist bent of the Nigerian judiciary, by which law, is seen as 'command' with its attendant bent on technicalities that may have the effect of downgrading principles.[6]

Law and its development as has become increasingly apparent, is closely related to the progress and development of a society. The reason this is the case, is because cohesion in any given society is the immediate impetus for all forms of development.[7] Social cohesion can only be brought about by rights ordering in which rights are acknowledged and infractions are

* Nwudego Nkemakonam Chinwuba, Ph.D. BL., Associate Professor, Department of Private and Property Law, University of Lagos. Email: uchinwuba@unilag.edu.ng; akonam22@yahoo.com

[1] [2013] UKSC 66.

[2] [2013] UKSC 66, para 3.

[3] *Majrowski* v *Guy's and St Thomas's NHS Hospital Trust* [2007] 1 AC 224.

[4] [2012] UKSC 56.

[5] [2012] EWCA Civ 938.

[6] A Emmanuel "Good Governance in Nigeria: The Role of the Judiciary" Second Annual Kasunmu Law Society Lectures of the Faculty of Law, University of Lagos (Delivered 18th July, 2012, University of Lagos Press, Lagos) 9.

[7] Social cohesion aims at the willingness of members of a society to co-operate with each other in order to survive and prosper. It also refers to positive social relationships, the bond or glue that binds people and targets the promotion of the well-being of everyone in the society.

redressed from not only rules but on a principled basis.[8] Thus, in v. *Hon. Justice E. I. Isuama*[9], Pats Acholonu JCA as he then was, stated:

> "…… nowadays jurisprudence does not kneel at the altar of form and technicality but on the premise of the living law that guarantees justice that is beholden and understood by the right thinking members of the society"[10].

In re-affirming the relationship of the society to law and the role of the outer and inner bar, the court in *Christian Brothers* stated that it is incumbent on the profession to recognise development of the law and its function in meeting the needs of society. Similarly, in *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.*[11], Lord Simons affirmed the position taken in *M'Cartan* v. *Belfast Harbour Commissioners*[12] that the value of an earlier authority lies, not in the view which a particular Court took of particular facts, but in the proposition of law involved in the decision.

Within the compartmentalisation of law, it is clear that tort law typifies a soft constitutional framework at least in common law jurisdictions. More than any other branch of the law, tort law is most viable and equipped in aiding governance by its coverage, operation and application. It advances and facilitates cohesion in human interaction; organised economic integration through internalisation of costs and insurance; relationship of individuals to property; restraint and care in actions or inactions; the boundaries of employment relations; contract, law enforcement, trade relations, integrity of reputation and personality. Vicarious liability is more so, because through the mechanism of logical reasoning reserved for the province of law, the mechanism of justice is oiled to bring about comfort in civil actions in a most robust, profound and sustainable manner. Its continuing relevance resonated in *Cox* v. *Ministry of Justice*[13] where Lord Reed stated that "the law of vicarious liability is on the move…it has not yet come to a stop. This appeal, and the companion appeal in *Mohamud* v. *WM Morrison Supermarkets Plc*[14] provide an opportunity to take stock of where it has got to so far".[15]

This paper examines the contemporary and comparative scope, development and application of vicarious liability. The analysis is in four parts; utility of a comparative legal framework; policy considerations and theoretical underpinnings of vicarious liability; modern scope and criteria for engaging vicarious liability and historical perspectives. The paper closes with a summary of the progress of the law in this all important area of judicial jigsaw that showcases the angle of law as the bedrock of social engineering and re-engineering.

2. Utility of Comparative Analysis

[8] For a fuller discourse on the relationship between societal cohesion, law, norm and rule see, J.E. Penner J.E. *The Idea of Property in Law* (OUP, 1997) Chapter 2.
[9] [2006] 6 NWLR (part 975) 184- (Appeal No. CA/E/145/2001 (Unreported) delivered 20/1/2003.
[10] Reiterated in *Unegbu* v. *Unegbu* [2004] II NWLR, (part 884) 332, 362 – 363.
[11] [1947] AC 1, para 3.
[12] [1911] 2 I.R. 143.
[13] [2016] UKSC 10.
[14] [2016] UKSC 11.
[15] [2016] UKSC 10, para 1.

Is there a need to examine the developments in law in a comparative manner? A comparative approach in the analysis, interpretation and application of law advances and sharpens jurisprudence while advancing the contextual practical application and acceptance of law. This, in turn, drives social cohesion. Comparative approach requires a continuing familiarisation with developments in similar jurisdictions. For instance, in the area of occupier's liability, it is inconceivable that in the case of *Samson Ugochukwu* v. *Unipetrol*[16] which was decided in 2002, counsels through the hierarchy of courts did not draw the attention to the frustration and harshness of the common law[17] on scope and application of occupier's liability as well as the policy and theoretical underpinnings which informed a departure from the orthodox common law principles of occupier's liability leading to the enactment of Occupier's liability Acts, 1957[18] and 1984.[19]

The important cases which were instrumental to the intervention of the legislature were also not mentioned.[20] While a reference was made to the Law Reform (Torts) Law of Lagos State, of which part three of the law finds equivalent sections in the 1957 Act, the background to the 1957 Act did not reflect in the judgement of the Nigerian Supreme Court.[21] In the event, the Supreme Court adopting the common law classification of entrants but not the intendment of the 1957 Act, as replicated in the Lagos State Law, disposed of the case.

In *Lister* v. *Hesley Hall Ltd*.[22], the first of the cases necessitating a review of the extant position on vicarious liability at the United Kingdom Supreme Court, Lord Steyn welcomed a comparative insight and approach:

> "My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in *Bazley v Curry*[23]; *Jacobi v Griffiths*[24]. Wherever such problems are considered in future in the common law world these judgments will be the starting point. On the other hand, it is unnecessary to express views on the full range of policy considerations examined in those decisions".[25]

[16] [2002] SC. 202/2000; [2002] 7 NWLR (part 765) 14.
[17] Typified by the outcome of the decisions in *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* [1929] A.C. 358; *Indermaur* v. *Dames* [1866] LR 1 CP 274. For a fuller picture see, 'Occupier's Liability' (Editorial) (1972) 21(3) The International and Comparative Law Quarterly 574-576.
[18] 1957 Chapter 31 5 and 6 Eliz 2.
[19] 1984 Chapter 3.
[20] *British Railways Board* v. *Herrington* [1972] A.C. 877; [1972] 2 W.L.R. 537; [1972] 1 All. E.R. 749; *Pannet* v. *McGuiness* [1972] 2 Q.B. 599; [1972] 3 W.L.R. 386; [1972] 3 All E.R. 137.
[21] Cap L64, Laws of Lagos State, (1994) first enacted 1961. The Courts in the United Kingdom had stretched the common law position beyond its elasticity in an effort to fit victims within lawful entrants through the implied permission.
[22] [2001] UKHL 22.
[23] [1999] 174 DLR (4th) 45.
[24] [1999] 174 DLR (4th) 71.

[25] [2001] UKHL 22, para 27; [2002] 1 A.C. 215; [2001] 2 W.L.R. 1311; see further Cane, Peter 'Vicarious Liability for Sexual Abuse'(2000) 116 *LQR* 21, 24. *Woodland v Essex County Council* [2003] 3 W.L.R. 1467; [2004] 1 All E.R. 589; [2004] A.C. 1; This is the same basis on which the House of Lords was invited to review the rule in *Rylands* v. *Fletcher*[25] in the case of *Transco Plc*. v. *Stockport MBC* [2013] UKSC 66; [2014] AC 537; at a time when some Commonwealth jurisdictions had ceased to see the logic of the rule occupying a separate head of liability paras 17 & 18; see *Burnie Port Authority* v. *General Jones Pty Co.* (1994) 120 ALR 42; see further R.F.V. Heuston & RA Buckley 'The Return of *Rylands* v. *Fletcher*' (1994)110 L.Q.R 506; Dziobon & Mullender 'Formalism Forever Thwarted: *Rylands* v. *Fletcher* in Australia (1995) *CLJ* 23. K.T. Warner (1998) Juridical

In another statement his Lordship reaffirmed that the cases were, of course, only of persuasive authority despite their eminence.[26]

3. Policy Considerations and Theoretical Underpinnings of Vicarious Liability

The primary socio-economic objective of the principle of vicarious liability is the idea of having a capable party who is held responsible for the injury sustained by the victim. To achieve this, the law commences with establishing the tort of the primary actor. Once this is done, the next stage is the assessment of compensation. Where the primary actor is a person of straw, as is usually the case, then the principle of vicarious liability sets in within the parameters of law. Control plays a part. The content of control has three components- identification of the engager of the tort feasor, on whom the responsibility for training and directions lies. These considerations are based on the presumption or policy framework that the engager of the tort feasor has the rationality to engage a responsible person, train such a person and obtain insurance or where relevant, pursue indemnity. On this premise, the concerns whether the principle of vicarious liability can induce carelessness on the part of the tort feasor or place exceptional burden on the engager are answered.

The principle gains additional support for its admonitory value in accident prevention. In the first place, deterrent pressures are most effectively brought to bear on larger units like employers who are in a strategic position to reduce accidents by efficient organization and supervision of staff. The fact that employees are, as a rule not worth suing because they are rarely financially responsible, removes from them the spectre of first liability as a discouragement of wrongful conducts, holding the engager liable. The law thus, furnishes an incentive to discipline servants or analogous relationships, if necessary by insisting on an indemnity or contribution. Vicarious liability promotes wide distribution of tort losses, the engager of the tort-feasor being a most suitable channel for passing them on through liability insurance and higher prices. In turn, a viable insurance sector advances stability in socio-economic status and interaction. Finally, the rule enhances the potency of the judiciary in its adjudicatory role for its judgements are thereby, not made in vain.

3.1 Modern Scope and Criteria for Vicarious Liability

Scope

The Salmond formulation traditionally used as a guide for imposing vicarious liability is:
(1) a wrongful act authorised by the master, or
(2) a wrongful and unauthorised mode of doing some act authorised by the master.
Thus, the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to one who engages an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has

Review 208. The same review of jurisdictional application also occurred with many other legal subjects such as the *Mareva injunction*. N. N. Chinwuba *The Mareva Injunction in Nigeria – An Exposition of its Development* (Germany, VDM Verlag, 2011).

[26] *The Catholic Child Welfare Society & Ors*. v. *Various Claimants & Ors.* [2012] UKSC 56, Para 3; [2013] 2 A.C. 1 (*Christian Brothers*); *KLB* v. *British Columbia* [2003] 2 SCR 403.

authorised that they may rightly be regarded as modes, although improper modes of doing them.[27]

As Lord Steyn stated in *Lister* v. *Hesley Hall Ltd*.[28], "for nearly a century English judges have adopted Salmond's statement of the applicable test as correct".[29] In the event, the Court thought that changed circumstances necessitated a change and did change the test. That the defendant in an action for vicarious liability must be in an employment relationship with the tort-feasor appears to be the rule in Nigeria.[30] The recent cases that came before the United Kingdom Supreme Court, clearly demonstrate that what is now required to impose a vicarious liability is that the relationship between the parties is one analogous to an employer and employee relationship. Secondly, the tort is not one limited by the Salmond test but extends to actions which do not fall within the mode of the scope of engagement provided that the risk has been created by the initial relationship between the parties.

In *Cox* v. *Ministry of Justice*[31] Lord Reed delivering the lead of a unanimous judgement, stated that the scope of vicarious liability can be determined by relating the facts of the individual case to two questions: "First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?"[32]

In the light of development and extended forms of interaction in society, the boundaries of vicarious liability have been expanded. Thus, it is worthwhile to "embrace tort-feasors who are not employees of the defendant, but who stand in a relationship which is sufficiently analogous to employment".[33]For instance, a relationship can give rise to vicarious liability even in the absence of a contract of employment where an employer lends his employee to a third party, the third party may be treated as the employer for the purposes of vicarious liability.[34] A car owner could also be held vicariously liable for accident occasioned by the use of his car for his own purposes. Intentional torts which were previously not covered can also come within vicarious liability.

In *Christian Brothers*[35]- 'the Institute of the Brothers of the Christian Schools', is an international unincorporated association whose membership was not in an employment relationship. In *Cox* v. *Ministry of Justice*[36], the tort-feasor was a prisoner.

Vicarious liability has been consistently dressed in the apparel of policy considerations and guided to ensure that the victim of a tort receives compensation for injury suffered where

[27] *The Catholic Child Welfare Society.*

[28] [2001] UKHL 22.

[29] [2001] UKHL 22, para 15.

[30] O, Tokunbo 'Nigeria: Vicarious Liability- What an Employer Needs to know' *The Guardian Newspapers* ng. 29th July, 2014 last accessed 08/08/2019; See also Steamco Ltd v Mark & Ors. (2018) LPELR45947 CA. , Ifeanyichukwu Psomdu Ltd v Soleh Boneh Ltd (2000) LPELR1432 SC, *Popoola* v. *Pan African Gas Distributors Ltd.* [1972] 1 All N.L.R. (part 2) 395; *Jarmakani Transport Ltd.* v. *Abeke* [1963] 1 All N.L.R. 180; *National Bank* of *Nigeria Ltd.* v. *T.A.S.A Ltd.* [1996] 8 NWLR (Part 468) 511.

[31] [2016] UKSC 10.

[32] [2016] UKSC 10, para 2.

[33] *Woodland v Essex County Council* [2013] UKSC 66; [2014] AC 537, para. 3.

[34] *Cox* v *Ministry of Justice* [2016] UKSC 10; This was considered in the earliest of the cases on vicarious liability- *Quarman* v. *Burnett* (1840) 6 M&W 499; *Donovan* v. *Laing Construction Syndicate* [1893] 1 Q.B. 629.

[35] [2012] UKSC 56; Para 3; [2013] 2 A.C. 1.

[36] [2016] UKSC 10.

someone else who is legitimately legally related to the person who caused the injury can make good the damage as nearly as is possible, by paying compensation. It does not exclude the person who is primarily responsible for the injury from being identified. Indeed, the primary source of the injury must first be identified and negligence or as has now been accepted the wrong (which could be intentional) ascertained before the question of vicarious liability can arise.[37] The current scope of vicarious liability evidences the following:

i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of one or more of its members;[38]
ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence;[39]
iii) Vicarious liability can even extend to liability for a criminal act of sexual assault;[40]
iv) It is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1;[41]

The effect of the new approach is that the scope of the employment is now not only determined in accordance with the express content of the contract of service or conducts directly related thereto but also by the general conduct and actions of the engaged individual in the course of the relationship, provided the harm occasioned was within the course of the employment or relationship and the relationship is one analogous to an employment.

3.2 Criteria

In *Christian Brothers* the Court stated that for liability to be vicarious, the enquiry is in two stages:

(1) was there a true relationship of employer/employee between D2 and D1?
(2) was D1 acting in the course of his employment when he committed the tortious act?[42]

At the second stage, the critical issue is the connection that links the relationship between D1 and D2 and the act or omission of D1, hence the synthesis of the two stages. [43]

Applying the formulation on the facts, the Court noted further that: "Both stages are in issue in the present case. There is an issue as to whether the relationship between the Institute and the *brothers* teaching at St William's was one that was capable of giving rise to vicarious liability.

[37] *Woodland v Essex County Council* [2013] UKSC 66, Paras 28 & 29; [2014] AC 537; see earlier case- *Morris* v *CW Martin & Sons Ltd.* (1966) 1 QB 716; *Port Swettenham Authority* v. *T W Wu & Co (M) Sdn Bhd* [1979] AC 580.

[38] *Heaton's Transport (St Helens) Ltd.* v. *Transport and General Workers' Union* [1973] AC 15, 99; *Thomas* v. *National Union of Mineworkers* (*South Wales Area*) [1986] Ch 20, 66-7; *Dubai Aluminium Co. Ltd.* v. *Salaam* [2002] UKHL 48; [2003] 2 AC 366.

[39] *Morris* v. *CW Martin & Sons Ltd.* [1966] 1 QB 716; *Dubai Aluminium Co. Ltd.* v. *Salaam* [2002] UKHL 48.

[40] *Lister* v. *Hesley Hall* [2001] UKHL 22; [2002] 1 AC 215.

[41] *Viasystems (Tyneside) Ltd.* v. *Thermal Transfer (Northern) Ltd. and others* [2005] EWCA Civ 1151; [2006] QB 510.

[42] *Christian Brothers* [2012] UKSC 56 para. 19.

[43] [2012] UKSC 56; Paras 21 & 22.

There is also an issue as to whether the acts, or alleged acts, of sexual abuse were connected to that relationship in such a way as to give rise to vicarious liability".[44]

The five criteria set out in *Christian Brothers* giving legitimacy to the liability are;

i.) The employer is more likely to have the means to pay compensation;
ii.) The wrong will have been committed as a result of activity undertaken by the employee on behalf of the employer;
iii.) The activity is likely to be part of the business activity of the employer;
iv.) The employer by engaging the employee to carry on the activity will have created the risk;
v.) The employee will have been, to a greater or lesser degree, under the control of the employer.

While in *Cox* v. *Ministry of Justice*[45], the unanimous judgement was in favour of the extension of the principle to cover the areas in focus, Lord Reed explained that all the criteria stated by Lord Phillips in *Christian Brothers* were not to be accorded equal weight. Short of disagreeing with the question of wealth and insurance in the first criteria, his lordship stated that criteria ii, iii and iv were of more value. Lord Reed also noted that the degree of control the defendant had over the claimant was not to be hyped as it used to. Thus, a vestigial degree of control was sufficient. His lordship considered relevant the modern life and said that it would be unrealistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee; nor indeed was it in times gone by, if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea.[46] In addition, the insurance status of the defendant or his wealth were not a principled justification in determining the liability or otherwise of the defendant.[47]

These related ideas of scope and criteria now form the basis of distilling and applying a modern form of vicarious liability. The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.

One can see that the criteria and scope of being vicariously liable are only sensible and even more so for a developing economy for which training of employees must be the responsibility of someone- and someone capable. Vicarious liability would not apply where the activities of the tort-feasor were entirely attributable to the conduct of a recognisably independent business of his own or of a third party. In *Nassir Kafagi* v. *JBW Group Ltd.*[48] the Court of Appeal refused to find that the defendant was vicariously liable for the actions of a contractor.

These are the kind of issues that the Nigerian Courts need to address and determine contextually, on which side the coin should face. It is clear that the question of the standing of the person on whom the burden of vicarious liability should lie has always been of momentum in

[44] *Christian Brothers* [2012] UKSC 56 para. 22.
[45] [2016] UKSC 10.
[46] *Cox* v *Ministry of Justice* [2016] UKSC 10, para 21.
[47] *Cox* v *Ministry of Justice* [2016] UKSC 10, para 20.
[48] [2018] EWCA Civ 1157

the question of being vicariously liable for the action of a tort feasor. Often times in the past the employee or the servant with whom the doctrine was kick-started was a man of straw. Furthermore, with respect to the application and scope of the doctrine between a contract of service and services, the principle developed with the underpinning that while an employer is able to internalise his cost through pricing, the operator of a contract of services could insure. For this reason, the origin of the principle of vicarious liability as is more fully discussed below did not extend to the person who engaged contract of services except in a very thin area where his duty is reserved and non-delegable.

3.3 Historical Perspectives

The term vicarious liability is credited to Pollock.[49] Initially, the common law made the master completely liable for the wrongs of servants or slaves. This gave way, particularly after the feudal system collapsed, to a new claim where liability depended on the master's command or consent to the action in question justified by the maxim *Qui facit per alium facit per se.*[50] This maxim is translated in English as "He who acts through another does the act himself".[51]

The master's liability is not based on breach of any personal duty that he owed but on the servant's tort being imputed to him. Vicarious liability was taken to be incident only to a relationship of controlled employment, traditionally described as that of master and servant but later referred to as, "Employer and Employee". Most important of the summations, is the feeling that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of that enterprise since the master is a more promising source for recompense than the servant who is apt to be a man of straw.[52] In *Balfour* v. *Barty-King*[53] Lord Goddard C.J delivering the judgement of the court noted: "It was left open to the men who were sent how to do the work, and in our opinion, the defendants are liable to the Plaintiff for this lamentable occurrence, the more lamentable in that the person ultimately responsible are insolvent".[54]

Despite the frequent invocation of such glib phrases as '*respondeat superior*'[55] or *qui facit per alium, facit per se*, the doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but is recognized as having its basis in a combination of policy consideration.[56] In *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.*[57], Lord Simonds called it the product of 'Social necessity'.[58] According to him the doctrine of the vicarious responsibility of the "*respondeat superior*," whatever its origin, is today justified by social necessity, but, if the question is where that responsibility should lie, the answer should

[49] It is said that Pollock claimed the courtship of the term vicarious liability in the Pollock-Holmes Letters-*The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock* (1874-1932) page233

[50] The earliest of the cases in which the principle was considered include: *Quarman* v *Burnett* (1840) 6 M W 499.
[51] It is a maxim often stated in discussing the liability of employer for the act of employee. It is also a fundamental legal maxim of the law of agency.
[52] Wills J. in *Limpus* v. *London Gen. Omnibus Co.* (1862) I H & C 526,339
[53] [1957] I Q B 496
[54] [1957] I Q B 496, 505.
[55] A doctrine of tort law that makes a master liable for the wrong of a servant.
[56] *The Catholic Child Welfare Society & Ors*. v. *Various Claimants & Ors.* [2012] UKSC 56; *Armes* v. *Nottinghamshire County* [2017] UKSC 60; *I.C.I. Ltd.* v. *Shatwell* [1965] A.C. 656, 686
[57] [1946[2 All E.R. 345; [1947] AC 1; [1946] UKHL 1
[58] [1946] 2 All E.R. 345; [1947] AC 1; [1946] UKHL 1.

surely point to that master in whose act some degree of fault, though remote, may be found.[59] Thus for his Lordship, here the fault, if any, was with the appellants who, though they were not present to dictate how directions given by another should be carried out, yet had vested in their servant a discretion in the manner of carrying out such directions. That they were careful in their choice of the employee did not relieve them of the liability, if an accident then occurred through his negligence. They had chosen him for the task.[60]

Consequently, despite the earlier reluctance to hold hospitals liable for the torts of their servants it has become generally accepted that hospitals can become liable for the negligence of nurses, radiographers, house surgeons, whole-time – assistant medical officers and probably, staff anaesthetists are the servants of the authority for the purposes of vicarious liability.[61]

3.4 Control

The burden of proving that control was not in him rests with the primary employer and is a very heavy one and can only be discharged in quite exceptional circumstance. The House of Lords held in *Mersey Docks & Harbour Board* v. *Coggins & Griffith (Liverpool) Ltd.*[62] that a general or permanent employer of another was liable for the negligence of that other. This was followed in the Nigerian case of *Rotimi* v. *Adegunle*[63] by the Supreme Court. The appellant hired a lorry from the respondent. The lorry was to convey logs of wood from Ibadan to Abeokuta. The respondent's servant drove the truck on his authority. The appellant was also in the truck. The driver was negligent in driving and the car was involved in an accident. The Supreme Court held that the respondent was vicariously liable having failed to prove that the control of the driver was passed to the appellant.

3.5 Course of Employment

The well accepted guide was that the master is generally liable for all acts done by the servant on the course of his employment. Here the law attempts to create a balance between the societal necessity to hold a financially responsible person liable for the torts of his servant and the injustice of holding him liable for every wrong of the servant. Despite the considerable number of case law here what is in the course of employment remained imprecise and functioned principally as a guide.[64] In *Mutual Aids Society Ltd.* v. *Akerele*[65] Lynskey J., noted "It must be a question of fact whether an unauthorised act by a servant is within the scope of his employment or outside his employment". When is an act outside the course of employment? It is answered that it is an unauthorised way or wrongful modes of doing an authorised act. This was the traditional Salmond's formulation.

In *National Bank* of *Nigeria Ltd.* V. *T.A.S.A Ltd.*[66] Mukhtar, JCA utilised the Salmond test when he stated that the test often times is that a servant's wrongful act is deemed to be in the course of his employment, if it is either:

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[59] [1947] AC 1, para 8.
[60] [1947] AC 1, para 8; [1946] 2 All E.R. 345; [1946] UKHL 1.
[61] *Sisters of St. Joseph* v. *Flemming* (1938) D.C.R. 417.
[62] [1947] A.C. I.

[63] (1959) 4 F.S.C. 19
[64] *Marsh* v. *Moores* (1949) 2 K.B 208, 215.

[65] [1965] I ALL N.L.R. 336.
[66] [1996] 8 NWLR (Part 468) 511

(a) a wrongful act authorised by the master
or;

(b) a wrongful and unauthorised mode of doing an act authorised by the master, for instance a bus conductor may perhaps still be acting within the course of his employment if he merely turns the bus around at the terminal during the driver's delayed absence but he certainly ventures beyond it by careering around the street.[67]

(c) But the employer may be liable if his driver permits an unauthorised person to take the wheel.[68]

Other guidelines which were employed in determining whether the employer/master could be held vicariously liable for a wrong include;

3.6 Car Owners

In Nigeria, road accidents is one area where vicarious liability ought to be brought to bear to extend even to licensing authorities and driving instructors. Negligence is definitely the common sphere of claims with respect to vehicle use and accidents but vicarious liability has been extended to allow victims of road carnage reach beyond the careless driver to the car or vehicle owner who invariably is in a better provision to pay any damages. An owner may under the Salmond' formulation, incur liability for an accident caused by someone else driving his car in one of two ways:

If the driver was his servant or agent, then he would be held vicariously liable but where he entrusts the car to someone of questionable competency then the master becomes personally liable for the ensuing tort.

Thus, where a car is being driven for the owner's purpose, then the owner will be held vicariously liable or where the owner will profit from the purpose for which the car is being used. This was the case in *Duclaud* v *Ginoux*[69] where the Nigerian Supreme Court held that although the owner of the car had given an equivocal authority to his wife to use the car, the car at the point in which it was involved in an accident, was not being used for his purpose. The car owner was therefore not liable to the plaintiff who was injured as a result of the negligent driving of the wife. But the owner will be free of liability where no advantage accrues to him as for instance where he lends the car to another for his personal amusement or when he permits the wife or child to drive the family car for their own purpose.[70]

On the other hand, in *Manuel* v *Edevu*[71] the owner of a car was held vicariously liable for the negligent driving of the person whom he had authorised to drive the car for delivery to a third party. It remains to be seen how the new formulations in the recent United Kingdom cases will apply to the use of vehicles. In spite of other laws specific to such activities, there is need to consider the introduction of liability to licensing authorities and driving instructors.

3.7 The Independent Contractor

A person who performs a contract for services is usually referred to as the independent contractor. The independent contractor undertakes to produce a given result but is not, in the

[67] *Beard* v. *London G.O Co.* (1900) 2 QB 530
[68] *Ricketts* v. *Tilling* (1915) IKB 644.
[69] [1969] 1 All N.L.R. 26.
[70] *Duclaud* v *Ginoux* [1969] 1 All N.L.R. 26
[71] [1968] 1 All N.L.R. 389.

actual execution of the work, under the order or control of the person for whom he does it. An underlying reason for the imposition of vicarious liability on the employer vide his servant's actions is the fact that having control over the servant, he is in a better position to handle him and guide him to good and reasonable conduct within employment and where he is unable to, he also has the power to eliminate the risk portended by terminating the employment or taking such necessary action. Where this is absent but one person engages another to accomplish a specified result, the relationship is that of principal and independent contractor. In such a case, the work, although done at the employer's request and for his benefits, is considered an independent function of the person who undertakes it, and does not ordinarily involve the principal or make him responsible for harm caused in the performance of the task.

In *Balfour* v. *Barty King*[72] Goddard, C.J. noted that from one point of view, it may be said that the test of an independent contractor is that he is left to carry out the work in his own way. As has been noted however, this does not distinguish the contract of service and may well not characterise the one for services.[73] As a general rule the engagement of an independent contractor does not entail responsibility for wrongs committed by him, or his employees, in the course of work which he has been engaged. This position is rightly so, for a person whose business it is, is better able to cope with risks of accident incidental to the contractor's enterprise. This position was captured in the five criteria laid down in *the Christian Brothers*.

There are also some major exceptions which are: the employer remains liable for non-delegable duties. The leading case on this is *George Martin Hughes* v. *John Percival*[74] which followed *Bower* v. *Peate*[75]. In laying down the views, Lord Blackburn (whose views in this respect it is said, are still treated with respect)[76], noted referring to the duty of the defendant to keep the party-wall in good stead, he was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant. But the defendant still remained subject to that duty and liable for the consequences if it was not fulfilled"[77]

However, despite this position a principal will not be liable where, the negligence is casual or collateral. In *Hardaker* v. *Idle District Council*[78], Lindley L.J defined collateral negligence as "negligence other than the imperfect or improper performance of the work which the contractor is employed to do" and negligence in the manner of conducting the operations as distinct from the character of the operation itself.[79] These definition has been criticised as being of very little help. This is particularly as most of the cases find a verdict for the Plaintiff. It has accordingly been suggested that the distinction may simply lie in distinguishing between risks which are inherent in the work and those which are not. A more recent view on this is that expressed in *Woodland v Essex County Council*.[80]

[72] [1957] 1 Q.B 496.
[73] *Perry* v. *Kendricks Transport Ltd*. [1956] 1W.L.R. 85.

[74] (1883) 8 App. Cas. 443.
[75] (1876) IQBD 321
[76] (1883) 8 App. Cas. 443.
[77] (1883) 8 App. Cas. 443, 446
[78] (1896)QB 335
[79] See also *Toretto House* v. *Berkman* [1939] 62 CLR 637
[80] [2013] UKSC 66.

Strictly speaking no duty is delegable but where all that is necessary is that reasonable care is required in selecting competent third party, then that duty is discharged but in some instances, the requirement is that the duty must be the performance of the work in issue so as not to result in damages to another. Failure on the part of the independent third party to fulfil that function is no defence for the person who engaged the contractor. Again, that A owes B a non-delegable duty is not tantamount to owing C the same duty.[81]

4 Conclusion

Vicarious liability remains a potent strategy for bringing comfort, such as tort law can achieve to a tort victim where someone can be held responsible in circumstances which shows that as one who engaged the tort feasor, there was failure of duty or responsibility. It also aids in enforcing the judgement of the court when it appears that a tort-feasor is unable and perhaps incapable of paying compensation to a victim of tort. An employer or persons in such analogous relationships can internalise the potential costs of actions for which vicarious liability can lie through pricing or insurance where more appropriate. By bearing this additional burden to the cost of production or activity, businesses and individuals have an interest in avoiding such potentially preventable costs or harm.

The consequence of this development is that businesses and individuals are more careful and take responsibility or this is imposed on them but victims of tort are fairly assured that they would not be left without compensation. It is thus, for businesses or independent contractors to internalise cost or insure the consequences of their operations.

In the light of increasing road and driving accidents involving vehicles, tricycles and motorcycles, the legal tool becomes very handy in checking to the extent this can be done, who is responsible for training a driver, issuing a licences to all forms of transportation as mentioned.

Tort law is thereby, made more efficient in its role of aiding other branches of law, in particular contract, insurance, constitutional and ancillary fundamental human rights regimes in the work of ensuring a cohesive society. The extension and reformulation of the principle, scope and criteria for interpretation and application in the highlighted common law and commonwealth jurisdictions are therefore a welcome development.

The comparative framework in which this feat was achieved leads to the impressive results that quite apart from aiding in justice delivery, comparative approach to law has the potential of keeping the legislature on its toes. Nigerian courts may therefore draw from these comparative experiences and forge the principle of vicarious liability in the socio-economic policy context of the nation. This approach rather than detract from, advances the objective of tort law as a formidable legal art for advancing fairness and adjusting losses, setting and maintaining decent boundaries in physical and territorial integrity, cohesive social interaction and contributing to the expansion of the economy through a vibrant insurance sector.

[81] *D & F Estates Ltd.* v. *Church Commissioners* [1889] A.C 177