Introduction

- Vicarious liability is a creature of the common law
- As a result, it is, by definition an evolving system of principles inferred from cases
- There is no “magic book” that can tell us all of the rules
- Perhaps to a greater extent than with other legal doctrines, the “rules” governing vicarious liability are only general guidelines to be inferred from the cases
What is Vicarious Liability?

- Strictly speaking, vicarious liability describes any situation where the law holds one person responsible for the misconduct of another, although the person held liable is free of personal blameworthiness or fault.
- Accordingly, vicarious liability is a form of strict liability.
- Its ancient origin is in the doctrine of respondeat superior in which a master is strictly liable for acts of his servants.
- The ancient basis for it came to be replaced by a more enlightened understanding of the policy considerations behind it.

Policy Rationales

- The most basic policy rationale is the enterprise risk rationale: those who employ others to advance their own economic interests should in fairness be placed under a corresponding liability for losses incurred in the enterprise.
- A corollary of this basic policy rationale is the principle of loss distribution: even where they do not do so overtly, courts instinctively allocate risk, all other things being equal, toward the person who is the least-cost insurer against that risk.
- A further policy rationale is encouraging organizational and enterprise risk management.
Policy Rationales (Continued)

- Focusing on the reasons why courts impose vicarious liability is not an academic exercise
- In many, if not most cases, these subtle policy considerations influence close cases
- They accordingly can serve as a general guideline to demarcate zones of risk
- In other words, if vicarious liability would serve these ends in any given case, a court will be more inclined to impose it
- By contrast, if none of the policy considerations are relevant in a given circumstance, this would militate against imposing it

On Whom is Vicarious Liability Imposed?

- Vicarious liability can be imposed in any circumstance where one person acts on behalf of, or at the direction of, another
- The most typically confronted situations are employment and agency
- As a general matter, courts are reluctant to impose liability on independent contractors, but the name given to a relationship is not decisive
- Factors such as the degree of control by the “employer,” the corresponding degree of autonomy of the independent contractor, the degree of integration of the contractor into the employer’s business, will all influence whether vicarious liability will be found
In What Circumstances Will Vicarious Liability be Imposed

- It is important to recognize that vicarious liability is a tort law concept: it is a misuse of language to speak of someone being vicariously liable in contract
- The relevant doctrine in a contract law context is the doctrine of actual and ostensible authority
- An employer (absent ratification of a contract) is only liable on those contracts made on its behalf where the employee had actual or ostensible authority to bind the employer to the contract
- So in such cases, the employee must have been purporting to act on behalf of the employer

Vicarious Liability in Tort

- Vicarious liability, however, does not necessarily depend on an employee purporting to act on behalf of an employer
- In some circumstances (especially in the case of certain economic torts such as misrepresentation), whether or not the employee purported to act on behalf of the employer will be a factor to consider in ascertaining whether vicarious liability ought to be imposed
- But this is not of the essence of vicarious liability in tort: in many cases, vicarious liability will be imposed where the employee in no way purported to act on behalf of the employer
When is Vicarious Liability Imposed

- At common law, the general test for when vicarious liability will be imposed can be described as follows:
- Employers are vicariously liable for
  1. Employee acts authorized by the employer
  2. Unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.
- There is normally rarely an issue as to whether a given act falls within the first category
- The difficult cases involve assessing the connection between the act and the employee’s employment

The Bazley v Curry Principles

- In 1999, in a decision called Bazley v Curry, the Supreme Court of Canada set out to provide some guidance as to when an act will be so connected with an employee’s employment that it will satisfy the second branch of the Salmond test
- Unfortunately, Bazley itself was an exceptional case that is of limited specific guidance in a business context
- The case considered an allegation by a former resident of a group home that the operator of the home was vicariously liable for sexual abuse perpetrated by an employee of the home who was hired without any knowledge by the operator that he was a pedophile
- The Court found vicarious liability based upon the association between the employee’s employment and the degree of close personal connection between the employee and the children in his care
The Bazley v Curry Principles

- *Bazley* established that the connection between the employment and the tort contemplated in the second branch of the *Salmond* test had itself to be addressed in two steps:
  1. The Court must first examine “whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls.”
  2. If the prior case law does not clearly suggest a solution, then the Court is to resolve the question of vicarious liability based on a policy analysis directed at ascertaining whether the employer’s conduct created or enhanced the risk that the tort would occur.

Factors Establishing the Connection Between the Tort and the Employment

1. The opportunity that the enterprise afforded the employee to abuse his or her power
2. The extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee)
3. The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise
4. The extent of power conferred on the employee in relation to the victim
5. The vulnerability of potential victims to wrongful exercise of the employee’s power
Subsequent Application of Bazley

- Notwithstanding that *Bazley* occurred in a circumstance of an allegation of sexual abuse, it has been followed in subsequent case law concerning financial losses
- The most prominent of these cases concern the liability of financial services firms for tortious actions connected with so-called “off-book” transactions engaged in by financial advisors
- In many of these post-*Bazley* cases, the question really resolves itself into a general enterprise risk analysis

Example: *Blackburn v Midland Walwyn Capital*

- In this case, a dealer was found vicariously liable for the activities of a representative who entered into unauthorized trading relationships with a client
- The Court applied *Bazley* and added a general policy-based justification:
  
  "Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer’s reasonable efforts, it is fair that the persons or organizations that create the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm."
Factors Considered in the Dealer Cases

1. Whether the off-book investment is undocumented, or documented in a materially different way from normal course investments
2. Whether the client liquidates *bona fide* investments held through the dealer for the purpose of investing in the off-book transaction
3. Whether the transaction is shown on the dealer’s statements and whether the client is aware of this
4. Whether payment is made to the dealer or to the representative directly
5. Whether the transaction was overt or surreptitious, with the client and the representative attempting to conceal it from the dealer

Factors Considered in the Dealer Cases (Continued)

6. Whether the proceeds are disbursed by the representative to the client or by the dealer to the client
7. Whether, once problems arise, the client approaches the dealer first or initially attempts to resolve it with the representative
8. Whether the transaction details are customary or unusual in some respect
9. Whether any other conduct occurred (such as repeated meetings with the client at the premises of the dealer) that would connect the dealer to the activities
10. Whether the client is unsophisticated, and could be reasonably expected to appreciate the difference between the representative personally and the dealer
General Observations

- The above factors are drawn from one very specific context, in which there is a significant body of case law.
- As these factors demonstrate, they are not legal rules but simply general indicia that guide courts in coming to what is basically a factual conclusion.
- Factors like these structure analysis and have some predictive value, but can never yield certainty.
- The best high-level guide is to go back to the basic policy reasons why vicarious liability is imposed, and assess specific facts in light of them.

Steps to Limit Risk

- Almost by definition, it is very difficult to limit risk associated with unauthorized employee activities.
- Attempts to control risk by contract, even where there is sufficient connection with potential “victims” to anticipate and plan against the risk, are of limited legal effectiveness, and may actually backfire.
- Put simply, to contractually protect against the risk, one has to acknowledge the risk, and doing so may actually assist a plaintiff.
- The best protection is, unfortunately, prevention.
Steps to Limit Risk

- The specific steps to be taken depend upon the context and the industry
- The first step is to appreciate that the risk of liability for unauthorized activities is real, and bigger than might be assumed
- The key is to be aware, to the greatest extent possible, of what employees are up to and to establish systems to spot unusual patterns of activity
- A robust whistleblower policy is also advisable
- Where, for business or other reasons, preventative steps are not appropriate, the only protection is insurance

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