A-Z Guide

VICARIOUS LIABILITY

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Overview

1. Vicarious liability is, in the employment context, the liability of an employer for the damages its employee causes in the course of the employee's employment with the employer.
2. Vicarious liability is based on an implied term of employment that the employer will indemnify its employee against loss arising out of the employment relationship; the implied duty of the employee in return is that they will exercise due care in the performance of the employment.
3. There is provision under the Employment Relations Act 2000 for both employers and employees to enforce their respective rights in respect of indemnification.
4. The Employment Relations Act 2000 provides that employers will be vicariously liable for the actions of their employees in the context of sexual and racial harassment if the employer has received a complaint of harassment and has not taken whatever steps are practicable to prevent its repetition.
5. The Human Rights Act 1993 provides that employers will be vicariously liable for the actions of their employees in the context of sexual and racial harassment if the employer cannot prove that it took such steps as were reasonably practicable to prevent the harassment complained of.
6. It may be appropriate in some circumstances to express the obligation of an employee to indemnify its employer in their employment agreement.

Introduction

Vicarious liability is when an employer is held legally responsible for the actions of an employee. It is the legal responsibility imposed on an employer, although they are free from blame, for a wrong committed by their employee in the course of their employment.

Vicarious liability arises because a third party suffers damage caused by an employee in the course of that employee's employment. The third party then looks to the employee's employer to restore the third party to the position they were in before the damage occurred.

It is a separate matter that an employer might then seek indemnity from the employee if the employee has failed in their duty to exercise skill and care in the performance of their employment thereby causing the damage that a third party had suffered.

If you are ever faced with having to "make good" an employee's damage to a third party because of your employee's conduct in the course of their employment then, depending on the circumstances, you may wish to consider seeking indemnification from your employee for your loss.

This **A-Z Guide** explains vicarious liability and employers' and employees' respective indemnities in respect of the common law, the Employment Relations Act 2000, and the Human Rights Act 1993.

Common law

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The concern with the common law in respect of vicarious liability is to furnish an innocent victim of wrongdoing with recourse against a financially responsible defendant. That has involved a balancing exercise that has often been challenged by the need of the courts to keep pace with reality in order to deliver principled but practical justice.

Historically, vicarious liability would only lie if the wrongful act was done by the employee in the course of employment. This means it was either a wrongful act authorised by the employer, or a wrongful and unauthorised mode of doing some act authorised by the employer. However, when this legal test began to result in absurd outcomes, the law was revisited.

A 2002 decision of the House of Lords, in which former pupils of a boarding school brought a claim for damages against the employer of a warden who had sexually abused boys at the school for a number of years, resulted in a finding of vicarious liability on the part of the school for the willful acts (deliberate as opposed to negligent) of the employee warden. Since the employer had entrusted the warden with the care of the boys the sexual abuse was inextricably connected with warden's duties within the employment relationship. Their Lordships allowed the claim: *Lister v Hesley Hall Ltd*20021 AC 215.

New Zealand

The vicarious liability of an employer for the conduct of its employee, who had extensively damaged a third party's truck when he crashed into it after having consumed liquor for several hours en route between Wellsford and Auckland, was upheld on appeal in *Firestone Tire & Rubber Company v Desmond (Unreported)* HC; 28 March 1996. The Court stated that the test of vicarious liability was objective; if the activities of the employee fall within the intended operations and purposes of the employer, then vicarious liability will arise regardless of the employee's wrong.

In that case the Court summarised the law in respect of vicarious liability. It found that:

- An employer cannot be held vicariously liable for the act of an employee unless in effecting that act the employee was carrying out the employer's business.
- If the employee was carrying out the employer's business the employer will be vicariously liable notwithstanding that it was being done in an unauthorised, or even prohibited, manner.
- Cases in which an employee has carried out the employer's business in an unauthorised or prohibited manner must be distinguished from those in which the employee's acts were so unconnected with the employer's business that they were essentially an independent act or frolic of the employee's own.
- If an employee is required to work at places other than the employer's premises, the journey to and from those places – including trips beginning or ending at the employee's own home – will normally fall within the scope of employment.

Employee's indemnification

The right to indemnity depends upon the law of agency, of which the employment contract is one manifestation. It was accepted by the *Employment Court in F v Attorney-General* 1994 2 ERNZ 62, that it is an elementary, fundamental and axiomatic proposition of the law of agency that the relation of principal and agent raises by implication a contract on the part of the principal to indemnify the agent against all liabilities incurred in the reasonable performance of the agency. It stated however, such rights can be excluded or modified by the express terms of the contract between the principal and the agent.

In *Everist v McEvedy* 1996 3 NZLR 348, the High Court held that the employer was vicariously liable for the third party's loss caused by its employee's failure to advise appropriately as it was the employee's responsibility to do as solicitor in a financial transaction. The employer sought indemnity from its employee for its vicarious liability on the basis of its employee's failure to exercise skill and care in the performance of his duties.

The Court agreed that on the face of the decision in *Lister v Romford Ice & Cold Storage Co Ltd* 1957 1 All ER 125 (see below) the employer was entitled to indemnity; however the employee successfully asserted that it was an implied term of his contract of employment that his employer would indemnify him against any personal liability he might have for erroneous conduct in the performance of his duties, except in the case of dishonesty or fraud. It was accepted that in New Zealand it is the custom that an employer solicitor will indemnify an employee solicitor against any such liability as the employee solicitor may have arising out of the ordinary course of practice, save in the case of dishonesty or fraud and that the custom is reasonable.

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The recent case of *Katz v Mana Coach Services Ltd* 2011 NZEmpC 49 shows that it is possible for an employee to lose their right of indemnity where the expenses they incur result from the employee's breach of duty, negligence or other fault. In this case Ms Katz was driving a bus which collided with the side of a vehicle. She admitted in an insurance form that she didn't see the vehicle, however Ms Katz successfully defended a formal charge of careless driving. She sought reimbursement for her legal costs from her employer on the basis that the costs were incurred 'in the reasonable performance of duties'.

The Court found that even though Ms Katz was discharged without conviction on the careless driving charge, the employer's own investigation established that Ms Katz was at fault in the incident. As Ms Katz had failed to exercise reasonable care and skill in her duties, she lost her right to indemnification for the consequences arising from that fault.

Employer's indemnification

The Employment Court, in *F v Attorney General* 1994 2 ERNZ 62 stated that it is an evident corollary of the axiomatic rule that the right to be indemnified does not apply if the activity giving rise to the liability consists of an unauthorised breach of duty owed by the agent to the principal. In such a case, if the injured party seeks to sue the principal on the footing of the principal's vicarious liability for the acts of the agent, the principal could seek indemnity from the agent, rather than the other way around. It stated:

> *Once it is established that the employer can sue the employee for damages for breach of duty, it follows that the employee cannot have a right of indemnity in respect of acts for which he or she is so liable to the employer.*

The facts of an English case (*Lister v Romford Ice & Cold Storage Co Ltd* 1957 1 All ER 125) illustrate this point:

> *An employee in a slaughter-house, while driving a truck in the course of his work, negligently backed it into and injured another employee who was his father. The father successfully sued the employer on the basis that it was vicariously responsible for its driver's negligence. The employer then brought an action against the driver (the son) for damages for negligence or breach of the contractual duty to drive its vehicles with due care. The driver's defence was that it was an implied term of his contract that his employer would indemnify him against all claims brought for any act done by him in the course of his employment. By a majority, the House of Lords, refused to uphold his defence.*

In *Bromwich v Pacific Commercial Bank Ltd* 1988 1 NZLR 641, the Court of Appeal agreed that but for the protection provided to the employer, the Post Office, by section 45 of the Post Office Act 1959, the employee postal worker might have been liable to indemnify his employer, as its servant, for the negligent handling of a parcel that contained banknotes and which was lost.

Employment Relations Act 2000

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Vicarious liability is a cause of an action that exists between the employer and the damaged third party aside from the employment relationship. The Employment Relations Act 2000 neither limits nor expands the cause of action in respect of indemnities.

Sexual and racial harassment

As an employer you may be held vicariously liable for the sexual or racial harassment of an employee where that harassment is perpetrated by a person who is a co-employee of the employee, or a person who is a client or customer of yours.

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Sections 108 and 109 define sexual and racial harassment. Sections 117 and 118 make it clear that when an employee makes a complaint to the employer that they have been sexually or racially harassed in their employment, the employer must inquire into the facts and take whatever steps are practicable to prevent any repetition of that harassment.

If an employer fails to take whatever steps are practicable to prevent repetition of the harassment complained of and the harassment is repeated, the Act stipulates that the employee is deemed to have a personal grievance by virtue of having been harassed in the course of the employee's employment as if that harassment had been perpetrated by you.

Depending on the circumstances, an employee may be able to pursue a remedy against you under this Act, and against the actual perpetrator of the harassment, under the Human Rights Act 1993.

Refer to the **A-Z Guides** on **Sexual Harassment, Racial Harassment,** and **Personal Grievances** for more information.

Employee's indemnification

Unless an employment agreement expressly excludes or modifies an employee's right to indemnification, then it is an implied term of the employee's employment that the employer will indemnify the employee against any loss suffered by the employee in the course of that employee's employment.

Where an employer fails to indemnify an employee, the employee could pursue the matter as a dispute. Section 129 of the Act provides that a person bound by or a party to an employment agreement may pursue a dispute in accordance with Part 10 of the Act (which provides for mediation and proceedings before the Employment Relations Authority) about the interpretation, application, or operation of an employment agreement.

Alternatively, an employee could seek a compliance order in the Employment Relations Authority on the basis of the employer's failure to observe any provision of an employment agreement, including the implied term of indemnification. The aim of a compliance order in this context would be to direct the employer to comply with the obligation to indemnify the employee.

The Employment Relations Authority has the jurisdiction to make determinations on disputes about the interpretation, application, or operation of employment agreements and matters related to breaches of employment agreements. If the breach of the implied term to indemnify constituted an unjustified action and it disadvantaged the employee in the employee's employment, the breach could form the basis of a finding of a personal grievance.

Employer's indemnification

If an employee's negligence or deliberate action causes loss to the employee's employer or, a third party for which the employer is vicariously liable, then there is no reason why the employer should not seek indemnification from its employee.

The mechanisms provided by the Act to assist an employee seeking indemnification are available to an employer, whether the employer relies on an express term, or an implied term, of the employment agreement.

Where an employment agreement expressly states that the employee will indemnify the employer for damage arising out of the employee's negligence or deliberate action, and that agreement has been signed by the employee, then that agreement may constitute authorisation by the employee to a deduction from their wages or salary. If this is the case, then it will be necessary for you to establish that the damage arose out of the employee's conduct, and that that conduct was either deliberate or negligent.

If an employee's conduct, negligent or otherwise, causes the employer loss then the employer has two courses of action open to it: discipline and indemnification. However, it is important that these two courses of action do not become confused; the object of disciplinary action is to rectify and condemn employee misconduct while indemnification is aimed at restoring loss.

Refer to the **A-Z Guide** on **Discipline** for further information on that topic.

Human Rights Act 1993

Vicarious liability

Sexual and racial harassment

As an employer you may be held vicariously liable for the sexual or racial harassment of an employee where that harassment is perpetrated by person who is a co-employee of the employee, a person who is a client or customer of yours, or a person who is an agent of yours.

Sections 62 and 63 define sexual and racial harassment. Section 68 makes it clear that you may be vicariously liable under this Act for harassment that you neither knew about nor condoned, if the perpetrator is another of your employees, and you cannot prove that you took such steps as were reasonably practical to prevent the harassment complained of. It also makes it clear that you may be vicariously liable under this Act for harassment perpetrated by an agent of yours, unless harassment occurred without your express or implied authority.

The definition of "employer" in this Act has an expanded meaning and includes the employer of independent contractors. In *TAB v Gruschow* 1998 3 ERNZ 638; the High Court held that this did not mean that just because a person was described as an independent contractor that the law would impose vicarious liability merely because of that description. It said that in each case the relationship must be examined in light of the purposes of the Act and the responsibilities accepted or imposed upon the parties arising out of the particular relationship.

Section 69 makes it clear that you are only vicariously liable under this Act in respect of customers or clients of yours, if you have received a complaint in writing from your employee but you fail to take whatever steps are practicable to prevent a repetition of the harassment complained of and the harassment is repeated.

Copyright Act 1994

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Illegal File Sharing

The Copyright Act 1994 include a regime for responding to the issue of illegal file sharing.

Under the regime, once an internet service provider becomes aware of an alleged infringement it is able to send a series of warnings to the account holder. Upon the third warning, any infringements occurring within a further specified period may make the account holder liable to a penalty of up to $15,000. The provider may also seek an order for the account holder's internet to be suspended for up to six months.

Where the account holder is an employer and the organisation's employees have engaged in illegal file sharing using the organisation's internet connection, this could result in substantial liability for the employer.

Refer to the **A-Z Guide** on **Illegal** File **Sharing** for further information on that topic including what constitutes a copyright infringement and the sort of preventative measures that can be taken to reduce the risk of infringing behaviour.

Conclusion

This **A-Z Guide** has provided you with an outline of what vicarious liability means in respect of the common law tradition and the modern employment relationship under the Employment Relations Act 2000 and the Human Rights Act 1993.

There will be occasions when the conduct or misconduct of your employees in their employment results in your organisation either assuming vicarious liability or being held vicariously liable. On some of those occasions you make look to your employees to indemnify you against your loss, and on some of those occasions you will indemnify your employees against personal loss.

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In some situations, it may be appropriate to consider expressing obligations of indemnification in your employment agreements; employers frequently require their employees to underwrite any damage caused to property which employers normally entrust to employees if that damage is caused by the fault of the employee.

Contact your EMA Employment Relations Consultant to discuss the issues raised in this guide if you believe they may apply to your employment circumstances at some time.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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