

# Books

*Vicarious Liability in Tort: A Comparative Perspective* by Paula Giliker  
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Paula Giliker's tome on vicarious liability starts with the frank concession that this doctrine is a 'cuckoo' in the nest, an aberration in a system of compensation which seeks to equate liability with fault, and one which, despite the exegeses of each final court of appeal in England, Canada and Australia, is yet to find a coherent *raison d'être*. It is then consoling to learn that the legal systems of France and Germany have also struggled to delineate the circumstances in which, and reasons why, one person or entity will be liable for the wrongs of another.

The aim of this book is to set out the theoretical basis for vicarious liability, and to see what insights are to be garnered from civil jurisdictions. It also seeks to examine the challenges posed to the doctrine by vicarious liability for intentional torts, by the burgeoning use of temporary and 'borrowed' employees, and by the prospect of vicarious liability of parents for the torts of their miscreant children. It aspires to synthesise the key policy arguments which influence the application of the doctrine across the legal systems examined. The author seeks to redress the 'under-theorisation' of vicarious liability in the academy, although it must be said that this is a criticism not often levelled against academic tort lawyers, and which might be the subject of some consternation amongst those who have written on the topic<sup>1</sup>.

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<sup>1</sup> See, for example, P S Atiyah's seminal text, *Vicarious Liability in the Law of Torts* (Butterworths, 1967). See also Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20 *Modern Law Review* 220 and 427; JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287; Gary T Schwartz, 'The Hidden and Fundamental Issue of Employer Vicarious Liability' (1996) 69 *Southern California Law Review* 1739; Attila Ataner, 'How Strict is Vicarious Liability? Reassessing the Enterprise Risk Theory' (2006) 64 *University of Toronto Faculty of Law Review* 63. See also Robert Stevens, *Torts and Rights* (Oxford University Press, 2007), especially 244–68.

So, to the content of the book. Chapter 2 examines what is common in all cases of vicarious liability: the need for a specific type of relationship, the existence of a wrongful act and the requirement that the victim be harmed within the ambit of the specified relationship. It would have been interesting for Giliker to have touched upon the requirement of a wrongful act by, for example, an employee which would itself be actionable if the employee were the defendant. While this requirement will often be clear in cases of direct physical harm, establishing the elements of negligence by an employee may be more difficult. At least in Australia, the combination of somewhat parsimonious civil liability legislation and increasing judicial reluctance to impose novel duties of care, or to extend the scope of existing duties, may make it more difficult to establish this sort of primary liability.

Nevertheless, Chapter 2 provides a most interesting exposition of French and German approaches to vicarious liability under art 1384 of the French Code Civil and §831 of the *Bürgerliches Gesetzbuch* respectively, noting that while there is no provision for vicarious liability per se in the German Civil Code, courts have effectively imposed it nonetheless. The chapter then progresses to a somewhat random discussion of the existence of an employer's right to indemnity from the errant employee and of vicarious liability for exemplary damages. It is not entirely clear how this fits with the author's purpose of establishing a basic framework for the operation of vicarious liability across legal systems.

The third chapter is devoted to the fundamental distinction between the employer/employee and the principal/independent contractor relationships, and the tests employed to demarcate the two. The existence of the employment relationship is, at least in common law systems, an essential precursor to the existence of vicarious liability. Giliker traces the role of an employer's control over the employee's activities as being both a test for liability and a justification for its imposition, and notes its transformation from literal control to its modern incarnation as the right to control. Under the more expansive continental approach, the possibility of control may be sufficient to establish the requisite relationship. She contends that control, in whatever guise, now provides only general guidance as to the existence of the employment relationship, and that there is no singular test. One must look to the totality of the relationship and recognise that there may be indicia pointing in different directions. Giliker concludes that determining the existence of the employment relationship is far from straightforward. The discussion might have been strengthened by a closer examination of what it is about the employment relationship itself that justifies the imposition of vicarious liability, and it may have been preferable if some of the theoretical justifications for the imposition of vicarious liability had been woven into this discussion.

The juxtaposition of the putative employment relationship with some of the underlying policy reasons in favour of vicarious liability can offer much guidance in factually ambiguous cases.

Chapter 4 examines the specific problems posed by borrowed employees and temporary workers. Changing patterns of employment — whereby the binary relationship of employer and employee may not exist — do not fit neatly with the conventional model of vicarious liability. Typically, person A is employed by person B, but B forms a contract with person C whereby A performs work for C. Ordinarily, there will be no contract between A and C. If A commits a wrongful act in the course of his or her employment, against whom might a plaintiff seek redress? The French solution to this problem has been to examine who had actual authority over the employee when the tort was committed, or to render the ‘end user’ liable. The crux of the issue here is whether the law should continue to apply the same test for the existence of the employment contract regardless of the context. I wonder if the problem is something of a straw man as it must be commonplace for there to be detailed contractual provisions governing the respective liabilities of the employment agency and its client for the actions of the employee. However, the point made by the author is salient: the conventional vicarious liability analysis may not be keeping pace with contemporary employment patterns and arrangements.

Chapter 5 discusses the use of non-delegable duties and principles of agency to extend vicarious liability beyond the employment relationship. This is said to raise great conceptual difficulties and to run the risk of confusing or conflating primary and vicarious liability. Giliker observes that, in civil systems, the extension of vicarious liability beyond the employment relationship has been relatively straightforward because of reliance on more general and expansive concepts of *commentant/préposé*<sup>2</sup> and the mellifluous *Geschäftsherr/Verrichtungsgelilfe*. The common law has been less able to find a principled basis for the extension of vicarious liability. Giliker submits that non-delegable duties have been fashioned to fill the gap but amount to a loose coalition of circumstances where considerations such as public safety, protection of property rights and vulnerable parties have prompted courts to impose duties that cannot be entrusted to others. The author questions the viability of the resort to these ad hoc fictions when a more flexible approach to the employment relationship might suffice. She does not think that the superimposition of principles of agency will yield coherent answers. Concepts of agency and non-

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<sup>2</sup> Such has been the ambit of the French provision that an electoral candidate has been held vicariously liable where one of his supporters got into a fight which lead to the death of one of his rival's apparatchiks: see Crim 20 May 1876 Gaz Pal 1976.2.545 note YM; RTD civ.1976.786 obs G Durry, cited in Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 107.

delegable duty impose primary and not vicarious liability. To extend vicarious liability to all workers would overwhelm existing insurance and financial arrangements. To leave victims without redress is not, however, the answer. Giliker suggests that:

a broader notion is needed of the employer/employee relationship which is capable, in the specific context of vicarious liability, of extending to non-traditional employer/worker relationships, but does not extend so far as to encompass all workers.<sup>3</sup>

This somewhat amorphous observation is, to some extent, given content later in the chapter where Giliker urges that the common law should look to its civil counterparts and abandon the idea of a legal definition of the contract of employment applicable to all contexts. Instead, it should develop a broader definition which extends to temporary or agency workers ‘with some degree of permanency’, who would be viewed as employees but for the legal arrangements adopted to avoid tax or employment protection. In essence, courts should look to substance rather than form. It is not immediately clear to me that courts, by looking at the totality of the relationship in question, do not already do this. Courts have often pierced the veil of expedient legal arrangements to reveal the true nature of the relationship.<sup>4</sup>

Chapter 6, which might more aptly have followed on from the chapter dealing with the existence of the employment relationship, is concerned with determining the scope of vicarious liability through concepts such as acting in the course or scope of one’s employment or functions. Giliker notes the similarity between jurisdictions of the verbal formulae employed to delimit the connection between the employee’s tortious act and the parties’ relationship. She notes that the commission of intentional torts and criminal acts by employees has posed the greatest conceptual challenge to the idea of acting in the course of employment. She appears to criticise the notion that a criminal act or intentional tort could ever be in the course of employment, such a view focussing more on the interests of a victim than a strict interpretation of duties expected of an employee. An overly malleable approach imposes an unjustifiable burden on innocent defendants. Because of either explicit or tacit policy considerations, all legal systems have found it difficult to provide a test capable of striking the ‘correct’ balance between the needs and burdens of the three

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<sup>3</sup> Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 141.

<sup>4</sup> See, for example, *Massey v Crown Life Insurance Co* [1978] 2 All ER 576; 671122 *Ontario Ltd v Sagaz Industries Canada Inc* (2000) 183 DLR (4<sup>th</sup>) 488, 494; *AMP Society v Chaplin* (1978) 18 ALR 385.

members of what she calls the vicarious liability triangle.<sup>5</sup> Civil courts have found it equally problematic to provide a clear definition of which acts fall within the scope of vicarious liability, although the French Supreme Court is said to have adopted a liberal approach whereby the slightest objective link between the *abus de fonctions* and the employee's functions will provide the requisite link. This approach begins with the assumption that if the workplace provides the opportunity for misconduct, then the employer must accept the risks arising from workplace conduct. This approach, according to Giliker, is only sustainable where there is widespread insurance and a cultural acceptance that employers should be subject to such broad liability.

The challenge, then, is to 'define a connection which goes beyond mere opportunity and reflects the extent to which vicarious liability is considered desirable.'<sup>6</sup> However, this rather vague sentiment is not taken further, as Giliker ultimately concedes that if courts are seeking to adapt the test to the particular facts of a case and retain sufficient flexibility to arrive at a just result, any test 'will by its very nature be vague and imprecise.'<sup>7</sup>

Chapter 7 examines parental vicarious liability for torts of their children. This category of liability is common in Europe but is unknown to the common law where ordinary principles of tort liability apply, and where, Giliker submits, the judiciary has been reluctant to judge the vicissitudes of parenting (although it must be said that this has not troubled Family Courts). Giliker advocates for some form of vicarious liability to be imposed on parents for the tortious acts of their children, noting French law has long imposed this form of liability under art 1384(4) of the Code. The difficulty, which is barely touched upon, is that in order to be vicariously liable, the child must have primary liability to the victim. Establishing that a minor has been negligent is not without considerable difficulty. There is also a danger of confusing direct liability of parents for their failure to control the acts of their children with true vicarious liability. Ultimately, the discussion of strict parental liability, while interesting, is somewhat *sui generis* and does not advance the thesis of the book further.

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<sup>5</sup> Note the divergent approaches to vicarious liability for sexual assaults committed by employees in *Bazley v Curry* (1999) 174 DLR (4<sup>th</sup>) 45. (Is there a significant connection between the creation or enhancement of a risk and wrong which results?); Lord Steyn in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (were the employees torts so closely connected with his or her employment that it would be fair or just to hold the employer vicariously liable?); cf Lord Hobhouse in the same decision (has the employer assumed a relationship to the claimant which imposes specific duties in tort upon the employer which have been entrusted to the employee?); and the decision of the High Court in *NSW v Lepore* (2003) 212 CLR 511, where a ratio has been difficult to discern.

<sup>6</sup> Giliker, above n 3, 190.

<sup>7</sup> Giliker, above n 3, 192.

The final chapter seeks to draw together the foregoing with the purpose of ‘identifying the key policy arguments which influence how legal systems apply the doctrine of vicarious liability.’<sup>8</sup> It is here that the author identifies the key policy rationales for the imposition of vicarious liability. In a sense, it might have been preferable for key concepts of fault, victim compensation, risk amelioration, deterrence and loss distribution to have been discussed earlier, as each of these policy factors cast light on each of the dilemmas and challenges referred to above. Nevertheless, the discussion of each of these factors is thorough and thoughtful. None of these factors, standing alone, provide a compelling justification for the imposition of vicarious liability. There is, according to the author, no single rationale which explains this form of liability; it is inescapably about policy considerations. The challenge, again somewhat nebulously expressed, is ‘reaching the correct combination of policy rationales’.<sup>9</sup> Giliker concedes that this is bound to create uncertainty. Such uncertainty is not necessarily the anathema we might think: ‘at times, law must recognise that certainty does not equate with social justice and while the aim of this book has been to give guidance and a clearer structure to the law, it cannot fail to recognise the nuances in the law, which make tort law capable of adapting and evolving over time and changing to meet new social needs.’<sup>10</sup> Ultimately, Giliker concludes that vicarious liability reflects a compromise, an instrument of private law which seeks to meet the needs of innocent victims and which reflects the need to respond to the risks created by industrialisation and technological advances.

The strength of this work lies not in its explication of the theoretical justifications for the imposition of vicarious liability which are not always integrated throughout the discussion (and which are well-versed elsewhere), nor in its unsurprising conclusion that there is a surfeit of justifications for the imposition of vicarious liability, nor in the axiomatic proposition that there is no panacea to explain why and when it should be imposed. The greatest strength of this book is the detailed comparative insights offered to the common law audience — something rarely on offer — and the salving conclusion that vicarious liability ‘is not a quirk of the common law but a principle which crosses legal systems in a surprisingly similar way.’<sup>11</sup>

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<sup>8</sup> Giliker, above n 3, 227.

<sup>9</sup> Giliker, above n 3, 244.

<sup>10</sup> Giliker, above n 3, 252.

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