

NEWSLETTER

VICARIOUS LIABILITY: EMPLOYERS LIABLE FOR EMPLOYEES' ACTIONS

Vicarious liability is a legal term used to describe a situation where the law holds one person liable for the wrongful act or omission of another person, even though it wasn't that person's fault.

For example: while on duty, the employee driving the vehicle belonging to the employer collides with a vehicle belonging to a third party and the driver and or passenger in the third party's vehicle is seriously injured. The accident has been proven to be the fault of the employee. You, as the employer, are liable. This is the principle of "vicarious liability"

It is important to note that vicarious liability only applies where a particular relationship exists, for example

- Employer – Employee relationship
- Motor vehicle owner – Motor vehicle driver relationship
- Principle – Agent relationship

For the purpose of this article our focus will solely be on Employer – Employee relationship. We should mention that one can be subject to vicarious liability if an employment relationship exists and the employee's conduct is at fault and/ or negligent and that the employee must be furthering the interest of an employer, not that of his own.

A lot of employers find themselves in a situation whereby employees are using company property for personal use and/ or hold onto Company property even over weekends and holidays. It is important to note that as an Employer, for you to be held liable for the actions of the Employee, such Employee must be acting within the course and scope of their employment.

The question is, when do we say an employee is acting within the course and scope of their employment? The course and scope of employment pertain to time, place and conditions under which the on – the-job incident or wrongdoing occurs.

Feldman (Pty) Ltd v Mall 1945 AD 733, the court stated that "a master who uses servants creates risk of harm to others if the servant proves to be "negligent, inefficient or untrustworthy" and "[i]t follows that if the servant's acts in doing his master's work or his activities are incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for the harm".

The above case is considered one of the creation of risk theory (traditional vicarious liability) and does not pose difficulties in proving, however the challenge arises with the cases of deviation vicarious liability whereby the extension of the concept "course and scope of employment"

In **Minister of Police v Rabie 1986 (1) SA 117 (A)** "a test was formulated, in terms of this test an employer may still be held liable even if the employee had abandoned the

employer's business and engaged on a frolic of his or her own provided that there is a sufficient close connection between the actions of the employee and the business of the employer.

One needs to understand that it does not matter how badly, dishonestly or negligently the employee conducted himself as in **Minister of Safety and Security v Morudu and Others 2016 (1) SACR 68 (SCA)** it was held that "A Police Officer employed in fingerprint unit, had went to the respondent's house with an unmarked vehicle and dressed as a civilian and shot and killed the husband of the 1st respondent with suspicion that he was cheating with his wife"

The Court applied the test in the **Minister of Police v Rabie** case and held that the employee was furthering his own interests and there was no sufficient close link between his conduct and the business of the employer.

In conclusion, it is important to note that vicarious liability can occur in two forms, namely "traditional vicarious liability" and "deviation vicarious liability".

Traditional vicarious liability, can be described as the common practice whereby an employee is always acting on behalf on the employer and it does not require the question of acting within the "course and scope of employment" as the employee is directly representing the employer.

Deviation vicarious liability, exists whereby it needs to be proven whether the employee is acting within the course and scope of his employment. In other words, would it be reasonably possible for anyone to link the act of the employee to the business of the employer.

It is not easy to prove that "vicarious liability" exists or does not exist in a particular scenario hence it is important that one relies on more or less the factors discussed above.

