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Paula Giliker

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Vicarious Liability in Tort

Vicarious liability is controversial: a principle of strict liability in an area dominated by fault-based liability. By making an innocent party pay compensation for the torts of another, it can also appear unjust. Yet it is a principle found in all Western legal systems, be they civil law or common law. Despite uncertainty as to its justifications, it is accepted as necessary.

In our modern global economy, we are unlikely to understand its meaning and rationale through study of one legal system alone. Using her considerable experience as a comparative tort lawyer, Paula Giliker examines the principle of vicarious liability (or, to a civil lawyer, liability for the acts of others) in England and Wales, Australia, Canada, France and Germany, and with reference to legal systems in countries such as the United States, New Zealand and Spain.

PAULA GILIKER is Professor of Comparative Law at the University of Bristol, where she specialises in comparative tort law. She has previously taught at the University of Oxford and Queen Mary, University of London. She is also a qualified barrister and visiting lecturer at the Universities of Hong Kong and Valencia.

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'I have never been able to see why the law should be so – why a man should be liable for the negligence of his servant, there being no relation constituted between him and the party complaining.'

(Lord Bramwell)¹

'*Respondeat superior* is an argument which, like David, has slain its tens of thousands. Its seeming simplicity conceals in fact a veritable hornet's nest of stinging difficulties. It is the merest dogma, and in no sense explanation. For while everyone can see that the master ought to answer for acts he has authorised, why should he be liable either where no authorisation can be shown, or where express prohibition of an act exists?'

(Harold Laski)²

'[T]here is now a consensus among those . . . who think about tort law that vicarious liability is an essential element in the tort system. Any idea of repealing vicarious liability would seem to us preposterous, inconceivable.'

(Gary T. Schwartz)³

¹ Before the Parliamentary Committee of 1876 (1887) Cd 285, p. 46.

² 'The basis of vicarious liability', *Yale Law Journal*, 26 (1916), 105 at 106–7.

³ 'The hidden and fundamental issue of employer vicarious liability', *Southern California Law Review*, 69 (1996), 1739 at 1745.

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