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### INDUSTRIAL RELATIONS

#### VICARIOUS LIABILITY

##### –EMPLOYERS ON THE HOOK–

While most employers are, at least notionally, aware that the actions of their employees can be attributed back to them, many do not explore the reasons or limits of this idea. Its source is the legal doctrine of Vicarious Liability, which gives form to the Latin maxim: “*qui facit per alium facit per se*” interpreted as “he who acts through another, does the act himself”. In law, it is described as the “strict liability of one, for the delict of another”. Loosely, a “delict” is an action or omission, either wilful or negligent, which causes damage. It does not necessarily fall under either contractual- or criminal

liability (although it may, depending on the circumstances).

In short, the employer is held civilly liable for damages caused by its employee and may be successfully sued by the one who suffers such damage. The range of damage covered by this doctrine is unlimited and may include matters as simple as a fender-bender; as complex as sexual harassment; or as serious as the death of another. As per the Law of Delict, any “*act of a person that is a negligent-, wrongful-, intentionally unlawful act / omission or otherwise culpable, causing harm to another*”.

Nevertheless, Vicarious Liability is regulated not by legislation but through Common Law, which operates irrespective of any pre-existing contact, contract or agreement with the one suffering harm. However, there is still a question as to whether the aggrieved

party may follow the chain of liability up to the employer or whether it will be limited in claiming damage from the employee only. Assuming that it has been proven that the employee in question has caused damage, it does not necessarily follow that employer can be held accountable. For the employer to be held liable, the action by the employee must have been committed during the course and/or in the capacity of their employment.

Specifically, there are three requirements: i) there needs to be an employment agreement (as defined in labour law) between employer and employee; ii) the employee, in causing the damage, must have acted within the scope of his/her employment and iii) the employee must be the actual perpetrator of the delict.

Each case is still judged upon its own merits. One of the earliest was *Feldman (Pty) Ltd v Mall* 1945 AD 733 where the court stated that a Master employing a Servant brings about many forms of risk of harm to others, if proven that the Servant was negligent, inefficient or untrustworthy. If the Servant, in completing his Master's instructions (or

activities incidental thereto) in a negligent or improper manner were to cause harm to another, the Master is deemed culpable for the harm [741].

Similarly, in *Bezuidenhout NO v Eskom* 2003 24 ILJ 1084 (SCA), Eskom forbid its employee from transporting any unauthorised passengers in the company vehicle. The court held that, due to this instruction, it could not be said that the employee, in so transporting unauthorised passenger, was acting "within the course and scope of his employment". Consequently the employer cannot be held vicariously liable.

This illustrates that there must be a nexus (close causal link) between the employee's conduct and what the employer authorises the employee to perform. (*Smith & Van der Nest* 2004 TSAR 520 536). This is not to say that an employer will escape liability merely on the basis that the employee's conduct was fraudulent, unauthorised or undertaken for the employee's own interest (*Minister of Fiancé v Gore* 2007 1 SA 111 (SCA)).

It becomes clear that an employer can protect itself from vicarious liability (at least, to a certain extent) by clearly defining the employee's scope of authority and forbidding those acts which it foresees might cause harm to itself or others. While the BCEA (at section 34) allows the employer some financial recourse against such an offending employee, this is often cold comfort and mostly entirely insufficient. Employers are advised to maintain thorough company policies and procedures in order to limit its liability.

In this regard, contact Invictus or your normal service provider