

The Economic Efficiency of Vicarious Liability in Employment Relationships

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Abstract: A tort that occurs because an employee is not qualified for a certain job but to operate that job and leads to damage. Many people may be confused in this case which party shall bear the tort liability caused by this infringement, the employer or the employee, and how vicarious liability has been applied. This paper introduces vicarious liability and vicarious liability in employment relationships. Under no matter civil law system or common law system, there is the same content of vicarious liability. This paper only focuses on the basis of vicarious liability which will not cause a fallacy between the common law system and the civil law system. Then the paper compares the economic efficiency under situations of the employer bears the liability of the unqualified employee's tort and the counterpart, and illustrates the deficiencies of the current discussion. This paper combines law and economy to work out the optimal rule i.e. the most efficient rule under the background case. It draws the conclusion that strict vicarious liability is more efficient in the economy and supports the application of vicarious liability in the legal system.

Keywords: vicarious liability, employment relationship, economic efficiency, unqualified employer's tort

1. Introduction

An accident occurred because an employee was performing a job for which he was not qualified after the employee had falsely told the employer that he was qualified. Should the employer be liable for the victim's losses? If the employer should, how should he be liable for the damage. The legal issue in this case is vicarious liability which is defined in *Black's Law Dictionary 8th edition* [1] that obligation rising from a party's relationship with each other. Also known as vicarious responsibility. Vicarious liability is a strict liability based on the existence of a specific relationship between the perpetrator and the responsible person - even if the employer did not intend for the employee to commit the tort, did not negligently allow the tort to occur, and did not know or could not have known that the act was occurring [2]. Vicarious liability is on the contrary of direct liability. Under direct liability, the employee is the person who bears the liability caused by whose tort. Under vicarious liability, the employee doesn't bear the tort liability directly, instead, whose employer bears the liability.

This paper introduces vicarious liabilities and analyzes which situation is efficient in economic field under two different rules: strict vicarious liability and negligent vicarious liability, then illustrates that strict vicarious liability is economically efficient in the case of employee's cheating

on qualification. The paper aims to work out the most economically efficient situation by comparing circumstances under strict vicarious liability and negligent vicarious liability. The result will give certain suggestions on the undertake of the liability which is efficient for the common legal practice.

2. Vicarious Liability in Employment Relationship

In above mentioned case, the employer should be liable for the employer liability. It is worth mentioning that vicarious liability and employer liability are not conceptually the same. However, it is announced in *Civil Code of the People's Republic of China Article 1191* that “where an employee of an employer has caused others to suffer damages as a result of performance of work assignment, the employer shall bear tort liability” [3].

Chinese law defines employer liability as vicarious liability, which is out of the range being discussed in this article. Employer liability and vicarious liability are different concepts. If this distinction is not made and the concept of “vicarious liability” is used uniformly to carry out comparative studies, there may be fallacies, such as the belief that the legal nature of vicarious liability may not necessarily be strict liability. It may also be a refutable presumption of fault, or even fault liability in general [4].

In the civil law system and the common law system, the employer's liability refers to the employer's liability for compensation, which is due to the employee's behavior causing injury in the course of performing his duties. Based on the nature of “vicarious liability”, vicarious liability is a strict liability based on a specific relationship. However, according to the common law point of view, if the employee's own conduct does not meet the constitutive requirements of the tort, such as the occurrence of the damage is not at fault, the employer is still not required to bear “vicarious liability” [5].

Vicarious liability in employment relationship should be concerned in this case that the employer should be liable for the wrongdoing of the employee's which is regulated in law field. For an employer to assume vicarious liability for an employee's conduct, the following conditions must be met: there is an employment contract the employer is only responsible for the acts carried out by the employee in the course of employment activities, but not for every act carried out by the employee; the employee must have committed a wrongful act in the course of employment; if the employee himself is not liable, the employer is not liable either [6]. The held for employment relationship is usually confused and abstract. If the employer can restrict his employee's job at any time or decide on time and range of the job, the employment relationship exists between them [7]. Given all the preconditions above, the employment relationship is valid in law.

3. The Different Forms of Liability in above Case

Obviously, the employer is at fault to the damage because he lied about his real capacity for work and cheated his way into the job. Under the rule of vicarious liability, the article illustrates two forms of vicarious liability the employer should take, strict vicarious liability and negligent vicarious liability.

3.1. Strict Vicarious Liability

It is under the strict vicarious liability rule that no matter how strict and cautious the supervision has the employer implemented which the employer has exercised a reasonable duty of care, he should be liable for the tort. Strict means when deciding the imputation, the employer's fault is not considered which is no-fault liability [8]. In French law, the employer liability is a liability without fault in the nature of security, and the employer cannot be exempted by proving that it has exercised the necessary duty of care in the selection and appointment of the employee [8]. To let the employer take the strict vicarious liability doesn't mean that only the employer should be fully liable for the compensation.

In comparative law, the right of pursuit is regarded as the responsibility of the employee for whose compensation in the joint and several liability with the employer. The current common practice is the employer having certain right to pursue the damage from the employee. According to the legal principle basis, the tort is directly committed by the employee's behaviour. If there is no punishment of the employee, the behaviour of employee will be out of control which is obviously unreasonable. This article focuses on the liability of employer, the right of pursuing is not in the range being discussed. In order not to cause confusion, the right to pursue should be mentioned here.

3.2. Negligent Vicarious Liability

The counterpart is under the negligent vicarious liability rule that the employer should fulfill a duty of care by appointing qualified employees. If the employer hasn't been cautious enough on recruiting or has known whose employee is doing a job without being qualified but to ignore such action. If the employer can give evidence that he has been careful enough to verify the qualifications of the employee, with the common verification method in the market at that time, the liability of employer can be escaped. In Germany, employer liability is negligent vicarious liability that the employer liability is a fault liability, that is, the employer should be held responsible only if he fails to pay due attention to the selection, supervision and equipment. At the same time, the method of fault presumption should be adopted to properly strengthen the protection of victims [9]. The proof of having paid enough attention common with the verification method in the market at the same time examining the qualification of the employee is hard to identify which means the boundary is ambiguous.

4. The Comparison of Economic Efficiency Between Strict Vicarious Liability and Negligent Vicarious Liability

In common law, vicarious liability plays two main functions: First, it facilitates the imposition of legal liability on various groups (such as corporations and government departments) recognized by law as capable of bearing rights and responsibilities; Second, it helps to strengthen the compensation function of civil law by satisfying the victim's compensation request [10]. By emphasizing the importance of fulfilling the compensation, vicarious liability is regarded to ensure the rights of the claimant.

To see this in the economic field, on the premise of holding vicarious liability and having the possibility of paying the full damage, the employer will normally minimize the loss of the tort by implementing strict and cautious terms in selecting and supervising employees. The ability to control the wrongdoer is part of the rationale for imposing liability on the employer even though it is not at fault. It is the focus on the defendant's relationship with the wrongdoer, rather than with the victim, which distinguishes vicarious from direct liability. The assertion that vicarious liability is strict is legal shorthand for the rule that the defendant's liability is triggered by a relationship with the wrongdoer, not, as in negligence, a relationship of proximity with the victim [11]. The argument claimed by David Neild illustrated vicarious liability from the viewpoint of jurisprudence that the employer's vicarious liability does not assume the employer to be at fault.

It is simply not economically efficient for the employer because the employer will pay more cost on the recruit and supervision. For the employee, who owes less fortune than the employer may individually pay off the damage for a long period. Worse still, the payment will lead to bankruptcy or debt evasion which causes secondary harm to the rights of the claimant. Beyond all doubt, it is not efficient. However, to compare the total profit of both employer and employee in a particular tort damage, the profit of vicarious liability is lower than letting the employer bear the compensation. To some extent, vicarious liability orders the employer to recruit qualified staff which helps to regulate

the social order and maintain reasonable competition in case of malignant competition breaking the rule of the market. For the third party, employees who lack the necessary job skills are a source of danger. Therefore, if an employer uses an inappropriate employee for financial gain, it is responsible for the potential risks arising from this behavior. Even if the employer can provide evidence that it did not know that the employee was incompetent to work, it does not exempt the employer from liability [12]. The employer owes a duty of appointing and supervising whose employees. The employer carries a certain social responsibility to maintain the order of law. The more strict standard of recruiting employees will be practiced.

In negligent vicarious liability, as is claimed above, the boundary of evidence on the employer having taken enough measures to prove that he has been fully careful to perform the duty of care. Also, under negligent vicarious liability, the liability of compensation of the employee is totally avoided. From the view of jurisprudence, the outcome of employees' labour mainly belongs to the employer, in other words, the thought there may be an argument that employees and employers are unequal in their ability to acquire fortune. The employee provides more work for less pay, and the employer provides less work for more pay. The employee's tort is closely related to the employer's work, if the tort liability is totally borne by the employee, then the employee will be too cautious with the work which will lower the production of himself, and then lower the economic efficiency indirectly.

5. Conclusion

This paper introduces vicarious liability and the application of vicarious liability in the employment relationship, then compares the economic efficiency of strict vicarious liability and negligent liability. In conclusion, by illustrating the basic components of the two rules above, the rule of strict vicarious liability is more economically efficient than the rule of negligent vicarious liability. The strict vicarious liability has universal value and is more suitable for the modern development of economics.

However, the paper only discussed the liability of the employer, the right of pursuit of the employer is not discussed in this paper. For the more complete development of legal system, the liability for the employee from the pursuit of the employer should be discussed in the further study. Also, another situation of the liability assignment should be considered that the employer and the employee bear joint and several liability. The rationality of joint and several liability needs to be further discussed from the viewpoint of jurisprudence. Whether it is more efficient than the liability allocation system under the rule of vicarious liability should be analyzed in a more detailed mathematics model to confirm the accurate conclusion. Besides the drawbacks of the situation hasn't been discussed, more statistics should be given in calculating the efficiency to prove the conclusion. Further research should look into the differences of vicarious liability in different legal systems. For the more accurate research, researchers should look into vicarious liability in different countries and combine the national conditions and the legal practice conditions to give the efficient conclusion of employment liability.

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