

## NOTES / AANTEKENINGE

### PRELIMINARY THOUGHTS ON WHETHER VICARIOUS LIABILITY SHOULD BE EXTENDED TO THE PARENT-CHILD RELATIONSHIP

“When new circumstances arise we must adapt long-established principles to them, for the law is not so stereotyped and narrow that it cannot be extended and applied to new cases which arise out of the increasing and changing requirements and necessities of the times” (Kotzé CJ in *Houghton Estate Co v McHattie and Barrat* (1894) 1 Off Rep 92 104).

#### 1 Introduction

The parent-child relationship does not provide a basis for vicarious liability in our law and before considering whether it should, it is necessary to give a brief background of the doctrine of vicarious liability and the policy factors underlying it. (Much has been written on vicarious liability, but for an introductory overview see Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 365ff; Scott *Middelike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) *passim*; Wicke *Vicarious Liability in Modern South African Law* (1997); Wicke “Vicarious Liability: Not Simply a Matter of Legal Policy” 1998 *Stell LR* 21; and Atiyah *Vicarious Liability in the Law of Torts* (1967) *passim*.)

#### 2 General nature of vicarious liability

Vicarious liability may in general terms be described as the strict liability of one person for the delict of another, the former being indirectly or vicariously liable for the damage caused by the delict of the latter (Neethling and Potgieter *Delict* 365; and Wicke 1998 *Stell LR* 21). The principle of vicarious liability did not originally apply in the South African common law but was received from English law where it had been introduced in the late seventeenth century (*cf Masuku v Mdlalose* 1998 1 SA 1 (A) 13-14; Williams “Vicarious Liability and the Master’s Indemnity” 1957 20 *MLR* 220 228; Queensland Law Reform Commission Report 56: “Vicarious Liability” (2001) (“QLRC R 56”) 9; Calitz “Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability” 2005 *TSAR* 215 217; and Neethling and Potgieter *Delict* 365).

Vicarious liability is an exception to the basic premise of the law of delict that fault is a prerequisite for liability and has been developed to provide

victims with compensation where legal and public policy so requires despite the absence of fault on the part of the defendant; it is a public policy mechanism for extending liability arising from the commission of a delict (*cf Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 273-274). This form of liability applies where a particular relationship, recognized by the law, exists between the defendant and the wrongdoer, for example between employer and employee, principal and agent, motor-car owner and motor-car driver, partners among each other and the state and a public school (see Neethling and Potgieter *Delict* 365ff and 365 fn 110 for other examples).

### 3 Origin of vicarious liability

It is commonly accepted that the historical origins of vicarious liability lay in the Roman system of noxal liability (*Justinian's Institutes* 4.8; *cf Fleming The Law of Torts* (1998) 409; Lawson *Negligence in the Civil Law* (1968) 69ff; and Mendelson *The New Law of Torts* (2007) 653). This system imposed legal responsibility upon the head of the household (*paterfamilias*) for the conduct of his family, including the family servants. In the beginning, under the noxal actions (or noxal surrender) a master who was sued for acts of a slave, or a parent sued for the conduct of a child, could surrender the slave or child to the plaintiff, either to be sold for compensation or to suffer private vengeance (Mendelson 653). The significance of the noxal actions for purposes of this contribution is that it shows that the law at a very early stage recognized parents' responsibility for the conduct of their children beyond the boundaries of the parents' fault. (There are other doctrines explaining the reasons for vicarious liability that are not particularly relevant to the present discussion, such as the seventeenth and eighteenth centuries' maxim *qui facit per alium facit per se* ("he who acts through another acts himself") (also referred to as the *respondeat superior* doctrine); see Loots "Sexual Harassment and Vicarious Liability: A Warning to Political Parties" 2008 *Stell LR* 143 145ff and sources cited there; and *cf* Mendelson 653-654 for a brief historical note on the origins of vicarious liability.)

### 4 Theories aimed at justifying vicarious liability

The social and economic changes that have taken place over centuries have given rise to varying explanations for the survival of vicarious liability (see in general Scott *passim*; Wicke *passim*; Wicke "Vicarious Liability for Agents and the Distinctions between Employees, Agents and Independent Contractors" 1998 *THRHR* 609ff; Wicke 1998 *Stell LR* 21ff; QLRC R 56 9ff; and Neethling and Potgieter *Delict* 355-356 and 365-366). The justification for vicarious liability has been sought in various policy considerations, not all of which are equally applicable to the different categories of vicarious liability (Wicke 1998 *Stell LR* 21, 23 and 42); as a matter of fact, the policy consideration underlying vicarious liability in one category, such as the employment relationship, may not be very relevant in another category, for example amongst partners (*cf* Wicke 1998 *Stell LR* 21 and 23).

There is also no consistency in the requirements for the different categories of vicarious liability; each category has its own specific requisites (see Neethling and Potgieter *Delict* 365ff). Although it has been suggested

that the principles underlying vicarious liability are so confused that they are incapable of being reformed and that a bold break is necessary to correct the flaws and to modernize the law (Midgley "Mandate, Agency and Vicarious Liability: Conflicting Principles" 1991 *SALJ* 419 425-426; and Wicke 1998 *Stell LR* 22), it is understandable that each category, because of its distinct character, has its own set of requisites. Clarity and consistency of principles should be sought within each category without attempting to force the same principles onto other categories: for example, though vicarious liability applies to both the employer-employee relationship and between partners between each other, these relationships differ to such an extent that it would be incongruous to apply exactly the same vicarious-liability principles to both.

The following theories, amongst others, attempt to justify vicarious liability:

- (1) liability is founded on an employer's own fault in selecting an employee (*culpa in elegendo*). This view is based on a fiction, an irrebuttable presumption that the master himself has been negligent if his servant commits a delict and has been described in *Feldman (Pty) Ltd v Mall* (1945 AD 733 738) as a "hoary explanation";
- (2) in terms of the interest or profit theory it is only fair and just that the employer who receives the benefits of business activities, must also bear its burdens as a corollary (*cf RH Johnson Crane Hire (Pty) Ltd v Grotto Steel Construction (Pty) Ltd* 1992 3 SA 907 (C) 908; and Mendelson 655);
- (3) according to the identification theory the employee is merely the employer's arm (if the employee acts, the employer, in fact, is acting);
- (4) the solvency (or "deep-pocket") theory advances that the employer is liable because he is normally in a better position financially than the employee (*cf De Wilzem v Die Regering van KwaZulu* 1990 2 SA 915 (N) 921; and *Chartaprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA) 282);
- (5) the deterrence theory claims that an employer who is likely to be held (vicariously) liable "has every incentive to encourage its employees to perform well on the job and to discipline those who are guilty of wrongdoing" (*London Drugs Ltd v Keuhne and Nagel International Ltd* [1992] 3 SCR 299 340);
- (6) the risk or danger theory suggests that the work entrusted to the employee in pursuit of the employer's interests creates certain risks of harm (eg, the commission of delicts) for which the employer should be held liable on the grounds of fairness and justice as against injured third parties (*cf in general Scott* 30ff 37ff; Wicke 1998 *Stell LR* 21 42; and Calitz 2005 *TSAR* 215 ff);
- (7) the possibility of loss distribution, for example through insurance, has been considered a relevant factor not only in determining which of two parties should be required to bear the risk of a loss, but has also had an effect on the development of vicarious liability generally (*Smith v Eric S Bush* [1990] 1 AC 831 858; *Scott v Davis* (2000) 175 ALR 217 295-296; and *cf QLRC R* 56 14);

- (8) the control test (which is also used to determine whether a employer-employee relationship existed) in terms of which one party's right of control over the other's conduct may be conclusive in establishing the former's vicarious liability (*cf* Midgley 1991 *SALJ* 419 421; and Wicke 1998 *Stell LR* 22 and authorities cited there in fn 9); and
- (9) "social convenience and rough justice" (*Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 (HL) 685; and *cf* *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 471-472) (see also Mendelson 653-654 for additional theories).

Although all the above theories contain elements of truth and are persuasive to some degree, it is clear, as stated in *Hollis v Vabu Pty Ltd* (*supra* 273-274), that given the diversity of conduct involved, probably none can be accepted, by itself, as completely satisfactory for all cases (*cf* also QLRC R 56 10; Wicke 1998 *Stell LR* 21 42; and Calitz 2005 *TSAR* 215-216). Since vicarious liability is fundamentally policy-based one or more of the theories mentioned may contribute in finding that vicarious liability is appropriate in a given case.

## 5 Factors inhibiting the expansion of vicarious liability

At a fundamental level, the extension of vicarious liability to new situations such as the parent-child relationship needs to surmount the basic premise of the law that a person must bear the damage he suffers himself (*res perit domino*) (*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 461 (SCA) 468; and Neethling and Potgieter *Delict* 3). This view is reflected in the refusal of the courts to extend Aquilian liability unless compelled by policy considerations (*cf* *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 500; also *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 145; and *Chartaprops 16 (Pty) Ltd v Silberman supra* 276). Furthermore, vicarious liability is a form of no-fault liability (and has as such been characterized by McKerron "Basis of Doctrine of Vicarious Liability: Two Views" 1956 *SALJ* 432 433 as "an anomaly which can only be explained on grounds of social policy"; and *cf* Wicke 1998 *Stell LR* 21). The courts view strict liability with disfavour and are reluctant to relinquish fault as a prerequisite for delictual liability, as demonstrated by their refusal to introduce no-fault liability for damage caused by defective products (*Wagener and Cuttings v Pharmicare Ltd* 2003 4 SA 285 (SCA); *cf* *Chartaprops 16 (Pty) Ltd v Silberman supra* 281; Wicke 1998 *Stell LR* 21; and Visser "Delict" in Du Bois (ed) *Wille's Principles of South African Law* (2007) 1215). Recognition of a new category of vicarious liability, such as the parent-child relationship, will therefore require compelling social and legal policy reasons.

## 6 Expanding the scope of vicarious liability

Despite the courts' reluctance to expand delictual liability to new situations, they have gradually expanded the scope of vicarious liability particularly

within the employer-employee relationship where legal policy demanded it, and the legislator has added a further category of vicarious liability, that of state and public school, through section 60(1) of the South African Schools Act 84 of 1996 (see in general Neethling and Potgieter *Delict* 365ff). For example, vicarious liability has been extended by the courts in certain cases of the State's liability for intentional delicts committed by its employees (*cf Minister of Finance v Gore* 2007 1 SA 111 (SCA) (manipulation of tender process), discussed by Scott "Middellike Aanspreeklikheid van die Staat Weens Manipulasie van 'n Tenderproses" 2007 *TSAR* 569; Neethling and Potgieter "Middellike Aanspreeklikheid vir 'n Opsetlike Delik" 2007 *TSAR* 616; *K v Minister of Safety and Security* 2005 6 SA 419 (CC) (rape by policemen); *cf* Neethling and Potgieter "Middellike aanspreeklikheid van die staat vir verkragting deur polisiebeamptes" 2005 *TSAR* 595; Fagan "The confusions of *K*" 2009 *SALJ* 156; Neethling and Potgieter *Delict* 368ff and authorities cited there; *F v Minister of Safety and Security* 2010 1 SA 606 (WCC) (rape by policeman), and of employers for sexual harassment by their employees; *cf Grobler v Naspers Bpk* 2004 4 SA 220 (C); Neethling and Potgieter *Delict* 368ff; and generally Loots 2008 *Stell LR* 143; Loubser and Reid "Vicarious Liability for Intentional Wrongdoing: After *Lister* and *Dubai Aluminium* in Scotland and South Africa" 2003 *The Juridical Review* 156-157 and 158; Van der Walt and Midgley *Principles of Delict* (2005) 37; and Neethling "Risk-creation and the Vicarious Liability of Employers" 2007 *THRHR* 535-537). On the other hand, the Supreme Court of Appeal has recently declined to expand vicarious liability to the employer-independent contractor relationship through the so-called non-delegable duty doctrine (*Chartaprops 16 (Pty) Ltd v Silberman supra* 285; *cf* Scott "The Possibility of a Principal's Liability for the Delict of an Independent Contractor" 2009 *THRHR* 667; Neethling and Potgieter "Delictual Liability of Employer for Damage Caused by Independent Contractor" 2009 *THRHR* 661; and Neethling and Potgieter *Delict* 366 fn 123).

## **7 Extending vicarious liability to the parent-child relationship?**

### *7.1 Introduction*

As stated, in terms of our law a parent-child relationship in itself is not sufficient to set the parent who was not at fault vicariously liable for damage caused by the delict of his or her child (*April v Pretorius* 1906 TS 824; *Conradie v Wiehahn* 1911 CPD 704; *De Beer v Sergeant* 1976 1 SA 246 (T); see in general Potgieter "Aanspreeklikheid van Ouers vir Skade Veroorsaak deur Hul Minderjarige Kinders?" 2008 *THRHR* 331; and *cf* Visser 1216). (For the purposes of this contribution a child is regarded as a minor, that is a person under the age of 18 years.) According to the law as it stands, a parent will be vicariously liable for a delict committed by the child only if at the time of the causing of damage there existed one of the stereotyped relationships giving rise to vicarious liability, such as that between employer and employee (*De Beer v Sergeant supra* 251; and Scott 1977 *TSAR* 79). A parent may be directly liable (on the basis of his or her own delictual conduct) for the damage caused by the child in limited cases only, for

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example where the parent uses his child intentionally as an instrument to cause damage or negligently fails to control the child (*cf De Beer v Sergeant supra* 251; and *Godfrey v Campbell* 1997 1 SA 570 (C)).

## 7.2 Policy considerations

### 7.2.1 Introduction

Not all the policy reasons mentioned above (par 4) that are applicable to vicarious liability generally are necessarily relevant to the question of extending such liability to the parent-child relationship. It cannot for example be said in seriousness that parents were at fault in “electing” their damage-causing children (*culpa in elegendo*), or that parents should in terms of the so-called interest or profit theory bear the burden of their children’s activities as a corollary to their benefits or potential benefits (unless, of course, parent and child are in an employer-employee relationship), or that in terms of the identification theory children are merely extensions of the parents. Neither is parenting a business which enables parents to distribute, by way of increased prices for goods or services sold, the loss that the imposition of vicarious liability for damage caused by their children may bring about, nor to distribute in such a manner the cost of any insurance premiums in regard to policies taken out against the possibility of such loss (*cf QLRC R 56 79*). On the other hand, public and legal policy considerations underlying the risk, solvency and deterrence theories and the availability and cost of insurance, together with the public policy considerations of fairness and justice underlying vicarious liability generally, may have a bearing on the question whether vicarious liability should be extended to the parent-child relationship (*cf QLRC R 56 14 61*).

### 7.2.2 Public policy considerations of fairness and justice underlying vicarious liability generally

It is generally accepted that vicarious liability finds its roots in a variety of policy considerations (see Fleming 410). Vicarious liability is thus not the result of any clearly developed and logical legal principle (Hughes (“Vicarious liability” in Todd (ed) *The Law of Torts in New Zealand* (2009) 1029) but courts in recent times tend to assume that the policy basis lies in a combination of “loss spreading” and “rough justice”; as being one strand in a progressive tendency toward more extensive protection of innocent third parties (*Kooragang Investments Pty Ltd v Richardson & Wrench Ltd supra* 471-472).

The main reason for vicarious liability is to provide a plaintiff with a party worth suing for loss incurred and internationally vicarious liability has become a useful medium to expand liability. Deakin, Johnston and Markesinis (*Markesinis and Deakin’s Tort Law* (2008) 697ff) state that the expansion of vicarious liability is “in tune with the current trend, prevalent in modern tort law, liberally to compensate physical injuries at the same time as widening the category of risks for which defendants with ‘deep pockets’ can be deemed responsible”.

There is a growing tendency to expand vicarious liability outside the strict confines of the traditionally recognized relationships. In *671122 Ontario Ltd v Sagaz Industries Canada Inc* ([2001] 2 RCS 995 (SCC)) the Canadian Supreme Court stated that although vicarious liability is most prevalent in the employment relationship, “the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed”. After a comparative exploration of case law *Loots* (2008 *Stell LR* 143 147) also concludes that vicarious liability “has a flexible characteristic which leaves it open to the court to identify new categories of relationships to fall within its scope when society’s political, social and economic atmosphere demands it”.

The recent trend to widen the scope of vicarious liability to novel situations is also prevalent within the conventional forms of vicarious liability. This development has called for a new, “open” approach in determining whether an employer should be liable for his employee’s unauthorized, intentional delicts where no precedent is conclusive. In this respect the Canadian Supreme Court decision in *John Doe v Bennett* ([2004] 1 SCR 436 (SCC)) has been trend-setting. Referring to *inter alia* her earlier decision in *Bazley v Curry* ([1999] 2 SCR 534 (SCC) 559-560), McLachlin CJ, in considering vicarious liability of a church corporation for the sexual abuse of young boys by one of its priests (445-446), opined that the imposition of vicarious liability may usefully be approached in two steps. First, a court should establish whether there are precedents which unambiguously determine whether the case should attract vicarious liability. Should prior cases fail to suggest a solution clearly, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability. The judge stated that vicarious liability is based on the underlying principle that the person who puts a risky venture into the community may be held responsible fairly when those risks materialize and cause loss or injury. She continued:

“Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer. This is necessary to ensure that the goals of fair and effective compensation and deterrence of future harm are met ...”

This approach is reflected in O’Regan J’s leading South African Constitutional Court judgment in *K*, where she held that vicarious liability should be imposed if a sufficiently close connection existed between the conduct of the wrongdoer and his employment (see also *Lister v Hesley Hall Ltd* [2002] 1 AC 215 230 (HL), where Lord Steyn held that a school, as employer, was vicariously liable for sexual abuse committed by one of its employees, and stated, after analyzing *Bazley*, that the appropriate question was whether the acts in question were “so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable”; and *cf Hughes* 1053).

However, the “sufficiently close connection” test in itself does not as if by magic provide the answer to the question whether vicarious liability should be imposed in a given matter. This approach must be informed by the facts of the particular case, concrete policy factors such as deterrence and effective compensation, as well as general policy considerations of fairness and justice calling for the imposition of vicarious liability.

Although in *Bennett*, McLachlin CJ focused on the extension of liability to a novel situation within an established vicarious liability category (the employer-employee relationship), her approach is just as relevant in considering whether vicarious liability should be extended to a completely new category, like the parent-child relationship. Since there are no cases which clearly suggest a solution in such cases, the broader policy rationales behind strict liability should be considered to determine whether vicarious liability should be imposed here. All these factors, and others that may be relevant, should play a role in establishing the imposition of vicarious liability in a new situation uninformed by precedent.

Hughes (1068-1069) points out that vicarious liability falls to be determined in an increasing number of novel situations outside the direct employer-employee related categories. Although these situations do not (yet) include the parent-child relationship specifically and relate mostly to instances where the vicariously liable person or entity benefits in some way from the actions of the person committing the delict whilst performing some kind of service for the former, the approach followed in *S v Attorney-General* ([2003] 3 NZLR 450 (CA)) in novel situations within the broad employer-employee relationship can also inform the question whether vicarious liability should be expanded to completely new categories, such as the parent-child relationship (*cf* also Hughes 1069):

“[In] novel relationships ... what ... is required is not so much an inquiry into whether the relationship can be pressed into a category which either mandates vicarious liability or does not. Rather, there should be an examination of the nature of the relationship in comparison with the conventional ones. A judgment must then be made as to whether, in the light of all relevant features of the relationship, the law should or should not impose vicarious liability for misconduct which has a sufficient connection with and is within the risks created by the relationship. The way the courts have dealt with similar or analogous relationships will be instructive. Ultimately, however, the court must make the necessary judgment after careful appraisal of the particular case.”

On the other hand, it must be acknowledged that the courts do not allow themselves free rein to expand vicarious liability indiscriminately, as evidenced by the refusal by the Supreme Court of Appeal in *Chartaprops* to extend vicarious liability to an employer for the conduct of an independent contractor (see par 6 above).

Be that as it may, there is clear evidence that courts internationally are increasingly willing to consider widening the scope of vicarious liability in cases where changing public and legal policy considerations demand such an extension. This development opens the door for considering the expansion of vicarious liability to the parent-child relationship which calls for an original approach to the concept of vicarious liability in view of the novel nature of the category. The principal question should not be whether this relationship can be “pressed into” a conventional relationship giving rise to

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vicarious liability, but whether, on the basis of fairness and justice, legal and public policy considerations now require parents to be vicariously liable for the delicts of their minor children. Some of the conventional theories justifying vicarious liability may play a role in this regard.

### 7 2 3 Risk or danger

Scott (30ff and 37ff) has argued strongly that the risk theory is the true rationale for vicarious liability, specifically with reference to the employer-employee relationship (see also *Minister of Police v Rabie* 1986 1 SA 117 (A) 134-135; and *cf Macala v Maokeng Town Council* 1993 1 SA 434 (A) 441; *Grobler v Naspers Bpk supra* 297; *F v Minister of Safety and Security supra*; but *cf Minister of Law and Order v Ngobo* 1992 4 SA 822 (A) 832-834; and *Ess Kay Electronics Pty Ltd v First National Bank of Southern Africa Ltd* 2001 1 SA 1215 (SCA) 1218-1219).

This theory suggests that where a person's activities create a considerable increase in the risk or danger of causing damage, that is, an increased potential of harm, there is sufficient justification for holding him liable on the grounds of fairness and justice for damage even in the absence of fault (*cf Neethling and Potgieter Delict* 356). Whether the potential of risk in a given case has been increased enough will depend largely on the legal convictions of the community, as reflected *inter alia* in legislation and case law (Van der Walt "Strict Liability in the South African Law of Delict" 1968 *CILSA* 55).

It is self-evident from the damage often caused by children that parents create some risk of damage simply by bringing children into the world. Whether such risk is in itself sufficient to justify vicarious liability is different matter. Socio-political factors might militate against finding for vicarious liability in these cases and some may argue that it is invalid to equate the parent-children relationship with that of, for example, employers and their employees who cause damage; that children are an asset to society and that parents should not be penalized without fault for damage caused by the delicts of their children if the parents themselves lacked personal fault in relation to their children's conduct. The opposing argument may be that it should be the parents of children who cause damage, rather than the victims, who should carry the risk for such loss.

The relative dearth of reported court cases regarding damages claims for loss caused by children should not be taken as indicative that children do not cause such damage. It is common knowledge that instances of harm or damage caused by children in South Africa abound (as in many other countries) and are increasing at a disturbing rate. Children cause damage not only to property (*eg*, by way of vandalism, negligent or careless conduct), but also through various forms of personality infringement such as physical and psychological harm (often through violent behaviour, bullying, assault, intimidation and insult), defamation, and the infringement of dignity and privacy. It is hardly necessary to substantiate this statement: the media regularly reports on incidents of violence, bullying, assault, *etcetera*. Two general references will suffice: the spokesperson of the Tshwane Metro Police in Pretoria stated that bullying and violence are becoming a major

headache in the city's schools (Fourie 27 February 2008 *Tshwane-Beeld 2*) whilst Thomas Blaser, education researcher at the South African Institute for Race Relations (SAIRR) has found that South African schools are the most dangerous in the world. The SAIRR has requested government to intervene urgently in the "growing tendency of violence and disorder" in the country's schools. According to the statement, South Africa came last in the world with regard to school safety in terms of the 2007 "Progress in International Reading Literacy Study" (PIRLS), with only 23% of children indicating that they feel safe at school (Rademeyer 6 February 2008 *Beeld 5*). Case law in this field is scarce because there is not much point in claiming from children who have no money to pay; not because children do not cause loss. As a matter of principle, the risk of loss caused by children through delictual conduct should be borne by their parents and compelling reasons – which are not readily forthcoming – need to be advanced why parents should not be held liable for such loss.

As is the case with other theories such as the "sufficient connection" approach (par 7 2 2 above), the creation of risk principle cannot answer the vicarious liability question on its own (*cf Ess Kay Electronics Pte Ltd v FNB Southern Africa Ltd supra 1219*); risk is but one factor to be taken into consideration in this regard. Thus Loubser and Reid (2003 *Juridical Review 156*) have argued convincingly that "the risk theory and other rationales for vicarious liability cannot logically be divorced from the scope of the rule, because the scope of the rule, to a large extent, involves a value judgment and policy considerations, such as the fair distribution of risk, to inform that value judgment".

#### 7 2 4 Solvency – the ability to pay damages

There is a viewpoint that the solvency theory probably explains the origin and function of vicarious liability best (Williams 1957 20 *MLR 232*; see also *Hollis v Vabu Pty Ltd supra 288*; and *cf Chartaprops 16 (Pty) Ltd v Silberman supra 282*). The court in *Chartaprops 16 (Pty) Ltd v Silberman (supra 282)* also pointed out that the historical rationale for imputing liability to a master has been that "that they had deeper pockets". "This explanation is based upon the consideration that, when someone is injured as a result of the fault of another who has insufficient resources to pay, the injured person should be able to seek compensation from another who, although not at fault, is relevantly connected to the cause of the loss" (QLRC R 56 11). Williams (1957 20 *MLR 232*) puts it thus:

"However distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant. It is commonly felt that when a person is injured (particularly when the injury is a bodily one), he ought to be able to obtain recompense from someone; and if the immediate tortfeasor cannot afford to pay, then he is justified in looking around for the nearest person of substance who can plausibly be identified with the disaster."

In view of the general responsibility of parents for the conduct of their children, it can hardly be denied that parents are in a general sense "relevantly connected" to the loss caused by their children. Whether this should be the case in specific fact situations, is another matter. There is also

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no guarantee that the imposition of vicarious liability on a parent will necessarily provide the plaintiff with a financially viable defendant. Many, perhaps most parents in South Africa are financially just as incapable to pay for the damage caused by their children as the children themselves, unless the parents have insured themselves against liability for loss or injury caused by their children. But if the law were to be changed to provide for the parents' vicarious liability for such damage, many parents might decide to take out insurance to cover damage caused by their children, thereby becoming economically viable defendants. Even then there may be doubt whether vicarious liability should be available on the basis of this policy consideration alone. The Queensland Law Reform Commission (QLRC R 56 78-79) was of the view that the fact that parents may be able to insure against a liability of this kind is not on its own a valid reason for recommending the imposition of vicarious liability on them if such a change in the law would not otherwise be justified having regard to the other policy considerations that support the principle of vicarious liability generally. As in the case of vicarious liability generally, it should be "the overall nature of the relationship between the parties, and the circumstances of the case [including the solvency theory], that determine whether policy considerations justify the application of the principle" (*cf* QLRC R 56 16).

#### 7 2 5 Distribution of loss through insurance; financial consequences of vicarious liability

The Queensland Law Reform Commission (QLRC R 56 79) apparently regards the fact that not all parents would be in a position to insure against vicarious liability for the damage caused by their children as militating against the imposition of such liability. The Commission also states (QLRC R 56 79) that damages payable by a parent found vicariously liable for a delict committed by his or her child could have serious consequences for the financial position of the whole family. In my view these factors by themselves are not convincing to reject parental vicarious liability. In the past the ability to ensure against vicarious liability in specific cases has never been a prerequisite for such liability. Moreover, homeowners' insurance nowadays regularly includes cover for legal liability and it is not inconceivable that the imposition of vicarious liability on parents will prompt insurance companies to offer affordable insurance to provide for cover for this specific risk very quickly. Granted that vicarious liability of parents might have serious financial consequences for their family, the preferable counterargument is that since vicarious liability is a legal mechanism aimed at distributing loss equitably, it would be more just and equitable to compel parents to pay for the loss caused by their children than to expect the loss-sufferers to carry the burden.

#### 7 2 6 Deterrence: possible liability will encourage instruction, supervision and control

In the employer-employee relationship vicarious liability is justified in terms of the deterrence theory on the basis that an employer who is likely to be held (vicariously) liable "has every incentive to encourage its employees to

perform well on the job and to discipline those who are guilty of wrongdoing” (*London Drugs Ltd v Keuhne and Nagel International Ltd supra* 340) and to “adopt strategies to minimize the risk of loss or injury to third parties by his or her employee” (QLRC R 56 79). The fact that a parent has the capacity and responsibility to instruct, supervise, guide and control a child is a strong argument supporting the imposition of vicarious liability on the parent where the child causes loss through delictual conduct.

There is mounting opinion that parents should be more actively involved in controlling and taking responsibility for the conduct of their children in and outside the schools context, not only in South Africa, but also in Britain, Australia and a number of European countries. In South Africa, certain provisions of the recently published “Call for Comment on Learner Attendance Policy and Procedures, 2009” (N 982 of 2009, GG 32414 of 2009-07-17) serve as an example of a growing acknowledgement of parents’ responsibility for the conduct of their children: sections 15-19 of the Notice place various duties on parents relating to their duty to ensure that their children attend school. (Note also the wide range of parental responsibilities towards their children listed expressly in s 18(2)(a) read with the definition of “care” in s 1(1) of the new Children’s Act 38 of 2005.)

Regarding the position in England, Paton (2009 [www.Telegraph.co.uk](http://www.Telegraph.co.uk)) stated: “Parents will be hit by severe penalties if children misbehave under a back-to-basics crackdown on indiscipline in schools ...” Paton also reports that “[a] three-year Government study into classroom behaviour will call for greater use of parenting contracts for mothers and fathers failing to keep children in line and £50 penalties for those condoning truancy”.

In its submission to the Queensland Law Reform Commission the Queensland Police Union of Employees pointed out that in certain areas of the state the police service are engaged for up to 70% of its available man hours in dealing with juvenile crime and expressed the opinion that “to impose on parents a financial obligation to pay compensation for damage to person or property caused by the intentional actions of a child is likely to have a positive effect in ensuring that children are more adequately supervised by their parents” (QLRC R 56 66-69; but *cf* QLRC R 56 69 for views opposing the extension of vicarious liability to the parent-child relationship on the basis of “disadvantages and unfairness” (which were not elaborated on in the Report)). The Queensland Law Reform Commission ultimately recommended that vicarious liability should not be extended to this relationship (QLRC R 56 iii 80).

## 7 2 7 Control

In the employment relationship, power and control are regarded as relevant factors in establishing vicarious liability. Thus, after considering factors relevant in determining whether there is a sufficient connection for imposing vicarious liability in the case of intentional delicts, the court in *Bennett* (446) stated that the employer’s control over the employee’s activities is an indication of whether the employee is acting on the employer’s behalf and continued:

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“At the heart of the enquiry lies the question of power and control by the employer: both that exercised over and that granted to the employee. Where this power and control can be identified, the imposition of vicarious liability will compensate fairly and effectively.”

There is also support for the argument that outside the conventional employer-employee situation one party's right of control over the other's conduct should play a role in determining whether policy considerations favour the imposition of vicarious liability (*cf* Midgley 1991 *SALJ* 419 421 423; Wicke 1998 *Stell LR* 22). The fact that parents have a right of control over the conduct of their minor children should be taken into account in considering whether a parent-child relationship should form the basis for vicarious liability.

### 7 2 8 Other considerations favouring parent-child vicarious liability: the position in certain other countries

In addition to the policy considerations set out above, the need for extended liability of parents for the loss caused by their children is evidenced by the fact that many European countries recognize some form of parental liability for such loss, although the legal basis, extent and practical application of this liability may differ (see in general Spier *Unification of Tort Law: Liability for Damage Caused by Others* (2003) *passim* and for a useful summary; Galand-Carval “Comparative Report on Liability for Damage Caused by Others – Part I – General Questions” in Spier *Unification of Tort Law* 289-308). Galand-Carval (294) states: “In almost all the European countries, it is possible to find some form of special liability imposed on parents for harm caused by their minors. This is true of France, Germany, Greece, Italy, Poland, Portugal, Spain, Switzerland, Belgium, the Netherlands and the Czech Republic”. This author (Galand-Carval 294-295) also points out that a number of states in the USA have special statutes or judicial doctrines providing for some form of parental liability, and that in Israel a new provision is envisaged making parents liable for damage caused by their minors while under their custody. Although the legal basis, extent and practical application of parental liability – which are often based on legislative provisions and not necessarily on principles of vicarious liability – may differ in the various countries, the principle of parental liability is regarded as sufficiently well established in a majority of European countries for it to be regarded as a “common European rule” (Galand-Carval 295).

Section 198 of the Juvenile Justice Act 1992 of the Australian state of Queensland imposes a degree of liability on a parent whose child has been convicted of a personal or property offence by providing that a parent may be ordered to pay compensation up to a specified amount, if the court is satisfied, among other matters, that the parent “may have contributed to the fact the offence happened by not adequately supervising the child” (although it is unclear how this provision differs from a parent's common law negligence liability). Legislation in the Northern Territory provides that, in certain circumstances, a parent may be liable, to a maximum of \$5,000, for property damage caused intentionally by his or her child (s 29A of the Law Reform (Miscellaneous Provisions) Act 1956 (NT)).

The English common law does not impose vicarious liability on parents for the torts committed by their children (Murphy *Street on Torts* (2007) 623; Dugdale and Jones (general eds) *Clerk & Lindsell on Torts* (2006) 282; Oliphant "Children as tortfeasors under the law of England and Wales" in Martín-Casals (ed) *Children in Tort Law* (2006) 161; and *cf* Mendelson 653). As has been pointed out (par 7 2 6 above), the Queensland Law Reform Commission (the Commission) (QLRC R 56 iii 80) also declined to expand vicarious liability to this relationship, despite the submission of the Queensland Police Union of Employees that argued for some form of liability of parents for their children's wrongdoings (QLRC R 56 66-69). The Commission (80) was of the opinion that the fact a parent cannot terminate his or her relationship with the child (whereas it is possible for an employer to dismiss an employee) "is likely to be a significant limitation on the extent to which the imposition of vicarious liability on a parent would operate as a deterrent to future harm being caused by the child". In my view the Commission overemphasised the significance of a parent's inability to terminate the relationship with his or her child who causes loss through delictual conduct as a factor inhibiting the deterrent effect of vicarious liability. If parents know that they could be vicariously liable for the delicts of their children and that they cannot escape such liability because of their inability to terminate the parent-child relationship, they would probably instruct, supervise, guide, control and discipline their children more diligently in an attempt to evade such liability as far as possible. Seen thus, the inability of parents to terminate the parent-child relationship would enhance, rather than diminish, the deterrent effect of vicarious liability.

## 7 2 9 Power of courts to develop the common law

The South African Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power *inter alia* to develop the common law, taking into account the interests of justice (s 173 of the Constitution of the Republic of South Africa, 1996). In my view the interests of justice require the expansion of vicarious liability to include the parent-child relationship, as considered against the public policy factors set out above. In addition, a court, when developing the common law, must promote the spirit, purport and object of the Bill of Rights (s 39(2) of the Constitution), and when interpreting the Bill of Rights a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, consider international law and may consider foreign law (s 39(1) of the Constitution). Chapter 2 of the Constitution ("Bill of Rights") sets out the constitutionally protected basic rights, many of which may be infringed by the delictual conduct of children. The imposition of vicarious liability on parents for damage caused by their children's delicts can enhance the protection of these basic rights. Many foreign jurisdictions have on grounds of public and legal policy extended the liability for loss caused by children to their parents, and South African courts should consider these developments in developing the law. In this regard the manner in which Nel J in *Grobler v Naspers Bpk* (*supra* 298) took into account the relevant provisions of the Constitution and foreign law for his innovative decision that an employer is vicariously liable for the sexual harassment committed by its employee serves as an example.

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## 8 Conclusions

It has often been pointed out that the law of vicarious liability is confusing and fraught with contradictions and uncertainties. Of the various conventional philosophies, theories and principles underlying vicarious liability, no single one can answer the question whether vicarious liability should be expanded to the parent-child relationship. In the end one has to fall back on the fundamental truth that the rationale for vicarious liability is to provide the injured plaintiff an opportunity “to sue someone who is not a person of straw” (Midgley 1998 *SALJ* 419 425), and to decide whether policy considerations of justice and equity demand that parents should be held liable for the damage caused by the delicts of their minor children. Some of the reasons justifying the existing categories of vicarious liability could inform this decision, but the investigation should proceed from a broader base and consider all possible policy considerations. Should it be found on principle that the parent-child relationship merits the imposition of vicarious liability, the requisites for such a new category of vicarious liability need not necessarily reflect the principles underlying the existing categories; new principles will have to be worked out to determine whether in a given case a parent should be held vicariously liable for a child’s delict. In this regard guidance may be sought in the many foreign jurisdictions which recognize some form of parental liability for damage caused by their children.

As has been submitted, the reasons for vicarious liability of parents for the conduct of their children have to be sought in a number of policy considerations, for example the risk created by bringing a child into the world, the fact that the parent rather than the impecunious child is usually better suited to pay for (or to distribute through insurance) the loss caused by the child, the notion that possible liability for a child’s conduct may cause the parent to instruct, control, supervise, guide and discipline the child more thoroughly regarding potentially damage-causing behaviour. Naturally the existence of a parent-child relationship should not without further ado give rise to parental liability, just as an employment relationship in itself does not constitute vicarious liability: prerequisites must be satisfied for liability to follow. Although the prerequisites for vicarious liability in the traditional categories may offer valuable guidelines, the requirements for a parent’s vicarious liability, should it be recognized, will have to be worked out with reference to the distinctive nature of the parent-child relationship in a particular fact-situation. In this regard it will be useful to investigate instances in other legal systems where parents are being held liable for the damage caused by their minor children.

The courts, utilizing their constitutional power in terms of section 173 of the Constitution to develop the common law in the interests of justice, should seriously consider imposing vicarious liability on parents whose children cause damage through delictual conduct. In this regard the statement of Kotzé CJ in *Houghton Estate Co*, quoted below the title of this contribution, is particularly apposite.

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