

An Appraisal of Vicarious Liability in Criminal Law

Aniedi J. Ikpang*

Abstract

The law on vicarious liability flows from two perspectives. The first is in the area of torts, which is wholly civil. The second is in the area of criminal law. It is, therefore, vicarious liability in criminal law, which forms the centrality of this paper. The general position of the law is that no person should be held criminally liable for an offence except some measure of fault is traced or traceable to him. The exceptions are in respect of offences of strict and vicarious liabilities where the element of fault or guilty mind is dispensed with. This paper examines the topic against the background of the common law and statutes, the different factors affecting vicarious liability in criminal law, types of vicarious liability offences, the position of corporations in respect of the crime and, the justifications for the existence of the crime. This paper advocates for offences vicarious liability to be created expressly by statutes. It also enjoins the criminal justice system to sensitize the public on the existence of the crime.

1 Introduction

The concept of vicarious liability so well developed in tort has not found favour with the criminal court. In criminal jurisprudence, a man is not guilty for offence committed by another person as the basis of liability in criminal law is the personality liability, that is to say, no one is to be liable without fault. Accordingly, a person is criminally responsible only in respect of those acts attributable to him.¹ But this

* **Dr. Aniedi J. Ikpang**, LL. B; BL; LL. M; Ph. D (Nig.) is a lecturer, Faculty of Law, University of Uyo, Uyo, Head of Department of Private Law between May 2005 and February 2008 and now Head of Department of Public Law as well as the Vice Dean, Faculty of Law, University of Uyo,

is not sacrosanct, as statutes have created offences of vicarious liability. The theoretical basis of this paper is to focus on vicarious liability which to many, is a law too draconian to master /victim.

Hitherto, a master was not liable for the theft or fraud committed principally for the benefit of the servant and not that of the master.² In the leading case of *Lloyd v Grace, Smith and Co.*,³ a solicitor's managing clerk, without the knowledge of his employer, induced a widow to give him instructions to sell certain property, to hand over the title deeds and to sign two documents which were neither read over nor explained to her, but which she believed were necessary for the sale. The documents were, in fact, a conveyance to the clerk of the property, of which he dishonestly disposed for his own benefit. It was held that since the clerk was acting within the scope of his authority, his employer was liable; thus extending the liability of an employer to crime or fraud committed by his employee.

The principle in *Lloyd's* case was applied in the Nigerian case of *United Africa Co. Ltd v Saka Owode*,⁴ where the defendant, a transport contractor, sought business from the plaintiff. He introduced to them two men whom he said were his driver and clerk, and stated that whenever the plaintiff had any goods to be transported, they should give the goods to the two men. Goods were later given by the plaintiff to the two men for carriage to one of the plaintiff's branches up-country but they were never delivered, and the driver and clerk were subsequently convicted of stealing the goods. The plaintiff claimed that the defendant was vicariously liable for the conversion of the goods by his servants and the Privy Council, reversing the West African Court of Appeal and agreeing with the trial Judge held that he was liable. In the word of Lord Daksey:⁵

Uyo, Nigeria. He has published many scholarly articles in reputable journals with research interests in Criminal Law, Comparative Criminal Law and Criminal Justice. Email: ikpanganiedi@yahoo.com.

¹ Smith & Hogan: *Criminal Law*, (7th edn.) (London: Butterworths, 1988), p. 72.

² G. Kodilinye, *Nigerian Law of Torts*, (2nd edn.), (Lagos: Spectrum, 1999).

³ (1912) *A.C.* 716.

⁴ (1955) *A.C.* 130.

⁵ *Ibid.*, at p. 145.

Lloyd v Grace, Smith & Co. establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment... In the present case, the fair inference from the fact proved is that the defendant's servants committed the goods expressly and that they converted the goods whilst they were on the journey, which the defendant has undertaken to carry out. The conversion therefore was in the course of the employment to the defendant's servants.

In criminal law, the principal is not answerable for the act of the deputy as in civil cases, except there is a command by the principal to his inferior. In the case of *R. v Huggins*,⁶ *Huggins*, the warden of the fleet was charged with the murder of a prisoner whose death had been caused by the servant of Huggins's deputy. It was held that, though the servant was guilty, Huggins was not, since the acts were done without his knowledge. Raymond C. J. said:⁷

It is a point not to be disputed but that in criminal cases, the principal is not answerable for the act of the deputy as he is in civil cases. They must each answer for their own acts and stand or fall by their own behaviour. All the authors . . . proceed on the foundation of this distinction; that to affect the superior by the act of his deputy, there must be the command of the superior, which is not found in this case.

At common law, vicarious liability was not the basis of criminal liability except in the cases of public nuisance and criminal defamation.⁸ For a master to be liable for the criminal act of his servant, he must have to some extent participated in it.⁹ In *Mandila*

⁶ (1730) 92 E. R. 518.

⁷ *Ibid.*

⁸ R. Card: *Criminal Law*, (13th edn.), (London: Butterworths, 1995), p. 571.

⁹ *Ibid.*, p. 570.

Karaberis Ltd. & Filton v I.G.P.,¹⁰ the prosecution argued, in respect of the charge of stealing lorries by persons unknown, that since the second appellant was the area manager of a company (the first appellant), he must be held criminally responsible for any offence committed in relation to the lorries. Rejecting this contention, Ademola C. J. F. said:¹¹

Whatever the position of a manager in case of absolute liability, he cannot be convicted of an offence involving *mens rea* except in respect of his acts or omission, and even if, in this case, it has been a reasonable inference that the lorries had been stolen by someone, there was no evidence whatsoever to implicate the second appellant.

Vicarious liability may of course be imposed by the use of express words. There are a number of such statutes in Nigerian law but these will be discussed much later in the paper. Where a vicarious criminal liability is created by statute, the presumption is that *mens rea* is displaced.

2 Basis of Vicarious Liability as Crime

For there to be vicarious liability in crime, the following conditions rooted and developed in tort must be fulfilled:

2.1 Commission of a crime by the Servant

For the master to be vicariously liable, the prosecution must first of all prove the commission of a crime by the servant. As Denning, L. J. explained:¹²

To make a master liable for the conduct of his servant, the first question is to see whether the servant is liable, if the answer is 'yes,' second question is to see whether the employer must shoulder the servant's liability.

Vicarious liability of the master arises only on the primary liability of the servant. This lead to the question, who is a servant? The

¹⁰ (1969) 1 All N.L.R. 390.

¹¹ *Ibid.*

¹² *Young v Box & Co. Ltd.* (1951) 1 T.L.R. at p. 793.

answer is very important for the operation of the concept because a master is only liable for the act of his servant.

2.2 Servant

The courts have outlined the following tests in determining who a servant is:

2.2.1 Control Test:

Under common law, the first known test for the determination of a servant is the control test. It seeks to ascertain whether the employer controls the employee in the way and manner the assignment is to be performed.¹³ This test was carefully enunciated in the old case of *Yewens v Noakes*¹⁴ where it was held that a servant is a person subject to the command of his master as to the manner in which he should do his work.

This test was applied by the court in the Nigerian case of *Dola v John*¹⁵ where the court relied on the definition of servant by *Salmond on Torts* to the effect that:¹⁶

A servant may be defined as any person employed by another to do work for him on the farms of his employer. ...
A servant is a person engaged to obey his employer's orders from time to time.

In the above case, the court relied heavily on the control test to hold a goldsmith liable for the theft by his servant. The control test emphasizes the element of control between the employer and the servant.

2.2.2 Integration Test

A useful alternative to the control test is what may be called the integration test. Lord Denning in the case of *Stevenson Jordan and*

¹³ G. Umoh, *Principles of Employers Liability* (Uyo: Kan: Educational Books, 2003), p. 13.

¹⁴ (1880) 6 *QB*. 530.

¹⁵ (1973) 3 *E. L. S. L.R.* 302.

¹⁶ *Ibid.*

*Harrison Ltd. v Macdonald and Evans*¹⁷ formulated this test in the following words:¹⁸

Under a contract of service, a man is employed as part of a business, and his work is done as an integral part of business, whereas under a contract for service, his work, although done for the business is not integrated into it but is only accessory to it.

On this test, the following are examples of servants of the organizations, which employ them.¹⁹ They are hospital doctors and nurses, University lecturers, schoolteachers, hotel staff, etc. On the other hand, a person with a contract for services is usually referred to as an independent contractor and there may be several reasons why an individual may wish to be classed as such; the prime one is usually taxation, for there may well be tax advantages in being self-employed, of a legal nature.²⁰ Examples of servants under contract for services include a motor mechanic, a plumber, an electrician, a mason, a carpenter, etc. who is engaged to handle a particular job or task, without being in the employment of the master. In this type of contract, the master does not control the way and manner in which the servant does the work.

2.2.3 Multiple Tests

In order to reach a conclusion as to whether a person is employed under a contract of service, the courts have in recent years adopted a more flexible test.²¹ This test takes into consideration all the test and factors mentioned above. This approach may be said to emanate from the judgment of Justice Mckenna J. in the often-quoted case of *Ready*

¹⁷ (1952) 1 T.R.101.

¹⁸ *Ibid.*

¹⁹ Kodilinye, *op. cit*, *supra*, note 2 at p. 238.

²⁰ I. T. Smith & J. C. Wood, *Industrial Law*, (5th ed.), (London: Butterworths, 1993), p. 9. See also, Umoh, *op.cit*, note 13 at p. 6.

²¹ Umoh, *op.cit*, note 13 at p. 13.

Mixed Concrete (South East) Ltd. v Minister of Pension,²² where he formulated three conditions upon which a contract of service would be based:

- (a) The employee agrees to provide his own work and skill.
- (b) There must be a sufficient degree or control exercisable by the employer, and
- (c) The other terms of the contract must not be inconsistent with a contract of service.

The multiple tests are more flexible, comprehensive and a more composite approach compared to the other tests.

2.3 The Course of Employment

A master will be vicariously liable for the servant's crime committed during the course of his employment. A crime comes within the course of the servant's employment if:

- (a) It is expressly authorized by his master, or
- (b) It is an unauthorized manner of doing something authorized by his master, or
- (c) It is necessarily incidental to something which the servant is employed to do in practice.

Whether a servant's act is within the course of his employment is a question of fact.²³

2.3.1 Manner of doing the work the servant was employed to do:

A master will be liable for the criminal act of the servant if that act arises from course of his employment even if it is an unauthorized manner of doing his job. Thus in *Copen v Moore* (N0.2),²⁴ an employee was held vicariously liable for a sale effected by a sales assistant in an unauthorized manner. In the instant case, a shop

²² (1968) 2 QB 427.

²³ *U. A. C. v Owoade. supra* note 4.

²⁴ (1898) 2 QB 2891.

assistant sold American ham as Scotch ham contrary to the express instruction of the employer. The court held the employer vicariously liable. According to the Court:²⁵

The provision of S. 2 (2) of the Merchandise Mark Act, 1887, which makes it an offence to sell goods which makes it an offence to sell goods to which forged trademark or false trade-description is applied, makes a master criminally liable for acts done by his servants in contravention of the section when acting within the general scope of their employment, although contrary to their master's order, unless the master can show that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission of offences by his servant.

2.3.2 Authorized Limits of Time and Place

A relevant factor in determining whether or not a servant's act was within the course of his employment is the time or place at which it was committed. As regards time, whether it is committed during working hours or within a reasonable period before or after, the court is more likely to hold the master liable for it.²⁶

2.3.3 Express Prohibition

A master may be liable for his servant's act even though he expressly forbade such act. In *Allen v Whitehead*,²⁷ the licensee of a café employed a manager to run the premises. Despite instructions from the licensee not to allow prostitutes to enter, the manager permitted women he knew to be prostitutes to meet on the premises. The Licensee was held liable on account of the manager's acts and knowledge.

2.3.4 Connection with Employer's Business

Where a servant does an act which he has no express authority to do but which is nonetheless intended to promote his master's legitimate interests, the master will be liable in the events of its being criminal.

²⁵ *Ibid.*

²⁶ Kodilinye, *op. cit.*, note 2 at p. 241.

²⁷ (1930) 1 K.B. 211.

The case of *Allen v Whitehead*²⁸ is apposite in this regard. Despite the fact that the manager was acting outside his power, the master was still liable because it was done in furtherance of his interest.

3 Principle of Criminal Vicarious Liability

It is a principle of the criminal law that *prima facie*, a principal is not to be made criminally responsible for the act of the servant.²⁹ According to Lord Atkin J. (as he then was), in the case of *Mousell Brothers v London and North Western Ry.*³⁰

I think that the authorities cited by my Lords make it plain that while *prima facie* a principal is not to be made criminally responsible for the act of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case, the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the “object” of the statute, the “word” used, the nature of the “duty” laid down, the person upon whom it is imposed.³¹

Vicarious liability is a creation of the legislature through the enactment of regulatory offences, which impose duties on licensee. The main objective of these regulatory statutes is the protection of the public. The courts have played a major role in the development of vicarious liability in criminal law by interpreting the statutes as imposing vicarious liability so as to give effect to the intention of the legislature.

²⁸ *Ibid.*

²⁹ G. Williams: *Criminal Law. The General Part*, (2nd edn.), (London: Stevens & Son, 1962).

³⁰ (1917) 2 K.B. 236.

³¹ *Ibid*, p. 845

The courts over the years also have used two (2) principles to impose vicarious liability and attribute fault to the employer of labour.³² Before the discourse on the principle, a preliminary remarks.

4 Factors Affecting Vicarious Liability in Crime

The application of vicarious liability is essentially a problem of statutory interpretation. The application of the concept is based on several factors.³³ These include language, object, duty and the gravity of offence.

4.1 Language: The language or words used by the statute in defining the offence is very essential for the determination of the application or imposition of vicarious liability. Where the language is clear and unambiguous, it will be easy for the court to apply the concept but, where it is not, then, it is left for the court to decipher the intention of the law makers.³⁴ This lack of definitional precision has given the courts the latitude in interpretation. This approach has caused a lot of juristic ink to flow in contemplation of the court's attitude to apply vicarious liability in licensing cases.³⁵

4.2 The Object of the Legislature:

The weight of judicial authorities supports the view that the courts apply vicarious liability because it was intended to be imposed by legislature.³⁶ The intention of the legislature or the policy behind it can be deduced from the words of the statute or the objective of that particular statute. Most regulatory offences are meant for the protection of the public. The object of the law is always stated at the

³² G. Williams: "Mens Rea and Vicarious Responsibility," *Current Legal Problems (CLP)*, Vol 9, (1958), p. 57.

³³ Per Lord Atkin in *Mousell Brothers v London and North Western Ry* *supra*, note 29.

³⁴ *Okonkwo and Naish, Criminal Law in Nigeria*, (2nd ed.), (Lagos: Spectrum, 1980), p. 87.

³⁵ See Williams, *loc. cit*, note 21 at p 57; See also, B. Fisse: "Elimination of Vicarious Responsibility in Statutory Offences," Parts 1 & 2 (1968) A.L.T.Vol 42. 199 and 200. Also, see the view of His Lordship in *Vane v Yinna Poullous* (1965) AC 468.

³⁶ See *Allen v Whitehead*, *supra*, note 26.

commencement of a statute. In interpreting the statute, it must be interpreted to give effect to the stated object of the law.³⁷

4.3 Duty:

The nature of the duty imposed by a statute is necessary for the determination of the operation of vicarious liability.³⁸ Duties are measured by certain standard set for the well being of the society. Most regulatory offences impose duties on licensees for the well being of society. These duties cannot be delegated. The law has given a specific duty to a licensee and where he failed, he cannot be heard to complain.³⁹

Where a statute creates or imposes a duty upon individual persons, it would be strange result if the duty could be evaded by delegation to servants. Where a duty is imposed by the law upon a person in such a way that a breach of the duty amounts to disobedience of the law, then if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the licensee.⁴⁰

4.4 Gravity of the offence:

Regulatory offences are different from the criminal offences, which the common law, Criminal Code and Penal Code deal with. Though breaches of these offences are visited with penalties often of considerable severity, they are offences, says Lush. J, in *Davies v Harvey*,⁴¹ which are not criminal in any real sense, but are acts, which, in the public interest, are prohibited under a penalty.⁴²

The penalties attached to regulatory offences are less severe than the penalties attached to offences under the Criminal Code.

³⁷ Per Lord Atkin in *Mousell Case*. See also *R v Tyler* (1891) 2 Q.B. 588.

³⁸ Umoh, *op.cit*, note 13 at p. 64.

³⁹ K. Anderson, "Quasi-Criminal Liability of Master for acts of Servant" (1943), 16 *ALJ*, p 210.

⁴⁰ *R. v Tyler*, per Lord Bowen.

⁴¹ (1874) 9 Q.B. 922.

⁴² Anderson. *op.cit*, note 38 at p. 287.

Where the gravity of punishment attached to an offence is severer than mere fine, then there must be a presumption of *mens rea*.⁴³

In *Clegg v C.O.P.*,⁴⁴ Verity C. J. said that:⁴⁵

The offence created by the section is one of the extreme gravity. A felony is the gravest type of offence... and does involve in our view, a degree of criminality in which *mens rea* is an essential ingredient...

Regulatory offences are at best quasi-criminal or simple offence. Thus, the requirement of *mens rea* can be dispensed with. Any offence that involves imprisonment for two (2) years or more is an offence of gravity and requires the proof of *mens rea*.

5 Vicarious Liability Offences

5.1 Offences connected with licensed premises

The clearest examples of offence of vicarious liability are those in connection with licensed premises both in England and Nigeria. The rule developed in England is that where a statute uses words like “suffers” “permit” etc, it is essential to prove actual knowledge of the commission of the offence in the licensee or his willful blindness provided the licensee was himself present at the premises at the time of the commission.⁴⁶ But if the licensee has delegated the management of the premises to a servant and he is himself absent at the time of the commission of the offence, then both his servant and himself are liable.

The technical distinction of the position where the licensee is on the premises and where he is not, at the time of the commission of the offence by his servant, is inapplicable to Nigeria, at least with regard to offences connected with licensed premises.

⁴³ Williams, *loc. cit*; note 29 at p. 289.

⁴⁴ (1949) 12 *W.A. C.A* 379.

⁴⁵ *Ibid*.

⁴⁶ A. Aguda, Akintola & Okunade, *Principles of Criminal Liability in Nigeria n Law*, (2nd edn.), (Ibadan: Heinemann, 1990), p. 125.

The law in Nigeria places liability in both situation on both the licensee and his servant. For example, section 51 the Liquor Act⁴⁷ provides that: ⁴⁸

If any person being the manager for or the servant of, or authorized to act for, a license holder, shall do any act or thing or be guilty of any omission in which if done or omitted by the license holder would constitute an offence by the license holder, shall be liable to the penalties prescribed by this Act for such offence whether such act, thing or omission was done or made with or without the knowledge or consent of the license holder.

There is also vicarious liability imposed under section 14 of the same Act. Under that section, in any case of the conveyance of intoxicating liquor into a prohibited area: “the owner and the master or person in charge of any vessel, vehicle or other means of transport employed in such conveyance or any carrier” is liable to be convicted.

5.2 Trade Licenses

Similar to the law under the license offences just discussed, some offences under English statutes dealing with the granting of trade licenses have been held to be offences of vicarious responsibility. These are mainly offences connected with the use of motor vehicles. By section 27 of the Customs and Inland Revenue Duties Act, 1869 it is an offence for any person to use a van without a carriage license except it is used solely for the conveyance of goods in the course of trade. In *Strutt v Cliff*,⁴⁹ the bailiff who was in charge of the dairy farm of the defendants used a van belonging to them without their knowledge and authority for his own private purpose. In upholding the conviction of the defendants for an offence under the section of the Act, Lord Alverstone, C. H. held that: ⁵⁰ “the appellants by placing the

⁴⁷ Formerly of the *Laws of the Federation of Nigeria* (LFN) 1958, now omitted in LFN, 2004.

⁴⁸ *Ibid.*

⁴⁹ (1911) 1 K.B. 1.

⁵⁰ (1911) 1 K.B.1 .

bailiff in charge of the van, delegated to him their power to prevent its user for the purpose which it was in fact used, and they are consequently responsible for his act.” The defendants were held liable even though the servant was acting outside the scope of his employment and this makes the judgment open to objection. On the other hand, Coleridge, J. held that the defendants would not have been liable if it had been a stranger who made use of the van.⁵¹

And in *Green v Burnett*,⁵² the defendant’s company, as well as their driver, was held liable for using a motor vehicle with defective brakes even though the company was not negligent in not discovering the defect.

In Nigeria, the Motor Vehicles (Third Party) Insurance Act⁵³ provides a good example of this type of offence under consideration. It provides that:⁵⁴

subject to the provisions of this Act, no person shall use or cause or permit any other person to use a motor vehicle unless there is in force in relation to the user of that motor vehicle by such person or such other person as the case may be such a policy of insurance... as complies with the provision of this Act.

Under this statute, whilst his servant can make a person vicariously liable for the use if he is aware of such a case, it is hard to see how a complete stranger, which he never acquiesced in, nor permitted, can make him liable for use of which he was not aware or of a use.⁵⁵

In a charge of defamatory libel under the Criminal Code,⁵⁶ not only the editor but it is submitted, the proprietor and the publisher of the periodical in which the libel appears, may also be held liable for publishing it.⁵⁷ The Criminal Code provides that: ⁵⁸

⁵¹ *Ibid*, p 7.

⁵² (1955), 1 *QB* 78.

⁵³ Cap M 22, LFN 2004. s. 3 (1).

⁵⁴ *Ibid*.

⁵⁵ Aguda, *op.cit*, note 45.

⁵⁶ Cap C 38 LFN. 2004, Chapter 33 thereof.

⁵⁷ Aguda. *op.cit.*, note 45 at p. 127.

The criminal responsibility of the proprietor, editor or publisher, of any periodical for the publication of any defamatory matter contained therein may be rebutted by proof that such publication took place without his knowledge and without negligence on his part.

In *Ogubuagu v Police*,⁵⁹ the appellant was the proprietor, printer and publisher of a Newspaper in Jos, Plateau State. When leaving Jos, he instructed the man he left in charge not to publish the paper while he was away. The man however, published the paper and included a seditious libel in one issue. In allowing the appeal of the appellant against a conviction by the lower court, the Appeal Court said:

The theory of the common law is that the proprietor having appointed a person to publish a Newspaper inserts in it, the proprietor publishes the matter *per allium* and is answerable for anything seditious or defamatory published. But when the proprietor tells his servant not to publish the paper, I cannot see why the proprietor should be answerable for an issue of the paper published by a disobedient servant. In publishing the paper, the servant is not acting as agent of the proprietor, therefore it cannot be said that the proprietor is publishing anything *per allium*.⁶⁰

The Criminal Code states that:⁶¹

Any person who... prints, publishes, sells offers for sale, distributes or reproduces any seditious publications ... shall be guilty of an offence.

In *Ako Adjei & Anor v R.*,⁶² the court held that the Chairman, the Managing Director and the Editor of a Newspaper which published

⁵⁸ s. 380 (2) of the Criminal Code.

⁵⁹ (1953) 2 *NLR*, 139.

⁶⁰ *Ibid.*, at p. 143.

⁶¹ s. 51 (1) thereof.

⁶² (1951) 13 *W.A.C.A.* 253.

a seditious publication could all be found guilty under a similar provision of the Ghanaian Criminal Code.

6 Vicarious Liability under Common Law

Under the English common law, there was an irrebutable presumption of *mens rea* as an essential requirement for the proof of an offence. It was a general rule under the common law that one person is not responsible for the acts of another, which he has not authorized and of which he was ignorant, even if that person is his employee acting in the course of his employment so that civil vicarious liability might arise.⁶³ Thus, in the old case of *Huggins*⁶⁴, the warden of the fleet prison was acquitted on a charge of murdering one of the inmates, as it appeared that death had been caused by confinement in an unhealthy cell by an employee of the accused without any direction from him and without his knowledge.

However, this rule was subject to exceptions. In certain limited cases, a person can be vicariously held criminally liable for acts of others, which he has not authorized nor deliberately failed to prevent and of which he was ignorant. These exceptions relate to the offence of public nuisance, defamatory libel and contempt of court. The offence of public nuisance was an important exception to the general rule. In *R v Medley*,⁶⁵ the Chairman, his deputy and other directors of a GCB Company were indicted for a public nuisance for conveying by certain pipes into a river, certain deleterious ingredients, whereby the waters were polluted and rendered unfit for human consumption. In holding the accused persons liable, Denman C. J. said:⁶⁶

It is said that the directors were ignorant of what had been done. In my judgment, that makes no difference ... It seems to both common sense and law, that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants.

⁶³ Richard Card, *op.cit.*, note 8 at p. 570.

⁶⁴ (1730) 1 Barn KB 358, Richard Card, *op.cit.*, note 8 at p. 571.

⁶⁵ (1834) 6 Car & P. 292; 172 ER, 1248.

⁶⁶ *Ibid.*, p. 292; 172 ER 1250; Aguda, *op.cit.*, note 45 at p.162 respectively.

This observation must, however, be confined to the type of offence under consideration by the court in the case.

In *R v Stephens*,⁶⁷ the accused who was over 80 years of age was the owner of a slate quarry. The rubbish from the quarry was stacked about five or six yards from the edge of a river, but after sometime, floods carried away the rubbish, which eventually obstructed navigation. Although the accused was old and unable personally to superintend the working of the quarry, which was being managed for his benefit by his son, it was nevertheless held that he could be found guilty of causing public nuisance even though this had been caused without his knowledge and contrary to his general orders.

Also, at common law, a master was held responsible for any defamatory libel published by his servant in the course of his employment even though he did not authorize the publication. Although this is an offence requiring *mens rea* in the sense that the accused must have known or must have been reckless as to the libelous character of the publication, yet once the servant had the necessary *mens rea*, the master was vicariously liable. In *R. v. Walker*,⁶⁸ criminal information was preferred against the defendant as the proprietor of a Newspaper, *The Times*, for libel it contained. The defendant said in evidence that though he was in fact the proprietor of the newspaper, he had nothing to do with the conduct of it; and that he resided in the country far from where it was published. In finding the accused liable, Lord Kenyon said that he was clearly of the opinion that:⁶⁹

The proprietor of a newspaper was answerable criminally, as well as civilly, for the acts of his servants or agents for misconduct in the conduct of the newspaper.

⁶⁷ (1866) *LR* 1 *QB* 702.

⁶⁸ (1779) p. 170 *ER* 524.

⁶⁹ Aguda, *op.cit.*, note 45 at p. 123.

The provision of the law has been materially altered and the absence of knowledge and of negligence creates a good defence to such charge.⁷⁰

Finally, contempt of court was also an offence of vicarious liability. In *R v Evening Standard & Co. Ltd.*,⁷¹ a journalist negligently misreported the hearing at a preliminary investigation before a magistrate, which report was published by the defendant newspaper. It was held that the reporter, the editor and the newspaper were all guilty of contempt of court.

7 Vicarious Liability under Statute

Under statute, the presumption of *mens rea* is a rebuttable one. There can be little doubt that the legislature can decide to create offences of vicarious liability by the use of express words. There are a number of such statutes in Nigerian and English law. The real difficulty is the determination of the circumstances in which the courts will be justified in reading offences as those of vicarious liability by implication in the absence of express words.

In England, the stumbling block on the way of the courts creating vicarious liability by implication is the common law principle requiring that the accused must have the requisite *mens rea* and also that, an accused must himself have committed the *actus reus* for the offence. The Sheriffs Act, 1887 imposes a penalty upon any sheriff's officer who *inter alia*:⁷²

Takes or demands any money or reward under any pretext whatever, other than the fees or sums allowed by or in pursuance of this or any other Act.

It was held in *Lee v Dangar, Grant & Co.*,⁷³ that as the penalty involved in the provision was in the nature of an offence, there must be *mens rea* in the accused before he could be liable under the statute. According to the Lord Esher MR:⁷⁴

⁷⁰ See s.7 of the English Libel Act, 1843. 6 & 7 Vict. C 96.

⁷¹ (1954) 1 *QB* 337.

⁷² Sheriffs Act 1887, 50 & 51 C. 55, s. 22.

⁷³ (1892) 2 *QB* 337; Aguda, *op. cit.*, note 45 at p. 124.

⁷⁴ Aguda, *op. cit.*, note 45 at pp. 348 – 349.

In order to recover this penalty under section 29, you must bring yourself strictly within the words of the section and no person is answerable for the act of another. Each person is answerable for his own acts. The action would not lie against the Sheriff for the act of bailiff, unless he himself took part in it or had procured the bailiff to do it.

Despite the presumption in favour of *mens rea*, where a statute in England expressly imposes vicarious liability or where it will be nugatory of the effect of a particular statute not to impose vicarious liability, the English courts will use the principles and factors earlier discussed to impose vicarious liability.

It must be stated that vicarious liability in criminal law owed its development to the courts, which adopted a literal/liberal approach in interpreting statute as imposing vicarious liability so as to give effect to the intention of the lawmakers.⁷⁵

In *Allen v Whitehead*⁷⁶ Lord Hewart C. J. said:⁷⁷ “I think that this provision in this statute would be rendered nugatory if the contention of *mens rea* is upheld.”

In Nigeria, there is no distinction between common law and statutory offences. All offences are statutory. The presumption of *mens rea* is at best a rebuttable one and can be displaced by the express wording of the statute.⁷⁸ The Criminal Code⁷⁹ provides to the effect that: “A person is not criminally responsible for an act or omission, which occurs independently of the exercise of his, will”

This above provision of the Criminal Code overrides all federal statutes excepting those of Northern Nigeria whose basic criminal concept must also be found in the Penal Code. And it is clear from the general reading of the Penal Code that it does not recognise vicarious liability. It is submitted that all other Northern Nigerian penal statutes must be read subject to the fundamental principle of criminal liability.

⁷⁵ Williams, *loc. cit.*, note 31 at p. 61.

⁷⁶ *Supra* note 26 at p. 222..

⁷⁷ *Ibid.*

⁷⁸ Okonkwo and Naish, *op.cit*; note 33 at p. 89.

⁷⁹ Criminal Code, s. 24.

It is clearly obvious in the Penal Code that a person should be held responsible only for his own acts.⁸⁰

The operation of section 24 may be excluded and vicarious criminal liability imposed. In some cases, such vicarious liability is not strict, and an employer may be able to escape conviction. In the Factories Act,⁸¹ the occupier of a factory is *prima facie* guilty of an offence if any of the provisions of the Act in respect of the health, safety, and welfare of the workers is contravened. But he may escape liability if he can bring the actual offender to court and show that he himself used all diligence and that the offence occurred without his consent, connivance or willful default. In other statutes, the employer escapes vicarious liability. Thus, under section 54 of the Liquor Act,⁸² a holder of a liquor license is liable for any act or thing or omission done or made by anyone authorized to act for, whether such act, thing or omission was done or made with or without the knowledge or consent of the license holder.

Some Nigerian statutes have been interpreted so as to allow vicarious liability in order to give effect to the intention of the Legislature. The argument is that in the present social and economic set up in Nigeria, if confined within reasonable limits, the doctrine of vicarious liability is essential even though it is an exception to the basic principles of criminal liability.⁸³ In *Gardner v Akeroyd*,⁸⁴ Lord Goddard, C. J., was of the opinion that:⁸⁵ "... the doctrine of vicarious liability is necessary doctrine for the enforcement of modern legislation...."

It is the opinion of this present writer that the same would apply in Nigeria if it ever comes up for consideration.

Vicarious liability has been confined more to what has been usually described as "public welfare offences." There are only few offences of vicarious liability under both the Criminal and the Penal

⁸⁰ Aguda, *op.cit.*; note 45 at p. 126.

⁸¹ Cap F1, LFN 2004, s. 74 (1).

⁸² For more, see note 46 above.

⁸³ Aguda, *op.cit.*, note 45 at p. 125.

⁸⁴ (1952) 2 KB 264.

⁸⁵ *Ibid.*

Code. Most examples of vicarious liability offences are found in other statutes.⁸⁶

The argument in favour of the imposition has always been premised on necessity, for the protection of the public welfare. Although there is an element of truth in this argument, it has also been argued in several quarters that the purpose of the law would equally be satisfied by making an employer liable only if, he has been negligent in failing to prevent the offence.⁸⁷ It has been argued that it is harsh and inequitable to impose criminal liability on a man who has taken reasonable steps to forestall the happening of a certain event, which later happened without his knowledge. In most cases, the event happens not out of negligence of the employer but of the willful disobedience of the employee.⁸⁸

The aggregate of opinion favours the elimination of vicarious liability and its substitution with a liability based on negligence on the part of the employer.⁸⁹ In most statutes, there are statutory defences, which are open to employers and others who may be vicariously liable. This was as a result of the court's refusal to read into statutes, as imposing vicarious liability for offences, an exception protecting employers who show due diligence in the management of their business in cases where nothing which they could reasonably be expected to do would have prevented the commission of the offence by the employee.⁹⁰ Accordingly, some statutes contain an express provision for defences of this nature in relation to offences under it.⁹¹

The paucity of cases of vicarious criminal liability shows that, the Nigerian courts are not enthusiastic of imposing it or that the

⁸⁶ Aguda, *op.cit.*, note 82,

⁸⁷ G. Williams, *Criminal Law*, (The General Parts), Chap. 43, p. 951 (citation); c.f B. Fisse: "Elimination of Vicarious Liability in Regulatory Offences," A.L.J. vol 42 Part 1 & 2 p. 182.

⁸⁸ Williams, *op.cit.*, note 86 at p. 958.

⁸⁹ *Vane v. Yianno Poulous* (1965) AC 486; c.f ., Williams, *loc. cit.*, note 32 at p. 58, & Brent Fisse, *op.cit.*, note 87 at p. 192.

⁹⁰ Lord Goddard's dictum in *Tesco Supermarket Ltd. v Nattrass*. (1972) AC 155.

⁹¹ Criminal Code, s. 380 (2).

requirement of guilty mind under Section 24 of the Criminal Code is not easily displaced.

Under section 24 of the Criminal Code, it is provided that subject to the express provisions relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will or an event which occurs by accident.⁹² This is known as the principle of criminal responsibility otherwise referred to as the principle of no liability without fault. According to the learned authors Okonkwo & Naish, all legal systems have to some degree or other incorporated the simple moral idea that no one should be convicted of a crime unless some measure of subjective fault can be attributed to him.⁹³ The above provision is consistent with the Penal Code Law, which also entrenches the principle of criminal responsibility in it.⁹⁴

The provisions of the statutes above are in confluence with each other but runs contrary to vicarious criminal liability, for, while the principle of criminal liability states that a person can only be liable for an act which has committed or for an omission which he has made; the doctrine of vicarious criminal liability, on the other hand, states that one can be liable for the act or omission that of another, provided the person which did the act or made the omission was at the time under his control. The principle of vicarious criminal liability is of common origin and since it cannot be used as an exception to section 24 of the Criminal Code Act and section 48 of the Penal Code Law, this paper is of the lofty view that the code should be amended and a provision created in order to admit of vicarious criminal liability.

At this juncture, a conundrum now arises as to whether the word 'will' under section 24 of the Criminal Code is synonymous with the expression 'guilty mind.' Okonkwo and Naish in resolving the said puzzle submit that the word 'will' in the first paragraph of section 24 includes in respect of the act or omission and its surrounding circumstances, not only intention (guilty mind) to do the act or make

⁹² *Ibid.*, s. 24.

⁹³ Okonkwo & Naish, *Criminal Law in Nigeria*, 2nd ed. (Ibadan : Spectrum Publishing, 1990), p . 66.

⁹⁴ See the Penal Code Law No. 18 of 1959, s. 48.

the omission, but also, awareness of all the material circumstances.⁹⁵ The inference is that a man cannot be said to be fully exercising his will as to a particular element of an offence unless he is aware of it.

8 Special Positions of Corporations

The principle of vicarious liability is of particular application to Corporations. Section 1 of the Criminal Code defines “person” to include corporations of all kinds. Thus, a corporation is a juristic person distinct and different from the members and is criminally liable for its acts.⁹⁶ The Companies and Allied Matters Act provides as follows:⁹⁷

Any act of the members in general meeting, the board of directors, or of a managing director, while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefore to the same extent as if it were a natural person.

It is thus clear that a corporation can be made criminally liable by the express wording of a particular statute.⁹⁸ Section 74(5) of the Factories Act, for instance contemplates the possibility of the commission of any one of the offences it creates by a “company,” “co-operative society,” “or other body of persons.”

For example, in *R. v Anglo- Nigerian Tin Mines Ltd*,⁹⁹ it was held that a firm could be prosecuted for certain offences under the Oil Mineral Ordinance.

Hitherto, under common law, it was not possible to hold a company liable for any criminal offence. The chief obstacle to the acceptance of the concept of the criminal liability of a corporation has been the combination of its artificiality with the traditional need for the

⁹⁵ Okonkwo & Naish, *op. cit.*, note 93 at p. 83.

⁹⁶ The case of *Salomon v Salomon* (1897) AC. 22 established Corporate Legal Personality.

⁹⁷ Companies and Allied Matters Act, Cap C. 20, LFN, 2004, s. 65.

⁹⁸ Godwill Umoh; *op.cit.*, note 13 at p. 67.

⁹⁹ (1930) 10 NLR 69.

proof of *mens rea* of crime.¹⁰⁰ In the *Tin Mines Case*,¹⁰¹ Berkeley J. said: “There was no one who could be brought before the court and if necessary placed in the dock.”¹⁰²

And more serious was the objection that a corporation could not be said to have a mind capable of being guilty and therefore could not be convicted of any offence requiring any type of *mens rea*. And there was the further point that it was not possible to find a suitable punishment for corporation.¹⁰³

This obstacle has been marked down and a corporation can be criminally liable for its acts even in respect of offences that require *mens rea*. Although a corporation does not have a mind of its own, the minds or knowledge of its directors can be imputed to it.

In the case of *H.L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Sons Ltd*,¹⁰⁴ Lord Denning L. J.¹⁰⁵ stated thus:¹⁰⁶

A company may in many ways be likened to a human body. It has a brain and a nerve center, which controls what it does. It also has hands, which hold the tools and act in accordance with directions from the nerve centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and controls what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such....

In the leading case of *TESCO Supermarket Ltd v. Nattrass*,¹⁰⁷ it was said that the company may be criminally liable for the acts only of:¹⁰⁸

¹⁰⁰ Richard Card, *op.cit.*, note 8 at p.574.

¹⁰¹ *R v. Anglo – Nigerian Tin Mines Ltd*, (1930) N.L.R. 69.

¹⁰² *Ibid*, p.75.

¹⁰³ Smith & Hogan, *op.cit.*, p. 178.

¹⁰⁴ (1957) 1 *QB* 159.

¹⁰⁵ As he then was.

¹⁰⁶ *Ibid.*, at p. 172.

¹⁰⁷ (1972) *AC* 153.

¹⁰⁸ *Ibid.*, at p. 171.

...the board of directors, the managing director and perhaps other superior officers of a company (who) carry out the functions of management and speak and act as the company.

Nowadays, the general rule is that a corporation may be criminally liable to the same extent as a natural person, subject to two exceptions:

- (i) In the cases of offences which from their very nature cannot be committed by corporations; and
- (ii) Where the only punishment the court can impose is physical.

In *Union Bank of Nigeria, Plc v Jase Motors (Nig.) Ltd & Anor*,¹⁰⁹ the Court of Appeal held that: A company being a legal person or juristic person can only act through its agents or servants...¹¹⁰

The foregoing position was re-affirmed in the case of *Ishola v S. G. Ltd.*¹¹¹ Similarly, in *Ogabaji v Arewa Textile Plc*,¹¹² the court was of the view that the directors of the company were the directing mind of the company.

The concept of vicarious criminal liability of corporation was well developed before corporate liability, for it was easy to hold a corporation vicariously liable, for example, in the law of criminal libel a master was liable for the action of his servant by the doctrine of “respondent superior.”¹¹³ With regard to this offence, the master was liable once it was proved that he authorized the publication of the paper containing the libelous article. In offences of vicarious liability, a corporation was held liable irrespective of whether the offence required *mens rea* or not. In *Mousell Brothers v L. W. Railway*,¹¹⁴ the manager of a firm whose duty it was to fill up or direct the filling up of

¹⁰⁹ (1997) 1 *NWLR* (Pts. 1 & 3) p. 284.

¹¹⁰ *Ibid.*

¹¹¹ (1997) 1 *NWLR* (Pt. 480)p. 285.

¹¹² (2001) 2 *NWLR* (Pt. 686) 147 C.A.

¹¹³ Aguda, *op.cit* , note 45 at p. 352.

¹¹⁴ (1917) 1 *KB* 236.

the consignment notes of the firm wrongly described the goods with intent to avoid the payment of the rate payable in respect of the right classification of the goods. It was held that a corporation could be properly convicted of an offence of giving a false account with intent to avoid payment of tolls, on the ground that this was an offence of vicarious responsibility.

In *R v The Amalgamated Press (of Nig.) Ltd*,¹¹⁵ the defendant was held vicariously liable for sedition. In the case of *Attorney-General, Eastern Region v Amalgamated Press of Nigeria Ltd*.¹¹⁶ Ainsley C. J. said:¹¹⁷

...that a corporation can have knowledge of the falsity or otherwise of that which is published in a newspaper and a corporation through its agents, is clearly capable of making enquiries as to the falsity or otherwise of what it has published. A corporation is also capable of publishing in a newspaper that which the corporation knows or has reasons to know is false.

In the case of *R. v Ojukoro*,¹¹⁸ a Lagos Newspaper, *The Daily Times* published a statement that a theft at Government House had been traced to an ex-convict who had recently been discharged from prison. It was held that this statement was calculated to prejudice the minds of the public against the accused and therefore it constituted contempt of court. In *R. v Service Press Ltd*,¹¹⁹ the Newspaper was also held vicariously liable for the publication of seditious article and contempt of court. In *R. v Zik's Press Ltd*,¹²⁰ a corporation was held guilty of publishing a seditious publication, contrary to section 51 (C) of the Criminal Code.

It was the view of the court in *Inspector-General of Police v Mandilas and Karaberis and Anor*,¹²¹ that a corporation as well as its

¹¹⁵ (1961) 1 KB 236.

¹¹⁶ (1956-1957) E.R. N.L.R 12.

¹¹⁷ *Ibid.*, p. 17.

¹¹⁸ (1926), N. L.R. 60.

¹¹⁹ (1952) 14 WACA. 176.

¹²⁰ (1947) 12 WACA 202.

¹²¹ (1998) W.R.N.L.R 247.

area manager could be jointly guilty although in the instant case they were not. In *DPP, Western Nigeria v Associated Newspaper of Nigeria Ltd. & Anor*,¹²² a newspaper and its editor were jointly charged of willfully publishing a false report of the debate of the Western House of Assembly. It was established that the report of the proceedings of the House as published by the first defendant contemporary was false, but his parliamentary reporter had submitted the report to the second defendant, the editor. The learned trial judge simply said that since the report was false and the defendant willfully i.e, deliberately published it; therefore, they were both guilty of the offence.

Thus, where the act of the servant or agent of the corporation can be imputed to it, it will be held criminally liable vicariously.

9 Justifications for Vicarious Liability in Criminal Law

Criminal responsibility is generally regarded as essentially personal in nature. The exception to this principle, whereby a person can be convicted of an offence of which he was ignorant and which was actually committed by another has been justified firstly on the basis of the need to enforce modern regulatory legislation, such as that governing the sale of food and drugs or intoxicating liquor.¹²³ The courts consider that the most effective way of enforcing such legislation is to impose on the employer liability for the contravention by employees in order to encourage him to prevent them from infringing the legislation.

In *Garner v Akeroyd*,¹²⁴ Lord Goddard C. J. was of the opinion that:¹²⁵

If an act forbids a sale of adulterated food, or of goods with a false trade description or at a price in excess of a statutory maximum, the master will be liable notwithstanding that the sale was effected by his servant and without his knowledge,

¹²² (1959) *W.R.N.L.R.* 247.

¹²³ Richard Card, *op.cit.*, note 8 at p. 574.

¹²⁴ (1952) 2 *NLR* 206.

¹²⁵ *Ibid.*

provided only that the sale was in the course of the servant's employment. The seller was the employer and the offence was complete as soon as the goods were sold....

The second justification for imposing vicarious liability in criminal law on employer by the court is predicated on the basis that it is a way of implementing the legislation and enforcing the intention of the legislature.

Thirdly, a particular person, such as a licensee, can only commit some offences and such an offence would be rendered nugatory where that person acted through others.¹²⁶ According to Lord Diplock, in *Tesco Ltd. v Natrass (H.L.)*:¹²⁷

Nowadays, most business transaction for the supply of goods or services are not actually conducted by the person who in civil law is regarded as the party to any contracts made in the course of the business, but by servant or agent acting on his behalf. Thus in the majority of cases, the physical act or omissions which constitute or result in an offence under the statute will be those of servants or agents of an employer or principal on whose behalf the business is carried on. Consumer's protection, which is the purpose of statute of this kind, is achieved only if the occurrence of the prohibited acts or omission is prevented. It is the deterrent effect of penal provisions, which protects the consumer from the loss he would sustain if the offences were committed. This I apprehend is the rational and moral justification for creating in the field of public health and safety, offences of vicarious liability...¹²⁸.

Lastly, it is argued that offence of vicarious liability is quasi-criminal and punishable by fine not imprisonment and it is for the welfare of the public.

The main objection against vicarious liability in criminal law is that penal liability differs from liability in tort. Vicarious liability in tort is meant to compensate the injured party, while the main objects of

¹²⁶ Aguda, *op.cit.*, note 45 at p. 348.

¹²⁷ (1972) *AC* 151.

¹²⁸ *Ibid.*, at p. 179.

criminal law are punishment and deterrence. Thus, while torts are compensatory, criminal law is punitive. Therefore, it is harsh to impose liability on another rather than the person with the fault element. But on the other hand, since the object of criminal law is for the protection of the society, the imposition of vicarious liability in criminal law is to check harmful activities of defaulters to the complainants.

10 Prescriptions

Offences of vicarious liability should be created expressly by statute. This would leave no one in doubt that statute or indeed the legislature intended one to be criminally liable for the fault of another. This will complement the common law principle that the master could be liable, though guilty of no fault himself.

It appears that not much has been known about this crime by the local populace which is made up of illiterates and semi-illiterates and this explains why it is not frequently prosecuted in our courts. The criminal justice systems of the states are advised, to sensitize the public on the existence of the crime, which is designed to place the responsibility of the agent or servant on the master or principal, as the case may be. Although it seems sad to place criminal liability on a person without any fault, the existence of vicarious liability in criminal law currently¹²⁹ evolves principally from common law, where his servant in the course of his official duty makes a master to be liable for any wrong or misdeed, whether a criminal or tortuous acts committed. This style of liability could make the servant to be callous bearing in mind that in case of prosecution and conviction for offence from his conduct, the master as an innocent third party could be held vicariously liable. It also places him in a disadvantaged position to suffer liability for an offence he did not commit.

11 Conclusion

It is a general principle in criminal law that no person shall be criminally responsible for the act of another, which he has not

¹²⁹ *Ifeanyi v Soneh Boneh* (2000) 5 NWLR (Pt .656) 322, CA; See also *AG of the Federation v Ajayi* (2000) 12 NWLR (Pt. 683) 509, CA.

authorized or willed. Therefore, all legal systems had to some degree or other, incorporated the simple moral idea that no one should be convicted of a crime unless some measure of subjective fault can be attributed to him.¹³⁰ This is known as the principle of no liability without fault in Nigeria and it draws substantially from section 24 of the Criminal Code. Since the application of section 24 can be excluded by express wording by a latter or subsequent statute, the requirement of guilty mind can be displaced or dispensed with in such situations, which opens the doorway for the recognition of vicarious criminal liability.

¹³⁰ Okonkwo & Naish, *op.cit.*, note 34 at p. 66.