

# *Analysis of the Reasons for “Vicarious Liability” in Tort*

## *— From the Perspective of Economics*

Ruining Zhang<sup>1,a,\*</sup>

<sup>1</sup>*Economic Law College, Southwest University of Political Science and Law, Chongqing, 401120, China*

*a. m15032719743@163.com*

*\*corresponding author*

**Abstract:** There is no word for "Vicarious Liability" in Chinese law, but as an important concept in the common law system and a common situation in civil law, this article explains the reason and rationality of the establishment of Vicarious Liability from the perspective of economics. This paper explains the benefits of applying the principle of strict liability by applying the Hand formula and the minimum cost principle. To be sure, Vicarious Liability greatly reduces the cost of private transactions, which is conducive to the circulation of the market and the development of the society. Research methods involved in the paper: literature analysis, and case analysis. The study finds that although Vicarious Liability is criticized by some branch theory in the law system, it still has the rationality and necessity of its existence. The importance of vicarious liability can be found especially in the field of employment relationships and in the minor infringement.

**Keywords:** Vicarious Liability, Minimum Cost, Supervision of Minor Children, Employment Relations.

## 1. Introduction

Vicarious liability mainly means that if there is a special relationship between the actor and the third party or if there is a special relationship between the actor and the victim when the third party commits some infringement against others and causes damage to the others, the actor shall bear the tort liability to the victim for the infringement committed by the third party. In many doctrines there are arguments for vicarious liability. In some doctrines, it is believed that vicarious liability causes liability confusion and intentional tort. However, few articles consider the rationality of vicarious liability from the perspective of legal economics. This paper demonstrates the rationality of the existence of vicarious liability from the perspective of cost input and efficiency, mainly through the literature analysis and case analysis to enhance credibility. It is hoped that the application of vicarious liability can be promoted from a new perspective and that employers can be encouraged to enhance their supervision and control over their employees by demonstrating the vicarious liability that should exist in the employment relationship. It is hoped that in the future, vicarious liability can evolve into a more efficient and in line with social needs.

## 2. The establishment of the obligations of the direct infringer and the victim

### 2.1. The scope of the obligation setting and the applicable imputation principle

In China, there are two practical tort liability alternatives, namely, complete liability vicarious and limited vicarious liability [1]. Complete vicarious liability mainly refers to that: as long as the direct infringer (the third party) causes the infringement of the rights of the victim, the litigant shall bear the vicarious liability; But limited vicarious liability has relaxed the standard: The actor shall bear the tort liability of the direct infringer. However, if the direct infringer has intentional or gross negligence, the actor shall bear joint and several liability. But usually vicarious liability refers to complete vicarious liability, the limited vicarious liability in Chinese judicial practice is complementary and extended to it, and this paper only discusses complete vicarious liability. Vicarious liability is a necessary incidental result of generally strict liability. When liability is not related to people's behavior but is objectively defined risk state, the logical result is that the responsible actor bears the responsibility for the occurrence of this risk, regardless of who directly causes the damage[2]. The meaning of the principle of strict liability means that: As long as the victim has been damaged, the person who causes the accident is required to bear the damages, regardless of whether he takes measures to prevent the occurrence of the accident. The vicarious liability requires that the injury caused by the actor or the object shall be compensated by the person who has a specific relationship with the actor or is in charge of the object. In this way, the imputation principle of complete vicarious liability use should be the strict liability principle.

### 2.2. The standard for reasonable prevention

In the previous section, it was mentioned that the imputation principle of vicarious liability is strict liability. Some doctrines against vicarious liability often refer to the tort caused by the negligence of a third person, claiming that the actor should not be liable in tort at this time. The benefit of applying strict liability is that: It is up to the actor to measure the cost of prevention and the cost of liability for infringement, rather than for the court to determine whether the litigant is out of negligence--a vague, difficult standard. This can greatly facilitate the cost of judicial input. Since the "lawsuit of direct infringement" does not consider the subjective psychology of the litigant concerned, as long as the infringement is carried out in a direct and violent way, such infringement is established [3]. This makes the judgment efficiency greatly improved. In real life, when the potential victims spend more time and energy to strengthen prevention, the criminals tend to converge; At the same time, when the law strengthens the punishment for such a crime or increases the crackdown on such crimes, the criminals will also tend to converge [4]. The application of this rule to vicarious liability remains applicable.

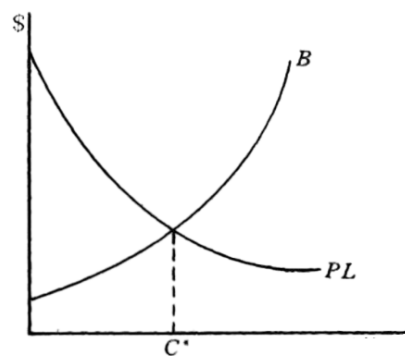


Figure 1: Hande Formula

Figure 1 can intuitively express the relevant content of Hand formula. From the perspective of Hand formula itself, this is a mathematical calculation to measure risk and benefit. It compares the prevention costs on both sides of the equation with the expected costs, which is actually a cost-benefit analysis of prevention behavior [5]. Only when the  $B < PL$ , the act of a third person is considered negligence. If it is up to the court to determine whether a third person commits the degree of attention to point C, it is undoubtedly inefficient. However, if the principle of strict liability is applied, it only needs to consider whether the loss of the victim is caused. Judging whether it is negligence and the cost of preventing the third party shall be borne by the actor of the beneficial party. Compared with the court, the litigant can better contact the prevention costs, potential consumption costs, etc. The task of the court is only to determine the appropriate tort liability to ensure that the wrongdoer will not intentionally let a third party infringe on the rights of others to profit himself because the cost of breaking the law is lower than the cost of prevention.

### 2.3. Minimum cost bearing principle

One function of law is to promote social development, and the opposition to vicarious liability is not to see the setting of vicarious liability, which just reflects the effect of law in reducing social transaction costs and improving social efficiency. The law can establish the main goal of legislation as efficiency, while the problem of fairness is transferred to the tax law and the transfer payment system[6]. In social production, the law reduces the cost of private transactions by stipulating the obligations of both parties to promote the improvement of social efficiency. Therefore, in terms of legal efficiency, the law should consider the party who can bear the responsibility at a lower cost to take more responsibility. It is called the minimum cost bearing principle. For example, in a tort dispute, if A can resolve the dispute with one unit of social wealth and B needs two units of social wealth, then the law should support A to bear the responsibility for resolving the dispute. However, it should be noted that the purpose of applying the minimum cost assumption principle is to reduce the social cost invested in dispute resolution. Caldo in his book *The Welfare of Economics Proposition and Utility of Individual Comparison* said that: a policy for some people well, but for other people damage, whether to improve the social welfare, is that "even if all the policy damage are fully compensated, others in society is still better than before" [7]. That is to say, if the legal cost is higher than the private transaction cost, then the law should not intervene in the dispute, or let the parties realize that the expected benefit of solving the problem through the law is lower than the cost to win the judgment.

## 3. Different areas of vicarious responsibility

### 3.1. Vicarious responsibility of the guardian to the ward

Under the definition of vicarious liability, a guardian should bear the tort liability of the ward to others. The main discussion here is on the vicarious liability between the minor child and the parent. From the perspective of economics, parents will invest a lot of market prime cost in their minor children to increase the possibility that their minor children can obtain more potential benefits in the future [8]. The more parents pay attention to their children, the higher the optimal investment level of their children, and the optimal investment cost at this time will be approximately equal to the total social income of the family. Parents will constantly modify their children's behavior in order to ensure that they make effective investments. From this point of view, the cost of prevention will be lower than the cost of children's own tort liability. At the same time, minor children are attached to their parents both in personality and in economy, which is also in line with the "control theory" of vicarious liability. In Gissevn Goodwill Case, in which the defendant's son damaged the plaintiff's property, the plaintiff sought compensation from the defendant's parents. The Florida Supreme

Court specifically stated that parents should be liable to their children. This also reflects the support of the common law system for vicarious responsibility.

### 3.2. Vicarious liability of employer to employee

Most of the refutation of the application of the vicarious liability doctrine in the employment relationship considers the presence of intent or negligence of the tortfeasor. In the article of Professor Zhang Minan's *Comparison of Vicarious Liability*, the concept of "four elements" is put forward [9]. Among them, the fourth element is mentioned: the actor assumes the tort control obligation to the third party. The actor shall assume the obligation to control the behavior of the third party based on the special relationship with the third party. Back to the section "Standards for Reasonable Prevention", Whether the behavior of the third person is intentional or negligent, it can be regarded as the actor failing to fulfill the "obligation to control the behavior of the third party". In Chinese law creatively puts in the judgment of the actor, the actor can recover against the third party. In this way, investment costs can be concentrated to some extent to improve social efficiency. However, it is important to note that if the employer has instructed the employee to perform activities that clearly violate the rights of others, the principle of accountability should not be applied, because it violates the vicarious liability requirement that the actor does not participate in the tort.

## 4. Conclusion

This paper mainly discusses the concept of alternative responsibility and its rationality and theoretical basis for its existence. As an important part of the tort law, the setting of vicarious liability contains considerable legal wisdom. Although there are some contents that need to be discussed, it has made a significant contribution to improving social efficiency and promoting social development. This article also has some shortcomings, because it involves economic analysis, so assume that everyone is "rational people". But in fact, in legal practice, there are some people who will violate the principle of interest first. In the section "Vicarious responsibility of the guardian to the ward", universal altruism and little attention or no attention to their children were not being considered. This paper will continue the study of the application of vicarious liability in different countries and will incorporate additional considerations.

## References

- [1] Wang Cheng, *Reflection and Reconstruction of tort substitution Liability in Civil Law, China, 2023, No.05, p. 22*
- [2] [Switzerland] Piere Widmer: *Liability for Damage to Others: Swiss Law, [He] Jaap Spier: Unification of Tort Law: Liability for Damage to Others, translated by Mei Xiaying, Gao Shengping, Law Press, 2009, p. 344.*
- [3] Lian Zekai, *The Inquiry of British Strict Responsibility -- centered on the Lai Principles British Research 2022,02, p. 103*
- [4] Yang Jingorange *Legal and economic analysis of winning telecom fraud--From the perspective of victim crime prevention cost legal Expo 2017,26, page 6*
- [5] Liu Shunjie, *"Application of Hand Formula", 2022, page 8*
- [6] Zhai Yue, *Research on the Principles of Environmental Tort Accountability from the Perspective of Legal Economics, Issue 02,2017, p. 15*
- [7] Xiao Rong, Hao Bo, *A Brief Analysis of legal and Economic Issues in Demolition--From the Efficiency perspective of Caldo and Hicks, 12,2013, pp. 27-28*
- [8] Richard A-Posner, *Economic Analysis of the Law, Little Brown Publishing Company, 1992, p. 99*
- [9] Zhang Min'an, *Comparative Research on vicarious Liability, Journal of Gansu University of Political Science and Law, No.05,2009, p. 52*