Vicarious liability and exemplary damages

Although the position is not settled in English law, there is some judicial support for the appropriateness of an award of exemplary damages against a vicariously liable employer for a tort committed by an employee.

The purpose of exemplary damages is to punish and deter. (Their availability in English law is heavily restricted, as discussed in Chapter 11.) Yet, according to some rationales governing vicarious liability (discussed earlier), a vicariously liable D is an innocent party, strictly liable, without any personal fault on its part. Hence, is it legally rational that exemplary damages, where available, should be permitted against that party? Relevant judicial opinion has been divided.

Judicial views against
In the case of misfeasance in public office, one member of the House of Lords disapproved of the notion that exemplary damages should be countenanced against a vicariously liable D:

In Kuddus v CC of Leicestershire, Mr Kuddus, C, reported to the police that property had been stolen from his flat. A police constable assured him that the matter would be investigated, but subsequently the constable forged C’s signature on a statement purporting to be a withdrawal by C of his complaint, and the investigation was closed. C alleged vicarious liability against the Chief Constable, D, for the policeman’s misfeasance in public office, and also claimed exemplary damages against D. Held: Lord Scott considered that it was ‘contrary to principle’ to punish D, as a person whose behaviour was not in any way blameworthy. No other member of the House expressed a view, because D did not take the point, so it was not actually addressed in argument.

Lord Scott’s observations were dicta only, for the case actually turned on whether exemplary damages could be awarded for misfeasance in public office. However, there were two principal criticisms noted by his Lordship, re the notion that a vicariously liable D could be liable to pay exemplary damages. First, in the absence of some personal breach of duty by the Chief Constable, there was no basis for punishing him via exemplary damages – the conduct merits punishment was
not his conduct, but that of his officers. Secondly, if the officer did not actually bear the burden of paying the exemplary damages award, then how can it be said that exemplary damages would achieve a deterrent effect, supposedly one of the rationales of an exemplary damages award?

In that light, when the Court of Appeal later came to consider a claim for misfeasance in public office in Watkins v Sec of State for the Home Dept\(^3\) (where prison officers had opened a prisoner’s correspondence with his legal advisers, in breach of Prison Rules), Brooke LJ observed that Mr Watkins 'prudently did not press for an [exemplary damages] award against the Home Office'.

Judicial views for

There have been other judicial indications by the Court of Appeal, both before and since Kuddus, that exemplary damages are available against a vicariously-liable D.

For example, where successful claims were brought against the police employer for vicarious liability, for the torts of assault, battery, false imprisonment and malicious prosecution committed by his officers, exemplary damages were awarded against that employer. In Thompson v Commr of Police,\(^4\) £25,000 in exemplary damages was awarded. Lord Woolf MR noted that, insofar as exemplary damages were concerned: the damages will be paid out of police funds; when calculating the appropriate award, employer D’s capacity to pay is a relevant factor; and that the means of the wrongdoing employee are irrelevant to the size of the award which the employer is vicariously liable to pay. In Rowlands v CC of Merseyside Police,\(^5\) a possible award of exemplary damages was withdrawn from the jury by the trial judge, but this was overturned on appeal, with £7,500 awarded. Moore-Bick LJ approved of the award for two reasons. First, the issue ‘must be answered by resort to considerations of policy rather than strict principle’ – and policy should permit exemplary damages against a vicariously-liable D where wrongs of an employee had a direct effect on C’s civil liberties, and where the police employer bore ‘public responsibility for the conduct of the officers’. Secondly, it had been assumed that exemplary damages could be recovered from a vicariously-liable defendant, ever since the Police Act 1964 rendered chief constables vicariously liable for the torts of their officers, and hence, courts ‘should be slow to disturb an understanding of the law that has existed for over 40 years’.

Exemplary damages against a vicariously-liable D in defamation cases have also been awarded without adverse judicial comment (eg, Maxwell v Pressdram Ltd\(^6\) and in Riches v NGN Ltd\(^7\)).

In Mosley v NGN Ltd,\(^8\) Eady J held that exemplary damages were not available for a claim for infringement of privacy – but remarked in dicta that vicarious liability and exemplary damages were not, in his view, incompatible (but if they were, then an appellate ruling to that effect was necessary).

The law reform corner: England and Wales

In its 1997 report, Aggravated, Exemplary and Restitutionary Damages,\(^9\) the English Law Commission favoured the general availability of exemplary damages against a vicariously-liable D, for these reasons:

- any argument that it was ‘unfair’ to visit exemplary damages upon an innocent D was equally applicable to the shifting of compensatory damages onto the vicariously-liable D;

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\(^4\) [1998] QB 498 (CA) 517.  
\(^6\) [1987] 1 WLR 298 (CA).  
\(^7\) [1986] QB 256.  
\(^8\) [2008] EWHC 1777 (QB) [197]–[203].  
\(^9\) (1997, Rep 247) [1.186]–[1.189].
Vicarious liability

- employers who were liable for exemplary damages vicariously would be incentivised to control and educate their employees;
- exemplary damages against the employee himself would not be as direct as other sanctions, such as loss of employment, disciplinary sanctions, and poor references;
- a vicariously liable D shares joint and several liability with the wrongdoing employee, and it is one of the few instances of joint tortfeasors where one D has the power to control the actions of another (the very essence of the employment relationship, per Ready Mixed Concrete), hence, the imposition of vicarious liability on the employer was not unfair;
- the ‘enterprise liability’ theory of vicarious liability meant that the employer must bear the burden of the employee’s wrongdoing, as a quid pro quo for taking the benefit of the employee’s wrongdoing – and one of those ‘burdens’ could be exemplary damages in appropriate cases.

However, where the employee had received a monetary benefit from his wrongdoing that required disgorgement via an award of restitutionary damages, the EWLC saw the issue differently: ‘the concept of vicarious liability may not apply to restitutionary damages. Can one say that an employee who personally receives a benefit by committing a tort in the course of employment renders his employer liable for the benefit he received? ... we consider that this issue is one best left for future courts to resolve, for all instances of restitution for wrongs.’

Where the employee assists another to commit a tort

§18.B An employer is not vicariously liable if its employee aids a third party to commit a tort, but the employee’s acts themselves do not comprise a tort.

No liability attaches to an employee who is involved in actions which facilitate or assist in the commission of the tort, but which, on their own, do not amount to commission of the tort (per VFS Financial Services (UK) Ltd v Euro Auctions (UK) Ltd). In that event, no vicarious liability will attach to the employer either.

In Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Dept, Mr Chong, the third party, was familiar with financing international trade. He persuaded the Credit Lyonnais Bank, C, that he was a major exporter of commercial goods to Nigeria and America, and devised a fraudulent scheme via which he obtained money from C by selling to it ‘accepted bills of exchange’. Export Credits, D, was in the business of granting insurance against the risk that foreign buyers would default in payments. Mr Pillai, a senior underwriter at D, authorised certain guarantees on behalf of D. Mr Pillai was a party to Mr Chong’s plan to deceive the bank. When Mr Chong had obtained over £10m of C’s money, he disappeared. C sued D vicariously, for the deceit committed by its employee Mr Pillai. Held (HL): D was not vicariously liable. Although Mr Pillai acted in the course of his employment when he authorised the issue of the guarantees, that was not in itself a wrongful act; and although Mr Pillai knew of the use to which Mr Chong intended to put them, it was not his act, but the acts of Mr Chong, which deceived C. According to Lord Woolf MR, ‘before there

10 ibid, [1.75]–[1.76]. 11 [2007] EWHC 1492 (QB) [76]. 12 [2000] 1 AC 486 (HL), quote at 495.
can be vicarious liability, all the features of the tort which are necessary to make the employee liable have to have occurred in the course of the employment. Otherwise there is no liability. You cannot therefore combine the actions of Mr Pillai in the course of his employment with actions of Mr Chong (which if done by Mr Pillai would be outside the course of Mr Pillai’s employment), and say Export Credit is vicariously liable for the consequence of Mr Pillai’s and Mr Chong’s combined conduct.’

**Impact on defences**

If D is vicariously liable for an employee’s wrongdoing, then D can take advantage of a finding of contributory negligence (as in, e.g., *Silverlink Trains Ltd v Collins-Williamson*[^13] or *volenti* (as in, e.g., *ICI Ltd v Shatwell*[^14]) made against a wrongdoing employee. This was discussed in Chapter 10.