

'Nuptial Knots': A Discourse on Employment Vicarious Liability Scenarios



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Introduction

The employer-employee relationship (E-ER) is in many ways akin to that of a husband and a wife; colloquially, employment is a sort of 'wedding' contract between the employer and the employee.² An employee is "a person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."³ The essence and implications of the 'nuptial knot' tied via an employment contract is a key underpinning of employment, industrial and labour

law.

"The tying of the nuptial knot", symbolic of commitment and strength, is a beautiful, meaningful and perhaps spiritual moment in a wedding ceremony that brings an old custom into present times. This nuptial element superimposes on the E-ER, party to party obligations and responsibilities. Deciphering their obligatory boundaries, as well as exuding mutual fairness and respect are essential attributes for the duo, given that human capital and a thriving E-ER are a *sine qua non* for organisational success.⁴ On the flip side, a crash in the E-ER may be

variously disruptive for the parties just like the 'demoralisation' baggage of a broken marriage.

Against the foregoing background, this article discusses differing VL scenarios arising in employment including the employer's potential VL for employee's fraud, theft or related criminal offences, suggesting inclusion of vicarious criminal liability (VCL) and the securitisation of VL via indemnities of the employer and employee contained in the contract of employment (CoE).⁵

Contract of Employment –The Root of Vicarious Liability in the Employer-Employee Relationship

The CoE, is the bedrock for the aggrieved party's enforcement rights in VL. According to a learned commentator, "It is clear that in the Nigerian approach to vicarious liability, the orthodox position is in operation and the relationship that triggers vicarious liability is contractual employment."⁶

1. The author acknowledges the helpful comments of **Afolabi Elebiju, Esq.** (Principal, LeLaw Barristers & Solicitors), to the drafts of this article. However, the usual disclaimers apply as the author is fully responsible for the views (and any errors) herein.

2. For instance, the marriage and the E-ER are both contractual, having responsibilities and duties accorded to each party and each party in either relationship has a separate legal personality at law amongst others. Also, before a marriage, the partners date each other for acquaintance and once their minds are made up, they tie the "knots" under certain terms and conditions and the extant laws. Similarly, prior to a contract of employment (CoE), employers interview a proposed employee to determine the proper fit for potential roles. Upon a *consensus ad idem*, the employment knot is tied (i.e. the CoE is entered into). Furthermore, in a marriage, a partner can ostensibly pledge the other party's credits and enter into binding contracts (e.g. for necessities) on behalf of the other and to which that other would be legally bound. Likewise, an employee might ostensibly bind his employer to certain obligations even when the latter is oblivious of the transactions. This is vicarious liability (VL) a legal concept that makes an employer liable for the wrongs of the employee, usually, when committed in the course of the employment.

3. Bryan A. Garner, 'Black's Law Dictionary', (9th ed. (2009), Thomson Reuters), p. 602. The term is also statutorily defined in **section 73 Employees' Compensation Act, No. 13 of 2010 (ECA)**, to mean: "... a person employed by an employer under oral or written contract of employment whether on a continuous, part time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the Federal, State and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy." Whilst **section 120 Pension Reform Act No. 4 of 2014 (PRA)** states "employee", "... means any person employed in the Service of the Federation, the Federal Capital Territory, a Government of a State of Nigeria, Local Government council or private company or organisation or firm." Interestingly, the **Labour Act Cap. L1, Laws of the Federation of Nigeria (LFN) 2004 (LA)** does not define an employee, although it defines both 'employer' and 'worker'. **Section 16 Industrial Training Fund Act, Cap. 19, LFN 2004 (ITF Act)** (as amended by **section 14 ITF (Amendment) Act, No. 19 of 2011 (ITFA)**) defines "employees" as meaning "all persons whether or not they are Nigerians, employed in any establishment in return for a salary, wages or other consideration, and whether employed full-time or part-time, and includes temporary employees who work for periods of not less than three months in a year." Emphasis supplied.

4. For more examples on this, see Afolabi Elebiju et al, 'Lenses: "Employers as Victims" of Inappropriate Consensual Employee Relationships (ICERs)', LeLaw Labour & Employment Newsletter (No.1), March 2021, p. 1: https://lelawlegal.com/add111pdfs/Newsletter_CORRECTED_2.pdf (last accessed: 23.03.2022).

5. A CoE is defined in **section 91(1)** as: "an agreement whether oral or written, express or implied, whereby one person agrees to employ another as a worker and that other person agrees to serve the employer as a worker." This definition requires one to reference the definition of a "worker", which is also provided in **section 91(1)** as: "any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour, but does not include..."

6. Dr. Nwudegin Chinwuba, 'An Analysis of Revamped Functionality for Vicarious Liability in Nigeria', (2020) 11 GRBPL No.2, p.64.

A CoE like any other contract is subject to the general rules of contracts. A distinguishing factor however, is its subjectivity to various statutory or legal provisions, making it an abridgement of the *laissez faire* principle. Nevertheless, the parties may agree to any form of CoE according to their desired terms to the extent that such terms are not illegal, immoral or contrary to public policy. Aside from express terms, implied terms⁷ have been said to give business efficacy to the CoE.⁸

Extent of Employer's Liability for Employee's Fraud/Theft and Related Crimes in the Course of Employment

a. Tortious Acts

Against the principle of proving fault to establish liability in tort, the sustainability of the VL concept has been hinged on the feasibility of securing compensation for the victim from a defendant who possesses the requisite financial capacity.⁹ A writer put it succinctly, "In one respect tort law requires that whoever brings on and keeps a thing that is likely to cause harm if it escapes must rein it in and keep it enclosed. At other times, it requires that a person should not only keep in contemplation persons within

close proximity but also an assurance to such persons that he would be careful in choosing who represents him or her."¹⁰

Amongst all the requisite elements to establish VL under Nigerian law, the critical questions border on the negligence or otherwise of the act or omission of the employee,¹¹ and the time and circumstances during or under which the commission of the act occur as to constitute 'in the course of employment'.¹² Given that the discourse on what constitutes 'course of employment' under VL is not novel, and the position of the law on the point is well grounded, the subject matter will not be the primary focus in this article.¹³

b. Criminal Acts

In their article, '**Mens Rea Principle and Criminal Jurisprudence in Nigeria**',¹⁴ the authors pose the question; "What of the doctrine of vicarious liability, is it relevant to Nigerian criminal law in relation to the principle of mens rea?"¹⁵ Although the concept of VCL may be viewed by some as 'a double whammy' of some sort, given the inhibitions with VL and corporate criminal liability (CCL), the

question posed is a valid one nevertheless, as the liability attribution lines get blurry in employee fraud/theft/other related acts, which are criminal in nature.¹⁶

Generally, VL does not extend to criminal act(s). English authors, Martin & Storey opined that: "...in criminal law, the normal rule is that one person is not liable for crimes committed by another."¹⁷ In Nigeria, compounding the VL dilemma, **Section 36(12) 1999 Constitution of the Federal Republic of Nigeria (as amended)** provides for the statutory creation of crimes.¹⁸ Two learned authors, have following Nigerian case law and the **Criminal Code**, opined that: "...criminal justice does not generally admit of such doctrine [i.e. VL]. This is sequel to the presumption against strict liability that a man cannot generally be liable for an offence involving mens rea which is committed by somebody else even in his control or service unless he is branded one of the participes criminis in relation to the offence charged."¹⁹

7. Including an employer's indemnities in favour of the employee as well as implied common law duties.

8. See Sam Erugo, 'Introduction to Nigerian Labour Law Contract of Employment and Labour Practice', (2019, Princeton & Associates), p.119. According to him, (at p.118) apart from the terms expressly agreed in a CoE, there are implied terms often derived from statutes and case law, which are assumed to be part of the agreement and quoting Mackinnon, LJ: "... that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provisions for it in their agreement; they would testily suppress him with a common 'oh, of course.'"

9. J. W. Neyers, 'A Theory of Vicarious Liability', Alberta Law Review, Vol.43, No.2, 07 Dec 2020 at p.326:

<https://albertalawreview.com/index.php/ALR/article/view/1254#:~:text=The%20main%20premise%20of%20the,that%20imposes%20liability%20for%20of%20fault> (accessed 28.01.2022). There, the author expresses a similar opinion about VL as, "unexplainable mystery of tort law which seemingly contradicts the pervasive regime of fault."

10. Emphasis supplied. Chinwuba, (supra), pp. 58-59. See also Kodilinye & Aluko, 'The Nigerian Law of Torts', (2nd ed., (1999), Spectrum) at p.235, where the authors depict an employer's responsibility to proximate third parties for the acts of its employee(s) as: "... a person who employs others to advance his own economic interest should be held responsible for any harm caused by the activities of those employees, and that the innocent victim of the employee's tort should be able to sue a financially responsible defendant, who can always take out an insurance policy against liability."

11. *Ibid.*, p.239. See also *Young v. Box & Co. Ltd.* [1951] 1 TLR 789, at 793, per Denning, L.J., "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."

12. See *SCM Ltd. v. HEP Eng. (Nig.) Ltd.* [2021] 11 NWLR (Pt.1788) 407 at 426H-427C, per Okoro JSC, who held that, "the legal concept of vicarious liability simply means the situation of one person taking the place of another in so far as liability is concerned. ... In other words the plaintiff must establish the liability of the servant in order to succeed against the master in an action. The requirements that will make the master liable for the acts of his servant or agent are as follows:- 1. That the servant was negligent; 2. That he was the servant of the master; and 3. That he acted in the course of his duty. See *Ifeanyi Chukwu (Osondu) Company Limited v. Soleh Boneh (Nig.) Ltd.* [2000] 5 NWLR (Pt. 656) 322, *Agbanelo v. Union Bank of (Nig.) Ltd.* [2000] 7 NWLR (Pt. 666) 534; *Iyere v. Bendel Feed & Flour Mill Ltd.* (2008) 18 NWLR (Pt. 119) 300."

13. See *Ifeanyi Chukwu (Osondu) Company Limited v. Soleh Boneh (Nig.) Ltd.* (supra), at 367A where the SC opined per Iguh, JSC that, "... where a servant commits a tort in the course of his employment. He and his master are in law equally joint tortfeasors as the law, in appropriate cases, imputes the commission of the same tort or wrongful act to both of them jointly."

14. Oraegbunam & Onunkwo, 'Mens Rea Principle and Criminal Jurisprudence in Nigeria', NAUJILJ, Vol.2, 2011, pp.225-248: <https://www.ajol.info/index.php/aujilj/article/view/82407> (last accessed 28.02.2022).

15. *Ibid.*, p.226.

16. For a detailed discussion, see Yewande Obayomi, 'Some Thoughts on Corporate Criminal Responsibility in Nigeria', LeLaw Thought Leadership, September 2017, p.1: https://lelawlegal.com/add111pdfs/Corporate_Criminal_Responsibility.pdf (last accessed 21.04.2022).

17. Martin & Storey, (supra), p.181.

18. It provides thus: "Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a state, and subsidiary legislation or instrument under the provisions of law". Examples of statutes which have provisions for CCL/corporate criminal responsibility (CCR) can be gleaned from Yewande Obayomi, (supra), at p.3.

19. Oraegbunam & Onunkwo, (supra), p.234.



The Supreme Court (SC) followed this rule in **Akpa v. State**²⁰ where Tobi JSC, delivering the lead judgment stated: “Criminal liability is personal. It cannot be transferred. This is because the mens rea or actus reus is on the accused in court and cannot be transferred to any other person not charged.”²¹ Likewise in **APC v. PDP & Ors.**,²² the SC held, per Fabiyi, JSC that “It is basic that there is no vicarious liability in the realm of criminal law. Anyone who contravenes the law should carry his own cross.”²³

Historically, under English law, an employee’s fraud or theft could not be imputed on an employer, unless the act was for the employer’s benefit.²⁴ Later on, cases like **Lloyd v. Grace Smith & Co.**,²⁵ recognised scenarios under which an employer could be held liable for the criminal acts of the employee, even if the employer is not a beneficiary of the fraudulent act.²⁶ It did not matter whether or not the fraud was committed for the master’s

benefit; the critical factor was whether or not the fraud had been committed in the course of the servant’s employment.

Under Nigerian law, although the prevalent rule is the general one as endorsed by the SC, there are divergent views on VL in fraud, theft or criminal offences. In the **SCM Ltd case**, Abba Aji, JSC (concurring with the lead judgment by Okoro, JSC) opined as follows:

“The principle of vicarious liability with its roots in the earliest years of the common law is that a master is liable for any wrong even if it is a **criminal offence** or a tortuous act committed by his servant while acting in the course of his employment. This principle of law was enunciated by Sir John Holt CJ in *Hern v. Nicholas* (C. 1700), 1 SALK 289. See also *Per Ogundare, JSC in Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh (Nig.) Ltd.* (2000) LPELR-1432(SC) (Pp. 12-14, para. F); (2000) 5 NWLR (Pt. 656) 322. Since then, this principle of common law has remained

law and its applicability to any stated facts will remain a ground of law.”²⁷

Whilst there is a dearth of reported Nigerian cases on VL in employee fraud/criminal offences, the VL principle remains a difficult and controversial issue in employers’ circles and in legal discourse globally. Some lawyers have opined that, “Many employers cringe at the thought of the rule as it is perceived as a rule that protects the interest of third parties to the disadvantage of the employer. In time past, it was unreasonable to make an employer vicariously liable for the wrongs of an employee.”²⁸ It would perhaps be even more incredulous, where the wrong is a fraud/theft/is otherwise criminal in nature.

Furthermore, some statutory provisions supplant VL, for instance where personal liability and CCL simultaneously exist for the same offence or where directors and officers are personally liable for certain breaches by a company.²⁹

20. [2008] 14 NWLR (Pt. 1106) 72 at 94F-G.

21. *Akpa v. State* (supra).

22. [2015] 15 NWLR (Pt. 1481) 1 at 73 G-H.

23. See also, *Yusuf v. FRN*, where the Court of Appeal, per Oho JCA, held thus: “The settled position of the law is that there is no transfer of criminal liability or Agency under the Nigerian Criminal Justice System.” Emphasis supplied.

24. Kodilinye & Aluko, (supra), p.248.

25. Here the House of Lords held the employer liable for the servant’s fraud despite the fact that the fraud had been perpetrated by the clerk for his own purposes and the employer was not a beneficiary.

26. This principle in *Lloyds’ case* was applied in *UAC Ltd. v. Saka Owoade* [1955] AC 130: Kodilinye & Aluko, (supra), p.249.

27. At 433C-D. Emphasis supplied.

28. Tokunbo Orimobi LP, ‘Vicarious Liability – What an Employer Needs to Know’, *BusinessDay*, 17.07.2014: <https://businessday.ng/news/legal-business/article/vicarious-liability-what-an-employer-needs-to-know/#:~:text=Vicarious%20Liability%20For%20The%20Crimes%20Of%20An%20Employee&text=Today%20an%20employer%20can%20be,that%20was%20not%20the%20case>. Last accessed 25.02.2022.

29. See Afolabi Elebiju and Sam Ngwu, ‘Anomalies: The Illogics of Section 283(c) and 20(1)(d) Companies and Allied Matters Act 2020 Directors’ Removal/Disqualification Overkill’, *LeLaw Thought Leadership*, March 2022 p.4: https://lelawlegal.com/add111pdfs/AESam_-_Director_Removal_Final_Review.pdf (accessed 22.04.2022).

However, in many other jurisdictions, the scope of the VL doctrine is being increasingly expanded to accommodate criminal liability. In **Commissioner v. MTS**,³⁰ Tepedino an employee of MTS, who sold insurance for the company, had during the course of his employment, committed several fraudulent acts (and was paid commission). It was established that the employee used his employer's office space, had access to the company's bank accounts and was using company resources to perpetuate the violations. The company argued—its unawareness of any fraudulent conduct, not partaking of any share of the commission, and that the fraudulent acts were not within the employee's course of employment amongst other things.

It was decided that Mr. Tepedino held himself out as an employee of MTS when he committed the insurance-related and fraudulent acts and that MTS was vicariously liable for his fraudulent acts. A learned author's commentary on the case is to the effect that:

"The Appellate Division ultimately affirmed this decision and invoked a well-established analysis for holding an insurance provider liable for fraud committed by its employee....Further, it demonstrates that an employer cannot avoid responsibility by turning a blind eye to the fraudulent conduct of an employee taking place in their offices and through the use of their

*resources. Insurance agents and representatives act in a fiduciary capacity and are held to a higher standard of conduct and responsibility compared to other industries. Thus, agents and representatives should continue to be cognizant of their role in insurance procurement and be sure to monitor employees for any conduct that can put the company at risk for substantial damages."*³¹ Emphasis supplied.

A Canadian court, per *Faieta, J.* in **Pallotta v. Cengarle**,³² reportedly found a real estate lawyer vicariously liable for his (long time trusted) clerk's mortgage fraud scheme as well as for breach of trust. By false representation, she received C\$200,000 from the Plaintiffs on the impression that the amount would be lent to a local land developer, but she used same for her own purposes. Her employer (Mr. Cengarle), denied responsibility in all the actions. The Court imposed liability on the employer taking into account several policy considerations set out by the SC of Canada.³³

In India, the realms of VCL are reportedly made up mostly of white collar crimes; and that debates on VL have been focused on the applicability of the rule, when the laws creating the offences are silent. The commentator emphasising the Indian SC's reliance on the decision stated that;

"In Tesco Supermarkets Ltd. v Natrass, where it was held that, in the

absence of a specific statutory or common law exception, the principle of corporate criminal liability was not based on the vicarious liability. Instead, it was based on the concept of attribution. However, it's true that a company cannot think and act on its own as it is a juristic personality. The acts are done through certain of its employees. And therefore, the mental states and actions of its employees are attributed to the company.

*This is a legal fiction which was required in order to the separate legal personality of the company to sustain itself over a period of time. Otherwise, the company would not be able to sign contracts, negotiate with business partners, acquire property, sue and be sued and make public disclosures. Hence, it is followed from Tesco Supermarkets case that corporate criminal liability is **not a species of vicarious liability but is a species of attribution** of natural actions and states of minds to artificial entities."³⁴*



30. No. A-297-19, (N.J. Sup. Ct. App. Div. Nov 18, 2021), cited from Lawrence B. Berg, 'Risks from Employee Fraud: Vicarious Liability Concerns for Insurance Agencies', Marshall Dennehey, 30.11.2021: <https://marshalldennehey.com/articles/risks-employee-fraud-vicarious-liability-concerns-insurance-agencies> (accessed 25.02.2022).

31. *Ibid.*,
32. See, Glenn Gibson et al, 'Ignorance of Fraud is No Defence: Employer Vicariously Liable for Rogue Employee', Chambers Global Practice Guides, 13.10.2020: <https://www.canadianfraudlaw.com/2020/10/ignorance-of-fraud-is-no-defence-employer-vicariously-liable-for-rogue-employee/> (last accessed 28.02.2022). Court file CV-16-56337 released 27.02.2020.

33. *Ibid.* The considerations are as follows: "1. Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. 2. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires. 3. The fact that wrongful acts may occur is a cost of doing business. 4. Faced with two faultless parties, a much stronger justification exists for placing the risk of loss on the party who introduced the risk and is better able to control that risk."

34. Soumya Bajpai, 'No Prosecution Against Directors for Operational Issues: Concept of Vicarious Liability', Enterslice, 27.04.2020: <https://enterslice.com/learning/concept-of-vicarious-liability/#:~:text=Vicarious%20criminal%20liability%20in%20Indian,the%20offences%20of%20the%20company> (accessed last 03.03.2022).

Rationale for the Applicability of VL to Crime

A major argument against the applicability of VL in fraud/theft etc., is that which is made when considering the impact of the *mens rea* doctrine. In a way, this mirrors the perspective from the VL-tort angle, that generally there is no liability without fault. There is no gainsaying that nearly always, the presence of both the physical (*actus reus* or guilty act) and the mental (*mens rea* or guilty mind) elements are required to establish a crime – except in strict liability and VL scenarios. Furthermore, it is incontestable that *mens rea* cannot be transferred from the actor to the defendant-employer/any other person.

In the opinion of the present writer, what is however arguable is that transferring *mens rea*, is not the essence of VL. VL does not seek to transfer the state of mind of the actor/employee to a non-participant defendant/employer. What VL does is

firstly, to establish the culpability of the actor (this more likely than not requires establishing the actor's *mens rea*) and then seeks to transfer the compensatory burden from the actor/employee and impute same to the defendant/non-participant employer. This burden-imputation can be justifiable under Neyer's indemnity theory mentioned earlier via the implied contractual obligation of the employer to his employee.³⁵

Another point is that, although there is no doubt that the two concepts are intertwined there appears to be a transposition of the terms CCL and VL. This transposition appears to bring a lot of confusion and misplacements. VL does not always equate to or involve CCL and *vice versa*.

The distinction between criminal fraud and civil fraud may also be another angle to look at the VL concept. It has been said, that although many people equate fraud with theft, there is a distinction, and

that a distinction also exists between criminal fraud and civil fraud. *"The basic difference between criminal fraud and civil fraud lies in who is pursuing the legal action in the case. A single act of fraud can be prosecuted as a criminal fraud by prosecutors, and also as a civil action by the party that was the victim of the misrepresentation."*³⁶

This suggests that following the non-applicability of VL in criminal matters, the employer's VL would tilt in one direction or the other. This fact would appear to put the employer in an even more advantageous position against an employee. The employer would prefer a criminal flavor in which case VL would never be established against the employer as opposed to a third party/customer pursuing a civil fraud matter against the employee. This argument sounds even more plausible given that there is a mutually beneficial relationship between the employer and the customer for which the employee could be 'sacrificed'.



35. See Neyers, (*supra*), p.326, where the writer opined that, "If this article has succeeded, vicarious liability will no longer be an unexplainable mystery of tort law which seemingly contradicts the pervasive regime of fault, but rather it will be seen as an application of the contractual concepts of subrogation and indemnity to the particular relationship between employee, employer and tort victim. If this is right, then it also follows that the common law doctrine of vicarious liability is explicable, despite repeated claims to the contrary, as a coherent manifestation of the principles of corrective justice."
 36. 'Criminal Fraud v. Civil Fraud: What's the Difference?', Bochetto Lentz, 23, 03, 2015; <https://www.bochettoandlentz.com/criminal-fraud-vs-civil-fraud-whats-difference/> (accessed 25.02.2022).



Conclusion

In recent times, within the Nigerian jurisdiction an upsurge in media reports about potentially VL claims can be perceived. The pervasive notion of no consequences for wrong doing has also been on an alarming increase. The dimensions of this are multifarious: alleged fraud by employees targeted at their employer's customers, medical cases such as death resulting from negligently conducted surgical operation, potential parental liability cases like alleged arson committed by

a minor resulting in multimillion naira losses to an Abuja supermarket in 2021.

Also, are cases related to sexual harassment by employees as well as inappropriate consensual employee relationships.³⁷ Due to the multiplicity of situations arising, the need for an expansion in the scope of VL within the Nigerian jurisdiction, and a departure from the 'forgiving' cultural and religious attitude to civil and criminal wrong, are inevitable.

As similarly discussed elsewhere, the E-ER counterparts may take appropriate protection measures by having indemnification clauses in their CoEs for subrogation against 3rd party VL claims and the employers for the benefit of the employer and the employee respectively.³⁸ Parties can thus be held accountable for their actions. The domino effect of this is the tendency to serve as a greater incentive for better employee behavior, since the employer as a larger economic unit is better positioned to efficiently organise, monitor and discipline its staff.

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37. Afolabi Elebiju et al, (*supra*), p. 4. Sex for marks scandals in tertiary institutions and ICER relationships between academic staff etc.

38. See Neyers, (*supra*), at p.287, "It is proposed that the solution to the puzzle of vicarious liability rests within the contractual relationship between employer-employee and not the relationship between the employer and the tort victim." It was further submitted (at p.301) that when VL is examined with an E-ER contractual lens, "a compelling justification for the doctrine can be found ... in the employer's implied promise in the contract of employment to indemnify the employee for harms (including legal liability) suffered by the employee in the conduct of the employer's business..."