Protecting Employees with HIV/Aids at the Workplace: A Vicarious Liability Approach

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1 INTRODUCTION

Since the beginning of the HIV epidemic, more than sixty million people have contracted HIV[1] and nearly thirty million deaths have been attributed to HIV-related causes.[2] Currently there are thirty-four million people now living with HIV/AIDS,[3] of whom twenty-three million five hundred thousand reside in sub-Saharan Africa. The macro-economic effect of HIV in the workplace is substantial. HIV-related absenteeism, loss of productivity and the cost of replacing workers lost to the AIDS pandemic threaten the survival of businesses and industrial sectors in the ever increasing competitive global market.[4] HIV/AIDS does not only affect impoverished families, communities and a large portion of the urban population, it also affects the workforce base of businesses.[5]A crucial issue for employers seeking to promote equal opportunity in emerging markets is the question of how HIV/AIDS affected employees are treated.

A significant cause for concern is the management of occupational exposure to HIV/AIDS. According to Mangione,[6] occupational exposure to HIV/AIDS remains one of the biggest threats in the labour industry. Medical staffs were identified as the most susceptible to exposure.[7] Statistics of a cross-sectional survey revealed that nineteen percent of respondents were

[1] Statistics: Worldwide T*he Regional Picture* http://www.amfar.org (last accessed August 2014).
[2] Ibid.
[3] Ibid.
[4] For macroeconomic impact on economy see http://www.un.org. (last accessed August 2014).
[5] Ibid.
[6] Mangione, Gerberding and Cummings "Occupational exposure to HIV: frequency and rates of underreporting of percutaneous and mucocutaneous exposures by medical house staff" *American Journal of Medicine* (1991) 85-90.
[7] Ibid.

accidentally exposed to HIV/AIDS infected blood.[8] Necessary legal intervention seems necessary in managing occupational exposure to HIV/AIDS. Common law places a duty on employers to provide safe working conditions for their employees.[9] This duty was explained in the case of *Van Deventer v Workmen's Compensation Commissioner,*[10] where the court held that an employer owes a common law duty to a workman to take reasonable care for their safety. In addition, employers are statutorily bound to provide a safe working environment free of risk to their employees.[11] Failure to adhere to these duties could render an employer liable.Currently, most employees are aware of recourse in terms of the Compensation for Occupational Injuries and the Diseases Act,[12] but most remain unaware of their right to claim through civil avenues. Notwithstanding the direct liability that may accrue to an employer for failure to provide a safe working environment, such employer can further be joined indirectly in an action based on an employee's intentional or negligent harming of another employee. The latter form of joinder, commonly known as the doctrine of vicarious liability, is infrequently applied in the South African labour industry. This is due to a degree of unawareness and ignorance on the part of the employees leading to many employers escaping liability for third party exposure claims.

The article seeks to explore the possible remedies available to HIV infected employees who have sustained occupational injuries in the workplace. Despite statutory and common law demands on employers to provide a safe working environment, there appears to be an increase in the number of HIV/AIDS occupational transmission cases worldwide. The writer in seeking to provide a clearer framework in dealing with such cases, will recommend a vicarious liability approach as a possible solution in dealing with an employee's right to claim damages.

[8] Ibid.
[9] Venter, Levy, Conradie and Holtzhausen *Labour Relations in South Africa* (2009) 177.
[10] *Van Deventer v Workmen's Compensation Commissioner* 1962 4 All SA 64 (T).
[11] S 8 *(1)* of the Occupational Health and Safety Act 85 of 1993 states " Every employer shall provide and maintain, as far as reasonably practicable, a working environment that is safe and without risk to the health of his employees." S 2(1) and s 5(1) of the Mine Health and Safety Act 29 of 1996 resonate these provisions. Creating the obligation on the employer to provide as far as practicable a safe working environment which includes minimising the risk to exposure of HIV infection.
[12] Compensation for Occupational and Injuries and Diseases Act 130 of 1993.

2 VICARIOUS LIABILITY: A THEORETICAL UNDERSTANDING

In an attempt to better understand the doctrine of vicarious liability, it is important to analyse the common law position and demarcate all the prerequisites required for a claim to succeed. An analysis of local and international case law is crucial to creating a broader understanding of the scope and application of this particular doctrine. As previously stated, occupational exposure to HIV/AIDS remains a threat to the industry and little knowledge is available on recourses available to an aggrieved party for contracting of the virus. The contracting of the virus may occur during personal injury or through a needle stick injury. Further, although improbable, a third party can contract the virus through the negligence of an HIV positive employee. Joining an employer through vicarious liability for the actions of an employee is conceivable provided certain requirements.

2 1 Background

In South Africa, it is trite law that the employer bears the responsibility for unlawful acts committed by employees during the scope of their employment. An aggrieved third party may claim damages from the employer despite the employer not being at fault in any way. The unlawful conduct of the employee can be imputed to the employer.[13] Vicarious liability is an exception to the basic premise of the law of delict that fault is a prerequisite for liability.[14] Accordingly, it can be construed that a master is held absolutely liable as opposed to strictly liable for delictual acts. The latter form of liability requires the plaintiff to prove a wrongful act on the part of the defendant which results in harm or damage. The concept of absolute liability renders the defendant liable without any proof of wrongfulness on their part.[15] Initially foreign to South African law, the vicarious liability doctrine has been borrowed from English law.[16] The rationale behind the doctrine of vicarious liability lies in the need to provide the victim with recourse against a defendant of substance who is able to pay damages.

[13] Vettori *Law, Democracy and Development* (2012).
[14] Ibid.
[15] Scott *The Theory of Risk Liability and its Application to Vicarious Liability* (2009).
[16] Marsellus, Botha and Millard 'The past, present and future of vicarious liability in South Africa' (2012) 45 DeJure 225.

2 2 An Evaluation of Relevant Theories

There have been many different theories attempting to explain the dynamics of the vicarious liability doctrine. Many believed that vicarious liability was aimed at faulting the employer's discretion in selecting the employee whilst other explanations emanated from the interest and profit theory,[17] the solvency theory, and the risk and danger theory.[18] Anglo-American writers have attributed justification of the vicarious liability doctrine to the implication of the loss-distribution principle.[19] This principle is commonly linked with the concept of enterprise liability, which dictates "that a person, who for his own purposes creates a substantial risk of damage to other people, can justifiably be saddled by law with responsibility for the materialization of the risk without having to prove fault on his part."[20] The loss-distribution principle was introduced to clarify the introduction of the employer's liability and workmen's compensation statutes. The initial attempt of liability with fault proved to be problematic as modern advancements in technological, social, economic and industrial fields posed a threat to the sustenance of the fault doctrine. Plaintiffs found it difficult to accrue blame to a specific person as the products and activities increased in the industrialised world.[21] The sociological approach demanded that the party undertaking the dangerous activity be burdened with the responsibility for any harm caused, thereby holding the employer liable as they gained economic benefits from the activities. Many academics dispute the rationale and basis for holding the employer liable and have rendered several arguments in substantiation of their opinions. Van der Walt[22] has proposed that the risk liability theory replace the "fault theory" as a probable basis for holding the employer liable through vicarious liability.[23]

The argumentative risk liability theory as occasioned by the control aspect can also form a crucial underlying principle of the doctrine. According to this theory, one person having to perform services or a duty on behalf of another person upon the latter's instructions or with their

[17] The profit theory is not widely held among writers. Its failure was based on the criticism that economic advantage could not serve as a satisfactory criterion for liability in law.
[18] Marsellus op cit at 307.
[19] Scott op cit at 306.
[20] Flemming "An Evaluation of the fault concept" 32 *Tennessee LR* 394.
[21] Scott op cit at 306.
[22] Van der Walt *Strict Liability in the South African Law of Delict* (1968).
[23] Scott op cit at 306.

knowledge enhances the possibility of damage done to a third party.[24] By engaging in a relationship with the person, the instructing party is thus assuming the risk as affected by association. Most international courts are now of the strong opinion that the employer should bear the liability for any faults arising out of their negligent employees' conduct. In the case of *Imperial Cold Storage v Yeo*[25], it was held that "it is for public advantage that the loss should fall on that one or two who could most easily have prevented the happening or the recurrence of mischief."

Overlooking certain visible attributes will not form a clear justification to exonerate an employer from liability. The case of *Victor v Logie*[26] reiterated the absolute liability placed on an employer despite fault being absent. Graham JP categorically declared that it would be regarded as a dangerous precedent if he allowed the owner of the vehicle to escape liability for the damage, where such damage was occasioned by the negligent driving of a vehicle by an employee whilst under the influence. He believed that as soon as the drunken status of the driver was established, very little evidence would be required to establish the "master's" liability. This ruling was based on the employer's negligence in being inattentive to the driver's intoxication problem. Searle JP took up a parallel view two years later in the case of *Penrith v Stuttaford*,[27] where he stated that it is unreasonable to allow the owner of a vehicle to escape liability for damages arising from his chauffeur's negligent driving, despite the owner transferring the vehicle to another for purposes of a trip. The considerable risk liability principle became an influential factor in assisting the court in arriving at its decision. The fact that the owner was unaware that his chauffeur was a dangerous driver was irrelevant. Evidently on an international level, the risk liability doctrine is fully operational and offers no justification for negligence and ignorance on the part of the employer.

[24] Ibid.
[25] *Imperial Cold Storage v Yeo* 1928 CPD 432.
[26] *Victor v Logie* 1923 EDL 233.
[27] *Penrith v Stuttaford* 1925 CPD 154.

3 VICARIOUS LIABILITY IN SOUTH AFRICA

Initial reluctance to apply the risk theory in South Africa led to South African Jurist Barlow questioning its integration into the South African legal system.[28] As the theory was commonly being applied without formal recognition, Barlow asserted "...the question to be faced is not the fact that the risk-theory is only recognized to a very limited extent, but rather that its increased application is a matter of concern." Barlow's plea for greater recognition did not go unheeded as a glance at today's legislation reveals formal integration of the theory. Despite tacit application, conflicting views still manifest themselves regarding fault as a prerequisite to delictual liability. South African law is indicative of the extent to which the doctrine of fault still dominates legal theory. At the same time, South African law poses a strong opposition to the recognition of the risk principle as an independent new ground of delictual liability. Nevertheless, vicarious liability has formed an essential part of delictual law, proving the risk theory operational and employable. An international look at the doctrine of vicarious liability governing USA reveals similar scope and application as that of the doctrine of vicarious liability in South Africa. This is based on the original derivatives from common law. In America, a delictual action is classified as a tortious act (tort.)[29] Parallel to the doctrine of vicarious liability runs a similar doctrine known as *respondeat superior* ("let the master answer").[30] This legal doctrine, which is recognised by common and civil law, states that in many circumstances an employer is responsible for the actions of employees performed within the course of their employment. The distinct difference between the doctrine of vicarious liability and *respondeat superior* is that the latter extends to principle-agent relationships.[31] USA recognises two main requirements to succeed with a claim based on vicarious liability. First and most importantly, the wrongdoer must be acting as a servant or employee of the employer; and secondly the tort. act must be committed during the course of employment.[32] In South Africa, strict emphasis is placed on the element of fault being complied with. In USA, the position is more relaxed and liability is

[28] Scott *The Theory of Risk Liability and its Application to Vicarious Liability* (2009).

[29] Wikipedia defines vicarious liability as a strict secondary liability that arises under the common law doctrine, namely: "the responsibility of the superior for the acts of their subordinate, or in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator."

[30] Wikipedia "Vicarious Liability" http://en.wikipedia.org/wiki/vicarious_liability (last accessed in July 2014).

[31] Ibid.

[32] The one exception permitted under the doctrine of vicarious liability is the 'coming and going rule' which states that the daily commute is generally considered to be outside the scope of employment; however, in contrast, if an errand is run for an employer which takes them away from their regular workplace, the employer may be held for injuries occurring during the commute. See *Moradi v Marsh USA, Inc*- Cal.Rptr.3d-2013 WL 5203485.

imposed though the risk liability theory on an employer for intentional and incidental actions of the employee causing injury to a third party, employee or stranger.[33]

An employer in the USA is further held liable vicariously for an employee's breach of a statutory duty, differing from the common law duty imposed on employers as provided for in South Africa. Consequently, the employer can be held liable for the breach of a statutory duty even though the duty is owed by the employee personally and individually. This duty has implications in the workplace with regard to harassment.[34] The case of *Lister v Hesley Hall Ltd*[35] was monumental in establishing that an employer cannot avoid liability by showing that an employee engaged in intentional and unauthorised wrongdoing. Since the Lister case[36], the approach taken by the courts has expanded in determining the circumstances for the applicability of vicarious liability and the criteria has been broadened.

In South Africa, statutory labour recognition has ensured that vicarious liability claims do not indemnify the employee from third party claims against him or her. S 36 of The BCEA[37] affords authority to an employer to deduct monies from the employee's remuneration as a mode of compensation for the employer's loss or damages suffered. However, before this can be executed, certain requirements need to be met. The employee should be given reasonable opportunity to show why the deductions should not be made. The total amount deducted should not exceed the actual amount of the loss or damage, and the total deductions from the employee's remuneration should not exceed one-quarter of their remuneration.[38] In order to successfully impose legal liability to an employer through vicarious liability, certain prerequisites need to be considered. The undermentioned three fundamental requirements form the basis of a vicarious liability claim and each must be met in its entirety met before one arrives at apportioning such strict liability on the part of another. The absence of one or more of these requirements would see the withdrawal of vicarious liability claims against employers.

[33] Law teacher "Vicarious Liability:Free Tort Law Study Guide" http://www.lawteacher.net/tort-law/vicarious-liability.php (last accessed in July 2014).
[34] See *Majrowski v Guy's and St Thomas's NHS trust* [2006] UKHL 34.
[35] *Lister v Hesley Hall Ltd* [2001] UKHL 22.
[36] *Lister supra above.*
[37] S 36 of the Basic Conditions of Employment Act 75 of 1997.
[38] Ibid.

3 1 Establish Employ

It must be established that the person who committed the delict was in fact in the employ of the employer at the time the delict was committed. Innes JA stated in the historic case of *Mkize v Martens*[39] that:

> "A plaintiff who seeks to make a master liable for the negligent act of a servant must prove the servant was acting in the course of employment. That onus may conceivably be discharged by inference from established facts."

In terms of the LRA[40] an employee is defined as:

> "(a)any person excluding an independent contractor, who works for any person or for the State and who receives, or is entitled to receive any remuneration (b) any other person who in any manner assists in carrying on or conducting the business of the employer."

Remuneration has been defined as any payment in money, in kind, or both in money and in kind made or owing to any person in return for that person working for any other person, including the State. The term remunerate bears the corresponding meaning. Whilst the majority of matters involving vicarious liability deal with the relationship between employer and employee, the relationship is deemed to be a contractual relationship where one party exercises authority over the other. The definition specifically precludes an independent contractor from facing the repercussions of the doctrine of vicarious liability.[41] The dividing line between the contract of employment and the contract for services in particular is not always easy to draw, as demonstrated in the cases of *Lordining & Stevenson* and *Jordan & Harrison v Macdonald & Evans*[42] in which the court remarked: "It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference [between it and the independent contractor] lies."

In an attempt to assist the courts in distinguishing between an independent contractor and an employee, the legislature has enacted two sections.[43] S 200A (1) of the Labour Relations Act[44]

[39] *Mkize v Martens* 1914 AD 382 at 319.
[40] S 23 of The Labour Relations Act 66 of 1995.
[41] See *Langley Fox Building Partnership (Pty) Ltd v De Valance* 1991 1 SA 1 (AD) and *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).
[42] *Lordining & Stevenson, Jordan & Harrison v Macdonald and Evans* 1952 1 TLR 101.
[43] S 83 *(A)* of The Basic Conditions of Employment Act 75 of 1997 and S 200 *(A)* of the Labour Relations Act 66 of 1995.
[44] The Labour Relations Act 66 of 1995, s 200 *(A)*(1).

contains a number of presumptions indicating that a person is an employee. The clause reads: "Subject to the presence of factors of manner and hours worked, affiliation to organisations, economic dependence and provision of own tools, a worker is deemed an employee until the contrary can be proven."[45] In the case of *Stein v Rising Tide Productions CC*,[46] the court stated that the general rule is that an employer is not liable for the negligent wrongdoing of an independent contractor. Liability may be imputed only if the employer was personally at fault, leading to the negligent injuring of a third party. It was decided that should an employer be responsible for ensuring that the execution of work not be performed according to regulated safety standards, then the employer is indeed liable.[47]

Uncertainty still exists in relation to the distinction between independent contractors and employees despite general rules being endorsed. In an attempt to clarify the uncertainty, several judicial tests have been recognised. Although not fully adopted due to reservations about the effectiveness, most courts use these tests as guiding authority.[48] Industrial courts have found these tests to be operational especially in cases of unfair dismissal.[49]

[45] "Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:(a)the manner in which the person works is subject to the control or direction of another person;(b)the person's hours of work are subject to the control or direction of another person (c)in the case of a person who works for an organisation, the person forms part of that organisation;(d)the person has worked for that other person for an average of at least 40 hours per month over the last three months;(e)the person is economically dependent on the other person for whom he or she works or renders services; (f)the person is provided with tools of trade or work equipment by the other person; or (g)the person only works for or renders services to one person."

[46] *Stein v Rising tide productions cc* (2002) 23 ILJ 2017 (C).

[47] "The general rule is that an employer is not liable for the negligence or the wrongdoing of an independent contractor employed by him or her, except where the employer has in some way been personally at fault in regard to the conduct of the independent contractor which has caused harm to a third party. An employer will therefore not be able to shelter behind the fact that the wrongdoer was an independent contractor or that the wrongdoer was hired from a temporary employment service, if the employer itself is responsible to ensure that the work executed by an independent contractor or temporary employee is performed safely and adequately."

[48] See *R v AMCA Services Ltd and another* 1962 (4) SA 207 (A) where the appellate division rejected the organisation test on the basis that "… it created more questions than answers". This test was dismissed by the court as being too vague.

[49] See *Whitcutt v Computer Diagnostics Engineering (Pty) Ltd* 1987 8 ILJ 517 (IC) also see *Long & Another v Chemical Specialties Tvl (pty) Ltd* 1987 8 ILJ 523 (IC) ; *Maubani v African Bank 1987 8 ILJ 517 (IC) ; Rossouw v Suid-Afrikaanse Mediese Navorsingsraad* 1987 8 ILJ 660 (IC).

3 2 The Control Test[50]

This test focuses on the element of control exercised by the employer over the employee. The purpose of the control test is to establish whether one party controls the activities of another. Traditionally the power to control has been the trademark of an employment contract. This implies that prescriptions are not only made regarding what should be done but also where and when it should be done. The ambits of this test were clearly mandated by *De Villiers CJ* in the case of *Colonial Mutual Life Assurance Society Ltd v Macdonald*[51] where he stated:

> "One thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract."

As highlighted in *Macdonald*,[52] mere prescription of duties is not entirely sufficient to constitute employment status. A degree of supervision needs to be present, regulating the manner and mode of the work conducted. This leads to an inherent weakness occasioned by the need for certain workers to require a certain degree of independence in the performance of their tasks. After much deliberation it was found that the employer need not have absolutely authority over the employee, but merely exercise some degree of control in order to essentially fulfil the requirements.[53] Confusion should not be created between choosing to refrain from exercising the right to supervision and absence of the requirements of an employment relationship. In the case of *R v AMCA* Services and another,[54] Schreiner JA remarked that the mere fact that the employer does not choose to exercise that right does not render the contract something other than one of employment.

The courts are generally less assertive in the application of the control test with reference to vicarious liability cases involving labour brokers, as seen in the case of *Midway Two Engineering & Construction Services v Transnet Bpk*.[55] The Supreme Court of Appeal held "for the purposes of establishing vicarious liability in cases where the employee who had caused the

[50] Commonly referred to as either the supervision test or control test see *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* 1947 AC 1.
[51] *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 at 434-435.
[52] Ibid.
[53] Macdonald supra note 335. See also *R v Feun* 1954 (1) SA 58 (T) and *Rodrigues v Alves & others* 1978 (4) SA 834 (A).
[54] See *R v AMCA Services Ltd and another* 1962 (4) SA 207 (A).
[55] *Midway Two Engineering & Construction Services v Transnet Bpk* (1998) 19 ILJ 752 (SCA).

damage was supplied by a labour broker, the control test is outmoded". A multifaceted test is required which takes into account all relevant factors to establish whether as a matter of policy and fairness the employer of the labour broker was more closely associated with the risk-creating act.

3 3 The Organisation Test[56]

The courts' dissatisfaction with the control test led them to investigate another form of testing. The organisation test was created as a more literal means of analysis. It was originally developed by Lord Denning in the case of *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans*.[57] Lord Denning stated that:

> "under a contract of service a man employed as part of the business and his work is done as an integral part of the business but under a contract for services his work, although done for the business, is not integrated into it but only accessory to it."[58]

The underlying principle of this test was that the more the worker was integrated into organisation, the more likely they could be considered an employee. The test was frequently applied due to limited knowledge on the interpretation of integration and organisation. South Africa adopted the approach. According to this test, analysis needs to be conducted to derive the extent to which a worker is integrated into the employer's organisation. The rationale for this approach was based largely on the need for union subscriptions of permanent employees. This test aimed to eliminate employees being portrayed as independent or temporary contractors as a smokescreen by employers to escape liability.

3 4 The Dominant Impression Test[59]

The control test and organisation test were then combined as subsidiary requirements to provide a basis for the dominant impression test. In terms of this test, the relationship between the parties was viewed as a whole and a conclusion was derived from viewing the whole arrangement. After all the factors were viewed, the court had to decide whether the dominant impression created was

[56] *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans* (1952) 1 TLR 101.
[57] Ibid.
[58] Ibid.
[59] Also known as the multiple test, guidelines derived from the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* (1968) 2 QB 497.

that the person performing their duties is deemed an employee. The Appellate Division approved this approach.[60] Though the courts did not stipulate what procedures may be included when analysing the relationship, guidance was extrapolated from the English case of Ready Mixed Concrete.[61] Mackenna J set out three possible components to be met which were indicative of a service contract.[62] Firstly, a servant should agree on a wage or form of remuneration in exchange for the provision of their services. Secondly, the express or implied agreement of performance, subject to sufficient degree of control, should be present. Lastly, the nature of the contract should be consistent with a contract of service. This approval was reaffirmed in the South African case of *Smith v Workmen's Compensation*.[63] The courts found the following indications applicable in determining the distinction:

1) The right to supervision;
2) The dependence of the worker on the employer in performance of duties;
3) Whether the worker is required to devote a specific time to his/her work;
4) Whether the worker is obliged to perform his/her duties personally;
5) Whether the worker is paid according to a fixed rate or on commission;
6) Whether the worker provides his/her own tools; and
7) Whether the employer has a right to discipline the worker.

Despite acceptance and application, there has been some degree of criticism on the basis that it omits the central question, i.e. the determination of a particular contract being one of employment. It needs to be established whether the dominant impression gained from the relationship in question is in fact a contract of employment. The test gives no indication of the nature of those features.

[60] This approach was followed in the case of *Ongevallekommissaris v Onderlinge Versekering- genootskap AVBOB*1976 (4) SA 446 (A).
[61] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance (1968*) 2 QB 497.
[62] "A contract of service exists if… three conditions are fulfilled. (i) The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with being a contract of service."
[63]*Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).

3 5 The Economic Test

Although not a commonly employed test, this test can be seen as tailored to modern working conditions and involves the identification of which party is benefitting from the services rendered. The court proposed that the test should entail asking whose business it is, and whether the party performing the work or rendering the service is carrying on business for themselves and on their behalf and not merely for another.[64] The economic test can be seen to be consistent with the Anglo-American understanding and application of the risk liability theory.

3 6 Conduct Amounting to a Delict

The conduct or act must amount to a delict occasioned by a third party suffering a loss or placed under prejudice. A delict is defined as a civil wrong or more concisely as wrongful and blameworthy conduct which causes harm to a person. The civil wrong must be an actionable one, resulting in liability on the part of the wrongdoer.[65] The most common delictual claims dealt with are motor vehicle collisions and assault charges. An employer is deemed vicariously liable for their employees' actions when both parties are joined as defendants in the action. Full payment of the plaintiff's claim by either party absolves the other from having to make payment.

In order for an employee to succeed with a claim in delict, certain prerequisites need to be met. It must be established that a wrongful act was committed. This constitutes an unlawful act which causes prejudice to another. Fault in the form of negligence or intent needs to be shown. The element of causation needs to be met compelling the plaintiff to show a connection or causal link between each element of the cause of action. Lastly, damages need to be substantiated. Given the purpose of the action being based on patrimonial loss, it is necessary for the plaintiff to show the actual loss suffered.[66]

3 7 Establish that Delict Committed During Course and Scope of Employment

It must be established that the employee committed the delict during the course and scope of his or her employment. The core requirement to be met in succeeding with a claim of vicarious liability is proving that the delict was committed during the course and scope of employment.

[64] See the case *of Montreal V Montreal Locomotive Works* (1947) 1 DLR 161 for courts proposal.
[65] Wikipedia "South African law of delict" http://en.wikipedia.org (last accessed in July 2014).
[66] Pete, Hulme, du Plessis and Palmer *Civil Procedure A Practical Guide* 2 ed (2006).

The test is whether the employee at the time of the alleged wrongful conduct was conducting the affairs of the business or doing the work of the employer.[67] There is no general rule determining whether the employee acted within the course and scope of employment as it is largely dependent on the facts of each case. Differing cases have presented differing judgments, which has resulted in differing views on properly defined parameters or guidelines in interpreting course and scope of employment. The courts, in an attempt to clarify the ambiguity, have developed certain sub-rules. In the case of *Feldman (Pty) Ltd v Mall*,[68] the court defined core requirement in a deviation case as "a question of degree with regard to space and time when determining if the act of an employee falls within the scope of employment or not".

It should be noted that not every act of an employee committed during the time of employment which is advancement of their personal interest or for the achievement of their own goals necessarily falls outside the scope of their employment. The courts held in the case of *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport*[69] that the determining of liability of the employer must depend on the nature and extent of the deviation. Should the deviation be so excessive that it cannot be reasonably said that the employee is exercising the functions for which they were appointed, nor can it be said that they were carrying out some instruction for their employer, then the employer ceases to be liable for any delicts committed. The court further added that consideration of the facts will be taken into account on a case to case basis.[70]

The courts reiterated[71] that the test for activities within the course and scope of employment is a subjective-objective one. The court in *Minister of Police v Rabie*[72] explained the dynamics of the standard subject-objective test as follows:

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of employment, and that in deciding whether an act by the servant does fall, some reference is to be made to the servant's intention[…] The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's

[67] See *Minister of Law and Order V Ngobo* 1992 (4) SA 822 (A) and *Minister of Police v Rabie* 1986 (1) SA 117 (A).
[68] *Feldman v Mall* 1945 AD 732.
[69] *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport* 2000 ILJ 2585-2588 D-F.
[70] *See African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 2 SA 437 (A) with regard to this matter.
[71] *Minister* of *Police v Rabie* 1986 1 SA 117 (A).
[72] Ibid.

> acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."

Although the subjective-objective test has been less prominently applied in recent years, the courts still utilise the principles in deciding on vicarious liability matters.[73]

Vicarious liability can be inferred in cases where a servant acted for his/her own benefit contrary to the prohibition of his/her master. In such cases the liability of the master depends solely on the nature of the prohibition. If the prohibition is aimed at restricting certain modes or manners of performance of authorised work, the master may still be held liable. If the prohibition limits the sphere of employment, the master may not be held liable for negligent performance of prohibited acts. The case of *Bezuidenhout NO v Eskom*[74] better explains the distinction between prohibition of manner and prohibition of employment scope. In this case, the father of a hitchhiker claimed two and a half million rand from Eskom. Based on a claim for vicarious liability, it was argued that one of their employees injured his son due to negligent driving occasioned by him falling asleep and losing control of the vehicle. The defence based its argument on the express prohibition of the employee's superiors to provide lifts to passengers in the absence of acquired permission. Van Der Merwe J found that the employee had been using a company vehicle when he extended an invitation to the hitchhiker. Based on the visible company signage, the hitchhiker could in no way be under the false pretence that the vehicle was a private vehicle. The court held that in the absence of authority and lack of relation to employed duties, the employee had not been acting during the course and scope of employment and thus exonerated Eskom from any vicariously liable claim.

It is clearly evident that the requirement relating to unauthorised passengers created a limitation on the scope of employment. It was not merely an instruction or recommendation as to the manner of performing the employers business. If the subjective-objective test is applied, it can be viewed that the employee was perfectly aware he was prohibited from offering lifts to unauthorised passengers. He had no intention of furthering Eskom's affairs by doing so, and the

[73] See *Minister van Veiligheid en Sekuriteit v Japmoca Bk* 2002 (5) SA 649 (SCA). The court expressed the view that the standard test has been less prominently applied in recent years than was the case previously.
[74] *Bezuidenhout NO v Eskom* 2003 24 ILJ 1084 (SCA).

subjective test was not satisfied. Further, the hitchhiker's presence had made no contribution in any way to the furthering of Eskom's business and consequently the close connection required by the objective test was demonstrably absent.

4 COMMON LAW DUTY IN SOUTH AFRICA

The common law places a duty on employers to provide safe working conditions for their employees.[75] In establishing whether the employer conformed to this duty, it needs to be asked whether a reasonable person in the same circumstances would have only provided the facilities or would they have done more to improve the safety of the workplace to protect employees against physical and psychological harm.[76]

This duty was explained in the case of *Van Deventer v Workmen's Compensation Commissioner*.[77] The court held that an employer owes a common law duty to a workman to take reasonable care for his safety. The question of reasonable care arises in each case which may differ depending on the facts and circumstances. It is generally accepted that a master is in the first place under a duty to see that their servants do not suffer, either through their personal negligence or by reason of failure to provide a proper and safe working system and suitable operational plant. If a servant is employed to do work of a dangerous nature, the employer is bound to take all reasonable precautions for the workman's safety.

Employers can be held liable for their omissions if they fail to prevent people from causing harm to their employees. It is deemed standard that a reasonable employer should have foreseen the potential for such harm and can be held liable for failure to prevent such harm.[78] Arising from this expectation, there is a common law duty on an employer to take necessary precautionary measures to prevent HIV positive employees from suffering any form of discrimination. This common law duty can also be seen to extend to the employer's duty to protect their employees

[75] Venter, Levy, Conradie and Holtzhausen *Labour Relations in South Africa* (2009) 177.
[76] Van Jaarsveld *Principles and Practices of Labour Law* (2011) 201.
[77] Van Deventer v Workmen's Compensation Commissioner 1962 4 All SA 64 (T).
[78] Brassey *Employment and Labour Law* (2011) E4.

from other employees. In this sense the employer can be held liable for the acts of their employees which were performed during the course and scope of the employment relationship.[79] In the case of *Media 24 Ltd and Another v Grobler*[80] relating to a breach of an employer's common law duty, the court remarked as follows:

> "This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from physical harm caused by what may be called physical hazards. It must also in appropriate circumstances include a duty to protect them from psychological harm caused."

5 CONCLUSION

The duty of care afforded to employees by employers is warranted under common law, statutory law and general contractual relationships, while common law provides for the relationship between a master and servant and the obligation to provide a safe working environment. Statutory law further invokes obligations on an employer through the Labour Relations Act, Employment Equity Act, Occupational Health and Safety Act, and the Mine Health and Safety Act. These duties extend not only to employer-employee relationships but also to employee-employee relationships and employee and third party relationships. An employer is required to take safety measures in order to safeguard any possible harm occurring in their place of business. Failure to comply with these obligations will render an employer liable for negligence occasioned by his omission. It is evident that the medical profession is the most vulnerable and susceptible risk group for occupational transmission of HIV/AIDS. Although standard precautionary measures could be established, failure to implement or execute the measures effectively leads to the condemning of the employer. Several claims have succeeded in the UK for occupational exposure to HIV/AIDS resulting from the failure of an employer to provide sufficient protective equipment and training.

Whilst hospitals invoke policies and principles to manage HIV/AIDS in the workplace, these policies are seldom adhered to which renders the hospitals vicariously liable for any claims arising from negligent employees. This places the employer at a disadvantage as they have neither recourse nor protection against the conduct of negligent employees. Common law places

[79] Brassey op cit note 381.

[80] *Media 24 Ltd and another v Grobler* 2005 3 All SA 297 (SCA). This case concerned the sexual harassment of one employee towards another. The employer was vicarious liable based on a breach of his common law duty of care. He was ordered to pay the employee R 800 000.00.

a duty on employers to provide a safe working environment for their employees. This is attainable through workplace policies being displayed and implemented, but employers fail to abide by these. There are two issues that form the basis for vicarious liability claims. Firstly, failure on an employer's part to devise safe workplace policies in line with international and national standards will render them liable for any harm caused in the workplace. Secondly, despite workplace policies being regulated, failure on the part of an employee to reasonably comply with the policies can still render the employer liable. It is clear that while the doctrine should be applied in South Africa in relation to occupational exposure claims, there should be strict application of the strict liability doctrine, thereby faulting the employer for an omission to provide guidelines and policies on effective management. A stringent workplace policy being deliberately neglected or disobeyed should not serve as a premise to further hold the employer liable.

South Africa does have ample legislation in place protecting an HIV/AIDS positive worker but the recognition and application of the doctrine of vicarious liability can only enhance the framework safeguarding HIV positive employees. Vicarious liability claims for occupational exposure is an avenue not sufficiently explored in South Africa. Theoretically, vicarious liability claims are understood and deemed actionable for negligence or failure to implement safety control measures, but from a practical perspective it is hardly ever pursued due to a lack of knowledge surrounding the doctrine. By providing an in-depth analysis of the doctrine, and dealing with the elements that need to be complied with in order to pursue a claim for damages, a framework has been provided to deal with the occupational exposure of HIV/Aids in the workplace environment.