

THE VICARIOUS LIABILITY OF PARENT COMPANY LIABILITY FOR ITS SUBSIDIARY

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Abstract

The paper is of a theoretical nature and provides with more complete understanding of the vicarious liability, different concepts of the vicarious liability and peculiarities of the vicarious liability of parent company for its subsidiary. The paper does not provide an empirical investigation. First of all, the main finding of the paper is that the vicarious liability is complex and is by nature of combination of fault and strict liability and involves three actors and two-level relationship. Secondly, a parent company may be held liable in parallel with its subsidiary on the basis on its own negligent conduct and on the basis of the vicarious liability. Thirdly, it is important to distinguish between the direct liability of the parent company as a result of breach of a duty of care and vicarious liability as a result of piercing of the corporate veil.

Keywords: Parent Company, Subsidiary, Vicarious Liability

1. INTRODUCTION

Piercing of the corporate veil and vicarious liability of parent company for its subsidiary has involved many debates in recent years. This matter is topical because on the one hand in the light of development of big corporations, the victims of activities of such corporations need to be properly defended. On the other hand, the grounds for the liability of parent company for its subsidiary shall be defined appropriately.

Researching the topic of vicarious liability of parent company we used literature based research method with tendency to the descriptive analysis. We used the method of comparative analysis comparing the vicarious liability of parent company for its subsidiary and the vicarious liability of parents for their children and the vicarious liability of employer for its employees as well as comparing different concepts of the vicarious liability. Researching the roots of the vicarious liability we employed historical legal method.

The paper itself is of a theoretical nature which provides with more complete understanding of the vicarious liability, different concepts of the vicarious liability and peculiarities of the vicarious liability of parent company for its subsidiary.

Currently, with development of globalized processes and businesses all over the world we can see in increasing frequency establishment of local and multinational corporations. They create complicated structures and subsidiaries within the territory of one country or in the territories of different countries. Introducing new complicated organizational structures, companies pursue different goals: optimization of business processes and taxation, cost-cutting, and increase of business efficiency.

There are some extreme examples with regard to number of subsidiaries which are maintained by the companies: Bank of America maintains 316 subsidiaries, Morgan Stanley – 299 subsidiaries, Pfizer – 174 subsidiaries²⁸. In most cases we can see less extreme examples: Citigroup – 20 subsidiaries, Google – 25 subsidiaries, Microsoft – 10 subsidiaries²⁹. In these cases the subsidiaries were created for tax-reduction purposes. However, in many cases companies set up or acquire new subsidiaries in order to develop business, move production to cost-efficient areas, or expand to the new markets.

Pursuant to generally accepted rule of the company law each company with limited liability is responsible for its own conduct within the limit of the assets belonged to it. It is must be noted that there is no unified and consistent approach with respect to the decisions of the courts concerning applicability of the negligent liability and the piercing of the corporate veil and holding the parent companies liable for torts committed by their subsidiaries³⁰. Courts delivering decisions consider all relevant circumstances of the particular case. The cautious approach of the courts with respect to the piercing of the corporate veil may be explained by the fact that bringing the parent company to

²⁸ Smith D. (2013), *Offshore Shell Games. The Use Offshore Tax Heavens by the Top 100 Publicly Traded Companies*, July 2013

²⁹ See *id.*

³⁰ It is illustrated by examples of *Adams v Cape Industries plc* and *Walkovszky v Carlton*. In the first case the US court pierced the corporate veil and held the parent company liable for its subsidiary, however taking into account that the parent company was established in the UK, the decision was not enforced because the UK court decided that there are no grounds for holding the parent company liable for wrongs committed by its subsidiary. In the second case there is inconsistency within one decision of the US court. While the court decided that the shareholder shall not be liable for the company, Keating, J expressed the dissenting opinion according to which there are grounds to hold it liable.

responsibility for its subsidiary courts go against main principles of both tort and company law.

Currently there are quite many researches devoted to piercing of the corporate veil from the perspective of corporate law and corporate relationship. Vicarious liability through the examples of parents' liability for their children or companies' liability for their employees is also well researched in juridical literature. However, not enough attention is given to the vicarious liability of parent company for its subsidiary. It is evidenced by the fact that some authors do not distinguish between tortious liability of the parent company itself (for breach of the duty of care) and vicarious liability of the parent company for its subsidiary (which is primary based on the relationship between the parent company and its subsidiary). To this end, this paper is aimed to close a gap in legal analysis of the vicarious liability of parent company for its subsidiary.

The main purpose of this paper is to research such phenomenon as parent company's vicarious liability for its subsidiary and to analyze the legal nature of vicarious liability in the context of parent company's liability for its subsidiary as well as to research different concepts of the vicarious liability and draw the clear cut line between direct liability of parent company for its subsidiary and piercing the corporate veil.

2. TWO GROUNDS FOR PARENT COMPANY'S LIABILITY: BREACH OF A DUTY OF CARE (DIRECT LIABILITY) AND PIERCING OF THE CORPORATE VEIL (VICARIOUS LIABILITY)

A parent company may be held liable along with its subsidiary in two cases: on the basis of breach of a duty of care and on the basis of piercing of the corporate veil.

In the first case, a duty of care and breach of such duty owed by the parent company to individuals affected by its subsidiary's operations (for example, workers employed by subsidiaries or local communities) shall be established³¹. The Court of Appeal in *Cape* case³² held that:

[A] parent company which is proved to exercise *de facto* control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company.

It seems that in this case the parent company is liable directly for its own wrongful conduct, i.e. for breach of its own duty of care rather than for conduct of its subsidiary. In other words, "[d]irect liability is liability for breach of one's own duty of care, while vicarious liability . . . is liability for

breach of another's duty of care"³³. When a subsidiary company abuses human rights, its parent company may be held liable if the conduct of the parent company itself was also negligent or intentional (i.e. parent company was "at fault")³⁴. Since, in such case the parent company is liable for its own fault conduct, this liability goes beyond the concept of vicarious liability, i.e. liability for other people and therefore goes beyond the scope of this paper.

The second ground for holding the parent company liable is "when the doctrine of separate legal personality is being abused to perpetrate fraud or avoid existing legal obligations, the courts may be prepared to "lift the corporate veil", look behind the corporate structure, impute subsidiary's conduct to the parent, and hold the parent company liable on the basis of vicarious liability for acts of its subsidiary."³⁵. To that end International Commission of Justice noted:

At times there is a failure to distinguish correctly between situations in which a parent is allegedly

liable on the basis of its own faulty conduct, and situations in which a court is asked to "pierce the corporate veil" and hold a parent company vicariously liable for the acts of its subsidiary.³⁶

3. PARENT COMPANY'S VICARIOUS LIABILITY

So, in fact, parent companies' liability for their subsidiaries, alongside with employers' liability for their employees is a vicarious liability. We first heard about vicarious liability in tort law of societies more than 3000 years ago³⁷. The law to which the beginning of the story of vicarious liability may be attributed is one that was common to many ancient cultures - the goring ox³⁸. This ancient law may hold the owner liable for the injury causing ox even though the fault of the owner was not involved or he did not intend for the harm to occur³⁹. In the Roman law a concept of *patria potestas* (i.e., paternal power) was known where the father had supreme power over his children, grandchildren, and slaves⁴⁰. Ancient Germanic law also attached vicarious liability to a master for all of the harm inflicted by a slave, and in time⁴¹:

[T]he employer [...] was liable in the medieval law for the torts of his employees; both his household servants, obligated to him by contract, and those persons whose services he utilized in the

³³ Burns J.J. (2010-2011), "Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims", Michigan Law Review, Vol. 109 No.4, pp. 657-668

³⁴ ICJ, Corporate Complicity and Legal Accountability: Facing the Facts and Charting a Legal Path - Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (Report, Vol. 3: Civil Remedies, 2008), p. 47

³⁵ See *id.*

³⁶ See *id.*

³⁷ Miller N.P. (2004), "An Ancient Law of Care", 26 Whittier Law Review, Vol.26 No.2, pp.3-21

³⁸ Beau Baez III H. (2009-2010), "Volunteers, victims and vicarious liability: why tort law should recognize altruism", University of Louisville Law Review, Vol. 48 No.3, pp.221-230

³⁹ Levmore S. (1986), "Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law", Tulane Law Review, Vol.61 No.2, pp. 235-278

⁴⁰ See Beau Baez III, *supra* note 11

⁴¹ See *id.*

³¹ Van Dam C. (2013), European Tort Law 2nd ed., Oxford university Press, Oxford, United Kingdom

³² *Lubbe v Cape plc [1998] CLC 1559, 1568*

performance of works undertaken by contract, such as artisans, carters, etc. Similarly, the liability of the master of a household continued to be recognized for the members of the family and for other persons resident in his house⁴².

Vicarious liability is a liability that is attributed to one person (B) for the wrongful act committed by another (A) in situations where B is not involved in any legal wrong⁴³. In this case, attachment of vicarious liability is justified by a relationship between the two persons⁴⁴. The main elements of the vicarious liability which should be emphasized are the next ones: (1) a wrongful act or omission by another; (2) some relationship between the actual tortfeasor and the defendant on whom liability is imposed, and (3) some connection between the wrongful act or omission and that relationship⁴⁵.

The first necessary requirement is a *tortious act or omission* by another – subsidiary commits a wrong independently, for example, breaches environmental law, competition law or a duty towards its employees. The second requirement – some *relationship between the tortfeasor and the defendant*, i.e. between parent company and subsidiary, in our case. According to the general principle of tort law no one should be liable for others⁴⁶. However, vicarious liability, in general and parent company's liability for its subsidiary, in particular, is an exception to the general principle and second element outlined above plays very important role in imposing tortious liability on the parent company. The third requirement – some *connection between the tortious act or omission and the relationship between the actual tortfeasor and the defendant*. For example, in case of employer liability for its employee, it usually requires that the wrong was committed in the course of employment or if the act was, in some appropriate sense, within the scope of employment⁴⁷. In case of parent company's liability for its subsidiary, the subsidiary has to commit tort within the authority delegated to it by the shareholder (parent company). Both the company itself and its directors should not act *ultra vires*, i.e. beyond the power granted by the articles of association, bylaw and/or other internal documents of the company.

4. RATIONALES OF VICARIOUS LIABILITY OF THE PARENT COMPANY FOR ITS SUBSIDIARY

What are the rationales behind vicarious liability of the parent companies for their subsidiaries? J.W. Neyers discusses six rationales for vicarious liability

of employer for its employees⁴⁸. Some of them can also be applicable to the parent companies' liability.

Control in parent company-subsidiary relationship is more complicated than in employer-employee relationship. In the former case ownership ratio plays very important role. It is argued that control is an inadequate explanation for imposition of vicarious liability⁴⁹. However, taking into account that the vicarious liability is in fact liability for wrongs committed by others, control, is necessary element in imposing such liability, especially in terms of the parent company's liability for its subsidiary. Control in such situation reflects relationship between the parent company and the subsidiary which is the second necessary element for vicarious liability. At the same time in order to hold the parent company liable for its subsidiary such element as abuse of control on the part of the parent company should be involved.

In the context of employer liability, the compensation explanation of vicarious liability seems to be very well-founded, because employer usually is more solvent debtor than employee. However, in the light of the parent companies' liability at first glance it may seem that this argument loses its weight, because subsidiary itself is separate company with its own capital. On the other hand, if a company is a member of a group, according to the general practice the main "player" in this group is a parent company which accumulates resources on its level in the form of dividends and the other members are forced to support it even though this might have negative influence on their own financial conditions. The subsidiary may be deliberately undercapitalized by the parent company in order to shield the latter from tort liability, even though it gets benefits as a shareholder from the highly risky activities undertaken by the subsidiary⁵⁰. Similarly, the parent company may use its control over the subsidiary to transfer property to itself, by virtue excessive dividends, capital reductions, overpricing of intra-company sales and under pricing of purchases, and similar mechanisms⁵¹. As a result the parent company turns to be more solvent debtor than its subsidiary. So, this rationale for parent company's liability for its subsidiary should not be underestimated.

Deterrence explanation of vicarious liability is more obvious in employer-employee relationship, because "the employer can often take measures to influence employee behavior through discipline at work or through the ultimate penalty of dismissal"⁵². At the level of parent company-subsidiary there is no such dependence between two economic units, but even in this case parent company has some influence on subsidiary. Taking into account that subsidiary usually acts in coordination with the parent company, with approval of the later and in the interests of the whole group the subsidiary is

⁴² Huebner R., Francis S.P., Vinogradoff P. (1918), *A History of Germanic private law*, Little, Brown, Boston

⁴³ Neyers J.W. (2005), "A theory of vicarious liability", *Alberta Law Review*, Vol.43 No. 4, pp. 287-296

⁴⁴ Black H.C. (1990), *Black's Law Dictionary*, 6th ed., s.v. "vicarious liability", West Publishing Co., St. Paul

⁴⁵ Atiyah P.S. (1967), *Vicarious Liability in the Law of Torts*, Butterworths, London.

⁴⁶ Johnston D. (1995), "Limiting liability: Roman Law and the Civil Law Tradition", *Chicago-Kent Law Review*, Vol. 70 No.4, Rev., pp. 1515-1519

⁴⁷ Ataner A. (2006), "How strict of vicarious liability? Reassessing the Enterprise Risk Theory", *University of Toronto Faculty of Law Review*, Vol. 64 No.2, pp.63-66

⁴⁸ See Neyers, *supra* note 16

⁴⁹ See, *id.*

⁵⁰ Anderson H., (2011), "Parent Company Liability for Asbestos Claims: Some International Insights", *Legal Studies*, Vol. 31 No.4, pp. 547-551

⁵¹ See *id.*

⁵² Davis K.E. (2000), "Vicarious Liability, Judgment Proofing and Non-Profits", *University of Toronto Law Journal*, Vol. 50, No.4, pp. 407-411

dependent on the parent company to some extent. Moreover, the parent company as a shareholder may be empowered to participate in appointment of the directors of the subsidiary. Even though disciplinary regime is defined internally by the subsidiary, *de facto* parent company as a shareholder may influence dismissal of the directors of the subsidiary. Although deterrence explanation of vicarious liability of the parent company is not as obvious as in vicarious liability of the employer, it plays role to some extent.

Enterprise liability theory is quite popular among explanations of vicarious liability of the employer for their employee. "It is based on the notion of reciprocity between benefit and burden."⁵³ This theory can also be taken into account in case of vicarious liability of the parent company for its subsidiary. According to the economic analysis theory the main goal of company is to aggregate welfare for shareholders. The parent company as a shareholder has a right to receive dividends from its subsidiary which can be considered as benefit. So, burden imposed on the parent company by virtue of vicarious liability for its subsidiary may be justified by benefit received by the parent company in the form of dividends.

Another justification of vicarious liability is so-called "mixed policy" explanation which includes all the above mentioned rationales⁵⁴. Criticizing all justifications of vicarious liability outlined above J.W. Neyers argues that one should focus on the relationship between employer-employee (in our case parent company-subsidiary) rather than on the relationship between employer (parent company) and the tort victim and the goals that would be achieved by if liability were imposed⁵⁵. As one can see vicarious liability is more complicated phenomenon as it may seem at the first glance. It includes 2-level relationship: tortfeasor-victim and parent company/employer - subsidiary/employee. In light of this the question arises: what is relationship between vicarious liability, strict liability and fault liability?

5. THREE CONCEPTS OF VICARIOUS LIABILITY

Theory of vicarious liability is quite complicated and deals with both fault and strict liability. In order to determine requirements for vicarious liability it is important to define how these three types of liability relate to each other. Basically, one can say that there are three main doctrines according to which vicarious liability may be defined as a type of strict liability, as a type of non-fault liability and as a combination of strict and fault liability. Now we propose to consider these three different perspectives.

5.1. First concept of vicarious liability: vicarious liability is a form of strict liability

According to the first concept, vicarious liability is a type of strict liability. Vicarious liability is liability attributed to the employer for the tort committed by the employee when it was committed in the course of his employment (very often vicarious liability is considered only as employer liability for its employee).⁵⁶ This is considered as a form of strict liability, because the "innocent" employer is held liable for the fault of his employee⁵⁷. As Osborne explains, vicarious liability is "described as strict because it requires no proof of personal wrongdoing by the person subject to it"⁵⁸. Another author Waddams states that "vicarious liability is a form of strict liability, in that employers have been held liable for tortious acts of employees without proof of any fault on the employer's part"⁵⁹. Indeed,

Strict liability is described as liability without fault [...] Strict liability is also referred to as objective liability or risk liability, which means that liability is to be established independent of the tortfeasor's conduct⁶⁰.

As we can see, distinctive feature of strict liability is absence of fault on the part of tortfeasor irrespective of his own conduct. However, in this case, it is supposed that the direct relationship between the victim and the person who is sought liable exists. Yet, the important aspect which should be taken into account when one considers vicarious liability is that a person who actually commits a wrong and a person who bears liability are different. Actually, person who bears liability has nothing to do with a wrong committed by another person except for some relationship between the former and the latter, for example, employer-employee relationship or parent company-subsidiary relationship. Another feature of vicarious liability is that the element of fault liability is involved on the part of the actual tortfeasor. So, the given concept does not take into account two important peculiarities of vicarious liability:

1. Vicarious liability does not involve direct relationship between the defendant and the victim;
2. Vicarious liability includes fault element on the part of the actual tortfeasor

Schematically this concept can be depicted on figure 1 below:

⁵³ Keating G.C. (1997), "The Idea of Fairness in the Law of Enterprise Liability", Michigan Law Review, Vol.95 No.2, pp. 1266-1360

⁵⁴ Smith B. (1948-1949), "Cumulative Reasons and Legal Method", Texas Law Review, Vol. 27 No. 4, pp. 454-459

⁵⁵ See Neyers, *supra* note 16

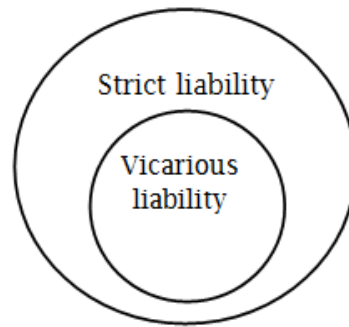
⁵⁶ This concept of vicarious liability will be considered through the example of employer's vicarious liability, because this type of vicarious liability is the most researched. However, the same concept is applicable to the parent company's vicarious liability

⁵⁷ <http://www.britannica.com/EBchecked/topic/600206/tort/16476/Liability-without-fault>, accessed May, 2015

⁵⁸ Osborne P.H. (2003), The Law of Torts 2nd ed., Toronto, Carswell

⁵⁹ Waddams S.M. (2003), Dimensions of Private Law, Cambridge University Press, United States of America, New York

⁶⁰ See van Dam, *supra* note 4

Figure 1. Vicarious liability is a form of strict liability

From our point of view this concept does not reflect the legal nature of vicarious liability. Vicarious liability has more complicated structure than mere strict liability because it includes two-level relationship: a) relation a tortfeasor vis-à-vis third party who is a victim and b) relationship between actual tortfeasor and a person who bears liability; and a fault element on the part of tortfeasor.

5.2. Second concept of vicarious liability: vicarious liability is a form of non-fault liability

According to the second concept of vicarious liability

Vicarious liability should also be distinguished from the closely related concept of strict liability.

Under strict liability, the defendant must engage in prohibited conduct, but the separate requirement that the defendant have a *culpable mens rea* – some degree of fault – is removed. Vicarious liability, in contrast, dispenses with the requirement that the defendant engages in the prohibited conduct, instead holding the defendant liable for the conduct of another⁶¹.

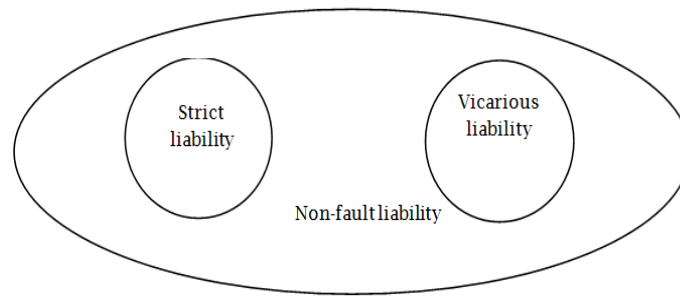
According to the abovementioned concept, it seems that non-fault liability and strict liability are not synonymous. Non-fault liability is a wider notion than strict liability and includes vicarious liability as a separate type of non-fault liability which is placed next to strict liability. So, non-fault liability is divided into two types of liability – strict and vicarious – on the ground of participation or non-participation of defendant in the prohibited conduct. Under the concept of strict liability the defendant has to be engaged in such type of conduct and even though it does not involve fault on his or her part, he or she will be held liable. In this case “plaintiff has to prove that a) she suffered a compensable loss; b) the injurer acted; c) the injurer’s conduct caused the loss she seeks to have repaired”⁶². In contrast, in case of vicarious liability important factor is absence of defendant’s conduct directly towards the victim, which means that the vicarious liability is based on more difficult concept which involves, on the one hand, tortfeasor’s prohibited conduct and, on the other hand, connection between tortfeasor and

defendant. Existence of three actors – tortfeasor, defendant and victim – and two-level relationship – between the tortfeasor and the victim and between the defendant and the tortfeasor – puts vicarious liability on the different level in comparison with strict liability. And again, as it was stated above the element of fault liability on the part of the tortfeasor is involved in vicarious liability. To that end, vicarious liability cannot be considered as a type of non-fault liability and cannot be placed on the same level with strict liability.

Figure 2 schematically represents the concept according to which vicarious liability is the type of non-fault liability. From our perspective, this concept does not fully reflect the legal nature of vicarious liability.

⁶¹ <http://law.jrank.org/pages/2248/Vicarious-Liability-Vicarious-liability-strict-liability-distinguished.html#ixzz3SCyprd74>, accessed May, 2015

⁶² Coleman J.L. (1992, reprinted 2013), *Risk and Wrongs*, Cambridge University Press, United States of America, New York

Figure 2. Vicarious liability is a form of non-fault liability

5.3. Third concept of vicarious liability: vicarious liability as a combination fault and strict liability

Cees van Dam considers vicarious liability as strict liability with an extra (strictly liable) debtor⁶³. He argues that “strict liability can be considered as liability without negligence, but elements of negligence may still play a role in rules of strict liability.”⁶⁴ For example, the strict liability of the employer for loss caused by his employee requires the involvement employee’s negligent conduct⁶⁵. Although the author considers vicarious liability as variation of strict liability, it is clear from the context that he takes into account relationship on both levels: between the actual wrongdoer and the injured person and between the defendant and the wrongdoer. In our opinion, such approach reflects plenitude and legal nature of vicarious liability. On the one hand, vicarious liability is fault liability from the victim point of view. Yet, it is strict liability from the defendant’s perspective. So, in order to seek damages from the defendant the plaintiff has to prove fault liability of tortfeasor (compensable loss, act of the injurer, fault of the injurer and casual link between the injurer’s fault and suffered loss) and legal relationship between the wrongdoer and the defendant. It makes vicarious liability a more complicated than both strict and fault liability and separates it in a different type of liability which contains characteristics of both types of liability.

Vicarious liability is a point where fault and strict liability meet. Jules L. Coleman researching relationship between these two types of liability came to the following conclusions:

(1) Fault liability based on the injurer’s negligence is not ordinarily defeasible by an excuse. In that sense, both fault and strict liability in torts are forms of strict liability. (2) Strict liability in torts differs from fault liability in that an injurer can defeat liability neither by excuse nor justification. (3) Fault liability is really the rule the victims are strictly liable for their losses unless the injurer is at fault. (4) Strict (injurer) liability is really the rule that injurers are strictly liable for the losses their conduct occasions unless the victim is at fault. (5) Thus, fault and strict liability are mirror-images of one another. (6) Therefore, there are two dimensions of strict liability in fault liability. A victim can be

liable whether or not she has done wrong, provided her injurer is not at fault. An injurer who is at fault can be liable even if his fault is not culpable, even, in other words, if he has an excuse for his doings. (7) One difference between strict and fault liability is that in fault liability, innocent victims who have not caused their losses can be liable for them, whereas under strict liability, innocent injurers can be liable only if they have caused another’s loss. (8) If causing a loss is a morally relevant fact about someone, then strict liability may be preferable to fault liability⁶⁶.

As we can see, fault and strict liability are not polar and have some contact points. They are closely interconnected with each other and are in fact mirror-images of each other. In case of vicarious liability we have three actors - victim, actual injurer and defendant and two-level relationship: between the victim and the injurer and between the injurer and the defendant. So, in case of injurer-victim relationship the victim is strictly liable for losses unless the injurer is at fault. On the upper level (injurer-defendant) it is presumed that the defendant is liable for losses unless the victim is at fault. It means that victim can avoid liability if she proves that the injurer is at fault while the defendant can do so if she proves that victim is at fault. As we can see, it deals only with victim’s or injurer’s fault (fault liability) but does not deal with defendant’s fault towards the victim (strict liability), that means there should be another connecting factor between three abovementioned actors. Such factor is the legal relationship between the injurer and the defendant.

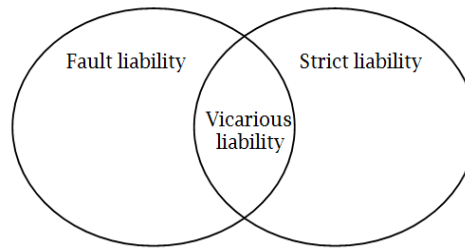
Concept of vicarious liability is shown on Figure 3.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

Figure 3. Vicarious liability is a combination fault and strict liability

Paula Giliker states that:

Vicarious liability, as a doctrine, is thus problematic. It does not fit into the dominant concept of fault underlying the law of tort and focuses not on individual responsibility for one's actions, but on responsibility for others in the absence of proof of fault on one's part⁶⁷.

5.4. Is it important to distinguish between parent company's direct liability and parent company's vicarious liability?

Turning to the two approaches to the parent companies' liability described at the beginning of this paper (i.e. parent company's liability for its own negligent conduct and parent company's vicarious liability), vicarious liability of the parent company is a combination of fault and strict liability. Thus, the parent company might be held strictly liable for the wrongful conduct of the subsidiary by virtue of the fact that there is a connection between the actual wrongdoer (subsidiary) and the parent company.

However, it is worthwhile noting that the ICJ's position according to which parent company's negligent liability should be distinguished from parent company's vicarious liability⁶⁸ is not supported by everyone and not everyone draws clear line between them. It is unusual for the courts to distinguish between personal liability of parent corporations on the basis of statutory (or other) rules and a liability which is attributable to veil piercing doctrine⁶⁹. To that end, some authors argue that "in many instances it would be artificial to distinguish between both types of shareholders' liability"⁷⁰.

From our perspective, it is important to distinguish between these two types of parent company's liability not only from theoretical point of view, but also in practice. First of all, "in case of the parent company's personal liability, limited liability is not at stake, it may incur liability on the basis of existing (statutory) legal grounds that apply to it in the same way as these would apply to non-incorporated entities or to natural persons."⁷¹ Secondly, in order to hold the parent company liable for its own wrongful conduct a duty of care and breach of such duty of care should be established while in case of parent company's vicarious liability for its subsidiary the relationship between the

parent company and its subsidiary should be established. Thus, we face with absolutely different grounds for liability of the parent company. The plaintiff bringing the action against the parent company has to decide on which ground the defendant should be held liable and consequently to prove either existence and breach of a duty of care on the part of the parent company or existence and abuse of control which parent company has over its subsidiary.

6. CONCLUSION

A parent company may be held liable in parallel with its subsidiary on the basis on its own negligent conduct and on the basis of vicarious liability. Vicarious liability of the parent company for its subsidiary is more complicated than fault or strict liability.

Vicarious liability is liability which arises in the case when one person is held liable for a wrong committed by the other. So, on the one hand, there is a relationship between the actual tortfeasor and the victim. This relationship itself is quite simple and involves fault liability of the wrongdoer, i.e. the subsidiary. The other component of vicarious liability is relationship between the actual torfeasor, i.e. subsidiary and the defendant, i.e. parent company. This relationship does not involve fault liability on the part of the parent company, and is in fact strict liability from the perspective of the latter. To that end, vicarious liability in general, and vicarious liability of the parent company for its subsidiary, in particular is more complicated than just fault or strict liability.

Even though some authors and courts think that it is not necessary, it is our opinion that it is important to distinguish between these two separate cases of liability. Vicarious liability has a long history and may be justified by several rationales.

In order to hold the parent company liable on the basis of its own negligent conduct it is necessary to prove that the parent company has the duty of care towards the victims of the tort even though it is not directly involved in the wrongful conduct. UK courts use 3-level *Caparo* test in order to establish if the duty of care exists. Contrary to that, although the parent company does not own the duty of care to the victims of tort, the parent company may be held vicariously liable for the wrongful conduct of its subsidiary. In this case the decisive fact is the relationship between the parent company and subsidiary. To that end, tortious liability of the parent company for its subsidiary is, in fact, vicarious liability. Vicarious liability is a special form of tort liability which is characterized by existence of an extra debtor, such as, for example, parent

⁶⁷ Giliker P. (2010), *Vicarious Liability in Tort: a Comparative Perspective* 1st ed., Cambridge University Press, United States of America, New York

⁶⁸ See ICJ, *supra* note 7

⁶⁹ Vandekerckhove K. (2007), "Piercing the Corporate Veil", *European Company Law*, Vol.4 No.5, pp.191-200

⁷⁰ See *id.*

⁷¹ See *id.*

company. Such liability may be imposed when three elements are in place: 1) tortious act committed by the actual tortfeasor; 2) relationship between the actual tortfeasor and the defendant and 3) connection between tortious act and relationship between the actual tortfeasor and the defendant. Different concepts of vicarious liability were researched, such as vicarious liability as a form of strict liability, vicarious liability as a form of non-fault liability and vicarious liability as a combination of fault and strict liability. It seems that the last concept depicts the legal nature of vicarious liability in the most precise way, because on the one hand, fault liability of the actual tortfeasor (subsidiary) is involved and, on the other hand, it deals with strict liability of the defendant (parent company).

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