# Vicarious Liability for Group Torts



# Vicarious Liability for Group Torts



Sara Spiro Svendsen Vicarious Liability for Group Torts First edition, first imprint

This book was published in August 2023 by Ex Tuto Publishing A/S. Design and typesetting by Mere.info A/S, which has used LibreOffice for Linux and the typefaces Baskerville Original and Cronos designed in 2000 and 1996 by František Štorm and Robert Slimbach, respectively. The book is printed in Denmark on Munken Pure 120 g/m² by Narayana Press, and the binding is carried out by Buchbinderei S.R. Büge GmbH.

We have made this book from FSC-certified paper to support sustainable forest management.

Copyright © 2023 the author Printed in Denmark 2023 ISBN 978-87-420-0057-1

#### Ex Tuto Publishing A/S

Toldbodgade 55, 1. DK-1253 København K www.extuto.com



Published with support from

•• DREYERSFOND



### **Outline Contents**

	PART I: METHODOLOGY	1
1	Background and Methodology	3
2	The Theory of Conflicting Rules	23
	PART II: THE PROBLEM OF GROUP TORTS	49
3	Evolution of Corporate Liability and Non-Liability	51
4	Limited Liability and Group Torts	77
	PART III: CURRENT STRATEGIES TO COUNTER THE GROUP-TORT PROBLEM	99
5	Veil Piercing	101
6	Direct Tort Law	139
	PART IV: VICARIOUS LIABILITY AS A POSSIBLE STRATEGY	165
7	Vicarious Liability	167
8	The Exclusionary Effect of Company Law Liability	199
9	A Natural Evolution of Vicarious Liability	<b>22</b> 1

	PART V: CONCLUSION	233
10	Conclusion	235

### Contents

	PAI	RT I: M	ETHODOLOGY	1
1	Bac	kgroui	nd and Methodology	3
	1.1.			
	1.2.	Probler	m Definition and Research Questions	3 5
	1.3.	Metho	dology	7
		1.3.1.	Fundamental Research ('Grundlagenforschung')	8
		1.3.2.	Legal Dogmatic Approach	10
	1.4.	Scope a	and Delimitation	11
	1.5.	Necess	ary Definitions and Terminological Considerations	12
		1.5.1.	Corporate Groups	12
		1.5.2.	Tort, Tort Creditors and Group Torts	13
		1.5.3.	Vicarious Liability	14
	1.6.	State o	f the Art	18
	1.7.	Outline	e	21
2	The	Theor	y of Conflicting Rules	23
	2.1.	Introdu	uction	23
	2.2.	2. Overlapping Norms and Norm Conflicts		24
		2.2.1.	Overarching Paradigm of Norm Overlaps and Norm Conflicts	24
		2.2.2.	Placing Concurrency Theory within the Overarching	
			Paradigm of Norm Overlaps	27
		2.2.3.	Concurrency Theory's Relevance to Certain Norm Conflicts	31
	2.3.	Concui	rrency Theory Applied – Breach of Contract and Tort	32
		2.3.1.	The Conflict between Contract and Tort	32
		2.3.2.	The Non-Cumul Doctrine	35
		2.3.3.	Anspruchskonkurrenz, Concurrent Liability, and	
			Konkurrencelære	40
	24	Choosi	ing the Right Approach	44

	PAI	RT II: THE PROBLEM OF GROUP TORTS	49			
3	Evo	Evolution of Corporate Liability and Non-Liability 3.1. Introduction				
	3.1.					
	3.2.	.2. Evolution of the Corporation as a Potential Subject of Liability				
		and Limited Liability	53			
		3.2.1. First Period: 1600–1800	53			
		3.2.2. Second Period: 1780–1880	59			
		3.2.3. Third Period: 1865–2020	68			
	3.3.	Conclusion	75			
4	Lim	nited Liability and Group Torts	77			
	4.1.	4.1. Introduction				
	4.2.	Judgment Proofing the Group	78			
	4.3.	The Traditional Rationale for Limited Liability	80			
		4.3.1. A Rationale for Limited Liability based on the				
		Contractual Creditor	80			
		4.3.2. Limited Liability in the Context of Corporate Groups	84			
	4.4.	A Revised Rationale for Limited Liability in Context of Torts	87			
		4.4.1. The Theory of Liability Equilibrium	87			
		4.4.2. Imbalance in the Liability Equilibrium	88			
	4.5.	Current Strategies and Proposals for Reform	91			
		4.5.1. Company Law Strategies and Direct Tort Law	91			
		4.5.2. Proposals for Reform	94			
	4.6.	Conclusion	97			
	PAI	RT III: CURRENT STRATEGIES TO				
	co	UNTER THE GROUP-TORT PROBLEM	99			
5	Vei	l Piercing	101			
	5.1.	Introduction	101			
	5.2.	Entity Liability and Enterprise Liability				
	5.3.	. Company Law-Based Group Liability in Different Jurisdictions				
		5.3.1. United States of America	106			
		5.3.2. England	111			
		5.3.3. Germany	117			
		5.3.4. Denmark	123			
	5.4.	A Common Core	131			
	5.5.	Does Veil Piercing Counter the Liability Issues of Corporate Groups?	135			
	5.6.	. Conclusion 1				

6	Dir	139	
	6.1.	Introduction	139
	6.2.	General Rules and Considerations	140
	6.3.	A Trend Toward Foreign Direct Liability	143
	6.4.	National Direct Liability	149
		6.4.1. Denmark	149
		6.4.2. England	153
	6.5.	A Movement Toward National Direct Liability	159
	6.6.	Conclusion	163
	PAI	RT IV: VICARIOUS LIABILITY	
	AS	A POSSIBLE STRATEGY	165
7	Vic	167	
	7.1.	Introduction	167
	7.2.	General Considerations behind Vicarious Liability	169
	7.3.	The Distinction Between Agents, Employees, and	
		Independent Contractors	173
		7.3.1. Employee v Agent	174
		7.3.2. Employee v Independent Contractor	178
	7.4.	Employer Liability	179
		7.4.1. Denmark	179
		7.4.2. England	181
		7.4.3. United States of America	186
	7.5.	Other Bases of Vicarious Liability	189
		7.5.1. Independent Contractors	189
		7.5.2. The Tort of an Agent	194
		7.5.3. Product Liability Law	196
	7.6.	Conclusion	197

8	The	Exclu	sionary	Effect of Company Law Liability	199
	8.1.	• • •			
	8.2.	. The Relevant Conflict			
	8.3.	8.3. Concurrency Theory as the Relevant Framework			
		8.3.1.	Choosin	g the Relevant Approach	203
		8.3.2.	The Eng	lish Experience with Direct Liability	204
		8.3.3.	A Choice	e of Action Approach as a General Framework	206
	8.4.	Vicarious Liability: An Exception to the Choice of Action Approach			208
		8.4.1.	Exception	ns to the Choice of Action Approach	208
		8.4.2. Exhaustion			210
			8.4.2.1.	The Same Rule	211
			8.4.2.2.	Circumvention	213
		8.4.3.	Erosion		216
			8.4.3.1.	Limitation concerning Parent Companies	217
			8.4.3.2.	Limitation to Tort Creditors with No Contractual	
				Relationship to the Parent	218
	8.5.	Conclu	ısion		219
9	ΑN	A Natural Evolution of Vicarious Liability			221
	9.1.	Introduction			221
	9.2.	The Current Status of Vicarious Liability			222
	9.3.	Direct Liability: Evolution Through the Back Door?			225
	9.4.	Would Vicarious Liability Create Balance in the Liability Equilibrium?			228
	9.5.	Conclu	ısion		231
	PAI	PART V: CONCLUSION			233
10	Conclusion			235	
	Table of Cases			239	
	Bibliography			249	