

Summary of the Rules—Vicarious Liability

I. The Basic Principle

A ∂ is strictly liable for harm caused by the tortious conduct of

1. Tortfeasors who are in an **actionable relationship** with the ∂ ;
2. And which occurs while the tortfeasor is acting **within the scope of that relationship**.

II. Actionable Relationship

In order for an **actionable relationship** to exist, at least one of the following circumstances must be present:

1. **Employer-employee:** The following factors are sometimes considered when an actionable employer-employee (rather than independent-contractor) relationship is unclear. These factors are often seen as indicating “control,” which in turns suggests more of an employer-employee relationship rather than an independent-contractor relationship. Consider whether:
 - (a) The hiring party supplied the equipment, tools, and place of work;
 - (b) The tortfeasor was paid by the hour or month rather than by the job;
 - (c) The work being done by the tortfeasor was part of the regular business of the hiring party;
 - (d) The hiring party had an unlimited right to end the relationship with the tortfeasor;
 - (e) The work being done by the tortfeasor was the only occupation or business of that person;
 - (f) The kind of work performed by the tortfeasor is usually done under the direction of a supervisor rather than by a specialist working without supervision;
 - (g) The kind of work performed by the tortfeasor does not require specialized or professional skill; and
 - (h) The services performed by the tortfeasor were to be performed over a long period of time.
2. **Independent contractors—exceptions** (*Mavrikidis*): Independent contractors typically are not in an actionable relationship, but there are some “exceptions.” I only expect you to know:
 - (a) The hiring party retains actual control over the manner and means of doing the work, and not just a right to specify a result; or
 - (b) The hiring party knowingly hires an incompetent contractor (e.g., unqualified or unlicensed contractor);
3. **Apparent relationship** (*O’Banner*): The ∂ acted as if the tortfeasor was in a master-servant or principal-agent relationship. All of the following factors must be present:
 - (a) ∂ created the impression that the tortfeasor was ∂ ’s employee or agent;

- (b) π reasonably believed that the tortfeasor was ∂ 's employee or agent; and
 - (c) π was harmed because she relied on her belief.
4. **Partnership:** The ∂ and the tortfeasor are partners in a partnership. See page 748.
 5. **Joint Enterprise:** See page 748.
 6. **Inducing a tort**

III. Within the Scope of the Relationship

A. General Rule

A tortious act occurs within the scope of the relationship if it is foreseeably related to the kinds of tasks that the tortfeasor was employed or expected to perform for the ∂ and if it occurred substantially during authorized time and space limits. Some courts also require that the tortfeasor's action be motivated (at least) in part by a purpose to serve the ∂ .

B. Common Scenarios and Special Rules

1. **Prohibited Acts.** The fact ∂ had prohibited the tortfeasor from engaging in the act that caused the harm is not dispositive. A tortfeasor's unauthorized or criminal conduct may still be within the scope of the relationship.
2. **Deviations.** A tortfeasor's conduct that slightly and temporarily deviates from his or her work is to be expected. For example, acts that are necessary for an employee's comfort, health, and convenience while at work are within the scope of the relationship.
3. **Going and Coming.** In general, a tortfeasor is not acting within the scope of his relationship while traveling to and from the workplace, unless either:
 - (a) The tortfeasor, while commuting, performs a concurrent service for ∂ [like picking up something at Home Depot on the way to a job site] that would have necessitated a trip by another employee or ∂ itself, had the tortfeasor been unable to perform it; or
 - (i). *Hinman*: The tortfeasor, while commuting, benefits the ∂ by working in a distant labor market and which is reflected by the fact ∂ has paid for both the tortfeasor's travel time and expenses.
 - (b) The ∂ requires the tortfeasor to drive his or her personal vehicle to and from the workplace so that the vehicle may be used for work-related tasks.
4. **Social and Recreational Activities.** Social or recreational activities that occur after normal work hours are within the scope of the relationship if:
 - (a) They are carried out with the ∂ 's stated or implied permission; and
 - (b) They either provide a benefit to the ∂ or have become customary.