Critical Analysis of Vicarious Liability in India and USA

Bhoomika Kumar*

Introduction

Vicarious liability occurs when A is held liable for the actions of B due to the relation between them. For vicarious liability to arise there must be a relation between the two. It can be due to the act or omission of a legal duty. In this context, an employer can be held vicariously liable for the actions of his employee. In the case of the Exxon Valdez oil spill case[1], the Exxon Shipping Company was held vicariously liable for the 10.8 gallons of crude oil spill into the water body and affecting the biodiversity. This case is the earliest example in which the shipping company owner was held responsible for the action of his employee. Even though the employer was not responsible for the oil spill, he is considered responsible for his employee's actions since he can prevent or limit the harmful activities carried on by the employees.

Liability of Cab Aggregators

The ride-hailing companies like Ola and Uber have been under a lot of fire due to the plethora of cases of sexual harassment, assault and negligence of the drivers. These platforms are operating in the country

* Student, CMR University, School of Legal Studies.
[1] 128 S. Ct. 2605

in a lot of gray areas. The aggregators are conveniently evading the liability of their employees.[2]

The government recognizes these digital intermediaries or market platforms for the passengers to connect with a driver for the sake of transportation as aggregators. This was bought by the Motor Vehicles (Amendment) Act, 2019. This provision shows that the only laws that govern the employment status of the drivers are the terms and conditions of the aggregators. These are the terms and conditions that the user agrees to, for availing of the services of these digital platforms or apps. It says that the drivers are third-party contractors and not the employees hired by the company. As explained above, vicarious liability does not apply to independent contractors. This relieves the aggregator from shouldering any liabilities.

Boycott of Cab Aggregators in Bangalore

The cab aggregators were under the scrutiny of the judiciary for not paying the drivers their share of the money received by the customers. These cab aggregators have argued initially that these cab drivers work in the capacity for service, but since the drivers are not allowed to decide on the terms of their employment as well as the fare that will be collecting from the customers. It is only right that these cab drivers work in the capacity of 'contract of service'. Since these aggregators decided to raise the fare charge, the Karnataka High Court took up the

[2] V, Chaitra. "Regulating the Olas and Ubers." *Deccan Herald*, 29 July 2019, https://www.deccanherald.com/opinion/in-perspective/regulating-the-olas-and-ubers-750349.html. Accessed 9 June 2022.

matter in the interest of the public. The court decided in favor of these drivers. Therefore a wider definition to all the terms and strict guidelines have to be established to avoid such injustice. This is a very serious issue of worker missclassification. `

Control test considering the modern economy

It is a legal test that determines the nature of employment. The employment status does not concern only the control over the employee but also the control over the manner of doing work. In Silver Jubilee Tailoring House v. Chief Inspector of Shops[3], the court held that the control test is not a mitigating factor in distinguishing the 'contract of service' from 'contract for service'. There should be an examination of all the other factors as well that constitute the case in hand. 'One size fits all' is an unrealistic approach to all those skilled employments to determine the master-servant relationship.

In Stevenson Jordon and Harrison Ltd v. Macdonald and Evens[4], a progressive step was taken regarding the control test. It was concluded as a contract of service when the work performed by the employee is an integral part of the growth of the business.If the work is ancillary to the main business then the person is said to be under a contract for service. If the manner of work of the employee is the sole source of revenue for the corporation then the employee has a contract of service. In this context, transportation is an integral part of the shipping company and a major source of revenue therefore the drivers should be

[3] AIR 1974 SC 37
[4] [1952] 1 TLR 101

treated as employees. The same rationale should be applied with the case of the aggregators in India, since these drivers are the main source of income to these companies. Therefore, they are employees and not independent contractors.

In Erik Search v. Uber[5],the United States District Court for the District of Columbia held Uber liable for the actions of its driver. The driver had stabbed a rider and fled the scene. The court applied the duck test which is 'if it walks like a duck, swims like a duck and quacks like a duck, it's a duck'.[6] The manner of hierarchy with respect to the aggregator and the driver was considered to determine that Uber was liable for the actions of the driver.

In Doe v. Uber Techs., Inc.,,[7] the District Court for the Northern District of California held uber vicariously liable for the offence of rape commited by the driver. The court considered the fact that there is no option for the drivers to negotiate the ride fares with the customers and they have to follow the fare threshold set by the Uber without any input from the drivers. And Uber has complete control over the fares even in different circumstances where the driver takes a different route or surge in traffic etc. Uber also has complete control over the customer data that is kept hidden from the drivers. The drivers are also obligated to accept all the ride requests that they get from the customers, they have

[5] 15–257 JEB

[6] Tiwari, Suyash, and Prakul Khera. "The Liability of Cab Aggregators in India vis-à-vis their Consumers - The CBCL Blog." *The CBCL Blog*, 12 October 2020, https://cbcl.nliu.ac.in/contract-law/the-liability-of-cab-aggregators-in-india-vis-a-vis-their-consumers/. Accessed 11 June 2022.

[7] 184 F. Supp. 3d 774

to face the consequences for declining the ride requests. Uber also has the authority to fire the drivers at its whims and fancies. This also satisfies the hire and fire test.

In Uber France v. M A X, the drivers were classified as employees and not self employed by the Court of Cassation. The court used the three-limb test to categorize the drivers as employees. The three-limb test says that if the person can build his own client base, fix the tariff that he is going to charge for the service rendered and set the terms and conditions for rendering the service, only then can he be classified as a self-employed or independent contractor. Here the terms self-employed and independent contractor has been used synonymously. As per this rationale the drivers associated with Uber have a subordinate relationship with the company and the company cannot evade vicarious liability.

The Indian courts have to take into consideration the principles and the rationale laid down in these foreign courts and evolve the principles of its own. The approaches taken in these cases reflect in the interest of justice.

User Agreements

These aggregators use adhesive contracts or standard form of contracts. These contracts do not give any leverage to the other party, making them weaker by only giving the option of agreeing to the terms or leaving it. The customer does not really read the terms of the user agreement thoroughly. They do not have any power to negotiate the terms of the agreement. The aggregators evade the entire liability

through these agreements. A legally binding contract arises from the equal bargaining power of both parties. The principle of ad idem is not followed and these contracts are unilaterally drafted agreements. These platforms are abusing their dominant position. This issue has been raised in the Indian court as well. In Central Inland Water Transport Corporation v. Brojo Nath Ganguly[8], the court held that the unfair clauses in the contracts that offer an unfair bargain to the party are unenforceable.

Unfair (Procedural and Substantive) Terms in Contract Bill, 2006 was introduced by the Law Commission of India. This bill included the fairness and reasonability test but the statute has not been enacted so far. The Consumer protection Act, 2019 contains the definition of unfair contract under section 2(46) as a contract that includes terms that impose unreasonable obligations or consciences that are disadvantageous to the consumers. Under section 47 and 58 of the Act, the State and National Commission can declare these terms of the contract as void. The risk and the responsibility shifts onto the weaker parties in these agreements.

Vicariously Liability for Humanless Cars

The recent development in technology has led to autopilot cars or 'humaless cars'. The law is criticized to be not developing at the rate at which the technology is developing. The current autopilot cars require the active supervision of the driver and do not make the car

[8] 1986 AIR 1571

autonomous. In the event of an accident the question of liability arises. The question of shouldering the responsibility, the driver or the manufacturer of the product.

Autonomous cars offered by companies like Ford, Mercedes, Tesla, Google, General Motors, Tata, etc. operate on minimum to no human interaction. According to the Vienna Convention on Road Traffic,1968 the necessity of the driver to be in control of the automobile is not negotiable. The United States was not among the signatories for this convention. The Society of Automotive Engineers has delineated automation into 6 categories.[9] We need to acknowledge that different levels of autonomous cars will need to have different levels of liability. For instance, the car with semi automation cannot be treated the same as the car that is completely automated. The percentage of human factor and the proportionality of the technology involved has to be taken into consideration.

The status quo with respect to traditional approaches is that there is product liability and criminal liability. The product liability is imposed on the manufacturer and the criminal liability is imposed on the drivers as seen earlier with the uber cases. The alternative to this is having a dedicated framework to hold the autonomous cars liable for the incident. This can be done by making these cars a legal personality like a corporation. This will enable them to be held accountable.

The courts in the European Union are the most progressed in this issue. They understood the need to have a dedicated category and not the

[9] "Automated Vehicle Safety." *NHTSA*, https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety. Accessed 11 June 2022.

traditional approaches such as product liability, strict liability, negligence or homicide. They have decided to grant legal personhood for autonomous cars.[10] This makes the cars a legal personality and provides them with certain rights and duties. The liability of the stakeholders needs to be balanced.

Currently the licensing and the usage of automated cars in India is not allowed according to the Motor Vehicles Act 1988. In case of death or impairment, the driver is held completely liable for his actions. This is the principle that is used in Indian jurisprudence. Even the testing of automated vehicles is not allowed in India but the Motor Vehicles Amendment Bill 2016 has certain clauses that fosters research, innovation and development.

Recommendation

India is the 4th largest market for the automobile industry. It is important for the economy that the legal framework evolves with the development in technology and innovation. Ola and Uber are multi billionaire companies that open the Indian markets to the global investors in turn generating revenue and employment. Therefore, there is an absolute necessity of the legal fraternity to evolve and create a deliberative framework that speaks about the liability of all the stakeholders in detail. There needs to be more authorities or a dedicated

[10] European Parliament, European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, European Parliament (February 16, 2017), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0051&from=EN

authority to scrutinize the user agreements that are given by the aggregators. These agreements are against the basic principle of a valid contract. The liability of the stakeholder needs to be balanced and since all the parties are getting equal rights, the liability must also be equally distributed. There needs to be exhaustive testing by honest authorities to avoid the unfortunate incident that might arise from the automated cars. All these issues will be sorted when a wider and acceptable definition is provided to terms like 'cab aggregators' and 'cab drivers'. The major problem of worker misclassification can be avoided.

Conclusion

The laws are already changing to accommodate the needs and requirements of the technology but the rate at which this change is occurring is not meeting the needs. Since the users cannot read the long user agreement, the government should scrutinize such agreements and declare them void if one of the parties have too much bargaining power. When a crime has been committed by the cab drivers, they are charged with criminal liability. Since there are the employees of this multinational companies, these companies should shoulder the product liability. Because the percentage of compensation can be easily taken care by the company than a mere cab driver.

The jurisprudence should also evolve in such a way that the liability is balanced between the stakeholders. This applies to the matter of artificial intelligence as well. Artificial intelligence may not necessarily not evil but the laws have to change to accommodate the needs. Here

the important factor is changing as per the society needs. The dynamicity of the law is the game changing factor.