



Vicarious Liability for Tortious Acts: A Comparative Study of the Civil Code of Indonesia and the Netherlands

Gatot P. Soemartono^{1*} and Jason Novienco²

¹ Faculty of Law, Tarumanagara University, Jakarta, Indonesia

² Yakin Bertumbuh Sekuritas, Jakarta, Indonesia

*Corresponding Author: gatots@fh.untar.ac.id

Abstract. This article examines the implications of unlawful acts by corporate employees, which can harm both the corporation and its reputation. In civil law, aggrieved parties are entitled to seek compensation from the responsible party. However, when the perpetrator is an employee, principles of vicarious liability or alternative liability may apply. Both the Indonesian Civil Code and the new Dutch Civil Code (Nieuw Burgerlijk Wetboek, NBW) govern vicarious liability, but ongoing revisions to the Dutch code have created noticeable differences between the two legal frameworks. This study employs a **normative legal research method** to analyze these vicarious liability provisions in both legal systems, aiming to enhance **legal certainty**. The findings reveal significant distinctions in how Indonesia and the Netherlands treat vicarious liability, particularly within **banking law**. The evolution of vicarious liability in the NBW profoundly affects its application in banking cases. In conclusion, this comparative approach is essential for reforming existing Indonesian regulations concerning the **restitution of assets to bank customers or victims**. The goal is to ensure that aggrieved parties can effectively recover their losses while simultaneously safeguarding banks and corporations from the repercussions of *ultra vires* actions committed by their employees.

Keywords: Vicarious Liability, Tortious Act, Subordinate, Indonesian Civil Code, Nieuw Burgerlijke Wetboek.

1 Introduction

In civil law, individuals have the right to seek compensation for actions committed by another person, a concept known as vicarious liability. The doctrine of “vicarious liability” is generally referred as liability for the acts of others (Giliker, 2011). Thus, it holds individuals responsible for wrongdoings committed by others.

Numerous employers are unaware that they can be subject to liability for a variety of actions carried out by their employees while on the course of their employment. These actions include bullying, harassment, violence, discrimination, and even copy right infringement or libel. Employers can also be held accountable for the conduct of

third parties, such as clients and customers, as long as these parties are under the direct control of the employer (Appiah-Agyekum & Kayi, 2013).

Over time, there has been thorough scrutiny of the criteria used to determine whether employers can be held vicariously liable for their employees' actions (Varuhas, Higgins, & Edelman, 2022). A "servant" refers to an individual employed by another to carry out tasks under the employer's guidance and control, referred to as the "master". The term "course of employment" indicates that the action in question should occur while the person is employed. Generally, the master bears responsibility for the wrongful actions or known as "torts" committed by their servant, but not for the tortious actions of an independent contractor. This highlights that a person's liability is connected to the tort committed by another individual, in which the defendant had no direct involvement. Nonetheless, the plaintiff can still legally pursue the employer using principles from common law or relevant statutes for wrongdoings committed by others.

In the context of a master and servant relationship, the master bears vicarious liability wrongful acts committed by the servant during their employment. Consequently, if a servant engages in wrongful behavior while carrying out their job responsibilities, both the master and the servant may be held accountable. The fundamental prerequisites to establish a vicarious liability tort within the master-servant dynamic are twofold: the act must be executed by the servant, and it must occur within the scope of employment. For instance, if an employee (B) commits wrongful acts during the duration of their employment, the employer (A) is deemed vicariously liable for those torts (Queensland Law Reform Commission, 2001).

The relationship between partners in a firm is like principal and agent relationship. Consequently, if one partner commits a wrongful act while conducting the ordinary business of the firm, all other partners are vicariously liable for that act. This means that all the partners, including both the guilty partner and the others, are considered joint tortfeasors, sharing liability for the wrongful act. Their liability is also joint and several (Singh, 2021).

Vicarious liability is one of the few instances where an organization which may not be directly at fault, can still be held liable for an incident. This liability can extend to their employees or even unpaid volunteers (Dabrusin, 2000). Volunteers can be integrated into a team just as much as paid professionals, performing the same tasks, undergoing equivalent training, and wearing identical uniforms. It would be peculiar if a victim, injured by a volunteer working alongside paid employees and indistinguishable to the public, were subjected to a distinct legal framework. The existing approach to vicarious liability faces challenges in accommodating volunteers and individuals in non-economic or non-employment relationship, such as self-employed workers, casual workers, temps, and home-workers who operate outside the traditional employment contract. Our understanding of vicarious liability has become a polarized division between employees with contracts and independent contractors, failing to provide a logical explanation for other forms of vicarious liability, which have emerged as additional forms of liability alongside the primary category (Morgan, 2012).

There is no universally accepted definition of the concept of vicarious liability that is conclusive enough to preclude all other definitions. The matter is made worse when we consider that there appears to be no statutory definition of the concept (Okpeh, 2021). Various accounts of the rationale behind vicarious liability vary significantly.

This is acknowledged by the judiciary, with MacDuff J. stating that: “there is no precise unanimity among judges or academics regarding the rationale, and there is no single accepted truth.” Presently, the primary justifications put forth by judges in case law revolve around loss distribution, and enterprise liability (Morgan, 2012).

Enterprise liability justifications are founded on the principle that “with benefits come burdens, he who takes the profit of the enterprise should take the loss”. In other words, if an enterprise or organization enjoys the benefits and profits derived from the actions of its employees or agents, it should also bear the responsibility for any losses caused by those actions. However, this rationale for vicarious liability as pointed out by Stevens, does not fully account for situations where non-profit making organizations, such as the State and charities, may also be held vicariously liable (Stevens, 2009).

While differences have been proven to exist in the application of vicarious liability across various sectors and industries, variations can also be observed between countries (Appiah-Agyekum & Kayi, 2013), particularly when comparing Indonesia and the Netherlands. We all knew that Indonesia adopts civil law system due to its historical connection as a former tributary of Continental Europe, the Netherlands. To this day, Indonesia remains influenced by legislation inherited from the Dutch, based on the principle of concordance. As a result, the laws and legal principles inherited from the Dutch colonial era continue to apply until the new laws are established (Soerodjo, 2016). This variation in legal systems can impact the interpretation and application of vicarious liability in different jurisdictions.

It is undeniable that Indonesia has not been able to establish a new Civil and Criminal Code up to the present time. As a result, it can be deduced that the Indonesian Civil Code is an outdated regulation that has not kept pace with the developments in the types and forms of crimes that exist today. On the other hand, the Netherlands has taken several steps to modernize its old Civil Code, known as *Burgerlijk Wetboek*, transforming it into the *Nieuw Burgerlijk Wetboek*, which now contains 9 books, while the *Burgerlijk Wetboek* only contains 3 books. The author’s focus in this discussion is to examine the changes that have occurred and the differences in vicarious liability arrangements between the two regulations: The Indonesian Civil Code and *Nieuw Burgerlijk Wetboek*. By exploring these variations, a deeper understanding of how each legal system addresses vicarious liability can be gained.

With the existence of vicarious liability, some employers or companies find themselves in a difficult position. When employees commit wrongful acts that cause harm, not only does the company’s reputation suffer, necessitating efforts to rebuild trust, but the company is also obligated to pay or provide compensation to the aggrieved party for the mistakes of its employees. This liability is incurred even if the company itself is not directly at fault for the wrongful actions. As a result, vicarious liability places employers in a challenging situation where they must bear responsibility for the actions of their employees, both financially and in terms of reputation management, even when they were not directly involved in or aware of the wrongful conduct.

To enhance the reader’s comprehension, an illustrative case will be presented to serve as a benchmark for evaluating the application of vicarious liability. The case involves an incident of fraud perpetrated by an employee of Maybank Indonesia, resulting the loss of approximately IDR 22 billion from customer funds. In an attempt to address the situation, a mediation process facilitated by the Consumer Protection Department

of the Financial Services Authority took place, leading Maybank Indonesia to commit to reimbursing the customer's fund with IDR 16.8 billion. The remaining IDR 5.2 billion is pending further investigation by the National Police Headquarters.

2 Research Method

The implemented research method is normative legal research. Legal research refers to a procedure with the purpose of uncovering legal regulations, principles, and doctrines to resolve legal problems (Muhammad, 2004). The research approach implemented is descriptive research, characterized by an objective representation of specific subjects and explanation of factors linked to or methodically outlining factual attributes or attributes of distinct populations within particular domains with precision and accuracy (Azwar, 1998).

Based on the chosen research method and the research nature, this study applies both a statutory approach and a comparative approach. The statutory approach involves an examination of laws and provisions pertaining to the addressed legal matters. In contrast, the comparative approach entails comparing the laws of one country with those of one or more other countries concerning the same subject (Marzuki, 2016). In terms of data analysis techniques, this study applies a deductive approach. According to Peter Mahmud Marzuki, the deduction method applies a syllogism, a concept derived from Aristotle. This method involves presenting a major premise (a general statement), followed by a minor premise (a specific statement), leading to a conclusion. However, within legal argumentation, the legal syllogism is more complex than the traditional syllogism (Marzuki, 2011).

To ensure the research process's continuity, the researcher applies data collection techniques through library research, encompassing a comprehensive review of books, literature, journals, notes, and reports relevant to the addressed issue. The primary legal materials applied in this study encompass the 1945 Law of the Republic of Indonesia, the Indonesian Civil Code, Law Number 8 concerning the Consumer Protection Act, and other related regulations. Secondary legal materials, constituting resources that expound on primary legal materials, include research findings, legal books, legal journals, and commentaries relevant to the study's issues (Nazir, 2013).

3 Results and Discussions

3.1 Tortious Acts

The formulation of "tort" finds its origins in the French Civil Code during the latter half of the 19th century, exerting a significant influence on the evolution of tort theory in Anglo-Saxon law. (Fuadi, 2005) The term "tort" itself is derived from the French word "torquere" or "tortus", while the word "wrong" stems from the French term "wrung", signifying an error or loss. Essentially, "tort" signifies "wrong". However, particularly in the legal domain, the term "tort" has evolved to encompass the meaning of a civil wrongdoing that does not arise from a breach of contract. Consequently, it aligns with

the concept of “unlawful acts” or “onrechtmatige daad” in the Dutch legal system and other Continental European countries (Fuadi, 2013).

In the Netherlands, the concept of “unlawful act” underwent a distinction between two periods: before 1919 and after 1919. Prior to 1919, an act was not considered a tortious act solely if it was contrary to decency or contrary to the community's consensus on prioritizing the interest of others (Fuadi, 2002). Under the *Nieuw Burgerlijk Wetboek*, the definition of an “unlawful act is characterized as an infringement upon a right, an act or omission conflicting with a legal duty, or contrary to societal norms as established by unwritten law...” (NBW, Article 162).

This codification significantly influenced the court decision in the Netherlands, such as the case of *Lindenbaum v. Cohen*. In this instance, a Dutch court addressed whether the term “unlawful act” as defined in article 1401 of the *Burgerlijk Wetboek* should be construed strictly as per written law or more broadly. The Dutch courts have interpreted “unlawful act to encompass acts or omissions that encroach upon other person's right, contravene the defendant's legal obligations, or deviate from the prudence expected in society concerning another's well-being or property” (Schilfgaarde, 1991). Consequently, an unlawful act is comprehended as an action or omission violating others' rights, diverging from legal responsibilities, or transgressing the societal duty of care towards others' interests or property. This signifies that unlawful acts have a broader scope beyond mere violations to laws and regulations.

In the Netherlands, “perbuatan melawan hukum” is defined as “onrechtmatige daad” while “perbuatan melanggar hukum” is defined as “onwetmatige daad”. Due to the historical lineage of the unlawful acts theory from the Dutch government, changes in the Netherlands have indirectly influenced the concept of unlawful acts in Indonesia. In accordance with the Indonesian Civil Code, an unlawful act denotes an action perpetrated by an individual who, owing to their negligence, inflicted harm upon another person (Indonesian Civil Code, Article 1365). Consequently, an unlawful act must encompass the subsequent components: (1) an action exists; (2) this action contradicts the law; (3) the offender has committed an error; (4) the victim sustains a loss; and (5) there is a causal relationship between the action and the incurred loss (Fuadi, 2013).

3.2 Vicarious Liability

Civil liability is governed by Article 1365 of the Indonesian Civil Code, which stipulates that “any act violating the law and resulting in harm to others obliges the individual responsible for the harm due to their mistake to provide compensation for the loss”. However, when linked to Article 1367 of the Indonesian Civil Code, it becomes evident that civil liability does not solely hinge on an individual's errors; rather, accountability can extend or be transferred to someone due to mistakes or losses stemming from actions undertaken by others. The provisions within Article 1367 of the Indonesian Civil Code concerning unlawful acts are termed “liability” or “substitute liability” (Djojodirdjo, 1979). This liability can be categorized into two forms: liability for the actions of others and liability arising from goods under their control.

Vicarious liability, also referred to as substitute liability, denotes a legal obligation that one person assumes for the misconduct committed by another individual. (Ali, 1995) According to *Black's Law Dictionary*, vicarious liability is defined as “the liability that a supervisory entity (such as an employer) bears for the actionable behavior

of an underling or associate (such as an employee) based on their relationship” (Gamer, 2679). Additionally, Mahrus Ali contends that “vicarious liability signifies the legal accountability of one person for the wrongful deeds of another, particularly, when those acts occur within the scope of employment” (Arief, 2002). This liability can arise due to a work-related relationship or authority wielded by the principal over the individual responsible for the wrongdoing. Moreover, the perpetrator’s intention may be to benefit the principal for the labor they carry out.

Vicarious liability plays a crucial role as a tool to ensure social justice by ensuring compensation for the aggrieved party in cases of unlawful acts (Mihardja, 2020). On February 14, 1916, a precedent in the Netherlands, known as “Arrest Susu”, marked the inception of the vicarious liability doctrine. This case originated from an incident in Amsterdam in 1903, involving a dairy entrepreneur who labeled his milk packaging as “Pure Milk” despite it being adulterated with water by a clerk in his employ. The initial court’s ruling found the entrepreneur guilty, prompting an appeal in which the entrepreneur claimed ignorance of the mixing due to it being done by an employee. However, even at the cassation level, the judge upheld entrepreneur’s liability, arguing that the responsibility for the mistake of mixing fell on the entrepreneur as the employer of the involved employee. This judgment underscored that despite the employer’s lack of direct fault, they are still liable due to the employee’s working relationship and association with the employer (Water en Melk Arrest, 1916).

The application of the vicarious liability doctrine gave rise to a concept called the “deep pocket theory”. This theory primarily related to financial responsibilities, signifying liabilities that can be quantified in monetary terms. It relates to situations where an employer or and individual who employs other is perceived to possess greater financial resources and is better positioned to address compensation claims compared to the employee.

3.3 Differences in Vicarious Liability Arrangements in Indonesia and the Netherlands

In Indonesia, the regulations concerning vicarious liability are founded on the stipulations outlined in Article 1367 of the Indonesian Civil Code. These arrangements can be categorized into the following classifications:

1. the theory of respondeat superior, a superior risk bearing theory;
2. the theory of non-supervisory surrogate responsibility for those in their care; and
3. the theory of surrogate responsibility for goods under their responsibility (Nasution, 2014).

In addition to Article 1367 – Article 1369 of the Indonesian Civil Code, arrangements concerning vicarious liability are also specified in various legal provisions, including:

1. Article 19 Paragraph 1 of Law Number 8 of 1999 concerning Consumer Protection Act: This law addresses the liability of businesses for the actions of their employees that affect consumers.
2. Article 29 of the Financial Services Authority Regulation (Peraturan Otoritas Jasa Keuangan) Number 1/POJK.07/2013: This regulation pertains to consumer protection in the financial services sector and outlines rules related to vicarious liability.

3. Article 37 of the Financial Services Authority Regulation Number 77/POJK.01/2016: Regulation deals with information technology-based money-lending services and includes provisions on vicarious liability.
4. Article 27 Paragraph 2 of Bank Indonesia's Regulation Number 22/20/PBI/2020: Regulation focuses on consumer protection by Bank Indonesia and covers aspects of vicarious liability.
5. Article 31 Law Number 8 of 1995 concerning Capital Market Act: This law addresses vicarious liability in the context of capital markets.

These provisions collectively establish the legal framework for vicarious liability in various sectors and industries within Indonesia. Article 1365 of the Indonesian Civil Code provides a clear and easily comprehensible legal framework regarding individual liability for compensation in cases of unlawful acts that cause harm to others. This clarity helps ensure that people of all backgrounds and levels of society can understand and engage with the principles of liability and compensation for their actions.

In addition to Article 1365 of the Indonesian Civil Code, Article 1367 establishes the principle of vicarious liability or substitute responsibility. This principle extends the scope of responsibility beyond an individual's own actions to include losses caused by the actions of others who are together create a comprehensive framework for addressing compensation and responsibility for damages resulting from various parties' actions, contributing to a fair and equitable system for resolving civil disputes in Indonesia.

In light of the developments in Book 6 about Obligation and Contracts *Nieuw Burgerlijk Wetboek* in the Netherlands, where there is a growing advocacy for increased responsibility, particularly concerning a parental and product liability, it is evident that societal perspectives on accountability for unlawful acts are evolving rapidly. These changes in Dutch civil law might serve as an inspiration for potential innovations in Indonesian civil law. As such, it becomes crucial for the Indonesian government to contemplate further interpretations of Book 6 and consider adjustments to civil law regulations, particularly those pertaining to vicarious liability, in order to stay aligned with contemporary standards and societal needs.

In the Netherlands, the regulations concerning vicarious liability are extensively covered in Book 6 of *Nieuw Burgerlijk Wetboek*, specifically in Section 6.3.2, which addresses liability for damage caused by other persons or by things (regarding responsibility for losses arising from the actions of other people or things) (NBW, Article 169-184). These detailed regulations provide comprehensive coverage compared to the vicarious liability arrangements in Indonesia. Some of the detailed provisions in the Dutch law include:

1. Article 6:169, Liability for tortious acts of children.
2. Article 6:170, Liability for faults (tortious acts) of a subordinate.
3. Article 6:171, Liability for faults (tortious acts) of a non-subordinate.
4. Article 6:172, Liability for faults (tortious acts) of representative.
5. Article 6:173, Liability for dangerous equipment.
6. Article 6:174, Liability for dangerous constructed immovable things.
7. Article 6:175, Liability for dangerous substances.
8. Article 6:176, Liability for Dumping grounds.
9. Article 6:177, Liability for Mining operations.

10. Article 6:178, Statutory exclusion of liability.
11. Article 6:179, Liability for animals.
12. Article 6:180, Liability co-possessors; transfer of a thing under a condition precedent.
13. Article 6:181, Liability for damage caused in the course of a business.
14. Article 6:182, Joint and several liability of co-operators.
15. Article 6:183, Youthful age or disability is not a defense against liability based on a tortious act.
16. Article 6:184, Liability and cost-effective measures.

The analysis of vicarious liability in this article specifically centers on Article 1367 of the Indonesian Civil Code and Article 6:170 of the Nieuw Burgerlijk Wetboek, as these two provisions share similarities. Both addresses the accountability of employers or superiors for the acts of their subordinates or employees, a concept commonly associated with the doctrine of vicarious liability. The distinctions between these arrangements are evident in the descriptive verbs applied within these respective articles.

Table 1. The difference between Article 1367 Paragraph 2 of the Indonesian Civil Code and Article 6:170 Paragraph 1 NBW.

Article 1367 Paragraph 1 of the Indonesian Civil Code	Article 6:170 Paragraph 1 Nieuw Burgerlijk Wetboek
<p>“A person is not only responsible for losses caused by his own actions, but also for losses caused by the actions of people who are his responsibility or caused by goods under his control”. (Emphasis added)</p>	<p>“The person in whose service a subordinate fulfils his duties, is liable for damages caused to a third person by the fault of this subordinate, if the risk of the fault has been increased by the order to perform such duties and the person by whom he was employed had control through such juridical relationship over the conduct constituting the fault”. (Emphasis added)</p>

In the two arrangements mentioned above, both stress that an individual bears responsibility not only for their own actions but also for the actions of those under their authority. However, the distinction lies in the fact that in the NBW, there is an additional affirmation that superiors and employers are obliged to compensate for losses incurred by third parties due to the errors of subordinate. This obligation arises when the error results from a superior’s directive and the employers’ control over the subordinate through legal ties pertaining to wrongful conduct.

From the presented table, the divergence between vicarious liability in the Indonesian Civil Code and Nieuw Burgerlijk Wetboek becomes apparent. The Indonesian Civil Code lacks specificity in defining “actions of people who are dependents”, making room for multiple interpretations, given the broad scope of “actions”. In contrast, Nieuw Burgerlijk Wetboek clearly stipulates that the employer or superior is liable for losses resulting from the mistakes of those under the authority “if the action or mistake

arises due to an order from the superior”. Based on the Dutch vicarious liability provisions, the employer or superior is solely accountable for the actions of subordinates causing losses to third parties due to their orders. In Indonesia’s vicarious liability framework, the responsibility extends to losses inflicted by individuals dependent on and supervised by the employer or superior.

Exceptions to vicarious liability, relieving employers or superiors from responsibility for their subordinate’s mistakes, are outlined in Article 1367 Paragraph 4 of the Indonesian Civil Code. This provision specifies that “such liability ceases if parents, school teachers, or head carpenters can prove their inability to prevent the actions for which they might be held accountable” (See Article 1367 Paragraph 4 Indonesian Civil Code). In contrast, *Nieuw Burgerlijk Wetboek* contains an affirmation in Article 6:170 Paragraph 2. This clause clarifies that “Paragraph 1 (pertaining to vicarious liability) does not apply when the subordinate is employed by a natural person who didn’t act within their professional or business scope when establishing the legal relationship with the subordinate. In such cases, liability falls on the person in whose service the subordinate [eg. nanny, cleaning lady] was only if the subordinate, was executing duties assigned by the natural person during the fault leading to damages to a third party” (See Book 6 Article 170 Paragraph 2 *Nieuw Burgerlijk Wetboek*).

The two arrangements mentioned above allows superiors to avoid liability for the actions of their subordinates or those under their responsibility. However, in both arrangements have different requirements. Referring to the Indonesian Civil Code, superiors are not responsible if “supervisors prove that each of them cannot prevent the act”, whereas in *Nieuw Burgerlijk Wetboek* it is stated that “supervisors are not responsible if subordinates act outside of work, and superiors are only responsible if subordinates when carrying out their work as assigned to them causes losses to third parties”. Or in other words, the exemption from employer or company liability for vicarious liability in *Nieuw Burgerlijk Wetboek* is based on the *ultra vires* doctrine.

This concept implies that the employer can be released from liability if it can prove that the employee engaged in an abuse of office (*abus de fonctions*). This typically occurs when an employee, acting without any form of authorization from the employer (whether explicit or implicit), goes beyond their official responsibilities and acts for personal reasons unrelated to their job (Fouquet, 2022).

3.4 Application of Vicarious Liability Against Tortious Acts of Company’s Employees

Here, an example case is given as a benchmark for assessing the application of vicarious liability. At the end of 2020, there was a case of fraud committed by internal parties from the bank itself, which regarding the case of loss of customer funds of PT Bank Maybank Indonesia Tbk., (“Indonesia’s Maybank”) named Winda Lunardi along with Floleta (her mother) who is estimated to be approx. IDR 22 billion. In this case the main suspect was the Head of the Maybank Canang Cipulir Branch with the initials “A” as the party who offered to open a savings account to Winda Lunardi and his family who then falsified the customer’s personal information and then gave it to the bank. This fraudulent activity effectively concealed all the transaction processes from the customer.

In a mediation process facilitated by the Consumer Protection Department of the Financial Services Authority (Otoritas Jasa Keuangan), Indonesia's Maybank has committed to replacing IDR 16.8 billion to Winda Lunardi. Meanwhile, the remaining IDR 5.2 billion, Indonesia's Maybank will await the investigation process conducted by the National Police Headquarters (Halim, 2021). From the bank's management perspective, the compensation provided by Indonesia's Maybank is considered reasonable if the bank itself had committed the fraud or unlawful act. However, in this case, the wrongdoers are employees of the bank.

Legal Relations between Customers and Banks. In a legal relationship between a customer and a bank, the agreement that is formed is not based on mutual consent but is instead mandated by law. Agreements typically require the mutual consent of both parties, but in this context, the agreement is obligatory due to legal requirements. (See Indonesian Civil Code, Article 1233).

The bank must have an agreement mandated by law to engage with the customer. As a result, customers do not have the position or power to negotiate contracts for opening bank accounts or other services. Instead, customers are obligated to comply to all terms and conditions or contracts presented by the bank, even though they may sign a document indicating their agreement. This agreement, however, includes an element of compulsion. In other words, if a customer does not accept or agree with the terms and conditions provided by the bank, they cannot open an account or receive the services offered by the bank.

The absence of an agreement means that a claim for compensation is based on an unlawful act. Agreement contains rights and obligations of the parties involved, and a violation of these terms constitutes a breach. If a bank causes harm or loss to a customer, the customer can seek compensation through legal action based on an unlawful act rather than a breach of contract.

Consumer protection laws typically differentiate between two types of consumers: end consumers, who are the ultimate users or beneficiaries of a product, and intermediate consumers, who utilize a product as part of the production process for another product. According to Article 1 point 2 of Law Number 8 of 1999 concerning Consumer Protection Act, the regulation primarily focuses on end consumers. In the context of banking, customers are considered end consumers, because they use banking products and services for their own interests and needs.

In the absence of specific regulations from the Financial Services Authority (OJK) regarding bank responsibilities towards end consumers, the legal relationship between customers and banks is enforced by the Consumer Protection Act. Under the Consumer Protection Act, strict liability applies. Article 28 of the Consumer Protection Act places the burden and responsibility of proving the absence of guilt on the business actor, which in this case would be the bank or corporation. This means that the bank must prove its innocence in terms of the elements of guilt when facing a claim for compensation under Article 19, Article 22, or Article 23 of the Consumer Protection Act.

When the harmed consumer is an intermediate consumer, both parties involved are legal entities, and as a result, the Consumer Protection Act does not apply. Instead, the case is handled under tortious acts or unlawful acts as outlined in Article 1365 of the Indonesian Civil Code. In the context of a tortious act, Article 1865 of the Indonesian

Civil Code is applicable, which states “that anyone who claims a right or presents an event to confirm that right or dispute another person’s right must prove the existence of that right or the event being presented” (See Article 1865 Indonesian Civil Code). This principle is commonly known as “actori incumbit probatio” or the burden of proof rests in the claimant.

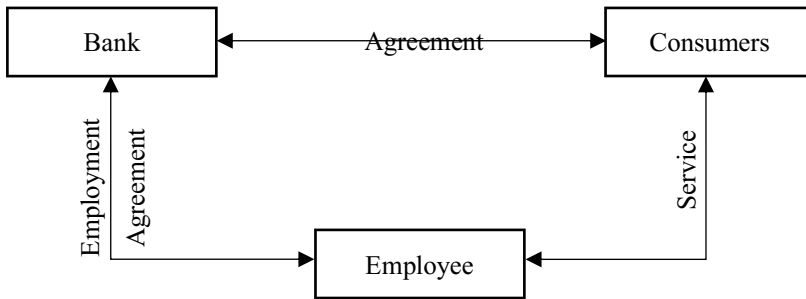
The differences in the elements of proof between unlawful acts and strict liability are summarized in the following table:

Table 2. Differences in Proof of Unlawful Acts and Strict Liability.

Element	Act Against the Law		Strict Liability	
	Consumer (P)	Bank (D)	End Consumer (P)	Bank (D)
Tortious Act/ Unlawful Act	✓		✓	
Guilt	✓			✓
Loss	✓		✓	
Causal Relations	✓		✓	

Information: P = Plaintiff D = Defendant ✓ = Parties who must prove

Fig. 1. An illustration of banking relationships with customers and end consumers



Based on the illustration above, the relationship between a bank and its employees is bound by an employment agreement, while the relationship between the bank and its customers is bound by an agreement, which is generally in the form of account opening agreements, credit agreements, and so on. These agreements contain various terms and conditions that customers or consumers are required to adhere to. These documents establish a legal agreement between the bank and the consumer. In the course of conducting its business, a bank deploys its employees to provide services directly or indirectly to the bank’s customers. Each employee has specific duties and authorities based on their position within the bank.

Application of Vicarious Liability in Banking. If a bank engages in unlawful actions, such as tortious acts, it can be obligated to provide compensation. This is something that is reasonable if the bank is the one directly responsible for illegal conduct. Under Article 1365 of the Indonesian Civil Code, banks are required to compensate individu-

als or entities who have suffered losses or have been victimized by their actions. However, a question arises when the harm is the result of unlawful actions committed by the bank's employees rather than the bank itself. Should the bank be held accountable in such cases, even though the wrongdoing was a deliberate act carried out by the employee?

This is where vicarious liability comes into play, as outlined in Article 1367 Paragraph (1) of the Indonesian Civil Code, which states that "an individual is not only accountable for losses resulting from their own actions but also for losses caused by the actions of individuals under their responsibilities." This implies that the bank is accountable not only for losses resulting from its own actions but also for losses resulting from the actions of its employees. This is possible because there is a legal relationship between banks and their employees, which is an employer-employee relationship. Consequently, employees are considered individuals under the responsibility of the bank or company that employs them.

Every worker or employee engaged with a company is typically provided with guidelines, company regulations, or a related document, such as standard operating procedures. These documents outline the expected behaviours and actions that employees must adhere to (do's and don'ts), as explained in Article 24 Paragraph 1 of Bank Indonesia's Regulation Number 22/20/PBI/2020 regarding Bank Indonesia's Consumer Protection Act. If an employee breaches these provisions or regulations, they may face disciplinary actions or receive a warning letter from the company. Consequently, if an employee performs their duties and exercises their authority as specified in their employment contract and company regulations, but their actions or mistakes lead to losses for third parties, the bank is liable for compensating those third parties.

If an employee engages in activities that fall outside the scope of their designated duties and authority as outlined in their employment contract and the company's regulations, it can be considered an "ultra vires" act or an action beyond their control. Under Article 1367 paragraph (1) of the Indonesian Civil Code, companies are still held responsible for their employees' actions because these employees are regarded as their dependents. Conversely, Article 6:170 Paragraph 1 of the Nieuw Burgerlijk Wetboek specifies that the company is not accountable for the actions of its employees when these actions do not result from orders from superiors related to their job responsibilities. The principle is further reinforced by Article 6:170 Paragraph 2 of the Nieuw Burgerlijk Wetboek, which essentially states that an employer is only liable if their employee commits an action or mistake within the assigned duties and it leads to harm to third parties".

The provisions regarding vicarious liability in the Indonesian Civil Code and Nieuw Burgerlijk Wetboek emphasizes a different aspect. Accountability should be based more on an act that causes harm, while the legal relationship between employers and employees or parents and children is a supporting factor or variable. Regardless of the legal relationship, compensation may be awarded if the act constitutes a tortious act or wrongdoing. In this case, the term "act" in the Indonesian Civil Code has a very broad definition, whereas in Nieuw Burgerlijk Wetboek, it refers to an act ordered by the employer to fulfill work duties. It could be said that vicarious liability in the Nieuw Burgerlijk Wetboek adheres to the ultra vires doctrine, meaning that if an employee commits an act or mistake outside of their designated duties and authority, the responsibility lies with the employee themselves.

Article 1467 Paragraph 4 of the Indonesian Civil Code specifies that “the responsibilities mentioned above end if the parents, school teacher or head of the carpenter proves that each of them could not prevent the act for which they should be responsible.” In terms of prevention, the extent to which a legal entity can prevent an individual's personal desires or intentions from engaging in wrongful actions can be challenging. Even though there are various types of employee training and company rules that require workers to carry out tasks in accordance with their authority and responsibilities. If an employee has malicious intent, they may choose to disregard these rules.

In cases like the one mentioned by the author, where the suspect managed to manipulate account opening documents and transfer procedures for personal gain, it may be difficult for the legal entity (in this case, the bank) to completely prevent such actions, especially if the employee is acting with intent to deceive. However, the legal entity is still held responsible because of the vicarious liability doctrine.

In the latest update of Bank Indonesia's Regulation Number 22/20/PBI/2020 regarding Bank Indonesia's Consumer Protection, the Governor of Bank Indonesia has emphasized that administrators are mandated to take measures to prevent certain behaviors by their management and employees. This is outlined in Article 24 Paragraph 1 of the regulation, which states that “organizers are required to prevent managers, supervisors and employees from engaging in the following behaviors:

1. Enriching or benefiting themselves and/or other parties; and
2. Misusing or abusing the authority, opportunities and/or facilities that they have due to their position or role, which can harm consumers.

The preventive measures outlined in the Bank Indonesia's Regulation can be understood from the explanation of Article 24 Paragraph 1, which indicates that “organizers' efforts to carry out prevention can be achieved by having and implementing guidelines for the conduct and actions of management, supervisors and employees”. It's a common practice for companies, particularly established ones, to have such guidelines in place. However, having these guidelines alone is insufficient to absolve a company from its responsibility to provide compensation. This is because the definition of “actions” in Article 1367 of the Indonesian Civil Code is quite broad.

4 Conclusions and Suggestions

4.1 Conclusions

There are significant differences between the Indonesian Civil Code and the Dutch Nieuw Burgerlijk Wetboek in their regulation of vicarious liability. The Indonesian Civil Code focuses on liability for the actions of other people, animals or pets, and objects under their supervision while the Dutch Nieuw Burgerlijk Wetboek provides more detailed categories of liability. In terms of liability for the actions of employees, the Indonesian Civil Code emphasizes the legal relationship of employment, allowing employers to be released from liability if they can prove they were unable to prevent the employee's actions. In contrast, the Dutch Nieuw Burgerlijk Wetboek places more

emphasis on whether the actions were carried out within the scope of the employees' job, and employers can be released from liability if the action was *ultra vires*.

In the case of tortious acts committed by employees, according to the Indonesian Civil Code, Indonesia's Maybank is obligated to provide compensation for the actions of its employee, the Head of the Cipulir Branch. Failure to do so may lead to the Financial Services Authority (OJK) filing a lawsuit against Indonesia's Maybank to ensure compensation for the victim. In contrast, under the Dutch *Nieuw Burgerlijk Wetboek*, Indonesia's Maybank may not be obliged to provide compensation because employee's actions violated internal company regulations and Standard Operational Procedures, categorizing them as *ultra vires*.

4.2 Suggestions

Review of Vicarious Liability Regulations: The government should conduct a comprehensive review of vicarious liability regulations in Indonesia. While these regulations are scattered across various laws and regulations, it is essential to ensure they are consistent and up to date. Comparing them with similar regulations in the Netherlands, as well as international best practices, can be beneficial. This review should also consider expanding the scope of vicarious liability where appropriate.

Addressing Compensation Challenges: If Indonesia adopts an *ultra vires* approach to vicarious liability, addressing the challenge of compensating victims becomes crucial. The government should consider creating a special regulation or mechanism to trace and recover assets or wealth obtained by employees through tortious acts. This would facilitate the process of providing compensations to victims and ensure that wrongdoers do not benefit from their actions. In the end, these suggestions aim to enhance the clarity and effectiveness of vicarious liability regulations in Indonesia while addressing practical challenges in enforcing them.

References

1. Nana Nimo Appiah-Agyekum, F., Esinam Afi Kayi, S.: Knowledge and Awareness of Vicarious Liability: Views of Healthcare Workers in Ghana. *Online Journal of Health Ethics Online Journal of Health Ethics* **9**(1), (2013)
2. Paula Giliker, F.: Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective. *Journal of European Tort Law* **2**(1), 31-56 (2011)
3. Arthur S., Hartkamp, F.: Civil Code Revision in The Netherlands: A Survey of Its System and Contents, and Its Influence on Dutch Legal Practice. *Louisiana Law Review* **35**(5), (1975)
4. Anita Mihadja., F., Cynthia Kurniawan, S., Kevin Anthony, T.: Vicarious Liability: Perspektif Masa Kini. *Journal Education and Development Institute Pendidikan Tapanuli Selatan* **8**(1), (2020)
5. Philip Morgan, F.: Recasting Vicarious Liability. *The Cambridge Law Journal* **71**(3), (2012)
6. Krisnadi Nasution., F.: Penerapan Prinsip Tanggung Jawab Pengangkut Terhadap Penumpang Bus Umum. *Mimbar Hukum* **26**(1), (2014)
7. Bizibrains Okpeh, F.: Modern Approach to The Doctrine of Vicarious Liability. SSRN <https://ssrn.com/abstract=3884388>, (2021)

8. Elizabeth Van Schilfgaarde, F.: Negligence Under The Netherlands Civil Code – An Economic Analysis. *California Western International Law Journal* **21**(2), (1991)
9. Singh A., F.: Critical Analysis of Vicarious Liability. *International Journal of Law Management and Humanities* **4**(3), 4533-4548 (2021)
10. Irawan Soerodjo, F.: The Development of Indonesian Civil Law. *Scientific Research Journal (SCIRJ)* **4**(9), 30-35 (2016)
11. Roger Scruton., F.: The eclipse of listening. *The New Criterion* **15**(3), 5–13 (1996)
12. Mahrus Ali, F.: *Asas-Asas Hukum Pidana Korporasi*. PT Raja Grafindo Persada, Jakarta (2013)
13. Syarifuddin Azwar, F.: *Metode Penelitian*. Pustaka Pelajar, Yogyakarta (1998)
14. Mukti Fajar Nur Dewarta, F., dan Yulianto Achmad, S.: *Dualisme Penelitian Hukum Normatif & Empiris*. 4th edn. Pustaka Pelajar, Yogyakarta (2017)
15. M.A. Moegni Djojodirdjo, F.: *Perbuatan Melawan Hukum*. Pradnya Paramitha, Jakarta (2010)
16. Muhammad Djumhana, F.: *Asas-Asas Hukum Perbankan Indonesia*. Citra Aditya Bakti, Bandung (2008)
17. Munir Fuady, F.: *Perbuatan Melawan Hukum; Pendekatan Kontemporer*. 1st edn. PT Citra Aditya Bakti, Bandung (2002)
18. Munir Fuady, F.: *Perbandingan Hukum Perdata*. PT Citra Aditya Bakti, Bandung (2005)
19. Munir Fuady, F.: *Perbuatan Melawan Hukum; Pendekatan Kontemporer*. 4th edn. PT Citra Aditya Bakti, Bandung (2013)
20. Bryan A Garner, F.: *Black's Law Dictionary*. 8th edn. United States of America: West (2004)
21. Peter Mahmud Marzuki, F.: *Penelitian Hukum: Edisi Revisi*. Kencana Prenada Media Group, Jakarta (2017)
22. Peter Mahmud Marzuki, F.: *Penelitian Hukum Edisi Revisi*. 12th edn. Kencana Prenada Media Group, Jakarta (2016).
23. Peter Mahmud Marzuki, F.: *Penelitian Hukum*. Kencana Prenada Media Group, Jakarta (2011).
24. Jason Varuhas, F., Andrew Higgins, S., James Edelman, T.: *McGregor on Damages*. Sweet & Maxwell London United Kingdom (2022)
25. Abdulkadir Muhammad, F.: *Hukum dan Metode Penelitian Hukum*. PT Citra Aditya Bakti, Bandung (2004).
26. Moh. Nazir, F.: *Metode Penelitian*. Ghalia Indonesia, Bogor (2013).
27. Robert Stevens, F.: *Torts and Rights*. Oxford University Press, United Kingdom: Oxford (2009)
28. Rogers Partners LLP page, <http://www.rogerspartners.com/wp-content/uploads/2016/06/A-Framework-for-Assessing-Vicarious-Liability.pdf>, last accessed 2023/06/26

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

