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Reining in Vicarious Liability

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Introduction

The doctrine of vicarious liability occupies a highly exceptional and anomalous position within tort law. The UK system of tort law is predominantly fault based and it is premised on the basic principle that people should only be held responsible for their own wrongdoings. Vicarious liability contradicts both of these principles as it imposes no-fault liability on a defendant who has not been shown to have engaged in any kind of tortious wrongdoing. The remit of the doctrine of vicarious liability has expanded dramatically over the last 20 years. The main expansions have been effected with the laudable aim of providing compensation to victims of institutional child abuse, but unfortunately not limited to this context. It is argued that the law has gone too far and, for the sake of the integrity of both the doctrine and the tort system as a whole, the remit of vicarious liability should be drastically curtailed. As will be demonstrated, the current law on vicarious liability is inconsistent, replete with internal contradictions and generally incoherent.

This paper will look first at the nature of vicarious liability and possible theoretical justifications for its existence before moving on to discuss and critique the various ways in which the doctrine has been expanded in recent years. This will include discussion of the doctrine of non-delegable duty liability which has become, in effect, a tool for imposing vicarious liability for independent contractors.

The Nature of Vicarious Liability

Vicarious liability is a form of secondary liability. This means that the defendant's liability is triggered by the primary liability of another party. Primary liability, by contrast, refers to personal liability for wrongdoing. The vicarious liability doctrine most commonly applies to employers and it is almost wholly a common law creation.[1] While this paper is mostly concerned with the position of the

[1] There have been two statutory developments in its history: (i) s.88 of the Police Act 1996 which makes Chief Constables or Police Authorities vicariously liable for tort committed by their police officers and (ii) s. 10 of the Partnership Acts 1890 which similarly extends the doctrine to business partners. For convenience purposes, this paper will adopt the terminology of employer and employee when discussing the application of vicarious liability.

vicariously liable defendant, it is worth noting briefly the position of the actual tortfeasor, the employee. Vicarious liability does not extinguish the liability of the primary tortfeasor. The vicariously liable employer and the tortfeasor employee are held jointly and severally liable. Claimants therefore have a choice of who to sue,[2] and could in theory sue the employee. They almost always opt to go through the vicarious liability route as it usually guarantees a solvent defendant – employers often have public liability insurance. Of more relevance for present purposes, where the insurance company pays out in relation to a vicariously defendant, it takes on a right of subrogation against the tortfeasor employee. A gentleman's agreement not to enforce such rights of subrogation has been in force in the insurance industry for some decades, but it only covers claims where the wrong committed by the employee was unintentional. Most of the expansions of the doctrine of vicarious liability relate to intentional torts, usually trespass torts covering acts of sexual abuse. To my knowledge, nothing has been written about the impact of such developments on the gentleman's agreement. If it is abandoned, the use of subrogation rights risks completely undercutting the main point of vicarious liability – the provision compensation through an economically efficient route. In the past, this would have been a moot issue, as most individual tortfeasors would lack assets and would not be worth suing. Now of course it is common for individuals to have public liability insurance as part of their house insurance.

The importance of the fact that vicarious liability is a form of no-fault secondary liability is that, in assessing whether liability arises, the court should not inquire at all into the defendant employer's conduct. Liability arises from the existence of an employment-related relationship between our defendant and the tortfeasor and the fact that there is said to be an adequate connection between that relationship and the commission of the tort. In practice, there is evidence in some cases of the courts justifying the imposition of vicarious liability by reference to the conduct of the defendant. This blurs the boundaries between primary and secondary liability. Examples of this will be presented in the next part of this paper. The distinction is further blurred by the Supreme Court's resurrection of non-delegable duty liability, a form of primary liability, to extend the range of circumstances in which employers can be held liable on a no-fault basis for independent contractors. This too will be explored later in the paper.

As regards the legal elements of the doctrine, traditionally it was described as being composed of 3 requirements: (i) the existence of a contract of employment; (ii) the commission of a tort by the employee and (iii) proof that the tort in question was committed with the 'course of employment'. Following the decision of the Court of Appeal in *JGE* [2012] EWCA Civ 938 in July 2012 and the UK Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 in November 2012, the test has been reformulated and is now said to consist of a two-stage approach: (i) is there a relationship between the defendant and the tortfeasor that is capable of giving rise of giving rise of vicarious liability (the relationship requirement) and (ii) evidence of a close connection between that

[2] Recovering in full from that party and leaving that defendant with a contribution right to pursue against the other liable party.

relationship and the act or omission of the tortfeasor (the close connection requirement).

The recent legal developments in vicarious liability will be discussed under the headings of 'the relationship requirement' and 'the close connection requirement'. The latter will be addressed first in order to reflect the chronology of the relevant case law. Firstly, however, it is necessary to look briefly at the theoretical basis for the existence of the doctrine.

Theoretical Justifications for Vicarious Liability

This paper adopts the position that we can only properly critique the composition and application of the doctrine if we have a clear idea of what it is for. Although the doctrine has been around for hundreds of years, and is routinely used in practice, it is perhaps surprising that no one has yet come up with a convincing set of theoretical justifications for its very existence within our fault based tort system, let alone its now controversial manner of operation. Much ink has been spent on this exercise and with little success.

Baty (writing in 1916)[3] and Atiyah (writing in 1967)[4] concluded that the doctrine could perhaps be justified by reference to the following non-exhaustive list of justifications: (i) the employer gets the benefit of the employee's labour so should take on any associated burdens (ii) the employer has contributed to risk of harm to public by choosing to operate the relevant enterprise and by choosing to have employed the harm-causing employee (iii) the employer has 'deep pockets' (meaning he or she can afford to cover the loss)and (iv) the employer can engage in widespread loss distribution – that is, pass on the cost of the damages award to consumers through small increase in price of product being produced. This reflects the idea that a loss of £1000 is much less of a loss if spread amongst 1000 people than if it is imposed on just one person. Lastly, there is also the consideration that it is cheaper and more administratively efficient for employer to secure insurance to cover activities of enterprise, than for individual workers to take out their own policies to cover themselves against potential liabilities. Of all the reasons cited, the loss distribution one has probably always been regarded as carrying the most weight.

None of these justifications were said to be convincing on their own, but instead to have cumulative effect in terms of justifying vicarious liability. Since doctrine operated fairly narrowly within the field of commercial enterprise (and only applied to unintentional torts committed by employees) until the late 1990s, it was not that controversial and therefore it was tolerated without too much scrutiny or criticism. However the new expanded version of the doctrine is one that routinely applies to not-for-profit organisations and makes them liable for harms that have been intentionally inflicted by one of their workers. This makes it very difficult to justify on loss distribution grounds. Nonetheless, the loss

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[3] T Baty, *Vicarious Liability* (London, 1916)
[4] P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths: London, 1967)

distribution justification is still routinely cited by the courts as a justification for the new expanded version of vicarious liability. This demonstrates the lack of judicial engagement with crucial question of the doctrine's continued legitimacy.

The key cases effecting this expansion contain vague and contradictory attempts at justifying it. Initial attempts at justification focussed on vague policy-based 'justice and fairness' reasoning. While it might seem fair to compensate the victim, it is certainly not fair to saddle a defendant with no fault liability in circumstances where he or she is unable to distribute the loss. Moreover, why are the victims of torts committed by employees more deserving of an easy route to guaranteed compensation that anyone else? A highly emphasised recurring message is that vicarious liability also achieves deterrence. This is just wrong. Fault based liability achieves deterrence. No fault liability is more likely to encourage a 'devil may care' attitude. Plus, in the context of child abuse cases, given that the threat of criminal prosecution has not deterred the tortfeasor, it is hard to see how an employer can realistically make changes within institution to guard against such harm. Note that in the seminal child abuse vicarious liability cases, the claims were only brought via the vicarious liability route as no fault could be found on the part of the employer as regards vetting procedures and employee supervision.

The enterprise risk justification (which refers to the idea that the defendant's enterprise has created the particular risk of the harm caused by the tort and that as a quid pro quo it should therefore assume the burden of paying for that harm) is another current judicial favourite. The problem with this argument is that it only works in cases where liability is limited to risks that are both linked to a special feature of the enterprise and as well as to a tangible benefit received by the employer defendant. When the courts try to use this argument to justify the imposition of no fault liability on not-for-profit run childrens' homes and care homes for the elderly, it rings completely hollow. Contrary to the suggestion of a senior judge,[5] the setting up of an institution to care for the vulnerable does not create a new risk of abuse. Such predators sadly already exist. Moreover, the application of vicarious liability to such enterprises effectively punishes those carrying out valuable social activities. A point that has not received nearly enough attention is that the imposition of no-fault liability in these contexts will inevitably discourage private not-for-profit enterprises from continuing to operate. The insurance premiums will often prove prohibitive. So for the sake of compensating the few, the many will lose out. Where the service is provided by a public authority, the damages award will come out of its (limited) budget. This means less money available to discharge its public duties.

On a more analytical note, the other big problem with the use of the enterprise risk argument is that it is applied too loosely. As will be seen from the discussion of the case law in the next sections, almost any activity can be described as linked to a risk created by the enterprise. The use of risk rationales to impose no fault liability is always going to be a, for want of a better word, risky strategy. As everyone knows, risks are ubiquitous. So why single out employer enterprises as sole targets of no-fault liability? If we apply risk reasoning consistently, all risky

[5] *Lister v Hesley Hall* [2001] UKHL 22 per Lord Millett at paragraph 83.

activities should attract no fault liability. Having children is a good example –so it should follow that parent should be liable on a no fault basis for all harms caused by their children. Another obvious example is driving accidents. Is that where we want to end up?

Within American tort scholarship, reams and reams have been written on economic efficiency theories of vicarious liability. (There is a very active law and economics movement in the US but, fortunately, it has never really caught on in the UK). Economic efficiency in this context is based on idea that only optimally efficient enterprises should operate within the market and that this can only be achieved by imposing no-fault liability for harms associated with the enterprise. This is because optimally efficient enterprises are said to be those that can cover both their internal and external costs (including, harm to others through the fact of operating) and still make a profit. The costs of harms to others are thus treated as a form of transaction that must be attributed to the enterprise so that an accurate picture of its true costs is obtained. If the enterprise can absorb such costs and still survive in the market, then that supposedly means that people must really want/need its products or services. The theory runs that it is a valuable enterprise that is worth keeping within the market.[6] This is a very simplified explanation of economic efficiency theory and its application to vicarious liability. Further elaboration is not however necessary as it is does not provide a credible explanation of the operation of the doctrine of vicarious liability in law. In so far as it makes wealth maximisation a core goal, it is also an unattractive theory and it is based on certain tenuous assumptions, such as the idea that people as consumers always act rationally.

More importantly, economic efficiency theory of vicarious liability does not withstand sustain detailed scrutiny. It fails to explain numerous legal cases of vicarious liability, and more significantly, if fails to explain why the doctrine of vicarious liability is limited to *torts* of employees for economic efficiency theory covers all harms caused by the enterprise. Moreover, it is only remotely persuasive if it limits vicarious liability to for-profit enterprises, since not-for-profits cannot engage in the kind of loss distribution needed to achieve optimal efficiency.

In my opinion, American scholar George Fletcher offers the most convincing explanation of why we have vicarious liability and why we only apply it to employers.[7] This theory may be described as a fairness conception of enterprise liability. Briefly stated, the defendant employer should be liable because he/she acquires some kind of benefit from having another person (the tortfeasor) act to pursue his/her particular aims and so it is only morally fair that he/she should take on burden of harms caused by that employee in the course of pursuing the aims of the enterprise. It is important to note that that the burden and the benefit must be proportionate. Predictably, however, this theory of vicarious liability is again only really convincing if limited to commercial enterprises. This is due to the

[6] See, for example, G Calabresi 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale Law Journal 499

[7] G C Keating, 'The Idea of Fairness in the Law Enterprise Liability' (1997) 95 Michigan Law Review 1266

fact that efficient loss distribution will generally always be central to the proportionality assessment.

In summary, vicarious liability can only really be justified in relation to for-profit enterprises where a proportionate benefit/burden can be established, and it can also be shown that the defendant can efficiently distribute the cost of paying the compensation.

One way of reining in vicarious liability is therefore to limit its application to for-profit enterprises. At its core, vicarious liability is tolerated as an exceptional doctrine within fault-based tort regimes because the burden of liability it imposes is easily spread. Realistically however, the courts are highly unlikely to accept the argument that not-for-profit enterprises should be exempted. Alternatively, liability should only extend to torts that are committed while the employee is pursuing the aims of the enterprise. In addition to excluding intentional torts, this would means a strict interpretation of the old 'course of employment' requirement, now the 'close connection' assessment. It is to this requirement that we now turn.

The Development of the Close Connection Test

It is important to situate the developments in vicarious liability within their social and political context. As mentioned in the Introduction, the main changes in the doctrine of vicarious liability have been directed at dealing with the social problem of institutional child abuse that emerged as a huge public scandal across the Commonwealth in the late 1990s and early 2000s. These scandals concerned abuse that had taken place in the 40s, 50s, 60, 70s and 80s. The countries most affected were the UK, Ireland, the US, Canada, Australia and New Zealand. The scandal was particularly serious in Canada where there was direct state involvement in taking indigenous children from family homes and putting them into children's homes where they were mistreated. Such actions were designed to break up indigenous communities and based on an overt policy of cultural assimilation which was pursed by the federal government for several decades. This arguably explains why Canada took the lead in changing the law of vicarious liability to provide compensation to child abuse victims. In Canada's defence, it is currently way ahead of other countries in terms of making amends for its mistakes. It has set up truth commissions and state funded compensation schemes. In Australia, a similar pattern of state behaviour ('Stolen Generations') was evident from late the 1800s right up until the 1970s. The term 'the Stolen Generations' has been adopted to refer to those Aboriginal children who were forcibly removed from their family homes by the State and placed into residential facilities. Some children were also adopted by non-Aboriginal families. For those sent to residential facilities, physical sexual and psychological abuse was rife. Quite astonishingly, these forcible removals were legal under specially created Acts of Parliament. The rational for removal was that such children would be disadvantaged if left in their own communities and that they would receive a better education and general upbringing if remove. Like Canada, Australia is now

doing what it can to atone for this and notably it has set up a Royal Commission set up to investigate.

It is against this backdrop that we need to read the game-changing cases in the expansion of vicarious liability, namely the Canadian Supreme Court decision in *Bazley v Curry* (1999) 2 SCR 534 and the UK House of Lords decision in *Lister v Hesley Hall* [2001] UKHL 22. The prime objective in these cases was to provide compensation at all costs to those particular claimant child abuse victims.

In terms of the legal elements of vicarious liability, it should be noted that the purpose of linking the relevant tort to the employment relationship is to ensure that the defendant's liability only extends to harms associated with the enterprise. Harms that are unrelated, or only tangentially related, cannot legitimately (under any of the various theories for vicarious liability) attach to the defendant employer. So anything done by worker during his or her personal life should not in theory give rise to vicarious liability.

Under the old language used, such employees would be said to be 'on a frolic of their own'. Under old test for determining the connection between the tort and the employment, the Salmond test, this distinction between torts that were or were not sufficiently related to the employment was generally clear and fairly maintained. This is no longer the case under the new formulation of the doctrine. Many acts that would have been treated as 'folics' under the old Salmond test will now attract the vicarious liability of the employer.

The Salmond test provided that an employee's acts would be categorised as falling within the course of employment if: (i) it had been authorised by the employer; or (ii) it could be regarded as a wrongful and unauthorised mode of doing some act authorised by the employer. This generally excluded intentional wrongdoing on the part of the employee as it is difficult to describe wilful wrongdoing as an unauthorised mode of doing an authorised act.

A key decision in the lead up to the changes in the law is *Trotman v North Yorkshire* (1999) LGR 584*.* In this case a deputy headmaster of a special school assaulted a mentally disabled pupil while on a school trip to Spain. The accommodation arrangements that had been made involved the teacher sharing a bedroom with the pupil. There was a clear relationship of employment and commission of the torts of assault and battery. The vicarious liability claim failed however on the basis that the teacher's acts of assault and battery were said to fall outside his course of employment. The teacher had taken advantage of his position of authority and of the care arrangements made by the school for the trip. Nevertheless, his conduct was said to be 'far removed from an authorised mode of carrying out a teacher's duties on behalf of his employer'. Indeed, it was regarded as 'a negation of the duty of the council to look after children for whom it was responsible.'

This approach was reversed by the House of Lords in its decision in *Lister v Hesley Hall*.[8] The claimants in *Lister* alleged that, while residents of a school boarding house between 1979 and 1982, they were sexually abused by the warden who was in control of the day to day running of the house. The house was owned and operated by the defendants as a private commercial enterprise. They initially argued both direct negligence as regards their selection and supervision of the warden, as well as vicarious liability. The direct liability claim dismissed at early stage due to lack of fault. As regards vicarious liability, the House of Lords said that the Salmond test was too narrow, and that it would be replaced with a new close connection test similar to that set out by Canadian Supreme Court in *Bazley* a couple of years previously. Under this new test, a tort will fall under the course of employment if there is a sufficiently close connection between the tort and the employment.

Unlike the defendant in *Lister*, the defendant in *Bazley* operated residential care facilities for emotionally troubled children on a not-for profit basis. It was sued by one of its former residents in respect of acts of sexual abuse carried out by an employee. Central to the decision was the fact that the regime of care operated by the defendant was one of total intervention, with employees acting as substitute parents. This meant that they were involved in activities such as bathing the children and in tucking then into bed at night. In coming up with the new 'close connection' test for course of employment, the Canadian Supreme Court discussed the purpose of vicarious liability as a doctrine and said that it was a policy creation and that it was justified by the principles of fair and efficient compensation and deterrence. The notion of fair and efficient compensation was based on loose notion of risk creation combined with a capacity for efficient loss distribution. Given that the defendant in *Bazley* operated on a not-for-profit basis, such reasoning was wholly inapplicable to the actual facts of the case. It was also suggested that defendants in such circumstances could deter such harm in future by engaging in 'imaginative administration'. It is important to note that in the companion case to *Bazley*, a case called *Jacobi v Griffith*, a differently constituted panel of the Supreme Court came to a different conclusion on liability and appeared to disagree with general arguments made in *Bazley*.

It has already been pointed out that an economic efficiency rationale is unconvincing where the defendant is a public authority or a not-for profit organisation. Ironically, such economic reasoning would have been more convincing in the context of *Lister* where the defendant was a for-profit enterprise, but for some reason, although the House of Lords in *Lister* expressly based their close connection test on the decision in *Bazley*, they expressly refused to endorse the economic efficiency rationale contained within in it. Notably, the House of

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[8] Note that due to doctrine of binding precedent, the High Court and the Court of Appeal in *Lister* were unable to go against the *Trotman* decision. In their desperation to allow the claim to succeed, they endorsed a highly convoluted argument that the warden was negligent for not reporting his own harmful intentions to his employers, ie that he had a affirmative duty to take such positive steps and that he had breached this duty in failing report himself. When the case got to the House of Lords, the House of Lords dismissed this ludicrous basis for liability, and instead simply overruled *Trotman*.

Lords did not however offer a different rationale in its place. If we look at the individual speeches we can detect rhetoric of fairness and justice, risk creation and assumption of responsibility for care of vulnerable. As noted already, none of these are appropriate grounds for no-fault liability.

The first application of the close connection test outside child abuse context was in *Dubai Aluminium v Salaam* [2002] UKHL 48, a case with a fairly complicated set of facts. The claim involved a firm of solicitors set up a legal partnership. One of the firm's partners committed a tort when he helped a client carry out a large-scale fraud against Dubai Aluminium. All members of the firm were sued by Dubai Aluminium in equity and they paid out a large amount of money in settlement. They then sought to recover some of this money from the client, the main culprit in the fraud. But under the terms of s. 10 of the Partnership Act 1890, the firm could only go after this person if they could show that they were legally liable for the wrongful acts committed by the partner who had helped facilitate the fraud. So paradoxically, this was a case where the partners wanted a finding that they were vicariously liable. They welcomed it. They argued for it. This important aspect of the decision in Dubai is often glossed over completely.

It is also important when it comes to assessing the fairness and justice rationale employed in it to justify the finding of vicarious liability. Due to the unique features of the case, it actually was fair and just to impose liability as it enabled the claimants to recover their losses from the party that had wrongfully caused them. In all the other cases, the notion of fairness has applied only to the claimant's need for compensation and no mention is made of the fact that it is unfair to impose the burden of providing that compensation on an innocent party.

Things start to get a bit ridiculous when we get to the decision in *Mattis v Pollock* [2003] EWCA Civ 887. In this case a nightclub doorman stabbed and seriously injured a customer of the club. He been involved in an altercation with some friends of the victim earlier in the night and had been chased from the scene. He went to his flat, which was nearby, armed himself with a knife and returned to scene several hours later to seek his revenge. He singled out the victim as a member of the group and then attacked him. He severed his spinal cord and rendered him paralyzed. The doorman was convicted of GBH. Not surprisingly however the victim also wanted compensation for his significant injuries and so he sued doorman's employer in vicarious liability. The torts involved were once again assault and battery. Although his conduct would appear to constitute a pretty clear example of a personal vendetta, only tangentially related to the job, it was nevertheless said to satisfy the close connection test. The Court of Appeal approached the close connection test by questioning whether it would be fair and just to impose vicarious liability. If so, then that meant that the connection would be considered to be sufficiently close. The Court was clearly swayed by evidence that defendant had encouraged the tortfeasor to generally act violently and aggressively. However such reasoning is more in line with fault-based liability and therefore primary liability.

Then we have *Majrowski v Guy's and St thomas' NHS Trust* [2006] UKHL 34, where the defendant employer was held vicariously liable for harassment committed by

senior employee against junior employee. The tort involved was that statutory tort of harassment (under s. 3 of the Protection from Harassment Act 1997). A new slant was added to close connection test in so far as it was held that it could be satisfied by evidence that employee's wrongdoing represented a risk that was 'reasonably incidental' to the nature of the job. The *Majrowski* ratio would appear to indicate that all enterprises operating a hierarchical system of line management will create risks of abuse of authority which are closely connected to the employment for the purposes of vicarious liability.

The reasoning in *Majrowski* also demonstrates that while the test is supposed to be 'is it so closely connected to the employment that it is fair and just to impose vicarious liability', in practice it is approached the other way around. If it seems fair to impose vicarious liability, then we can label the connection as close enough. Such woolly reasoning makes the law unpredictable.

Finally we come to *Weddall v Barchester Healthcare; Wallbank v Wallbank Fox Designs* [2012] EWCA Civ 25, two preposterous decisions which show just how far the courts have lost their way with vicarious liability. Both cases were heard together, with differing results. In *Weddall*, claimant was the deputy manager of a care home for people with severe mental health issues. The tortfeasor was a Senior Health Assistant in the home. On the night in question, another member of staff phoned in sick and the claimant manager needed to find a replacement. He phoned the tortfeasor, who was drunk and in a bad mood. The tortfeasor formed the idea that manager was making fun of him. He got on his bike, rode to the home, saw the claimant sitting in the garden and immediately started violently attacking him. He had to be pulled off the claimant by another employee. The Court of Appeal held that was not closely connected to his employment but was rather an independent venture of his own.

Contrast *Wallbank*, where the workplace was a factory. The claimant and the tortfeasor were co-workers. The tortfeasor was said not to have been very good at his job and he often had to be reminded of what to do. One the day in question, he was doing a task inefficiently (loading metal frames into an oven) and the claimant is said to have commented on this in an exasperated fashion. He then suggested loading the oven in a different way and went to help the tortfeasor with the task. In response, the tortfeasor put his hand on the claimant's face and threw him back on to a table about 12 feet away. The claimant broke his back. The same Court of Appeal that decided *Weddall* held that this attack was closely connected to the employment. At least part of the reasoning seems to have been based on the idea that it is only to be expected that tempers will flare in a factory and that 'an overly-robust reaction' to a legitimate instruction is consequently a reasonable incidental risk for the purposes of satisfying the close connection test. It goes without saying that this reasoning is highly questionable.

Application of the close connection test to the police

Arguably the most inconsistent application of the close connection test is to be found in cases involving the police. The courts started off finding close connections

and imposing liability, but in later cases decided against vicarious liability on tenuous grounds, making dubious distinctions.

In *Weir v Bettison* [2003] EWCA Civ 111, a police officer was helping his girlfriend move house using a police vehicle without permission (and therefore without insurance). When unloading her stuff at the apartment building, the officer approached by the claimant and his friend (who were described in court as 'local youths'). The claimant asked the police officer if he was with the police and he admitted that he was. The claimant's friend lived in that same building. Sometime later, the police officer in question accused the claimant of rummaging through his girlfriend's bags. An altercation ensured. The police officer was said to have manhandled the claimant down the stairs before throwing him into the restraining cage in the back of the police van, where he allegedly further assaulted him. He then let claimant go as he seemed 'contrite' and his girlfriend also confirmed that nothing appeared to be missing. The claimant sustained various injuries, backed up by a medical report from the hospital he attended. Vicarious liability was imposed on the relevant Chief Constable on basis that the offending officer had been purporting to act as police officer at the relevant time. The case report is unusually short as it seems to have been treated by the Court of Appeal as a very straightforward claim. No credence given to the defendant's argument that the offending officer had been acting 'on a frolic of his own' at the time.

Then we have *Bernard v AG of Jamaica* [2004] UKPC 47 (a Privy Council decision). The claimant in this case had joined a long queue of about 15 people at a post office in order to make a long distance phonecall. Just as he got to the phone and started to make his call, the tortfeasor approached him, informed him that he was a police office and demanded (in what was said to have been a 'crude and vulgar' manner) immediate use of the phone. He is also alleged to have said that, as a police office, he was not prepared to wait in a queue. The claimant refused to give him the phone, whereupon the officer became violent. He pushed and hit the claimant, and then when the claimant still refused to give over the phone, the officer pulled out his police-issued revolver and shot him in the head. Fortunately it was not a fatal shot. While the claimant was recovering from his injuries in hospital, the officer placed him under arrest for assaulting a police officer and handcuffed him to the bed. The officer then went on the run and was later sacked. Quite astonishingly, criminal proceeding against the claimant for assault were continued for a number of months before being dropped. The close connection test was easily satisfied on the basis that the officer explicitly claimed to be acting as a police office at the relevant times. He also intimated that he was on police business and shot the claimant using a police-issue gun.

The next case of interest is *AG for British Virgin Islands v Hartwell* [2004] UKPC 12 (another Privy Council decision). The tortfeasor was a police officer who had access to a loaded gun in the police station where he worked. On the night in question, he was said to have taken the gun, abandoned his post and travelled to a neighbouring area to check up on his girlfriend. In fact, he was said to have gone off in a fit of jealous rage. He went to the busy bar where his girlfriend worked, saw her talking to someone, and he fired 4 shots in their direction. Evidently he did not have a very good aim, as managed to hit girlfriend and cause her relatively

minor injuries, but shot and seriously injured claimant, who was an innocent bystander. The claim for vicarious against his employer, the Attorney General for the British Virgin Islands, failed on the basis that the officer was not purporting to act as a police officer at the relevant time. He was said to have been engaged in a personal vendetta, having abandoned his post. Significantly, however, the Attorney General held primarily/directly liable in negligence for the injuries sustained by the claimant. The direct negligence related to the fact that the officer, who was known to be a loose cannon, was given unsupervised access to a gun. The relevant duty of case was based on this creation of a situation of danger. Breach was established by evidence that there had been no checks whatsoever over this officer using gun. Crucially, there were various previous documented incidents indicating that this person was not to be trusted with a gun. Notably, he was said to have previously threatened with a knife a man who was present in his girlfriend's apartment. This incident was investigated at the time but dismissed by those in authority as nothing serious. A second incident concerned this officer involved him being seen walking around at night with the gun in his belt on display. (It is relevant to note that police in this particular area did not generally carry arms). He was warned about this. Thus there was very strong evidence of direct fault on part of his employers.

After that, the trend changed in the opposite direction, with vicarious liability claims being dismissed even in the face of seemingly strong close connections with their jobs. This 'no liability' trend is in line with the current approach in direct negligence actions against the police for failing to protect members of the public.[9]

In *N v Chief Constable of Merseyside* [2006] EWHC 3041, the tortfeasor police officer was sitting in uniform in his car outside a nightclub. He was off duty and he was in his own car rather than a police car. The claimant, a young woman, was carried out of the club in a very intoxicated state. A first-aider employed by the club tried to persuade her to go to the hospital, but she refused and said that she would get a taxi home. The first-aider was worried about her (apparently, she had also taken drugs). The tortfeasor officer witnessed all of this and spoke to first-aider, identifying himself as a police officer and asking if he could help. He told first aider that he would take her a police station. He went over to the girl, told her that he was a police officer, showed her warrant card/police badge and told her to get into the car. He drove her home, raped and indecently assaulted her over several hours, and filmed it. She was unconscious the whole time. In bringing her vicarious liability claim, the victim argued that there was a close connection between the manner in which the officer had committed the tort and his job as a police officer. She pointed in particular to the fact that he had purported at all times to be a police officer, and was in uniform. The Chief Constable defendant argued that the officer was off duty, and that he had merely used his uniform and warrant card to camouflage his personal desire to assault vulnerable women. The High Court was persuaded by the Chief Constable's arguments and held that the elements of vicarious liability were not satisfied. In particular, there was not a

[9] See, for example, *Hill v Chief Constable of West Yorkshire* [1988] 2 WLR 1049, *Brooks v Commissioner of Police for the Metropolis* [2005] 1 UKHL 24, *Smith v Chief Constable of Sussex Police [2008] UKHL 50* and *Michael v Chief Constable of South Wales Police* [2015] UKSC 2.

close enough connection to make it fair and just to impose vicarious liability. Apparently the fact that the officer was in uniform and relied on his ostensible authority as a police officer amounted to no more than the use of a 'mere opportunity' to commit the crimes.

In N, a lot of emphasis was put on the fact that the tortfeasor was a determined rapist. Evidence from his seized computer indicated that he had researched attacking drugged women. For the High Court, it was apparently important that on the night in question, he was 'on the prowl'. This would seem to suggest that the more determined a criminal the tortfeasor is, the less fair it is to hold the employer vicariously liable. As such, it runs directly counter to the key cases of *Lister* and *Bazley*.

It is very difficult to distinguish *N* from *Weir*. In both cases, the officers were off duty and not explicitly purporting to act on official police business at the relevant time. The only real difference is that the officer in *Weir* used a police vehicle. Given how common it is for police to use unmarked cars, such a distinction is hardly significant enough to justify the differing outcomes in the cases.

The inconsistent reasoning within the case law on the close connection test demonstrates that the test, as currently interpreted, is not fit for purpose. It can too easily be used as a tool by the courts to achieve whatever outcome they subjectively think is the best. That is not how the law is supposed to work.

The relationship requirement

Traditionally, vicarious liability has drawn crucial distinction between employees and independent contractors. The crux of the difference is said to be that employees have a contract of service while independent contractors have contracts for services. This difference is supposed to reflect the idea that an employee works solely for the defendant employer and is fully integrated into enterprise. Independent contractors on the other hand do more specialist and occasional work, and are not similarly integrated in the enterprise.

The basic rule is that vicarious liability does not extend to independent contractors. Exceptionally however employers can be liable on no-fault basis for independent contractor where a non-delegable duty is said to apply. This form of liability will be discussed in the next section but for now the main point to note is that although non-delegable duty liability is no-fault based, confusingly, it gives rise to a form of primary liability on the part of the defendant employer. In the past, this form of liability was rarely used, and the consensus amongst academics is that it is a mere tool for overcoming the employee requirement in vicarious liability. The breadth of the non-delegable duty doctrine has unfortunately been extended by recent Supreme Court decision in *Woodland v Essex County Council* [2013] UKSC 66, a decision that will also be discussed in detail in the next section. It should already be clear however that the need for a reassessment of the employment requirement of vicarious liablity has become all the more pressing.

Even before the complications created by *Woodland* and non-delegable duty liability, there were many problems with the employee/independent contractor distinction. This is due to the fact that that so many non-traditional types of working relationships have become commonplace and as a result the distinction has become increasingly blurred. The law on vicarious liability has not moved in step with these changes. Plus, the changing justifications for the existence of vicarious liability have effectively undermined the importance of the employee/independent contractor distinction. To take one example discussed earlier, if the creation of a risk by the enterprise is treated as the basis of the non-fault liability doctrine, there is no reason to confine liability to harms that are committed specifically by employees.

The brief discussion above of the non-delegable duty doctrine is just one example of many artificial means that have been crafted to get around the employee requirement. Employers have tried to formally construct employment contracts as being contracts for services, even though the nature of the working relationship is more akin to a standard employment one. Much court time has consequently been wasted on assessing whether the contract in question is one of service or for services. Academics have long called for the employment requirement to be overhauled. It is argued here that the distinction between employee and independent contractor should be abandoned and replaced with a narrowly defined notion of 'worker'. But that is a discussion for another time.

The issue that we shall instead focus on here is the creation of a new category of employment relationship known (rather unimaginatively) as a 'relationship akin to employment.' Initially this category was created to close the loophole concerning the employment status of priests, and to prevent the Catholic Church, one of the greatest offenders in terms of institutional child abuse, avoiding vicariously liability on the grounds that the relationship requirement could not be satisfied. Priests cannot be treated in the same way as ordinary employees as they are said to be employed by God. For tax purposes, they are treated as office holders. The decision to bring them, or rather the Church, within the reach of the vicarious liability seems eminently sensible.[10] In keeping with the other child-abuse-motivated changes to the doctrine, the modification of the relationship requirement has not been specifically confined to priests and the Catholic Church. Not surprisingly, the 'relationship akin to employment' notion has already been used against a public authority in a non-child abuse context and there are calls to extend the 'relationship akin to employment' notion to foster carers, agency workers etc. It is only a matter of time before it goes the way of the 'close connection' test.

The new 'relationship akin to employment' notion was created by the Court of Appeal in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938. In this case it was held that the Catholic Church could be

[10] In many cases, the Catholic Church could be sued directly on the basis of negligence. Much evidence in recent years has emerged about deliberate cover-ups and wide spread practices of moving paedophile priests to new parishes once allegations of abuse arise. The decision to sue on a vicarious liability basis will be done generally for expediency reasons, however it does allow the Church to officially hide behind the no-fault aspect of the finding of liability.

held vicariously liable, via the trustees of the relevant local diocesan trust, for acts of sexual abuse committed by one of its priests on the basis that the relationship involved was 'akin to employment.' In exercising his ministry, the priest was subject to the oversight, supervision and sanctions of the bishop. He was integrated into the organisational structure of the Catholic Church's enterprise and the system of remuneration by the bishop was close to that of a formal salary. Although the Catholic Church is not a legal entity, it operates in a highly organised and hierarchical fashion. In the words of Ward LJ at paragraph 77, it 'looks like a business and operates like a business.' The Court of Appeal therefore had no compunction in treating it exactly like a business.

In deciding *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 in November 2012, the Supreme Court adopted the same approach to determining the liability of a Christian Brother's organisation. In this group action, 170 former students of a residential school for boys sought to hold two groups of defendants vicariously liable in respect of acts of abuse allegedly committed by teachers at the school between 1958 and 1992. The majority of the teachers concerned were members of a lay Catholic teaching Institute known as the Brothers of Christian Schools (hereafter known as the Institute). The first defendants, referred to as 'the Middlesbrough defendants, were the managers of the school and they were sued in their capacity as official employers of the brother teachers. The Institute was sued as a second defendant on the basis that it effectively ran the school at all material times and had a quasi-employment relationship with the relevant abusers. At first instance, and on appeal, the vicarious liability claims were successful against the Middlesbrough defendants only. Before the Supreme Court, the Middlesbrough defendants sought to establish the dual vicarious liability of the Institute. The claimants therefore were not involved in this final leg of the litigation, it being to determine only whether the Middlesbrough defendants could bring in the Institute as a co-defendant and to therefore share the damages burden.

The Supreme Court allowed the appeal and held that the Institute was vicariously liable, alongside the Middlesbrough defendants, for the acts of abuse committed by the brothers. The relationship between the brothers and the Institute was akin to that of employer and employees: the brothers were directed by the Institute to undertake the teaching activity and they did so in furtherance of the mission of the Institute, namely to provide a Christian education to children.

As regards the question of dual vicarious liability, Lord Phillips endorsed the approach adopted by Rix LJ in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2005] EWCA Civ 1151 and held the main question to ask is whether the employee in question is so much a part of the work, business or organisation of both employers that it is fair to make both employers answer for his negligence. In this case, the relationship between the brothers and the Institute was even closer than that of an employer and its employees. The business and mission of the Institute was the common business and mission of every brother who was a member of it. Overall, it was fair, just and reasonable for the Institute to share vicarious liability with the Middlesbrough defendants.

In assessing the extent to which the decision in *CCWS* extends the law on vicarious liability, it is however important to note that the defendant in *CCWS* was not the Catholic Church, but rather a lay religious organisation. While both the Catholic Church and the Institute are unincorporated associations, the Catholic Church is a unique entity. It is a highly organised and obscenely wealthy global institution, which holds no real parallel in terms of its power and influence. Prior to *CCWS*, the ratio of *JGE* could easily have been confined to the Catholic Church. The decision in *CCWS* however confirms that the doctrine of vicarious liability can apply to unincorporated associations more generally.

According to the reasoning adopted by the Supreme Court, the terms of the new relationship requirement should only apply to organisations that operate as corporate organisations. Predictably, the first post-*CCWS* decision, *Cox v Ministry of Justice* [2014] EWCA Civ 132, a defendant that was not a corporate body but rather a public authority. The claimant in this case was a catering manager in a prison and she suffered an injury due to the negligence of a prisoner who was undertaking paid kitchen work. The prisoner was not technically an employee of the Ministry of Justice, although the relationship did bear many of the hallmarks of a typical employment relationship, including the fact that the prisoner was question was paid a wage (albeit a nominal one) for the work. The main justification for recognising that vicarious liability could apply to the Ministry of Justice and prisoner/worker relationship seems to have been that the particular tasks being undertaken by the prisoner were essential to the running of the prison (ie, feeding people). If these tasks were not performed by prisoners, the Ministry of Justice would have to hire ordinary civilian employees to carry them out.

Further litigation testing the boundaries of the relationship akin to employment notion will not be far on the horizon.

No-fault liability for independent contractors - liability for breach of a non-delegable duty.

As noted already, the doctrine of non-delegable duty liability imposes no fault liability on employers for harms committed by independent contractors. Unlike vicarious liability, the defendant's liability is primary rather than secondary. This means that the defendant is said to be personally responsible for the harm suffered by the claimant.

Where a non-delegable duty arises, the defendant can delegate performance of the duty but not ultimate responsibility for its performance. Whereas the duty of care in negligence in a duty to take reasonable care, a non-delegable duty is a duty to ensure that care is taken. Surprisingly (or perhaps not), there is little judicial guidance on when non-delegable duties arise. From the case law, there are some sporadic instances in nuisance, and at one point it was though that it could develop into a doctrine of liability for extra-hazardous activities. The most well known example relates to the employer's duty towards his or her employees to provide a safe system of work. However, it is well known that the doctrine was only ever applied in this context to circumvent the old doctrine of common employment

(this doctrine provided a complete defence to an employer when injuries suffered by an employee were caused by another employee).

The non-delegable duty doctrine was also thought at one time to apply to hospitals, so as to make them liable on a no-fault basis for harms suffered by their patients, However crucially this coincided with the period when doctors were not considered to be employees for the purposes of the vicarious liability doctrine. This was during this period when control was thought to be a defining feature of the employment requirement. On the basis that doctors were more skilled than their managers and managers could not therefore direct them on how to carry out their tasks, doctors were originally categorised as independent contractors. Thus the non-delegable duty was used in this context to circumvent the employment obstacle to vicarious liability.

Prior to Supreme Court decision in *Woodland v Essex County Council* [2013] UKSC 66, the non-delegable duty doctrine was not often used in practice to create no-fault liability for independent contractors. This was a good thing for it is not a coherent doctrine, having been developed on an ad hoc basis to fill perceived gaps in the law. There are few scholars who would defend its existence or operation. It is therefore unfortunate that it has been the subject of a high-profile reinvention.

The claimant in *Woodland* suffered a serious brain injury after getting into difficulties in a swimming pool during a school swimming lesson. She alleged negligence on the part of both the swimming teacher and the lifeguard but wanted to target her own education authority as defendant, presumably for solvency reasons. Vicarious liability could not be argued as the tortfeasors were clearly not employed by the defendant. They were instead employed by an unincorporated association called Direct Swimming Services. The defendant had contracted with this company to provide swimming lessons for its pupils. As regards its legal relationship with the defendant, Direct Swimming Services was therefore an independent contractor. In an attempt to attach no-fault liability somehow to the defendant, the claimant argued that the defendant owed her a non-delegable duty. At its core, the non-delegable duty was formulated as a duty to ensure that the claimant's swimming lessons were carefully conduct and supervised. Crucial to the finding of a non-delegable duty in this instance was the fact that the defendant education authority was required by the national curriculum to provide physical training of a number of alternative kinds, one of which was swimming.

The ratio of the decision is fairly narrow. The defining features of the non-delegable duty liability imposed are set out as follows: i. the claimant is a vulnerable party (in the sense of being dependent on the protection of the defendant); ii. the pre-tort relationship between the defendant and the claimant is one which gives rise to affirmative duties to protect the claimant from foreseeable harms; iii. the claimant has no control over how the defendant chooses to perform these positive duties; iv. the defendant has delegated to a third party some integral part of the performance of the relevant positive duty; and; v. the third party has been negligent specifically in respect of the performance of the delegated duty.

As a result of *Woodland*, defendants who have positive duties to protect vulnerable individuals (eg children, prisoners in custody, hospital patients), and who would ordinarily be directly liable in negligence where they breach those duties, will now assume no-fault responsibility if they outsource those duties to another body. Public authorities will be particularly affected.

In justifying the decision, Lady Hale stated that the imposition of a non-delegable duty would ensure that all school pupils are placed in an equivalent legal position as regards compensation for type of wrongful incident that had afflicted the claimant. She gave the example of three children attending schools under differing arrangements: Amelia who goes to a fee-paying school, Belinda who attends a large state school with its own swimming pool and swimming instructors and Clara who attends a small state school which has no swimming pool of its own and which has to contract with an independent service provider to provide swimming lessons for its pupils. In the absence of non-delegable duty liability, Clara would be the only one of the three unable to sue her own school for compensation. While this attempt to address a matter of social and political inequality may seem laudable at first sight, it arguably goes far beyond the function of the court. Given the number of social and political equalities that currently exist, it is also one that would probably feature fairly low down on the list of priorities. It goes without saying that such reasoning also raises serious questions about the perceived purposes of the tort system. At a more basic level, it is difficult to see why school children should be treated differently to any other tort victim. The law is a capricious beast, and examples of unfairness occur on a daily basis. Just consider the example of the pedestrian injured by a driver who has had a sudden heart attack. The driver will not be found negligent as there will be no breach of duty and the claimant will not recover as a result.

Woodland is a classic instance of 'hard cases make bad law'. More litigation involving attempts to extend its ratio is to be expected.

Conclusion

The extensions to the law on no-fault employer liability are hard to justify and few would deny that they have gone too far. Vicarious liability in particular is an example of an exception that risks becoming the rule. As such, it raises questions about the future retention of our fault-based tort system. For those who think that tort law is as much about personal responsibility as it is about compensation, this is a worrying prospect. So how do we rein in the law on no-fault liability? The most obvious and radical solution would be to abolish both vicarious and non-delegable duty liability. All employer liability would become exclusively fault-based. This is unlikely to happen in the absence of strong lobbying from bodies with considerable political clout.

The alternative solution is to limit the application of vicarious liability to for-profit enterprises that can engage in efficient loss distribution. A more realistic approach would be to persuade the courts to narrow the close connection test and rethink the definition of 'employee'.

Whatever happens, the convoluted ratio of *Woodland* decision should not be permitted to apply to new situations.