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VICARIOUS LIABILITY AND ENTERPRISE RISK IN THE GIG ECONOMY

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I. Introduction

1 The term "gig economy" was coined as recently as 2015. It is associated with modern technology platforms and sophisticated algorithms able to match gig demand with labour supply. By contrast, the common law doctrine of vicarious liability dates back to the mediaeval ages[1] – a time in which the windmill was considered a major technological development. The question is, can this age-old doctrine keep pace with what is considered a modern way of organising labour? In the writers' view, the doctrine of vicarious liability has proved to be a flexible one, adaptable to changing business realities. In the gig economy, the timeless concept of people working for other people (and the risks incurred thereby) continues. The doctrine of vicarious liability, underpinned by the principles of enterprise risk, remains relevant to the gig economy.

II. Gig economy contrasted with traditional employment

2 Persons in the gig economy take up short jobs, or "gigs" on an *ad hoc* basis and earn a fee for performing this work. The fee paid is typically in accordance with the specific amount of work

1 *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677 at [11].

required to be performed, and not necessarily per day or piece. The "gig economy" is therefore a model of labour built on freelancing. Ride-sharing services such as Uber and Grab; and food-delivery services including Deliveroo and Foodpanda are paradigms of the model. Helpling, a platform that offers part-time cleaning services, Fiverr, a platform for freelance services such as design, writing and translation, and home-sharing platform Airbnb are other examples of businesses that use this model of labour.

3 Technology is closely associated with the gig economy for two main reasons. First, technology has made it easy to connect work with manpower. Smartphones, mapping software, and the ability to receive and process vast quantities of data, have enabled the rise of technology platforms that match service consumers to service providers. Second, the business model of certain technology companies relies on gig workers to rapidly scale. By relying on cheap, readily available manpower that does not demand the traditional protections of employment (and associated financial and administrative costs), a technology company has a large source of flexible labour that it can leverage.

4 A key difference between gig economy work and traditional employment is the nature of the obligations that exist between the enterprise and the worker. For traditional employment the enterprise is obliged to provide the worker with work; in turn the worker is obliged to accept this work. Incidental to these reciprocal obligations are rights such as Central Provident Fund contributions, protected leave time and legal protections against wrongful dismissal. Legally, manpower are termed employees, and enterprises termed employers, with a contract of service subsisting between the two.[2]

5 By contrast, in the gig economy, enterprises are not obliged to provide work; and personnel are not obliged to accept any work if provided. Typically, gig economy enterprises go to lengths to avoid structures that resemble contracts of service, or terminology that suggests employment. For example, Uber refers (or referred) to a driver as a "partner", "customer" or "independent third

2 Employment Act (Cap 91, 2009 Rev Ed) s 2(1).

party contractor" that merely uses Uber's app platform to receive bookings; Uber is an "agent" of the driver, and a contract for providing transport services exists between the passenger and the driver. Uber expressly disclaims that any employment relationship is created between itself and the driver.[3]

III. Evolution of doctrine of vicarious liability in England and Wales

6 Vicarious liability is a form of secondary liability that holds the defendant liable for the acts of another person, where the defendant is not the one at fault. Essentially, it amounts to a tightly wound compromise on who should bear the financial consequences of a tort. On the one hand there is the social interest in giving an innocent victim recourse against a financially responsible defendant, but on the other hand there is a hesitation to unduly burden businesses.[4]

7 Therefore it is important, as the Court of Appeal of Singapore has cautioned, to recognise the proper limits of the doctrine, and the circumstances under which the court will be prepared to impose liability.[5] Notwithstanding the requirement for properly appreciating the boundaries of vicarious liability, the doctrine has proved to be remarkably adaptable to the requirements of commercial and business realities, and the changing nature of labour and consumption.

8 Vicarious liability traces its history to the mediaeval ages. Then, it provided that a master was liable for his servants' misdeeds if done at his command and consent, broadening to include the concept of "implied command".[6] In its early days, vicarious liability thus essentially resembled a form of the principles of agency.

3 *Uber BV v Aslam* [2019] ICR 845; [2019] 3 All ER 489 at [13], [14] and [15].
4 *Per* Lord Steyn in *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [14].
5 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [41].
6 *JGE v Trustees of Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 at [20].

9 In the 17th century, the doctrine was forced to apply to disputes arising from the new factual realities of business life stirred up by England's expansion in commerce, industry, and the sea trade. Yet, the theoretical basis anchoring the doctrine remained uncertain. Principles floated during this time included that the master impliedly undertook to answer for the servant's tort, that the servant had implied authority to act, or that the servant's tort could be imputed to the master.[7] No uniform approach, however, could be discerned from the case law.

A. Public policy as the foundation for imposing vicarious liability

10 It was only sometime in 18th century England that policy considerations took root as a normative justification for the doctrine, and it came to resemble the modern form that we are familiar with today.[8] In *Hern v Nichols*,[9] an employee swindled a customer into accepting silk of a quality different from that contracted for. Holt CJ, in imposing liability on the merchant for his employee's deceit, reasoned that "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger". This prescient statement, grounded in public policy, continues to resonate in today's doctrine of vicarious liability.

11 In early 20th century England, financial and legal advisory services became more commonplace. Fraud practised by an employee on an enterprise's clients remained a problem, perhaps magnified in value, given the context of financial services. In *Lloyd v Grace Smith & Co*,[10] a conveyancing clerk tricked an old widow into signing papers that conveyed two cottages to the clerk, for no

7 *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677 at [12]–[17], quoting Sir William Holdsworth, *A History of English Law* vol 8 (Little, Brown and Co, 1908) at pp 476–477; and referring to *Boson v Sandford* (1691) 2 Salk 440; *Turberville v Stampe* (1698) 1 Ld Raym 264; and *Hern v Nichols* (1708) 1 Salk 289.

8 *JGE v Trustees of Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 at [21]; *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [19].

9 (1708) 1 Salk 289.

10 [1912] AC 716.

consideration. The House of Lords held the solicitors' firm which employed the clerk vicariously liable for the clerk's fraud.

12 In so doing, Lord Macnaghten initiated the concept of "enterprise risk", which continues to influence the modern doctrine of vicarious liability.[11] His Lordship held that the party to bear the loss for the fraud ought to be the solicitors' firm, which had accredited the clerk as its representative, and clothed him with authority to deal with the firm's clients. It should not be the client, who had entrusted herself into the hands of the firm.[12]

13 Although Lord Macnaghten's language bears resemblance to that of agency, the point was really one of public policy. Liability on the solicitors' firm had not been imposed on the grounds that the clerk had apparent authority to act in the fraudulent way he did. Rather, it was that public policy dictated that the firm should bear the loss and not the innocent client, because the clerk was held out as (and indeed was) an employee of the firm. It was through the clerk that the firm dealt with its clients.

14 At that stage of the common law, public policy in the form of enterprise risk gradually crystallised as the justification for vicarious liability. Shifting the focus onto the nature of the risk imposed on the public by an enterprise became the catalyst for drawing vicarious liability out of the strict employer-employee relationship and its application to other relationships of labour. A broader definition of worker and enterprise responsibility would now be possible – and as is discussed later in this article, this would prove to be significant for the adaptation of vicarious liability to the gig economy.

15 This development however was steadfastly incremental, taking the better part of a century. The then go-to Salmond test for vicarious liability, developed in the early part of the 20th century, was for a long time rooted in the traditional conception of employment. Over the years, cases related to commercial motor

11 The Earl of Halsbury in *Lloyd v Grace Smith & Co* [1912] AC 716 at 727 also quoted Holt CJ in *Hern v Nichols* (1708) 1 Salk 289.

12 *Lloyd v Grace Smith & Co* [1912] AC 716 at 738.

vehicles (such vehicles became more common in 20th century England) and sexual assault (in the 21st century) brought the Salmond test out of its comfort zone and led to a rethinking of the test for vicarious liability.

B. Salmond test and its limitations

16 The "Salmond test" was for a century the touchstone for the doctrine of vicarious liability. It was formulated in the textbook *Salmond on Torts*, and imposed vicarious liability if it were either "(a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master".[13] By definition, the Salmond test applied only to the employment relationship.

17 Defining the applicable scope of employment to apply the Salmond test was not always an easy task, however, and often turned on fine definitions of what an act authorised by the master was. A good illustration is the case of *Rose v Plenty*,[14] in which a milkman in 1970s Bristol would bring a teenage boy onto his milk truck to help with the milk deliveries. The milkman did so despite the fact that his employers had expressly prohibited such a practice.

18 One day, the boy sustained a compound fracture in his foot, due in part to the milkman's negligent driving. The English Court of Appeal found the employers liable to compensate the boy. The court held that the milkman was acting in the course of his employment in taking the boy on the truck and engaging the boy's help to deliver milk. Taking the boy on the truck was therefore an unauthorised mode of doing acts authorised by the master, and this fell within the second limb of the Salmond test.

19 The Court of Appeal was split over the employer's express prohibition on the milkman taking the boy onto his truck.[15]

13 *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [15], quoting *Salmond on Torts* (Stevens and Haynes, 1st Ed, 1907) at p 83–84 and *Salmond and Heuston on Torts* (Sweet & Maxwell, 21st Ed, 1996) at p 443.

14 [1976] 1 WLR 141; [1976] 1 All ER 97.

15 Lord Denning MR and Scarman LJ in the majority, Lawton LJ dissenting.

In earlier cases of commercial vehicles giving lifts to passengers despite express prohibitions, liability was not imposed on the employer. For example, when a lorry driver gave a contractor a lift, and the contractor was injured, no liability was imposed on the driver's employers.[16] In that case, the court reasoned that in giving a lift, the lorry driver was performing an act of a class which he was not employed to perform at all, and fell outside the scope of his employment. Giving a lift was not considered a wrongful mode of performing tasks that the lorry driver was hired to perform.

20 The express prohibition on the lorry driver therefore defined the scope of his employment. By contrast, that on the milkman in *Rose v Plenty* was a prohibition *within* the scope of his employment. These distinctions were not always satisfactory or predictable. This could lead to employers facing difficulties with organising their business affairs, or to insurers in pricing their premiums.[17]

21 There were other difficult cases of employees driving commercial vehicles. The questions raised included whether injury caused by negligent driving was within the scope of employment if there was an extant express prohibition,[18] or if the accident occurred while the employee was driving back to the worksite from a tea break.[19] In a way, drivers and their vehicles present a different dimension to employment before the advent of motor vehicles. Drivers have significant autonomy and range in the conduct of their vehicles, more so than the traditional workplace-bound employee; and the potential for motor vehicles to cause serious accidents is high. This consideration remains relevant to the gig economy, where a lot of gig economy jobs involve driving, whether for the transport of passengers or goods.

22 Additionally, the Salmond test did not cope well with cases of deliberate wrongdoing.[20] If an employee committed fraud or an intentional tort, there could be situations where rough social

16 *Conway v George Wimpey & Co Ltd* [1951] 1 All ER 363.
17 See Lawton LJ's speech in *Rose v Plenty* [1976] 1 WLR 141; [1976] 1 All ER 97.
18 *Twine v Bean's Express Ltd* [1946] 1 All ER 202.
19 *Hilton v Thomas Burton (Rhodes)* [1961] 1 WLR 705; [1961] 1 All ER 74.
20 See Lord Millett's speech in *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [66]–[68].

justice might demand that the employer compensate the victim of the tort. Yet, the intentional tort would certainly not be a wrongful act authorised by the master. It would also be unrealistic to categorise it as a wrongful and unauthorised mode of doing some act authorised by the master.

23 This was especially stark in the 21st century case of *Lister v Hesley Hall Ltd*[21] ("*Lister*"). In that House of Lords case, a warden systematically sexually abused boys in the boarding house he ran in Doncaster. Sexual assault could hardly be an authorised mode of carrying out a warden's duties of caring for his charges; clearly the assaults were intentional, and the warden had indulged in those acts for his own purposes. Yet the link between the warden's employment and the assaults seemed clear. Certainly, the warden had had access to the boys as a result of his employment, and the employers cared for the boys through the warden. Nevertheless, a strict application of the Salmond test would absolve the employer of liability, and as Lord Steyn put it, it seemed that in cases of assault, the greater the fault of the servant, the less the liability of the master.[22]

24 Lord Steyn considered that a better approach than the Salmond test would be to focus on the relative closeness of the connection between the nature of the employment and the particular tort. It was too simplistic and narrow to focus on whether the specific acts of sexual assault were modes of doing authorised acts. Rather than dissecting an employee's work into component tasks and activities, a broad inquiry must be undertaken as to the nature of his employment. Therefore, vicarious liability should be considered on the basis that the employer cared for the boys through the warden, and that there was a very close connection between the warden's employment and the sexual assaults committed. In so reasoning, Lord Steyn masterfully wove together threads of authority from an often-overlooked elaboration of the Salmond test, the Court of Appeal's judgment in *Rose v Plenty*, and

21 [2001] 1 AC 215; [2001] UKHL 22.
22 *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [24].

the Canadian Supreme Court cases of *Bazley v Curry*[23] and *Jacobi v Griffiths*[24] (both cases also involving sexual abuse).[25]

25 It was also in *Lister* that enterprise risk from the days of *Lloyd v Grace Smith & Co* resurfaced in English law as a justification for imposing vicarious liability on an employer. Lord Millett addressed the dilemma of whether an employer should be responsible for intentional wrongdoing by an employee. Drawing on academic writings,[26] the Canadian cases[27] of *Bazley v Curry* and *Jacobi v Griffiths*, *Lloyd v Grace Smith & Co* itself, *Rose v Plenty* and other English authorities, his Lordship concluded that the answer was yes.

26 If the intentional tort happened when the employee took advantage of the position in which the employer had placed him to enable the purposes of the employer's business to be achieved, the employer should be liable. This was so whether it was sexual abuse, financial crime, or negligent personal injury, considering the breadth of authority that Lord Millett had taken into account[28] – in line with the "general idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong".[29] This idea of risk continued to be of significance in subsequent English case law.[30]

23 (1999) 174 DLR (4th) 45.
24 (1999) 174 DLR (4th) 71.
25 See also *Barclays Bank v Various Claimants* [2020] 2 WLR 960; [2020] UKSC 13 at [10].
26 For example, see Patrick Atiyah in *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at p 171, cited in *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [65] and [79].
27 *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [70] and [83].
28 *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [79].
29 *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22 at [65] and [79].
30 See also Lord Phillips in *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [74].

C. Enterprise risk as modern guiding principle of vicarious liability

27 Just a year after the decision in *Lister*, a differently constituted House of Lords[31] in *Dubai Aluminium Co Ltd v Salaam*[32] ("*Dubai Aluminium*") reinforced enterprise risk as a guiding principle for the imposition of vicarious liability, this time in a commercial context.[33] Lord Nicholls, delivering the leading judgment, said:[34]

> ... The underlying legal policy [of vicarious liability] is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.

28 In *Dubai Aluminium*, a solicitors' firm was held vicariously liable for fraudulent acts committed by one of its partners. The innocent partners argued that they had not authorised the rogue partner's fraud and should not be held liable as the fraud thus fell outside the ordinary course of the firm's business. Lord Nicholls disagreed with this submission and held that the policy reasons underlying enterprise risk meant that liability for agents should not be confined to acts done with the employer's authority. It is a fact of business life that agents may exceed the bounds of their authority or even defy express instructions. It would only be fair to allocate the risk of losses thus arising to the businesses, rather than to the victim.[35]

29 Ten years after *Dubai Aluminium*, enterprise risk developed the doctrine of vicarious liability further – this time, proving influential in bringing vicarious liability outside the traditional

31 Lords Hutton, Hobhouse and Millett sat on the corams of *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; [2003] 1 All ER 97 and *Lister v Hesley Hall Ltd* [2001] 1 AC 215; [2001] UKHL 22.

32 [2003] 2 AC 366; [2003] 1 All ER 97.

33 See also Lord Phillips in *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [74] and [75].

34 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; [2003] 1 All ER 97 at [21].

35 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366; [2003] 1 All ER 97 at [22].

employment relationship. The *Catholic Child Welfare Society v Various Claimants*[36] ("*Christian Brothers*") case, decided in 2012, concerned physical and sexual abuse committed by brothers of a religious order from 1958 to 1992 on boys at the Yorkshire school in which the brothers taught. The order was created with the mission of giving a Christian education to boys and was an unincorporated association with substantial assets. The brothers were not employees of the order. Rather, they were bound to the order and each other by religious vows of lifelong chastity, poverty, and obedience.[37] Despite these features of the case, the order was found vicariously liable for the brothers' abuse.

30 Giving the judgment of the House of Lords, Lord Phillips began with the two-stage test for vicarious liability. The first stage asks if there is a relationship between the tortfeasor and defendant that made it fair, just and reasonable for the defendant to compensate the victim of the tort. The second asks if there is a sufficiently close connection linking the relationship between tortfeasor and defendant with the tort.

31 The first stage is usually answered by the employer and employee relationship, as these five incidents generally subsist there:[38]

> (a) the employer would be more likely than the employee to have the means to compensate the victim and could be expected to have insured itself against that liability;
>
> (b) the tort would have been committed as a result of activity undertaken by the employee on behalf of the employer;

36 [2013] 2 AC 1; [2013] 1 All ER 670.

37 In fact, the brothers had signed employment contracts with another group of defendants who managed the school and who were found vicariously liable for the abuse. The question in *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 ("*Christian Brothers*") was whether the order could *additionally* be responsible for the brothers' abuse: see *Christian Brothers* at [4].

38 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [35].

(c) the employee's activity would likely be part of the business activity of the employer;

(d) the employer, by employing the employee to carry out the activity, would have created the risk of the tort being committed by the latter; and

(e) the employee would, to a greater or lesser degree, have been under the control of the employer at the time the tort was committed.

32 But to Lord Phillips, these incidents were not confined to the employment relationship. So long as a relationship had the same five incidents, it could give rise to vicarious liability on the grounds that it is "akin" to a relationship of employment.[39] These five incidents would thus be important to the analysis of liability in the gig economy, as will be seen. In *Christian Brothers*, two features of the relationship between the brothers and the order made it even closer than that of an employer to employees – namely, the religious vows that bound; and the fact that any earnings the brothers had, they transferred to the order who would cater for their needs from these funds.[40]

33 Indeed, the relationship between the brothers and the order was directed at achieving the order's objective of providing Christian teaching for boys.[41] To Lord Phillips, that a brother was acting for the common purpose of the brothers as an unincorporated association alone sufficed to satisfy the first stage of the test.[42]

34 Enterprise risk was more overtly analysed in the second stage of the test. Lord Phillips concluded that in cases of abuse, vicarious liability is warranted upon a defendant whose relationship with the abuser allows it to use the abuser to carry on its business to further its own interest; and where it does so in a manner which

39 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [47].
40 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [57]–[58].
41 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [59].
42 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [61], [89] and [90].

created or significantly enhanced the risk of abuse. The creation of risk was an important criterion in establishing the close connection between the relationship and the abuse. It was not just a policy reason, but stood as part of the principled basis for the test.[43] In *Christian Brothers*, the relationship between the brothers and the order enabled the order to place the brothers in positions of religious and academic authority over the vulnerable boys, greatly enhancing the risk of sexual abuse.[44]

35 Subsequently, the House of Lords in *Cox v Ministry of Justice*[45] ("*Cox*") clarified that Lord Phillips' approach was not confined to sexual abuse. Rather, it was intended to "provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment".[46]

36 *Cox* was a case of personal injury caused by negligence. A prisoner working in a prison kitchen in Swansea dropped a sack of rice on the catering manager while she was bent over, causing her to suffer a back injury. The prisoner was not an employee of the prison, and the prisoner's work in the kitchen went towards feeding the inmates, not commercial or profit-driven activities. The House of Lords imposed liability on the prison. Lord Reed, giving the judgment of the House, stated enterprise risk in emphatic terms:[47]

> By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities … An important consequence of that extension is to enable the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which may be

43 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [86] and [87].
44 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [91]–[93].
45 [2016] AC 660; [2017] 1 All ER 1.
46 *Cox v Ministry of Justice* [2016] AC 660; [2017] 1 All ER 1 at [29].
47 *Cox v Ministry of Justice* [2016] AC 660; [2017] 1 All ER 1 at [29].

> motivated by factors which have nothing to do with the nature of the enterprises' activities or the attendant risks.

37 Lord Reed's speech is perhaps the most expansionary consideration of enterprise risk in the House of Lords. Although a prison kitchen is hardly the most novel of workplaces, his Lordship's speech goes beyond those walls and recognises that in the modern economy, enterprises may choose to structure their relationships with labour in ways that have no connection to the risks that the enterprises' activities pose to society.

38 The law of torts and vicarious liability has to keep up with that commercial reality. Focussing on risk as the essence of that analysis is incisive. Risk and its fruition will always be the cause of a tort; and risk exists precisely because an enterprise deploys its labour into society to advance its business purposes. Regardless of the legal relationship between the enterprise and labour, risk informs the protections which the law of torts has to afford the public. *Cox*, and the jurisprudence it traces its lineage from, incrementally embraced a more diverse range of relationships than those within the old parameters of the doctrine of vicarious liability.[48]

IV. Enterprise risk and vicarious liability in Singapore

39 The doctrine of vicarious liability in Singapore has followed the English move outside of the classic employment relationship to adapt to the modern realities of doing business. In 2018, Belinda Ang Saw Ean J in *Ong Han Ling v American International Assurance Co Ltd*[49] ("*Ong Han Ling*") relied on *Lister* and *Dubai Aluminium*, expressly invoking enterprise risk in imposing vicarious liability on an insurance company for fraud practised by one of its life insurance agents.[50] Of interest in this case is how the agent and company had structured their relationship *inter se* – they signed three contracts between them making it clear that both parties did not intend to be employer-employee. There were express terms appointing the

48 See also Lord Reed in *Armes v Nottinghamshire County Council* [2018] AC 355; [2017] UKSC 60 at [54].

49 [2018] 5 SLR 549.

50 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549 at [153] and [160].

agent as agent, and disclaiming employment; remuneration was commission-based and tied to production targets.[51] On the face of the relationship, both agent and company had exerted themselves to avoid one of employment.

40 The appearance of this contractual relationship, however, was not material to the analysis on vicarious liability. As her Honour stated, the question asked by the first limb of the test was whether the relationship between agent and company possessed certain qualities in substance, such that the relationship was capable of giving rise to vicarious liability.[52] Indeed the relationship in *Ong Han Ling* did.

41 The company relied on its agents to carry out its insurance business, market its policies to the general public, and handle the company's relationship with the policyholder thereafter. The risk of agent fraud was created because the company placed its agents in proximity to policyholders to advance the company's business, and accepted policyholder instructions from the agent without verification. Her Honour saw it fit that the company should fairly take the risk of its agent's torts. In spite of the contractual arrangement between the parties, in the public's eye the agent was essentially an emanation of the company's enterprise, a representative sent and controlled by the company she represented.[53]

42 As to the second limb of the test, there was a sufficient connection between the agent's fraud and her relationship with the company, as the company's business model relied on agents to cultivate close relationships with clients and sell them policies directly.[54]

43 Notably, her Honour recognised that the courts "have recently been more willing to overtly embrace the policy

51 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549 at [170].
52 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549 at [171].
53 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549 at [172]–[175].
54 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549 at [176]–[187].

justifications underlying the doctrine and adapt its reach to more complex present-day relationships", citing two main considerations: the need for effective compensation for the victim, and deterrence of future harm by encouraging the employer to reduce related risks.[55] This recognition that vicarious liability has to keep up with modern relationships, coupled with her Honour's perceptive examination of the relationship in substance between the parties, belies a suppleness and adaptability in the Singapore doctrine of vicarious liability.

44 In the 2019 case of *Saimee bin Jumaat v IPP Financial Advisers*[56] ("*Saimee*"), Choo Han Teck J imposed vicarious liability on a financial advisory firm for negligent misrepresentations by two of its financial advisers. Enterprise risk featured in the second limb of the test here, unlike in *Ong Han Ling* where it appeared in analysis of the first limb. In *Saimee* the defendants did not dispute that there was a relationship akin to employment and did not contest the first limb.

45 The second limb of the test requires a close connection between the defendant-tortfeasor relationship and the tort. Citing Lord Nicholls' speech in *Dubai Aluminium* on the point of enterprise risk, his Honour considered that the financial advisory firm, as the enterprise that hired the financial advisers, was in the best position to manage its own risk and prevent further wrongdoing to its clients, The relationship between the firm and its advisers significantly increased the risk of negligent misrepresentations – the firm's business model allowed the advisers opportunity for abuse, within the relationship of trust and confidence created between the advisers and their clients.[57]

46 In Singapore therefore, enterprise risk has drawn the doctrine of vicarious liability into application beyond the traditional

55 *Ong Han Ling v American International Assurance Co Ltd* [2018] 5 SLR 549 at [153].

56 [2019] SGHC 159. This case has been overturned on appeal in *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat* [2020] SGCA 47, but on the ground that the claim was time-barred. The High Court's analysis on vicarious liability was not considered by the Court of Appeal and remains intact.

57 *Saimee bin Jumaat v IPP Financial Advisers* [2019] SGHC 159 at [28]–[32].

employment relationship. That enterprise risk has been useful at both stages of the test could suggest its utility as an overarching principle guiding the imposition of liability. Given that enterprise risk began life as a policy consideration by Lord Mcnaghten in *Lloyd v Grace Smith & Co* (before being absorbed into the principled criteria for the test by Lord Phillips in *Christian Brothers*), it is perhaps no surprise that it is capable of informing both limbs of the test.

V. Vicarious liability and the gig economy – at present

47 This appears to be an emerging field of law. There has been no significant jurisprudence on gig economy work and vicarious liability – perhaps in part because gig economy enterprises take pains to settle such cases and avoid final judicial pronouncement. The ride-sharing enterprise Uber, unfortunately for it, features in all the notable case reports.

48 In the US, there are judicial decisions lying on both sides of the spectrum. A federal judge in 2016 rejected Uber's preliminary contention on a point of law, that Uber could not be liable for sexual assault on the grounds that Uber's drivers were independent contractors, not employees. In other words, the allegations against Uber for sexual assault committed by its drivers would have been allowed to proceed, albeit this case was subsequently settled out of court. However, a California judge in 2019 reached the opposite legal conclusion, rejecting a plaintiff's claim that Uber was responsible for sexual assault committed by a driver, on the grounds that the driver's assault was not inherent in his working environment or typical of the business.[58] That said, legislation that came into effect in California in 2020 provided statutory criteria supporting the classification of gig economy workers as employees, and placed the burden of proof on the hiring entity to classify such workers as independent contractors.[59] In August 2020, a California court enforced this legislation and granted a preliminary injunction restraining Uber and fellow ride-sharing

58 Alaina Lancaster, "Uber Can't Completely Shake Jane Doe Assault Case" *Law.com* (22 November 2019).

59 Assembly Bill No 5 (2019–20 Reg Sess).

enterprise Lyft from classifying their drivers as independent contractors.[60] At the time of writing, the injunction remains subject to appeal, but these developments suggest that the future may be more supportive of gig economy workers being classified as employees, with the application of vicarious liability to their acts potentially following suit.

49 The furthest a gig economy case has got through the Commonwealth courts is the *Uber BV v Aslam*[61] ("*Uber*") case before the English Court of Appeal and currently before the UK Supreme Court on appeal.[62] In *Uber*, the Employment Tribunal (upheld by the Employment Appeal tribunal and the Court of Appeal) found that Uber's drivers were not independent contractors, but rather, "workers" under the UK Employment Rights Act 1996.[63] Under English labour law, "workers" fall in the middle ground between employees, who have the full suite of employment rights; and independent contractors, who have no employment rights as they are seen as self-sufficient. "Workers" are entitled to a limited set of employment rights.

50 The English courts found that Uber drivers are not agents of Uber as a principal, notwithstanding that the contracts between Uber and its drivers (described above) designated them as such. Indeed, the majority of the Court of Appeal said it was "not real", and that the only sensible interpretation of the business reality was that the drivers work for Uber. The drivers provide the skilled labour through which Uber runs its transportation business, delivers its services, and earns its profits. The written contract did not reflect the real relationship between the parties.

60 Superior Court of the State of California, County of San Francisco, No. CGC-20-584402 filed 10 August 2020 in *People of the State of California v Uber Technologies Inc. and Lyft Inc.*

61 [2019] ICR 845; [2019] 3 All ER 489.

62 Oral arguments were heard before a seven justice coram of the UK Supreme Court on 21 and 22 July 2020.

63 c 18, s 230(3)(b).

VI. Vicarious liability and the gig economy – the future

51 Gig economy work has important features that resonate with the facts of cases in which vicarious liability was imposed. As with the case of *Ong Han Ling*, and Lord Nicholls' speech in *Dubai Aluminium* on the point that enterprise carries out its business through agents, gig economy enterprises are similarly reliant on manpower to carry out their enterprise. Given how closely this manpower is tied to the business platform to accept and provide the services, for example, ride-hailing or food delivery, it would be a fiction to say that this manpower can be an independent contractor and provide these services of his own accord. This manpower is essentially an emanation of the gig economy enterprise. This echoes Lord Reed's speech in *Cox*, in that the manpower carries out activities integral to the gig economy's business, and in assigning the manpower these activities, the business has created the risk of a tort occurring.

52 Additionally, the manpower acts as intermediary between the businesses and the clients – indeed a business such as Grab or Uber would not itself interface with the client (beyond provision of the platform and customer support). The only human face that a client sees when dealing with such a business is that of the driver or food-delivery worker. This manpower bears the business's mark, either as car decals for ride-sharing services or uniforms for food-delivery services. This intermediation mirrors the relationship between the financial advisers and their clients in *Ong Han Ling* and *Saimee*.

53 Lord Phillips' five incidents set out in *Christian Brothers* are likely present in the gig economy, and in that sense relationships between enterprises and their gig economy workers could be considered "akin" to employment. It is important to clarify that this equivalence is in the context of vicarious liability only, as Lady Hale pointed out in *Barclays Bank plc v Various Claimants*[64] ("*Barclays*"), and not necessarily for other employment-related purposes such as employment law, tax, or social security.

64 [2020] 2 WLR 960; [2020] UKSC 13 at [29].

54 For the first incident, an enterprise is more likely than the gig economy worker to have the means and insurance to satisfy a claim – gig economy work is not highly skilled or highly paid and its workers would not be especially pecunious. The second, third and fourth incidents could be satisfied, given that gig work is performed expressly to further the enterprises' businesses. Gig economy work tends to be very simple, and therefore complex questions of fact on whether the work indeed created the risk of the tort are unlikely to arise. If a delivery rider causes personal injury on his way to his destination, it seems plain that the enterprise in engaging the rider created the risk of this tort. On these second, third and fourth incidents, questions of whether the gig worker is an independent contractor may be relevant, but the prevailing *Uber* position suggests that they would not be. For the fifth incident, the question of control could be specific to the enterprise's business model. Control is probably present for ride-sharing and delivery work, where the worker follows the route dictated by the enterprise's mapping software. However, for enterprises like Fiverr and Airbnb which are built on and expressly market the uniqueness and individuality of the worker's listing on the platform, the element of control by enterprise may require a deeper analysis.

55 Importantly, the courts have been willing consider the real substance of the relationship between enterprises and workers, regardless of what contractual form this may take. Lord Reed in *Cox* stressed the importance of protecting the public notwithstanding changes in legal relationships,[65] Ang J in *Ong Han Ling* imposed vicarious liability notwithstanding express contractual disclaimers of employment, and the English Court of Appeal in *Uber* acknowledged the real substance of the quasi-employment relationship in the gig economy, rather than its apparent form. This is critical to holding enterprises accountable for the risks created by their businesses, notwithstanding the innovation of gig economy business structures.

56 Independent contractors remain outside the scope of vicarious liability, and this boundary is tightly policed. As the Singapore Court of Appeal said in *Ng Huat Seng v Munib Mohammad*

65 *Cox v Ministry of Justice* [2016] AC 660; [2017] 1 All ER 1 at [29].

Madni[66] ("*Ng Huat Seng*"), the cases of *Christian Brothers* and *Cox* did bring vicarious liability outside of the strict employment relationship. But those cases did not disturb the position of an independent contractor, who is by definition engaged in his own enterprise. It would not be fair, just or reasonable to impose vicarious liability on another enterprise in those circumstances.[67] After quoting *Ng Huat Seng* at length with approval, Lady Hale in *Barclays* added that Lord Phillips' five incidents could help decide "whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business".[68] Indeed in *Barclays*, no vicarious liability was imposed on the defendant bank for sexual assault perpetuated by a doctor it had hired to screen job applicants. The doctor was in business in his own account as a medical practitioner, and the bank was just one of his clients.[69]

57 In the final analysis, vicarious liability can and will likely adapt to the gig economy, to hold enterprises accountable for the risks that their businesses pose to the public. The House of Lords has expressly contemplated this possibility – Lady Hale in *Barclays* noted that the developments in *Christian Brothers* and *Cox* have broken the link between vicarious liability and the traditional sphere of employment law. Her Ladyship specifically recognised that this "may be of benefit to people harmed by the torts of those working in the 'gig' economy",[70] suggesting a future of possibilities for the doctrine.

58 That enterprise risk remains the driving principle behind the modern doctrine of vicarious liability allows the doctrine to remain a supple and resilient one, girded by the overarching consideration

66 [2017] 2 SLR 1074.

67 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 at [64]; see also Lord Reed in *Cox v Ministry of Justice* [2016] AC 660; [2017] 1 All ER 1 at [24] and [29] and Lady Hale in *Barclays Bank v Various Claimants* [2020] 2 WLR 960; [2020] UKSC 13 at [24].

68 *Barclays Bank v Various Claimants* [2020] 2 WLR 960; [2020] UKSC 13 at [27]. See also Lord Reed in *Armes v Nottinghamshire County Council* [2018] AC 355; [2017] UKSC 60 at [59] and in *Cox v Ministry of Justice* [2016] AC 660; [2017] 1 All ER 1 at [24] and [29].

69 *Barclays Bank v Various Claimants* [2020] 2 WLR 960; [2020] UKSC 13 at [28].

70 *Barclays Bank v Various Claimants* [2020] 2 WLR 960; [2020] UKSC 13 at [29].

to protect victims of torts from the risks created by the workers through whom business is carried out. Enterprises should be held responsible for these risks, as a socially just incident of the financial and other benefits that their businesses reap from society.

59 Vicarious liability has thus emerged from its Middle Ages of agency and implied authority, to a new future regulating the creative ways in which modern day humans, with the benefit of technology, have chosen to structure their lives and professional relationships. As Lord Phillips said, and Lady Hale echoed, "[t]he law of vicarious liability is on the move".[71]

71 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1; [2013] 1 All ER 670 at [19]; *Barclays Bank v Various Claimants* [2020] 2 WLR 960; [2020] UKSC 13 at [1].