INTERNALISING EXTERNALITIES

An Enterprise Risk Approach to Vicarious Liability in the 21st Century

This article argues that the law of vicarious liability must evolve to meet the exigencies of contemporary times. These include recognising the multiplicity of modern work arrangements beyond the traditional employment contract, as well as deterring sexual assault of young and vulnerable victims by those placed in positions of power, and ensuring that such victims receive just and adequate compensation for the ordeal they have suffered. It notes that over the last decade, courts have gravitated towards an overarching rationale of "enterprise risk" when imposing vicarious liability for intentional torts, and suggests that a more explicit acceptance of a new paradigm of "internalising externalities" can assist courts in deciding the appropriate legal responsibility to be assigned to entities – whether profit-maximising companies, volunteer organisations or religious bodies – that benefit from carrying on an enterprise that necessarily introduces risks to others. It concludes that recent decisions of the Supreme Courts of the UK and Canada, as well as the Singapore Court of Appeal, on the law of vicarious liability are certainly on the right track, and a holistic consideration of requiring enterprises to internalise the risks that they create would better unify the different stages of the test for vicarious liability.

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I. Introduction

1 In a scenario where an individual is acting on behalf of an enterprise, whether a profit-maximising business or a non-profit organisation, tort law generally serves to allocate the cost of accidents amongst three parties: the enterprise, the actor/agent and the victim. While the actor/agent can be found to be personally liable to the victim in negligence or for committing an intentional tort, the victim may not be able to recover compensation from an insolvent tortfeasor. As delegation of the performance of activities is so pervasive in modern

business relationships, it is particularly pertinent to develop a set of efficient rules for the law of vicarious liability to better increase social welfare outcomes and to control actor/agent risk-taking.

2 The recent spate of sexual abuse scandals that have rocked educational institutions and religious organisations require a robust response from not just the criminal enforcement agencies but also from the courts to protect these young and vulnerable victims from harm. There is no denying that vicarious liability is "at odds with the general approach of the common law" by deviating from fault as the core basis for liability.[1] Over the last decade and a half, the highest appellate courts in the Commonwealth common law jurisdictions have had to grapple with the unenviable issue of whether to impose tortious liability on such entities for the sexual assaults perpetrated by individuals engaged by them. There still appears to be no unanimity between judges and academics about the rationale behind vicarious liability, Glanville Williams commenting that vicarious liability is "the creation of many judges who have different ideas of its justification or social policy, or no idea at all".[2] The House of Lords has noted that it was "not useful to explore the historical origins of the vicarious liability of an employer in the hope of finding guidance in the principles of its modern application";[3] instead judges have resorted to overt policy considerations to resolve the intractable issues before them. Consequently the courts have boldly interpreted the Salmond formulation in an expansive manner to impose vicarious liability on boarding schools and the Catholic Church for intentional torts committed by individuals who were employed by or associated with these enterprises.[4]

3 The extension of the close connection test by the House of Lords in *Lister v Hesley Hall* ("*Lister*") in 2002 is not without its critics – in particular by academic commentators who insist on doctrinal purity

1 *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [8], *per* Lord Nicholls. See also Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at p 2.

2 Glanville Williams, "Vicarious Liability and the Master's Indemnity" (1957) 20 MLR 220 at 231.

3 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [34], *per* Lord Clyde.

4 *Eg*, *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1; *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *C v D, SBA* [2006] EWHC 166; *New South Wales v Lepore* (2003) 212 CLR 511; and *Bazley v Curry* [1999] 2 SCR 534. The term "enterprise" is here used to encompass non-profit organisations, as will be explained further at paras 45–47 below.

and a strict adherence to the Salmond formulation.[5] On the other hand, the *Lister* test – at least the version propounded by Lord Steyn – has been hailed as "an intellectually satisfying and practical criterion"[6] and has been consistently applied across many cases throughout the Commonwealth involving intentional torts.[7] While courts have not jettisoned the longstanding principle that an employer may be vicariously liable for the tortious act of an employee but not for the acts of an independent contractor, there is a discernible trend of a liberal application of the close connection test to situations involving religious ministers and boarding school wardens sexually abusing minors.

4 When the English Court of Appeal held by a bare majority in *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust*[8] ("*JGE II*") that vicarious liability may be imposed in scenarios where the relationship between the defendant and the tortfeasor was akin to that of employer and employee, the decision sparked much discussion on whether such circumvention of the classical touchstone of an employer-employee relationship had introduced too much doctrinal uncertainty.[9] On 21 November 2012, the UK Supreme Court in *Various Claimants v Catholic Child Welfare Society*[10] ("*CCWS*"), perhaps emboldened by Pope Benedict's historic public apology to the victims of sexual abuse by Catholic priests in Ireland,[11] brushed aside these criticisms and handed down a rare unanimous joint judgment that affirmed the test of "akin to employment" articulated in *JGE II*. Lord Phillips, with whom Lady Hale and Lords Kerr, Wilson and Carnwath agreed, held that:[12]

5 *Eg*, Po Jen Yap, "Enlisting Close Connections: A Matter of Course for Vicarious Liability" (2008) 28 *Legal Studies* 197 and Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 CLWR 268.

6 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [75]; *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844 at [19].

7 *Eg*, *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844; *Bernard v Attorney-General of Jamaica* [2004] UKPC 47; and *Mattis v Pollock* [2003] 1 WLR 2158.

8 [2012] EWCA Civ 938, affirming the decision in *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871; [2012] 2 WLR 709 (QB).

9 See, *eg*, Phillip Morgan, "Case and Comment – Revising Vicarious Liability: A Commercial Perspective" [2012] LMCLQ 176; Phillip Morgan, "Recasting Vicarious Liability" (2012) 71 Camb LJ 615; Jane O'Sullivan, "Case and Comment – The Sins of the Father: Vicarious Liability Extended" (2012) 71 Camb LJ 485; and David Tan, "A Sufficiently Close Relationship Akin to Employment" (2013) 129 LQR 30.

10 [2012] UKSC 56; [2013] 2 AC 1.

11 *Eg*, Jonathan Wynne-Jones & Nick Squires, "Pope's Apology: 'You Have Suffered Grievously and I Am Truly Sorry'" *The Telegraph* (20 March 2010).

12 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [34].

> … [t]he policy objective underlying vicarious liability is to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim.

The phrase "fair, just and reasonable" is identical to the third limb of the *Caparo* test for duty of care in English law, and would be a familiar signal to English courts that there is much discretion accorded to judges to make an evaluative judgment in each case having regard to the particular factual circumstances.[13]

5 Although the Singapore Court of Appeal had not considered the extent to which, for the purposes of vicarious liability, the employer-employee relationship may be stretched to include independent contractors and volunteers, Chan Sek Keong CJ, delivering the judgment for the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd*[14] ("*Skandinaviska*"), endorsed the approach taken by the Supreme Court of Canada where McLachlin CJ restated the rationale of vicarious liability as follows:[15]

> Vicarious liability is based on the rationale that *the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public*. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. [emphasis added]

6 This article argues that the law of vicarious liability must evolve to meet the exigencies of the contemporary times. These include recognising the multiplicity of modern work arrangements beyond the traditional employment contract, as well as deterring sexual assault of young and vulnerable victims by those placed in positions of power, and ensuring that such victims receive just and adequate compensation for the ordeal they have suffered. Part II provides a brief history of the key justifications for imposing vicarious liability.[16] Part III traces the judicial development of the elements of the test for vicarious liability and notes that over the last decade, courts have gravitated towards an overarching rationale of "enterprise risk" when imposing vicarious liability for

13 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618. See also Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at p 169.

14 [2011] 3 SLR 540.

15 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [70] (citing *Roman Catholic Episcopal Corp of St George's v John Doe (a pseudonym) and John Doe (a pseudonym)* [2004] 1 SCR 436 at [20].

16 See paras 7–12 below.

intentional torts.[17] Part IV suggests that a more explicit acceptance of a new paradigm of "internalising externalities" can assist courts in deciding the appropriate legal responsibility to be assigned to entities – whether profit-maximising companies, volunteer organisations or religious bodies – that benefit from carrying on an enterprise that necessarily introduces risks to others.[18] Part V concludes that recent decisions of the Supreme Courts of the UK and Canada, as well as the Singapore Court of Appeal, on the law of vicarious liability are certainly on the right track, and a holistic consideration of requiring enterprises to internalise the risks that they create would better unify the different stages of the test for vicarious liability.[19]

II. Justifications for vicarious liability

7 Vicarious liability is not a tort, yet it lies within the province of all common law systems of tort law. It has been recognised for centuries as a rule of responsibility which obliges the defendant to be liable for the torts committed by another party the defendant is personally at fault. Vicarious liability derived originally from medieval notions of headship of a household, including wives and servants; their status in law was absorbed into that of the master.[20] It has been spoken of in the archaic terms of master/servant and *respondeat superior*, and discussed in the modern language of employer/employee/independent contractor. Liability is imposed on the defendant not because the defendant was found to be at fault, but as a result of the defendant's relationship with the *tortfeasor* rather than the victim. Vicarious liability runs counter to the notions of corrective justice and individual responsibility that underpin much of tort law, yet it is fast becoming the first port of call for judges anxious to find someone to bear the burden of paying compensation.

8 Courts and academic commentators have often lamented the enigmatic nature of the law of vicarious liability. No one denies the existence of the doctrine, but its multifarious policy objectives and the scope of its application are notoriously unclear. Paula Giliker astutely notes that:[21]

> … vicarious liability rests at the heart of the modern law of tort, despite its status quo as a cuckoo in the nest of corrective justice. It provides a solvent target for claims and, supported by the defendant's

17 See paras 13–35 below.
18 See paras 36–49 below.
19 See paras 50–57 below.
20 See *Scott v Davis* (2000) 204 CLR 333 at 409–410.
21 Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at p 19.

> ability to insure or self-insure, is perceived as a means by which everyday risk may be spread within various sectors of society.

9 Under the traditional doctrine of *respondeat superior*, masters are held vicariously liable for the torts that their servants commit in the course of employment. In the last decade, decisions in the UK and Canada have practically ignored the historical basis of vicarious liability or a need to locate a doctrinal foundation upon which to expand the imposition of vicarious liability in a principled fashion when the courts there readily pinned responsibility on faultless defendants for acts of violent assaults[22] and sexual abuse[23] committed by individuals whose conduct the defendants never would have permitted. In *Maga v Archbishop of Birmingham*[24] ("*Maga*"), Longmore LJ commented that:[25]

> [In cases] not covered by previous authority, it may be necessary to have in mind the policy behind the imposition of vicarious liability. That is difficult because there is by no means universal agreement as to what that policy is. Is it that the law should impose liability on someone who can pay rather than someone who cannot? Or is it to encourage employers to be even more vigilant than they would be pursuant to a duty of care? Or is it just a weapon of distributive justice?

The decisions sometimes blurred the distinction between primary responsibility (often couched as a non-delegable duty) and secondary responsibility, *viz* vicarious liability, resulting in a muddied doctrine of vicarious liability that was more obfuscating than illuminating.[26] This article does not propose to resolve the overlap between non-delegable duties of care and vicarious liability, but would instead attempt to articulate a cohesive framework within which vicarious liability can operate.

10 The common law development of vicarious liability has its origins in the medieval ideas of identification of a master with the acts of their servants or notions of agency.[27] In 1691, Holt CJ articulated a test of implied command which laid the critical foundation for the

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22 *Eg*, *Mattis v Pollock* [2003] 1 WLR 2158 and *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18.

23 *Eg*, *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1; *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; and *Bazley v Curry* [1999] 2 SCR 534.

24 [2010] EWCA Civ 256; [2010] 1 WLR 1441.

25 *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 at [81].

26 *Eg*, *New South Wales v Lepore* (2003) 212 CLR 511.

27 For an excellent account, see Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at pp 12–16.

modern doctrine of vicarious liability: "[F]or whoever employs another is answerable for him, and undertakes to his care to all that make use of him."[28] From the 1800s, the English courts began to develop the course of employment test, which is known today as stage 2 of the vicarious liability inquiry.

11 There were two principal legal bases for vicarious liability that had been discussed in case law and academic literature over the years. The first and dominant view is known as the "servant's tort" theory which is a rule of responsibility that requires the imposition of liability on the master for the wrongful act of the servant in the presence of some form of antecedent consent or relationship between the defendant (master) and the tortfeasor (servant). The second basis, called the "master's tort" theory, posits that the master is liable for the torts of the servant by virtue of the attribution of the servant's acts to the master; therefore, the master is deemed to have committed the wrongful act. In some cases, judges have peremptorily invoked the maxim "*qui facit per alium facit per se*", which can be translated as "he who acts through another, acts for himself", to justify imposing vicarious liability.[29]

12 However, Lord Reid in *Staveley Iron and Chemical Co v Jones*[30] disapproved of the master's tort theory and its reliance on maxims as conclusive of a principled justification:[31]

> The maxims *respondeat superior* and *qui facit per alium facit per se* are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it.

Giliker also points out that "vicarious liability generally renders both the tortfeasor and the person deemed at law responsible jointly liable to the victim" but that "the master's tort theory renders solely the master liable" and therefore cannot be sustained.[32] With the servant's theory being the prevailing view today, the next question to be answered is: How does one transform a theory into a set of coherent and useful principles that can guide the development of the law of vicarious liability in the 21st century?

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28 *Boson v Sandford* (1691) 2 Salk 440; (1691) 91 ER 382 (as quoted in Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at p 12).

29 *Eg*, *Mitchell v Tarbutt* (1794) 5 TR 649 at 651; (1794) 101 ER 362 at 363.

30 [1956] AC 627.

31 *Staveley Iron and Chemical Co v Jones* [1956] AC 627 at 643.

32 Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at p 15.

III. Evaluating the elements – The need for a unifying rationale

13 While it might not be possible to identify a singular overarching policy objective, there is consensus that generally, when examining whether vicarious liability should be imposed on party *A* for the acts of party *B*, courts follow a two-stage inquiry. Stage 1 involves an evaluation of the relationship between *A* and *B* – whether they were in an actual or deemed employer-employee or agency relationship to which vicarious liability may attach.[33] Independent contractors may be nonetheless held to be in a deemed employment relationship if an enterprise exercised adequate control over the method of performance of tasks and, in certain circumstances, if the tortfeasor was additionally presented to the public as an "emanation" of the enterprise.[34] Stage 2 determines the scope of the employer's or deemed employer's liability, and requires that the wrongful act be committed in the "course of employment". Common law courts have traditionally applied the Salmond test:[35]

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of [the servant's] employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.

However, there is arguably a third limb as John Salmond himself intimated:[36]

> [A] master … is liable even for acts which he has not authorised, provided they are so connected with acts he was authorised, that they might be rightly regarded as modes – although improper modes – of doing them.

This explanation forms the basis of the "close connection" test presently applied by the House of Lords,[37] the Supreme Court of Canada[38] and the Singapore Court of Appeal.[39]

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33 *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1; *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18.

34 *Hollis v Vabu* (2001) 207 CLR 21 at 42.

35 Robert Heuston & Richard Buckley, *Salmond and Heuston on the Law of Torts* (Sweet & Maxwell, 21st Ed, 1996) at p 443. The test was first enunciated in John William Salmond, *The Law of Torts* (Stevens & Haynes, 1907) at p 83. See also *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [15], *per* Lord Steyn.

36 John William Salmond, *The Law of Torts* (Stevens & Haynes, 1907) at pp 83–84.

37 *Eg*, *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.

38 *Eg*, *Bazley v Curry* [1999] 2 SCR 534 and *Jacobi v Griffiths* [1999] 2 SCR 570.

39 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540.

A. Stage 1 – From "employer-employee relationship" to "relationship akin to employment"

14 The finding of an employer-employee relationship remains at the heart of all systems of vicarious liability.[40] In as early as 1939, Gerald Stevens recognised that "the definition of servant or employee is, then, a part of the general question of how the risk and cost of injuries should be borne".[41]

15 Control may not be wholly determinative in determining the existence of an employer-employee relationship, but on some of the present authorities the question of control appears to be at the crux of the test to be applied.[42] In *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd*[43] ("*Awang bin Dollah*"), the Singapore Court of Appeal recognised that in cases dealing with employer's vicarious liability for damage caused by a tortfeasor to a third party:[44]

> … an 'employer' in such a case means not only the party who actually employs the employee, but also the one who at the material time exercises or has the right to exercise control over the employee in respect of the work he was engaged to perform, notwithstanding that there is no contract of employment between him and the party who exercises or has the right to exercise control.

It was clear from the unanimous decision in *Awang bin Dollah* that, under Singapore law, one may be held vicariously liable for the torts of an independent contractor, as indicated by L P Thean JA:[45]

> … where the workman is not employed by the main contractor but by a sub-contractor, the main contractor may be liable as the 'employer' of the workman, if he exercises or has the right to exercise control over the workman in respect of the work upon which he was engaged to perform.

16 If one were to apply the traditional test of control as laid down in *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd*[46] ("*Mersey Docks*"), or a combined control/integration test – also known

40 Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at p 77.
41 Gerald Stevens, "The Test of the Employment Relation" (1939) 38 Mich L Rev 188 at 199.
42 *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18 at [82].
43 [1997] 3 SLR 677.
44 *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd* [1997] 3 SLR 677 at [19].
45 *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd* [1997] 2 SLR(R) 746 at [20].
46 [1947] AC 1.

as the composite "totality of the relationship" test – as articulated in *Hawley v Luminar Leisure Ltd*[47] ("*Hawley*") or *Hollis v Vabu*[48] ("*Hollis*"), it is likely that a church authority may not exercise sufficient control over the method of performance of the tasks assigned to a priest, and the priest may not be integrated to the extent of being part and parcel of the organisation. However, in *JGE II*, Ward LJ was of the view that in modern times, "control has become an unrealistic guide";[49] Davis LJ thought that there was no need for actual control and "capacity and entitlement to control" was sufficient.[50] Although both Ward and Davis LJJ concurred that the law of vicarious liability was not a static concept and had to adapt to the changes in circumstances and public perceptions over the generations, they differed on the appropriate criteria to be applied at stage 1 to determine whether the relationship in question was one that was "akin to employment".

17 Indeed the law of vicarious liability must evolve to meet the contemporary imperatives of deterring sexual assault of young and vulnerable victims by those placed in positions of power, and ensuring that such victims receive just and adequate compensation for the ordeal they have suffered. Although the decisions of the House of Lords in *Lister* and *Dubai Aluminium Co Ltd v Salaam*[51] ("*Dubai Aluminium*") have indicated the generous latitude that the highest appellate court in the UK was willing to accord to stage 2 in finding a close connection between the tortfeasor's intentional acts of sexual assault and fraud and his scope of employment, the House of Lords have not had the opportunity to explore how far they were willing to go for stage 1 when there was no formal contract of employment between the tortfeasor and the alleged employer until *CCWS* came before the UK Supreme Court in 2012.

18 In reversing the Court of Appeal's judgment, the Supreme Court acknowledged that "[s]exual abuse of children is now recognised as a widespread evil"[52] and held that the Institute of the Brothers of the Christian Schools ("the Institute") should share with the Catholic Child Welfare Society and Middlesbrough Diocesan Rescue Society, which were responsible for managing St William's at various times at which the sexual assault of the boys occurred, vicarious liability for the abuse

47 *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18.
48 (2001) 207 CLR 21.
49 *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 at [65].
50 *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 at [127].
51 [2003] 2 AC 366.
52 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [83].

committed by the brothers there. In *CCWS*, the Supreme Court overturned the decision of the Court of Appeal that vicarious liability could not be shared, and rejected the reliance on the criteria of control as the dispositive factor.[53] It is important to note this unequivocal judicial shift away from the central criterion of control to a more nuanced approach that incorporates an evaluation of enterprise risk, the significance of the tortfeasor's activities to the enterprise and the degree of integration of these activities into the organisational structure of the enterprise.

19 This is a belated development in English law, as the High Court of Australia abandoned the centrality of the control test over a decade ago. In *Hollis*, the joint majority judgment was of the view that:[54]

> The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. … With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one.

In *Hollis*, a courier company was found vicariously liable for the negligence of the bicycle riders it had hired in the conduct of its business enterprise. While there was some evidence of control by the company over the manner of performing the work (*eg*, through a work roster), the tipping point on the facts appears to be the "significance of livery": that "the couriers were presented to the public and to those using the courier service as emanations of Vabu. They were to wear uniforms bearing Vabu's logo".[55] This "totality of the relationship" test rests implicitly on the policy consideration of internalising enterprise risk, and it seems similar to the court's analysis in *CCWS*, although it was not referred to.

20 In *CCWS*, the Institute was an unincorporated association of members who were lay brothers of the Catholic Church "bound together by lifelong vows of chastity, poverty and obedience and by

53 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [36], [37], [43] and [45].

54 *Hollis v Vabu* (2001) 207 CLR 21 at [43] (quoting Harold H Glass, Michael H McHugh & Francis M Douglas, *The Liability of Employers in Damages for Personal Injury* (Law Book Co, 2nd Ed, 1979) at pp 72–73).

55 *Hollis v Vabu* (2001) 207 CLR 21 at [50]–[51].

detailed and very strict rules of conduct".[56] These rules, originally approved by the Pope in 1724, govern all aspects of the life and conduct of the brothers, and contain provisions governing interactions with children taught by the brothers.[57] Although the Institute arguably exercised a high degree of control over the lives of the brother-teachers, especially at the location at which the brothers undertook the teaching or acted as headmaster or deputy headmaster,[58] the statutory arrangements made it clear that the school was not run by the Institute, but the school management board. It was an agreed fact that:[59]

> … [i]f a brother was sent to a school managed by a third party, the Institute's control over his life remained complete. He remained bound by his vows, and every year the Provincial made an annual visit of inspection of the community and the brothers living in it, which embraced their role within the school.

21 Lord Phillips, delivering the judgment for the court, relied heavily on the judgments in *JGE v English Province of Our Lady of Charity and Trustees of the Portsmouth Roman Catholic Diocesan Trust*[60] ("*JGE I*") and *JGE II*. His Lordship found MacDuff J's judgment at first instance in *JGE I* to be "lucid and bold",[61] where it was held that the test of vicarious liability involved a synthesis of stages 1 and 2. In the Court of Appeal, Ward LJ essentially adopted the crucial features identified by MacDuff J in considering whether a relationship "akin to employment" was present; Lord Phillips referred to this "impressive leading judgment"[62] with approval and declined to impose a stringent test of control as applied in *Mersey Docks*.

22 Lord Phillips cautioned against equating the doctrine of vicarious liability with control, and explicitly approved of Rix LJ's approach in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[63] under which dual vicarious liability may be imposed if the

56 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [8].
57 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [9].
58 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [17].
59 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [18].
60 [2011] EWHC 2871; [2012] 2 WLR 709.
61 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [48].
62 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [19].
63 [2005] EWCA Civ 115.

employee in question was "so much a part of the work, business or organisation of both employers".[64] Lord Phillips explained that:[65]

> … [v]icarious liability was a doctrine designed for the sake of the claimant, imposing a liability incurred without fault because the employer was treated at law as *picking up the burden of an organisational or business relationship which he had undertaken for his own benefit*. [emphasis added]

This overriding policy rationale, expressed in such pellucid terms by an unanimous court, is significant for future cases as it thrusts the policy objective of the "enterprise risk" approach of the Canadian Supreme Court into the forefront of English jurisprudence.[66] However, such considerations had been prominent in earlier decisions of the House of Lords, albeit in the context of evaluating stage 2 of the vicarious liability analysis. For instance, Lord Nicholls, delivering the leading judgment in *Dubai Aluminium*, held that the legal policy underlying vicarious liability:[67]

> … 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.

23 According to Lord Phillips in *CCWS*, it would be "fair, just and reasonable" to impose vicarious liability if the relevant criteria were satisfied at stages 1 and 2, and that:[68]

> … [w]here the criteria are satisfied the policy reasons for imposing vicarious liability should apply … [but] the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap.

His Lordship's pronouncement evokes tones of the Delphic Oracle, and may not be particularly illuminating for lower courts who are likely to require better guidance in terms of the precise elements to consider

64 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 115 at [79].

65 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [43]. See also Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at p 333.

66 *Eg*, *Bazley v Curry* [1999] 2 SCR 534 at [22] and [31]–[46]. See also *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [77] and [79].

67 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [21].

68 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [34].

when evaluating the nature of the relationship sufficient to give rise to vicarious liability. It appears that the overarching *policy diktat* of the employer "picking up the burden of an organisational or business relationship which he had undertaken for his own benefit" [69] – together with other policy considerations of victim compensation and deterrence[70] – would guide the formulation of the *criteria* that would be applied to the factual scenario in every dispute. In this regard, Ward LJ's criteria in *JGE II* which comprises a combination of four tests[71] to evaluate whether the relationship between the defendant and the tortfeasor was "akin to employment" appeared to have the implicit approval of Lord Phillips.[72] Regrettably, the Supreme Court did not articulate clearly whether these criteria ought to be applied to future cases.

24 Notwithstanding the shortcomings in the *CCWS* judgment, the clarification provided by Lord Phillips in respect of the synthesis of stages 1 and 2 is much welcomed. It was held that "[w]hat is critical at the second stage is the connection that links *the relationship between D1 and D2* and the act or omission of D1" [emphasis in original].[73] If the tortfeasor, *D1*, does something that he is required or requested to do pursuant to his relationship with *D2*, or in furtherance of a common purpose for the benefit of *D2*, stage 2 of the test is likely to be satisfied. However, as Lord Phillips points out, "sexual abuse can never be a negligent way of performing such a requirement".[74] Unfortunately *Lister* does not provide the precise criteria that will give rise to vicarious liability at stage 2: "The test of 'close connection' approved by all tells one nothing about the nature of the connection."[75] Lord Phillips then considered how the "creation of risk" or "enterprise risk" policy rationale

69 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [43]. See also *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [21]. See generally Alan O Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment and Related Legal Doctrines" (1988) 101 Harv L Rev 563.

70 *Eg, Bazley v Curry* [1999] 2 SCR 534 at [29]–[32] and *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [77]–[83]. See also Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at pp 234–243.

71 The approach was based on that first proposed in Richard Kidner, "Vicarious Liability: For Whom Should the 'Employer' Be Liable?' (1995) 15 *Legal Studies* 47.

72 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [49]–[50].

73 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [21]. *D1* is the tortfeasor and *D2* is the employer for the purposes of imposing vicarious liability.

74 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [62].

75 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [74].

that was quintessential to the formulation of the close connection test by the Canadian Supreme Court[76] had been influential in a number of decisions of the House of Lords[77] and the Privy Council.[78] His Lordship conceded that the precise criteria "are still in the course of refinement by judicial decision"[79] but ventured to proffer that at stage 2:[80]

> … [v]icarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse.

25 This line of inquiry thus provides a "strong causative link"[81] between the relationship between the defendant and the tortfeasor (stage 1) and the acts of abuse that has arisen as a result of this relationship (stage 2). This nexus was alluded to by Gleeson CJ in *New South Wales v Lepore*[82] ("*Lepore*"), but was not further explored.[83] Perhaps Lord Phillips could have given Lord Neuberger MR's decision in *Maga* more than a cursory nod, as there was much to glean from the adroit analysis there of a set of detailed factors to determine if there was a sufficiently close connection between the tortfeasor's employment as a priest at the church and the abuse which he inflicted on the claimant to render it fair and just to impose vicarious liability for the abuse on his employer the archdiocese.[84] The key factors were: (a) the priest's *relationship* with the archdiocese which clothed him in clerical garb and

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76 In particular, it was held in *Bazley v Curry* [1999] 2 SCR 534 at [41], *per* McLachlin J, that:

> … [v]icarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. [emphasis in original]

77 *Eg*, *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [21] and *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [9].

78 *Eg*, *Bernard v Attorney-General for Jamaica* [2004] UKPC 47; [2005] IRLR 398 at [23]. *Contra Brown v Robinson* [2004] UKPC 56 at [11].

79 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [85].

80 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [86].

81 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [86].

82 (2003) 212 CLR 511.

83 *New South Wales v Lepore* (2003) 212 CLR 511 at 539–540:

> When the specific responsibilities of an employer relate in some way to the protection of person or property, and an intentional wrongful act causes harm to person or property, then the specific *responsibilities* of a particular employee may require close examination. [emphasis added]

84 *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 at [44]–[55].

enabled him to hold himself out as having a special role and moral authority; (b) the priest was *assigned a special responsibility* for youth work at the church by the archdiocese which allowed him to come in contact with the claimant; (c) the abuser's role as priest in the archdiocese gave him the *status and opportunity* to entice the claimant by ostensibly respectable means connected with his employment; and (d) the acts of abuse – whether perpetrated on or away from the employer's premises – arose from the abuser's role as a priest employed as such by the archdiocese. It is important to note Lord Neuberger's caution that "the fact that the opportunity to commit abuse arises as a result of the employment is not enough"[85] and his suggestion that a claimant must also show that there was "a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of that harm".[86]

26 In summary, both the unanimous decision in *CCWS* and the joint majority judgment in *Hollis* have taken a global approach, driven by a common set of contemporary considerations, to determining whether an employer-employee relationship exists in stage 1. The increasing alacrity in recent years of multifarious enterprises engaging contractors and volunteers, and the outsourcing to agents in the place of "employees", reinforces the need to address the inadequacy of the more traditional control test as enunciated in *Mersey Docks* in favour of the more flexible modern approach adopted in *CCWS* and *Hollis*. While the Singapore Court of Appeal has yet to rule conclusively on this issue, the court's willingness to extend vicarious liability to cover the tortious acts of an independent contractor in *Awang bin Dollah*, and its overt resort to policy imperatives in *Skandinaviska* when considering stage 2, suggest that it is likely to adopt a similarly expansive approach.

B. Stage 2 – Expanding the ambit of "close connection"

27 Stage 2 considers whether the tortious act of *B* was within the scope of employment, and it is widely accepted that a "close connection" test may be applied.[87] Confronted with the problem of systematic sexual abuse of young children in a boarding house, the House of Lords in *Lister*[88] unanimously overruled a previous decision of the Court of

85 *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 at [52].

86 *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 at [53] (referring to *Jacobi v Griffiths* (1999) 174 DLR (4th) 71 at [79]).

87 *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Bazley v Curry* [1999] 2 SCR 534; *New South Wales v Lepore* (2003) 212 CLR 511; *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540.

88 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

Appeal[89] and held that the employer of the warden of a school boarding house was vicariously liable for the sexual assaults committed by the employee. All five law lords considered and approved of the Canadian Supreme Court's decisions in *Bazley v Curry*[90] ("*Bazley*") and *Jacobi v Griffiths*[91] ("*Jacobi*") where the court eschewed a strict adherence to the unauthorised conduct/unauthorised mode distinction and adopted a broader principle of "close connection".[92] However, the law lords arrived at their conclusions based on different reasonings. Four different versions of the close connection test were given.[93]

28 Lord Steyn, with whom Lords Hutton and Hobhouse concurred, explicitly adopted the "close connection" test to determine whether an employee's act was "so closely connected with his employment that it would be fair and just to hold the employers vicariously liable".[94] Lord Steyn emphatically endorsed *Bazley* and *Jacobi*, holding that:[95]

> … wherever such problems [of sexual abuse of young and vulnerable children] are considered in future in the common law world these judgments will be the starting point.

Lord Steyn's version was consequently adopted as the *Lister* test, restated by Lord Nicholls in *Dubai Aluminium* as:[96]

> … the wrongful conduct must be so closely connected with acts the … employee was authorised to do that … the wrongful conduct may fairly and properly be regarded as done by the [employee] while acting in the ordinary course of the employee's employment.

29 In *Lister*, the House of Lords did not adopt the "enterprise risk" explanation – evident in the Canadian Supreme Court decisions – as a theoretical framework when tackling stage 2. Although Lord Steyn declined to "express views on the full range of policy considerations examined in those decisions",[97] his ringing endorsement of *Bazley* and *Jacobi* does not preclude English courts from accepting an overarching risk framework to guide the resolution of issues raised under stage 2.

89 *Trotman v North Yorkshire County Council* [1999] LGR 584.
90 *Bazley v Curry* [1999] 2 SCR 534.
91 [1999] 2 SCR 570.
92 See also Peter Cane, "Vicarious Liability for Sexual Abuse" (2000) 116 LQR 21.
93 Phillip Morgan, "Distorting Vicarious Liability" (2011) 74 MLR 932 at 933; Paula Giliker, "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 TLJ 35 at 39.
94 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 230.
95 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 230.
96 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at 377.
97 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [27].

30 In Singapore and Hong Kong, the highest appellate courts have been less concerned with the precise formulation of the "close connection" test, conceding that in the area of vicarious liability, "the ultimate goals of fairness and justice must be paramount".[98] The Court of Final Appeal in Hong Kong in applying *Lister* held that:[99]

> … by 'close connection' is meant a connection between the employee's unauthorised tortious act and his employment which is so close as to make it *fair and just* to hold his employer vicariously liable. [emphasis added]

31 There is much disagreement and academic criticism in respect of the overt considerations of public policy,[100] but the inevitable trend emerging in a number of Commonwealth common law jurisdictions like England, Canada, Australia, Singapore and Hong Kong is a convergence toward a more liberal interpretation of the "close connection" test for determining whether an employee's intentional wrongful act falls within the scope of employment for the purposes of imposing vicarious liability.

32 In *Skandinaviska*, decided by the Singapore Court of Appeal, Chan CJ observed that the close connection test which imposes vicarious liability only when it would be fair and just to do so requires the court to:[101]

> … openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'.

33 *Skandinaviska* was a case involving an elaborate fraud perpetrated by an employee of Asia Pacific Breweries ("APB") over a period of more than four years against two claimant banks, where it was unanimously held on the facts that APB was not vicariously liable to the banks for the fraud as the financial institutions had failed to take reasonable precautions. Nevertheless, the Court of Appeal agreed that the applicable test for determining whether vicarious liability should be imposed on an employer for torts committed by an employee during an

98 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [81].

99 *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 3 HKLRD 844 at [19].

100 See, *eg*, Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 CLWR 268; Douglas Brodie, "Enterprise Liability: Justifying Vicarious Liability" (2007) 27 OxJLS 493; and Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010).

101 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [75] (citing *Bazley v Curry* [1999] 2 SCR 534 at [41]).

unauthorised course of conduct was the "close connection" test,[102] and the application of this test should be guided by the rationale that:[103]

> … a person who employs another to advance his own interests and thereby creates a risk of his employee committing a tort should bear responsibility for any adverse consequences resulting therefrom.

34 Chan CJ emphasised that the policy consideration of deterrence from future harm:[104]

> … which is aimed at promoting efficiency in business enterprises through deterrence, is a legitimate one. However, like victim compensation, it rests on the fundamental premise that the employer is best placed, relative to everybody else, to manage the risks of his business enterprise and prevent wrongdoing from occurring.

35 In this respect, the Singapore Court of Appeal's judgment in *Skandinaviska* provides a solid basis for courts to incorporate an overarching "enterprise risk" framework into the tests applied at stages 1 and 2 of the vicarious liability analysis. Chan CJ unequivocally approved of a two-pronged approach to examining whether a close connection existed for the purposes of imposing vicarious liability on an employer for the intentional wrongdoing for an employee: first, the court should consider the factual matrix by applying the five factors proposed by McLachlin J in *Bazley*;[105] and second, policy considerations of effective victim compensation and deterrence of future harm in the light of better management of enterprise risks should guide the court's determination of whether it would ultimately be fair and just to impose vicarious liability.[106] The *Bazley* factors, relevant in determining whether the requisite degree of connection exists in a particular case, include: (a) the opportunity that the enterprise afforded the employee to abuse his or her power; (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee); (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise; (d) the extent of power conferred on the employee in relation to the

102 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [75].

103 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [77].

104 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [70].

105 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [87]–[88] and [95].

106 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [77]–[83] and [92]–[93].

victim; and (e) the vulnerability of potential victims to wrongful exercise of the employee's power.[107]

IV. "Internalising externalities" – Extrapolating from *Skandinaviska*

36 In his adroit judgment, Chan CJ in *Skandinaviska* distinguishes the *rationale* of vicarious liability from the *goals or objectives* of victim compensation and deterrence. The *raison d'être* for vicarious liability is premised on "efficiency": the person who runs an enterprise, and who obtains a benefit from appointing other individuals to conduct activities connected to the enterprise, should bear the external risks that emanate from this enterprise. This "*Skandinaviska* risk paradigm" not only holds for stage 2 but, as the author shall argue, is equally applicable to stage 1. The term "enterprise risk" should not be seen as a misnomer when the concept is invoked in the imposition of vicarious liability on non-profit institutions whose ability to spread losses is limited compared to profit-making enterprises. It stands for a wider proposition that *any* institution would be vicariously liable for the acts of its agents where the risk of injury could be said to be closely associated with the wrong that occurred, and it would be just, fair and reasonable that the entity that engaged in, and profited from or gained a non-economic benefit from, particular activities should internalise the full cost of operations, including potential torts.[108]

37 While deterrence has been touted as an objective of the law of vicarious liability, Chan CJ argued that while this may hold true in many negligence scenarios:[109]

> … [i]n yet other cases, the type of tort that occurs is, realistically speaking, uncontrollable and, therefore, not amenable to deterrence. This is particularly relevant to torts committed in the course of excessively risky business enterprises, spur-of-the-moment torts and intentional torts. In such situations, it may well be possible to find that the employer has done all that is reasonable to deter the tort and yet has failed to prevent the commission of the tort. In such situations, deterrence as a justification for imposing vicarious liability loses much of its force.

38 The *Skandinaviska* risk paradigm finds support in the bulk of case law despite courts generally being reluctant to refer more explicitly

107 *Bazley v Curry* [1999] 2 SCR 534 at [41].

108 See also Simon Deakin, "'Enterprise-risk': The Juridical Nature of the Firm Revisited' (2003) 32 Ind Law J 97.

109 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [80].

to risks for fear of slipping into the domain of law and economics. The impenetrable code of "just, fair and reasonable" has often been used by English courts to allow for a covert consideration of whether an enterprise should internalise the risks that it has created. Cases like *Morris v C W Martin & Sons Ltd*[110] demonstrate that where an employer undertakes the care of a client's property and entrusts the task to an employee who steals the property, the employer is vicariously liable. It can also be viewed from the perspective that the risk of theft by an employee is inherent in a business which involves (and benefits from) entrusting the custody of a customer's property to employees, and when this risk eventuates, the owner of the business should bear the consequences. Similarly, where the activities of businesses involve engaging individuals to deliver goods, decisions like *Ilkiw v Samuels*[111] and *Rose v Plenty*[112] show a finding of vicarious liability through an almost tortured interpretation of stage 2 when courts have refused to openly discuss how these businesses have created risks to the community. On the other hand, Lord Nicholls in *Dubai Aluminium* explicitly states that:[113]

> The underlying legal policy is based on the recognition that carrying on a business enterprise involves risk 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.

39 In *Hollis*, the joint judgment of Gleeson CJ and Gaudron, Gummow, Kirby and Hayne JJ of the High Court of Australia

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110 [1966] 1 QB 716 (a firm of cleaners was held vicariously liable to a customer whose fur was stolen by one of its employees). See also *Port Swettenham Authority v T W Wu & Co (M) Sdn Bhd* [1979] AC 580.

111 [1963] 1 WLR 991. A lorry driver was given strict instructions by his employers not to allow anyone else to drive the lorry. He allowed a third party, who was incompetent, to drive it without making any inquiry into his competence to do so. Under the second limb of the Salmond test (stage 2), the court found that the driver was employed not only to drive, but to be in charge of the lorry as his employer's representative. The employers were held vicariously liable for the resulting accident.

112 [1976] 1 WLR 141. A milk roundsman, despite strict instructions not to do so, asked a boy to help him deliver milk and let him accompany him on his float. This was clearly an unauthorised act but the court held that it nevertheless was done in the course of delivering milk. The employer was held liable for injuries sustained by the boy when he fell off the float as a result of the roundsman's negligent driving.

113 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [21]. It should be noted that Donal Nolan is less charitable towards the enterprise risk approach to vicarious liability as demonstrated in his trenchant criticisms in Donal Nolan, "Book Review: *Enterprise Liability and the Common Law* by Douglas Brodie" (2012) 41 Ind Law J 370 at 370–372.

acknowledged that all employees and independent contractors perform work for the benefit of their employers and principals respectively, but this, by itself, cannot be a sufficient indication that this person is an employee.[114] The court referred with approval to McLachlin J's judgment in *Bazley*, which held that:[115]

> … where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong.

40 In *Darling Island Stevedoring and Lighterage Co Ltd v Long*,[116] Fullagar J expressed the view that the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy.[117] Lord Millett in *Lister* cites John Fleming with approval, noting that vicarious liability has its basis in a combination of policy reasons and:[118]

> Most important of these is the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise.

His Lordship also approved of Atiyah's observations that "[t]he master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on".[119]

41 As the most ardent supporter of adopting the enterprise risk framework for the law of vicarious liability, Lord Millett argues that if the employer-defendant's objectives cannot be achieved without a "serious risk" of the employee-tortfeasor committing the kind of wrong which he has in fact committed, the employer ought to be liable. Moreover, the fact that his employment gave the tortfeasor the opportunity to commit the wrong is not enough to make the employer liable. The owner of the enterprise (or "employer") is "liable only if the risk is one which experience shows is inherent in the nature of the business".[120]

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114 *Hollis v Vabu* (2001) 201 CLR 77 at [40].

115 *Hollis v Vabu* (2001) 201 CLR 77 at [42] (quoting *Bazley v Curry* [1999] 2 SCR 534 at 548–549).

116 (1957) 97 CLR 36.

117 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 56–57.

118 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [65] (quoting John Fleming, *The Law of Torts* (Thomson Reuters, 9th Ed, 1998) at p 410).

119 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [65] (quoting Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at p 171).

120 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [65]. Indeed Lord Millett emphasised this later in his judgment (at [82]):

(*cont'd on the next page*)

42 Reinier Kraakman notes that the fundamental economic analysis of vicarious liability, developed with the aid of principal-agent models, looks to the insolvency of agents and to limitations on the ability of the parties to shift liability as the basic conditions favouring vicarious liability.[121] Most prominently, scholars like Lewis Kornhauser,[122] Alan Sykes[123] and Steven Shavell[124] agree that vicarious liability for ordinary torts is more likely to increase social welfare, and to be efficient because employers/principals have greater ability to monitor or otherwise exert more control over actors/agents who perform activities that confer a benefit on the enterprise. In the early 1980s, Sykes argued that "vicarious liability may lower social marginal costs by increasing the incentives for loss avoidance"[125] and it "eliminates the incentives for inefficient expansion when agents are potentially insolvent by forcing enterprises to bear the full costs of their activities".[126] Moreover, vicarious liability "may lead to the employment of more … responsible agents with an attendant increase in loss-avoidance effort".[127] Engaging in a similar analysis, Kornhauser concluded that:[128]

> … shifting from agent to enterprise liability will lead to a greater level of care if first, the principal can affect the probability of injury by her arrangement of the work environment; second, the principal may, at some cost, screen agents on the basis of carefulness; or third, the principal can identify the causally responsible agent more readily than

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> In the present case the warden's duties provided him with the opportunity to commit indecent assaults on the boys for his own sexual gratification, *but that in itself is not enough to make the school liable*. The same would be true of the groundsman or the school porter. [emphasis added]

121 Reinier H Kraakman, "Vicarious and Corporate Civil Liability" in *Enclyclopedia of Law and Economics: Volume II* (Boudewijn Bouckaert & Gerrit De Geest eds) (Edward Elgar, 1999) at pp 669 and 670. The term "agent" is used here to broadly represent all actors who perform functions for the enterprise under myriad work arrangements.

122 Lewis A Kornhauser, "An Economic Analysis of the Choice between Enterprise and Personal Liability for Accidents" (1982) 70 Cal L Rev 1345.

123 Alan O Sykes, "The Economics of Vicarious Liability" (1982) 93 Yale LJ 1231; Alan O Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" (1988) 101 Harv L Rev 563.

124 Steven Shavell, "The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize their Employees" (1997) 17 Int'l Rev L & Econ 203.

125 Alan O Sykes, "The Economics of Vicarious Liability" (1982) 93 Yale LJ 1231 at 1250.

126 Alan O Sykes, "The Economics of Vicarious Liability" (1982) 93 Yale LJ 1231 at 1251. Sykes further explains that "[t]he scale of enterprise activity then contracts to the point where the price of agency output covers its social marginal costs".

127 Alan O Sykes, "The Economics of Vicarious Liability" (1982) 93 Yale LJ 1231 at 1251.

128 Lewis A Kornhauser, "An Economic Analysis of the Choice between Enterprise and Personal Liability for Accidents" (1982) 70 Cal L Rev 1345 at 1370.

courts can. In each of these three cases, the shift to enterprise liability will lead to a decrease in the number of injuries.

43 Today, where employer insurance is usually compulsory in many sectors, a successful claim in vicarious liability is likely to result in an eventual distribution of losses throughout the relevant sector. In theory, the loss distribution will extend beyond the enterprise to the general public, for instance, the cost of higher insurance premiums being passed on to customers in the form of higher prices. Although Peter Cane points out that "loss spreading … is not self-justifying",[129] it should be noted that loss spreading is an *effect* of risk internalisation. Risk internalisation as a *justification* for vicarious liability is grounded in notions of social justice and economics.[130]

44 To illustrate the different kinds of risks that an enterprise may introduce to a community, a hypothetical scenario of a full-service commercial bank engaging both full-time employees and part-time workers (whom, for convenience, shall be referred to as "agents") to sell investment products to customers at its branches all over Singapore will now be considered. These agents don uniforms and are stationed at designated investment counters in the branches. What risks has the bank introduced to the community in the pursuit of its commercial objectives? A potential or existing customer may be injured by the negligent act of an agent, whether as a result of relying on poor financial advice or having a cup of hot tea spilt on him or her. This customer may also be defrauded by the agent or sexually assaulted. In these circumstances, the court is likely to have no problem relying on a risk internalisation justification to support a finding of vicarious liability. In another hypothetical scenario, now involving a non-profit organisation in Singapore like the Society for the Physically Disabled or Boys' Town, these institutions are dedicated to providing important guidance, rehabilitation, counselling and training that benefit many members of society. However, they also introduce risks. Again, their agents – which include full-time employees, part-time workers and casual volunteers – in the conduct of numerous activities on behalf on the organisations would no doubt be viewed by the beneficiaries and public as emanations of the enterprise. There is a possibility that these agents might commit negligent acts or intentional torts in the course of carrying out activities for these institutions.

129 Peter Cane, "Justice and Justifications for Tort Liability" (1982) 2 OxJLS 30 at 52. See also Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at pp 236–237.

130 See, *eg*, Harold J Laski, "The Basis of Vicarious Liability" (1916) 26 Yale LJ 105 at 121.

45 In the private sector, compelling profit-maximising firms to internalise the costs of their agents' misconduct that accompany their productive activities can arguably result in an efficient scale of production by aligning the private costs of production with the social costs. In the 21st century, as the debate intensifies on whether public agencies and non-profit organisations should be held vicariously liable for the torts committed by their agents, the notion of internalising externalities nonetheless applies with equal force. Even if the enterprise is not insured, from an economic standpoint, it is still in a better position *vis-à-vis* the victim to bear the costs of the accident. From the perspective of social justice, the enterprise – even if it is a small charitable institution seeking to assist the disadvantaged in society – should also pay for the sexual assault on children under its care. Kraakman notes that while pinning vicarious liability on such entities might not affect the scale of the non-market enterprise, it will still induce "optimal caretaking, self-policing and efficient risk-bearing".[131] According to Giliker, French law has also moved towards a recognition that an enterprise should bear the risks created by the activities of the employees in its service, thereby establishing a regime adapted to modern needs.[132]

46 Whether one is a profit-maximising firm or a non-profit institution, the enterprise has to make a decision on the level of precaution to take in the conduct of its activities, and it has to bear the costs (often quantifiable and financial in nature) of such a decision. The consumer-potential victim enjoys the benefits of such decisions, for instance, from the reduction in the probability of harm to the victim. However, the benefits of taking precaution are *external* with respect to the enterprise's decision on how much precaution should be taken. If the enterprise bears the costs and benefits of its own decision, then it will decide optimally. However, when either costs or benefits are external, the decision-maker is unlikely to take into account all the costs and benefits involved. If there is a real possibility of a finding of vicarious liability, and the likelihood of paying compensation may be mitigated by taking certain precautions, this may be viewed as a "benefit" that the enterprise can properly evaluate in the decision-making process. By recognising that the overriding rationale of the law of vicarious liability is to internalise the externalities, it incentivises a socially optimal level of precaution, that is, where the sum of the cost of precaution and the expected accident cost is equal to the social cost of an accident.

131 Reinier H Kraakman, "Vicarious and Corporate Civil Liability" in *Enclyclopedia of Law and Economics: Volume II* (Boudewijn Bouckaert & Gerrit De Geest eds) (Edward Elgar, 1999) at pp 669 and 673.

132 Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at pp 238–239 and 246.

47 The *Skandinaviska* risk paradigm implicitly embodies these attributes and ensures that both corporates and non-corporates face the full expected costs of accidents or wrongdoing. As Chan CJ notes:[133]

> The applicability of victim compensation and deterrence as valid policy considerations in a particular case does not inevitably lead to the conclusion that the employer should be held vicariously liable; *vice versa*, the inapplicability of these considerations does not mean that the employer may not be made vicariously liable.

48 The *Skandinaviska* test – with its two-step analysis applicable to *all* intentional torts including physical assault, sexual abuse or fraud – arguably provides a more methodical approach for courts to evaluate the existence of a close connection than Lord Phillips' succinct and elegant formulation in *CCWS*. The first step involves an examination of how the facts at hand fulfil the *criteria* of opportunity, furtherance, relatedness of the wrongful act to the enterprise risks, power and vulnerability; while the second step requires an active engagement with the relevant *policy* considerations to determine whether it would be fair, just and reasonable to impose vicarious liability. This test not only covers the enterprise risk and other policy considerations that the Supreme Court was concerned with in *CCWS*,[134] but also resonates with Lord Phillips' recondite observations that "the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap".[135]

49 Nevertheless, one must be cautious that enterprises are not always compelled to internalise the costs of all risks that eventuate. One should not conflate a risk internalisation justification with a liability conclusion. The limiting mechanisms operate at stages 1 and 2 as fact-intensive inquiries. Chan CJ highlighted this in *Skandinaviska*:[136]

> What the court has to do in each case is to examine all the relevant circumstances – *including policy considerations* – and determine whether it would be fair and just to impose vicarious liability on the employer. [emphasis in original]

Where the victim may have the capacity to take precautions against certain risks – like in the case of an international bank which is the victim of a commercial fraud (in *Skandinaviska*) as opposed to

133 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [81].

134 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [43] and [86].

135 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1 at [34].

136 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [75].

vulnerable young children in a boarding school (in *Lepore*) – it would not be fair and just to impose vicarious liability. The introduction of a "precondition for the imposition of vicarious liability … that the victim seeking compensation should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant"[137] in *Skandinaviska* arguably provides a counterbalance to the expansive proclivity of the risk internalisation paradigm. A risk-based approach to vicarious liability, by augmenting the ease by which victims obtain compensation, also diminishes the incentive for victims to take care of their own safety. It is perhaps fair and just that victims who have the means to protect themselves from harm but instead *increase* the risk of harm to themselves should not be allowed to claim compensation from the enterprise.

V. Conclusion

50 Kraakman's observation supports the direction that the Supreme Courts of the UK and Canada are heading in *CCWS* and *Bazley*, as well as the *Skandinaviska* risk paradigm:[138]

> In most cases strict vicarious liability is congruent with a policy of forcing firms to internalize tort costs. In fact, when principals cannot monitor their agents' behavior, the only justification for vicarious liability is the internalization of tort costs and the concomitant regulation of activity levels.

51 If an enterprise faces the prospect of vicarious liability, it would be incentivised to locate and discipline potentially errant agents, and even be able to reduce tort costs through screening measures, training programs and closer monitoring. It would not be able to hide behind legal concepts like "control", "independent contractors" or "in the course of employment" if it has indeed introduced risky activities into the community. In *Hollis*, McHugh J of the High Court of Australia warned that:[139]

> … [i]f the law of vicarious liability is to remain relevant in the contemporary world, it needs to be developed and applied in a way that will accommodate the changing nature of employment relationships.

137 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (S) Pte Ltd* [2011] 3 SLR 540 at [78].

138 Reinier H Kraakman, "Vicarious and Corporate Civil Liability" in *Enclyclopedia of Law and Economics: Volume II* (Boudewijn Bouckaert & Gerrit De Geest eds) (Edward Elgar, 1999) at pp 669 and 675.

139 *Hollis v Vabu* (2001) 207 CLR 21 at 54.

The adoption by the UK Supreme Court in *CCWS* of the "akin to employment" test at stage 1 and the "close connection" test at stage 2 arguably represents a principled and coherent development of the law of vicarious liability for intentional torts that focuses on the enterprise risk principle as the primary explanatory factor for imposing vicarious liability.[140]

52 In the context of sexual abuse in educational institutions or religious enterprises, these more nuanced approaches can better strike a balance between public concern over protection of young and vulnerable children, the just imposition of a financial burden on enterprises which introduce such risks to society, and the legal desire for rules to exhibit certainty and consistency. In other commercial contexts, including organisational liability in a healthcare system,[141] the myriad contractual arrangements between the enterprise and individual professionals militate against a strict adherence to the traditional doctrinal rules in stages 1 and 2.

53 By engaging bouncers as part of the business of running a nightclub, as in *Hawley*, the management has exposed its patrons to the risk of physical assaults. The use of bicycle couriers, as in *Hollis*, would subject members of the public to the risk of potential physical injuries through accidents. A financial institution that hires managers, consultants and client advisers in pursuit of commercial objectives creates the risks of fraudulent misconduct. The Catholic Church introduces the risk of sexual assaults on young children when its priests and ecclesiastical volunteers propagate the faith amongst the community. As Phillip Morgan notes:[142]

> Volunteers may work alongside paid employees, carrying out the same tasks, receiving the same training, and wearing the same uniform. They may be equally associated with the enterprise as employees. They may be indistinguishable to members of the public, or consumers of their services, from the paid employees they work alongside.

54 It is time to view enterprises not only as a positive wellspring of benefits to the economy and general society, but also a provenience of risks. As courts across the common law world begin to nudge towards a policy-oriented approach that has, at its heart, a risk management-cost

140 Claire McIvor has earlier noted this shift but has expressed her disagreement with this approach. She contends that the "courts are currently applying the enterprise argument to vicarious liability in a manner that is both inappropriate and disproportionate": Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 CLWR 268 at 286.

141 See, *eg*, Tracey Evans Chan, "Organisational Liability in a Health Care System" (2010) 18 TLJ 228 at 235–237.

142 Phillip Morgan, "Recasting Vicarious Liability" (2012) 71 Camb LJ 615 at 649.

internalisation impetus, it is important to consider more carefully the impact on the doctrinal development of stages 1 and 2 of the test for vicarious liability. The risk approach to vicarious liability should not be *carte blanche* for courts to find a convenient deep-pocket enterprise to bear the costs of an accident or wrongdoing, but should guide a clearer articulation of rules that may be properly applied in every situation. Although "risk creation" should not automatically lead to the imposition of liability, a "risk internalisation" framework can better orientate courts to consider the factual circumstances in stages 1 and 2 in a principled and consistent fashion.

55 One nagging question remains: How does one reconcile vicarious liability with the nebulous doctrine of non-delegable duty of care?[143] The former is concerned with secondary liability without proof of fault while the latter is premised on primary fault-based liability, albeit exhibiting characteristics of strict liability. It has been observed that non-delegable duties are "often resorted to and adopted as a response to perceived inadequacies in vicarious liability".[144] In *Woodland v Swimming Teachers Association*[145] ("*Woodland*"), Lord Sumption JSC intimated that:[146]

> … the expression 'non-delegable duty' has become the conventional way of describing those cases in which the ordinary principle is displaced and the duty extends beyond being careful, to procuring the careful performance of work delegated to others.

56 In established categories of non-delegable duty of care, there is invariably "vulnerability on one side *and* power or control on the other" [emphasis added].[147] The courts have considered the inability of

143 See, *eg*, Phillip Morgan, "Case and Comment – Vicarious Liability for Employee Theft: Muddling Vicarious Liability for Conversion with Non-delegable Duties" [2011] LMCLQ 172 at 178 ("There is a need to distinguish direct duties from vicarious liability"); Claire McIvor, "The Use and Abuse of the Doctrine of Vicarious Liability" (2006) 35 CLWR 268 at 295 ("it would seem that courts are actually mixing up three distinct forms of liability: (1) ordinary fault-based liability; (2) exceptional no-fault based direct liability based upon breach of a non-delegable duty; and (3) vicarious liability"); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) at pp 117–118.

144 Phillip Morgan, "Recasting Vicarious Liability" (2012) 71 Camb LJ 615 at 640. See also John Murphy, "Juridical Foundations of Common Law Non-Delegable Duties" in *Emerging Issues in Tort Law* (Jason Neyers, Erika Chamberlain & Stephen Pitel eds) (Oxford: Hart Publishing, 1st Ed, 2007) at p 371.

145 [2013] UKSC 66; [2014] AC 537.

146 *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] AC 537 at [5].

147 Prue Vines, "*New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland*: Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability" (2002) 27 MULR 612 at 623; David Tan, "The Salient Features

(*cont'd on the next page*)

children to protect themselves from sexual abuse by teachers or staff members of schools and, in addition to holding the school vicariously liable for the acts of its staff, have opined that a non-delegable duty may also be imposed.[148] Although all the judgments in *Lister* concluded with a finding of vicarious liability based on the satisfaction of the "close connection" test, the policy justifications invoked by the law lords to support the extension of vicarious liability might apply equally to non-delegable duties.[149] When examining the relationship between the school and the abused children, their Lordships employed in varying degrees the terminology of non-delegable duties, leading Tony Weir to comment that "the speeches in *Lister* modulate vertiginously between these two grounds of liability, which are quite distinct and should be kept so".[150] In *Maga*, the Court of Appeal found that, in addition to vicarious liability, the archdiocese owed a duty of care to the claimant but did not elucidate whether this duty was non-delegable in nature.[151] A few years later, in *Woodland*, the UK Supreme Court conceded that:[152]

> In principle, liability in tort depends on proof of a personal breach of duty. To that principle, there is at common law only one true exception, namely vicarious liability.

Lord Sumption JSC, with whom Lords Clarke, Wilson and Toulson JJSC agreed, noted the expansion in vicarious liability of the boundaries of the employer-employee relationship in cases such as *CCWS*, but reminded us that an enterprise may nonetheless be held *personally* liable for the acts of a true independent contractor where an employer-

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of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459 at 473. See also *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 884 ("the relationship of doctor and patient is a very special one, the patient putting his health and his life in the doctor's hands"); *Cassidy v Ministry of Health* [1951] 2 KB 343 at 363–365; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 544–557; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270–271; and *Ramsay v Larsen* (1964) 111 CLR 16 at 28. However, the diversity of judicial views – as well as academic opinions – on the precise nature of a non-delegable duty is beyond the scope of this article. See, *eg*, *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22; *New South Wales v Lepore* (2003) 212 CLR 511; and Christian Witting, "*Leichhardt Municipal Council v Montgomery*: Non-delegable Duties and Roads Authorities" (2008) 32 MULR 332.

148 *New South Wales v Lepore* (2003) 212 CLR 511 at 551–553, *per* Gaudron J, and 563–573, *per* McHugh J.

149 *Eg*, *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [25], *per* Lord Steyn, and [82], *per* Lord Hoffmann.

150 Tony Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th Ed, 2004) at p 292. See, *eg*, *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [55].

151 *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 at [72]–[74].

152 *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] AC 537 at [3].

employee relationship was not found.[153] The court, however, thought it was not necessary to expound further on this issue.

57 Perhaps the next enterprise one may embark on is to reconcile the law of vicarious liability with the non-delegable duty of care under *Spandeck* formulation.[154] Undoubtedly that undertaking would be of immense benefit to both legal scholarship and practice in Singapore.

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153 *Woodland v Swimming Teachers Association* [2013] UKSC 66; [2014] AC 537 at [3]. Similarly in *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256; [2010] 1 WLR 1441 at [74], Lord Neuberger MR also pointed out, again without further elaboration, that:

> … it is easy to envisage circumstances where an employer could owe, and be in breach of, a duty of care, without being vicariously liable, in respect of sexual abuse committed by an employee.

154 This is the universal test for determining the existence of a duty of care in negligence as laid down in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100. See also *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761; David Tan & Goh Yihan, "The Promise of Universality: The *Spandeck* Formulation Half a Decade On" (2013) 25 SAcLJ 510; and David Tan, "The Salient Features of Proximity: Examining the *Spandeck* Formulation for Establishing a Duty of Care" [2010] Sing JLS 459.