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Case Note

RECONSIDERING THE IMPOSITION OF DUAL VICARIOUS LIABILITY IN THE BORROWED EMPLOYEE CONTEXT

The Singapore Approach in *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 and *Hwa Aik Engineering Pte Ltd v Munshi Mohammad* [2021] 1 SLR 1288

The limits of the law on dual vicarious liability were recently tested in the decisions of *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 and *Hwa Aik Engineering Pte Ltd v Munshi Mohammad* [2021] 1 SLR 1288, both before the General and Appellate divisions of the High Court. Against the backdrop of these decisions, this case note argues that the approach laid down by the High Court may go some ways in resolving the tension and assist in settling the perennial question of the role of control in dual vicarious liability. In particular, it is argued that control should be the main factor in guiding the court's determination, and a framework is proposed to provide a clearer and more practical approach. This case note also considers whether the *pro hac vice* principle, which allows a permanent employer to shift liability entirely to the temporary employer if the former has temporarily transferred the services of one of his general servants to another party for a particular occasion, remains relevant in light of this development.

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I. Introduction

1 The "borrowed employee" situation in tort law is typified where the tortfeasor, while regularly under the employment of the permanent employer, is loaned out to the temporary employer for the purposes of assisting in temporary work. Should the tortfeasor injure another individual ("V") while accomplishing that temporary work, who should V be allowed to claim against? Under normal circumstances, the doctrine of vicarious liability is invoked to pin liability on the employer of the tortfeasor; but here, there are two employers. And so, the problem is one of determining if liability can be shared between the employers, and if so, how that should be established.

2 For around 180 years, since the *dicta* of Littledale J in *Laugher v Pointer*,[2] English jurisprudence proceeded on the assumption that only one employer should be held vicariously liable. Even then, the permanent employer would almost always be held vicariously liable. This was due largely to the stringency of the test for transfer of liability to the temporary employer laid down by the House of Lords in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited*[3] ("*Mersey Docks*"). The *pro hac vice*[4] principle, as it was termed, states that where a defendant employer has "for a particular purpose or on a particular occasion temporarily transferred the services of one of his general [workers] to another party [*ie*, the temporary employer] so as to constitute him *pro hac vice* the servant of that other party with consequent [vicarious] liability for [the worker's] negligent acts".[5] Framed this way, the *pro hac vice*

2 *Laugher v Pointer* (1826) 5 B & C 547.
3 [1947] AC 1.
4 Translated from Latin, it means "for this occasion".
5 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 at 12–13.

principle assumes that liability can only be imposed on either employer, not both.[6]

3 This all changed in the controversial Court of Appeal decision of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[7] ("*Viasystems*"). In *Viasystems*, a two-judge Court of Appeal boldly resolved that the law permitted the imposition of dual vicarious liability on both employers. The approach to establishing dual vicarious liability, however, differed greatly between both judges. May LJ viewed the operative test as being that of dual control – whether the respective employers had the requisite authority to give orders as to how the work should or should not be done.[8] Rix LJ, while agreeing that shared control could be sufficient, viewed it as being part of a broader test of integration – whether the employee was so much part of the work, business or organisation of both employers that it is *just* to make both employers answer.[9]

4 Rix LJ's broad approach was subsequently endorsed by the Supreme Court of the United Kingdom in *Various Claimants v Catholic Child Welfare Society*[10] ("*Christian Brothers*"). Lord Phillips (with whom the rest of the coram agreed) rejected May LJ's approach of focusing exclusively on the notion of control, viewing such a stringent test as unjustified in the context of dual vicarious liability.[11] *Christian Brothers* represented a landmark judgment in recognising the possibility of imposing vicarious liability on two defendant employers even when the negligent employee was under the temporary employment of one of the defendants. These authorities, however, left unaddressed the relevance of the *pro hac vice* principle. One may surmise, however, that by downplaying of the relevance of control in favour of a more contextual analysis, the *pro hac vice* principle was for all purposes and intent rendered otiose.

6 See, *eg*, *Karuppan Bhoomidas v Port of Singapore Authority* [1978] 1 WLR 189. In that case, the Privy Council appears to have assumed that where an employee is "loaned" by one employer to another, only either one of the employers will be subject to vicarious liability.

7 [2006] 2 WLR 428. See also Lord Hope of Craighead, "Tailoring the Law on Vicarious Liability" (2013) 129 LQR 514 and Robert Stevens, "A Servant of Two Masters" (2006) 122 LQR 201.

8 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] 2 WLR 428 at [16] and [47].

9 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] 2 WLR 428 at [79].

10 [2012] 3 WLR 1319.

11 *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 at [45].

5 In *Munshi Mohammad Faiz v Interpro Construction Pte Ltd*[12] ("*Interpro*") and *Hwa Aik Engineering Pte Ltd v Munshi Mohammad*[13] ("*Hwa Aik*"), the General and Appellate Divisions of the Singapore High Court respectively had the opportunity to consider this approach under Singapore law. While the decisions endorsed the approach laid out in *Christian Brothers* for establishing dual vicarious liability (and by extension Rix LJ's approach in *Viasystems*), much emphasis was placed n the extent of control *shared* by the defendants in those cases. This in fact illustrates the weakness in the *Christian Brothers* approach and the ever-present tension between a predominantly control-based approach and a more contextual approach as part of the overall analysis.

6 This case note argues that *Interpro* and *Hwa Aik* pave the way for resolving the tension and settling the perennial question regarding the relevance of control in dual vicarious liability. It is submitted that control *should* be the main factor guiding the court's determination, and a framework will be proposed to provide a clearer and more practical approach. Overall, it is also hoped that this will serve to streamline the doctrine of vicarious liability, ensuring its continued applicability bearing in mind contemporary developments relating to vicarious liability under English law.

II. The facts and reasoning of the courts in *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* and *Hwa Aik Engineering Pte Ltd v Munshi Mohammad*

7 Mr Munshi Mohammad Faiz ("Munshi") was a construction worker employed by Interpro Construction Pte Ltd ("Interpro"). Interpro was the sub-contractor engaged by K P Builder Pte Ltd ("KPB"), the main contractor, for a construction project. KPB also engaged Hwa Aik Engineering Pte Ltd ("HWE") to supply an excavator and a trained operator, one Panchanathan Santhosh Kumar ("Santhosh"), to carry out excavation works at the project site.

8 It was undisputed that HWE was Santhosh's permanent employer, and Santhosh was temporarily employed by KPB. Unfortunately, Santhosh was negligent in the operation of the excavator and caused Munshi to suffer severe personal injuries. Munshi sued Interpro, KPB and HWE on the basis that they were vicariously liable for Santhosh's negligence.

12 [2021] 4 SLR 1371.
13 [2021] 1 SLR 1288.

9 The lower court judge found Santhosh to be negligent in operating the excavator and that Interpro and KPB were jointly and severally vicariously liable for Santhosh's negligence. On appeal to the General Division of the High Court, the issue turned on which of the defendants ought to be held vicariously liable for Santhosh's negligence.

10 Relying on *Viasystems*, *Christian Brothers* and *Blackwater v Plint*,[14] Dedar Singh Gill J opined that dual vicarious liability is relevant where both the temporary and principal employers satisfy the general test for imposing vicarious liability.[15] This was followed by the caveat that "it is not in every case that multiple defendants will be held vicariously liable for the acts of a single tortfeasor"; rather, the court must consider all the relevant circumstances to determine whether it is "fair and just to hold multiple employers responsible".[16]

11 Despite this analysis, however, much of the court's findings in relation to establishing liability amongst the three defendants focused on the extent of control. For KPB, the court held that it lacked control over Santhosh's operation of the excavator. Accordingly, it was not fair, just or reasonable to hold KPB liable. The same, however, could not be said for Interpro and HWE. Gill J held that both had exercised some form of control over Santhosh, and as such both were held to be jointly vicariously liable to Munshi. Gill J's reasonings were as follows: Interpro had employed a safety supervisor-cum-foreman, who incorporated a system that required Santhosh to operate the excavator in accordance with Munshi's signals, including where the excavator was positioned and where it moved or stopped. Interpro, through this employee, thus had "considerable control" over how Santhosh operated the excavator.[17] As for HWE, its responsibility for training and selecting excavator operators meant that it retained some form of control over excavator operators such as Santhosh. Although the court employed policy reasons to supplement its finding on liability, it was clear that the element of control was given greater emphasis and weight.[18]

12 More interestingly, Gill J also considered what was termed as an "alternative approach": that of considering how the *pro hac vice* principle would affect the analysis for establishing dual vicarious liability.[19] This approach was considered in response to HWE's submissions that

14 *Blackwater v Plint* [2005] 3 SCR 3.
15 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [68].
16 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [69].
17 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [72].
18 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [73] and [77].
19 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [79].

Santhosh's employment was transferred to either Interpro or KPB, such that HWE no longer exercised control over Santhosh and ought not to be held liable. Unsurprisingly, Gill J dismissed this line of argument: despite Santhosh being *pro hac vice* employed by Interpro, HWE nevertheless retained a residual element of control in the form of training and selecting Santhosh for assignments.[20]

13 Dissatisfied with the outcome, HWE sought leave to appeal to the Appellate Division of the High Court on the question of its liability. Leave to appeal was ultimately not granted for a number of reasons which were featured in *Hwa Aik*. What was crucial, however, were the court's observations on dual vicarious liability arising from *Viasystems*. HWE argued at the leave hearing that its employment, training and selection of Santhosh did not have any nexus to the negligent act. In response, the court noted that the fact that the permanent employee does not have direct control over the employee's conduct at the time of the negligent conduct does not militate against imposing liability. Rather, the imposition of liability is justified on the bases of various policy reasons underlying vicarious liability in general.[21] Such policy reasons include the provision of effective compensation, deterrence of future harm through encouraging employers to take steps to reduce the risk of harm, internalisation of the benefits and burdens of enterprise ventures, and acknowledgement that employers are better placed to spread the risk of loss.[22] Despite this pronouncement, the court in *Hwa Aik* did not go further to examine whether Gill J's reasoning, namely the significant weight ascribed to control, was consistent with the accepted approach espoused by Rix LJ in *Viasystems* and Lord Phillips in *Christian Brothers*.

III. Analysis

A. Divergences from the approach in Various Claimants v Catholic Child Welfare Society*?*

14 *Interpo* and *Hwa Aik* are significant decisions that recognise dual vicarious liability under Singapore law, although the test articulated by these courts may have differed from that set out in *Christian Brothers*.

15 In *Christian Brothers*, 170 men alleged that they were subject to sexual abuse by teachers during their time at a residential school for boys between 1958 and 1992. The teachers were provided by the Institute of the

20 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [80].
21 *Hwa Aik Engineering Pte Ltd v Munshi Mohammad* [2021] 1 SLR 1288 at [22].
22 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [64].

Brothers of the Christian Schools, a religious organisation of lay Catholic brothers whose mission was to provide education for children. While the school management was held to be vicariously liable for the acts of abuse by the teachers, they sought to argue that the Institute should likewise be vicariously liable. Lord Phillips accepted the school management's argument and held that dual vicarious liability is established in "a situation where the employee in question … is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence".[23] His Lordship then undertook a context-focused analysis focusing on the employee's degree of integration into the temporary employer's operation, whilst remaining under the employment of the permanent employer.[24] His Lordship ultimately found that:[25]

> … the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees: (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the [institute] directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the [institute] required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.

This approach is, to some extent, divergent from Gill J's approach in *Interpro*, which focused on the extent of control that each defendant employer exerted over the negligent employee.

16 *Interpro* was not the only decision which evinced a preference for a control-based reasoning. Indeed, in cases subsequent to *Viasystems* but prior to *Christian Brothers*, the English Court of Appeal had reaffirmed the applicability of control as a key factor in finding dual vicarious liability.[26]

17 Even following the pronouncements in *Christian Brothers*, control remained a significant aspect of the inquiry on imposing dual

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23 *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 at [43].

24 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] 2 WLR 428 at [80].

25 *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 at [56].

26 Phillip Morgan, "Recasting Vicarious Liability" (2012) 71(3) *Cambridge Law Journal* 615 at 629–630. See also *Hawley (David Philip) v Luminar Leisure Ltd* [2006] EWCA Civ 18 and *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257.

vicarious liability. In the recent English Court of Appeal's decision of *NatWest Markets plc v Bilta (UK) Ltd*[27] ("*NatWest Markets*"), the issue was whether the second defendant, RBS Sempra Energy Europe Ltd ("RBS SEEL"), should be held vicariously liable for the tortious acts of its trader employees, even though they were seconded to the first defendant, Royal Bank of Scotland plc ("RBS"), to carry out trading activities pursuant to a contractual arrangement between both companies.

18 While the "imposition of vicarious liability and of dual liability … is a highly fact sensitive exercise",[28] it is clear that much of the courts' reasoning in *NatWest Markets* was focused on the nature and degree of the employer's control over the employee. The English High Court held that this was a "paradigm case for the imposition of dual vicarious liability".[29] While the traders were employees of RBS SEEL, they also had the power and authority, as RBS's agents, to commit RBS to trading contracts. Further, they had to operate within the guidelines and restrictions imposed by RBS, were subject to directions that might be given by RBS, and the trading activity they were conducting was that of RBS. RBS SEEL's appeal against liability was dismissed by the English Court of Appeal on two grounds: first, RBS SEEL failed to discharge its burden of proof lay to shift responsibility for the negligence of its trader employees to RBS.[30] Second, and more crucially, RBS SEEL retained an overarching responsibility for the provision and supervision of traders, and that they were contractually obliged to ensure that its traders complied with any instructions reasonably given to them by RBS.[31]

B. A return to a control-oriented approach for establishing dual vicarious liability?

19 The above analysis illustrates the substantial uncertainty that lies in the *Christian Brothers* analysis itself. Despite the court's preference for a more holistic analysis, the presence of control by the temporary employer remains a strong *indicium* for attracting dual vicarious liability. While such an approach appears at odds with the authoritative pronouncements in *Christian Brothers*, there are several reasons why this approach should be preferred.

20 For one, despite May LJ's and Rix LJ's disagreements over the appropriate test, it should not be overlooked that both agreed that control

27 *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680.
28 *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [185].
29 *Bilta (UK) Ltd v NatWest Markets plc* [2020] EWHC 546 (Ch) at [214].
30 *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [175].
31 *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [172] and [180].

was relevant. Where their Lordships parted ways, however, is the *extent* of control relevant before dual vicarious liability is imposed. Nevertheless, in various examples proffered, Rix LJ himself suggested that direct and indirect control over how the employee performs his job was a crucial indicator.[32] Crucially, that joint control would warrant imposing dual vicarious liability was acknowledged by Rix LJ when his Lordship stated that "it is a situation of *shared* control where it is just for both employers to share a dual vicarious liability".[33]

21 Even if Rix LJ and Lord Phillips intended to downplay the element of control when establishing dual vicarious liability, such pronouncements were made given the broader doctrinal shift at that time, where in a knot of cases the courts sought to give lesser weight to the significance of control to vicarious liability *simpliciter*. This also led Lord Phillips to develop what has come to be known as the "Phillips Five" factors guiding the determination of when vicarious liability is established: (i) the employer has greater means to compensate; (ii) the activity leading to the tort was committed on behalf of the employer; (iii) the employee's activity was part of the employer's business activity; (iv) the employer created the risk of the tort being committed; and (v) the employee was under the employer's control. This broader shift was underscored in *Cox v Ministry of Justice*[34] ("*Cox*"), where Lord Reed observed that amongst the Phillips Five, the means to compensate and the existence of control were *unlikely* to be of independent significance in most cases,[35] a point which his Lordship again reiterated in *Armes v Nottinghamshire County Council*[36] ("*Armes*").

22 Despite Lord Reed's warnings in *Cox* and *Armes*, control and the means to compensate were the very factors he ultimately depended on in his decision. Indeed, recent developments in the doctrine of vicarious liability *simpliciter* indicate the objections *specifically* against the factor of control are beginning to wane. This was picked up on most recently by Baroness Hale in *Barclays Bank v Various Claimants*[37] ("*Barclays Bank*"). In *Barclays Bank*, Baroness Hale opted to shy away from the importance of *all* Phillips Five factors. While this of course included control, it also included the employee's integration into the employer's business – the very crux of Rix LJ's approach in *Viasystems*.

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32 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] 2 WLR 428 at [80].

33 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] 2 WLR 428 at [78].

34 *Cox v Ministry of Justice* [2016] AC 660.

35 *Cox v Ministry of Justice* [2016] AC 660 at [20]–[21].

36 *Armes v Nottinghamshire County Council* [2017] UKSC 60 at [55]–[58].

37 *Barclays Bank plc v Various Claimants* [2020] UKSC 13.

23 Even assuming that the importance of control has been downplayed following Lord Reed's *dicta* in *Cox* and *Armes*, there remains a justifiable difference in the extent of control relevant when inquiring into vicarious liability *simpliciter* and *dual* vicarious liability. Control may not be especially significant in the former analysis because liability is sought to be imposed in situations where the relationship between the defendant and tortfeasor is not necessarily an *employer–employee* relationship, but one that is "akin to employment".[38] Shifting the focus away from control would allow the doctrine of vicarious liability to capture more instances of negligence committed by *quasi*-employees. This would fit within the English courts' previous expansionary attitude towards vicarious liability.[39] Under the paradigm situation where *dual* vicarious liability is concerned, however, the tortfeasor is clearly an employee *vis-à-vis* each defendant employer. Accordingly, both employers would have the authority to issue instructions to the employee. In such situations, it would be entirely appropriate to compare the extent of control between each employer *vis-à-vis* the employee. Indeed, utilising control as the focus would preclude any undue expansion of dual vicarious liability to include rendering independent contractors liable.[40]

24 Finally, while the views espoused by Rix LJ in *Viasystems* and Lord Phillips in *Christian Brothers* favour a more holistic analysis focusing on whether it is fair and just to impose vicarious liability on both employers, such an approach may have the undesired effect of motivating courts to undertake a policy-based analysis, thereby engendering uncertainty. Although this was not ostensibly suggested by the court in *Hwa Aik*, the court's reasoning that a permanent employer may nonetheless be vicariously liable in a borrowed employee situation "because of policy reasons" comes very close to that.[41] With respect, such an approach would be contrary to the need for commercial certainty, as businesses engaged in loaning or borrowing employers should be able to predict the risk that liability may be incurred, and to what extent. For this reason, Baroness Hale in *Barclays Bank* observed that courts may have "a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of his employee … with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability".[42]

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38 Phillip Morgan, "Recasting Vicarious Liability" (2013) 129 LQR 139 at 140–141.

39 Aaron Yoong & Sui Yi Siong, "Back to Basics? Recent Developments in Vicarious Liability in the UK Supreme Court" (2021) 28 TLR 18.

40 *Clerk & Lindsell on Torts* (Michael A Jones, Anthony M Dugdale & Mark Simpson eds) (Sweet & Maxwell, 22nd Ed, 2018) at paras 6–25.

41 *Hwa Aik Engineering Pte Ltd v Munshi Mohammad* [2021] 1 SLR 1288 at [22].

42 *Barclays Bank plc v Various Claimants* [2020] UKSC 13 at [16].

25 It is thus crucial to distinguish *why* dual vicarious liability should be imposed on both employers from *how* it should be done. As Lord Hobhouse in *Lister v Hesley Hall Ltd*[43] perceptively puts it: "an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be".[44] Policy rationales such as internalisation of enterprise risk, deterrence, effective compensation, and loss-spreading function as the normative rationales for imposing dual vicarious liability, but not so much as to how dual vicarious liability should be imposed.

26 For these reasons, the authors suggest that control ought to be given greater weight as the main factor when considering the imposition of dual vicarious liability. This requirement coheres with May LJ's approach of requiring *shared* control. Such a requirement is also justified from a principled perspective. The presence of shared control indicates that both employers have voluntarily assumed a stake in the employee's conduct (or misconduct), and that they should thus be liable for the employee's negligence as part of "enterprise risk", *ie*, that employers who stand to profit jointly from their commercial ventures must also share the risks inherent in their joint enterprise.[45]

27 It is also worth mentioning that an earlier decision by the Singapore High Court in *Chen Qiangshi v Hong Fei CDY Construction Pte Ltd*[46] in fact supports the view that, at least under Singapore law, the element of control remains the main consideration in imposing dual vicarious liability. The plaintiff in that case was a construction worker who suffered injuries during the relocation of a rebar cage. The collapse of the rebar cage was due to the negligence of the signalman-rigger who was employed by the first defendant subcontractor. The first defendant was in turn engaged by the second defendant main contractor overseeing the construction works, and the latter also employed a safety supervisor who oversaw the relocation of the rebar cage on-site. It was not disputed that each defendant was vicariously liable for their own employee's negligence. Despite this, George Wei JC observed that it was possible for both defendants to be vicariously liable for the negligent employee responsible for performing the functions of a signalman-rigger. In relation to the second defendant, Wei JC noted that since the second

43 *Lister v Hesley Hall Ltd* [2002] 1 AC 215.
44 *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at [60].
45 David Tan, "Internalising Externalities: An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822.
46 [2014] SGHC 177.

defendant had a more direct control of the negligent employee's conduct during the relocating operation, the second defendant would thus be liable notwithstanding the absence of any formal employer–employee relationship.[47] That being said, the first defendant was not entirely absolved of liability. This was because the negligent employee was "employed by the first defendant … [and] in a task that required coordination of workers with different functional skills and responsibilities … [such] that the first defendant … retained sufficient control to fall under the principle of dual responsibility for [the negligent employee's] acts".[48] In other words, since control as between both parties were shared, both the first and second defendants would have to be vicariously liable for the employee's negligence.

C. The continued relevance of the pro hac vice *principle?*

28 As mentioned earlier, the *pro hac vice* principle allows a permanent employer to shift liability entirely to the temporary employer if the former "has for a particular purpose or on a particular occasion temporarily transferred the services of one of his general servants to another party so as to constitute him *pro hac vice* the servant of that other party with consequent liability for his negligent acts".[49] This is a high threshold to meet,[50] and requires the permanent employer to show that the temporary employer has "overridden" the former's ability to direct the employee on how to perform his job. That is why in *Mersey Docks*, the appellant permanent employers were unable to demonstrate that there was such a transfer of employment, simply because the negligent employee was at all times operating the crane under the instructions of the appellant, whereas the respondent stevedores who engaged the appellant's employee did not instruct the latter on how to operate the crane.[51]

29 Viewed this way, a problem arises as to whether the *pro hac vice* principle is doctrinally consistent with the doctrine of dual vicarious liability. This is because the concept of control envisaged under the *pro hac vice* principle is one that is concerned with an employer's direct and immediate form of control over the employee. Indeed, Viscount Simon in *Mersey Docks* held that the *pro hac vice* principle is only invoked

47 *Chen Qiangshi v Hong Fei CDY Construction Pte Ltd* [2014] SGHC 177 at [196].
48 *Chen Qiangshi v Hong Fei CDY Construction Pte Ltd* [2014] SGHC 177 at [201].
49 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 at 13. See also *BNM v National University of Singapore* [2014] 4 SLR 931 at [24].
50 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 at 10–11; *BNM v National University of Singapore* [2014] 4 SLR 931 at [149]–[150].
51 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 at 13.

where the temporary employer enjoyed the right to "control the way in which the act involving negligence was done".[52] On the other hand, dual vicarious liability looks at whether, on top of the direct control exerted over the employee, the permanent employer retains a residual form of control over the employee. If so, then despite having transferred direct control over the employee's day-to-day work to the temporary employer, the permanent employer remains responsible for the employee's conduct. This was in fact reflected in Gill J's alternative analysis in *Interpro*, which suggested that even if Santhosh's employment was *pro hac vice* transferred to Interpro, HWE retained a residual form of control over Santhosh, having trained and selected him for the assignment.[53] Put another way, both doctrines operate at different planes and with different underlying assumptions about the nature and extent of control that are relevant to the analysis.

30 Theoretical difficulties aside, practical challenges also arise when a permanent employer seeks to invoke the *pro hac vice* principle as a defence against the imposition of dual vicarious liability. The key issue lies with the requisite threshold that the permanent employer must satisfy to demonstrate the complete transfer of control over the employee's conduct to the temporary employer. This difficulty was aptly illustrated in *NatWest Markets*. As canvassed above, the English Court of Appeal dismissed RBS SEEL's defence that its employee traders were so integrated into RBS's day-to-day trading business that RBS alone should be responsible for the employee traders' tortious acts. The following reasons were critical to the court's findings: (a) the traders were managed by RBS SEEL's other employees; (b) the traders conducted their trading activities using RBS SEEL's systems; (c) the traders were located in RBS SEEL's offices; (d) RBS had no day-to-day involvement with the traders' trading activities; and (e) RBS did not impose its corporate policies upon the traders.[54] Further, the presence of a contractual matrix underlying the transfer of the traders' temporary employment from RBS SEEL to RBS strengthened the view that control over RBS SEEL's employees was not sufficiently transferred over to RBS. This was especially so given that RBS SEEL undertook several contractual obligations in relation to its employees even as they were seconded to RBS. As the court put it, "RBS SEEL [retained] an overarching responsibility for the provision of the traders, managers and others which it employed and for their supervision" by virtue of the contractual obligations undertaken.[55]

52 *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 at 10–11.
53 *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] 4 SLR 1371 at [80].
54 *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [158].
55 *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [180].

31 The court's *dicta* in *NatWest Markets* suggests that short of a complete severance of any form of relationship between the permanent employer and the employee, it would be near impossible to establish the complete transfer of control over to the temporary employer. Indeed, a permanent employer may need to demonstrate that it has no influence whatsoever over the employee's performance of his or her employment under the temporary employer. Even then, this may be insufficient to shift vicarious liability onto the temporary employer, if the permanent employer exercises *residual control* over the employee in the form of training or selecting the latter for the task, as was the case in *Interpro*. It is no wonder that Lord Phillips observed that the test laid for establishing the *pro hac vice* principle as espoused in *Mersey Docks* "was so stringent as to render a transfer of vicarious liability almost impossible in practice".[56]

32 On the other hand, the continued recognition of the *pro hac vice* principle may be one borne out of practical necessity and the need to do justice in deserving cases. It is understandable that some may view it as unfair for employers to remain liable despite having nothing to do with its employee's negligent act that was committed whilst under the employment of the temporary employee.

33 Ultimately, this case note does not seek to conclusively resolve the relevance of the *pro hac vice* principle in the realm of dual vicarious liability. Indeed, the English Court of Appeal in *NatWest Markets* had the opportunity to consider the interaction of both principles head on and did not rule out the possibility that the *pro hac vice* principle may nevertheless apply to transfer liability entirely to the temporary employer. These relevant issues should therefore be considered when the occasion arises before the courts.

D. Alternative approaches to dealing with the imposition of liability in the borrowed employee context

34 It is submitted that there are two alternative ways by which the conundrum of the borrowed employee could be dealt with. First, the determination of dual vicarious liability could be dealt with under the second stage of the vicarious liability test – looking at the closeness of the connection between the tort and the tortfeasor's capacity in which he was employed. This may present a conceptually neater solution, particularly with the focus on enterprise risk that underpins the close connection test as the Supreme Court recently clarified in *W M Morrison Supermarkets plc v Various Claimants*.[57]

56 *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 at [37].
57 *W M Morrison Supermarkets plc v Various Claimants* [2020] AC 989.

35 Second, residual control or an integration within the permanent employer's business is arguably an alternative conceptualisation of a separate duty of supervision. Such a duty, while having lost favour only in recent times,[58] has been tangentially thrust into the limelight again since *Armes*. A robust duty of supervision would obviate the need for a convoluted dual vicarious liability analysis, imposing a duty on the general employer to ensure reasonable precautions are taken.

IV. Conclusion

36 Admittedly, to say that the permanent employer retains control over the employee by virtue of the former's role in selecting and training the employee may be stretching the notion of "control" somewhat. The reality is that most, if not all permanent employers will play a role in the selection and training of its employees. These employees are loaned to the temporary employers, who then give the employees more specific instructions for the specific projects that might lead to tortious events. Why then, should a permanent employer nevertheless remain liable? Perhaps the true reason is premised on policy considerations – that the victim of the tortfeasor should not be out of pocket and with no recourse to compensation. This may especially be the case where the employers may not have the necessary financial resources to compensate the victim.

37 This, however, does not satisfactorily resolve the discomfort that the Sword of Damocles hangs over the permanent employer's head, such that they will inevitably be held responsible to some extent. The key concern is the perceived unfairness that underlies the notion of attributing liability to the permanent employer. Justice Woo Bih Li in *Hwa Aik* gave two suggestions how such unfairness may be mitigated:[59]

> (a) First, permanent employers may seek a contractual indemnity from the temporary employer for the conduct of the employee. The value of that indemnity would depend on the scope of the indemnity and the financial strength of the temporary employer.
>
> (b) Second, permanent employers may seek insurance cover for vicarious liability for the actions of the employee in such a situation. The scope of such a cover would have to be carefully framed.

58 PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworth & Co, 1967) at pp 327–332.

59 *Hwa Aik Engineering Pte Ltd v Munshi Mohammad* [2021] 1 SLR 1288 at [23].

38 To these two solutions, the authors propose a third: the apportionment of contribution between both employers. Indeed, in assessing the extent of contribution, s 15 read with s 16(1) of the Civil Law Act 1909[60] confers the courts a judicial discretion to determine contribution in a manner that is "just and equitable having regard to the *extent of that person's responsibility for the damage in question*". Hence, the more immediate and direct control which an employer may have over the employee, the greater the responsibility which that employer would have to bear. After all, such apportionment is justified as a matter of enterprise risk, especially where the greater control exercised by the employer over the employee meant that it was in a better position to prevent the tort.

39 Even then, these practical solutions may have their limits. For instance, the limitation of insurance coverage is that the scope of such policies may not cover the permanent employer from liability in the borrowed employee situation. Even if it can be extended to cover such situations, it may lead to significant increase in insurance costs. But perhaps more fundamentally, the reality of industries such as in building and construction is the permanent employer's lack of knowledge that such forms of liability exist. Accordingly, permanent employers may not be able to adopt such risk management strategies until it is too late.

40 Given the theoretical and practical problems inherent within the paradigmatic scenario of the borrowed employee situation, legislative intervention is perhaps the most ideal way of resolving the apportionment of liability between the permanent and temporary employee. Unless and until that happens, a control-oriented approach would provide a more simplified and practical understanding of the sources of liability for employers who intend to lend or borrow employees for temporary gigs, especially within the construction and labour industry. Coupled with the abovementioned practical suggestions, this approach is perhaps the neatest way forward in dealing with the issues discussed.

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60 2020 Rev Ed.