TR 08 - 142

RE-EVALUATING THE LAW OF VICARIOUS LIABILITY IN SOUTH AFRICA

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ABSTRACT

This thesis is an analysis of the law of vicarious liability and its application within the legal framework of delict in South Africa. A brief overview of the historical development of this branch of law is given, with reference to the influences of Roman, Roman-Dutch and English law. That is followed by an exposition of the 'modern' interpretation of vicarious liability as applied in South African courts, highlighting apparent inconsistencies and the need for reform in what has become a persistently controversial area of law. Specific attention is paid to the so-called 'course and scope enquiry' and to the enduring difficulties associated with attributing liability to employers for the deliberate wrongful conduct of their employees. It is argued that the courts have yet to reach consensus on a general principle capable of being applied to the facts of so-called 'deviation cases', and that consequently the legal divergence on these matters gives rise to uncertainty and concern. It is submitted that the way in which the traditional test for vicarious liability is currently applied fails to give true effect to the policy considerations upon which this branch of law is founded. By way of comparison with the South African position, a detailed account of the law of vicarious liability in comparable foreign jurisdictions is given, with emphasis placed on recent developments in England and the British Commonwealth. The study then moves to an analysis of the various policy considerations behind vicarious liability, with particular attention being paid to the role of risk-related liability and the role of risk-assumption in the 'course and scope' enquiry. A comparative analysis follows, highlighting differences between the approaches of the foreign jurisdictions and that taken by the South African courts. The work concludes with a proposal that the South African courts should broaden the scope of vicarious liability and opt for a model similar to that which has recently been adopted in Canada.

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PRINCIPAL WORKS CITED AND MODE OF CITATION

BOOKS

P S Atiyah *Vicarious Liability in the Law of Torts* (1967) Butterworths: London

B Atkin, K Evans, G McLay, S Petersson and D Carter *Torts in New Zealand – Cases and Materials* 3ed (2002) Oxford University Press: Australia

T B Barlow *The South African Law of Vicarious Liability in Delict and a Comparison of the Principles of Other Legal Systems* (1939) Juta & Co Ltd: Cape Town

P Q R Boberg *The Law of Delict – Volume 1 Aquilian Liability* (1984) Juta: Johannesburg

A Borkowski and P du Plessis *Textbook on Roman Law* 3ed (2005) Oxford University Press: Oxford

J Burchell *Principles of Delict* (1993) Juta & Co Ltd: Lansdowne

J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) Juta & Co Ltd: Kenwyn

W L Burdick *The Principles of Roman Law and their Relation to Modern Law* (1989) The Lawyers Co-operative Publishing Co: Rochester, New York

R H Christie *The Law of Contract* 4ed (2001) Butterworths: Durban

C Dadomo and S Farran *The French Legal System* (1993) Sweet and Maxwell: London

S Deakin, A Johnston and B Markesinis *Markesinis and Deakin's Tort Law* 5ed (2003) Clarendon Press: Oxford

A M Dugdale and M A Jones *Clerk & Lindsell on Torts* 19ed (2006) Sweet & Maxwell: London

J G Fleming *The Law of Torts* 9ed (1998) LBC Information Services: Sydney

G L Gall *The Canadian Legal System* 3ed (1990) Carswell: Toronto

W van Gerven, J Lever and P Larouche. *Cases, Materials and Text on National, Supranational and International Tort Law* (2000) Hart Publishing: Portland, Oregon

H R Hahlo and E Khan *The South African Legal System and its Background* (1968) Juta & Co: Cape Town

R F V Heuston and R A Buckley *Salmond and Heuston on the Law of Torts* 19ed (1987) Sweet & Maxwell: London

R F V Heuston and R A Buckley *Salmond and Heuston on the Law of Torts* 21ed (1996) Sweet & Maxwell: London

W J Hosten, A B Edwards, F Bosman and J Church *Introduction to South African Law and Legal Theory* 2ed (1995) Butterworths: Durban

A J Kerr *The Law of Agency* 3ed (1991) Butterworths: Durban

W P Keeton, D B Dobbs, R E Keeton and D G Owen *Prosser and Keeton on The Law of Torts* 5 ed (1984) West Publishing Co: St. Paul, Minnesota

J G Kotzé *Simon Van Leeuwen's Commentaries on Roman Dutch Law* Vol II (1886) Stevens and Haynes Law Publishers: London

R W Lee *An Introduction to Roman Dutch Law* 5ed (1953) Clarendon Press: Oxford

B S Markesinis *A Comparative Introduction to the German Law of Tort* (1986) Clarendon Press: Oxford

E A Martin (ed) *Oxford Dictionary of Law* 4ed (1997) Clarendon Press: Oxford

R G McKerron *The Law of Delict* 7ed (1971) Juta & Co Ltd: Cape Town

J R Midgley *Lawyers' Professional Liability* (1992) Juta & Co. Ltd: Kenwyn

J Murphy *Street on Torts* 11ed (2005) Oxford University Press: Oxford

J Neethling, J M Potgieter and P J Visser *Law of Delict* 5 ed (2006) LexisNexis Butterworths: Durban

M Parkington, A O'Dowd, N Legh-Jones and A Longmore *MacGillivray & Parkington on Insurance Law* 6ed (1975) Sweet & Maxwell: London

M F B Reinecke, S van der Merwe, J P van Niekerk and P Havenga *General Principles of Insurance Law* (2002) LexisNexis Butterworths: Durban

W V H Rogers *Winfield and Jolowicz on Tort* 16ed (2002) Sweet & Maxwell: London

W V H Rogers *Winfield and Jolowicz on Tort* 17ed (2006) Sweet & Maxwell: London

W E Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) Butterworth: Durban

P Stewart and A Stuhmcke *Australian Principles of Tort Law* (2005) Cavendish Publishing: New South Wales

J Thomson *Delictual Liability* 2ed (1999) Butterworths: Edinburgh

F Trindade and P Cane *The Law of Torts in Australia* 3ed (1999) Oxford University Press: Australia

J C van der Walt and J R Midgley *Principles of Delict* 3ed (2005) LexisNexis Butterworths: Durban

G E White *Tort Law in America: An Intellectual History (Expanded Edition)* (2003) Oxford University Press: New York

H Wicke *Vicarious Liability in Modern South African Law* (1997) (Unpublished LLM Thesis: University of Stellenbosch)

K Zweigert and H Kötz *Introduction to Comparative Law* 3ed (Translated by T Weir) (1998) Oxford University Press: New York.

ARTICLES

P S Atiyah "American Tort Law in Crisis" (1987) 7 *OJLS* 279

R W Baker "The Importance of a Word in the Respondeat Superior Doctrine" (1952-1955) 2 *UQLJ* 1

R W Baker "The Respondeat Superior Doctrine: An Addendum" (1952-1955) 2 *UQLJ* 156

G Betlem "Torts, a European *Ius Commune* and the Private Enforcement of Community Law" (2005) 64 *CLJ* 126

P Q R Boberg "A New Head of Vicarious Liability?" (1962) 79 *SALJ* 235

P Q R Boberg "Oak Tree or Acorn? – Conflicting Approaches to Our Law of Delict" (1966) 83 *SALJ* 150

H D J Bodenstein "The Liability of the Crown for Torts of its Servants" (1923) 40 *SALJ* 277

H D J Bodenstein "The Liability of the Crown for Torts of its Servants" (1923) 40 *SALJ* 410

K Calitz "Vicarious liability of employers: reconsidering risk as a basis for liability" (2005) 2 *TSAR* 215

P Cane "Vicarious Liability for Sexual Abuse" (2000) 116 *LQR* 21.

L Collins "Vicarious Liability and the Conflict of Laws" (1977) 26 *ICLQ* 480

J Conaghan "Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment"(1996) 16 *OJLS* 407

M Dendy "When the Force Frolics: A History of State Liability for the Delicts of the Police" (1986) *Acta Juridica* 20

W O Douglas " Vicarious Liability and Administration of Risk" (1929) 38 *YLJ* 584

J G Flemming "Employee's Tort in a Contractual Matrix: New Approaches in Canada" (1993) 13 *OJLS* 430

I N Fredricks & B S C Martin "State Liability for the Delicts of the Police: Closing the Circle" (1994) 57 *THRHR* 102

G Galabresi "Some Thoughts on Risk Distribution and the Law of Torts" (1960–1961) 70 *YLJ* 499

P Giliker "Rough Justice in an Unjust World" (2002) 65 *MLR* 269

O W Holmes "Agency" (1890-1891) 4 *HLR* 345

O W Holmes "Agency II" (1891-1892) 5 *HLR* 1

A J Kerr "Mandataries and *Conductores Operis*" (1979) 96 *SALJ* 323

H J Laski "The Basis of Vicarious Liability" (1926) 26 *YLJ* 105

F H Lawson "Notes on the History of Tort in the Civil Law" (1940) 22 *JCL* 136

P Legrand "Taking Another Look at French Civil Law" (1987) 7 *OJLS* 136

B Markesinis "Judicial Style and Judicial Reasoning in England and Germany" (2000) 59(2) *CLJ* 294

B S C Martin "State Liability For the Delicts of the Police: Minister of Police v Rabie 1986 1 SA 117 (A)" (1989) 52 *THRHR* 273

H M Matthews "Notes: Negligence and Breach of Statutory Duty" (1984) 4 *OJLS* 429

L McCarthy "Vicarious Liability in the Agency Context" (2004) 4 *QUTLJ* 1

R G McKerron "Passenger Killed While Travelling on Engine of Train: Liability of Administration" (1951) 68 *SALJ* 1

R G McKerron "Basis of Doctrine of Vicarious Liability: Two Views" (1956) 73 *SALJ* 432

D J McQuoid-Mason "Vicarious and Strict Liability" (1993) 30 *LAWSA* 41

J R Midgley "Mandate, Agency and Vicarious Liability: Conflicting Principles" (1991) 108 *SALJ* 419

C R Morris, Jr "Enterprise Liability and the Actuarial Process – The Insignificance of Foresight" (1960-1961) 70 *YLJ* 554.

E Mureinik "The Contract of Service: An Easy Test For Hard Cases" (1980) 97 *SALJ* 246

"Notes of Some Controverted Points of Law: Master's Liability for Servant's Acts" (1918) 35 *SALJ* 25

K Opoku "Delictual Liability in German Law" (1972) 21 *ICLQ* 230

G T Schwartz "Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?" (1994-1995) 42 *UCLA* Law Review 377

T J Scott "Some Reflections on Vicarious Liability and Dishonest Employees" (2000) *Acta Juridica* 265

W E Scott "The Theory of Risk Liability and its Application to Vicarious Liability" (1979) *CILSA* 44

T Smith "Scope of the Business: The Borrowed Servant Problem" (1939–1940) 38 *MLR* 1222

Y B Smith "Frolic and Detour" (1923) 23 *CLR* 444

Y B Smith "Frolic and Detour" (1923) 23 *CLR* 716

M Stranex "Liability for the Delicts of the Police: The Underwriter State" (1986) 103 *SALJ* 190

J Swanton "Master's Liability for the Wilful Tortuous Conduct of his Servant" (1985) 16 *UWALR* 1

A O Sykes "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule" (1988) 101 *HLR* 563.

J B Talbot "Car Owner's Liability for Friend's Driving" (1964) 81 *SALJ* 73

J C Van der Walt "Strict Liability in the South African Law of Delict" 1968 *CILSA* 49

S Vogenauer "An Empire of Light? Learning and Lawmaking in the History of German Law" (2005) 64(2) *CLJ* 481

R R Webber "'Scope of Employment' Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees" (1992) 76 *MLR* 1513

R Weekes "Vicarious Liability for Violent Employees" (2004) 64 *CLJ* 53

S Whittaker "Privity of Contract and The Law of Tort: The French Experience" (1995) 15 *OJLS* 327

J H Wigmore "Responsibility for Tortious Acts: Its History" (1893–1894) 7 HLR 315

G Williams "Liability for Independent Contractors" (1956) 16 *CLJ* 180

J Wright "Local Authorities, the Duty of Care and the European Convention on Human Rights" (1998) 18 *OJLS* 1

OTHER

Queensland Law Reform Commission, Vicarious Liability, Report no. 56 (2001)

ABBREVIATIONS

The following abbreviations have been used:

A – Appellate Division (SA)

AC – Appeal Cases (UK)

AD – Appellate Division (SA)

AIRC – Australian Industrial Relations Commission

AJ – Acting Judge

AJA – Acting Judge of Appeal

All ER – All England Reports

All SA – All South African Law Reports

ALR – Australian Law Reports

Art – Article

B & C – Barnewall and Cresswell's Reports K.B. 1822-1830 (UK)

BAG – Bundesarbeidsgericht (Germany)

BCLR – Butterworths Constitutional Law Reports (SA); or British Columbia Law Reports (Canada)

BGB – Bürgerliches Gesetzbuch (German Civil Code)

BGH – Bundesgerichtshof (German Federal Supreme Court)

BGHZ – Entsheidungen des Bundesgerichtshofes in Zivilsachen (Decision of the German Supreme Court in civil matters)

BK – Close Corporation (SA)

Bpk – Public Company (SA)

Bull.civ. – Bulletin des arrest de la Cour de cassation, chambres civiles (France)

Bull.crim. – Bulletin des arrest de la Cour de cassation, chambre criminele (France)

BVerfG – Bundesverfassungsgericht (Germany)

C – Cape of Good Hope Provincial Division (SA)

C – Codex of Justinian

C&P – Carrington & Payne's Nisi Prius Reports (UK)

CA – Court of Appeal (UK)

Cass. – Cour de cassation (France), as the case may be:

Ass. plén. – Plenary Assembly (Since 1967)

Ch. réun. – Joined Chambers (Until 1967)

civ. – Civil Chamber (with chamber number after 1952)

crim. – Criminal Chamber

Soc. – Social Chamber

C.civ. – Code civil (French Civil Code)

CC – Close Corporation (SA); or Constitutional Court (SA)

Cf – Compare

Ch – Chancery Division Reports (UK); or Chapter

CILSA – Comparative and International Law Journal of Southern Africa

CJ – Chief Justice

CLJ – Cambridge Law Journal

CLR – Columbia Law Review

CLR – Commonwealth Law Reports (Australia)

Co – Company

Comb. – Comberbach's Reports, K.B. 1685-1699 (UK)

CPD – Cape of Good Hope Provincial Division Law Reports (SA)

D – Durban and Coast Local Division Law Reports (SA)

D – Digest of Justinian

DH – Recueil hebdomadaire Dalloz (France)

DLR – Dominion Law Reports (Canada)

E – Eastern Cape Provincial Division (SA)

E & E Dig – English and Empire Digest

ed – edition; or editor

(Edms) Bpk – Private Limited Company (SA)

EG – Estate Gazette Law Reports (UK)

e.g. – for example

ER – English Reports

et al – and others

Ex – Court of Exchequer (UK)

Exch. – Court of Exchequer Chamber (UK)

ff – and following

fn – footnote

Gaz.Pal. – Gazette du Palais (France)

H&C – Hurlston and Coltman's Exchequer Reports (UK)

HC – High Court

HCA – High Court of Australia

HL – House of Lords (UK)

HLR – Harvard Law Review

ICLQ – International and Comparative Law Quarterly

ICR – Industrial Cases Reports (UK)

i.e. – that is

ILR – International Law Reports

Inst. – Institutes of Justinian

IRLR – Industrial Relations Law Reports (UK)

J – Judge; or Justice

JA – Judge of Appeal

JCL – Journal of Comparative Legislation and International Law

JCP – Semaine Juidique; or Juris-classeur périodique, General Edition (France)

KB – Kings Bench Division Reports (UK); or King's Bench (UK)

Keb. – Keble's King's Bench Reports 1661-1679 (UK)

LAC – Labour Appeal Court (SA)

LAWSA – The Law of South Africa

LJ – Lord Justice

Lloyd's Rep – Lloyd's Reports (UK)

LQR – Law Quarterly Review

Ltd – Public Company (SA)

MLR – Modern Law Review

Mod. – Modern Reports 1669-1732 (UK)

Moo. – Francis Moore's King's Bench Reports 1512-1621 (UK)

N – Natal Provincial Division (SA)

NC – Northern Cape Provincial Division (SA)

NJW – Neue Juristisch Wochenschrift (Germany)

NLR – Natal Law Reports (SA)

NO – Nomine officii

NPD – Natal Provincial Division Reports

NSWLR – New South Wales Law Reports (Australia)

NZLR – New Zealand Law Reports

O – Orange Free State Provincial Division (SA)

OJLS – Oxford Journal of Legal Studies

OPD – Orange Free State Provincial Division Reports (SA)

OR – Official Reports (SA)

p – page

para – paragraph

(Pty) Ltd – Private Limited Company (SA)

QB – Queens Bench Division Reports

QUTLJ – Queensland University of Technology Law Journal

R – Rex/Regina

Rep – Reports

RG – Reichsgericht (Germany)

Ry - Railway

S – State

s – section

SA – South African Law Reports

SALJ – South African Law Journal

Salk. – Salkeld's King's Bench Reports 1689-1712 (UK)

SALLR – South African Labour Law Reports

SAR – South African Railways and Harbours

SCA – Supreme Court of Appeal (SA)

SCC – Supreme Court of Canada

SCR – Supreme Court Reports (Canada)

SE – South Eastern Cape Local Division

Show. – Shower's Parliamentary Cases 1681-1698 (UK)

Skin. – Skinner's King's Bench Reports (UK)

ss – sections

Str. – Strange's Kings Bench Reports 1716-1749 (UK)

T – Transvaal Provincial Division (SA)

t/a – trading as

THRHR – Tydskrif vir Hedendaagse Romeins-Hollandse Reg

TPD – Transvaal Provincial Division

TSAR – Tydskrif vir Suid-Afrikaanse Reg

UCLA – University of California, Los Angeles

UQLJ – University of Queensland Law Journal

UWALR – University of Western Australia Law Review

VersR – Versicherungsrecht (Germany)

VSCA – Victorian Supreme Court of Appeal (Australia)

WLD – Witwatersrand Local Division Reports (SA)

WLR – Weekly Law Reports (UK)

YLJ – Yale LJ

ZIP – Zeitschrift für Wirtschaftsrecht (Germany)

& – and

§ – paragraph; or section

TABLE OF CASES

A

Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel (Unreported PR927971 [2003] AIRC 504, 14 May 2003)

ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd [2001] 1 All SA 1 (A)

AMP v Chaplin (1978) 18 ALR 385

Armagas Ltd v Mundogas SA The Ocean Frost [1986] 1 AC 717

Armory v Delamirie (1 Str., 505); 93 ER 664

B

Bain v Central Vermont Railway Co 1921 (2) AC 412

Balfron Trustees v Peterson [2001] IRLR 758

Barwick v English Joint Stock Bank 1867 LR 2 Ex 259

Bayley v Manchester, Sheffield and Lincolnshire Rye (1873) LR 8 CP 148

Bazley v Curry (1999) 174 DLR (4th) 45

Bezuidenhout NO v Eskom 2003 (3) SA 83 (SCA)

Boson v Sandford (2 Salk. 440); (3 Mod. 323); (1 Show. 29); 91 ER 382

Bracebridge Engineering Ltd v Darby [1990] IRLR 3 EAT

Broom v Morgan [1953] 1 QB 597

Bugge v Brown (1916) 26 CLR 110

Bull v Devon Area Health Authority [1993] 4 Med LR 117 CA

Butler v Modrak (1983) 49 ACTR 3

C

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

Carter & Co (Pty) Ltd v McDonald 1955 (1) SA 202 (A)

Cassidy v Ministry of Health [1951] 2 KB 343

Century Insurance Co Ltd v Northern Ireland Road Transport Board [1942] AC 509

Cheshire v Bailey [1905] 1 KB 237

Collins v Hertfordshire CC [1947] KB 598

Colonial Mutual Life Assurance Ltd v Macdonald 1931 AD 412

Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41

Conway v George Wimpey & Co Ltd [1951] 2 KB 266

Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy 2003 (4) SA 34 (SCA)

Cremer v Humberstone (2 Keb. 352); 84 ER 220; 326

D

Deatons Pty Ltd v Flew (1949) 79 CLR 370

Donoghue v Stevenson [1932] AC 562

Dowling v The Diocesan College 1999 (3) SA 847 (C)

Dubai Aluminium Co Ltd v Salaam and Others [2003] 2 AC 366

Dukes v Marthinusen 1937 AD 12

Dyer v Munday [1895] 1 QB 742

E

Eksteen v Van Schalkwyk en 'n Ander 1991 (2) SA 39 (T)

Energy Measurements (Pty) Ltd v First National Bank of SA Ltd 2001 (3) SA 132 (W)

Ess Kay Electronics Pte Ltd v First National Bank of South Africa Ltd 2001 (1) SA 1214 (SCA)

Estate Van der Byl v Swanepoel 1927 AD 141

Esterhuizen v Administrateur Transvaal 1957 (3) SA 710 (T)

F

Faircape Property Developers (Pty) Ltd v Premier, Western Cape 2002 (6) SA 180 (C)

Feldman v Mall 1945 AD 733

Fennelly v Connex South Eastern Ltd [2001] IRLR 390

G

Gaitanis v Nicholas Moss Pty Ltd [2003] VSCA 63

Gibbins v Williams, Muller, Wright & Mostert Ingelyf en Andere 1987 (2) SA 82 (T)

GJ v Griffiths [1995] BCJ No. 2370 (QL) (SC)

Godfrey and Others v Campbell 1997 (1) SA 570 (C)

Gold v Essex CC [1942] 2 KB 293

Grammar et al' v Nixon (1 Str., 653); 93 ER 761

Grant v Australian Knitting Mills [1936] AC 85

Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank [1996] 4 All SA 278 (W)

Grobler v Naspers Bpk 2004 (4) SA 220 (C)

H

Harrison v Michelin Tyre Co Ltd [1985] 1 All ER 918

Hayward v Georges [1966] VR 202

Heasmans v Clarity Cleaning Co Ltd [1987] ICR 949

Hern v Nicholls (1 Salk. 288); 90 ER 1154, 91 ER 256

Hiltonian Society v Crofton 1952 (3) SA 130 (A)

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Humberstone v Northern Timber Mills (1949) 79 CLR 398

I

Ilkiw v Samuels [1963] 1 WLR 991

J

Jarvis v Hayes (2 Str. 1083); 93 ER 1047

R H Johnson Crane Hire (Pty) Ltd v Grotto Steel Construction (Pty) Ltd 1992 (3) SA 907 (C)

Joel v Morrison (1834) 6 C & P 501

K

K v Minister of Safety and Security 2005 (9) BCLR 835 (CC)

Kingston v Booth (Skin. 228); 90 ER 105

KLB v British Columbia [2003] SCC 51

Kooragang Investments Pty Ltd v Richardson and Wrench Ltd [1982] AC 462

L

Langley Fox Building Partnership (Pty) Ltd v De Valence 1991 (1) SA 1 (A)

Laughter v Pointer (5 B & C, 547); 108 ER 204

League Against Cruel Sports v Scott [1986] QB 240

Lee v Cheung [1990] 2 AC 374

Lever v Purdy 1993 (3) SA 17 (A)

Limpus v London General Omnibus Co [1862] 1 H & C 526

Lister and Others v Hesley Hall Ltd [2002] 1 AC 215

Lloyd v Grace, Smith and Co 1912 AC 716

Lockgelly Iron and Coal Co v M'Mullan [1934] AC 1

London Drugs Ltd v Kuehne & Nagel International Ltd [1992] 3 SCR 299

M

Macala v Maokeng Town Council 1993 (1) SA 434 (A)

Macdonald v Dickson (1868) 2 SALR 32

Mangope v Asmal 1997 (4) SA 277 (T)

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173

Mattis v Pollock [2004] 4 All ER 85

Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA)

Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd 1947 AC 1

Messina Associated Carriers v Kleinhaus 2001 (3) SA 868 (SCA)

Michell v Alestree (3 Keb. 650); 84 ER 932

Middleton v Fowler (1 Salk, 282); 90 ER 971, 91 ER 247

Midway Two Engineering & Construction Services v Transnet Bpk 1998 (3) SA 17 (SCA)

Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA)

Minister of Law and Order v Ngobo 1992 (4) SA 822 (A)

Minister of Police v Rabie 1986 (1) SA 117 (A)

Minister of Safety and Security v Luiters 2006 (4) SA 160 (SCA)

Minister of Safety and Security v Luiters 2007 (2) SA 106 (CC)

Minister van Polisie en 'n Ander v Gamble en 'n Ander 1979 (4) SA 759 (A)

Mkize v Martens 1914 AD 382

Morgans v Launchbury [1973] AC 127

Morris v C W Martin & Sons Ltd [1966] 1 QB 716

Mtetwa v Minister of Health 1989 SA 600 (D)

N

Nahhas v Pier House (Cheyne Walk) Management (1984) 270 EG 328

New South Wales v Lepore and Another; Samin v Queensland and Others; Rich v Queensland and Others [2003] HC 4

O

Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A)

P

P A B v Curry (1995) 9 BCLR (3d) 217

Paton v Caledonian Insurance Co 1962 (2) SA 691 (D)

Petterson v Royal Oak Hotel Ltd [1948] NZLR 136

Phoenix Society Inc v Cavenagh (1997) 25 MVR 143

Photo Production Ltd v Securicor Ltd [1980] AC 827

Plumb v Cobden Flour Mills Co Ltd 1914 AC 62

Polland v Parr & Sons [1927] 1 KB 236

Port Swettenham Authority v TW Wu Co [1979] AC 580

In Re: Porter, Re Transport Workers Union of Australia (1989) 34 IR 179

Proceedings Commissioner v Ali Hatem [1999] 1 NZLR 305

R

R v Feun 1954 (1) SA 58 (T)

Reedie v London and North Western Railway Company (1849) 4 Exch 244; 79 ER 1201

Richard Ellis SA (Pty) Ltd v Miller 1990 (1) SA 453 (T)

Ricketts v Thomas Tilling Ltd [1915] 1 KB 644

Rodrigues v Alves 1978 (4) SA 834 (A)

Roe v Minister of Health [1954] 2 QB 66

Rofdo (Pty) Ltd t/a Castle Crane Hire v B & E Quarries (Pty) Ltd 1999 (3) SA 941 (SE)

Roos v De Loor's Ltd 1931 TPD 100

Rose v Plenty and Another [1976] 1 All ER 97

Rossouw v Central News Agency Ltd 1948 (2) SA 267 (W)

S

S v Attorney-General [2003] 3 NZLR 450

S v Mavaneni 1963 (4) SA 89 (D)

S v Walsall Metropolitan Borough Council [1985] 1 WLR 1150

Scott v Davis [2000] HCA 52

Sir Robert Wayland's Case (3 Salk. 234); 91 ER 797

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

Soblusky v Egan (1959–60) 103 CLR 215

South African Railways and Harbours v Marais 1950 (4) SA 610 (A)

Southern v How (34 E & E Dig, 123); 79 ER 400

ST v North Yorkshire County Council [1999] IRLR 98

Staton v National Coal Board [1957] 1 WLR 893

Stein v Rising Tide Productions CC 2002 (5) SA 199 (C)

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

Storey v Ashton (1869) LR 4 QB 476

T

Turberville v Stamp (Comb, 459); (1 Lord Raymond, 264); (Skin., 681); 90 ER 590 & 903

Twine v Beans Express 1946 (1) All ER 202 (KB)

U

Union Government v Hawkins 1944 AD 556

Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 KB 248

V

Van den Berg v Coopers and Lybrand 2001 (2) SA 242 (SCA)

Viljoen v Smith 1997 (1) SA 309 (A)

W

Waltham v Mulgar (Moo. 1076); 72 ER 899

Ward v Evans (2 Salk, 442); 90 ER 965, 91 ER 383

Warren v Henlys Ltd [1948] 2 All ER 935

Weir v Bettison [2003] All ER 273

Wilkinson v Joyceman [1985] 1 Qd R 567

Woods v Multisport Holdings Pty Ltd [2002] ALR 145

Z

Zuijs v Wirth Bros (1955) 93 CLR 561

FRENCH CASES (In Chronological Order)

Cass. Crim. 23 November 1928 Gaz. Pal. 1928. 2. 900

Cass. Civ. 4 May 1937 DH 1937. 363

Cass. Civ. 19 December 1950 JCP 1951. II. 6577

Cass. Crim. 5 November 1953 Gaz. Pal. 1953. 2. 383

Cass. Crim. 28 November 1956 JCP 1957. IV. 2

Cass. Soc. 7 January 1965 Bull. Civ. 1965 IV no. 7

Cass. Crim. 15 February 1972 JCP 1972. II. 17 159

Cass. Ass.plén. 19 June 1977 JCP 1977. II. 18730

Cass. Ass.plén. 17 June 1983 JCP 1983. II. 20120

Cass. Ass.plén. 15 November 1985 JCP 1986. II. 20568

Cass. Ass.plén. 19 May 1988 DS 1988. 513

Cass. Crim.5 March 1992 JCP 1993. II. 22013

Cass. Civ. 16 June 2005 Bull. Civ. 2005. II. 158

GERMAN CASES (In Chronological Order)

RG LZ 1930, 589

BGHZ NJW 1952, 418

BGHZ NJW 1952, 658

BGH NJW 1956, 1106

BGH NJW 1965, 391

BGH BGHZ 1966, 311

BGHZ NJW 1968, 391

BGH VersR 1969, 518

BGH NJW 1971, 31

BGH NJW 1971, 1313

BAGZIP 1994, 1712

TABLE OF STATUTES

SOUTH AFRICA

Employment Equity Act 55 of 1998

South African Police Services Act 68 of 1995

UNITED KINGDOM

Commonwealth of Australia Constitution Act of 1900

Employment Protection (Consolidation) Act of 1978

Police Act of 1996

Sex Discrimination Act of 1975

AUSTRALIA

Civil Liability Act 2002 (NSW)

Partnership Act 1891 (Qld)

NEW ZEALAND

Partnership Act of 1908

INTRODUCTION

The principal object of this thesis is to examine and re-evaluate the doctrine of vicarious liability in the South African law of delict. Vicarious liability is that which attaches to a person for a delict committed by another party and is, as such, a form of 'strict' or 'no-fault' liability. It is therefore not surprising that the doctrine is controversial. Its apparent departure from the principle of fault makes it difficult to apply in a system which is based almost exclusively on the idea that persons should only be held accountable for those wrongs for which they were personally responsible. Yet it has to be conceded that there are a number of cogent policy reasons for attributing liability to one for the actionable harm caused by another, where the latter is acting as an agent or employee of the former. These policy considerations are sufficiently compelling to justify the existence of the doctrine, despite the fact that it offends the well established principle of fault.

Although the legal basis of vicarious liability can rarely be challenged, there are aspects of its application with which it is particularly difficult to come to terms. It is accepted that the so-called 'test' for vicarious liability comprises three elements, two of which (those dealing with the commission of a delict and the existence of a relationship capable of founding liability) are fairly straightforward and are not often a source of contention. However, the obscurity of the third element – that which deals with the 'course and scope' enquiry – gives cause for concern. This study focuses on that element of the enquiry and particularly on problems which arise when liability is sought for the wilful delictual wrongs of employees committed whilst carrying out their appointed functions.

It has long been recognised that cases of vicarious liability brought about by the deliberate and often criminal misconduct of employees present difficulties due to the fact that the employees' acts are almost always expressly forbidden by their employers and are antithetical to the duties which they are employed to perform. Under the traditional course and scope enquiry, it is extremely difficult to attach liability to employers for such conduct, even though in some instances it is clearly fair to do so. For instance in *Ess Kay Electronics v First National Bank* the respondent escaped liability where one of its employees had been using his position to defraud

clients. The Supreme Court of Appeal held that his actions could not be considered to have fallen within the course and scope of his employment in that they were committed in furtherance of his own interests and that they were clearly not authorised by his employer. This decision is a perfect example of a situation in which it would have been more appropriate for the employer to bear the burden of liability for its employee's conduct than for its customers to do so, yet the plaintiff was unsuccessful.

Before the *Ess Kay* decision the courts were inclined to take a broader approach and incorporate what became known as the 'creation of risk' principle, in terms of which an employer would be held liable for deliberate wrongful acts of employees where that employer created the risk of the harmful conduct occurring. Unfortunately this principle was inadequately structured and provided no means of limitation. Consequently, the creation of risk principle was not applied consistently and was eventually discarded in *Ess Kay*. The result was that vicarious liability could no longer be claimed for the deliberate wrongs of employees. This position was clearly untenable and later in *K v Minister of Safety and Security* the Constitutional Court was forced to re-consider the issue. In this case the court recognised the need for the policy considerations behind vicarious liability to inform the way in which liability is founded, and followed an approach which appeared to incorporate the creation of risk into the course and scope enquiry. Unfortunately, although the court was able to arrive at an equitable conclusion in that particular case, it confined its decision to the specific facts before it, and failed to develop the principles of vicarious liability. Subsequent decisions on the issue have also avoided the establishment of a clear and unequivocal principle, leaving the law in a state of some uncertainty.

The problems surrounding the application of the course and scope enquiry appear to be universal and by no means exclusive to the South African legal system. However, recent developments in Canada and the United Kingdom have shown a new, and perhaps improved, way of dealing with cases of vicarious liability for the deliberate misconduct of employees. In the light of these developments, this study will propose a that the South African law of vicarious liability requires re-evaluation and adjustment in order to meet the needs of modern society and reflect the values enshrined in the Constitution.

My analysis was facilitated by desktop research of case law and relevant literature, as well as comparative research on selected cases and academic works from foreign jurisdictions.

The choice of which comparative jurisdictions to examine was based on a number of factors. Research into the English law of vicarious liability was necessary in view of the fact that our modern principles are based almost exclusively on the English model. Moreover, the English courts have recently developed existing principles in an attempt to rectify some of the more questionable aspects of the course and scope enquiry. These developments compelled close attention.

Examination of the law in the British Commonwealth of Nations revealed a number of interesting and relevant developments. The Australian courts have recently come up with what are arguably the most comprehensive and well-defined requirements for establishing relationships capable of founding liability; New Zealand has made developments regarding the imposition of liability on employers for acts of sexual harassment committed by their employees in the workplace; and the Canadian Supreme Court is responsible for the groundbreaking decision in *Bazley v Curry* which has had, and will continue to have, a profound effect on the law of vicarious liability in all common law jurisdictions.

The examination of the relevant laws in France and Germany enabled an approach to the subject from a different point of view. Research of civil law systems revealed that although they and common law jurisdictions have developed independently, many aspects of their systems are remarkably similar, including the confusion and uncertainty surrounding the interpretation of the law of vicarious liability.

Nevertheless, due to the fact that common law authorities have often been reluctant to break away from traditional methods of founding liability, it was felt that it would be erroneous to examine British and Commonwealth systems exclusively and without a basis for comparison with those of at least two independent European jurisdictions, even if these systems did not prove particularly useful in the long run.

The first chapter of the thesis will focus on an historical analysis of the development of the doctrine of vicarious liability, touching on its roots in Roman law, the Roman-Dutch interpretation of employer's liability and the development of the modern principles of vicarious liability in England. Chapter two gives a full account of the current test for vicarious liability as applied by our courts, paying specific attention to the course and scope enquiry and the problems encountered when dealing with intentional wrongs and the 'creation of risk' principle. The following two chapters trace the development of vicarious liability in comparable foreign jurisdictions, the former dealing with the common law jurisdictions of England and the British Commonwealth of Nations, and the latter with the civil law jurisdictions of France and Germany. The concluding chapter starts with a brief analysis of the social justification for the law vicarious liability and the various policy considerations upon which it is founded, and proceeds to evaluate the doctrine in light of the developments in the respective foreign jurisdictions discussed in the previous chapters.

This thesis reflects the law as stated in the sources available to me as at 1 November 2007.

CHAPTER ONE

TRACING THE DEVELOPMENT OF VICARIOUS LIABILITY

1.1. WHAT IS VICARIOUS LIABILITY?

When used in a legal sense the word 'vicarious' means 'acting or done for another' and is derived from the Latin word *vicarius*, meaning 'substitute'. Simply expressed, vicarious liability is the delictual liability of one person for the actionable conduct of another. One of the most comprehensive definitions of the term was given by Barlow, who described vicarious liability in delict as:[1]

> "... [T]he liability of one person for the delictual acts of another, such liability arising from the relationship between the person who commits the delict and the person who is held liable, but existing independently of any relationship between the injured party and the person who is held liable, and of any fault, mediate or immediate, on the part of the latter."

From this it is possible to identify three defining features of vicarious liability.[2] The first feature is the existence of a relationship between the party having committed the delict and the party sought to be held liable. Relationships capable of founding liability are typically those in which the party having committed the delict is employed by the party sought to be held liable. As such, the most common relationship capable of founding liability is that of general employment. Other relationships include agents and principals, business partners, owners and drivers of vehicles and other categories analogous to employment.[3] As far as this first aspect is concerned, the general principle is that those who engage others to perform tasks on

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[1] T B Barlow *The South African Law of Vicarious Liability in Delict and a Comparison of the Principles of Other Legal Systems* (1939) 1.

[2] Barlow describes these features as 'essentials'. Although this is perhaps a more accurate description, the use of the term 'essential' in this context is potentially misleading as the 'essentials' could be confused with the 'essential elements' required by the so-called 'test' for vicarious liability which is set out in chapter 2.

[3] A detailed analysis of the relationships capable of founding vicarious liability will be given in chapter 2.

their behalf can be held liable for the delicts of those engaged as long as the other requirements of vicarious liability can be established.[4]

The second feature is that the liability exists independently and does not rely on the existence of a contractual relationship between the injured party and the party sought to be held liable.[5]

The third and most controversial feature of vicarious liability is the absence of fault on the part of the party sought to be held liable. This is a form of 'no fault liability' (also described as 'strict liability') which attaches to a person for a delict committed by another party who was not at fault due to the fact that the party committing the delict was performing a task on behalf of the other when the delict was committed.

It is not surprising that 'no-fault' liability is controversial, bearing in mind that modern laws of restitution are generally based on fault liability.[6] The importance of the requirement of fault is emphasised by society's idea of fairness and the need for this view to be reflected in the way in which legal systems settle disputes. Most members of society would baulk at the idea of holding someone responsible for something for which they personally were not at fault. It follows that the idea that someone could be held responsible for the injurious conduct of another is perhaps even more repugnant. Yet there is a contrary view that those who use the services of others to further their own aims should bear a measure of responsibility for any harm sustained by third parties in the performance of those services. It is this feeling, together with the nature of modern employment practices and a tendency towards compensatory litigation, which has inspired the development of the modern notion of vicarious liability.

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[4] The test for vicarious liability in the South African law of delict will be discussed in chapter 2.

[5] Being concerned with delictual liability, this branch of law aims at remedying non-contractual wrongs. As R G McKerron *The Law of Delict* 7ed (1971) 2-3 puts it: "A delict consists in the breach of a duty imposed by law independently of the will of the party bound." This is not to say that these two forms of liability (delictual and contractual) cannot exist concurrently. However, as mentioned above, vicarious liability is only concerned with compensating those having suffered delictual harm. For more on concurrence of actions, see J C van der Walt and J R Midgley *Principles of Delict* 3ed (2005) para 53; J Neethling, J M Potgieter and P J Visser *Law of Delict* 5ed (2006) 239-242.

[6] Barlow *Vicarious Liability* 4. See F H Lawson "Notes on the History of Tort in the Civil Law" (1940) (3rd Series) 22 *JCL* 136 at 137-142; P S Atiyah *Vicarious Liability in the Law of Torts* (1967) 12.

Although there are many theoretical justifications for attributing this form of liability,[7] it can be argued that it is simply "... based on social policy regarding what is fair and reasonable and amounts to an expression of a society's legal convictions that victims of delictual conduct should be able to recover damages from someone who has the ability to pay."[8]

1.2. TRACING THE DEVELOPMENT OF THE LAW OF VICARIOUS LIABILITY

Owing to the hybrid nature of South African law, it is not surprising to find that the development of our modern law of vicarious liability cannot be attributed to any single legal system.[9] Although the modern concept of vicarious liability was not recognised by the Romans, the Roman principle of 'master's'[10] liability has often been cited as the foundation upon which the law of vicarious liability is built.[11] Thus it is relevant to examine the liability for the acts of slaves and free servants in Roman law.

The Roman-Dutch authority on the subject is, as Boberg puts it, "a matter of grave uncertainty."[12] However, it is worth noting that although the modern law of vicarious liability is based almost entirely on English principles,[13] a Roman-Dutch framework still exists[14] and will compel closer examination.

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[7] The social justifications for vicarious liability are discussed in more detail in chapter 5.

[8] Van der Walt and Midgley para 29.

[9] Although South African law can be said to have developed along Roman-Dutch lines it is not strictly accurate to describe it as a Roman-Dutch legal system. The influence of English law has had a profound effect on many branches of South African law, vicarious liability being no exception. One cannot but agree with H R Hahlo and E Kahn *The South African Legal System and its Background* (1968) 586, when they make the observation: "Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England."

[10] The terms 'master' and 'servant' have recently been replaced by 'employer' and 'employee' despite the fact that the newer terms are often misleading and do not adequately describe all relationships capable of founding liability. However, for the purposes of this section the words master and servant have to be used as they are the only terms capable of describing the types of relationship envisaged by the old authorities.

[11] Barlow *Vicarious Liability* 4.

[12] P Q R Boberg "Oak Tree or Acorn? – Conflicting Approaches to Our Law of Delict" (1966) 83 *SALJ* 150 at 169. McKerron *Delict* 89 points out that the Roman-Dutch writers expressed conflicting views on the subject.

[13] McKerron *Delict* 89 is of the view that our modern law of vicarious liability is entirely based on the English doctrine of master's liability. This is also the view of Lawson "Notes on the History of Tort in

1.2.1. Roman Law

> "That Roman law had a profound influence, both direct and indirect, upon the South African law of vicarious liability is beyond dispute. Neither the Roman-Dutch writers nor our own Courts have hesitated to draw copiously from the Digest and the Institutes for illustrations of the principle of the master's liability."[15]

It is difficult to explain how reliance could be placed upon a legal system in which no general principle of vicarious liability (as we now know it) existed. The principle that a master is liable in delict for the actionable conduct[16] of his servant committed in the course and scope of the latter's appointed function would, as Barlow puts it, "have sounded strange to the Roman lawyer."[17] Indeed, Lawson confirms that "the whole notion of a master's liability for the wrongs of his free servant committed in the course of his employment is alien to Roman ideas."[18]

In Roman law liability for the acts of slaves was not founded on such a narrow basis and the master's liability for the acts of free servants was still dependent on a measure of personal fault on the part of the former. Nevertheless, a master's liability for the acts of slaves and free servants (such as it then was) provided a basis for the modern action of vicarious liability.

As far as slaves were concerned, an injured party (or indeed a member of that party's family) was entitled to take Noxal Action against the master.[19] In terms of such action the master was obliged to offer monetary compensation to the victim for the harm suffered. However, the master would never be held liable beyond the value of the slave and was therefore entitled to escape liability by surrendering the latter to the

the Civil Law" 145, who believes that the *respondeat superior* doctrine was 'probably' English in origin. This is Discussed further below at 1.2.2.

[14] Boberg "Oak Tree or Acorn?" 170.

[15] Barlow *Vicarious Liability* 12.

[16] In Roman law, liability arose from the commission of a wrongful act such as "*furtum* (theft), *rapina* (robbery), *damnum* (damage), or *injuria* (injury). See W L Burdick *The Principles of Roman Law and Their Relation to Modern Law* (1989) 485. However, as R W Lee *An Introduction to Roman Dutch Law* 5ed (1953) 321 points out, this classification of heads of liability was not exhaustive – other grounds of liability such as *dolus* and various so-called 'quasi-delicts' existed and will be examined further below.

[17] Barlow *Vicarious Liability* 12.

[18] Lawson "Notes on the History of Tort in the Civil Law" 139. See also "Notes of Some Controverted Points of Law: Master's Liability for Servant's Acts" (1918) 35 *SALJ* 25 at 27.

[19] Slaves had no legal capacity and could therefore not sue or be sued. See A Borkowski and P Du Plessis *Textbook on Roman Law* 3ed (2005) 96.

plaintiff.[20] This form of compensation was known as noxal surrender[21] and was eventually reserved only for slaves or animals that had caused injury.[22]

Noxal liability is illustrative of the nature of Roman compensatory laws in that it demonstrates an emphasis on revenge and punishment.[23] In a reipersecutory system[24] in which the aim of a delictual remedy is to compensate victims rather than punish transgressors, there is perhaps a more persuasive social justification for this form of liability.[25]

The punitive nature of Roman laws of restitution made it difficult to justify an action against the master of a free servant. Where free individuals were concerned, the requirement of fault played a particularly important role in Roman law. During the classical period[26] it was unusual for an man to be held liable when he himself was not at fault. According to Barlow, "This characteristic of the Roman legal mind tended to retard any development of the idea that a master could be held liable for the acts of

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[20] Barlow *Vicarious Liability* 15; *Inst.* 4, 8, 3; D. 9, 4, 1. See also Burdick *The Principles of Roman Law* 510. Borkowski and Du Plessis *Textbook on Roman Law* 96 point out that in early times it seemed that the primary duty of the master was to surrender the slave. Financial compensation would have been a negotiable alternative.

[21] *Noxa* meant 'mischief' – the mischief was surrendered. Borkowski and Du Plessis *Textbook on Roman Law* 96.

[22] Originally *noxal* action could be taken against the *family* of a wrongdoer. Under these circumstances the *patresfamilia*s of the two families would enter into negotiations and come to an agreement as to how the debt would be settled. Usually the delinquent would be handed over to the aggrieved group who would then exact its revenge. However, in the earlier days it was apparently not uncommon for a surrogate family member to be handed over. Although the *paterfamilias* was not obliged to do so, he could "buy off the vengeance" (Barlow *Vicarious Liability* 12-14); ("Notes on Some Controverted Points of Law" 25).

[23] As Lawson "Notes on the History of Tort in the Civil Law" 138 observes, "[O]ne general characteristic seems to have persisted throughout Roman legal history: actions in delict were always thought of as penal."

[24] In a reipersecutory system damages are based on the actual patrimonial loss suffered by the plaintiff. W J Hosten, A B Edwards, F Bosman and J Church *Introduction to South African Law and Legal Theory* 2ed (1995) 804. South African laws of restitution are primarily reipersecutory (Barlow *Vicarious Liability* 16).

[25] The various social justifications for the modern law of vicarious liability will be examined in chapter 5.

[26] The classical age in Roman law, identified as a period of legal reform, is said to have begun with the rule of the Emperor Hadrian and to cover the second century and early part of the third century AD (Encyclopaedia Britannica (1969) Vol. XIX 545-548). Within this period a distinction is made between pre-classical law (which ended with the demise of the Republic in 27 BC) and the classical law proper, otherwise known as the "golden age" of Roman law, which coincided with the period of the Principate during which the Roman Empire covered almost all of the known world. The development of Roman law reached its zenith during this period (Hosten *et al Introduction to South African Law and Legal Theory* 274 -279).

the employees."[27] During this period and in Justinian's time,[28] the general law was that no action could be brought against a master for the injurious conduct of free servants within his charge unless he himself could be shown to have been at fault.[29] However, it appears that exceptions to this general principle did exist and that vicarious liability (as we now know it), was applied in a number of cases.[30] These early Roman cases of vicarious liability, having had a significant influence on many of the Dutch writers and the South African courts,[31] are worthy of closer examination. They can be divided into two main classes: cases of *custodia* liability, and of praetorian liability.[32]

As far as the former is concerned, persons would be held liable for loss or damage to goods or articles temporarily within their care. This form of liability was often imposed in cases where goods were entrusted to others for the purpose of repair, workmanship or safe-keeping. It was also occasionally imposed in cases where a contract of *locatio conductio operis* existed between the parties.[33] In these cases the responsibility was absolute in that it did not require *dolus* or *culpa* on the part of the responsible party. Therefore if a servant of the custodian were to lose, steal or damage the goods or articles, the aggrieved party could proceed against the employer even though the element of personal fault may not have existed. Although this form of liability did not establish a general principle of vicarious liability and was confined to specific contractual relationships,[34] it seemed to establish the idea that it could be fair to hold one liable for the faults of another under certain circumstances. This was an idea that the Justinian interpolators found difficult to come to terms with. They were

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[27] Barlow *Vicarious Liability* 16.

[28] Perhaps more accurately described as the period of the *Dominate*. "In 284 AD, the emperor Diocletian replaced the Principate with an absolute monarchy called the *Dominate*" (Hosten *et al Introduction to South African Law and Legal Theory* 280). Although this period was characterised by a decline of the Roman empire and indeed a commensurate decline in legal science, the emperor Justinian successfully codified Roman law with the *codex constitutionum*, promulgated in 529AD. Hosten *et al Introduction to South African Law and Legal Theory* 282.

[29] Barlow *Vicarious Liability* 16. In terms of *D.* 43, 16, 1, 12 a master who ordered his servants to perform wrongful acts would be held liable as if he had committed the acts personally. Alternatively, if a master was found to have appointed a careless servant, he could be held liable for any harm negligently caused by that servant.

[30] Many writers describe these cases as 'Quasi-Delicts'. See Burdick *Principles of Roman Law* 512-513; Borkowski and Du Plessis *Textbook on Roman Law* 96.

[31] Barlow *Vicarious Liability* 16-17.

[32] Barlow *Vicarious Liability* 17.

[33] *Ibid.*

[34] "Notes of Some Controverted Points of Law" 26.

perhaps the most vehement proponents of the *schuld prinzip* (fault principle) and although they chose to acknowledge *custodia* liability, they attempted to base its application on the presumption of negligence on the part of the custodian. [35]

As regards the second category, there were five main classes of action introduced by the Roman *praetors*, each of which concerned the absolute liability of a master for the acts of his servants. Fault was not a requirement, and in each case liability was based on a ground of public policy.[36] The actions were:

(a) The liability of the carrier, the inn-keeper and the stable-keeper
(b) The *actio exercitoria*
(c) Liability of the *publicanus*
(d) The actions *de effuses et dejectis* and *de positis et suspensis*
(e) Liability under the Edict *de vi et vi Armata*

The liability of carriers, inn-keepers and stable-keepers was very similar to custodian liability[37] and was only limited by *vis major*. In terms of this action, those who availed themselves of the services of inn-keepers, stable-keepers and shipmasters were entitled, under certain circumstances, to claim compensation for losses incurred as a result of the delictual acts of the employees of men of these classes.[38] Provision was made for three types of action in these cases, an action on account of damage to goods (*actio damni*),[39] theft,[40] and reception of goods (*receptum*).[41] This action was considered particularly important as it was often necessary to trust this class of person and allow property into their custody.[42]

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[35]Barlow *Vicarious Liability* 18.
[36] *Ibid.*
[37] Some believe it is based on *custodia* while others believe it to be purely *praetorian*. The difference between the actions was that in the case of *custodia* the action could be taken regardless of whether the master or servant committed the actionable conduct, whereas the liability of carriers, inn-keepers and stable-keepers under the Edict could only be invoked where the harm was caused by a slave or servant. Burdick *Principles of Roman Law* 509-510.
[38] "Notes of Some Controverted Points of Law" 26. Borkowski and Du Plessis *Textbook on Roman Law* 350 point out that in addition, the innkeepers were liable for the acts of permanent residents. The rationale behind this was that although innkeepers were not likely to select which passing travellers to accommodate, they were regarded as able to choose their permanent residents.
[39] *D*. 4, 9, 7.
[40] *D*. 47, 5.
[41] *D*. 4, 9, 1.
[42] Borkowski and Du Plessis *Textbook on Roman Law* 350.

The *actio exercitoria* was based on contract and made provision for the liability of an exercitor (a man who traded in a ship for profit) for the actions of his agents acting within the scope of their authority.[43] The existence of a mandate in some commercial or professional matter was necessary, and the action was confined to cases in which contracts were made by agents on behalf of the exercitor.[44]

The liability of the *publicanus* (or tax-farmer) for the acts of his subordinates was introduced in order to provide a specific remedy for victims of theft and violence committed by those subordinates in the different provinces.[45] As with the other forms of liability mentioned, it was absolute and did not require fault on the part of the *publicanus*.

The actions *de effuses et dejectis* and *de positis et suspensis* were introduced by the *praetors* in an attempt to keep the roads of Rome safe for those travelling along them.[46] These actions could be taken against occupiers of buildings who caused damage to the persons or property of pedestrians by throwing objects out of windows or placing objects in dangerous positions.[47] If a servant of the occupier caused harm in contravention of the Edict, his or her master would be liable. The liability was absolute[48] and extended beyond the acts of servants to acts of inmates.[49]

Liability under the Edict *de vi et vi armata* dealt with the forcible ejectment of a man from property.[50] In these cases the dispossessed party had to apply for an interdict forcing the other party to restore his possession. If the respondent did not comply with the terms of the Interdict he would be liable for damages.[51] Specific provision was made for liability of a master whose servant had committed the act of ejectment.[52]

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[43] Barlow *Vicarious Liability* 21.
[44] *Ibid.*
[45] Barlow *Vicarious Liability* 21-22. *D.* 39, 4, 1, 5.
[46] Barlow *Vicarious Liability* 22. *D.* 9, 3, 1, 1.
[47] The occupier need not have been the owner for the purpose of attaching liability. Burdick *Principles of Roman Law* 507.
[48] Borkowski and Du Plessis *Textbook on Roman Law* 350.
[49] *Ibid.*
[50] There were originally two Edicts, one dealing with ejectment by ordinary force and the other dealing with ejectment by force of arms. The two Edicts were fused by Justinian for the sake of practical convenience. Barlow *Vicarious Liability* 23.
[51] *Ibid.*
[52] *Ibid.*

When examining the various instances in which masters were held liable for the actionable conduct of their servants, it becomes clear that although the Romans had no general principle of vicarious liability, the idea of holding a master accountable for the acts of his servants in the absence of personal fault was not foreign to them. Indeed, the *praetors*' recognition of the need for a wider scope of liability in certain cases shows a willingness to depart from entrenched principles for reasons of policy. This is surely one of the earliest pieces of evidence of law being directed or diverted by policy, or altered to accommodate specific social circumstances. perhaps this broad-minded approach paved the way for the modern law of vicarious liability.

1.2.2. Roman-Dutch Law

The Roman-Dutch law on vicarious liability lacks clarity, perhaps due to the fact that the old writers seemed to have had divergent opinions on the subject.[53] Barlow points out that these conflicts of opinion have led some writers to conclude that the early law did not recognise vicarious liability at all.[54] Indeed, it has been said that "[t]here is apparently not a single authority of Roman-Dutch law to be found who states that an employer is as a general rule, responsible for the act of his employee acting within the sphere of his functions."[55] Though this may be true, it cannot be said that early Roman-Dutch law had *no* provision for the liability of a master for wrongs committed by his servant. Barlow observes that there are three different systems mentioned by the Roman-Dutch authorities which dealt with the liability of a master for the acts of his servant: " (a) Liability to the extent of wages due; (b) No liability at all; and (c) Liability *in solidum*."[56]

As regards the first system, masters would be held liable for the wrongs committed by their servants only to the extent of the wages due to them. According to Grotius masters or mistresses could not be liable for wrongs committed by their servants beyond the amount of their unpaid wages.[57] Voet pointed out that where a servant had

[53] Barlow *Vicarious Liability* 61. In *Mkize v Martens* 1914 AD 382 at 386 Lord De Villiers commented that the Dutch authorities "were in hopeless conflict with each other."
[54] *Ibid.*
[55] "Notes of Some Controverted Points of Law" 28.
[56] Barlow *Vicarious Liability* 61.
[57] J G Kotzé *Simon Van Leeuwen's Commentaries on Roman Dutch Law* Vol.II (1886) 21; *Mkize v Martens* 386-387.

caused harm to a third party by a wrong committed *outside* the scope of his employment, the master would be obliged to pay the injured party wages due to the servant.[58] If, however, the wrong was committed during the performance of the servant's appointed tasks *Voet* was of the opinion that the master would be liable *in solidum* for the ensuing damages, regardless of whether or not wages were due to the servant.[59] It seems that most authorities were in agreement that masters would be liable to the extent of wages due when the wrong was committed *beyond* the scope of employment and that this limitation did not apply when the wrong was committed *within* the scope of employment.[60] This notwithstanding, "A small but influential group of Roman-Dutch writers took the view that the liability of the master was limited to wages due, even in those cases where the delictual act was committed within the servant's scope of employment."[61]

Unfortunately Grotius' statement (which is used as authority for this proposition) is unclear and has been variously interpreted.[62] Barlow is of the view that Van der Keesel was perhaps the last authority to interpret the old Dutch and Roman laws correctly.[63] Van der Keesel interpreted Grotius' statement of the law to create a general principle applicable to nearly all cases of master's liability.[64]

As far as Barlow's second 'system' is concerned, it appeared that "[a] small school of Roman-Dutch writers took the view, that the master was not liable for the acts of his servants under any circumstances."[65] Some early authorities, such as Grotius, believed that a master could never be held liable for the acts of his servants in the absence of

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[58] *Mkize v Martens* 387.

[59] Barlow *Vicarious Liability* 61. Van der Keesel did not agree with Voet on this point and confined liability of the master to those cases in which he had been enriched by the conduct of his servant.

[60] Barlow *Vicarious Liability* 62. However, Groenewegen and Bort followed Grotius' idea that this wage-based liability could be applied to all cases.

[61] *Ibid.*

[62] Barlow *Vicarious Liability* 65; See also *Lewis v Salisbury Gold Mining Co* 1 OR 2-3 where Kotzé JA comments on Grotius' explanation. Both Groenewegen and Van der Keesel accept the statement as a general principle capable of being applied to all cases in which a servant has committed a wrong, whereas Voet and Van Leeuwen appear to confine this type of liability to cases in which the servant's acts are committed beyond the scope of employment.

[63] Barlow *Vicarious Liability* 70.

[64] *Ibid.* Van der Keesel recognised that the Roman liability of inn-keepers was extraordinary and not part of any general principle.

[65] Barlow *Vicarious Liability* 71.

personal fault.[66] Huber[67] (writing in the middle of the seventeenth century) was of the opinion that there was no liability for the wrongs of servants at all and that any such liability could not be reconciled with general legal principles.[68] Finally, van der Linden[69] adopted Grotius' view that in order to be held liable for the wrongs of a servant the master must have been guilty of some personal fault.[70]

Despite Voet's interpretation of wage-liability, neither of the two systems mentioned above expressly recognised the principle of liability in *solidum*. Indeed, it is extremely difficult to trace the development of this principle, which seemed to offend the well-established fault principle of Roman law. However, as already mentioned, the Roman exceptions to this principle were, at the very least, an acceptance of the possibility that the delictual acts of a free servant could render his or her master liable to the extent of the harm sustained by an injured party.

Although liability in *solidum* was almost certainly influenced by these exceptions, it is difficult to see how the Dutch authorities managed to distil such a number of distinct principles relating to specific factual situations into a generalised modern rule of vicarious liability. According to Barlow, "the historical basis of the modern Roman-Dutch rule is the fact of selection."[71] He goes on to point out that the early writers recognised that in *Corpus Juris* this type of liability was based on the lack of care in the selection of employees. It appears that this provided the necessary link between a number of cases which would otherwise have been clearly distinguishable from one another. This principle gained significant strength and it is argued that liability *in solidum* should be regarded as "the rule of Roman-Dutch law."[72]

[66] *Ibid.* Even though Grotius accepted that there could have been liability under certain statutes, he was still "inclined to hold that the master must be guilty of some personal fault," in order to draw down liability.
[67] *Praelectiones* (Vol. 2 ad. *D.* 15, 1, 4).
[68] Barlow *Vicarious Liability* 72.
[69] *Supplementum ad Voet* (9, 4, 10).
[70] Barlow *Vicarious Liability* 73.
[71] Barlow *Vicarious Liability* 76.
[72] Barlow *Vicarious Liability* 82.

1.2.3. English Law

Though the *respondeat superior*[73] doctrine is a relatively recent development' (having emerged during the late seventeenth and early eighteenth centuries),[74] it cannot be disputed that liability for the acts of others can be traced back to medieval times.[75] However, in England "[t]he early medieval idea of holding a master responsible for all his servant's wrongs gave way, with the passing of the feudal system, to the principle that his liability be limited to the particular acts he had ordered or afterwards ratified."[76]

The 'modern' concept of vicarious liability in English law is no older than three hundred years, and only developed its present characteristics during the earlier part of the nineteenth century.[77] Indeed, from about the early fourteenth up until the late seventeenth century, the idea that a master could be held liable for the wrongdoings of his servants in the absence of personal fault was unheard of[78] and Rogers observes that "[a]t one time liability seems only to have arisen if the employer had expressly commanded the wrong."[79]

This inclination towards what has been termed the 'general agency' or 'command' rule[80] is well illustrated by a number of early seventeenth century cases. In *Waltham v Mulgar*[81] in 1607 a servant was charged with the lawful task of confiscating the goods of the King's enemies. The servant unlawfully confiscated goods belonging to the plaintiff (who was not an enemy). It was held that his master could not be held liable as he had not authorised the servant's wrongful conduct either ostensibly or

[73] The Latin translation of *respondeat superior* is 'let the principal answer'. E A Martin (ed) *Oxford Dictionary of Law* 4ed (1997) 403.
[74] R W Baker "The Importance of a Word in the *Respondeat Superior* Doctrine" (1952-1955) 2 *UQLJ* 1 at 4.
[75] *Ibid.* To go back further than the seventeenth century in an examination of the English law on the subject is beyond the scope of this work. However it is worth noting that the English law was heavily influenced by Roman law on the subject. See O W Holmes "Agency" (1890-1891) 4 *HLR* 345 at 350.
[76] J G Fleming *The Law of Torts* 9ed (1998) 409; See also W P Keeton, D B Dobbs, R E Keeton and D G Owen *Prosser and Keeton on The Law of Torts* 5ed (1984) 500.
[77] Barlow *Vicarious Liability* 36; See also Fleming *The Law of Torts* 409; W V H Rogers *Winfield and Jolowicz on Tort* 17ed (2006) 882.
[78] Barlow *Vicarious Liability* 39; Baker "*Respondeat Superior* Doctrine" 4.
[79] Rogers *Tort* (2006) 882.
[80] Baker "*Respondeat Superior* Doctrine" 4.
[81] Moo. 1076; 72 ER 899.

otherwise. Similarly, in 1618 in *Southern v How*[82] it was held that the aggrieved party could not claim from a principal who had not directed his agent to enter into an agreement with the latter or to make the representations which had caused this party harm. In 1685 in the case of *Kingston v Booth*[83] it was held: "If I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act."[84]

This narrow interpretation of master's liability gradually gave way towards the end of the seventeenth century, to a less restrictive approach which would eventually evolve into the modern law of vicarious liability. The move towards strict liability for employers was perhaps due to a changing socio-economic climate in Britain. Indeed, Fleming points out:[85]

> "[T]he expansion of commerce and industry, which set in towards the end of the 17th century, necessitated an adjustment of this narrow rule. The change from home industry to ever larger units of production vitiated the assumption that a master could exercise a close control over his servants, and the increasing hazards arising from modern industry necessitated a wider range of responsibility than that previously countenanced."

It is said that Chief Justice Holt was responsible for introducing the modern principle in England,[86] and that "he and his contemporaries laid the foundations of the modern law."[87] The first of the cases in which the modern principle was applied was that of *Boson v Sandford*[88] in 1691. In this case the owners of a ship were held liable for the negligence of the ship's master which caused the plaintiff's goods (which were being transported on the owners' vessel) to spoil. Eyre J held that the ship's master was no more than a servant of the owners. Holt CJ held: "The owners are liable in respect of the freight, and as employing the master; for whoever employs another is answerable for him and undertakes for his care to all who make use of him."[89] Similarly, in *Turberville v Stamp*[90] in 1698 a master was held liable for the damage caused by a fire

[82] 34 E & E Dig, 123; 79 ER 400.
[83] Skin. 228; 90 ER 105.
[84] 90 ER 105.
[85] Fleming *The Law of Torts* 409.
[86] Barlow *Vicarious Liability* 36; Baker "*Respondeat Superior* Doctrine" 5.
[87] Barlow *Vicarious Liability* 40.
[88] 2 Salk. 440; 3 Mod. 323;1 Show. 29; 91 ER 382.
[89] 91 ER 382.
[90] Comb, 459; 1 Lord Raymond, 264; Skin., 681; 90 ER 590 & 903.

set by his servant in the course and scope of the latter's duties. Holt CJ held: "[I]f my servant doth any thing prejudicial to another it shall bind me, where it may be presumed that he acts by my authority, being about my business."[91]

The Chief Justice went further in *Sir Robert Wayland's* case[92] by holding that it would be "more reasonable" for the master to suffer for the cheats of his servants than for strangers and tradesmen to bear the consequent losses. In 1709 in the case of *Hern v Nicholls*[93] he made what has been described as one of his most famous statements:[94] "[T]he merchant was liable for the deceit of his factor [servant], though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reason that he who employs and puts a trust and confidence in the deceiver, than a stranger."[95] Barlow points out that the principle established in these cases was recognised as unquestioned law in 1725,[96] but it was not until 1826 in *Laughter v Pointer*[97] that a degree of certainty was reached on the subject. In this case the general principle that a master would be liable for the acts of his servants in the absence of personal fault (on the part of the former) was firmly established:[98]

> "By the middle of the next century it was finally accepted that the existence of [the employment] relationship was necessary for vicarious liability[99] and sufficient to make the employer liable, provided the act was done in the course of the employment. At the same time the phrase 'implied authority' which had been the cornerstone of the master's primary liability gives way gradually to the modern 'scope of employment'."

1.3. THE SOUTH AFRICAN LAW OF VICARIOUS LIABILITY

Having examined the Roman and Roman-Dutch law relating to vicarious liability, it is not difficult to understand why the South African courts relied heavily on the English law when developing the modern principles of vicarious liability. The apparent confusion surrounding the early Roman-Dutch writing on the subject was never really

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[91] 90 ER 590.
[92] 3 Salk. 234; 91 ER 797.
[93] 1 Salk. 288; 90 ER 1154, 91 ER 256.
[94] Barlow *Vicarious Liability* 42.
[95] 91 ER 256.
[96] Barlow *Vicarious Liability* 42.
[97] 5 B & C, 547; 108 ER 204.
[98] Rogers *Tort* (2006) 882.
[99] *Reedie v London and North Western Railway Company* (1849) 4 Exch. 244; 79 ER 1201.

cleared up, even though the courts were inclined to accept that liability *in solidum* was the relevant Roman-Dutch rule for vicarious liability. Research on the matter was superficial until Kotzé CJ's explanation of the old authorities appeared in 1894 in *Lewis v Salisbury Gold Mining Co,* in which the Chief Justice adopted the view that employers would be liable *in solidum* for the delictual actions of employees committed within the scope of their employment.[100]

Despite the various references to Roman and Roman Dutch principles it is clear that the South African courts looked to English law for guidance. Indeed, Barlow points out:

> "[O]ne is forced to come to the conclusion that our early Judges fell back, at least subconsciously, upon the well-recognised principles of English law and, with these principles in their minds, tried to find supporting authority in the old writers."

Insofar as this is true, it can be said that the development of the modern concept of vicarious liability in South African law mirrored the development of principle in English law.

[100] Barlow *Vicarious Liability* 91.

CHAPTER TWO

THE CURRENT TEST FOR VICARIOUS LIABILITY

2.1. INTRODUCTION

This chapter will outline the test for vicarious liability as it is applied by our courts.[1] The test is primarily based on two enquiries – the first to determine whether there is a relationship capable of founding liability,[2] and the second to determine whether the delict was committed in the course and scope of work performed on behalf of the person sought to be held liable. A number of factors are considered under each enquiry and it is therefore necessary to examine each of these individually.

The chapter is divided into two sections. The first examines the approach taken by the courts when determining whether or not a relationship between the wrongdoer and the party sought to be held liable is capable of founding liability. As far as this aspect is concerned, the various relationships which have been held to be capable of founding liability are examined in light of the multifaceted test[3] applied to determine whether or not such relationships exist.

The second section deals with the more complicated and much debated question of which acts will be deemed to have been committed in the course and scope of employment. Here a number of decisions are examined chronologically in order to illustrate how the court's approach has varied over the years. Particular attention is paid to the development of the 'creation of risk' principle since the decision in *Feldman v Mall.*[4]

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[1] Academic theories differ as far as the application of the test for vicarious liability is concerned.

[2] This is a relationship in which a party performs appointed tasks for another and is typically one of employment. However, a number of relationships are capable of founding liability; these relationships are discussed below.

[3] The test established in *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 (3) SA 17 (SCA).

[4] 1945 AD 733.

2.2. DETERMINING THE RELATIONSHIP BETWEEN THE PARTIES

As pointed out above, in order for vicarious liability to arise, there has to be a relationship between the party who committed the delict and the party sought to be held liable. According to Van der Walt and Midgley, "there is no uniform or universal principle governing each and every case, but the classic connecting factor is the employment relationship."[5] They go further to point out that the "courts have thus far considered three broad categories of relationships to be sufficiently analogous to satisfy the creation of the necessary link: employment; mandate; and that between an owner and driver of a motor vehicle."[6] These are, however, not the only categories, as any relationship sufficiently akin to one of employment will be capable of founding liability.[7]

2.2.1. The Employment Relationship

There are many factors which are considered when determining whether or not an employment relationship exists, the traditional one being the control exercised by an employer over the tasks of the employee. In terms of the 'control test', an employment relationship will exist if an employer has the right[8] to control the tasks of his or her employee and the manner[9] in which that employee performs the tasks.[10] If an employer has no control over the work being performed, the 'employed' person would be an independent contractor.

As a general rule, those employing the services of an independent contractor will not be held vicariously liable for any delicts committed whilst those services are being performed.[11] In such circumstances liability will only arise if a separate legal duty

[5] Van der Walt and Midgley para 29.
[6] *Ibid.*
[7] *Messina Associated Carriers v Kleinhaus* 2001 (3) SA 868 (SCA). See also McKerron *The Law of Delict* 90.
[8] In *Rodrigues v Alves* 1978 (4) SA 834 (A) it was held that 'actual control' was not a requirement as long as the 'right to control' existed.
[9] If there is a right to control the tasks, but not the manner in which they are performed, the relationship may be one of mandate and not necessarily one of employment.
[10] See D J McQuoid-Mason "Vicarious and Strict Liability" (1993) 30 *LAWSA* para 44.
[11] McKerron *Delict* 90.

exists. In *Langley Fox Building Partnership (Pty) Ltd v De Valence*[12] Goldstone AJA set out the requirements for holding an employer liable for delicts committed by sub-contractors. The same approach was taken in *Stein v Rising Tide Productions CC*[13] where it was held that although there may be circumstances under which a separate duty is owed, the general rule is that employers are not vicariously liable for the delicts of independent contractors.

Neethling, Potgieter and Visser[14] note that the control test has been validly criticised because of its simplistic and fictional nature and Rogers makes an interesting point when commenting on the application of the control test:

> "In modern conditions the notion that an employer has the right to control the manner of work of all his servants, save perhaps in the most attenuated form, contains more of fiction than of fact."[15]

This is particularly true where employees are given a wide discretion in the performance of their tasks. Van der Walt and Midgley give the examples of police, employed airline pilots, doctors and trustees as employees who work with a fair amount of discretion.[16] It is clear that where these types of employees are concerned, the control test does not provide a suitable indication of whether or not an employment relationship exists.[17]

In *Midway Two Engineering & Construction Services v Transnet Bpk* the court took a broad approach and held "that in determining the relationship between the parties a multi-faceted test should be utilised, taking account of all relevant factors and circumstances of the specific case."[18] This approach was similar to the "dominant impression" test applied earlier in *Smit v Workmen's Compensation Commissioner*;[19] a test which was recently adopted in the *Stein v Rising Tide Productions CC*, where it

[12] 1991 (1) SA 1 (A) at 12H-J.
[13] 2002 (5) SA 199 (C).
[14] Neethling *et al Law of Delict* 340.
[15] Rogers *Tort* (2006) 885.
[16] Van der Walt and Midgley para 29.
[17] These categories of employee will be discussed further at 2.2.4.
[18] Neethling *et al Law of Delict* 340.
[19] 1979 (1) SA 51 (A), see also: *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A); and *R v Feun* 1954 (1) SA 58 (T).

was held that "the crucial test, particularly in marginal cases, is whether or not the 'dominant impression' of the relationship is that of a contract of employment."[20]

When applying the 'dominant impression' test a number of factors are considered and weighed against each other. Wicke points out:[21]

> "The relevant method is to weigh the *indicia* that tend toward the existence of a contract of service against those indicating a contract of a different nature. The Judge follows a typological approach, according to which control is not an indispensable requirement of the contract of service but one of a number of *indicia*, the combination of which may be decisive."

Van Heerden J lists a number of relevant factors in his judgment in the *Smit* case,[22] among which are: the nature of the work performed; the manner of payment, (whether the payment is made at a fixed rate or on commission); the discretion given to the employee in the performance of his or her duties; whether the employee is restrained from working for another employer; whether or not the employee provides his or her own tools or equipment; the power of the employer to dismiss and the length of time of the employment.

In the English case, *Market Investigations Ltd v Minister of Social Security,*[23] Cook J made the following observation:[24]

> "No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question (whether or not an employment relationship exists), nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has,

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[20] At 206D.
[21] H Wicke *Vicarious Liability in Modern South African Law* (1997) (Unpublished LLM Thesis: Stellenbosch University) 49; see also E Mureinik "The Contract of Service: an Easy Test for Hard Cases" (1980) 97 *SALJ* 246 at 257-266.
[22] 206I-207B.
[23] [1969] 2 QB 173.
[24] 184-185.

and whether and how far he has an opportunity of profiting from sound management in the performance of his tasks."

It seems that a similar view is taken by the South African courts as the right of control is now viewed merely as one of a number of *indicia* that an employment relationship exists.[25] The broad, multifaceted test adopted in the *Midway* case is now accepted as the standard test for determining the employment relationship.

2.2.2. Mandate and Agency

Mandators will be vicariously liable for any delicts committed by their mandataries in the execution of their functions.[26] Similarly, principals will be held liable for delicts committed by their agents whilst performing tasks in the course and scope of their authority.[27]

In *Eksteen v Van Schalkwyk en 'n Ander*[28] the issue of attributing liability to a mandator for delicts committed by his mandatary was considered. The court sought guidance from Roman-Dutch law due to the apparent *lacuna* in the South African law on the subject.[29] On reviewing Roman-Dutch law, the court found that as a rule a mandator will be liable for the delicts of a mandatary only if the mandator was party to the actionable conduct,[30] or if he or she was personally at fault. Personal fault would arise where the mandator should reasonably have foreseen such conduct and taken the necessary steps to avoid it.[31] The court found that this was in line with South

[25] *Smit v Workmen's Compensation Commission* 1979 (1) SA 51 (A) at 62D–63B.
[26] Van der Walt and Midgley para 29.
[27] *Ibid.*
[28] 1991 (2) SA 39 (T).
[29] J R Midgley "Mandate, Agency and Vicarious Liability: Conflicting Principles" (1991) 108 *SALJ* 419. The author explains that these gaps were caused mainly by the use of imprecise terminology which was introduced from English law.
[30] As held by Schriener JA in *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) 210: "A person is himself liable who orders another to commit a delict which he then commits, or who orders another to do an act which in the natural course of things will lead to the commission of a delict, the act being done and the delict following." Another instance in which a mandator will be held liable is where the actionable conduct of the mandatary is subsequently ratified or adopted ((*Rectius enim dicitur in maleficio ratihabitionem mandato comparari:* Ulpian, *D*.43.16.1.14.), McKerron *Delict* 87). See also McQuoid-Mason "Vicarious and Strict Liability" para 52.
[31] Midgley "Mandate" 420.

African law and that as such, a mandator could not be held liable for the delict of his or her mandatary in the absence of involvement or personal fault.[32]

When determining the liability of mandators for the delicts committed by their mandataries it is important to note the difference between empowered and unempowered mandataries and to note the subtle difference between agents and mandataries.

> "A contract of mandate may be entered into by one who is not an agent at all, or by one who is an unempowered agent but is obliged to carry out certain instructions, or by one who is an empowered agent and is obliged to further his principal's interests."[33]

The distinction between a relationship of mandate and that of agency has been the cause some confusion. Midgley points out[34] that the court's insistence on using the existence of an agency relationship to found liability[35] in cases concerning mandates is erroneous as "authority is conceptually distinct from the relationship between the parties."[36] It is important to note that when determining the employment relationship, it does not matter whether or not the party committing the delict is an empowered or unempowered agent or mandatary.

When determining the relationship between the parties, the agreement between the mandator and the mandatary is the most important factor as it establishes the link which is necessary to found liability. The authority given to agents and mandataries should only be considered when determining the scope of employment.[37] As far as determining the relationship between the parties is concerned, the only issue is one of independence. Where an agent is an ordinary employee (which is often the case) there is no difficulty,[38] but where the agent is independent the issue becomes more complicated.

[32] *Eksteen v Van Schalkwyk en 'n Ander* 45E.
[33] A J Kerr *The Law of Agency* 3ed (1991) 13.
[34] Midgley "Mandate" 421.
[35] *Dukes v Marthinusen* 1937 AD 12.
[36] Midgley "Mandate" 421.
[37] This factor will be discussed at 2.3.
[38] An employer may be held vicariously liable for the delicts of his employees regardless of their status as agents, (empowered or otherwise).

The complication arises due to the apparent confusion between the terms 'independent contractor' and 'independent agent'. As mentioned above,[39] employers will not be held liable for delicts committed by independent contractors. However, agents, whether independent or otherwise, can still render their principals vicariously liable through their delictual conduct. Kerr points out that in the law of contract the term 'independent contractor' refers to a *conductor operis*, whereas in delict the term includes independent agents, mandataries as well as *conductores operis.*[40] The fundamental difference between mandataries, employees and independent agents is that the independent agent is not obliged to do any work at all if he or she does not wish to do so.[41] Although the independent agent can therefore be distinguished from an employee or mandatary, it does not follow that such an agent can be described as an 'independent contractor'.[42]

2.2.3. The Relationship Between Owners and Drivers of Vehicles

Under certain circumstances an owner of a motor vehicle may be held liable for the negligent actions of the driver of the vehicle. This liability arises where the driver has the right to control the way in which the vehicle is driven, or where the relationship between the owner and the driver is akin to one of employment.[43] The traditional requirements for determining whether or not the relationship is sufficient to found liability were set out by Fannin J in *S v Mavaneni*:[44]

> "In South Africa the owner of a motor car is liable for the negligent driving of it by another person authorised by him to drive it if:
> *(a)* the vehicle is being driven on behalf of the owner, and
> *(b)* the relationship between the owner and driver is such that the former retains the right to control the manner in which the car shall be driven."

[39] At 2.2.1 above.
[40] A J Kerr "Mandataries and *Conductores Operis*" (1979) 96 *SALJ* 323 at 323.
[41] Kerr *Agency* 17.
[42] Kerr *Agency* 18 gives an example of the confusion between the two terms when pointing out that the insurance agent in *Colonial Mutual Life Assurance Ltd v Macdonald* 1931 AD 412 was clearly an independent agent, "yet in two of the three opinions in the case he was described as an 'independent' contractor."
[43] *Messina Associated Carriers* 876F. See also McKerron *Delict* 94.
[44] 1963 (4) SA 89 (D) 91E-G.

Although the legal position has not changed much as far as vicarious liability of vehicle owners are concerned, the Supreme Court of Appeal has recently held in *Messina*:[45]

> "Ultimately the true enquiry is whether the relationship between the owner and the driver and the interest of the former in the driving of the latter is sufficiently analogous to the case of an employee driving in the course and scope of his employment to justify the negligence of the driver being attributed to the owner."

The justification for imputing such liability lies in social policy regarding what is just and equitable under the circumstances.[46] Neethling, Potgieter and Visser point out how the imposition of liability in cases such as this has been explained with reference to the 'risk theory'.[47] They draw attention to *Paton v Caledonian Insurance Co*[48] where Henning J made the following observation: [49]

> "It seems to me that the owner of a potentially dangerous thing, such as a motor vehicle, who retains control of it, although he allows another to handle it, is vicariously responsible to others for the harm caused to them by such handling."

The reason for attributing liability was oversimplified in this case. It is submitted that this justification for liability, although valid, cannot stand alone without reference to an employment or mandate relationship between the parties.[50] This kind of relationship is necessary in that "the basis of liability on the part of the owner is that the vehicle is driven by the other at his instance or with his concurrence"[51] and for his purposes. This is supported by Schriener JA in *Carter & Co. (Pty) Ltd v McDonald*,[52] quoting Salmond:[53]

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[45] Scott JA in *Messina Associated Carriers* 175H-I.
[46] McQuoid-Mason "Vicarious and Strict Liability" para 55: "The rationale for the vicarious liability of the owner of a motor vehicle is said to be that, while drivers may be men of straw, owners are more likely to be insured or may otherwise be capable of absorbing the loss."
[47] Neethling *et al Law of Delict* 345.
[48] 1962 (2) SA 691 (D).
[49] At 695.
[50] It is interesting to note that under the *actio de pauperie* the negligence of a handler of a dangerous animal may be used as a defence to an action against the owner of that animal. However, where the handler is the employee of the owner, the latter may be held vicariously liable for the former's negligence: *Lever v Purdy* 1993 (3) SA 17 (A).
[51] J B Talbot "Car Owner's Liability for Friend's Driving" (1964) 81 *SALJ* 73 at 78.
[52] 208B-C.
[53] R F V Heuston and R A Buckley *Salmond and Heuston on the Law of Torts* 19ed (1987) para 26(5).

> "In order to render the owner liable it is necessary to find as a fact that the driver was acting, not for his own purposes, but for those of the owner of the car. If he lent the car to his friend for his friend's purposes he would not be liable. For control means that the journey is the journey of the principal."

2.2.4. Discretionary Performance of Functions

As mentioned above,[54] there are many types of employment relationship in which employees enjoy a wide discretion when performing their tasks. Some common examples of these types of employees are doctors, airline pilots, police and trustees.[55]

In *Esterhuizen v Administrateur Transvaal*[56] it was held that the provincial administration could be held liable for delicts committed by doctors in its employ, even though these practitioners conducted their work with wide discretion. As Burchell points out:[57]

> "[A]ny control, or even the right of control, over their conduct is limited. However, they fall into the category of 'servants' and if they were negligent while acting in the course and scope of their employment their employer (the Minister of Health or, in older cases, the provincial administration) would be vicariously liable."

The same principle was applied in *Minister van Polisie en 'n Ander v Gamble en 'n Ander*[58] where it was held that members of the police force were always under the control of the State when they were about police business, notwithstanding the fact that they were given a wide discretion in performing their appointed tasks.

As far as trustees are concerned the Supreme Court of Appeal confirmed in *Van den Berg* that their employers will be held vicariously liable for any delicts committed by these employees while discharging their duties.[59] The fact that trustees act with a wide discretion does not exempt their employers from liability.

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[54] At 2.2.1.

[55] Van der Walt and Midgley para 29.

[56] 1957 (3) SA 710 (T).

[57] J Burchell *Principles of Delict* (1993) 216. See also *Mtetwa v Minister of Health* 1989 SA 600 (D).

[58] 1979 (4) SA 759 (A).

[59] *Van den Berg v Coopers and Lybrand* 2001 (2) SA 242 (SCA).

2.2.5. Liability of Partners

A partnership can be held vicariously liable for the actionable conduct of one of its partners. However, as Midgley points out, "[T]he rationale, and as a result, the requirements for liability remains unclear."[60] In *Rodrigues v Alves & Others* the Appellate Division touched on the issue of liability of partners, but it seems that the court failed to present a clear and unequivocal relationship requirement. Viljoen AJA made the following observation:[61]

> "A partner may act in many capacities for the partnership and in my view it depends upon the nature of the capacity in which he acts whether the partnership incurs vicarious liability. It is therefore not his capacity as a partner but the capacity in which he acts for the partnership which is important."

He went on to hold that where a partner carried out general representative work for the partnership, he or she would be acting as a servant of the partnership, but where the partner engaged in specific work for the partnership, that work would make the partner an independent contractor. It is difficult to see how any partner can be considered an independent contractor *vis-á-vis* the partnership. Surely, in a situation in which a partner engages in specific work for the partnership, that partner is acting as the agent of the partnership. As Midgley points out,[62] this *dictum* suggests that the partnership relationship itself is insufficient to found liability. This aspect of the decision is not problematic, but the implication that the partner must be acting as an 'employee' in order for liability to arise is.[63] Surely the distinction between independent actions and those performed in the course and scope of the partnership's business should be dealt with at the second stage of the enquiry?[64]

McKerron points out that, although there is no direct authority in point, "The liability of partners for each other's delicts is governed by the same principles as the liability

[60] J R Midgley *Lawyers' Professional Liability* (1992) 187.
[61] At 839 F.
[62] Midgley *Lawyers' Professional Liability* 187.
[63] Interestingly, McKerron is of the opinion that "the doctrine of employer's liability is not applicable, since no partner is the servant or employee of any other partner, or of the partnership." McKerron *Delict* 89.
[64] The second leg of the test for vicarious liability which is used to determine whether or not an employee's actions were performed during the course and scope of employment. Discussed further at 2.3.

of a principal for the delicts of his agents."[65] The fact that a partner is a representative of the partnership business serves as a *prima facie* indication that an agency relationship exists between the partner and the partnership. There seems to be no good reason therefore, to treat partnership arrangements any differently from those of agency when applying the principles of vicarious liability. "If a partner is not an employee, principles similar to those applicable to representatives should be applied."[66]

2.2.6. Relationships Analogous to Employment

The courts take a fairly broad view as far as the 'employment' relationship is concerned[67] and therefore liability may also arise "where 'in the eye of the law' the one was in the position of the other's servant,"[68] even though no formal employment relationship existed between the parties. In the *Messina Associated Carriers v Kleinhaus*,[69] Scott JA pointed out that this is an extension of the concept of employment based on policy considerations.

In terms of this principle, the relationship can be extended to any relationship analogous to that of employment and can include a relationship between a parent and child[70] and even one akin to such a relationship.[71] In *Dowling v Diocesan College and Others* it was held that a case of vicarious liability could be made out against a school for delicts committed by its prefects.[72] A similar application of the principle can be seen in *Gibbins v Williams, Muller, Wright & Mostert Ingelyf en Andere,*[73] where a university was held liable for the negligent conduct of a house committee member during an initiation ceremony. The plaintiff was forced to dive into a 'mud bath' which was not deep enough for this purpose and was left paralysed due to the back injuries he sustained.

[65] McKerron *Delict* 89. See also McQuoid-Mason "Vicarious and Strict Liability" para 53.
[66] Midgley *Lawyers' Professional Liability* 187.
[67] *Midway Two Engineering & Construction Services v Transnet Bpk* 23H-J.
[68] *Messina Associated Carriers v Kleinhaus* para 10H-I.
[69] *Ibid.*
[70] As seen in *Messina Associated Carriers.*
[71] *Dowling v The Diocesan College* 1999 (3) SA 847 (C) 852H.
[72] This confirmed the decision in *Hiltonian Society v Crofton* 1952 (3) SA 130 (A) where it was held that the actions of prefects could render a school vicariously liable where their powers duties were similar to those exercised by teachers. In effect, such duties rendered the prefects *de facto* employees.
[73] 1987 (2) SA 82 (T).

It has recently been held that provincial government can be vicariously liable for the negligent acts of a cabinet minister. In *Faircape Property Developers (Pty) Ltd v Premier, Western Cape*[74] it was held that the fact that the minister in question was accountable to parliament and in particular to the premier resulted in the relationship being analogous to one of employment. This decision followed the position taken in *Mangope v Asmal*,[75] where it was held that the accountability of cabinet ministers to Government serves as a *prima facie* indication that Government has control over the way in which these ministers fulfil their functions.[76] This 'control' was considered sufficient to create a relationship which was capable of founding liability. As such it was held that unless the minister could show that he was acting outside of his powers as a minister, the Government could be held vicariously liable for his conduct.[77] The decisions in these two cases clearly illustrate that the courts consider the relationship between organs of State and cabinet ministers as one analogous to employment and is therefore capable of founding vicarious liability in the same way as an ordinary employment relationship.[78]

2.2.7. Multiple Employers

An interesting difficulty is presented when an employee who works for two or more employers commits a delict in the course of his or her duties. The obvious question is which employer bears responsibility for the employee's conduct?

In *R H Johnson Crane Hire (Pty) Ltd v Grotto Steel Construction (Pty) Ltd*[79] Conradie J held that the control test gives the best indication of where the liability should lie in cases where more than one employer was involved. It was held that liability should follow the employer who controls the manner in which the work is to be conducted as "the master who controls the manner in which the servant does his work is the one

[74] 2002 (6) SA 180 (C) 201G-H.
[75] 1997 (4) SA 277 (T).
[76] At 291B.
[77] At 291C.
[78] See J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 147-149.
[79] 1992 (3) SA 907 (C).

who can most effectively control the risk of harm."[80] The issue in this case was whether the respondent could be held liable for the negligent conduct of a crane operator, who was in fact employed by the applicant. It was held that although the temporary employer had the right to control what the employee worked on, the employer had no right to control the manner in which the work was performed. It was therefore held that the temporary employer could not be held vicariously liable for the harm. This principle was later applied in *Rofdo (Pty) Ltd t/a Castle Crane Hire v B & E Quarries (Pty) Ltd*,[81] where it was held that although a temporary employer could direct an employee to perform certain tasks, a general employer who had the right to control the manner in which the tasks were performed would be vicariously liable for any delicts flowing from the performance of these tasks.

A similar position is followed by the English courts. A good example is *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd*[82] which presented very similar facts to those seen in the *R H Johnson Crane Hire* case. Here it was held that the general employer had the power to direct the way in which the employee operated the machine, whereas the temporary employer only had the power to direct what work was to be done and where. The general employer was held liable for the harm caused.

In both English and South African law the general employer is *prima facie* liable for an employee's negligence – the burden of proving otherwise is placed on that employer.[83] If the general employer can prove that the delict was committed in respect of actions over which the temporary employer had control, the latter will be held liable.[84] This principle was adopted by the Supreme Court of Appeal in *Midway Two Engineering & Construction Services v Transnet Bpk*, where a temporary employer was held liable for the delict of a lorry driver who was hired out by a labour broker. It

[80] At 907D-E. In this case the respondent hired a crane and the services of a crane driver to operate the machine from the applicant. The applicant sought to recover damages from the respondent for losses sustained as a result of the negligent use of the machine. An excessive load was placed on the crane, causing it to fall over a precipice.
[81] 1999 (3) SA 941 (SE).
[82] 1947 AC 1.
[83] *Rofdo (Pty) Ltd t/a Castle Crane Hire v B & E Quarries (Pty) Ltd* 948H.
[84] W V H Rogers *Winfield and Jolowicz on Tort* 16ed (2002) 711. See also McQuoid-Mason "Vicarious and Strict Liability" para 45.

was held that the nature of the employee's work was such that the temporary employer had the right to control how it was performed.

Interestingly, the English courts follow a 'fact-specific' approach, in terms of which inferences are drawn from the type of work being performed by the employee. Rogers observes: [85]

> "A distinction is drawn between cases where a complicated piece of machinery and a driver are lent, and cases where labour only, particularly where it is not of a highly skilled character, is lent. In the former case, it is easier to infer that the general employer continues to control the method of performance.... In the latter case it is easier to infer that the hirer has control not merely in the sense of being able to tell the workman what he wants done, but also of deciding the manner of doing it."

The South African authorities tend to favour a broader, principle-based approach, whereby all of the facts and circumstances surrounding the particular case are considered under a multifaceted test.[86]

2.3. THE 'COURSE AND SCOPE' ENQUIRY

> "How can any wrong be in the scope of a servant's employment? No sane or law-abiding employer ever hires someone to tell lies, give blows or act carelessly."[87]

Most employers do not hire people to lie to, cheat, assault or steal from their clients, nor do they hire people knowing that these employees will act carelessly, causing harm to others. Unfortunately many employees act carelessly and many wilfully depart from their duties in order to satisfy their own, often criminal, ends. Under these circumstances the courts have to determine whether or not the employee's digression was sufficient to take his or her acts outside the course and scope of employment.[88]

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[85] Rogers *Tort* (2002) 711.
[86] *Midway Two Engineering & Construction Services v Transnet Bpk* 22E-23I.
[87] Rogers *Tort* (2006) 892.
[88] Although the term 'employment' suggests the existence of an employment relationship in the ordinary sense, it is used throughout this section to describe a state of affairs in which one party performs work for another and includes all of the categories of relationships capable of founding liability discussed in 2.2 above.

2.3.1. The Basic Requirements

When deciding on liability of employers for the actionable conduct of their employees, courts have to reach a conclusion as to whether or not the conduct occurred during the course and scope of the employee's service. If it is found that the conduct occurred outside the course and scope of employment the employer will not be held liable. This principle is neatly set out in *Mkize v Martens*:[89]

> "A master is answerable for the torts of his servant committed in the course and scope of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment."

This leg of the enquiry is focused on determining whether or not an employee was engaged in the work of his or her employer at the time of the delict. "The focus is not so much on the wrong committed by the servant as upon the act he is doing when he commits the wrong."[90]

The question of whether or not an act was committed in the course and scope of employment is one of fact[91] and there is therefore no exact test or formula. This has caused some confusion, particularly as the courts have yet to reach consensus on the issue.[92]

Van der Walt and Midgley point out that in employment cases, the activity of the employee must relate to what that employee is generally employed to do.[93] Furthermore the functions performed by the employee must have been carried out with the purpose of furthering the employer's business interests.[94] Rogers explains this concept as follows:[95]

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[89] 390.
[90] Rogers *Tort* (2006) 893.
[91] Van der Walt and Midgley para 29; McKerron *Delict* 95.
[92] K Calitz "Vicarious liability of employers: reconsidering risk as a basis for liability" (2005) 2 *TSAR* 215 at 216.
[93] Van der Walt and Midgley para 29.
[94] *Ibid.*
[95] Rogers *Tort* (2006) 893.

> "The underlying idea is that the injury done by the servant must involve a risk sufficiently inherent in or characteristic of the employer's business that it is just to make him bear the loss."

First, it is necessary to establish what the employee was employed or instructed to do; next to determine whether a particular deviation from the employee's work is so far removed from his or her appointed task as to conclude that the employee had been derelict in his or her duties.

2.3.2. The Scope of an Employee's Instructions

The scope of an employee's instructions can be determined with reference to a contract of service between the employee and his or her employer. However, the scope of authority[96] to perform certain tasks is seldom clear. This means it is often necessary to go beyond the contract to make an assessment based on the facts of the particular case.

There is some confusion surrounding the determination of whether certain acts are committed within the scope of an employee's authority. The problem this raises arises from the fact that courts have not been consistent in the application of an accepted general principle. In *Minister of Law and Order v Ngobo*[97] the court took a broad approach similar to that taken in *Minister of Police v Rabie*[98] and did not go sufficiently into the issue of authority. In these cases the court merely asked, "Did the employee engage in the affairs of the employer at the time the delict was committed?"[99]

In *Ess Kay Electronics Pte Ltd v First National Bank of South Africa Ltd,*[100] however, Howie JA said: "The question is always: were the acts in the case under consideration in fact authorised; were they in fact performed in the course of the employee's

[96] It must be noted that when using the word 'authority' in this context, I am not necessarily describing an agency situation. Instead 'authority' is used to describe what an employee is permitted to do in the course and scope of his or her employment.
[97] 1992 (4) SA 822 (A).
[98] 1986 (1) SA 117 (A).
[99] Van der Walt and Midgley para 29.
[100] 2001 (1) SA 1214 (SCA).

employment?"[101] He went further to point out that even if the actions of the employee "superficially, appear to form a close link between the wrong and the employee's duties,"[102] the employer cannot be held liable. Van der Walt and Midgley point out that the emphasis on authorisation in Howie JA's formulation might be misleading and suggest that the second part of the question should be treated as an alternative to the first part.[103]

The *Ess Kay* decision suggests that in order for an act to be within the course and scope of employment, it *must* have been authorised. With respect, this makes very little sense and it is suggested that this is in fact not what the court intended. It seems far more likely that the intention was to frame these two questions in the alternative. In *Estate Van der Byl v Swanepoel*[104] it was clearly established that employees acts do not have to be authorised in order to fall within the course and scope of their employment.[105] This principle was confirmed in *Feldman v Mall* where it was held that an employer could be held liable "even for acts which he has not authorised."[106] This principle makes sense in that it makes allowance for the fact that the conduct of an employee which leads to the delict is very frequently unauthorised. A good example of the principle is the classic case of drivers deviating from their authorised routes.[107]

If it is accepted that the scope of an employee's instructions do not necessarily influence the finding that certain acts were committed within the course and scope of employment, it must be asked what the relevance of determining an employee's authority has to the 'course and scope' enquiry where ordinary employment is concerned.[108] The answer is that the employee's instruction serves as a helpful point of reference from which it is possible to determine the extent of the employee's deviation, if any.

[101] At 219 para 10.
[102] *Ibid.*
[103] Van der Walt and Midgley para 29.
[104] 1927 AD 141.
[105] At 147.
[106] At 774.
[107] See *Estate Van der Byl v Swanepoel.*
[108] In cases of mandate and agency it is clear that the scope of authority has more direct bearing on the enquiry: *Eksteen v Van Schalkwyk en 'n Ander.*

2.3.3. Deviation from Instructions

After the scope of employment has been established, it is necessary to determine whether and how far the employee deviated from his or her instructions while committing the delict. Van der Walt and Midgley point out that "the test is whether the employee's digression is so great in respect of time and space that it cannot reasonably be said that the functions to which he or she was appointed are still being exercised."[109] They go on to explain that the courts follow a 'two-tier' approach which was described by Zulman JA in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*[110] as follows:[111]

> "The effect of the 'two tier test', as postulated by Jansen JA, is that an employer will only escape liability if his employee had the subjective intention of promoting solely his own interests and that the employee, objectively speaking, completely disassociated himself from the affairs of his employer when committing the act."

The problem with this test is that it is unclear. It provides no clearly defined requirements and therefore too much is left to interpretation. The courts have not taken a concrete stance on the issue and as a result there is little legal certainty. Indeed in *Union Government v Hawkins*[112] it was observed that the reason for the lack of a hard and fast rule is due to the factual basis of the enquiry which makes it difficult to set rigid guidelines. It is therefore necessary to examine the facts of the relevant cases in order to illustrate how the issue has been approached over the years.

A good example of a simple deviation case is *Viljoen v Smith.*[113] In this case the appellant's employee, a farm labourer, caused a veld fire on the respondent's farm while deviating from his employer's instructions.[114] The respondent alleged that the employee had caused the fire negligently in the course and scope of his employment

[109] Van der Walt and Midgley para 29. See also McQuoid-Mason "Vicarious and Strict Liability" para 46.
[110] [2001] 1 All SA 1 (A).
[111] At 6D.
[112] 1944 AD 556 at 564.
[113] 1997 (1) SA 309 (A).
[114] The employee, while working on his employer's vineyard, had climbed through a fence onto the respondent's farm in order to relieve himself. While doing so behind some bushes, he attempted to light a cigarette and the match head flew off, causing a fire.

and that consequently the appellant was vicariously liable for the damage sustained. It was argued by the appellant that the employee's actions were outside the course and scope of his employment in that they were for a personal purpose. It was further argued that the distance, some 300 metres from his place of work, that he travelled to reach the respondent's farm was an indication that he had abandoned the work of his employer.

The court held, firstly, that not every personal act committed by an employee during his or her employment necessarily fell outside the course and scope of employment[115] and that under the circumstances, the personal nature of the employee's acts did not take him outside the course and scope of his employment. Regarding the appellant's second argument, the court held that although the employee had deviated from his work and had acted against his employer's wishes,[116] his degree of digression was not material enough to conclude that he had abandoned the work of his employer. It was held that he was acting within the course and scope of his employment and his employer was therefore liable.

Even though the issue was not dealt with in detail in the *Viljoen* case, it had previously been established in *Estate Van der Byl v Swanepoel*[117] that where an employee deviates from the instructions of his or her employer, and commits a delict while deviating, the fact that the employee was unauthorised to perform the act in question will not necessarily free the employer from liability. In fact, an employer may even be held liable where an employee deliberately disobeys instructions.[118] Van der Walt and Midgley point out:[119]

> "Where conduct has been forbidden, a distinction is drawn between a prohibition that limits the sphere of employment and one that restricts conduct within the sphere of employment. In the former instance the employee acts outside his or her course of employment, while in the latter instance the conduct falls within that scope."

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[115] 315F-G.

[116] The respondent had forbidden his employees from entering the appellant's farm. It appears that the respondent did not concentrate on this fact in his argument. Even though it was briefly considered, the court did not find this to have an influence on the course and scope enquiry.

[117] 146. See also *Feldman v Mall* 774.

[118] *Ibid.* See also McKerron *Delict* 99.

[119] Van der Walt and Midgley para 29.

The *Estate van der Byl* case neatly illustrates this principle. The appellant was sued for the negligent conduct of one of his drivers who, at the time of the delict, was deliberately disobeying his instructions.[120] The driver carried a passenger through an area in which he was strictly forbidden to carry passengers. On the way back from dropping the passengers off, the driver collided with the respondent's cart, seriously injuring him.

The respondent claimed that the appellant was vicariously liable in that the driver of the taxi was acting in the course and scope of his employment even though he was acting against the instructions of his employer. It was held that because the driver was acting for the benefit of his employer and carrying on his employer's business, he was still acting in the course and scope of that business. It is clear in this case that the instructions of the employer prohibiting the employee's actions, merely restricted the conduct within the sphere of the employment and did not restrict the sphere of the employment itself.[121]

This approach makes sense and leaves little room for inconsistent interpretation. However, the situation becomes more complicated where an employee goes on what the courts describe as 'a frolic of his own'.[122] In this case the employee temporarily disengages from his or her work to further his or her own interests. The courts have the difficult task of having to draw a line between what is and what is not within the course and scope of employment. As pointed out above, there is little legal certainty as far as this issue is concerned, largely due to the fact that the courts have failed to apply a concrete test.

In *Feldman v Mall* an employee of the appellant was ordered to deliver various parcels using a company service vehicle. His instructions were to return the service

[120] The appellant owned a number of taxi cars and carried on a taxi business in Gordon's Bay. He did not have a licence to operate in the neighbouring municipality of Somerset Strand. He did, however, have permission to carry passengers to and from the railway station in Somerset. He expressly instructed his drivers that they were not permitted to carry passengers between points *within* the Strand.

[121] It must be noted that employers cannot be held liable for delicts committed by employees who take it upon themselves to perform functions which clearly lie outside the sphere of employment, even though these functions may be for the benefit of the employer: *Roos v De Loor's Ltd* 1931 TPD 100.

[122] This well known phrase was coined in England by Parke B in *Joel v Morrison* (1834) 6 C&P 501 at 503. See Y B Smith "Frolic and Detour" (1923) 23 CLR 444.

vehicle to a certain garage after having distributed the parcels. After having delivered the goods however, the employee drove the service vehicle to a place some miles away from his employer's place of business and proceeded to drink enough alcohol so as to render him incapable of driving safely. While attempting to drive back to the garage he negligently collided with and killed the respondent's husband. The respondent claimed damages for loss of support for her and her two minor children. The court held that the appellant was liable for the delict committed by its employee, in that the employee had not entirely abandoned the work of the employer even though he had deviated from his instructions. In this case an important factor was that the employee had not fully disengaged from his duties when he deviated and that by attempting to return the service vehicle it was clear that he was engaging in the work of his employer.[123]

It is often easy to distinguish between acts committed in furtherance of one's own interests and those committed for the benefit of an employer. For example, in *Carter & Co v McDonald* an employee got permission to go to the market for his own purposes during work hours and was lent a company bicycle. On his way to the market he negligently collided with the respondent who was crossing the road. It was held on appeal that although the employee was using a company vehicle and was technically on company time, it was clear that he was engaged in carrying out his own business and not that of his employer. The employer could not, therefore, be held vicariously liable for his negligent conduct.[124]

Although this distinction seems straightforward, a difficulty arises where an employee is acting within the course and scope of his employment for one purpose and outside it for another. Examples of this are most commonly found where drivers carry unauthorised passengers. They are still carrying out their main duty for the employer, but acting outside of their scope of employment by carrying the unauthorised passengers.

[123] However framed, this decision is a clear example of a 'policy-based' ruling.
[124] Schriener JA observed that in this case the employee was not acting as an employee, rather as a bailee to whom the employer lent his property (at 208).

In *South African Railways and Harbours v Marais*[125] an employer was sued for the negligent conduct of one of its train drivers who was deviating from instructions and performing his appointed tasks at the same time. The driver of the train allowed a passenger to accompany him and the fireman on the train's engine contrary to a standing order prohibiting him from allowing passengers from travelling on the engine.[126] The passenger's wife claimed damages, arguing that the actions of the driver rendered his employers vicariously liable for her husband's death and the resultant losses she sustained. It was admitted that the accident had occurred due to the negligence of the driver. However, it was argued by the appellant that in allowing the passenger to accompany him on the engine, the driver of the train was acting outside the course and scope of his employment.

This case raised an interesting difficulty as the driver of the train was plainly acting in the course and scope of his employment for the purpose of driving the train, but it was clear that he had invited the passenger to join him for his own personal purpose and against his employer's instructions. The court had to determine whether the instruction prohibiting the driver from allowing unauthorised passengers limited the scope of his employment. It was held that this prohibition did limit the scope of the driver's employment and that therefore, by allowing an unauthorised passenger access to the engine for personal reasons, the driver was acting outside the course and scope of his employment.[127] Watermeyer CJ made the following remark in summing up:[128]

> "In my opinion a master cannot be held liable for the death of a person which is caused by an extra danger to such person not created by a negligent performance of the master's work but by an act done by his servant for his own purposes and entirely outside the scope of his employment."

[125] 1950 (4) SA 610 (A). See also *Rossouw v Central News Agency Ltd* 1948 (2) SA 267 (W).
[126] The three of them were drinking brandy and the driver was driving at an excessive speed. It was proved that the excessive speed caused the train to derail, and as a result of the derailment all three men were killed by burns they sustained. It was also proved that had the passenger not been in the immediate vicinity of the engine when the train derailed, he would not have been killed.
[127] Interestingly, in the minority judgment delivered by Greenberg JA, emphasis was placed on the duty of care owed by the appellant to the respondent. It was held that such duty did not exist as the victim was not foreseeable by the appellant. See McKerron "Passenger Killed While Travelling on Engine of Train: Liability of Administration" (1951) 68 *SALJ* 1, where the author criticises this minority judgment. See also P Q R Boberg *The Law of Delict: Volume I – Aquilian Liability* (1984) 332.
[128] At 619H-620A.

The same approach was recently followed in *Bezuidenhout NO v Eskom,*[129] where a 19-year-old boy hitched a ride with the employee of the respondent who was busy carrying out his appointed tasks.[130] The vehicle was involved in an accident which was caused by the negligence of the driver and the young man was badly injured. His father sued the respondent on his son's behalf. It was held that the employer's instructions not to carry unauthorised passengers limited the scope of the driver's employment.[131] Thus, by disregarding his employer's instructions, the employee was acting outside the course and scope of his employment. This was an important decision illustrating as it did the difference between prohibitions which limited the scope of employment and those which merely determined the manner in which tasks were to be performed.[132] It was also established that an employee could simultaneously act within and outside the course and scope of employment and that the employer's liability would depend on the capacity in which the employee was acting when committing the delict. This follows the "dual capacity approach"[133] which was also adopted in the English case, *Twine v Beans Express.*[134] In terms of this approach an employee can act within the course and scope of his employment for one purpose and outside it for another.[135]

2.3.4. Intentional Wrongs and the Creation of Risk Principle

It is very difficult to assess whether or not an employee is acting in the course and scope of his employment when committing wrongful acts which are clearly unauthorised by their employers. As far as the subjective part of the enquiry is concerned,[136] it is clear in most instances that employees who deliberately commit wrongful delictual acts do so of their own volition and for entirely personal reasons.

[129] 2003 (3) SA 83 (SCA).
[130] The driver was expressly prohibited from carrying unauthorised passengers.
[131] At 93G.
[132] In the former instance, an employer would escape liability where an employee deviates from the instruction, whereas in the latter instance the deviation would not take the employee's conduct outside the course and scope of his or her employment.
[133] K Calitz "Vicarious liability" 223.
[134] [1946] 1 All ER 202 (KB).
[135] Interestingly, the *Twine* case dealt mainly with the 'duty of care' issue and was used as authority in the much criticised minority judgment in *SAR v Marais*. It was held that an unauthorised passenger was a trespasser and therefore was not a reasonably foreseeable plaintiff whom the employer would owe a duty of care. This illustrates a marked contrast to the South African approach to such delictual claims, as pointed out by McKerron in his criticism of the minority judgment in *SAR v Marias*.
[136] The two-tier test explained by Zulman JA in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 6D.

The question which needs to be asked in such cases is whether or not social policy demands that their employers be held vicariously liable for their actions, even though subjectively speaking they were acting on a frolic of their own? As Van der Walt and Midgley point out, the actionable conduct of such employees is often the antithesis of an act carried out in the course an scope of their employment.[137]

The general principle as far as this type of deviation is concerned was clearly set out in *Mkize v Martens,*[138] in which Innes CJ held that an act undertaken solely for an employee's own interests and purposes cannot render an employer vicariously liable, even where the act in question was committed during the employee's service.[139]

In *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy,*[140] the respondent sought damages from the appellant after one of its employees assaulted him. There had been an altercation between the respondent and a bartender, who was in the employ of the appellant, at the latter's bar. When the respondent left the bar the bartender followed him outside and assaulted him. The court held:[141]

> "It was a personal act of aggression done neither in furtherance of his employer's interests, nor under his express or implied authority, nor as an incident to or in consequence of anything Goldie was employed to do. The reasons for and circumstances leading up to the assault may have arisen from the fact that Goldie was employed by the appellant as a barman, but personal vindictiveness leading to the assaults on patrons does not render the employer liable."

It is important to note that the actions of the employee were not incidental to anything which he was employed to do. A difficulty arises where the deliberate wrongful actions of employees are incidental to their employment. Burchell points out that if the act of the employee causing the harm was necessarily incidental to an authorised

[137] Van der Walt and Midgley para 29 fn 39.

[138] At 390.

[139] See 2.3.1 above. Although this decision appears to disregard the principle that an employer can be held liable for the deliberate and unauthorised delictual conduct of employees; a principle which was later acknowledged in *Estate van der Byl v Swanepoel* and confirmed in *Feldman v Mall.* This statement of the legal position fails to account for the fact that in many instances the delictual acts of employees committed within the course and scope of their employment are committed solely to further the interests of those employees. Innes CJ's decision suggests that under these circumstances employers can never be held accountable. The result is surely out of line with the policy considerations behind vicarious liability.

[140] 2003 (4) SA 34 (SCA).

[141] 41H-I.

act, the employer will be held liable.[142] The author gives the example of *Mkize v Martens* where, despite Innes CJ's restrictive interpretation, the employer was held liable for damage caused by a fire which was started by his employees while attempting to cook themselves a meal. (The employer supplied the meal as per their employment agreement). It was held that the fact that they were permitted to have meals while working indicated that this fell within the scope of their employment, and that therefore the cooking of the meals was reasonably incidental thereto. It is difficult to reconcile the result of this case with Innes CJ's interpretation of the legal position. It is perhaps significant that, although the cooking of such meals was obviously in the interests of the employees, those interests were not sufficiently divorced from those of their employer to warrant a finding that they were acting outside the course and scope of their employment.

It is not always easy to determine what actions are incidental to an employee's tasks, and although it may seem that certain acts are not reasonably incidental, these acts may still be committed within the general course of employment. The difficulty often arises where an employee's position creates the occasion for him or her to commit the wrongful conduct.

Unfortunately the courts have not been clear on this issue and there are a number of contrasting decisions which illustrate a reluctance to accept the application of a defined set of guidelines. Consequently there is little legal certainty as far as this aspect of vicarious liability is concerned.

The creation of risk principle was used as one of the justifications for liability by Watermeyer CJ in *Feldman v Mall.* In this case it was held that an employer who uses his employees to further his own legitimate ends creates the risk of harm to others while the employee is performing his functions. Because of this creation of risk, it was held that the employer was under a duty to ensure that others were not harmed by the employee during the performance of his appointed tasks. If an employee strayed from his functions and caused harm through negligence, inefficiency or even

[142] Burchell *Principles of Delict* 218.

intentional wrongful conduct, the employer was to be held liable due to his or her failure to prevent the harm. The popularly quoted *dictum* of Watermeyer C J reads:[143]

> "[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty.[144] It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party, the master is responsible for that harm."

This *dictum* was later relied upon by the Appellate Division in *Minister of Police v Rabie* where it was held that a policeman who had wrongfully assaulted, arrested and detained the respondent while off-duty rendered his employer liable because his conduct was facilitated by his position as a police official and that his employer created the risk of his unlawful actions when employing him.[145] When applying the facts of the case to the creation of risk principle outlined above, Jansen JA made the following observation:[146]

> "By appointing Van der Westhuizen as a member of the force, and thus clothing him with all the powers involved, the State created a risk of harm to others, viz. the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution."

This 'risk creation' approach was not, however, long-lived. As Neethling, Potgieter and Visser observe, "In later judgments the appellate division was unwilling to develop risk creation as an independent basis of vicarious liability."[147] It has been suggested[148] that Jansen JA's failure to define the limits of liability based on the

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[143] At 741.

[144] Interestingly, this raises the question of whether or not a separate legal duty is owed by an employer in cases where there is potential for employees to commit delicts. In such cases, an employer's liability would be personal and not vicarious. The implications will be discussed in chapter 5.

[145] See M Stranex "Liability for the Delicts of the Police: The Underwriter State" (1986) 103 *SALJ* 190.

[146] At 134J-135B.

[147] Neethling *et al* *Law of Delict* 343.

[148] K Calitz "Vicarious liability" 220.

creation of risk led ultimately to its rejection by the Appellate Division in *Minister of Law and Order v Ngobo*.

In *Ngobo*'s case two off-duty police officers, dressed in plain clothes, were involved in a street altercation with three men during which both policemen drew and fired their service revolvers. One of the shots fatally injured the respondent's son, who was one of the men involved in the altercation. The facts of this case were clearly distinguishable from those of *Rabie*'s case,[149] as the police officers were off-duty and did not purport to act as police officers. Further, their conduct could not remotely be described as a mode of carrying out their employment.[150]

However, notwithstanding this distinction, Kumleben JA found it necessary to attack Jansen JA's application of the creation of risk principle:[151]

> "In so far as *Rabie*'s case may be said to have replaced the standard test with one based on creation of risk, I am for the reasons stated of the view that it was wrongly decided. Moreover, whether direct liability may in certain circumstances attach to an employer as a result of the risk created by him, this consideration in my opinion is not a relevant one to be taken into account when the standard test is to be applied in order to decide whether the master is vicariously liable"

This decision effectively rejected the creation of risk principle.[152] However, the courts seemed reluctant to disregard the creation of risk as a ground for attributing liability completely. In *Macala v Maokeng Town Council*[153] the court used risk as the basis of its enquiry into the course and scope of employment. In this case an off-duty police officer wearing police uniform, shot the appellant whilst attempting to shoot another.[154] Despite the fact that the police officer was off-duty and that his actions were clearly motivated by personal reasons, it was argued that his position as a police officer had created the opportunity and perhaps the means to commit the wrongful

[149] This much was admitted by Kumleben JA at 832B-C.
[150] As pointed out by Kumleben JA at 832C: "Unlike Van der Westhuizen in that case (*Rabie*), the policemen with whom we are concerned at no stage, whether genuinely or ostensibly, acted as such or exercised any official function."
[151] At 832C-D.
[152] See I N Fredericks and B S C Martin "State Liability for the Delicts of the Police: Closing the Circle" (1994) 57 *THRHR* 102.
[153] 1993 (1) SA 434 (A).
[154] The police officer was coerced into the shooting by a woman who had enlisted his 'services' to rid herself of a man with whom she was having intimate relations.

acts, and that although his actions were self-motivated, they fell within the risk of harm created by his employer.[155] The court rejected this argument by holding that the conduct of the officer was sufficiently removed from his appointed tasks so as not to render his employer liable. However, the court held that "the creation of risk principle is directly related to the enquiry as to whether the policeman was acting in the course and scope of his employment as such."[156]

In *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*[157] it was held that where an employee was depositing stolen cheques for her own purposes whilst engaging in the work of her employer, she was still engaging in the functions for which she was employed. It was held that she was performing these functions in an improper manner and that therefore, even though her actions were for her own benefit, her employer should be held liable. In fact, the court went further to point out that her employment functions facilitated the dishonest conduct. The court based its decision on the principle applied in *Feldman v Mall* and specifically made mention of the leading English decision,[158] *Lloyd v Grace, Smith and Co*,[159] in which a firm of solicitors was held liable for the fraudulent actions of one of its clerks.

Although it appeared that *Ngobo* had not successfully done away with the creation of risk principle, the Supreme Court of Appeal finally took a firm position on the issue in *Ess Kay Electronics v First National Bank* where, as pointed out by Neethling, Potgieter and Visser, the court went "even further by declaring that the risk theory is merely an explanation of the principle of vicarious liability and not the formulation of the principle itself."[160]

In *Ess Kay* the respondent escaped liability despite the fact that its employee was found to be defrauding customers during the course of his employment. It was held that "an act done solely for the employee's own interests and purposes, and outside the employee's authority, was not done in the course of employment even if it was

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[155] At 440D.
[156] At 441D-E.
[157] [1996] 4 All SA 278 (W).
[158] At 285H.
[159] 1912 AC 716. This decision is discussed fully in chapter 3.
[160] Neethling *et al Delict* 343.

done during such employment."[161] It was held that the risk creation theory could not be used as a justification for holding an employer liable as this theory is concerned with a reason for attributing vicarious liability to employers and not a factor to be considered when determining whether or not they should be held liable.[162]

Energy Measurements (Pty) Ltd v First National Bank of SA Ltd[163] followed the decision in the *Ess Kay Electronics* case. It was held that the theft of cheques by a bank employee did not render the bank liable as the employee had "completely disengaged himself from the duties of his contract of employment."[164] The same narrow approach was followed in *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* where it was held that where an employee was misappropriating funds for himself he was engaged on a frolic of his own[165] and that therefore his employer could not be held liable. Although the court set out the test followed in the *Feldman* case, no consideration was given to the 'assumption of risk' principle set out by Watermeyer CJ. Another curious aspect of this decision was that Willis J concentrated on the 'control test', and held that since the employer had lost factual control over the employee, it could not be held liable for his actions.[166] As Scott points out, the control test is no longer of primary importance and furthermore, 'factual control' was never a requirement as far as this test was concerned.[167]

Even though these decisions seemed to bury the creation of risk approach, the principle resurfaced in *K v Minister of Safety and Security.*[168] In this case, a young woman was raped by three policemen who were on duty at the time of the offence. The Minister was sued vicariously for the harm committed by the police officers on grounds that they committed the offence while working for the State. The

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[161] *Ess Kay Electronics* at 1218F-H. T J Scott "Some Reflections on Vicarious Liability and Dishonest Employees" 2000 *Acta Juridica* 265 at 272 points out, "It is implicit in the judge's remarks that a finding of vicarious liability on the part of an employer for an employees theft or fraud is virtually impossible."

[162] With respect, this makes very little sense. It is submitted that if the theory of risk assumption is accepted as providing the rationale for the rule, it should find its way into the application of the test. This is discussed in chapter 5.

[163] 2001 (3) SA 132 (W).

[164] At 134E-F.

[165] At 7F.

[166] Scott "Some Reflections on Vicarious Liability and Dishonest Employees" at 274.

[167] See *Midway Two Engineering & Construction Services v Transnet Bpk* 22E and 22H-J. It was clearly established in *Rodrigues v Alves* at 842A that only the right to control was necessary to satisfy the test.

[168] 2005 (9) BCLR 835 (CC).

Constitutional Court held that although the offending officers were acting for their own benefit and clearly outside of their mandate, their failure to protect the applicant from harm[169] constituted a wrongful departure from their legal duty as public officials. The actions of the policemen rendered the respondent liable due to the fact that their failure to protect the plaintiff from harm was a failure connected with the performance of their employment duties, duties which were also owed to the plaintiff by their employer.[170]

It was on this basis that the court ultimately found in favour of the Appellant. However, as regards vicarious liability was, it was observed that the conduct of the policemen was facilitated by their role as police officers[171] and that therefore the conduct was sufficiently linked to their employer's business to render the employer liable.

This aspect of the decision ties in with creation of risk principle which was disregarded in the *Ess Kay* decision. In light of this development, it seems that the delicate issue of vicarious liability for the wilfully wrongful conduct of employees was once again open for reconsideration.

In *Grobler v Naspers Bpk*[172] the Supreme Court of Appeal had to examine the liability of an employer for the sexual harassment of one of its employees.[173] In this case, the plaintiff claimed damages from the defendant due to the trauma she had suffered as a result of the sexual harassment of another of its employees. When determining whether or not the actions of the perpetrator (who was described by the court as a 'serial harasser') were within the course and scope of his employment, the court found

[169] A duty entrusted to them as police officials.
[170] This 'duty of care' was dealt with in the leading case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) where it was held that the police owed a general duty of care to the citizens of South Africa whom they are sworn to protect. It was held that this duty was extended to the Minister who, for reasons of social policy, would be held liable for the failure of police to offer such protection where it is due. This is in line with the Constitution, which enjoins all organs of State to uphold its provisions and, in particular, the Bill of Rights.
[171] Being police officers, the general public would be more inclined to trust them.
[172] 2004 (4) SA 220 (C).
[173] Interestingly, the plaintiff claimed damages under the common law instead of claiming in terms of s60 of the Employment Equity Act 55 of 1998 (which deals with an employer's liability for sexual harassment in the workplace). Section 60 provides only for situations where both parties are employed by the same employer and in this case as the plaintiff and the perpetrator were employed by different employers the provisions of the Act did not apply.

that the existing rules of vicarious liability were not flexible enough to find in favour of the plaintiff.[174] It was observed that if the established principles were followed, an employer could never be held liable for the sexual harassment by one of its employees, as the actions of such employees would always fall outside the course and scope of liability.[175] It was held that the common law rules of vicarious liability had to be adapted to protect the rights of women in the workplace.[176]

The court made particular mention of the risk created by employers as far as sexual harassment in the workplace is concerned. It was held that the opportunity presented to the harasser to abuse his authority was a risk created by his employer, a risk which was relevant when considering the latter's liability.[177]

Unfortunately, as Calitz observes,[178] although the risk principle was applied in this case, "The court clearly intended that the new test was necessitated by the 'new' problem of sexual harassment and sexual abuse and did not intend formulating a general rule applicable to all cases of vicarious liability."

The Supreme Court of Appeal,[179] on appeal, confirmed the decision, but the reasons differed. The court placed its emphasis on the fact that the respondent's employer had a duty to prevent sexual harassment in the workplace, and that it failed to take reasonable steps to prevent such behaviour. Farlam JA made the following observation:[180]

> "It is clear, in my opinion, that the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so."

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[174] At 298B.
[175] The court came to this conclusion after assessing the actions of the perpetrator with reference to the conduct of the bartender in the *Costa da Oura* case.
[176] At 298E-G.
[177] At 286D-H.
[178] K Calitz "Vicarious liability" 232.
[179] *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA).
[180] At 350F-G.

The employer's liability was therefore direct and the court did not go into the issue of vicarious liability. The Supreme court of Appeal left the question open and did not comment on Nel J's approach.[181]

In *Minister of Safety and Security v Luiters*[182] the issue of whether or not the actions of an off-duty police officer were within the course and scope of employment once again came before the Supreme Court of Appeal. In this case the respondent had been shot by an off-duty police officer who was seeking to apprehend a group of people who had allegedly attempted to rob him.[183] It appeared that the actions of the police officer were personally motivated, but from the evidence of witnesses, it seemed that the he "looked like he wanted to arrest people."[184] It was argued on behalf of the appellant that the actions were outside the course and scope of the officer's employment in that he was off-duty at the time of the shooting and was clearly acting out of a personal desire to apprehend the alleged robbers. It was conceded however, "that a member of the South African Police Service could, in terms of the police standing orders, at any time place himself on duty when an offence has been committed."[185]

In his judgment, Navsa JA relied on the test adopted by the Constitutional Court in *K v Minister of Safety and Security*[186] in which the following two questions were asked:

> "The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer."

[181] Farlam JA made the following observation at 349B-C: "In view of the fact that I am satisfied that the respondent succeeded in establishing the second cause of action (the negligent breach of a legal duty by the employer) on which she relied against Tydskrifte, it is unnecessary for me to deal with Mr *Burger's* submissions that Nel J's finding of vicarious liability against the first appellant was inappropriate."
[182] 2006 (4) SA 160 (SCA).
[183] The respondent had been rendered tetraplegic after being shot in the back while trying to flee the scene after hearing gunfire.
[184] Para 5.
[185] Para 10.
[186] Para 32.

It was held that in this case "there was a confluence between [the officer's] interest and those of the South African Police Service."[187] Further, that although the actions could have been personally motivated, there was a sufficiently close link between the employee's actions and the purposes of his employer to render the latter vicariously liable for the former's actions. On application for leave to appeal to the Constitutional Court[188] it was held that there were no reasonable prospects of success and the application was therefore dismissed. Langa CJ held:[189]

> "Once off-duty police officers are found on the facts of a particular case to have put themselves on duty, as they are empowered and required to do by their employer, they are for the purposes of vicarious liability in exactly the same legal position as police officers who are ordinarily on duty."

The latest decision on the issue of vicarious liability for the actions of deliberately dishonest employees was in the case of *Minister of Finance and Others v Gore NO,*[190] where the respondent, in his capacity as a liquidator of a company, sought damages from the appellants for pure economic loss sustained by the company he was in the process of liquidating. The loss was sustained as a result of the fraudulent conduct of various provincial administration officials. The conduct of these officials was the direct cause of the company not being awarded a government tender.[191]

It was argued that the officials were acting outside the course and scope of their employment in that they committed a number of acts which were "alien to their responsibility to the provincial administration as stewards of the tender process."[192] The court observed that the difficulties associated with the course and scope enquiry where dishonest employees are concerned make it necessary to examine policy reasons for attributing vicarious liability when coming to a conclusion on a particular set of facts.[193] In view of this, it was held that there was not, nor could there be, "any

[187] *Minister of Safety and Security v Luiters* para 23.
[188] In *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC).
[189] Para 35.
[190] 2007 (1) SA 111 (SCA).
[191] The officials deliberately manipulated the tender process in order to benefit another company in which they held an interest.
[192] Para 26.
[193] Para 27.

general principle that an employer cannot be responsible for an employee's intentional wrongful conduct."[194] The court applied the traditional 'two-pronged' test seen in *Minister of Police v Rabie,*[195] and found that although the officials may have been motivated by self interest, the effects of their subjective intentions were not wholly self-directed.[196] Because their actions were still directed at the performance of their mandate in awarding the tender, it was held that from an objective point of view the actions of these employees closely resembled what they were employed to do.

Unfortunately, the court did not go into the reasons for attributing liability and failed to develop any framework upon which future similar cases can be decided. It seems that the court once again saw fit to leave the issue open to interpretation.

2.4. CONCLUSION

When examining the way in which the courts interpret and apply the legal rules which have developed for vicarious liability over the years, it is clear that there are some glaring disparities, most of which concern the second leg of the so-called 'test'.[197]

There is little dispute as far as the establishment of a relationship capable of founding liability is concerned. The multifaceted test which was adopted by the court in the *Midway* case seems to fulfil its purpose adequately and has been applied with some consistency since its acceptance.

As far as the 'course and scope' enquiry is concerned, there is still uncertainty and consequently much debate. It is difficult to apply a rigid set of guidelines to different and often distinctive sets of facts, but it is necessary for the courts to take a clear and precise stand as far as the application of a general principle is concerned. When examining the cases, and in particular those involving dishonest employees, it is clear that the courts have not reached consensus on a general principle which can be applied to the facts of so-called 'deviation cases'. The question which requires an

[194] *Ibid.*
[195] At 134D-E.
[196] *Minister of Finance and Others v Gore NO* para 29.
[197] The 'course and scope' enquiry.

answer at this point is: Does the traditional test for vicarious liability give true effect to the reasons underlying this form of strict liability?

If the rationale behind this form of strict liability is based on policy considerations as to what is just and fair under the prevailing circumstances, it is submitted that we need to take a closer look at the application of the course and scope enquiry, for "one cannot escape a feeling of misgiving that large banking institutions may escape liability towards unsuspecting, *bona fide* clients and third parties under circumstances as encountered in the cases of *Greater Johannesburg Transitional Metropolitan Council* and *ESS Kay*."[198]

[198] Scott "Some Reflections on Vicarious Liability and Dishonest Employees" 279.

CHAPTER THREE

ANALYSIS OF THE LAW IN ENGLAND AND THE BRITISH COMMONWEALTH OF NATIONS

3.1. INTRODUCTION

The aim of this chapter is to provide a detailed analysis of the law of vicarious liability as it is applied in England and the British Commonwealth of Nations. All Commonwealth countries discussed in this chapter derived their legal systems purely from the English common law.[1] Unlike South Africa,[2] these countries, uninfluenced by other legal systems, have stayed close to their English law roots. However, each legal system has developed independently and is accordingly distinctive in some respects.[3]

In spite of this, there is often little difference between the way in which the original principles are applied in Commonwealth countries. Due to the overwhelming similarity between the systems of tort law in the respective jurisdictions, the development of the principles of vicarious liability will be examined in one section which, while outlining the general features and principles applicable to all commonwealth legal systems, will highlight relevant differences.

[1] This is because these countries were formerly British colonies.

[2] Having been occupied by the Dutch from 1652 to 1795, South African law was initially Roman-Dutch. The Anglicisation of South African law only began after the second occupation of the Cape of Good Hope in 1806 and was only "vigorously pursued" after 1820. Despite the influence of English law, the South African system has remained primarily Roman-Dutch, particularly in the area of delict. See Hosten *et al Introduction to South African Law and Legal Theory* 346-375

[3] Interestingly, the English courts are now often influenced by legal developments in the Commonwealth. It is also worth noting that all of the former colonies operate under written Constitutions which have influenced their legal development.

3.2. DEVELOPMENT OF THE PRINCIPLES OF VICARIOUS LIABILITY IN ENGLAND AND THE BRITISH COMMONWEALTH.

3.2.1. Brief Historical Background

Canada was originally a French colony but was ceded to the British in 1763.[4] The English common-law system governs the private law component of Canadian law in nine of its provinces.[5] Although the cession of the colony pre-dated the French revolution of 1789, the legal system in Quebec remains significantly influenced by French law.[6] As a result, while the other provinces operate under a common-law system, the province of Quebec has a mixed system: its public law derives from English common law while its private law is derived from French civil law.[7] For the purpose of this study however, only the predominant English system used in the other provinces will be examined.[8] Canada has operated under a written constitution since 1982.[9]

The English established Australia as a colony after settling on the eastern seaboard of the continent in 1787. Australia became a federation of states in 1900 and formally adopted a constitution in 1901 with the enactment of the Commonwealth of Australia Constitution Act of 1900 passed in Westminster.[10] Although Australia remains a member of the British Commonwealth, all constitutional ties with Britain were eventually severed in 1986 with the passing of the Australia Act. New Zealand was annexed by the British in 1838 as a colony and achieved Dominion status in 1907. As a federation of provinces, New Zealand also operates under a constitution.[11]

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[4] Encyclopaedia Britannica (1969) Vol. IV 734.

[5] G L Gall *The Canadian Legal System* 3ed (1990) 165.

[6] Lawson "Notes on the History of Tort in the Civil Law" 155 points out that although the civil law in Quebec draws heavily from the *Code Civil*, it has not remained stagnant but has developed independently. Unfortunately, although the development of the principles of vicarious liability under Quebec's civil law may differ from the development of the principles in France, a study into the relevant differences is beyond the scope of this work.

[7] *Ibid.*

[8] For a detailed exposition on the reception of English law in the nine provinces see Gall *The Canadian Legal System* 50-53.

[9] Gall *The Canadian Legal System* 62. Although there was a constitution before this (the main written component of which was embodied in three British Statutes), it is generally accepted that the "new" constitution is the primary source of constitutional law in Canada.

[10] Encyclopaedia Britannica (1969) Vol. II 784.

[11] Encyclopaedia Britannica (1969) Vol. XVI 453.

3.2.2. The Structure of the Common Law of Tort

Rogers points out that the law of tort[12] is difficult to define and that although there have been numerous attempts to do so, no clear and accurate definition has emerged.[13] However, for the sake of convenience he uses the definition advanced by Winfield which reads as follows:[14]

> "Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages."

Although this definition does not cover all the necessary aspects of the law of tort it clearly establishes the basic principle that this branch of law is concerned with compensation for what is considered to be actionable harm. In this sense it is no different from the South African law of delict.[15] That, however, is not to say that the English and South African approaches to delictual or tortious liability are the same.

Perhaps the most important distinguishing feature of the English law of torts is that it is based on specific heads of liability. Rogers admits that "We [the English] have a collection of torts rather than a single principle."[16] The law of torts in England has been shaped incrementally with the development of different forms of action for different types of wrong.[17] Dugdale and Jones note:[18]

> "Each tort is seen as having its own characteristics in terms of the conduct it sanctions and the interest it protects. In the absence of overarching principles, each tort requires its own exposition."

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[12] The English term for 'delict'.

[13] Rogers *Tort* (2006) 1.

[14] Rogers *Tort* (2006) 5. This definition is not completely accurate, but it is a good starting point. As Rogers observes, "Winfield was not seeking to indicate what conduct is and what is not sufficient to involve a person in tortious liability, but merely to distinguish tort from certain other branches of law."

[15] McKerron observes that "In the Roman and Roman-Dutch authorities the term 'delict' is commonly used to include both criminal and civil wrongs. Sometimes, however, it is used in a narrower sense – in the sense in which the term 'tort' is used in English law – to denote a civil wrong (*delictum privatum*)." McKerron *Delict* 1. The author goes on to proffer a definition of delict as follows: "The breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in the consequence of the breach." McKerron *Delict* 5. Like the English definition, this does not purport to be a 'test' for determining the existence of a delict, rather a formal definition.

[16] Rogers *Tort* (2006) 54.

[17] A M Dugdale and M A Jones *Clerk & Lindsell on Torts* 19ed (2006) 13.

[18] *Ibid.*

It is important to note this feature of English tort law when examining the way in which the law of vicarious liability is applied. It must be borne in mind that in order for vicarious liability to arise, a tort must have been committed.

A number of specific torts capable of rendering an employer liable have been recognised by the English courts. Each of these is treated with reference to the general principles of vicarious liability, but the way in which the principles are applied is occasionally unique to the species of tort.[19] It appears that although cases are often grouped according to the category of tort into which they fall, general principles still govern the distinction between cases.[20]

There remains a strong link between the English and Commonwealth laws of tort, which is perhaps due to the fact that tort is primarily based in the common law.[21]

3.2.3. The Common Law Test for Vicarious Liability

In English law vicarious liability is recognised in much the same way as it is in South Africa. It is viewed "not as a distinct tort, but rather a process by which one can be held liable for a recognised tort committed by another."[22] Similarly the justification for imposing this form of strict liability lies in public policy and cannot be attributed to any single theory or basis.[23] The basic test for vicarious liability is essentially the same as the South African test – for liability to arise there must be a relationship

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[19] A good example of this is in cases of fraud where the test for vicarious liability is specifically tailored to suit this type of tort. This is examined in detail in 3.3.5.1.

[20] The most noticeable principle-based categorization occurs when determining whether or not tortious acts were committed in the scope of employment. Two broad categories of act can be identified, those which are either expressly of impliedly authorised and those which are sufficiently connected to the tortfeasor's employment. These categories are discussed in detail below.

[21] The development of common law being largely influenced by precedent, it is doubtful whether any of the former colonies will completely shake off the influence of English law. However, since 2002 all Australian states have undergone legislative reform which has had a direct effect on tort law. See P Stewart and A Stuhmcke *Australian Principles of Tort Law* (2005) 215-252. The influence of this new legislation on the law of vicarious liability is comparatively small. Legislation in New South Wales and Victoria (Section 5 Q of the Civil Liability Act 2002 (NSW); and Section 44 of the Wrongs Act (Victoria)) renders a breach of a non-delegable duty to be determined as if it were vicarious liability. As Stewart and Stuhmcke *Tort Law* 355 observe, the manner in which these provisions will be applied by the courts remains uncertain.

[22] R F V Heuston and R A Buckley *Salmond and Heuston on the Law of Torts* 21ed (1996) 430.

[23] S Deakin, A Johnston and B Markesinis *Markesinis and Deakin's Tort Law* 5ed (2003) 572. See Atiyah *Vicarious Liability* 12-28 for a detailed exposition on the traditional and modern social justifications for vicarious liability in English law.

capable of founding liability and the tort must have been committed in the scope of employment.[24] This chapter will proceed to examine the two elements of this test independently.[25]

3.2.4. Relationships Importing Vicarious Liability

Typically, there are few expressly recognised categories of relationship which are capable of founding vicarious liability. Express recognition has been given to four broad categories: the common relationship between an employer and employee; the relationship between partners; the relationship between principals and agents[26] and the relationship between owners and drivers of vehicles.

For the purposes of this section, although the relationship between principal and agent, business partners, and that between owners and drivers of motor vehicles will be briefly examined, the focus will be on the general employment relationship.[27]

3.2.4.1. Agency

The term 'agent' has a broader meaning in tort than it does in contract. Trindade and Cane note that the term 'agent' "is used to indicate that one person acts with the authority of another (the principal). An agent in this sense may be a servant or an independent contractor, or neither."[28] The general rule is that principals will be liable for the tortious conduct of agents. Indeed, Rogers observes:[29]

> "It has been said on high authority that in principle the law governing vicarious liability for servants and agents is the same and depends upon the question, 'was the servant or agent acting on behalf of, and within the scope of the authority conferred by the master or principal?' The answer will often differ simply because the authority of a servant is usually more general."

[24] The word 'employment' is used for convenience here, and may to interpreted to include all relationships capable of founding liability.
[25] Although the existence of a tort is necessary and can thus rightly be regarded as another element of the test, the focus will be on the existence of a relationship capable of founding liability and the scope of employment.
[26] It appears that no distinction is made between this relationship and the relationship between mandators and mandataries.
[27] For the sake of convenience, the agency relationship, partnerships and the relationship between owners and drivers will be examined before the general employment relationship.
[28] F Trindade and P Cane *The Law of Torts in Australia* 3ed (1999) 732.
[29] Rogers *Tort* (2006) 909.

Stewart and Stuhmcke observe that although agents may simultaneously be both employees and/or independent contractors, when performing tasks within the course of agency, such agents often take on the legal identity of the principal.[30] This occurs when the agent acts as an organ of the principal. It follows, therefore, that any tort committed whilst acting in this capacity will render the principal liable, regardless of the employment status of the agent. Trindade and Cane explain this principle as follows:[31]

> "In relation to independent contractors, the notion of agency might be used to create exceptions to the basic rule of no-liability:[32] if a person were held to be an agent, their status as a servant or independent contractor would be irrelevant. So the concept of agency could, in theory, be used to create another type of case where the status of the employee was irrelevant."

Although this exception points to the specific type of agency whereby the agent acts as an organ of the principal in transactions with third parties, it has been suggested that, if applied generally, the rule of liability for torts of an agent could very well subsume the rule of no-liability for torts of an independent contractor.[33]

There is much academic debate surrounding the application of agency principles in tort. Indeed, McCarthy points out[34] that many well-known academics[35] are of the view that agency has no place in the context of vicarious liability,[36] and that that form of liability should be limited to the employer/employee relationship. Most

[30] Stewart and Stuhmcke *Tort Law* 351.
[31] Trindade and Cane *The Law of Torts in Australia* 733.
[32] The authors point to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, where such use was made. In this case a distinction was drawn between ordinary work performed by agents acting on behalf of their principals and situations in which the agents act as representatives of their principals. Dixon J, at 49, pointed out that work done at the principal's request and for his benefit is considered as the independent function of the person who undertakes it, whereas, when the principal benefits from the agent standing in his or her place, the agent becomes an extension of the principal's personality, thereby rendering the principle vicariously liable for any tortious acts committed by the agent. This specific category of agency is therefore an exception to the rule of no-liability for the acts of independent contractors, as liability attaches to the capacity within which the employee is acting and is not influenced by the status of the employee.
[33] J Swanton "Master's Liability for the Wilful Tortious Conduct of his Servant" (1985) 16 *UWALR* 1 at 18
[34] L McCarthy "Vicarious Liability in the Agency Context" (2004) 4 *QUTLJ* 1 at 9.
[35] Among them, Fleming, Balkin, and Davis.
[36] With the exception of the tort of deceit, and the possible exception of the relationship between owners and drivers of motor vehicles.

commentators,[37] however, suggest that agency *does* have a place in the law of vicarious liability. Trindade and Cane note that there are two areas in which agency can play a role, the first being where the agent is an employee of the principal, and the second where the agent is an independent contractor. They suggest that in the former situation the notion of agency could be used where the scope of agency is broader than that of employment.[38] It could well be that the acts of an employee fall outside the scope of employment, but are still within the scope of agency, in which case agency could be used to found liability. In the latter instance they suggest that agency can provide the exception to the 'no-liability for independent contractors rule'.[39]

McCarthy observes[40] that both academic approaches present difficulties. The former approach, though simple, does not appear to be in line with a number of cases where principals have been held liable for the torts of their agents.[41] As far as the latter approach is concerned, it would often be difficult to distinguish between agents and independent contractors. Another problem which McCarthy highlights is that the courts are reluctant to find liability for the acts of independent contractors, even though they may be agents.[42]

It appears that the Commonwealth authorities do not draw a distinction between independent contractors and independent agents.[43] This is probably one of the features of their law which causes, or at least contributes, to confusion. However, certain principles which have been adopted in the Commonwealth could inform the South African application of the test in agency cases. For example, the exception to the no-liability for independent contractors rule, which is created when an agent acts as a representative in business transactions with third parties on behalf of the principal. Such an exception does not exist in South African law and should perhaps be

[37] Among them, Gardiner, McGlone, Trindade and Cane, and Luntz and Hambly.
[38] Trindade and Cane *The Law of Torts in Australia* 733.
[39] *Ibid.*
[40] McCarthy "Vicarious Liability in the Agency Context" 10.
[41] He goes on to suggest that the possible rationalisation for this approach is that where tortious acts are committed in the course of agency, the principal's liability could be direct and not vicarious.
[42] McCarthy gives the example of *Gaitanis v Nicholas Moss Pty Ltd* [2003] VSCA 63 where Phillips JA doubted that a principal could ever be held liable for the acts of an agent who is also considered to be an independent contractor. The case involved liability for the acts of a property agent.
[43] A distinction which is made in South African Law – see chapter 2 at 2.2.2.

investigated.[44] Academic debate notwithstanding, the general rule remains that the tortious acts of agents will render their principals vicariously liable as long as these acts fall within the scope of the agent's authority.

3.2.4.2. Business Partners

Business partners may be held vicariously liable for each other's torts, provided that the tortious conduct occurs within the scope of the partnership's business dealings. As in South African law, it appears that the capacity in which the partner concerned was acting determines whether or not the partnership will be held vicariously liable.

In *Butler v Modrak*[45] it was held that a partner will be liable for the negligence of his co-partner causing injury when engaged in the business of the partnership. It was also held that such a situation is treated as a special instance of the liability of an agent.[46]

3.2.4.3. Owners and Drivers of Vehicles

The relationship between owners and drivers of vehicles will only be capable of founding vicarious liability where it can be concluded that the relationship is analogous to one of agency. Therefore, when attempting to establish the link between owners of vehicles and drivers, it can be said that two elements are required. The first is that the owner of the vehicle gave the driver permission to use it;[47] the second is that there has to be a relationship between the owner and the driver in terms of which the latter is acting as an agent or employee of the former.

In England it is settled law that owners will only be liable where they have an interest in the purpose for which the vehicle was being used at the time of the commission of the tort. This principle was finally established in the leading English case of *Morgans v Launchbury*[48] in which the owner's husband permitted a third party to drive her car in order to take him home after having had too much to drink. Although it could

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[44] This will be discussed in more detail in chapter 5.

[45](1983) 49 ACTR 3.

[46] In Australian law the liability of business partners for each other's torts is largely governed by the Partnership Act 1891 (Qld). See Stewart and Stuhmcke *Tort Law* 340.

[47] This requirement is fairly straightforward. If for example, the vehicle is taken without permission, the owner cannot be held liable for the actions of the person who took it.

[48] [1973] AC 127.

probably have been argued that the driver was serving the owner's interests, there was no basis for inferring the existence of an agency relationship between the parties.

In Australia, the position is less clear.[49] However, it appears that at common law the requirements are the same as those used by the English. It has been recognised that there are two elements which must necessarily be present in order for an owner to be held liable for the negligent driving of his vehicle by another. These are: "(1) a request by the owner that the driver use the vehicle and (2) an interest by the owner in the purpose for which the vehicle is being driven."[50] In *Soblusky v Egan*[51] it was held that that where these two requirements are met, an agency relationship is created which forms the basis upon which liability can be founded.[52]

In *Scott v Davis*[53] the High Court of Australia recently rejected an extension of this principle to situations in which other types of vehicles are involved. It was held that the application of the principle was too wide. In this case the owners of a plane, who were holding a party on their property, asked a licensed pilot to give some of their party guests a ride in the aircraft. The pilot, through his own negligence, caused the plane to crash, killing himself and injuring the passengers. The plaintiffs argued that the principles established in *Soblusky*'s case applied and that the owners of the plane were vicariously liable on the basis of an agency relationship which was created by their instructions to the pilot. The court held firstly, that the pilot was not the owners' agent due to the fact that they were in no position to control the way in which the pilot

[49] Trindade and Cane *The Law of Torts in Australia* 733. In Australia, due to various statutory provisions, the common law principles establishing liability of vehicle owners for the torts of drivers are infrequently applied. In most Australian jurisdictions car owners are obliged to take out insurance policies covering their liability and the liability of all other drivers of the vehicle (said policies having to cover authorised *and* unauthorised drivers) for death or physical injury, caused by or arising out of use of the vehicle. Of course, these provisions are wide enough to impose liability on the owner, (or at least the owner's insurer), in the absence of an agency relationship between the owner and driver of the vehicle.

[50] Stewart and Stuhmcke *Tort Law* 351.

[51] (1959-60) 103 CLR 215.

[52] This principle correlated with the later decision by the House of Lords in *Morgans'* case, where the court went further to point out that the purpose for which the vehicle was being driven need not necessarily have been commercial in order for the agency relationship to be created. Indeed the principle would apply even if the purpose were social.

[53] [2000] HCA 52.

was flying the plane and secondly, that the agency principle established in *Soblusky*'s case should not be extended beyond ordinary motor vehicles.[54]

This decision emphasises the necessity of control over the manner in which a driver or pilot operates the vehicle and although the *Soblusky* principle was not entirely rejected, it will be interesting to see how the Australian courts approach this type of case in future, after having considered the decision in *Scott*.[55]

3.2.4.4. The General Employment Relationship

For the purposes of vicarious liability the term 'employment' is given the same wide interpretation as it is in South African law and includes most tasks performed by one party for the benefit of another. A number of factors are used to determine whether or not an employment relationship exists.[56] Rogers points out that a 'composite' approach tends to be favoured in which a number of elements of the relationship are considered as a whole.[57] In *Market Investigations Ltd v Minister of Social Security*, Cook J made the following observation:[58]

> "No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question (whether or not an employment relationship exists), nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his tasks."

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[54] It is assumed that they were referring to motor cars and other road vehicles fitting into a similar category.

[55] Interestingly, no consideration was given to the 'right of control' in *Scott*'s case. It could be argued that if this could replace actual control, as it does in South African law, the owners would have been held liable. The fact that they were not present in the plane at the time of the accident would not have detracted from their right to control the manner in which the aircraft was being operated. See chapter 2 at 2.2.3 for a detailed account of the South African position.

[56] See *Lee v Cheung* [1990] 2 AC 374.

[57] Rogers *Tort* (2006) 886. See *Lee v Cheung* . It should be noted that this composite test is similar to the "multi-faceted" test followed by South African courts. See 2.2.1 above. See also Deakin, Johnston and Markesinis *Tort Law* 576-580.

[58] 184-185.

In this sense, there is little difference between the South African and English tests for determining whether or not an employment relationship exists between the parties. As in South African law, the general rule is that one cannot be held liable for delicts which are committed by independent contractors[59] and therefore great emphasis is placed on the distinction between the employees and independent contractors. The factors used by the courts when making distinction are essentially those referred to above.[60]

When determining whether or not an employment relationship exists, the Australians have adopted a similar stance.[61] However, they have favoured a more specific approach in terms of which many factors are examined with no overriding attention being paid to specific *indicia*.[62] In the leading case of *Stevens v Brodribb Sawmilling Co Pty Ltd*,[63] the court emphasised the observation made by Cook J in the *Market Investigations* case, confirming that there was "no single 'checklist' of *indicia* to distinguish the relationship between employer-employee or employer-independent contractor."[64] However, recognising the need to establish a guideline, the court produced a list of relevant factors.[65] This list of considerations formed the basis of the

[59] J Murphy *Street on Torts* 11ed (2005) 552. Here the position is similar to that in South Africa as an employer using the services of an independent contractor will be liable for harm caused by the actions or omissions of the contractor only if a separate legal duty is owed. In this case, liability most often founded on a breach of what is described as a 'non-delegable duty'. There are certain duties, mainly arising from contract, which cannot be delegated to independent contractors, or even permanent employees for that matter. See *Bull v Devon Area Health Authority* [1993] 4 Med LR 117 CA. Non-delegable duties will be discussed at 3.4. below.

[60] *Street on Torts* 552-554 lists three primary considerations: 'control'; 'personal investment'; and 'the intention of the parties'. These considerations will be weighted according to the factual circumstances surrounding each case. See Dugdale and Jones *Clerk & Lindsell on Torts* 321.

[61] *Zuijs v Wirth Bros* (1955) 93 CLR 561. It has long been accepted that the traditional 'control test' does not give an adequate reflection of the type of relationship which exists, particularly in situations where employees are given wide discretion in performing their tasks. The *Zuijs* case involved a dispute over workmen's compensation for injuries sustained by an acrobat who was in the employ of the respondents. It was held that the control exercised over the manner in which the employee performed his duties was irrelevant when looking at the nature of the relationship. Consideration was given to the terms and duration of service, the manner of payment and the status of the 'employee' in the organization. See also Dixon J's comments in *Humberstone v Northern Timber Mills* (1949) 79 CLR 398 at 404.

[62] Stewart and Stuhmcke *Tort Law* 342.

[63] (1986) 160 CLR 16.

[64] Stewart and Stuhmcke *Tort Law* 342. This decision indicated the court's final rejection of the 'control test'. However, as in England and South Africa, the element of control remains a factor. See Mason J's comments in *Stevens* at 24, where he lists a number of relevant considerations.

[65] These factors are incorporated into the list of considerations examined in *Abdalla v Viewdaze Pty Ltd t/as Malta Travel* and are discussed in detail below.

landmark decision in *Hollis v Vabu Pty Ltd,*[66] where the court used them to make the distinction between employees and independent contractors. Stewart and Stuhmcke[67] draw attention to a particularly useful unreported judgment, *Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel,*[68] which applied the principles set out in the *Hollis* case. In *Abdulla* the court gave a comprehensive but practical summary of steps to be followed when trying to distinguish between relationships of employment and relationships involving independent contractors. This summary of steps is perhaps the most informative and well-structured guideline to date and therefore compels discussion.[69]

The court started by pointing out that the nature of the work performed should be identified first, as it helps in identifying the relevant *indicia* and the necessary weight which should be attached to each. It was also recognised that an examination of the nature of the work may provide guidance when certain terms in the contract between the parties appear to be ambiguous. Having said that, the court went on to emphasise the importance of the terms and terminology used in the contract when attempting to identify the nature of the relationship between the parties, always bearing in mind that the parties cannot alter the true nature of their relationship by giving it a different label.[70] It held that the various *indicia* which have been identified by the authorities over the years have to be considered[71] whilst acknowledging that there is no comprehensive list and that the weight attached to each of the *indicia* will vary according to the circumstances of the particular case. Of course, where all information points overwhelmingly in the direction of a particular finding, it should be followed. Although it was accepted that there is no *numerus clausus* as far as the various *indicia* are concerned, the court took the time to present the following comprehensive list:[72]

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[66] (2001) 207 CLR 21. In *Hollis* the court confirmed the broad approach followed in *Stevens* and examined a number of *indicia* when determining the existence of an employment relationship.
[67] Stewart and Stuhmcke *Tort Law* 343-345.
[68] (Unreported PR927971 [2003] AIRC 504, 14 May 2003).
[69] The usefulness of this guideline is in no way restricted to an Australian context and can be of assistance to courts in all common law jurisdictions. As this is an unreported judgment, the summary provided by Stewart and Stuhmcke *Tort Law* 343-345 is useful. The full judgment, however, can be found online at the 'Australasian Legal Information Institute' website at http://www.austrii.edu.au/au/cases/AIRC/2002/1504.html.
[70] This was perhaps best put by Gray J in *In Re: Porter, Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184, where he says: "The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognize it as a duck."
[71] A heavy emphasis was placed on the *indicia* identified in *Stevens'* case.
[72] Para 34.

- Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like.[73]
- Whether the worker performs work for others (or has a genuine and practical entitlement to do so).[74]
- Whether the worker has a separate place of work and/or advertises his or her services to the world at large.
- Whether the worker provides and maintains significant tools or equipment.[75]
- Whether the work can be delegated or subcontracted.[76]
- Whether the putative employer has the right to suspend or dismiss the person engaged.[77]
- Whether the putative employer presents the worker to the world at large as an emanation of the business.[78]
- Whether income tax is deducted from remuneration paid to the worker.
- Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.[79]
- Whether the worker is provided with paid holidays or sick leave.
- Whether the work involves a profession, trade or distinct calling on the part of the person engaged.[80]
- Whether the worker creates goodwill or saleable assets in the course of his or her work.

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[73] Although it was recognised that absence of control does not necessarily indicate that an employee is an independent contractor, control remains a strong indicator particularly where it is present. See *Zuijs v Wirth Bros* at 571; *Hollis v Vabu.*

[74] The right to exclusive use of an employee's services is indicative of the existence of an employment relationship. The opposite is true where the employee is entitled to work for others.

[75] Where the worker has made significant investment in capital equipment it is usually inferred that that worker is an independent contractor. See *Hollis v Vabu* para 47.

[76] If the worker is entitled to delegate or subcontract his tasks to others, there will be a strong presumption that the worker is an independent contractor. See *AMP v Chaplin* (1978) 18 ALR 385 at 389.

[77] See *Stevens v Brodribb Sawmilling Co Pty Ltd* 36. The right to suspend or dismiss usually indicates the existence of a contract of employment.

[78] An example of this would be the wearing of a uniform.

[79] The court observed that employees tend to be paid periodically, whereas independent contractors are usually paid on a task by task basis. However it was also acknowledged that under modern conditions this distinction is becoming less pronounced.

[80] It was observed that specialists and professionals are more likely to be engaged as independent contractors.

- Whether a worker spends a significant portion of his remuneration on business expenses.

These *indicia* are not the only factors which should be considered when determining the nature of the relationship between the parties, but they provide a guideline which can and will add value to the enquiry. Where, after consulting this list there is still uncertainty "the determination should be guided by matters which are expressive to the fundamental concerns underlying the doctrine of vicarious liability."[81]

3.2.4.5. Specific Forms of Employment

The general rule is that employers will be held liable for the tortious conduct of employees, regardless of the independent nature of their tasks. Because the English courts tend to follow a fact-specific approach,[82] certain rules have developed for determining the status of certain specific types of employee. It appears that there are three types of employee that have been given particular attention as far as the determination of status is concerned. These are: hospital staff, police officers and borrowed employees.[83] It is no coincidence that these employees perform their functions with a fair measure of personal discretion. That is perhaps why the English courts have seen fit to classify them independently so as firmly to determine their employment status.[84]

As regards hospital staff, even those professional persons who perform their functions with full discretion are employees of the hospital. In *Gold v Essex CC*[85] it was held that specialist radiographers would be considered employees of the hospital administration for the purposes of establishing a relationship capable of founding vicarious liability.[86] Similarly, in *Cassidy v Ministry of Health*[87] house surgeons and

[81] Para 34 (6). It is clear from this statement that the court recognised the necessity of incorporating the various policy considerations behind vicarious liability into this stage of the enquiry.
[82] In terms of which the legal principles are tailored to fit specific sets of facts. In South Africa the facts are examined in the light of general legal principles.
[83] Other specific categories which have been mentioned include: taxi drivers, agency workers, club servants and professionals in any field.
[84] The South African courts favour a principle-based approach and therefore try to apply a general principle capable of covering all types of employment when determining the status of employees.
[85] [1942] 2 KB 293.
[86] In this case the plaintiffs five-year-old daughter was severely disfigured due to the negligence of a specialist radiographer who failed to use the correct screen when applying Grenz ray treatment. It was

assistant medical officers who worked with a hospital on a full-time basis were held to be employees of the hospital administration.[88] In fact, it has even been held that part-time anaesthetists could be considered employees of the hospital at which they perform their functions.[89]

In terms of recent English legislation[90] the chief officer of police for any defined area is held liable for torts committed by subordinates under his or her control.[91] Liability will arise where the tortious conduct of officers is committed whilst exercising, or purporting to exercise, their duties.[92]

So-called 'borrowed employees'[93] present an interesting complication, as it is difficult to determine who of their employers should bear responsibility for their actions. The English have adopted a very similar approach to that followed by South African courts when determining liability in instances where multiple employers are involved. Murphy observes that "[t]here is a very strong presumption indeed that someone remains the employee of the general or permanent employer although another employer borrows his services."[94] Emphasis is placed on whether or not the temporary employer had the right to control the manner in which the employee's tasks were conducted. The employer who has control over the manner in which the employee's tasks are performed will be held vicariously liable should that employee

held that the hospital administration owed a duty to patients to ensure that they were treated properly by all hospital staff, including full time professional practitioners.

[87] [1951] 2 KB 343.

[88] See also *Collins v Hertfordshire CC* [1947] KB 598; *Street on Torts* (2005) 555; Rogers *Tort* (2006) 888-890; Dugdale and Jones *Clerk & Lindsell on Torts* 329.

[89] See *Roe v Minister of Health* [1954] 2 QB 66.

[90] Section 88 of the Police Act of 1996.

[91] Traditionally, police officers were not considered servants to any person or body and therefore no claim could be made against the Crown or the Police Authority for delicts committed by police officers. Chief officers are obviously not personally liable and any successful claims are paid out of the police fund.

[92] In *Weir v Bettison* [2003] All ER 273 it was held that as long as the officer was purporting to exercise his or her authority when committing the tort, it is not material whether or not that officer was on duty at the time. In this case an off-duty officer assaulted a youth who he suspected of stealing, and locked the boy in the back of a police van which he had appropriated for his own purposes without permission.

[93] A borrowed employee is simply an employee who is lent out (gratuitously or otherwise) to a temporary employer.

[94] *Street on Torts* 556. See also Fleming *The Law of Torts* 419.

commit a tort. This principle is best described in the Canadian case, *Bain v Central Vermont Railway Co*:[95]

> "[I]t is well established that the master in whose general service a man is, is not responsible for the tortious acts of a man if the control of the master had been, for the time being, displaced by the power of control of another master into whose temporary service the man had passed by being lent (even gratuitously) or sub-contracted. In such case it is the *patron momentaine* and not the *patron habituel* who is responsible."

In *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* a crane driver who had been hired out to the respondents negligently caused harm to a third party. The court had to decide whether the general or temporary employer would be vicariously liable for the harm. It held that the general employer had the power to direct the way in which the employee operated the machine, whereas the temporary employer only had the power to direct what work was to be done and where. It was therefore concluded that the general employer would be liable.

Under the 'fact-specific' approach followed by the English courts, inferences are drawn from the type of work being performed by the employee. Rogers observes: [96]

> "A distinction is drawn between cases where a complicated piece of machinery and a driver are lent, and cases where labour only, particularly where it is not of a highly skilled character, is lent. In the former case, it is easier to infer that the general employer continues to control the method of performance.... In the latter case it is easier to infer that the hirer has control not merely in the sense of being able to tell the workman what he wants done, but also of deciding the manner of doing it."

It is clear that there is very little difference between the way in which the English and Commonwealth courts approach the task of establishing the existence of a relationship capable of founding liability and the way in which the South African courts deal with the enquiry. Although the English tend to categorise certain types of employment for the sake of clarity, the general underlying principles are the same.[97]

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[95] 1921 (2) AC 412.

[96] Rogers *Tort* (2002) 711.

[97] Interestingly however, in its 2001 report on vicarious liability the Queensland Law Reform Commission made the suggestion that legislation should be introduced to provide that, where an employer, including the State, lends or lets on hire an employee's services to another person and the employee commits a tort while there continues to be a contract of service between the employer and the

3.2.4.6. Relationships Not Capable of Founding Liability

Parents are not vicariously liable for the tortious conduct of their children.[98] Similarly, social services authorities are not vicariously liable for the torts of foster parents. Authority for this can be found in *S v Walsall Metropolitan Borough Council*,[99] where it was held that foster parents to whom children in the care of local authorities were boarded out could not be considered as agents of the child care authorities for the purposes of imposing vicarious liability. This principle was recently upheld in the Supreme Court of Canada in *KLB v British Columbia*,[100] where it was held that although foster parents act in pursuance of a public goal, they could not be regarded as having acted on behalf of a public authority for the purposes of vicarious liability.[101]

3.3. THE SCOPE OF EMPLOYMENT

As in South African law, the second part of the test for vicarious liability is concerned with the question of whether or not employees'[102] acts were committed in the course and scope of their employment. If they were not, then the claim cannot succeed. The difficulty is where to draw the line between acts falling within the scope of employment and those considered to fall outside the scope of employment. That requires a factual enquiry to establish an objective interpretation of what acts are necessarily incidental to the employee's specific function.

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employee, the employer is vicariously liable for the tort. The employer would be liable to the same extent, if any, that he or she would have been had the employee not been lent or let to the other person (Queensland Law Reform Commission, Vicarious Liability, Report no. 56 (2001) at 3.4.). It appears that if this suggestion is followed (which is likely, due to Australia's recent trend towards the codification of many aspects of tort law) liability will always attach to the general employer.

[98] Trindade and Cane *The Law of Torts in Australia* 734. Although, as in South Africa direct liability may arise through failure to exercise proper control over children. A good example of this can be seen in the South African case of *Godfrey and Others v Campbell* 1997 (1) SA 570 (C), a case involving the failure of parents to control their minor daughter who was engaged in an adulterous affair with the respondent's husband. The authors go further to point out that failure to exercise appropriate control also forms the basis of the liability of occupiers of premises for the conduct of their visitors. See *Wilkinson v Joyceman* [1985] 1 Qd R 567; and *Woods v Multisport Holdings Pty Ltd* [2002] ALR 145 (a case involving an injury sustained in an indoor cricket match on the respondent's premises).

[99] [1985] 1 WLR 1150.

[100] [2003] SCC 51.

[101] See Rogers *Tort* (2006) 910.

[102] For the sake of convenience the general employment relationship will be used when discussing the connection between the acts of the tortfeasors and their appointed tasks. Trindade and Cane *The Law of Torts in Australia* 735 point out that "in the case of agents, the question, though the same in substance, is usually put in the form of whether the agent was acting within the scope of the authority."

In *Lister and Others v Hesley Hall Ltd*[103] Lord Clyde observed that 'scope of employment' and 'course of employment'[104] are used interchangeably, but that the former is preferable as the term 'course of employment' is used in a number of statutory provisions dealing with other branches of law not connected with vicarious liability. This has the potential to cause confusion and so the more suitable term 'scope of employment' will be used when referring to this element of the enquiry.

Perhaps the best short description of acts falling within the scope of employment is given by Rogers:[105]

> "The act will be within the scope of employment if it has been expressly or impliedly authorised by the employer[106] or is sufficiently connected with the employment that it can be regarded as an unauthorised manner of doing something which is authorised, or is necessarily incidental to something which the employee is employed to do."

This definition neatly sets out the principles which govern the application of the 'scope of employment' enquiry. From the description it is clear that there are two situations in which the actions of employees will be considered to fall within the scope of employment. First, where the conduct has been expressly or impliedly authorised and second, where there is a connection between the employee's acts and his or her employment. The second category of actions can be further subdivided into those which can be regarded as unauthorised modes of performing authorised tasks, those which can be regarded as sufficiently connected to the employee's appointed tasks, and those which are necessarily incidental to the type of employment.

When categorising the various cases according to the general principles outlined above, it is possible to gain a clearer understanding of the way in which the courts determine whether or not the actions of employees fall within the scope of their

[103] [2002] 1 AC 215 at para [40].
[104] Heuston and Buckley *Salmond* 443.
[105] Rogers *Tort* (2006) 893.
[106] The author points out that if the authorised act is inherently wrongful the employer will be directly liable as he or she will have procured a wrong and there would therefore be no need to rely on vicarious liability.

employment. It is therefore necessary to examine cases with reference to these principles.

3.3.1. Express and Implied Authority

Employers will be held vicariously liable for acts of employees which are expressly or impliedly authorised. As far as express and implied authority are concerned, only the latter requires attention. It is clear that employers are liable for expressly authorised acts but there are a number of instances where implied authority is presumed – such as an employee's authority to act to protect his employer's property in emergencies where the employee has a reasonable belief that it is in danger.[107] If an employee acts on such authority, his or her employer will be liable unless it can be proved that the employee exceeded the bounds of such authority.[108] Although there are number of instances in which implied authority is presumed, the list is not exhaustive and the facts of each case are examined in order to determine the existence and extent of such authority.[109]

A good example of a situation in which the determination of whether or not an employees acts exceeded his or her implied authority is in the case of wrongful 'mistake'.[110] Often, an employee mistakenly acts outside this authority when committing a tort and the court has to determine whether the departure from authority is sufficient to take the conduct outside the course and scope of employment. This often presents difficulties due to the nature of unspoken authority. In some cases it is difficult to define the limits of implied authority. The courts need to evaluate the circumstances surrounding each set of facts and come to a decision which is often only an application of common sense to the problem. In that case it could be argued that the decision becomes a matter of policy rather than principle.

The limits, however, are easily identified in many cases. In *Polland v Parr & Sons* a carter struck a boy he believed to be pilfering sugar from his employer's wagon to the

[107] See *Polland v Parr & Sons* [1927] 1 KB 236.
[108] In *Polland* at 245 Atkin LJ said that "[W]here the servant does more than the emergency requires, the excess may be so great as to take the act out of the class." This case is discussed further below.
[109] Deakin, Johnston and Markesinis *Tort Law* 584-586.
[110] Vicarious liability for wrongful mistakes is discussed further in 3.3.4.6.

back of the neck with excessive force. The court held that although the force used was excessive, it was not sufficiently so to take his actions outside the course and scope of his employment.[111] This decision is illustrative of the fact that determining whether or not there has been a sufficient departure from authority to put the act outside the course and scope of employment is simply a question of degree.

3.3.2. Unauthorised Modes of Performing Authorised Tasks

The traditional Salmond test for determining whether or not an act was committed in the course and scope of employment placed emphasis on unauthorised modes of performing authorised tasks and has been used extensively to justify the imposition of vicarious liability for acts which often appeared to be outside the scope of employment. Simply put, the test is as follows:

> "[A] wrongful act is deemed to be in the course of employment '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'."[112]

The distinction between 'authorised acts' and 'authorised modes' is important when determining whether or not an act is sufficiently connected with the employment that for it to be regarded as an unauthorised mode of performing an act which was authorised. Deakin, Johnston and Markesinis observe:[113]

> "Leaving aside the 'implied authority' fiction, the test is simply: was this what the employee was employed to do? Was it a bad way of doing it?"

Of course, this approach can lead to employers being held liable for acts which are prohibited – a feature of the English system which widens the scope of liability somewhat, and is perhaps responsible for the broad approach which has recently been adopted by the courts in England, Australia, Canada and New Zealand.[114] This has been recognised as a necessary evil because if prohibited acts could not incur liability

[111] Rogers *Tort* (2006) 896.
[112] Deakin, Johnston and Markesinis *Tort Law* 587.
[113] Deakin, Johnston and Markesinis *Tort Law* 586.
[114] The effect of this principle on determining which acts fall within the scope of employment is discussed in detail in chapter 5.

employers could construct their instructions in such a way as to avoid most forms of vicarious liability.

3.3.2.1. Expressly Prohibited Conduct

When determining whether or not an employer can be held liable for the tort of an employee committed whilst the latter was engaged in expressly prohibited conduct, the courts have to evaluate the nature of the employer's instructions. If it is found that the prohibition limits the scope of employment, engaging in the prohibited conduct will take the employee's actions outside the scope of his or her employment. Conversely, if the prohibition merely limits conduct *within* the scope of employment, the employee's conduct will not necessarily fall outside the scope of employment.

There are two good examples popularly used by commentators to illustrate this approach, the first being the English case of *Century Insurance Co Ltd v Northern Ireland Road Transport Board*[115] in which an employer was held liable for the harm caused by one of its employees when discarding an ignited match onto the floor of a service station while filling the station's underground petrol tanks. The match sparked a fire which burned down the filling station. It was held that although the employee was prohibited by his employer from smoking whilst filling up underground tanks (the match was struck to light a cigarette), this prohibition did not take the conduct outside the course of his employment.

The second popular example used to illustrate the principle is *Phoenix Society Inc v Cavenagh.*[116] In this case an intoxicated bus driver collided with the plaintiff's car, injuring the plaintiff in the process. It was held that although the driver's employer had prohibited her from driving whilst under the influence, this prohibition did not take her actions outside the scope of her employment. The fact that the driver was intoxicated simply indicated that she was performing her authorised activity (driving the bus) in an unauthorised manner.

[115] [1942] AC 509.
[116] (1997) 25 MVR 143.

The general principle, as stated by Trindade and Cane, is that [117]

> "for the purposes of vicarious liability the exact terms of the employees' service or authority are not conclusive of the scope of employment. The question is whether the act constituting the tort or out of which it arose was broadly of the class which the employee was required or permitted to do."

Thus it can be concluded that employers will be held liable for harm arising out of conduct which they have prohibited as long as the conduct falls broadly within the scope of employment. Of course, this still begs the question – how broad *is* the class of action? Moreover, how does one determine what falls *within* the class of action?

The limiting factor here is the type of prohibition. Lord Dunedin made the following observation in *Plumb v Cobden Flour Mills Co Ltd*: [118]

> "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

The leading Australian case on this point is *Bugge v Brown*. The parties were neighbouring farmers in the north-west of Victoria. A farm worker in the employ of the respondent lit a fire on the respondent's farm which, due to negligence on the part of the worker, spread on to the appellant's land, destroying property to the approximate value of £1022. The appellant sought to hold the respondent vicariously liable for the worker's negligence, alleging that the conduct occurred within the course of the latter's employment. It is significant in this case that part of the employee's remuneration was that he should be fed, a task which was ordinarily carried out by the respondent's cook. On the day of the incident, however, the respondent's cook was not present and the employee was provided with some raw meat and potatoes by the respondent's wife. The respondent instructed his employee not to cook the meat by the dam, but to walk to another location a mile away from

[117] Trindade and Cane *The Law of Torts in Australia* 740. See also *Ilkiw v Samuels* [1963] 1 WLR 991 and *Bugge v Brown* (1916) 26 CLR 110.
[118] 1914 AC 62 at 67.

where he was working in order to cook the food. The employee chose not to follow his employer's instructions and lit a fire where he was working, such fire being the one which spread onto the plaintiff's land.

It was held that despite acting contrary to his instructions, the employee's conduct was reasonably incidental to his employment. It was held that the employer's instructions did not limit the sphere of employment,[119] and therefore by disobeying them, the employee did not take his actions out of the course of his employment.

Another example of a case in which a prohibition did not limit the sphere of employment was *Limpus v London General Omnibus Co,*[120] in which it was held that a prohibition from racing on the road merely limited conduct within the sphere of employment and not the sphere of employment itself. An employee caused a collision whilst racing and it was held that the employer was liable notwithstanding the instructions given to the employee prohibiting the such conduct. It was held that the employee was carrying out his tasks in an unauthorised manner.

In *Rose v Plenty and Another*[121] a milkman enlisted a thirteen-year-old boy to help him with his deliveries contrary to an express prohibition by his employer. The boy was injured due to the milkman's negligent driving and consequently sued the employer. It was held that the employer's strict instruction not to carry passengers and not to employ children in the performance of the employee's duties did not limit the sphere of employment, but merely affected the employee's mode of conduct within the scope of his employment. The employer was held vicariously liable because the employee's failure to follow instructions had not taken his conduct outside the course and scope of employment.

The *Rose v Plenty* decision contrasts with two earlier cases in which employers were held not liable for harm caused to unauthorised passengers. In *Twine v Bean's Express* it was held that since the unauthorised passenger was effectively a trespasser, the employer owed no duty of care towards him as he was not a foreseeable plaintiff. The

[119] At 119.
[120] [1862] 1 H & C 526.
[121] [1976] 1 All ER 97.

employer was therefore held not to be liable.[122] In *Conway v George Wimpey & Co Ltd*[123] a driver employed by the defendants to transport workmen around a construction site negligently caused injury to the plaintiff while giving him a lift. The driver was given specific instructions not to transport anyone who was not an employee of the defendants' firm. The plaintiff was not one of the defendants' employees and was therefore an unauthorised passenger. It was held that the employee was acting outside the course and scope of his employment as the prohibition limited the scope of that employment.

It is difficult to reconcile these cases. Deakin, Johnston and Markesinis[124] are of the view that "such a reconciliation is neither always possible, nor even desirable, since decisions in this area of the law should not be used like tintacks with which to nail down particular solutions, but simply as starting-points in a process of reasoning by analogy, by the use of contrasting examples, guided by common sense." It could be argued that although such cases are not always reconcilable, the courts should at least try to find some common thread of reasoning, particularly as the distinction between examples is often devoid of common sense.

3.3.2.2. Temporary Deviation from Instructions

Equally inconclusive are cases where employees commit torts while deviating from their employers' instructions. This type of case most often presents itself when drivers temporarily deviate from their designated route in order to pursue some personal aim, causing harm whilst on their detour. In these cases, employees will be regarded as having acted outside the course and scope of their employment if they were on a 'frolic of their own'. This test is singularly obscure as it depends solely on an interpretation of a factual situation. Moreover, "much depends on the way in which

[122] It must be noted, however, that the *Twine Bean* decision has come under severe criticism. Trindade and Cane *The Law of Torts in Australia* 740 are of the view that the grounds upon which this decision were based are now 'suspect'. The authors highlight the fact that the main ground upon which the decision was based was rejected by Lord Denning MR in *Rose v Plenty* on the basis that it is no longer the law that occupiers owe no duty to trespassers on their premises. They go further to point out that the decision is also suspect because it is assumed that a master can only be held liable if that master owes a duty to the plaintiff. The role played by the duty to take care in the law of vicarious liability will be discussed in more detail below at 3.4.
[123] [1951] 2 KB 266.
[124] Deakin, Johnston and Markesinis *Tort Law* 589.

the factual statement is phrased."[125] Further, it may be argued that classifying an act as a 'frolic' does not provide a clearly-defined explanation of whether or not it was outside the course and scope of employment. Deakin, Johnston and Markesinis point out:[126]

> "To call an action a frolic is not to give reason why it is outside the course and scope of employment; it only expresses a decision already made that it is outside."

Fleming observes[127] that if the driver's "private errand were alone decisive, he would in logic leave the scope of his employment as soon as he started his detour and not re-enter until he returned to his original route." The law, however, does not follow this logic: it takes a broader, more practical view when confronted with the problem. It has long been accepted that certain departures from strict instruction are inevitable, and that most of these departures cannot, in fairness, be viewed as sufficiently removed from an employee's tasks so as to conclude that the work of the employer was abandoned. The courts therefore conduct an objective enquiry into the nature of the deviation. As Fleming puts it:[128] "[I]t (the court) embarks on the uneasy task of striking a pragmatic compromise, having regard to the space, time and purpose of the deviation."

Of course if we are to accept that the test is as stated above,[129] it is not surprising that its application has done little to promote legal certainty. There is no consistent guidance as to what constitutes a sufficient departure and therefore courts have to treat each situation on its own merits. Although this may not be particularly desirable, it is difficult to see how comprehensive guidelines could be introduced, bearing in mind that the enquiry into whether or not an act can rightly be described as a frolic is always a question of fact.

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[125] *Ibid.*
[126] *Ibid.*
[127] Fleming *The Law of Torts* 424.
[128] *Ibid.*
[129] As it has not been stated in more precise terms, we are entitled to accept that the test is merely whether or not, objectively speaking, the actions of the employee in deviating from his or her instructions were so great in respect of time and space as to conclude that the employee was engaging on a 'frolic of his or her own'. See the comments made by Parke B in *Joel v Morrison*.

In *Storey v Ashton*[130] it was established that in determining whether or not a deviation is sufficient to take the actions of an employee outside the scope of employment, the question is simply one of degree.[131] Although this exposition of the principle makes sense, it does little to dispel uncertainty. It appears that the court's decision hinges on the seemingly unguided opinion of the presiding officer after having been given a subjective account of a factual situation.

Difficulties abound due to the number of differing circumstances which may be present in each case. Murphy recognises that "the diversity of employment relationships is so great that it will not be surprising to discover that these issues of fact are frequently of exceptional difficulty."[132] It seems that the courts have recognised these difficulties, particularly in cases where employees act purely for their own benefit when committing torts.[133] In *Lister's* case it was recognised that the traditional distinction between what constituted an unauthorised mode of performing authorised duties, and conduct falling outside the scope of employment, did not offer much help in cases of deliberate wrongful conduct committed solely to further the employee's own interests. As Murphy points out:[134]

> "[I]t is quite properly uncontentious to regard negligence in the performance of a job as a wrongful mode of doing an authorised act. But deliberate, heinous acts by an employee are far more difficult to classify in such terms."

This notwithstanding, it has been recognised that in certain circumstances liability can and should attach to employers whose employees have acted in furtherance of their (the employees') own interests.[135]

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[130] (1869) LR 4 QB 476.
[131] 48.
[132] *Street on Torts* 565.
[133] See Dugdale and Jones *Clerk & Lindsell on Torts* 337.
[134] *Street on Torts* 566.
[135] Heuston and Buckley *Salmond* 447; Rogers *Tort* (2006) 898. See also *Lloyd v Grace Smith and Co Ltd*.

3.3.3. Acts Incidental to Employment

As far as acts incidental to employment are concerned, "an act done by an employee will not necessarily be excluded from the course of the employee's employment merely because it is not an act which the employee is actually employed to perform."[136] As long as the act in question is reasonably incidental to the employment, the employer will be held responsible. In *Staton v National Coal Board*[137] it was held that a first aid attendant was acting within the course and scope of his employment while cycling along a road within the precincts of the colliery at which he was employed. It was held that although the purpose of his cycling was to collect his wages from the pay office, and was therefore not in furtherance of his duties, his conduct was reasonably incidental to his employment.

On the face of it, the English test for determining whether or not an act was committed in the scope of employment is vague and open to widely variable interpretation.

The English authorities have gone to great lengths to point out that the enquiry is one of both law and fact, as it involves the application of legal principle to fact.[138] However, the factual circumstances of each case are of primary importance when attempting to establish a link between the conduct and the employee's scope of employment. As Rogers observes, the test "is not one that lends itself to the imposition of mechanical or precise formulae."[139]

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[136] Dugdale and Jones *Clerk & Lindsell on Torts* 340.
[137] [1957] 1 WLR 893.
[138] See Rogers *Tort* (2006) 893; *Street on Torts* 565; *Dubai Aluminium Co Ltd v Salaam and Others* [2003] 2 AC 366 at para 24.
[139] Rogers *Tort* (2006) 893.

3.3.4. Wilful Wrongs and the 'Sufficient Connection' Test

It has long been accepted that deliberate, even criminal, tortious conduct on the part of employees will not necessarily fall outside the scope of employment.[140] However, as Fleming observes:[141]

> "[C]oncern over imposing too onerous a burden on employers, combined with a hesitation to make one person responsible for another's misconduct involving a taint of moral delinquency, has often in the past led to a noticeably narrower definition of responsibility."

Isaacs J noted in *Bugge v Brown*[142] that it is far more difficult to view deliberate misconduct as a mode of performing an authorised duty than it is to view negligence as such.[143] This is particularly true when the conduct in question appears to have the sole aim of furthering the employee's interests. Indeed, where the conduct is a product of the employee's wish to further his or her employer's interests, the courts will be far more inclined to view the conduct as reasonably incidental to the tortfeasor's employment.[144]

Therefore it is not surprising that intentional torts give rise to problems when determining whether or not they are sufficiently connected to an employee's tasks. In most circumstances it is singularly difficult to offer a convincing argument that the deliberate wrongful conduct of an employee constitutes an unauthorised mode of performing an authorised task (unless of course the wrongful act itself was authorised). Equally difficult is an attempt to found liability by claiming that wilfully wrongful and often criminal acts are incidental to an employee's job. It is for this reason that the English and Commonwealth courts have broadened their approach and applied what has been described as the test of 'sufficient connection' between the

[140] *Macdonald v Dickson* (1868) 2 SALR 32. See Trindade and Cane *The Law of Torts in Australia* 737; Fleming *The Law of Torts* 426; Stewart and Stuhmcke *Tort Law* 349.
[141] Fleming *The Law of Torts* 426.
[142] At 116.
[143] This is perhaps because deliberate misconduct is almost always antithetical to an employee's appointed tasks and aimed solely at furthering the letter's interests. Negligence is, by definition, unintentional and is therefore more likely to be connected to the employee's appointed tasks as it has no particular aim or intention. It could be argued that by deliberately committing a wrongful act whilst performing asks on behalf of an employer, the employee is consciously departing from these tasks.
[144] See *Hayward v Georges* [1966] VR 202.

wrong committed and scope of the employee's employment.[145] In terms of this test the court looks at all the surrounding circumstances and decides whether or not there was a sufficient connection between the employees' conduct and their employment.

The specific forms of deliberately wrongful conduct which have been identified are the recognised torts of theft, assault, sexual assault and fraud.[146] Vicarious liability for sexual harassment is now also a possibility.[147] With the exception of fraud (which is based on ostensible authority), all of these forms of conduct can render employers liable where it is found that there is a sufficient connection between the conduct and the fact of employment. Although in many cases the traditional Salmond test is used to justify the imposition of liability, it appears that the sufficient connection test is perhaps better suited to cases of intentional tort.

3.3.4.1. Fraud

Fraud is treated differently from other forms of intentional wrong when determining vicarious liability. This is not surprising, as the nature of fraud creates problems specific to this type of wrong.[148] In *Armagas Ltd v Mundogas SA The Ocean Frost*[149] the House of Lords accepted that the rules and principles applicable to vicarious liability for fraud are particular to this wrong and therefore do not follow the same line of authority as those dealing with other torts such as negligence or trespass.[150]

As with theft, the courts were traditionally reluctant to impose vicarious liability in fraud cases.[151] The possibility of vicarious liability being imposed for the fraudulent conduct of an employee was first accepted in *Barwick v English Joint Stock Bank,*[152] but it was not until *Lloyd v Grace Smith & Co* that liability was accepted for fraud

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[145] Deakin, Johnston and Markesinis *Tort Law* 591. See *Lister v Hesley Hall Ltd.*

[146] Other examples of wrongful conduct for which employers have been held liable include, arson and trespass. See *Photo Production Ltd v Securicor Ltd* [1980] AC 827; *League Against Cruel Sports v Scott* [1986] QB 240.

[147] This was recently considered in New Zealand and will be discussed below.

[148] Rogers *Tort* (2006) 906; Dugdale and Jones *Clerk & Lindsell on Torts* 348.

[149] [1986] 1 AC 717.

[150] See Dugdale and Jones *Clerk & Lindsell on Torts* 348; *Street on Torts* 574.

[151] As with all other wilful wrongs, this reluctance stemmed from the fact that such acts were almost always committed in furtherance of the employee's own interests and outside the scope of their instructions.

[152] 1867 LR 2 Ex 259. This case involved liability of a bank for the fraudulent conduct of one of its managers.

where the employer did not benefit from its commission.[153] Before this, liability was restricted and would only be imposed where the acts were, at least partially, to the benefit of the employer. Perhaps the most important principle which was derived from the *Lloyd* case was that an employee's conduct would be within the scope of employment if such conduct fell within that employee's actual or ostensible authority. In *Lloyd* a solicitor's clerk defrauded a client by persuading the client to entrust certain title deeds, thereafter disposing of the property for his own benefit. It was clear that the clerk had apparent authority to deal with matters involving title deeds as his employer had often allowed him to do so, thereby representing that he had the necessary authority.[154] Earl Loreburn commented:[155]

> "If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it."

In cases where an employee has deceived the claimant, it is incumbent on such a claimant to prove that he or she relied on the employee's ostensible authority.[156] This is what distinguishes fraud cases from ordinary wrongs committed by employees.[157] If the claimant was aware that the employee had no authority, he or she would not be able to succeed in a claim against the employer.[158]

3.3.4.2. Theft

Traditionally, the courts were of the view that an employer could not be liable for thefts perpetrated by their employees,[159] but this position has now changed.[160] In *Morris v C W Martin & Sons Ltd*[161] the plaintiff sent her mink coat to the defendants

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[153] Deakin, Johnston and Markesinis *Tort Law* 592; Dugdale and Jones *Clerk & Lindsell on Torts* 349.
[154] Deakin, Johnston and Markesinis *Tort Law* 592.
[155] At 725.
[156] Deakin, Johnston and Markesinis *Tort Law* 592; *Street on Torts* 574.
[157] It was recognised in *Dubai Aluminium Co Ltd v Salaam and Others* that "Reliance on ostensible authority does not arise in most cases of vicarious liability, and it is never relevant when the act was the very thing that caused the loss." See also *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248.
[158] See *Kooragang Investments Pty Ltd v Richardson and Wrench Ltd* [1982] AC 462.
[159] In *Cheshire v Bailey* [1905] 1 KB 237 it was held that the act of stealing could only be done outside the scope of employment.
[160] Dugdale and Jones *Clerk & Lindsell on Torts* 346.
[161] [1966] 1 QB 716.

for cleaning.[162] An employee of the defendants, to whom the job of cleaning was entrusted, stole the coat and the defendants were held liable for the criminal conduct of that employee. Liability was based on the fact that the defendant company was a bailee for reward and therefore was under a duty to protect the bailed goods from theft or depredation. This duty is non-delegable: therefore if it is entrusted to an employee or agent, liability for breach of the duty by such employee or agent still attaches to the employer.[163]

Although it was held that the defendants were liable for breach of their own non-delegable duty and their liability was therefore direct and not strictly vicarious, the English commentators have agreed that the principles established in this case are applicable to vicarious liability.[164] Deakin, Johnston and Markesinis observe that the employee in *Morris'* case could be said to have done what he had been asked to do improperly,[165] thereby performing authorised functions in an unauthorised manner. This decisive principle was supported by the Privy Council in *Port Swettenham Authority v TW Wu Co,*[166] where Lord Salmon stated:

> "The heresy that any dishonest act on the part of a servant employed to take care of the goods is necessarily outside the scope of his employment, and that the master cannot be liable for the dishonest act unless done for his benefit or with his privity, was exorcised by *Lloyd v Grace, Smith & Co.* It was on the basis of this heresy that *Cheshire v Bailey* laid down the startling proposition of law that a master who was under a duty to guard another's goods was liable if the servant he sent to perform the duty for him performed it so negligently as to enable thieves to steal the goods, but was not liable if that servant joined with the thieves in the very theft. This proposition is clearly contrary to principle and common sense."

It is difficult to see the logic of the ruling in this case which accepted that the employee had been performing authorised tasks in an unauthorised manner in order to commit theft. It is not easy to see how the act of theft could be considered a mode of

[162] She originally sent it to a furrier who, with her permission, subcontracted the work to the defendants.
[163] It must be noted that in the case the defendants were sub-bailees, but the principles applicable to ordinary bailees still applied.
[164] In *Photo Production Ltd v Securicor Transport Ltd* it was held that principles set down by Diplock and Salmon LJ in *Morris'* case are of general application. This view was adopted by Lord Steyn in *Lister v Hesley Hall* where he commented that *Morris* could not be dismissed merely as a case of bailment.
[165] Deakin, Johnston and Markesinis *Tort Law* 592. See also Rogers *Tort* (2006) 904-905.
[166] [1979] AC 580.

performing authorised activities. Surely it makes more sense simply to conclude that the employee's theft was sufficiently connected to his or her employment?

That view was upheld in *Nahhas v Pier House (Cheyne Walk) Management.*[167] A porter in the employ of the defendants burgled a flat using keys entrusted to him by his employer. It was held that although the defendant company was not a bailee of the property, it was nevertheless liable as it had entrusted the keys to the employee. It was clear in this case that liability was based on a sufficient connection between the employment and the tort.

It must be noted, that where an employee is found to have stolen property, an employer will only be liable where such property has been entrusted to that employee in some way or another. In *Heasmans v Clarity Cleaning Co Ltd*[168] it was held that an employer will not be held liable merely because the opportunity to commit the offence was created by the employee's position.[169]

3.3.4.3. Assault

It is well established that acts committed out of personal spite and resentment will not render employers vicariously liable, regardless of whether or not they are generated in the course of the employee's service.[170] The popular Australian example of this principle is *Deatons Pty Ltd v Flew,*[171] a case in which a barmaid severely injured a customer by throwing a beer glass at him. She threw the glass out of anger, after having been treated badly by the customer. It was held that the barmaid's actions could not render her employer liable as they were clearly motivated by personal resentment and anger and were in no way incidental to her employment. If, however, she had been charged with maintaining order in the bar as a condition of employment, it might have been held that her actions were incidental to that employment and thus

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[167] (1984) 270 EG 328.
[168] [1987] ICR 949.
[169] In this case a cleaner employed by the defendant to clean the plaintiff's premises used the plaintiff's telephones to make international calls. This carried on for six months and cost the plaintiff over £1400.00. The cleaning company was held not to be liable as the mere fact that they created the opportunity for such conduct could not render them liable.
[170] Dugdale and Jones *Clerk & Lindsell on Torts* 344. See also Trindade and Cane *The Law of Torts in Australia* 739.
[171] (1949) 79 CLR 370.

her motives would not have influenced the finding as the action of throwing the glass would almost certainly have been viewed as an improper way of performing her appointed task.[172]

An example of a situation in which such conduct was found to be within the scope of employment is the New Zealand case of *Petterson v Royal Oak Hotel Ltd.*[173] In this case a barman refused to serve an intoxicated customer, who consequently threw a glass at him. As the customer was leaving the establishment the barman threw a piece of glass in his direction, which missed and lodged in the eye of the plaintiff, who was one of the other customers in the bar. It was held that although the barman had acted out of personal ill-will, his actions constituted an improper manner of performing his task of maintaining order in the bar. Of course, it could be argued that this decision is another example of the court stretching what can rightly be described as authorised conduct in order to find for the plaintiff. Surely the throwing of a sharp object cannot be regarded as being sufficiently connected to the task of keeping order to conclude that it was merely an unauthorised mode of doing so?

This principle is also neatly illustrated by *Warren v Henlys Ltd,*[174] where a petrol attendant at a service station assaulted a customer after having been threatened by him.[175] It was clear in this case that the employee was acting in furtherance of his own interests and out of personal spite and vengeance. It was held that the employer was not responsible for the employee's conduct.

These cases are readily distinguishable from cases in which assaults are committed in furtherance of the employer's interests. In such cases, employers will be held liable regardless of whether or not the conduct is in fact authorised. For example, in *Dyer v Munday*[176] an assault by the defendant's manager rendered it vicariously liable as the conduct was in furtherance of the defendant's interests. In this case the employee was

[172] See the comments of Gleeson CJ in *New South Wales v Lepore and Another; Samin v Queensland and Others; Rich v Queensland and Others* [2003] 2 HC 4 at 65.
[173][1948] NZLR 136.
[174] [1948] 2 All ER 935.
[175] The customer threatened to report the attendant to his superiors after the attendant had used violent language towards him. In his own words, the attendant admitted that in response to the threat he "gave him one on the chin to get on with."
[176] [1895] 1 QB 742.

thwarted in his attempts to recover some furniture which was hired out by his employer. The furniture had been pledged to the hirer's landlord as security for unpaid rent and the landlord's wife attempted to stop the defendant's employee from removing it, whereupon the employee assaulted her. It was held that the employee was acting in furtherance of his employer's interests, despite the fact that such conduct was neither sanctioned nor authorised.

This position was endorsed in *Fennelly v Connex South Eastern Ltd*[177] where it was held that if the employee's acts are motivated by a desire to protect an employer's interests, the employer will be held liable, even where there is no express or implied authority for such conduct. The enquiry is focused on whether or not the unauthorised conduct is personally motivated.

In *Fennelly's* case a ticket inspector assaulted a railway passenger following an altercation over the inspection of the passenger's ticket. The passenger refused to submit his ticket for inspection, claiming that it had already been inspected. During this altercation the defendant's employee reacted to being called a fool by the claimant and assaulted him by putting him in a headlock and dragging him down some steps. The court held that the assault could not be divorced from the original altercation which was started in furtherance of the employer's interests. Inexplicably, the court held that there was nothing to suggest that the ticket inspector had acted in furtherance of his own interests; yet the undisputed facts compel the conclusion that the assault was a personal reaction to the verbal abuse of the claimant. This conclusion is reinforced by the fact that the assault took place after the claimant had shown the inspector his ticket, thereby enabling the latter to fulfil his authorised task. Nevertheless the court held the defendant liable for the conduct of its employee.

Similarly, in *Mattis v Pollock*[178] a nightclub owner was held liable for a brutal assault on a patron by one of his employees. The employee in question was hired as a doorman and was, in fact, encouraged by his employer to use force in the performance

[177] [2001] IRLR 390.
[178] [2004] 4 All ER 85.

of his duties.[179] The incident which gave rise to the action occurred after a brawl in the defendant's night club involving some of the claimant's friends and the doorman. After being assaulted by a number of patrons, the doorman managed to escape the club and return home, where he armed himself with a knife. Bearing this weapon he returned to the scene and stabbed the claimant, who happened to be the first person he was able to apprehend. It was held that the doorman's actions were so closely connected with his appointed functions that his employer was vicariously liable for the harm caused to the claimant.

The *Fennelly* and *Mattis* cases blur the distinction between acts of personal aggression and those in furtherance of an employer's interests. There is no doubt in either of these cases that the conduct of the respective employees began in furtherance of their employers' interests, but it is extremely doubtful that the assaults were not personally motivated. These decisions suggest that as long as the assault was triggered by an employee's desire to serve his or her employer's interests, that employer will be held liable for any resulting harm.[180] It appears that the principle in assault cases may therefore be similar to that of fraud in that liability is based on actual or ostensible authority. This broad interpretation of the principles of vicarious liability seems to be gaining ground in England and it has been argued that it is possible that the net of liability is being cast too far.[181]

3.3.4.4. Sexual Harassment

Sexual harassment in the workplace has become an area in which the laws governing vicarious liability have been interpreted generously. Although the act of sexual harassment is not in itself, a tort, employers may be held vicariously liable for their employees' breach of anti-discrimination legislation.[182] In *Bracebridge Engineering*

[179] His primary function was to intimidate and eject unruly patrons, a task which he seemed to perform with what can best be described as unnecessary enthusiasm. Such behaviour became cause for concern among his fellow employees, who, on more than one occasion, expressed their misgivings to their employer.

[180] It may be argued that this position cannot be reconciled with the decision in *Warren's* case as it is clear that the employee's actions were triggered by a desire to protect his employer's interests.

[181] See R Weekes "Vicarious Liability for Violent Employees" (2004) 64 *CLJ* 53. This argument is discussed in detail at 3.5. below.

[182] *Street on Torts* 572. It has been argued that the law of torts should be developed to include an action for sexual harassment, as although statutory remedies exist, they do not cover all possible instances of

Ltd v Darby,[183] a female employee of the appellants was sexually harassed by two fellow employees, both of whom were appointed in supervisory positions. It was held that although the act of harassment was independently motivated and was not done in furtherance of the employer's interests, it was nevertheless committed within the scope of the employees' duties. It was held that the act of harassment constituted an improper mode of carrying out a supervisory function.

Once again it could be argued that the court was stretching the idea of what could be described as 'supervision'. Surely, under no circumstances can sexual harassment be considered a part of performing the task of supervision. It appears that although the court justified its finding by attempting to fit the facts into the traditional Salmond formulation, it was simply following the sufficient connection test.

One of the latest significant decisions on vicarious liability for sexual harassment is the New Zealand case, *Proceedings Commissioner v Ali Hatem*,[184] in which a partnership was held liable for acts of sexual harassment committed by one of its partners. Although the firm's liability was based on the Partnership Act of 1908, the test applied by the court was ostensibly the same as that applied under the common law and a determination as to whether or not the partner's acts fell within the ordinary course of business had to be made. Section 13 of the Partnership Act reads:

> "13. Liability of the firm for wrongs: Where, by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of its co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act."

The court held that the determination of whether or not the acts committed by the partner were in the ordinary course of business should be guided by policy

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harassment. See J Conaghan "Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment" (1996) 16 *OJLS* 407 at 412-413.

[183] [1990] IRLR 3 EAT. An appeal from the decision of an Industrial Tribunal. The action was brought in terms of sections: 1(1)(a), 6(2)(b), and 41(1) of the Sex Discrimination Act of 1975, and section 55(2)(c) of the Employment Protection (Consolidation) Act of 1978.

[184] [1999] 1 NZLR 305.

considerations and that the purpose behind the legislation must be kept in mind when coming to a conclusion. Tipping J said the following:[185]

> "In the ultimate judgment which has to be made, issues of policy may arise. For example, in the present case, sexual harassment of an employee by one partner, if it is not the responsibility of the firm as a whole, is likely to be less vigorously policed. One purpose of the legislation is obviously to deter sexual harassment and to provide a remedy for its victims. That purpose will be better achieved by holding the firm as a whole liable, rather than just the individual partner. Obviously policy matters cannot lead to a result which is otherwise untenable, but in a case involving matters of degree, as most contested cases will, it is legitimate to keep the purpose of the legislation in mind."

It was observed that although the acts committed by the partner could not be regarded as part of the firm's business, they were committed *while* the partner was engaged in the firm's business[186] and indeed while the partner was engaged in the authorised task of dealing with staff. It was accepted that partners in a firm generally have the authority to deal with the employees of the firm,[187] and,[188]

> "If they deal with them badly, rather than well, they are nevertheless doing something within the ordinary course of the business of the firm. They are doing something generally authorised, albeit they are doing the particular acts in a tortious manner."

As pointed out by Calitz,[189] the court did not apply the new 'close connection' test, but stuck to the original Salmond rule, holding that the partner was engaged in an unauthorised mode of performing authorised tasks. This generous interpretation of the rule seems to confirm the trend towards a wider scope of liability for the wrongful acts of employees, although it seems that the courts still insist on using the 'unauthorised mode' rationale for attributing liability, even where it appears to make little sense. As mentioned above, it is very difficult to accept that sexual harassment can be regarded as a mode of performing an authorised task.

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[185] Para 19.
[186] Para 23.
[187] This was particularly true of the partner in question, who was charged with dealing with the staff because he spoke better English than the other partner.
[188] Para 24.
[189] K Calitz "Vicarious liability" 230.

3.3.4.5. Sexual Assault

The difficulties encountered when attempting to connect the conduct of employees with their appointed tasks are particularly severe in cases where sexual assault has been committed by an employee. In these cases there can be no doubt that the offender was acting in furtherance of his or her own interests. However, that does not prevent employers from being held vicariously liable for the employee's actions.[190]

The influence of *Bazley v Curry*[191] on the approach to cases of sexual assault (and indeed on most recent decisions involving the liability of employer's for the personally motivated criminal acts of their servants) cannot be overstated. This decision has and will continue to have a marked influence on the application of the principles of vicarious liability in all common-law jurisdictions, and thus compels attention.

The facts were as follows: The appellant, a charitable organisation, operated two residential care facilities for the treatment of emotionally troubled children. One of their employees (Curry) was found to have systematically sexually abused the children at one of the homes and was consequently dismissed. Curry was later convicted on 19 counts of sexual abuse, two of which related to the respondent. The respondent sued the organisation, claiming that it was vicariously liable for the employee's tortious conduct. The trial court upheld the respondent's claim, as did the court of appeal. The appellant was granted leave to appeal to the Supreme Court of Canada.

The main issue faced by the court in this matter was whether or not the employers could be held vicariously liable for their employees' sexual assaults on persons within their care.[192] The court recognised that in cases such as this, the application of the

[190] Rogers *Tort* 901; Deakin, Johnston and Markesinis *Tort Law* 593. See also P Cane "Vicarious Liability for Sexual Abuse" (2000) 116 LQR 21; P Giliker "Rough Justice in an Unjust World" (2002) 65 MLR 269.

[191] (1999) 174 DLR (4th) 45.

[192] There was a second ancillary issue of whether or not non-profit employers should be exempted from liability. This issue was not the focus of the decision and therefore requires little attention. Suffice it to say that the court found absolutely no sound reason why non-profit organizations should be exempted

traditional test for vicarious liability (the Salmond test) presented a number of difficulties. Perhaps most significant among these was that the test does not set clear guidelines for distinguishing between unauthorised modes of performing authorised acts, and entirely independent acts. McLachlin J suggested that one way to answer this question was to look at settled cases with similar evidentiary backgrounds.[193] However, as Fleming rightly pointed out, "precedents are helpful only when they present a suggestive uniformity on parallel facts."[194] Where no suitable precedent exists, this method of drawing the distinction cannot be followed, and other means of making the distinction are necessary.

The court observed that the recent trend in situations where no clear precedent could be found is to turn to policy for guidance.[195] Attention was drawn to the comments of La Forest J in *London Drugs Ltd v Kuehne & Nagel International Ltd*[196] who recognised that the application of the test for vicarious liability should be informed by the policy considerations behind this form of liability.

The court suggested that the determination of the second part of the Salmond test[197] should be approached in two steps:[198]

> "First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability."

As far as the first step is concerned, it is difficult to distil clear principles from a line of authority in which general principles have been applied to materially different sets of facts. This notwithstanding, the court managed to break down the previously

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from compensating victims, regardless of their charitable intent and the service they render to the community.

[193] Para 12. The court quoted the comment made by Heuston and Buckley *Salmond and Heuston on the Law of Torts* 19ed 522 "[T]he principle is easy to state but difficult to apply. All that can be done is to provide illustrations on either side of the line."

[194] Fleming *The Law of Torts* 421. Cited at para 12.

[195] Para 14.

[196] [1992] 3 SCR 299.

[197] That which deals with the determination of whether or not an employee's acts were unauthorised modes of performing authorised activities.

[198] Para 15.

decided cases into three broad categories. It was suggested that if a common thread could be found between the three categories, it could help to interpret the way in which the test should be interpreted.[199] The categories defined by the court were:[200]

> "(1) cases based on the rationale of 'furtherance of the employer's aims'; (2) cases based on the employer's creation of a situation of friction; and (3) the dishonest employee cases."

McLachlin J held that the first category relies on the notion that the employee, by acting in furtherance of his or her employer's aims, has to have 'ostensible' or 'implied' authority to perform the unauthorised act.[201] She observed that although this rationale can be used effectively in cases of negligence, other than in cases of fraud it does not provide an adequate basis for intentional torts. She noted that[202] "It is difficult to maintain the fiction that an employee who commits an assault or theft was authorised to do so, even 'ostensibly'." The court found it best to place cases they described as those "addressing the distinction between a frolic and a detour" or so-called 'deviation' cases into this category.

As regards the second category, an employer is held liable where that employer's aim or enterprise incidentally creates a situation of 'friction'[203] which may give rise to employees committing tortious acts. The court found that intentional torts arising from such situations can be likened to accidents in that they stem from certain inevitable risks attendant to the employer's type of business.[204] McLachlin J pointed out:[205]

> "Like accidents, they [the torts] occur in circumstances where such incidents can be expected to arise because of the nature of the business, and hence their ramifications appropriately form part of the cost of doing business."

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[199] Para 17.
[200] *Ibid.*
[201] Para 18.
[202] *Ibid.*
[203] Friction in this sense is used to describe a situation in which an increased risk of harm is present. For example, hiring an employee whose job is to maintain order in a public house or night club creates a situation of friction.
[204] Para 19.
[205] *Ibid.*

Although the court did not specifically express which type of cases would fall into this category, the examples they cited suggest that cases of assault committed by employees whose tasks created a risk of confrontation would most readily fit this mould.[206]

It was recognised that cases involving dishonest employees could not be categorised under any of these headings. The court quite accurately observed:[207]

> "A bank employee stealing a client's money cannot be said to be furthering the bank's aims. Nor does the logic of a situation of friction apply, unless one believes that any money-handling operation generates an inexorable temptation to steal."

Despite this, the court accepted that employers are increasingly being held liable for the fraud and theft of their employees, and that in the absence of a logical connection to established principles, the courts are tending towards a more policy-driven approach.

Of particular concern in *Bazley v Curry* was the categorisation of sexual abuse. After the controversial decision in the English case, *ST v North Yorkshire County Council*,[208] the status of sexual assaults in cases of vicarious liability was disturbingly uncertain.[209] In that case it was held that the act of sexual abuse cannot be viewed as an unauthorised mode of performing an authorised act and that therefore it could not, in terms of the Salmond test, fall within the scope of employment. Butler-Sloss LJ came to the conclusion that acts of sexual assault are closest to acts of ordinary assault and that therefore such cases should be treated in the same manner.[210] It was held that since the acts of assault were personally motivated and in no way incidental to the employee's tasks, the employer could not be liable.

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[206] For example, *Dyer v Munday*, *Mattis v Pollock*, *Fennelly v Connex*. In all of these cases it could be argued that a situation of friction existed.
[207] Para 20.
[208] [1999] IRLR 98.
[209] In the case the plaintiff, a student at the defendants' school for the mentally handicapped, was sexually assaulted by the deputy headmaster of the establishment while on a school excursion in Spain.
[210] At 101. Butler-Sloss LJ said: "The line of decisions which is, in my view, the most relevant to consider involved assaults by employees."

It is not difficult to see the court's logic here as, when viewed in the context of ordinary assault, it is clear that a distinction can be drawn between cases in which a situation of friction is created and those in which it is not. It seems that only in the former category of cases are employers held liable (presumably due to the fiction of ostensible authority). In cases of sexual assault a situation of friction is almost never created by the employer. Thus the grouping of sexual assault with ordinary assault will inevitably lead to a situation whereby employers will never be held liable for the sexual assaults of their employees.

The *ST* decision was criticised in *Bazley*, with the comment that the conclusion that sexual assault is closer to an ordinary assault than it is to deceitful conduct is questionable in that while the tort is of a physical nature, it is equally arguable that the trust-abusing character of child abuse fits more into the dishonesty genre.[211] Leaving the categorisation aside, the court in *Bazley* went further to repeat the statement made by Lowry J in the court *a quo*:[212]

> "If a postal clerk's theft and a solicitor's clerk's fraud can be said to have been committed in the course of their employment, I can see no sound basis in principle on which it can be concluded that Curry's criminal conduct should not attract vicarious liability."

In this sense the court found that the reasoning in *ST v North Yorkshire County Council* would lead to anomalies. In *GJ v Griffiths*[213] Wilkinson J was less subtle in his criticism of *ST*, saying: "[S]urely a distinction is not to be drawn attributing a higher standard to the way society looks after its jewellery than its children."

It seems that we cannot view sexual assault in the same light as ordinary assault when determining whether or not the act is committed within the course and scope of employment. To do so would be to pronounce that acts of sexual assault cannot be committed in the course and scope of employment. That would surely defeat the purpose of vicarious liability and result in serious injustice.

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[211] Para 24.
[212] Sub-nom *P A B v Curry* (1995) 9 BCLR (3d) 217 at 263.
[213] [1995] BCJ No. 2370 (QL) (SC) para 76.

Returning to what was said earlier in the judgment about finding a common thread between the categories of cases, the court emphasised the need for what it described as a unifying principle. It was found that there was a common feature shared by all three categories, namely the creation of risk. The court recognised that:[214]

> "The common theme resides in the idea that 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."

Although this may be seen as a mere exposition of the policy rationale behind attributing liability to employers for the acts of their employees which seem antithetical to the employers' business aims, it cannot be discarded as such. In *Bazley* it was finally accepted that principle needs to be reconciled with policy in cases where a connection between the patently dishonest acts of an employee and his or her employment is sought to be made.

The court reviewed a number of policy considerations[215] and came up with two principles which should guide the courts in cases where precedent is inconclusive:

First, the courts should approach the question of liability in a more general manner, focusing on the purpose behind vicarious liability [216] and second, the courts must recognise that the fundamental question is whether the wrongful act is sufficiently related to the employer's business to justify the imposition of vicarious liability. *It will be sufficiently related where there is a clearly discernable connection between the creation or enhancement of risk and the wrongful conduct.*[217]

In order to determine whether or not the connection between the employer's creation or enhancement of risk and the wrong committed by the employee is sufficient to found liability, the following factors may be considered:[218]

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214 Para 22.
215 All of which will be discussed in detail in chapter 5.
216 Para 41(1).
217 Para 41(2). (My emphasis).
218 Para 4(3)(a-e). The list is non-exhaustive and relevant factors may vary.

"(a) The opportunity that the enterprise afforded to 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 (by the employer) in relation to the victim;
(e) The vulnerability of potential victims to wrongful exercise of the employee's power."

The question of what would introduce or necessarily enhance the risk of harm occurring was dealt with by the court with reference to sexual abuse cases.[219] The court held that the risk of an employee abusing a child will be materially enhanced by giving the employee an opportunity to commit the abuse.[220] Furthermore, the risk of harm can be enhanced by the nature of the relationship created by the type of employment.[221] McLachlin J found:[222]

> "The more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer."

In summary, the court came to the conclusion that the test for vicarious liability should not focus on interpreting the semantic nuances encountered when trying to distinguish between which types of conduct can and cannot be considered to fall within the course of an employee's service. It should rather focus "on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm."[223]

This decision has effectively set the benchmark for cases where vicarious liability is sought for sexual abuse committed by employees. Although it may be argued that the

[219] Although this area was given specific attention, the principles are quite capable of being moulded to fit different factual situations.
[220] Para 43. If an employee is permitted or required to spend long periods alone with the child, the opportunity for abuse is greater, whereas, if the employee is only permitted or required to spend short periods with the child, the risk is reduced. Further, if in addition to being permitted to spend extended periods alone with the child, the employee is expected to supervise intimate activities such as bathing or toileting, the risk of harm increases.
[221] Para 44. Employment which places the employee in an intimate relationship with children (such as a parent-like role) and gives the employee a position of power, will enhance the risk as the employee will be able to use the position to his or her advantage.
[222] *Ibid.*
[223] Para 46.

approach is too broad, it seems that the courts have looked favourably on the decision. Perhaps it is felt that the policy considerations behind the imposition of liability for this type of case warrant a departure from a more traditional, narrow approach.

The *Bazley* decision was recently followed in the leading English case of *Lister and Others v Hesley Hall Ltd.* In this case the defendants, a children's home, were held liable for the sexual assaults of one of their employees who had been using his position as a warden to sexually abuse the claimants. The court applied what is now popularly described as the 'sufficient connection' test,[224] criticising previous awkward references to "improper modes" of performing an employee's tasks.[225] In terms of this test a broad enquiry into the nature of the employment and the circumstances surrounding the employee's functions is made. Although the court stressed that the mere creation of opportunity to commit the offence would not be sufficient to found liability.

Unfortunately, the House of Lords in *Lister* was not as explicit as the Canadian Supreme Court in *Bazley v Curry*. Although the court followed the example set by *Bazley v Curry*, it was far more conservative and refrained from taking a more policy-driven approach.[226] Apart from adopting a particularly broad stance, the court did not change the core principles underlying the test for vicarious liability. Indeed, Deakin, Johnson and Markesinis are of the view that "*Lister* simply replaces one verbal formula (the distinction between 'authorised acts' and 'unauthorised modes') with another ('sufficient connection') which in the long run may prove no more adequate to the task in hand."[227]

It is difficult to argue with this view, particularly since the 'new' test has done little to eliminate the awkwardness of the old one. That being the case, the decision gives rise to concern that the new test has extended the scope of vicarious liability quite

[224] Deakin, Johnston and Markesinis *Tort Law* 593.
[225] At 245. Rogers *Tort* (2006) 901-902 is of the opinion that Lord Steyn was perhaps being too harsh on the reference to improper modes of performing authorised tasks. He feels that the facts of *Lister* could easily have been accommodated by the traditional test, producing the same result.
[226] Deakin, Johnston and Markesinis *Tort Law* 593.
[227] Deakin, Johnston and Markesinis *Tort Law* 595.

drastically. There is a fear, particularly among insurers and employers, that it may cause floodgates to open.[228]

Although courts in many jurisdictions seem to be opening up to the idea of broadening the application of the principles of vicarious liability in cases of sexual assault,[229] it appears that the Australian courts have been more reserved on the issue and have yet to take a clear position.[230] In *New South Wales v Lepore and Another; Samin v Queensland and Others; Rich v Queensland and Others* the majority of the court came to the conclusion that, in principle, there is no sound reason why a school authority should not be held vicariously liable for the acts of sexual abuse committed by schoolteachers whilst performing their duties so long as those acts are closely related to their employment. However, the court found that there were insufficient facts for a finding of liability in the case and the issue was not addressed in sufficient depth. This notwithstanding, it appears from the comments of Gleeson CJ that the Australian courts will most likely move in the direction of the English, Canadian and New Zealand authorities when deciding like cases in future.[231]

3.3.4.6. The Tort of Negligence

In English law 'negligence' is itself an independent tort.[232] The tort of negligence was recognised as an independent tort for the first time in 1932 in *Donoghue v Stevenson,*[233] and has since gained ground as a cause of action. This acceptance of

[228] Giliker "Rough Justice" 276.
[229] This more liberal attitude seems to flow from the broad approach recently adopted by the courts in England (with *Lister v Hesley Hall*), Canada (with *Bazely v Curry*) and New Zealand (*S v Attorney General* [2003] 3 NZLR 450 and *Proceedings Commissioner v Ali Hatem*).
[230] Stewart and Stuhmcke *Tort Law* 349.
[231] The Chief Justice was of the view that where the relationship between teachers and pupils is invested with a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between acts of sexual assault and the teacher's employment. This view suggests that liability could very well be based on the notion that the working environment creates an opportunity to commit the offence. The English authorities have gone to great lengths to point out that this basis for imposing liability does not suffice. However, it is doubtful whether their formulation of the required connection between employment and misconduct is any different in principle.
[232] Rogers *Tort* (2006) 74. It must be noted, however, that it is also a state of mind which is one element of the tort. Of course it is also used as an element in a number of other torts.
[233] [1932] AC 562. In this case the appellant was poisoned by a decomposed snail which was contained in a bottle of ginger beer manufactured by the respondent. This case established that there is a duty on manufacturers to ensure that products are free from defects which could cause foreseeable harm to person or property. See also Deakin, Johnston and Markesinis *Tort Law* 76.

negligence as a tort in its own right has widened the net of liability. Negligence would previously have been limited to forming an element in a complex relationship or in some specialised breach of a duty.[234]

Rogers describes the elements of the tort of negligence as follows:[235]

> "(1) a legal duty on the part of D towards C to exercise care in such conduct of D as falls within the scope of the duty; (2) breach of that duty, i.e. a failure to come up to the standard required by law; and (3) Consequential damage to C which can be attributed to D's conduct."

Simply put, the elements making up a claim for negligence are: "Duty, breach, causation and damage."[236] In the tort of negligence, "the 'duty' is the core ingredient of the tort,"[237] and not the tort itself.[238]

The structure of the negligence enquiry has direct influence on the way in which the test for vicarious liability is applied in cases where an employee's negligence is at issue. It is also particularly relevant where a duty is placed on the employer to take care when dealing with clients, customers or even third parties.[239] For the purposes of this section only the carelessness of employees and their wrongful mistakes will be discussed.

In *Lockgelly Iron and Coal Co v M'Mullan*[240] Lord Wright pointed out:[241]

> "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the

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[234] Heuston and Buckley *Salmond* 430. See also *Grant v Australian Knitting Mills* [1936] AC 85 at 103.
[235] Rogers *Tort* (2006) 132.
[236] Deakin, Johnston and Markesinis *Tort Law* 74.
[237] Rogers *Tort* (2006) 134.
[238] It must be noted that this 'duty' forms an element of all torts and is not confined to the tort of negligence. However in most other torts the obligation is negative and therefore needs no explicit attention. As Rogers *Tort* (2006) 134 suggests, "all that duty signifies in those torts is the comparatively simple proposition that you must not commit them: they have their own, detailed, internal rules which define the circumstances in which they are committed and duty ads nothing to those."
[239] This duty will be discussed in at 3.5. below, where the intersection between individual and vicarious liability is examined.
[240] [1934] AC 1.
[241] At 25.

> complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

Although it is clear that mere carelessness is insufficient to found liability without the existence of a recognised legal duty, it must be accepted that carelessness is a necessary ingredient of the negligence enquiry and, of course, all enquiries in which negligence is a factor.

As far as the careless conduct of employees is concerned, carelessness may give rise to a claim based on the tort of negligence itself, or may form part of a claim in which negligence is an ingredient. The fact that an employee's conduct was negligent does not take it out of the scope of employment. Furthermore, those negligent acts committed whilst the employee was deviating from instructions will not necessarily be regarded as having been committed outside the scope of employment.[242] As Rogers comments: "[I]t (negligence) may still be in the course of employment even if the servant is not acting strictly in the performance of his duty provided he is not 'on a frolic of his own'."[243]

A good illustration of how the principle applies to mistake can be seen in the case of *Bayley v Manchester, Sheffield and Lincolnshire Ry*[244] where it was held that an employer would be liable for the actions of an employee who was doing what he or she was employed to do in a "blundering way".[245] The fact that the actions of the employee are not authorised does not release the employer from responsibility. The reason for this is that the employee is still pursuing an authorised activity, albeit in an unauthorised manner.[246]

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[242] As in all cases where vicarious liability is sought, an inquiry into the nature and degree of deviation is necessary in order to determine whether or not an employer should be held responsible. See *Storey v Ashton*.

[243] Rogers *Tort* (2006) 894.

[244] (1873) LR 8 CP 148.

[245] Rogers *Tort* (2006) 896. In *Bayley's* case a porter employed by the defendants mistakenly removed a train passenger (by force) after the passenger told him that he was going to Macclesfield. The porter was under the impression that the train was going to a different destination. However, it *was* going to Macclesfield.

[246] This principle is well illustrated in *Bayley's* case. The porter had the job of ensuring that passengers were in the correct trains; the fact that he mistakenly removed a passenger did not take his actions outside the scope of his employment.

The question in this type of case is one of degree. The courts have to determine how far the employee deviated from his or her authority. If the deviation is great enough it can be said that the employee acted outside the course and scope of his or her employment. This is a question which the court has to assess on a case by case basis and typically leaves room for varying interpretation.

An employer will also be held liable where an employee's digression from authority amounts to negligence. Where this is the case, the usual principles attaching to the tort of negligence apply. In *Ilkiw v Samuels*[247] a driver employed by the defendants allowed a third (unauthorised) party to drive on his behalf. The unauthorised driver negligently caused an accident. It was held that the original driver's conduct in allowing the other party to drive the vehicle without enquiring as to this party's ability to perform the task amounted to negligence. Such negligence fell within the course of his employment, and rendered the defendants vicariously liable.[248]

3.4. NON-DELEGABLE DUTIES: A FORM OF VICARIOUS LIABILITY?

In the law of contract, certain duties can be delegated to a third party, but only with the express agreement of the party to whom the duty is owed.[249] However, in most instances the delegating of such a duty[250] does not free the delegator from his or her responsibilities under the contract.[251] Therefore, having ordered a third party to perform on his or her behalf, the debtor remains liable, as the third party is merely a mandatary[252] and has not replaced the debtor as far as the creditor is concerned. The debtor cannot claim that since he or she has delegated a responsibility, that responsibility no longer resides with him or her.

[247] See also *Ricketts v Thomas Tilling Ltd* [1915] 1 KB 644.

[248] It seems that the issue of causation was not given much weight by the court in this case. It is curious that the court did consider the negligent acts of the unauthorised driver as a *novus actus interveniens* which broke the chain of causation. Although this opens an interesting enquiry, it is not necessary to enter a debate on the element of causation for the purposes of this section.

[249] R H Christie *The Law of Contract* 4ed (2001) 537.

[250] For example, ordering a third party to pay a creditor or to render certain services on behalf of the contracting party giving the order.

[251] Unless of course the original contract had been changed and the debtor had been replaced by agreement.

[252] Christie *Contract* 537.

To a certain extent the same principle applies with delictual duties, even though the scope of these duties is often wider than it is in contract.[253] There are certain responsibilities which cannot be avoided by claiming that they were delegated to another. In English law, these are known as non-delegable duties.[254]

It appears that in a number of English and Commonwealth cases vicarious liability has been based on failure to provide that care was taken where a duty to do so was present.[255] The liability has been described as vicarious as this duty, which binds the party sought to be held liable, is breached by an employee or agent of this party. In these cases liability is based on the fact that the employer's duty is non-delegable and therefore cannot be escaped. As such the status of the employee or agent is irrelevant and liability can be imposed even where the duty was delegated to an independent contractor. It has therefore been said that "a non-delegable duty may be viewed as an exception to the rule that an employer is not vicariously liable for the torts of an independent contractor."[256]

It appears that although liability in these cases is still often described as vicarious, it is more accurate to describe it as personal. Indeed Giliker points out: "Reference to duties 'entrusted' and 'delegated' to the employee seem more indicative of primary liability, rendering the term 'vicarious' redundant in the circumstances."[257] It is perhaps for this reason that liability for non-delegable duties has never been introduced into the South African law of delict. In our law there remains a clear distinction between individual and vicarious liability, a difference which is closely guarded.

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[253] The delictual duty to take care is wider in that it does not require the existence of a contractual relationship between the injured party and the party sought to be held liable.

[254] Although the term 'non-delegable' suggests that the duties in question cannot be delegated, it merely expresses the fact that the party owing the duty cannot escape his or her obligation by delegating. Such duties *can* be delegated, but at the delegator's own risk. Determining the existence of such a duty has been the subject of much debate and is beyond the scope of this work. For a detailed exposition of the doctrine of non-delegable duties see G Williams "Liability for Independent Contractors" (1956) CLJ 180.

[255] Rogers *Tort* (2006) 912 points out that in these cases a 'duty to take reasonable care' has to be distinguished from a 'duty to ensure that care is taken'. Where the former duty is present the employer only has to ensure that a competent contractor was hired to do the work. However, where there is a duty to ensure that care is taken, the employer cannot escape liability in this way and is under a personal obligation to ensure that the contractor performs his or her tasks with care.

[256] Stewart and Stuhmcke *Tort Law* 353.

[257] Giliker "Rough Justice in an Unjust World" 275.

3.5. POINTS OF INTERSECTION BETWEEN INDIVIDUAL AND VICARIOUS LIABILITY

Atiyah made an interesting observation relating to the distinction between personal and vicarious liability: [258]

> "[T]he distinction between personal and vicarious liability – although well rooted in legal thinking – is not nearly so clear-cut as is often thought, and where the traditional theory would produce clearly absurd or unsatisfactory results there is no reason why it should not be jettisoned."

Weekes[259] carefully examined the new 'close connection test' adopted by the House of Lords in *Lister v Hesley Hall* and followed in *Dubai Aluminium Company Ltd v Salaam* and *Mattis v Pollock*, also drawing attention to the influential decision in *Bazley v Curry*. His views on the links between the new test and individual liability are interesting and warrant close consideration. He states that three competing rationales[260] have emerged from the recent expansion of the test for vicarious liability which "either explain, or perhaps offer alternatives to, the degree of close connection required."[261] These are the 'risk rationale', the 'assumption of responsibility rationale', and the 'policy rationale'. He goes on to say that each of these rationales "mimics an element of the test for imposing a *direct* duty of care in negligence,"[262] and that in so doing "they revive the 'master's tort theory' of vicarious liability."[263] In terms of that theory employers are liable for the acts of their employees which breach their own (the employer's) duty of care towards third parties.[264]

As regards the first of these rationales, English courts have imported what Weekes describes as the "North American concept of enterprise risk"[265] in terms of which an

[258] Atiyah *Vicarious Liability* 11.
[259] Weekes "Vicarious Liability for Violent Employees".
[260] The use of the term 'rationale' is perhaps slightly misleading when used in this context as it suggests that the rationale is used as a basis upon which liability is founded. It seems that Weekes merely used the term to describe the reason for attributing liability without attaching any theoretical justification.
[261] Weekes "Vicarious Liability for Violent Employees" 54.
[262] *Ibid.*
[263] *Ibid.*
[264] See *Broom v Morgan* [1953] 1 QB 597 at 607-609 where Denning LJ commented on the nature of employer's liability. He stated that the employer himself was under a duty to see that care was exercised in the carrying out of his business, and held "If the (employed) driver is negligent there is a breach of duty not only by the driver himself, but also by the master."
[265] Weekes "Vicarious Liability for Violent Employees" 55.

employer's liability is based on an assumption of risk. In *New South Wales v Lepore and Another*[266] Gleeson CJ noted that the risk assumption principle could be used to justify the decision in *Deatons Pty Ltd v Flew*,[267] as it could be argued that the actions of the employee in that case were in no way incidental to her employment and that therefore her employer had not created the risk of harmful conduct. He made the following *obiter* observation:[268]

> "The fact that it was no part of the barmaid's responsibilities to keep order in the bar was important. If that had been part of her duties, then presumably there would have been an increased risk that any violent propensities on her part could result in harm to customers."

This rationale appears to explain the decisions in *Petterson v Royal Oak Hotel Ltd*, *Warren v Henlys Ltd* and perhaps even *Fennelly v Connex South Eastern Ltd* discussed above.[269] It certainly played a major role in *Mattis v Pollock*. Weekes points out that "[t]he judgment in *Mattis* adopts an unarticulated risk rationale."[270] It is quite obvious that hiring a bouncer at a night club and charging him with the task of ejecting unruly patrons creates risk of injury to customers. Weekes is of the view that the use of the risk rationale in *Mattis* "seems intuitively unjust,"[271] in that the 'faultless' employer is held liable for the intentional criminal acts of his employee. He suggests that in cases in which employees are guilty of committing deliberate wrongs, a clear contrast emerges between "the 'innocence' of the employer and the (proven criminal guilt) of the employee."[272] Of course, many would argue that by running a nightclub – an enterprise which is inherently surrounded by the risk of confrontation – an employer willingly takes on all attendant risks involved. After all, examination of the policy consideration of risk assumption reveals that these cases are in line with the purpose behind the law of vicarious liability, even though decisions like that of *Mattis* appear to promote what could be described as 'rough justice'.

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[266] See 3.3.4.5. above.
[267] See 3.3.4.3 above.
[268] At 65.
[269] See 3.3.4.3. above.
[270] Weekes "Vicarious Liability for Violent Employees" 55.
[271] Weekes "Vicarious Liability for Violent Employees" 56.
[272] *Ibid.*

Though the risk rationale appears to promote the policy considerations upon which vicarious liability is based, there is a convincing argument that the use of the risk rationale as a reason for imposing liability leads to the blurring of the distinction between direct and vicarious liability. As pointed out by Laddie J in *Balfron Trustees v Peterson*,[273] the focus seems to have shifted from the relationship between the employer and employee to the relationship between the employer and the victim.

Under Weekes' second rationale, the assumption of responsibility rationale, employers will be held liable where their own duty of care towards the plaintiff has been breached by an employee. In *Lister v Hesley Hall*[274] Lord Hobhouse observed that certain classes of persons or institutions assume a duty of care towards those with whom they conduct business by virtue of the relationship which is created between the parties. Examples of such relationships include *inter alia* those associated with schools, prisons and hospitals. Where such a relationship exists an employer's duty is extended to those to whom it is entrusted and if breached will render the employer liable as if that employer personally breached the duty. Lord Hobhouse went on to point out:[275]

> "The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant."

Of course this rationale is based on the English concept of non-delegable duties and is perhaps not as relevant to the South African model as that of the assumption of risk rationale. Nevertheless it is worth mentioning as it could be argued that the assumption of risk barely differs from the assumption of responsibility. The only real difference is that the former focuses on the creation of a risk-bearing situation, whereas the latter focuses on the extension of a specific duty.

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[273] [2001] IRLR 758 para 27.
[274] Paras 54-55.
[275] Para 55.

The third, 'policy rationale', as Weekes describes it, was the rationale behind the decision in *Bazley v Curry*. The test applied by McLachlin J relies on what she claimed to be 'broader policy rationales', taking a list of independent non-exhaustive criteria into account.[276] However, it appears that this 'policy-driven' approach is firmly based on the creation and enhancement of risk by the employer's enterprise and it is difficult to see how a distinction can be made between the 'policy rationale' and the 'risk rationale'. Indeed, the court in *Bazley v Curry* made no such distinction, holding that the primary focus should be on the creation of risk and that various 'policy considerations' should be used as a guideline to determine the extent of the risk created.

It is clear that the so-called 'risk rationale' for attributing liability is beginning to gain momentum, and is being used by the courts, (deliberately or otherwise), as a reason for attributing liability. However, Weekes suggests that the intersection between direct and vicarious liability created by this rationale has the potential to create unjust results. He uses *Mattis v Pollock*[277] as an example. The case was pleaded on the basis of direct liability in the first instance, and failed, yet was successful on appeal where vicarious liability was pleaded, the test being almost identical in both instances.

It is obvious that the whole purpose of attributing vicarious liability is to offer a prospect of success in a case where direct liability will almost surely fail, but there must be some safeguard to limit liability. As Weekes points out, the risk rationale relies heavily on the concept of a duty of care owed by the employer to the victim. In cases involving the wrongs of employees it is particularly difficult to discharge that duty. Indeed, in *Feldman v Mall* it is suggested that the giving of directions or imposition of certain restrictions on the activities of employees is not a sufficient performance of the duty. This poses the question: What limits liability where an unarticulated risk rationale is used to establish vicarious liability?

Under the traditional test for vicarious liability, the employer's responsibility is limited by the fact that the employee's conduct had to have been committed within the course and scope of the latter's functions. Under an unarticulated risk rationale this

[276] Para 4(3)(a-e). See 3.3.4.5. above.
[277] See 3.3.4.3. above.

limitation is replaced by "a single factor – that the employer owes a duty of care to the customer in question."[278] Weekes suggests that this approach is too broad and leaves no room for limitation. Indeed, it seems that in cases where risk assumption is used without qualification, liability will almost certainly be imposed and there is virtually nothing that the employer can do to avoid it. However, it is submitted that the decision in *Bazley v Curry* offers a solution to the problem. Although the court based its new 'test' on the assumption and enhancement of risk, the rationale cannot be described as 'unarticulated' in that the various criteria used to determine the extent of the risk created by the employer provide an in-built limitation.[279]

It is clear that the broadening of the test for vicarious liability creates an intersection between it and direct liability, and although it may seem desirable to separate the two, such a division is not always practical. It is submitted that using the assumption of risk to found liability is perfectly acceptable as long as sensible limitations are introduced to mitigate the burden placed on employers.

3.6. CONCLUSION

Despite the fact that in general terms there are a number of practical differences between South African and English common law approaches to delictual liability, the laws of vicarious liability applied in England and the British Commonwealth are strikingly similar to those in South Africa.[280] Thus it is not surprising, that the difficulties surrounding this branch of law are not confined to our system, and it is reasonable to expect that any development in the wider constituency leading towards clarification or reform will be closely followed in South Africa.

The English and Commonwealth jurisdictions examined in this chapter have begun to follow a broad approach when determining whether or no an employee's conduct can be considered to fall within the course and scope of the latter's appointed functions. It seems that the courts are more readily imposing liability in what could be described as 'borderline' cases, and are becoming more inclined to impose vicarious liability on

[278] Weekes "Vicarious Liability for Violent Employees" 62.
[279] The practical implications of this test will be discussed below at 5.6.2.
[280] This is not unexpected given the influence of English law on our legal system and the fact that both the Roman-Dutch and English principles remain strongly tied to their Roman law roots.

employers for the deliberate wrongful acts of their employees. Whether or not this broad approach, which smacks of allowing a desirable verdict to influence judgment, is logical or fair remains in question, but if eventually it leads to a measure of codified legal practise it should find favour in South Africa. Indeed it could be argued that the South African judiciary has a compelling motive to attempt a degree of reform of its own volition. Rapid socio-economic development in the Republic combined with a tendency to rush to litigation to support compensatory claims[281] will make a greater degree of codification in cases of vicarious liability desirable.

[281] A tendency which is most likely a result of globalization. The influence of litigious societies such as the United States and perhaps even the United Kingdom will only strengthen in years to come.

CHAPTER FOUR

ANALYSIS OF THE LAW IN CIVIL LAW JURISDICTIONS

4.1. CIVIL LAW JURISDICTIONS

Although in principle, the law of torts is similar throughout the western world, the structure of the various legal systems has a marked effect on the way in which the law is applied. The English law of torts has stayed close to its Roman roots and has often been said to follow a "pigeon-hole" approach,[1] in that it relies on specific heads of tortious liability instead of on general principles. The French and German tort laws are, however, more general in application, even though these systems are nominally codified.

In spite of the fact that civil and common law jurisdictions have developed independently, many aspects of the different systems are similar, and it is important to note that each can offer valuable assistance to the other.[2] It is therefore necessary to examine the way in which civil law jurisdictions approach the problem of vicarious liability.

4.2. FRANCE

French civil law is largely based on the *Code Civil*,[3] which has been in force since the early part of the nineteenth century.[4] The law of vicarious liability is entirely based on the Code and has not changed significantly since its enactment.[5]

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[1] W Van Gerven, J Lever and P Larouche *Cases, Materials and Text on National, Supranational and International Tort Law* (2000) 2.

[2] This is particularly true where common and civil law converge on certain issues. B Markesinis "Judicial Style and Judicial Reasoning in England and Germany" (2000) 59(2) *CLJ* 294 believes that there is a" gradual convergence" of common law and modern civil law.

[3] The *Code civil des Français* was promulgated in 1804. Its title was changed to the *Code Napoléon* in 1807 and was changed back and forth until 1870 when it finally became the *Code Civil* (C Dadomo and S Farran *The French Legal System* (1993) 9). It must be noted that although the *Code* makes up the largest part of the French civil law, it is not the only written source of this section of private law. Dadomo and Farran *The French Legal System* 25 point out that "a number of written laws exist outside

The structure of the Code does not differ greatly from that of the German civil code. It has an introductory part and is divided into three books which are subdivided into Articles. The first book covers Articles 7 to 515 and deals with the law of persons. The second covers Articles 516 to 710 and is concerned with the definitions and rights in property. The third and most voluminous book covers Articles 711 to 2281 and contains provisions relating to the acquisition of property,[6] succession, contract, delict, matrimonial property law, unjust enrichment and many other branches of civil law.[7]

Unlike the German code, the *Code Civil* is remarkably broad and open to judicial interpretation. Dadomo and Farran observe:[8]

> "[F]rom the outset, the compressed legislative style of the Code gave the courts scope to interpret its provisions to make the law applicable to unforeseen individual cases, and to changes in the circumstances of society, which the legislators could not, and did not attempt to, envisage. Thus the Code sets out general principles and maxims of the law, leaving it to the judge and legislator to apply them or supplement them as necessary."

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the Code, whose status is neither more nor less because they have not been incorporated into the Code."

[4] The *Code Civil* was intended to replace all previous laws on matters contained in its provisions. Despite this wish to break away from the old legal system the *Code* was heavily influenced by certain areas of Roman law and indeed by Germanic customary law which was prevalent in the North of France at the time. The *Code Civil* unified the system of private law which was disturbingly segmented and unclear. K Zweigert and H Kötz *Introduction to Comparative Law* 3ed (Translated by T Weir) (1998) 74-84 give a comprehensive account of the history of French law and of the significance of the *Code Civil* in unifying the French legal system. See also Dadomo and Farran *The French Legal System* 1-10.

[5] Although there have been calls for reform since the early 1900's (it is not a coincidence that these challenges occurred shortly after the promulgation of the very advanced German Code in 1900) the *Code Civil* has remained largely untouched despite various amendments in certain areas. The only significant reforms have been in the areas of family law, matrimonial regimes and co-ownership. See Dadomo and Farran *The French Legal System* 10-11. The *Code* was a remarkable and revolutionary piece of law and it is not surprising that it remains in force today. Napoleon himself was quoted as saying: "It is not in winning 40 battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my Code civil will not be forgotten, it will live forever." (Dadomo and Farran *The French Legal System* 10-11).

[6] It is not surprising that the Code placed an emphasis on all laws and rights relating to property for it has been said that the original Code was "the law-book of the third estate" (Zweigert and Kötz *Introduction to Comparative Law* 93). The bourgeoisie were mainly land owners and it is believed that the draftsmen of the Code sought primarily to protect land owners interests and property rights.

[7] Dadomo and Farran *The French Legal System* 25.

[8] *Ibid.*

It is not surprising then that the French code fails to provide specific guidance on many of its provisions. In many instances, vicarious liability being one, the Code merely provides a general rule and goes no further in setting out specific requirements.

4.2.1. The French Law of Delict

The French law of delict is a perfect example of the revolutionary style of the *Code Civil*. Van Gerven, Larouche and Lever observe:[9]

> "[T]he French *Code civil* of 1804, in the spirit of the French revolution, sought to eradicate the institutions of the past and did away with the different heads of tort by laying down the celebrated general clause of Article 1382 C.civ. that 'anyone who through his act, causes damage to another by his fault shall be obliged to compensate the damage'. Article 1383 then goes on to provide that 'everyone is responsible for the damage caused not only by his act but also by his negligence or carelessness'."

These provisions are remarkably broad, especially when viewed against the common law and German systems. The French do not make provision for the 'duty of care' which makes up the foundation of the common law concept of negligence, nor do they set out a finite list of protected interests.[10] Furthermore, the French concept of harm (*dommage*) is seemingly unlimited and is in no way restricted by the classifications found in common law systems such as personal injury, pure economic loss, injury to reputation and so forth.[11] Whittaker points out:[12] "In principle, all faults, all categories of injury and all injured persons, whether foreseeable or not, are included with the protection of delict."

[9] Van Gerven *et al International Tort Law* 2.

[10] S Whittaker "Privity of Contract and The Law of Tort: The French Experience" (1995) 15 *OJLS* 327 at 331.

[11] *Ibid.* The French, however, *do* refer to three broad types of harm: *Préjudice materiel* (often referred to as *préjudice economique*), which is what we would describe as patrimonial harm; *préjudice corporel* (personal injury); and *dommage moral*, which covers mental distress, grief, nervous shock and even damage to reputation.

[12] Whittaker "Privity of Contract and The Law of Tort: The French Experience" 331-332.

This broad approach notwithstanding, the Code still provides for certain specific delictual actions, vicarious liability being one.[13] Although the law of vicarious liability is specifically provided for, the provisions relating to that form of liability follow the tendency of the rest of the Code and are very broad.

4.2.2. Articles 1384(1) and 1384(5) Code Civil

The liability of an employer for the delicts of his or her employee is governed by Article 1384 (5) C.civ., which has to be read in conjunction with Article 1384 (1) C.civ.:[14]

> "[1] Everyone is liable for the damage caused not only by one's own conduct, but also by the conduct of persons for whom one is responsible or things in one's keeping (*garde*) ...
> [5] Principals [*maîtres*] and 'employers' [*commettants*] [are liable] for the damage caused by their servants [*domestiques*] and 'employees' [*préposés*] in the course of the functions for which they are employed."

There are three general requirements which have to be satisfied for a claim to be successful: Firstly, the *préposé* must be personally liable for the harm under Article 1382-3 C.civ. In terms of this section, the *préposé* will be liable if three elements are present, namely harm, fault and causation.[15] Secondly, there must be what the French call a *lien de préposition* between the *commettant* and the *préposé*. Loosely translated, this means "employment relationship," but as Van Gerven, Lever and Larouche point out,[16] this translation "would fail to account properly for the fact that the *lien de préposition*, for the purposes of Article 1384(5) C.civ., can extend beyond

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[13] Other 'special' forms of liability for the acts of others include: liability of teachers for the acts of their pupils, (Art. 1384.6 – which has been amended by Art. 1384.8 in order to lessen the burden on teachers by allowing them to escape where their fault cannot be proved), and liability of parents for the acts of their children (Art. 1384.4 – which bases liability on a rebuttable presumption of fault). Provision is also made for liability for the acts of animals (Art. 1385) and damage caused by ruinous buildings (Art. 1386). Whittaker "Privity of Contract and The Law of Tort: The French Experience" 332.

[14] Van Gerven *et al International Tort Law* 468.

[15] These elements need no further explanation for the purpose of this study. For a detailed exposition on the various elements of French tort law see Van Gerven *et al International Tort Law* chapter II (for the types of injury for which reparation may be sought), Chapter III (for an explanation of the fault principle), and Chapter IV (for the element of causation). The authors point out (at 468) that "it is not impossible that case law will evolve so as to remove the requirement that the *préposé* be at fault." This has been the topic of much discussion, but is beyond the scope of this work.

[16] Van Gerven *et al International Tort Law* 469.

employment relationships."[17] The third requirement is that the tortious conduct of *préposé* must have fallen *dans les fonctions* ("within the functions") of the *préposé*.[18]

Once the above requirements are met an irrebuttable presumption of liability arises. Unlike the German example, the *commettant* cannot escape liability by showing that he or she was not at fault.[19] Furthermore, *commettants* cannot absolve themselves from responsibility by proving that the event causing the harm was a *cause étrangére* (an event which the *commettant* could neither foresee nor avoid).[20]

The only way in which a *commettant* can avoid liability is by showing that the *préposé* would not have been held liable had the victim sought direct relief.[21] This confirms the principle that the employer can only be held liable if the employee committed a delict and that if it can be proved that the actions of such employees do not satisfy the general requirements of delict, either through absence of one of the essential elements, or due to the presence of a valid defence, the employer cannot be held accountable.[22]

4.2.3. *Lien de Préposition*

Independent contractors do not qualify as *préposés* for the purposes of vicarious liability. It is thus important to make the distinction between independent contractors and employees. Zweigert and Kötz observe:[23]

> "The French courts apply the same standards as the German courts in deciding whether the person who caused the harm was a 'servant' of the defendant

[17] The authors give the example of situations where one renders gratuitous service to another. In these situations, the latter can be held liable for the torts of the former under Article 1384(5) despite there being no formal employment relationship between the parties.

[18] The second and third requirements warrant specific attention and will be discussed below.

[19] For example in the selection and supervision of the *préposé*. Zweigert and Kötz *Introduction to Comparative Law* 636.

[20] Van Gerven *et al International Tort Law* 469.

[21] Zweigert and Kötz *Introduction to Comparative Law* 635. In this case it would have to be shown that the *Préposé* would not have been found personally liable in delict either due to the absence of an essential element or the existence of a valid defence.

[22] Although this principle seems relatively obvious and straightforward it must be remembered that under the German civil code an employee's fault is not relevant to the enquiry. It appears that the French have followed the same line of thinking as the common law jurisdictions as far as this is concerned.

[23] Zweigert and Kötz *Introduction to Comparative Law* 636.

employer in the sense of § 831 BGB.[24] For this purpose one asks whether the assistant was in a relation of dependence on the employer, that is, whether he was bound to follow the orders and instruction given to him with regard to the execution of the work assigned to him."

When determining the existence of an employment relationship an employer will only be considered as such where he or she has the power to give instructions and to direct how the employee's functions are to be carried out.[25] In *Cass. Crim., 15 February*[26] The plaintiff was defrauded by a person who gave the impression that he was in the employ of the defendant. It was held that the defendant could not be liable unless he had actual authority over the tortfeasor. It would not suffice that the person committing the wrongful conduct *appeared* to be the defendant's subordinate. The court held:[27]

> "*A* lien de préposition *arises when one person has the power to give instructions to another as to how the functions of that other person are to be fulfilled; however, that power must really exist and not merely be apparent*."[28]

This seems quite restrictive but the implications are not as limiting as they seem. Van Gerven, Larouche and Lever point out that the test is fairly broad:[29]

> "It is well established under French law that the power of the *commettant* does not need to rest on a legal or contractual right; it may also arise from factual circumstances. Furthermore, it does not need to be effectively exercised, as long as it exists, nor does the *commettant* need to have the requisite level of technical knowledge to deal competently with the work of the *préposé*."

Although the French test is not as comprehensive as the common law tests used to establish the existence of a relationship capable of founding liability, the basic principle is the same. The French courts also take a holistic view of the employment relationship and do not restrict themselves to narrow definitions. It has been recognised that employees in some fields are allowed a great deal of freedom when completing their tasks and often have to perform their functions using their own

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[24] See 4.3.3. below.
[25] See *Cass. Civ., 4 may 1937* DH 1937, 363.
[26] JCP 1972. II. 17 159. Translated by YP Salmon.
[27] Van Gerven *et al International Tort Law* 490.
[28] Of course, as pointed out in para 28, the apparent employer could still be held liable under Article 1382 C.civ. for allowing it to appear as if the tortfeasor was an employee.
[29] Van Gerven *et al International Tort Law* 491.

discretion. In these circumstances it is still possible for the worker to be considered a *préposé*.[30]

4.2.4. *Dans le Fonctions*

Once it has been established that a relationship capable of founding liability exists between the person sought to be held liable and the person who caused the harm, the question of whether or not the harm was caused in the performance of an assigned task is asked. In terms of Article 1384 (5) a *commettant* will only be liable where the delict of the *préposé* was committed whilst performing 'the tasks for which they are employed' (*dans les fonctions auxquelles ils les ont employés*).[31]

Like the 'course and scope of employment' enquiry, this part of the test fails to establish a clear and comprehensive guideline. The French courts have had to grapple with similar difficulties to those faced in common-law jurisdictions. Although the problems surrounding this element of the test are not unique, the courts in each of the respective jurisdictions seem to follow distinct patterns.[32] It appears that the French courts invariably follow an approach favourable to the plaintiff when attributing liability to the employer.[33] This approach is typically illustrated by the pattern which has developed in relevant cases.

As far as harm caused through negligence is concerned, there is little to distinguish the French approach from that which is followed in the English and Commonwealth systems. The courts tend to look at the circumstances surrounding the commission of the delict and are inclined to be liberal when making the link between the employee's activities and the harm. In *Cass. Civ. 19 December 1950*[34] an employer was held liable when his employee carelessly caused a fire while running an errand. In this case the employee, a farm worker, was asked by the defendant to fetch a tool from his

[30] An example of this type of situation is where a doctor works for a hospital. In *Cass. Crim.5 March 1992*, JCP 1993. II. 22013 it was held that a doctor who worked at the defendant hospital was the *préposé* of the hospital for the purposes of Article 1384 (5) C.civ. even though his professional activities were not directed by the hospital authorities in any way.
[31] Zweigert and Kötz *Introduction to Comparative Law* 636.
[32] As mentioned above, the jurisdictions of common law systems are beginning to tend towards a wide interpretation of the test, whereas the Germans are more restrictive in their approach.
[33] Zweigert and Kötz *Introduction to Comparative Law* 637.
[34] JCP 1951. II. 6577.

neighbour. On the way the worker caused a fire by carelessly attempting to fill his petrol lighter. Similarly, in *Cass. Soc. 7 January 1965*,[35] a farmer sent his farmhand to assist his neighbour. While returning in darkness on a bicycle without lights, the farmhand collided with a pedestrian, causing injury. The farmer was held liable for the harm even though he had not stipulated the means by which the worker should return, or even the route he should take.[36]

In order for liability to arise there has to be a discernable link between the harm and the activities for which the *préposé* was employed.[37] Therefore, in so-called 'deviation' cases, the nature and degree of the deviation will be relevant when attempting to find the necessary link.

As in common law jurisdictions, under French law employers may be held liable for the intentional wrongs of their employees. The French courts have been particularly generous in attributing vicarious liability in circumstances where employees act for their own benefit and intentionally cause harm. A good example of this can be seen in *Cass. Crim. 23 November 1928*,[38] where the defendant's driver stopped his truck in order to shoot a pheasant he had spotted on the plaintiff's land. Although he had acted intentionally and for his own benefit, his employer was held liable. In *Cass. Ass.plén. 19 May. 1988*[39] it was held that employees who use their position to defraud their employer's clients will render their employers liable.[40] In fact, the courts have gone even further to hold an employer liable for a murder committed by one of his employees. In *Cass. Crim. 5 November 1953*[41] the defendant, the owner of a cinema, employed an usher who took a client into the cellars and murdered her. The defendant

[35] Bull. Civ. 1965 IV no. 7.

[36] Zweigert and Kötz *Introduction to Comparative Law* 637 point out that in this situation the German courts would have asked whether the route or means of transport was stipulated by the employer and would almost certainly given this substantial weight. The French court did not seem to consider this. It must be noted however, that where an employee commits a delict on the way to work from his or her home or on the way home from work, the employer will not be held liable. See *Cass. Crim. 28 November 1956* JCP 1957. IV. 2.

[37] This principle was explained clearly in *Cass. Ass.plén. 19 June 1977*, JCP 1977. II. 18730 where an employer was absolved from responsibility due to the fact that the employee's conduct could not be linked in any way to the performance of a designated task. In this case the employee was involved in a motor accident while using a company vehicle for his own purposes.

[38] Gaz. Pal. 1928. 2. 900.

[39] DS 1988. 513.

[40] In this case an insurance agent in the employ of the defendant intentionally deceived clients and made off with their funds.

[41] Gaz. Pal. 1953. 2. 383.

was held vicariously liable. This decision suggests that the employer will be liable for providing the opportunity to commit the offence.[42]

However, as Zweigert and Kötz observe,[43] "[t]he question is much disputed and recurrent differences of opinion between the courts of appeal and within the Cour de Cassation have had to be resolved by the *Assemblée pléniére*."[44] In fact, many of the *Assemblée pléniére* decisions are difficult to reconcile with others. For example, in *Cass. Ass.plén. 17 June 1983*[45] a driver in the employ of the defendant dumped petrol on the plaintiff's property while attempting to steal petrol from his employer. The driver was on his way to fill up his own petrol tank with his employer's tanker and dumped the petrol on the plaintiff's property when he saw he was being followed. The employer was not held liable as the link between the employee's conduct and his appointed functions could not be made. This decisions is difficult to reconcile with some of the earlier cases, such as *Cass. Crim. 23 November 1928* and indeed *Cass. Crim. 5 November 1953.*

It is difficult to specify clear guidelines on this part of the test, but there *is* a set of general principles which guide the courts when determining the link between the *préposés* actions and his or her appointed functions. These guidelines were explained by the *Cour de Cassation* in *Cass. Ass. plén., 19 May 1988*, perhaps the most comprehensive decision on the subject. The facts were: The defendant's sales representative (H) had defrauded the plaintiff (an elderly woman) by embezzling funds after selling her various financial products. The plaintiff sued the defendant insurance company in terms of Article 1384 (5), arguing that the embezzlement occurred while H was acting *dans les fonctions*. The court *a quo* held in favour of the plaintiff. However, on appeal to the criminal chamber of the *Cour de Cassation* the decision was set aside. The case was remitted for further consideration. The second court of appeal once again found in favour of the plaintiff. The case was finally referred to the *Assemblée pléniére*.[46]

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[42] Something which the English, Commonwealth *and* German authorities are vehemently opposed to.
[43] Zweigert and Kötz *Introduction to Comparative Law* 637.
[44] The *Assemblée pléniére* is the full court of the *Cour de Cassation.*
[45] JCP 1983. II. 20120.
[46] Van Gerven *et al International Tort Law* 501.

The *Assemblée pléniére* held that in order for the principal to be freed from liability, three cumulative conditions have to be met. "The worker must have acted outside the scope of his functions, without permission, and for a goal unrelated to his powers."[47] It was recognised that the second two conditions did not present any particular difficulty, but the first, on the other hand, was decidedly more complicated. The court took an objective position as far as the first condition was concerned and held that "to act beyond the scope of one's functions is to act in a way which does not arise from the exercise of those functions."[48]

The court recognised that this position makes it almost impossible for a *commettant* to escape liability where *préposés* abuse their powers (*abus de fonctions*). Nevertheless, it was willing to accept this, subject to two exceptions: First, where the plaintiff is aware that the *préposé* is abusing his or her office, the relationship between the victim and the *préposé* is taken outside the scope of the latter's functions and the *commettant* will not be held liable for the resulting harm. Secondly, where there has been a breach by the *préposé* of a specific obligation undertaken by the *commettant* towards the victim, the former may escape liability.

A good example of such a situation is where the employee's actions are in direct contrast to what he or she is employed to do. This was the case in *Cass. Ass.plén. 15 November 1985*.[49] In this case an employer was held not liable where its employee deliberately set fire to the plaintiff's factory in order to demonstrate the shortage of fire extinguishers.[50] Here it was held that the worker put himself beyond the scope of his employment by performing acts which were directly opposite to his function of protecting the plaintiff's property.[51]

The same approach was adopted in the recent case of *Cass. Civ. 16 June 2005*,[52] where the warden of an old age home extorted money out of one of the residents by

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[47] Para 4.
[48] *Ibid.*
[49] JCP 1986. II. 20568.
[50] The *préposé* was employed by the defendant security company to guard the plaintiff's factory.
[51] It was established in *Cass. Crim. 19 march 1992*, that this would not succeed where the *préposé* did not have a security position. It is important that the act directly contrasts with the employee's appointed tasks.
[52] Bull.civ. 2005. II.158 at 141.

preying on her (the victim's) weaknesses and abusing her position as an authority figure.[53] The warden's employers were held liable for the harm caused to the victim. It was held that the *préposé* had acted within her assigned functions and that therefore the *commettant* could not escape liability. The court placed a heavy emphasis on the fact that the *préposé's* position had given her the opportunity to take advantage of the residents and that the *commettant's* delegation of tasks had created the occasion for her to commit the offence.

Of course, the consequence of these decisions is that vicarious liability in France is far broader than it is in the English and Commonwealth systems and more obviously, the German system. Indeed, it could be argued that the French go even further than the Canadians did in *Bazley v Curry* by placing emphasis on the creation of an occasion to commit an offence.

4.3. GERMANY

In Germany the law of obligations is governed by the German Civil Code which is most commonly referred to as the BGB (*Bürgerliches Gesetzbuch*). The BGB was promulgated on the 18th of August 1896 and put into force on the 1st of January 1900.[54] Van Gerven, Lever and Larouche describe the structure of the BGB as, "very remarkable, in that the general is constantly treated before the specific, at every level of the BGB structure."[55]

The code is set out in five volumes – Book (I) is entitled *'Allgemeiner Teil'* ('General Part'),[56] while Book (II), '*Schuldverhältnisse*' deals specifically with obligations.[57] The first six parts of book (II) centre around general issues, whereas at the end of part

[53] The warden convinced her victim that she was liable to be expelled from the home and that she (the warden) could prevent this by altering certain papers. Between January 1994 and November 1996 the victim made out seventy-four cheques in favour of the warden.

[54] B S Markesinis *A Comparative Introduction to the German Law of Tort* (1986) 21. This date is significant as the code finally completed the unification of modern Germany. For a more detailed historical account of German lawmaking see S Vogenauer "An Empire of Light? Learning and Lawmaking in the History of German Law" (2005) 64(2) CLJ 481 at 493-500.

[55] Van Gerven *et al. International Tort Law* 3.

[56] *Ibid.* Zweigert and Kötz *Introduction to Comparative Law* 146 point out that "the General Part sets out to expound certain basic institutions common to the whole of private law which the lawyer meets with in the law of obligations as well as the law of property, family law and the law of succession."

[57] The law of obligations deals with personal rights and provides for claims in contract, unjustified enrichment and tort. Book (III) deals with the law of property, Book (IV) with family law and Book (V) with the law of succession. See Zweigert and Kötz *Introduction to Comparative Law* 145.

seven, more specific provisions are made relating to "*Unerlaubte Handlungen*" (impermissible behaviour).[58] This structure seems to provide for a balance between the general, principled approach followed by the French and the tort-specific English system. Indeed, van Gerven, Lever and Larouche are of the view that "[t]he BGB steers a middle course between the English and French legal systems by breaking with a tradition of specific heads of liability on the one hand, while on the other hand and after much learned discussion, not including a general clause." [59]

4.3.1. General Principles of Delict in Germany

Tort law under the BGB mirrors the features of the Civil Code itself in that it is both general and specific. The general clauses inform the application of rules specific to recognised torts. Opoku observes:[60]

> "The German law of torts consists of (a) three general clauses, (b) five specifically regulated torts, (c) rules for vicarious liability, and (d) cases of strict liability which are provided by statutes."

The three general clauses are better described as heads of tortious liability, and are laid down in §823 and §826 of the Code.[61] The first clause provides for liability where there has been an injury affecting one of the victim's legally-protected interests.
§826 I reads:[62]

> "A person who intentionally or negligently injures the life, body, health, freedom, property or other right of another contrary to the law, is bound to compensate him for any damage arising therefrom." [63]

The legally-protected interests are enumerated in the text and include rights to life, body, health, freedom, ownership and any *sonstiges Recht* ('other right').[64] The

[58] Van Gerven *et al International Tort Law* 3.
[59] *Ibid.*
[60] K Opoku "Delictual Liability in German Law" (1972) 21 *ICLQ* 230 at 231.
[61] Zweigert and Kötz *Introduction to Comparative Law* 599.
[62] Opoku "Delictual Liability in German Law" 232.
[63] The unlawfulness requirement is satisfied if one of the protected interests is invaded without legally accepted justification. The justifications are similar to our typical defences and include self defence and necessity among others. The fault element is the same as the one followed in most common-law jurisdictions as it requires either intention or negligence (the negligence enquiry is strikingly similar to that in common-law). See Zweigert and Kötz *Introduction to Comparative Law* 599-602; Opoku "Delictual Liability in German Law" 232-233.

second head of liability is found in §823 II and provides that one who culpably contravenes a statute designed to protect another will be bound to compensate the victim.[65] The third head of liability is set out in §826 and is based on the concept of *boni mores*. Under this section:[66] "A person who intentionally causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage."[67]

In addition to the general clauses the BGB makes provision for five specific tort situations:[68]

> "(a) Endangering the credit of another person; (b) violation of a woman's sexual honour; (c) liability for damage done by animals; (d) liability for damage done by buildings; (e) liability for breaches of official duties by civil servants."

The tort process requires a three-stage approach under which harm, unlawfulness and fault are required. As far as the harm (*Tatbestand*) requirement is concerned, the facts of the case are examined in order to determine whether or not there has been harm to a legally-protected interest.[69] Unlawfulness (*Rechtswidrigkeit)* refers to a violation of one of the legally-recognised interests without just excuse.[70] The unlawfulness enquiry is similar to ours in that it is based on an objective standard of behaviour which is expected of right thinking individuals. The fault (*Verschulden*) is more subjective in nature and refers to the *dolus* or *culpa* of the person alleged to have committed the offence.[71] Like the French, the Germans also make a clear distinction

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[64] Each of the protected rights have specific characteristics and are not as broad as their respective titles suggest. For the purpose of this study, it is not necessary to go into the details of these rights.

[65] Zweigert and Kötz *Introduction to Comparative Law* 602; Opoku "Delictual Liability in German Law" 234 points out: "It is generally agreed that the clause refers to any norms of conduct whether embodied in a statute, decree, ordinance or derived from customary law." It must be noted that the nature of the harm is significant in that liability will only arise in circumstances envisaged by the protective norm or statute. In other words, the harm must result from the danger which the law sought to eliminate.

[66] Opoku "Delictual Liability in German Law" 234.

[67] This provision is as wide as it appears and has been used by the courts to found liability for all manner of sins. Although the section is particularly interesting it is unnecessary to examine it in detail.

[68] Opoku "Delictual Liability in German Law" 235.

[69] For instance, the *Tatbestand* of §823(1) is an interference with life, body, health, freedom, ownership or *sonstiges Recht*. See Van Gerven *et al International Tort Law* 286-287.

[70] Van Gerven *et al International Tort Law* 302.

[71] There is a raging debate over the 'wrongfulness' and 'fault' enquiries in German law. It seems that their authorities are not pleased with the potential overlap between the two enquiries. Although this

between negligent and intentional behaviour. In German law however, these forms of conduct often have direct bearing on the specific prohibition. For instance, liability for conduct which is *contra bonos mores*[72] can only arise where the *harm* was intended. It is not sufficient that the conduct is deliberate – the harm must also have been intended.[73] In this sense, the role of intention plays a far more significant role in German law than it does in common-law jurisdictions.

4.3.2. § 831 BGB – Employer's Liability for Harm Caused by Employees

The German rule of vicarious liability is unique in that it is still dominantly based on the fault of the employer. Zweigert and Kötz observe that "[i]n the *Germanic* legal family, the liability of a superior for the harm caused by his staff always depends on whether any *personal* fault of his contributed to the harm."[74]

In this sense, although the liability of an employer for the torts of employees is a stricter form of liability, it is not technically a form of 'strict liability', and is perhaps not even what common law practitioners would describe as 'vicarious liability'.[75]

Liability for harm caused by employees is dealt with under § 831 BGB. Paragraph (1) of § 831 reads:[76]

> "Anyone who employs another person for a task is liable for the injury unlawfully caused to a third party by that other person in the accomplishment of the task. No liability shall arise if (i) the employer (*Geschäftsherr*) exercised reasonable care in the selection of the employee and – when the employer himself procures tools or directs the accomplishment of the task – in

debate is interesting, it is beyond the scope of this paper. For more detail see Zweigert and Kötz *Introduction to Comparative Law* 599-600 and Van Gerven *et al International Tort Law* 303.

[72] In terms of §826 BGB.

[73] Van Gerven *et al International Tort Law* 340.

[74] Zweigert and Kötz *Introduction to Comparative Law* 630.

[75] It has been suggested that there were a number of reasons why the Germans adopted the supposedly 'weaker' rule. One reason was that a casuistic Roman approach was followed when constructing the law, and another, more practical reason, was that there was a fear that introducing a 'true' form of vicarious liability would cause unwarranted economic consequences. Of particular concern was the possibility of an increased economic burden being placed on small industry. Markesinis *The German Law of Tort* 677. See also Zweigert and Kötz *Introduction to Comparative Law* 143-144.

[76] Van Gerven *et al International Tort Law* 480. There is a second paragraph to §831 which imposes liability on persons who undertake for the employer one of the tasks mentioned in the second sentence of paragraph (1), but as Van Gerven *et al* point out, this is of minor importance and does not warrant specific attention.

the procurement of tools and the direction [of the employee] or (ii) the injury would also have been caused if the employer had taken such reasonable care."

This provision clearly indicates that fault plays a significant role in the enquiry. In English, Commonwealth, South African and French law, liability automatically arises where conditions similar to the first sentence of § 831 (I) are met. In German law however, satisfying the conditions set out in the first sentence of the paragraph merely creates a *presumption* of liability. This presumption can be rebutted by the employer by proving that he or she was not at fault or alternatively that there was a lack of causation.[77] As Van Gerven, Lever and Larouche point out, "§ 831 (I) does not therefore create a true regime of liability for others, but rather a regime of liability for presumed fault."[78]

In order to succeed in a claim under § 831 (I) the victim has to prove three things. First that he or she sustained harm which was caused by the wrongful conduct of the employee.[79] Next, that the person committing the harm was in fact employed by the person sought to be held liable and finally, that the harm was caused while the employee was carrying out his or her appointed tasks.[80]

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[77] Van Gerven *et al International Tort Law* 480. Of course, lack of causation would also exclude liability in all other jurisdictions. However, this would ordinarily be dealt with when determining whether or not a delict was committed in the first place.

[78] *Ibid.*

[79] Interestingly, fault on the part of the employee is not required. Van Gerven *et al International Tort Law* 481 point out that "§831(1) does not make the employer answer for the fault of the employee, but rather makes the employer liable for his or her own presumed fault." See also Zweigert and Kötz *Introduction to Comparative Law* 633.

[80] Van Gerven *et al International Tort Law* 481. It must be noted that if the injured party can also prove the personal liability of the employee under one of the other general or specific clauses of the BGB, the employer and his or her subordinate will be held jointly and severally liable for the harm. However, in terms of labour law an employee may be exempted from liability under certain circumstances, due to the fact that the quantum of damages is often disproportionate in terms of recovery to the means of the employee. In the event of this right of exemption (*Freistellungsanspruch*) being exercised, damages will be apportioned between the employer and the employee. The apportionment principle is dealt with in §254 (1) BGB and only provides for apportionment according to the extent of the injured party's fault. However, the Federal Labour Court in BAG (Joined Chambers), 27 September 1994, ZIP 1994, 1712 held that the principle of apportionment applied to the relationship between employers and their workers in that the employee is engaged in the risk creating activity of the employer and that the operational risk has a material influence on the causation of the harm. In view of this the employer is bound to indemnify his or her employee against potential damages arising out of the risk-creating activity. The apportionment will depend on the degree of fault – where the employee is guilty of gross negligence of intentional wrongdoing, he or she will bear most of the burden, whereas if there has merely been slight negligence, the employer will bear the whole burden (Van Gerven *et al International Tort Law* 482).

The first requirement is fairly straightforward and needs no further explanation for the purposes of this section.[81] However, the second and third requirements are particularly significant and are examined below.

4.3.3. The Employment Relationship

In order for an employer to be held liable for the harm caused by a servant[82] or work assistant (*Verrichtungsgehilfe*) the existence of a relationship capable of founding liability must be proved.[83] The German test for establishing whether or not an employment relationship exists is strikingly similar to the one followed in common law jurisdictions. The German authorities have recognised the difficulties presented when attempting to follow the traditional 'control test' under modern employment conditions and have therefore taken a broader approach.[84] However, the German approach is still not as broad as the one followed in common law jurisdictions:[85]

> "A person only qualifies as *Verrichtungsgehilfe* in the sense of § 831 BGB when he or she is dependent on the instructions of the employer (*Geschäftsherr*). The employer need not have a detailed right of control (*Weisungsrecht*); it is sufficient that the employer can at any time determine the scope and duration of the tasks of the employee, restrict them or terminate them."[86]

[81] For further detail on the 'unlawfulness' requirement see Markesinis *The German Law of Tort* 681-684.

[82] The term 'servant', although now not in general use, may still be used accurately to describe a person performing tasks on behalf of another. Unlike the term 'master', which is now considered anachronistic in many countries, the term 'servant' is still used by English, Commonwealth and European countries. The reason for this is perhaps due to the fact that the term better describes those performing tasks on behalf of others who cannot strictly be described as employees. A common example of such a person is one performing gratuitous services for another. Another possible reason for the use of the term is that it is far less complicated and misleading than the term 'agent'. It is submitted that if the South African courts looked past the various unacceptable connotations of the term and used it in an appropriate context, it may prove to be useful. For the sake of consistency however, the term 'employee' will be used throughout the remainder of this work and should be taken to represent any relationship in which one performs tasks for the benefit of another.

[83] For the purposes of this section, only the common employment relationship will be examined. Although the general distinction between employees and independent contractors is made in German law, it does not seem that a distinction is made between ordinary employees and agents.

[84] Markesinis *The German Law of Tort* 678.

[85] BGH BGHZ 1966, 311. Translation by A Hoffmann and Y P Salmon cited in Van Gerven *et al International Tort Law* 496.

[86] In this case it was held that §831 would not apply to partners in basic civil law partnerships unless one of the partners was acting as the other's subordinate when the conduct causing the harm took place. The structure of German partnership law appears to be far more complex and multi-faceted than our partnership laws and a discussion on the topic is beyond the scope of this work. It appears however, that partners will be held liable for the wrongful conduct of their co-partners in one of two situations: firstly, where partners are seen as organs of the partnership and have the power to act in a

Although this test is not as broad and multi-faceted as the common law tests applied in the South African and English systems it is suggested that the core principles guiding the determination of employment are fundamentally the same. Both tests can successfully be used to found liability in situations where employees perform their tasks with a fair measure of discretion and accommodate the fact that the scope of control is often difficult to define in modern working conditions.

The Germans have adopted the same approach used by English, Commonwealth, and South African courts in cases where employees are 'lent out' by a general employer to perform tasks on behalf of a temporary employer. The general employer will most often be held liable for the employee's torts because this employer is usually in a better position to direct the manner in which the employee carries out his or her tasks.[87]

As in common law jurisdictions, employers will not be held liable for the wrongful conduct of independent contractors,[88] rendering the distinction between employees and independent contractors important. Markesinis points out that when making the distinction, "German lawyers are increasingly following the Common law example and looking at the entire economic relationship, not merely enlarging or adapting the control and direction test."[89]

4.3.4. Damage Caused in the Exercise of an Appointed Function

Under German law, in order for an employer to be held liable for the wrongful acts of an employee, the harm must have been inflicted by the latter while exercising an assigned function. This requirement is basically the same as the 'course and scope of

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representative capacity; and secondly, if it can be proved that one of the partners is the *Verrichtungsgehilfe* (employee) of the other; in this case, the latter may be held liable in terms of §831 BGB. It was held that unlike general commercial partnerships or limited partnerships, the structure of basic civil partnerships does not allow for partners to qualify as representative organs of the partnerships, and thus, where these structures are concerned, it has to be proved that the wrongdoer was the *Verrichtungsgehilfe* of the other partner at the time of the offence.

[87] Markesinis *The German Law of Tort* 678.

[88] As in the common law jurisdictions, the Germans have exceptions to the general rule of no-liability for independent contractors. Like the English, they have developed rules which provide for liability where harm has been caused as a result of the breach of a non-delegable duty. Markesinis *The German Law of Tort* 679-680.

[89] Markesinis *The German Law of Tort* 679.

employment' requirement in English, Commonwealth and South African Law and the '*dans les fonctions*' requirement in French law. The German expression is, '*in Ausführung der Verrichtung*' and literally means "in the accomplishment of his or her tasks." Van Gerven, Lever and Larouche point out that although the phrases used in the different systems are not identical and are often not interpreted in the same way, there is a common idea that the scope of liability should be limited to situations in which a link between the conduct and the employment can be found.[90]

Markesinis notes that the rule is not particularly informative and goes on to point out that it is one of the most litigious aspects of the law of vicarious liability.[91] The fact that it is not particularly informative is perhaps why it is often the most contentious issue faced by the courts when dealing with cases of vicarious liability in both civil and common law jurisdictions.

The determination of whether or not an employee's acts can be said to have occurred 'in the accomplishment of his or her tasks' is a question of fact and, as Markesinis points out, the decision is thus often 'impressionistic' and open to generalisation.[92] As with their common law counterparts, it seems that the Germans are tending towards a broader interpretation of what acts necessarily fall within the course and scope of employment.[93]

However, it must be noted that the German law is still somewhat stricter than other comparable jurisdictions when it comes to this question. This strict approach stems from the fact that the Germans require fault on the part of the employer. Therefore, even if it can be proved that an employee's wrong was committed in the accomplishment of his or her tasks, the employer will not be held liable unless that

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[90] Van Gerven *et al International Tort Law* 499-500.
[91] Markesinis *The German Law of Tort* 680.
[92] *Ibid.*
[93] Markesinis *The German Law of Tort* 680 is of the view that this broadening of the area of activity falling within the scope of liability is partly due to an increase in motor traffic (and its accompanying compulsory insurance schemes), and partly due to a widening of the scope of acceptable risk. This widening has occurred due to the fact that large legal entities seem to have taken over the position of employer from natural persons. It is interesting to note that the balance is shifting in favour of individuals as the traditional focus of the BGB was to protect industry. This change in attitude is most probably due to the fact that German industry is now well developed and no longer threatened by socio-political upheaval and war.

employer was at fault in failing to exercise the necessary care when selecting the employee and/or in the selection of tools and giving of directions.[94] Similarly;

> "[I]f the wrong is something incidental to the work assigned (*bei Gelegenheit der Verrichtung*) to the worker, his master will not be 'vicariously' liable (under § 831 BGB) for it, unless it can be shown that he himself was at fault (§ 823 I BGB) in introducing this risk."[95]

However, the employer may, if all other requirements are met, be held liable where the employee's act can be described as an improper mode of performing his or her assigned functions.[96]

Where an employee disobeys an express prohibition, the employer will almost always be absolved from responsibility. The common example here is a situation in which a driver gives a lift to the injured party against his or her employer's express instruction. Under these circumstances the employee's conduct in deliberately disobeying orders "is so flagrant that the accident is treated as having occurred only 'on the occasion of' his employment,"[97] and not within the course of employment. Interestingly, however, the employee's reasons for flouting the employer's instructions are relevant to the enquiry. If, for example, the driver disobeyed his instructions in order to further his employer's ends by delivering parcels more swiftly, the employer may be held responsible for the wrong.[98]

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[94] The exculpatory proof used to absolve the employer from liability is discussed in detail below.

[95] Markesinis *The German Law of Tort* 680.

[96] Markesinis *The German Law of Tort* 681. BGH NJW 1971, 31. This is much the same as the corresponding rule in English law. The employer will not be absolved of responsibility merely because the employee was performing his or her tasks in a forbidden manner. In BGHZ NJW 1968, 391 the manager of an information agency deliberately and wrongfully gave false references. It was held that although his acts were intentional and illegal, he was still operating within the sphere of his functions. He was performing his appointed task (to give references for the purpose of establishing creditworthiness) in an improper manner.

[97] Zweigert and Kötz *Introduction to Comparative Law* 632. BGH NJW 1965, 391. As in English law, the mere fact that an employee's job created the opportunity to commit the wrongful act will not suffice to render his or her employer liable.

[98] Zweigert and Kötz *Introduction to Comparative Law* 632-633, BGH NJW 1965,391. In BGH NJW 1971, 31 the defendant's brother (acting as the former's *Verrichtungsgehilfe*) was ordered to collect 10 tons of coal. Contrary to the defendant's instructions, he used a lorry-train instead of the lorry to make the collection. On the way to the collection point, the lorry-train skidded around a sharp bend and collided with the plaintiffs car, causing the plaintiff severe injury. The reason for the defendant's brother using the prohibited transport was so that he could complete the delivery in one trip. It was held that this behaviour was intrinsically connected to his orders and could therefore be considered to fall within his appointed function.

In so-called 'deviation' cases, it appears that the German authorities follow a similar approach to that which has been adopted by common-law jurisdictions. Where an employee deviates from a prescribed route and causes harm so deviating, the extent of the deviation will determine whether or not the employer will be held liable for the harm.[99]

4.3.5. The Employer's Exculpatory Proof

If the first three requirements of § 831 BGB are satisfied, the employer is presumed to be at fault. However, as already mentioned, this presumption is rebuttable and the employer will only be held liable if he is unable to offer what is often described as 'exculpatory proof'. There are two possible ways in which the employer can exculpate him or herself under § 831 BGB: by showing that he or she was careful in the selection, instruction, and training of his or her employees and that they were supplied with adequate equipment with which to perform their functions; and/or if the employer can show that the damage or injury would have occurred regardless of whether or not the abovementioned requirements were met.

As far as the first aspect is concerned, proving proper selection, training and supervision is not a burden which is easily discharged. Indeed, Markesinis observes:[100]

> "Producing evidence that the servant was properly selected, instructed, and supervised has become an increasingly heavy burden for employers – especially in those cases where the accident is caused in the context of carriage of passengers by buses, trains, trams, and the like."

It seems that the duty of supervision placed on employers is particularly onerous, and requires frequent and active involvement in the delegation of all tasks performed by employees at every level of the business structure. The extent of the employer's duties is well illustrated by a number of cases.

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[99] Markesinis *The German Law of Tort* 680; Zweigert and Kötz *Introduction to Comparative Law* 633. RG LZ 1930, 589.
[100] Markesinis *The German Law of Tort* 684.

In BGHZ NJW 1952, 418, the owner of an estate was held liable for the harm caused to the plaintiff by a bolting horse which was being used by one of his agricultural labourers to transport gasoline. It was found that the instructions given to the labourer were inadequate under the circumstances, and although the instructions came from the employer's manager, it was held that the employer had not properly discharged his duty to supervise the instructions of the manager and ensure that they were adequate.

In BGH VersR 1969, 518, a bus company was held liable for harm sustained by one of its passengers due to the negligent conduct of the driver. In this case the plaintiff, a sixty-year-old woman, slipped on a patch of ice while attempting to board the defendant's bus. As she was regaining her balance, the conductor signalled the driver to start the vehicle and the driver duly set the bus in motion. The plaintiff was struck by the vehicle and sustained various bodily injuries as a result. It was held that although the driver and conductor were given instruction on how to behave appropriately during their training, this was not sufficient to discharge the defendant's supervisory duty. The duty could only be discharged by giving the driver and conductor continual oral reminders of the dangers associated with icy bus stops or at least providing accessible written notice of the dangers and the means for avoiding them.

Where the employer is a large organization it is very difficult, sometimes even impossible, to prove that every employee has been carefully selected and supervised. Under these circumstances, the Germans follow a system of 'decentralised exoneration' (*dezentralisierter Entlastungsbeweis*). In terms of this system the employer need only show that 'leading employees' (for example, managers or foremen) had been properly chosen and supervised. Once this has been proved, the leading employee is substituted for the real employer and will be held liable if he or she cannot show that the employee in question was properly selected and supervised.[101]

[101] Markesinis *The German Law of Tort* 685. The author points out that this system is not particularly desirable from an economic point of view, or in terms of labour-management relations, and has thus not been adopted by other systems which are otherwise based on the German model. (The Swiss, for example).

This practice does not seem to be particularly fair in that it imposes liability on an employee instead of on the main employer. Since the ultimate employer derives the benefit of the delinquent employee's services, that employer should be held responsible for any harm occasioned in the performance of those services. Moreover, it is unlikely that a leading employee would have the means to satisfy a compensation claim. The supreme court has for that reason found a way to neutralise its unfortunate effects "by finding fault in the real master for the way he has organised his business and thus made the accident possible."[102]

4.3.6. Alternative Means of Redress for Harm Caused by Employees

The fact that employers are able to escape liability under § 831 BGB by providing the necessary exculpatory proof makes it very difficult for the plaintiff to succeed. Indeed, most common and civil lawyers would agree that it is difficult enough having to get through the first two requirements. Although the duties of selection and supervision placed on employers are remarkably onerous and are not easily discharged, the fact remains that this provision still provides employers with an opportunity to avoid liability.

The German authorities have recognised that in this sense §831 may unduly favour employers and have consequently been quick to accept methods of bypassing this section. Zweigert and Kötz are of the view that "§ 831 BGB is thoroughly unsound in policy and the only reason it has remained in the BGB so long is that the judges have done much to undermine its effect."[103]

Markesinis discusses the three main ways by which the courts have bypassed § 831.[104] The first way is primarily applicable to legal entities. In terms of § 31 BGB[105] and § 89 BGB,[106] private and public business entities will be held liable for torts committed

[102] *Ibid.*
[103] Zweigert and Kötz *Introduction to Comparative Law* 634.
[104] Markesinis *The German Law of Tort* 685-690.
[105] Private law entities.
[106] Public law entities.

by their organs.[107] The liability of these entities is closer to the true principle of vicarious liability in that it is absolute and requires no fault on the part of the employer – liability will attach to the entity if it can be shown that the representative was 'carrying out his or her duties' when committing the tort.

The second way in which the courts have avoided § 831 is by holding the employer liable under § 823 I BGB for harm caused by a defect in the structure of the enterprise or failure to provide a safe system of work.

In BGH NJW 1956, 1106 it was held that even hospitals have a duty to guide the actions of doctors under certain circumstances, and will be held liable for any harm resulting from a failure to discharge such a duty. In this case the plaintiff suffered harm which was caused by the treatment he was receiving from a doctor at the defendant hospital.[108] There was nothing to suggest that the treatment was negligently administered and the harm arose out of a risk which was inherent in the treatment. The action was based on the doctor's failure to advise the plaintiff of the risks involved with the treatment. It was found that the plaintiff had not been adequately warned. In its defence, the hospital was able to provide the necessary exculpatory proof required to absolve it of liability. The court used § 823 I BGB however, and held the hospital responsible for its culpable failure to impress upon its doctors the need to inform their patients of the intrinsic risks of any treatment.

In BGH NJW 1971, 1313 the defendant's excavator, which was being used to dig a ditch for the purpose of moving a electricity supply cable, burst a pipe connecting the plaintiff's house to a main gas pipeline, causing gas to escape into the plaintiff's cellar. The gas caused an explosion which damaged the plaintiff's house to the extent that it had to be pulled down. The pipe was damaged due to the negligence of the defendant's employees, but the defendant was able to produce the necessary exculpatory proof to free him from responsibility under § 831. However, the court chose to hold the employer personally liable as civil engineers who use excavators

[107] The term 'organ' describes board members or any other duly appointed representatives. Note that only certain legal entities qualify under these sections – see the note on 1966, BGHZ 45, 311 in footnote 86.

[108] The plaintiff's electro-shock treatment, during which his twelfth vertebra was fractured. The fracture rendered him bedridden for six and a half months and after recovery his right leg was left paralysed. He also suffered from intestinal and heart problems as a result of the treatment.

have a duty to safeguard the public when excavating near supply lines.[109] It was observed that due to the risks involved in this activity, it is incumbent on all civil engineers to act with extreme caution and acquaint themselves with all of the necessary information before attempting to dig. The court held that the defendant had not adequately discharged the duty to take care and was therefore personally liable in terms of § 823 I BGB in that this indicated a failure to adopt a safe system of work.

The third and perhaps most interesting way in which the courts have managed to evade § 831 BGB is by reverting to the principles of contract. This is achieved through § 278 BGB, which provides for the liability of debtors for the acts of those they employ to fulfil their obligations. Markesinis explains:[110]

> "§ 278 states that a 'debtor' – which in the instances that concern us means the employer – 'is responsible for the fault of his statutory agent and of persons who he employs in fulfilling his obligation, to the same extent as for his own fault'. It thus imposes upon the debtor 'strict' liability for *faults of the persons he uses in the course of fulfilling his contractual obligations*."

This provision is clearly wider and is far more favourable to plaintiffs than § 831. Firstly, there is no provision for exoneration, and secondly, the terms of § 278 suggest that those capable of rendering debtors liable for their torts do not – strictly speaking – have to be employees.[111] The main difficulties with using § 278 are firstly, that the section can only be invoked where the employer owes the plaintiff a contractual obligation, and secondly, that the range of remedies is often more restricted in contract than it is in tort.[112]

[109] 'Supply lines' include gas, electricity, water and telephone lines.
[110] Markesinis *The German Law of Tort* 687.
[111] *Ibid.* The author goes on to point out that there are a number of other advantages to plaintiffs who wish to sue under contract. Among these advantages are the fact that it is easier to succeed in an action for pure economic loss under contract, the prescription period may be longer and the burden of proof may be more favourable.
[112] Markesinis *The German Law of Tort* 687-688. The second difficulty experienced by plaintiffs who choose to base their claims on § 278 is that their remedies are restricted to patrimonial loss. For example, a remedy for pain and suffering cannot be claimed. In BGHZ NJW 1952, 658 the plaintiff was injured due to the carelessness of the defendant hospital's chief doctor. The plaintiff claimed damages from the doctor and the hospital. His claim against the hospital for patrimonial loss was upheld (under §278 BGB), but the court would not grant the claim for pain and suffering against the hospital. The court held rather, that the claim for pain and suffering could be made against the doctor in terms of §823 I BGB.

Because § 278 requires a 'relationship creating obligations' (*Schuldverhältnis*), the German courts have gone to great lengths to find the existence of contractual relationships wherever possible. As a result, the principles of contract have been extended to include what has been described as the 'precontractual phase'. This extension was first made in what Markesinis describes as 'the famous linoleum case' in which the concept of *culpa in contrahendo* was used to extend contractual remedies to the negotiation stage of a prospective contractual relationship.

In the 'linoleum' case the plaintiff wished to purchase linoleum from the defendant company's department store. After looking through various patterns the plaintiff expressed an interest in a particular roll of linoleum. In order to retrieve this roll the defendant's sales assistant moved two others aside. These rolls fell, injuring the plaintiff and her daughter. It was found that the defendant's sale assistant had been negligent in that he had failed to move the rolls to a position with appropriate lateral support. It was held that although the contract of sale had not been formally entered into, the plaintiff's demand to see the goods and the fulfilment of this demand constituted a precontractual relationship capable of creating a duty of care.

This extension of the contractual relationship creates a very wide scope for contractual liability and it could be argued that if § 831 BGB provided a less restrictive notion of vicarious liability such extensions would not be necessary. Indeed, Zweigert and Kötz note:[113]

> "The English jurist Pollock stated that the strict liability of a master for the torts of his servants, such as exists at Common Law, was justified by the consideration that if it did not exist a 'huge expansion of implied, i.e. fictitious, contracts, to no great advantage of either law or conscience', would ensue; the development of German law has vindicated this prediction to the hilt."

[113] Zweigert and Kötz *Introduction to Comparative Law* 634.

4.4. CONCLUSION

Given the nature of true vicarious liability, it is not surprising that its application is fraught with inconsistency and that it is difficult to establish a clear line of judicial reasoning. The problems surrounding vicarious liability transcend jurisdictional boundaries and are seldom unique to a particular system.

While the English and Commonwealth approach to this form of liability is often criticised, it is a severe indictment to the German law that the courts actively seek alternative means of redress in order to avoid the specific provision of the *Bürgerliches Gesetzbuch* dealing with vicarious liability; and although the French system is often praised for its awe- inspiring generality, this oversimplification comes at a price. Suffice it to say that none of the jurisdictions can be said to have a perfect system. Indeed it could be argued that certain aspects of the respective systems are wholly inadequate.

CHAPTER FIVE

RE-EVALUATING THE SOUTH AFRICAN LAW OF VICARIOUS LIABILITY

5.1. INTRODUCTION

After examining the law of vicarious liability in South Africa and abroad, it is clear that the problems surrounding the application of this branch of law are not confined to any of the respective legal systems. There are a number of troublesome aspects which need to be addressed in each system. This study, however, is primarily concerned with the problems faced in South Africa and this chapter will concentrate on those difficulties.

The social justification and main policy considerations behind vicarious liability are examined, with particular emphasis given to risk-related liability. Finally, the problematic aspects of the law of vicarious liability in South Africa are critically analysed with reference to the foreign systems examined in chapters three and four.

5.2. THE SOCIAL JUSTIFICATION FOR VICARIOUS LIABILITY: POLICY CONSIDERATIONS

Although a number of theories are used to justify the application of the law of vicarious liability, it has been said that "there is no sound theoretical/legal basis for the imposition of vicarious liability."[1] Perhaps the most reasonable view is that of the majority of the Australian High Court in *Hollis v Vabu*[2] which is that although there is no sound legal rationale behind vicarious liability; it is grounded on a number of plausible policy considerations.[3] This supports Fleming's observation that "the modern doctrine of vicarious liability cannot parade as a deduction from legalistic

[1] McCarthy "Vicarious Liability in the Agency Context" 13.
[2] 37-38 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) 54-55 (McHugh J).
[3] McCarthy "Vicarious Liability in the Agency Context" 13.

premises, but should be frankly recognised as having its basis in a combination of policy considerations."[4]

The Queensland Law Reform Commission[5] has recently identified a number of cogent policy reasons for the imposition of vicarious liability. These policy considerations do not differ from what have often been described as 'theories justifying vicarious liability'.[6] However, it seems that the latter description misleads, implying as it does that that each of the 'theories' has an independent value and can alone be used as a 'theoretical justification' for the imposition of liability. It follows that although the various policy considerations behind vicarious liability provide a valuable basis when viewed together, none of them serve as valid justifications in their own right, but when viewed collectively the considerations provide a clear picture of the policy upon which the law of vicarious liability is grounded. The Commission identified four main factors:[7]

- Vicarious liability enables the plaintiff to obtain compensation from someone who is financially capable of satisfying a compensatory judgment.
- Those who employ others to advance their own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise.
- The regime promotes a wide distribution of the tort losses since the employer is the most suitable channel for passing them on through appropriate liability insurance and higher prices.
- Vicarious liability is also a coherent doctrine from the perspective of deterrence. ... Given that the employer will be held liable there is every incentive to encourage employees to perform diligently at work in all respects, and to discipline those who are guilty of wrongdoing.

When examining these policy considerations it is clear that there are two dimensions to the social justification for attributing vicarious liability. This was recognised by Van Gerven, Larouche and Lever:[8]

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[4] Fleming *The Law of Torts* 410; See also Keeton *et al Prosser and Keeton on The Law of Torts* 500-501.

[5] Hereafter referred to as 'the Commission'.

[6] See Neethling *et al Law of Delict* 338-339.

[7] Queensland Law Reform Commission, Vicarious Liability, Report no. 56 (2001) 22. See the also *London Drugs Ltd v Keuhne and Nagel International Ltd* per La Forest J at 338-340.

[8] Van Gerven *et al International Tort Law* 523.

> "It makes ... sense [to impose liability on the employer] from a moral perspective (the employer is the one who deploys the workforce and derives the benefit from its activities) and from an economic perspective (the employer is arguably better placed to take efficient precautionary measures, to insure the liability arising from the conduct of its employees and to shoulder the risk by spreading the costs, as it does for other risks related to the firm)."

These two dimensions are neatly reflected in the policy considerations listed above. Each of these considerations carries an element of social justification and therefore compel attention.

5.2.1. 'Deep Pockets'

It is not uncommon for an employee to be what could be described as 'a man of straw'. Where that is the case, it is considered reasonable that the burden should be shouldered by the employer because in most instances the employer is better able to do so.[9] The idea that plaintiffs should be entitled to claim compensation from a party who is better able to pay is rooted in the policy that victims should be able to achieve compensation regardless of the fact that the wrongdoer does not have the means to satisfy the claim. "However distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant."[10]

5.2.2. Loss Distribution, Indemnity and Fidelity Insurance

The practical consequence of holding employers liable for the delicts of their employees is that the employer will spread the cost of compensation through pricing[11] or insurance and it can justifiably be said that this mitigates the employer's loss. This is especially true in modern business conditions as the employer is often a large enterprise which, by virtue of its size and economic viability, has the ability to insure against the loss in this way. The result is that[12]

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[9] Fleming *The Law of Torts* 410 points out that this rationale was christened the "deepest pocket" principle by Baty *Vicarious Liability* (1916) 154.

[10] Queensland Law Reform Commission 23.

[11] Queensland Law Reform Commission 24. See also Fleming *The Law of Torts* 426.

[12] Rogers *Tort* (2006) 883.

"losses caused by the torts of the enterprise's servants are borne in small and probably unnoticeable amounts by the body of its customers, and the injured person is compensated without the necessity of calling upon an individual, whose personal fault may be slight or even non-existent, to suffer the disastrous financial consequences that may follow liability in tort."

Employers are also in a position to insure themselves against loss resulting from the conduct of their employees by taking out specific insurance policies. There are two types of policy which may be used by employers in order to insure themselves against compensatory claims: ordinary indemnity policies and fidelity policies. The former may only be used to insure against claims for negligence, while the latter insures against claims for negligence, fraud, dishonesty, theft, embezzlement and other situations in which an employee's integrity, honesty or fidelity is found wanting.[13]

Appropriate insurance coverage is perhaps the most efficient way in which an employer can guard against vicarious liability. However, in insulating an employer from liability, insurance coverage can be a serious drawback for employees as they may be sued by the insurer through subrogation.[14] Thus, if an insured employer is held liable for the careless or wrongful act an employee, in theory the insurer will be entitled to act against the employee through subrogation even though the employer may not wish to take action against the employee.

In many cases employers would not be inclined to act against their employees in order to recover a loss sustained as a result of their delictual conduct (though this may not be the case where the delictual conduct is deliberate). Indeed, suing an employee for an act of minor negligence would not necessarily be in the interests of the employer. It would almost certainly result in the loss of the employee concerned and perhaps even a loss of confidence in the employer by remaining staff. An insurer claiming compensation from employees would most likely have a similar effect.

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[13] M Parkington, A O'Dowd, N Legh-Jones and A Longmore *MacGillivray & Parkington on Insurance Law* 6ed (1975) 236, 951, 1001. Hosten *et al Introduction to South African Law and Legal Theory* 918-919.

[14] *MacGillivray & Parkington on Insurance Law* 776 define subrogation as "the right of an insurer, who has paid for a loss, to receive the benefit of all the rights and remedies of the insured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained." M F B Reinecke, S van der Merwe, J P van Niekerk and P Havenga *General Principles of Insurance Law* (2002) 282 point out that the rights of an insured against his employee are amenable to subrogation. See *Richard Ellis SA (Pty) Ltd v Miller* 1990 (1) SA 453 (T).

However, if the employer releases the employee from liability (which can be done before or after indemnification by the insurer), the employee's debt will be discharged and the insurer will not be entitled to a claim through subrogation.[15] Employers may also include a provision in the insurance contract denying the insurer the right of subrogation in order to protect employees against liability.[16] In this way indemnity insurance can be used to protect the interests of both employers *and* employees.

5.2.3. The Deterrent Effect of Vicarious Liability

The notion that imposing liability on an employer will motivate that employer and indeed other employers into taking greater care over the work performed by their employees is a quite compelling justification for attributing liability. As the Commission points out:[17]

> "An employer has the capacity to exercise control over the workplace activities of an employee. An employer may discipline an employee and, ultimately, an employer can terminate the employment of an employee. It is argued that the imposition of vicarious liability on an employer for the wrongful conduct of an employee might encourage the employer to exercise these powers, thereby reducing the risk of future harm."

Betlem states that there is empirical proof that the enforcement of compensation claims acts as a deterrent.[18] This conclusion is supported by Schwartz[19] who conducted comprehensive empirical research on the deterrent effect of tort law. Schwartz's investigations are based on the so-called 'economic deterrence' rationale which has been used to justify the imposition of delictual liability. In terms of this rationale, the threat of liability discourages parties from engaging in conduct which could potentially lead to liability.[20]

[15] Reinecke *et al General Principles of Insurance Law* 277; *Richard Ellis SA (Pty) Ltd v Miller.*
[16] Reinecke *et al General Principles of Insurance Law* 277.
[17] Queensland Law Reform Commission 25; Fleming *The Law of Torts* 410.
[18] G Betlem "Torts, a European *Ius Commune* and the Private Enforcement of Community Law" (2005) 64 *CLJ* 126 at 131.
[19] G T Schwartz "Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?" (1994-1995) 42 *UCLA* Law Review 377.
[20] Schwartz "Does Tort Law Really Deter?"381.

Interestingly, this theory has come under fire from many leading commentators[21] who argue that the deterrent effect of tort liability is not as great as the proponents of the economic deterrence theory would have us believe. The critics have advanced a number of objections in an attempt to disprove the theory and Schwartz comments on those considerations which seem to appear consistently.[22]

It has been suggested by critics that liability as a deterrent is rendered unnecessary by other incentives. These incentives include morality, self-preservation, and what are described as 'first-party market incentives'.[23] As far as morality is concerned, it is believed that moral principles may discourage engaging in conduct which may pose a risk to third parties. Although this may be the case, there is a compelling counter-argument that many potential defendants do not seem particularly concerned with the safety of others.[24] Indeed it could be argued that in the sphere of vicarious liability, defendants (employers) would be even less morally motivated due to the fact that they are often disconnected from potential plaintiffs.

As regards self-preservation, it is believed that under certain circumstances a potential tortfeasor will refrain from dangerous conduct in order to protect him or herself from harm. It is noted that this argument is generally restricted to cases of motorised transport.[25] It is obvious that, in the normal course of events, motorists are likely to drive with care in order to ensure their own safety. In cases of vicarious liability it is difficult to see how this consideration could carry much weight. Although the actual tortfeasor (the employee in this case) may be so motivated, it does not follow that the employer will be particularly concerned, unless of course the risk of incident poses a threat to his or her business interests.

First-party market incentives are those which motivate businesses to take measures to prevent harm to customers and the public at large. This motivation revolves around the principle of product liability and may influence manufacturers who would stand

[21] Among them Atiyah, Fleming and White.
[22] Schwartz "Does Tort Law Really Deter?" 382.
[23] *Ibid.*
[24] Schwartz "Does Tort Law Really Deter?" 383.
[25] *Ibid.*

to lose sales as a result of product defects.[26] Such motivation could perhaps be extended to situations in which third parties come into contact with a business or its employees. Employers may be motivated by commercial interests to insist on measures to protect against harm where such harm would reflect negatively on the image of the business. Of course this motivation only has an effect where the shortcomings of a particular enterprise are sufficiently publicised. This presents a strong argument in favour of delictual liability as it is well known that law suits attract a great deal of publicity. Indeed it is certain that few things are as well publicised as a large compensatory claim.

Critics of the deterrence theory go further to suggest that liability insurance removes the incentives to those covered by nullifying the effects of the threat of liability.[27] Of course, liability insurance is dependant on the threat of liability, so although it may be argued that this form of insurance removes the incentives of those covered to take care, without the risk of liability there would be no need to maintain such policies. It could be said that the risk of increased premiums could act as an incentive to take precautionary measures.

Another consideration which is popularly used to discount the deterrence theory is that in cases of negligence the conduct is often inadvertent and completely accidental. It is argued that "if the party's conduct is not a function of her own mental choices, then liability rules that appeal to the mind will not be influential."[28] Although this is often the case, defendants (particularly employers in cases of vicarious liability) should be motivated to do as much as possible to minimise the risk of accidents. The fact that harm is often accidental does not mean that the risk of it occurring cannot be reduced by introducing precautionary measures. As Rogers points out, "If there were no vicarious liability, the employer's incentive to minimize the risks created by his activity would be reduced."[29]

In some instances employers create or enhance the risk of accident by adopting dangerous policies or encouraging reckless working habits. Where this is the case, the

[26] Schwartz "Does Tort Law Really Deter?" 382.
[27] Schwartz "Does Tort Law Really Deter?" 382-383.
[28] Schwartz "Does Tort Law Really Deter?" 383.
[29] Rogers *Tort* (2006) 883.

threat or imposition of delictual liability can provide a strong incentive to change policies and to discourage reckless behaviour. Schwartz[30] provides a particularly good example of this in referring to an American case in which a well-known pizza delivery company was compelled to change one of its policies after being forced to pay a compensation claim of $78 million. The company promised to deliver pizzas within 30 minutes after customers had placed their orders, a policy which often had the effect of encouraging employees to drive negligently in order to fulfil the promise. The incident which gave rise to the claim for compensation involved a two-car collision in which one of the company's drivers was involved. As a result of the case the company withdrew its 30 minute guarantee and adopted a number of precautionary measures in order to reduce the risk of future incidents.

It cannot be said that delictual liability is the only effective deterrent against harmful conduct, but it must have some influence on the behaviour of potential defendants. Surely the possibility of liability creates at least a moderate incentive to take measures to avoid harmful conduct? When it comes to vicarious liability "[e]mployers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision."[31] There is a compelling argument that holding employers vicariously liable for the delicts of their employees encourages "imaginative and efficient administration and supervision, thereby reducing the risk that the employer had introduced into the community."[32]

5.2.4. The Assumption of Risk as a Basis for Vicarious Liability

The justification that those who derive benefit from the employee's tasks should carry the burden of risk attendant in the performance of such tasks is linked to the concept of equity. Indeed, the general feeling is that "it is more just to make the person who has entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting, than that the other and entirely innocent party should be left to bear the loss."[33] This feeling is linked to the belief that

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[30] Schwartz "Does Tort Law Really Deter?" 419.

[31] *Bazley v Curry* para 32.

[32] Giliker "Rough Justice in an Unjust World" 273 referring to the comments of McLachlin J in *Bazley v Curry* para 33.

[33] *Ibid.*

victims should be entitled to claim compensation regardless of the wrongdoer's ability to satisfy a claim.

The assumption of risk as a justification for imposing vicarious liability has two aspects. The first is that of equity as described above and the second is that employers should be liable for the delicts of their employees because employers create the risk of harm to third parties by enlisting the services of others to perform tasks on their behalf. This is known as the 'assumption of risk rationale' and is arguably the most practical and perhaps most popular justification for the law of vicarious liability. Indeed, Lord Nicholls made the following observation in *Dubai Aluminium Co Ltd v Salaam*:[34]

> "The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risk to others. It involves a 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."

In fact, in spite of what some authorities believe,[35] the above justification seems to have filtered its way into the legal requirements for attributing this form of liability. As Giliker observes, "It provides a justification for liability and a basis for future decision-making."[36]

The assumption of risk in enterprise is a significant policy consideration when it comes to establishing the link between an employee's appointed tasks and the commission of a tort or delict. Atiyah notes:[37]

> "In the typical case of vicarious liability the master plays a considerable part in creating the circumstances in which the tort is committed. The servant is where he is because he is employed by the master, and in many cases the tort is committed on the employer's premises or with some property belonging to the employer."

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[34] Para 21.
[35] In particular, the court in *Ess Kay Electronics v First National Bank*.
[36] Giliker "Rough Justice in an Unjust World" 278.
[37] Atiyah *Vicarious Liability* 13.

Although employers are rarely involved in the commission of the delictual acts of their employees, in most cases it would be difficult to argue that they were not involved in the creation of the risk of such conduct, whether accidental or not. From an equitable point of view it must be argued that since the employer's enterprise creates the risk of harm to third parties, that employer should be held accountable when such harm eventuates. As Rogers observes, there is "a rather deep-seated and intuitive idea that someone who, generally for his own benefit, sets a force in motion should have responsibility for the consequences even if he chooses others to carry out the task."[38]

An argument that employees alone should be forced to bear the costs of harm which is often accidental and nearly always a result of an inherent risk in the employer's enterprise is untenable. Indeed "[i]t is realised that if a workman is compelled to take upon himself all the risks of his employment, the results will be socially disastrous."[39] As Fleming points out, holding an employee liable will either overtax his or her financial resources[40] or require double insurance, covering both employer *and* employee.[41] It seems reasonable to assume that although the main purpose behind vicarious liability is to provide victims with compensation, it could also be seen as a way in which to channel liability away from an employee who would otherwise find him or herself in a dire situation.[42] Despite the fact that vicarious liability does not insulate employees from personal claims, the reality is that plaintiffs who are successful in their vicarious claims rarely pursue personal claims against employees.

[38] Rogers *Tort* (2006) 882.

[39] H J Laski "The Basis of Vicarious Liability" (1926) 26 *YLJ* 127. J G Fleming "Employee's Tort in a Contractual Matrix: New Approaches in Canada" (1993) 13 *OJLS* 430 at 430 points out that "[u]nder modern conditions of labour relations it seems well-nigh incongruous to make employees personally liable for accidents they cause in the course of carrying out their tasks."

[40] Fleming *The Law of Torts* 411.The author goes further to point out that under modern working conditions it is unlikely that an employee's financial resources are equal to his or her capacity for causing loss.

[41] *Ibid.*

[42] Van Gerven *et al International Tort Law* 525.

5.3. RE-EVALUATING THE TEST FOR VICARIOUS LIABILITY

As mentioned earlier, the so-called 'test' for vicarious liability is divided into two distinct parts. When assessing the problematic aspects of vicarious liability in South Africa, it is necessary to isolate the two parts of the test and examine them individually.

5.3.1. Relationships Capable of Founding Liability

The first part of the test is not particularly contentious. Establishing the existence of an employment relationship has been made easier by the fact that the courts have allowed the process to be informed by principles of labour law. The new 'multifaceted' test adopted in *Midway Two Engineering & Construction Services v Transnet Bpk*[43] appears to be very reasonable and straightforward.[44] In fact the only criticism of this test is that it is not as comprehensive as it could be. Although a number of *indicia* are listed, a great deal is left to the discretion of the court in determining the existence of an employment relationship and it is submitted that a more structured approach should be followed in order to promote greater certainty. Perhaps the best set of guidelines can be found in the unreported Australian decision in *Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel.*[45] These guidelines do not cover all relevant considerations, but they provide a comprehensive list of factors which add value to the enquiry.

Perhaps the most difficult and imprecise aspect of this part of the test is encountered when attempting to distinguish between independent contractors and agents. In these circumstances one of the main problems is that the terminology used by the courts is often misleading. For instance, the term 'authority' is often used when attempting to determine the existence of a relationship capable of founding liability, when the authority given to agents and mandataries should be considered only when determining the scope of employment. It has little bearing on the nature of the

[43] See also *Smit v Workmen's Compensation Commissioner* and *Stein v Rising Tide Productions CC.* This multifaceted approach stems from the 'dominant impression' test followed when establishing the existence of an employment relationship for the purposes of labour disputes.
[44] It is also worth noting that this approach is strikingly similar to that which is followed by the English courts. See *Market Investigations Ltd v Minister of Social Security.*
[45] See also *Stevens v Brodribb Sawmilling Co Pty Ltd* and *Hollis v Vabu Pty Ltd.*

relationship between the party sought to be held liable and the party who committed the delict.

Another problem is that the agency relationship is somewhat wider than the employment relationship and it is thus often difficult to determine whether or not an agent is in fact an employee for the purposes of vicarious liability.[46] Although the English courts appear to simplify matters by not making the distinction between independent contractors and independent agents, it could be argued that it does little to promote certainty.[47] Indeed, the English approach is no more amenable to consistency than the South African – albeit for a different reason.[48] It is not surprising therefore, that using the agency relationship to found vicarious liability has sparked debate in most common law jurisdictions.[49]

As described in chapter three, there is much academic debate surrounding the application of agency principles in delict and more particularly in the field of vicarious liability. Indeed, some commentators believe that agency should not feature in cases where vicarious liability is at issue,[50] and that this form of liability should only be considered where an ordinary employment relationship exists. These commentators, however, are in the minority as most academics believe that the agency relationship should be capable of founding liability, if only for the reason that it is difficult to eliminate the agency relationship from those capable of founding liability without causing at least *some* degree of injustice. It could be argued that since the agency relationship is often wider than an ordinary employment relationship,

[46] As mentioned in chapter 2 at 2.2.2, there are a number of different types of agent, and there is often confusion between 'independent agents' and 'independent contractors'. This can present a problem as the former category of worker can render principals vicariously liable for their delicts, whereas the latter, as a general rule, cannot.

[47] See chapter 3 at 3.2.4.1.

[48] The English courts seem to be less inclined to draw distinct boundaries between individual and vicarious liability. For instance, if an 'employer' uses an independent contractor on a building site and this contractor negligently harms a third party, the English and South African approaches will almost certainly differ, but the result may well be the same. If it is found that the 'employer' owes a duty to the injured party to take care, and that no such care was taken, an English court is likely to hold the 'employer' vicariously liable for the contractor's failure to discharge what is known as a non-delegable duty. A South African court faced with the same set of facts is likely to disregard vicarious liability because the employer's duty to take care is concerned with individual liability. The court will automatically separate this cause of action and follow a simple aquilian test in order to establish liability.

[49] Most notably in the United Kingdom and Australia.

[50] Subject to certain exceptions. See chapter 3 at 3.2.4.1.

including it in the category of relationships capable of founding liability would place an unfair burden on principals. On the other hand, excluding the agency relationship would prejudice those seeking redress.

Contemporary authorities seem inclined to protect the interests of an injured party. This inclination is becoming most pronounced in cases of vicarious liability, where the courts are becoming progressively more generous in finding relationships capable of founding liability, and indeed in determining what activities fall within the course and scope of employment. It points to a tendency in the courts in South Africa and in other common-law jurisdictions to look for ways to increase the scope of liability rather than to restrict it. In such circumstances, it follows that the agency relationship could very well be used to widen the scope of liability in future. In fact, it has already been suggested that the agency relationship could be used to found liability where the scope of an employment relationship does not extend as far as the scope of agency.[51] It has also been argued that where an agent is an independent contractor, the agency relationship can provide the exception to the no-liability for independent contractors rule.[52]

Interestingly, in the civil law jurisdictions of France and Germany, there is little confusion surrounding the role of agency in the law of vicarious liability and thus no extensive debate. This is because both the Germans and the French have refrained from making the distinction between agents and ordinary employees. The German term '*Verrichtungsgehilfe*' covers nearly all forms of relationship in which a person performs functions on behalf of another,[53] and although an agent may not always be a '*Verrichtungsgehilfe*', he or she can be considered to be a 'corporate organ', in which case the employer will automatically be held liable for actionable harm caused when acting in that capacity.[54] Similarly, in France, principals (*maîtres*) and employers (*Commettants*) are treated no differently from each other when it comes to imposing

[51] Trindade and Cane *The Law of Torts in Australia* 733. As mentioned in chapter 3 at 3.2.4.1, where the agent is an employee of the principal, it could well be that the acts of an employee fall outside the scope of employment but remain within the scope of agency; in which case agency could be used to found liability.
[52] *Ibid.* See chapter 3 at 3.2.4.1.
[53] Van Gerven *et al International Tort Law* 529.
[54] Van Gerven *et al International Tort Law* 527 point out that liability for corporate organs is not strictly vicarious in that the conduct of the wrongdoer is deemed to be the conduct of the corporation. However, practically speaking, this forms an extension of vicarious liability.

vicarious liability.[55] The civil law approach makes perfect sense. After all, in examining the purpose behind attributing vicarious liability, it is difficult to accept a proposal that a distinction be made between ordinary employment and agency.[56] It is even more difficult to rationalise the suggestion that agency should not qualify as a relationship capable of founding liability.

Returning to the South African situation, although the scope of agency may cast the net of liability too far in certain instances, the risk of injustice if the relationship is excluded is far greater than the risk of unfairness created by including it. Either way, it is clear that the agency relationship should feature as a relationship capable of founding vicarious liability.

What remains disturbing is the general principle established in *Eksteen v Van Schalkwyk en 'n Ander* that a mandator can not be held liable for the delict of his or her mandatary in the absence of involvement or personal fault.[57] Surely this principle unduly restricts the liability of principals and mandators. In English and Commonwealth systems there is no such restriction and the general principle is that tortious acts of agents will render their principals vicariously liable as long as these acts fall within the scope of the agent's authority.[58] Similarly, in the French and German systems no distinction is made between the way in which the liability of employers and principals is founded.[59]

There appears to be no sound reason for distinguishing between ordinary agency and employment when attributing vicarious liability. In fact, by requiring personal fault on the part of the person sought to be held liable, the implication is that a principal can never be held *vicariously* liable for the acts of an agent. Atiyah points out:[60]

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[55] Van Gerven *et al International Tort Law* 529 point out that "Article 1384(5) C.civ. has also been applied to agents, contractors, relatives or even persons who did a friendly favour."
[56] And indeed the various types of agency.
[57] At 45E.
[58] Rogers *Tort* (2006) 909.
[59] In fact in German law, if the wrongdoer is found to be a corporate organ, the principal's liability is far less restricted than it would be in the case of ordinary employment. See Van Gerven *et al International Tort Law* 527.
[60] Atiyah *Vicarious Liability* 100.

> "If there is any true vicarious liability for agents, it is a liability of exactly the same nature as liability for servants, *i.e.*, it depends on the mere imposition of responsibility by the law on one person for the act of another."

It is submitted that the agency relationship should be treated as that of employment when it comes to founding vicarious liability.

As regards the other relationships capable of founding vicarious liability, there does not appear to be any serious difficulty. The principles governing the liability of owners for drivers of motor vehicles are commensurate with the purpose behind vicarious liability and appear to be applied in a consistent fashion. It is interesting to note that in South Africa *and* abroad the liability of owners of motor vehicles for the torts of their drivers is based on a relationship akin to one of agency. However, although agency is expressly thus recognised in the foreign jurisdictions, the South African authorities tend to liken the relationship between owners and drivers to one of employment,[61] even though in most cases it would be more accurate to classify the relationship as one of agency. It has obviously been realised that as soon as the owner/driver relationship is placed into the category of agency, the courts will attempt to follow the principle applicable to the vicarious liability of principals and agents – a principle which is perhaps best avoided for reasons already discussed.

Using the relationship between business partners to found liability is possible[62] but, surprisingly, there is little South African authority on the subject.[63] The South African approach appears to be similar to that which is followed in Germany[64] in that the capacity in which the partner is working will determine whether or not that partner's actions can render the other partner or partners vicariously liable. The difference is that South African authority suggests that the partner must be acting as an 'employee' in order for liability to arise, whereas the German law provides for liability where the partner was acting as an employee (*Verrichtungsgehilfe*) *or* where the partner was acting in his or her capacity as a representative (or organ) of the partnership. It is clear that the German test makes more sense and that agency should play a role in the

[61] *Messina Associated Carriers v Kleinhaus* 175H-I.
[62] See Chapter 2 at 2.2.5.
[63] The only case dealing with vicarious liability of partners is *Rodrigues v Alves & Others*. However, as stated in chapter 2 at 2.2.5, although the Appellate Division touched on the issue, the court failed to present a clear and unequivocal relationship requirement.
[64] See Chapter 3 at 3.2.1.3.

enquiry. As noted earlier,[65] there seems to be no good reason to treat partnership arrangements any differently from those of agency when applying the principles of vicarious liability.

Where 'borrowed' employees are concerned, the South African cases are in line with the decisions in the other common law jurisdictions *and* in France and Germany.[66] The right to control the manner in which tasks are performed is a universal measure as far as this type of arrangement is concerned and no suitable alternative suggests itself.

5.3.2. The Course and Scope Enquiry

Unlike the first part of the test for vicarious liability, the so-called 'course and scope' enquiry is fraught with inconsistency. Indeed, when commenting on this part of the test Comyn J commented that "the large body of case law ... is notable for one thing, its inconsistency very often with an immediately preceding case."[67]

Although certain aspects of this part of the test present no particular difficulty, the South African authorities have not reached consensus on a general principle which can be applied to the facts of what appear to be 'like' cases in situations involving employees committing delicts while deviating from instructions. As mentioned earlier[68] 'deviation cases' present the most noticeable difficulties, particularly those involving dishonest employees. If it is accepted, as it is suggested it must be, that this part of the test involves a question of fact, it is easy to understand how the application of a general principle is difficult. However, that is not to say that the courts should not attempt to find a common thread of reasoning when dealing with what are perceived to be 'hard cases'. It is essential that decisions as to whether or not certain conduct falls within the course and scope of employment are capable of being reconciled with one another.

[65] *Ibid.*
[66] See Van Gerven *et al International Tort Law* 530.
[67] *Harrison v Michelin Tyre Co Ltd* [1985] 1 All ER 918 at 920. See Deakin, Johnston and Markesinis *Tort Law* 583.
[68] In chapter 2 at 2.4.

As far as cases involving the ordinary negligence of an employee are concerned, there is little room for inconsistency, as the general principles provide reasonably comprehensive guidelines.[69] This study emphasises situations in which employees wilfully disobey instructions in order to further their own ends. An attempt is made to find a unifying principle capable of guiding the courts in cases where the link between the conduct of employees and their appointed functions appears to be capable of rendering employers liable yet seems too tenuous when scrutinised through the lens of vicarious liability.

It seems that the traditional common law tests offer little assistance in attempting to find a comprehensive general principle capable of reflecting the various policy considerations behind vicarious liability. Indeed, it could be argued that these tests have stunted the development of a coherent and consistent set of rules by relying on vague and often ambiguous formulations of principle. In this respect the English 'Salmond test' is no better than the South African 'course and scope' enquiry and therefore provides little guidance. The continental civil law systems certainly do not appear to provide a satisfactory answer to the problem either. In any case, it would be particularly difficult to adopt civil law principles in a system which is based on the common law model. As Boberg puts it:[70]

> "Whatever may be said of our legal system in its original form, its contemporary orientation is far closer to the casuistic common-law systems than to the codified continental ones."

Having said that, the French approach seems to have set the watermark for broadening the scope of liability and the Germans have shown remarkable ingenuity in their attempts to found liability in situations where their law does not provide adequate redress. Although the traditional common law tests used in the English and Commonwealth systems are not particularly helpful, the recent policy-based test adopted by the Canadian Supreme Court in *Bazley v Curry* and the so-called 'close connection' test adopted by the House of Lords in *Lister v Hesley Hall* appear to be

[69] For example, where a driver is involved in an accident and negligently causes harm to a third party while delivering goods for his employer in accordance with the employer's instructions, it is not difficult to attach liability to the employer. Unfortunately, it is rarely as straightforward as that. See also *Bazley v Curry* para 18.

[70] Boberg "Oak Tree or Acorn?" 171.

moves in the right direction. The question is whether or not certain features of these tests or systems should be incorporated into the South African law of vicarious liability in order to rectify some of its shortcomings? In order to answer this question a brief examination of each of the respective systems is necessary.

5.3.2.1. The French and German Approaches

The French approach is extremely broad. In the leading case of *Cass. Ass. plén., 19 May 1988* the *Assemblée pléniére* noted: "To act beyond the scope of one's functions is to act in a way which does not arise from the exercise of those functions."[71] Use is made of what have been described as 'objective relevant factors' when establishing whether or not an employee's actions can be connected to the scope of employment. Such objective factors include:[72]

- Time, (did the injurious conduct occur during working time?)
- Place, (did the injurious conduct take place on work premises?)
- Means, (did the *préposé* use tools or other means put at the disposal of the *préposé* by the *commettant* to cause the injury?)

The use of these factors in establishing the link between the conduct and the scope of employment broadens its ambit considerably and suggests that employers will be liable for the wrongful conduct of employees as long as the tasks entrusted provide the latter with an opportunity to commit an offence. In other words, employers will be held accountable where the employment is the *sine qua non* of the delict.[73]

If at first glance the French approach appears to be excessive, it is not that far removed from the approach followed in *Bazley v Curry*. Although in *Bazley* the court did not go as far as to say that employers would be held liable on the basis of their

[71] Para 4.
[72] Van Gerven *et al International Tort Law* 502.
[73] Van Gerven *et al International Tort Law* 533 point out that the French approach can be viewed in terms of causation and that it comes close to the equivalency theory (*equivalence des conditions*) of causation. This theory corresponds with the *sine qua non* or "but for" test used in the first step of the South African test to establish causation. The simple explanation of this view is best given by referring to the question: "But for the employment, would the harm have occurred?" Although this seems a bit too broad an enquiry (it has long been recognised that it is too broad to establish causation without reference to the limitation of 'legal causation'), it is difficult to see how it is any different from the French approach to establishing the link between the conduct of employees and their scope of employment. The objective factors used by the French courts to establish this link are no more complicated than an ordinary "but for" enquiry.

creation of the opportunity to commit an offence, they did base liability on the creation and enhancement of risk by an employer.

There appears to be a fine line between opportunity and risk and it could be argued that in creating the opportunity for the employee to commit an offence the employer is materially enhancing the risk of the harm eventuating. For instance, in a situation in which an employee is entrusted with the close supervision of small children, it could be said that the employer is creating a opportunity for that employee to abuse his or her powers. It can also be said that the employer is creating or enhancing a risk by empowering the employee.

Of course, although the situation mentioned above would lead to the same conclusion using both approaches, there are circumstances in which this would not necessarily be the case. A good example of such a situation would be a case in which a school caretaker is found to have abused a pupil. In such a case it can be said that by employing the worker and allowing that worker to come into contact with the pupils the school afforded that worker the opportunity to commit the offence. Surely then, under the French approach, the school would be held accountable. Under the approach followed in *Bazley*, however, it could be argued that the school did not place the employee in a sufficiently intimate position to create a foreseeable risk of abuse.[74] It could be said that although the school provided the opportunity to commit the offence it did not create or materially enhance a risk. It appears that this is what separates the two approaches. That followed in *Bazley* introduces a limitation which is perhaps necessary in that it marginally narrows the scope of liability.

It could be argued that all forms of employment create attendant risks to varying degrees. Liability for these risks, however, should be limited by reasonable foreseeability, taking all relevant surrounding circumstances into account.

As regards the German system, although the *Bürgerliches Gesetzbuch* deserves praise for its precision and comprehensive structure, § 831 does not provide for 'true' vicarious liability in the sense that it does not recognise liability without fault. However, that accepted, it could be argued that although the French and common law

[74] See *GJ v Griffiths*.

systems proclaim their laws of vicarious liability not to include fault, they actually do. It seems that the French test, along with the new tests which have recently emerged in England and the Commonwealth require a measure of fault on the part of the defendant. Although this 'fault' requirement is not expressly recognised, it lies hidden beneath the veil of the defendant's duty of care towards the plaintiff, a duty which seems to have been incorporated into the respective tests despite the fact that it introduces the element of personal fault into the enquiry.[75]

If this argument is accepted, the German principles relating to an employer's exculpatory proof could be relevant when attempting to find a suitable way of limiting employers liability. However, it seems that the German methods of exculpation do not appear to cater adequately for all factual situations: they tend to focus on negligence and their system of decentralised exoneration completely defeats the purpose of vicarious liability.

5.3.2.2. A Policy-driven Approach – 'The Creation and Enhancement of Risk' and the Test of 'Close Connection'

The recent expansion of the scope of vicarious liability in England and the Commonwealth with the decision of the Canadian Supreme Court in *Bazley v Curry* and that of the House of Lords in *Lister v Hesley Hall* is a promising development. Additionally, the attitudes of the respective courts toward the traditional 'course and scope' enquiry indicate a refreshingly modern outlook. It seems that the Canadians have managed to incorporate the policy considerations which form the foundation of the law of vicarious liability into the test itself, and although the English have not gone that far, they have at least managed to widen existing principles in order to achieve just results.

In *Bazley* the court recognised that the traditional test was not suitable when attempting to found liability in cases where employees had engaged in deliberate misconduct. Although the courts had previously connected the actions of these employees with their appointed functions, this almost always involved stretching the

[75] The introduction of a measure of fault into the new common law tests will be discussed in detail below .

bounds of logic by applying a singularly inadequate fiction. McLachlin J observed that although there are a number of different categories of cases in which the wrongful acts of employees could render their employers vicariously liable, the common feature in all these cases was the employer's creation of risk.[76] She went further to point out that employers who create a risk through their enterprise should be held liable for any losses incurred in the course of such enterprise.[77]

Although, as mentioned earlier, this appears to be a mere exposition of one of the policy rationales behind vicarious liability, the court included the creation and enhancement of risk in a new test. The test incorporates two guiding principles:[78]

> "(1) They [courts] should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussion of 'scope of employment' and 'mode of conduct'.
>
> (2) The fundamental question is whether the wrongful act is <u>sufficiently related</u> to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the <u>creation or enhancement of a risk</u> and the wrong that accrues therefrom, even if unrelated to the employer's desires."

These principles significantly broaden the scope of liability. However, unlike the French test there seems to be an implied limitation. Although the connection between the wrongful conduct and the employment does not seem to be limited in terms of foreseeability,[79] the implication of the second principle is that provision of "mere opportunity" to engage in wrongful conduct will not render employers liable. In this sense, despite the fact that the employment may have been the *sine qua non* of the harm, the link between the conduct and the employment may still be too tenuous to found liability. As McLachlin J put it: "When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability."[80]

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[76] Para 22.
[77] Para 30.
[78] Para 41.
[79] As Fleming *The Law of Torts* 422 puts it: "We are not concerned with attributing fault to the master for failing to provide against foreseeable harm (for example in consequence of employing an incompetent servant), but with the measure of risks that may fairly be regarded as typical of the enterprise in question. The enquiry is directed not at foreseeability of risks from specific conduct, but at foreseeability of the broad risks incident to a whole enterprise."
[80] Para 40.

The court went further to propose a non-exhaustive list of factors to be considered when determining whether or not the link between the employment and the conduct is sufficient to warrant the imposition of liability. These factors include, but are not limited to:

> "(a) The opportunity that the enterprise afforded to 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 (by the employer) in relation to the victim;
> (e) The vulnerability of potential victims to wrongful exercise of the employee's power."

Use of the above factors introduces further limitation in that they provide a basic framework within which the courts are able to exercise their discretion. Although it may seem alarmingly broad, the policy-driven test adopted by the Canadian Supreme Court is not without limitation and is arguably a very sound formulation of principle.

The so-called 'close connection' test adopted by the House of Lords in *Lister v Hesley Hall* on the other hand is not as clear and straightforward. Unfortunately, although the House purported to follow the *Bazley* decision, it refrained from introducing any of the policy considerations used by the Canadian Supreme Court to limit the scope of liability. Consequently, it appears that the English have extended the scope of liability beyond acceptable limits and it is not surprising that the decision has invoked strong criticism.[81] It does not provide any suitable guidelines and puts little, if any, limitation on the scope of employers' liability. As Giliker rightly points out:[82]

> "By importing the Canadian test of 'close connection' without its policy justifications, the House of Lords achieves a 'just' result for the victim, but at the expense of uncertainty."

[81] See 3.3.4.5. above; Deakin, Johnston and Markesinis *Tort Law* 595; Giliker "Rough Justice" 276.
[82] Giliker "Rough Justice" 279.

5.3.2.3. The South African Position

Since the rejection of the 'creation of risk principle' by the then Appellate Division in *Minister of Law and Order v Ngobo* the South African courts have edged around the issue of attributing vicarious liability for the deliberate delictual actions of employees and have yet to come up with a clearly-defined approach to these cases.

Although the decisions in *Macala v Maokeng Town Council* and *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* suggested that *Ngobo* had not had the effect of eliminating the creation of risk as a basis for founding liability, the Supreme Court of Appeal completely dismissed it in *Ess Kay Electronics v First National Bank.* Since the partial re-emergence of risk as a basis for founding vicarious liability in *K v Minister of Safety and Security,* the law has been in a state of considerable uncertainty, an uncertainty which has not been eradicated by recent decisions.[83] The courts have refrained from setting a general principle and have limited their conclusions to the circumstances particular to each of the respective cases. Furthermore, despite the apparent trend towards a wider risk-based approach the *Ess Kay* decision still looms unchallenged.

It could be argued that the formulation of the test in *Feldman v Mall* was too broad and that a departure was perhaps necessary in order to limit the scope of employers' liability. It appears that the *Feldman* test relied on the policy consideration of 'assumption of risk' without providing a structured framework for its application. The court made no attempt to define what could and could not be considered to be risks inherent in an employer's enterprise, and by placing a duty on employers without explaining the way in which that duty could be discharged, the court suggested that vicarious liability could not be escaped. However, despite its shortcomings the *Feldman* decision touched on an important policy consideration and should not have been dismissed out of hand. Indeed, it seems that even after Kumleben JA's attack on the creation of risk in *Ngobo*, the courts were reluctant to depart from what appeared to be a sound reason for attributing liability.

[83] For example, *Grobler v Naspers Bpk,* which had very little to do with vicarious liability and should not have gone further than the employer's direct duty of care towards employees, *Minister of Safety and Security v Luiters* and *Minister of Finance and Others v Gore NO.* See 2.3.4. above.

It could be argued that the complete disregard for the assumption of risk principle in *Ess Kay* was a serious mistake. Not only did it produce a highly questionable result; it restricted and possibly set back the development of the law of vicarious liability. Since *K v Minister of Safety and Security* the courts have begun to realise that the policy considerations behind vicarious liability need to be reflected in their decisions.[84] In order for this to be achieved, such policy considerations need to be factored into the test for vicarious liability. Although it seems that there has been movement in the right direction, the establishment of a clear general principle is needed.

5.4. CONCLUSION

The expansion of the scope of vicarious liability is an inevitable consequence of a changing socio-economic climate. Such changes have a direct influence on public policy and are therefore reflected in the decisions of our courts. The fact that the courts are beginning to place more emphasis on the protection of individuals in society is beyond dispute. Our Constitution demands this protection, as does society's sense of justice and equity.

There is wide acceptance that to impose liability on employers (especially large, wealthy corporations) is socially justifiable for a variety of reasons and that in many instances the courts will stretch existing principles in order to compensate victims, even though the link between the employment and the delictual conduct is, at best, tenuous. In some 'hard cases' (such as *K v Minister of Safety and Security*) it appears that the courts decide that holding an employer liable is just and equitable under the circumstances particular to the case and attempt to fit existing principles to the facts. Obviously this does little to promote uniformity and leaves a wide scope for varied interpretation. Surely better for the courts to accept that the reason for attributing liability is that public policy requires it under the circumstances of the case. If it is accepted, as perhaps it should be, that the law of vicarious liability is based entirely on policy, it is logical that policy considerations should play the major role in

[84] This is clear from the decisions in *Grobler, Luiters* and specifically *Gore* at para 27 (see 2.3.4. above).

determining whether or not an employer should bear responsibility for the delicts of his or her employees.

It is submitted that the decision in *Bazley v Curry* is a model which should be followed and that the test for vicarious liability should focus not on whether or not an employee's conduct fell within the course and scope of employment, but rather on whether the employer's enterprise and empowerment of the employee materially increased the risk of the delictual conduct and hence the harm. This is clearly a more cogent approach in that it does away with awkward and inconsistent interpretations of what does and does not fall within the course and scope of employment, replacing it with a sound policy-based enquiry flexible enough to accommodate most, if not all, conceivable factual situations. Alternatively, a 'dominant impression' test could be adopted, in terms of which a number of factors are examined in light of the policy considerations underlying vicarious liability. These factors could include: the time, place and purpose of the employee's actions; the scope of the employee's instruction; his or her intention; and scope of authority.

Of course, as referred to above,[85] it could be argued that the *Bazley* test crosses the boundary between individual and vicarious liability by creating a duty on employers whose enterprises carry certain inherent risks. However, it seems that an intersection between direct and vicarious liability is inevitable in some cases and although it may go against established legal principle it appears to be necessary in order to achieve just results. Indeed, McLachlin J points out that "[t]he idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law."[86]

Though this approach may seem broad, the reality cannot be overlooked that in the modern business environment, employers create a substantial risk to third parties by employing a number of people to perform tasks which often require a great deal of care, skill, honesty and integrity. It is in the interests of society that such employers be held accountable for the actions of those employees. Such a burden on employers,

[85] At 5.5.2.1. above.
[86] McLachlin J para30.

heavy though it may seem, is made lighter by the fact that they are able insure against loss either through product pricing or appropriate formal insurance.

In estimating the economic impact of a broader test, it could be predicted that insurance premiums will increase on high-risk fidelity insurance policies, prices on certain products and services may increase marginally and many employers will exercise a greater degree of care in the hiring, training and supervision of employees. None of these consequences are likely to have a disastrous effect on business or the economy. The likely positive is that victims of delictual harm will be placed in a less precarious position as regards their prospect of success in claims for compensation. Furthermore, an untenable degree of legal confusion and uncertainty will be considerably reduced.