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# A frolic in the law of tort: Expanding the scope of employers' vicarious liability

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*The traditional approach to the imposition of employers' vicarious liability has recently been reconsidered and revised by the Supreme Court of Canada and the House of Lords, in the context of employees' sexual assaults committed against young persons in their charge. Under the new, more flexible approach, vicarious liability can be imposed on the basis of a close connection between the employment and the tort. This change is more than cosmetic. It is no longer necessary to show that the employee's wrongful act was a mode of carrying out the employment duties. This article reviews the case law in which this development has taken place, and considers the appropriateness of the close connection principle to cases of negligence-based torts.*

Tort law has distributive effects that need to be justified if tort law is to be judged an acceptable legal and social institution.<sup>1</sup>

## INTRODUCTION

Recent decisions in the Supreme Court of Canada and the House of Lords have forced a substantial rewriting of the law of vicarious liability. A pragmatic approach, one that purports to more openly confront the issues underlying the imposition of vicarious liability on an employer for the torts of an employee, and that eschews the semantics of the conventional, century-old formula for determining the course of employment, has been adopted. This development has taken place in the context of trespassory torts, specifically, sexual assault, for which the imposition of vicarious liability is problematic under the traditional approach. Under the new approach, vicarious liability can more readily arise for trespassory torts such as sexual assault, based on a close connection between the employment and the tortious act in question. This article assesses the sexual assault cases in which the new test has been developed, and concludes that a more flexible approach is justified in the context of employees' sexual assault, and intentional torts generally.

An unavoidable question is whether the close connection test should be applied to negligence torts, easily the most common of the torts committed by employees in the course of their work, and therefore the area in which the new principle, if extended, would have the most impact. If so, are the implications of

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<sup>1</sup> Cane P, "Distributive Justice and Tort Law" (2001) 4 NZLR 401 at 404.

extending the new test to cases of employee negligence significant, and are they likely to lead to results different to those under the traditional approach? This article considers the recent application of the close connection test to employee negligence in the Hong Kong Court of Final Appeal,<sup>2</sup> and questions the appropriateness of the close connection test for most cases of employee negligence. The article argues for a restrained and incremental application of the new test to employee negligence, and concludes that justification for applying the close connection test to negligence can be made out only for a limited class of negligence cases, and then only if clear and rational limits for its application are adopted.

### EMPLOYERS' VICARIOUS LIABILITY

Vicarious liability means that a person, herself or himself free from blame, may be held liable for the torts of another. The principle is exceptional in the law of tort, with its historical emphasis on a philosophy of individualism, personal freedom and personal responsibility for the consequences of one's conduct, and is thus confined to a few specific relationships. Most notable of these is the employer/employee relationship. In this context the imposition of vicarious liability is acknowledged as performing important social and economic functions, equally from the perspectives of distributive and corrective justice.

An employer is vicariously liable only for those employee torts committed in the course of employment. The generally accepted formulation defining the course of employment, attributed to Professor John Salmond in the first edition of his book, *The Law of Torts*,<sup>3</sup> has stood firmly and weathered well almost a century of judicial scrutiny. The accepted formulation is surprisingly and perhaps unfortunately concise:

[A]n employer will be liable not only for a wrongful act of an employee that he has authorized, but also for "a wrongful and unauthorized mode of doing some act authorized by the master".

Expressed thus, this statement of the principle attempts to strike a balance between what had at one time been an almost unqualified liability of masters for the torts of servants, and the recognition that the unrestricted imposition of vicarious liability on a master even when not at fault would be too onerous a burden to bear, in particular for modern commercial enterprises where the master was not in a position to closely supervise the activities of servants.<sup>4</sup>

Of course, Salmond was not inventing the law but expressing his understanding of it. Although his statement has recently been described by Lord Millett as "not a statutory definition", it was nonetheless, according to Lord Millett, a "guide to the principled application of the law to diverse factual situations".<sup>5</sup> At any rate there can be no doubt that the judicial respect accorded

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<sup>2</sup> The Court of Final Appeal replaced the Privy Council as Hong Kong's highest appeals court on 1 July 1997. Its membership includes non-permanent members from the House of Lords and from appeals courts of other common law jurisdictions.

<sup>3</sup> (Steven and Haynes, London, 1907) p 83. Now, see Heuston RFV and Buckley RA, *Salmond and Heuston on the Law of Torts* (21st ed, Sweet & Maxwell, London, 1996) p 443. Hereafter, this principle will be referred to as the "Salmond principle", or the "Salmond formulation", or the "Salmond test".

<sup>4</sup> Fleming JG, *The Law of Torts* (9th ed, LBC Information Services, Sydney, 1998) p 421.

<sup>5</sup> *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 245.

the Salmond formulation has been reverent,<sup>6</sup> certainly if measured in terms of the number of citations, and would be the envy of any modern-day academic.

Despite, or perhaps because of, the simplicity of the Salmond formulation, in application it has proved to be somewhat less than precise, dependent on judicial attitudes in changing times.<sup>7</sup> As such, it is, in application at least, an evolving concept that must be kept in check, to ensure that it continues to meet the needs of those changing times. This is particularly so given the range of different employment situations that exist in a modern, sophisticated economy, not to say the nature of different forms of wrongful conduct in which employees are capable of engaging. The "one size fits all" approach is unlikely to achieve just results in all of the circumstances that can potentially give rise to claims for vicarious liability.

#### **POLICY JUSTIFICATIONS FOR VICARIOUS LIABILITY**

There are a number of possible justifications for the imposition of vicarious liability on employers for the torts of employees, none of which, on its own, is entirely satisfactory or convincing. Writers and judges have expressed their justification theories differently, which inevitably include some or all of the following considerations.

Vicarious liability ensures compensation. The employer will inevitably be more financially capable than an employee of satisfying the judgment. There can be little doubt that the introduction of the concept of vicarious liability into the law of tort was largely driven by the pragmatic consideration of finding a "deep pocket" to ensure that compensation is paid.

Secondly, since the employer makes a profit from the enterprise in which the employee was engaged when the tort was committed, it is only fair that the employer be made liable (in addition to the employee). After all, the employer has introduced the risk of accident through her or his enterprise and, perhaps more to the point, the employer is in the best position to exert influence over employees and modify the techniques of production such that the occurrence of similar accidents can be better avoided in future. In other words, the employer is in the best position to respond to the deterrence function of an award of damages. Of course, this consideration applies more readily to negligence torts committed in the course of performing work duties than it does to intentional torts, which by their nature are often unrelated to work duties, and therefore cannot be anticipated.

Finally, vicarious liability is a loss-distribution mechanism. This is obviously so, to the extent that it spreads the loss beyond the employee, to the employer as well. Moreover, and related to the deterrence function, the employer is in a position to spread the loss even further, to its paying customers, by internalising the costs through the raising of prices of the products or services

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<sup>6</sup> Lord Diplock referred to the Salmond formula as "that infelicitous but time-honoured phrase": see *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 737.

<sup>7</sup> In *Kilboy v South Eastern Fire Area Joint Committee* [1952] SC 280 at 285, Lord President Cooper observed: "What was once presented as a legal principle has degenerated into a rule of expedience, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political conditions"; and in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685, Lord Pearce said that "the doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice".

accordingly.<sup>8</sup> And, of course, employers are normally insured against such contingencies, and, therefore, can spread the loss through the insurance company to other policyholders who also pay insurance premiums. This way, no single person or entity shoulders the often catastrophic consequences of a moment's inadvertence.

The first two considerations explain why vicarious liability is, in the main, restricted to the torts of employees, and does not extend, for instance, to the torts of independent contractors.<sup>9</sup> Independent contractors, by definition, are not subject to as much control by employers as are employees, are largely free to make choices as to how work should be done, and at any rate are often as capable as the employer of making good on a judgment entered against them.<sup>10</sup>

As will become apparent later, it is important to understand that the form of liability under consideration is truly *vicarious*. It is to be distinguished from primary, fault-based liability for the acts of third parties, such as the liability of the British Home Office for the torts of the borstal boys in its custody in *Home Office v Dorset Yacht* [1970] AC 1004, a liability which was based on the direct duty owed by the Home Office prison authorities to the yacht owners. Vicarious liability is not premised on a personal duty owed by the defendant to the plaintiff, but rather on the relationship between the defendant and the tortfeasor. Once the necessary relationship is established, in this case, the master/servant relationship, the defendant can be held liable for injuries caused by the tortfeasor. In this sense, vicarious liability is strict – it is imposed despite the absence of fault on the part of the employer.

## THE COURSE OF EMPLOYMENT

It is a long-established condition for the imposition of vicarious liability that the tortfeasor was in a master/servant relationship with the employer. Proof of this condition poses problems of its own, and is often the main issue in dispute in vicarious liability cases.<sup>11</sup> However, this article is not concerned with the question of the master/servant relationship, but with the other necessary condition for vicarious liability, that the employee's tort was committed in the course of employment. This is a necessary condition because only then can vicarious liability be justified. It would hardly be just to impose liability on an employer for all wrongs committed by employees, whether after work hours, or however unrelated to the work assigned by the employer. However, the delineation of this condition naturally gives rise to contentious positions: when does an employee's act fall within the course of employment, and when not? Judicial attitudes to the policy underlying vicarious liability will be

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<sup>8</sup> Under this view, the goal of economic efficiency is also advanced, as producers using cheap, accident-causing methods of production and materials will be required to bear the costs of accidents and be prevented from out-pricing competitors.

<sup>9</sup> For exceptions to the general rule, see Fleming, n 4, pp 434-438.

<sup>10</sup> However, it should be noted that this will not be so where, as often occurs in Hong Kong, the contractor is a small, one- or two-person entity effectively at the beck and call of the employer. For the peculiarities of the Hong Kong situation, still prevailing today, see Rear J, "Self-employment in the Building Industry" (1972) 2 HKLJ 150. For more current figures, see the Hong Kong Country Report at <http://www.geocities.com/rolitain/>.

<sup>11</sup> Fleming, n 4, pp 413-418.

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determinative in circumscribing the course of employment, and hence the amount of protection (that is, assured compensation) afforded the victims of tort.

Of course, employees are not hired to commit torts. Nonetheless, under the traditional formulation, the course of employment concept includes not only those wrongful acts authorised or instructed by the employer (a relatively uncontroversial proposition, and, on its terms, arguably a form of primary rather than vicarious liability anyway), but also the more frequent occurrence of a lawful act authorised by the employer, but done in a wrongful and unauthorised way. This second category includes an employee's negligent performance of normal work duties, which causes injury to another, the paradigm case being an employee's careless driving of a motor vehicle. Moreover, it includes conduct "incidental to the employment", for example, an employee's careless lighting of a cigarette while transferring petrol from a lorry to a tank, which resulted in an explosion and fire.<sup>12</sup>

It follows, then, that if, during the course of work, an employee engages in a diversion, going on "a frolic of his own", to use a favourite phrase of judges,<sup>13</sup> engaging in an unauthorised act not incidental to the authorised employment duties, the employee will be deemed to have stepped out of the course of employment. That is, where the employee's activity is a very clear departure from the scope of the employment, there will be no vicarious liability.

The case of *Storey v Ashton* (1869) LR 4 QB 476, in which the court considered the deviation to be an entirely new and independent journey, provides a classic example. A driver who delivered goods as instructed, and who, rather than returning directly to his employer's premises, decided to first drive in another direction to visit the home of his colleague's relative on personal business, was found to be acting outside the course of his employment for the purposes of the action against the employer brought by a pedestrian injured during the course of that diversion. However, as can be seen from the decided cases, the degree of diversion to be permitted by the courts does not lend itself to a hard and fast determination and the result in a particular case will very much depend on the facts of the case and the judge's view of what justice demands. Certainly, it is a determination about which reasonable persons may very well disagree. The characterisation of an employee's act as a frolic speaks more of a conclusion than an explanation as to why the conduct is outside of the course of employment. The law reports abound with cases where the employee failed to follow instructions, often for the employee's own convenience, and was nonetheless found to be in the course of employment.<sup>14</sup> The Salmond formulation does not provide a clear pointer in such cases.

In a similar vein, it is not a sufficient proof that the employer expressly prohibited the activity in question.<sup>15</sup> In such circumstances, the determination of the course of employment issue will very much depend on a number of factors, ultimately, whether the prohibition is viewed as having limited the scope of the

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<sup>12</sup> *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509.

<sup>13</sup> Attributed to Parke B in *Joel v Morison* (1834) 6 C&P 501 at 503; 172 ER 1338 at 1339.

<sup>14</sup> See, eg, *Whatman v Pearson* (1868) LR 3 CP 422; *Dense Billion Ltd v Hui Ting-sung* [1996] 2 HKC 110. In both cases the driver, contrary to instructions, followed a different route, in order to park nearer to his home. In both cases he was held to be acting within the course of the employment.

<sup>15</sup> This must be so, for if it were otherwise, an employer could avoid liability by issuing instructions limiting employee conduct to the careful performance of prescribed work duties.

employment, or merely having limited the ways in which the authorised employment can be carried out – again, a distinction that is not easy to make.<sup>16</sup>

Not surprisingly, it has repeatedly been stated that the fact that the employment has merely created the opportunity for the commission of the tort is not in itself sufficient to bring the tort within the second limb of the Salmond test.<sup>17</sup> This last caveat must be applied, for otherwise an employer's liability for employees' torts would be limitless.

These considerations apply well enough to negligence torts, but they have been held to apply equally to intentional torts, whether of a trespassory or fraudulent nature. It is true that torts of the latter sort are more prone to be categorised as outside of the course of employment, because, by their nature, such trespassory and fraudulent activities are less likely to be viewed as merely wrongful modes of performing authorised tasks. More often than not they involve a personal agenda of the employee, and therefore qualify as a classic "frolic of his own" case. Imposition of vicarious liability in this field of tortious activity has been comparatively rare. Examples found in the cases in which vicarious liability has been imposed include the trespassory excesses of police officers and prison authorities in the exercise of powers of arrest and detention,<sup>18</sup> the overly zealous tactics of schoolteachers in the disciplining of students,<sup>19</sup> and the excesses of doormen and "bouncers" in the exercise of their protective functions,<sup>20</sup> employment situations in which the assigned work clearly contemplates the possibility of the use of force against the person.<sup>21</sup> However, where the assigned work does not contemplate the use of force, the application of the Salmond formulation to intentional torts will be more problematic, and the considerations just discussed of little assistance.

### VICARIOUS LIABILITY FOR SEXUAL ASSAULT

In *Bazley v Curry* [1999] 2 SCR 534; (1999) 174 DLR (4th) 45, *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71 and *Lister v Hesley Hall Ltd* [2002] 1 AC 215, the courts were concerned with sexual assault committed by social workers against children or teenagers in their care or under their supervision. In *Bazley*, the employee acted as a parent figure to the children in a residential home, and abused that position when he committed sexual assaults against some of the children. McLachlin J, giving the judgment of the court in *Bazley*, recognised the inadequacy of the standard Salmond formulation to address tortious conduct of such a blatantly self-gratifying nature, and felt that

<sup>16</sup> See, eg, *Canadian Pacific Railway Co v Lockhart* [1942] AC 591; *Rose v Plenty* [1976] 1 WLR 141.

<sup>17</sup> *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949, cited with approval by Lord Clyde in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 235; see also Atiyah PS, *Vicarious Liability in the Law of Torts* (Butterworths, London, 1967) p 177.

<sup>18</sup> *Racz v Home Office* [1994] 2 AC 45; *Kimmy Suen King-on v A-G of Hong Kong* [1987] HKLR 331.

<sup>19</sup> *Ryan v Fildes* [1938] 3 All ER 517.

<sup>20</sup> *Lakatosh v Ross* (1974) 48 DLR (3rd) 64.

<sup>21</sup> For examples of an employee's fraud that attracted vicarious liability – the outright theft of a customer's property entrusted to the employee – see *Lloyd v Grace, Smith & Co* [1912] AC 716, and *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716. *Lloyd v Grace, Smith & Co* established that a fraud committed for the benefit of the employee and not the employer could fall within the course of employment.

justice required a less formalistic approach. In intentional tort cases in which “precedent is inconclusive” (at 559; 64), she recommended a pragmatic approach, one that “openly confronts the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of ‘scope of employment’ and ‘mode of conduct’” (at 559; 64). The question was whether the wrongful act is “*sufficiently related* to conduct authorised by the employer to justify the imposition of vicarious liability” (at 559; 64) (emphasis in original). For her, enterprise risk provided the basis for answering that question. The decided cases in which vicarious liability had been imposed for trespassory or fraudulent torts committed by “bouncers”, school teachers, accounts clerks and the like (at 546-548; 54-56) provided a common theme that where the “employee’s conduct is closely tied to a risk that the employer’s enterprise has placed in the community” (at 549; 56), vicarious liability might be justly imposed. In such cases, the costs of the risks should rightly be internalised by the employer (at 557; 62). Something more than a coincidental link between the enterprise and the employee’s duties, a mere opportunity or but-for relationship, is required (at 558; 63). “It must be possible to say that the employer *significantly* increased the risk of harm” by employing the worker to perform the assigned tasks” (at 560; 65) (emphasis in original).

Comment [S2]: Opening quotes?

McLachlin J identified certain factors to be taken into account in determining the sufficiency of the connection in such cases. Where the enterprise conferred extensive power on the employee, and provided the opportunity to abuse that power in circumstances where the employment creates a relationship of intimacy (or friction) with the potential victims, victims who are particularly vulnerable, a sufficient connection could be made out (at 560; 65). In appropriate cases the extent to which the wrongful act may have furthered the employer’s aims would also be relevant (at 560; 65).

McLachlin J’s judgment signals a significant development in the law of vicarious liability. It neatly overcomes the semantic difficulties of the traditional Salmond approach in a context of aberrational human conduct in which modern notions of fairness clearly cry out for a remedy that is not illusory, as it undoubtedly would be against the transgressing employee. Such a development is justified on the basis of a commonly shared sense of justice, and serves to advance the important policy motives behind vicarious liability – compensation, deterrence and the distribution of losses across a spectrum where they can be manageably and justly borne. The guidelines provided in the context of intentional torts where “precedent is inconclusive” offer some objective criteria to assist courts, not to mention employers.

Nonetheless, it must be observed that however much a fresh approach to address the emergence of a serious and widespread societal problem is to be welcomed, the approach adopted inevitably attracts the sorts of criticisms levelled at the Salmond formulation itself. It is open-ended and fails to provide a clear pointer. The uncertainty is evidenced best perhaps by the decision in *Jacobi v Griffiths* [1999] 2 SCR 570; (1999) 174 DLR (4th) 71, in which the identically constituted court that reached a unanimous finding of vicarious liability in *Bazley v Curry* was on the same day split four-to-three against the imposition of vicarious liability in another case of sexual assault committed by a social

worker.<sup>22</sup> However much the new principle has improved the plight of this vulnerable, and admittedly narrow, band of tort victims, bright lines have not been drawn. That may be unavoidable, given the need for flexibility in such cases, and a necessary price to pay for the advancement of a just cause.

McLachlin J's approach received broad endorsement in the House of Lords in the factually similar case of *Lister v Hesley Hall Ltd* [2002] 1 AC 215.<sup>23</sup> However, in *Lister* the principle was struck at an even more general level of abstraction, and with a less clear expression of the criteria to be applied in determining close connection.

In *Lister* a warden in charge of a unit in a residential home for teenaged boys with behavioural difficulties sexually abused some of the boys. Like McLachlin J, Lord Steyn warned against "a preoccupation with conceptualistic reasoning" (at 224),<sup>24</sup> particularly in cases like that under consideration. Conveniently, Lord Steyn found justification for the close connection principle in Salmond's own amplification of the second limb of his famous test (at 230):<sup>25</sup>

But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are *so connected* with acts which he has authorized, that they may be rightly regarded as modes – although improper modes – of doing them.

(emphasis **provided**)

**Comment [S3]:** "added" is our normal style – OK to change?

According to Lords Steyn, Clyde and Millett, Salmond's embellishment provided the basis for a proper understanding of the vicarious liability principle. For Lord Steyn, "the question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable" (at 230). This approach overcame the difficulties of the traditional Salmond formulation, because (at 227):

[I]t is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorized acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for the children.

Lord Steyn found (at 230) that the connection was sufficiently close as to make it just and fair to impose vicarious liability because "after all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties ... matters of degree arise ... but the present case clearly falls on the side of vicarious liability".

**Comment [S4]:** Delete?

<sup>22</sup> The Supreme Court of Canada applied similar reasoning in *Jacobi v Griffiths* to that applied in *Bazley v Curry*, although on the facts it decided by a bare majority against the imposition of vicarious liability. The majority thought that the degree of intimacy required by the employment was not as great, and placed importance on the fact that most of the assaults took place after work hours away from the work premises.

<sup>23</sup> Lord Steyn said (at 230), with reference to *Bazley* and *Jacobi*, that "wherever such problems are considered in future in the common law world, these judgments will be the starting point".

<sup>24</sup> The English Court of Appeal had recently decided, in *Trotman v North Yorkshire County Council* [1999] LGR 584, a factually similar case, that vicarious liability did not attach. The House of Lords viewed this outcome as unsatisfactory, and in the result, overruled *Trotman*.

<sup>25</sup> Quoting from Salmond, n 3, pp 83-84.

Again, it must be observed that, as with McLachlin J's principle, the principle proposed by Lord Steyn is no more precise than the traditional Salmond formulation. Indeed, it is even less precise than what was proposed by McLachlin J, who offered rather more in the way of an underlying theory to support the imposition of vicarious liability for intentional torts, with explicit reference to risk, deterrence and loss internalisation. McLachlin J also provided guidelines for the application of the new principle.<sup>26</sup> By contrast, Lord Steyn's formulation does not immediately make clear whether, for instance, a teacher, as opposed to a warden of a residential home, who assaults a student, comes within the new test. Such "matters of degree" were not explained in his judgment. "Justice and fairness", an overused and empty phrase, takes the matter no further. To this extent the case may prove to be useful more as a precedent for the imposition of vicarious liability, rather than as principled guidance of general application.

Lord Clyde did not follow Lord Steyn in emphasising considerations of justice and fairness. Nonetheless, he struck his principle equally generally, stressing that a "broad approach" is required, in which case "it becomes inappropriate to concentrate too closely upon the particular act complained of", and "not only do the purpose and the nature of the act have to be considered but the context and the circumstances in which it occurred have to be taken into account" (at 234).

Although Lord Hobhouse agreed with the reasons given by Lord Steyn, he gave a separate judgment of his own, in which he made no mention of the close connection test. He appeared to be most impressed with the fact that the employer was itself in a duty relationship with the plaintiff, a duty that he had delegated to the employee. He referred to "the general proposition that, where the defendant has assumed a relationship to the plaintiff which carries with it a specific duty towards the plaintiff, the defendant is vicariously liable in tort if his servant, to whom the performance of that duty has been entrusted, breaches that duty" (at 241).<sup>27</sup> Somewhat out of step with the other members of the court, Lord Hobhouse said that the correct approach "is to ask what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer" (at 242). With respect, it is difficult to see how such an approach achieves any greater clarity than the Salmond test, given that it begs the question of how to define the scope of the contractual duty or, in Salmond terminology, the scope of the employment.

Lord Millett expressly adopted the close connection test but, like McLachlin J, emphasised the risks created by the employment: an employer is liable "only if the risk is one which experience shows is inherent in the nature of the business" (at 244). Mere opportunity to commit the tort would not be sufficient, but the facts of the present case went further. The employee did not merely (at 250)

take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys.

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<sup>26</sup> See below at 10.

<sup>27</sup> To similar effect see at 250 per Lord Millett.

It is interesting to note that much of the justification for a finding of vicarious liability put forward by all of the Law Lords<sup>28</sup> rests on the relationship between the employer and the victims of the tort, in particular, that it was through the employer's broad delegation to the employee of its own duties to the plaintiffs that the torts were committed. Yet, vicarious liability has never been premised on any such relationship, but on the duty owed by the employee to the tort victim. The Law Lords risk conflating the personal duty owed by the employer to the boys, a duty that undoubtedly exists, a breach of which was in fact pleaded but later abandoned, with the duty owed by the employee to the boys. Be that as it may, it seems clear from the judgments that the close connection test as fashioned by the court in *Lister* does involve a consideration of the employer's relationship with the plaintiffs as a crucial component.

No doubt, the fact of a duty relationship between the employer and the plaintiffs reinforces the justice of the plaintiffs' claim for a remedy, but the implications of this development should not be overlooked, given that the fault of the employer has never had a role to play in the determination of vicarious liability, which is, after all, a form of strict liability, a liability that is very much to the benefit of tort victims. The court's reasoning prompts the observation that the new vicarious liability principle would perhaps be best restricted to cases concerning such situations, that is, where the employer is in a duty relationship with the plaintiff, thereby limiting the force and reach of the new principle.<sup>29</sup> At any rate, care should be taken not to incorporate this feature as a new condition for the imposition of vicarious liability generally. To do so would significantly and unnecessarily alter the law, very much to the detriment of plaintiffs.

Moreover, one might well query whether such cases could not be better resolved on the basis of non-delegable duty. Lord Hobhouse included in the class of case of persons or institutions that are in this type of special relationship to another human being "schools, prisons, hospitals, and even, in relation to their visitors, occupiers of land" (at 239). Yet most of these categories have heretofore been treated as "non-delegable duties" for which liability attaches to the employer according to established precedent.<sup>30</sup> Viewed this way, the law of vicarious liability may not have required a rewriting.<sup>31</sup>

**Comment [S5]:** PI check expression here

<sup>28</sup> Lord Hutton did not give a separate judgment, and simply agreed with Lord Steyn.

<sup>29</sup> Indeed, this appears to be the meaning ascribed to *Lister* in the subsequent English Court of Appeal decision of *Cercato-Gourvia v Kyprianou* [2001] EWCA Civ 1887 (defendant/employer's application to strike out dismissed because, applying *Lister*, vicarious liability for supervisor's assault on employee might arise, there being a duty owed by the defendant employer to the victim/employee). Similar reasoning was applied in the Queen's Bench decision in *Mattis v Pollock* [2002] EWHC 2177 (no vicarious liability for assault committed by doorman because the duty owed by the defendant pub owner to the customer had come to an end, the assault having taken place after the doorman had departed the pub). However, no mention was made of this point in the appeal to the Court of Appeal (appeal allowed, applying *Lister* and *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913, treating the incident outside the pub as a continuation of the employee's actions based on his duties inside the pub: see *Mattis v Pollock* [2003] EWCA Civ 887).

<sup>30</sup> Fleming, n 4, pp 412-413, 434-435.

<sup>31</sup> In another sexual assault case, non-delegable duty was adopted by a majority of the Court of Appeal of New South Wales in *Lepore v New South Wales* (2001) 52 NSWLR 420, although rejected on appeal by a majority of the High Court of Australia in *New South Wales v Lepore* (2003) 77 ALJR 558. Only McHugh J in the High Court supported this approach.

Nonetheless, the significance of the development in *Lister* is more than cosmetic. With a stroke of the pen, the House of Lords, in step with the Supreme Court of Canada, has moved from the position where only authorised acts could form the basis for the imposition of vicarious liability (recalling that the second limb of the Salmond test – improper modes of doing *authorised acts* – contemplates the performance of acts that are authorised), to one where, for the first time in the history of the common law, vicarious liability can be imposed for *unauthorised acts*. It was the essence of the Lords' reasoning, the very condition that prompted this re-evaluation of the law of vicarious liability, that the acts of sexual assault could not be explained as authorised acts performed in a merely unauthorised way. In this sense, the decision signals a sea change in the development of tort liability. Of course, if confined to trespassory conduct, sexual assaults constituting the prime example, it could be viewed as a merely incremental adjustment necessary to address the injustice of vulnerable groups of tort victims being left without a remedy. Changing social attitudes justify such a change. So, too, perhaps for victims of trespassory police abuse, and perhaps also for fraud committed by employees against the employer's clients.<sup>32</sup> Such a development is warranted. But what are the implications for other torts, in particular, the commonplace case of an employee's negligence?

Comment [S6]: Delete comma?

#### NEGLIGENCE-BASED TORTS

Given that negligence torts are inherently different than intentional torts, based as they are on inadvertence, one might well ask whether the same vicarious liability rules should apply to both. Historically, the position has been to withhold vicarious liability for intentional torts, outside of a small range of employment situations.<sup>33</sup> This has occurred in part because of the semantics of the Salmond formulation and its poor fit with intentional torts, but reflects the uncontroversial view that most intentional torts are simply not a performance of employment duties but a negation of them. The principle advanced in *Bazley* and *Lister* represents a response to the problem that arises in the unique employment situation in which the worker is required to establish a relationship of trust and intimacy with a vulnerable class. Such cases require special treatment.

Comment [S7]: "to"?

Lord Clyde provided a clue to the application of the new principle when he said in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 236 that "cases which concern sexual harassment or sexual abuse should be approached in the same way as any other case where questions of vicarious liability arise". Moreover, all of the other Law Lords supported their reasoning by drawing on vicarious liability cases concerning negligence.<sup>34</sup> This was very much in contrast to the decision in *Bazley v Curry* [1999] 2 SCR 534; (1999) 174 DLR (4th) 45, where McLachlin J (at XXX, 64) was careful to word the decision as applying to intentional torts, and then, only in circumstances where precedent did not otherwise point the way.

Comment [S8]: pl provide SCR ref

Comment [S9]: delete comma?

<sup>32</sup> The *Lister* principle was applied to such a case by the House of Lords in *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913 (vicarious liability in the context of the *Partnership Act* imposed on a firm for the dishonest assistance in a fraud by one of the firm's partners).

<sup>33</sup> See above at 6-7.

<sup>34</sup> After referring to the driver's deviation case of *Williams v A & W Hemphill Ltd* (1966) SC 31, Lord Steyn noted that it was a case of negligence but "nevertheless, the reasoning throws light on the problem under consideration": see *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 235.

At the time of writing, English courts had not yet considered the application of the close connection principle to negligence cases.<sup>35</sup> Inferior courts in Canada appear to have left the question open.<sup>36</sup> The High Court of Australia has now considered *Bazley* and *Lister* in the context of a similar factual setting – sexual assaults committed by schoolteachers against pupils – but by a significant majority, rejected the adoption of the close connection approach.<sup>37</sup> It can therefore be deduced that the High Court of Australia would not endorse a close connection approach in negligence cases.

The Hong Kong Court of First Instance and the Hong Kong Court of Appeal have heard vicarious liability cases concerning negligence.<sup>38</sup> In spite of the decision in *Lister*, the courts in these cases found no vicarious liability, while expressing doubts that *Lister* had changed the law significantly, at least as applied to negligence. More recently, the Hong Kong Court of Final Appeal has considered the matter afresh and, reversing the Court of Appeal and trial judge, determined that the *Lister* principle does indeed apply to negligence cases. A close examination of that case is necessary to see whether such an extension of the new principle is appropriate, and whether or not it is justified.

#### **Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd**

In *Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd* [2002] 1 HKLRD 844, two pedestrians were injured in an accident caused by the negligent driving of the second defendant, an employee of the first defendant hotel. Although employed ostensibly as a doorman, the second defendant occasionally acted as a “car jockey”, which required him to park cars for the hotel’s customers, and to move the hotel’s courtesy limousines (owned not by the hotel, but hired with drivers from a third party) to make room for others. On such occasions, this required the second defendant to drive the limousines around the block to the back of the hotel, and where obstructions required, to drive further down the adjacent busy roadway on a longer route back to the hotel. The second defendant was not otherwise employed or authorised to drive cars.

There was evidence, accepted by the trial judge, to the effect that a practice had evolved, acquiesced in by the hotel, for employees to go to an outside restaurant, where time permitted, for the purpose of obtaining food for hotel staff. Normally, an employee would walk or take a taxi to the restaurant, or persuade one of the licensed limousine drivers employed by the limousine company to drive him there. The hotel management was aware of this practice, and apparently raised no objection.

<sup>35</sup> *Lister* has, however, been applied in the context of trespassory torts: see *Cercato-Gourvia v Kyprianou* [2001] EWCA Civ 1887; and *Mattis v Pollock* [2003] 1 WLR 2158, both discussed above at n 29. *Lister* has also been applied in fraud cases: see *Balfron Trustees Ltd v Peterson* [2001] IRLR 758 (striking out application dismissed because *Lister* left open the possibility of firm’s vicarious liability for solicitor’s knowing assistance in dishonest scheme); and *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913 (see n 29).

<sup>36</sup> In *CS v Miller and Boy Scouts of Canada* (2002) 1 Alta LR (4th) 120, the close connection principle was applied and vicarious liability imposed when a camp counsellor negligently failed to report a sexual assault committed by a colleague against a five-year-old boy scout.

<sup>37</sup> *New South Wales v Lepore* (2003) 77 ALJR 558.

<sup>38</sup> *Chan Yin Yee v Secretary for Justice* (2002) HCPI 1435 of 2000 (Court of First Instance); and *Tse Ngan Heung v Ritz-Carlton Ltd* (2001) CACV 353 of 2001 (Court of Appeal).

A frolic in the law of tort: Expanding the scope of employers' vicarious liability

On the day in question, the second defendant obtained possession of the keys to one of the hotel's courtesy limousines, the chauffeur having gone off duty. He used the limousine to drive a hotel bellboy to a restaurant in order to obtain some food for himself and for other staff members. While doing so the second defendant lost control of the vehicle, which mounted the pavement and caused serious injuries to the pedestrians. This was undisputed negligence, the second defendant taking no interest in the proceedings. However, in answer to the pedestrians' claim of vicarious liability (supported by the appellant, the "insurers concerned" under the Motor Insurers Bureau Scheme<sup>39</sup>), the hotel argued that the first defendant's driving of the vehicle for the purpose of obtaining food was unauthorised, and therefore outside the course of employment.

The trial judge ruled that the first defendant hotel was not vicariously liable. Applying the conventional Salmond formula, the second defendant's conduct could not be viewed as a merely unauthorised mode of doing an act authorised by the employer. It was plainly an unauthorised act, not part of his duties. He was not driving the limousine as a car jockey at the relevant time, but for his own private purposes, a classic "frolic of his own" scenario.

By the time the matter reached the Hong Kong Court of Appeal, the House of Lords had decided the case of *Lister v Hesley Hall Ltd*.<sup>40</sup> However, the argument that the doorman's unauthorised and negligent driving could be viewed, under the reasoning in *Lister*, as being sufficiently connected with his employment to be deemed within the course of his employment, was rejected by a unanimous Court of Appeal. The court did not read *Lister* as having significantly changed the way that vicarious liability cases should be approached, at least in the context of negligence, and at any rate, for reasons similar to those provided by the trial judge, felt that the second defendant's driving of the limousine was not sufficiently connected with the employment to justify the imposition of vicarious liability. The insurer concerned, Ming An Insurance Co, appealed this ruling to the Court of Final Appeal.

On its face, it is not at all obvious that the principle in *Bazley* and *Lister* should apply in *Ming An*. *Bazley* and *Lister* concerned sexual assault, a tort that does not fit well with the Salmond approach, while *Ming An* concerned the negligent driving of a motor vehicle. In *Ming An* there was no emerging social evil in need of urgent redress. Employee torts such as that in *Ming An* have been committed from time immemorial. Moreover, there was not present in *Ming An* an overriding relationship of duty or assumption of responsibility on the part of the employer in respect of the victim, a feature of *Bazley* and a consideration that figured prominently in the judgments in *Lister*.

Nonetheless, the Court of Final Appeal was unanimous in allowing the appeal. All members took the view that the decision in *Lister* had fundamentally altered the law of vicarious liability. Moreover, they read *Lister* as applying equally to negligence cases as to intentional torts.

Comment [S10]: "and"?

<sup>39</sup> Under this non-statutory scheme, the appellants would be liable to pay out the judgment, in the event that the second defendant was found not vicariously liable, and its insurance policy not applicable.

<sup>40</sup> Under the *Basic Law*, Hong Kong's post-1997 mini-constitution, the common law continues to apply to Hong Kong. English decisions no longer have binding force but will, as a practical matter, be followed unless there are strong reasons for not doing so.

Deleted:

Lord Cooke of Thorndon NPJ<sup>41</sup> and Chan PJ<sup>42</sup> agreed with Bokhary PJ, who gave the main judgment. Litton NPJ and Mortimer NPJ also agreed with Bokhary PJ, but gave separate judgments.

Bokhary PJ adopted Lord Steyn's formulation of the close connection test in *Lister*. He said (at 852) that "[b]y 'close connection' is meant a connection between the employee's unauthorized tortious act and his employment which is so close as to make it fair and just to hold his employer vicariously liable.

**Comment [S11]:** Pl add closing quote marks

Bokhary PJ did not think that in most cases this new test was likely to lead to different results than under the traditional "wrongful mode of doing an authorized act" test (at 851-852). He observed that the basic test for vicarious liability has never varied according to the type of tort, and that the judgments in *Lister*, although concerned with sexual assault, involved a consideration of negligence cases. Moreover, he correctly observed that none of the judges in *Lister* confined their reasoning to cases of intentional wrongdoing, and that Lord Clyde expressly stated that the same approach should apply to negligence torts. The close connection criterion impressed Bokhary PJ "as inherently just and fair for all cases of tort committed by an employee while engaged in an act not authorized by his employer ... the concept is a simple one which ought not to be complicated by reading other requirements into it" (at 854). He endorsed the approach of McLachlin J in *Bazley v Curry*, paraphrasing that "the courts should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'" (at 854).

**Comment [S12]:** "to those"?

Bokhary PJ accepted that car jockeys were not authorised to drive limousines for the purpose of collecting food. However, he emphasised that car jockeys were authorised to drive limousines, albeit for a different purpose, and that in doing so they would occasionally be required to drive on the very road on which the accident took place. He also stressed that limousines were sometimes used for collecting food, albeit driven by licensed chauffeurs. He pointed out that the collecting of food for hotel staff served the hotel's purpose, in that it was in the interest of the hotel that staff be fed. For these reasons, Bokhary PJ was satisfied that the tort "was so closely connected with [the] employment that it would be fair and just to hold the hotel company vicariously liable" (at 856).<sup>43</sup>

Although it is encouraging to see a more open approach to the question of the imposition of vicarious liability, Bokhary PJ's judgment, as with those in *Lister*, prompts the question whether the new test is really any more practical in setting the boundaries for vicarious liability. McLachlin J's test was proffered only in the context of intentional torts, and then, only when precedent did not clearly settle the matter.<sup>44</sup> It is noteworthy that in deciding to impose vicarious liability, Bokhary PJ made no reference to precedent, in particular to the guidance provided in the *frotlic* line of cases, preferring to reason according to the generalities of the new principle. Under his approach, judges are invited to "openly confront" the question of vicarious liability on the basis of what justice

**Comment [S13]:** Delete comma?

**Comment [S14]:** OK or "frotlic" in inverted commas?

<sup>41</sup> Non-permanent Judge of the Court of Final Appeal.

<sup>42</sup> Permanent Judge of the Court of Final Appeal.

<sup>43</sup> In addition, Bokhary PJ mentioned, but "did not consider important" the facts that the second defendant was in uniform when the accident happened, that it happened during work hours, and that he had set out from his place of employment (at 856).

<sup>44</sup> *Bazley v Curry* [1999] 2 SCR 534 at 559; (1999) 174 DLR (4th) 45 at 64.

and fairness requires, but with little guidance as to the criteria on which the assessment of close connection and justice and fairness should be based. It is an assessment that judges will have to make on a case-by-case basis, assessing the factual matrix according to their own perceptions of what is just and fair. However, something more precise is required than is provided by the *Lister* principle, if the new test is to apply to employee torts generally, and is to improve on the traditional approach. Certainly, something more precise is required, unless the current distribution of rights and responsibilities is to be significantly altered.

Litton NPJ agreed with Bokhary PJ's judgment and, without offering reasons of his own, proceeded on the assumption that the new test applied equally to negligence torts. Citing a post-*Lister* edition of *Winfield & Jolowicz on Tort*,<sup>45</sup> he said (at 856), with reference to the new test, that "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 the employer bear the loss". Referring to Lord Wilberforce in *Kooragang Investments Pty v Richardson & Wrench* [1982] AC 462 at 472, he thought that "the tendency has been toward more liberal protection of third parties" (at 857). For Litton NPJ, "matters such as the servant's duties at the time when the tort occurred, whether he was acting in the interests of the employer or solely for himself, are still relevant" (at 859). However, what seems to be the vital consideration for Litton PJ in imposing vicarious liability, the one with which he began and concluded his judgment, was whether "the risk which gave rise to the damage (here, the servant's reckless driving of someone else's limousine)" was created by "the business activities of the employer, broadly speaking" (at XXX). If they were, they could have been insured against. In this respect, his reasoning is very close to that of Lord Millett in *Lister* and McLachlin J in *Bazley v Curry*.

**Comment [S15]:** Pl provide "at" ref for quote.

However, as formulated, Litton NPJ's judgment prompts the observation that the close connection test, already open-ended, is made no less so by constructing the necessary close connection out of the employer's creation of risks and nothing more. That criterion is too vague. All enterprises involve the creation of risks. On its face, that criterion would apply equally to a wide range of fact situations that heretofore were considered clearly outside of the scope of the employment. The risk that eventuated accompanies all enterprises that involve the use of motor vehicles. For instance, it would apply to the driver in *Storey v Ashton* (1869) LR 4 QB 476. More guidance is required in the way of criteria in order to avoid contradicting a century of case law, a result that Litton NPJ could not have intended. He certainly could not have intended such a dramatic result without explicitly saying so.

Mortimer NPJ also agreed with Bokhary PJ's summary of the close connection test, and that it is of general application, not confined to intentional torts. However, he then formulated the close connection test somewhat differently than Bokhary PJ and Litton NPJ. He said it involved a consideration of two matters (at 861-862):

**Comment [S16]:** "to"?

The first is whether it is established that at the time of the negligent driving, [the second defendant] was acting within the scope of his employment (however this concept is expressed). The second is whether his negligent

<sup>45</sup> (16th ed, Sweet & Maxwell, London, 2002) at [20-9].

driving was so closely connected with his employment as to be “fair and just” to hold his employer, the Hotel, vicariously liable.

With respect, this passage is not easy to decipher, and reveals Mortimer J’s reluctance, a perhaps understandable reluctance, to embrace the new test wholeheartedly. If, with reference to his first consideration, an act is within the scope of the employment, the matter is settled. Close connection and fairness and justice, his second consideration, do not have to be considered. For Mortimer NPJ, the only issue, as in the standard Salmond formulation, is whether the act was within the scope of the employment. Given that the second defendant was authorised to drive limousines, albeit for a different purpose; that there was a practice of limousine chauffeurs to use limousines to collect food, a practice known to management, and one from which management can be taken to benefit; that he was in uniform and in working hours; and that there was an inherent risk that he would drive the vehicle in these circumstances, he was acting within the scope of his employment.

**Comment [S17]:** NPJ?

**Comment [S18]:** delete?

**Comment [S19]:** Add “allowing”?

It has to be observed that Mortimer NPJ’s reasoning is fundamentally different in approach than that of Bokhary PJ, and even Litton NPJ. Although he endorsed the *Lister* approach, he did not actually require it. The *Lister* approach does not seek to determine whether or not the act in question was authorised, but whether the admittedly unauthorised act is sufficiently connected to the employment to make it just and fair to impose vicarious liability. If, indeed, the employee’s act in *Lister* could be shown to be an authorised one, there would have been no need to consider the matter further. In this way it can be seen how the *Lister* close connection test is particularly apropos for sexual assaults and other trespassory conduct which in no sense can be viewed as authorised.

**Comment [S20]:** “to”?

Treating the judgments as a whole, *Ming An* appears to be an unmitigated search for deep pockets.<sup>46</sup> In the process it greatly expands the scope of employers’ vicarious liability. Close connection criteria have been loosely defined, and the judgments provide little in the way of principled guidance. The scales of distribution have been significantly tipped. If justification for doing so is to be found in deterrence arguments, it is difficult to see how they can be made out. The deterrence argument that the employer has created risks for which it should be liable begs the question of what the employer could do to prevent such unauthorised employee excursions. Circumstances required that limousines be moved by doormen on short notice, so it will not do to prevent them access to keys. A scenario that would be appreciated by judges in Hong Kong, wherein the domestic helper has possession of the car keys to wash the car, and who drives off with the car, gives rise to a similar close connection as that in *Ming An*, yet surely such an occurrence should not give rise to a claim for vicarious liability. Equally, basing the close connection on the employer’s acquiescence in the staff practice of obtaining outside food is unconvincing. All employers tolerate such a practice in one way or another. The scenario wherein a shop clerk who with his supervisor’s permission slips out for a takeaway tea, and who in his haste spills the tea on a pedestrian, surely does not give rise to a claim for vicarious liability. The only response of an employer would be to prevent the obtaining of outside food, one that is hardly practical or in the interests of employees. Ironically, the

<sup>46</sup> This despite the fact that even if the Court of Final Appeal did not find vicarious liability, the pedestrians would be paid by the limousine owner’s insurers. The appeal was effectively a fight between two insurance companies.

employer in *Ming An* already went further than most employers in this regard, in that it actually did provide on-site food, however much it may not have been to the liking of the staff. Similarly, the argument cited in *Ming An* to the effect that obtaining food advances the interests of the employer does not hold up, as this applies to all employers.

It is easy to see the impact of the new rule. Facts such as those under consideration would formerly have been treated differently, as indeed they were by the trial judge, who did not have the benefit of the judgments in *Lister*, and the Court of Appeal, which did. Four of the members of the court acknowledged that the act in question in *Ming An*, driving a hotel car to obtain food, was unauthorised, in other words, a "frolic". As stated in the benchmark case, *Storey v Ashton* (1869) LR 4 QB 476, the determination of whether the employee is in the course of employment is a matter of degree, according to the extent of the deviation, having regard to the nature of the employment, and the decided cases. The view of Bokhary PJ to the effect that previous cases would not be decided differently under the new test,<sup>47</sup> does not hold up. *Ming An* places in doubt *Storey v Ashton* and like cases, where, if the tort's close connection to the employment, tempered by considerations of justice and fairness, was applied, a different result might very well be reached. Indeed, the deviation in *Storey v Ashton* could be viewed as less in degree than that in *Ming An*, where the driver was not meant to be in the vehicle at all, at the time in question. The act in question in *Storey v Ashton*, like that in *Ming An*, was unauthorised. Under the new rule, it could easily be reassessed as sufficiently closely connected to the employment as to make it just and fair to impose vicarious liability, especially if attention is paid to the close connection criterion emphasised by all of the judges, that the employment created the risk in question.<sup>48</sup>

#### **A RECOMMENDED APPROACH FOR EMPLOYEES' NEGLIGENCE-BASED TORTS**

"Tort law has distributive effects that need to be justified if tort law is to be judged an acceptable legal and social institution."<sup>49</sup> The distributive justice function permeates tort law. Through its substantive rules, responsibilities, rights and benefits are allocated amongst the various players. Of course, tort law more immediately performs a corrective justice function, restoring rights and correcting the imbalance caused by disruptive conduct. Vicarious liability shares in that function, and seeks to apply corrective justice. However, there can be no doubt that vicarious liability is tort law's most explicit loss-distribution mechanism, especially given that it operates, unlike other forms of tort liability, without regard to considerations of fault.

As discussed earlier in this article, there is an arguably inherent justice in the application of the loss-distribution mechanism of vicarious liability to most cases of employee torts occurring in the pursuit of activities on behalf of profit-seeking commercial enterprises. This distribution function reinforces the deterrent

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<sup>47</sup> Mortimer NPJ was of the same view (at 860).

<sup>48</sup> A similar argument could be made with regard to the decision in *Chan Yin Yee v Secretary for Justice* (2002) HCPI 1435 of 2000, in which an employee's use of his employer's vehicle to attend a relative's exhumation was held to be outside the course of employment. The case was decided two months before the Court of Final Appeal decision in *Ming An*.

<sup>49</sup> Cane, n 1 at 404.

function of tort law, putting the greater responsibility for accident prevention on the one most capable of preventing accidents. However, any judicial change to the distribution of responsibilities, as much as rights, in this context, must be justified in social and economic terms. Accepting, for the reasons given in the preceding sections, that such a justification has been made out in cases like *Lister* and *Bazley*, involving, as they do, morally unacceptable and self-gratifying abuses of vulnerable classes of victims, can it be made out in standard negligence cases? It is submitted that it is not sufficient to widen the ambit of vicarious liability to those cases without first making out a case for doing so having regard to considerations that apply to negligence-based torts, and that has not been done by the Court of Final Appeal.

### **Negligent performance**

Most employee negligence cases encounter little difficulty with the traditional Salmond formulation for vicarious liability.<sup>50</sup> That is because most negligence cases consist in a careless performance of assigned work duties. Common examples include a speeding van driver, a sleepy watchman or a careless porter. Each of these can be easily explained as wrongful performance of prescribed work duties.

There is nothing in the judgments in *Bazley* and *Lister* that purports to identify any failing in the law of vicarious liability as applied to negligent performance cases. The court in *Ming An* was not concerned with a negligent performance case, although the tenor of the judgments suggests that the close connection test applies to vicarious liability generally, including negligent performance. It is submitted that this area of vicarious liability requires little if anything in the way of reform, however much the aphoristic nature of the Salmond formulation could be improved upon. The danger in doing so, however, is in the upsetting of current expectations regarding liability, and the loss-distribution balance that is currently struck.

The overriding issue continues to be whether or not the tort was committed in the course of employment. The close connection test should not be mistaken as a substitute for the traditional approach, but an addendum to it. Given the clear and understandable body of case law that has been developed in the negligent performance cases, it serves no purpose to risk upsetting expectations and creating uncertainty by inviting judges, in every case of negligent performance, to “openly confront the issue” of vicarious liability afresh, guided only by judicial perceptions of what is just and fair. This area of the law is best left as it is.

**Comment [S21]:** “but should be regarded as an ...”?

### **Negligent frolics**

However, the semantics problem arising from the traditional Salmond formulation identified in *Bazley* and *Lister* is not confined to the context of sexual assault. It applies equally to classic employee frolics. In both classes of case the employee, at the decisive moment, consciously departs from her or his work duties to engage in self-serving conduct and, in doing so, causes injury to another.

In negligent frolics, as in sexual assault, the problem arises because of the difficulty in characterising the act in question as a mode of fulfilling

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<sup>50</sup> Atiyah, n 17, p 257.

employment duties, a characterisation that can take place at different levels of particularity.<sup>51</sup> The conduct of a foot courier employed to deliver goods, but who uses a company car to do so, can equally be characterised as delivering goods or as engaging in the (wrongful) act of driving a company car. The semantics problem is no less acute here than in the sexual assault cases, and reform of the law, although not as urgent, is no less warranted. The close connection test provided in the context of sexual assault may well be a suitable device through which to achieve the reform, as decided by the Hong Kong Court of Final Appeal. However, the limits of the new test require a careful examination before an across-the-board extension can be justified, unless a century of legal development is to be thrown out the window, and the loss-distribution expectations dramatically upset. Employers being asked to foot the bill for employees' unauthorised and insubordinate conduct are entitled to as much.

In *Ming An* the judgments as rendered suggest that the potential for application of the new test is wide indeed, very likely to lead to results out of step with decisions reached in like cases in the past. The change to the law is more than incremental. Employees are prone to frolics, to take advantage of the opportunities that work provides to take care of private business, or to just goof off to break the boredom of work, a problem that is particularly exposed in the unauthorised-use-of-vehicles cases. Any rule of law that seeks to make employers liable for employee negligence on the basis of risk creation alone, however admirable from the perspective of corrective justice and deterrence considerations, marks a bold departure from the existing distribution of responsibilities and rights, and if that is the desired objective, clear language should be deployed, and ample justification made out.

Comment [S22]: Add "and is"?

Comment [S23]: delete? (too colloquial/colourful for the Review?)

There are broadly two types of frolic cases that can be found in the case law. The most common example, and the one that is more easily characterised as within the course of employment, involves a worker engaged in the employer's business, who decides to deviate, for an unauthorised food break, or for a visit to a friend, or to pursue some unrelated private errand. These deviations have formerly been addressed as a "matter of degree", and as such, the results have been inconsistent and difficult of prediction.<sup>52</sup> The close connection test may provide some greater rationality to the decision-making, so long as the criteria for close connection are reasonably clear. This may require some time, as the courts will need a variety of fact situations before the criteria can be settled. It is important to begin the process at the right level of generality, that is to say, a clear policy rationale and justification for a finding of close connection.

*Ming An* concerned the second type of employee frolic. The employee in *Ming An* was not engaged in an authorised driving of the car when he decided to obtain food using the car, and later negligently lost control of the car causing injury. If he had been, a close connection with the employment might be more easily made out. As it was, he had from the beginning embarked on an outright act of insubordination, which cannot be described as a mere deviation from his authorised route. Previously, such cases were dealt with unequivocally as frolics, outside of the course of employment.<sup>53</sup> However much the decision in *Ming An*

<sup>51</sup> Atiyah, n 17, pp 181-182.

<sup>52</sup> See the cases cited in Fleming, n 4, pp 424-426.

<sup>53</sup> Atiyah, n 17, p 252. Moreover, the employee cannot convert his unauthorised frolic into an authorised act by doing some incidental act from which the master benefits: Atiyah, n 17, p 252.

might be applauded for “openly confronting the issue of whether vicarious liability should lie”, it appears to overrule a long line of authority.

Given that the semantics problem in frolic cases will not go away if ignored, a closer examination of some of the salient features of the reasoning in *Ming An* may be helpful, to see if a workable principle can be fashioned. The decisions in *Bazley* and *Lister*, which inform the decision in *Ming An*, should also be considered. They should be considered in light of important precedents in which helpful guidance has been provided in frolic cases.

In one of the most helpful decisions in this area the English Court of Appeal provided useful guidance in the case of *Rose v Plenty* [1976] 1 WLR 141, where an employee/van driver disobeyed express instructions regarding the carrying of helpers. Factors to be taken into account in determining whether or not the employee was acting in the course of employment included the nature of the employment, the nature of the express prohibition (if any), the degree of deviation from the instructions, the degree of discretion allowed to the employee in doing the work, and the extent to which the employer may still benefit from the employee’s conduct. On this basis the court was able to rule that the employee acted within the course of employment despite ignoring an express prohibition. The case offers useful objective criteria for all “frolic” cases, whether concerning a mere deviation, or an act of outright insubordination, including the violation of an express prohibition. Its continuing relevance should not be overlooked when assessing whether or not a sufficiently close connection between the wrongful act and the employment is made out.

**Comment [S24]:** should “frolic” be in inverted commas throughout?

*Bazley* and *Lister* involved facts in which the employer was in a duty relationship with the victims, or at least had assumed certain responsibilities for the victims. This feature was emphasised by all of the judges in *Lister*. Yet this feature is not present in *Ming An*. A line of authority in England has emerged which would confine the application of *Lister* to such duty relationships.<sup>54</sup> Such a restriction would serve to contain the effects of the close connection principle within manageable, and relatively harmless, limits. It would leave the typical frolic case untouched. However, as already observed, this approach tends to conflate the issue of the employer’s duty with that of the employee. Vicarious liability should not tread on the question of employer fault, constituting as it does a possible separate cause of action. Moreover, as pointed out, the frolic line of cases is also bedevilled by the semantics problem identified in *Bazley* and *Lister*. Therefore, that approach does not recommend itself convincingly.

A common theme that does emerge from *Bazley*, and less precisely, from *Lister* and *Ming An*, is enterprise risk, the introduction and enhancement of risk through the employer’s enterprise for which the employee should be liable. This was the main theme of McLachlin J and of Lord Millett. All of the judges in *Ming An* emphasised the importance of risk creation, or of a risk characteristic of the enterprise. As a principle for determining the limits of the course of employment, risk enhancement is not new. As long ago as 1967, Atiyah<sup>55</sup> offered the following guidelines for determining whether an unauthorised act was within the course of employment:

First, what has the employer authorised the employee to do?

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<sup>54</sup> See n 29.

<sup>55</sup> Atiyah, n 17, p 183.

Secondly, is there a substantial risk that, in doing what he has been authorized to do, the servant will commit torts of the kind which he has in fact committed?

Risk enhancement offers a more rational basis on which to shape the new principle, whether concerned with sexual assault or employee frolics. It sits well with the key underlying policy justifications for vicarious liability – deterrence and loss distribution. Employers will be required to do more, to think of creative ways of preventing the realisation of risks,<sup>56</sup> and the additional costs for the slight redistribution of losses can naturally be internalised, as with other costs, by the employer.

However, as a sufficient marker, risk enhancement requires more than risk creation. What is required is a material enhancement of the risk arising from the specific responsibilities entrusted by the employer to the employee, not merely the creation of circumstances whereby delinquent employee conduct may occur. The close connection will be most easily made out where the employer has herself or himself undertaken a duty or responsibility in respect of the victim, and then delegates that responsibility to an employee. Having undertaken the responsibility and created in the plaintiff a relationship of trust with the employee, the employer has put the victim that much more at risk. However, such an employer's undertaking is not a necessary condition for close connection, and has little relevance in a typical employee frolic case.

An employer's carte blanche to employees entrusted with motor vehicles or other dangerous equipment in circumstances in which there is an enhanced risk of unauthorised use, may be such a case. The increased risk of injury from negligence creates the necessary close connection between the employment and the employee's negligent frolic.

It is, however, submitted that in the vast majority of cases, this would not include circumstances whereby an employee not authorised to drive, does so for her or his own purposes. This is more accurately characterised as the creation of an opportunity for tortious behaviour. For this reason, Litton NPJ's description (at 858) of *Ming An* as a "borderline case" is apt, if not overly generous, given that *Ming An* involved an unmitigated act of employee insubordination. Employers should not be made guarantors of their employees' conduct, for to do so would tip the scales of distributive justice dramatically.

*Bazley v Curry* provides an example of a careful application of the close connection principle that should be followed by other courts. Not only had the employer undertaken a duty to the victims, the employer had encouraged intimacy in the performance of the work duties, thereby marking the case as one of true material enhancement of risk. McLachlin J's criteria for the application of the close connection test to intentional tort cases offer a useful parallel for negligent frolics. The opportunity that the employment provides the employee to abuse privileges, the extent to which the wrongful act may have furthered the employer's aims and therefore increased the likelihood of occurrence, and the vulnerability of potential victims, have relevance in this context. All of these criteria speak to the issue of risk enhancement which goes beyond mere risk creation.

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<sup>56</sup> As suggested by McLachlin J in *Bazley v Curry* [1999] 2 SCR 534 at 555; (1999) 174 DLR (4th) 45 at 61.

Moreover, it is important to recall that McLachlin J's approach does not dispense with precedent, but is to be adopted only when precedent does not point the way. In *Ming An* this admonition was not followed. None of the leading precedents, or the guidance provided in those cases, was examined by the Court of Final Appeal, much to the detriment of the analysis that supports the decision in the case. Important precedents such as *Rose v Plenty* should continue to guide the courts in the area of negligent frolics. In this way, consistency of results is more likely to be achieved in the application of the close connection test.

### CONCLUSION

The floodgates of vicarious liability have been perceptibly nudged open with the adoption of the close connection test. The change in the law is more than cosmetic. For the first time, vicarious liability can be imposed for plainly unauthorised acts. In those cases where the new test is applied, it will no longer be necessary to characterise the employee's conduct as a wrongful mode of performing an authorised act. Moreover, despite the fashioning of the close connection test in the context of intentional torts, it will now be applied to some negligence cases, as has happened in Hong Kong's Court of Final Appeal.

The argument for a fresh approach to vicarious liability in cases of sexual assault is made out, on grounds of social, corrective and distributive justice in *Bazley*. This approach has been rightly endorsed in *Lister*, for to do otherwise would result in a grave injustice for a vulnerable class of tort victims merely for the sake of adherence to a traditional but unworkable principle. However, the broad, generalist approach to vicarious liability for employees' sexual assault in *Lister* is in need of rationalisation through the adoption of more precise criteria. *Lister* should not be interpreted as a green light for courts to approach every case of vicarious liability without regard to criteria such as those proposed by McLachlin J in *Bazley*.

Importantly, the new principle should not be viewed as a substitute for the traditional approach, but as an addendum to it, in the words of McLachlin J, where "precedent is inconclusive". The overriding issue is still that of the course of employment. The new principle provides a means of achieving justice in those cases in which the traditional approach is problematic. The new principle will have most relevance in an area of an emerging and grave social problem. Sexual assault is one such area. Negligent performance of work duties is not. There is no identifiable problem with this area of vicarious liability.

Comment [S25]: "the"?

However, the new principle can be applied, where appropriate, to negligent frolics, a category that is not easily resolved under the traditional approach. Vicarious liability should be imposed only where the employment can be said to objectively and materially enhance the risks, in circumstances where much more than a mere opportunity for self-serving and ultimately negligent behaviour is created. McLachlin J's guidelines in *Bazley* provide a useful model for the development of appropriate criteria in negligent frolic cases. Moreover, guidelines developed in the frolic line of cases should continue to have application. The failure to make reference to those precedents in *Ming An*, and the failure to articulate criteria for the application of the close connection test to negligence cases, resulted in a decision very much on the outer boundaries of the new principle, putting at risk the current distributive balance in ways that have not been justified.