Developing a Contextual-Pluralist Model of Vicarious Liability

ABSTRACT

This article presents a somewhat novel way of looking at vicarious liability by developing a model that is both sensitive to context and factual nuance, and understanding of the fact that none of the purported theoretical justifications for the doctrine are entirely satisfactory on their own. It is suggested that a pluralistic balancing approach to the relevant theories could be predicated on the somewhat recent emergence of the 'fair, just and reasonable' test in this area of law. From a normative standpoint, this is likely to lead to a more meaningful, adaptable and transparent law on employer liability. The article also highlights that the adoption of a contextual-pluralist model may lead to a more consistent and in-depth judicial application of the various rationales for vicarious liability. In so doing, it claims that judges should adopt a so-called 'thick approach' to the use of theory.

KEY WORDS: tort law, vicarious liability, context, pluralism, theory

1. Introduction

As one of the most established principles of the common law world, vicarious liability is a doctrine that holds one party (usually an employer) strictly liable for the tortious actions of another (usually an employee), provided that there is a 'close connection' between the conduct and the wrongdoer's relationship with the defendant. Given Lord Nicholls' comments in *Majrowski v Guy's and St Thomas' NHS Trust* that 'vicarious liability is at odds with the general approach of the common law',[1] it is fair to say that the doctrine remains a controversial one, particularly in the ongoing absence of any unifying theoretical rationale to hold it together. This is not, however, for want of trying. In a judgment that perhaps marks the zenith of theoretical appraisal in vicarious liability case law, Lord Phillips in *Various Claimants v Catholic Child Welfare Society* ('*CCWS*') outlined a number of theories[2] – such as deep pockets, loss spreading, enterprise liability and control – that make it 'fair, just and reasonable to impose vicarious liability on the employer'.[3] Other theories, such as deterrence and the fault of the employer, have also been used.

However, each theory has – quite rightly – been subject to the criticism that it cannot fully explain all of the contours of vicarious liability.[4] Given its strict liability nature, the

[1] [2006] UKHL 34, [8].

[2] The phrase 'theories' is used here to denote the justifications for vicarious liability. This is consistent with recent scholarly literature and case law on the issue: see Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing 2018) 149-57 and *JGE v English Province of Our Lady of Charity* [2013] QB 722, 760 (Ward LJ).

[3] [2012] UKSC 56, [35].

[4] For an excellent summary of the criticisms of each theory, see Jason Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alta L Rev 287, 291-300.

doctrine has been described as a 'cuckoo in the nest of corrective justice',[5] so it makes little conceptual sense to predicate liability on an employer's poor choice or supervision of an employee.[6] Perhaps for similar reasons, those theories (such as control and deterrence) that point to the employer being in the best preventative position cannot fully explain the doctrine either. As Atiyah notes, simply establishing control over another cannot always give rise to vicarious liability, for if this were so, we should expect to see, for example, parents liable for the torts of their children.[7] Likewise, and at least without empirical support, deterrence too appears unable to justify vicarious liability in all scenarios. For instance, various judges in Commonwealth jurisdictions have questioned whether, in the context of intentional criminal acts, the deterrence theory (which suggests that vicarious liability will encourage an employer to prevent an employee committing a tort) is really relevant given that the criminal law equally failed to deter the wrongdoer.[8]

It is also clear that those theories based upon distributive justice – such as deep pockets, loss spreading and enterprise liability – fail to fully explain the doctrine. The idea behind the first two rationales is that it is preferable to cast the loss upon an entity that is better able to pay out compensation, either because it has larger financial assets or better insurance cover than an individual.[9] However, whilst these theories might well be relevant in many scenarios, predicating the rationale for vicarious liability on these two factors alone simply boils down to

[5] Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 19.

[6] See, e.g., *Reedie v London and North Western Railway Co.* (1849) 4 Ex 244, 255 (Baron Rolfe).

[7] Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 19.

[8] *New South Wales v Lepore* [2003] HCA 4, [219] (Gummow and Hayne JJ); *Jacobi v Griffiths* [1999] 2 SCR 570, [73] (Binnie J).

[9] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (7th edn, CUP 2006) 230.

searching for an entity that is best able to bear the loss (which in most cases is the state).[10] Enterprise liability does not fare much better either. Various scholars have noted that the benefit-burden principle of this theory (which suggests that employers benefitting from a certain act should bear any losses emanating from that activity) sits uneasily when applied to charitable institutions.[11] Similarly, asking what risks are inherent to a particular enterprise does not accurately explain the law on vicarious liability, as this enquiry logically leads to liability for independent contractors and not just those 'akin' to employees.[12] It is perhaps for such reasons that the Supreme Court in the recent cases of *Barclays Bank v Various Claimants* ('*Barclays*')[13] and *WM Morrison Supermarkets v Various Claimants* ('*Morrison*')[14] sought to circumvent the use of theory to 'doubtful cases' in an attempt to provide a more 'principled and consistent' law on employer liability.

The purpose of this article is to reject these assertions by outlining my normative preference for a contextual-pluralist model of vicarious liability. This entails two overlapping claims. The first is that a *combination* of the aforementioned theories under a 'fair, just and reasonable' assessment might be able to provide a better rationale for the doctrine. The second is that we should shun a case-by-case approach in favour of a more circumstantial model that seeks to delineate which theories are most relevant by context. These propositions lead, I suggest, to a more meaningful, adaptable and transparent law on vicarious liability. This is evidenced by drawing on developments in other areas of law where judges have similarly

[10] Atiyah (n 7) 22.

[11] Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 855; Giliker (n 5) 240; Neyers (n 4) 298.

[12] Gray (n 2) 138.

[13] [2020] UKSC 13, [27] (Lady Hale).

[14] [2020] UKSC 12, [24] (Lord Reed).

struggled to pinpoint the appropriate role of theory. The key point here is that, whilst some judges are already sensitive to balancing theoretical factors in their judgments, more should be doing so in order to improve the law on vicarious liability. In turn, this leads us to our final analysis which considers how my contextual-pluralist framework might be applied in practice. In particular, I show how the adoption of my model will lead to a more consistent and in-depth application of theory (which I label as a 'thick' approach) to cases in this area of law.

2. Examining the Two Constituent Elements of a Contextual-Pluralist Model

A. Pluralism – A Matter of 'Fair, Just and Reasonable'?

The first element of my suggested model is its necessarily pluralistic nature. Given the aforementioned limitations in each of the traditional theoretical justifications for vicarious liability, Macduff J (writing at first instance) in *JGE v English Province of Our Lady of Charity* correctly highlighted that there is 'no precise unanimity between judges (or between academics) about the rationale [for vicarious liability]; no single accepted truth'.[15] Similar comments were also evident in Lord Clyde's judgment in *Lister v Hesley Hall Ltd*, when he admitted that he is not convinced that 'there is any reason of principle or policy which can be of substantial guidance in the resolution of the problem of applying the rule in any particular

[15] *JGE* (n 2) 727.

case'.[16] Courts in other jurisdictions have expressed similar sentiments, with Gaudron J in *New South Wales v Lepore* referring to the 'absence of a satisfactory and comprehensive jurisprudential basis for the imposition of liability on a person for the harmful acts or omissions of others.'[17] Such views are also evident in the surrounding literature. Baty argued, for instance, that attempts to justify the doctrine were nothing more than 'hopeless groping',[18] and in later years, Williams lamented that vicarious liability was the 'creation of many judges who have had different ideas of its justification or social policy, or no idea at all… yet the rationale, if we can discover it, will remain valid so far as it extends'.[19]

What is interesting about many of these comments is that they do not necessarily reject the wholesale use of theory in the determination of vicarious liability; rather, they simply seem to highlight that no single theory can fully explain the various – and oftentimes competing – contours of this doctrine. It is contended here, then, that we might be able to achieve a more theoretically adept law on vicarious liability by adopting a pluralistic approach that openly balances a multitude of theories to arrive at a socially justifiable outcome. Burton is correct to highlight that such '[p]luralist balancing would contribute more than monism to the legal system's legitimacy.'[20] This is seemingly because, as Schwartz points out in relation to combining both deterrence and corrective justice rationales in the law of negligence, the ability to 'affirmatively deploy two rationales rather than one in defence of certain portions of the tort

[16] [2002] 1 AC 215, 232.

[17] *Lepore* (n 8) [106].

[18] Thomas Baty, *Vicarious Liability* (Clarendon Press 1916) 148.

[19] Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20 MLR 220, 231.

[20] Steven Burton, 'Normative Legal Theories: The Case for Pluralism and Balancing' (2013) 98 Iowa L Rev 535, 553.

system may well play a crucial role in the evaluation of those portions' overall value'.[21] In perhaps more simplistic terms, a finding based on multiple converging theories is undoubtedly more justifiable and legitimate than a finding based only on one theory.

A pluralistic approach might also open up adjudicative 'options for choice rather than channelling everyone to the one possibility privileged by law.'[22] Consider, for example, the contrasting judgments of May LJ and Rix LJ on the issue of dual vicarious liability in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*.[23] The former adopted a monistic approach and preferred to focus on the 'employers' right (and theoretical obligation) to control the relevant activity of the employee'.[24] In contrast, the latter doubted whether the doctrine of dual vicarious liability should be 'wholly equated with the question of control', and instead suggested that we should examine whether the tortfeasor was 'so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.'[25] By recognising that no single theory should be 'wholly determinative',[26] Rix LJ's broader pluralistic approach leads to two important developments. Firstly, it allows us to gain a deeper understanding of how each theory interacts with one another in the juridical process. Indeed, by probing his Lordship's approach, Hallett LJ in the later case of *Hawley v Luminar Leisure Ltd* was able to clarify that the concept of control is also relevant to 'the question of how much the employee has become embedded in that organisation' for the

[21] Gary Schwartz, 'Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice' (1997) 75 Tex L Rev 1801, 1827.

[22] Hanoch Dagan, 'Pluralism and Perfectionism in Private Law' (2012) 112 Colum L Rev 1409, 1427.

[23] [2005] EWCA Civ 1151.

[24] *Viasystems* (n 23) [52].

[25] *Viasystems* (n 23) [79].

[26] *Viasystems* (n 23) [79].

purposes of enterprise liability.[27] Secondly, and following Lord Phillips' approval of this more pluralistic approach,[28] various commentators have recognised that Rix LJ's test might lead to more frequent findings of dual vicarious liability.[29] This appears consistent with my later analysis where I highlight how my more pluralistic model will (usually) lead to a wider scope of vicarious liability than was advocated by the Supreme Court in *Barclays*.

For now, it is worth highlighting how we might accommodate a pluralistic approach in the current law on vicarious liability. It is suggested that this balancing exercise could be predicated on the relatively recent emergence of the 'fair, just and reasonable' test in this area of law.[30] Various judges have referred to the notion of 'fair and just'[31] or 'fair, just and reasonable'[32] in determining the extent of an employer's liability; a trend which, as Robertson

[27] [2006] EWCA Civ 18, [82].

[28] *CCWS* (n 3) [45]. See also, writing extra-judicially, Lord Phillips, 'Vicarious Liability on the Move' (2015) 45 HKLJ 29, 35.

[29] Phillip Morgan, 'Vicarious Liability on the Move' (2013) 129 LQR 139, 141-42; Claire McIvor, 'Vicarious Liability and Child Abuse' (2013) 29 PN 62, 65.

[30] As is discussed in Part 3, the language of 'fair, just and reasonable' is often criticised as a fig leaf that masks ad hoc judicial analysis. However, it is hoped that a contextual-pluralist application of the 'fair, just and reasonable' enquiry (which stresses the importance of theory and fact sensitivity) could provide a more meaningful and transparent conception of this nebulous test. This could prove of use to both vicarious liability and to other areas of tort law (such as the duty of care).

[31] *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [47] (Lord Toulson); *Vaickuviene v J Sainsbury plc* [2013] CSIH 67, [36] (Clerk LJ); *JGE* (n 2) 762 (Ward LJ); *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256, [44] (Lord Neuberger); *N v Chief Constable of Merseyside Police* [2006] EWHC 3041 (QB), [37] (Nelson J).

[32] *Barclays* (n 13) [27] (Lady Hale); *Grubb v Shannon* [2018] SC GLA 13, [113] (Sheriff Reid); *Armes v Nottinghamshire County Council* [2017] UKSC 60, [87] (Lord Hughes); *Cox v Ministry of Justice* [2016] UKSC 10, [42] (Lord Reed); *CCWS* (n 3) [94] (Lord Phillips).

rightly points out in the duty of care context, may be useful in identifying and weighing the individual justice and community welfare concerns in each dispute.[33] However, given that the language of 'fair, just and reasonable' in torts stems from the seminal judgment of *Caparo v Dickman*,[34] Gray questions why a:

> principle used to determine whether a duty of care is owed in terms of negligence law should be applied in the context of vicarious liability, where typically the defendant is not actually accused of any wrongdoing.[35]

Beuermann makes a similar accusation, forcefully arguing that it is 'nonsensical' to consider whether a strict liability case is 'fair, just and reasonable' because it is imposed 'regardless of personal wrongdoing by the defendant'.[36] With respect, these arguments are difficult to accept. Insofar as the fair, just and reasonable test is simply 'code for policy'[37] – and not a free-standing theoretical concept *per se* – the argument that these commentators seem to be making is that socio-legal concerns are only relevant to fault-based liability, and *not* strict liability. Quite why this should be the case is not entirely clear.

Perhaps a more pressing issue, and one which goes to the heart of my pluralistic stance, is raised by Stevens. In taking a more restrictive approach to the scope of the doctrine, he opines that vicarious liability is not a 'vegetable soup' in which we can assimilate a number of theories

[33] Andrew Robertson, 'Justice, Community Welfare and the Duty of Care' (2011) 127 LQR 370.

[34] [1990] 2 AC 605.

[35] Gray (n 2) 154.

[36] Christine Beuermann, 'Up in *Armes*: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort' (2018) 25 TLJ 1, 18.

[37] Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2007) 187.

that do not fully explain the doctrine, and mash them together to provide a satisfactory rationale.[38] Stevens attempts to buttress this argument by highlighting that the various normative justifications for vicarious liability often 'point in different directions'.[39] However, it does not seem to me that this necessarily dictates that a pluralistic fair, just and reasonable enquiry is unworkable. Rather, it is simply a recognition that there is an inevitable tension between some theories that will require balancing out by a prudent judge having regard to the unique contextual matrix of each case. What we are looking for under a contextual-pluralist model, then, is a common theoretical solution to a particular problem. This approach can be briefly illustrated by applying my model to the issue of vicarious liability for punitive damages, a subject area that remains largely unsettled in UK law.[40]

The purpose of such damages is often said to be retributivist or deterrent in nature, in that they are primarily designed to punish wrongdoing.[41] As we can see when we explicitly analyse the notion of fault, however, this aim sits uneasily when applied to strict liability. Employers held vicariously liable have done nothing wrong, and as a result they are not in a position to be deterred by the imposition of large-scale damage awards. In this light, Sturley persuasively concludes that 'if punitive damages punish someone who is not guilty of any misconduct, they do not accomplish their stated purpose.'[42] However, it is only by explicitly bringing the theoretical foundations of both punitive damages and vicarious liability to the fore that this is revealed. Likewise, the work of Morris also suggests that vicarious liability for

[38] Robert Stevens, *Torts and Rights* (OUP 2007) 259.

[39] Stevens (n 38) 259.

[40] Contrast *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 162 (Lord Scott) with *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065, [47] (Moore-Bick LJ).

[41] Gray (n 2) 249-58.

[42] Michael Sturley, 'Vicarious Liability for Punitive Damages' (2010) 70 La L Rev 501, 516.

punitive damages is contrary to both the theories of enterprise risk and deep pockets, in that it 'gives the plaintiff an undeserved windfall that has nothing to do' with the 'risk-shifting' or 'reparative' function of enterprise liability, something which is already 'duly served… by the allowance of compensatory damages.'[43] Whilst it must be conceded that loss spreading could justify the award of such damages in light of the fact that employers can take out insurance against such a risk,[44] it is clear that the overwhelming theoretical consensus is that punitive damages in the context of vicarious liability cannot be justified under my model. This discussion leads us nicely to the second aspect of my contextual-pluralist framework.

B. Sketching a Context-Oriented Approach

By drawing on the work of Robinette,[45] the second element of my proposed model suggests that we may be able to attain a vantage point of theoretical relevance in vicarious liability by determining *ex ante* the weight to be afforded to a particular theory in certain contexts. On this basis, I reject a literal case-by-case approach to liability (championed most prominently by James),[46] and would prefer instead to 'disaggregate' vicarious liability by framing which theoretical principles are most relevant in certain circumstances.[47] In short, context is all important here. Llewellyn explains that an examination of 'concrete instances' is 'necessary in

[43] Clarence Morris, 'Punitive Damages in Tort Cases' (1931) 44 Harv L Rev 1173, 1199-1200; c/f George Priest, 'Punitive Damages and Enterprise Liability' (1982) 56 S Cal L Rev 123.

[44] See, e.g., *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897.

[45] Christopher Robinette, 'Can There Be A Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine' (2005) 43 Brandeis L J 369; Christopher Robinette, 'Torts Rationales, Pluralism, and Isaiah Berlin' (2007) 14 Geo Mason L Rev 329.

[46] Fleming James, 'Tort Law in Midstream: Its Challenge to the Judicial Process' (1959) 8 Buff L Rev 315.

[47] Robinette (2005) (n 45) 413-14.

order to make any general proposition, be it a rule of law or any other, *mean* anything at all.'[48] In this respect, it might justifiably be concluded that my model of liability is heavily tilted towards a legal realist conception of the law, in that it seeks to prevent legal discourse descending into an 'orgy of overgeneralisation'.[49] As Paz-Fuchs explains, transitioning a concept or theory from 'one context to another is not only legitimate, but serves to buttress the (formalist) myth of coherence and consistency'.[50] Let us now take a few brief examples to illustrate this point in practice.

First, consider the vicarious liability of amateur and professional sports clubs, an issue that was recently discussed by Morgan.[51] In the amateur context, both loss spreading and deep pockets are important theoretical considerations. In the absence of any effective mechanism to spread loss, an amateur sports club might be forced to cease operations, and a deserving victim may not be able to attain adequate compensation if their only cause of action is directly against the tortfeasor himself (who is likely to be a man of straw). In contrast to these scenarios, such loss spreading concerns are not quite as pressing in the professional sports industry. Most professional clubs (and indeed any other non-sporting multi-national commercial company) will be able to easily absorb any losses, and it may be that enterprise liability is a more pertinent theoretical issue in this context. After all, there is certainly a case for arguing that any injuries caused due to the win-at-all-costs mentality of elite sport might be attributed as an enterprise risk of this industry. As Weatherill succinctly notes, 'there is merit in distinguishing between

[48] Karl Llewellyn, *The Bramble Bush: On Our Law and its Study* (Oceana Publications 1960) 2.

[49] Herman Oliphant, 'A Return to Stare Decisis' (1928) 14 ABAJ 71, 73-4.

[50] Amir Paz-Fuchs, 'It Ain't Necessarily So: A Legal Realist Perspective on the Law of Agency Work' (2020) 83 MLR 558, 569.

[51] Phillip Morgan, 'Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?' (2018) 38 Legal Studies 242.

amateur and recreational sport, where the profit-making motive is absent and participation is of greater significance than winning or losing, and professional sport, where the partisan element is greatly heightened.'[52]

The second example of a context-oriented approach relates to the notion of control. Whilst Lord Reed has sought to downplay the importance of this theory in recent years,[53] Morgan has convincingly argued that it can still be useful in determining the scope of vicarious liability.[54] Yet, Voyiakis questions why one party can manifest a high degree of control over another in some scenarios – such as the driving instructor-learner relationship in *Nettleship v Weston*[55] - and still not be held vicariously liable.[56] The answer lies, it seems, in the differing purposes and contexts of each case, something which Voyiakis himself appears to recognise.[57] Indeed, he observes that the pedagogical nature of the relationship in *Nettleship* is sufficiently distinct from the traditional employment context so as absolve the instructor from liability.[58] Again, in this scenario, we may also conclude that loss spreading assumes a greater degree of significance than it might in other contexts. There is perhaps little practical need to resort to the fictitious language of agency – as was the case in *Morgans v Launchbury*[59] – to hold a driving instructor vicariously liable, particularly when the tortfeasor herself is now adequately

[52] Stephen Weatherill, *Principles and Practice in EU Sports Law* (OUP 2017) 4-5.

[53] *Armes* (n 32) [65]; *Cox* (n 32) [21].

[54] Phillip Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) CLJ 202, 203.

[55] [1971] 2 QB 691.

[56] Emmanuel Voyiakis, *Private Law and the Value of Choice* (Hart Publishing 2017) 226.

[57] Voyiakis (n 56) 211 (noting that 'whether action-direction entails responsibility for A, B or both depends not only on the degree of direction that A exercises over B's conduct, but also on the context or the purpose for which that direction is exercised').

[58] Voyiakis (n 56) 227-228.

[59] [1973] AC 127 (HL).

covered by third party motor insurance under s.143 of the Road Traffic Act 1988. Such a context-sensitive approach also probably helps to explain why parents are not currently held vicariously liable for torts committed by their children, despite the fact that such relationships exhibit an unusually high level of control between the two parties.

Countless other examples could be included here, such as the issue of vicarious liability in the familial context. Take the facts of *Lister v Romford Ice and Cold Storage*,[60] a case in which an employee negligently injured his own father whilst driving a lorry. The father successfully sued his son's employers under the doctrine of vicarious liability. In such scenarios where family members are involved, we might conclude that the deterrence rationale should be downplayed because, as Keren-Paz astutely explains, the employee in this context already has sufficiently strong incentives to exercise caution.[61] The truth is that there is no theoretical justification that can purport to claim a monopoly on the endless scenarios to which vicarious liability might attach, and it may be that, if my model is accepted, we could in time come to develop a law on vicarious liabilities (with different theoretical justifications for different factual matrixes), rather than *a* law of vicarious liability.

Now, it is abundantly clear that this heavily contextualised model can only go so far without some further refinement of what all the contexts actually are (and indeed what theories are most relevant to each of them). Robinette is undoubtedly correct to convey that such disaggregation will be a 'difficult and painstaking task full of nuance'.[62] Indeed, in those hard cases where various theoretical factors are in tension with one another, this approach offers little guidance on what weight to offer to the respective theories. As Shmueli contends, a contextual-pluralist approach might require an 'unrealistically cumbersome' examination when

[60] [1957] AC 555.

[61] Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Routledge 2007) 15.

[62] Robinette (2005) (n 45) 414.

various goals clash.[63] Consider, for instance, the difficulties in determining liability where we have numerically similar groups of theories pulling in opposite directions. The situation could be further complicated if we believe that a solitary theory running against the grain of many other rationales carries a much stronger argument than the others in their individual capacity. How does a judge deal with this trade-off?

Perhaps the most frank answer (even if not the most satisfactory) is offered by the pluralist Isaiah Berlin: there is 'no clear reply'.[64] As Hardy argues, each 'value is its own yardstick, and there is no independent measuring rod that can be used to referee clashes between them.'[65] But this incommensurability is not necessarily an insurmountable problem for adjudication. Raz notes that the law 'characteristically includes only incomplete indications' as to the relative weight of many legal principles, and 'leaves much to judicial discretion to be exercised in particular cases.'[66] He further outlines that the scope of such discretion is 'doubly extended', since 'not only must the relative importance of principles be determined, but also the importance relative to each principle of deviating from it or of following it on particular occasions.'[67] In fact, and as critical legal scholars would likely attest to, 'the law is infused with irresolvably opposed principles and ideals.'[68] The candid comments of Cooke J in *Market Investigations v Minister of Social Security* are testament to this fact. In

[63] Benjamin Shmueli, 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) 48 U Mich J L Reform 745, 767.

[64] Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Henry Hardy ed, John Murray 1990) 17.

[65] Henry Hardy, 'Isaiah Berlin's Key Idea' (2000) 11 Philosophers' Magazine 15, 15-6.

[66] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale L J 823, 846.

[67] Raz (n 66) 846.

[68] Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin' (1986) 15 Phil & Pub Aff 205, 217.

perusing the various factors that might give rise to an employment contract, his Honour observed that:

> [n]o exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant… nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.[69]

As we can see, judges in vicarious liability cases have long grappled with the indeterminacy of legal rules and trade-offs between competing goals, so it does not seem to me that this critique is fatal to the implementation of a contextual-pluralist model. The reality is that the relative importance of each theory is 'always and necessarily contextual'.[70]

This concession seems eminently preferable to any misguided attempt to offer a descriptive or normative hierarchy of theoretical principles. Giliker attempted the former in 2010 when she suggested that leading case law highlighted three 'primary policy factors' (loss spreading, enterprise risk and victim compensation) and three 'secondary policy factors' (deterrence, fault and the negligence-intentional divide).[71] Such a broad-brushed approach, however, is likely to lose focus, over-generalize and surrender fact-sensitivity if applied in a blanket manner. To return once again to Berlin, it must be recognised that, due to the various contexts in which vicarious liability might operate, the theoretical justifications for the doctrine are 'incapable… of being ordered in a timeless hierarchy'.[72] As Crowder reiterates, without

[69] [1969] 2 QB 173, 184-185. See also, in the Canadian context, *Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983, [48] (Major J).

[70] Dagan (n 22) 1424.

[71] Giliker (n 5) 248.

[72] Berlin (n 64) 79.

reference to context, such values cannot be 'ranked for decisive reason in the abstract'.[73] With these comments in mind, I must highlight how the adoption of my contextual-pluralist model is likely to contribute to a better law on vicarious liability.

3. Benefits of a Contextual-Pluralist Approach

So far, I have suggested that judges should ask what the relevant theoretical considerations are in each vicarious liability context, and balance these accordingly to arrive at a sensible and socially desirable outcome. The purpose of this section, then, is to outline *why* the use of theory is necessary. Indeed, it is quite common for many commentators to simply align the theories of employer liability with either their immediate subject[74] or their model of liability,[75] without actually exploring why theoretical appraisal is important. Consequently, this section hopes to fill in this gap, as well as sharpening how my contextual-pluralist model might work in practice by highlighting three key benefits of such an approach.

A. Meaningfulness

The first benefit of my contextual-pluralist approach is that it helps to somewhat nullify the tautological nature of the 'fair, just and reasonable' enquiry that is currently conducted in a

[73] George Crowder, 'Value Pluralism, Diversity and Liberalism' (2015) 18 Ethical Theory Moral Pract 549, 551.

[74] Phillip Morgan, 'Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?' (2015) 31 Journal of Professional Negligence 276, 289; Jonathan Morgan, 'Vicarious Liability for Independent Contractors?' (2015) 31 Journal of Professional Negligence 235, 235.

[75] Po Jen Yap, 'Enlisting Close Connections: A Matter of Course for Vicarious Liability?' (2008) 28 Legal Studies 197, 214.

number of leading vicarious liability cases. A fine example of the potential circularity of such an assessment is provided by Lord Nicholls' enunciation of the close connection principle in *Dubai Aluminium Co Ltd v Salaam*. Here, he stated that:

> the wrongful conduct must be so closely connected with the acts the partner or employee was authorised to do that… [it] may fairly and properly be regarded as done… while acting in the ordinary course of the firm's business.[76]

Notably, he conceded that the test afforded 'no guidance on the type or degree of connection' that is required to establish liability.[77] Similar comments can also be identified in the surrounding literature, with Stanton referring to the 'fair, just and reasonable' assessment as an 'ultimately vague test'[78] that provides judges with 'limited concrete guidance and considerable discretion'.[79] This, he suggests, is likely to lead to 'pockets of liability'.[80] However, bearing in mind the contextualised nature of my approach, this is not necessarily undesirable.[81] As Dagan explains, we should welcome 'localized' coherence that strives to 'sustain pockets of coherence that reflect clusters of cases sufficiently similar in terms of the pertinent normative principles

[76] [2002] UKHL 48 [23].

[77] *Dubai Aluminium* (n 76) [25].

[78] Keith Stanton, 'Defining the Duty of Care for Bank References' (2016) 32 PN 272, 274.

[79] Keith Stanton, 'Professional Negligence: Duty of Care Methodology in the Twenty First Century' (2006) 22 PN 134, 136.

[80] Stanton (n 79) 142.

[81] This may, however, be subject to the caveat that future research is required to determine the basis upon which we can distinguish these pockets of liability, and to explain how certain contexts can be differentiated from one another.

that should guide their regulation.'[82] Furthermore, and to respond to those concerns that the language of 'fair, just and reasonable' is too circular or empty,[83] it is suggested that a pluralistic balancing of the relevant theories may provide some underlying guidance by adding a little flesh to the bones of this somewhat nebulous test.

Such an approach might be reconciled with similar methods in other areas of law. For example, in *Quintavalle v Human Fertilisation and Embryology Authority*, Lord Hoffmann suggested that the word 'suitable' in the context of Schedule 2 of the Human Fertilisation and Embryology Act 1990 was an 'empty vessel which is filled with meaning by context and background.'[84] By adopting such an approach to vicarious liability – that is to say, by utilising theoretical principles as the driving forces behind the 'fair, just and reasonable' test – we could perhaps appease some of the emptiness of this formula. As Keating explains, '[w]hen judges are confident that certain decisions are correct *because* they are fair, but are unable to explain precisely *why* those decisions are fair, scholars have their work cut out for them.'[85] McIvor makes a broadly similar point when she argues that fairness is an inherently subjective term that is 'only capable of taking on any real meaning when applied against the backdrop of an articulated set of core values.'[86] In this regard, it is notable that even those scholars who reject a more theoretical evaluation of vicarious liability have commended the 'actual articulation of the real basis or bases behind generic phrases like fair, just and reasonable'.[87]

[82] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 UTLJ 607, 658-9.

[83] See, e.g., Donal Nolan, 'Deconstructing the Duty of Care (2013) 129 LQR 559, 583.

[84] [2005] UKHL 28, [33].

[85] Gregory Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 Mich L Rev 1266, 1272.

[86] Claire McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 CLWR 268, 279.

[87] Gray (n 2) 155.

Consequently, Lord Reed cogently maintains that, where the five-factor test outlined by Lord Phillips in *CCWS* is satisfied, it is 'unnecessarily duplicative' to then re-assess the fairness of the result.[88] This appears to be a clear direction to avoid a whimsical use of the fair, just and reasonable test to overturn a result that is justified by theory. As Lord Reed later clarified in *Morrison*, concepts such as 'fairness' are not 'intended as an invitation to judges to decide cases according to their personal sense of justice'.[89] This is a sensible safeguard against unbridled judicial activism. Normatively, whilst I am generally reluctant to accept that the formalities of law should be afforded greater importance than the equities of liability, I also recognise that there must be *some* limits imposed on the fair, just and reasonable test. My limit is reached whenever it is used as an empty criterion to shield a judge's personal beliefs without regard to the underlying theories of vicarious liability. In this light, I must applaud the comments of McLachlin J in *Bazley v Curry* who suggested that courts should examine the purposes of vicarious liability, and ask whether the imposition of liability in future disputes would serve those purposes.[90]

Although not every judge in the UK has seemingly subscribed to this point of view,[91] it must be recognised that some have paid heed to McLachlin J's advice. In *JGE*, for example, Ward LJ posited that 'one cannot understand how the law relating to vicarious liability has developed nor how, if at all, it should develop without being aware of the various strands of policy which have informed that development.'[92] Such thoughts also appear to echo the

[88] *Armes* (n 32) [36].

[89] *Morrison* (n 14) [24].

[90] [1999] 2 SCR 534, 545.

[91] See, e.g., *Lister* (n 16) [60] (Lord Hobhouse, who argued that 'an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application').

[92] *JGE* (n 2) 761.

sentiments of the legal realist Oliver Wendell Holmes, when he presciently observed that 'a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated.'[93] In this light, and in a revealing statement that is in tune with the broader argument set out in this article, he concludes that we have 'too little theory in the law rather than too much'.[94] If a more meaningful and socially justifiable law on vicarious liability is needed, then it may be preferable to adopt Karl Popper's approach by utilising the doctrine's underlying theoretical principles as 'nets cast to catch what we call the world.'[95]

B. Adaptability

As McHugh J recognised in the Australian case of *Hollis v Vabu*,[96] the second benefit of my contextual-pluralist model is that it provides a more adaptable basis upon which to determine an employer's liability. This is perhaps a welcome development for the doctrine in light of what Dickens terms the 'growing nomenclature of "atypical" or "non-standard" work'.[97] For example, Bell highlights that 'the likes of Uber are unsettling the waters in even mundane and everyday transactions.'[98] Following the advent of the so-called 'gig economy' – a working culture which is generally associated with short-term and freelance work – the task of

[93] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 469.

[94] Holmes (n 93) 476.

[95] Karl Popper, *The Logic of Scientific Discovery* (Routledge 2000) 59.

[96] [2001] HCA 44, [93].

[97] Linda Dickens, 'Exploring the Atypical: Zero Hours Contracts' (1997) 26 Indust L J 262, 263.

[98] Andrew Bell, 'Vicarious Liability: Quasi-Employment and Lose Connection' (2016) 32 Journal of Professional Negligence 153, 155-6. For case law examples, see *Uber BV v Aslam* [2018] EWCA Civ 2748 and *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

identifying an employee for the purposes of vicarious liability has been complexified. As District Judge Vince Chhabria bemoaned in the US case of *Cotter v Lyft Inc*, using the legal tests developed in the 20th century to address employment issues in the 21st century is akin to being 'handed a square peg and asked to choose between two round holes'.[99] In this light, there is much to commend in Staughton J's pronouncement at first instance in *McDermid v Nash Dredging & Reclamation Co. Ltd* that the 'common law would become obsolete if it did not develop to meet new situations'.[100] Given that some judges have in fact already started to tailor the law on vicarious liability when applying the doctrine to cases of child sexual abuse and fraud,[101] it seems that the adoption of a more malleable contextual-pluralist approach would not be out of line with recent developments in this area.

Admittedly, the adaptable nature of my suggested model of liability also leaves much discretion for judges to define the relevant context. In *Mohamud v WM Morrison Supermarkets plc*,[102] for instance, the context could be construed as either 'petrol station', 'supermarket' or (broader still) 'retail'. However, just as the type of context may influence which theories are most relevant, it may also be the case that theory could influence how a certain context is to be defined. In this manner, we might identify a symbiotic relationship between theory and context under my model of liability. By way of example, consider the aforementioned distinction between amateur and professional sports teams. Recent reports indicate that some lower league

[99] 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015)

[100] The Times 31 July, 1984, as cited by Ewan McKendrick, 'Vicarious Liability and Independent Contractors – A Re-Examination' (1990) 53 MLR 770, 781.

[101] *CCWS* (n 3) [83]-[5]; *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717.

[102] *Mohamud* (n 31).

professional football clubs are currently facing significant economic difficulties,[103] and it could be that both loss spreading and deep pockets justify placing these teams into a different context than other more financially healthy Premier League clubs. For those lower-end professional clubs with less money, it might be worthwhile to consider the theory of enterprise liability *alongside* their ability to also spread loss. Of course, we should be wary of encouraging an overly narrow interpretation of each context, lest it render such an approach meaningless. In the end, however, a judge will have to make an appropriate classification of the context based on both theory and the factual matrix of the case.

Whilst some might instinctively respond that this produces too much uncertainty, I see no reason why a contextual-pluralist model should be rejected on this basis, particularly as such judicial flexibility is actually evident in many other facets of vicarious liability and tort law more generally.[104] In relation to the former, consider one of the more recent cases of vicarious liability, *The Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*.[105] Perhaps influenced by the intuition that the victim here was deserving of compensation, Davies LJ was able to make use of the tailored approach to sexual abuse by refusing to recognise a distinction between 'adult' and 'child' sexual abuse in this case.[106] If a judge has the capacity to delineate

[103] Miguel Delaney, 'The Death of the 72? Why Football Outside the Premier League is on its Knees' (23 May 2019) The Independent <https://www.independent.co.uk/sport/football/football-league/premier-league-epl-efl-league-one-two-championship-miguel-delaney-a8926126.html>; Daniel Plumley, Jean-Philippe Serbera and Rob Wilson, 'Too Big to Fail? Accounting for Predictions of Financial Distress in English Professional Football Clubs' (2020) 22 J Appl Account Res 93.

[104] See, for example, Lord Neuberger, 'Some Thoughts on Principles Governing the Law of Torts' (Singapore Conference on Protecting Business and Economic Interests, August 2016) para 27 <https://www.supremecourt.uk/docs/speech-160819-03.pdf> accessed 25 May 2021.

[105] [2021] EWCA Civ 356.

[106] *Barry Congregation* (n 105) [84].

the type of *act* they are dealing with, is it really much more of a stretch to grant them permission to also decide the type of *context*?

Likewise, in matters of causation, for instance, the courts have long grappled with determining the specific kind of loss that must be reasonably foreseeable in order to satisfy the test of remoteness,[107] a task that is broadly akin to the difficulties that a judge might face when attempting to frame the specific context under my model. This is evident in *Jolley v Sutton London Borough Council*,[108] a case in which a young child was injured when a collapsed car jack caused a derelict boat to fall on top of him. Whilst the Court of Appeal denied liability by describing the loss as "physical injury caused by a jack giving way" (which was not foreseeable),[109] the House of Lords adopted a wider view of the relevant harm so as to allow a seemingly deserving claimant to slip under the remoteness test. In their view, the correct classification of the harm was simply "physical injury caused by meddling with the boat" (which *was* foreseeable).[110]

Interestingly, Lord Steyn in this case noted that that it would be a 'sterile exercise' to rely on previously decided cases here when judges enjoy such widespread freedom as to how to characterise specific acts.[111] Instead, the stance adopted by the House of Lords may have been partly influenced by theoretical considerations, most notably the deeper pockets of the council and their ability to spread the loss better than the young claimant.[112] Consequently, this case shows not only the potential for theory to displace a rigid adherence to precedent, but also

[107] Contrast *Hughes v Lord Advocate* [1963] AC 837 with *Doughty v Turner Manufacturing* [1961] AC 388.

[108] [2000] 1 WLR 1082.

[109] [1998] 1 WLR 1546.

[110] *Jolley* (n 108) 1093.

[111] *Jolley* (n 108) 1089.

[112] McBride and Bagshaw (n 11) 315.

the fact that law is an inherently indeterminate field of study that provides much scope for judicial rhetoric to drastically influence the outcome of cases. As the following section illustrates, this is a reality that we must face openly and transparently.

C. Transparency

The third and final benefit of a more explicit contextual-pluralist appreciation of vicarious liability under the 'fair, just and reasonable' enquiry is that it may lead us to a more honest and candid assessment of employer liability. This suggestion could be reconciled with a greater trend for frankness in other areas of private law. On the issue of illegality, for example, Lord Toulson in *Patel v Mirza* – citing with approval a passage he made in the earlier case of *ParkingEye v Somerfield Stores Ltd*[113] – contended that:

> [r]ather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it.[114]

Interestingly, Lord Toulson also appeared to maintain that a contextual-pluralist approach might prove to be the most felicitous route to implementing a more transparent and sincere body of legal rules. He stated, seemingly in agreement with Lord Kerr,[115] that the 'best result in terms of policy' is achieved by granting judges the 'flexibility to consider and weigh a range

[113] [2013] QB 840, [52]-[53].

[114] [2016] UKSC 42, [49].

[115] *Patel* (n 114) [128] (his Lordship referring to the benefits of a 'rounded assessment of the various public policy considerations at stake').

of factors in the light of the facts of the particular case before them.'[116] In adopting a more formalist-inspired approach, Lord Sumption forcefully rejected Lord Toulson's suggestion on this basis of its vagueness and arbitrariness.[117]

It is interesting, however, that the more candid approach from *Patel* does not stand alone in this regard. Similar viewpoints might be also identified in Lord Wilson's judgment in *Hounga v Allen*,[118] as well as in *Les Laboratoires Servier v Apotex*.[119] In the latter, Lord Toulson had 'no criticism' of the Court of Appeal's seemingly contextual-pluralist approach to illegality which sought to take into account a broad range of factors 'in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it.'[120] Again, however, we might identify an underlying tension between the approaches of Lord Toulson and Lord Sumption in this case. Writing for what might be considered the dominant view, the latter stressed the uncertainty of giving effect to the underlying theories of a doctrine, adding (somewhat dubiously) that it would make it 'difficult for [courts] to acknowledge openly what they are doing'.[121] Consequently, we can see that the extent to which theory can be utilised to determine the appropriate scope of vicarious liability will often depend, to a considerable degree, on *which* judges are presiding over a certain case. In perhaps more cruder terms, it might also depend on

[116] *Patel* (n 114) [91]-[92].

[117] *Patel* (n 114) [126].

[118] [2014] UKSC 47, [42].

[119] [2014] UKSC 55. See also *Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609, [69]-[71] (Andrew Phang Boon Leong JA).

[120] *Apotex* (n 119) [62] (referring to *Les Laboratoires Servier v Apotex* [2012] EWCA Civ 593, [73] (Etherton LJ)).

[121] *Apotex* (n 119) [20].

other extraneous factors such as what a judge 'had for breakfast'.[122] This is to recognise that the debate on the relevance of theory here is part of the broader issue – both in tort law[123] and law in general[124] – of the proper role of the judge. As it is hopefully now clear, I am much in favour of Lord Toulson's approach, and I would agree with those commentators such as Jane Stapleton who colourfully assert that an open judicial consideration of theory is the key to letting 'daylight in on magic'.[125]

Indeed, it is surmised that such 'daylight' would cast a particularly useful glow over the somewhat murky grounds of vicarious liability. Commenting extra-judicially, Australian Chief Justice Susan Kiefel has observed the phenomenon of 'unexpressed social policy' in this area of law,[126] and Gaudron J in *Lepore* has referred to the likelihood of many judges being swayed by clandestine policy choices.[127] In *Bazley*, McLachlin J opined that a 'meaningful articulation' of vicarious liability is fortified by theory 'rather than by artificial and semantic distinctions'.[128] In the UK, it has been suggested that the imposition of liability in *Limpus v*

[122] Although this term is generally credited to the realist Jerome Frank, Schauer contends that it is not clear whether he said anything of the like: see Frederick Schauer, *Thinking Like A Lawyer: A New Introduction to Legal Reasoning* (Harvard UP 2009) 129.

[123] Similar debates on the relevance of policy have also arisen in the context of the duty of care; see, e.g., *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [84] (Lord Mance) and *Smith v Ministry of Defence* [2013] UKSC 41, [170] (Lord Carnwath).

[124] See generally, John Griffith, *The Politics of the Judiciary* (4th edn, Fontana Press 1991).

[125] Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 Aust Bar Rev 135, 138.

[126] Susan Kiefel, 'Vicarious Liability in Tort - A Search for Policy, Principle or Justification' (New South Wales Supreme Court Judges Conference, 2017) 2 <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ25Aug2017.pdf> accessed 23 May 2021.

[127] *Lepore* (n 8) [106].

[128] *Bazley* (n 90) 556.

London General Omnibus Co[129] (which concerned a bus driver obstructing a rival bus, contrary to his employer's express instructions), may have been animated by the fact that the French-controlled defendant company was regarded as a 'foreign invader'.[130]

To similar effect, Denning LJ in *Cassidy v Ministry of Health* acknowledged that the previous general unwillingness to impose vicarious liability on hospitals – usually predicated on the assertion that no employment relationship existed between the doctor/surgeon and the hospital[131] – perhaps stemmed from a judicial 'desire to relieve the charitable hospitals from liabilities which they could not afford.'[132] A more contemporary example relates to the judicial utilisation of a 'purposive approach' to respond to the shockingly inordinate amount of recent sexual abuse cases in the context of vicarious liability.[133] Various scholars have suggested that the doctrine has been 'moulded' to 'uncover, comprehend and respond' to the numerous instances of child sexual abuse.[134] In other words, it seems that some judges have adopted the realist technique of initially forming a conclusion about a particular case, and then working backwards *from* that conclusion to find defensible legal arguments justifying that

[129] (1862) 158 ER 993.

[130] Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) 854 (citing Theo Barker and Michael Robbins, *History of London Transport, Volume 1* (Allen & Unwin 1963) 69-98).

[131] See generally *Hillyer v The Governors of St Bartholomew's Hospital* [1909] 2 KB 820, 829 (Kennedy LJ).

[132] [1951] 2 QB 343, 361.

[133] Simon Deakin and Zoe Adams, *Markesinis & Deakin's Tort Law* (8th edn, OUP 2019) 574-5.

[134] Paula Giliker, 'A Revolution in Vicarious Liability: *Lister*, the *Catholic Child Welfare Society* Case and Beyond' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 122-3; Andrew Bell, '"Double, Double Toil and Trouble": Recent Movements in Vicarious Liability' (2018) JPIL 235, 238.

interpretation.[135] If this is the case, then it is eminently preferable that judges candidly acknowledge this fact, rather than allowing the act of sexual abuse to continue as a hidden persuader whilst they mask their decision behind the façade of precedent and "established" legal tests.

A similar furtive approach has also been recognised in other areas of tort law too – most notably in relation to psychiatric injury, with Williams suggesting that the historic limitations placed on recovery for this type of harm were rooted in 'conceptions of policy… even if the language of foreseeability [was] used to justify it.'[136] Accordingly, and to quote Smillie, such surreptitious reasoning does little except to:

> obscure the fact that decisions in hard cases are based on controversial value judgments by the courts, and to preserve the appearance of value-free adjudication by reference to a fundamental pre-existing legal principle.[137]

It seems that there are two (potentially overlapping) reasons for demanding a more transparent law on vicarious liability. First, it allows future judges and scholars to subject this reasoning to honest scrutiny that could go some way to providing at least a semblance of clarity to the eclectic array of rules and normative justifications that are generally at play in most vicarious liability disputes. To fail to offer this transparency is to fundamentally betray the value judgments that judges are necessitated to make in their adjudicative responsibilities. Barker makes a similar point in relation to economic loss, when he suggests that concerns regarding

[135] See Michael Sevel, 'How Judges are Free to Decide Cases' (2018) Revista Forumul Judecatorilor 113, 120; Max Radin, 'The Theory of Judicial Decision: Or How Judges Think' (1925) 11 ABAJ 357, 359.

[136] Glanville Williams, 'The Risk Principle' (1961) 77 LQR 179, 192-3.

[137] John Smillie, 'The Foundation of the Duty of Care in Negligence' (1989) 15 Mon LR 302, 315.

the Delphic nature of concepts such as 'proximity' and 'fairness' can often be overcome by 'judges being more explicit about the policy priorities which generate their conclusions'.[138] Second, it may be that a more honest and candid approach to the role of theory and context could lead us closer to the excavation of 'moral truth' in the law. According to historian Yuval Noah Harari, legal concepts are inter-subjective in that they only exist within the shared consciousness of humanity.[139] As such, if enough people believe that this 'imagined order' of legal rules are defective or unfair, the law can – and should - be changed. Priel makes a similarly insightful point:

> Truths about the world are not themselves 'legal', 'chemical', 'economic', or 'psychological': These are human categories imposed upon reality that itself does not contain them… the content of our law should be based on truths. If a truth is *relevant* to making a better decision, it matters little whether they have been arrived at using 'lawyers' methods' or by other means.[140]

Of course, to uncover any such truth, it may be necessary for judges to refer to, and utilise, sound empirical data developed by experts in other disciplines. Such a development would, as some scholars have posited, help to 'spark more candour and more transparency' in judicial decisions, primarily because it would help to 'ground the normativity of law in empirical reality

[138] Kit Barker, 'Wielding Occam's Razor: Pruning Strategies for Economic Loss' (2006) 26 OJLS 289, 301.

[139] Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Vintage 2015) 132.

[140] Dan Priel, 'Two Forms of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Bloomsbury 2019) 177-8.

rather than in the prejudices and self-interests of the lawmakers.'[141] Many theories – most notably enterprise risk and deterrence – could be supported by such epistemological insights.[142] As an example to illustrate the latter, it is surmised that, in the interests of openness, empirical evidence should have been utilised to support Clarke MR's proposition in *Gravil v Carroll and Redruth Rugby Football Club* that holding a rugby club vicariously liable would have encouraged the club to take pre-emptive disciplinary action against foul play.[143] Of course, this call for a greater use of empirical data is but a tentative one considering some of the obvious difficulties with this suggestion,[144] but it is one still worth mentioning in light of its ability to transform vicarious liability into a more transparent doctrine.

4. Applying Theory to Vicarious Liability: The Case for a Consistent 'Thick Approach'

A more concrete development associated with the adoption of a contextual-pluralist approach is to ensure that judges apply the theory of employer liability to the relevant contexts at hand

[141] Steven Chanenson, 'Get the Facts, Jack - Empirical Research and the Changing Constitutional Landscape of Consent Searches' (2003) 71 Tenn L Rev 399, 447; Richard Redding, 'Reconstructing Science through Law' (1999) 23 S Ill U L J 585, 606.

[142] On the relevance of empirical evidence to the theory of enterprise risk, see Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 OJLS 493, 499.

[143] [2008] EWCA Civ 689, [26]-[27].

[144] For instance, we might ask whether reliable or relevant empirical data on a subject exists at all. Other concerns may relate to: the costs of obtaining such data (and whether this is economically worthwhile); when it is appropriate to use empirical evidence; and the competency of judges to rely on such data.

to help shape decisions, rather than merely paying lip-service to the idea. It is only through such application that the three purported benefits of my model can be attained. Since the emergence of the 'fair, just and reasonable' language in vicarious liability, we can perhaps identify three broad groups of cases that highlight the inconsistency in the way that judges are utilising and applying theory.

A. Theory Exclusionists

The first group of cases have either completely ignored, or made minimal reference to, the theoretical underpinnings of the doctrine. In light of Lord Phillips' enunciation in *CCWS* of his five indicia of liability, it is both surprising and disappointing that such a body of cases exist. Here, we might find judgments from the UK Supreme Court in *Morrison*[145] and *Mohamud*.[146] The Court of Appeal decisions in *Bellman v Northampton Recruitment Ltd*,[147] *Various Claimants v WM Morrison Supermarkets plc*[148] and *London Borough of Haringey v FZO*[149] also appear to fall into this category. Instead of referring to (and applying) the theoretical rationales underlying vicarious liability, many of these judgments instead focussed on refining established tests by asking whether the employee's act could be classed as a 'seamless episode'.[150] However, without some guidance propping these legal tests up, we risk vicarious

[145] *Morrison* (n 14).

[146] *Mohamud* (n 31).

[147] [2018] EWCA Civ 2214.

[148] [2018] EWCA Civ 2339.

[149] [2020] EWCA Civ 180.

[150] This phrase was first coined in *Mohamud* (n 31) [47] (Lord Toulson), and was later adopted by the Court of Appeal in *Bellman* (n 147) [26] (Asplin LJ) and by the Supreme Court in *Morrison* (n 14) [14] (Lord Reed).

liability descending into 'doctrinaire legalism' which masks the real reasons for decisions.[151] With reference to the 'seamless episode' test, for example, Lee persuasively notes that 'time itself is a seamless and continuous sequence of events: any story can be told in a way that meets this test'.[152]

It is also noticeable that there is no general trend of liability in these cases. Whilst many were keen to impose liability on employers (such as *Mohamud*, *Bellman* and *FZO*), others (most notably the Supreme Court in *Morrison*) were not. In some scenarios, a theoretically-informed contextual-pluralist approach might make no difference to the end result, and this can be illustrated by briefly sketching out how my model might be applied to the facts of *Morrison*. For instance, by analysing the theory of enterprise liability in this case, it is difficult to envision how the supermarket was receiving any benefit from a disgruntled employee leaking personal data on the internet; in fact, the rogue tortfeasor was specifically trying to harm his employer because he was subject to their disciplinary proceedings, so it seems illogical that Morrisons should be tasked with simultaneously bearing the burden. Whilst it is possible to argue that the supermarket created the risk of the misuse of private information and breach of confidence, it is not a risk, as Langstaff J noted at first instance, that was a 'mainstream' one.[153] Moreover, I query whether the imposition of vicarious liability would have been consistent with the theory of deterrence, given that it might deter companies in the future from adequately sanctioning errant employees. Given that Lord Reed suggested we should identify the relevant 'factors or principles which point towards or away from vicarious liability in the case before the court',[154]

[151] Atiyah (n 7) 7.

[152] James Lee, 'The Supreme Court, Vicarious Liability and the Grand Old Duke of York' (2020) 136 LQR 553, 557.

[153] *Various Claimants v Wm Morrison Supermarkets plc* [2017] 3 WLR 691, [194].

[154] *Morrison* (n 14) [24].

it is disappointing that he did not then go on to conduct a pluralistic balancing approach that was sensitive to this very unique factual matrix.

Plunkett notes that the court in *Mohamud* equally failed to grasp this opportunity.[155] In fact, Giliker questions whether a more thorough examination of risk in *Mohamud* might have led to a different result in this case. She ponders whether we can really say that 'a kiosk attendant in a petrol station with a duty to interact with customers has such authority, power or control over the customer to give rise to vicarious liability.'[156] Consequently, and perhaps more unusually, we might conclude that a focus on balancing the theoretical factors in each case under my contextual-pluralist model might actually *limit* the scope of vicarious liability in some rare scenarios.

B. Thin Versions of Theory

The second category of cases represent an improvement upon the theory-exclusionist cases. These cases are more explicit in their recognition of the underlying theories of vicarious liability. Here, we might find various judgments such as the Supreme Court rulings in *Barclays*[157] and *Cox* v *Ministry of Justice*.[158] Other cases might include the Court of Appeal judgments in *Barry Congregation*,[159] *Graham v Commercial Bodyworks*[160] and *Kafagi v JBW*

[155] James Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556, 561-2.

[156] Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77 CLJ 506, 533.

[157] *Barclays* (n 13).

[158] *Cox* (n 32).

[159] *Barry Congregation* (n 105).

[160] [2015] EWCA Civ 47.

Group Ltd,[161] as well as the High Court rulings in both *GB v Stoke City Football Club*[162] and *Brayshaw v Partners of Apsley Surgery*.[163] However, these cases are only considered a 'thin' version of a contextual-pluralist approach simply because the recognition of theoretical factors did not generally translate into a detailed *application* of such theories to the facts of each case. We might only identify one or two sparse paragraphs where theory is considered in light of the factual matrix of each case,[164] and no attempt is seemingly made to explain the omission of those theories that are not. For example, it would seem to me that, in the context of *Brayshaw*, the theory of deterrence might be relevant to the vicarious liability of a doctor's surgery, particularly as liability might lead to more defensive practices. Similarly, given that the employer in *Graham* was not a large multi-national company, it is surprising that the court did not consider the employer's ability to spread loss alongside enterprise liability.

In order to fully reap the benefits of meaningfulness, adaptability and transparency associated with a contextual-pluralist approach, it is suggested that judges must do more than simply rehearse the basic parameters and contents of each theory. They must explain what theories are relevant to each context, and then embed them throughout their decision in a comprehensive and explicit manner, making sure to adequately apply them to the facts of the case. Whilst it is recognised that this might be a somewhat idealistic view, it is not, as we now discuss, one without some supporting precedent.

[161] [2018] EWCA Civ 1157.

[162] [2015] EWHC 2862 (QB).

[163] [2018] EWHC 3286 (QB).

[164] See, e.g., *Cox* (n 32) [32]-[34] (Lord Reed); *Barclays* (n 13) [28] (Lady Hale); *Graham* (n 160) [14] (Longmore LJ); *Kafagi* (n 161) [53]-[54] (Singh LJ); *GB* (n 162) [145]-[146] (Butler HHJ); *Brayshaw* (n 163) [68]-[69] (Spencer J).

C. Thick Versions of Theory

Under this third category of cases – which includes the Supreme Court ruling in *Armes v Nottinghamshire County Council*[165] and the Court of Appeal judgment in *Barclays Bank v Various Claimants*[166] – we can identify a much more prominent application of theory to the facts. Delivering the leading judgment in *Armes*, Lord Reed applied a strong fairness argument predicated on risk when he argued that the local authority's placement of children in the care of foster parents created a 'relationship of authority and trust between the foster parents and the children'.[167] Consequently, when the (inherent) risk of abuse materialised, it was fair for the authority to compensate that victim. Lord Reed also found the control theory applicable here because – by virtue of their 'powers of approval, inspection, supervision and removal' – the local authority 'exercised a significant degree of control over both what the foster parents did and how they did it.'[168] Loss spreading and victim compensation theories were also applied, with his Lordship outlining that the local authority were in a much better position than most foster parents to insure against the loss.[169] Lastly, Lord Reed also considered the deterrence rationale of vicarious liability.[170] He took a dim view of the idea that imposing vicarious liability would discourage authorities from placing children in the care of foster parents, presumably because the alternative was to place the children in residential care homes (where

[165] *Armes* (n 32). For similar theoretical approaches to the possible vicarious liability of foster carers in Canada and New Zealand, see (respectively) *KLB v British Columbia* [2003] 2 SCR 403 and *S v Attorney-General* [2003] 3 NZLR 450.

[166] [2018] EWCA Civ 1670.

[167] *Armes* (n 32) [61].

[168] *Armes* (n 32) [62].

[169] *Armes* (n 32) [63].

[170] *Armes* (n 32) [66]-[70].

local authorities would still have to bear the loss).[171] Interestingly from the perspective of transparency, Lord Reed argued that, if there was merit in this floodgates argument, then 'there is every reason why the law should expose' such a 'widespread problem of child abuse by foster parents'.[172] His candid concession as to the lack of empirical evidence on this point is also to be commended, as this identification of empirical gaps in the current literature could somewhat allay the fears of those concerned with the scarcity of suitable empirical data for judicial use.

I am wary that the discussion so far may expose me to the critique that I am a 'theory fetishist', in that my argument perhaps boils down to the circular proposition that theory-heavy decisions are better simply *because* they balance theory. To help avoid this criticism, it is worth contrasting the thin approach to theory used by the Supreme Court in *Barclays* (which rejected liability) with the thick approach adopted by the Court of Appeal in *Barclays* (which led to liability). This will hopefully show how the use of theory can lead to better results. In the former, Lady Hale simply asserted that the tortfeasor, Dr Bates, was 'clearly' an independent contractor carrying on his own business, and that he was not 'part and parcel' of Barclays Bank.[173] It is suggested that her Ladyship's focus on such semantic tests obscured the real focus in this context: that of control. As was made clear by Irwin LJ in the Court of Appeal, Barclays explicitly controlled the nature of the physical examinations required as part of their recruitment process, and, in mandating an overly intrusive examination that gave the young applicants no choice in the matter, it was fair to conclude that the tortious activity was being taken on behalf of the bank for the purposes of enterprise liability.[174] Now, it might be

[171] *Armes* (n 32) [68].

[172] *Armes* (n 32) [69].

[173] *Barclays* (n 13) [27].

[174] *Barclays* (n 166) [39]-[40] and [56]-[57].

countered that the Supreme Court *did* in fact also analyse control by highlighting that Dr Bates was not paid a retainer and that he was able to refuse an examination (and it is for such reasons that I describe this case as a thin approach to theory).[175] However, this seems problematic from both ends of the spectrum. If we accept this reasoning, then this seems to run counter to Lady Hale's warning that theory should only be considered in 'doubtful cases'.[176] In contrast, if such findings *did not* go towards analysing control, then the Supreme Court arguably missed a trick by erroneously equating the present scenario with a general health examination.[177]

Reservations must also be expressed in relation to Lady Hale's use of the term 'doubtful', a further factor which suggests that the more theory-heavy approach of the Court of Appeal is preferable to the Supreme Court's more doctrinal method. In particular, I am sceptical as to whether this vague test is workable in practice; what I consider to be doubtful might be very different from what someone else considers to be doubtful. Furthermore, if a certain result was so clearly obvious, why would the expected loser to the dispute waste precious time and resources in litigating the matter? In this regard, we might contend that the vast majority of disputes that wind up in court are in fact those hard cases that truly cast a spotlight on the inherent indeterminacy of law. On this basis, almost all litigated cases attempting to grapple with the employment status of certain workers might be said to be 'doubtful' and thus deserving of theoretical appraisal. Lady Hale instead seemed content to dedicate a vast majority of her judgment to analysing previous precedent (and only one paragraph to the facts of the immediate case). However, in light of the necessarily context-

[175] *Barclays* (n 13) [28] (Lady Hale).

[176] *Barclays* (n 13) [27].

[177] As Nicola Davies J explained at first instance in *Barclays*: the 'control was of a higher level of prescription than might usually be found in the context of an examination required to be performed by a doctor.' See *Barclays* (n 166) [27].

sensitive nature of the doctrine, I must express my agreement with Irwin LJ that such an exercise is inherently 'otiose'.[178] With great respect, Lady Hale's more doctrinal analysis lacks the necessary meaningfulness, adaptability and transparency that was evident in the Court of Appeal's more contextual-pluralist decision. In this light, I am far less convinced than other scholars that *Barclays* and *Morrison* put an end to the runaway train of vicarious liability,[179] and it may be wise to instead treat these two decisions with a healthy dose of scepticism going forward.

D. The Use of Theory: Concluding Observations

On the basis of the above three categories, we might make a number of observations regarding the use of theory. First, the 'thick' version of theoretical analysis provides a fine example of how the pluralistic aspect of my contextual-pluralist model of vicarious liability should operate. In this light, it is suggested that both *Armes* and the Court of Appeal judgment in *Barclays* are a useful benchmark for any future court wishing to implement such a model of vicarious liability. To further improve these decisions, however, the judges in each case could have more closely examined what the most relevant and weighty theories in each of the respective contexts were. Some semblance of this is evident in *Barclays*,[180] but *Armes* reads as if all of the cited theories are to be afforded equal weight in the foster care context. If this is indeed the case, more should have been done to explain why this is so.

Second, the current use of theory in the case law is applied in an alarmingly haphazard manner. Such concerns are amplified when even individual judges are adopting inconsistent

[178] *Barclays* (n 166) [42].

[179] Craig Purshouse, 'Halting the Vicarious Liability Juggernaut: *Barclays Bank PLC v Various Claimants*' (2020) 28 Med L Rev 794, 795.

[180] *Barclays* (n 166) [56] (Irwin LJ referring to control as 'the most critical factor').

stances. For example, whilst Lord Reed delivered the commendable leading judgment in *Armes*, he also did so in the theoretically vacuous Supreme Court decision in *Morrison* three years later. Irwin LJ also sat on both of the theoretically distinct Court of Appeal decisions in *Barclays* and *Bellman*.[181] Unlike in the Lord Toulson-Sumption example offered above, this perhaps makes it difficult to predict the extent to which any judge will utilise and apply theory in any given case.

The third observation – and one which might partially explain this second point – is that all of the theory exclusionist cases are focussed primarily on the course of employment enquiry. In contrast, and barring *Graham* and *GB* which deal with this second stage, all of the cases under the 'thin' or 'thick' categories are concerned with the identification of the necessary relationship for vicarious liability (the first stage).[182] This is curious. Prior to the early 2010s, it might be recognised that theoretical discussion was largely confined to cases dealing with the second course of employment criterion.[183] So why the sudden change? The answer perhaps lies in the fact that the high-water mark of theoretical analysis in the context of vicarious liability arrived in two 2012 cases that both dealt with the first stage: *JGE* and *CCWS*. Indeed, Lord Phillips even explicitly linked his five-step formula in the latter to the employer-employee relationship.[184] Subsequent courts seem to have treated this as meaning that theoretical balancing is *only* relevant at the first stage. It is suggested that the law has taken

[181] In *Bellman*, Irwin LJ did, however, emphasise the fact-sensitive nature of the case by reiterating that 'this combination of circumstances will arise very rarely': see [37]-[40].

[182] The most recent case of *Barry Congregation* appears to continue this trend. Somewhat peculiarly for a vicarious liability case, both stages of the doctrine were considered in detail here. However, whilst the theory of enterprise liability was applied by Davies LJ in a relatively thorough manner at the first stage ([74]-[81]), it received but one sentence of analysis at the second stage ([88]).

[183] Giliker (n 5) 251.

[184] *CCWS* (n 3) [47].

a wrong turn here. It makes little sense to say that the benefits of meaningfulness, adaptability and transparency are only applicable to the first stage, especially when (until the early 2010s) very little theoretical attention was paid to this test. What is needed under a contextual-pluralist approach is to recognise that the use and application of theory is relevant to *both* stages of vicarious liability.

Fourth, my analysis of control in *Barclays* demonstrates that the use of theory is perhaps an unavoidable aspect of even the most doctrinal test. To illustrate this point, consider the recent Australian decision of *Prince Alfred College v ADC*, where the High Court opted for a more formulaic test to vicarious liability which asked whether the employment relationship provided not only the opportunity, but also the occasion for the harmful conduct.[185] In determining this connection, the High Court of Australia stressed that we must have regard to the tortfeasor's 'authority, power, trust, control and the ability to achieve intimacy' with the victim.[186] Now, given that the High Court dismissed the importance of enterprise risk in this case,[187] it might be questioned how else we could decide whether the employee exercised authority, power and trust on their formulation of liability. It seems to me that, in reality, this amounts to little more than enterprise liability. If the judges were concerned with analysing whether a particular role afforded an employee the ability to exercise power or achieve intimacy, is this not just basing liability on the fact that a certain risk was inherent in a particular position? If not, the High Court did a remarkably poor job of ensuring the clarity of the law. If so, then theoretical evaluation seems inevitable in light of the 'transcendental nonsense' produced by this 'occasion' test.[188]

[185] [2016] HCA 37, [80].

[186] *Prince Alfred* (n 185) [81].

[187] *Prince Alfred* (n 185) [45] and [59]-[60].

[188] Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 809, 820.

Finally, and on a related point, we can see that even a more formalistic approach is not necessarily guaranteed to produce more certainty in decisions on vicarious liability,[189] and it fails to offer the same benefits of meaningfulness and transparency as my suggested theoretical model. Goudkamp and Plunkett have compellingly argued that there is no bright-line distinction between opportunity and occasion, and attempting to differentiate the two leads to the judicial application of labels that are 'essentially devoid of content' and 'overly focused on terminology'.[190] The truth is that there is no magical judicial formula that will help to bring more certainty to vicarious liability, regardless of whether a more doctrinal or socio-legal stance is adopted. Judges are not robots with in-built algorithms programmed for consistency. They are humans, and will make human decisions. Some of these decisions may well be contradictory. In this regard, if Laws LJ in the Court of Appeal in *Woodland v Swimming Teachers Association* is correct to argue that a 'sharper edge' than the fair, just and reasonable test is needed to determine liability,[191] then it must be recognised that the potential alternatives are rather dull indeed. As such, I can do little more than to echo Lord Dyson's wise words in *Mohamud* when he colourfully argued that the 'search for certainty and precision in vicarious liability is to undertake a quest for a chimaera'.[192] If this is true, it would be erroneous to reject my contextual-pluralist model based on its lack of certainty.

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[189] A formalist approach to the application of vicarious liability has found currency in a range of cases and scholarly works. See, e.g., *Dubai Aluminium* (n 76) [26] (Lord Nicholls); Richard Glofcheski, 'A Frolic in the Law of Tort: Expanding the Scope of Employers' Vicarious Liability' (2004) 12 Tort L Rev 18, 38-9; Lewis Klar, 'Judicial Activism in Private Law' (2001) 80 Can Bar Rev 215, 240.

[190] James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17 OUCLJ 162, 167. To similar effect, see Desmond Ryan, 'From Opportunity to Occasion: Vicarious Liability in the High Court of Australia' (2017) 76 CLJ 14, 17.

[191] [2012] EWCA Civ 239, [9].

[192] *Mohamud* (n 31) [54].

5. Conclusion

This contextual-pluralist model of vicarious liability has been a challenging argument to make, and it is likely to be an even greater challenge to implement in practice. Going forward, it will be necessary to further hone what all of the relevant contexts are, as well as identifying which theories are most relevant in each respective context under a 'fair, just and reasonable' assessment. However, I hope to have shown how a more contextualised balancing approach further strengthens the case for adopting a more meaningful, adaptable and transparent law on employer liability. Because the underlying focus of this article has largely centred on *what* the purpose of law is – and *how* judges apply it – much of this discussion could also be of passing interest to those concerned with the use of theory in other areas of private law.

With these comments in mind, I have outlined that judges in future cases should adopt a 'thick' version of theory that applies the relevant theoretical factors to *both* stages of the traditional two-step test for vicarious liability. This application could also be supported by empirical data, a suggestion that is likely to bring the doctrine more in line with a legal realist conception of the law. Given my argument that theory is also often necessary to add substance and meaning to doctrinal tests, it has been suggested that a strict formalistic test for vicarious liability is no more conducive to certainty than my contextual-pluralist model. Of course, whilst there might be much more to unpack in some of these lines of reasoning, it is hoped that this article has at least gone some way to stimulating a more rigorous discussion on the use and importance of theory to the ever-developing area of vicarious liability.