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## RECASTING VICARIOUS LIABILITY

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## RECASTING VICARIOUS LIABILITY

PHILLIP MORGAN\*

### I. INTRODUCTION

With the Government's rhetoric on the Big Society it is now time to review a number of legal doctrines from the perspective of the phenomenon of volunteering. Volunteers contribute significantly to the United Kingdom's GDP, between 2–3% according to the European Union.<sup>1</sup> As reported by a Department for Communities and Local Government survey, a significant proportion of adults in the United Kingdom volunteer.<sup>2</sup> A volunteering industry has developed.<sup>3</sup> The Government as part of its Big Society project has encouraged volunteering organisations to provide services which were traditionally delivered by paid employees of the state or local authorities.<sup>4</sup> Voluntary organisations also compete amongst themselves, and with commercial concerns for contracts to deliver services on a commercial basis, although the service itself may be delivered by unpaid volunteers. For example, a volunteer staffed Legal Advice Centre may hold a contract with the Legal Services Commission and use paid employees and volunteers working alongside one another to fulfil the contract, or a first aid organisation such as St John Ambulance may contract to provide first aid coverage to a commercial event, but the staff provided will be

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<sup>1</sup> European Commission-DG EAC, *Volunteering in the European Union, Final Report* (London 2011), 11; also EYV 2011: Focus EU, *Figures on Volunteering in the EU*, ([http://europa.eu/press\\_room/pdf/eyv2011\\_figures\\_en.pdf](http://europa.eu/press_room/pdf/eyv2011_figures_en.pdf)), (last accessed 21 February 2012).

<sup>2</sup> According to the Department for Communities and Local Government's *2010–11 Citizenship Survey* (London, 2011) in 2010–11, 39% of adults reported that they volunteered formally at least once a year, and 25% reported that they volunteered formally at least once a month. 55% of adults reported that they volunteered informally at least once a year, and 29% of adults said that they volunteered informally at least once a month. The survey defined formal volunteering as "Giving unpaid help through groups, clubs or organisations to benefit other people or the environment", and defined informal volunteering as "Giving unpaid help as an individual to people who are not relatives".

<sup>3</sup> C. Rochester, A. Paine, and S. Howlett, *Volunteering and Society in the 21st Century* (Basingstoke 2010), 3, 222–226.

<sup>4</sup> Cabinet Office, *Building the Big Society* (London 2010), para 1, 4. David Cameron, *Prime Minister's Speech on the Big Society*, 14 February 2011, (available: <http://www.number10.gov.uk/news/pms-speech-on-big-society/>) (last accessed 21 February 2012).

volunteers.<sup>5</sup> Volunteers may work alongside paid employees, carrying out the same tasks, receiving the same training, and wearing the same uniform. They may be indistinguishable by members of the public, or consumers of their services, from the paid employees that they work alongside.

Our present approach to vicarious liability has problems in accommodating volunteers, and others in non-economic or non-employment relationships. Whilst these problems presently manifest themselves in the case law dealing with religious ministers and members of religious communities, the problem is of a significantly broader scope.

The rhetoric urging expansion of the voluntary sector, the sector's take-over of public services, and its competition with commercial concerns, should lead to a reconsideration of vicarious liability. A volunteer can be as much a part of a team as a professional. It would be odd if a victim, injured by a volunteer working alongside paid employees and indistinguishable by onlookers to them, is subject to a different legal regime, than if the victim is injured by the volunteer's co-worker within the organisation who happens to be a paid employee. Further, an absence of vicarious liability for volunteers would potentially place the individual volunteer in a detrimental position to his employee colleague, in that vicarious liability can have the practical effect of acting as a protective mechanism for the tortfeasor.<sup>6</sup>

We have allowed our understanding of vicarious liability to become a polarised division between employees with contracts, and independent contractors. This fails to give a rational account of other forms of vicarious liability which have simply become additional pockets of liability in addition to the "main" category. There is presently no overarching doctrine that unites them. It is suggested that the law is mature enough to accept vicarious liability for non-contractual employees. It is further argued that the categories of vicarious liability are not in fact separate categories and can instead be rationalised. A new test of association is proposed. All relationships between two persons can be subjected to analysis along the twin axes of day to day control and discretion in role to determine whether or not their relationship should trigger vicarious liability. This association model accommodates all of the existing forms of vicarious liability and places them into a single category. It also allows the accommodation of new and emerging forms of economic and non-economic occupations. This will include at least some forms of volunteers.

<sup>5</sup> These contracts are often profit making, although most bodies within the voluntary sector will apply this profit to funding their other, non-profit making activities.

<sup>6</sup> See Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers*, (LRC 93 -2009; Dublin 2009), pp. 78 [3.88], 109 [4.12], which considers that vicarious liability may act as a form of protection for volunteers, preventing them from being required to resort to personal resources.

## II. VICARIOUS LIABILITY

Vicarious liability is a system of strict liability through which one entity A is made strictly liable for the torts of another, B, even though A is not at fault. An action may be brought against A or B, or both. The paradigm example of vicarious liability is that of an employer's liability for the torts of their employees committed within the course and scope of their employment. This is not the only example where such liability operates, for example, it also applies in the context of "principal" and "agent",<sup>7</sup> and between partners,<sup>8</sup> amongst others. The categories of vicarious liability are presently increasing. There is no overarching theory which coherently explains the reason for these individual pockets of liability.

Vicarious liability multiplies the number of possible defendants to the claimant's action and thus increases the probability of finding a solvent or insured defendant.<sup>9</sup> It is not the only way of claiming against A. B's tort may place A in breach of a direct duty of care to the victim of the tort to select,<sup>10</sup> train, and monitor B, or, A may have a non-delegable duty to the victim, the performance of which A cannot delegate to another,<sup>11</sup> so that, even if A has selected, trained, and monitored B properly, B's tort will place A in breach of this duty. One example of such a duty is bailment.<sup>12</sup> These three different routes to establishing liability on A's behalf must be kept distinct.<sup>13</sup> Whilst they are not mutually exclusive, in some cases only one of the routes will result in a successful action against a defendant. For example in circumstances where A does not owe a non-delegable duty to C, and where A properly selects, trains, and monitors B, and is thus not in breach of a direct duty to C, an action may only be brought against A by invoking vicarious liability.

Accounts of the rationale behind vicarious liability differ. The problem may be that "Vicarious liability is the creation of many judges who have different ideas of its justification or social policy, or no idea at all."<sup>14</sup> This problem is also recognised by the judiciary, MacDuff J. recently declaring: "[t]here is no precise unanimity between judges

<sup>7</sup> See J. Murphy, in A. Dugdale and M. Jones (eds.), *Clerk and Lindsell on Torts*, 20th ed. (London 2010), (hereafter "*Clerk & Lindsell*"), §6–78, p. 397. This is not true agency, see below.

<sup>8</sup> Partnership Act 1890, s. 10.

<sup>9</sup> P. Cane, *Atiyah's Accidents, Compensation and the Law*, 7th ed., (Cambridge 2006), 230. The victim is only compensated for their injuries once.

<sup>10</sup> *E.g. Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 W.L.R. 2158.

<sup>11</sup> *Clerk & Lindsell*, §6–57, p. 386.

<sup>12</sup> R. Stevens, "Non-Delegable Duties and Vicarious Liability" in J. W. Neyers, E. Chamberlain and S. G. A. Pitel (eds.), *Emerging Issues in Tort Law* (Oxford 2007) (hereafter "*Emerging Issues*"), ch. 13, p. 337; *Clerk & Lindsell*, §6–68, p. 392, based on *Morris v C. W. Martin & Sons Ltd* [1966] 1 Q.B. 716. See P. Morgan, "Vicarious Liability for Employee Theft: Muddling Vicarious Liability for Conversion with Non-Delegable Duties" [2011] L.M.C.L.Q. 172.

<sup>13</sup> W. V. H. Rogers, *Winfield and Jolowicz on Tort*, 18th ed. (London, 2010), 945.

<sup>14</sup> G. Williams, "Vicarious Liability and the Master's Indemnity" (1957) 20 M.L.R. 220, 231.

(or between academics) about the rationale; no single accepted truth.”<sup>15</sup> The main justifications presently advanced by the judges in the case law appear to be loss distribution,<sup>16</sup> and enterprise liability.<sup>17</sup> Loss distribution is that “D2 [is] more able to bear the loss than D1, often (although not always) because he can and will in practice insure against it. Where there is such insurance, the cost is often in effect passed on to the buyers or users of the service or goods provided by D2.”<sup>18</sup> Stevens argues that this cannot be the, or indeed *a*, rationale for vicarious liability since this does not explain why employers of domestic staff who are not insured may also be vicariously liable, further that this collapses into state liability, since this is the entity which can spread the loss most widely.<sup>19</sup> Relatedly, loss spreading does not explain why we have vicarious liability instead of *other* more efficient forms of loss spreading such as taxation funded compensation or social security schemes.<sup>20</sup>

Enterprise liability justifications are based on the idea that with benefits come burdens, he who takes the profit of the enterprise should take the loss. However, this justification for vicarious liability as Stevens points out fails to explain why non-profit making organisations such as the State and charities may be vicariously liable.<sup>21</sup> Brodie responds that “charities still run risks for the benefit of the organisation”,<sup>22</sup> and that the criticism only stands “if profit is viewed in a purely financial sense”.<sup>23</sup>

Recognising this, Steele notes that there may be two versions of enterprise risk, one an economic variant, and secondly a moral version.<sup>24</sup> To justify vicarious liability where a community interest is being fulfilled she states that the response of the moral version is that it would not be fair and just for an individual alone to bear the whole risk created by satisfying the communities’ need for activities such as policing, “[t]he costs and risks of essential public services should be

<sup>15</sup> *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, [2011] EWHC 2871 (QB), [2012] 1 All E.R. 723, at [10].

<sup>16</sup> E.g. Hughes L.J. in *Various Claimants v Institute of the Brothers of the Christian Schools* [2010] EWCA Civ 1106 at [35].

<sup>17</sup> D. Brodie, “Enterprise Liability: justifying vicarious liability” (2007) 27 O.J.L.S. 493, 496 sees *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 A.C. 215 as “utterly consistent” with enterprise liability; D. Brodie, *Enterprise Liability and the Common Law* (Cambridge 2010), p. 23 (hereafter *Enterprise Liability*). Cf. P. Giliker, “Making the Right Connection: Vicarious liability and institutional responsibility” [2009] T.L.J. 76.

<sup>18</sup> Hughes L.J. in *Various Claimants* at [35].

<sup>19</sup> R. Stevens, *Torts and Rights*, (Oxford 2007), (hereafter “*Torts and Rights*”), p. 258. Stevens does not consider that it is *a* rationale either, since one cannot add up different policy explanations which do not fully justify the doctrine to justify the doctrine. (p. 259).

<sup>20</sup> Note discussion in P. Giliker, *Vicarious Liability in Tort, A Comparative Perspective*, (Cambridge 2010), 237 (hereafter “*Vicarious Liability in Tort*”).

<sup>21</sup> For a convincing rebuttal of enterprise liability in its economic variant see R. Stevens, *Torts and Rights*, pp. 258–259.

<sup>22</sup> D. Brodie, *Enterprise Liability*, p. 11.

<sup>23</sup> *Ibid.*

<sup>24</sup> J. Steele, *Tort Law, Text, Cases, and Materials*, 2nd ed., (Oxford 2010), 574.

spread around.”<sup>25</sup> This however, is a disguised loss spreading model to which Stevens’ criticisms stand. A counterargument to this is that it is not just a loss spreading model, but instead it is an attempt to explain why the loss should be spread. It is a justification for state liability, rather than an exercise that collapses into state liability. If so, the explanation fails to explain at what point loss spreading should cease. In the case of policing it fails to explain why the loss spreading should stop with the Chief Constable or Police Authority for the Area, and not the nation, which can of course spread the loss most widely.

This argument may be seen to conflate two notions of loss spreading, loss spreading as a social outcome, and loss spreading as a legal outcome. It is however, submitted that the distinction between the two is artificial. Loss spreading as a social outcome is where the loss is passed on as a matter of fact to another, for example where a supplier passes on the costs of vicarious liability by requiring its clients to pay increased prices for its products. In such a case the victim of the tort cannot directly sue those who ultimately bear the financial consequences. Loss spreading as a legal outcome is where the loss is spread by making another directly liable in law to the victim for the loss, for example through vicarious liability, or direct actions against insurers.<sup>26</sup> The victim may sue these others directly. There are two flaws to this approach. Loss spreading justifications for vicarious liability do not rely on loss spreading as a legal outcome, this is since vicarious liability only increases the number of defendants who sustain the loss by one, or by a small number in the case of dual vicarious liability. Loss spreading as a legal outcome thus produces little loss spreading. Instead loss spreading arguments look at the ability of these others to spread loss, as a matter of fact.<sup>27</sup> Secondly, this distinction in the context of the loss spreading justification for vicarious liability is somewhat artificial, since there are cases in which another can be made liable in law for the loss, although the victim cannot sue these individuals directly. An entity may compel another by force of law to pay for the consequences of vicarious liability, even if that other is not technically made vicariously liable. For example, with the Chief Constable, the vicarious liability stops with the Chief Constable, and not the society which the Police Force serves, however the Police Authority may place a precept on the council tax, effectively compelling local council tax payers to pay for the cost of the vicarious liability, with criminal sanctions for non-payment. Either form of loss spreading social or legal, still does not

<sup>25</sup> *Ibid.*, p. 574.

<sup>26</sup> E.g. through the Third Parties (Rights against Insurers) Act 2010.

<sup>27</sup> For example through passing costs through “liability insurance and higher prices”, L. Klar, in C. Sappideen and P. Vines (eds), *Fleming’s The Law of Torts*, 10th ed., (Sydney 2011), 438, [§9.10].

explain why as a matter of law the vicarious liability buck stops with the Chief Constable.

Further as Steele notes<sup>28</sup> enterprise liability fails to explain and distinguish between employees and independent contractors,<sup>29</sup> unless in such cases the contractor can be considered to be in an enterprise of their own, something doubtful in many cases.

Of course, there may be more than one explanation for vicarious liability,<sup>30</sup> however, care should be taken not to use this an excuse to incorporate flawed explanations, as Stevens pithily puts it: “Justifications for legal rules are not like the ingredients of vegetable soup. We cannot simply add together a number of disparate ingredients and expect to get a satisfactory result.”<sup>31</sup>

Stevens instead relies on the idea of attribution, and uses a football analogy: whose team does D1 play for?<sup>32</sup> However, this is not just a question of who is a player since whilst players may score goals, the club manager, or physiotherapist could trigger penalties within the league if they invade the pitch and assault the referee. To extend the football analogy, with attribution, if a goal is scored, it matters not if it is scored by professional footballer, or his amateur teammate who wears the same strip and plays for the same team.

This concept of attribution is closely linked with two further justifications for vicarious liability given by Atiyah, that of control<sup>33</sup> and group identification.<sup>34</sup> Whilst control has been criticised as a theory for vicarious liability, it is submitted below that these criticisms are not well founded. It further plays a significant part in the case law in determining who is an employee for the purpose of vicarious liability. Control has two aspects, and the flaw in some of the criticisms of control based explanations is to focus only on one dimension.<sup>35</sup> This will be developed in the final section of the article.

An employer is not liable for all of the torts committed by its employees. Rather the employer is only liable for those employee torts which are committed within the course and scope of the employee’s employment.<sup>36</sup> There are differences in approaches within the case law

<sup>28</sup> J. Steele, *Tort Law*, pp. 574–575.

<sup>29</sup> See also D. Brodie, *Enterprise Liability*, pp. 507–8; further R. Stevens, in *Emerging Issues*, p. 361.

<sup>30</sup> *Fleming’s The Law of Torts*, p. 438, [§9.10].

<sup>31</sup> R. Stevens, *Torts and Rights*, p. 259. Stevens also notes that some of the traditional justifications thrown into the mix are contradictory, and “point in different directions” (p. 259).

<sup>32</sup> The conclusion of this article does require the discussion or adoption of Stevens’ approach to the master’s tort theory.

<sup>33</sup> P. Atiyah, *Vicarious Liability in the Law of Torts* (London 1967), pp. 15–16.

<sup>34</sup> *Ibid.*, p. 16, although refers to “identification” rather than group identification. G. Williams, “Vicarious Liability and the Master’s Indemnity” (1957) 20 M.L.R. 231, 234, refers to “group unity”.

<sup>35</sup> Note R. Stevens, *Torts and Rights*, p. 258, criticising a control based approach on the fact that parents are not vicariously liable for their children. Note that parental liability for children is however a common European rule, see P. Giliker, *Vicarious Liability in Tort*, pp. 196–226.

<sup>36</sup> *Clerk and Lindsell*, §6–28, p. 369.

as to the applicable test and factors to apply to determine what is within the course and scope of employment. The starting point is now the speech of Lord Steyn in *Lister v Hesley Hall*,<sup>37</sup> as developed by Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam and Others*<sup>38</sup> as: “the wrongful conduct must be so closely connected with acts the ... employee was authorised to do that, for the purpose of the liability of the ... employer to third parties, the wrongful conduct may fairly and properly be regarded as done ... while acting in the ordinary course of ... the employee’s employment”.<sup>39</sup> Whilst the exact nature and scope of the mainstream “close connection” test that determines for which of B’s acts, the principal A, is liable for, is uncertain, it is clear that the employers of a Warden of a school boarding house employed to look after children in a residential setting are vicariously liable for his deliberate acts of abuse.<sup>40</sup>

In the case of *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*,<sup>41</sup> vicarious liability was found for the acts of abuse committed by a Roman Catholic Priest against a child who lived within the parish, but who was, and whose family were unconnected with the Church. The Priest was treated as an employee for the purpose of the appeal.<sup>42</sup> Partly based on the Supreme Court of Canada’s reasoning in *Bazley v Curry*,<sup>43</sup> *Maga* introduced a status based risk test.<sup>44</sup> *Maga* does not answer the question of for whom you may be vicariously liable, but instead it answers the different question of which acts committed by a person whom you may be vicariously liable for, trigger vicariously liability.

The core of *Maga* is that where you elevate the status of another such that it materially increases the risk of the commission of a tort, you are vicariously liable for that tort, at least where the person whose status is elevated is your employee.<sup>45</sup> The author has criticised this case elsewhere on a number of grounds.<sup>46</sup> These criticisms also stand for the subsequent decision of the High Court in *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman*

<sup>37</sup> [2001] UKHL 22, [2002] 1 A.C. 215. As Giliker notes four different tests for close connection were given in *Lister*. P. Giliker, “Making the right connection: Vicarious liability and institutional responsibility” [2009] T.L.J. 35, 39, fn 30. See also P. Giliker, *Vicarious Liability in Tort*, pp. 166–167.

<sup>38</sup> [2002] UKHL 48, [2003] 2 A.C. 366.

<sup>39</sup> Para. [23].

<sup>40</sup> As in *Lister* itself.

<sup>41</sup> [2010] EWCA Civ 256, [2010] 1 W.L.R. 1441.

<sup>42</sup> The issue of whether a Bishop can be vicariously liable for a Diocesan Priest was subsequently determined in the case of *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

<sup>43</sup> [1999] 2 S.C.R. 534.

<sup>44</sup> P. Morgan, “Distorting Vicarious Liability” (2011) 74 M.L.R. 932.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, pp. 940–944.

*Catholic Diocesan Trust*,<sup>47</sup> in so far as it relied on *Maga* and attempts to use status elevation as a mechanism in determining the question, for whom a principal may be vicariously liable.

### III. CONTRACT?

It is seen as a basic principle of vicarious liability that whilst one may be vicariously liable for an employee's wrong, one is not vicariously liable for the wrongs of an independent contractor.<sup>48</sup> In determining whether a person is an employee or an independent contractor it is necessary to examine whether or not these agreements amount to a contract of service (employee), or a contract for services (independent contractor). It is however submitted that there is in fact no need for a contract between A and B, for A to be vicariously liable for B's torts. The present mainstream justification for the requirement for a contract between A and B is based on a subrogation model of vicarious liability, which as set out and dealt with below is incorrect. Nevertheless given the control and attribution approach adopted, the relationship between A and B is important in its effect on A's relationship with the victim C. With a control based model of vicarious liability it is possible to argue that a contract between A and B is required to provide the necessary *vinculum iuris* for control to be present. This too is a flawed argument, a contract is just one of many ways in which A can exercise control over B, other methods of control exist, for example public or regulatory law, tortious duties, criminal law, and factual control. You do not necessarily need a contract with another for them to "play for your team." A serviceman does not have a contract with the Crown, yet he may be criminally liable for a failure to obey a lawful order.

There are a number of tests for determining employment for the purposes of vicarious liability. As the Editors of Clerk and Lindsell<sup>49</sup> state there is no one simple test and the modern approach rests on "multiple factor[s]". Many of the tests used come from other areas of law. These areas have different policies to vicarious liability, for example the policy of who is an employee for the purposes of National Insurance is different to the policy of who is an employee for the purposes of health and safety regulation, which in turn has a different policy to vicarious liability.<sup>50</sup> With the un-codified area of vicarious

<sup>47</sup> [2011] EWHC 2871 (QB), [2012] 1 All E.R. 723. These criticisms appear to have been accepted by the Court of Appeal, [2012] EWCA Civ 938, at [120]–[121], *per* Davis L.J.

<sup>48</sup> *D & F Estates Ltd v Church Commissioners* [1989] A.C. 177, 208. *C.f.* *Winfield and Jolowicz on Tort*, pp. 948–9, suggesting that this distinction may need to be adjusted given changes in employment practices.

<sup>49</sup> *Clerk and Lindsell*, §6–11, pp. 360–1.

<sup>50</sup> For support for this proposition see S. Deakin, A. Johnston, and B. Markesinis, *Markesinis and Deakin's Tort Law*, 6th ed., (Oxford 2008), 698, (hereafter "*Markesinis and Deakin*").

liability, whilst employees almost invariably have such contracts of service it is argued that they are not essential.

Neyers advances the view that vicarious liability is explicable only as a matter of contract.<sup>51</sup> His theory focuses on the employee-employer relationship, rather than the employee-victim, or employer-victim relationships.<sup>52</sup> He alleges that vicarious liability results from the “employer’s implied promise in the contract of employment to indemnify the employee for harms (including legal liability) suffered by the employee in the conduct of the employer’s business”.<sup>53</sup> The tort victim is then “subrogated to the employee’s right of indemnity”.<sup>54</sup> This theory he alleges “explains why the tortfeasor must be an employee – since if the tortfeasor is not an employee he or she will not have a right of indemnity from the person sought to be made vicariously liable”.<sup>55</sup>

Such an approach requires there to be a contractual relationship between the employer and employee. With no contractual relationship there can be no vicarious liability. Supporting this proposition is the fact that it was considered necessary to introduce statutory vicarious liability<sup>56</sup> for police officers, who do not hold ordinary contracts of employment. Neyers’ theory however is contradictory to the general thrust of allowing vicarious liability for deliberate torts, including those which are also criminal acts, such as the sexual abuse in *Lister*. No employer would agree to indemnify an employee for such acts of abuse, and there would be public policy reasons to prevent any such agreement to do so from being enforceable. Whilst Neyers accepts that deliberate torts are a problem with his theory he alleges that all such cases must be instances of personal fault or wrongly decided.<sup>57</sup>

A second criticism of this theory is that vicarious liability is not just restricted to the employer – employee relationship, and further that there are also a number of categories of case in which an employer is vicariously liable for a person who does work for him in a manner similar to an employee but with whom he has not contracted. An example of such is the case of *Hawley v Luminar Leisure Ltd*.<sup>58</sup> Here the door attendants did not contract with Luminar, rather they contracted with ASE Security Services Ltd, however, they were employees of Luminar for the purposes of vicarious liability since they were

Note also R. Kidner, “Vicarious liability: for whom should the ‘employer’ be liable?” (1995) 15 *Legal Studies* 47.

<sup>51</sup> J. W. Neyers, “A Theory of Vicarious Liability” (2005–2006) 43 *Alta. L. Rev.* 287.

<sup>52</sup> *Ibid.*, p. 301.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, p. 303.

<sup>55</sup> *Ibid.*, p. 304.

<sup>56</sup> *Police Act 1996*, s. 88.

<sup>57</sup> Neyers, *op. cit.*, p. 314. The theory also does not explain the requirement of the employee to indemnify the employer, although it is submitted that the current case law on employee indemnification is incorrect.

<sup>58</sup> [2006] EWCA Civ 18, [2006] I.R.L.R. 817.

controlled by Luminar's management and integrated into its business. A second example is the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*<sup>59</sup> which introduced dual-vicarious liability which rendered two entities vicariously liable for an employee even though one had not contracted with him. A further example is the case of *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* where it was held that a Bishop may be vicariously liable for the actions of a Diocesan Priest, even where their relationship was not governed by contract, but was instead governed by Roman Catholic Canon Law.<sup>60</sup>

If vicarious liability were to require a contract it would also prevent it arising for volunteers. An individual may volunteer for a charitable entity such as Oxfam or St John Ambulance, wear their uniform, receive their training, work for them under their direction and control, and be a part of the public face of that organisation, yet have no contract of employment with that entity. It would be odd if the entity could then disclaim vicarious liability for them on that basis. Members of the Armed Forces too, do not hold contracts of employment with the Crown,<sup>61</sup> instead they serve under terms of service. Nevertheless the Ministry of Defence is regularly held liable for the torts of members of the Armed Forces.<sup>62</sup> The test for employment is thus more multifaceted in vicarious liability, and there should be no requirement for a contract.

The significance of non-contractual employees and volunteers is that there is no contract in which a term of indemnification can be implied that the non-contractual employee or volunteer will indemnify the employer for the losses sustained in being held vicariously liable for their wrongs. This is, however, not a problem given that vicarious liability applies in other contexts in which no contract exists in which such a term can be implied, the industry practice in not enforcing such provisions, and the fact that the "employee" indemnification approach is itself incorrect.<sup>63</sup>

As argued above vicarious liability is not founded on contract, rather control and attribution. This means that one need not have a contract for vicarious liability to be present, provided an individual

<sup>59</sup> [2005] EWCA Civ 1151, [2006] Q.B. 510.

<sup>60</sup> [2012] EWCA Civ 938. At the time of the abuse in *JGE* the applicable code was the 1917 Code of Canon Law. The presently applicable code is the 1983 Code of Canon Law, which followed (belatedly) the Second Vatican Council. To that extent, it may be open to distinguish *JGE* in future cases involving relationships governed by the 1983 Code. However, any opportunities to distinguish in this context are limited, and unlikely to succeed.

<sup>61</sup> *Quinn v Ministry of Defence* [1998] P.I.Q.R. P387 (CA).

<sup>62</sup> E.g. *The Ministry of Defence v Charles Peter Timothy Radclyffe* [2009] EWCA Civ 635; see also *A (A Child) v Ministry of Defence and Another* [2004] EWCA Civ 641, [2005] Q.B. 183, per Lord Phillips M.R., at [10], where military hospitals are staffed by military medical staff, or civilian staff employed by the MoD, the MoD would be vicariously liable. Only the civilian staff would have contracts of employment.

<sup>63</sup> See G. Williams, "Vicarious Liability and the Master's Indemnity" (1957) 20 M.L.R. 220.

plays for your team. Both employees and volunteers may play for the same team, and be indistinguishable to outsiders. Given the industry practice in not enforcing employee indemnification where an employer has been held vicariously liable,<sup>64</sup> vicarious liability has developed into a protective mechanism for employee tortfeasors. This is since claimants bring their actions against the employer (since they are often a richer and insured entity) instead of the employee, thus in practical terms protecting the employee's assets from being used to satisfy any judgment in favour of the claimant.<sup>65</sup> To deny this protection to a teammate that discharges the same function, in the same way, as his paid colleagues, on the basis that he is not paid, and does not have a contract, seems odd. With the expansion of the voluntary sector, the development of a volunteering industry which provides services traditionally provided by paid employees of the state or local authorities, and the competition between the voluntary sector and commercial concerns, to impose this litigation risk on the individual volunteer instead of the volunteering organisation, the controlling enterprise, seems to unduly penalise the volunteer over his employee counterpart. This would also favour volunteering organisations over commercial concerns when they compete for business, albeit at the expense of the unpaid volunteer.

#### IV. BROADENING OF VICARIOUS LIABILITY

In recent years there has been significant broadening of the concept of vicarious liability, and the categories of vicarious liability, both extending a previous category and creating new ones. Most of these however appear to be additional pockets of liability, and are not rationalised together with liability for employees.

##### *A. Agency*

Vicarious liability is not limited to the case of employer and employee, it may also apply in the context of principal and agent. In this context the word agent may be confusing.<sup>66</sup> This is since generally when one is liable for one's agent the liability is primary not vicarious.<sup>67</sup> However, in the context of vicarious liability agent is not used to connote agency in the sense meant by commercial lawyers, but rather a different

<sup>64</sup> P. Cane, *Atiyah's Accidents, Compensation and the Law*, 7th ed, (Cambridge, 2006), 232.

<sup>65</sup> A phenomena alluded to by the Irish Law Reform Commission, see *Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009; Dublin 2009), pp. 78 [§3.88], 109 [§4.12].

<sup>66</sup> T. Weir, *An Introduction to Tort Law*, 2nd ed., (Oxford 2006), 106.

<sup>67</sup> P. Giliker, *Vicarious Liability in Tort*, p. 102.

concept. Bowstead and Reynolds consider that such cases are in fact not linked to agency.<sup>68</sup> In *Launchbury v Morgans*<sup>69</sup> Lord Wilberforce accepted “that ‘agency’ in contexts such as these is merely a concept, the meaning and purpose of which is to say ‘is vicariously liable,’ and that either expression reflects a judgment of value”.<sup>70</sup>

The language of principal and agent in the context of vicarious liability is typically found in the cases where one individual who has lent a motor vehicle to another has been held vicariously liable for that other’s wrong.<sup>71</sup> In such cases one may be liable for one’s “agent” who is not an employee. The “agent” need not have a contract with the liable party.

Debates exist as to the nature of this liability. The Editors of Clerk and Lindsell allege that this form of vicarious liability for an “agent” is a *sui generis* form of liability,<sup>72</sup> and for cases other than fraud the category “agent” in vicarious liability has no relevance.<sup>73</sup> Giliker too argues that agency is distinct from vicarious liability,<sup>74</sup> and is critical of a resort to it. She acknowledges that two types of claim persist in this area, that of fraudulent mis-statements and lending of a car.<sup>75</sup> The policy behind its use in a motoring context appears to be based on reaching an insured defendant. The need for this is now significantly less pressing given compulsory insurance and the Motor Insurance Bureau for uninsured drivers.<sup>76</sup>

Nevertheless cases do exist outside of the motoring and fraud contexts in which a principal has been held vicariously liable for the tort of their agent, even where the tort is not one of fraud, and where the agent is not an agent in the contractual sense. An example is the case of the *League Against Cruel Sports Ltd v Scott and Others*<sup>77</sup> which held that a master of hounds was vicariously liable for trespasses committed by mounted hunt subscribers (followers) over whom he exercised control, in addition to the hunt servants.<sup>78</sup> However, a hunt master is not vicariously liable for the hunt followers and supporters who follow on foot, in cars, and on motorbikes, over which the master has significantly less control. Whilst the *League Against Cruel Sports* may be a

<sup>68</sup> P. Watts and F. Reynolds (eds.), *Bowstead and Reynolds on Agency*, 19th ed. (London 2010), §8–187.

<sup>69</sup> [1973] A.C. 127.

<sup>70</sup> P. 135.

<sup>71</sup> E.g. *Ormrod v Crossville* [1953] 1 W.L.R. 1120.

<sup>72</sup> See *Clerk and Lindsell*, §6–74, pp. 365–6.

<sup>73</sup> *Ibid.*, §6–79, pp. 397–8.

<sup>74</sup> P. Giliker, *Vicarious Liability in Tort*, p. 110.

<sup>75</sup> *Ibid.*

<sup>76</sup> See *Winfield and Jolowicz*, p. 977.

<sup>77</sup> [1986] Q.B. 240.

<sup>78</sup> *Per* Park J.: “he can exercise considerable control over the conduct of a mounted subscriber in the chase. I can find no reason why the master should not be held vicariously liable for trespass committed by such a person.”

controversial case, further examples of this concept of agency are to be found in cases dealing with trade union officials or shop stewards,<sup>79</sup> and also the case of “*Thelma*” (*Owners*) v *University College School*<sup>80</sup> where School Governors were held vicariously liable for the negligent act of a pupil who was acting as the Cox of the School VIII.<sup>81</sup> Another such application outside of these contexts is *Moore v Bude-Stratton Town Council*.<sup>82</sup> In this case a Councillor was abusive to a Council employee. The Councillor was not an employee or officer of the council, nor a person to whom any of the Council’s relevant powers had been delegated. Whilst the Employment Appeal Tribunal was divided, the majority held that the Council were vicariously liable for the Councillor’s acts.<sup>83</sup> In *S v Walsall MBC*<sup>84</sup> which deals with foster parents, the case was argued as one of principal and agent in a vicarious liability context, and no objection was taken to this that vicarious liability could not apply to principals and agents in the non-technical sense, rather the question was instead whether foster parents were agents.<sup>85</sup>

Nevertheless, it is difficult to find an overarching concept of vicarious liability for agents, but the categories are not as closed as Clerk and Lindsell otherwise suggest. One starts to agree with Rogers that the operation of vicarious liability in the context of principal and agent rests on “ad hoc judgment[s] that for one reason or another the principal ought to pay”.<sup>86</sup> If so, if one is to follow a traditional analysis, care is needed so as not to remove the divide between employers and independent contractors. Broader use of agency within a vicarious liability context is made within other common law jurisdictions, and

<sup>79</sup> Note dicta in *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] A.C. 15, 99, per Lord Wilberforce, applied in *Thomas and Others v National Union of Mineworkers (South Wales Area) and Others* [1986] Ch. 20, 67, per Scott J.

<sup>80</sup> [1953] 2 Lloyd’s Rep 613.

<sup>81</sup> “[T]he cox was the agent of the defendants. The eight was the property of the school governors, and it was used by them for their purposes, that is to say for the training of boys, and also for the purposes of being entered in races on the river in regattas or otherwise; and no doubt the objects of that were to give an incentive to the boys to do their best at rowing and also, with a hope of winning, to enhance the prestige of the school and perhaps induce parents to send their sons there.” per H.H. Judge A Ralph Thomas, at 618.

<sup>82</sup> [2001] I.C.R. 271, (EAT); Lindsay J, the President, being in the minority. Further applied in *De Clare Johnson v MYA Consulting Ltd Employment Appeal Tribunal*, 31 August 2007 (Unreported), concerning vicarious liability of a company for the acts of a non-employee in causing the constructive dismissal of an employee. Reference also made in *Cheltenham B.C. v Laird* [2009] EWHC 1253 (QB); [2009] I.R.L.R. 621.

<sup>83</sup> The minority accepted vicarious liability for agents, but did not consider it to be present on the facts of the case.

<sup>84</sup> [1985] 1 W.L.R. 1150.

<sup>85</sup> In the context of the regulatory regime then in force, they were held not to be agents. The regulatory regime applicable to foster parents has now changed significantly from that applicable at the time of the injury in *S v Walsall*.

<sup>86</sup> *Winfield and Jolowicz*, p. 976; P. Giliker, *Vicarious Liability in Tort*, p. 116, considers it an “Odd remnant” which “adds little to our understanding of the principles of vicarious liability”.

this route was used to establish vicarious liability for foster carers in New Zealand.<sup>87</sup>

Nevertheless this resort to the concept of agency is uncertain and unpredictable. Agency seems a conclusion rather than a characteristic which triggers vicarious liability. Whilst agency is available as a mechanism to deal with some unusual cases it should not become the norm. Giliker argues that vicarious liability for agents was used to extend vicarious liability to those who work gratuitously for a defendant.<sup>88</sup> It is submitted that courts are masking their dislike of the binary test of employee/independent contractor, which is becoming increasingly unsuitable in the modern workforce,<sup>89</sup> through recourse to this notion of agency. There is less need to resort to agency if we acknowledge that one can be a non-contractual employee (either where one has a contract with another, one's relationship is governed by a regulatory regime, or one is a volunteer). The concept of non-contractual employee would also provide a neat solution to the situation where a relationship is governed by a non-contractual religious vow governed by Canon Law, such as the position of a member of a monastic community, where the control by the Abbot over a monk may be far greater than any employer. But there will still be cases in which policy requires vicarious liability to be present, even if by strict application of the binary divide of employee/independent contractor, (even including non-contractual employees), it should not be present, as in the case of the *League Against Cruel Sports*. An account of vicarious liability is required which will accommodate both these *and* the cases which we have called non-contractual employees. Such an account is set out below.

#### V. OTHER EMERGING CATEGORIES OF VICARIOUS LIABILITY

Recently, new categories of vicarious liability have been emerging, and developing in a piecemeal and ad hoc fashion. There has been no attempt to give an account of them which also incorporates the traditional areas of vicarious liability. It is submitted that they are a manifestation of the increasing unsuitability of a model of vicarious liability founded on traditional notions of employment. In so far as they show the inadequacies of the present approach to vicarious liability, and the need for the approach to match the needs of today, a

<sup>87</sup> See *S v Attorney General* [2003] NZCA 149. Kirby J. (dissent) in *Hollis v Vabu* [2001] HCA 44 also relied on the concept of agency; criticised by L. McCarthy, "Vicarious Liability in the Agency Context" (2004) 4(2) Q.U.T.L.J.J. 268.

<sup>88</sup> P. Giliker, *Vicarious Liability in Tort*, p. 109.

<sup>89</sup> See for instance E. McKendrick, "Vicarious Liability and Independent Contractors – A Re-examination" (1990) 53 M.L.R. 770.

broader account of vicarious liability is required. Our account of vicarious liability needs to be able to accommodate these.

#### A. Employer +

The first new category of liability can be termed employer +, this is where A, the employer of B may be vicariously liable for B's tort, and additionally, a second principal C may also be simultaneously vicariously liable for B's tort even though C does not have a contract with B. In *Viasystems*<sup>90</sup> work was carried out by a fitter and a fitter's mate, supplied to the second defendants by the third defendants on a labour-only basis, under the supervision of a fitter working for the second defendants. The fitter's mate was negligent. The Court of Appeal held that, both the second and third defendants were vicariously liable for the negligent act.

May L.J. stated one should concentrate on the relevant negligent act and whose responsibility it was to prevent it. There could be more than one person responsible and thus may be more than one "employer". This is a control analysis. That this is a control analysis is reinforced by May L.J.'s use<sup>91</sup> of the dicta of Denning L.J. in *Denham v Midland Employers' Mutual Assurance Ltd.*<sup>92</sup> "if a temporary employer has the right to control the manner in which a labourer does his work, ... then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility". May L.J. also stressed that the critical relationship for vicarious liability to be present is "the employers' right (and theoretical obligation) to control the relevant activity of the employee".<sup>93</sup> The language of a second employer, is a fiction, and is simply shorthand for the position where the second entity is vicariously liable for the individual. Rix L.J.,<sup>94</sup> however, doubted that the doctrine of vicarious liability should depend solely on the question of control and suggested a broader test of "whether or not the employee in question is so much part of the work, business or organisation of both employers that it is just to make both employers answer".

In *Luminar* Hallett L.J. noted the distinction between the two approaches and considered that the question of control is at the heart of dual vicarious liability.<sup>95</sup> This is further supported by *Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GmbH and*

<sup>90</sup> [2005] EWCA Civ 1151, [2006] Q.B. 510.

<sup>91</sup> Para. [15].

<sup>92</sup> [1955] 2 Q.B. 437, 444.

<sup>93</sup> Para. [52].

<sup>94</sup> Para. [78]-[79], at [79]: "the right of control has not retained the critical significance it once did".

<sup>95</sup> Para. [82], obiter since whichever of the two approaches adopted the Court was not persuaded that on the facts of *Luminar* that it made any difference.

others,<sup>96</sup> which supports a control analysis. In *Biffa* supervision is distinguished from control.<sup>97</sup> The extra element that makes C liable is control.

The existence of a form of liability founded on control and a fictional deeming of a second employer based on their control of B would suggest that it is not too great a leap to establish a form of vicarious liability based on control alone. It is submitted that the law has now established such liability. If control is sufficient to establish the additional vicarious liability of C, it should be enough to establish vicarious liability even if there is no other entity to which C's vicarious liability may be dual or additional. *Luminar* as a case in which dual vicarious liability was held not to be present supports this. The door attendant in *Luminar* did not contract with Luminar, rather he contracted with ASE Security Services Ltd, however, he was an employee of Luminar for the purposes of vicarious liability since he was controlled by Luminar's management and integrated into its business. Luminar had no contract with him. They did not pay him. Yet they were vicariously liable for him. The employer with whom he had a contract, and who paid him, ASE Security Services Ltd, on the other hand, were not vicariously liable for him – they did not exercise the requisite control. Whilst the language of transfer of employment is often used, this is a fiction, there is no transfer of contract.<sup>98</sup> One entity is made vicariously liable for another simply on the basis of control, and (possibly) integration. The application of this to volunteers and volunteering organisations is obvious. It should make no difference that there is another entity with whom that individual does have a contract with who does not exercise any control. *Luminar* also shows the centrality of control, an employer who pays you, and with whom you have a contract of employment ceases to be vicariously liable for you if they cease to have control over you.

### B. Unincorporated Associations

In *Various Claimants v Institute of the Brothers of the Christian Schools*<sup>99</sup> the Claimants alleged abuse by staff at their former school.<sup>100</sup> For the relevant period the School was run by a board of managers. Some, but not all, of the School's teachers were supplied by the

<sup>96</sup> [2008] EWCA Civ 1257, [2009] Q.B. 725.

<sup>97</sup> Para. [58], *per* Stanley Burnton L.J. "Supervision is not control. An architect or a clerk of the works may supervise the work of a contractor's employees, but he does not exercise control for the purposes of vicarious liability. ... But the right to supervise does not, without more, carry with it the entitlement to instruct how to do the work, particularly where the employees are not unskilled labourers but skilled welders."

<sup>98</sup> *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 Q.B. 437, 443 *per* Denning L.J.

<sup>99</sup> [2010] EWCA Civ 1106. This case it is submitted casts some doubt on the status based risk approach contained in *Maga*, see *Op. cit.* P. Morgan, "Distorting Vicarious Liability".

<sup>100</sup> Para. [1].

Institute of the Brothers of the Christian Schools,<sup>101</sup> an unincorporated association. The question was whether the Institute, in addition to the School Management, were liable for the acts of abuse committed by the Brothers who were employed by the Managers.<sup>102</sup> In addition, at least one volunteer helper was alleged to have been an abuser,<sup>103</sup> however, the Court of Appeal did not address the issue of vicarious liability for volunteers.

The Institute is a ‘lay community of teachers’, who swear lifelong vows of poverty, chastity, and obedience, live under a strict rule of conduct and wear habits.<sup>104</sup> Members are addressed as ‘Brother’. A brother is a ‘lay’ religious and cannot be ordained as a priest, since the “reason for his ministry is not to preside at liturgical services or to administer the sacraments, but to educate his students as Christians in secular subjects as well as in religion”.<sup>105</sup> They live in communities and evangelise through teaching. They are a ‘lay’ rather than a monastic order since they are subject to the authority of the Diocesan Bishop.<sup>106</sup> Whilst the issue of vicarious liability was in the context of dual vicarious liability it did not turn on this issue and the Court of Appeal examined the question of vicarious liability for members of unincorporated associations generally.

The Institute was held not to be vicariously liable for the Brothers’ acts of abuse. Hughes L.J.,<sup>107</sup> held that vicarious liability could apply to unincorporated associations,<sup>108</sup> but treated the position differently to employment, appearing to propose that the test for establishing sufficient connection to the tort is different. This is an additional form of vicarious liability, although Hughes L.J. did not consider it to be a new one.<sup>109</sup> Pill L.J. held that the case did not turn on the Institute’s unincorporated association status,<sup>110</sup> as it is a hierarchical tight-knit organisation with a mission, and thus a Court should not be deterred from finding vicarious liability by qualms about finding members responsible for the conduct of another member. He correctly noted that<sup>111</sup> the Institute is distinguishable from a professional or educational organisation.<sup>112</sup> Nevertheless the claim to vicarious liability failed upon an

<sup>101</sup> The De La Salle Institute, hereafter ‘the Institute’. The brother teachers were identifiable by their names and dress.

<sup>102</sup> Under contracts of employment.

<sup>103</sup> Para. [9].

<sup>104</sup> Para. [54], [78].

<sup>105</sup> [http://www.lasalle.org/index.php?option=com\\_content&view=article&id=96&Itemid=55&lang=en](http://www.lasalle.org/index.php?option=com_content&view=article&id=96&Itemid=55&lang=en) (last visited 21 February 2012).

<sup>106</sup> Para. [24].

<sup>107</sup> With whom Tomlinson L.J. agreed.

<sup>108</sup> Para. [38].

<sup>109</sup> Para. [40]–[41], given that partnerships are a form of unincorporated association.

<sup>110</sup> Para. [76].

<sup>111</sup> Para. [83].

<sup>112</sup> Which normally decides what standard a person has to attain before a qualification is conferred, Para. [84].

analysis of the responsibility for managing the School.<sup>113</sup> The School was run by a Board of Managers, not the Institute. The Institute had not undertaken the role of managing the School,<sup>114</sup> and did not manage the School.<sup>115</sup> The Institute did not exercise effective control over a Brother's conduct of his teaching job,<sup>116</sup> instead a Brother's teaching was subject to the control of the Board of Managers.<sup>117</sup> It was the Board of Managers, the employers of the Brother Teachers, who managed the School, who were vicariously liable for them.<sup>118</sup>

In examining the connection of the tort to the relationship, Hughes L.J., noted that the position of an agent<sup>119</sup> is not the same as an employee,<sup>120</sup> and that the relationships should be treated differently: "They are clearly not all treated the same. They do not all create the same connection between the tort of D1 and his relationship with D2".<sup>121</sup> He evoked the close connection test in *Lister*, nevertheless he did not reach the outcome which an application of the *Lister* close connection test would reach in the circumstances. This was recognised by Pill L.J., who considered that if vicarious liability were to be established, applying *Lister* it would extend to the alleged acts of abuse.<sup>122</sup> Instead Hughes L.J., with whom Tomlinson L.J. agreed,<sup>123</sup> as shown by his conclusion that there was no close connection, used a narrower test, although he did not fully elucidate it. He considered that "the risk must be inherent in a business or operation carried on by D2, entrusted by him to D1".<sup>124</sup> He considered there was no entrustment to the Brother Teachers by the other members of the Institute, and even if there was they did not have the "required interest" to "create the necessary close connection".<sup>125</sup>

Whilst the case was decided in the context of institutional abuse, vicarious liability within unincorporated associations obviously extends beyond this area. It is the category of vicarious liability that you would wish to examine if during a village cricket match a club member of a visiting team negligently hits a six into a playground and injures a child. This form of vicarious liability seems to be founded on control

<sup>113</sup> Oddly *Maga* was not referred to in this case. This does not however make the case *per incuriam* since the facts are sufficiently different for the two to be distinguished, further in so far as *Various Claimants* deals with the required connection of the relationship to the tort, it deals with a different relationship and it is submitted that it is possible to discern from the case that different tests of connection to the tort may be applicable to different relationships (for example unincorporated associations).

<sup>114</sup> Para. [87].

<sup>115</sup> Para. [53].

<sup>116</sup> Para. [48], [56].

<sup>117</sup> Para. [53].

<sup>118</sup> Para. [85].

<sup>119</sup> Used here in a broad sense.

<sup>120</sup> Para. [42].

<sup>121</sup> Para. [42].

<sup>122</sup> Para. [85].

<sup>123</sup> Para. [65].

<sup>124</sup> Para. [47].

<sup>125</sup> Para. [57].

and interest in the activity,<sup>126</sup> which in turn relates to the issue of attribution. The test for sufficient connection, whilst only loosely elucidated, would appear to be different from the close connection test adopted within the employer/employee context.

The recognition of vicarious liability in the context of unincorporated associations is significant. Within English law the notion of an unincorporated association is very broad. Unincorporated associations do not have legal personality.<sup>127</sup> They may encompass large complex and disciplined organisations, such as the Institute, to informal and temporary groups that have come “together for temporary and specific purposes with little or nothing by way of formally-agreed rules”.<sup>128</sup> According to Hughes L.J. in *R v L*<sup>129</sup>: “the legal description “unincorporated association” applies equally to any collection of individuals linked by agreement into a group. Some may be solid and permanent; others may be fleeting, and/or without assets. A village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association”.

Lawton L.J. in *Conservative and Unionist Central Office v Burrell*<sup>130</sup> stated that an unincorporated association is “two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will”. For there to be an unincorporated association there is a need for a contract between each and every member.<sup>131</sup> However, such contracts are easily found, and if an “implicit but sufficiently clear understanding is reached by two or more people, there is a contract forming an unincorporated association”.<sup>132</sup>

*Various Claimants* turned on issue of control, who had power to control the Brothers in their teaching role, whilst the Institute no doubt had significant control over the Brothers’ day to day lives and conduct, it did not control the Brothers in their teaching role, instead, the Board of Managers did. It would appear that both the employer + category of vicarious liability, and the category present in *Various Claimants* can

<sup>126</sup> An approach to vicarious liability based on an economic view of enterprise liability cannot account for liability in such a context given the charitable activities of the Institute, nor would it account for imposing vicarious liability on range of unincorporated associations.

<sup>127</sup> Scottish Law Commission, *Unincorporated Associations*, Scot Law Com No 217, (Edinburgh 2009), pp. 2 [1.4], 7 [2.2]; N. Stewart, N. Campbell, and S. Baughan, *The Law of Unincorporated Associations* (Oxford 2011), p. 4 [§1.09].

<sup>128</sup> Stewart *et al.*, p. 7 [§2.1].

<sup>129</sup> [2008] EWCA Crim 1970, [2009] P.T.S.R. 119, at [11].

<sup>130</sup> [1982] 1 W.L.R. 522, 525.

<sup>131</sup> *Ibid.*

<sup>132</sup> Stewart *et al.*, p. 12 [§2.01].

collapse into a single category based on control and interest in the activity, this leading to attribution, whose team are they playing for?

Whilst the requirement for a contract for there to be an unincorporated association would suggest that the category of vicarious liability for unincorporated associations cannot be joined with the employer + category, this is to fall into a trap. Although such contracts are readily found, for vicarious liability to be present what is required by *Various Claimants* is control and interest, membership alone is not enough. With the unincorporated association category the control is provided by, and the interest demonstrated via, the contract, however, in vicarious liability control may be present via other means such as criminal law, public or regulatory law, tortious duties and factual control. The unincorporated association category is simply an illustration of that concept. That such categories can collapse into a single category is supported by the *Luminar* decision.

### C. Elevation of Status?

The core of *Maga*<sup>133</sup> is that where you elevate the status of another such that it materially increases the risk of the commission of a tort, you are vicariously liable for that tort, at least where the person whose status is elevated is your employee.<sup>134</sup> Is there also a category of vicarious liability whereby A who confers office upon B, or elevates<sup>135</sup> a particular individual B to a position of authority and grants them status over another (C), may be vicariously liable for B's torts by mere fact of the conferral of or elevation of status alone, even when B is not treated as A's employee? Such a category would have obvious application in the case of foster carers, or religious ministers. This idea of status is broader than the conferral of powers of control over the victim, for example a religious minister, such as the priest in *Maga* may occupy a position of authority and has status conferred upon him through ordination, but that minister will not necessarily have any power of control, even over his own congregation, or those unconnected with his religion or religious denomination.

Leaving aside the criticisms made of a status elevation approach by the author in an earlier piece,<sup>136</sup> status elevation or status conferral by themselves cannot be enough to trigger potential vicarious liability. More must be required. A change in status may enhance the risk of the commission of a tort, and therefore play a role, but risk enhancement by itself is also not a justification for vicarious liability. Even if status

<sup>133</sup> [2010] EWCA Civ 256, [2010] 1 W.L.R. 1441.

<sup>134</sup> *Ibid.*

<sup>135</sup> The word elevate is used to connote an increase in "status".

<sup>136</sup> P. Morgan, "Distorting Vicarious Liability".

elevation has been used within existing categories of vicarious liability in establishing close connection, it cannot establish new categories of vicarious liability by itself. This is so even if the elevation is to a high status, such as that of a Peer; in such a case the Crown cannot be vicariously liable for the acts of the newly ennobled who utilise their newfound status to defraud others. A response to this is that ennoblement confers status, but not authority, over others, and it is the status derived authority that is the core of the elevating status approach. For example, a University may confer degree awarding powers on a private college, this confers a status on that college which it did not previously have. However, it does not grant authority to the college over the students of that college. Any authority the private college has over its students stems from its contractual arrangements with those students. Although the conferral of status may have facilitated that authority in that the students may not have contracted with the private college if it did not have degree awarding powers, the authority is not directly derived from that status. This objection is still unsound, with the case of adoption, where a person is elevated to the ultimate position of authority over another, that of parent to a child, the state cannot be subject to vicarious liability for the acts of the adoptive parent post adoption despite the state's role in the adoption process. Simply placing B in a position where they may have authority or control over another is not enough, there should be no vicarious liability without control or attribution (of or over B) being present.

Whilst the point of whether or not there could be vicarious liability for a Priest was not taken in *Maga*, it was in *JGE* and in the decision of the Supreme Court of Canada in *Doe v Bennett*.<sup>137</sup> With a religious minister such as the Priest in *Maga* or *JGE*, control and attribution may be present. It is these, rather than the status alone which mean that the Roman Catholic Church should be vicariously liable for a Priest's torts provided there is a sufficient connecting factor to the tort. The decision of the High Court in *JGE* to the extent that it can be interpreted to suggest otherwise is incorrect. Reliance on status based risk enhancement/creation to establish a category of vicarious liability is unwelcome.<sup>138</sup>

<sup>137</sup> 2004 SCC 17, [2004] 1 S.C.R. 436.

<sup>138</sup> See P. Morgan, "Distorting Vicarious Liability". Although referring to the issue of status in establishing close connection to the tort, the arguments are equally valid in this context. In relying upon status elevation the High Court in *JGE* cited South African authority (*Police v Rabie* (1986) 1 S.A. 117) which sits oddly alongside co-ordinate English case law (P. Morgan, "Distorting Vicarious Liability", p. 943). The reliance on status in *JGE* by the High Court may be a by-product of the misleading approach taken in the case to the level of control exercisable by a Bishop over a Priest of his Diocese (see below). These criticisms appear to have been accepted by Davis L.J. in *JGE*, at [120]-[121], who cited the author's previous work (at [117]).

#### D. Close Connection

Recently an alternative category of vicarious liability has been suggested based on close connection. If there is a sufficiently close connection between A and B, A may be vicariously liable for B. This is a relationship close connection test. Confusingly the same language is used in this relationship close connection test as the close connection test which is used to determine whether or not the tort was sufficiently connected to the relationship.

The relationship close connection test stems from the Supreme Court of Canada's decision in *Doe v Bennett*. This case concerned the question of whether or not a Roman Catholic Episcopal Corporation could be vicariously liable for the torts of a Roman Catholic Priest of the Diocese. The significance of this case is not the fact that it addresses the question of vicarious liability for a religious minister, but rather that it successfully invoked vicarious liability for a non-employee. In doing so *Doe* proposed a test of broad application to distinguish between those for whom vicarious liability should be present, and those for whom it should not.

Whether or not Roman Catholic Priests are employees does not affect the potential value of the close connection approach proposed in these cases, given that these tests will be applicable to those who are clearly not employees, such as unpaid volunteers, or those to whom other categories of vicarious liability have been applied so far. Whilst recent case law on the employment status of religious ministers has accepted employee status for certain purposes,<sup>139</sup> these cases deal with other denominations with very different systems of regulation and canon law to the Roman Catholic Church, and the Court of Appeal in *JGE* held that Roman Catholic Priests were not employees.<sup>140</sup>

In *Doe*, McLachlin C.J., giving the judgment of the court, considered that there were two elements to vicarious liability, “[f]irst, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer.”<sup>141</sup> This is a model of vicarious liability based not on employment, but instead predicated on the proximity of the relationship

<sup>139</sup> *Moore v President of the Methodist Conference* [2011] EWCA Civ 1581, Methodist Minister was an employee for the purposes of Section 230 of the Employment Rights Act 1996. *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, [2008] I.C.R. 282, New Testament Church of God Pastor was an employee for the purposes of Section 230 of the Employment Rights Act 1996. *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 A.C. 28, Ordained Minister of the Church of Scotland working as an Associate Minister was an employee for the purposes of Section 82(1) of the Sex Discrimination Act 1975.

<sup>140</sup> The Court of Appeal in *JGE* held that they were not employees, at [30] *per* Ward L.J., at [131], *per* Davis L.J.

<sup>141</sup> Para. [20].

between two parties. Its applicability to volunteers is clear. For the Supreme Court of Canada the determination of the sufficiency of closeness of the relationship, is strongly influence by control: “[a]t the heart of the inquiry lies the question of power and control by the employer”.<sup>142</sup> The Supreme Court of Canada held that the relationship between priest and bishop was sufficiently close for vicarious liability to be present, since a bishop exercises significant control over a priest.<sup>143</sup> Whilst the invocation of control in *Doe* is theoretically sound, the flaw in *Doe* it that it is a model based on a single dimensional idea of control, that is too simplistic and would lead to odd conclusions (see below).

This use of the language of close connection to establish whether or not a relationship between parties is sufficient for it to trigger vicarious liability was used in an English context in the first instance decision in *JGE*. *JGE* was the first case in which an English Court was specifically asked the question of whether a Diocesan Bishop of the Roman Catholic Church can be vicariously liable for the acts of a priest within the diocese. In other English cases this point has been assumed or conceded.<sup>144</sup> Both the High Court and Court of Appeal concluded that the relationship was sufficient to trigger vicarious liability, only the High Court relied on a close connection test. An efficient shortcut to the conclusion existed through the notion of vicarious liability within unincorporated associations, however, this form of vicarious liability was not discussed.<sup>145</sup>

The High Court in *JGE* however, despite utilising the language of close connection, and citing McLachlin C.J.’s, two stages, ignored the Supreme Court of Canada’s approach to control as being a key part of the determination of close connection. The motivation behind this appears to be the different findings of fact at first instance in *JGE* compared to *Doe* on the evidence of canon law as to the question of the

<sup>142</sup> Para. [21].

<sup>143</sup> Para. [27]. “The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline him.” ([27]). The relationship was therefore considered “akin to employment” ([27]). [Editor’s note: For the official view of the Catholic Church, see Pontifical Council for Legislative Texts, “Nota Esplicativa” (2004): [http://www.vatican.va/roman\\_curia/pontifical\\_councils/intrptxt/documents/rc\\_pe\\_intrptxt\\_doc\\_20040212\\_vescovo-diocesano\\_it.html](http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pe_intrptxt_doc_20040212_vescovo-diocesano_it.html) (last visited 19 September 2012.)]

<sup>144</sup> The litigation instead being fought on the sufficiency or not of the connection between the tort and the relationship: *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, [2010] 1 W.L.R. 1441, at [36], (Diocesan Priest/Non-Catholic member of the local community). Whilst other cases have assumed that there may be vicarious liability for Priests, these cases have not looked at the relationship between Bishop/Priest, but rather in these cases the Priest was also a teacher and the principal was the Board of Governors, e.g. *C v D, SBA* [2006] EWHC 166 (QB) at [111] (Priest Headmaster/Pupil, Board of Governors “unquestionably” vicariously liable), *Raggett v Society of Jesus Trust 1929 for Roman Catholic Purposes* [2010] EWCA Civ 1002; [2010] C.P. Rep. 45 (Priest Schoolteacher/Pupil).

<sup>145</sup> However, given that the test of connection to the tort test in unincorporated association cases would appear to be different, and more difficult to establish, it is understandable why counsel for the claimant would not wish to frame their case around this pocket of vicarious liability.

control that a bishop exercises over a priest. The test proposed at first instance in *JGE*, whilst using the same language, is more fluid, indeed, MacDuff J. recognised the possibility for uncertainty, admitting that the close connection test is easier to recognise than define<sup>146</sup> and stated that: “[t]he court will look carefully at the full nature of the relationship. All the surrounding facts and circumstances are to be considered. These will include many of the matters which are of relevance also at stage two”.<sup>147</sup> Again, the significance of this case in the context of this article, is not that it concerns priests, or its conclusion on that issue, but rather the alternative category of vicarious liability that it proposes.

MacDuff J’s close connection test in *JGE* may be seen as attempt to introduce a new, more encompassing form of vicarious liability to English law. Despite invoking *Doe* and the same language, this close connection test, is a different test to that in *Doe*. Its applicability to volunteers, however, is also clear. Whilst not expressly stated,<sup>148</sup> that this was intended as a new overarching category of vicarious liability, this is clear from the conclusion that a relationship of employer/employee would meet this first test, but other relationships would also be sufficient, including Bishop/Priest.<sup>149</sup> An overarching category of vicarious liability is welcome, the current un-rationalised pockets of liability that currently exist lead to artificialities and anomalies. However, a shift away from control, given its centrality to vicarious liability is unwelcome.

Unfortunately, in so far as either version of the relationship close connection test were an attempt to create an overarching category of vicarious liability they were both flawed. Firstly, with such an approach the same factual material may need to be examined twice, firstly in establishing the close connection between the persons, and secondly to establish the close connection between the tort and the relationship.<sup>150</sup> Thus in some cases if the first stage is fulfilled, the second stage which determines the connection to the tort may be a formality, in that the question and test will not be sufficiently different.

Secondly, whilst an attempt at rationalising vicarious liability is welcome, close connection is not the appropriate way in which to do so. Close connection as a test in this context (in either form) is too broad. Simply assessing the association between two individuals would lead to

<sup>146</sup> Para. [41].

<sup>147</sup> Para. [41].

<sup>148</sup> Whilst the argument in the case was centred on whether the relationship was “akin to employment”, refreshingly MacDuff J. moved away from simply discussing whether or not a Priest is an employee. Disappointingly, whilst MacDuff J. acknowledged that other categories of vicarious liability may exist ([6]), he did not discuss, or engage with them, or attempt to overtly rationalise them into a single category.

<sup>149</sup> Para. [34], [43].

<sup>150</sup> Particularly given the reliance on authorities on the second close connection test to inform the relationship close connection test by MacDuff J. in *JGE*.

vicarious liability of parents for the acts of their children, something which is not accepted in English law.<sup>151</sup> That this test is too broad is implicitly admitted in MacDuff J.'s comments in *JGE*: "to assist the performance of the role",<sup>152</sup> and further through his use of the language of just and fair,<sup>153</sup> as a control mechanism for vicarious liability which is reminiscent of fair, just, and reasonable, the language used to control direct duties and to determine whether or not they exist in a given context. It is therefore with some relief that the Court of Appeal accepted the author's criticisms of the close connection test in *JGE*<sup>154</sup> (including the parent/child example)<sup>155</sup> and refused to endorse such a test.

Although the model of close connection in *Doe* is preferable to that at first instance in *JGE* since it correctly incorporates the centrality of control to vicarious liability. The flaw with either model of relationship close connection test is that vicarious liability does not look at the strength of association between two individuals. Instead it looks at the strength of association between two individuals in the context of a purposeful activity assigned by one (A) to the other (B) (or assigned by and to one another, such as in some unincorporated associations), for the benefit of A, or in order to achieve A's objectives.<sup>156</sup> This is the reason why a parent is not vicariously liable for their child. The child has no assigned purposeful activity, unless it is assigned a task by another, which must be for that other's benefit or to achieve that other's objectives. Of course, there will be some circumstances of parental vicarious liability, where a parent has employed their own child, but vicarious liability does not stem from the parental relationship alone, or their status. This is further dealt with below. An alternative rational account of vicarious liability is proposed later in this article, with a different overarching category.

### *E. Akin to Employment*

In holding a Bishop vicariously liable for a Priest the majority of the Court of Appeal in *JGE* stepped away from the close connection test used by the High Court and utilised a new category of vicarious liability, that of "akin to employment". This new category does not require

<sup>151</sup> *Donaldson v McNiven* [1952] 2 All E.R. 691, 692, per Lord Goddard C.J., "Some people have thought that parents ought to be responsible for the torts of their children, but they are not." See P. Giliker, *Vicarious Liability in Tort*, pp. 196–226 for a comparative survey of parental liability.

<sup>152</sup> Para. [42].

<sup>153</sup> Para. [42].

<sup>154</sup> P. Morgan, "Revising Vicarious Liability – A Commercial Perspective" [2012] L.M.C.L.Q. 175, 179. Cited in *JGE*, at [56], per Ward L.J., and [117], per Davis L.J.

<sup>155</sup> Para. [61], per Ward L.J.

<sup>156</sup> MacDuff J. recognises this implicitly, at Para. [35], "he was appointed in order to do their work", and at [36], "the man appointed and authorised by them to act on their behalf."

a contract of service,<sup>157</sup> and applies to where the relationship “is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable”.<sup>158</sup>

This is an incremental response, which will catch what the author has termed non-contractual employees. Its parameters are not yet hammered out. It may be open to criticism in that in operating this test Ward L.J. overstressed the economic element required for vicarious liability.<sup>159</sup> With some volunteers there may be no remuneration or financial benefits. The test also does not encompass some forms of vicarious liability based on agency and within some unincorporated associations. However, this criticism is unfair since unlike the close connection test this test does not attempt to encompass all forms of vicarious liability, and is not an overarching category of vicarious liability. There will still be cases in which policy requires vicarious liability to be present, even if by strict application of the binary divide of employee/independent contractor, (even including non-contractual employees, or relationships akin to employment), it should not be present.

## VI. ALTERNATIVES TO VICARIOUS LIABILITY

Non-delegable duties are often resorted to and adopted as a response to perceived inadequacies in vicarious liability.<sup>160</sup> It is being increasingly utilised to “plug the gaps left by ... vicarious liability” particularly given that formal employee-employer relationships are “dwindling”.<sup>161</sup>

*Lister* suggests that there may be such a duty in a child care context.<sup>162</sup> Such a duty would however depend on the wording of the relevant statute or statutory instrument.<sup>163</sup> Non-delegable duties are easy to invent. Indeed, Glanville Williams described them as a “logical

<sup>157</sup> Para. [73], *per* Ward L.J.

<sup>158</sup> *Ibid.*

<sup>159</sup> Para. [79]–[80]. Davis L.J. (the other member of the majority), ignored the financial considerations, and looked at control, connection, and objectives.

<sup>160</sup> See G. Williams, “Liability for Independent Contractors” (1956) C.L.J. 180; for non-delegable duties in a child care context see P. Case, *Compensating Child Abuse in England and Wales* (Cambridge 2007), 106–107.

<sup>161</sup> J. Murphy, “Juridical Foundations of Common Law Non-Delegable Duties” in J. Neyers, E. Chamberlain and S. G. A. Pitel, *Emerging Issues in Tort Law* (Oxford 2007), ch. 14, p. 371.

<sup>162</sup> See R. Stevens in *Emerging Issues*, p. 363.

<sup>163</sup> To give an example, with foster parents the legislation governing their relationships with both authorities and the foster children differs from jurisdiction to jurisdiction. Such a non-delegable duty was rejected by the Canadian Supreme Court in *MB v British Columbia* 2003 SCC 53, [2003] 2 S.C.R. 477 and *KLB v British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, whilst non-delegable duties were present in the relevant legislation the Court stated there was no general non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents. A non-delegable duty approach is taken in Louisiana, *Vonner v State of Louisiana*, 273 So.2d 252, LA 1973, and *Miller v Martin, Department of Social Services, State of Louisiana and Methodist Home for Children*, 838 So.2d 761, LA 2003. A non-delegable duty was also adopted in *Bartels v The County of Westchester*, 76 A.D.2d 517, NY 1980.

fraud”.<sup>164</sup> One cannot simply manufacture non-delegable duties for cases where liability for volunteers or other non-employees is desired, this would make liability for volunteers or non-employees more onerous than for employees, in that with non-delegable duties there is no need for a close connection to the tort for liability to be triggered.

Direct duties too are not the solution. To take an example, St John Ambulance may select a volunteer, train them, and assess them to ensure that they meet industry standards. That individual might also be a professional health care worker in their non-voluntary employment. Whilst the organisation owes a duty of care to the victim to properly select, train, and monitor the volunteer, to breach this duty fault is required. Where proper selection, training, and monitoring has occurred, if such a volunteer whilst on duty with St John Ambulance then attempts to use Reiki to deal with a heart attack, this causing harm, there will be no direct claim on St John Ambulance since it is not in breach of a direct duty to the heart attack victim as it is not at fault. If however an NHS ambulance paramedic responded to the incident, the NHS likewise owes a duty of care to the victim to properly select, train, and monitor its paramedics. Where the NHS has carried out proper selection, training, and monitoring, but the paramedic attempted to treat in the same negligent way, causing harm, there would also be no direct action against the health authority, since it is not at fault. However, in the latter case vicarious liability would be present as the paramedic is an employee. Likewise if St John Ambulance were utilising an employed staff member, instead of a volunteer, there would be vicarious liability.

#### VII. A RATIONAL ACCOUNT?

In examining the question of whether vicarious liability is present for a volunteer or for a non-employee there is presently a need to examine a number of different categories of vicarious liability, some of which overlap. The present system produces presently unlinked pockets of vicarious liability, in doing so it accepts vicarious liability for some individuals who do not have contracts of employment such as members of the Armed Forces and some office holders. Nevertheless, it fails to account for volunteers, of which there are many types from employees in all but name on the one hand, to occasional Church flower arrangers on the other.

The problem is that vicarious liability is not properly rationalised. Rather than accept that pockets of liability exist outside of the normal contractual employee -employer category which may render a principal

<sup>164</sup> G. Williams, “Liability for Independent Contractors” (1956) C.L.J. 180, 193. Cf. R. Stevens, *Emerging Issues*, p. 368: “Non-delegable duties are not the cuckoos in the nest.”

vicariously liable for another who they would not be liable for under the traditional divide, there has been a tendency to ignore them, or to declare them anomalous, whereas they are a natural release of steam caused by the inadequacies of the present approach to who is an employee for the purposes of vicarious liability. We tend to think of employer and employee, and employer and independent contractors as a binary divide. We forget that these divides are largely labels which we use to describe the outcome, of vicarious liability, or no vicarious liability. There are of course a range of relationships which are analogous to, but are not quite, employment, just as there are ranges in types of employment.

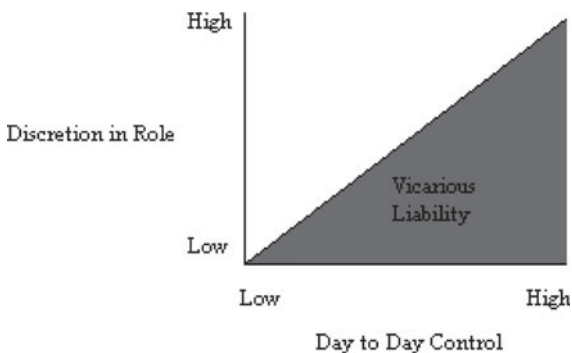
A better approach, linked to the idea of control and attribution is to think of vicarious liability as being a two axes scale, which assesses association. The position of a person on this scale indicates whether or not they are part of the principal's team so as to trigger vicarious liability for them. This approach does not require there to be any contract, and volunteers can be plotted onto the scale. A volunteer can be as much part of the team as a professional.

Along the X axis is day to day control. This aspect of control covers all day to day aspects of a person's role excluding the method of working. This axis ranges from the lowest level of control to the highest. Factors to determine the level of day to day control would cover, a range of matters including for example dictation of working hours and location, dress codes and uniforms, disciplinary systems, and whether or not they may have a lunch break, amongst many others. This ranges from a level of control from a highly regimented system where day to day control exists over persons even when they are off duty and where criminal penalties may be imposed for a failure to follow lawful orders (such as in the Armed Forces) or to act (such as within the Police Service), to a level of day to day control where the only control the principal has over the person is the power to exclude them from their premises, for instance a volunteer who cleans the Church hall after hours. This need not be control in law though, but rather control in fact, since in a highly regimented religious community such as a monastery there may be no "legal" control by the leader of a religious community such as an Abbot over the individual monk since English law may not recognise the canon law under which the monk made his vow of obedience, whereas in fact the Abbot's control over the monk would typically exceed most employers' control over their employees. With what we currently label independent contractors the principal is likely to have significantly less day to day control than over what we currently label employees, this will however, not always be the case.

The second axis is labelled discretion in role. This covers how the person carries out the role, and the level of direction they receive.

At one end of the scale the individual has little discretion in how to carry out the role, they must follow the direction and instructions of their principal as to the exact process they must use. At the other end of the scale is complete discretion, provided the person achieves the required end result it matters not which method they used to get there. This is a better approach than simply examining whether someone is an employee or independent contractor. The volunteer cleaner of the Church hall may be able to clean it using whatever method and equipment they like, however, an unpaid volunteer for St John Ambulance must follow certain processes, and may not for instance use Reiki to treat a suspected heart attack.

Using these two axes a person can be plotted on to the chart. Their position on the chart determines whether or not the principal is vicariously liable for them, whether or not they play for the principal's team, or are one of the support staff sufficiently connected to trigger vicarious liability. This method therefore includes those who do not have contracts of employment such as members of the Armed Forces, office holders, religious ministers and members of religious communities, volunteers, agents, hunt followers, and requires no stretching or the development of new categories. This approach would explain for instance why mounted subscribers for a hunt trigger vicarious liability on the part of the master of a hunt, but not the followers in cars.



What the diagram demonstrates is that for vicarious liability to be present, as the level of discretion in role increases, more day to day control is required to compensate for this higher level of discretion. For vicarious liability to be present where the level of discretion in role is at its highest, day to day control must be at an extremely high level.

Such an approach will make little difference for many of those over which vicarious liability is presently acknowledged to exist in so far as those currently considered employees are concerned, or those currently considered independent contractors, however, it will make a difference for some. This use of a two axes approach to the elements of control

also ensures that vicarious liability does not result for parents for their children, since one axis is discretion in the role.<sup>165</sup> The singular approach to what are presently seen as different forms of vicarious liability does appear to indicate that the same test of connection of the person's role to the tort is used for all cases, however, this need not be the case and the close connection test, which assesses the links between the relationship and the tort, can operate more strongly or weakly depending on where the relationship falls on the chart.<sup>166</sup>

Of course, there will be some circumstances of parental vicarious liability, but in these cases vicarious liability does not stem from the parental relationship alone, or their status. An example of where such vicarious liability is present is where a child is employed in the parents' family business. For the vicarious liability axis test to be triggered, a parent must assign the child an activity that has a purpose beneficial to the parent or which achieves the parent's objectives; the parent's objectives for the child (the actor), are not enough. Thus ordering the child to do its homework is not enough. Once such an assignment of a role has taken place, just like any relationship where someone is carrying out a role for another it becomes subject to the two axis test.

Thus where a child carries out work for the family business, there will be vicarious liability in some cases, but not in others which are more in the nature of what is currently termed an independent contractor relationship.

An example of where there would be no vicarious liability in most cases is where a parent orders their child to wash the parent's car. Just as if they get anyone else to wash their car for them, such as a scout carrying out work for "bob-a-job" week, the relationship becomes subject to the axis test. However, in both cases there would be no vicarious liability (the relationship is more in the nature of an independent contractor), they are not playing for the parent's team, and their discretion in role is high, even if the parent provides the relevant equipment. Supervision, as noted in *Biffa*, is not control. There is however a difference between the unrelated scout and the parent's child, in the context of the level of day to day control. However, vicarious liability is not present apart from the most extreme cases of when the parent directs exactly how the child is to carry out the job for them, so as to remove most of their discretion, and disciplines the child when they deviate from this; however, vicarious liability would be

<sup>165</sup> With the ordinary activities of a child, such as play, its level of discretion and the fact that it cannot be said to have a role vis-à-vis the parents means that vicarious liability is not present. If however the child is carrying out a task or work for its parents this is a different issue, and the discretion in the assigned role will need to be analysed.

<sup>166</sup> As with the current separate categories where a different test was used in *Various Claimants*.

present for anyone working under such a strict regime, whether they were the parent's child or not.

Control analysis is often discredited using the example of the hospital surgeon or ship's master.<sup>167</sup> The argument is that the hospital cannot direct the surgeon as to exactly how to carry out the operation, it itself lacks that skill. This is however artificial. There is nothing preventing a hospital or health service from laying down exactly how its employees must work, and the procedures they must follow, or for a shipping company to direct how its masters must navigate and the techniques they must use.<sup>168</sup> With an independent contractor, this right is not present. A shipping company cannot tell the harbour pilot how to conduct his pilotage when in their vessel.<sup>169</sup> A second criticism which has been given of control analysis is that it would result in superior employees being vicariously liable for subordinate employees.<sup>170</sup> This however does not follow. A company may employ two employees, one of which it makes the manager of the other. The power and control a manager has over an inferior employee does not result from the manager's relationship with the employee, but rather the employee's relationship with their shared employer. Any power or control that the manager exercises is power delegated to it by the controlling body, the company. For our twin axes approach delegated control is not a relevant form of control, we are instead interested in the control that exists due to an individual's direct relationship with another.

The twin axes approach gives a coherent account of all forms of vicarious liability. The place on the chart will determine the question of liability. The chart however is not an exact science with arbitrary measurements, instead the positions are relative, and there will of course be some cases which are difficult to place. The greatest difficulties as with the present law will be at the boundaries. It however produces a single rational scheme for vicarious liability.<sup>171</sup> It is also superior to the relationship close connection test, in so far as such a test is an attempt to produce a single rationalised approach to the

<sup>167</sup> See for instance *Morren v Swinton and Pendlebury BC* [1965] 1 W.L.R. 576, 582, per Lord Parker C.J. *Markesinis and Deakin*, p. 668, state in the context of the employee/independent contractor divide that with the increase in specialist skills of employees the ability of an unskilled employer to control the work has diminished. Whilst critical of it they state that it may be preserved in the form of a "right to control their work if he possessed the necessary skill". I argue that this is incorrect, an employer may control the work whether or not he possesses the necessary skill.

<sup>168</sup> E.g. whether to use GPS within sight of land or visual fixing, (amongst many others). Note *Zuijs v Wirth Brothers Pty. Ltd* (1955) 93 C.L.R. 561, 571, per Dixon C.J., Williams, Webb and Taylor JJ. "The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it."

<sup>169</sup> Note *The Pilotage Act 1987*, s. 16.

<sup>170</sup> *Op. cit.*, Atiyah, *Vicarious Liability in the Law of Torts*, p. 16.

<sup>171</sup> The scheme which provides an account of all categories of vicarious liability does not itself rest on a rejection of the enterprise liability approach (in either form) to vicarious liability.

categories of vicarious liability, not only in that it provides greater guidance, but also through the fact that it recognises that vicarious liability does not simply look at the strength of association between two individuals. Instead vicarious liability looks at the strength of association between two individuals in the context of a purposeful activity<sup>172</sup> assigned by one (A) to the other (B) (or assigned by and to one another, such as in some unincorporated associations), for the benefit of A, or in order to achieve A's objectives. The twin axes ensures that this is required and do not, for instance, result in vicarious liability for a parent for their children.

The scheme would not change the end result in *Doe* or *JGE* (at least under Roman Catholic Canon Law). Whilst the relationship of Bishop/Priest is close to the line, at first instance *JGE* unlike *Doe* downplayed the control that a Bishop had/has over a Priest by focusing on the Bishop's lack of a power to dismiss a Priest,<sup>173</sup> by which the Court meant dismiss from the clerical state (a form of laicisation, the power is reserved to the Vatican).<sup>174</sup> The majority of the Court of Appeal in *JGE* disagreed with MacDuff J's findings on the level of control<sup>175</sup> and found the level of control to be "real and substantial".<sup>176</sup> A Priest was/is subject to a highly developed disciplinary system and the Bishop did/does have other significant powers to remove a Priest from his Parish (with cause),<sup>177</sup> or to discipline or

<sup>172</sup> E.g. the purposeful activity in *Lister* was looking after the children; in *Mattis v Pollock* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158, the purposeful activity was controlling access and maintaining security.

<sup>173</sup> There was a high level of agreement on the part of the Canon Law experts, and MacDuff J. considered it uncontroversial that (at [29]): "There is effectively no control over priests once appointed. Within the bounds of canon law, a priest is free to conduct his ministry as he sees fit, with little or no interference from the bishop, whose role is advisory not supervisory. A bishop has a duty of vigilance but is not in a position to make requirements or give directions. ... The bishop had no power of dismissal. Dismissal from office would have to be effected through the church in Rome". Further "The bishop must exercise Episcopal vigilance. There is clearly some element of control within this, although there is nothing in the way of penalty or enforcement; the purpose is to oversee and advise. The bishop may only redeploy the priest in another parish if the latter consents." The findings on Canon Law contradicted those made in *Doe v Bennett*, this was recognised but not dealt with by MacDuff J. in *JGE*; it concerned the same Code and system of Canon Law.

<sup>174</sup> The relationship in *JGE* was under the 1917 Code of Canon Law. Such relationships are now governed by the 1983 Code of Canon Law. For reduction to the lay state see Can. 211, (Can. 290, 1983 Code), some effects remain since the ordination is not itself invalidated.

<sup>175</sup> Para. [126], [134]. *per* Davis L.J.

<sup>176</sup> Para. [134].

<sup>177</sup> The Church recognises a sacred hierarchy of clerics, "in which some are subordinated to others" (Can. 108 § 2 of the 1917 Code, the equivalent provision in the 1983 Code does not state this (Can. 266)). Under Can. 127 (see Can. 273 in the 1983 Code), clerics are obliged to show reverence and obedience to their own Ordinary (i.e. a Priest reverence/obedience to his Bishop). An Ordinary cannot transfer without cause an unwilling irremovable Priest without special facilities from the Apostolic See (note Can. 2163, there is no equivalent provision in the 1983 Code. Under 1983 Code: Can. 1748–1752 there is no need to resort to the Apostolic See). However, under the 1917 Code an Ordinary can remove a removable Priest provided the procedure in Can. 2163–2167 is followed (see Can. 1748–1752, 1983 Code). Additionally, where there is cause an Ordinary can remove even an irremovable priest from his Parish (Can. 2147, procedure at Can. 2147–2156; removable pastors: Can. 2157–2161); (Can. 1740–1747, 1983 Code). An Ordinary could also

coerce<sup>178</sup> him in a number of circumstances, many of these being in excess of the powers which an ordinary employer would have.<sup>179</sup> By analogy, whilst a Bishop cannot dismiss a Priest from the clerical state, he can remove the Priest from active ministry or suspend<sup>180</sup> him, just as a hospital can dismiss or suspend a doctor from his position at the hospital but cannot strike the doctor off the Medical Register, this is instead for the General Medical Council. Significantly, control is assumed in safeguarding reports relating to the Roman Catholic Church.<sup>181</sup> There are also a number of restrictions on the conduct and requirements in conduct of a Priest's day to day life, which few employees face,<sup>182</sup> and a requirement of a uniform.<sup>183</sup> A Priest's discretion in role varies depending on the function he is exercising. He has significant discretion in his evangelic function, and may for instance evangelise through running a football club or a youth disco, but he has very little discretion in his liturgical function.<sup>184</sup> He may also be granted a specific function by his Bishop such as vocations director or hospital chaplain. That these cases often involve sexual abuse may distort our view as to the applicability of vicarious liability to the relationship of Bishop/Priest. If a Priest who is appointed Hospital Chaplain by his Bishop, and whose duties require him to attend the hospital to administer the sacraments (where his liturgical discretion is minimal) to Catholic patients, negligently injures a patient during the administration of the sacraments, that there should be vicarious liability seems clear cut.<sup>185</sup>

It has to be acknowledged that this rationalised model of vicarious liability will produce some limited expansion to vicarious liability in

immediately deprive a Priest of his parish in certain circumstances, e.g. concubinous Priests (Can. 2176, 2177; no direct equivalent in the 1983 Code, although Can. 1395 provides for suspension).

<sup>178</sup> E.g. Can. 2380, clerics or religious carrying on trade/business in breach of Can. 142 "are to be coerced by the Ordinary with penalties" (now see Can. 1392, 1983 Code).

<sup>179</sup> E.g. under Can. 2302, a command or a prohibition about living in a certain place or a relocation to house of penance. (No direct equivalent in 1983 Code).

<sup>180</sup> See Can. 2186 for suspension. Penal provisions on suspension also exist in both Codes.

<sup>181</sup> For example the review carried out by Lord Nolan available at <http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan1.htm>, (last accessed 21st February 2012), e.g. at Para 3.5.16.

<sup>182</sup> E.g. to display a holy exterior, and interior life (Can. 124; see analogous Can. 276, 1983 Code), prohibition on marriage/obligation of chastity/celebracy (Can. 132; Can. 277, 1983 Code), to avoid profane novelties and pseudo-science (Can. 129; Can. 279 §1, 1983 Code), prohibition on suretyship without permission of the Ordinary (Can. 137; Can. 285, 1983 Code), no gambling, hunting, and restrictions on entering taverns, (Can. 138; no such provisions under 1983 Code, but see Can. 285), obligation to avoid shows, dances, and spectacles, (Can 140; no equivalent in 1983 Code), prohibition on exercising business or trade (Can. 142; Can. 286, 1983 Code now permits this with permission).

<sup>183</sup> Can. 136; (Can. 284, 1983 Code).

<sup>184</sup> I.e. A Priest cannot refuse to use the new translation of the Missal into English and instead use the older translation.

<sup>185</sup> In the case of an Extra-Ordinary Minister of Holy Communion, a lay volunteer, who distributes Holy Communion to the patient, the day to day control over the lay volunteer would in the vast majority of cases be too weak for vicarious liability to be present. Note also Ward L.J.'s example in *JGE* at [83].

that relationships which have not been previously examined in English case law will become subject to analysis to see if vicarious liability may be present. An example of this is the relationship between franchiser and franchisee. In some cases the balance between day to day control, and discretion in role will be such that vicarious liability will be present between the franchisor and franchisee. Tools, equipment and uniforms may be provided by the franchisor, who in a number of cases will also advise and support the franchisee, exercising supervision and some control to ensure that the value of the brand is maintained. The franchisee's discretion in carrying out the role may be severely limited, and the franchisee may in some cases be required to perform their role in accordance to strict instructions and policy to ensure conformity between different franchisees. Whilst the franchisee will have a separate legal identity, they are often indistinguishable from the franchisor to their customers.<sup>186</sup>

A further example of a potential expansion is in the case of some PhD students. Whilst not considered "employees" some PhD students, particularly in the sciences, work on part of a funded project in a way that may resemble a job. The student may be required to work in the University's laboratory, as part of a team, under the instruction of others, working on the project of their supervisor, and in some cases the level of discretion in role may be minimal. Control may also be exercised over the student, in that there may be a dictation of regular working hours, working location, dress codes, and potential for withdrawing of funding. These are factors that will need to be considered when subjecting the relationship between the student and their university to the axis test. Some PhD students in the sciences may be in a relationship to their university sufficient to trigger vicarious liability. The same factors will of course need to be considered for PhD researchers in the arts and humanities, however, very few are likely to trigger vicarious liability.

The twin axes scheme which explains the case law and accommodates all of the current forms of vicarious liability, is not by itself incompatible with the notion of enterprise liability, provided a broader notion of enterprise liability is taken, a non-economic version, which considers an enterprise as the embarking on a purposive pattern of conduct with a definite end in view. For adherents to non-economic enterprise liability theories, this is an association with the enterprise test.

<sup>186</sup> In the United States vicarious liability for franchisees is regularly pleaded, and there can be in certain circumstances vicarious liability for a franchisee. This vicarious liability is based on a control based notion of "agency" or "apparent agency". See J. H. King Jr, "Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees" (2005) 62 *Washington & Lee L. Rev.* 417.

## VIII. CONCLUSION

The law is mature enough to accept non-contractual employees for the purposes of vicarious liability. So far the law has tended to attempt to squeeze non-economic actors into poorly rationalised additional categories of vicarious liability which are not accounted for in traditional vicarious liability doctrine. It is now possible to rationalise these different forms into a single category which accommodates all present and emerging forms of vicarious liability. The twin axes of day to day control and discretion in role can encompass all instances and determine in all circumstances whether a principal should be vicariously liable for an actor. Unlike the relationship close connection test the twin axes approach takes into account the fact that vicarious liability is not simply about associations between individuals, but rather associations in the context of beneficial purposeful activities.

Volunteers may work alongside paid employees, carrying out the same tasks, receiving the same training, and wearing the same uniform. They may be equally associated with the enterprise as employees. They may be indistinguishable to members of the public, or consumers of their services, from the paid employees they work alongside. Writing in 1990 McKendrick suggested that the development of an 'atypical' workforce, of the self employed, casual workers, temps, and homeworkers, outside the classic contract of employment, "undermines the goals served by the doctrine of vicarious liability".<sup>187</sup> To this development, and the greater use of subcontracting, can now be added the expansion of the voluntary sector into the commercial sphere, and also into the delivery of formerly public services. Voluntary bodies are often contracted to deliver services on a commercial basis, although the service itself may be delivered by unpaid volunteers. A system of vicarious liability founded on a binary division between employee and independent contractor is proving increasingly unsuitable. Courts are masking their increasing dislike of the binary test of employee/independent contractor through recourse to these other categories, particularly agency, and also employer + . The proposed model in this article faces up to this issue, rationalises these and other emerging categories of vicarious liability, and deals with and provides a way to assess new and emerging forms of occupation. In subjecting at least some volunteers to the principle of vicarious liability, it is providing them with a form of protection that their employee colleagues who are often

<sup>187</sup> E. McKendrick, "Vicarious Liability and Independent Contractors – A Re-examination" (1990) 53 M.L.R. 770, 784. See also R. Kidner, "Vicarious liability: for whom should the 'employer' be liable?" (1995) 15 Legal Studies 47, 49.

indistinguishable to outsiders possess. This acceptance of vicarious liability for at least some volunteers is not out of step with other common law jurisdictions.<sup>188</sup> Giliker considers that vicarious liability will “continue to evolve and change in accordance with the changing values of society. ... It is not static: this is its strength, not its weakness”.<sup>189</sup> It is submitted that this new rationalisation of the categories is a step in its evolution.

<sup>188</sup> See United States Restatement (Third) of Agency, 2006, which makes provision for the vicarious liability of volunteers: § 7.07 Employee Acting Within Scope Of Employment, § 7.07 “(3) For purposes of this section, (a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work, and (b) the fact that work is performed gratuitously does not relieve a principal of liability.” Note, J. D. Kahn, “Organizations’ Liability for the Torts of Volunteers” (1985) 133(6) U. Pa. L. Rev 1433. See also South Australia Volunteers Protection Act 2001, s. 5(1).

<sup>189</sup> Giliker, *Vicarious Liability in Tort*, p. 254