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Vicarious Liability in Scotland

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I. Introduction

This chapter first surveys the doctrinal core of vicarious liability in Scotland. Generally, the present law is either settled or on a predictable trajectory: of principal interest is the manner of its evolution to date and to come. If it develops as we envisage, problems which courts will encounter, and the character of future foreign influence, are in turn foreseeable. We address these matters in the third section of the chapter, before the fourth considers under-examined issues bearing on Scots law's response to historic child abuse.

II. General Principles of Vicarious Liability

Vicarious liability involves the imposition, regardless of fault, of liability upon one defender for another defender's delict (tort). Two elementary points may be addressed briefly. First, one cannot be vicariously liable if no delict has been committed.¹ Second, vicarious liability is distinct from direct liability for breach of a personal duty.² This section concentrates on the basic inquiry: the requirement of a relationship capable of giving rise to vicarious liability; and the requirement that any delict be relevantly linked to that relationship.³ Though we summarise and evaluate certain features of the current position on each of these issues, the fundamental stakes are like those in play in jurisdictions with far more law and literature of interest.⁴ To say something of any real moment, it is necessary primarily to examine how vicarious liability has developed, and is likely to develop, in Scotland.

¹ *Baxter v Colvilles Ltd* 1959 SLT 325 (IH); *Sutherland v Bank of Scotland Plc* [2014] CSOH 113 [42].

² *Marshall v William Sharp & Sons Ltd* 1991 SLT 114 (IH) esp 119 (Lord Ross), 124–25 (Lord Dunpark), addressing a common law safe system of work case before vicarious liability.

³ *Grubb v Shannon* [2018] SC GLA 13, 2018 SLT (Sh Ct) 193 [17], [61]–[64]; *Kennedy v Bonnici* [2021] CSOH 106, 2022 SLT 63 [55].

⁴ Scholarship which could not have been produced for want of material if focused principally on Scottish sources includes C Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Oxford, Hart Publishing, 2019); A Gray, 'A Critique of the Enterprise Risk Theory of Vicarious

A. Relationships Giving Rise to Vicarious Liability

The first stage of the basic inquiry concerns the relationships from which vicarious liability arises. Chief among them is employment. Cases of borrowed employees also pose no difficulty. Beyond that, eventual recognition of dual vicarious liability seems probable, and the notion of a relationship ‘akin to employment’ is less novel in Scotland than perhaps hitherto thought.

i. *Employment and Employment Pro Hac Vice*

It is well-established that, whilst there is no general liability for the delict of one’s independent contractor,⁵ relationships of employment and employment *pro hac vice* give rise to vicarious liability.⁶ In the mid-1940s it was recognised that the indicia of employment cannot remain frozen in time,⁷ and shortly thereafter, Lord Cooper confirmed that changing social, political and employment conditions render appropriate ‘a broad overhead view’ of the arrangements between persons which the courts encounter.⁸ Importantly, the judges are realistic about how influential should be a purported employer’s level of control over a purported employee. This will be important. But it has long been acknowledged that control need not be exercised in fact. It may suffice that the employer can secure the proper discharge of the purported employee’s functions should the need arise.⁹ Moreover, an employment relationship may exist even where control is practically unnecessary, or beyond a purported employer’s own skill.¹⁰

Control aside, any factor appearing relevant in a particular case must be considered, including powers of selection and dismissal, methods of and reasons for payment, financial risk, provision of tools or equipment, the general nature of a purported employee’s work, party intention,¹¹ the collection of income tax or national insurance or, of course, the presence of a contract that might qualify as one of employment.¹² Helpful more general questions include whether service

Liability’ (2019) 62 *Canadian Business Law Journal* 181; J Dietrich and I Field, ‘Statute and Theories of Vicarious Liability’ (2019) 43 *Melbourne University Law Review* 515. We wrote too early to consider fully Professor Elspeth Reid’s account of vicarious liability in *The Law of Delict in Scotland* (Edinburgh, Edinburgh University Press, 2022), [3.01]–[3.77].

⁵ *Grubb* (n 3) [48]–[49], [56]; for an exception, see, eg, *Esso Petroleum Co Ltd v Scottish Ministers* [2016] CSOH 15, 2016 SCLR 539 [14]–[24]: primary liability for independent contractors’ negligent damage to neighbouring property.

⁶ *King v Fife Council* 2004 Rep LR 33 (OH) [9].

⁷ *Short v J&W Henderson Ltd* 1946 SC (HL) 24, 33–35, where Lord Thankerton opined that the indicia of employment may require to be restated. *Short* was a workers’ compensation statute case, but is cited in vicarious liability cases such as *Kilboy v South Eastern Fire Area Joint Committee* 1952 SC 280 (IH) 285, 287.

⁸ *Kilboy* (n 7) 285–87.

⁹ *Short* (n 7) 33–35.

¹⁰ *United Wholesale Grocers Ltd v Sher* 1993 SLT 284 (OH) 287.

¹¹ *Ibid* 286–87.

¹² *Grubb* (n 3) [87].

in return for remuneration is offered as opposed, for example, to an end result simpliciter; or whether a purported employee is part and parcel of another's business, rather than conducting a separate business on her own account as a true independent contractor.¹³ Recent authority permits the latter question to be understood as the kernel of an 'entrepreneur test'.¹⁴ Both questions assist in the identification of factors bearing on a given case.

There is no single test for employment *pro hac vice*. Criteria which assist in some cases will not in others.¹⁵ But again, there exist general questions to focus the analysis. Appellate authority suggests that, broadly, the matter depends primarily on the transfer, not of actual detailed control over the manner of an employee's work,¹⁶ but of capacity to direct, or to *delegate* to her a discretion as to, how work is done.¹⁷ It has also been proposed that the search is for facts establishing a transfer of responsibility for conduct in the discharge of functions, and that this *may* be less likely in cases involving employees considered skilled.¹⁸ Furthermore, an employee must expressly or impliedly accept working for a temporary employer. In this regard, it appears to have been thought that something in the nature of a contract was required.¹⁹ But for decades it has been clear that a tripartite agreement to transfer the employee from one employer to another is not essential.²⁰

Just as in much earlier times,²¹ English sources on the above issues have continued freely to be cited in the courts: when the indicia of employment are recalled;²² and in matters concerning borrowed employees.²³ Also observable in secondary sources,²⁴ this openness supplements learning that already exists.

¹³ *Sher* (n 10) 287.

¹⁴ See *Grubb* (n 3) [72], [99], citing *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 [72].

¹⁵ *Malley v London Midland & Scottish Railway* 1944 SC 129 (IH) 136, 140–41, 144–45.

¹⁶ Though transfer is likelier where, eg, the usual employer cedes control over the employee's place, apparatus and manner of work, as observed in *Lyell v Sun Microsystems Scotland BV* [2005] CSOH 36, 2005 SCLR 786 [6](3), [14], an employers' (direct) liability case.

¹⁷ *McGregor v JS Duthie & Sons & Co Ltd* 1966 SLT 133 (IH) 141–142 (Lord Grant), 143 (Lord Strachan), 145 (Lord Walker).

¹⁸ *King* (n 6) [11]–[12]; *Moir v Wide Arc Services Ltd* 1987 SLT 495 (OH).

¹⁹ *Malley* (n 15) 137 (Lord Cooper, original emphasis: 'strictly speaking, there must always be ... a tripartite agreement'), 147–49 (Lord McKay), 149–50 (Lord Jamieson).

²⁰ *McGregor* (n 17) 142 (Lord Grant), 144–45 (Lord Walker).

²¹ See P Simpson, 'Vicarious Liability' in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol II (Oxford, Oxford University Press, 2000) 604–05, explaining English influence on the Scottish recognition of employment *pro hac vice*, tentatively dated to 1893. See also *Ogilvie v The Magistrates of Edinburgh* (1821) 1 S 24 (IH), in which the court sent away to English ports for information about 'the manner of appointing and paying pilots, and the understood freedom from responsibility on the part of those who appointed them'.

²² For example, in *Kilboy* (n 7) 285–86, Lord Cooper relied upon both Scottish and English authority. See, similarly, *Marshall* (n 2) 121.

²³ Where the decision in *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 (HL) has been highly influential. Various speeches are cited in the borrowed employee cases mentioned above.

²⁴ See, eg, G Cameron, *Thomson's Delictual Liability* 6th edn (London, Bloomsbury, 2021) [12.6]–[12.8], [12.18]; Reid (n 4) [3.18]–[3.22].

As the cases drawn upon here from the twentieth century onwards show, Scots law is self-sufficient as regards the principles which guide the identification of employment relationships. Those principles are easily stated, and their concreteness must at least aid their application. But it is their general open texture that makes it easy to act upon the clear licence which judges past have given to keep the law moving, and this is perhaps the most important feature of the body of authority addressed here. From a doctrinal perspective, we might look forward to refinement of what could often be rather unrestrained, multi-factorial examinations of fact situations, to see if they disclose employment.²⁵ Of most obvious interest in this regard will be the general questions highlighted above. They may help sharpen academic writings, pleadings and the judicial guidance which will benefit from at least some systematisation as it proliferates in further decided cases. From a practical perspective, as in other jurisdictions, newer working and employment practices will cause novel fact patterns to come before the courts;²⁶ and they will further occupy those advising clients. In particular, what has been called ‘the orthodox employee/independent contractor distinction’ will likely continue to be challenged by employers, who have ‘an obvious incentive ... to seek to pre-empt vicarious liability by dressing their workers in the clothing of contractors rather than employees’.²⁷ On top of the legal flexibility identified above, Scots law’s theoretical ability to respond to this difficulty, and others, is or will be improved by developments considered under the next two headings. But in turning to them, we concentrate on the insights they yield about how the law is shaped in this jurisdiction.

ii. Dual Vicarious Liability

It is likely that, when directly considered again, dual vicarious liability will be recognised in Scots law.²⁸ In *Park v Tractor Shovels Ltd*,²⁹ part of Hatten’s role was to maintain his employer’s plant at a steel works. He volunteered to assist the pursuer with work on plant belonging to the latter’s own employer at the same site. Hatten negligently injured the pursuer, who argued, inter alia, that both his own employer and Hatten’s usual employer were vicariously liable. Lord Cowie accepted that it was ‘at least in theory possible that although Hatten was

²⁵ For an academic attempt to do this elsewhere, see P Bomball, ‘Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law’ (2021) 43 *Sydney Law Review* 83.

²⁶ For earlier developments in England, Australia and Hong Kong, see P Giliker, ‘Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective’ (2018) 6 *Chinese Journal of Comparative Law* 265, 267–71.

²⁷ D Nolan, ‘Reining in Vicarious Liability’ (2020) 49 *Industrial Law Journal* 609, 616–17. See also *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 [29].

²⁸ Lord Jauncey’s statements in *Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso Bernicia)* [1989] AC 643 (HL, Scot) 685–86 need not be discussed here for the reasons given in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510 [33]–[34], [73]–[74].

²⁹ *Park v Tractor Shovels Ltd* 1980 SLT 94 (OH).

acting within the scope of his employment with the second defender [and usual employer, which *was* held vicariously liable], he was at the time of th[e] accident in the temporary employment of the first defenders'; but he had 'no hesitation in rejecting' that possible argument, because the heavy burden of showing that responsibility had shifted was not discharged.³⁰ His Lordship concluded:

Having reached that decision it seems to me that that disposes of any question of joint liability on the part of the defenders based on vicarious responsibility. In my opinion it is not merely a tenet of the Christian faith that a man cannot serve two masters, but that it applies also to the legal doctrine of vicarious liability.³¹

Three points temper the surprise which such concision might elicit. First, how full or persuasive an argument Lord Cowie heard on the point is unclear from the *Scots Law Times* report. Second, in 1980 the conclusion pronounced perhaps appeared obvious, at least to a likely busy first instance judge, already in a pursuer's favour on established principles.³² Third, and relatedly, the strongest support for dual vicarious liability to put before Lord Cowie was, realistically, Patrick Atiyah's famous monograph.³³ Atiyah favours dual liability as a general rule in cases of employment *pro hac vice* where the pursuer is a third party rather than one of the wrongdoer's two employers.³⁴ They would be left 'to dispute among themselves who should bear the burden'.³⁵ Authority from the United States is cited in support. But Atiyah doubts whether an English court could emulate its approach.³⁶ So, even if Lord Cowie had read Atiyah's book, it might have been too tentative to carry the day. It is not referred to in the report of *Park*, and any general claim about awareness of it at the bar or on the bench would be speculative.³⁷ In any event, its open citation, or even consultation without reference, are perhaps unlikely.³⁸ Then-current tendencies against the use in court of writing by living authors were not unwavering. But they were strong, and did not soften so as to be more like today's until the 1990s.³⁹

³⁰ *ibid*, 100.

³¹ *ibid*, 101.

³² It goes too far to claim *generally* that dual vicarious liability was probably then considered impossible 'outside the academic world': WJ Stewart 'A Note on Matthew' 6, 24: The Theology of Dual Vicarious Liability' 2007 *Scots Law Times (News)* 99, 101; compare *Kastner v Toombs* (1980) 611 P 2d 62 (Alaska SC) 65; though compare, in turn, *DePratt v Sergio* (1981) 102 Wis 2d 141 (Wis SC).

³³ PS Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967) ch 18 esp 156–57, 163–64.

³⁴ In the latter event, the employers' position inter se should, in Atiyah's view, depend on any contract by which the employee is lent, not delict: *ibid* 153–54.

³⁵ *ibid* 163.

³⁶ But see his views about the possibility that more than one employer might be liable, just not *vicariously*: *ibid* 157–58.

³⁷ A favourable book notice of course came long before *Park*, if it raised the book's profile at all: DM Walker 1967 *Scots Law Times (News)* 171.

³⁸ Undue optimism is implicit in the statement, which cannot be wrong taken literally, that '[i]t is *not impossible* that the argument taken may in some way have been infused by [Atiyah's] work': Stewart (n 32) 101, fn 25 (emphasis added).

³⁹ K Reid, 'Smoothing the Rugged Parts of the Passage: Scots Law and its Edinburgh Chair' (2014) 18 *Edinburgh Law Review* 315, 332–34.

We should not think ill of Lord Cowie, then. All the more so, because however well-reasoned, a case will not affect developments if it slips from memory. It appears that some have forgotten *Park*'s significance. For example, the important *Stair Memorial Encyclopaedia* records English law's acceptance of dual vicarious liability, citing *Park* only in discussion of employment *pro hac vice*.⁴⁰ The case is not mentioned at all in other widely read work, such as *Gloag & Henderson*. Perhaps with studied imprecision, this text observes that 'dual vicarious liability is yet to be recognised in Scots law', and notes that it 'may prove a useful device in cases, for example, involving agency workers'.⁴¹ Reference is made to English authorities that have already made the move,⁴² Scottish commentary on which also omits *Park*.⁴³

The same pattern is visible in more recent Scottish cases. In *Bell v Alliance Medical Ltd*,⁴⁴ Lord Boyd appeared to accept as good law certain 'incremental developments' by reference to passages from *Various Claimants v Catholic Child Welfare Society*,⁴⁵ in which Lord Phillips stated that '[i]t is possible for two different defendants, D2 and D3, each to be vicariously liable for the single tortious act of D1'. And in *Grubb v Shannon*,⁴⁶ Sheriff Reid opined that the deemed transfer reasoning, usually employed to resolve cases of employment *pro hac vice*, was 'an unwieldy fiction': '[a] more principled solution may finally have been found in the concept of dual vicarious liability'. This is not an endorsement of something like Atiyah's proposal of routine dual liability in employment *pro hac vice* cases. The Sheriff's reference to *Viasystems*⁴⁷ confirms that English law provided the food for thought. These *obiter* hints plainly favour a conception of dual vicarious liability along the lines drawn south of the border. That is, now that Rix LJ's approach in *Viasystems* has been preferred to May LJ's control-centred analysis,⁴⁸ dual vicarious liability arises when practical and structural considerations suggest that a wrongdoer is recognisable as part of the work, business or organisation of more than one defender sought to be made vicariously

⁴⁰ With three other cases, for the proposition that the burden of showing 'that transfer of liability has taken place ... can be discharged only in exceptional circumstances': K Miller, 'Strict Liability' in R Black (gen ed), *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol XV (London, LexisNexis, 1995) [249], citing *Viasystems* (n 28) in an update appended to that paragraph. See also Cameron (n 24) [12.18], citing *Park* on employment *pro hac vice* but observing that dual vicarious liability has 'not been considered in the Scottish courts'.

⁴¹ HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* 15th edn (Edinburgh, W Green, 2022) [25.15], fnn 97–8. See also Reid (n 4) [3.33]–[3.34].

⁴² *Viasystems* (n 28); and *Various Claimants v Child Catholic Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 (CCWS).

⁴³ A Barron, 'Vicarious Liability for Employees and Agents' 2006 *Scots Law Times (News)* 79; G Junor, 'Child Abuse Claims – a Reversal of View' 2013 *Scots Law Times (News)* 59.

⁴⁴ *Bell v Alliance Medical Ltd* [2015] CSOH 34, 2015 SCLR 676 [113].

⁴⁵ CCWS (n 42) [20]–[21] esp [20(iv)]; citing *Viasystems* (n 28).

⁴⁶ *Grubb* (n 3) [55].

⁴⁷ *Viasystems* (n 28).

⁴⁸ See CCWS (n 42) [45].

liable, so that each may justly be treated as assuming the burden of the beneficial relationships which they have undertaken.⁴⁹

As seen under previous headings, and as will be seen under the next, a flexible conception exists in Scotland of employment, employment *pro hac vice*, and relationships ‘akin to employment’, for the purposes of vicarious liability. Once this conception is accepted, dual vicarious liability seems doctrinally unchallenging, and is rather simply conceived of as practically necessary to give effect to commonly listed policy objectives of vicarious liability on easily imaginable fact patterns. A glance beyond the British Isles shows that if the idea is accepted in principle,⁵⁰ the current English model is not the only conceivable one. One could favour routine dual vicarious liability based on a stronger normative commitment to responsibility for risks characteristic of an organisation’s activities than to responsibility for the wrongdoing of persons over whom an entitlement to control exists.⁵¹ But neither awareness of this nor appetite for further investigation are likely to be great in this jurisdiction. As has been seen, even Scottish authority contrary to courts’ and commentators’ current inclinations is being ignored, consciously or not, in favour of English law. On the current state of the sources – and barring valuable litigation rendering worthwhile the sort of argument and judgment-writing that please academics – it would surprise if much, if any, debate, preceded Scots law’s eventual commitment to the *Viasystems* approach.⁵²

iii. Relationships ‘Akin to Employment’

Only relatively recently was it confirmed that vicarious liability may arise from something *called* a relationship ‘akin to employment’. However, there is precursive appellate authority. In the 1990 case of *Marshall v William Sharp & Sons Ltd*,⁵³ a quarry manager died on site due to the negligence of an electrician, Dean. Though Dean was not an employee of the quarry’s operators,⁵⁴ the Inner House held them vicariously liable for his delict. A statutory instrument required that a competent

⁴⁹ *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 [152]–[155], [185]–[187]; though the penultimate sentence in the second-cited paragraph range may neglect *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, [2006] IRLR 817.

⁵⁰ Which is not inevitable: *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250, (2013) 85 NSWLR 335 [23]–[33]; special leave refused [2014] HCA 77; applied in *Hallmark Construction Pty Ltd v Harford* [2020] NSWCA 41 [79]–[81], [90].

⁵¹ See the reasoning of the Supreme Court of Louisiana (a jurisdiction favoured by some Scottish academic lawyers) in *Morgan v ABC Manufacturer* (1998) 710 So 2d 1077 (La SC) 1084: where a negligent employee is lent, the lending employer remains liable under the Louisiana Civil Code, art 2320; referred to in argument and mentioned in *Viasystems* (n 28) 513 (argument), [41], [43] (May LJ).

⁵² For better or worse: JW Neyers, ‘Joint Vicarious Liability in the Supreme Court of Canada’ (2006) 122 *LQR* 195, 197; and in comparison with the acceptance of dual vicarious liability after quite-lengthy discussion of policy and authority in *Munshi Mohammad Faiz v Interpro Construction Pte Ltd* [2021] SGHC 26 [52]–[69]; leave to appeal refused with reasons [2021] SGHC(A) 1 esp [12]–[24].

⁵³ *Marshall* (n 2).

⁵⁴ *ibid* 119, 121 (Lord Ross, with whom Lord Maxwell agreed), 125–26 (Lord Dunpark).

person be available to conduct electrical work on authorisation of a manager. It was highly relevant ‘that Dean was the quarry electrician, and that this brought him within the statutory jurisdiction of the [defenders’] quarry manager’ – here, the deceased.⁵⁵ Additional evidence suggested that Dean ‘became part of the defenders’ workforce’: always on call at an hourly rate, he was the only electrician at the quarry, work for which took up most of his time.⁵⁶ Furthermore, ‘the weight of the evidence showed that Dean was indeed under the *supervision and control* of the defenders as *part of their workforce* when working at the quarry’.⁵⁷ They relied upon Dean as an expert, and he would be in charge of electrical work. However, and as Dean himself recognised, general oversight and direction was with the defenders through the deceased.⁵⁸ For these reasons, ‘although Dean was an independent contractor or a contractor with a degree of independence, the defenders were in the circumstances vicariously liable for his negligence’.⁵⁹

According to *Marshall*, then, one may be vicariously liable for the negligence of a contractor who is so integrated into one’s business as effectively to be part of one’s workforce. The decision could usefully have underpinned the recognition by more junior Scottish courts that a relationship ‘akin to employment’ gives rise to vicarious liability. Yet its influence upon this development has been near-imperceptible. To some extent this is understandable. For example, holding that an action against an archdiocese for sexual abuse by a priest was time-barred in *CW v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh*,⁶⁰ Temporary Judge Arthurson QC acknowledged, *obiter*, that factually similar English decisions had ‘state[d] a significant development of the law of vicarious liability, in particular as it pertains to the relationship of priest and Archdiocese’; and he saw ‘no reason why these principles should not be applicable fully in this jurisdiction in that context’. If it was even contemplated, reference to *Marshall* here might have seemed superfluous.

More revealing is that *Marshall* barely figured in *Grubb v Shannon*.⁶¹ There, the pursuer had an allergic reaction to the eyebrow tint which Higgins, a beauty

⁵⁵ *ibid* 121.

⁵⁶ *ibid* 121; see also the observation of Lord Dunpark, concurring, that ‘the only difference between Dean and an electrician employed as a full-time servant of the defenders in the quarry workforce was that Dean worked part time at an hourly rate instead of full time at a weekly wage’: *ibid* 125.

⁵⁷ *ibid* 121, emphasis added.

⁵⁸ The core evidence on this point is omitted from the *Scots Law Times*’ reproduction of Lord Ross’ opinion, but is partly quoted and summarised by Lord Dunpark: 1991 SLT 114, 123, 125; and fully reproduced at 1991 SCLR 104, 114–15.

⁵⁹ *Marshall* (n 2) 121 (Lord Ross, with whom Lord Maxwell agreed). See also the conclusion of Lord Dunpark, concurring, that ‘while one may say that Dean was a contractor of his own labour, he cannot reasonably be classified as an independent contractor, for whose negligence the defenders are not liable’: (n 2) 125–26.

⁶⁰ *CW v Trustees of the Roman Catholic Archdiocese of St Andrews and Edinburgh* [2013] CSOH 185 [15], [17]; citing *CCWS* (n 42); and *E* (n 14). Similarly understandable are the brief remarks in the employee-wrongdoer case of *Kennedy* (n 3) [55]–[56]; citing *Various Claimants v Barclays Bank Plc* [2020] UKSC 13, [2020] AC 973 [1]; and *E* (n 14).

⁶¹ *Grubb* (n 3).

therapist, applied without conducting an initial skin test, or enquiring about allergies or experiences with similar treatments. Shannon leased and ran the salon in which the injury was caused. Though not Higgins's employer,⁶² Shannon was vicariously liable for Higgins's negligence based on a relationship between them 'akin to employment'. The facts were 'unremarkable'.⁶³ The case is significant for Sheriff Reid's approach to and account of the law. He outlined a 'modern theory of vicarious liability', to 'be found in a quartet of landmark Supreme Court' cases,⁶⁴ with 'reinforcing ground breaking decisions of the English Court of Appeal' also meriting consideration.⁶⁵ The policy incidents identified by Lord Phillips in *Various Claimants v Catholic Child Welfare Society*⁶⁶ served only as convenient headings under which to consider many factual details of Higgins's relationship with Shannon, by extensive reference to previous authorities.⁶⁷ After this analysis, which – if necessary – could be described comfortably as compliant with the UK Supreme Court decision in *Various Claimants v Barclays Bank Plc*,⁶⁸ it was held that:

Ms Higgins did indeed carry on activities, entrusted to her by the defender [Shannon], as an integral part of the defender's business activities, and for the benefit of the defender; that her activities were not attributable to the conduct of a recognisably independent business of her own, or of a third party; and that the negligence which forms the basis of the action was a risk created by the defender by assigning those activities to Ms Higgins.⁶⁹

Marshall was the only Scottish case cited for the pursuer on the 'akin to employment' point. Whether anything was made of it in argument is unclear from Sheriff Reid's summary of submissions.⁷⁰ The only reference to it in his note was with another case, when observing that vicarious liability may arise, 'exceptionally, in the context of a contract for services, as between an employer and independent contractor'.⁷¹ The brevity is probably explained by the fact that it was *not* actually

⁶² *ibid* [87].

⁶³ *ibid* [2].

⁶⁴ Each of which he later summarised: *ibid* [74]–[84].

⁶⁵ *ibid* [15], [61]–[73], citing CCWS (n 42); Cox (n 27); *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11, [2016] AC 677; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355; noted B Lindsay (2018) 22 *Edinburgh Law Review* 294; *Viasystems* (n 28); *E* (n 14); and noting, by reference to *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 [27]–[28], the earlier influence of *Bazley v Curry* [1999] 2 SCR 534 (SCC); *Jacobi v Griffiths* [1999] 2 SCR 570 (SCC).

⁶⁶ CCWS (n 42) [35], [47], discussed in more detail by Giliker in chapter three.

⁶⁷ See *Grubb* (n 3) [86]–[111], where refinements in Cox (n 27) and *Armes* (n 65) permitted Sheriff Reid, for example, to test for control by Shannon over *what* Higgins did, not *how* she did it; and to place no weight on 'deeper pockets' or insurance considerations.

⁶⁸ See *Barclays* (n 60) [27]. Less convinced is Reid (n 4) [3.29].

⁶⁹ *Grubb* (n 3) [112].

⁷⁰ Assembling facts on which '[p]articular reliance was placed' to establish a relationship 'akin to employment', before authorities referred to were simply listed: *ibid* [46].

⁷¹ *ibid* [48], also citing *Stephen v Thurso Police Commissioners* (1876) 3 R 535 (IH), and in discussing the 'traditional theory of vicarious liability', ie, separately from the 'modern theory', found in English cases.

contended for Shannon that relationships ‘akin to employment’ were unknown to, or could not give rise to vicarious liability in, Scots law.⁷² The possibility of a concession based on *Marshall* aside – that would surely have been noted – it seems that its main potential contribution in this case was uncalled-for because of assumptions by counsel and the Sheriff.

This state of affairs is broadly similar to that highlighted above, with *Park*. Scottish authority relevant to another not-inevitable development⁷³ was effectively passed over. Neither the parties nor the Sheriff in *Grubb v Shannon* brought domestic learning to bear on an essential condition of a claim that, ‘[p]erhaps as little as five years’ prior, would have been struck out on the pleadings, but in 2018 came ‘in the dizzying wake of a sea change in the law relating to vicarious liability’, wrought by English cases.⁷⁴ However, *Park* is a forgettable, thinly reasoned first instance case running counter to more recent judicial and academic opinion on dual vicarious liability. Its near-disappearance may have been acquiesced in by those remembering it who disagree with its holding. *Marshall*, by contrast, is a fully reasoned appellate decision that positively favours the proposition that a relationship ‘akin to employment’ gives rise to vicarious liability. Yet it was not drawn upon by or, it seems, before, a junior first instance court to support what was acknowledged to be a considerable extension of established doctrine.⁷⁵ The reality is elementary: ‘the busy practitioner’ – and, we would add, the hard-pressed judge – ‘must use the readiest tools to hand, and these, whatever their jurisprudential origin, ... will tend to mould the development of [Scots] law’.⁷⁶ *Marshall* is, then, an even starker example than *Park* of the strong gravitational pull which English authority can exert on vicarious liability north of the border.

B. Linking Delictual Conduct to the Defenders’ Relationship

Turning to Scottish learning on the second stage of the basic inquiry since *Lister v Hesley Hall Ltd*,⁷⁷ we note initially that the gravitational pull just mentioned has not been all one-way. A little of the Caledonian punctuated three important English movements on the close connection test. First – and though of course

⁷² Instead, her solicitor argued unsuccessfully that Shannon and Higgins’s relationship was ‘more akin to that of landlord and tenant ... than to employment’: *Grubb* (n 3) [47], [116].

⁷³ Authorities conflict in Australia, for example: *DP v Bird* [2021] VSC 850 [120]–[214]; *PCB v Geelong College* [2021] VSC 633 [289]–[312].

⁷⁴ *Grubb* (n 3) [15], [61].

⁷⁵ See *ibid* [66]: a ‘significant innovation’ that relationships ‘akin to employment’ give rise to vicarious liability.

⁷⁶ TB Smith, ‘Strange Gods: The Crisis of Scots Law as a Civilian System’, in his *Studies Critical and Comparative* (Edinburgh, W Green, 1962) 87; A Rodger, “‘Say Not the Struggle Naught Availeth’: The Costs and Benefits of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 419, 421.

⁷⁷ *Lister* (n 65).

not decisive – Scottish cases did inform the position taken in *Lister*. One was a ‘good illustration of the correct approach’.⁷⁸ Another showed ‘the importance of the existence of a sufficient connection’ between delictual conduct and the defendants’ relationship.⁷⁹ Second, we can recall the Scottish origin of a specific phrase: ‘the field of activities’ assigned to a wrongdoer,⁸¹ praised for its malleability in *Mohamud v WM Morrison Supermarkets Plc*.⁸² Third, that same language received further attention⁸³ in 2020, when the Supreme Court addressed the close connection test in *Various Claimants v WM Morrison Supermarkets Plc*,⁸⁴ and endorsed a formula like that approved prior to *Mohamud*: the court must generally decide whether

wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.

As well as deserving a small portion of the (dis)credit for these movements, Scots law has tracked them. The first stage in this further reception of English learning was the acceptance of *Lister* in cognate instances of sexual abuse of minors in care,⁸⁵ and in cases concerning other wrongdoing, negligent and intentional.⁸⁶ This stage has already been charted by Bogle, whose 2019 article also notes the second stage:⁸⁷ the account of the law in *Mohamud* was applied in *Grubb v Shannon*.⁸⁸ A third stage in the process commenced in 2021. Following a tacit *obiter* application in an employee negligence case,⁸⁹ *Morrison* was explicitly taken as authoritative

⁷⁸ *Lister* (n 65) [18] (Lord Steyn); discussing *Williams v A & W Hemphill Ltd* 1966 SC (HL) 31.

⁷⁹ *Lister* (n 65) [39], [41], [44] (Lord Clyde); discussing *Kirby v National Coal Board* 1958 SC 514 (IH). One of the then-serving Scottish Law Lords, Lord Clyde mentioned other Scottish cases in his speech: *Lister* (n 65) [34], [48]. See also *Lister* (n 65) [59] (Lord Hobhouse).

⁸⁰ Also noted by D Brodie, ‘Vicarious Liability and Bifurcation: Reflections on *WM Morrison Supermarkets v Various Claimants*’ (2020) 24 *Edinburgh Law Review* 389, 390, though we would not date the phrase’s further lease of life to its mere appearance in a lengthy quotation in *Lister* (n 65).

⁸¹ See *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796 (IH) 802; discussed by Lord Clyde in *Lister* (n 65) [47].

⁸² n 65 [35]–[36], [44]. See further *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129 [140]–[145].

⁸³ To use deliberately a neutral expression.

⁸⁴ *Various Claimants v WM Morrison Supermarkets Plc* [2020] UKSC 12, [2020] AC 989 esp [22]–[23], [25], [30]–[31]; citing, eg, *Dubai Aluminium Company Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366.

⁸⁵ *J v Fife Council* [2008] CSIH 63, 2009 SC 163 [38] (an appeal as to quantum; vicarious liability was undisputed). The same is observable in many of the limitation cases mentioned in section IV.A. below, eg, *Kelly v Gilmartin’s Executrix* 2002 SC 602 (OH) [46].

⁸⁶ *Vance v North Lanarkshire Council* [2008] CSOH 70, 2008 Rep LR 90 [25]; *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35, 2010 SLT 671 [24].

⁸⁷ S Bogle, ‘Responsibility for Another’s Wrong in Scotland: Stick with *Lister* or Twist with *Mohamud*?’ [2019] *Juridical Review* 211, 218–26, 230.

⁸⁸ *Grubb* (n 3) [61], [64], [80]–[84], [117]–[122].

⁸⁹ See *SH v Care Visions Group Ltd* [2021] SC EDIN 28, 2021 Rep LR 83. Though vicarious liability was undisputed, Sheriff Dickson took care to make a relevant finding that was plainly modelled on *Morrison* (n 84) [23].

in *Kennedy v Bonnici*,⁹⁰ which concerned the vicarious liability of school trustees for historic sexual abuse.

This shadowing of English law looks fortuitous today. No hard case has seriously tested the close connection analysis.⁹¹ In the only case to apply *Mohamud*, the pursuer's success did not depend on any particular test.⁹² *Grubb v Shannon* was a clear-cut instance of authorised functions negligently discharged. Whatever the wider potential of that decision, therefore, we in Scotland may simply bypass costly debate involving the courts about whether a *Mohamud*-type analysis is too permissive,⁹³ at least for usual application.⁹⁴ Based on *Kennedy*, and given pleaders' understandable habit of referring judges to more recent English cases,⁹⁵ *Morrison* looks set quietly to become the core authority on the close connection test.

If this is what occurs, it will be possible to say that the past two decades or so have seen the close connection test rather smoothly embraced in Scotland. This is further apparent when one considers the main Scots appellate authorities since *Lister: Wilson* and *Vaickuviene*. These cases actually support the *Morrison* test,⁹⁶ recognise that a tailored test has been applied in sexual abuse cases⁹⁷ and provide guidance like that highlighted in *Morrison* as conducive to principled decision-making.⁹⁸ For example, the question whether it is fair and just to impose vicarious liability is not generally at large in individual cases.⁹⁹ Analytically similar previous decisions guide the application of the close connection test in an instant case.¹⁰⁰ Temporal or causal links between a wrong and the defenders' relationship do not themselves establish a close connection.¹⁰¹ Wrongdoing in the course of an

⁹⁰ *Kennedy* (n 3) [57]–[59] (Lady Wolfe).

⁹¹ Compare, eg, *Mohamud* (n 65); *Bellman v Northampton Recruitment Ltd* [2016] EWHC 3104 (QB), [2017] ICR 543; reversed [2018] EWCA Civ 2214, [2019] ICR 459; *Various Claimants v WM Morrison Supermarkets Plc* [2017] EWHC 3113 (QB); affirmed [2018] EWCA Civ 2339, [2019] QB 772; reversed (n 84). (It is, of course, impossible to know how many Scottish disputes might settle due to reliance by practitioners on the English position, reducing litigation north of the border and the chances of difficult cases.)

⁹² Even as against a more traditional 'scope of employment'-style analysis, as Sheriff Reid all but stated: *Grubb* (n 3) [118]–[120].

⁹³ Among many sources, see D Ryan, "Close Connection" and "Akin to Employment": Perspectives on 50 Years of Radical Developments in Vicarious Liability' (2016) 56 *Irish Jurist* 239, 247–51.

⁹⁴ P Giliker, 'A Revolution in Vicarious Liability: *Lister*, the *Catholic Child Welfare Society* Case and Beyond' in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private law* (Oxford, Hart Publishing, 2018) 134–39.

⁹⁵ With less emphasis on Scottish cases, as noted in *Wilson* (n 86) [31]. See the discussion of English authority as it appeared in *Vaickuviene v J Sainsbury Plc* [2013] CSIH 67, 2014 SC 147; *Grubb* (n 3); then *Kennedy* (n 3).

⁹⁶ Most clearly in *Wilson* (n 86) [7]–[8] (Lord Hamilton, with whom Lord Reed agreed), [25]–[30] esp [26]–[27] (Lord Carloway, with whom Lord Reed agreed). See also *Vaickuviene* (n 95), [29], [34] (Lord Carloway), [43] (Lord Brodie), [45], [50] (Lord McGhie).

⁹⁷ *Vaickuviene* (n 95), [22]–[23], [26]–[27], [38] (Lord Carloway, with whom Lord Brodie and Lord McGhie generally agreed).

⁹⁸ *Morrison* (n 84) esp [22]–[26], [29]–[31], [35]–[47].

⁹⁹ *Wilson* (n 86) [12]–[13] (Lord Hamilton); *Vaickuviene* (n 95) [25] (Lord Carloway).

¹⁰⁰ *Wilson* (n 86) [13] (Lord Hamilton), [31] (Lord Carloway); *Vaickuviene* (n 95) [28], [37] (Lord Carloway).

¹⁰¹ *Wilson* (n 86) [28]–[29] (Lord Carloway); *Vaickuviene* (n 95) [20]–[21], [37] (Lord Carloway).

independent, self-interested venture, is not regarded as closely connected with the defenders' relationship.¹⁰²

What, however, of the Inner House's assertions that the so-called Salmond test remains relevant '[w]ithin the context of the broad test' of close connection?¹⁰³ So placed, the Salmond test is redundant. It neither adds anything to the close connection test, nor alters the outer limits of liability. Unsurprisingly, pleaders and judges in lower courts consistently prefer straightforwardly to apply the close connection test and associated guidance.¹⁰⁴ Having previously attracted comment,¹⁰⁵ the Inner House's composite approach appears destined to be forgotten, along with other potentially distinctive features of the Scottish case law.¹⁰⁶ It may be expected that continuity, not change, will largely characterise this area of vicarious liability in Scotland.

III. Particular Issues in Vicarious Liability

This section addresses two matters related to those examined so far. Having given a sense above of what the law is, where it is going and what has influenced it, we identify problems on the horizon, and the sources on which Scottish courts might draw in future.

A. Future Difficulties

Scholars have noted English law's strong historical influence on vicarious liability in Scotland.¹⁰⁷ It is unsurprising that it has persisted. We hazard that there exists in this field, as it more clearly does in certain others,¹⁰⁸ a general inclination among

¹⁰² *Wilson* (n 86) [30], [32]–[34] (Lord Carloway); *Vaickuviene* (n 95) [28], [37] (Lord Carloway).

¹⁰³ *Wilson* (n 86) [25]–[27], [29]–[30] (Lord Carloway); *Vaickuviene* (n 95) [19]–[21], [24]–[25], [32] (Lord Carloway); citing, eg, RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* 21st edn (London, Sweet & Maxwell, 1996) 443.

¹⁰⁴ In addition to *Grubb* (n 3) [119]–[120], see *Scottish Water Business Stream Ltd v Automatic Retailing (Scotland) Ltd (in admin)* [2014] CSOH 57 [94]; *Somerville v Harsco Infrastructure Ltd* [2015] SC EDIN 71 esp [22]. Slightly more ambiguous is *Shields v Crossroads (Orkney)* [2013] CSOH 144, 2014 SLT 190 [56]–[58].

¹⁰⁵ S Arnell, 'Employers' Vicarious Liability – Where Are We Now?' [2010] *Juridical Review* 243, 258–61; M Campbell, '*Somerville v Harsco Infrastructure Ltd*: Transferred Intent and the Scope of Vicarious Liability' (2016) 20 *Edinburgh Law Review* 211, 213–16.

¹⁰⁶ See those discussed post-*Mohamud* (n 65), which no longer stand out as distinctive post-*Morrison* (n 84), by Bogle (n 87) esp 228–30; and D Brodie, 'Vicarious Liability: The Net Tightens' (2016) 129 *Reparation Bulletin* 1, 3. Correctly, Brodie later reassessed the position: 'Vicarious Liability and Practical Jokes' (2020) 156 *Reparation Bulletin* 5, 7.

¹⁰⁷ E Reid and M Loubser, 'Strict Liability' in R Zimmermann, K Reid and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford, Oxford University Press, 2004) 626–27.

¹⁰⁸ See, eg, HL MacQueen, *MacQueen and Thomson on Contract Law in Scotland* 5th edn (London, Bloomsbury 2020) [1.56].

Scots lawyers to keep pace where possible with their neighbouring jurisdiction,¹⁰⁹ which is much larger.¹¹⁰ Whether or not this is so, practitioners seem regularly to envisage, sometimes tacitly,¹¹¹ that relevant English developments will be emulated in due course. For example, a leading Scottish law firm's note on *Grubb v Shannon* observes that its 'most significant implication ... is that Scottish law is following changes in England[:] we might anticipate that any further changes south of the border will be adopted here'.¹¹² As appears from the previous section of this chapter, we agree, especially so far as concerns further developments driven by the Supreme Court. Though its decisions in English appeals are technically non-binding,¹¹³ the Inner House's 'deferential attitude'¹¹⁴ to them is readily understandable from a practical point of view.¹¹⁵

If our prediction is correct, then, in the realm of vicarious liability, Scots lawyers will in future encounter problems like those in store for their English counterparts.¹¹⁶ Most importantly, how do we detect the 'doubtful cases' in which, *Barclays* suggests,¹¹⁷ policy reasoning 'may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability'? Can or should there *really* be a bright

¹⁰⁹ There is some evidence of it in relation to sexual abuse cases, specifically: Junor (n 43) 65; Lord Hope, 'Tailoring the Law on Vicarious Liability' (2013) 129 *LQR* 514. By *keep pace* we mean *at least* to develop similarly detailed doctrine, rather than *always* to align wholesale, though this will sometimes be desired and often results.

¹¹⁰ We take as given the reader's awareness that senior courts in England and Wales give thousands of judgments yearly. In Scotland, it is hard reliably to establish how many disputes give rise to *written decisions*. Of these, there are, of course, fewer than there are *disposals* of disputes, official statistics on which not assist. (See, eg, the detailed decennial tables in *Civil Justice Statistics in Scotland 2019–20* (April 2021).) A 31 August 2021 Westlaw search for 2017–20 inclusive yields, respectively, 235, 206, 170 and 178 written decisions of the Court of Session (Outer and Inner Houses); and 201 in total for the Sheriff Appeal Court (Civil). (Cross-checking this search using Bailii yields figures of 224, 226, 171, 167; and a surely partial 81.)

¹¹¹ There is no hint that Supreme Court decisions in English appeals do not state Scots law in, eg, A Forsyth, 'Vicarious Liability Supreme Court Judgements', *Insights* (15 April 2020) www.burnesspaull.com/insights-and-events/news/vicarious-liability-supreme-court-judgements.

¹¹² Brodies, 'Vicarious Liability – Scotland Moves in the Same Direction as England & Wales', *Insights*, (3 July 2018) <https://brodies.com/insights/insurance-and-risk/vicarious-liability-scotland-moves-in-the-same-direction-as-england-wales>. See also the admission of vicarious liability in *A v Glasgow City Council* [2021] CSOH 102, 2021 SLT 1577, a foster abuse case.

¹¹³ *AJ Allan (Blairnyle) Ltd v Strathclyde Fire Board* [2016] CSIH 3, 2016 SC 304 [31].

¹¹⁴ Bogle (n 87) 230. More generally, judges and academics often cite English cases 'without specific warning that they do not determine Scots law': M Dewart, *The Scottish Legal System* 6th edn (London, Bloomsbury, 2019) [12.19]. Note, though, that borrowing from England is sometimes doctrinally inappropriate: *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 [31].

¹¹⁵ See Lord Hope, 'Scots Law Seen from South of the Border' (2012) 16 *Edinburgh Law Review* 58, 75–76.

¹¹⁶ For the first two questions, see P Giliker, 'Can the Supreme Court Halt the Ongoing Expansion of Vicarious Liability? *Barclays* and *Morrison* in the UK Supreme Court' (2021) 37 *PN* 55, 61–62, 67. For the third, see C Beuermann, 'Vicarious Liability for Football Scouts' (2022) 138 *LQR* 170, 172–75.

¹¹⁷ *Barclays* (n 60) [27]; not yet applied on this point in Scotland, but cited for general propositions in *Kennedy* (n 3) [55]–[56].

line between cases of sexual and other kinds of abuse,¹¹⁸ on the former side of which the tailored close connection test will stay?¹¹⁹ And might some reasoning permitted by the tailored test sit ill with elements of the reasoning understood to assist with whether a relationship between defenders gives rise to vicarious liability in the first place? These questions having emerged very recently, we can do no more than ask them. When they arise in Scotland, English learning will doubtless assist, if available.

Yet for all we have said about the reasonable use in Scotland of English sources on vicarious liability, they are no panacea. Consider briefly a further unanswered question: how does vicarious liability interact with agency? In 2013 Macgregor noted, *inter alia*, that the English position could be clearer, and that a different approach on the matter might be adopted north of the border.¹²⁰ The ground may have shifted since she wrote. But English law still furnishes no model for *easy* adoption.¹²¹ We leave aside the detail. The point here is that this sparks interest in whether Scottish courts might look to jurisdictions *other* than England to develop their doctrine of vicarious liability. To this prospect we now turn.

B. Glancing Furth of England

Some might think that the first port of call should really be mixed legal systems,¹²² among which Scotland's has been counted.¹²³ We overlook those in respect of which a 'language problem' arises, like Quebec,¹²⁴ on the basis that it is 'unrealistic

¹¹⁸ The court, for example, was unwilling to apply a different test to racist harassment in *Vaickuviene* (n 95) [2], [17], [38]. The question in the main text is distinct.

¹¹⁹ *Morrison* (n 84) [23], [36]; accepted at first instance in *Kennedy* (n 3) [57]–[59] for the tailored test in the sexual abuse context, but *without excluding* that test on different facts. Though tailored test reasoning may escape the sexual abuse context (*Chell v Tarmac Cement and Lime Ltd* [2022] EWCA Civ 7 [27]), it need not: see the caution in *Ali v Luton Borough Council* [2022] EWHC 132 (QB) [30]–[33], [47]–[48].

¹²⁰ L Macgregor, *The Law of Agency in Scotland* (Edinburgh, W Green, 2013) [13-01]–[13-02], [13-10]–[13-25]; citing, eg, *McE v De La Salle Brothers* [2007] CSIH 27, 2007 SC 556 [132] (Lord Osborne). Subsequent cases yield little. But see Lord Glennie's fleeting observations in *British Sky Broadcasting Group Plc v Avalonbar Ltd* [2014] CSOH 39 [55], in the context of breach of interdict and the statutory wrong of copyright infringement.

¹²¹ See PG Watts and FMB Reynolds, *Bowstead & Reynolds on Agency* 22nd edn (London, Sweet & Maxwell, 2021) [8-176]–[8-204]; C-H Tan, 'Vicarious Liability in the Law of Agency?' [2022] *Journal of Business Law* 164. (Neither source examines *only* English authority.)

¹²² See generally J Du Plessis, 'Comparative Law and the Study of Mixed Legal Systems' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* 2nd edn (Oxford, Oxford University Press, 2019).

¹²³ S Thomson, 'Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture' (2014) 7 *Journal of Civil Law Studies* 51.

¹²⁴ For the main legislative regimes, see the *Code civil du Québec*, arts 1459–1464 (standard categories, including employers' liability), 2164 (mandator's liability). For a statement and application of employers' liability principles to facts involving historic child abuse, see *Lachance v Institut séculier Pie X* [2021] QCCS 1064 [180]–[339]. As appears from that judgment (*ibid* [198]–[204]),

to expect lawyers to cite, and judges to digest, decisions from other jurisdictions in foreign languages.¹²⁵ We also leave aside systems like Louisiana,¹²⁶ which, though certainly of general comparative interest,¹²⁷ have not seen their doctrines of vicarious liability examined by Scots lawyers. Such jurisdictions are less likely to attract the attention of pleaders and judges working on the subject at hand.

Realistically, the likeliest source of inspiration among mixed systems is South African law, enthusiasm for which among Scottish academic lawyers is well-known.¹²⁸ A short 2004 account of vicarious liability in both jurisdictions noted their ‘predominantly English ... derivation’ and similarity in many respects.¹²⁹ Naturally, more recent South African literature repays careful study.¹³⁰ But what might *primary* sources add to a Scottish court’s decision-making? Section II.A of this chapter showed that, on relationships giving rise to vicarious liability, Scots law is quite developed.¹³¹ So any examination of South African learning would probably be aimed at illuminating the close connection test. Whether this would often bear fruit unavailable elsewhere may, however, be doubted. For example, apex decisions on vicarious liability for sexual offences by police officers could clarify the *tailored* close connection test.¹³² Normally, though, cases applying the test itself will surely be more helpful.¹³³

Moreover, because the tailored test is confined in *Morrison* to sexual abuse cases, it is likely that risk-based reasoning will be heavily circumscribed in Scots (and English) law. Such reasoning is not so bridled in South Africa. There, courts can reach results which – *currently* – their Scottish counterparts might not.

Quebec courts sometimes rely on policy reasoning derived from common law Canadian cases: see further N De Stefano, ‘A Comparative Look at Vicarious Liability for Intentional Wrongs and Abuses of Power in Canadian Law’ (2020) 98 *Canadian Bar Review* 1. Where this is so, some Scots lawyers may rather simply tap that source directly.

¹²⁵ J Blackie and N Whitty, ‘Scots Law and the New *Ius Commune*’ in HL MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (Edinburgh, W Green, 1996) 74–75.

¹²⁶ For the main legislative regimes, see the Louisiana Civil Code, arts 2318, 2320.

¹²⁷ See VV Palmer and E Reid, ‘Preface’ in VV Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh, Edinburgh University Press, 2009).

¹²⁸ See generally D Carey Miller, ‘Sibling Mixed Systems: Reviewing South African/Scottish Comparative Law’ (2016) 20 *Edinburgh Law Review* 257, but esp 280, addressing the fleeting second-hand reference to a South African vicarious liability decision in *Vaickuviene* (n 95) [23].

¹²⁹ Reid and Loubser (n 107) 626–36.

¹³⁰ See, eg, that available to practitioners and judges in Edinburgh’s Advocates Library: M Loubser and R Midgley (eds), *The Law of Delict in South Africa* 3rd edn (Cape Town, Oxford University Press, 2018) ch 33; M Loubser, *Tort Law in South Africa* (The Hague, Kluwer Law International, 2020) [443]–[465]. The *South African Law Reports* are held in the same location.

¹³¹ Except on the unanswered agency question, alluded to above. But ‘diversity of opinion’ on this topic means that South African law may not greatly assist: S Wagener, ‘The Relationship(s) Giving Rise to Vicarious Liability in South African Law’ (2014) 131 *South African Law Journal* 178, 190.

¹³² See *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419; *F v Minister of Safety and Security* [2011] ZACC 37, 2012 (1) SA 536.

¹³³ See, eg, *Barry Congregation of Jehovah’s Witnesses v BXB* [2021] EWCA Civ 356, [2021] 4 WLR 42 (permission to appeal granted 30 March 2022); *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352. Predictably, such cases have come to attention in Scotland. See, eg, use of *BXB* in *Kennedy* (n 3) [58].

In *Stallion Security (Pty) Ltd v Van Staden*,¹³⁴ a security company was vicariously liable when its site manager robbed and murdered a person working late in premises he oversaw. Relying on Canadian and English decisions, and eschewing ‘references to a link with the duties, authorised acts or employment of the employee’ whose wrongdoing ‘did not in any manner constitute the exercise’ of those duties or acts,¹³⁵ the court held ‘that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the *harm* caused by the employee and the *business* of the employer’.¹³⁶ On the facts, the employee’s ‘special position created a material risk that [he] might abuse his powers’, which ‘risk rendered the deceased vulnerable and produced the robbery and consequently the murder’.¹³⁷ Further, Stallion’s security services contract with the company for which the deceased worked ‘provide[d] a significant normative link between Stallion’s business and the harm suffered by’ the deceased’s widow.¹³⁸

In *Vaickuviene*, a 2013 case about racially motivated harassment culminating in an employee-on-employee murder, the Inner House opined that such wrongdoing did not itself justify ‘any more generous an interpretation of the general’ close connection test, like that observable in the sexual offences context.¹³⁹ If adhered to, this view entails that a Scottish court would decide *Stallion Security* differently. And it is not the only case about which this may be said.¹⁴⁰ Based on the foregoing, we doubt whether South African case law would *presently* assist much in difficult Scottish litigation on the close connection test – in respect of which the experience of other jurisdictions will most probably be surveyed. As has been said before, the benefits of intra-mixed-system study are by no means guaranteed.¹⁴¹

So where will Scottish pleaders and judges look to in future, if not simply south, to England? How will they employ decisions from different jurisdictions? Going by the cases, the most likely answers are: to other *common law* countries; and to refine the close connection test.¹⁴² It is perhaps improbable that Scots

¹³⁴ *Stallion Security (Pty) Ltd v Van Staden* [2019] ZASCA 127, 2020 (1) SA 64; noted J Scott [2020] *Tydskrif vir die Suid-Afrikaanse Reg* 338.

¹³⁵ *Stallion Security* (n 134) [19]; an analysis at the core of the connection test in *Morrison* (n 84).

¹³⁶ *Stallion Security* (n 134) [17], [27]–[32] (emphasis added); citing, eg, *Bazley* (n 65); and CCWS (n 42).

¹³⁷ *ibid* [36].

¹³⁸ *ibid* [37].

¹³⁹ *Vaickuviene* (n 95) [22]–[23], [26]–[27], [38] (Lord Carloway, with whom Lord Brodie and Lord McGhie generally agreed). Because the tailored test was straightforwardly accepted in *Kennedy* (n 3) [57]–[59] as ‘the correct’ one, the decision does not determine whether it is confined to the sexual abuse context in Scotland.

¹⁴⁰ See, eg, *Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd* [2020] ZAGPJHC 111; reversed on other grounds [2022] ZASCA 7. The court applied the *Stallion Security* (n 134) risk-based analysis to an employee theft where it would not arguably be so used in English law: see Giliker (n 116) 69–70.

¹⁴¹ K Reid, ‘The Idea of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 5, 38.

¹⁴² See the references by pleaders and judges to Canadian (by far the most frequent), Australian and United States authority in *Wilson* (n 86) [11], [13], [23], [32]–[33]; *Vaickuviene* (n 95) [12], [15], [19], [22], [28]; *Somerville* (n 104) [19], [24]–[27], [30]; *Grubb* (n 3) [15].

law will ever differ fundamentally from English law on general questions of vicarious liability.¹⁴³ However, the courts' observable intellectual openness is sure to persist. We would be unsurprised if it increased, both in terms of legal systems considered, and the matters of principle on which foreign learning is brought to bear.¹⁴⁴

IV. Responding to Historic Child Abuse in Scotland

Turning to the legal response in this jurisdiction to the evil of historic child abuse, this has at least three dimensions: inquisition, legislation, and litigation. This first aspect – reflecting on the incidence and causes of abuse and recommending best practice for the future – presently is being performed in respect of children in care by the Scottish Child Abuse Inquiry,¹⁴⁵ and the report of the Scottish Football Association's *Independent Review of Non-Recent Sexual Abuse in Scottish Football*¹⁴⁶ was published in February 2021. While more legislation may be expected in light of the above, so far the Scottish Parliament has passed the Limitation (Childhood Abuse) (Scotland) Act 2017 and recently established a compensation scheme for those alleging abuse in institutional care with the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021. Furthermore, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 now provides for group proceedings, a possibility recently availed of by survivors of alleged child sex abuse.¹⁴⁷ As for litigation, the influence of English law is apparent in setting the test for vicarious liability. But very few cases have explored how that test will be applied by the Scottish courts in the specific context of historic child abuse.¹⁴⁸

¹⁴³ See Bogle (n 87) 212, 230.

¹⁴⁴ See, eg, the discussion of an overall test for relationships giving rise to vicarious liability, and the relevance of control, in the *Irish* case of *Morrissey v Health Service Executive* [2020] IESC 6, [2020] PNLR 17 [12.7]–[12.20], reference to which may transpire to be instructive. *Morrissey* is discussed in more detail by Ryan in chapter five.

¹⁴⁵ Established in 2015, the inquiry has issued a series of case study findings, but is not due to deliver its final report until 2023 at the earliest. The SCAT's website is available at <https://childabuseinquiry.scot>.

¹⁴⁶ Available at www.scottishfa.co.uk/media/7516/independent-review-of-sexual-abuse-in-scottish-football-final-report.pdf.

¹⁴⁷ Permission has been granted under this legislation for proceedings to be brought by 22 former Celtic Boys Club players against Celtic FC plc. No written opinion is available, but see www.dailyrecord.co.uk/news/scottish-news/celtic-boys-club-victims-given-26355604. This high profile case, involving one of Scotland's largest football teams, likely will lead to judicial consideration of the issues raised in this section, and of vicarious liability more generally.

¹⁴⁸ See most explicitly *Kennedy* (n 3) [59]. There may also be difficult issues of proof, given that it has been recently noted that the use of similar fact evidence is precluded in the civil context by Inner House authority: *EG v The Governors of the Fettes Trust* [2021] CSOH 128, 2022 Rep LR 26 [22].

A. Limitation

The primary reason for this is that most litigation has not proceeded to a determination of liability because of the strict limitation period applicable to such claims. Until recently, historic abuse claims were subjected to the general, three-year limitation period,¹⁴⁹ with the Scottish courts hesitant to either defer this on the basis of subsequent discovery of the severity of a pursuer's injuries¹⁵⁰ or find it 'equitable' to extend the limitation period.¹⁵¹ Often, the prejudice caused to the defender by the inability of the alleged abuser to give evidence – usually by reason of death – would undermine any attempt to have the limitation period extended.¹⁵² This was so even if there existed limited evidence from other sources: what mattered was any material – even if not total – loss of evidence.¹⁵³

Concerns about the strictness of the limitation regime led to the passing of the Limitation (Childhood Abuse) (Scotland) Act 2017. It disapplies¹⁵⁴ the three-year limitation period in relation to claims by those who suffered personal injury caused by abuse perpetrated, or which began, while they were children.¹⁵⁵ It is retrospective in effect,¹⁵⁶ and can resuscitate claims previously disposed of on the basis of the old limitation regime or settled correspondingly.¹⁵⁷ There are, however, exceptions to the operation of the Act.

The first, internal to the Act, is that a defender can argue that an action nevertheless should not proceed for one of the two reasons stated in section 17D: (i) that it would not be possible for a fair trial to take place; and/or (ii) that the defender would be substantially prejudiced, and that prejudice would outweigh

¹⁴⁹ Prescription and Limitation (Scotland) Act 1973, s 17(2)(a). The general rule is that the period runs from the later date between when the injuries were sustained and when the injured party reached the age of 16 (s 17(3)). Subsequent revelations or realisations do not amount to fresh injuries: *Aitchison v Glasgow City Council* [2010] CSIH 9, 2010 SC 411, disapproving *M v O'Neill* [2006] CSOH 93, 2006 SLT 823. On the differences between this regime and the Limitation Act 1980, see *McE* (n 120) [155]–[161] (Lord Osborne). For the continuing difficulties posed by limitation in England and Wales in this context, see *TVZ v Manchester City Football Club Ltd* [2022] EWHC 7 (QB) (a case which can be distinguished from the context of the Celtic Boys Club case (n 147)).

¹⁵⁰ Suppression of the relevant abuse will not be treated as within the rule that 'unsoundness of mind' allows the court to defer computation under s 17(3): *McE* (n 120) [173]–[175] (Lord Osborne). See also *K v Marist Brothers* [2016] CSOH 54; affirmed [2017] CSIH 2, 2017 SC 258 [7] (non-disclosure prompted by threats of spiritual condemnation).

¹⁵¹ 1973 Act, s 19A. The sole reported example of an extension – which was not a vicarious liability case – is *A v N* [2013] CSOH 161, affirmed [2015] CSIH 26, 2015 SLT 289. See also the tentative conclusion in *Gorrie v Marist Brothers* 2002 SCLR 436 (OH).

¹⁵² See, eg, *B v Murray* (No 2) 2005 SLT 982 (OH) [120]–[122]; affirmed [2007] CSIH 39, 2007 SC 688, [2008] UKHL 32, 2008 SC (HL) 146; *CW* (n 60) [19]; *F v Quarriers* [2015] CSOH 82, 2016 SCLR 111 [148]–[149]; *K* (n 150) [90]–[91].

¹⁵³ *B v Murray* (OH) (n 152) [30] (Lord Drummond Young).

¹⁵⁴ By inserting a new s 17A-D into the 1973 Act.

¹⁵⁵ 'Abuse' is defined in s 17A(2) as including 'sexual abuse, physical abuse, emotional abuse and abuse which takes the form of neglect ...'

¹⁵⁶ 1973 Act, s 17B.

¹⁵⁷ *ibid*, s 17C.

the pursuer's interest to such a degree that the action should not proceed. A note of caution has been sounded against generalising from previous decisions,¹⁵⁸ and the relevance of cases decided under the prior regime remains unclear,¹⁵⁹ and opinions diverge on whether fair trial issues are preliminary matters, or should rather be determined after at least some evidence is heard.¹⁶⁰ However, some general points may be distilled from the decided cases. It has been accepted that the expansion of vicarious liability, and the introduction of the 2017 Act itself, may constitute substantial prejudice to a defender.¹⁶¹ But these alone will not be particularly weighty factors in the face of a pursuer with financial and personal interest in the adjudication of a claim supported by some, albeit incomplete, evidence.¹⁶² The extent and effects of the abuse will be considered in assessing the interest of the pursuer, whose reasons for delaying the action will not be relevant to that enquiry.¹⁶³ However, the death of an alleged abuser still usually will prevent a fair hearing,¹⁶⁴ unless the allegations have been admitted or there exists testimony from the abuser against which the allegations can be tested.¹⁶⁵ If there is 'no basis on which the defender can properly assert that the alleged abuse did not occur', then that will be a 'very significant matter' affecting the fairness of the trial.¹⁶⁶ This especially will be so where unspecified allegations are made against unnamed individuals.¹⁶⁷

The second, external, exception is that the Act does not affect the position in relation to claims in respect of abuse suffered before 26 September 1964. Claims in respect of such abuse have been extinguished by the operation of the doctrine of prescription.¹⁶⁸ Given the restrictions on the competence of the Scottish Parliament,¹⁶⁹ human rights concerns moved the legislature to not seek to disturb

¹⁵⁸ *A v XY Ltd* [2021] CSOH 21, 2021 SLT 399 [53] (Lord Woolman).

¹⁵⁹ Compare *B v Sailor's Society* [2021] CSOH 62, 2021 SLT 1070 [240] (Lady Carmichael) (s 19A cases 'provide no useful guidance in relation to what constitutes substantial prejudice' and not tasked with specifically considering fairness of hearing) with *JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) [101] (Chamberlain J) (reasoning in s 19A cases regarding fairness of hearing 'relevant' and 'helpful'). In *Kennedy* (n 3) [60], Lady Wolfe preferred the former view; whereas in *B v Congregation of the Sisters of Nazareth* [2022] CSOH 8, 2022 Rep LR 31 [85], Lord Weir was more agnostic.

¹⁶⁰ Compare *LM v DG's Executor* [2021] SAC (Civ) 3, 2021 SLT (Sh Ct) 87 [15] (fair hearing 'cannot be held over until the end of a proof') with *Kennedy* (n 3) [64]–[66], [68] (fair hearing issues may remain live throughout proof).

¹⁶¹ *A v XY* (n 158) [41]–[43].

¹⁶² *ibid* [46]–[51] ([51]: scales tipped 'decisively in favour of the pursuer').

¹⁶³ *JXJ* (n 159) [101].

¹⁶⁴ *ibid* [107]–[111], [113]–[115]; *B v Sailor's Society* (n 159) [242], [255], [273]; *B v Sisters of Nazareth* (n 159) [108].

¹⁶⁵ *JXJ* (n 159) [104]–[106]; *B v Sailor's Society* (n 159) [236] (referring to the police interview of the alleged abuser in *LM* (n 160)).

¹⁶⁶ *B v Sailor's Society* (n 159) [273].

¹⁶⁷ *B v Sisters of Nazareth* (n 159) [104]–[109].

¹⁶⁸ *Kelly* (n 85) [29]–[43]; *K* (n 150) [71]–[77], discussing the effect of the Prescription and Limitation (Scotland) Act 1984. Note that the s 19A discretion also cannot be employed to revive a claim which is prescribed, as it is part of the law of limitation only.

¹⁶⁹ Scotland Act 1998, s 29(2)(d).

this position.¹⁷⁰ A limited remedy for those abused in institutional care will be provided by the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021, which will establish a compensation fund made up of contributions from care providers which have signed up to the redress scheme. But not all survivors will have been abused in that context; nor will the scheme's capped recoveries sufficiently compensate all conceivable injuries.

Limitation inevitably requires that hard and fast lines be drawn, and the 2017 Act has at least ensured that those lines are drawn less harshly against those alleging historic abuse. A pursuer seeking compensation for a deceased pursuer's delicts still, however, faces an uphill struggle. A historic abuser might well have challenged the competence of the Scottish Parliament to pass bolder limitation legislation on human rights grounds,¹⁷¹ and this weighed heavily in the minds of the architects of the reform when fixing its contours.¹⁷² In framing this native legislative solution, the Scottish Government strongly was influenced by reforms in several Australian states following the Australian Royal Commission into Institutional Responses to Child Sexual Abuse.¹⁷³ However, given that the Scots and various Australian measures differ in formulation, Australian case law is probably of limited significance to interpreters of the 2017 Act.¹⁷⁴

B. Legal Personality / Unincorporated Associations

A further question, particularly important in historic child abuse litigation, is how principles of vicarious liability apply where the defender alleged to be in the requisite relationship with the wrongdoer is an unincorporated association bereft of legal personality. Unincorporated associations 'occupy an anomalous and unsatisfactory position' in Scots law.¹⁷⁵ This is more acute given the historic importance of such associations – religious and secular – in the provision of residential care, schooling,¹⁷⁶ sports coaching and other recreational and social opportunities to Scottish children, increasing their potential incidence as defenders in cases involving historic child abuse. However, despite sustained analysis and recommendations by the Scottish Law Commission, the precise nature of

¹⁷⁰ See, eg, the Justice Committee of the Scottish Parliament, *Stage 1 Report on the Limitation (Childhood Abuse) (Scotland) Bill* (2017 7th Report) [69]–[74], [99].

¹⁷¹ eg under the Convention for the Protection of Human Rights and Fundamental Freedoms, art 6 and protocol 1, art 1.

¹⁷² Stage 1 Justice Committee Report (n 170) [23]–[26], [73].

¹⁷³ See the Policy Memorandum to the Limitation (Childhood Abuse) Bill [13]–[14], [32], [41], [87]. The Australian provisions are discussed by Beuermann in chapter four.

¹⁷⁴ Compare *JXJ* (n 159) [101(i)] with *LM v DG's Executor* [2020] SC DUN 1, 2020 SLT (Sh Ct) 11 [29], [33]; reversed on other grounds (n 160).

¹⁷⁵ *Gloag & Henderson* (n 41) [47.01].

¹⁷⁶ See eg T O'Donoghue, 'The Role of Male Religious Orders in Education in Scotland' in SJ McKinney and R McCluskey (eds), *A History of Catholic Education and Schooling in Scotland: New Perspectives* (London, Palgrave Macmillan, 2019) 81–102.

unincorporated associations' potential liability remains unsettled.¹⁷⁷ It recently has been observed that, generally, 'the application of concepts such as vicarious liability ... may be less than straightforward or, indeed, inapt' in the context of unincorporated associations.¹⁷⁸ That being said, there is support for the view that 'a person.^[179] who is injured through the fault of such an association or its servants or agents has a right of action in delict against the association,'¹⁸⁰ with specified members capable of being 'constituted as agents for the whole of the membership for certain purposes', including defending litigation.¹⁸¹ These formulations do not reflect the post-CCWS expansion of the test for vicarious liability: can it be said that there is a relationship 'akin to employment' between a body without legal personality and its members?

Nevertheless, there is recent Scottish authority holding an unincorporated religious order vicariously liable for assaults perpetrated by a member,¹⁸² but neither the personality point nor the relationship point receives any discussion in the reported decision. The sheriff held the defender association – in the singular – 'jointly and severally liable' for the assault. This terminology perhaps reflects the fact that, procedurally, a judgment against the 'association' in such circumstances technically is a judgment against the members called before the court, who thereafter have a right of relief against the association's property.¹⁸³ This can be contrasted with the position in England, where CCWS apparently has settled that an unincorporated association can be liable for the torts of its members, without need for recourse to the concept of agency or procedural workarounds.¹⁸⁴ The English position specifically was rejected by the Supreme Court of Ireland in *Hickey v McGowan*,¹⁸⁵ where the position adopted was broadly in line with that in Scotland: a religious order, lacking legal personality,

¹⁷⁷ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140, 2008); *Report on Unincorporated Associations* (Scot Law Com No 217, 2009). See further *Kershaw v Connel Community Council* [2018] CSOH 111, 2019 SLT 121 [13]–[18], [33].

¹⁷⁸ *The Shore Porters' Society of Aberdeen v Brown* [2021] CSOH 37 [16] (Lady Wolfe).

¹⁷⁹ The picture is complicated if the injured party also is a member of the association, as vicarious liability is said not to arise among co-principals: *Harrison v West of Scotland Kart Club* 2004 SC 615 (IH).

¹⁸⁰ *Gorrie* (n 151) [8.5].

¹⁸¹ *McE* (n 120) [130] (*obiter*). cf *Kershaw* (n 175) [33] which reads this case as holding that vicarious liability cannot arise between an unincorporated association and its members. What was decided in *McE* was that a vicarious liability case had been improperly pleaded. In the passage cited in the main text, such liability *in principle* was accepted.

¹⁸² *T v The English Province of the Congregation of Christian Brothers* 2020 SLT (Sh Ct) 108.

¹⁸³ *Harrison* (n 179) [23].

¹⁸⁴ CCWS (n 42) [61]. However, the imposition of vicarious liability on unincorporated association for all connected wrongs of their members has been criticised: P Morgan, 'Vicarious Liability on the Move' (2013) 129 LQR 139, 140–41; P Morgan, 'Vicarious Liability and the Beautiful Game – Liability for Professional and Amateur Footballers?' (2018) 38 *Legal Studies* 242, 255–58.

¹⁸⁵ *Hickey v McGowan* [2017] IESC 6, [2017] 2 IR 196.

cannot itself be vicariously liable for the tort of a member,¹⁸⁶ but a member may vicariously be liable for the torts of another to the extent this was carried out in the ‘common interest’ of the association¹⁸⁷ or ‘sufficiently connected to the object and mission of the order’.¹⁸⁸

What remains unclear is which members may be held vicariously liable for the delict of another in Scots law. The position in English law – which equates for these purposes an unincorporated association to that of a body corporate – would be to treat all members of the association at the time of the initiation of litigation (or, perhaps, the execution of the ensuing judgment) as liable.¹⁸⁹ However, in *Hickey*, the Supreme Court of Ireland held that only those who were members of the association at the time of the wrongdoing would be fixed with liability.¹⁹⁰ In *Gorrie v Marist Brothers*, the Outer House outlined these two possible approaches without deciding between them, simply stating that the former was ‘not *prima facie* incompetent’.¹⁹¹ The Scottish Law Commission made no recommendation bearing on the question. Clearly, there may well be situations where there simply are no contemporaneous members alive to be held liable, and this approach would increase the chance of a defender being able to establish, in terms of the limitation provisions discussed above, that no fair trial could take place. That – and the interests of justice generally – favour treating all members at the time of the litigation as liable, but this admittedly goes against the logic of sustaining the unincorporated nature of associations. The Scottish Parliament already has in other areas proven willing to correct injustices caused by quirks of legal personality.¹⁹² Legislation framed for the particular context – as the 2017 Act is for limitation purposes – providing for recovery from unincorporated associations for historic child abuse,¹⁹³ may be a proportionate way to secure justice without wider disruption to the legal regimes in play.

¹⁸⁶ *ibid* [46]–[52] (O’Donnell J).

¹⁸⁷ *ibid* [56].

¹⁸⁸ *ibid* [38].

¹⁸⁹ The result of Lord Phillips’ reasoning in *CCWS* (n 42) is that *Campbell v Thompson* [1953] 1 QB 445 (QB), which reflects the Irish position discussed below – at least for the purposes of granting a representative order under CPR r 19.6 – now does not stand.

¹⁹⁰ *Hickey* (n 185) [56], although it is recognised that this default rule may be departed from by the rules of the association. For the practical implications of this – and the possibility of having the names of other potential members disclosed by order of the court – see *Grace v Hendrick* [2021] IEHC 320.

¹⁹¹ *Gorrie* (n 151) [8.6]. In *T* (n 182), the point was not discussed, and it is not clear precisely against whom decree was granted.

¹⁹² See the Partnerships (Prosecution) (Scotland) Act 2013, removing the possibility of a partnership evading criminal liability by dissolving in the period between the criminal act and the ensuing prosecution (which occurred infamously in *Balmer v HM Advocate* [2008] HCJAC 44, 2008 SLT 799).

¹⁹³ See, relatedly, *Hickey* (n 185) [57] (O’Donnell J): ‘[w]hether this is a desirable position as a matter of law and whether further changes should or could be made, is a matter which might usefully be considered by those charged with law reform’.

V. Conclusion

The basic principles of vicarious liability in Scotland are quite well-settled, especially given a relative paucity of case law on the subject. Though Scottish learning has occasionally been forgotten, borrowing from England is frequent, understandable and likely to continue. It is to be hoped that this will not come at the expense of insights available elsewhere, particularly from the wider common law world. Quite apart from this, the Scottish Parliament has already shown itself willing to alter general rules in responding to the widespread social ill of child abuse. Further such local and targeted intervention may yet prove necessary.