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VICARIOUS LIABILITY: ANALYSING RELATIONSHIPS AKIN TO EMPLOYMENT

1. Introduction

Vicarious liability is the treatment, regardless of fault, of one defendant as liable for another defendant's wrong.[1] The two-stage basic inquiry centres on whether (i) the defendants' relationship is one of employment,[2] or one akin to employment; and (ii) the wrongdoing is so closely connected with acts which the wrongdoer is authorised to do that it may fairly and properly be regarded as done in the course of the defenders' relationship.[3] This Article concentrates on one relationship giving rise to vicarious liability: the relationship akin to employment, which may also be termed quasi-employment.[4] Since its definitive appellate recognition in *E*,[5] quasi-employment remains a substantial source of judicial disagreement in England. Litigation has thrice more proceeded to the Court of Appeal.[6] And after five Supreme Court decisions, the latest in 2023, an attempt at clarification and synthesis seems timely.[7]

Discussion in the textbooks is generally quite brief, and is sometimes limited – or largely limited – to summaries of leading decisions.[8] There is no need for another such treatment. Building on other work,[9] this Article cuts through the authorities – including a growing body of first instance

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[1] For discussion of what actually is attributed to the vicariously liable defendant, see R Leow, *Corporate Attribution in Private Law* (Hart 2022) ch 4; *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21 [49]-[81].

[2] From which vicarious liability usually arises: *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 [35]. Employment includes employment pro hac vice: *Natwest Markets Plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 [149]-[156], also discussing dual vicarious liability, which is not recognised everywhere: *Bird and Clancy v Plaintiffs A, B, C and D* [2022] NSWCA 119 [197]-[198].

[3] The phrasing of stages (i) and (ii) reflects English and Scottish usage: *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15 [1], [4], [58]; *C and S v Shaw* [2023] CSOH 11, 2023 SLT 359 [25]-[26]; affirmed [2023] CSIH 36. Inquiries focusing on the defendants' relationship and the association of that relationship to the relevant wrongdoing exist elsewhere but differ in their detail. See, e.g., *Fullowka v Pinkerton's of Canada Ltd* [2010] SCC 5, [2010] 1 SCR 132 [142]; *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58, [2017] 2 SLR 1074 [42], [44]; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, (2022) 398 ALR 404 [82]-[83], [191].

[4] For the terminology, see *BXB* (n 3) [58](iii)-(iv), [60], [62].

[5] *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 [73], [120]-[122].

[6] *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352 esp [122]-[137]; reversing [2020] EWHC 595 (QB); *Hughes v Rattan* [2022] EWCA Civ 107, [2022] 1 WLR 1680 esp [84]-[91]; affirming [2021] EWHC 2032 (QB), but disagreeing with the Judge as to vicarious liability in a lengthy obiter dictum; *MXX v A Secondary School* [2023] EWCA Civ 996 esp [64]-[75]; affirming [2022] EWHC 2207 (QB), but disagreeing with the Judge that there was no quasi-employment on the facts of the case.

[7] *CCWS* (n 2); reversing, on vicarious liability, both [2010] EWCA Civ 1106, and the decision of HH Judge Hawkesworth QC at first instance, Queen's Bench Division, Dewsbury District Registry, 3 November 2009; *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660; affirming the Court of Appeal's reversal ([2014] EWCA Civ 132) of the decision at first instance by HH Judge Keyser QC, Swansea County Court, 3 May 2013; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355; reversing both [2015] EWCA Civ 1139, and [2014] EWHC 4005 (QB); *Various Claimants v Barclays Bank Plc* [2020] UKSC 13, [2020] AC 973 esp [6], [8], [27]-[28]; reversing both [2018] EWCA Civ 1670, and [2017] EWHC 1929 (QB); *BXB* (n 3); reversing both [2021] EWCA Civ 356, and [2020] EWHC 156 (QB).

[8] There is a slightly fuller account in MA Armitage (gen ed), *Charlesworth and Percy on Negligence* (15th edn, Sweet & Maxwell 2022) [7.34]-[7.49]. Compare G Cameron, *Thomson's Delictual Liability* (6th edn, Bloomsbury 2021) [12.8]; J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) [21.12]-[21.15]; EC Reid, *The Law of Delict in Scotland* (EUP 2022) [3.23]-[3.30]; A Tettenborn (gen ed), *Clerk & Lindsell on Torts* (24th edn, Sweet & Maxwell 2023) [6.35]-[6.36].

[9] M Campbell and B Lindsay, 'Vicarious Liability in Scotland' in P Giliker (ed), *Vicarious Liability in the Common Law World* (Hart 2022); M Campbell and B Lindsay, 'Refining Vicarious Liability' (2024) 28 Edinburgh L Rev forthcoming.

decisions – and adopts a prescriptive perspective,[10] laying down what is thought to be the best approach to quasi-employment cases. It may commend itself to pleaders and judges faced with the issues addressed. Even if not, engagement with what follows may help to sharpen the arguments of those differently inclined. Focus is on English sources. But Scots law essentially aligns with English law in this context, as discussed below. And developments here may be of interest elsewhere to those pondering the position in other jurisdictions, whether relationships akin to employment are recognised there or not.[11]

Before Section 3 suggests a systematic way to assess whether a relationship between defendants is one of quasi-employment, Section 2 highlights two matters to which attention must be given before commencing the analysis. Section 4 tackles the most pressing difficulty arising at stage (i) of the basic inquiry in cases of this kind: the role of policy. Section 5 looks at the state of play in Scotland. Section 6 concludes. Before proceeding, it is noted that the development of quasi-employment perhaps renders unattractive any further erosion of the general principle against vicarious liability for the wrong of a true independent contractor in order, for example, to protect persons wronged by gig economy workers,[12] difficult though it may remain to draw relevant distinctions.[13]

2. Preliminary matters

The first matter requiring initial attention is the appropriate way to look in general at a relationship between defendants which may give rise to vicarious liability because one of quasi-employment. Practitioners know of the need to advise on vicarious liability as a risk.[14] Working practices evolve,[15] and organisations may look to evade vicarious liability and other burdens by making persons acting on their behalf and for their benefit appear to be independent contractors.[16] Thus, judges must concentrate on reality, not appearances, when analysing the arrangements between defendants which come before them in vicarious liability cases. Two propositions form the starting point for this approach. Each is explained differently.[17] First, how parties label their relationships is unimportant. Strictly, their view on a matter of law is irrelevant.[18] Secondly, judges may overlook

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[10] J Smits, 'What Is Legal Doctrine?' in R van Gestel, HW Micklitz and EL Rubin (eds), *Rethinking Legal Scholarship: a Transatlantic Dialogue* (CUP 2018) 217-219.

[11] For Canada, see *Doe v Bennett* [2004] SCC 17, [2004] 1 SCR 436 [27]. Movement at common law in Australia has been more tentative: *RC v The Salvation Army (Western Australia) Property Trust* [2023] WASCA 29 [141]-[156]; *Bird v DP* [2023] VSCA 66 [80]-[130] esp [82], [113]-[117]; special leave granted [2023] HCA Trans 145; but for relevant legislative developments, see C Beuermann, 'Vicarious Liability in Australia' in P Giliker (ed), *Vicarious Liability in the Common Law World* (Hart 2022) 98-100.

[12] See *Barclays* (n 7) [24], [27], [29]. As the use in the main text of the word *further* clarifies, the present writer does not *quite* agree with the court's view that there has been *no* erosion.

[13] Compare J Gracie, 'Vicarious Liability: No Longer "on the Move"' (2021) 26 Torts LJ 269, 275, 278-279.

[14] K Patrick and M Bowly, 'Vicarious Liability of Employers: Supreme Court Provides Welcome News' (2020) 9(5) Compliance & Risk 10, 13-14.

[15] Commenting from the perspective of vicarious liability, see P Giliker, 'Vicarious Liability and Corporations' in M Petrin and C Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar 2023) 276-278.

[16] *Cox* (n 7) [29]-[31]; *E* (n 5) [58]-[60]; *Grubb v Shannon* [2018] SCGLA 13, 2018 SLT (Sh Ct) 193 [58]-[59]; *Morrissey v Health Service Executive* [2020] IESC 6, [2020] PNLR 17 [12.11]-[12.16]; J Fullbrook, 'Reverberations from *Uber v Aslam* in Personal Injury Claims?' [2021] JPIL 57, 63-66, also mentioning that one could always instate vicarious liability for independent contractors.

[17] Policy ideas influence developments at this stage of the vicarious liability inquiry but cannot be relied upon for want of consensus: *E* (n 5) [50]-[60]; *Grubb* (n 16) [50]-[51], [58]-[59]. Labour and tax law cases show that the approach suggested here nevertheless requires a satisfactory rationale: compare *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657 [69]-[87]; with *Revenue and Customs Commissioners v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] ICR 1059 [156]. Note, however, that whether a relationship gives rise to vicarious liability does not depend on how it is seen from other perspectives: *Cox* (n 7) [11]; *Barclays* (n 7) [29].

[18] Even if occasionally helpful: *Personnel Contracting* (n 3) [66], [184].

the letter of defendants' contractual – and presumably other – arrangements where they contradict reality, even if otherwise unchallenged:[19] whether a relationship gives rise to vicarious liability 'turns on all the circumstances of the case'.[20] This proposition is well-vouched by authority. A justification for it is elusive. But one could usefully commence with and enlarge upon a principle, short of a sham doctrine requiring party collusion, that 'rules of contract law ([such as] usual rules of contractual construction) are not to be conscripted in aid of transactions or documents that are deceitful or that mask the true agreement of the parties'.[21]

The second matter requiring initial attention is the identification of a defendant who may be vicariously liable.[22] This is, of course, a necessary step in any vicarious liability case. But the issue is to the fore in the quasi-employment context. The search for what may be termed a quasi-employer will sometimes be simple. In other cases, it may be more challenging than in standard situations of employment or shared employment. There may be multiple potential quasi-employers, actors therein, and representatives thereof,[23] among whom relevant powers and responsibilities are distributed. Behind a wrongdoer there may, for example, be an overall governing religious body, satellite setups for the body, members from time to time of a particular congregation, and trustees[24] from time to time of that congregation. Resistance on the part of these groupings in litigation could give rise to difficult questions. Most generally: who is or are the vicariously liable quasi-employer(s), and who should satisfy any judgment? Undifferentiated references to 'the defendants' do not suffice.[25] Even where a quasi-employer is identifiable, it will perhaps more probably than in standard situations be an unincorporated association. Though this poses no difficulty in England, the uncertain status of unincorporated associations as defenders could in Scotland be taken up by well-advised, properly funded litigants.[26]

3. Core principles

After the identification of a wrongdoer's potential quasi-employer comes the question whether she stands in a relationship akin to employment with a wrongdoer. Based on the best account of the authorities, this section sets out as concisely as possible a pattern of inquiry that could usefully be embraced. It is necessary to undertake a close examination of the features of the defendants' relationship 'that are similar to, or different from', one of employment.[27] Focus is on these, but

[19] E.g. as a sham or as having been varied: compare ibid esp [43], [59], in which it was decided that contract terms were an unchallenged, comprehensive, and so decisive, record of the parties' relationship; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, (2022) 398 ALR 603.

[20] *Natwest* (n 2) [151]; citing *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 (HL) 10, 15, 20, 21; in turn cited in *Kerr v Hailes (Plant) Ltd* 1974 SLT (Notes) 31, 32. Based on this proposition one might overlook unreal contractual provisions denying any obligation to do or provide work, or instituting sweeping substitution entitlements.

[21] P Bomball, 'Contractual Autonomy, Public Policy and the Protective Aim of Labour Law' (2020) 44 Melbourne U L Rev 502, 522-534 esp 529.

[22] See generally, including for the term *quasi-employer*, *BXB* (n 3) [58](iii)-(iv), [59]-[64].

[23] See the careful analysis required to determine who should be sued as representing the crown in *X v Y* [2023] CSOH 17, 2023 SC 235 [49], [54]-[67].

[24] The trustees accepted liability in *D v Bishop's Conference of Scotland* [2022] CSOH 46, 2022 SLT 816.

[25] Compare *BXB v Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 156 (QB) [2020] EWHC 156 (QB) [1]; [2021] EWCA Civ 356 [2]; both at [2020] 4 WLR 42, in which the governing body agreed to satisfy any judgment against the trustees.

[26] See Campbell and Lindsay, 'Vicarious Liability in Scotland' (n 9) 217-219. There perhaps existed extra-legal reasons not to dispute vicarious liability in, e.g., *T v The English Province of the Congregation of Christian Brothers* [2020] SC EDIN 13, 2020 SLT (Sh Ct) 108; and a later case involving the same defender, counsel, and solicitors: *AB* [2022] SC EDIN 7.

[27] *BXB* (n 3) [58](ii); *Barclays* (n 7) [27]; stating that this was also key in *CCWS* (n 2); *Cox* (n 7); and *Armes* (n 7). The court in *Barclays* (n 6) [18], [23] demonstrated this for *CCWS* (n 2); and *Armes* (n 6); but not *Cox* (n 6), though see that case at [32]-[37]. See also the efforts made in *BXB* (n 3) [36], [43], [46].

not to the *entire* exclusion of outward appearances.[28] The relationship is akin to employment if it possesses the same fundamental qualities as those inherent in an employment relationship,[29] so that if the dichotomy is factually apposite,[30] the wrongdoer more closely resembles an employee than an independent contractor.[31] Thus the presence of the normal indicia of employment, or something close to them, is key.[32] Relevant features of a working relationship between a wrongdoer and quasi-employer include:

> '[W]hether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the [wrongdoer], the extent of the [second] defendant's control over the [wrongdoer] in carrying out the work, whether the work is being carried out for the [second] defendant's benefit or in furtherance of the aims of [an] organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the [wrongdoer's] role fits.'[33]

In the usual manner, assistance is derived from parallels with, and general guidance in, previous authorities.[34] The existence of quasi-employment may be determinable based on authority which applies more or less directly to a set of arrangements between defendants, examined in detail.[35] Absent such authority, the matter is determinable by the use in broader fashion of authorities yielding incidental factual comparisons and general guidance from principle,[36] such as that quoted just above.

4. The role of policy

Difficulty commences with the statement in the Supreme Court case of *Various Claimants v Barclays Bank Plc* that in so-called 'doubtful cases', certain policy factors 'may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to

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[28] This seems the best way to read the arrangements-focused dicta in *Hughes* (n 6) [86]-[88]; and query the views there expressed that the phrase 'recognisably independent business', used in *Cox* (n 7) [24], [29]-[30], means a business 'recognisable to someone with no knowledge of the contractual arrangements between the tortfeasor and the defendant'; and that *Barclays* (n 7) marks some sort of reversion to 'focus … on the contractual arrangements between tortfeasor and defendant'. Compare *Barness v Ingenious Media Ltd* [2019] EWHC 3299 (Ch), [2020] PNLR 10 [75]-[79]; *SKX v Manchester City Council* [2021] EWHC 782 (QB), [2021] 4 WLR 56 [45]-[46], [48]; and, semble, *Barclays* (n 7) [22].
[29] *Ng Huat Seng* (n 3) [63]. Note that a relationship akin to employment may be *closer* than an employment relationship: *CCWS* (n 2) [56]-[58]; and a non-commercial entity may be vicariously liable: *Cox* (n 7) [30].
[30] See *TVZ v Manchester City Football Club Ltd* [2022] EWHC 7 (QB) [310]-[311]; *Carr v Brands Transport Ltd* [2022] EWHC 3167 (KB) [343], [357].
[31] *TVZ* (n 30) [240]-[246], [256], [259].
[32] *DSN* (n 6) [60], [62], [122], [127]-[128].
[33] *BXB* (n 3) [58](ii), [66]-[67]; *TVZ* (n 30) [261]-[263], [313]-[320]: proportions of time wrongdoer spends with quasi-employer's operation and elsewhere, shouldering of profit-loss-risk, duties of obedience, extent and nature of control over wrongdoer, wrongdoer's involvement with core of quasi-employer's operation; *Barclays* (n 7) [28]: burden of administration, framing of tasks, payment structure, freedom to refuse work, who insures, whether purported quasi-employer is closer to being one in a portfolio of clients than an employer. On top of at least a more then vestigial degree of control over what the wrongdoer does, and a real degree of integration into the quasi-employer's operation, the court in *DSN* (n 6) [66]-[69], [72], [78], [82], [101]-[104], [122]-[128] endorsed as a relevant factor the assignment of tasks to the wrongdoer which increases the risk of wrongdoing. The assignment of tasks may be at the root of some relevant considerations. But risk of wrongdoing is not itself a relevant criterion: *BXB* (n 3) [69].
[34] *DSN* (n 6) [104], [129], [131]-[135]; *TVZ* (n 30) [258]-[263], [302]-[303]; *BXB* (n 3) [68].
[35] This is necessarily an oversimplification. See K Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little & Brown 1960) 77-91, famously cataloguing sixty-four ways precedent may be handled or affect an instant case.
[36] As in *Carr* (n 30) [361].

impose vicarious liability'[37] First, the factors highlighted are unhelpful. Secondly, no policy reasoning of any type is necessary to the decision of quasi-employment cases.[38]

In the first place, then, the factors referred to by the Supreme Court are 'policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied':

> '(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;[39] (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;[40] (v) the employee will, to a greater or lesser degree, have been under the control of the employer.[41] […]
>
> [These] incidents of the relationship between employer and employee … make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is akin to that between an employer and an employee.'[42]

As the introductory and closing words of this passage confirm, the five factors are set up as policy reasons for having *employers*' vicarious liability *in the first place*. A decision whether the contours of the doctrine should expand to take in a new situation from which an employment relationship proper is absent, but in which the core normative concerns of employers' vicarious liability are present, is supposed to be assisted by an understanding of these reasons.[43] That such an understanding provides such assistance may, however, be doubted. Factor (i), deep pockets and insurance, explains why one might target a particular defendant at all.[44] It cannot be used to differentiate relationships of quasi-employment (or, indeed, employment) from those of principal and independent contractor. The same objection applies to factor (ii), causation of wrongdoing through action on another's behalf, and factor (iv), creation of the risk of wrongdoing. These are unconcerned with any particular kind of relationship between a wrongdoer and a party sought to be made vicariously liable. Further, factors (ii),[45] causation, (iii), integration into business activity, (iv),[46] risk creation, and (v), control,[47] will likely be present in any situation in which arguments of

[37] *Barclays* (n 7) [14]-[18], [27]; discussing *CCWS* (n 2). See also *DSN* (n 6) [99]-[101]; *BXB* (n 3) [58](iv): 'difficult cases'.
[38] By *policy* is meant 'substantive justifications to which judges', and indeed other lawyers, 'appeal when the standards and rules of the legal system do not provide a clear resolution of a dispute': J Bell, *Policy Arguments in Judicial Decisions* (Clarendon 1983) 22-23.
[39] On the weight of deep pockets and insurance, compare *Cox* (n 7) [20]; with *Armes* (n 7) [56], [63]; and see *BXB* (n 3) [42], [82].
[40] On factors (ii), (iii), and (iv), 'the beating heart of the policy assessment' (S Eggleton (2023) 139 LQR 193, 197), see *Cox* (n 7) [23]-[24], [29]-[32]; and on the 'core idea' encapsulated in these factors, see *BXB* (n 3) [42], [47], [58](iv), [69], [82], also noting that factors (i) and (v) have 'little, if any, force'.
[41] On this factor, see *Cox* (n 7) [21]; and on factors (ii)-(v), see *DSN* (n 6) [77]-[78], [82], [101]-[104], [135].
[42] *CCWS* (n 2) [35], [47] (reference omitted); and see the endorsement of loss distribution ibid [34].
[43] *Barclays* (n 7) [16]-[28], [27]; *Ng Huat Seng* (n 3) [62].
[44] See *CCWS* (n 2) [34].
[45] *DSN* (n 6) [102].
[46] *Armes* (n 7) [77] (Lord Hughes, dissenting): 'will in practice apply to virtually all situations in which A asks or authorises B to deal in some manner with C'.
[47] *DJ v Barnsley MBC* unreported Sheffield County Court, 13 August 2021 [34]-[35], [57]-[58]: 'business activity, risk, control and means [i.e. deep pockets] are more or less written into every fostering situation'.

vicarious liability are contemplated. In many circumstances worth litigating – and supposedly meriting analysis through a policy lens because hard to analyse – perhaps only a little effort is needed to bring these factors out.[48] Query, therefore, their potential to assist in cases posing special difficulty.

In the second place, if the factors thought helpful by the Supreme Court are largely unfit for purpose, it is fortunate that they – and policy reasoning generally – are unnecessary. A careful examination of the cases, particularly those decided by lower courts, discloses that a consideration of whether policy reasoning can be used in a quasi-employment case proceeds as follows. Such reasoning is *not strictly*[49] permissible where a detailed analysis of the parties' relationship with the aid of precedents determines to the court's satisfaction whether a relationship akin to employment exists.[50] If not, policy reasoning *is* permissible.[51] Unmistakeable instances aside,[52] a clear example of a case in which policy reasoning is needed involves 'a pattern of relationships with legal and factual elements which differ from those found in any of the authorities to which [the court is] referred'.[53] At a measure of distance from this lie (i) from a legal perspective, 'circumstances which have not previously been the subject of an authoritative judicial decision';[54] and (ii) from a factual perspective, situations in which a claimant can 'establish the essential minimum of the employee relationship … but where uncertainty remains whether' the defendants' relationship 'is sufficiently analogous to that of a conventional employment relationship'.[55] The matter is one of degree. The further removed a case from the clear example, the more caution is required in allowing policy reasoning to influence its resolution.[56]

This picture is familiar to lawyers acquainted with the use in England (and Scotland) of policy reasoning in the law of negligence when the question arises whether a person is under a duty of

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[48] See the admirably frank warning in the clear case of *TVZ* (n 30) [327]: '[i]t is deceptively easy to apply [policy reasoning] in a way that leads to a conclusion that [vicarious liability] is fair, just and reasonable'.

[49] The word 'generally' has, however, been used, reflecting the usual 'never say never' attitude which must prevail among appellate judges: *Cox* (n 7) [41]; *BXB* (n 3) [58](iv), [82].

[50] *SKX* (n 28) [50]-[54]. In emphasising that this is a matter for the *court*, it is not unrealistically suggested that *counsel* would forbear to argue that hers is a doubtful case if she thinks she properly can, even knowing she may very well not succeed.

[51] *TVZ* (n 30) [279](4).

[52] *Carr* (n 30) [362]: 'unquestionable[]'; *SKX* (n 28) [53]: 'classic'; *DJ* (n 47) [23], [33], [65]: a doubtful case 'that would delight the most sadistic law examiner ever born'; agreed with when the decision was affirmed on appeal [2023] EWHC 1815 (KB) [39].

[53] *JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) [136], [144].

[54] *Cox* (n 7) [41], which was 'such a case'. By this, Lord Reed seems to have meant that the proposition that the ministry-prisoner relationship could give rise to vicarious liability was undecided. Note that Lord Reed considered policy by reference to the fair, just and reasonable construct (ibid [42]-[44]), not the five policy factors from *CCWS* (n 2) under discussion here. He saw the latter as 'criteria for the imposition of vicarious liability', reflecting 'the various policy justifications for its imposition': *Cox* (n 7) [41]. So they had already informed his discussion of the details of the defenders' relationship: see ibid [32]-[39] ('the requirements laid down in [*CCWS*] are met'); *Barclays* (n 7) [16], [20]-[22]; *BXB* (n 3) [42]-[44].

[55] 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, 71-72. See also *DJ v Barnsley MBC* [2023] EWHC 1815 (KB) [34], [39].

[56] *TVZ* (n 30) [327]-[328]. It should not, of course, be thought that judges will *never* mention policy if they decide that it is not strictly engaged. Most obviously, they may address it *obiter* (for appellate acknowledgement that this may be wise, see *Benyatov v Credit Suisse Securities (Europe) Ltd* [2023] EWCA Civ 140, [2023] ICR 534 [32]) lest their initial assessments be held wrong on appeal. See *DSN* (n 6) [129]; *TVZ* (n 30) [219], [257], [321], [327]; *MXX v A Secondary School* [2022] EWHC 2207 (QB) [200]; affirmed because no sufficiently close connection between wrongdoing and relationship between defenders, but appellant abuse survivor's contention accepted that the judge misapplied to the facts her correct statement of the law relating to quasi-employment [2023] EWCA Civ 996 [64]-[75]. Recognition that counsel on both sides had fully argued the point may explain the brief mention of policy in *Hughes v Rattan* [2021] EWHC 2032 (QB), [2022] 1 WLR 194 [101]-[102], [131] (unaddressed when the Court of Appeal disagreed with the judge on vicarious liability in a lengthy obiter dictum: [2022] EWCA Civ 107, [2022] 1 WLR 1680).

care.[57] Where authority already gives an answer, the wisdom of that answer in policy terms has already been considered. It need not be re-considered unless a court is invited to depart from decided cases.[58] Ordinarily, only where established principles provide no answer does the question become whether one *should* develop the law incrementally and by analogy with established authority, so that a duty of care is imposed.[59] Particular consideration is given to (i) whether so doing would be fair, just, and reasonable;[60] (ii) the needs to avoid incoherence and inappropriate distinctions; and (iii) the potential consequences of extending existing doctrine.[61] Though identifying established categories of case may be challenging,[62] it is clear that any move beyond them,[63] starting with extensions of the same and not just the recognition of entirely new ones, involves policy reasoning.[64] The closer one is to facts on which a duty of care has been recognised, the more easily the necessary policy assessment tips in favour of further development.[65]

The parallel is plain between the 'authority then policy' approach in the akin to employment inquiry, and that applicable to the duty of care question. But the analyses are distinguishable. In negligence, the courts consider it possible for a case to be incapable of decision 'in accordance with an established line of authority', so that policy reasoning is necessary.[66] The necessity arises, it is said,[67] because a judge can be unable to construct from the cases a normative statement applicable to a fact situation in such a way as suffices to say whether a duty of care exists as a matter of law.[68] By contrast, it is *always* possible to dispose of a quasi-employment case based on ample existing authority. There may be no precedent on all fours.[69] But at the very least, there is available a suite of indicia of employment against which to test the details of the relationship between a wrongdoer and a person sought to be made vicariously liable.[70]

A pertinent distinction between duty of care and quasi-employment situations thus lies in what (it is thought) the authorities can do. In novel negligence cases, the headline question is whether

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[57] For Scotland, see, e.g., *Adiukwu v Secretary of State for the Home Department* [2020] CSIH 47, 2021 SC 38 [7], [53], [69], citing and summarising authority. And on the relationship between the approach set out here and assumption of responsibility, see *Benyatov* (n 56).

[58] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 [26], [42].

[59] *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780 [64].

[60] *Royal Bank of Scotland International Ltd v JP SPC 4* [2022] UKPC 18 (IoM), [2023] AC 461 [80].

[61] *Robinson* (n 58) [27], [29], [69](1)-(2).

[62] ibid [85]-[87]. For disagreement in an apex court, see *Rankin (Rankin's Garage & Sales) v JJ* [2018] SCC 19, [2018] 1 SCR 587 [18], [28] (Karakatsanis J, for the majority), [71]-[76] (Brown J, with whom Gascon J agreed).

[63] A question of degree: *Reeman v Department of Transport* [1997] PNLR 618 (CA) 625.

[64] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2019] AC 831 [15]-[16], noting that it is unnecessary for 'the precise factual situation' to have been 'been the subject of a reported judicial decision' to exclude policy: '[i]t is sufficient that the case falls within an established category in which the law imposes a duty of care'; *Robinson* (n 58) [84].

[65] *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021 [23].

[66] *Commodity Solution Services Ltd v First Scottish Searching Services Ltd* [2019] SAC (Civ) 4, 2019 SC (SAC) 41 [31], [33]; *ABC v St George's Healthcare NHS Trust* [2020] EWHC 455 (QB), [2020] PIQR P13 [28], [29], [156]; *Hughes v Turning Point Scotland* [2019] CSOH 42, 2019 SLT 651 [81], [93]-[94]; *Benyatov* (n 56) [24]-[29], [55]-[57], [60]; affirming the approach at first instance [2022] EWHC 135 (QB). Compare *Ashraf v Lester Dominic Solicitors Ltd* [2023] EWCA Civ 4, [2023] PNLR 14 [71]-[73]; *A v B Ltd* [2022] CSOH 34, 2022 SLT 577 [17]-[21].

[67] To what point judges handle precedents and decide cases how they *purport* to may be left aside. For two discussions, of two angles, among many, see D Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 J Leg Ed 518; B Leiter, 'Legal Realism and Legal Doctrine' (2015) 163 U Pa L Rev 1975.

[68] L Duarte d'Almeida, 'What Is It to Apply the Law?' (2021) 40 Law and Philosophy 361, 371-372, 383-385.

[69] C Michelon, 'The Uses of Precedent and Legal Argument' in T Endicott et al (eds) (ed), *Philosophical Foundations of Precedent* (OUP 2023) 118-123.

[70] See those set out in, and in the text to, n 33, above. The courts regularly direct themselves according to generalised guidance in other contexts, such as contractual interpretation disputes: *EMFC Loan Syndications LLP v The Resort Group Plc* [2021] EWCA Civ 844, [2022] 1 WLR 717 [56]-[58]; *Paterson v Angelline (Scotland) Ltd* [2022] CSIH 33, 2022 SC 240 [32].

persons generally should owe a duty of care on a given fact pattern.[71] There is no conceptual limit to the considerations which may bear on this. Liability 'for negligence may be argued in an almost unlimited range of circumstances', and '[p]articular cases can always raise questions which cannot be covered by principles or policies of relatively general application'.[72] So one can well understand how authority may run out of steam, rendering policy necessary.[73] In quasi-employment cases, the headline question is more granular: do comparatively fact-focused indicia of employment, and relevant individual decisions, support the conclusion that this relationship is akin to one in which a wrongdoer serves a business in subordinated, dependent fashion under another's control?[74] Perhaps because what bears on the existence of quasi-employment is ordinarily more concrete,[75] the authorities cannot run out of steam. So not only is policy redundant, there is no clear start-stop point for its use. Yet it has not been suggested that it is relevant in every case of this kind.

Ideally, then, policy reasoning would be excluded from akin to employment cases.[76] But it is necessary to be realistic. One cannot physically prevent pleaders and judges from *mentioning* policy. And like it or not, they will *employ* policy.[77] So, based on the foregoing, here is how they should – if they must. First, the Supreme Court's five factors should be discarded. Their replacement should be the fair, just and reasonable construct, borrowed from the law of negligence. It leaves room to identify and argue based on policy considerations worthy of serious discussion.[78] Secondly, and especially since policy reasoning is strictly unnecessary, it should be discussed openly, and it should influence exceptionally. It should feature alongside as full an account of relevant authority as possible. And at most, it should serve to prevent absurd or grotesque outcomes.[79]

5. The position in Scotland

Though based mainly on English sources, the approach advocated in this Article is compatible with Scots law. The 'doctrine of vicarious liability as it exists in Scotland … today is predominantly English in derivation'.[80] At both the 'right relationship?' and 'right connection?' stages of the basic inquiry, English learning is frequently cited and influential.[81] The earliest Scottish decision to address quasi-employment is 2018's *Grubb v Shannon*.[82] As the only such case from north of the

[71] Goudkamp and Nolan (n 8) [5.012], [5.016]; Tettenborn (gen ed) (n 8) [7.08], [7.15]-[7.30], stating that a duty of care 'applies to a general class of relationship and damage' before discussing how to determine its existence.
[72] Armitage (gen ed) (n 8) [2.02] ('the potential scope of negligence as a basis for legal liability is virtually unlimited'), [2.48], [2.58].
[73] S Deakin and Z Adams, *Markesinis and Deakin's Tort Law* (8th edn, OUP 2018) 94-95.
[74] See *Uber* (n 17) [73]-[75] (referring to employees and workers). The notion of dependent labour runs through the discussion in Z Adams and others, *Deakin and Morris' Labour Law* (7th edn, Hart 2021) ch 2.
[75] Compare the indicia set out in, and in the text to, n 33, above, with the more abstract discussion of policy and typical concerns in Tettenborn (gen ed) (n 8) [7.26]-[7.27]; C Witting, *Street on Torts* (16th edn, OUP 2021) 44-46.
[76] Compare the view of the court in *BXB* (n 3) [44], [58](iv), [82], which observed that policy is unnecessary 'in the vast majority of cases'.
[77] J Thomson, 'Principle or Policy? The Judicial Development of the Law of Delict' [2003] CLP 123, 136-138, 150-151.
[78] On lawyers' tacit knowledge of what arguments are likely proper, see, e.g., J Bell, 'The Acceptability of Legal Arguments' in N MacCormick and P Birks (eds), *The Legal Mind: Essays for Tony Honoré* (Clarendon 1986); S Swaminathan, 'Analogy Reversed' [2021] CLJ 366, 380-385.
[79] This is a rejection of the court's view in *BXB* (n 3) [44], [58](iv), [82] that policy is even a 'useful final check' in cases which are merely 'difficult'.
[80] 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* (OUP 2004) 626-627.
[81] Campbell and Lindsay, 'Vicarious Liability in Scotland' (n 9) passim; Campbell and Lindsay, 'Refining Vicarious Liability' (n 9) esp section D; *JXJ* (n 53) [120] (apparently approving party agreement that the English and Scots doctrines of vicarious liability align). There is heavy reliance on English sources in Scottish accounts of vicarious liability: Cameron (n 8) [12.5]-[12.19]; Reid (n 8) [3.1]-[3.77]; HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* (15th edn, W Green 2022) [25.07]-[25.15].
[82] *Grubb* (n 16).

border in which liability was finally determined, it bears some discussion. Shannon, leased premises which she fitted out and ran as a beauty salon with two other therapists and a hairdresser under a brand which she devised. One therapist, Higgins, worked from the room otherwise used by Shannon. She contributed modestly to rent, but retained all income from customers. She was generally present on the same three days each week, with keys and authority to open and lock up. She had access to the salon's Facebook account to solicit custom for the overall concern, which she further aided by appearing in publicity imagery and attending a third party wedding fair in branded clothing with the other therapist, whose arrangement with Shannon for another room was similar. All three beauty therapists offered a set range of treatments at agreed prices; promotions or discounts were in the end up to Shannon. Higgins' beauty therapy was a central part of Shannon's main business activity, carried on over an extended period, subject to substantial restrictions on pricing, and a more than minimal degree of control as to what she did as a self-employed person. She effectively stood in Shannon's shoes when working, going about assigned activities which carried a risk of injury through carelessness. The pursuer reacted allergically to the eyebrow tint which Higgins applied without conducting an initial skin test, or inquiring about allergies or experiences with similar treatments. Though not Higgins's employer – and though, for example, she paid Higgins no money, provided no equipment, and collected no tax or national insurance – Shannon was vicariously liable for Higgins's negligence based on a relationship between them akin to employment. Drawing on English learning, Sheriff Reid held in an extraordinarily detailed note 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.'[83]

This followed discussion using the Supreme Court's five factors as convenient headings.[84] The second, third, and fifth were taken as reflecting longer-standing guidance on the identification of employment.[85] Along with the 'recognisably independent business' admonition[86] – a different,[87] but clear,[88] way to state that vicarious liability does not arise from the relation of principal and true independent contractor – the second to fourth factors are echoed in the statement of principle which Sheriff Reid repeatedly emphasised, and closely tracked in his just-quoted conclusion.[89] He understood himself to be examining whether Shannon's relationship with Higgins exhibited 'characteristics similar to those found in employment […] such as to make it fair, just and reasonable' for it 'to give rise to vicarious liability'.[90] He was not *also* standing back and considering policy as a separate question.[91] Unsurprisingly, then, the complete quintet of factors merely

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[83] ibid [112].

[84] ibid [86]-[111].

[85] ibid [72], [89], [96]-[97]; citing *E* (n 5) [72].

[86] Sheriff Reid's understanding of this phrase is doubtful: see n 28, above, and *Grubb* (n 16) [100] (original emphasis): '*recognisable* to a reasonable person or objective bystander standing in the shoes of the injured claimant'. But his analysis went beyond features of the defenders' relationship knowable to third parties.

[87] Lee, 'The Supreme Court, Vicarious Liability and the Grand Old Duke of York' (2020) 136 LQR 553, 555.

[88] *Barclays* (n 7) [20]-[22], [24]; *Ng Huat Seng* (n 3) [64]; D Nolan, 'Reining in Vicarious Liability' (2020) 49 Industrial LJ 609, 612, 613-614.

[89] *Grubb* (n 16) [68]-[71] ('backbone' characteristics), [94], [96], [100], [112]; *Cox* (n 7) [24].

[90] *Grubb* (n 16) [63]; mis-citing *Cox* (n 7) [24]; for *Armes* (n 7) [54]. See also *Grubb* (n 16) [67]: 'What, then, are these "characteristics" of an employment relationship?'

[91] See his reference to 'a number of important ground rules to be observed before one embarks upon an analysis of the [defenders'] relationship', the fifth of which was that 'it will not always be necessary to ask the broader question, namely whether it is 'fair, just and reasonable' to impose liability. The 'whole point' of seeking to align the five criteria

provided a framework within which to assess many factual details of the defenders' relationship[92] by extensive reference to case law. An overt consideration of risk-creation would likely not feature in Sheriff Reid's note were he writing it today.[93] He might further adopt a different structure to render unambiguous the conformity of his reasoning with more recent authority.[94] Nevertheless,[95] though Sheriff Reid used the Supreme Court's five factors to give *form* to his thinking, this did not produce a particularly errant analysis in *substance*. Rather, this approach assisted with examining the defenders' communings in detail. And despite certain infelicitous turns of phrase,[96] there is more textual support in his note for the view that he did not – rather than that he did – unduly downplay the principle that vicarious liability does not ordinarily arise from a relationship of principal and true independent contractor.[97]

Developments subsequent to *Grubb v Shannon* pose no difficulty. In *Kennedy v Bonnici*,[98] the court avoided confusion into which the pleadings might have led it and concluded that no question of quasi-employment arose. The pursuer offered to prove employment proper, and the trustee's obligation to meet liabilities incurred by a predecessor was unrelated to vicarious liability. The Supreme Court's decision in *Barclays*[99] was relied upon by counsel and noticed by the court. So, too, in *X v Y*.[100] That case concerned the liability of the Crown for assaults and harassment by a Sheriff, and directly engaged the relevant principles. The opinion shows real effort at detailed examination of the defenders' relationship, including statutory underpinnings; the position as to payment, appointment, removal, and guidance – if not supervision – by the Crown; and the significance of the principle of judicial independence. Cases said to be relevant were also addressed. It may be noted that policy was not brought to bear in this novel case. The main reason for this is likely that the central question – answered negatively – was whether the pursuer was bound to fail to establish a relationship akin to employment. However, policy's being left out of account lends at least a little support to the view that quasi-employment cases can very well be decided without it.

Grubb v Shannon may require to be read a little charitably in light of subsequent developments, which have continued the smooth embrace in Scotland of English learning as it has appeared.[101]

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with the various policy justifications for its imposition [is] to procure a result that [is] inherently fair, just and reasonable': *Grubb* (n 16) [70]; quoting *Cox* (n 7) [41].

[92] Details which were decisive in the judgment originating the list of policy reasons: *CCWS* (n 2) [56]-[60]; *DSN* (n 6) [62].

[93] See the relatively brief discussion in *Grubb* (n 16) [103]-[104]. Given Scottish courts' established habits of tracking English authority in this area, it may safely be assumed that the relevant warning in *BXB* (n 3) [69] will come to be treated as authoritative.

[94] See especially *Barclays* (n 7) [27]-[28]; *BXB* (n 3) [58].

[95] With the rest of this paragraph, compare Reid (n 8) [3.29].

[96] *Grubb* (n 16) [101], where Sheriff Reid said that the therapists were 'self[-]employed' and 'independent contractors', but independent contractors 'to whom activities forming core parts of the defender's enterprise were assigned or entrusted'. This language is less problematic when read with Scottish appellate authority for the proposition that one may be vicariously liable for the negligence of an independent contractor who is so integrated into one's business as effectively to be part of one's workforce: *Marshall v William Sharp & Sons Ltd* 1991 SLT 114 (IH) 121, 125-126, the only Scottish case cited for the pursuer on the akin to employment point, but not drawn upon by, or before, the court as it consciously extended Scottish doctrine: see *Grubb* (n 16) [66], [73].

[97] See the immediately preceding footnote, and nn 28, 86-88, above, on the expression 'recognisably independent business'.

[98] *Kennedy v Bonnici* [2021] CSOH 106, 2022 SLT 63 [28], [42]-[44], [52]-[56]; citing *Barclays* (n 7) for general propositions but not applying it as the court was concerned with a purported employee-wrongdoer.

[99] *Barclays* (n 7).

[100] *X v Y* (n 23) [13], [18], [22]-[32]; obviously applying *Barclays* (n 7), cited in argument. (The word *detailed* is used in the main text, bearing in mind that that the question was simply whether to allow proof.)

[101] See Campbell and Lindsay, 'Vicarious Liability in Scotland' (n 9) passim; Campbell and Lindsay, 'Refining Vicarious Liability' (n 9) esp section D.

However, if pleaders and judges are receptive, the approach advocated here to identifying quasi-employment and policy reasoning could be adopted in due course.

6. Conclusions

'The recognition of relationships "akin to employment" [is] an important extension of the doctrine of vicarious liability beyond the limits of employment' which has proved 'problematic' in its application.[102] The discussion in this Article is of interest to lawyers in England, Scotland (as shown in Section 5), and elsewhere (as noted in the Introduction). It contributes to our understanding of a developing area of the law by moving beyond coverage in the books. The best approach to the analysis of a potential relationship of quasi-employment between defendants is prescribed (Section 3), after the identification of key prior issues (Section 2). Following the Supreme Court's decision in *Barclays Bank*, the place of policy reasoning in this context remains uncertain.[103] A highly restricted role for it may be accepted, if only because it is in reality impossible to prevent its being employed. At best, it belongs at the outermost margin (Section 4).

[102] A Silink and D Ryan, 'The Relevance of "Control" in Both Stages of the Test for Vicarious Liability in Relationships That Are "Akin to Employment"' (2022) 37 PN 229, 238.
[103] P Giliker, 'Vicarious Liability in England and Wales' in P Giliker (ed), *Vicarious Liability in the Common Law World* (Hart 2022) 51-52.