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EXPANDING SCOPE OF ENGLISH LAW ON VICARIOUS LIABILITY AND THE INEVITABILITY OF CONCEPTUAL UNCERTAINTY

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Abstract

Vicarious liability is an English law principle that is rooted in antiquity. It entails the transfer the liability of a persons' negligent or tortious action to another person as a result of the relation relationship existing between both parties. Traditionally, vicarious liability has usually been applied in instances where employee/employer relationship exists between the tortfeasor and the third party and when the tortious act occurred 'in the course of employment'. Through a case law analysis, this paper examined how vicarious liability principle has transitioned beyond its traditional conception over the ages. For instance, the Wilson and Clyde Case infused the non-delegable duties dimension of vicarious liability. The paper adopts the doctrinal methodology through examination of primary sources such as case laws and secondary sources such as opinion of authors and other scholarly works on the topic. Different jurisprudence has been reflected in the interpretation of the vicarious liability principle in different cases. The study submits that the implication of the inconsistencies in the interpretation of the principle is the uncertainty which has been created as to the true state of the law on the subject.

Keywords: Conceptual Uncertainty, Tortious Liability, tortfeasor, , Vicarious Liability

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1.0 Introduction

Society and morality view compensating those who have been wrongly harmed as a basic tenet of justice.[1]Vicarious liability (VL) and non-delegable duties(NDD), are two mechanisms that pursuit this aim, that is; compensation in the name of justice. The normative basis of VL that signs up to distributive justice has been present since the medieval era,[2] but became established due to the Victorian recognition,[3]thereby making it 'ceased to be a mere matter of private concern'.[4]Despite its longevity, commentary[5]echoes[6] VL as being 'troublesome'[7] and 'mysterious'.[8] This provides firm testimony the doctrine continues to be problematic. The same unease is directed towards NDD.[9]

The source of the problem is VL/NDDs do not sit comfortably in a system of fault-based liability where corrective justice is pivotal. The juristic basis of VL's collective responsibility is at odds with torts personal responsibility regime which allows the criterion of 'fault' to be ignored and places responsibility, not on the tortfeasor, but on a

[1] WVH Rogers, *Tort Law* (18thedn, Oxford University Press, 2018)289.

[2] Peter Kane, *Tort Law* (Hart Publishing 2017)45.

[3] Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Sweet & Maxwell, 1967)172. Stephen Todd, 'Vicarious Liability on the Move – But Where Should It Stop?'(2020) 7 JICL 1,40.

[4]*Charleston v London Tramways Co* (1888) 4 T.L.R. 629 [23] (Holt LJ).

[5] James Fleming 'Vicarious Liability' (1950) 28 Tulane Law Review 161; Tony Weir,*Tort Law* (2ndedn, Oxford University Press) 6 – 212. Simon Di Rollo, 'Principle's Expediency – Recent Developments in the Law of Vicarious Liability', (2020) 28 Scots Law Times 28, 185 – 189.

[6] Thomas Baty, *Vicarious Liability* (The Clarendon Press, 1916)154. Oliver Wendell Holmes, 'Agency'(1891) 4 Harv Law Review 891. Holmes stated that vicarious liability was, "no better than holding one person responsible for another debts." G Williams, 'Vicarious liability and the master's indemnity' (1957) 20 MLR 220 at 232 – Williams states that vicarious liability is simply a mechanism looking for a solvent defendant.

[7]*E v English Province of Our Lady of Charity* [2012] EWCA Civ 938 (23) (Ward LJ).

[8] Kane (n 2)45.

[9] Stephen Todd, 'Vicarious Liability on The Move – But Where Should it Stop?'(2020) 7 JICL 1,40. Phillipa Giliker, 'Vicarious Liability, Non-Delegable Duties and Teachers: Can You Outsource Liability for Lessons?' (2015) 31 PN 259, 272.

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third person who is not morally wrong or in fault. Nonetheless, the problem lies not in the aims of VL,[10]but in the overriding uncertainty of its juridical features which pivots on policy considerations.[11] This leads to the nub of the problem; the issue of VL is not its morality, but the degree in which it can be applied.[12]

VLs static growth resulted in complacency to the doctrine.[13]As no fault doctrines contain potential threats of indeterminate claims, the recent expansion in the scope/ambit of VL,[14] (similarly, though to a lesser degree, NDD),[15]has emphasised the need for an appraisal of its principles.[16]Specifically, the question focus' on whether this expansion drives a coach and horses through the deep – rooted judicial orthodoxy that VL does not extend to independent enterprises/contactors. In order to assess the clarity of VL's principles and its relationship with NDD, this paper questions whether the recent case law has pinpointed the boundaries and control mechanism to the doctrines, or, alternatively, there is still an unsatisfactory judicial response to the question of the meaning of strict liability for the tort of another.

[10]"The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven." *Alcock v. Chief Constable of South Yorkshire Police* [1992]1 A.C. 310 (1445 G) (Lord Steyn). Also, as noted above the normative basis of vicarious liability has been accepted since the Middle Ages.

[11] n 6 (Baty) 154.

[12] Ibid.,

[13] This was largely due to the fact that the workforce has been relatively stable in terms of "employees" and "employers." Donal Nolan, 'Reining in Vicarious Liability' (2020) 49(4) I.L.J. 609 – 625.

[14]*Lister v Hesley Hall Limited* (2001) UKHL 215; *Dubai Aluminium Limited v Salaam* [2002] UKHL 48 *E v English Province of Our Lady Charity* [2012] EWCA; *Various Claimants v CCWS* [2012] 2 AC 1; *Woodland v Swimming TA* [2014] AC 537, *Mohamud v VM Morrison Supermarkets Plc* [2016] A.C. 677 (SC) *Cox v Ministry of Justice* [2016] AV 660. *Armes v Nottinghamshire County Council* [2017] UKSC 60,*Barclays Bank plc v Various Claimants* (2020) ICR 893, *Wm Morrison Supermarkets plc v Various Claimants* (2020) ICR 874.

[15]*Woodland* (n 14).

[16] James Counsell and Joshua Cainer, 'Historical Sexual Abuse Claims: Is Vicarious Liability 'on the Move' Again?' (2020) 4 JPI Law 225,232.

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2.0 The Concept of Vicarious Liability

VL is the strict liability for the negligent/tortious conduct for another person.[17]It is only imposed when the defendant has a relationship with the tortfeasor. That relationship is predominantly an 'employee – employer' one.[18] The traditional finding of VL is by the two-limb Salmond test; there is an employer-employee relationship; (ii) when the tort/harm occurred it was 'in the course of employment'.[19]

2.1 The Second Limb Expansion

Stevens notes 'rights' come with an expectation of a remedy.[20]This expectation has allowed VL to mould itself to atypical situations to find compensation. The House in *Lesley Hall (Lister)*[21] faced a new expectation when an employee sexually abused boys in a school. Under the second VL limb, unauthorised acts that are 'connected to the authorised act' such as acts of negligence, are a mode of doing the authorised act. Conversely, criminal /tort of intention, such as sexual abuse is not.[22]The House citing other common law jurisdictions,[23]provided the Salmond test gave way to anew 'close connection' test whereas wrongful act was 'sufficiently related' to the 'activities of authorised conduct.'[24]Lord Steyn moved away from the justification that centred on the enterprise theory,[25]and instead explained it by the open textured principles of fair -just- reasonable.[26]

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[17]*E v English Province of Our Lady Charity* [2012] EWCA Civ 938, [2013] QB 722.
[18] Atiyah (n 3)82.
[19] Rogers (n1)90.
[20]Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers, Erika Chamberlain & Stephen Pitel, eds, *Emerging Issues in Tort Law* (Hart Publishing, 2007)3.
[21]*Lister* (n 14).
[22] This is known as the Salmond test. *Warren v Henlys Ltd* [1948]2AllER935; *Keppel Bus Co Ltd v Ahmad* [1974] 1 WLR 1082
[23]*John Doe v Bennett* [2004] SCC 17; *Bazley v Curry* [1999] 174 DLR (4th) 45;*Jacobi v Griffiths* [1999] 174 DLR (4th) 7.These cases moved from the previous orthodox Salmond test and created a "sufficient connection" test. Simon Deakin, 'Enterprise – Risk, the juridical Nature of the Firm Revisited' (2003) 32 ILJ 97.
[24]*Lister* (n 14).
[25] (The defendant created the risk therefore should take the burden for the risk).
[26]*Lister* (n 14).

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Lord Steyn's quest was to protect the rights of the vulnerable but the broadness of fairness inherently lends itself to torts enquiring nature and provides the autonomy to expand legal rules by policy.[27] Burrough J famously cautioned against extension of VL on policy; 'I … protest against arguing too strongly upon public policy, it is a very unruly horse and when you get astride it, you never know where it will carry you'.[28]Lord Steyn's policy objective together with a void on the type or degree of connection required to satisfy the rule, unleashed Burroughs unruly horse for the next 20 years.[29]

The double problem of Lord Steyn's lack of legal formulae/policy justification led to a fusion of policy/legal rules/principles/criteria within the 'close connection test' which led to wider and unclear applications; *Maga*[30] introduced an 'occasion of risk' associated with the employee's activities and Lord Phillips in *Christian Brothers* imported 'close proximity 'to assess a 'connection' with the employee's normal tasks.[31]The two cases widened the test but failed to place legal criteria/principles on the degree of the extension. *Mohamud v VM Supermarkets*[32] demonstrates the judiciary took full advantage of Burroughs J. 'unruly horse' and extended the 'close connection test' to one of breaking point.

In *Mohamud* a Somalian customer entered the defendant's petrol station with an enquiry. The employee verbally abused him and followed the claimant to his car and physically assaulted him. Lord Toulson, citing case law stated,[33]'His conduct … inexcusable…but within the field of activities… [it] was an unbroken sequence of

[27]*Donoghue v Stevenson* (1932) AC 562.
[28]*Richardson v Mellish* (1824) 2 Bing 252;*Wallis v Smith* (1882)21; D *Rex v Hampden* (1637) 3 ST 1293.
[29] Note the above case law (n 14). Also in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC366, the House of Lords applied the *Lister* approach to vicarious liability in a case of commercial fraud.
[30]*MagavThe Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA 256.
[31]*Christian Brothers* (n 14) (67) (Phillips LJ).
[32]*Mohamud* (n 14).
[33]*Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co 1925 SC 796* , (80) (Cullen LJ) used the phrase "field of activities."

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events.'[34]Then further, 'His employers entrusted him with that position …they should be held responsible for their employee's abuse of it'.[35]Previously, the test questioned whether the actual risk that produced the harm was connected to the field of activities - a doorman who is employed for being assertive/aggressive, acts in his field of activities if he negligently assaults a defendant.[36]His Lordship appears to change this to one, where in the non - existence of *novus actus* any employee, from any field of activity (cleaner, waiter etc) who assaults a third person will satisfy the test. This is strengthened as 'motive was irrelevant'.[37]It is hard to read the court's statements without concluding any causal relationship can catch all acts. His Lordship lastly justified this by the policy of 'social justice'[38]The justification of 'social justice' was the death knell to any previous attempt of clarification as it produced a confusion on the boundaries and principles of VL. It is for this reason that common wealth jurisprudence disagreed with *Mohammed*'s extension.[39]

The First Limb

Lord Denning remarked in 1951 an employee; 'is easy to spot but difficult to describe.'[40]Now in 2021 'atypical' relationships' are very common this makes this difficulty greater.[41] The courts utilise the tests; 'control'(master/servant relationship) [42] whether the tasks are

[34]*Mohamud* (n 14),[47] (Toulson LJ).
[35]Lord Toulson: (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Reed agree)
[36]*Mattis v Pollock* [2003] 1 WLR 2158.
[37]*Mohamud* (n 14),[48] (Toulson LJ).
[38] Ibid, (n 14),[45].
[39]*Prince Alfred College Incorporated v ADC [2016] HCA 37.*
[40]*Stevenson Ltd v MacDonald & Evans* [1953] 1 TLR 101. (45) Lord Denning. It is essential to note that workers labels as an employee or independent contractor are not conclusive to the real relationship because employers/employees sometimes have "sham" contracts to avoid paying tax/national insurance. Also, it allows the employer to avoid statutory obligations such as maternity pay, unfair dismissal claims etc. The Employment Relations Act 1996 does not add any help on the definition of an employee.
[41] Judith Freedman, 'Employment Status, Tax and the Gig Economy – Improving the Fit or Making the Break' (2020) 31 Kings Law Journal 2,194.
[42]*Cassidy v Ministry of Health* [1951] 1 ER 574.

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'integral' to the employer's business, [43]'mutuality of obligations' (exchange of promises)[44]'economic reality'(worker working for business/himself).[45]The totality picture determines the relationship,[46]where not one test is determinative.[47]

English Province[48]concerned a priest who abused a girl in a children's home.[49]Contract, pay or terms were missing in the relationship, but control was present; 'The priest vows obedience to the bishop'.[50]As a Priest 'spreads the word of God,'[51] the Priest was also 'integral' to the Church's enterprise. The court, extended the first limb Salmond test and, explicitly stated, 'vicarious liability had moved on from the confines of the employment contract …where the test was now …sufficient analogous … and close in character.'[52]This was further stretched in *Christian Brothers* (CW).[53]The court held VL in the case where boys were sexually abused at the hands of Christian Brothers. Control was present by the spiritual promises taken by the Brothers and held this was a 'relationship akin to employment. 'Lord Phillips in CW relied on five principles to justify VL; the business should compensate as the business delegated the harmful activity,[54] it was

[43]*Lee Ting Sang v Chung Chi – Keug* [1990] 2 AC 374.
[44]*Pimlico Plumbers Plc and Mullins v Smith* [2018] UKSC 29.
[45]*Lee Ting Sang v Chung Chi – Keug* [1990] 2 AC 374.
[46]Richard Kidner, 'Vicarious Liability: for whom should the 'employer' be liable?' (1995) 15 LS 47.
[47]*Argent v Minister of Social Security* [1968] 1 WLR 1740 (1758) (Roskill LJ) - "To my mind, no single one is decisive".The case law is inconsistent where for example in *KLB v British Columbia* [2003] 2 SCR 403, the court stated "control" was a decisive factor.
[48]*English Province* (n 14).
[49]The Trustees of the Portsmouth Roman Catholic Diocesan Trust
[50]*English Province* (n14)189.
[51] Ibid (212).
[52] Ibid.The court held one should seek to establish "the broad characteristics of the employer/employee relationship" and ask whether it "bears a sufficiently close resemblance and affinity in character" to one of employment.
[53]*Christian Brothers* (n 14).
[54] Delegation Theory. For an early example in the case of *Brocklesby v Temperance Permanent Building Society* [1895] A.C. 173 (345) (Watson LJ) - "Surely the loss should fall upon the one which has selected the agent to raise money for him …"

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part of the enterprise,[55]that created the risk,[56] the employer has the means to compensate[57] and finally, the employer controls the employee.[58]

English Province/CW stretched the test to embrace atypical relationship.[59]In doing so, the courts produced uncertainty on what this means, language such as analogous and akin are open ended. Firstly, the cases demonstrate the judiciary awkwardly squeezing facts to fit into the above judicial tests (control, integral etc). This questions the utility and rational of the tests and discredits the judicial application of them. It appears that VL's function to compensate outranks any clear sense of the common law rules. The provisions of *CW* policy aim, demonstrate VL's justification rests on the belief of *ipso facto* danger in a business' activities,[60] where this makes it reasonable that the master bears the responsibility.[61]

Case law after *CW* demonstrates progressive fusing of legal rules/ policy. In *Cox*[62]a tortfeasor prisoner accidently harmed a staff member whilst volunteering in the kitchens. The activity of working in the kitchen was integral to the business, satisfying the akin to employment. This raises the question whether just being in work can satisfy the test. In *Armes v Nottinghamshire*[63]a girl was sexually abused by foster parents. The claimant took an action against the

[55] Enterprise – The enterprise has benefits from workers and therefore should compensate.

[56] Creation of risk - at the business itself created the risk it is only fair that the business compensates.

[57] The deep pocket theory – also note that it is also considered the employer is likely to be insured. Early case demonstrating this *Limpus v L.G.O. Co* (1862)1 H. & C. 526 (539) (Willes J).

[58] Control argument – This is a species of agency, where the master controls the servant and therefore the servant is representing the master/principal.

[59]*BXB v Trustees of the Watchtower Bible and Tract Society* [2020] 4 WLR 42 – An elder of a Jehovah witness congregation considered to be "integral" part of the "business activities" of the church and therefore the church was found VL for the elder's rape of a member of the congregation.

[60] Warren Swain, 'A Historical Examination of Vicarious Liability, A vertelleUpas Tree' (2019) 78 Cambridge Law Journal 3.

[61] *Docks & Harbour Board v Coggins & Griffiths* at 30 [1947] AC 1 (Simons LJ).

[62]*Cox* (n 14).

[63]*Armes* (n 14).

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Council in VL/ NDD (NDD dealt with below).Utilising *CW* principles Lord Reed held the Council was in the business of looking after children. The foster parents were integral to that business,[64] and the Council controlled the relationship, therefore it was justified to find the Council, with the 'deeper pockets' liable. The decision has been highly criticised on the basis of weighing too heavily on policy factors where there is an agreement with Lord Hughes who dissented and stated bringing up a child in a family was not the business of the local authority.[65]Todd echo's the unease' it does not look like a relationship analogous to employment'.[66]Lord Reed showed VL's hand that comes to play when the 'tortfeasor cannot be found'.[67]The court wanted to find a solvent defendant and as a result, found a tortfeasor via policy not principles.

2.3 Barclays Bank- Morrison[68]

In *Barclays*[69]the defendants commissioned doctor sexually abused claimants during pre – employment medical examinations. An analysis of the nature of the relationship between Barclays/Doctor using the judicial tests,[70]concluded the doctor was an independent contractor and not 'akin to employment. 'Lady Hale reviewed the case law and stated the distinction between employee/independent contractor was always present and notwithstanding the courts had a 'tendency to elide policy reasons into the doctrine,' case law demonstrates legal rules eclipse policy objectives when deciding the outcome of a given case.[71]

Her Ladyship stated *Armes* was a difficult decision but justified it as the tortfeasors did not have their own business and therefore were not

[64]*Barrett v Enfield London Borough Council* [2001] 2 AC 550 -a local authority employs trained staff to make decisions and to advise it.
[65]*Armes* (n 14) (79 – 79) (Hughes) Lord Hughes also was not persuaded that the imposition on a local authority of vicarious liability for torts committed by parents was justified.
[66] Todd (n 9).
[67] *Armes* (n 14) (63) (Reed LJ)AC 355 at [63]; Reiterating *Quarman v Burnett* (1840) 151 ER 509.
[68]*Morrison* (n 14).
[69]*Barclays* (n 14).
[70] Control/organisational/integral tests (n 41-44).
[71]*Barclays* (n 14)

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independent contractors.[72]This clarifies independent contractors are off VLs limits, this does not alter the remaining doubt whether VL can be deduced from legalistic premises.[73]Debatably, the reason why the judiciary elide policy as reasons is because this is where VL has its basis. As observed by commentators such as Todd[74] and Steele[75] unless the independent contractor is, without doubt, in an enterprise of their own, most of the policy/principles described are found in the relationship between independent contractors/employers as well as employee- employers. Hence, this undermines any claim of a clear understanding of the rules of VL.[76]

In *Morrison's* an employee work activity included IT tasks on other employee's data. The employee resentful of a previous disciplinary procedure copied hundreds of personal data off the employer's PC with a personal USB and published it online at his home with the aim to hurt his employers. The Supreme Court held there was no VL as the act failed the close connection test. The facts in *Morrison's*[77]are similar to *Mohammed*.[78]Each concerned employee who performed a criminal act, on a non - vulnerable claimant. Lord Reed stated the lower courts misunderstood Lord Toulson's reasoning on social justice, causal connection, and that; motive was irrelevant and actually, *Mohammed* had followed *Dubai Aluminium*[79] - the consideration being whether the conduct was closely connected with the acts that the employee was authorised to do (field of activities) and it was fair/proper to be regarded to find VL. Lord Reed added a

[72] Her Ladyship also referenced the cases of *Kafagi v JBW Group Limited* [2018] EWCA Civ 1157;*Ng Huat Seng v Munib* [2017] SGCA 58 Seng that used the traditional approach and reached the same conclusion as *Barclays*.

[73] Craig Purshouse, 'Halting the Vicarious Liability Juggernaut *Barclays Bank Plc v Various Claimants* '(2020) 28 Medical Law Review 4,798; Richard Aikens and Andrew Dinsmore, 'A life raft for financial institutions in the sea of vicarious liability for rogue traders'

[74] (n 2) Todd.

[75] Jenny Steele, *Torts* (5thedn Blackwell Press 2017) 155.

[76]*JXJ v Province of Great Brittan of the Institute of Brothers of the Christian Schools* [2020] EWHC 1925.

[77]*Morrison*(n 14).

[78]*Mohammed* (n 14).

[79]*Dubai* (n 29).

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finding of VL could not be made on policy and the court had to find VL on legal principles/rules, as to do otherwise is;'an invitation to judges to decide cases according to their personal sense of justice'.[80]His Lordship distinctly held not all acts can fall within the ambit of VL,[81]but provided no extra information or clear principles in what is, and what is not included. It appears we are left with the meandering use of semantic language to discover whether an act fits with a given field of activities or not.

2.4 Non-delegable Duties

Though it is not possible to delegate a duty,[82] the problem with NDD, is not the label, but its genesis; it was simply, 'made up 'to stop injustices.[83]As a result, NDD rests on disparate/questionable rationales.[84]The *ratio decidendi* in Wilsons[85]highlights NDD places a positive duty of care which cannot be discharged by an employer commissioning a 'competent' worker/independent contractor as it is a 'personal duty whether he performs it himself or by ...servant or agents'.[86]This is not a duty to act in a certain way as a response to foreseeable risks, but an absolute duty to take care. This creates a duty of care which is greater than the standard one.[87]NDD is a duty produced from a 'special relationship/nature of activity' not between the employer/worker (as in VL) but on a protective relationship between the employer/claimant.

[80]*Morrison* (n 12) (24) (Reed L). Professor Glanville Williams considers that VL is a total creation by the judges. Williams (n 6).
[81] Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing 2019)195.
[82] Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers, Erika Chamberlain & Stephen Pitel eds, *Emerging Issues in Tort Law* (Hart Publishing, 2007)3.
[83] Rogers (n 1)89.
[84] Stevens (n 81).
[85]*Wilson and Clyde Co v English* [1937] UKHL 2.
[86] Ibid.
[87]*Cassidy* (n 42).

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2.5The Woodland Case

In *Woodland*[88]a young girl suffered catastrophic injuries at a school swimming pool lesson which was held by an independent contractor. In an action in NDD, the Appeal Court held to find liability against schools was too broad - therefore it failed on policy grounds. The Supreme Court disagreed.

Lord Sumption emphasised the lack of NDD's legal principles and rules,[89]and pointed out that the unrelated categories of NDD, (land - based torts,[90]obstruction on the highway [91] hazardous activities, and in safe/healthy environment for working) had 'no general underlying principle'.[92]Then, referring to *Caparo's* incremental approach identified; protective relationships as a new category where a special relationship between the defendant and the claimant provides a positive duty to protect the claimant,[93] allowing an assumption of responsibility to be imputed.[94] The identifying facts to establish this personal duty are:(1) An antecedent and personal relationship with the defendant;(2) A degree of control where the Claimant has no autonomy on how it is exercised; (3)The activity delegated to a third party; (4) The third party performed the activities; (5) the breach comes from the activity that the defendant had assumed responsibility for. Once satisfied, the court justified NDD with the fair just and reasonable criterion.

[88]*Woodland* (n 14), *Christian Brothers* (n 14).
[89]*Woodland* (n 14) (56) (Sumption L).
[90]*Rylands v Fletcher* [1868] LR 3 HL 330. Although it stands on its own cause of action, it does provide an early demonstration on a type of "hazardous" when water escaped to a neighbour's land by the negligence of an independent contractor it was the landowner that was liable for the damage to the neighbouring land. Hyde R, *Charlesworth & Percy on Negligence* (14th Edn, Sweet & Maxwell 2020)
[91]*Ellis v Sheffield Gas Limited* (1853) 2 El & Bl 76.
[92]*Woodland* (n 14) (24) (Sumption L). NDD was introduced to overcome the harshness of the common employment defence.
[93]*Cassidy* (n 42).
[94]*Woodland* (n 14) (32) (Sumption L); *Caparo Ind Plc v Dickman* [1990] 2 AC 605.

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3.0 Analysis

Due to the threat of indeterminate claims, the High Court in Australia called for 'caution' in extending the ambit of NDD. [95]The *Woodland* principles are progressive in nature and provides a degree of direction, and thought here has not been a flood of NDD claims it makes it easier to widen the extent of liability due to the direct inclusion of the *Caparo* incremental approach, or as Baroness Hale stated, the use of, 'the dynamic common law'.[96] But, the case did not clear the ambiguity in NDD. As Giliker observed: 'The Sumption test provides guidance in straight forward cases, but … there is a lot left unsaid'.[97]In support of this, it is notable Lord Sumption fudged an explanation of assumption of responsibility thus, leaving the boundaries unclear.

Cassidy demonstrated the existence of an assumption of responsibility[98]on the basis of the overall accountability of a hospital for all its activities, but the court found on VL. Buxton[99] argues *Woodland* took this generalised approach demonstrating interchangeability between NDD/VL. This explains that in general hospital cases which involve protective relationships with a vulnerable victim can raise an action in either NDD/VL.[100]This is due to an overlap in core principles such as delegation, field of activities and what appears to be the lynchpin in NDD/VL–'control. 'This has led Hyde to argue *Lister*[101] could also have held NDD. The facts in *Armes*[102]also satisfied *Woodland* and *CW* criteria.[103]Yet, the court held VL/NDD cannot co - exist and found in VL and not NDD. Putting the

[95]*Hollis v Vabu Pty Ltd* (2003) 212 CLR 511 LJ Gleeson.
[96]*Woodland* (n 14) (34) Hale Baroness.
[97] Paula Giliker, 'Vicarious Liability, Non-Delegable Duties and Teachers: Can You Outsource Liability for Lessons?' (2015) 31 PN 259, 272.
[98]*Cassidy* (n 42). His Lordship recogonised that hospitals came under this "protective" category as well as prisons. prisoners and residents in care homes. *GB v Home Office* [2015] EWHC 819.
[99] Richard Buxton, 'Vicarious liability in the twenty-first century' (2020) 79(2) CLJ 217,220.
[100] Morrisey v Health Service Executive [2020] IESC 6 and noted in Editorial, 'Non delegable Duty' [2021] 1 Reparation Bulletin 2.
[101]*Lister* (n 14) Hyde (n90)7-101.
[102]*Armes* (n 14).
[103]*Christian Brothers* (n 14).

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question of concurrent liability aside,[104]the above analysis demonstrates difficulties in understandings the conceptual differences between VL/NDD.

An added problem is the inconsistency of application; Burnett LJ[105] stated NDD does not embrace intentional torts, but Lord Reed of the Supreme Court stated it does.[106]Also for VL, Lord Reed in *Cox*[107]stated, 'wealth not insurance' was a principled justification. But, in *Armes*, Lord Reed stated the wealth of the defendant should never be taken into account.[108]Thus, demonstrating judicial confusion. Furthermore, Lord Reed, in *Armes* held for VL, the parents were 'integral' to the foster services of the council, yet, for NDD, 'care services' was not the duty of the council.[109] Again, appearing as a semantic exercise. Lord Sumption only dealt with the 'children/vulnerable' category. An assumption of responsibility in NDDs hazardous activities category has no place to play, leaving these 'rag bag' of cases[110]left in juridical darkness.

In comparing the *Woodland* criteria with *CW*, the former leans towards principles and the latter policy. Yet, within the provisions of policy itself, it is difficult to find a distinction between VL/NDD. Each doctrine has their central aim on compensation and contain policy objectives of; 'delegation of tasks,' 'enterprise theory,' and use the justification of 'fair – just. 'As Buxton states, it is difficult to see where the difference lies in principles.[111]Instrumental to *Woodland* was the fact that if the girl had attended a fee-paying school a contract would have allowed compensation. As a result, *Woodland* unleased

[104] There is no reason why there cannot be concurrent liability with these two doctrines.

[105]*NA v Nottinghamshire CC* [2015] EWCA Civ 1139 [22] (Burnett LJ). New South Wales v Lepore [2003] HCA 4 also held this view.

[106]Giliker (n 97).

[107]*Cox* (n 14).

[108]*Armes* (n 14).

[109]*Armes*(14) (60) (Reed LJ).

[110] Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers, Erika Chamberlain & Stephen Pitel eds, *Emerging Issues in Tort Law* (Hart Publishing, 2007) 331.

[111] Richard Buxton, 'Vicarious liability in the twenty-first century' (2020) 79(2) CLJ 217,220.

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tort law to overcome the restrictions of contract law. Nonetheless, there are problems in the application of policy. *Lister* justified VL on insurance, *Cox*[112]on control and *Mohamud* on "social justice".[113]This shifting in doctrines/principles provides strength in the conclusion that the boundaries of VL/ND are so elastic that in reality the judiciary can pick and choose from either.

4.0 Conclusion

VLs expansion to "atypical" workers for mostly victims of sexual abuse and NDD's Woodlands extension for vulnerable victims has resulted, in certain circumstances, claimants satisfying the principles of the two doctrines. This demonstrates, they are unified in their concern with humans being vulnerable to harm. They are, nonetheless, trespassing on each other's turf where the only bright line is in the event that the tortfeasor is without doubt an independent contractor. There will never be a satisfactory grand unifying theory to either VL/NDD where; as Lord Dyson stated, 'to search for certainty and precision is to undertake a quest for a chimaera.'[114] The reason for this is VL/NDD are swimming in an uncertain sea of policy and not common law principles. Furthermore, a priori of rules could limit the mechanism of vicarious liability/NDD. This has the potential to reduce the ability of NDD/VLs to find new solutions to novel social problems and provide a social distribution of profit and loss for injuries at work as well as providing for the new 20th century phenomena of sexual abuse cases.

VLs extension has meant employers can be liable for criminal acts against their interest by the extension to 'connection of employment' for acts of 'rape'[115] and grievous bodily harm.[116]Furthermore, the

[112]*Cox* (n 14).
[113] Douglas Brodie, 'Enterprise Liability, Justifying Vicarious Liability' (2007) 27 Oxford J Legal Studies 34,78. Fr example in the case of *Lister v Hesley Hall* [2002] 1 AC 21 the House of Lords depended on the risk policy, whereas in the case of *Armes v Nottingham* CC the court focussed on the control factor. *Rose v Plenty* [1976] 1 WLR 141 at 147 also rested on Social policy.
[114]*Mohamud v VM Morrison Supermarkets Plc* [2016] A.C. 677 (SC) (54)(Dyson MR)
[115]*BXB* (n 59).

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extension of the 'akin to employment' means those employers can be found VL for helpers, such as priests/football scouts that contribute to the 'benefits the activities of an organisation.'[117]The point being, justification for liability placed on an innocent third person is more pronounced where there is a risk the hardships outweigh the positives of VL/NDD. *Morrison* and *Barclays Bank* have restrained the doctrine,[118]but there still exists a vagueness in VL's application of 'balancing benefits and burdens.'[119]Finding a legal formula appears fruitless and as VL/NDD are in unison to protect victims of sexual abuse - commentators such as Beuermann have proposed statutory intervention for dealing with claims of abuse in homes and schools.[120] In the meantime, we are left with the common law to deal with the types of claims as analysed in this essay. As inferred in *English Province* the categories of relationship that give rise to VL are 'not closed.'[121]*Donoghue's* sword of negligence resonates in VL which means the only one thing for certain is – we haven't seen the last of it yet.

[116]*Morrison* (n 14).
[117]*DSN v Blackpool Football Club Ltd* [2020] EWHC 595. James Counsell and Joshua Cainer, 'Historical Sexual Abuse Claims: Is Vicarious Liability 'on the Move' Again?' (2020) 2 JPI 225,244.
[118] Emily Gordon, 'Mohamud explained and re-understanding "close connection" in vicarious liability' (2020) 79 C.L.J. 3,401–404. *JXJ v Province of Great Brittan of the Institute of Brothers of the Christian Schools* [2020] EWHC 1925.
[119]*LJ Rix in Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited Ltd &Ors* [2005] EWCA Civ 1151.
[120] Christine Beuermann, *Reconceptualising Strict liability for the Tort of Another* (Hart Publishingm, 2019)45, 78.
[121]*JGE* (n 14).

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