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EMPLOYERS' VICARIOUS LIABILITY—WHERE ARE WE NOW?

SARAH ARNELL*

Introduction

The recent decision of the Inner House of the Court of Session in the case of *Wilson v Exel UK Ltd (t/a Exel)*¹ has given the Scottish courts the opportunity to demonstrate how they are going to treat the approach to the application of vicarious liability of an employer for his employees' wrongdoings. This article traces the journey that the principle of vicarious liability has taken since the early 1900s. It demonstrates how the leading House of Lords decision of *Lister v Hesley Hall Ltd*² was not the first occasion when the close connection between the wrongdoing and the employment had been used to impose vicarious liability. However, the emotive nature of the wrongdoing in that case, sexual abuse, added to the significance of the renewed focus by the House of Lords on close connection and the apparent move away from the course of employment test with its "improper mode of doing authorised acts"³ sub-test. The English courts have embraced this change of focus. This article attempts to extract from the English decisions since *Lister* those elements in a case that will point to a close connection such that it is fair and just to impose vicarious liability. The Scottish courts, on the other hand, would appear to be maintaining the link with the "traditional approach" of the course of employment with the Inner House decision of *Wilson v Exel UK Ltd (t/a Exel)*. A difference in approach would appear to be forming. Close connection is the very foundation of vicarious liability itself, but is it too broad a test on its own to curb the floodgates of litigation in this area of the law? Applied alone, there is a risk of the approach seen in the obiter remarks in the Scottish decision of *Sharp v Highland and Islands Fire Board*.⁴ One alternative is to define broadly those situations where a close connection will be held to exist, and apply them to new cases. This appears to be what is generally happening in England. The other alternative is to anchor the close connection test to the traditional approach of course of employment and this is the more restrained approach evident in the Inner House.

Vicarious liability before *Lister v Hesley Hall Ltd*

Atiyah⁵ identified three essential requirements for the creation of vicarious liability. They are (1) a wrongful act or omission by a person (the wrongdoer);

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¹ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671.

² *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311.

³ See below, at "Vicarious Liability Before *Lister v Hesley Hall Ltd*".

⁴ *Sharp v Highland and Islands Fire Board*, 2005 S.L.T. 855.

⁵ Patrick S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967), p.3.

(2) some relationship between the wrongdoer and the defender who is to be held liable; and (3) some connection between the wrongdoing and that relationship. Without all these factors, you have the general rule of delict encapsulated in the maxim *culpa tenet suos auctores*; the personal liability of the wrongdoer alone.

Where the relationship that exists between the wrongdoer and the defender is that of employee and employer respectively, the test that the courts have been using for over 100 years in order to establish whether the third requirement is met, is that the servant must have committed the wrongdoing “in the course of his employment” or a similar form of this test. In order to determine whether an employee’s delict or tort was committed by him in the course of his employment, the courts have often chosen to apply a further test. The court will ask whether the employee was doing an act he was authorised to do albeit negligently or in an unauthorised manner. This may be referred to as the improper mode test.

The position taken by the courts in England and Scotland up to the decision of the House of Lords in *Lister* was not greatly dissimilar. An appropriate starting point for Scotland might be the case of *Kirby v National Coal Board*.⁶ The Lord President Clyde,⁷ like judges⁸ in many cases decided prior to and since this decision, warned that each case depends to a large extent on its own particular facts. However, the Lord President felt that the various situations that the courts are faced with in this type of case could be divided into four general categories.⁹ The first category was where the master actually authorised the particular act. In such a situation the employer was “clearly”¹⁰ liable for the act. The second category is where the employer does work which he is employed to do but does it in a way which his employer did not authorise and would not have authorised had he known of it. The employer will still be responsible. The third category is where the employee is employed to do a particular job and does something which is outside the scope of that job or class of job. The employer will not be liable for any wrongful act that is committed by the employee at this time. The fourth category is where the employee simply uses the opportunity that his employment gives him (whether it be the place of his employment, the time or the tools of his employment) to do something for his own purposes. If a delict is committed during this time his employer will not be responsible. It is clearly the second category that represents the improper mode test. The emphasis is on the employee doing what he is employed to do but in an unauthorised way.

⁶ *Kirby v National Coal Board*, 1958 S.C. 514.

⁷ *Kirby v National Coal Board*, 1958 S.C. 514 at 532.

⁸ See for example Lord Thankerton in *Canadian Pacific Railway Co v Lockhart* [1942] A.C. 591 at 599.

⁹ *Kirby v National Coal Board*, 1958 S.C. 514, per Lord President Clyde at 532.

¹⁰ *Kirby v National Coal Board*, 1958 S.C. 514, per Lord President Clyde at 532.

In the case of *Kirby*, an explosion in a mine injured the pursuer. The explosion took place when an employee struck a match in order to light a cigarette. The employee had gone to an area of the mine where there was waste material in order to have a cigarette during an enforced cessation of his work caused when repairs were required to be made to the machinery the employee was working on. It was held that this was not a situation where the employee was doing a job that he had been instructed to do and whilst doing it, negligently lit a cigarette; so it was not an example of the employee doing something he was authorised to do but in a way that was unauthorised. The Lord President felt that what this workman did was in no way connected with the work he was employed to do. The determining factors seemed to be that the employee stopped the particular work he was doing, left the particular place where he was working and went to a place where he was not entitled to go and he went there for his own purposes and his own pleasure. The Lord President in *Kirby*, after enunciating the four categories, then went on to say:

“It is often difficult in the particular case to distinguish between the second and the third of these situations, but the criterion is whether the act which is unauthorised is so connected with acts which have been authorised, that it may be regarded as a mode—although an improper mode—of doing the authorised act, as distinct from constituting an independent act for which the master would not be liable.”¹¹

It is at this point that English law and Scots law intertwine, because the Lord President took his test to distinguish between the second and third category from *Salmond on the Law of Torts*.¹² Salmond had stated that an act was deemed to be within the course of employment where it was a wrongful act authorised by the employer or where it was a wrongful or unauthorised mode of doing an act that was authorised by the employer.¹³ The Lord President had focused however on what Salmond said following this categorisation of when an employee was acting within the course of his employment. Salmond said:

“But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them . . . On the other hand if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an

¹¹ *Kirby v National Coal Board*, 1958 S.C. 514, per Lord President Clyde at 533.

¹² *Salmond on the Law of Torts*, edited by W.T.S. Stallybrass, 9th edn (London: Sweet & Maxwell, 1936), p.95.

¹³ *Salmond on the Law of Torts*, edited by R.F.V. Heuston, 16th edn (London: Sweet & Maxwell, 1973), p.474.

independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it.”¹⁴

So for both jurisdictions there was an emphasis on the tort or delict being an improper mode of doing an authorised act.

A well known example of this improper mode situation can be seen in the case of *Century Insurance Co Ltd v Northern Ireland Road Transport Board*.¹⁵ Here the employee struck a match whilst he was transferring petrol from a lorry to an underground tank and by doing so caused an explosion. The House of Lords in *Century* found that the employee was doing the job he was instructed to do—to watch over the delivery of the spirit into the tank and to turn off the tap when the proper quantity had passed from the tanker—but performed it in a negligent manner—by starting smoking and throwing away a lighted match at the same time. The House of Lords in *Century* did not rely on Salmond’s formulation but the judges did focus on the fact that the cigarette was lit whilst physically in the middle of doing the job instructed and whilst still doing the job instructed. The court took the view that the employee had negligently carried out the duties he was employed to carry out.

The course of employment test, which at first glance might appear to be fairly straightforward, with the addition of the sub-test of improper mode, actually created an unnecessary complexity in the approach to the issue of whether the employer should be vicariously liable for the wrongdoing of his employee in a particular situation.¹⁶ The test has not been applied in the same way across the board. This is partly because of its actual complexity, partly because the courts have dealt with it as a question of fact when in reality it is a mixture of fact and law¹⁷ and partly because central to this approach’s application is determining what the employee was employed to do and this can be described at varying levels of generality.¹⁸ It has also detracted attention away from the fundamental criterion required for vicarious liability—a sufficiently close connection between the wrongdoing and the employer/employee relationship. This fundamental criterion is the very reason why the law imposes vicarious liability between an employer and employee. The courts reached a point where they had got so caught up with asking themselves whether the wrongful act was an improper mode of doing an authorised act, that they became distanced from the reason for the rule of vicarious liability which in turn made it more difficult for the courts to determine when it was

¹⁴ *Salmond on the Law of Torts*, 16th edn, 1973, p.474.

¹⁵ *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] A.C. 509.

¹⁶ For support see Atiyah, *Vicarious Liability in the Law of Torts*, 1967, p.172.

¹⁷ Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam* [2002] 3 W.L.R. 1913 at [24], recognises that it is not a question of fact, but a “conclusion of law”.

¹⁸ Atiyah, *Vicarious Liability in the Law of Torts*, 1967, p.263.

just to impose vicarious liability. It was also recognised by Atiyah in 1967 that the improper mode approach was not particularly suitable when the wrongdoing was an intentional act as opposed to an act of negligence.¹⁹

Close connection before *Lister*

Not all cases, even before the House of Lords' decision in *Lister*, where the vicarious liability of an employer for the employee's wrongful act was at issue, have applied the improper mode test. Some of the courts, even before *Lister*, focused on the need for a close connection between the job the employee is employed to do and the wrongful act. This can be seen in the leading Scottish "detour" case of *Williams v A&W Hemphill Ltd*.²⁰ The driver of a lorry was employed to drive a number of boys from Benderloch to Glasgow. The boys persuaded the driver to take a detour and it was whilst on this detour that the driver's negligence resulted in a serious accident. The House of Lords held that the driver was acting in the course of his employment whilst on this deviation. It was simply a connection to the employer's business that Lord Pearce, who gave the judgment, focused upon. Whether there was such a connection depended upon whether the journey was a new and independent journey or still part of the authorised journey.²¹ Where there was a detour, it was a matter of degree as to whether the detour took the journey into the realm of a new and independent journey from that which was authorised by the employer. In this case the fact that the boys were still in the lorry and still required to be taken to Glasgow seemed to weigh heavily with the House in their decision that the lorry driver was still carrying out the job he was employed to do and was not on a new and independent journey.²²

In the cases of *Bell v Blackwood Morton and Sons Ltd*²³ and *Thomson v British Steel Corp*,²⁴ rather than the word "connection" being used, there was focus on whether the employee was employed to do the act during which the delict occurred or whether the act was *incidental* to the employment.²⁵ Admittedly in the case of *Bell* where the delict occurred as the employees were descending a stair at the end of the working day in order to exit the employer's premises, the First Division relied heavily in their finding that

¹⁹ Atiyah, *Vicarious Liability in the Law of Torts*, 1967, p.262. See also *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311, per Lord Clyde at [37] and Lord Millett at [69].

²⁰ *Williams v A&W Hemphill Ltd*, 1966 S.C. (H.L.) 31.

²¹ The focus on a new independent journey as bringing the act outwith the course of employment was taken from *Storey v Ashton* (1868–69) L.R. 4 Q.B. 476.

²² This focus on the lorry still containing its passengers has been criticised by Atiyah, *Vicarious Liability in the Law of Torts*, 1967, pp.253, 254.

²³ *Bell v Blackwood Morton & Sons Ltd*, 1960 S.C. 11.

²⁴ *Thomson v British Steel Corp*, 1977 S.L.T. 26.

²⁵ This terminology is used again after the *Lister* decision in cases such as *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2006] 3 W.L.R. 125 and *Cumbria CC v Carlisle-Morgan* [2007] I.R.L.R. 314, as part of the close connection test.

descending the stairs was an act within the scope of employment on the fact that the employers had retained control of that particular act in order to ensure it was done safely. However, Lord Sorn states that acts that fall within the scope of employment include acts that are incidental to the employee's employments.²⁶ In *Thomson* Lord Maxwell referred to Lord Sorn's words in *Bell* and stated that if what an employee was doing (whether it was travelling from one place to another, or anything else) can properly be regarded as part of or an incident of his work, then the employer is vicariously liable.²⁷

Some English decisions have also dealt with the issue by looking to see if there was a connection between the wrongful act and the employment rather than or as well as asking whether it was an improper mode of doing an authorised act.²⁸ A particularly interesting decision is that of the Court of Appeal in *Fennelly v Connex South Eastern Ltd.*²⁹ Lord Justice Buxton, who gave the leading judgment, felt that a broad view should be taken of what the job of the employee was, of the acts he carried out, and of his authority to do those acts. He seems to have foretold the wider view of course of employment that the House of Lords ultimately took in *Lister*. In *Fennelly*, the employee, a Mr Sparrow, was a ticket inspector. Lord Justice Buxton formulated his job as being to deal with the public in relation to tickets and to interfere with their progress if they did not produce a ticket. Mr Sparrow had asked to see the plaintiff's ticket and the plaintiff had refused. An argument followed. This, the court felt, was all clearly within the course of Mr Sparrow's employment. The plaintiff then walked away. Mr Sparrow said something to the effect of, "I've had enough of this" and then went after the plaintiff and placed him in a neck-lock. Lord Justice Buxton felt that this was connected to the argument over the ticket, particularly in light of Mr Sparrow's comments just before the neck-lock. The neck-lock "sprang directly"³⁰ out of the altercation in which Mr Sparrow had asked to see the plaintiff's ticket. It was, according to Buxton L.J., all one incident. So although connection was not a test or approach formally recognised by the courts, prior to *Lister*, it had been used as part of the course of employment analysis.

Lister v Hesley Hall Ltd

The decision in the case of *Lister*, 34 years after Atiyah published his book on vicarious liability, brought us back to the roots of vicarious liability.

²⁶ *Bell v Blackwood Morton & Sons Ltd*, 1960 S.C. 11, per Lord Sorn at 26. *Bell* was followed in the case of *Peden v Strathclyde RC*, 1995 G.W.D. 4-202 OH, where a proof before answer was allowed on the basis that it was arguable that having regard to the employee's duties, there was a sufficient connection with the employment for the events to be incidental to it.

²⁷ *Thomson v British Steel Corp*, 1977 S.L.T. 26, per Lord Maxwell at 28, 29.

²⁸ For example, *Heasmans v Clarity Cleaning Co* [1987] I.R.L.R. 286; *Irving v Post Office* [1987] I.R.L.R. 289; *Harrison v Michelin Tyre Co Ltd* [1985] 1 All E.R. 918.

²⁹ *Fennelly v Connex South Eastern Ltd* [2001] I.R.L.R. 390.

³⁰ *Fennelly v Connex South Eastern Ltd* [2001] I.R.L.R. 390, per Buxton L.J. at [18].

The House of Lords recognised that if the third essential requirement of a sufficiently close connection between the wrongdoing and the employer/employee relationship can be established, the requirements for vicarious liability can be made out such that it is just and fair to impose vicarious liability, whether or not the act can neatly be termed an improper mode of doing an authorised act. And so the House of Lords created a new test in the sense that the focus was now more clearly to be on a close connection between the wrongdoing and the employer/employee relationship rather than whether it can be said that the employee was doing an act he was authorised to do in an improper manner, but this test was clearly not new in itself.³¹ The reason for the rule had now in fact become the rule.

The House of Lords in *Lister* found the defendant company vicariously liable for the acts of sexual abuse that had been carried out by their employee against children who had lived in the boarding annex of a school for boys with emotional and behavioural difficulties. The boarding annex and school were owned by the defendants and the employee was employed as a warden to look after the boys at the annex. At first sight, this case appears to have expanded the application of the course of employment test beyond all recognition. Sexual abuse would, on the face of it, appear to be an independent act of the employee quite unrelated to his job and something therefore for which the employer should not be held liable. This was the position taken by the Court of Appeal.³² The House of Lords does move away from the improper mode test but on a wide view the general course of employment test has not been displaced. The court just goes back to basics. The emotive and repulsive nature of the act that the employee “performed” creates a smoke screen behind which lies an application of the fundamental criterion of close connection.

In reaching their decision, the Law Lords in *Lister* were heavily influenced by the decision of the Supreme Court of Canada in the case of *Bazley v Curry*.³³ The judgment of the court was delivered by McLaughlin J. The defendants ran residential care facilities for children. The case involved the sexual abuse of one of the children by an employee of the defendants. The court found that the employers encouraged the employees to have a quasi-parental relationship with the children. The focus on the connection between the employment activity and the wrong, that had been recognised by Atiyah, was brought again to the fore. Justice McLaughlin narrowed her focus to the

³¹ Lord Steyn in the Privy Council decision of *Bernard v Attorney General of Jamaica* [2004] UKPC 47; [2005] I.R.L.R. 398, observed that the decision in *Lister* emphasised the intense focus required on the closeness of the connection.

³² *Lister v Hesley Hall Ltd*, *Times*, October 13, 1999. The Court of Appeal followed the case of *T v North Yorkshire CC* [1999] I.R.L.R. 98.

³³ *Bazley v Curry* (1999) 174 D.L.R. (4th) 45 Supreme Court of Canada. The exception is perhaps Lord Hobhouse who, in *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311 at [60], says that *Bazley* provides useful social and economic reasons but he does not rely on it.

risk that was created by the employment activity to justify the imposition of vicarious liability on the employer. And along with the two primary policy considerations which she identified as dominating this area of the law, provision of a just and practical remedy and deterrence of future harm, used these elements to justify the wider approach to vicarious liability than had been adopted in the past. The case of *Bazley* formulates the question in a case of vicarious liability to be—is there a connection between the enterprise and the wrong that justifies vicarious liability, in terms of fair allocation of the consequences of the risk the enterprise gave rise to, and/or deterrence?³⁴ Justice McLaughlin impresses that the enterprise must significantly contribute to the risk. Opportunity may or may not be enough, depending on the circumstances.

Four of the five Law Lords³⁵ in *Lister* focused on the close connection between the employment and the act of the employee. They all refer to Salmond's statement that an act may be unauthorised but so closely connected to the authorised act as to be an improper mode of doing the authorised act. All four judges take a broad view of the job the warden was employed to carry out. They found that the duty of the employee was to look after and care for the boys in his charge. Whilst Lord Steyn and Lord Hutton focus on the fact that the close connection is achieved because the warden was employed to care for the boys and he committed the acts of sexual abuse whilst he was in the process of caring for them, Lords Clyde and Millett in establishing the sufficient connection between employment and the act, place greater emphasis on the fact that the defendant company undertook to keep the boys safe and delegated that duty to care for the boys to their employee.

Lord Hobhouse, in contrast, focuses singularly on the defendant company entrusting their duty to care for the boys to their employee. The employee owes this duty to his employer but also to the boys and he fails to fulfil this duty when he sexually abuses the boys. His employer is vicariously liable for this breach by the employee. Lord Hobhouse does not frame his reasoning within the close connection vehicle that the other Law Lords focus upon. Lord Hobhouse states that the talk of "connection"³⁶ simply indicates the "requisite relationship"³⁷ between the act and the job the employee is employed to do. Lord Hobhouse is of course correct. At the heart of the course of employment test is the requirement for a connection between the delict or tort and the employer/employee relationship such that justifies the imposition of vicarious liability; Atiyah's third requirement. Lord Hobhouse finds the "requisite

³⁴ *Bazley v Curry* (1999) 174 D.L.R. (4th) 45 Supreme Court of Canada, per McLaughlin J. at [37].

³⁵ Lords Steyn, Clyde, Hutton (who did not give an individual judgment but concurred with Lord Steyn) and Millett.

³⁶ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311, per Lord Hobhouse at [59].

³⁷ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311, per Lord Hobhouse at [59].

relationship”³⁸ or the sufficient connection in this particular case because the employee fails to fulfil the duty delegated to him by his employers. Because the duty was delegated by the employers, the employers are liable for its failure. But Lord Hobhouse goes too far when he says that the “fundamental criterion”³⁹ in the correct approach is a comparison of the duties owed by the servant to the plaintiff and the duties the servant owes to his employer.⁴⁰ A comparison of the duties works in this case because the close connection or requisite relationship is based on the delegation of the duty. This is just one way in which the close connection or requisite relationship can be established, but as we are to see in cases decided after *Lister*, it is not the only way.

Another way of reasoning the decision of the House of Lords was formulated by Atiyah back in 1967.⁴¹ At the same time as the warden was performing the intentional act of sexually abusing the boys, he was also negligently performing the authorised act of caring for the boys. The warden is therefore acting within the scope of his employment. The beginning of this approach can be seen in the judgments of Lords Hobhouse, Clyde and Millett when they rely for their reasoning, in some part, on the duty to care for the boys delegated to the warden and the warden’s obvious failure in this duty. The Law Lords do not go as far as saying that the warden was negligently performing an authorised act, but they begin to go down the road that would lead to that conclusion. Only Lord Millett specifically states at the end of his judgment that liability lies in the doing of the intentional act rather than the failure to perform a duty to take care of the boys. This seems out of keeping with the rest of his reasoning which, up until that point, appeared to be based on a failure by the employee to fulfil the duties that were entrusted to him by his employer.⁴² Moreover, the failure to perform a duty (and therefore negligently performing an authorised act) is simply the other side of the same coin. The close connection or requisite relationship is created by the fact that the employee performed an act which amounted to a failure to fulfil a duty that had been delegated to him by his employer. The failure in duty creates the close connection in *Lister*. Lord Millett⁴³ calls the duty approach an artificial approach based on a misreading of *Morris v CW Martin & Sons Ltd*,⁴⁴ but Salmon L.J. in *Morris* specifically refers to the negligence of the employee and the tort of conversion as the “two causes of action” and Rosalind Coe⁴⁵

³⁸ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311, per Lord Hobhouse at [59].

³⁹ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311, per Lord Hobhouse at [60].

⁴⁰ See C.A. Hopkins, “What is the course of employment?” (2001) 60(3) C.L.J. 458, 460.

⁴¹ Atiyah, *Vicarious Liability in the Law of Torts*, 1967, pp.264, 265. According to Atiyah, this type of reasoning was used in a number of cases to justify the imposition of vicarious liability.

⁴² See Rosalind Coe, “A new test for vicarious liability?” (2001) 151(6995) N.L.J. 1154.

⁴³ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311, per Lord Millett at [84].

⁴⁴ *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, per Salmon L.J. at 738.

⁴⁵ Coe, “A new test for vicarious liability?” (2001) 151(6995) N.L.J. 1154. See also Atiyah, *Vicarious Liability in the Law of Torts*, 1967, p.265.

suggests that just as the employee may be guilty of criminal as well as tortious conduct, a person may be guilty of two types of tortious conduct simultaneously.

The decision in *Lister* showed that there is more than one way to achieve the necessary close connection. Although not all the judges specifically founded their decision on this, the close connection could be said to exist because the duty that the employee breached was a duty that had been delegated to him by his employer. This delegation created the close connection in this particular case. The crucial duty, i.e. the duty that was breached, stemmed from the employer in this case. In cases where the crucial duty began and finished with the employee (where the wrongful act of the employee is unintentional, for example where the employee committed an act of negligence against an individual) there will need to be something else that creates the sufficient connection. In those types of cases, the requisite close connection will exist where it can be said that the act was an improper way of performing an authorised act. So *Lister* should not be taken to replace the improper mode test with the close connection test. Rather the close connection test should be taken to be the primary test which can be satisfied in a number of ways. Improper mode is one way, delegated duty is another. In the words of Lord Millett in *Dubai Aluminium Co Ltd v Salaam*⁴⁶:

“An employer has been held to be vicariously liable for the intentional wrongdoing of his employee in a wide variety of different circumstances. In some of the cases the employer has undertaken a duty towards the plaintiff and then delegated the performance of that duty to his employee: see *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Lister v Hesley Hall Ltd* [2002] 1 AC 215. The decisive factor in *Lloyd v Grace Smith & Co* [1912] AC 716 was that the employee who committed the fraud for his own benefit was the person to whom his employer invited the client to entrust her affairs. In all those cases the plaintiff was a client or customer of the employer. But that is not essential. It was not the case in *Hamlyn v John Houston & Co* [1903] 1 KB 81. The decisive feature in that case was that, in paying the bribe, the partner was merely using an improper means of obtaining information for his firm which it was his job to obtain. But the circumstances in which an employer may be vicariously liable for his employee's intentional misconduct are not closed. All depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing.”

Post-Lister in the English courts

The effect that the decision of *Lister* had on how the application of vicarious liability is focused cannot be more clearly seen than when the pre-*Lister* case

⁴⁶ *Dubai Aluminium Co Ltd v Salaam* [2002] 3 W.L.R. 1913, per Lord Millett at [129]. The House of Lords applied the test of close connection that had been honed in *Lister* and found a firm of solicitors vicariously liable for the fraudulent acts of one of their partners.

of *Daniels v Whetstone Entertainments*⁴⁷ is compared with the post-*Lister* case of *Mattis v Pollock (t/a Flamingos Nightclub)*.⁴⁸

Both cases involved the acts of a doorman. In *Daniels*, there was an argument on a dance floor and the doorman became involved. The doorman was assaulted by one of the patrons of the dancehall and then whilst trying to remove the plaintiff from the dancehall, the doorman then assaulted the plaintiff whom he believed to be the person who had assaulted him. By the time the manager was called the doorman was outside. The manager ordered the doorman to return inside. The doorman refused and then when he saw the plaintiff outside, minding his own business, he assaulted him again. The Court of Appeal found that the doorman's duties were to keep order in the ballroom and to eject any persons who were causing trouble, if necessary by the use of reasonable force. They held that the first assault by the doorman was carried out in the course of ejecting the plaintiff but that the second assault, when the plaintiff was outside and showing no signs of wanting to re-enter the dancehall, was not within the scope of employment and was an act of private retaliation. The court had relied on the by now well known passage from *Salmond on Torts*, focusing on the question of whether the actions of the doorman could be taken to be wrongful modes of doing something that the doorman was employed to do.

This is to be contrasted with *Mattis*. The case involved a nightclub bouncer who was encouraged to use violent and aggressive behaviour in controlling customers. The nightclub bouncer assaulted the plaintiff. The assault was the culmination of a series of events that occurred after the plaintiff's friend was barred from the nightclub by the bouncer. In the scuffle that took place after the friend was prevented from entering the club, the bouncer had found himself outnumbered. He went to his flat which was near to the club and returned a short time after, armed with two knives. When he was about 100 metres from the club, he came upon the plaintiff and the others with whom he had been involved in the scuffle. The bouncer ran up to the plaintiff and stabbed him in the spinal cord.

The Court of Appeal in *Mattis* had the decisions of *Lister* and *Dubai Aluminium* before it. From these cases, the court drew the "deceptively simple"⁴⁹ question of whether the assault was so closely connected with what the doorman's employer had authorised or expected of him, that it would be fair and just to conclude that the employer was vicariously liable for the harm sustained. Following *Dubai Aluminium*, the court clearly rejected any restrictions on the close connection test based on arguments such as that the act was

⁴⁷ *Daniels v Whetstone Entertainments* [1962] 2 Lloyd's Rep. 1.

⁴⁸ *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158. See further Paul T. Rose, "The evolution of vicarious liability in tort in respect of deliberate wrongdoing" (2009) 3 J. P. I. Law 179.

⁴⁹ *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158, per Judge L.J. at [19].

for the employee's own benefit or an act of self indulgence, and it specifically stated that where an employee was expected to use violence, the likelihood of establishing that an act of violence fell within the broad scope of his employment was greater than it would be if he were not.⁵⁰ The court held that the stabbing was directly linked to the incident that had taken place in the club. This was particularly emphasised by the words the bouncer used as he stabbed the plaintiff, to the effect that what he was about to do (i.e. the stabbing), would teach the plaintiff not to mess with him. The court said it was approaching the matter broadly and that even although there was an element of personal revenge, the responsibility of the employer for the actions of the bouncer was not extinguished. This broad approach, we have already seen, had been followed by the Court of Appeal in the pre-*Lister* case of *Fennelly*.⁵¹

The application of the close connection test has clearly expanded the effect of vicarious liability. This can be further seen in the case of *Bernard v Attorney General of Jamaica*⁵² where the defendant was held to be vicariously liable for the actions of an off-duty police officer who had used his position to try to queue jump and then shot the claimant in the head. The police officer had then arrested the claimant when he awoke in hospital and handcuffed him to the bed. In this case, the close connection test is applied by the Privy Council along with the just and reasonable consideration. The Privy Council rely quite heavily on the creation of risk by the defendant in allowing off-duty constables to take loaded revolvers home and carry them while off duty as a base upon which to structure the vicarious liability in this case. This together with the evidence that the constable had purported to act as a policeman just before he shot the plaintiff (there was a purported assertion of police authority immediately before the shooting and the police officer arrested Bernard in hospital), created the sufficient close connection. The court does clearly seek to align the acts within the course of the man's employment so as to distinguish the case from that where the employment merely creates opportunity.

Whilst the close connection test has been brought to the forefront of vicarious liability and its application has expanded the range of acts for which an employer may be made vicariously liable there has, from the beginning, been a clear recognition that mere opportunity to commit the wrongdoing created by the employment, will not per se be sufficient to establish vicarious liability.⁵³ An example is the Privy Council decision of *Attorney General of the British Virgin Islands v Hartwell*.⁵⁴ This case also involved the actions of a

⁵⁰ *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158, per Judge L.J. at [25].

⁵¹ *Fennelly v Connex South Eastern Ltd* [2001] I.R.L.R. 390.

⁵² *Bernard v Attorney General of Jamaica* [2004] UKPC 47; [2005] I.R.L.R 398.

⁵³ See McLaughlin J. in *Bazley v Curry* (1999) 174 D.L.R. (4th) 45 Supreme Court of Canada; and *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311.

⁵⁴ *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12; [2004] 1 W.L.R. 1273.

police officer. In *Hartwell*, the police officer abandoned his post, took a revolver from a strongbox in the police station and went to a bar where his girlfriend was working. He fired four shots and seriously injured a tourist. Lord Nicholls, giving the judgment for the Privy Council, dealt with this aspect of the case succinctly:

“From first to last, from deciding to leave the island of Jost Van Dyke to his use of the firearm in the bar of the Bath & Turtle, Laurent’s activities had nothing whatever to do with any police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost Van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of ‘a frolic of his own’”.⁵⁵

The factors that had been put forward to support a close connection—the fact that Laurent was on duty; that his jurisdiction extended to the area where the bar was; and that it was a police revolver he had used—were dismissed as insufficient. The difference between this case and *Bernard*, is that *Hartwell* never purported to act as a police officer and he did not seek to abuse the position of authority his employment gave him.

The application of the close connection test to these police cases, it is suggested, correctly attributes liability to the defendant when the connection to the employment (by virtue of whatever factors, including the risk of harm created by the employment) is strong enough to justify vicarious liability, and refuses to impose it when the connection is mere opportunity and any risk that is created by the circumstances of the employment and then realised by the wrongdoer, contributes only to the opportunity created rather than to the substance of the wrongdoing. However, the position a police officer holds is, it is suggested, particularly prone to abuse because of the position of trust that a police officer holds in relation to the public. In that respect, it has similar elements to the position of a warden in a children’s home. Abuse of that trust is an inherent risk in the position.

In contrast to *Hartwell*, in the case of *N v Chief Constable of Merseyside*⁵⁶ the wrongdoer did purport to act as a police officer. The fine line between mere opportunity and sufficient connection is clearly demonstrated here. The police officer was off duty, sitting in his own car outside a nightclub, but having been on duty earlier, was still in his uniform. He asked a first aider from the nightclub if he was okay, as he saw that the first aider was trying to help the

⁵⁵ *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12; [2004] 1 W.L.R. 1273, per Lord Nicholls at [17].

⁵⁶ *N v Chief Constable of Merseyside* [2006] EWHC 3041 (QB)

claimant who was clearly heavily intoxicated. The first aider expressed his concerns for the claimant. The police officer told the first aider he would “sort it” and told the claimant, “I am the police” when she sat in his car. He then showed her his badge and reiterated, “I am the police”. He then told the first aider that he would take the claimant to the police station. The police officer in fact drove past a number of police stations, took the claimant to his house and raped her.

Although s.88(1) of the Police Act 1996 applied, the vicarious liability in that section is stated to apply, “as a master is liable in respect of torts committed by his servants in the course of their employment” which brings into application the close connection test. Mr Justice Nelson in the High Court, felt that the police officer had merely used his uniform and position as the opportunity to commit the assaults. He did not owe a specific duty to care for the claimant, that had been entrusted to him by his employer (delegated duty), as in *Lister*, and he was not, purporting to perform a police function such as arrest, or enforcing police authority as in *Bernard*. So no close connection was created. Mr Justice Nelson was also influenced in his decision by policy considerations; there simply was not a close enough connection such that it would be fair and just to hold the defendants vicariously liable. Yes there was a connection—opportunity—but in Nelson J.’s mind, one not sufficiently strong enough to justify vicarious liability. The flaw in Nelson J.’s position however is that he failed to deal with the fact that the position the police officer held in the community particularly allowed him to engender the trust of the plaintiff and abuse that trust, as it had for the employee in *Lister*. One has to question whether the risk of abuse of trust in this type of employment was not such as to create a close enough connection that it was just and reasonable to find vicarious liability? Or did this situation fall on the same side of the line as the other Canadian case of *Jacobi v Griffiths*⁵⁷ where the majority of the Supreme Court found that the employment (an employee at a children’s recreational club) had merely provided the opportunity for G to develop a rapport with the children that he subsequently sexually abused. Did the risk, in both cases, contribute only to the opportunity created, rather than to the substance of the wrongdoing? It is the employment creating the position of trust and the risk that the employee abuses that trust that, arguably, creates a connection that is close enough for it to be just and reasonable to fix upon the employer vicarious liability for abuse of that trust. In *Jacobi*, it is arguable that the employment does not merely create opportunity in such terms as time and physical place. Rather, it creates the substantial emotional dependence or trust that is needed to commit wrongdoings such as abuse.⁵⁸ Although this is not needed for rape, as physical presence

⁵⁷ *Jacobi v Griffiths* (1999) 174 D.L.R. (4th) 71.

⁵⁸ For support see the dissenting opinion of McLaughlin J. in *Jacobi v Griffiths* (1999) 174 D.L.R. (4th) 71. She felt that the employee’s fostering of trust at the club, which flowed from the requirement of the job that he forge bonds of intimacy and respect, enabled him to commit the acts.

is enough, the position of trust provided the physical opportunity. Mr Justice Nelson put *N v Chief Constable of Merseyside* on the side of the line of opportunity, but the circumstances of the case create something more than just opportunity. The off-duty police officer *was* purporting to perform a police function, in the minds and eyes of the first aider and the intoxicated club-goer in the lead up to the wrongdoing (so the case is similar to *Bernard*) and there was a high degree of risk of abuse of his position, as there was in *Lister* and *Mattis v Pollock*. It is suggested that there was enough in *N v Chief Constable of Merseyside* to establish a close enough connection for it to be fair and just to impose vicarious liability.⁵⁹

The decision of *N v Chief Constable of Merseyside* starkly highlights how the new emphasis on close connection that has become the new test for vicarious liability amounts to a policy decision. But although *Lister* expanded the situations where vicarious liability will be established, there is still needed a strong connection between the wrong and the employment. Past decisions have shown that it may be delegated duty; or it may be the actions of the wrongdoer being in purported exercise of the employment, together with an increased risk of harm, that creates the sufficient connection. Increased risk of harm alone has, in some circumstances, even been enough to establish vicarious liability, such as in *Mattis* and also the decision of *Gravil v Carroll*.⁶⁰ But the case of *N v Chief Constable of Merseyside* has rejected the argument that the creation of a high degree of risk that the employee will abuse the trust and authority engendered by his employment, is enough to establish a close connection. This is because it can be categorised as merely the creation of an opportunity, but this ignores the additional factors of abuse of trust and authority engendered by the employment which, it is arguable, creates a close enough connection that it is fair and just to find vicarious liability. The existence of such an element could potentially be the next ground on which the courts find a close enough connection that justifies vicarious liability.⁶¹ It sits somewhere between mere opportunity and the now established situations of improper mode; delegated duty; purported exercise of the employment;

⁵⁹ See Max Loubser and Elspeth Reid, "Vicarious Liability for Intentional Wrongdoing: After *Lister* and *Dubai Aluminium* in Scotland and South Africa", 2003 Jur. Rev. 143, 157, for support for a category of vicarious liability where the delict has been perpetrated by abuse of authority or trust.

⁶⁰ *Gravil v Carroll* [2008] EWCA Civ 689; [2008] I.R.L.R 829, where the Court of Appeal found that a punch to the face that was given after the final whistle in a rugby match, but just following a scrum whilst there was still a melee which was part of the game, was very closely connected to the employment such that it would be fair and just to impose vicarious liability. In this case, the player had a contract of employment to play rugby for the club. There was an express provision in the contract that players must not physically assault an opponent so it was a breach of an express term of the contract. However the court approached the question of vicarious liability almost exclusively by the close connection test and the creation of risk.

⁶¹ See Loubser and Reid, "Vicarious Liability for Intentional Wrongdoing", 2003 Jur. Rev. 143, 157 for support of a third category of vicarious liability, one which accommodates cases where the delict has been perpetrated by abuse of authority or trust.

and, sometimes increase in risk of harm. Just as close connection has moved from being the reason for the rule to the rule itself, so too the creation of risk could move from being the reason for the rule to a formulation of the rule itself.⁶² This may suggest a greater desire by the courts to reflect the policy and reasoning more strongly in the decision itself.

The Scottish reaction to *Lister*

The case of *Wilson v Exel UK Ltd (t/a Exel)*,⁶³ in the Inner House of the Court of Session, gave the court the opportunity to demonstrate its approach to vicarious liability of an employer in light of the decision of *Lister*. Here the pursuer averred a case of negligence on the part of the defenders, Exel, whom she said was vicariously liable for the acts of Reid who was employed by Exel as a supervisor and who also was given responsibility for health and safety. Reid was averred to have pulled the pursuer's ponytail tightly and pulled her head back as far as it would go, causing her injury. The basis of the pursuer's case seems to be taken from Lord Hobhouse's judgment in *Lister*. It was averred that the employer had assumed a duty of care towards the pursuer; that duty had been delegated to Reid as supervisor; and the close connection existed because the duty that Reid had breached was a duty that had been delegated to him by his employer. This delegated duty route, it was argued, meant that the motive of the employee and the fact that he was serving his own ends, did not negative the vicarious liability.

Lord Carloway held that the main approach was whether the employee's actions were so closely connected with his employment that it would be fair and just to hold the defenders vicariously liable. He then referred to the, "well established and fundamental principle"⁶⁴ of finding vicarious liability when the actings were within the scope of the employee's employment. He said that this principle was, "within the context of the broad test".⁶⁵ He quoted Salmond's well known words⁶⁶ and then Lord Clyde in *Lister* where Lord Clyde says:

"The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised."⁶⁷

Lord Carloway goes on to state that Lord Clyde in *Lister* also emphasised the importance of the traditional approach. He then refers to a number of cases

⁶² See Loubser and Reid, "Vicarious Liability for Intentional Wrongdoing", 2003 Jur. Rev. 143 at 155 which discusses the different approaches to the risk theory by Scottish and South African courts.

⁶³ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671.

⁶⁴ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671, per Lord Carloway at [25].

⁶⁵ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671, per Lord Carloway at [25].

⁶⁶ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671, per Lord Carloway at [26].

⁶⁷ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671 at [27].

where the use of violence takes place whilst the employee is engaged in a task associated with his duties: *Mattis*; *Gravil*; and *Bernard*. He contrasts these with the case in hand where when Reid pulled the pursuer's ponytail, he was not purporting to do anything connected with his duties either relating to health and safety or in relation to his role as a supervisor. Reid was engaged on a "frolic"⁶⁸ of his own. He was not entrusted to look after the pursuer in the way that rendered the defendants liable in *Lister*. Lord Carloway thereby considers the application to the case of delegated duty, improper mode and a purported exercise of the duties of the job, but feels that none is relevant in the circumstances. He concludes by saying that either way, whether the general test of close connection and what is fair and just or whether the more specific criterion of scope of employment is applied, the pursuer's case fails.

Accordingly, the Inner House has not taken the opportunity to use *Lister* to sweep away the traditional test of scope of employment and the court retained the link to an improper mode of doing an authorised act or "ways of carrying out the work which the employer has authorised".⁶⁹ This is now seen as part of the broader test of close connection which is closely tied up with policy through the additional fair and reasonable requirement. The court felt that both the general and specific test failed to establish vicarious liability in this case. A frolic of the employee's own will still not create vicarious liability in Scotland, even although the test for establishing vicarious liability has no doubt been expanded by *Lister*. However the Inner House has shown that this expansion will not easily be established and that the traditional approach which has now been placed within the umbrella of close connection, thereby stretching that which can be encompassed by it, is still as valid as ever.

The fact that the Inner House has had an opportunity to pass judgment on the current approach to vicarious liability is a welcome clarification of the Scottish position, because it will emphasise to lower Scottish courts that the *Lister* close connection test is not to be applied to the exclusion of the consideration of the course of employment test, contrary to the approach that the Lord Ordinary took in his obiter remarks in the case of *Sharp v Highlands and Islands Fire Board*.⁷⁰ The course of employment test exists within the

⁶⁸ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671, per Lord Carloway at [34]; cf. *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB), where the treatment of the plaintiff by fellow employees was taken to be so closely connected to the nature of the employment that it was fair and just to impose vicarious liability. In this case some of the wrongful actions involved wrongful ways of doing the employee's job, for example, omitting the claimant from internal circulation lists; failing to deliver any internal mail to the claimant all week, until Friday afternoon. The test applied was close connection alone, although the close connection was justified because, "some aspects of the behaviour involved work that one or other of the women were required to undertake in the course of their employment" (per Owen J. at [101]).

⁶⁹ *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671, per Lord Carloway at [27], quoting Lord Clyde in *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2001] 2 W.L.R. 1311.

⁷⁰ *Sharp v Highlands and Islands Fire Board*, 2005 S.L.T. 855.

context of the broader close connection test and both are to be kept in mind when determining vicarious liability. It is unlikely that the Inner House would have agreed with the obiter remarks of the Lord Ordinary in *Sharp*. The Lord Ordinary simply applied the close connection test without any link with the course of employment consideration or the improper mode of employment sub-test. He then listed a number of considerations which led him to the view that playing in a football match that was traditionally played at the end of a course which the defenders had insisted employee's attend, was an action that was so closely connected with the employment that it would be fair and just to hold them vicariously liable for the employee's actions during the match. These considerations amounted to the employee still being an employee whilst he was on the course; that the employer would have expected the employee to take part in the match; and the employer had not opposed the employee playing in the match. Taking a generous view, it can be argued that this situation can just about be said to be closely connected to the employment but it is harder to say that the act that was done was within the scope of the employee's employment. It is hard to see how the Inner House's approach would have come to the same conclusion as the Lord Ordinary. The Inner House has shown that even in new circumstances of liability, the close connection test will still be bound up with the traditional test, as it always has been since the time of *Salmond*. The course of employment is the anchor to the close connection test.

Conclusion

From an analysis of the cases since *Lister*, it is clear that the Inner House of the Court of Session is taking a more incremental and cautious step in terms of their application of the close connection test than the courts south of the border. The Inner House is taking a more pronounced approach of keeping the close connection test anchored to the course of employment test, rather than taking the close connection test as a stand alone test. The difference in approach is subtle but there is no doubt that the latter allows a far freer reign in finding vicarious liability as can be seen in *Sharp v Highlands and Islands Fire Board*. But despite the slightly less restrained approach south of the border, the courts there are still looking for more than mere opportunity. Close connection has been shown to exist where there has been a delegated duty and also where there has been a purported exercise of the employee's position, as well as the established situation where the wrongdoing can be considered as a way of doing the work authorised by the employer (improper mode). The creation of a high risk of harm will strengthen the argument for vicarious liability as a policy consideration, but it has at times been enough in itself to satisfy the close connection and impose vicarious liability. The creation of a high risk of abuse of the trust or authority created by the employment has, so far, not been enough to establish the close connection. It will be interesting to see whether the English courts develop this ground of

close connection and particularly interesting to see if the initial signs of a divergence in approach between Scotland and England are confirmed and developed further. It is perhaps too early to say how these differing approaches will each shape vicarious liability in each jurisdiction, but they both represent ways of containing the potentially broad close connection test.

