Vicarious liability

A T HEO RY O F V ICARIOUS L IABILITY 1 A THEORY OF VICARIOU S LIABILITY J. W . N EYERS * This article proposes a theory of vicarious liability which attempts to explain the central features and limitations of the doctrine. The main premise of the article is that the common law should continue to impose vicarious liability because it can co-exist with the current tort law regime that imposes liability for fault.

The author lays out the central features of the doctrine of vicarious liability and examines why the leading rationales (such as control, compensation, deterrence, loss-spreading, enterprise liability and mixed policy) fail to explain or account for its doctrinal rules. The author offers an indemnity theory for vicarious liability and examines why the current rules of vicarious liability are limited in application to employer-employee relationships and do not extend further.

It is proposed that the solution to the puzzle of vicarious liability rests within the contractual relationship between employer-employee and not the relationship between the employer and the tort victim. The proposed indemnity theory implies a contract term that indemnifies the employee for harms suffered in the course of his or her employment. Vicarious liability then follows from an application of the contractual concepts of subrogation and indemnity to the particular relationship between employee, employer and tort victim.

Finally, the article discusses and attempts to resolve the possible criticisms that may follow the indemnity theory, including concerns that it is in conflict with leading decisions, including Lister v. Romford, Bazley v. Curry and Morgans v. Launchbury. TABLE I. II. OF C ONTENTS T HE D OCTR INE OF V

Assistant Professor of Law, University of Western Ontario. An earlier version of this article was presented to the Tort Law section of the 2004 SLS Conference in Sheffield. The author would like to thank the participants in that section for their helpful questions and suggestions.

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N . . . . . Vicarious liability occupies a mysterious place in the common law.

Our system of wrongs is premised upon fault as justifying why the apparatus of the state is to be marshalled against the assets of one person for the benefit of another. 1 Yet despite this general conception, the law has recognized for centuries that in som e cases one perso n may b e vicariously liable for the fault of another. 2 Rathe r than ex cising this an oma ly on its march towards modernity, as had been suggested by some, 3 the common law continued to develop and rely on vicarious liability to such an extent that it is now generally assumed that any complete theory of tort law must be able to account for its presence. Interestingly, this consensus has emerged in spite of the absence of any comprehensive theory of vicarious liability — a theory that actually explains the central features and limits of the doctrine. 5 The purpo se of this article will be to unravel the mystery of vicarious liability by offering just such a comprehensive explanation of the doctrine. The article will be divided into four 1 2 3 4 5 See e. g. , O. W. Holmes, “ Agency” (1890-91) 4 Harv. L. Rev. 345; (1891-92) 5 Harv. L. Rev. at 14: “ I assume that common-sense is opposed to making one man pay for another man’s wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legalresponsibility. ” See also Frederic Cunningham, “ Respondeat Superior In Admiralty” (1905-06) 19 Harv. L. Rev. 445 at 445: “ That there could hardly be greater injustice than to take A’s property and give it to B because C has injured B seems clear, yet that is the result of the maxim respondeat superior. ” See the discussion of various common law and civilian legal systems in Lewis v. The Salisbury Gold Mining Co. 1894), 1 O. R.

1 (H. C. J. S. Afr.) at 20. See e. g. , T. Baty, Vicarious Liability: A Short History of the Liability of Employees, Principals, Partners, Associations and Trade-Union Members, (Oxford: Clarendon Press, 1916). See Gary T. Schwartz, " The Hidden and Fundamental Issue of Employer Vicarious Liability" (1996) 69 S. Cal. L. Rev. 1739 at 1745: "[T]here is now a consensus among those ... who think about tort law that vicarious liability is an essential element in the tort system. Any idea of repealing vicarious liability would seem to us preposterous, inconceivable. For a similar view, see W. V. H. Rogers, Winfield and Jolowicz on Tort, 16th ed. (London: Sweet & Maxwell, 2002) at 704 [Rogers, Winfield and Jolowicz]: " It is inconceivable that a serious proposal for the abolition of vicarious liability will be made so long as the law of tort as we know it remains alive"; Lewis N. Klar, Tort Law, 3rd ed. , (Toronto: Thomson Carswell, 2003) [Klar, Tort Law] at 582: " Despite its inadequacies, the doctrine of vicarious liability is firmly entrenched in ... tort law. " See New South Wales v. Lepore (2003), 195 A. L. R. 412, [2003] HCA 4 at para. 06, Gaudron J. [Lepore]: The absence of a satisfactory and comprehensive jurisprudential basis for the imposition of liability on a person for the harmful acts or omissions of others — vicarious liability, as it is called — is a matter which has provoked much comment. ... Further, it may be that thefailureto identify a jurisprudential basis for the imposition of vicarious liability has resulted in decisions which are not easily reconciled with fundamental legal principle. See also the comments of the majority in Hollis v. Vabu Pty. Ltd. (2001), 207 C. L. R. 1, [2001]HCA 44 at para. 35 [Vabu] that "[a] fully satisfactory rationale for the imposition of vicarious liability ... has been slow to appear. " A T HEO RY O F V ICARIOUS L IABILITY 3 parts. Part I will lay out the central features of vicarious liability that need to be explained. Next, Part

II will show why the leading rationales fail to adequately account for these rules. Part III will then offer a theory of vicarious liab ility and demo nstrate that it can explain these doctrinal limitations. 6 Finally, Part IV will address possible criticisms of the proposed theory.

The ultimate conclusion of this article will be that the common law was right to maintain vicarious liability in the face of its criticism since the doctrine can sit comfortably beside a regime that imp oses liab ility for fault. I. T HE D O C T R I N E OF V ICARIOUS L IABILITY Vicarious liability is a liability that is imposed on one person (B) for the torts of another (A) in situations where B has not committed any legal wrong. 7 W hile the historical or jurisprudential origins of this liability are not entirely clear, 8 it has been well entrenched in the common law for several centuries.

The central features of the doctrine of vicarious liability are four-fold. First, a tort must have been committed by A, it not being enough that A’s actions merely had an adverse impact on the plaintiff. 9 Second, at the relevant time, A must be an employee or agent of B. 10 Third, A ’s tort must be com mitted in the course of A’s 6 7 8 9 10 For the sake of clarity, the theory which will be presented is not historical since, as Lord Clyde notes: “ It is not useful to explore the historical origins of the vicarious liability of an employer in the hope of finding guidance in the principles of its modern application” (Lister v.

Hesley Hall, [2002] 1 A. C. 215, [2001] UKHL 22 at para. 34 [Lister v. Hesley Hall]). Nor does my argument depend on proof of a major conspiracy among hundreds of judges over hundreds of years to secretly apply the proposed theory while publicly articulating different justifications. Instead the

argument will be that although the judges have not agreed on their reasons for imposing vicarious liability they were mostly correct in doing what they have done on the basis of a rationale that never occurred to them, i. e. the one presented in Part III of this article. As was noted by the Privy Council in Bernard v.

The Attorney General of Jamaica, [2004] UKPC 47 at para. 21(BAILII), Lord Steyn: “ Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases of vicarious liability where employers were at fault. But it is not a requirement. This consideration underlines the need to keep the doctrine within clear limits. ” Oliver Wendell Holmes suggested the doctrine was based on the fiction that the act of the servant is the act of the master: see Holmes, supra note 1.

Wigmore argued that the doctrine arose out of the liability of the employer for commands given to his servants within the course of the servant’s employment: John H. Wigmore, “ Responsibility for Tortious Acts: Its History” (1893-94) 7 Harv. L. Rev. 315 [Wigmore]. For judicial elaboration of the history of vicarious liability: see British Columbia Ferry Corp. v. Invicta Security Service Corp. (1998), 167 D. L. R. (4th) 193 (B. C. C. A.) at para. 12. At one time, under the master’s tort theory, it was thought that a tort did not necessarily have to have been committed by the employee, see Twine v.

Bean’s Express Ltd. , [1946] 1 All E. R. 202 (C. A.); Broom v. Morgan, [1953] 1 Q. B. 597 (C. A.); and the discussion in Glanville Williams, “ Vicarious Liability: Tort of the Master or of the Servant? ” (1956) 72 Law Q. Rev. 522. This line of reasoning was replaced by the now orthodox servant’s tort

theory adopted in Staveley Iron and Chemical Co. Ltd. v. Jones, [1956] A. C. 627 (H. L.) [Staveley] and Imperial Chemical Industries v. Shatwell, [1965] A. C. 656 (H. L.). See e. g. , MacDonald v. Advocate General for Scotland and Pearce v.

Mayfield Secondary School Governing Body, [2004] 1 All E. R. 339, [2003] UKHL 34. While there has been controversy and confusion as to whether the law accepts a general regime of vicarious liability of principals for the torts of their agents (see P. S. Atiyah, Vicarious Liability in the Law of Torts (London: Butterworths, 1967) at c. 9; and F. M. B. Reynolds et al. , Bowstead & Reynolds on Agency, 17th ed. (London: Sweet & Maxwell, 2001) at 21-22 [Reynolds, Bowstead & Reynolds]), it is submitted that the law is best summarized by G. H. L.

Fridman, The Law of Torts in Canada, 2d ed. (Toronto: Carswell, 2002) at 292 [Fridman, Torts in Canada]: In the modern law of vicarious liability there appears to be no reason to differentiate an agent 4 A LBERTA L A W R EVIEW (2005) 43: 2 employment with B. 11 And finally, the fact that B also is liable for A’s tort d oes not insulate A from liability — i. e. A and B become joint tortfeasors both amenable to suit by the tort victim. These are the central features for which any theory o f vicarious liability will have to be ab le to account. 2 In order to be a complete explanation of vicarious liability, however, it is not enough to explain these elements of the doctrine . A comprehensive theo ry of vicarious liab ility will also have to explain why the private law doctrine is limited in its application solely to the employer-employee relationship. 13 Thus, it will have to explain why vicarious liability is not 11 12 13 who is employed by a principal for the purpose of negotiating

contracts on his behalf from a servant whose functions are associated less with the transaction of legal business than with the performance of non-legal acts on his master’s behalf.

Older law referred to a principal’s liability for torts committed by his agent in terms of whether they were committed while the agent was acting within the scope of his authority, and to a master’s liability for torts committed by his servant in terms of whether such acts were performed by the servant while he was acting in the course of his employment. The expressions “ scope of authority” and “ course of employment” have now become indistinguishable. They are in effect interchangeable.

Courts regularly speak of an act within or outside the course of employment, or the scope of authority, of an employee, whether such employee is an agent in the restricted sense, or a servant as that term was meant in earlier centuries. See also, Thomas Atkins Street, The Foundations of Legal Liability: A Presentation Of The Theory and Development of the Common Law, vol. 2 (Northport: Edward Thompson, 1906) at 454; Anthony M. Dugdale ed. , Clerk & Lindsell on Torts, 18th ed. (London: Sweet & Maxwell, 2000) at 262 [Dugdale, Clerk & Lindsell]; Heatons Transport (St. Helens) Ltd. . Transport and General Workers’ Union, [1973] A. C. 15 (H. L.), Lord Wilberforce. The only limitation on the statement given by Fridman is that in order for a principal to be liable for the torts of a true agent it must be demonstrated that the agent was not in fact an independent contractor; see infra, note 14 and Atiyah, earlier in this note at 347-48. For ease of reference, this article will henceforth use language which refers to the employee-employer

relationship, wherever possible, which should be taken to include the principal-agent relationship as well.

For a description of these features, see Dugdale, Clerk & Lindsell, supra note 10 at 233-34; Rogers, Winfield and Jolowicz, supra note 4 at 701-703; B. S. Markesinis et al. , Markesinis and Deakin’s Tort Law (New York: Oxford University Press, 2003) at 572 [Markesinis, Markesinis and Deakin]; Tony Weir, Tort Law (Oxford: Oxford University Press, 2002) at 95; Nicholas J. McBride & Roderick Bagshaw, Tort Law, 2d ed. (Harlow: Longman, 2005) at 634-37; Francis A. Trindade & Peter Cane, The Law of Torts in Australia, 3d ed. (Melbourne: Oxford University Press, 1999) at 717, 735, 742; Klar, Tort Law, upra note 4 at 579-80, 586; Fridman, Torts in Canada, supra note 10 at 276; M. A. Jones, Textbook on Torts, 8th ed. (Oxford: Oxford University Press, 2002) at 421 ff. Vicarious liability is also statutorily imposed in various Commonwealth countries, for example, on partners for the torts of their partners, on the heads of police forces for the torts of their officers, and on the Crown for the torts of its servants. These statutory manifestations of vicarious liability are not discussed in this article (though it is likely that these manifestations of vicarious liability are also explicable on the theory herein proposed).

It is also sometimes stated, on the authority of Brooke v. Bool, [1928] 2 K. B. 578 (Div. Ct.) that parties are vicariously liable for the torts of their joint venturers; see McBride & Bagshaw, supra note 12 at 637. This blanket statement is somewhat misleading. In some cases, true vicarious liability is imposed, not due to the parties status as joint venturers but rather because

the parties, much like those participating in a partnership, can be viewed as mutual agents, see Co-operative Retail Services Ltd. v.

Taff-Ely Borough Council, [1983] 133 N. L. J. 577 (Q. B.), Beldam J. In other situations where the agency interpretation is unavailable, liability is fault-based since the apparently faultless joint venturer procured, authorized or conspired to commit a tort, breached a nondelegable duty or was personally negligent: see Hazel Carty, " Joint Tortfeasance and Assistance Liability" (1999) 19 L. S. 489 for a discussion. Some of the misunderstanding surrounding this area of the law has been engendered by Brooke v.

Bool itself since the two judges who decided the case offered at least four different justifications for liability on its facts including: agency, control, joint enterprise and breach of non-delegable duty. This over determination and lack of clarity may explain why the case A T HEO RY O F V ICARIOUS L IABILITY 5 imposed on employers for the torts of their independ ent contractors, 14 on parents qua parents for the torts of their children, 15 on sup erior se rvants for the torts o f their subord inates, 16 on beneficiaries for the torts of their trustees, 17 nor on shareholders for the torts of company directors/emp loyees.

More generally, it will have to explain why the common law's commitment to strict liability in the employer-employee relationship has not led to the adoption of a co mprehensive regime of strict liability in tort. 18 In other word s, it will have to explain where vicarious liability begins but also why it stops where it does. As Allan Beever notes: In reco m m end ing a [ration ale], th e task is no t m erely to show that the favoured [rationale] generates the desired outcome in the particular situation unde r discussion; it is also to

show that the [rationale] does not generate inappropriate outcomes in other situations.

But the latter seldom receives attention. 19 II. T HE F A I L U R E OF P R O P O SE D R A T I O N A L ES TO E XPLAIN THE D O C T R IN E This part of the article will examine the leading rationales put forth to justify vicarious liability and argue that none of them are true explanations of the doctrine since they cannot explain the central features of the doctrine nor its doctrinal limits. This argument will not be 14 15 16 17 18 19 “ has engendered curiously little in the way of subsequent reported authority”; see Unilever Plc v. Gillette (U. K.) Ltd. , [1989] R. P. C. 583 (C. A.) at 603, Mustill L. J.

In any event, if the foregoing analysis is correct, the existence of liability for joint venturers is perfectly consistent with the theory of vicarious liability that will be proposed in Part III of this article. Quarman v. Burnett (1840), [1835-1842] All E. R. Rep. 350, 151 E. R. 509 (Ex. Ct.); Stevens v. Brodribb Sawmilling (1985), 160 C. L. R. 16 (H. C. A.); D & F Estates Ltd. v. Church Commissioners for England, [1989] A. C. 177 (H. L.); Northern Sandblasting Pty. Ltd. v. Harris (1997), 188 C. L. R. 313 (H. C. A.) [Northern Sandblasting]; 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. , [2001] 2 S.

C. R. 983 [Sagaz]. While some texts (see Atiyah, supra note 10 at 3; Trindade & Cane, supra note 12 at 739; Fridman, Torts in Canada, supra note 10 at 309-10) contend that in some circumstances there is such vicarious liability, when these situations are examined it can be seen that the instances of liability are all manifestations of personal liability, usually in the form of a breach of some kind of nondelegable duty. For a similar view, see Dugdale,

Clerk & Lindsell, supra note 10 at 250; Rogers, Winfield and Jolowicz, supra note 4 at 729; McBride & Bagshaw, supra note 12 at 636; Jones, supra note 12 at 440.

Moon v. Towers (1860), 8 C. B. (N. S.) 611; 141 E. R. 1306 (C. P.); Carmarthenshire CC v. Lewis, [1955] A. C. 549 (H. L.). Parents can, however, be held vicariously liable qua employer/principal if their children commit a tort while acting the course of their employment or agency: Smith v. Leurs (1945), 70 C. L. R. 256 (H. C. A.); Hewitt v. Bonvin, [1940] 1 K. B. 188 (C. A.). But this, of course, is just an application of the ordinary rules of vicarious liability. Bainbridge v. Postmaster General, [1906] 1 K. B. 178 (C. A.); Rainbow Industrial Caterers Ltd. . C. N. R. Co. (1998), 54 D. L. R. (4th) 43 (B. C. C. A.). In certain limited circumstances, a beneficiary will become liable to personally indemnify a trustee for her torts and hence become vicariously liable for them. Put crudely, this occurs when a trustee has become an agent of an absolutely entitled beneficiary: see Hardoon v. Belilios, [1901] A. C. 118 (P. C.); Trident Holdings Ltd. v. Danand Investments Ltd. (1998), 64 O. R. (2d) 65 (C. A.); Reynolds, Bowstead & Reynolds, supra note 10 at 20. For a detailed discussion, see John Mowbray et al. Lewin on Trusts, 17th ed. (London: Sweet & Maxwell, 2000) c. 21. Once again, however, this is just an application of the ordinary rules of vicarious liability. As Ernest Weinrib argues: “ A justification justifies: it has normative authority withrespectto the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. Thus if a justification is to function as a justification, it must

be permitted, as it were, to expand into the space that it naturally fills. ” See Ernest J.

Weinrib, The Idea of Private Law, (Cambridge: HarvardUniversity Press, 1995) at 39 [Weinrib, Private Law]. Allan Beever, “ Particularism and Prejudice in the Law of Tort” (2003) 11 Tort L. Rev. 146 at 150. 6 A LBERTA L A W R EVIEW (2005) 43: 2 exhaustive since many of the arguments have been made in detail before and only limited argument is necessary to show that the leading theories of control, compensation, deterrence, loss-spreading, enterprise liability and mixed policy fail adequately to explain the existing limitations of the doctrine. 0 A. CONTROL One of the traditional explanations of vicarious liability is that the employer should be vicariously liable since the employer controls the activities of her employees. 21 Unfortunately, control cannot explain the contours of vicarious liability for a number of reasons. As was noted eloquently by P. S. Atiyah, control cannot be treated as either a sufficient reason for always imposing liability, or as a necessary reason without wh ich th ere s hou ld nev er be vicario us liab ility.

Control has never per se been a ground for imposing vicarious liability, e. g. , a pa rent is not liab le for th e torts of his children, a superior servant is not liable for the torts of subordinate servants, sch oolteachers are not liab le for the torts o f th eir pu pils an d s o fo rth . C on verse ly the absence of control — although at one time thought to preclude vicarious liability in the case of skilled and prof essio nal se rvan ts — is tod ay no t a ser ious obs tacle to s uch liability. 22

Thu s, given these failings, control is an inadequa te explanation o f the present contours of vicario us liability. B. C O M P E N S A T I O N /D E E P P

OCKETS The compensation explanation of vicarious liability holds that the rationale for the doctrine is to ensure that innoc ent plaintiffs have a solvent defendant against whom to enforce their legal rights and that as between employees and emplo yers this is mo st likely to be the employer who is wealthier and/or carries insurance. 23 This justification of vicarious liability is flawed for three prima ry reaso ns.

First, it does no t explain why com pensation m ust come from the employer, since the plaintiff would be equally well compensated if the 20 21 22 23 As Weir, supra note 12 at 96 argues: “ There is no point in discussing the matter … [since] the scope of the rule is not determined by the preferred rationale. ” I have not included discussion of the maxims respondeat superior and qui facit per alium facit per se since they are generally discredited as theories of vicarious liability, see e. g. , John G.

Fleming, The Law of Torts, 9th ed. (Sydney: LBC Information Services, 1998) at 410; Fridman, Torts in Canada, supra note 10 at 277-78. As Lord Reid observed in Staveley, supra note 9 at 643: “ The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it. ” See e. g. , Atiyah, supra note 10 at 15; Baty, supra note 3 at 147. Atiyah ibid. at 16. See the similar comments regarding children in Baty ibid. at 153. See Limpus v. London General Omnibus Company (1862), 158 E.

R. 993 at 998, Willes J. : “ It is wellknown that there is virtually no remedy against the driver of an omnibus, and therefore it is necessary that, for injury resulting from an act done by him in the course of his master’s service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. ”

See also Viscount Canterbury v. A. -G. (1842), 1 Ph. 306. Lord Lyndhurst L. C. ; Bazley v. Curry, [1999] 2 S. C. R. 534 at para. 0 [Bazley]; Baty, supra note 3 at 154; Fleming, supra note 20 at 410; Bruce Feldthusen, " Vicarious Liability For Sexual Torts" in Nicholas J. Mullany & Allen M. Linden, eds. , Torts Tomorrow: A Tribute to John Fleming (North Ryde, N. S. W. : LBC Information Services, 1998) at 224-25. A T HEO RY O F V ICARIOUS L IABILITY 7 payment came from any other source. 24 Mo reover, even if the concern is " effective compensation" 25 as op posed m erely to " p ossible com pensation," the governm ent, in most cases, has deeper pockets than any employer. 6 Second, the compensation explanation, when taken seriously, also tends to d estroy the emp loyee/independent contractor distinction. As Robert Flannigan argues: " Generally speaking, an employer will be richer ... than the workers he emp loys, whether they are servants or independent contractors. That being so ... no distinction ought to be made between servants and independent contractors for the purposes of vicarious liab ility. " 27 Third, the compensation rationale cannot explain why the plaintiff must have suffered a tort at the hands of the employee or why this tort must have been committed in the co urse of employment. 8 As Ernest We inrib notes: " Behind the identification of comp ensatio n as a go al of tort law is the need created in the victim by the very fact of injury. This need, however, is unaffected by the way the injury was produced . " 29 Thus, since the rationale of compensation cannot explain why the compensation must come from the employe r, nor justify three of the central doctrinal requirements of the law of vicario us liability, it cann ot be a persuasive explanation f the doctrine . C. D E T E R RE N C E The deterrence explanation of vicarious liability comes in two broad forms: one focused on the employer; the other

focused on the employee. The employer-focused version of the theory argues tha t since larger eco nom ic units are in the best position to red uce accide nts through efficient organization and discipline of staff, the law is justified in making them 24 25 26 27 28 29 Ernest J.

Weinrib, " Understanding Tort Law" (1989) 23 Val. U. L. Rev. 485 at 503-505. As Robert Flannigan questioned: " Why ... is the choice of compensator only a choice between the employer and the servant? " Robert Flannigan, " Enterprise Control: The Servant-Independent Contractor Distinction" (1987) 37 U. T. L. J. 25 at 28. See also Lewis N. Klar, " Judicial Activism in Private Law" (2001) 80 Can. Bar Rev. 215 at 237 [Klar, " Judicial Activism"]. Bazley, supra note 23 at para. 31.

Likewise, see Atiyah, supra note 10 at 22, who notes: After all there will always be plenty of people in the world better able to pay damages than any particular defendant who may be unfortunate enough to be sued for a tort, but mere wealth, however good a ground it may be for imposing taxation, could never by itself be treated as a ground for imposing liability in tort. And even if it were, why should the employer out of all the other wealthy people in the world be singled out for liability? Clearly this justification is no justification at all. For a similar view: see Christopher G.

Riggs, " Vicarious Liability of Employers For Sexual Abuse By Employees: Implications For Churches of Recent Judicial Decisions" (2000) 3 J. of Church L. Assoc. Can. 87 at 101; Flannigan, supra note 24 at 28-29. Flannigan, supra note 24 at 28. For a similar view, see the judgment of Waller L. J. in Gwilliam v. West Hertfordshire Hospital NHS Trust, [2003] Q. B. 443 (C. A.) at para. 38 where he attempted to create a duty on the employer of an independent

contractor to ensure not only the safety of an independent contractor but also the collectibility of any award made against it.

This broad duty was doubted in Naylor v. Payling, [2004] EWCA Civ. 560. See Atiyah, supra note 10 at 27-28: “ Undoubtedly it would be just as convenient and efficient a method of securing compensation for accidents to make all employers pay for their servants’ torts, and therefore to insure against them, when they are committed outside the servant’s course of his employment, as much as when they are committed within the course of employment. ” See also, McBride & Bagshaw, supra note 12 at 638; Trindade & Cane, supra note 12 at 736.

Weinrib, Private Law, supra note 18 at 38. For a similar view, see Peter Cane, The Anatomy of Tort Law (Oxford: Hart Publishing, 1997) at 47 [Cane, Anatomy] (the compensation “ argument cannot explain why vicarious liability is more or less limited in its application to the employer-employee relationship and why tort law is not generally based on social welfarist principles. ”) 8 A LBERTA L A W R EVIEW (2005) 43: 2 vicario usly liable in the name of accident reduction. 0 This version of the deterrence argument is not really an explanation of vicarious liability, however, since it either negates the “ vicarious” aspect of the rule or it is over-inclusive and can not explain why it is limited to the emplo yee/em ployer relation ship. If the reason for vicarious liability is that the employer should be held liable because she committed some fault (such as failing to supervise, foster a properenvironmentor select appropriately) then liability is not vicario us but ra ther a p articular application o f the fault regime. 1 Mo reover, if this was the reason for the rule, then one would expect that the employer would be

able to escape from “ vicarious” liability by proving that she was without fault (as one is able to do in the G erma n versio n of the doctrine). 32 Ho wever, as is well know n, positive pro of that the emp loyer conducted herself without fault will not serve as a defence to the common law version of the doctrine. 33 For these reasons, therefore, this version of the emplo yer-focused d eterrence rationale canno t explain vicario us liability.

Some versions of the employer-focused deterrence argument, however, are not dependent on the employer’s fault but rather argue, as the Supreme Court of Canada did in Bazley, that [b]eyond the n arrow ban d of e m ployer c ond uct th at attrac ts dire ct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the comm unity. Holding the em ployer vicariously liable for the wrongs of its employee m ay encourage th e e m plo ye r to ta ke su ch ste ps , a nd he nc e, re du ce th e ris k o f fu tu re ha rm . 34

W hile this might b e a valid reaso n to ho ld someone liable in the abstract, the theory cannot explain why this liability is not imposed across the private law — in other w ords why liability for preventab le yet not reaso nab ly foreseeable harms is limited to the employee-employer relationship. 35 For e xample, on this analysis, there is no reason why the defendant in Bolton v. Stone should not have been held liable to compe nsate the plaintiff for the foreseeable and preventable, but not reasonably foreseeable, injuries that she suffered since “ imaginative and efficient administration” might have reduced the risk of her injury. 6 Thus, since the 30 31 32 33 34 35 36 See Fleming, supra note 20 at 410. For a slightly different view, see Peter Cane, “

Responsibility and Fault: A Relational and Functional Approach to Responsibility" in Peter Cane & John Gardner, eds. , Relating to Responsibility (Oxford: Hart, 2001) 81 at 100 (" an important justification for strict liability is to increase the chance that those at fault will be held liable in the face of difficulties of proof"). See e. g. , Mattis v. Pollock, [2003] 1 W. L. R. 2158 (CA) where the fault of the employer in encouraging employeeviolencemay explain the court's decision to impose " vicarious" liability.

For a discussion of the case, see Robert Weeks, " Vicarious Liability for Violent Employees" (2004) 63 Cambridge L. J. 53. See Basil Markesinis & Hannes Unberath, The German Law of Torts, 4th ed. (Oxford: Hart Publishing, 2002) at 700. See Atiyah, supra note 10 at 19: " It is, of course, as clear as anything could be that the master is not exonerated from liability merely because he has exercised all possible care in his choice of servant. " See also, Baty, supra note 3 at 147; Glanville Williams, " Vicarious Liability and the Master's Indemnity" (1957) 20 Mod. L. Rev. 220; 20 Mod. L. Rev. 37 at 438 [Williams, " Master's Indemnity"]. See Bazley, supra note 23 at para. 33. See also London Drugs Ltd. v. Kuehne & Nagel International Ltd. , [1992] 3 S. C. R. 299 at 339, La Forest J. [London Drugs]. For a similar point, see Klar, " Judicial Activism," supra note 24 at 237. [1951] A. C. 850 (H. L.). See especially the speech of Lord Radcliffe who stated at 868: " I can see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she has received as a result of the sport that they have organized on their cricket ground at Cheetham Hill.

But the law of negligence is concerned less with what is fair than with what is culpable, and I A T HEO RY O F V ICARIOUS L IABILITY 9 employer-centred

version of deterrence is either a form of fault or posits a systematic form of strict or “ quasi-fault” liability that is logically illimitable to the employee-employer relationship, this form of the deterrence argument canno t explain vicario us liability.

The employee-centred version of the deterrence rationale argues that since employees rarely have sufficient wealth to meet the full costs of their liabilities and in some circumstances it will not be possible for the tort victim to identify the particular employee responsible, emp loyees will be inadeq uately deterred from committing torts. In order to meet this deterrence gap, emplo yers are held vicariously liable since employers can often take measures to influence employee behaviour through discipline at work or thro ugh the ultimate penalty of dism issal. 7 W hile this may appear to offer some explanation of vicarious liability there are a number of problems with this version of the deterrence rationale. First, in many situations the identity of the employee/tortfeasor will be known 38 and even in situations where the identity might be unknown there are many procedural and evidentiary devices, short of vicarious liab ility, that can be used to enco urage those with information to disclose what they know. 39 Second, the deterrence theory does not work particularly well where the act to be deterred is already a crime. 0 As Gumm ow and H ayne JJ. noted in Lepo re: “ If the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in dam ages for the assault com mitted. ” 41 Third, the theory cannot explain why damages are paid to the injured plaintiff, since the employer would be equally induced to monitor her employee if dama ges were paid to the state or any other person. 42 Fourth,

the rationale does 37 38 39 40 41 42 cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case. See Kevin E. Davis, “ Vicarious Liability, Judgment Proofing and Non-Profits” (2000) 50 U. T. L. J. 407 at 409-11 summarizing the main thrust of the American deterrence literature such as Steven Shavell, Economic Analysis of Accident Law (Cambridge: Harvard University Press, 1987) at 173; Alan O. Sykes, “ The Economics of Vicarious Liability” (1984) 93 Yale L. J. 1231; Alan O. Sykes, “ The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines” (1988) 101 Harv. L. Rev. 563; Steven P.

Croley, “ Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness” (1996) 69 S. Cal. L. Rev. 1705; Bruce Chapman, “ Corporate Tort Liability and the Problem of Overcompliance” (1996) 69 S. Cal. L. Rev. 1679. See also Jennifer H. Arlen & W. Bently MacLeod, “ Beyond Master-Servant: A Critique of Vicarious Liability” in M. Stuart Madden, ed. , Exploring Tort Law (Cambridge: Cambridge University Press, 2005) 111. Schwartz, supra note 4 at 1756 argued: “ it is only a small subset of cases in which an employee pondering negligent conduct can appreciate that his identity will remain beyond the ken of the plaintiff. As Richard Townshend-Smith argued, many of these problems could be overcome by reversing the burden of proof by assuming that a tort committed by an employee was exacerbated by the negligence of the employer and then leaving it up to the employer to prove that she was not at fault, see R. Townshend-Smith, “ Vicarious Liability for Sexual (and other) Assaults” (2000) 8 Tort L. Rev. 108

at 128. As was the case in many of the recent leading cases, such as Bazley, supra note 23; Lister v. Hesley Hall, supra note 6; Lepore, supra note 5, etc.

Lepore, supra note 5 at para. 219. For a similar view: see Riggs, supra note 26 at 101 where he argues: “[I]n the case of sexual predators who are deterred neither by potential criminal sanctions nor efficient administration of a church’s affairs, the imposition of liability on the church — whatever its rationale — will bear little relationship to deterrence. ” See Weinrib, Private Law, supra note 18 at 47. 10 A LBERTA L A W R EVIEW (2005) 43: 2 not seem to limit itself to the employee-emp loyer relationship.

M any, if not m ost, people would be unable to meet any major tort claim made against them 43 and thus, the deterrence theory would point to a generalized vicarious liability regime for the types of torts which are inade quately deterred and over which another might have some de facto or de jure contro l. 44 In any event, this version of the deterrence rationale certainly supp orts the vicarious liability of parents for the torts committed by their children, of a foreman of the torts of her subordinates 45 or of an emp loyer for the torts of judgment-proof independent contractors46 — positions which are clearly not the law. 7 Fifth and finally, there seems something arbitrary in limiting the choice of “ person-used-as-deterrence” to that of employer and the method of deterrence to the payment of comp ensatory dam ages. 48 One could argue that potential tortfeasors might be better deterred if vicarious liability was imposed on a loved relation, such as a pa rent or adult child, and if the penalty impo sed was the payment of exemplary damages, the loss of their liberty or the confiscation o f a favoured p rivileges (such as their licence to drive).

Thus, much like the employer-centred version of deterrence, the employeecentred version fails to explain vicario us liability. D. L OSS -S P R E A D IN G Another leading explanation of vica rious liab ility is that of loss-spreading, na mely that in fixing liability on the emp loyer, the burden of the injury will be sp read out am ong his customers and insurers. 49 As T raynor J. argued in Escola v. Coc a-Cola Bottling Co. “[t]he cost of an injury and the loss o f time orhealthm ay be a n overwhelm ing misfo rtune to the person injured, and a needless one, for the risk on injury can be insured by the [employer] and distributed among the p ublic as a cost of do ing business. ” 50 Much like the other explanations of vicarious liability, loss-spreading suffers fro m num erous difficulties in accounting for the d octrine of vicarious liab ility. First, it cannot explain why vicarious 43 44 45 46 47 48 49 50 As Arlen & MacLeod, supra note 37 at 13 argue: “ In many important situations … agent insolvency is the rule, not the exception. See also David Goddard, “ CorporatePersonality— Limited Recourse and its Limits” in Ross Grantham & Charles Rickett, eds. , Corporate Personality in the 20th Century (Oxford: Hart Publishing, 1998) 11 at 33-34; Atiyah, supra note 10 at 22. See McBride & Bagshaw, supra note 12 at 639 who note: “[I]f [deterrence] is correct, one would expect the law to say that A will be held vicariously liable in respect of B’s tort if A could possibly have done something to prevent that tort being committed. But it does not say this and it has never said this. As Williams argues: “ in many situations it is not the master who is in the best position to prevent injury being caused by a workman, but some superior servant. … If the avoidance of harm justifies [vicarious liability] … one would expect strict responsibility to be cast on all the superior servants” (Williams, “ Master’s Indemnity,” supra note 33 at 439). See Arlen & MacLeod, supra

note 37 who argue for the abolition of the independent contractor/employee distinction on deterrence grounds for “ wealth constrained” and “ judgment-proof” independent contractors.

See authority cited in Part I of this article. For a similar point in relation to compensation, see Flannigan, supra note 24 at 28. This was the argument generally favoured by Atiyah, supra note 10 at 27 who described it as “ the most rational justification that can be offered for vicarious liability today. ” See also Young B. Smith, “ Frolic and Detour” (1923) 23 Colum. L. Rev. 444 at 456; Williams, “ Master’s Indemnity,” supra note 33 at 442. For judicial support, see Bazley, supra note 23 at para. 1: “ the employer is often in the best position to spread the losses [caused by an employee’s tort] through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society,” McLachlin J. ; Lister v. Hesley Hall, supra note 6 at para. 65, Lord Millet; London Drugs, supra note 34 at 338-39, La Forest J. ; Dubai Aluminium v. Salaam, [2003] 2 A. C. 366 (H. L.) at para. 107, Lord Millet [Dubai]. 150 P. 2d 436 at 441 (Cal. 1944). A T HEO RY O F V ICARIOUS L IABILITY 11 liability is imposed in situations where the loss cannot be spread. 1 For e xample, it is clear that an emp loyer of a domestic serva nt is vicariously liable for her employee’s torts even though this cannot be spread through a customer base and regardless of insurance. 52 Likewise, it is difficult to envisage, in the absence of insurance which might or might not be readily available, how a charity might distribute these losses onto the community, 53 yet it is trite law that they may be held vicariously liable. 54 Second, the rationale does not explain why the loss-spreading “ vehicle” must be the employer as opposed to a scheme of social insurance

or through vicarious liab ility imposed on the go vernm ent. 5 Third, the rationale could be used to impose vicarious liability for the torts of independent contractors if it turned out emp irically that the employer could better spread the loss than a particular contractor or class of contractor. 56 And fourth, the loss-spreading justification does not explain why the loss to be dissipated must be both a tort and committed in the course of employment, as op posed to a naturally caused catastrophic illness o r an acciden tal self-inflicted injury. 7 Therefore, because of its inability to acco unt for the central features o f the doctrine, loss-spreading is not an adeq uate explana tion of vicarious liability. E. E NTERPRISE L IABILITY Another prominent explanation for vicarious liability is that of enterprise liability. Although there are a multitude of different versions of these theories, they generally come in one of two broad forms. The first, as typified in the writings of Gregory Keating58 and Jane 51 52 53 54 55 56 57 58 See e. g. the criticism of Callinan J. in Vabu, supra note 5 at paras. 115-17 that the assumptions underlying loss-spreading (such as the ability to raise prices or obtain insurance) are merely assumptions and not fact. It was also submitted by the appellant that the imposition of liability upon the respondent would provide an efficient means of passing on losses to insurers ... [since] the “ respondent’s enterprise” W [is] a legal personality better able to assess the risks, and pay the insurance necessary to cover them.

This last submission reflects assumptions about the equitable distribution of losses and economic efficiencies often made by authors of textbooks, and, on occasion, judges. ... There are ... difficulties about these sorts of assumptions. They are only assumptions. They may, I suspect, have been

made without access to all of the relevant information, and not always after rigorous scrutiny by people adequately qualified to process and evaluate that information. See Harrison v. Duke of Rutland, [1893] 1 Q. B. 142 (C. A.); Jardine v.

Lang (1911), 2 S. L. T. 494. For a similar point, see Williams, " Master's Indemnity," supra note 33 at 441. See McBride & Bagshaw, supra note 12 at 639, n. 33. See also Klar, " Judicial Activism," supra note 24 at 238, n. 83 and judgment of the majority in Jacobi v. Griffiths, [1999] 2 S. C. R. 570, Binnie J. [Jacobi] which doubt the applicability of the loss-spreading rationale to charities. See e. g. , Mersey Docks and Harbour Board v. Proctor, [1861-73] All E. R. Rep. 397 (H. L.); John Doe v. Bennett, [2004] 1 S. C. R. 36; and the discussion in David R. Wingfield, " The Short Life and Long After Life of Charitable Immunity in the Common Law" (2003) 82 Can. Bar Rev. 315. Weinrib, Private Law, supra note 18 at 37; Flannigan, supra note 24 at 29. Flannigan, ibid. Jane Stapleton, Product Liability (London: Butterworths, 1994) at 193; Weinrib, Private Law, supra note 18 at 185, n. 27; Atiyah, supra note 10 at 27-28; McBride & Bagshaw, supra note 12 at 640; F. D. Rose, " Liability for an Employee's Assaults" (1977) 40 Mod. L. Rev. 420. See also Gregory C.

Keating, " The Idea of Fairness in the Law of Enterprise Liability" (1997) 95 Mich. L. Rev. 1266 at 1360 where he argues: " it is fair to make enterprises pay for the accidental injuries characteristic of their activities whenever doing so will distribute the financial burdens of those accidents among those who have benefited from the underlying risk impositions. " 12 A LBERTA L A W R EVIEW (2005) 43: 2 Stapleton, 59 is based on the notion of reciprocity

between benefit and burden. 60 As Friendly J. noted on behalf of the Second Circuit in Ira S.

Bushey & Sons, Inc. v. United States: “ respondeat superior … rests not so much on policy grounds … as in a deeply rooted sentiment that a business enterprise canno t justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. ” 61 The second version, as typified by the Supreme Co urt of Canada’s dec ision in Bazley, is that it is fair to make the employer pay because the employer’s enterp rise created o r exacerbated the risk that the p laintiff would suffer the injury that she did. 2 The reciprocity version of enterprise liability fails to account for many of the important aspects of vicarious liability. First, it cannot explain why charities should be vicariously liable for their employees’ torts since altruistic institutions do not receive the material benefits required to render the reciprocity argument applicable against them. 63 Yet it is trite law that they may be vicariously liable. 64 Second, reciprocity cannot explain why the emp loyer’s vicarious liability is unlimited in amount rather than being limited to profit or assets of the enterprise (whether actual or potential). 5 Third, the rationale canno t explain why the enterprise is only liable for the torts com mitted by its employees and not all accid ents caused in the search of profit. 66 As G lanville W illiams argued: 59 60 61 62 63 64 65 66 Stapleton, supra note 57 at 186: “ if, in seeking to secure financial profit, an enterprise causes certain types of loss, it should be legally obliged to pay compensation to the victim. ” For early judicial endorsement, see Hall v. Smith (1824), 2 Bi 156, Best C. J. and Duncan v. Findlater, [1839] VI Cl & Fin 894, 7 E. R. 934, Lord Brougham.

For more modern authority, see Dubai, supra note 49 at para. 21, Lord Nicholls: “ The … legal policy [underlying the law on vicarious liability] is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the [employees] through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged. ” 398 F. 2d 167 at 171 (2d Cir. 1968).

As was argued by McLachlin J. for the court: “ The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer’s reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. ” Bazley, supra note 23 at para. 31. See also Lister v. Hesley Hall, supra note 6 at para. 5, Lord Millet. For an economic justification of enterprise risk, see Simon Deakin, “‘ Enterprise-Risk’: The Juridical Nature of the Firm Revisited” (2003) 32 Industrial L. J. 97. See Riggs, supra note 26 at 101 where he argues that such theories sit “ awkwardly in the case of organizations like churches or Girl Guides which are arguably created to provide benefits — not to receive them. ” See also Klar, Tort Law, supra note 4 at 581; McBride & Bagshaw, supra note 12 at 640, n. 33; Williams, “ Master’s Indemnity,” supra note 33 at 230; Schwartz, supra note 4 at 1750, n. 1. See authority cited supra note 54. See Baty, supra note 3 at 147. For example in the Roman law and medieval civil law there was, in

many commercial circumstances, “ an equivalence between the value of the property [engaged in the enterprise] and the owner’s liability arising from it” (David Johnston, “ Limiting Liability: Roman Law and the Civil Law Tradition” (1995) 70 Chicago-Kent L. Rev. 1515 at 1536; see also R. Zimmerman, The Law of Obligations: Roman Foundations of the Civilian Tradition (Oxford: Oxford University Press, 1996) at 1118).

Alan O. Sykes “ An Efficiency Analysis of Vicarious Liability under the Law of Agency” (1981) 91 Yale L. J. 168 at 173. A T HEO RY O F V ICARIOUS L IABILITY In an action against the master for the negligence of the servant, it is necessary to prove the servant’s negligence. This should not be the case if the underlying reason of the law is to impose upon an undertaking the social loss caused by its operations. A loss caused without negligence is just as much a loss as one caused by negligence.

For e xa m ple , n eith er a tra din g firm n or its va nm e n c an av oid so m e traffic accidents; yet these accidents are part of the social cost of the firm’s activities. 67 13 Fourth, the theory has difficulty explaining the lack o f vicarious liability for independent contractors since that is a situation of mutual pro fit, mutual benefit and burden. 68 Now as Stapleton and A tiyah suggest, this rule can be saved if one accepts that “ the benefit derived from an independent contractor’s services is fixed and predetermined, [and] the benefit from the services of employees is open-ended” 69 or “ in the nature of an equity. 70 But even if this further clarification is introduced, it would not explain why beneficiaries or shareholders are not vicariously liable for the torts of their trustees or directors since they too are equity stakeholders. 71 A fifth, related objection, is that the rec iprocity rationale cannot explain

why vicarious liability is limited to the employee/employer relationship, since if the rationale was taken seriously the common law would have a schem e of strict liability for business torts 72 — which is certainly not the law. 3 Sixth and finally, the re cipro city rationale has difficulty explaining why the em ployee remains pe rsona lly liable for his or her tort after that tort has been ascribed to the em ploye r's enterprise, since the rationale supposes that it is the enterprise which benefits and therefore it is the enterprise which should bear the burden. 74 Unfortunately, the enterprise risk version of the rationale is not any more successful in explaining the current limits of vicarious liability except to the extent that it would allow vicarious liability to be imp osed o n charities. 75 Mo reover, if this explanation were to expand 67 68 69 70 71 72 73 4 75 Williams, " Master's Indemnity," supra note 33 at 442. See Harold J. Laski, " The Basis of Vicarious Liability" (1916) 26 Yale L. J. 105; McBride & Bagshaw, supra note 12 at 639-40; Stapleton, supra note 57 at 190. As Baty, supra note 3 at 32 argues, if reciprocity were taken literally everyone who hires a taxi cab would be placed " in an unenviable situation! " Likewise, as Williams argued: " In a society based on the division of labour we are all constantly receiveing benefit from the work of others, but this does not, and cannot, make us legally liable for their wickedness and mistakes" (see " Master's Indemnity," supra note 33 at 230).

See also Klar, Tort Law, supra note 4 at 586. Stapleton, supra note 57 at 190-91. Atiyah, supra note 10 at 18. Atiyah himself notes this fact later on the same page but does not realize its significance: " If a company makes very large profits in any one year due to the exertions of its men, the company may indeed be faced with demands for increased wages in the following

year, but the fact remains that the surplus profit earned by the company during that year goes to the ordinary shareholders. ” Ibid. See Schwartz, supra note 4 at 1750, n. 61.

Cane, Anatomy, supra note 29 at 46, n. 16 (The reciprocity theory “ would justify the imposition of strict liability in a wide range of situations in which it is currently not imposed. ”) The position is of course different in many jurisdictions in the United States which have adopted judge-made systems of products liability, hence many of the leading American articles on the topic are not so much attempting to explain vicarious liability but rather attempting to show that vicarious liability fits with this growing body of products liability law, see e. g. Keating, supra note 58; Robert L. Rabin, “ Some Thoughts on the Ideology of Enterprise Liability” (1996) 55 Md. L. Rev. 1190. See the judgment of La Forest J. in London Drugs, supra note 34 where he argued for the abolition of the employee’s personal liability. See also Stapleton, supra note 57 at 193, arguing for such a move. One suspects that the Supreme Court adopted this version of the theory since the defendant in Bazley was a charity which did not receive the financial profit necessary to render it liable under the reciprocity version of the theory.

While justifying the vicarious liability of charities, the theory poses other 14 A LBERTA L A W R EVIEW (2005) 43: 2 to its logical limits, it would pose an even greater divergence with the current law than does the reciprocity version, since it would countenance a general regime of strict liability for the imposition of all risk, as opposed to one limited by the profit motive. 76 Therefore, much like the rationales of co ntrol, comp ensation, deterrence

and loss-spreading, enterp rise liability (in both its forms) canno t hope to explain the doctrine of vicarious liability.

F. M I XE D P O L IC Y Given the failure of the leading justifications of vicarious liability to explain the contours of the do ctrine individually, many lead ing jurists have argued that vicarious liab ility is instead explained by a combination of these policy considerations. 77 As B ryant Sm ith famously remarked in 1949: [A]ssuming that the doctrine is to be justified, is not its justification more properly to be found along the following line of thought? Masters are liable for the negligent injuries done by their servants to third persons because: 1.

As a rule the master controls the conduct of the business and is usually therefore in a better position than … anyone else exc ept th e ser van t … to pre ven t suc h inj uries . 2. In g ene ral, the m aster selects the servant and here also he has an opportunity, denied to third persons, by care and intelligence in the choice, to keep dow n the risks. 3. Ord inarily the servant is doing the m aster’s w ork and the risk is therefore not im prop erly regarded as one of the hazards of the business.

To protect the master against responsibility beyond this principle, his liability is extended only to the injuries done “ in the course of the em ploym ent. ” 4. The master as a rule ge ts the prof its. … 5. In most instances, though not in all, the master is better able to pay, and it is ju st, as betw een him and the in noc ent th ird person, to put up on the m aster the risk of the servant’s inab ility to pay. … 6. U sua lly, though not alw ays, th e m aste r is in a b etter p osition than the th ird p erso n to spread the risk onto the comm unity as a whole.

And so on through the … reasons that might be offered. 78 W hile there is some hope that the comb ination of rationales may explain the contours of vicarious liability, there are a number of reasons to doubt that this is the case. First, some of the rationales are inconsistent. As Flannigan explains: “ The deep pocket justification makes the employer liable because he is able to bear the loss. The loss distribution justification, on the other hand, makes the employer liable because he is able to avoid bearing the loss. 79 Second, even if one combines the various rationales, many of the central elements of 76 77 78 79 problems such as justifying the imposition of vicarious liability on parents for their children’s torts, see Markesinis, Markesinis and Deakin, supra note 12 at 572, n. 233. As Klar questions in relation to Bazley: “ Would [risk creation] not be a strong rationale for the introduction of strict liability in product liability cases, for example? Is McLachlin J. as she then was) signalling a willingness on the part of the Supreme Court to rethink Canadian tort law’s commitment to negligence law and to move more aggressively towards strict liability…? ” (“ Judicial Activism,” supra note 24 at 238). For a similar concern, see “ Master’s Indemnity,” supra note 33 at 439 where Williams argues: “ the prevention of injury is not generally regarded as the sole aim … of the law of tort. Were it so, the argument would result in strict responsibility for harm caused by the defendant, however remotely. [I]t would be neither a workable nor a just law. ” See also Rogers, Winfield and Jolowicz, supra note 4 at 704. For a reasoned judicial rejection of generalized strict liability, see Wagener v. Pharmacare Ltd. , [2003] All S. A. 167 (S. C. A.). See Fleming, supra note 20 at 410; Rogers, Winfield and Jolowicz, ibid. at 704; Markesinis & Unberath, supra note 32 at 694; Stephen Waddams, Dimensions of Private Law: Anglo-American Categories and Concepts

(Cambridge: Cambridge University Press, 2003) at 102-104. Bryant Smith, “ Cumulative Reasons and Legal Method” (1948-49) 27 Tex.

L. Rev. 454 at 458-59. Flannigan, supra note 24 at 28. A T HEO RY O F V ICARIOUS L IABILITY 15 vicarious liability are still difficult to explain. For example, Stapleton notes that none of the modern rationales, save perhaps some versions of deterrence, would justify limiting an emp loyer’s liability solely to tortiously caused injury. 80 Likewise, John G. Fleming argues that the combined rationales approach points to eliminating the personal liability of the employee and having this liability channelled through the employer alone. 1 Third, the combined app roach would seemingly still have difficulty limiting the doctrine of vicarious liability to its current well-accepted limits since all the rationales, save perhaps some versions of enterp rise liability, point to the imposition of vicarious liability on parents for the torts of their children. As a result of these deficiencies, it seems evident that any number of vicarious liability regimes might be supported by the combined policies such that even together they do not really explain why we have these doctrinal rules and not others.

T hus, although it might be possible to argue that the current doctrinal limitations of vicarious liability are the perfect instantiation of the control, compensation, deterrence, loss-spreading and enterprise liability rationales which optim ally com bines their logic and which p erfectly balances all their contradictions and incoherences, that this were indeed so “ would be a coincidence of Panglossian proportion. ” 82 III. A N E X P L A N A T IO N OF V ICARIOUS L IABILITY

Having discounted the main rationales that have been offered to explain vicarious liability, this article will now outline a theory which comprehensively explains the doctrine. 83 The mistake with mo st of the prevailing rationales, it is submitted, is that they have focused almost exclusively on the relatio nship betwe en the emplo yer and