UNDUE JUDICIAL RESTRAINT IN *BIRD V DP*

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This article argues that the decision of the majority in Bird v DP (a pseudonym) [2024] HCA 41 ('Bird') was characterised by undue judicial restraint, principally in its reasoning for maintaining the restriction of the doctrine of vicarious liability in tort to employment relationships (rather than including relationships 'akin to employment' as in the United Kingdom). The majority was unduly restrained in rejecting the role of policy considerations in making its determination; in under-emphasising the logic of expanding the scope of the doctrine; and in overstating concerns about maintaining the certainty of the doctrine. This analysis still matters even after the High Court expanded non-delegable duties to cover intentional tortious acts in AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2, and the Victorian Parliament imposed retrospective statutory vicarious liability: non-delegable duties have different aims and thresholds, while legislative solutions are politically fragile and inconsistent. The article thus situates Bird in the longstanding debate in Australian jurisprudence between the Kirby/Mason school of legal realism and the Dixon/Heydon school of legal originalism, showing why Bird presents no clear obstacle to expanding the first stage of the vicarious liability enquiry. In doing so, it provides a Kirby-ian reminder that concerns about the law's coherence need not obviate the Court's role in shaping the law in response to changing social circumstances, not least in the protection of the most vulnerable in society.

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I Introduction

Tort law provides multiple avenues for imposing liability on institutions for abuse and misconduct perpetrated against those in their care.[1] Breach of a non-delegable duty is one avenue; that is, the positive duty an institution has to ensure those for whom it is responsible are treated with reasonable care by independent contractors or employees who are engaged to provide that care.[2] In *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* ('*AA*'), the High Court of Australia confirmed that non-delegable duties applied to intentional wrongdoing,

[1] See further David Tan, 'An Enterprise Risk Approach to Vicarious Liability in the 21st Century' (2015) 27 Singapore Academy of Law Journal 822, 823.

[2] Neil Foster, 'Non-Delegable Duty and Intentional Torts: AA v Trustees of the Roman Catholic Church before the High Court of Australia' (Seminar Paper, Australian and New Zealand Tort and Compensation Researchers and Teachers Network Symposium, 16–17 February 2026) 5 <https://lawandreligionaustralia.blog/>.

overturning a longstanding precedent in *New South Wales v Lepore* ('*Lepore*').[3] This decision was widely celebrated for its vindication of institutional abuse survivors.[4]

AA follows closely on the heels of another, more controversial High Court determination, which neglected to find a Catholic Diocese *vicariously* liable for the actions of a now-deceased priest against the plaintiff, *Bird v DP (a pseudonym)* ('*Bird*').[5] A majority of the Court neglected to expand vicarious liability to cover the non-employment relationship between the priest and the Diocese (diverging from the United Kingdom Supreme Court ('UKSC'), which had developed a category of 'akin to employment' that addressed such relationships). *Bird* was heavily criticised, and the Victorian government passed retrospective legislation making churches vicariously liable for such abuse in the first half of 2026, specifically including relationships 'akin to employment'.[6]

AA and the Victorian legislation may suggest that survivors are now more well-equipped to pursue redress against institutions for historical (and not so historic) abuse, and abuse that sadly still likely occurs today.[7] Vicarious liability still matters, though, insofar as (a) the Victorian legislation has not been uniformly replicated at the time of writing, leaving uneven statutory protections for survivors of

[3] *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 427 ALR 67 ('*AA*'); *New South Wales v Lepore* (2003) 212 CLR 511 ('*Lepore*'). See further Paula Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse in England and Wales and Australia: A Matter for Private Law or the State?' (2024) 44 *Legal Studies* 591, 595. For a discussion of *AA* and non-delegable duties, see Joshua Yuvaraj, 'Opening the Floodgates? *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2' (2027) *Singapore Journal of Legal Studies* (forthcoming).

[4] See, eg, Christopher Knaus, 'Landmark High Court Ruling Finds Catholic Church Had Duty to Protect NSW Child from Paedophile Priest', *The Guardian* (online, 18 February 2026) <www.theguardian.com/au>.

[5] *Bird v DP (a pseudonym)* (2024) 283 CLR 45 ('*Bird*'). Vicarious liability has been conceptualised in different ways: see, eg, Samuel Goldberg, 'Vicarious Liability for Equitable Wrongdoing' (2024) 48(1) *Melbourne University Law Review* 42, 48–9; *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 [48]–[51] (Kiefel CJ, Gageler, Gordon and Jagot JJ) ('*Schokman*'); James Goudkamp, 'Rethinking Fault Liability and Strict Liability in the Law of Torts' (2023) 139 *Law Quarterly Review* 269, 287; Elise Bant, 'Rethinking Corporate Groups: Insights from Systems Intentionality' (2025) 47 *Sydney Law Review* 1, 6; Christine Beuermann, 'Dissociating the Two Forms of So-Called 'Vicarious Liability' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 477.

[6] *Justice Legislation Amendment (Vicarious Liability for Child Abuse) Act 2026* (Vic) s 93C(1); Eden Hynninen, '"Thunderous Applause" as Vicarious Liability Laws Pass Victoria's Upper House', *ABC* (online, 18 February 2026) <www.abc.net.au>; Richard Willingham, 'Churches to Be Held Vicariously Liable for Abuse under New Victorian Laws to be Proposed to Parliament', *ABC* (online, 17 June 2025) <www.abc.net.au>.

[7] See further *Schokman* (n 5) [81]. Non-delegable duties could conceivably "fill the gap" where vicarious liability falters, for example where a locum doctor commits torts not in the course of their employment: see, eg, Craig Purshouse and Ilias Trispiotis, 'Is "Conversion Therapy" Tortious?' (2022) 42 *Legal Studies* 23, 37–8.

institutional abuse across Australia; and (b) the doctrines of vicarious liability and non-delegable duties still have different thresholds, emphases and roles in the matrix of tortious liability.[8] Thus, we should not willingly jettison the opportunity to highlight potential improvements in one area of the law due to developments in another, particularly in the absence of uniform statutory protections, given the importance of providing means of redress to those who have suffered under the care of institutions.

This article develops the crowded field of vicarious liability scholarship, and the emerging post-*Bird* scholarship on vicarious liability, by showing that the majority's reasoning was governed by undue judicial restraint ('a disposition to conserve existing law, refraining from pursuing the more innovative route'),[9] grounded in misguided concerns about the role of policy, the doctrinal boundaries of the akin to employment test and the need to preserve certainty in the doctrine.[10] It suggests that given the fast-moving nature of social circumstances, primarily but not exclusively in relation to institutional abuse, courts are not limited from responding in the manner the majority appeared to consider it was in *Bird*; and therefore that in the future an expansion of the first stage of the vicarious liability determination, alongside non-delegable duties applicable to intentional torts and as a backstop to legislative action, can be seriously considered. This article uses *Bird* to highlight the inverse of the common trope that the High Court engages in 'judicial activism' far too

[8] Stelios Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care: A Step Too Far?' (2016) 79(5) *Modern Law Review* 884, 885, 899; Allison Silink, 'The Scope of the Non-Delegable Duty of Care in "a Coherent Law of Negligence" under Australian Law' (2026) 54(1) *University of Western Australia Law Review* (advance); Simon Deakin, 'Organisational Torts: Vicarious Liability versus Non-Delegable Duty' (2018) 77(1) *Cambridge Law Journal* 15, 16.

[9] Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60(1) *University of Toronto Law Journal* 23, 24–5. Note that judicial restraint also has particular applications in administrative law which are not in view in this article: see, eg, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 [128]–[129] (Edelman J).

[10] For different angles on *Bird*, see Nicholas Chen and Naomi Oreb, 'The High Court Decision in *Bird v DP (A Pseudonym)*: Where Are we at with Employment, Quasi-Employment and Vicarious Liability in Australia?' (2025) 30(1) *Torts Law Journal* 1; Anthony Gray, 'Relationships Akin to Employment and Vicarious Liability: The High Court's Rejection in *Bird v DP (A Pseudonym)*' (2024) 29(4) *Tort Law Review* 376; Douglas Freeburn, '"Employment or Nothing": An Analysis of *Bird v DP* and the Australian Approach to Vicarious Liability in Cases of Institutional Abuse' (2025) 44(1) *University of Queensland Law Journal* 183; Aryan Mohseni and Zachary Gomes, 'Vicarious Liability and the Triumph of Form in *Bird*: Coming Home to Roost?' (2026) 100 *Australian Law Journal* (forthcoming).

readily:[11] that is, undue restraint is just as problematic as ungrounded activism.[12] To do so, this article sets out the doctrinal and procedural background for the *Bird* determination in Part II, before critiquing the majority's reasons for dismissing the akin to employment test in Part III. It concludes in Part IV.

II Background

A *The First Stage of Vicarious Liability Generally*

Vicarious liability comprises two stages under Australian common law: (a) whether the relationship between A, typically an organisation, and B, typically an employee, is one that is capable of giving rise to vicarious liability; and (b) whether B was acting in the course or scope of employment (in relation to party A) when they committed the tort.[13] If both of these stages are met then A will be vicariously liable for the tortious actions of B: A will not be regarded as having *done* the act, but the liability that would have been attributed to B will fall on A.[14]

In *Bird*, the High Court reaffirmed that the first stage was only satisfied if there was an employment relationship. This was out of step with other apex courts in the common law world. For example, the UKSC in *Various Claimants v Catholic Child Welfare Society* ('*Christian Brothers*') confirmed the first stage can be satisfied with relationships that are 'akin to employment'.[15] That decision involved a religious 'institute' constituted as an unincorporated association of lay members of the

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[11] See, eg, James Allan, 'The Three "Rs" of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'Riginalism' (2012) 36(2) *Melbourne University Law Review* 743; Johnny M Sakr and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40(1) *University of Queensland Law Journal* 119, 147–8; Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 20; Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30(2) *Melbourne University Law Review* 576, 590 ('Judicial Activism: Power without Responsibility?').

[12] Thus, the original contribution of this paper is of the 'micro-legal' type: 'research that analyses a specific legal problem, such as a specific provision of a statute or code, or a specific case or line of cases [with] … something new', namely the balance between internal coherence and the Court's wider role to respond to society: Mathias M Siems, 'Legal Originality' (2008) 28(1) *Oxford Journal of Legal Studies* 147, 148–9. By analogy, see Rosalind Dixon and Po Jen Yap, 'Responsive Judicial Remedies' (2025) 14(2) *Global Constitutionalism* 323, 342.

[13] Paula Giliker, 'Vicarious Liability in the Common Law World: An Introduction' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 3. Cf Tan (n 1) 829.

[14] *Bird* (n 5) 71–2 [44].

[15] *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ('*Christian Brothers*'). *Christian Brothers* built on the approach introduced in *JGE v Portsmouth Roman Catholic Diocesan Trust* [2013] QB 722 and the approach has subsequently been followed in cases like *Cox v Ministry of Justice* [2016] AC 660 and *Armes v Nottinghamshire County Council* [2018] AC 355 ('*Armes*'). See further Paula Giliker, 'Vicarious Liability in England and Wales' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 48–52.

Catholic Church, specifically an institution for the care of boys in need, at which members of the class action suffered sexual abuse at the hands of both employees and lay members of the institute.[16] The focus of the appeal was on vicarious liability for the actions of the non-employee members. The UKSC concluded that the institute should be regarded as vicariously liable for the actions of those members because its relationship with those members bore enough similarities to employment to make it 'fair, just and reasonable' to do so.[17] The UKSC set out the relevant similarities as a 'five incidents' test, which included whether party B's 'activity is likely to be part of the business activity' of party A and the likelihood of party B being more able to compensate the aggrieved party than party A.[18]

The UKSC subsequently refined the 'akin to employment' relationship in *Various Claimants v Barclays Bank* ('*Barclays Bank*').[19] That decision involved the liability of Barclays Bank for alleged sexual assaults committed by a doctor engaged to perform pre-employment reports for the bank's employees. The UKSC found that the doctor was not an employee of the bank and was clearly carrying on business on his own account;[20] accordingly, vicarious liability could not attach to Barclays Bank. The UKSC emphasised that the line running through the cases, including *Christian Brothers*, was 'understanding the details of the relationship', and that when it was clear the person was carrying on business independently, there was no reason to apply the 'five incidents' test.[21] That test would apply only in 'doubtful' circumstances, though the overarching test still appears whether it was 'fair, just and reasonable to impose vicarious liability' on that particular relationship.[22]

B *The Majority's Reasoning*

In *Bird*, the Victorian Supreme Court and the Court of Appeal applied a similar approach to a relationship that was neither one of employment nor an independent contract (priest and Diocese).[23] On appeal to the High Court, however, the majority (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ) found that an employment relationship was required for vicarious liability. The majority had five reasons for reaching this conclusion.

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[16] *Christian Brothers* (n 15) [3]–[4].
[17] Ibid.
[18] Ibid [35].
[19] *Various Claimants v Barclays Bank plc* [2020] 4 All ER 19 ('*Barclays Bank*').
[20] Ibid [28].
[21] Ibid [27].
[22] Ibid.
[23] *DP (a pseudonym) v Bird* [2021] VSC 850 [116]–[214]; *Bird v DP (a pseudonym)* (2023) 69 VR 408 [77]–[131].

First, the High Court has 'repeatedly rejected' the idea that fairness, justice and reasonableness should be the basis for 'determining and developing the law of vicarious liability'.[24] The majority was influenced by the fact that such determinations appear too subjective to ground reliable development of the doctrine: they 'depend … on contestable policy choices and the allocation of risk, *which are matters upon which minds might differ*'.[25]

Second, the employment relationship was a solution with 'deep roots' that should not be arbitrarily discarded, even though this was 'harsh' given the heinous acts at issue.[26]

Third, expanding the first stage beyond employment risked creating 'uncertainty and indeterminacy' in unduly expanding the doctrine 'to relationships which hitherto would not have been understood to involve one party being liable for another's wrongs', and when it comes to distinguishing relationships 'akin to employment' from those involving independent contractors.[27]

Fourth, it was not within 'the body of accepted rules and principles' of the law to expand the first-stage test.[28]

Fifth, it was the responsibility of Parliament, not the Courts, to develop or '[r]eformulat[e] the law on vicarious liability'.[29] Despite (pre-Victorian) statutory reforms seeking to hold institutions to account for abuse across different jurisdictions in Australia, the majority did not consider it had the remit to expand the first-stage test by analogy to those statutory developments.[30]

Accordingly, the majority declined to expand the first-stage test for vicarious liability to cover non-employment relationships. The appeal was therefore allowed, and the Diocese bore no vicarious liability for the priest's offences.

C *Why an Analysis of Bird Matters*

The outcome in *Bird* is consistent with the development of the vicarious liability doctrine in Australia in that it steadfastly upholds the distinction between employment and non-employment relationships.[31] Putting aside consequentialist

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[24] *Bird* (n 5) 80 [62].
[25] Ibid (emphasis added).
[26] Ibid 81 [63]–[64].
[27] Ibid 81–2 [65]–[66].
[28] Ibid 82 [67], citing *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ) ('*Breen*').
[29] *Bird* (n 5) 82 [67].
[30] Ibid 84 [71].
[31] See also Henry Ea, 'High Court Narrows Vicarious Liability for Institutional Abuse', *Law Society Journal* (online, 21 November 2024) <https://lsj.com.au/>.

criticisms (which merit examination but are not the focus of this article), a doctrinal critique requires us to assess whether the majority had good reasons to maintain the restriction of vicarious liability doctrine; or more specifically, when confronted with the potential to expand the doctrine to relationships akin to employment, whether its reasons for not doing so stand up to scrutiny.[32]

This analysis matters despite the broadening of non-delegable duties to intentional acts in *AA*; non-delegable duties and vicarious liability still achieve different ends by different tests.[33] Vicarious liability focuses on the relationship between the institution and the tortfeasor; non-delegable duties focus on the relationship between the institution and the plaintiff.[34] Depending on the situation, a non-delegable duty may remain even more difficult to prove than vicarious liability.[35] This is consistent with the idea that the non-delegable duty is an exception to the general rule that A is generally not liable for the conduct of C, an independent contractor, against B, the plaintiff,[36] and to the 'fault-based principles on which the law of negligence is based' generally.[37]

The other avenue for protection is statutory, but even here, there remains scope for the common law of vicarious liability. If there is no legislation making an institution vicariously liable, the plaintiff will need to rely on the common law. And if there is legislation, plaintiffs will need to meet statutory thresholds to hold an institution liable, which can vary per jurisdiction.[38] Legislation is also inherently political (and therefore fragile) in a way the common law is not. Parliament can legislate to respond to, and in some cases functionally invalidate, a decision of the courts, as appears to be the case in *Bird*. The flip side of relying on legislation, though, is the fragility of political will. In an age of increasing political division, it is not impossible, nor improbable, to imagine a world in which protections like the Victorian and

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[32] See also Kenneth Hayne, 'Letting Justice Be Done without the Heavens Falling' (2001) 27(1) *Monash University Law Review* 12, 19.

[33] See also *AA* (n 3) [137] (Gordon J); Warren Swain, 'Vicarious Liability: A Pailful of Slops and Other Hazards' in Kit Barker and Ross Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2018) 89, 108–9.

[34] Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care' (n 8) 890.

[35] See, eg, *The Commonwealth v Introvigne* (1982) 150 CLR 258, 271 (Mason J), cited with approval in *AA* (n 3) [15]. See also *Armes* (n 15) [49]–[50].

[36] Francis Santayana, 'Vicarious Liability, Non-Delegable Duties and the "Intentional Wrongdoing Problem"' (2019) 25(2) *Torts Law Journal* 152, 159–60.

[37] *Woodland v Essex County Council* [2014] AC 537, [22] (Lord Sumption), cited with approval in *AA* (n 3) [22]. For a normative evaluation of non-delegable duties, see Anthony Gray, 'Reinvigorating Non-Delegable Duties in Australia?' (2017) 25(2) *Tort Law Review* 59, 74–7.

[38] Gray, 'Relationships Akin to Employment' (n 10) 379 n 23. A table comparing the different approaches taken in Australia, current as of February 2026, is on file with the author. Thanks to Jack McKenzie for preparing this information.

Australian Capital Territory legislation are rolled back on the back of targeted lobbying by institutions and other entities to limit, or avoid, primary or secondary tortious liability for abuse.[39] Corporate roll-backs of diversity and inclusion programs in Australia (consistently with trends in the United States[40]) are a salient reminder that understandings we may take as accepted — like the need for vicarious liability legislation to hold institutions to account for abuse — are far more fragile than we might otherwise think in a globalised, polarised world. As Brennan J noted in his dissenting judgment in *Dietrich v The Queen*:

> In modern times, the function of the courts in developing the common law has been freely acknowledged … The reluctance of the courts in earlier times to acknowledge that function was due in part to the theory that it was the exclusive function to keep the law in a serviceable state. *But legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community*.[41]

This does not mean we should not *rely* on legislation; only that the presence of legislation itself is no good reason to avoid considering how the common law doctrine should be developed alongside it.

More broadly, vicarious liability still matters given the context of a widespread shift towards the gig economy in Australia.[42] With the narrow approach in *Bird*, tortious actions are also less likely to be brought against large technology platforms if their 'partners' (eg rideshare drivers) cannot be assessed as being in relationships 'akin to employment', and they are still regarded as independent contractors under the law. The Victorian legislation was targeted at survivors of abuse in institutional settings: a worthy end, but limited to particular factual matrices. To that end, *Bird* arguably limits civil recourse not just in the case of institutional abuse, but in broader contexts to which vicarious liability can apply.

Accordingly, neither the Victorian legislation nor *AA* completely obviate the value of critically analysing the majority's approach in *Bird*. Scholars have taken different approaches to doing so. For instance, Chen and Oreb delineate the different

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[39] On the influence of lobbying, see, eg, Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41(2) *Adelaide Law Review* 507, 509–12.

[40] Luca Ittimani, 'Australian Employers Cut Back on Diversity and Inclusion Programs Amid US "Anti-Woke" Backlash', *The Guardian* (online, 10 December 2025) <www.theguardian.com/au>.

[41] *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J) (emphasis added) ('*Dietrich*').

[42] See also Devon Airey, '"The Gig is Up": The Politics and Policy of Compensating Harms Caused by Gig Workers' in Jodi Gardner et al (eds), *Politics, Policy and Private Law: Volume I: Tort, Property and Equity* (Hart Publishing, 2023) 25.

approaches to vicarious liability in England and Australia, highlighting the *potential* for employment *pro hac vice* (typically used to allow lawyers not yet admitted to practice in a specific jurisdiction to appear in particular cases in that jurisdiction) as an in-between category in the absence of acknowledgement of the 'akin to employment' category.[43] Gray looks back at prior High Court jurisprudence and theories of vicarious liability to ascertain whether vicarious liability *could* have been applied to relationships akin to employment.[44] Gomes and Mohseni decry the apparent shift towards non-delegable duties and away from vicarious liability,[45] while Freeburn argues that policy *can* drive the development of the vicarious liability doctrine, and that policy (eg deterrence) justifies the application of vicarious liability to any relationship characterised by factors set out in the English courts.[46]

In this article, I supplement those analyses by reverse-engineering a warning provided by Gleeson J in *AA*. In her minority judgment, Gleeson J expressed concern that non-delegable duties had been heavily criticised, given the lack of doctrinal development or clarity behind them, and if expanded, may cause incoherence with legislation in New South Wales ('NSW') that appeared to prefer the statutory imposition of vicarious liability in situations of institutional abuse.[47] On these grounds, Gleeson J indicated 'caution [should be exercised] … in expanding the scope of non-delegable duties or expanding the categories of relationship in which non-delegable duties are imposed'.[48] To the extent that this instinct is commendable to preserve the coherence and efficacy of the common law (a Heydonian/Dixonian emphasis),[49] I argue that the inverse is true in *Bird*: that the majority in *Bird* were overly restrained in rejecting the opportunity to expand the first stage of the vicarious liability test. That critique is necessarily Kirby-ian,[50] but it is not a wholesale rejection of Dixonian originalism (a claim which would require

[43] Chen and Oreb (n 10) 25–7.
[44] Gray, 'Relationships Akin to Employment' (n 10) 383–91.
[45] Mohseni and Gomes (n 10).
[46] Freeburn (n 10) 197–200.
[47] *AA* (n 3) [477]–[482] (Gleeson J). See also Silink (n 8) 34–5.
[48] *AA* (n 3) [483].
[49] Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493, 507–8.
[50] Michael Kirby, '"Judicial Activism"? A Riposte to the Counter-Reformation' (2005) 11(1) *Otago Law Review* 1, 4–5. See also Kirby, 'Judicial Activism: Power without Responsibility?' (n 11) 593:

> So long as law is something more than mere rules, so long as it speaks of deep values and human aspirations, of human dignity and fundamental rights, there will be people called judges who have the responsibility to express and apply the law and, in new circumstances, to push it forward and adapt it in a principled way.

considerably more reasoning than is the focus of this article).[51] The history of the High Court reveals ebbs and flows between restraint and activism, with no one governing theory of the Court's role.[52] Accordingly, the argument in this article is more about recovering balance in the legal method to be applied when facing a vicarious liability determination.

After all, any decision to overturn prior case law of the High Court depends on applying principles established by the Court in *John v Federal Commissioner of Taxation*:

> that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases … a difference between the reasons of the justices constituting the majority in one of the earlier decisions … the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience … the earlier decisions had not been independently acted on in a manner which militated against reconsideration …[53]

An application of those factors to *Bird* is beyond the scope of this article. Nevertheless, the analysis adopts the normative force of, and is designed to supplement, Gleeson J's conclusion (again in the minority) that *Bird* represented 'a missed opportunity for the Australian common law to develop in accordance with changed social conditions and in tandem with developments in other common law jurisdictions'[54] by showing the lack of persuasiveness in the majority's reasoning. In doing so, this article aims to remove the obstacles set up by the majority against the expansion of the first stage, in anticipation of future analyses showing why employers *should* be held vicariously liable for the actions of non-employees with whom they have a particular type of professional relationship (ie 'akin to employment') in Australia.

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[51] See, eg, Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163, 183. Cf John Gava, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27(1) *Melbourne University Law Review* 186. On the 'wide and unbridgeable gulf' between these two schools of legal method, see Michael Coper, 'Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554, 571; Michael Coper, 'The Seven Habits of a Highly Effective High Court' (2003) 28(2) *Alternative Law Journal* 59, 63; Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19, 30–2.

[52] See, eg, Sonali Walpola, 'After the Australia Acts: The High Court's Attitude to Changing the Common Law (1987–2016)' (2021) 21(1) *Oxford University Commonwealth Law Journal* 31, 41–63; Gava (n 50) 189; Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) it?' (2020) 43(3) *Melbourne University Law Review* 903, 903–5.

[53] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 ('*John*').

[54] *Bird* (n 5) 87 [79].

III The Majority's Undue Dismissal of the 'Akin to Employment' Category

This Part shows that the *Bird* majority's reasons for declining to adopt an 'akin to employment' approach to the first stage of a vicarious liability determination are characterised by undue judicial restraint because they (a) neglect the proper role of policy considerations; (b) under-emphasise the logical nature of expanding the doctrine to non-employment, non-contractor relationships; and (c) over-emphasise concerns about certainty. None of the above suggests there is no merit to the employment test — merely that the *Bird* majority's caution in maintaining the test was unpersuasive.

A *The Appropriate Role of Policy Considerations*

The first way in which the majority displayed undue restraint in *Bird* was in its rejection of policy considerations as a basis for determining whether to expand the first stage of the vicarious liability enquiry. The majority reasoned as follows:

> The … assessment of what is fair, just and reasonable … depended upon contestable policy choices and the allocation of risk, which are matters upon which minds might differ and which this Court has repeatedly rejected as a sound basis for determining and developing the law of vicarious liability and duties of care.[55]

In the first instance, this argument seems deceptively persuasive, particularly if, as Gomes and Mohseni argue, vicarious liability is not 'a question of policy — *should* vicarious liability be found? — [but instead a matter of] incremental development by reference to the doctrine's fundamental concerns'.[56] Indeed, a frequent trope in jurisprudence and scholarship is that there is no coherent *overarching* theoretical rationale for the doctrine.[57] The lack of a comprehensive engagement with the doctrine's theoretical basis in *Bird* is, as Goudkamp and Plunkett (writing in a pre-*Bird* context) note, 'unfortunate as understanding why such a rule exists is … crucial to determining the circumstances in which it should apply'.[58] Nevertheless, it is not necessary to delineate a particular basis for vicarious liability (insofar as that may be possible, which is far from certain) to conclude that the Court was not precluded

[55] Ibid 80 [62] (citations omitted).
[56] Mohseni and Gomes (n 10) 11.
[57] Giliker, 'An Introduction' (n 13) 17.
[58] James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17(1) *Oxford University Commonwealth Law Journal* 162, 168; *Prince Alfred College v ADC* (2016) 258 CLR 134 ('*Prince Alfred*'). See also Rick Bigwood and Joachim Dietrich, 'Uncertainty in Private Law: Rhetorical Device or Substantive Legal Argument?' (2021) 45(1) *Melbourne University Law Review* 60, 83–4.

from, and perhaps may have benefited from, taking into account policy considerations like fairness, justice and reasonableness when making that determination. Two arguments ground this claim.

1 *The Weakness of Prior Case Law to Ground the Argument*

First, it is not clear that the case law relied on by the majority as a barrier to considering policy considerations actually barred it from doing so.[59] In *Hollis v Vabu* ('*Hollis*'), the High Court noted that vicarious liability in the employment context 'was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy'.[60] The majority in *Bird* referred to this statement, but did not substantively engage with it when arguing against policy considerations.[61] The majority only said that engaging policy considerations 'as the sole or determinative basis for developing the principle … would require the Court to revisit and overrule' various prominent High Court judgments dealing with vicarious liability, or parts thereof.[62]

However, the *Bird* majority did not elaborate on exactly what overruling would occur, nor why it would have been inappropriate to overrule those judgments. Such justifications are important because, as an apex court, the High Court's overruling function is key, and despite its general reticence to overrule its prior cases, the Court does so when required (most notably and recently in *AA*).[63] Given the seriousness of the acts at issue and the broader context of holding institutions to account for such behaviour, it would have been beneficial for the majority to articulate a more cogent basis if it decided not to overrule prior case law in this instance.

Meanwhile, the majority cited extracts from two High Court judgments in *Lepore* and *Prince Alfred College v ADC* ('*Prince Alfred*') as examples of when the Court has previously rejected policy considerations when invited to expand vicarious liability.[64] However, those cases do not provide as strong support as may initially seem the case. *Lepore* involved joined claims against the NSW and Queensland

[59] This analysis develops Freeburn's justification for the use of policy, which centred on the lack of a 'clear principled foundation for vicarious liability' and how common law development 'sometimes requires judges to make some initial move in logic that is not otherwise justified by established legal principle': Freeburn (n 10) 196–7.
[60] *Hollis v Vabu* (2001) 207 CLR 21 [34] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*').
[61] *Bird* (n 5) 73–4 [48].
[62] Ibid 74 [49] (citations omitted).
[63] See generally Sonali Walpola, 'The Development of the High Court's Willingness to Overrule Common Law Precedent' (2017) 45(2) *Federal Law Review* 291 ('The High Court's Willingness to Overrule'); Nicholas Aroney, 'The High Court of Australia: A Federal Supreme Court in a Common Law Federation' (2017) 17 *Fédéralisme Régionalisme* 1, 3–5; Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34(2) *Melbourne University Law Review* 519, 520.
[64] *Bird* (n 5) 80 [62], referring to *Lepore* (n 3) 560 [128], 586 [212] and *Prince Alfred* (n 58) [38]–[47].

Governments made in respect of assaults by teachers against students.[65] The paragraphs cited from the judgments of Gaudron, Gummow and Hayne JJ respectively in *Lepore* should not be taken as authoritatively dismissing those policy considerations in the context of determining the type of relationship giving rise to vicarious liability.[66] And as Beuermann notes, *Lepore* 'left the law in an entirely unsatisfactory state', a deficiency the High Court sought to rectify with its reasoning in *Prince Alfred*.[67]

Yet *Prince Alfred* also provides limited authority for the *Bird* majority's proposition: '[a]ll comments on vicarious liability … in *Prince Alfred …* were dicta'.[68] *Prince Alfred*, another case in which the respondent sought damages from the College in respect of sexual abuse perpetrated by a housemaster, dealt only with the second stage of vicarious liability, not the first (because there was already an employment relationship).[69] This means the *Bird* majority was free to depart from the reasoning and dicta in *Lepore* and *Prince Alfred* if it considered appropriate. It was not necessarily bound by those cases to reject policy considerations in the context of a first-stage vicarious liability analysis.

What then of the assertion that the law of tort in Australia does not develop by recourse to policy?[70] This position was articulated in *Sullivan v Moody* ('*Sullivan*') and accepted by the majority in *Bird* without further elaboration.[71] Yet much of the normative weight of that position rests on the distinction, elucidated in *Sullivan*, between 'principle' and 'policy':

> The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort [in Australia] develops by reference

[65] *Lepore* (n 3) 416 [7].
[66] The Gummow and Hayne JJ paragraph (ibid [212]) is inconclusive as a rejection of policy considerations. The Gaudron J paragraph (ibid [128]) comes closest by saying that 'vicarious liability ought to be imposed only in circumstances where it can be justified by reference to legal principle'. As argued below, however, the distinction between principle and policy is questionable.
[67] Christine Beuermann, 'Vicarious Liability in Australia' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 73, 78.
[68] Ibid.
[69] *Prince Alfred* (n 58) [1]–[2], [80]–[85].
[70] Mohseni and Gomes (n 10) 13 n 99; Gray, 'Relationships Akin to Employment' (n 10) 380; *Sullivan v Moody* (2001) 207 CLR 562 [49] ('*Sullivan*'). Chen and Oreb (n 10) at 21–2 hint at, but do not directly address, this point.
[71] *Sullivan* (n 70) [49]; *Bird* (n 5) 80 [62].

> to principles, which must be capable of general application, not discretionary decision-making in individual cases.[72]

The distinction has been considered questionable for decades.[73] As Witting argues, 'policy feeds into the development of legal principles … the law *is an instrument* of policy. It is shaped by pre-determined ideas of what law should do — in guiding conduct and/or in resolving disputes between persons'.[74] And even if we were to accept that a binary *of sorts* exists between the two, it does not follow that policy automatically leads to 'discretionary decision-making': policy can instead be as broad as the need to maintain coherence in the law, or to preserve the interests of vulnerable parties — all of which are features of Australian tort jurisprudence going back decades.[75] As Burns notes, 'public or social policy is widely utilised by judges in the High Court as part of their judicial reasoning in negligence cases'.[76] Burns has also studied the use of 'social facts' in judicial reasoning: 'general statements [made by courts] about the nature and behaviour of people and institutions and the nature of the world and society'.[77] Such facts are used to ground policy and other arguments.[78] In negligence cases, such facts are very rarely grounded in empirical evidence, but are often based on 'common sense' understandings of the world.[79] While a detailed consideration of social facts in tort law decision-making is outside the scope of this article, Burns' research strongly suggests judges in Australia are influenced by, and resort to, concerns about the world around them in their reasoning and decision-making processes, both in tort jurisprudence and more generally.

Finally, the approach the High Court took in deciding to overturn *Lepore* in *AA* (as to whether non-delegable duties can apply to intentional wrongdoing) lends itself to the application of policy factors in a vicarious liability analysis. In deciding whether

[72] *Sullivan* (n 70) [49].
[73] Kylie Burns, 'Fulfilling the Promise of the Golden Thread? Vulnerability and Australian Negligence Law' in Kylie Burns et al (eds), *Torts on Three Continents* (Oxford University Press, 2024) 89; Jane Stapleton, 'The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable' (2003) 24 *Australian Bar Review* 135, 136–7.
[74] Christian Witting, 'Tort Law, Policy and the High Court of Australia' (2007) 31(3) *Melbourne University Law Review* 569, 572 (emphasis in original).
[75] Harold Luntz, 'The Use of Policy in Negligence Cases in the High Court of Australia' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 77–8.
[76] Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21(2) *Torts Law Journal* 73, 76 ('It's Not Just Policy'). See also Dan Priel, 'Land Use Priorities and the Law of Nuisance' (2015) 39(1) *Melbourne University Law Review* 346, 383.
[77] Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 317–8.
[78] Burns, 'It's Not Just Policy' (n 76) 83.
[79] Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319, 321–2.

to overturn *Lepore*, Gageler CJ, Jagot and Beech-Jones JJ applied the factors in *John v Federal Commissioner of Taxation*[80] as to when it is acceptable for the Court to depart from its prior decisions:

> The exclusion of an intentional criminal act from a non-delegable duty of care established by *Lepore* reflected judicial policy choices which are unable to be sustained consistently with principle, have not led to any useful result but rather have created incoherence in the common law, and have not been independently acted upon. For these reasons *Lepore*, to the extent it decided that a non-delegable duty to ensure that reasonable care is taken cannot apply to an intentional criminal act, should be overturned.[81]

This passage suggests that it would have been acceptable to maintain the approach in *Lepore*: (a) if it were based on judicial policy choices which could be sustained consistently with principle; (b) if *Lepore* had led to 'useful result[s]' in reality; and (c) if *Lepore* were coherent with the common law. For at least points (a) and (b), there is a strong argument that policy considerations, broadly construed as above, play a role: what were the 'judicial policy choices' of the judges in deciding to restrain non-delegable duties in *Lepore*? And what is the real-world impact of *Lepore* when it comes to 'usefulness' — a concept which appears to at least open the door to questions of policy?[82] As acknowledged above, non-delegable duties and vicarious liability are profoundly different, though they address similar subject matter. Nevertheless, the readiness of the High Court to entertain, however indirectly, the role of policy in overruling itself on *Lepore* in *AA* merely highlights the undue restraint of the majority in *Bird* to do the same when considering whether to expand the first stage of the vicarious liability determination to relationships akin to employment.

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[80] *John* (n 53) 620, applying the reasoning in *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 56–8 (Gibbs CJ).

[81] *AA* (n 3) [50] (Gageler CJ, Jagot and Beech-Jones JJ).

[82] Harding and Malkin (n 63) 536–7. See also Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42(2) *Sydney Law Review* 209, 222. The "useful result" step does appear under-theorised: see, eg, Anthony Gray, '*Vanderstock v Victoria*: Are "True" Consumption Taxes Forbidden to the States by Section 90 of the *Australian Constitution*?' (2022) 44(4) *Sydney Law Review* 591, 599; Kristen Walker, 'When Can a Court's Decision Be Ignored?' (2022) 46(2) *Melbourne University Law Review* 572, 597; Ashleigh Barnes, 'Stare Decisis and Constitutional Guarantees: *Commonwealth v Yunupingu*' (2024) 46(3) *Sydney Law Review* 347, 352; David Tan et al, 'How Does the High Court Interpret the *Constitution*? A Qualitative Analysis Between 2019–21' (2024) 47(1) *University of New South Wales Law Journal* 179, 200; Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 9.

2 *The Particular Policy Considerations at Issue Can Be Implemented without Undue Subjectivity*

On the assumption, then, that policy considerations (insofar as they are different from principles, which is far from certain) can play a role in the vicarious liability determination, we come to the concern that doing so would end up being unduly subjective — the 'discretionary' concern in *Sullivan*. The approach here reflects the caution the Court has previously indicated it will apply to the use of policy, with a preference for 'established policies rather than ad hoc policy concerns'.[83] However, I argue below that policy considerations like fairness, justice and reasonableness *can* be incorporated into the vicarious liability analysis in a way that does not obviate the doctrine of precedent or make the decision entirely subjective.[84]

Part of the problem lies in the false dichotomy between reliance on case law and reliance on policy. In *Prince Alfred*, the High Court referred to a statement by Binnie J in the Supreme Court of Canada that '[o]verly frequent resort to general principles opens the door to subjective judicial evaluations that may promote uncertainty and litigation at the expense of predictability and settlement'.[85] To that end, the High Court in *Prince Alfred* favoured 'considering whether the approach taken in decided cases furnishes a solution to further cases as they arise'.[86] Yet in doing so, the High Court created a false dichotomy between the policy choices influencing an individual judge's decisions and prior case law; the former as irredeemably subjective and the latter as a pragmatic guarantee of consistency and predictability.[87]

This dichotomy may well have justified the *Bird* majority's reticence to adopt fairness, justice and reasonableness *if* those factors were overriding mandatory considerations that needed to be considered *separately from* the legal threshold questions.[88] However, the High Court was free to incorporate those factors in ways that maintained subordination to established doctrine. The UKSC may be a model of restraint here. In *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*, Lord Burrows appeared to relegate policy considerations to 'an afterthought … a

[83] Witting (n 74) 582.
[84] This is a development of Freeburn's (n 10) 186–8 justification for policy in this context, because it more directly addresses the majority's concerns in rejecting policy.
[85] *Prince Alfred* (n 58) [44], referring to *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 [41] (Binnie J).
[86] *Prince Alfred* (n 58) [46].
[87] Cf Stevens, who views any consideration of policy by the courts as inappropriate because of its subjective nature (unless judges are appointed differently with 'political legitimacy'): Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 306–19.
[88] See, eg, Desmond Ryan, 'From Opportunity to Occasion: Vicarious Liability in the High Court of Australia' (2017) 76(1) *Cambridge Law Journal* 14, 16; *Sullivan* (n 70) [53].

final check *after* the two-stage test has been applied',[89] such that policy should only be considered 'in difficult cases where no doctrinal answer is apparent'.[90]

Notwithstanding the exact method of incorporating these policy considerations, they cannot be dismissed out of hand: fairness, justice and reasonableness arguably underlie tort law itself. The heart of tort law, the negligence claim, requires the establishment of the defendant's duty to the plaintiff.[91] Founding case law establishing the negligence claim permits, and even requires, the Court to assess 'whether it is fair, just and reasonable that a duty be recognised in all the circumstances of the case' where the application of prior case law leaves the issue uncertain (ie in 'borderline' cases).[92] And as Raz concedes, '[t]he content of the duties of care we are subject to … is … a matter of *fair distribution of the risk of liability to damages*'.[93]

The foundational role of these factors suggests applying them to vicarious liability is not the morass of subjectivity that the majority feared, but an approach that is within the very heart of tort law.[94] If indeed the 'core application [of vicarious liability] has been in relation to the tort of negligence',[95] it would, as Freeburn argues, seem strange to accept fairness, justice and reasonableness in the latter context but dismiss them as too subjective in the former.[96] And indeed, in at least some decisions involving vicarious liability, fairness has been influential.[97] A more nuanced position would be to acknowledge that these policy factors have *some* role in the assessment

[89] *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2024] AC 567, [58(iv)]; Paula Giliker, 'Vicarious Liability in the UK Supreme Court and High Court of Australia' (2024) 44(1) *Legal Studies* 191, 195.
[90] Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 609. For a more expansive view of the use of fairness, justice and reasonableness in the assessment of negligence, see Janet O'Sullivan, 'Negligence, Policy and "Novel Exceptions"' in Jodi Gardner et al (eds), *Politics, Policy and Private Law, Volume 1: Tort, Property and Equity* (Hart Publishing, 2023) 118.
[91] Stephen Todd, 'Personal Liability, Vicarious Liability, Non-Delegable Duties and Protecting Vulnerable People' (2016) 23(2) *Torts Law Journal* 105, 106.
[92] Ibid 107; Stelios Tofaris, 'Duty of Care in Negligence: A Return to Orthodoxy?' (2018) 77(3) *Cambridge Law Journal* 454, 455. See also John D Ford, 'Children in Need and the Law of Torts' (1995) 54(1) *Cambridge Law Journal* 32, 34, referring to *M (A Minor) v Newham London Borough Council* [1994] 2 WLR 554 (CA).
[93] Joseph Raz, 'Responsibility and the Negligence Standard' (2010) 30(1) *Oxford Journal of Legal Studies* 1, 18 (emphasis added), cf 12–13; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2(1) *Oxford Journal of Legal Studies* 30, 34. See also Nick Sage, 'Relational Wrongs and Agency in Tort Theory' (2021) 41(4) *Oxford Journal of Legal Studies* 1012, 1014 on the role of justice in civil disputes.
[94] See Raz (n 93) 12–13.
[95] Paula Giliker, 'Vicarious Liability in the Common Law World: Comparative Conclusions' in Paula Giliker (ed), *Vicarious Liability in the Common Law World* (Hart Publishing, 2022) 3.
[96] Freeburn (n 10) 197–8.
[97] Gray, 'Reinvigorating Non-Delegable Duties' (n 37) 72–3.

of whether to impose vicarious liability, but that this does not require bypassing objectivity and adherence to precedent.[98] It is also arguable that those values are consistent with the 'golden thread' Stapleton identified in High Court jurisprudence in a 2003 paper ('Protection of the Vulnerable'), and which has sporadically arisen in the years since.[99]

Of course, the fact that it is so difficult to find a consistent rationale for vicarious liability[100] means the role of fairness, justice and reasonableness can be subject to ongoing debate. While they are 'regularly invoked in … cases' involving vicarious liability in the UK and Canada,[101] McBride and Bagshaw suggest that, as with other purported rationales for vicarious liability, fairness, justice and reasonableness are either illusory in explaining the doctrine, or the doctrine does not actually reflect them in practice.[102] Doubtless, a more fulsome normative evaluation of the role of fairness, justice and reasonableness as motivating rationales for vicarious liability (in the context of the first stage) would usefully supplement tort jurisprudence and scholarship.[103] However, the point made above still stands: the majority in *Bird* did not provide valid reasons for neglecting the use of fairness, justice and reasonableness in its consideration of whether to expand the first stage of the vicarious liability enquiry.

B *The Expansion as Logically Derived from Vicarious Liability's Rules and Principles*

1 *The Court's Opportunity to Respond to Shifting Social Circumstances*

The second way in which the majority displayed undue restraint is by wrongly identifying an unbreakable link between the employment threshold of the first stage determination on the one hand, and the principles and rules of vicarious liability: '[a]bandoning the threshold requirement of a relationship of employment for the

[98] See Pearl Davidson, 'Availability of Vicarious Liability for Intentional Abuse Committed by Foster Carers against Foster Children' (2019) (3) 25 *Torts Law Journal* 252, 277.
[99] Burns, 'Fulfilling the Promise of the Golden Thread' (n 73); Stapleton (n 73).
[100] Stevens (n 87) 259; Gray, 'Reinvigorating Non-Delegable Duties' (n 37) 70–1. See also Warren Swain, 'A Historical Examination of Vicarious Liability: A "Veritable Upas Tree"?' (2019) 78(3) *Cambridge Law Journal* 640 on the doctrine's theoretical incoherence.
[101] Justin Tan, 'Vicarious Liability as Risk-Through-Placing' (2022) 51(4) *Common Law World Review* 268, 269–70.
[102] Nicholas J McBride and Roderick Bagshaw, *Tort Law* (Pearson, 7th ed, 2024) 664.
[103] See, eg, James Brown, 'Developing a Contextual-Pluralist Model of Vicarious Liability' (2021) 28(2) *Tort Law Review* 123.

purposes of vicarious liability does not fit within the body of accepted rules and principles'.[104]

The majority provided no further explanation for their argument except to suggest that there was no basis in the 'difficulties' caused by vicarious liability to expand the doctrine, such expansion being the proper role of the legislature.[105] The majority cited Gaudron and McHugh JJ in *Breen v Williams* on this point with approval, those Justices having made a general comment about how the common law advances.[106] Yet in so relying on Gaudron and McHugh JJ, the *Bird* majority opened the door to what those Justices said next regarding the courts' role to advance common law doctrines when confronted with shifting social circumstances:

> In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. *From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions*. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived *logically or analogically from other legal principles, rules and institutions*.[107]

In other words, the *Bird* majority applied dicta from *Breen* outside its context: development of the common law in response to social circumstances is part of the analysis when evaluating the legitimacy of a judicial development of common law doctrine. This argument is consistent with Gordon J's (extrajudicial) exhortation:

> [J]udges … have a responsibility to develop the common law aside from the need to ensure coherence. The common law cannot remain static. The common law must respond to 'developments of the society in which it rules'. A previously understood principle of the common law may become ill-adapted to modern circumstances.[108]

There is an argument that restricting vicarious liability to employment relationships is 'ill-adapted to modern circumstances'. First, the changing nature of work — especially given the shift to a gig economy in many sectors — means 'workers may not have a contract of employment even though they are in reality part of an

[104] *Bird* (n 5) 82 [67].
[105] Ibid.
[106] Ibid, citing *Breen* (n 28).
[107] *Breen* (n 28) [47] (emphasis added).
[108] Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What is the Judicial Function?' (2019) 42(1) *University of New South Wales Law Journal* 4, 24 (citation omitted).

organisation'.[109] Thus, in *Hollis*, a majority of the High Court (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) classified a relationship between a courier company and its bicycle couriers as one of employment.[110] However, the extent to which economies have been transformed by large-scale platformisation has further muddied the waters since *Hollis*,[111] which suggests the employer-contractor distinction may be artificial at best and unhelpful at worst by absolving large corporations of liability for 'partners' with whom they are in 'non-employment' relationships. Closely related is the fact that religious institutions structure their relationships with clergy in numerous ways, which can make it challenging to apply a strict employment test.[112]

Second, there is in Australia 'a general intolerance of physical, sexual and psychological abuse of children, and increased recognition of societal responsibility for setting and maintaining appropriate standards of care for children, especially in institutional settings'.[113] Third, and relatedly, the protection of children as vulnerable parties aligns with the emphasis on vulnerability in negligence doctrine in Australia,[114] and the argument that '[v]icarious liability exists because of the legal policy to protect innocent third parties'.[115] Insofar as the plaintiff in *Bird* was not able to seek recourse against the Catholic Diocese for the abuse they suffered, there is a strong argument that would in any case be an 'exceptional case … where a rule of the common law produces a manifest injustice, [in which the High Court] will change the rule so as to avoid perpetuating the injustice'.[116]

These circumstances suggest a response from the courts in the form of a 'reformulat[ion]'[117] of the first stage would be justified if it would hold more organisations liable for tortious conduct by those affiliated with them,

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[109] Davidson (n 98) 274.
[110] *Hollis v Vabu* (n 60) [47]–[56].
[111] Paula Giliker, 'Vicarious Liability and Corporations' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar, 2023) 274, 277–8. Platformisation here is understood as 'the penetration of the infrastructures, economic processes, and governmental frameworks of digital platforms in different economic sectors and spheres of life, as well as the reorganisation of cultural practices and imaginations around these platforms': Thomas Poell, David Nieborg and José van Dijck, 'Platformisation' (2019) 8(4) *Internet Policy Review* 1, 1.
[112] See, eg, *Bread of Life Christian Church in Auckland v Chen* [2024] NZEmpC 69; *New Testament Church of God v Stewart* [2008] ICR 282.
[113] *Bird* (n 5) 87 [78].
[114] James Gallen, 'Institutional Liability, Historical Abuses and Vulnerability' in James Gallen and Tanya Ni Mhuirthile (eds), *Law, Responsibility and Vulnerability: State Accountability and Responsiveness* (Routledge, 2021) 110, 115.
[115] Stephen Simblet, 'Abuse of Power and Vicarious Liability' (1994) 53(3) *Cambridge Law Journal* 430, 432.
[116] *Dietrich* (n 41) 319 (Brennan J dissenting).
[117] *Bird* (n 5) 87 [79].

including abuse perpetrated by those affiliated with religious organisations. This is consistent with Gleeson J's argument in *Bird* that changes in statutory obligations on religious organisations, and case law overseas involving such organisations, suggest 'a marked social change in which relationships established under non-legal frameworks … *are not an acceptable justification for the non-imposition of vicarious liability where the relevant relationships are regarded as … akin to employment*'.[118]

Expanding the first stage to cover relationships 'akin to employment' would not *necessarily* contravene *Breen* as cited by the majority: it derives logically or analogically from the legal principles, rules and institutions underlying vicarious liability. Determining whether a relationship of employment exists *already* requires a detailed analysis of a particular relationship, with no definitive criteria and a holistic approach to be applied.[119] An 'akin to employment' approach, as in *Barclays Bank*, is much the same, requiring the Court to analyse whether the relationship bears similar enough characteristics to the employment relationship to warrant the application of vicarious liability.[120] In any case, the majority's recourse to established 'principles' reengages the false binary between policy and principle articulated above; as one bleeds into the other, the majority here appears to have created a rod for its own back, insofar as the very considerations it rejected as the basis for broadening the first stage of the vicarious liability enquiry may in fact be the same considerations that justify that expansion on the logic of Gaudron and McHugh JJ in *Breen*.

Importantly, this article does not suggest that the Court is *obliged* to develop the law in this instance. The normativity of the Court's role is a complex issue to be discussed elsewhere, and the High Court's conservatism can be commendable, particularly when it comes to overruling its own decisions to improve the law.[121] The argument in this article is more nuanced; it is that the *Bird* majority did not present valid reasons for neglecting to broaden the scope of relationships recognised by vicarious liability. Doing so could have been normatively justified by shifting social circumstances (as outlined in *Breen*), and would arguably have reflected the

[118] Ibid 109 [150] (emphasis added).
[119] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, [20] (Mason J); Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (Federation Press, 4th ed, 2017) 572–3.
[120] See also Gleeson J's argument that doing so is consistent with the enterprise liability theory of vicarious liability: at [86]–[93]. For more on enterprise liability as a prominent rationale of vicarious liability, see, eg, Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493; Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care' (n 8) 888; John Bell, 'Vicarious Liability for Child Abuse' (2010) 69(3) *Cambridge Law Journal* 440, 442; Po Jen Yap, 'Enlisting Close Connections: A Matter of Course for Vicarious Liability?' (2008) 28(2) *Legal Studies* 197, 213–4.
[121] See also Harding and Malkin (n 63) 555–6.

common law's 'proven ability … to adapt and respond to changing societal attitudes and values'.[122]

2 *The Unnecessary Recourse to Statutory Responses*

The response may well be that '[r]eformulation of the law of vicarious liability is properly the province of the legislature'.[123] The majority cited *Breen* as authority for that proposition; however, Gaudron and McHugh JJ only made that concession in the context of 'changes in the law that cannot logically or analogically be related to existing common law rules and principles'[124] — which, as I have articulated above, do not necessarily stand in the way of an expansion.

This does not necessarily make the common law the *preferred* solution. After all, parliamentary intervention in tort law typically occurs where there is 'dissatisfaction with the operation of the common law',[125] and vicarious liability is one doctrine that has repeatedly caused difficulty for courts in Australia and elsewhere. And as we have seen, legislation has already been passed in Victoria to more effectively address liability for institutional abuse. Nevertheless, there are three reasons why the common law can still play an important role when it comes to vicarious liability determinations, in Australia at least.

First, vicarious liability is a creature of the common law, not statute. The courts set the parameters of that doctrine according to the doctrine of precedent. The High Court, meanwhile, has 'the final authority to determine what is the common law of Australia' and 'to develop the common law to meet the needs and conditions of Australia'.[126] This position strongly suggests that where the common law *can* be developed by the court, the Court retains a responsibility to do so, cognisant of but not abdicating its own bespoke role to legislators. Unless legislation expressly

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[122] Pam Stewart and Anita Stuhmcke, 'High Court Negligence Cases 2000–10' (2014) 36(4) *Sydney Law Review* 585, 609. See also Walpola, 'The High Court's Willingness to Overrule' (n 63) 314: 'As illustrated by *Mabo* and subsequent decisions, the [High] Court has been prepared to overturn foundation common law rules, and has also been willing to adapt the common law to Australian circumstances'.

[123] *Bird* (n 5) 83–4 [68]–[70].

[124] *Breen* (n 28) [47].

[125] Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 599.

[126] Robert C Beckman, 'Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council' (1987) 29(2) *Malaya Law Review* 254, 259. For the longstanding debate between declaratory (courts "discover" the law) and change (courts "make" the law) conceptions of judicial decision-making, see, eg, Samuel Beswick, 'The Declaratory Theory of Judicial Law-Making' (2026) 39(1) *Canadian Journal of Jurisprudence* 1. This paper reflects the "change" position, in that judges develop and change the law of vicarious liability to reflect social circumstances: see further Gageler and Gordon JJ (writing in the minority) in *Prince Alfred* (n 58) [127]; though it can be consistent with the declaratory position as well, in that judges 'discover' the heart of that doctrine was always meant to address broader relationships than those in the employment context.

replaces the common law (which is not apparent on the face of the *Justice Legislation Amendment (Vicarious Liability for Child Abuse) Act 2026* (Vic)), it can remain a live issue for courts to adjudicate — especially so in Australian jurisdictions without such legislative protection.

Second, Australian statutory responses to institutional abuse in this context are inconsistent across jurisdictions, and have appeared not to hold institutions to account for the tortious acts of those associated with them in non-employment relationships.[127] Compared to that fragmented approach, the High Court is better positioned to provide a unified statement of the law of vicarious liability in Australia,[128] granting greater certainty to litigants and organisations.

Third, even where statutory reform is instituted to expand vicarious liability, the parameters of that reform may be inconsistent. The post-*Bird* Victorian legislation applies retrospectively; however, statutory reform recommendations and responses in Australia have generally tended to be *prospective* rather than retroactive.[129] This approach limits the ability of victims to seek redress for actions that have already occurred. That limitation would exist even if the statutory responses were coherent and unified, unless Parliament expressly provided for retrospective application, which typically only occurs in 'exceptional and questionable case[s]'.[130] Yet there is less of an equivalent limitation on courts because their declaratory power generally operates retrospectively.[131] The potential injustice of retrospective application of statutes is limited in the case of judges because by nature, they 'are likely to … make more limited decisions, and have neither the power nor the inclination to make more far-reaching decisions'.[132] And even when courts overrule prior decisions with retrospective effect, there are principles that constrain that exercise to a reasonable degree, for example, where the principle being overruled has been the subject of 'justifiable reliance' by the public.[133] The default position in the common law, unlike

[127] See Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 600–1; Giliker, 'Vicarious Liability and Corporations' (n 111) 279–80 n 42; Luke Borgert, 'An Update on Vicarious Liability: Legislative Reform', Mills Oakley (Web Page, 24 November 2025) <www.millsoakley.com.au>.
[128] Giliker, 'Reparation for Non-Recent Institutional Child Sexual Abuse' (n 3) 601.
[129] *Bird* (n 5) 83–4 [69]–[70], 139 [242], 140–3 [245]–[247]; *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) s 2(2); *AA* (n 3) [49].
[130] Jack Beatson, 'Has the Common Law a Future?' (1997) 56(2) *Cambridge Law Journal* 291, 313.
[131] *Ha v New South Wales* (1997) 189 CLR 465, 475; *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, 378–9 (Lord Goff); Beatson (n 131) 314; Lucas Clover Alcolea, 'Why is there "But One Common Law in Australia"? (2025) 99(7) *Australian Law Journal* 530, 538.
[132] Andrew Palmer and Chales Sampford, 'Judicial Retrospectivity in Australia' (1995) 4(2) *Griffith Law Review* 170, 184.
[133] Ibid 188–91.

in statute, is retrospective application, with a prospective-only approach in exceptional circumstances.[134]

Thus, while statutory reforms represent positive steps in response to historical institutional abuse, particularly where they are retrospective as in Victoria,[135] the courts retain an important role in the application and development of the vicarious liability doctrine, in ways that can better reflect its varied policy aims. The majority, in acknowledging the positive impact of legislation, need not have jettisoned its own opportunity to so develop the common law. This was the second example of its undue restraint in the *Bird* majority's reasoning.

C *Overstated Concerns about Certainty*

The third manifestation of undue restraint in *Bird* was the majority's overstated concerns about the uncertainty that moving beyond the employment relationship would create. The majority suggested this was because expanding the first stage would blur the lines even further between employers and independent contractors.[136] To an extent, uncertainty in vicarious liability is unavoidable. As Lord Dyson MR has said, '[t]o search for certainty and precision in vicarious liability is to undertake a quest for a chimaera'.[137] However, while the majority's desire to maintain certainty in this context is still commendable,[138] it overstated the risk of uncertainty for the following reasons.[139]

1 *The UK Position Has Been Clarified since Christian Brothers*

Christian Brothers may well have created uncertainty, leading the UKSC to clarify the position in *Barclays Bank*.[140] Yet that clarification showcases the role of the courts: to develop and reformulate common law doctrines where appropriate. If a refined test, as in *Barclays Bank*, more effectively addresses the uncertainty of creating a

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[134] Richard HS Tur, 'Time and Law' (2002) 22(3) *Oxford Journal of Legal Studies* 463, 474.
[135] See also the third recommendation in Paula Giliker, 'Caging the Bird: Vicarious Liability in the High Court of Australia', *University of Bristol Law School Blog* (Blog Post, 13 January 2025) <https://legalresearch.blogs.bris.ac.uk>.
[136] *Bird* (n 5) 81–2 [65]–[66].
[137] *Mohamud v WM Morrison Supermarkets Plc (Rev 1)* [2016] AC 677, [54].
[138] Phillip Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75(2) *Cambridge Law Journal* 202, 204.
[139] This analysis supplements Freeburn's approach to certainty, which is largely supportive while identifying the inherent uncertainty of the first stage of a vicarious liability determination, the 'onerous' nature of the akin to employment test in the UK, and the remaining 'stage two' requirement: Freeburn (n 10) 201.
[140] *Bird* (n 5) 79–80 [61], citing *Christian Brothers* (n 15) [27].

new category between employment and independent contractor relationships, the *Bird* majority's opposition is less coherent.

The *Bird* majority considered that this updated test ('whether the tortfeasor is carrying on business on his own account or whether [the tortfeasor] is in a relationship akin to employment with the defendant') still created uncertainty.[141] This was because only using some of Lord Phillips' 'five incidents' in *Christian Brothers* would likely lead to challenges in differentiating between employment and independent contractor relationships, especially in 'borderline' cases.[142]

However, it is not clear that *Barclays Bank* would require using some of the indicia only in those borderline cases. In that case, Lady Hale stated that such 'doubtful cases' may engender the use of the five incidents, yet without specifying that only some may be helpful or that only some may be used.[143] Even if courts were permitted to use only some of the indicia — thereby justifying the majority's hesitation — a simple correction would be for the High Court to specify that all the indicia should be used.

2 *Certainty Concerns about the Five Incidents Test May Be Overstated*

In any case, concerns about the uncertainty of the five incidents test may be overstated following *Barclays Bank*. The 'carrying on business on his own account' test clarifies, rather than blurs, the lines between employment and independent contractor relationships, even if a third category is considered; that category would always be under the *conceptual* umbrella of employment and defined by a person *not* carrying on business on their own account.[144]

There is, of course, a residual uncertainty as to how and when exactly the five-incident test will be applied, which would benefit from judicial clarification.[145] Complicated facts may also render the determination of whether a person is undertaking business for another party or themselves — like the doctor in *Barclays Bank*, who sexually assaulted patients he had been engaged to medically evaluate[146] — difficult. The point remains, however, that there may be more certainty in defining coverage of vicarious liability by whether a person is *not* carrying on business on their own account. Doing so emphasises the independence of the person's

[141] *Bird* (n 5) 81–2 [66].
[142] Ibid.
[143] *Barclays Bank* (n 19) [27].
[144] See McBride and Bagshaw (n 102) 655.
[145] Alison Silink and Desmond Ryan, 'Vicarious Liability for Independent Contractors' (2018) 77(3) *Cambridge Law Journal* 458, 461; Freeburn (n 10) 201.
[146] *Barclays Bank* (n 19) [2]–[8].

endeavours as the deciding factor, rather than diving too deeply into whether they formally meet the status of employee.[147]

All things considered, expanding the first stage along the lines of the UK's approach in *Barclays Bank* would not *necessarily* have created the uncertainty the *Bird* majority appeared so concerned by.[148] The majority appeared unduly fixated on the five incidents, without recognising that the UKSC had adopted a much more flexible approach in *Barclays Bank*, which could have been a prototype for the High Court and the development of Australian laws in this area.

IV CONCLUSION

In *Bird*, the majority neglected to expand the first stage of the vicarious liability test in a way that would have covered non-employment, non-contractor relationships that nonetheless reflect policy considerations which appear consistent with the doctrine. The undue judicial restraint characterising the majority's approach was defined by three aspects. First, the majority unjustifiably dismissed the role of policy considerations, despite those considerations being at the heart of tort law and appearing to consistently influence tort jurisprudence in Australia (as shown in *AA*). Second, the majority incorrectly deemed an expansion beyond the employment relationship inconsistent with the established rules and principles of Australian common law, and in any case, relinquished responsibility over this area of significant need to Parliament. Third, the majority over-emphasised the potential uncertainty an expansion of the first stage to relationships 'akin to employment' would cause, failing to give proper weight to the flexibility of the refined approach the UKSC adopted in *Barclays Bank*. For these reasons, the majority would not have strayed into the realm of 'arbitrary departures from basic doctrine' had it decided to so expand the first stage of vicarious liability; that alternative outcome instead appears, in the first instance at least, to be a development of 'the common law in new circumstances in ways that are logically reasoned and shown to be a consistent development of past decisional law'.[149]

Bird is an example of how undue judicial restraint can be as problematic as undue judicial activism, insofar as courts may not respond to social circumstances in

[147] Of course, one of the advantages of a 'closed' approach is that it does not create uncertainty in other areas of law like employment or tax law. This is a potentially fruitful avenue of exploration but is beyond the scope of this article.

[148] See also Neil Foster, 'Convergence and Divergence: The Law of Non-Delegable Duties in Australia and the United Kingdom' in Andrew Robertson and Michael Tillbury (eds), *Divergences in Private Law* (Hart Publishing, 2016) 109, 132–3, though Foster acknowledges he does not canvass the criticism in detail.

[149] *Cattanach v Melchior* (2003) 215 CLR 1, [137] (Kirby J).

situations where such responses may be justified and urgently needed. The analysis in this article thus emphasises the importance of being *appropriately* cautious when confronted with a controversial doctrine with significant policy implications. Preservation of the law's coherence need not obviate the court's opportunity (some may argue responsibility) to develop the law in response to shifting social conditions and circumstances[150] — especially insofar as the pursuit of total coherence may well be a mirage, or at least of overstated importance.[151] *Bird* was, in Gleeson J's words, a 'missed opportunity' to reach an outcome driven by appropriate, rather than undue, caution, as to the relationships covered by vicarious liability.[152]

Accordingly, while the law is settled following *Bird* — vicarious liability only applies to employment relationships — there are good reasons for the High Court to reconsider the majority's employment-only approach should the question of overturning *Bird* arise in the future, not least of which is the pressing need to ensure the most vulnerable members of society are protected from, and given recourse against, heinous acts of abuse perpetrated within the auspices of institutional care.

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[150] See *Dietrich* (n 41) 319–22 (Brennan J).
[151] John Murphy, 'Anomalies in Tort Law' (2023) 86(4) *Modern Law Review* 872, 895–7; Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160. Cf Silink (n 8) 35.
[152] Cf Robert French, who extrajudicially decried the phrase 'missed opportunity' in scholarly critiques of judgments as showing 'an insufficient appreciation of the nature and limits of the judicial function … [as t]he court's first task is always to decide the case before it': 'Judges and Academics: Dialogue of the Hard of Hearing' (2013) 87(2) *Australian Law Journal* 96, 102.