RELATIONSHIPS AKIN TO EMPLOYMENT AND VICARIOUS LIABILITY: A UNITED KINGDOM AND AUSTRALIA COMPARISON

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Recently, the High Court of Australia denied a religious institution was vicariously liable for sexual abuse committed upon a child by a priest. In doing so, it set the Australian law on a different path than the United Kingdom, where such claims have been allowed. This article explains this difference of opinion in the context of strains placed on vicarious liability by changes in realities of work and broader societal standards. The law has been asked to evolve to accommodate these changes. It has to some extent in both jurisdictions, but the High Court refused to accept relationships akin to employment could found an action for vicarious liability. This article argues the United Kingdom approach is preferred; the High Court's reasoning for rejecting that approach is unconvincing, and worsens incoherence of principle in this troubled area.

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I INTRODUCTION

Traditionally, the law of vicarious liability was cast in terms of two elements. The first considered whether the parties (the defendant and the wrongdoer) were in an employment relationship ('first element'); the second considered whether the wrong complained of occurred within the course of that relationship ('second element'). If the answer to both questions was yes, the employer would be liable to the injured third party for the wrong committed by the employee.[1] The archetypal opposite of an employee was an independent contractor. A person engaging someone classified as an independent contractor would *not* be vicariously liable for the contractor's actions. Traditionally, the law utilised concepts like "control" to determine whether parties were within an employment relationship; specifically, the right of the organisation said to be the employer to control what the person said to be the employee did, and how they did it, together with other factors.[2] Vicarious liability was easier to apply in previous times, where businesses were at least originally often household-focussed, with a relatively small number of employees, and where the nature of work was simplified.[3] The Court applied a scope of employment test to the second element.[4] Vicarious liability is strict liability. It is imposed upon an employer regardless of personal fault on their part. It imposes liability upon an employer because of the wrongdoing of another. In this way, it is unusual. It is generally exceptional to impose liability on one person or organisation for the wrongdoing of another person or organisation.[5] And strict liability has become somewhat unfashionable today, given the explosive growth in the fault-based tort of negligence.[6] Both of these factors may naturally restrict its scope of operation.

This group of principles would become strained. This strain was primarily caused by changes in the nature and structure of work,[7] and pressure to recognise vicarious liability in situations beyond traditional conceptions of employment.[8] Though

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[1] *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567, 572 (Lord Burrows for the Court) ('*BXB*').
[2] *Zujis v Wirth Brothers Pty Ltd* (1955) 93 CLR 561, 571 (Dixon CJ, Williams, Webb and Taylor JJ) ('*Zujis*'); *Stevens v Brodribb Sawmilling Co Ltd* (1986) 160 CLR 16, 24 (Mason J, Brennan J agreeing at 47, Deane J agreeing at 49), 36 (Wilson and Dawson JJ) ('*Stevens*').
[3] Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018) 24–5 ('*Vicarious Liability*').
[4] *Lloyd v Grace, Smith & Co* [1912] AC 716, 725 (Earl Loreburn), 736–7 (Lord Macnaghten, Lord Atkinson agreeing at 739), 741 (Lord Shaw) ('*Lloyd*'); *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148–9 (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*'); RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* (Sweet and Maxwell, 19th ed, 1987) 521–5.
[5] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 264–5 (Gleeson CJ, Gaudron J agreeing at 270, Hayne J agreeing at 288), 299 (Callinan J).
[6] Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998).
[7] Pauline Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43 *Sydney Law Review* 83, 105 ('Entrepreneurship'); Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493, 503.
[8] Justice Deane has referred to the distinction as 'increasingly amorphous': *Stevens* (n 2) 49. Paula Giliker criticises its formality given changes in the labour market: *Vicarious Liability in Tort: A*

principles relevant to both elements became strained, and important work has been done to identify this and suggest solutions,[9] I focus in this article particularly on strains relating to the *first* element of a vicarious liability claim, *not* the second element (except as briefly noted below in Part V(F), because on one view this is also relevant to discussion of the first element). Further, this article is *not* focused on alternative potential paths to liability, particularly the question of non-delegable duties.[10] There has been pressure for the law to respond to these strains by adaptation and refinement of relevant principles. The current question, whether relationships akin to employment can attract vicarious liability, should be seen in that context.

Part II of the article identifies these strains and summarises how the law has responded. This discussion can be applied both to the United Kingdom ('UK') and Australia, because in relation to these principles, those jurisdictions took a similar approach, unless specifically noted otherwise. The law of the former provided a basis for the law of the latter. Part III considers UK developments, particularly related to the first element of vicarious liability, and whether relationships akin to employment can found such an action. This is another way in which the law has evolved to deal with changes in society. The UK courts have considered this issue on several occasions, providing valuable potential guidance for Australian courts. It is considered worthwhile reflecting on these developments at some length in determining which path Australian law should follow. The recent Australian decision was the first occasion the matter was considered by the High Court. This makes it particularly useful to consider the law of a jurisdiction which has heard many more cases in this area, and has a similar culture and society to Australia. It will also identify specific instances in which the law of the UK and that of Australia differ in ways material to the current context. Part IV considers the recent High Court of

Comparative Perspective (Cambridge University Press, 2010) 60 ('*Vicarious Liability in Tort*'). Douglas Brodie suggests acceptance of enterprise risk theory might herald changes to the traditional distinction: (n 7) 506–8.

[9] Christine Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse' (2015) 37 *Sydney Law Review* 113 ('Conferred Authority Strict Liability'); Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing, 2019) ch 4 ('*Reconceptualising Strict Liability*'); Christine Beuermann, 'Up in Armes: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort' (2018) 25 *Torts Law Journal* 1 ('Up in Armes').

[10] Support for non-delegable duties in this context appears in Christine Beuermann, 'Vicarious Liability and Conferred Authority: Trustees of the Barry Congregation of Jehovah's Witnesses v BXB' (2024) 87(4) *Modern Law Review* 995 ('Vicarious Liability and Conferred Authority'); Christine Beuermann, 'Discerning the Form at the Second Stage of Vicarious Liability' (2022) 81(3) *Cambridge Law Journal* 495 ('Discerning the Form'); Beuermann, 'Conferred Authority Strict Liability' (n 9); 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); *AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* (2026) 100 ALJR 170.

Australia decision in which the question whether vicarious liability could apply to relationships akin to employment was considered. Part V offers a detailed critique of the High Court's reasoning in this case, explaining why it was wrong to reject the notion relationships akin to employment could be the basis of vicarious liability. Rather, Australian law in this respect should have followed the path taken by the UK courts. Part VI concludes.

The article makes an original contribution to the literature. There had been no primary authority, and thus little discussion in the secondary literature, in terms of whether Australian law should accept that relationships akin to employment could attract vicarious liability. The article considers the recent High Court decision and its reasoning regarding the issue in depth, comparing it with the UK approach, and questioning the High Court's reasoning. It demonstrates that the High Court's claim that acceptance of the UK position would undermine the traditional distinction between employees and independent contractors is false, as is the claim that acceptance of that position would require overrule of past cases. These are not criticisms that currently appear in the literature. The article demonstrates that the decision creates incoherence between the two limbs of vicarious liability, and with the policy rationale for vicarious liability. Neither proposition currently appears in the literature. Most of the vicarious liability literature ignores developments occurring elsewhere in the law, specifically employment law. This article considers those developments. The High Court has recently taken a narrow, legalistic view of the nature of a working relationship.[11] It will be shown that this fact exacerbates the problems caused by the Court's rejection of the notion that relationships akin to employment can found a vicarious liability claim. But most of the vicarious liability literature does not accommodate changes in the law outside the law of tort. These interact with developments in vicarious liability, and must be part of the discussion.

II Strains on Vicarious Liability and Legal Responses

A *Beyond Control*

Firstly, as the world of work became more sophisticated and the nature of work more specialised, it became less likely an employer would, or would seek to, control in detail how an employee did work, or even in some cases what they did. Employees would frequently have greater expertise than their employer, making the suggestion the employer would seek to, or conceivably could, control these kinds of details

[11] *CFMMEU v Personnel Contracting* (2022) 275 CLR 165 ('*CFMMEU*').

sometimes incongruous.[12] As a result, there was a move to a "right to control" test, as opposed to actual control.[13] The law also responded by developing a (somewhat complementary) organisation test, considering the extent to which the worker was associated with the organisation, or the extent to which they conducted a business of their own.[14]

B *Beyond Work*

Courts decided vicarious liability should be applied in circumstances beyond employment, including what were described as 'agency' situations.[15] This strained the traditional first element of a vicarious liability action, since some of those to whom it applied were not employees.[16] There remains uncertainty as to the precise meaning of agency in this context.[17]

C *Contracting Out*

Thirdly, work would increasingly be contracted out to third parties, rather than done in-house.[18] In this context the law first considered the extent, if any, to which vicarious liability in the broad context of "work" might apply to those who were not employees according to traditional tests including control. This occurred in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and Others* ('*Viasystems*').[19] There the plaintiffs engaged the first defendant to install air conditioning. The first defendant sub-contracted the work to the second defendant. The second defendant then further sub-contracted the work to the third defendant, under the second defendant's supervision. A worker employed by the third

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[12] *Various Claimants v Catholic Child Welfare Society and Others* [2013] 2 AC 1, 15–16 (Lord Phillips for the Court) ('*Catholic Child Welfare Society*').
[13] *Zujis* (n 2) 569–71 (Dixon CJ, Williams, Webb and Taylor JJ); *Stevens* (n 2) 29 (Mason J, Brennan J agreeing at 47, Deane J agreeing at 49), 36–7 (Wilson and Dawson JJ).
[14] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217 (Windeyer J); *CFMMEU* (n 11) 208–9 (Gageler and Gleeson JJ), 234 (Gordon J, adopting a similar test); Bomball, 'Entrepreneurship' (n 7). This is reflected in the definition of 'worker' in s 230(3)(b) of the *Employment Rights Act 1996* (UK), as distinguished from a person carrying on business.
[15] *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-Operative Assurance Company of Australia Ltd* (1931) 46 CLR 41, 49 (Dixon J) ('*Colonial Mutual Life*'); *Lloyd* (n 4) 731 (Lord Macnaghten, Lord Atkinson agreeing at 739); *Morgan v Launchbury* [1973] AC 127, 135 (Lord Wilberforce).
[16] Strain would also be placed on the second element of a vicarious liability action — considering whether wrongdoing occurred within the course of employment — in the face of deliberate or criminal wrongdoing by an employee. However, the focus of this article is mainly the first element.
[17] Giliker, *Vicarious Liability in Tort* (n 8) 132–3.
[18] Ewan McKendrick, 'Vicarious Liability and Independent Contractors: A Re-Examination' (1990) 53 *Modern Law Review* 770 referred to the growth of an 'atypical workforce' presenting challenges for tort law, straining concepts of employment in this context: at 770, 781.
[19] [2006] QB 510 ('*Viasystems*').

defendant did the work negligently, resulting in damage to the plaintiff's premises. The question was whether, and to what extent, the second and third defendants could be held liable for the damage.

The Court of Appeal found *both* could be held vicariously liable. For present purposes, the significance of this finding is the finding the *second* defendant could be held vicariously liable for the wrongdoing, although they were not the employer of the wrongdoer.[20] The reasoning is important. Only two judges heard the case, adopting different reasons. Lord Justice May held it was the entitlement of the second defendant to control the wrongdoer that permitted them to be held (jointly) vicariously liable.[21] For Rix LJ, the question was whether the wrongdoer was a sufficiently integral part of a defendant's business to make it just for the defendant to be vicariously liable for the wrongdoer's actions.[22] Importantly, the Court indicated preparedness to look beyond the strict contractual situation, in favour of an approach focussed on the substance of the parties' relevant relationships.[23] Though applying different tests, the judges found the second defendant could be vicariously liable for wrongdoing committed by someone who was not their employee. The precedent was set. It would subsequently be utilised in contexts far removed from this one, as we will see.

D *Religious Institutions*

Another challenge was to deal with vicarious liability in the context of religious institutions. Obviously, the concept of religious institutions is not new. However, recent years have seen a marked increase in the number of claims brought against religious institutions for alleged abuse committed by those apparently working for the institution. These workers would not meet the definition of an employee, as traditionally conceived.[24] At a societal level, there has been increased awareness of abuse. Relatedly, there are community demands alleged perpetrators be brought to justice, and the wrongfulness of and responsibility for the behaviour addressed.[25]

[20] On this question, Australian authority has differed in the past: *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 641 (Gibbs CJ), 646 (Wilson J), 685 (Dawson J) ('*Oceanic Crest*'). This position was derived from English authority. Given changes in English law on this matter, the High Court's view today is unclear.
[21] *Viasystems* (n 19) 519 (May LJ).
[22] Ibid 537 (Rix LJ). Subsequent decisions favour this approach: *Catholic Child Welfare Society* (n 12) 18.
[23] *Viasystems* (n 19) 529–32 (Rix LJ), reflecting *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1, 15 (Lord Porter), 22 (Lort Uthwatt). Such an approach is supported in Mat Campbell, 'Vicarious Liability: Analysing Relationships Akin to Employment' (2023) 39(4) *Journal of Professional Negligence* 153.
[24] *Catholic Child Welfare Society* (n 12) 26.
[25] Ibid 25–6.

Religious institutions were typically in the best position to provide compensation, or be insured in respect of it. Thus, existing vicarious liability principles, crafted in a different context and prima facie applicable to the employer-employee relationship, were potentially strained if applied here.

As I will soon demonstrate, the English law of vicarious liability responded to these strains by adapting. It eventually accepted relationships akin to employment might be sufficient to meet the first element of a vicarious liability claim. In this regard, it followed the same path as the Canadian courts. That jurisdiction's Supreme Court had accepted this approach in finding a religious institution could be vicariously liable for sexual abuse committed by a priest, although the priest was not in a traditional employment relationship with the institution.[26] McLachlin CJ for the Court concluded:

> The relationship between the bishop and a priest in a diocese is not only spiritual, but temporal. The priest takes a vow of obedience to the bishop. The bishop exercises extensive control over the priest, including the power of assignment, the power to remove the priest from his post, and the power to discipline him. It is akin to an employment relationship … the priest is reasonably perceived as an agent of the diocesan enterprise. The relationship between the bishop and the priest is sufficiently close.[27]

This is important because a recent Australian High Court decision considered the same question for the first time. In sharp contrast to the English and Canadian precedent, and in contrast to earlier occasions where the High Court had adapted relevant principles of vicarious liability, this time it refused to adapt principle to accept vicarious liability could apply to relationships akin to employment.[28] This article will now discuss development of the concept of relationships akin to employment in English law and its application to extend the ambit of vicarious liability, before considering the Australian High Court's recent decision to refuse to do so.

[26] *John Doe v Bennett* [2004] 1 SCR 436.
[27] Ibid 449.
[28] *Bird v DP (a pseudonym)* (2024) 283 CLR 45 ('*Bird*'). Similar sentiments appear in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, 577: 'the relationship between an assistant parish priest and the "members" (of the church) is too slender and diffuse to establish … vicarious liability in tort' (Mason P, Ipp JA agreeing at 604 [200], McColl JA agreeing at 604 [201]).

III UK Application of Vicarious Liability to Relationships Akin to Employment

The matter was considered in a different context to *Viasystems* in *E v English Province of Our Lady of Charity and Another* ('*E*').[29] There the question was whether the defendant trustees could be liable for abuse committed by a priest within the Diocese. The defendant argued it could not be held vicariously liable for the abuse, because the priest was not an employee. The plaintiff argued *Viasystems* had established vicarious liability could apply to relationships akin to employment. The priest was not appointed by written agreement, and there were no terms and conditions, other than those in canon law. The defendant did not pay the priest remuneration; he was paid from donations to the Diocese. The priest had general responsibility to run the parish as he saw fit, with little to no direction given, or control exercised, by the bishop. However, the bishop could remove a priest from a diocese.

The UK Court of Appeal found the priest was not an employee of the Diocese. Nor was he an independent contractor. It held vicarious liability could be applied to relationships akin to employment,[30] if fair and reasonable to do so. In deciding this, questions of control by the defendant over what the wrongdoer did, the extent to which the wrongdoer had freedom to organise and perform the work, whether the work done was central to the defendant's enterprise or organisation, and whether the wrongdoer was in business of their own account, were relevant.[31] The church could exercise control over the priest's activities, and the priest was appointed to further the defendant's aims and purposes.[32]

These matters were subsequently considered by the UK Supreme Court. In *Various Claimants v Catholic Child Welfare Society and Others* ('*Catholic Child Welfare Society*'),[33] the question again arose regarding the vicarious liability (if any) of a religious order for abuse committed by brother teachers within its educational institutions. The Supreme Court unanimously accepted vicarious liability could arise in relationships akin to employment.[34] This was because the rationale for imposing vicarious liability in employment relationships was equally applicable in such

[29] [2013] QB 722 ('*E*').
[30] Ibid 768 (Ward LJ).
[31] Ibid 768–9 (Ward LJ). Lord Justice Ward acknowledged assistance from Richard Kidner, 'Vicarious Liability: For Whom Should 'the Employer' Be Liable?' (1995) 15 *Legal Studies* 47, 63–4 in crafting this approach.
[32] *E* (n 29) 785 (Davis LJ).
[33] *Catholic Child Welfare Society* (n 12).
[34] Ibid 18.

relationships. That rationale was explained in terms of five factors ('the five-factor test'). These were: (a) the employer was more likely to have the means to compensate the victim and can be expected to be insured against the risk; (b) the wrongdoing was committed as a result of activity conducted by the wrongdoer on behalf of the defendant; (c) the wrongdoer's activity was likely part of the defendant's business or organisation; (d) the defendant created the risk of the wrongdoer's wrongdoing; and (e) the wrongdoer was at least partly under the defendant's control.[35] On the facts, the relationship between defendant and wrongdoer was akin to employment. The defendant directed the wrongdoer to engage in teaching activity. It was done in pursuit of the defendant's objects and purposes, and was required to be done within the defendant's rules and policies.[36]

The five-factor test was refined. In *Cox v Ministry of Justice* ('*Cox*'),[37] the question of vicarious liability arose in the context of the potential liability of the defendant for negligence committed by an inmate. The Supreme Court clarified the first factor was typically of marginal significance, if any. The last factor was not as important today as previously. The remaining factors overlapped. The Court reframed the test:

> [A] relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.[38]

The Court explained this flexible approach responded to the dynamic nature of modern workplace situations, where often no written employment contract existed. It was consistent with a theory that organisations should be held liable for materialisation of risks inherently created in pursuit of their activities. However, it drew the line in situations where the wrongdoer was engaged in their own business. The decision also signalled cases involving the sexual abuse of children were not subject to exceptional rules.[39] The Court again noted it was taking a substantive, rather than formalistic, approach.[40]

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[35] Ibid 15.
[36] Ibid 20.
[37] [2016] AC 660, 670 [24] (Lord Reed for the Court) ('*Cox*').
[38] Ibid.
[39] Ibid 672.
[40] Ibid 673. Subsequent cases emphasised the traditional distinction between employment and relationships akin to employment, on the one hand, and independent contractor situations on the

Subsequently, the Supreme Court held foster parents may be in a relationship with a statutory authority charged with care of minors sufficiently akin to employment to attract vicarious liability.[41] The *Armes v Nottinghamshire County Council* ('*Armes*') decision attracted criticism that the concept of relationships akin to employment had stretched 'too far'.[42] Such criticism is typically not of the essential idea relationships akin to employment should be equated with those of employment (for vicarious liability purposes), but rather application of that principle to foster parents.[43]

In *Various Claimants v Barclays Bank* ('*Barclays Bank*'), the Supreme Court held a bank could not be vicariously liable for abuse allegedly committed by a doctor. The doctor had been retained by the bank to perform preemployment health checks. He was paid a fee per report completed. The Court found he was operating a business of his own, rather than constituting an inherent part of the bank's business. Thus, the bank was not vicariously liable for his alleged wrongdoing. In so confirming, the Court re-committed to the distinction between an employee and an independent contractor.[44] On the five-factor test, the Court held it did not apply where clearly a person was an independent contractor; rather, it was useful in marginal cases.[45]

Finally, in *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*,[46] the Supreme Court found that, in determining whether a relationship was sufficiently akin to employment to attract vicarious liability, a court might consider factors like whether the work was remunerated in money or in kind, the extent to which the wrongdoer's actions were integral to the defendant's organisation, the extent to which the defendant had control over the wrongdoer's work, whether the work was

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other: *Various Claimants v Barclays Bank Plc* [2020] AC 973, 986 (Baroness Hale for the Court) ('*Barclays Bank*').

[41] *Armes v Nottinghamshire County Council* [2018] AC 355 ('*Armes*'); *DJ v Barnsley Metropolitan Borough Council* [2025] 1 WLR 148 ('*Barnsley Metropolitan*').

[42] Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77(3) *Cambridge Law Journal* 506, 508 ('Analysing Institutional Liability').

[43] Aaron Yoong and Sui Yi Siong, 'Back to Basics? Recent Developments in Vicarious Liability in the UK Supreme Court' (2021) 28 *Tort Law Review* 18, 29; Beuermann, 'Up in Armes' (n 9); Giliker, 'Analysing Institutional Liability' (n 42) 534.

[44] *Barclays Bank* (n 40) 985–6. See also *BXB* (n 1) 587. Others have questioned it: Allison Silink and Desmond Ryan, 'Vicarious Liability for Independent Contractors' (2018) 77 *Cambridge Law Journal* 458, 460: '[t]here is no bright-line distinction between the status of an employer [sic] and that of an independent contractor … '. Others have argued it should be discarded: Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71(3) *Cambridge Law Journal* 615, 616; Giliker, 'Analysing Institutional Liability' (n 42) 516–17.

[45] *Barclays Bank* (n 40) 987. A similar view was expressed in *BXB* (n 1), in which the Court referred to the five-factor test as a useful 'final check' in marginal cases: at 588.

[46] *BXB* (n 1).

being conducted for the defendant's benefit and in furtherance of its aims, arrangements regarding appointment and termination, and whether there was a hierarchy of seniority into which the work fitted.[47]

A *Summary of the UK Position*

The Supreme Court has accepted vicarious liability can apply to relationships akin to employment. This is because the rationale for imposition of vicarious liability upon employees may be applicable in other relationships, including those with features similar to employment, but not traditionally regarded as employment. It has been determined it would be arbitrary to rely on technical distinctions in such cases to deny vicarious liability for wrongdoing. This embraces changes in employment practices, accepting the law must evolve rather than insist on traditional rules that often no longer reflect workplace realities. It accepts organisations sometimes "dress up" arrangements as independent-contractor relationships, contrary to reality.[48] They may do this for numerous reasons, including to avoid vicarious liability. The law can respond by favouring substance over form.[49] Changes in the UK law also reflect changes in community standards, including greater awareness of child sexual abuse, general community abhorrence of it, and the felt need to hold institutions accountable for abuse committed by those closely associated with them.

This does not obliterate the traditional distinction between employees and independent contractors, and the relevant rationales may only be useful in borderline cases where a worker is not clearly an employee or an independent contractor. It remains important to consider how integrated the worker is to the relevant organisation, whether the worker is engaged in an enterprise of their own, to what extent they are acting in furtherance of the organisation's purposes and objectives, the extent to which the organisation controlled the worker's activities, and appointment and termination arrangements.

B *Reflections on the UK Position*

The UK position has much to commend it. Particularly where there is a lack of precedent, analogies with equivalent situations can be useful. Obviously, this is how the common law has developed over time. The High Court specifically endorsed this

[47] Ibid 587. The parties' motivations are irrelevant: *Barnsley Metropolitan* (n 41) 168 (Lady Carr CJ, Bean and Baker LLJ).
[48] Campbell, 'Analysing Relationships' (n 23) 154–5.
[49] Donal Nolan, 'Reining in Vicarious Liability' (2020) 49 *Industrial Law Journal* 609, 617; ibid 155.

approach in an earlier vicarious liability case.[50] This is consistent with a position that, just as employment can ground vicarious liability, so too can relationships akin to employment.

Vicarious liability has a policy basis. Although the precise policies it is designed to further are contested, it is considered coherent that if the relevant agreed policies underlying vicarious liability are applicable to situations outside of what is traditionally regarded as employment, they should be applied in this broader context. Relatedly, where we have no clear answer to a particular legal issue, like whether relationships akin to employment can ground vicarious liability (which was for a time undetermined), we should be guided by principles, rather than deciding in an ad hoc fashion. A similar approach has been articulated by the Supreme Court of Canada.[51]

Further, the alternative is worth considering. If the law were to take a narrow position and refuse to accept relationships akin to employment could ground vicarious liability, while accepting employment relationships do, it would encourage parties to engage in opportunistic behaviour to craft relationships to deny vicarious liability.[52] These can be highly formalistic and not reflective of substance. In principle, one should generally take a substantive view of situations and relationships in applying the law, not an unrealistic, formalistic approach.[53] The latter would invite undesirable arbitrariness in legal outcome.

Law must respond to changes in the society it purports to regulate. This applies both to evolving employment situations, and changes in attitude regarding sexual abuse in our society. It is dangerous for the law to be out of touch with society.[54] The world of work has changed substantially from when original rules regarding vicarious liability were crafted. The law has largely proven adaptable to respond to these and broader societal changes around accountability of various kinds of organisations, as

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[50] *Prince Alfred College* (n 4) 150 (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[51] *Bazley v Curry* [1999] 2 SCR 534, where McLachlin CJ (for the Court) explained that increasingly, courts confronted with vicarious liability disputes where precedent suggested no clear answer were examining the policy of vicarious liability and whether finding liability in a novel case would further it: at 545 [14]–[15](‘*Bazley*’).

[52] This can also occur where employers claim a worker is an independent contractor, whereas in fact they operate more as an employee: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (‘*Hollis*’).

[53] Anthony Gray, ‘Relational Contract Theory, the Relevance of Actual Performance in Contract Interpretation and Its Application to Employment Contracts in the United Kingdom and Australia’ (2023) 52(2–3) *Common Law World Review* 61.

[54] Patrick Devlin, ‘Commercial Law and Commercial Practice’ (1951) 14 *Modern Law Review* 249; Michael McHugh, ‘The Law-Making Function of the Judicial Process: Part I’ (1988) 62 *Australian Law Journal* 15 (‘Part I’); Michael McHugh, ‘The Law-Making Function of the Judicial Process: Part II’ (1988) 62 *Australian Law Journal* 116 (‘Part II’).

earlier explained. The way UK law has adapted vicarious liability to accommodate these changes is positive. This does not mean every decision or all of the reasoning is entirely defensible. It is the general acceptance relationships akin to employment can meet the first element of a vicarious liability action that is applauded here.

As noted above, there has been both criticism[55] and support[56] of the akin to employment test. There remains doubt as to the application of the test to the so-called "gig economy".[57] One commentator states it is evidence vicarious liability has gone 'too far', lacking theoretical underpinning and involving definitional uncertainty.[58] This article does not defend *Armes*, used by some as evidence of the law having gone too far. There is valid criticism of uncertainty created by the concept of akin to employment, in that reasonable minds might differ on whether a relationship is sufficiently akin to employment to justify vicarious liability. However, uncertainty in this area appears inevitable, as Lord Reed noted in *Cox*.[59] It is also sometimes difficult to determine whether a worker is an employee or an independent contractor, yet that is a venerable legal distinction.

This article adopts the factors identified by the UK courts in determining whether a relationship is akin to employment. As discussed above in the context of *E* and *Cox*, these include the extent to which the wrongdoer is integrated into the business of the organisation sought to be made liable for their activity or whether they are acting as a separate entity, the extent to which the wrongdoer is acting independently or under the control (notional or real) of the organisation, the extent to which the wrongdoer pursues that organisation's purposes, payment arrangements (if any), etc. As elaborated shortly, the focus should be on the practical reality of the arrangements, not their formal structure, and whether the practical reality is sufficiently akin to an employment relationship, as we conceive of it today. Notions of enterprise risk can provide a theoretical underpinning for an akin to employment

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[55] David Tan, 'A Sufficiently Close Relationship Akin to Employment' (2013) 129 *Law Quarterly Review* 30, 34.

[56] Philip Morgan, 'Vicarious Liability on the Move' (2013) 129 *Law Quarterly Review* 139, 143; John Bell, 'The Basis of Vicarious Liability' (2013) 72 *Cambridge Law Journal* 17, 19; Andrew Bell, 'Vicarious Liability: Quasi-Employment and Close Connection' (2016) 32 *Professional Negligence* 153, referring to *Cox* (n 37) (also involving the concept of relationship akin to employment) as an 'admirably explicit and pragmatic response to a world where employment relationships are increasingly complex and variable': at 155.

[57] 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.

[58] Giliker, 'Analysing Institutional Liability' (n 42) 506, 508, 532. James Plunkett observed akin to employment was being applied broadly: 'Taking Stock of Vicarious Liability' (2016) 132 *Law Quarterly Review* 556, 560 ('Taking Stock').

[59] *Cox* (n 37) 672.

test. A person in this situation may be said to be part of the organisation of the "employer", not running their own business. As noted above, the UK courts have emphasised the approach does not abandon the traditional distinction between employees and independent contractors.

The article will soon discuss the very different position recently taken on this issue by the High Court of Australia. Of course, the article does not assume Australian law should always mirror that of the UK. Indeed, there are important differences between UK law and Australian law material to the current context that ought to be borne in mind. Firstly, in determining whether an employment relationship exists, a majority of the Australian High Court applies a highly formalistic approach.[60] It is largely a matter of contract interpretation, with very limited exceptions concerning variation by subsequent conduct, shams, etc. A majority of the Court generally refused to consider how the contract worked in practice in determining the legal nature of the parties' relationship. This approach has been criticised.[61] It presents a marked contrast with the UK position, which has demonstrated much greater willingness to consider the true nature of the parties' relationship, including the realities of the parties' engagement.[62] Simply, while UK law here favours substance over form,[63] the Australian (common) law does the reverse.[64]

Given employment contacts are typically written by the party in the stronger position, usually the engaging firm, it is not surprising a focus on contract formalities will generally make it less likely a worker will be deemed an employee. This is for a range of reasons, including the kind of (employee-protective) regulation to which an

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[60] *CFMMEU* (n 14) 186–7 (Kiefel CJ, Keane and Edelman JJ), 229 (Gordon J, Steward J agreeing at 243 [203]); *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254, 261 (Kiefel CJ, Keane and Edelman JJ), 286 (Gordon and Steward JJ) ('*ZG Operations*'). Cf *CFMMEU* (n 14) 214–16 (Gageler and Gleeson JJ);
ZG Operations (n 60) 280–5 (Gageler and Gleeson JJ). See also Andrew Stewart, Mark Irving and Pauline Bomball, 'Shifting and Ignoring the Balance of Power: The High Court's New Rules for Determining Employment Status' (2023) 46(4) *University of New South Wales Law Journal* 1214.
[61] Stewart, Irving and Bomball (n 60) 1245–8; Carolyn Sutherland, 'Judging the Employment Status of Workers: An Analysis of Commonsense Reasoning' (2022) 46(1) *Melbourne University Law Review* 281, 310.
[62] *Autoclenz Ltd v Belcher* [2011] 4 All ER 745, 754–7 [26]–[35] (Lord Clarke for the Court) ('*Autoclenz*'); *Uber BV v Aslam* [2021] ICR 657, 679–81 (Lord Leggatt for the Court).
[63] Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370, 387 ('Statutory Norms').
[64] The *Fair Work Act 2009* (Cth) s 15AA(1) requires a court to consider the substance, reality and true nature of a relationship in determining whether it meets the definition of an employment relationship. It reasserts the multi-factorial test in determining whether an employment relationship exists: at s 15AA(2). Of course, there is no guarantee this will translate to the vicarious liability context.

employment relationship is subject, and the consequences for vicarious liability. The article will return below to the consequences for the current discussion, in terms of this material difference in approach.

Another way in which UK law has evolved is to recognise employment relationships as relational in nature,[65] in some respects different from typical contracting.[66] This again tends toward a flexible view of the parties' relationship, emphasising its actualities, and including preparedness to imply terms into the relationship.[67] In contrast, the High Court of Australia has maintained its view of employment relationships primarily through the prism of contract law and rules such as the parol evidence rule, declining to imply terms accepted in the UK.[68] Principles governing interpretation of a contract of employment in Australia are those governing the interpretation of a contract generally.[69] Unlike the High Court,[70] English courts apply a multi-factorial test in determining whether an employment relationship exists.[71]

The third way in which UK law has evolved has been to accept the close connection test for the *second* element of vicarious liability. For many years, UK courts applied the Salmond test to vicarious liability. In employment contexts, employers were liable for: (a) wrongful acts committed by the employee; and (b) a wrongful and unauthorised mode of doing an act authorised by the employer. Salmond indicated the employer was also liable for unauthorised acts, if so connected with authorised acts that they ought to be regarded as modes, albeit improper modes, of doing them.[72] Strain was placed on this formulation when applied to intentional wrongdoing by an employee.[73] It was difficult to argue criminal behaviour of an employee was a wrongful and unauthorised mode of doing that which they were employed to do.[74] The courts applied these tests to intentional criminal acts by

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[65] *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 (Lord Hoffmann).
[66] *Autoclenz* (n 62) 757 [34]; Pauline Bomball, 'Contractual Autonomy, Public Policy and the Protective Domain of Labour Law' (2020) 44(2) *Melbourne University Law Review* 502, 532–3 ('Contractual Autonomy').
[67] *Malik v Bank of Credit & Commerce International SA (in liq)* [1998] AC 20.
[68] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.
[69] *CFMMEU* (n 14) 193 (Kiefel CJ, Keane and Edelman JJ), 212 (Gageler and Gleeson JJ), 229–31 (Gordon J, Steward J agreeing at 243 [203]).
[70] Ibid 183 (Kiefel CJ, Keane and Edelman JJ), 238 (Gordon J, Steward J agreeing at 243 [203]). Cf the joint reasons of Gageler and Gleeson JJ: at 211–12. Earlier Australian cases had embraced a multi-factorial approach: *Hollis* (n 52) 33 (Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ).
[71] *Professional Game Match Officials v Revenue and Customs Commissioners* [2024] ICR 1480.
[72] John Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Steven & Haynes, 1st ed, 1907) 83.
[73] *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 226 (Lord Steyn, Lord Hutton agreeing at 238 [52]), 232 (Lord Clyde), 244 (Lord Millett) ('*Lister*'); *BXB* (n 1) 573.
[74] Christine Beuermann, 'Discerning the Form' (n 10) 513.

employees, and sometimes found employers vicariously liable for them.[75] Particular difficulties were noted in applying the test (or in finding the test was met)[76] in the context of child sexual abuse within an institutional setting, because that type of activity is anathema to the purposes of such institutions and beyond the scope of employment. This eventually led the House of Lords to adopt a close connection test, derived from Canada.[77] The question became whether there was a sufficiently close connection between the wrongdoing and the employment to make it fair and just to impose vicarious liability.[78] Only a minority of the High Court of Australia has accepted this test,[79] and a majority has favoured a different test.[80] Although this development relates primarily to the *second* element of vicarious liability identified above, not the *first* element, and the main focus of this article is on the first element, there is an argument the two elements are (or ought to be) considered together, so this close connection test *might* impact decisions regarding the first element. This argument is elaborated upon in Part IV.

IV THE HIGH COURT DECISION IN *BIRD V DP (A PSEUDONYM)*

A priest (Father Coffey) sexually assaulted the respondent (DP) in the latter's family home. DP was aged 5 at the relevant time. Coffey had been engaged as an assistant parish priest. He was not engaged by the relevant diocese as either an employee or an independent contractor. However, he was engaged to pursue the church's work in the Diocese. The relevant bishop exercised significant control over Coffey, expressed to be 'at least as great as, if not greater than' that relating to a typical employee.[81]

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[75] *Lloyd* (n 4); *Morris v C W Martin and Sons Ltd* [1966] 1 QB 716. Cf *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 ('*Deatons*').
[76] *Trotman v North Yorkshire County Council* [1999] LGR 584, 591 (Butler-Sloss LJ, Thorpe LJ agreeing at 592).
[77] *Bazley* (n 51); *Jacobi v Griffiths* [1999] 2 SCR 570. Beuermann says the close connection test and Salmond approach are 'not dissimilar': 'Vicarious Liability and Conferred Authority' (n 10) 1004.
[78] *Lister* (n 73) 230 (Lord Steyn, Lord Hutton agreeing at 238 [52]), 232 (Lord Clyde), 245 (Lord Millett); *BXB* (n 1) 587–8. The close connection test has been criticised: Beuermann, 'Discerning the Form' (n 10) 520–2.
[79] *New South Wales v Lepore* (2003) 212 CLR 511, 543–4 (Gleeson CJ), 604 (Kirby J) ('*Lepore*'). Gummow and Hayne JJ conceded it was relevant to consider the closeness of connection, but considered it was really another way of stating the course of employment test: at 586. In *Prince Alfred College* (n 4), all members of the Court rejected the close connection test, although some of its factors might be relevant to the test the Court favoured: at 149–50 (French CJ, Kiefel, Bell, Keane and Nettle JJ), 172 (Gageler and Gordon JJ).
[80] This is whether the employment provided not merely the opportunity, but the occasion, for the wrongdoing to occur: *Prince Alfred College* (n 4) 159–60 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172). See Paula Giliker, 'Vicarious Liability in the UK Supreme Court and High Court of Australia' (2024) 44 *Legal Studies* 191, 198.
[81] *Bird* (n 28) 53 (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), quoting the Court of Appeal: *Bird v DP (a pseudonym)* (2023) 69 VR 408, 439–40 [125] ('*Bird* (VSCA)').

The Court accepted Coffey was not an employee of the Diocese.[82] According to the traditional approach, this precluded the possibility the church could be vicariously liable for his actions. The Court was asked to extend the first element of vicarious liability to include relationships akin to employment, as had occurred in the UK. It was argued that, on the facts, the relationship between the Diocese and Coffey was akin to employment. The Diocese through the bishop could potentially exercise, and did exercise, substantial control over Coffey's work. It was responsible for his appointment, including where he worked and for how long, what he did, and his benefits. It provided him with clerical clothing. Coffey was regarded as representing the church in his community activities, furthering the objectives of the church. These points convinced both the trial judge and the Court of Appeal the relationship was akin to employment, and that this was (or should be) sufficient to meet the first element to ground vicarious liability.[83] However, a majority of the High Court disagreed. It was not the law in Australia that relationships akin to employment could attract vicarious liability.[84] To be clear, the appeal was allowed unanimously, but there were important differences in reasoning. The view of Justice Gleeson substantially diverged from that of her Honour's colleagues.

A *Majority Reasoning*

The joint reasons found it had always been necessary that an employment relationship be found to exist between the defendant and the alleged wrongdoer for vicarious liability to apply.[85] They noted developments in English law that relationships akin to employment could be sufficient to meet the first element of vicarious liability. The joint reasons characterised English law as having a 'radically different set of starting principles' regarding vicarious liability compared with Australia.[86] They found Australian law had not accepted some of these principles. One was that vicarious liability could potentially apply in relation to criminal activity, including assault. The joint reasons (incorrectly) suggested this principle was 'in tension with the requirement that the acts must be committed in the course of employment'.[87]

[82] *Bird* (n 28) 58 (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).
[83] *DP (a pseudonym) v Bird* [2021] VSC 850; *Bird* (VSCA) (n 81).
[84] *Bird* (n 28) 59 [5] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).
[85] Ibid 74.
[86] Ibid 77.
[87] Ibid. The High Court in *Prince Alfred College* (n 4) accepted vicarious liability could apply to sexual assault (clearly a criminal activity). The (main) joint reasons held 'the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability': at 159 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172). Respectfully, Jagot J correctly held in *Bird*

The UK Supreme Court had referred to the need to fairly, justly and reasonably allocate liability in seeking to justify extension of vicarious liability to relationships akin to employment. The joint reasons in *Bird v DP (a pseudonym)* (‘*Bird*’) correctly noted this concept had not been applied in Australian vicarious liability cases. The phrase ‘fair, just and reasonable’ in the context of determining whether or not tortious liability exists has been more broadly applied to duty of care questions in the UK.[88] Australian law rejected this approach to establishing a duty of care,[89] and to vicarious liability.[90] As a result, one can justify this distinction between English and Australian tort law principles at the broader level of the law of tort, of which vicarious liability is part. Of course, this difference does not necessarily mean relationships akin to employment should never be regarded in Australian law as sufficient to meet the first element of vicarious liability.

It was noted the UK Supreme Court had applied five factors relevant to the question whether it was ‘fair, just and reasonable’ to impose vicarious liability regarding relationships akin to employment.[91] The joint reasons noted concern the five-factor test might cause uncertainty, and that this had been observed in subsequent case law. These decisions had been the subject of trenchant criticism.[92] As explained above, these cases had applied vicarious liability to make a prison authority legally liable for the conduct of a prisoner who was under their control. It had been applied to make a local authority vicariously liable for abuse committed by foster carers to whom the authority had delegated responsibility. The joint reasons reflected concern that, if Australian law applied the five factors identified in *Catholic Child Welfare Society* to determine whether a relationship was sufficiently akin to employment to justify vicarious liability, the traditional distinction between

(n 28) that ‘criminal and intentional tortious conduct may nevertheless be within the course of an employee’s employment’: at 135, citing *Prince Alfred College* (n 4) 159–60 [80].

[88] *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 (Lord Bridge) (‘*Caparo*’). Lords Oliver and Jauncey, writing separately, each phrased this as whether imposing liability is ‘just and reasonable’: at 633 (Lord Oliver), 655 (Lord Jauncey). Lords Roskill and Ackner agreed with all judgments: at 627 (Lord Roskill), 629 (Lord Ackner). Subsequently, *Robinson v Chief Constable of South Yorkshire Police* [2018] AC 736 narrowed application of the *Caparo* (n 88) three-stage test, including the ‘fair, just and reasonable’ requirement: at 745–7.

[89] *Sullivan v Moody* (2001) 207 CLR 562, 579 (The Court).

[90] *Prince Alfred College* (n 4) 150 (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[91] These five factors were: (a) the employer was more likely to have resources to compensate the victim and was expected to insure against such risk; (b) the tort was likely committed by the wrongdoer as a result of activity on the employer’s behalf; (c) the activity was likely part of the employer’s business activity; (d) the employer likely increased the risk of the tort being committed by engaging the wrongdoer; and (e) the wrongdoer was under the employer’s control: *Catholic Child Welfare Society* (n 12) 15 [35].

[92] *Bird* (n 28) 79 [60], referring to *Cox* (n 37); *Armes* (n 41).

employees and independent contractors would be impacted.[93] This directly contradicts the insistence by all members of the UK Supreme Court in *Barclays Bank* that there was

> nothing … in the … Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. Two cases decided by common law courts since [*Catholic Child Welfare Society*] and *Cox* have reached the same conclusion.[94]

The joint reasons suggested reform of vicarious liability to extend the first requirement to include relationships akin to employment was for the legislature, not the courts.[95] They considered that to extend the first element in the way suggested would require overrule of earlier Australian High Court decisions,[96] and parts of other decisions.[97]

Justice Jagot agreed, holding it was essential to maintain the clear distinction between the first and second elements.[98] Her Honour rejected the Court of Appeal's position that the situation of someone such as Coffey was unique, in that they could not be classified as either an employee or an independent contractor.[99]

B *Justice Gleeson (Dissenting on the Principle, Not the Result)*

Justice Gleeson disagreed with the joint reasons on whether relationships akin to employment could attract vicarious liability. To be clear, her Honour did not dissent on the ultimate question of whether vicarious liability applied on these facts. She held that such relationships could give rise to such liability, as one legislature in Australia has recognised.[100] On the facts, she agreed with the conclusion of the Court

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[93] *Bird* (n 28) 81–2 [66].
[94] *Barclays Bank* (n 40) 986 [24].
[95] *Bird* (n 28) 82 [67] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), citing, amongst other cases, *Breen v Williams* (1996) 186 CLR 71, 115 ('*Breen*'). Their Honours noted recent legislative reform in this area had not made this extension: at 83–4 [69]. See also the reasons of Jagot J: at 141–3.
[96] *Hollis* (n 52); *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 ('*Sweeney*'). See *Bird* (n 28) 74 [49].
[97] *Scott v Davis* (2000) 204 CLR 333 ('*Scott*'); *Lepore* (n 79). See *Bird* (n 28) 74 [49].
[98] *Bird* (n 28) 134 [230].
[99] Ibid 133 [226].
[100] *Civil Liability Act 2002* (NSW) s 6G ('*CLA* NSW'). Cf *Civil Liability Act 1936* (SA) ('*CLA* SA') (vicarious liability only applies to employees). The *Civil Liability Act 2002* (WA) s 15C ('*CLA* WA') provides judgment against an individual in the current context can be satisfied against assets of the relevant institution, but does not refer to vicarious liability. Some jurisdictions provide that a religious institution can be liable for actions of an individual 'associated' with it: *Wrongs Act 1958* (Vic) s 91; *Civil Liability Act 2003* (Qld) s 33D ('*CLA* Qld'); *Civil Liability Act 2002* (Tas) s 49H ('*CLA* Tas'); *Civil*

in deciding the defendant should not be held vicariously liable for Coffey's behaviour. However, for Gleeson J this was because the *second* element of vicarious liability, whether the wrongdoer's behaviour was within the scope of employment, had not been met.[101] Justice Gleeson held the factual context in the case could potentially meet the *first* element.

Her Honour claimed the majority position was a 'missed opportunity' to develop Australian common law in response to an evolution in social conditions.[102] Her Honour referred particularly to increased recognition of the rights of children. Justice Gleeson noted a general reduction in deference to religious or charitable organisations, and a greater preparedness to hold such organisations accountable for abuse committed within their field of activity.[103]

Justice Gleeson supported the traditional distinction between employment, on the one hand, and independent contracting, on the other. However, she acknowledged there were relationships akin to employment, to which vicarious liability should (or potentially could) attach. This was justified on the basis that, as a matter of substance, the relationships had the same essential qualities as employment relationships. Justice Gleeson claimed that, if vicarious liability were not extended to such relationships, anomalies would arise.[104]

Her Honour disagreed with the majority that there was inadequate theoretical foundation for such extension. She found vicarious liability was based on notions of enterprise risk, as accepted in the UK and Canada. She held this was also the philosophical foundation for vicarious liability in Australia.[105] The theory is that businesses should be held legally responsible for the materialisation of risks considered inherently part of their activities. These are risks considered characteristic of those activities.[106] Justice Gleeson claimed it was consistent with this theory that vicarious liability apply to situations akin to employment.[107] On the

Law (Wrongs) Act 2002 (ACT) s 114BBD. However, this is not vicarious liability; it is simply the imposition of a duty of care. An institution might not have breached its duty, and thus would not be liable for abuse committed.

[101] *Bird* (n 28) 88 [80].

[102] Ibid 87 [79].

[103] Ibid 87 [78].

[104] Ibid 89.

[105] Ibid 92. This is supported in *Hollis* (n 52) 40–1 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[106] *Hollis* (n 52) 40 (Gleeson CJ, Gummow, Kirby and Hayne JJ). There is doubt as to whether enterprise risk theory continues to underpin vicarious liability in Australia. It is not mentioned in *Prince Alfred College* (n 4) or *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165, aside from a single mention in the context of explaining the approach of other jurisdictions: at 175 [13] (Kiefel CJ, Gageler, Gordon and Jagot JJ) ('*CCIG Investments*').

[107] *Bird* (n 28) 93.

facts before the Court, there was no argument Coffey was an independent contractor. Extension of vicarious liability to him did not undermine the traditional division between employees and independent contractors.[108] Nor was such an extension inconsistent with past High Court authority, according to Gleeson J.[109] Her Honour cited earlier Australian cases where vicarious liability was held to exist, though no employment relationship existed between the parties.[110]

Her Honour concluded the church and Coffey were in a relationship akin to employment, in line with the reasoning of the lower courts. The church represented to the community that Coffey acted for them. His activities were pivotal to the church's mission and function. He was accountable to the bishop for his activities and effectively subservient to him. He had no other vocation or source of income, and was dependent on the church. The Diocese gave him accommodation. He wore clerical clothing supplied by the Diocese. This had the effect of visibly connecting him to the church in the eyes of the community.[111]

V Reflections on the High Court Decision

A *Unconvincing Attempt to Distinguish Australian from UK Law*

As indicated above, the joint reasons claimed English law had a 'radically different set of starting principles' regarding vicarious liability compared with Australia.[112] They stated Australian law had never accepted some of them. One such principle was that it was possible for vicarious liability to apply to criminal acts, including criminal assault. The joint reasons claimed this principle was 'in tension with the requirement that the acts must be committed in the course of employment'.[113] Respectfully, this is wrong. In *Prince Alfred College Incorporated v ADC* ('*Prince Alfred College*'),[114] all members of the High Court clearly contemplated application of vicarious liability to criminal conduct. The main joint reasons (with which the other joint reasons relevantly agreed) were emphatic: 'the fact that a wrongful act is a

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[108] Ibid.
[109] Ibid 94 [101]. Justice Gleeson quoted Gaudron J in *Lepore* (n 79) 561 [130] in support of this proposition: at 95 [102].
[110] *Scott* (n 97); *Soblusky v Egan* (1960) 103 CLR 215, cited in *Bird* (n 28) 95. See also *CFMMEU* (n 14) 200 (Kiefel CJ, Keane and Edelman JJ); *Colonial Mutual Life* (n 15), cited in *Bird* (n 28) 96. Hollis (n 52) 46 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) noted vicarious liability 'more usually flows' from an employment relationship.
[111] *Bird* (n 28) 110–15.
[112] Ibid 77 [55].
[113] Ibid 77 [56]. The High Court in *Prince Alfred College* (n 4) 148 confirmed the course of employment doctrine, but added a supplemental test based on whether the employment provided the occasion for the wrongdoing: at 159–60 (French CJ, Kiefel, Bell, Keane and Nettle JJ).
[114] *Prince Alfred College* (n 4).

criminal offence does *not* preclude the possibility of vicarious liability'.[115] In the earlier High Court case of *Deatons Pty Ltd v Flew* ('*Deatons*'),[116] involving an employee throwing a glass at the plaintiff, vicarious liability was held not to apply. However, there was no mention this was because the employee's acts likely amounted to criminal assault. Similarly, in *New South Wales v Lepore* ('*Lepore*'),[117] there was no suggestion the fact the wrongdoer was engaged in serious criminal behaviour precluded application of vicarious liability. Thus, it is simply wrong to attempt to distinguish Australian from UK vicarious liability law by claiming that the latter, but not the former, contemplates application of vicarious liability in the context of criminality. Justice Jagot was correct, with respect, in acknowledging Australian law contemplated that vicarious liability could attach to criminal activity, citing *Prince Alfred College*.[118]

Of course, if members of the High Court now wish to say criminal conduct cannot be the basis of vicarious liability, because such actions could never be within the course of employment, that is valid. But respectfully, it would be better to concede past Australian authority had accepted that vicarious liability could apply to criminal acts, rather than apparently assert that it had not. And that would require the overrule of past Australian case law to the contrary, something which apparently is a roadblock for some justices (see below).

B *Unconvincing Argument UK Position Affects the Employee/Contractor Distinction*

The joint reasons expressed concern that adoption of the five-factor test identified in *Catholic Child Welfare Society* to determine whether a relationship was sufficiently akin to employment to justify imposition of vicarious liability might undermine the distinction between employees and independent contractors.[119]

With respect, this is hard to square with the position in the UK, which continues to apply the five factors, at least in marginal cases. In recently reaffirming the potential utility of the factors, the UK Supreme Court emphasised their use did *not* mean the traditional distinction between an employee and an independent contractor was undermined:

[115] Ibid 159 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172) (emphasis added).
[116] *Deatons* (n 75).
[117] *Lepore* (n 79).
[118] *Bird* (n 28) 135.
[119] Ibid 81–2.

> There is nothing in the … Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded. Two cases decided by common law courts since [*Catholic Child Welfare Society*] and *Cox* have reached the same conclusion.[120]

Thus, the claim in the joint reasons in *Bird* that acceptance of the five factors — or at least some of them, in some circumstances — would obliterate the traditional distinction between employees and independent contractors is also incorrect. It is not suggested the High Court should embrace the five factors. However, it is (with respect) inaccurate to criticise them as the joint reasons did in *Bird*. The reasoning directly contradicts the UK Supreme Court on point. That jurisdiction's case law does not reflect erosion of the distinction between employee and independent contractor.

It is conceded that, theoretically, some factors may cut across the traditional distinction. For example, consideration (b), whether the wrong was committed as a result of activity conducted by the wrongdoer on the defendant's behalf, could be applied to an independent contractor. Similarly, (d), whether the defendant created the risk of the tortfeasor's wrongdoing, could be applied to an independent contractor. This is noted elsewhere.[121] However, the proof is in the pudding. The case law does not reflect that the five factors have eroded the traditional distinction, and the Supreme Court emphasised in *Barclays Bank* that distinction ought to be maintained. The justices may (respectfully) be taken at their word.

C *Unconvincing Claim Applying Vicarious Liability to Relationships Akin to Employment Would Require Overruling Past Cases*

The joint reasons stated:

> This Court has repeatedly refused to extend the boundaries [of vicarious liability] to include independent contractors, or to extend the doctrine by reference to policy considerations as the sole or determinative basis for developing the principle. For the Court to do so now would require the Court to revisit and overrule *Hollis* and *Sweeney*, and at least aspects of *Scott* and *Lepore*.[122]

In sharp contrast is Gleeson J:

> I … do not agree with the plurality's contention that a decision imposing vicarious liability on the Diocese in this case would require this Court to

[120] *Barclays Bank* (n 40) 986 [24]. See also *BXB* (n 1) 587.
[121] Silink and Ryan (n 44) 459.
[122] *Bird* (n 28) 74.

> overturn *Hollis, Sweeney, Scott v Davis* and *Lepore*. The question whether vicarious liability arises in the context of the relationship between a diocese and a parish priest has not previously arisen in this Court … those cases [which have typically concerned whether a particular wrong was within the scope of employment, or the dichotomy between employee and independent contractor] … do not bear directly on the question in this appeal of whether relationships that are akin to employment attract vicarious liability. A case is not authority for a proposition that is not argued.[123]

Which of these opposed positions is correct? The first part of the first sentence in the joint reasons, that the High Court had repeatedly refused to extend the principle of vicarious liability to independent contractors, may be regarded as a straw person argument. So much may be accepted. But that was not relevant in *Bird*. It was not and could not be seriously suggested the wrongdoer in *Bird* was an independent contractor. He was far from being engaged in his own enterprise.

The second part of the first sentence then dismisses the extension of vicarious liability by way of policy factors. This is presumably a reference to the five-factor test in *Catholic Child Welfare Society*, which applies, at least to some extent, in the UK, and which is expressly policy-based.[124] I do not defend the first of those factors here, relating to so-called "deep pockets" considerations, nor suggest it should be relevant in assessing whether or not vicarious liability should apply. However, the other factors are defensible — these typically relate to the extent to which the wrongdoer is integrated in the defendant's activities, is pursuing their purposes, is running a business of their own, and questions of control. With respect, they underlie the current approach the High Court takes to determine whether a worker is an employee or an independent contractor. Indeed, they were utilised by the High Court recently in this context:

> The value of the own business/employer's business dichotomy in determining whether a person engaged to undertake work for another is an employee of that other has long been recognised … while the … dichotomy may not be perfect so as to be of universal application … the dichotomy usefully focusses attention upon those aspects of the relationship … which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it

[123] Ibid 94. Justice Gleeson noted that Gaudron J in *Lepore* had specifically contemplated vicarious liability could extend beyond relationships of employment: *Lepore* (n 79) 561.
[124] *Catholic Child Welfare Society* (n 12) 15.

> can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.[125]

So, respectfully, it is concerning the High Court dismisses the five-factor test, where it continues to use virtually the same considerations as those comprised in four of those factors in determining whether an employment relationship exists.

What of the claim in the second sentence that acceptance that relationships akin to employment could give rise to vicarious liability would require overruling of *Sweeney v Boylan Nominees Pty Ltd* ('*Sweeney*')[126] and *Hollis v Vabu Pty Ltd* ('*Hollis*')?[127] The joint reasons provide a reference at least to the relevant paragraph in *Sweeney* they claim to be inconsistent with such a development. That paragraph is [33], found at page 173 of the judgment.[128] This relates to the distinction between employment and independent contractor arrangements. As discussed, the fact that the UK Supreme Court has emphasised that acceptance of relationships akin to employment might ground a vicarious liability claim *does not* mean the traditional distinction between an employee and an independent contractor is discarded.[129] Given this, I am unable to accept the position of the joint reasons that acceptance that relationships akin to employment might ground a vicarious liability claim would require overruling of *Sweeney*.

What of the claim such acceptance would require the overruling of *Hollis*? On this occasion, the High Court in *Bird* does not refer to any specific paragraph of the judgment in *Hollis* that apparently would require overruling. There is nothing in the joint reasons that would require overruling to accept relationships akin to employment could ground vicarious liability. The High Court's reference might just be a repeat of its claim *Sweeney* would require overruling, in that the distinction between employee and independent contractor was live in *Hollis* as well. But repetition of the same claim does not make it convincing. Nothing in *Hollis* nor in *Sweeney* states relationships akin to employment *cannot* found a vicarious liability claim. This is not surprising; the issue was not live in either case.

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[125] *CFMMEU* (n 14) 184–5 (Kiefel CJ, Keane and Edelman JJ). Gageler and Gleeson JJ expressed a similar view: at 208–9. So too did Gordon J: at 234.
[126] *Sweeney* (n 96).
[127] *Hollis* (n 52).
[128] This is deduced from *Bird* (n 28) 74 n 81, which refers to 81 [63] of the same judgment. There the Court cites the joint reasons in *Sweeney* (n 96) 173 [33]: '[w]hatever may be the logical and doctrinal imperfections and difficulties of the origins of the law relating to vicarious liability, the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out' (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[129] *BXB* (n 1) 587 [58].

The claim that acceptance of this principle would require aspects of *Scott*[130] and *Lepore*[131] to be overruled is also highly questionable. *Scott* was not an employment case, so it cannot be taken to have decided anything regarding the extent to which vicarious liability applies in the context of work. In *Lepore*, the wrongdoers were teachers, and an employment relationship clearly existed between defendant and wrongdoer. Thus, anything said in either case that might be interpreted to suggest relationships akin to employment cannot found the basis of a vicarious liability claim could only be obiter dicta. By definition, it could not require overruling in the current context. In sum, Gleeson J was (with respect) correct in disagreeing with the joint reasons' claim that the appellant's argument would require overrule of two cases and partial overrule of another two. The claim is unfounded.

D *Incoherence between Vicarious Liability Limbs*

It *seems* the High Court has settled upon an approach to the *second* limb of vicarious liability that considers whether the employment situation provided the occasion for the wrongdoing to occur. Five members of the Court, in terms with which the other two members agreed, stated it was relevant to consider whether

> the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act … it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim … In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim … Where … the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[132]

Three preliminary points must be made. Firstly, it is acknowledged the question whether relationships akin to employment can found vicarious liability claims relates to the *first, not the second*, limb of vicarious liability.[133] On the other hand, the

130 *Scott* (n 97).
131 *Lepore* (n 79).
132 *Prince Alfred College* (n 4) 159–60 (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172).
133 In *Bird* (n 28), Jagot J emphasised the distinctness of the two limbs, stating material relevant to one limb was irrelevant to the other: at 134.

two limbs may not be totally independent.[134] The second point is it is appropriate to be tentative in addressing the High Court's use of the occasion test. Although announced for the first time in *Prince Alfred College*, it was barely sighted in the subsequent decision in *CCIG Investments Pty Ltd v Schokman*,[135] and was not discussed in *Bird*.[136] I have been critical of the test elsewhere,[137] but that is irrelevant for current purposes.

The point for present purposes is that, on the assumption that the occasion test is to be utilised in relation to the second limb, and on the assumption there is or may be some link between the limbs, the contents of the test do not justify limiting the first limb to employment strictly so-called. In other words, both relationships of employment and relationships akin to employment might provide the occasion for wrongdoing to occur.[138]

Specifically, an organisation that places a person in a position akin to employment may be placing them such that it provides the occasion for wrongdoing to occur. Recall the factors the High Court itself cited in seeking to apply the occasion test — authority, power, trust, control and the ability to achieve intimacy. On the facts in *Bird*, the religious body was in a position of high authority and power. It placed the wrongdoer in a position of great trust. The victim's family trusted the church, and the person chosen by the church to do the work of the church. Through these means he achieved intimacy with the victim. On one view, whether he was strictly speaking an employee or in a situation akin to employment (but not employment, according to a strict definition) is irrelevant to the question whether the relationship between the wrongdoer and the defendant provided occasion for the breach. Whether or not he is strictly an employee, the religious organisation placed him in a position where he could commit the abuse — physically, by essentially requiring him to have close contact with members of the Diocese, and spiritually, by conferring upon him a

[134] *Cox* (n 37) 664, where Lord Reed (for the Court) noted the two limbs were 'inter-connected'. Of course, the position is not necessarily the same in Australia; the matter remains open here.
[135] *CCIG Investments* (n 106) 182 (the only reference being to an argument the respondent made based on *Prince Alfred College* (n 4), to which the Court's response was 'no such enquiry is presented by the circumstances of this case' (Kiefel CJ, Gageler, Gordon and Jagot JJ)). Edelman and Steward JJ did not refer to it. Justice Gleeson said it may not be easy to distinguish cases where employment provided the 'opportunity' for the wrongdoing (which the High Court had said in *Prince Alfred College* (n 4) was not sufficient), and where it provided the occasion for the breach (which the Court found in *Prince Alfred College* (n 4) was sufficient): at 204 [95].
[136] Its omission in *Bird* (n 28) is less surprising, because that case focussed on the first element, while *CCIG Investments* (n 106) was focussed on the second.
[137] Gray, *Vicarious Liability* (n 3) 71–2.
[138] The High Court did not claim acceptance of the akin to employment test would be inconsistent with the occasion test. I have independently considered the matter, with a view to coherence in the law.

position of high authority, which inherently created high trust and significant control over members of the Diocese. Again, this article does not seek to defend the High Court's recently established occasion test for the second limb. However, on the basis it is currently part of the law unless and until revisited or formally discarded, it does not justify exclusion of relationships akin to employment from the first limb.[139] And there is sense in interpreting the limbs so that they work together, rather than in an antagonistic fashion, so matters pertaining to one limb might be (tangentially, at least) relevant to matters pertaining to the second. At the least, the two limbs should not be at cross-purposes with one another.

There is a suggestion in the literature the UK's adoption of a close connection test is linked with its adoption of the akin to employment principle:

> [T]he [UK] Supreme Court [has] held that an employment relationship is no longer required for vicarious liability to be imposed. In the Supreme Court's view, strict liability could be imposed if the Catholic Church had generated a sufficiently 'close connection' between the lay brothers and the claimants. *Consequently,* a relationship 'akin' to employment was sufficient. It is unlikely that this decision would have been reached without the earlier developments in *Bazley* and *Lister.*[140]

The logic of this argument would suggest that, given the High Court of Australia has not accepted the close connection test espoused in *Bazley v Curry*[141] and *Lister v Hesley Hall Ltd*,[142] it would (or should) not accept that relationships akin to employment could found an action for vicarious liability. Respectfully, one does not necessarily follow from the other. It would be congruent with the High Court's occasion test to include relationships akin to employment within the first limb. Relationships akin to employment can provide the occasion for wrongdoing, just as relationships of employment can. In other words, I do not accept the High Court's apparent rejection of the close connection test does or should preclude it from accepting relationships akin to employment can found vicarious liability.

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[139] Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 475; Stephen Todd, 'Personal Liability, Vicarious Liability, Non-Delegable Duties and Protecting Vulnerable People' (2016) 23(2) *Torts Law Journal* 105, 119.

[140] Beuermann, 'Conferred Authority Strict Liability' (n 9) 120–1 (emphasis added). *Bazley* (n 51) and *Lister* (n 73) accepted the close connection test in relation to the second limb of vicarious liability.

[141] *Bazley* (n 51).

[142] *Lister* (n 73).

E *Incoherence with the Policy Rationale of Vicarious Liability*

Use of the word "seems" is again appropriate here — it *seems* the High Court accepts (at least, has sometimes accepted) an enterprise risk rationale for vicarious liability. Authority for this appears in the joint reasons in *Hollis*, where five justices state:

> In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise.[143]

This is a clear endorsement of enterprise risk theory. Enterprise risk theory originated in the Canadian law,[144] before subsequently being accepted in the UK.[145] The judgment of Gleeson J in *Bird* operates on the basis Australian law accepts enterprise risk as the rationale for vicarious liability.[146] On the other hand, caution is appropriate. Five members of the High Court in *Prince Alfred College* doubted the approach, and this was repeated in *CCIG Investments*.[147] Enterprise risk theory was not mentioned in the joint reasons in *Bird*, nor by Jagot J, but was embraced explicitly by Gleeson J (dissenting on the principle).[148]

So, frankly it is not known whether the High Court accepts enterprise risk to explain or rationalise vicarious liability. The Court seemed to accept it in *Hollis* and *Sweeney*, but not in *Prince Alfred College* and *CCIG Investments*, though it did not expressly dissent from the earlier support. As indicated, Gleeson J proceeded in *Bird* as if Australian law accepted it as the basis for vicarious liability.

If the High Court does accept enterprise risk as the primary theoretical basis, or at least a major basis, for vicarious liability, it is difficult to justify why relationships akin to employment cannot found vicarious liability. This is because such a person

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[143] *Hollis* (n 52) 40 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), approved in *Sweeney* (n 96) 172 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[144] *Bazley* (n 51) 557.
[145] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 377 (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66]); *Armes* (n 41) 381.
[146] *Bird* (n 28) 92: '[t]he enterprise liability theory … is the central justification for vicarious liability in Australia'.
[147] '[T]he risk-allocation aspect of the [enterprise risk] theory is based largely on considerations of policy, that an employer should be liable for a risk its business enterprise has created. Such policy considerations have found no real support in Australia or the United Kingdom': *Prince Alfred College* (n 4) 153 (French CJ, Kiefel, Bell, Keane and Nettle JJ), cited in *CCIG Investments* (n 106) 175–6 (Kiefel CJ, Gageler, Gordon and Jagot JJ). Cf the United Kingdom's embrace of enterprise risk theory: *Armes* (n 41) 381.
[148] See *Bird* (n 28) 92: '[t]he enterprise liability theory … is the central justification for vicarious liability in Australia'.

may well be engaged in activity directly relevant to the kind of risk an organisation of that type generates. They may by their actions have created the risk characteristic of the organisation's activities. According to enterprise risk theory, costs associated with the materialisation of those risks should be borne by the organisation. Thus, there is incoherence between the theory the High Court apparently still applies to determination of vicarious liability questions and the exclusion of relationships akin to employment from the potential scope of vicarious liability. The logic of enterprise risk theory is that the status of the worker is irrelevant, provided they are implicated in materialisation of a risk that is inherent in the defendant organisation's activities.

The traditional exclusion of independent contractors from the scope of vicarious liability does not create incoherence with enterprise risk theory.[149] This is because, if we accept the organisation test, a finding that a worker is engaged in an enterprise of their own, rather than as part of the organisation that retained them to provide a particular service, then enterprise risk would favour allocation of that risk to the worker's enterprise, and not the organisation that retained the worker for a particular service.[150] This argument reflects the current Australian position that disfavours possible dual vicarious liability.[151] Thus, enterprise risk theory is entirely congruent with the employee/contractor distinction.[152] The same cannot be said for those in a relationship akin to employment. They are *not* in an enterprise of their own; if they were, they would be independent contractors, not in a position akin to employment. Thus, excluding them from the scope of vicarious liability is incoherent with enterprise risk theory. There is no (other) enterprise to which to allocate the risk in such a situation.

Though this article is primarily concerned with the question whether relationships akin to employment should potentially be able to found an action for vicarious liability, there is another relevant question — whether the difficulties in relation to establishing the required employment relationship, particularly in cases involving religious institutions, justify a special rule. Others have suggested, at least in cases

[149] Cf Brodie (n 7) 506–8.
[150] In *Cox* (n 37) 670, Lord Reed (for the Court) held a relationship other than employment (such as one akin to employment) could give rise to vicarious liability where the wrongdoer's activities were integral to the defendant's business activities and for their benefit rather than attributable to the conduct of a recognisably independent business. Cf James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17 *Oxford University Commonwealth Law Journal* 162, 169; Plunkett, 'Taking Stock' (n 58) 559.
[151] *Oceanic Crest* (n 20) 641 (Gibbs CJ), 646 (Wilson J), 685 (Dawson J).
[152] Bomball argues the organisation test for determining whether a worker is an employee or an independent contractor is consistent with enterprise risk theory: Entrepreneurship (n 7) 101–2. Cf Marco Cappelletti, 'A Pluralist View of Vicarious Liability in Tort' (2024) 140 *Law Quarterly Review* 61, 74.

of institutional child abuse (many of which, but not all, involve religious institutions), the law might *abolish* the requirement of an employment relationship.[153] This would be justified on the basis of the sometimes ambiguous status upon which religious figures are engaged by religious organisations.

Respectfully responding, if the High Court has not accepted relationships akin to employment can found vicarious liability, it is unlikely to go further and discard the need for an employment relationship altogether. It would of course be open for parliament to carve out this exception. However, the response to the *Royal Commission into Institutional Child Sexual Abuse* (discussed below at Part V(H)) suggests, at least at present, disinclination to do so. Secondly, it is not satisfactory to carve out a special rule to deal with institutional child sexual abuse, on principle, because the rationale for extending vicarious liability to situations akin to employment holds true, regardless of whether we are dealing with child sexual abuse, adult sexual abuse, child physical but non-sexual abuse, adult non-sexual abuse, or other types of injury or damage. Of course, we find child sexual abuse abhorrent, in a way that we do not find other types of injury abhorrent. However, this is not regarded as sufficient for a special carveout. The UK Supreme Court has not favoured special rules for vicarious liability as it relates to sexual abuse.[154] Thus, while I acknowledge the special difficulties in applying vicarious liability in this context, my preferred response is to accept that relationships akin to employment can found such liability, rather than recognise a special exception to the general rule.

F *Interaction with Narrow View of Employment Relationships*

The effect of the High Court's refusal to apply vicarious liability to relationships akin to employment is exacerbated by the Court's narrow approach to determining whether an employment relationship exists. It was noted earlier that Australian law had taken a different path to the UK here. The High Court has utilised a formalistic, technical approach to the interpretation of employment contracts.[155] If the contract as written reflects an apparent view of a non-employment relationship, a majority of the Court will likely take this on face value, even if the reality of how the contract works is different. In other words, the fact the Court takes a technical approach to interpreting employment contracts means there is potentially less scope for vicarious liability — the party drafting the contract, if well-advised, will know how to draft a contract to reflect its wishes regarding whether the engagement is

[153] Griffin and Briffa (n 139) 474–5; Beuermann, 'Vicarious Liability and Conferred Authority' (n 10) 1007.
[154] *Cox* (n 37) 672; *BXB* (n 1) 588–9.
[155] *CFMMEU* (n 14).

employment or not. Given the raft of regulation and the spectre of vicarious liability surrounding employment relationships, assume the party drafting the contract (the organisation procuring the work) will draft the contract to suggest a non-employment agreement,[156] even though as the contract actually runs (and is intended to run) it is essentially employment.[157] Courts will heed the label given to the arrangements.[158] Unless the court views it as a sham (possible, but rare), the effect will be to limit the scope of vicarious liability, more narrowly than the substance of the contract requires. This is made worse by the fact that, on another issue, the Court refuses to consider whether relationships somewhat like employment can ground vicarious liability. Of course, some such relationships might be those subject to the drafting just discussed, but there could be others.

There is a "flipside" to an observation that the difficulties created by the High Court's refusal to accept relationships akin to employment can ground vicarious liability are exacerbated by the High Court's technical approach to determining whether or not an employment relationship exists. That flipside is that the High Court should accept that relationships akin to employment can ground vicarious liability. This would appropriately focus the law on the substance of the parties' relationship, not how it is technically structured.

In other words, there is logical alignment between a focus on the substance of the parties' actual relationship and agreement that relationships that are akin to employment can have the same legal consequences (at least, for vicarious liability) as employment. And there is a depressing consistency in a court that focuses on form rather than substance, and one that refuses to accept relationships akin to employment should be treated (at least for some purposes) as identical in effect to employment.

G *Whether Reform Is for Parliament Rather than Courts*

Another reason the majority gave for refusing to accept relationships akin to employment could meet the first element was that reform was a matter for the legislature, not courts.[159] Reasonable people will differ on the proper scope of

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[156] For example, a clause specifying the worker may not accept work: *Consistent Group Ltd v Kalwak* [2007] IRLR 560, 566 [57]–[58] (Elias J).
[157] See Stewart, Irving and Bomball (n 60) 1245.
[158] *CFMMEU* (n 14) 214 (Gageler and Gleeson JJ), 234–5 (Gordon J, Steward J agreeing at 243); ibid 1224–5.
[159] *Bird* (n 28) 83–4 (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), 141–2 (Jagot J). The joint reasons claimed 'abandoning the threshold requirement of a relationship of employment for the purposes of vicarious liability does not fit within the body of accepted rules and principles': at 82. Their Honours had just cited *Breen* (n 95) 115: '[j]udges have no authority to invent legal doctrine

judicial power. One view is that vicarious liability is a creature of the common law. It was the common law that established the two elements to be met for vicarious liability to apply. It would, on this view, be proper for the Court to modify either requirement, as new scenarios are considered. Vicarious liability has evolved through the centuries through courts. It seems timid to refuse to countenance a relatively modest refinement to one existing element of the doctrine, and Gleeson J acknowledged its modesty.[160] The UK courts, hardly radical in nature, took this step. It would not amount to an 'invention' or 'distortion' of legal doctrine, to adopt the test in *Breen v Williams*,[161] cited above. What courts have created, they can modify.[162] Giliker, writing of the Australian position before *Bird*, is critical:

> [R]etaining a narrow interpretation of "employee" is misguided in that it fails to respond to the casualisation of modern working relationships … [r]ecognising the impact of the gig economy is not a sign of weakness, but one of progress.[163]

It may be added that retaining a narrow interpretation of employee in the current context fails to take account of changed societal attitudes towards abuse, including the need for accountability. The High Court's timidity is unwarranted.

The alternative is legislative reform. This is a state responsibility, so the spectre arises of eight different sets of principles. All jurisdictions have had the opportunity to reform civil liability legislation in light of greater awareness of these issues. Only New South Wales has specifically legislated to provide vicarious liability could apply to relationships akin to employment, and that was limited to child sexual abuse.[164] Other jurisdictions have resorted to duty of care principles in this context, rather than vicarious liability. Obviously, this is a less certain path to liability, because on a given set of facts, it may or may not be found that a duty of care has been breached, and the plaintiff has suffered loss as a result of it. For these reasons, statutory reform is not a realistic alternative.

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that distorts or does not extend or modify accepted legal rules and principles' (Gaudron and McHugh JJ).

[160] *Bird* (n 28) 93.

[161] *Breen* (n 95).

[162] *Jaensch v Coffey* (1984) 155 CLR 549, 599–600 (Deane J); McHugh, 'Part II' (n 54) 116.

[163] Giliker, 'Analysing Institutional Liability' (n 42) 533. Giliker describes the Australian position as 'overly cautious'.

[164] *CLA* (NSW) (n 100) s 6G. Western Australia has provided judgment against an individual in this context can be enforced against the relevant institution's assets: *CLA* WA (n 100) s 15C (though it does not use the words 'vicarious liability'). Other states have preferred duty of care (which may or may not have been breached), not vicarious liability: *Wrongs Act* s 91; *CLA* Qld (n 100) s 33D; *CLA* Tas (n 100) s 49H. Only the South Australian legislation specifically contradicts the suggestion relationships akin to employment can give rise to vicarious liability: *CLA* SA (n 100) s 50G.

H *Recommendations of the Royal Commission*

Finally, it should be noted the *Redress and Civil Litigation Report* (2015), compiled in association with the *Royal Commission into Institutional Responses to Child Sexual Abuse* (2017), recommended legislation making institutions liable for child sexual abuse committed by those 'associated' with the institution, subject to a reverse onus provision. The institution would need to demonstrate it had taken all reasonable steps to avoid the abuse. It concluded:

> For the purposes of the … imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.[165]

Of course, it is not suggested courts should make reforms to the law just because a royal commission has so recommended. It is one relevant factor that after an investigation, a royal commission has made this recommendation to extend vicarious liability beyond those traditionally regarded as employees to include those 'associated' with the institution.

I *Summary of Reflections*

In summary, the High Court decision in *Bird* is unsatisfactory because: (a) in attempting to distinguish Australian law from that in the UK, it makes misleading statements about Australian law; (b) in attempting to explain why the UK position should not be taken, it claims it would result in the removal of a traditional distinction drawn in the context of employment. The UK Supreme Court decision earlier in the same year (cited by members of the High Court) emphatically *rejects* that suggestion; (c) in attempting to explain why Australian law should not recognise relationships akin to employment could attract vicarious liability, the judgment wrongly claims that step would require overrule or partial overrule of past decisions; (d) it leads to incoherence between the first and second elements of vicarious liability, assuming they should be read together; (e) it is inconsistent with the policy rationale the High Court has previously accepted underlies vicarious liability; (f) it does not recognise that vicarious liability is a creature of the common law, so it is appropriate for courts to reform it when required; and (g) it runs counter

[165] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, 2015) 495 Recommendation 92. The joint reasons in *Bird* (n 28) noted this Report but not its recommendation vicarious liability be extended beyond traditional conceptions of employment: at 83.

to specific recommendations of the Royal Commission in this area to permit vicarious liability to apply in non-employment situations, at least in this context.

And I do not forget the practical outcome — the law denies liability of a religious institution, although they placed a wrongdoer in a trusted position which facilitated his egregious wrongdoing against a trusting family in the context of functions performed for the religious institution.

VI CONCLUSION

Changes in the nature and realities of employment, and in societal values, have strained existing principles relating to vicarious liability. The law has proven itself to be reasonably nimble in responding to many of these changes. As part of this evolution, the UK Supreme Court has accepted relationships akin to employment can attract vicarious liability. The Australian High Court recently rejected this development. This article has argued the High Court was wrong to do so. The reasoning of the majority approach is unconvincing and, at times, plainly incorrect. The decision creates incoherence between the two limbs of vicarious liability, and with the rationale of the doctrine apparently accepted by the Court. It is generally not favoured by commentators, and contradicts recommendations of the Royal Commission. Given these are all principles of the common law, courts can readily address these matters. And the practical result of this decision is denial of a legal remedy to someone who has been the victim of disgraceful sexual abuse by a person in a position of trust, put there by the defendant, and failure of the law to allocate any legal responsibility to an institution that employed a person who committed such abuse. Many would regard this as manifestly unjust.