A HISTORICAL EXAMINATION OF VICARIOUS LIABILITY: A 'VERITABLE UPAS TREE'?

I. INTRODUCTION

In his forthright and at times rather eccentric critique of vicarious liability written in 1916, Thomas Baty likened vicarious liability to the upas tree.[1] The upas tree (*antiaris toxicaria*), which is a traditional source of poison for arrows and blow darts, has not surprisingly captured the literary imagination.[2] With due allowance for hyperbole there is some truth in this characterisation. Writing to Oliver Wendall Holmes, Sir Frederick Pollock would describe Baty's book as "clever paradoxical" and go onto to say that its author was "of the school who think that the law can be reduced to rigorous chess problems".[3] In a review of the work in the *Law Quarterly Review*, Pollock made many of the same points at greater length.[4] Pollock himself was decidedly more pragmatic. He accused Baty of overlooking the "factor of insurance in the practical aspect of these questions".[5] The division between normative neatness and practical considerations remains present in the modern commentary on vicarious liability.[6] Baty had a point in his general criticism of vicarious liability. Vicarious liability was, and it remains, curiously unsatisfactory. Even within the law of tort, which has proved volatile in a number of respects, few legal doctrines can be as difficult to pin down as vicarious liability. In *Mohamud v WM Morrison Supermarkets plc*,[7] Lord Dyson recently observed that, "To search for certainty and precision in vicarious

[1] *Vicarious liability: a short history of the liability of employers, principals, partners, associations and trade-union members, with a chapter on the laws of Scotland and foreign states* (Oxford 1916), 7. For Baty's extraordinary life see, Motokichi Hasegawa (ed.) Thomas Baty, *Alone in Japan: the reminiscences of an international jurist resident in Japan 1916-1954* (Tokyo 1959).
[2] For example, the tree is the subject of a poem by Pushkin, The Upas Tree.
[3] Mark De Wolfe Howe (ed.), *The Pollock-Holmes Letters Correspondence of Sir Frederick Pollock & Mr Justice Holmes 1894-1932 vol. 1* (Cambridge 1942), 233 Pollock to Holmes March 1916.
[4] (1916) 32 L.Q.R. 226.
[5] Ibid. 227.
[6] For a recent, detailed examination of these complex issues see: Anthony Gray, *Vicarious Liability Critique and Reform* (Oxford 2018).
[7] [2016] A.C. 677.

liability is to undertake a quest for a chimaera".[8] He was unworried by this fact because he thought that, "impression is inevitable" when it came to vicarious liability.[9]

In recent decades, the problem of systemic child abuse has prompted a re-examination of this area of law. The authorities, which are atypical, raise difficult issues about the extent to which an employer ought to be liable for the criminal activity of an employee.[10] In many of these cases as in others there is an allied problem – the extent to which there should be liability for those who are akin to an employee such as an independent contractor.[11] Whilst some private law legal doctrines remain relatively stable, others periodically undergo a realignment. Vicarious liability is undoubtedly of the second type. Several major changes have taken place down the centuries. After a period of stability from the Middle Ages into the early modern period in the late seventeenth into the early eighteenth century, the existing law of vicarious liability began to be challenged. During this period economic structures and employment relations were changing.[12] The mid-nineteenth century saw another reappraisal of vicarious liability. It was probably connected to the fact that legal writers and judges began to recognise that fault was central when it came to rationalising tortious liability.[13] At this point vicarious liability, which imposes liability on an employer without fault, seems to require an explanation. The period that follows which runs from the late nineteenth century until after the Second World War has not attracted much comment.[14] This omission is important gap. A series of events led to a reconsideration of vicarious liability during this period. These included changes in the way that legal writers began thinking about vicarious liability along with some important statutory reforms of tort law. During the 1950s the rationalisation of vicarious liability also came to be bound up in an attempt by Lord Denning to reshape tortious responsibility.

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[8] [2016] A.C. 677, 695.
[9] Ibid.
[10] Some recent examples which went to the highest court include: *Lister v Hesley Hall* [2002] 1 A.C. 215; *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 A.C. 1; *Woodland v Swimming Teachers Association and others* [2014] A.C. 537. There are also numerous examples in other jurisdictions including: *Bazeley v Curry* [1999] 2 S.C.R. 534; *Jacobi v Griffiths* [1999] 2 SCR 570; *EDG v Hammer* [2003] 2 S.C.R. 459; *New South Wales v Lepore* (2003) 212 C.L.R. 511. For a critical reflection on the recent authorities see: 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 CLJ 506.
[11] *Catholic Child Welfare Society v Various Claimants* [2013] 2 A.C. 1; *Cox v Ministry of Justice* [2016] A.C. 660; *Armes v Nottinghamshire County Council* [2017] 3 W.L.R. 1000. A recent Court of Appeal decision suggests that there can be vicarious liability for the torts of independent contractors: *Barclays Bank Plc v Various Claimants* [2018] EWCA (Civ) 1670.
[12] For an overview of the history of the contract of employment see, Simon Deakin, "The Contract of Employment: A Study in Legal Evolution" (2001) 11 Historical Studies in Industrial Relations 1.
[13] DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999), 182. Roscoe Pound made a similar point in 1923, Roscoe Pound, *Interpretations of Legal History* (Cambridge 1923), 110.
[14] For example, the subject is hardly mentioned in the excellent: Paul Mitchell, *A History of Tort Law 1900-1950* (Cambridge 2015).

II. RATIONALISING VICARIOUS LIABILITY BEFORE THE 20TH CENTURY

Most modern lawyers, if they think about a rationale at all, would explain vicarious liability using the servant's tort theory under which an employee's duty of care is imputed to the employer and by which the employer becomes liable because of a breach of duty by an employee.[15] Under the alternative, master's tort theory, an employee's acts rather than their legal duty are attributed to the employer. On this view the employer commits a tort by a breach of their *own* tortious duty. For the most part both theories produce the same outcome although there are some occasions where the distinction is critical.[16] For example under the servant's tort theory, the employer cannot be liable when the employee has a defence to the tort. The master's tort theory has no such difficulties because the employer is liable for the acts of the employee and not their tort.

In *Majrowski v Guy's and St Thomas' NHS Trust*,[17] Lord Nicholls observed, "In times past this 'employer's tort' analysis of vicarious liability had respectable support in England. But since then your Lordships' House has firmly discarded this basis in favour of the 'employee's tort' approach". Before the nineteenth century it is impossible to find a single coherent explanation for vicarious liability. There were a number of reasons for this omission. Perhaps the most important was the fact that jurors sat at the heart of the system of civil litigation and were allowed to determine questions of liability under the cloak of proof.[18] As a result legal doctrine was largely hidden behind jury verdicts of guilty or not guilty.[19] The decline of the jury began in the mid-eighteenth century but the boundary between law and fact, where the former was a matter for a jury and the latter a matter for a judge, only really hardened in the nineteenth century when judges in civil cases almost entirely asserted their dominance over juries.[20] Trying to understand vicarious liability in the Middle Ages is an exercise in piecing

[15] E. Peel and J. Groudkamp, *Winfield and Jolowicz on Tort*, 19th ed. (London 2014), 21-001; Michael Jones (ed), *Clerk & Lindsell on Torts*, 22nd ed. (London 2018), 6.60; Paula Giliker, *Vicarious Liability in Tort A Comparative Perspective* (Cambridge, 2010), 13-16. One exception is, Robert Stevens, *Torts and Rights* (Oxford, 2007), 262-67. Stevens favours the master's tort analysis but his reasoning is quite different.
[16] For a useful short summary see: Robert Stevens, "Vicarious Liability or Vicarious Action?" (2007) 123 L.Q.R. 30.
[17] [2007] 1 A.C. 224, 230.
[18] Morris S. Arnold, "Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind" (1974) 18 American Journal of Legal History 267; J. Mitnick, "From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror" (1988) 23 American Journal of Legal History 201.
[19] Sometimes these issues came to light by way of special verdicts, see Robert Palmer, *English Law in the Age of the Black Death 1348-1381* (Chapel Hill, 1993), 156-59.
[20] This can be seen in the way that judges dealt with questions of duty and breach in negligence, see D.J. Ibbetson, "The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries" in Eltjo Schrage (ed.), *Negligence The Comparative Legal History of the Law of Torts* (Berlin 2001), 229, 240-48.

together disparate fragments.[21] There are dangers in modern judges reading modern interpretations into those authorities.[22]

Early examples in which a master was liable for a servant occur in the context of actions of trespass on the case based on customs of the realm.[23] One of the most important customs concerned the escape of a domestic fire.[24] In the course of argument in *Beaulieu v Finglam* in 1401 it was said that, "It would be against all reason to put blame or fault on a man where there is none in him; for his servant's negligence cannot be said to be his own doing". Markham J. was not sympathetic:

> A man is bound to answer for his servant's act, as for his lodger's act, in such a case. For if my servant or lodger puts a candle on the wall and the candle falls into the straw and burns the whole house, and also my neighbour's house, in this case I shall answer to my neighbour for the damage which he has suffered.[25]

In the absence of custom the same principles began to apply. In *Caunt's Case*,[26] an action on the case for deceit was brought against both a master and his servant for warranting a butt of rumney wine sound, when it was "unwholesome and unsuitable". It emerged in the pleading that a servant had sold the wine. Martin J explained that:

> But if your servant, with your collusion and by your command, sells some unwholesome wine, the buyer shall have an action against you; for it is your own sale. If the case is that you did not command your servant to sell the wine to this plaintiff, then you may say that you did not sell it to the plaintiff.

The idea here was that an employer should be liable for an *act* that they had commanded. The precise scope of a command could cause disagreement[27] but the general idea reflects the notion that a servant stands in the shoes of a master and is therefore rather closer to the modern law of agency in appearance than it is to vicarious liability.

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[21] For a helpful discussion see, Ibbetson, *Obligations*, 69-70. For a more detailed treatment of the early law see, Warren Swain, "Vicarious liability, a pailful of slops and other hazards" in Kit Barker and Ross Grantham (eds.), *Apportionment in Private Law* (Oxford 2018), 89-110.
[22] For example in the way that Lord Toulson finds something akin to non-delegable duties and possibly enterprise liability in the old cases: *Mohamud v WM Morrison Supermarkets plc* [2016] A.C. 677, 684-87
[23] There were earlier precedents in some of these situations in trespass writs, see Morris M. Arnold (ed.), *Select Cases of Trespass from the King's Courts 1307-1399 (vol I) Selden Society Vol. 100* (London 1984), lxiv-lxx.
[24] J.H. Baker, "Trespass, Case, and the Common Law of Negligence 1500-1700" in Schrage (ed.), *Negligence*, 47, 60-62.
[25] (1401) YB Pas 2 Hen IV pl. 6, fo. 18 reproduced in J.H. Baker, *Baker and Milsom Sources of English Legal History*, 2nd ed. (Oxford 2010), 610-11.
[26] (1430) YB Mich 9 Hen VI pl. 37, fo. 53 reproduced in Baker, ibid., 561-62.
[27] For an example, see *Anon* (1471) YB Trin Edw IV fo. 6, pl. 10 reproduced in Baker, *Sources*, 563-65.

By the late seventeenth century the standard explanation for a master's liability was the principle of authority instead of command. Authority is a more malleable concept. It is easier to say that a servant acted with a master's authority (which encompasses a greater range of conduct), than it is to say that they acted under his command. It is possible to authorise something without commanding it. As Holt CJ explained in *Tuberville v Stamp*[28] where a fire spread:

> [I]f the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit.[29]

These differences apart the terms command and authority were still sometimes used interchangeably.[30] This is perhaps not surprising as they could easily cover the same conduct. An additional, third principle emerged in the nineteenth century. It began to be said that an employer's liability turned on whether the employee was acting in the course of employment. Yet despite the new terminology the basic idea remained the same: an employer was liable because the employee's act was imputed to them rather than the employee's duty of care. The master's tort theory was emphasised by Lord Chelmsford L.C. in a well-cited passage on a Scottish Appeal, *Bartonshill Coal Co. v McGuire*:[31]

> It has long been the established law of this country that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of this is, that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se.*[32]

Many legal writers of the period came to a similar conclusion. Charles Smith expressed himself with some brevity:

> A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service: the maxims applicable to such cases being, *Respondeat superior*, and … *Qui facit per alium facit per se*.[33]

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[28] (1697) 1 Ld Raym 264, 12 Mod 152, Carth 425, Comb 459, Comyns 32, Holt 9, Skin 681.
[29] (1697) 1 Ld Raym 264, 264-65. For the influence of Holt C.J. see, Lord Toulson, *Mohamud v WM Morrison Supermarkets plc* [2016] A.C. 677, 684.
[30] *Boucher v Lawson* (1734) Cas T Hard 85, 88 (by counsel for the defendant).
[31] (1858) 3 Macq 300.
[32] Ibid. 306.
[33] Charles Smith, *A Treatise on the Law of Master and Servant* (London 1852), 151.

In books as varied as law student crammer,[34] Underhill's treatise on tort law,[35] to Holland's avowedly theoretical, *The Elements of Jurisprudence*,[36] the maxim *qui facit per alium facit per se* was used to explain the reason a master was liable for his servant. To modern eyes stating 'let the master answer' or 'he who acts through another, acts himself' are poor explanations. At the time the use of legal maxims was a popular technique[37] and maxims were still important enough to justify an entire treatise.[38] Even those writers who avoided maxims and drew a parallel with agency instead were still making the same point that an employer was liable for the acts of his employee.[39]

There was judicial support for a master's tort theory elsewhere.[40] Another definitive statement can be found in *Hutchinson v York, Newcastle and Berwick Railway*,[41] where Baron Alderson held that, "The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act".[42] He continued that, "whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: *Qui facit per alium, facit per se*".[43] Despite the words of Lord Chelmsford L.C. and Baron Alderson things were not always quite as clear as they might at first seem. A further mid-nineteenth description by Willes J. in *Barwick v English Joint Stock Bank*[44] was more ambiguous:

> The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.[45]

Willes J. emphasised the servant's wrong as opposed to their act. Another aspect of the decision is unusual. The term enterprise liability is much more recent but the recognition that doing something for a master's benefit

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[34] Joseph Shearwood, *A Sketch of the Law of Tort for the Bar and Solicitors' Final Examinations* (London 1886), 60.
[35] Sir Arthur Underhill, *A Summary of the Law of Torts, or, Wrongs Independent of Contract* (London 1873), 30.
[36] Sir Thomas Holland, *The Elements of Jurisprudence* (Oxford 1880), 99.
[37] In addition to those specifically mentioned see: Robert Campbell, *The Law of Negligence* (London 1871), 55; Francis Piggott, *Principles of the Law of Torts* (London 1885), 53.
[38] Herbert Broom, *A Selection of Legal Maxims, classified and illustrated* (London 1845), 200, for particular reference to the maxim *qui facit per alium facit per se*.
[39] For example: Anthony Hammond, *A Practical Treatise on Parties to Actions and Proceedings* (London 1817), 82; Francis Piggott, *Principles of the Law of Torts* (London 1885), 53; Ernest Parkyn, *The Law of Master and Servant* (London 1897), 101.
[40] *Tolhausen v Davies* (1888) 58 L.J.Q.B. 98, 99.
[41] (1850) 5 Ex 343.
[42] Ibid. 350.
[43] (1850) 5 Ex 343, 350.
[44] (1867) L.R. 2 Ex 259.
[45] Ibid. 265.

brought reciprocal obligations on the master has echoes in the modern idea as articulated by Calabresi: 'the notion that losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault'.[46] Support for these ideas is sporadic before modern times but it is not entirely absent either. As a result there was no one rationale for liability.

In *Bush v Steinman*[47] Rooke J. had said: 'He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs'.[48] On that occasion the owner of a house was liable when a servant of a sub-contractor of a builder he had employed left lime in the road, causing the plaintiff's carriage to overturn. The relationship between the defendant and the person causing the damage was more tenuous than the usual one between a master and servant. Whilst agreeing with his colleagues Eyre C.J. was clearly uneasy about the outcome. As he pointed out, the owner 'appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author'.[49] For a while the courts were content to apply special rules in cases like this to occupiers of land who were liable for independent contractors but this line of authority was finally rejected in *Reedie v London and North Western Railway Co*.[50]

III. SEARCHING FOR A RATIONALE FOR VICARIOUS LIABILITY

By the final decades of the nineteenth century it was obvious to some legal writers that the orthodox explanations were inadequate. Sir Frederick Pollock argued that *respondeat superior*, "is a dogmatic statement, not an explanation"; *qui facit per alium facit per se* was also deficient because it does not cover acts of servants that are unauthorised but still within the course of employment.[51] He points out if the master was to be blamed for showing a lack of care in employing a servant who commits a tort then it should follow that if he had shown all due care he ought to be absolved of liability, which was clearly not the case. Pollock's favoured explanation was closer to enterprise liability:

[46] Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Y.L.J. 499, 500.
[47] (1799) 1 B & P 404.
[48] Ibid. 409.
[49] (1799) 1 B & P 404, 406.
[50] (1849) 4 Ex 244, 20 L.J. Ex 65, 13 Jur 659. For a discussion of these cases see, Ibbetson, *Obligations*, 182-83.
[51] Sir Frederick Pollock, *The Law of Torts: a Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law* (London 1887), 67.

> I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.[52]

Pollock took up the subject of vicarious liability again in his more philosophical work, *Essays in Jurisprudence and Ethics*.[53] Having once more criticised the standard justifications he pointed out that:

> In the case of injury suffered through a servant's negligence, the servant, generally speaking, cannot pay, and the master can; and the feeling that compensation ought to be had somewhere jumps at the master's liability.[54]

This looks less like an explanation than a statement of the obvious. Pollock himself recognised that his own reasoning was not entirely satisfactory. Taken to its logical conclusion it would mean that a master could be liable for losses caused by behaviour that he has expressly forbidden provided the servant was in breach of his duty and acting in the course of his employment.[55] The idea that the employer was better able to pay has some intuitive appeal and Pollock was still not alone in suggesting it.[56] Pollock's own position was more subtle. It involved an idea akin to enterprise liability but one with a moral underpinning reflected in the employer's duty.[57]

One of the reasons that vicarious liability had come to be seen as problematic was identified by Pollock in a note in the *Law Quarterly Review* where he pointed out that a doctrine which had grown up during very different social and economic conditions was "incongruous" in an age of "industrial individualism".[58] Pollock was not alone in trying to find a new explanation. Wigmore looked for answers in the history of the doctrine.[59] Providing a critique was rather easier than providing an alternative explanation. Enterprise liability for example proved to be a dead end as far as the courts of the time were concerned.[60] Baty produced the most radical proposal of the era. His basic thesis was that vicarious liability was an invention of Holt C.J..[61] His arguments are rather

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[52] Ibid. 68.
[53] (London 1882).
[54] Ibid. 118.
[55] Pollock, *Torts*, 117.
[56] Frank Hackett, "Why is a Master Liable for the Torts of His Servant?" (1893) 7 H.L.R. 107, 111-12.
[57] On this moral aspect to Pollock's reasoning see, Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford 2004), 257-60.
[58] The phrase used in this context was Pollock's in a note: (1918) 34 L.Q.R. 230, 231.
[59] J.H. Wigmore, "Responsibility for Tortious Acts: Its History.-II." (1894) 7 H.L.R. 383.
[60] There is the occasional authority supporting this analysis in the nineteenth century but much earlier on and only an isolated example, see *Duncan v Findlater* (1839) 6 Cl & F 894, 910.
[61] Baty, *Vicarious Liability*, 29.

difficult to unravel but Baty seems to object to the idea that an employer could be liable for an employee simply because they act in the course of their employment. Rather he suggests that there should be no liability on the part of the employer unless there is an "invitation of confidence" between the plaintiff and the employer.[62] Harold Laski made no mention of master or servant torts and whilst he saw value in vicarious liability, in an article in the Yale Law Journal in 1916[63] he argued that a new "social interpretation" was needed. He found this in the idea that, "The promotion of social solidarity is an end it is peculiarly incumbent upon the law to promote, since its own strength and even life, depends upon the growth of that sentiment".[64] Laski's support of this version of vicarious liability was a reflection of his criticism of laissez-faire ideology and he would comment, "[I]t becomes increasingly evident that society cannot be governed on the principles of commercial nihilism".[65]

Laski was a political theorist rather than a lawyer. His friend the American jurist, Oliver Wendell Holmes, added a note of caution in a letter to Laski when he said that, "there should be a limit to be found in values to the public of the life, limb, or what not damaged".[66] Laski's attempt to explain vicarious liability was likely to be too idealistic for most lawyers but it does make the point that the existing and long established rationale for vicarious liability were no longer adequate. Nor was he alone in seeking a social explanation. The future US Supreme Court justice William O. Douglas, agreed with Laski that the issue was one of "economic and social factors" but rather than promoting social solidarity he thought that vicarious liability was explained by an allocation of risk.[67]

The absence of a single convincing explanation was one sign that vicarious liability rested on unsecure and shifting doctrinal foundations. Baty went to some trouble to identify all the different reasons legal writers had put forward for vicarious liability. He came up with nine different justification from which he deduced that, "A doctrine that is accounted for on nine different grounds may reasonably be suspected as resting on no very firm basis of policy".[68] Like Pollock in his *Essays*, Baty would conclude that the real reason for an employer's

[62] Baty, *Vicarious Liability*, 12. Baty suggests that this explains the liability of innkeepers for the loss or damage of a guest's goods.
[63] Harold J. Laski, "The Basis of Vicarious Liability" (1916) 26 Y.L.J. 105.
[64] Ibid. 121.
[65] Laski, "Vicarious Liability", 134.
[66] Mark De Wolfe Howe (ed.), *Holmes-Laski Letters The Correspondence of Mr Justice Holmes and Harold J Laski 1916-1935 Vol 1* (New York 1953) Holmes to Laski, 13 Jan 1917. Holmes wrote these words after Laski promised a copy of his article but before he had received it.
[67] William O. Douglas, "Vicarious Liability and Administration of Risk I" (1929) 38 Y.L.J. 584; "Vicarious Liability and Administration of Risk II" (1929) 38 Y.L.J. 720.
[68] Baty, *Vicarious Liability*, 143.

liability rested on nothing stronger than that "damages are taken from a deep pocket".[69] Others were less ambitious. Thomas Beven would describe *respondeat superior* as a formula and not a reason[70] down to the final edition of his treatise in 1908.[71] Whilst he did not take the maxims too seriously he still adopted a master's tort approach.

The early treatise writers were prepared to support a theory of attribution. The master was liable because the servant's act was their act. Some of the newer generation of writers began to move towards a servant's tort analysis which stressed that the master was liable for the torts of a servant. For a long time both approaches existed side by side. Once the standard maxims began to be abandoned the nineteenth century lawyers were not always clear to distinguish liability for a tort and liability for an act. Willes J. and Pollock both talk about a servant's "wrong". Oliver Wendell Holmes himself was curiously imprecise. In the two instances in his book *The Common Law*,[72] in which he mentions the subject on one occasions he suggests that a master is liable for the servant's wrong and in the other the servant's act.[73]

In the leading treatise, by Clerk and Lindsell, the authors state that "the employer is liable for all torts committed by the party employed".[74] Yet a few pages earlier the older familiar formula appears with an emphasis on the act rather than the tort of the employee.[75] At best this seems to suggest that the authors put little weight on the distinction between wrongs and acts and by extension had no set notion of a master or servant's tort theory in mind. The same approach using these two formulas was evident in later editions of the same work.[76]

In the opening paragraph of the section of his treatise on master and servant, John Salmond, wrote:

> A master is liable for any tort committed by his servant while acting in the course of employment…Its rational justification is to be found in the presumption that the negligence and other torts of a servant in the execution of his master's business are either actually authorised by the master, or, at least, are the

[69] Baty, *Vicarious Liability*, 154.
[70] Thomas Beven, *Principles of the law of negligence* (London 1889), 271.
[71] Thomas Beven, *Principles of the law of negligence*, 3rd ed. (London 1908), vol. 1, 574.
[72] (Boston 1881).
[73] Ibid. 16, 90.
[74] J.F. Clerk and W.H.B. Lindsell, *The Law of Torts* (London 1889), 48.
[75] Ibid. 46.
[76] J.F. Clerk and W.H.B. Lindsell, *The Law of Torts*, 7th ed., by W. Wyatt-Paine (London 1921), 74.

> result of some want of care on the master's part in the choice of competent servants or in the superintendence and control of their work.[77]

The way in which Salmond sought to justify liability involved trying to locate fault with the employer and thereby provide a link to the employee's breach, although he also conceded that this rationale did not necessarily fit with all of the case law.[78] Salmond gave no explanation why he had suddenly abandoned the traditional view that an employer was liable for the acts of an employee rather than their torts. Salmond's wording in this context was not in any way ambiguous. Yet somewhat perplexingly in his book on legal theory Salmond wrote that vicarious liability meant that, "one man is made answerable for the acts of another".[79] This phrase is redolent of the master's tort theory and the same formula was used down to the last edition of *Jurisprudence* for which Salmond was responsible in 1924.[80] All of this rather begs the question whether Salmond appreciated the different meanings to which his language could give rise or whether he was actually committed to a master or servant tort analysis and was just imprecise with the language that he used.[81]

Writing thirty years after Salmond, Percy Winfield also favoured a servant's tort theory: "A is liable for the tort of B committed against C, though A is no party to the tort. B himself is of course usually liable".[82] At the same time he would admit that, "a scientific reason for the rule is hard to find".[83] He continued:

> It seems to be based on a mixture of ideas – that the master can usually pay while the servant cannot; that a master must conduct his business with due regard to the safety of others; that the master by employing the servant has 'set the whole thing in motion'.[84]

Whilst the debate about the true basis of vicarious liability was to be found in the legal literature albeit in ways that were sometimes confusing, such questions seem to have made little impression on the case law. Dicta can be found which seem to adopt a servant's tort analysis. Willes J has already been referred to. There is still no indication that judges placed any significance on a master or servant's tort theory any more than Clerk and Lindsell did.[85]

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[77] Sir John Salmond, *The Law of Torts: a Treatise on the English Law of Liability for Civil Injuries* (London 1907), 78.
[78] Ibid. 80, "very often this presumption does not correspond to the facts".
[79] Sir John Salmond, *Jurisprudence, or, The theory of the law* (London 1902), 465.
[80] Sir John Salmond, *Jurisprudence, or, The theory of the law*, 7th ed. (London 1924), 432.
[81] I am grateful to xxx for this important point.
[82] P.H. Winfield, *A Textbook on the Law of Tort* (London 1937), 123-24.
[83] Ibid. 126.
[84] Winfield, *Tort*, 126.
[85] For another example which seems to adopt a servant's tort analysis without much explicit discussion see, *Kelly v Metropolitan Railway Co* [1895] 1 Q.B. 944, 947-48.

The absence of judicial comment is not very surprising because for the most part it was not something that it was necessary for judges to address because either approach produced the same outcome. It is difficult to draw any very definitive conclusions but in those few situations where it made a difference to the outcome judges seemed content to adopt a master's tort analysis without explicitly admitting that they were doing so. *Dyer v Munday*,[86] provides a good example. The plaintiff's lodger had failed to pay an instalment on a hire-purchase agreement, and in the process of removing the lodger's furniture, the defendant's employee assaulted the plaintiff. The employee was not liable because of legislation, which prevented someone who had suffered a criminal sanction from facing a civil action in the same matter.[87] The employee here had a defence to a claim in tort yet the Court of Appeal saw no difficulty in finding the defendant employer liable. All three members of the Court of Appeal stressed that an employer could be liable for a criminal act of an employee provided it was in the course of employment. Lord Esher M.R. and Rigby L.J. explained that, as a matter of statutory interpretation, the statute, which protected the employee, did not apply to the employer.[88]

Outside specific legislation there were other situations in which the fact that the employee had a defence failed to prevent an employer's tortious liability. The law as it stood at the time meant that spouses could not be liable to each other in tort.[89] This potentially causes a problem when one spouse (the employee) injured another and the injured party brings a claim against an employer or principle. In *Smith v. Moss,*[90] an injured wife successfully brought an action against her mother in law, who was the master for the purposes of the action, when she was injured by her husband's driving. Charles J., held that, "I cannot conceive that, if a husband, while acting as agent for somebody else, commits a tort, which results in injury to the wife, the wife is deprived of her right to recover against the principal who is employing the husband as agent".[91] There was no attempt to justify this outcome by reference to master or servant's tort theory. Rather Charles J. reasoned that the negligent driver was both a husband and an agent and that his status as the former did not preclude a claim against a principal.

[86] [1895] 1 Q.B. 742 (CA).
[87] Offences Against the Person Act (1861) 24 & 25 Vict c 100, s 45.
[88] [1895] 1 Q.B. 742, 746-47 (Lord Esher M.R.), 748 (Rigby L.J.).
[89] For a typically thorough treatment of the question see the judgment of McCardie J. in *Gottliffe v Edelston* [1930] 2 K.B. 378.
[90] [1940] 1 K.B. 424.
[91] Ibid. 425.

By the late 1930s when Winfield was writing, legal authors had begun to reject traditional explanations for vicarious liability. Judicial silence on the subject does not necessarily correlate to enthusiasm for orthodoxy rather than acquiescence. During the second half of the twentieth century the master's tort theory would be eclipsed by the servant's tort theory of liability. In the immediate post war period however, despite what some legal writers were advocating, the master's tort theory still held sway.

IV. THE MASTER'S TORT THEORY REASSERTED

The most obvious occasion to discuss the theory of vicarious liability arose where the employee could call on a defence. *Broom v Morgan*[92] was the first detailed examination of the impact of marriage on tort liability between spouses. The plaintiff and her husband were employed by the defendant to run his public-house. The wife was injured when she fell through a trap door which her husband had negligently left unprotected. At first instance, Lord Goddard, restated the master's tort theory: "The master is just as much liable as though he commits the tort himself because the servant's act is his act".[93] Yet, as Lord Goddard conceded, *Smith v Moss* aside, there was very little authority on the precise question of vicarious liability and spouses. It is perhaps telling that he was forced to rely on an American decision of Cardozo C.J. in finding the employer liable.[94] The defendant appealed. The Court of Appeal dismissed the appeal and found the employer liable.[95] Although the judgments vary in detail, all three judges adopted a version of the traditional analysis. Singleton L.J. quoted from Lord Chelmsford in *Bartonshill Coal Co v McGuire* and again repeated the standard maxim, *qui facit per alium, facit per se*.[96] Hodson L.J. supported a master's tort analysis and also referred to Lord Chelmsford.[97] Denning L.J. gave a slightly different account of the master's tort theory. His version fitted with earlier ideas of enterprise liability: "It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done".[98] Enterprise liability would become an important general principle later on: this analysis was unusual for the time.[99] The Court of Appeal clearly felt uncomfortable about using the status of the victim as a wife in barring a claim against the employer. As

[92] [1952] 2 All E.R. 1007.
[93] [1952] 2 All E.R. 1007, 1009.
[94] [1952] 2 All E.R. 1007, 1010. The decision was *Schubert v August Schubert Wagon Co* (1928) 164 N.E. 43.
[95] [1953] 1 Q.B. 597.
[96] [1953] 1 Q.B. 597, 602.
[97] [1953] 1 Q.B. 597, 612.
[98] [1953] 1 Q.B. 597, 608.
[99] For later on see note 159 below.

Singleton L.J. explained, "there is no reason, either in law or in common sense, why they (the employer) should be given an immunity which springs in the case of husband and wife from the fiction that they are one, and the desire that litigation between husband and wife should not be encouraged".[100]

A statute in 1962 meant spouses could be liable to each other in tort and therefore this situation ceased to cause difficulties.[101] Actions against the employer of a spouse were however not the only occasion when judges in the immediate post-war period would restate the master's tort analysis. In *Twine v Bean's Express Ltd*[102] an employee of the defendant carried an unauthorised passenger in the defendant's van who was killed as a result of the employee's negligent driving. The employer was held not be liable. The plaintiff was a trespasser and the employee was not authorised to carry passengers. The decision is unsatisfactory on several levels,[103] but it does contain an unequivocal endorsement of the master's tort theory. Uthwatt J. stated: "The law attributes to the employer the acts of a servant done in the course of his employment and fastens upon him responsibility for those acts".[104] The Court of Appeal did not consider the correctness of this analysis but dismissed the appeal on the grounds that the driver was not acting in the course of his employment.[105]

A third group of decisions concern "common employment". The origins of the doctrine are obscure,[106] but it was not contested by the mid-nineteenth century.[107] An employee was prevented from bringing a claim against an employer for an injury caused to him by another employee. The common employment doctrine marked a significant inroad into the principles of vicarious liability. Whilst the implications were serious for those involved, they were not quite as far reaching after 1880 with the rise of statutory liability for workplace

[100] [1953] 1 Q.B. 597, 607.
[101] Law Reform (Husband and Wife) Act 1962, s 1.
[102] [1946] 1 All E.R. 202.
[103] There is a useful case-note on the decision: F.H. Newark, "Twine v. Bean's Express, Ltd." (1954) 17 M.L.R. 102.
[104] [1946] 1 All E.R. 202, 204.
[105] (1946) 62 T.L.R. 458.
[106] It is commonly but erroneously attributed to *Priestley v Fowler* (1837) 3 M & W 1. See A.W. Brian Simpson, *Leading Cases in the Common Law* (Oxford, 1995) 100-134. Fears about the scope of vicarious liability if the claim were to succeed may have been an important factor in the outcome: Michael Stein, "Priestley v. Fowler (1837) and the Emerging Tort of Negligence" (2003) 44 Boston College Law Review 689, 700.
[107] *Hutchinson v York, Newcastle and Berwick Railway* (1850) 5 Ex 343; *Bartonshill Coal Company v Reid* (1858) 3 Macq 282.

injury.[108] There were also a series of significant exceptions to the prohibition.[109] By the late 1930s the whole doctrine of common employment was increasingly seen as unsatisfactory. Lord Wright in *Wilson & Clyde Coal Company Ltd v English* even went as far as to suggest that it was 'well-established, but illogical'.[110] Academic writers were also critical. William Robson wrote that, 'The time has clearly come when the doctrine of common employment should be abolished'.[111] One difficulty recognised by Lord Macmillan was that common employment could potentially come into conflict with vicarious liability:

> If a servant is injured by the negligence of a fellow-servant acting within the scope of their common employment, the former doctrine would impose liability on the master, while the latter doctrine would exculpate him.[112]

The doctrine was held not to apply because the cause of the injury was in flaws in the safe system of working by which the mine operated and the agent was performing the duties of the owner. This was not a situation where one employee injured another. This case fell within the category of a non-delegable duty. A year later in *Radcliffe v Ribble Motor Services Ltd*,[113] the House of Lords would again consider the common employment doctrine and decide that it did not apply. One of the defendant's coach drivers negligently knocked down and killed another of the defendant's drivers. The accident occurred in a public street. The plaintiff widow succeeded in a claim. The common employment doctrine was once again criticised. Lord Macmillan said that 'its original ratio has long ceased to be regarded as tenable'.[114] Although he regretted its existence Lord Wright emphasised that as something settled by the House of Lords it could only be changed by legislation.[115] On the facts the doctrine was held not to apply. The employment was not common because the employees were said not to be engaged in 'common work'. The fact that they were working for the same employer is not enough. They must be a 'common object' to their activities.

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[108] On the Employers' Liability Act 1880 see: P.W.J. Bartrip and S.B. Burman, *The Wounded Soldiers of Industry* (Oxford, 1983) 126-57; Simon Deakin, "Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?" in TT Arvind and J Steele (eds.), *Tort Law and the Legislature* (Oxford, 2013) 253-67.
[109] For a discussion of the rule and exceptions see, Mitchell, *Tort Law*, 209-240.
[110] *Wilson & Clyde Coal Company Ltd v English* [1938] A.C. 57, 79.
[111] William A. Robson, "Common Employment Reflections on the Doctrine in the light of Wilson and Clyde Coal Company Ltd v. English" (1937) 1 M.L.R. 224, 225.
[112] [1938] A.C. 57, 74.
[113] [1939] A.C. 215.
[114] [1939] A.C. 215, 235.
[115] [1939] A.C. 215, 246.

The entire rationale and the tenor of these decisions was to avoid applying the common employment doctrine. In 1948 it was finally abolished.[116] Three years earlier the defence of contributory negligence was also liberalised.[117] One consequence of these changes was to focus attention on the relationship between employees and the extent to which an employer might be vicariously liable free from the shackles of common employment and the old contributory negligence defence. In *Jones v Staveley Iron and Chemical Co Ltd*,[118] one worker was injured by another. One question to be addressed was the standard of care to be expected by a skilled worker and the way that translated to vicarious liability for an employer. In the Court of Appeal, Denning L.J. gave one of the last major endorsements of the master's tort theory:

> He acts by his servant; and his servant's acts are for this purpose, to be considered as his acts. Qui facit per alium facit per se…If he takes the benefit of a machine like this he must accept the burden of seeing that it is properly handled.[119]

He goes on to cite *Broom v Morgan* to the effect that an employer is liable even if the employee is immune from liability. Denning L.J. combined the traditional maxim with something akin to enterprise liability. Romer L.J. said nothing about immunity but can equally be said to adopt a master's tort analysis:

> [I]t is well settled that a master is liable for the acts of his servants, if done in the course of their employment, on the principle qui facit per alium facit per se. If an employer employs a crane driver to operate a crane, it is the employer himself who, in the eye of the law, is operating it, though he is doing so through the person of the employee.[120]

Hodson LJ seemed more inclined towards a servant's tort analysis: "In my opinion, fault must be attributed to the crane driver, and the question then arises whether this amounts to negligence".[121]

An appeal was dismissed but the House of Lords took the opportunity to support a servant's tort analysis.[122] Lord Reid said of Denning LJ's use of the maxims that "it is rarely profitable and often misleading to use Latin maxims in that way" and that "I do not think that they add anything".[123] He stressed that it order for an employer to be liable the servant must be negligent.[124] He suggests that Romer and Hodson LJJ both 'appear to...base their

[116] Law Reform (Personal Injuries) Act 1948, s 1.
[117] Law Reform (Contributory Negligence) Act 1945.
[118] [1955] 1 Q.B. 474.
[119] [1955] 1 Q.B. 474, 480.
[120] [1955] 1 Q.B. 474, 484.
[121] [1955] 1 Q.B. 474, 482.
[122] [1956] 1 A.C. 627.
[123] [1956] 1 A.C. 627, 643.
[124] [1956] 1 A.C. 627, 644.

judgment on the crane driver having been negligent'.[125] This is a servant's tort analysis. Lord Morton was of the same view. On the question of immunity he states that Denning LJ's words are: "in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a case if the servant is 'immune', so is the employer".[126] Lord Tucker's speech is more ambiguous. He states that, "The present is a simple straightforward case of a master's responsibility for the acts of his servant done in the course of her employment".[127] Yet he also seems to base his conclusions on the negligence of the crane driver.[128]

V. THE RISE OF A SERVANT'S TORT ANALYSIS

As Glanville Williams pointed out, *Jones v Staveley Iron and Chemical Co Ltd* did not "settle the question beyond all doubt".[129] The remarks might have been obiter but this was still the first major judicial endorsement of a servant's tort analysis. The same approach could be detected a few years earlier when the Crown Proceedings Act 1947, s 2(1)(a) had also declared that the Crown was liable in "respect of torts committed by its servants or agents". It is difficult to give a definitive reason for the decline of the master's tort theory. It is unlikely that one factor alone was at play. The master's tort theory had underpinned vicarious liability for centuries and was not killed off by a single decision. The backstory was more complicated. Winfield in his influential treatise on tort had adopted a servant's tort analysis in the late 1930s. He would still concede that a "scientific basis" of vicarious liability is hard to find. The sixth edition of Winfield's treatise, edited by T Ellis Lewis,[130] contained a new section addressing the nature of vicarious liability. It was singled out in a review of the new edition by Denning with the observation that, "The true basis of the master's liability has been under much discussion lately".[131]

Ellis Lewis began by saying that the true basis "still waits final determination" before explaining that "the doctrine is based on public policy or sound necessity rather than deduction from legal principle".[132] The demise of the common employment doctrine was one reason why vicarious liability had come to the fore but it was also

[125] [1956] 1 A.C. 627, 644.
[126] [1956] 1 A.C. 627, 671.
[127] [1956] 1 A.C. 627, 646-47.
[128] [1956] 1 A.C. 627, 646.
[129] "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 L.Q.R. 522, 522.
[130] T. Ellis Lewis, *Winfield on Tort*, 6th ed. (London 1954).
[131] [1955] C.L.J. 113-14.
[132] T. Ellis Lewis, *Winfield*, 173.

part of a wider movement in the 1950s when the courts were making a conscious effort to modernise vicarious liability. The older terminology of master and servant fell out of use,[133] maxims were regarded with suspicion,[134] and the nineteenth century law was increasingly seen as ill-suited to more modern employment relationships.[135]

Another important factor which helped to ensure that judges began to systematically address vicarious liability was highlighted by academic commentators at the time[136] but has received little notice in the intervening decades. At this point Lord Denning enters the story. In a series of judgments Denning L.J. sought to elide vicarious liability in which one person is liable for another with a non-delegable duty. He was clever to dress up what amounts to a fundamental change in emphasis in traditional garb by using the old maxim *qui facit per alium facit per se*. Using this analysis the employer was liable not because the employee's tort or act was imputed to them but because they had themselves committed a tort themselves. A passage from *Broom v Morgan*[137] illustrates the point:

> My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.[138]

Denning L.J. was careful to distinguish this form of liability from vicarious liability but he suggested on the facts that there was vicarious liability as well.[139] In *Jones v Staveley Iron and Chemical Co Ltd*,[140] Denning L.J. used the same analysis:

> The employer is made liable, not so much for the crane driver's fault, but rather for his own fault committed through her. He puts her in charge of a great machine which can cause much damage if it is

[133] Admittedly the language of master and servant was slow to die out. It continued to be used by successive editors of Winfield's treatise.
[134] And not just in England and Wales, see *Darling Island Stevedoring and Lighterage Co. Ltd v Long* (1957) 97 C.L.R. 36, 56-57 (Fullagar J.).
[135] O. Kahn-Freund, "Servants and independent contractors" (1951) 14 M.L.R. 504, 505-6.
[136] Two case notes in the Cambridge Law Journal discuss this point at some length: C.J. Hamson, "Tort – Master's Vicarious Liability to Spouse of Servant" [1954] C.L.J. 45; K.W. Wedderburn, "Negligence – Standard of Care – Vicarious Lability" [1955] C.L.J. 151.
[137] [1953] 1 Q.B. 597.
[138] [1953] 1 Q.B. 597, 609.
[139] [1953] 1 Q.B. 597, 609.
[140] [1955] 1 Q.B. 474.

> not properly handled. He must see that reasonable care is used in the handling of it so that it does not cause damage. No matter whom he employs to handle it, he must ensure that a proper standard of care is obtained.[141]

This approach was not entirely novel. It is a little like the way that the House of Lords in *Wilson & Clyde Coal Company Ltd v English*[142] sidestepped the common employment doctrine. On that occasion the House of Lords stressed that the employer was liable for failing to provide a safe system of work. Denning L.J. seems to be pointing towards the idea of a "non-delegable" duty. It is no coincidence that elsewhere Denning L.J. argued that hospitals were liable for injuries suffered by patients using a non-delegable duty.[143] One difference from primary liability properly so called is that where the duty is non-delegable the employer is liable without fault on their part. In this respect non-delegable duties resemble vicarious liability but they are not identical.[144] The role that non-delegable duties ought to play in the modern law is contested.[145]

The House of Lords in *Jones v Staveley Iron and Chemical Co Ltd* was clear in resisting the attempt by Denning L.J. to reshape employer's liability for the acts of their employees. It did so by insisting that the case was properly one of vicarious rather than primary liability. Lord Morton explained, "Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute".[146] Both the master and servant's tort theories are examples of vicarious liability but it is easier to draw a sharp line between vicarious liability and primary liability when a servant's tort analysis is used. Once an employee is required to commit a tort there was no possibility of conflating his tort with that of the employer.

The reason that the House of Lords was resistant to extending the scope of primary liability was never fully articulated. One likely fear was that it would involve extending the scope of an employer's liability. The fear of

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[141] [1955] 1 Q.B. 474, 480.
[142] [1938] A.C. 57.
[143] *Cassidy v Ministry of Health* [1951] 2 Q.B. 343, 359-60; *Roe v Ministry of Health* [1954] 2 Q.B. 66, 82.
[144] Non-delegable duties are sometimes conflated with vicarious liability. For a discussion of that issue see: Robert Stevens, "Non-Delegable Duties and Vicarious Liability" in Jason Neyers et al (eds.), *Emergent Issues in Tort Law* (Oxford 2007), 331-368; Jonathan Morgan "Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken" (2015) 74 C.L.J. 109, 120.
[145] Traditionally whilst an employer could not be vicariously liable for an independent contractor they could be liable by way of a non-delegable duty: *Woodland v Swimming Teachers Association and others* [2014] A.C. 537, 573-74. In addition to the literature ibid. see: Glanville Williams, "Liability for Independent Contractors" [1956] C.L.J. 180.
[146] [1956] 1 A.C. 627, 639.

indeterminate liability for employers was something that Denning himself would comment on in the context of the liability for hospitals.[147] The same concern has continued to be reflected in modern attempts to explain the imposition of non-delegable duties using the idea of "assumption of responsibility".[148] The question then remains why has vicarious liability survived at all?

VI. CONCLUSION

In the late 1960s Patrick Atiyah wrote that, "On the whole it seems doubtful whether much is to be gained by examination of the 'true' basis of vicarious liability".[149] On one level this statement is true. A master or servant's tort theory usually gives the same outcome as far as liability is concerned but the question of the accepted analysis has a significance that goes outside itself. It goes to the nature of liability in tort more generally. Once tortious liability was characterised by fault vicarious liability was increasingly difficult to justify. It became necessary to rationalise the doctrine on pragmatic or policy grounds. In *Imperial Chemical Industries Ltd v Shatwell*[150] Lord Pearce made the point that, "The doctrine of vicarious liability has not grown from, any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it".[151]

Despite the struggle to find a coherent justification vicarious liability has proved to be remarkably resilient. In part this no doubt stems from the natural conservatism of lawyers. Yet there is more to the story than that. During the 1950s there was a resistance to attempts to extend primary liability. As late as the mid-1970s, in *Launchbury v Morgans*[152] Viscount Dilhorne and Lord Pearson were still repeating the maxim, *qui facit per alium, facit per se.*[153] Yet unlike their nineteenth century counterparts the fact that Lord Pearson talked about the negligence of the driver does not however suggest that he was actually adopting the master's tort theory.[154] The

[147] Lord Denning, *The Discipline of Law* (London 1979), 241-42.
[148] For a cogent criticism of this approach see, Morgan, "Independent Contractors", 128.
[149] P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London 1967), 7.
[150] [1965] A.C. 656.
[151] [1965] A.C. 656, 685.
[152] [1973] A.C. 127.
[153] [1973] A.C. 127, 140 (Viscount Dilhorne), 140 (Lord Pearson).
[154] [1973] A.C. 127, 140

House of Lords on this occasion was anxious to set down the limits on vicarious liability outside an employment relationship and more specifically to close off an attempt by Lord Denning in the Court of Appeal to impose liability on the owner for accidents caused by drivers of the family car.

Vicarious liability has several built in limitations. An employee needed to be acting in the course of employment before the employer was vicariously liable. This aspect has caused difficulties where there is an independent contractor and where the employee is acting in a criminal manner.[155] Non-delegable duties cause their own problems despite an unduly sanguine endorsement from the Supreme Court.[156] Non-delegable duties are still exceptional[157] although they might however provide a better explanation to a case like *Lister v Hesley Hall*.[158] Primary liability has always been a third option. An employer could be liable for their own negligence in, for example, failing to provide a safe system of work or failing to carry out proper checks on a criminal employee. The House of Lords in *Jones v Staveley Iron and Chemical Co Ltd* did not deny that there could be situations of potential primary liability. Their objection was to the way that Denning L.J. was stretching the idea to a point where it would replace vicarious liability. It is after all possible in most employment contexts to find some sort of systemic failure when something goes wrong. This is why managers in large organisations are so keen on internal paper trails so that blame can be attributed elsewhere if disaster strikes. If anything, over the past few years, vicarious liability seems to have become more secure because of the way that appellant judges have turned to enterprise liability in a more systematic manner than before.[159] The version of vicarious liability that is universally applied is the servant's tort theory but the master's tort theory has the much stronger historical pedigree.[160]

[155] For the former see, Ewan McKendrick, "Vicarious Liability and Independent Contractors — A Re-examination" (1990) 53 M.L.R. 770. For a recent example of the latter see, *Woodland v Swimming Teachers Association* [2014] A.C. 537.
[156] *Woodland v Swimming Teachers Association* [2014] A.C. 537, 590 (Baroness Hale).
[157] *Woodland v Swimming Teachers Association* [2014] A.C. 537, 583 (Lord Sumption).
[158] [2002] 1 A.C. 215. For this point see Stevens, *Torts*, 272-73.
[159] For a discussion see Swain, "Vicarious Liability", 108-110. Enterprise liability has been heavily criticised by Gray, *Vicarious Liability*, 123-48, but it has found favour in a number of contexts in the modern law see, Douglas Brodie, *Enterprise Liability and the Common Law* (Cambridge 2010). For a striking example in the context of vicarious liability see, *Cox v Ministry of Justice* [2016] A.C. 660.
[160] For a recent, albeit obiter, endorsement of the master's tort theory see, *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, [5].