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Introduction

Theories of enterprise liability have, historically, had a significant influence on the development of various aspects of the law of torts.[1] Enterprise liability has impacted upon both statutory and common law rules. Prime examples would include laws on workmen's compensation and products liability. Of late, in a number of jurisdictions, enterprise liability has been a powerful catalyst for change in the employer's responsibilities towards third parties by prompting changes to the law on vicarious liability. The results have been seen most dramatically where the employer's responsibility for the intentional torts of employees is concerned. Whilst enterprise liability has been widely influential and, whilst the policy issues faced by the courts have been very similar, the solutions adopted have varied in different jurisdictions, some displaying a greater debt to enterprise liability than others. Recent common law reforms have not been without controversy and have raised difficult and challenging questions about the appropriate scope of an employer's responsibilities. It seems timely to both review whether recourse to enterprise liability has provided an appropriate basis upon which to justify an expansion of legal responsibilities and to assess the merits of the specific reforms that have occurred. It is also timely to consider what further developments are likely and the ways in which different jurisdictions may respond. The potential for such developments is not confined to the law of torts but also exists at the level of the contract of employment: a major question is whether enterprise liability will be as influential in prompting changes to the duties owed by employer and employee.

Two of the most significant decisions concerning the employer's responsibilities for the intentional torts of employees have been those of the Canadian Supreme Court in *Bazley v Curry*[2] and *Jacobi v*

[1] G. C. Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 Vand. L. Rev. 1285.
[2] (1999) 174 DLR (4th) 45.

Griffiths.[3] Vicarious liability was said to be justified on the basis of enterprise liability: 'the employer puts in the community an enterprise which carries with it certain risks. When those risks materialise and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss.'[4] In the UK in *Lister v Hesley Hall*,[5] Lord Steyn warmly endorsed the Canadian jurisprudence: 'Wherever such problems are considered in future in the common law world these judgments will be the starting point.' Prior to *Lister* an employer would have been vicariously liable for some instances of intentional wrongdoing but by no means all. *Bazley* prompted a radical reappraisal of the extent of an employer's responsibilities and, as discussed below, led to the claimant succeeding in *Lister*. It should be noted at the outset that the Australian courts have been much less taken with *Bazley*.

Historical influences

Theories of enterprise liability have, of course, been hugely influential in the development of both statutory and common law rules in a variety of jurisdictions over many years. In the UK an early example is constituted by the workmen's compensation legislation. The enactment of the Workmen's Compensation Act 1897 meant that henceforth, irrespective of fault, employers would be obliged to pay accident compensation to their employees. The 1897 Act compelled the employer to pay compensation in respect of some of life's vicissitudes and was an extremely important piece of legislation. It provided for compensation for industrial injuries where the injury was caused by an 'accident arising out of and in the course of employment'.[6] The compensation was to be paid by the employer but there was a complete defence where the injury was attributable to the serious and wilful misconduct of the injured employee.[7] Where the employer was liable at common law the rights of employees were preserved but an employer was not liable to pay compensation both independently of and under the Act.[8] The Act did not apply to all employments but only to railway, factory, mine, quarry or engineering work and some forms of construction work,[9] the underlying rationale

[3] (1999) 174 DLR (4th) 71. [4] Ibid., 60. [5] [2002] 1 AC 215.
[6] Workmen's Compensation Act 1897, s. 1(1).
[7] Ibid., s. 1(2)(c). [8] Ibid., s. 1(2)(b). [9] Ibid., s. 7(1).

for the selection being that priority for inclusion should be given to the more hazardous enterprises. The Act was a remarkable piece of social legislation and imposed a form of strict liability on employers. Compensation for industrial injuries was now seen as the responsibility of the enterprise: 'Where a person, on his own responsibility and for his own profit, sets in motion agencies which create risks for others, he ought to be civilly responsible for the consequences of what he does.'[10] Uncertainty was expressed as to who would ultimately bear the cost of the scheme: 'whether in the ultimate allocation of that burden the larger share will fall upon profits or upon wages, or whether it will be possible to transfer under existing economic conditions any appreciable portion of that burden upon the consumer in the shape of an added price of goods, are questions upon which opinions may very well differ'.[11]

Numerous US states also adopted similar statutes[12] and the radical nature of the legislation prompted one US commentator to ask whether fundamental changes in the common law might emerge: 'the time-honoured principles of the law of torts have been cast aside, a wider rule of responsibility has been framed, and no man can now say what will be the ultimate effects of the new doctrine'.[13] One reason for supposing that this was a realistic possibility was the incongruity between the position of the worker injured in the course of his employment by a 'pure accident' and that of a third party. The former was able to recover because of the statutory scheme whilst the latter could not in the absence of fault.

Theories of enterprise liability have also driven key common law developments. In the case of products liability in the US, for example, the impact has been dramatic as the respective rights and obligations of manufacturers and consumers have changed very significantly,[14] two landmark cases being *Henningsen v Bloomfield Motors*[15] and *Greenman v Yuba Power Products*.[16] In the latter the plaintiff was injured while using a power tool which had been given to him by his wife who had purchased it. He brought an action against the retailer and the manufacturer. The Supreme Court of California held that a manufacturer is strictly

[10] Parl. Deb., 3.5.1897, Vol. 48, H.C., Col. 1427. [11] Ibid., Col. 1441.
[12] W. G. Cowles, 'Workmen's Compensation in the United States' (1912–13) 6 Me. L. Rev. 283.
[13] J. Smith, 'Sequel to Workmen's Compensation Acts' (1913–14) 27 Harv. L.R. 235. And see E. R. Thayer, 'Liability Without Fault' (1915–16) 29 Harv. L.R. 801, 814.
[14] G. L. Priest, 'The Invention of Enterprise Liability' (1985) 14 J. Legal Studies 461, 462.
[15] 161 A.2d 69. [16] 377 P.2d 897.

liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Strict liability is very much the exception within the common law of tort and Traynor J looked to his earlier opinion in *Escola v Coca Cola*[17] in explaining why this position was justified. Imposing strict liability on the manufacturer is an effective means of deterring dangerous behaviour: 'Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.'[18] The results in terms of loss distribution were also desirable: 'Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.'[19] Crucially, such a position was fair because the creation of the risk was attributable to the manufacturer: 'However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.'[20] *Henningsen* was a decision of the Supreme Court of New Jersey in an action brought by a car owner's wife against the manufacturer to recover damages on account of injuries sustained by her while she was driving the car (which was said to be defective) shortly after its purchase. It was held that the defendant was liable irrespective of whether negligence had occurred and even though privity of contract was absent. Justifications of loss distribution and deterrence again came to the fore:

> where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur.[21]

[17] 150 P.2d 436. And see R. J. Traynor, 'The Ways and Meanings of Defective Products and Strict Liability' (1964–5) 32 Tenn. L. Rev. 363.
[18] Ibid. [19] Ibid. [20] Ibid. [21] *Henningsen*, n. 15 above.

These decisions proved to be extremely influential and led to many states in the USA adopting rules of strict liability for defective products.[22] Indeed this body of jurisprudence was codified, in the form of the revised section 402A, when the second Restatement of Torts was published in 1965.[23] It is important to note at this stage that a number of different meanings can be attributed to the concept of enterprise liability. This is a point of some significance because recourse to different definitions can determine which policy factors are promoted by the outcome in any particular case.

Reforming the law on the basis of enterprise liability gives rise to challenging questions for the judiciary, as the case of *Goldberg v Kollsman*[24] (decided shortly after *Greenman*) demonstrates. There a damages action was brought after a passenger died in a plane crash. The operator was sued in negligence but the plane manufacturer and the manufacturer of the plane's altimeter were also sued. The claim against the latter was regarded as irrelevant on the basis that adequate protection for the passengers arose from the obligations of the manufacturer. The minority suggested that the plane operator rather than the manufacturer was the enterprise with which the court should be concerned: 'the dominant enterprise and the one with which the plaintiff did business and relied upon was the airline'. The case is of interest as it illustrates that identifying the responsible enterprise may involve contentious value judgements. The minority saw their task as one of placing the risk on the enterprise in the course of whose business it arose.

Where tort is concerned the influence of enterprise liability is not confined to questions of duty but may impact on other key questions such as causation. In the notable US case of *Sindell v Abbott Laboratories*[25] the claimants brought claims against drug manufacturers seeking to hold them individually and jointly liable for unlawfully manufacturing, marketing and promoting a drug (DES) which was said to have carcinogenic effects. It was held that the claims could succeed on the basis that the defendants could be jointly liable on the concerted action theory of causation. The fact that some of the defendants may not

[22] C. J. Peck, 'Negligence and Liability Without Fault in Tort Law' (1971) 46 Washington Law Review 225, 237.
[23] S. P. Croley and J. D. Hanson, 'Rescuing the Revolution: The Revived Case for Enterprise Liability' (1992–3) 91 Mich. L. Rev. 683, 701.
[24] 12 N.Y.2d 432.
[25] For a critique of *Sindell* see D. Fischer, 'Products Liability – An Analysis of Market Share Liability' (1981) 34 Vand. L. Rev. 1623.

have manufactured the DES ingested was irrelevant in the light of that theory. The claimants would be successful if they could show that the defendants had acted jointly and in concert in the testing, marketing and promoting of DES. The court went on to indicate that had the concerted action theory been inapplicable they might well have adopted an 'enterprise liability' theory of causation and the discussion in an academic article by Sheiner was commended.[26] There might be thought to be a close correlation between the approach adopted in the case and one based upon enterprise liability.[27] The application of Sheiner's theory would result in the joint and several liability of all the members of an industry who marketed the same defective product. The theory would be applicable where a number of elements were satisfied, including a pattern of inadequate standards across an industry.[28] Such an approach, whereby a group of enterprises was viewed as a single collective entity, was appropriate on classic enterprise liability grounds: 'The employer, who derives a profit from the enterprise, is the party best able to absorb and distribute its foreseeable costs to the public. He is also in the best position to take preventative measures.'[29] A collective approach was called for: where 'an entire industry, engaged in a predictably dangerous enterprise and following similar safety practices, places an identically defective product in the stream of commerce, the industry rather than the individual manufacturer should be the focal point for liability because it can best allocate risks, distribute costs and take preventive measures'.[30]

Invoking enterprise liability as a justification for vicarious liability also has a considerable pedigree. In a seminal article in the *Yale Law Journal* in 1929, Douglas reasoned that the 'hazards of a business should be

[26] N. Sheiner, 'DSS and a Proposed Theory of Enterprise Liability' (1977–8) 46 Fordham Law Review 963.

[27] J. Stewart, 'Beyond Enterprise Liability in DES Cases – Sindell' (1981) 14 Ind. L.R. 695, 704.

[28] The elements of enterprise liability were said to be: (1) Plaintiff is not at fault for his inability to identify the causative agent and such liability is due to the nature of the defendants' conduct. (2) A generically similar defective product was manufactured by all the defendants. (3) Plaintiff's injury was caused by this product defect. (4) The defendants owed a duty of care to the class of which the plaintiff was a member. (5) There is clear and convincing evidence that plaintiff's injury was caused by the product of one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury. (6) There existed an insufficient, industry-wide standard of safety as to the manufacture of this product. (7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed.

[29] Sheiner, n. 26 above, 1001.

[30] Ibid., 1002.

borne by the business directly'.[31] Loss distribution was thereby facilitated in that the costs would be borne by the consumers of the products of the business. The opinions in *Bazley*, in this very area, would prove to be hugely profound.

Contemporary judicial thinking

Whilst the Canadian decisions referred to above may have pride of place, the earlier US decision in *Ira S. Bushey v US*[32] has been highly influential. Cases such as *Greenman* placed great store on deterrence and loss distribution, policy considerations which have long held sway in vicarious liability cases. Indeed they continue to do so in some versions of enterprise liability. The vicarious liability case of *Bushey* brought questions of equity centre stage. The case was decided on the basis of enterprise liability which was said to reflect 'a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities'. The case concerned a coastguardsman who was living aboard a coastguard vessel while it was in dry dock. Whilst intoxicated he opened the dry dock's floodgate valve, thereby causing the dry dock to sink. The decision to impose vicarious liability was justified on the basis of equitable considerations; the court was not convinced, for example, that imposition of liability would lead to a more efficient allocation of resources. Indeed, denial of liability 'might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the future, while placing the burden on shipowners is much less likely to lead to accident prevention'.[33]

The possibility of such drunken misbehaviour arising was seen as a risk of the enterprise and it was therefore fair to hold the employer responsible. What happened was on a par with what might have been expected: it was foreseeable that crew members crossing the dry dock might do damage, negligently or even intentionally. Other risks which might have materialised would have been too far removed from those generated by the enterprise:

> If Lane had set fire to the bar where he had been imbibing or had caused an accident on the street while returning to the drydock, the Government would not be liable; the activities of the 'enterprise' do not reach into

[31] W. O. Douglas, 'Vicarious Liability and Administration of Risk', 38 Yale L.J. 584, 586.
[32] 398 F.2d 167 (2d Cir. 1968). [33] Ibid., 170–1.

> areas where the servant does not create risks different from those attendant on the activities of the community in general ... if the seaman upon returning to the drydock, recognized the Bushey security guard as his wife's lover and shot him, vicarious liability would not follow; the incident would have related to the seaman's domestic life, not to his seafaring activity, and it would have been the most unlikely happenstance that the confrontation with the paramour occurred on a drydock rather than at the traditional spot.[34]

The significance of the decision becomes apparent when it is recalled that the fact that a particular form of harm is characteristic of an activity does not, in tort as a whole, lead to strict liability: 'the harm of knife cuts are in some sense "characteristic" of the distribution of knives; adverse side effects are "characteristic" of the manufacture of prescription drugs ... yet our tort system shows no interest in imposing automatic liability on the companies that produce knives and drugs'.[35] The reasoning in *Bushey*, along with some highly creative Californian jurisprudence (see Chapter 3), played a big part in shaping the decision in *Bazley*. The linkage of risk creation and responsibility in law came to be seen as an eminently equitable nexus.

The significance of enterprise risk in determining the extent of vicarious liability came to the fore in the Canadian Supreme Court in *Bazley v Curry*.[36] In that decision, which was very much policy driven, the court elected to modify the Salmond test;[37] as formulated it failed to give adequate weight to the principal policy factors. At the level of practical application *Bazley* allowed a finding of liability on the basis of a 'close connection' between the employee's tort and the employment in question, some such formulation being seen as necessary to ensure that there is adequate linkage between the employee's behaviour and the risks inherent in the employer's enterprise. Justifying such a modification of the existing law involved an articulation of the key policy concerns. It has long been accepted that vicarious liability is a creature of policy, but establishing the precise nature of the relevant policy concerns has been very much a matter

[34] Ibid., 172.
[35] G. T. Schwartz, 'The Hidden and Fundamental Issue of Employer Vicarious Liability' (1995–6) 69 S. Cal. L. Rev. 1739.
[36] (1999) DLR 174 (4th) 45.
[37] Salmond said that a wrongful act is deemed to be done by a 'servant' in the course of his employment if 'it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master': J. W. Salmond, *The Law of Torts* (London: Stevens and Haynes, 1907), p. 83; and R. F. V. Heuston and R. A. Buckley (eds.), *Salmond and Heuston on the Law of Torts*, 21st edn (London: Sweet & Maxwell, 1996), p. 443.

for debate. The Supreme Court dealt with these matters with some vigour. Not only were the principal policy concerns fully articulated and appraised but, crucially, they were also ranked. Ultimately, *Bazley* puts forward a justification for the imposition of vicarious liability which might be styled 'enterprise liability'. This, the author would suggest, is a matter of some importance where future development of the law is concerned. Henceforth, it should be easier to determine, in any given context, what judicial policy requires. We learn that, most fundamentally, vicarious liability is justified given that 'the employer puts in the community an enterprise which carries with it certain risks. When those risks materialise and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss.'[38] Such a stance also has the merit of facilitating loss distribution. Vicarious liability is, therefore, seen as the corollary of the creation of risks by an enterprise. Equity dictates that the enterprise, which stands to profit from the running of those risks, should be obliged to compensate in the event of harm materialising. Whilst equitable considerations provided the principal justification, the role of vicarious liability in promoting deterrence was seen as the second principal justification. This is not altogether surprising since one function of strict liability is to reinforce fault liability.[39] In a negligence action the burden of proof is on the plaintiff to demonstrate the actual steps that the reasonably careful employer should have taken. This may be far from easy. For instance, in the UK decision in *Lister v Hesley Hall*,[40] which dealt with similar issues, the complaints that the employers were careless in their care, selection and control of the warden were not accepted. However, if the employer cannot hope to avoid liability, simply by defeating the particular allegations of fault that the plaintiff puts forward, it must look to doing so through taking measures beyond that required by the law of negligence. Strict liability compels innovation in that, if the enterprise cannot find a means of averting the risk, it will be liable for the consequences. In *Bazley* it was said that 'beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community'.[41] This requires not only that suitable

[38] *Bazley*, n. 36 above, 60.
[39] P. Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), p. 48.
[40] [2002] 1 AC 215. [41] *Bazley*, n. 36 above, 61.

precautions are introduced to meet specific risks but that questions of organisational 'culture' are addressed. For instance, incentive schemes should not function in such a way as to undermine the impact of health and safety measures. However, it must be recognised that, at the end of the day, there may be nothing that could have been done by the most imaginative and enterprising employer. This does not present a problem for enterprise liability. It holds that the employer should be vicariously liable given that the employer is obliged to accept responsibility for managing the risks it has created. It is seen as equitable that, having introduced a risk, you are taken to warrant that you will manage that risk effectively. At this point the two principal justifications converge in that it is regarded as fair that breach of that warranty leads to liability on the part of the enterprise to pay compensation. It might also be the case that strict liability would lead to an enterprise extending their insurance coverage.[42]

In conclusion, *Bazley* holds that enterprise liability justifies the doctrine of vicarious liability because, on grounds of equity, an enterprise should compensate when risks it has introduced materialise. Equity also demands that the enterprise must accept full responsibility for managing those risks. The intellectual debt to *Bushey* is readily apparent.

Given the obvious desire to compensate children who had been the subject of abuse, the outcome in *Bazley* is not unduly surprising. However, that outcome was greatly facilitated by enterprise liability. It had long been recognised that such a theoretical perspective suggested that 'all injuries caused by workmen which arise out of and in the course of their employment should result in the master's liability – whether or not the injury resulted from some activity which benefited the employer or was authorised by him, and whether it occurred through the servant's wilfulness or through his negligence'.[43]

The significance of profit

In a stimulating article Neyers[44] draws attention to the fact that some theories of enterprise liability stress the significance of profit: 'if, in seeking to secure financial profit, an enterprise causes certain types

[42] See G. L. Priest, 'The Current Insurance Crisis and Modern Tort Law' (1986–7) 96 Yale L.J. 1521, 1538.
[43] G. Calabresi, 'Some thoughts on risk distribution and the law of torts' (1960–1) 70 Yale L.J. 499, 544.
[44] J. W. Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alberta Law Review 287.