'Employment or Nothing': An Analysis of *Bird v DP* and the Australian Approach to Vicarious Liability in Cases of Institutional Abuse

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This article concerns the extent to which institutions should be held vicariously liable for abuse perpetrated by non-employees. Recently, in Bird v DP *('*Bird*'), the High Court of Australia confirmed that a relationship of employment is a precondition to vicarious liability attaching to a defendant (subject to limited exceptions). Contrary to developments in overseas jurisdictions, the Court refused to expand the doctrine to encapsulate relationships 'akin to employment'. This article first details the doctrine of vicarious liability and its application to institutional abuse cases. It then compares the historical approach in Australia to that adopted in the United Kingdom and Canada. Finally, it focuses upon the decision in* Bird *and analyse the competing arguments as to the appropriateness of the binary 'employment or nothing' test.*

I Introduction

There is a scourge of sexual abuse in institutional settings. This insidious, 'widespread evil' has had profound and devastating effects on victims.[1] It is corrosive to the social fabric; eating away at trust and confidence held by the public in organisations charged with the protection of society's most vulnerable.

While victims are increasingly litigating claims of institutional abuse, perpetrators are often impecunious and have less capacity than the institutions they serve to effectively compensate claimants. In many instances, the only mechanism available to victims for meaningful recourse is the pursuit of organisations through the doctrine of vicarious liability.

However, in cases of institutional abuse, the application of vicarious liability is famously uncertain. At its heart, the doctrine of vicarious liability is a creature

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1 *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 25 [83] (Lord Phillips, Baroness Hale, Lord Kerr, Lord Wilson, Lord Carnwath JJSC agreeing) ('*Christian Brothers*').

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of policy, borne of perceptions of justice, fairness and a need to distribute risk. The doctrine was traditionally applied to 'master and servant' relationships between tortfeasors and defendants. Over the centuries, the weight of precedent sank the doctrine deeper and deeper into that foundation. Until relatively recently, it was generally understood that a relationship of controlled employment was a necessary precursor to a finding of vicarious liability.

But the rise in institutional abuse claims has exposed fissures in the conceptual foundations of the vicarious liability. So often in institutional settings, the relationships between defendants and abusers fall outside the employment paradigm. Priests of a diocese; volunteers of a college; brothers of a holy order — courts have been confronted with non-employment relationships that are nevertheless responsive to policy concerns said to underlie the doctrine.

In the face of these challenges, apex courts in other common law jurisdictions have uprooted vicarious liability from its strict master–servant foundations and expanded the concept to encapsulate relationships 'akin to employment'. In those jurisdictions, the enquiry has been untethered from so-called 'artificial' and 'semantic' distinctions based upon the legal status of the relationship.[2]

For so long, it was uncertain as to whether Australian jurisprudence would follow this trend. While it was assumed that, subject to limited exceptions, vicarious liability remained contingent upon a strict contract of employment, no superior court had confronted the issue directly.

The question was recently answered. In *Bird v DP* ('*Bird*'),[3] the High Court of Australia laid to rest any prospect of a redrawing of vicarious liability in Australia, refusing to expand the test to relationships between defendant and tortfeasor that are 'akin to employment'. In doing so, a plurality explicitly disavowed the justifications that had underpinned expansion of the doctrine elsewhere in the common law world.

This article focusses upon the first stage of the common law test for vicarious liability — namely, the assessment of whether the relationship between tortfeasor and defendant is capable of attracting liability. The doctrine and its history in Australia and overseas will be outlined. I will then focus on the decision in *Bird* and analyse the competing arguments as to whether institutions should be capable of being held vicariously liable for abuse perpetrated by non-employees.

There exist powerful criticisms of a conception of vicarious liability allowing for relationships 'akin to employment'. As the plurality in *Bird* observed, there is a lack of any clear and stable legal principle for a redrawing of the kind undertaken overseas. On the other hand, it has been argued that the binary approach of making vicarious liability contingent upon a tortfeasor's employment status allows, in effect, the tail to wag the dog. Where a non-employment relationship nevertheless possesses the same fundamental qualities that make employment

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2 *Bazley v Curry* [1999] 2 SCR 534, 556 [36] (McLachlin J for the Court) ('*Bazley*').

3 (2024) 98 ALJR 1349 ('*Bird*').

responsive to the policy rationales underpinning vicarious liability, why should the doctrine be excluded?

II Vicarious Liability

Vicarious liability in tort is 'an unusual form of liability'.[4] It arises when the law holds a defendant responsible for the torts of another, although the defendant is himself free from personal blameworthiness.[5] The doctrine involves 'secondary liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant'.[6] Vicarious liability is a species of strict liability in the sense that it is not contingent upon fault on the part of the defendant. However, it is not a personal liability and is not dependent upon the defendant owing any duty to a claimant.[7] Importantly, the fact that a wrongful act in question is a criminal offence does not preclude the possibility of vicarious liability.[8]

A *A Two-Stage Enquiry*

There are two stages of the vicarious liability enquiry.[9] The first is directed at the relationship between defendant and tortfeasor, requiring the relevant relationship to be one capable of giving rise to vicarious liability. The second stage concerns the connection between that relationship and the commission of the tort by the tortfeasor.[10] Much confusion in this area of law derives from a conflation of these two stages.

Vicarious liability is, classically speaking, incident to the relationship of controlled employment — traditionally described as that of 'master and servant'.[11] In instances where the tortfeasor is clearly an employee of the defendant, stage one to the enquiry will be satisfied; the main issue will be whether the employee committed the tort in the course of his employment (stage two).

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4 *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2024] AC 567, 572 [1] (Lord Burrows JSC, Lord Reed PSC, Lord Hodge DPSC, Lord Briggs and Lord Stephens JJSC agreeing) ('*BXB*').

5 Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10th ed, 2011) 437 [19.10] ('*Fleming*').

6 *Bird* (n 3) 1361 [44] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ).

7 *BXB* (n 4) 572 [1].

8 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 159 [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*').

9 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 199–200 [82] (Kiefel CJ, Keane and Edelman JJ); *Christian Brothers* (n 1) 12 [21]; *BXB* (n 4) 573 [4].

10 *Bird* (n 3) 1362 [46] (Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ), 1371 [81] (Gleeson J).

11 *Fleming* (n 5) 440 [19.30].

B *Foundations in Policy*

The modern doctrine of vicarious liability is afflicted by 'logical and doctrinal imperfections'.[12] There is a lack of 'clear or stable principle which may be understood as underpinning the development of this area of the law'.[13] Vicarious liability is not a product of 'analytical jurisprudence',[14] nor does it derive from any 'deduction from legalistic premises'.[15] The doctrine is, at its heart, a creature of policy.

Because of its foundations in policy, vicarious liability has been characterised as a 'unstable principle' lacking a 'coherent basis'.[16] It has been observed that '[v]icarious liability in the law of torts is, above all, a subject fashioned by judges at different times, holding different ideas about its justification and social purposes, or no idea at all'.[17]

The rationales said to underlie the doctrine of vicarious liability derive from early conceptions of the master and servant relationship. They can largely be distilled into three primary policy considerations.

The first is termed 'enterprise risk' or 'enterprise liability'.[18] A person who puts a risky enterprise into the community may fairly, it is said, be held responsible when those risks ripen into loss or injury.[19] There is said to be justice in an enterprise who takes the benefit of activities carried on by a person integrated into its organisation also bearing 'the cost of harm wrongfully caused by that person in the course of those activities'.[20] The enterprise risk theory has largely underpinned the expansion of vicarious liability in other Commonwealth jurisdictions (discussed below). In the recent decision of the Supreme Court of the United Kingdom in *Armes v Nottinghamshire County Council*, Lord Reed JSC (with whom the other members of the Court agreed) boldly described the rationale as being the 'most influential idea in modern times'.[21]

The second (closely related) consideration pertains to the master having 'deeper pockets' than the tortfeasor and being a 'more promising source of recompense than his servant who is apt to be a "man of straw" without

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12 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 173 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*').

13 Ibid 166–7 [11].

14 *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36, 56–7 (Fullagar J) ('*Darling Island*').

15 *Fleming* (n 5) 438 [19.10].

16 *Prince Alfred College* (n 8) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

17 *New South Wales v Lepore* (2003) 212 CLR 511, 612 [301] (Kirby J) ('*Lepore*').

18 *BXB* (n 4) 584 [47].

19 See *Christian Brothers* (n 1) 21–2 [64], 24 [75]; *John Doe v Bennett* [2004] 1 SCR 436, 445 [20] (McLachlin CJ for the Court) ('*Bennett*').

20 *Armes v Nottinghamshire County Council* [2018] AC 355, 381 [67] (Lord Reed JSC, Baroness Hale of Richmond PSC, Lord Kerr and Lord Clarke JJSC agreeing) ('*Armes*').

21 Ibid.

insurance'.[22] Imposing liability on the master is said to promote 'wide distribution of tort losses', the master being a more 'suitable channel for passing losses on through liability insurance and higher prices'.[23]

As to the third concern, the doctrine is said to have 'admonitory value', with deterrent pressures most effectively brought to bear 'on larger units like employers who are in a strategic position to reduce accidents by efficient organisation and supervision of their staff'.[24] It has been said to be 'seriously unjust to leave the burden of the damage, and thus of prevention of harm, on the victim'.[25] By holding the master liable, the law is said to furnish 'an incentive to discipline servants guilty of wrongdoing'.[26]

Much has been written about the flaws in these rationales. There are competing concerns 'not to foist undue burdens on business enterprise'[27] combined with 'a hesitation to make one person responsible for another's misconduct involving a taint of moral delinquency'.[28] In *Cox v Ministry of Justice* ('*Cox*'),[29] Lord Reed JSC (Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreeing) observed, in relation to the second policy concern, that '[t]he mere possession of wealth is not in itself any ground for imposing liability' and, in relation to the issue of insurance, that 'employers insure themselves because they are liable: they are not liable because they have insured themselves'.[30] As to the third concern, it has been argued that to justify vicarious liability by deterrence is to import elements of fault or quasi-fault liability — elements antithetical to the liability being 'vicarious'.[31] In *New South Wales v Lepore* ('*Lepore*'), Kirby J characterised deterrence as being, in the context of that specific case, 'less persuasive' than other rationales.[32]

While the above policy considerations have attracted extensive attention in academia and in overseas courts, the High Court of Australia has been resistant to accepting them as a basis for vicarious liability. In *Hollis v Vabu Pty Ltd* ('*Hollis*'), a majority spoke of a responsibility attaching to enterprises for harms caused in the conduct of the enterprise, and particularly, responsibility for harms caused by persons who are 'identified as representing that enterprise'.[33] However, in subsequent decisions, members of the Court made statements that appeared to

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22 *Fleming* (n 5) 438 [19.10]. See also *Jacobi v Griffiths* [1999] 2 SCR 570, 589 [29] (Binnie J for Cory, Iacobucci, Major and Binnie JJ).
23 *Fleming* (n 5) 438 [19.10].
24 Ibid.
25 *Lepore* (n 17) 613 [305] (Kirby J).
26 *Fleming* (n 5) 438 [19.10].
27 Ibid 437 [19.10]. See also *Bazley* (n 2) 551 [26].
28 *Fleming* (n 5) 455 [19.130].
29 [2016] AC 660.
30 Ibid 669 [20].
31 JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287, 293–6.
32 *Lepore* (n 17) 613 [305].
33 (2001) 207 CLR 21, 40 [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*').

cast doubt on the use of the enterprise risk theory as a basis for development of the common law in Australia.[34]

C *Legislative Reform*

While legislative reform is outside the scope of this article, the author acknowledges statutory extension of no-fault liability in many jurisdictions — including changes rendering religious institutions liable for torts committed by priests.[35] Much of this reform has been undertaken in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.[36]

III Overseas Expansion

In other common law jurisdictions, the law of vicarious liability has been 'on the move'.[37] What was once a 'relatively clear and well-settled picture of vicarious liability' has been redrawn and expanded.[38] Apex courts in England and Canada have recognised relationships outside the employment paradigm as being capable of giving rise to vicarious liability. This has been done largely in response to claims of sexual abuse in institutional contexts where the relationships between defendants and abusers so often fall outside the 'master and servant' archetype.

In England, the relationships capable of giving rise to vicarious liability have been expanded to include those 'akin to employment'.[39] Consequently, in that jurisdiction, the test at stage one to the enquiry is said to be whether the relationship between the defendant and the tortfeasor was one of employment or, alternatively, a relationship akin to employment.[40]

This new approach was confirmed in *Various Claimants v Catholic Child Welfare Society* ('*Christian Brothers*')[41] where an institute of Christian brothers was held vicariously liable for child sexual abuse occasioned by its members at a school.

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34 *Sweeney* (n 12) 166–7 [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

35 See *Civil Liability Act 2002* (NSW) ss 6G–6H, as inserted by *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW); *Civil Liability Act 2002* (Tas) ss 49I–49J, as inserted by *Justice Legislation Amendment (Organisational Liability for Child Abuse) Act 2019* (Tas).

36 The commission considered parliamentary reform to be the proper and appropriate vehicle for ensuring institutional accountability and redress for the harms committed by members and employees: see *Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation* (Report, September 2015) 61–78.

37 *Christian Brothers* (n 1) 11 [19].

38 *BXB* (n 4) 573 [3].

39 See *Christian Brothers* (n 1) 18 [47], adopting the approach in *E v English Province of Our Lady of Charity* [2013] QB 722 ('*E*').

40 *BXB* (n 4) 573 [3], 587 [58].

41 *Christian Brothers* (n 1).

Despite the lack of any contract of employment binding the brothers to the institute, the relationship between those parties was sufficiently akin to that of employment to satisfy stage one. The relationship was said to share 'essential elements' of an employment relationship including a hierarchical structure, the brothers being subject to the directions and rules of the institute, and the brothers acting in furtherance of the institute's objectives.[42] The Supreme Court justified its adoption of the 'akin to employment' test on the grounds that the policy objective underlying vicarious liability is 'to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim'.[43]

The 'akin to employment' test has been followed and developed in subsequent cases.[44] In *Various Claimants v Barclays Bank plc*,[45] Baroness Hale (Lord Reed PSC, Lord Hodge DPSC, Lord Kerr and Lord Lloyd-Jones JJSC agreeing) confirmed that, in contrast to other areas of law, 'the distinction between people whose relationship is akin to employment and true independent contractors' was determinative for the purposes of vicarious liability. Despite expansion of the doctrine, it was said to be 'going too far down the road to tidiness' to, in effect, recognise the latter category of relationship as being capable of enlivening the doctrine.[46] Her judgment confirms, as Lord Burrows JSC later put it, that the distinction between independent contractors and employees remains of 'crucial importance'.[47] Baroness Hale also cautioned against eliding 'the policy reasons for the doctrine of the employer's liability for the acts of his employee … with the principles which should guide the development of that liability' into relationships akin to employment.[48]

There is some indication that, at least in England, the expansion of vicarious liability has come to rest. In *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses*,[49] Lord Burrows JSC (with whom the other members of the Court agreed) said: 'The idea that the law still needs tailoring to deal with sexual abuse cases is misleading. The necessary tailoring is already reflected in, and embraced by, the modern tests.'[50]

The Supreme Court of Canada has similarly expanded the concept of vicarious liability to encompass a wider set of relationships analogous to that of employment. In that jurisdiction, the enquiry at stage one focusses upon whether the relationship between the defendant and the tortfeasor is

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42 Ibid 20 [56].
43 Ibid 15 [34].
44 See *Cox* (n 29); *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677; *Armes* (n 19); *Various Claimants v Barclays Bank plc* [2020] AC 973 ('*Barclays Bank*').
45 *Barclays Bank* (n 44).
46 Ibid 988 [29].
47 *BXB* (n 4) 585 [50].
48 *Barclays Bank* (n 44) 984 [16].
49 (n 4).
50 Ibid 598 [58].

'sufficiently close'.[51] Application of the doctrine is said to be 'animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions'.[52]

In *John Doe v Bennett* ('*Bennett*'),[53] the Supreme Court found a diocesan episcopal corporation vicariously liable for sexual assault perpetrated by a priest on boys in his parishes. This was the outcome despite the priest not being under any contract of employment. The Court held that the relationship between a bishop and a priest in a diocese was 'akin to an employment relationship',[54] inasmuch as the priest took a vow of obedience to the bishop and the bishop exercised extensive control over the priest's activities. This form of arrangement was held to be capable of attracting liability.

IV The Australian Position before Bird

Prior to *Bird*, it was uncertain as to whether the High Court of Australia would reciprocate the overseas recasting of vicarious liability. While it had been widely understood that, save for some narrowly defined exceptions, the only relationship capable of giving rise to vicarious liability is that arising from a contract of employment, this had not been tested conclusively.

Historically, the High Court has drawn a sharp distinction between employees and independent contractors. An independent contractor carries out their work, not as the representative of another, but as a principal in their own enterprise.[55] Thus, the 'general rule' has long been that a defendant is not vicariously liable for a tort committed by an independent contractor.[56] This 'central conception' was cast by a majority of the High Court as being 'too deeply rooted to be pulled out'.[57]

The decision in *Colonial Mutual Life Assurance Society Ltd v The Producers & Citizens Co-operative Assurance Co of Australia Ltd* ('*Colonial Mutual Life*')[58] is seen as a high watermark of vicarious liability in Australia. In that case, a party who engaged an agent (an independent contractor) to solicit for the creation of legal relationships between that party and others was held to be vicariously liable for slanders made by the agent in the course of that engagement.

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51 *Bennett* (n 19) 445 [20].
52 *Bazley* (n 2) 556 [36].
53 (n 19).
54 Ibid 449 [27].
55 *Colonial Mutual Life Assurance Society Ltd v The Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, 48 (Dixon J).
56 *Hollis* (n 33) 36 [32] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney* (n 12) 191 [100] (Kirby J).
57 *Sweeney* (n 12) 173 [33] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
58 (n 55).

In a real sense, the reasoning in *Colonial Mutual Life* ran afoul of the orthodox position that vicarious liability hinges upon employment. However, any exception established by that decision has proved to be a limited one. A majority of the High Court in *Sweeney v Boylan Nominees Pty Ltd* ('*Sweeney*')[59] later clarified that the conclusion reached in *Colonial Mutual Life* depended 'directly' upon 'the identification of the independent contractor as the principal's agent (properly so called)'.[60] Additionally, the ratio of *Colonial Mutual Life* was said to be confined to a specific set of circumstances — that is, engagement of the contractor as the agent of the principal to bring about legal relations between the principal and third parties.[61] The majority in *Sweeney* emphasised that no authority, including *Colonial Mutual Life*, 'established the principle that A is vicariously liable for the conduct of B if B "represents" A (in the sense of B acting for the benefit or advantage of A)'.[62]

Before *Bird*, the decision in *Prince Alfred College Inc v ADC* ('*Prince Alfred College*')[63] was the leading High Court authority on vicarious liability in the context of institutional sexual abuse. That case concerned assault perpetrated on a student by a boarding housemaster employed by the appellant college. The victim alleged that the college was vicariously liable for the wrongful acts of the housemaster. While it was ultimately unnecessary for the Court to finally determine the issue of liability, French CJ, Kiefel, Bell, Keane and Nettle JJ recognised that the requirement that the tortfeasor's wrongful act be committed in the course or scope of employment has remained a 'touchstone' for vicarious liability.[64] The plurality concluded that liability may arise where the role given to the employee, and the nature of the employee's responsibilities, had the effect that the employment not only provided an opportunity, but also was 'the occasion,' for the commission of the wrongful act by the employee.[65] This has been referred to as the 'special role' criterion.

Critically, in *Prince Alfred College*, the perpetrator was an employee. Properly understood, the special role criterion identified by the plurality was relevant to stage two of the test for vicarious liability — that is, the connection between the employment relationship and the act or omission in question. As Jagot J in *Bird* later identified, the test propounded in *Prince Alfred College* did not 'constitute a separate feature enabling vicarious liability to be established in respect of the conduct of a person who is not an employee'.[66]

As much was recognised by the Supreme Court of Victoria in *PCB v Geelong College*.[67] That decision concerned abuse perpetrated by a non-employee at a

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59 (n 12).
60 Ibid 170 [22] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
61 Ibid.
62 Ibid 172 [29].
63 (n 8).
64 Ibid 149 [41].
65 Ibid 159–60 [80]–[81].
66 *Bird* (n 3) 1401 [238].
67 *PCB v Geelong College* [2021] VSC 633.

'House of Guilds' operated by the defendant, Geelong College. In finding that the College was not vicariously liable for the tortious conduct committed by the non-employee, O'Meara J made important observations about the effect of *Prince Alfred College.* His Honour explained:

> In my view, the presence of a relationship of employer and employee is a necessary intermediate step or foundation in the reasoning of the High Court in *Prince Alfred College*. I do not read that reasoning as supporting any proposition to the effect that the intermediate step may be removed, and a vicarious liability for the criminal acts of another imposed, merely by searching for what might in general terms be described as being a 'special role' to be discerned by reference to a multifactorial analysis untethered to any distinct, assigned or formal relationship between the parties.[68]

O'Meara J's observations undoubtedly reflected the conventional understanding in Australia pre-*Bird* that, subject to limited exceptions, employment was a precondition to vicarious liability attaching to a defendant.

V *Bird v DP*

A *Victorian Court of Appeal*

The primacy of the employment relationship to vicarious liability was called into question when, in 2023, the Victorian Court of Appeal published its decision in *Bird v DP* ('*Bird VSCA*').[69] In dismissing an appeal against a decision of Forrest J,[70] the Court recognised a non-employment 'sui generis' relationship between a priest and a diocese as being capable of giving rise to vicarious liability. The case concerned sexual assault occasioned upon the respondent (then a child) by a Catholic priest, Bryan Desmond Coffey. The respondent sued the Diocese of Ballarat, alleging that it was vicariously liable for Coffey's assaults. It was uncontentious that Coffey, in his role as assistant priest under the Diocese, was neither an employee of the Diocese, nor was he an independent contractor engaged by it. No relationship of employment arose because the Diocese lacked 'immediate control or supervision' over Coffey's activities.[71]

The Court of Appeal observed that the relationship between a diocese and a priest was 'necessarily, sui generis'.[72] It did not exist in the context of a commercial relationship or a purely social relationship. Instead, 'the relationship [was] founded in the context of the hierarchical system of a Diocese of the Roman Catholic Church'.[73] In many ways, the relationship between Coffey and the

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68 Ibid [303] (O'Meara J).
69 *Bird v DP* (2023) 69 VR 408 ('*Bird VSCA*').
70 *DP v Bird* [2021] VSC 850 ('*Bird VSC*').
71 Ibid [211].
72 *Bird VCSA* (n 69) 438 [120] (Beach, Kaye and Niall JJ).
73 Ibid.

Diocese echoed the relationship recognised as being 'akin to employment' in the English *Christian Brothers* decision.

Controversially, the Court of Appeal found stage one of the enquiry to be satisfied. It held that the sui generis relationship between Coffey and the Diocese was one which, in an appropriate case, would render the Diocese vicariously liable for any tort committed by Coffey in his role as an assistant priest within the Diocese.[74]

This conclusion was reached through a multi-factorial analysis of the relationship between Coffey and the Diocese — untethered to the existence of any employment relationship. While Coffey was not, in a strict legal sense, an employee of the Diocese, he was said to be 'a representative', 'the servant' and 'an emanation' of the institution.[75] The Court placed emphasis on the relationship being 'governed by a strict set of normative rules', enabling Coffey 'to embody the Diocese in his pastoral role' and permitting the Diocese to exercise a degree of control over Coffey.[76] The Court also observed that Coffey was subject to instruction, supervision, transfer and sanction by the Diocese.[77] He was dependent on the Church and his livelihood was provided for.[78]

The Court sought to justify its method by reference to Dixon J's judgment in *Colonial Mutual Life*. It contended that Dixon J's judgment in that case established that, 'in an appropriate case, a relationship may give rise to vicarious liability on the part of a principal, notwithstanding the tortfeasor was not an employee of the principal'.[79] The Court of Appeal found that, based on the approach of Dixon J, 'the extent to which the tortfeasor presented as an emanation of the principal' was a 'central factor' in determining whether stage one was satisfied.[80]

This component of the Court of Appeal's judgment was controversial at the time. The agency relationship identified in *Colonial Mutual Life* was far removed from the 'sui generis' relationship between Coffey and the Diocese. Prior to *Bird*, no superior court had recognised a relationship of this kind as being capable of giving rise to vicarious liability.

Having found that stage one was satisfied, the Court of Appeal proceeded to consider stage two of the vicarious liability enquiry. In doing so, it applied the test from *Prince Alfred College*. The Court found that the position of power and intimacy vested in Coffey as an assistant priest of the parish 'provided him not only with the opportunity to sexually abuse the respondent, but also the occasion for the commission of those wrongful acts'.[81] Liability was established and, for a moment, jurisprudence in Australia seemed on the precipice of change.

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74 Ibid 441 [130].
75 Ibid 440–1 [128]–[129].
76 Ibid 439–40 [125].
77 Ibid.
78 Ibid 440 [129].
79 Ibid 437 [114].
80 Ibid 435 [104].
81 Ibid 446 [148].

B *High Court of Australia*

However, any prospect of expansion to vicarious liability in this country proved to be short-lived. On appeal, the High Court unanimously decided to overturn the Court of Appeal's decision. On the question of whether the boundaries of vicarious liability should be expanded in Australia beyond a relationship of employment, all justices — save for Gleeson J — answered 'no'.

Gageler CJ, Gordon, Edelman, Steward and Beech-Jones JJ penned the plurality judgment. Their Honours were explicit that, in Australia, 'a relationship of employment is a necessary precursor to a finding of vicarious liability'.[82] There was said to be a lack of 'stable' or 'solid' foundation for any expansion of the doctrine or for its bounds to be redrawn.[83] Difficulties in clearly defining the breadth of vicarious liability could not themselves, it was said, form 'a proper basis' for its extension.[84]

The plurality acknowledged that the relationship between Coffey and the Diocese 'exhibited certain features that resembled that of a relationship of employer and employee'.[85] However, their Honours expressed concern that, in the absence of clear or stable principle, 'expanding the threshold requirement to accommodate relationships that are "akin to employment" would produce uncertainty and indeterminacy'.[86]

The plurality was critical of overseas approaches, observing that the rationale for the doctrine's expansion in England depended upon 'contestable policy choices and the allocation of risk', which were said to be 'matters upon which minds might differ' and not 'a sound basis for determining and developing the law of vicarious liability'.[87]

Reference was made to the judgments in *Hollis* and *Sweeney* where the Court had refused to extend the boundaries of vicarious liability to include independent contractors or to develop the principle solely by reference to policy considerations. To expand the doctrine required, the plurality said, that those decisions be revisited and overruled.[88] Citing the Court's statements in *Sweeney*, the plurality rejected that *Colonial Mutual Life* justified 'the attribution of Coffey's conduct to the Diocese or the Bishop under the rubric of "vicarious liability"'.[89]

Jagot J, in separate reasons, reached conclusions consistent with those of the plurality. In her Honour's view, previous High Court authority stood firmly

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82 *Bird* (n 3) 1362 [45].
83 Ibid 1373 [48].
84 Ibid 1368 [67].
85 Ibid 1367 [64].
86 Ibid 1367 [65].
87 Ibid 1367 [62].
88 Ibid 1363 [49].
89 Ibid 1359 [33].

against extension of the principles of vicarious liability and there was otherwise no basis for expansion of the doctrine.[90]

On the threshold issue, Gleeson J disagreed. In a separate judgment (discussed in more detail below), her Honour argued that relationships akin to employment should be capable of attracting vicarious liability. Her Honour described the case as 'a missed opportunity for the Australian common law to develop in accordance with changed social conditions and in tandem with developments in other common law jurisdictions'.[91]

Gleeson J was critical of the plurality's conclusion that there was 'no adequate foundation for the development of the law of vicarious liability'.[92] Her Honour contended that existing case law governing the doctrine of vicarious liability did not foreclose the extension of the doctrine to relationships akin to employment.[93]

According to Gleeson J, features indicative of employment could be 'seen in the Diocese's appointment of Coffey as an assistant parish priest'.[94] By reason of such features, and because Coffey could not be classified as an independent contractor, the relationship between Coffey and the Diocese was, it was said, fairly described as 'akin to employment'.[95]

Notwithstanding Gleeson J's conclusion that the relationship between the Diocese and Coffey was capable of attracting vicarious liability, her Honour held that the Diocese was not liable for the assaults inflicted upon DP. This was because, her Honour said, '[t]he torts were therefore not committed in the course of Coffey's performance of his role as assistant parish priest'.[96] In other words, the second stage of the enquiry was not satisfied.

VI Criticisms

The following is a summary of the arguments against the 'employment or nothing' approach affirmed by the plurality in *Bird*. Though the plurality's reasoning is compelling and, in the author's view, largely consistent with previous High Court authority, there are nevertheless strong criticisms that can be made of the conclusions reached. As will be seen, some (but not all) of these arguments were advanced by Gleeson J in her Honour's reasons.

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90 Ibid 1401 [241].
91 Ibid 1371 [79].
92 Ibid 1372 [85].
93 Ibid 1371 [79].
94 Ibid 1385 [159].
95 Ibid 1387 [176].
96 Ibid 1387–8 [177]–[183].

A *The 'Judicial Whim' Paradox*

A concern uniting the plurality was the perceived lack of legal foundation for expansion of the doctrine. It was said that difficulties in clearly defining the breadth of vicarious liability could not themselves form 'a proper basis' for its development.[97] Reference was made[98] to the following statement by Gaudron and McHugh JJ in *Breen v Williams*:

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles.[99]

The plurality's unwillingness to permit notions of justice and fairness to drive progression in the law of vicarious liability reflect broader concerns about judges acting upon 'judicial whim' rather than legal principle.[100] Common law courts have warned against developing principle 'as an expedient reaction to the problem confronting the court' rather than proceeding in an incremental and principled way.[101]

While it is difficult to resist the plurality's conclusion that there was 'no solid foundation for expansion of the doctrine or for its bounds to be redrawn',[102] it does raise something of a paradox. As the High Court has repeatedly observed, there has never been any clear principled foundation for vicarious liability at all. Vicarious liability, and its application, has 'not grown from a single, logical legal rule' but instead 'from judicial perceptions of individual justice and social requirements that vary over time'.[103] Justification for the doctrine 'has long been accepted as ultimately based on legal policy'.[104] Thus, just as there is no coherent basis to expand the breadth of the principle beyond employment, there is arguably no principled justification for strictly limiting it to that relationship. Beyond the weight of history, it is difficult to identify any reason why the mere existence of a contract of employment should be determinative.

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97 Ibid 1368 [67].
98 Ibid.
99 *Breen v Williams* (1996) 186 CLR 71, 115.
100 To adopt the language of Kirby J in *Lepore* (n 17) 612 [301].
101 *E* (n 39) 761 [54] (Ward LJ).
102 *Bird* (n 3) 1363 [48].
103 *Lepore* (n 17) 611 [300] (Kirby J).
104 Ibid 612 [300] (Kirby J).

B *Policy as a Basis for Expansion*

The plurality's judgment was, in essence, a rejection of the notion that policy should dictate development in the law of vicarious liability. Their Honours said: 'Whether or not true vicarious liability can be explained by any theory based on a relationship of employment, a relationship of employment has always been a necessary precursor in this country to a finding of vicarious liability'.[105]

While the plurality's reticence can be understood, there is a compelling argument that, in this 'unusual' domain grounded purely in value judgments, it is appropriate for the same rationales that led to entrenchment of the doctrine in the common law to also inform its development. If the only justification for vicarious liability is policy, and policy allows for A, why should the doctrine be restricted to B?

It has been recognised that, in any re-expression of the common law, it is 'normal' to have regard to considerations of policy, as well as to legal authority and principle.[106] In addition to vicarious liability, the common law is replete with examples of the infusion of legal principle with human conceptions of fairness and justice. In the United Kingdom, 'high principles of public policy'[107] led to the recognition of a standalone cause of action for restitution of tax paid by a citizen to a public authority pursuant to an unlawful demand.[108] In the context of administrative law, courts regularly make 'qualitative judgments' about what the legislature should be taken to intend in conferring powers on the executive — particularly where there is an absence of any affirmative indication of such intention. For example, the common law ordinarily implies a condition that statutory power be exercised with procedural fairness to those whose interests may be adversely affected.[109] These qualitative judgments cannot be justified solely by reference to legal deductive reasoning. They are, to a large degree, traceable to human conceptions of fairness and dignity.[110]

However imperfect an analogy between vicarious liability and the above domains might be, these examples illustrate how development of the common law sometimes requires judges to make some initial move in logic that is not otherwise justified by established legal principle. To adjust for changing social conditions and values, the law has, from time to time, pulled itself up by its own bootstraps. As Kirby J observed in *Lepore*, when apex courts are called upon to respond to a new

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105 *Bird* (n 3) 1363 [48] (citations omitted).

106 *Lepore* (n 17) 611 [300] (Kirby J).

107 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch), [315] (Henderson J).

108 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, discussed (but not followed) by the High Court of Australia in *Redland City Council v Kozik* (2024) 98 ALJR 544.

109 See, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 100 [39] (Gaudron and Gummow JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666[97] (Gummow, Hayne, Crennan and Bell JJ).

110 See James Allsop, 'The Foundations of Administrative Law' (Whitmore Lecture, Sydney, 4 April 2019) 15–16.

problem for society, 'it is inevitable that, as in the past, the common law will give an answer exhibiting a mixture of principle and pragmatism'.[111]

If, contrary to the plurality's reasoning, one accepts that development to the law of vicarious liability can be guided by the foundational policy rationales, the question becomes whether those theories favour — or at least, do not preclude — the 'akin to employment' approach. As identified below, there are strong arguments that they do.

C *Justification for 'Employment or Nothing' in Policy*

It is difficult to identify anything in the policy justifications for vicarious liability that would support a strict limitation to employer–employee relationships. To the author's knowledge, there is nothing in any formulation of the enterprise risk theory, the deeper pockets rationale or the objective of deterrence that bespeaks a sharp restriction of this kind.

In *Hollis*, the plurality listed features of an employment relationship that distinguished it from an independent contracting arrangement.[112] These features mirrored many of those identified in *Christian Brothers* that, in the Supreme Court's view, rendered it 'fair, just and reasonable' to impose vicarious liability.[113] The factors from both *Hollis* and *Christian Brothers* (as adjusted by more recent case law)[114] include, but are not limited to, the following:

a. The tortfeasor is integrated in, and not independent from, the defendant. This may be demonstrated by the existence of 'a hierarchy of seniority' into which the tortfeasor's role fits.

b. The tortfeasor is subservient to and dependent on the defendant (both in relation to livelihood and for 'tools of trade').

c. The defendant has exclusive access to the services of the tortfeasor and/or the tortfeasor lacks capacity to undertake other vocations.

d. The tortfeasor undertakes work that is integral or central to the defendant's enterprise.

e. The defendant has a high degree of control exercisable over the tortfeasor, and capacity to organise and supervise the tortfeasor's activities.

f. The defendant presents the tortfeasor as being an emanation or representative of the defendant.

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111 *Lepore* (n 17) 611 [300].
112 *Hollis* (n 33) 42–5 [48]–[57].
113 *Christian Brothers* (n 1) 20 [56] .
114 See *BXB* (n 4) 587 [58].

Arguably, any kind of relationship — employment or otherwise — that exhibits these traits is responsive to the policy rationales that underlie vicarious liability. Notions of justice and fairness advanced by the enterprise risk theory are not attracted to any specific legal category of relationship. Rather, the theory answers to conditions where a defendant places a risky enterprise in the community into which the tortfeasor is integrated, and where the tortfeasor acts for the benefit of that enterprise. Similar observations were made by Gleeson J. Her Honour said the enterprise risk the theory justified and provided 'a principled basis' for expansion of the doctrine to relationships akin to employment.[115]

As to deterrence, an enterprise's ability to 'to put in place the necessary preventive and supervisory precautions'[116] to prevent abuse does not depend upon the legal status of its relationship those integrated within its organisation. Thus, to limit vicarious liability to the employment domain arguably blunts the admonitory value of the doctrine, particularly in religious settings where sui generis relationships between defendants and tortfeasors are so common. Eradication of abuse requires 'powerful motivation acting upon those who control institutions', particularly those charged with the care and protection of society's most vulnerable.[117] That motivation is, arguably, not sufficiently supplied by the narrow view of vicarious liability affirmed in *Bird*.

The fact that employment relationships will, by definition, satisfy the criteria identified above is, arguably, not a reason to restrict vicarious liability to that category. Where some other species of relationship exhibits the same features, it is difficult to identify any principled basis for its exclusion. For the law to deny liability based solely upon the absence of a contract of employment is, in a sense, to disregard the true substance of the relationship between tortfeasor and defendant.

The above analysis reflects the view expressed by Gleeson J. Her Honour referred to categories of relationship that,

> 'when whittled down to their essence, possess the same fundamental qualities as those which inhere in employer-employee relationships', so that it is anomalous not to impose vicarious liability for torts committed in the course of the relationship.[118]

In the view of her Honour, the legal basis of a relationship is immaterial and 'does not provide a satisfactory explanation for imposing liability on an organisation in one case, and for not imposing liability on that organisation in the other'.[119]

The outcome in *Bird* illustrates the bluntness of a binary employment or nothing approach. It was uncontentious that the relationship between Coffey and the Diocese exhibited many features of conventional employment. Indeed, it is

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115 *Bird* (n 3) 1374 [94].
116 *Lepore* (n 17) 613 [305] (Kirby J).
117 *Bazley* (n 2) 555 [32].
118 *Bird* (n 3) 1372 [86], quoting *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074, 1097 [63] (Sundaresh Menon CJ for the Court) (Court of Appeal).
119 *Bird* (n 3) 1374 [95].

difficult to conceive of any employment relationship closer than the 'sui generis' relationship that confronted the High Court.

Gleeson J opined there was no reason to distinguish a diocese from any other organisation in the context of enterprise risk. Her Honour emphasised that members of Catholic religious orders have limited 'individual capability to compensate victims of any personal injuries for harm that they might inflict in the course of the organisation's work'.[120] The functions of an enterprise in absorbing, controlling and spreading risks were said to be of particular importance.

Though religious organisations like the Diocese may lack the capacity to directly control priests, there are other forces at work. Priests act in subservience not only to the institution, but the faith itself. Religious dogma dictates a priest's day-to-day behaviours more than any conventional employment relationship. It restricts their autonomy, speech, and personal life. It controls who they marry, the clothes they wear and the entities they worship. Priests in Coffey's position stand 'as representatives of the Church's values' and are required to 'embody them always'.[121]

Conceivably, the reason institutions like the Diocese do not closely supervise priests' work is that a higher level of supervision already exists. Coffey was subservient to the word of God and the dictates of canon law, not merely the directions of his supervisors within the Diocese. In a very real sense, by virtue of his vows to the Church, these were sources of immediate control and supervision. While the Diocese did not supervise Coffey's adherence to the faith in an immediate sense, the Diocese was an emanation of the Catholic Church at large — an institution claiming to be the faith's authoritative source. When all of this is considered, there is something illusory in the conclusion that the Diocese lacked 'immediate control or supervision' over Coffey.[122] The connection between the two actors was arguably 'closer than that of an employer and its employees'.[123] To describe the relationship between Coffey and the Diocese as being 'akin to employment' is, if anything, to underplay its proximity.

However, as the plurality judgment in *Bird* makes clear, these special features of the priest–diocese relationship are almost certainly irrelevant in the absence of any contract of employment. Priests in the position of Coffey are treated upon something of a fiction — as if they are independent and operating their own enterprise. For these reasons, one could argue that to make such fine distinctions between employment and non-employment determinative in the context of vicarious liability is an 'artificial' and 'semantic' exercise.[124] There is a compelling case to be made that, despite the absence of a binding contract of employment, a relationship bearing the salient features of any typical employment relationship should nevertheless be capable of giving rise to vicarious liability.

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120 Ibid 1374 [96].
121 *Bird VSC* (n 70) [240].
122 Ibid [211].
123 *Christian Brothers* (n 1) 20 [58].
124 Cf *Bazley* (n 2) 556 [36].

D *Uncertainty and Indeterminacy*

In *Bird*, the plurality expressed concern that 'expanding the threshold requirement to accommodate relationships that are "akin to employment" would produce uncertainty and indeterminacy'.[125] While it is difficult to argue with this conclusion, three points can be made.

First, even with a limitation to employment relationships, there is a degree of uncertainty and indeterminacy built into the first stage of the vicarious liability enquiry. As cases like *Hollis* make clear, whether a tortfeasor is an employee can often be a complex question requiring the same kind of multi-factorial analysis used overseas in determining whether a relationship is akin to employment.

Second, as has been demonstrated in the United Kingdom, the 'akin to employment' threshold is an onerous one. The expanded test 'does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant'.[126] The mere fact that a tortfeasor's conduct was intended to benefit a defendant or was undertaken to advance some objective of the enterprise will not suffice. More is required.

Finally, it must be borne in mind that claimants must still satisfy stage two of the vicarious liability enquiry — that is, on the basis of the test adopted in *Prince Alfred College*, it must be proved that the relevant relationship provided the opportunity and occasion for the tortious conduct. The closeness of the connection between the relationship between the defendant and the tortfeasor and the act of abuse requires 'a strong causative link'[127] and provides 'an objective, rational basis for liability and for its parameters'.[128]

VII Alternative Rationales for Vicarious Liability

Some commentators have proposed new justifications to better explain vicarious liability and its traditional limitation to employment relationships. Neyers contends that existing rationales erroneously focus upon the relationship between the master and the tort victim and 'the goals that would be achieved if liability were imposed'.[129] Instead, it is argued, the most compelling justification for the doctrine lies solely in the relationship between the employer and employee — specifically, 'in the employer's implied promise in the contract of employment to indemnify the employee for harms (including legal liability) suffered by the employee in the conduct of the employer's business'.[130] Indeed, to look at

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125 *Bird* (n 3) 1367 [65].
126 *BXB* (n 4) 587 [58].
127 *Christian Brothers* (n 1) 26 [86].
128 *Prince Alfred College* (n 8) 148 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ).
129 Neyers (n 32) 301.
130 Ibid.

vicarious liability through this lens would justify why the tortfeasor must be an employee — since if the tortfeasor is not an employee, they will not have a right of indemnity from the person sought to be made vicariously liable.

However, to the author's knowledge, no common law court has sought to rationalise vicarious liability in this way. To do so would serve to narrow the scope of the doctrine beyond even the restrictive interpretation adopted in Australia. Principally, it is difficult to reconcile intentional or criminal misconduct by an employee as falling within an employer's implied indemnity.

VIII Tort Theory

In both Australia and overseas, limited attention has been paid to tort theory and its interface with the 'akin to employment' test. Commentators have drawn a distinction between the master's tort theory and the servant's tort theory of vicarious liability.[131] Under the master's theory, a master is liable because the *acts* of a servant are attributed to the master. The servant's theory holds instead that the *liability* of the servant is attributed to the employer. While the servant's theory is seen to have precedence in Australia, its capacity to justify the imposition of vicarious liability has been challenged by some including, most notably, Robert Stevens.[132]

In *Darling Island Stevedoring & Lighterage Co v Long*,[133] Kitto J appeared to endorse the master's theory, suggesting that vicarious liability was 'not a liability substituted for that of the servant'. A master's liability, his Honour asserted, is a 'separate and independent liability' that exists 'not because the servant is liable, but because of what the servant has done'.[134] However, in the same decision, Fullagar J observed that master's theory had not prevailed in Australia, stating:

> The rule is, in my opinion, rightly stated, as it always is, in terms of liability and not in terms of duty. The liability is a true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another.[135]

Arguably, the servant's theory places greater emphasis on stage one to the vicarious liability enquiry. Given that, on the servant's theory, the liability of the employer is contingent mainly upon the liability of the employee, much depends on the nature and closeness of the relationship between those parties, and whether it is sufficient to justify attributing the liability of one to the other, and less upon the relationship between the employer and the tortious act(s). Conversely, the

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131 See Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* 515, 517.

132 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 244; Robert Stevens, 'Vicarious Liability or Vicarious Action?' (2007) 123(Jan) *Law Quarterly Review* 30.

133 *Darling Island* (n 14).

134 Ibid 61.

135 Ibid 57.

master's theory focusses more on stage two of the enquiry, asking whether the acts of the tortfeasor are sufficient to impose liability upon the defendant.

In the author's view, expanding the scope of stage one to encapsulate relationships 'akin to employment' represents closer alignment to the master's theory, freeing the enquiry from questions of employment and allowing liability to hinge more readily upon the nature of the acts themselves.

The decision in *Bird* arguably tends in the opposite direction, signalling the continued relevance of the servant's theory in Australia. Though the plurality did not mention the theory by name, they nevertheless characterised 'vicarious liability in its true or proper sense' as a 'secondary liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant'.[136]

IX Conclusion

The decision in *Bird* has provided clarity to the law of vicarious liability in Australia. It makes clear that, contrary to other parts of the common law world, employment remains a precondition to the application of vicarious liability in this jurisdiction. As the plurality's reasoning demonstrates, there exist powerful arguments against uprooting the doctrine from its master and servant foundations. However, notwithstanding the decision, the appropriateness of a binary 'employment or nothing' test at the first stage of the vicarious liability enquiry remains controversial. In conditions where the relationships between abusers and institutions so often fall outside the employment paradigm, this controversy will no doubt continue into the future.

[136] *Bird* (n 3) 1361 [44].