Cambridge Law Journal, **63(1)**, March 2004, pp. 53–64
Printed in Great Britain

SHORTER ARTICLE

VICARIOUS LIABILITY FOR VIOLENT EMPLOYEES

ROBERT WEEKES*

THE Flamingo's Nightclub hired a new bouncer. He was accustomed to manhandling certain customers off the premises—a commendable quality in a bouncer, one might think. Indeed, the owner of the club encouraged the bouncer to be aggressive in ejecting his patrons. Yet, when a customer resisted, a fight started, and the bouncer himself was forced to flee. He returned home, armed himself with a knife and attacked another patron in the street. The Court of Appeal (Judge, Dyson L.JJ., Pumfrey J.) held the owner of the club vicariously liable for the injuries inflicted.[1] The attack did not occur on the premises. A period had intervened since the initial incident in the club. The owner did not and could not countermand the conduct of his absent employee, who was pursuing a private desire for revenge, and not any instruction of his employer. Nevertheless, the tipping point for vicarious liability was held to be the owner's earlier encouragement and employment of this aggressive bouncer.

Mattis v. *Pollock* is the third of recent domestic appellate decisions dramatically to extend the scope of vicarious liability of employers for intentional torts committed by their employees, its prequels being *Lister* v. *Hesley Hall Ltd.*[2] and *Dubai Aluminium Company Ltd.* v. *Salaam.*[3] The conceptual difficulty is, however, well established. It arises from the second limb of the Salmond test, which regards the employee's conduct as being within the "course of his employment" where it is "a wrongful and unauthorised mode of doing some act authorised by the master".[4] It has long been

* Research Fellow, British Institute of International and Comparative Law, London; Pupil Barrister. My thanks to Dr. T.R. Hickman and Dr. M. Andenas for their helpful comments on earlier drafts of this article. All errors remaining are of course my own.

[1] *Mattis* v. *Pollock* [2003] EWCA 887, [2003] 1 W.L.R. 2158.
[2] [2001] UKHL 22, [2002] 1 A.C. 215.
[3] [2002] UKHL 48, [2002] 3 W.L.R. 1913.
[4] J. Salmond, *Law of Torts*, 1st edn., (London 1907), p. 83.

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

accepted that this limb encompasses deliberate criminal wrongdoing.[5] The artificiality of deeming an act to be "authorised" that the employer impliedly, or even unequivocally, prohibited, is also condoned.[6] Yet, as Lord Wilberforce observed: "the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts".[7] Thus the vexed issue is the extent of wrongfulness required to render the employee's act an unauthorised "frolic of his own".

I. The Close Connection Test

The House of Lords has lately asked whether the actions of the employee were "so closely connected" with the duties that he was authorised to do that "they may fairly and properly be regarded" as being within the course of his employment.[8] This was the approach endorsed by the Court in *Mattis*.[9] However, the bland test of "close connection" begs no less a question than that of the "ordinary course of employment". Moreover, the House has suggested that it is not a pure or primary question of fact, but a secondary one that requires "evaluative judgment" of all the circumstances of the case as well as relevant precedent.[10]

Consequently, competing bases have emerged which either explain, or perhaps offer alternatives to, the degree of close connection required. Each one mimics an element of the test for imposing a *direct* duty of care in negligence. Each has been considered not only by domestic courts but also by the highest appellate authorities of Canada and Australia. This note considers three of these rationales in the light of the decision in *Mattis*. It observes how they revive the "master's tort theory" of vicarious liability. This theory holds an employer vicariously liable for those acts of the employee which breach the employer's own duty of care to the customer.[11] It demands neither that the employee's acts be within the course of his employment nor that they be tortious.[12] This note concludes by addressing the implications of reinvigorating this theory, which includes the potentially vast expansion of liability

[5] *Dyer* v. *Munday* [1895] 1 Q.B. 742.
[6] *Ilkiw* v. *Samuels* [1963] 1 W.L.R. 991; *Rose* v. *Plenty* [1976] 1 W.L.R. 141.
[7] *Kooragang Investments Pty Ltd.* v. *Richardson & Wrench Ltd.* [1982] A.C. 462, 473.
[8] Note 2 above, at pp. 223–224; n. 3 above at para. [23].
[9] Note 1 above, at para. [26].
[10] Note 3 above, at paras. [24]–[26].
[11] *Broom* v. *Morgan* [1953] 1 Q.B. 597, 609; 612; *Boyle* v. *Kodak* [1969] 1 W.L.R. 661, 672–673.
[12] *X* v. *Bedfordshire County Council* [1995] 2 A.C. 633, 739–740; *KR* v. *Bryn Alyn Community (Holdings Limited)* [2003] EWCA Civ 85, at [102].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

of private sector employers for the dangerous activities of their employees.

II. The Risk Rationale

First, under the rubric of "close connection" the House has imported the North American concept of enterprise risk. It has been described as "a fact of life ... that sometimes ... agents may exceed the bounds of their authority or even defy express instructions".[13] The employer having selected the employee, delegated the duties and standing to benefit from their performance, should have calculated and accepted this risk.[14] The Canadian Supreme Court has emphasised that an employer ought to be liable not only for the creation of this risk, but also for enhancing a risk that is "inherent" in the nature of her business.[15] In an Australian authority analogous to the facts of *Mattis*, the owner of a bar was not held vicariously liable for his employee's "spontaneous act of retribution" against a customer.[16] Gleeson C.J. noted obiter that risk analysis explains this decision: "The fact that it was no part of the barmaid's responsibilities to keep order in the bar was important. If that had been part of her duties, then presumably there would have been an increased risk that any violent propensities on her part could result in harm to customers".[17]

Risk analysis already has a proud heritage in direct liability. The foreseeability of a risk determines the scope and extent of the primary duty of care.[18] Where there is "a manifest and obvious risk" of tortious damage being inflicted by a third party for whom another party is responsible, the latter owes a personal duty of care to those who may suffer such damage.[19] The House of Lords has even recently affirmed the substitution of risk for factual causation.[20] The "course of employment" is likewise both a question of fact and a causal requirement of vicarious liability. A risk *per se* is unlikely to found either duty or causation,[21] but its existence is often the decisive reason for imposing liability.

The judgment in *Mattis* adopts an unarticulated risk rationale. The Court accepted that bouncers perform a necessary function of maintaining order and discipline in a nightclub. The Court of

[13] Note 3 above, at para. [22].
[14] *Hamlyn* v. *John Houston & Co.* [1903] 1 K.B. 81, 85; note 2 above, at para. [65].
[15] *Bazley* v. *Curry* (1999) 174 D.L.R. (4th) 45 at [37]; note 2 above, at para. [83].
[16] *Deatons Pty Ltd.* v. *Flew* (1949) 79 C.L.R. 370.
[17] *New South Wales* v. *Lepore* [2003] H.C.A. 4 at [65].
[18] *Bolton* v. *Stone* [1951] AC 850; *Tomlinson* v. *Congleton Borough Council* [2003] UKHL 47, at [34]–[37]; [79]–[80].
[19] *Dorset Yacht* v. *Home Office* [1970] 1 A.C. 1004, 1035.
[20] *Fairchild* v. *Glenhaven Funeral Services* [2002] UKHL 22, [2003] 1 A.C. 32.
[21] *E.g.*, *Gregg* v. *Scott* [2002] EWCA Civ 1471, [2003] Lloyd's Rep Med 105, at [58]–[59].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

Appeal has acknowledged that this function inevitably includes the barring and ejection of unruly patrons by the use of reasonable force.[22] The employment and encouragement of this violent bouncer therefore might be said to have enhanced the risk of injury to customers that is generated by the "friction" and "confrontation" inherent in the enterprise of running a nightclub. As Judge L.J. observed on behalf of the Court in *Mattis*: "it is clear that where an employee is expected to use violence while carrying out his duties, the likelihood of establishing that an act of violence fell within the broad scope of employment is greater than it would be if he were not".[23]

Yet, in this case, the risk rationale seems intuitively unjust. There is of course a generic unfairness to the second Salmond category of vicarious liability. This is because it is a species of "strict liability"—the defendant is held liable notwithstanding his lack of personal fault and in spite of not authorising the conduct. The injustice is exaggerated where the conduct of the third party is not merely negligent, but deliberately wrong. This case creates a familiar contrast between the "innocence" of the employer and the (proven criminal) guilt of his employee: to borrow the phrase of Lord Hobhouse, the bouncer had committed "the paradigm of those acts which an employee could not conceivably be employed to do".[24]

However, the specific unfairness of the risk rationale lies in its drastic limitation of the means by which the employer can evade liability. The Court declined to hold that the bouncer should have been dismissed following an earlier incident of inappropriate violence. It accepted that the owner could not have intervened to prevent the attack. Instead, it concluded (with admirable hindsight) that the bouncer should never have been employed at all. The Court may implicitly have founded liability on the owner's earlier encouragement of the bouncer's aggressive behaviour. Yet, the Court also accepted that this bouncer's attitude was intended to intimidate unruly patrons into leaving quietly. The owner's policy may paradoxically have made injuries to *all* his customers a smaller, rather than a greater, risk.

It would seem that a sufficient risk was created by the *a priori* step of employing this particular bouncer in an enterprise that posed some inherent risk of personal injury to its customers. In short, the precedent condition for liability is employment, rather than the commission of acts *during the course of* employment. As

[22] *Vasey* v. *Surrey Free Inns Plc* [1996] P.I.Q.R. 373, 377–378.
[23] Note 1 above, at para. [25].
[24] Note 2 above, at para. [53].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

Laddie J. has commented on the *Lister* decision: "In other words, the terms of the employment become less important than the fact of the employment and the relationship between the victim and the employer becomes central".[25] Moreover, liability for the selection and employment of a dangerous employee or an independent contractor is a familiar category of direct liability.[26] The risk rationale therefore represents the first intersection between direct and vicarious liability.

III. The Assumption of Responsibility Rationale

A second rationale for the imposition of vicarious liability is the notion of the assumption of responsibility. As Lord Hobhouse held:

> The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant. Where these conditions are satisfied, the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negative the vicarious liability for his breach of the "delegated" duty.[27]

The assumption of responsibility rationale is derived from the test of proximity in establishing a *direct* duty of care. Lord Atkin's neighbour principle has long been glossed with this reasoning in another triangular tortious situation—the tort of negligent misstatement.[28] A voluntary assumption of responsibility creates an exception to the rule that: "even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do".[29] A minority in the High Court of Australia has recently applied this rationale to found the direct liability of employers for the intentional torts of their employees, in cases factually analogous to both *Lister* and *Bazley*. Gaudron and Mc Hugh JJ. held that school authority, as an employer of a paedophile teacher, was held to owe a non-delegable duty of care to the school pupils that he assaulted.[30]

This approach is an attractive one for claimants. It circumvents the central conceptual conundrum of vicarious liability; proving that the employee's conduct was within the course of his

[25] *Balfron Trustees* v. *Peterson* [2001] I.R.L.R. 758, at [27].
[26] *Pinn* v. *Rew* (1916) 32 T.L.R. 451; *Wilsher* v. *Essex Area Health Authority* [1987] Q.B. 730, 775; 778.
[27] Note 2 above, at para. [55]; para. [20] *per* Lord Steyn; para. [82] *per* Lord Millett.
[28] *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.* [1964] A.C. 465, 494 but cp *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, 862.
[29] *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 986; *Smith* v. *Leurs* (1945) 70 C.L.R. 256, 261–262.
[30] Note 17 above, at paras. [99]–[105]; [154]–[166].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

employment or sufficiently closely connected to it. As Gleeson C.J. noted: "It is enough that the victim has been injured by an employee on an occasion when the employer's duty of care covered the victim".[31] Moreover, this approach eschews the difficulty of finding direct liability of employers for the intentional torts of their employees; that the decision of the employee to violate the express or implied rules of his employment will invariably constitute an independent act precluding his employer's personal liability.

This approach extends beyond domestic precedent, as demonstrated by the rejection of the pleading on direct liability in *Mattis*. Judge Seymour at first instance held that the events culminating in the stabbing of the customer developed in distinct stages. The decision of the patrons to attack the bouncer and his to retaliate, the lapse of time, and the change of location, may jointly or severally have been sufficient to break the chain of causation between the nightclub owner and his customers.[32] The minority Australian approach would not succeed here. The relationship between a nightclub owner and his customers is not so exceptional that it gives rise to a duty in one to ensure that the other is protected from the wrongful behaviour of third parties, even if such behaviour is criminal. The category of such "special relationships" has been confined to those where one party is especially vulnerable, such as schoolchildren[33] and hospital patients.[34] The only route to bring home liability was the vicarious one.

However, Judge Seymour did affirm not only that the assumption of responsibility rationale operates in the context of vicarious liability, but that it is a necessary condition of such liability. The judge interpreted the *Lister* decision such that "vicarious liability depends upon the employer owing a duty to the victim performance of which he has elected to entrust to an employee who then commits the wrongdoing in question".[35] On this reading, vicarious liability would require a *personal* duty of care on behalf of the employer. The inquiry into the scope or course of employment of the employee is replaced by a conventional examination of the extent and duration of the duty of care of the employer. Accordingly, at first instance, vicarious liability was denied on the basis that the owner was not under a continuing duty to the customer of the club at the time of being attacked by

[31] *Ibid.*, at para. [31].
[32] *Mattis* v. *Pollock* [2002] EWHC 2177, at [77].
[33] *The Commonwealth* v. *Introvigne* (1982) 150 C.L.R. 258.
[34] *Gold* v. *Essex County Council* [1942] 2 K.B. 293.
[35] Note 32 above, at para. [74].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

his employee.[36] The assumption of responsibility rationale is thus a second point of convergence between direct and vicarious liability.

This approach can clearly produce results divergent from those of the monolithic course of employment inquiry. As Laddie J. has noted: "Even though the employee's acts are so heinous that they could not reasonably be said to form part of his obligations *vis à vis* his employer, they are treated as within the scope of his employment *vis à vis* the victim, since he was employed to discharge the employer's duty to the victim".[37] However, the defendant in *Mattis* sought to deny this possibility by the ingenious submission that the duty of care of the owner was "to take reasonable care to employ suitable staff to exercise supervision and control of his employees whilst they were *acting in the course of their employment*".[38]

IV. The Policy Rationale

The third rationale for the imposition of vicarious liability is derived from considerations of policy. Domestic courts and commentators have long appreciated that vicarious liability owes a greater debt to policy and expediency than legal principle.[39] The Canadian Supreme Court has recently expressly adopted this approach to determining whether the requisite closeness of connection exists. MacLachlin J. summarised the two-stage test: "First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in the light of broader policy rationales behind strict liability".[40] These rationales are crystallised into five independent and non-exhaustive criteria:

(a) the opportunity that the employer's enterprise afforded the employee to abuse his power;
(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to be committed by the employee);
(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
(d) the extent of power conferred on the employee in relation to the victim;

[36] *Ibid.*, at para. [77].
[37] Note 25 above, at para. [27].
[38] Note 32 above at para. [76] [emphasis added].
[39] *E.g.*, *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656, 685.
[40] Note 15 above, at para. [15].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

(e) the vulnerability of potential victims to the wrongful exercise of the employee's power.[41]

Lord Steyn has commented of these Canadian cases that, "Wherever such problems are considered in future in the common law world these judgments will be the starting point".[42]

The consideration of policy is the third of the accepted conditions for establishing a direct duty of care.[43] The judgment of Lord Browne-Wilkinson in the *Bedfordshire* case contemplates this third point of intersection between direct and vicarious liability. His Lordship concluded that the same policy considerations precluded the establishment of a direct duty of care on behalf of the local authority, and, on behalf of their employees (for the breach of which the authority would be vicariously liable).[44]

However, the policy approach would appear no nearer the finishing point of determining liability than the test of close connection which it purports to explain.[45] Both stages of the test place undue emphasis on slender distinctions of fact, with the probable consequence that the imposition of vicarious liability becomes arbitrary. It is unlikely that the initial survey of precedent should ever unambiguously determine whether liability exists. For example, the Court in *Mattis* distinguished the decision in *Daniels* v. *Whetstone*[46] on the basis that the bouncer had there "contumaciously repudiated his employer's unequivocal instructions that he should return back inside the premises". Yet, it was obliged to acknowledge the affirmation of the House in *Dubai Aluminium* that vicarious liability may be established even when an employee was "acting contrary to express instructions".[47] Moreover, both authorities are further distinguishable from *Mattis* for the reason that the owner had no opportunity to issue any such instructions to his absent and irrational employee. Similarly, the fact that the bouncer's act was one of retribution is not decisive to deny liability,[48] nor the fact that the attack did not occur on the employer's premises.[49]

Therefore, the bifurcated approach seems inevitably to collapse into consideration of degrees of proof of the policy factors. Yet,

[41] *Ibid.*, at para. [41]; *Jacobi* v. *Griffiths* [1999] 174 D.L.R. (4th) 71.
[42] Note 2 above, at para. [27].
[43] *Caparo Industries Plc* v. *Dickman* [1990] 2 A.C. 605, 616.
[44] *X* v. *Bedfordshire County Council* [1995] 2 A.C. 633, 754.
[45] Note 2 above, at para. [60] (Lord Hobhouse).
[46] [1962] Lloyd's Rep 1.
[47] Note 1 above, at para. [28].
[48] Note 46 above, at p. 10; cp: *Warren* v. *Henley's Ltd.* [1948] 2 All E.R. 935; note 16 above; *Irving* v. *Post Office* [1987] I.R.L.R. 289.
[49] *Poland* v. *John Parr & Sons* [1927] 1 K.B. 236, 375–376 cp *Vasey* v. *Surrey Free Inns Plc* [1996] P.I.Q.R. 373 (note 22 above).

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

this second stage necessarily replicates the ambivalent first stage of analysis. Where any of the above factors has met divergent judicial opinion and generated conflicting precedent, this is because the courts have disagreed as to its significance in policy terms for determining the imposition of vicarious liability. The indeterminacy of this second stage (or more properly, single stage) of analysis is illustrated by the contrasting judicial opinions in the second of the Canadian decisions, being delivered by the same Court, on the same day, and in relation to facts almost identical to the *Bazley* case.[50] The Court of Appeal in *Mattis* concluded that the *Bazley* factors are neither complete nor conclusive.[51]

V. Conclusions

This analysis of putative rationales for the imposition of vicarious liability in the *Mattis* case is vulnerable to the allegation of semanticity. This criticism is also familiar from the context of the direct liability.[52] However, the above analysis does allow for several observations on the recent Commonwealth jurisprudence of vicarious liability.

First, each rationale would appear to demand a different inquiry into the triangular relationship between the employer, employee and customer. The risk rationale is focused upon the nature of the business of the employer and the duties of the employee. It asks whether either element posed an inherent risk to the customer which materialised in his injury. The assumption of responsibility rationale examines the relationship between the employer and the customer. It has regard to whether this relationship amounted to a duty of care that could be said to have been breached by the injury of the customer. The policy rationale largely considers the relationship between the employer and the employee. It inquires whether, as a matter of fact and degree, its terms contributed to the injury of the customer. This mode of investigation seems most analogous to the conventional test of the course of employment. The flaws of each rationale have been canvassed above and none emerges as a superior alternative to the others. As Lord Oliver has noted in the context of direct liability: "I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp".[53] Yet, the different emphases required by each rationale must bear clear

[50] *Jacobi* v. *Griffiths* [1999] 174 D.L.R. (4th) 71.
[51] Note 1 above, at para. [21].
[52] Note 43 above, at para. 628 *per* Lord Roskill.
[53] *Ibid.*, 628 cf. *Staton* v. *National Coal Board* [1957] 1 W.L.R. 893, 895.

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

implications for the pleading of a claimant's case on vicarious liability for intentional torts of employees.

Second, each rationale does require consideration of a common factor which formerly was largely irrelevant to questions of vicarious liability—the position of the customer. If the employer is not to be exposed to "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class",[54] her duty of care must be limited to persons fulfilling the status of customer of the enterprise, (in addition to the common duty of care owed to visitors). Hence the reasoning of Judge Seymour in *Mattis,* whereby the duty of care did not extend to a customer who had left the premises of the nightclub.

Third, each rationale illustrates why the decision in *Mattis* at least appears to be unjust. These rationales rely upon concepts derived from the direct duty of care. The claim for direct liability of the owner failed at first instance. Nevertheless, identical or analogous tests were applied upon appeal to found vicarious liability. The logic of the institution of vicarious liability is of course that it should offer a remedy where direct liability cannot be established. However, the harshness of this logic is most apparent where a case pleaded on identical terms in direct and vicarious liability can succeed on the one ground and not the other.

Fourth, such reliance on the principles of direct liability suggests that the master's tort theory of vicarious liability has been unfortunately revived. This doctrine effectively removes three limiting factors on the scope of vicarious liability, being the requirements that the employee's conduct be tortious, that it occur within the course of employment, and that all the ingredients of the tort occur within the course of employment.[55] It replaces these conditions with a single factor—that the employer owes a duty of care to the customer in question. The problem highlighted in *Mattis* is that in any inherently dangerous or confrontational enterprise, such as running a nightclub, this duty is likely to be implied simply from the risk inherent in the business, or, from a double assumption, that on account of this risk, the employer must necessarily have assumed a responsibility to the customer equivalent to a duty of care. It would appear to be private sector employers who are most vulnerable, for the *Bedfordshire* policy principles can be presumed to continue limiting the imposition of a direct duty of care on state authority employers, at least with regard to certain categories of claimant.[56]

[54] *Ultramares Corporation* v. *Touche* (1931) 174 N.E. 441, 444.
[55] *Credit Lyonnais Bank Nederland NV* v. *Export Credits Guarantees Dept.* [2000] 1 A.C. 486.
[56] *JD* v. *East Berkshire Community Health* [2003] EWCA Civ 1151, at [82]–[87].

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press

This controversy will continue. The Court of Appeal has recently sought to withdraw from the master's tort position by emphasising that liability is established by the breach of the employee's duty of care to a customer, for which the employer is vicariously liable, rather than by breach of the duty of care of the employer, which has been delegated or "entrusted" to the employee, and for which the employer is directly liable.[57] Such reasoning places dubious reliance on the speech of Lord Millett in *Lister* whilst declining to follow the approach of Lord Hobhouse. Whereas, if the master's tort approach is endorsed, the experience of the Australian High Court shows that the content of any direct duty of care will be highly contentious and context-sensitive.

For now, the decision in *Mattis* suggests that employers may have more to fear from "the bouncer at the disco door" with his "intimidating physical presence and menacing mien",[58] than their customers.

[57] *KR* v. *Bryn Alyn Community (Holdings) Limited* [2003] EWCA Civ 85, at [108].
[58] Note 22 above, at p. 378.

https://doi.org/10.1017/S0008197304006506 Published online by Cambridge University Press