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Vicarious Liability: A case study in the failure of general principles?

Christine Beuermann

1. Introduction

Are cases to be determined from the 'bottom-up', by reference to specific principles derived from the facts of decided cases, or from the 'top-down', by reference to more general principles found within the legal system? This dilemma is not unique to vicarious liability but is of particular significance given the long standing failure of the courts to identify a convincing justification[1] that both shapes and informs the test for determining when an employer should be held strictly liable[2] for the wrongdoing of an employee. Consideration of the issue is also timely given the now [in]famous declaration of Lord Phillips in *Various Claimants* v *Catholic Child Welfare Society*[3] that 'the law of vicarious liability is on the move'.[4]

Concerned by the rate of change and the risk of misstep, the High Court of Australia expressly considered the question of whether priority should be given to the facts of decided cases or general principles when determining vicarious liability in the recent case of *Prince Alfred College Inc.* v *ADC*.[5] A majority of the High Court concluded that the starting point should be the facts of decided cases, favouring the more 'orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise'.[6] This was in stark contrast to the approach perceived to have been taken by the UK Supreme Court in *Mohamud* v *WM Morrison Supermarkets plc*,[7] decided just seven months earlier. In the High Court's view, the Supreme Court determined whether to impose vicarious liability on the employer in that case by considering general principles such as 'justice' and 'fairness' rather than identifying and applying any specific legal principle or principles derived from factually similar cases of vicarious liability. To the extent that such general principles were not expressly informed by the cases, the High Court feared the approach had led the Supreme Court into error.

This short article explores the decision of the High Court of Australia in *Prince Alfred College* and considers the importance of the facts of decided cases to the development of the law of vicarious liability more generally. The decision is itself limited by its own facts and pleading anomalies. It is necessary to understand that context to appreciate some of the more unusual features of the decision. For instance, the framing of the pleadings in *Prince Alfred College* returned the High Court of Australia to more traditional formulations of the heavily criticised Salmond test for vicarious liability. The framing of the pleadings also prevented the High Court from exploring more fully the interrelationship between vicarious liability and liability for breach of a 'non-delegable duty of care', an additional and similarly under-

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[1] These difficulties are accurately described in the first part of the following article: Jason Neyers, 'A theory of vicarious liability' (2004) 43 Alberta Law Review 287. For a more expansive consideration see: P Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) and P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP, 2010).

[2] Defined for these purposes as liability imposed regardless of personal wrongdoing by the defendant; Peter Cane, 'Responsibility and fault: a relational and functional approach to responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart, 2001) 81, 99.

[3] [2013] 2 AC 1.

[4] *Ibid* at [19].

[5] [2016] HCA 37 ('*Prince Alfred College*').

[6] *Ibid* at [46].

[7] [2016] AC 677 ('*Mohamud*').

explained form of strict liability for the wrongdoing of another in tort. Notwithstanding these difficulties, the High Court's focus on the facts of decided cases can be seen as an important first step in identifying a principled basis for a discrete and fact-specific form of strict liability for the wrongdoing of another in tort (whether that form of strict liability is ultimately called vicarious liability or something else). This specific form of strict liability arises where an employer places an employee in a position of 'authority, power, trust, control [or] intimacy'[8] in respect of the plaintiff or claimant, in turn creating the potential for the employee to abuse that 'authority, power, trust, control [or] intimacy'. Due to an over reliance on general principles, this specific form of strict liability for the wrongdoing of another in tort has, to date, escaped identification by the courts.

2. The Facts

Prince Alfred College is an addition to the long line of cases brought by students who have been sexually abused by a teacher (or some other employee) against the school they were attending when the abuse occurred.[9] The perpetrator in *Prince Alfred College* was Dean Rollo Bain, a boarding house master. Bain was one of three boarding house masters employed by the College and was rostered on two to three nights per week. Over a period of about 8 months in 1962, Bain used his position as boarding house master to go into the year 8 dormitory to sexually abuse the plaintiff under the guise of settling the plaintiff and other boarders by reading them a story in bed after lights-out.[10] The evidence suggested that it was not the usual practice of other boarding house masters employed by the College to go into the dormitories during this time. Instead, primary responsibility for supervising the boarders when preparing for bed and after lights-out was borne by student prefects.

At trial, the fact of the abuse was not disputed. The abuse had been discovered late in 1962 when the plaintiff confided in a friend who told the College chaplain. Bain was dismissed by the College shortly thereafter. The College made no attempt at the time to contact the police and the boarders were told not to discuss the matter either amongst themselves or outside the College. When the abuse was eventually brought to police attention in 2005, Bain was arrested. He pleaded guilty to all charges.

The principal complicating factor in the case was the length of time that had passed between the abuse and the commencement of the legal proceedings. A number of key witnesses had died, including the headmaster, the senior master and the school chaplain.[11] Other witnesses, including the senior housemaster, were ill and unable to give evidence.[12] This made it very difficult to determine the 'processes in employing Bain, the instructions to and supervision of Bain, the practices in the boarding house and the school's response to Bain's conduct and dismissal'.[13]

The full extent of the plaintiff's injuries also took a considerable period of time to materialise. The plaintiff was first diagnosed with post-traumatic stress disorder in 1996, some 30 years after the abuse. The disorder was triggered when he enrolled his own son at the College and the plaintiff experienced flashbacks after attending College events. The plaintiff approached the College that same year and, after receiving assurances that no student

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[8] (n 5) at [82].
[9] Including, *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215, *Bazley* v *Curry* (1999) 174 DLR (4th) 45 and *New South Wales* v *Lepore* (2003) 212 CLR 511 ('*Lepore*').
[10] There was also one occasion where abuse occurred off school premises; [2015] SASCFC 161 at [57].
[11] (n 5) at [24].
[12] *Ibid*.
[13] (n 10) at [139].

at the College would again be subjected to such abuse, reached a financial settlement. He reached a further financial settlement with Bain in 1998. At the time of these settlements, the plaintiff's prognosis for recovering from his post-traumatic stress disorder was relatively good.[14] Subsequently, however, his condition deteriorated. In 2003, the plaintiff became suicidal and was admitted to a psychiatric hospital. There were similar episodes in the following years and in 2007 the plaintiff was told he was unlikely to recover or return to managing his various small businesses. It was not until this point that the plaintiff commenced legal proceedings against the College.

3. Case history

The significant delay in commencing legal proceedings and the resulting difficulties arising from that delay meant that the procedural question of whether an extension to the applicable limitation period[15] should be allowed largely overtook the plaintiff's substantive legal claims. The trial judge found that the College 'would suffer actual prejudice of the greatest magnitude in having to defend the plaintiff's claim due to the extent of the delay'.[16] Of particular concern were the difficulties in obtaining evidence as to the exact nature of Bain's duties at the College during the relevant period. Although overturned by the Full Court of the Supreme Court of South Australia, the trial judge's refusal to grant an extension of the limitation period was ultimately upheld by the High Court of Australia.

Having upheld the trial judge's refusal to grant an extension of the limitation period, five of the seven judges of the High Court of Australia (in the form of a single majority judgment[17]) proceeded to comment on two of the substantive claims brought by the plaintiff; the claim that the College should be held vicariously liable for the sexual abuse perpetrated by Bain and the alternative claim that the sexual abuse perpetrated by Bain amounted to a breach of the so-called 'non-delegable duty of care' owed by the College to the plaintiff.[18] The majority's decision to comment on these claims is at odds with their earlier admonishment of the trial judge for so doing when her refusal to extend the limitation period rendered the claims nugatory.[19] It is explicable, however, in light of the earlier decision of the High Court of Australia in *New South Wales* v *Lepore*.[20]

Lepore is a notoriously difficult case.[21] Decided shortly after the decisions of the Supreme Court of Canada in *Bazley* v *Curry*[22] and the House of Lords in *Lister* v *Hesley Hall*,[23] it was the High Court of Australia's first opportunity to consider the circumstances in which a school might be held strictly liable for the abuse (sexual or otherwise) of a student by

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[14] Although the notes of the psychologist the plaintiff was attending at this time were accidentally destroyed; (n 10) at [24].
[15] Limitation of Actions Act (SA) 1936, s 48.
[16] (n 10) at [139].
[17] French CJ, Kiefel, Bell, Keane and Nettle JJ.
[18] Various claims were also brought by the claimant for negligence by the College itself in appointing Bain, supervising Bain and responding to the allegation of abuse by Bain.
[19] (n 5) at [9].
[20] (n 9).
[21] Prue Vines, '*NSW* v *Lepore*; *Samin* v *Queensland*; *Rich* v *Queensland* – Schools' Responsibility for Teachers' Sexual Assault: Non-delegable Duty and Vicarious Liability' (2003) 27 Melbourne University Law *Review* 612; Jane Wangmann 'Liability for Institutional Child Sexual Assault: where does *Lepore* leave Australia?' (2004) 28 Melbourne University Law Review 169.
[22] *Ibid.*
[23] *Ibid*.

a teacher. Six separate judgments were delivered in the three co-joined appeals.[24] Four of the seven judges found that it was possible to hold a school strictly liable, in certain circumstances, for the abuse of a student by a teacher. Despite the veneer of consensus, there was no agreement between these judges as to the basis upon which such strict liability might be imposed.[25]

Two of the judges thought a school could be held vicariously liable for the abuse of the teacher. Justice Kirby followed the lead of the House of Lords in *Lister* and held that vicarious liability could be imposed when there was a sufficiently 'close connection' between the abuse and the employment.[26] Chief Justice Gleeson was concerned that the 'close connection' test was too broad, but was prepared to impose vicarious liability in the more limited circumstances where the employee was 'invested with a high degree of power and intimacy'[27] in respect of the student. In contrast, McHugh J held that abuse of a student by a teacher could amount to a breach of the 'non-delegable duty of care' owed by the school to the student. Justice Gaudron held somewhat unorthodoxly that such liability could be justified on the basis of estoppel.[28]

Ultimately, evidential deficiencies and pleading errors meant that the appeals in *Lepore* were resolved largely on procedural grounds. The failure of the High Court of Australia to reach a majority position as to the basis upon which a school might be held strictly liable for the abuse of a student by a teacher made life very difficult, however, for lower court judges. The majority in *Prince Alfred College* therefore found it necessary to provide some guidance to the lower courts by commenting on the plaintiff's substantive claims in vicarious liability and liability for breach of a 'non-delegable duty of care'.[29] Such guidance was strictly dicta. As emphasised by the minority judges,[30] the decision in *Prince Alfred College* 'does not mark out the exact boundaries of any principle'.[31]

4. Liability for breach of a non-delegable duty of care

The first substantive claim addressed by the majority judges in *Prince Alfred College* was liability for breach of a 'non-delegable duty of care'. This argument received short shrift.

Six of the seven judges in *Lepore* had found that liability for breach of a 'non-delegable duty of care' could not extend to intentional wrongdoing, such as the sexual abuse of a child.[32] To overturn this decision, it was therefore necessary for the plaintiff in *Prince Alfred College* to address the court on why it should reconsider a previous decision.[33] This

[24] *Samin* v *Queensland* and *Rich* v *Queensland* (2003) 212 CLR 511.
[25] For further discussion of case, see C. Beuermann, 'Conferred Authority Strict Liability and Institutional Child Sexual Abuse (2015) 37(1) Sydney Law Review 113.
[26] *Lepore* (n 9) at 622.
[27] *Ibid* 546.
[28] *Ibid* 561.
[29] (n 5) at [10].
[30] Gageler and Gordon JJ.
[31] (n 5) at [131].
[32] The UK Supreme Court is currently considering the question of whether liability for breach of a 'non-delegable duty of care' can extend to intentional wrongdoing in the pending appeal of *NA* v *Nottinghamshire CC* (UKSC 2016/0004). See also P Morgan, 'Fostering, vicarious liability, non-delegable duties and intentional torts' (2016) 132 Law Quarterly Review 399.
[33] *Ibid* at [36].

the plaintiff failed to do. The plaintiff's claim for breach of a 'non-delegable duty of care' was consequently dismissed without consideration of the claim's merits.

Although the majority in *Prince Alfred College* spent little more than a paragraph discussing liability for breach of a 'non-delegable duty of care' in their judgment, a much broader discussion of the claim had been entertained at the hearing. During the hearing, it became evident that the formulation of the doctrine of liability for breach of a 'non-delegable duty of care' advanced by the plaintiff rested on the now outdated fiction that the physical abuse perpetrated by Bain could be attributed to the College so that the College could be viewed as personally engaging in wrongdoing.[34] This view of liability for breach of a 'non-delegable duty of care' is out-of-step with more modern formulations of the doctrine that can be found in the various judgments in *Lepore* and the recent decision of the UK Supreme Court in *Woodland* v *Swimming Teachers Association*.[35] Those formulations suggest that, to the extent liability for breach of a 'non-delegable duty of care' is imposed regardless of any actual wrongdoing by the defendant, it is a form of strict liability.[36]

When viewed as a form of strict liability, it becomes necessary to delineate the boundary between liability for breach of a 'non-delegable duty' and the other form of strict liability for the wrongdoing of another in tort, vicarious liability. Delineating that boundary proved particularly difficult for the judges in *Lepore*. Since the formulation of the doctrine of liability for breach of a 'non-delegable duty' advanced by the plaintiff denied even the potential for the two forms of liability to conflict, the plaintiff was unable to offer the High Court of Australia any assistance in resolving this difficulty. This failure explains the reluctance of the majority to engage with the substance of the claim.

5. Vicarious liability

The plaintiff's formulation of the doctrine of vicarious liability in *Prince Alfred College* was similarly outdated. The plaintiff though was not alone in presenting this formulation, with both parties seeking to take the High Court of Australia back to its 1949 decision in *Deatons Pty Ltd* v *Flew*.[37] The majority in *Prince Alfred College* proved more receptive to this attempt to reinstate a more traditional formulation of the law. The decision of the UK Supreme Court in *Mohamud*, handed down just one month prior to the High Court of Australia granting leave to appeal in *Prince Alfred College*, appears to have been a significant factor.

Mohamud stands as the current high watermark of an employer being held vicariously liable for the intentional wrongdoing of an employee. A customer at a Morrisons' petrol station had asked the employee at the payment kiosk for assistance in printing out a document. The employee refused the assistance, and ordered the customer out of the petrol station whilst shouting racial abuse. Not content with the customer leaving, the employee then followed the customer back to his car (which was parked in the petrol station forecourt) and physically assaulted him, causing serious physical injuries. The employee had resisted all attempts by his supervisor to stop the attack. Despite the apparent racial motivations for the assault, Morrisons was held vicariously liable. In the Supreme Court's view, there was a

[34] *Prince Alfred College Inc. v ADC* [201] HCATrans 163.
[35] [2014] AC 537.
[36] *Ibid* at [22] (Lord Sumption) and *Lepore* (n 9) at [257] (Gummow and Hayne JJ). For the definition of strict liability adopted for the purposes of this article see (n 2).
[37] (1949) 79 CLR 370 ('*Deatons*').

sufficiently 'close connection' between the attack and the employment to justify the imposition of vicarious liability.[38] Specifically, the Supreme Court found that there was an 'unbroken sequence of events' between the attack and the 'field of activities' assigned to the employee, making it 'fair' and 'just' to impose vicarious liability for the assault.[39]

As already noted, the majority in *Prince Alfred College* found the decision of the UK Supreme Court in *Mohamud* problematic. First, it was not easily reconciled with the earlier decision of the High Court of Australia in *Deatons* (the case identified by both parties in *Prince Alfred College* as espousing the current law of vicarious liability in Australia). The facts of the case are relatively well-known. A barmaid, in response to alleged harassment by a drunken customer, accidentally threw not only the beer, but the beer glass, blinding the customer in one eye. The employer escaped vicarious liability on the basis that the barmaid's conduct was an 'independent act of personal retribution'[40] and therefore outside the course of employment. In *Mohamud*, vicarious liability was imposed notwithstanding that the conduct of the employee could be similarly described and the connection between the employment and the assault was arguably even more tenuous since the customer was leaving the employer's premises and no longer enjoying or intending to enjoy the employer's services at the time of the assault (whereas the customer in *Deatons* was still sitting at the bar and continuing to drink at the time of the assault).[41]

The majority in *Prince Alfred College* was also concerned more generally with the approach taken by the UK Supreme Court in *Mohamud* to determining vicarious liability. In the majority's view, this approach was unduly broad.[42] In the cases leading up to *Mohamud*, the Supreme Court had moved the test for determining vicarious liability away from the traditional 'course of employment' Salmond test that was engaged in *Deatons*, to the requirement that there be a sufficiently 'close connection' between the employment and the employee's wrongdoing for vicarious liability to be imposed.[43] The facts of *Mohamud* demonstrated the ease with which this requirement could be satisfied; the connection between the employee's 'field of activities' and the assault being little more than causal on the facts of the case.[44] The majority in *Prince Alfred College* was of the view that a causal connection could not itself explain the imposition of vicarious liability. The decision could therefore only be explained by an over-reliance on general principles such as 'fairness' and 'justice'.[45] This had not previously been the approach to determining vicarious liability in Australia,[46] and, in the majority's view, should not now become the approach to determining vicarious liability in Australia. Instead, the majority in *Prince Alfred College* confirmed that whether vicarious liability could be imposed on an employer for the intentional wrongdoing of an

[38] (n 5) at [47].
[39] *Ibid*.
[40] (n 37) at 378.
[41] Despite Lord Toulson's attempt to strengthen the connection by the employee threatening the customer to never come back; (n 5) at [47].
[42] (n 5) at [45].
[43] Starting with *Lister* (n 9).
[44] (n 5) at [72].
[45] Lord Neuberger, 'Some Thoughts on Principles Governing the Law of Torts', speech given at Singapore Conference on Protecting Business and Economic Interests, 19 August 2016 at https://www.supremecourt.uk/docs/speech-160819-03.pdf (last accessed 30 November 2016).
[46] (n 5) at [45].

employee was to be determined in accordance with a specific principle derived from a close analysis of the decided cases.[47]

To this end, the majority in *Prince Alfred College* conducted a detailed analysis of the cases in which an employer had previously been held vicariously liable for the intentional wrongdoing of an employee in order to identify the specific fact or facts of those cases that attracted liability. The analysis showed that the cases shared a common feature; in each case, the defendant employer had placed the employee in a position of 'authority, power, trust, control [or] intimacy'[48] in respect of the claimant. In *Lloyd* v *Grace, Smith & Co,*[49] for instance, the defendant firm of solicitors was held vicariously liable when the managing clerk employed by the firm to conduct its conveyancing business had transferred two properties owned by a client of the firm into his own name. The managing clerk was able to do this as the firm had conferred authority on the clerk to receive documents, such as title deeds, from clients on its behalf. The employee in *Morris* v *C W Martin & Sons Ltd*[50] had similarly been conferred authority to receive property from clients on behalf of the employer. In that case, the defendant dry cleaner was held vicariously liable when the employee absconded with a mink stole deposited with the employee for dry cleaning. In the long line of child sexual assault cases, of which *Prince Alfred College* was an example, the teachers had been placed by the schools in a position of power in respect of the students, being conferred authority by the school to direct the behaviour of the students and to discipline the students should they not comply.

Having identified the common feature of the cases in which vicarious liability had been imposed on an employer for the intentional wrongdoing by an employee, the majority in *Prince Alfred College* then sought to derive the relevant legal principal. They were assisted in this task (though perhaps misguidedly) by the decision in *Deatons,* to which they had been referred by the parties. Justice Dixon had commented in that case that the wrongful conduct in *Deatons* was not conduct 'to which the ostensible performance of [the] master's work gives occasion'. Instead, the employee's work as a barmaid provided merely an opportunity to engage in such wrongful conduct. Seizing on this distinction, the majority suggested that an employer provides the occasion, rather than just the opportunity, for wrongdoing where the employer places the employee in a position of 'authority, power, trust, control [or] intimacy'[51] in respect of the plaintiff. The creation of this 'special relationship' between the employee and the plaintiff by the employer could suffice, in the majority's view, to determine that intentional wrongdoing occurred in the course of employment where the employee subsequently 'takes advantage' of that relationship to engage in such wrongdoing.[52]

The majority was affirmed in this conclusion by an analysis of the cases in which vicarious liability had NOT been imposed on an employer for the intentional wrongdoing of an employee. In the child sexual assault cases, for instance, schools had been held vicariously liable for sexual assaults of students committed by teachers, but not other employees such as bakers and gardeners.[53] Unlike teachers, neither bakers nor gardeners are generally vested with authority by a school to direct the behaviour of students.[54] As the

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[47] *Ibid*.
[48] *Ibid* at [82].
[49] [1912] AC 716.
[50] [1966] 1 QB 716.
[51] (n 5) at [82].
[52] *Ibid* at [81].
[53] *B* v *Order of the Oblates of Mary Immaculate* (2005) 258 DLR (4th) 385 and *G(ED)* v *Hammer* (2003) 230 DLR (4th) 554.
[54] *G(ED) ibid* at 557-8 (McLachlin CJ).

barmaid in *Deatons* had not been given any responsibility for crowd control within the pub and had not been vested with any other special power or authority in respect of the customer, it could be analysed in similar terms. The only case which defied this analysis was the recent decision of the UK Supreme Court in *Mohamud*. For this reason, the majority in *Prince Alfred College* suggested it may have been wrongly decided:[55]

> There were no special features of his employment which would be associated with the offending. His want of authority, power or control over customers was confirmed by the fact that he was clearly subject to supervision. It is apparent that the carrying out of his employment duties did not provide the 'occasion' for the offending.

All that was left for the majority in *Prince Alfred College* was to apply the newly devised legal principle for imposing vicarious liability on an employer for the intentional wrongdoing of an employee to the facts of the case. The evidential difficulties resulting from the passage of time, however, meant that it was almost impossible to ascertain sufficient details of Bain's employment to be able to determine whether the school in *Prince Alfred College* did anything more than provide a mere opportunity for Bain's wrongdoing. It was for this reason that the majority was ultimately reluctant to overturn the trial judge's refusal to extend the limitation period on the facts of the case.

6. The importance of facts

Prince Alfred College stands as a cautionary tale for the increasingly prevalent search by courts and legal academics for disembodied general principles to guide the development of the law.[56] There are several useful lessons that can be drawn from the decision of the majority of the High Court of Australia about the importance of the facts of decided cases to the development of the law of vicarious liability.

(a) Lesson One – Decisions in individual cases are shaped by the facts and the parties' pleadings

The decision of the majority of the High Court of Australia in *Prince Alfred College* is problematic and will be criticised. At best, the distinction between forms of employment that provide the 'occasion' as opposed to the 'opportunity' for wrongdoing by an employee is very fine; at worst, it is semantic. By adding yet another set of circumstances that might satisfy the 'course of employment' element of the Salmond test retained by the High Court of Australia for the purposes of determining vicarious liability, the High Court has also done little to address the historic definitional difficulties that led ultimately to the test's abandonment in Canada and England and Wales. Such criticisms, however, are a product of the specific facts of the case and the nature of the parties' pleadings.

To start, *Prince Alfred College* was a largely inappropriate vehicle to address the shortcomings of *Lepore* and resolve the question of whether a school can be held strictly liable for the sexual abuse of a student by a teacher in Australia. Several key witnesses had died, the period of time from the abuse to the trial made evidence gathering difficult and the plaintiff had received previous settlements in respect of the claim.

Concerns about the potential expansionary effects of the decision of the UK Supreme Court in *Mohamud* also affected how the pleadings in the case were drawn. The conservative

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[55] (n 5) at [73].

[56] 'Corrective justice' might be seen as another example of such a general principle; Ernest J Weinrib, *The Idea of Private Law* (OUP, 2012).

nature of those pleadings left the High Court of Australia little room to develop the law of vicarious liability beyond the constraints of the traditional Salmond test. In the circumstances, all the High Court could do was flag how the law might develop should the High Court be presented with a case in the future in which it could examine the merits of imposing strict liability on a school for the sexual abuse of a student by a teacher free from procedural and pleading difficulties.

The conservative nature of the pleadings also prevented the High Court from fully exploring the interrelationship between vicarious liability and liability for breach of a 'non-delegable duty of care'. Despite the willingness of several judges at the hearing to identify the boundary between the two forms of liability, there was little opportunity to rationalise the law and produce a coherent picture of strict liability for the wrongdoing of another in tort more generally given that the pleadings failed to recognise both forms of liability as 'strict'.

(b) Lesson Two – In the absence of a convincing justification, vicarious liability should be determined by reference to specific legal principles derived from the facts of decided cases

Despite its difficulties, the real value of the majority's decision in *Prince Alfred College* lies in the attention drawn by the majority to the methodology used by judges when determining vicarious liability. Vicarious liability is an exceptional form of liability. It is imposed regardless of personal wrongdoing by the defendant employer. There should consequently be a very clear justification for any expansion of that liability. By choosing to focus on methodology, the majority in *Prince Alfred College* were able to expressly consider whether the expansion of vicarious liability flagged by Lord Phillips in *Various Claimants*[57] was an intentional development of the law, or whether the expansion had been an inadvertent result of a shift in judicial decision making method.[58] Specifically, a shift from the traditional 'bottom-up' method of deriving specific legal principles from a detailed examination of the facts of decided cases to a more 'top-down' approach of deciding cases by reference to broader, general principles. After reviewing the decision of the UK Supreme Court in *Mohamud*, the majority in *Prince Alfred College* were clearly concerned that any expansion was more accidental than deliberate.

A review of the reasoning process of Lord Toulson, who gave judgment for the majority in *Mohamud*,[59] confirms that the majority in *Prince Alfred College* had reason to be concerned. It is not that Lord Toulson disregarded the decided cases. Having considered the historic development of vicarious liability more generally, Lord Toulson did indeed conduct a

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[57] (n 3) at [19]. For further commentary on *Mohamud* see: D Ryan, '"Close Connection" and "Akin to Employment": perspectives on 50 years of radical developments in vicarious liability' [2016] Irish Jurist 239; J Plunkett, 'Taking stock of vicarious liability' (2016) Law Quarterly Review 556; P Morgan 'Certainty in vicarious liability: a quest for a chimaera? (2016) Cambridge Law Journal 202.

[58] Similar concerns were recently expressed by O'Donnell J of the Supreme Court of Ireland in *Hickey* v *McGowan* [2017] IESC 6, [42] (with whom Denham CJ, MacMenamin and Dunne J agreed): 'Vicarious liability is not on the move, at least not of its own volition. If it moves, it is by the decision of judges which must be reasoned and justified. The law of vicarious liability was relatively stable, narrow and well understood for most of the 20th century until recently, and much if not all of the development of the law has occurred because of the necessity of addressing the phenomenon of historic sexual abuse of children in an institutional context. There is in my view no discernible movement in the common law world to expand vicarious liability, and therefore liability without fault, on the basis merely of an ability to pay alone, and any such development would raise fundamental issues. Instead, there has been a number of carefully analysed, but not always consistent, attempts in the courts of the highest level in the common world, to provide a framework in which to address claims of historic sexual abuse.'

[59] Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Dyson MR and Lord Reed JSC were all in agreement.

review of the cases in which a claimant had sought to hold an employer vicariously liable for an assault occasioned by an employee. This review showed that the decisions reached in the cases were largely inconsistent; with an employer sometimes being held vicariously liable for such an assault but not always. Especially telling in this regard, was a decision of the New Zealand Court of Appeal decided just one year before the High Court of Australia decision in *Deatons*.[60] Both cases involved assaults by bar staff on customers in pubs. Unlike the High Court of Australia, however, the New Zealand Court of Appeal imposed vicarious liability on the employer in the case. It is what Lord Toulson did next, however, that is critical. Rather than delve deeper into the cases to see if there were any factual distinctions that might explain the different results, Lord Toulson concluded that the inconsistency was the product of the well-known deficiencies of the traditional 'scope of employment' Salmond test. As such deficiencies had ultimately led to the abandonment of the 'scope of employment' test, Lord Toulson formed the view that such cases were of limited utility.

On this basis, Lord Toulson was able to put the decided cases largely to one side when determining how the 'close connection' test should be interpreted and applied. Keen not to repeat the mistakes of the past, he was reluctant to recognise any specific principle as underpinning the 'close connection' test. Quoting Kant, he noted: 'Out of the crooked timber of humanity, no straight thing was ever made.'[61] He was also reluctant to attribute the status of principle to any policy previously recognised as informing vicarious liability. Notably, although Lord Toulson recognised 'enterprise risk' as the concept which explained the 'social underpinning of the doctrine of vicarious liability', he did not think courts were required to conduct a 'retrospective assessment of the degree to which the employee would have been considered to present a risk'.[62] Instead, Lord Toulson chose to adopt a broad general principle to inform the 'close connection' test. He held that whether the tortious conduct of an employee was sufficiently 'closely connected' with the employment for vicarious liability to be imposed was to be determined by identifying the 'field of activities' entrusted to the employee and then asking 'whether it was right for the employer to be held liable under the principle of social justice'.[63]

It is difficult to envisage how asking whether an employer should be held vicariously liable 'under the principle of social justice' would not lead to further expansion of the law, particularly where no attempt is made to identify what amounts to 'social justice' for the purposes of imposing vicarious liability or what limits should be placed on the imposition of such liability.[64] As now apparent, Lord Toulson did not think it appropriate in *Mohamud* to explicitly recognise any such limits. The potential for such expansion can readily be seen by contemplating a slight change in the facts of *Mohamud*. Consider a situation in which the victim of a *Mohamud* type attack was not a customer, but a fellow employee of equal standing. There is a consistent line of cases in which employers have avoided vicarious liability where an employee is injured as a result of a practical joke instigated by another employee.[65] An exception has been made in circumstances where the instigator of the practical joke was a supervisor of the injured employee and the practical joke occurred in the

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[60] *Petterson* v *Royal Oak Hotel Ltd* [1948] NZLR 136.
[61] (n 7) at 692.
[62] Ibid. Arguably, it has been the use of the concept of 'enterprise risk' that has kept vicarious liability within reasonable bounds in the jurisprudence of the Supreme Court of Canada.
[63] Ibid.
[64] A parallel might be drawn with the difficulties evidence in containing the 'neighbourhood principle' after *Donoghue* v *Stevenson* [1932].
[65] For example, the well-known case of *Smith* v *Crossley Bros Ltd* (1951) 95 Sol Jo 65.

course of that supervision.[66] Under the approach of Lord Toulson in *Mohamud*, however, such a distinction is at risk of being overlooked. In both circumstances, the employees will be required to work together as part of their 'field of activities' and the practical joke may well form part of an 'unbroken sequence of events'[67] stemming from the commencement of that work. The question of the nature of the relationship between the two employees will not arise.

Concerns with the potentially expansive nature of the approach adopted by the UK Supreme Court in *Mohamud* are now also being expressed by lower courts in England and Wales. The judge in *Bellman* v *Northampton Recruitment Ltd*,[68] the first vicarious liability case decided after *Mohamud*, expressly noted the need for limits to be placed on the test for determining vicarious liability. The case involved an assault which occurred after a work Christmas party. At the conclusion of the official Christmas party, the staff moved on to another hotel. At the hotel, and after a considerable number of drinks, the managing director of the company took offence to a comment made by one of the sales managers about how the company was being managed and assaulted him. The sales manager was left severely injured and sought to hold the company vicariously liable for the actions of the managing director. Although it was possible to draw an 'unbroken sequence of events' from the work hosted Christmas party which fell within the managing director's 'field of activities' to the conversation which led to the assault, the judge refused to impose vicarious liability. In his view:[69]

> If the mere fact of a discussion being between employees and about work were enough for liability to arise, it would mean that such a company's potential liability would become so wide as to be potentially uninsurable.

The judge was therefore keen to identify the outer limits of vicarious liability. Not insignificantly, the judge found the means to do this by conducting a careful review of the facts and reasoning in similar cases of employee to employee assaults.

By drawing attention to methodology, the majority in *Prince Alfred College* have highlighted the possibility that what was driving the apparent expansion of vicarious liability identified by Lord Phillips in *Various Claimants*[70] was an over-reliance on general principles as opposed to any deliberate attempt to expand the scope of vicarious liability more generally.[71] Rather than risk such expansion in Australia, the majority of the High Court in *Prince Alfred College* opted to revert to the more traditional 'bottom-up' approach of devising specific legal principles from the facts of decided cases.

(c) Lesson Three – An employer will be held strictly liable for the wrongdoing of an employee where that employee is placed in a position of 'authority, power, trust, control [or] intimacy' over a claimant

The efforts of the majority in *Prince Alfred College* in utilising this 'bottom-up' approach should also not be ignored. Leaving to one side the difficulties associated with the

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[66] For example, *Chapman* v *Oakleigh Animal Products* (1970) 8 KIR 1063. In the harassment context, consider *Majjrowski* v *Guy's and St Thomas's NHS Trust* [2007] 1 AC 224.
[67] (n 7) at 693.
[68] [2016] EWHC 3104 (QB).
[69] *Ibid* at [77].
[70] (n 3) at [19].
[71] It cannot be safely assumed in such circumstances that the same decision would have been reached in recent vicarious liability cases if the courts had retained the traditional bottom-up methodology directed at deriving specific legal principles from a close analysis of decided cases.

occasion/opportunity distinction, the majority may be viewed as having identified a discrete, additional form of strict liability for the wrongdoing of another in tort. Vicarious liability responds to the relationship between the employer and employee.[72] The claimant may be a total stranger to both the employer and employee, and liability will still be imposed. In contrast, the form of strict liability identified by the majority in *Prince Alfred College* responds to a pre-existing relationship between the defendant and the injured claimant.[73] Specifically, a relationship in which the defendant is in a position of 'authority, power, trust, control [or] intimacy'[74] in respect of the claimant. Where the defendant subsequently puts a third party in a similar position of 'authority, power, trust, control [or] intimacy' in respect of the claimant, the defendant will be held strictly liable if that third party takes advantage of that position to wrongfully injure the claimant.

The most significant feature of the discrete form of strict liability for the wrongdoing of another in tort[75] identified by the majority in *Prince Alfred College* is that, unlike vicarious liability, it extends to intentional wrongdoing by the third party towards the claimant. To understand why, it is necessary to examine the concept of 'authority' which signifies the types of relationships that attract this form of strict liability.[76] Consider the relationship between a school and its students, which was the particular relationship under consideration in *Prince Alfred College*. A school is vested with authority to direct the conduct of its students in order to effectively educate those students. Given a school is not a natural person, those educational objectives would be unduly limited if only the school itself could exercise such authority. Consequently, a school also has the capacity to confer its authority to direct the conduct of its students upon a third party, for instance, a teacher. The capacity of a school to confer such authority upon a third party, however, is not without its problems. When a school confers its authority to direct the conduct of a student upon a third party, it creates a power relationship which did not previously exist. This power relationship enables the third party upon whom authority has been conferred to direct the conduct of a student and creates an expectation that the student will obey. As the third party upon whom authority has been conferred is not necessarily subject to the same restraints in the exercise of that authority as the school,[77] there is significant potential for this power relationship to be abused. A teacher, for instance, may direct a student to perform a scientific experiment, but fail to provide that student with appropriate safety equipment.[78] Alternatively, a teacher may direct a student into a storeroom for the purposes of sexually assaulting that student.[79] Students are consequently put at risk of physical harm whenever their school confers upon a third party authority to direct the conduct of those students.

It is this potential for a person upon whom authority has been conferred by a school to abuse the power relationship created by the school's conferral of authority which arguably attracts the concern and the intervention of the law. The discrete form of strict liability for the wrongdoing of another in tort identified by the majority in *Prince Alfred College* can be

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[72] P. Cane, *Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), 46-47.
[73] (n 5) at [81].
[74] *Ibid* at [82].
[75] A form of liability I have previously described as 'conferred authority strict liability'; C. Beuermann, 'Vicarious Liability and Conferred Authority Strict Liability' (2013) 20(3) Torts Law Journal 265.
[76] Although it also can include the employment relationship, the relationship between state and prisoner and the relationship between bailor and bailee.
[77] Not being party to the relevant contract or the subject of the applicable legislation which is generally aimed at schools rather than individual members of the school.
[78] *Williams* v *Eady* (1893) 10 TLR 41.
[79] *Lepore* (n 9).

seen to respond to the potential for abuse of the power relationship created by the school's conferral of authority by holding the school liable regardless of personal fault for any harm wrongfully caused to a student by the third party upon whom authority has been conferred. The liability effectively holds a school to account for damage wrongfully caused to a student by a third party upon whom the school has conferred its authority to direct the conduct of the student. In so doing, the liability provides students with a degree of protection from an abuse of the authority conferred by their school upon that third party.

Importantly, 'authority' in this sense is distinct from the concept of 'authorisation' that historically underpinned the Salmond 'course of employment' test traditionally utilised in the second stage of determining vicarious liability. 'Authorisation' refers, in general terms, to whether an employee has permission to engage in the particular conduct that resulted in harm to the claimant. Its focus is the association between the directions issued by the employer to the employee and the wrongful conduct engaged in by that employee. As such, it is limited by what conduct the employer has actually permitted (either expressly or impliedly)[80] the employee to do. In contrast, the concept of 'authority' utilised in the discrete form of strict liability for the wrongdoing of another in tort identified by the majority in *Prince Alfred College* is much broader and refers, in general terms, to a capacity to exercise a form of power or control over the claimant, whether that be a power to direct the claimant's behaviour or control over the claimant's property. Its focus is not the conduct engaged in by the third party and whether such conduct was permitted by the defendant, but the vulnerability of the claimant to an exercise of the power conferred upon by the third party by the defendant. As such, it is the claimant's perception of the power being exercised that is important. It follows, that it is the apparent and not the actual terms of the power conferred by the defendant upon the third party over the claimant that determines the scope of this second form of strict liability. It is for this reason that the discrete form of strict liability for the wrongdoing of another in tort identified by the majority in *Prince Alfred College* can extend to intentional wrongdoing by the third party conferred the relevant authority by the employer or school. Had there been evidence in *Prince Alfred College* that the claimant and the other year 8 boarders expected to be answerable to Bain as boarding house master when going to bed, the College would have more than likely, subject to resolution of the limitation period issue, been held strictly liable for the sexual abuse that resulted from Bain taking advantage of the position of power created by the College vis-à-vis the claimant.

Recognition of the discrete form of strict liability for the wrongdoing of another in tort by the majority in *Prince Alfred College* is timely. Coherency in the law rests on sound taxonomy and comparing like with like. To the extent both the basis and scope of these two forms of strict liability for the wrongdoing of another in tort differ, they are distinct. Having separated the two forms of strict liability, progress may now finally be made in identifying the otherwise illusive justification or justifications for imposing liability on a defendant regardless of personal wrongdoing.[81] It may also prevent future courts falling into the trap of *Mohamud*[82]and extending the circumstances in which such an exceptional form of liability might be imposed on the basis of little more than a causal connection.

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[80] See C. Beuermann, 'Tort Law in the Employment Relationship: A Response to the Potential Abuse of an Employer's Authority' (2014) 21 Torts Law Journal 169.
[81] *Ibid*.
[82] (n 7).