

Up in *Armes*: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort

The current tests for imposing strict liability for the wrongdoing of another in tort are unhelpful. Not only do they provide judges with insufficient guidance as to how the tests are to be applied, but there is considerable uncertainty as to specific circumstances in which each of the different tests are to be applied. The confusion faced by the various judges in *Armes* is therefore understandable. This article outlines how focussing on the different relationships which give rise to the different types of strict liability for the wrongdoing of another in tort can provide a way through the confusion and assist judges develop the law in a more consistent and coherent way.

Introduction

The question faced by the Supreme Court of the United Kingdom in *Armes v Nottinghamshire County Council*¹ was an important one. Can a local authority be held strictly liable² when a foster parent abuses a foster child placed by the local authority in the foster parent's care? The various judges asked to consider the question as the case progressed through the courts disagreed as to the answer. This is unremarkable; there are cases in which judges might reasonably disagree. That the judges were unable to even agree on the appropriate framework for resolving the question is, however, cause for concern.

The claimant in *Armes* had been abused as a child by consecutive foster carers in whose care she had been placed by Nottinghamshire CC. There was no evidence that Nottinghamshire CC had acted negligently in either making or supervising the foster care placements. The only question then was whether Nottinghamshire CC could be held strictly liable for the abuse committed by different foster carers. The trial judge and the Court of Appeal found for Nottinghamshire CC. The Supreme Court found for the claimant. In general terms, there were three possible answers to the question posed in *Armes*: a local authority is vicariously liable for the abuse of a foster child by a foster parent; a local authority is in breach of a so-called 'non-delegable duty of care' owed to a foster child abused by a foster parent; or a local authority is not liable at all.³ Both at trial and in the Court of Appeal, very little attention was paid to the possibility that vicarious liability might be imposed, it having been found that a local authority exercised too little control over a foster parent on a day-to-day basis for a foster parent to be considered in a relationship 'akin' to employment.⁴ Most of the judges in the early stages of *Armes* therefore focussed on determining whether a local authority owed a 'non-delegable duty of care' to a foster child. The possibility of a 'non-delegable duty' was, however, ultimately discounted on the basis that it would not be 'fair, just and reasonable' to impose such a duty on a local authority. In contrast, the judges in the Supreme Court dismissed the possibility that a local authority owed a 'non-delegable duty of care' to a foster child relatively easily as they were concerned about the effect of imposing such a duty on the liability of parents more

¹ [2018] AC 355.

² Defined as liability imposed irrespective of personal wrongdoing; Peter Cane, 'Responsibility and fault: a relational and functional approach to responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (2001) 81, 99.

³ The prospect of the local authority's personal liability in negligence will not be considered in this article, the focus being instead on the prospect of the local authority being held strictly liable for the abuse.

⁴ [2015] PTSR 653, 696. [2016] QB 739, 756-757.

generally. Instead, the judges in the Supreme Court chose to focus on determining whether the local authority could be held vicariously liable for the wrongdoing of the foster parent. A majority of the Supreme Court found that a local authority could be held vicariously liable for the wrongdoing of a foster parent on the basis that a local authority had sufficient supervisory control over a foster parent to make them 'akin' to an employee.⁵

The stark differences in approach between the various judges asked to resolve the issues in *Armes* suggests there is a need for a map of strict liability for the wrongdoing of another in tort. Usefully, the various issues grappled with by the judges in *Armes* provide some clues as to what that map should look like. The object of this article is to outline that map. Given the evident limitations of the tests so far devised and the consequent confusion of judges, there is little to be gained by simply outlining the specific reasoning of each judge who considered the question of liability in *Armes* and this will not be attempted. Instead, the institutional features of the case will be examined in order to demonstrate how the difficulties faced by the various judges in *Armes* might be addressed.

Part one of the article starts by identifying a number of difficulties the judges had to contend with in deciding *Armes*. Individual judges can be seen to have placed varying importance on each of these difficulties, affecting how the particular judge framed their decision and identified the appropriate cause of action for potentially imposing strict liability.

Part two examines the various relationships at play in *Armes*. It shows that a majority of the judges focussed on the relationship between the local authority and the foster child when making their decision, as opposed to the relationship between the local authority and foster parent. There was, however, no correlation between the cause of action relied upon by a judge and the relationship upon which their reasoning was based.

Part three of the article considers why the relationship between a local authority and a foster child is significant for the purposes of determining whether the local authority should be held strictly liable for the abuse of the foster child by the foster parents. The significance of the relationship lies in the authority vested in the local authority to direct the conduct of the foster child which is then conferred by the local authority on the foster parent (when not also the legal parent of the foster child), creating a power relationship that did not previously exist and which is subject to abuse.

Part four demonstrates that the judges in *Armes* would have been better able to address the difficulties pertaining to foster care outlined in part one of this article had they explicitly acknowledged that any strict liability to be imposed on the local authority was to be imposed by virtue of the relationship between the local authority and a foster child.

Part five outlines a new map of strict liability for the wrongdoing of another in tort based on the relevant relationship which gives rise to the particular form of strict liability for the wrongdoing of another in tort and, in so doing, clarifies the boundary between vicarious liability and liability for breach of a 'non-delegable duty of care'. It argues that there are two discrete forms of strict liability for the wrongdoing of another in tort which respond to different relationships: vicarious liability which responds to the relationship between the defendant employer and the third party employee who wrongfully injured the claimant; and liability for

⁵ [2018] AC 355, 379-380.

breach of a ‘non-delegable duty of care’ (or more accurately, ‘conferred authority strict liability’) which responds to the relationship between the defendant and the claimant and the fact that the defendant conferred authority to direct the conduct of the claimant upon the third party who wrongfully injured the claimant.

Difficulties raised in *Armes*

The judges in *Armes* faced two discrete sets of difficulties. The first set arose by virtue of the peculiar position of foster parents and the needs of vulnerable children in the care of social services more generally. The second set stemmed from the historic failure of the courts to identify a convincing juridical basis for the liability imposed for breach of a ‘non-delegable duty of care’ and the resulting uncertainty as to the boundary between vicarious liability and liability for breach of a ‘non-delegable duty of care’.

Foster parents

A foster parent has day-to-day responsibility for the care of a foster child. Typically, a foster parent has no parental responsibility for a foster child before that child is placed in the foster parent’s care by a local authority. A local authority may, however, under current regulations, place a foster child in the care of their legal parent if it is in the best interests of the child.⁶ Where the foster parent is not the foster child’s legal parent, the local authority confers authority on the foster parent to direct the conduct of the foster child as if the foster child was a child of their own. Where the foster parent is the legal parent of the foster child, there is no need for such authority to be conferred as the legal parent is already vested with authority to direct the conduct of the child. In both situations, the local authority has extensive regulatory obligations to supervise and monitor the placement.⁷

What makes the position of a foster parent relatively unusual is that, unlike most parents, a foster parent is simultaneously acting as both a parent and a service provider. These dual aspects of the foster parent’s role are legally problematic in that the standard of care expected of a parent and a service provider with responsibility for the care of children can differ. For instance, a school may be held liable to a child who, as a result of poor supervision, runs onto a busy road and is injured, but the courts have resisted imposing such liability on a parent.⁸

The potential difference in legal responsibility between parents and service providers responsible for the care of children was a cause for concern in *Armes*. The judges were worried that if they held the local authority strictly liable for the abuse by the foster parents that any parent who placed their own child in the care of a third party (such as a babysitter, friend or other family member) could be held similarly strictly liable. Historically, no such liability had been imposed on parents.

The judges in *Armes* were also concerned that a foster child placed by a local authority with their own legal parents may be put in a preferential position to other children. If a local authority could be held strictly liable for the wrongdoing of a foster parent, a foster child could potentially look to the local authority for compensation when abused by their legal parent, notwithstanding the inability of other children who had not been fostered to do so. There was

⁶ Child Care Act 1980 (UK) s 21(2).

⁷ See description of statutory framework by Lord Reed; [2018] AC 355, 363-365.

⁸ Discussed further in part four below, titled ‘Overcoming the difficulties pertaining to foster care’.

a risk that a local authority would effectively become a state insurer of a foster child in such a position.⁹

More broadly, the judges in *Armes* were concerned that whatever decision they reached might impact the capacity of a local authority to act in the best interests of children placed in foster care. The judges were concerned that imposing liability could lead to a potential flood of claims, diverting the limited public resources of already over-stretched underfunded local authorities to defending and funding such claims and away from the care of vulnerable children. The judges also did not want to indirectly affect the decisions made by local authorities when deciding where to place foster children. There was some concern that imposing liability on a local authority would result in more children being placed in institutional care, contrary to a ‘fundamental principle of social work practice that children are best placed in a family environment’.¹⁰

The various judges in *Armes* can be seen to have responded to the difficulties concerning the peculiar position of foster parents and the needs of vulnerable children in the care of social services very differently. The judges in the Supreme Court readily dismissed the idea of the local authority owing a ‘non-delegable duty’ to a foster child for fear of a similar duty being imposed on parents and the risk of foster children placed by a local authority into the care of their legal parents being in a privileged position. Choosing to focus on the ‘service provider’, as opposed to the ‘parent’, aspect of being a foster parent meant that the judges in the Supreme Court concentrated on determining whether the local authority could be held vicariously liable for the abuse of the foster child by the foster parent. In contrast, there was considerable support at trial and in the Court of Appeal for recognising that the duty of care owed by the local authority was a ‘non-delegable duty’. Focusing more on the ‘parent’ as opposed to the ‘service provider’ aspect of being a foster parent, both the trial judge (Males J) and Black LJ in the Court of Appeal were prepared to find that the five stages of Lord Sumption’s test from *Woodland v Essex County Council*¹¹ for recognising a ‘non-delegable duty of care’ had been satisfied. Satisfaction of the test meant that there was little scope to address the concerns that ultimately prevented the Supreme Court recognising a ‘non-delegable duty’. The possibility of a ‘non-delegable duty’ was, however, ultimately discounted by the introduction of a sixth stage to the five-stage test; the requirement that it be ‘fair, just and reasonable’ to impose liability for breach of a ‘non-delegable duty of care’. Justice Males at trial and Burnett and Black LLJ in the Court of Appeal held that the broader ramifications of imposing liability on a local authority in terms of the provision of social services for vulnerable children meant that it was not ‘fair, just and reasonable’ to find that the duty of care owed by the local authority to the foster child in *Armes* was ‘non-delegable’.

Boundary between vicarious liability and liability for breach of a ‘non-delegable duty of care’

In addition to the concerns about the peculiar position of foster parents and the needs of vulnerable children in the care of social services, the judges in *Armes* faced further difficulties stemming from the lack of clarity as to the juridical basis of the liability imposed for breach of a ‘non-delegable duty of care’. The continuing failure of the courts to identify a convincing

⁹ See, for example, Lord Hughes: [2018] AC 355, 387-388.

¹⁰ See, for example, Lord Reed: [2018] AC 355, 365.

¹¹ [2014] AC 537.

basis for such liability has given rise to considerable uncertainty as to the boundary between vicarious liability and liability for breach of a ‘non-delegable duty of care’. The judges in *Armes* were therefore concerned as to where the limits of the two different forms of strict liability for the wrongdoing of another in tort lay. It was unclear, for instance, whether it was possible to impose liability for breach of a ‘non-delegable duty of care’ if a claim for vicarious liability had been denied.¹² It was also unclear whether liability for breach of a ‘non-delegable duty of care’ could extend to intentional wrongdoing, or whether only a claim for vicarious liability could be made in respect of intentional wrongdoing.¹³

Prior to *Armes* there had been no real need for the courts to clarify the boundary between vicarious liability and liability for breach of a ‘non-delegable duty of care’. The previous cases in England and Wales involving historic child sexual abuse had all been brought in vicarious liability.¹⁴ It was not until the Supreme Court decision in *Woodland* that liability for breach of a ‘non-delegable duty of care’ was raised as a possibility in similar cases involving injury to children whilst in institutional care. The claimant in *Woodland* had been a student at a local authority run school and was injured whilst participating in a school-organised swimming class at the local authority run pool. The Supreme Court found that the local authority owed the claimant a ‘non-delegable duty of care’ in its capacity as educator and that the duty would have been breached if negligence on the part of the swimming instructor could be established. No claim for vicarious liability was made in *Woodland* as it had been accepted by the parties that the swimming instructor was an independent contractor engaged by the local authority. The employment status of the foster parent was challenged in *Armes*, however, raising the possibility that vicarious liability might also be imposed.

The extent of the dilemma that faced the judges in *Armes* in terms of the boundary between vicarious liability and liability for breach of a ‘non-delegable duty of care’ is brought into focus by considering the position of a foster child who is both in foster care and a student at a local authority run school; a not uncommon situation. Having been placed in the care of a foster parent by the local authority, the foster child is expected to comply with the directions of their foster parent, the foster parent (where not also the legal parent) having been conferred authority by the local authority to direct the conduct of the foster child in the most intimate aspects of the foster child’s everyday life. When the foster child goes to school, the foster child is similarly expected to comply with the directions of their teacher, the teacher having been conferred authority by the local authority to direct the conduct of the foster child for the purpose of the foster child’s and the other children’s education. In both situations, the authority conferred upon the foster parent and the teacher is subject to abuse.

It is difficult to distinguish the position of a foster child relative to either the foster parent or teacher charged with their care. There was also little guidance available to the judges in *Armes* as to how best determine which of the two available bases of strict liability might be imposed (if any) in light of such similarities or where the boundary between the two different bases of strict liability lay. Lord Reed (giving judgment for the majority) seemed open to the possibility of overlap between the two different bases of strict liability, but refused to be drawn on the limits or extent of that overlap.¹⁵ To the extent that the majority in the Supreme Court needed

¹² See, for example, Lord Reed: [2018] AC 355, 375.

¹³ See discussion by Lord Reed: [2018] AC 355, 369 and 375.

¹⁴ Starting with *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

¹⁵ [2018] AC 355, 375.

to show that a foster parent was in a position ‘akin to employment’ to impose vicarious liability, it was necessary to at least maintain the potential for overlap, given that liability for breach of a ‘non-delegable duty of care’ had traditionally been extended to circumstances beyond which vicarious liability might otherwise be imposed; that is, to circumstances in which the third party who injured the claimant was not an employee. Lord Hughes (in dissent) refused to find that a foster parent was in a position ‘akin to employment’ and was much firmer in maintaining the distinction between the two bases of liability.¹⁶ Lord Justice Burnett in the Court of Appeal was of a similar view, emphasising the historical development of liability for breach of a ‘non-delegable duty of care’ as a mere device to impose strict liability outside an employment relationship.

Which Relationship?

No challenge is made to the decision in *Armes* itself. Indeed, it is argued towards the end of this article that the outcome ultimately reached on the facts of the case was correct. The reasoning in *Armes* is, however, confused and provides judges with very little guidance when deciding such cases. To the extent that the various judges asked to decide the case needed to address the difficulties outlined above, this is understandable. It does not, however, remove the need to clarify the law.

One way to bring such clarity is to look beyond the reasoning of the judges in *Armes* to the institutional features of the case, specifically the features of the different relationships at play. Prior to *Armes*, both the Supreme Court of Canada and the New Zealand Court of Appeal had the opportunity to consider whether a government agency could be held vicariously liable for the abuse of a foster child by a foster parent. The Supreme Court of Canada denied the claim, whereas the New Zealand Court of Appeal allowed it. A comparison of the two decisions is instructive, in that it reveals that the judges in the different courts focussed on different relationships when determining whether vicarious liability should be imposed. The Supreme Court of Canada focussed on the relationship between the government agency responsible for foster care and the foster parent, whereas the New Zealand Court of Appeal focussed on the relationship between the government agency and the foster child. It is submitted that the various judges in *Armes* would have been better able to address the difficulties outlined in the previous section had they explicitly identified the particular relationship that could potentially give rise to strict liability on the facts of the case (regardless of the particular cause of action in question).

Canadian Approach – relationship between local authority and foster parents

The Canadian approach to determining whether a government agency responsible for foster care can be held strictly liable for the abuse of a foster child by a foster parent rests on a particular characterisation of the goal of foster care, and hence the role of foster parents. The characterisation was first adopted by the Supreme Court of Canada in *KLB v British Columbia*.¹⁷ As McLachlin CJ, giving judgment for the majority, explained:¹⁸

Foster families serve a public goal – the goal of giving children the experience of a family, so that they may develop into confident and responsible members of society. However, they discharge this public goal in a highly independent manner, free from close government control...The independence of the foster

¹⁶ [2018] AC 355, 390.

¹⁷ [2003] 2 SCR 403.

¹⁸ [2003] 2 SCR 403, [23]-[24].

family is essential to the government's goal of providing family care. If foster parents had to check with the state before making ordinary day-to-day decisions, they not only would be less effective as parents, but would be unable to deliver the spontaneous, loving responses and guidance that the children need. Foster families must be left to arrange their own family routine, in their own way. They must deal with day-to-day challenges and problems by working them out within the family, and by sharing responsibility for doing this, demonstrating to foster children that it is possible to resolve difficulties by working together.

The focus on providing the 'experience of a family' or 'family life' was central to the Supreme Court of Canada's rejection of the claim for vicarious liability in *KLB*. Not only were foster parents separate from the government agency, but it was essential to maintain that independence in order to achieve the goal of foster care. Reaching this conclusion made it very difficult to then argue that the government agency had sufficient control over foster parents to support a finding that the foster parents were 'closely' enough connected with the government agency to impose vicarious liability.¹⁹

Only two of the judges in *Armes* placed similar emphasis on the relationship between the defendant local authority and the claimant foster parent in determining whether the local authority could be held strictly liable for the foster parent's abuse of the foster child. Both judges refused to impose such liability, regardless of the particular cause of action selected by the judge as the potential basis for imposing such liability.

In the Supreme Court, Lord Hughes can be seen to have used the Canadian approach to deny the claim for vicarious liability. He explicitly approved the reasoning of the Supreme Court of Canada in his dissenting judgment:²⁰

The foster carers do not do what the authority would otherwise do for itself; they do something different, by providing an upbringing as part of a family. The children live in a family; a family life is not consistent with the kind of organisation which the enterprise test of vicarious liability contemplates... This is essentially the reasoning which was adopted by the Supreme Court of Canada in *KLB v British Columbia* when confronting the same issue as now faces this court and in concluding that vicarious liability does not attach to the Government for the acts or omissions of foster parents. It seems to me both principled and realistic.

The Canadian approach was not only used, however, to deny the claim for vicarious liability. Tomlinson LJ in the Court of Appeal can also be seen to have used the Canadian approach to deny the claim for breach of a 'non-delegable duty of care'. Finding that the role performed by foster parents is not one which can of itself be performed by a local authority made it somewhat easier for Tomlinson LJ to subsequently find that the defendant local authority had not 'delegated' any relevant duty to the foster parents that had abused the claimant and could not therefore be held liable for breach of a 'non-delegable duty of care'.

Lord Justice Tomlinson started his judgment in *Armes* with an analysis of the relevant statutory framework (which changed during the course of the period within which the claimant was in foster care). From that analysis, Tomlinson LJ found that the local authority owed at least two distinct duties to children over whom a care order had been made. First, the local authority had a 'duty to take reasonable steps to protect the child from harm'.²¹ Secondly, the local authority had a duty to 'provide accommodation and maintenance for a child in its care'.²²

¹⁹ [2003] 2 SCR 403, [27].

²⁰ [2018] AC 355, 389.

²¹ Children and Young Person Act 1969 (UK) s 24 and Child Care Act 1980 (UK) s 10.

²² Child Care Act 1980 (UK) s 21.

Lord Justice Tomlinson then considered what needed to be shown to establish that the local authority owed a ‘non-delegable duty of care’ to a foster child. He examined Lord Sumption’s five-stage test for determining the existence of such a duty in *Woodland*, paying particular attention to stage four:²³

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimants...

Focusing on this stage, Tomlinson LJ then asked himself whether a relevant duty assumed by the defendant local authority towards the claimant foster child had actually been delegated to either of the foster parents found to have abused her. Looking first at the duty to take reasonable steps to protect the claimant from harm, Tomlinson LJ found that the local authority at no time divested itself of this duty as it remained responsible for exercising reasonable care in selecting foster parents and supervising all foster placements.²⁴ He reasoned that, as the local authority had not divested itself of the duty, the duty could not have been delegated by the local authority to the foster parents. This left the duty to provide accommodation and maintenance to the claimant as the only possible candidate for a duty which the local authority might have delegated. Tomlinson LJ found, however, that this duty had been ‘discharged’ rather than ‘delegated’. The defendant local authority had a choice to either accommodate the claimant in an institution or make arrangements for foster care. As the accommodation provided by foster parents included the provision of ‘family life’, it was not accommodation which the defendant local authority could of itself have provided. As the defendant local authority could not of itself provide foster care it could not be said that the duty to accommodate the claimant placed on the foster parents was one which had been delegated by the defendant local authority. At best, the local authority had ‘discharged’ its duty to accommodate the claimant by arranging a form of accommodation that the local authority could not itself provide.

Having found that there was no relevant duty that was delegated by the defendant local authority to the foster parents who abused the claimant, Tomlinson LJ found that no liability could be imposed on the defendant local authority for breach of a ‘non-delegable duty of care’.

New Zealand Approach – relationship between local authority and foster child

In contrast to the Canadian approach, the New Zealand approach focuses on the relationship between the government entity responsible for foster care and the foster child in determining whether that government entity can be held strictly liable for the abuse of a foster child by a foster parent. The approach was first used by the New Zealand Court of Appeal in *S v Attorney-General*.²⁵ Giving judgment for the majority, Blanchard J described the position of the foster child (identified as BS in the judgment) in the following terms:²⁶

The foster parents were empowered to exercise fulltime parenting control over BS in the course of which they were expected to supervise or assist him in intimate activities. He was therefore particularly vulnerable to a wrongful exercise of power by the persons to whom the Department had entrusted him. There was always a risk of sexual abuse of a foster child from a foster parent who had not been carefully selected or whose perverted tendencies has not previously surfaced. The placement of BS in a foster home, though effectively directed by the legislation, necessarily put him in a place where day-to-day supervision

²³ [2014] AC 537, 551.

²⁴ [2016] QB 739, 752.

²⁵ [2003] 3 NZLR 450.

²⁶ [2003] 3 NZLR 450, [70].

by department personnel could not be expected as it would have existed for a child in an institution run by the state.

By focussing on the position of the foster child, rather than the role of the foster parents, Blanchard J was able to identify specific risks faced by the foster child whilst in foster care and connect those risks to the government agency responsible for placing the foster child in foster care. Establishing such a connection was critical to the foster child's claim. As the risk which ultimately came to fruition (the risk of abuse) was the very risk created by the government agency when it conferred control over the foster child upon the foster parents, the New Zealand Court of Appeal held the government agency vicariously liable for the abuse perpetrated by the foster parents.

Notwithstanding the fact that the decision in *S v Attorney-General* does not appear to have been brought to the attention of the judges either at trial or in the Court of Appeal,²⁷ a majority of judges in *Armes* placed similar emphasis on the relationship between the defendant local authority and the claimant foster child in determining whether the local authority could be held strictly liable for the foster parent's abuse of the foster child. The judges who adopted the New Zealand approach either did impose strict liability on the defendant local authority for the abuse or were able to satisfy the relevant tests for imposing such liability more readily.

In the Supreme Court, Lord Reed (with whom Lady Hale, Lord Kerr and Lord Clarke agreed) can be seen to have used the New Zealand approach to support his finding that the defendant local authority was vicariously liable for the abuse of the claimant foster child by the foster parents. Lord Reed stated:²⁸

...the local authority's placement of children in their care with foster parents creates a relationship of authority and trust between the foster parents and the children, in circumstances where close control cannot be exercised by the local authority, and so renders the children particularly vulnerable to abuse. Although it is generally considered to be in the best interests of children in care that they should be placed in foster care, since most children benefit greatly from the experience of family life, it is relevant to the imposition of vicarious liability that a particular risk of abuse is inherent in that choice. That is because, if the public bodies responsible for decision-making in relation to children in care consider it advantageous to place them in foster care, notwithstanding the inherent risk that some children may be abused, it may be considered fair that they should compensate the unfortunate children for whom that risk materialises, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement.

This reasoning mirrors that of Blanchard J in the New Zealand Court of Appeal in *S v Attorney-General*, even though it was used to justify the finding that the foster parent was in a position 'akin to employment' in accordance with the criteria laid down by the Supreme Court in *Cox v Ministry of Justice*.²⁹ The elements of the 'akin to employment' test were not, however, dissimilar to the 'close connection' test applied by the New Zealand Court of Appeal; specifically, Lord Reed found that the local authority created the risk of harm to the foster child by placing the foster child with the foster parents, who were providing an 'integral part of the local authority's organising of its child care services' and were under the general supervision of the local authority in providing that service.³⁰

²⁷ [2018] AC 355, 381.

²⁸ [2018] AC 355, 379.

²⁹ [2016] AC 660.

³⁰ [2018] AC 355, 378-380.

The New Zealand approach was also adopted at trial and in the Court of Appeal to satisfy the relevant test for establishing a ‘non-delegable duty of care’. Consider the judgment of Males J at trial. His focus on the position of the foster child led him to frame the duty of care owed by the defendant local authority to the claimant in relatively broad terms.³¹

The positive duty which the local authority assumes is to care for the child. That includes but is not limited to the duty to care for the child’s material needs by providing accommodation and maintenance. That particular duty is ‘discharged’ by placing the child in appropriate accommodation pursuant to section 21 of the CCA 1980, but the broader aspects of the duty remain. Care and protection of the child from harm, which is an integral part of the overall duty, is delegated to the foster parent or other person with whom the child is placed. The child is placed in the foster parent’s care for that purpose and it is the foster parent who exercises the day to day care of the child that goes with such care.

This aspect of the judgment of Males J was cited with approval by both Black and Burnett LLJ on appeal,³² and stands in stark contrast to the more atomistic approach taken by Tomlinson LJ described in the previous section.

It will be recalled that Tomlinson LJ identified two specific duties bestowed upon the defendant local authority under the relevant statutory framework (‘a duty to take reasonable steps to protect the child from harm’ and a duty to ‘provide accommodation and maintenance for a child in its care’³³) and then considered whether either of those specific duties had been delegated to the foster parents. Justice Males instead started with the fundamental need of the claimant foster child for care, as highlighted by the statutory framework,³⁴ and framed the duty owed to the foster child accordingly. Justice Males then looked to identify the persons charged with a duty to provide that care. The first persons Males J identified as having a duty to care for the claimant was the defendant local authority. This duty was ‘assumed’³⁵ when the claimant’s mother proved unable to provide that care and a care order placing the claimant in the custody of the defendant local authority was made. Day-to-day care, however, was provided by the foster parents. A duty to provide that care was imposed when the defendant local authority placed the claimant in the care of the foster parents. Such a duty could only have been bestowed by the defendant local authority, the foster parents having had no connection with the claimant previously.

Having framed the duty owed to the claimant in such broad terms, the judges who adopted the New Zealand approach to determine the existence of a ‘non-delegable duty of care’ at trial and in the Court of Appeal found it easier than Tomlinson LJ to satisfy the different stages of Lord Sumption’s five stage test for determining the existence of such a duty. Stages one and two of the test were conceded by the defendant at trial to have been satisfied.³⁶ Those stages require a claimant to demonstrate that they are a child or some other especially vulnerable person for whom the defendant has ‘actual custody, charge or care’ and has assumed a positive duty to

³¹ [2015] PTSR 653, 701.

³² Though subject to one qualification (see below).

³³ See part two above, titled ‘Which relationship?’.

³⁴ [2015] PTSR 653, 701.

³⁵ The notion of ‘assumption of responsibility’ has been recognised as problematic. See generally Kit Barker, ‘Unreliable assumptions in the modern law of negligence’ (1993) 109 *Law Quarterly Review* 461 and, more recently, Andrew Robertson and Julia Wang, ‘The Assumption of Responsibility’ in Kit Barker, Ross Grantham and Warren Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller*, Hart Publishing, 2015.

³⁶ [2015] PTSR 653, 667.

protect from harm prior to the claimant being wrongfully injured.³⁷ Both Males J and Black LJ confirmed that the concession was rightly made. They may also have taken some comfort from Lord Sumption's focus on the vulnerability and care status of a claimant in describing these first two stages of the test when they came to frame the duty owed by the defendant local authority to the claimant foster child in the terms that they did.

Stage three of Lord Sumption's test requires a claimant to show that they have no control over how a defendant chooses to perform their duty to protect the claimant from harm. Despite the defendant local authority's attempt to argue that its statutory obligation to give 'due consideration' to the claimant's wishes when arranging care³⁸ meant that it was not possible to say that the claimant had 'no' control whatsoever, both Males J and Black LJ had little difficulty in finding that the age of the claimant at the relevant times meant that she had no effective control over whose care she was placed in. Stage three of the test was consequently also found to be satisfied.³⁹

Stage four of Lord Sumption's test for determining the existence of a 'non-delegable duty of care' proved the most difficult for judges to satisfy, regardless of whether the particular judge adopted the Canadian or New Zealand approach. Such difficulties, however, highlight most clearly the differences between the two approaches. To satisfy stage four of the test a claimant has to show that the defendant has delegated a function integral to the performance of its positive duty to protect the claimant from harm to a third party and that the third party is exercising the defendant's custody or care of the claimant in order to perform that function.⁴⁰ By framing the duty owed by the defendant local authority to the claimant broadly as a duty to care for the claimant, the judges adopting the New Zealand approach were not only able to ascertain that a duty to care for the claimant had been imposed on the foster parents when the defendant local authority placed the claimant in their care, but that the defendant local authority still retained its own duty to care for the claimant after the placement (although the nature of the care to be provided differed). Identifying a continuous connection between the duties borne by the defendant local authority and the foster parents meant that Males J and Black LJ were able to find that the duty owed by the defendant local authority to the claimant had been 'delegated' to the foster parents,⁴¹ satisfying the requirement. Framing the duties owed by the defendant local authority in much narrower, more specific terms, had prevented Tomlinson LJ from making a similar connection.

To the extent stage five of the test is closely connected with stage four, requiring a claimant to show that the third party had been negligent in the performance of the very function delegated to her by the defendant,⁴² it was accepted by the defendant at trial that if stage four of the test was satisfied, stage five would be also. The concession was subject to one qualification: whether liability for breach of a 'non-delegable duty of care' could extend to intentional wrongdoing? The issue arose because Lord Sumption had used the word 'negligence' when describing the requirements of stage five of the test in *Woodland*.⁴³ Such difficulties in

³⁷ [2014] AC 537, 583.

³⁸ Child Care Act 1980 (UK), s 18.

³⁹ [2015] PTSR 653, 700; [2016] QB 739, 757.

⁴⁰ [2014] AC 537, 583.

⁴¹ [2015] PTSR 653, 701; [2016] QB 739, 758.

⁴² [2014] AC 537, 583.

⁴³ [2014] AC 537, 583.

determining the boundary between vicarious liability and liability for breach of a ‘non-delegable duty of care’ were discussed above.

Despite finding the five stages of Lord Sumption’s test for determining the existence of a ‘non-delegable duty of care’ satisfied, and despite adopting a similar approach to the Court of Appeal of New Zealand which found liability on similar facts in *S v Attorney-General*, neither the trial judge nor Black and Burnett LJ on appeal were prepared to find that the duty of care owed by the defendant local authority to the claimant foster child was ‘non-delegable’. All three judges were of the view that Lord Sumption had imposed an additional requirement to the five-stage test that needed to be satisfied before a ‘non-delegable duty’ could be found; specifically, the requirement that it be ‘fair, just and reasonable’ to impose such a duty.⁴⁴ Furthermore, all three judges found that on the facts of the case it would not be ‘fair, just and reasonable’ for a ‘non-delegable duty’ to be found. The reasons enunciated included a potential flood of claims, the resulting need to use the limited public resources of already over-stretched and underfunded local authorities to fund such claims and the risk of defensive social-work practices emerging, with local authorities concentrating more on avoiding legal liability as opposed to advancing the best interests of the children in their care.⁴⁵

Significance of Relationship between Local Authority and Foster Child

What is striking about the analysis in the previous section is that there was no correlation between the cause of action identified by a judge in *Armes* as the most likely basis for imposing strict liability and the relationship relied upon by the judge to establish that liability. Instead, the judges appeared to instinctively interpret the requirements for establishing each of the two different forms of strict liability in light of the features of the relationship they had recognised as the most significant to determining liability under either the Canadian or New Zealand approach. It can now be seen, for instance, that it was much easier for Lord Reed in the Supreme Court to establish that a foster parent was in a position ‘akin to employment’ because, unlike Lord Hughes, he was not actually focussing on the features of the relationship between the local authority and the foster parents but the features of the relationship between the defendant local authority and the claimant foster child. Similarly, it was much more difficult for Tomlinson LJ in the Court of Appeal to identify a so-called ‘duty’ that might have been ‘delegated’ to the foster parents so that liability for breach of a ‘non-delegable duty of care’ might be imposed since, unlike Males J and Black LJ, he was determining the existence of such duties by reference to the relationship between the defendant local authority and the foster parents and not the relationship between the local authority and foster child. Quite remarkably, not even satisfaction of the five-stage test was sufficient for Males J and Black LJ to impose strict liability, with both judges creating a sixth stage to the five-stage test to deny the imposition of liability for breach of a ‘non-delegable duty of care’.

It is submitted that the only way for a judge to overcome such implicit interpretation biases in determining whether to impose strict liability for the wrongdoing of another in tort is for the judge to explicitly identify the relationship which gives rise to the prospect of strict liability in a particular case and to determine whether strict liability should be imposed by reference to the features of that relationship. As can now be seen, a majority of the judges in *Armes* were of the view that if the defendant local authority was to be held strictly liable for the abuse

⁴⁴ [2014] AC 537, 584.

⁴⁵ See, for example, [2015] PTSR 653, 702-703 (Males J); [2016] QB 739, 761-762 (Black LJ).

perpetrated by the foster parents, such liability was to imposed by virtue of the relationship between the defendant local authority and the claimant foster child and not the relationship between the defendant local authority and the abusive foster parents. But why is that relationship significant?

The significance of the relationship between a local authority and foster child is hinted at in the quotes from Blanchard J in the New Zealand Court of Appeal in *S v Attorney-General* and Lord Reed in the Supreme Court in *Armes* set out above. When a foster child is taken into care, a local authority is vested by legislation with a broad range of powers and duties to look after the foster child including, where necessary, the authority to direct the conduct of the foster child.⁴⁶ When a local authority places a foster child in the care of a foster parent (where that foster parent is not also the child's legal parent), the local authority confers that authority on that foster parent to similarly direct the conduct of the foster child. In so doing, the local authority creates a power relationship that did not previously exist. Furthermore, when a local authority confers its authority to direct the conduct of a foster child on a foster parent, that foster parent is not necessarily subject to the same restraints in the exercise of that authority as the local authority. This is because the restraints placed on the exercise of that authority by a local authority are incorporated into the legislation that creates that authority and are not automatically transferred to a foster parent when the authority is conferred. It is up to the local authority to impose such restraints (if any) in an agreement with the foster parent. The power relationship created by the conferral of authority by the local authority upon the foster parent to direct the conduct of the foster child is therefore subject to abuse.

It can be argued that the strict liability imposed on the government agencies in both *S v Attorney-General* and *Armes* responded to the potential for abuse of the power relationship created when the respective defendant government agencies' conferred their authority to direct the conduct of the claimant foster child to the foster parent (the foster parent not being also the legal parent of the foster child). The imposition of strict liability effectively held the government agency to account for the consequences of conferring that authority upon the foster parent.⁴⁷

Overcoming the Difficulties Pertaining to Foster Care

Had the judges in *Armes* explicitly identified the relationship that gave rise to the imposition of strict liability in that case, they would have been better able to address the difficulties outlined in part one of this article. The difficulties pertaining to the peculiar nature of foster care will be re-examined in this part in light of the specific features of the relationship between a local authority and a foster child which gives rise to that liability. The difficulties pertaining to the boundary between vicarious liability and liability for breach of a non-delegable duty of care will be re-examined in the next and final part of this article which outlines a new map of strict liability for the wrongdoing of another in tort.

⁴⁶ Child Care Act 1980 (UK) s 10 which applied at the time NS was in foster care. The current legislation is not as explicit, but to similar effect; Childrens Act 1989 (UK) s 22.

⁴⁷ The significance of conferring authority over a child in the context of a school relationship was discussed in C Beuermann, 'Vicarious liability and conferred authority strict liability: *Woodland v Swimming Teachers' Association* [2012] EWCA Civ 239' (2013) 20 TLJ 265.

Difficulty 1 – Different treatment of parents

It will be recalled that the first difficulty the judges faced in *Armes* was an apparent incongruity in the treatment of a local authority and a parent when conferring authority to direct the conduct of a child upon a third party. Specifically, how could a local authority be held strictly liable for the abuse of a foster child by a foster parent but a parent would not be held so liable if they were to leave their child in the care of a friend or family member who abused the child? A close examination of the particular features of the relationship between a local authority and a foster child compared with the particular features of the relationship between a parent and child explains why strict liability is imposed by virtue of one relationship and not the other.

The position of a local authority and a parent conferring authority to direct the conduct of a child upon a third party is undoubtedly similar; both are vested with authority to direct the conduct of the child and both may confer that authority upon a third party, creating a power relationship that did not previously exist and is at risk of abuse (where the foster carer was not also the child's legal parent). There is, however, an important difference. This difference arises not from the nature of the act of conferring authority, but in the nature of the legal responsibility of a local authority and a parent for the care of the child.

Although a parent is vested with authority to direct the conduct of their child by virtue of their status as parent and associated social practices, courts have long been reluctant to impose liability on a parent in respect of the exercise of that authority. For instance, a parent is not generally held liable to their child in negligence unless the harm to the child resulted from some type of action by the parent that placed the child in danger.⁴⁸ In contrast, a local authority is subject to a positive duty to take reasonable steps for the safety of a child in their care.⁴⁹ Compare the following cases. In *Arnold v Teno*⁵⁰ the Supreme Court of Canada found that a mother was not liable to her daughter who had been struck by a car on a busy road after purchasing an ice-cream at an ice-cream van after the mother had given her daughter money for that purpose and sent her off alone. In contrast, the House of Lords in *Barnes v Hampshire County Council*⁵¹ found a local authority liable to a student who was injured by a truck on her way home from the local authority run school after the children were released from school five minutes before the official closing time.

Various reasons have been given for the reluctance of the courts to impose liability on a parent in respect of harm to their children, including: difficulties in setting the standard of care;⁵² a concern not to interfere in family relationships;⁵³ and a concern that if liability were imposed

⁴⁸ For example, the parent of a child hit by a car was held liable to the child in *McCallion v Dodd* [1966] NZLR 710 because the parent had required the child to walk on the side of the road at night.

⁴⁹ See, for example, *Geyer v Downs* (1977) 138 CLR 91.

⁵⁰ (1978) 83 DLR (3rd) 609.

⁵¹ [1969] 1 WLR 1563.

⁵² See *Surtees v The Royal Borough of Kingston Upon Thames* [1992] PIQR 101,123-124 (Vice-Chancellor): 'The studied calm of the Royal Courts of Justice, concentrating on one point at a time, is light years away from the circumstances prevailing in the average home. The mother is looking after a fast moving toddler at the same time as cooking the meal, doing the housework, answering the telephone, looking after the other children and doing all the other things that the average mother has to cope with simultaneously or in quick succession in the normal household. We should be slow to characterize as negligent the care which ordinary loving and careful mothers are able to give to individual children, given the rough and tumble of home life.'

⁵³ *Posthuma v Campbell* (1984) 37 SASR 321, 329 (Jacobs J): '...to assert that the duty is absolute and unqualified, and that only the breach of that duty, as distinct from the existence of the duty, is to be determined by what is reasonable in the circumstances, represents to my mind a wholly unacceptable intrusion of the law of

no one would be prepared to assist parents in looking after their children.⁵⁴ The 24/7 nature of the parent/child relationship and the general inability of a parent to surrender parental responsibility in respect of their child are also likely to be relevant factors.⁵⁵

Whatever the reason, there is a risk in imposing strict liability on a parent that the parent would be subject to greater liability for the wrongdoing of a third party conferred authority by the parent to direct the conduct of the child than the parent would otherwise be subject to in respect of the care of their own child. Given the practical need during the life of a child for a parent to arrange for at least some aspects of their parental responsibility to be performed by another person, this is a significant risk.

It follows that there is good reason not to impose strict liability on a parent who confers authority on another person to care for their child and harms the child in the process. The same cannot be said for local authorities. The standard of care owed by a foster parent to a foster child is typically less onerous than that owed by the local authority itself.⁵⁶

The risk of a parent being subjected to greater liability for the wrongdoing of a third party upon whom they have conferred authority to direct the conduct of their child as opposed to their own wrongdoing does not, of course, arise in respect of all torts. In cases of battery, for instance, the prospective liability of the parent in respect of their own wrongdoing would be the same as that which would be imposed on the parent for the wrongdoing of a third party who engaged in similar conduct. The prospect of holding a parent liable for the wrongdoing of a third party upon whom they have conferred authority to direct the conduct of their child is not, however, restricted to instances of child sexual abuse. As there is a risk of greater liability being imposed on a parent in other cases, such as those involving negligence, the risk of higher liability remains a valid concern and can explain the general position that parents are not held liable for the wrongdoing of a third party upon whom the parent has conferred authority to direct the conduct of their child.

Difficulty 2 – What if foster child placed with legal parent?

The second difficulty the judges faced in *Armes* was the risk of preferential treatment for foster children placed by a local authority with their legal parents. If strict liability was to be imposed on a local authority for the abuse of a foster child by a foster parent, a foster child placed by a local authority with their legal parent could look to the local authority for compensation when injured by their legal parent. Again, a close examination of the particular features of the relationship between a local authority and a foster child compared with the particular features of the relationship between a legal parent and a foster child explains why strict liability is imposed by virtue of one relationship and not the other.

negligence into family and domestic relationships. It would impose a fetter on parental judgment and discretion, presumably by reference to some imaginary norm.'

⁵⁴ *Robertson v Swincer* (1989) 52 SASR 356, 361-362 (King CJ): 'The threat to the financial security of parents and families is by no means the only adverse social consequence to be feared. Parents and children in our society are very dependent upon the support and assistance of benefactors. Children are cared for frequently by supportive relatives and friends and by kindly neighbours. What would be the effect upon such supportive arrangements of the knowledge that a failure of care in supervision might expose the benefactor to being stripped of his assets in consequence of an action for damages?'

⁵⁵ Childrens Act 1989 (UK) s 2(9). See more generally *Surtees v Royal Borough of Kingston upon Thames* [1992] PIQR 101, 123-124.

⁵⁶ *Surtees v Royal Borough of Kingston Upon Thames* [1992] PIQR 101.

It has already been noted that the significance of the relationship between a local authority and a foster child is that the local authority is vested with authority to direct the conduct of the foster child and subsequently confers that authority on a foster parent when the foster child is placed in the foster parent's care. When a local authority places a foster child in the care of their legal parent, the local authority does not create a power relationship between the legal parent and foster child; that power relationship already exists.⁵⁷ There are also differences in respect of the protections placed on the exercise of authority within that power relationship. A local authority will impose restrictions on how a foster parent is to exercise the authority to direct the conduct of the foster child when that authority is conferred upon the foster parent by the local authority. Such restrictions are derived from, but are not necessarily the same, as the restrictions placed by legislation on the local authority's exercise of the same authority. When a foster child is placed by a local authority with their legal parent, the legal parent is subject to the very same restrictions on the exercise of their authority to direct the conduct of their child as they would have been prior to the local authority's decision to take the child into care. The protection available to the foster child in respect of the exercise of that authority has not changed. In contrast, a foster child is dependent upon a local authority putting in place adequate restrictions on the exercise of authority over the foster child when that authority is conferred by the local authority.

Giving judgment for the majority of the Supreme Court in *Armes*, Lord Reed could see that there were differences in the relationship between a legal parent and a foster child and the relationship between a foster parent who is not the legal parent and a foster child, but struggled to enunciate how exactly the relationships differed. The current framing of the test for establishing vicarious liability did not assist Lord Reed in this endeavour.⁵⁸

...even if their care of the child might be described as having been approved by the local authority, and was subject to monitoring and might be terminated, nevertheless they would not have been recruited, selected or trained by the local authority so as to enable it to discharge its child care functions. They would have been carrying on an activity (raising their own child) which was much more clearly distinguishable from, and independent of, the child care services carried on by the local authority than the care of unrelated children by foster parents recruited for that purpose.

One it is acknowledged that the significant feature of the relationship between a local authority and a foster child is the conferral of authority upon the foster parent, it becomes easier to explain why strict liability does not arise when the foster parent who abuses the foster child is also the foster child's legal parent.

It should be noted that the placement by a local authority of a foster child with their legal parent is not without risk. The continuance of the power relationship between the legal parent and the foster child rests on the local authority's decision to return the foster child to the care of their legal parent; a decision which the local authority has the power to retract.⁵⁹ By placing a foster child with their legal parent, a local authority therefore creates the risk that the power relationship between the legal parent and the foster child will not continue to be abused notwithstanding it was abuse of that power relationship which necessitated the removal of the foster child from the care of their legal parent in the first place. Irrespective of whether the creation of such risk could result in personal liability on a local authority, the Supreme Court

⁵⁷ In contrast to the placement of the child with other relatives who would not have previously had such authority over the foster child.

⁵⁸ [2018] AC 355, 382-383.

⁵⁹ See relevant Guidance and Regulations to the Childrens Act 1989 (UK).

appears to have formed the view in *Armes* that the creation of such a risk is insufficient to support the imposition of strict liability.⁶⁰

Difficulty 3 – ‘Fair, just and reasonable’ and effect on child social services

The final difficulty faced by the judges in *Armes* in terms of the peculiar features of foster care were the broader concerns about the impact of imposing strict liability on the capacity of local authorities to act in the best interests of vulnerable children in the care of social services. Such concerns were raised under the umbrella inquiry of whether it was ‘fair, just and reasonable’ to impose any liability in the case (whether vicarious liability or liability for breach of a ‘non-delegable duty of care’).

Had the judges in *Armes* explicitly acknowledged that any strict liability to be imposed on the local authority was to be imposed by virtue of the relationship between the local authority and the foster child they would have noticed a very particular feature of such concerns; they are extraneous to the relationship between the local authority and the foster child. As concerns about the impact of imposing strict liability on child social services more generally are extraneous to the relationship between the local authority and the foster child, it is unclear why they were being considered at all.

The requirement that it be ‘fair, just and reasonable’ to impose strict liability (whether under the test for vicarious liability or liability for breach of a ‘non-delegable duty of care’) has been borrowed from the three-stage test for determining the existence of a duty of care in negligence, laid down by the House of Lords in *Caparo Industries plc v Dickman*.⁶¹ The primary function of the test is to enable the courts to more readily balance the interests of the parties to the dispute, both as individuals and, more broadly, as members of a functioning society.⁶² Without this capacity, there is a risk that the imposition of liability in negligence becomes so onerous that individuals could be discouraged from engaging in the range of ordinary, everyday activities necessary to lead fulfilling lives.⁶³ To this extent, use of the ‘fair, just and reasonable’ test to balance the often competing interests of the parties has proved central to the development and containment of the modern tort of negligence, particularly in light of the failure of the courts to identify a definitive test for determining the existence of a duty of care more generally.⁶⁴

Notwithstanding similar difficulties in establishing the different tests for imposing strict liability, there is a fundamental difference in the nature of the liability being imposed. Liability in negligence is personal, requiring proof of wrongdoing personally engaged in by the defendant. In contrast, strict liability is a form of liability imposed regardless of any personal wrongdoing by the defendant.⁶⁵ As such, when the courts impose strict liability they are not engaged in a process of balancing the interests of the parties. In as much as strict liability is

⁶⁰ Though might support heightened personal liability eg for omissions.

⁶¹ [1990] 2 AC 605.

⁶² See Andrew Robertson, ‘Justice, Community Welfare and the Duty of Care’ (2011) 127 *Law Quarterly Review* 370.

⁶³ Peter Cane, *The Anatomy of Tort Law* Hart Publishing, 1997, 10-15.

⁶⁴ At least in England and Wales, although note the recent efforts of the Supreme Court of the United Kingdom to limit use of the inquiry of whether it is ‘fair, just and reasonable’ to impose a duty of care to novel cases; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595. Balancing is also done in other jurisdictions, but in a different form, for example, the salient features approach in Australia.

⁶⁵ Cane above n 2.

imposed regardless of personal wrongdoing by the defendant, it is imposed regardless of the personal interests of the defendant. It follows that the imposition of such liability is, by definition, 'unfair'.⁶⁶ In such circumstances it is nonsensical to ask whether the imposition of liability for breach of a 'non-delegable duty of care' is 'fair, just and reasonable'.

There were consequently no grounds in *Armes* to consider the impact of imposing strict liability on the capacity of local authorities to act in the best interests of vulnerable children in the care of social services more generally. There is a distinct possibility, however, that such concerns were raised to sidestep the more pressing difficulties outlined above pertaining to the potential imposition of strict liability on parents and the beneficial treatment of foster children placed with their legal parents. The judges who had relied on the 'fair, just and reasonable' test to dispose of the claim for strict liability in *Armes* had found no other way to address those difficulties. As focussing on the features of the relationship between a local authority and a foster child provides a means to address such concerns, it may also be that there is no longer the impetus to engage in such an inquiry.

Map of Strict Liability for the Wrongdoing of Another in Tort

That the courts are confused as to the boundary between vicarious liability and liability for breach of a 'non-delegable duty of care' is now painfully evident. Such confusion stems from an inadequate understanding of the juridical basis for imposing such liability. This article has shown that strict liability in *Armes* was imposed by virtue of the features of the relationship between the defendant local authority and the claimant foster child (and might now be more appropriately called 'conferred authority strict liability'⁶⁷). Focusing on the particular relationship which gives rise to strict liability (whether vicarious liability or conferred authority strict liability) enables a new map of strict liability for the wrongdoing of another in tort to be drawn.

It has long been established that vicarious liability responds to the employment relationship, although there are various explanations as to why this might be the case.⁶⁸ Conferred authority strict liability does not respond to the employment relationship, at least not an employment relationship between the defendant and the third party wrongdoer.⁶⁹ It responds to a relationship between the claimant and the defendant. This is reflected in stage two of Lord Sumption's test in *Woodland* which requires there to be an 'antecedent relationship between the claimant and the defendant' with particular features.⁷⁰

The confusion seems to stem from the situation where there is both an employment relationship between the defendant and third party wrongdoer and a relationship between the claimant and the defendant that might attract conferred authority strict liability. The abuse of a student by a

⁶⁶ The mechanism historically used to resolve this unfairness has been the vesting of a right in the defendant to be indemnified by the third party wrongdoer, essentially shifting the risk of successfully recovering from the third party wrongdoer from the claimant to the defendant. See, in the context of vicarious liability, *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555. Significance of the indemnity to strict liability for the wrongdoing of another in tort is discussed further in Christine Beuermann, 'Tort law in the employment relationship: a response to the potential abuse of an employer's authority' (2014) 21 *Torts Law Journal* 169.

⁶⁷ See Beuermann above n 47.

⁶⁸ J W Neyers, 'A theory of vicarious liability' (2004) 43 *Alberta Law Review* 287, 293-298. Cf Beuermann *ibid*.

⁶⁹ Although it may respond to an employment relationship between the claimant and the defendant, where the defendant employer confers its authority to direct the conduct of the claimant employee to a third party.

⁷⁰ [2014] AC 537, 584.

teacher employed by a local authority to teach in a school provides such an example. It has previously been assumed that it is the employment relationship (or a relationship between the defendant and the third party wrongdoer akin to employment) that triggers liability in cases such as *Lister*⁷¹ and *Various Claimants*.⁷² However, these cases were decided before the Supreme Court determined in *Woodland* that there was a second relationship in such circumstances that might also trigger strict liability; the relationship between the school and the student. Had the potential for strict liability to be imposed by virtue of the relationship between the school and the student in both *Lister* and *Various Claimants*, there would have been no need to extend the long-established Salmond test for determining vicarious liability to accommodate the imposition of strict liability in those cases.

It follows that there are two discrete forms of strict liability for the wrongdoing of another in tort which respond to different relationships: vicarious liability which responds to the relationship between the defendant employer and the third party employee who wrongfully injured the claimant; and conferred authority strict liability which responds to the relationship between the defendant and the claimant and the fact that the defendant conferred authority to direct the conduct of the claimant upon the third party who wrongfully injured the claimant. There is insufficient room within the scope of this article to fully explain these two forms of strict liability. Key differences can, however, be identified.

One clear difference between the two forms of strict liability is that they respond to the wrongdoing of different types of people.⁷³ Conferred authority strict liability can respond to the wrongdoing of an independent contractor, an employee or even a person who has been acting gratuitously. This is because it is not the status of the person who has engaged in the wrongful conduct that is important, but the fact that the wrongdoer has been conferred authority by the defendant to direct the conduct of the claimant. In contrast, it is well established that vicarious liability only responds to the wrongdoing of an employee⁷⁴ (or possibly the wrongdoing of a person in a relationship ‘akin to employment’⁷⁵).

The second difference between the two forms of strict liability is more controversial and has been more difficult to both identify and resolve due to the trajectory of the historical development of the two doctrines. The difference lies in the type of wrongdoing to which the two forms of strict liability respond. Contrary to the concerns expressed by some of the judges in *Armes*,⁷⁶ it can be argued that conferred authority strict liability responds to both negligent and intentional wrongdoing, whereas vicarious liability is generally limited to negligence.⁷⁷ To be sure, this statement belies the recent extension of vicarious liability in England and Wales.⁷⁸ It is important to recall, however, that under the previous Salmond test, vicarious liability was not generally understood to extend to intentional wrongdoing engaged in by an employee on a

⁷¹ *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

⁷² *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1.

⁷³ Beuermann above n 66.

⁷⁴ Although it is envisaged that there may well be a need to reconsider this extension of vicarious liability if the arguments in this article are accepted.

⁷⁵ In jurisdictions where that test has been accepted.

⁷⁶ For example, [2016] QB 739, 754 (Burnett LJ).

⁷⁷ See Beuermann above n 66 and Beuermann above n 47.

⁷⁸ Culminating in *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677.

‘frolic of their own’.⁷⁹ The first extension of the scope of vicarious liability to include intentional wrongdoing occurred in *Lister*, in which there was not one, but two relationships that might possibly have attracted strict liability.

The difference in scope between the two forms of strict liability can be explained by returning to the hypothetical scenario posed earlier in this article; the example of a foster child who also attends a local authority run school. Starting with conferred authority strict liability. If the liability responds, as suggested, to the risk created by a local authority’s conferral of authority upon a teacher or foster parent (where not also the legal parent) to direct the conduct of a foster child, it can be argued that the scope of conferred authority strict liability is not limited by the terms of the actual authority conferred by the local authority. Instead, it extends to circumstances in which a teacher or foster parent is acting within the terms of the *apparent* authority conferred by the local authority immediately prior to the wrongdoing. This is because the foster child will interact with both the teacher and the foster parent on the basis of the terms of the apparent authority conferred upon that person by the local authority. One reason a foster child will go with a teacher or a foster parent into a room with no other children, for instance, is because the teacher or foster parent has the apparent authority to direct the foster child to do so. It follows that it is the terms of the apparent authority that has been conferred by the local authority that shapes the power relationship between the teacher and/or foster parent and the foster child and it is the potential for abuse of that power relationship that attracts the concern and intervention of conferred authority strict liability. It can be argued that it is for this reason that conferred authority strict liability extends to intentional wrongdoing by the third party conferred authority to direct the conduct of the claimant by the defendant.

In contrast, vicarious liability has historically been limited by the terms of the *actual* authority⁸⁰ exercised by an employer over an employee. Identifying a convincing basis for vicarious liability has proved difficult for the courts, but it is possible to explain both vicarious liability and conferred authority strict liability in terms of the potential abuse of authority.⁸¹ An employer is vested with authority to direct the conduct of an employee for her own benefit and may exercise that authority without making adequate allowance for the discharge of other obligations or responsibilities owed by the employee. In such circumstances, there is the potential for an employer to create a conflict between an employee’s duties under her employment contract and other general law obligations or responsibilities the employee might owe. This conflict can put pressure on an employee to follow her employer’s directions rather than complying with her obligations or responsibilities at general law. The exercise of authority by an employer over an employee is therefore subject to abuse. An employer, for instance, may direct an employee to act in ways that involve unreasonable risk when undertaking a particular task because of the associated costs. Strangers to the employment relationship are consequently put at risk because an employer can exercise her authority to direct the conduct of an employee for her own benefit. Viewing vicarious liability as a response to the risk of the abuse of authority by the employer explains why vicarious liability has historically been limited to cases where an employee has been acting within the terms of the

⁷⁹ Vicarious liability being denied when an employee was acting, in general terms, ‘on a frolic of their own’; *Deatons v Flew* (1949) 79 CLR 370.

⁸⁰ Either express or implied.

⁸¹ I explored this argument more fully, including the difficulties in determining the scope of vicarious liability, in Beuermann n 66 above.

actual authority exercised by the employer, for it is only in such circumstances that the risk of abuse of the authority vested in the employer exists.

The above analysis is radical and goes beyond any explanation of vicarious liability so far accepted by the courts. For the first time, however, drawing a connection between the bases of the two forms of strict liability enables the boundary between vicarious liability and conferred authority strict liability to be clearly delineated. It can now be seen that the two forms of strict liability for the wrongdoing of another in tort not only respond to the wrongdoing of different types of people, but to different types of wrongdoing. Any overlap between the two forms of strict liability is restricted to circumstances in which an employee, who has been conferred authority to direct the conduct of the claimant by the defendant, negligently injures the claimant in the course of exercising that authority. A local authority might, for instance, be held strictly liable for an employed teacher who negligently injures a student under either doctrine, whereas only conferred authority strict liability might arise if the student's injuries resulted from intentional misconduct of the teacher (or indeed a foster parent, there being no rational basis to adopt a different approach to determining liability in the two instances).⁸² In such situations, concurrent liability might be tolerated as the circumstances satisfy two different basis for imposing liability. As the degree of overlap is relatively small, it presents a limited threat to the continued existence of the two discrete forms of strict liability for the wrongdoing of another in tort.

Conclusion

It can be seen from this article why the judges had such difficulty in *Armes* applying the respective tests for determining either to impose the newly extended version of vicarious liability or liability for breach of a 'non-delegable duty of care'. Neither test adequately directs a judge to consider the relevant features of the particular relationship that gives rise to the prospect of such liability. To the extent that neither test reflects the basis upon which such liability is being imposed, the tests are confusing and unhelpful. They are also capable of being manipulated to achieve a desired result. This situation is entirely unsatisfactory. Not only does it prevent certainty and consistency in the law, but creates the risk of an exceptional form of liability (imposed regardless of personal wrongdoing) being unduly expanded. The only way to avoid this is to adopt tests which accurately reflect the basis of the liability. To this end, this article has suggested a new map of strict liability for the wrongdoing of another in tort. The map outlines two discrete forms of strict liability for the wrongdoing of another in tort which respond to different relationships: vicarious liability which responds to the relationship between the defendant employer and the third party employee who wrongfully injured the claimant; and conferred authority strict liability which responds to the relationship between the defendant and the claimant and the fact that the defendant conferred authority to direct the conduct of the claimant upon the third party who wrongfully injured the claimant. The adoption of such a map will go a considerable way to ensuring that future judges have much greater guidance when faced with difficulties such as those which arose in *Armes*.

⁸² Unless such intentional misconduct was actually directed by the local authority eg corporal punishment (notwithstanding such a direction would be contrary to law).