breach rather than duty) was more recently championed entirely *unsuccessfully* by the late Lord Bingham, dissenting in *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 A.C. 373 and *Smith v Chief Constable of Sussex; Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225. What Lord Bingham tried in vain the Court of Appeal in *Smith v MoD* has now been accomplished, by declining to engage with those authorities at all.

Public authority tort liability is notorious for complexity. For it is a tricky business to weigh up the competing constitutional concerns: the state should not claim sweeping immunities for its (otherwise tortious) actions (*e.g., Entick v Carrington*); but the courts should not second-guess matters of high policy for which politicians should properly be accountable to Parliament. Yet if ministerial responsibility is seen to be "falling short", this should be addressed directly; it would be unwise for the judiciary to fill the "vacuum" (*cf. Regina v Home Secretary, Ex parte Fire Brigades Union* [1995] 2 A.C. 513, 567 *per* Lord Mustill). By contrast with such inherent problems, *needless* complication arises from incompatible lines of case-law. One might have believed that *Barrett* and *Phelps* had joined *Junior Books v Veichi* [1983] 1 A.C. 520 in "the slumber of the uniquely distinguished" (*cf. The Orjula* [1995] 2 Lloyd's Rep. 395 per Mance J.). But *Smith v MoD* has awoken them once more. The Supreme Court may yet restore order (an appeal is to be heard in February 2013).

JONATHAN MORGAN

THE BASIS OF VICARIOUS LIABILITY

VICARIOUS liability is founded on the responsibility of an enterprise for those it uses as helpers to carry out its activities. That is the conclusion to be drawn from *The Catholic Child Welfare Society v Various Claimants and the Institute of the Brothers of Christian Schools* [2012] UKSC 56. In a single judgment of the Supreme Court, Lord Phillips restated some of the basic principles of vicarious liability so as to give more clarity to a branch of law unsettled by a flurry of recent decisions, notably *Lister v Hesley Hall Ltd.* [2002] 1 A.C. 215 and *Dubai Aluminium Co. Ltd. v Salaam* [2003] 2 A.C. 366. This case has made significant progress in achieving what O'Sullivan ([2012] C.L.J. 485, 488) identified as "specifically *tortious* principles and policies" for this branch of law.

The *Various Claimants* case dealt with a preliminary issue whether the Institute of the Brothers of Christian Schools (the "De La Salle

Brothers"), an international unincorporated association, was potentially vicariously liable for the child abuse committed by members of its community when they taught at an Approved School in Market Weighton. The School was run by an agency of the Diocese of Middlesborough which employed the staff. The Catholic Child Welfare Society, successor in title to the original diocesan agency running the School, appealed against the decision of the Court of Appeal ([2010] EWCA Civ 1106) that it alone was liable for the abuse by the brothers as teachers of the school. The appeal was upheld, so that the De La Salle Brothers were also to be vicariously liable for the acts of their members. The decision of the Supreme Court thus creates a situation of dual vicarious liability.

Lord Phillips at [35] identified five "policy reasons that usually make it fair, just and reasonable" to impose vicarious liability. First, the employer is more likely to have the means to compensate the victim than the employee (the "deep pocket" argument). Secondly, the tort was committed as a result of an activity undertaken by the employee on behalf of the employer (the "delegation of task" argument). Thirdly, the employee's activity is likely to be part of the business activity of the employer (the "enterprise liability" argument). Fourthly, the employer by employing the employee created the risk of the tort (the "risk creation" argument). Fifthly, the employee will have been under the control of the employer (the "control" argument).

Lord Phillips was quick to limit the importance of control as a criterion for liability, a view shared, for example by Markesinis and Deakin *Tort Law* (7th edn., 2012), pp. 558–9; and Paula Giliker, *Vicarious Liability in Tort* (2010), ch. 3. (*cf*. Philip Morgan, "Recasting Vicarious Liability" [2012] C.L.J. 615, 642–7.) It is no longer realistic that a superior can direct how a person performs a task (and this was noted long ago in relation to doctors in *Cassidy v Minister of Health* [1951] 2 K.B. 343). In *Various Claimants* it was not possible for the Australian superiors of the order to have any real power of direction and control over what was being done by its members in North Yorkshire. Control effectively became limited to the ability of the employer to direct in general terms what the employee does. On this point, Lord Phillips preferred the reasoning of Rix L.J. in the Court of Appeal to that of May L.J. Rather than focusing on control, he suggested that the employer took the burden of an organisational relationship which he had undertaken for his own benefit: [2010] EWCA Civ 1106 at [43], [45]. Indeed, Garland-Caval suggests that control is simply a negative factor in liability: its absence is a reason for not finding vicarious liability (in J. Spier (ed.), *Unification of Tort Law: Liability for Damage Caused by Others* (2003), p. 306).

The deep pocket argument was not actually used in the rest of the judgment and hardly counts as an independent legal principle in English law. Other legal systems permit the reduction of damages if they would be an oppressive burden to the defendant (*Principles of European Tort Law* ("PETL") art. 10:401 and notes thereto), but no system requires the imposition of liability simply because of a deeper pocket.

Lord Phillips used the idea of enterprise liability in a more sophisticated way than the traditional focus on employer/employee relationship. He approved of the willingness of the Court of Appeal in *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; noted [2012] C.L.J. 485 to extend liability to those whose relationship was "akin to that between an employer and an employee". In this way, the delegation of a task and ordinary employment (his second and third arguments) merge to create liability based on the way an enterprise has put someone into a position in which he can commit harm within the (bad) performance of the functions entrusted to him. Lord Phillips summarised the approach of Ward L.J. in that case as asking "whether the workman was working on behalf of an enterprise or on his own behalf and, if the former, how central the workman's activities were to the enterprise and whether these activities were integrated into the organisational structure of the enterprise" (at [49]). In other words was he "part and parcel of that organisation and wholly integrated into it" (at [50]). As a result, in *JGE*, whatever the peculiarities of his employment status in the Catholic Church, a priest was clearly part of the "business (*sic*) carried on by the bishop" (*per* Lord Phillips at [54]). In this case, teaching in the Approved School was part of the "business" of the De La Salle Brothers (at [59]). Thus non-employees (such as volunteers) can easily be part of an enterprise.

The terminology used here of "business", "workman" or "employer" is distracting. The Australian case of *Hollis v Vabu* (2001) 207 C.L.R. 21 used the concept of "representative agent" to describe the person liable. But Giliker (*op. cit*., p. 132) cautions against extending a concept like "agency" which has a fairly well-defined meaning. More usefully, the PETL art. 6:102 sets out liability for a person who is an "auxiliary" and Weir described him as a "helper" (*An Introduction to Tort Law* (2nd edn., 2006), p. 105), the person who is put out into the world to be the presence of the enterprise in the situation where harm was caused. That idea is more fully captured by Lord Phillips in describing the Canadian authorities: "Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant

abuse" (at [86]). It is not risk creation as such that justifies vicarious liability (at [87]), since the person need not be known to be likely to cause harm. Rather, as Lord Millett stated in *Lister* [2002] 1 A.C. 215, at [65], [83], the potential danger may be something which happens in that kind of enterprise and which is a potential burden to be accepted alongside the benefits (not necessarily financial) to the enterprise. On this basis, the second, third and fourth policy arguments are woven together into a theory of enterprise liability for helpers, whether they are employed or not. The enterprise is liable where the tortfeasor performs functions as part of the enterprise, which puts him in a situation for its benefit and where the harm done is a risk of carrying out that kind of function, even if that harm was wholly undesired by the enterprise.

By endorsing Ward L.J.'s approach in *JGE*, the Supreme Court has rightly side-stepped arguments that the peculiar employment situation of a particular helper, such as a celebrity presenting a show for a broadcaster or a repair mechanic sent out under a service contract who is engaged technically on a self-employed basis, can lead the enterprise to evade vicarious liability for the actions of the celebrity or repairman. What weighed with the courts in *Various Defendants* and *JGE* is that the abusers were placed by the enterprise, as part of their mission, in a position from which the tortfeasor happened to cause a harm which was a risk inherent in the activity in question. The solution adopted also opens up the possibility of dual liability on the specific facts of a case, thus endorsing the approach in *Viasystems (Tyneside) Ltd. v Thermal Transfer Northern Ltd*. [2005] EWCA Civ 1151.

Unlike German law (§828 BGB) and Roman Catholic Canon Law (Pontifical Council for Legislative Texts, "Nota Esplicativa" of 2004), English law does not base vicarious liability on the fault of the superior. *Various Claimants* shows that the scope of strict vicarious liability can be resolved by analysing the enterprise and how the activity of the helper fits into it, and that is a distinctively tortious way of reasoning.

JOHN BELL

RELIEF AGAINST PENALTIES WITHOUT A BREACH OF CONTRACT

BANK charges continue to be controversial. The holder of a current account or a credit card may be charged up to £50 for overdrawing or exceeding a credit limit by £1 for a brief time. Yet the bank's costs of processing the relevant payments and overdraft are minimal. In *Office of Fair Trading v Abbey National plc*. [2009] UKSC 6, [2010] 1 A.C. 696 (noted [2010] C.L.J. 21) the Supreme Court held that the