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A HISTORICAL EXAMINATION OF VICARIOUS LIABILITY: A "VERITABLE UPAS TREE"?

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ABSTRACT. *Vicarious liability was, and it remains, curiously unsatisfactory. After a period of stability from the Middle Ages into the early modern period in the late seventeenth into the early eighteenth century, the existing law of vicarious liability began to be challenged. The mid-nineteenth century saw another reappraisal coinciding with the rise of notions of fault. The period that follows, from the late nineteenth century until after the Second World War period has not attracted much comment. One key debate in this period and earlier which provides a useful lens to examine the doctrine was whether vicarious liability should be properly characterised as a master's or servant's tort theory. The history of the doctrine during this period goes some way to explaining why the modern law remains incoherent.*

KEYWORDS: *vicarious liability, history, master's tort theory, servant's tort theory.*

I. INTRODUCTION

In his forthright and, at times, rather eccentric critique written in 1916, Thomas Baty likened vicarious liability to the Upas tree.[1] The Upas tree (*antiaris toxicaria*), which is a traditional source of poison for arrows and blow darts, has not surprisingly captured the literary imagination.[2] With due allowance for hyperbole there is some truth in his characterisation. Writing to Oliver Wendall Holmes, Sir Frederick Pollock would describe Baty's book as "clever paradoxical" and go onto to say that its author was "of the school who think that the law can be reduced to rigorous

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1 T. Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-union Members, with a Chapter on the Laws of Scotland and Foreign States* (Oxford 1916), 7. For Baty's extraordinary life, see M. Hasegawa (ed.) and T. Baty, *Alone in Japan: the reminiscences of an international jurist resident in Japan 1916–1954* (Tokyo 1959).

2 For example, the tree is the subject of a poem by Pushkin, "The Upas Tree".

chess problems".[3] In a review of the work in the *Law Quarterly Review*, Pollock made many of the same points at greater length.[4] Pollock himself was decidedly more pragmatic. He accused Baty of overlooking the "factor of insurance in the practical aspect of these questions".[5] Baty still made a valid point in his general criticism of vicarious liability. Vicarious liability was, and it remains, curiously unsatisfactory. Even within the law of tort, which has proved volatile in several respects, few legal doctrines can be as difficult to pin down as vicarious liability. In *Mohamud v WM Morrison Supermarkets plc.*,[6] Lord Dyson recently observed that "To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera".[7] He was unconcerned because he thought that "impression is inevitable" when it came to vicarious liability.[8]

In recent decades, the exposure of systemic child abuse has prompted a re-examination of this area of law. The authorities, which are atypical, raise difficult issues about the degree to which an employer ought to be liable for the criminal activity of an employee.[9] In many of these cases, as in others, there is an allied problem – the extent to which there should be liability for those who are akin to an employee such as an independent contractor.[10] The history of the subject has received no more than cursory attention in debates about the scope and value of vicarious liability. The omission is important. In *Prince Alfred College v ADC*, the High Court of Australia has recently observed that a "fully satisfactory rationale for the imposition of vicarious liability" has been "slow to appear in the case law".[11] The reasons, in part at least, lay in the past.

The absence of a single clear explanation for vicarious liability might not matter very much were it not for the fact that vicarious liability is frequently central to the question of who pays compensation when a tort is committed. In most instances an insurer indemnifies an employer or corporation.[12]

3 M. De Wolfe Howe (ed.), *The Pollock-Holmes Letters Correspondence of Sir Frederick Pollock & Mr Justice Holmes 1894–1932*, vol. 1 (Cambridge 1942), 233 (Pollock to Holmes, March 1916).
4 (1916) 32 L.Q.R. 226.
5 Ibid., at p. 227.
6 *Mohamud v WM Morrison Supermarkets plc.* [2016] A.C. 677.
7 Ibid., at p. 695.
8 Ibid.
9 Some recent examples that were appealed to the highest court include: *Lister v Hesley Hall* [2002] 1 A.C. 215; *Catholic Child Welfare Society and others v Various Claimants* [2013] 2 A.C. 1; *Woodland v Swimming Teachers Association and others* [2014] A.C. 537. There are also numerous examples in other jurisdictions including: *Bazeley v Curry* [1999] 2 S.C.R. 534; *Jacobi v Griffiths* [1999] 2 S.C.R. 570; *EDG v Hammer* [2003] 2 S.C.R. 459; *New South Wales v Lepore* (2003) 212 C.L.R. 511. For a critical reflection on the recent authorities, see P. Giliker, "Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-delegable Duties and Statutory Intervention" [2018] C.L.J. 506.
10 *Catholic Child Welfare Society* [2013] 2 A.C. 1; *Cox v Ministry of Justice* [2016] A.C. 660; *Armes v Nottinghamshire County Council* [2017] 3 W.L.R. 1000. A recent Court of Appeal decision suggests that there can be vicarious liability for the torts of independent contractors: *Barclays Bank Plc. v Various Claimants* [2018] EWCA (Civ.) 1670.
11 *Prince Alfred College v ADC* (2016) 258 C.L.R. 134, 148.
12 J. Morgan, "Tort, Insurance and Incoherence" (2004) 67 M.L.R. 384, at 393.

An employer (or their insurance company) might then, in theory, be able to recover damages on an indemnity against an employee.[13] In practice, attempts to enforce a master's indemnity against the employee have caused disquiet.[14] Most modern lawyers, if they think about a rationale at all, would explain vicarious liability using the servant's tort theory under which an employee's duty of care is imputed to the employer and by which the employer becomes liable because of a breach of duty by an employee.[15] Under the alternative, master's tort theory, an employee's acts rather than their legal duty are attributed to the employer. On this view the employer commits a tort by a breach of their *own* tortious duty. For the most part both theories produce the same outcome although there are some occasions where the distinction is critical.[16] For example, under the servant's tort theory, the employer cannot be liable when the employee has a defence to the tort. The master's tort theory has no such difficulties because the employer is liable for the acts of the employee and not their tort.

The reasons behind the failure to settle on a single, clear rationale for vicarious liability are complex. It is sometimes said that the old authorities support the master's tort theory.[17] They can certainly be read that way, but restraint is required in trying to find concrete answers to modern problems in the very old authorities. A slightly more promising line of inquiry might be to look to the nineteenth century. This was a time, after all, where the foundations of modern tort law were beginning to be established.[18] Fault became a central component of tortious liability at this time.[19] At this point vicarious liability, which imposes liability on an employer without fault, clearly required an explanation. Despite these factors, no very coherent explanation was forthcoming. A growing body of legal literature did little to add much clarity. In the period after the Second World War various statutory reforms of tort law presented a new opportunity to consider the basis of vicarious liability. Unfortunately, these decisions added further confusion particularly once non-delegable duties were thrown into the mix. More recent scholarship has tried to locate vicarious liability

13 *Lister v Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555.

14 For example, see Tony Weir's posthumously published case note: "Subrogation and Indemnity" [2012] C.L.J. 1. I am grateful to one of the reviewers for drawing this note to my attention.

15 E. Peel and J. Groudkamp, *Winfield and Jolowicz on Tort*, 19th ed. (London 2014), 21-001; M. Jones (ed.), *Clerk & Lindsell on Torts*, 22nd ed. (London 2018), 6.60; P. Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge 2010), 13–16.

16 For a useful short summary, see R. Stevens, "Vicarious Liability or Vicarious Action?" (2007) 123 L.Q.R. 30.

17 One modern supporter of the master's tort theory makes this point: R. Stevens, *Torts and Rights* (Oxford 2007), 260. Giliker, *Vicarious Liability*, p. 13 also accepts this historical analysis.

18 D.J. Ibbetson, "The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries" in E. Schrage (ed.), *Negligence: The Comparative Legal History of the Law of Torts* (Berlin 2002), 229–71.

19 D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999), 182. Roscoe Pound made a similar point in 1923: R. Pound, *Interpretations of Legal History* (Cambridge 1923), 110.

within broader notions of attribution based on principles of agency[20] or enterprise liability.[21] Many of these ideas, to varying degrees, have some historical pedigree but the modern law is undoubtedly a muddle and the history of the doctrine is part of the problem.

II. Vicarious Liability: A Short History

In *Majrowski v Guy's and St. Thomas' NHS Trust*,[22] Lord Nicholls observed: "In times past this 'employer's tort' analysis of vicarious liability had respectable support in England. But since then your Lordships' House has firmly discarded this basis in favour of the 'employee's tort' approach." Trying to understand the nature of vicarious liability in the Middle Ages is an exercise in piecing together disparate fragments.[23] There are dangers in judges reading modern interpretations into those authorities.[24] There are several reasons why looking for a single coherent explanation for vicarious liability before the nineteenth century is difficult. Jurors sat at the heart of the system of civil litigation and were allowed to determine questions of liability under the cloak of proof.[25] Legal doctrine was largely hidden behind jury verdicts of guilty or not guilty.[26] The decline of the jury began in the mid-eighteenth century but the boundary between fact and law, where the former was a matter for a jury and the latter a matter for a judge, only really hardened in the nineteenth century when judges in civil cases almost entirely asserted their dominance over juries.[27] A second reason for caution when looking at the old authorities relates to the way that the law was structured. Whereas the modern law is founded on an action in negligence the mediaeval law was built around the forms of action.[28] The way in which the liability was framed was relevant to the way that older action of trespass interacted with the newer action of trespass on the case.[29]

20 A. Gray, *Vicarious Liability Critique and Reform* (Oxford 2018); R. Leow, "Companies in Private Law: Attributing Acts and Knowledge", PhD, Cambridge, 2017. I am grateful to Dr Leow for making her thesis available to me.

21 D. Brodie, *Enterprise Liability and the Common Law* (Cambridge 2010).

22 *Majrowski v Guy's and St. Thomas' NHS Trust* [2007] 1 A.C. 224, 230.

23 For a helpful discussion, see Ibbetson, *Obligations*, pp. 69–70. For a much more detailed treatment of the early law, see W. Swain, "Vicarious Liability, a Pailful of Slops and Other Hazards" in K. Barker and R. Grantham (eds.), *Apportionment in Private Law* (Oxford 2018), 89–110.

24 For example, in the way that Lord Toulson finds something akin to non-delegable duties and possibly enterprise liability in the old cases: *Mohamud* [2016] A.C. 677, 684–87.

25 M.S. Arnold, "Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind" (1974) 18 Am.J. Leg.Hist. 267; J. Mitnick, "From Neighbor-witness to Judge of Proofs: The Transformation of the English Civil Juror" (1988) 23 Am.J.Leg.Hist. 201.

26 Sometimes these issues came to light by way of special verdicts, see R. Palmer, *English Law in the Age of the Black Death 1348–1381* (Chapel Hill 1993), 156–59.

27 This can be seen in the way that judges dealt with questions of duty and breach in negligence, see Ibbetson, "The Tort of Negligence", pp. 240–48.

28 For an overview of the tort actions, see J.H. Baker, *An Introduction to English Legal History*, 5th ed. (Oxford 2019), 67–71.

29 Vicarious liability was not traditionally available in trespass, see Swain, "Vicarious Liability", pp. 97–99.

Early examples, in which a master was liable for a servant, occur in the context of actions of trespass on the case based on customs of the realm[30] one of most important of which concerned the escape of a domestic fire.[31] In the course of argument in *Beaulieu v Finglam* in 1401 it was said that "It would be against all reason to put blame or fault on a man where there is none in him; for his servant's negligence cannot be said to be his own doing". Markham J. was unsympathetic:

> A man is bound to answer for his servant's act, as for his lodger's act, in such a case. For if my servant or lodger puts a candle on the wall and the candle falls into the straw and burns the whole house, and also my neighbour's house, in this case I shall answer to my neighbour for the damage which he has suffered.[32]

The same principles soon began to apply in the absence of a custom of the realm. In *Caunt's Case*,[33] an action on the case for deceit was brought against both a master and his servant for warranting a butt of rumney wine sound, when it was "unwholesome and unsuitable". It emerged in the pleading that a servant had sold the wine. Martin J. explained that:

> But if your servant, with your collusion and by your command, sells some unwholesome wine, the buyer shall have an action against you; for it is your own sale. If the case is that you did not command your servant to sell the wine to this plaintiff, then you may say that you did not sell it to the plaintiff.

The idea here was that an employer should be liable for an *act* that they had commanded. The precise scope of a command could cause disagreement[34] but the general idea reflects the view that a servant stood in the shoes of a master. This idea is rather closer to the modern law of agency in appearance than it is to vicarious liability.

By the late seventeenth century principle of authority began to replace that of command. Authority is a more malleable concept. It is easier to say that a servant acted with a master's authority (which encompasses a greater range of conduct), than it is to say that they acted under his command. It is possible to authorise something without commanding it. As Holt C.J. explained in *Tuberville v Stamp*[35] when a fire spread:

30 There were earlier precedents in some of these situations in trespass writs, see M.M. Arnold (ed.), *Select Cases of Trespass from the King's Courts 1307–1399 (vol. I) Selden Society Vol. 100* (London 1984), lxiv–lxx.

31 J.H. Baker, "Trespass, Case, and the Common Law of Negligence 1500–1700" in Schrage, *Negligence*, pp. 47, 60–62.

32 *Beaulieu v Finglam* (1401) Y.B. Pas. 2 Hen. IV pl. 6, fo. 18 reproduced in J.H. Baker, *Baker and Milsom Sources of English Legal History*, 2nd ed. (Oxford 2010), 610–11.

33 *Caunt's Case* (1430) Y.B. Mich. 9 Hen. VI pl. 37, fo. 53 reproduced in Baker, ibid., at pp. 561–62.

34 For an example, see *Anon* (1471) Y.B. Trin. Edw. IV fo. 6, pl. 10 reproduced in Baker, *Sources*, pp. 563–65.

35 *Tuberville v Stamp* (1697) 1 Ld. Raym. 264, 12 Mod. 152, Carth. 425, Comb. 459, Comyns 32, Holt 9, Skin. 681.

> [I]f the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit.[36]

Command and authority were still sometimes used interchangeably[37] which is perhaps not surprising as they could easily cover some of the same conduct. Authority was closer to vicarious liability in a modern sense. It is more difficult to conceptualise a servant acting within the master's authority as standing in the master's shoes in the same way as one commanded to do a thing. A series of decisions Holt C.J. made clear that, in so far as there was a rationale for the master's liability, it remained unchanged – the master was responsible for the *act* of his servant.[38] For a century or more afterwards, judges stressed that a master was liable for the acts of his servant acting with his authority.[39]

How liability was imposed in practice was no doubted determined by how juries of the time understood the employment relationship. None of this amounts to a very carefully worked out justification for vicarious liability, although there is a strong hint in some judgments of Holt C.J. that he saw it as desirable that an employer was liable for his employee if the alternative was that the injured party went uncompensated.[40] Before the nineteenth century, the employment relationship was highly regulated,[41] but at the same time servants were often seen as members of the family unit.[42] Given the very different nature of the employment relationship, some care needs to be taken in using the old authorities to support a particular rationale for the modern law.

III. The Nineteenth Century: A Failure to Find a Rationale

By the nineteenth century, it began to be said that an employer's liability turned on whether the employee was acting in the course of employment. Despite the new terminology, which is still used to this day, the basic justification was still the same: an employer was liable because the employee's act was imputed to them rather than the employee's duty of care. A principle that was more definitively recognisable as the master's tort theory came to be emphasised. For example, Lord Chelmsford L.C. in a well-cited

36 Ibid., at pp. 264–65. For the influence of Holt C.J., see Lord Toulson, *Mohamud* [2016] A.C. 677, 684.
37 *Boucher v Lawson* (1734) Cas. T. Hard. 85, 88 (by counsel for the defendant).
38 *Middleton v Fowler* (1699) 2 Salk. 282; *Jones v Hart* (1699) 2 Salk. 441.
39 *Laugher v Pointer* (1826) 5 B. & C. 547.
40 *Lane v Cotton* (1700–1701) 1 Salk. 17, 18; *Hern v Nichols* (undated) 1 Salk. 289.
41 Originally as a result of the Statute of Labourers (1349) 23 Edw. III c 1–8. For the later history, see D. Hay, "England, 1562–1875" in D. Hay and P. Craven (eds.), *Masters, Servants and Magistrates in Britain and the Empire, 1562–1955* (Chapel Hill 2004), 59, 62–82.
42 K. Wrightson, *Earthly Necessities* (New Haven 2000), 33.

passage on a Scottish Appeal, *Bartonshill Coal Co. v McGuire*[43] explained:

> It has long been the established law of this country that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of this is, that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se*.[44]

Another statement along these lines can be found in *Hutchinson v York, Newcastle and Berwick Railway*,[45] where Baron Alderson held that "The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act".[46] He continued that "whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: *Qui facit per alium, facit per se*".[47]

As well as judges, many legal writers of the period came to a similar conclusion. Charles Smith expressed himself with some brevity: "A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service: the maxims applicable to such cases being, *Respondeat superior*, and … *Qui facit per alium facit per se*."[48]

In books as varied as law student crammer,[49] Underhill's treatise on tort law,[50] to Holland's avowedly theoretical, *The Elements of Jurisprudence*,[51] the maxim *qui facit per alium facit per se* was used to explain the reason a master was liable for his servant. To modern eyes stating "let the master answer" or "he who acts through another, acts himself" are poor explanations. At the time however the use of legal maxims was a popular technique[52] and maxims were still regarded as important enough to merit an entire treatise.[53] Even those writers who avoided maxims and instead drew parallels with agency were still making the same point that an employer was liable for the acts of his employee.[54]

43 *Bartonshill Coal Co. v McGuire* (1858) 3 Macq. 300.
44 Ibid., at p. 306.
45 *Hutchinson v York, Newcastle and Berwick Railway* (1850) 5 Ex. 343. See also *Tolhausen v Davies* (1888) 58 L.J.Q.B. 98, 99.
46 Ibid., at p. 350.
47 *Hutchinson* (1850) 5 Ex. 343, 350.
48 C. Smith, *A Treatise on the Law of Master and Servant* (London 1852), 151.
49 J. Shearwood, *A Sketch of the Law of Tort for the Bar and Solicitors' Final Examinations* (London 1886), 60.
50 Sir A. Underhill, *A Summary of the Law of Torts, or, Wrongs Independent of Contract* (London 1873), 30.
51 Sir T. Holland, *The Elements of Jurisprudence* (Oxford 1880), 99.
52 In addition to those specifically mentioned, see R. Campbell, *The Law of Negligence* (London 1871), 55; F. Piggott, *Principles of the Law of Torts* (London 1885), 53.
53 H. Broom, *A Selection of Legal Maxims, Classified and Illustrated* (London 1845), 200, for reference to the maxim *qui facit per alium facit per se*.
54 For example, A. Hammond, *A Practical Treatise on Parties to Actions and Proceedings* (London 1817), 82; Piggott, *Principles of the Law of Torts*, p. 53; E. Parkyn, *The Law of Master and Servant* (London 1897), 101.

Despite the words of Lord Chelmsford L.C. and Baron Alderson there was still room for ambiguity.[55] This was clear from a further mid-nineteenth description by Willes J. in *Barwick v English Joint Stock Bank*[56]: "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."[57]

In this passage Willes J. emphasised the servant's wrong as opposed to their act. He also seems to hint at something like the modern idea of enterprise liability.[58] Willes J. did not develop a concrete principle of enterprise liability on this occasion. But there is more than a suggestion of similar ideas in older authorities that, when activity benefits an enterprise, the enterprise should carry the risk of any damage caused by employees.

In *Bush v Steinman*,[59] Rooke J. had said: "He who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs."[60] On that occasion the owner of a house was liable when a servant of a sub-contractor employed by a builder left lime in the road, causing the plaintiff's carriage to overturn. The relationship between the defendant and the person causing the damage was more tenuous than the usual one between a master and servant. Whilst agreeing with his colleagues, that the owner was liable, Eyre C.J. was clearly uneasy about the outcome. As he pointed out, the owner "appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate author".[61] For a time the courts were at least content to apply something like enterprise liability to occupiers of land rendering them liable for independent contractors but this line of authority was finally rejected in *Reedie v London and North Western Railway Co.*[62] A broader principle of enterprise liability did not catch on with judges at this time, although it would become attractive to lawyers at various points subsequently.[63] The episode shows a degree of fluidity when it comes to finding a rationale for vicarious liability which was mirrored in the broader debate of the period.

55 For further explicit support for the master's tort theory, see *Tolhausen* (1888) 58 L.J.Q.B. 98, 99.
56 *Barwick v English Joint Stock Bank* (1867) L.R. 2 Ex. 259.
57 Ibid., at p. 265.
58 For a seminal account of enterprise liability, see G. Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Y.L.J. 499, at 500.
59 *Bush v Steinman* (1799) 1 B. & P. 404.
60 Ibid., at p. 409.
61 Ibid., at p. 406.
62 *Reedie v London and North Western Railway Co.* (1849) 4 Ex. 244, 20 L.J. Ex. 65, 13 Jur. 659. For a discussion of these cases, see Ibbetson, *Obligations*, pp. 182–83.
63 For an isolated example, see *Duncan v Findlater* (1839) 6 Cl. & F. 894, 910.

IV. Searching for a Rationale for Vicarious Liability

By the final decades of the nineteenth century, it was obvious to many legal writers that the orthodox explanations were inadequate. Sir Frederick Pollock argued that *respondeat superior*, "is a dogmatic statement, not an explanation"; *qui facit per alium facit per se* was also said to be deficient because it does not cover acts of servants that are unauthorised but still within the course of employment.[64] He points out if the master was to be blamed for showing a lack of care in employing a servant who commits a tort then it should follow that if he had shown all due care he ought to be absolved of liability, which was clearly not the case. Pollock's favoured explanation was closer, but not identical to, the modern idea of enterprise liability: "I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."[65]

Pollock took up the subject of vicarious liability again in his more philosophical work, *Essays in Jurisprudence and Ethics*.[66] Having once more criticised the standard justifications he pointed out that: "In the case of injury suffered through a servant's negligence, the servant, generally speaking, cannot pay, and the master can; and the feeling that compensation ought to be had somewhere jumps at the master's liability."[67]

This looks less like an explanation than a statement of the obvious. Pollock recognised that his own reasoning was not entirely satisfactory. Taken to its logical conclusion it would mean that a master could be liable for losses caused by behaviour that he has expressly forbidden provided the servant was in breach of his duty and acting in the course of his employment.[68] The idea that the employer was better able to pay has some intuitive appeal and Pollock was still not alone in mentioning it.[69] Pollock's own position was a little more nuanced. He combined something akin to enterprise liability with the idea that an employer had a moral duty for the acts of their employees.[70]

One of the reasons that vicarious liability had come to be seen as problematic was identified by Pollock in his note in the *Law Quarterly Review* which pointed out that a doctrine which had grown up during very different social and economic conditions was "incongruous" in an age of "industrial

64 Sir F. Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (London 1887), 67.
65 Ibid., at p. 68.
66 Sir F. Pollock, *Essays in Jurisprudence and Ethics* (London 1882).
67 Ibid., at p. 118.
68 Pollock, *Torts*, p. 117.
69 F. Hackett, "Why Is a Master Liable for the Torts of His Servant?" (1893) 7 H.L.R. 107, at 111–12.
70 On this moral aspect to Pollock's reasoning, see N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford 2004), 257–60.

individualism".[71] Pollock was not alone in seeking a novel explanation for vicarious liability. John Henry Wigmore, the American evidence scholar, looked for answers in the history of the doctrine.[72] Providing a critique was rather easier than providing an alternative explanation. Baty produced the most radical proposal of the era. Beyond the erroneous claim that vicarious liability was an invention of Holt C.J.,[73] his argument is rather difficult to unravel. Baty seems to object to the idea that an employer could be liable for an employee simply because they act in the course of their employment. Rather he suggests that there should be no liability on the part of the employer unless there is an "invitation of confidence" between the plaintiff and the employer.[74] An equally novel approach taken by Harold Laski made no mention of a master or servant tort theory and, whilst he saw value in vicarious liability in an article in the *Yale Law Journal* in 1916,[75] he argued that a new "social interpretation" was needed. He found this in the idea that "The promotion of social solidarity is an end it is peculiarly incumbent upon the law to promote, since its own strength and even life, depends upon the growth of that sentiment".[76] Laski's support of this version of vicarious liability was a reflection of his criticism of laissez-faire ideology, and he would comment "it becomes increasingly evident that society cannot be governed on the principles of commercial nihilism".[77]

Laski was a political theorist rather than a lawyer. His friend, the American jurist Oliver Wendell Holmes, added a note of caution in a letter to Laski when he said that "there should be a limit to be found in values to the public of the life, limb, or what not damaged".[78] Laski's theory was likely to be too idealistic for most lawyers, but it does make the point that the existing and long established rationale for vicarious liability were no longer seen as adequate. Other writers looked for a social explanation. The future US Supreme Court justice William O. Douglas, agreed with Laski that the issue was one of "economic and social factors" but rather than promoting social solidarity he thought that vicarious liability was explained by an allocation of risk.[79]

71 The phrase used in this context was Pollock's in a note: (1918) 34 L.Q.R. 230, 231.
72 J.H. Wigmore, "Responsibility for Tortious Acts: Its History. II" (1894) 7 H.L.R. 383.
73 Baty, *Vicarious Liability*, p. 29.
74 Ibid., at p. 12. Baty suggests that this explains the liability of innkeepers for the loss or damage of a guest's goods.
75 H.J. Laski, "The Basis of Vicarious Liability" (1916) 26 Y.L.J. 105.
76 Ibid., at p. 121.
77 Ibid., at p. 134.
78 M. De Wolfe Howe (ed.), *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J. Laski 1916–1935*, vol. 1 (New York 1953), Holmes to Laski, 13 January 1917. Holmes wrote these words after Laski promised a copy of his article but before he had received it.
79 W.O. Douglas, "Vicarious Liability and Administration of Risk I" (1929) 38 Y.L.J. 584; "Vicarious Liability and Administration of Risk II" (1929) 38 Y.L.J. 720.

The absence of a single convincing explanation was one indication that vicarious liability rested on insecure and shifting doctrinal foundations. Baty went to some trouble to identify all the different reasons put forward for vicarious liability. He came up with nine different justification from which he deduced that "A doctrine that is accounted for on nine different grounds may reasonably be suspected as resting on no very firm basis of policy".[80] Like Pollock in his *Essays*, Baty would conclude that the real reason for an employer's liability rested on nothing stronger than that "damages are taken from a deep pocket".[81] Other writers were less worried by the absence of a justification. Thomas Beven would describe *respondeat superior* as a formula and not a reason[82] down to the final edition of his treatise in 1908.[83] Whilst he did not take the maxims too seriously, he still chose to adopt a master's tort approach.

Although the old maxims began to be abandoned, lawyers were not always very clear to distinguish liability for a tort, and liability for an act. Willes J. and Pollock both talk about a servant's "wrong". Oliver Wendell Holmes was curiously imprecise. There are two instances in his book *The Common Law*,[84] in which he mentions the subject – on one occasion he suggests that a master is liable for the servant's wrong, and on the other the servant's act.[85] In the leading treatise, by Clerk and Lindsell, the authors state that "the employer is liable for all torts committed by the party employed".[86] Yet, a few pages earlier the older familiar formula appears with an emphasis on the act rather than the tort of the employee.[87] At best this seems to suggest that the authors put little weight on the distinction between wrongs and acts, and by extension had no set notion of a master or servant's tort theory in mind. The same approach using these two formulas was evident in later editions of the same work.[88]

In the opening paragraph of the section of his treatise on master and servant, John Salmond, wrote:

> A master is liable for any tort committed by his servant while acting in the course of employment …. Its rational justification is to be found in the presumption that the negligence and other torts of a servant in the execution of his master's business are either actually authorised by the master, or, at least, are the result of some want of care on the master's part in the choice of competent servants or in the superintendence and control of their work.[89]

80 Baty, *Vicarious Liability*, p. 143.
81 Ibid., at p. 154.
82 T. Beven, *Principles of the Law of Negligence* (London 1889), 271.
83 T. Beven, *Principles of the law of negligence*, 3rd ed. (London 1908), vol. 1, 574.
84 O.W. Holmes, *The Common Law* (Boston 1881).
85 Ibid., at pp. 16, 90.
86 J.F. Clerk and W.H.B. Lindsell, *The Law of Torts* (London 1889), 48.
87 Ibid., at p. 46.
88 J.F. Clerk and W.H.B. Lindsell, *The Law of Torts*, 7th ed., by W. Wyatt-Paine (London 1921), 74.
89 Sir J. Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (London 1907), 78.

Salmond gave no explanation for abandoning the traditional view in favour of the idea that an employer was liable for the torts of an employee rather than their acts. Salmond's wording was unambiguously supportive of a servant's tort analysis. Yet, somewhat perplexingly in his book on legal theory, Salmond wrote that vicarious liability meant that "one man is made answerable for the acts of another".[90] This phrase is redolent of the master's tort theory, The same formula was used down to the last edition of *Jurisprudence*, for which Salmond was responsible in 1924.[91] All of this invites the question whether Salmond appreciated the different meanings to which his language could give rise, or whether he was actually committed to a master or servant tort analysis and was just imprecise with the language that he used. It seems likely that, like other writers of the time, he was doubtful about the existence of any coherent theory and thought that there was little to choose between a master's or servant's tort analysis.

Writing 30 years after Salmond, Percy Winfield would unequivocally favour a servant's tort theory: "A is liable for the tort of B committed against C, though A is no party to the tort. B himself is of course usually liable."[92] At the same time he would admit that "a scientific reason for the rule is hard to find".[93] He continued: "It seems to be based on a mixture of ideas – that the master can usually pay while the servant cannot; that a master must conduct his business with due regard to the safety of others; that the master by employing the servant has 'set the whole thing in motion'."[94]

The confusing debate about the true basis of vicarious liability in the legal literature of the time unsurprisingly made little impression on the case law. There is still no indication that judges placed any significance on a master's or servant's tort theory any more than Clerk and Lindsell did.[95]

The absence of judicial comment has another explanation. For the most part it was not something that it was necessary for judges to address given either the master's or servant's tort theory produced the same outcome. It is difficult to be definitive but in those few situations where it produced a different outcome, judges seemed content to adopt a master's tort analysis without explicitly admitting that they were doing so. *Dyer v Munday*[96] illustrates the point. The plaintiff's lodger had failed to pay an instalment on a hire-purchase agreement and, in the process of removing the lodger's furniture, the defendant's employee assaulted the plaintiff. The employee was not liable because of legislation, which prevented someone who had

90 Sir J. Salmond, *Jurisprudence, or, The Theory of the Law* (London 1902), 465.
91 Sir J. Salmond, *Jurisprudence, or, The Theory of the Law*, 7th ed. (London 1924), 432.
92 P.H. Winfield, *A Textbook on the Law of Tort* (London 1937), 123–24.
93 Ibid., at p. 126.
94 Ibid.
95 For another example that seems to adopt a servant's tort analysis without much explicit discussion, see *Kelly v Metropolitan Railway Co.* [1895] 1 Q.B. 944, 947–48.
96 *Dyer v Munday* [1895] 1 Q.B. 742 (CA).

suffered a criminal sanction from facing a civil action in the same matter.[97] The employee had a defence to a claim in tort, yet the Court of Appeal saw no difficulty in finding the defendant's employer liable. All three members of the Court of Appeal stressed that an employer could be liable for a criminal act of an employee; provided it was in the course of employment. Lord Esher M.R. and Rigby L.J. explained that the statute, which protected the employee, did not apply to the employer as a matter of statutory interpretation.[98]

Outside specific legislation, there were other situations in which the employee's defence failed to prevent an employer's tortious liability. As it stood at the time, the law meant that spouses could not be liable to each other in tort.[99] This potentially causes a problem when one spouse (the employee) injured another and the injured party brings a claim against an employer or principle. In *Smith v Moss*,[100] an injured wife successfully brought an action against her mother in law, who was the master for the purposes of the action, when she was injured by her husband's driving. Charles J. held that "I cannot conceive that, if a husband, while acting as agent for somebody else, commits a tort, which results in injury to the wife, the wife is deprived of her right to recover against the principal who is employing the husband as agent".[101] There was no attempt to justify this outcome by reference to master's or servant's tort theory. Rather Charles J. reasoned that the negligent driver was both a husband and an agent, and that his status as the former did not preclude a claim against a principal.

By the late 1930s, when Winfield was writing, legal authors had begun to reject traditional explanations for vicarious liability. Judicial silence on the subject does not necessarily correlate to enthusiasm for orthodoxy as opposed to acquiescence with it. During the second half of the twentieth century the master's tort theory would be eclipsed by the servant's tort theory of liability. In the immediate post-war period however, despite what some legal writers were advocating, the master's tort theory still held sway.

V. The Master's Tort Theory Reasserted

In the period after the Second World War, judges became more explicit in adopting a master's tort theory in those cases where the employee could call on a defence. *Broom v Morgan*[102] was the first detailed examination of the impact of marriage on tort liability between spouses. The plaintiff and her

97 Offences Against the Person Act (1861) 24 & 25 Vict. c 100, s. 45.
98 *Dyer* [1895] 1 Q.B. 742, 746–47, per Lord Esher M.R., 748, per Rigby L.J.
99 For a typically thorough treatment of the question, see the judgment of McCardie J. in *Gottliffe v Edelston* [1930] 2 K.B. 378.
100 *Smith v Moss* [1940] 1 K.B. 424.
101 Ibid., at p. 425.
102 *Broom v Morgan* [1952] 2 All E.R. 1007.

husband were employed by the defendant to run his public-house. The wife was injured when she fell through a trap door which her husband had negligently left unprotected. At first instance, Lord Goddard, restated the master's tort theory: "The master is just as much liable as though he commits the tort himself because the servant's act is his act."[103] Yet, as Lord Goddard conceded, *Smith v Moss* aside, there was very little authority on the precise question of vicarious liability and spouses. It is perhaps telling that he was forced to rely on an American decision of Cardozo C.J. in finding the employer liable.[104] The defendant appealed. The Court of Appeal dismissed the appeal and found the employer liable.[105] Although the judgments vary in detail, all three judges adopted a version of the traditional analysis. Singleton L.J. quoted from Lord Chelmsford in *Bartonshill Coal Co. v McGuire*, and again repeated the standard maxim, *qui facit per alium, facit per se*.[106] Hodson L.J. supported a master's tort analysis and referred to Lord Chelmsford.[107] Denning L.J. gave a slightly different account of the master's tort theory. His version aligned more closely with the earlier, albeit fragmented, support for enterprise liability: "It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done."[108] The Court of Appeal clearly felt uncomfortable about using the status of the victim as a wife in barring a claim against the employer. As Singleton L.J. explained: "there is no reason, either in law or in common sense, why they (the employer) should be given an immunity which springs in the case of husband and wife from the fiction that they are one, and the desire that litigation between husband and wife should not be encouraged."[109]

A statute in 1962 meant spouses could be liable to each other in tort and therefore this situation ceased to cause difficulties.[110] Actions against the employer of a spouse were not the only occasion when judges in the immediate post-war period would reiterate the master's tort analysis. In *Twine v Bean's Express Ltd.*,[111] an employee of the defendant carried an unauthorised passenger in the defendant's van who was killed as a result of the employee's negligent driving. The employer was held to not be liable. The plaintiff was a trespasser, and the employee was not authorised to carry passengers. The decision is unsatisfactory on several levels,[112] but

103 Ibid., at p. 1009.
104 Ibid., at p. 1010. The decision was *Schubert v August Schubert Wagon Co.* (1928) 164 N.E. 43.
105 *Broom v Morgan* [1953] 1 Q.B. 597.
106 Ibid., at p. 602.
107 Ibid., at p. 612.
108 Ibid., at p. 608.
109 Ibid., at p. 607.
110 Law Reform (Husband and Wife) Act 1962, s. 1.
111 *Twine v Bean's Express Ltd.* [1946] 1 All E.R. 202.
112 There is a useful case-note on the decision: F.H. Newark, "Twine v. Bean's Express, Ltd." (1954) 17 M.L.R. 102.

it does contain an unequivocal endorsement of the master's tort theory. Uthwatt J. stated: "The law attributes to the employer the acts of a servant done in the course of his employment and fastens upon him responsibility for those acts."[113] The Court of Appeal did not consider the correctness of this analysis, but dismissed the appeal on the grounds that the driver was not acting in the course of his employment.[114]

A third group of decisions concern the doctrine of "common employment". The origins of the rule are obscure,[115] but it was not contested by the mid-nineteenth century.[116] It meant that an employee was prevented from bringing a claim against an employer for an injury caused to him by another employee. The common employment doctrine marked a significant inroad into the principles of vicarious liability. Whilst the implications were serious for those involved, after 1880 they were not quite as far reaching due to the rise of statutory liability for workplace injury.[117] There were a series of significant exceptions to the prohibition.[118] By the late 1930s, the whole doctrine of common employment was increasingly seen as unsatisfactory. Lord Wright, in *Wilson & Clyde Coal Company Ltd. v English*, went as far as to suggest that it was "well-established, but illogical".[119] Academic writers were also critical of the principle. William Robson wrote that "The time has clearly come when the doctrine of common employment should be abolished".[120] One difficulty recognised by Lord Macmillan was that common employment could potentially come into conflict with vicarious liability: "If a servant is injured by the negligence of a fellow-servant acting within the scope of their common employment, the former doctrine would impose liability on the master, while the latter doctrine would exculpate him."[121]

On the facts, the common employment doctrine was held not to apply because the cause of the injury was due to flaws in the safe system of working by which the mine operated, and the agent was performing the duties of the owner. This was not a situation where one employee injured another.

113 *Twine* [1946] 1 All E.R. 202, 204.
114 *Twine v Bean's Express Ltd.* (1946) 62 T.L.R. 458.
115 It is commonly, but erroneously, attributed to *Priestley v Fowler* (1837) 3 M. & W. 1. See A. W. B. Simpson, *Leading Cases in the Common Law* (Oxford 1995), 100–34. Fears about the scope of vicarious liability, if the claim were to succeed, may have been an important factor in the outcome: M. Stein, "Priestley v. Fowler (1837) and the Emerging Tort of Negligence" (2003) 44 B.C.L.Rev. 689, at 700.
116 *Hutchinson* (1850) 5 Ex. 343; *Bartonshill Coal Company* (1858) 3 Macq 282.
117 On the Employers' Liability Act 1880, see P.W.J. Bartrip and S.B. Burman, *The Wounded Soldiers of Industry* (Oxford 1983), 126–57; S. Deakin, "Tort Law and Workmen's Compensation Legislation: Complementary or Competing Models?" in T.T. Arvind and J. Steele (eds.), *Tort Law and the Legislature* (Oxford 2013), 253–67.
118 For a discussion of the rule and exceptions, see P. Mitchell, *A History of Tort Law 1900–1950* (Cambridge 2015), 209–40.
119 *Wilson & Clyde Coal Company Ltd. v English* [1938] A.C. 57, 79.
120 W.A. Robson, "Common Employment Reflections on the Doctrine in the Light of Wilson and Clyde Coal Company Ltd. v. English" (1937) 1 M.L.R. 224, at 225.
121 *Wilson & Clyde Coal Company Ltd.* [1938] A.C. 57, 74.

This case fell within the category of a non-delegable duty. A year later in *Radcliffe v Ribble Motor Services Ltd.*,[122] the House of Lords would again consider the common employment doctrine and decide that it did not apply. One of the defendant's coach drivers negligently knocked down and killed another of the defendant's drivers. The accident occurred on a public street. The plaintiff widow succeeded in a claim. The common employment doctrine was once again criticised. Lord Macmillan said that "its original ratio has long ceased to be regarded as tenable".[123] Although he regretted the existence of the common employment rule, Lord Wright emphasised that as something settled by the House of Lords it could only be changed by legislation.[124] On the facts, the doctrine was held not to apply. The employment was not common because the employees were said not to be engaged in "common work". The fact that they were working for the same employer was not enough. There must be a "common object" to their activities.

The entire rationale for these decisions was to avoid applying the common employment doctrine and, by extension, to refuse to limit vicarious liability. In 1948, the rule was finally abolished.[125] Three years earlier the defence of contributory negligence was also liberalised.[126] One consequence of these changes was to focus judicial attention on the relationship between employees and the extent to which an employer might be vicariously liable free from the shackles of common employment and the old style contributory negligence defence. In *Jones v Staveley Iron and Chemical Co. Ltd.*,[127] one worker was injured by another. One question to be addressed was the standard of care to be expected by a skilled worker and the way that translated to vicarious liability for an employer. In the Court of Appeal, Denning L.J. gave one of the last major endorsements of the master's tort theory: "He acts by his servant; and his servant's acts are for this purpose, to be considered as his acts. Qui facit per alium facit per se …. If he takes the benefit of a machine like this he must accept the burden of seeing that it is properly handled."[128]

He goes on to cite *Broom v Morgan* to the effect that an employer is liable even if the employee is immune from liability. Denning L.J. combined the traditional maxim with something akin to enterprise liability. Romer L.J. said nothing about immunity but can equally be said to adopt a master's tort analysis:

> [I]t is well settled that a master is liable for the acts of his servants, if done in the course of their employment, on the principle qui facit per alium facit per

122 *Lister* [1939] A.C. 215.
123 Ibid., at p. 235.
124 Ibid., at p. 246.
125 Law Reform (Personal Injuries) Act 1948, s. 1.
126 Law Reform (Contributory Negligence) Act 1945.
127 *Jones v Staveley Iron and Chemical Co. Ltd.* [1955] 1 Q.B. 474.
128 Ibid., at p. 480.

> se. If an employer employs a crane driver to operate a crane, it is the employer himself who, in the eye of the law, is operating it, though he is doing so through the person of the employee.[129]

Hodson L.J. seemed more inclined towards a servant's tort analysis: "In my opinion, fault must be attributed to the crane driver, and the question then arises whether this amounts to negligence."[130]

In dismissing an appeal, the House of Lords took the opportunity to support a servant's tort analysis.[131] Lord Reid said of Denning L.J.'s use of the maxims that "it is rarely profitable and often misleading to use Latin maxims in that way" and that "I do not think that they add anything".[132] He stressed that in order for an employer to be liable the servant must be negligent.[133] Lord Reid suggests that Romer and Hodson L.JJ. both "appear to . . . base their judgment on the crane driver having been negligent".[134] This is a servant's tort analysis. Lord Morton was of the same view. In fact, it is far from clear that Romer L.J. did subscribe to this analysis. On the question of immunity, he held that Denning L.J.'s words are "in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a case if the servant is 'immune', so is the employer".[135] Lord Tucker's speech is more ambiguous. He states that "The present is a simple straightforward case of a master's responsibility for the acts of his servant done in the course of her employment".[136] Yet he also seems to base his conclusions on the negligence of the crane driver.[137]

VI. The Rise of a Servant's Tort Analysis

As Glanville Williams pointed out, *Jones v Staveley Iron and Chemical Co. Ltd.* did not "settle the question beyond all doubt".[138] The remarks were obiter and aspects of the reasoning are not entirely satisfactory. It was still the first major judicial endorsement of a servant's tort analysis. The same approach was also reflected in statute. The Crown Proceedings Act 1947s. 2(1)(a) declared that the Crown was liable in "respect of torts committed by its servants or agents". It is difficult to give a definitive reason for the decline of the master's tort theory. It is unlikely that one factor alone was at play. The master's tort theory had been around for a long time

129 Ibid., at p. 484.
130 Ibid., at p. 482.
131 *Staveley Iron and Chemical Co. Ltd. v Jones* [1956] 1 A.C. 627.
132 Ibid., at p. 643.
133 Ibid., at p. 644.
134 Ibid.
135 Ibid., at p. 671.
136 Ibid., at pp. 646–47.
137 Ibid., at p. 646.
138 G. Williams, "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 L.Q.R. 522, at 522.

and was not killed off by a single decision. The backstory is more complicated. Winfield, in his influential treatise on tort, had adopted a servant's tort analysis in the late 1930s. He would still concede that a "scientific basis" of vicarious liability is hard to find. The sixth edition of Winfield's treatise, edited by T. Ellis Lewis,[139] contained a new section addressing the nature of vicarious liability which Denning L.J. singled out in a book review in which he commented that "The true basis of the master's liability has been under much discussion lately".[140]

Ellis Lewis began by saying that the true basis of vicarious liability "still waits final determination" before explaining that "the doctrine is based on public policy or sound necessity rather than deduction from legal principle".[141] The demise of the common employment doctrine was one reason why vicarious liability had come to the fore, but it was also part of a wider movement in the 1950s in which the courts were making a conscious effort to modernise vicarious liability. The older terminology of master and servant fell out of use,[142] maxims were regarded with suspicion,[143] and the nineteenth-century law was increasingly seen as ill-suited to more modern employment relationships.[144]

Another important factor which helped to ensure that judges began to systematically address vicarious liability was highlighted by academic commentators at the time,[145] but has received little notice in the intervening decades. In a series of judgments, Denning L.J. sought to elide vicarious liability in which one person is liable for another with the principle of a non-delegable duty. He did so by using the old maxim *qui facit per alium facit per se*. Using this analysis, the employer was liable not because the employee's tort or act was imputed to them but because they had themselves committed a tort. A passage from *Broom v Morgan*[146] illustrates the point:

> My conclusion on this part of the case is, therefore, that the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. If the servant is immune from an action at the suit of the injured party owing to some positive rule of law, nevertheless the master is not thereby absolved. The master's liability is his own liability and remains on him notwithstanding the immunity of the servant.[147]

139 T.E. Lewis, *Winfield on Tort*, 6th ed. (London 1954).
140 [1955] C.L.J. 113–14.
141 Lewis, *Winfield*, p. 173.
142 Admittedly, the language of master and servant was slow to die out. It continued to be used by successive editors of Winfield's treatise.
143 And not just in England and Wales; see *Darling Island Stevedoring and Lighterage Co. Ltd. v Long* (1957) 97 C.L.R. 36, 56–57, per Fullagar J.
144 O. Kahn-Freund, "Servants and Independent Contractors" (1951) 14 M.L.R. 504, at 505–06.
145 Two case notes in the *Cambridge Law Journal* discuss this point at some length: C.J. Hamson, "Tort – Master's Vicarious Liability to Spouse of Servant" [1954] C.L.J. 45; K.W. Wedderburn, "Negligence – Standard of Care – Vicarious Lability" [1955] C.L.J. 151.
146 *Broom* [1953] 1 Q.B. 597.
147 Ibid., at p. 609.

In *Jones v Staveley Iron and Chemical Co. Ltd.*,[148] Denning L.J. used the same analysis:

> The employer is made liable, not so much for the crane driver's fault, but rather for his own fault committed through her. He puts her in charge of a great machine which can cause much damage if it is not properly handled. He must see that reasonable care is used in the handling of it so that it does not cause damage. No matter whom he employs to handle it, he must ensure that a proper standard of care is obtained.[149]

This approach was not entirely novel. It is a little like the way that the House of Lords in *Wilson & Clyde Coal Company Ltd. v English*[150] sidestepped the common employment doctrine. On that occasion, the House of Lords stressed that the employer was liable for failing to provide a safe system of work. Denning L.J. seems to be pointing towards the idea of a non-delegable duty. It is no coincidence that Denning L.J. argued elsewhere that hospitals were liable for injuries suffered by patients using a non-delegable duty.[151] Although Denning L.J. was careful to distinguish this form of liability from vicarious liability,[152] his approach risks collapsing the two. In cases of a non-delegable duty and vicarious liability the employer is liable without fault on their part. Although similar, the two are not identical.[153] A non-delegable duty is a form of primary liability. The employer is the one with the duty. The role that non-delegable duties ought to play in the modern law is contested.[154] Denning L.J.'s intervention added to the conceptual confusion. The way that he tried to develop a form of primary liability expressed as a non-delegable duty was broader than anything that had gone before.

The House of Lords in *Jones v Staveley Iron and Chemical Co. Ltd.* was clear in resisting the attempt by Denning L.J. to reshape employer's liability for the acts of their employees. It did so by insisting that the case was properly one of vicarious rather than primary liability. Lord Morton explained: "Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry

148 *Jones* [1955] 1 Q.B. 474.

149 Ibid., at p. 480.

150 *Wilson & Clyde Coal Company Ltd.* [1938] A.C. 57.

151 *Cassidy v Ministry of Health* [1951] 2 Q.B. 343, 359–60; *Roe v Ministry of Health* [1954] 2 Q.B. 66, 82. In part, this may be motivated by a desire to limit the liability of doctors and, more generally, judicial reluctance to find that doctors have failed to meet the requisite standard of care, see W. Swain, "The Development of Medical Liability in England and Wales" in E. Hondius (ed.), *The Development of Medical Liability* (Cambridge 2010), 27, 42–44.

152 *Broom* [1953] 1 Q.B. 597, 609.

153 Non-delegable duties are sometimes conflated with vicarious liability. For a discussion of that issue, see R. Stevens, "Non-delegable Duties and Vicarious Liability" in J. Neyers et al. (eds.), *Emergent Issues in Tort Law* (Oxford 2007), 331–68; J. Morgan, "Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken" [2015] C.L.J. 109, at 120.

154 Traditionally whilst an employer could not be vicariously liable for an independent contractor, they could be liable by way of a non-delegable duty: *Woodland* [2014] A.C. 537, 573–74. In addition to the literature ibid., see G. Williams, "Liability for Independent Contractors" [1956] C.L.J. 180.

out a duty imposed upon him as an employer by common law or statute."[155] Both the master's and servant's tort theories are examples of vicarious liability, but it is easier to draw a sharp line between vicarious liability and primary liability when a servant's tort analysis is used. Once an employee is required to commit a tort, there was no possibility of conflating his tort with that of the employer.

The reason that the House of Lords was resistant to extending the scope of primary liability, expressed as a form of non-delegable duty, was never fully articulated. One likely fear was that it would involve extending the scope of an employer's liability. The fear of indeterminate liability for employers was something that Lord Denning himself would comment on in the context of the liability for hospitals.[156] The same concern has continued to be reflected in modern attempts to explain the imposition of non-delegable duties using the idea of "assumption of responsibility".[157]

VI. Conclusion

In the late 1960s, Patrick Atiyah wrote that "On the whole it seems doubtful whether much is to be gained by examination of the 'true' basis of vicarious liability".[158] On one level, this statement is true. The master's or servant's tort theory usually gives the same outcome as far as liability is concerned but the question of the accepted analysis has a significance beyond itself. It goes to the nature of liability in tort more generally. Once tortious liability was characterised by fault then vicarious liability was increasingly difficult to justify. Despite the struggle to find a coherent justification, vicarious liability has proved to be remarkably resilient.

A master's tort analysis can be constructed from the older cases, although the way jurors reached decisions about liability makes it difficult to know how these notions were applied in practice. The emergence of a much larger body of legal literature in the nineteenth century did little to introduce much clarity. In part, this was because there was no well-developed theoretical structure for tort law – in contrast to Will theory which, however imperfectly, provided a framework for contract law.[159] It was extremely difficult to find a theory that fitted all of the authorities on vicarious liability. Ever since pragmatic or policy-based justifications for vicarious liability have proved to be attractive. In *Imperial Chemical Industries Ltd. v Shatwell*,[160] Lord Pearce made the point that

155 *Staveley Iron and Chemical Co. Ltd.* [1956] 1 A.C. 627, 639.
156 Lord Denning, *The Discipline of Law* (London 1979), 241–42.
157 For a cogent criticism of this approach, see Morgan, "Independent Contractors", p. 128.
158 P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London 1967), 7.
159 W. Swain, *The Law of Contract 1670–1870* (Cambridge 2015), chs. 8, 9.
160 *Imperial Chemical Industries Ltd. v Shatwell* [1965] A.C. 656.

> The doctrine of vicarious liability has not grown from, any very clear, logical or legal principle but from social convenience and rough justice. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it.[161]

As late as the mid-1970s, in *Launchbury v Morgans*,[162] Viscount Dilhorne and Lord Pearson were still repeating the maxim, *qui facit per alium, facit per se*.[163] Unlike their nineteenth-century counterparts, the fact that Lord Pearson talked about the negligence of the driver does not suggest that he was actually adopting the master's tort theory.[164] The House of Lords on this occasion was anxious to set down the limits on vicarious liability outside an employment relationship, and more specifically to close off an attempt by Lord Denning M.R. in the Court of Appeal to impose liability on the owner for accidents caused by drivers of the family car. By this stage the servant's tort theory was no longer questioned.

It is easy enough to see how various reforms of tort law thrust vicarious liability before the courts. It is more difficult to explain why, in a relatively short period, the courts began to adopt a servant's tort analysis. One reason may be that the idea was gaining ground in the legal literature. Another, perhaps more plausible, reason may lay in the fact that a servant's tort theory draws a clearer distinction between primary and vicarious liability because it is clear that the servant breaches the duty of care. It may be no coincidence that Lord Denning favoured a master's tort analysis. In part, the servant's tort analysis may have been a judicial reaction to his attempt to develop a primary liability expressed as something akin to a non-delegable duty. His analysis not only ran the risk of blurring the boundary between primary and secondary liability, but of creating open-ended liability. This becomes a problem once non-delegable duties start to be used outside judicial attempts to subvert the common employment doctrine, or other similarly narrow exceptional circumstances and become a general doctrine.[165]

Because so many explanations for vicarious liability are possible, this area of the law has been particularly subject to changes in fashion. Sometimes this is cyclical. Just recently appellant judges have turned to enterprise liability once more.[166] It has proved easier for lawyers to treat vicarious liability as

161 Ibid., at p. 685.
162 *Launchbury v Morgans* [1973] A.C. 127.
163 Ibid., at p. 140, per Viscount Dilhorne, 140, per Lord Pearson.
164 Ibid., at p. 140.
165 For a rather sanguine endorsement of the idea, see *Woodland* [2014] A.C. 537, 590, per Baroness Hale.
166 For a discussion, see Swain, "Vicarious Liability", pp. 108–10. Enterprise liability has been heavily criticised by Gray, *Vicarious Liability*, pp. 123–48, but it has found favour in a number of contexts in the modern law; see Brodie, *Enterprise Liability*. For a striking example in the context of vicarious liability, see *Cox* [2016] A.C. 660.

a distinct body of doctrine, which is difficult to explain. Little attempt has been made to explain where it fits within a broader theory of tort law. Stevens, who advocates a master's tort theory, is a modern exception in this regard.[167] In fact the master's tort theory hasn't completely disappeared from view.[168] The choice between a master's or servant's tort theory matters less than it used to because there are fewer instances where a choice makes a difference in practice. Yet, from the point of view of coherence, something closer to a satisfactory explanation is only ever likely to be forthcoming when lawyers can give a proper account of the survival of vicarious liability in a fault-based system of tort law.

167 Stevens, *Torts*, pp. 257–74.

168 For a recent obiter endorsement of the master's tort theory, see *Ancient Order of Foresters in Victoria Friendly Society Ltd. v Lifeplan Australia Friendly Society Ltd.* [2018] HCA 43, at [5].