Vicarious Liability and the Triumph of Form in *Bird*: Coming Home to Roost?

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In Bird v DP, the High Court confined vicarious liability to relationships of employment. This was a triumph of formalism, out of step with history and principle. While the Court was rightly hesitant to follow England and Canada, where vicarious liability has been imposed using nebulous policy considerations, the better approach was to continue developing the categories of vicarious liability incrementally, by reference to the doctrine's fundamental concerns, including control and enterprise risk. Problematically, Bird appears to form part of a project to shift liability for enterprises to the law of non-delegable duties, which rests on insecure foundations and should not be extended to intentional torts. The attempt to overrule Lepore in the pending High Court appeal in AA v Trustees of the Roman Catholic Church is Bird coming home to roost. Legislation is needed to reverse Bird and ensure that the post-Royal Commission reforms fulfil their original purpose.

I INTRODUCTION

Across common law jurisdictions, institutional abuse has sharpened attention on the principles governing vicarious liability — a species of strict liability "based on attribution of liability, not

attribution of the acts, of a wrongdoer to a defendant".[1] Perpetrators are frequently impecunious, and holding the institution liable, even where it is without fault, may be the only avenue to compensation. Historically, an impediment was where the institution was an unincorporated association incapable of being sued, shielding access to trust assets.[2] Legislation enacted following the Royal Commission into Institutional Responses to Child Sex Abuse ('Royal Commission') lifted this bar for institutional child abuse.[3] But a further issue remained. In the paradigm case, vicarious liability arises in an employment relationship, yet an unincorporated association cannot employ. In *Bird v DP* ('*Bird*'),[4] the paradigm case became the only case.

In *Bird*, the respondent was sexually assaulted by Father Coffey, an assistant parish priest appointed by the Bishop of the Roman Catholic Diocese of Ballarat ('the Diocese') to a parish church. At first instance and on intermediate appeal, the Diocese was vicariously liable.[5] Although Coffey was neither an employee nor independent contractor of the Diocese,[6] the relationship was governed by hierarchies in Canon Law.[7] Those rules, although legally unenforceable, subjected Coffey to control that was "at least as great as…that enjoyed by an employer".[8] Coffey's work was also "integrally interconnected with the fundamental work…of the Diocese".[9] Thus, "[i]n a real and relevant sense", Coffey was the Diocese's "servant", notwithstanding "that he was not, in a strict legal sense, an employee".[10] Regardless, a High

[1] *Bird v DP* (2024) 98 ALJR 1349, [44] ('*Bird*').
[2] *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565 ('*Ellis*').
[3] Eg, *Civil Liability Act 2002* (NSW), Pt 1B ('CLA').
[4] *Bird* (n 1).
[5] *Bird v DP* (2023) 69 VR 408 ('VCA'); *DP v Bird* [2021] VSC 850.
[6] VCA (n 5) [77].
[7] Ibid [120].
[8] Ibid [125].
[9] Ibid [128].
[10] Ibid [129].

Court majority held that the Diocese was not vicariously liable because employment was a "threshold requirement".[11]

Bird has left the law of vicarious liability in Australia governed by a formalistic distinction between employment and non-employment relationships. Part II argues that the better approach is to ask whether the doctrine's "fundamental concerns", which include control and enterprise risk, are engaged.[12] By beginning with the label of "employee" (or "independent contractor") — formerly a statement of conclusion that those concerns are (or are not) engaged — *Bird* "invert[s] the order of inquiry".[13] Still, the High Court was rightly hesitant to follow English and Canadian courts to the extent that vicarious liability has been imposed using nebulous policy considerations. Part III argues that *Bird*'s narrowing of vicarious liability may reflect an anxiety to contain the problematically broad approach to the "scope-of-employment" test in *Prince Alfred College v ADC* ('*ADC*').[14]

Indeed, *Bird* appears to form part of a broader project, foreshadowed by Edelman and Steward JJ in *CCIG Investments Pty Ltd v Schokman* ('*Schokman*'),[15] to shift the liability of enterprises to the law of non-delegable duties. Part IV argues that this trajectory is problematic: the law of non-delegable duties rests on insecure foundations and should not be extended to intentional torts. Part V considers potential legislative responses.

II VICARIOUS LIABILITY FOLLOWING *BIRD*

In *Bird*, vicarious liability was described as involving a twofold inquiry: whether the tortfeasor was the defendant's employee; and then the "separate question" of whether the wrongdoing was in the "scope of that employment".[16] The appellants submitted that, to dismiss the appeal,

[11] *Bird* (n 1) [5].
[12] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [45] ('*Hollis*').
[13] Ibid [37].
[14] (2016) 258 CLR 134.
[15] (2023) 278 CLR 165.
[16] *Bird* (n 1) [46].

the Court would need to abandon the first limb or, as embraced by the respondents, follow England and Canada in "expand[ing]" the first limb to relationships "akin to employment".[17] In those jurisdictions, vicarious liability is imposed according to policy considerations: in England, according to what is "fair, just and reasonable";[18] and in Canada, by invoking enterprise risk and deterrence.[19] The Court was concerned that, absent a "stable" rationale for vicarious liability, following those jurisdictions would "produce uncertainty" and expand liability.[20]

However, the case proceeded on a false dichotomy. Following England and Canada was unnecessary. The Australian common law already recognised vicarious liability outside employment where the relationship fell within the doctrine's just limits, which included notions of control and enterprise risk.

A *Vicarious liability does not require employment*

A word is "the skin of a living thought and may vary greatly in colour and content according to circumstances and time".[21] Especially so in vicarious liability, where "employment" does not "display its legal content by its semantic meaning".[22] The doctrine's contours are perhaps best understood as derived from medieval notions of headship of a household,[23] which developed by analogy with a slaveowner's noxal liability for the acts of their slave.[24] As Holmes said, the employer/independent contractor distinction is "easily explained" if we remember that an independent contractor "corresponds to a free man in ancient Rome, who has

[17] Appellant's Submissions, *Bird* (n 1), 08/07/2025, [29]; Respondent's Submissions, *Bird* (n 1), 18/07/2025, [25ff].
[18] *Various Claimants v CCWS* [2013] 2 AC 1, [47] ('*CCWS*').
[19] *Bazley v Curry* [1999] 2 SCR 534, [30]-[32] ('*Bazley'*).
[20] *Bird* (n 1) [65]-[67].
[21] *Towne v Eisner*, 245 US 418, 425 (1918).
[22] *Hollis* (n 12) [225].
[23] *Scott v Davis* (2000) 204 CLR 333, [230] ('*Scott*').
[24] *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, [20] ('*Sweeney*').

a separate legal existence".[25] However, by virtue of being rooted in "analogies which are no longer apt (if they ever were)",[26] there is "no adequate…explanation of the modern law, except by the survival…of rules which lost their true meaning when the objects of them ceased to be slaves".[27]

It should also not be forgotten that, before the abolition of forms of action, "there was…little in the way of an abstract body of substantive law which could be called the principles of tort law".[28] The language of "employee" (and its antecedent, "master") instead emerged in the context of a pleading system that required proof of control over a human agent to make out an action on the case (premised on *indirect* harm caused 'through' some independent intermediary). Were the harm direct, such as where the agent's *acts* were attributed to the defendant, the plaintiff was non-suited.[29]

Although vicarious liability has no single "completely satisfactory" rationale,[30] there are "fundamental concerns" which have informed the doctrine's application.[31] In *Hollis v Vabu Pty Ltd* ('*Hollis*'), five judges of the High Court recognised these as including "control" and enterprise risk:

> "…the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury…to them which may fairly be said to be characteristic of the conduct of that enterprise."[32]

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[25] 'The Arrangements of the Law – Privity' (1872) 7 *American Law Review* 46, 62.
[26] *Sweeney* (n 24) [20].
[27] Holmes, *The Common Law* (1881) 232.
[28] AWB Simpson, 'The Elusive Truth About Holmes' (1997) 95 *Michigan Law Review* 2027, 2053.
[29] *Scott* (n 23) [177ff]; *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36, 70.
[30] *Hollis* (n 12) [35].
[31] Ibid [45].
[32] Ibid [42]-[45].

In recent cases, including *Bird*, the High Court has sought to diminish the importance of enterprise risk.[33] However, as Gleeson J observed in dissent, it has been a "central justification" for vicarious liability.[34] It underlies the test for employment. Classically, an employee was subject to the master's actual exercise of control.[35] That test developed in "a predominantly agricultural society…untroubled by the complexities of modern industrial society".[36] As specialisation flourished, actual control no longer indicated the connection between a person and an enterprise. Thus, control became only one relevant factor and the emphasis shifted to the "right to exercise" control,[37] motivated by the "deeply rooted sentiment" that an enterprise is responsible for injuries "characteristic of its activities".[38] Hence Windeyer J's observation that the employee/independent contractor distinction is "rooted fundamentally in the difference between a person who serves his employer in [the employer's] business, and a person who carries on a…business of his own".[39] Rather than possessing a single immutable meaning, "employee" and "independent contractor" were conclusory statements reflecting these underlying concerns.

The broader influence of enterprise risk over the development of strict liability is not often appreciated. Indeed, the law developed several situations where a person was liable for another's acts, independently of contract. Pollock, speaking in the twilight of the Industrial Revolution, identified the element common to these situations as being that "a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours".[40] Liability was imposed on an employer for acts occurring in the course of their business; that was the state of affairs for

[33] *Bird* (n 1) [48]; *Shockman* (n 15) [13]; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, [59] ('*ADC*').
[34] *Bird* (n 1) [94].
[35] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 29 ('*Stevens*').
[36] Glass et al, *The Liability of Employers in Damages for Personal Injury* (1979) 72-73.
[37] *Stevens* (n 35) [44].
[38] *Ira S Bushey & Sons v United States* 398 F.2d 167, 171 (1968).
[39] *Marshall v Whittaker's Building Supply* (1963) 109 CLR 210, 217.
[40] *Essays in Jurisprudence and Ethics* (1882) 122.

which they were responsible.[41] However, outside employment, there was also an occupier's liability under the rule in *Rylands v Fletcher*[42] and possibly toward invitees,[43] cattle-trespass,[44] and liability where wrongdoing was done at another's "command".[45] These examples are best understood as direct liability,[46] but Pollock's insight was that enterprise risk has been integral in delimiting strict liability in general.

Prior to *Bird*, the categories of vicarious liability were not closed. Rather, the common law proceeded incrementally, "identifying categories that do (eg employment) and do not (eg independent contractors) attract vicarious liability".[47] This was the legal milieu for *Quarman v Burnett* ('*Quarman*'),[48] the classic authority that there is no vicarious liability for an independent contractor. Parke B found that the defendants were not the negligent coachman's master: they did not command the wrongdoing; nor was it they who "selected him" as "servant", who "could remove him for misconduct", or "whose orders he was bound to...obey".[49] Regardless, the plaintiff contended that an occupier's strict liability for activities on their land, even where those activities are not carried out by a servant, should extend to chattels. Referring to Littledale J's judgement in *Laugher v Pointer*,[50] Parke B rejected this argument. Littledale J had reasoned that, unlike land, chattels were ordinarily "sent out into the world" and entrusted with others "who are not...servants, but whose employment it is to attend to it".[51] Thus, the essential characteristics for vicarious liability, including control, were absent.

[41] *Sweeney* (n 24) [23].
[42] (1868) LR 3 HL 339.
[43] *Kondis v State Transport Authority* (1984) 154 CLR 672, 682-688 ('*Kondis*').
[44] *Lee v Riley* (1865) 144 ER 629.
[45] *Morley v Gaisford* (1795) 126 ER 639, 640.
[46] Liability for authorised wrongdoing is best understood as direct because the servant is merely an instrument for implementing the master's will: *Scott* (n 23) [168]; cf *Bird* (n 1) [205].
[47] *Ellis* (n 2) [53].
[48] (1940) 151 ER 509.
[49] Ibid 513-514.
[50] (1826) 108 ER 204.
[51] Ibid 210.

Clearly, *Quarman* did not foreclose vicarious liability in *all* non-employment relationships. Employment was a sufficient, not necessary, condition. In *Ashworth v Stanwix*,[52] decided shortly after *Quarman*, it was treated as settled law that partners were vicariously liable for their co-partner's torts, quite apart from any "employment". In *Head v Briscoe*,[53] there was "no doubt" that a husband was vicariously liable for a libel published by his wife.

Another key example is agency. In *Bird*, the majority distinguished agency from vicarious liability (the former involving primary liability based on attribution of acts), and on that basis stated that *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* ('*CML*')[54] stood outside the "rubric of 'vicarious liability'".[55] However, the basis of liability in *CML was* vicarious and not by attribution under the law of agency. In *CML*, a company's agent, who was an independent contractor, made slanderous statements while inducing persons to make proposals for life insurance. As explained in *Sweeney v Boylan Nominees Pty Ltd* ('*Sweeney*'), the company was "vicariously liable" because of the "closeness of connection between the principal's business and the conduct of the independent contractor", which was "established by" the agency and the slander being uttered in the course of executing that agency.[56] The relationship therefore "fit entirely within the explanation of vicarious liability identified by Pollock".[57] *CML*, as interpreted in *Sweeney*, is inconsistent with *Bird*. The true position is as Gummow J explained in *Scott v Davis* ('*Scott*'): "vicarious" liability does not rest upon "agency", but nor does it rest upon employment.[58]

In *Scott*, there was no employment or agency relationship between an aeroplane owner and a negligent pilot, who took the plaintiff on a joyride at the owner's request. The majority reasoned

[52] (1860) 121 ER 606.
[53] (1833) 162 ER 1064.
[54] (1931) 46 CLR 41.
[55] *Bird* (n 1) [31]-[33].
[56] *Sweeney* (n 24) [24].
[57] Ibid [21].
[58] *Scott* (n 23) [239].

on the assumption that vicarious liability might arise outside of a master-servant relationship, for instance in agency relationships.[59] However, consistently with *Quarman*, it was insufficient that the pilot was the owner's representative entrusted with a chattel.[60] On this basis, the majority criticised *Soblusky v Egan*,[61] where an owner or bailee of a motor vehicle was vicariously liable for their negligent driver, and in any case distinguished it because the owner was on the ground unable to assert control over the pilot.[62] The extension of vicarious liability to "a new species of actor, one who is not an employee, nor an independent contractor, but an 'agent' in a non-technical sense", was rejected.[63]

Scott was applied in *Sweeney*, where owners of a service station were not vicariously liable for a negligent mechanic (who was an independent contractor) merely because he acted for the owner's benefit.[64] The independent contractor relationship was "well beyond the bounds set by notions of control" and "course of employment",[65] but agency was given as an example of a non-employment relationship within those bounds.[66] In *Hollis*, the majority stated that vicarious liability "*usually* flows" from an employment relationship.[67] The conclusion that the couriers were employees was informed by the "fundamental concerns" of vicarious liability, as applied to "one of the many particular relationships that has developed in contemporary Australian society".[68] The majority invoked enterprise risk to explain that independent contractors lacked the necessary "identification with the alleged employer".[69] In *NSW v Lepore*

[59] Ibid [19], [223], [299]-[302], [357].
[60] Ibid [268]-[270].
[61] (1960) 103 CLR 215.
[62] *Scott* (n 23) [258].
[63] Ibid [269].
[64] *Sweeney* (n 24) [28]-[29].
[65] Ibid [26].
[66] Ibid [24].
[67] *Hollis* (n 12) [29] (emphasis added).
[68] Ibid [59].
[69] Ibid [40].

('*Lepore*'), four judges referred to enterprise risk as relevant to imposing vicarious liability.[70] Contrary to *Bird*,[71] none of these decisions treated employment as a threshold requirement.

There is no principled reason why vicarious liability should not arise with an unincorporated charitable association, where a contractual relationship is juristically impossible but the incidents of employment remain (as in *Bird*). It is well-established that charitable organisations may be vicariously liable.[72] Similar notions of enterprise risk are engaged: "the broader…community that 'profits' from the enterprise should also bear the cost" of its characteristic risks.[73] Furthermore, the master-servant relationship was historically status-based.[74] The contractualisation of employment has not contractualised the rationales for vicarious liability. The view that liability "is found in an employer's promise in the contract of employment to indemnify the employee" has not been accepted.[75] Hence also Fullagar J's observation, in discussing the Crown's vicarious liability for members of the military or police force, that "a master's liability in tort" requires a particular relation, "*normally contractual*", where "a right of control over the acts of the immediate wrongdoer is essential".[76] The distinction in *Bird* between employment and non-employment relationships prefers form over substance.

Across Australia, legislation has deployed "employment" as a threshold requirement in a variety of fields, including industrial relations, taxation, and social welfare. These statutes are

[70] (2003) 212 CLR 511, [65] (Gleeson CJ), [202] (Gummow and Hayne JJ), [303] (Kirby J).
[71] *Bird* (n 1) [49].
[72] *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 556.
[73] *Lepore* (n 70) [303].
[74] *CBA v Barker* (2014) 254 CLR 169, [16]. In *Hollis* (n 12), the multifactorial test of employment, which involves consideration of "the totality of the relationship" between the parties, and "not merely" the "contractual terms", puts into sharp relief the distinction between the employment *contract* and the employment *relationship*. Although a majority of the High Court criticised the multifactorial approach in *CFMMEU v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 ('*CFMMEU*'), there is much force to Gageler and Gordon JJ's response that "[t]he relationship of employment is…not to be conflated with the contract" under which the relationship is "[t]ypically, *although not universally*," established and maintained: at [105], [110].
[75] *Hollis* (n 12) [12].
[76] *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 284 ('*Perpetual Trustee*').

ordinarily construed as adopting the common law meaning of "employment" developed for the purposes of vicarious liability.[77] *Bird*'s elevation of employment may reflect nothing more than the "temptation…to import meretricious symmetry" into what was always an ad-hoc and value-laden exercise.[78] Indeed, *Bird* has not developed the common law coherently with a "consistent legislative view" of "the public interest".[79] Legislative reforms following the Royal Commission have evinced "[i]ncreasing recognition that priests…are analogous to employees in important respects",[80] including by introducing statutory vicarious liability (on a prospective basis) for institutional child abuse by those "akin to an employee".[81] Legislatures have also lifted limitation periods for child abuse.[82] *Bird* has drastically curtailed the efficacy of those reforms.

Bird made no reference to the United States or the Restatements. Yet the American approach, which parallels *Hollis,* is instructive. For the purposes of vicarious liability, a "servant" is a person "employed to perform services in the affairs of another…subject to the other's control or right to control" in the physical conduct of the services, as determined through a multifactorial inquiry.[83] The relationship need not be contractual, nor involve an expectation of reward,[84] and may be founded in a religious organisation's by-laws (eg, Canon Law).[85] The question is whether the person "would be regarded as part of the employer's own working staff".[86] Thus, in *Moses v Diocese of Colorado*,[87] an "agency or employment relationship", sufficient for vicarious liability, existed between a Diocese and priest where it "exercised the

[77] *CFMMEU* (n 74) [97].
[78] *Perpetual Trustee* (n 76) 285.
[79] *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49, [25].
[80] *Bird* (n 1) [149].
[81] Eg, CLA (n 3) s 6G(1).
[82] Eg, *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic).
[83] ALI, *Restatement (Second) of Agency* (1958) §220(1) ('Second Restatement'). The Third Restatement focuses primarily on control, but the Second Restatement remains widely used: Anthony Gray, *Vicarious Liability* (Hart Publishing, 2018) 89.
[84] Ibid §220(1), 225.
[85] *Stevens v Roman Catholic Bishop of Fresno* 49 Cal.App.3d 877, [4ff] (1975).
[86] Keeton et al, *Prosser and Keeton on Torts* (West Publishing, 5th ed, 1984) §70.
[87] 863 P.2d 310 (1993).

right of control over the manner of work…as well as the hiring, compensation, counselling performed by the priest and discipline of the priest". Employment is but a metaphor for a conclusion as to control and responsibility.

B *The misstep in England and Canada*

Bird was right not to follow English and Canadian courts, where vicarious liability has been approached as a question of policy — *should* vicarious liability be found? — rather than through incremental development by reference to the doctrine's fundamental concerns. The latter represents the method of the Australian common law.[88]

In Canada, the principal's and tortfeasor's relationship must be "sufficiently close as to make…vicarious liability appropriate".[89] "Sufficient" is a circular word and "close" reeks of proximity. The assessment focuses on the two policy goals identified in *Bazley v Curry* ('*Bazley*'):[90] fair and effective compensation; and deterrence of future harm. This is apt to misdirect the analysis. First, compensation is said to be "fair" where a person "creates a risk and that risk materialises".[91] This proves too much. It is more expansive than the conception of enterprise risk endorsed in *Hollis.* There is no qualification that the risks are those "characteristic" of the enterprise;[92] rather, they may include those "directly antithetical" to the enterprise's aims.[93] Accordingly, the inquiry threatens to become whether "but for" the tortfeasor's engagement, the wrongful act would have occurred,[94] which is at least in tension with non-liability for independent contractors.

[88] *Sullivan v Moody* (2001) 207 CLR 562, [49] ('*Sullivan*').
[89] *K.L.B v British Columbia* [2003] 2 SCR 403, [19] ('*K.L.B*').
[90] *Bazley* (n 19) [31]-[32].
[91] *K.L.B* (n 89) [20].
[92] *Hollis* (n 12) [42].
[93] *Lepore* (n 70) [222].
[94] Ibid [223].

Second, vicarious liability achieves more "effective" compensation where the principal has deeper pockets. This elevates wealth into a ground for liability. However, the task of courts is "loss fixing rather than loss spreading".[95] There is "no jurisdiction *ex aequo et bono* to practise distributive justice".[96] In any case, insurance arrangements should follow the law; thus, for example, insurance is not a reason for imposing a duty of care.[97] It also cannot be assumed that a principal has greater means or access to insurance cover, particularly where the principal is a not-for-profit or the impugned conduct is criminal.[98]

Third, any deterrence is likely to be remote. Fault-based liability already incentivises principals to carefully select and supervise staff, and workplace laws constrain the ability to discipline employees. For intentional torts or crimes, ordinary legal sanctions have already failed to deter the wrongdoer. Indeed, in educational or recreational settings, strict liability may perversely incentivise reducing supervision over children to minimise the opportunity for abuse.[99]

In England, the question is even more indeterminate: whether "it is fair, just and reasonable to impose vicarious liability".[100] This reproduces the policy-charged limb of the "*Caparo* test" for determining novel duties of care, which the High Court rejected in *Sullivan v Moody* as inconsistent with the Australian common law method.[101] In England, the adoption of this test triggered a "significant expansion" of vicarious liability, suggestive of a "wholesale embrace of the 'deep pockets' theory".[102] In *Armes v Nottinghamshire County Council* ('*Armes*'),[103] the Council was vicariously liable where foster parents sexually abused a child placed in their care without fault by the Council. The decision has elicited strong criticism.[104] The majority

[95] *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529, 580 ('*Willemstad*').
[96] *Jacobi v Griffiths* [1999] 2 SCR 570, 589.
[97] *Willemstad* (n 95) 580.
[98] *Lepore* (n 70) [36].
[99] Ibid [66].
[100] *CCWS* (n 18) [35].
[101] *Sullivan* (n 88) [49].
[102] Rolph et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021) [26.16].
[103] [2018] AC 355.
[104] Dickinson, 'Fostering Uncertainty in the Law of Tort' (2018) 134 *LQR* 359.

reasoned that the Council had greater means and that its lack of control over the foster parents *supported* liability because placing the child beyond its control created the risk[105] — a rationale which would "apply to virtually all situations in which A asks…B to deal in some manner with C"[106] and subsume negligence. Three years later, the UKSC described *Armes* as a "difficult" case and re-emphasised the traditional test focused on identification with the principal's enterprise.[107] It may be that, as with the shift towards incrementalism in negligence,[108] England is converging with the pre-*Bird* Australian position.

The difficulty with the Canadian and English approaches is that each fixes upon "ill-defined" policy considerations, inviting "discretionary decision-making in individual cases".[109] For example, the treatment of control in *Armes* may be contrasted with *K.L.B v British Columbia*, where on similar facts the Supreme Court of Canada held that there was no vicarious liability because foster parents operate "in a highly independent manner".[110] Strict liability is exceptional, and where it is imposed it should be predictable and principled. Canada and England achieve neither standard.

III THE "SCOPE OF EMPLOYMENT" TEST

While *Bird* narrowed the first stage of the vicarious liability inquiry, the High Court recently settled on an expansive approach to the second stage in *ADC*. In the context of intentional wrongdoing, the majority explained that employment must afford the *occasion*, and not merely the *opportunity*, for the wrongdoing.[111] This directed attention to the position the employer placed the employee vis-à-vis the victim, and whether the employee took advantage of that

[105] *Armes* (n 103) [61], [77].
[106] Ibid [77].
[107] *Barclays Bank Ltd v Various Claimants* [2020] UKSC 13, [23]-[27].
[108] *Steel v NRAM Ltd* [2018] UKSC 13, [22].
[109] *Sullivan* (n 101) [49].
[110] *K.L.B* (n 89) [23].
[111] *ADC* (n 14) [80].

position to achieve, for example, authority, trust, or intimacy.[112] There is a clear similarity with the Canadian approach in *Bazley*, which involves asking whether the "enterprise and empowerment of the employee materially increased the risk".[113]

ADC is a response to difficulties with prior approaches to the "scope of employment", which have included asking whether an act is a "wrongful and unauthorised mode of doing an authorised act".[114] To ask, as in England, whether there is a "sufficient connection" between the employee's position and the wrongdoing is to beg the question.[115] Nevertheless, *ADC* casts the net problematically wide. By its nature, institutional abuse ordinarily involves the wrongful exercise of power derived from the wrongdoer's position of authority. For example, a teacher's duties may "inevitably require intimate contact with the child".[116] Vicarious liability threatens to become absolute liability.

The solution lies in recognising that, contrary to *Bird*, the two stages of the vicarious liability inquiry are not entirely "separate".[117] Each is informed by an enterprise's responsibility for the risks which attend "the *furtherance* of the venture"[118] — ie, those "characteristic…of [the] enterprise".[119] Hence, in *Lepore*, Gummow and Hayne JJ repudiated *Bazley* in terms equally applicable to *ADC*:

> "[*Bazley*] shifts attention from the risks which conducting the enterprise brings with it (through employees doing the tasks they are *employed* to do) to the risk that individuals

[112] Ibid [80]-[81].
[113] *Bazley* (n 19) [46].
[114] Salmond, *Law of Torts* (1907) 83.
[115] *Wm Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12, [25].
[116] *Lepore* (n 70) [247].
[117] *Bird* (n 1) [46].
[118] *Lepore* (n 70) [222].
[119] *Hollis* (n 12) [42].

will break the law and their employment contract while they are at work. The inquiry about risk becomes an inquiry about opportunity for wrongdoing."[120]

The focus ought to be on whether the conduct occurred in performance of "what the employee is actually employed to do or is held out by the employer as being employed to do".[121] This is the "only state of things which the employer created and for which the employer should be held responsible".[122] Thus, in *Deatons v Flew*,[123] the barmaid's actions — throwing a glass at a customer in retaliation for an insult — were "quite unconnected" with her employment: they were not in the intended or "ostensible performance of [the] master's work", nor "under cover of the authority" she was "held out as possessing".

The consequence may be that intentional torts are usually outside the scope of employment because the perpetrator acts without a "semblance of proper authority".[124] However, it must be recognised that *institutional abuse* often occurs in the ostensible performance of pastoral care and spiritual training responsibilities, encouraged by "distorted beliefs that their actions are not harmful".[125] American authorities are again instructive. In *Mullen v Horton*, a priest began a sexual relationship with a parishioner while providing "pastoral, spiritual and psychological counselling", which formed part of his "priestly duties".[126] It was held that the jury could have reasonably characterised the sexual relationship as "a misguided attempt at pastoral-psychological counselling".[127] There was evidence that the emotionally charged setting may invite confusion between a "therapeutic relationship" and "an intimate sexual relationship".[128]

[120] *Lepore* (n 70) [214].
[121] Ibid [242].
[122] Ibid [202].
[123] (1949) 79 CLR 370, 380-382.
[124] *Lepore* (n 70) [241].
[125] Royal Commission, *Final Report* (Vol 2, 2017) 137.
[126] 46 Conn.App. 759, 761-765 (1997).
[127] Ibid 765.
[128] Ibid 766.

The circumstances must be carefully scrutinised to determine whether "the acts were independent…pursuits unrelated to [the institution's] activities".[129]

The extended 'occasion' test in *ADC* runs counter to the trend away from strict liability in Australia.[130] The chief reasons for its adoption would be deterrence and that it is more economically efficient to pursue the well-funded employer. As discussed,[131] neither is compelling, particularly as a basis for liability where acts significantly diverge from the wrongdoer's responsibilities. *Bird* somewhat ameliorates *ADC*'s impact by introducing a formalistic divide between employment and non-employment relationships, but the better approach was to return the 'scope-of-employment' to a principled foundation.

IV THE SHIFT TO NON-DELEGABLE DUTIES

Bird signalled a reallocation of institutional liability for child abuse from vicarious liability to non-delegable duties. In *Schokman*, Edelman and Steward JJ suggested that "it might now be argued that imposing liability for breach of a non-delegable duty of care in cases of child sexual abuse is more appropriate than vicarious liability",[132] echoing statements in the UKSC.[133] Non-delegable duties do not discriminate between the conduct of employees and contractors. Hence the attempt in the pending High Court appeal in *AA v Trustees of the Roman Catholic Church* ('*AA*')[134] to overrule *Lepore* and impose strict liability on enterprises for all acts of their delegates, intentional or negligent.

[129] *Jeffrey v. Central Baptist Church* 197 Cal.App.3d 721, 722 (1988).
[130] *Stevens* (n 35) 42.
[131] See Section II.B.
[132] *Schokman* (n 15) [81].
[133] *Woodland v Essex County Council* [2014] 1 AC 537, [28], [38].
[134] S94/205, commenced 01/07/2025.

That would not be a salutary development. The underdeveloped law of so-called non-delegable duties provides an insecure foundation upon which to rest the variety of cases in the modern world where persons are held out as representatives of an enterprise, whether 'extra-hazardous' or not, for four reasons.

First, non-delegable duties were largely forms of what came to be called '*Rylands v Fletcher*' liability. The notion that a person carrying on extra-hazardous or non-natural activity on their land is strictly liable for harm caused by that activity was a product of nuisance.[135] Nuisance was, and is, conceptualised as a property tort standing largely independent of fault. It will be recalled that the rule in *Rylands v Fletcher* was discarded by the High Court in *Burnie Port Authority v General Jones Pty Ltd*,[136] largely because it was inconsistent with the modern trajectory toward fault-based standards of conduct and away from old "categories" of strict liability.

Second, as Glanville Williams explained, non-delegable duties expanded in the 19th century as a "typical piece of judicial legislation, designed to mitigate the mischief of the doctrine of common employment" by imposing "direct" liability by assertion rather than reasoning.[137] But the common employment rule has since been displaced by statute.[138]

As Gummow J noted in *Thompson v ACT*, where statute erodes the reason for a common law rule, that rule should cease.[139] Yet there may be more than one reason for the rule. Speaking generally of the organic development of common law doctrines, Holmes said:

> "The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought

[135] *Woodland v Swimming Teachers Association* [2014] AC 537, [8].
[136] (1994) 179 CLR 520 ('*Burnie*').
[137] 'Liability for Independent Contractors' [1956] *Cambridge Law Journal* 180.
[138] Eg, *Workers' Compensation Act 1926* (NSW) s 65.
[139] (1996) 186 CLR 574, 584.

> of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career."[140]

He then instanced non-delegable duties as an example of a shapeshifting doctrine searching for a new reason:

> "A baker's man, while driving his master's cart to deliver hot rolls of a morning, runs another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered from the time of Ulpian to that of Austin, that it is because he was to blame for employing an improper person. If he answers, that he used the greatest possible care in choosing his driver, he is told that that is no excuse; *and then perhaps the reason is shifted, and it is said that there ought to be a remedy against some one who can pay.*"[141]

With the demise of the common employment rule, the 'agency' fiction, and the apparently uncompromising "rule" in *Rylands v Fletcher*, the only rationale that remains is brutally pragmatic — that the enterprise has "deeper pockets" or greater access to insurance. That rationale emerged in the Industrial Revolution. But it is doubtful whether the social evil of the occasional insolvent tortfeasant contractor is of sufficient gravity to justify strict liability for all the delegate's wrongdoing, including crimes.

Third, the contours of non-delegable duties are too imprecise. Dissecting the morass of English cases from the Industrial Revolution, *Prosser and Keeton on Torts* complains that it is "difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the

[140] Holmes (n 27) 8.
[141] Ibid 9 (emphasis added).

community that the employer should not be permitted to transfer it".[142] The Restatements are to similar effect.[143] None deterred, Sir Anthony Mason attempted in several decisions to rationalise these duties as cases where the defendant (a) undertakes (b) to carry on an especially risky task, (c) to which another is especially vulnerable.[144] That formulation was endorsed in *Bird*.[145]

Those factors now coincide with the requirements for an ordinary duty in negligence. The separation of non-delegable duty from negligence made sense when "proximity", rather than an undertaking to carry on a risky activity, was the criterion in negligence. That is no longer the case. The better view is that non-delegable duties are "strict" because the delegator owes a direct duty of care in negligence, but the standard of care is extraordinarily high because the magnitude of risk is equally high. That is to say, the calculus in the omnibus negligence framework since *Donoghue v Stevenson* now accounts for the concerns which "categories" of non-delegable duties sought haphazardly to address in the 19th century. The subsumption of older categories into the imperial march of negligence is not radical; it was underway at least since the 1960s, when the old categories of "dangerous agencies" and "occupier-trespasser" duties were dissolved into negligence.[146]

Indeed, some of the original non-delegable duty cases were framed in the language of "taking reasonable care", rather than of ensuring an outcome. In *Hughes v Percival*, the House of Lords held that a landowner who engaged a contractor who negligently subsided the party-wall breached their "non-delegable" duty to neighbours.[147] Lord Blackburn suggested the duty was to exercise "reasonable care and skill".[148] Lord Watson said the risk must have been

[142] Keeton et al (n 86) 512.
[143] ALI, *Restatement (Third) Torts: Liability for Physical and Emotional Harm* (2020) 401-407.
[144] *Commonwealth v Introvigne* (1982) 150 CLR 258, 270-271; *Kondis* (n 43) 687; *Burnie* (n 136) 550.
[145] *Bird* (n 1) [37].
[146] Lindell (ed), *The Mason Papers* (Federation Press, 2007) 71.
[147] (1883) 8 AC 443.
[148] Ibid 447.

"reasonably anticipated".[149] Indeed, relevantly to the position later taken in *Lepore*, Lord Watson excluded from the scope of non-delegable duties the conduct of delegates who were "insane [or] dishonest".[150] Opportunistic, "casual, or collateral acts" were equally excluded.[151]

As Gummow and Hayne JJ explained in *Lepore*, it was then by some imperceptible, and erroneous, shift that those fault-based duties came to be known as "strict" simply because they were "non-delegable".[152] Misunderstandings of Lord Blackburn's dictum above improperly "transformed a duty to act carefully into a duty to achieve a particular result".[153] Critically, the duty's strictness does not follow from the proposition that liability should not be avoided by delegating the task. That is why "non-delegable duty" is a misnomer. The strictness of a 'non-delegable' duty is a non-sequitur.

It has been suggested that *Lepore* is inconsistent with *Morris v C W Martin & Sons Ltd* ('*Morris*'),[154] where the English Court of Appeal held that a launderette was strictly liable for their delegate's intentional criminal act — the theft of a mink coat entrusted to the launderette.[155] In *Bird*, that was used to suggest that liability for a non-employee's sexual assault is better seen as breach of a non-delegable duty.[156] Edelman and Steward JJ in *Schokman* saw *Morris* as a case of non-delegable duty.[157]

But *Morris* illustrates why "non-delegable duty" is a misnomer. The case had little to do with tort. The launderette operator was a bailee. Bailees are strictly liable for the custody of bailed goods. Just as the strictness of the 'non-delegable duty' of party-wall owners is furnished by

[149] Ibid 451.
[150] Ibid 455.
[151] *Pickard v Smith* (1861) 142 ER 535, 539.
[152] *Lepore* (n 70) [249]
[153] Ibid [249].
[154] [1966] 1 QB 716.
[155] *Schokman* (n 15) [73].
[156] *Bird* (n 1) [52].
[157] *Schockman* (n 15) [74].

the law of nuisance,[158] the duty in *Morris* was strict only because that was a consequence of the law of bailment, a scion of the old *lex mercatoria*. The duty might equally be contractual. Whether X's liability can be avoided by engaging a delegate is analytically distinct from whether X's liability is "strict" (or independent of fault) in the first place. To suppose otherwise is the basic error of "non-delegable duties" in their modern form. There is much to be said for Professor Fridman's view, writing on the Canadian law of torts, that a non-delegable duty is not its own species of duty, but that old cases of non-delegable duty "can be explained on other conventional grounds such as private nuisance…joint tortfeasance, statutory non-delegable duty, liability under *Rylands v Fletcher*, or personal negligence".[159] That is consistent with the High Court's statement that for "there [to] be a non-delegable duty of care there must first be a duty of care", and that one must not "elide the step of finding a duty with that of determining its delegability".[160]

Fourth, while the view that non-delegable duties constitute some standalone genus of strict liability in tort is historically mistaken, it may now be too entrenched to be disturbed. Even so, there is hardly reason to extend it to delegates' criminal acts, even if the distinction between intentional and negligent acts may not be analytically precise. Justice Windeyer recognised that policy and workability provide "the bedrock foundation on which the common law of torts stands" and inform its development.[161] As a matter of policy, it would be intolerably onerous to make anyone who assumes the care of specially vulnerable persons an insurer for *every* act of their delegate, however intentional or opportunistic. What incentive would remain to sue in negligence and establish fault? Equally, coherence demands restraint: in *Stoneman v Lyons*, four High Court judges warned against expanding non-delegable duties lest we subvert the

[158] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 367.
[159] Chamberlain et al (eds), *Fridman's The Law of Torts in Canada* (Thomson Reuters, 2020) 359.
[160] *Hollis* (n 12) [27].
[161] *Smith v Jenkins* (1970) 119 CLR 397, 418.

employee/independent contractor distinction.[162] After all, non-delegable duties developed in the 19th century to fill gaps in vicarious liability, not to supplant it. The problem is "to prevent the exception from eating up the rule".[163]

Bird's attempt to reallocate liability for sexual abuse to non-delegable duties distorts this preference for vicarious liability and for negligence — a preference shared in Canada[164] and reflected in statute. Section 5Q of the *Civil Liability Act 2002* (NSW) ('CLA') requires courts to consider non-delegable duties as though they were cases of vicarious liability for a delegate's negligence for the purposes of that Act. That enactment was a product of the Ipp Report's dislike for non-delegable duties as a "disguised" form of vicarious liability.[165] Expansion of non-delegable duties would be incoherent with the policy of those statutes.

It would also cut across the post-Royal Commission reforms. For example, CLA, s 6F imposes a duty of care in negligence on organisations to take reasonable steps to prevent child abuse in connection with their responsibility for a child. Proof of abuse raises a presumption of negligence, rebutted only when the defendant proves that reasonable care was taken. That provision is prospective only, applying from 26 October 2018. An attempt at general law to make institutions strictly liable under a non-delegable duty would be incoherent with Parliament's choice to make liability subject to a defence of "reasonable precautions". In the *AA* appeal, counsel discredited this possibility: "if Parliament had wanted it to be exhaustive, it could have said so".[166] That submission fixes only on inconsistency. However, the common law may be *incoherent* with statutory policy despite not being *inconsistent* with any implied negative.[167]

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[162] (1975) 133 CLR 550, 565 (Stephen J), 576 (Mason J, Barwick and Gibbs JJ agreeing).
[163] *Woodland* (n 135) [22].
[164] *EDG v Hammer* (2003) 230 DLR (4th) 554, [20].
[165] Ipp, *Review of the Law of Negligence* (2002) [11.12]-[11.13].
[166] *AA* [2025] HCATrans 053, 2331-2333.
[167] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [25].

The incoherence is only added by a recent NSW Government proposal to make CLA, Part 1B retrospective, with "ongoing work...being conducted through the Standing Council of Attorneys-General" to enact uniform legislation to that effect.[168] It need hardly be said that developments in the common law should take heed of the effect of uniform legislation.[169]

V A LEGISLATIVE RESPONSE?

The post-Royal Commission reforms, particularly the statutory vicarious liability regime for institutional child sexual abuse, have likely diminished *Bird*'s impact. Indeed, the potential of these reforms remains underappreciated in recent litigation. In NSW, CLA s 6O provides that, upon appointment of a proper defendant, a duty owed by the unincorporated association "is a duty…owed by the proper defendant" and the proper defendant's liability is "that the organisation would have incurred" if it "had legal personality". Yet in *AA*,[170] where proceedings were initiated against the Diocese's property-holding trustee, the pleadings fixed upon the trustee's ownership of the presbytery where the abuse occurred to ground a duty of care, by analogy with owner-occupier duty cases such as *Modbury Triangle Shopping Centre Pty Ltd v Anzil*.[171] The better approach is to rely upon the Diocese's deemed legal personality to establish that *the Diocese* owed the duty.

Nevertheless, further reforms are worthwhile. First, the proposed retrospective application of statutory vicarious liability would not generate significant uncertainty, and it may be appropriate to reverse *Bird*: *Hollis*, *Scott* and *Sweeney* illustrate that the legal system already teems with established norms to determine liability. Second, the statutory regime defines an individual as "akin to an employee" using the "organization test" championed by Lord

[168] NSW, *Parliamentary Debates*, Legislative Council, 6 March 2025 (Courtney Houssos) 72.
[169] *Esso* (n 79).
[170] [2025] NSWCA 72, [186].
[171] (2000) 205 CLR 254.

Denning[172] — ie, whether the individual "carries out activities as an integral part of the activities carried on by the organisation…for the benefit of the organisation".[173] The multifactorial approach, as in *Hollis*, is preferable. As Mason J warned in *Stevens v Brodribb Sawmilling Co Pty Ltd*,[174] the organization test may impose liability even where the principal lacked "capacity to control the contractor", a concern realised in *Armes*, where the benefit the Council received from the foster parents' actions received significant weight, despite the lack of control.[175] The test also poses difficult questions with atypical workers and labour hire arrangements, where individuals may be integrated into the organization's workplace but not their business.[176]

Third, questions of corporate attribution are central to negligence claims. For instance, in determining the foreseeability of the risk of abuse for the purposes of the standard of care, does a parish priest's knowledge suffice, or must it be that of the Bishop or Cardinal? It has been suggested that CLA, s 6O relaxes the rules of attribution.[177] That is unlikely. Section 6O is a machinery provision deeming the organisation's acts to be those of the proper defendant: subsection (b) provides that "anything *done by* the unincorporated organisation is taken to have been done by the proper defendant", but that does not answer what was "done by" the unincorporated association in the first place. It has never been suggested that comparable provisions, such as colonial "claims against the government" legislation, altered rules of attribution for the Crown. Clarification may be needed, noting that attribution at an exceedingly low level risks transmuting fault-based liability into strict liability.

[172] *Broom v Morgan* [1953] 1 QB 597.
[173] *CLA*, s 6G.
[174] *Stevens* (n 35) 28.
[175] *Armes* (n 103) [60].
[176] Riley et al, *Macken's Law of Employment* (Thomson Reuters, 2022) [2.710].
[177] *AA* (n 166) 83-89 (Herzfeld SC).

Fourth, an issue not addressed in *Bird* is joint vicarious liability where there are multiple employers, a lurking possibility given the complex interplay of unincorporated organisations in large institutions. Joint vicarious liability is not possible in Australia.[178] However, it is accepted in other common law jurisdictions,[179] and logically, "a single act", or two simultaneous acts, "may…effect the purposes of two independent employers".[180] That may merit recognition in statute.

VI CONCLUSION

The development of the law of vicarious liability "has not always proceeded on a correct understanding of the basis of earlier decisions".[181] *Bird* continues the trend, imposing a formalistic division between employment and non-employment relationships. Rather than follow England and Canada or shift liability to non-delegable duties, a principled approach involves asking whether the relationship engages the doctrine's fundamental concerns, including control and enterprise risk. That ought to be the approach in legislation reversing *Bird*.

[178] *Day v Ocean Beach Hotel Shellharbour* [2013] NSWCA 250, [23]-[33].
[179] *Viasystems v Thermal Transfer* [2006] QB 510; *Blackwater v Plint* [2005] 3 SCR 3; Second Restatement (n 83) §226.
[180] Second Restatement (n 83) §226.
[181] *Sweeney* (n 24) [11].