THE LIABILITY OF EMPLOYERS FOR THE ACTS OF THEIR EMPLOYEES: A COMPARATIVE ANALYSIS OF SECTION 425 OF THE THAI CIVIL AND COMMERCIAL CODE AND VICARIOUS LIABILITY IN ENGLISH TORT LAW

BY

MR. ADAM REEKIE

A THESIS SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE DEGREE OF MASTER
OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
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was approved as partial fulfillment of the requirements for
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Thesis Title	THE LIABILITY OF EMPLOYERS FOR THE ACTS OF THEIR EMPLOYEES: A COMPARATIVE ANALYSIS OF SECTION 425 OF THE THAI CIVIL AND COMMERCIAL CODE AND VICARIOUS LIABILITY IN ENGLISH TORT LAW
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ABSTRACT

The doctrine of vicarious liability in English law has undergone significant development in the last few years. This has been due to a number of recent cases the facts of which did not easily fall within the previous legal tests which had endured for some years. The UK Supreme Court, in reviewing and reshaping the doctrine, has focused on the legal principle and policy bases and has given clear statements that the doctrine should aim at compensating victims predominantly on the basis of enterprise risk theory. Enterprise risk theory dictates that a business should be responsible for damage arising from all the risks which are caused or enhanced by its operation, adopting a concept aligned with distributive justice rather than corrective justice which is more usual in tort law. Although the UK Supreme Court has made clear statements about the policy and principle basis of the doctrine, uncertainty remains over the application of the test for when, and for whom, vicarious liability may arise.

Section 425 of the Thai Civil and Commercial Code appears to contain the same requirements for conferring liability on an employer for the acts of her employee as the doctrine of vicarious liability in English law. These elements are (i) the requirement for a particular relationship, employer-employee, and (ii) the requirement that the wrongful act be committed in the course of employment. Indeed, the requirements of Section 425, when read with other connected sections in the Thai Civil and Commercial Code, demonstrate a fundamentally different legal concept to the stated sources of the Section, namely one that is strict (non-fault based) liability confined to the relationship of employer and employee. However, these are the same concepts that were present in English law vicarious liability at the time of the adoption of the Thai Civil and Commercial Code, which may suggest the influence of English law on the key draftsmen (who had received extensive legal education in England).

The similarity in the requirements presents the opportunity for a useful comparative analysis. Although English law vicarious liability has previously been compared to the position in other common law jurisdictions and Western European jurisdictions, this thesis offers the opportunity for a detailed examination of how a fundamentally similar rule has developed in a system which differs in terms of traditional legal categorisation (common law and civil law), geographical position (West and East), and standard economic classification (developed and developing). The objectives pursued by this thesis are to study and analyse the legal doctrines of both systems, to develop and present a clear picture of the theoretical underpinnings of the legal concepts, to analyse how those concepts have evolved, to apply the current Thai law to the fact patterns that have recently challenged English law, and to therefore be able to make recommendations for the future development of both systems.

This thesis argues that both systems appear to recognise the policy basis of enterprise risk theory, but that there are areas in the tests of each system which do not fully accord with this policy basis. Although Thai law relies on the control test for the establishment of the relevant relationship which was abandoned by the English courts

as too restrictive, the Thai law interpretation of the test is broader and may therefore avoid some of the issues that have beset the English courts. Nevertheless, using a test based on control does not fit well with enterprise risk theory. However, the English integration/organisation test, which purports to align more closely with enterprise risk theory, does not appear yet to be well adapted to dealing with situations where multiple parties benefit from a business' activities. The Thai Dika Court's approach in these situations is to be preferred. Finally, it appears that Section 425 may, similarly to English law prior to the most recent line of cases, be unable to confer liability on an employer for extreme acts which, although not committed strictly in the course of employment, are nevertheless closely connected with their assigned tasks. A broadening of the liability under Thai law to take such situations into account is therefore recommended.

Keywords: vicarious liability, Section 425 of the Thai Civil and Commercial Code, employer's liability, liability for the acts of others, tort law, strict liability, comparative law

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Adam Reekie

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CHAPTER 1
INTRODUCTION

1.1 Background

1.1.1 English law

The English common law notion of vicarious liability is an example of a rare concept in tort law, especially judicially-developed tort law, in that it confers strict liability. The usual position in English tort law is that the individual is held responsible for the consequences of her own wrongful acts. As Lord Nichols put it, speaking in the House of Lords:

"Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts."[1]

This can be seen as a general principle based on notions of corrective justice going back to Aristotle, which seeks to achieve equality in situations of essentially transactional wrongdoing: Party A has done harm to Party B, and Party B has suffered harm; therefore the judge tries to restore this situation to equality by passing judgment against Party A and awarding Party B damages to restore each of them to their former position.[2]

However the doctrine of vicarious liability in English law grants a remedy to an injured party against an innocent party who did not commit a wrongful

[1] *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, 8
[2] See Aristotle, *Nichomachean Ethics* especially 1132a

act. In other words, it renders the defendant[3] liable for acts of another party. The classic situation is of employer and employee: this doctrine holds the employer liable for wrongful acts of the employee, provided they were committed in the course of employment. Therefore this notion does not adhere to basic principles of tort law: that a person is responsible for her own wrongful acts, and that there should be "no liability without fault".[4] Rather than corrective justice, the concept is one of distributive justice: a principle of how resources should be distributed in society.

In spite of this, "relatively little attention"[5] has been directed at the principled basis of the notion of vicarious liability, either by English judges or, to a lesser extent, academics. At least this was the case until the 21st century. Since the landmark *Lister* case[6] there has been a line of cases expanding the application of the doctrine into new areas, and this expansion has required the courts to explain and understand the doctrine and its principled basis and justification anew. The reason for this line of cases seems to be the Supreme Court's intention to find a remedy for certain defendants in situations which do not fall easily into the criteria laid down by previous cases. This is demonstrated by *Lister*, the first English case in this line of decisions.

In this case, the defendants owned and managed a boarding school which dealt particularly with children who have emotional and behavioural difficulties. The institution was run by Mr Grain, the warden, who was responsible for discipline and supervision of the children. The claimants in the case had attended the school

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[3] This defendant is often referred to as D2, where D1 is the actual tortfeasor and D2 is liable through the doctrine of vicarious liability, not having committed the tortious act herself.

[4] Peter Cane, *The Anatomy of Tort Law* (1997) 49

[5] Paula Giliker, *Vicarious Liability in Tort: a Comparative Perspective* (2010) 2, although there have been notable academic works in this area, particularly G Williams, 'Vicarious Liability and the Master's Indemnity' (1957) *The Modern Law Review* 20, 220-235 and P.S. Atiyah, *Vicarious Liability in the Law of Torts* (1967), both cited in argument in the UK Supreme Court in the recent cases on this topic which will be discussed below, *Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v WM Morrison Supermarkets PLC* [2016] UKSC 11

[6] *Lister v Hesley Hall Ltd* [2002] UKHL 22

between 1979 and 1982, and had been systematically sexually abused by Mr Grain. Mr Grain was subsequently sentenced to seven years imprisonment, but the victims sought civil compensation. A claim of negligence directed against the defendant school was rejected at first instance and not appealed. The House of Lords was asked to consider whether the defendant could be found vicariously liable for the acts of Mr Grain, the defendant's employee. The House of Lords found that the defendants were so liable, in spite of the fact that Mr Grain's acts were precisely contrary to the duties for which he had been employed – the court considered that they were nevertheless committed in the course of employment. This decision expanded the doctrine beyond its previously accepted limits; however, the House of Lords did not give a clear and agreed statement of the principled basis on which the decision was based nor did they provide a test that is simple to apply for judges in future cases; Lord Nichols in a subsequent House of Lords case in the same year concerning vicarious liability, *Dubai Aluminium Co Ltd v Salaam*,[7] commented that the decision "provides no clear assistance" for applying the new test.

The recent expansion has not only been in terms of the kinds of acts for which liability will be conferred on the employer. The traditional limitation of the doctrine to the employer-employee relationship has also been lifted, again by a case concerning sexual abuse. This was the more recent case of *Various Claimants v The Catholic Child Welfare Society*[8], in which a large number of claimants brought proceedings alleging physical and sexual abuse by staff at a school until its closure in the 1990s. The headmaster and a number of the staff were members of the Institute of Brothers of Christian Schools, an unincorporated association of a religious character. Here the court found that the relationship between the brothers and the Institute was

[7] [2002] UKHL 28
[8] [2012] UKSC 56

"sufficiently akin to that of employer and employees"[9] such that it was "fair, just and reasonable"[10] that vicarious liability be borne by the defendant.

Therefore these cases have expanded the application of this doctrine significantly, both in terms of the relationships and acts covered. Lord Philips in *Various Claimants* said that the decisions prior to that case "represent sound and logical incremental developments of the law".[11] However he admitted too that they made it harder to identify the criteria that must be demonstrated to establish vicarious liability.[12] Indeed, the courts' decisions, including that in *Various Claimants* and the cases which followed, have created a significant amount of uncertainty in the application of the law: the policy objectives and principles of the doctrine have been stated in different ways by different judges, and the application of the law now apparently focuses more on whether the judge believes it is fair just and reasonable to find the defendant liable, with little in the way of clear guidance. The uncertainty has resulted in two cases heard together in the Supreme Court in 2016, *Cox v Ministry of Justice*[13] and *Mohamud v WM Morrison Supermarkets PLC,*[14] concerning the relationship and the type of acts covered respectively, which will be discussed in detail in this thesis. However, there remains uncertainty as to the scope and application of the recently expanded doctrine.

1.1.2 Thai law

The concept of individual responsibility can be seen as the basic principle not just of English tort law, but also of the Thai law of wrongful acts (ละเมิด *lamert*). Section 420 of the Thai Civil and Commercial Code (TCCC), which may be considered the general rule relating to wrongful acts, states:

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[9] ibid at [60]
[10] ibid at [34]
[11] ibid at [21]
[12] ibid
[13] [2016] UKSC 10
[14] *Mr A M Mohamud (in substitution for Mr A Mohamud (deceased)) v WM Morrison Supermarkets plc* [2016] UKSC 11

"A person who, willfully or negligently, unlawfully injures the life, body, health, liberty or property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor."[15]

Therefore the general rule is, like in English law, that the person who unlawfully injures another is the person who is required to pay compensation. However, the TCCC also has an exception to this general rule covering the relationship of employer and employee in Section 425, which states:

"An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment."[16]

From the plain wording of the legal rule, it is evident that the conception is materially the same as the English law notion of vicarious liability, or at least as the notion was before the recent line of cases expanding the doctrine as mentioned above. There is the requirement for the relationship: employer-employee; the requirement for the wrongful act to be committed in the course of employment; and, crucially, strict liability: where the two former elements are made out, the employer cannot escape liability by claiming that she acted properly. Liability is strictly conferred without the proof, or even the presumption, of fault on the employer. The relationship alone is sufficient to give rise to the liability for a wrongful act of another.

Indeed, as argued in this thesis, this strict liability calls into question the orthodox view of the development of this part of the TCCC. The orthodox view, based indeed on interviews with the draftsmen (although such interviews were conducted many decades after the event) is that the TCCC was compiled by essentially copying earlier codes. Indeed, the Book of Revised Drafts, a compilation of the revised

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[15] Thai Civil and Commercial Code, Section 420, translation from Kamol Sandhikshetrin, *The Civil and Commercial Code Books I-VI and Glossary* (2008)

[16] Thai Civil and Commercial Code, Section 425, translation from Sandhikshetrin (n 15)

English drafts of the TCCC which contains handwritten notations giving the sources for each provision, states the sources of Section 425 of TCCC as Section 189 of the 1923 draft Civil and Commercial Code, Article 715 of the Japanese Civil Code and Section 831 of the German Civil Code.[17] The orthodox view of the method used seems, essentially, to have been to compare the wording of two English translations – De Becker's translation of the Japanese Civil Code and Chung Hui Wang's translation of the German Civil Code – and to select the one which was linguistically superior.

However, as argued in more detail in this thesis, a close analysis of these sources suggests that this is an over-simplified view of the process. Here, the draftsmen of TCCC have in fact altered the wording in a way which produces a very different legal concept to the three stated sources. The 1923 code, heavily influenced by French law, does not contain the distinction between employees and independent contractors which is explicit in the TCCC. The German and Japanese codes have a concept of liability in this area which is fundamentally based on fault of the employer. Although they both have a presumption that the employer is at fault, if the employer can demonstrate that she acted properly in selection and supervision of the employee, the employer shall not be held liable. This creates a fault-based conception of liability, rather than strict liability. As such, a fault-based concept means that this doctrine fits closer with the general concept of tort liability: the employer was at fault when selecting/supervising the employee; this fault resulted in damage to a third party; therefore, in accordance with the standard corrective justice basis of tort liability, the employer should be liable. The TCCC, however, unlike the apparent sources of the provision, is based on strict liability arising only within the employment context.

It is argued in this thesis that these differences in concept call into question the view of the development of the TCCC as one of mere copying of the stated sources. Rather, it is suggested that the draftsmen, the key members of whom had received legal education in England, may have been influenced by the English law

[17] Book of Revised Drafts, Section 425: see discussion in Chapter 3 below

concept of vicarious liability to create a provision which is materially the same as the English concept at the time of drafting of the TCCC, and fundamentally different from that of the 1923 draft, and the Japanese and German stated sources.

Even if the precise mechanism of the creation of this part of the TCCC cannot be firmly concluded in the absence of direct evidence which satisfactorily explains the form of Section 425, it seems clear that the concepts of Section 425 and English law vicarious liability at the time of drafting the TCCC appear materially the same, at least on the plain wording of the legal concepts. This therefore provides an opportunity to observe how an apparently similar rule has been interpreted and developed in two systems which differ fundamentally in terms of, for example, their traditional legal categorisation (common law and civil law), geographical position (West and East), standard economic classification (developed and developing[18]), etc.

It is hoped that this provides the opportunity for a fruitful comparison which will result in a deeper understanding of both systems' attitudes to and conceptions of the liability of employers for the acts of their employees. It is hoped that this deeper understanding will help achieve some further specific goals as stated below.

1.2 Hypothesis

1. English law has struggled to cope with recent cases which have expanded the scope and basis for vicarious liability resulting in an unsatisfactory state of the law. An analysis of Thai law will provide a sufficient solution for the future development of the English law of vicarious liability.

[18] For example, as regards the WTO, Thailand is a member of the Asian Group of Developing Members, see communication WT/GC/COM/6 issued 27 March 2012. For the purposes of the WTO, Members announce for themselves whether they are developed, developing or less developed: other Members may challenge their self-classification. Thailand has therefore classified itself, for WTO purposes at least, as developing. The UK is considered a developed country for WTO purposes.

2. In the recent line of English cases, the courts have revisited the principled basis and justification for the English doctrine of vicarious liability. A comparison with Thai law will reveal whether the same principles are in evidence or whether Thai law rests on different principles. The principles, once identified, may help Thai law deal effectively with difficult cases such as those which have recently challenged English law.

1.3 Objectives of study

1. To study, analyse and compare the English common law concept of vicarious liability and Section 425 of the TCCC (and other relevant sections).

2. To develop and present a clear picture of the theoretical basis and principles underlying both the English common law concept of vicarious liability and Section 425 of the TCCC (and other relevant sections).

3. To study and analyse the way in which the English law of vicarious liability has developed and the way in which Section 425 of the TCCC was adopted to assist in a clearer understanding of the development and principles underlying the rules.

4. To analyse how Thai law may be able to address challenging cases of the kind with which the English law of vicarious liability has struggled.

1.4 Scope of study

This study focuses on (i) the relationship of employer-employee and (ii) the type of acts which confer liability on the employer, as these are the key elements of the English law doctrine of vicarious liability which have been questioned and developed by recent case law. As such, the comparative exercise will focus on similar elements in Thai law. The employer's indemnity (English law) or joint liability (Thai law) will not be analysed in detail other than in relation to the principles underlying the legal rules.

Furthermore, vicarious liability in English law continues to apply primarily to private sector employers and their employees (or situations with similar relationships, after the *Various Claimants* case). Therefore this study will focus primarily on Section 425 and other provisions of the TCCC which apply to private individuals and private sector entities. It will not consider provisions regarding liability of public sector employees, ministries, government officials etc, which are covered by other areas of Thai law.

The focus of this thesis is on acts of employees which have not been specifically ordered or authorized by their employers. In circumstances of specific orders or authorization by employers, the principles which apply are that of agency, both in English law and Thai law. Vicarious liability concerns acts of employees which are done in the course of employment, but not specifically ordered or authorized by the employer. Therefore specifically ordered or authorized acts are outside of the scope of this thesis.

1.5 Methodology

Research will be conducted through literature review and documentary research. The basic methodological principle applied will be functionalism. Essentially, functionalism proceeds by identifying a social problem or need in society; then finding the institution (legal or otherwise) which addresses the social problem or need in that society; after this, the comparatist will look at a different society and attempt to identify the institution, legal or otherwise, which addresses the same social problem or need within that society.[19] As such, the focus of a functionalist comparative exercise is the problem[20] rather than the legal rule.

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[19] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Trans. Tony Weir, 3rd edn 1998) 34

[20] For some, the assumption that both societies experience the same problem is an issue for functionalism – e.g. See Pierre Legrand, 'The Same and The Different', in Pierre Legrand and Roderick Munday, *Comparative Legal Studies: Traditions and Transitions*

In this thesis, the identified problem is whether, and to what extent, employers may be held liable for acts of their employees which they have not ordered or authorized. This problem is addressed in English law by the doctrine of vicarious liability, and in Thai law by Section 425 of the TCCC (and other sections). The functionalist comparative exercise will proceed by focusing on similar circumstances in which these two rules have been applied to identify areas of similarity and difference between the two systems' approaches, which it will then attempt to explain by identifying and analysing principles underlying the two rules. As such, much of the analysis will centre on judicial decisions.

Functionalism, for some proponents,[21] would use a presumption of similarity in the ways that societies deal with the same problem, which may be seen to act as a heuristic principle. Others have criticized this presumption as not demonstrating an acceptance of differing legal cultures, and have preferred to presume difference between systems.[22] This thesis will presume neither similarity nor difference, although the objectives of this research will be best served by identifying the similarities and differences in principles applied in English law and Thai law, and identifying differences in the application of Thai law which may serve to address the issues facing the application of English law.

English law and Thai law have been chosen as the legal systems for comparison for the following reasons.

English law is selected as the starting point of the comparison because of the issues it is currently facing as a result of the recent expansion of the doctrine of vicarious liability. Thai law is chosen as a suitable comparison system because of the

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(2003), 284ff. However, these concerns may be partly a result of the word "problem". The conclusion may be that the "problem" is not regarded as a problem in one society for a variety of reasons. However, this conclusion may nevertheless be arrived at by a comparison starting with the same "problem" in two societies.

[21] E.g. Zweigert and Kötz (n 19) 37

[22] E.g. Pierre Legrand, 'The Same and The Different', in Pierre Legrand and Roderick Munday, *Comparative Legal Studies: Traditions and Transitions* (2003), 240ff

similarity of the rule which is in operation. It is argued in this thesis that the similarity is due to the circumstances surrounding the drafting of the TCCC. Thai law offers a particular opportunity because the rule has been developed and applied in a system quite different to the English legal system in terms of legal categorisation, influences, history etc. English law in this area already often takes into account other decisions and developments in other common law jurisdictions;[23] it is hoped that Thai law may provide a new avenue by which to look for improvement in the development of the law. Nevertheless in making recommendations concerning the adoption in English law of Thai law notions, or vice versa, must be made with care and with an understanding of the differences between the systems which may make such adoption problematic or inappropriate.

As regards Thai law, the arguments concerning the development of the TCCC are important also for the attempt to discover the principled basis of Section 425 of the TCCC. The similarity of the rule, and the possibility developed in this thesis that the English notion was an influence in drafting this and related provisions, means that similarities and differences in the application of the law by Thai and English judges may help to reveal the principles underlying the application of Section 425 of the TCCC. Theories of legal transplantation, beginning with Alan Watson[24] and developed subsequently by other theorists, will be employed in this regard.

1.6 Expected results

[23] In particular, the Canadian Supreme Court judgment in *Bazley v Curry* [1999] 2 SCR 534 is often quoted and extremely influential in *Lister* and subsequent cases.

[24] Watson, 'Legal Change: Sources of Law And Legal Culture,' (1983) 131 University of Pennsylvania Law Review 1121 on his influential attack on the so-called mirror theories of the relationship between law and society, and his key text on the theory of legal transplantation, A Watson, *Legal Transplants: An Approach to Comparative Law* (1974)

1.To understand the English law doctrine of vicarious liability, the way in which the scope of application of the law has recently been expanded and the issues which it faces;

2. To understand the application of the Thai law in relation to the liability of employers for the acts of their employees, in particular as regards the application of Section 425 of the TCCC and other related sections;

3. To understand the principles underlying the English doctrine of vicarious liability and the way in which this doctrine has developed;

4. To understand the principles underlying the application of Section 425 of the TCCC as a result of a comparison with the application of the English law doctrine of vicarious liability, and as a result of the way that Section 425 of the TCCC was adopted;

5. To be able to make recommendations as to future developments of the English law doctrine of vicarious liability; and

6. To be able to make recommendations on how Thai law may be interpreted in the event of it being required to address to challenging situations similar to those which English law has struggled.

CHAPTER 2
TERMINOLOGY, PRINCIPLES AND POLICY

2.1 Terminology

2.1.1 English law terminology

As stated in Chapter 1 of this thesis, 'vicarious liability' is the term used in English law, and in common law generally,[25] to signify strict liability on one party for the tortious acts of another party. Historically, in common law, vicarious liability has been described as the liability for the 'master' for the torts of his 'servants': as such, in the parts of this thesis which deal with the historical development of the English law doctrine of vicarious liability, this terminology will occasionally be used. The more frequently used modern terms are 'employer' and 'employee', since the employer-employee relationship is the most typical example in which vicarious liability will be applied.

Traditionally the courts have drawn a fundamental distinction between those working under a 'contract of service' (employment), who are considered 'employees' and in relation to whose acts employers may be held vicariously liable, and those operating under a 'contract for services', who are considered 'independent contractors' and for whose acts an employer will generally not be held liable. Therefore, in this thesis, the terms "employer", "employee" and "independent contractor" will predominantly be used to refer to the typical parties involved in the English law notion of vicarious liability, despite the fact that English law now recognises that vicarious liability may arise outside of the employment relationship as discussed later in this thesis.

[25] Although the term 'agency' is used in the USA in circumstances which would be referred to by other common law jurisdictions as 'vicarious' – see Giliker (n 5) 22

For liability of the employer to arise vicariously, the victim must prove that the employee has committed a specific tort, for example negligence or trespass against the person, and the act must have been performed in the course of the employee's employment. Therefore this thesis will usually refer to the 'tortious act' of the employee and the employee's 'course of employment', since these are the usual English law terms.

2.1.2 Thai law terminology

As stated in Chapter 1 of this thesis, the central provision conferring liability on employers for wrongful acts of employees is Section 425 of the TCCC, which may be translated as:

"An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment"[26]

This may be broken down into two elements, similarly to the English doctrine of vicarious liability: the relationship between the defendant and the individual committing the wrongful act, and the circumstances within which the act was committed. The Thai terms translated above as "employer" and "employee" are *nai jang* and *lug jang* respectively. The distinction between an employee and an independent contractor, which traditionally was fundamental to English law vicarious liability as mentioned above, is made clear in Section 428 of the TCCC:

"An employer is not liable for damage done by the contractor to a third person in the course of the work, unless the employer was at fault in regard to the [work][27] ordered or to his instructions or to the selection of the contractor"[28]

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[26] TCCC Section 425, translation from Sandhikshetrin (n 12)

[27] The authoritative Kamol Sandhikshetrin translation gives "word" instead of "work", but it is clear from the original Thai version that "work" is correct and "word" is therefore a typographical error.

[28] TCCC Section 428, translation from Sandhikshetrin (n 12)

Here, though translated as "employer", the Thai word used in 428 is *pu wa jang tam kong*, which literally translates as 'a person who hires someone to do something', rather than *nai jang* used in Section 425. In the translation of Section 428 cited above, "contractor" is used for the Thai *pu rab jang*, which literally translates as 'a person who is hired'. In order to avoid confusion with the English law terminology, this thesis will use capitalised terms in respect of the following Thai law terms: "Employer" for *nai jang*, "Employee" for *lug jang*, "Hirer" for *pu wa jang tam kong* and "Contractor" for *pu rab jang*.

The scope of an Employee's acts for which an Employer will be held liable under Section 425 of the TCCC are those *lamert*, "wrongful acts", which are *gratam bai nai tang gan ti jang*, "committed in the course of his employment." In this thesis, the term "wrongful acts" will be used to avoid confusion with the English law term "tortious acts", as above. The practical difference caused by these definitions and their interpretations will be discussed elsewhere, in particular in chapters 4 and 5 of this thesis.

2.2 Mapping: placing the doctrines within their frameworks

2.2.1 Vicarious liability within English tort law

Vicarious liability sits within English tort law, also sometimes referred to as the English 'law of torts' due to the various bases of liability that apply to different torts.[29] Torts may be regarded, most simply, as "civil wrongs for which law will provide a remedy."[30] However, there is no widely accepted definition of a tort that would clearly distinguish between torts and other civil wrongs, such as breaches of contract or of an equitable obligation. Indeed, tort law is conceived in English law as a part of a larger

[29] John Murphy and Christian Witting, *Street on Torts* (13th edn, 2012) 14
[30] Jenny Steele, *Tort Law: Text, Cases and Materials* (3rd edn 2014) 3

body of civil law sometimes called the law of obligations. The law of obligations may be most easily described by contrasting it with the law of property.[31] The law of property consists of rules that establish proprietary rights and interests ("constitutive rules"), which the law of obligations protects ("protective rules"). Although contract law and the law of trusts, for example, may be treated as part of the law of obligations, in fact these topics contain both constitutive rules and protective rules. So, for example, contract law lays down both rules which require the parties to keep contracts, and which sanction them if they breach such contracts (protective rules) but also rules which concern the formation of contracts (constitutive rules), which give rise to the relevant obligations. By contrast, tort law is purely protective: it establishes obligations designed to protect interests created by constitutive rules of the law of property, trusts and contract or which arise in some other way.[32]

The classic approach[33] to understanding the purpose and functions of tort law is to focus on the interests of the claimant. Interests in this context may be defined as "the kinds of claims, wants, or desires that people seek to satisfy in life, and which a civilised society ought to recognise as theirs as of right".[34] Tort law determines which of these interests are so fundamental that the law should impose duties upon all members of society that are designed to protect those interests, and to provide a remedy when those interests are wrongfully violated.

The lack of unity perceived in English tort law can be traced back to the historical "forms of action" which were central to the early system of pleading cases before the English courts. Under this formulary system, an action could only be started (and succeed) if the facts of the plaintiff's case fitted into one of the formulae which the courts recognised. If a formula (called a "writ") could not be found, the claim would fail even if otherwise potentially deserving of a remedy on basic grounds of fairness.

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[31] This approach is taken by Peter Cane (n 4) 10ff

[32] Cane (n 4) 11

[33] John Murphy and Christian Witting (n 29) 5

[34] ibid

Although this formulary system was replaced in the 19th century, with "forms of action" replaced by more conceptual "causes of action", it has left its mark on the modern system. The prevalent approach to tort law is still essentially formulaic. Modern torts are treated as sets of technical legal rules which define the conditions for success in litigation: "[a] lawyer advises a client whether planned action might attract tort liability by surveying the causes of action in tort and determining whether the proposed activity falls within any one of them."[35]

English tort law can be mapped by identifying the different circumstances in which an interest has been found by the courts as worthy of protection (a "protected interest"[36]), and what actions have been considered to violate that protected interest ("sanctioned conduct"). For example, assault, a subcategory of the tort of trespass to the person, recognises the protected interest of "bodily integrity", and the sanctioned conduct of "immediate threat which deliberately puts the claimant in fear of unlawful interference with her bodily integrity". A person who can show a protected interest will have a cause of action in respect of any other person who has undertaken the relevant sanctioned conduct.

There are many different causes of action due to the variety of different protected interests and sanctioned conduct. As a result, many textbooks will discuss the law by reference to a list of a particular number of 'torts', where different causes of action are gathered into categories, including the tort of negligence, the tort of nuisance, the tort of conversion, the tort of defamation etc. It is notable also that the list of causes of action is not closed, and the courts may in the future find more protectable interests and sanctioned conduct. As such, the English law of torts remains a dynamic area of English common law.

Vicarious liability is not itself a tort, but rather a mechanism by which liability will be imposed on one person for the tort of another. In order to employ the

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[35] Cane (n 4) 8

[36] This terminology is used by Cane (n 4), and commonly used in other texts.

doctrine of vicarious liability, a claimant must show (i) that a tort has been committed against her; (ii) that the relevant relationship exists between the vicarious defendant and the tortfeasor (usually the relationship of employer-employee); and (iii) that the tort was committed in the course of the relationship, usually employment (or in doing something that has a sufficiently close connection to employment). Therefore vicarious liability acts as an exception to the general programme of tort liability, usually operating in the context of the employment relationship.

2.2.2 Section 425 within the Thai law of wrongful acts

The English approach to tort law described above, focusing on individual causes of action arising from specific protectable interests and sanctioned conduct, is typical in common law jurisdictions. This common law approach is in notable contrast to the approach generally taken in civil law jurisdictions (i.e. jurisdictions derived from or based on Roman law), of which Thai law is an example. Rather than the common law approach which tends to be characterised by a focus on whether a particular situation fits into a framework of rules and quite narrow principles which define the elements of a tort, civil law jurisdictions typically may be thought of as applying broad, general principles to particular facts.[37]

The Thai law relating to wrongful acts is contained in Book II of the TCCC which covers the law of obligations, at Title V. This Title is separated into three Chapters: (i) Liability for wrongful acts; (ii) Compensation for wrongful acts; and (iii) Justifiable acts. Chapter (i) has the following structure:

Section 420 is the general provision for wrongful acts.[38] As discussed in more detail below (in 2.4.2.2), this provision confers a wide ranging fault-based concept of personal liability: where a person unlawfully injures, wilfully or negligently, the life, body, health, liberty, property or any right of another, that person commits a

[37] Cane (n 4) 4

[38] Alessandro Stasi, *General Principles of Thai Private Law* (2016), 116

"wrongful act" and must make compensation.[39] The remaining subsections of this chapter may be seen to either clarify the operation of, or provide exceptions to, this general provision in particular circumstances.

Sections 425, 426 and 428 deal with the application of this liability for wrongful acts committed by Employees or Contractors. Section 425 provides essentially an exception of the general fault-based personal liability conferred by Section 420 for wrongful acts committed by an Employee in the course of employment: the Employer will be jointly liable to pay compensation for such acts. Section 426 grants an indemnity for the Employer who has been required to pay out under Section 425 – she is entitled to be reimbursed by the relevant Employee. Section 428 provides that, in contrast, a Hirer will not be liable for the acts of a Contractor unless she was at fault in regard to the work ordered or the instructions given. As discussed in more detail below, Section 428 clarifies that this extension of liability to the Employer will not apply in the Hirer-Contractor relationship. Here, the general fault-based personal liability principle evident in Section 420 is re-established, and the strict and vicarious liability exception provided by Section 425 is explicitly confined to the Employer-Employee relationship.

Therefore Section 425 may be seen as an exception to the general rule of the Thai law of wrongful acts in Title V of Book II of the TCCC. Although the general principle is that the person committing a wrongful act (as defined by Section 420) will be liable to compensate the victim, Section 425 provides an exception in the Employer-Employee relationship.[40] Here the Employer will be jointly liable for wrongful acts committed in the course of employment.

2.3 Critical literature review

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[39] Setabutr, *Principles of Civil Law: the Law of Delict* (1980) 78

[40] See Paijit Punyaphan, *Explanation of the Civil and Commercial Code: Wrongful Acts* (13th edn BE 2553) para 79

2.3.1 Scholarship on English law vicarious liability

The doctrine of vicarious liability has attracted the attention of numerous academics throughout the history of English legal scholarship. Much of the earlier work concentrated on the historical development of the doctrine, most notably John Wigmore's three-part article "Responsibility for Tortious Acts: Its History",[41] published in 1894, and the classic Oliver Wendell Holmes article, "Agency" published in 1891,[42] and the subject has been treated at length in the most famous works on English legal history including Pollock and Maitland's *The History of English Law Before the Time of Edward I*,[43] Holdsworth's *A History of English Law*[44] and later Plucknett's *Concise History of the Common Law*.[45] The differing views on the origins and development of the doctrine are addressed below, in Chapter 3.2. However, what has proved the most influential early attempt to deal in detail with the fundamental principles and policy is a 1916 work by Baty[46] which included an extensive and critically analytical view of the various policy bases that had previously been used to justify the doctrine. This work was significantly built upon by what has become the classic text in this area during the latter part of the 20th century, P.S. Atiyah's *Vicarious Liability in the Law of Torts*[47] which is often referred to in UK House of Lords/Supreme Court judgments including the most recent *Cox* and *Mohamud* cases. Atiyah's work updated Baty to a large degree, in particular focusing on changes in working practices

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[41] John Wigmore, 'Responsibility for Tortious Acts: Its History' (1894) 7(6) Harvard Law Review 315-337; John Wigmore, 'Responsibility for Tortious Acts: Its History. II. Harm Done by Servants and Other Agents: 1300-1850' (1894) 7(6) Harvard Law Review 383-405; John Wigmore, 'Responsibility for Tortious Acts: Its History. III.' (1894) 7(6) Harvard Law Review 441-463.

[42] Oliver Wendell Holmes Jr, 'Agency' (1891) Harvard Law Review 1

[43] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd edn 1898)

[44] WS Holdsworth, *A History of English Law* (3rd edn 1923)

[45] Theodore Plucknett, *Concise History Of the Common Law* (1956)

[46] T Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principles, Partners, Associations and Trade Unions Etc.* (1916)

[47] Atiyah (n 5)

during the 20th century, and the development of a more comprehensive insurance market, which ultimately affect the relative importance of the various principles and policy justifications for the doctrine and consequently shape its interpretation and application. However, since 1967 much has changed, in particular the rise of looser employment relationships and casual work, and therefore numerous other academics have reappraised the doctrine as case law has continued to develop, as discussed elsewhere in this thesis. Many of these works have been re-examinations of the basis of the doctrine[48] as each new important case has altered the application of the doctrine particularly in the wake of the decision in *Lister*.[49] However, the majority of these have used similar approaches, analysing the interpretation of judges in these cases in light of the various previously identified principle and policy bases. Other approaches to addressing the doctrine have included economic analyses which have focused on the benefits or otherwise of the extension of the doctrine,[50] generally advising only minor modifications to the doctrine to improve incentives. Only one work has performed an extensive comparative exercise in order to bring understanding to the doctrine: Paula Giliker's 2010 work, *Vicarious Liability in Tort: a Comparative Perspective*.[51] This uses primarily the French and German legal systems, identifying that the conventional approach of examining common law systems had frequently been performed (for example, by Atiyah in the academic sphere and often also by the courts in the most

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[48] e.g. John Bell, 'The Basis of Vicarious Liability' (2013) Cambridge Law Journal 72(1), 17.

[49] E.g. Claire McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) Common Law World Review 35, 268. Ewan McKendrick, 'Vicarious Liability and Independent Contractors—A Re□examination' (1990) *Modern Law Review* 53(6), 770-784.

[50] E.g. Alan O Sykes, 'The boundaries of vicarious liability: An economic analysis of the scope of employment rule and related legal doctrines' (1988) *Harvard Law Review* 101(3), 563-609; Yolande Hiriart and David Martimort, 'The benefits of extended liability' (2006) *The RAND Journal of Economics* 37(3), 562-582; Juan Carlos Bisso and Albert H. Choi, 'Optimal agency contracts: The effect of vicarious liability and judicial error' (2008): *International Review of Law and Economics* 28(3), 166-174.

[51] Giliker (n 5)

detailed judgments) without providing satisfactory clarity to the law. Giliker focuses on France and Germany due to proposals for harmonisation of tort law in the EU, the fact that both systems have much in common with England economically and politically, and due to the striking similarity in the formulations adapted in the different systems.[52] This thesis attempts to add to the comparative scholarship by broadening the search further. Rather than confining the search to countries which are similar politically and economically, this thesis investigates the potential for fruitful investigation performed on a system which is less similar politically and economically, historically, and in terms of its system's standard legal categorisation, but which has a similar formulation of the rule. [53] Furthermore, since Giliker's work was published there have been new developments in the law, in particular with the *Vicarious Claimants*, *Mohamud* and *Cox*. It is hoped that this will give a fresh perspective to the subject.

2.3.2 Scholarship on Section 425 of the TCCC

There have been several studies focusing on Section 425 of the TCCC, of which the most material are three LL.M theses. The first is the LL.M thesis of Ms Kornkanya Kanyapongse, entitled "Liability of Employers for the Consequences of Intentional Wrongful Acts by Employees".[54] This thesis explores the issue of employers' liability which arises from Sections 425 and 427 of the TCCC, but only focuses on the question of whether the employers should bear such liability when the employees committed the wrongful acts for personal reasons which have no, or very little, connection to their work. In particular, the thesis asks whether the employer should be held liable if the employee commits such wrongful act by deceit, fraud or any act deemed criminal under Thailand's criminal law. Accordingly, this thesis is significantly

[52] ibid at 5

[53] See earlier discussion in 1.1 above.

[54] Kornkanya Kanyapongse, "Liability of Employers for the Consequences of Intentional Wrongful Acts by Employees" (ความรับผิดของนายจ้างในผลแห่งการละเมิดโดยจงใจของลูกจ้าง) (Master's Thesis, Faculty of Law, Chulalongkorn University (BE.2532 (1989)).

different from Ms Kanyapongse's thesis because this thesis explores the vicarious liability from a comparative perspective, between English and Thai law, without such narrow focus on the issue of deceitful, fraudulent or criminal acts on the part of the employee. Therefore, this thesis has a different focus and a wider scope. Moreover, Ms Kanyapongse's thesis was written in 1989, and therefore this thesis provides updated research.

The second LL.M thesis was written by Mr. Sunthorn Leksakulchai, entitled "The Right to Recourse of Employers against Employees in the Case where the Employees Commit a Wrongful Act: An Analytical and Comparative Study".[55] This thesis researched one aspect of vicarious liability only, which is the extent of the employers' right to recourse under sections 425 and 426 of the TCCC. This thesis chose to compare Thailand's right to recourse with similar rights in countries from both civil law and common law systems, namely: Germany, France, Japan, England, the United States of America and Australia. As such, this thesis is significantly different in focus and scope from the author's thesis which specifically excludes the employer's right to recourse from its scope, focusing instead on the two hypotheses set out in Chapter 1. Finally, Mr. Leksakulchai's thesis was written almost thirty years ago, in 1990, before the most recent line of cases which has fundamentally changed English law in this area.

The third LL.M thesis was written by Pol. Lt. Nuttinee Satitanuchit, entitled "Employer's Liability".[56] In this thesis, Pol. Lt. Satitanuchit researched into vicarious liability of employers under Sections 425 and 426 of the TCCC, focusing on

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[55] Sunthorn Leksakulchai, The Right to Recourse of Employers against Employees in the Case where the Employees Commit a Wrongful Act: An Analytical and Comparative Study" (สิทธิไล่เบี้ยของนายจ้างที่มีต่อลูกจ้างในกรณีลูกจ้างทำละเมิด: ศึกษาเชิงวิเคราะห์และเชิงกฎหมายเปรียบเทียบ) (Master's Thesis, Faculty of Law, Thammasat University (BE. 2533 (1990)).

[56] Pol. Lt. Nuttinee Satitanuchit, "Employer's Liability" (ความรับผิดของนายจ้างในการกระทำละเมิดของลูกจ้าง), Master's Thesis, Faculty of Law, Thammasat University (BE.2553 (2010))

three main concepts: the nature of employers and employees, the scope of employment and the right of recourse against employees. The thesis also made some comparison with foreign laws, such as French law, German law, English law and American law, with the practical aim of finding a solution which may be helpful for improving the Thai law in this area. This thesis is significantly different from the present thesis because the approach taken here is to use English law as the starting point and investigate Thai law for the potential for improvement of English law, and to improve understanding of the policy and principle bases in order to make positive recommendations for legal development. Furthermore, this third thesis was written in 2010 which is before some of the most significant recent cases which have shaped English law in this area, including *Various Claimants* which is of fundamental importance to the current position in English law. Moreover, this author believes that by conducting a detailed and extensive comparative study between two jurisdictions only, namely Thailand and the England, this author's thesis offers greater insight into the law in this area through both contextual and structural comparative analysis.

2.4 Principles and policy objectives

2.4.1 Introduction

The remainder of this chapter will discuss the principles and policy objectives upon which the doctrine of vicarious liability, and by extension Section 425 of the TCCC, is based. It is argued that there is a need to specifically justify vicarious liability in English law, and Section 425 of the TCCC, because the nature of the liability created, being strict and vicarious, is counter to the general nature of liability for tortious/wrongful acts in both systems. The standard position in both Thai law and English law is that an individual is responsible only for the consequences of her own wrongful/tortious acts. Vicarious liability and Section 425 of the TCCC confer liability on a different person to the individual who committed the wrongful/tortious act, without the requirement for fault on their behalf. This section then sets out various potential theoretical justifications for the imposition of strict and vicarious liability. It is argued

that no single theoretical justification can explain all the features of either of the legal rules in either system. Rather, the policy justifications of victim compensation, loss distribution, enterprise risk and, to an extent, deterrence all play their part in explaining different features of the legal rules. The weight given to each of these policy objectives will be examined in the following Chapters of this thesis.

2.4.2 The need to justify strict and vicarious liability

2.4.2.1 English law

As discussed in the introduction, vicarious liability runs contrary to two fundamental principles of English tort law: first, that people should only be liable for damage or injury caused by their own acts or omissions; second, that people should only be liable where they are at fault.[57] Vicarious liability is liability of one person for the consequences of the tort of another. Vicarious liability is also conceived as strict liability, conferring liability without fault on the part of the vicariously liable party.

Indeed, English legal scholarship has long identified the need to justify the existence of the doctrine of vicarious liability.[58] Writing in 1916, Baty identified nine grounds which had been expressed by earlier academics and judges in various cases during the development of the doctrine.[59] Baty describes these as control, profit, revenge, carefulness and choice, identification, evidence, indulgence, danger and satisfaction, concluding, after a discussion of each, that "In hard fact, the real reason for employers' liability is the ninth: the damages are taken from a deep pocket."[60] Atiyah, writing in 1967, acknowledged the continued significance of many of these justifications, while concluding that the principle of loss distribution had become the most rational modern explanation for the existence of the doctrine.[61]

As discussed in the introductory chapter, justifications have become increasingly important following the most recent line of cases which have

[57] See, for example, Cane (n 4) 13f.
[58] Atiyah (n 5) 12
[59] Baty (n 46) 146ff.
[60] ibid 154
[61] Atiyah (n 5) 27

expanded the doctrine of vicarious liability in English law. The Supreme Court in the *Various Claimants* case made it clear that the first limb of the vicarious liability test – the existence of the relevant relationship – would be assessed on the basis of the underlying rationale of the principle. The Supreme Court said that vicarious liability would arise where it was "fair, just and reasonable" to impose liability on that particular defendant, accepting a variety of policy concerns which usually make it fair just and reasonable to impose liability when satisfied.[62]

2.4.2.2 Thai law

In Thai law also, the strict liability conferred by Section 425 is at odds with the general conception of liability for wrongful acts, which is fault based. Section 420 of the TCCC is the general provision conferring liability for wrongful acts:

"A person who, willfully or negligently, unlawfully injures the life,[63] body, health, liberty or property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefor."[64]

This is a fundamentally fault based concept: the person who causes an injury unlawfully, through wilfullness or negligence, is required to make compensation.

The chapter in the TCCC setting out liability for wrongful acts[65] can be seen to have the following structure: Section 420 provides the general position with regard to the liability for wrongful acts, and the subsequent provisions, 421 to 437, clarify the operation of this general provision in specific circumstances. Thus 421 and 422 clarify that exercise of rights which can only have the purpose of causing injury,

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[62] *Various Claimants* at [35]

[63] A more natural English translation would be "causes the loss of life or injures the body...". Grateful thanks go to Dr Prachoom Chomchai for suggesting this improvement.

[64] TCCC, Section 420, translation from Sandhikshetrin (n 12)

[65] TCCC Title V Chapter 1

and the infringement of statutory provisions intended for the protection of others, will be considered wrongful acts for the purpose of applying Section 420. Section 424 provides that the courts will not be bound by amounts for compensation stated in criminal law. Sections 429 to 437 essentially set out who is liable for damage caused by acts of minors and those who lack capacity due to mental illness, joint tortfeasors, animals, defective buildings, items falling from buildings, and vehicles.

In almost all of these situations, the person on whom the relevant section confers liability may avoid it by demonstrating that she took proper care. In the case of damage caused by those who lack capacity (minors and those of unsound mind), animals, and defective buildings, the person on whom the relevant section confers liability – i.e. parents/guardians/teachers, owners and possessors respectively – can escape liability by showing that they exercised proper care in the circumstances. Furthermore, liability may be avoided if the defendant can show that the damage would have occurred even if proper care had been exercised. Indeed, even Section 437, which confers liability on the possessor or controller of a vehicle for injury caused by the vehicle, allows such person to escape liability if she can prove that the injury resulted from force majeure or the fault of the victim. Thus this creates merely a presumption of fault, although a strong presumption, which results in liability. Where the defendant can prove that they were not at fault, they will escape liability.

Therefore, although the law in these situations puts a presumption of liability upon a different individual from the person (or animal or object) who committed the wrongful act, this liability is fault based. If the defendant can demonstrate that she was not at fault in the situation which caused the damage,[66] she will not be liable. Thus all these provisions fit into the same regime as Section 420. Indeed, they may be seen as clarifying who will be responsible, under the application of the principle stated in 420, in situations where it is not immediately obvious who would be the liable: the law will resist holding a person without legal capacity, or animals (or objects) liable

[66] Or, for Section 437, that the victim was at fault or the occurrence of force majeure.

for wrongful acts, and therefore the law points to the person who is presumed to be liable in the circumstances. However, if that person can overturn the presumption, demonstrating that she is not at fault, they will not be held liable.

Indeed, Section 428, which governs liability for the acts of independent contractors, appears to fit within this regime. This provides that a hirer will not be liable unless she was at fault in regard to the work ordered, or the instructions or the selection of the contractor. This is clearly fault based, conferring liability on the hirer only where fault can be proved.

There are four provisions which do not fit within this regime: Sections 425, 427, 434 (in respect of owners) and 436. These confer strict liability upon employers for the wrongful acts of employees within the scope of their employment; principles for acts of agents within the scope of their agency arrangements; owners for the damage of defective construction of buildings (where the person in possession acted with proper care); and occupiers for things falling from buildings. Thus, since the strict liability of employers for the wrongful acts of their employees is at odds with the general position of fault based liability for wrongful acts under the TCCC, it follows that this liability requires special justification.

2.4.3 Potential justifications and theoretical basis

The different potential theoretical principle and policy justifications for strict vicarious liability in the case of employers and employees are categorised and described in different ways by academics. However, this thesis will divide the different justifications into three types which offer the clearest categorisation in terms of different concepts: [67] Fault and identification; victim compensation and loss distribution; and risk and deterrence. Although these arguments have been developed by academics with reference to the English law doctrine of vicarious liability, the same justifications may be considered in relation to Thai law due to the similar nature of Section 425 of the TCCC and the fact that it, like the English law doctrine of vicarious

[67] This categorisation is adopted by Giliker (n 5) 228ff.

liability, also appears at odds with the general nature of liability for wrongful acts as discussed above.

2.4.3.1 Fault and identification

This category includes two different arguments. The first argument is that the fault of the employee is simply evidence of the fault of the employer: the employee would only have been able to cause damage to the victim because the employer selected the wrong person to employ, or did not properly supervise the employee in carrying out the task which led to the injury.

This line of reasoning is clear in many other jurisdictions, such as those which were most influential in drafting the TCCC, particularly German and Japanese law, as evident from s.831 of the German Civil Code and s.715 of the Japanese Civil Code. In both of these systems, the employer is liable for damage caused by the employee unless the employer can show (i) proper care in the selection of the employee and (ii) proper care in the supervision of the employee. Importantly, the liability will also not arise if the employer can demonstrate that the damage would have arisen even if proper care in selection and supervision had been taken. Furthermore, the French Civil Code, which imposes strict liability in Article 1384, did so on the basis that fault in selection or supervision by the employer is presumed, although such presumption is irrebuttable.[68]

However, there are clear statements in case law that fault of the employer is not the theoretical basis for the English law concept, even using a presumption. For example, per Lord Reid in the House of Lords case of *Stavely Iron and Chemical Co. Ltd v Jones*,[69] "an employer, though guilty of no fault himself, is liable for the damage done by the fault or negligence of his servant acting in the course of his

[68] Giliker (n 5) 231: this was the theoretical concept behind including strict liability in a system which otherwise was strongly fault based, and was originally interpreted as requiring fault in order to confer liability. However, this no longer represents the view of French law.

[69] [1956] AC 627

employment".[70] It is clear that the English doctrine of vicarious liability is not conceived as arising due to fault, even presumed fault, in selection or supervision of the employee. Furthermore, as discussed above, Section 425 of the TCCC appears also to reject the notion of a fault basis for liability. In relation to persons who lack capacity, animals, defective buildings and independent contractors, the person on whom the law confers a presumption of liability can overturn such presumption by proving that they were not at fault. The liability for acts of another under Section 425 is strict: even where the employer bears no fault, she will nevertheless be liable. As such, from the plain meaning of Section 425 and clear statements in English case law, it seems that fault of the employer is not the underlying principle of the legal rules in either jurisdiction.

The second argument concerns identification: the employer is held liable for the tortious acts of the employee because the acts of the employee are attributed to the employer. This is sometimes known as the 'master's tort' theory - the wrongful acts are attributed to the master – as distinct from the 'servant's tort' theory, which holds the master liable for the tortious acts of the servant.

This theory of attribution of acts has received some attention and support by academics and by the English courts. For example, Glanville Williams, who was cited in argument (although not on this point) in the most recent Supreme Court case of *Cox v Ministry of Justice*[71] wrote in favour of this view, saying that although it was a legal fiction, it was justified by its results.[72] It also has received attention in case law: for example, in *Twine v Bean's Express Ltd*,[73] the plaintiff had been given a lift by a van driver, the defendant's employee, who had been expressly prohibited from driving with passengers. At first instance, Uthwatt J considered whether the case could be argued on the basis not of whether the driver owed a duty of care to the passenger to

[70] ibid at 643
[71] [2016] UKSC 10
[72] G. Williams, 'Vicarious liability: Tort of the master or the servant?' Law Quarterly Review 72 (1956), 522 at 545
[73] [1946] 1 All ER 202

take care, but whether the employer owed that duty. In his view, "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."[74] Denning LJ argued[75] that liability should be seen as personal to the master, rather than conferred vicariously, placing reliance on the maxim, frequently used by courts in older cases, '*qui facit per alium facit per se*', which can literally be translated as 'who acts through another acts for herself' although it is questionable whether the courts intend, in the historical uses of this maxim, to approve its literal meaning.

However, academics and later court decisions have been critical of this conception of the principle of vicarious liability. The House of Lords in *Staveley Iron and Chemical Co Ltd v Jones*[76] supported the 'servant's tort' theory of vicarious liability, Lord Morton for example stating that "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 out a duty imposed upon him by common law or statute".[77] Academics have also been critical of this concept of attribution, regarding it as artificial and an unwelcome legal fiction.[78]

Nevertheless the theory of identification continues to have modern adherents, since proponents argue that it fits better with the dominant corrective justice view of tort. For example, Robert Stevens asserts that the actions (rather than the liability) of the tortfeasor are attributed to the employer, rendering the person to whom the action is attributed personally liable.[79] Indeed, Paula Giliker[80] sees evidence of a

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[74] [1946] 1 All ER 202 at 204

[75] See *Broom v Morgan* [1953] 1 QB 597 at 607-9 and *Jones v Staveley Iron and Chemical Co Ltd* [1955] 1 QB 474, 480

[76] [1956] AC 627

[77] ibid at 639

[78] "Legal fictions should be discouraged whenever possible in the law in that they tend to undermine confidence in the openness and legitimacy of the legal process." Giliker (n 5) 15

[79] Stevens, *Torts and rights* (2009) Ch. 11

[80] Giliker (n 5) 233f.

persistence of fault-based reasoning in the judgment of Lord Hobhouse in *Lister v Hesley Hall Ltd*[81] which focused on the relationship between employer and victim, rather than employee and victim, to provide a more acceptable basis for the extension of the doctrine of vicarious liability to cover criminal acts.

However, in spite of the arguments and several potential supporting passages from some judgments discussed above, it is submitted (and considered to be the "dominant view"[82]) that the better conception of vicarious liability is that of 'servant's tort' as opposed to 'master's tort': vicarious liability should be considered as secondary form of liability, separate from primary liability. The English law concept is not based on fault or identification, but simply is liability conferred on one person for damage caused by acts of another. Indeed, this appears to represent the Thai law conception also, on the plain wording of Section 425 of TCCC. Here, the focus is the wrongful act of the employee as such. Were the basis for this section identification, it is submitted, the section would surely have been drafted differently to demonstrate this: for example, the drafters could have chosen to provide that the wrongful acts of the employee committed in the course of employment will be deemed to be the acts of the employer. However, the drafters chose instead simply to impose liability jointly upon the employer: there is no suggestion in the drafting of Section 425 that the acts of the employee will be considered, deemed, or identified as, the acts of the employer. Therefore it seems that fault and identification are not supported by either English case law or the plain wording of Section 425 as the basis of either the English law or Thai law rules.

2.4.3.2 Victim compensation and loss distribution

The idea that victim compensation is a key objective for vicarious liability is an old one in English law. In *Hern v Nichols*[83] in 1708, a case concerning

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[81] [2002] 1 AC 215 at paras 54 and 57

[82] Giliker (n 5) 15

[83] (1709) 1 Salk 289

fraud which stands at the start of the expansion of vicarious liability which had become near extinct in the middle ages,[84] Holt CJ expressed this concept as follows:

"for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."[85]

The concept therefore is as follows: in circumstances where the tortfeasor does not have sufficient means to pay damages to the victim, who should suffer the loss? Should it be the victim or should it be the employer? The argument based on victim compensation, per Holt CJ, is that it is better that the employer should be liable, since the employer took care to put trust and confidence in the employee: the victim is a stranger and has no way of vetting the trustworthiness of the employee; therefore the employer should lose out rather than the victim. The formulation by Holt CJ actually brings in further concepts; arguably, there are ideas here concerning deterrence, as the employer is well placed to stop the employee abusing such trust by the careful selection of the employee and close monitoring of the employee's performance of her tasks. However, it is clear from this statement that a key policy objective is to ensure that a victim does not lose out where another defendant may reasonably be pursued.

The simplest view of the victim compensation argument (in fact less nuanced than that expressed by Holt CJ) is referred to as a "deeper pockets" argument: the employer is usually in a better financial position than the employee, and therefore represents a surer source for compensation of the victim. However this argument is not sufficient justification for imposing the liability by itself; merely having the means to pay for a claim should not make a person liable. Furthermore, it does not

[84] See Chapter 3 for a discussion of the development of English and Thai law in this area.

[85] (1709) 1 Salk 289

explain why a claimant may bring a claim directly against the employer. If this were a sufficient justification for the doctrine, surely the procedure would be to bring a claim against the employee first; only where the employee has insufficient means to satisfy the claim would the victim be able to proceed against the employer, akin to a guarantor of the employee's ability to meet claims. There is no such mechanism in English or Thai law.

Instead the better conception of the victim compensation argument is that of loss distribution. This argument runs that, rather than simply being able to pay claims to the victim, the employer is best placed to distribute such costs to society and therefore can spread the costs of compensation more efficiently. Indeed, the costs of compensating victims of employees' wrongful acts may be passed on to the consumers of the employer's business by a small increase in the cost of goods or services to meet the losses suffered by the employer. Therefore the cost of compensating the victim for their injury may have a smaller impact on society by being spread around the customers of the business, rather than falling entirely on the shoulders of the employee.

Potential issues with employers being themselves unable to meet the costs of a particular claim are addressed by insurance, and development of the insurance industry in the latter part of the 19th century in England, combined with workmen's compensation legislation, has arguably made the strict liability regime more acceptable and workable for employers. Indeed, the workmen's compensation regime is founded on the belief that it is socially more expedient to spread or distribute the losses which are inevitable in industry among a large group than have this rest on the shoulders of a few.[86]

Where insurance is widely available and, in the private sector, usually compulsory[87] the effect is to distribute loss even more widely: rather than being

[86] For a full discussion, see Giliker (n 5) 235

[87] Employers' Liability (Compulsory Insurance) Act 1969 (UK) and the Workmen's Compensation Act BE 2537 (1994) (Thailand) which establishes a Workmen's Compensation Fund: note that a number of organisations funded through public funds in both jurisdictions are not required to carry insurance and may choose to self-insure.

distributed to the customers of the particular employer who is held vicariously liable, the loss will be distributed in the form of higher insurance premiums for all those businesses carrying insurance. It may be argued that even in areas where insurance is not available and where costs may not be passed onto consumers, losses will still be distributed among shareholders through lower dividends or by reducing fixed costs, such as staff wages.[88]

However, although loss spreading is an important concept for explaining why a strict liability regime in this form may be acceptable and workable, it is not a justification that explains many of the features of vicarious liability. For example, it does not explain why vicarious liability is restricted to tortious (English law) or wrongful (Thai law) acts rather than all injuries and accidents; it does not explain why the acts of independent contractors are excluded; and it does not explain why employers should be held liable rather than, say, the state. For indeed the state could distribute losses most widely by raising social security payments to establish compensation funds drawn from the whole of society. Alternatively, victims could be encouraged to take out private insurance and take responsibility for their own injuries without the need for a system of vicarious liability or the need to bring a claim against any party provided the insurance covers the risk. Due to these issues, it seems that the policy justifications of victim compensation and loss distribution are not sufficient in themselves to explain the features of the English and Thai law rules.

Although public liability insurance, which protects businesses against claims from members of the public who have been injured by, or suffered property damage from, a business or its employees is not compulsory, in most circumstances commercial landlords and lending banks in the UK will require a business that interacts with the public to carry such insurance in order to sign a lease and lend working capital respectively. Therefore as a matter of practice, most UK businesses dealing with the public will carry such insurance. The same public liability product is available in Thailand, although it forms a small part of the insurance market, direct premiums in 2015 amounting to a little over 2bn Baht: http://www.oic.or.th/sites/default/files/institute/course/85449/public/khunaannth_wangwsu_thailand_update_2016_k_anon_24-6-16.pdf accessed 20 Oct 2016

[88] Atiyah (n 5) 23

2.4.3.3 Risk and deterrence

The argument regarding risk is essentially that the employer should take the risk of harm because: (i) she takes the benefit of the activity which causes the risk; and/or (ii) she has created the risk due to choosing to carry on the activity as a business. In other words, an employer who profits from activities of employees should also bear losses arising from such activities: the damage from the tortious or wrongful acts that employees commit in the course of their employment is considered simply a part of the costs of doing business. A proper view of the total costs of using an employee – essential in judging the profit and loss of a business – should therefore include compensation for the victims of damage caused by employees while acting in the course of their employment.

This argument is regarded as a theory of enterprise risk. Jenny Steele[89] separates enterprise risk theories into moral enterprise risk and economic enterprise risk. Moral enterprise risk is that an enterprise should take on the risks it creates and that it benefits from because it is fair to do so: it is not fair to pass this risk on to others. This does not imply that there is anything wrong with creating the risk or that the enterprise is considered to have exacerbated the inherent risks of running a business in any way: simply that it is fair that the enterprise take on the consequences of the risk since the enterprise created the risk. By contrast, economic enterprise risk is that the costs of an enterprise ought to be internalized to stimulate the most efficient level of risk-taking. Otherwise, if an enterprise is able to pass on risks to others, it will be tempted to take additional risks because they come at no cost. Steele points out that it is the moral version of enterprise risk theory which has been explored most often by the English courts.[90]

Connected to the enterprise risk theory, or at least consequent on accepting the proper imposition of strict liability on the employer, is the argument that

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[89] Jenny Steele (n 30) 519

[90] ibid

vicarious liability promotes deterrence. The argument is that the employer has the opportunity to increase standards of safety, for example, by better methods of selecting and supervising employees. This may be seen as creating the most appropriate incentives: vicarious liability gives employers the incentive to find ways of reducing the risk of employees committing tortious/wrongful acts since they will bear liability for such acts.

To accept such arguments is to accept a particular view of the role of tort law in society. Rather than the corrective justice basis of tort, this requires adopting a view based on distributive justice. A model distributing the costs of compensation to those best placed in society to meet them, who have created the risk by carrying out a particular activity, and who may be incentivised to reduce such risks in the future is preferred to one in which the individual is held accountable for his or her own fault. Enterprise theory is thus connected to the loss distribution notions discussed in the previous section. Loss distribution arguments justify looking beyond the employee to compensate the victim in a manner that causes less impact on society; enterprise risk theory justifies why the employer should be the party chosen to bear compensation: not simply because the employer has more resources or can pass on the costs, but because the employer creates the risk by selecting the employee and benefits from the risk by profits arising from the product of the employee's labour.

However, enterprise risk and deterrence arguments are perhaps less justified in the case of non-profit making organisations, including government bodies. Certainly the idea that the enterprise should bear the risk because it also receives the profit would seem not to apply. Extending liability here on this basis may threaten the continued operation of these organisations. However, this argument may be countered on the basis that such organisations create risks, and may deter risks, in the same way as for-profit organisations; therefore the enterprise risk argument, that the enterprise chose to carry on this activity and therefore created and should bear the risk, runs the same. It may simply be that the cost of operating for these organisations will rise, reflecting the true cost of that enterprise's activities upon society.

A key issue with the enterprise risk and deterrence argument is that it does not account well for the distinction drawn, in both Thai law and English law, between employees and independent contractors. The activities of an enterprise create risk, whether they are performed by employees or outsourced to independent contractors. However, an employer will not usually be liable for activities outsourced to independent contractors even if they are of a similar nature to those performed by employees. Although an independent contractor may be seen to be a distinct enterprise carrying on business on its own behalf, in many cases independent contractors carry out core activities of an enterprise and are quite embedded in a different organisation to their notional employer. Therefore it is harder to support conferring liability on their notional employer rather than the enterprise within which they regularly operate, given that the latter's business is arguably fundamentally causing the risk, and is most able to respond to the incentive of deterrence as it is most directly in control of the environment within which the individual works.

A typical example of this is that of the casual or agency worker. In the construction industry, for example, it is common for a company (the "developer") carrying out a construction project to use workers of a different organisation (an "agency") to carry out certain tasks. The agency pays the workers' wages, making profit by the surplus generated through the contract with the developer. If a worker causes damage through negligence in performing her work, which company - the developer or the agency - should be held responsible? The doctrine of vicarious liability and Section 425 of the TCCC would usually[91] suggest that the worker is an employee of the agency, and merely an independent contractor of the developer. Therefore the developer cannot be held liable for injury or damage to a third party caused by the worker. However, this seems to run counter to the enterprise risk basis of the doctrine: the enterprise creating the risk in this example is surely the developer, by choosing to carry out the development in the course of which the damage was caused. Although the agency may

[91] This question will be analysed in detail in Chapter 4

play a part in creating the risk by the selection of the individual to send to the developer's site, the developer is fundamentally setting in motion the whole project in which the risk arises. Nevertheless, the standard position is that the developer will not be held liable.[92]

However, if we change the scenario so that the negligent worker is a full time employee of the developer, the legal analysis under vicarious liability and Section 425 of the TCCC changes, to confer liability on the developer. Thus the enterprise risk created by the developer is the same in both scenarios, while the legal analysis of which party is responsible for tortious/wrongful acts of the worker changes depending only on the employment status of the worker. Indeed, this issue seems to be what has driven a move away from a hard division between employees and independent contractors in a recent line of cases in English law, where the focus has shifted towards how integrated the individual is in the business of the employer, rather than focusing on their technical employment status.

The enterprise risk theory also, perhaps, fails to explain why it must be proven that the employee has committed a tortious/wrongful act. A doctrine of vicarious liability based on enterprise risk theory would arguably cover all damage caused by the enterprise, not merely that arising from proven tortious/wrongful acts: all damage caused by the enterprise in its operation would, following the theory, be for the enterprise to compensate as it would take the benefit of all profit from its activities. Provided damage and causation could be proved, enterprise risk theory would suggest that the enterprise should compensate for the damage. The requirement for the act to be proven to be tortious/wrongful, rather than just damaging, seems beyond what is required by enterprise risk theory.

The enterprise risk rationale also casts doubt on the issue of the employer's indemnity in English law and the ability, provided by Section 426 of the

[92] Although, as discussed in Chapter 4, this may not now always be the position in England following the *Viasystems* case, nor in Thailand following the reasoning in certain Dika Court judgments.

TCCC, for an Employer to claim reimbursement from an Employee of any compensation paid out under Section 425. If it is most reasonable to make the employer liable for the tortious or wrongful acts of her employees, why undercut this allocation of liability by allowing the employer to claim for reimbursement against the employee? Although in England at least this indemnity is seldom used and there is a 'gentleman's agreement',[93] that insurers will not proceed against employees in such circumstances, its existence is a conceptual problem for the enterprise risk justification. However, perhaps this indemnity could be justified on the basis of the incentive which it creates on employees: without any liability possible for the employee, there is limited incentive to take care since the result of any tortious or wrongful act will fall on the employer. A legal mechanism, even if seldom used, for liability to potentially fall on an employee will create a direct incentive to take proper care in carrying out tasks. Nevertheless, the existence of the indemnity/joint liability does not sit easily with the theory of enterprise risk.

The deterrence argument itself likewise raises concerns. The existence of insurance will lessen the impact of paying compensation, reducing the incentive created by strict liability. If it is argued that an incentive would be produced by a rise in insurance premiums consequent on frequent or large claims made by an employer, this can be countered by the observation that premiums are, due to market forces and especially where insurance is compulsory, not directly related to the number of claims against a particular employer. Therefore, where is the incentive for an employer to incur costs implementing safety measures if a failure to do so will not result

[93]The case of *Lister v Romford Ice and Cold Storage Co* [1957] AC 555 concerned an insurance company which, contrary to the employer's wishes, pursued a negligence claim against an employee to recover money paid under the employer's insurance contract. In response to criticism of this decision, a committee was set up by the Ministry of Labour to review the problem. In 1959 it produced a report which rejected legislative reform in favour of concluding a voluntary agreement in the insurance sector restricting when insurers would enforce this indemnity. Insurers will not pursue actions against employees except where there has been evidence of collusion or willful misconduct: see discussion in Giliker (n 5).32f.

in higher costs from claims? Furthermore the courts have faced situations in which it seems that steps could not reasonably have been taken to prevent the harm from occurring, no matter how strong the incentive. For example, in *Lister v Hesley Hall*,[94] there were proper procedures in place for selection and the warden lived in the home with his wife, neither of which safety measures prevented the abuse; hence, it is not clear that the conferring of liability in this case would prove a deterrence in the future in similar circumstances, since there may not be more steps that employers can reasonably take to prevent such abuse.

Deterrence, it is argued, may be seen as a possible beneficial consequence of vicarious liability but it cannot be a fundamental underlying justification for the doctrine. Enterprise risk has, it is argued, increased in importance and has been fundamental in expanding the doctrine in the recent line of cases as argued elsewhere in this thesis. However, enterprise risk fails to explain why vicarious liability has not been extended to cover all harmful acts which cause loss to the claimant, and not just tortious/wrongful acts committed by employees. Indeed, linking risks with notions of fairness, as per the moral enterprise risk theory discussed above, suggests that the court sees that enterprise risk, although influential, is not the sole justification for imposing liability.

2.4.4 Conclusion

It seems that none of the different theoretical justifications are free from criticism or able, individually, to explain all the features of vicarious liability in English law or Section 425 of the TCCC. The argument that the doctrines are based on fault of the employer does not explain the fact that liability is conferred strictly on the employer. The argument that the acts of the employee can be identified as the acts of the employer is at odds with reality and therefore appears to be a legal fiction: furthermore, the plain wording of Section 425 of the TCCC and various statements in English case law do not support this argument. The argument that the doctrines are based on victim compensation and loss spreading does not explain why the claimant

[94] [2002] 1 AC 215

may pursue the employer directly, nor why the employer is held liable rather than using a system of compulsory private insurance or government compensation schemes. The argument that it is based on enterprise risk does not explain the distinction between independent contractors and employees, since the same risk is created by the enterprise (and from which it may benefit) regardless of who performs the relevant activities. Deterrence may be seen as a benefit of a framework conferring liability on the employer, although this does not explain liability conferred in situations where harm could not have been prevented, and the argument is substantially weakened in the case of an employer who is comprehensively insured, where premiums may not rise significantly following a claim.

Indeed, it may be argued that there is no single theoretical basis which completely explains all the features of the doctrine of vicarious liability and Section 425; rather, the legal rules may be seen as containing a mixture of these different notions. The challenge for each legal system is achieving the correct balance of the different policy considerations, and deciding what weight to give to each element. It is the purpose of this thesis to identify the particular mix and weight given to different policy objectives in the different systems by employing a functionalist comparative approach to the different elements in both systems' conceptions of the liability of employers for the acts of their employees.

CHAPTER 3
DEVELOPMENT OF VICARIOUS LIABILITY AND SECTION 425 OF THE TCCC

3.1 Introduction

This chapter makes two arguments concerning vicarious liability and Section 425 of the TCCC. Regarding vicarious liability, an examination of the development of the doctrine reveals that although it may have had ancient roots in early Germanic law, the operation of the doctrine was gradually restricted so that it had virtually collapsed into a concept akin to agency by the 16th century if not before, only surviving in a few specific circumstances which were the subject of medieval exceptions. However, in the 17th century the doctrine was revived and expanded by Holt CJ and subsequent judges who restated the principle to apply more broadly, covering all acts committed by employees in the course of their employment. It is argued that the principles underlying the development of the legal doctrine were not clearly stated by judges at the time, or during the following period of expansion. This led to issues with the application of the doctrine over the following centuries where earlier ideas of command and identification appear alongside more modern ideas of enterprise liability, victim compensation and deterrence.

This chapter argues that this mixture of ideas and the reliance on Latin maxims suggests that the real reason for the development of the doctrine is policy; that it seemed fairer to the judges in certain circumstances to find the employer responsible without a clear legal principle on which to base the liability. Subsequent developments, such as the restriction of the doctrine to employees rather than independent contractors, were introduced to make the general application of the rule more workable as demands of legal certainty struggled with the unarticulated policy basis for the doctrine.

The second argument advanced in this chapter concerns Section 425 of the TCCC. An examination of the development of Thai law in this area suggests a different concept for this section has been adopted to that evident in the claimed sources. The

stated Japanese and German civil code sources for this provision are fundamentally fault-based concepts, according with the general structure of the parts of the code addressing wrongful acts. However, Section 425 of the TCCC confers strict liability. Section 425 appears based closely on the other stated source, the 1923 draft civil and commercial code, which was heavily influenced by the French Civil Code. However, this source does not have a conceptual distinction between the Employer-Employee relationship and the Hirer-Contractor relationship in terms of conferring liability. An examination of the earlier legal systems in Thailand reveals that although there is a suggestion that strict and vicarious liability existed in the ancient Code of Manu, which influenced early Thai law through the *Dharmasastra*, this concept had been abandoned by the time of the Three Seals Code. This chapter argues that, instead, this provision may have been influenced by the English law doctrine of vicarious liability. The key Thai draftsmen received legal education in England and Section 425 is materially identical to the conception of English law vicarious liability in the early 20th century.

In order to advance these arguments, this chapter will trace the development of English law vicarious liability from its early origins until the beginning of the 20th century, focusing on statements of judges and contemporary commentators concerning the principles of the doctrine. The development will not be traced further than this at this point as, pursuant to the second argument, this is the time at which it may have influenced Section 425 of the TCCC; later developments will be addressed in the subsequent chapters. Then this chapter will trace the development of Thai law focusing on the liability of employers for the acts of their employees, starting with the earliest available historical sources and finishing with a comparison of Section 425 of the TCCC with the claimed sources and then English law at the time of its drafting.

3.2 Development of vicarious liability

3.2.1 Early origins and a trend towards limiting liability

The origins and early development of an action in English law whereby an employer may be held liable for the acts of an employee which she did not command are subject to debate. Wigmore states that there was a time when the master bore full responsibility for the acts of "his serf or domestic".[95] The origins of this responsibility arise from the notion of territorial lordship in early Germanic law, where the housemaster was responsible to third parties for the actions of those attached to his house. At first, this included both bondsmen and also half-free and free persons who were attached to his house. If a free but landless person spent a sufficient amount of time at a landowner's house, the landowner became responsible for them, in the sense that the master's liability extended to their actions: he had to represent them in a suit and render satisfaction for them.[96]

Later, this liability became limited in respect of free persons; the master could hand them over to the court and discharge himself from liability. However, in respect of serfs and domestics, handing them over at first relieved the master from liability for blood-feud or peace money, but still left the master liable to pay compensation money. This developed into the practice of handing over the serf or domestic, at first in part payment for the injury and later in total exoneration of responsibility provided it was accompanied by an oath that the master had played no part in the wrongful deed.[97]

The trend over time was a gradual reduction of the liability of the master. It seems that by the end of the 1200s[98], so far as any criminal penalties were concerned, the master was usually able to exonerate himself by pleading that he had not commanded or consented to the act. Wigmore argues that the liability to make good any

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[95] John Wigmore, 'Responsibility for Tortious Acts: Its History' (1894) 7(6) Harvard Law Review 315, 330

[96] See Professor Brunner, Deutsche Rechtsgeschichte (1892), ii. S.93, quoted in Wigmore (n 95), 330

[97] Wigmore (n 95), 330

[98] ibid 322

harm done (i.e. the civil liability) remained strictly with the master at this time. However, over the following centuries the command or consent test was gradually extended to limit liability in civil cases.[99] This process began with those acts which were most morally reprehensible, i.e. criminal acts, and eventually the test was accepted as a general rule applying to trespass in the 16th century.

However, other academics dispute the claim that vicarious civil liability remained with the master for so long. For example, Baty finds the cases which Wigmore uses as evidence "some not very convincing authority" for the claim that the master retained civil liability until the 15th century, pointing to a lack of any trace of the notion in the literature at the time, and attributing similar liability to frankpledge, which "was not limited to employers and cannot be the parent of their specific obligation".[100] Maitland, too, doubts the existence of such a liability even in the 13th century,[101] suggesting that the use of the phrase *respondeat superior* in statutes of the time conferred a kind of guarantee relationship, where the master would satisfy a judgment only where the direct defendant could not pay: a different, secondary liability concept to the primary liability conferred by the doctrine of vicarious liability. Also he argues that such statutes only referred to specific situations, such as the relationship between sheriffs and their subordinates, or lords and their bailiffs, and did not apply to disputes between private individuals. Indeed, in support of the argument that this was not the general rule for private employers, Plucknett notes that there appears evidence of only one case in which it is applied to the bailiff of a lord; all the other cases concern public officials.[102] Holdsworth[103] sees the general position as being stated by the Statute of the Staple[104] of 1353, which purported to harmonize the mercantile rules in a particular area

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[99] ibid 384ff

[100] Baty (n 46) 9

[101] "if we look for the best legal ideas of the thirteenth century to Edward I.'s statutes, we shall see no "identification" of the servant with the master and, what is more, no very strong feeling in favour of "employer's liability."" Pollock and Maitland (n 40) 557

[102] Plucknett (n 45) 475, n.3

[103] Holdsworth (n 44) 383ff

[104] 27 Edward III. St. 2 c. 19

with the common law rule, providing that no merchant shall lose or forfeit his goods or merchandise for any trespass or forfeiture incurred by his servant unless his act is by the command and consent of his master. Holdsworth sees this as according with the prevailing view of civil liability at the time, which was that a person should only be liable for his or her act, not the acts of a servant.[105]

Whether or not Wigmore's account is accepted, it seems that academics would at least agree that by the 16th century, if not before, for a master to be liable for the tortious acts of a servant, the master must command or consent to the servant's act. The limitation of liability to command or consent was refined further in the 16th and 17th centuries by the adoption of the doctrine which Wigmore calls "Particular Command",[106] which required that, to be liable, the master must specifically command the servant to do the particular wrongful act which results in the injury. With the adoption of the notion of Particular Command, vicarious liability is essentially abolished: for the master to have commanded the particular act which resulted in the wrong, the liability of the master can be seen to arise through principles akin to agency rather than vicarious liability.

However, there were a few specific exceptions to this general position. These included the case of fire started by a servant for which the master remained strictly liable, and the liability of certain professionals – those engaged in "common callings" which included carriers, innkeepers and farriers, which occupations gave their practitioners a special status[107] - who would remain liable if their servants caused damage in carrying out their duties in some circumstances. The reason for the survival of these exceptions may have been, in the case of fire, that it posed a particular danger at the time, and in the case of common callings, that particular trust was placed in the practitioners: perhaps these exceptions remained to give the master incentive to take special care in supervising the servants carrying out these tasks. It appears to be the

[105] Holdsworth (n 44) vol III, 384
[106] Wigmore (n 95) 392
[107] Plucknett (n 45) 480

survival of these exceptions which allowed an expansion of the liability, led by Holt CJ at the end of the 17th century.

3.2.2 Holt's expansion of vicarious liability

In 1691, in the case of *Boson v Sandford,*[108] an action was brought by a shipper of goods against the owners of the ship for damage to the goods caused by the negligence of the master of the ship. Eyre CJ gave judgment in favour of the plaintiff on the ground that the owners of the ship were in effect carriers who, under the medieval law exception mentioned above, had strict liability for the acts of their servants. However, Holt gave judgment on the basis of a broader principle that "whoever employs another is answerable for him, and undertakes for his care to all that make use of him."[109] In the 1698 case of *Turberville v Stamp*[110] which concerned a fire lit by a servant which had spread to the plaintiff's land, Holt again gave judgment in broader terms than the majority, who relied on the medieval exception for fire, stating that "if my servant doth anything prejudicial to another, it shall bind me, when it may be presumed that he acts by my authority, being about my business".[111]

Furthermore Holt CJ did not confine this principle to cases of negligence. For example in the 1700 case *Hern v Nichols*[112] the plaintiff brought an action in the tort of deceit on the basis that the defendant's factor had made a fraudulent misrepresentation in a transaction involving silk. The factor was operating overseas and there was no evidence of deceit on the part of the defendant personally. However Holt held that the defendant was liable.

It seems that this liability was restricted to the case where the servant was about his master's business. For example, in the 1699 case of *Middleton v*

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[108] (1691) 2 Salk. 440; SC 3 Mod. 321

[109] 2 Salk. 440, quoted in Holdsworth (n 44) vol VIII, 474

[110] Comb. 459

[111] Comb. 459, quoted in Holdsworth (n 44) vol VIII, 474

[112] *Hern v Nichols* (1700) 1 Salk 289

Fowler,[113] Holt explained the principle as "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master."[114] However, this extension of liability does nevertheless appear to be a new direction of development of the law, given that the previous centuries had tended to reduce a master's liability to only specifically commanded acts.

As regards the influences for this new direction, it is evident that the specific medieval exceptions to the command and consent requirement may have been the starting point, since the early cases either involve the subject matter of the exceptions, such as fire or carriers, or situations in which judges seem to be attempting to apply the exceptions by analogy. However, academics have also suggested that there may be influence from Roman law, coming to 17th century English common law via the court of Admiralty and mercantile custom. For example, Holdsworth[115] points out that doctrines apparently derived from Roman learning in relation to quasi-delict were previously used in the court of Admiralty to settle the liability of the master and owner of a ship to the shipper and passengers for the delicts of the crew, and the liability of the owner for the delicts of the master. Indeed, it is notable that *Boson v Sandford* was an action brought by a shipper against the owner. However, the principle expressed here is wider than that adopted by the Admiralty courts at the time, which restricted the circumstances to those which involved some sort of contractual relationship between the parties.

It seems that Holt caused a clear change in the direction of jurisprudence on this topic, not perhaps because of the decisions that he made, which may arguably have been consistent with previous doctrine at least to the extent that liability required some kind of command or authorization (even if implied by the relationship) or fell within medieval exceptions, but because "his attitude paved the way

[113] 1 Salk. 282
[114] 1 Salk. 282, quoted in Holdsworth (n 44) vol VIII, 475
[115] Holdsworth (n 44) vol VIII, 475

for radical innovation. It is ... his dicta rather than his decisions, that have had such a sweeping effect."[116] Indeed, Baty reviews the more influential cases of Holt which have often been subsequently cited and argues that many are not tort cases, many statements are made at the *nisi prius* stage rather than at trial, in the influential case of *Jones v Hart*[117] the hypothetical examples that Holt gives are actually mistakenly indicated by reporters to have been actual cases, and that the famous statement "a master is responsible for all acts done by his servant in the course of his employment" quoted from *Turberville v Stampe* with approval by Willes J. in *Patten v Rea*[118] was in fact taken from the headnote rather than being the words of Holt. Per Baty, "The liability in tort constitutes a gigantic inverted pyramid whose apex is nothing but nisi prius dicta."[119]

3.2.3 Principles evident in Holt's expansion and reception of the doctrine

Perhaps because of these differing origins, the basis on which the principle rests seems not to be clearly articulated at the time of, and in the century following, the expansion by Holt. Blackstone, in his commentaries written at least two generations after these cases (1758-65), states that the principle seems to be that "the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se*."[120] There is perhaps an attempt here to link the contemporary common law position, following Holt's expansions, to the earlier requirement for the master's command of the relevant act. Rather than the limiting Particular Command test, which required the master to have specifically commanded the act of the servant, the expansion is achieved through the concept of implied command: by employing a servant, the master has, by implication, commanded

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[116] Baty (n 46) 19
[117] 1698 (Holt), 642
[118] 2 CB, NS 614
[119] Baty (n 46) 28
[120] William Blackstone, *Commentaries on the Laws of England* (1830) Book I Ch 14, 418

the servant to perform all acts that are about the master's business. Therefore the master should answer for the consequences of all acts which are within the scope of the servant's employment, because she impliedly commanded them.

However, Blackstone goes on to give some very different justifications. He gives the example of a servant of an innkeeper who robs his guests, stating that the master will be required to make restitution on the following basis: "for as there is a confidence reposed in him, that he will take care to provide honest servants his negligence is a kind of implied consent to the robbery; *nam, qui non prohibit, cum prohibere possit, iubet*."[121] This focuses on the relationship between the injured party and the employee, rather than that between the employee and employer. Furthermore, Blackstone adopts the idea that servants can be permitted to do certain acts on the basis of implied command, conferring liability on the master, and states that whatever a servant is permitted to do in the usual course of his business is equivalent to a general command.[122] He again goes on to restate the principle as "the damage must be done, while he is actually employed in the master's service; otherwise the servant will answer for his own misbehavior."[123]

Blackstone concludes by stating that a master can frequently suffer loss by putting faith in his servant, but can never gain by offloading the responsibility for a task by also relinquishing liability: "and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong."[124] It can be seen by this perhaps rather mixed set of statements of principle that there was significant variety present in the authorities which Blackstone uses in support of the notion of the master's liability for actions of the servant.

It is also notable that there is one basis of the notion which Blackstone does not mention, although earlier clearly present in Holt's judgment in *Hern v*

[121] ibid
[122] ibid 419
[123] ibid 419-20
[124] ibid 420

Nichols[125] and *Wayland's Case*[126]: public policy. In *Hern v Nichols*, Holt's opinion was that, if someone must lose out as a result of the deceit, "it is more reasonable that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger".[127] In *Wayland's Case*, Holt stated that "it is more reasonable that [the master] should suffer for the cheats of his servants than strangers and tradesmen". Indeed, perhaps this is a significant driving force behind the decisions of Holt and other judges of the age, that it simply seemed more reasonable that the master compensated the victim than that the victim would go uncompensated. It is notable that judges at the time (and since), and Blackstone, often resort to Latin phrases such as *qui facit per alium, facit per se* or *respondeat superior* as justification for the principle which, per Wigmore, are legal fictions employed "to sanction a rule that we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally."[128]

3.2.4 18th-19th century developments

Although it is unclear exactly how the process took place, it seems that Holt's dicta had acquired the force of law by 1725 when, per Baty, "we find the principle of the master's liability for acts done in the course of the servant's employment stated as unquestioned law by Lord Raymond"[129] and in the second half of the 18th century the "scope of employment" test starts to take over from the "command" test. From this time, the test is usually phrased as "scope" or "course" of "employment",[130] "scope of authority"[131] or "in furtherance of and within the scope of the business with which he

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[125] 1. Salk. 289
[126] 3 Salk 234
[127] Quoted in Wigmore (n 95) 395
[128] ibid 399
[129] Baty (n 46) 28f.
[130] *Sleath v. Wilson*, (1839) 9 C&P 607; *Story on Agency* (1839); *Smith on Master and Servant* (1852)
[131] *Cornfoot v. Fowke*, (1840) 6 M. & W. 358; *AG v Siddon* (1830) 1 Tyrwh 41; *Coleman v. Riches*, (1855) 16 CB104

was trusted".[132] However, there are a few examples cited by Wigmore[133] of the command test used in the period 1800 to 1850.

Through the middle of the 18th century judges grappled with the new test, which resulted in expansion of the circumstances in which liability would be conferred.[134] This more extended liability, evident by the end of the 18th century, brought new questions which had not been of issue before, in particular the question of who counts as a servant for the purpose of this rule and the boundaries of the scope of employment.

3.2.4.1 Employees and independent contractors

This question seems to have been first addressed in the case of *Bush v Steinman*[135] in which the court held that, in effect, the employer was liable for the acts of independent contractors. However, the fairness of this decision was doubted by Eyre CJ in that case due to the remoteness of the connection between the tortfeasor and the defendant.

The subsequent case of *Laugher v Pointer*[136] declared the non-liability of a casual hirer for the negligence of a driver and *Quarman v Burnett*[137]

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[132] Keating J in *Bolingbroke v. Board* (1874) LR 9 CP at 577

[133] Wigmore (n 95) 402f.

[134] In 1716 (*Horseman qui tam v Gibson* (1716) Fortes., 32 (Exch), per Baty (n 46) 30), the master of a ship was held liable to the penalty for using the King's moorings, even though he was not 'on board' as required by the statute, on the basis that he was liable for the conduct of his subordinates, who were in actual control. In 1730, *R v Huggins*, (1730) Fitz-G. 177, the Warden of Fleet was indicted in respect of the death of a prisoner through the violence of his subordinates, and in 1738, *Jarvis v Hayes* (1738) 2 Stra. 1083, a cartman's employer was sued by a man who had been thrown off a ladder by the cart. By 1799 the doctrine had been extended to charge a landowner with the consequences of the negligence of a builder's workman (*Bush v Steinman* 1 B&P 404). In the words of Baty (n 46, 30), "Eyre CJ was at a loss to know exactly on what basis to ground the decision; but he thought it convenient that the injured person should not be put on inquiry as to who exactly it was that caused the damage".

[135] (1799) 1 B&P 404, Holdsworth (n 44) 479

[136] (1826) 9 B&C 548, Baty (n 46) 33

[137] (1840) 6 M&W 499

confirmed that even regular hirers would not be liable for the negligence of drivers. In this case, Parke said that to extend liability to everyone acting for a master's benefit would produce unworkable consequences whereby even the "purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street".[138] These and other contemporary cases have established the modern rule that an employer, though liable for the acts of her employee, is generally not liable for the acts of an independent contractor, essentially on the basis that to do otherwise would create a practically unworkable situation rather than on the basis of legal principle.

However, this rule was itself not without difficulty and many commentators have seen the division between employees and independent contractors overly strict, as discussed later in this thesis. Such difficulties were also seen at the time of its development, and there is clear evidence of judges bending other principles to confer liability in cases which they thought were deserving, although involving independent contractors.[139]

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[138] ibid

[139] For example, it was thought during the first half of the 19th century that special rules applied to occupiers of land, making them liable for the negligent acts of their independent contractors, arising from the interpretation of cases such as *Bush v Steinman*. However this was firmly rejected by *Reedie v London and North Western Railway Co* (1849) 4 Ex 244. This sparked a number of cases in which the courts used a range of strategies to achieve the same result without applying these rules. Occupiers of land were made responsible for negligence of independent contractors by a reformulation of their duty of care (*Pickard v Smith* (1861) 10 CNBS 470) or by finding that statutory duties were non-delegable, so that employers would remain liable no matter who performed the duty (*Hole v Sittingbourne and Sheerness Railway Company* (1861) 6 H&N 488), or by other doctrines such as public nuisance (e.g. *Ellis v Sheffield Gas Consumers Co* (1853) 2 El & Bl 767) or private nuisance (e.g. *Rich v Basterfield* (1847) 4 CB 783, 802). However, in trying to twist other doctrines to find liability which the judges felt was warranted but which would not be conferred by the newly developed rules of vicarious liability, such decisions arguably added to the already fragmentary nature of the English law of tort (see Ibbetson, *A Historical Introduction to the Law of Obligations* (2001) 182f.).

3.2.4.2 Scope of employment

In *Barwick v English Joint Stock Bank*[140], Willes J stated that the general rule was that the master would be liable for every wrong of a servant or agent that was (i) committed in the course of the service and (ii) for the master's benefit. In subsequent cases this was used to support the argument that the employee's act must be committed for the purpose of benefitting the employer, which, if accepted, significantly limited the application of the tort. However, this argument was rejected by the House of Lords in 1912 in the landmark case of *Lloyd v Grace Smith & Co.*[141] This case concerned a solicitor's clerk who managed the defendant firm's conveyancing department. He defrauded a client, the plaintiff, who had come to the firm for advice regarding the sale of two properties. The clerk procured the plaintiff's signature on documents conveying the properties to himself which he sold for his own benefit. The House of Lords found that the firm was liable for the clerk's fraud. Thus it was clear that the liability extended beyond acts for the master's benefit.

Furthermore the House of Lords recognised that a broad interpretation was required when deciding whether an employee or an agent had acted within the scope of their employment or authority: it was clear that the clerk was not authorised to defraud the plaintiff. However, Lord Mcnaughten noted that it was within the scope of the clerk's employment to advise clients regarding the best way to sell property and the execution of any necessary documents. He made a broader statement to the effect that it would be unjust if the firm were not held liable, calling the clerk the firm's "accredited representative"[142] and therefore it was right that the person who placed him in that position should be held liable.

Indeed, in 1907 Salmond published the first edition of a textbook on the *Law of Torts* which included a definition of a wrongful act by a servant in the

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[140] (1867) 2 LR Exch 259, at 266
[141] [1912] AC 716
[142] ibid 738

course of employment as "either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorized mode of doing some act authorised by the master". It also stated that a master is liable for acts which he has not authorised if they are "so connected with acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them".[143] This formula was cited and approved in many cases until the House of Lords in *Lister* in the 21st century which took a new approach as will be discussed later in this thesis.

3.2.5 Statements of principle

By the middle of the 19th century, there are clearer, though not necessarily consistent, statements from judges on the reasons for conferring liability and the basis for its existence. It can be seen how far the position has changed from the time before Holt. However, there are still traces of the older ideas within the judges' statements. Two examples are particularly illuminating here.

First, Lord Brougham in the case of *Duncan v Finlater* (1839):[144]

"The rule of liability and its reason I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

Second, Chief Justice Shaw of Massachusetts in *Farwell v Boston and Worcester Railway Corp* (1842):[145]

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[143] JW Salmond, *The Law of Torts: a Treatise on the English Law of Liability for Civil Injuries* (1st edn 1907) 83f.

[144] 6 Cl & Fin at 910, quoted in Holdsworth (n 44) vol VIII, 478

[145] 2 Met 49, 3 Macqueen 316, quoted in Holdsworth (n 44) vol VIII, 478

"This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter* ... The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security."

In these judgments, we arguably see hints at enterprise liability in the statements of Lord Brougham which refer to the employment setting the whole thing in motion and the acts being done for the benefit of the employer. There are also suggestions of the notion of deterrence in the comment that the employer may "turn him off from that employ". There are also ideas of command, or at least implied command, with his statements of "under my orders" and "under my direction". In the statements of Shaw CJ we see the idea of identification, a legal fiction, of the servant's acts simply regarded as the acts of the master in terms of civil liability, for public policy reasons of social duty and security – incentivizing masters to ensure that their affairs are conducted carefully whether or not they are carrying them out personally, since they have the final decision on who will carry out their affairs and in what manner.

3.2.6 Conclusion

Although the origins and early development of the English law doctrine of vicarious liability are debated by legal historians, it seems that the liability has its roots in the liability of a house owner for the acts of other members of his household in early Germanic law, which was originally strict and wide-ranging. However, during the early period of the common law's development, the scope of this liability is gradually restricted so that by the 16th century, if not before, a master is only liable for the acts of a servant which he has commanded or consented to. Over the next two centuries the master's liability was restricted still further so that it arose, subject to

a few specific exceptions, only where the wrongful act of the servant was specifically commanded by the master, which is more akin to liability arising through agency principles than the doctrine of vicarious liability. However, the trend of the doctrine's restriction was reversed at the end of the 17th century, in particular by Holt CJ, who by dicta and in cases in which medieval exceptions arguably applied, expressed the principle in broad terms that liability arose on a test of whether the act was committed in the scope of employment of the servant, rather than by the command of the master. In the following centuries judges applied this principle broadly, and came to face new questions of what relationship would be covered by the doctrine – employees or independent contractors – and what was considered to be the scope of employment.

By the early years of the 20th century, as evidenced for example by the publication of Salmond's *Law of Torts*, the answers to these questions had been given, although, as will be discussed later in this thesis, by no means settled. The position arrived at is that a master will be held strictly liable for the damages caused by a servant for acts done within the scope of the servant's employment. The doctrine only applies to employees and not independent contractors. Acts within the scope of employment should be interpreted widely, including wrongful acts authorized by the master as well as an unauthorized mode of doing some act authorized by the master and an unauthorized act which is connected with an authorized act.

The principle on which the liability is based is not made explicit, either by Holt or by subsequent judges and commentators. However, in their statements there is clear evidence of enterprise risk and deterrence as well as identification and older ideas of command, or at least implied command. There are also clear statements of recognition that notions of policy, more than legal principle, underlie the existence of the doctrine although there is no accepted or articulated concept of which policy end is to be achieved, nor how relevant factors should be balanced in achieving it.

3.3 Development of Section 425 of the TCCC

3.3.1 Introduction

In understanding the development of Section 425 of the TCCC it will be helpful to conduct a review of the development of earlier laws. This will aid in understanding whether the concept was already dealt with and familiar to the legal system before the TCCC was drafted, and thus may explain the nature of the modern provision, or whether the notion was not addressed under the previous system and was adopted only at the time of drafting the TCCC.

The history of Thailand (or, before 1939 CE, the Kingdom of Siam) before the promulgation of the Civil and Commercial Code in 1925 may be separated into three distinct periods. These periods trace the movement of the centre of power of the Thai people: the early history and the Sukhothai period; the Ayutthaya period; and the Bangkok period. This section briefly sets out the development of the law in each period, with particular reference to employer's liability.

3.3.2 Early history and the Sukhothai period (600-1350 CE)

It seems generally accepted that during its earliest phases, traditional Thai law was influenced by the ancient Indian Hindu moral code, the Code of Manu.[146] This ancient code, from the second century BCE[147] is a mixture of moral principles, religious practices, and some more practical rules aimed at governing a society in a fair manner. It seems that the code likely came to the Kingdom of Siam through a Pali translation of the Sanskrit original, which had been used by the earlier Mon civilization while under Khmer rule.[148] The corpus of legal treatises in use in Siam in this period, known as the *Dharmasastra*,[149] is modified from the Code of Manu in a number of

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[146] Robert Lingat, 'Evolution of the Conception of Law in Burma and Siam' (1949) 38(1) Journal of Siam Society, 23

[147] There are many earlier sources, but the authoritative version was probably compiled in the few centuries before 200 BCE: PV Kane, *History of the Dharmasastra* (1958) vol 1, 9

[148] Lingat (n 146) 24; Sarasin Virapol, 'Law in Traditional Siam and China: A Comparative Study (1977) 65(1) Journal of the Siam Society Bangkok 81, 94

[149] Also written in English as *Thammasat*, a transliteration of the Thai pronunciation

ways, adding some customary rules and removing the Hindu religious aspects, but wholly incorporates the civil rules of the earlier text.[150]

It is not known precisely when this system was put in place, but there is documentary evidence of the *Dharmasastra* in the Sukhothai period. A stone inscription dealing with legal matters states that the royal proclamations engraved on it are enacted according to *Dharmasastra-Rajastra*.[151] These were the two written sources of early Siamese law: the *Dharmasastra* had ultimate authority, given its divine derivation, and therefore bound even the king.[152] However, when the king adjudicated a conflict in a difficult case, the decision would be announced to be used as a precedent for later similar cases.[153] These legal rules, and some other decrees, became incorporated into the corpus of the *Dharmasastra* as *Rajastra*, being rules of a secondary rank: the *Darmasastra* were known as the "roots of the matter" and the *Rajasastra*, as derivations, were known as the "branches of the matter".[154]

3.3.3 Employer's liability in the Code of Manu

The Code of Manu has little to say about the liability of employers for acts of employees due to the ancient context within which it was written. However, even here there is some attention given to this kind of liability. Vol VIII v243 of the Code of Manu concerns liability (here, in the form of a royal fine) in relation to crops of a third party destroyed by an escaped animal, and draws a distinction between an escape

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[150] Lingat (n 146) 14

[151] Lingat (n 146) 24

[152] According to legal foundation myths, the words of the Laws of Manu were found in Manu's vision written on the walls of the universe, and therefore the king had little power to deviate from it (see Andrew Harding 'The Eclipse of the Astrologers: King Mongkut, His Successors, and the Reformation of Law in Thailand' in *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Brill 2008) 307, 313)

[153] Preedee Kasemsup, 'Reception of Law in Thailand-A Buddhist Society' in M Chiba (ed) *Asian Indigenous Law* (2013) 267, 277

[154] ibid 278

caused by an act of servants alone and an escape resulting from acts done with the knowledge of the farmer:

"If (the crops are destroyed by) the husbandman's own fault, the fine shall amount to ten times as much as (the king's) share; but the fine (shall be) only half the amount if (the fault lay) with the servants and the farmer had no knowledge of it."[155]

Arguably this has more to do with the liability of owners of land for the escape of dangerous animals than the liability of employers *per se*, but it is interesting to see a concept of (limited) strict liability of the master for the act of the servant here, with a recognition that the liability may be reduced, though not removed entirely, in non-fault cases. Another revealing passage is found in Vol VIII v. 293-4, which concerns damage caused by a poorly driven cart:

"293. If the cart turns off (the road) due to the driver's want of skill, the owner shall be fined if damage (is done), two hundred (panas)

294. If the driver is skillful (but negligent) he alone shall be fined"[156]

Here we have a clear instance of something akin to early employer's liability in this particular circumstance. Indeed, there is a clear division made between circumstances involving skilled and unskilled drivers. If a driver is unskilled, the owner of the cart must bear the liability, which is strictly conferred; if the driver is skilled but negligent, the owner bears no responsibility. It may be possible to see in this division a notion of liability based on fault: perhaps liability is imposed on the owner on the basis of fault for employing an unskilled driver. Where the driver is skilled but negligent, the owner bears no responsibility, perhaps demonstrating that the owner is not at fault if he

[155] G Buhler, *Sacred Books of the East: Laws of Manu* (1886) Vol XXV, 295
[156] ibid

employs a properly skilled driver: a proper selection of a driver is all that is expected of an owner; if damage arises from negligent driving, liability is on the driver alone as the owner has absolved himself from liability through proper selection.

This apparent fault-based approach is obscured slightly by the following provision which puts part of the liability on the passengers of the skilled but negligent driver.[157] Perhaps this acted as an incentive for the passengers not to distract the driver while carrying out his duty, or as an incentive for passengers to choose carts on which they travelled appropriately, or dealt with the difficulty of identifying who was driving where several persons were on the cart, or perhaps even reflected a theory that paying passengers were seen as employers or controllers of the skilled driver: the underlying theory is not stated. However, it seems possible to see the primary provision conferring liability on the owner as being based on fault: where the owner used proper selection of a driver, the owner will escape liability.

These are only two instances in a very ancient code (one of which is arguably more concerned with liability of an owner of land rather than an employer), however it is revealing that this influential code seems to have directly addressed the problem of employer's liability in at least one specific circumstance, and to have adopted at least some kind of a fault-based system.

3.3.4 The Ayutthaya period (1350-1767 CE)

A major stumbling block to discovering the Thai laws of the Ayutthaya period is the near total destruction of the city in 1767 by Burmese armies.[158] Indeed, as much as nine tenths of the laws of Ayutthaya may have been lost in the sacking.[159] However, in 1805, Rama I, the founder of the subsequent Bangkok dynasty, oversaw the compilation and publication of Siam's first comprehensive law code, the Three Seals Code,[160] which represented a reconstruction of the laws of the Ayutthaya

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[157] ibid v.294

[158] DGE Hall, *A History of South-East Asia* (4th edn 1981) 480

[159] Virapol (n 148) 81

[160] In Thai, *Kotmai Tra Sam Duang*

kingdom, and remained the operational code for the country until the adoption of the westernized codes in the 20th century.

If taken as a pure reconstruction of the laws at the end of the Ayutthaya period, it seems clear that the legal development had been extensive in this era due to the complexity and sophistication of the Three Seals Code in comparison to the earlier *Darmasastra*. However, it seems that the Three Seals Code was intended to be a revision of the laws rather than a simple reconstruction, as demonstrated by the Code's preamble.[161] In order to restore the proper operation of justice in the state, the King appointed a royal commission in order to 'cleanse' the corrupted texts.[162] This cleansing, or purification, of the law seems to have been likely more extensive than reverting the law to be in full conformity with the earlier Pali sacred text; instead, it seems to have

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[161] The motivating force behind the compilation resulted from a divorce case involving the restoration of premarital property to a woman named Amdaeng Pom, wife of Nai Bunsri. The first instance case had awarded judgment in favour of the wife, allowing her to recover the property. The husband appealed on the basis that his wife had committed adultery – with one of the judges in the case in the first instance court, no less – and that therefore the judgment was unfair as adultery should not result in the recovery of property. The court hearing the appeal, however, upheld the judgment quoting a provision in the law stipulating that a woman could always be granted a divorce. Eventually news of the judgment made its way to the King, Rama I, who immediately realised the injustice of the result and supposed that there must be an error in the quoted text of the law. He therefore ordered the text used by the judges to be compared with the official copies kept at the palace, so the inconsistency could be identified and rectified. However, the comparison revealed that the texts of all the copies in fact contained the same provision. The preamble to the Code then states that the King concluded that the period of upheaval during and following the sack of Ayutthaya in 1767 had left Thai law "greatly confused, unclear and contradictory, for there were greedy people who ... had made changes as they saw fit in the laws in order to allow for the judgements they wanted." *Phraratcha Phongsawadan Ratchakan thi Nung* (1) [The Royal Chronicle of King Rama I] Bangkok 1962, quoted in Yonei Ishii, 'The Thai Tammasat (with a Note on the Lao Thammasat)' in *Laws of South-East Asia*, Hooker (ed) (1986) Vol I 143, 143

[162] After 11 months, in 1805, the commission completed its task and produced three official copies of the laws called *Chabap Luang* (or 'royal version'), each of which was stamped with the authorizing seals of the minister of the north, south and central provinces, giving the law its name: the Three Seals Code.

been more a process of rationalization and improvement to make the law conform to justice in the modern society.[163] Therefore it seems perhaps over-simplistic to say that, through the Three Seals Code, Siamese society in the Bangkok period "inherited the law of the Ayutthaya period without any change."[164] Nevertheless it is the most important source for forming some understanding of the law of the Ayutthaya period, though its limitations for this purpose, given the context within which it was written, must be borne in mind.

3.3.5 Employer's liability in the Three Seals Code

Like the much more ancient Code of Manu, the Three Seals Code contains few, if any, provisions directly relating to the liability of an employer for the acts of an employee. Notably, even the few instances discussed above which existed in the Code of Manu seem to have been abolished. Provision 87 in Part 17 of the Three Seals Code concerns liability in the context of hiring an ox cart to transport goods, a similar context to the clearest instance of vicarious liability in the Code of Manu as discussed above. An English translation of the first part of this provision is as follows:

"In this provision, whoever hires a person's ox cart to carry items to a destination, where the owner of the cart rides the cart along the path and causes items in the cart to be damaged, may not find fault with the driver. If the driver drives the cart off the path and causes the items to be damaged, then the cart owner has to pay for the items."[165]

On its face, the second sentence of this provision appears to confer liability on a cart owner if a driver damages items due to driving a cart off the designated path. This would suggest vicarious liability: liability placed on the employer (the cart

[163] Yonei Ishii (n 161) 145

[164] Preedee Kasemsup (n 153) 276

[165] Provision 87 of Part 17 of the Three Seals Code. Grateful thanks go to Dr Surutchada Reekie for providing the English translation.

owner) for the acts of the employee (the cart driver). However, this does not appear to be the correct interpretation of this provision. In this provision, the words "cart owner" and "cart driver" are used interchangeably. Rather than apportioning liability in terms of the cart owner-cart driver relationship (employer-employee), this provision actually regulates liability in the relationship between cart owner and the cart hirer (lessor-lessee). Therefore a better description of this provision is as follows: if the cart owner/driver follows the instructions of the hirer in terms of route, the owner/driver will not be liable for damage to the transported goods. However, if the owner/driver takes a different path to the one specified by the hirer, the owner/driver is responsible for loss or damage caused. This provision therefore assumes owner and driver are the same – the use of the terms interchangeably must have this implication. This is supported by the rest of this provision, which gives more details about circumstances in which the owner/driver will be liable for damage to the transported goods and the ox cart.

Therefore this provision is not concerned with vicarious liability. Indeed, the situation described is bilateral: it simply governs the relationship between hirer and owner/driver of a cart for the transport of goods. It apportions liability between these parties in certain situations, which may essentially be seen in modern day terminology as terms implied by law into a contract for hire of an ox cart for the transport of goods.

Therefore it seems that at least by the time of the Three Seals Code, there are no notions of liability being conferred on an employer for the actions of an employee, or analogous relationships. Even though there is some evidence for this concept in the much earlier Code of Manu in certain situations such as that of ox cart driving, the Three Seals Code contains no such concept even in the same situations. Indeed, this is the case even in the lengthy provisions of the Code dealing with the relationship between slaves and their masters – there is no concept of the master being responsible for the actions of the slave. The absence of vicarious liability is significant, especially given its (admittedly modest) presence in the earlier Code of Manu, the basis

for the relevant part of the *Dharmasastra*. The fundamental concept adopted in the law is one of direct, fault-based liability alone: vicarious liability, particularly any concept of strict liability, is absent at this time in the laws of Siam, as evidenced by the Three Seals Code.

3.3.6 The Bangkok period (1767-1925 CE)

The development of Siamese law following the introduction of the Three Seals Code at the start of the Bangkok period was driven by both external pressures exerted by unequal treaties with Western powers and internal motivations of the progressive monarchs seeking to modernize the kingdom.

3.3.6.1 Treaties with the West and Extraterritoriality

Starting in 1855 with the Bowring treaty with Britain, Siam concluded a number of unequal treaties with, and under pressure from, Western powers.[166] As well as sharply reducing import and export duties and certain trading and commodity monopolies, consular jurisdiction was introduced to exclude the jurisdiction of Siamese authorities over foreigners, i.e. extraterritoriality.[167]

The extraterritoriality began to pose a problem as the number of foreigners present in Siam increased following the opening of the Suez Canal in 1869. Later, the claim to extraterritoriality was extended to subjects of other states who lived in Siam and registered for protection of Western powers.[168] This system became abused to the extent that Siamese citizens would register themselves for protection and even sell their protection certificates to others in secret.[169] The direction open to Siam to remove the extraterritoriality of the unequal treaties was to revise its legal system. If Siam revised its legal system to achieve a technical sophistication which the Western powers would accept, then any justification for extraterritoriality would be nullified.

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[166] MB Hooker, 'The 'Europeanization' of Siam's Law 1855-1908', in *Laws of South-East Asia*, Hooker (ed) (1986) Vol II, 531

[167] ibid 540

[168] Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (3rd edn 2014) 49

[169] Francis Sayre, 'The passing of extraterritoriality in Siam' (1928) American Journal of International Law 70, 76

Clearly this meant that the required level and form of technical sophistication would be determined by the Western powers.[170] In this exercise, it is natural that Siam would have looked to Japan's example which had, by employing foreign experts to revise its laws and courts to be in accordance with those of Western powers, previously been able to secure an end to extraterritoriality.[171]

The revision of Siamese laws began to be effected at the end of the 19th century during the reign of King Rama V (1868-1910), who rapidly and extensively modernized the Kingdom in a vast number of respects. In between 1892 and 1900 there were a number of changes in law, in particular reform in the law of criminal procedure, reform of marriage law and land registration, reform of the legislative function, the establishment of a legislative council introducing a forum for legislative initiative, and a reform of the judicial system including the establishment of a Ministry of Justice.[172] The progress of the reforms were noted by Western powers, and Japan in a treaty of 1898 stated that extraterritoriality would be removed subject to the completion of the reforms.[173] Siam used this as a model for other treaties and negotiations with Western powers following the reforms. In 1920, the USA became the first country to abolish entirely its consular jurisdiction; with the USA's help, Siam was able to use this example to negotiate abolition by a number of other states, and eventually Britain and France agreed in 1925 to free Siam from extraterritoriality.[174]

3.3.6.2 Direction of Legal Reform: Codification

As with a number of areas of modernization, and considering that one of the major purposes in modernizing was to satisfy Western powers that extraterritoriality was not justified due to their recognition of the sophistication of Siam's legal system, Rama V looked to the West for models. He sent a number of his

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[170] Hooker (n 166) 548

[171] David Engel, *Law and Kingship in Thailand during the Reign of King Chulalongkorn* (1975) 76

[172] Hooker (n 166) 549ff.

[173] Hooker (n 166) 555

[174] Sayre (n 169) 81ff.

children, nobles and government officials to Europe to study. In 1885, Prince Rabi, King Rama V's son, was sent to the University of Oxford to study law; on his return, he was assigned to create a judicial system.[175] Due to the Prince's education, and to the King's policy of attempting to balance the influences of the Western powers (particularly Britain and France), there was significant influence from both Britain and France during the earliest phases of modernization: the Ministry of Justice hired almost equal numbers of English and French foreign advisers,[176] legal education included lectures and books on English law concepts by Prince Rabi as well as civil law lectures delivered by visiting professors from Europe.[177]

Therefore, when the time came to reform the substantive laws of Siam, Rama V was presented with the choice between adopting civil law or common law as the basis for the new system. Prince Rabi, with an English law background, preferred common law, whereas the King's French and Belgian legal advisers preferred a civil law, in particular French, system. Ultimately, the King decided to adopt the civil law system as the model, seeing the similarity in the code system to traditional Siamese law, in particular the Three Seals Code.

This marked an important moment, as Siamese law deliberately made a choice to adopt French law in place of English law, which was starting to gain traction due to the impact through legal education of many of the Siamese jurists of this period who were starting to use English law principles in cases involving foreigners where traditional Siamese law was silent.[178] The government appointed a Legislative Council in 1909 to draft a Civil and Commercial Code. Parts I and II of the Civil and Commercial Code were drafted predominantly by French legal advisers, although

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[175] Baker and Phongpaichit (n 168) 65

[176] ibid 67

[177] National Archive of Thailand, 'Georges Padoux's Memorandum on the Question on Legal Education in Siam' (20 Dec 1913) Kor Tor 35.10/10, 142, quoted in Munin Pongsapan, 'The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance' (PhD Thesis, University of Edinburgh 2013) 77

[178] Preedee Kasemsup (n 153) 293

English educated Thai legal advisers were added to the committee in 1916,[179] and were promulgated in 1923.

However when the draft was circulated, Phraya Manavarajasevi, who had been made secretary of the Codification Commission and responsible for overseeing the Thai translation of the draft, found the code unsystematic and unsuitable, and convinced the King and the ministers to draft a new code following the Japanese model, which had substantially adopted the German Civil Code[180]. The new drafting committee, dominated by Thai jurists,[181] proceeded to complete two books of the new code in about 7 months, based on the Japanese Civil Code. The Civil and Commercial Code came into effect in 1925, and is still in use today in Thailand.

3.3.6.3 Draftsmen of the Thai Civil and Commercial Code of 1925

The process of drafting the Civil Code of 1925 was run by the Committee of Legislation.[182] Although René Guyon, a Frenchman who had been the chief draftsman of the 1923 Code, was retained as an advisor to the Committee, it seems that Thai draftsmen played the leading role in producing the new draft.[183] According to

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[179] Munin Pongsapan, 'The Reception of Foreign Private Law in Thailand in 1925: A Case Study of Specific Performance' (PhD Thesis, University of Edinburgh 2013) 83f.

[180] However, it is interesting to note that Japan had a similar experience to Siam in adopting a civil code from Western models: Japan also had first attempt at drafting a code based on the French model resulting in a draft known as the "Old Civil Code" in 1890 which was never enacted due to widespread criticism about its structure. The draft was rewritten, the redrafters heavily influenced by the first and second drafts of the German Civil Code, and the present Civil Code was enacted in 1896. However, the Japanese Civil Code is also a mixed reception of various European codes of the 19th century and is not simply an adoption of the German Civil Code in translation. See Hiroyasu Ishikawa, *Codification, Decodification and Recodification of the Japanese Civil Code* in Julio Cesar Rivera (ed.), *The Scope and Structure of Civil Codes*, (2013) (p.267ff)

[181] Munin (n 179) 85

[182] In Thai, คณะกรรมการร่างกฎหมาย *kana gammagan rang gotmai*

[183] Other than the chairman, the Committee had four Thai members and three French members, although two of the members of the Committee, one French and one Thai, were absent throughout the drafting process. Phraya Manavarajasevi, was considered the first Secretary-General of the department: according to him, the Thai draftsmen

Munin Pongsapan,[184] the minutes of the drafting committee meetings between March and October 1925 show that the three Thai draftsmen dominated the drafting work: Phraya Jindabhirom Rajasabhabordi, Phraya Dhebvithoon Pahoolsarutabordi and Phraya Manavarajasevi. All three of these key draftsmen had received legal education in England.

Phraya Jindabhirom Rajasabhabordi, after receiving education at the Law School of the Ministry of Justice and qualifying as a Siamese barrister, was sent to study law in England in 1906 and was called to the bar at Gray's Inn in 1910. Phraya Dhebvithoon Pahoolsarutabordi was also sent to England in 1906 to study law after education at the Ministry of Justice Law School. In 1909, he was called to the Bar, also at Gray's Inn. Phraya Manavarajasevi was the younger brother of Phraya Jindabhirom Rajasabhabordi, and like his brother he qualified as a Siamese barrister and was sent by the Ministry of Justice to study law in England in 1913, being called to the Bar at Inner Temple in 1916. All three returned to Siam and served in the judiciary before being called to the drafting committee. Therefore the three most influential[185] figures in drafting the TCCC had all undergone extensive legal education in England, indeed all qualifying as English barristers, at the start of the 20th century before returning to Siam.

Thus although the 1923 Code was based on the French Civil Code, and the subsequent 1925 Code was based primarily on German and Japanese models, the key draftsmen of the 1925 Code had an educational background in English law rather than the laws of those jurisdictions. Therefore there is justification to look for the influence of English law concepts in the drafting of the TCCC.

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played a leading role in drafting the code since they outnumbered the French members of the Committee (Munin (n 179) 90)

[184] Munin (n 179) 90

[185] Conversely to his role in drafting the 1923 Code, René Guyon, the most influential foreign figure, "was not instrumental in the drafting process of the Code of 1925" (Munin (n 179) 98)

3.3.7 Drafting method and sources of Section 425 of the Thai Civil and Commercial Code

To understand how the drafters arrived at the formulation of Section 425 it is useful to examine the methodology used in drafting the TCCC generally. Phraya Manavarajasevi, who gave interviews on how the TCCC was drafted many years after the Code's promulgation, proposed a new direction after the failure of the 1923 Code:

"We use the method that the Japanese did - that is 'to copy' - in drafting their Civil Code...we therefore simply copied Japanese law. This is a simple and quick way [to complete a draft]. Even the French drafters were not skilful enough at drafting a good Civil Code. We, Thais, with relatively limited skills and experience, would do it even worse. To adopt the Japanese method is efficient because the Japanese copied from the German Civil Code, which was a product of hundred of years of development. The Japanese carefully chose comprehensible German legal principles which were suitable for them but ignored complicated ones"[186]

The official policy was to adopt an approach focusing on the German Civil Code due to the unsuitability of the code based on the French Civil Code as discussed above. However, the Thai drafters chose to copy the Japanese Civil Code believing that this had been based on the German Civil Code and seemed to have successfully been made appropriate to a modernizing legal system. Furthermore, the Japanese Civil Code had been accepted as satisfactory by Western powers who had released Japan from the requirement of extraterritoriality. Therefore this served the important purpose of protecting the new code from criticism by those powers.

Regarding the materials used for this copying method, the key drafters, speakers of English and Thai, produced a draft in English based on English publications

[186] Manavarajasevi, *Interviews* 4 translation in Munin (n 179) 103

of foreign laws. In the draft of the 1925 Code, each provision contained a reference note which shows which foreign materials were used as the model. In a compilation of the English drafts of Books I and II of the 1925 Code (the 'Book of Revised Drafts') which had passed through a revision committee stage which reviewed and translated the draft, there is also a list of abbreviations for foreign statutes and legal sources. The English translations of the Japanese and German Civil Codes used were primarily Chung Hui Wang's *The German Civil Code: Translated and Annotated* published in 1907 and De Becker's *Annotated Civil Code of Japan* Volumes I and II published in 1909.[187] An important feature of the latter is that De Becker included references to (usually) the German Civil Code beneath each provision translated, which may understandably have led the drafters of the TCCC into believing that the referred provisions were the source of the relevant Japanese provision. This also perhaps is the reason the drafters believed the Japanese Civil Code was so representative of the German Civil Code, whereas in fact it is derived from a number of sources.[188]

When it came to the process of drafting, the drafters, it seems, would concentrate on the linguistic superiority of the provisions: when there came a choice as to which version should be adopted, they would choose the linguistically superior provision.[189] However, it seems that this was not the process followed in every case: per Munin Pongsapan, "On rare occasions, the draftsmen amended the wording they copied from foreign models to suit the needs of the Thai people".[190]

The entry in the Book of Revised Drafts for Section 425 of the 1925 Code sets out the English revised text as follows:

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187 Manavarajasevi, *Interviews* 8-9; 'Meeting Minutes' (1 June 1925) in Munin (n 179) 113

188 See Hiroyasu Ishikawa, *Codification, Decodification and Recodification of the Japanese Civil Code* in Julio Cesar Rivera (ed.), *The Scope and Structure of Civil Codes* (2013) 267ff

189 Munin (n 179) 118-9

190 ibid 119

"425. – An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment"

The stated sources, in a hand written note to the provision, are Section 189 of the 1923 Code, Section 831 of the German Civil Code, and Section 715 of the Japanese Civil Code. The handwritten note simply states these three sources without giving further information.

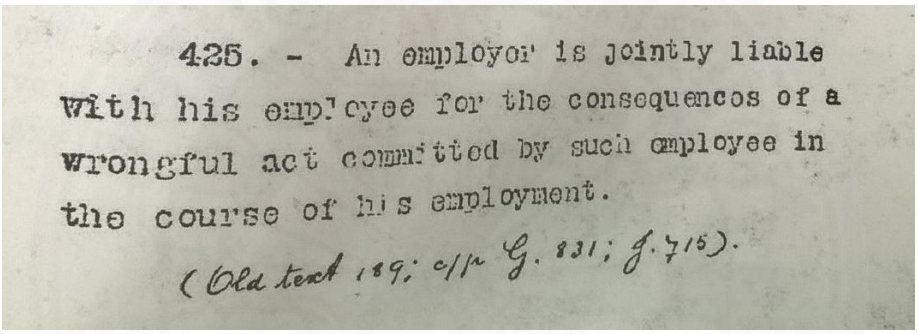
425. - An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment.
(Old text 189; c/f G. 831; J. 715).

Figure 3.1 – Office of the Council of State, Doc No 79, 'การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)' (1925) 305, which contains an English draft of the provision prepared by the draftsmen with handwritten annotations giving the sources. 'Old text' refers to the 1923 draft, 'G' refers to the German Civil Code and 'J' refers to the Japanese Civil Code.

3.3.7.1 'Old text' and the French Civil Code

In spite of the fact that the purpose of the drafting committee of the 1925 Code was to abandon the 1923 Code, which was considered unsuitable, and to start afresh using Japanese and German models rather than the French code starting point, the annotations suggest that this section has its source in the 1923 Code. A translation of Section 189 of the 1923 Code is as follows:

"189 – the employer and employee are jointly liable for the consequences of the wrongful act which the employee has committed in the course of his employment."[191]

It can be seen from this translation that this provision from the earlier code is materially identical to the provision adopted in the 1925 Code. Indeed, when comparing the Thai texts side by side, the Thai wording likewise is materially identical, the only difference being in the word order at the start of the provision which makes no difference to the meaning.[192]

Given the level of influence of French advisers in the compilation of the 1923 Code, and given that this provision appears to have been retained in its entirety from that text, it will be worthwhile to consider the legal position on this topic in the French Civil Code, which is governed by Article 1384.

Article 1384(1) of the French Civil Code, which was originally treated as a general introductory provision, simply states that "A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody."[193] This has been interpreted to provide for a general rule of liability for the acts of others, but only since a landmark case in CE 1991.[194] The main provision in terms of vicarious liability is Article 1384(5), which has been present in its current form since the original version of the 1804 Code, which provides:

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[191] Translation of Section 189 of the Civil and Commercial Code of BE 2466. Grateful thanks go to Dr Surutchada Reekie for providing this translation.

[192] In translation, the 1923 Code states that "the employer and employee are jointly liable" whereas the 1925 Code states "an employer is jointly liable with his employee": in Thai, as in English, the change in word order here has no effect on the meaning.

[193] Translation from Paula Giliker (n 5) 25

[194] Giliker (n 5) 25

"Masters and employers [will be strictly liable] for the damage caused by their servants and employees in the functions for which they have been employed."[195]

There are two particular points to note in comparison with the wording of the TCCC here. Firstly, the requirement here is merely "damage" rather than a wrongful act. However, in subsequent interpretations, including prior to the drafting of the TCCC, it seems that liability has traditionally arisen only for faults of employees, although this is not strictly stated.[196] Secondly, 1384(5) refers to 'masters and employees' – *les maîtres et les commettants* – and 'servants and employees' – *domestiques et préposés*: the words used here expressly indicate that the relationships under Article 1384(5) go beyond the employer/employee relationship and context, and may extend to other relationships where one party is employed to undertake certain relationships on behalf of another.[197] It is important to note that there is no explicit recognition in the French code of the distinction between Employees and Contractors.

Indeed, the provisions of the 1923 Code likewise have no recognition of the distinction between Employees and Contractors. Indeed it is notable that the Thai terminology, as discussed in Chapter 2, for 'employer' and 'employee' in the 1923 Code is นายจ้าง *nai jang* and ลูกจ้าง *lug jang* respectively. In layman's terms, these are very general words: the former phrase literally means simply a person who hires something or someone, and the latter is a person who is hired. On the plain meaning of the words, these would be at least as broad terms as those used in the French Code, and potentially even broader. Thus, it seems that the 1923 Code uses general terminology, and includes no provision distinguishing between employees and independent

[195] Translation from Giliker (n 5) 25

[196] According to Giliker ((n 5) 27), this requirement can be traced back to a decision in 1866, Cas req 19 February 1866 S 1866.1.214, therefore this would have been the accepted interpretation at the time of drafting of the TCCC and the draft 1923 Code.

[197] Giliker (n 5) 26

contractors: this suggests that the intention of the draftsmen of the 1923 Code was to create a position which conferred liability on parties outside of the employer-employee relationship, similarly to French law.

However, in the 1925 Code, this position has changed. Although the wording of this provision remains in the same form, the inclusion of two other critical provisions creates the distinction with independent contractors not present in French law, or apparently in the 1923 Code. First, Section 428 is included in the 1925 Code, drawing the explicit distinction between the Employer (*nai jang*) Employee (*lug jang*) relationship and the Hirer (*pu wa jang tam kong*) Contractor (*pu rab jang*) relationship. As discussed in Chapter 2, only the first relationship will confer strict liability. Second, Sections 575 and 587 of the 1925 Code are included, which set out the definitions of hire of services contracts and hire of work contracts respectively. These explicitly state that the parties to a hire of services contract will be called Employer (*nai jang*) and Employee (*lug jang*), and the parties to a hire of work contract will be Hirer (*pu wa jang tam kong*) and Contractor (*pu rab jang*). Thus, although the terms used in the 1923 Code may have been intended to confer liability in relationships outside of the employment context by using general terms, the draftsmen of the 1925 Code fundamentally altered this position by giving these general terms specific definitions and by including Section 428 (stated by the Book of Revised Drafts to be based on Section 716 of the Japanese Civil Code) to explicitly distinguish the Employer-Employee relationship, which gives rise to strict liability, from the Hirer-Contractor relationship, which does not.

As a result, the inclusion of these other provisions creates a position quite different from the 1923 Code provision, which is a stated source, and the French Civil Code on which it may have been based.

3.3.7.1 Japanese and German civil codes

The Book of Revised Drafts states that the provision is also based on Article 715 of the Japanese Civil Code and Section 831 of the German Civil Code. The translation of Article 715 of the Japanese Civil Code in De Becker is as follows:

"A person who has employed another for a certain business is bound to make compensation for any damages caused to a third party by the person employed in the execution thereof, except the employer has exercised proper care in the selection and appointment of the person employed and in the supervision of the business, or when the damages could not have been avoided even by proper care and attention."[198]

The translation of Section 831 of the German Civil Code by Chung Hui Wang is as follows:

"A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has used ordinary care in the selection of the employee, and, where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care.

The same responsibility attaches to a person who, by contract with the employer, undertakes to take charge of any of the affairs specified in par.1, sentence 2."[199]

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[198] De Becker *Annotated Civil Code of Japan* (1909) Vol II, 277

[199] Chung Hui Wang *The German Civil Code: Translated and Annotated* (1907) 182

Comparing these versions to the TCCC Section 425, the Thai provision is linguistically similar to the first clause of the Japanese provision (up to the work "except") and to the first sentence in the German provision. However, there are some notable differences even here. Firstly, the Thai law specifies that the employer will be jointly liable with the employee: the Japanese and German provisions concern solely the liability of the employer. Secondly, the Japanese and German provisions simply refer to "damage" or "damages" which must be compensated (although the German provisions specify "unlawfully caused" damage); the Thai provision refers to the "consequences of a wrongful act". This causes a material difference in the provisions: for Japanese and German provisions, the employer is liable for all damage, in the Japanese code without reference to its cause. In the TCCC, the employer is only liable for the consequences of "a wrongful act". This potentially therefore suggests a different scope of application for the provision.

However, the most major difference is in what is omitted from the TCCC provision. Both the Japanese and German codes include the concept that the employer may absolve herself from liability if she can show that she acted in an appropriate manner, i.e. using the required level of care. In the Japanese provision, the employer is not liable where she can show proper selection and supervision of the employee, or in cases where damage would have occurred in any event. The German provision is materially the same, relieving the employer of liability where ordinary care has been used in selection, supply or superintendence, or if the damage would have arisen in any case. The omission of such wording in the TCCC fundamentally changes the nature of the provision, and of the notion of the employer's liability.

In the Japanese and German codes, the notion of the liability is fault-based. If the employer can prove that she was not at fault, she will not attract liability. Here, fault is presumed in the case of damage caused by an employee: the employer can rebut this presumption by proving that she acted properly in the selection and supervision of the employee, or if the damage would have happened regardless of the actions of the employer. Therefore this is not strict liability or vicarious liability, in

the sense of being liable for the acts of another person. The notion is that the liability lies with the employer because the employer was at fault; the employer failed to properly select and supervise the employee, therefore any damage that results from the acts of the employee can be seen to be caused directly by the fault of the employer, and the employer must make compensation. By omitting this concept, the TCCC operates on a fundamentally different notion. Here, the employer must pay compensation for the consequences of the wrongful acts of employees, regardless of the employer's own actions or level of care employed. Therefore this is both strict and vicarious liability.

3.3.7.3 English law vicarious liability

Therefore, although the TCCC provision is claimed, in the List of Sources of the Civil and Commercial Code Books I-V, to be based on the 1923 Code, Japanese and/or German civil codes, a close reading of the provision reveals fundamental differences in the law: the TCCC has not adopted a fault-based liability conception of employer's liability, but rather adopts a strict, vicarious, liability notion which is in line with English law. The TCCC includes a concept of distinguishing the Employer-Employee relationship from the Hirer-Contractor relationship as regards liability, not present in the 1923 Code or in the French Civil Code, but present in English law. Also, the scope of the provision is materially different to that of the Japanese and German codes: the latter refer simply to damage, although in the German code the reference is to damage caused unlawfully. The TCCC refers specifically to "consequences of a wrongful act" which provides a more limited scope of operation. This is in line with the English law position, where the employee must have committed an actionable tort:[200] merely the evidence of damage is not sufficient.

Therefore, because of the concepts of strict (i.e. non-fault) liability, vicarious liability (i.e. for another person), the requirement for a wrongful/tortious act (i.e. not merely damage) and a restriction to the employer-employee relationship (i.e. not

[200] As stated by the House of Lords in *Credit Lyonnais Bank Netherland NV v Export Credits Guarantee Department* [2000] 1 AC 486

independent contractors or other relationships), it may be concluded that Section 425 of the TCCC is fundamentally in line with the English doctrine of vicarious liability as it was conceived at the beginning of the 20th century, and dissimilar to the claimed 1923 Code, Japanese or German sources of the provision and French law.

3.4 Conclusion

From the above discussion, it may be concluded as follows: although the stated sources of Section 425 of the TCCC refer to Section 189 of the 1923 Code, Section 715 of the Japanese Civil Code and Section 831 of the German Code, a close comparison of the provisions reveals that the TCCC is based on a fundamentally different notion. Section 425 includes strict, vicarious liability rather than direct liability using the (rebuttable) presumption of fault of the employer, unlike the Japanese and German codes. Section 425 of the TCCC also differs from the 1923 predecessor to the TCCC: although the concept of strict and vicarious liability is included in Section 189 of 1923 Code, the scope of that provision is materially different, since that provision covers relationships outside of the employer/employee context unlike Section 425, when read with Sections 428, 575 and 587. Furthermore, there is no concept of vicarious liability evident in the Three Seals Code, suggesting that this concept of strict and vicarious liability is not a part of Thai law prior to the drafting of the TCCC.

Conversely, Section 425 of the TCCC seems fundamentally the same in conception to the English law doctrine of vicarious liability at the time of its drafting, as discussed in the first part of this chapter. At this time, English law conferred strict and vicarious liability on employers for the tortious acts of employees committed within the course of employment. The acts of independent contractors would not confer liability on others. The TCCC confers strict and vicarious liability of Employers for the wrongful acts of their Employees in the course of employment. The acts of Contractors will not give rise to the liability of Hirers. The concepts and scope of Section 425 and the English law doctrine of vicarious liability are the same in that they concern strict

and vicarious liability for wrongful/tortious acts and are limited to the employer-employee relationship (as opposed to that of independent contractors); neither of the stated civil law models, nor the French Code, contains all of these concepts and this scope. Furthermore the older laws of the Thai people, at least from the era of the Three Seals Code, do not contain a concept of vicarious liability but seem fundamentally fault-based, abandoning even potential vicarious liability present in the ancient Code of Manu: this suggests that the provision was not influenced by concepts present in the legal system operating prior to the drafting of the 1925 Code.

Although there is no direct evidence of English law as the inspiration for this provision – indeed, the stated sources are the 1923 Code and the Japanese and German provisions – it is notable that the Thai drafters of the TCCC, Phraya Jindabhirom Rajasabharbordi, Phraya Dhebvithoon Pahoolsarutabordi, and Phraya Manavarajasevi, were all legally educated in England and each called to the English Bar. As a result, although there is no direct evidence of English law as the source for this provision, the similarity of the provision to the English law concept in comparison to the other dominant sources of the TCCC may suggest at least the influence of English law on the drafting.

3.5 Implications

As discussed in chapter 2, the surrounding provisions in the TCCC generally follow a fault-based concept, similar to the stated civil law code sources: Section 425 is a rare example of strict liability. Therefore in Section 425 we may see an instance of the draftsmen amending the wording of the foreign models "to suit the needs of the Thai people",[201] and it is suggested that they were influenced here by their English legal education to adopt a model of strict and vicarious liability in accordance with the English doctrine of vicarious liability. Following this conclusion, the comparative

[201] Munin (n 179) 119

exercise performed by this thesis is justified not simply on a functionalist comparative basis, where legal systems may be compared by focusing on their approach to a similar problem faced by both systems, but also on the basis that the legal rule itself has a common source, or at least common influence.

Although beyond the scope of this thesis, this conclusion has some implications from a theoretical perspective on the development of Thai law. If, as the conclusions suggest, English law influenced the drafting of Section 425 of the TCCC, this challenges the view of the stated sources of the provision and of the method of compilation as one of copying the most linguistically superior of the Japanese and German civil code provisions. Instead, the process seems more complicated. Indeed, it is particularly notable how a provision was retained from the previous 1923 Code, based on French law, but the position created as a result of reading this provision with other sections creates a position which demonstrates a significantly different conception to that of French law. This highlights the complexity of the process. Furthermore, it seems that the drafters were influenced at least to some extent by their legal background and education. The fact that the influence was English law seems to support some claims made most famously by Alan Watson's theory of legal transplants challenging the close or necessary connection between social, economic or political circumstances and a system of rules of private law[202] which claims instead that important factors are the legal cultures and backgrounds of the legal profession – here, the drafters of the TCCC – and to an extent chance.[203]

For Watson, legal transplants are not usually a result of a systematic search for the most appropriate rule, but rather depend to a large extent on the political prestige or authority of the donor system at the time of transplant rather than the appropriateness of the rule itself. This is largely a matter of historical accident. In Section 425 of the TCCC we can see this historical accident in effect: due to political pressures and factors at the time, England was often chosen as the destination of Siamese lawyers to further

[202] This theory is primarily expounded in Alan Watson, *Society and Legal Change* (2nd edn 2010), but also present elsewhere in his writings.
[203] Watson, *The Nature of Law* (1977) 106ff

their education. As a result, the key drafters were all educated in England. Therefore this historical accident has perhaps led to an English influence to the final position created in respect of Section 425. That the influence is one of historical accident, rather than shaping the provisions "to suit the needs of the Thai people" is supported by the analysis that vicarious liability had been abandoned in the Three Seals Code, and therefore there seems to have been no requirement to alter the 1923 Code or the Japanese or German positions arising from this source. As such, this analysis of Section 425 seems to support a view of legal transplants arising through borrowing driven by the backgrounds and legal cultures of the lawyers, and historical accident, rather than through a process of selecting the rule which best suits the particular needs of a society. However, this analysis also demonstrates the fact that the interplay between the 1923 Code, the provisions of the Japanese and German codes, and English law concepts is extremely complex. Although the draftsmen may have modestly seen themselves as 'simply' copying the code with the most elegantly drafted provision, in fact the process of selection of the provisions and the final position created is by no means simple and, as argued here, owes much to the backgrounds of the draftsmen and not just to the stated sources of the provisions.

CHAPTER 4
EMPLOYEES AND INDEPENDENT CONTRACTORS

4.1 Introduction

This chapter will discuss the first of the two required elements to confer liability under the English law doctrine of vicarious liability and Section 425 of the TCCC, that of the relationship between the individual committing the tortious/wrongful act and the person who may be liable to compensate the victim. For convenience, in the discussion that follows the individual committing the tortious/wrongful act will be referred to as "D1" and the person (natural or juristic) upon whom the law confers liability vicariously will be referred to as "D2".

This chapter will proceed by first discussing the evolution of the current position in English law which has been the subject of significant change as demonstrated by a recent line of cases. Then this chapter will discuss the position in Thai law, to establish the corresponding test under Section 425. In the third section, this chapter will perform a comparative analysis of the two jurisdictions' approaches focusing particularly on how Thai law would apply in situations which have been problematic to English law, addressing the first hypothesis of this thesis as set out in the introductory chapter. Finally this chapter will analyse in detail the policy and principles that are evident in the application of the law in each jurisdiction, addressing the second hypothesis as set out in the introductory chapter.

4.2 English law

In the first limb of the doctrine of vicarious liability in English law traditionally it has been asked whether D1 was an employee of D2. If not an employee, D1 was considered an independent contractor whose tortious actions would not confer liability upon D2. However, following the most recent line of cases, in English law it is no longer necessary to find a formal relationship of employment to confer liability on

D2. The question now, as will be discussed below, is whether the relationship has the features which justify conferring vicarious liability on D2. The existence of the employer-employee relationship will in all cases justify the conferring of liability. However, even if the relationship is not one of employment, it may nevertheless be 'akin to employment' and thus it may be considered fair, just and reasonable to confer vicarious liability on D2. Independent contractors, under this view, are relieved from liability not because of the lack of a formal employment relationship, but because they undertake risk-bearing activities on their own behalf rather than on behalf of another.

Therefore the position that emerges from case law is that vicarious liability will be conferred by establishing that the required relationship exists, which is either:

(i) the employer-employee relationship; or

(ii) another relationship which satisfies the 'akin to employment' test, which takes into account a 'fair, just and reasonable' requirement judged with reference to the underlying policy basis of the doctrine.

Since the relationship of employment is central to this test, it is appropriate to examine how its existence is established under English law.

4.2.1 Relationship of employment

The traditional difference between an employee and an independent contractor turns on whether the relevant individual is operating under a contract of service or a contract for services. However, there is no universal definition within English law of either of these terms. For example, a leading textbook[204] gives the following terminological note:

[204] Steele (n 30)

"[A] contract of service is the sort of contract that is entered into between employer and employee; a contract for services is the sort of contract entered into when appointing an independent contractor."[205]

Although a contract may specify that the person doing the work is an independent contractor, or may call itself a contract for services, this is by no means determinative and it is open to the court to consider whether, as a matter of fact, such contract is by its nature a contract of service.[206] The intention of the parties is relevant but not conclusive.[207] Traditionally the distinction between them lies in the different level of control exercisable by the employer, particularly control over the manner in which the work is to be done. However, in recent years developments in the doctrine of vicarious liability and also in other areas of the law for which the distinction is important[208] has demonstrated flaws in the control test. The more modern approach is to abandon a simple test and to take an approach of assessing a number of factors, of which control is one.

4.2.1.1 Control Test

The classic test for establishing the employment relationship is one of control. The distinction is based on the concept that in a contract for services the master only controls *what* is to be done; in a contract of service, the master also can

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[205] ibid at 522

[206] *Ready Mixed Concrete v Ministry of Pensions and National Insurance* [1968] 2 QB 497

[207] Contrast *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 with *Lane v Shire Roofing Co (Oxford)* [1995] IRLR 493, CA. The intention of the parties is likely to be most relevant where there are conflicting indications of the nature of the relationship, or in particular where the relationship is unusual or ambiguous. In these cases, the label the parties give it may carry more weight: see Clerk & Lindsell, *On Torts* (18th edn, 2000) 5-04

[208] For example, to determine an individual's status for the purposes of the social security system or to decide if a worker is capable of benefitting from rights in the Employment Rights Act 1996, which only apply to employees.

control the method of working, i.e. *how* it is done.[209] In the House of Lords case of *Short v J & W Henderson Ltd*[210] Lord Thankerton stated four factors which indicate the existence of an employment relationship:

(a) the master's power of selection

(b) the payment of remuneration

(c) the master's right to control the method of doing the work

(d) the master's right of suspension or dismissal

Of these, (a), (b) and (d) effectively demonstrate whether there is in fact a contractual relationship between the two parties at all. However, the circumstances of remuneration may also be indicative, with payment by results suggesting a relationship of independent contractors and payment by time suggesting an employment relationship. The key indicator was usually factor (c), the master's right to control the method of doing the work.[211]

Indeed, it seems the control test will still be helpful in certain cases, since if a contract allows the master the right, realistically exercisable in the circumstances, to control the method of working of the servant, then the contract will be a contract of service and the servant an employee.[212] However, the absence of a

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[209] For an early formulation of the control test, see *Yewens v Noakes* (1880) 6 QBD 530

[210] [1946] QB 90

[211] See for example the earlier case of *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762 in which the court weighed a number of factors in deciding whether or not the relationship was one of employment, including regular hours of work, a fixed period of employment, control over place of work, exclusivity of service, right to dismiss for breach of reasonable instructions, and continuous dominant and detailed control. The court, per McCardie J, concluded by saying "It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant."

[212] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 186, see also Clerk & Lindsell (n 207) 5-06; John Murphy and Christian Witting (n 29) 633.

realistic right of control over the servant's method of working will now no longer be decisive that the relationship is one of independent contractors. The move away from the control test has come as a result of attempting to apply the doctrine to skilled professionals.

4.2.1.1.1 Issues with the control test – skilled professionals

The control test presents a problem particularly when applied to skilled professionals who are not under a high degree of practical control in the performance of their activities by their employer.[213] A good example of this issue, which led to a challenge to the control test, is the case of a negligent doctor or surgeon. Is a hospital the employer of the surgeon, and therefore vicariously liable for the physician's negligence, even though a surgeon may have complete autonomy in performing surgery? Using the traditional test of whether or not the employer can control the method of work is unlikely to confer employee status on physicians, and the conclusion for some years was that hospitals were not liable for the negligence of doctors at common law, under the doctrine of vicarious liability.[214]

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[213] Kahn-Freund observed in 1951 that in a post-industrial age, workers are expected to be more skilled and exercise more discretion in carrying out their roles; the more skilled the employee, the less directed they will be by their employer (O Kahn-Freund, 'Servants and independent contractors' (1951) 14 MLR 504, 505-6)

[214] The leading case in this area was the 1909 case of *Hillyer v Governors of St Bartholomew's Hospital* [1909] 2 KB 820, where the Court of Appeal held that the only duty undertaken by the governors of a public hospital towards a patient who is treated by the hospital is to use due care and skill in the *selection* of physicians. The hospital was not vicariously liable for the *actions* of doctors or surgeons because of the lack of control exercised over their actions. However, the court said that vicarious liability would exist in relation to, for example, attendance by nurses in the wards which the court considered was more closely controlled by the hospital (at 829 per Kennedy LJ).

However, by the middle of the twentieth century[215] the courts recognised a need to modify this rule and in four key cases[216] it was stated that professionals working full-time for hospitals could be treated as employees, casting doubt on the universality of the control test.[217] Indeed, changing working conditions have meant that even in the case of workers without professional qualifications it is often unrealistic to say that the employer has significant effective day-to-day control over the activities of employees, especially in large modern corporate organisations.

4.2.1.2 Integration or organisation test

This line of cases instituted the adoption of flexibility with regard to the control test. Denning LJ, in the 1952 case of *Stephenson, Jordan and Harrison*

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[215] Some commentators see the switch to hold hospitals liable as being prompted by the introduction of the NHS in the UK. This placed hospitals on a surer financial footing, as they now had the backing of the state. Previously they had been predominantly charitable enterprises, and a refusal to confer liability may have had the policy purpose of not jeopardizing their socially important operations – see Dias and Markesinis, *Tort Law* (3rd edn 1995)

[216] *Gold v Essex CC* [1942] 2 KB 293 (radiographer); *Collins v Hertfordshire County Council* [1947] KB 598 (resident junior house surgeon); *Cassidy v Ministry of Health* [1951] 2 KB 343 (assistant medical officer and house surgeon); and *Roe v Minister of Health* [1954] 2 QB 66 (anaesthetist).

[217] However, the basis on which liability was extended in these cases was not simply by revisiting the control test (although doubt was cast on its universality), but rather by developing a primary liability of hospitals to patients in terms of a duty of care which could not be removed by delegation – a so-called 'non-delegable' duty to undertake to treat patients and to select and appoint the professionals who will give such treatment. This is primary liability of the hospital in respect of the patient; if a hospital fails in its duty of care it would be directly liable to the patient. Therefore liability is on a different basis: direct, fault-based liability, arising from a failure to meet a duty of care found by the judges in these cases, rather than the secondary liability basis of vicarious liability. Indeed, the question of whether or not all physicians will be seen as employees of most UK hospitals is now unlikely to be decided by the court as the NHS indemnity compensation scheme now covers all staff regardless of their technical status (NHS Circular: HSG (96) 48: *NHS indemnity arrangements for handling clinical negligence claims against NHS staff* (1996)). The question of whether visiting or consulting surgeons should be regarded as employees has yet to be settled as a matter of English law (see Giliker (n 5) 63).

Ltd v Macdonald & Evans[218] agreed with Somervell J in *Cassidy v Ministry of Health*[219] that the control test was not universally correct and that there were many contracts of service where the master cannot control the manner in which the work is to be done. Denning said that it was "almost impossible to give a precise definition"[220] of the distinction between a contract of service and a contract for services for the purpose of vicarious liability, but that:

"One feature which seems to me to run through the instances is that, under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business: whereas under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it."[221]

This is the so-called "organisation" or "integration" test, which involves asking whether the individual's work was an integral part of the employer's organisation, rather than accessory to the business. This test has become central to vicarious liability after the *Viasystems* case, as discussed below.

4.2.1.3 Multiple factor approach

The integration test expressed by Lord Denning did not replace the control test. In *Ready Mixed Concrete v Ministry of Pensions and National Insurance*[222], MacKenna J argued that control was still the dominant factor (although the control need not be unrestricted),[223] but that it was not the only feature of the test. Even if there is

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[218] [1925] 69 RPC 10

[219] [1951] 2 KB 343

[220] ibid p.570

[221] ibid

[222] [1968] 2 QB 497

[223] Here, control includes the power of deciding the thing to be done, the way in which it will be done, the means to be employed doing it, the time when and the place where it shall be done. However, this did not mean that such right must be unrestricted, and MacKenna J cited with approval the following words of Dixon C.J in *Zuijs v Wirth Brothers Proprietary, Ltd* (1955) 93 CLR 561, 571: "What matters is lawful authority to

sufficient control, it still must be asked whether the terms of the contract as a whole were consistent with a contract of service.[224]

In a case decided a year after the *Ready Mixed Concrete* case, *Market Investigations v Minister of Social Security,*[225] Cooke J clearly dismissed control from being the sole determining factor and suggested that the fundamental test to be applied is as follows:

"'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service."[226]

In employing this more instinctive approach, control would be considered but other factors of importance included whether the individual provided equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management, whether and how far he has the opportunity to profit from good management in performing his task.[227] However, in *Hall (Inspector of Taxes) v Lorimer*[228] the Court of Appeal found the test from *Market Investigations* unhelpful in the case of a professional, working freelance for various television production companies.

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command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters"

[224] For this aspect, MacKenna J gave examples of other types of contract, such as a contract of carriage and said that the judge's task is to classify what kind of contract it was, and in doing so he may take into account other matters besides control.

[225] [1969] 2 QB 173

[226] ibid at 184

[227] In this case, as well as *Ready Mixed Concrete* and others, the 1947 Privy Council decision in *Montreal v Montreal Locomotive Works Ltd* was influential and much discussed by the judges. Here Lord Wright held that a four-fold test would in some cases be more appropriate, including (1) control (2) ownership of tools (3) chance of profit (4) risk of loss. This test is clearly influential for Cooke J's formulation.

[228] [1994] 1 All ER 250, CA

Thus there is no single test for whether a worker is an employee or an independent contractor. Instead the modern method is to take a "multiple factor"[229] approach where all aspects of the relationship are to be assessed, and the court must take into account and give the appropriate weight to each of the separate factors of the case. However, the importance of the test for establishing the relationship of employment is less critical in the context of vicarious liability now that the courts have expanded the doctrine to apply to relationships not falling strictly into the categorisation of employer-employee.

4.2.2 Vicarious liability outside of the employment relationship

4.2.2.1 Borrowed workers/dual employment

An issue which led to development of the law in this area generally, and the control test in particular, is that represented by the 1946 case of *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd*[230] which concerned the situation where an employee of one organisation is hired by another for a particular task or period of time. The court held that, in such circumstances, the general employer rather than the temporary employer would usually be considered the proper employer for the purposes of vicarious liability.[231] To overturn this position, a general employer may prove that the temporary employer has intervened and given specific instructions on how a particular task is to be performed. In these circumstances, the temporary employer will be held liable.[232]

In *Denham v Midland Employers Mutual Assurance Ltd,*[233] the Court of Appeal made clear that a transfer to a temporary employer, of the kind

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[229] Clerk & Lindsell (n 207) 5-10

[230] [1946] UKHL 1

[231] Although all five Lords gave different judgments and formulations for the proper test, the common reasoning among them is that the general employer is liable because they have the authority to tell the employee the manner in which to do the work. Ordinarily, employees use their discretion in how to go about their task: however, this discretion is vested in the employee by the general employer.

[232] Lord Simon at 10, Lord MacMillan at 13, Lord Uthwatt at 21

[233] [1955] 2 QB 437

envisaged (rarely) occurring in *Mersey Docks* would not be considered a transfer of employment for other purposes. This is an important step in the development of the law, as it is explicit recognition that the test of employment in terms of conferring vicarious liability is not the same as the test of employment for other purposes, such as tax or national insurance contributions.

The approach in Mersey Docks remained the accepted position until the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*,[234] which has emerged as an extremely significant decision in this area.[235] This case also concerned a scenario in which there was a question of whether a general employer or a temporary employer was the correct defendant for vicarious liability.

Two judges heard the case in the Court of Appeal, May LJ and Rix LJ. May LJ made an extensive review of previous cases to decide whether there was any authority binding the court to find only one party liable under the doctrine of vicarious liability or whether it was open to decide that more than one party was vicariously liable.[236] May LJ concluded that the concept that only one party could be held liable was based on procedural issues which no longer applied to the legal system

[234] [2005] EWCA Civ 1151

[235] See for example Ward LJ in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, who stated that the decision of the Court of Appeal in Viasystems, perhaps unwittingly, created "a whole new ballgame" (at [60]) with their decision.

[236] The Court of Appeal, before the beginning of the hearing, was referred to a discussion in Atiyah's seminal work in this area, *Vicarious Liability in the Law of Torts* (1967) (n 5), where that author notes that it is strange that the court has never considered what the author regarded as an obvious solution in some cases, the imposition of dual liability, holding both the general employer and the temporary employer liable for the acts of the borrowed employee. The court adjourned the hearing, inviting counsel in the case to research and present arguments so that the court could examine this possibility in the case.

and obiter remarks in much earlier cases.[237] Thus there was no technical reason preventing him from considering this argument in this case.[238]

May LJ held that both the temporary and general employer were vicariously liable, using a test of control: each 'employer' was entitled to control the actions of the worker, on the facts. As between each other, there should be equal contribution which the judge considered was "close to a logical necessity"[239] given that neither employer was personally at fault, and therefore dual control would mean equal contribution.

Rix LJ agreed with May LJ's conclusions but chose to "add some words"[240] of his own because the court was departing from the long-standing assumption that dual vicarious liability was not possible. In attempting to define the circumstances in which such dual liability should arise, Rix LJ said that the balance of authority lay in favour of a situation where the right of control over the employee is shared between different employers: where the right to control the method of performance of the employee's duties lies solely on one side or another, the

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[237] The judge concluded that the assumption that only one party could be held liable seemed to be an assumption stemming from obiter remarks in the 1826 case of *Laugher v Pointer* (1826) 5 B&C 547 which the judge said were a result of the procedural difficulties which would have arisen in the legal system, as it then existed, as a result of allowing multiple actions against multiple principles: something which is not particularly an issue for the modern legal system.

[238] May LJ also examined the approach of other common law jurisdictions and academic commentary, concluding that other jurisdictions gave no clear guidance for the problem and that academic commentary generally favoured dual liability but considered that the courts were constrained by previous authorities. He concluded that there was no technical reason preventing him from considering this argument in this case: "If, on the facts of a particular case, the core question is who was entitled, and in theory obliged, to control the employee's relevant negligent act so as to prevent it, there will be some cases in which the sensible answer would be each of two "employers"." *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 at [49]

[239] ibid at [52]

[240] ibid at [54]

responsibility in terms of vicarious liability lies on that side also. However, the judge said that he was "a little skeptical that the doctrine of dual vicarious liability has to be wholly equated with the question of control".[241] Instead, he suggested that the relevant circumstances would be where the employee in question "is so much a part of the work, business or organisation of both employers that it makes it just to make both employers answerable for his negligence."[242]

However, it is important to note that Rix LJ and May LJ used different tests. May LJ relied on the concept of control only; Rix LJ ultimately advocated a test of whether the employee was integrated into the relevant organisation. This integration test was subsequently used in the 2012 Court of Appeal case of *E v English Province of Our Lady of Charity*,[243] and the Supreme Court case in the same year in *Various Claimants v Catholic Child Welfare Society*,[244] which did not concern dual vicarious liability. Rather this test was used to expand vicarious liability to find a defendant liable outside a formal employer-employee relationship.

4.2.2.2 Relationships akin to employment

There are three key cases which have developed the ability to confer vicarious liability outside of the employment context. This section will trace this development by discussing each case in turn.

4.2.2.2.1 E v English Province of Our Lady of Charity

In the case of *E*, the Court of Appeal was asked to decide whether the relevant relationship existed to confer vicarious liability between a priest and the trustees of a trust which had stood in the place of the Bishop of Portsmouth. The case concerned sexual abuse by a priest appointed by the Bishop. Ward LJ, in the Court of Appeal, had no difficulty in concluding that there was no contract of service or contract for services between the Bishop and the priest. Although this depended on the

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[241] ibid at [79]
[242] ibid
[243] [2012] EWCA Civ 938
[244] [2012] UKSC 56

facts of each case, here the appointment to the office of parish priest was truly an appointment to an ecclesiastical office.[245] However, Ward LJ also considered whether the doctrine of vicarious liability could be extended to cases where the relationship was *akin* to employment.

Ward LJ stated that the time had come to recognise that the context in which the question arises, as to whether a person is an employee or an independent contractor, is essential: different tests applied whether an employee is seeking a remedy against an employer for unfair dismissal, liability for income tax, a claim under sex discrimination legislation, vicarious liability etc. Different justifications applied for the remedy for an innocent victim against the employer of a tortfeasor, and therefore the tests used for other contexts should not confine the operation of the doctrine of vicarious liability.[246]

The broad question that Ward LJ stated should be asked is "whether the tortfeasor bears a sufficiently close resemblance and affinity in character to a true employee that justice and fairness to both victim and defendant drive the court

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[245] ibid at [30]. The parties did not contest the following facts about the priests: (i) priests in the diocese were informed about their appointments verbally, which were then announced in a circular letter sent out to the clergy; there were no terms and conditions of their appointments, and no form of contract; (ii) there was effectively no control over priests once they had been appointed; they were free to conduct their ministry as they saw fit, with no supervisory role played by the bishop; (iii) priests did not receive any financial support from the diocese; remuneration mainly came from collections and each parish was responsible for generating its own income; (iv) under cannon law, the bishop may only redeploy the priest in another parish if the latter consents; there is some element of control of the bishop over the priest, but there is nothing in the way of penalty or enforcement; (v) there are a number of differences between the relationship and the standard contract of employment, and the relationship between priest and bishop is more one of collaborator than superior and subordinate; (vi) a bishop and a priest would not regard their relationship as being one that could be adjudicated upon by the civil courts.

[246] Ward viewed *Viasystems* as a crucial decision, for in that case the second defendant was held liable for the actions of the tortfeasor despite being accepted as not an 'employee' of the second defendant: the actual contract of employment "was treated as no more than an irrelevant distraction" [2012] EWCA Civ 938 at [60].

to extend vicarious liability to cover his wrongdoing."[247] Ward LJ referred to questions of control and integration and concluded that there was no single test; it was necessary to use various tests to see whether cumulatively they point towards the employer-employee relationship or away from it.[248]

Weighing the factors,[249] Ward LJ concluded that the priest was more like an employee overall than an independent contractor. The relationship was close enough, and so akin to, employer-employee to make it just and fair to impose vicarious liability. Justice and fairness was expressed to be used as a check on the conclusion, not a stand-alone test for a conclusion. The result in *E* was approved by the Supreme Court in the case of *Various Claimants v Catholic Child Welfare Society*,[250] which acknowledged the influence of the Court of Appeal's reasoning of Ward LJ in *E* and which is now the leading authority in this area.

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[247] ibid at [62]

[248] ibid at [69]. For answering this question, Ward LJ turned to criteria in an article by Professor Richard Kidner, "Vicarious Liability: for whom should the 'employer' be liable?" (1995) 15 LS 47, which focused essentially on four tests: the control test, the organisation test (how central the activity is to the enterprise), the integration test (whether the activity is integrated into the organisational structure), and the entrepreneur test (is the person in business on his own account). Ward considered these appropriate signposts which may point to vicarious liability.

[249] Regarding control, Ward LJ stated that the question should be viewed in a wider sense than inquiring whether the employer has the legal power to control how the employee carries out his work: it was rather whether the employee is accountable to his superior for the way he does the work so as to enable the employer to supervise and effect improvements in performance and eliminate risks of harm to others (at [76]). In this sense, the priest was accountable to the bishop. Regarding the organisation test, Ward recast the Roman Catholic Church in terms applicable to a business, identifying the objective as being to "spread the word of God" (at [77]), to meeting which "target" (at [77]) the priest's role was central. The role of the parish priest was considered wholly integrated into the organisational structure of the enterprise, thus satisfying the integration test. Regarding the entrepreneur test, while Ward LJ concluded that he did not directly take a salary and was paid from what could be taken from collections, any surplus was not his own and he was required to reside in the parochial house was something more akin to an employee than an independent contractor.

[250] [2012] UKSC 56

4.2.2.2.2 Various Claimants v Catholic Child Welfare Society

This case concerned an institute known as the Brothers of the Christian Schools (the "Institute"), an unincorporated association whose members are lay brothers of the Catholic Church. There were allegations of physical and sexual abuse committed by brothers at a residential institution for boys in need of care called St Williams. St Williams was owned by a charitable trust and run by the Catholic Child Welfare Society ("CCWS"), which made employment contracts with teachers including brothers of the Institute. The vicarious liability of CCWS was found and not appealed. However, the Supreme Court was required to answer the question of whether the Institute was responsible at law for the acts committed by its members.

Lord Phillips, delivered the judgment with which the other judges[251] all agreed. In finding the defendants liable, he considered the *Viasystems* case and the tests of May LJ and Rix LJ, preferring the approach of the latter (i.e. the integration test) on the basis that May LJ's test was too stringent.[252] He stated that, in the context of the modern world, it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship. Rather, the significance of control is that the employer can direct *what* the employee does, not *how* she does it.[253] Lord Phillips also approved of the conferring of vicarious liability where "the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents."[254]

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[251] Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath

[252] Lord Phillips considered that the *Mersey Docks* case imposed a test "so stringent as to render a transfer of vicarious liability almost impossible in practice" [at 37] and he stated that the test that May LJ applied in *Viasystems* was the same test applied in *Mersey Docks*. He considered that there was no justification for such a stringent test when considering whether there is dual vicarious liability.

[253] ibid at [36]

[254] ibid at [47]

4.2.2.2.3 Cox v Ministry of Justice

The Supreme Court again had an opportunity to clarify this area of the law in 2016 with the case of *Cox v Ministry of Justice*.[255] The facts of the case were that the claimant, Mrs Cox, worked as the catering manager at HM Prison Swansea. She was in charge of four members of staff, and there were about 20 prisoners who worked in the kitchen and came under her supervision. The prisoners working in the kitchen were selected and paid a nominal wage: prisoners were not required to work in the kitchen. In the process of unloading a delivery of food, a prisoner negligently dropped a sack of rice onto Mrs Cox's back, injuring her. The Supreme Court was asked to decide whether the Ministry of Justice (of which the prison service is an executive agency) could be held vicariously liable for the negligence of the prisoner.

In the judgment, Lord Reed, with whom the other members of the court agreed,[256] approved the approach of Lord Phillips in *Various Claimants* summarising it as follows:

"a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."[257]

Lord Reed confirmed that this should not be confined to a special category of cases, such as the sexual abuse of children, but provides a basis for identifying vicarious liability which may be imposed outside relationships of employment. He accepted that the criteria are insufficiently precise to make their

[255] [2016] UKSC 10
[256] Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson
[257] ibid at [24]

application to borderline cases plain and straightforward, but that this was a criticism which could be made of other principles of tort law.[258] Lord Reed strongly downplayed the element of control that had historically been part of the analysis, saying that the concept of control was now only that the employer could control what the employee does, not how she does it, and thus was "unlikely to be of independent significance in most cases".[259]

The focus on the business activities carried out by the defendant and the attendant risks, for Lord Reed, helped direct attention to issues that are likely to be relevant in the modern workplace, where workers may in reality be part of the workforce of an organisation without having a formal contract of employment. It also reflects "prevailing ideas about the responsibility of businesses for the risks which are created by their activities".[260] Lord Reed put significant emphasis on the identified policy basis of the doctrine, which is different to other contexts in which the question may be asked and therefore requires a different test. The policy basis will be discussed in more detail later in this chapter.

Applying this to the instant case, the requirements laid down in *Various Claimants* were met. Prisoners working in the prison kitchen are integrated into the operation of the prison, so that activities assigned to them by the prison service form an integral part of the activities which it carries on in furtherance of its aims: here, the activity of providing meals to prisoners. Furthermore, the prisoners work under the direction of the prison staff. As a result, there is sufficient relationship between the prisoner and the Ministry of Justice to confer vicarious liability for the negligent acts of the prisoner.

Lord Reed also considered whether it was always necessary to ask the broader question of whether it was fair, just and reasonable to impose vicarious liability. In this regard, he considered that the criteria listed by Lord Phillips in *Various*

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[258] ibid at [28]
[259] ibid at [21]
[260] ibid at [29]

Claimants were designed to ensure that vicarious liability is imposed where it is fair, just and reasonable to do so. However, he also conceded that where a case concerns circumstances which have not previously been subject of an authoritative judicial decision it may be valuable "to stand back and consider whether the imposition of vicarious liability would be fair, just and reasonable."[261] He considered the conclusion in the instant case was not unreasonable or unjust.

4.2.3 Current position

Traditionally the question of whether or not a relationship will confer vicarious liability has focused on whether the worker is operating under a contract of service or a contract for services, with only the former capable of conferring vicarious liability. However, following the most recent line of cases it is clear that the doctrine is not confined to a formal employment relationship. Rather, vicarious liability can be conferred in relationships which are considered *akin* to employment.

When considering the current test, it seems clear that the traditional control test does not provide a universal answer to whether or not a sufficient relationship exists. Furthermore, it is also clear that the test for the relationship conferring vicarious liability is different from the test of whether an individual is an employee for contexts other than vicarious liability. However, it seems that if an employer has the right to exercise a high level of control over how a worker goes about her tasks, the worker will be considered an employee. Nevertheless it is clear that the doctrine of vicarious liability extends beyond these limits.

Therefore, following Lord Reed[262] in *Cox*, the doctrine of vicarious liability will apply outside of traditional employment relationships where the following criteria are met:

(a) the individual carries on activities as an integral part of the business activities carried on by a defendant; and

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[261] ibid at [42]

[262] Per Lord Reed, ibid at [23]

(b) for its benefit (in the sense of advancing its objectives, not necessarily connected to profit) rather than entirely attributable to an independent business of her own or a third party.

For new situations there is a caveat that the judge should consider whether it is "fair, just and reasonable" to impose liability, taking into account the policy basis of the doctrine. Therefore the test is now fundamentally one of integration of an individual within an organisation. Indeed, the most recent case law recognises that in the modern workplace there are numerous relationships which do not fit easily into a binary 'contract of service or contract for services' framework, and sufficient integration of an individual into an organisation will confer liability vicariously on the employer due to the underlying policy justifications of the doctrine as identified by the judges.

4.3 Thai law

Section 425 of the TCCC provides that if an Employee commits a wrongful act in the course of employment, the Employer will be jointly liable for the consequences. Section 428 of the TCCC clarifies the distinction between Employee and Contractor: wrongful acts of the latter will not confer strict liability on the Hirer; liability will only arise in the Hirer-Contractor relationship if the Hirer was at fault in terms of the work ordered, the instructions given or the selection of the Contractor. In other words, only the Employer-Employee relationship will confer strict liability; liability in the Hirer-Contractor relationship is direct and fault based, thus falling within the general scheme of Thai law in relation to wrongful acts as demonstrated by the general section of the TCCC, Section 420, as discussed in more detail in Chapter 2. Therefore a crucial distinction in terms of conferring liability is that between the Employer-Employee relationship and the Hirer-Contractor relationship.

4.3.1 Employer-Employee relationship

Similarly to English law, the Employer-Employee relationship is defined by reference to the contract,[263] the Thai term for which is *wajangraengngan*, usually translated as a 'hire of services contract'. The definition of a hire of services contract is given in Section 575 of the TCCC, of which the most authoritative translation is as follows:

"A hire of services is a contract whereby a person, called the [Employee] agrees to render services to another person, called the [Employer] who agrees to pay a remuneration for the duration of services."[264]

A contract complying with this definition gives rise to the relationship of Employer-Employee for all purposes under the TCCC. Therefore this is not a specific test of the relationship that is required for the purpose of conferring liability under Section 425: the existence of a hire of services contract will mean that the relevant persons are treated as Employer and Employee for all purposes under the TCCC.

By contrast, the Hirer-Contractor relationship is defined by reference to a different contract, *wajangtamkong*, usually translated as a 'hire of work contract'. The definition of this contract is given in Section 587 of the TCCC, of which a translation is as follows:

"A hire of work is a contract whereby a person, called [Contractor], agrees to accomplish a definite work for another person, called [Hirer], who agrees to pay him a remuneration of the result of the work."[265]

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[263] See Punyaphan (n 40) para 80

[264] Thai Civil and Commercial Code, Section 575, translation from Kamol Sandhikshetrin (n 15) with terminology used in this thesis substituted in square brackets.

[265] Thai Civil and Commercial Code, Section 587, translation from Kamol Sandhikshetrin (n 15) with terminology used in this thesis substituted in square brackets. A more natural translation of the last clause would be "and the latter agrees to pay him

The basic distinction between the two relationships, as indicated by the wording of the two provisions, is the basis on which the Employee or Contractor is remunerated. Under the hire of services relationship, the Employee is remunerated for the time she has worked: whether or not the specific task has been completed, the Employee is entitled to remuneration. However, under the hire of work arrangement, the Contractor must complete the work in order to receive remuneration. The distinction here may be brought out by the difference between a driver working full time for an individual and a taxi driver. The former will receive wages for the whole time that she works. The latter will only receive remuneration for completing the task for which she is hired, i.e. the particular journey agreed with the passenger. Therefore the former is a hire of services relationship, while the latter is a hire of work relationship.[266]

However, remuneration is not the only factor. Pursuant to a Dika Court[267] decision,[268] the status of Employee also depends on the power of the Employer to control and order the individual. The aspect of power of control derives from Section 583 of the TCCC:

"If the [Employee] willfully disobeys or habitually neglects the lawful commands of his [Employer], absents himself from service,[269] is guilty of gross misconduct, or otherwise acts in a manner incompatible with the due and faithful

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remuneration for the successful result of the work". Grateful thanks to Dr Prachoom Chomchai for suggesting this improvement to the translation.

[266] Peng Pengniti, *Explanation of the Civil and Commercial Code on Wrongful Acts* (BE 2552) para 148

[267] The Thai Supreme Court (ศาลฎีกา, *sandika*), subsequently referred to in this thesis as the "Dika Court" to avoid confusion with the UK Supreme Court.

[268] 3825/2524. See below, Section 4.3.2 (p.99), for a discussion of this case.

[269] A more natural English translation would be "abandons work". Grateful thanks to Dr Prachoom Chomchai for suggesting this improvement to the translation.

discharge of his duty, he may be dismissed by the [Employer] without notice or compensation."[270]

Pursuant to this section, the Employer has the power to summarily dismiss an Employee if the Employee (i) willfully disobeys her lawful commands or habitually neglects them, (ii) is absent from work, (iii) is guilty of gross misconduct, or (iv) otherwise acts in a manner incompatible with due and faithful discharge of duty. As this power is conferred on an Employer by the TCCC pursuant to the relationship created by the hire of services contract, it follows, according to the Dika Court's reasoning, that the existence of this power suggests the existence of the Employer-Employee relationship.[271] Therefore if the arrangement between the worker and the person hiring her permits the latter to give lawful commands to the former (including time and place of work), and summarily dismiss the former if she ignores such commands or carries out tasks with gross negligence or otherwise than in accordance with due and faithful discharge of duty, this will be a hire of services contract. In other words, if a person has the right to control the method, time and place of work of a worker, this will be an Employer-Employee relationship.

4.3.2 Remuneration and control

Therefore, to determine the existence of the Employer-Employee relationship under the TCCC, there are two questions:[272]

(i) Manner of remuneration: is the worker paid remuneration for the whole time that she works rather than on the basis of completion of the work?

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[270] Thai Civil and Commercial Code, Section 583, translation from Kamol Sandhikshetrin (n 15) with terminology used in this thesis substituted in square brackets.
[271] See also Punyaphan (n 40) para 81
[272] Pengniti (n 266) para 148

(ii) Control: does the Employer/Hirer have the power to control the manner, time and place of work of the worker, enforced by the power to dismiss the worker?

It seems that positive answers must be given to both questions to establish the hire of services relationship, which confers liability on an Employer under Section 425 for the wrongful acts of an Employee.[273] Otherwise the relationship will likely be one of hire of work, conferring the more limited fault-based direct liability under Section 428.

4.3.2.1 Remuneration

The key distinction between a hire of services contract and a hire of work contract, in relation to remuneration, is whether the remuneration is paid for the duration of the services or for completion of the work. A classic example of this distinction is revealed by a comparison between Dika Court judgments 2502/2523 and 1206/2500.[274]

The facts of 2502/2523 were that D1 offered the services of cleaning and looking after cars which were parked along a road on which premises where D1 also worked as a security guard were situated. The car cleaning and guarding service was not part of D1's job as a security guard. D1, without permission, drove one of the cars in his charge and had an accident as a result of his negligence. The Court had to decide whether the car owner could be considered D1's Employer, and thus jointly liable with D1. The Court found that the remuneration of D1 was on the basis of completed work: the car owners only asked for a clean car, and for the car to be returned safely at the time they picked it up. Therefore the car owners were not Employers of D1; rather, they were Hirers and D1 a Contractor.

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[273] Pengniti (n 266) para 148

[274] ibid

This may be contrasted with the earlier Dika case 1206/2500, in which the defendant (D2) hired Mr Daud to watch over his timber raft. Mr Daud was negligent in his duties and the raft broke away from its moorings, floated away down the river and damaged the claimant's house. The Court had to decide whether the relationship between D2 and Mr Daud was hire of services or hire of work. Although the contract between D2 and Mr Daud was described as a contract for watching over a timber raft, it appeared that D2 paid remuneration monthly for the whole time Mr Daud was looking after the raft. On this basis, the Court was able to conclude that there was a contract for services, rather than a contract of work between D2 and Mr Daud.

The distinction between these two cases appears to be that an Employee makes her services available for a particular duration in which they may or may not be required; a Contractor agrees to perform particular tasks for which she will be remunerated. In the first case, the car owners paid each day for the work that D1 did in looking after their cars. If they did not bring the cars that day, it is assumed, they would not need to pay. However, in the second case, Mr Daud was employed a month at a time to look after the timber raft. The payment was linked to the time during which he agreed to perform services, rather than to the performance of the actual task. This forms the basis of the distinction between hire of services and hire of work in terms of the factor of remuneration.[275]

Payment for the duration of services does not require that remuneration be calculated by the hour or day, however; it can be calculated by reference to the work also.[276] A revealing example of this is Dika Court judgment 3834/2524. In this case, D1 had the duty of driving a truck to transport rocks, soil and sand for D2. D2 paid remuneration to D1 on a 'per trip' basis, and payment was made only when the work was completed. However, the Dika Court found that D1 was D2's Employee. The factor that the Court focused on in making this decision was the high level of control that D2 had over D1 in the relationship, in particular such facts as D1

[275] ibid
[276] ibid, para 157

being required to return the truck to D2's parking lot once the tasks were complete. The Dika Court stated that the 'per trip' basis was only a means of calculating the worker's remuneration. D1 had to follow D2's commands throughout the duration of the services that D1 was providing. Thus, remuneration was paid on the basis of the duration of services, merely calculated on a 'per trip' basis.[277]

However, it is submitted that the distinction between remuneration calculated on a 'per task' basis and remuneration that is made only for completion of specific tasks is a fine one. In practice, it seems that the level of control of the Employer over the Employee will play a large part in making the distinction, whereas in some circumstances the facts concerning the payment of remuneration may be inconclusive.[278]

4.3.2.2 Control

As stated above, the second key feature in establishing whether an arrangement is the extent of control over the worker. In essence, pursuant to Section 583 of the TCCC, if the hiring person has the right to control the method, time and place of work of a worker, this will be an Employer-Employee relationship.[279] Importantly, this test appears to focus on the *right* to give lawful commands generally, and does not require in practice close control of the Employee. This means that the test contains a certain level of flexibility which allows it to be applied in relationships where the Employee is a skilled professional and operates in practice with a great deal of

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[277] See also Dika Case 3370/2535, which concerned a similar set of facts. The court also concluded that a payment to a driver 'per trip' was merely a way of calculating wages, and designating remuneration when work is complete. The court focused on the level of control in the relationship, the evidence showing that the Employee had the duty to drive any vehicle according to the Employer's order, and during the time that the Employee was working for the Employer, the Employee was prohibited from driving for someone else. The facts therefore showed that the Employee was under the Employer's power/order and authority, and thus the relationship was a contract of services within the meaning of Section 575 of the TCCC.

[278] Pengniti (n 266) para 157

[279] ibid, para 148

autonomy. The operation of the control test may be seen clearly from its application to cases of borrowed employees.

4.3.2.2.1 Borrowed employees

The issue here is to identify the Employer in a situation where an Employee, who usually works for an Employer, is required to work under the instructions of another. The test here is to analyse the same factors of remuneration and control described above.[280]

By way of example, in Dika case 594/2485 the Employee was employed as a truck driver by a truck owner. A customer hired a truck to serve as a replacement for the customer's truck, which was out of service. The truck owner told his Employee to drive the truck for the customer. The Employee drove negligently on the way to deliver the truck to the customer. The Dika Court held that the truck owner was jointly liable with the Employee, as his Employer under Section 425. The Employee still received his salary from the truck owner, and the truck owner had the power to control and order the driver, as shown by his requesting the driver to drive the truck to the customer.

The features of control and remuneration may be evident by a comparison between the different cases of 769/2485 and 533/2499. In the first case, the owner of a steamboat offered it for hire on condition that the owner appoint and pay for deckhands and expenses of the boat. If the customer was not satisfied with the captain or deckhands, the arrangement was that he should inform the owner and the owner would find new staff for the customer. When the captain committed a wrongful act, the customer was not held to be liable as an Employer. This is because the remuneration was via the owner, who paid for the deckhands and expenses, and because the customer could not exercise control over the captain or deckhands: hiring or firing was in control

[280] ibid, para 152

of the owner, and the customer was limited in instructions he could give to the captain, as the route of the boat was already designated in the contract.[281]

In the second case, the owner of a motorboat let Songkla Lumliang Company hire the boat for its business. The company also hired the boat crew and the second defendant, who had the duty of controlling the boat. The second defendant hit the claimant's boat, causing damages. The Court held that the Songkla Lumliang Company was the Employer of the second defendant, as they were paying the second defendant's wages and had the power to control and order the second defendant while they were hiring the boat. During the period of hire, the second defendant temporarily became the Employee of the company; once the period of hire ended, the second defendant would again become the Employee of the owner of the boat.

Importantly, in the second case, the second defendant was considered the Employee of the Songkla Lumliang Company even though the latter may in practice have had little control over the manner in which the second defendant drove the boat: the second defendant was a skilled worker, and therefore presumably had significant autonomy in decisions as to how to drive the boat. Nevertheless the control that Songkla Lumliang Company had, i.e. issuing commands about where and when to drive the boat, was sufficient to satisfy the test.

[281] For a similar set of facts, also concerning the hire of a boat, see a recent Dika Case 8174/2557. Here, the boat's running and management were not within the scope of the responsibility of the defendant, but rather were under the absolute authority of a third party company, Drive Tide Ltd, the captain and the crew who would make decisions in order to ensure the safety of the boat and its running. If the defendant was not satisfied with the work of the captain or crew, there was no direct authority to exclude that person from working or replace any of the crew members; rather, the defendant had to take any complaints to the captain who would investigate the matter, and take appropriate action. Furthermore, Drive Tide Ltd had the responsibility of providing food, wages and other expenses for the captain and crew: the defendant was only liable to pay for the hire of the boat to Drive Tide Ltd. Therefore, the defendant was not jointly liable for a wrongful act committed by a crew member.

4.3.2.2.2 Multiple Employers

An important question which the Thai courts (similarly to the English courts) have faced is whether it is possible for more than one person to be an Employer for the purpose of Section 425. The approach of the Dika Court in answering this question gives evidence of a broad interpretation of who may be considered an Employer which takes into account the economic realities of the relevant circumstances rather than a restrictive approach focusing on remuneration and control only.

This may be demonstrated by Dika Case 650/2545. In this case, the first defendant was a limited partnership, of which the second and third defendants were the managing partners. The fourth defendant had a hire-purchase arrangement with the legal owner (the sixth defendant) of a truck and registered it for the purpose of a transportation business, together with the first defendant.[282] The fifth defendant was the employee of the fourth defendant, whose role was to drive the truck, which he did negligently causing an accident and damage to the claimant. The Dika Court had to determine whether the first, second and third defendants should be jointly liable with the fifth defendant (D1) and fourth defendant (D2), as the fifth defendant's Employer.

The Dika Court held that the first defendant (and second and third defendants as managing partners of the limited partnership) was jointly liable under Section 425 of the TCCC. In arriving at its decision, the Court looked at the economic reality of the situation, in terms of the way the business operated and who received benefit from the activities of the fifth defendant. Here, the facts were that the first defendant was registered as an operator of a transportation business, and that business had 30 trucks under its operation, none of which belonged to the first defendant. However, it was clear that the first defendant received income and benefit from all the trucks participating in the business. The Court also mentioned the fact that

[282] Many cases involve similar facts, where the owner of a vehicle allows it to be used by the owner and/or operator of a transportation concession: see Pengniti (n 266) para 153.

the first defendant's name was also displayed on the side of the truck, and that this, together with the fact that the first defendant allowed the fourth defendant to register for participation in the business, showed that the first defendant had consented to participate in business together with the fourth defendant.

The Court also refused to confer liability on the sixth defendant, the legal owner of the truck, who had entered into a hire-purchase arrangement with the fourth defendant. Key to the distinction appears to be that the fourth defendant, as the party in possession of the truck, had the ability to register the truck for the transportation business without asking for permission from the sixth defendant. Therefore the sixth defendant was seen as merely owning the truck and participating in a hire-purchase arrangement; the sixth defendant did not participate in the transportation business together with the other defendants.

The consistency of the Dika Court in this approach can be seen from other decisions, for example that in case 225/2521.[283] In this case, the first defendant entered into a hire-purchase arrangement with the second defendant (against whom the case was dismissed at first instance) for an oil tanker truck. The first defendant paid wages to a driver and used the tanker truck to transport oil for the third defendant. The driver drove negligently causing an accident resulting in serious injuries to the claimant. The Dika Court had to decide whether the third defendant was jointly liable with the first defendant.

[283] For other examples, see cases 1576/2506, 450/2516, and 4070/2533 which contain similar facts, demonstrating a consistent approach by the Dika Court. How widely this concept has been interpreted can be seen by the facts of Dika case 2779/2535. Here, the first defendant was an employee of Tor, the second defendant's husband, and drove a car in the course of his employment. Tor used the revenue he received from the operation of the car to spend on his family, and made car lease repayments out of family savings. The Court considered that these facts meant that this was a business jointly conducted by Tor's wife, the second defendant. As such, the second defendant was jointly liable for damages caused by the first defendant in the course of employment.

The Dika Court held that the third defendant was jointly liable with the first defendant Employer of the driver. In reaching its decision, material facts appear to be that for the first defendant to use the tanker for the purpose of transporting oil, the first defendant was required to do this in the third defendant's name and to display the name of the third defendant on the side of the vehicle. Furthermore, the third defendant also received benefits from the oil transportation, with a fixed amount of remuneration per trip. Therefore, although the first defendant paid the driver's wages and was in possession of the oil tanker, the oil tanker was driven as a part of the third defendant's business, and the third defendant was liable as an Employer of the driver.

An interesting Dika Court case which shows the limits of this approach is case number 292/2542 which concerned medical negligence. In this case, the second defendant was a plastic surgeon, who negligently performed an operation on the claimant at a hospital operated by the first defendant causing her significant injury. The facts were that the claimant visited the second defendant at his private clinic. The second defendant recommended that the claimant undergo laser surgery, to which the claimant agreed. The parties agreed that the surgery would be performed at the first defendant's hospital.

The Dika Court paid significant attention, in the decision, to the financial arrangements. The first defendant and the second defendant asked for the payment, 100,000 Baht, to be split in a cheque: 70,000 to the second defendant and 30,000 to the first defendant. The first defendant's evidence was that in these kinds of surgeries, it is common for the hospital to ask for payment for the room, medical care, and medicine. The hospital also provided an anaesthetist and nurse as helpers. However, the payment for the surgery will be made directly from the patient to the surgeon.

On this basis, the Dika Court held that the first defendant could not be considered the Employer of the second defendant. From the attention paid in the decision to the financial arrangements, it seems that in this circumstance there was a very clear demarcation of services that were provided by each party, the hospital and the surgeon. It appears that the second defendant was clearly operating a business for,

and by, himself: the hospital was providing auxiliary services to the surgeon's business, but it seems that the hospital did not have any control over the doctor's operation, either in the method of operation or of the act of operating. Furthermore, the first defendant did not remunerate the second defendant - their fee was clearly split for the claimant – and the doctor was not operating in the name of the hospital. From this case, it seems where there is a clear demarcation of responsibilities, which are remunerated separately, the court will not view the situation as one of a single business. Instead, there are separate services businesses which are simultaneously providing separate services to the claimant. However, it is submitted that the facts of this case would not apply to every case of medical negligence: where a surgeon operates under the management of a hospital, and where the patient pays a single fee to a hospital covering both surgery and hospital fees, the decision may well be different.

4.3.3 Summary of position

The question of whether there is an Employer-Employee relationship under Section 425 of the TCCC rests on a positive answer to two questions:

(i) Is the employee remunerated for the whole time that she works rather than on the basis of completion of the work?

(ii) Does the Employer/Hirer have the power to control the manner, time and place of work of the worker?

From the available Dika Court jurisprudence, it seems that the analysis of the first question may be in some ways connected to the second question, since it seems that even payment calculated on a 'per task' basis may be considered remuneration on the basis of time, where the Employer has control over the Employee for the duration of the work and the 'per task' basis can be seen simply as a manner of calculation of quantum of remuneration. Regarding the second question, it appears that the analysis rests on the *right to* control the manner, time and place of the worker rather than the amount of control that is exercised in practice. In particular, with skilled

workers (such as the captain of a ship in 769/2485) the ability to monitor and control the manner of their work will not in reality be exercised by the Employer. However, they will have the right to control how the Employee operates, in the sense that they will be able to issue orders to the Employee, and if the Employee does not follow such orders or falls below an appropriate standard in carrying them out, the Employer will have the right to dismiss the worker.

In the circumstances of temporary hiring of Employees, the identity of the Employer will follow the right to control. Therefore if the hirer has the right to order and dismiss Employees, she will be considered the Employer; if this right does not pass to the hirer, then the general employer will remain the Employer.

In the case of multiple Employers, the Dika Court has shown a consistent policy to interpret the concept of the business for which the Employee works widely. Thus, where the Employer-Employee relationship exists, the court will look at the reality of the business and appears willing to confer liability jointly on all the parties who can be considered to benefit from, and operate within, the business. A line is drawn where particular services are remunerated separately, and thus can be considered separate businesses, as in case 292/2542. Also those parties providing assets through e.g. hire-purchase arrangements are unlikely to be considered a part of the business, especially where the use of those assets in the business is without their control or authorisation. The court seems in particular to take into account the use of a party's brand or the inclusion of an asset or worker in an operating licence as evidence of participation in the same business.

4.4 Comparison

This section of this chapter will perform a comparison of three areas within this topic which highlight the differences in the approaches of the two jurisdictions: remuneration, control and situations where there are multiple employers. This exercise will focus on the facts of cases, especially those which have been particularly challenging to English law, addressing the first hypothesis of this thesis.

4.4.1 Remuneration

As discussed above, the basis of remuneration is a required element for a finding of an Employer-Employee relationship in Thai law. However, the distinction between remunerating on the basis of time or remuneration on the basis of task can, as discussed, be a fine one, since the Dika Court has on a number of occasions found that remunerating on a 'per task' basis may be simply a method of calculating remuneration within a hire of services contract. It appears that the distinction between the two is fundamentally a distinction based on control. Where there is a very high level of control over the manner and time of work, for example whether the worker is required to do any task assigned by the Employer and required to make herself available to that Employer to the exclusion of others, this will be considered a hire of services arrangement almost regardless of the way the remuneration is calculated. As such, a focus on remuneration outside of questions of control is inappropriate.

It seems clear in Thai law that there must be remuneration of some kind. However, as discussed below in respect of multiple employers, this does not mean that only the person paying the remuneration may be considered an Employer. Rather, where there is remuneration and control, the worker will be considered an Employee (rather than a Contractor). Once their status as an Employee has been established, the court will look at the business organisation broadly, and will hold all the parties who participate in and benefit from that organisation's business activities as Employers, even where they do not pay remuneration to the worker.

The question of whether there needs to be remuneration to establish the relevant relationship in English law appears to have a different answer under the new integration/organisation test. In the House of Lords case of *Short v J & W Henderson Ltd*[284], discussed above, the payment of remuneration was a required element in finding a relationship of employment, indeed of finding any contractual relationship between D1 and D2, whether as independent contractor or employee. However, this case was decided long before the most recent line of cases, following

[284] [1946] QB 90 (n 207)

which the doctrine now clearly applies to relationships *akin* to employment. In both *Various Claimants* and *E* the courts considered that the tortfeasors were not remunerated in the manner usual for a contract of employment. Indeed, they received no wages at all although they did receive certain benefits and necessities from the vicarious defendants. In *Various Claimants*, the Brothers were in fact required to remit all their personal possessions and fees that were paid for teaching to the Institute, which would provide them with necessities in return: the court considered this was certainly not an analogous situation to remuneration under an employment contract. However, in spite of the absence of remuneration, the courts were able to apply the integration/organisation test, considering that these situations were *akin* to employment, such that a relationship giving rise to vicarious liability existed.

Applying Thai law regarding the requirement for remuneration to these cases, it is suggested that where there is no remuneration at all, Section 425 will not apply. It is clear from Section 575 that remuneration is an essential component to a hire of services contract, and therefore of the designation of Employee. There is no suggestion in the wording of the TCCC of applying liability under Section 425 to relationships *akin* to that of Employer-Employee. However, when looking at the facts of these cases, it may be possible that Thai law could apply. In *Various Claimants*, the Brothers were paid wages for teaching; they were merely required to pass these back to the Institute as a part of their vows. With the broad view of who may be considered an Employer in Thai law (as discussed below), the Brothers may be considered Employees in relation to their teaching posts, and the Institute may be considered jointly liable when the broad view is taken of the business of the school. This point will be dealt with in more detail below. However, this should be covered by a strong caveat that there are no Dika Court cases on similar situations in Thai law, and it is doubtful if the TCCC would apply to religious orders in Thailand in the same way as to businesses – indeed, such facts are outside of the scope of this thesis. However, applying Thai law to these facts is useful to demonstrate the way in which the concept of remuneration may apply differently to English law.

4.4.2 Control

In both systems, control of the employer over the employee is an important factor in establishing the existence of an employment relationship. However, as discussed above, in English law, the application of the control test was problematic and has led to the establishment of the current test of whether the activities are integrated into the business and for the organisation's benefit (the 'integration/organisation' test). It seems that the development of this test is designed to impose liability on situations in which it would be unjustly (taking into account the policy basis of the doctrine) denied by the control test, and therefore this new test must be considered to expand the application of the doctrine.

As discussed above, the English law conception of control historically focused on the right to control the method of working – i.e. how the worker goes about her task.[285] This evolved through the case law into a narrow approach to the concept of control, focusing on whether the employer has effective day-to-day control and supervision of the particular tasks of an employee. This approach ran into difficulty when applied to skilled professionals, and over time seems to have proven less and less applicable to modern workplaces and large corporations. Thai law also focuses on control as essential to establishing the Employer-Employee relationship. However, control is here interpreted more flexibly. Rather than requiring actual day-to-day oversight of a worker's task, control, pursuant to Section 583 of the TCCC, is the *right* to control the method, time and place of work of a worker. This gives rise to an Employer-Employee relationship in circumstances where actual effective day-to-day supervision is unrealistic: the contractual right to control, rather evidence of factual control, is sufficient to establish the relationship.

The distinction between the two approaches may be best shown by application to the same facts. The leading case in the area of hospitals' vicarious liability for the negligence of doctors in England, under the control test, was *Hillyer v Governors*

[285] *Short v J & W Henderson Ltd* [1946] QB 90 (n 207)

of St Bartholomew's Hospital.[286] In this case, the court said that a hospital is not vicariously liable for the actions of doctors or surgeons because of the lack of control exercised over those actions. Doctors and surgeons have a high degree of autonomy over their actions, and therefore it is unreasonable to expect the management of a hospital to control the actions of these medical professionals. However, if we apply the Thai conception of control to this case, it is likely that a full-time doctor who operates under the orders of a hospital's management will be subject to the hospital's control in the sense of a *right* to control her method, time and place of work. Certainly the application of Thai law to skilled workers can be seen by cases such as 769/2485, where the hirer of a boat was held to have the right to control the method, time and place of work of a ship's captain, although in practice the hirer would not have had sufficient knowledge to control the specific tasks of the ship's captain when operating the ship in the sense required by English law. Therefore the concept of control in Thai law is significantly broader, with the potential to apply to more situations than the English law concept of control.

As a result of this overly restrictive view of control in English law, the most recent line of English cases has resulted in the test of whether an individual carries on activities as an integral part of the business activities carried on by the defendant, and for its benefit (rather than to benefit a business of his own or a third party). Thus applying the new test to the earlier case of *Hillyer*, it is likely that doctors or surgeons working full time in a hospital under orders of a hospital's management will now be caught by this test: they are carrying on activities (i.e. treating patients) as an integral part of the business activities of the hospital (i.e. treating patients) for its benefit (i.e. fees for treatment, or pursuing the objective of treating patients) rather than for the benefit of themselves or a third party. Conversely, applying this new test to the facts of Dika Case 769/2485 described above, it is likely that the new English law test would result in the same conclusion as the application of Thai law: the doctor would not be considered an

[286] [1909] 2 KB 820, discussed above at n 207

employee of the hospital. Although his activities (i.e. surgery) may be considered an integral part of the hospital's business (i.e. treating patients), it is clear that he is performing the activities for his personal business as a surgeon, evidence for which is the separate payment and the fact that the patient dealt with the surgeon primarily through his clinic business.

Therefore, since the Thai law interpretation of control, focusing as it does on whether the Employer has the right to control the manner, place and time of work of the worker, is broader than the historic English law concept of control, it is able to avoid many of the issues that the English law control test presented when applied to skilled professionals. Indeed, when applied to skilled professionals, in the cases above the new English test of integration/organisation produces the same outcome as the Thai test based on control, although the tests are based on a different concept.

One case which may reveal a different conclusion, and demonstrate the difference in terms of concept, is applying the Thai test of control and the English test of integration/organisation to the facts of *E* (discussed above). The court found that although the priest (D1) owed the bishop (D2) reverence and obedience, he exercised his ministry as a co-operator and collaborator rather than someone who is subject to the control of his superior. When the bishop appoints a priest to each parish within the diocese there is a duty for the bishop to exercise "episcopal vigilance", but it was considered that there was nothing in the way of penalty or enforcement: the bishop could only redeploy the priest in another parish if the latter consents. Therefore, the bishop lacks the right to dismiss the priest. If we apply the TCCC to these facts, it seems that the lack of the right to dismiss might well bring a conclusion that the bishop is not the priest's Employer, since Section 583 seems to clearly reserve this right to an Employer. Under English law, as discussed above, the priest was held to carry on activities as an integral part of the organisation of the diocese, in pursuance of the goals of the diocese, and therefore in a relationship sufficiently akin to employment to confer liability on the bishop.

As such, where English law found the bishop to be vicariously liable as in a relationship *akin* to employment, an application of the TCCC would probably not reach the same conclusion, since the essential element of the Thai law concept of control, the right to dismiss, is lacking. However, again it should be noted that it is unlikely that the TCCC would apply to a similar situation with a religious order in Thailand, and consideration of the law as it applies to religious organisations under Thai law is outside of the scope of this thesis. Nevertheless, this does demonstrate the fact that Section 425 of the TCCC will not extend to situations outside of the Employer-Employee context, whereas English law vicarious liability will now certainly apply outside this context.

4.4.3 Multiple employers

A key point of comparison between the systems is the question of whether and to what extent vicarious liability may be conferred on several employers simultaneously: in other words, who will be considered an employer. As discussed above, traditionally in English law it was considered that only one party may be held to be an employer. This position was overturned in the *Viasystems* case, following which the judgment of Rix LJ which has been clearly approved by the Supreme Court in *Various Claimants*,[287] that the circumstances in which more than one party could be held as an employer would be where the employee in question "is so much a part of the work, business or organisation of both employers that it makes it just to make both employers answerable for his negligence."[288] This test is clear recognition that several parties can be held to be employers, even where there is no formal contract of employment with each of them, provided that a worker can be seen to be integrated into the business or organisation of each of them. The reference to the extent of the integration to be sufficient to make it "just" to extend the liability appears to be specific reference to the underlying policy basis of the doctrine of vicarious liability. As discussed above, this means viewing the doctrine from a point of view of enterprise

[287] *Various Claimants* at [37] per Lord Phillips
[288] *Viasystems* at [79]

risk, following the most recent line of cases. However, since this is a recent case and a new direction for the law in this area, it is a matter of speculation how willing the courts will be to extend the doctrine to find multiple parties employers: however, the facts of *Viasystems* and *Various Claimants* are informative, since the latter was decided and the former approved by the Supreme Court.

Conversely, under Thai law, the Dika Court has consistently been willing to find several parties liable as Employers, even where such parties are not directly remunerating or controlling the Employee. So, for example in Dika Case 650/2545 discussed above, the Dika Court was prepared to hold the first defendant operator of the transport business jointly liable for the damage caused by negligent driving of an Employee of the fourth defendant, who was one of a number of truck operating entities under the umbrella of the first defendant. The Dika Court found the first defendant liable, on the basis that the first defendant received income from the trucks participating in the business, the first defendant's name was displayed on the truck and the first defendant allowed the fourth defendant to register for participation in the business.

Applying the new test from *Viasystems* as approved by *Various Claimants* to these facts, the first defendant would be found liable under English law vicarious liability if the driver was so much a part of the work, business or organisation of both the fourth and first defendant that it makes it just to find both defendants liable for his negligence. In applying these tests, it seems that English courts may now take into account many of the same factors that the Dika Court showed to be material. Certainly the fact that the first defendant received income entirely, it appears, from the operations of such trucks suggests that the activities of the drivers are central to the first defendant's business. The fact that they were operating under the brand and within the registration of the first defendant represents even closer integration of the fourth and first defendants. Therefore it seems plausible that, now, the English test would confer liability on both defendants also.

However, this conclusion should be expressed with caution. Although there is now the ability, under the new English law test, to hold several parties liable as employers, it remains to be seen how willing the courts will be to do so. The element of extending the liability where it is "just" to do so gives significant discretion to the courts, and how judges, and the superior courts, will use this discretion remains to be seen. It is notable that English law has a long history of refusing to find multiple parties liable as employers, and it is possible that this approach may continue to set the rule, with only cases of very clear integration attracting the new expansion of liability. Indeed, it might be argued, using the facts of Dika Case 650/2545 as an example, that the 'business' of the first defendant should be construed very narrowly: on these facts, the business could be 'licensing the rights to run a transportation business' and the fourth defendant 'providing transportation services'. As such it may be open to the court to see that a driver is only an integral part of the fourth defendant's business, and not that of the first defendant. Without further case law in this area, it is impossible to conclude with any certainty.

4.5 Principles and policy

The analysis and comparison of the two systems' approaches performed above allows the contours and differences of the two doctrines to become apparent. This chapter will now apply the potential principles and policy bases of the doctrines, as discussed in Chapter 2, to the two jurisdictions, addressing the second hypothesis of this thesis.

4.5.1 English law

The shift that English law has experienced from the control test to the organisation/integration test demonstrates an important change in the understanding of the policy and principles underlying the doctrine of vicarious liability. As discussed in Chapter 2, the policy and principle bases which have been suggested for the doctrine

may be divided into three broad categories: fault and identification; victim compensation and loss distribution; and risk and deterrence.

A test for a relationship conferring vicarious liability that focuses on control would appear to be most closely aligned with the first of these categories. Where control is the determining factor for finding a party liable, this suggests that due to the ability for the employer to control the employee, the fact that the employee committed a tort demonstrates either (i) fault of the employer, in the sense that the employer failed to properly control the employee, and therefore the damage that results is caused by this failure of the employer; or (ii) identification, in the sense that where an employer has significant control over the employee, the actions of the employee can be thought of as an extension of the actions of the employer because the employer had the ability to control those actions. Therefore a test which is fundamentally based on control would appear to suggest this policy basis for the doctrine.

However, as discussed above, there has been a shift in English law away from the control test as being determinative (although as above it seems that a high level of control will still likely result in a finding of a relationship sufficient to confer liability). The test now is one of how much D1's activities are an integral part of the business of D2, and carried out for D2's benefit (as opposed to on D1's own, or another's, account). This test appears much more closely aligned with a concept of enterprise risk. The focus is no longer on how closely an employer controls the acts of an employee, but rather whether an employee's actions can be seen to be a part of the business of an employer. This therefore looks at the actions of D1, and where those actions appear to be integrally part of the business of D2, D2 should bear the risk of wrongful damage caused by those actions. This is firmly within an enterprise risk conception of the doctrine. There is no suggestion that the employer is at fault for failing to control employees; rather the doctrine is based on recognising the full risks caused by a business organisation and assigning to that business the responsibility for making good any damage caused.

There is also potentially evidence of a new broad view of what constitutes a business organisation as a result of the *Viasystems* case as approved by *Various Claimants*. Here, where an employee appears to be integrated into the organisations of two employers when performing certain activities, both employers may bear liability for his tortious acts. This is recognition that the concepts of the risks caused by a business can go beyond the concept of a single entity. Rather the concept of an organisation can cover several different legal entities as employers, based on the idea that in performing a particular activity, an employee can be serving several entities simultaneously, all benefiting from (and causing the risk by engaging her for) her activities. However, this test is in some ways a restrictive one, and surely more restrictive than that used in Thai law as discussed below. With this test, the business of each relevant organisation must be analysed and matched against the activities that the worker was undertaking when the tort was committed. Thai law, by comparison, looks at the business that the Employee's actions are a part of, and then will hold all persons benefitting and participating from that business as jointly liable Employers. The concepts of the two jurisdictions may be displayed graphically below, to demonstrate this difference:

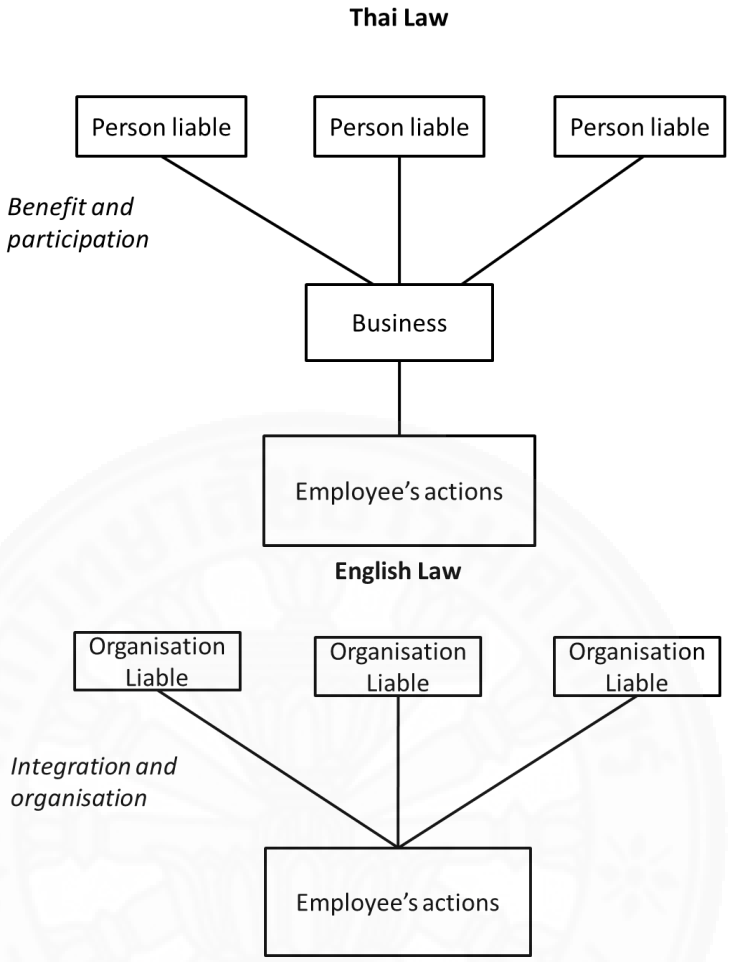

Figure 2 – Diagram of different conceptions of liability of multiple parties in Thai law and English law

In the Thai law test, the court will look at the business which the Employee is serving with her actions. Then the court will take a broad view of those who benefit from and participate in that business. Each party will be held liable, which is fully compatible with the concept of enterprise risk: those who take the benefit of the activities performed in a business should also bear responsibility for the risks of those activities. By comparison, English law looks at the activities of an employee and analyses whether that employee, in conducting those activities, is an integrated part of, and working for the benefit of, the organisation of another. Where this analysis concludes that there are several organisations served by that employee, each organisation will be held liable.

The difference demonstrated here is a focus on the integration of the actions of an employee within an organisation in English law, rather than a focus on who it is that benefits from the activities of a business broadly viewed, as in Thai law. In other words, English law considers conferring liability where there are multiple organisations into which an employee's actions are integrated, rather than where there are multiple beneficiaries of a business, who all benefit from the activities of an Employee. This, it is suggested, is less compatible with enterprise risk than the Thai law concept, which focuses far more directly on the idea that the benefits derived from business activities are tied to the requirement to make compensation. There is no analysis of the benefits of an enterprise or the different parties who may receive this in the English law concept of vicarious liability. Indeed, where there is a party who clearly directly benefits from the activities of a worker, but into whose organisation that worker is not integrated, such party will be held liable under Thai law (assuming the worker has Employee status) but will not be held liable under English law.

4.5.2 Thai law

As discussed above, the test for whether a worker is an Employee is based on method of remuneration (based on duration or completion of a task) and control, where a high level of control can be determinative of the proper view of the method of remuneration. The fundamental requirement of control would appear, as argued above in respect of English law, to suggest that the concept underlying Section 425 is rooted in fault and identification rather than the other categories. However, as discussed above in the comparison section of this chapter, the Thai law concept of control is quite different to the English law concept under the problematic historic control test. Rather than focusing on a high degree of control in practice over specific tasks, the Thai law conception of control focuses on the *right* to control the manner, time and place of work of the worker. As discussed above, this allows Thai law to be applied to situations involving skilled professionals in a manner that the English law control test was not. However, it is argued that there is another interpretation for the

policy basis of Section 425, which is evident from the Dika Court's willingness to hold multiple parties responsible for the wrongful acts of an Employee.

As discussed above, once it has been established that D1 is an Employee (using the remuneration and control test), the Dika Court will look at the reality of the business in which the Employee was acting and appears willing to confer liability jointly on all the parties who can be considered to benefit from, and participate within, the business. Importantly, in conferring liability on these other parties, the Dika Court is not concerned whether such parties each individually have the right to control the Employee. If Section 425 were fundamentally based on a concept of fault, it would follow that the law would only confer liability on those who were at fault because they failed to properly control their Employee. If a person had no right to control the actions of an Employee, it would follow that they could not be at fault for failing to control them. However, this is not the way that Section 425 operates. Rather, the Dika Court will analyse the economic reality of the business organisation for which the Employee is acting, and will hold all those who directly benefit from the organisation responsible for the wrongful act of the Employee. This is clear recognition of the enterprise risk theory: those who benefit from the activities of a business organisation should also be responsible for the negative consequences of those activities; in other words, if you benefit from the risks of a business, you should be responsible for them also.

Seen in this light, it may be possible to see the Thai concept of the control test in a manner that is more compatible with enterprise risk theory than the fault and identification theory. The focus on the right to control, it is argued, may in fact be a mechanism for judging whether a worker is fundamentally working for her own benefit, or for the benefit of another. The distinction being made with this test is simply that of Employee v Contractor; once Employee status has been established, there is no question regarding control for establishing which parties are liable for her wrongful acts. Therefore manner of remuneration and right to control should be seen simply in the context of establishing the status of D1. This is a very different concept to the

English law control test, which sought not only to establish the status of D1 but also the identity of D2.

Nevertheless, even seen in this light, this arguably begs the question of why the test of the status of D1 is rooted in control rather than, for example, the new English law concept of integration/organisation. The answer to this may lie in the fact that this remuneration and control test establishes the Employee status of an individual for all purposes under the TCCC, not simply for the purpose of liability under Section 425. This is a fundamental difference between the current conception of English law vicarious liability and Section 425 of the TCCC.

Under Thai law, the analysis may be seen as follows: the first question is whether D1 has the status of Employee, using a test of remuneration and control. Once Employee status has been established, which operates for all purposes under the TCCC, the court will then look to who may be considered jointly liable for wrongful acts under Section 425. In this investigation, the court will use a wide view of a business organisation, indicating an enterprise risk policy basis, to confer liability.

This is fundamentally conceptually different to the approach that English law takes. Following the most recent line of cases, it is clear that the question in English law is not whether D1 has employee status. Indeed, the operation of the doctrine has now been taken away from questions of employment, and it has been made clear that finding a relationship between D1 and D2 sufficient to confer vicarious liability requires a different analysis than whether D1 is an employee of D2 in other employment contexts, such as for questions of wrongful dismissal etc. Vicarious liability is not dependent on establishing the existence of an employer-employee relationship; rather it requires finding a relationship which is sufficiently close to justify conferring vicarious liability, of which employer-employee is the most common example. This view of the relationship allows expansion outside of the employment context, to situations *akin* to employment: akin in the sense that they share those incidents of the usual employer-employee relationship which demonstrate a sufficiently close relationship to confer vicarious liability. Thus English law has removed the

conceptual link between the employment relationship and vicarious liability; it is unlikely that Thai law can make a similar conceptual removal without alteration of the wording of Section 425 of the TCCC.

4.6 Conclusion

This chapter has examined the first element of required for conferring liability under the doctrine of vicarious liability and Section 425 of the TCCC, which is the existence of a sufficient relationship between D1 and D2. Although historically English law has focused on establishing whether there is a sufficient degree of control over the activities of D1 to establish the existence of a contract of service relationship, the most recent line of cases has established a test based on whether the activities of D1 are an integral part of the activities of D2, and whether D1 is carrying out those activities for D2's benefit. This new test has been established with clear recognition of the enterprise risk policy basis for the doctrine, the link reinforced by a further requirement which is that, in applying the new test to novel situations, the judge should also consider whether it is fair, just and reasonable to impose liability (i.e. whether liability should be imposed with a view to the policy basis of the doctrine). English law will also hold more than one Employer liable, where it is fair to do so on the basis that the employees activities are an integral part of more than one organisation, although this is a recent development: the extent to which English judges will be prepared confer liability on numerous parties remains to be seen.

The Thai law test for the relevant relationship is based on remuneration by time, rather than for the completion of a task, and control, where an Employer has the right to control the manner, time and place of work of an Employee. Where there is a sufficient degree of the right to control, this may be determinative that payment based on completion of a task is merely a method of calculation, rather than truly remuneration based on task. A key feature of the Dika Court's application of the law has been a willingness to consider that multiple parties may be held liable for an Employee's wrongful acts. The basis on which this liability is conferred is not one of control, but

rather on a view of whether such persons benefit from and participate in the business which the Employee serves. This suggests an enterprise risk theoretical basis for the application of Section 425, as liability is tied to whether a person benefits from an Employee's activities, rather than tied to a failure to exercise control over them (which would suggest a fault basis). The fact that this is potentially at odds with the concept of the control test is explained, it is argued, by the fact that this test establishes D1's status as an Employee or Contractor for all purposes under the TCCC, not just Section 425.

This conclusion reveals certain fundamental differences between the two systems' approach to this issue. In recent years, English law has recognised that vicarious liability is not fundamentally tied to a concept of employment. Rather, it is based on enterprise risk and thus asks different questions than tests of employment in other contexts. This has allowed English law to confer liability outside of employment relationships, to encompass situations which are 'akin' to employment, i.e. which have those incidents which are required to confer vicarious liability, incidents which the classic employer-employee relationship also shares. The question now is not whether an employment relationship exists; rather, the question is whether a relationship exists that is sufficient to confer vicarious liability. Conversely, in Thai law, due to the link between Section 425 and Section 587 (discussed above), there is no flexibility to confer liability outside of an Employer-Employee relationship, which status will be relevant to other contexts outside of Section 425.

Therefore the conclusions that we can draw are that Thai law and English law in this area both have clear recognition of enterprise liability (though aspects of other concepts as discussed in Chapter 2). They are also each flexible and rigid in different ways. English law is flexible in that it will apply to contexts outside of strict employer-employee relationships, with a clear link to the underlying policy of the doctrine. However, it is still in some ways rigid, especially in its application to multiple employers: the integration/organisation test must be run against each potential vicarious defendant in turn, and sufficient integration into the business of each must be

established to confer liability. Thai law, conversely, is rigid in that it can only apply to an Employee, whose status must be established by the control test. However, it is more flexible as the courts may look at which persons benefit from and participate in the business which the Employee is working for in order to confer liability, not at the integration between those persons and the activities of the Employee. This is a more flexible concept, which is more closely aligned with the enterprise risk policy basis as discussed above.

The application of these conclusions to the hypotheses developed in Chapter 1 of this thesis will be undertaken in Chapter 6, which will also discuss their implications for the two jurisdictions.

CHAPTER 5
IN THE COURSE OF EMPLOYMENT

5.1 Introduction

Whereas the previous chapter discussed the first element required to confer liability under English law vicarious liability and section 425 of the TCCC, the existence of the relevant relationship between the person committing the tortious or wrongful act (referred to as 'D1') and the person held liable by the law, the vicarious defendant (referred to as 'D2'), this chapter will discuss the second element of liability, which concerns the wrongful act itself and its context.

This chapter will proceed by first discussing the current position in English law which has been the subject of significant change in this area as demonstrated by a recent line of cases. Then this chapter will discuss the position in Thai law to establish the corresponding test under Section 425, and its interpretation by the courts. In the third section, this chapter will perform a comparative analysis of the two jurisdictions' approaches focusing particularly on how Thai law would apply in situations which have been problematic to English law, addressing the first hypothesis of this thesis as set out in the introductory chapter. Finally this chapter will analyse in detail the policy and principles that are evident in the application of the law in each jurisdiction, addressing the second hypothesis as set out in the introductory chapter.

5.2 English Law

Where the relevant relationship exists, as discussed in the previous chapter, D2 will be liable for the torts of D1 so long as there is a sufficiently close connection between the tort committed and that relationship to confer liability on D2. This test has only recently emerged in case law, and previously the long established test was whether the tort was committed in the course of D1's employment. Therefore in understanding

the current position in English law, the previous position will be discussed as well as the formulation of the current test.

The nature of the tort is irrelevant, and the employer will be liable even where the elements of the tort require a particular mental state or intention which is not held by D2, since the nature of the doctrine is one of strict and vicarious liability. However, all of the relevant conduct amounting to the tort must be committed in the course of employment: if the acts of D1 which are committed in the course of employment are not in themselves sufficient to constitute a tort, and a tort is only committed when the acts are combined with other acts committed outside of the course of employment, D2 shall not be held vicariously liable.[289]

5.2.1 Course of employment

Until recently, the question of whether D2 would be held liable for the torts of D1, assuming the relevant relationship between them had been established, would be answered by considering whether the tort was committed in the course of D1's employment. The question of whether a particular wrongful act is committed in the course of employment is a question of fact and no simple test will cover all cases.[290] However, the test which has been most frequently adopted throughout the twentieth century is that formulated by Sir John Salmond in the first edition of his authoritative textbook *Torts*, published in 1907:

"A master is not responsible for a wrongful act done by his servant unless it is done in the course of employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of

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[289] *Credit Lyonnais Nederland N.V. v Export Credits Guarantee Department* [1999] 2 WLR 540, HL. In this case, a fraud committed against the plaintiff bank by a third party involved the participation of the defendant's employee. The employee was personally liable as a conspirator and joint tortfeasor. However, the assistance that he provided as an employee, the only part of his actions which were in the course of employment, was not sufficient for a finding of deceit, and therefore this did not confer liability on the defendant employer.

[290] *Staton v National Coal Board* [1957] 1 WLR 893 at 895 per Finnemore J.

doing some act authorised by the master... a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them."[291]

This formulation has become known as the 'Salmond test' and has been cited with approval numerous times throughout the twentieth century.[292] The key distinction in this test is between those acts of an employee which constitute an improper mode of carrying out her duties and those acts which fall outside the scope of employment. In more recent years, the tendency of the courts was to move to a broader interpretation of the 'course of employment' in order to protect third parties.[293] As such the court should not dissect the employee's tasks into component parts but ask in a general sense the question "what was the job at which he was engaged for his employment?".[294] Sometimes the courts have used the question "was the employee on a frolic of his own?",[295] a positive answer to which would lead to the conclusion that the tort was not committed in the course of employment.

5.2.1.1 Prohibitions

The contours of this approach can be seen from cases where an employer has given an employee instructions which prohibit certain acts. Whether the prohibitions work to exclude the acts of the employee from being performed in the course of employment seemed to depend on whether the instructions merely prohibited a particular mode of carrying out employment, or whether such instructions restrict the

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[291] Salmond (n 143) 83

[292] E.g. *Poland v John Parr & Sons* [1927] 1 KB 236 at 240; *Canadian Pacific Railway v Lockhart* [1942] AC 591 at 599; *Warren v Henlys Ltd* [1948] 2 All ER 935 at 937

[293] As noted by Lord Wilberforce in *Kooragang Investment Pty Ltd v Richardson and Wrench Ltd* [1982] AC 462 at 471

[294] *Ilkiw v Samuels* [1963] WLR 991 at 1004

[295] *Joel v Morison* (1834) 6 C&P 501 at 503, restated in *Harrison v Michelin Tyre Co. Ltd* [1985] ICR 696 by Comyn J as follows: "Was it so divergent from the employment as to be plainly alien to and wholly distinguishable from the employment?"

class of actions which the employee is employed to perform. An informative example is the case of *LCC v Cattermoles (Garages) Ltd*,[296] where an employee had the duty to move vehicles, but he was prohibited from driving them: instead he was supposed to move vehicles by pushing them. In this case, the court found that the employer was liable for damage caused by the employee's negligence while driving a vehicle when instructed to move it. He was still doing the job he was employed to do; the prohibition related to merely the mode of carrying out the job, i.e. the mode of moving the vehicle. Therefore his actions were carried out in the course of employment, since his employment included the duty of moving vehicles, even though the specific act of driving the vehicle had been prohibited. This may be compared with *Iqbal v London Transport Executive*,[297] where a bus conductor was ordered to get an engineer to move a bus parked in a way which obstructed traffic. The conductor was expressly prohibited from driving buses. His subsequent action of driving the bus was found by the Court of Appeal to be outside the course of his employment: he was employed as a bus conductor, and driving a bus was in no way a part of his duties.

5.2.1.2 Surrounding circumstances

To determine whether a wrongful act is done by an employee in the course of employment, all the surrounding circumstances must be taken into account, rather than just the act that leads to the damage. An example is the case of *Century Insurance Co v Northern Ireland Road Transport Board*[298] in which the driver of a petrol tanker, delivering petrol to a garage, lit a cigarette while petrol was flowing from the vehicle into an underground storage tank and carelessly discarded the burning match causing severe damage. Although the act of lighting the cigarette was unconnected with employment, when considered as part of behaviour while delivering petrol it can be seen to amount to negligence in the course of employment.

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[296] [1953] 1 WLR 97

[297] (1973) 16 KIR 39, CA

[298] [1942] AC 509

5.2.1.3 Allowing others to perform the task

Allowing another to perform a task can also be considered an action in the course of employment. For example, the case of *Ilkiw v Samuels*[299] concerned a lorry driver who allowed another worker to move his lorry a short distance inside a warehouse without having made any enquiry concerning that worker's qualifications and in violation of his employer's instructions. The lorry driver's employer, despite not being the employer of the workman, was held liable. The reasoning was that the driver had been negligent in allowing another to move the lorry: the lorry driver was employed not only to drive but also to be in charge of the lorry in all circumstances while on duty.[300]

5.2.1.4 Acts incidental to employment

Acts which are considered to be reasonably incidental to the employment of the employee will also be considered to occur in the course of employment, even where those acts fall outside those acts which the employee is specifically employed to do. For example, in *Staton v National Coal Board*[301] an employee who was a first-aid attendant at one of the defendant's collieries was held to have been acting in the course of employment when he was cycling along a road within the boundary of the colliery in order to collect his wages from the payment office. Likewise employees will be considered as within their course of employment from when they arrive at their place of work until they leave, provided they arrive neither unreasonably early nor leave unreasonably late.[302] However, normally an employee on the way to or from work will not be considered to be acting in the course of employment, unless the employer requires the employee to travel in a particular manner as part of her duties.[303] However, on occasion the particular circumstances may be

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[299] [1963] 1 WLR 991

[300] ibid at 998, per Wilmer LJ and at 1002 per Danckwerts LJ

[301] [1957] 1 WLR 893

[302] *Compton v McLure* [1975] ICR 378; *R v National Insurance Comp., ex. p. East* [1976] ICR 206

[303] *Vandyke v Fender* [1970] 2 QB 292

considered so closely connected with the performance of the job that the travel may be classified as reasonably incidental to the employment.[304]

5.2.1.5 Engaged on the employer's business

Another element that the courts have considered necessary in the test is for the employee to be engaged on the employer's business when the misconduct occurred, and not merely on his own business. However, deviations from the task to be performed, for the employee's own purposes, may still fall within the course of employment: the distinction is a question of degree. At some point the deviation may be such that it is considered a separate transaction, and as a result the employee will not be considered acting in the course of employment. However a more minor deviation will be considered to be in the course of employment. Thus, a totally unauthorised journey by an employee driver, on business of his own, will be considered outside the course of employment;[305] however, from the case of *Storey v Ashton*[306] it is clear that the extent – both in distance and time – of the detour will be considered relevant, as will the purpose of the deviation.[307]

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[304] E.g. *Smith v Stages* [1989] AC 928, HL. In this case, an employee who had been working away from his normal place of employment negligently drove his own car on the way home causing an accident. He had been travelling to start work at his ordinary place of employment later in the week. The travelling day was paid as a work day, entitling his employer to direct the manner in which he was to travel. Therefore the employer was held vicariously liable.

[305] *Mitchell v Crassweller* (1853) 13 CB 237

[306] (1869) LR 4 QB 476. In this case, a driver and clerk of a wine merchant business were sent to make deliveries and collect empty bottles. On their way back, they diverted to the clerk's house to visit a relative, and in the process negligently ran over and injured the plaintiff. The court held that the employer was not liable as the driver was, at that time, engaged in a new and independent journey which was outside of the course of his employment.

[307] *Williams* v *A and W Hemphill Ltd* [1966] UKHL 3; the House of Lords held the employer vicariously liable even where the deviation of a driver was substantial. The deviation was at the request of the employer's passengers, and therefore the House considered that the driver was still on the employer's business (i.e. the transport of passengers) rather than on a frolic of his own.

5.2.1.6 Acting on initiative

An employee acting on his initiative may be acting within the course of employment where the employer, either expressly or by implication, has given the employee discretion which he must exercise in the course of his employment. For example, in the case of *Smith v North Metropolitan Tramways Co*[308] the plaintiff was a passenger on a tram. The defendant's employee, the conductor, demanded his fare. The tram was crowded and the plaintiff told the conductor that he would pay the fare as soon as he could get enough space to put his hand in his pocket. An altercation followed from which the conductor pushed him off the tram so that he fell and suffered injury. The defendants were held liable. The court considered that a conductor would be acting within the ordinary course of business if he removed a customer from a tram who refused to pay the fare. Therefore, although he acted violently and negligently in going about the task, he was considered to be acting in the course of employment: he was exercising discretion in the manner of carrying out his duties granted to him by his employer.

5.2.2 From Course of Employment to Close Connection

Although the Salmond test had been accepted through much of the twentieth century, it came under challenge in the case of *Lister v Hesley Hall,*[309] which started a new direction of the law in this area. In *Lister,* the House of Lords considered that the second limb of the Salmond test – whether the employee's conduct was an unauthorised mode of doing some act authorised by the master – was not easily applied to a set of facts where the tortfeasor carries out assaults for personal gratification. Instead, they focused on the explanation given by Salmond which states that the master is liable for unauthorised acts provided they are "so connected with acts which he has authorised" that they might be regarded as modes, although improper modes, of doing them. The appeal to this sentence in Salmond allowed the House of Lords to develop a

[308] (1891) 55 JP 630
[309] [2002] 1 AC 215

new 'close connection' test. However it is clear from development in subsequent case law that the close connection test is not to be construed as merely clarifying the element of an unauthorised mode of performing an authorised task, but goes far beyond this. To understand the close connection test, it is necessary to begin with the Canadian Supreme Court case of *Bazley v Curry*,[310] which strongly influenced the House of Lords in *Lister*.

5.2.2.1 Bazely v Curry

The defendant's Children's Foundation operated residential care homes for emotionally troubled children. One of the defendant's employees used his position as a carer to abuse children, and was convicted of committing sexual abuse. The respondent, one of the employee's victims, brought a suit against the defendant using the doctrine of vicarious liability.

At first instance, the judge held the defendant vicariously liable. He considered that abusing the children could be said to be an unauthorised mode of doing an authorised task, since the employee was authorised to perform intimate duties such as bathing the children and putting them to bed. The British Columbia Court of Appeal upheld the decision but on different grounds, considering that the Salmond test applied very awkwardly to the facts of the case. In the Supreme Court, McLachlin J agreed stating that there was a need to return to first principles of the doctrine.

McLachlin's judgment identifies the policy grounds supporting the imposition of vicarious liability to be fair compensation and deterrence, which she linked to the concept of the employer's introduction or enhancement of a risk.[311] The introduction of an enterprise into the community brings with it inherent risks, and this implies the possibility of managing the risk to minimise the cost of the harm which may flow from it.[312] Using this enterprise risk foundation for the doctrine, McLachlin concluded that:

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[310] (1999) 2 SCR 534

[311] ibid at [34]

[312] ibid

"the policy purposes are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong which justifies the imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the risk and/or the deterrence."

The question therefore is whether there is a connection between the employment and the risk. The connection must be 'salient' and the employment of the tortfeasor must have made a 'material contribution' to the risk. The Supreme Court of Canada set out some factors which would help future courts apply the test, including:

(a) The opportunity that the enterprise afforded the employee to abuse his or her power;

(b) The extent to which the wrongful act may have furthered the employer's aims (and therefore more likely to have been committed by the employee);

(c) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise

(d) The extent of power conferred on the employee in relation to the victim

(e) The vulnerability of potential victims to wrongful exercise of the employee's power

Since this case included wrongful acts related to intimacy which was inherent in the employer's enterprise, and since the employee was in a position of significant power over the victim, the extension of vicarious liability to acts of intentional abuse could be justified.

5.2.2.2 Lister v Hesley Hall

The facts of *Lister* are analogous to *Bazely v Curry*, in that they also involve sexual abuse at the hands of an employee. In *Lister*, the defendants owned and managed a boarding house. The warden, an employee of the defendants, systematically abused children within his care. A claim that the defendants had been directly liable due to their lack of care in selecting or supervising the warden was rejected at first instance. A claim against the defendants in vicarious liability was upheld on a clearly artificial argument by the first instance court, and rejected in the Court of Appeal on the basis that the acts of abuse committed by the warden did not fall within the Salmond test of course of employment. The House of Lords, however, found the defendants vicariously liable. Influenced by the decision in *Bazely v Curry*, the House of Lords reformulated the test for 'course of employment' as one of 'close connection'.

In the leading judgment, Lord Steyn referred explicitly to the judgments of the Canadian Supreme Court in *Bazely v Curry* (and *Jacobi v Griffiths*,[313] heard together with *Bazely v Curry*), stating that these judgments should be the starting point for whenever such problems should be considered in the future. He stated the test as follows:

"The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House."[314]

Although Lord Steyn's may be considered the leading judgment, in that Lord Hutton agreed with it as did Lord Hobhouse (with some further observations), Lord Millett's judgment has been the most influential in subsequent case

[313] 174 DLR (4th) 71

[314] *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 230

law. Lord Millet tied his judgment and the close connection test directly to his interpretation of the underlying policy basis of the doctrine:

> "a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong. If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business."[315]

Approving of Atiyah's view in his influential work *Vicarious Liability in the Law of Torts*,[316] Lord Millet here adopted a view of the doctrine of vicarious liability which is rooted in enterprise risk: if achieving an employer's objectives inherently bears a risk, the employer should be liable for that risk. However, it is clear that mere opportunity is not sufficient: the risk must be inherent to the nature of the business. Formulating the test in this way it becomes irrelevant that the employee was acting for his own benefit, or contrary to instructions, or indeed that the act is the opposite of the intended duty of the employee. Applying this to the facts in *Lister*, the warden's duties provided him the opportunity to commit sexual abuse, but that in itself was not sufficient to make the employer liable: the same could be said for any employee who had access to the school. However, it was the special position of trust that the employer put in the warden, the responsibility for the care and welfare of the boys, that created the close connection between his employment and the risk of abuse.

In formulating the test in this way, the UK Supreme Court broadened the test from that *in Bazely v Curry*, in particular in not carrying out the same detailed review of the particular duties of the employee but of viewing the risks of the

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[315] ibid at 244
[316] Atiyah (n 5)

enterprise more generally. This close connection test was developed further in subsequent case law.

5.2.2.3 Dubai Aluminium v Salaam

In the case of *Dubai Aluminium v Salaam*[317] the House of Lords cited with approval a passage in Atiyah's *Vicarious Liability in the Law of Torts* which had also been used by Lord Millett in *Lister*, where that scholar states that the "master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on."[318] This is drawn directly from the enterprise risk justification as set out by Lord Millett in *Lister*, and importantly it does not require the concept of 'material contribution to the risk' which was included in the *Bazely v Curry* test.

5.2.2.4 Various Claimants v Catholic Child Welfare Society

The facts of this case and its effect on the first limb of the test for vicarious liability have been discussed earlier in this thesis.[319] However this case also employed the close connection test, which Lord Philips formulated in a different way to Lord Millett. Again referring to the Canadian authorities, he formulated the test as follows:

"Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link."

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[317] [2003] 2 AC 366

[318] Atiyah (n 5) 171

[319] See 4.2.2.2.2 above

This formulation of the test brings together both limbs of vicarious liability. The concept of the relationship between the defendant and the abuser is the first limb, usually satisfied by establishing the employer-employee relationship as discussed in the previous chapter. The close connection test is demonstrated by establishing the use of the abuser in a manner which has 'created or significantly enhanced' the risk that the victim would be abused. There must be an essentially close relationship between the relationship (e.g. of employment) and the acts of abuse. This statement goes even further than Lord Millett, as there seems to be a rejection of the requirement that the risk be inherent in the defendant's business. Rather, if there is a close connection between the employment relationship and the abuse, regardless of the inherent risks in the business, sufficient close connection will be found.

5.2.2.5 Mohamud v WM Morrison Supermarkets

The Supreme Court had the opportunity of clarifying the proper approach in the recent case of *Mohamud v WM Morrison Supermarkets*.[320] The facts of this case were that the claimant was a customer of the defendant, who owns and operates a chain of supermarkets in this instance including a petrol station. The defendant's employee, Mr Khan, was responsible for ensuring that the petrol pumps and associated kiosk were kept in good order and for serving customers. The claimant attempted to use the services of the kiosk but was the victim of foul, racist and threatening language by Mr Khan. The claimant left the kiosk and returned to his car. He was followed by Mr Khan, who had a further altercation with the claimant, who was by then sitting in his car, resulting in Mr Khan punching the claimant, dragging him from his car and beating him in the forecourt, ignoring instructions from his supervisor who attempted to intervene.

At first instance, the case was dismissed on the basis that there was not sufficient close connection between Mr Khan's job, which involved nothing more than serving and helping customers and members of the public, and the unprovoked

[320] [2016] UKSC 11

assault on the claimant. This decision was upheld by the Court of Appeal, on the basis that Mr Khan had not been given duties involving a clear possibility of confrontation or placed in a situation where an outbreak of violence was likely. The mere fact that his employment involved interaction with customers was not sufficient to make his employer liable for his use of violence against the claimant.

After a full review of previous cases and the development of the close connection test, Lord Toulson[321] stated the court has to consider two matters: the first question is what function or "field of activities" have been entrusted by the employer to the employee, such question being considered broadly; secondly, the court must decide whether there is sufficient connection between the position in which he was employed and his wrongful conduct to "make it right for the employer to be held liable under the principle of social justice which goes back to Holt".[322] The judge admitted that it was futile to attempt to give too precise a measure to the closeness of connection, and that to do so would "miss the point".[323] He then stated that cases where the necessary connection had been found were cases in which the employee misused his position in a way which injured the claimant, which itself is the justification for imposing liability on the defendant employer.

Applying this to the facts, the court found that there was a sufficiently close connection to impose vicarious liability. Mr Khan's job was to attend to customers and to respond to their enquiries, and therefore the initial altercation in the kiosk – answering the claimant's question and asking him to leave - was within the field of activities assigned to him. The court considered that what happened afterwards, following the claimant to his car and physically abusing him, was an "unbroken sequence of events",[324] and therefore should be considered a continuation of the original

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[321] With whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Reed agreed. Lord Dyson agreed with the reasoning and the result, but included remarks in defence of the close connection test and in rejection of an "authorised representative" test.

[322] [2016] UKSC 11 at [45]

[323] ibid

[324] ibid at [47]

altercation which had been within the field of the employee's activities. Also the court noted that Mr Khan, immediately before he punched the claimant, told the claimant in threatening words that he was never to come back to the petrol station. This was an order to stay away from his employer's premises, and as such he was purporting to be about his employer's business. It was an abuse of his position which had been given to him by his employers.

Some of the language in Lord Toulson's judgment, it is submitted, is somewhat unhelpful. In particular references to Mr Khan's purporting to be about his employer's business, which would seem to be irrelevant, given that the test is an objective one considering whether the connection between the position of the employee, the field of activities assigned to her, and the wrongful conduct, which should be viewed in the light of principles of social justice. Indeed, Lord Toulson also said that Mr Khan's motives, which he considered to be personal racism, were irrelevant.[325] In such a test, the attitude or belief of the tortfeasor plays no part. However, the judgment is clear recognition of the continuation of the close connection test and approval of the approach started in *Lister* and developed in subsequent case law.

Lord Dyson, while agreeing with Lord Toulson's analysis, chose to add some statements in defence of the close connection test. The appellant had requested the court to change the test from one of close connection, which he submitted was too vague, to one of whether a reasonable person would think that the tortfeasor was an "authorised representative" of the vicarious defendant. Lord Dyson rejected this argument on the basis that the proposed test would provide no more certainty than the close connection test. Furthermore Lord Dyson's statements demonstrate clear approval of basing the close connection test on the concept of underlying justice. In defence of this concept, Lord Dyson argued that the purpose of the Salmond test was to clarify situations in which it would be just to impose vicarious liability; the inclusion of the concept of justice directly, with the close connection test, was, he argued, an

[325] ibid at [48]

improvement. He also noted that using concepts such as whether it was fair, just and reasonable to impose liability was already widespread in English tort law, for example in establishing a duty of care or remoteness of loss. Therefore he saw no particular problem in adding vicarious liability to the list of situations where a judge would need to use such concepts, guided by case law.

5.2.3 Current position

From the above discussion, following *Mohamud v WM Morrison*, the current position of the law for this element of vicarious liability may be stated as follows. Vicarious liability may be imposed where there is sufficiently close connection between the relationship between D1 and D2 and the wrongful act committed by D1. In order to establish whether there is such a close connection, there are two stages of consideration:

- The first stage is to investigate what are the "field of activities" which are assigned to D1 by D2 as a result of the relationship between them. The answer to this should be interpreted broadly.
- The second stage is to investigate the connection between the field of activities assigned to D1, as it emerges from the first stage, and the wrongful conduct. If it is sufficiently close to make it just to impose liability, then vicarious liability will be imposed. The question of whether or not it is just, it is implied, is to look to the policy basis of liability, with a particular focus (following statements of judges in the most recent line of cases) on enterprise risk. It seems clear from the recent case law that the mere fact that the relevant relationship presents D1 with the opportunity to commit a tort is not sufficient; the risk of committing the tort must be created or enhanced by the relationship.

5.3 Thai law

Section 425 of the TCCC states that an Employer will be jointly liable with an Employee for the consequences of a wrongful act committed "in the course of employment". However, in order to understand the manner in which this has been interpreted by the courts in order to perform a comparative exercise fruitfully later in this chapter it is necessary to analyse a selection of the Dika Court judgments in similar contexts to those discussed above in relation to English law.

5.3.1 For the Employer's benefit

An act will be considered in the course of employment if it is carried out for the benefit of the Employer, even where it is not a usual part of an Employee's duties.[326] A key distinction that runs through the case law is that between an action committed for the benefit of an Employer and one which is considered to be an Employee's personal business.[327] Dika case 3078/2533 concerned the manager of a branch of a commercial bank who drove the branch's car to a new year party and negligently hit the claimant's car. The new year party was for an association of banks in the province, established in order to coordinate the work of the banks and exchange opinions. An application for membership of the association had to be approved by the bank's headquarters. On the basis that the branch manager's membership of the association, including attendance at the new year event, was beneficial to the bank's business, the Court held that the branch manager was acting in the course of his employment when he drove the car.[328]

5.3.2 Prohibitions and intentional wrongs

It is clear that an Employer may be held liable where an Employee commits a wrongful act despite a prohibition of that act by an Employer.[329] For

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[326] Pengniti (n 266) para 158
[327] Punyaphan (n 40) para 85
[328] Pengniti (n 266) para 158
[329] Punyaphan (n 40) para 85

example, in Dika case 2171-2173/2517, the Employee had the responsibility of fixing cars. He took a car out for a test drive, during which he drove negligently and caused an accident. The Court held the Employer liable, in spite of the fact that the Employer had issued an internal rule prohibiting Employees from driving the cars that they were supposed to fix.

It is also clear that an Employer may be held liable for intentional wrongful acts of an Employee, but there must be some kind of connection between the intentional wrongful act and the Employer's business.[330] To use a clear example, if an Employer gives an Employee security guard a gun to carry on his shift, the Employer will be held liable if the Employee fires the gun at the claimant while on duty.[331] However, if the wrongful act is not connected with the Employer's business, the Employer may escape liability. An example of this is Dika case 1484/2499, where the Employee's duty was to deliver coconuts to customers. During the course of the delivery, the customer quarrelled with, and insulted, the Employee. The Employee reacted angrily, and punched the customer. The court considered that this was a separate incident, and not within the business that the Employer had assigned to the Employee. However, it should be noted that the Dika judgment does not contain any details of the quarrel: if the quarrel had concerned the delivery of the coconuts or their quality then, it has been argued, this may have been considered to be in the course of employment.[332]

Nevertheless, even where a quarrel commences in the context of the Employer's business, the resulting injuries to the claimant may not necessarily be considered to have been committed during the course of employment. An interesting example comes from Dika case 1942/2520. In this case, the Fourth Defendant was the owner and operator of a bus running on a route in Bangkok, and the Employer of the First, Second and Third Defendants. The First and Second Defendants were bus

[330] ibid para 84
[331] Dika Case 2499/2524
[332] Note that this is the opinion of Pengniti (n 266) para 158

conductors, and the Third Defendant was the bus driver. While driving on the route at a high speed, the driver swerved the bus causing the claimant and other passengers to fall from their seats. The claimant criticised the bus driver for dangerous driving, to which criticism the First, Second and Third Defendants took umbrage. Before the claimant alighted at his stop at Chulalongkorn University, the First, Second and Third Defendants all set about the claimant, punching him and, in the case of the First Defendant, using the metal, tube-shaped container in which fares were collected to beat him over the head. The claimant suffered damages for which he sued the Fourth Defendant as Employer of the First, Second and Third Defendants. However, the Dika Court found that the Fourth Defendant was not liable. In reaching its conclusion, the Court took the view that the objects of the Fourth Defendant were providing a public transportation service; the criticism of the driver and the incident which followed this were not considered to be within the objects of the Fourth Defendant, and therefore the Fourth Defendant was not held liable.

This case demonstrates a narrow view of the business of an Employer,[333] whereas other cases appear to pay more attention to the surrounding circumstances and to consider acts of Employees which are incidental to their employment as within the course of employment.

[333] There are other Dika Court judgments which show consistency in this approach. For example Dika Case 1931/2518, which concerned a postman who parked his car to collect letters from a postbox as part of his rounds. A traffic policeman approached him and told him to park more carefully, to which the postman replied rudely. The policeman put his head through the open window into the car and told the postman that he was charging him with insulting a police officer. The postman then started the car and drove away, knocking down the policeman. The Court held that the insult and obstruction of the policeman from discharging his duty were personal business since they had nothing to do with the post office department. Again, this case demonstrates a narrow focus on the objectives of the Employer when deciding whether the actions of an Employee are carried out in the course of employment.

5.3.3 Surrounding circumstances and acts incidental to employment

An example of this is Dika case 1089/2519, in which an Employee had the duty of unloading bamboo shoots from a car under the orders of his Employer. The Employee struck a match in order to light a cigarette, and a spark landed on a nearby pile of cotton. The resulting inferno engulfed a storage warehouse and several houses including the claimant's. The Dika Court held that the Employee had negligently caused the fire while moving boxes of bamboo shoots under the orders of the Employer. Here, it seems that the Employee's wrongful act of negligently lighting a cigarette was considered in the course of employment, perhaps because it can be seen as reasonably incidental to the particular ascribed task of unloading bamboo shoots: not an unusual activity to engage in when performing such a task. Thus it seems that the court will look at the circumstances and consider whether the Employee's acts can be considered as incidental to their tasks, such as here the usual activity of smoking a cigarette on a break.[334]

Therefore it seems that acts which are considered reasonably incidental to an Employee's tasks, such as negligently lighting a cigarette on a break from work, will be considered to be committed in the course of their employment, whereas quarrelling with customers, even when such quarrels arise out of the activities for which they are employed, may in some cases be considered personal matters of the Employee and therefore outside of the course of their Employment.

5.3.4 Acts which are considered personal business

An interesting example of the line that is drawn between acts which are considered committed in the course of employment and those which are considered personal business is Dika case 2060/2524. In this case, the First Defendant (D1) drove a car in the course of his employment with the Second Defendant (D2) negligently, and hit the claimant's son, causing him serious injury. D1 sought to conceal his act, and dumped what, it is supposed, he assumed was the victim's dead body in a roadside

[334] Pengniti (n 266) para 158

waterway. The facts showed that it was the immersion of the victim in the water that caused his death, rather than the accident. The Dika Court held that D2 was liable for the accident which caused serious injury to the victim, but not for the victim's death. When D1 dumped the victim in the water, this was his personal business, an attempt to escape personal liability and conceal his wrongdoing, and therefore not in the course of his employment.[335] Indeed, this was even the case where the personal actions of the Employee were consequent on, or at least were actions which the Employee decided to perform because of, actions which were committed within the course of employment. Therefore it seems that there is a sense in which the Employee must be working for the Employer in the sense of carrying out tasks in order to achieve the objectives of the Employer, or to carry on the Employer's business, rather than activities which are purely committed for the personal benefit of the Employee. Where the objectives of the Employee change to the personal, the Employer will not be held liable.

However, this can be compared with the facts and decision in Dika case 2739/2532. In this case, the First Defendant was the Employee of the Third Defendant, with the responsibility of driving the Third Defendant's car. On this occasion, the First Defendant was not in fact driving the car, but had assigned this task to the Second Defendant whom he had asked to return the car to a car park. However, the Second Defendant deviated from the specified route and collided with the victim's car. The Second Defendant fled from the scene of the accident, but the victim followed the Second Defendant in order to negotiate compensation for the damage caused. The victim caught up with the Second Defendant at a traffic light, but the Second Defendant refused to come out of the car to negotiate with the victim and tried to drive away. The victim then leapt onto the car, holding on in an attempt to prevent the Second Defendant from escaping. The Second Defendant then drove dangerously in an attempt to shake the victim off, causing the victim to fall from the car; in the process, the car ran over the victim and he died from his injuries.

[335] See ibid

The Dika Court's analysis in this case was, firstly, that even though it was the Second Defendant driving the car rather than the First Defendant, who was the Employee of the Third Defendant, nevertheless the Third Defendant should be held liable: the First Defendant delegated his task to the Second Defendant, and therefore the Second Defendant was under the responsibility of the First Defendant. This was the case even though the Second Defendant drove off the designated route. Therefore the Third Defendant should be jointly liable for the damage caused by the crash. However, the Court also said that the following incident, where the Second Defendant fled from the scene and, in so doing, caused the victim's death, followed on from the original crash. The Court did not distinguish between the original crash and the events that followed, but rather saw all the actions as part of the same event, perhaps seeing it as artificial to draw the line between the incidents that were part of the accident and those which were not.

It is interesting to compare this conclusion with Dika case 2060/2524, discussed above.[336] The distinction between the two seems to be that the court in 2739/2532 saw the Second Defendant's attempt to flee the scene as a part of the same incident as the accident, whereas in 2060/2524 the Court saw the decision to throw the victim into a waterway to escape responsibility for the crash was a new incident carried out as the First Defendant's personal business. The distinction seems to be, on the facts of any particular case, whether the judges consider all the wrongful acts to be part of the same event or whether there is a break in the action sufficient to consider subsequent wrongful acts to be separate. In relation to these two cases, it is submitted that the First Defendant's conduct in case 2060/2524 was particularly extreme in nature; the decision to attempt to cover up a death resulting from an accident by hiding a body in a waterway is perhaps so extreme and unusual that the Court felt it warranted treatment as a separate event. However, in case 2739/2532, the decision to flee the scene of a minor accident is perhaps not so extreme, nor is the decision to drive somewhat wildly when the victim

[336] Note that Pengniti (n 266), para 158, criticises the different treatment given to the cases by the Dika Court.

threw himself on the car. The more natural sequence of events in this case, it is suggested, explains the different treatment by the Dika Court.

This approach is consistent with a number of Dika Court decisions which concern Employees driving home from work or deviating from a route. In many cases, wrongful acts committed in such circumstances will be considered to have been committed in the course of employment. For example, in case 1681/2523, an Employee drove a motorbike home after work, so that he could use it to ride back to work the next day. However, on the way home he stopped off, drank alcohol, and when he continued his journey he hit the claimant's husband. In case 274/2534, an Employee was ordered to drive a car from work to a garage, but decided to go out for the night and had an accident on the way back. In case 2517/2534, the Employer ordered an Employee to drive a car to a petrol station, but the Employee drove the car to a pharmacy to buy medicine, against the Employer's regulations, and hit the claimant's car. In all these cases, the relevant wrongful act was considered to have been committed in the course of employment. It seems that in each of these cases, the Employee had a certain amount of discretion, in the sense that the Employer gave the Employee the keys to the vehicle and did not exercise a significant amount of control or instructions over how the Employee used the vehicle. As such, some deviation from a route or from the purpose of a trip will still be considered within the course of employment. However, as discussed above, this seems to be a question of degree and there does come a point where the deviation is so significant that the Employee will be considered to be engaged on their own personal business. Thus, for example, in case 1772/2512 an Employee driver, after work was finished for the day, drove his Employer's car out of the office in order to transport another Employee's kitchenware to that person's house. This was considered by the court to be the Employee's personal business.

5.3.5 Summary of position

The interpretation of 'in the course of employment' in Thai law appears to focus significantly on the distinction between acts that are committed while the Employee is engaged on a task for the Employer's benefit and those which are

considered the Employee's personal business. The latter will not be considered to be committed in the course of employment. It is clear that a prohibition of the relevant wrongful conduct by an Employer will not be sufficient to make the act outside of the course of employment, and even intentional wrongful acts may be caught provided there is a connection between the wrongful act and the Employer's business. However, the extent of the connection is key for determining whether the wrongful act is within or outside of the course of employment and this appears to be a question which is tied closely to the facts and circumstances of each case.

When deciding whether acts are committed within the course of employment, the court will consider that incidental acts, such as lighting a cigarette on a break, or deviations from a route, for a meal or a drink, fall within the course of employment. This is the same for wrongful acts committed in a chain of events which follows on closely from acts that are clearly within the role assigned to an Employee. However, where the Employee takes action which appears to be somewhat extreme, such as assaulting a customer or hiding a supposedly dead body, this will usually be considered an Employee's personal business and therefore outside of the scope of actions covered by Section 425.

The question as to which activities are personal business and which are in the course of employment is a very much a question of degree, in terms of the amount of deviation from the Employee's duties or the unusual nature of the Employee's behaviour. The Dika Court's attitude to this nature of degree may be most clearly illustrated by a comparison of some of the cases discussed above by English cases involving similar facts, which exercise will be performed in the following section.

5.4 Comparison

This section of this chapter will perform a comparison of four areas within this topic which highlight the differences in the approaches of the two jurisdictions: acts of employees which have been specifically prohibited by employers; cases which involve insults and violence; the attitude of the courts to whether a situation can be

considered a continuing series of events; and finally the cases which have so challenged English law, resulting in the change to the course of employment test, *Lister* and *Various Claimants*, addressing the first hypothesis of this thesis.

5.4.1 Prohibitions

An informative area of comparison is in the cases in English and Thai law which deal with tortious/wrongful acts of an employee which are specifically prohibited by the employer. Both systems allow for such tortious/wrongful acts to confer liability on an employer, but there are interesting contours of difference between the two systems' approaches.

In Dika case 2171-2173/2517, discussed above, the Employee had the responsibility of fixing cars and was prohibited from driving those cars by an internal rule. He took a car out for a test drive, during which he drove negligently and caused an accident; the Dika Court held that such wrongful act was committed within the course of his employment. The facts of this case, and the prohibition, are materially similar to the two English law cases discussed above of *LCC v Cattermoles Garages Ltd*[337] and *Iqbal v London Transport Executive*,[338] both involving employees who were prohibited from driving by employers' regulations. However, the distinction between those two cases was that in *LCC* the employee's duty was to move cars, but he was prohibited from using driving as a method of moving them; in *Iqbal* the bus conductor was prohibited from driving - his employment was to act as a conductor which did not involve moving buses by driving or by any other means at all. The English courts held that the driving in *LCC* was in the course of employment, as an unauthorised mode of performing an authorised task; the driving in *Iqbal* was not in the course of employment as it was outside of the field of activities assigned to the employee. Applying the English law reasoning to Dika case 2171-2173/2517, it appears that the facts are more similar to *Iqbal* than to *LCC*. In the Thai case, the Employee's task was to fix cars, not to move

[337] [1953] 1 WLR 97

[338] (1973) 16 KIR 39, CA

the cars by driving or any other means. As such, under the previous English law position, the Employee in this case would be considered not acting in the course of employment.

However, it is clear that the English case law has materially altered in its attitude towards prohibited acts. In the most recent line of cases, the tortious acts which harmed the victims were in many cases subject to clear prohibitions. Indeed, in *Lister* and *Various Claimants*, the tortfeasor (D1) was in each case employed specifically to prevent the kind of conduct which D1 carried out against the victims. Indeed, it is this feature of the cases which led the courts to conclude that the Salmond formulation of an 'unauthorised mode of doing an authorised task' was inappropriate since it was not applicable in such circumstances. Therefore it is necessary to apply the current test under English law to the facts of Dika case 2171-2173/2517.

Under the current English law test as discussed above, it is first necessary to identify the field of activities assigned to D1 by D2. Here, it appears that the Employee had the task of fixing cars, which should be interpreted broadly to include investigating whether the cars operated properly or not. The second stage is to investigate the connection between the position of D1, as identified, and the wrongful conduct and then to consider if it is just to impose liability in light of the enterprise risk policy basis. Applying this to the facts, it seems that the Employee's duties would have clearly given him access to the victim's car. However, mere opportunity is not sufficient under English law: the risk must be created or enhanced by the relationship. Here, the Employee would have been trusted with total, unmonitored access to the car, and the requirement to ensure the car is fixed would have included running the motor and ensuring the car was operational. This leads to a close connection between fixing the car and driving the car, especially considering the amount of trust placed in the Employee by giving him total access. Indeed, looking at the policy basis, the car fixing business benefits from the Employee having total access and control over the car, by not requiring extra resources to supervise the Employee etc. Therefore, on an enterprise risk basis it seems justified that the business should also bear the responsibility for the

Employee abusing that position. This result also is consistent with the less important, though often referred to, policy aim of deterrence: other similar businesses will be encouraged to properly select and supervise such employees and control the environment in which they work to ensure that similar situations do not occur if they know that they will likely be held liable for such actions.

Therefore, a thorough application of the current English law test to the facts of Dika case 2171-2173/2517 leads to the conclusion that in this situation there likely would be a sufficiently close connection between the relationship between the Employer and Employee and the wrongful act committed that it is just to confer liability on the Employer for the wrongful act of the Employee. Therefore the current English law test gives a different result to the previous 'in the course of employment' test under English law; however, it gives the same result as reached by the Dika Court in this case.

This analysis demonstrates that the new English law test for vicarious liability allows much greater scope for conferring liability where the employer prohibits the employee from engaging in the activity that results in the tortious act. However, it seems that the Thai law concept of 'in the course of employment' has been interpreted more broadly than the historic English concept, so that it would confer liability under Section 425 in situations in which the previous test under English law would not. Therefore it is possible to conclude that the new English law test has brought the position of the two systems into greater similarity with regard to the treatment of situations where the tortious/wrongful act of D1 arises out of conduct which is prohibited by D2.

5.4.2 Cases involving insults and violence

Another interesting area of comparison is cases which involve insults and violence. This was the subject of the most recent Supreme Court case on vicarious liability discussed above, *Mohamud*, which in this aspect appears similar to the facts of two Dika Court cases discussed above, 1484/2499 and 1942/2520. The two Thai cases, as discussed above, concerned a coconut deliveryman (former case) and the driver and conductors of a bus (latter case) who in each case had a quarrel with a customer which

resulted in a violent confrontation. In both cases the Dika Court discharged the Employer from liability, considering that the acts committed were not in the course of their employment. It has been considered that, although the subject matter of the quarrel in 1484/2499 is not known, if it had directly concerned the delivery of the coconuts this may have changed the outcome, bringing the incident within the course of the Employee's employment. However, in 1942/2520, the cause of the quarrel was the driver's dangerous driving and the victim's complaint concerning this. This suggests that even where the quarrel originates from the way that an Employee is performing their duties, insults and violence which result from the quarrel may be considered acts which are not within the course of employment.

We can compare the approach here with the facts and decision in *Mohamud*. In *Mohamud* the victim, who entered the petrol station as a customer, was subject to foul, threatening, racist language from an employee, Mr Khan. The victim left the shop, but was pursued by Mr Khan which resulted in a further altercation and Mr Khan physically beating the victim and warning him never to come back to the petrol station. Comparing this with the two Dika Court cases, here there are also insults and a violent altercation between an Employee and a customer. The subject matter of the quarrel appears to be based on personal and racial issues here, rather than the way that the Employee was carrying out his duties (as in 1942/2520). As such, this seems likely to be considered by the Dika Court as outside of the course of Mr Khan's employment: the physical altercation had apparently nothing to do with the Employee's duties, which were merely to serve customers (rather than e.g. provide security), nor was intended to further the Employer's interests or objectives, nor arose from the way that the Employee was performing his duties. In this regard, even if the quarrel had started from the way the Employee was performing his duties, the resulting insults and violence may nevertheless be considered outside of the course of employment, as in the decision in 1942/2520.

However, under English law as discussed above, the Supreme Court found that there was a sufficient closeness between Mr Khan's employment and the

violent altercation to hold the employer liable. Serving customers, including dealing with their questions and asking them to leave the premises in certain circumstances were within the field of activities assigned to Mr Khan. The court found sufficiently close relationship between these activities and the violent altercation that followed: the risk of violence to a customer was considered suitably created or enhanced by employing Mr Khan to hold the employer liable. From an enterprise risk point of view, the employer benefitted from Mr Khan's actions of serving customers; therefore the employer should bear the risk of harm resulting from such actions, and the violence arising from an altercation with a customer was considered here to be one of those risks.

Applying the Supreme Court's English law reasoning to the two Dika Court cases tends likewise to suggest a different conclusion to that of the Dika Court. In both cases, the Employee committing the wrongful act (D1) was put in a position where, it appears, they were expected to, or it is anticipated that they would, deal with customers. Although few of the facts concerning the coconut deliveryman and the quarrel are evident from the judgment in 1484/2499, it can be assumed that dealing face-to-face with customers was a part of the Employee's duties; following English law reasoning, a resulting altercation with a customer would likely be considered closely connected to his duties, the risk of which would be materially enhanced by selecting that Employee to carry out those duties. This assumption could be overturned if the altercation between the deliveryman and the victim was truly personal in nature, for example if the two individuals were known to each other outside of the delivery business, that they had a long running feud, and that the delivery of coconuts merely gave the deliveryman the opportunity of carrying out a personal revenge.

Regarding the facts of 1942/2520, there were three Employees who carried out the beating on the victim, the First and Second Defendants being the bus conductors and the Third Defendant being the bus driver. The fields of activities assigned to these defendants as Employees differs somewhat. It is assumed that the Third Defendant is assigned to drive the bus, and would not be expected to interact with passengers. However, the First and Second Defendants were bus conductors, whose

field of activities appears significantly involved with dealing with customers, collecting fares, providing information as to the route etc. It could be seen that these activities are not far from, and indeed may have included, dealing with customer complaints and keeping order on the bus.[339] As a result, it seems that a physical altercation with a complaining customer seems quite closely connected to this field of activities. The Third Defendant, by contrast, had a field of activities which, it is assumed, should not involve significant contact with passengers: although it would provide him with opportunity to commit the wrongful act, by putting him in the same vicinity as the passenger, it would not otherwise enhance the risk that this wrongful act would take place. Again, this analysis is performed without detailed knowledge of facts which are not provided in the case summary, such as the instructions and training given to the bus driver, whether as a matter of regulation or common practice there is significant interaction between bus drivers and passengers which would enhance the risk of an altercation etc. However, as discussed above, it seems likely that an English law analysis would hold the Employer liable here for the wrongful acts of the First and Second Defendants, there being sufficiently close connection between their assigned field of activities as bus conductors and the wrongful act of physically beating a complaining passenger.

5.4.3 Continuing sequence of events

One important issue in *Mohamud*, which was subject to debate, is whether the employer could be held responsible for the verbal altercation in the petrol station, while Mr Khan was serving a customer, but that when Mr Khan left the shop

[339] Note however the decision of the Privy Council in *Keppel Bus Co v Sa'ad bin Ahmad* [1974] 1 WLR 1082 which was discussed critically by the Supreme Court in *Mohamud*. Here, the Privy Council rejected a claim against the employer of a bus conductor who had struck the plaintiff passenger in the eye with a ticket punch on the basis that the conductor could not be described as maintaining order on the bus. The Board rejected the argument that his job could be described as "managing the bus" and that his conduct arose out of his power and duty to do so. Lord Toulson in *Mohamud* criticised that decision, which applied the now-outdated Salmond formula, saying (at [34]) "[i]n such circumstances it was just that the passenger should be able to look to the company for compensation".

and followed the victim to his car, at this stage he was on personal business. It was only at this point that physical violence commenced and therefore, the defence argued, the employer should not be held liable. In the leading judgment, Lord Toulson rejected this argument primarily[340] because he did not think that it was reasonable to consider that Mr Khan had metaphorically taken off his uniform the moment he stepped out from the counter; instead it was considered a seamless episode, following up on the altercation occurring in the shop a few moments before.

In the judgment, a distinction was drawn with an earlier case involving similar facts which is informative for this discussion, *Warren v Henlys Ltd*.[341] In this case a customer at a petrol station had an angry confrontation with the petrol pump attendant, who (wrongly) suspected him of trying to leave without paying. The customer was enraged by the way that he had been spoken to by the attendant. He saw a police car passing on the road, and drove after it. He complained to the police officer about the manner in which the attendant had been behaving and persuaded the officer to return to the petrol station with him. After listening to both parties' explanations of what happened, the police officer indicated that he did not think that it was a police matter. The customer then said that he would report the attendant to his employer. At this point, the attendant punched the customer in the face.

The judge in *Warren v Henlys* held that the assault was not committed in the course of employment. By the time the assault happened, the customer's business with the petrol station had ended. When the customer left the petrol station and returned with a police officer, he was on personal business since the objective of his activity by

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[340] Lord Toulson in fact offers two reasons: the first is the reason explained here. The second is that Mr Khan threatened the victim to never come back to the petrol station. This, Lord Toulson suggested, showed that Mr Khan considered he was acting for, or on behalf of, the business. However, as discussed above, this second reason is problematic, suggesting that the tortfeasor's personal belief is important as to whether or not they considered they were acting for the employer or not. Furthermore, as Lord Toulson himself says in the following paragraph, [48], the motive of the employee is irrelevant to the analysis.

[341] [1948] 2 All ER 935

this time was making a personal complaint about the attendant. At the time that the attendant reacted violently to the customer's indication that he would report him to his employer, the relationship between them had changed from employee-customer to that of a person making a complaint to the police and the subject of the complaint. Lord Toulson in *Mohamud* approved this reasoning.[342]

A similar distinction can be seen in the Dika Court cases 2060/2524 and 2739/2532 discussed above. In the former case, the First Defendant was held to have hit and injured the victim while driving in the course of employment. However, when he decided to dump the victim in water beside the road, this was personal business carried out to conceal his wrongdoing. In the latter case, the Second Defendant's collision with the victim's car, flight from the scene, and running over the victim at a traffic light all were considered committed within the course of employment.

The reasoning of the Dika Court and the Supreme Court under English law seem consistent in approach here. Where there is a clear break in the chain of causality, where D1 can be considered to make a conscious decision which is for her personal benefit, or on her personal business, at that point the employer will cease to be liable. However, where the different actions are perceived as a consistent or seamless flow of events, the employer will be held liable. When the facts of these cases are examined, it seems difficult to discern a clear conceptual distinction. For example, the decision to drive away from an accident in 2739/2532 seems to have been made for the personal benefit of the Employee, to escape the consequences of causing the accident. Likewise, in *Warren v Henlys* the altercation between the petrol pump attendant performing his duties did cause the following events, and indeed the threat to report him to his employer caused violence. Therefore whether there can be considered a break in the chain of events appears very much to turn on the facts. Indeed, in this analysis, it is suggested that actions are more likely to be considered by a judge as a part of the chain of events if they flow naturally and reasonably from one another. The more

[342] *Mohamud* (n 14) at [32]

extreme or unusual the decision of one of the parties is, the more likely it is that this will be considered personal business. Thus the decision to drive away from a scene of an accident, while reprehensible, is more natural than the decision to conceal an accident by throwing a body in water. Likewise, the decision to leave a petrol shop to pursue and continue an argument started there is more natural than the decision to leave the scene, discuss matters with a policeman, return and continue the confrontation.

Thus it appears that it is difficult to theorise when a sequence of events will be considered broken: this will be considered by judges on a case by case basis. However, it is suggested that the more natural the events which follow are, the less likely they are to break the sequence of events.

5.4.4 Lister and Various Claimants

A final point of comparison is to analyse whether acts such as those in *Lister* and *Various Claimants* would be considered to have been committed in the course of employment under Thai law. As discussed above, it was the difficulty of applying the English law concept of 'in the course of employment' in these cases which led to the development of the new test. The question here, simply put, is whether the legal system will hold an employer liable for acts which were specifically prohibited and indeed were the antithesis of the duties which the employee was allocated. In each case, the employee in question was given the task of supervising and protecting vulnerable people, in which they were given a great deal of trust, and the employees abused that trust in sexually assaulting the people they were supposed to protect.

First it should be noted that so far no cases with similar facts to these have been decided by the Dika Court, therefore whether or not Thai law will apply can only be theorised using the available jurisprudence on other cases with different though potentially analogous facts. As discussed above, in the section comparing the English and Thai concepts as regards prohibited acts, it appears that Thai law is more broadly interpreted than the English law concept before the most recent line of cases. Dika case 2171-2173/2517, discussed above, held that the Employer was liable for the Employee driving a car that he was supposed to fix away from the premises in spite of a prohibition

from the Employer. Potentially, using previous English case law, this would not have been considered within the course of employment since the task of fixing cars is different to the Employee's duty of driving cars. However, under current English law the driving of the cars would likely be considered sufficiently closely connected with the task of fixing cars to confer vicarious liability on the Employer. The willingness of Thai law to confer liability in spite of a prohibition, and in doing so to take a broad view of what will be considered in the course of employment, is helpful for conferring liability on an Employer in factual circumstances analogous to *Lister* and *Various Claimants*. However, turning to the cases discussed above in relation to violence resulting from insults, it appears that the Dika Court has been notably reluctant to confer liability on Employers in such circumstances. In particular, in cases such as 1942/2520 discussed above concerning the violence of the bus conductors and driver, the Court did not impose liability on an Employer in spite of the fact that the violence originated in an argument over the manner that one of the Employees performed his duties, that the violence was carried out by Employees whose duties involved dealing face-to-face with passengers, and the fact that the violence took place on the Employer's bus using a ticket collecting tin used to collect fares. Furthermore, there are other cases which demonstrate the consistency of this approach.[343]

The reluctance of the Dika Court to confer liability on an Employer under Section 425, it is suggested, may be due to the extreme nature of these actions. The more extreme the activity is, for example reacting with a violent assault to a customer complaint, the more likely the Dika Court appears to be to consider that activity a result of the personal business of the Employee, and the less likely to be performed within the course of employment. It should be stressed that this is still fundamentally dependent on the context: for example, if an Employee is hired to undertake a task which may involve physical altercations, such as a security guard, wrongful acts of violence may be more likely seen as occurring in the course of

[343] See above discussion at 5.4.2 and case 1484/2499 discussed above.

employment.[344] However, it may be suggested that more extreme acts in the sense of being a more unforeseeable or unpredictable consequence of their duties are less likely to be considered performed in the course of employment.

Considering the Dika Court jurisprudence discussed above, it seems that the balance of the cases lies in favour of considering that acts of violence, where use of force is not part of or close to the Employee's duties, are not usually considered to be within the course of employment. Therefore it would follow that an Employer is unlikely, under Thai law, to be considered liable for sexual abuse committed by an Employee whose duties include protecting the victims against such abuse. However, this conclusion is by no means a strong one, and it may be open to a Thai court, in view of Dika decisions which hold an Employer liable for acts of an Employee which have been prohibited, to decide differently. Especially given the connection between the degree of trust and discretion given to the Employee in these circumstances, the broader interpretation given to the Thai test compared to the historic English course of employment test suggests a more flexible approach to conferring liability than the position which faced the English courts, resulting in the most recent line of decisions. Nevertheless the balance of the cases suggest that, even taking into account this flexibility, Thai law would likely not hold an Employer liable in such circumstances.

5.5 Principles and policy

The analysis and comparison of the two systems' approaches performed above allows the contours and differences of the two doctrines to become apparent. This chapter will now apply the potential principles and policy bases of the doctrines to the two jurisdictions, addressing the second hypothesis of this thesis. As discussed in Chapter 2, the policy and principle bases which have been suggested for the doctrine

[344] See Dika case 2499/2524 in which a security guard fired a gun, given to him by his Employer, at the claimant. The Employer was held jointly liable.

may be divided into three broad categories: fault and identification; victim compensation and loss distribution; and risk and deterrence.

5.5.1 English law

In formulating the new test, English law specifically includes the concept of whether it is just to confer liability, taking into account the principles and policy of the doctrine. In formulating and applying this test, it has been clear that enterprise risk is the foundation of the doctrine. As a result, in deciding whether the tortious acts of an employee are sufficiently closely connected to her employment, the courts will specifically look at whether the enterprise risk policy aim justifies conferring liability.

The reformulation of the test as one of relative closeness of connection between the field of activities of an employee and the wrongful act, it is suggested, is also closer to the policy doctrine of deterrence than the previous 'in the course of employment' test. This is because, in terms of prevention, the previous test would only incentivise employers to monitor and control the actions of an employee within her particular selection of duties. Outside of these duties, the employer was not responsible. However, now a wider view of the field of activities must be taken into account, and therefore employers must not only attempt to prevent tortious acts of employees within the ambit of their specific duties, but also through all actions associated with their more widely defined field of activities. This will provide the incentive for employers to actively monitor and supervise a wider range of actions of their employees: thus this provides a greater potential power of deterrence which, as discussed earlier in this thesis, is a justifiable policy aim which has been recognised by the courts, albeit a subsidiary one to enterprise risk.

Similarly, the shift of a test away from a narrow one of course of employment to a wider one of connection with the field of activities of an employee implies a move away from the policy aims of fault and identification. A focus on the course of employment of an employee suggests a test which is closer aligned to these concepts: the employer designated particular tasks to an employee; if while performing

these tasks a tortious act is committed, the employer should be responsible because she assigned these tasks to the employee. This concept seems potentially more closely linked with fault and identification: either it is the fault of the employer for assigning the tasks, or the direct link between the tasks themselves and the employer. A move away from this concept to other activities of an employee which are merely connected with the field of activities that the employee is assigned weakens this link, especially with the explicit recognition of the enterprise risk policy basis.

Finally, regarding the policy aims of victim compensation and loss distribution, it is submitted that the new test is expansive in that it captures actions of an employee which would not have been caught under the old course of employment test, while any acts which under the previous test would have conferred liability will also be caught. This expansion can be seen somewhat to support these aims by giving the victim a higher likelihood of being able to find an employer liable in addition to the tortfeasor. However, as above, the Supreme Court has made clear statements to the effect that the underlying policy aim of the doctrine, to be taken account of in this test, is that of enterprise liability. Therefore although a more expansive test may further these aims more than the previous law, this can be seen as somewhat incidental since the policy objective is clearly now that of enterprise risk.

5.5.2 Thai law

The Thai law test, as discussed above, is overall likely to confer liability on Employers in more situations than the more restrictive historic English law interpretation of 'in the course of employment'. However, it appears more restrictive than the new English law test of a connection between the field of activities and the tortious act. In particular, it is doubtful that the prevailing interpretation of 'in the course of employment' in Thai law will confer liability on an Employer when an Employee commits extreme violent or sexually abusive acts which are the antithesis of her specified duties.

This view of Thai law suggests a more narrow view of enterprise risk than is present in English law. Under English law, the concept of the risks that an

enterprise creates in society appears broad, so that it will cover situations where employees abuse the positions that have been assigned to them by an enterprise. The enterprise is seen as creating or enhancing the risk that an employee will carry out a tortious act, even where the motivation of that tortious act is purely personal. Thai law does not appear to extend this far.

Rather, there remains something of a focus on the motivation of the Employee who commits the wrongful act. If it is intended to satisfy a personal aim, such as vengeance for an insult, the Employer will not be held liable even though the Employer may be argued to have created or enhanced the risk of the wrongful act by assigning those duties to that Employee, and benefits from the Employee's carrying out those duties. Under Thai law, the focus is on the specific duties which are assigned to the Employee. Where such duties, or incidental acts or acts which seem to naturally follow from such duties, result in a wrongful act, the Employer will be liable perhaps because, taking an enterprise risk view, the Employer benefits from the duties when performed properly. Where acts are seen as purely personal in motivation, the Employer should not be held liable because the Employer does not benefit from personally motivated acts: only acts which are committed in furtherance of the Employer's objectives, i.e. those which are committed in performing, or incidentally or simultaneously with performing, the Employee's duties. This is a more narrow view of enterprise risk, in the sense that it does make the Employer for all risks which flow from assigning certain tasks, responsibility and authority to an Employee (including the risks of the Employee abusing the same for personal reasons). Instead, it is a view of enterprise risk that assigns the Employer responsibility for the risks flowing from an Employee attempting to carry out the duties assigned to her. Once the Employee acts for personal reasons, the Employer will not be responsible.

In the same way that the Thai law test would allow only for a narrower view of enterprise risk than English law, arguably it also focuses less on the policy aim of deterrence. Although Thai law will find an Employer liable even where the Employee violates a prohibition – which creates a strong incentive to actually prevent the

Employee from committing wrongful acts rather than just creating an internal rule to avoid liability – if an Employee abuses their position by acting in an extreme or personally motivated manner, the Employer will not be held liable. Therefore this only creates the incentive to control the Employee's actions which are directly associated, or very closely associated, with her duties: the Employer will not have as strong an incentive to ensure that proper systems are in place to prevent an Employee carrying out a personally motivated abuse of her position.

As discussed above in English law, a focus on the course of employment is arguably more in line with policy objectives of fault and identification, since the law will tie liability to the duties assigned to the Employee. This is suggestive that liability is conferred because it was the Employer's fault in assigning such tasks and not properly supervising the Employee. Put another way, the Employer should be held liable for abuses which were natural as a consequence of assigning duties and responsibilities to an Employee, on the basis that the Employer ought to have known that there was a risk of abuse. If the actions of an Employee are so extreme that no one could have anticipated them, this cannot be seen as the Employer's fault, and therefore the Employer should not be held liable. However, the jurisprudence does not support this as a policy basis for the interpretation, since there are numerous examples of liability conferred on Employers where Employees violate prohibitions, stray from routes assigned to them, commit wrongful acts while on a break or an activity incidental to their duties etc. If this were the policy basis for this doctrine, there would, it is submitted, be a focus on instructions given by the Employer, or whether systems were put in place by the Employer to prevent the relevant wrongful act. There is no such consideration in any of the case law.

5.6 Conclusion

This chapter has examined the second element required to confer liability under English law vicarious liability and Section 425 of the TCCC, which concerns the

wrongful/tortious act committed by D1 and its context. As discussed, English law historically had a test which analysed whether the tortious act had been committed in the course of employment. The interpretation of this concept, strongly influenced by Salmond's formulation, was an act which was either authorised by the employer or a wrongful or unauthorised mode of doing an act authorised by an employer. As such, even though there was recognition that prohibitions and acts incidental to employment or those caused by the employee's own initiative could potentially confer liability, this was a restrictive test. The focus was very much on whether the employee was acting for the employer's business when committing the tortious act. The Salmond test was unable, unjustly in the House of Lords'/Supreme Court's view, to confer liability in cases such as *Lister* and *Various Claimants*, which concerned an employee abusing their position by performing acts which were the antithesis of the duties assigned to them. Such abuse could not easily be seen as an unauthorised mode of performing their duties.

This led to the development of the new test, which investigates whether there is a connection between the tortious act and the field of activities assigned to the employee which is sufficient to justify conferring liability, taking into account an enterprise risk policy basis of the doctrine. This is an expansive test, and it removes from the analysis any focus on the motivations of the employee. Rather the test now attempts to confer liability where the employer, by assigning a particular field of activities to the employee, has created or enhanced the risk of the tortious act occurring.

Section 425 of the TCCC by contrast will confer liability on an Employer for a wrongful act of an Employee committed within the course of employment. However, as discussed, the Dika Court's interpretation of this concept is wider than the historic English law interpretation using the Salmond test. The Dika Court appears more ready to take a broad view of the duties assigned to an Employee, and therefore will confer liability on an Employer if an Employee commits wrongful acts which are prohibited, acts which are incidental or committed on a break from work, or committed when driving home from work or deviating from a route which, under the historic English law test, would not be considered in the course of Employment since they

would not fall under the unauthorised mode of performing an authorised task requirement of the Salmond test.

However, the Dika Court has shown a consistent approach of ruling that acts which are personally motivated and, in particular, extreme acts or violent acts are committed outside of the course of employment. Although such acts may confer liability if the Employee has duties assigned which require physical force, or where violence is the result of a seamless sequence of events which flow from the performance of her duties, the more violent, extreme or unforeseeable such acts are, the more likely it seems that they will be considered personal business and therefore not to confer liability on the Employer. Indeed, when examining the facts of the cases which challenged English law, and inspired the development of the new test, it seems that using the Thai law test is unlikely to confer liability on an Employer.

The different tests and interpretations of the Supreme Court and the Dika Court suggest some differing contours as regards the policy basis of the doctrine. The Supreme Court, with the new test, explicitly incorporates an enterprise risk policy basis for the doctrine. From the cases, this appears to be a broad view of enterprise risk, taking into account all the risks in society that the enterprise causes or enhances, including the risk that an employee will abuse her position to commit a personally motivated tort. The Thai law concept is more restrictive than the new English law test. It is compatible with a view of enterprise risk, but it is a more narrow view than that shown by the English law test: under Thai law, an Employer will only be liable for the risks that arise from an Employee carrying out her duties; if that Employee abuses the position given to her for a personally motivated wrongful act, it is unlikely that Thai law will find her liable unless there is a very close relationship between the wrongful act and her duties so that they seem to flow from each other somewhat naturally. Where the abuse of the position is violent or extreme it seems that the Employer should not be held liable.

On this concept, there is perhaps some element of a fault basis for the interpretation of a doctrine: the Employer should be held liable for abuses which were natural to understand as a consequence of assigning duties and responsibilities to an Employee, since the Employer ought to have anticipated that there was a risk of abuse.

If the actions of an Employee are so extreme that no one could have anticipated them, this cannot be seen as the Employer's fault, and therefore the Employer should not be held liable. However, the jurisprudence does not fully support this as the dominant policy underlying the Dika Court's interpretation, since there is not focus on the instructions given by the Employer, or any investigation into whether systems were put in place by the Employer to prevent the wrongful act, which might result, if fault were the policy basis, in relieving the Employer from liability.

The application of these conclusions to the hypotheses developed in Chapter 1 of this thesis will be undertaken in Chapter 6, which will also discuss their implications for the two jurisdictions.

CHAPTER 6
CONCLUSION

This conclusion will proceed first by summarising and compiling the analysis performed and arguments advanced so far in this thesis. This chapter will then turn to the hypotheses set out in Chapter 1 and analyse them in light of the conclusions reached from the analysis in the preceding chapters. Finally this chapter will make recommendations for improvement of both Thai and English law based on these conclusions, and discuss the implications of such recommendations.

6.1 Summary of analysis and arguments

This thesis began, in Chapter 1, from a position where the English law doctrine of vicarious liability was perceived as being the subject of significant recent development in response to the challenges presented by a line of cases which did not easily fall within the previous legal tests which had stood for some years. Section 425 of the TCCC appears, on its face, to contain the same requirements in terms of the elements for conferring liability, elements which are materially similar to the English law doctrine of vicarious liability. These elements are (i) the requirement for a particular relationship, that of employer-employee, and (ii) the requirement that the tortious/wrongful act be committed in the course of employment.

The similarity in these requirements has presented the opportunity for a fruitful comparative study, in the hope that much may be gained by the detailed examination of how a similar rule has been interpreted and applied in two systems which differ fundamentally in terms of their traditional legal categorisation (common law and civil law), geographical position (West and East), and standard economic classification (developed and developing). The objectives pursued by this thesis have been to study and analyse the legal doctrines of both systems, to develop and present a clear picture of the theoretical underpinnings of the legal concepts, to analyse how those concepts have evolved, to apply the current Thai law to the fact patterns that have

recently challenged English law, and to therefore be able to make recommendations for the future development of both systems.

Chapter 2 of this thesis, after clarifying the terminology that is used, examined the position that English law vicarious liability and Section 425 of the TCCC occupy in the legal systems. In each system, the doctrine demonstrates essentially an exception to the general programme of liability for tortious/wrongful acts. The standard position is that the person committing the tortious/wrongful act is the person who bears complete responsibility for the consequences of that act; only a person who commits a wrongful act is held responsible for the consequences. Vicarious liability and Section 425 are exceptions, in that they confer liability on one person for the tortious/wrongful act of another, where the relevant criteria apply.

Since this concept is at odds with the general programme of liability in both systems, in the unusual position of conferring liability strictly (without fault) and vicariously (on another) it appears that there is a particular need to justify the doctrines in both systems. Chapter 2 discussed the various different potential theoretical principle and policy justifications for the doctrines by reference to three categories: fault and identification; victim compensation and loss distribution; and risk and deterrence. After discussing and analysing these principle and policy justifications in light of the Thai law and English law conceptions, it appears that none of the different theoretical justifications are free from criticism or able, individually, to explain all the features of vicarious liability or Section 425. Instead, the legal rules may be seen to contain a mixture of these different notions: therefore the comparative exercise to be performed later in the thesis should focus on identifying the particular mix of different objectives in each legal system, in order to assist in addressing the hypotheses of the thesis.

Chapter 3 attempts to make further progress in uncovering the principle and policy mixture by tracing the development of English law vicarious liability and Section 425 of the TCCC. An analysis of the history of English law vicarious liability demonstrates how it developed from its formerly wide-ranging Germanic origins to become gradually restricted through the early centuries of the common law so that it

only applied, subject to a few medieval exceptions, where the wrongful act of the servant was specifically commanded by the master. However, this restrictive trend was reversed at the end of the 17th century, in particular by Holt CJ's dicta, which expressed the principles in broader terms so that liability arose whenever the act of a servant was committed within the scope or course of employment. By the beginning of the 20th century, the scope of application of the doctrine had become more restricted again, so that it only applied to employees, to be distinguished from independent contractors, and only to wrongful acts committed in the course of their employment. There is evidence, in the statements of the various judges, of enterprise risk and deterrence, but also of identification and older ideas of implied command and even fault.

An examination of the development of Section 425 of the TCCC reveals a fundamentally quite different notion to that present in the sources stated in the notes of the draftsmen, i.e. Section 189 of the 1923 Code, Section 715 of the Japanese Civil Code and Section 831 of the German Code. Section 425 includes strict, vicarious liability rather than direct liability using the (rebuttable) presumption of fault of the employer, unlike the Japanese and German codes. Section 425 also, when read together with Section 428, 575 and 587, restricts the scope of the doctrine to the Employer-Employee relationship, making a distinction with the Hirer-Contractor relationship identified by the hire of services or hire of work contract respectively. This is a different scope to the French inspired 1923 Code which uses general words which would expand the application of the liability beyond the specific employment relationship. The concept of strict and vicarious liability for the wrongful acts of another is also not part of Thai law prior to the drafting of the TCCC. However, the concepts present in Section 425 are in essence the same as those present in English law vicarious liability, and the education and biographical backgrounds of the key draftsmen of the TCCC suggest that English law vicarious liability may have influenced the final form of Section 425, when read with the connected sections.

While this conclusion may have further implications for understanding the development of the TCCC and indeed the method of legal transplantation more

generally, in the context of this thesis this analysis helps explain the form of Section 425 (and connected provisions) and the similarity to the English doctrine of vicarious liability, and suggests a justification for identifying similar principle and policy bases underlying the rules in the two systems. At a fundamental level, it adds further justification to the choice of systems for comparison, as this demonstrates that the two rules were similar, and indeed potentially based on the same concepts, at the time of adoption of the TCCC. Therefore the comparative exercise can track and analyse how the rule has been interpreted in two fundamentally different systems over the intervening 92 years since the TCCC's adoption.

Building on the discussion of the first three chapters, from which conclusions have been drawn about the policies, principles, background and development of the legal concepts in both systems, Chapters 4 and 5 have provided an extensive comparative analysis of the application of the legal rules in both systems. Chapter 4 addressed the first limb of the two doctrines, the relationship between the person committing the tortious/wrongful act (D1) and the person on whom the law will confer liability vicariously (D2). Chapter 5 addressed the nature of acts which would confer liability on D2.

The analysis in Chapter 4 demonstrated that English law, although previously focusing on control over D1's activities to establish the existence of a contract of service relationship, as over the most recent line of cases established a test based on whether the activities of D1 are an integral part of the activities of D2, and whether D1 is carrying out those activities for D2's benefit. In applying the new test to new situations, a judge should also consider whether it is fair, just and reasonable to impose liability, using an enterprise risk policy basis for the doctrine. Thai law, by contrast, focuses on two questions: remuneration by time (rather than on the basis of completed work) and whether the Employer has the right to control the manner, time and place of work of the Employee. However, it appears that a sufficient level of control may be determinative that payment based on completion of a task is merely a method

of calculation; in other words, where there is ambiguity, the test hinges on the level of control of the worker.

There are some interesting contours of difference between the two systems' interpretations:

- Firstly, Thai law has a more flexible approach to the concept of control than was the case under the previous position of English law: where English law required a high degree of practical ability of an employer to control the manner of work of an employee, Thai law requires only the *right* to control the manner, time and place of work. This allows Thai law to confer liability in many areas in which previous English law, unjustly under the current view, could not.
- Secondly, English law, under the recent line of cases, has fundamentally removed the doctrine of vicarious liability from the concept of employment: instead the focus has moved to whether the activities of D1 are an integral part of D2's enterprise, and for D2's benefit. However, Thai law remains fundamentally tied to the concept of the employment relationship due to the link between Section 425 and Sections 428, 575 and 587 of the TCCC. As such, English law is theoretically more flexible in its application of the doctrine outside the employment relationship.
- Finally, although both systems recognise the concept of holding more than one person vicariously liable for the same wrongful/tortious act of D1, the concepts which are demonstrated are fundamentally different. English law requires the integration/organisation test to be run against each defendant separately: where D1's activities are found to be suitably integrated into, and performed for the benefit of, more than one D2, each will be held liable. By contrast, the Dika Court, once Employee status has been established for D1, will look broadly at who benefits from the business for

which D1 was acting; where several parties participate in, and benefit from, such business, Section 425 will confer liability on all of them.

The analysis in Chapter 5 demonstrated that English law, historically, asked whether the tortious act had been committed in the course of employment. The interpretation of this concept, strongly influenced by Salmond's formulation, was an act which was either authorised by the employer or a wrongful or unauthorised mode of doing an act authorised by an employer. Although there was recognition in case law that this test could apply, in certain circumstances, to acts which were prohibited, incidental or committed at the employee's initiative, this was a restrictive test. In particular, it was the inability of this test to confer liability when an employee committed an act which was the antithesis of her duties, such as in the facts in *Lister* and *Various Claimants* which resulted in the development of the law. The new test investigates whether there is a sufficiently close connection between the tortious act and the field of activities assigned to the employee to justify conferring liability, taking into account an enterprise risk policy basis of the doctrine.

Section 425 of the TCCC, by contrast, uses the test of whether the wrongful act was committed in the course of employment. However, the Thai law test uses a concept which is broader than the English concept under the Salmond formulation. The Dika Court appears to take a broader view of the duties assigned to an Employee, and is willing to confer liability on an Employer in certain circumstances for acts which are prohibited, incidental, or even when deviating from a task to an extent which English law, under the previous test, would consider sufficient to place them outside of the course of employment.

Although, as discussed, the new English law test has in some ways brought the two systems' approaches closer together, as it broadens the range of actions which will confer liability on D2, there remain important differences between the application of the law in the two systems. In particular, the Dika Court has shown a consistent approach of holding that acts which are personally motivated and, in particular, extreme acts or violent acts, fall outside of the course of employment. Indeed, when applying

the Thai law test to the cases which inspired the change in English law, it appears that Thai law would be unlikely to confer liability in such circumstances on the Employer.

The analysis of the policy and principles evident in the interpretation and application of the law reveals that both Thai law and English law demonstrate a recognition of enterprise risk theory. However, the extent to which they recognise this differs. In English law, there is now a broad recognition that the enterprise creates risks not just through the activities of its employees, but rather of any persons who work in an integrated relationship with an organisation and for its goals. There is also recognition that it is not simply acts which are performed for the benefit of an organisation for which an enterprise should be liable; rather, an enterprise should be responsible for the risks of assigning an individual duties or authority which may be abused to the harm of others, even where the activities are performed under that individual's personal motivation.

By contrast, Thai law, with a focus on the extent to which an individual is controlled by an Employer and whether the Employee can be considered to be acting for an Employer rather than with a personal motivation, displays a narrower view of the relationship and kinds of acts which will confer liability. On this view, an enterprise is liable for the risks that are associated with activities that are performed for its benefit by those under a high level of, at least theoretical or contractual, control. In particular, the focus on control that is evident in the code provisions and jurisprudence might arguably imply the presence of policy elements of fault and identification: where control by the Employer is required, this suggest the Employer is liable either that because she failed to exercise control properly or because the level of control suggests that the Employee's actions are an extension of, and therefore to be identified with, the Employer.

However, this conclusion is softened by the interpretation taken by the Dika Court that it is only the *right* to control that confers Employee status, rather than a level of *in practice* control which English law required. A focus at this level, it is argued, suggests that a distinction is being made on status: i.e. this determines whether the individual is working for herself or for another party, in which case she will have

Employee status. A focus on what happened in practice, whether or not the Employer actually controlled the actions of the Employee, is more aligned with fault and identification; a focus merely on the 'right to control' is arguably potentially aligned with enterprise risk theory – the contractual matrix, here, is defining whether an individual is in business on her own account or for another.

The idea that the Employer should be liable for activities which she benefits from, which were done with the purpose of benefiting her, suggests an enterprise risk theory. However, Thai law will not extend to confer liability from risks which arose because of carrying on a business activity but which were not performed to benefit the Employer, or which were performed by those over whom an Employer did not have a sufficient level of control to designate them an Employee.

However, there is an aspect in which the Thai law interpretation of Section 425 displays a closer alignment with the enterprise risk theory than English law, and that is in its attitude to holding several parties liable for the wrongful acts of D1. English law is somewhat restrictive, requiring D1's activities to be integrated into the organisation of each D2. However, Thai law, once establishing that D1 is an Employee of one D2, will confer liability on all those who benefit from the activities of D1. This takes a significantly broader view of the different parties who may be held liable for the wrongful acts of D2, and one which is more closely aligned with enterprise risk theory: where a party benefits from a business activity, they should bear responsibility for the risks associated with that activity.

6.2 Hypotheses

Following this summary of the analysis performed so far in this thesis, this chapter will now directly address the hypotheses set out in Chapter 1 with the conclusions reached as set out above.

6.2.1 Hypothesis 1

English law has struggled to cope with recent cases which have expanded the scope and basis for vicarious liability resulting in an unsatisfactory state of the law. An analysis of Thai law will provide a sufficient solution for the future development of the English law of vicarious liability.

As discussed above, there have been clear statements from the Supreme Court that the policy basis of vicarious liability is enterprise risk. Indeed, this policy basis is brought into the English law test in both elements: first, an individual will be considered sufficiently integrated into an organisation and working for its benefit to confer liability if it is just to do so on the basis of enterprise risk theory; second, liability for a tortious act will fall on D2 if there is sufficient connection between the field of activities assigned to D1 to justify conferring liability on the basis of enterprise risk theory.

However, the uncertainty which English law currently faces is not in the wording of these tests, which seems clear following *Cox* and *Mohamud*. Rather, it is the boundaries of the concept of enterprise risk theory and how far the courts will extend liability. It seems that Thai law does not provide a perfect model in every respect as regards demonstrating and fulfilling enterprise risk theory, and therefore Thai law by itself does not provide a wholly sufficient solution for the problems facing English law. However, there are aspects where Thai law seems more closely aligned with enterprise risk theory, and allows for more coherence than current English law.

In particular, it is submitted that the integration/organisation test is not perfectly aligned with enterprise risk theory as regards conferring liability on more than one vicarious defendant. It appears that this is an area in which English law could look to Thai law for an improved concept. As discussed above, in these situations, Thai law looks broadly at the business an Employee works for; where a wrongful act is committed, all those benefitting from and participating in the business are held jointly liable. As argued above, this more aptly addresses enterprise risk theory: at a most basic level, all of these parties should bear the responsibility for wrongful acts because they also receive the benefit of that Employee's services. Under English law, by contrast, a

party could receive a benefit of D1's activities but nevertheless not bear the risk for tortious acts on the basis that D1 was not integrated into that party's organisation.

As regards the other elements of the Thai law concept demonstrated in the interpretation and application of Section 425, it appears that these are unlikely to provide a sufficient solution for English law as it currently stands. As regards the concept of control and restricting the doctrine to the Employer-Employee relationship, it appears now that English law has rejected control due to a problematic over-restrictive interpretation which arose through the development of case law, and English law has also identified that the restriction to the employment relationship is not compatible with the broad view of enterprise risk theory which has been adopted by the Supreme Court.

Although this means that Hypothesis 1 is not fulfilled, the comparative exercise performed in this thesis has, it is submitted, assisted in significantly clarifying the view of enterprise risk theory that has been adopted by the English courts in the most recent line of cases, and will contribute to a better understanding of how English law may apply to future cases, due to the contours of difference that have been highlighted with the Thai law concepts.

6.2.2 Hypothesis 2

In the recent line of English cases, the courts have revisited the principled basis and justification for the English doctrine of vicarious liability. A comparison with Thai law will reveal whether the same principles are in evidence or whether Thai law rests on different principles. The principles, once identified, may help Thai law deal effectively with difficult cases such as those which have recently challenged English law.

As discussed above, the comparative analysis of the principles and policy evident in the interpretation and application of the law in the two systems reveals that both appear to recognise the policy basis of enterprise risk theory. However, the extent to which they recognise this differs. The focus that Thai law maintains on the extent of control that must exist to confer Employee status on an individual, and

whether an Employee is acting with a personal motivation or for an Employer, display a rather narrower view of what kind of risks an enterprise will be held liable for.

The focus on control suggests elements of fault and identification, which are not suggested by the wording of Section 425 itself; and indeed this element arises through the application and interpretation of Section 575 read with Section 583 as discussed above in Chapter 4. Furthermore, the view that Employers will not be responsible for actions of Employees which are personal business, or personally motivated, does not perhaps fully accord with enterprise risk theory.

Taking a broad view of enterprise risk theory, such as that adopted by English law, it is not simply that an enterprise should bear responsibility for risks directly associated with activities that are assigned to workers, from which it benefits. Rather, it is that by assigning a particular worker a particular field of activities and responsibilities, there arise certain risks. Because the enterprise benefits from the worker performing the activities, it should be responsible for the consequences of the risks which are all those associated with the assignation of that individual, not just those that are associated with the tasks themselves.

Thus, assigning a task to a worker does not just create the risk that the worker will carry out the task badly, inappropriately, or will deviate from the task and commit a wrongful act. Rather, it also means that that worker will have a particular status, responsibilities and powers which may either be used properly or abused, for personal or other reasons. Under the English law concept of enterprise liability, the enterprise is held liable for the abuse of such powers for personal reasons; under Thai law, it seems that especially where the abuse is of an extreme or violent or clearly personal nature, the Employer will not be held liable.

In particular, this analysis reveals that Thai law may not confer liability in factual situations analogous to those present in the *Lister* and *Various Claimants* cases which challenged the previous conception of English law vicarious liability. It is submitted that just as in the English cases, were such facts to arise in Thailand it would be an unsatisfactory position if claimants were unable to be compensated by a proper application of the law. Again, the comparative exercise

undertaken by this thesis has failed to confirm the hypothesis, as it does not reveal how current Thai law may deal effectively with such cases. However, it has highlighted a potentially problematic area for Thai law, on the basis of which recommendations may be made for improvement.

6.3 Recommendations and implications

From the above analysis of the comparative exercise performed in this thesis to the hypotheses developed in Chapter 1, this thesis now makes the following recommendations:

1. The English courts should adopt an approach similar to the Thai Dika Court when analysing whether multiple parties may be held vicariously liable for the tortious acts of D1.

The reason for making this recommendation, as discussed above, is that in this area the approach of the Thai Dika Court seems much better aligned with the concept of enterprise risk theory than the current Supreme Court approach of running the integration/organisation test in relation to each potential vicarious defendant. Rather, once establishing that an individual (D1) is carrying out activities as an integrated part of another's organisation and for their benefit, it appears closer to the concept of enterprise liability that all those who benefit from D1 being assigned those activities should together bear liability for the consequences of the associated risks.

As well as aligning English law more closely with enterprise risk, this would also have the benefit of serving the policy aim of victim compensation. For where the immediate 'employer' is an insolvent company, the victim of a tort may look to others who benefited from the activities of D1 for compensation, increasing the potential pool of defendants for the claimant.

The major issue with adopting this approach is the large potential expansion in liability for businesses in the English economy. For with the adoption of this concept,

immediately businesses would become liable for the wrongful acts of a large number of individuals whom they might not naturally identify as their employees. There is therefore a potential uncertainty from the point of view of a business as to which individuals it needs to closely monitor, and which activities of which employees it will be considered to directly benefit.

However, it is submitted that there are ways for the businesses and economy generally to adjust to this change to make it feasible. For example, in circumstances where several legal entities work together on a project (which, it is submitted, covers the majority of the circumstances that we are concerned with here) it is common for them to operate under a contract which will apportion liabilities between the parties. It is likely that if the English courts adopted an approach in line with that recommended, the various parties could apportion the costs of particular individuals torts between one another with the use of indemnities and guarantees in order to arrive at a satisfactory level of risk compared with the compensation in any particular circumstance. Indeed, the Thai approach, focusing on only those directly benefitting, also respects the concept of limited liability and will not 'look through' a business to consider, for example, shareholders liable. As such, businesses will still be able to a large extent to manage the level of risk they adopt. With a proper network of guarantees and indemnities in place, the only additional risk that businesses would be taking on, compared to the current position, is a risk of the party who has agreed to indemnify the others for the tortious acts of employees being unable to pay under the indemnity (i.e. going insolvent). This insolvency risk is a fundamental underlying risk in many such projects, and is present for all contractual and other obligations on such projects. Furthermore, this can be mitigated by the second suggested option, which is insurance.

Public liability insurance in the UK protects businesses against claims from members of the public who have been injured by, or who have suffered property damage from, a business or its employees. As discussed,[345] although such insurance is

[345] See above at 2.4.3.2

not compulsory, it is commonly insisted upon by landlords and lending banks in the UK. If the English courts adopt an approach as recommended, there will be demand in the market for such insurance products to cover any claim made on the basis of vicarious liability: indeed, depending on the policy wording, it is likely that many current policies would already cover such liability.

On this basis, an adoption of a broader concept of who may be held vicarious as recommended may be more acceptable to society. Although opponents may claim that this will cause an undesirable rise in risk for businesses which must be passed on to customers with higher prices, it appears that the risks can be mitigated by appropriate indemnities and guarantees with business partners and through insurance products which are either currently available or could easily be slightly adapted to meet the demand. Most importantly, the recommendation would improve the legal doctrine in the sense that it would more closely align it with the stated policy aim of enterprise risk theory, while also achieving other aims of victim compensation and, where the insurance market is effectively utilised, loss distribution through, if any, a slight increase in insurance premiums for public liability insurance.

2. Thai law should expand the concept of 'in the course of employment' to cover wrongful acts which, although personally motivated, are closely connected with the field of activities assigned to them by a business

As discussed above, Thai law shares many of the concepts of English law vicarious liability. In particular, Thai law has generally had a slightly broader interpretation than English law vicarious liability prior to the latest line of cases, which makes it sufficiently flexible to confer liability in situations that English law was criticised for not providing a remedy. However, there is one area in which, as discussed above, Thai law will not be sufficiently flexible to confer liability, and that is where an Employee abuses a position that they have been assigned to carry out a personally motivated act, particularly an extreme or violent act.

As discussed above, the current position of Thai law in these circumstances is not in alignment with enterprise risk theory. For, from this point of view, it could be

argued that if a business has created the risk by, and derives benefit from, assigning an Employee a particular field of activities, the business should likewise bear the liability for closely connected wrongful acts, more justly than the victim.

Although, as discussed above, it might be possible for the Dika Court to interpret Thai law in a manner that gives victims a remedy in such circumstances, it appears that the balance of authority lies in favour of not doing so. As a result, this recommendation would be best achieved by a modification of Section 425 in the TCCC itself.[346] A suggested formulation of wording, drawn from the development of English case law, is as follows (suggested new English wording in bold):

Section 425: An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment **or a wrongful act which is sufficiently connected with the field of activities assigned to such employee to justify conferring joint liability on the employer**

This additional wording would provide the flexibility and authority for Thai judges to hold Employers responsible for a broader range of wrongful acts of their Employees, in particular where although they cannot be considered 'in the course of employment' because, for example, they are the antithesis of their duties or are very extreme or violent or personally motivated, the risk of their occurrence is created or enhanced by the choice of the business to carry on that activity, selecting that Employee for those duties, and the business benefitted from doing so. As such, this would bring Thai law into closer alignment with the concept of enterprise risk theory.

This amendment to the law would also have benefits as regards victim compensation, loss distribution and deterrence. Under the current interpretation of

[346] Another possibility is that the President of the Dika Court could issue a statement that the provision should be interpreted to include such acts. However, since the balance of authorities appears to have rejected this approach, as discussed, the Dika Court may feel unwilling to depart from its previous interpretation without approval from the legislature in the form of an amendment to the TCCC itself.

Section 425, it appears that victims of wrongful acts will be more likely to be deprived of a remedy, at least under the TCCC, the more violent or extreme the wrongful act is. As discussed in Chapter 4, a particularly violent or extreme act will often be interpreted by the Court as being personally motivated. Therefore this creates the position that those victims who may be most in need of compensation – innocent victims of a physical assault, for example – are more likely to be denied access to a solvent defendant than a victim of a minor wrongful act, which is more likely to be considered within the course of employment. However, this amendment would materially change this position and therefore achieve better the policy aim of victim compensation. As regards loss distribution, the victims of such wrongful acts would also have the costs of such compensation distributed among a wider selection of defendants and, importantly for this policy aim, among defendants who have the ability to spread the loss further through raising the costs of goods and services or through insurance. As such, the innocent victim of an Employee who abused their position to commit a personally motivated wrongful act will not have to suffer the financial loss: rather, where the Employee cannot pay, the loss will land upon the Employer first and then be passed more widely to customers or through higher insurance premiums. Finally, an expansion of this liability would also better achieve the policy aim of deterrence, since where an Employer may be held liable for a wider selection of acts of an Employee, this will incentivise the Employer to better monitor and supervise that Employee.

Regarding the implications of accepting this recommendation, as with Recommendation 1 above critics may claim that an expansion of this kind of liability would present an unreasonable cost for businesses which would need to be passed onto customers through higher prices of goods and services. In particular, business may see the need to store up reserves for unpredictable acts of employees as a difficult burden to place on their businesses. However, this complaint may be addressed by arguing that this simply represents the total cost of goods and services, since this risk should be seen as part of the cost of providing the same. Furthermore there are ways of mitigating the expansion in potential liability, especially as regards the uncertainty of the level or

likelihood of costs, notably in the expansion of the insurance market. A rise in the risk of having to pay out in a claim under Section 425 would likely result in a rise in demand for similar insurance products to Public Liability Insurance in the UK. The more widely such insurance is carried, the lower the likely cost of premiums and the more efficiently the costs can be spread across society. Therefore, as above, this change would in theory ultimately create a position where the victim of a wrongful act at the hand of an Employee, where the Employee has abused his position to commit a personally motivated wrongful act, will not bear the costs but will be able to be compensated by the Employer who took the decision to appoint, and benefitted from appointing, that Employee to that position, and those costs would ultimately be passed to the insurance market and/or customers through a very small rise in the price of goods or services.

On this basis, although the comparative analysis undertaken in this thesis has not supported the hypotheses set out in Chapter 1, the exercise has allowed the development of positive recommendations for the development of the law in both systems to bring the law in each case into closer alignment with the identified policy aims.

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