

## STATUTE AND THEORIES OF VICARIOUS LIABILITY

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*In the last century, there has been intermittent debate as to which of two theories, master's tort theory or servant's tort theory, forms the legal basis for vicarious liability. The master's tort theory holds that an employer is liable because the acts of an employee ('servant') are attributed to the employer ('master'), whereas the servant's tort theory holds that the liability of the employee is attributed to the employer. In most cases, the choice of theory does not affect the outcome: neither theory focuses on the content or scope of vicarious liability, and both appear in part to describe the mechanism of liability. The purpose of this article is not to advocate for the superiority of one or other of the theories. Rather, our purpose is to assess the utility of the debate itself and the role, if any, that these theories play in answering contemporary cases. Significantly, many of the situations where the choice of theory might matter arise in statutory contexts, and the outcomes of cases are thus closely associated with the interpretation of statutory duties and, more so, protections. A close consideration of the statutory contexts demonstrates a fundamental point not previously highlighted in debates about the master's tort and servant's tort theories: statutory interpretation and associated policy drive the outcomes of the cases, with the chosen theory generally used to support those outcomes. Courts do not generally consider the merits of each theory, certainly not as part of a holistic overarching view on private law. What unfolds is a nuanced story of a complex interaction between statute and common law.*

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Cite as:

Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* (advance)

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## I INTRODUCTION

Vicarious liability, at its core, imposes strict liability on employers for wrongs committed by employees in the course of employment. The precise boundaries of that liability, and the tests that ought properly to be applied in determining it, are contested questions.<sup>1</sup> For example, what is the nature of the relationship that activates liability, and ought relationships 'akin to employment' suffice?<sup>2</sup> What are the appropriate tests to establish whether conduct is 'in the course of employment', especially where intentional wrongdoing is at issue?<sup>3</sup> It is fair to say that courts have 'struggled' to explain the law,<sup>4</sup> and are

<sup>1</sup> This is evidenced by the volume of commentary on the topic in common law jurisdictions and the increasing number of cases falling to be decided, including by the highest courts of appeal.

<sup>2</sup> In the UK this has been held to be the case: see, eg, *Armes v Nottinghamshire County Council* [2018] AC 355 (Supreme Court) ('*Armes*'); *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (Supreme Court) ('*Christian Brothers Case*'); *E v English Province of Our Lady of Charity* [2013] QB 722. In response to *Armes*, see, eg, Stelios Tofaris, 'Vicarious Liability and Non-Delegable Duty for Child Abuse in Foster Care: A Step Too Far?' (2016) 79(5) *Modern Law Review* 884 (responding to the earlier decision of the UK Court of Appeal); Christine Beuermann, 'Up in *Armes*: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort' (2018) 25(1) *Torts Law Journal* 1. Consider also the position in Canada: *KLB v British Columbia* [2003] 2 SCR 403, 417–20 [19]–[23] (McLachlin CJ). In Australia, such an expansion of liability has not occurred and seems less likely after *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 ('*Prince Alfred College*'), which supports a narrower approach to vicarious liability than in the UK (at least in relation to the scope of employment test): at 159–60 [80]–[81] (French CJ, Kiefel, Bell, Keane and Nettle JJ). However, legislative changes in New South Wales extend the vicarious liability of certain institutions for child abuse engaged in by persons in relationships with those institutions that are 'akin to employment': *Civil Liability Act 2002* (NSW) ss 6G–6H ('*NSW Civil Liability Act*').

<sup>3</sup> See, eg, *Prince Alfred College* (n 2) 149–61 [42]–[84] (French CJ, Kiefel, Bell, Keane and Nettle JJ); Harry Crawford, 'A Step in the Right Direction? Vicarious Liability for Intentional Wrongdoing of Employees in *Prince Alfred College Incorporated v ADC*' (2017) 24(3) *Torts Law Journal* 179.

<sup>4</sup> Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) xli ('*Vicarious Liability in Tort*').

in an ‘uncertain position about the approach which should be taken.’<sup>5</sup> That uncertainty may be explained, in part, by the absence of any single theory, or clearly articulated policy,<sup>6</sup> which justifies vicarious liability. Instead, vicarious liability is said to flow from multiple and differing policy justifications, and various theories have been employed to explain its operation.<sup>7</sup> This paper is not directly concerned with the ongoing controversies as to the content and ambit of vicarious liability. It focuses instead on an intermittently pursued debate, namely the competition between two theories as to the ‘legal basis for’ vicarious liability: the master’s tort theory (‘MTT’) and servant’s tort theory (‘STT’).<sup>8</sup> The MTT holds that an employer is liable because the *acts* of an employee (‘servants’ in the older cases) are attributed to the employer (‘master’), whereas the STT holds that the *liability* of the employee is attributed to the employer.<sup>9</sup> Of these two competing theories, it is the STT that is said to hold sway in modern common law, at least in the UK<sup>10</sup> and Australia.<sup>11</sup> That

<sup>5</sup> *Prince Alfred College (n 2)* 148 [38] (French CJ, Kiefel, Bell, Keane and Nettle JJ). The High Court noted ‘the divergent views about the approach to be taken to the question of vicarious liability both generally and in cases of the kind here in question’. The Court also described vicarious liability as an ‘unstable principle, one for which a “fully satisfactory rationale ...” has been “slow to appear”’: at 148 [39], quoting *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (‘*Hollis*’).

<sup>6</sup> *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161. The ‘policy’ underlying the modern concept of vicarious liability ‘has not been fully articulated’, and there does not ‘emerge any clear or stable principle which may be understood as underpinning the development of this area of the law’: at 166–7 [11] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). In that paragraph, the High Court refers, rather loosely, to the ‘rationale’, ‘policy’, and ‘principle[s]’ of vicarious liability, however, the precise meaning or reach of these terms is not clarified. This is probably not important for present purposes. Whichever label is used, our focus is on theories that have some explanatory or justificatory role.

<sup>7</sup> In Australia, see, eg, *Hollis (n 5)* 37 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), quoting T Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-Union Members with a Chapter on the Laws of Scotland and Foreign States* (Oxford University Press, 1916) 154; *Prince Alfred College (n 2)* 148–9 [39]–[41] (French CJ, Kiefel, Bell, Keane and Nettle JJ). In the UK, see, eg, *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 685 (Lord Pearce); *Majrowski v Guy’s & St Thomas’s NHS Trust* [2007] 1 AC 224, 230 [15] (Lord Nicholls) (‘*Majrowski*’). This is not, of course, an unusual state of affairs in tort law. After all, various tests have been employed over the years in an attempt to explain the duty of care concept in negligence. In that context, too, it has proved impossible to identify a single policy that explains and unifies the law.

<sup>8</sup> Giliker, *Vicarious Liability in Tort* (n 4) 13.

<sup>9</sup> Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 244.

<sup>10</sup> *Majrowski (n 7)* 230 [15] (Lord Nicholls); Giliker, *Vicarious Liability in Tort* (n 4) 14–15. According to Giliker, ‘[t]he dominant view is ... that the “servant’s tort” theory prevails’: at 15. See also below n 15.

said, recent statements at the highest judicial level in Australia suggest that the STT might not be as dominant as might appear and that, perhaps, vicarious liability is about the attribution of acts, and not the attribution of liability, after all.<sup>12</sup> For example, in a recent case raising the question of whether vicarious liability could arise for equitable wrongs, members of the High Court described vicarious liability as ‘attributing to one person the wrongful *acts* of another’.<sup>13</sup>

This debate might seem largely irrelevant to the operation of the law and current controversies because the bearing, if any, of the two theories upon the appropriate scope of vicarious liability is seldom explored or articulated. Certainly, discussions about these theories seem removed from difficult and important questions such as whether, and in which circumstances, a government agency or non-profit institution should be held vicariously liable for sexual assaults committed against children in their care, by ‘employees’ or others. And, in most cases, it makes no difference which theory is applied. On *either* theory, an employer will be liable if the twin criteria of relationship and scope are satisfied.<sup>14</sup> Perhaps unsurprisingly, therefore, mainstream judicial and academic commentary typically focuses on where the boundaries of liability should be drawn, and rarely engages in any detailed discussion of the merits or otherwise of the competing theories,<sup>15</sup> with the exception of an ongoing and robust defence of the MTT by Robert Stevens.<sup>16</sup>

<sup>11</sup> See below nn 48–9 and accompanying text. A sense of the widely held academic position on the issue is evidenced in Carolyn Sappideen and Prue Vines (eds), *Fleming’s The Law of Torts* (Lawbook, 10<sup>th</sup> ed, 2011) 437–40.

<sup>12</sup> See, eg, *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136 (*‘Pioneer Mortgage Services’*). The Full Court stated that the question is still open in Australia, though perhaps hinted at a preference for the ‘attribution of acts’ thesis: at 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ).

<sup>13</sup> *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1, 5 [5] (Kiefel CJ, Keane and Edelman JJ) (emphasis added), citing *Majrowski* (n 7) 229 [10] (Lord Nicholls). Although *Majrowski* supports the proposition that vicarious liability may be available in equity, it does not support the language of attributing acts.

<sup>14</sup> Stevens, *Torts and Rights* (n 9) 262. Moreover, Stevens accepts that the MTT does not, in any case, tell us what the detailed content of the rules of attribution ought to be: at 267. In Stevens’ view, however, the tests of close connection and enterprise risks lead to excessively wide vicarious liability and stem from the confusion sown by STT and its policy rationales (though he considers that the results of some sexual abuse cases imposing liability on the basis of these wide tests are justifiable as breaches of non-delegable duties): at 271–4.

<sup>15</sup> See, eg, Paula Giliker, ‘Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-Delegable Duties and Statutory Intervention’ (2018) 77(3) *Cambridge Law Journal* 506 (*‘Analysing Institutional Liability’*). Giliker

The purpose of this article is not to advocate for the superiority of one or other of the MTT or STT. Rather, our purpose is to assess the utility of the debate itself and the role, if any, that these theories play in answering contemporary cases. As such, our focus is on situations where the choice of theories *might* matter — where that choice could have practical consequences for litigants and the success or otherwise of their claims. Significantly, many of these situations arise in statutory contexts and the outcomes of cases are thus closely associated with the interpretation of statutory duties and, more so,

discusses the UK Supreme Court's efforts at fundamentally reframing vicarious liability to produce 'a modern theory of vicarious liability': at 516, quoting *Cox v Ministry of Justice* [2016] AC 660, 670 [24] (Lord Reed JSC), discussing *Christian Brothers Case* (n 2). The discussion by Giliker of attempts at a new 'theory' does not refer to either the STT or MTT (nor, indeed, do either of the cases just noted), but is rather focused on explaining the underlying basis for the specific tests identified for establishing the two limbs of liability — a relationship that gives rise to vicarious liability, and a close connection between that relationship and the acts or omissions of the 'employee': Giliker, 'Analysing Institutional Liability' (n 15) 516. See also James Goudkamp and James Plunkett, 'Vicarious Liability in Australia: On the Move?' (2017) 17(1) *Oxford University Commonwealth Law Journal* 162–70.

In her recent work seeking to explain both vicarious liability and non-delegable duty, Christine Beuermann concludes that the STT and MTT are not particularly useful in explaining the law of vicarious liability: Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart Publishing, 2019) ch 5.

Anthony Gray supports a narrower vicarious liability that is tied closely to ideas of agency and imposes liability only for conduct that has been expressly or impliedly authorised by the employer: Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, 2018) 178. In short, the employers must themselves be 'morally blameworthy'. Importantly for present purposes, Gray considers that such an approach is not inconsistent with either the MTT or STT. Indeed, it appears that he is agnostic as to which theory is preferable, noting only that the choice of theory may make a difference in peripheral matters: at 179.

Interestingly, and although he does not say so directly, the 'indemnity theory' outlined by Jason Neyers necessarily *rejects* both the MTT and the STT: JW Neyers, 'A Theory of Vicarious Liability' (2005) 43(2) *Alberta Law Review* 287, 301–4. Neyers claims (at 301) that a

compelling justification for the doctrine [of vicarious liability] can be found in the relationship between the employer and employee — namely in the employer's implied promise in the contract of employment to indemnify the employee for harms (including legal liability) suffered by the employee in the conduct of the employer's business.

Plainly, if an indemnity approach is taken, neither the employee's liability (STT) nor the employee's act (MTT) is transferred to the employer. Nevertheless, Neyers accepts that, as a matter of positive law, the MTT has been 'replaced by the now orthodox servant's tort theory': at 289 n 9.

<sup>16</sup> Stevens, *Torts and Rights* (n 9) ch 11; Robert Stevens, 'Vicarious Liability or Vicarious Action?' (2007) 123 (January) *Law Quarterly Review* 30.

protections.<sup>17</sup> A close consideration of the statutory contexts demonstrates a fundamental point not previously highlighted in debates about the MTT and STT: statutory interpretation and associated policy drive the outcomes of the cases, with the theory generally used to support those outcomes. Put another way, the courts are engaged in a process of what might be termed ‘bottom-up reasoning’: in order to determine whether vicarious liability is appropriate, the courts first consider the individual circumstances, statutory context and reasons for an employee’s special duty, immunity or defence, and whether the employer should be liable in those circumstances, and *then* adopt one theory or the other to further support those conclusions. Courts do not generally consider the merits of each theory, certainly not as part of a holistic overarching view on private law. What unfolds is a nuanced and interesting story of a complex interaction between statute and common law,<sup>18</sup> including the interpretation of statutory protections and their impact on determining the liability of individuals and of their employers. The MTT and STT form but one part of this complex interaction.

## II A BRIEF EXPLANATION OF TERMINOLOGY

Before proceeding further, it is necessary to clarify what we mean by the terms ‘defence’, ‘immunity’ and ‘protection’. These terms are potentially problematic, and a growing body of literature exists from which a range of possible meanings might be gleaned.

The term ‘defence’ is problematic because tort law scholars disagree as to whether a distinction can be maintained between ‘defences’ on the one hand and ‘denials’ of wrongdoing — that is to say, ‘pleas by the defendant that one or more of the elements of the tort in which the claimant sues is missing’<sup>19</sup> — on the other.<sup>20</sup> This question is interesting, but it need not be resolved here. In

<sup>17</sup> The term ‘protections’ is unpacked in Part II. We note for now, though, that it includes what are commonly referred to as ‘immunities’, which might operate as denials of liability or as answers to liability.

<sup>18</sup> See Justice Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) 1–4. Justice Leeming’s consideration of the central role of the interaction between statute and judge-made law in the law of negligence resonates in this area and is discussed further below.

<sup>19</sup> James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 46.

<sup>20</sup> Cf Glanville Williams, “The Logic of “Exceptions”” (1988) 47(2) *Cambridge Law Journal* 261, 277; Julius Stone, ‘Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd v Imperial Smelting Corporation, Ltd*’ (1944) 60 (July) *Law Quarterly Review* 262, 280; Luis Duarte d’Almeida, ‘Defining “Defences”’ in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 35,

this article, we use the term ‘defence’ to refer to any exculpatory rule that is ‘external to the elements of the claimant’s action.’<sup>21</sup> A defence therefore provides an answer to a prima facie wrong.<sup>22</sup> The vast majority of so-called statutory ‘good faith’ protections would appear to operate as defences according to this definition;<sup>23</sup> to avoid unnecessary complexity, we proceed on the assumption that this is universally true (that there is, in other words, no such thing as a good faith denial).<sup>24</sup>

The term ‘immunity’ is more problematic, for at least two reasons. First, despite apparent agreement among scholars that immunities do not deny wrongdoing,<sup>25</sup> nevertheless that term is occasionally employed in precisely this way. Advocates, for example, are sometimes said to be immune from liability because they owe ‘no duty’ to clients in respect of conduct that occurs during, or which is intimately connected with, the trial process.<sup>26</sup> If this is correct, then the immunity afforded to advocates operates as a denial of wrongdoing, as opposed to a defence to wrongdoing. Whether an immunity operates as a defence or a denial might be a question of statutory interpretation or, if the immunity in question is based in the common law, it might simply reflect judicial preference for one conceptual approach over the other.

51–2; Eric Descheemaeker, ‘Tort Law Defences: A Defence of Conventionalism’ (2014) 77(3) *Modern Law Review* 493, 499.

<sup>21</sup> Goudkamp, *Tort Law Defences* (n 19) 2.

<sup>22</sup> By ‘prima facie’ we mean simply to convey that the employee’s conduct satisfies the elements of a wrong, absent any protection that might undo or answer that wrong. We acknowledge that this term is problematic, however, for the reasons observed by John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) 77–9.

<sup>23</sup> Iain Field, ‘Good Faith Defences in Tort Law’ (2016) 38(2) *Sydney Law Review* 147, 152–3; Iain Field, ‘A Good-Faith Challenge to the Taxonomy of Tort Law Defences’ (2017) 40(2) *University of New South Wales Law Journal* 537, 543–4.

<sup>24</sup> It is possible, of course, that a good faith protection might be cast as a denial.

<sup>25</sup> See, eg, Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 90. John Gardner (n 22) makes a similar claim in the criminal context: at 88–9. Although other scholars do not appear to say so directly, it seems implicit in the claim that *excuses* do not deny wrongdoing that *immunities* do not do so either: see, eg, Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press, 1999) 139; Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 218; Goudkamp, *Tort Law Defences* (n 19) 85–6. As these extracts reveal, a more controversial question is whether *justifications* deny wrongdoing. However, this question need not be addressed here.

<sup>26</sup> See, eg, *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 33–4 [94]–[95] (McHugh J). According to his Honour, the ‘immunity afforded advocates in Australia involves a recognition of the existence of obligations of due care and skill owed to clients, but for policy reasons denies a duty of care that gives rise to a cause of action in damages’: at 34 [97].

The second reason that the term ‘immunity’ is problematic is that it is sometimes used, confusingly, to *include* good faith defences<sup>27</sup> (and, indeed, other species of conduct-based protection such as qualified or partial privileges).<sup>28</sup> We do not embrace this broad definition of immunity. For present purposes, we adopt Goudkamp’s view that immunities are ‘insensitive to the rational defensibility of the defendant’s conduct.’<sup>29</sup> In contrast, good faith (and other similar) defences turn on proof that the defendant’s conduct, though negligent or intentional (as the case might be), nevertheless satisfies some minimum standard of conduct (such as good faith).

To summarise, we use the term ‘immunity’ wherever that immunity stems from the status of the defendant (rather than the *quality* of their conduct) so that it can potentially encompass both defences and denials. This approach is consistent with the use of that term by courts. We do not, however, include good faith defences within that term’s ambit (even though courts also, at times, loosely use ‘immunity’ to describe such defences).

Finally, we use the word ‘protection’ as an umbrella term for *any* exculpatory rule, regardless of whether it is (1) a defence or a denial, or (2) sensitive or insensitive to the quality of the defendant’s conduct.

### III WHEN DOES THE THEORY MATTER?

We start with some simplified factual examples in which the choice of theory could have a significant impact on the outcome of cases. In all these examples, we assume that an employee (‘E’) commits a prima facie wrongful act in the course of their employment that injures a claimant (‘C’). The question is whether C can sue the employer (‘D’).

Example 1: E, a firefighter, is protected from liability by a statutory defence that applies to her because she acted in good faith (that is, the defence is enlivened because of the quality of her conduct). The statute makes no

<sup>27</sup> See, eg, James Goudkamp, ‘Statutes and Tort Defences’ in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 31, 45–6; *Search and Surveillance Act 2012* (NZ) s 165; *Mental Health Act 2013* (Tas) s 218; *Bankstown City Council v Alamo Holdings Pty Ltd* (2005) 223 CLR 660, 674 [47] (Gleeson CJ, Gummow, Hayne and Callinan JJ); *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545 (Court of Appeal), in which case the issue of the scope of a statutory good faith defence was referred to throughout as an issue of the scope of the defendant Council’s ‘immunity’.

<sup>28</sup> See, eg, American Law Institute, *Restatement (Second) of Torts* (1979) § 895D.

<sup>29</sup> Goudkamp, *Tort Law Defences* (n 19) 76.

reference to the impact of this defence on the (vicarious) liability of D. Is D liable?

Example 2: D is subject to a duty to C; E is C's husband and is not subject to a duty to C because his status as her spouse renders him immune.<sup>30</sup> Is D liable and does this depend on whether the 'immunity' is characterised as substantive or procedural?<sup>31</sup>

Example 3: E, a supervisor in charge of unloading a ship, is subject to a statutory duty that is personal to her to ensure that a safety hatch is closed prior to unloading.<sup>32</sup> D does not have that duty cast upon him. Is D liable?

On the face of it, and leaving aside any more sophisticated analysis or extraneous factors that also could impact on liability, if the MTT is applied, then D would be liable in Examples 1 (firefighter) and 2 (husband, and irrespective of whether the husband's immunity is substantive or procedural); however, D would not be liable in Example 3 (supervisor in charge). If the STT is applied, then D would be liable in Example 3, but would not be liable in Examples 1 (firefighter) and 2 (husband, unless the immunity granted to the husband is merely procedural).

#### IV BACKGROUND TO THE COMPETING THEORIES

The history of vicarious liability is long and complex.<sup>33</sup> Vicarious liability appears to have started as a mechanism by which 'a mediaeval master was liable for whatever a servant did'.<sup>34</sup> By the 17<sup>th</sup> century, vicarious liability was justified by reference to a fiction that the acts of a servant were impliedly commanded,<sup>35</sup> or, later still, presumed to have been authorised, by the

<sup>30</sup> If a defence applies to D *only*, no real conceptual issues arise irrespective of which theory is applied, unless there is a question of whether a defence applies only to the personal or direct liability of D or also to its vicarious liability.

<sup>31</sup> Examples 1 and 2 may overlap, it should be noted, because an immunity might be framed as a defence.

<sup>32</sup> See, eg, *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36 ('*Darling Island*').

<sup>33</sup> For discussion of the historical development of vicarious liability, see Warren Swain, 'Vicarious Liability: A Pailful of Slops and Other Hazards' in Kit Barker and Ross Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2019) 89 ('Vicarious Liability'); Warren Swain 'A Historical Examination of Vicarious Liability: A "Veritable Upas Tree"' (2019) 78(3) *Cambridge Law Journal* 640; Glanville Williams, 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) 72 (October) *Law Quarterly Review* 522 ('Vicarious Liability').

<sup>34</sup> Leeming (n 18) 115.

<sup>35</sup> Swain, 'Vicarious Liability' (n 33) 92–5; *ibid.*

master.<sup>36</sup> The maxim *qui facit per alium facit per se* ('he who acts through another does the act himself') was used to support this liability,<sup>37</sup> and statements that the master was therefore personally responsible for his own wrong, because the servant's acts were attributed to him, were not uncommon.<sup>38</sup> Until sometime in the 20<sup>th</sup> century, statements in support of the MTT predominated, even if the logic of that theory was not always necessarily applied,<sup>39</sup> but the preference for the MTT changed in the course of that century.

In Australia, one can readily find judicial statements from the 20<sup>th</sup> century in support of both theories. In *Shaw Savill & Albion Co Ltd v Commonwealth*,<sup>40</sup> for example, Dixon J seems to invoke the STT:

It may be assumed that the liability of the Commonwealth to be sued in tort means that if an officer or servant of the Crown ... commits a civil wrong, then the Commonwealth is vicariously liable for his breach of duty. ... In the present

<sup>36</sup> Swain, 'Vicarious Liability' (n 33) 95–7. See, eg, *Middleton v Fowler* (1698) 1 Salk 282; 91 ER 247.

<sup>37</sup> Williams, 'Vicarious Liability' (n 33) 523.

<sup>38</sup> See, eg, *Ackworth v Kempe* (1778) 1 Douglas 40; 99 ER 30, 31 (Lord Mansfield); *Laugher v Pointer* (1826) 5 B & C 547, 553; 108 ER 204, 207 (Littledale J). See also *Pioneer Mortgage Services* (n 12) 147–8 [50] (Davies, Gleeson and Edelman JJ) and the list of authorities cited there.

<sup>39</sup> See, eg, *Hutchinson v The York, Newcastle & Berwick Railway Co* (1850) 5 Ex 343; 155 ER 150, which highlights that the courts did not consistently apply the logic of the theory. After restating that the attribution of acts is the basis for vicarious liability, Alderson B stressed that this did not mean, however, that a servant who negligently injured himself could sue the master on the basis that his own negligent acts were those of the master, stating that '[t]he grounds for these distinctions are so obvious as to need no illustration': at 154. This seems all well and good, but Alderson B went on to use this argument to support the view that a servant could therefore not sue the master when injured by another servant's negligence — the defence of 'common employment'. There is no logical basis in the MTT for that defence; indeed, Alderson B justified the conclusion on a risk analysis — that employees take the risk of their fellow employee's negligence. The case illustrates that the MTT was not determinative of liability, since here, both the logic of the MTT and justice would surely demand that vicarious liability could and should arise: employee 1's careless act causing injury to employee 2 could be attributed to the employer, such that employee 2 would have a claim against the employer (especially given, further, that the employee probably could not be said to have taken such risk vis-à-vis the employer). On the defence of common employment, see also *Priestley v Fowler* (1837) 3 M & W 1; 150 ER 1030 (Lord Abinger CB).

<sup>40</sup> (1940) 66 CLR 344.

case, at all events, the liability of the Commonwealth must be vicarious; it must depend on the existence of a duty of care [in the employees] ...<sup>41</sup>

Other statements of Dixon J, however, appeared to assume the premise of the MTT.<sup>42</sup>

Both theories found support in the important case of *Darling Island Stevedoring & Lighterage Co Ltd v Long* ('Darling Island'),<sup>43</sup> as seen in the opposing views of Fullagar J and Kitto J. The former described an employer's vicarious liability as 'true vicarious liability: that is to say, the master is liable not for a breach of a duty resting on him and broken by him but for a breach of duty resting on another and broken by another.'<sup>44</sup> Importantly, this meant that 'if the servant is "immune" [from liability], so is the employer.'<sup>45</sup>

On the other hand, Kitto J considered the liability to be 'for vicarious acts': the master is liable 'because of what the servant has done. It is a separate and independent liability, resulting from attributing to the master the conduct of the servant'.<sup>46</sup>

Despite this difference of opinion at the highest level, and the lack of further authoritative High Court decisions on point, in *Kable v New South Wales*,<sup>47</sup> Allsop P considered many of the recent authorities and suggested that the STT appears to have prevailed.<sup>48</sup> Other judges have reached similar conclusions, finding support in some of the statements of the High Court in *New South Wales v Lepore*.<sup>49</sup> As already noted above, that conclusion may now

<sup>41</sup> Ibid 360. Note, however, that where there is 'an immediate duty lying on the Crown', for example, where the duty that has been breached arises from the occupation of land, the Crown itself will be liable.

<sup>42</sup> See, eg, *Field v Nott* (1939) 62 CLR 660, where Dixon J held that a public officer, exercising discretion in the execution of an independent duty is alone liable for breach: 'The Crown is not *acting through him* and is not vicariously responsible for his tort': at 675 (emphasis added) (citations omitted).

<sup>43</sup> *Darling Island* (n 32).

<sup>44</sup> Ibid 57.

<sup>45</sup> Ibid 58 (Fullagar J), quoting *Staveley Iron & Chemical Co Ltd v Jones* [1956] AC 627, 639 (Lord Morton) ('*Staveley Iron*').

<sup>46</sup> *Darling Island* (n 32) 61 (Taylor J agreeing at 66).

<sup>47</sup> (2012) 268 FLR 1 (Court of Appeal).

<sup>48</sup> Ibid 18–19 [52]–[53]. The appeal to the High Court did not engage with the issue: *New South Wales v Kable* (2013) 252 CLR 118.

<sup>49</sup> (2003) 212 CLR 511, 611 [299] (Kirby J) ('*Lepore*'), cited in *Bell v Western Australia* (2004) 28 WAR 555, 561 [25] (McLure J, EM Heenan J agreeing at 567 [59], Le Miere J agreeing at 573 [78]).

be open to doubt.<sup>50</sup> In the UK, however, the STT has not been seriously challenged since the 1950s, and in *Majrowski v Guy's & St Thomas's NHS Trust* ('*Majrowski*'), Lord Nicholls confirmed that the "employee's tort" approach ... is now settled law.<sup>51</sup> This is so, despite subsequent major developments in the UK Supreme Court and its attempts to produce a 'modern theory' of vicarious liability.<sup>52</sup>

Judicial statements are therefore inconclusive and modern academic commentary rarely engages closely with either theory. Indeed, some commentary is dismissive of the MTT, sometimes perfunctorily so, given the assumption as to the predominance of the STT. For example, the editors of *Fleming's The Law of Torts* ('*Fleming*') note that the 'employer's liability is [based] ... on the servant's *tort* being imputed to the employer', and that this 'true nature of vicarious liability has not been seriously doubted in modern times.'<sup>53</sup> According to *Fleming*:

Despite the frequent invocation of such tired tags as ... 'qui facit per alium facit per se', the modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations.<sup>54</sup>

As a modern supporter of MTT, Stevens accepts, it seems, that the liability imposed is strict, but considers this to be justified because of the attribution of

<sup>50</sup> As noted in *Pioneer Mortgage Services* (n 12), support for the STT was not unanimous in *Lepore*, and their Honours considered that the other judgments in that case 'have a strong resonance with the approach of attribution of acts': at 149 [57] (Davies, Gleeson and Edelman JJ). This contrasts with McLure J's view in *Bell* (n 49) finding no support for the MTT in the judgments in *Lepore*: at 561–2 [26].

<sup>51</sup> *Majrowski* (n 7) 230 [15]. Other statements were made to similar effect: at 240 [52] (Lord Hope); 246 [72]–[73] (Baroness Hale). For earlier decisions, see especially *Harrison v National Coal Board* [1951] AC 639, 671 (Lord MacDermott) ('*Harrison*'); *Staveley Iron* (n 45) 638–40 (Lord Morton), 643 (Lord Reid). There was also some academic support for the STT early in the 20<sup>th</sup> century: see, eg, PH Winfield, *A Text-Book of the Law of Tort* (Sweet & Maxwell, 1937) 123–4.

<sup>52</sup> See Giliker, 'Analysing Institutional Liability' (n 15) 516–17.

<sup>53</sup> Sappideen and Vines (n 11) 439 (emphasis in original) (citations omitted).

<sup>54</sup> *Ibid* 438 (citations omitted). *Fleming* views the MTT as a manifestation of a 'constructive' fault argument giving rise to a breach of the master's personal duty, which is an 'untraversable' fiction: at 439. *Fleming* therefore dismisses the view that vicarious liability is based on breach of the defendant's own duty: at 440. After a lengthier discussion of the competing theories, Giliker concludes that vicarious liability is a rule of 'responsibility, not attributed fault', and that the MTT 'blurs the ... notion of individual responsibility' and the distinction between liability for one's own wrongdoing and for the acts of another: Giliker, *Vicarious Liability in Tort* (n 4) 15.

the employees' acts to the employer.<sup>55</sup> The MTT is closely linked to the notion of authority to act on behalf of the employer (where the conduct is in the course of employment). For Stevens, the MTT is central to his argument that tort law is explicable as a liability that vindicates the rights of a claimant.<sup>56</sup> Absent the MTT, that thesis is challenged by vicarious liability because it appears to impose liability on someone who has not infringed a right of the claimant. The attribution of acts overcomes this challenge because it means that liability attaches only to persons who, if they had personally committed the attributed acts, would be liable in tort.<sup>57</sup> Further, the MTT is also a rebuttal of the STT and its indirect challenge to Stevens' rights thesis because of its multiple policy justifications that are linked to characterising tort law as being about loss compensation.<sup>58</sup>

The STT is therefore linked to pragmatic, policy-based rationales for vicarious liability. In the words of a judgment of the Federal Court, summarising the English position, true vicarious *liability*

is heavily based upon a theory that a defendant should be liable for wrongdoing that can be regarded as part of the risks of its business activities, whether or not the wrongdoing is committed for the purpose of furthering those activities. In other words, the enterprise that obtains the benefit should pay the cost of the risks that are fairly part of those activities.<sup>59</sup>

<sup>55</sup> Stevens is not all that clear on this point, however. Although he accepts that many torts are forms of strict liability, he also identifies the STT as 'academic orthodoxy' and links it to vicarious liability 'being commonly described as a species of strict liability', seemingly with a hint of disapproval: Stevens, *Torts and Rights* (n 9) 100–1, 244. However, later, he states that policy arguments in favour of vicarious liability based on the STT are ones that support strict liability *in general*, seemingly thereby assuming that vicarious liability is a *specific* form of strict liability: at 259.

<sup>56</sup> *Ibid* 244.

<sup>57</sup> *Ibid*. See also at 262:

The attribution of [a tortfeasor's] acts to [the defendant] means that [the defendant] has infringed [the claimant's] rights. Importantly for the rights-based model, it means that the defendant who is held vicariously liable for the acts of another is as guilty of infringing the rights of the claimant as the person physically acting.

<sup>58</sup> *Ibid* 244.

<sup>59</sup> *Pioneer Mortgage Services* (n 12) 148 [54] (Davies, Gleeson and Edelman JJ). Of course, the MTT might also be linked to pragmatic policy concerns. Indeed, this was an early criticism of the MTT: see, eg, Baty (n 7) 28–9. However, this does not appear to be the position taken by Stevens — in his view, the MTT explains why certain rights exist against the particular defendant as a matter of principle, without the need to identify any underlying policy: Stevens, *Torts and Rights* (n 9) 267–8.

One of the few commentators, apart from Stevens, to comprehensively consider the merits of the competing theories, focusing on circumstances in which the application of each theory could lead to different outcomes, was Glanville Williams. Williams focused on circumstances in which specific defences or duties arose, including by virtue of specific statutory provisions.<sup>60</sup> However, Williams did not consider the impact of statutory law generally upon these theories, or the principles that guide the interpretation of statutory duties and protections, both of which contexts are particularly significant in Australian developments both before, and in the more than 60 years since, his article.

Nonetheless, his main conclusions bear repeating. Importantly, although Williams noted a number of circumstances in which the MTT provided a better explanation of the outcomes of cases,<sup>61</sup> he also noted circumstances in which the STT provided a more satisfactory explanation of the law (or would lead to a more just outcome).<sup>62</sup> Williams therefore demonstrated that the uniform application of either theory could not explain the law and would lead to anomalies.<sup>63</sup> He demonstrated that ‘both theories have utility in different situations,’<sup>64</sup> and that ‘[m]any problems would be resolved if it were recognised that the master can be made liable under either doctrine according to circumstances.’<sup>65</sup> The pragmatic conclusion is captured by this comment, made in reference to competing judicial statements about which theory holds sway:

<sup>60</sup> See, eg, Williams, ‘Vicarious Liability’ (n 33) 525.

<sup>61</sup> For some of these, however, Williams noted that the STT would also explain the outcome: see, eg, Williams, ‘Vicarious Liability’ (n 33) 534.

<sup>62</sup> Ibid 535. For example, if an employee injures themselves in the course of employment, through their own negligence, then a strict application of the MTT could be used to argue that the employer should be liable to the employee — the employer is said to have committed the negligent act that injured the employee. However, the STT explains that, since the employee is not liable to themselves, nor is the employer. On this basis, Williams criticises the outcome in *Stapley v Gypsum Mines Ltd* [1953] AC 663, which is explicable in terms of the MTT: Williams, ‘Vicarious Liability’ (n 33) 535–6.

<sup>63</sup> Williams, like Giliker, notes that the MTT destroys the distinction between personal (or non-delegable) and vicarious responsibility: Williams, ‘Vicarious Liability’ (n 33) 540; Giliker, *Vicarious Liability in Tort* (n 4) 15.

<sup>64</sup> Williams, ‘Vicarious Liability’ (n 33) 525.

<sup>65</sup> Ibid 547. Williams also makes the rather cryptic statement that he ‘regard[s] [the master’s tort] theory not as excluding the servant’s tort theory but rather as being supplementary to it’: at 522.

The difference of opinion seems to resolve itself into an opposition between the master's tort theory and the servant's tort theory. It is, however, possible to uphold both theories, and to say that the master is responsible when either fits the facts. In other words, the law may recognise both vicarious responsibility in the proper sense of the term and also a doctrine of vicarious conduct.<sup>66</sup>

Despite Stevens' description of Williams as the 'one defender' of the MTT in modern times,<sup>67</sup> there is no unqualified support for the MTT here.

## V EMPLOYEE IMMUNITIES BASED ON STATUS

We now consider some of the situations in which theory has played a role in determining the outcomes of cases. Before we turn to statute, we start with immunities that arise from the status of a wrongdoer. That status may derive from a position or relationship (eg husband), or from the context in which the person acts (eg acting as a witness). We accept that the distinction we draw between status-based immunities and defences that are based on the quality of someone's conduct, to be considered later, is not clear-cut;<sup>68</sup> however, it is useful for current purposes, since statutes are, at most, of only peripheral relevance to the status cases.

Where a *prima facie* 'wrongdoer' has available an immunity which prevents an injured claimant from claiming against that party, numerous cases have applied that immunity to employers of that party. In short, the common law tends to transfer such an immunity (though there are exceptions). This is so both in cases where the source of the immunity is (more usually) common law<sup>69</sup> or statute.<sup>70</sup> Similarly, transferred immunity also applies, as we shall see later, in the context of conduct-based defences. Importantly, where an

<sup>66</sup> Ibid 544.

<sup>67</sup> Stevens, *Torts and Rights* (n 9) 260. Similarly, Giliker also states that Williams 'argued strongly' in favour of the MTT: Giliker, *Vicarious Liability in Tort* (n 4) 13.

<sup>68</sup> For example, statutory defences in Australian jurisdictions for 'good samaritans' typically incorporate both status (acting as a rescuer) and the quality of the conduct (such as not acting recklessly): see, eg, *NSW Civil Liability Act* (n 2) ss 56–8.

<sup>69</sup> See, eg, *Commonwealth v Griffiths* (2007) 70 NSWLR 268 (Court of Appeal) ('Griffiths').

<sup>70</sup> See, eg, *Civil Liability Act 2003* (Qld) s 39. This provision affords protection to 'volunteers' and has been interpreted as giving the same immunity to those who 'employ' such volunteers: *Goodhue v Volunteer Marine Rescue Association Inc* [2015] QDC 29, [171]–[175] (McGinness DCJ) ('Goodhue').

immunity or a defence is statutory, the key issue is one of statutory interpretation and whether the statute impliedly supports vicarious liability arising.<sup>71</sup>

Where an immunity applies to an employee, some cases have used the STT to justify the extension of the immunity to employers. *Commonwealth v Griffiths* ('*Griffiths*')<sup>72</sup> is an example in which a common law immunity was transferred. The case concerned the immunity of witnesses giving evidence in court proceedings.<sup>73</sup> The New South Wales Court of Appeal held that the immunity extended to the employer, the Australian Government Analytical Laboratories ('AGAL'), which was conducted by the Commonwealth. AGAL was not vicariously liable for any tort committed by the witness and the Court found support for that conclusion in the STT.<sup>74</sup> Irrespective of the theory, however, the Court concluded that 'there is a long line of authority ... that a person who is vicariously liable for the tortious conduct of another is protected by any immunity that is available to the actual wrongdoer'.<sup>75</sup> AGAL was also protected from direct liability by the immunity.<sup>76</sup> The Court emphasised that the policy reasons for the immunity supported the conclusion that the employer should not be held liable (vicariously or directly).<sup>77</sup> The immunity was treated as a substantive one.

Similarly, in *Parker v Commonwealth* ('*Parker*'),<sup>78</sup> Windeyer J in the High Court considered that the combat immunity of defence service personnel from liability in the tort of negligence also extended to the Crown.<sup>79</sup>

<sup>71</sup> See below Part VI. Of course, many statutes either expressly exclude vicarious liability or expressly transfer liability from the immune employee to the employer. Compare also the situation where a statute *creates a new liability*, considered in *Majrowski* (n 7). The House of Lords held that the assumption was that an employer would be vicariously liable unless the statute impliedly or expressly excluded such liability: at 231 [16] (Lord Nicholls, Lord Hope agreeing at 242 [57], Baroness Hale agreeing at 246 [72]–[74], Lord Carswell agreeing at 247 [78], Lord Brown agreeing at 248 [81]).

<sup>72</sup> *Griffiths* (n 69).

<sup>73</sup> That immunity also extends to out-of-court conduct that is sufficiently connected with court proceedings: *ibid* 278 [42] (Beazley JA, Mason P agreeing at 270 [1], Young CJ in Eq agreeing at 298 [144]).

<sup>74</sup> *Ibid* 292–3 [110]–[116] (Beazley JA).

<sup>75</sup> *Ibid* 293 [115].

<sup>76</sup> *Ibid* 293 [119]–[120].

<sup>77</sup> *Ibid* 299 [148] (Young CJ in Eq).

<sup>78</sup> (1965) 112 CLR 295 ('*Parker*').

<sup>79</sup> *Ibid* 301–2. Windeyer J's obiter statements that the armed forces immunity also applied to claims by one service member injured by another in peace time were disapproved by the High Court in *Groves v Commonwealth* (1982) 150 CLR 113, 133 (Stephen, Mason, Aickin and Wilson JJ) ('*Groves*'), but this is not relevant to the point above.

The support in the case law for transferring immunities is clearly consistent with the STT, even where not expressly justified on that basis. Since the employee is not liable, nor is their employer. Whether such a result is easily reconcilable with the MTT is more difficult and we return to it below.<sup>80</sup> It should be noted, however, that Windeyer J in *Parker* concluded, in the context of combat immunity of service personnel, that vicarious liability of an employer did not arise irrespective of the underlying basis of vicarious liability, though he did not provide any explanation for this conclusion:

Whether the so-called ‘vicarious’ liability of a master for the tortious acts of his servant arises because the master is answerable for his servant’s torts, or because the acts of his servant are imputed to him so as to make him himself liable in tort, has been much discussed and has provoked differing views, judicial and academic ... But, however the principle of liability should be expressed, I think that the Commonwealth is only liable for the acts or omissions of a servant if the servant would himself be liable ...<sup>81</sup>

There are, however, other cases that have held employers liable even where the employee is not (being immune). Some of these cases have relied on the MTT to support that conclusion. However, the case law that is often cited to support this approach — decided around the middle of the 20<sup>th</sup> century — arose in the context of the tort immunity existing between spouses prior to its abolition. As such, rather than being interpreted as strongly supporting the MTT, these cases may reflect a disapproval of the immunity itself, and may therefore have been driven by broader policy and social considerations — to minimise the impact of the immunity as much as possible.<sup>82</sup>

At common law, there was a longstanding rule barring *any claims* by one spouse against the other, which was in part justified by the fiction that a husband and wife were, at law, ‘one’ — that is, the identification of the wife with the husband.<sup>83</sup> That fiction and wider immunity was largely abrogated in England under the *Married Women’s Property Act 1882*, 45 & 46 Vict, c 75

<sup>80</sup> See below Part VII.

<sup>81</sup> *Parker* (n 79) 300–1 (citations omitted).

<sup>82</sup> Notwithstanding some lingering support, it was clear by the 1950s (if not earlier) that many of the policies underlying spousal immunity were seriously at odds with social views as to the status of women. The mood of the times is well captured — and the process of abolition across common law jurisdictions clearly documented — in Stella J Bailey, ‘Intrafamily Tort Immunity: Alberta’s Position’ (1978) 16(3) *Alberta Law Review* 418.

<sup>83</sup> See Geoffrey Sawer, ‘Husband and Wife versus Master and Servant: A Collision of Concepts’ (1953) 27(5) *Australian Law Journal* 323, 323. Cf *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605, 615–16 (Dixon CJ, Williams, Webb and Fullagar JJ) (*‘Tooth’*).

(‘Married Women’s Act’) and analogous legislation in other common law jurisdictions. However, s 12 of that Act *preserved* the common law immunity from suit so far as personal *torts* were concerned.<sup>84</sup> It is in this context that *Broom v Morgan* (‘*Broom*’)<sup>85</sup> arose.

In *Broom*, the plaintiff wife and her husband were both employed by the defendant, Morgan. The plaintiff was injured through her husband’s negligence when she fell through a trapdoor that her husband had negligently failed to close. The plaintiff sued her husband’s employer, who was held liable by the Court of Appeal. The main basis for this conclusion in the three separate judgements was the MTT: since the *acts* of the husband were attributed to the employer, and the employer did not have the benefit of the husband’s immunity from suit (under s 12 of the *Married Women’s Act*), the employer was liable for those acts.<sup>86</sup> After supporting the MTT reasoning,<sup>87</sup> however, Denning LJ gave a second reason supporting the employer’s liability: even if that liability were truly *vicarious*, such that the employee’s liability was transferred or attributed (according to the STT), the husband’s immunity from suit was merely procedural, and not substantive. The husband had still committed a tort, but the wife was merely procedurally barred from pursuing that claim.<sup>88</sup>

<sup>84</sup> Sawyer (n 83) 323 n 2; *Broom v Morgan* [1953] 1 QB 597, 611 (Hodson LJ) (‘*Broom*’). The Act overrode the fiction but preserved an immunity for torts so as not to encourage litigation as between spouses: Sawyer (n 83) 324.

<sup>85</sup> *Broom* (n 84).

<sup>86</sup> All three judgments adopted reasoning that appeared to endorse the MTT: *ibid* 604–6 (Singleton LJ), 609 (Denning LJ), 612 (Hodson LJ). Singleton LJ relied in part on an earlier New South Wales Court of Appeal decision of *Waugh v Waugh* (1950) 50 SR (NSW) 210.

<sup>87</sup> Lord Denning MR later retracted his support for the MTT in *Rose v Plenty* [1976] 1 WLR 141, 144, quoting *Young v Edward Box & Co Ltd* [1951] 1 TLR 789, 793 (Denning LJ).

<sup>88</sup> *Broom* (n 84) 609–10 (Denning LJ). However, Hodson LJ denied that the immunity was merely procedural: at 611–12. This part of Denning LJ’s reasoning was, however, rejected in Australia in *Tooth* (n 83), where the High Court held the immunity to be substantial and not merely procedural: at 615–16 (Dixon CJ, Williams, Webb and Fullagar JJ). This conclusion is inconsistent with using the STT to explain *Broom*, but the High Court did not engage with theories of vicarious liability. In *Tooth* (n 83), the wife had successfully claimed against the employer for her injuries on a worker’s compensation claim: at 607–8. The employer sought an indemnity from the employee husband, whose wrongful conduct had caused the injury. Thus, the Court had to consider whether the injury was ‘caused under circumstances creating a legal liability in some person’, namely the husband: *Workers Compensation Act 1926* (NSW) s 64. In other words, would the husband have been liable if sued by his wife under s 16 of the *Married Women’s Property Act 1901* (NSW)? The Court held that the plaintiff had no claim for indemnity against the husband because his immunity was substantive and not procedural, and therefore there was no *liability* on the husband’s part: *Tooth* (n 83) 618 (Dixon CJ, Williams, Webb and Fullagar JJ), 619 (McTiernan J). The Court rejected the view that

Although *Broom* lends support to the MTT, one commentator on that case (and other cases raising similar issues) noted that they

represent the familiar situation of courts driven towards a particular conclusion by considerations of value of policy and endeavouring to reconcile their decision with an established system of concepts, the concepts themselves being so ill-defined that their redefinition is still possible.<sup>89</sup>

Putting *Broom* to one side, are the cases in which the immunity of the employee *has* been transferred to the employer reconcilable with the MTT? Since, under the MTT, only attributed acts that are wrongful give rise to liability,<sup>90</sup> it could be argued that cases in which an employee's immunity is transferred to the employer are reconcilable with the MTT because the immunity means that the employee's conduct is not 'wrongful' (or an actionable wrong).<sup>91</sup> But this is not the approach taken by courts; the immunity of witnesses, for example, is based expressly on policy grounds, and it is not suggested that the inherent wrongfulness of the employee's conduct is removed, as the quote from *Griffiths* above, referring to an 'immunity ... [for] the actual *wrongdoer*', demonstrates.<sup>92</sup>

Alternatively, it could be argued that the immunity cases are reconcilable with the MTT, because the act that is attributed to the employer is also the act that gives rise to the immunity: for example, the giving of evidence as a witness, or engaging in an armed conflict. Therefore, when those acts are attributed, it is the employer that is giving evidence, or engaging in armed conflict. In such circumstances the immunity should and does transfer. This

for torts for which married women cannot sue, 'it is only the remedy and not the liability which is absent': at 609 (Dixon CJ, Williams, Webb and Fullagar JJ). Importantly, however, the effect of the decision in *Tooth* was therefore similar to that in *Broom*, in that the Court in *Tooth* preserved the wife's right to compensation against indirect depletion from an indemnity claim brought against her husband. In *Broom*, the Court's clear motive was to give the plaintiff wife access to compensation: ie the employer should not get the benefit of the husband's immunity. Both cases therefore preserved the wife's right to compensation by ensuring that it was borne by the employer rather than no-one (*Broom*), or shifted to the husband and was therefore borne by the family unit (*Tooth*). Certainly, both cases could be seen as reflecting a disapproval of the unfair impact on injured spouses of the spousal immunity and its potential to limit access to (or practically meaningful access to) compensation, even against third-party employers. See also Sawer (n 83) 325. Sawer, writing before *Tooth*, comments only on *Broom* and similar decisions.

<sup>89</sup> Sawer (n 83) 326. The same comment could be equally applied to *Tooth* (n 83).

<sup>90</sup> See Stevens, *Torts and Rights* (n 9) 262.

<sup>91</sup> Such an argument is difficult to sustain, however, as it would need to be applied consistently and would equally apply to *Broom* (n 84), where the immunity was not transferred.

<sup>92</sup> *Griffiths* (n 69) 293 [115] (Beazley JA) (emphasis added).

contrasts with the outcome of, but is also reconcilable with, *Broom*, in which the immunity did not transfer, since the context of the employee's conduct was not what gave rise to the immunity — it was purely his status as the claimant's husband. The employer who was deemed to be doing the employee's negligent act did not thereby become the plaintiff's 'husband'.<sup>93</sup>

Such an argument means that cases which have held that a status-based immunity transfers to the employer are *reconcilable* with the MTT (because the employer can claim the benefit of the attributed acts giving rise to the immunity), but nonetheless, they are not *explained* by the MTT. This is because the reasons that underpin the conclusion that the employer is immune are, for the most part, policy-driven and focused on the appropriate reach of the immunity in order to give it proper effect.<sup>94</sup>

## VI EMPLOYER IMMUNITY: THE 'INDEPENDENT DUTY RULE'

The cases that we have considered so far deal with the general issue of the position of employers where employees are immune from liability. We move now to a much more specific context in which difficulties arise as to the liability or otherwise of employers, and in which the MTT and STT have played a role in resolving those difficulties. That context is the direct liability of the Crown (or the state) and its vicarious liability for torts committed by Crown employees (officers or public servants).

Prior to the abolition of Crown immunity, the maxim that 'the King can do no wrong' precluded not only direct liability of the Crown, but also vicarious liability.<sup>95</sup> The Crown was not liable for torts, consistently with the MTT,<sup>96</sup>

<sup>93</sup> Similarly, Stevens argues that further support for the MTT can be found in *Barker v Braham* (1772) 2 Bl R 866; 96 ER 510 ('*Barker*'): Stevens, *Torts and Rights* (n 9) 254. In *Barker* (n 93), a sheriff's justification for carrying out an arrest on the basis of a writ did not extend to the defendant lawyer who had taken out the invalid writ. The sheriff's immunity arose from *being* a sheriff, and not from *acting* as a sheriff, so the lawyer who was deemed to have done the same acts could not claim that protection: at 511–12 (De Grey CJ). Nonetheless, the case does not pose any difficulty for the STT either. It was not a case of employment, but one in which the defendant had authorised and directed the wrongful act; that is, it was better explained as an independently wrongful accessorial liability. There could thus be no possible basis for allowing the defendant to hide behind the sheriff's privilege.

<sup>94</sup> See, eg, *Griffiths* (n 69), which focuses on the policy of the witness immunity only being extended to an employer after consideration of the policy underlying the immunity, namely to ensure the finality of litigation: at 293 [117]–[120] (Beazley JA, Mason P agreeing at 270 [1], Young CJ in Eq agreeing at 298 [144]).

<sup>95</sup> Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10(1) *Tort Law Review* 14, 15–16.

since the maxim applied equally to acts alleged to have been done by a servant under authority of the Crown.<sup>97</sup>

In Australia, Crown immunity from liability in torts was abolished early in comparison to other common law jurisdictions, so that by 1902, after Federation, immunity of the Crown in right of the Commonwealth had been abolished.<sup>98</sup> Prior to this, all states, other than Victoria, had long abolished it and imposed tortious liability on the Crown.<sup>99</sup> Despite the abolition of general Crown immunity, however, judge-made law proceeded to carve out an ongoing immunity for the Crown, based on English cases that maintained the immunity of employers where the employee exercised an independent discretion or power.<sup>100</sup> This is variously known as the ‘independent duty rule’ (‘IDR’), or ‘independent discretionary function principle.’<sup>101</sup>

In the UK, although Crown immunity was not abrogated until 1947 by the *Crown Proceedings Act 1947*, 10 & 11 Geo 6, c 44 (‘*Crown Proceedings Act*’),<sup>102</sup> that immunity had not placed a burden on plaintiffs in the first half of the 20<sup>th</sup> century. This was because plaintiffs could sue individual public servants who were personally liable for their torts and, from 1908 or even earlier, the Crown

<sup>96</sup> Ibid 16, citing *Feather v The Queen* (1865) 6 B & S 257; 122 ER 1191, 1204–5 (Cockburn CJ for the Court) (‘*Feather*’).

<sup>97</sup> *Feather* (n 96). ‘For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done’: at 1205.

<sup>98</sup> *Claims against the Commonwealth Act 1902* (Cth) s 2.

<sup>99</sup> Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4<sup>th</sup> ed, 2011) 8 n 34, 152–3. Victoria’s legislation was passed in 1955: *Crown Proceedings Act 1955* (Vic).

<sup>100</sup> See, eg, *Tobin v The Queen* (1864) 16 CB NS 310; 143 ER 1148, 1163–4 (Erle CJ for the Court) (‘*Tobin*’); *Stanbury v Exeter Corporation* [1905] 2 KB 838, 841–2 (Lord Alverstone CJ), 843 (Wills J), 843 (Darling J) (‘*Stanbury*’). The strength of these authorities is questionable. The latter case appears to have mainly relied on textbook statements that themselves appear to have referred to United States decisions: at 843 (Wills J), citing Thomas Beven, *Negligence in Law* (Stevens and Haynes, 2<sup>nd</sup> ed, 1895) vol 1, 388–9. Those US cases, concerning liability for police, were decided in the context of still-existing general state immunity.

<sup>101</sup> See generally Susan Kneebone, ‘The Independent Discretionary Function Principle and Public Officers’ (1990) 16(2) *Monash University Law Review* 184. Hogg, Monahan and Wright (n 99) also use the label ‘independent discretion’, albeit as a ‘rule’ rather than a principle: at 173. See also *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 (‘*Cubillo*’), referring to the ‘independent discretion rule’: at 336 [1088] (O’Loughlin J); Leeming (n 18), referring to the ‘independent function exception’: at 118. Leeming notes that the rule created ‘an exception from a generally worded statutory liability created in ... local legislation permitting claims against ... colonial governments’.

<sup>102</sup> *Crown Proceedings Act 1947*, 10 & 11 Geo 6, c 44, s 2(3) (‘*Crown Proceedings Act*’).

would defend any actions against the servants and pay any damages ‘in a proper case’.<sup>103</sup> This practice of ‘standing behind’ any servant acting in the course of their employment appears to have been a general practice.<sup>104</sup> In other words, the vicarious liability of the Crown was accepted as a matter of procedural practice and was not litigated,<sup>105</sup> presumably even in circumstances where the IDR might have otherwise applied. As Hogg, Monahan and Wright conclude, the practice of standing behind claims against servants ‘was probably the reason why the scandalous gap in the law was not filled much earlier’.<sup>106</sup> With the passage of the *Crown Proceedings Act*, the IDR was abolished.<sup>107</sup> For these reasons, that rule has been of little relevance to English law since the start of the 20<sup>th</sup> century.

The IDR has been said to be an ‘exception to the general rule of the Crown’s vicarious liability which has been said to exist in the case of those officers who have some independent duty cast on them by the law’.<sup>108</sup> The rule was stated as follows by Dixon J in *Little v Commonwealth*:<sup>109</sup>

[A]ny public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability ...<sup>110</sup>

The twin features of the IDR are therefore the liability of the employee and the immunity of the (Crown) employer. The IDR is (or was, in jurisdictions in which it has been abolished) largely concerned with government employees, but it can also arise in the context of statutory bodies and even private

<sup>103</sup> Hogg, Monahan and Wright (n 99) 154, quoting George Stuart Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (Stevens and Sons, 1908) 351. However, the practice seems to have originated much earlier: see *New South Wales v Ibbett* (2006) 229 CLR 638, 650 [41] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ) (*Ibbett*), quoting *Commonwealth v Mewett* (1997) 191 CLR 471, 543 (Gummow and Kirby JJ).

<sup>104</sup> Hogg, Monahan and Wright (n 99) 154.

<sup>105</sup> However, the practice did not assist plaintiffs seeking to hold the Crown directly liable, for example, as occupier: see *ibid* 154–5.

<sup>106</sup> *Ibid* 154.

<sup>107</sup> *Crown Proceedings Act* (n 102) s 2(3).

<sup>108</sup> *Groves* (n 79) 125 (Stephen, Mason, Aickin and Wilson JJ).

<sup>109</sup> (1947) 75 CLR 94.

<sup>110</sup> *Ibid* 114 (citations omitted), quoted in *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 662 (Brennan J) (*Oceanic Shipping*).

employers, where the employee is nonetheless carrying out independent functions conferred by statute.<sup>111</sup>

The IDR therefore creates an immunity on the part of employers, but not employees exercising their independent discretions, such that they (and not their employer) owe a duty that is independent and conferred by law.<sup>112</sup> That is, as stated by the High Court in *Enever v The King*,<sup>113</sup> the powers are exercised 'by virtue of [the] office' as an 'original authority'.<sup>114</sup> Although the rule 'appears to have developed primarily as a means of distancing the Crown from the tortious acts of police officers',<sup>115</sup> the rule has been widely applied to

<sup>111</sup> See, eg, *Oceanic Shipping* (n 110), in which the IDR applied to a ship's pilot employed by a private company that carried out pilotage services as required by statute, and the employer merely nominated suitable persons to be appointed by the Governor as pilot. However, Hogg, Monahan and Wright (n 99), citing *Oceanic Shipping* as supporting the application of the rule to private employers, note that statutory or common law powers are normally not vested in employees of private companies: at 173. In *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] 1 AC 643 ('*Esso Petroleum*'), the House of Lords applied *Oceanic Shipping* to s 15(1) of the *Pilotage Act 1913*, 2 & 3 Geo 5, c 31 to exclude vicarious liability of a port authority for a pilot's negligence because the pilot was discharging an independent professional duty as a 'principal and not as a servant', and because liability was impliedly excluded by the statute: *Esso Petroleum* (n 111) 690–1 (Lord Jauncey).

<sup>112</sup> In other words, the 'powers are not derived from the general employer': *Oceanic Shipping* (n 110) 642 (Gibbs CJ). For an unsuccessful attempt to distinguish *Oceanic Shipping*, see, eg, *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* (2005) 148 FCR 68, 97–8 [97]–[102], 104–5 [124]–[130] (Tamberlin, Mansfield and Allsop JJ).

<sup>113</sup> (1906) 3 CLR 969 ('*Enever*').

<sup>114</sup> *Ibid* 977 (Griffith CJ). Some commentators appear to treat the IDR as being different to the treatment of persons exercising 'original authority': see, eg, Kneebone (n 101) 196. Kneebone refers to 'original authority' as one of two limbs derived from *Enever* (n 113), and as precluding someone from being treated as a servant of the Crown at all: at 202. However, *Enever* (n 113) does not seem to draw such a clear distinction; Griffith CJ's reference to the nature of duties performed after discussing 'original authority' appears to provide further reason for the same conclusion: at 976–7. Subsequent cases seem to treat references to original authority as merely different ways of formulating the requirements of the IDR. For example, Legoe J in *De Bruyn v South Australia* (1990) 54 SASR 231 ('*De Bruyn*') notes the absence of vicarious liability where either an employee exercises 'independent discretions', or where an officer is 'discharging an independent function or a duty especially cast upon [them] by the special act': at 242, quoting *Enever* (n 113), *Baume v Commonwealth* (1906) 4 CLR 97 ('*Baume*'), respectively. But Legoe J seems to view these merely as slightly different ways of formulating the same principle. Certainly, Yeldham J in *Oriental Foods (Wholesalers) Co Pty Ltd v Commonwealth* (1983) 50 ALR 452 (Supreme Court of New South Wales) did not appear to treat these as distinct grounds or different rules: at 454.

<sup>115</sup> Iain Field, 'Good Faith Protections and Public Sector Liability' (2016) 23(3) *Torts Law Journal* 210, 220.

a variety of other public officers employed both by the Crown and public statutory authorities.<sup>116</sup>

A master–servant relationship obviously may exist in the context of a servant of the Crown who is in a relationship of employment, being, for example, at ‘the command and direction of the Crown’, or where the relationship is one that is ‘typically that of master and servant’.<sup>117</sup> This means that the Crown is vicariously liable for the wrongs committed by such a servant in the course of their employment.<sup>118</sup> However, where the public servant’s duties are ‘to be executed as an independent responsibility’, the Crown will not be held liable.<sup>119</sup> This means that the functions performed by a given officer may have a dual character: some functions may invest the officer with ‘an independent responsibility’ for which no vicarious liability arises, while other acts are ordinary acts done in the course of employment, and for the employer, for which the Crown is vicariously liable.<sup>120</sup> As Dixon J stated:

No one has yet denied that the Crown is liable for the tort of an officer committed within the scope of his duty, except in situations where the duty which he is attempting to fulfil is one cast upon him by law to be executed as an independent responsibility, so that the Crown is not acting through him.<sup>121</sup>

Further, much of the reasoning adopted in these cases explains the absence of employer liability on the basis that the employee was not acting in the course of employment.<sup>122</sup> That is, the employer is not liable because the independent

<sup>116</sup> See, eg, *Stanbury* (n 100), applying the rule to an inspector of livestock appointed by a local authority. Field gives other examples, including a legal aid officer, tax commissioner, magistrate, prison guard and customs officer: *ibid*.

<sup>117</sup> *A-G (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 249 (Dixon J) (*‘Perpetual Trustee’*).

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* 250. Dixon J gives the example of a customs officer. Some earlier cases suggested that where an independent duty is exercised, the relationship cannot be characterised as one of master and servant: see, eg, *Enever* (n 113) 994 (O’Connor J). That is not the better view, however. As Wilson J, for example, stressed in *Oceanic Shipping* (n 110), the doctrine is not concerned with questions of ‘control’ but rather with questions of ‘status and of statutory authority’: at 649–50. See also at 638–9 (Gibbs CJ). Cf at 682–3 (Dawson J).

<sup>121</sup> *Perpetual Trustee* (n 117) 249. Only when an employee such as a police officer exercises specific powers and duties, which require independent ‘personal responsibility of judgment’, does vicarious liability not arise: at 252. ‘In most respects a member of the police force is subject to the direction and control which is characteristic of the relation of master and servant.’

<sup>122</sup> See, eg, *Oceanic Shipping* (n 110) 662 (Brennan J).

duty is not exercised on behalf of the employer. This explains why the master may be simultaneously both liable, and not liable, for different acts of the same employee.

Importantly, the IDR is a judge-made rule — originating before general Crown immunity from tort liability was abolished — which was applied in response to the statutory abolition of Crown immunity. But, although the IDR is a common law rule, whether it applies (or applied) depends on the nature of the powers cast upon the Crown employee and, almost invariably, this depends on the statute that sets out the powers. This means that the question of whether an employee holds an independent duty is inherently one of statutory interpretation. As O'Connor J stated in *Baume v Commonwealth* ('*Baume*'), 'the form of the Statute and the words of the legislature must be considered in every case'.<sup>123</sup> To be sure, MTT reasoning seems to underlie some of the early cases that supported the establishment of the IDR — specifically that the consequence of finding an independent discretion was that the Crown could not be liable, since the Crown did not control its performance, and therefore did not owe a duty with regard to its exercise.<sup>124</sup> Nonetheless, the question of in whom the duty to exercise the power resides is always one of statutory interpretation, and the consideration of the theory appears to be largely secondary.<sup>125</sup>

The centrality of statutory construction can be seen in the important case of *Darling Island*. Although this case did not arise in the context of Crown

<sup>123</sup> *Baume* (n 114) 123. See also *Cubillo* (n 101) 343–5 [1118]–[1121] (O'Loughlin J).

<sup>124</sup> See, eg, *Tobin* (n 100). In this case, the plaintiff sought a petition of right against the Crown (a mechanism that provided relief as an exception to general Crown immunity), but the petition failed, in part because it was not available to maintain a claim in tort, but also on general principles of vicarious liability: at 1163–4 (Erle CJ for the Court).

The IDR is not incompatible with the STT, however, if one takes the view that the legislation creating the independent duty is imposing an obligation exclusively on the officer holding the discretionary power and that either the employee is consequently not acting in the course of employment when exercising that duty, or else that an employer's vicarious liability would be inconsistent with the statutory purpose. Further, the *Crown Proceedings Act* (n 102) states that the Crown is liable 'in respect of torts committed by its servants or agents': at s 2(1)(a). Arguably, this section, and similarly worded sections, seem to assume the STT applies. See also Harold Luntz et al, *Torts Cases and Commentary* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2017) 947, discussing the equivalent Victorian provision.

<sup>125</sup> See, eg, *Enever* (n 113), in which case there was no mention of theory directly, but the discussion of agency by Griffith CJ seems to implicitly accept the MTT: at 977. In essence, his Honour held that an officer does not exercise delegated authority but rather the officer's own authority derived from statute or common law (by 'virtue of office'). However, any argument that this means that the officer is not an employee for any purposes has clearly been rejected in subsequent cases.

employees and a duty to exercise *discretionary* powers imposed on officers by statute, it did concern a statutory duty, breach of which caused loss to the plaintiff. The critical question, like that inherent in the IDR, was: on whom did the statute impose that duty?<sup>126</sup>

The plaintiff brought a breach of statutory duty claim against his employer after he was injured falling into the hold of a ship due to an unsecured hatch.<sup>127</sup> Under the *Navigation (Loading and Unloading) Regulations 1941* (Cth) (*'Navigation Regulations'*), responsibility for securing the hatches was placed on the 'person-in-charge',<sup>128</sup> which was defined as the person in 'control' of the persons unloading a ship.<sup>129</sup> The plaintiff alleged that his supervisor, also employed by the defendant, had failed to discharge that duty.<sup>130</sup> The High Court unanimously held both that the *Navigation Regulations* created a private right to sue on the part of workers injured as a result of any breach of that statutory duty, but that that right did not arise against the employer of the 'person-in-charge'.<sup>131</sup> The second issue is of relevance here.

For Williams J and Fullagar J, the only critical question was one that concerned the construction of the statute and the meaning of the phrase 'person-in-charge', and whether the statutory duty only gave rise to claims against that specified person.<sup>132</sup> Their Honours stressed that the duties were imposed only on that person, and therefore the statutory claim was limited.<sup>133</sup> Although the

<sup>126</sup> *Darling Island* (n 32) 58 (Fullagar J). Hogg, Monahan and Wright (n 99) say that the IDR rule is focused on powers, but that the same reasoning applies to duties: at 173 n 105, citing *Darling Island* (n 32). In *Majrowski* (n 7), the House of Lords disapproved of *Darling Island* insofar as it was based on the MTT, because the House had 'firmly discarded this basis in favour of [the STT]': at 230 [13]–[15] (Lord Nicholls). The Court considered that, in the context of statutory wrongs, 'vicarious liability arises *unless* the statutory provision expressly or impliedly *excludes* such liability': at 231 [16] (Lord Nicholls, Lord Hope agreeing at 242 [57], Baroness Hale agreeing at 246 [72]–[74], Lord Carswell agreeing at 247 [78], Lord Brown agreeing at 248 [81]) (emphasis in original). *Darling Island* was explicable on this qualification: see generally at 230–1 [12]–[17].

<sup>127</sup> *Darling Island* (n 32) 43 (Williams J).

<sup>128</sup> *Navigation (Loading and Unloading) Regulations 1941* (Cth) reg 31 (*'Navigation Regulations'*). These were made under s 425 of the *Navigation Act 1912* (Cth).

<sup>129</sup> *Navigation Regulation* (n 128) reg 4.

<sup>130</sup> *Darling Island* (n 32) 43 (Williams J).

<sup>131</sup> *Ibid* 50–2 (Williams J, Fullagar J agreeing at 55), 54 (Webb J), 59 (Kitto J, Taylor J agreeing at 66).

<sup>132</sup> *Ibid* 44–5 (Williams J, Webb J agreeing at 53), 55–6 (Fullagar J).

<sup>133</sup> *Ibid* 50–1 (Williams J, Fullagar J agreeing at 56, 58). In a brief judgment, Webb J also agreed with Williams J, and stressed both that the statutory duty was not placed on the employer, and that it was not the employee's liability that was attributed to the employer (seemingly rejecting the STT): at 53–4.

question of whether the employer was vicariously liable for the supervisor's breach of statutory duty was itself seen as one of common law, to allow such a claim would be to enlarge the scope of the statutory duty.<sup>134</sup> As Williams J stated:

Any correlative civil liability for breach of the duty created by the regulation must ... be confined to the supervisor or foreman. It would seem to be quite inconsistent with principle to hold that an employer upon whom no personal liability is imposed by a statute or regulation can be sued for a breach of that duty simply because it is committed by an employee in the course of his employment. The statute or regulation can, if Parliament or its duly authorised delegate sees fit, impose a personal duty on the employer and he is then bound to see that the duty is performed.<sup>135</sup>

Although Fullagar J agreed with Williams J and his emphasis on statutory construction,<sup>136</sup> he also stated his preference for the STT as the basis for vicarious liability, notwithstanding (as he stressed) that the theory had no real bearing on the questions of statutory construction raised.<sup>137</sup>

Of the other judges, Kitto J and Taylor J both supported the MTT, with Kitto J offering an extensive analysis of the basis for vicarious liability and supporting the thesis that it is the acts of the employee that are attributed to the employer. Having accepted that the regulation placed no duty on the defendant, Kitto J consequently found that the defendant could not be liable for the breach of the employee's personal duty.<sup>138</sup> The liability (and the servant's duty) was not shifted vicariously, only the servant's act.<sup>139</sup> That act,

<sup>134</sup> Ibid 52 (Williams J).

<sup>135</sup> Ibid 52–3.

<sup>136</sup> Ibid 54. Fullagar J also stated, however, that he did not consider breach of statutory duty to be a tort: at 56. This is a conclusion that Stevens has (rightly) criticised: Stevens, *Torts and Rights* (n 9) 264. It should be noted, however, that this comment was a further reason Fullagar J gave for reaching the conclusion that the Crown was not liable: *Darling Island* (n 32) 56.

<sup>137</sup> *Darling Island* (n 32) 56–8. His Honour stated that he did not consider it 'either necessary or profitable, for the purposes of this case, to inquire into the nature or origin or theoretical justification' of the common law rule of vicarious liability: at 56. See *Harrison* (n 51) for obiter statements, in support of a different conclusion, that a master should be liable for the servant's breach of a statutory duty imposed personally on the servant (had the need to determine the issue arisen): at 652 (Lord Porter), 671 (Lord MacDermott, Lord Oaksey agreeing at 665), discussed in Williams, 'Vicarious Liability' (n 33) 543–4. See also *National Coal Board v England* [1954] AC 403 (House of Lords), avoiding the question of the theoretical basis for vicarious liability.

<sup>138</sup> *Darling Island* (n 32) 60–6 (Kitto J, Taylor J agreeing at 66).

<sup>139</sup> Ibid 61.

when done by the employer, was not a legal wrong.<sup>140</sup> Kitto J and Taylor J therefore categorically rejected the STT.

To summarise, the authorities reveal two strands of cases: (1) where a public servant engaged in ordinary conduct committed a tort, and the Crown was held liable applying the ordinary principles of vicarious liability; and (2) where a public servant tortiously exercised an independent discretion, and the Crown was therefore immune in accordance with the IDR.

#### VII CHANGES IN POLICY: STATUTORY CONDUCT-BASED EMPLOYEE DEFENCES AND TRANSFERRED LIABILITY OR TRANSFERRED IMMUNITY

The IDR developed into an entrenched body of judge-made law, but, not surprisingly, there was little support for it among commentators; not only did it leave public servants personally liable for torts committed while performing their job, it also left claimants without access to the deep pockets of the government employer.<sup>141</sup> Even though the independent duties in question involved the exercise of discretion and judgement, these factors of themselves do not justify treating a public employer (or a party injured by their employee) differently to a private employer (or a party injured by their employee).<sup>142</sup>

Commencing early in the history of some of the Australian colonies,<sup>143</sup> and elsewhere certainly in the first half of the 20<sup>th</sup> century, legislatures responded

<sup>140</sup> Ibid.

<sup>141</sup> Hogg, Monahan and Wright (n 99) offer some such criticisms: at 174; and cite further critics of the rule: at 174 n 112. *Cubillo* (n 101) also cites numerous critics, including reference to the rule being ‘much reviled’: at 343 [1115] (O’Loughlin J), quoting Paul Finn and Kathryn Jane Smith, ‘The Citizen, the Government and “Reasonable Expectations”’ (1992) 66(3) *Australian Law Journal* 139, 145.

<sup>142</sup> We acknowledge, of course, that specific policy reasons might exist that support the protection of public employers in certain instances, and that this might be achieved by denying a duty, applying the IDR, or affording a specific statutory immunity. Clearly, however, such specific policy concerns cannot justify the existence of a general rule that is notionally protective of all public employers. Moreover, when no duty of care is owed at all to parties suffering injury on the basis that the decision-making involved considerations of broader government policy, no duty will arise on the part of the employees or their employers.

<sup>143</sup> For example, the protection of police for conduct without proof of ‘corruption or malice’ was first set out in statute in Western Australia by the *Shortening Ordinance 1853* (WA) sch s H. This provision was later incorporated into the *Police Act 1892* (WA) (‘WA Police Act’) and preserved in the *Interpretation Act 1918* (WA): *Western Australia v Cunningham* [No 3] [2018] WASCA 207 [120] (Buss P and Murphy JA), [191] (Pritchard JA). Section H appears to have been incorporated into various Acts in the 19<sup>th</sup> century: see, eg, *Masters and Servants Amendment Ordinance 1868* (WA); the *Stamp Act 1882* (WA).

to the perceived unfairness of the IDR by inserting defence provisions into legislation operating in many spheres of government activity and functions. As Kirby J said in the context of police liability in *Ferdinands v Commissioner for Public Employment*:<sup>144</sup>

The decision in *Enever*, inconvenient as it was, has never been overruled by this Court. It has been followed and applied in many cases. Extensive legislation has been enacted throughout the Commonwealth to overcome its effect and to provide for governmental liability for defined acts and omissions of police officers.<sup>145</sup>

The purpose of the legislation was to protect employees, usually by formulating the protection in terms of conduct done ‘in good faith’ pursuant to the statute (or similar wording). We refer to these protections, regardless of their specific wording, as ‘good faith defences’. Some of these (particularly, it appears, earlier) good faith defences provided merely for the immunity of the employee — that is to say, the Crown’s immunity from liability (under the IDR) continued.<sup>146</sup> Many of these defences went further, however, by shifting any liability that might otherwise have arisen against the employees, but for that immunity, to the Crown.<sup>147</sup> An indicative provision is s 84 of the *Police Service Act 2003* (Tas):

<sup>144</sup> (2006) 225 CLR 130.

<sup>145</sup> *Ibid* 153 [70] (citations omitted).

<sup>146</sup> See, eg, *Highways Act 1926* (SA) s 29(1) (*‘Highways Act’*), as repealed by *Statutes Amendment (Public Sector Consequential Amendments) Act 2009* (SA) cl 184. First introduced in its precursor, the *Roads Improvement Act 1921* (SA) s 26(1), the s 29(1) defence extended to the Commissioner of Highways as well as inspectors and officers, but in *De Bruyn* (n 114) the State and not the body corporate was sued. At the time the provision was introduced the general Crown immunity from liability for torts may still, arguably, have existed in South Australia. The Court did not reach a clear conclusion as to whether a general immunity still existed when the legislation was passed: at 244–5 (Legoe J). Earlier conflicting decisions as to whether the *Claimants’ Relief Act 1853* (SA) applied to torts or not were also noted: *De Bruyn* (n 114) 235 (King CJ), 240 (Legoe J). Nonetheless, even on the assumption that general Crown immunity was abolished prior to the passage of s 29(1) of the *Highways Act*, the Court held that the absence of liability on the part of the servant provided immunity for the Crown employer. King CJ simply applied Windeyer J’s reasoning in *Parker* that the immunity extended to the employer, irrespective of the theory of vicarious liability that was applied, although the result is more reconcilable with the STT: at 235, citing *Parker* (n 79) 300–2. Of course, given the doubts as to whether even general Crown immunity had at the time of the provision’s passage been abolished, it seems safe to conclude that the legislature did not intend to impose vicarious liability when granting immunity to Crown employees.

<sup>147</sup> These provisions also apply to circumstances where the Crown would in any case have been vicariously liable (prior to the passage of the provisions) for ordinary wrongdoing — that is,

- (1) A police officer does not incur any personal liability for any act or omission done or made in good faith in the exercise or performance, or purported exercise or performance, of any powers or duties at common law or under this or any other Act or law.
- (2) A liability that, but for subsection (1), would lie against a police officer, lies against the Crown.

The effect of this section, and similar ones widely used in Australian legislative provisions governing various government departments and their employees,<sup>148</sup> is to grant an immunity to public servants who perform (or purport to perform) their duties ‘in good faith’ (or whatever the precise requirements of the individual provision are), and to shift liability to the Crown for the consequences of the employee’s conduct.<sup>149</sup> That protection does not apply to ‘bad faith’ employees, who continue to remain personally liable and for whose torts the Crown employer may or may not be vicariously liable (depending on the formulation and interpretation of the defence).<sup>150</sup> These developments

wrongdoing that was not in the performance of an independent duty, such that the employee’s actions were in the course of employment.

<sup>148</sup> The details of such provisions vary considerably, however. Although the provisions generally utilise the language of acting ‘in good faith’, other standards are also adopted. See, eg, *WA Police Act* (n 143) s 137(3), providing that ‘[a]n action in tort does not lie against a member of the Police Force for anything ... done, *without corruption or malice*, while performing or purporting to perform the functions of a member of the Police Force’ (emphasis added).

<sup>149</sup> See, eg, *ibid* s 137(5)(a).

<sup>150</sup> See, eg, *ibid*. Importantly, the wording of this section suggests that if a police officer acts *with* corruption or malice, that liability does not shift to the Crown, which could presumably still rely on the IDR and the express wording. This interpretation is supported by a series of Western Australian cases involving alleged (and, in some instances, proved) corrupt or malicious conduct by police officers. See especially *Cunningham* (n 143) [128] (Buss P and Murphy JA) (citations omitted):

When s 137(3) is engaged, it confers immunity from action. It alters the position at common law, insofar as and to the extent that under the common law, an action could lie against a police officer in tort even where the police officer has acted without malice or corruption. It nevertheless leaves the common law to apply to torts where police officers in the performance, or purported performance, of their powers and duties, act with corruption or malice. The liability of police officers in such circumstances could include liability for both aggravated and exemplary damages.

See also *Mickelberg v Western Australia* [2007] WASC 140, [138]–[145] (Newnes J); *Ives v Western Australia [No 8]* [2013] WASC 277, [60] (Le Miere J); *Calabro v Western Australia [No 3]* [2014] WASC 84, [55], [66] (Martin J). Cf *Public Service Act 2008* (Qld) s 26C (‘*Qld Public Service Act*’). This section transfers tort liability of the employees to the State, even for bad faith conduct, but gives the State a right to seek contribution from such an employee if they were also grossly negligent.

mean that the IDR rule is now largely redundant, except insofar as bad faith employees exercising independent discretion are concerned, even in jurisdictions in which it has not been formally abrogated. In some jurisdictions, such as NSW and South Australia, as well as the UK, the rule has been abolished altogether.<sup>151</sup>

It is necessary, then, to consider separately the two aspects of good faith defences, namely (1) the extent and scope of the protection afforded to employees, and (2) whether, and if so, when, liability shifts to the Crown.

Turning first to the protection of employees, many good faith defences draw a distinction between good faith acts done *pursuant to* an Act — that is, in the actual or purported exercise of its powers — and acts more generally done *for the purpose of* an Act, but which do not require specific authorisation.<sup>152</sup> Put simply, the scope of a protection that applies only to acts done pursuant to an Act is limited ‘primarily to the exercise of powers which of their nature will involve interferences with persons or property’<sup>153</sup> — ergo, conduct that is otherwise trespassory or, if such a function is exercised carelessly, negligent. Thus, a protection drafted in this way would extend to an employee who enters private premises in good faith to put out a fire, even if he or she does so negligently, but it would not extend to an employee who merely drives a fire truck negligently (since this act does not require special authority

<sup>151</sup> The IDR has been formally abolished by statute in NSW: *Law Reform (Vicarious Liability) Act 1983* (NSW) ss 7–8 (*‘NSW Vicarious Liability Act’*). Section 7 applies to all employees — the master is vicariously liable for independent functions carried out in the course of employment. Section 8 applies to persons in the service of the Crown: ‘Notwithstanding any law to the contrary’, the Crown is vicariously liable ‘in respect of the tort committed’ by its servants in the course of their service. See also pt 4, which deals with claims arising from police torts. The purpose of ss 7–8 is to override the IDR: Leeming (n 18) 118; Kneebone (n 101) 204–5. Hogg, Monahan and Wright (n 99) state that the abolition of the State’s IDR immunity in NSW applies even if the servant has a defence: at 168. However, this must now be incorrect (even if it was ever correct as a generalisation) given s 3C of the *NSW Civil Liability Act* (n 2).

The rule is abolished in South Australia via the *Crown Proceedings Act 1972* (SA) s 10(2), which, according to Legoe J in *De Bruyn* (n 114), ‘appears to have delivered a legislative coup d’état to any such limitation’ created by the IDR: at 242. However, it is contested whether it is effective in achieving that aim: Kneebone (n 101) 199–200.

The rule has been abolished in the UK by s 2(3) of the *Crown Proceedings Act* (n 102) in relation to the Crown, but may still apply to statutory authorities: see *Esso Petroleum* (n 111).

The IDR probably survives elsewhere: Hogg, Monahan and Wright (n 99) 174 n 113. See generally *Cubillo* (n 101) 335–49 [1083]–[1133] (O’Loughlin J).

<sup>152</sup> See, eg, *Plant Protection Act 1989* (Qld) s 28, interpreted in *Colbran v Queensland* [2007] 2 Qd R 235. The protection against liability for good faith but grossly negligent conduct no longer applies in the Act which displaced it: *Biosecurity Act 2014* (Qld) ss 496(4)–(5).

<sup>153</sup> *Board of Fire Commissioners (NSW) v Arduin* (1961) 109 CLR 105, 109 (Dixon CJ).

to perform).<sup>154</sup> In contrast, when a protection applies only to acts done *for the purposes of* a statute, its scope is limited — applying the presumption that Parliament does not intend to erode fundamental rights in the absence of clear language to that effect<sup>155</sup> — to functions that *do not* require special authority to perform.<sup>156</sup> Thus, a protection drafted in this way would extend to an employee who negligently damages private premises entered under a license granted by the occupier, but it would not extend to an employee who damages private premises entered without such license. Of course, some provisions may combine both types of protections.

The broadest protection for employees is one which applies to *all* conduct engaged in in an official capacity, even if done in bad faith.<sup>157</sup> Obviously, one would expect that such a wide protection would include a transfer of liability to the state employer.<sup>158</sup>

Turning, then, to the liability of employers. There are three ways in which statutes have dealt with the position of the Crown, as employer, when establishing defences that protect employees based on the quality of the employees' conduct. First, the legislation can *transfer liability* to the Crown. A common form in which this is done is by stating that a liability that, 'but for' the defence, would lie against an employee, lies against the Crown.<sup>159</sup> Secondly, legislation can do the exact opposite, by expressly extending the protection of a defence to the Crown *as well as* the employee.<sup>160</sup> Finally, the statute may be

<sup>154</sup> Ibid 109–10.

<sup>155</sup> See below nn 172–3 and accompanying text.

<sup>156</sup> This distinction is explored at length in Field, 'Good Faith Defences in Tort Law' (n 23) 157–8.

<sup>157</sup> See, eg, *Qld Public Service Act* (n 150) s 26C. The provision states that 'engage in conduct in an official capacity' means engage in conduct as part of, or otherwise in connection with, a person's role as a State employee, including, for example, engaging in conduct under or purportedly under an Act': at sub-s (6) (emphasis in original).

<sup>158</sup> See, eg, *ibid* s 26C(3), which provides that the State can seek contribution from the employee if they acted other than in good faith and were grossly negligent. See also *Police Service Administration Act 1990* (Qld) s 10.5.

<sup>159</sup> See, eg, *Police Services Act 2003* (Tas) s 84. See above n 147 and accompanying text.

<sup>160</sup> See, eg, *Fire and Rescue NSW Act 1989* (NSW) s 78, titled 'Protection from liability' and stating that acts (or failures to act) done 'in good faith for the purposes of executing this or any other Act, [do not] subject such a person [to whom the provision applies] personally, or the Crown, to any action, liability, claim or demand'. Such a result may also follow from the use of the term 'person' if that term, as a matter of interpretation, includes the Crown, for example, because of generic interpretation provisions: see, eg, *Hamcor Pty Ltd v Queensland* [2014] QSC 224 ('*Hamcor*'), interpreting *Fire and Rescue Service Act 1990* (Qld) s 129. Dalton J stated that the provision, in applying to 'persons', included the Crown: *Hamcor* (n 160) [216]–[220]. This was based on s 32D(1) and sch 1 of the *Acts Interpretation Act 1954* (Qld),

silent as to its operation on the liability (primary and vicarious) of the Crown employer. In this last scenario, the courts have had to confront the question, which is one of statutory interpretation, as to whether the Crown was impliedly intended to be vicariously liable.<sup>161</sup> In many cases, the absence of express liability-shifting provisions leads courts to assume that Crown immunity (insofar as it previously arose in some of these circumstances from the IDR) continues. But whereas the IDR was at times supported by the MTT, now the courts will sometimes turn to the STT to support a conclusion that the protection for the employee also protects the Crown employer. A good illustration is provided by the case of *Bell v Western Australia* ('*Bell*').<sup>162</sup>

In *Bell*, the plaintiff suffered the loss of his houseboat when it sank after a naval architect surveyor, employed by the WA Department of Transport to survey and certify the boat, negligently failed to require the manufacturer to take steps to ensure that one of the doors to the houseboat would not be opened while it was afloat.<sup>163</sup> The trial judge found that the surveyor would have been liable but for the immunity provided by s 124 of the *Western Australian Marine Act 1982* (WA).<sup>164</sup> That section applies to conduct done 'in good faith in the exercise or purported exercise of a power or in the discharge or purported discharge of a duty under [the] Act'. The Act made no reference to the liability of the Crown.

The Western Australian Court of Appeal rejected the view that the immunity was merely a procedural one from suit.<sup>165</sup> It considered that the weight of authority favoured the view that 'immunity from liability of the servant cannot co-exist with vicarious liability of the employer whatever the jurisprudential basis of vicarious liability',<sup>166</sup> and that view was strengthened by the

which extends 'persons' generally to include a corporation, which in turn includes a 'body politic'. The Act has since been renamed as the *Fire and Emergency Services Act 1990* (Qld), and the defence in the old s 129 is significantly narrowed in s 153B. Compare also s 153C, which expressly lists the Crown as a protected entity, but only in narrow circumstances.

<sup>161</sup> See, eg, *Morris v Beardmore* [1981] AC 446, 463–4 (Lord Scarman); *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 436–8 (Mason CJ, Brennan, Gaudron and McHugh JJ). See *Wheeler v Leicester City Council* [1985] 1 AC 1054, 1065 (Lord Browne-Wilkinson).

<sup>162</sup> *Bell* (n 49).

<sup>163</sup> *Ibid* 559–60 [10]–[17] (McLure J).

<sup>164</sup> *Bell v Western Australia* [2003] WADC 18, [38] (Commissioner Greaves).

<sup>165</sup> *Bell* (n 49) 560–1 [18]–[24] (McLure J, EM Heenan J agreeing at 567 [59], Le Miere J agreeing at 573 [78]), discussing *Tooth* (n 83).

<sup>166</sup> *Bell* 563 [32] (McLure J), citing *Parker* (n 79) 300–1 (Windeyer J).

general rejection by the courts of the MTT.<sup>167</sup> The Court noted that the Act did not expressly preserve the vicarious liability of the State, unlike numerous other WA statutes,<sup>168</sup> though EM Heenan J thought that this should not be taken so far as to provide a

convincing basis for a rule of statutory interpretation to the effect that where the immunity of the State ... employee is conferred by legislation, immunity also results for the State unless the statute expressly preserves the liability of the State which would, otherwise, remain.<sup>169</sup>

Numerous other authorities supported the conclusion reached in *Bell*,<sup>170</sup> and subsequent cases have affirmed a similar approach.<sup>171</sup> There are, however, other cases that are not reconcilable with this transfer of statutory immunity,<sup>172</sup> and doubts have been expressed on the issue. However, those doubts are

<sup>167</sup> Ibid 563 [34] (McLure J).

<sup>168</sup> Ibid 563 [34]–[35]. See also at 564 [41].

<sup>169</sup> Ibid 572 [75]. It should be noted that EM Heenan J seems to assume that the MTT supports the conclusion that the employer is only liable if the employee is: at 572 [74]. However, this is incorrect, as *Broom* (n 84) demonstrates: at 609 (Denning LJ).

<sup>170</sup> See above Part V for discussion of such cases. See also *Robertson v The Queen* (1997) 92 A Crim R 115, 121–2 (Steytler J) (Supreme Court of Western Australia).

<sup>171</sup> See, eg, *Goodhue* (n 70). See also *Griffiths* (n 69), though this was outside the statutory context.

<sup>172</sup> One case in which a defence protected the employee against liability, but in which that protection was held not to extend to the Crown as employer, is *Queensland v Roane-Spray* [2018] 2 Qd R 511 ('*Roane-Spray*'). The case concerned a claim against the State as employer of ambulance officers, who negligently injured the plaintiff while transporting her on a stretcher: at 513 [3] (Bowskill J). Section 27(1) of the *Civil Liability Act 2003* (Qld) protects certain prescribed 'entities' from liability for services performed to 'enhance public safety' if done in good faith (and not recklessly). Although the Queensland Ambulance Service was listed as such an entity, it was not incorporated and was not the employer of the officers: *Roane-Spray* (n 172) 516 [19] (Bowskill J). The Queensland Court of Appeal therefore, in what seemed a quite straightforward statutory interpretation, held that the State was not a listed entity, and therefore could not take the benefit of s 27: at 516 [21] (Bowskill J, Fraser JA agreeing at 512 [1], Philippides JA agreeing at 512 [2]). However, there are some difficulties with this holding. Section 26 also protects persons performing duties to enhance public safety for prescribed entities. The ambulance officers were therefore protected from liability under that section. The Court stated that the claim did not raise s 26 issues and therefore did not consider cases that have held that, where a defence or immunity applies to an employee, the employer may also be immune: at 514 [7] (Bowskill J, Fraser JA agreeing at 512 [1], Philippides JA agreeing at 512 [2]). Bowskill J stated that '[t]here would need to be very clear language used before s 27 could appropriately be construed as removing the vicarious liability of the State, as an employer, for the negligent acts of its employees': at 516 [21]. But that seems to miss the point — s 27 does not necessarily protect the State as it is not a prescribed entity, but its employees were clearly protected by s 26. Why did that

not only based on vicarious liability theory (the MTT or otherwise) but also on statutory interpretation, including the assumption that a statute should not be interpreted to take away an existing right unless expressed in clear terms.<sup>173</sup>

As authorities such as *Bell* illustrate, where the statutory defence does not include the transfer of liability to the Crown, the courts have generally concluded that the immunity of the ‘good faith’ servant also extends to the employer, albeit now by reference to the STT: absent the employee being liable, the employer is also not liable. To the extent that the state employer may have benefited from the previous IDR immunity at common law, that benefit survives, absent clear legislative signals, and does so supported by the STT.

To be sure, if one puts to one side the *reasoning* in the transferred immunity cases that support the STT, it could be argued that the *results* of such cases are nonetheless reconcilable with the MTT. The argument could be made that the law not only attributes the actions of the employees to the employers, but also the ‘good faith’ of their actions so that the conduct, though tortious, is excused. There are at least two difficulties with this argument.

First, the courts generally only attribute the knowledge of one party to another in exceptional circumstances and in relation to limited parties (such as the ‘directing mind and will’ of a company) rather than for all employees.<sup>174</sup> Similarly, Stevens argues that a person’s state of mind, such as malice, will not also be attributed to another in circumstances where the actions of that person are attributed.<sup>175</sup> For these reasons, it is difficult to argue that, outside

protection not transfer, then, to the State as their employer, based on STT? Perhaps the decision is based on the principle that a statute will not be construed to take away a common law right unless a legislative intent to do so clearly emerges; certainly, Bowskill J cites a number of authorities in support of that principle: at 516 n 9.

<sup>173</sup> See, eg, *Roane-Spray* (n 172) 516 [21] (Bowskill J). In *Bell* (n 49), EM Heenan J also canvassed relevant authorities before agreeing with the outcome: at 572–3 [76]–[77]. Of course, if the circumstance is one in which the IDR would, but for the statutory defence, have applied, then the statute is not taking away an existing right.

<sup>174</sup> Stevens, *Torts and Rights* (n 9) 255–6, quoting *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 713 (Viscount Haldane LC). As Stevens notes, this means that an innocent principal, whose agent (or employee) is aware of the falsity of a statement, will not be liable in deceit, except in those exceptional circumstances in which the agent’s knowledge is attributed: Stevens, *Torts and Rights* (n 9) 255, citing FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18<sup>th</sup> ed, 2006) 463–4. That said, it has also been held that all wrongful aspects of an employee’s conduct are attributed, including both an employee’s acts and intention: *Zorom Enterprises v Zabow* (2007) 71 NSWLR 354, 358–9 [13] (Basten JA).

<sup>175</sup> Stevens, *Torts and Rights* (n 9) 254–5.

exceptional circumstances, the *motives* of the servant (whether good or bad) should be attributed to the employer.

The second difficulty is that the statutory good faith defences, in their own terms, simply do not apply in the circumstances to render the employer's 'conduct' lawful. The MTT holds that defendant employers will only be liable for acts that, if done independently by them, would amount to a tort.<sup>176</sup> In the context of statutory good faith defences, the tortious acts typically exculpated include trespass to land, battery, false imprisonment and the like.<sup>177</sup> If those acts are attributed to employers then, *prima facie*, they have committed those torts, and any attempt to argue that they can rely on good faith faces an insurmountable hurdle. This is because, if a statute only expressly attaches to the relevant officer performing the act (such as a police officer or inspector) but does not attach to others (such as the state or statutory entity employer), it can only protect *those prescribed persons or officers* when carrying out certain functions and with a particular motive. To adopt an expansive interpretation of such protections, inclusive of employers, would offend both natural language and the presumption in favour of private rights. Those defences, by their own terms, do not apply to the employers who are said (under the MTT) to have done the acts. In the absence of any statutory guidance as to the employer's vicarious liability, therefore, the MTT would hold the state liable and not immune. The transfer of immunity to the employer is only reconcilable with the STT, since it is the absence of *liability* on the part of the employee that removes the employer's liability. Under the STT, then, the employer does not rely on the statutory defence as applying *directly* to them. In contrast, under the MTT, the employer would need to rely on the statutory defence directly, where the terms of the statute do not so apply.

#### VIII THE INTERACTION BETWEEN STATUTE AND COMMON LAW

The preceding parts demonstrate that statutory duties and protections pose significant challenges for the operation of vicarious liability and, indeed, its doctrinal basis. This is especially so when statutes create independent duties that rest only on employees, or provide for protections that apply only to employees. For the most part, these challenges are met by the courts with established principles of statutory interpretation, as opposed to any underly-

<sup>176</sup> Ibid 246.

<sup>177</sup> See Field, 'Good Faith Defences in Tort Law' (n 23) 157.

ing theory of vicarious liability (the MTT or STT). Does the statute expressly or impliedly render the employer liable or not, where the employee has breached an independent duty, or claims the protection of a defence or immunity? Theory has been of some, albeit sometimes peripheral, relevance to the reasoning that resolves these questions, but even where it is relevant, courts have not consistently applied one theory over the other.

What these developments demonstrate is a complex dialogue, or subtle interaction,<sup>178</sup> between judge-made law and statutes that modify the existing legal framework, in which the courts seek to discern legislative intent in the course of interpreting various statutory defences, while also responding to those changes with their own legal developments. For example, and as explained above, after Crown immunity for torts was generally abolished, the courts responded by creating a narrower immunity on the part of employers in the form of the IDR.<sup>179</sup> This was supported, in some cases, by appeals to the MTT. Subsequently, however, the legislature responded to that new immunity by abolishing the wide liability of employees, and often transferred that liability to the employer (where the IDR had previously protected employers), thereby significantly curtailing the application of the IDR. That is the current position in relation to many Crown employees and, because the courts are sensitive to legislative signals, and legislatures are cognisant of the interpretive presumptions and techniques applied by the courts, the statutory language affords a far surer guide as to whether the Crown is also protected than does the MTT or STT.<sup>180</sup> Such protections do not, therefore, support one or the other theory; they are agnostic about both. Even where the legislature is silent as to whether the liability of a protected employee should transfer to the Crown, it is well established that, in such instances, the employee's immunity will (ordinarily) transfer to the Crown. This transfer of immunity is now sometimes supported by reference to the STT, and it may be that the STT

<sup>178</sup> Leeming (n 18) 111: 'The interaction between statute and judge-made law can be subtle.'

<sup>179</sup> See above Part VI.

<sup>180</sup> See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added) (citations omitted): 'Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results *and which are known to parliamentary drafters and the courts*'. See also *Majrowski* (n 7) 246 [72] (Baroness Hale): 'Parliament must be assumed to legislate in the knowledge of the general law, which includes the law of vicarious liability, so that one must look for indications that Parliament did not intend it to apply to the particular duties or prohibitions it was imposing'; Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 146: 'Any inquiry into the meaning of an Act should ... start with the question: "What message is the legislature trying to convey in this communication?"'.

afforded the foundation upon which the courts constructed certain of the interpretive presumptions now applied, but in contemporary practice that theory is by the way. What matters, and all that matters, is legislative intent, and *any* theory or presumption can be dispatched with a stroke of the legislature's pen.<sup>181</sup> One significant feature of this dialogue is that Crown immunity has survived, albeit in an ever-decreasing scope, even as the legislature repeatedly reduces it.

All of this illustrates a point made more generally by Justice Mark Leeming, when considering statute and the law of negligence, that statute and judge-made law are '*entangled*', 'and indeed that much judge-made law is best seen as a response to or a consequence of statute.'<sup>182</sup> As his Honour adds:

[T]o refer merely to a 'line of authority' on a particular topic can distort the truth that the so-called 'line' is really a series of decisions themselves responding to legislation enacted as a consequence of earlier decisions. Statute is commonly a reaction to judge-made law, and is itself the occasion for further development of the law.<sup>183</sup>

In the context of vicarious liability, that process has seen judges use theories of vicarious liability as one of the tools relied upon to justify decisions, but those theories are not consistently used, and the decisions themselves are part of the

<sup>181</sup> A particularly clear demonstration of this point is provided by Basten JA in *New South Wales v Bryant* (2005) 64 NSWLR 281, 286 [15] ('*Bryant*')

To the extent that the distinction being drawn by Kitto J in *Darling Island Stevedoring* is an accurate reflection of the general law [supporting the MTT], it is clear that a different analysis is required by s 8(1) [of the *NSW Vicarious Liability Act* (n 151)], which makes the Crown liable in respect of 'the tort' of the person in its service, an expression which must be understood to encompass both the acts, the state of mind accompanying the acts and the breach of duty. Accordingly, it is the analysis of Fullagar J which is reflected in s 8 [supporting the STT].

See also s 106(1) of the *Sex Discrimination Act 1984* (Cth), which imposes upon persons (including public bodies) vicarious liability for 'acts' of sexual discrimination or sexual harassment engaged in by employees (or agents), 'as if that person had also done the act'. If the STT holds sway in Australia, it is clearly displaced by this provision. Interestingly, s 106(2) excludes liability if 'reasonable steps' were taken to prevent the employee from doing the act in question. However, the courts have construed this defence narrowly, requiring active measures to have been taken. For a useful analysis of the case law in this area, see Patricia Easteal and Skye Saunders, 'Interpreting Vicarious Liability with a Broad Brush in Sexual Harassment Cases' (2008) 33(2) *Alternative Law Journal* 75, 77–8.

<sup>182</sup> Leeming (n 18) 3 (emphasis in original).

<sup>183</sup> *Ibid.* See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31] (Gleeson CJ): 'Legislation and the common law are not separate and independent sources of law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship.'

ongoing dialogue between the judge-made law and statute. Any attempt to explain the current law of vicarious liability — which is the product of the complex interaction of statute and judge-made law — by resort to one theory is likely to fail. No single theory can explain the law, because that law is not a product of a theory but of a dynamic relationship between statute and judge-made law. The critical importance of statute in shaping the current law — including its theoretical uncertainties — ought not to be underestimated.

#### IX CONSIDERING THE ARGUMENTS SUPPORTING THE MASTER'S TORT THEORY

In summary, we are firmly of the view that to ignore statutory interventions, and to use the MTT to explain the remnant common law, would be to ignore the rich interplay between statute and judge-made law, and to construct a theory that explains only one aspect of the overall legal position. Nonetheless, we conclude by briefly considering some of the further reasons given in support of the view that the MTT better explains vicarious liability as it operates in the law. We do so for the sake of completeness, and in response to the argument that, where statute does not apply, only common law theory can provide answers. We will focus on the arguments of Robert Stevens.

First, Stevens highlights several legal rules and decisions that are only explicable in terms of the MTT. For example, he notes the rule that a plaintiff may be found to be contributorily negligent because of the conduct of its employees (the 'both ways' rule).<sup>184</sup> Undeniably, given the employees are not *liable* in any form (since they owe and breach no duty to another), the STT does not explain why an employer should be contributorily negligent for its employee's conduct. It is clearly consistent, however, with the attribution of an employee's *acts* rather than liability.<sup>185</sup>

Secondly, and similarly, Stevens argues that the willingness of the courts to hold employers vicariously liable for exemplary damages awarded as a result of an employee's conduct is explicable based on the MTT, but not the STT.<sup>186</sup> Stevens suggests that the justification for exemplary damages under the MTT is that the employer is liable on the same basis as if 'he had personally committed the wrong,'<sup>187</sup> whereas under the STT, the employer is not at fault

<sup>184</sup> Stevens, *Torts and Rights* (n 9) 262.

<sup>185</sup> The 'both ways' rule has been criticised by some commentators: see, eg, Sappideen and Vines (n 11) 333.

<sup>186</sup> Stevens, *Torts and Rights* (n 9) 265–6.

<sup>187</sup> *Ibid* 266.

and is strictly liable. There is certainly support for that view.<sup>188</sup> However, the ‘fault’ under the MTT is still a fiction; the employer is said to have done the act (giving rise to exemplary damages) because the law deems it so, not because it is so. The MTT could just as well support the conclusion that *deemed* fault should not give rise to punishment. Admittedly, given that the quantity of damages can vary according to the individual circumstances of the employer and employee, an employer’s liability *appears* to be different to that of the employee.<sup>189</sup> But in a straightforward case where the damages awarded are the same, it can just as well be said that it is the employee’s liability (to satisfy the remedy awarded against her, including the exemplary damages) that is transferred or attributed to the employer (according with the STT). As Jim Davis has concluded, ‘since the wrong of the employee merited the award of ... exemplary damages, that wrong, and the concomitant liability for damages, is transferred to the employer.’<sup>190</sup>

<sup>188</sup> See, eg, *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, in which Lord Scott rejects vicarious liability for exemplary damages on the basis of an STT-type analysis, stating that ‘the conduct meriting punishment was not [the employer’s] conduct but that of his officers’ and that ‘vicarious punishment ... is contrary to principle and should be rejected’: at 163 [136]–[137].

See also *Ibbett* (n 103) 650–5 [41]–[60] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). Here, the High Court also seems to support Stevens’ analysis, but the discussion is confused and confusing because of the Court’s incorrect labelling throughout of the STT as the MTT (seemingly on counsel’s misleading submission). Further, the basis for the award of exemplary damages was itself authorised by ss 8 and 9B of the *NSW Vicarious Liability Act* (n 151), which is worded in terms of the STT. Nonetheless, the statute allows for different considerations to be taken into account in assessing an award against the Crown than would be taken into account against employees — a position that is certainly more reconcilable with the MTT. Fundamentally, however, the question before the Court was one of interpretation of the impact of statute on the previous common law position.

<sup>189</sup> Stevens, *Torts and Rights* (n 9) 265, discussing *Thompson v Commission of Police of the Metropolis* [1998] QB 498. See also *Ibbett* (n 103). However, vicarious liability does not take away the employer’s personal (direct) liability so that, as a matter of quantifying the exemplary damages against the employer, separate acts of the employer that independently exacerbate the wrong (as in *Ibbett*) ought still to be relevant.

<sup>190</sup> Jim Davis, ‘Misfeasance in Public Office, Exemplary Damages and Vicarious Liability’ (2010) 64 *AIAL Forum* 59, 66. However, the opposite conclusion could also be reached, namely that vicarious liability should not, as a matter of policy, extend to vicarious punishment. Gray (n 15) also suggests that the STT supports making an employer automatically liable for exemplary damages for which the employee would have been liable, since the ‘employee’s wrongdoing is entirely attributed to the employer’: at 264. However, he appears to contradict this conclusion immediately: at 265. In any case, in Australia at least, the question of vicarious liability for exemplary damages is now often one of statute, such as in the context of police officers: see, eg, *WA Police Act* (n 143) s 137(6). Certainly, this appears to be how Basten JA approached the question in *Bryant* (n 181). In that case, and notwithstanding the fact that s 8(1) of the *NSW Vicarious Liability Act* (n 151) imposes liability on the Crown for

Thirdly, Stevens' rejection of the reasoning of the key UK case that favours the STT, while plausible, downplays the reasons actually given. *Majrowski* concerned s 1 of the *Protection from Harassment Act 1997* (UK), which created a wrong of harassment, that '[a] person must not pursue a course of conduct ... which amounts to harassment of another'. The issue before the House of Lords was whether the employer of a person who engaged in such conduct against a fellow employee was vicariously liable for the employee's wrong.<sup>191</sup> The Court held that the employer was liable and did so, in part, by strongly endorsing the STT — that is, the employee's *liability* was attributed to the employer.<sup>192</sup> Stevens argues that it was not necessary for the Court to endorse the STT over the MTT, noting that 'the duty ... was imposed upon persons generally'<sup>193</sup> — that is, a 'person' could be either an individual or a corporation.<sup>194</sup> Therefore, so his argument goes, if the wrongdoer's *acts* were attributed to the employer, the corporation would be considered to be the 'person' committing the harassment and could be held vicariously liable. However, it seems implicit in much of their Lordships' reasoning that they viewed s 1 as being concerned with interpersonal relationships,<sup>195</sup> so it would be odd to conclude that the corporation 'harassed' the claimant. In other words, the duty was imposed only on the employee, but vicarious liability still applied 'unless the statutory provision expressly or impliedly *excludes* such liability' (which it did not).<sup>196</sup> It was the strong preference for characterising vicarious liability as a liability-shifting mechanism that applies generally to all wrongs, including statutory wrongs, which drove the decision reached.

Stevens gives several other examples in which the operation of the law is better able to be explained by the MTT than the STT.<sup>197</sup> Most of these are of

'the torts' of police officers (thus supporting the STT), Basten JA went on to conclude that the legislature clearly intended the Crown to be liable under that section for exemplary damages: *Bryant* (n 181) 286–7 [16]–[20]. This interpretation was also supported by various policy considerations, including governmental accountability and deterrence: at 287–91 [21]–[31].

<sup>191</sup> *Majrowski* (n 7) 227–8 [1]–[2] (Lord Nicholls).

<sup>192</sup> *Ibid* 230 [15].

<sup>193</sup> Stevens, *Torts and Rights* (n 9) 265.

<sup>194</sup> Seemingly endorsing that interpretation is the statement of Lord Nicholls in *Majrowski* (n 7) 231 [19]: 'Further, it is now tolerably clear that, although the victim must be an individual, the perpetrator may be a corporate body'.

<sup>195</sup> See, eg, *ibid* 231 [18] (Lord Nicholls), 244–5 [65] (Baroness Hale).

<sup>196</sup> *Ibid* 231 [15] (Lord Nicholls) (emphasis in original). See also above n 71 and accompanying text.

<sup>197</sup> Stevens, *Torts and Rights* (n 9) 262–7.

minor importance. However, the difficulty with these types of arguments is that the examples which Stevens selects largely ignore the types of cases we have discussed here, decided in the statutory context, and which are not easily reconcilable with the MTT. In particular, he does not consider cases in which statutory defences are transferred, supported in part by the STT.

## X CONCLUSION

For judges who wish to reinvigorate the debate on theories of vicarious liability,<sup>198</sup> it may pay to be cautious if the theoretical positions they espouse are intended to be uniformly upheld and *consequential*. By consequential, we mean that the theory is intended to coherently explain all of the law, so that all questions for which the application of one theory over another makes a difference are answered consistently with the preferred theory. Of course, if statements about theory are merely intended to be general sentiments about what may be one rationale among many for vicarious liability, then they invariably contain some truth. As Williams pragmatically concluded, both theories may have their place.<sup>199</sup> Certainly, our consideration of both the MTT and the STT in cases arising in the statutory context demonstrates a sophisticated interplay between exercises in statutory interpretation, broader policy considerations, and theory. Overall, however, it looks as if theory is merely a further hook on which to hang the results. It is statute and the outcome that judges consider just and appropriate in that statutory context that dictate the decisions, and the choice of theory follows.

That neither the MTT nor STT can fully explain all decisions where the choice of theory might matter and that, indeed, the decisions reflect the courts' lack of commitment to any particular theory of vicarious liability, is not surprising. As was noted in *Hollis v Vabu Pty Ltd*, 'the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy.'<sup>200</sup> But, of course, that statement in itself can be seen as a rejection of the MTT and an endorsement of the legal realism of the STT, albeit that legal realism also acknowledges that, sometimes, justice demands that the STT itself be put to one side. Indeed, in all cases where statutory provisions govern,

<sup>198</sup> That, perhaps, may be the purpose of the rehearsal of the various principles concerning vicarious liability in *Pioneer Mortgage Services* (n 12) 149 [48]–[58] (Davies, Gleeson and Edelman JJ).

<sup>199</sup> Williams, 'Vicarious Liability' (n 33) 547.

<sup>200</sup> *Hollis* (n 5) 37 [34] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

it is only their interpretation that matters, and both theories must give way to that task. To acknowledge this reality is not to abandon principle to legislative whimsy, or to deny the explanatory value of underlying theories in early case law, but rather to place proper emphasis on the interpretive legal principles that govern outcomes in the majority of contemporary cases.