VICARIOUS LIABILITY FOR EQUITABLE WRONGDOING

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The concept of equitable vicarious liability will be unfamiliar to many Australian lawyers. Vicarious liability is of enduring significance in the law of tort but is rarely invoked in the context of equitable wrongdoing. Yet English courts are now comfortable applying vicarious liability to equitable wrongs, and recent dicta of the High Court of Australia and the Supreme Court of New South Wales suggest that Australian law might follow suit. This article considers whether such a development should be encouraged. It argues that a doctrine of equitable vicarious liability would be both justified and principled, in that it would fill a gap in the law, without creating incompatibility with equity's existing approach to determining liability. However, it doubts the strength of the authorities that have sparked these developments, contending that the evidence of vicarious liability being applied by the Court of Chancery, cited by majorities of the House of Lords and the High Court of Australia, has been misunderstood.

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* BA (Hons), LLB (Hons) (Syd). This article originated as an Honours thesis under the supervision of Professor Barbara McDonald, for whose insights I am grateful. I thank the anonymous referees and the Editors for their helpful comments.

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I Introduction

In February 2022, Ward CJ in Eq handed down the decision of the Supreme Court of New South Wales in *Anderson v Canaccord Genuity Financial Ltd* ('*Anderson*').[1] The case concerned the liability of a financial services firm (Patersons) for its involvement in a failed attempt to save companies (the Ashington Group) from insolvency.[2] Amongst other bases of potential liability, the plaintiff claimed that Patersons was vicariously liable for knowing assistance, provided by its employees, in purported breaches of fiduciary duties committed by Ashington's employees.[3]

This claim appears novel, at least to an Australian observer. Vicarious liability is regularly used to determine the liability of an employer for torts committed by its employees.[4] Yet it is rarely mentioned in the context of equitable wrongs like 'knowing assistance',[5] and it has been treated by courts exercising equitable jurisdiction as a peculiarity of the common law.[6] Nevertheless, Ward CJ in Eq concluded that vicarious liability could apply to equitable wrongdoing and proceeded to determine the plaintiff's claim.[7] An appeal was

[1] (2022) 161 ACSR 1 ('*Anderson Trial*').

[2] Ibid 23 [1]–[3], 24 [12], 25 [18], 26 [21], [23], 27 [26]–[28], 28 [30]–[31], 101–5 [486]–[510], 218–19 [1236]–[1237] (Ward CJ in Eq).

[3] Ibid 24 [12], 306 [1685] (Ward CJ in Eq).

[4] See Barbara McDonald and David Rolph, 'Remedial Consequences of Classification of a Privacy Action: Dog or Wolf, Tort or Equity?' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart, 2018) 239, 251. See, eg, *Hollis v Vabu* (2001) 207 CLR 21, 46 [61] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*'); *Bugge v Brown* (1919) 26 CLR 110, 129 (Isaacs J), 132 (Higgins J) ('*Bugge*').

[5] See McDonald and Rolph (n 4) 251–2.

[6] See, eg, *Illuzzi v Edwards* (1997) Q Conv R ¶54-490, 59917–18 (Fitzgerald P and Lee J), 59921 (Williams J) ('*Illuzzi*'); *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384, 453–6 [362]–[374] (Besanko J) ('*Lifeplan Trial*').

[7] *Anderson Trial* (n 1) 327 [1772]–[1773].

upheld on other grounds;[8] accordingly, the Court of Appeal did not need to determine the issue, describing it only as a question of 'general importance'.[9]

The conclusion of Ward CJ in Eq was not unexpected; indeed, it continued a growing momentum towards the recognition of vicarious liability for equitable wrongdoing in Australian law. Prior to *Anderson*, the issue had been considered in five Australian cases,[10] approved in two of those cases (albeit once in a statutory context)[11] and cited, without substantive comment, in a further five.[12] In *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* ('*Ancient Order*'), the High Court offered its first comments on the issue.[13] The doctrine had been rejected by Besanko J at first instance[14] but was left unresolved on appeal by the Full Court of the Federal Court, which described it as an 'important question of principle'.[15] The High Court, similarly, did not decide the issue.[16] However, the majority — Kiefel CJ, Keane and Edelman JJ — appeared open to its application, stating that 'the Court of Chancery recognised vicarious liability of partners in this manner at least as early as 1842'.[17]

[8] *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151, 157 [1]–[2], 254 [426], 255 [430] (Gleeson, Leeming and White JJA) ('*Anderson Appeal*').

[9] Ibid 214–15 [262] (Gleeson, Leeming and White JJA).

[10] *Coulthard v South Australia* (1995) 63 SASR 531, 535–6 (King CJ), 538–40 (Perry J), 552–4 (Debelle J) ('*Coulthard*'); *Illuzzi* (n 6) 59917–18 (Fitzgerald P and Lee J), 59921 (Williams J); *Lifeplan Trial* (n 6) 453–6 [362]–[375] (Besanko J); *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* (2017) 259 FCR 43, 79 [110] (Dowsett J) ('*Oliver Hume*'); *Hraiki v Hraiki* [2011] NSWSC 656, [71]–[76] (White J) ('*Hraiki*').

[11] *Coulthard* (n 10) 535–6 (King CJ), 538–40 (Perry J), 552–4 (Debelle J); *Hraiki* (n 10) [71]–[76] (White J).

[12] *SWM Financial Services Pty Ltd v Lloyd* [2011] NSWSC 1108, [101]–[102] (Ball J); *Pandee Services Pty Ltd v Roberts* [2007] FCA 68, [48]–[49] (Lander J); *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1, 30 [121]–[123] (Allsop CJ, Middleton and Davies JJ) ('*Lifeplan Appeal*'); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 11 [5] (Kiefel CJ, Keane and Edelman JJ), 29 [64] (Gageler J) ('*Ancient Order*'); *Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501, 648 [680]–[681] (Finn J).

[13] *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman JJ), 29 [64] (Gageler J).

[14] *Lifeplan Trial* (n 6) 456 [374].

[15] *Lifeplan Appeal* (n 12) 30 [123] (Allsop CJ, Middleton and Davies JJ).

[16] *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman JJ), 29 [64] (Gageler J).

[17] Ibid 11 [5], citing *Brydges v Branfill* (1842) 12 Sim 369; 59 ER 1174 ('*Brydges*'). See also *Dubai Aluminium v Salaam* [2003] 2 AC 366, 395 [104] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]) ('*Dubai Aluminium*'), citing *Brydges* (n 17).

Moreover, this trend is not anomalous amongst comparable jurisdictions. In *Dubai Aluminium Co Ltd v Salaam* ('*Dubai Aluminium*'), the House of Lords unanimously extended the statutory vicarious liability of partners to equitable wrongdoing.[18] That decision, cited with approval in *Ancient Order*,[19] has since been extended beyond the partnership context in decisions of the House of Lords and the Supreme Court[20] and it has been applied on multiple occasions by superior courts in the United Kingdom.[21] The principle is thus well-established in English law. For a period, Canadian law appeared likely to follow the same path for breaches of fiduciary duties,[22] although this seemed to proceed through the characterisation of that wrong as a tort:[23] a taxonomy derived from

[18] *Dubai Aluminium* (n 17) 374–5 [7]–[12] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), 395–7 [104]–[111] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). See generally *Partnership Act 1890* (UK) s 10; *Partnership Act 1892* (NSW) s 10(1).

[19] See *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman JJ), citing *Dubai Aluminium* (n 17) 404 [141] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

[20] *Majrowski v Guy's & St Thomas's NHS Trust* [2007] 1 AC 224, 229–31 [10]–[17] (Lord Nicholls), 242 [58], 244 [63] (Lord Hope), 246 [73]–[74] (Baroness Hale), 247 [77] (Lord Carswell), 248 [81] (Lord Brown) ('*Majrowski*'); *Various Claimants v Wm Morrison Supermarkets plc* [2020] AC 989, 1023 [51], 1024 [54]–[55] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr, Lloyd-Jones JJSC and Baroness Hale agreeing) ('*Wm Morrison Supermarkets*'). See also *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556, 1563 [27]–[28] (Lord Neuberger PSC, Lords Clarke, Sumption, Reed and Carnwath JJSC agreeing) ('*Vestergaard Frandsen*').

[21] See, eg, *Group Seven Ltd v Nasir* [2020] Ch 129, 180–92 [118]–[154] (Henderson, Peter Jackson and Asplin LJJ) ('*Group Seven Appeal*'); *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch), [538]–[555] (Morgan J) ('*Group Seven Trial*'); *Bilta (UK) Ltd (in liq) v NatWest Markets plc* [2020] EWHC 546 (Ch), [193]–[196] (Snowden J) ('*Bilta*'); *Northampton Regional Livestock Centre Co Ltd v Cowling* [2016] 1 BCLC 431, 469–74 [89]–[96] (Tomlinson LJ, King LJ agreeing at 478 [115], Arden LJ agreeing at 478 [116]) ('*Northampton Regional Livestock*'); *Flogas Britain Ltd v Calor Gas Ltd* (2014) 34 FSR 757, 785–6 [123]–[127] (Proudman J); *Balfron Trustees Ltd v Peterson* [2001] IRLR 758, 761–4 [22]–[42] (Laddie J). See also *Pintorex Ltd v Keyvanfar* [2013] EWPCC 36, [46]–[50] (Recorder Alastair Wilson QC) ('*Pintorex*').

[22] See *Strother v 3464920 Canada Inc* [2007] 2 SCR 177, 235–41 [98]–[108] (Binnie J for Binnie, Deschamps, Fish, Charron and Rothstein JJ), 262–3 [161]–[162] (McLachlin CJ) ('*Strother*'); *Clayburn Industries Ltd v Piper* (1998) 62 BCLR (3d) 24, 46–7 [72]–[75] (Burnveat J); *57134 Manitoba Ltd v Palmer* (1989) 37 BCLR (2d) 50, 57–9 (Esson JA for the Court) ('*Manitoba*'); *Osborne v Harper* [2005] BCSC 1202, [233] (Sigurdson J); *Andrews v Keybase Financial Group Inc* (2014) NSR (2d) 239, 268 [170] (Wright J).

[23] *Manitoba* (n 22) 57–8 (Esson JA for the Court), quoting *57134 Manitoba Ltd v Palmer* (1985) 65 BCLR 355, 377–8 (Spencer J). *Manitoba* (n 22) has also been treated as an example of contractual, rather than equitable, vicarious liability: *Canwest Propane Inc v Steele* (1990) 110 AR

American law[24] but firmly rejected in Australia.[25] This line of authority was forcefully rejected by the Nova Scotia Court of Appeal in 2016,[26] but the issue remains alive.[27]

If accepted in Australia, the application of vicarious liability in equity would reshape both the limits of third-party equitable liability and the mechanism by which it is determined. Vicarious liability is established by proof of two elements: that the primary wrongdoer (a) was in a recognised relationship with the defendant and (b) committed the wrong within the 'course' of that relationship.[28] Vicarious liability is thus both a principle of strict liability and the common law's 'one true exception' to the principle that a defendant should only bear liability for the acts for which it is personally responsible.[29] This is significant

81, 85–7 [20]–[26] (Prowse J); *Golden Images Management Ltd v Champers Enterprises Ltd* [2001] BCSC 924, [95]–[99] (Scarth J).

24 See Deborah A DeMott, 'Accessory Disloyalty: Comparative Perspectives on Substantial Assistance to Fiduciary Breach' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 253, 255, quoting American Law Institute, *Restatement (Second) of Torts* (1979) § 874 cmt (b).

25 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 196–7 [71] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*'), quoting *Norberg v Wynrib* [1992] 2 SCR 226, 272 (McLachlin J for L'Heureux-Dubé and McLachlin JJ). See also *Pilmer* (n 25) 218 [136] (Kirby J).

26 *Carvery v A-G (Nova Scotia)* (2016) 371 NSR (2d) 296, 317–23 [67]–[97] (Fichaud JA for the Court) ('*Carvery*').

27 See, eg, *Barker v Barker* [2020] ONSC 3746, [1249]–[1255] (Morgan J). An appeal was allowed on other grounds: *Barker v Barker* 162 OR (3d) 337, 414–15 [316]–[317] (Hourigan, Trotter and Zarnett JJA).

28 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, 199–200 [82] (Kiefel CJ, Keane and Edelman JJ), 239 [191] (Gordon J) ('*CFMMEU*'). See also GE Dal Pont, *Law of Agency* (LexisNexis, 4th ed, 2020) 529–31 [22.3]–[22.6]; David Rolph et al, *Balkin & Davis: Law of Torts* (LexisNexis, 6th ed, 2021) 881–4 [26.18]–[26.22]. For a discussion of the relationships that can satisfy the first requirement, see *Bird v DP (a pseudonym)* (2023) 69 VR 408, 428 [82], 437–8 [113]–[115] (Beach, Kaye and Niall JJA); PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 3. The second element has been outlined in *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*'). Their Honours in that case rejected the 'close connection' test that is applied in England and Canada: at 149–60 [43]–[83] (French CJ, Kiefel, Bell, Keane and Nettle JJ, Gageler and Gordon JJ agreeing at 172 [130]–[132]). Cf *Wm Morrison Supermarkets* (n 20) 1013–22 [16]–[47] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr, Lloyd-Jones JJSC and Baroness Hale agreeing); *Re Broome v Prince Edward Island* [2010] 1 SCR 360, 388–90 [60]–[65] (Cromwell J for the Court).

29 *Woodland v Swimming Teachers Association* [2014] AC 537, 572 [3] (Lord Sumption JSC, Lords Clarke, Wilson and Toulson JJSC agreeing, Baroness Hale agreeing at 586 [28] (Lords Clarke, Wilson and Toulson JJSC agreeing)). See also *Anderson Trial* (n 1) 316 [1728] (Ward CJ in Eq). See below Part II.

for two reasons. First, vicarious liability might be broader in scope than the existing bases of equitable liability. If so, its recognition would subject employers to wider liability than that which they bear at present.[30] Secondly, vicarious liability would provide an alternative, and often advantageous, path to establishing the liability of an employer by avoiding the 'protracted' issues of proof and corporate attribution involved in claims under equity's existing bases of secondary liability.[31] Indeed, the England and Wales Court of Appeal has suggested that claimants might 'simplify' cases involving corporate fraud by pleading vicarious liability:[32] a suggestion applied by at least one lower court to equitable claims.[33]

Yet despite the consequences of recognising vicarious liability, the principle remains heavily under-theorised. Developments across the Commonwealth have been driven almost exclusively by the judiciary,[34] with only passing academic analysis in a handful of pieces.[35] Questions of whether such an extension is necessary, let alone justified, await consideration. It is to this task that this article is addressed. Its focus is on wrongs arising in equity's exclusive jurisdiction for which a monetary remedy is available. For reasons of scope, it concentrates on the three wrongs that have arisen most regularly in the case law: breach of fiduciary duty, breach of an equitable duty of confidence and knowing assistance. Its focus is on the 'paradigm example of vicarious liability': that of a corporate employer for the wrongs of its employees.[36]

This article contends that the development of a power in equity's exclusive jurisdiction to impose vicarious liability would be both justified and principled. This is for three reasons. First, there is a space for its operation: equity's existing

[30] James Edelman, 'Unanticipated Fiduciary Liability' (2008) 124 (January) *Law Quarterly Review* 21, 21, 25–6 ('Fiduciary Liability').

[31] See Lee Aitken, 'The Solicitor as Constructive Trustee' (1993) 67 (January) *Australian Law Journal* 4, 4; Andrew Stafford and Stuart Ritchie, *Fiduciary Duties: Directors and Employees* (Jordan Publishing, 2nd ed, 2015) 371–2 [8.5].

[32] *Bank of India v Morris* [2005] BCC 739, 763 [113] (Mummery LJ for the Court).

[33] See *Bilta* (n 21) [1], [147], [193]–[197] (Snowden J), quoting ibid.

[34] See above nn 3–27 and accompanying text. See also McDonald and Rolph (n 4) 251–2.

[35] See, eg, McDonald and Rolph (n 4) 251–5; Stafford and Ritchie (n 31) 371–3 [8.5]–[8.9], 382–3 [8.47]–[8.53]; Simon Baughen, 'Accessory Liability at Common Law and in Equity: "The Redundancy of Knowing Assistance" Revisited' [2007] (4) *Lloyd's Maritime and Commercial Law Quarterly* 545, 558–63; Edelman, 'Fiduciary Liability' (n 30) 23–6.

[36] Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71(3) *Cambridge Law Journal* 615, 617; *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, 15 [34]–[35] (Lord Phillips, Baroness Hale, Lords Kerr, Wilson and Carnwath JJSC agreeing) ('*Catholic Child Welfare Society*').

framework of primary and accessorial liability leaves important gaps in which the victim of an employee's wrongdoing, committed in the course of the employee's employment, may be left without a remedy against the employer. Secondly, the rationale for vicarious liability is agnostic as to the juridical nature of the wrong to which it applies; accordingly, as a matter of coherence, these remedial gaps in the law should be filled by vicarious liability. Thirdly, the development would not be unprincipled because vicarious liability would neither subvert the existing framework of equitable liability nor be conceptually incompatible with equity's 'unique foundation and goals'.[37]

The argument proceeds in four further parts. Part II explains how the term 'vicarious liability' is used in this article. Part III assesses the strength of the historical ancestry of vicarious liability in equity that has been asserted by majorities in the High Court of Australia and the House of Lords. Part IV identifies the spaces in which vicarious liability, and vicarious liability alone, would assign to the employer liability for an equitable wrong committed by an errant employee. Part V justifies the extension of vicarious liability into these spaces, including by rebutting the contention that vicarious liability and equity are in some way incompatible.

II What Is Vicarious Liability?

The question posed by this heading is an interminable one. In 1916, Harold J Laski bemoaned the law of vicarious liability, describing it as being in a state of 'sad confusion'.[38] A century later, that sentiment continues to enjoy widespread judicial and academic support.[39]

In *CCIG Investments Pty Ltd v Schokman* ('*CCIG Investments*'), Edelman and Steward JJ observed that one source of confusion is the persistent misuse of the term 'vicarious liability'.[40] Their Honours suggested that two distinct doctrines have historically been conflated under the label 'vicarious liability': (a) liability, based on principles of agency, arising from the attribution of an

[37] *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ) ('*Youyang*').

[38] Harold J Laski, 'The Basis of Vicarious Liability' (1916) 26(2) *Yale Law Journal* 105, 105–6.

[39] See, eg, *CCIG Investments Pty Ltd v Schokman* (2023) 410 ALR 479, 490 [48] (Edelman and Steward JJ) ('*CCIG Investments*'), quoting ibid; *Prince Alfred College* (n 28) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 3–4.

[40] *CCIG Investments* (n 39) 490 [48].

agent's conduct to their principal and (b) 'true' vicarious liability, which involves the attribution to an employer of liability incurred by an employee.[41] The former is a direct or 'primary' liability: where a principal authorises its agent's conduct, then the principal may be treated as having, itself, committed those acts — liability would be imposed accordingly.[42] The second doctrine is a true vicarious liability. It involves the attribution to an employer of *liability* incurred by an employee. This liability is 'secondary': the employer is not held to have committed the wrong but is made, as a matter of policy, to take responsibility for it.[43] In *CCIG Investments*, Edelman and Steward JJ concluded that, 'to avoid confusion', only the second kind of 'vicarious liability' ought to bear that label;[44] the first is better understood as a doctrine of 'vicarious conduct' arising from principles of agency.[45]

Although the terminology of 'vicarious conduct' may be unfamiliar, the distinction drawn by their Honours between direct liability, based on agency, and true vicarious liability is today an orthodox one.[46] In England, developments in vicarious liability, both in tort and equity, have proceeded on the basis that vicarious liability is a form of attributed liability, to be distinguished from liabilities arising through the application of principles of agency.[47] In Australian law, the same distinction is visible, including in equity.[48] As will be shown, true vicarious liability is a novel concept in equity; however, instances of a principal being held liable in equity through the attribution of the misconduct of their agent are not.

[41] Ibid 490–7 [48]–[69]. Their Honours also noted a third area of law, not relevant to this article's inquiry, that has been conflated with the two doctrines mentioned thus far — non-delegable duties: at 497–501 [70]–[81]. See also *CFMMEU* (n 28) 199 [82] (Kiefel CJ, Keane and Edelman JJ), cited in ibid 490 [49].

[42] *CCIG Investments* (n 39) 490–1 [50] (Edelman and Steward JJ).

[43] Ibid 491 [51], 495–6 [65] (Edelman and Steward JJ).

[44] Ibid 490 [49].

[45] Ibid 490–1 [50].

[46] See, eg, ibid 503 [92] (Gleeson J); *CFMMEU* (n 28) 199–200 [82] (Kiefel CJ, Keane and Edelman JJ); *Queensland Bulk Water Supply Authority v Rodriguez & Sons Pty Ltd* (2021) 393 ALR 162, 190–1 [85]–[89] (Basten, Meagher and Leeming JJA); *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136, 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ); *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 290 [127] (Maxwell P) ('*Christian Youth Camps*'); Dal Pont (n 28) 529–30 [22.3].

[47] *Majrowski* (n 20) 228–30 [7]–[15] (Lord Nicholls); *Bilta (UK) Ltd (in liq) v Nazir [No 2]* [2016] AC 1, 28–9 [70] (Lord Sumption JSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)) ('*Nazir*').

[48] See above nn 40–6 and accompanying text. See below nn 138–9 and accompanying text.

The focus of this article is on the availability of 'true' vicarious liability in equity, and references to 'vicarious liability' should be understood accordingly. It is to the history of vicarious liability that this article now turns.

III An Equitable Ancestry of Vicarious Liability?

In *Anderson*, Ward CJ in Eq identified a 'thread of cases illuminating an ancestry and a practice of courts administering equitable jurisdiction applying the principle of vicarious liability'.[49] Her Honour traced the Commonwealth case law back to *Brydges v Branfill* ('*Brydges*'),[50] a 19th-century case cited by majorities of both the High Court and the House of Lords as evidence that, in the words of Kiefel CJ, Keane and Edelman JJ, 'the Court of Chancery recognised vicarious liability of partners [for equitable wrongdoing] at least as early as 1842'.[51] In so doing, her Honour accepted the conclusion, embraced by those majorities, that vicarious liability has a history of application in equity.[52]

This history is important. On one view, it is a precondition to intermediate appellate courts recognising a modern power to impose vicarious liability in equity.[53] As the Court observed in *Re Diplock; Diplock v Wintle* ('*Re Diplock*'), 'if the claim in equity exists it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity

[49] *Anderson Trial* (n 1) 326 [1770].

[50] *Brydges* (n 17) 1181–2 (Shadwell V-C), cited in ibid 320 [1744].

[51] *Ancient Order* (n 12) 11 [5], citing *Brydges* (n 17); *Dubai Aluminium* (n 17) 395 [104] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), citing *Brydges* (n 17). See also James Edelman, '*Marsh v Keating* (1834)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006) 97, 121–2, citing *Brydges* (n 17) 1177 (W Follett) (during argument), 1182 (Shadwell V-C).

[52] *Anderson Trial* (n 1) 320–7 [1744]–[1773]; *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman J); *Dubai Aluminium* (n 17) 395 [104] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [88]).

[53] See *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 307 [24]–[25] (Spigelman CJ) ('*Harris*'), quoting *Chapman v Chapman* [1954] AC 429, 444 (Lord Simonds LC) ('*Chapman*'). See also *Harris* (n 53) 419 [457] (Heydon JA), quoting *Re Diplock; Diplock v Wintle* [1948] 1 Ch 465, 481–2 (Lord Greene MR, Wrottesley and Evershed LJJ) ('*Re Diplock*'). See generally Anthony Mason, 'Fusion' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 11, 12–13; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 65–6 [2-380]–[2-395].

jurisdiction'.[54] Even if that precondition is not absolute (as this Part will contend), historical applications of vicarious liability in equity should still provide comfort that its revival would be neither 'insouciant [n]or unprincipled'.[55]

Accordingly, this Part assesses the strength of this asserted historical ancestry. It contends that vicarious liability is neither the sole nor the most plausible explanation for *Brydges* and analogous cases. It thus suggests that the development of vicarious liability in equity should be viewed not as the revival of a 'muted'[56] or 'withered'[57] historical jurisdiction but rather as the creation of a new doctrine that must be consciously imported from the common law. This contention does not deny that such a step can and should be taken; rather, it recognises that any attempt to apply vicarious liability in equity must squarely confront its novelty and justify it accordingly.

This Part commences with an analysis of *Brydges* before turning to an examination of the significance of identifying an equitable heritage of vicarious liability.

A Brydges v Branfill

Warren Swain has cautioned that, in the context of vicarious liability, 'restraint is required in trying to find concrete answers to modern problems in the very old authorities'.[58] Such caution is necessary in approaching *Brydges*. After being described as 'well-known' in the 19th century,[59] the case, decided by Shadwell V-C in 1842, was rescued from a century of relative obscurity in *Dubai Aluminium* by Lord Millett, who presented it as (the sole) evidence of the existence of a historical jurisdiction of the Court of Chancery to impose

[54] *Re Diplock* (n 53) 481–2 (Lord Greene MR, Wrottesley and Evershed LJJ), quoted in *Harris* (n 53) 419 [457] (Heydon JA). See also Michael Tilbury, 'Fallacy or Furphy? Fusion in a Judicature World' (2003) 26(2) *University of New South Wales Law Journal* 357, 357–8; *Harris* (n 53) 307 [24] (Spigelman CJ), 317 [91] (Mason P).

[55] Keith Mason, 'Fusion: Fallacy, Future or Finished?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 41, 70.

[56] *Harris* (n 53) 386 [343] (Heydon JA).

[57] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191 (Mason and Wilson JJ). See also *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 568 [123] (Gageler J).

[58] Warren Swain, 'A Historical Examination of Vicarious Liability: A "Veritable Upas Tree"?' (2019) 78(3) *Cambridge Law Journal* 640, 642.

[59] *Howard v Earl of Shrewsbury* (1867) LR 3 Eq 218, 227–8 (Lord Romilly MR) ('*Howard*').

vicarious liability.[60] In *Ancient Order*, Kiefel CJ, Keane and Edelman JJ approved this interpretation, citing *Brydges* as an example of the equitable 'vicarious liability of partners'.[61] This section contends that there are alternative, and arguably more plausible, interpretations of the case.

Brydges concerned an elaborate fraud by a tenant for life of settled lands.[62] That tenant obtained an Act of Parliament to sell the land and invest the proceeds.[63] However, after the estates were sold and the money was paid into court, the tenant fraudulently misrepresented the sum necessary for the investment and obtained a court order under which an excess sum was paid out to an associate, Quillinan.[64] A firm of solicitors acted for the tenant at all stages.[65] One partner, Brooks, knew of the fraud, but the other two partners, Grane and Cooper, were entirely unaware of any irregularity.[66] The Vice-Chancellor held Grane and Cooper jointly and severally liable with Brooks to reimburse the trust estate.[67]

The basis of the partners' respective liabilities is unclear. On its face, Brooks' liability appears to be in knowing receipt, since it was he who received the money taken out of court under a power of attorney from Quillinan.[68] So understood, the other partners' liability appears capable of explanation on conventional grounds. Since the 18th century, partners have been liable for the misappropriation of property entrusted to their firm.[69] This principle is now codified in the *Partnership Act 1890* (UK) s 11 ('*Partnership Act*').[70] As Lord Millett

[60] *Dubai Aluminium* (n 17) 395 [104] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

[61] *Ancient Order* (n 12) 11 [5], citing ibid, *Brydges* (n 17). See also Edelman, '*Marsh v Keating* (1834)' (n 51) 121–2, citing *Brydges* (n 17) 1177, 1182 (Shadwell V-C).

[62] See *Brydges* (n 17) 1178–82 (Shadwell V-C).

[63] Ibid 1178 (Shadwell V-C).

[64] Ibid 1178–82 (Shadwell V-C).

[65] Ibid 1178 (Shadwell V-C).

[66] Ibid 1181–2 (Shadwell V-C).

[67] Ibid 1182 (Shadwell V-C).

[68] See ibid 1181.

[69] See, eg, *Willet v Chambers* (1778) 2 Cowp 814; 98 ER 1377, 1378–9 (Lord Mansfield). See also *Sadler v Lee* (1843) 6 Beav 324; 49 ER 850, 853–4 (Lord Langdale MR); *St Aubyn v Smart* (1868) LR 3 Ch App 646, 649–50 (Page Wood LJ, Selwyn LJ agreeing at 650–1) ('*St Aubyn*'). See generally Roderick I'Anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 20th ed, 2017) 481–2 [12-104].

[70] Banks (n 69) 482–3 [12-105]–[12-106], citing *Partnership Act 1890* (UK) s 11. See generally *Partnership Act 1892* (NSW) s 11(1).

noted in *Dubai Aluminium*, this liability is not vicarious.[71] Rather, it is an '*original* liability of the firm to account for receipts'.[72] Thus, if the money was received by Brooks as an agent for the firm, then receipt by him was also receipt by Grane and Cooper and they would be directly liable for its subsequent misapplication.

But, according to Lord Millett, 'this was not the ground on which the innocent partners were held liable'.[73] Lord Millett instead interpreted the case as follows:

> In dealing with the money Brooks was acting in a purely ministerial capacity under a power of attorney from the tenant for life, and he duly accounted to his principal. The money was not received in any sense by the firm or by Brooks on its behalf; the power of attorney was given to Brooks alone and not jointly with his partners, as in *St Aubyn v Smart* (1868) LR 3 Ch App 646. He was guilty of dishonest assistance, not of knowing or even dishonest receipt, and the only basis on which his partners could have been liable was that they were vicariously liable for his wrongdoing.[74]

Respectfully, this interpretation reflects how *Brydges* might be decided today.[75] Yet there are two reasons to doubt whether it reflects how the case was actually decided.

First, even if a receipt-based analysis cannot justify the liability imposed on the partners, this was exactly how the case was understood in subsequent decades. In *Marsh v Joseph*, the Court of Appeal attributed the partners' liability to the fact that '*they* received the money'.[76] In *Phosphate Sewage Company v Hartmont*, Malins V-C cited *Brydges* alongside three other cases decided using

[71] *Dubai Aluminium* (n 17) 396–7 [110] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

[72] Ibid 396 [110] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]) (emphasis added). See also Banks (n 69) 482–3 [12-105]–[12-106]; Atiyah (n 28) 117.

[73] *Dubai Aluminium* (n 17) 395 [105] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

[74] Ibid.

[75] Another example of an apparent acceptance of a 'ministerial receipt' defence can be found in *Staniar v Evans* (1886) 34 Ch D 470, 478 (North J).

[76] [1897] 1 Ch 213, 249 (Lord Russell CJ for the Court) (emphasis added) ('*Marsh*'), citing *Brydges* (n 17).

agency and receipt analysis,[77] including *St Aubyn v Smart* ('*St Aubyn*')[78] which Lord Millett sought to distinguish from *Brydges* in *Dubai Aluminium*.[79] Moreover, across contemporary (and modern) editions of Lord Nathaniel Lindley's leading text on the law of partnerships, *Brydges* has consistently been given as an example of the type of liability that was eventually codified into the *Partnership Act* s 11.[80] In Lord Lindley's words, in *Brydges* 'receipt by a partner was treated as receipt by the firm'.[81] Finally, one contemporaneous case shows that Shadwell V-C's description of the innocent partners' 'moral characters' as having been 'unaffected' by the fraud is consistent with Brooks' wrongful conduct being attributed to them through agency:[82] in *Doe v Martin*, a principal's behaviour was described as 'fair and honourable' despite his agent's fraud being imputed to him.[83] The Vice-Chancellor's conclusion, which he described as arising from 'general principles with respect to liability', is thus difficult to characterise as an intentional development of some form of vicarious liability as opposed to the application — potentially erroneously — of accepted principles of attribution.[84] Indeed, no other case applying this kind of equitable vicarious liability is apparent. Although 'innocent' partners were held liable for the equitable wrongdoing of co-partners in several contemporaneous cases, each is explicable by ordinary principles of agency.[85]

The second reason to doubt Lord Millett's interpretation is that an alternative explanation for *Brydges*, apparently uncontemplated by his Lordship, is

[77] (1877) 5 Ch D 394, 443 ('*Phosphate Sewage Company*'), citing *Brydges* (n 17), *Blair v Bromley* (1846) 5 Hare 542; 67 ER 1026 ('*Blair*'), *St Aubyn* (n 69), *Plumer v Gregory* (1874) LR 18 Eq 621 ('*Plumer*'). See also *Blair* (n 77) 1031–3 (Wigram V-C); *St Aubyn* (n 69) 649–50 (Page Wood LJ), 650 (Selwyn LJ); *Plumer* (n 77) 629, 630–1 (Malins V-C).

[78] *St Aubyn* (n 69), cited in *Phosphate Sewage Company* (n 77) 443.

[79] *Dubai Aluminium* (n 17) 395 [104]–[105] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), citing *Brydges* (n 17), *St Aubyn* (n 69).

[80] See, eg, *Brydges* (n 17), cited in Lord Lindley et al, *A Treatise on the Law of Partnership* (Sweet and Maxwell, 8th ed, 1912) 194–6, Sir Nathaniel Lindley and Walter B Lindley, *A Treatise on the Law of Partnership*, ed Walter B Lindley (Sweet and Maxwell, 6th ed, 1893) 167, 209, Banks (n 69) 484 [12-109]. See also at 483–4 [12-107]–[12-108].

[81] Banks (n 69) 484 [12-110], discussing *Brydges* (n 17).

[82] See *Brydges* (n 17) 1182.

[83] (1790) 4 Term R 39; 100 ER 882, 897 ('*Doe*'). See also *Brydges* (n 17) 1178 (Bethell) (during argument), citing *Doe* (n 83).

[84] *Brydges* (n 17) 1181 (Shadwell V-C).

[85] See, eg, *St Aubyn* (n 69) 649–50 (Page Wood LJ), 650 (Selwyn LJ); *Blair* (n 77) 1032–3 (Wigram V-C); *Plumer* (n 77) 629, 632–3 (Malins V-C); *Stone v Marsh* (1827) 6 B & C 551; 108 ER 554, 558–60 (Lord Tenterden CJ for the Court).

available: namely, that, in imposing liability on the innocent partners, the Court was exercising its inherent jurisdiction to discipline solicitors as officers of the court. By 1842, it was well accepted that solicitors, in dealing with funds held in court, were responsible for 'bringing before the Court all matters which were essential for the Court to know, in order that the Court might deal properly with the fund'.[86] Where a solicitor breached that duty, they were liable to 'make good the loss' to the fund flowing from the breach.[87] This liability was founded on the status of solicitors as officers of the court, and the court could make a summary order without commencing separate proceedings.[88]

Notably, this jurisdiction could extend beyond the solicitor who acted personally in the matter to solicitors whose names were 'upon the record'.[89] In *Re Dangar's Trusts*, decided in 1889, legacies bequeathed to two beneficiaries, an infant and one Mitchell, were paid into court.[90] Later, a petition was presented to the Court to authorise payment of dividends from both legacies to Mitchell, in breach of trust.[91] The petition was organised by Mitchell's next friend, himself a solicitor, but the solicitor on the record for the petitioners was another solicitor, Nelson.[92] The terms of the trust were misstated in affidavits presented to the Court by the next friend, and the payments in breach of trust were authorised.[93] Nelson attempted to resist liability on the basis that he had merely lent his name to the other solicitor and had not, himself, reviewed the affidavits.[94] He was unsuccessful: by placing his name on the record, he 'took upon himself a duty as an officer of the Court; and he [had to] be held

[86] *Re Dangar's Trusts* (1889) 41 Ch D 178, 198 (Stirling J); *Ezart v Lister* (1842) 5 Beav 585; 49 ER 705, cited in *Re Dangar's Trusts* (n 86) 187–8 (Stirling J). See also *Todd v Studholme* (1857) 3 Kay & J 324; 69 ER 1132, 1136, 1138 (Page Wood V-C); *Dixon v Wilkinson* (1859) 4 De G & J 508; 45 ER 198, 202–3 (Knight Bruce LJ), 203 (Turner LJ); Rupert M Jackson and John L Powell (eds), *Jackson & Powell on Professional Negligence* (Sweet & Maxwell, 3rd ed, 1992) 326 [4-29]; Ian E Davidson, 'The Equitable Remedy of Compensation' (1982) 13(3) *Melbourne University Law Review* 349, 360.

[87] *Marsh* (n 76) 245 (Lord Russell CJ for the Court) (Court of Appeal).

[88] *Re Dangar's Trusts* (n 86) 196–8 (Stirling J); *Marsh* (n 76) 227–8 (Kekewich J) (High Court), 245 (Lord Russell CJ for the Court) (Court of Appeal); *McIlraith v Ilkin* [2007] NSWSC 911, [28] (Brereton J).

[89] *Simmons v Rose; Re Ward* (1862) 31 Beav 1; 54 ER 1037, 1041 (Romilly MR) ('*Simmons*').

[90] *Re Dangar's Trusts* (n 86) 184–5 (Stirling J).

[91] Ibid 184 (Stirling J).

[92] Ibid 184–5, 197–8 (Stirling J).

[93] Ibid.

[94] Ibid 197–8 (Stirling J).

responsible for the discharge of his duty, that of bringing before the court all matters which were essential for the Court to know, in order that the Court might deal properly with the fund'.[95]

There is a strong argument that this jurisdiction was the true basis of the decision in *Brydges*. Like in *Re Dangar's Trusts*, the entire firm, and not just Brooks, were the solicitors on record.[96] Moreover, as Shadwell V-C emphasised, 'all' the documentation by which the Court was deceived 'emanated from the office of Brooks, Grane & Cooper'[97] and was 'carried in before [the Court] by the partnership' as a whole.[98] It was this involvement in the 'false representation' made to the Court that appeared decisive to the partners' liability.[99] First, Shadwell V-C did not connect their liability to Brooks' receipt of property.[100] By contrast, the express 'ground' for imposing liability was that the Court had been 'deceived by false representation', violating its 'bounden duty' to ensure 'the statements upon which it acts' are 'strictly true'.[101] Moreover, after emphasising the need to protect the 'vast quantity of property confided to the care of the Court', Shadwell V-C justified the partners' liability as follows:

> Upon general principles with respect to liability, I cannot distinguish Mr Cooper or Mr Grane from Mr Brooks. They were all of them solicitors and officers of the Court; and the Court cannot regard any division of labour as among themselves, but must look upon the act of the partnership towards the Court as the act of all and every of them. The safety of the public requires this.[102]

The Vice-Chancellor's focus was thus on the partners' status as 'officers of the Court', on their actions 'towards the Court' and on the court's need to protect the private property that it holds.[103] These considerations reflect the language used in other cases to justify the court's disciplinary jurisdiction.[104] The very

[95] Ibid. See also *Simmons* (n 89) 1041 (Romilly MR). Cf *Marsh* (n 76) 244–7 (Lord Russell CJ for the Court) (Court of Appeal).

[96] *Brydges* (n 17) 1178, 1181 (Shadwell V-C); *Re Dangar's Trusts* (n 86) 197–8 (Stirling J).

[97] *Brydges* (n 17) 1181.

[98] Ibid 1178.

[99] See ibid.

[100] See ibid 1181–2.

[101] Ibid 1181 (Shadwell V-C).

[102] Ibid.

[103] See ibid.

[104] *Simmons* (n 89) 1039–40 (Romilly MR); *Marsh* (n 76) 230 (Kekewich J) (High Court); *Re Dangar's Trusts* (n 86) 197–8 (Stirling J).

text of Shadwell V-C's decision thus points away from the interpretation proposed by Lord Millett.[105]

There are thus two alternative — and arguably more plausible — interpretations of *Brydges* to that given by Lord Millett and accepted by the High Court. Each draws greater support from the language of the judgment or its subsequent treatment. Moreover, each avoids the need to identify the implicit creation of an otherwise anomalous power to impose vicarious liability. If either interpretation is accepted, then *Brydges* cannot evince a historical jurisdiction to impose vicarious liability.

B *Fusion*

On one view, this analysis should preclude the recognition of a modern power to impose vicarious liability in equity. The dicta of the Court in *Re Diplock*, quoted above, that equitable claims must have an 'ancestry' in the precedents of the Chancery courts, were approved by Heydon JA in *Harris v Digital Pulse Pty Ltd* ('*Harris*')[106] in which the New South Wales Court of Appeal, by majority, refused to recognise an equitable power to award exemplary damages, a common law remedy, for breach of fiduciary duty.[107]

However, this view should not be accepted. It is no longer contended that the administrative fusion of the courts of equity and common law, effectuated by the Judicature reforms, involved a fusion of substantive law.[108] Yet, equally, it is now well-recognised that those Acts did not prohibit the continuation of the 'history of integration and mutual learning' characteristic of both branches

[105] See *Howard* (n 59) 227–8, 230 (Lord Romilly MR), discussing *Brydges* (n 17); *Marsh* (n 76) 249 (Lord Russell CJ for the Court) (Court of Appeal), citing *Brydges* (n 17); *Hogaboom v Receiver-General of Canada; Re Central Bank of Canada* (1897) 28 SCR 192, 196–7 (SH Blake QC and WR Smythe) (during argument) ('*Hogaboom*'), citing *Brydges* (n 17). See also *Hogaboom* (n 105) 197 (Newcombe QC and FE Hodgins) (during argument), citing *Brydges* (n 17) 1181 (Shadwell V-C).

[106] *Harris* (n 53) 419 [457] (Heydon JA), quoting *Re Diplock* (n 53) 481–2 (Lord Greene MR, Wrottesley and Evershed LJJ). See also *Harris* (n 53) 307 [24]–[26] (Spigelman CJ).

[107] *Harris* (n 53) 422 [470], 424 [478] (Heydon JA, Spigelman CJ agreeing at 303 [3], 313 [16], Mason P dissenting at 340–1 [215]–[228]).

[108] See Heydon, Leeming and Turner (n 53) 64–5 [2-375]. See generally *Supreme Court of Judicature Act 1873* (Imp) 36 & 37 Vict, c 66, s 3; *Supreme Court of Judicature Act 1875* (Imp) 38 & 39 Vict, c 77, s 1.

of law.[109] It is open to courts applying equitable jurisdiction both to fashion new doctrines and to 'adopt and adapt' concepts drawn from the common law provided that such development occurs incrementally and on a principled basis.[110] This kind of reasoning — termed 'fusion by analogy' by James Edelman — was indeed implicitly accepted in *Harris*; each judge was willing to consider whether an equitable power to award exemplary damages should be developed by analogy with tort.[111] As such, although the failure of 'the great equity judges of the past'[112] to develop a doctrine might suggest that its development is unnecessary or 'inappropriate', it cannot be determinative.[113] If the particular development can be justified, 'then the opposing weight of history loses its force'.[114]

As such, to conclude that *Brydges* does not evince a historical power to impose vicarious liability in equity is not to deny the capacity of modern courts to fashion that power now. Instead, it demonstrates that its application cannot be justified as the mere revival of a 'muted jurisdiction'.[115] The contention of the remainder of this article is that this development should nevertheless be encouraged as a matter of both practical necessity and doctrinal coherence.

[109] See Simone Degeling and James Edelman, 'Introduction' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 1, 2. See also Lionel Smith, 'Fusion and Tradition' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 19, 38.

[110] See *Harris* (n 53) 326 [141] (Mason P). Note, however, that Mason P was merely summarising arguments that he himself did not accept, notwithstanding Spigelman CJ and Heydon JA's approaches: at 321 [109] (Mason P), 305 [11]–[13] (Spigelman CJ), 419 [457] (Heydon JA). See also *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, 463 (Young J); *Giller v Procopets* (2008) 24 VR 1, 32 [146] (Ashley JA) ('*Giller*'); Tilbury (n 54) 369, 376; Anthony Mason, 'Fusion' (n 53) 14; Andrew Burrows, 'Remedial Coherence and Punitive Damages in Equity' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 381, 396, 402.

[111] James Edelman, 'A "Fusion Fallacy" Fallacy?' (2003) 119 (July) *Law Quarterly Review* 375, 377. See also at 377–9, citing *Harris* (n 53) 303 [2], 306 [18], 308 [29], 310–11 [49]–[52] (Spigelman CJ), 324–9 [131]–[155], 335–9 [191]–[213] (Mason P), 391–2 [353]–[355], 402–3 [391], 405 [401], 413 [435] (Heydon JA). See also Burrows (n 110) 383–402.

[112] *Harris* (n 53) 307 [23] (Spigelman CJ).

[113] See ibid 307 [24] (Spigelman CJ), quoting *Chapman* (n 53) 444 (Lord Simonds LC).

[114] David A Hughes, 'A Classification of Fusion after *Harris v Digital Pulse*' (2006) 29(2) *University of New South Wales Law Journal* 38, 46. See also *A-G (UK) v Blake* [2001] 1 AC 268, 280 (Lord Nicholls); *Giller* (n 110) 32 [146] (Ashley JA).

[115] See *Harris* (n 53) 386 [343] (Heydon JA).

IV A Role for Vicarious Liability in Equity

Vicarious liability is a doctrine of significant practical utility: by multiplying the possible defendants to a claim, it increases the likelihood that one will have the pockets to satisfy any liability.[116] Yet despite its frequent application in the law of tort, vicarious liability has rarely been applied to equitable wrongdoing, and a claimant is yet to successfully establish a claim of this kind in Australia.[117] This Part thus seeks to identify a space, and hence a need, for vicarious liability: are there victims of equitable wrongdoing committed by an employee within the course of their employment who, absent vicarious liability, would be left without a remedy against the employer?

To answer this question, this Part makes two arguments. First, it identifies equity's existing approach to determining liability and notes its dependence, in this context, on the attribution of knowledge or conduct to the employer through principles of agency. It then turns to an in-depth examination of the rules of attribution themselves, isolating the areas in which vicarious liability, and vicarious liability alone, would hold the employer liable for the wrongdoing of an employee. It concludes that the existing bases of equitable liability, applied through rules of attribution, fail to comprehensively hold employers responsible for 'wrongful' conduct committed by employees in the setting of their employment. It thus suggests that there are spaces in which vicarious liability would operate as the sole basis for assigning liability to an employer.

A *Establishing Personal Liability in Equity: The Role of Attribution*

The most obvious reason why vicarious liability is rarely invoked is that it is simply unnecessary: existing doctrines can be used to identify a direct liability in the employer for the misconduct of its employees.[118] To demonstrate their breadth, it is convenient to address doctrines of accessorial and primary liability in turn.

First, equity has developed a broad network of rules of accessorial liability by which a third party (such as an employer) can be held liable for its involvement in wrongdoing committed by a primary wrongdoer (such as an

[116] Morgan (n 36) 617, citing Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 7th ed, 2006) 230.

[117] See above nn 4–17 and accompanying text.

[118] McDonald and Rolph (n 4) 252.

employee).[119] This liability is commonly associated with *Barnes v Addy*, in which Lord Selborne LC crystallised the requirements of 'knowing receipt' and 'knowing assistance'.[120] However, it is not so limited:[121] an employer may also be liable if it dishonestly procures or induces a breach of trust, acts as a de facto trustee without authority or is the wrongdoer's alter ego.[122] Although originally formulated in the context of trusts, these liabilities can also arise from participation in a breach of fiduciary duty or a breach of confidence.[123]

The capacity of accessorial liability to hold an employer personally liable for the conduct of an employee is exemplified by *Australasian Annuities Pty Ltd (in liq) (recs and mgrs apptd) v Rowley Super Fund Pty Ltd*.[124] Rowley, the sole director of Australasian Annuities ('AA'), authorised the payment of AA's funds to a corporate super fund, Rowley Super Fund ('RSF'), that he controlled.[125] This was a breach by Rowley of his fiduciary duties to AA.[126] When AA failed,

[119] JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 261 [13-35]. See generally *Lifeplan Trial* (n 6) 456 [374] (Besanko J); *Oliver Hume* (n 10) 79 [110] (Dowsett J).

[120] (1874) LR 9 Ch App 244, 251–2, cited in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140–1 [111]–[112] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah Constructions*').

[121] *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 625 [67] (Leeming JA, Barrett JA agreeing at 612 [1], 613 [5], Gleeson JA agreeing at 613 [6], [9]–[10]) ('*Hasler*'); Heydon and Leeming (n 119) 258–60 [13-34].

[122] Heydon and Leeming (n 119) 261 [13-35], citing *Farah Constructions* (n 120) 159 [161], 160 [163] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), *Hasler* (n 121) 625 [69], 627 [77], 632 [106] (Leeming JA, Barrett JA agreeing at 612 [1], 613 [5], Gleeson JA agreeing at 613 [6]–[9], [10]), *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 357 [243], 415 [556] (Finn, Stone and Perram JJ) ('*Grimaldi*'). See also Jamie Glister, 'Equitable Liability of Corporate Accessories' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2017) 275, 277–82.

[123] See, eg, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 396–7 (Gibbs J) ('*Consul Development*'); *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62, 94 [154] (Leeming JA, Bell P agreeing at 67 [1], Brereton JA agreeing at 106 [214]); *City of Sydney v Streetscape Projects (Australia) Pty Ltd* (2011) 94 IPR 35, 144–5 [484]–[491] (Einstein J); *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196, 228 [179] (Barrett JA, Meagher JA agreeing at 198 [1], Ward JA agreeing at 239 [239]); *Vestergaard Frandsen* (n 20) 1563 [26] (Lord Neuberger PSC, Lords Clarke, Sumption, Reed and Carnwath JJSC agreeing).

[124] (2015) 318 ALR 302 ('*Australasian Annuities*').

[125] Ibid 304–5 [1], 305 [3], [7]–[8] (Warren CJ), 334–5 [136]–[143] (Neave JA), 358–64 [261]–[281] (Garde AJA). But see at 328–31 [108]–[118] (Warren CJ).

[126] Ibid 315–18 [52]–[65] (Warren CJ), 373 [316] (Garde AJA, Neave JA agreeing at 333 [134]).

its receivers sought to recover the funds from RSF.[127] RSF was held liable for knowing receipt on the basis that Rowley's knowledge could be imputed to RSF.[128] Accordingly, RSF (the employer) was held directly liable, as a knowing recipient, for its own personal wrong: namely, its involvement in its employee's wrongdoing.[129]

Yet, often, recourse even to accessorial liability is unnecessary: the employer will itself owe a *primary* duty — either as a trustee, fiduciary or confidant — that would be breached by the very conduct committed by the employee.[130] As such, if the employee's conduct can be attributed to the employer, then that conduct may be treated as a breach of the employer's personal obligation, further limiting the need for vicarious liability.[131]

A primary duty may arise from a pre-existing relationship between the claimant and the employer: for example, where the employer itself is the trustee of property misapplied by an employee.[132] Yet, in the context of a breach of confidence, a pre-existing relationship is not necessary.[133] An employer will, by the conduct of an employee alone, assume a primary obligation of confidence if it is treated as the confidant of confidential information received by an employee.[134] For example, if an employee, such as a journalist, receives confidential information in circumstances that impart an obligation of confidence, then knowledge of its confidentiality might be imputed to the employer, enlivening a primary obligation to protect against its misuse.[135] If the journalist subsequently misuses the information, their actions, if attributable, will have both

[127] Ibid 304–5 [1]–[2], 307 [21] (Warren CJ).

[128] Ibid 373 [316] (Garde AJA, Neave JA agreeing at 334 [136]).

[129] Ibid. See also at 332 [124] (Neave JA), 372 [310] (Garde AJA).

[130] See McDonald and Rolph (n 4) 252.

[131] Ibid.

[132] Pauline Ridge, 'Equitable Accessorial Liability: Moving Beyond *Barnes v Addy*' (2014) 8(1) *Journal of Equity* 28, 28–9. See generally *Blyth v Fladgate* [1891] 1 Ch 337 ('*Blyth*').

[133] See Paul S Davies, *Accessory Liability* (Hart Publishing, 2015) 102. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224 [34] (Gleeson CJ), 271–2 [169]–[170] (Kirby J), 314–15 [295]–[296] (Callinan J) ('*Lenah Game Meats*').

[134] See McDonald and Rolph (n 4) 252.

[135] Ibid. See, eg, *G v Day* [1982] 1 NSWLR 24, 34–6 (Yeldham J). See also Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) 287 [7.105], citing *A-G (UK) v Observer Ltd* [1990] 1 AC 109, 260 (Lord Keith, Lord Brightman agreeing at 265, Lord Jauncey agreeing at 293), 268, 272 (Lord Griffiths, Lord Brightman agreeing at 265), 281 (Lord Goff, Lord Brightman agreeing at 265); *Lenah Game Meats* (n 133) 225 [39] (Gleeson CJ), 271–2 [169]–[170] (Kirby J), 314–16 [295]–[298] (Callinan J).

created and breached an equitable obligation in the name of their employer, avoiding any need to rely on vicarious liability.[136]

Hence, on existing principles, an employer may already assume personal liability from the wrongful actions of its employees. As noted in Part II, this liability is conceptually distinct from vicarious liability. Vicarious liability is indirect.[137] Under the orthodox 'servant's tort' theory, neither the conduct nor the knowledge of the employee is imputed to the employer; rather, the employer merely answers for the employee's personal liability.[138] By contrast, the kinds of equitable liability identified above are forms of direct liability based on a doctrine of 'vicarious conduct'; they recognise a personal liability in the employer arising from conduct or knowledge of its employees that is identified, through the application of rules of agency, as the conduct or knowledge of the employer itself.[139]

This liability is far-reaching. However, its capacity to cover the field, and thus render vicarious liability redundant, is far from absolute. As noted above, cases of vicarious liability are typically brought against corporate employers.[140] In this context, both primary and accessorial equitable liability depend on the imputation of the conduct or knowledge of an employee or employees to the corporate employer. Such attribution is necessary, either to identify the existence or breach of a primary equitable obligation, such as an obligation of confidence,[141] owed by the company or to attribute the knowledge and acts of assistance, inducement or receipt that support the company's accessorial liability to the

[136] McDonald and Rolph (n 4) 252.

[137] See above Part II.

[138] Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* 515, 517; Robert Stevens, 'Vicarious Liability or Vicarious Action' (2007) 123 (January) *Law Quarterly Review* 30, 30, 32. See also *CCIG Investments* (n 39) 490–1 [49]–[52] (Edelman and Steward JJ); *Nazir* (n 47) 65 [186], 71–2 [205] (Lords Toulson and Hodge JJSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)). See generally Glanville Williams, 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) 72 (October) *Law Quarterly Review* 522.

[139] See Williams (n 138) 544, quoted in *CCIG Investments* (n 39) 491 [52] (Edelman and Steward JJ). See also at 490–1 [49]–[51] (Edelman and Steward JJ); Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) 374–5, quoting *Moulin Global Eyecare Trading Ltd (in liq) v Commissioner of Inland Revenue (Hong Kong)* (2014) 17 HKCFAR 218, 248–9 [61] (Lord Walker NPJ, Ma CJ agreeing at 299 [1], Ribeiro PJ agreeing at 230 [2], Bokhary NPJ agreeing at 238 [33]) ('*Moulin Global Eyecare*').

[140] See above n 36 and accompanying text.

[141] See, eg, *Coulthard* (n 10) 535–6 (King CJ). See generally *Blyth* (n 132).

company.[142] The limits of equity's existing approach to liability thus correlate to the limits of attribution. As the following section will show, the conduct caught within these limits is, in important respects, narrower than the conduct captured by vicarious liability, leaving fine, but important, categories of conduct for which equity presently provides no relief.

B *The Rules of Attribution*

Although the principles overlap, the attribution of knowledge and acts each occurs according to distinct rules such that one may be attributed without the other.[143] Each will be considered in turn.

1 *Attributing Conduct*

Attribution of acts in the context of equitable wrongdoing occurs according to the ordinary common law rules of agency.[144] That is, the conduct of an employee acting within the limits of their actual or apparent authority is attributed to the employer.[145]

It is the gap between the limits of an employee's authority and the scope of their employment that creates the first space for vicarious liability.

As Peter Watts and Francis Reynolds observe, the phrase 'scope of authority' is often interchanged with 'course of employment', with each identifying the

[142] Rachel Leow, 'Equity's Attribution Rules' (2021) 15(1) *Journal of Equity* 35, 48, 50–4 ('Attribution Rules'); *Grimaldi* (n 122) 357 [243]–[246] (Finn, Stone and Perram JJ). See, eg, *Nazir* (n 47) 38–9 [87]–[88] (Lord Sumption JSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)), 71–2 [203]–[207] (Lords Toulson and Hodge JJSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)); *Australasian Annuities* (n 124) 325–31 [97]–[118] (Warren CJ), 358–64 [261]–[281] (Garde AJA, Neave JA agreeing at 334 [136]); *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch), [194]–[199] (Morgan J); *Bilta* (n 21) [222] (Snowden J).

[143] *Moulin Global Eyecare* (n 139) 266 [99] (Lord Walker NPJ, Ma CJ agreeing at 299 [1], Ribeiro PJ agreeing at 230 [2], Bokhary NPJ agreeing at 238 [33]); Leow, 'Attribution Rules' (n 142) 46–56.

[144] Leow, 'Attribution Rules' (n 142) 35, 48–9, 52–4, 62. See generally *Nazir* (n 47) 71 [205] (Lords Touslon and Hodge JJSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)).

[145] Leow, 'Attribution Rules' (n 142) 49, 54. See also Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st ed, 2018) 528–9 [8-199]–[8-200] ('*Bowstead and Reynolds*'); *Group Seven Trial* (n 21) [532]–[549] (Morgan J); Dal Pont (n 28) 528 [22.1].

range of acts for which an employer should be responsible.[146] But the nexus between employment and wrongdoing necessary to give rise to vicarious liability — captured in the 'course of employment' test — is wider than an employee's actual or apparent authority.[147] Thus, '[f]rom an early date', courts have recognised that an employee acting beyond their authority may still be acting within the course of their employment, including where their conduct is prohibited by the employer or done for the deliberate benefit of the employee to the prejudice of the employer.[148] Indeed, where deliberate criminal conduct is in issue, the High Court has expanded the traditional Salmond test, which itself embraces 'unauthorised mode[s]' of committing 'authorised acts',[149] to impose vicarious liability where the employer provided the occasion, and not merely the opportunity, for the commission of the tort.[150]

This gap has proven to be significant in two categories of cases where vicarious liability has emerged as the only available remedy.

The first is where the employee's wrongful act is of a kind that they are employed to perform but, due to either an 'excess of zeal' or a fraudulent incentive, is conducted outside their authority (whether or not for their own benefit).[151]

[146] See Watts and Reynolds, *Bowstead and Reynolds* (n 145) 506 [8-176]. See, eg, Paul L Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (Sweet & Maxwell, 10th ed, 2016) 178 [7-33].

[147] *Bugge* (n 4) 116 (Isaacs J), 132 (Higgins J); *Dubai Aluminium* (n 17) 377 [21]–[23] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), 399–400 [122] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]); Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency: First Supplement to the Twenty-First Edition* (Sweet & Maxwell, 2018) 43 [8-180].

[148] Davies and Worthington (n 146) 175 [7-31]. See also *CCIG Investments* (n 39) 483–4 [16] (Kiefel CJ, Gageler, Gordon and Jagot JJ), 503–4 [93] (Gleeson J); *Nazir* (n 47) 28 [70] (Lord Sumption JSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)); Rolph et al (n 28) 906–7 [26.58]–[26.59].

[149] *Prince Alfred College* (n 28) 149 [42] (French CJ, Kiefel, Bell, Keane and Nettle JJ), citing John W Salmond, *The Law of Torts: A Treatise of the English Law of Liability for Civil Injuries* (Steven and Haynes, 1907) 83–4.

[150] *Prince Alfred College* (n 28) 159–60 [80]–[81] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *CCIG Investments* (n 39) 485 [21]–[22], 487 [32]–[33] (Kiefel CJ, Gageler, Gordon and Jagot JJ), 504–5 [95] (Gleeson J). The expanded Salmond test has been applied both in response to institutional sexual assault and elsewhere: see, eg, *Johnston v New South Wales* [2019] NSWSC 1206, [74]–[76] (Harrison AsJ); *HD Projects Pty Ltd v SafeWork NSW* [2022] NSWCCA 212, [50] (Macfarlan JA, Hamill J agreeing at [70], Cavanagh J agreeing at [71]).

[151] *Dubai Aluminium* (n 17) 378 [30] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). See also at 395 [105] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). Cf *Lloyd v Grace,*

An example is *Dubai Aluminium*, where a law firm was vicariously liable for a partner drafting contracts to facilitate a fraud.[152] Another is the English case of *Group Seven Ltd v Nasir* ('*Group Seven*').[153]

In *Group Seven*, it was argued that a bank, LLB Verwaltung ('LLB'), was responsible for the dishonest assistance provided by an employed 'relationship manager', Louanjli, in the laundering of proceeds of fraud through the accounts of a firm of solicitors, Notable.[154] Louanjli, with knowledge of the fraud, had provided a misleading oral bank reference to Notable which encouraged it to accept the entitlement of one of the fraudsters to deal with certain money that Notable held in a client account.[155] Payments were then made from that account in breach of trust.[156]

Louanjli's statements to Notable were made beyond the limits of his actual (and likely apparent) authority such that they could not be attributed to LLB.[157] However, LLB was held vicariously liable.[158] The Court of Appeal emphasised that the law gives 'the concept of "ordinary course of employment" an extended scope'[159] since '[t]he risk of an employee misusing his position is one of life's unavoidable facts'.[160] In the circumstances, Louanjli's invocation of his ostensible standing within the bank, and Notable's reliance upon it, militated

Smith & Co [1912] AC 716, 730, 739 (Lord Macnaghten, Lord Atkinson agreeing at 739, Lord Shaw agreeing at 739, Earl Loreburn agreeing at 725).

152 *Dubai Aluminium* (n 17) 373 [1]–[2], 383 [49] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66]), 388 [75] (Lord Hobhouse), 401–2 [130]–[131] (Lord Millett, Lord Hutton agreeing at 386 [66]).

153 *Group Seven Appeal* (n 21).

154 Ibid 140 [2]–[4], 141–2 [8]–[9], 142 [11] (Henderson, Peter Jackson and Asplin LJJ).

155 Ibid 140 [4], 141 [6], [8], 176 [107.2], 178 [110], [113], 186 [135] (Henderson, Peter Jackson and Asplin LJJ).

156 Ibid 148 [31] (Henderson, Peter Jackson and Asplin LJJ).

157 Ibid 178 [114] (Henderson, Peter Jackson and Asplin LJJ).

158 Ibid 192 [154]–[156] (Henderson, Peter Jackson and Asplin LJJ).

159 Ibid 189 [143] (Henderson, Peter Jackson and Asplin LJJ), quoting *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677, 692 [41] (Lord Toulson JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Reed JSC agreeing) ('*Mohamud*'), quoting *Dubai Aluminium* (n 17) 377 [22] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

160 *Group Seven Appeal* (n 21) 189 [143] (Henderson, Peter Jackson and Asplin LJJ), quoting *Mohamud* (n 159) 692 [40] (Lord Toulson JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Reed JSC agreeing). See also *Cox v Ministry of Justice* [2016] AC 660, 669–70 [23] (Lord Reed JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreeing) ('*Cox*'), cited in *Group Seven Appeal* (n 21) 189 [143] (Henderson, Peter Jackson and Asplin LJJ).

in favour of vicarious liability.[161] The Supreme Court denied permission to appeal.[162]

The second category is where the employee's wrongdoing was both deliberate and criminal and thus unauthorised by the employer. Applying the dicta in *Prince Alfred College Inc v ADC* ('*Prince Alfred College*'), vicarious liability may be imposed if the wrongdoing was enabled by the 'authority, power, trust, control and the ability to achieve intimacy with the victim' afforded to the employee, such that their employment provided the occasion, and not just the opportunity, for the wrongdoing.[163] Two cases demonstrate the potential significance of this expanded scope of liability to claims for breach of confidence. In *Coulthard v South Australia* ('*Coulthard*'), an unidentified public servant leaked confidential information learnt in a round table with stakeholders.[164] The Full Court of the Supreme Court of South Australia, applying the Salmond test, held that the disclosure was outside the scope of the employee's employment such that the government was not vicariously liable.[165] However, it is possible that, applying the test in *Prince Alfred College*, a different result would be reached today: the employee, through their employment, was afforded unique control over the confidential information of the claimants, who were vulnerable to its abuse.[166] A similar issue arose in the English case *Wm Morrison Supermarkets plc v Various Claimants*.[167] Both the High Court and the Court of Appeal held that an employee's deliberate attempt to disclose the private information of nearly 100,000 of his co-workers was an unauthorised act for which his employer was nevertheless vicariously liable.[168] That finding was reversed by the Supreme Court which held that, on the facts of that case, the connection between the employee's misconduct and the acts that he was authorised to do was

[161] *Group Seven Appeal* (n 21) 191–2 [152] (Henderson, Peter Jackson and Asplin LJJ).

[162] *Group Seven Ltd v Nasir* [2020] 1 WLR 2663, 2663.

[163] *Prince Alfred College* (n 28) 159–60 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ). See also *CCIG Investments* (n 39) 487 [34] (Kiefel CJ, Gageler, Gordon and Jagot JJ), 504 [93] (Gleeson J).

[164] *Coulthard* (n 10) 533 (King CJ).

[165] See ibid 535–6 (King CJ), 537–9 (Perry J), 554 (Debelle J).

[166] See *Prince Alfred College* (n 28) 159–60 [81]–[82] (French CJ, Kiefel, Bell, Keane and Nettle JJ); ibid 533 (King CJ).

[167] *Wm Morrison Supermarkets* (n 20) 1010–11 [2]–[8] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr, Lloyd-Jones JJSC and Baroness Hale agreeing).

[168] *Various Claimants v Wm Morrison Supermarkets plc* [2019] QB 772, 777 [1]–[2], 778 [9], 832 [198]–[199] (Langstaff J) (High Court), 837 [1]–[4], 837–8 [6]–[10], 854 [79] (Etherton MR, Bean and Flaux LJJ) (Court of Appeal).

insufficient.[169] However, the possibility that vicarious liability could arise — given the right factual matrix — is, again, clear.

These circumstances, in which vicarious liability provides relief where direct liability, founded on the rules of attribution, does not, are complemented by further gaps arising from limitations on the circumstances in which an employee's *knowledge* may be imputed to an employer.

2 *Imputing Knowledge*

Issues of imputation primarily arise in two contexts: to assess whether the employer itself acquired confidential information and to establish the knowledge element under either limb of *Barnes v Addy*.[170]

It is not possible, here, to comprehensively address the relevant rules of attribution. First, despite the regularity with which these issues arise, clarity as to the proper approach remains lacking.[171] Further, rules of attribution are context-dependent and may depend on both the right being enforced and the juridical nature of the person to whom knowledge is to be imputed.[172] Accordingly, general statements of principle are fraught with difficulty.[173] Nevertheless, the following may be noted. For reasons of scope, the focus here will again remain on attribution to a corporate employer, that being the context in which vicarious liability is most commonly invoked.[174]

The modern approach to corporate attribution was established in English law by *Meridian Global Funds Management Asia Ltd v Securities Commission*.[175] Rejecting the universality of the previously supreme 'directing mind and will' approach, Lord Hoffmann identified a malleable approach focused

[169] *Wm Morrison Supermarkets* (n 20) 1022 [47], 1024 [56] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr, Lloyd-Jones JJSC and Baroness Hale).

[170] See generally *Barnes v Addy* (n 120) 251–2 (Lord Selborne LC, James LJ agreeing at 255–6, Mellish LJ agreeing at 256). See above nn 141–2 and accompanying text.

[171] Watts and Reynolds, *Bowstead and Reynolds* (n 145) 535 [8-209]; Rachel Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022) 1 ('*Corporate Attribution*').

[172] Leow, *Corporate Attribution* (n 171) 3; *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), [154] (Moore-Bick LJ).

[173] See, eg, *Anderson Appeal* (n 8) 209 [237]–[238], 213 [255]–[256] (Gleeson, Leeming and White JJA); *Nazir* (n 47) 18 [41] (Lord Mance JSC, Lord Neuberger PSC agreeing at 11 [9] (Lords Clarke and Carnwath JJSC agreeing)), 27 [67] (Lord Sumption JSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)).

[174] *Catholic Child Welfare Society* (n 36) 15 [34] (Lord Phillips, Baroness Hale, Lords Kerr, Wilson and Carnwath JJSC agreeing).

[175] [1995] 2 AC 500 ('*Meridian Global Funds*').

on the context and purpose for which attribution is needed.[176] This context-specific approach has been adopted in Australian law.[177] However, for the purposes of equitable liability, courts have generally relied on two methods of attributing knowledge.[178]

The first approach is to apply ordinary principles of agency.[179] As with the approach taken to the attribution of acts,[180] the knowledge of employees, directors or other agents will generally be imputed to the company if the employee was authorised to receive the relevant information and to communicate it to the company.[181]

A second approach is to impute to the company the state of mind of its 'directing mind and will'.[182] Labelled the 'organic' theory of attribution, this approach captures those individuals whose knowledge may be considered that of the company itself rather than that of a mere agent.[183] It applies without controversy to those directors of a company who carry out management functions

176 Ibid 511–12 (Lord Hoffmann for the Court). See also *Nazir* (n 47) 18 [41] (Lord Mance JSC, Lord Neuberger PSC agreeing at 11 [9] (Lords Clarke and Carnwath JJSC agreeing)), 27–8 [67] (Lord Sumption JSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)), 66–7 [190]–[191] (Lords Toulson and Hodge JJSC, Lord Neuberger agreeing at 10–11 [7]–[9] (Lords Clarke and Carnwath JJSC agreeing)); *Director General, Department of Education and Training (NSW) v MT* (2006) 67 NSWLR 237, 242–4 [16]–[24] (Spigelman CJ, Ipp JA agreeing at 249 [54], Hunt AJA agreeing at 249 [55]) ('*MT*').

177 *MT* (n 176) 242–4 [16]–[24] (Spigelman CJ, Ipp JA agreeing at 249 [54], Hunt AJA agreeing at 249 [55]). See also *Anderson Appeal* (n 8), in which their Honours canvassed a raft of authorities demonstrating the Australian approach: at 208 [234] (Gleeson, Leeming and White JJA).

178 Dietrich and Ridge (n 139) 379; Leow, *Corporate Attribution* (n 171) 151; RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 1110–11 [16.190]. See also *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 701 (Hoffmann LJ) ('*El Ajou*').

179 Dietrich and Ridge (n 139) 379; Leow, *Corporate Attribution* (n 171) 151; Austin and Ramsay (n 178) 1110–11 [16.190].

180 See above nn 144–5 and accompanying text.

181 See Austin and Ramsay (n 178) 1111–12 [16.210]. See generally Dal Pont (n 28) 556–7 [22.49]–[22.50]. In the context of, at least, knowing assistance, it is the state of mind of the natural person who controlled the conduct amounting to 'assistance' that will be imputed to the company: *Anderson Appeal* (n 8) 211–12 [247]–[249] (Gleeson, Leeming and White JJA).

182 Austin and Ramsay (n 178) 1111 [16.200]. See also at 1097 [16.060]; Davies and Worthington (n 146) 181–2 [7-40].

183 See Austin and Ramsay (n 178) 1111 [16.200]. See also *Hamilton v Whitehead* (1988) 166 CLR 121, 127 (Mason CJ, Wilson and Toohey JJ).

and 'spea[k] and ac[t] as the company'.[184] However, it is now well-established that 'different persons may for different purposes satisfy the requirements of being the company's directing mind and will'[185] such that an officer or employee of a company may be identified as its 'directing mind and will' in relation to a particular function or transaction.[186] To assess whether a particular individual is the directing mind and will, the court will look to whether that person has been 'vested with autonomy, control, discretion or a significant degree of responsibility'.[187] Doubts have been expressed about the doctrine's application in civil proceedings beyond the contexts of statute and contract.[188] Nevertheless, it continues to be applied to identify accessorial wrongdoing.[189]

3 *Gaps in the Law*

Each of these approaches leaves substantial gaps to be filled by vicarious liability due to their failure to cover all of the wrongdoing that could be committed within the course of employment.[190] These gaps arise along two fault lines: first,

[184] See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 171 (Lord Reid). See also at 170 (Lord Reid); *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1, 678–9 [6143] (Owen J) ('*Bell Group*'); *J C Houghton & Co v Nothard, Lowe & Wills Ltd* [1928] AC 1, 14 (Viscount Dunedin, Viscount Dunedin for Lord Atkinson J agreeing at 34), 18–19 (Lord Blanesburgh for Viscount Sumner).

[185] *El Ajou* (n 178) 706 (Hoffmann LJ). See also at 695–6 (Nourse LJ), 699 (Rose LJ); *Meridian Global Funds* (n 175) 508–9 (Lord Hoffmann for the Court).

[186] *Bell Group* (n 184) 678–9 [6143]–[6144] (Owen J), citing *El Ajou* (n 178) 705–6 (Hoffmann LJ). See, eg, *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471, 488 [84]–[86] (Spigelman CJ), 505 [235]–[236] (Beazley JA). See also *Optus Administration Pty Ltd v Wright* (2017) 94 NSWLR 229, 287 [280] (Gleeson JA).

[187] *Bell Group* (n 184) 679 [6144] (Owen J), quoted in Austin and Ramsay (n 178) 1108 [16.180]. Cf *Anderson Trial* (n 1) 298–9 [1649] (Ward CJ in Eq).

[188] See Watts and Reynolds, *Bowstead and Reynolds* (n 145) 548–50 [8-215]; *Beach Petroleum NL v Johnson* (1993) 43 FCR 1, 27–8 [22.25]–[22.29] (von Doussa J) ('*Beach Petroleum*'). See also the criticisms expressed in *Anderson Appeal* (n 8) 211–12 [249] (Gleeson, Leeming and White JJA), quoting *Australasian Securities and Investments Commission v Westpac Banking Corporation [No 2]* (2018) 357 ALR 240, 266 [1660] (Beach J).

[189] See, eg, *El Ajou* (n 178) 695–8 (Nourse LJ), 699–700 (Rose LJ), 705–7 (Hoffmann LJ); *Bell Group* (n 184) 678–9 [6142]–[6144] (Owen J); *Anderson Trial* (n 1) 221 [1251], 304–6 [1676]–[1684] (Ward CJ in Eq); *BCEG International (Australia) Pty Ltd v Xiao* (2022) 162 ACSR 601, 692–3 [425] (Rees J) ('*BCEG*'). Appeal from *BCEG* (n 189) was allowed in part on another ground: *Xiao v BCEG International (Australia) Pty Ltd* (2023) 111 NSWLR 132, 137–8 [12]–[15], 163 [161]–[162] (Gleeson JA, Mitchelmore JA agreeing at 164 [163], Griffiths AJA agreeing at 164 [164]) ('*Xiao*').

[190] *Prince Alfred College* (n 28) 149 [41] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

the seniority of the errant employee and, secondly, the capacity in which the employee was acting when their knowledge was obtained.

The comparatively narrow scope of the directing mind and will approach is evident. Absent an express or implied delegation of significant authority in relation to the relevant transaction, the knowledge of an ordinary employee of limited seniority will not be attributed.[191] The doctrine thus demands a level of seniority or responsibility that is likely to exclude the liability of the company for the acts of an ordinary employee. Any such requirement of seniority forms no part of the law of vicarious liability.

The use of agency does extend attribution to employees of lower seniority: any employee — or, indeed, even a non-employed agent, such as a solicitor — may be identified as an agent of the company.[192] Yet the circumstances in which the knowledge of an agent are attributed to a principal are not unqualified.[193] An important gap arises from one such qualification: where an agent's knowledge is acquired privately, including in the course of a distinct transaction, it will generally not be imputed.[194]

This condition has proven significant where an employee misapplies confidential information obtained in their previous employment to their new employer's benefit. This was the exact situation in *Lifeplan Australia Friendly Society Ltd v Woff* ('*Lifeplan*').[195] An employer's confidential information was misapplied by its ex-employees to the benefit of their new employer.[196] Vicarious liability was identified as the sole possible basis of liability in respect of that

[191] See above nn 182–7 and accompanying text.

[192] Leow, *Corporate Attribution* (n 171) 152.

[193] Austin and Ramsay (n 178) 1110–12 [16.210]; Dal Pont (n 28) 559–66 [22.54]–[22.65].

[194] Austin and Ramsay (n 178) 1111–12 [16.120]. This principle appeared in the context of the imputation of knowledge to a natural person in *Farah Constructions* (n 120) 148 [127] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), quoting *El Ajou* (n 178) 703–4 (Hoffmann LJ). However, the position may be different if the agent's task itself is to disclose information: *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (in liq)* (2003) 214 CLR 514, 548 [87] (Gummow and Hayne JJ), quoting *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679, 697 [89] (Handley JA, Meagher JA agreeing at 682 [1], Powell JA agreeing at 709 [153]). See generally Dal Pont (n 28) 564–6 [22.62]–[22.64].

[195] *Lifeplan Trial* (n 6) 390 [1], 392 [9], 393 [18] (Besanko J).

[196] Ibid.

breach.[197] Although ultimately left undecided on appeal in *Ancient Order*,[198] vicarious liability has arisen in a string of cases with similar fact patterns.[199]

On its face, the receipt by an employee of knowledge in a private capacity would also exclude vicarious liability where the receipt of such knowledge was an element of the wrong. This is because, on traditional principles, vicarious liability can only arise where all elements of the wrong, except damage, are committed within the course of employment.[200] However, in respect of claims for breach of confidence, the Supreme Court of the United Kingdom appears to have accepted that it is the *misuse* of confidential information with knowledge of its confidential character that constitutes the wrong.[201] As such, if confidential information is disclosed within the scope of employment, the capacity in which the information was obtained is immaterial.[202] Dicta in *Dubai Aluminium* suggest that the same approach may apply to knowing assistance — if the wrongdoer acts with knowledge of the underlying breach of duty, the source of that knowledge may be immaterial.[203]

There are thus circumstances in which vicarious liability will provide relief where the rules of attribution will not. As the next Part will show, where these gaps in the law exist the policy justifications for vicarious liability suggest that the law should provide a remedy.

[197] Ibid 453–4 [363] (Besanko J); *Lifeplan Appeal* (n 12) 30 [121]–[123] (Allsop CJ, Middleton and Davies JJ); *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman JJ), 29 [64] (Gageler J).

[198] *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman JJ), 29 [64] (Gageler J).

[199] See, eg, *Manitoba* (n 22) 58 (Esson JA for the Court); *Vestergaard Frandsen* (n 20) 1563 [27]–[28] (Lord Neuberger PSC, Lords Clarke, Sumption, Reed and Carnwath JJSC agreeing); *Pintorex* (n 21) [46]–[50] (Recorder Alastair Wilson QC). See generally *Thomas v Pearce* (2000) 27 FSR 718, 719–20 (Buxton LJ).

[200] Rolph et al (n 28) 899 [26.45]; *Dubai Aluminium* (n 17) 381 [39] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

[201] See *Wm Morrison Supermarkets* (n 20) 1018 [32], 1022 [47] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr, Lloyd-Jones JJSC and Baroness Hale agreeing); *Vestergaard Frandsen* (n 20) 1563 [27] (Lord Neuberger PSC, Lords Clarke, Sumption, Reed and Carnwath JJSC agreeing). See also Aplin et al (n 135) 670 [15.18].

[202] See also Aplin et al (n 135) 670 [15.18]; *Lifeplan Trial* (n 6) 453 [363] (Besanko J).

[203] See *Dubai Aluminium* (n 17) 381 [39] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), 397–8 [114]–[115] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). See also *Group Seven Trial* (n 21) [550], [554]–[555] (Morgan J).

V Justifying Vicarious Liability in Equity

The thesis of this Part is that the application of vicarious liability to equitable wrongs would be both justified and principled.

It contends, first, that the justifications for vicarious liability are agnostic as to the wrongdoing to which it applies. As such, if the test for vicarious liability is met, then the doctrine, by its own rationale, provides a positive justification for imposing liability on an employer even if the underlying wrongdoing is equitable, rather than tortious, in nature.

Secondly, it rebuts the contention that this extension of the law would subvert the existing framework of equitable liability and would therefore be unprincipled. To do so, it refutes the two arguments accepted at first instance in *Lifeplan* as sufficient reasons to reject the extension of vicarious liability to equitable wrongdoing: (a) that vicarious liability would 'subvert' equity's existing rules of third-party liability (typified by *Barnes v Addy*) and (b) that there is a conceptual asymmetry in awarding a gains-based remedy for strict liability wrongdoing.[204]

A *A Positive Justification for Equitable Vicarious Liability*

It is well-accepted that vicarious liability is a 'policy device'[205] derived from 'social convenience and rough justice'[206] rather than 'a critical or refined consideration of other concepts in the common law'.[207] As McHugh J emphasised in *Hollis v Vabu Pty Ltd* ('*Hollis*'): 'Not only does the doctrine of vicarious liability have its basis in policy considerations, but common law courts acknowledge that [its] evolution … continues to be guided by policy.'[208] It is thus unsurprising that vicarious liability continues to be described in the High

204 *Lifeplan Trial* (n 6) 456 [374] (Besanko J), discussing *Barnes v Addy* (n 120).

205 Queensland Law Reform Commission, *Vicarious Liability* (Report No 56, December 2001) 9 <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0003/372936/wp48.pdf>, archived at <https://perma.cc/X663-QD7J>, citing *Rose v Plenty* [1976] 1 WLR 141, 147 (Scarman LJ) ('*Rose*').

206 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 685 (Lord Pearce).

207 *Rose* (n 205) 147 (Scarman LJ), quoted in Queensland Law Reform Commission (n 205) 9.

208 *Hollis* (n 4) 55 [87] (McHugh J). See also at 37 [34] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *CFMMEU* (n 28) 199–200 [82] (Kiefel CJ, Keane and Edelman JJ).

Court as 'an unstable principle … for which a "fully satisfactory rationale … " has been "slow to appear"'.[209]

Yet, although no single theory can, alone, explain vicarious liability,[210] it is accepted that 'four broad policy grounds' collectively justify its continued operation.[211]

The first is based in notions of enterprise liability.[212] It posits that 'a person who employs others to advance [their] own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise'.[213] This justification relies both on notions of relative control (the employer, rather than the victim, selects and manages the employee and is thus better placed to guard against their wrongdoing)[214] and the 'deep-rooted' feeling[215] that the person who places an enterprise 'in the community'[216] to obtain a benefit should bear the inherent risk of wrongdoing.[217]

Enterprise liability has been accepted as the chief justification for vicarious liability in Canada[218] and has arguably underpinned vicarious liability in

[209] *Prince Alfred College* (n 28) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ), quoting *Hollis* (n 4) 37 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[210] *Hollis* (n 4) 37–8 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 166–7 [11] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Sweeney*'); Dietrich and Field (n 138) 516–17; Giliker (n 39) 244.

[211] Queensland Law Reform Commission (n 205) 10, citing *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299, 338–9 (La Forest J); John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 410, quoted in *Hollis* (n 4) 54–5 [86] (McHugh J). See also at 37–8 [35] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); Giliker (n 39) 243–4. But see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 257–9 ('*Torts*').

[212] Fleming (n 211) 410. See generally Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493.

[213] Fleming (n 211) 410, quoted in *Hollis* (n 4) 54 [86] (McHugh J), *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 243 [65] (Lord Millett) ('*Lister*'), *Bazley v Curry* [1999] 2 SCR 534, 553 [30] (McLachlin J for the Court) ('*Bazley*').

[214] Queensland Law Reform Commission (n 205) 12, citing *Bugge* (n 4) 117 (Isaacs J), *Hern v Nichols* (1708) 1 Salk 289; 91 ER 256, 256, *Hamlyn v John Houston & Co* [1903] 1 KB 81, 85–6 (Collins MR) ('*Hamlyn*').

[215] Atiyah (n 28) 18, quoted in Queensland Law Reform Commission (n 205) 11.

[216] *Bazley* (n 213) 548–9 [22] (McLachlin J for the Court), quoted in Queensland Law Reform Commission (n 205) 12.

[217] Queensland Law Reform Commission (n 205) 11–12. See also *Beach Petroleum* (n 188) 30–1 [22.32]–[22.33] (von Doussa J).

[218] *Bazley* (n 213) 548–9 [22] (McLachlin J for the Court); *Prince Alfred College* (n 28) 153–4 [57]–[62] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *CCIG Investments* (n 39) 482–3 [13] (Kiefel CJ, Gageler, Gordon and Jagot JJ); Giliker (n 39) 162–6, discussing *Bazley* (n 213); Brodie (n 212).

England.[219] Its status in Australia is more complicated and warrants attention here. In *Prince Alfred College*, the majority stated that the policy considerations underpinning the theory 'have found no real support in Australia'.[220] Respectfully, this contention must be significantly qualified.[221] In *Hollis*, six members of the Court seemed to approve the enterprise liability theory,[222] and similar reasoning can be found in prior and subsequent opinions.[223] What has in fact been clearly rejected is the willingness of Canadian courts to transmute enterprise liability into a positive *test* of liability.[224] In *New South Wales v Lepore*, Gleeson CJ emphasised that notions of 'risk' are not, in Australian law, 'a *test* for determining whether conduct is in the course of employment, as distinct from an explanation of the willingness of the law to impose vicarious liability';[225] Gummow and Hayne JJ reasoned similarly.[226] Thus a contention that enterprise liability has been rejected in Australian law as a justification for vicarious liability should not be accepted.

The second policy justification is deterrence.[227] This justification posits that the threat of vicarious liability encourages the employer both to implement

[219] Brodie (n 212) 496–7, citing *Dubai Aluminium* (n 17) 377 [21] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), 395 [107] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). See also at 396 [107] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]); *Mohamud* (n 159) 691–2 [40] (Lord Toulson JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Reed JSC agreeing). Cf Giliker (n 39) 169; *Prince Alfred College* (n 28) 153 [59] (French CJ, Kiefel, Bell, Keane and Nettle JJ); *New South Wales v Lepore* (2003) 212 CLR 511, 543 (Gleeson CJ) ('*Lepore*'); *CCIG Investments* (n 39) 482–3 [13] (Kiefel CJ, Gageler, Gordon and Jagot JJ).

[220] *Prince Alfred College* (n 28) 153 [59] (French CJ, Kiefel, Bell, Keane and Nettle JJ). See also *CCIG Investments* (n 39) 482–3 [13] (Kiefel CJ, Gageler, Gordon and Jagot JJ).

[221] Rolph et al (n 28) 914–15 [26.64].

[222] *Hollis* (n 4) 40 [42] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), 56–7 [90] (McHugh J); Rolph et al (n 28) 914–15 [26.64]; Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart, 2018) 61–2; Queensland Law Reform Commission (n 205) 12 n 74. But see Giliker (n 39) 249–50.

[223] See, eg, *Sweeney* (n 210) 175 [38], 184–5 [70]–[72] (Kirby J); *Lepore* (n 219) 612–13 [303] (Kirby J); *Scott v Davis* (2000) 204 CLR 333, 418–19 [253] (Gummow J) ('*Scott*'), citing *Bugge* (n 4) 117 (Isaacs J); *CCIG Investments* (n 39) 497 [69] (Edelman and Steward JJ). See generally Queensland Law Reform Commission (n 205) 11–12.

[224] Rolph et al (n 28) 914–15 [26.64]; Giliker (n 39) 174.

[225] *Lepore* (n 219) 543 [65] (emphasis added).

[226] Ibid 586 [214].

[227] Fleming (n 211) 140, quoted in *Hollis* (n 4) 54–5 [86] (McHugh J). See also at 55–6 [88] (McHugh J); Queensland Law Reform Commission (n 205) 10, 13.

the supervision necessary to prevent its employees from causing harm, recognising that the employer is best placed to implement such supervision, and to discipline employees that are guilty of wrongdoing.[228]

The final two related justifications are perhaps more pragmatic than principled.[229] The third ground, termed the 'deep pocket' principle by Thomas Baty,[230] recognises that an employer is 'a more promising source of recompense than the [employee] who is apt to be a man of straw';[231] liability should be imposed on a defendant who can pay.[232] The fourth ground is loss distribution: the employer can more readily spread losses across society through liability insurance or by charging higher prices.[233] Each has been judicially recognised as having a significant practical influence on the law of vicarious liability[234] despite criticisms that insurance should follow, rather than create, liability.[235]

The crucial insight justifying an extension of vicarious liability to equitable wrongdoing is that each of these policy considerations, although developed in the context of tort law, is agnostic as to the underlying wrong, including its

[228] Fleming (n 211) 140; Brodie (n 212) 495. See also *Christian Youth Camps* (n 46) 293 [140], 294 [143] (Maxwell P); *Lepore* (n 219) 613–14 [305]–[306] (Kirby J). Cf at 581–2 [198]–[199] (Gummow and Hayne JJ).

[229] Fleming (n 211) 140; Gray (n 222) 151, citing *Cox* (n 160) 669 (Lord Reed JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreeing); Queensland Law Reform Commission (n 205) 12.

[230] 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* (Clarendon Press, 1916) 154, cited in Fleming (n 211) 410 n 7.

[231] Fleming (n 211) 410.

[232] Queensland Law Reform Commission (n 205) 11, quoting *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* (1995) 132 ALR 514, 534 (Lindgren J), quoting FMB Reynolds, *Bowstead on Agency* (Sweet & Maxwell, 15th ed, 1985) 386; *Hollis* (n 4) 56 [89] (McHugh J).

[233] Fleming (n 211) 410, cited in Queensland Law Reform Commission (n 205) 12. See also *Dubai Aluminium* (n 17) 395–6 [107] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). But see *Scott* (n 223) 419 [253] (Gummow J).

[234] *Scott* (n 223) 419 [253]–[254], 421–2 [265] (Gummow J), 435–6 [300], 438–9 [309] (Hayne J), 450 [342] (Callinan J); *Catholic Child Welfare Society* (n 36) 15 [34]–[35] (Lord Phillips, Baroness Hale, Lords Kerr, Wilson and Carnwath JJSC agreeing).

[235] Susan Kiefel 'Vicarious Liability in Tort: A Search for Policy, Principle or Justification' (2018) 13(4) *Judicial Review* 383, 391, citing Robert Flannigan, 'Enterprise Control: The Servant–Independent Contractor Distinction' (1987) 37(1) *University of Toronto Law Journal* 25, 35. See also *Imbree v McNeilly* (2008) 236 CLR 510, 519–20 [21]–[23] (Gleeson CJ). But see at 553 [143] (Kirby J).

juridical nature.[236] If the enterprise is held liable for the materialisation of its risks into wrongs, then it should be immaterial whether that wrong is tortious or equitable.[237] Similarly, an employer is just as capable of deterring and compensating for equitable wrongdoing as it is for tortious wrongdoing and should be equally able to distribute any losses.[238] This agnosticism is explained by the theoretical focus of these four justifications: each responds to the employment relationship and the economic position of employers rather than the nature of the wrongful act itself.[239] As Robert Stevens notes, each supports 'strict liability in general' — none justifies 'confining the liability of a defendant employer to the torts committed by [its] employees'.[240] As such, if vicarious liability for torts can be adequately justified, then the same policy considerations should favour vicarious liability being recognised for equitable wrongdoing.

This observation is significant for two reasons. First, it suggests that the limitation of vicarious liability to tortious wrongs is incoherent, since vicarious liability, so limited, holds an employer responsible for some wrongs but not others without adequate justification (at least so far).[241] In this way, wronged parties whose cases are *relevantly* alike are treated inconsistently; this situation constitutes positive justification for changing the law to remove the inconsistency.[242] An example of this apparent incoherence in operation is *Hamlyn v John Houston & Co*.[243] The first of two partners in a firm of grain merchants bribed a competitor's clerk to share confidential information.[244] The second partner was held to be vicariously liable for the first partner having induced a

236 See *Dubai Aluminium* (n 17) 375 [11], 383 [48] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]), 395–6 [107] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]); *Majrowski* (n 20) 229 [10] (Lord Nicholls); *Wm Morrison Supermarkets* (n 20) 1023 [51], 1024 [54] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr, Lloyd-Jones JJSC and Baroness Hale agreeing).

237 See Jane Stapleton, *Product Liability* (Butterworths, 1994) 192–3.

238 See *Dubai Aluminium Co Ltd v Salaam* [1991] 1 Lloyd's Rep 415, 471 (Rix J).

239 See *Anderson Trial* (n 1) 325 [1767]–[1768] (Ward CJ in Eq); Christine Beuermann, 'Vicarious Liability: A Case Study in the Failure of General Principles?' (2017) 33(3) *Journal of Professional Negligence* 179, 190–1.

240 Stevens, *Torts* (n 211) 259 (emphasis omitted). See also Stapleton (n 237) 192–3; Fleming (n 211) 410–11.

241 See below Part V(B)(2).

242 Smith (n 109) 23; Burrows (n 110) 396.

243 *Hamlyn* (n 214) 84 (Collins MR).

244 Ibid.

breach of contract (a tort) but the second partner would not have been liable for involvement in the clerk's breach of confidence despite each liability arising on the same facts.[245]

Secondly, the applicability of the rationale for vicarious liability to equitable wrongdoing confers new meaning on the species of conduct, identified in Part IV, for which vicarious liability, and vicarious liability alone, would provide relief against an employer. It suggests that the absence of direct liability in the employer does not reflect a *considered* gap in the law but rather an anomalous lacuna — or unjustifiable omission — that ought to be filled by vicarious liability.[246] The test for vicarious liability is designed to ensure that the connection between the wrongdoing and the employment relationship is sufficiently close to engage the doctrine's underlying justifications — whatever they may be.[247] As such, wherever the test for vicarious liability is met there is not 'anything unjust' in imposing liability,[248] since the requirement that the wrongdoing must occur within the course of employment reflects a necessary 'balance between competing interests'.[249] As Isaacs J noted, the test itself defines the 'just limits of a master's responsibility for the wrongdoing of [their] servant'.[250] Hence, if the application of vicarious liability is to be 'co-extensive with [its] rationale', then an employer should, in such circumstances, be liable, irrespective of the equitable basis of the employee's wrongdoing.[251]

There is thus an anomalous gap in the law and a positive justification, supplied by the policy bases of vicarious liability, for utilising the doctrine of vicarious liability to meet it. This amounts to a strong prima facie argument in favour of extending vicarious liability to equitable wrongdoing.

[245] Ibid 86 (Collins MR, Romer LJ agreeing at 86, Mathew LJ agreeing at 86). This was consistent with the relevant holdings of the trial judge: at 81–2.

[246] See generally *Harris* (n 53) 339 [212], 339–40 [214] (Mason P).

[247] *Prince Alfred College* (n 28) 148–50 [39]–[47] (French CJ, Kiefel, Bell, Keane and Nettle JJ). See also Brodie (n 212) 494–5, 498; *Dubai Aluminium* (n 17) 395–6 [107] (Lord Millett, Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]); *Majrowski* (n 20) 229 [10] (Lord Nicholls).

[248] *Dubai Aluminium* (n 17) 383 [48] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]). See also *Majrowski* (n 20) 229 [9] (Lord Nicholls).

[249] *Prince Alfred College* (n 28) 148 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[250] *Bugge* (n 4) 117 (Isaacs J), quoted in *Hollis* (n 4) 38 [38] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

[251] See *Harris* (n 53) 335 [195] (Mason P).

Yet the analysis above cannot, alone, justify an extension of vicarious liability to equitable wrongdoing. As Spigelman CJ noted in *Harris*, equity should not adopt a common law doctrine if it would be 'incompatible' with the web of equitable doctrines into which it must be assimilated.[252] As foreshadowed, two bases of purported incompatibility have emerged.[253] The first is practical: will vicarious liability impermissibly subvert equity's existing rules of third-party liability?[254] The second is conceptual: is there something inconsistent in a defendant, who is only strictly liable, answering for a conscience-based wrong for which a gains-based remedy is ordinarily available?[255] The following section will address each of these putative bases of incompatibility in turn, concluding that neither creates the kind of incompatibility that should weigh against an extension of the doctrine.

B *Subverting* Barnes v Addy

The first argument put against extending vicarious liability to equitable wrongdoing is that the doctrine would undercut equity's existing rules of accessorial liability, particularly the two limbs of *Barnes v Addy*. This concern was enunciated by Besanko J at first instance in *Lifeplan* (although his Honour's criticism was limited to situations where the third party is a *new* employer)[256] and restated by Dowsett J in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd*:

> As I understand it, the problem is that to apply the doctrine of vicarious liability in order to impose upon an employer, liability for a breach of trust (or fiduciary duty) by an employee, without more, would go beyond the ambit of accessorial liability as identified in *Barnes v Addy* and subsequent cases.[257]

The basis of this concern appears to be the High Court's judgment in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Constructions*').[258] In that case,

[252] Ibid 312 [57].

[253] *Lifeplan Trial* (n 6) 456 [374] (Besanko J).

[254] Ibid.

[255] Ibid.

[256] Ibid, discussing *Barnes v Addy* (n 120).

[257] *Oliver Hume* (n 10) 79 [110] (citations omitted).

[258] *Farah Constructions* (n 120) 150–1 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 737–8 [23] (Leeming JA) ('*Fistar*').

the High Court resoundingly denied that the first limb of *Barnes v Addy* (knowing receipt) existed alongside a common law doctrine of restitution based in unjust enrichment.[259] Like vicarious liability, this new liability would have been 'strict [albeit] subject to defences'[260] and thus 'more readily satisfied' than liability under *Barnes v Addy*.[261] The Court noted that its recognition would thus render the first limb of *Barnes v Addy*, which has a more onerous notice requirement, 'otiose'.[262] This presented two relevant issues.[263] The first was one of precedent. The notice requirement for knowing receipt had been affirmed in 'seriously considered dicta of a [High Court] majority'.[264] As such, the Court concluded that it was not open to an intermediate appellate court to take a step that would 'nullify' its application.[265] The second issue was substantive. By avoiding the need to establish the defendant's knowledge, a strict liability claim would 'erode the existing law' of *Barnes v Addy*, which the Court implicitly took to have a sound basis in principle.[266] This was treated as a justification for declining to recognise the proposed doctrine.[267]

As identified by Besanko J and Dowsett J, this reasoning presents a substantial barrier to an extension of vicarious liability.[268] Leaving aside any issue of

[259] *Farah Constructions* (n 120) 148–59 [130]–[158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[260] *Fistar* (n 258) 744 [52] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]), citing ibid 151 [134]; *Anderson Trial* (n 1) 316 [1728] (Ward CJ in Eq).

[261] *Fistar* (n 258) 744 [53] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]), citing *Barnes v Addy* (n 120).

[262] *Farah Constructions* (n 120) 151 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), discussing *Barnes v Addy* (n 120).

[263] For the further issues of principle noted by the Court, see *Farah Constructions* (n 120) 155–9 [149]–[158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[264] Ibid 150–1 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), citing *Consul Development* (n 123) 396 (Gibbs J), 410 (Stephen J, Barwick CJ agreeing at 376–7).

[265] *Farah Constructions* (n 120) 157 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also at 150–1 [134], 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Fistar* (n 258) 744 [53] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]), discussing *Farah Constructions* (n 120), *Barnes v Addy* (n 120).

[266] *Farah Constructions* (n 120) 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), discussing *Barnes v Addy* (n 120).

[267] *Farah Constructions* (n 120) 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[268] *Lifeplan Trial* (n 6) 456 [374] (Besanko J); *Oliver Hume* (n 10) 79 [110] (Dowsett J).

precedent,[269] it identifies a conflict with *Barnes v Addy* as a normative justification, in and of itself, for rejecting a development of the law, since it subverts equity's traditional approach to third-party liability.[270]

The following section analyses whether the concerns enunciated in *Farah Constructions* indeed apply to recognising vicarious liability in equity and, if so, whether they preclude such recognition. To do so, it contends that this aspect of the reasoning in *Farah Constructions* should be understood as an instance of the High Court's growing jurisprudence on 'coherence' in the law. Analysed in this light, it concludes that vicarious liability would not be incoherent with equity's existing regime of third-party liability and thus does not engage the concern identified in *Farah Constructions*.

1 Farah Constructions *as an Issue of Coherence*

It is important to be precise about the consequences of *Farah Constructions*. When does a conflict with *Barnes v Addy* actually militate against a development of the law?

Farah Constructions cannot mean that equitable third-party liability should never be countenanced beyond the boundaries of *Barnes v Addy*. As the authors of *Jacobs' Law of Trusts in Australia* observe, *Barnes v Addy* liability is '[p]lainly' not 'an exhaustive statement' of the ways in which third parties might be found liable in equity.[271] This was indeed accepted by the High Court in *Farah Constructions* itself, with the Court recognising procurement or inducement liability as a distinct category of accessorial liability.[272]

Moreover, *Farah Constructions* cannot mean that the mere fact that two doctrines give rise to liability on the same set of facts is necessarily inappropriate. This is obviously true where the relevant doctrines are both species of equitable

[269] High Court dicta in *Ancient Order* (n 12) appear to invite the development of vicarious liability in equity by intermediate appellate courts: at 11 [5] (Kiefel CJ, Keane and Edelman JJ). See also *Anderson Trial* (n 1) 327 [1772] (Ward CJ in Eq); JC Campbell, 'The New Section 100A of Trustee Act 1925 (NSW): When a Beneficiary Is Personally Liable to Indemnify a Trustee' (2020) 14(2) *Journal of Equity* 103, 123–4, citing *Ancient Order* (n 12) 11 [5] (Kiefel CJ, Keane and Edelman JJ), 29 [64] (Gageler J).

[270] *Farah Constructions* (n 120) 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[271] Heydon and Leeming (n 119) 259 [13-34]. See also *Fistar* (n 258) 742–3 [45]–[47] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]); *Great Investments Ltd v Warner* (2016) 243 FCR 516, 530 [55] (Jagot, Edelman and Moshinky JJ) ('*Great Investments*'); *Grimaldi* (n 122) 356 [242] (Finn, Stone and Perram JJ).

[272] *Farah Constructions* (n 120) 159 [161] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

accessorial liability: it is not uncommon for cases to be decided under *both* limbs of *Barnes v Addy* and sometimes through other forms of equitable participatory liability as well.[273] But it is also true of liabilities arising from different branches of the law.[274] Examples include the concurrent liability of company directors for breaches of fiduciary duty and the *Corporations Act 2001* (Cth),[275] claims for rescission for fraudulent misrepresentation in both equity and at law,[276] and concurrent liability with respect to duties of care in tort and contract.[277] Thus, 'there is nothing foreign to the Australian legal system in a plaintiff having alternative claims arising out of the same facts'.[278]

What, then, is the factor that meant that unjust enrichment would have eroded, rather than complemented, knowing receipt?

A likely answer to this question can be found by viewing the dicta in *Farah Constructions* in the context of the High Court's expansive jurisprudence on the role of 'coherence' in the development of the law.[279] The concept of coherence is drawn from an extensive philosophical tradition that extends beyond its application to the common law method.[280] However, in the jurisprudence of the

[273] See, eg, *Grimaldi* (n 122) 358 [248], 373 [320] (Finn, Stone and Perram JJ); *Fistar* (n 258) 738–9 [30], 741–3 [40]–[47] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]); *Great Investments* (n 271) 530 [54]–[55], 531–2 [60]–[61], 533–4 [68]–[69] (Jagot, Edelman and Moshinsky JJ); *Hasler* (n 121) 612–13 [2]–[3] (Barrett JA), 624–8 [64]–[83] (Leeming JA, Barrett JA agreeing at 612 [1], 613 [5], Gleeson JA agreeing at 613 [6], [9]–[10]).

[274] *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 265 [154] (Allsop P, Campbell JA agreeing at 269 [179], Handley AJA agreeing at 270 [180]) ('*Heperu*'). See generally Mark Leeming, 'Overlapping Claims at Common Law and in Equity: An Embarrassment of Riches?' (2017) 11(3) *Journal of Equity* 229.

[275] See, eg, *Ancient Order* (n 12) 24–5 [50]–[52], 28 [61] (Gageler J); *Re Sunnya Pty Ltd* [2024] NSWSC 403, [741], [930]–[934], [948], [1046] (Williams J). See also *R v Byrnes* (1995) 183 CLR 501, 516–18 (Brennan, Deane, Toohey and Gaudron JJ), 521–4 (McHugh J).

[276] This example is given by Leeming (n 274) 231–3.

[277] See, eg, *Fistar* (n 258) 743 [48] (Leeming JA, Bathurst CJ agreeing at 732 [1], Sackville AJA agreeing at 750 [88]), citing *Pilmer* (n 25) 175–7 [9]–[12] (McHugh, Gummow, Hayne and Callinan JJ).

[278] *Fistar* (n 258) 743 [48] (Leeming JA, Bathurst CJ agreeing at 732 [1], Sackville AJA agreeing at 750 [88]), quoted in *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 641 [198] (Nettle, Gordon and Edelman JJ).

[279] A large number of examples are collated in Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160, 1161. See generally Michael Gillooly, 'Legal Coherence in the High Court: String Theory for Lawyers' (2013) 87(1) *Australian Law Journal* 33.

[280] Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42(2) *Monash University Law Review* 360, 362–3.

High Court, coherence has been associated with two interlocking concerns.[281] First, individuals should not be subject to conflicting duties.[282] Secondly, one branch of the law should not 'cut across' or subvert another.[283] If a proposed extension of the law — such as the recognition of a novel duty of care — would have either effect, then the need to preserve the law's 'coherence' will weigh significantly, if not decisively, against its acceptance.[284]

It is the second concern that is of present relevance. This strand of coherence reasoning posits that where two branches of law arise on the same facts, the policy promoted by one set of principles should not be contradicted by the other.[285] As Andrew Fell observes, its focus is thus on the 'consistency of the law's underlying reasons'.[286]

Its operation is well-demonstrated by *Sullivan v Moody* ('*Sullivan*'): the High Court's first detailed explanation of its concern with coherence.[287] In that case, appellants sought to use the law of negligence, rather than defamation, to seek redress for communications that caused them damage, including to their reputations.[288] The appellants were the fathers of children who had been examined by medical practitioners for evidence of sexual abuse.[289] The appellants contended that the practitioners owed them duties to take reasonable care in reporting allegations that suggested their involvement in the abuse.[290] The Court

[281] Gillooly (n 279) 36–46.

[282] Ibid 36–41.

[283] *Sullivan v Moody* (2001) 207 CLR 562, 580 [53] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) ('*Sullivan*'), quoted in ibid 37. See also at 38, 41–6.

[284] *Miller v Miller* (2011) 242 CLR 446, 454 [15]–[16] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Miller*'), quoted in Gillooly (n 279) 44. See also at 43–6; *Gala v Preston* (1991) 172 CLR 243, 252–5 (Mason CJ, Deane, Gaudron and McHugh JJ), 270–3 (Brennan J), 278, 280 (Dawson J), 285–92 (Toohey J), cited in *Miller* (n 284) 467–72 [57]–[69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[285] Gillooly (n 279) 37–8, 41–6. See also Fell (n 279) 1177; *Miller* (n 284) 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Keith Mason, 'Strong Coherence, Strong Fusion, Continuing Categorical Confusion: The High Court's Latest Contributions to the Law of Restitution' (2015) 39(3) *Australian Bar Review* 284, 296.

[286] Fell (n 279) 1177.

[287] *Sullivan* (n 283), discussed in Gillooly (n 279) 36.

[288] See *Sullivan* (n 283) 568–70 [4]–[16], 580–1 [54] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

[289] Ibid 567 [1], 568 [4]–[5], 569–70 [10]–[11] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

[290] Ibid 568–9 [7], 570 [12].

denied that those duties of care existed.[291] Amongst other reasons,[292] it observed that the proposed duties would have circumvented the balance that defamation strikes between 'competing interests of the parties through well-developed principles about privilege and the like'.[293] In particular, the duties would have allowed one branch of the law to 'subvert' the 'balance of rights and obligations, duties and freedoms' struck by another.[294] As such, the Court refused to allow the appellants to rely on negligence to recover damages that the law of defamation would deny.[295]

This second strand of coherence reasoning provides an explanation for why unjust enrichment was so forcefully rejected in *Farah Constructions*. It will be recalled that a central pillar of the High Court's reasoning was that strict restitutionary liability would 'erode … traditional equitable protection'.[296] The Court's concern, there, was not that the protection given to owners of equitable property would be lessened: the Court's observation that the strict liability claim would prove easier to satisfy implies that restitution would oblige the return of trust property where knowing receipt would not.[297] Rather, like in *Sullivan*, the Court's concern was that the strict liability posited by unjust enrichment was not congruent with the balancing of interests embodied in the existing law.[298] Knowing receipt strikes a balance between the interests of the owner and the third-party recipient of trust property.[299] It does so by allowing relief only where the recipient received the property *with notice* of the breach

[291] Ibid 583 [65] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

[292] Ibid 582–3 [60]–[64] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

[293] Ibid 581 [54].

[294] Ibid 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), quoted in *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 410 [42] (Gummow, Heydon and Crennan JJ). See also *Sullivan* (n 283) 580–1 [54]–[55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

[295] *Sullivan* (n 283) 581 [54], 583 [65]–[66] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ). See also Fell (n 279) 1168.

[296] *Farah Constructions* (n 120) 150 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[297] Ibid 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See *Fistar* (n 258) 744 [53] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]).

[298] See *Farah Constructions* (n 120) 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Sullivan* (n 283) 580–1 [54]–[55] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

[299] See *Lake v Crawford* [2010] NSWSC 232, [23] (Harrison J) ('*Lake*'), discussing *Barnes v Addy* (n 120).

of trust, thus establishing sufficient fault to justify liability.[300] Indeed, the context of Lord Selborne LC's dicta in *Barnes v Addy* was a concern that agents for trustees, particularly solicitors, might incur 'unreasonable and inequitable' liability for their innocent involvement in breaches of trust.[301] The respondent in *Farah Constructions*, proposing an approach of strict liability, did not demonstrate why that balance should be upset — that is 'how there was any justice in permitting restitution against a defendant who received trust property without notice of that fact'.[302] To use the terminology of Peter Birks, adopted in part by the High Court plurality in *Equuscorp Pty Ltd v Haxton*,[303] to allow the claim would be to 'stultif[y]',[304] or 'make nonsense of',[305] the law's '*considered* position'[306] and would thus be incoherent.[307]

2 *Vicarious Liability and Coherence*

This jurisprudence shows that a mere overlap between vicarious liability and personal liability under *Barnes v Addy* would not necessarily create incoherence. Rather, the extension of vicarious liability to equitable wrongdoing should be denied for reasons of coherence if, *and only if*, it would contradict the balancing of interests embodied in the existing rules of third-party liability. An extension of vicarious liability to equity would not have this effect. To explain why this is so, it is useful to return to *Sullivan*.

The decision in *Sullivan* does not mean that a communication can *never* give rise to liability in negligence where defamation does not provide a remedy. As Michael Gillooly observes, '[l]egal coherence does not mandate such a blanket

[300] *Lake* (n 299) [23] (Harrison J), discussing *Barnes v Addy* (n 120). See also *Port of Brisbane Corporation v ANZ Securities Ltd [No 2]* [2003] 2 Qd R 661, 678–9 [31] (McPherson JA, Davies JA agreeing at 682 [40], Mullins J agreeing at 682 [41]).

[301] See *Barnes v Addy* (n 120) 251–5 (Lord Selborne LC, James LJ agreeing at 255, Mellish LJ agreeing at 256). See also at 255–6 (James LJ, Mellish LJ agreeing at 256).

[302] *Farah Constructions* (n 120) 158 [155] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[303] (2012) 246 CLR 498, 519–20 [37]–[38] (French CJ, Crennan and Kiefel JJ) ('*Equuscorp*'), quoting Peter Birks 'Recovering Value Transferred under an Illegal Contract' (2000) 1(1) *Theoretical Inquiries in Law* 155, 203 ('Recovering Value').

[304] Birks, 'Recovering Value' (n 303) 203. See also *Equuscorp* (n 303) 519–20 [37]–[38] (French CJ, Crennan and Kiefel JJ).

[305] Birks, 'Recovering Value' (n 303) 203, quoted in *Equuscorp* (n 303) 519 [37] (French CJ, Crennan and Kiefel JJ).

[306] Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 224.

[307] *Equuscorp* (n 303) 522–3 [45] (French CJ, Crennan and Kiefel JJ, Gummow and Bell JJ agreeing at 544 [111]).

prohibition',[308] and intermediate courts have since refused to reach that conclusion.[309] This is because if negligence recognises liability where defamation does not, considerations of coherence demand a further investigation: does the law of negligence, in reaching such a conclusion, disapprove of the balancing of interests conducted by defamation?[310] That is, are 'the *same* reasons … weighted inconsistently'?[311] Accordingly, as Fell observes, no issue of coherence may arise if negligence imposes liability for reasons not considered by the law of defamation.[312]

It was this very insight that led Hodgson JA in *Stewart v Ronalds* to hold that the coexistence of defamation and negligence was not necessarily inappropriate.[313] His Honour observed that negligence justifies liability by reference to the relationship between plaintiff and defendant: a fact to which defamation is blind.[314] Thus, where the degree of relative responsibility and vulnerability in that relationship justifies imposing a duty of care, it may be appropriate to recognise a liability that defamation would deny.[315] This same argument was accepted by Lord Lowry in the House of Lords in *Spring v Guardian Assurance plc* (a case cited without comment in *Sullivan*);[316] Lord Lowry described that relationship as 'a justification, not for extending the liability for defamation … but for bringing into play a different principle of liability'.[317] Thus, one situation where an inconsistency in results between distinct branches of the law *might* not involve an inconsistent weighting of the law's 'underlying

[308] Gillooly (n 279) 37.

[309] Ibid, citing *Reeves v New South Wales* [2010] NSWSC 611, [379]–[380] (Schmidt J), *Stewart v Ronalds* (2009) 76 NSWLR 99, 113 [50], 114 [58] (Allsop P, Handley AJA agreeing at 127 [129]), 120–1 [104] (Hodgson JA, Allsop P agreeing at 113 [50] (Handley AJA agreeing at 127 [129])) ('*Stewart*'), *Spring v Guardian Assurance plc* [1995] 2 AC 296 ('*Spring*'). See also at 324 (Lord Goff, Lord Lowry agreeing at 325), 325–6 (Lord Lowry), 334–7 (Lord Slynn, Lord Lowry agreeing at 325), 346–52 (Lord Woolf, Lord Lowry agreeing at 325).

[310] Fell (n 279) 1188.

[311] Ibid (emphasis in original).

[312] Ibid.

[313] *Stewart* (n 309) 120–1 [104] (Hodgson JA, Allsop P agreeing at 113 [50]).

[314] See ibid.

[315] See ibid.

[316] *Spring* (n 309) 325; *Sullivan* (n 283) 581 [54] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), citing *Spring* (n 309).

[317] *Spring* (n 309) 325 (emphasis omitted).

reasons' — and thus incoherence — is where one branch imposes liability upon a 'stimul[us]', or further justification, uncontemplated by the other.[318]

This principle explains why vicarious liability does not upset the balancing of interests established by *Barnes v Addy*.[319] Accessorial liability, including under *Barnes v Addy*, and vicarious liability respond to different stimuli. As Joachim Dietrich and Pauline Ridge have identified, 'vicarious liability is based on a relationship link between the parties' (ie the wrongdoer and their principal): it is the nature of the employment relationship and its connection to the wrong that justifies liability.[320] The employer's conduct is immaterial.[321] By contrast, accessorial liability is based solely on a 'participation link': it looks to the accessory's culpable conduct with respect to the primary wrongdoer regardless of the relationship between the two.[322] Indeed, Lord Selborne LC's dicta were directed to determining when the conduct of a '*strange[r]*' with respect to a trust would justify the imposition of a constructive trust.[323]

Hence, vicarious liability does not reject the balancing of interests conducted by *Barnes v Addy*. Unlike unjust enrichment, it does not identify a lesser degree of participation, and thus fault, as sufficient to justify the imposition of responsibility on a stranger for their involvement in a breach of trust. Rather, it responds to an alternative justification for liability that was uncontemplated by *Barnes v Addy*. The connection between vicarious liability and accessorial liability is thus comparable to the distinction drawn by the New South Wales Court of Appeal between proprietary claims (such as a claim based on a better equitable title) and claims based on conscience (such as those made with reference to *Barnes v Addy* liability).[324] Given the different rationales of

[318] Lee Aitken, 'Recovering "Stolen Money": *Barnes v Addy*, Money Had and Received, and the Struggle for Remedial Coherence' (2016) 43(3) *Australian Bar Review* 304, 313. See also *Spring* (n 309) 325 (Lord Lowry).

[319] *Barnes v Addy* (n 120) 251–2 (Lord Selborne LC, James LJ agreeing at 255–6, Mellish LJ agreeing at 256).

[320] Dietrich and Ridge (n 139) 105–6, citing Hazel Carty, 'Joint Tortfeasance and Assistance Liability' (1999) 19(4) *Legal Studies* 489, 490.

[321] See Carty (n 320) 490.

[322] Dietrich and Ridge (n 139) 106.

[323] *Barnes v Addy* (n 120) 251–2 (Lord Selborne LC, James LJ agreeing at 255–6, Mellish LJ agreeing at 256) (emphasis added).

[324] *Fistar* (n 258) 742–3 [46]–[47] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]).

vicarious and accessorial liability, 'there is nothing antithetical or incoherent' in recognising their coexistence.[325]

Any concern that vicarious liability would undercut *Barnes v Addy* should thus be set aside.

C *Conceptual Incompatibility*

The second ground of purported incompatibility is conceptual in nature and arises from the 'unique foundation and goals of equity'.[326] It concerns an apparent inconsistency between the strict nature of vicarious liability and the role of conscience as equity's 'universal talisman'[327] and 'organising concept'.[328]

Unconscionability (or unconscientiousness)[329] is widely accepted as the 'fulcrum upon which entitlement to equitable relief turns'.[330] Yet, under the orthodox 'servant's tort' theory, vicarious liability is a rule of attributed fault, not conduct:[331] the employer merely answers for the wrong committed by another without any imputation of personal wrongdoing.[332] In *Illuzzi v Edwards* ('*Illuzzi*'), it was noted that this lack of imputation creates an apparent conceptual asymmetry: if 'the foundation of equitable relief is conduct which offends against conscience' then it would be arguably inconsistent to impose equitable liability on an entity that, by definition, was ignorant of the wrongdoing for

[325] See ibid 742 [47]. See also *Grimaldi* (n 122) 356–8 [242]–[247] (Finn, Stone and Perram JJ); *Great Investments* (n 271) 530 [55] (Jagot, Edelman and Moshinsky JJ).

[326] *Youyang* (n 37) 500 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). See also *Lifeplan Trial* (n 6) 456 [374] (Besanko J).

[327] See Leow, 'Attribution Rules' (n 142) 44, quoting Sir Anthony Mason, 'Themes and Prospects' in PD Finn (ed), *Essays in Equity* (Law Book, 1985) 242, 244.

[328] See Leow 'Attribution Rules' (n 142) 44, quoting Alastair Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261, 261.

[329] *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [20]–[21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) ('*Tanwar Enterprises*').

[330] *Lift Capital Partners Pty Ltd (in liq) v Merrill Lynch International* (2009) 73 NSWLR 404, 429 [126] (Barrett J). See also at 429–30 [127]–[135] (Barrett J); ibid. See generally Patrick Parkinson, 'The Conscience of Equity' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 29 ('Conscience'); Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9(1) *Journal of Equity* 1.

[331] See above n 138 and accompanying text.

[332] *Prince Alfred College* (n 28) 148 [39] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

which it was being made to answer.[333] Rather, at least where a breach of fiduciary duty is in issue, equity should look to the direct relationship between the employer and the victim and identify actual wrongdoing committed by the employer in its own name.[334]

At least linguistically, this criticism appears significant. 'Conscience', at first glance, relates to the defendant's state of mind.[335] As such, if equitable relief is only granted where a defendant's conscience is affected, then a concept of equitable vicarious liability would appear to be a contradiction in terms.

Yet at this level of simplicity, the argument is manifestly incorrect.[336] It is not the case that unconscientiousness can *only* be identified by reference to the relationship between the victim and the defendant. This may be true for a defendant's *personal* liability for certain wrongs, such as breach of fiduciary duty, that respond to relationships of trust and confidence.[337] But it is not true for all equitable interventions. For example, to use Patrick Parkinson's taxonomy, equity also responds to 'unjust outcomes' such as the 'unjust retention of property'.[338] Thus, equitable claims based on title — such as proprietary claims based on a better equitable title[339] — do not depend on a pre-existing relationship between the defendant and the victim.[340] Similarly, an obligation of confidence may arise from the circumstances through which information was obtained rather than from any pre-existing relationship between the confidant and plaintiff.[341]

Moreover, 'strict liability' is not foreign to equity. Again, equitable claims based on title do not necessarily arise from any wrongful conduct by the defendant. For example, where an innocent volunteer receives stolen funds, they

[333] See *Illuzzi* (n 6) 59918 (Fitzgerald P and Lee J). See also at 59921 (Williams J); *Carvery* (n 26) 319–21 [79]–[85] (Fichaud JA for the Court).

[334] See *Illuzzi* (n 6) 59918 (Fitzgerald P and Lee J), 59921 (Williams J).

[335] See Sarah Worthington, *Equity* (Oxford University Press, 2nd ed, 2006) 328.

[336] See *Ministry of Health v Simpson* [1951] AC 251, 276 (Lord Simonds, Lord Normand agreeing at 277, Lord Oaksey agreeing at 277, Lord Morton agreeing at 277, Lord MacDermott agreeing at 277) ('*Simpson*').

[337] See Parkinson, 'Conscience' (n 330) 37 [207].

[338] Ibid 46 [212].

[339] *Great Investments* (n 271) 530 [55] (Jagot, Edelman and Moshinsky JJ).

[340] Ibid. See also *Tanwar Enterprises* (n 329) 325 [25] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

[341] See *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 437–8 (Deane J, Gibbs CJ agreeing at 421, Mason J agreeing at 421, Wilson J agreeing at 421, Dawson J agreeing at 446); *Coco v AN Clark (Engineers) Ltd* (1968) 1A IPR 587, 591 (Megarry J).

may be required to restore the money in their hands upon discovering the true position.[342] Described as a 'strict liability trust',[343] the defendant's conscience is touched by 'the later discovered position, not [by] wrongful conduct'.[344] Similarly, liability for breach of fiduciary duty is strict as is the personal liability of a recipient of property misapplied in the administration of a deceased estate.[345]

Thus, to be arguable, the purported incompatibility between vicarious liability and the conceptual foundations of equity must be particularised further. The concern appears to arise from the nature of the particular wrongs for which an employer might be vicariously liable. To explain and rebut this argument, it is convenient to focus on fiduciary duties.

Fiduciary obligations are imposed in response to a relationship of trust and confidence to ensure that the fiduciary does not abuse their position for personal gain.[346] That relationship 'breathes life' into the fiduciary's duties, defining the limits of permissible conduct and the remedies available.[347] As such, fiduciary liability is essentially personal in nature and meaningless once separated from the relationship.[348] The concern in *Illuzzi* can thus be rephrased as follows: is there a 'conceptual asymmetry' in holding an employer, whose conscience

[342] *Fistar* (n 258) 738–9 [30] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]), quoting *Heperu* (n 274) 265 [154] (Allsop P, Campbell JA agreeing at 269 [179], Handley AJA agreeing at 270 [180]).

[343] *Great Investments* (n 271) 530 [55] (Jagot, Edelman and Moshinky JJ), discussing *Fistar* (n 258) 744 [52]–[53] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]).

[344] *Heperu* (n 274) 265 [154] (Allsop P, Campbell JA agreeing at 269 [179], Handley AJA agreeing at 270 [180]).

[345] Worthington (n 335) 328; Pauline Ridge, 'Constructive Trusts, Accessorial Liability and Judicial Discretion' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Lawbook, 2013) 73, 77 [5.90]; *Grimaldi* (n 122) 404 [509] (Finn, Stone and Perram JJ), quoting *Harris* (n 53) 407 [407] (Heydon JA); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman*'); *Fenwick v Naera* [2016] 1 NZLR 354, 377 [73] (Glazebrook J for McGrath, Glazebrook, O'Regan and Blanchard JJ); *Simpson* (n 336) 276 (Lord Simonds, Lord Normand agreeing at 277, Lord Oaksey agreeing at 277, Lord Morton agreeing at 277, Lord MacDermott agreeing at 277), cited in Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 231, 239–40.

[346] Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 339, 339 [1001]. See also Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 (July) *Law Quarterly Review* 452, 453, 460.

[347] See *Carvery* (n 26) 320 [83]–[84] (Fichaud JA for the Court), quoting Leonard I Rotman, *Fiduciary Law* (Carswell, 2005) 150. See also *Maguire v Makaronis* (1997) 188 CLR 449, 464 (Brennan CJ, Gaudron, McHugh and Gummow J) ('*Maguire*'); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 45 [185]–[189] (Spigelman CJ, Sheller and Stein JJA).

[348] See *Carvery* (n 26) 320 [84] (Fichaud JA for the Court), citing Rotman (n 347) 367–9.

is untouched by the fiduciary relationship, responsible for a violation of that relationship?[349]

The issue with this criticism is that it confuses the breach of conscience that justifies the imposition of liability on the fiduciary (the employee) and the breach of conscience underlying the employer's liability. The vicariously liable employer is not liable as a de facto fiduciary, and their liability need not be justified as such. As noted above, vicarious liability is imposed as a matter of policy.[350] In *Coulthard*, King CJ postulated that equity fixes upon the conscience of the employer by requiring it to accept a liability for which it ought to take responsibility.[351] In other words, equity responds to the employer's failure to accept a liability that, as a matter of conscience, it ought not to deny. Thus, although the employer's liability appears to mirror that of the employee, it is in fact conceptually distinct since the unconscientious conduct of the employer does not arise from the underlying relationship of trust and confidence that justifies the employee's liability. It should thus be immaterial that the employer is not, themselves, a participant in the fiduciary relationship.

Nevertheless, this observation gives rise to a second concern, identified by Besanko J in *Lifeplan*: if vicarious liability is not imposed in response to the employer's own breach of a fiduciary relationship, can the employer's independent breach of conscience justify the award of the remedies typically available to a victim of fiduciary wrongdoing?[352] More importantly: if the answer is no, should this preclude vicarious liability entirely?

An important distinction between liabilities in tort and equity is the equitable jurisdiction to award a gains-based remedy, such as an account of profits, against a wrongdoer.[353] An account of profits requires the wrongdoer to 'account for the profit made within the scope and ambit of the duty'.[354] Alongside rescission, it is the 'pre-eminent' remedy for a breach of fiduciary duty and it will be available as a matter of course once a breach of fiduciary duty is

349 See *Illuzzi* (n 6) 59917–18 (Fitzgerald P and Lee J), 59921 (Williams J).

350 See above Part V(A).

351 *Coulthard* (n 10) 535. See also *Dubai Aluminium* (n 17) 377 [21]–[22] (Lord Nicholls, Lord Slynn agreeing at 386 [65], Lord Hutton agreeing at 386 [66], Lord Hobhouse agreeing at 386 [68]).

352 *Lifeplan Trial* (n 6) 456 [374].

353 But see Heydon, Leeming and Turner (n 53) 910 [26-025].

354 Ibid 186 [5-270], citing *Warman* (n 345) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ), *Maguire* (n 347) 468 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also *Ancient Order* (n 12) 12–13 [9] (Kiefel CJ, Keane and Edelman JJ), 37–40 [89]–[96] (Gageler J), 64 [179] (Nettle J).

established (subject to discretionary considerations), although a claimant may elect to receive a loss-based remedy (namely, equitable compensation) in its place.[355] An account of profits is similarly available for breach of an *equitable* duty of confidence and for knowing assistance and receipt, although the principles by which an account is assessed may differ between causes of action.[356]

A broader analysis of the remedies that should be available against a vicariously liable defendant is beyond the scope of this piece. However, there is a strong argument that vicarious liability cannot support the disgorgement of the employer's own profits. Gains-based relief serves a prophylactic function: it aims to discourage the wrongdoer's breach of duty rather than to compensate the victim's loss.[357] As Besanko J noted, gains-based relief is inconsistent with the loss-distribution justification given for vicarious liability,[358] which aims to provide a practical remedy to the victim of wrongdoing rather than to remove an incentive to disloyalty.[359] This position assumes some force from the run of decided cases.[360] My research did not identify a case in which gains-based relief was awarded against a vicariously liable principal.[361] By contrast, the England and Wales Court of Appeal dismissed a suggestion that 'proprietary relief' could be available against an otherwise innocent partner in *Northampton Regional Livestock Centre Co Ltd v Cowling*,[362] and the Supreme Court of Canada, in *Strother v 3464920 Canada Inc*, denied that a law firm that was held

[355] Conaglen (n 346) 463.

[356] Heydon, Leeming and Turner (n 53) 1184 [42-190]; Aplin et al (n 135) 781 [20.01]; *Ancient Order* (n 12) 12–13 [9] (Kiefel CJ, Keane and Edelman JJ), 32–3 [75]–[76] (Gageler J), 71–2 [197] (Nettle J); Jamie Glister, 'Accounts of Profits and Third Parties' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 175, 193 ('Accounts of Profits').

[357] *Ancient Order* (n 12) 12 [9] (Kiefel CJ, Keane and Edelman JJ), quoting Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 48 (October) *Law Quarterly Review* 472, 474; Conaglen (n 346) 463. Cf *Strother* (n 22) 226–7 [75]–[76] (Binnie J for Binnie, Deschamps, Fish, Charron and Rothstein JJ).

[358] *Lifeplan Trial* (n 6) 455 [368]. See also *Strother* (n 22) 237–8 [103] (Binnie J for Binnie, Deschamps, Fish, Charron and Rothstein JJ).

[359] *Strother* (n 22) 237–8 [103] (Binnie J for Binnie, Deschamps, Fish, Charron and Rothstein JJ).

[360] *Lifeplan Trial* (n 6) 456 [374] (Besanko J).

[361] Cf *Northampton Regional Livestock* (n 21) in which an innocent partner was held liable for the wrongdoing partner's profit: at 474 [96] (Tomlinson LJ, King LJ agreeing at 478 [115], Arden LJ agreeing at 478 [116]).

[362] Ibid 435–6 [1], 474 [96], 476 [105] (Tomlinson LJ, King LJ agreeing at 478 [115], Arden LJ agreeing at 478 [116]).

vicariously liable for a partner's breach of fiduciary duty under statute was liable to repay legal fees that it, as opposed to the partner, had earned.[363]

For Besanko J, this suggested that vicarious liability cannot apply to equitable wrongs where the particular remedy sought against the *employee* was an account of profits.[364] Yet this concern should not be accepted.

First, it is unlikely that the remedies awarded against an employee and a vicariously liable employer *must* coincide such that *each* party's conduct must justify a gains-based remedy. An accessory to a fiduciary's breach of duty, such as a knowing assistant, is 'ordinarily' accountable only for their own profit, not that of the fiduciary.[365] As such, the defaulting fiduciary and knowing assistant may be subject to different remedies entirely: one compensatory and the other profit-based.[366] The degree of fault of an employer whose liability is only vicarious is, by definition, less than that of an accessory. It would thus be anomalous to require the employer to account for the primary wrongdoers' profit if the employer is strictly liable but not if it is directly liable as an accessory.[367] If so, then there should be no difficulty in awarding a loss-based remedy against the employer and a gains-based remedy against the employee.

Moreover, the fact that vicarious liability cannot justify a particular *remedy* should not preclude *liability* entirely. If the rationale of vicarious liability supports the imposition of liability on an employer but not the availability of a particular remedy, that is something that can and should be considered when the court selects the appropriate remedy and not beforehand. This discretionary approach would have the benefit of preserving equity's characteristic remedial

[363] *Strother* (n 22) 189–90 [1], 228 [81], 229 [83] (Binnie J for Binnie, Deschamps, Fish, Charron and Rothstein JJ).

[364] See *Lifeplan Trial* (n 6) 455 [368], 456 [374].

[365] *Grimaldi* (n 122) 415–16 [557] (Finn, Stone and Perram JJ). See also *Warman* (n 345) 569 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); Heydon, Leeming and Turner (n 53) 187–9 [5-270]. A fiduciary and a third party who act *in concert* to secure a mutual benefit will be jointly and severally liable for their combined profits: *Grimaldi* (n 122) 415–16 [558] (Finn, Stone and Perram JJ), cited in Glister, 'Accounts of Profits' (n 356) 191–2, *Xiao* (n 189) 148 [65] (Gleeson JA, Mitchelmore JA agreeing at 164 [163], Griffiths AJA agreeing at 164 [164]).

[366] *Xiao* (n 189) 137 [12], 149–51 [68]–[84] (Gleeson JA, Mitchelmore JA agreeing at 164 [163], Griffiths AJA agreeing at 164 [164]).

[367] Cf *Northampton Regional Livestock* (n 21) 435–6 [1], 474 [96], 476 [105] (Tomlinson LJ, King LJ agreeing at 478 [115], Arden LJ agreeing at 478 [116]).

flexibility while ensuring that questions of liability precede the choice of remedies as is the ordinary logic of the law.[368]

Importantly, denying an account of profits as an exercise of remedial discretion, rather than by precluding liability, would be entirely orthodox. Like all equitable remedies, profit-stripping is 'discretionary' and is awarded or denied 'according to settled principles'.[369] Moreover, there is clear precedent for the remedy (but not liability) being denied where the underlying breach of conscience cannot, in the circumstances, support it. In *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*, Windeyer J limited an account to those profits made by the defendant while '*knowingly* infringing' the plaintiff's trademark, reasoning that it would not be unconscionable for the defendant to retain profits innocently made.[370] In the context of breach of confidence, Tanya Aplin et al argue that the defendant being 'totally innocent' is a discretionary factor that might preclude an account of profits (without foreclosing liability).[371] Similarly, Jamie Glister has argued that the low degree of fault involved in some cases of knowing receipt means that an account of profits should not automatically follow liability.[372] Indeed, the England and Wales Court of Appeal has noted that an account of profits against a non-fiduciary may be refused if the remedy would be 'disproportionate in relation to the particular form and extent of wrongdoing';[373] this proposition was quoted with apparent approval by the New South Wales

[368] *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 278–9 [1] (Gummow, Hayne, Heydon, Kiefel and Bell JJ), quoting *Warman* (n 345) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ). See also *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 419 (Brennan J).

[369] Heydon, Leeming and Turner (n 53) 186 [5-270], citing *Warman* (n 345) 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ), *Chan v Zacharia* (1984) 154 CLR 178, 204–5 (Deane J).

[370] (1968) 122 CLR 25, 34–5 (emphasis added), quoted in Ian E Davidson and Mark P Cleary, 'Taking Accounts' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 939, 954–5 [2614].

[371] Aplin et al (n 135) 783–4 [20.07], citing *Conran v Mean Fiddler Holdings Ltd* (1997) 24 FSR 856, 861 (Walker J). See also *Retractable Technologies v Occupational and Medical Innovations* (2007) 72 IPR 58, 81 [86] (Greenwood J), quoted in *Sports Data Pty Ltd v Prozone Sports Australia Pty Ltd* (2014) 316 ALR 475, 484–5 [54] (Wigney J).

[372] Glister, 'Accounts of Profits' (n 356) 184, 190. See also Paul D Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan WM Waters (ed), *Equity, Fiduciaries and Trusts: 1993* (Carswell, 1993) 195, 211.

[373] *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499, 535 [119] (Longmore LJ for the Court) ('*Novoship*').

Court of Appeal in *Xiao v BCEG International (Australia) Pty Ltd*.[374] It is thus submitted that vicarious liability's asserted inability to support gains-based relief does not render the doctrine 'incompatible' with equity's unique conceptual foundations.

VI Conclusion

As has been noted, vicarious liability is a doctrine 'on the move'.[375] In particular, the last few decades have seen an expansion of its scope as courts have sought to devise effective civil remedies for victims of deliberate criminal conduct.[376] Yet hidden amongst this movement, underappreciated in the academic literature, has been the development addressed in this article: the increasing acceptance, particularly in England, that vicarious liability both can and should apply to equitable wrongdoing.

This article has shown that parallel development should be encouraged in Australia. Although vicarious liability may lack the equitable provenance asserted by majorities of the High Court of Australia and the House of Lords, there is both space and a justification for its application in equity. Concerns that vicarious liability would subvert equity's existing approach to determining third-party liability, or would be otherwise incompatible with equity's conscience-based approach, cannot be sustained.

The application of vicarious liability in equity would, of course, be both novel and significant. In some contexts, vicarious liability would arise where personal liability does not. Moreover, where personal and vicarious liability operate concurrently, vicarious liability might provide a simpler path to establishing a plaintiff's case. But, as Lord Nicholls reminds us, '[e]quity has not been hampered by a fear of innovation'.[377] The decision in *Anderson* reflects this innovative spirit. It remains to be seen whether other Australian courts will share it too.

[374] *Xiao* (n 189) 142 [42] (Gleeson JA, Mitchelmore JA agreeing at 164 [163], Griffiths AJA agreeing at 164 [164]), quoting ibid. Cf *Ancient Order* (n 12) 36 [83] (Gageler J), citing *Novoship* (n 373).

[375] *Catholic Child Welfare Society* (n 36) 11 [19] (Lord Phillips, Baroness Hale, Lords Kerr, Wilson and Carnwath JJSC agreeing), quoted in *Cox* (n 160) 664 [1] (Lord Reed JSC, Lord Neuberger PSC, Baroness Hale DPSC, Lord Dyson MR and Lord Toulson JSC agreeing).

[376] See, eg, *Prince Alfred College* (n 28); *Lepore* (n 219); *Lister* (n 213); *Catholic Child Welfare Society* (n 36); *Bazley* (n 213); *Jacobi v Griffiths* [1999] 2 SCR 570.

[377] Nicholls (n 345) 245.