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AUTHORITY, VICARIOUS LIABILITY AND MISREPRESENTATION

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This article explores the interface between vicarious liability and agency authority in the context of misrepresentation. It suggests that while vicarious liability is often a wider concept than agency authority, where the torts of misrepresentation are concerned there should be symmetry between vicarious liability and authority in agency.

I. INTRODUCTION

The doctrine of vicarious liability is a rule of responsibility which renders the defendant liable for the tortious act of another.[1] Vicarious liability typically arises in an employer-employee relationship. The employer is regarded as liable for the torts of the employee if such torts were committed in the course of employment. What is regarded as being within the course of employment is an extended concept because vicarious liability can arise in cases where the employee did something he was not authorised to do. Indeed, it might be said that no employer would regard a tortious act as being within the employee's course of employment unless the employer had specifically authorised the act in question. The doctrine of vicarious liability is not, however, limited to acts that are authorised by the employer and may even extend to acts that are expressly prohibited.

Policy considerations undergird the doctrine of vicarious liability as it must presumptively be remarkable to place the consequences of a tortious act on a party that did not commit or authorise such an act. In *Dubai Aluminium Co Ltd v. Salaam*, Lord Nicholls expressed the policy considerations in the following terms:[2]

> The underlying legal policy [for vicarious liability] is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is

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1 Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (New York: Cambridge University Press, 2010) at 1.

2 [2003] 2 A.C. 366 at paras. 21, 22 (H.L.) [*Dubai Aluminium*].

just that the business should be responsible for compensating the person who has been wronged.

This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of "ordinary course of employment" an extended scope.

Vicarious liability is essentially a means of loss allocation, often between two or more innocent parties. It seems to be premised in part on the notion that just as the rewards from carrying on a business inures to the employer, it is fair and just that some of the risks associated with the business are borne by it. In determining what is fair, the courts take into account a number of considerations and some of these will be discussed in the context of this article.

Another important policy consideration is to incentivise employers to take appropriate precautions to limit employee wrongdoing or carelessness, thereby reducing the risk of future harm to the community.[3] These twin policy objectives of fair compensation and deterrence underlie the doctrine of vicarious liability.[4]

II. Intentional Wrongdoing

In determining the acts that may be within the employee's course of employment, it would seem natural that acts of carelessness should fall within such a framework more easily as compared to intentional wrongdoing. One can clearly envisage an employee intending to further the employer's interest but doing so carelessly. While it may also be the case that an employee intends to further his employer's interest in a wrongful way, many cases of intentional wrongdoing, particularly those involving fraud, will be attempts by the employee to advance his own interests rather than the employer's. It might therefore be thought that vicarious liability ought not to be imposed in such circumstances because intentional wrongdoing should be excluded from being considered as being within the scope of employment. Employers who have not authorised wrongful acts can almost certainly be taken generally to have at least implicitly prohibited them.

In this context, *Lloyd v. Grace, Smith & Co* is an important case for its clarification of the circumstances in which an employer may be liable for the fraud of an employee.[5] Until *Barwick v. English Joint Stock Bank*,[6] it was unclear if an employer

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3 *Bazley*, *infra* note 68 at para. 33.

4 See *ibid*. at para. 36; *Skandinaviska*, *infra* note 62 (a judgment delivered by Chan Sek Keong C.J., Chao Hick Tin and Andrew Phang Boon Leong JJ.A.).

5 [1912] A.C. 716 (H.L.) [*Lloyd*].

6 (1867) L.R. 2 Ex. 259 [*Barwick*].

could be liable for the fraud of an employee. *Barwick* made it clear that, in principle, liability could be fixed on an employer in such circumstances. However, Willes J.'s judgment contained an apparent qualification, namely that "the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."[7] This suggested that the vicarious liability of an employer for the fraud of an employee depended on the question of whether the employer, and not just the employee, benefited from the fraud.[8] This qualification was not accepted by the House of Lords in *Lloyd*.[9] Therefore, the position today is that an employer may be liable for the fraudulent act of its employee even if the employee intended only to benefit himself.

The facts in *Lloyd* were that Mrs. Lloyd, a widow, owned two cottages and a sum of money secured on a mortgage. She consulted a firm of solicitors as she was not satisfied with the income derived from her property. The managing clerk of the firm, who conducted the conveyancing business of the firm without supervision, induced Mrs. Lloyd to give him instructions to sell or realise her property. Towards this end, she gave him her deeds and also signed two documents which she did not read or understand, but which she believed were necessary to effect the sale of the cottages. The documents were in fact a conveyance of the cottages and a transfer of the mortgage to the managing clerk who then dishonestly disposed of Mrs. Lloyd's property and pocketed the proceeds. Although there was no dishonesty on the part of the sole member of the firm at the time the fraud was perpetrated, and the managing clerk had acted outside the scope of what he had been authorised to do with a view to benefiting only himself, the firm was held liable for the fraud committed by the managing clerk.

The result has been justified both on the basis of vicarious liability as well as agency. The former considers that the employer of the managing clerk was vicariously liable for his acts as they were committed in the course of employment. As Earl Loreburn put it: "If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it."[10] Where vicarious liability of an employer is established, the employer's liability is secondary and not primary in that the employer has not committed the tort personally and is therefore free from blame, but is treated as nevertheless being responsible for the consequences of the tort committed by the employee.

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[7] *Ibid*. at 265.

[8] *Lloyd*, *supra* note 5 at 725, 730, 731. See also *Lister*, *infra* note 34 at 224, 245, 246.

[9] Lord Macnaghten in *Lloyd*, *ibid*. at 731, said:

> [*Barwick*] decided that if on a new trial the jury should come to the conclusion that the agent of the bank had in fact committed the fraud, which in the pleadings was charged as the fraud of the bank, then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded. And I think it follows from the decision, and the ground on which it is based, that in the opinion of the Court a principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

[10] *Ibid*. at 725. See also Lord Macnaghten, *ibid*. at 730.

The other justification is founded on agency reasoning. In fact, agency terminology is commonly used in vicarious liability cases.[11] This is understandable[12] though not entirely accurate. An agent, understood in its strict legal sense, is a person who is authorised by another, the principal, to act on the principal's behalf and through so doing, the agent has the power to alter the principal's legal relations. Where agency applies, the principal is regarded as being bound by the agent's acts and such liability is primary rather than vicarious or secondary. As the agent has performed an act at the request of the principal and on the principal's behalf, the law treats the acts of the agent as if they were the acts of the principal.[13] An agent may be either an employee or independent contractor,[14] or perhaps neither.[15] Similarly, an employee may have agency powers to affect the principal's legal relations, but equally many employees have no such powers and are therefore not agents in a legal sense. However, the existence of the employee-agent explains why terms used in vicarious liability and agency are often conflated.

A point of intersection between vicarious liability and agency lies in the concept of authority. In determining whether an employee has acted in the 'course of employment', the authority the employee has is a relevant consideration. If an employee has authority to act on the principal's behalf in a manner that can alter the latter's legal relations, and the employee commits a tort in the course of doing so, it is likely that the employee will be considered to have acted within the course of his employment. In fact "from early times, it was sought to justify the employer's vicarious liability on the hypothesis of implied authority."[16] The employer-principal may also be liable on agency principles.[17] Yet the idea of authority in vicarious liability is not as narrowly confined as in agency. Take the case of a driver employed by a company who has been authorised to make a delivery from the company's factory to its customer's warehouse. While this is relevant to determining whether the driver was acting in the course of employment if he caused an accident while driving from the factory to the

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[11] For example, Lord Macnaghten, *ibid*. at 730, said: "That seems to me to be a clear finding that the fraud was committed in the course of Sandles' employment and not beyond the scope of his agency", thus seemingly conflating both vicarious liability and agency. Thomas Atkins Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law*, vol. 2 (Northport, New York: Edward Thompson Co., 1906) at 454 said: "There has never been a time when cases on master and servant were not cited as authority in the law of principal and agent, and vice versa."

[12] Lord Macnaghten in *Lloyd*, *ibid*. at 736, said "that the expressions 'acting within his authority,' 'acting in the course of his employment,' and the expression 'acting within the scope of his agency' (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing… Whichever expression is used it must be construed liberally".

[13] Generally, see Peter Watts & F.M.B. Reynolds, eds., *Bowstead & Reynolds on Agency*, 19th ed. (London: Sweet & Maxwell, 2010), art. 1 [*Bowstead & Reynolds*]. This description of agency is subject to qualifications and exceptions but suffices for the purpose of this paper.

[14] Vicarious liability only attaches to an employer for the acts of an employee. If the tortfeasor is not an employee but an independent contractor, the person using the services of the independent contractor will only be liable if the tort was authorised by him, or exceptionally if the tortious act fell within the independent contractor's apparent authority.

[15] For example, the gratuitous agent.

[16] Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law*, 6th ed. (Oxford: Clarendon Press, 2008) at 680.

[17] In *Conway*, *infra* note 30 at 275, Asquith L.J. said that "[t]he two approaches [*i.e.* vicarious liability based on the scope of employment and apparent authority in agency], of course, overlap or interlock to some extent."

warehouse, it can hardly be said that the driver was authorised to alter the company's legal relations in the strict agency sense.

The concept of 'apparent authority' broadens the scope of the law of agency. An agent acting outside the scope of actual authority conferred by the principal may nevertheless bind the principal if the agent appeared to have the authority in question. Such authority is referred to as 'apparent authority'. For the principal to be bound by apparent authority, the appearance of the agent's authority must have come about through an act of the principal. In such circumstances, if a third party acted on the basis of this appearance of authority, the principal will be bound if the act of the agent fell within the scope of such apparent authority. Apparent authority is often justified as being based on estoppel, and therefore the lack of real authority does not prevent the third party from claiming against the principal as the principal is estopped from denying the authority of the agent.[18] Apparent authority will also be relevant in the context of determining whether the act of an agent-employee was within the course of that employee's employment. In the context of cases involving fraud or deceit, its existence may even be crucial to the issue.[19]

Accordingly, agency analysis was also used in *Lloyd* to arrive at the result.[20] Earl Loreburn spoke of the authority of the managing clerk to receive deeds and to carry through sales and conveyances, as well as to give notices on the firm's behalf. He took advantage of the opportunity given to him as the firm's representative to defraud the widow. In his Lordship's view, this was a breach by the firm's agent of a contract made by him, as the firm's agent, to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. In other words, the managing clerk, on behalf of the firm, entered into a contract which bound the firm,[21] and the firm was responsible for the agent's breach of the contract. Lord Macnaghten said that the firm should suffer for the managing clerk's fraud because the sole partner had put the clerk in the partner's place and clothed him with his own authority.[22] Since it is clear that the clerk did not act within his actual authority, Lord Macnaghten was placing liability on the acts of the partner which caused the widow to reasonably believe that the managing clerk was clothed with authority; in other words, the firm was bound by the clerk's appearance of authority rather than any actual authority he possessed.[23]

III. Broadening the 'Course of Employment'

Although actual and apparent authority are relevant to the issue of determining whether an employee-agent has acted within the course of employment, there is no complete overlap; this is understandable given the different objectives of agency

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[18] *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480 (C.A.).

[19] Thus in *Lloyd*, *supra* note 5, Earl Loreburn used agency reasoning to determine what was within the course of business; see also *Armagas*, *infra* note 54, which will be discussed below.

[20] See also *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 K.B. 248 (C.A.).

[21] Because of apparent rather than actual authority.

[22] *Lloyd*, *supra* note 5 at 738. The reliance on apparent authority reasoning is even clearer in the judgment of Lord Shaw of Dunfermline at 740.

[23] This was the explanation of *Lloyd* adopted by Lord Nicholls in *Dubai Aluminium*, *supra* note 2 at para. 28. See also *Conway*, *infra* note 30, where it was held on the facts that there was no representation by the employer on which apparent authority may be made out.

and vicarious liability. This will be discussed in greater detail later. For now, it is necessary to briefly discuss the current test of what constitutes an act falling within the course of employment.

The traditional test for determining whether an employee has acted in the course of employment is commonly referred to as the 'Salmond test' which states that:[24]

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by his master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.

Little difficulty arises where a master has authorised his servant to perform a wrongful act, aside from having to establish factually that this was so. Most cases therefore involve determining whether the act of the employee was an unauthorised mode of doing an act that was authorised by the employer. It cannot be the case that any wrongful act by an employee brings the employee's act outside the scope of employment, thereby leaving no prospect of vicarious liability, given that every tort involves a wrongful act. Accordingly, a wrongful and unauthorised mode of performing one's duties has been accepted as falling within the course of employment. The classic example is perhaps the deliveryman who, in the course of executing his orders, drove beyond the speed limit thereby causing an accident. This would generally be regarded as falling within the scope of employment as his act would be regarded as a wrongful way of doing what he was asked to do.

While this approach can be readily justified, it cannot also be the case that any wrongful act by the employee leads to liability being imposed on the employer simply because the wrongful act was committed by the employee during the employee's time at work,[25] or exceptionally after the employee had finished for the day.[26] The approach under the 'Salmond test' requires the courts to ascertain the scope of what the employee was expected to do and to ask if the wrongful act fell within such scope. This can be difficult in marginal cases, particularly where prohibitions against certain acts are in place,[27] and would turn on how broadly or narrowly the court construes the employee's duties to be. An excellent example can be found in *London County Council v. Cattermoles (Garages) Ltd*.[28] In that case, the employee was employed as a general garage hand and part of his duty was to assist in getting motor cars out of the way of other motor cars. He was instructed to do this by hand and forbidden from driving them as he did not possess a driving licence. While moving a van that was obstructing access, he did so by driving the van to the highway where it collided with the plaintiff's van. At first instance, it was held that there was no vicarious liability as

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[24] John William Salmond, *The Law of Torts* (London: Stevens and Haynes, 1907) at 83.

[25] This should be regarded broadly as employees today frequently continue to work beyond designated working hours whether with or without overtime pay.

[26] For an example of vicarious liability for a negligent act by an employee after he had finished for the day, see *Staton v. National Coal Board* [1957] 1 W.L.R. 893 (Q.B.).

[27] This is because the question then arises as to whether the prohibitions set the limits of the scope of employment such that prohibited acts do not fall within the course of employment, or are merely things which employees are prohibited from doing within the scope of their employment, see *Plumb v. Cobden Flour Mills* [1914] A.C. 62 at 67 (H.L.); *Canadian Pacific Railway Co. v. Lockhart* [1942] A.C. 591 at 599 (P.C.).

[28] [1953] 1 W.L.R. 997 (C.A.).

the judge took the view that his scope of employment was to move vehicles by hand. The Court of Appeal took a broader view and found that part of the employee's function was simply to move cars in the garage so as to make way for other cars that wanted to get in or out. As such, the prohibition was not a limit on the scope of employment and what the employee did was merely an unauthorised mode of performing his duties. Evershed M.R. said that "the court does not attempt narrowly to define the precise limit and scope of a [person's] employment by treating the… prohibition… as limiting the scope of employment as distinct from being confined in its application to modes of performance."[29]

On the other hand, in *Conway v. George Wimpey & Co. Ld.*,[30] the employer was held not to be vicariously liable for its driver giving a lift to a workman who was not employed by the employer. The employer instituted a service within the perimeter of an airport to transport its workers working on one part of the airport to other parts of the airport as necessary. The drivers were expressly prohibited from giving a lift to other persons working at the airport who were not employees of the employer. The plaintiff, who hailed one of the employer's lorries and was given a ride, was injured through the negligence of the driver. It was held that the employer was not vicariously liable. The driver had not acted within the course of employment as the driver had performed an act he was not employed to perform.[31]

It is widely acknowledged that, on occasion, it is not easy to discern why a case falls on one side or the other. It is conceivable that in *Conway*, the Court of Appeal could have characterised the scope of employment more broadly as giving rides from one part of the airport to another, and that the breach of the prohibition against offering rides to non-employees was merely an improper mode of carrying out the driver's duties. As is sometimes the case when matters are finely balanced, the ultimate decision of how the law should be applied to the facts may have been impressionistic.[32] In *Ilkiw v. Samuels*, Diplock L.J. opined, in the context of cases where there were express prohibitions, that the matter must be looked at broadly without "dissecting the servant's task into its component activities… by asking: what was the job on which he was engaged for his employer".[33]

Beyond the question of whether the act fell outside the scope of employment or was merely an unauthorised mode of performing an employee's duty, the 'Salmond test' is arguably difficult to apply in certain cases involving intentional wrongdoing. As can be seen from *Lloyd*, the fact that an employee intended to defraud a client does not take the act outside the course of employment, or beyond apparent authority. However, in that case, the employee-agent perpetrated the fraud within the scope of the work he was employed to do. The facts in that case are at a different level from one where a person asked to run a boarding house for children sexually abuses several children staying at the house. Given that such a person was employed to care for the children in the boarding house, it would be difficult to say that such abuse was an unauthorised mode of doing some act this person was authorised to do. It would be

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[29] *Ibid*. at 1002.

[30] [1951] 2 K.B. 266 (C.A.) [*Conway*].

[31] An argument based on the apparent authority of the driver to carry persons working at the airport whether employed by the employer or not was also rejected.

[32] Asquith L.J. said in *Conway*, *supra* note 30 at 276, that this was by no means an easy case.

[33] [1963] 1 W.L.R. 991 at 1004 (C.A.).

different if the person attempted to discipline the children but did so inappropriately. It is conceivable that the well-being of children entrusted to a boarding house includes appropriate acts of discipline, and wrongful acts in the course of disciplining the children would therefore fall within the course of employment.

Accordingly, in *Lister v. Hesley Hall Ltd*,[34] the House of Lords adopted a broader test. The case involved the sexual abuse of children residing in a boarding house attached to a school owned and managed by the defendants. The warden of the boarding house who abused the children had been hired by the defendants. The Court of Appeal, reversing the trial judge, held that there was no vicarious liability for the warden's acts as what he did could not be regarded as an unauthorised mode of carrying out his authorised duties. As Lord Millett put it in the House of Lords, it is "stretching language to breaking point to describe the series of deliberate sexual assaults… as merely a wrongful and unauthorized mode of performing that duty."[35] Nevertheless, the House of Lords allowed the appeal. Although their Lordships were at pains to say that the approach being adopted conformed to existing authority,[36] it seems clear that a more expansive notion of 'mode' was being applied such that assaults "aris[ing] directly out of circumstances connected with the employment" could give rise to vicarious liability.[37] Using the test of 'close connection', Lord Steyn concluded his reasoning as follows:[38]

> I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House.[39]

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[34] [2002] 1 A.C. 215 (H.L.) [*Lister*].

[35] *Ibid*. at para. 68.

[36] Thus Lord Steyn, *ibid*. at para. 28, said that he was "[e]mploying the traditional methodology of English Law".

[37] *Ibid*. at para. 24. Lord Clyde's observations at para. 37 are also pertinent:

> An act of deliberate wrongdoing may not sit easily as a wrongful mode of doing an authorised act. But recognition should be given to the critical element in the observation, namely the necessary connection between the act and the employment… What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered. The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorised.

The approach in *Lister* was adopted in Singapore by the Court of Appeal in *Skandinaviska*, *infra* note 62.

[38] *Lister*, *ibid*. at para. 28.

[39] See also Lord Clyde, *ibid*. at para. 50 who said that:

> [H]is position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he committed and the work which he had been employed to do… His general duty was to look after and to care for, among others, the appellants… That he performed that function in a way which was an abuse of his position and an abnegation of his duty does not sever the connection with his employment. The particular acts which he carried out upon the boys have to be viewed not in isolation but in the context and the circumstances in which they occurred.

Essentially, as Lord Millett pointed out, the care and welfare of the boys had been entrusted to the warden, and thus it was the very employee to whom the school had entrusted the care of the boys who committed the assaults.[40]

IV. Authority and Course of Employment

Authority in the law of agency refers to the actual and apparent authority[41] that can alter the principal's legal relations. The paradigm situation where agency applies is in the formation of a contractual relationship between the principal and a third party through the act of the agent. Nevertheless, it is well-recognised under agency law that a principal who authorises his agent to commit a tort will be liable for the tortious act of the agent. In this way, the agent has the power to affect the principal's legal relations. If the agent is also an employee, the law of vicarious liability will arrive at the same conclusion because a wrongful act authorised by an employer is deemed to be done in the course of employment. Thus in cases involving wrongful acts that are authorised, there is an overlap between authority and course of employment[42] though authority can, through agency, extend liability for acts of non-employees.

Understandably, the concept of 'actual' or 'real' authority is unimportant where the employee has committed a wrongful act that was not authorised by the employer. The second limb of the 'Salmond test' refers to "a wrongful and unauthorised mode of doing some act authorised by the master", but in this context, the act "authorised by the master" is merely a way to convey the scope of the task set by the employer for the employee. Such an "act" is not wrongful in itself, otherwise it would have fallen within the first limb of the 'Salmond test'. It is the "mode" or act performed to fulfil the task set by the employer that was not authorised, but which the employer is nevertheless responsible for if it was a wrongful way of performing the employee's authorised duties. This would be the case if there were some connection between the wrongful act and the employee's job scope. The real change in the law brought about by *Lister*[43] was to broaden the range of acts that would be regarded as being unauthorised modes of performing authorised acts, through the test of whether the wrongful act was sufficiently closely connected to an employee's authorised duties for vicarious liability to arise.

This aspect of what falls within the course of employment does not generally fit in well with apparent authority either, even though apparent authority imposes liability in the absence of real authority. This is because of the need for a representation by the principal before apparent authority can arise; it is the representation, whether by word or deed, that estops the principal from denying the agent's authority. In most torts, it is difficult to see how the employer-principal could have made any representation to the victim that could have led the latter to believe that the employee-agent had the authority to commit the wrongful act.[44] The victim may not even know at the

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[40] *Ibid*. at para. 82.

[41] Although the latter is a misnomer because there is no real authority in apparent authority, but merely the appearance of authority which the principal cannot deny because he is estopped from doing so.

[42] Though liability for the former is primary and for the latter is secondary.

[43] *Supra* note 34.

[44] Though McLachlin J. in *Bazley*, *infra* note 68, expressed the view that apparent authority as a rationale works well enough for torts of negligent accident though not for intentional torts. It is suggested that the

time of the tort that the tortfeasor is an employee or agent. In such circumstances, the doctrine of the undisclosed principal may also be applicable.[45] An undisclosed principal will only be liable for the acts of an agent that fall within the agent's actual authority.[46]

It is clear therefore that the second limb of the 'Salmond test', and particularly as understood in the light of *Lister*,[47] is a much broader concept than apparent authority in agency. In *Dubai Aluminium*,[48] Lord Nicholls explained that operating a business enterprise involves risk to others that they may be harmed by wrongful acts of employees. Much of this risk should be borne by employers. It would not be acceptable for the risks associated with employee carelessness or excess of authority to be placed on third parties. Accordingly, authority cannot be the touchstone for vicarious liability as employees will on occasion be careless, may sometimes exceed their authority, or even defy express instructions and in so doing cause harm to others who should be entitled to a remedy against the employer.[49]

However, authority may nevertheless have a significant role to play in those torts which are not unilateral, but instead require an act or response from the victim to constitute the tort. This is the case for torts of misrepresentation which require that the victim must, where the statement is fraudulently made, have been induced by the statement to enter into the transaction,[50] or that it was reasonable to rely on the statement in the case of negligent misstatements.[51] From a policy perspective, it cannot be that a person can rely on every untruth told by an employee-agent so as to make the employer-principal civilly liable for the consequences of the untruth. This places a significant risk on business enterprises while providing no incentive for third parties to exercise such degree of prudence and judgment as may be appropriate in the circumstances. Such a legal position would simply lead to higher costs that would have to be absorbed by society as a whole in one form or another.

V. Authority, Vicarious Liability and Misrepresentation

A. *Fraudulent Misrepresentation*

The foregoing policy considerations underlie why the approach of the House of Lords in *Lloyd*[52], *viz*. using the doctrine of apparent authority as a basis to justify the result,

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reference to apparent authority is a loose one by way of analogy and simply means that the employee was acting in furtherance of the employer's aims, see *Bazley*, *ibid.* at para. 19.

[45] An undisclosed principal is one whose existence, and not merely whose identity, is unknown to the third party.

[46] This is because a person whose existence is unknown to the victim cannot have made any representation to the victim.

[47] *Supra* note 34.

[48] *Supra* note 2. This was a case involving the liability of a firm for the wrong of one of its partners, but it was considered that the position for vicarious liability for employees was similar.

[49] *Ibid*. at para. 22.

[50] *Edgington v. Fitzmaurice* (1885) 29 Ch. D. 459 (C.A.); *Downs v. Chappell* [1997] 1 W.L.R. 426 (C.A.).

[51] *Hedley Byrne & Co. Ltd v. Heller & Partners* [1964] A.C. 465 (H.L.); *Berry Taylor v. Coleman* [1997] Professional Negligence and Liability Reports 1 (C.A.); *Hagen v. ICI Chemicals and Polymers Ltd* [2002] Industrial Relations Law Reports 31 (H.C.).

[52] *Supra* note 5.

was appropriate. As Lord Shaw of Dunfermline put it:[53]

> [W]hen the authority does ostensibly include within its scope transactions of a particular character, then quoad a third party dealing in good faith with such an agent, the apparent authority is, as is well settled, equivalent to the real authority and binds the principal.

The principal had clothed the agent with the appearance of authority to make the representations that led to the plaintiff being deceived. As the agent appeared to have the authority to do what had constituted the fraudulent acts, and the plaintiff relied on the agent's representations when she was thereby induced to transfer her property to the agent, the principal was responsible for the loss suffered by the plaintiff.

Lloyd was a case involving fraud. A similar approach was taken in *Armagas Ltd. v. Mundogas S.A. (The Ocean Frost)*,[54] which was another case involving the tort of deceit. In that case, the plaintiff had purchased a ship from the defendant. In connection with the purchase, the broker and the defendant's Vice-President (Transportation), who was also the chartering manager, conspired to bring a spurious three-year charterparty with the plaintiff into existence so as to induce the plaintiff to purchase the vessel which would then be chartered back to the defendant. In fact, the defendant's chartering manager had no authority to agree to this three-year charter of the ship. The plaintiff's officers were aware that he had no such general authority but it was represented to them by the broker and the chartering manager that he had sought—and the defendant had granted—specific authority for it. In fact, the defendant only intended to enter into a twelve-month charterparty. When the fraud unravelled because of a collapse in hire rates generally, the plaintiff brought a claim against the defendant for breach of the charterparty. The grounds for the claim were that the chartering manager had apparent authority to enter into a three-year charterparty, or the defendant was vicariously liable for its employee's deceit.

In rejecting the argument based on apparent authority, Lord Keith, with whom the other Law Lords agreed with, stated that it must be a most unusual and peculiar case where an agent who was known not to have any general authority to enter into the transaction in question could by reason of circumstances created by the principal "reasonably be believed to have specific authority to enter into a particular transaction of that type."[55] In other words, an agent known not to have general authority to enter into a type of transaction is unlikely, in respect of a particular transaction, to have had apparent authority for that transaction as the other contracting party would not have a reasonable basis to believe that such specific authority existed. In the context of *Armagas*, it is also relevant that the representation was made by the agent. In general, apparent authority arises only where the representation is made by the principal; an

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[53] *Ibid*. at 740. See also Earl Loreburn at 725 who referred to an agent "held out as authorized" and Lord Macnaghten at 738 who said that the principal had "put this rogue in his own place and clothed him with his own authority".

[54] [1986] A.C. 717 (H.L.) [*Armagas*].

[55] *Ibid*. at 777.

agent cannot generally make representations as to the agent's own authority unless this can be traced back to an act of the principal itself.[56]

The House of Lords similarly held that there was no vicarious liability for the acts of the chartering manager. Lord Keith said:[57]

> At the end of the day the question is whether the circumstances under which a servant has made the fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do, and when the employer has done nothing to represent that he is authorised to do it. In the present case Mr. Magelssen [*viz*. the chartering manager] was not authorised to enter into the three year charterparty, to do so was not within the usual authority of an employee holding his position, and Armagas knew it, and Mundogas had done nothing to represent that he was authorised to do so. It was contended for Armagas that concluding the contract for the sale of the vessel was within Mr. Magelssen's actual authority, and that inducing the sale by falsely representing that he had authority to enter into the charterparty amounted to no more than an improper method of performing what he was employed to do, such as in other contexts was sufficient to attract vicarious liability. But the sale of a ship backed by a three year charterparty is a transaction of a wholly different character from a straightforward sale, even if the charterparty is not to be regarded as a transaction separate and distinct from the sale, and Mr. Jensen and Mr. Dannesbøe knew that Mr. Magelssen had no authority to enter into a transaction of that character on his own responsibility.

It is clear from Lord Keith's reasoning that insofar as fraudulent misrepresentations are concerned, vicarious liability is dependent on the employee at least appearing to have authority to make the representations in question. In this context, there accordingly appears to be a symmetry between 'course of employment' and actual and apparent authority.

Armagas was a decision pre-dating *Lister*,[58] and the question is whether it remains valid notwithstanding the newer 'close connection' test. In *So v. HSBC Bank Plc*,[59] Etherton L.J. expressed the view that the approach in *Armagas* fitted the analysis in *Dubai Aluminium* which itself endorsed the 'close connection' test.[60] It would appear, therefore, that at least at this point, English law regards *Armagas* as being good law.[61]

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[56] Generally, see *Bowstead & Reynolds*, *supra* note 13 at para. 8-022; G.E. Dal Pont, *Law of Agency*, 2nd ed. (New South Wales: LexisNexis Butterworths, 2008) at 534-536; Tan Cheng Han, *The Law of Agency* (Singapore: Academy Publishing, 2010) at paras. 05.034-05.056.

[57] *Supra* note 54 at 782, 783.

[58] *Supra* note 34.

[59] [2009] EWCA Civ 296 [*So*].

[60] *Supra* note 2 at 377.

[61] See also Giliker, *supra* note 1 at 175-181.

In Singapore, the correctness of *Armagas* was directly challenged as being superseded by *Lister*. In *Skandinaviska Enskilda Banken AB (Publ) v. Asia Pacific Breweries (Singapore) Pte Ltd*,[62] an elaborate fraud had been perpetrated by the finance manager of the defendant company. The finance manager procured credit facilities ostensibly for the defendant. He accepted the credit facilities in the defendant's name and provided forged directors' resolutions that purportedly documented such acceptance. The finance manager used much of the money from the credit facilities towards his gambling habit, with the consequence that a large amount lent was not recoverable from him when the fraud unravelled. The plaintiff banks sought to recover their losses from the defendant on the basis of agency and vicarious liability. On the issue of vicarious liability, the trial judge, Belinda Ang J., found against the plaintiffs, relying on *Lloyd* and *Armagas*, that in relation to cases involving deceit, there was no difference between the questions of whether the employee was acting in the course of employment and whether he was acting within the scope of his actual or apparent authority. As she had come to the view that the finance manager did not have apparent authority for his acts, it followed that there was no vicarious liability.[63] On appeal, it was argued that Belinda Ang J. was wrong to take this approach in light of *Lister*.[64]

The Court of Appeal endorsed the 'close connection' test and expressed the view that there should be no distinction between intentional and inadvertent acts as such a distinction had not been made in *Lister*. The test for whether vicarious liability should be imposed on the employer was "whether the fraud of the employee is so closely connected with his employment that it is fair and just that the employer

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[62] [2011] 3 S.L.R. 540 (C.A.) [*Skandinaviska*].

[63] See *Skandinaviska Enskilda Banken AB (Publ) v. Asia Pacific Breweries (Singapore) Pte Ltd* [2009] 4 S.L.R.(R.) 788 at paras. 194, 197 (H.C.). Belinda Ang J. found, on the agency issue, that no one in the defendant company had held the finance manager out as having any particular authority to communicate to the plaintiff banks that the defendant's board had approved of the transactions that the finance manager had been discussing with the banks. The banks also required certified extracts of relevant board resolutions and the finance manager was not the person who could provide such certification. The Court of Appeal affirmed the finding that there was no apparent authority on the facts (*Skandinaviska, ibid.* at para. 61).

[64] Robert Stevens, "Why do Agents 'Drop Out'?" [2005] L.M.C.L.Q. 101 at 105, 106, argues that this aspect of *Armagas* may no longer be correct, if it ever was. He contends that what an employee-agent would ordinarily be authorised to do, which goes towards determining apparent authority, does not answer the question of whether he was acting in the course of employment. The focus for the latter is on the connection between the nature of the employment and the tort of the employee, not upon what it appears the employee was authorised to do. "The presence of actual or ostensible[/apparent] authority should be *sufficient* to find that an employee was acting in the course of employment but it should not be *necessary*" (at 106) [emphasis in original, footnotes omitted]. This author generally agrees with these propositions put forward by Stevens. The only point of disagreement would be regarding the application of these propositions in the context of misrepresentations, and for the reasons set out in this article, the author considers the approach in *Armagas* to be correct. Torts of misrepresentation are not unilateral but instead require a response from the victim. Accordingly, it would not be a fair mode of allocating loss if the employer was made vicariously liable even if the employer had prohibited the employee from making the representation and did nothing to cause the victim to believe reasonably that the employee could make such representations while performing his duties. In such cases, if the victim relies on what the employee represents to the victim, the victim simply chooses to rely on the employee and, having done so, should bear the consequences of this. The lack of apparent authority in this context operates as a limiting factor on what is regarded as being within the scope of employment, and not merely as a means of excluding primary liability on the employer through agency.

should be held vicariously liable for the employee's fraud."[65] In holding on the facts that vicarious liability was not made out under the 'close connection' test, the court took various factors into consideration including the finance manager's lack of actual authority, that his fraudulent acts involved false representations to the plaintiffs that the defendant had accepted the credit facilities and that the forged documents were genuine. Another factor was that the plaintiff banks were not vulnerable victims and were in a position to dictate terms to prospective borrowers and thereby protect themselves against fraud, which was what every prudent bank should do when granting loans to new customers. The fraud could have been prevented by the plaintiffs taking very elementary precautions, such as contacting any of the defendant's directors to verify that the defendant had accepted the credit facilities.[66]

While the Court of Appeal did not adopt the same reasoning as Belinda Ang J. by expressly equating authority and vicarious liability in the context of fraud, crucially the court did not express any disagreement with the outcomes and reasoning in *Lloyd* and *Armagas*. Accordingly, it is submitted that even if there is now a unified test based on 'close connection', rather than treating cases involving dishonest conduct with no intention of benefiting the employer as being governed by a set of principles and a line of authority of peculiar application[67]—and this must now be taken to be the position in Singapore—, the results and reasoning in *Lloyd* and *Armagas* are not inconsistent with the 'close connection' test. In Singapore, this is consistent with the factors that the Court of Appeal took into consideration in rejecting the claim based on vicarious liability. The plaintiffs could not rely on the finance manager's false assertions that the defendant had accepted the credit facilities given that there was no basis for such belief aside from what the finance manager represented, and in view of this, the plaintiffs should have taken reasonable steps to protect themselves. Thus, it would follow that if a fraudulent representor had neither actual nor apparent authority, the representee should take reasonable steps to ascertain the truth of what has been represented and cannot expect that the employer will be held vicariously liable without more. In this context, the policy considerations as outlined below by McLachlin J. in *Bazley v. Curry* are relevant:[68]

> [T]he policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization).

It is submitted that in the context of fraudulent misrepresentations, the requirement of 'close connection' is not met where the representation falls outside the actual or apparent authority of the employee-agent. Since the employee had neither actual nor

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[65] *Skandinaviska*, *supra* note 62 at para. 86.

[66] It is suggested that this reasoning of the Court of Appeal must be understood in the context of the court's earlier finding that there was neither actual nor apparent authority, and therefore elementary precautions should have been taken before acting on what was represented by the finance manager. It should not be understood as being authority for the proposition that carelessness on the part of the victim affords a defence to an employer in cases involving deceit on the part of an employee who has acted within the scope of his employment, see generally *Standard Chartered Bank v. Pakistan National Shipping Corporation Limited (No. 2)* [2003] 1 A.C. 959 (H.L.).

[67] *Armagas*, *supra* note 54 at 780.

[68] (1999) 174 D.L.R. (4th) 45 at para. 37 (S.C.C.) [*Bazley*].

apparent authority, the employer has not introduced any risk to the representee; the wrongful act by the employee cannot be said to be closely connected to the employment in the absence of grounds for the representee to believe that the representor could make the representation. In addition, even if such a risk has been introduced by the employer through the operation of the business, the employer has taken steps to manage and minimise the risk by limiting the employee's actual authority, and by not taking any steps that would cause a third party to believe that the employee had the authority in question. There is little else that the employer can practically do.

In cases where the employee-agent has made representations as to his own authority, the position should be even clearer so as not to undermine the general proposition in the law of agency that a self-representing agent should not be able to enlarge his apparent authority.[69] Any other rule would place all employer-principals in an invidious position as it would mean that regardless of any act on their part, agents would be able to speak to their authority and this would then be binding on their principals. Such a rule would undermine the utility of the law of agency as it would discourage the use of agents due to the significant increase in the risk of using agents. Agency concepts of actual and apparent authority act as control mechanisms to define the scope of the principal's liability. As representations do not cause harm in themselves, but only do so when acted upon, there does not seem to be any compelling policy reason why vicarious liability should undermine this where the agent is also an employee.[70] Accordingly, it is suggested that an agency approach is more appropriate and should drive our understanding of whether there is a close connection between the statement and the job for which the employee was employed to do.

In addition, and this will be discussed more fully in the next section on negligent misrepresentation, fairness is an important element in determining how to allocate loss through vicarious liability. This was an issue that was expressly addressed in *Armagas*. Lord Keith felt that it was not just to impose liability on an employer where the employer had not done anything to lead the victim to believe that the employee was acting in the course of the employer's business, and where the victim has been misguided in relying on the employee.[71]

B. *Negligent Misrepresentation*

The position is less clear in relation to negligent misrepresentations. In *Armagas*, Lord Keith limited the court's reasoning to vicarious liability in the field of intentional wrongdoing by the servant, particularly by way of dishonest conduct. His Lordship explicitly excluded consideration of the basis of vicarious liability in relation to torts

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[69] *Armagas*, *supra* note 54; *British Bank of the Middle East v. Sun Life Assurance Co of Canada (U.K.) Ltd* [1983] 2 Lloyd's Rep. 9 (H.L.).

[70] It has been said in the context of negligent statements that by ordaining one 'close connection' test for attributing vicarious liability, the court in *So*, *supra* note 59, has undermined or destroyed another unity, namely that actual and apparent authority would otherwise have been concepts applicable to all principals, and not only employers, in relation to liability for statements. The 'close connection' test is generally applicable only to employers, and a different test will apply to principals who are not employers, see Peter Watts, "Principals' Tortious Liability for Agents' Negligent Statements—Is 'Authority' Necessary?" (2012) 128 Law Q. Rev. 260 at 279.

[71] See discussion accompanying *supra* note 57.

such as negligence or trespass, which he said followed a different line.[72] It would seem logical though that the approach for negligent misstatements should mirror that for fraudulent misrepresentations. For a claim in negligent misrepresentation to succeed, the plaintiff must establish *inter alia* that the circumstances were such as to render it reasonable for the plaintiff to have relied on the defendant's statement. It is difficult to see how such reliance can be reasonable if the employee had neither actual nor apparent authority to make the statement. Thus in *Armagas*, Goff L.J. in the Court of Appeal said:[73]

> In cases of fraud at least, involving as they do a representation by the servant in reliance upon which the third party has acted to his detriment, the master can only be vicariously liable for the servant's fraud where he has acted within his ostensible authority. If this were not the law, in many cases where the servant has warranted his authority, fraudulently or even negligently, the master would be vicariously liable for the tort; there is no trace in the authorities of this being so.

However, this position was explicitly rejected by the English Court of Appeal in *So*.[74] In that case, it was held that the defendant bank was vicariously responsible for its employee's carelessness in making the representations as to the bank's intention to carry out the terms of the letter of instruction and that it had accepted such terms.[75] The court rejected the argument that the proper test for vicarious liability for negligent statements was not the 'ordinary course of employment' test but actual and apparent authority. *Armagas* was distinguished as a case based on dishonest misconduct that was governed by a different approach. Vicarious liability for negligent misstatements should be governed by the same rules as with other torts, given *Dubai Aluminium*[76] which laid down the principles applicable across the field of tortious wrongdoing in light of the applicable principles of public policy. As Etherton L.J. put it:[77]

> The short answer to Mr McQuater's point is that the distinction he seeks to make between negligent statements and other torts in relation to vicarious liability is not one for which there is any reported authority, and was not made by the House of Lords in either *Armagas* or *Dubai Aluminium*, and is contrary to the analysis in the latter which laid down the principles applicable across the field of tortious wrongdoing in the light of the applicable principles of public policy.[78]

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[72] *Supra* note 54 at 779, 780.

[73] *Ibid*. at 738.

[74] *Supra* note 59; noted by Christian Witting, "Banks, Dangerous Documents and Other People's Money" (2010) 126 Law Q. Rev. 39. Watts, *supra* note 70, expresses scepticism over the approach taken by the Court of Appeal.

[75] Though the claim failed on other grounds.

[76] *Supra* note 2.

[77] *Supra* note 59 at para. 62.

[78] The following passage from F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 18th ed. (London: Sweet & Maxwell, 2006) at para. 8-180, was not accepted:

> Torts of misrepresentation involve reliance by the plaintiff. This suggests that the principal should not be liable for the misrepresentations of the agent who is also a servant unless the third party was justified in relying on them, *viz.* unless they were made within the agent's actual or apparent authority, which of course they may be. This viewpoint has been adopted by the House of Lords, at least as regards the tort of deceit. It is arguable that it puts limits on 'the course of employment' test which would otherwise be applied in a tort case, for an agent authorised to make a contract who makes

It is submitted respectfully that the reasoning does not sufficiently take into consideration the elements that constitute individual torts. Accordingly, it adopts too blunt an approach in seemingly requiring all torts not involving dishonest conduct to be similarly treated for purposes of vicarious liability, when in truth what is a fair and just allocation of the loss must keep in mind the elements of the tort in question. Thus, while the policy considerations are applicable across the field of tortious wrongdoing, a determination of how loss allocation should take place ought to take into account the nature of the tort.

In this regard, the observations of the Singapore Court of Appeal in *Skandinaviska*[79] are instructive. In determining the vicarious liability issue, the Court of Appeal expressed the view that because vicarious liability can be imposed on a party that is without fault, it "can only be justified if the victim of the tort is himself not at fault, or is less at fault" than the person who has committed the tort or such person's employer.[80] If this was not the case, "the policy of victim compensation as a justification for imposing vicarious liability loses much of its moral force."[81] The court went on to say that while it was a valid policy consideration that the doctrine of vicarious liability would incentivise employers to take steps to reduce the risks of employee wrongdoing, in some instances the employer is not the person in the best position to do so. "In some situations, the person best placed, or at least better placed, to prevent the tort may well be the victim himself or a third party."[82]

Also relevant is that notions of fairness play a role in determining how to allocate the loss between two or more innocent parties which can be a difficult exercise. Fairness is a potentially vague and unclear concept in that it is probably impossible to define it precisely in relation to the myriad situations in which the issue of vicarious liability can arise. Yet, it is difficult to deny that notions of fairness and justice underlie many legal concepts. Legal rules would have little legitimacy if the society subject to it did not generally believe the rules to fairly reflect communitarian notions of what is fair and just. Thus in *Lister,* Lord Steyn said that the question was "whether the warden's torts were so closely connected with his employment that it would be fair

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false representations outside his actual or apparent authority in connection with it can be said to be doing an act within the scope of his duties in a wrongful manner; or such a representation may be sufficiently related to his duties to justify vicarious liability. The preferable view is however that the suggested rule sets true limits on the scope of employment in respect of torts of misrepresentation: the dealings which the servant is employed to enter into are in this respect to be identified with reference to his authority. The third party should not have relied on statements neither actually nor apparently authorised at all and hence should not be able to sue in tort on the basis of course of employment reasoning. Liability for other wrongs committed in connection with authorised activities (*e.g.* assault, negligent driving) remains; in this respect the 'course of employment' test is wider than 'authority' reasoning [footnotes omitted].

The present edition remains sympathetic to the position stated in the 18th edition while acknowledging that *So*, *ibid*., is "currently authoritative", see *Bowstead & Reynolds*, *supra* note 13 at para. 8-180.

79 *Supra* note 62.

80 *Ibid.* at para. 78.

81 *Ibid*.

82 *Ibid*. at para. 80; see also generally 581, 582. These observations, made in the context of a case involving deceit and, it is submitted, relevant also in the context of negligent representations, have little or no force in cases involving unilateral torts. In general, the carelessness of the victim is not relevant to determining the issue of vicarious liability. Such carelessness may be relevant in allowing the employer who is found to be vicariously liable in negligence to raise the issue of contributory negligence so as to reduce the damages payable.

and just to hold the employers vicariously liable."[83] The quality of the connection between the wrong and the employment must be such that it would be fair to hold the employer liable.

If these considerations are taken into account, it is suggested that it is entirely appropriate for actual and apparent authority to set the boundaries within which vicarious liability for negligent misrepresentation arises. Many of the considerations that underlie why the absence of actual and apparent authority would preclude vicarious liability for fraudulent misrepresentation even under the 'close connection' test are applicable to negligent misrepresentation.[84] Where a third party relies on an employee-agent's representation in the absence of actual or apparent authority on the part of the employee, the greater fault lies with the third party unless the mere fact that the employer has employed that employee is sufficient fault in itself. Inasmuch as it might be argued that the benefits that may be reaped from engaging in business should be accompanied by the burdens, it is not the law that every wrongdoing of an employee is attributed to the employer; providing employment benefits society, so there are good reasons not to overly penalise or dis-incentivise employment. To say that a business undertaking can potentially reap benefits and must therefore also bear the burden of employee wrongdoing is only one aspect of the equation. Business undertakings bring economic benefits to their communities and this underscores the need for a fair balance of loss allocation between businesses and victims for acts of employees. Where the employer has limited the agent's authority, and has neither communicated anything to the third party that would have led the latter to believe the employee-agent had the authority to make the statement, nor placed the employee in any position where the employee would typically have such authority, the employer would appear to have done its part and the third party who deals with the employee will be better placed to take precautionary measures to prevent himself from being the victim of a negligent misrepresentation. In these circumstances, it would not be fair and just to find that there was such a 'close connection' between the act of negligence and the employment. If the third party chooses to take the risk of relying on the employee, the third party should bear the consequences of such a judgment call.

Thus far, the analysis has proceeded on the basis that there is primary liability against the employee, and the only question is whether secondary liability arises. However, principal liability on the part of the employee may not arise if the absence of actual or apparent authority is such that it was not reasonable for the representee to have acted in reliance on the representation. For example, a client may know that a junior solicitor assisting a partner was not authorised to provide a legal opinion on the questions raised by the client with the law firm. In addition, the firm has not done anything to create such a belief on the client's part. The junior solicitor gives wrong advice which the client acted on. Was it reasonable for the client to have relied on the junior solicitor's advice given the client's knowledge that the junior solicitor was not authorised to provide the opinion? If it was not reasonable for such reliance to have occurred, there will be no primary liability, and consequently no secondary vicarious

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[83] *Supra* note 34 at para. 28.

[84] If *Armagas*, *supra* note 54, is still good law, as it appears to be in England, it is difficult to see why there should be a dramatic distinction between fraudulent and negligent misrepresentation even accounting for the fact that the former deals with intentional wrongdoing.

liability.[85] The fact that 'reasonableness of reliance' is a constituent element of the primary tort provides further support for actual and apparent authority to act as limits to the imposition of vicarious liability on the 'close connection' test.

A further issue is whether the employee-agent has assumed personal responsibility for the misrepresentation, and if he has not, the issue of vicarious liability may also not arise. In *Williams v. Natural Life Health Foods Ltd.,*[86] it was held that a director of a franchisor company[87] was not personally liable to franchisees for the losses suffered by them as a result of negligent advice given by the franchisor company. In a sense, this is an unremarkable proposition given that the advice emanated from the company and the doctrine of separate personality. The director would be liable only if he had assumed personal responsibility for the advice given and it was held on the facts that he had not. Given that there were no personal dealings between the director and the plaintiff, the House of Lords found that there was no basis on which to find that the director had assumed personal responsibility for the advice given in the name of the company. The relevance of this case[88] is that a negligent misrepresentation made by an employee-agent may be considered on the facts to have been made purely in a representative capacity, in which case no question of liability attaches to the employee. The representation will be one made by the employer, who incurs primary rather than secondary liability.

For a negligent representation to be primarily attributable to the employer, the representation must have been made within the actual or apparent authority of the employee. These then become the employer's acts for which the employer bears responsibility.[89] This being the case, it is arguable that a consistent approach should be adopted in respect of secondary liability where there has been an assumption of responsibility on the part of the employee. If this is the case, absent any actual or apparent authority, where there is an assumption of responsibility by the employee in relation to a negligent representation, vicarious liability ought not to arise because the absence of any actual or apparent authority limits the scope of such secondary liability, or that the causative element of the tort is not made out because it was not reasonable to rely on the misrepresentation or the assumption of responsibility.[90]

VI. Conclusion

The desire to sympathise with the victims of torts is understandable and this explains in part the malleable, open-ended nature of the doctrine of vicarious liability. As between two innocent parties, where the victim is often an individual and the employer a successful corporation, it is often easier to arrive at a decision where

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[85] In *Williams v. Natural Life Health Foods Ltd.* [1998] 1 W.L.R. 830 (H.L.) [*Williams*], it was held that a director would be liable for negligent advice given by the company if the director had assumed personal responsibility for the statement and it was reasonable for the victim to have relied on the director's assumption of responsibility.

[86] *Ibid*.

[87] Which had become insolvent hence the need to proceed against the director personally.

[88] The House of Lords considered the principles to be applied to be of general application and "not peculiar to companies", *supra* note 85 at 835 (Lord Steyn).

[89] See *Bowstead & Reynolds*, *supra* note 13 at para. 8-182.

[90] *Williams*, *supra* note 85 at 836, 837. For an extended discussion of this case, see Watts, *supra* note 70.

the loss is allocated to the latter since the employer will usually be in a better position to bear the loss, or redistribute it. Given the flexible nature of the doctrine, it may well be that this is an unsaid factor that underlies some of the decisions arrived at. Yet employers and businesses are entitled to be treated fairly too, given that they play an important role in the well-being of society; even if they are better able to redistribute loss, this will not be costless. It is submitted, therefore, that the law is in danger of over-reaching if employers are to be made vicariously liable for the misrepresentations of their employees even where such employees did not have actual or apparent authority to make the misrepresentations in question.