Vicarious Punishment: An Employer's Vicarious Liability for Exemplary Damages

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I. Introduction:

In *Rookes v Barnard*, Lord Devlin stated that "the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour"[1]. The logical corollary to this restriction on the availability of exemplary damages might appear to be the further restriction that a defendant cannot be liable for exemplary damages unless he *himself* committed the punishable behaviour, as Lord Scott asserted (*obiter dictum)* in *Kuddus v Chief Constable of Leicestershire Constabulary*[2]. This approach was not adopted, however, by the Court of Appeal in *Rowlands v Chief Constable of Merseyside Police*, where exemplary damages were awarded against a defendant whose liability was purely vicarious (vicarious punishment)[3].

In light of *Rowlands,* this dissertation considers whether vicarious punishment can be justified[4]. In other words, is it justifiable to hold an innocent employer vicariously liable for a punitive award of damages? To answer this question, it is first necessary to determine the availability of, and independent justifications for, both exemplary damages (Part II) and vicarious liability (Part III). This analysis is utilised in Part IV to delineate the scope for vicarious punishment under the current law, focusing on the impact of the expanded 'course of employment' test in *Lister and others v Hesley Hall Ltd*, and answer the aforementioned question of whether vicarious punishment can in fact be justified[5].

II. Exemplary Damages:

a) Exemplary Damages: Justifications

In the civil law, a claimant is awarded basic damages, in contrast to exemplary damages, to compensate him for the harm caused by a tortious act; 'the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong'[6].

In limited circumstances, however, the court will also award aggravated and/or exemplary damages. These supplementary awards share "a considerable overlap" in so far as both are available in situations where basic damages do not fully account for the reprehensible and outrageous nature of the tortfeasor's conduct[7]. Nevertheless, these awards have, since *Rookes,* been conceptually distinct, with exemplary damages occupying a particularly controversial position within the civil law[8].

Aggravated damages are awarded to provide further *compensation* to the claimant, "notwithstanding the fact that it may have a punitive effect by increasing the overall amount the defendant is ordered to pay"[9]. Such awards are available in a wide range of circumstances, including where the claimant has suffered 'loss of reputation, injured feelings, outraged morality, or requires protection against further calumny or outrage'[10], and help to reflect the "natural indignation of the court" for the defendant's conduct[11].

In contrast, exemplary damages have no compensatory function, but are awarded to "punish and deter" the tortfeasor for their outrageous conduct. Following the "very considerable pruning operation" [12] in *Rookes v Barnard*, the discretionary power of the courts to award exemplary damages has been limited to three narrow categories[13]:

(i) 'oppressive, arbitrary or unconstitutional action by the servants of the government';
(ii) 'where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'; and
(iii) 'where exemplary damages are expressly authorised by statute'[14].

Exemplary damages have been criticised for "confusing the function of the civil law, which is to compensate, with the function of the criminal law, which is to inflict deterrent and punitive penalties"[15]. The opposing view notes, however, that "it cannot be taken for granted … that there is something inappropriate or illogical or anomalous (a question begging word) in including a punitive element in civil

damages"[16]. Indeed, the Law Commission have found that "the *principled* case for retaining exemplary damages is to be preferred to the principled case for abolition" [17].

Nevertheless, the case for retaining exemplary damages relies largely on arguments of *public policy*. The starting premise for a public policy led defence of exemplary damages is that the law must respond effectively to outrageous behaviour. Such a response is not forthcoming, however, in certain situations where 'defects' in the criminal law prevent the tortfeasor's outrageous behaviour from being reliably punished[18]; a failing exacerbated where civil law remedies such as basic damages, aggravated damages and restitutionary damages "are perceived as inadequate to achieve a just result between the parties"[19]. Exemplary damages operate to fill these lacunas; the punishment meted out 'vindicates the strength of law'[20].

This 'vindication' is achieved through two interlinked punitive aims: (1) punishing the tortfeasor; and, via this punishment, (2) deterring the tortfeasor and others from committing such acts in the future by promoting respect for the law[21]. Aim (1) is clearly achieved when the tortfeasor is held *personally* liable for the punitive award (cf. when the employer is held *vicariously* liable: Part IV(d) *below*), as it hurts him in his pocket. Unfortunately, the success or failure of aim (2) is an issue of 'practical usefulness' to which "no amount of theorising can provide an answer"[22]. The courts have nevertheless adopted the reasonable view that potential tortfeasors are deterred from outrageous conduct by the possibility of personal liability for a punitive award[23]. Indeed, Edelman has mounted a convincing defence of exemplary damages based purely on its perceived deterrent effect[24].

As a brief aside, it is interesting to note the Law Commission's claim that the limitations imposed on the availability of exemplary damages by the *Rookes* categories prevents the aforementioned punitive policy aims from being fully achieved[25]. Category 1 has been criticised for excluding the outrageous tortious acts of private companies and individuals[26]. The limitations on category 2 awards have also been criticised on the grounds that it is often difficult to see why "the profit motive should suffice but a malicious motive should not"[27]. Thus, the Law Commission recommended a "principled, statutory expansion of the availability of exemplary damages"[28].

This dissertation supports the continuing availability of exemplary damages as a 'remedy of last resort'[29]. It is submitted that they have served a "valuable purpose in restraining the arbitrary and outrageous use of executive power"[30], and 'played a significant role in buttressing civil liberties'[31]. As Lord Nicholls notes, 'the extent to which the principle of exemplary damages continues to have vitality is striking'[32]. These policy aims are sufficiently powerful, even if only partially achieved under the limitations imposed by *Rookes*, to negate concerns of legal principle. Although the Law Commission's arguments in favour of expanding the availability of exemplary damages are powerful, they must be balanced against the fact that "English law already contains a heavy, indeed exorbitant, punitive element in its costs system" [33]. It is to be hoped that exemplary damages continue to be developed and refined at common law.

b) Exemplary Damages: Availability

This section examines the availability of exemplary damages under the *Rookes* categories. Following *Kuddus*[34], the 'cause of action' introduced in *A B v South West Water Services Ltd* has been overruled[35]. Thus, if tortious conduct falls under any of the three categories, the courts have the discretion to award exemplary damages[36]. For the purposes of this dissertation, it is only necessary to consider categories 1 and 2, as category 3 is of limited scope[37].

(i) Category 1

Exemplary damages can be awarded where there has been "oppressive, arbitrary or unconstitutional action by the servants of the government", as seen in cases such as *Wilkes v Wood*[38]. In *Broome,* it was made clear that 'servants' would include "all persons purporting to exercise powers of government, central or local, conferred upon them by statute or at common law by virtue of the official status or employment which they held" [39]. Thus, it has been held to include the police [40], local government[41], local authorities[42] and prison guards[43].

Although this category does not generally extend to "private corporations or individuals"[44], it is interesting to consider whether a private company, 'exercising powers of a public nature' could ever qualify

as a servant. The Court of Appeal has found that a privatised company, exercising statutory powers as a protected monopoly supplier[45], was not a servant. Nevertheless, this decision leaves open the possibility of a private company qualifying as a servant of the government if it were exercising delegated public powers of a sufficient magnitude[46]. It is submitted that staff working in privately managed prisons and juvenile detention centres would likely qualify due to the government's delegation of significant powers to detain prisoners.

There is no authoritative definition of an 'oppressive, arbitrary or unconstitutional' tortious act; the case law only serves to show that exceptional conduct is required[47]. Successful cases have generally involved trespass, false imprisonment, assault and malicious prosecution by the police. For example, in *Makanjuola v Commissioner of Police of the Metropolis*, Henry J awarded exemplary damages for a policeman's sexual assault on a young woman, committed 'in the shadow of his warrant card'[48]. Similarly, in *Rowlands*, the Court of Appeal awarded exemplary damages where a police officer arrested the claimant unnecessarily, assaulted her and falsified evidence against her[49].

(ii) Category 2

The second category concerns situations where the "defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff"[50], as seen in cases such as *Bell v Midland Railway Co*[51]. Cynical wrongdoers must be shown that 'tort does not pay'[52].

To qualify, a defendant must have: (i) 'been aware of, or reckless as to, the illegality of what is proposed' and (ii) decided to carry on with it anyway "because the prospects of material advantage outweigh the prospects of material loss"[53]. It is to be noted that no 'balance sheet' calculations are required[54].

The courts have interpreted this category relatively broadly. It has been most readily utilised in the libel context[55], but has also been applied in situations where landlords have attempted to unlawfully force tenants to leave rented premises[56]. It appears likely that exemplary damages could also be awarded where a Doctor or Dentist carried out unnecessary treatment for profit[57].

(iii) Conclusion

To conclude, the preceding analysis has shown that both categories of exemplary damages are typically only engaged where there has been outrageous behaviour emanating from 'bad-faith intentional torts' such as assault, libel and trespass[58]. This restriction is significant when the availability of vicarious punishment is considered in Part IV.

III. Vicarious Liability:

An employer will be vicariously liable for a tortfeasor's actions if three criteria are met: (1) the tortfeasor committed a tort; (2) the tortfeasor is his employee[59]; and (3) the tort was committed during the 'course of employment'[60]. If satisfied, the claimant can hold the employer liable for the measures of basic and aggravated damages awarded against the tortfeasor. For reasons that will become clear, this section focuses on the recent judicial expansion of the course of employment test, before looking at the justifications for vicarious liability.

(a) The Course of Employment

An employer is not vicariously liable for every tortious act that an employee commits; such an approach would not 'correspond with common sense notions of fairness'[61]. Instead, liability is limited to situations where there is a *sufficient nexus* between the tortious act of the employee and the duties for which the employee was employed to carry out. This nexus is known as the 'course of employment', and justifies holding the employer liable.

The Salmond test has traditionally governed the course of employment; an employer would only be vicariously liable where the tortious act was "a wrongful and unauthorised mode of doing something

authorised by the master [employer]''[62]. For example, in *Rose v Plenty,* a milkman negligently injured a child who had been helping him to complete his milk round. The child was able to hold the milkman's employer vicariously liable as the child's assistance was a mode of delivering the milk; it did not matter that the employer's prohibition on the use of children made the mode 'wrongful and unauthorised'[63]. The Salmond test restricted liability to situations where the employer had provided 'implied authority'[64] for the employees act; these situations will be referred to as the 'Salmond scenarios'.

The Salmond test usually prevented vicarious liability where employees had committed bad-faith intentional torts; these acts could rarely be seen as "doing something authorised by the master" [65]. For example, the operators of a children's home would not be vicariously liable where an employee sexually assaulted a resident[66]; this kind of conduct 'is the very opposite of what the warden has been authorized to do'[67]. Thus, employers were not liable where the employee was 'off on a frolic of his own'[68]. This narrow approach to vicarious liability left claimants without a reliable source of compensation in situations where the employee's act fell outside the Salmond test, such as child abuse in a children's home, and the employee lacked the resources necessary to pay the award of compensatory damages[69].

To ensure victim compensation, the courts gradually expanded the course of employment to cover bad-faith intentional torts[70]. This expansion culminated with the House of Lords decision in *Lister*[71], where the Salmond test was replaced with the close-connection test developed in the Canadian case of *Bazley v Curry*[72]. The close-connection test focuses on 'whether the employer's torts were so closely connected with his employment that it would be fair and just to hold the employer's vicariously liable'[73]. Thus, the close-connection test for course of employment does not expressly prohibit vicarious liability for bad-faith intentional torts of employees[74]. Indeed, in *Lister*, the owners of a boarding house were found liable for the sexual abuse committed by the schools warden[75].

In the aftermath of *Lister*, it was suggested that the close-connection test would "probably lead to a different decision [from the Salmond test] in only a handful of cases"[76]. The decision has nevertheless clearly expanded vicarious liability into the realm of bad-faith intentional torts[77]. For example, in *Mattis v Pollock*, the Court of Appeal held a nightclub owner vicariously liable for a stabbing committed by the club's bouncer, despite the fact that the assault had taken place outside the nightclub and the bouncer had first returned home to get the knife[78].

Similarly, in *Gravil v Carrol*, the Court of Appeal found an amateur rugby club vicariously liable for a physical assault committed by their player[79], despite the fact that the assault occurred after the final whistle and the player's contract of employment expressly prohibited such violent conduct. This type of situation, where vicarious liability would not previously have been available under the Salmond test, will be referred to as the 'Lister Scenarios'.

(b) Justifications

The doctrine of vicarious liability breaches the 'fault' principle, which has traditionally played a central justificatory role in tort law, as the employer is liable in the absence of fault. Moreover, both the judiciary and academic commentators have been unable to provide 'a comprehensive theory of vicarious liability … that actually explains the central features and limits of the doctrine'[80]. It is therefore surprising to note that, in contrast to exemplary damages, there have not been widespread calls for its abolition. Indeed, vicarious liability has been described as an "essential"[81] and "firmly entrenched"[82] part of the tort system.

Perhaps the most convincing theoretical justification for the doctrine of vicarious liability is that an employer who stands to profit from an activity must compensate victims for any resulting harm[83]. The English courts have alluded to such theories, but have been relatively content to 'parade vicarious liability as a deduction from legalistic premises'[84]. Such an approach fails to recognise the undoubted influence of policy considerations[85], as affirmed in Canada by the Supreme Court case *Bazley v Curry*[86]. The imposition of vicarious liability on an employer serves two main policy aims: (i) 'victim compensation'; and (ii) deterrence of future harm[87].

(i) Victim Compensation

A claimant should be able to obtain compensation for harm caused by employees. The courts recognise that the employer is "a more promising source of recompense than his servant who is apt to be a

man of straw"[88]; the employer is more likely to have the resources, or more pertinently the insurance cover, necessary to meet a compensatory award than the employee. As Glanville Williams notes, the doctrine appears to "owe its explanation, if not its justification, to the search for a solvent defendant"[89]. The pursuit of victim compensation resulted in the expansion of the course of employment test in *Lister*[90]. The fault principle is effectively sacrificed to ensure the 'provision of a just and practical remedy' for the claimant's harm[91].

(ii) Deterrence

As a subsidiary aim, the doctrine of vicarious liability is also intended to deter future harm[92], by motivating employers to actively monitor their employees and introduce safeguards to prevent their tortious conduct[93]. It is submitted that the deterrent function serves a useful purpose in the Salmond scenarios; the employer is in the best position to recognise the potential for tortious acts, and attempt to prevent employees from committing them when they are doing something "authorised by the master".

In the Lister scenarios, however, the deterrent justification is not as persuasive; it is unrealistic to expect employers to be able to prevent intentional acts, far removed from the reasons for employment, such as sexual assault. As Neyers notes, "deterrence theory does not work particularly well where the act to be deterred is already a crime"[94]. Similarly, per Hayne LJ: "if the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed"[95]. Thus, it is submitted that deterrent theory cannot justify vicarious liability in the Lister scenarios.

(iii) Conclusion

Despite the lack of deterrence, this dissertation accepts that the extension of vicarious liability principles to the Lister scenarios, flowing from the expanded course of employment test, can be justified in the context of compensatory damages. This acceptance flows from the proliferation of insurance cover for employers, which ensures that the burden of the claimant's compensation does not fall solely on the employer, but is spread across the whole community; this is a matter of "sound resource allocation"[96]. Indeed, it has been stated that liability insurers cover 94% of the total amount paid out in personal injury cases[97]. The flipside to achieving victim compensation, however, is that employers have been effectively reduced to 'involuntary insurers' in the Lister Scenarios, with little hope of deterring such acts.

IV. Vicarious Punishment:

a) Vicarious Punishment: Rowlands v Chief Constable of Merseyside Police

In *Rowlands,* the Court of Appeal authoritatively addressed the issue of 'vicarious punishment'[98]. This area of law had previously attracted little judicial or academic discussion, and had not been subject to an authoritative decision[99]. As will be seen, a number of earlier cases had, however, *assumed* the availability of vicarious punishment. Moore-Bick LJ, delivering the sole judgment of the court, held the Chief Constable vicariously liable for basic, aggravated and category 1 exemplary damages[100].

Unfortunately, *Rowlands* did not clearly delineate the availability of vicarious punishment. Moore-Bick LJ's judgment is ambiguous as to whether vicarious punishment should be of general application or limited to the particular facts of the case. The judgment only cites case law where the availability of vicarious punishment has been assumed against the Police for category 1 exemplary damages awards[101], but it is clear that an assumption of vicarious punishment has also been made in non-Police cases[102] and cases concerning category 2 awards[103]. A further complication is that the vicarious liability of the police is governed by the statutory provisions of the Police Act 1996 s88, replacing Police Act 1964 s48, rather than the common law principles discussed above[104].

On the basis of these difficulties, *Rowlands* could be said to support three possible interpretations: (1) vicarious punishment is limited to award of category 1 exemplary damages concerning the police; (2) vicarious punishment is limited to awards of category 1 exemplary damages[105]; or (3) vicarious punishment is available for category 1 & 2 awards[106]. In *Mosley v News Group Newspapers Ltd,* Eady J (*obiter dictum)*

settled on the third interpretation[107], feeling unable to deny the possibility of a category 2 exemplary damages claim purely on the basis that it was vicarious[108]. Such a refusal "could probably at this stage only be made by the House of Lords"[109].

Thus, employers appear to be vicarious liable for awards of both compensatory and exemplary damages. Moreover, the courts seem willing to calculate the size of the exemplary damage award on the basis of the employer's resources, rather than the employees. Moore-Bick LJ attempted to justify such an approach on the basis that the courts should be "able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question"[110].

b) Vicarious Punishment: the importance of the expanded Course of Employment test

Following *Rowlands*[111] and *Mosley*[112], an employer appears to be vicariously liable for awards of both category 1 and 2 exemplary damages whenever the employee's tortious act falls within his course of employment. This section considers how the development of the 'course of employment', discussed at III(a), has affected the availability of vicarious punishment.

The *Salmond* course of employment test prevented employers from being vicariously liable for bad-faith intentional torts committed by employees[113]. This had the unintentional effect of strictly limiting the potential for vicarious punishment, as exemplary damages were commonly only awarded for bad-faith intentional torts[114]. The few situations where the doctrines did converge to allow vicarious punishment predominantly concerned the police[115].

Since the *Lister* close-connection test and the decision in *Rowlands*, the potential for vicarious punishment has increased dramatically due to the fact that an employer can now be vicariously liable for bad-faith intentional torts[116] committed by employees: the Lister Scenarios. To appreciate the magnitude of this development, it is helpful to consider some examples. In the pre-*Lister* case of *Makanjuola*, a police officer threatened to report a young woman for immigration offences if she did not submit to acts of sexual assault[117]. The court awarded compensatory damages and category 1 exemplary damages. On considering the applicability of vicarious liability, Henry J accepted that the claimant was 'only placed in the predicament that she was because of the respect she gave to the warrant card'. Nevertheless, on applying the Salmond test, Henry J found that the acts 'could not be properly regarded as the fraudulent performance of that which the police officer had the authority to do honestly'. Rather, they were 'an independent action by a rogue police officer'[118]. Thus, vicarious liability was not available for the awards of compensatory or exemplary damages[119]. This result was unfortunate for the claimant, as the police officers heavy debts might well have prevented, or delayed, the payment of damages.

In contrast, the facts of *Makanjuola* would likely meet the requirements of the close-connection test; the policeman's position of power and authority makes it 'more materially likely that an abuse of that power relationship can be fairly ascribed to the employer'[120]. As the police officer's abuse of power was substantial, with the acts being largely facilitated by his warrant card, the Chief Constable would be vicariously liable for the awards of compensatory and exemplary damages in this Lister scenario.

Similarly, it is possible to imagine an expansion of vicarious punishment for category 2 awards. For example, if a Doctor conducted an unnecessary breast examination on a female patient in order to obtain information for a database, without her informed consent[121]. Under the Salmond test, the NHS would not be vicariously liable for the compensatory or category 2 exemplary damages; the breast examinations were not an authorised act. In contrast, this scenario would likely fall within the Lister Scenarios under the close-connection test, as the Doctor's position of authority had allowed him to conduct such treatment. The NHS or private healthcare provider would therefore be liable for the awards of compensatory and exemplary damages. As an aside, the arbitrary nature of the availability of exemplary damages under the *Rookes* categories is apparent in this situation, as an exemplary damage award could not be made if the Doctor had touched the patients for sexual reasons.

To conclude, the expansion of the course of employment test in *Lister*, undertaken to ensure victim compensation, has had the seemingly unforeseen additional effect of increasing the scope for vicarious punishment.

c) Vicarious Punishment: Joint-tortfeasors and the highest common factor

In *Broome*, the House of Lords considered whether exemplary damages could be awarded against joint-tortfeasors with different levels of guilt[122]; a situation with several parallels to the vicarious punishment of innocent employers. Thus, it is useful to consider how the House of Lords resolved this issue, and whether the decision has any direct impact on vicarious punishment.

It is established law that an award of exemplary damages must take into account "everything which aggravates or mitigates the defendant's conduct", including the 'means of the parties'[123]. This approach creates problems where defendants are jointly liable for torts, as "only one may have been guilty of the outrageous conduct or, if two or more are so guilty they may be guilty in different degrees or, owing to one being rich and another poor, punishment proper for the former may be too heavy for the latter"[124]. The concern is that an award of exemplary damages could unduly punish the innocent joint tortfeasor, which is similar to concerns regarding vicarious punishment of an innocent employer.

In *Broome*, the House of Lords mitigated the potential for unfairness by holding that 'awards of punitive damages in respect of joint torts should reflect only the lowest figure for which any of them can be held liable'[125]; Lord Hailsham's "highest common factor" rule[126]. Thus, "if any one of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any of the defendants, then they [the jury] must not make any addition to the compensatory damages"[127]. To allow otherwise would be to "abandon all pretence of justice"[128].

In the context of vicarious liability, the highest common factor rule appears to be directly applicable where the tortfeasing employee and employer are joined together as defendants. It would seem to follow that "if the conduct of any of them, including the employer, does not merit punishment, an exemplary damages award ought, in principle not to be made"[129]. The Law Commission has argued, however, that joint-tortfeasors and employers can be fairly distinguished, as employers have powers to discipline and deter employees that joint tortfeasors will often lack amongst themselves[130]. This view was taken prior to the expansion in *Lister*, and whether this distinction can be justified in the Lister Scenarios is open to doubt.

Regardless, in *Rowlands*, Moore-Bick LJ noted that a claimant could bring an action directly against the employer, without joining the employee, on the basis of his vicarious liability for the tortfeasing employee. This 'selective' approach ensures that the highest common factor rule is not engaged[131], paving the way for vicarious punishment[132]. Interestingly, Robert Stevens has used the availability of vicarious punishment to argue that an employee's actions, rather than the employee's liability, are attributed to the employer in vicarious liability cases[133].

To conclude, innocent joint-tortfeasors are protected from exemplary damages by the highest common factor rule, whilst innocent employers are not. The validity of this distinction effectively rests on the issue of whether vicarious punishment furthers the punitive aims of exemplary damages, which is considered in Part IV(d). If these aims are not furthered, it follows that vicarious punishment should be abolished to preserve a 'pretence of justice'[134].

d) Vicarious Punishment: furthering the punitive aims?

In *Kuddus*, Lord Scott argued 'that, silently and without any proper or principled justification for it, a system of vicarious punishment of employers for the misfeasance of their employees has crept into our civil law'[135]. This section considers whether a legitimate justification has been made out for vicarious punishment.

Vicarious punishment is not justified by legal principle; it 'seems wrong in principle to punish someone other than the wrongdoer'[136]. Vicarious punishment is also not required to ensure victim compensation, as the employer is already vicariously liable to the claimant for compensatory awards in situations where vicarious punishment is available.

Nevertheless, in *Rowlands,* Moore-Bick LJ felt that vicarious punishment was justified on policy grounds[137]; a view shared by the Law Commission, who recommended the availability of vicarious punishment in 1997, prior to the decision in *Lister*[138]. These policy reasons are centred on the claim that vicarious punishment can 'offer a wider, if indirect, method for pursuing the aims of punitive damages'[139]. As seen in Part II, the two punitive aims of exemplary damages are: (i) punishing the tortfeasor; and (ii) deterring the tortfeasor and others from committing such acts in the future by promoting respect for the

law. This section considers whether these, and other possible justifications, are achieved by vicarious punishment.

(i) Punishing the tortfeasor

Vicarious punishment does not punish the tortfeasor; indeed, the employer's vicarious liability allows the tortfeasing employee to escape direct punishment. Whilst acknowledging this criticism[140], the Law Commission argued that 'vicarious punishment' results in the indirect punishment of employees by encouraging employer's to take disciplinary action, which 'may be a more severe form of sanction for wrongdoing by employees than a punitive damages award could directly provide'[141].

Disciplinary measures are undoubtedly powerful, but it seems unrealistic to suggest that employers would only be motivated to use them by the threat of vicarious punishment. It is submitted that in vicarious punishment situations the outrageous behaviour of the employee is often sufficient to motivate employers to carry out disciplinary action. For example, in *Makanjuola*, the offending Police Officer had been dismissed long before the case reached court[142]. Employer's can also already be said to have a strong source of motivation for taking disciplinary action: their vicarious liability for awards of basic and aggravated damages.

To conclude, vicarious punishment does not directly or indirectly punish the tortfeasor. Rather, the innocent employer is punished, whilst the tortfeasing employee is effectively let 'off the hook'.

(ii) Deterring the tortfeasor and others

The Law Commission has argued that vicarious punishment would help to deter future conduct by providing employers with an 'incentive to control and educate their workforces', through the use of wrong-preventing educative processes. In the seminal work *Vicarious Liability in the Law of Torts*, Atiyah posited a similar view: "it may well be that the deterrence would be more effective if aimed against the employer rather the servant"[143].

In contrast, Lord Scott declared as "fanciful" the idea that vicarious punishment could operate as a deterrent[144], arguing that it is difficult to see how an "award of exemplary damages adds anything at all to the deterrent effect of the "trial judge's findings of fact in favour of the injured person and his condemnation of the conduct in question". This is particularly so in situations where the award is "going to be met out of public funds"[145]. Indeed, in *The Damages Lottery*, Atiyah reverses his view on deterrence, noting that vicarious punishment "serves no useful purpose"[146].

In the Salmond Scenarios, the arguments are finely weighted. As Edelman notes, the key "is to strike a balance between a concern for sufficient deterrence and a concern for the liberty of the individual"[147]. On balance, this dissertation accepts the Law Commissions view of deterrence in the Salmond Scenarios. For the reasons expounded in Part III(b)(ii), the relatively close nexus between the tortious act of the employee and the duties for which the employee was employed to carry out makes it reasonable to suggest that employers could introduce safeguards to limit tortious conduct. Thus an award of exemplary damages where a police officer had used unnecessary force whilst undertaking a routine act would, as Lord Hutton has suggested in *Kuddus*, "serve to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times"[148]. This view cannot be conclusive, however, as it is not possible to measure the deterrent effect without an empirical study, as suggested by Professor Street[149]. Nevertheless, in contrast with Lord Scott's view, it is submitted that an award of exemplary damages in the Salmond Scenarios is likely to have a stronger deterrent effect than judicial condemnation and aggravated damages.

In the Lister Scenarios, however, the existence of a deterrent effect does indeed seem "fanciful"[150], both to the employer and others, for the reasons noted in III(b)(ii). For example, in *Makanjuola*, it is unrealistic to expect the Chief Constable to be able to introduce any kind of sensible measures to deter an off-duty police officer from undertaking a pre-mediated illegal act, which is far outside what he has been authorised to do. Nor would such an act have an effective deterrent effect on others in a similar position of responsibility.

To conclude, it is submitted that vicarious punishment is likely to serve an effective deterrent function in the Salmond Scenarios, but not in the Lister Scenarios.

(iii) Other justifications?

In *Rowlands*, Moore-Bick LJ suggested that "an award of exemplary damages is simply a means of expressing the jury's *'vigorous disapproval'* of the conduct of the police force as an institution, as well as of the individual police officers, on the occasion in question"[151]. This mirrors Lord Denning's view that "the ultimate justification of any punishment is not that it is a deterrent but that it is the *emphatic denunciation* by the community of a crime"[152]. It might well be argued that vicarious punishment can be justified on this basis.

In *Law, Liberty and Morality*, Hart questions whether emphatic denunciation actually requires punishment: "The normal way in which moral condemnation is expressed is by words, and it is not clear, if denunciation is really what is required, why a solemn public statement of disapproval would not be the most 'appropriate' or 'emphatic' means of expressing this"[153]. This dissertation takes the view that the judgment itself can achieve the requisite "vigorous disapproval", without the need for vicariously punishing an innocent employer.

(iv) Conclusion

To conclude, this section has argued that vicarious punishment does not further the punitive aim of punishing the tortfeasor, and cannot be justified by the need to show "vigorous disapproval" as this is achieved by the judgment. It has been accepted, however, that vicarious punishment is justified in the Salmond Scenarios, as the judgment itself may not achieve the optimum deterrent effect.

e) Vicarious Punishment: Comparisons with the Criminal Law

In this section, a brief comparison will be drawn between the civil and criminal law with respect to two interesting issues: (1) the level of complicity required for secondary liability and; (2) the availability of insurance cover for liability.

(i) Complicity

In *Broome*, Lord Reid stated that the availability of exemplary damages in the civil law "contravenes almost every principle which has been evolved for the protection of offenders"[154]. In the context of vicarious punishment, it is interesting to explore the validity of this statement by contrasting the level of complicity required for vicarious punishment with the level required under the Criminal law under S.8 Accessories & Abbettors Act 1861.

Under S.8, an employer is effectively only criminally liable for assisting or encouraging an employee where he has *deliberately* refused to exercise his powers to prevent the employee's crime[155]. In the civil law, an employer would also be liable in situations where he had encouraged[156] or deliberately refrained from exercising his power to prevent the employee's tortious act[157]. This liability is appropriate, as the employer's conduct merits punishment.

Following *Lister* and *Rowlands*, however, civil law liability is not limited to this extent. An employer can also be vicariously punished where an employee undertakes acts which are the complete opposite of what he has been employed to do, in the total absence of the employer's knowledge: the Lister scenarios.

Thus, the level of complicity required at the civil law is far lower than the comparable level in the criminal law. It therefore seems unjust to impose vicarious punishment in the Lister scenarios.

(ii) Insurance

In *Hardy v. Motor Insurers' Bureau*, the Court of Appeal confirmed that that public policy reasons prevent insurance to cover liability for a criminal act[158]; the intended effects of punishment are largely negated if insurance is available. The same policy reasons would also seemingly exist in the context of exemplary damages.

In *Lancashire CC v Municipal Mutual Insurance Ltd*, however, the Court of Appeal found that exemplary damages were covered by an insurance policy for "compensatory" awards; cover for exemplary damages had to be expressly excluded in the contract[159]. The court recognised that although such insurance "must undoubtedly reduce the deterrent and punitive effect of the [exemplary damages] order upon him, it will greatly improve the plaintiff's prospects of recovering the sum awarded". Moreover, the Court of Appeal felt that some punitive effect would be felt by the employer, as there "may well be limits of liability and deductibles under the policy" and "the insured is likely to have to pay higher premiums in future and [the employer] may well, indeed, have difficulty in obtaining renewal insurance"[160].

In Part 2 (ii) (text n93), it was seen that insurance cover played an important role in justifying the imposition of vicarious liability on an employer for compensatory damages. It might thus be argued that the availability of insurance for exemplary damages provides a panacea to the problems of vicarious punishment. The two situations can be clearly distinguished however; victim compensation is a worthy aim which should be supported by the availability of insurance cover, whilst punishing an innocent employer has been shown to have no useful effect. Put simply, the availability of insurance does not change the fact that vicarious punishment serves no desirable purpose, with the exception of deterrence in the Salmond scenarios.

f) Vicarious Punishment: The future? A return to the Salmond test

This dissertation has argued that vicarious punishment is unprincipled, and cannot be justified by policy considerations in the Lister scenarios. It has been accepted, however, that vicarious punishment would be likely to serve a useful deterrent function in the Salmond scenarios. Against this backdrop, it is necessary to consider two possible options for reforming vicarious punishment.

The first option would be to accept Lord Scott's view that "the objection to exemplary damages in vicarious cases seems to me to be fundamental", and abolish vicarious punishment in its entirety[161]. It is essential to note, however, that employers would remain liable where they were exercising direct control over events in *Brooke v Bool* type scenarios[162], as the employer deserves punishment for his direct involvement in the outrageous act. Indeed, as a strict matter of law, an employer would likely be primarily, rather than vicariously, liable in these scenarios. This approach is not preferred, however, as it ignores the potential deterrent effect in the Salmond Scenarios. It would nevertheless be preferable to the current law.

The second preferred option would be to limit the availability of vicarious punishment to the Salmond scenario. The simplest method of achieving this would be to re-introduce the Salmond test in the limited context of vicarious punishment; an employer would only be vicariously liable for exemplary damages where the act was "a wrongful and unauthorised mode of doing something authorised by the master [employer]''.

Thus, the employer would be vicariously liable for compensatory damages in both the Salmond and Lister scenarios under the normal close-connection test, but only vicariously liable for exemplary damages in the Salmond scenarios using the Salmond test. In the Lister scenarios, the employer's liability would be limited to the compensatory award, whilst the tortfeasing employee would be liable for the exemplary damages. This would appear to achieve the underlying policy aims of both vicarious liability and exemplary damages: victim compensation and direct punishment of the tortfeasor, whilst striking a fair balance between the burden placed on the employer and the rights of the claimant[163].

Unfortunately, *Heydon's* case only allows a single award to be made out in favour of the claimant[164]. This problem could potentially be circumvented, however, if a capping method similar to that developed in the libel case of *Veliu v Masrekaj* was utilised[165]. This method would 'cap' the employer's liability to the size of the compensatory award, whilst holding the tortfeasing employee liable for the total sum of compensatory and exemplary damages. The resources of the employee would be relevant for calculating the size of the exemplary damages award, rather than the employer. Such an approach should be accompanied by the imposition of strict guidelines for the quantification of exemplary damages; the approach seen in *Thompson* regarding the quantification of police awards should be expanded[166].

V. Conclusion:

The cumulative effect of *Lister* and *Rowlands* has dramatically expanded the scope for vicarious punishment[167]. This expansion has placed an unfair burden on innocent employers in the Lister scenarios, which cannot be justified by principle or policy. This dissertation has argued that vicarious punishment "should be rejected" in the Lister scenarios[168]. It has been accepted, however, that vicarious punishment is likely to have a legitimate deterrent effect in the Salmond scenarios. The legal reform envisaged in the second option of part IV(f) would strike an appropriate compromise between employers and claimants.

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[1] [1964] AC 1129 (HL) 1227 (Lord Devlin).
[2] [2001] UKHL 29 (HL) 131.
[3] [2006] 1 W.L.R 1065 (CA).
[4] *Rowlands* (n3).
[5] [2001] UKHL 22 (HL).
[6] *Lim v Camden & Islington Area Health Authority* [1980] AC 174 (HL) 187.
[7] Street, *Principles of the Law of Damages* (London, Sweet & Maxwell. 1962) p.34.
[8] *Rookes* (n1).
[9] *Rowlands* (n3) 26.
[10] *Cassell & Co. Ltd. Appellants v Broome* [1972] AC 1027 (HL) 1076-1077.
[11] *Broome* (n10).
[12] *Broome* (n10) 1098 (Lord Morris).
[13] *Rookes* (n1) 1221(Lord Devlin) exemplary damages had greater availability pre-*Rookes;* McGregor *McGregor on Damages* (Sweet & Maxwell, 2003) 11-002.
[14] *Rookes* (n1) 1226-1227 (Lord Devlin).
[15] *Broome* (n10) 1086B-G (Lord Reid).
[16] *Broome* (n10) 114C-D (Lord Wilberforce).
[17] Law Commission 'Aggravated, Exemplary and Restitutionary Damages' (Law Com No. 247, 1997).
[18] McGregor (n13) 11-001, LawCom (n17) p.100.
[19] *Kuddus* (n2) 63 (Lord Nicholls).
[20] *Rookes* (n1) 1226 (Lord Devlin).
[21] *Rookes* (n1), *Broome* (n10).
[22] Street (n7) p.36.
[23] *Kuddus* (n2).
[24] J Edelman 'In Defence of Exemplary Damages' p.225-248 in Rickett (eds) *Justifying Private Law Remedies* (Hart, 2008).
[25] Law Com (n17) p.105.
[26] *Kuddus* (n2) 66 (Lord Nicholls) .
[27] *Kuddus* (n2) 67 (Lord Nicholls).
[28] LawCom (n17): exemplary damages should be available "for deliberate and outrageous disregard of the plaintiff's rights" p.107; cf. McGregor (n13) 11-066 "it is somewhat disturbing to find moves afoot to bring them back"; Hansard, HC Vol 337 col. 502 9 November 1999 WA (government declined to take forward Law Com exemplary damage proposals); conf'd DCA 'The Law on Damages' (2007, CP 9/07) 196-199.
[29] Edelman (n24) ;cf. A Beever 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS; Anderson 'An exemplary case for reform' (1992) CJQ 233.
[30] *Rookes* (n1) 1223.
[31] *Kuddus* (n2) 63.
[32] *Kuddus* (n2) 63.
[33] cf. Lord Wilberforce *Broome* (n10) 1114.
[34] *Kuddus* (n2).
[35] [1993] QB 507.
[36] Wilby, B., *The Law of Damages* (Butterworths, 2003) 42-44 (analysis of discretionary factors).
[37] A rare example: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 S.13(2).
[38] 98 Eng. Rep. 489 (C.B. 1763).
[39] *Broome* (n10) 1130 (Lord Diplock).
[40] *Thompson v Comr of Police of the Metropolis* [1998] QB 498 (CA).
[41] *Broome* (n10) 1088.
[42] *Bradford City Council v Arora* [1991] 2 Q.B. 507 (CA).
[43] *Racz v Home Office* [1994] 2 AC 45 (HL).
[44] *Rookes* (n1) 1226; *Broome* (n10) 1088.

[45] *AB* (n35) [1993] (CA) 525-526, 531-532 (not overruled on this point).
[46] *The Law of Damages* (n36) 2.40.
[47] NB. bad faith is not a necessary requirement *Holden v Chief Constable of Lancashire* [1987] QB 380 (CA).
[48] (1989) Times, 8 August.
[49] *Rowlands* (n3).
[50] *Rookes* (n1).
[51] (1861) 10 C.B.N.S. 287.
[52] *Rookes* (n1) 1227.
[53] Broome (n10) 1079 (Lord Hailsham).
[54] *Broome* (n10) 1079 (Lord Hailsham).
[55] *Broome* (n10); *John v MGN Ltd* [1998] QB 598 (CA).
[56] *Ramdath v Daley* (1993) 25 HLR 273.
[57] Law Com (n17) p.8; *Appleton v Garrett* [1997] 8 Med LR 75.
[58] Neyers 'A Theory of Vicarious Liability' (2005) 43 Alta. L. Rev. 287
[59] *Market Investigations v Minister of Social Security* [1969] 2 QB 173.
[60] *Lister* (n5).
[61] *Bazley v. Curry* [1999] 2 SCR 534 [36].
[62] Buckley *Salmond & Heuston on the Law of Torts* (21st ed, 1996) p.443.
[63] *Rose v Plenty* [1976] 1 WLR 141 (CA).
[64] Lunney & Oliphant *Tort Law: Text and Materials* (Oxford, 2008) p.823.
[65] Neyers (n58); *Makanjuola* (n48).
[66] Facts of *Lister* (n5).
[67] Robert Stevens 'Torts and Rights' (Oxford, 2007) p.270.
[68] *Navarro v Moregrand Ltd and Anr* [1951] 2 T.L.R. 674 (CA) p.681 (Denning LJ).
[69] NB: potential compensation from Criminal Compensation Authority Fund.
[70] *Racz* (n43); Neyers (n58).
[71] *Lister* (n5).
[72] *Bazley* (n61) cf. *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.
[73] *Lister* (n5) p11.
[74] Neyers (n58).
[75] *Lister* (n5).
[76] Hopkins [2001] CLJ 458; cited in Lunney p.823.
[77] Glassbrook 'You're only supposed to blow the bloody doors off- employers' vicarious liability for the torts of violent employees' JPI Law 240 (2005); Neyers (n58).
[78] [2003] EWCA Civ 887.
[79] [2008] EWCA Civ 689.
[80] Neyers (n58).
[81] Lewis N. Klar, *Tort Law* (Toronto, 3rd ed) 582 cited by Neyers (n58) p.288.
[82] Gary T Schwartz 'The Hidden and Fundamental Issue of Employer Vicarious Liability' (1996) 69S Cal.L.Rev cited by Neyers (n58) p.288.
[83] *Bazley* (n61).
[84] Fleming *The Law of Torts* (LBC Information Services, 1998) p.410; Approach seen in *Lister* (n5) 27, 48.
[85] Fleming (n82) p.410.
[86] *Bazley* (n61); NB: in Lister (n5) only the close connection test was adopted, not the policy reasoning used in *Bazley.*
[87] Feldthusen, Bruce 'Vicarious Liability for Sexual Torts' in Mullany and Allen M. Linden *Torts Tomorrow: A Tribute to John Fleming* (Sydney, LBC Information Services, 1998); cited in *Bazley* (n61).
[88] Fleming (n82) p.41.
[89] Glanville Williams 'Vicarious Liability and the Master's Indemnity' (1957) 20 MLR 220.
[90] *Lister* (n5).
[91] Fleming (n82).
[92] *Bazley* (n61) 24, citing Fleming (n82).
[93] At a higher standard than that imposed by negligence principles.
[94] Neyers (n58) p.295.
[95] Gummow & Hayne JJ *Lepore;* cited by Neyers (n58).
[96] Fleming (n84) p.411.
[97] Pearson Report, Vol 2, para 509, Cited by Atiyah, *Atiyah's Accidents, Compensation and the Law* (1996, 6th Ed) p.190.
[98] *Rowlands* (n3) 48.
[99] *Kuddus* (n2) 126.

[100] *Rowlands* (n3).
[101] *Rowlands* (n3) [36]; Assumption seen in *Kuddus* (n2), *Thompson* (n40).
[102] *Racz* (n43).
[103] *Maxwell v Pressdram Ltd* [1987] 1 W.L.R. 298; cf. *Broome* (n10) 1088 (Lord Reid): category 2 "punitive damages could not be given unless it was proved that they [the publishers] knew that passages in the book were libellous and could not be justified or at least deliberately shut their eyes to the truth".
[104] A statutory regime is required because police men do not qualify as employee for common law vicarious liability, due to their 'exercise of original and not delegated powers' (*Makanjuola* (n48) p.17).
[105] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) 201.
[106] *Mosley* (n105) 201-202.
[107] *Mosley* (n105) 201-203.
[108] *Mosley* (n105) 203.
[109] *Mosley* (n105) 203.
[110] *Rowlands* (n3) 47.
[111] *Rowlands* (n3).
[112] *Mosley* (n105).
[113] *Neyers* (n58).
[114] As seen in Part II; *Neyers* (n58).
[115] Example *Thompson* (n40); this limited availability goes some way to explaining the sparsity of judicial and academic discussion of vicarious punishment pre-*Lister*.
[116] *Neyers* (n58).
[117] *Makanjuola* (n48).
[118] *Makanjuola* (n48) p. 20.
[119] *Makanjuola* (n48) p. 20.
[120] *Bazley* (n60) 44; Glassbrook (n77).
[121] Scenario similar to *R v Tabassum* [2000] 2 Cr App R 328 (CA).
[122] *Broome* (n10) .
[123] *ibid.* 1228.
[124] *ibid.* 1090.
[125] *ibid.* 1064.
[126] *ibid.* 1063.
[127] *ibid.* 1090.
[128] *ibid.* 1089.
[129] *Kuddus* (n2) 161 (Lord Scott).
[130] Law Com (n17).
[131] *Thompson* (n40) Lord Woolf: Where exemplary damages against Chief of Police under S.88 Police Act 1996 it "appears to us wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor".
[132] *Rowlands* (n3).
[133] Robert Stevens 'Vicarious liability or vicarious action? (2007) 123 LQR 30 [33].
[134] *Broome* (n10) 1089.
[135] *Kuddus* (n2) 136.
[136] PS Atiyah *The Damages Lottery* (Hart, 1997) p.175.
[137] *Rowlands* (n3).
[138] *Lister* (n5).
[139] Law Com (n17).
[140] Law Com (n17) p.159 & 161.
[141] Law Com (n17).
[142] *Makanjuola* (n48).
[143] Atiyah *Vicarious Liability in the Law of Torts* (1967, Butterworths).
[144] (n2) 108 cf. Lord Hutton- deterrent effect "not fanciful" *Kuddus* (n2) 79.
[145] *Kuddus* (n2) 108; cf. USA- punitive awards cannot be made against the government, as the effect is to 'burden the very tax payers and citizens for whose benefit the wrongdoer was being chastised'. *Newport City v Facts Concerts* (1981); cited in *Law of Damages* (n36) 2.72.
[146] Atiyah *Damages Lottery* (n136) p.175: "Punitive damages should be abolished in the cases of vicarious liability – it is contrary to all principle to punish one person for the misdeeds of another, and it serves no useful purpose to do so.".
[147] Edelman (n24) p.247.
[148] *Kuddus* (n2) Lord Hutton.

[149] Street (n7).
[150] (n2) 108.
[151] *Rowlands* (n3) 42.
[152] *Report of the Royal Commission on Capital Punishment* s.53, cited in Hart *Law, Liberty and Morality* (Stanford, 1963) p.65.
[153] Hart (n152) p.66.
[154] *Broome* (n10) 1087C-F.
[155] *R v Alfred Transport Ltd* [1997] 2 Cr App 326.
[156] *Mattis* (n78).
[157] *Brooke v Bool* [1928] 2 KB 578.
[158] [1964] 2 Q.B. 745; *Gray v. Barr* [1971] 2 Q.B. 554.
[159] [1997] Q.B. 897; Loucas 'Exemplary damages: policy terms' Int. I.L.R. G131 [1996].
[160] *Lancashire* (n159) 909.
[161] *Kuddus* (n2) 131.
[162] *Brooke* (n157).
[163] The employer could obtain exemplary damages insurance if he wished (See Part 3(e)(ii)).
[164] Heydon's Case (1612) 11 Co.Rep. 5a; cf. *Broome* (n10) 1090- support for separate punitive award against tortfeasors, but fears impractical.
[165] [2006] EWHC 1710 (QB); For overview of tortious contribution and Proportionate Liabilities, see Mitchell *The Law of Contribution and Reimbursement (*2003, OUP) p.160-164, 170-173.
[166] *Thompson* (n40) 514-518; '£50,000 is to be the absolute maximum'.
[167] *Lister* (n5); *Rowlands* (n3).
[168] *Kuddus* (n2) 137 (Lord Scott).

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