Vicarious Liability

Critique and Reform

Anthony Gray

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Criticisms of Enterprise Risk Theory

Like any theory purporting to explain the law, enterprise risk theory must be carefully considered. Criteria by which it must be assessed include its utility in actually explaining the law as it is, its ability to assist in the resolution of future cases, and the extent to which any assumptions it makes are open to challenge or question. It is to a consideration of such issues that this chapter is devoted.

I first return to the work of Klemme, discussed at the end of chapter five. Klemme also notes some assumptions, and perhaps some limitations, of the model. It assumes an enterprise is better able to more realistically judge what normal expectations consumers have of how they behave than it is to determine whether a court will find it has met a 'reasonable care' standard, and it assumes the managers of an enterprise will bear in mind a broader range of possible losses and how they might come about than they would under a negligence standard. And Klemme concedes that the enterprise liability model assumes the ability of the enterprise to be able to calculate the costs of prevention, or insurance, and to cause such costs to be accurately reflected in its pricing structure.[1] He concedes that if such an organisation is not able to effect such a distribution, the enterprise liability model may introduce a market distortion. The increase in prices that the organisation imposes may be placed on consumers of other products of that organisation, or others with little or no connection to the organisation at all. This will distort the market for those services, causing the market to demand fewer of those services, and for society to allocate fewer resources to them than would be optimal.[2]

Again, Klemme sees congruence between the enterprise liability model and the scope of employment doctrine within the realm of vicarious liability. The concept of control is important because it indicates that an employer is in the most

[1] H Klemme, 'The Enterprise Liability Theory of Torts' (1976) 47 *University of Colorado Law Review* 153. See, eg, *Bazley v Curry* [1999] 2 SCR 534, 554 (McLachlin J, for the Court); B Feldthusen, 'Vicarious Liability for Sexual Torts' in N Mullany and A Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (North Ryde, NSW, LBC Information Services, 1998) 229: 'all the costs of sexual torts committed in the course of employment would be allocated to a relatively sophisticated party who would take them into account rationally in pricing and output decisions'.

[2] Klemme, ibid, 188; to like effect A Schwartz, 'The Case Against Strict Liability' (1992) 60 *Fordham Law Review* 819, 834 who claims that enterprises cannot estimate the likely losses to plaintiffs with any degree of accuracy. This compromises the ability of strict liability regimes to induce optimal safety levels. He says the imposition of strict liability may result in sub-optimal, or non-existent supply of valuable products.

effective preventive position. It also increases the likelihood that the employer can calculate the risks that are part of their enterprise and distribute those costs of prevention or insurance in an economically efficient manner.[3] Calabresi agrees that the scope of employment doctrine is congruent with enterprise risk theory, concluding that costs 'not closely associated' with an enterprise should not be allocated to it.[4] Others disagree that the scope of employment doctrine is in fact congruent with enterprise risk theory.[5]

There is one aspect of the current law of vicarious liability that Klemme says cannot be reconciled with enterprise risk theory. This is the principle that an employer who is vicariously liable for the actions of their employee has an action available against the wrongdoing employee to reclaim those costs, or an indemnity. Klemme says that under a true theory of enterprise risk vicarious liability, such recovery should not be permitted.[6] Calabresi has a similar position,[7] as does Stevens.[8]

Not everyone believes that enterprise liability is in fact congruent with vicarious liability, at least as the principle is currently interpreted and applied. Spafford says that enterprise risk theory goes beyond the employment relationship because it focuses on risk. She says that it does not depend on the degree of control the employer has or may have over the employee, rather the degree of control the employer has over the risk.[9] This leads her to conclude that the distinction between employees and independent contractors is no longer viable.[10]

Others have elaborated upon these weaknesses in the enterprise risk theory. Morris questions the loss distribution argument for the theory, as others have criticised the notion that a goal, or the main goal, of tort law is efficient loss distribution at a more general level.[11] He says it is just not possible to make generalised

[3] Klemme, ibid, 198.

[4] G Calabresi,'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499, 514.

[5] A Ehrenzweig, 'Negligence Without Fault' (1966) 54 *California Law Review* 1422, 1466 who while discussing enterprise risk states that 'the issue is not whether the servant intended to act within his employment, but whether in view of what the servant was actually employed to do, it was probable that he would do what he did, or in other words, whether his harmful conduct was typical for the enterprise in which he was employed'.

[6] Klemme (n 1) 201.

[7] Calabresi (n 4) 544, as does Anne Spafford: A Spafford, 'The Enterprise Risk Theory: Redefining Vicarious Liability for Intentional Torts' (LLM Thesis, University of Toronto, 2000) 88.

[8] R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 259.

[9] Spafford (n 7) 18.

[10] ibid 54. This is her reading of the Supreme Court of Canada's decisions in *Jacobi* and *Bazley* where the 'course of employment' test was not the focus; instead the closeness of the connection between the conduct and the risk created by the enterprise was paramount: 'the activity itself is the focus of liability' (72).

[11] E Weinrib, *The Idea of Private Law* (Oxford, Oxford University Press, 2012) 75: 'loss-spreading as a tort doctrine is incoherent'; P Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997) 231: 'it is probably true that some people see loss spreading as a function of tort law and seek to use it to that end. The real difficulty is that tort law is, by reason of its structure, not well-designed to perform this function'; R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press,

statements about the extent to which an organisation is able to distribute any or all of the costs of prevention, deterrence and insurance:

> [A]ll that can be said is that entrepreneurs probably bear part of it themselves, they spread part of it to their employees, creditors, suppliers and customers, and the members of each of these groups spread it … to those with whom they have important economic relations.[12]

Others make the same point.[13]

The ability of an organisation to distribute these costs will depend on characteristics of the market into which it supplies services. For instance, elasticity of demand will be important.[14] Some industries are very price sensitive, or price elastic, hampering the ability of an enterprise to spread risks among customers; in contrast, in markets with inelastic demand, risk spreading will be much easier. Relatedly, one must consider whether the market into which the enterprise is supplying is highly competitive or not,[15] including matters such as number of competitors, relative market share, barriers to entry and exit, and the extent to which substitutability of products is possible.[16] It will be more difficult for an entrepreneur to spread these losses in a highly competitive market. Thus, it is dangerous to make simplistic general assumptions about the ability of any organisation to distribute losses and risks elsewhere, yet this is what enterprise liability theory relies upon. An example of this occurs in the literature, where it is boldly concluded that employers should be liable for sexual abuse committed in the course of employment because the employer 'would take them into account rationally in pricing and output decisions'.[17] With respect, how an individual employer is to actually make such a calculation is anything but clear.

Douglas has also made substantial criticisms of the enterprise risk theory. He challenges the assumption of the enterprise risk theory that entrepreneurs can price such risks and distribute them to customers or insure against them.[18] Calabresi is lukewarm about enterprise risk as a loss-spreading device, concluding it is relatively inefficient in this regard, and that a general social insurance

2013) 204: 'the job of the courts is not to seek the best loss-spreader in each case, and they are not equipped to do so'.

[12] CR Morris, 'Enterprise Liability and the Actuarial Process—The Insignificance of Foresight' (1961) 70 *Yale Law Journal* 554, 586.

[13] W Douglas, 'Vicarious Liability and Administration of Risk I' (1929) 38 *Yale Law Journal* 584, 594: 'the capacity of business individually, as well as collectively, to distribute the costs of shifting these risks or the costs of assuming them, though theoretically without limit, no doubt has bounds beyond which it does not realistically exist'.

[14] Calabresi (n 4) 523.

[15] ibid 504.

[16] ibid 523.

[17] Feldthusen (n 1) 227.

[18] Douglas (n 13) 589: 'the degrees of probability of negligent detours and negligent frolics causing damage to others are difficult to measure'.

scheme would be more efficient.[19] Williams reaches a similar position.[20] Keating has also expressed concerns about the law and economics justification for enterprise risk.[21]

Keating's work contrasts the 'world of acts' in which much of tort law principle was conceived and developed, involving a perception of wrongs as being isolated, discrete acts involving individuals or organisations. However, the industrial revolution massively changed the world, such that it became a 'world of activities' involving large-scale commercial activity, which activity inevitably created risks. The challenge for the law was to adapt principles conceived in a different context to the new context of commerce. As indicated earlier, it was around this time of change, the late nineteenth and early twentieth century, that the possibility of insurance for business risk was created. He views the availability of insurance as a possible catalyst for change in tort principle, away from its world of acts, to a world of activities, in which notions of enterprise risk, as opposed to individualised assessments of fault, find a natural home.[22]

However, he says that the potential for insurance to effect this kind of change in tort law depends on the extent to which losses are insurable.[23] He says that losses that are insurable have three characteristics—there are a large number of homogeneous exposures, losses are accidental, and losses must not be correlated in any way. He also points out that the offering of insurance for such risks including the cost of acquiring information about the risk of particular insureds, the cost of administering such insurance contracts, monitoring claims and behaviour of insureds and adjusting premiums, must be low enough to make the offer of the product viable.

[19] Calabresi (n 4) 529–30: 'though as a system of loss-spreading enterprise liability has some merits, it is still relatively inefficient. In the first place, we are not prepared to charge enterprises with losses which are not readily assignable to some specific activity … if risk spreading is really important, these general losses of living would in themselves require some kind of social insurance. Enterprise liability may be similarly inefficient where the cost of collecting the loss from the enterprise is very large—in terms of court costs or lawyers' fees … a greater misallocation is caused by incurring the avoidable costs of trying to allocate the loss than by leaving it where it falls and letting the price of the product involved understate its true costs. At best then, if risk spreading is deemed crucial, enterprise liability could only do part of the job; the other part would have to be filled in by some social insurance scheme'.

[20] G Williams, 'Vicarious Liability and Master's Indemnity' (1957) 20 *Modern Law Review* 437, 442: 'litigation is an expensive and inefficient way of administering social insurance'.

[21] G Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 *Michigan Law Review* 1266, 1308: 'enterprise liability is out of step with optimal precaution concerns both in its definition of the boundaries of liability and in its recognition of defences to liability. It is even more out of step with optimal loss spreading concerns. For enterprise liability (or any other form of strict liability) to achieve optimal loss spreading, damages awards must be pitched at the deterrence level for negligently inflicted harms and at the insurance level for non-negligently inflicted harms. Doing this, however, converts strict liability into an echo of negligence liability'.

[22] Others say that insurance is not relevant because it introduces a foreign concept into a private relationship. For instance, Weinrib says that to take account of insurance in determining the rights and liabilities of parties under tort law amounts to the unwarranted intrusion of public law concepts into the private law realm: E Weinrib, 'The Insurance Justification and Private Law' (1985) 14 *Journal of Legal Studies* 681.

[23] Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (n 21) 1336.

Others have pointed out that insurance may apply differently, according to whether the employee wrongdoing was negligent, or deliberate and wilful. Insurance policies for employers commonly contain exclusions for actions that are wilful.[24] Again, this undermines the loss-spreading rationale said to justify the enterprise risk approach.

Keating is also concerned at the possible scope of a vicarious liability doctrine premised on notions of enterprise risk:

> The claim that actors are subject to a special kind of culpability when they set in motion (or sustain) processes that are statistically certain to cause harm sweeps too broadly. Highway fatalities on Fourth of July weekends are actuarially predictable with great precision, yet no one thinks that we are, as a society, collectively culpable for failing to forbid driving on Fourth of July weekends.[25]

As a result, he favours a narrower conception of enterprise risk, focusing on cases where the defendant had direct control over the circumstances leading up to the accident, and where a defendant has done something which makes a kind of accident 'all but inevitable'.[26] For Keating it is defensible to make organisations liable for their 'characteristic risks' because the organisation can 'estimate and minimise ex ante, and to disperse ex post'.[27] Others say that risk is inherent in anything, making it an ineffective differentiator.[28]

Others have made a similar point, expressing concern that if the rationale for enterprise risk is accepted in the context of vicarious liability, it would be difficult not to extend it to a range of other cases in which liability was in issue and where it might at least theoretically be possible to distribute risk.[29] Concern by others about

[24] Spafford (n 7) 92 cites four Canadian decisions where the relevant insurance policy excluded coverage for intentional wrongdoing: *Scott v Wawanesa Mutual Insurance Co* [1989] 1 SCR 1445; *Sansalone v Wawanesa* [2000] SCJ No 27; *Bluebird Cabs v Guardian Insurance* [1999] BCJ No 694; and *University of Western Ontario v Yanush* (1988) 67 OR (2d) 525. The case *World Harvest Church v Grange Mutual Casualty Company Ohio* App Lexis 5994 (Court of Appeals of Ohio, 2013) is an example of a case involving an insurance policy excluding the insurer's liability for acts of abuse.

[25] Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (n 21) 1342.

[26] ibid 1345.

[27] ibid 1354; G Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 *Southern California Law Review* 193, 212.

[28] 'The real problem is that mischief is inherent in, typical of, or inevitable in human conduct, such that any time an employer hires a person to do work, the employer creates the risk that, in doing whatever it is that he or she has been hired to do, the worker will cause harm, whether randomly, deliberately or otherwise': A Ataner, 'How Strict is Vicarious Liability? Reassessing the Enterprise Risk Theory' (2006) 64(2) *University of Toronto Faculty of Law Review* 63, 91.

[29] *Wights v Staff Jennings Inc* 405 P 2d 624 (Oregon, 1965): 'substantially the same reasons for imposing strict liability upon sellers of defective chattels have been advanced in several other cases and in various texts and articles. Summarized, the thesis is that a loss resulting from the use of the defendant's defective goods is a "casualty produced by the hazards of a defendant's enterprise, so that the risk of loss is properly a risk of that enterprise", a view (known as) … the theory of enterprise liability. The reasoning would seem to apply not only in cases involving personal injuries arising from the sale of defective goods, but equally to any case where an injury results from the risk creating conduct of the seller in any stage of the production and distribution of goods … It seems to us that the enterprise liability rationale … proves too much and that if adopted would compel us to apply the principle of strict liability in all future cases where the loss could be distributed'.

the possibly open-ended scope of enterprise risk liability is shared by others.[30] This leads them to seek to find appropriate limits on the doctrine, for instance by confining it to cases where an enterprise creates an 'excessive or unacceptable level of risk', perhaps because they are involved in 'extra-hazardous activity', sourced to the original strict liability case of *Rylands v Fletcher*.[31] Obviously the Restatements (Torts) have made use of the concept of extra-hazardous in seeking to map out the limits of strict liability.[32]

Others have pointed out an apparent inconsistency at the heart of enterprise risk theory in terms of the extent to which the employer took precautions to avoid the risks created by their enterprise. Given that vicarious liability is seen as a strict liability doctrine, the fact that the employer took all reasonable precautions to avoid the risks created by their enterprise would, strictly speaking, be irrelevant. Ataner criticises this position:

> The interesting question is if, having shifted the focus to the risk-creating activity of the employer and having invited an assessment of the characteristics of the employment enterprise as a whole, the enterprise risk approach can actually sustain an absolute disregard for the level of care taken by the defendant, which is required by a doctrine of strict liability. I do not believe that it can. If the employer is to be held vicariously liable for having designed, structured and implemented an enterprise that carries the risk of employee wrongdoing, then surely the manner in which she conducts the enterprise, and whether or not she actually manages to reduce the potential risk to an acceptable minimum, should have some bearing on the courts' assessment of liability.[33]

Another justification provided by the Supreme Court of Canada in *Bazley v Curry*[34] in adopting the enterprise risk approach to vicarious liability was its potential to deter undesired conduct:

> The second major policy consideration underlying vicarious liability is deterrence of future harm. Fixing the employer with responsibility for the employee's wrongful act,

[30] 'It cannot be true that any employment enterprise, in and of itself, poses an excessive risk justifying the imposition of strict liability': Ataner (n 28) 101.

[31] ibid 101–02; see also C McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 *Common Law World Review* 268, 287 who believes it should only apply where there is a 'high degree of relevant harm' inherent in the enterprise. This might be close to the concept of extra-hazardous activity contemplated in the United States Restatements, and United States case law.

[32] Restatement (Second) of Torts s 520(f); Restatement (Third) of Torts: Liability for Physical and Emotional Harm s 20 (American Law Institute, 2010). George Fletcher would confine use of strict liability to cases of non-reciprocal risk, which has some parallels with extra-hazardous activity: G Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 537.

[33] Ataner (n 28) 85. She concludes enterprise risk theory is weak because of its apparent inconsistency—its consideration of the risks created by an enterprise, but its refusal to take into account what the employer did by way of risk mitigation. This leads her to conclude that the courts adopt the German principle, allowing an employer a so-called 'exemplary defendant' defence where the employer can show they took all reasonable precautions. This is somewhat similar to a fault-based negligence doctrine. Stevens has a similar view: *Torts and Rights* (n 8) 258: 'it is commonly said that holding an employer liable for the torts of his employees will encourage the employer to be careful … however this argument fails to explain why the employer is liable even where he has taken due care in these matters. When the employer has done all that he can, what further encouragement is there in imposing liability in any event?'.

[34] [1999] 2 SCR 534.

> even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision … beyond the narrow bank of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of the employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.[35]

With respect, this reasoning seems somewhat convoluted.[36] How can strict vicarious liability provide the required deterrent effect, and encourage 'efficient organisation and supervision', when the employer knows that, if this theory is applied, they will be held liable for the materialisation of risks connected with their enterprise regardless of the precautions they took and whether they are the most efficient organisation possible? Elsewhere, it has also been observed that in some cases, particularly deliberate employee wrongdoing, and most especially deliberate employee criminal activity, this activity is not deterrable by the employer.[37]

Thus, the deterrence rationale of vicarious liability, even if it supports the imposition of strict liability in some cases (which is not conceded, and which a recent study denies),[38] demonstrably does not apply in cases of deliberate criminal wrongdoing, yet it appears in judgments which then go on to find an employer liable for the deliberate, criminal wrongdoing of an employee. With respect, Binnie J for the majority in *Jacobi* was right to point out that care must be taken with respect to the deterrence rationale, because it can 'blur the line' between vicarious liability and negligence.[39]

The idea of deterrence does not support the imposition of strict liability upon an employer, as opposed to fault-based liability.[40] What incentive will strict liability provide to careful selection and training of staff, and efficient organisation and management, that a negligence, fault standard will not?[41] Further, practical

[35] ibid 554–55.

[36] A McPeak, 'Sharing Tort Liability in the New Sharing Economy' (2016) 49 *Connecticut Law Review* 171, 192: 'generally deterrence goals are not furthered when the actor's conduct results in liability regardless of the level of care used'.

[37] Ataner (n 28) 93.

[38] J Sevier, 'Vicarious Windfalls' (2017) 102 *Iowa Law Review* 651, 657 where an empirical test found 'no evidence that employers in our sample would meaningfully change their employee selection criteria based on their beliefs about their vicarious liability for the acts of their employees'.

[39] *Jacobi v Griffiths* [1999] 2 SCR 570, 614 (Binnie J, for Cory, Iacobucci and Major JJ); see also JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 *Alberta Law Review* 287, 294: 'positive proof that the employer conducted himself without fault will not serve as a defence to the common law version of the doctrine. For these reasons … this version of the employer-focused deterrence rationale cannot explain vicarious liability'.

[40] J Neyers and D Stevens, 'Vicarious Liability in the Charity Sector: An Examination of *Bazley v Curry* and *Re Christian Brothers of Ireland in Canada*' (2005) 42 *Canadian Business Law Journal* 371, 396: 'the deterrence argument is largely incoherent because either it is based on the fault of the employer or it will not work'.

[41] GT Schwartz, 'Hidden and Fundamental Issue of Employer Vicarious Liability' (1996) 69 *Southern California Law Review* 1739, 1760: 'negligence law … seems capable of achieving all that ought to be achieved' (referring to encouraging employers to take cost-justified measures in the selection and supervision of employees, disciplining of staff and regulation of scope of activities).

constraints on the ability of employers to discipline staff, for example unfair dismissal laws, collective bargaining and other aspects of the modern workplace should be acknowledged.[42] The idea that the imposition of strict liability will provide more incentive for an employer to discipline and punish errant employees is subject to these significant practical constraints. Atiyah was unimpressed with rationales for vicarious liability based on deterrence arguments.[43]

Further, the imposition of strict liability upon an enterprise may indeed provide a deterrent effect, but the deterrence may be to operating the organisation at all, or to providing particular services, facilities and products. Consumer welfare may fall if the goods or services provided by the organisation are no longer available.

It can seem particularly perverse when applied to the non-profit sector and organisations providing essential community services. It is harder to conceive their situation in terms of an 'efficient' level, for instance, of charitable services, education, or health service provision. Is it desirable that the extent to which a school offers educational services is reduced to meet an 'efficient' level of optimal provision? After all, this is what strict liability is lauded as achieving.[44] Neyers and Stevens are particularly critical of the use of enterprise risk theory in the context of charities:

> It does not make sense to say that the existence of any particular institution increases the risk of paedophilia if we accept the assumption that there should be a sufficient number of these institutions to look after all children in need. The assumption is a solid one since the alternative to the institution is the street. Surely the children are more vulnerable and the paedophile more empowered if they are left on the street. So the policy argument supporting vicarious liability cannot apply to any particular charity … since the existence of a particular institution does not put a new risk into the community … the court (in *Bazley*) must mean that all childcare institutions that provide parent-like intervention into the lives of children are strictly liable for incidents of paedophilia that occur on their time since it is the risk of paedophilia or simply the presence of children that generates the liability. Hence the decision is an intentional and direct assault on the charity sector. It is moved by misguided and misplaced compassion, misguided because it prefers as a policy option that the children have no institution (since all institutional resources are now available to pay for the torts of paedophiles)

[42] ibid 1758.

[43] PS Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967) 17: 'the case for imposing vicarious liability on the ground that it forwards the policy of accident prevention must … be regarded as largely not proven'. He pointed out insurance companies did not inspect the business premises of the insured to determine the extent to which they had implemented safe workplace systems, and that the accident record of an insured may be affected just as much by luck as by any accident preventive measures they took.

[44] W Landes and R Posner, 'The Positive Economic Theory of Tort Law' (1981) 15 *Georgia Law Review* 851, 904: 'strict liability is more likely to be the superior regulatory device in cases where optimal accident avoidance requires altering the defendant's activity rather than his care or the plaintiff's activity or care'.

and misplaced because it is not for judges to show compassionate bias, especially with other people's property.[45]

Of course, another option for an employer concerned with the spectre of strict liability is to engage independent contractors, rather than employees, to provide particular services on an as-needs basis since, traditionally at least, an employer is not vicariously liable for the actions or omissions of an independent contractor as they would be for an employee. As was noted above, one of the weaknesses of the enterprise liability doctrine is that it does not explain why an engaging firm is vicariously liable for acts of employees, but not independent contractors. On the basis of the existing position whereby an employer is not vicariously liable for the actions of independent contractors, the imposition of strict liability may result in some employers shifting to contract labour as needed, rather than retain employees. In economic terms, the imposition of strict liability in such circumstances has created a market distortion, where parties do not base decisions on employer/employee or employer/independent contractor on the basis of economic efficiency, but on circumventing legal liability rules. It is suggested that an aim of legal rules should be to minimise market distortion, not introduce it.

Calabresi says that the enterprise risk theory means that an employer should be liable for all injuries caused by employees that arise in the course of employment. It should not matter whether the activity was one which benefited the employer or was authorised by them. It was irrelevant whether the act was negligent or wilful. He assumes that insurance is available in each instance. He concludes that the cost of an activity is not in any way less real simply because it was deliberately caused by an employee, or the employee was not authorised to do it.[46]

In a leading United States decision, Judge Friendly considered enterprise risk theory in relation to a sailor.[47] The sailor was attached to a ship which was in dry dock for repairs. While returning from shore leave, the sailor turned a number of wheels on the side of the dry dock. As a result, the ship fell against the dry dock, causing it damage. The issue was whether the plaintiff dry dock owner could sue the sailor's employer. In his decision Judge Friendly identified further limits to the enterprise risk approach. He found that it would only lead to a more efficient allocation of resources where the result of imposing the cost on the enterprise would be that it would cause it to consider whether further steps could be taken to prevent recurrence of the accident. On the facts there, he found that imposition of liability on the United States government for the sailor's actions would not necessarily lead the government to more closely screen would-be sailors. Instead, he preferred to rest enterprise risk liability on the basis of fairness, that an enterprise should only be vicariously liable on the enterprise risk approach for 'accidents

[45] Neyers and Stevens (n 40) 402–03; similarly Stevens, *Torts and Rights* (n 8) 272: 'it stretches credibility to suggest that running a non-profit residential care home for emotionally troubled children increases the risk of children being abused'.

[46] Calabresi (n 4) 544–45.

[47] *Ira S Bushey and Sons Inc v United States* 398 F 2d 167 (2nd Cir, 1968).

which may fairly be said to be characteristic of (their) activities'.[48] The Restatement (Third) of Torts also frames strict liability in terms of the 'characteristic risks' of an activity.[49] Smith asked whether the 'conduct of the master's business was a contributing cause of the servant's act'. If the answer was no, the master was not liable. If the answer was yes, a further question should be asked: whether, in view of what the employee was employed to do, it was 'probable' that the employee would do what they did. Only if the answer to the two questions was yes would the employer be liable, in the view of Smith.[50]

Scholars are critical of the 'characteristic risks' theorem. Brodie for instance wonders how a risk can be said to be characteristic of an enterprise when the conduct is generic to society as a whole. He says it is very difficult for a court to be able to state confidently that, for example, an enterprise has increased the risk of child abuse. He notes that children who are not institutionalised are also abused, and it is not readily apparent that the risk of abuse materially increases when a child is in residential care. It is not entirely clear how much the risk caused by the enterprise needs to be higher than the risk in society generally in order to justify vicarious liability on the enterprise risk theory. Nor is it clear whether a serious risk is required in order to justify application of the doctrine. He suggests that in the absence of empirical evidence, a risk arises that unwarranted assumptions will be made.[51] Schwartz says the concept of 'characteristic risks' does not explain most cases of vicarious liability,[52] and it is not generally used in tort law.[53] Stevens likewise is sceptical of the concept of 'increased risk' as a justification for the imposition of vicarious liability, at least with respect to deliberate wrongdoing.[54]

[48] ibid 171; similarly Gregory Keating states that enterprises should only be vicariously liable for distinctive risks of an enterprise—those risks it creates which are different from those which are encountered in the community in general: Keating, 'The Idea of Fairness in the Law of Vicarious Liability' (n 21) 1360. He says the concept of 'characteristic risk' places appropriate limits and boundaries on the scope of the enterprise's strict liability for accidents. Elsewhere he talks of enterprise liability being suitable to include within the costs of business 'inevitable losses … incident to carrying on an enterprise': G Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 *Vanderbilt Law Review* 1285, 1308.

[49] s 18 (Preliminary Draft No 2). Douglas Brodie is critical of the 'characteristic risk' concept. He wonders how a risk can truly be considered to be characteristic of a particular enterprise when it occurs in society generally.

[50] YB Smith, 'Frolic and Detour' (1923) 23 *Columbia Law Review* 717, 724.

[51] D Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27(3) *Oxford Journal of Legal Studies* 493; D Brodie, *Enterprise Liability and the Common Law* (Cambridge, Cambridge University Press, 2010) 43–47.

[52] GT Schwartz (n 41) 1750.

[53] ibid: 'The harms of knife cuts are in some sense "characteristic" of the distribution of knives; adverse side effects are "characteristic" of the manufacture of prescription drugs, and injuries to passengers are evidently "characteristic" of the operation of a bus system. Yet our tort system shows no interest in imposing automatic liability on the companies that produce knives and drugs and that operate buses' (1750).

[54] R Stevens, 'Non-Delegable Duties and Vicarious Liability' in J Neyers, E Chamberlain and S Pitel (eds), *Emerging Issues in Tort Law* (Oxford, Hart Publishing, 2007) 361–62: 'on the facts of Bazley it stretches credulity to suggest that running a non-profit residential care home for emotionally troubled children increases the risk of children being abused'.