Speculum Juris

Vol 37 No 1 (2023)
Published 28 July 2023

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Msaule "Should Vicarious Liability be Extended to the Minister of Police in the Circumstances of Unlawful Arrest by a Private Person?" 2023 (37) Spec Juris 104–117

Should Vicarious Liability be Extended to the Minister of Police in the Circumstances of Unlawful Arrest by a Private Person?

PR Msaule*
Lecturer, University of Limpopo

ABSTRACT

Vicarious liability denotes that the defendant is held delictually liable for the conduct of another (the actual wrongdoer). This is a form of strict liability, which means that the plaintiff does not have to prove that the defendant was at fault. Nevertheless, there must be some form of relationship between the defendant and the actual wrongdoer. In the majority of cases, vicarious liability arises from an empoyer–employee relationship. In this article, it is contended that the Minister of Police (Minister) must be held vicariously liable for unlawful arrests effected by private persons. This is despite the fact that there is no employment relationship between the Minister and a private person. Nonetheless, it is argued that despite lack of an employment relationship between the Minister and the private person, the Minister should be held vicariously liable for an unlawful arrest effected by a private person. Consequently, the conduct of the private person in effecting an arrest is identical to the obligations imposed on the police by legislation. Therefore, the acts of private persons in carrying out arrests must be viewed as public instead of private and thus closely

* LLM; LLB North-West University; Lecturer, University of Limpopo. I would like to appreciate the insightful comments by the anonymous reviewers, however, the usual caveats apply.

connected to the obligations of the police. It is trite that an individual who effects a private arrest does so with the intention of preventing crime and advancing the administration of justice. It would be unfair not to extend the "protection" that the police have to private persons in the event they make an unlawful arrest. The development of vicarious liability in this direction would be in line with section 39(2) of the Constitution which mandates the courts to develop common law. Furthermore, this development would ensure equal protection between victims who have been unlawfully arrested by police, on the one hand, and those unlawfully arrested by private persons on the other.

Keywords: Close connection; employer–employee relationship; police obligations; private person; unlawful arrest; vicarious liability.

1 INTRODUCTION

As a general rule, the duty to effect arrests is preserved for the police.[1] However, the Criminal Procedure Act 51 of 1977 (the Act) extends the power to arrest beyond just the police. In the main, this power is, preserved for peace officers.[2] The definition of a peace officer in the Act is broad and includes certain officials other than the police.[3] Although the Constitution does not expressly allocate the power of arrest to any institution, it is implicit from section 205(3) of the Constitution that this responsibility is primarily reserved for the police. The objects of the police as stated in this provision make this conclusion inescapable.[4] As already indicated, the Act authorises a broader category of public officials to effect arrests. In addition to the categories of persons who may be declared peace officers in terms of section 334(1)[5] of the Act, the Act also authorises private persons to effect arrests.[6] In *S v Martinus*[7] the court cautioned ordinary persons against carrying out private arrests. The reason for this is not difficult to fathom. It is trite that arrest constitutes a serious encroachment on the individual's right to freedom of movement and dignity. Thus, there is a need for control and limitation of the exercise of this power. Furthermore, private persons are not trained to effect arrests. Thus, the likelihood of private persons carrying out unlawful arrests is heightened. In the case of peace officers, the possibility of unlawful arrests is attenuated by their training and internal instructions.[8] The question that is posed in this contribution is whether it would be justifiable to extend liability to the Minister of Police (the Minister) for an unlawful arrest that has been effected by a private person, and if so, under which circumstances.

1 See s 205 of the Constitution; the Preamble to South African Police Service Act 68 of 1995; *F v Minister of Safety and Security* 2012 1 SA 536 (CC) and *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

2 See for instance, ss 40 and 41 of the Criminal Procedure Act 51 of 1977 (the Act).

3 Section 1 of the Act defines "peace officer" as including "any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section".

4 Section 205(3) of the Constitution provides that "[t]he objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

5 Although the provision does not seem to proscribe the appointment of private persons as peace officers, currently the only persons who occupy public office have been appointed as peace officers by the Minister of Justice and Correctional Services. For instance, immigration officials and traffic officials. See s 334(4) of the Act.

6 Section 42 of the Act.

7 *S v Martinus* 1990 2 SACR 568 (A) 578.

8 For example, Standing Order (G) 341 issued under Consolidation Notice 15/1999 and entitled "Arrest and the Treatment of an Arrested Person until Such Person is Handed Over to the Community Service Centre Commander" as quoted in *Minister of Safety and Security v Van Niekerk* 2008 1 SACR 56 (CC) fn 13.

2 VICARIOUS LIABILITY: A BRIEF EXCURSION

Although not novel, the concept of vicarious liability is a complex phenomenon.[9] At its core, it pre-supposes that one person (the defendant) is liable in delict for the conduct of another (the actual wrongdoer).[10] Liability is attributable to the defendant if a particular relationship exists between the two parties. The relationship between the defendant and the actual wrongdoer, in itself, does not mean that the defendant would be vicariously liable for the conduct of the wrongdoer. In addition, what is required is the nexus between the relationship of the defendant and the actual wrongdoer on the one hand and the wrongful conduct on the other.[11] In essence, vicarious liability is a form of strict liability in that it ascribes delictual responsibilities to the defendant who is not at fault, provided that all elements of delict are proven against the actual wrongdoer, including the relationship between the actual wrongdoer and the defendant.[12] All the defences available to the actual wrongdoer are generally available to the defendant.[13] Vicarious liability is a departure from the general rule that "fault is a prerequisite for liability".[14] Wicke contends that at first blush vicarious liability might appear to be unjust.[15] However, a closer analysis of the rule shows that it promotes justice[16] in that it serves to ensure that those who entrust others with responsibilities take due care that those entrusted with such responsibilities are fit for purpose and that they do not cause harm to others.[17] Commentators diverge on the justification of vicarious liability.[18] However, there are two prominent theoretical bases for the justification of vicarious liability: risk or danger theory, and interest or profit theory.[19] The risk theory presupposes that:

> [w]here a person's activities create a considerable increase in the risk or danger of causing damage, ie, an increased potential for harm, there is sufficient justification for holding him liable for damage even in the absence of fault.[20]

This risky activity is undertaken by and therefore increased through the conduct of another.

9 See *Hirsh Appliance Specialist v Shield Security Natal (Pty) Ltd* 1992 3 SA 643 (D) 649; In *Booysen v Minister of Safety and Security* 2018 6 SA 1 (CC) para 95, Zondo DCJ observed that: "In fact out of K, F and this matter in which vicarious liability had to be determined by this Court in the past few years, it was only in *K* that there was a unanimous judgment in this Court. *F* had a majority judgment and a minority judgment. In *F* there was a split in the Supreme Court of Appeal. This Court's judgment in *K* refers to a number of cases including those in foreign jurisdictions from which one can see that the determination of vicarious liability very often results in divisions in judicial opinions. This shows that very often judicial unanimity is a rarity in cases of vicarious liability. In the *Rabie* case itself there was a split in the Appellate Division when the *Rabie* test was adopted."

10 See, for instance, Wicke "Vicarious Liability: Not Simply a Matter of Legal Policy" 1998 *Stell LR* 21 21.

11 See *Minister of Safety and Security v Morudu* 2016 1 SACR 68 (SCA) para 37; *Booysen v Minister of Safety and Security* 2018 6 SA 1 (CC) para 62; Scott "The Theory of Risk Liability and Its Application to Vicarious Liability" 1979 *CILSA* 43 63–64; Wicke 1998 *Stell LR* 30.

12 Neethling and Potgieter, *Visser Law of Delict* 7 ed (2014) 389; Wicke 1998 *Stell LR* 21; Potgieter "Preliminary Thoughts on Whether Vicarious Liability Should be Extended to Parent-Child Relationship" 2011 *Obiter* 189 189.

13 Wicke 1998 *Stell LR* 30.

14 Potgieter 2011 *Obiter* 189; see also Scott 1979 *CILSA* 48–49.

15 Wicke 1998 *Stell LR* 21.

16 Wicke 1998 *Stell LR* 21.

17 Wicke 1998 *Stell LR* 23.

18 See for instance, Potgieter 2011 *Obiter* 191–192; Scott 1979 *CILSA* 49.

19 Neethling and Potgieter 380. Loots, "Sexual Harassment and Vicarious Liability: A Warning to Political Parties" 2008 *Stell LR* 143 156. For other theoretical bases of vicarious liability see Potgieter 2011 *Obiter* 191–192.

20 Neethling and Potgieter 380. However, these authors are quick to point out that a "satisfactory and universally accepted scientific basis for every instance of liability without fault has not been found, and will probably never be found." 380.

Historically, the test to determine whether the defendant has created this potential risk was to determine whether the defendant has some measure of control over the actual wrongdoer, the so-called "control test".[21] Although this characteristic is most dominant in the category of the employer–employee relationship, other categories of vicarious liability resemble it.[22] The interest or profit theory assumes that a person who engages in an activity for their own interest and causes harm to a third party must bear the responsibility for that harm.[23] The person who engages in the activity reaps the rewards of that activity, and they should also bear the losses.[24]

However, even these two theories are insufficient to adequately justify vicarious liability in all circumstances. According to Neethling and Potgieter:

> The justification for vicarious liability has been sought in various policy considerations, not all of which are equally applicable to the different categories of vicarious liability…; as a matter of fact, the policy consideration underlying vicarious liability in one category, such as the employment relationship, may not be very relevant in another category, for example amongst partners.[25]

In other words, no single justification applies across the board because of the varied circumstances under which vicarious liability may arise, and the flexibility of the doctrine behooves the courts to develop further categories.[26] Furthermore, "each category has its own specific requisites".[27] According to Potgieter: "Vicarious liability is thus not the result of any clearly developed and logical legal principle."[28]

Some commentators argue that the basis for the existence of vicarious liability is so confused to the extent that it cannot be reformed and that a "bold break" is required.[29] Against this backdrop, this article seeks to investigate whether it would be justifiable to extend liability for an individual's conduct to the State, in the circumstance where legislation entitles that individual to perform a particular action and not offer them protection against delictual claims arising from that conduct. There is nothing unusual about courts expanding the existing categories of vicarious liability nor are these categories "exhaustively defined nor closed".[30] Lord Reed argued: "The law of vicarious liability is on the move … It has not yet come to a stop."[31] However, it is trite that for a new category of vicarious liability to be recognised "compelling

21 Wicke 1998 *Stell LR* 22.

22 See Wagner "The Relationship(s) Giving Rise to Vicarious Liability in South Africa" 2014 *SALJ* 178 178.

23 The clearest example of this theory is a partnership. See *Lindsay v Stofberg NO* 1988 2 SA 462 (C).

24 Neethling and Potgieter 380.

25 Potgieter 2011 *Obiter* 190.

26 See Loots 1998 *Stell LR* 147.

27 Potgieter 2011 *Obiter* 190.

28 Potgieter 2011 *Obiter* 194; Swain "A Historical Examination of Vicarious Liability: A Veritable Upas Tree" *Cambridge LJ* 2019 640 641, observes as follows regarding the nebulous nature of vicarious liability: "few legal doctrines can be as difficult to pin down as vicarious liability … 'To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera'." Williams "Vicarious Liability and the Master's Indemnity" (1957) 220 231, in a similar vein stated that: "Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends." Quoted from *Lister v Hesly Hall Limited* [2001] UKHL 22 [3 May 2001] para 65.

29 Midgley, "Mandate, Agency and Vicarious Liability: Conflicting Principles" 1991 *SALJ* 419 425–426; Potgieter 2011 *Obiter* 191.

30 Potgieter 2011 *Obiter* 195.

31 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] 660 para 1 relying on the words of Lord Phillips in *Catholic Child Welfare Society v Various Claimants (FC)* [2013] 2 AC 1 para 19.

social and legal policy reasons" are required.[32] This article seeks to consider whether such reasons exist in the context of unlawful arrest by a private person in terms of section 42 of the Act. Before addressing this question, it is apposite to first determine the nature, purpose and scope of private arrest.

3 THE NATURE AND PURPOSE OF PRIVATE ARREST

It is trite that the law empowers a private person to effect arrests under certain circumstances.[33] However, in *Martinus*,[34] the court cautioned against persons carrying out private arrests. Since the development of modern government, the primary duty of combating crime and maintaining law and order falls within the purview of the State through the police.[35] When effecting arrest, it is clear that a private person is exercising powers that ordinarily fall within the realm of the police. This is despite such power being conferred by legislation. Had legislation not provided this power it is arguable that arrests by private persons would have been unlawful regardless of the circumstances. As such, a private person would have to be held liable for all the arrests they carry out. The only recourse available to a person who is the victim of or witnesses the commission of a crime would have been private defence in certain circumstances.[36] When the police effect arrests, they do so not only on the authority of the law but also as part of their employment duties as well as their constitutional obligations. Private persons, on the other hand, do not have any obligation to effect arrests. Although at first blush a private person who effects an arrest is acting on their own accord and benefit, closer scrutiny reveals that this is not always the case. In most cases, private persons make arrests in the course and scope of their employment with an employer other than the Minister. In such cases, the employer of the private person may be held vicariously liable.[37]

The question that may be asked is whether there should be a differential treatment between the incidents where the individual effects an arrest on their own "accord" and where the private person effects the arrest in the course and scope of their employment. This issue is addressed in due course. Of initial importance at the moment is to recognise that the Act does not afford any protection against delictual liability to a person who effects private arrest under both scenarios. This is despite the fact that, ultimately, arrests are made for and on behalf of the State. Private arrests are made in the public interest because a private person is carrying out the duty of the police.[38] In essence, the private person is exercising public power.

4 ARGUMENTS AGAINST EXTENDING VICARIOUS LIABILITY TO THE MINISTER

The proponents against the extension of vicarious liability of an unlawful arrest by a private person to the Minister would argue that such an extension does not satisfy the requirements of vicarious liability. The extension of vicarious liability would not be in line with the rationale for

32 Potgieter 2011 *Obiter* 192. Potgieter, relying on the Canadian case of *Bazley v Curry* 1999 2 SCR 534 posits that "[t]he imposition of vicarious liability may usefully be approached in two steps. First, a court should establish whether there are precedents which unambiguously determine whether the case should attract vicarious liability. Should prior cases fail to suggest a solution clearly, the next step is to determine whether vicarious liability should be imposed in light of broader policy rationales behind strict liability" (195).

33 See s 42 of the Act.

34 *S v Martinus* 1990 2 SACR 568 (A) 578.

35 Section 205 of the Constitution.

36 See generally Snyman *Criminal Law* 6ed (2014) 102–113.

37 See *Langeberg Foods v Tokwe* 1997 3 All SA 464 (E).

38 Section 50(1) of the Act provides among others that a person who has been arrested must be brought to a police station as soon as possible.

its existence. As already indicated, vicarious liability has been justified largely on two bases: the risk principle, and the interest or profit theory. Historically, these justifications applied to employment relationships. In *Catholic Child Welfare Society v Various Claimants (FC) (Christian Brothers)* Lord Phillips delineated five factors that underpinned the imposition of vicarious liability on employers.[39] The emphasis had been on the employer's ability to control the conduct of the employee. However, in recent times the scope of vicarious liability has been extended beyond traditional employment relationships to include, for instance, third parties who are using employees who are under contract of employment or other arrangements with another employer.[40]

In *Christian Brothers*, the United Kingdom Supreme Court extended vicarious liability beyond the traditional employment relationship by acknowledging relationships akin to employment as deserving of recognition for vicarious liability claims. However, even on the application of *Christian Brothers*' principles, the extension of vicarious liability to the Minister for an unlawful arrest by a private person seems far-fetched. It is common cause that there is no employment relationship between the private person and the Minister or even a relationship akin to employment. Liability against the Minister can only be imposed where damage can be attributed to the Minister through the conduct of their employees, or through an expanded test of a relationship that is similar to employment. It is trite that no relationship of whatever kind exists between the Minister and the private person and therefore the question whether their relationship is akin to employment does not arise. To hold otherwise would be a departure from a universal principle, as observed by MacDuff J, that "[vicarious liability] has clear limits … *[It] is not infinitely extendable*".[41] In this case, the conduct of the private person cannot be attributed to the Minister because no relationship exists between them. Put differently, the first requirement of vicarious liability is not satisfied.

The tenuousness of the relationship between the private person and the Minister can be illustrated by the facts in the United Kingdom Supreme Court case of *Barclays Bank Plc v Various Claimants*.[42] In this case, the issue before court was whether Barclays Bank must be found vicariously liable for the sexual assaults perpetrated by the wrongdoer (Dr Bates) on the respondents who had been examined by Dr Bates.[43] Dr Bates had been contracted (not employed) to conduct assessments and medical examinations on the Barclays Bank's prospective employees. Barclays Bank required the prospective employees to pass a medical examination before they could be hired. It was Barclays Bank that had identified Dr Bates as the medical practitioner to conduct these examinations. It was further Barclays Bank that had arranged the appointments with Dr Bates on behalf of the prospective employees. In the course of his examination, Dr Bates had to fill a pro forma report headed with the appellant's logo and titled "Barclays Confidential Medical Report" and it was Barclays Bank that paid for each of the reports.[44] Despite what seem to be "connecting" factors between Dr Bates and Barclays Bank the Supreme Court upheld the appeal. In the case of the private person effecting an unlawful

39 *Catholic Child Welfare Society v Various Claimants (FC)* [2013] 2 AC 1 para 35. Those factors are: "i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer; iii) The employee's activity is likely to be part of the business activity of the employer; iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; v) The employee will, to a greater or lesser degree, have been under the control of the employer."

40 *Catholic Child Welfare Society v Various Claimants (FC)* [2013] 2 AC 1 para 37.

41 *E v English Province of Our Lady Charity* [2013] QB 722 para 22 (emphasis in the original).

42 *Barclays Bank plc v Various Claimants* [2020] UKSC 13 [01 April 2020].

43 *Barclays Bank plc v Various Claimants* [2020] UKSC 13 [01 April 2020] para 2.

44 *Barclays Bank plc v Various Claimants* [2020] UKSC 13 [01 April 2020] para 3.

arrest, there appears to be no connection between that individual and the Minister.

Advocates against the extension of vicarious liability will further argue that there are no pressing legal policy considerations warranting the extension of this area of the law. It is trite, as Fleming puts it that "[v]icarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations."[45] Despite these observations, the search for a coherent and principled justification for vicarious liability persists. This is because, as Laski puts it,

> The basis of the rule [vicarious liability], is public policy. One knows, of course, that 'public policy' is a doctrine for which the judges have cherished no special affection. 'I, for one' said Burrough J., 'protest … against arguing too strongly upon public policy; it is a very unruly horse, and when you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.'[46]

As Lord Hobhouse of Woodborough remarked in *Lister v Hesley Hall Ltd* that:

> Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be.[47]

Whilst recognising the policy-laden nature of vicarious liability, the Supreme Court of Canada has observed that:

> A focus on policy is not to diminish the importance of legal principle. It is vital that the courts attempt to articulate general legal principles to lend certainty to the law and guide future applications. However, in areas of jurisprudence where changes have been occurring in response to policy considerations, the best route to enduring principle may well lie through policy. The law of vicarious liability is just such a domain.[48]

In *WM Morrison Supermarkets Plc v Various Claimants* the court held that despite the value-laden nature of vicarious liability, judges must make decisions that are "principled and consistent."[49] In *Armes v Nottinghamshire County Council*, the court held that the extension of vicarious liability requires "careful justification."[50] The policy consideration for the existence of vicarious liability identified in *Bazley v Curry*[51] — fair compensation and deterrence — do not justify the extension of vicarious liability to the category of claims envisaged in this article. In relation to compensation, the court held that it must be fair in the sense that liability is not imposed on the wrong employer.[52] Clearly, the imposition of liability on the Minister would not be imposed on the employer of the private person who has effected an unlawful arrest, let alone the wrong employer. In regard to deterrence, the argument that burdening the Minister with vicarious liability would be a panacea to this category of claims, is fatuous for obvious reasons.[53] Furthermore, the extension of vicarious liability as envisaged would divert the scarce resource from the fight against crime to payment of damages.[54] Given the astronomical figures that the Minister pays out for unlawful arrests that have been effected by police officials who

45 Fleming *The Law of Torts* 9ed (1998) 410 as quoted in *Bazley v Curry* [1999] 2 SCR 534 551.

46 Laski "The Basis of Vicarious Liability" *Yale LJ* 1916 105 111–112.

47 *Lister v Hesly Hall Ltd* [2001] UKHL 22 [3 May 2001] para 60.

48 *Bazley v Curry* [1999] 2 SCR 534 551.

49 *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 [01 April 2020] para 24.

50 *Armes v Nottinghamshire County Council* [2017] UKSC 60 [18 October 2017] para 91.

51 *Bazley v Curry* [1999] 2 SCR 534 555.

52 *Bazley v Curry* [1999] 2 SCR 534 554.

53 See *Bazley v Curry* [1999] 2 SCR 534 556.

54 See in general Wessels "Reconsidering the State's Liability for Harm Arising from Crime: The Potential Development of the Law of Delict" 2019 *Stell LR* 361–391.

are ostensibly trained and to whom numerous instructions apply, one shudders to think what the position would be should vicarious liability be extended as argued in this article.[55]

Despite these difficulties, should the law be developed to hold the Minister liable? The next section dissects this question.

5 SHOULD THE MINISTER BE HELD VICARIOUSLY LIABLE FOR UNLAWFUL ARREST MADE BY A PRIVATE PERSON?

Lord Phillips, after having identified the strides that have been made in the development of the law of vicarious liability,[56] determined the criteria that must be satisfied to establish "the modern theory of vicarious liability"[57] as requiring a synthesis of two stages:

> i) the first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability.
>
> ii) Hughes LJ identified the second stage as requiring examination of the connection between D2 and the act or omission of D1. This is not entirely correct. What is critical at the second stage is the *connection that links the relationship between D1 and D2* and the act or omission of D1, hence the synthesis of the two stages.[58]

Okpaluba and Osode posit that vicarious liability bestrides both labour law and the law of delict, however, its roots derive from employment law. Thus, the elements of labour law loom large in the determination of the scope and reach of vicarious liability.[59] Historically, it was imperative that the plaintiff proves that there was an employer–employee relationship between the defendant and the actual wrongdoer for the claim of vicarious liability to succeed.[60] According to the Salmond test,[61] the employer could only be held vicariously liable for the conduct of the wrongdoer if that conduct at the relevant time fell within the "course and scope of his or her employment" or unauthorised acts that are so connected with acts that the employer has authorised. Control was the pivot of this test.[62] However, the test developed in *Christian Brothers* unabashedly jettisoned the employment relationship as the foundation for vicarious liability and held that the courts must grapple with the nature of the relationship *per se* between the wrongdoer and the defendant to determine whether it was capable of giving rise to vicarious liability despite the non-existence of an employment relationship between the two parties. According to the court, the relationship between the defendant and the actual wrongdoer must

55 See for instance see Naidu "Big Payouts, Little Sanction in SAPS Wrongful Arrest Cases" https://www.iol.co.za/sundayindependent/news/big-payouts-little-sanction-in-saps-wrongful-arrest-cases-09b45ef6-df6c-44bb-a5f0-360a92a7450e (accessed 04-05-2022).

56 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1 para 20.

57 This is the terminology used by Lord Reed in *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 24.

58 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1 para 21 (emphasis in the original); see also *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 7.

59 Okpaluba and Osode, *Government Liability: South Africa and the Commonwealth* (2010) 297.

60 Okpaluba and Osode, *Government Liability* 298.

61 In terms of this test "[a]n employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorized by the employer or (2) unauthorized acts that are so connected with acts that the employer has authorized that they may rightly be regarded as modes – although improper modes – of doing what has been authorized…" quoted from *Bazley v Curry* [1999] 2 S.C.R 541.

62 Okpaluba and Osode, *Government Liability* 299–300.

be sufficiently akin to that of an employer and employee for vicarious liability to arise.[63]

Thus, for the Minister to be held vicariously liable the plaintiff must prove that the relationship between the private person and the Minister is akin to an employment relationship. In *Cox v Ministry of Justice*,[64] the United Kingdom Supreme Court rejected the appellant's (Ministry of Justice) contention that there was no employment relationship between the actual wrongdoer and the appellant. In this case, the court had to grapple with whether to hold the Ministry of Justice vicariously liable for the injuries caused to the prison catering manager by the negligence of a prisoner (the actual wrongdoer) who was working under the former's direction and on prison service pay.[65] No contract of employment existed between the prisoner and the prison service. After having considered the five factors that justify the imposition of vicarious liability on the employer listed by Lord Phillips,[66] the court found that these factors "are not equally significant."[67] Therefore, it was upon the court hearing the matter to determine the significance to attach to each of these factors. The court also found that factors one and five are "unlikely to be of independent significance" in the determination of the defendant's vicariously liability.[68] In relation to factors two to four, the court found that they are inter-related and must be approached as such when determining the question of vicarious liability. Having regard to these factors the United Kingdom Supreme Court endorsed the reasoning of the court of appeal in the same matter that:

> [t]he work performed by prisoners in the kitchen was essential to the functioning of the prison, and if not done by the prisoners would have to be done by someone else. It was therefore done on behalf of the prison and for its benefit. It was part of the enterprise or business of the prison service in running the prison. In short, the prison service took the benefit of this work, and there was no reason why it should not take its burdens.[69]

The court emphasised that the usage of the words such as "business", "benefit" and "enterprise" in the five factors enunciated by Lord Phillips should not be narrowly construed. The defendant need not be a business or enterprise in the ordinary sense for it to be held vicariously liable. "Nor", said Lord Reed, "need the benefit which derives from the tortfeasor's activities take the form of a profit."[70]

Applying these principles to the proposed development in this discussion, the significant overlap between the first stage and the second stage as enunciated by Lord Phillips, must be considered.[71] The fact that the private person is not employed by the Minister is not determinative of the matter. Rather the issue to be determined is whether, in essence, the relationship between the private individual and the Minister

> is in principle capable of giving rise to vicarious liability where the harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities

63 See *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1 paras 37–61.

64 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016].

65 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] paras 3, 4 and 7.

66 Listed in footnote 39.

67 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 20.

68 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 20–21.

69 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 14.

70 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 30; see also *Armes v Nqottinghamshire County Council* [2017] UKSC 60 [18 October 2017] para 58.

71 *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 114.

to the individual in question.[72]

Admittedly, establishing a relationship between the private person and the Minister is a daunting task. However, the difficulty of this exercise is somewhat reduced because the establishment of the relationship is not done in isolation of stage two, but rather requires the synthesis of both stages one and two.[73] Considering whether the relationship between the actual wrongdoer and the defendant exists, the court should not be fixated on the tests laid down by the courts when strictly dealing with labour law, for instance, in cases of unfair dismissal.[74] In determining whether stage one of the test has been satisfied the court must consider all the surrounding facts and circumstances and, according to the court in *E v English Province of Our Lady of Charity* "[t]hese will include many of the matters which are of relevance also to stage two."[75]

In *E v English Province of Our Lady of Charity* Ward LJ expressly concluded that there was no employment relationship between the actual wrongdoer and the defendant but nonetheless proceeded to investigate whether the relationship between the two parties was akin to employment and concluded that it was.[76] Among the factors that Ward LJ took into account in coming to the conclusion was that "the more relevant the activity is to the fundamental objectives of the business, the more appropriate it is to apply the risk to the business."[77]

The determination of whether a relationship is akin to employment is ultimately not "an exercise in analytical jurisprudence but [is] a matter of policy."[78] Lady Hale found that the five factors are not the only criteria and that policy consideration should also be taken into account.[79] However, when applying the five factors that Lord Phillips identified to determine whether the relationship between the private person and the Minister can give rise to vicarious liability the following transpires:

In relation to the first factor (the deep-pocket argument), it is indeed so that the Minister is in a better position to compensate the plaintiff *vis-à-vis* the private person. However, the inadequacy of this ground to find vicarious liability has been aptly described by Lord Reed when he said enterprises insure themselves because they might be liable and not that they are liable because they have insured themselves. Thus, Lord Reed concluded that the deep-pocket argument is not a "principled justification for imposing vicarious liability."[80] Lord Phillips did not address this aspect in *Christian Brothers*. The answer to this issue, either way, seems to make little difference in this case.

In relation to factor two (conduct undertaken on behalf of the employer), it cannot be argued with conviction that when a private person arrests a person whom they suspect has committed a Schedule 1 of the Act offence they do not do so on behalf of the Minister. This is true despite the fact that the private person has not been provided with any resources to carry out the arrest nor have they been granted the authority to carry out the arrest by the Minister. The police are given the authority to carry out arrests by sections 40 and 44 of the Act and not merely by the fact that they are employed by the Minister. Similarly, a private person is granted the authority

72 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 24.

73 See *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 7; *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1 para 48.

74 *Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1 para 49; *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 36.

75 *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 41.

76 *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 30 *et seq*.

77 *E v English Province of Our Lady of Charity* [2013] QB 722 (2012) para 77.

78 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (HCA) para 34.

79 *Barclays Bank Plc v Various Claimants* 2020 UKSC 13 [01 April 2020] para 18.

80 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 20.

to effect an arrest by section 42 of the Act. It would thus be incongruent to conclude that when police officials effect arrests, they do so on behalf of the Minister. Yet when a private person effects an arrest they do not act on behalf of the Minister.

In relation to factor three (employee's activity is likely to be part of the business of the employer), it is trite that the police are constitutionally mandated to prevent, combat and investigate crime and to keep law and order among others.[81] It cannot be disputed that the conduct of the private person to arrest a person they suspect to have committed an offence is closely related to the core "business" of the police. In *Cox v Ministry of Justice*, the court held that:

> when prisoners work in the prison kitchen, or in other workplaces such as gardens or the laundry, they are integrated into the operation of the prison. The activities assigned to them are not merely to benefit to themselves: a benefit which is, moreover, merely potential and indirect. Their activities form part of the operation of the prison, and are of direct and immediate benefit to the prison.[82]

This clearly applies to the arrest of a suspect by a private person.

In relation to factor four (by employing the employee the employer creates the risk of a delict being committed), it has already been indicated above that the power of the police does not necessarily derive from their employment but it is a duty imposed by statute, the same statute that permits a private person to effect arrests as well. It is thus clear that the police do not necessarily derive their authority to arrest from their employment as police but from legislation.

In relation to factor five (control), it has already been stressed that control no longer occupies the pride of place it used to.[83] It has been established that the most tenuous degree of control is sufficient to render the defendant liable. Although it is true that at the time a private person effects an arrest they do so all by themself, once the arrest has been effected there is a measure of control that is imposed on them. After a private person has effected an arrest, they have the obligation to take the arrestee to a police station.[84] It is clear from this stage that the private person would be under the control of the police.[85]

In relation to the second stage ("the connection that links the relationship between D1 and D2 and the act or omission of D1), the court in *Hollis v Vabu Pty Ltd t/a Crisis Couriers* found that what is important to determine is "'the totality of the relationship' between the parties; it is this which is to be considered."[86] In this case, the appellant was struck and knocked by an unknown cyclist who was wearing the respondent's uniform.[87] The respondent conducted the business of delivering parcels and documents.[88] The appellant sought to hold the respondent vicariously liable on the basis that the cyclist was the employee of the respondent. It was common cause that the bicycle couriers were required to provide their own bicycles and the responsibility to maintain them remained with the bicycle couriers themselves. Other than a radio and uniforms, the bicycle couriers were required to provide their own equipment.[89] The lower court's finding that the bicycle couriers were not employees of the respondent was dismissed by the High Court

81 See s 205(3) of the Constitution.

82 *Cox v Ministry of Justice* [2016] UKSC 10 [2 March 2016] para 34.

83 See for instance *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 44.

84 See s 50(1)(a) of the Act.

85 See *Armes v Nottinghamshire County Council* [2017] UKSC 60 [18 October 2017].

86 *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 24.

87 *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 2.

88 *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 1.

89 *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 8.

of Australia in the following terms:

> In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees.[90]

Although McHugh J agreed with the majority's conclusion, McHugh J did so for different reasons. McHugh J found that there was no employment relationship between the respondent and the unknown cyclist who had injured the appellant. According to McHugh J:

> It is true that the couriers by Vabu are neither employees nor independent contractors in the strict sense. But there is no reason in policy for upholding the strict classification of employees and non-employees in the law of vicarious liability and depriving Mr Hollis of compensation. Rather than expanding the definition of employee or accepting the employee/independent contractor dichotomy, the preferable course is to hold that employers can be vicariously liable for the tortious conduct of agents who are neither employees nor independent contractors. As McLachlin J pointed out in *Bazley v Curry* 'a meaningful articulation of when vicarious liability should follow in the new situations ought to be animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions'. To hold that an employer is vicariously liable for the conduct of a worker who is not an employee or independent contractor does not affect their relationship in other areas of the law or their freedom to contract between themselves or to arrange their business affairs. And it has the great advantage of ensuring that the doctrine of vicarious liability remains relevant in a world of rapidly changing work practices.[91]

6 DOES POLICY CONSIDERATION PERMIT THE EXTENTION OF VICARIOUS LIABILITY TO THE MINISTER?

In *Hollis v Vabu Pty Ltd*, McHugh J held that an employer may be held liable where no employment relationship exists. It is submitted that in the circumstances of this case adopting McHugh J's approach would not be stretching the application of vicarious liability to breaking point. The advantage of this perspective is that, as observed by McHugh J,[92] it obviates the need to distort the meaning of the employment relationship. Arrests by private persons of persons suspected of committing Schedule 1 of the Act offences furthers the Constitutional ideal of a country free from crime and which is underpinned by law and order. The approach advocated by McHugh J is in keeping with the spirit, purport, and objects of the Bill of Rights as envisaged by section 39(2) of the Constitution. Thus the development of vicarious liability as contended herein would not equate to what Zitzke calls "constitutional over-excitement".[93] The crime rate is high in South Africa, and it is axiomatic that the police cannot be in every inch of the country where serious offences take place. It is for this reason that the law permits private individuals

90 *Hollis v Vabu Pty Ltd m t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 47; see *Leota v Parcel Express Ltd* [2020] NZEmpC 61 [7 May 2020].

91 *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 Agust 2001] para 93.

92 *Hollis v Vabu Pty Ltd t/a Crisis Couriers* (2001) 207 CLR 21 (HCA) [9 August 2001] para 93.

93 Zitzke, "Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development" 2018 *CCR* 259.

to effect arrests on persons who commit or whom they suspect of having committed serious offences. Thus, to extend vicarious liability to the Minister for the unlawful arrest effected by a private person would not be a far-reaching development in our law of vicarious liability.

Factors that point to the justifiability of holding the Minister vicariously liable in this case include that the duty to arrest is primarily within the remit of the police. That the private persons' power to effect arrests is sourced from legislation must come into play. As it is derived from legislation and exercised for the purpose of maintaining law and order, this power is therefore not private but public in nature. Likewise, it is exercised for the benefit of the administration of justice. Like a police official, a private person who carries out an arrest does so with the aim of having the suspect brought to justice. If the private person's intentions are impure, then they are not carrying out a civic duty and therefore must fall outside of the "protection" proposed herein. Providing private persons with the authority to carry out arrests without any form of immunity is patently unfair to those who may, in good faith, exercise such power wrongfully. It exposes those persons to the risk equivalent to that experienced by the police, without similar "protective measures" against repercussions. Therefore, to treat them differently from the police in this regard manifests a naked preference that bears no relation to the fight against crime and the maintenance of law and order. Similarly, although in the analogous position, the victims who have been arrested by a private person may find themselves unable to receive adequate and just remedy due to the penurious position of the private person.[94] The same could not be said about a victim who has been arrested by the police.[95] This, it is submitted, is discrimination without basis and therefore not justifiable.

The risk of private persons carrying out unlawful arrests is accentuated by the fact that private persons are not equipped with the necessary training to carry out this duty. It would thus be unfair to transpose liability of the trained police officials to the Minister whilst failing to do the same to private persons who, when effecting arrests, are in truth carrying out the duty of the police. The correctness of this proposition is uncontestable. There would be nothing controversial if the conduct of a private person who *bona fide*, but wrongfully, carries out an arrest is regarded as being closely connected to the business of the Minister and thus holding the Minister vicariously liable despite the non-existence of an employment relationship. The fact that the Minister is not the employer of the private person must not automatically halt the enquiry. However, it does not mean that the enquiry would be an easy one.[96] For the purpose of a private person's unlawful arrest, the primary consideration must be the connection between the conduct of the private person and the "business" of the Minister. Indeed, they are connected. The conduct of the private person is meant to advance the objects which the Constitution ascribes to the police service.[97] Furthermore, it would be incongruous to accord protection in the form of vicarious liability to police who engage in activities that in no way advance the objectives of the police service such as in the cases of *F v Minister of Safety and Security*[98] and *K v Minister of Safety and Security*[99] but fail to extend similar protection to private persons who pursue these objectives. Public policy considerations as influenced by the values underlying the Constitution would tolerate a conclusion that the State must be held vicariously liable for the damage suffered by the plaintiff arising from an unlawful arrest by a private person. At the end of the day, the arrest is made on behalf of the State represented by the Minister. Baxter posits

94 Loots 2008 *Stell LR* 152 intimates that the principle of vicarious liability has previously been identified as a vehicle through which justice may be promoted.

95 This represents the so-called "deep pocket theory".

96 Loots 2008 *Stell LR* 153.

97 See s 205(3) of the Constitution.

98 *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

99 *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

that when exercising statutory powers

> officials are not acting on behalf of their employers (the executive) at all; at best (if we are to personify institutions) they act on behalf of the legislature. In short, an employer/employee situation *does not exist* …[100]

Although not an official, the private person (just like officials who are acting on statutory powers) is acting on behalf of the legislature. It is incontrovertible that the plenary law-making powers lie with parliament[101] not the executive or government departments. Then, in essence, there is no difference between an official and a private person who is carrying out what are essentially identical duties authorised to both by legislation. As already indicated, section 39(2) of the Constitution empowers the courts to develop new rules where the same are required to give effect to the spirit, purport, and objects of the Bill of Rights. As O'Reagan J observed, the development of the principle of vicarious liability will at times "require what may be troublesome lines to be drawn by courts applying them."[102] In other words, in certain circumstances, courts have to be bold in approaching novel questions before them. In certain circumstances, it may not be necessary to prove that the employer had the right to exercise control over the employee.[103]

There remains one issue that needs to be addressed: should the proposed extension of vicarious liability be applicable to arrests made by private persons emanating from their employment other than with the Minister? It is submitted that the extension propounded in this article must not extend to this type of private arrest. The basis for this is that the employers who engage employees to arrest others mostly do that for the purpose of deriving a benefit. An example of this type of business would be a security business. A closely related reason is that often these employees have limited discretion on whether to effect an arrest or not as they might be accused of failing to advance the interest of the employer in failing to effect arrests where they believe that a person has committed an offence for which their (employee's) services have been engaged with potentially dire consequences.[104] This illustrates that a private person who may effect arrests on behalf of their employers is likely to carry out more arrests than an individual who acts on their own initiative. This has the potential to increase unlawful arrests with dire consequences for the Minister whilst the employer reaps rewards as a result of the individual's employment.

7 CONCLUSION

As already indicated the principles governing vicarious liability are not static and from time to time their reach would be expanded beyond the recognised categories. In this article it is argued that vicarious liability should be extended to hold the Minister liable for an unlawful arrest that has been effected by a private person on their own accord who acts *bona fide*. It has been demonstrated that such an expansion would not be out of the ordinary due to the fact that the conduct of the private person not only mirrors the functions of the police, but importantly, it advances the objectives of the police of maintaining law and order.

100 Baxter, *Administrative Law* (1984) 631–632 as quoted by Froneman J in *F* para 99 (emphasis in the original).

101 See s 44(1) of the Constitution.

102 *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 23.

103 Loots 2008 *Stell LR* 155.

104 Cf *South African Allied Workers Union on behalf of Phakathi v Bidvest Protea Coin (Pty) Ltd* 2018 2 BALR 217 (CCMA).