VICARIOUS LIABILITY IN THE CRIMINAL LAW[1]

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Joxer: D'jever rade Willie . . . Reilly . . . an' his own . . . Colleen . . . Bawn? It's a darlin' story, a darlin' story!

Boyle: I'm telling you . . . Joxer . . . th' whole worl's . . . in a terr . . . ible state o' chassis![2]

(1) INTRODUCTION

Vicarious liability in the criminal law has been defined as "responsibility for the act or state of mind of another".[3] As it is applied the doctrine has limited scope only and most often operates on a master in relation to the acts of his servants, especially if the acts of the servant are in breach of a public licence held by the master. Such criminal responsibility is a form of "status offence".[4] The rule at common law is that apart from certain anomalous exceptions[5] no man is held criminally liable for the acts of others. It was expressed by Raymond C. J. in *R.* v. *Huggins*[6] in the following way:

> It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour.[7]

That case dealt with the warden of the Fleet Prison who was acquitted of murdering an inmate, who had died as a result of being confined in an unwholesome cell on the orders of the defendant's deputy, but without defendant's knowledge. More recently, the English Court of Appeal in *Vane* v. *Yiannopoullos*[8] took the view that "In general the doctrine of vicarious liability of a master for the acts of his servants finds no place in our criminal law."[9]

Such liability is then a creature of statute but, on analysis, very few pieces of legislation are unequivocal in imposing sanctions on the master for his servant's criminal acts. The development of this doctrine has been left largely to the courts in the sense that they superimpose a policy-orientated gloss on penal statutes to that effect when construing them. The policy factor underlying this gloss is that unless the master is held liable the purpose of the legislation would be frustrated.[10] Thus it is generally in social-welfare statutes of a summary nature that the doctrine has been resorted to, and then on the basis that it is the only effective preventive measure open to the Courts in applying them.[11] The judicial reasoning seems to be that Parliament is aware when it enacts legislation of this type, casting certain duties on employers (especially holders of a public licence) that the ultimate observance or breach of those duties most often rests with an employee. The only way then, of ensuring that such duties are observed is to place the employer in such an invidious position before the law that he takes all possible steps to ensure the legislative purpose is carried into effect. The judicial device resorted to is vicarious liability.

On examination it is patent that the legal test of vicarious liability has undergone a marked shift since its original application in the early

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part of the last century. At its inception[12] the doctrine seems to have been based on the criminal acts of the servant being within the "course of his employment",[13] thus rendering his master liable for them. Subsequently, however, the courts enunciated an alternative test based on the delegation of his statutory duties by the master to his servant.[14] The delegation test today is firmly established as the proper one to be applied in all criminal cases based on vicarious liability. In the House of Lords decision of *Vane* v. *Yiannopoullos*[15] Lord Evershed took the view:[16]

> . . . that in the absence of proof of actual knowledge, nevertheless the licensee or proprietor may be held liable if he be shown . . . effectively to have "delegated" his proprietary or managerial functions."[16]

That case concerned a restaurant licensee who was charged with knowingly selling intoxicating liquor contrary to the conditions of his licence (i.e. to persons not taking a meal).[17] The respondent had instructed his staff not to serve liquor to such persons, but during his absence in another part of the building a waitress did such an act. Although the appeal was dismissed by Lords Morris and Donovan on the ground that the "knowledge" required in the section referred to the licensee and not his servants, the same decision was reached by Lords Reid and Evershed on the basis that a conviction could have been sustained if there had been a true delegation but such a delegation was not evident on the facts.

The same provision was discussed in *Ross* v. *Moss*[18] where the licensee of a club absented himself (on holiday) and left the management of it to his father who was also a director of the company owning it. During the respondent's absence the rules of the club, relating to the sale of intoxicating liquor to members only, were flagrantly violated and the public was given unrestricted access and supplied with liquor. The respondent was convicted on appeal of knowingly selling liquor to non-members. The term "knowingly" was construed as including not only actual knowledge, but the deliberate disregarding of events, constructive knowledge, which arose in the instant case because the respondent, when himself present managing the club, had personal knowledge of systematic breaches of the licensing laws, and intended that they should continue in his absence. At the same time, though only *obiter dicta,* Lord Parker C.J. reaffirmed the delegation principle as the proper test to be applied in cases involving liability.[19]

A striking illustration of the delegation principle's operation is seen in *Linnett* v. *Metropolitan Police Commissioner*[20] where it was held that a co-licensee was liable for the criminal acts of another co-licensee, despite the absence of a master and servant relationship. The charge was one of knowingly permitting disorderly conduct on licensed premises,[21] and Lord Goddard C.J. held:[22]

> There are many cases under the Licensing Acts, the Food and Drugs Acts and other Acts in which convictions have been upheld of persons knowingly permitting certain acts, without any actual knowledge by them, the acts having been knowingly permitted by the servant or manager and that knowledge having been imputed to the master or principal. The principle underlying these decisions does not depend upon the legal relationship existing between master and servant or between principal and agent; it depends on the fact that the person who is responsible in law, as for example, a licensee under the Licensing Acts, has chosen to delegate his duties, powers and authority to another.

The court was here following the decision in *Allen* v. *Whitehead*[23] where an occupier of a cafe who adopted a sleeping role in its management was convicted under the same provision as in *Linnett's* case.[24] The defendant had been warned by the police that known prostitutes were using his cafe as a place of resort and he had directed the manager not to permit them to do so in the future. Despite the direction his manager continued to let prostitutes meet and gather on the premises and his knowledge was imputed to his master on the ground that the management of the cafe had been delegated to him.

The doctrine is not, however, applicable to all penal statutes and it is not always immediately apparent when a statutory offence will be construed as imposing vicarious liability. Judicial practice indicates that it is confined to social-welfare offences of a "quasi-criminal"[25] character. Turner J. in *Gifford* v. *Police*[26] adopted the following statement by Atkin J. in *Mousell Bros. Ltd* v. *London & North-Western Railway*[27] as setting out the matters to be taken into account by a court in deciding whether or not vicarious liability was intended to apply[28]:

> . . . regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

In the writer's opinion the delegation test is the proper one to be applied in all cases that fall within the totality of the indicia set out by Atkin J. above. The following comment by J. Ll. J. Edwards,[29] it is submitted, is the correct view to adopt to the broad statements of principle involved:[30]

> . . . it is suggested that the scope of employment or authority tests be discarded completely, and the doctrine of vicarious liability be aligned with the principle that he who chooses to delegate any duties, powers or responsibilities, imposed upon him by Act of Parliament, should remain liable for the acts of any person appointed to act in his place. It may well be that master and servant cases will continue to predominate, but it seems inimical to have a special test for such a relationship which may conflict with the wider and more general principle enunciated [the delegation test] in *Linnett* v. *Metropolitan Police*[31]. Moreover, it is submitted that the delegation rule should apply irrespective of whether the offence charged is one of absolute prohibition or one requiring of *mens rea* in the form of guilty knowledge.

It requires little by way of illustration to show the important differences in effect of the two tests. The delegation principle embraces the narrower test of acting within the scope of employment or authority. Thus if the latter were the correct test many principals would be able to avoid liability by carefully instructing their employees and defining the outer limits of their employment[31]a.

Under the delegation test this would not necessarily exculpate the employer, it would depend on the nature of the delegation and the nature of the offence. It is respectfully submitted that the statement by Turner J. in *Gifford* v. *Police*[32] should no longer be regarded as correct:[33]

> It is true, however, that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act in such words as to make the prohibition absolute; in which case the principal may be liable if the act is in fact done by his servants in the course of employment.

Instead, it is submitted, if a general delegation has been made or one involving the exercise of a discretion[34] the employer is liable (whether the duty is absolute or requires proof of *mens rea*) even if the act

is outside the servant's course of employment. In most cases, of course, there is no conflict between the two tests because the delegation principle includes all acts done in the course of a servant's employment. Although the limits of the delegation test cannot be clearly drawn one thing at least is clear, it imposes wider criminal liability than the alternative course of employment principle. The latter test is only applicable to the master and servant relationship, whereas the delegation test would apply in every case where the person in whom the statutory duty reposes chooses to delegate it. On the meaning of the term "delegation" Lord Evershed held the view:[35]

> If it be asked what is meant be delegation, it may be said (and I have in mind the citations which I have made[36]) that the expression will cover cases where the licensee or proprietor has handed over *all the effective management* of his premises, where he in truth connives at or wilfully closes his eyes to what in fact is being done. But I prefer to attempt nothing further in the way of definition applicable to any of the classes of case which have arisen; for I venture, for my part, to think that in the light of the numerous authorities the answer to any given case will generally depend upon the common sense of the jury or magistrate concerned, in the light of what I believe can now be fairly and sensibly derived from the effect of the numerous cases referred to in the argument, to some of which I have alluded. [emphasis added]

It would appear then that the delegation test embraces connivance or wilful blindness as well as all types of "effective" delegation (*quaere*, whether general or specific)[37] and is a matter of fact to be determined in every case with the guidance of prior decisions. The "open texture" of this test is patent. The use of the two tests by the courts as though they were synonymous has led to unnecessary confusion between them. If the delegation test is adopted as the appropriate one in every case, as it is suggested it ought to be, it can only lead to easier predictability of the outcome in any set of facts and a desirable degree of consistency of case law.

(2) VICARIOUS LIABILITY AND CORPORATE LIABILITY DISTINGUISHED

It is important in this context to bear in mind the two distinct categories of responsibility that may be imputed to a corporation for the criminal acts of its servants. This dichotomy is largely based on theoretical difficulties encountered by the courts during the last century. In New Zealand a corporation is a juridical person for the purposes of criminal prosecution[39] but corporate criminal liability is not restricted to the "quasi-criminal" type of statutory breach that is the *sine qua non* of vicarious liability imposed on natural persons. Thus a corporation may be held responsible for the criminal acts of its servants, either (a) Vicariously, where such liability (in New Zealand) is imposed by statute. In such a case the usual rules apply; or (b) Through corporate liability proper. Since at law a corporation is a separate person, distinct from its members, certain problems arose, particularly relating to offences containing *mens rea* as an essential ingredient. These were overcome by laying down the rule that in every corporation there are persons of a managerial or executive character whose acts, when on corporate business are deemed to be those of the company. Similarly, the relevant states of mind of executive servants are imputed to the corporation. Effectively, the acts and states of mind of such servants are the corporation's *per se*, so for the

purposes of criminal prosecution such a servant and the company are the same entity.[40] Liability of this type is not restricted to offences of a social welfare nature, although most cases in fact deal with "quasi-criminal" breaches.

The general principles of corporate liability[41] were set out in *R.* v. *I.C.R. Haulage Limited and Others*[42] where the appellant company was charged with common law conspiracy to defraud, and argued that such an indictment (involving proof of intent) could not lie against a corporation. The Court of Criminal Appeal, in rejecting this argument, cited with approval the following statement by Macnaghten J. in *Director of Public Prosecutions* v. *Kent and Sussex Contractors Ltd*:[43]

> It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate . . . If the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive . . . his knowledge and intention must be imputed to the company.

It is difficult to ascertain exactly the extent of corporate liability in this area. In *R.* v. *I.C.R. Haulage Limited and Others*[44] it was held that there were limitations on such responsibility as a result of a body corporate's artificial nature.[45] These exceptions include cases in which the offences could not be committed by a corporation,[46] as well as those for which the punishment is of a peculiarly corporal type.[47] These limitations on corporate liability are specifically recognised in s.6 (1) of the Acts Interpretation Act 1924, which reads:

> In the construction of every enactment relating to an offence punishable on indictment, or on summary conviction, the expression "person" shall, *unless the contrary intention appears,* include a body corporate (emphasis added).

It is also difficult to predict just which servant's acts will be imputed to the company. All that can be stated with certainty is that not every act of every servant, agent or member will be imputed to it as the company's own. Glanville Williams draws two distinctions, which he suggests are decisive in determining corporate liability:[48]

(i) Between executive and directive servants. The only acts and mental states that will be imputed to the corporation are those of persons who are in control of it, e.g. directors or managers with controlling voices.[49] Thus the means by which inferior servants' acts can be imputed to the company is by the separate and distinct ground of vicarious liability.

(ii) Between corporation business and private business. An act done by an employee (even of an executive character) outside the course of his employment will not involve the company in corporate liability. Once again this applies only to corporate liability as distinct from vicarious liability because insofar as the latter is concerned the "delegation" test operates which may conceivably include the acts of an executive employee that would otherwise be outside the course of his employment.

The recent decision of *John Henshall (Quarries) Ltd* v. *Harvey*[50] underscores the first test set out by Glanville Williams above. This case involved a weighbridge operator, employed by the defendants, who had permitted a lorry to carry an excessive load.[51] It was customary for the manager of the company to carry out periodic checks to see that all regulations were being observed, and neither he nor anyone

in his office were aware of the breach. On the question of a master being fixed with the knowledge of his servant, Lord Parker C.J. considered:

> . . . there is fundamentally no difference between a master who is an individual and a master who is a limited company, save that in the case of a limited company their knowledge must be the knowledge of those whom . . . Lord Denning referred[53] to as the brains of the company. There is no doubt that there are many cases where the knowledge of somebody in the position of the brain, maybe the directors, the managing director, the secretary, the responsible officers of the company, has been held to be the knowledge of the company. It seems to me that that is a long way from saying that a company is fixed with the knowledge of any servant: again to quote Lord Denning:[54] the knowledge of the hands as opposed to the brain merely because it is the servant's duty to perform that particular task.[55]

Since the weighbridge man was not an executive servant of the "brains" type his act was not that of the company's. On the question of vicarious liability it was considered the doctrine did not arise because "it is quite impossible to think of [the weighbridge operator's] duties and responsibilities falling within [the] doctrine of delegation".[56] As a result the appeal was allowed.

The earlier case of *National Coal Board* v. *Gamble*[57] concerned almost identical facts but can be distinguished on the ground that:[58]

> no evidence was called for the defence . . . the board [desiring] to obtain a decision on principle which would enable them to regulate their practice in the future. They therefore accepted responsibility for [their weighbridge man's acts] without going into any questions of vicarious liability;[59] and they called no evidence in order, we were told, that the decision might be given on facts put against them as strongly as might be.

Since no arguments were raised as to either corporate or vicarious liability the appeal was dismissed. The case certainly does not establish that a weighbridge operator is either an executive employee or a delegate, nor does it strike at any of the principles already discussed. It is a peculiar case and the decision rests on particular facts.

The apogee of corporate liabiilty was probably reached in *Moore* v. *Bresler Ltd*[60] which decided that there is no rule to the effect that the criminal act of the servant is not imputed to the company unless it is done with the intention of advancing its interests. There the company was convicted of making false purchase tax returns with intent to deceive.[61] The returns were made by the secretary and local manager of a branch-company, who made certain sales of the company's stocks, embezzled the proceeds and returned the false accounts. The conviction of the company was upheld on the ground that they were acting as its officers and within the scope of their authority. The decision seems a harsh one and has been criticised as "blurring the distinction in law between the agents of a corporation and the legal personae itself."[62] Certainly it appears to conflict with the distinction between corporation business and private business made by Glanville Williams who considers it to be "a confusion between *respondeat superior* and the doctrine of identification."[63]

(3) VICARIOUS LIABILITY AND STRICT LIABILITY

Although these different types of statutory culpability often coincide, they are not necessarily co-extensive. Statutory offences requiring proof of *mens rea* may also impose vicarious liability.[64] In logic, it can be argued that offences of strict liabiilty need not necessarily impose such vicarious liability, although most dicta would contravert such a pro-

position. In *John Henshall (Quarries) Ltd* v. *Harvey*[65] Lord Parker C.J. expressed his clear view to this effect:

> There is no doubt that in the case of absolute offences, as they are sometimes called, a master, whether an individual or a company, is criminally liable for the acts of any servant acting within the scope of his authority. That has been held in many cases; I need only mention two: *Mousell Brothers Ltd* v. *London & North Western Railway Co.*[66] and *Police Commissioners* v. *Cartman.*[67]

It is submitted that such a statement is open to the objection that it fails to put the delegation test, which must now be properly regarded as the basis of vicarious liability.[68] The distinction between vicarious and strict liability is often clouded as a result of a judicial tendency (expressed in such dicta as that of Lord Parker C.J., above) to telescope the process of statutory construction in cases which may involve both types. The finding that *mens rea* is not a necessary element of the offence is merely the first step; the defendant must also come within the wording of the legislation. This requires further construction of the statutory provision and its relation to the fact-situation. It means too, that the courts are required to construe verbs contained in penal statutes extensively, in order that vicarious liability can be drawn from the terms used by the draftsman. An example would be *Strutt* v. *Clift*[69] where the owners of a farm were convicted of "using" a van that was not used solely for the conveyance of goods in the course of trade.[70] It appeared that their bailiff, who managed the farm, had on one occasion used the van for his own purposes without the authority of the appellants. The conviction was affirmed on the basis of the delegation test.

The same term was held not to import vicarious liability in *Phelon & Moore Ltd* v. *Keel*[71] which concerned the offence of failing to keep a manufacturer's record of every occasion on which a general identification mark[72] was "used".[73] This decision can be rationalised, however, in terms of the delegation test because the occasion on which the "use" occurred involved an unauthorised use by a junior employee, who was not a "delegate" in the proper sense.

It would appear then ,that when a verb set out in a penal statutory provision is passive[74] it is open to being construed as imposing strict liability. Once that has been determined the further issue of vicarious liability must then be resolved. All the factors adverted to by Atkin J. in *Mousell Brothers Ltd* v. *London & North-Western Railway Co.*[75] must be taken into consideration and, if it appears that Parliament intended vicarious liability to apply, the delegation test is used to decide whether or not the defendant falls within the scope of the doctrine. It is submitted that it is entirely misleading to assume that the doctrine necessarily attaches to penal statutes of absolute prohibition.

(4) VICARIOUS LIABILITY AND MENS REA[76]

When a court construes a statutory offence as requiring proof of some form of *mens rea*[77] the general requirement is that, in the absence of true delegation by the master (e.g. of effective management of the business) the servant's state of mind is not imputed to his master in the absence of actual knowledge of the facts comprising the offence on the part of the latter.[78] In *John Henshall (Quarries) Ltd* v. *Harvey*[79] Lord Parker C.J. stated:

> In the recent case of *Vane* v. *Yiannopoullos*[80] it was held, and in doing so followed a long line of authority, that in the case of an individual master he does not know what is in the mind of his servant for the purpose of knowingly committing an offence; he must have actual knowledge of it. There is only possibly one exception to that: where he shuts his eyes and is regardless of whether a servant does his duty or not.

This principle was recently affirmed in *Gray's Haulage Co. Ltd* v. *Arnold*[81] which was an appeal against conviction on a charge of "permitting" a servant to drive a vehicle for continuous periods in excess of eleven hours in a period of twenty-four hours.[82] There was no evidence that the defendant company had actual knowledge of the offence and no evidence was given on their behalf. Lord Parker C.J. expressed his misgivings at the tendency to extend this type of offence in terms of constructive knowledge:[83]

> In my judgment there is a tendency today to impute knowledge in circumstances which really do not justify knowledge being imputed. It is of the very essence of the offence of permitting someone to do something that there should be knowledge. The case that is always referred to in this connection is *James & Son Ltd* v. *Smee*,[84] where in giving judgment I pointed out that knowledge is really of two kinds, actual knowledge, and knowledge which arises either from shutting one's eyes to the obvious or, what is very much the same thing but put in another way, failing to do something or doing something not caring whether contravention takes place or not.

Since the facts revealed neither actual knowledge nor a blindness to the obvious on the part of the defendant, the appeal was allowed.

(5) THE LICENSEE CASES

These cases comprise the vast majority of those in which the court has imposed vicarious liability. The principle of law in this area is clear:[85]

> Where a person having a public licence delegates to a servant the management of the business in respect of which the licence is granted . . . the licensee becomes vicariously responsible not only for the acts but even the states of mind of his delegate, though the statute makes no mention of the situation.

Reference need only be made to the most recent decisions, by way of illustration. Perhaps the most striking is *Vane* v. *Yiannopoullos*[86] where the charge was one of knowingly selling intoxicating liquor in breach of the defendant's licence.[87] The House of Lords considered that the term "knowingly" referred to the state of mind of the licensee himself and not the servant who committed the *actus reus*. Since the licensee had no such knowledge the prosecutor's appeal was dismissed. To this extent, the case is based on principles other than those applicable to vicarious liability, but the doctrine came under close scrutiny in a number of the judgments. It is suggested that the following dictum of Lord Evershed's correctly states the position in "licensee cases" where *mens rea* is required to be proved:[88]

> . . . in the absence of proof of actual knowledge, nevertheless the licensee or proprietor may be held liable if he be shown . . . effectively to have "delegated" his proprietary or managerial functions.

It seems to the writer also, that the summary by Lord Parker C.J. in *Ross* v. *Moss*[89] sets out accurately the general effect of *Vane* v. *Yiannopoullos*[90]:

> That case went on appeal to the House of Lords and, perhaps unfortunately, their decision, each one of their Lordships having given separate reasons, has produced an uncertainty as to the position. Quite shortly, Lord Reid and Lord Evershed were clearly of opinion that whether originally that principle

of delegation was valid, it was now too late to dispute it, and they clearly in their speeches both assumed that that principle, if on the facts it applied, namely if there had been a true delegation, was applicable to an offence against s.22 of the Act of 1961. As against that, both Lord Morris and Lord Donovan said that they found it unnecessary to pronounce upon the validity of the principle because even in the case of true delegation, that principle would not be applicable to an offence under this particular section. In other words ,they were saying without deciding: this may be a valid principle in regard to offences against other statutes but we are quite clear that it is not applicable to an offence against s.22. Lord Hodson, as I understand it, did not decide as any of the others had decided, but merely said that whatever the position, there could not on the facts of that case have been any delegation at all. As I have said, it is unnecessary in this case, having regard to the view I have expressed on the first point, to say what thetrue position is today in the light of the decision in the House of Lords; that may have to be decided on another occasion. Suffice it to say that while the speeches of Lord Morris and Lord Donovan must be treated as very persuasive authority, it would still, as I conceive it, be open to this court to hold, as indeed they assumed in the Divisional Court in *Vane* v. *Yiannopoullos,* that this general principle of delegation would apply to an offence against s.22. That, however, must remain over for another occasion.

In New Zealand most prosecutions of this nature are brought under the Sale of Liquor Act 1962.[91] Our Court of Appeal has on two recent occasions construed the effect of s.259 subss (1), (2), and (3), of that Act which reads as follows:[92]

"Supply of liquor to person under twenty-one—
(1) Every person commits an offence and is liable to a fine not exceeding ten pounds who, being the holder of a licence of any description under this Act, or the holder of a brewer's licence under the Finance Act 1915, or a manager, supplies any liquor, or allows it to be supplied, on or from any licensed premises, whether by sale or otherwise, to any person who is under the age of twenty-one years.
(2) Where on any licensed premises any person other than the licensee or manager supplies liquor to any person who is under the age of twenty-one years he commits an offence and is liable to a fine not exceeding ten pounds irrespective of any liability that may attach to the licensee or manager in respect of the same offence.
(3) It shall be a defence to a charge under subsection (1) or subsection (2) of this section to prove that the person supplying the liquor believed on reasonable grounds that the person to whom he supplied it was of or over the age of twenty-one years.

The first of these cases, *Gifford* v. *Police*[93] concerned the "supplying" of liquor by a barman to a youth apparently under the age of twenty-one years, and the liability of the manager for the barman's act.[94] It was conceded that a manager was in no different position from that of a licensee.[95] But it was argued on his behalf that neither a licensee nor a manager, on a proper construction of s.259, could be convicted in the absence of knowledge. Also, (it was submitted) subs. (3) of s. 259 was inconsistent with vicarious liability. The Court of Appeal unanimously dismissed these arguments and upheld the conviction.

Prior to the 1962 enactment, which added subs. (3) to s. 259, vicarious responsibility had been held to lie in such cases.[96] It is to be noticed that the licensee's liability under s. 259 (1) rests on his supplying liquor or if he "allows it to be supplied". Two members of the Court of Appeal held that the neutral term "supplying liquor" imported strict liability subject to the defence open to the accused under subs. (3) on proof of a specific state of mind at the time the *actus reus* was committed.[97] It was also considered that although the phrase "allows it to be supplied" may require some form of *mens*

rea to be proved (e.g. knowledge) it did not require to be construed as rejecting vicarious liability.[98] The Court took the unanimous view [99] that having regard to the history of the legislation the offence set out in s. 259 (1) imported vicarious liability.

It is of no little interest to note the broad judicial attitude revealed by this decision. The view was taken that before vicarious liability could be imported from a statute "the language must be reasonably clear"[100] and "the Courts do not lightly favour an interpretation importing this liability."[101] Despite this, however, "and not without some disinclination . . . I find myself compelled . . . to give some meaning to those words in order to adopt the more *robust* interpretation of this statute which I am convinced was the true intention of the Legislature."[102] On the face of the case it is difficult to see how the language of s.259 could be described as "reasonably clear" and the reference to a robust interpretation is surely no more than a euphemism signifying the court's intention to construe the verb "supply" extensively (*quaere*: an authoritarian as opposed to liberal approach).

Two further points remain to be discussed as arising from this case:

(a) The defence available under s. 259 (3) refers to the state of mind of the person actually supplying the liquor. The defence is open to the licensee or manager only if the actual supplier falls within the ambit of this subsection[103]. This means that the mental state of the actual supplier may be imputed to the licensee in just the same way as the mental state of an employee can be imputed directly to an employer in terms of a general delegation of authority. In the present case though, such imputation acts as a shield and not as a threatening lance.

(b) Although the delegation principle was not discussed *in extenso* the following important observation was made by North P.:[104]

> I desire however to guard myself against appearing to assent to the view that in order that vicarious responsibility should exist in the case of licensing offences in which *mens rea* is an essential ingredient, it is necessary that the delegation should be complete . . . . I am disposed to think that there can be delegation to a barman even although the licensee remains in general control of the premises, particularly in cases where the barman is entrusted with the responsibility of exercising a discretion.

This view seems to be contrary to that of Lord Evershed[105] who considered delegation to mean the "handing over of all the effective management". In logic, the approach of North P. is to be preferred if the basis of vicarious liability is to avoid penal statutes being rendered "nugatory". It may be that such a concept of delegation is confined to cases brought under the Sale of Liquor Act 1962, since North P. confines his comments to a barman and licensee situation and cites similar liquor licensing cases in support.[106] In the writer's view, once the need for the doctrine of vicarious liability is established as a desirable judicial weapon in the armoury of statutory construction, and the test accepted as one of delegation, Lord Evershed's definition is unsatisfactory. It is submitted that North P.'s dictum sets out a far more effective delegation test which should not be restricted to liquor licensing offences. Gauged by that test can there be any doubt that the defendant company in *John Henshall (Quarries) Ltd* v. *Harvey*[107] would have been held responsible?

The most recent decision given by the Court of Appeal on s.259 of the Sale of Liquor Act 1962 is *Budd* v. *Police*[108]. The facts were that the appellant who was the licensee had been convicted of supplying liquor to a person under the age of twenty-one years. His barman had served an adult customer, whilst the crowd at the bar was four or five deep, who had "shouted" a nineteen year old youth and who had later bought more beer for both with the youth's money. The issue on appeal was whether the barman had "supplied" the youth with liquor. In the Supreme Court the conviction had been based on the civil law of agency, i.e. a person acting through an agent may establish a contract between himself and another, even although the latter is unaware of the existence of the agency. This argument was rejected by the total court.[109]

North P. took the view that before a conviction could be entered "I think it is essential that there should be proof that a barman intended to supply a given individual." Thus the offence required proof of knowledge in the sense used in *Ross* v. *Moss*.[110] Again, in the words of North P.:

> . . . a licensee has a duty to know what is going on in his bar and, if persons under the age of twenty-one years are in the bar and the barman has taken no steps to require them to leave, this circumstance may well provide evidence that he has shut his eyes as to what is going on in his bar and therefore he may be deemed to have contructive knowledge of what is happening.

The same argument was adopted by Turner and McCarthy J.J.[110(a)] and the appeal was allowed. This decision is a welcome relief from what appeared to be on onerous duty cast on both licensees and barmen. It is also interesting to note in this respect, that the whole court was of the opinion that s.259, subs (1) and (2), set out offences of absolute liability.[112]

Another facet of s.159(3) was revealed by T. A. Gresson J. in *McLeod* v. *Police*[113] where the minor served could not remember the identity of the barman who had supplied him with liquor. His Honour, took the view that the subsection cast the onus of proof on the defendant and the failure of the Crown to establish the state of mind of the barman was no bar to a prosecution against the licensee:[114]

> . . . I have come to the conclusion that although s.259(3) gives the licensee or manager the benefit of a subjective test on reasonable grounds so far as the mind of the actual supplier is concerned, it is still necessary for him to establish such defence. In other words, there is no onus upon the prosecution to establish the identity of the particular barman concerned, provided it can prove—as it did in the present charges—a sale or supply to a minor by a servant of the licensee or manager acting within the scope of his employment. Once this is established it is then for the licensee or manager to avail himself of the defence provided in subs.(3) if circumstances so permit.

This case did not involve a discussion of whether subs (1) and (2) of s.259 imported strict liability, nor is any reason stated for the test of vicarious liability being one of the employee "acting within the scope of his employment". It is submitted that the real test to be applied is the delegation test as set out by North P. in *Gifford* v. *Police*[115], and that such a test should be applied whether or not the statute is one of strict responsibility or requires proof of *mens rea.* Measured by the suggested test the result in this case would have been the same.

(6) CONCLUSION

The doctrine of vicarious liability is a device of the courts[116] and the judicial inconsistencies in application are self-created. It is submitted

that such a doctrine is necessary having regard to the complexity of contemporary society and proliferation of social-welfare legislation of a penal character. The time is surely past when Judges should have to wrestle with ambiguous statutory provisions; especially when the standard by which liability is to be determined is by no means clear. It requires little in the nature of parliamentary draftsmanship to include in such legislation an interpretation clause that would settle the matter without recourse to long arguments on the meaning of a particular verb.

However, in the absence of such statutory direction it is submitted that the court must weigh up the factors outlined in *Moussell Bros Ltd* v. *London & North Western Railway*[117], and, if the legislation is construed as imposing vicarious liability, apply the delegaton test as set out by North P. in *Gifford* v. *Police*[118]. In this way the exercise is simplified, as the delegation test would apply in cases where either strict responsibility or *mens rea* applied and would be equally applicable to the licensing cases.

1 See Generally: Baty, Vicarious Liability Ch. X., F. B. Sayre, "Criminal Responsibility for the Acts of Another" (1930) 43 Harv.L.R. 689; Glanville Williams, Criminal Law, The General Part 2nd Ed. (1961) Ch. 7.; J. Ll. J. Edwards, Mens Rea in Statutory Offences, Ch. X.

2 Sean O'Casey, "Juno and the Paycock", Act III. In the writer's view this laconic comment sums up the present state of law in this field today.

3 Glanville Williams, loc. cit. at p.266 f.n. 1.

4 See on this point, Colin Howard, Strict Responsibility 49.

5 e.g. common law public nuisance committed by a servant rendered his master vicariously liable: *R.* v. *Stephens* (1866) L.R.1. Q.B. 702. In New Zealand it seems clear that the same principle does not apply to s.145 of the Crimes Act 1961, which sets out the offence of criminal nuisance. See Garrow & Spence's Criminal Law (4th ed.) 128.

6 92 E.R. 518.

7 In the English Reports ibid., at pp. 522-523 the principle is summarised thus: "He only is criminally punishable, who immediately does the act, or permits it to be done."

8 [1964] 2 Q.B. 739.

9 Ibid., per Lord Parker C. J. at p. 743, as restated by Turner J. in *Gifford* v. *Police* [1965] N.Z.L.R. 484 at p. 493 C.A.

10 e.g. *Allen* v. *Whitehead* [1930] 1 K.B. 211 at p.220: (otherwise the "statute would be rendered nugatory", per Lord Hewart C.J.), *Gifford* v. *Police* [1965] N.Z.L.R. 484 at p. 501: ". . . vicarious responsibility has been imposed, plainly I think ,because the Courts have thought that necessary to make the legislation work effectively", per McCarthy J.

11 See also the suggestion by A. E. Jones in "Vane v. Yiannopoullos and The Criminal Liability of Licensees" [1965] Crim.L.R. 401 at p.409, to the effect that the House of Lords might have decided the case differently if the penalties had been less stringent.

12 *R.* v. *Dixon,* 105 E.R.516.

13 The analogy with the law of torts is obvious. See e.g. *Police* v. *Cartman* [1896] 1 Q.B. 655, where Russell C.J. considered the term to be synonymous with the phrase "scope of his authority": ibid., at p.658. Even today the term is used (*quaere* incorrectly) as the test of vicarious liability: see e.g. the remarks of Lord Parker C.J. in *John Henshall (Quarries) Ltd* v. *Harvey* [1965] 2 W.L.R. 758 at 763.

14 *Redgate* v. *Haynes* (1875-76) L.R.1 Q.B.D. 89. For an account of the evolution of the "delegation" test see J. Ll. J. Edwards, "Mens Rea In Statutory Offences" at pp.226-234.

15 [1965] A.C. 486.

[16] Ibid., at p.504; see also the remarks of Lord Reid ibid., at pp.496-497, and Lord Goddard C.J. in *Ross* v. *Moss* [1965] 2 Q.B. 396 at pp.407-409.
[17] In breach of s.22(1)(a) of the Licensing Act 1961 (U.K.).
[18] *Supra.*
[19] *Ibid.*, at pp.407-409.
[20] [1946] K.B. 290.
[21] Contrary to s.44 of the Metropolitan Police Act 1839 (U.K.).
[22] *Ibid.*, at pp.294-295.
[23] [1930] 1 K.B. 211.
[24] *Supra.*
[25] *Pearks, Gunston and Tee Ltd* v. *Ward* [1902] 2 K.B. 1 at p.11 per Channell J.
[26] [1965] N.Z.L.R. 484 at p.494 (C.A.).
[27] [1917] 2 K.B. 836.
[28] *Ibid.*, at p.845.
[29] Mens Rea in Statutory Offences.
[30] *Ibid.*, at p.234.
[31] *Supra.*
[31a] In New Zealand this defect has been largely overcome by resorting to the notion of "ostensible" scope of a servant's authority. e.g. *Harvey* v. *Whitehead* (1911) 30 N.Z.L.R. 795, *Sivyer* v. *Taylor* [1916] N.Z.L.R. 586 and *Tocker* v. *Mercer* [1917] N.Z.L.R. 156. This ostensible scope of authority doctrine appears to be synonymous with the delegation test in so far as it applies to a master and servant relationship, but does not extend to other relationships where a delegation may be made.
[32] *Supra.*
[33] *Ibid.*, at p.493. Except, of course ,insofar as it is embraced by a general delegation.
[34] E.g., to serve liquor in a bar.
[35] *Vane* v. *Yiannopoullos* (supra) at 504-505.
[36] *Mullins* v. *Collins* (1874) L.R. 9 Q.B. 292; *Commissioner of Police* v. *Cartman* [1896] 1 Q.B. 655, *Mousell Brothers Ltd* v. *London and North Western Railway Co.*, [1917] 2 K.B. 836., *Emary* v. *Nolloth* [1903] 2 K.B. 264., *McKenna* v. *Harding* (1905) 69 J.P. 354., *Allen* v. *Whitehead* [1930] 1 K.B. 211., *Linnett* v. *Commissioner of Metropolitan Police* [1946] K.B. 290 and *Somerset* v. *Hart* (1884) 12 Q.B.D. 360.
[37] The views of North P. in *Gifford* v. *Police* (*supra*) at p.492 are, in the writer's view, to be preferred on this point.
[38] On this topic generally, refer to: Glanville Williams, "Criminal Law. The General Part" (2nd Ed.) Ch. 22., Welsh, "The Criminal Liability of Corporations" (1946) 62 L.Q.R. 345., Turner, "Russell on Crime" (12th Ed.) Vol. I at pp.96-98., Gower on Modern Law (1954), at pp. 93-97 and 148-150, and Northey, "Introduction to Company Law" (N.Z.) (5th ed.) at pp. 20-22.
[39] See ss. 4 and 6(1) of the Acts Interpretation Act 1924, and the definition of "Person-owner" in s.2 of the Crimes Act 1961.
[40] This is commonly referred to as the "alter-ego" doctrine. Of course, both the servant and the company can be prosecuted for the offence, except where the duty is expressly reposed solely in the company, for example in its capacity as occupier or licensee.
[41] As distinct from vicarious liability.
[42] [1944] K.B. 551.
[43] [1944] K.B. 146 at p.156.
[44] *Supra.*
[45] *Ibid.*, per Stable J. at p.554.
[46] As e.g. would be perjury and bigamy.
[47] Examples would be murder and treason for which terms of imprisonment or death are the only penalties. In *R.* v. *Cory Brothers and Company Ltd* [1927] 1 K.B. 810, an indictment for manslaughter was quashed.
[48] Criminal Law, The General Part (2nd Ed.) at pp.857-859.
[49] E.g. in the *I.C.R. Haulage* case (supra) the individual concerned was the managing director.
[50] [1965] 2 W.L.R. 758.
[51] Contrary to the Motor Vehicles (Construction and Use) Regulations 1955 (U.K.), regn. 68.
[52] *Supra* at p.764.

53 *Bolton (H.L.) (Engineering) Co. Ltd* v. *T. J. Graham & Sons Ltd* [1957] 1 Q.B. 159 at p.172.
54 *Ibid.*
55 This statement can only be referring to corporate liability as opposed to vicarious liability.
56 *Supra* at p.764. Why this view should be taken is not made clear; cp. the comments of North P. in *Gifford* v. *Police* [1965] N.Z.I.R. 484 at p.492 where he considered there can be an effective delegation if it requires a discretion to repose in the delegate.
57 [1959] 1 Q.B. 11.
58 *Ibid.*, per Devlin J. at p.25.
59 Or corporate liability for that matter.
60 [1944] 2 All E.R. 515.
61 In breach of the Finance (No. 2) Act 1940, (U.K.) s.35.
62 Welsh, "The Criminal Liability of Corporations" (1946) 62 L.Q.R. 345 at p.358.
63 Glanville Williams, Criminal Law, The General Part 2nd ed. (1961) at p.859.
64 e.g. *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918.
65 *Supra,* at p.763. See also *James & Son, Ltd* v. *Smee* [1955] 1 Q.B. 78 at p.95; *Gifford* v.*Police* [1965] N.Z.L.R. 484, per Turner J. at p.493, and *Griffiths* v. *Studebakers, Ltd* [1924] 1 K.B. 102 at p.105 per Lord Hewart C.J.
66 *Supra.*
67 *Supra.*
68 Lord Parker's views here are oddly at variance with his comments in *Ross* v. *Moss* [1965] 2 Q.B. 396 at pp.407-409, where he clearly considers the delegation test to be the proper one.
69 [1911] 1 K.B. 1.
70 Contrary to the Customs and Inland Revenue Act 1888 (U.K.).
71 [1914] 3 K.B. 165.
72 A special number plate to be used by manufacturers of motorcycles.
73 In breach of Art. XII of the Motor Car Registration and Licensing Order, 1903 (U.K.).
74 Such as: "uses", "supplies", "presents", or "carries".
75 *Supra* at p.845.
76 See generally, Glanville Williams, "Mens Rea and Vicarious Responsibility", (1959) 9 C.L.P. 57.
77 As e.g. in construing such verbs as "permits", "allows" or "causes".
78 This rule does not apply in "licensee cases" nor in cases of "corporate" liability.
79 *Supra,* at 763.
80 *Supra.*
81 [1966] 1 W.L.R. 534.
82 In breach of s.73(1)(c)(ii) of the Road Traffic Act 1960 (U.K.).
83 *Ibid,* at pp.536-537.
84 [1955] 1 Q.B. 78.
85 Glanville Williams, "Mens Rea and Vicarious Responsibility" (1959) 9 C.L.P. 57 at p.61.
86 *Supra.*
87 The facts were discussed supra.
88 *Supra* at p.504.
89 [1965] 2 Q.B. 396 at pp. 408-409. The facts were discussed supra.
90 *Supra.*
91 Formerly the Licensing Act 1881, and the Licensing Act 1908.
92 Subs.(3) was inserted as a result of divergent judicial views on the effect of the former provisions. See *Innes* v. *McKinlay* [1954] N.Z.L.R. 1054 where McGregor J. considered absence of *mens rea* could be proved by the defendant, and *Holland* v. *Peterkin* [1961] N.Z.L.R. 769 where Hutchison J. construed the offence as absolute. Subs.(3) seems to effect a combination of both constructions, i.e. the section is now one of strict liability unless the barman can prove absence of *mens rea.* To this extent, the views of McGregor J. appear to have been approved by Parliament.
93 *Supra.*
94 For a summary of the full facts see *Gifford* v. *Police* [1964] N.Z.L.R. 616 (S.C.).

95 As a result of the Sale of Liquor Act 1962, s.185(2) which reads: "Where any . . . licensee appoints a manager to conduct the business on his behalf—
(a) . . .
(b) The manager shall for all the purposes of this Act be responsible for the conduct of the business.

96 See e.g. *Sivyer* v. *Taylor* [1916] N.Z.L.R. 586.

97 *Supra* at p.491 per North P. and at p.502 per McCarthy J. This view (in another area) has been also held by Wilson J. in *Boyes* v. *Transport Department* [1966] N.Z.L.R. 171 at p.172 who considers that since *Lim Chin Aik* v. *R.* [1963] A.C. 160 the third category of penal statutes set out by Edwards J. in *R.* v. *Ewart* (1905) 25 N.Z.L.R. 709, no longer has any application; McCarthy J. reiterated his view in the unreported decision of *William Campbell Davidson* v. *Clark's Bakery (Rotorua) Ltd* (1966).

98 *Supra* at p.490 per North P. (following *Sivyer* v. *Taylor* [1916] N.Z.L.R. 586). The licensee cases generally do not require actual knowledge if there has been a proper delegation.

99 *Ibid.*, at pp.492-493 per North J., at p.500 per Turner J. and at p.502 per McCarthy J.

100 *Ibid* at p.500 per McCarthy J.

101 *Ibid.*

102 *Ibid* at p.500 per Turner J. (emphasis added).

103 *Ibid.*, at p.493 per North P.

104 *Ibid.*, at p.492.

105 Vane v. Yiannopoullos (*supra*) at pp.504-505.

106 *Harvey* v. *Whitehead* (1911) 30 N.Z.L.R. 795., *Tocker* v. *Mercer* [1917] N.Z.L.R. 156., and *Woodley* v. *Lawrence* [1924] N.Z.L.R. 1153.

107 *Supra.*

108 (1966) N.Z.L.R. 631.

109 *Ibid.*, "I consider that agency has no place in a case of this nature unless the person dealing with the agent is aware of the existence of the principal", per North P. at p.633.

110 *Supra.*

110(a) *Ibid.*, "I have no hesitation in rejecting the proposition . . . that an undisclosed principal may be foisted willy-nilly upon a licensee as a purchaser whom he has unknowingly 'supplied' with liquor" per Turner J., and "In my view before the offence is established it must be shown that the barman knew or should have known that the liquor was intended for a specific individual," per McCarthy J.

112 *Supra.*

113 [1965] N.Z.L.R. 318.

114 *Ibid.*, at p.321.

115 *Supra* at p.492.

116 By way of a gloss on penal statutes.

117 *Supra* per Atkin J. at p.845.

118 *Supra* at p.492.