

**THE LIABILITY OF EMPLOYERS FOR THE ACTS OF THEIR  
EMPLOYEES: A COMPARATIVE ANALYSIS OF SECTION 425 OF THE  
THAI CIVIL AND COMMERCIAL CODE AND  
VICARIOUS LIABILITY IN ENGLISH TORT LAW\***

*Adam Reekie* \*\*

**Abstract**

The doctrine of vicarious liability in English common law confers strict liability on one person for the wrongful act of another. The classic example is where an employer is held liable when an employee commits a tort in the course of their work. Since the turn of the 21<sup>st</sup> century, vicarious liability has been significantly developed by the courts in response to a line of challenging cases which did not easily fall within the previous tests. Now that the doctrine has been materially expanded, there remains some uncertainty over its application.

Section 425 of the Thai Civil and Commercial Code (TCCC) confers liability on an employer for the wrongful acts of an employee in materially similar circumstances to the historic English law test. This provides an opportunity for a fruitful comparative exercise on how these similar legal concepts have been interpreted in fundamentally different legal systems.

The comparative exercise performed in this article reveals a similar enterprise risk theory concept underlying both English law vicarious liability and Section 425 of the TCCC. However each system aligns more closely with this theory in different aspects. This provides the opportunity to make recommendations that each system adopt some features of the other, to bring the two legal concepts into closer alignment with the identified policy basis.

**Keywords:** Vicarious Liability, Employer's Liability, Tort Law, Section 425, Comparative Law

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\*\* Graduate student of Master of Laws Program in Business Laws (English Program),  
Faculty of Law, Thammasat University

### บทคัดย่อ

ในระบบกฎหมายคอมมอนลอว์ของประเทศอังกฤษ หลักเรื่องความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น ก่อให้เกิดความรับผิดเด็ดขาดของบุคคลในการกระทำละเมิดของบุคคลอื่น ตัวอย่างเช่นเมื่อนายจ้างต้องรับผิดเพื่อละเมิด เมื่อลูกจ้างกระทำละเมิดในทางหน้าที่จ้าง ตั้งแต่ยุคเปลี่ยนผ่านสู่ศตวรรษที่ 21 เป็นต้นมา ความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น ได้รับการพัฒนาอย่างมีนัยสำคัญ โดยศาล เพื่อที่จะตอบสนองต่อคดีซึ่งยากและไม่สามารถใช้หลักเกณฑ์เดิมที่มีได้ ปัจจุบันหลักเรื่องความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่นนี้ ได้ขยายออกไปอย่างมาก แต่อย่างไรก็ดี ยังมีความไม่แน่นอนชัดเจนในการปรับใช้

มาตรา 425 ของประมวลกฎหมายแพ่งและพาณิชย์ของประเทศไทย ก่อให้เกิดความรับผิดของนายจ้างเพื่อการกระทำละเมิดของลูกจ้าง ในสถานการณ์ที่คล้ายกันเป็นอย่างมากกับกฎหมายของอังกฤษในอดีต จึงก่อให้เกิดโอกาสในการศึกษาเปรียบเทียบเกี่ยวกับแนวคิดทางกฎหมายที่คล้ายคลึงกันของทั้งสองประเทศ ซึ่งได้รับการตีความที่แตกต่างกัน

การศึกษาเปรียบเทียบในบทความนี้แสดงให้เห็นว่าทั้งหลักกฎหมายเรื่องความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่นของทั้งประเทศไทยและประเทศอังกฤษมีความคล้ายคลึงกันในด้านทฤษฎีรากฐานคือ “enterprise risk theory” อย่างไรก็ดี แต่ละระบบกฎหมายนั้นมีความสอดคล้องกันทฤษฎีนี้ในแง่มุมที่ต่างกัน ซึ่งเป็นโอกาสอันดีที่จะเสนอข้อเสนอแนะต่อกฎหมายของแต่ละประเทศ เพื่อให้รับเอาลักษณะบางประการจากอีกระบบกฎหมายหนึ่งมาใช้ เพื่อปรับปรุงให้ระบบกฎหมายทั้งสองระบบนั้นสอดคล้องกับนโยบายอันเป็นรากฐานมากขึ้น

**คำสำคัญ** ความรับผิดเพื่อละเมิดอันเกิดจากการกระทำของผู้อื่น, ความรับผิดของนายจ้าง, กฎหมายละเมิด, มาตรา 426, การศึกษาเปรียบเทียบ

## Introduction

The English common law notion of vicarious liability is an example of an unusual<sup>1</sup> concept in tort law, especially judicially developed tort law, in that it confers strict liability on one person<sup>2</sup> for the wrongful act of another. The classic example is the case of an employer being held liable to pay compensation for a wrongful act committed by an employee.

Traditionally, two elements have been required to confer vicarious liability in English law: first, there is a requirement for an employment relationship between D1 (employee) and D2 (employer); second, there is a requirement that the relevant tortious act be committed in the course of employment. However, since the turn of the 21<sup>st</sup> century, vicarious liability has undergone significant development. Following the landmark decision in *Lister*<sup>3</sup> there has been a line of cases which did not easily fall within the previous legal test. The courts have responded by expanding the application of the doctrine, entailing a re-examination of its principle and policy basis.

Now, English law vicarious liability will also confer liability in relationships which are “sufficiently akin to that of employer and employees”<sup>4</sup> that it is “fair, just and reasonable”<sup>5</sup> to confer vicarious liability on the defendant. Furthermore, rather than the act being committed ‘in the course of employment’, the courts will now look at whether there is a sufficiently ‘close connection’ between the tortious act and the field of activities assigned to D1 by D2 to make it just to impose liability.<sup>6</sup> Two Supreme Court cases in 2016<sup>7</sup> have addressed these two elements of vicarious liability, but uncertainty about how the doctrine will be applied in the future remains.

Section 425 of the Thai Civil and Commercial Code (TCCC) states:

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<sup>1</sup>As Lord Nichols put it, speaking in the House of Lords, “Normally common law wrongs, or torts, comprise particular types of conduct regarded by the common law as blameworthy. In respect of these wrongs the common law imposes liability on the wrongdoer himself. The general approach is that a person is liable only for his own acts.” *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, 8

<sup>2</sup>This defendant is often referred to as D2, where D1 is the actual tortfeasor and D2 is liable through the doctrine of vicarious liability, not having committed the tortious act herself.

<sup>3</sup>*Lister v Hesley Hall Ltd* [2002] UKHL 22

<sup>4</sup>*Various Claimants v The Catholic Child Welfare Society* [2012] UKSC 56 at [60]

<sup>5</sup>*ibid* at [34]

<sup>6</sup>*Lister* (n 3) at 230

<sup>7</sup>*Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11

“An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment.”<sup>8</sup>

This provision contains elements which are materially similar to English law vicarious liability before the most recent line of cases: (i) the requirement for a particular relationship, that of Employer-Employee,<sup>9</sup> and (ii) the requirement that the wrongful act be committed in the course of employment.

This similarity presents the opportunity for a fruitful comparative study, in the hope that much may be gained by the detailed examination of how a similar rule has been interpreted and applied in two systems which differ fundamentally in terms of their traditional legal categorisation (common law and civil law)<sup>10</sup>, geographical position (West and East), and standard economic classification (developed and developing<sup>11</sup>).

This article examines the principle and policy justifications for the concepts represented by English law vicarious liability and Section 425 of the TCCC, and then compares the two required elements in both systems - (i) the nature of the required relationship between D1 and D2, and (ii) the nature of the acts which will confer vicarious liability within that relationship - and how they align with the principle and policy justifications. Consequently, it makes recommendations for the future development of the law in each system.

### **Principles and policy basis for vicarious liability**

The potential principle and policy justifications may be gathered into three types:<sup>12</sup> fault and identification; victim compensation and loss distribution; and risk and deterrence.

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<sup>8</sup> TCCC, Section 425, translation from Sandhikshetrin, *The Civil and Commercial Code Books I-VI and Glossary* (2008)

<sup>9</sup> In this article, the capitalised terms Employer and Employee are used for the Thai legal terms from the TCCC, *nai jang* and *lug jang* respectively.

<sup>10</sup> English judges and academics in this area already often take into account other decisions and developments in other common law jurisdictions. In particular, the Canadian Supreme Court judgment in *Bazley v Curry* [1999] 2 SCR 534 is often quoted and extremely influential in *Lister* and subsequent cases.

<sup>11</sup> For example, as regards the WTO, Thailand is a member of the Asian Group of Developing Members, see communication WT/GC/COM/6 issued 27 March 2012. Thailand has therefore classified itself, for WTO purposes at least, as developing. The UK has classified itself as a developed country for WTO purposes.

<sup>12</sup> This categorisation is adopted by Giliker, *Vicarious Liability in Tort: a Comparative Perspective* (2010) 228ff.

### **Fault and identification**

The argument regarding fault is that the wrongful act of the employee is evidence of the fault of the employer: the employee would only have been able to cause damage to the victim because the employer selected the wrong person to employ, or did not properly supervise the employee in carrying out the task which led to the injury. The argument regarding identification is that the employer is held liable for the tortious acts of the employee because the acts of the employee are attributed to the employer. Importantly, unlike other systems which strongly influenced the drafting of the TCCC,<sup>13</sup> the strict liability nature of Section 425 suggests that fault is not the policy basis of the concept.

### **Victim compensation and loss distribution**

In circumstances where the person who committed the wrongful act does not have sufficient resources to pay damages to the victim, who should suffer the loss? Should it be the victim or should it be the employer? The argument based on victim compensation is that it is better that the employer should be liable, since the employer took care to put trust and confidence in the employee: the victim is a stranger and has no way of vetting the trustworthiness of the employee.<sup>14</sup>

### **Enterprise risk and deterrence**

The argument regarding enterprise risk is essentially that the employer should take the risk of harm because: (i) she takes the benefit of the activity which causes the risk; and/or (ii) she has created the risk by choosing to carry on the activity as a business. The connected argument regarding deterrence is that the employer has the opportunity to increase standards of safety, for example, by better methods of selecting and supervising employees, and is well incentivised when she is exposed to liability for their wrongful acts. The English courts have explicitly favoured enterprise risk theory in the most recent line of cases.

Although it appears that there is no single policy basis that explains all the features of either English law vicarious liability or Section 425 of the TCCC, it is hoped that a comparative analysis will reveal the policy mix in the

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<sup>13</sup> German and Japanese law: s.831 of the German Civil Code and s.715 of the Japanese Civil Code. Here, the employer can escape liability if they can demonstrate that they acted with proper care, or that the damage would have occurred even if they had done so.

<sup>14</sup> This is a very old concept in English law vicarious liability. In *Hern v Nichols* (1709) 1 Salk 289, Holt CJ expressed this concept as follows: “for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger.”

systems and examine how well the legal regimes align, or may be amended to better align, with such policies.

## **The nature of the relationship**

### **English law**

The first limb of vicarious liability in English law traditionally asked whether D1 was an employee of D2, i.e. operating under a ‘contract of service’ rather than a ‘contract for services’ which governs the relationship between independent contractors and will not confer liability vicariously. The classic test for whether a worker is an employee focused on control,<sup>15</sup> the distinction being that in a contract for services the ‘employer’ only controls *what* is to be done; in a contract of service, the employer controls the method of working, i.e. *how* it is done.

However, this control test presented a problem particularly when applied to situations involving skilled professionals over whom an employer is unlikely to have a high degree of practical control in relation to the performance of their duties. The conclusion of English law for some years was that hospitals, for example, were not liable for the negligence of doctors under the doctrine of vicarious liability due to the lack of practical control by hospital management.<sup>16</sup> By the middle of the 20<sup>th</sup> century, however, the courts saw the need to modify this rule and in four key cases<sup>17</sup> it was stated that professionals working full-time for hospitals could be treated as employees. This conclusion cast doubt on the universality of the control test.

Although the control test was not quickly replaced, the recent case of *Various Claimants v Catholic Child Welfare Society*<sup>18</sup> has finally sent a clear message that the law has moved on. In this case, the Supreme Court applied vicarious liability outside a formal employer-employee relationship, conferring liability on an unincorporated religious institution for physical and sexual abuse of its members while teaching at a school. In doing so, they approved<sup>19</sup> a test based on how thoroughly D1 was integrated into the organisation of D2.

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<sup>15</sup> See *Short v J & W Henderson Ltd* [1946] QB 90 per Lord Thankerton

<sup>16</sup> *Hillyer v Governors of St Bartholomew's Hospital* [1909] 2 KB 820 (discussed below)

<sup>17</sup> *Gold v Essex CC* [1942] 2 KB 293 (radiographer); *Collins v Hertfordshire County Council* [1947] KB 598 (resident junior house surgeon); *Cassidy v Ministry of Health* [1951] 2 KB 343 (assistant medical officer and house surgeon); and *Roe v Minister of Health* [1954] 2 QB 66 (anaesthetist).

<sup>18</sup> [2012] UKSC 56

<sup>19</sup> The court approved the approach of Rix LJ in the Court of Appeal case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*, [2005] EWCA Civ 1151

The Supreme Court took the opportunity to clarify the approach in 2016 with the case of *Cox v Ministry of Justice*<sup>20</sup> which followed the approach in *Various Claimants*. It is now clear that the doctrine of vicarious liability will apply outside of traditional employment relationships where the following criteria are met:

(a) the individual carries on activities as an integral part of the business activities carried on by a defendant; and

(b) for its benefit (in the sense of advancing its objectives, not necessarily connected to profit) rather than entirely attributable to an independent business of her own or a third party.<sup>21</sup>

For new situations there is a caveat that the judge should consider whether it is “fair, just and reasonable” to impose liability, taking into account the policy basis of the doctrine.

### **Thai law**

To determine the existence of the Employer-Employee relationship under the TCCC, there are two questions:<sup>22</sup>

(i) Manner of remuneration: is the worker paid remuneration for the whole time that she works rather than on the basis of completion of the work? This requirement stems from the definition of ‘hire of services’ contract (the Thai term for which is *wajangraengngan*) in Section 575 of the TCCC; and

(ii) Control: does the Employer/Hirer have the power to control the manner, time and place of work of the worker, enforced by the power to dismiss the worker? This requirement comes from a Dika Court decision<sup>23</sup> connecting Section 425 with Section 583 which grants the Employer such powers over an Employee.<sup>24</sup>

From the Dika Court jurisprudence, it seems that the analysis of the first question may, in some circumstances, be connected to the second question since it seems that even payment calculated on a ‘per task’ basis may be considered remuneration on the basis of time where the Employer has

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<sup>20</sup> [2016] UKSC 10

<sup>21</sup> “a relationship other than one of employment is in principle capable of giving rise to vicarious liability where 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 to the individual in question.” *ibid* at [24]

<sup>22</sup> Pengniti *Explanation of the Civil and Commercial Code on Wrongful Acts* (BE 2552) para 148

<sup>23</sup> 3825/2524

<sup>24</sup> See also Punyaphan, *Explanation of the Civil and Commercial Code: Wrongful Acts* (BE 2553) para 81

sufficient control over the Employee for the duration of the work: the ‘per task’ basis can be seen simply as a manner of calculation of quantum of remuneration.<sup>25</sup> Regarding the second question, it appears that the analysis rests on the *right to* control the manner, time and place of the worker rather than the amount of control that is exercised in practice.

### **Comparison**

There are two areas which highlight the differences of approach in the two jurisdictions: the attitude to the control test and situations where there are multiple employers.

### **Control**

As discussed above, the English law conception of control historically took a narrow approach, focusing on whether the employer has effective day-to-day control and supervision of the particular tasks of an employee. This approach ran into difficulty when applied to skilled professionals, and over time seems to have proven less and less applicable to modern workplaces and large corporations. Thai law also focuses on control as essential to establishing the Employer-Employee relationship. However, rather than requiring actual day-to-day oversight of a worker’s task, pursuant to Section 583 of the TCCC, control is merely the *right to* control the method, time and place of work of a worker.

The distinction between the two approaches may be best shown by application to the same facts. The leading case in the area of hospitals’ vicarious liability for the negligence of doctors in England, under the control test, was *Hillyer v Governors of St Bartholomew’s Hospital*.<sup>26</sup> In this case, the English law control test found that a hospital was not the employer of a surgeon because the hospital management did not have a high level of control of the manner of work of a surgeon. Thai law would likely come to a different conclusion, since it is likely that a hospital’s management will have the *right to* control the method, time and place of work of a full-time doctor. The application of Thai law to skilled workers can be seen by cases such as 769/2485, where the hirer of a boat was held to have the *right to* control the method, time and place of work of a ship’s captain, and thus be considered an Employer, in spite of lacking the knowledge required to direct the captain’s manner of work. Therefore the concept of control in Thai law is significantly

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<sup>25</sup> A revealing example of this is Dika Court judgment 3834/2524. In this case, a sufficient level of control over the Employee led the Court to conclude that the ‘per trip’ basis of remuneration was merely a manner of calculation. The worker was an Employee. See Pengniti (n 22) para 157

<sup>26</sup> [1909] 2 KB 820



broad, and better able to apply to skilled professionals, and thereby may avoid some of the issues associated with the historic English law control test.

### **Multiple Employers**

Traditionally, under English law, only one party may be held to be an employer for vicarious liability. This position was overturned in the *Viasystems* case which held that more than one party could be held as an employer would be where the employee in question “is so much a part of the work, business or organisation of both employers that it makes it just to make both employers answerable for his negligence.”<sup>27</sup>

Conversely, under Thai law, the Dika Court has consistently<sup>28</sup> been willing to find several parties liable as Employers, even where such parties are not directly remunerating or controlling the Employee. Once a worker has been identified as an Employee based on the remuneration and control test, all those directly benefiting from her activities may be held liable as Employers under Section 425.

Although in some cases these tests may produce the same results, they are based on fundamentally different concepts. In English law, the integration/organisation test must be run against each potential employer separately. Under Thai law, once Employee status has been established, all those directly benefiting from the Employee’s activities will be held liable: a much simpler test to satisfy. Furthermore, it remains to be seen how willing the English courts will be to hold multiple parties liable, given their historical reluctance to confer liability on multiple employers.

### **The nature of the act**

#### **English law**

Before the latest line of cases, the long established test was whether the tort was committed in the course of D1’s employment. An act was considered “in the course of employment” where it was either a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer.

This test, however, was challenged by a line of cases starting with *Lister* which concerned physical and sexual abuse committed by employees. The House of Lords in *Lister* found that acts which were the antithesis of the task assigned to an employee did not easily fit into the test of an ‘unauthorised mode’ of doing an authorised act. Therefore, the English law test, as approved by the recent *Mohamud* case, is as follows:

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<sup>27</sup> *Viasystems* (n 19) at [79]

<sup>28</sup> For other examples, see cases 1576/2506, 450/2516, and 4070/2533.

(i) What is the “field of activities” assigned to D1 by D2?

(ii) What is the connection between the field of activities and the wrongful conduct? If it is sufficiently close to make it just to impose liability, then D2 will be held liable. Mere opportunity is not sufficient: the risk of committing the tort must be created or enhanced by the relationship. The question of whether it is ‘just’ is answered by reference to an enterprise risk theory basis of the doctrine.

### **Thai law**

Section 425 of the TCCC states that an Employer will be jointly liable with an Employee for the consequences of a wrongful act committed “in the course of employment”. An act will be considered in the course of employment even where it is not part of her usual duties,<sup>29</sup> or where it is prohibited by the employer<sup>30</sup> or an intentional wrongful act.<sup>31</sup> A key distinction that runs through the case law is that between an action committed for the benefit of an Employer and one which is considered to be an Employee’s personal business.<sup>32</sup> Where the line is drawn is a very much a question of the degree of deviation from the Employee’s duties or the unusual nature of the Employee’s behaviour: the greater the deviation or the more extreme the behaviour of the Employee, the less likely the act will be committed in the course of employment.<sup>33</sup> However, the Thai law test uses a concept which is broader than under the historic English law test. The Dika Court appears to take a broader view of the duties assigned to an Employee, and is willing to confer liability on an Employer in certain circumstances for acts which are prohibited, incidental, or even when deviating from a task to an extent which English law would consider sufficient to place them outside of the course of employment.

### **Comparison**

An interesting area of comparison is how the two legal systems treat acts involving insults and violence. This was the subject of the most recent English Supreme Court case, *Mohamud*, which involved a petrol station shop attendant employee verbally abusing and assaulting a customer based on racial motivations. The facts are similar to Thai Dika Case 1942/2520 which concerned the driver and conductors of a bus who had a quarrel with a customer who complained about the driver’s performance, which resulted in a

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<sup>29</sup> Pengniti (n 22) para 158

<sup>30</sup> Punyaphan (n 24) para 85 and 2171-2173/2517

<sup>31</sup> *ibid* para 84 and 2499/2524

<sup>32</sup> *ibid* para 85 and 3078/2533

<sup>33</sup> Compare 2060/2524 and 2739/2532, where fleeing a scene of an accident is in the course of employment but deciding to hide the victim of an accident in a waterway is considered personal business.

violent confrontation. The Dika Court decided that the violent confrontation was not in the course of employment. Indeed, this is consistent with other cases where the Court has refused to confer liability for insults and violence, since these are usually considered personally motivated. Applying this approach to the facts of *Mohamud*, it is likely that the Dika Court would not confer liability on the employer.

By contrast, using the new 'close connection' test, the Supreme Court decided that the employee's field of activities was dealing with customers, and that the violent altercation with a customer was therefore sufficiently closely connected to confer liability. It was not simply the fact that the opportunity for violence was created (which would not confer liability) but rather that by assigning this role to this employee the employer had materially increased the risk of the wrongful act. Applying this test to the facts of Dika Case 1942/2520, it seems that the Supreme Court would likely be able to confer liability in the case of the bus conductors, whose role was to deal with passengers (and therefore also passenger complaints). Perhaps in the case of the bus driver, a confrontation with a passenger may be considered not sufficiently closely connected with his field of activities (i.e. driving the bus).

Therefore it seems that the new English law test of 'close connection' would likely confer liability in situations where the current interpretation of Section 425 of the TCCC would not: to personally motivated, extreme or violent acts which have a connection to the field of activities assigned to the employee. In particular, addressing the cases which have provoked the development of English law, these were personally motivated acts of physical and sexual abuse: as such, these are likely to be considered outside of the course of employment in Thai law, and therefore Thai law would not be able to confer liability on an Employer, in the same way that the previous English law tests could not.

### **Comparison of principles and policy bases**

The analysis of the policy and principles in the two systems' approaches demonstrates recognition of enterprise risk theory, but to different extents. In English law, there is now recognition that an enterprise should be liable for the risks it creates through assigning anyone (not just employees) to perform tasks, and that assigning an individual to perform a particular task creates certain risks both in and outside the course of performing that particular task, including personally motivated wrongful acts which are the antithesis of the task.

By contrast, Thai law retains a focus on the extent to which a worker is controlled by an Employer to establish the required relationship (more suggestive of a fault and identification basis than enterprise risk) and whether the Employee is acting for the benefit of the Employer. This displays a narrower view of the relationship and kinds of acts which confer liability than English law. However, it is only the *right* to control that confers Employee status, rather than a level of in practice control which English law required under the previous test. A focus at this level, it is argued, suggests that a distinction is being made on status: i.e. this determines whether the individual is working for herself or for another party. This is consistent with enterprise risk theory, but more narrowly construed than in English law.

However, the comparison reveals that Thai law's attitude to holding multiple parties liable for the actions of an Employee is better aligned with enterprise risk theory than English law. English law requires D1 to be integrated into the organisation of each D2; by contrast, once the status of Employee has been established, Thai law will confer liability on all those who benefit directly from the Employee's actions: where a party benefits from a business activity, they should bear responsibility for the risks associated with that activity.

## **Conclusions and recommendations**

From the comparative exercise performed, the following conclusions and recommendations can be drawn.

First, although the recent development of English law has materially brought it into better alignment with enterprise risk theory than under the previous tests, English law is still deficient in its approach to conferring liability on multiple employers. Thai law is much better aligned with enterprise risk theory in this regard. Therefore it is recommended that the English courts should adopt an approach similar to the Thai Dika court when analysing whether multiple parties may be held vicariously liable for tortious acts. Specifically the English courts, like the Dika Court, should look at the economic reality of the arrangements and hold all parties who directly benefit from an employee's activities vicariously liable for the risks.

Second, although Thai law has a broader interpretation than the previous English law tests, Thai law will not be sufficiently flexible to confer liability where an Employee abuses a position that she has been assigned to carry out in a personally motivated act, particularly an extreme or violent act, in the same way as current English law. This is not well aligned with enterprise risk theory, since an enterprise may have created a risk by assigning a particular role to an Employee. Therefore Thai law should be amended to

address this. Since currently Section 425 of the TCCC may not allow sufficient room for an interpretation to cover such situations, the provision could be amended to include a concept from the English law test as follows (amendment in bold):

“Section 425: An employer is jointly liable with his employee for the consequences of a wrongful act committed by such employee in the course of his employment **or a wrongful act which is sufficiently connected with the field of activities assigned to such employee to justify conferring joint liability on the employer**”

This additional wording would provide the flexibility and authority for Thai judges to hold Employers responsible for a broader range of wrongful acts of their Employees, in alignment with enterprise risk theory.

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