

Enterprise Liability and the Common Law, by Douglas Brodie [Cambridge: Cambridge University Press, 2010, xi + 190 pp, ISBN 978 0 521 76201 4]

This book is a timely account of the relationship between the theory of ‘enterprise liability’ and a number of common law doctrines, principally vicarious liability. The account is timely because the dust has now begun to settle on the 1999 decision in *Bazley v Curry*, where the Supreme Court of Canada reformulated the law relating to the course of employment by seeking to put it on an ‘enterprise liability’ footing, a decision which in turn influenced the House of Lords’ approach to the same issue in *Lister v Heselley Hall Ltd*. According to the book’s author, Douglas Brodie, the invocation of enterprise liability can be seen as the common law’s response to contemporary concerns over the proper extent of corporate social responsibility, a claim he seeks to substantiate by a wide-ranging analysis of the inter-relationship between enterprise liability and the common law which is not limited to UK law but also makes extensive reference to authorities from Australia, Canada and the United States.

Although the bulk of this review will focus on a number of perceived weaknesses in Brodie’s account, the book also has a number of strengths. One of these is that, despite the author’s evident sympathy for the enterprise liability approach to vicarious liability, he openly acknowledges at least some of the difficulties to which it gives rise. Furthermore, he takes a broad approach to the topic, not only in terms of the jurisdictions he covers, but also in his attempt to extend discussion of the relationship between enterprise liability and the common law beyond vicarious liability to the contract of employment itself (see especially chs 10 and 12). Finally, at a number of points in the book, Brodie’s background as a labour lawyer gives him a perspective on questions relating to vicarious liability which most tort lawyers would lack – a good example is his use of the concept of the employer’s undertaking in s 3 of the Health and Safety at Work Act 1974 to critique the traditionally sharp distinction between tortious responsibility for the acts of employees and the acts of independent contractors (pp 79-80).

However, despite these and other strengths of the work, Brodie’s account is ultimately unsatisfying. Perhaps the most fundamental weakness of the book is the author’s failure to engage in a systematic evaluation of the enterprise liability idea itself. Indeed, the central concept of enterprise liability is never really nailed down. Early on (p 2), the author cites a statement from the *Bazley* case in which it is said that ‘the employer puts in the community an enterprise which carries with it certain risks’ and that when those risks materialise and cause injury ‘it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss’. However, the focus in this statement on fairness can be contrasted with instrumental justifications which

Brodie shortly afterwards describes as ‘classic enterprise liability grounds’, namely the ability of the enterprise to spread the losses caused by its activities and the need to incentivise those responsible for the enterprise to minimise the risks of harm to which it gives rise (p 6). Brodie’s failure to separate out these apparently competing rationales is exemplified by the way in which he refers to the ‘eminently equitable nexus’ between risk creation and legal responsibility and then a few lines later to the fact that the decision in *Bazley* was ‘very much policy driven’ (p 8).

Furthermore, by linking the enterprise liability rationale of vicarious liability with the case for strict product liability (pp 3-5), Brodie excludes the possibility of a theoretical account of the concept which explains why the employer’s vicarious liability is (typically) contingent on the fault of the employee, instead choosing to locate it in a broader tradition of strict liability justified by reference to loss-spreading, deterrence and internalisation of costs. This move is problematic, for a number of reasons. First, it leaves Brodie struggling to explain the continued significance of employee fault. His argument that modern tort law chooses to protect freedom of action over competing security interests by generally requiring proof of fault (p 11) is surely correct, but he fails to explain how this general preference for fault liability can be reconciled with the strict liability tradition upon which he also draws, let alone how the two approaches can coherently co-exist where vicarious liability is imposed for an employee’s negligent conduct. Secondly, Brodie glosses over the complexities of the strict liability tradition. For example, he cites Traynor J’s justification of strict product liability in terms of specific deterrence and loss distribution (p 4), and also Guido Calabresi’s case for strict liability based on market deterrence or cost internalisation (p 15), but he draws no clear distinction between them, and nor does he make clear which rationale he prefers.

Finally, the author fails to engage with the criticisms which have been made of the arguments for strict liability he refers to with apparent approval. At root, strict liability is liability based on causation alone, as the broad rationale of enterprise liability which he cites (p 13) makes clear: ‘losses to society created or caused by an enterprise or, more simply, by an activity, ought to be borne by that enterprise or activity’. However, harm is in fact caused, not by one activity alone, but by the interaction of different activities. Suppose a Waitrose lorry collides with a car, injuring the driver. Why should this loss be attributed to the Waitrose ‘enterprise’ rather than the car driver’s activity? And what if the lorry collides with another lorry, belonging to Tesco? By which of the two enterprises is the loss then ‘created or caused’? Surely the law’s response to such cases must, as it does, depend not on causation alone but also on fault? Similarly, Brodie’s apparent endorsement of a specific deterrence rationale of strict liability is troublesome. He argues (p 9) that one function of strict liability is to reinforce fault liability, by requiring the defendant (in the vicarious liability context, the employer) to

avoid liability by ‘taking measures beyond that required by the law of negligence’, and that this has the effect of compelling innovation, because if the enterprise cannot find a means of averting the risk, it will be liable for the consequences. However, since negligence already requires that the employer takes all reasonable steps to minimise the risks created by its operations, it follows that the additional measures and the innovation to which Brodie refers are *unreasonable*, with the result that strict liability will actually cause *over*-deterrence (though all things being equal, the rational employer would still not take these extra measures, since by definition the cost of doing so would be greater than the likely liability).

Moving away from the theoretical underpinnings of the enterprise liability idea, Brodie is more alert to some of the practical difficulties to which it gives rise. One such difficulty is where more than one enterprise is implicated, as in the US case he cites in which following a plane crash actions were brought not only against the airline, but also against the manufacturers of both the plane and the plane’s altimeter. As the author says, this case shows that identifying the responsible enterprise may involve ‘contentious value judgments’ (p 5), but the basis on which such judgments are to be made is not elucidated. Nor is it clear why he thinks (p 71) that in the case of a worker ‘loaned’ by a permanent employer to a temporary one, harm caused by the worker should be attributed to the enterprise of the temporary employer rather than that of the permanent employer, who presumably also stands to gain from the arrangement.

A second difficulty is identifying the risks which count as the ‘enterprise risks’ in a given case. The author cites a US judge who refers in this connection to ‘risks different from those attendant on the activities of the community in general’ (pp 7-8), but if this were the test then routine instances of vicarious liability—such as an accident caused by the careless driving of a small commercial vehicle—would seem to fall outside the enterprise liability approach. Nor is it clear whether the risks created by a particular enterprise should in some sense be weighed against the risks it eliminates or reduces. In *Bazley*, for example, the ‘enterprise’ was a charity which had taken the plaintiff into its care, thereby presumably reducing many risks of harm to which he would otherwise have been subject, including perhaps the risk of abuse. Should this somehow be weighed against the new risks to which its actions gave rise, such as the risk of abuse by its own employees which had materialised on the facts? Brodie is alert to this complication, and argues that such questions should be resolved by resort to empirical evidence (pp 40-41), but any such empirical enquiry would surely be fraught with difficulty, not least because it is not clear where such evidence is to be found. Finally, Brodie seems to assume that the enterprise liability approach is capable of encompassing situations in which the defendant is sued for failing to confer a benefit, as in the Canadian case he cites where a government contractor failed to take

reasonable steps to prevent rocks falling on the highway (p 89). In such cases, however, the defendant is being sued not for creating a risk, but for failing to protect the claimant against a risk which has arisen either through the force of nature or the act of a third party, and it is difficult to see in what sense such a risk is attributable to the defendant's 'enterprise'.

The final difficulty with the enterprise liability idea as it has been applied in the vicarious liability context is that the test of the 'course of employment' to which it has given rise is very imprecise. That test is whether or not there is a sufficiently close connection between the employee's wrongful conduct and his or her employment, a test which has proven difficult to apply in practice, so much so that in *Jacobi v Griffiths* (a case decided alongside *Bazley*), the Supreme Court of Canada divided four-to-three on whether the test it itself devised was satisfied where an employee of a children's club sexually assaulted two club members in his own home. Admittedly, the traditional 'Salmond' test—which asked whether the employee's conduct was authorised by the employer, or if not authorised, was an unauthorised mode of doing an act that was—was not free from uncertainty either, but at least the courts had given that test some bite by considering whether or not the employee's conduct could be said to have been in furtherance of the interests of his or her employer, an approach abandoned with the advent of the close connection test. Brodie does not shy away from these difficulties; on the contrary, he readily admits that the close connection standard 'fails to provide a meaningful test' (p 24), and goes so far as to say that more generally there is a 'real difficulty in translating the concept of enterprise risk into a practically applicable test' (p 30). His suggested solution is, however, far from convincing. He argues (at p 24) that the real question is the proper extent of the employer's responsibility, and that this is 'very much a matter of policy', with the result that the outcome 'in any particular case will owe far more to the judicial assessment and ordering of policy considerations than to the semantics of competing tests'. Quite apart from the difficulty of actually pinning down these 'policy considerations', however, it is doubtful whether ad hoc policy analysis of this kind will provide an acceptable degree of legal certainty in an area of such practical significance as the scope of vicarious liability.

Moving away from the work's central concern with the relationship between enterprise liability and vicarious liability, some other weaknesses can be identified. It is not clear, for example, why the start of the book is organised the way it is, with a quite general introductory chapter being followed immediately by a chapter on the reception of the *Bazley* decision in Australia and the UK. The result is that *Bazley* itself is rather overlooked, so much so that at no time is the reader actually given the facts of the case. Similarly, it is not clear why the closely related questions of the liability of employers for the acts of independent contractors and the concept of non-delegable

duties are dealt with in two different chapters (chs 7 and 11) which do not even follow on from each other. Another difficulty with the book is that although Brodie's attempt to extend discussion of the enterprise liability concept beyond vicarious liability is to be commended, in practice it gives rise to a number of chapters on rather disparate topics which end up detracting from the coherence of the work as a whole. These topics are the tort liability of corporations (ch 5), the liability of employers for psychiatric injury suffered by their employees (ch 9), the recovery of damages for distress in cases of breach of the contract of employment (ch 10) and the core values underlying the contract of employment, as exemplified by the implied obligation of mutual trust and confidence (ch 12). Finally, the author's focus on the enterprise liability idea means that he fails to bring out some of the subtleties of the recent case law on vicarious liability. One such is the continued vitality of the much derided 'control' test for the existence of an employment relationship in the context of the employee 'loaned' by a permanent employer to a temporary one (touched upon, but not fully explored, in ch 6). Another is the failure by the House of Lords in *Lister* to draw a clear line between the personal and the vicarious liability of an employer, with the result that while their Lordships attached considerable significance to the fact that the defendants in the case had been entrusted with the care of the claimant children and had delegated that duty to the employee who had abused them, they failed to advert to the fact that this reasoning has often been associated with personal liability via the non-delegable duty concept. And another is the way in which the courts in cases such as *Mattis v Pollock* (discussed at p 26) have exploited the looseness of the close connection test to factor the fault of the employer into the course of employment question, with the result that again the demarcation line between personal and vicarious liability has been blurred.

In conclusion, while there is much of value in this book, there are also a number of significant weaknesses, as a result of which the reader is left with the impression that, to some extent at least, the opportunity to produce a thorough and systematic account of the important recent developments in the law relating to vicarious liability and their relationship with the enterprise liability idea has been missed.

DONAL NOLAN
University of Oxford