

Upstream Liability: The Civil and Criminal Liabilities of the Manosphere

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Abstract

The Manosphere is a loose confederacy of male-centric online groups, consisting of activists, seduction communities, and cliques of extremists with verifiable links to mass-casualty attacks. Members of these communities are known to incite real-world harm, a phenomenon this thesis terms 'downstream harm.' The thesis responds to an urgent need for research into how this phenomenon should be combatted, both within the Manosphere and beyond. To do this it identifies whether existing legal tools would be effective in holding online actors liable, individually or collectively, for real-world harm. It employs a vignette methodology; exploring the criminal and civil liabilities of the Manosphere through plausible narratives designed to test existing legal frameworks. The thesis develops and analyses two narratives featuring orthodox Manosphere communities. However the conclusions are widely transferable.

By analysing these vignettes the thesis constructs defensible legal arguments on how existing frameworks could be used to hold online actors liable for downstream harm. It argues accessory liability, in crime and tort, is a means through which those who contribute to mass casualty attacks can be held to account. The thesis proposes a duty of care for online influencers to identify the circumstances in which they may be liable in negligence. It further suggests that the law of unincorporated associations could be used to establish wide-ranging collective liability for members of online communities. Indeed this could be used in conjunction with public nuisance to regulate the harms of the Manosphere.

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Table of Abbreviations: Footnotes¹

3PULICSS	Proceedings of the 3rd Universitas Lampung International Conference on Social Sciences
ACDCU	DCU Anti-Bullying Centre Dublin City University
ADP	Applied Development Psychology
AFS	Australian Feminist Studies
AFSPCLSR	All Faculty Scholarship, Pennsylvania Carey Legal Scholarship Repository
AJIntLL	American Journal of International Law
AJS	American Journal of Sociology
AmBFoundResJ	American Bar Foundation Research Journal
AmCrimLRev	American Criminal Review
ASIPP	Analysis of Social Issues and Public Policy
BDS	Big Data & Society
BeP	Belknap Press
BJSP	The British Journal of Social Psychology
BP	Bloomsbury Publishing
CalLRev	California Law Review
CLJ	Cambridge Law Journal
CJMCS	Continuum Journal of Media & Cultural Studies
CJWL	Canadian Journal of Woman and Law
CLH	Cambridge Law Handbooks
CLR	Criminal Law Review
CMC	Crime, Media, Culture
Colum.JL&SocProbs	Columbia Journal of Law and Social Problems
CTTA	Counter Terrorist Trends and Analyses
CP	Clarendon Press
CP	Current Psychology

¹ In accordance with Paragraph 4.2 of the 4th Edition of OSCOLA: Oxford University Standard for the Citation of Legal Authorities, this table of abbreviations is provided at the beginning of the thesis and consists of those found in the Cardiff Index of Legal Abbreviations or constructed from the table of terms provided by Paragraph 4.2.1

CPRep	Current Psychiatry Report
CUP	Cambridge University Press
DB	Deviant Behaviour
DCM	Discourse, Context & Media
EDI	Equality, Diversity and Inclusion
EEH	Explorations in Economic History
EEP	Edward Elgar Publishing Ltd
EHS	Evolutionary Human Sciences
EntLR	Entertainment Law Review
EnvLRev	Environmental Law Review
EP	Emerald Publishing
EPS	Evolutional Psychological Science
EUP	Edinburgh University Press
EurJCPR	European Journal on Criminal Policy and Research
EurJCrimeCrLCrJ	European Journal of Crime, Criminal Law, and Criminal Justice
EurJP	European Journal of Probation
EurJWS	European Journal of Women's Studies
EUT	Edizioni Università di Trieste
FC	Feminist Criminology
FM	First Monday
FMS	Feminist Media Studies
FordhamLRev	Fordham Law Review
FP	Feminism and Psychology
FP	Frontiers in Psychology
FS	Feminist Studies
GAD	Government Actuary's Department
GE	Gender and Education
GS	Gender and Society
HA	Hart Publishing
HUP	Harvard University Press
ICCT	Institute Centre for Counter-Terrorism

II	Internet Interventions
IJ	Irish Jurist
IJERPH	International Journal of Environmental Research and Public Health
IntlA	International Affairs
IntlCoCT	International Centre of Counter-Terrorism
IntlCS	Information, Communication & Society
IntUC	International Journal of Communication
IntUCJS	International Journal for Crime Justice and Social Democracy
IntUMS	International Journal for Masculinity Studies
Int'USocL	International Journal of the Sociology of Law
ISM	Information Systems Management
JAP	Journal of Applied Philosophy
JCJ	Journal of Crime and Justice
JCMC	Journal of Computer-Mediated Communication
JETL	Journal of Tort Law
JEurTL	Journal of European Tort Law
JGS	Journal of Gender Studies
JIV	Journal of Interpersonal Violence
JMIR	Journal of Medical Internet Research
JOM	Journal of Operations Management
JPN	Journal of Professional Negligence
JSS	Journal of Strategic Security
JSSR	Journal for the Scientific Study of Religion
KLJ	King's Law Journal
L&Phil	Law and Philosophy
LEG	Legal Theory
LQRev	Law Quarterly Review
LS	Legal Studies
LSR	Law and Society Review
MCS	Media Culture and Society

MichLRev	Michigan Law Review
MLR	Modern Law Review
MM	Men and Masculinities
MMA	Media Matters for America
MonLR	Monash University Law Review
MUMCS	Malmo University, Media and Communication Studies: Culture, Collaborative Media, and Creative Industries
NILQ	Northern Ireland Legal Quarterly
NMS	New Media & Society
OA	Oxford Academic
OHLJ	Osgoode Hall Law Journal
OJLS	Oxford Journal of Legal Studies
OL	Open Linguistics
OUP	Oxford University Press
PennStLRev	Pennsylvania State Law Review
PLRev	Property Law Review
PIAAAIC	Proceedings of the International AAAI Conference on Web and Social Media
PS	Psychology & Sexuality
PSP	Political Science and Politics
PT	Perspectives on Terrorism
QCLJ	Queensland Law Journal
QHR	Qualitative Health Research
QI	Qualitative Inquiry
QR	Qualitative Research
RevAS	Review of Accounting Studies
RJCIIntPL	Rabel Journal of Comparative and International Private Law
S&S	Stevens and Sons
SAGE	Sage Publications Limited
SaH	Stevens and Haynes
SC	Sexuality and Culture

SCRev	Sports Coaching Review
SCT	Studies in Conflict & Terrorism
SCT	Studies in Conflict and Terrorism
SHI	Sociology of Health & Illness
SIP	Springer International Publishing
SiSc	Simon and Schuster
SJLS	Singapore Journal of Legal Studies
SM	Sweet and Maxwell
SMS	Social-Media and Society
SS	Social Sciences
SSR	Social Science Research
TAAAPSS	The Annals of the American Academy of Political and Social Science
AJCL	The American Journal of Comparative Law
TPV	Terrorism and Political Violence
TR	Thomas Reuters
TV	Transcript Verlag
UALRP	University of Adelaide Law Research Paper
UNECE	United Nations Economic Commission for Europe
VandLRev	Vanderbilt Law Review
VO	Victims and Offenders
VUWLR	Victoria University of Wellington Law Review
Wash&LeeLRev	Washington and Lee Law Review
WSIF	Women's Studies International Forum

Table of Abbreviations: Main Body

Incels	Involuntary Celibates
LMR	Last Minute Resistance
MGTOW	Men Going their Own Way
MRA	Men's Rights Activist
MRAs	Men's Rights Activists
PUA	Pick Up Artist
PUAs	Pick Up Artists
UK	United Kingdom
US	United States

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Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University, all sources are acknowledged as references.

Introduction

The Manosphere is a loose confederacy of male-centric subcultures, including Men's Rights Activists who are concerned with resisting feminism, the male separatist Men Going their Own Way, and Pick Up Artists who seek to maximise sexual contact with women. At the extreme ends of the Manosphere are Involuntary Celibates, who deal in nihilistic despair and have been credibly linked to acts of terror.² Manosphere communities agitate for and influence real-world harm, a phenomenon the thesis labels downstream harm.

Downstream harm occurs when A, acting online, influences B so that they cause real-world harm. A's conduct occurs 'upstream' which flows to B, who then causes 'downstream' harm to C. Say Ross teaches men how to improve their fortunes with women and instructs Alex to use a dangerous technique, causing him to assault Amelia. The upstream actor has caused B to harm C. Indeed, B might not be influenced by a single person but an entire community. Say Jake joins a forum which is vitriolically opposed to feminism and is enraged when a clip of Abigail, a feminist, circulates online. Members post her personal information, send threatening messages, and spread cruel rumours to humiliate her. The community participates in a harassment campaign, which motivates Jake to send her a death threat. If Abigail suffers psychiatric harm, members of the community have influenced a crime and a tort.

This example of downstream harm poses a question of what the thesis terms, upstream liability. Namely would it be possible for members of the hypothetical forum to be held liable, in crime or tort, for the harm inflicted upon Abigail? Can those who influence real-world harm online be held liable when it manifests? This question of upstream liability, arising out of downstream harm, is what concerns the thesis.

These questions are pertinent because the law is already dealing with the downstream harms of the Manosphere. Tirrell warned that extreme Manosphere subcultures would inevitably violate the law.³ These extreme communities have now been linked to a succession of mass-casualty attacks across North America and Europe.⁴ In 2021 a

² A full definition of the Manosphere is provided in Chapter One

³ Lynne Tirrell, "Toxic Misogyny and the Limits of Counterspeech" [2019] 87 FordhamLRev 2433

⁴ Bruce Hoffman, Jacob Wave, Ezra Shapiro, "Assessing the Threat of Incel Violence," [2020] 43 SCT 565

suspected Incel was responsible a mass-shooting in the UK,⁵ in 2014 Elliot Rodger carried out the Isla Vista Killings,⁶ in 2018 Alek Minassian killed ten in a van attack,⁷ and finally in 2020 an Incel in Toronto attacked a massage parlour with a machete.⁸ Gotell observed that Incel communities venerate perpetrators of such attacks, whilst calling for further violence.⁹ Mass harassment campaigns by Manosphere subcultures against feminists, female journalists, and women in gaming are well documented.¹⁰ These harassing behaviours involve trolling, verbal abuse, sextortion, non-consensual sharing of intimate images, death threats, rape threats, photo manipulation, cyberstalking, doxxing, hacking, and DDOS attacks.¹¹ Further fears surrounding Manosphere influencers were raised in 2022 when Andrew Tate rose to mainstream popularity.¹² His influence is believed to have caused young fans, aged 11-18, to sexually harass young girls and female teachers on a mass scale.¹³

That legal systems are already being challenged by the Manosphere creates a pressing need for further research into how these harmful behaviours can be combatted. That these communities pose a threat has long been recognised within the literature. Boyd and Sheehy noted a trend in which Manosphere communities became preoccupied with targeting individual feminists.¹⁴ To Jones, Trott, and Wright, this involves women being disproportionately targeted for protracted online abuse.¹⁵ Blanco observed that

⁵ Matthew Weaver, Steven Morris, "Plymouth gunman: a hate-filled misogynist and 'incel' (*The Guardian*, 13/08/2021) <https://www.theguardian.com/uk-news/2021/aug/13/plymouth-shooting-suspect-what-we-know-jake-davison>, Accessed 15/03/2025

⁶ Author Unknown, "Elliot Rodger: How misogynist killer became 'incel hero' (*BBC*, 26/04/2018) <https://www.bbc.co.uk/news/world-us-canada-43892189>, Accessed 15/03/2025

⁷ Author Unknown, "'Toronto van attack: Minassian guilty of killing 10 people,' (*BBC*, 03/03/2021), <https://www.bbc.co.uk/news/uk-56269095>, Accessed 15/03/2025

⁸ Leyland Cecco, "Canadian man sentenced to life in prison for 'incel'-motivated murder," *The Guardian* (28/11/2023) <https://www.theguardian.com/world/2023/nov/28/toronto-man-sentenced-life-terrorism>, Accessed 15/03/2025

⁹ Gotell Dutton, "Sexual Violence in the 'Manosphere': Antifeminist Men's Rights Discourses on Rape" [2016] 5 IntUCJS 65

¹⁰ Debbie Ging, "Alphas, Betas, and Incels: Theorizing the Masculinities of the Manosphere, Men and Masculinities" (2017) 22 SAGE 638,650

¹¹ Debbie Ging, Eugenia Siapera, "Special issue on online misogyny" [2018] 10 FMS 515,524

¹² Craig Haslop and others, "Mainstreaming the Manosphere's Misogyny Through Affective Homosocial Currencies: Exploring How Teen Boys Navigate the Andrew Tate Effect" [2024] 10 SMS 1

¹³ Stephanie Wescott, Steven Roberts, Xuenan Zhao, "The problem of anti-feminist 'manfluencer' Andrew Tate in Australian schools: women teachers' experiences of resurgent male supremacy," [2023] 36 GE 167, 168-171

¹⁴ Susan Boyd, Elizabeth Sheehy, "Men's Groups: Challenging Feminism" [2016] 28 CJWL 5

¹⁵ Callum Jones, Verity Trott, Scott Wright, "Sluts and soyboys: MGTOW and the production of misogynistic online harassment" [2019] 22 NMS 1903,1907-1908

‘stealthing’, the intentional non-consensual removal of a condom during sex, was encouraged within the Manosphere as it empowered men and punished women.¹⁶ O’Neil warned that the seduction techniques promoted by the Manosphere could result in a slew of sexual offences.¹⁷ The threat posed by these communities has been acknowledged within the literature, so there is an obvious gap for research into how that threat might be combatted. Casey reviewed the history of extreme Manosphere subcultures to argue they pose a legitimate threat that the law must adapt to counter.¹⁸ This thesis will do exactly this by identifying how existing legal frameworks might be used to respond to the downstream harms of the Manosphere. That much of the literature raises concerns about the Manosphere and online harm, means the logical next step is a research project identifying how these concerns might be addressed. This will be the primary original contribution to the literature.

This comes at a critical juncture, as the Manosphere is growing. Scaptura and Boyle observed the growing prevalence of extreme Manosphere beliefs across the United States.¹⁹ However Manosphere communities have also been observed in India,²⁰ Bulgaria,²¹ and Spain.²² The Manosphere has expanded beyond its traditional domain within the Anglosphere. As the Manosphere grows across cultures and jurisdictions so too will the downstream harms associated with it, yet substantive research into the law’s role in combatting it is lacking. This thesis fills that gap, building on the literature to directly address how the law might respond to the downstream harms of the Manosphere as they become a global issue. Albeit this contribution will be concerned with the law of England and Wales.

¹⁶ Melissa Blanco, “Sex Trend Or Sexual Assault: The Dangers of Stealthing and the Concept of Conditional Consent” [2018] 123 PennStLRev 217

¹⁷ Rachel O’Neill, *Seduction: Men, Masculinity and Mediated Intimacy* (Polity, 2018)

¹⁸ Gretchen Casey, ‘Ending the Incel Rebellion: The Tragic Impacts of an Online Hate Group’ (2019) 21 LoyJPubIntL 71, 83-85, 104-105

¹⁹ Maria Scaptura, Kaitlin Boyle, ‘Masculinity Threat, “Incel” Traits, and Violent Fantasies Among Heterosexual Men in the United States’ [2019] 15 FC 278

²⁰ Srimati Basu, ‘Looking through Misogyny: Indian Men’s Rights Activists, Law, and Challenges for Feminism’ [2016] 28 CJWL 25

²¹ Jullietta Stoencheva, “The Manosphere Travels East: Constructing misogynist social identities on a Bulgarian online platform,” MUMCS, Master Thesis, 23/05/2022, 6

²² Silvia Díaz Fernández and others, “#TeamAlienadas: Anti-feminist Ideologic work in the Spanish Manosphere” [2023] 30 EurJWS 421

Moreover, there is a need for research into the law's role when dealing with online harm. Downstream harm is not unique to the Manosphere. Murthy identified that the internet has immense potential as a transnational tool.²³ However, like any tool, it can be used to cause harm. Online groups have been linked to the January 6th Attack on the US Capitol,²⁴ the rise in anti-Asian hate crimes during the COVID-19 pandemic,²⁵ and the transnational threat of extremism.²⁶ Indeed, the pandemic accelerated the extent to which online platforms feature in modern life,²⁷ with the Manosphere, in particular, taking advantage of the pandemic to expand.²⁸ This potential for harm, taken with the internet's importance, makes a legal response inevitable.²⁹ Thus, the thesis will be able to make an original contribution to the literature by identifying how the law of England and Wales can respond to downstream harm.

Claims of Liability

To do this, the thesis will investigate how existing frameworks, actions, and offences might apply to downstream harm. For example, the thesis explores accessory liability in crime for those who have procured an offence; propose a duty of care for influencers who endanger the public; and investigates routes to collective liability for online groups. By understanding the legal tools available the thesis can understand which, if any, can respond to downstream harm and the Manosphere itself.

Consequently, the thesis's starting point was to make claims of liability within the existing legal regime rather than proposing novel actions or offences. This starting point was informed by concerns around overcriminalisation and the potential practical limitations of proposing new legislation.

²³ Dhiraj Murthy, "Introduction to Social Media, Activism, and Organizations," [2018] 4 SMS 4

²⁴ Saifelddeen Zihiri and others "QAnon shifts into the mainstream, remains a far-right ally," [2022] 8 Heliyon, [https://www.cell.com/heliyon/fulltext/S2405-8440\(22\)00052-4](https://www.cell.com/heliyon/fulltext/S2405-8440(22)00052-4) 21/08/2024

²⁵ Inari Sakki, Laura Castren, "Dehumanization through humour and conspiracies in online hate towards Chinese people during the COVID-19 pandemic," [2022] 61 BJSP 1418

²⁶ Vincent Auger, "Right-Wing Terror: A Fifth Global Wave?," [2022] 14 PT 87, 92

²⁷ Pedro Acosta, "COVID-19 Pandemic: Shifting Digital Transformation to a High-Speed Gear," [2020] 3 ISM 226

²⁸ Gary Barker and others, "COVID-19 and Masculinities in Global Perspective: Reflections from Promundo's Research and Activism." [2021] 24 MM 168, 173

²⁹ Pedro(n27)

Firstly, we have good reason to be concerned about the current volume of criminal law, because it empowers the state to use some of its most coercive powers.³⁰ Chalmers criticised the New Labour Government as engaging in ‘frenzied-law making,’ enacting a new offence for each day they were in office. He argued that the result was an oversaturated, inaccessible, and difficult-to-comprehend criminal law which is barely fit for purpose.³¹ The result of such careless expansions of the criminal law is a consummate expansion of state power and punishment.³² One which risks transforming the criminal law into a bloated compendium, which promises extreme consequences for sometimes innocuous behaviours.³³ There is too much criminal law already, and so when researching liabilities arising out of a new phenomenon, it is preferable to work with what is already available.

Secondly, if the thesis were to propose new offences or civil actions, then to be implemented these would need to be adopted by Parliament. In crime, the House of Lords indicated in *DPP v Withers*,³⁴ that the courts have no power to create new common law offences, and so the creation of new criminal offences is a matter for Parliament. While the courts do retain the power to recognise the existence of new torts at common law, there is an indication that in novel, or unusual, circumstances the courts would much rather leave the matter to Parliament.³⁵ As a result, if new novel offences or civil actions were to be suggested, then these would likely need to be accomplished via legislation. This would be a time-consuming process, there is no guarantee that the thesis’s proposals would be adopted, and no indication that such reform is on the political agenda. Much of the focus of online regulation in recent years has been concerned with the responsibilities of social media platforms,³⁶ with the liabilities of individuals being of lesser concern. Consequently, as the thesis is concerned with the liability of individual upstream actors, any subsequent proposals for

³⁰ Andrew Ashworth, Lucia Zedner, *Preventative Justice* (OUP, 2014) 95-118

³¹ James Chalmers 'Frenzied law making': overcriminalization by numbers" [2014] 67 Current Legal Problems 483, 488, 494, 502

³² Douglas Husak, *Overcriminalisation: The Limits of the Criminal Law* (OUP, 2007) 3-54

³³ Erik Luna, Overextending the Criminal Law, [2003] 15 CATO Policy Report, 6, 14-16,

³⁴ [1975] AC 842 [860]

³⁵ *Wainwright v Home Office* [2003] UKHL 53 [20-33]

³⁶ Eliza Bechtold, "Regulating online harms: an examination of recent developments in the UK and the US through a free speech lens," [2024] Journal of Media Law, 16, 358,368-369

new legislation may not attract much political interest. Thus there may be very little prospect of them being adopted, and so the thesis's practical impact would have been limited.

Claims of liability under the existing legal regime would not need to engage the same political processes. Instead, an upstream actor could be criminally prosecuted or sued in tort, and the thesis's conclusions could form part of the legal argument made before a court. Such arguments could be rejected, but at the very least they could be tested in the real-world. Moreover, the thesis can influence the likelihood of its arguments being accepted by coming to well-reasoned conclusions grounded in authority. Ideally, the more compelling, and legally sound, a conclusion is then the greater the chance of it being accepted. This would not necessarily be true if the thesis were concerned with proposing new actions or offences. This is because no matter how compelling a legislative proposal is, if it is out of step with the current political agenda it is unlikely that it will be taken any further.

Consequently, concerns around overcriminalisation, and the desire to make a real-world contribution to legal practice meant that the thesis's starting point was to make claims of liability under the existing law. This was only ever a starting point and that novel actions or offences might be necessary was never excluded. On the contrary, it was always intended that if existing frameworks fell short, and there was no plausible claim to liability, then the thesis ought to make the case for reform. Ultimately this did not prove necessary because there were plausible routes to liability which could effectively respond to the downstream harms of the Manosphere. To identify whether a response was effective, the thesis considered separate factors for crime and tort. In the criminal analysis the thesis sought to investigate whether the blameworthy conduct of upstream actors could be punished and censured in a way which was proportionate to the wrongdoing.³⁷ Similarly, in tort, the thesis sought to identify whether there was a viable route for victims to undo the injustice done to them, and have the tortfeasor bear any associated loss or harm.³⁸

³⁷ Antony Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment' (1996) 20 *Crime & Justice* 1, 30-39

³⁸ Ernest Weinrib, *Corrective Justice* (OUP, 2012) 9, 334-344

It is argued that in the subsequent chapters the thesis sets out how the blameworthy criminal conduct of upstream actors could be properly captured by accessory liability in crime. Indeed that lesser charges would be insufficient forms part of the argument. Thus, the thesis was able to make criminal law claims that would ensure appropriate and proportionate punishment for upstream actors within the Manosphere. Similarly, in tort, the thesis argues that common design, negligence, and the law of unincorporated associations create avenues for victims to bring tort claims against upstream actors who have contributed to the wrong done to them. Thus, the thesis was able to identify how victims could seek redress and have the harm to them compensated. The availability of both civil and criminal routes to liability is also hoped to have a deterrent effect, as fears of prosecution or of being sued may cause upstream actors to reconsider their conduct.³⁹ As a result, the thesis did not propose new offences or torts.

Tort and Crime

The thesis focuses on crime and tort to explore a comprehensive legal response to downstream harm. As the thesis investigates how the law should respond to a phenomenon, there is an instinct to cast a wide net. The decision to focus on crime and tort reflects the burden of bringing proceedings. It would be for the Crown, or a victim minded towards a private prosecution, to identify whether an upstream actor should be charged with a criminal offence. Similarly, victims would need to consider proceedings in tort. The question would be whether an upstream actor has committed an existing tort or crime. Although beyond this, it is not clear that a comprehensive understanding of downstream harm could be gained by examining either crime or tort in isolation. Dyson describes the two jurisdictions as woven together, reinforcing one another, and so singularly focusing on either crime or tort would leave an incomplete picture. The intersections between tort and crime are not isolated instances.⁴⁰ Thus there is more to be learned about the law by looking at both jurisdictions. This is particularly true as the thesis seeks to propose a comprehensive legal response to downstream harm, which would be incomplete if either jurisdiction were excluded. Tort and crime are tightly

³⁹ This might be a slightly hopeful position considering the nature of the Manosphere, see Chapter 1, however the potential for real world legal action should be more of a deterrent than proposing a novel offence or action with no clear route to the statute book

⁴⁰ Matthew Dyson, *Unravelling Tort and Crime* (CUP, 2014), 1-14

bound together,⁴¹ and indeed as the thesis will look to extend, or stretch, the existing law, it is necessary to consider them both as where one goes, the other might follow.

Moreover, the thesis is interested in liability; crime and tort are mechanisms through which defendants are held personally liable for the harm they have caused. It is possible that legislation concerned with data protection, internet regulation, or the liabilities of social media companies could be engaged. However, this would not speak to whether those who have influenced real-world harm are liable for it, and so is not considered separately.

Designing the Project: Methodology

A full methodology chapter is provided, but in summary to explore the civil and criminal liabilities of the Manosphere, the thesis will construct fictional but plausible narratives, or vignettes, modelled on its behavioural archetypes. These vignettes will then be subject to legal analysis. To illustrate the thesis will examine whether an influencer is liable in negligence for causing sexual assault by analysing the tort before applying it to the vignette. The question is whether negligence is an effective legal tool for combatting downstream harm. Whether something is effective is determined initially by whether it applies at all. If a doctrine is applicable, its effectiveness must be further gauged by its internal principles, practical realities, or any other relevant factor. This is not a passive description of the law but an active attempt to extend or stretch it to produce a defensible legal argument on whether existing legal tools can effectively capture downstream harm.

There is a jurisdictional issue. A, B, and C may agitate and influence D to cause real-world harm, whilst all four are in different jurisdictions. Thus, saying that a given legal framework applies may be redundant. This is likely to be very common for online groups, especially international phenomena such as the Manosphere. For interjurisdictional instances of downstream harm the thesis's arguments might be very difficult to apply in the real-world. However, it will certainly apply for domestic instances: for example, a community WhatsApp group which agitates for violence against asylum seekers; a UK-based animal rights forum which plots to douse those

⁴¹ Ibid 19

who wear fur in blood; a social media influencer agitating for their followers to take to the street in a riot. Even if some of the arguments have a challenging interjurisdictional application, the thesis will identify legal tools with a clear domestic application.

The internet also poses issues in identifying defendants, as many act anonymously online, and so there is a further technological challenge. This is an undesirable limitation, but resolving it is beyond the scope of the project. This does not impede the thesis from making an original contribution to the literature. Whether a legal tool is even available is the logical prior question to whether it can apply across jurisdictions.

Additionally, there is no guarantee technological or jurisdictional issues will be relevant in every case. Say a localised number of MGTOWs are active on a messaging app. They fixate on Helen, a single mother in the community, who they think is sexually immoral and living off the hard-earned money of men by claiming benefits. Thus, they organise online to send her harassing letters, leave menacing voice messages on her phone, and otherwise make her life uncomfortable. As a result, they harass Helen who may wish for these men to face criminal and civil consequences. Indeed, this example need not be Manosphere specific. Imagine a small community Facebook page takes umbrage with a homeless person sleeping in a local park. Consequently, they agitate for members of the community to terrorise him. These are plausible instances of localised downstream harm and so there is value in knowing how the law might respond to it. Thus, the thesis will identify how legal doctrines can and should address downstream harm, which can be considered in light of any practical or technological challenges in future research.

Structure of the Thesis

The thesis consists of eight chapters, initially setting out what the Manosphere is and how it will be investigated. It then advances the vignettes and explores legal tools in a succession of analytical chapters. Each chapter works to identify how the law might respond to downstream harm.

Chapter One: What is the Manosphere

This chapter explains what the Manosphere is and justifies why its disunited elements should be classified under a single umbrella. This is necessary to define the thesis's subject matter and to identify precisely what is being investigated. Thus, the chapter

identifies and explains the Manosphere's 'Red Pill' worldview and its varying interpretations. All of this is used to identify the Manosphere's unique characteristics and to distinguish it from other instances of antifeminism.

Chapter Two: Methodology

This chapter details the rationale behind the vignette methodology and its implementation. It explains that this methodology was influenced by research practices in the social sciences, legal case studies, and the sporadic use of vignettes in legal scholarship. It then outlines the process of constructing the vignettes, the need for plausibility, and how the doctrinal method is deployed.

Chapter Three: The Incel Vignette

This chapter advances the Incel vignette, which features the character of Tom being radicalised by the Incel subculture. The plausibility of this vignette is justified with reference to the literature, the thesis's investigation of Incel communities, and real-world events. This chapter provides the vignette which will then be subject to legal analysis in chapters four and five.

Chapter Four: Accessory Liability in Crime

This chapter argues that members of Incel communities connected to mass-casualty attacks may be criminally liable as accessories. This cannot be widely extended to crimes of specific intent, but accessory liability is argued to be an effective legal tool for crimes of basic intent. The chapter explores radicalisation to argue that a person radicalising and inciting another could be a factual and legal cause of a mass-causality attack.

Chapter Five: Accessory Liability in Tort

This chapter explores joint tortfeasance by common design and procurement for the Incel vignette. It argues that members of Incel communities may be liable as joint tortfeasors. As there is an overlap with criminal offences, the chapter discusses the tort/crime interface and the impact this might have on a prospective claim. It argues there is a theoretically viable claim in tort, which is limited by practical reality.

Chapter Six: The Pick Up Artist Vignette

This chapter advances the Pick Up Artist vignette, which features Alex paying for the services of Ross, who advises him to use a technique which results in him sexually assaulting Amelia. The plausibility of this vignette is then advanced with reference to the thesis's investigation of Pick Up Artist influencers and the literature. This chapter provides the vignette which will then be subject to legal analysis in chapters seven and eight.

Chapter Seven: Influencer Liability

This chapter examines whether the influencer featured in the Pick Up Artist vignette is liable for the tortious sexual assault on Amelia. It proposes a duty of care and argues that the influencer is liable in negligence. The chapter also argues that Ross may be vicariously liable for the harm, because the relationship between Alex and Ross is akin to employment.

Chapter Eight: Collective Liability

This chapter explores routes to collective liability for the Pick Up Artist vignette, arguing that the fictional community is an unincorporated association. Thus, each member is jointly and severally liable for the torts with a close connection to the common purpose of that association. The chapter then examines collective criminal liability by statute, attribution, and delegation and the regulatory role of public nuisance.

Conclusion

Finally, the thesis concludes by demonstrating that its arguments are transferable across the Manosphere, and to upstream liability generally. It then discusses the original contribution the thesis has made to the literature, reflects on the project, and identifies avenues for further research.

Chapter One: What is the Manosphere?

Ging describes the Manosphere as an awkward confederacy of male-centric networks, subcultures, and forums.⁴² The Manosphere is predominantly made up of vulnerable young men,⁴³ who cluster into different communities and subcultures. Riberio identifies several 'classic' communities; MRAs who focus on male societal issues; PUAs who teach strategies to make men sexually successful; and the male separatist MGTOWs.⁴⁴ Finally there are Incels, united by rejection, despair, and misogynistic rage. Incels are the most famous Manosphere subculture due to their association with mass murder.⁴⁵

These groups are loosely affiliated and irreconcilably opposed. Geek and gaming subcultures have no affinity with 'TradCons' exalting traditional moral values in the same space. MRAs seek to change the world that PUAs wish to exploit, while MGTOWs wish to separate from it. Indeed, none of these groups have much in common with Incels.⁴⁶ Even if they can be amalgamated under the commonly accepted definition, it is outdated. Ging found that her conception of the Manosphere as made up of Incels, Tradcons, PUAs, MRAs, and MGTOWs had given way to a more expansive digital ecosystem.⁴⁷ The Manosphere is an evolving phenomenon that has experienced at least three transformations over the past two decades. Between 2006 and 2010, MRAs were the dominant group before being eclipsed by MGTOW. PUAs similarly declined during this period, although not to the same extent. The overall cycle is a dominant group rising, falling, and another taking its place.⁴⁸

This constant flux risks any definition of the Manosphere becoming obsolete. Lily suggested that the Manosphere is better conceptualised as its own universe, and each of its communities as a celestial body. When MRAs were the dominant group, the digital

⁴² Ging(n10) 644

⁴³ Matteo Botto, Lucas Gottzén, "Swallowing and spitting out the red pill: young men, vulnerability, and radicalization pathways in the manosphere," [2024] 33 JGS 596, 596, 604-606

⁴⁴ Manoel Ribeiro, Jeremy Blackburn, Emilian Cristofaro, "The Evolution of the Manosphere Across the Web" (15th PIAAIC, 2021) <https://ojs.aaai.org/index.php/ICWSM/article/view/18053>, accessed 01/08/2024)

⁴⁵ Ibid

⁴⁶ Ging(n10) 644

⁴⁷ Catherine Baker, Debbie Ging, Maja Brandt Andreassen, "Recommending Toxicity: The role of algorithmic recommender functions on YouTube Shorts and TikTok in promoting male supremacist influencers," [2024] ACDCU, <https://antibullyingcentre.ie/wp-content/uploads/2024/04/DCU-Toxicity-Full-Report.pdf> Accessed 1 Sep 2024,6

⁴⁸ Ribeiro(n44) 1, 7-8

universe could be imagined as filled with constellations concerned with male-centric issues.⁴⁹ But those stars have since cooled, and new ones have taken their place.⁵⁰ This conception of the Manosphere as an expansive, disparate, and chaotic space better captures its internal divisions and fluctuating evolution.⁵¹ But if the Manosphere eschews a conventional definition, what is it about these disparate and intractably opposed parts that justify a collective classification? The answer is that the Manosphere is a disparate but singular digital universe bound together by common forces.

Common Origins

Firstly, the Manosphere's origins can be traced to the Men's Movement complementing second-wave feminism, from which an antifeminist faction emerged.⁵² All Manosphere groups are descendants of that antifeminist faction.⁵³ Boyd and Sheehy characterised this faction by biological essentialism, misogyny, and narratives of male oppression.⁵⁴ The same characteristics are prevalent across the disunited communities of the Manosphere because the antifeminist faction is their mutual precursor.

Gotell compares the similarities between the Men's Movement and Manosphere's opposition to feminist activism against sexual violence.⁵⁵ Both groups argue that feminist law reform would be unduly sympathetic to victims, strip men of their due process rights, and give women the power to retroactively deem 'bad sex' non-consensual.⁵⁶ The Manosphere and the Men's Movement champion a shared narrative of male victimisation in which feminism is a ploy to undermine men. The Manosphere uncritically adopted the narratives of its precursor but shifted focus away from Fatherhood in favour of the perceived victimisation of young men.⁵⁷ Nevertheless the

⁴⁹ Mary Lily, 'The World is Not a Safe Place for Men': The Representational Politics of the Manosphere," (MA in Political Science, Faculty of Social Sciences University of Ottawa, 2016) 43-50

⁵⁰ Ribeiro(n44) 4

⁵¹ Lilly(n49) 43,50

⁵² Jie Lin, "Antifeminism Online MGTOW (Men Going Their Own Way): Ethnographic Perspectives Across Global Online and Offline Spaces," In Frömming U and others (Eds.), *Digital Environments: Ethnographic Perspectives Across Global Online and Offline Spaces* (Verlag, 2017) 80-83

⁵³ Shawn Valkenburgh, "She Thinks of Him as a Machine": On the Entanglements of Neoliberal Ideology and Misogynist Cybercrime" [2019] 5 SMS 3

⁵⁴ Boyd(n14) 5-7

⁵⁵ Gotell(n9) 66

⁵⁶ Ibid 68-75

⁵⁷ Ibid 72-74

narratives, characteristics, and objections to feminism of the Men's Movement persists within the Manosphere.⁵⁸

The Red Pill

Central to all Manosphere subcultures is the Red Pill worldview. The Red Pill is taken from the movie *The Matrix*,⁵⁹ in which humanity has been imprisoned in a simulation. The protagonist is invited to choose between a red and blue pill; to take the blue is to return to the simulation, while the red reveals reality for what it truly is. The Manosphere appropriates this motif to advance a narrative of male oppression. The Red Pill worldview asserts that feminism has structured society for the advancement of women.⁶⁰ Feminism maintains an illusion of female oppression to delude men into accepting this injustice.⁶¹ This 'Feminist Matrix' brainwashes men into subjugation. Only by taking the 'Red Pill' can this truth be revealed. This worldview unites the Manosphere through an unceasing narrative of gendered suffering. Its ideologically elastic principles are capable of uniting fundamentally opposed groups.⁶²

This has produced a shared lexicon. 'Red Pilled' and 'Blue Pilled' distinguish between those who accept the worldview and those who do not. Hierarchical gender relations are expressed in the language of 'Alpha' and 'Beta' males. Red Pill terminology further allows ideas to be covertly transmitted. 'Misandry,' which outsiders would interpret as prejudice against men, is used within the Manosphere to indicate a man-hating feminist order. However this isn't clear to the outsider looking in.⁶³ This occurs within the Manosphere's cultural activism. The hashtag #NotAllMen superficially argues that not all men are misogynistic. Within the Manosphere, it was covertly interpreted as discrediting feminism by 'disproving' patriarchy.⁶⁴ The Red Pill lexicon allows members of the Manosphere to signal to one another without alerting outsiders to their ideological positions. It is this common language that reveals the unifying influence of

⁵⁸ Ibid 66-67, 70-76

⁵⁹ Wachowski L, Wachowski L, *The Matrix* (1999) Warner Bros

⁶⁰ Rachel Schmitz, Emily Kazyak, "Masculinities in Cyberspace: An Analysis of Portrayals of Manhood in Men's Rights Activist Websites" [2016] 5 SocSci 1,9

⁶¹ Ibid 3-8, 10

⁶² Ging(n10) 644, 653

⁶³ Tracie Farrell and others, "Exploring Misogyny across the Manosphere in Reddit" [2019] Proceedings of the 10th ACM Conference on Web Science, 87 89-94

⁶⁴ Ibid 88

the Red Pill. Their lexicon requires shared ideological hegemons even if they are not interpreted consistently.

For instance, all Manosphere communities accept that castes of dominant alpha and servile beta males exist in human communities. Incels argue that this hierarchical gender structure is impermeable. Alpha males are born genetically superior, and women are biologically programmed to pursue them. Incels, genetically inferior men, will, therefore, always be denied sex.⁶⁵ PUAs, by contrast, challenge disenfranchised young men to escape 'beta male' status by learning how to become an 'alpha male.' The premise of PUA communities is irreconcilably opposed to that of Incels. Tradcons argue that feminist sexual liberation has allowed women to pursue alpha men. Thus, exists 'Alpha Widows', women so haunted by their experience of a 'superior lover,' they can never be satisfied with their 'beta husbands.'⁶⁶ This is said to be the leading cause of divorce and an impetus to prohibit pre-marital sex. A position which is fundamentally opposed to the hook-up culture embraced by PUAs. Conspiratorial MRA subcultures imagine conspiracies in which feminism is destroying alpha masculinity. The insult 'Soyboy' refers to a conspiracy in which the abundance of soy is said to be a plot to feminise men. But Incels and Pick Up Artists hold that women are naturally drawn to alpha men, and so the 'feminist matrix' is simultaneously destroying and lusting after 'alpha masculinity'. Each community operates on the same hegemon, but their interpretations are incompatible.

The Red Pill is not a consistent ideology but a binding force. It provides the lexicon and hegemons necessary to foster a collective identity. The Red Pill, claiming to be an inviolable truth, naturally distinguishes between those who have taken it and those who have not.⁶⁷ It is a unifying force, bringing order to this otherwise chaotic digital universe. Despite their differing shapes and properties, Manosphere subcultures share similar characteristics because they are bound by the same force. Specifically resistance, a

⁶⁵ Garth Stahl, Amanda Keddie, Ben Adams, "The manosphere goes to school: Problematizing Incel surveillance through affective boyhood" [2023] 55 366 367-369

⁶⁶ Ging(n10) 650

⁶⁷ Ann-Kathrin Rothermel, "The role of evidence-based misogyny in antifeminist online communities of the 'manosphere'" [2023] 10 BDS 1 2-5

shared view of women's nature, conspiratorialism, misogyny, and evolutionary psychology.⁶⁸

Resistance

The Red Pill imagines a reality in which men are oppressed by a common enemy. Unity is found, not in common agreement but opposition. This is a negative identity defined by its hostility to an external foe.⁶⁹ The Manosphere has no shared objectives and so all it can do is unite as a loose coalition against feminism.⁷⁰ Bratich and Banet-Weiser describe this as a manifestation of entitlement contrasted with failure. Those within the Manosphere often feel they have failed to achieve something they are entitled to. The Red Pill absorbs this sentiment and directs their rage towards an external force.⁷¹ The Red Pill awakens men to a world in which their failures are the fault of feminism, and so they become its perpetual victims. Thus, the Manosphere unites to resist its imagined oppressor.

The Red Pill rests on an implicit 'golden age' in which gender relations were in balance.⁷² This past age was usurped by feminism. There is no agreement on what the golden age was, when it occurred or whether it can be reclaimed. However, the substance of what has been lost is irrelevant.⁷³ It is the sensation of loss that unites the Manosphere.⁷⁴ This shared sense of loss justifies resisting feminism to reclaim what has been taken.⁷⁵ All Manosphere subcultures draw on narratives in which men and masculinity are diminished by feminist progress.⁷⁶ This shared sense of victimisation binds the Manosphere against a common enemy despite their internal disagreements.⁷⁷ The

⁶⁸ Michael Vallerger, Eileen Zurbruggen, "Hegemonic masculinities in the 'Manosphere' A thematic analysis of beliefs about men and women on The Red Pill and Incel," [2022] 22 ASIPP 602,609-616

⁶⁹ Nancy Leong, "Negative Identity" [2015] 88 CalLRev 1357 1388

⁷⁰ Ging(n10) 645

⁷¹ Jack Bratich, Sarah Banet-Weiser, "From Pick-Up Artists to Incels: Confidence, Games, Networked Misogyny, and the Failure of Neoliberalism" [2019] 13 IntlCJ 5003,5008-5012

⁷² Stephane Baele and others "From 'Incel' to 'Saint': Analyzing the violent worldview behind the 2018 Toronto attack," [2019] 33 TPV 77-96 90

⁷³ Ibid 13

⁷⁴ Ging(n10) 639-640

⁷⁵ Schmitz(n60) 2

⁷⁶ Rina Jame, "Take the Red Pill, Blame Feminism: Victimization Narratives Across the Manosphere" [2024] MM, <https://journals-sagepub-com.libproxy.york.ac.uk/doi/full/10.1177/1097184X241266209>, Accessed 01/07/2024

⁷⁷ Ibid 2-5

subcultures are united by a shared narrative of oppression, and so there must be an oppressor to resist.

This preoccupation with resistance commits the Manosphere to reducing the status of women. Under the Red Pill, women perpetuate an unjust society structured for their advancement. Society cannot be redeemed unless women lose their privileged position.⁷⁸ PUA techniques focus on reducing the status of women.⁷⁹ This principle underpins all PUA techniques. ‘Gaslighting’⁸⁰ involves sending mixed messages to make a woman feel confused and insecure so she can be propositioned for sex. ‘Negging’ involves paying backhanded compliments to undermine a woman’s self-esteem so she becomes appreciative of male attention.⁸¹ Each technique depends on reducing a woman to achieve sexual success. Similarly, MRA communities are concerned with advancing a narrative of male victimisation to delegitimise the struggles of women.⁸² This is done to justify undoing feminist accomplishments and reducing the legal status of women for the benefit of men.⁸³

Incel violence is concerned with incapacitating women to reduce their status.⁸⁴ Elliot Rodger, the perpetrator of the Isla Vista killings, hoped to ‘deliver a devastating blow’ that would shake women to ‘the core of their wicked hearts.’ Rodger fantasised about putting women in concentration camps because they represented a manifest injustice, and only by their eradication could the world be put right.⁸⁵ Incel violence is a means to reassert male power and exact retribution for feminist usurpation. Alek Minassian hoped the Toronto Van Attack would inspire further acts against women, with grandiose goals of a ‘Beta Uprising.’⁸⁶ Few Incels believe this to be realistic, but that is beside the

⁷⁸ Bratich(n71) 5006-5008

⁷⁹ Ibid 5012-5013

⁸⁰ This term also has a popular meaning

⁸¹ Ran Almog, Danny Kaplan, “The Nerd and His Discontent: The Seduction Community and the Logic of the Game as a Geeky Solution to the Challenges of Young Masculinity” [2015] 20 MM 27 34

⁸² Schmitz(n60) 10

⁸³ Gotell(n9) 73-73

⁸⁴ Bratich(n71) 5018

⁸⁵ Elliot Rodger, My Twisted World, 132-136, (School Shooters Info, 22/10/2014)

https://schoolshooters.info/sites/default/files/rodger_my_twisted_world.pdf, Accessed 01/11/2020

⁸⁶ Jacob Ware “Beta Uprising: Is there an Incel Threat to Asia?” (2021) 13 CTTA 10

point. Incel violence is motivated by the fantasy of reducing the status of women through bloodshed.

Women's Nature

Biological essentialism combines within the Red Pill to impart a collective view of women's nature, which castigates women as immoral, irrational creatures animalistically driven by biological imperatives. Women are said to seek sexual satisfaction from 'superior alpha men' and material security through marriage.⁸⁷ Manosphere communities believe in the 'dual mating hypothesis,' which suggests women will marry a 'beta' male for financial reasons whilst cheating on him with 'alphas' for sexual satisfaction. Chang explains this as an extension of the 'monstrous-feminine' trope, which emphasises the alleged monstrous and bestial qualities of women to justify restricting their autonomy.⁸⁸

That women's essential, primitive, and semi-autonomous nature can be predicted and exploited for sex drives PUAs.⁸⁹ The belief in 'Last Minute Resistance' suggests women will suddenly withdraw consent for fear of being thought of as promiscuous. However, she is not really saying no; rather, her resistance is an involuntary reflex. Her desires and opinions are irrelevant for she can be 'tamed' into compliance.⁹⁰ To MGTOWs, this view of women's nature means unrestrained women will naturally exploit men. Female-dominated society reflects women's nature by entrapping men as breadwinners and exploiting them.⁹¹ Thus, men must separate from women for their own protection.⁹²

Incels amplify the inhuman qualities of women to an extreme, envisioning them as 'femoids' who only resemble human beings. Incels agree that women instinctively pursue genetically superior 'alphas' and turn to 'betas' for financial security. But Incels are thought to be so inferior that they are excluded from the sexual hierarchy. This is blamed on women's malicious, inhuman nature, in which they sociopathically pursue biological impulses without regard for the men they hurt. This is illustrated by the

⁸⁷ Winnie Chang, "The monstrous-feminine in the Incel imagination" [2020] 22 FMS 1 6-10

⁸⁸ Ibid 3-4, 10

⁸⁹ Kaplan(n81) 88

⁹⁰ Ibid 37-38

⁹¹ Lin(n44) 78-90

⁹² Ibid 86-87

commonly held Incel belief in the ‘Dogpill’, which suggests women will have sex with large dogs. Chang argues that this belief is designed to portray women as so depraved that they are undeserving of human rights.⁹³ Incels agree that women are animalistic creatures who lack a fully human level of rational thinking. Incels simply do not accept that women’s inhuman nature can be manipulated and so see themselves as their victims.⁹⁴

These irrational, overly emotional, and bestial qualities of women reduce them to a semi-autonomous animalistic state. The paradox at the heart of all this is that women are simultaneously incapable of higher thought and a clique of master manipulators. Chang draws an explicit comparison to Nazism, which simultaneously portrayed Jews as weak, subhuman parasites and an existential threat to the Aryan world.⁹⁵ Nevertheless, this view of women’s nature has diffused across the entire Manosphere.

Conspiratorialism

The Manosphere embraces conspiratorialism to reconcile its ideological contradictions.⁹⁶ The Manosphere suggests that men are naturally individualistic, innovative, and self-reliant. When adherents fail to live up to these ideals, conspiratorialism is necessary to explain away their shortcomings.⁹⁷ Economic and personal suffering can instead be attributed to women.⁹⁸ Valkenburgh observed Manosphere communities arguing that the ‘flight of capital’ was the fault of feminism.⁹⁹ Feminism was said to enable widespread single motherhood as a means of ‘feminising’ boys into less desirable workers. Thus industry was left with no choice but to relocate and find new workers untouched by the corrupting influence of feminism. Scapegoating women and feminism reconciles the ideological inconsistency of the Red Pill and attributes any social ill to a single enemy.

⁹³ Chang(n87) 9-12

⁹⁴ Ibid 9-12

⁹⁵ Ibid 12

⁹⁶ Valkenburgh(n53)

⁹⁷ Ibid 9-10

⁹⁸ Bratich(n71) 5009-5018

⁹⁹ Valkenburgh(n53) 9

The Red Pill hijacks a Marxist worldview, casting men as an exploited underclass unaware of their oppression and women as a bourgeois exploiting their labour.¹⁰⁰ Instead of capital, women monopolise sex. A man can only escape sexual poverty by donating the fruits of his labour to a woman on unjust terms.¹⁰¹ The established view of women's nature within the Manosphere casts them as inhuman entities geared towards extracting a maximum of sexual and material profit.¹⁰² This in turn justifies retaliatory action.

The hijacked Marxist metaphor also explains the disunity of the Manosphere. It is easier to advance a narrative of unceasing oppression than a strategy to dismantle it.¹⁰³ As with Marx, consensus might exist on exploitative class dynamics, capitalist oppression, and a need to take action, but the nature of that action splinters the movement. Despite sharing a narrative and ideological heritage, a Marxist, Stalinist, and Democratic Socialist will find little common ground. The Red Pill, in hijacking a Marxist Metaphor, has inherited its disunity.

Conspiratorialism insulates the Manosphere against external and internal criticism. The worldview denigrates anyone who argues against it as a brainwashed victim. Adherents, by contrast, are virtuous men with the strength to see reality for what it truly is. Dissent is synonymous with weakness, delusion, and mindlessness. Consequently, Red Pill rhetoric spirals towards an echo chamber, for why even speak with those incapable of seeing through the grand illusion? Criticism from within these echo chambers is equally impossible, for to critique the worldview is to deny reality.¹⁰⁴ To challenge the tenets of the Red Pill is a signal that one has not truly embraced reality, and so should be dismissed.

The Red Pill further seeds division by convincing adherents that they, and they alone, see the world for how it truly is. The Red Pill's fixation on illusion teaches adherents they can trust only in their own perceptions and so should reject views based on anything

¹⁰⁰ Ibid 5

¹⁰¹ Ibid 6-9

¹⁰² Ibid 5-6

¹⁰³ Scott Aikin, "Deep Disagreement, the Dark Enlightenment, and the Rhetoric of the Red Pill" [2019] 36 JAP 420 430

¹⁰⁴ Ibid 424-428

else.¹⁰⁵ Activism for MRAs is essential to advance the interests of men but futile to separatist MGTOWs. Both accept the other is 'Red Pilled' to a point, but further divergencies can only be explained by delusion. Thus, each believes their solution is the only legitimate response. Constructive engagement beyond a basic opposition to feminism would go against the very conspiratorialism the Red Pill has imparted.

Defensive Misogyny

The centrality of misogyny to the Manosphere is explained by its online presence and unique relationship with feminism. Internet anonymity allows users to break with the civil and rational debate protocols necessary for offline interactions.¹⁰⁶ The internet's technical infrastructure enables the Manosphere's toxic behaviours. Moreover, the Manosphere's influence is concentrated on the internet, and so its power base would be lost if feminism was normalised online.¹⁰⁷ Thus, it can be characterised by existential threat.¹⁰⁸ Its extreme rhetoric is the natural product of a network which imagines itself to be in mortal peril from women and feminism. Thus, it generates a defensive hostility to guard against them both.

Dickel and Evolvi describe this phenomenon as networked misogyny through which the Manosphere reacts violently to feminist encroachment.¹⁰⁹ For example, during the #MeToo movement, Manosphere groups were observed claiming that those coming forward were unattractive and so were exacting revenge for being rejected. By characterising these women as undesirable and sexually frustrated, Manosphere adherents could downplay or dismiss the impact of sexual violence. Extreme Manosphere groups instead claimed that women enjoy rape, and so sexual violence is justified. Clusters of the Manosphere reacted defensively to feminist activism, forming an interconnected misogynistic response.¹¹⁰

¹⁰⁵ Ibid 431

¹⁰⁶ Debbie Ging, Eugeni Siapera, *Gender Hate Online* (SIP 2019) 2

¹⁰⁷ Ibid 284-303

¹⁰⁸ Ging(n106) 11

¹⁰⁹ Valerie Dickel, Giulia Evolvi, "Victims of feminism": exploring networked misogyny and #MeToo in the manosphere [2022] 23 FMS 1392

¹¹⁰ Ibid 1395-1405

This ‘defensive misogyny’ is both active and passive. It manifests actively as harassment campaigns intended to resist feminism through terror.¹¹¹ They troll, abuse, dox, threaten, manipulate photos, cyberstalk, hack, and otherwise harass the victim.¹¹² Of course these techniques are frequently used outside of, or indeed against, the Manosphere, but active misogyny is a deliberate strategy. These techniques dissolve the boundary between public and private abuse, allowing the perpetrators to strike deeply into the victim’s personal space.¹¹³ This makes the resulting humiliation a public spectacle, creating a chilling effect which deters women from engaging online. Passive defensive misogyny discourages women and feminists from engaging online via a general atmosphere of sexism.¹¹⁴ The Manosphere uses passive misogyny to reinforce biological essentialism, female submission, and male dominance to make the internet as hostile to women as possible.¹¹⁵ Wright observed this behaviour in MGTOW communities.¹¹⁶ Performative misogyny is used to demonstrate one’s commitment to male separatism, and so the community emits a steady stream of misogynistic ideals.¹¹⁷ This is true across the entire Manosphere, for the divided communities work in tandem to deter women from the internet.¹¹⁸ Passive and active misogyny is used to combat or deter women and feminism online to preserve the Manosphere’s digital influence.

Evolutionary Psychology

The Manosphere fixates on evolutionary psychology to assert the legitimacy of the Red Pill.¹¹⁹ For instance, the ‘dual mating hypothesis’ is modelled on the work of David Buss, although interpreted to imagine male victimisation as the inevitable result of women’s

¹¹¹ Ging(n106) 22

¹¹² Ging(n10) 524

¹¹³ Ging(n106) 27

¹¹⁴ Ibid 26-36

¹¹⁵ Jones(n15) 1914

¹¹⁶ Scott Wright, “The pussy ain’t worth it, bro’: assessing the discourse and structure of MGTOW,” [2020] 23 IntlCS 912

¹¹⁷ Jones(n15) 1904-1907

¹¹⁸ Ibid 1907

¹¹⁹ Valkenburgh(n53) 2-3

biology.¹²⁰ Bachaud and John identify a long history of evolutionary psychology being used for ideological purposes.¹²¹ However, it is ubiquitous in the Manosphere.¹²²

Valkenburgh suggest that this is a legitimate translation of the discipline, albeit expressed in crude language.¹²³ Bachaud and John disagree, suggesting the Manosphere misuses the discipline by conflating concepts, misrepresenting papers, and elevating theories into facts without evidence.¹²⁴ Nevertheless, the appeals to evolutionary psychology reveal it to be a fixation within the Manosphere. One which is used to rationalise pre-existing ideas and behaviour under a thin veneer of scientific legitimacy. Through evolutionary psychology, the Manosphere naturalises its ideals, justifies misogyny, and enshrines unequal gender relations as the unassailable natural order.¹²⁵ The Manosphere uses evolutionary psychology to assert its concepts as scientifically legitimate and justify its policy prescriptions.¹²⁶

Evolutionary psychology's storied antagonism with feminism further explains its role within the Manosphere. To O'Neil, feminism's aversion to biological essentialism sparked conflict with evolutionary psychology, which has gender essentialist tendencies.¹²⁷ For feminists, evolutionary psychology not only naturalises inequalities between men and women but implicitly supports oppressive power dynamics. The result of this conflict is that evolutionary psychology is largely devoid of feminist influence.¹²⁸ Thus, it is easier for the Manosphere to project its anti-feminist interpretations on the discipline.

¹²⁰ Ibid 7-9

¹²¹ Louis Bachaud, Sarah Johns, "The use and misuse of evolutionary psychology in online manosphere communities: The case of female mating strategies" [2023] 5 EHS, <https://www.cambridge.org/core/journals/evolutionary-human-sciences/article/use-and-misuse-of-evolutionary-psychology-in-online-manosphere-communities-the-case-of-female-mating-strategies/19522B41CF67DFF9F66D919E1F843CCC> Accessed 01/03/2024

¹²² Ibid 4-5 9-11

¹²³ Valkenburgh(n53) 8-9

¹²⁴ Bachaud(n123) 7-9

¹²⁵ Ibid 9-11, 16-17

¹²⁶ The naturalistic fallacy is a logical fallacy that assumes that something is morally desirable because it is natural.

¹²⁷ Rachel O'Neill, "Feminist Encounters with Evolutionary Psychology" [2015] 30 AFS 345, 345-346

¹²⁸ Ibid 347-349

Distinguishing the Manosphere

The Manosphere can be distinguished from other forms of antifeminism. For while the Manosphere advances similar narratives to the Men's Movement the nature of its antifeminism is different. The Men's Movement's antifeminism was rooted in its academic grounding in sex role theory.¹²⁹ Sex role theory originated within feminist scholarship but was later rejected, causing a rift within the Men's Movement and the emergence of an antifeminist faction.¹³⁰

The Manosphere's conflict with feminism is not based on a theoretical framework but a conspiracy theory in which all social ills are borne of a feminist matrix. The Men's Movement's criticisms of traditional masculinity have been abandoned. Where the Men's Movement initially rejected gender essentialism, the Red Pill embraces it to argue women's nature is intrinsically corrupt. Even when the antifeminist faction began to scapegoat women, it was done in the context of sex-role theory.¹³¹ The Men's Movement's antifeminism was grounded in its established theoretical framework; by contrast, the Manosphere is founded on a misogynistic conspiracy theory. In abandoning the theoretical framework of its precursor, the Manosphere has adopted a fundamentally different form of antifeminism.

The Manosphere's antifeminism is underpinned by misogyny; the theories of the Red Pill are an attempt to validate it. Nicholas and Agius suggested that users enter communities with pre-existing misogynistic beliefs and an implicit desire to return to a time in which men were dominant.¹³² The Red Pill rationalises pre-existing misogyny into a worldview in which male entitlement has been usurped by feminism. The Red Pill is a populist narrative designed to confirm the misogynistic beliefs of its user base and establish a 'truth' of male oppression to unite them against feminism. The Red Pill validates pre-existing biases around a lack of dating success, economic misfortunes, disenfranchisement, or any other failing which can be rationalised as the fault of

¹²⁹ Michael Messner, "The Limits of 'The Male Sex Role': An Analysis of the Men's Liberation and Men's Rights Movements' Discourse" [1998] 12 GS 255,256

¹³⁰ Ibid 258 262-263

¹³¹ Ibid 258-269

¹³² Lucy Nicholas, Christine Agius, *The Persistence of Global Masculinism : Discourse, Gender and Neo-Colonial Re-Articulations of Violence* (SIP, 2017)

women.¹³³ Misogyny is not imposed but intensified by the Red Pill, which strategically targets the anger, sexual frustration, and resentment of its user base. The Red Pill is a post hoc justification for antifeminism informed by misogyny above all else.

When compared to other antifeminist movements, the Manosphere is an outlier bearing only superficial similarities to its contemporaries. Chafetz and Dworkin suggest antifeminists are largely motivated by a sense of threat.¹³⁴ But no matter their time and place antifeminism has recurring attributes. Antifeminists stress patriotism, religion, and the central social role of women and the family.¹³⁵ The Manosphere is too divided for these traditional characteristics. Thus, it neglects the tenets of past antifeminism in favour of a conspiracy theory informed by misogyny. Other antifeminists see an enemy in feminism, not women, but the Manosphere has failed to draw this distinction.¹³⁶ Previous antifeminists opposed the perceived threat of feminism. The Manosphere opposes feminism because its true enemy is women.

Traditional Conservative Antifeminism

The Manosphere can be further distinguished from religious and conservative antifeminism, which leaves the 'TradCons' in something of a grey area.¹³⁷ Their accepted presence might indicate an overlap or affinity between the Manosphere and religious conservatives. However, despite their misleading name, Tradcons are far removed from religious and conservative antifeminism. They are a product of the Manosphere and no more compatible with religious and conservative antifeminism than the Manosphere itself.

There is a gulf between the Manosphere and religious and conservative antifeminism. Marshall analysed conservative and religious antifeminism from the anti-suffrage movement to the 'New Right' and concluded its defining characteristic was the protection of women.¹³⁸ The New Right opposed feminist law reform on the grounds it

¹³³ Ibid 32-36 49-52

¹³⁴ Janet Chafetz, Anthony Dworkin. "In the Face of Threat: Organized Antifeminism in Comparative Perspective" [1987] 1 GS 33,33-38,40-41,52-53

¹³⁵ Ibid 34,56

¹³⁶ Ging(n106) 2

¹³⁷ Ging(n10) 644-645

¹³⁸ Susan Marshall, "Who Speaks for American Women? The Future of Antifeminism," [1991] 515 TAAAPSS 50

posed a threat to the nuclear family. Their opposition to working women was tied into a wider narrative of employed mothers causing the moral decline of American youth.¹³⁹

The need to protect women and preserve traditional values is at the heart of conservative and religious antifeminism. This is not reflected in the Manosphere.

There are superficial similarities. Petchesky argued that conservative and religious antifeminism capitalises on feelings of insecurity and loss to establish a political base.¹⁴⁰ The Manosphere does the same but targets emotionally and sexually frustrated young men. The New Right used religion as a framework to justify its moral absolutism. The Red Pill is used in much the same vein. However, these superficial similarities reveal the incompatible lenses that these movements see the world through. The New Right galvanised voters to restore the centrality of religion to American life. The Manosphere largely ignores religion in favour of the Red Pill. Both associate feminism with hedonism and the moral downfall of society, but unlike the Manosphere's conspiratorialism, the New Right's objection was grounded in its anti-sex attitudes.¹⁴¹ The Manosphere is many things, but with Incel communities born of sexual frustration, Pick Up Artists championing promiscuity, and subcultures cherishing pornography, anti-sex is not one of them.

Conservative and religious antifeminism emerges as a response to specific policies.

Whereas the Manosphere has a principled objection to feminism. Indeed, feminists have allied with antifeminist conservatives on occasion against pornography and sex work. An alliance of convenience perhaps, but unthinkable in the Manosphere.¹⁴²

Moreover, conservative and religious antifeminism clearly distinguishes between women and feminism.¹⁴³ Himmelstein identified many in these circles supporting feminist reforms around equal pay and protection, only opposing policies which would challenge traditional gender roles.¹⁴⁴ Conservative and religious antifeminism opposes

¹³⁹ Ibid 52-56

¹⁴⁰ Rosalind Petchesky "Antiabortion, Antifeminism, and the Rise of the New Right" [1981] 7 FS, 206,207-208

¹⁴¹ Ibid 212,229-230

¹⁴² Robin West "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report." [1987] 12 AmBFoundResJ 681

¹⁴³ Jerome Himmelstein, "The Social Basis of Antifeminism: Religious Networks and Culture" [1986] 25 JSSR 1 7

¹⁴⁴ Ibid 10

feminism when it threatens traditional values; the Manosphere opposes it as a general rule.

Where conservative and religious antifeminism venerates and preserves the traditional role of women, the Manosphere demands their status be undermined for the benefit of men. For TradCons monogamy must be enforced because women's liberation allows them to become 'Alpha Widows.' Traditional values are a means to destroy the feminist matrix, and male authority is necessary because of women's corrupt nature.¹⁴⁵ The sociopathically corrupt and animalistic view of women's nature implies that men must take dominion over women for the greater good. This notion is not represented in conservative or religious antifeminism, which exalts the role of women as wives and mothers. For instance, conservative and religious antifeminist objections to domestic abuse shelters are not gender specific.¹⁴⁶ While the Manosphere objects to women's shelters for unjustly demonising men, they applaud those set up for male victims.¹⁴⁷ Conservative and religious antifeminists would be equally outraged; for a man to flee the home would be to evade his duties as a husband and father. Conservative and religious antifeminism does not enhance the status of men for its own sake. Antifeminism is one of many tools for conservatives to restore traditional values,¹⁴⁸ but it is the beginning and the end for the Manosphere.

The traditionalist view underpinning conservative and religious antifeminism does not bar these communities from misogyny. However, male supremacy is not embraced for its own sake but is a product of orthodox interpretations of scripture and traditional values. Although feminists argue that conservative and religious antifeminism is often a front for misogyny.¹⁴⁹ However, misogyny is not the explicit justification for conservative and religious antifeminists. The Manosphere, by contrast, is founded on an entrenched hostility to women. Antifeminist movements may emit misogyny, but it is intrinsic to the Manosphere.

¹⁴⁵ Lucy Nicholas, Christine Agius, *The Persistence of Global Masculinism: Discourse, Gender and Neo-Colonial Re-Articulations of Violence* (SIP, 2017) 40

¹⁴⁶ Petchesky(n140) 226

¹⁴⁷ Nicholas(n145) 51

¹⁴⁸ Petchesky(n140) 227

¹⁴⁹ Ibid 208-211,255,233

The Manosphere is detached from the history of conservative and religious antifeminism. Even as its members co-opt conservative and religious values for their own purposes. Tradcons might share a superficial devotion to marriage and motherhood with religious antifeminists, but their central worldview is the Red Pill. Feminism is not the enemy because it threatens traditional values but because of the oppressive conspiracy it is perceived to be. TradCon rhetoric does not align well with religious or conservative antifeminists, few of whom would argue 'Alpha Widows' are the leading cause of divorce. The core rationale of 'TradCon' communities is the Red Pill; thus, they are a product of the Manosphere, which itself is incompatible with conservative and religious antifeminism.

Conclusion

The Manosphere is a complex, fluid confederacy consisting of many communities, most of whom are irreconcilably opposed. These communities rise and fall in a digital universe that seldom remains static. The celestial bodies have little in common, fall in and out of alignment, rise and decline with their own trends, but are all subject to the same constant force: the Red Pill. Despite their differences, the Manosphere is bound by common origins and a shared worldview. This leads to the communities having common characteristics which transcend their disunity. What emerges from this is a distinct phenomenon with no real connection to past instances of antifeminism.

Chapter Two: Methodology

The Methodology

The thesis will explore the liabilities of the Manosphere through vignettes. Vignettes are compact sketches advanced to summarise themes, communicate findings, or otherwise enhance a research piece.¹⁵⁰ Their function is to create fictional environments.¹⁵¹ Their use within the thesis is informed by interdisciplinary trends, precedent within legal scholarship, and the association between law and narrative. They will be used to simulate environments, explore relevant issues, and test legal frameworks to produce a defensible legal argument with real-world applicability.

Each vignette will challenge principles of criminal and civil liability in line with the established behaviours of the Manosphere. Legal frameworks will be identified and applied to evaluate their ability to respond to the Manosphere.¹⁵² This will take the form of a defensible legal argument. If a vignette features A killing B because of C's influence, the analysis would argue C is liable as an accessory. If that argument is made out, accessory liability in crime may be a viable legal tool. To make defensible arguments the thesis will consider extending, stretching, or reinterpreting existing frameworks so that they apply to downstream harm. If this is needed, further doctrinal research will identify the policies and rationales behind the relevant legal principles.¹⁵³ This will be used to identify, and then justify, whether existing doctrines could and should stretch to online harm.

The thesis's use of vignettes to simulate behaviours is inspired by simulation methodologies. Simulations create small, simplified models for analysis, which, if tethered to the real-world, produce relevant worldly conclusions.¹⁵⁴ It is most effective when examining theoretical concepts, for the researcher can freely manipulate their simulation to test the versatility of abstract principles.¹⁵⁵ The thesis will use a vignette

¹⁵⁰ Margot Ely and others, *On Writing Qualitative Research* (Routledge, 1997) 70

¹⁵¹ Jessica Collett, Ellen Childs, "Minding the gap: Meaning, affect, and the potential shortcomings of vignettes," [2011] 40 SSR 513 513-514

¹⁵² Wing Chui, *Quantitative Legal Research, Research Methods for Law* (2nd edn, EUP, 2017)

¹⁵³ Graham Virgo, "Doctrinal legal research" in Peter Cane, Joanne Conaghan (ed) *The New Oxford Companion to Law* (OUP 2008)

¹⁵⁴ Nicholas Walliman, *Research Methods: The Basics* (Routledge, 2017) 7-11

¹⁵⁵ *Ibid* 12

methodology to create an environment in which principles of liability can be tested to their limit. These environments will consist of a chain of events which could plausibly challenge legal frameworks to produce widely applicable conclusions. The vignettes are a tool to construct effective legal arguments whilst demonstrating their premises to the reader.¹⁵⁶ This will allow the thesis to advance compelling legal arguments on whether existing legal tools are a viable means of curtailing downstream harm.

Methodology Justification

The thesis has drawn on the interdisciplinary use of vignettes. Within the social sciences, vignettes are frequently presented to participants to gauge their reactions and better understand or predict their behaviour.¹⁵⁷ Vignettes are a means to explore sensitive subjects, test theories, and construct environments to explore problems in depth.

Vignettes will allow for targeted discussion of the Manosphere without the drawbacks of empirical research. Vignettes create a distance between participant and subject, allowing detailed but safe discussions.¹⁵⁸ The thesis will benefit from a similar distance from the Manosphere. Empirical research, such as passively reading material, will be necessary to identify behavioural trends and construct plausible vignettes, but little else is needed. Direct empirical research would invite ethical issues, require the thesis to contend with ideological opposition to academia, and complicate the analysis. For example, there is a documented link between the Manosphere and the Far Right,¹⁵⁹ which has frustrated the proper labelling of Incel terrorists. Many are assumed to be Neo-Nazis or White Supremacists, whilst their misogynistic influences are overlooked.¹⁶⁰ An empirical methodology would result in the thesis spending more time justifying its research premises than conducting impactful legal analysis. The vignette

¹⁵⁶ Ibid 13-14 39

¹⁵⁷ Rhidian Hughes, "Considering the Vignette Technique and Its Application to a Study of Drug Injecting and HIV Risk and Safer Behaviour," [2001] 20 SHI 381

¹⁵⁸ Ibid 383-384

¹⁵⁹ Aaron Winter, *Online Hate: From the Far-Right to the 'Alt-Right' and from the Margins to the Mainstream* (Palgrave, 2019) 53-54

¹⁶⁰ Laura Bates, *Men Who Hate Women: From Incels to Pickup Artists* (SiSc, 2020)

methodology circumvents these concerns by creating a distance between the thesis and the Manosphere.¹⁶¹

Moreover, the thesis can explore relevant issues in depth whilst retaining creative control. Rossi and Alves used vignettes to examine fairness. They designed scenarios to invoke a sense of injustice and manipulated the facts to create less-than-realistic narratives to identify their participants' basic values.¹⁶² Thus, they could draw conclusions on what fairness meant to them. Within the thesis, vignettes will be used to create a malleable environment to engage and test legal principles. This will allow the thesis to identify which tools and principles should govern a practical legal response to downstream harm.

Furthermore, vignettes can engage with legal concepts. Vignettes are ideally suited to testing or confirming theories. They are an experimental method in which participants are immersed in fictional, but theoretically relevant, facts.¹⁶³ For instance, knowing how participants react to hypotheticals is a means of evaluating behavioural theories.¹⁶⁴ Vignettes are the ideal methodological tool for investigating the applicability of existing legal principles. The thesis can examine their effectiveness in hypothetical but plausible scenarios to come to defensible conclusions. Whereas case studies might not feature the issues necessary to fully explore a doctrine, they can be easily engaged in a vignette by incorporating those issues into the narrative. The methodology has been chosen because it benefits this analysis, the only major distinction is that the reader becomes the participant. They are invited to consider hypothetical situations and, if they find it compelling, agree with the thesis's analysis.

Legal Case Studies

The proposed methodology creates fictional case studies. Case study methodology involves the use of a specific set of facts to investigate a phenomenon.¹⁶⁵ By doing so

¹⁶¹ Ibid 384

¹⁶² Peter Rossi, Wayne Alves, "Rejoinder to Faia" [1980] 85 AJS 954

¹⁶³ Stephanie Eckerd and others, "On making experimental design choices: Discussions on the use and challenges of demand effects, incentives, deception, samples, and vignettes," [2020] 67 JO 261 262 268-269

¹⁶⁴ Ibid 268-269

¹⁶⁵ Pertti Alasuutari, Leonard Bickman, Julia Brannen, *The SAGE Handbook of Social Research Methods* (SAGE, 2008) 214

researchers come to appreciate a wider context than can be achieved through quantitative data gathering.¹⁶⁶ Maguire used vignettes to explore breach proceedings across jurisdictions. Vignettes were chosen because there were gaps in the literature which would have otherwise inhibited comparative research.¹⁶⁷ Maguire presented vignettes to judicial office holders to engage their decision-making.¹⁶⁸ Although participants were included, Maguire's use of vignettes served a specifically legal purpose because it could be inferred the participants would reach similar decisions on real-world facts.

Similar studies have also been done to research the sentencing practices of Magistrates Courts.¹⁶⁹ Hortsman presented vignettes to undergraduate students to understand public perceptions of sentencing security.¹⁷⁰ After reading the scenarios the participants were invited to give their thoughts on the appropriate sentence. This allowed the researchers to identify that these participants saw vignettes involving domestic abuse as less serious than non-domestic assaults. Yan and Lao presented vignettes to Chinese judges, and found that even if the facts were identical, female defendants received less harsh sentences for homicide.¹⁷¹ However, while these studies sought to understand a legal process, the thesis intends to use vignettes to analyse legal doctrine.

Vignettes feature in the functionalist approach to comparative legal research. For instance, comparative scholars might advance hypotheticals to explore how jurisdictions respond to issues.¹⁷² Say a scholar is comparing defamation in jurisdictions A and B but only A provides a statutory defence of honest opinion. Simply comparing their laws would suggest A provides the highest standard of protection. However, a functionally identical defence might be available under B's human rights framework. A comparative study concerned with defamation might neglect relevant legal mechanisms. Whereas assessing how jurisdiction B responds to hypotheticals

¹⁶⁶ Ibid 216

¹⁶⁷ Niamh Maguire and others, "Using vignette methodology to research the process of breach comparatively," [2015] 7 EurJP 241

¹⁶⁸ Ibid 242-243 255

¹⁶⁹ J Corkery, "Use of Vignettes in Sentencing Studies of English Magistrates" [1992] 20 Int'USocL 253

¹⁷⁰ Nicole Hortsman and others, "Sentencing Domestic Violence Offenders: A Vignette Study of Public Perceptions," 36 JIV 21

¹⁷¹ Shi Yan, Jiaqi Lao, Sex Disparities in Sentencing and Judges' Beliefs: A Vignette Approach [2002] 17 VO 597

¹⁷² Marieke Oderkerk, "The Need for a Methodological Framework for Comparative Legal Research: Sense and Nonsense of "Methodological Pluralism" [2015] 79 TRJCIIntPL 589 612

involving honest opinion would reveal them.¹⁷³ The proposed methodology builds on this, but rather than comparing jurisdictions, it will focus on how the law of England and Wales could respond to downstream harm.

Vignettes will maximise effective communication within the thesis. The story-like narratives of vignettes promote accessibility, allowing the reader to engage with and apply academic arguments.¹⁷⁴ The reader will understand the need for legal intervention, how the legal arguments would work in practice, and their effectiveness. Vignettes are a means to promote deeper engagement with the subject matter and demonstrate the strength of the thesis's conclusions. Through the vignettes, the thesis will ground the reader in a narrative to foster a deeper understanding of the key issues.¹⁷⁵

Within the thesis vignettes will facilitate a discussion of legal concepts. This is modelled on the constructivist use of case studies to assess the internal coherence of theories.¹⁷⁶ Vignettes allow researchers to apply theoretical principles to a set of facts to test their applicability.¹⁷⁷ Through fictionalised case studies, the thesis can accomplish the same whilst retaining creative control. Functionalist comparative research requires the researcher to understand how a system responds to a problem.¹⁷⁸ However, real-world case studies are specific to a context, which is not always conducive to this type of analysis.¹⁷⁹ Real-world case studies rarely conform to the requirements of comparative research and must be adapted.¹⁸⁰ For the analysis to be effective, the case study must stray from the facts to enable effective comparative research.¹⁸¹ Similarly, for the thesis, vignettes can be constructed on what is theoretically and legally relevant. The thesis departs more directly into fiction but the vignettes will still be based on established

¹⁷³ Ibid 613-615

¹⁷⁴ Pertti Alasuutari, Leonard Bickman, Julia Brannen, *The SAGE Handbook of Social Research Methods* (SAGE, 2008) 219

¹⁷⁵ Ibid 224

¹⁷⁶ Lisa Given, *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE, 2008) 70

¹⁷⁷ Ibid 68-70

¹⁷⁸ Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)," [1991] 39 *AJCL* 1 28-29

¹⁷⁹ Ibid 29

¹⁸⁰ Katerina Linos, "How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics," [2016] 109 *AJIntL* 375 485

¹⁸¹ Ibid 483

behaviours and real-world events. This will tether the vignettes to the “facts” to enable effective legal research.

Legal Academia

Vignettes have been used in legal scholarship. Hart used vignettes to critique the *Prevent Duty*, developing a narrative to highlight its discriminatory implementation.¹⁸² Similarly, this thesis will use vignettes to evaluate legal frameworks in the context of plausible online behaviours. However, Hart benefitted from extensive scholarly criticisms of *Prevent*, which his narratives could reinforce.¹⁸³ The thesis’s subject matter lacks such a bedrock in the literature, and so its arguments will need to be demonstrated through analysis.

Hart’s use of vignettes demonstrates how their communicative qualities translate into legal scholarship. Hart designed his vignettes as personalised narratives which would transmit complex ideas of race and inequality to white readers. His focus on the experiences of young Muslims provided the reader with a different perspective to convey a fuller context so they might better empathise with minority groups.¹⁸⁴ For the thesis, vignettes will provide the reader with a perspective from which to intuitively appreciate the harms of the Manosphere and engage with the legal arguments.

This use of vignettes is underpinned by the links between law and narrative. To Delgado, narratives have always been used to challenge misconceptions and show flaws in the legal regime.¹⁸⁵ To demonstrate, he crafts a vignette in which a black applicant is unfairly rejected by a university. He gives the applicant’s perspective to open a window into the experiences of marginalised groups.¹⁸⁶ Delgado’s narrative demonstrates racial issues to readers unable to experience them directly, by showing rather than telling them about it. Vignettes allow research to demonstrate arguments, navigate controversial issues, and communicate effectively.

¹⁸² Neil Hart, “Reimagining Prevent Duty in schools: how teachers can support students in their liberation from racialised narratives of radicalisation,” [2021] 40 EDI 180 180

¹⁸³ Ibid 191-194

¹⁸⁴ Ibid 181-185

¹⁸⁵ Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative.” [1989] 87 MichLRev 2411 2412-2413

¹⁸⁶ Ibid 2414

Through a vignette methodology, the thesis will explore sensitive issues. Delgado tailored his vignette to be relatable but non-confrontational and so argue systemic racism existed in universities without making the reader feel uncomfortable or attacked. Thus, they became more receptive to the argument. This thesis, which explores a controversial topic, will be able to do this more effectively through the vignette methodology. The arguments can be grounded in a context in which the reader is invited to engage their critical judgment and core values.¹⁸⁷ The vignettes will narratively demonstrate the harms of the Manosphere to the reader, so their critical judgment and core values prime them to be receptive to legal argument.

Indeed, the vignette methodology will enhance the impact of those legal arguments. Legal conclusions are not objective and so the thesis will produce defensible arguments on the applicability of existing legal tools.¹⁸⁸ The vignettes ground the reader in a context for those arguments to be effectively advanced. Singer provided his students with a narrative in which a factory exploited the trust of its workers and community for profit. A key group of students could not appreciate why the vignette posed moral questions and so did not engage with the arguments in favour of the workers. Singer concluded that the vignettes were so detached from his students' experiences that the victims became too abstract.¹⁸⁹ The vignette failed to draw them in, and so they could not fully appreciate the arguments being advanced.

He then developed a second vignette in which the law school arbitrarily decided to exploit its students for profit.¹⁹⁰ Once able to engage with the victims, the students were able to appreciate the arguments. Singer narrowed the gap between the student and the victim and forced them to see the world from a vulnerable perspective. He grounded them in a context where they became receptive to the arguments.¹⁹¹ The thesis will do the same, narrowing the gap between the reader and the downstream harms of the Manosphere. The reader will understand unfamiliar harms to appreciate why legal intervention is needed and so better engage with the arguments.

¹⁸⁷ Ibid 2414-2416, 2422-2425, 2441

¹⁸⁸ Joseph Singer "Persuasion" [1989] 87 MichLRev 2442, 2242-2443

¹⁸⁹ Ibid 2445-2449

¹⁹⁰ Ibid 2451-2452

¹⁹¹ Ibid 2454-2458

Constructing the Vignettes

Plausibility, that is, the connection to the “facts” is essential for the vignettes to have real-world application. Implausible vignettes produce untenable legal arguments. Moreover, implausible vignettes fail to provoke an intuitive response and cause participants to disengage.¹⁹² The thesis has chosen vignettes for their communicative ability and so implausibility must be avoided lest this be lost.¹⁹³

The thesis will ensure plausibility by designing composite vignettes. A composite vignette is an amalgamation of credible sources which is used to construct realistic but fictional narratives. Composites provide extensive creative control for the researcher whilst retaining plausibility.¹⁹⁴ To ensure the composites are plausible, the narrative must be grounded in the evidence available.¹⁹⁵ Thus, for the thesis, two principles will govern vignette construction.

Firstly, the narratives will be based on what has already been observed within the Manosphere. The thesis will have regard to the literature, past case studies, and material extracted from Manosphere communities. Secondly, the narrative can include reasonable extensions of what has already been observed within the Manosphere.

The first principle is designed to ensure the vignettes are tethered to reality. Only by drawing on the existing evidence can the thesis create a plausible simulation of the real-world. This was inspired by Maguire, who constructed vignettes to challenge legal procedures without straying into unreality.¹⁹⁶ Had they not been grounded in the evidence, the vignettes would not have been realistic enough for decision-makers to render relevant judgements.¹⁹⁷ For the thesis, relevant legal analysis requires an evidential tether to the real-world. Upstream liability must be explored in an environment the law could feasibly encounter.

¹⁹² Nicholas Jenkins and others, "Putting it in context: the use of vignettes in qualitative interviewing," [2010] 10 QR 175, 175-176, 186

¹⁹³ Ibid 180

¹⁹⁴ Nicola Spalding, Terry Phillips, "Exploring the Use of Vignettes: From Validity to Trustworthiness," [2007] 17 QHR 954

¹⁹⁵ Ibid 958-959

¹⁹⁶ Maguire(n166) 247

¹⁹⁷ Ibid 247-248

The second principle pragmatically circumvents gaps in the literature and allows plausible ventures into fiction. Manosphere communities have attracted very different degrees of scrutiny, so a clear evidential basis will not always be possible.¹⁹⁸ A reasonable extension will either be something that has been raised within the literature or justified within the thesis. For instance, the possibility that PUAs might inspire sexual offences.¹⁹⁹ In the absence of a real-world example, the thesis could analyse this behaviour as a reasonable extension. Why a behaviour is plausible will need to be argued, the relevant literature will need to be cited, and so the thesis must justify its proposed extensions. This will ensure that the tether between the vignettes and the real-world is not broken when the thesis goes beyond the existing evidence.

The two principles also counteract the risk of the thesis begging the question (in the strict sense of assuming the conclusion). Vignettes are a means to draw readers into a narrative, and so there is a risk of encoded bias.²⁰⁰ A reader might be swayed to accept undue punishment if the fictional perpetrator's behaviour is especially reprehensible. At this point, vignettes are not simulating environments but deceptively ushering the reader to a pre-determined conclusion irrespective of its academic coherence.

The two principles mitigate this risk by maintaining the tether between the vignettes and the real-world. Deceptively designed vignettes are invalidated by their untenable social reality.²⁰¹ Vignettes must be plausible if the conclusions are to have real-world application. For example, perpetrators within the vignettes should exhibit no more egregious behaviours than could be expected of comparable actors in the real-world. So long as evidence is required for these behaviours, the thesis cannot easily stray into deceptive unreality. Thus, the two principles create rules to ensure the vignettes are both plausible and less able to shepherd the reader to a predetermined conclusion.

Conclusion confirming behaviours are not confined to the content of the vignettes. Faia demonstrated this by imagining a survey in which participants selected between pre-

¹⁹⁸ Jones(n15) 1904

¹⁹⁹ O'Neil(n17) 91,96

²⁰⁰ Phil Langer, "The Research Vignette: Reflexive Writing as Interpretative Representation of Qualitative Inquiry—A Methodological Proposition," [2016] 22 QI 735, 741-742

²⁰¹ Michael Faia, "The Vagaries of the Vignette World: A Comment on Alves and Rossi." [1980] 85 AJS 951, 951-952

marital chastity, buggery, and bestiality. The most likely result would deceptively imply most Americans are in favour of chastity.²⁰² Vignettes based on extreme but isolated behaviours might be used to sway the reader into accepting a disproportionate response. Conclusion-confirming biases can be encoded within the structure of even plausible vignettes. The thesis excludes this possibility by communicating the process of vignette construction. If an audience is to be immersed in a narrative, they ought to have access to all its relevant information.²⁰³ A detailed understanding of how a narrative is crafted is necessary if participants are to draw legitimate conclusions.²⁰⁴ The thesis will provide the reader with the information necessary to understand the vignettes and the supporting evidence. Thus they can be satisfied the conclusions arise legitimately.

The thesis will transparently reflect on the vignette's construction to eliminate conclusion-confirming behaviours. Hart did the same by acknowledging his vignettes would reflect pre-existing bias by evaluating the narrative, explaining his decisions, and making it clear the vignette was inseparable from its author.²⁰⁵ Thus, the reader could take his bias into account. For the thesis, as the vignettes are advanced, they shall be justified. This justification will explain the rationale, core themes, and narrative decisions so the process is fully transparent to the reader. This, in turn, will enhance the quality of communication within the thesis.²⁰⁶ The reader is most concerned with whether a vignette can be trusted when using this methodology.²⁰⁷ Thus, explaining the plausibility of the vignettes provides the reader an opportunity to assess their trustworthiness and be confident in their honesty.

Doctrinal Research and Normative Standards

Once the vignettes are constructed, doctrinal analysis will be used to identify and evaluate the legal tools available. Narratives are ideal for evoking an intuitive response in which the reader understands why legal intervention is needed, but they do not make

²⁰² Ibid 952

²⁰³ Langer(n200) 742

²⁰⁴ Faia(n201) 953

²⁰⁵ Hart(n182) 190-191

²⁰⁶ Ibid 181,185

²⁰⁷ Spalding(n194) 958- 961

compelling arguments.²⁰⁸ That A harms B does not say anything about the law. The vignettes will create fictional environments for legal analysis which can identify whether existing legal tools capture A harming B. For this the doctrinal method will be deployed.

Doctrinal research is the identification, analysis, and evaluation of primary sources to extract general principles of law.²⁰⁹ Hutchinson describes it as the foundation to legal research.²¹⁰ The thesis will need to comprehend relevant legal frameworks before evaluating whether they apply to downstream harm. This should not be taken to imply there is objectivity within doctrinal analysis. Doctrinal research should be understood as an attempt to find legal coherence not certainty.²¹¹

Doctrinal research will be used to identify the legal issues relevant to each vignette. The next step will be to locate and evaluate primary sources to develop a systematic understanding of a legal tool, which can then be applied to the vignette. As existing doctrines may fall short, the thesis will then use secondary sources to identify the tool's context and underlying principles.²¹² Thus, it can advance a defensible argument that the law should be stretched, extended, or interpreted to capture the vignettes.

This defensible argument must be underpinned by some normative standard. Law is a disunited field with a multitude of overlapping theories.²¹³ It would be possible to select a theory and use it as a normative standard to evaluate the analysis. However, this risks tying the arguments to that theory. That a claim in tort is justified by, say, corrective justice does not mean it will apply in the real-world. To have real-world application, the thesis requires a broader normative standard.

The thesis draws from Duff's method of rational reconstruction. Rational reconstruction is the process of excavating a legal rule to identify the contexts, values, and goals according to which it is structured. Through this, the thesis can build an account of

²⁰⁸ Steven Winter, "The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning," [1989] 87 MichLRev 2225,2228,2259,2266

²⁰⁹ Terry Hutchinson, "Doctrinal Research Researching the Jury," in Mandy Burton, Dawn Watkins (edt) *Research Methods in Law* (Routledge, 2013) 16

²¹⁰ Ibid 10

²¹¹ Ibid 13,19

²¹² Ibid 18-24

²¹³ David Plunkett and Daniel Wodak, "The Disunity of Legal Reality," [2022] 28 LT 235

what the law aspires to be.²¹⁴ Rational reconstruction will allow the thesis to use the internal principles of a legal tool as a normative standard.²¹⁵ For instance, if causation became a live issue, the thesis would explore its contexts, values, and goals. If the doctrine was concerned with holding those who cause harm liable, this would be a relevant normative standard. If its existing principles failed to hold those who cause downstream harm liable, the thesis could argue the law is falling short. Alternatively, if existing principles need to be stretched to achieve this goal, there is an implicit argument for doing so. This will allow the thesis to make a practical contribution to the literature. If a proposed extension to a doctrine is consistent with its underlying principles, it is more likely to be adopted. This would not be the end of the argument; the law may often fail to live up to its ideals. However, should a proposed extension be grounded in the case law and be internally consistent with the doctrine's internal values, there is a stronger argument for it to be adopted.

This approach accommodates the inherent normativity of the law. Law is a social construct and so naturally reflects human values.²¹⁶ All legal research is necessarily prescriptive.²¹⁷ The doctrinal method superficially resembles 'legal science' with scholars tracing precedent to procure statements of what the law is. It is wrong to imagine this as 'discovering law' because the law is neither value-neutral nor objective.²¹⁸ Thus, while the thesis will use rational reconstruction to identify an internal normative standard, these norms are not objective. Any statement of law implicitly calls for political power to be exercised to validate it.²¹⁹ This methodology should not be interpreted as an attempt to find 'legal truth' but to advance a coherent account of upstream liability.

The doctrinal method will also require the thesis to interpret primary sources.

Researchers inevitably bring their own biases and judgements to doctrinal analysis, and

²¹⁴ Andrew Duff, *The Realm of Criminal Law* (OUP, 2018) 4

²¹⁵ Ibid 5-6

²¹⁶ Edward Rubin, 'Law and the Methodology of Law' (1997) *WisLRev* 521,526-527

²¹⁷ Ibid 522-525

²¹⁸ Hutchinson(n209) 131

²¹⁹ Rubin(n216) 528-529

thus, this, too, is a normative process.²²⁰ Indeed, Bodig compares the study of law to theology, with both disciplines revolving around the ‘true meaning’ of a given text.²²¹ The ‘true meaning’ is almost always consistent with a theologian’s pre-existing positions.²²² Doctrinal analysis is an inherently normative process, which is true for even dogmatic approaches to the method.

To illustrate, Pandectism was a school of thought in 19th-century Germany which sought to construct a coherent system of private law grounded in Roman law.²²³ They held to the continuing validity of Roman law, conceiving of law as a self-contained system which could be understood exclusively through its texts.²²⁴ Yet even this strict approach could not escape normativity. Francesco suggests they awkwardly interpreted Roman law to incorporate classical concepts into modern legal systems.²²⁵ Gaius, a Roman jurist, was instrumental to the Pandectist understanding of ownership.²²⁶ Francesco uses academic and contemporary sources to suggest the Pandectist interpretation would have required Gaius to make serious analytical mistakes. Two readings of the same text, grounded in the evidence, came to incompatible conclusions. The dispute cannot be settled internally.²²⁷ How sources are interpreted, weighed, and properly integrated with modern legal systems are normative value judgments.

The thesis must account for these normative value judgments if the doctrinal method is to be effective. Scholars inevitably engage with external material to interpret the law.²²⁸ A researcher faced with an aberrant ruling may argue the case was decided incorrectly, restricted to its context, or otherwise appeal to values beyond the law. The credibility and validity of these normative appeals is determined by whether scholars adhere to

²²⁰ Matyas Bodig, 'Legal Doctrinal Scholarship and Interdisciplinary Engagement' (2015) 8 *ErasmusLRev* 43

²²¹ *Ibid* 46-47

²²² *Ibid* 46-47

²²³ Federica Furfaro, "The Connections between German Pandectist School and Italian Legal Culture at the End of XIX Century", in *Sources of Law and Legal Protection*, (EUT, 2012)

²²⁴ George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer International Publishing 2014) 292-293

²²⁵ Francesco Giglio, 'Pandectism and the Gaian Classification of Things' (2012) 62 *UTorontoLJ* 1, 10-11

²²⁶ *Ibid* 3-7

²²⁷ *Ibid* 12-19

²²⁸ Paul Chynoweth, "Legal research" in Andrew Knight, Les Ruddock (ed), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 30-32

convention. To Chynoweth, researchers must moderate their normative-doctrinal arguments with academic consensus.²²⁹ A doctrinal argument may be technically coherent but invalidated for being contrary to the rule of law, human rights, or other widely accepted standards.²³⁰ Thus, the thesis must ground its normative-doctrinal arguments in existing conventions.

Rational reconstruction is a means of doing precisely this. It is a means of revealing underlying legal values and structures inherent to a given doctrine.²³¹ This is what grounds the argument in the established convention. For instance, due process is an essential value to the criminal law. Thus, if an offence requires the defendant to prove he had no criminal purpose, it violates that principle and is an aberration.²³² Thus, any doctrinal argument invoking the offence, while technically possible, is aberrant. Despite the internal structure and values of aberrant frameworks, they are normatively unsound. Rational reconstruction inevitably takes account of the structures of a given doctrine and the law itself. Thus, commonly accepted standards and conventions will inevitably factor into the analysis. The methodology will reveal the principles and conventions baked into the structure of the law, and so they can be accounted for in normative argument to ensure coherent and credible conclusions.

To illustrate, say the thesis explores public nuisance as a means of curtailing the socially objectionable behaviours of Manosphere communities. As a result, it would explore the history of the tort and former common law crime alongside the relevant literature to identify its structures, values, norms. Say public nuisance is structured to restrict public harm. The question would be whether the fictional behaviour in the vignette is a public harm falling within the scope of the tort. If it is a public harm, and public nuisance is technically possible, there is a normative argument this type of downstream harm should be captured by the tort. Rational reconstruction is a means to identify the standards to determine whether an argument is possible, plausible, and desirable. This will strengthen the doctrinal methodology as accounting for normative

²²⁹ Ibid 30

²³⁰ Ibid 35

²³¹ Iean Leader-Elliot, "A Critical Reading of R.A Duff, 'Answering for Crime'" [2009] UALRP 5

²³² Ibid

systems is a means to expose the inner logic of the common law.²³³ Effective doctrinal methodology analyses the law and produces arguments which advocate for theoretically grounded prescriptions.²³⁴ The proposed methodology is intended to identify the inner logic of law and apply it to the doctrines considered. The thesis will create a normative foundation on which to ground any proposed extension and evaluate its conclusions' strength and coherence.

This will also benefit the thesis's potential impact. Doctrinal analysis must do more than merely identify and codify legal rules. Law is unclear, inconsistently applied, and sits in a context which cannot be ignored if legal research is to have real-world application.²³⁵ Merely identifying which legal rules could be engaged by the vignettes would not make for an effective contribution to the literature. Instead, the thesis seeks to evaluate the principles underpinning the law to explore whether existing doctrines are effective and produce defensible legal arguments. The proposed methodology will provide much greater insight into the law being discussed and strengthen its defensible arguments that a legal rule is or ought to be engaged.

There is a practical overlap. If a doctrine is inconsistent with a fundamental value of the law, it is unlikely to be extended by the Courts. For instance, there is no general theory of criminal vicarious liability, only anomalous exceptions.²³⁶ So, if the thesis is considering them, acknowledging that the exceptions are inconsistent with the wider criminal law would suggest the proposed extension is unlikely to be practically endorsed. The proposed methodology allows both normatively and practically justified conclusions, which could legitimately inform a real-world legal response to downstream harm. Rational reconstruction is a means to identify underlying normative standards to effectively conduct doctrinal research. Thus, the thesis is poised to make a significant contribution to the literature by coming to legally and normatively justified conclusions on how the law can and ought to respond to downstream harm.

²³³ Richard Posner, 'The Present Situation in Legal Scholarship' (1981) 90 Yale LJ 1113

²³⁴ Ibid 1113-1115

²³⁵ Martin Dixon, "A doctrinal approach to property law scholarship. Who cares and Why?" [2014] 3 PLRev 1, 3-4

²³⁶ See the chapter on Collective Liability under the subheading 'Collective Criminal Liability'

There are, however, a multitude of alternative normative frameworks which might underpin the analysis. So why use this model of rational reconstruction over any one of the alternatives? There is limited scope to justify this decision; entire dissertations could be written on why we should prefer one theory over another. To that end, the thesis will draw from Rawls's model of reflective equilibrium, which largely presupposes the normative framework.

Reflective equilibrium is the process of bringing normative judgements and theoretical considerations into balance, modifying either when necessary. It is a form of moral reasoning in which judgments are generated from initial beliefs and intuitions. Rawl's advanced this model when discussing justice as fairness which he traced to the social contract. To determine the core principles of the social contract, one must imagine what rational persons under a veil of ignorance would fundamentally agree to.²³⁷ This would be the initial situation and our theoretical consideration. The core principles determining social benefits and burdens are analogous to normative judgements. Each core principle must be rationally and philosophically justified, and to demonstrate, Rawls gives the example of no one being advantaged or disadvantaged by natural fortune.²³⁸ If this can be rationally argued, then we imagine it would merit fundamental agreement at the initial situation. It has become a core principle of the social contract, and our understanding of justice should conform accordingly. Thus, the theoretical consideration is modified to accommodate a normative judgment and bring the two into harmony.²³⁹ This is reflective equilibrium in practice.

The starting belief and intuition, or theoretical consideration, governs the resulting analysis and argument to generate harmonious conclusions. If the conclusions are not harmonious, either the theoretical consideration or the conclusion must be modified. If a theoretical consideration inevitably produces an absurd moral judgement, the theoretical consideration needs to be modified. Alternatively, an absurd moral judgment that can be separated from the theoretical consideration can be rejected. As a result, the concluding moral judgements will reflect the premises of the initial position and vice

²³⁷ John Rawls, *A Theory of Justice* (BeP, 2005) 5-12

²³⁸ Ibid 20-21

²³⁹ Ibid 17-20

versa.²⁴⁰ The process focuses on bringing the two into harmony rather than justifying the initial position.

The thesis will use a process of rational reconstruction to identify the underlying normative frameworks of legal doctrine and assess those against its legal conclusions. The theoretical considerations will be those underlying normative frameworks, which will be argued in accordance with the relevant literature and authority. For instance, a doctrine may operate under an essential principle, which means there should be no liability within the vignette. Thus, even if liability is technically possible, the analysis should conclude that it is normatively unsound. To illustrate, if a wide-ranging terrorism offence goes against the fundamental principles of criminal law, liability may be technically possible but is normatively unsound. Thus, the thesis should reject this; it would be a viable, but perhaps undesirable, legal tool for responding to downstream harm. In doing so, the thesis's conclusion is harmonious with its theoretical considerations.

This presupposes that these theoretical considerations are present within the law and can be identified through rational reconstruction. This will not be addressed as the focus is bringing those theoretical considerations into harmony with any relevant conclusions. This is undeniably circular. This method justifies deductive inferences by their compliance with general rules, which are then justified by their own conformity to valid inferences.²⁴¹ Using reflective equilibrium within the thesis makes this circulatory inevitable. Doctrinal arguments will be rationally argued and justified by a presupposed framework. Thus, the thesis can focus on impactful legal analysis rather than dedicating extensive time and resources to justifying its theoretical premises.

The interplay between the vignette and doctrinal methodologies is intended to mitigate their respective drawbacks and produce stronger overall conclusions. Hutchinson partially inspired this approach; suggesting doctrinal research could be combined with interdisciplinary methodologies to enhance legal argument.²⁴² All doctrinal research can do is create a defensible legal argument, combining this with other methods

²⁴⁰ Ibid 20

²⁴¹ Nelson Goodman, *Fact, Fiction, and Forecast* (HUP, 4th edn, 1983) 63-64

²⁴² Hutchinson(n218) 130-133

however allows the researcher to fully justify it.²⁴³ Within the thesis the doctrinal method will be used to develop effective legal arguments. How this argument should be applied, who would benefit, and why it should be adopted can all be illustrated through the vignettes. The vignette methodology allows the thesis to demonstrate the strength of its arguments directly to the reader.

This interplay will further enhance the plausibility and applicability of the vignettes. Hutchinson argues an effective doctrinal argument depends on a bedrock of evidence upon which a legal conclusion can be drawn.²⁴⁴ Primary and secondary legal sources will be essential for the thesis's legal claims. The sources applied to the vignettes will be taken from the real-world, thus the thesis will ground the theoretical and normative discussion in existing legal reality. In infusing the vignettes with doctrinal methodology the thesis further enhances their plausibility and applicability. Allowing for stronger doctrinal argument which can be easily transposed into the real-world.

²⁴³ Ibid 133

²⁴⁴ Ibid 135

Chapter Three: The Incel Vignette

September 2021

Tom is 18 and beginning his first year of study at Heaton University. This is his first chance to live alone and put a difficult experience at high school and college behind him. Tom suffers from social anxiety, feelings of depression, and struggles to form relationships. His anxiety is pronounced around women, and he has difficulty speaking to them. Despite encouragement, Tom has not sought support.

Tom signs up for welcome events during his first week at university. Despite considerable anxiety, he forces himself to attend. He can interact with others but is visibly uncomfortable. His inability to speak around women proves insurmountable, and he feels that speaking with a girl he's interested in is impossible. Tom fails to make friends or find a partner and abandons the effort. He instead turns to video games. However, he begins to feel lonely and turns to the internet for advice. He is drawn to the forum */IntrovertedDating*, in the hope that it will help him find a girlfriend.

November 2021

Tom interacts with Eleanor. He researches her on social media, develops a crush, and consults */IntrovertedDating*. Several commentators suggest he approach Eleanor and ask her out which Tom makes plans to do. In-person, his anxiety grows, and he is unable to speak with her. Eventually, Eleanor posts pictures online of herself with another student, whom Tom assumes to be her boyfriend. He researches the other student, a boisterous athlete, and posts about his crush choosing someone else. Tom ends up arguing with a small minority who joke that Eleanor must have been out of his league.

January 2022

Tom's feelings of isolation and depression do not improve. He becomes reclusive, and his academic attendance slips dramatically. He ignores emails, deadlines, and refuses to seek help for his mental health. Eventually, he decides to return home. There, he feels more isolated than ever before.

February 2022

Tom looks for others who feel like they will never get anywhere socially or romantically and discovers the forum /AlwaysAlone. This is a community of people who struggle to find partners but unite around their shared sense of social isolation. Tom uses the forum to post about his struggles, his inability to date Eleanor, and his fear of being alone forever.

March 2022

Tom notices comments implying his experiences were beyond his control. Eventually, Tom sends a message to the user, who is called Luke. Luke tells Tom that their social shortcomings are the result of their appearance. Luke describes women as attracted only to strong, handsome, athletic men called 'Chads'. Luke applies this to Tom's story about Eleanor, saying she completely ignored him in favour of a 'Chad.' Luke suggests taking the conversation to *Incel Brotherhood*.

Incel Brotherhood is a public but obscure forum of men who identify as Incels. Its rules, which are agreed by majority vote, require users be male, refrain from discussing romantic experiences, but do not prohibit hateful or violent content. Articles which are said to prove their worldview are listed as required reading on a page for new users. Tom becomes familiar with the Incel narrative.

April – August 2022

Tom begins to relate to the Incels. He embraces the idea his issues are due to factors he cannot change and uploads a post declaring himself as 'Blackpilled'.²⁴⁵ He becomes hostile and misogynistic. He exclusively refers to women as 'Foids',²⁴⁶ denounces their 'degeneracy' and considers gender equality to be a mistake. This is not out of the ordinary for the forum.

Tom's newfound perspective strains his relationship with his parents. With trouble at home Tom spends more time on *Incel Brotherhood* and develops a reputation for vitriolic posts. Tom's more extreme posts quickly rise to the top of the forum, gaining him significant notoriety and encouraging further escalations. Some, including Luke,

²⁴⁵ Someone who has embraced Incel ideology. Anda Iulia Solea, Lisa Sugiura, "Mainstreaming the Blackpill: Understanding the Incel Community on TikTok," [2023] 29 EurJCPR, 311, 314

²⁴⁶ Foid, Femoid, or other variations are a dehumanising reference to 'Female Humanoid'. See (n237)

post comments designed to incite Tom, with his angry reactions attracting more attention from the community.

August 2022

Tom fixates on Eleanor as emblematic of the problems inherent to women. He makes it clear he is talking about a real person. Tom mentions her again after another user invites everyone to imagine a world in which Incels were assigned girlfriends. He posts a detailed fantasy about how happy they could have been together. Others express similar desires, while most mock Tom for ‘coping.’²⁴⁷

In response, he posts a violent, sexually explicit description of what he wants to do to Eleanor for rejecting him. This rises to the front page of *Incel Brotherhood*, and many users encourage Tom to act on his feelings or suggest his fantasy does not go far enough. Tom’s reaction is to post more violent fantasies. His intended victims always feature Eleanor. As his fantasies become more detailed, some Incels suggest potential weapons, post maps, or describe ways Tom could evade the authorities.

October – November 2022

Tom is asked to leave the family home within two months. He posts about his life being ‘officially over.’ Tom’s online activity is sporadic over the next few weeks, but as the deadline nears, he posts another fantasy. A stabbing spree at Heaton University, which Tom claims is inspired by the advice given to him on *Incel Brotherhood*. Eleanor’s murder is the centrepiece but Tom hopes to find other victims as well.

The comment thread plays out as follows:

Tom: Who’s ready for the next rebellion? No more LDAR²⁴⁸ it! Go ER²⁴⁹; put those sluts in their place.

Luke: Got it planned out?

²⁴⁷ “Cope,” or similar variations are used to mock the user by suggesting they are refusing to accept reality. Sparks(n287)

²⁴⁸ “Lay Down and Rot,” See (n287)

²⁴⁹ ER: Going Elliot Rodger, Full Elliot Rodger, and similar variations refer to someone willing to commit an act of terror. Moonshot, Incels: A Guide to Symbols and Terminology [2020]

<https://moonshotteam.com/resource/Incels-a-guide-to-symbols-and-terminology/> accessed 10/08/2024, 14

Tom: Gotta do it now. Got the gear, got your maps, good to go.

Unknown 1: Dude's larping,²⁵⁰ sixth time he's said this and now's the time??!

Tom: Been thinking about it forever

Luke: Give that foid what's coming!

Unknown 2: Imagine her ugly fucking face...finally get to penetrate her tho²⁵¹

Luke: She might even wish she'd taken it the other way

Tom: Think she'll remember me?

Luke Why? You a 6ft Chad?²⁵²

Unknown 3: Stacy²⁵³ gets killed by a subhuman, that's gonna sting!

Tom: She'll have the rest of her life to think about it

Unknown 1: New Saint's²⁵⁴ gonna drop boys

Luke: Saint Tom!!

Unknown 1: Dude's been talking about this for months, he's not doing shit.

Tom: I'm getting my subhuman face remembered one way or another

Unknown 3: If you're gonna do it just do it already!

Luke: Just move quick, cops will be over this thread

Tom: Imagine being nicked before I even do it

Luke: #SaintTom!

²⁵⁰ Live Action Roleplaying

²⁵¹ Immaturity, dark humour, and a fixation on sex permeate Incel communities. Grace Sharkey, "Failure to Thrive: Incels, Boys, and Feminism," [2021] 36 CJMCS 37

²⁵² Chad, a hypersexualised and hypermasculine stereotypical man often modelled on the 'jock' archetype. Center for Countering Digital Hate "The Incelosphere: Exposing Pathways into Incel Communities and the harms they pose to women and children," [2022] <https://counterhate.com/research/incelosphere/> Accessed 12/08/2024, 29

²⁵³ Stacy, the female equivalent of a Chad, refers to a hypersexualised and hyperfeminine stereotypical women modelled on cheerleader archetypes. See (n251) 29

²⁵⁴ Saint, Supreme Gentleman, and similar titles are attached to discussions on Elliot Rodger and other Incel perpetrators. Hoffman(n4) 572

December 2022

Tom posts at midnight a few days later.

Tom: You guys are all right. Any of you at Heaton might want to sleep in tomorrow if you get me? #ER #DayOfRetribution #IncelRebellion

Many users celebrate this post, others consider it a joke, but a few, including Luke, comment several times in the hope of contacting Tom. Luke suggests the post be removed and attempts to delete his messages with Tom. No one contacts the authorities. The post remains on the front page of *Incel Brotherhood*.

That morning, Tom travels to Heaton University armed with several knives taken from the family home. At the Humanities building, he is unable to find Eleanor, so instead attacks students indiscriminately. Tom flees the building when he hears police sirens, having killed three people and wounded five. He is then pursued across the University grounds and arrested.

Eleanor was in a different building altogether but is later informed that she was the intended target. She becomes aware of the violent fantasies written about her online and that a website was actively encouraging her murder. This causes her considerable emotional and psychological harm.

Justification

Hoffman, Ware, and Shapiro gave a wide-ranging overview of the Incel subculture and identified at least fifty fatalities flowing from Incel violence.²⁵⁵ Incels subscribe to an extreme version of the Red Pill, the 'Black Pill,' in which society is stratified by one's level of attractiveness. Incels believe they are at the bottom of that immutable hierarchy, destined to be ignored, bullied, and deprived of love. It is underpinned by an impulse to fight back and so is necessarily violent.²⁵⁶ Thus, the community was selected for a vignette featuring a mass-casualty attack.

Tom was designed to capture the archetypical Incel, so the resulting analysis would be plausible. Most Incels are young, heterosexual men with no meaningful prior romantic

²⁵⁵ Hoffman(n4) 572 565-587

²⁵⁶ Ibid 568

experience,²⁵⁷ which was the starting point for Tom's characterisation. Incels suffer disproportionately from depression, anxiety, autism, and suicidal ideation.²⁵⁸ The majority of Incels are young white men.²⁵⁹ All of which informed Tom's creation as a young man with self-reported anxiety and no prior romantic or sexual experiences. The work of the Radicalisation Awareness Network informed his social difficulties. They found Incel narratives to be attractive to young men with a social skills deficit, which causes them to feel powerless, frustrated, and isolated.²⁶⁰ There is evidence of an overrepresentation of autistic spectrum disorders in Incel communities, but this was not so overwhelming as to include it within the vignette. Instead, Tom was characterised by feelings of anxiety and depression and a general inability to navigate social situations. His attempts to meet women, */IntrovertedDating* being a generic dating forum to this effect, are undermined by his social skills deficit. This leads to his feelings of isolation, alienation, and, eventually, anger.

The forum */AlwaysAlone* was modelled on the existing subreddit r/ForeverAlone, a community for people who cannot find a partner. This can cause members to exhibit toxic behaviours,²⁶¹ which is reminiscent of Incel communities, although Incel discourse is prohibited.²⁶² r/ForeverAlone is colloquially described as Incel-adjacent; it has an overlap with extreme communities but does not promote 'blackpill' thought.²⁶³

To create a fictional simulation of the subreddit, the thesis identified the most popular posts using Reddit's upvote mechanism. This allows users to upvote or downvote posts, with the most popular rising to the top. The thesis analysed the most popular content by

²⁵⁷ Ibid 566-5688

²⁵⁸ Allysa Czerwisny, "Misogynist Incels gone mainstream: A critical review of the current directions in Incel-focused research," [2024] 20 CMC 196

²⁵⁹ Ibid 215-217

²⁶⁰ Radicalisation Awareness Network, "The Incel Phenomenon: Exploring Internal and External Issues Around Involuntary Celibates: Conclusion Paper", Page 4-6 https://ec.europa.eu/home-affairs/system/files/2021-08/ran_cn_incel_phenomenon_20210803_en.pdf, Accessed 17/01/2022

²⁶¹ r/Forever Alone, 'About the Sub, Common Misconceptions, and an In-depth look at the Rules (Reddit, 2019) https://www.reddit.com/r/ForeverAlone/comments/byosqf/about_the_sub_common_misconceptions_and_an/ Accessed 21/11/2021

²⁶² r/ForeverAlone, 'Reminder this is not an Incel subreddit' (Reddit, 2019) https://www.reddit.com/r/ForeverAlone/comments/mhe1f8/reminder_this_is_not_an_incel_subreddit/, Accessed 21/11/2021

²⁶³ Arie Perliger, Catherine Stevens, and Eviane Leidig, "Mapping the Ideological Landscape of Extreme Misogyny," [2023] ICCT 14

week, month, and year to identify the characteristics of this community. This method of passive data collection is among the established methodologies for studying Reddit. It involves extracting and analysing Reddit posts as a form of natural data which is user-generated. This data can be collected without any direct contact with the community.²⁶⁴ Thus, the thesis selected r/ForeverAlone and examined the most upvoted posts, as these indicated a high level of community engagement. The posts selected had to be directly relevant to the community's purpose, which is to create a community for those doomed to be 'Forever Alone.' The most upvoted comments in those posts were also examined, as they were likely to reflect the sentiments of the wider community. Multiple posts were chosen to ensure a broad cross-section of the community was examined.²⁶⁵

Incel sentiment on r/ForeverAlone was evident in overlapping narratives and a wider sense of hopelessness and victimisation. One of the most upvoted posts featured a user describing his anger at being single despite his social status and high income. His failings were widely attributed to his looks or other factors beyond his control.²⁶⁶ The belief that women refuse to date users because of such factors is consistent across the subreddit.²⁶⁷ This echoes Incel narratives of attraction being genetically determined.²⁶⁸ There are outbursts of bitterness and frustration on r/ForeverAlone reminiscent of what is observed in Incel spaces.²⁶⁹ A popular post describing users missing out on teenage romance saw outraged commentors furious that they might have to settle for another man's 'leftovers'.²⁷⁰ Although users must refrain from escalating this into Incel talking points, these sentiments may lead users to adopt more extreme positions. This was

²⁶⁴ Ibid 455-460

²⁶⁵ Author Unknown, <https://www.reddit.com/r/ForeverAlone/> Accessed 21/11/2021

²⁶⁶ r/Forever Alone, "I am proof that having a successful career and a high social status will get you absolutely nowhere," (625 Votes, 97% Upvotes) https://www.reddit.com/r/ForeverAlone/comments/kuhyfe/i_am_proof_that_having_a_successful_career_and_a/, Accessed 27/09/2021

²⁶⁷ /Forever Alone: Are you thinking about getting a girlfriend someday? (233 Votes, 98% upvotes) https://www.reddit.com/r/ForeverAlone/comments/q2b06m/are_you_thinking_about_getting_a_girlfriend/ Accessed 18/10/2021

²⁶⁸ Lauren Menzie, "Stacys, Beckys, and Chads: the construction of femininity and hegemonic masculinity within Incel rhetoric," [2022] 13 PS 69,73-82

²⁶⁹ Simmon Cotte, "Incel (E)motives: Resentment, Shame and Revenge," [2021] 44 SCT 93, 103-106

²⁷⁰ /Forever Alone We missed out guys (369 votes, 96% upvotes) https://www.reddit.com/r/ForeverAlone/comments/q9jezj/we_missed_out_guys/, Accessed 30/09/2021

highlighted by Gillet and Suzor,²⁷¹ who describe r/ForeverAlone as part of a broader collection of Incel communities. The subreddit has continuously struggled with misogynistic behaviour and usually sees an influx of Incels whenever their alternative spaces are banned.²⁷² r/ForeverAlone is thought to be one of the first Incel subreddits, and it is from here the subculture grew.²⁷³ It is a starting point for a prospective Incel's journey into the subculture. Several Incel murderers were members of the subreddit before committing their crimes.²⁷⁴ This is replicated in the vignette by */AlwaysAlone* to create a plausible starting point for Tom's radicalisation.

Passivity was a key characteristic of r/ForeverAlone. Among the most popular posts involved a user lamenting that he never had the courage to speak with his crush and being heartbroken when she interacted with others. A significant number of other users reported being too anxious or awkward to approach a romantic interest.²⁷⁵ In similar posts, users believed that they never developed the interpersonal skills necessary to form social or romantic relationships.²⁷⁶ Passivity is a constant, with users being unable to initiate romantic social interactions. It is something to be celebrated when users overcome these barriers.²⁷⁷ Tom is placed in a similar position. He observes and desires Eleanor but cannot bring himself to speak with her. He becomes infatuated with a fantasy of her, upon whom he projects feelings and motives in line with his changing worldview.

²⁷¹ Rosalie Gillet, Nicolas Suzor, "Incels on Reddit: A study in social norms and decentralised moderation," [2022] 27 FM 6.
<https://firstmonday.org/ojs/index.php/fm/article/download/12575/10654#p9>, accessed 01/02/2023.

²⁷² Ibid

²⁷³ Joe Whittaker, William Costello, Andrew Thomas, "Predicting Harm Among Incels (Involuntary Celibates): The Roles of Mental Health, Ideological Belief and Social Networking" Commission for Countering Extremism [2024] 8

²⁷⁴ Gillet(n271)

²⁷⁵ r/Forever Alone, 'Had a crush on a girl in my college class, saw her laughing with some good looking dude today' (253 votes, 94% upvotes)
https://www.reddit.com/r/ForeverAlone/comments/q6pcx1/had_a_crush_on_a_girl_in_my_college_class_saw_her/, Accessed 30/09/2021

²⁷⁶ r/Forever Alone, 'If you didn't develop proper interpersonal skills in your childhood and early adolescence, form a peer group, experience basic adolescence experiences and diversify your social skills with them, you're going to struggle later on with finding friends, getting dating partners or finding a sex partner' (271 votes, 97% upvotes)
https://www.reddit.com/r/ForeverAlone/comments/pxuf5d/if_you_didnt_develop_proper_interpersonal_skills/ Accessed 30/09/2021

²⁷⁷ r/Forever Alone: I asked a girl out (466 votes, 99% upvotes)
https://www.reddit.com/r/ForeverAlone/comments/ps968i/i_asked_a_girl_out/, Accessed 10/11/2021

Tom being approached by an Incel was modelled on concerns raised by r/ForeverAlone users. One user reported receiving messages from someone trying to ‘convert’ them to Inceldom, and others described similar experiences.²⁷⁸ The extent of the problem is unknown, but there is a recognised risk. Luke was introduced to recruit Tom to a more extreme community, even using his posting history against him. This highlights Tom’s vulnerability and creates scope to explore the liabilities of those who radicalise vulnerable people.

User experiences on r/ForeverAlone influenced Tom’s lifestyle. A popular post referred to the “NEET” lifestyle²⁷⁹ and living with their parents into their early adulthood.²⁸⁰ The majority of commentators described being in the same position, which contributes to their social isolation.²⁸¹ Mascherini analogized NEETS to the Japanese ‘*hikikomori*’; atomised young people who live with their parents, have no friends, and spend their time almost exclusively online. Bratich and Weiser argue that this environment prompts young men into Inceldom, as to escape their isolation they reach out to any community that will accept them.²⁸² Their desire to be accepted and fears of resuming isolation then deter them from leaving and incentivise them to adopt extremist positions. By having Tom adopt the NEET lifestyle he plausibly became susceptible to radicalisation.

Radicalisation occurs on *Incel Brotherhood*, which is modelled on *Incels.is*; the largest Incel community on the visible internet. Members must be male and cannot discuss romantic experiences, but even hate speech is permitted so long as members do not harass one another. Rules can be changed by majority vote; for instance, users voted to allow discussions on experiences with sex workers.²⁸³ This degree of organisation is replicated in the vignette.

²⁷⁸ r/ForeverAlone: Incels are Taking Over (118 votes, 79% upvotes)
https://www.reddit.com/r/ForeverAlone/comments/7dfbn7/incels_are_taking_over/, Accessed 10/11/2021

²⁷⁹ NEET: Not in Education, Employment, or Training.

²⁸⁰ R/Forever Alone: The NEET experience (1.1k upvotes, 99%)
https://www.reddit.com/r/ForeverAlone/comments/k4juz3/the_neet_experience/, Accessed 12/11/2021

²⁸¹ Massimiliano Mascherini, ‘Origins and future of the concept of NEETs in the European policy agenda’ in Jacqueline O’Reiley, Janine Leschke, Renate Ortlieb, Martin Seelieb-Kaiser, Paola Villa (eds) *Youth Labor in Transition* (OUP 2018) 502-529

²⁸² Bratich(n71) 5016

²⁸³ Incels.Is, ‘Rules’ <https://incels.is/threads/rules-and-faq.799/>, Accessed 25/11/2021

A similar investigation of *Incels.is* was necessary to determine the key characteristics of this community. This methodology here was inspired by Subrahmanyama's research into online chatrooms in which a researcher passively monitored a chatroom to explore how teenagers understood sexuality.²⁸⁴ For instance, they identified a broad range of sexual topics being discussed, but the content revealed more than teenage preoccupations with sex. Rather many teenagers used the forum to express concerns about their developing bodies and express themselves.²⁸⁵ The researchers passively observed the material to draw conclusions about the characteristics of the site. Similarly, the thesis sought to identify prevalent trends and attitudes on *Incels.is*.

This was achieved by examining the 'must read' and 'Inceldom discussion' sections of the forum. Threads believed to be the most noteworthy, or essential to the Incel experience, are placed in the 'must read' section by moderators. In addition, this section features posts with the highest degree of community engagement. Content is placed in this section selectively, with 167 threads²⁸⁶ compared to the 189,000 on 'Inceldom Discussion'. Thus, the threads marked 'must read' were interpreted as representing prevalent attitudes and beliefs. Of course the views of the moderators are not necessarily reflective of the community, and so it is possible they are selecting content which conforms to their own biases. There was no evidence of this but the possibility could not be ignored. Thus, it was also necessary to consider the 'Inceldom Discussion' section, which is for general discussion and allows 'low effort' posts.

When analysing this section, the thesis focused on the number of replies to a thread. A high number of views suggested the post was popular, and the replies were examined to identify general attitudes. As Incel communities are hyperbolic,²⁸⁷ potential general attitudes were cross-referenced by analysing multiple posts. By looking for attitudes across multiple posts within a section, fringe attitudes could be detected and

²⁸⁴ Kaveri Subrahmanyam, Patricia M. Greenfield, Brendesha Tynes, "Constructing sexuality and identity in an online teen chat room," [2004] 25 ADP 651

²⁸⁵ Ibid 655-656, 658-659

²⁸⁶ At the time of the analysis

²⁸⁷ Brandon Sparks, Alexandra Zidenberg, Mark Olver, "Involuntary Celibacy: A Review of Incel Ideology and Experiences with Dating, Rejection, and Associated Mental Health and Emotional Sequelae," [2022] 24 CPRRep 731

disregarded. Thus what was identified were recurring general attitudes and themes, which could then be interpreted as key characteristics of *Incels.is*.

Among these key characteristics was dogmatic hopelessness, with users actively stifling one another's hopes and aspirations. For instance, a thread arguing Incels should marry teenagers and mould them into 'good wives' before they were 'used up.' Most users chastised the poster for having any hope of escaping Inceldom and clinging to such an unlikely fantasy.²⁸⁸ Another thread denounced therapy for brainwashing Incels into self-delusion.²⁸⁹ A blog post in the 'must read' section argued that the point of the Blackpill was for Incels to accept their inherent unlovability. The only logical response was to "lay down and rot," as all attempts at self-improvement are futile.²⁹⁰ This dogmatic hopelessness is reflected within the vignette, as seen by the reaction to Tom posting fantasies of a happy life with Eleanor. The community discourages Tom from seeking help or imagining things could get better whilst condoning or encouraging his violent outbursts.

The literature characterises Incel communities by extreme misogyny, which was evident in the analysis. The entire Manosphere has a proclivity for extreme misogyny.²⁹¹ This is at its most potent in Incel communities, which are overtly misogynistic spaces in which sexist attitudes flourish.²⁹² This was apparent on *Incels.is*. In one example, a user posted a (possibly fabricated) screenshot of a woman mocking ugly men whilst being cartoonishly cruel and invoking genetics to justify her prejudice. Despite acknowledging the potential forgery, many commentators took this as a justification to hate women because it was an accurate reflection of how they thought. This escalated into calls for her to be disfigured, murdered, raped, or forcibly prostituted to Incels.²⁹³ Another thread on 'virgin-shaming' argued women were to blame for sexual assault. In the comments,

²⁸⁸ Incels.Is, 'I'm afraid TPTB might raise the age of consent' (Views 1K, replies 11) <https://Incels.is/threads/im-afraid-tptb-might-raise-the-age-of-consent.325965/>, Accessed 27/11/2021

²⁸⁹ Incels. 'Cognitive Behavioural Therapy: Organized Self-Deception and the antithesis of the Blackpill' (Must Read, Views 6k, Replies 56) <https://Incels.is/threads/cognitive-behavioural-therapy-organized-self-deception-and-the-antithesis-of-the-blackpill.317381/>, Accessed 22/11/2021

²⁹⁰ Randy Thompson, 'Blog: Misconceptions About the Blackpill,' (Incels.Is, 31/08/2020) <https://Incel.blog/misconceptions-about-the-blackpill/>, Accessed 10/11/2022

²⁹¹ Ging(n10) 645

²⁹² Tirrell(n3) 2433-2434, 2439-2440

²⁹³ Incels.is, 'This is what every foid thinks about ugly men' (Must Read: Views 83K, Replies 278) <https://Incels.is/threads/this-is-what-every-foid-thinks-about-ugly-men.200913/>, Accessed 10/12/2021

users argued that women deserve to be raped, secretly enjoy it, and Incels should use it to escape virginity.²⁹⁴ On another thread, users suggested girls as young as twelve intentionally entice older men into sex because this is their ‘sexual prime.’²⁹⁵ A similar thread on women’s nature garnered unanimous consent on them being inherently corrupt.²⁹⁶ Extreme misogyny is constantly reinforced on *Incels.is*, and so too, its fictional counterpart *Incel Brotherhood*.

This extreme misogyny is accompanied by violent sentiment. The extreme misogyny of Incel communities dehumanises women to the point where violence against them becomes acceptable.²⁹⁷ The vignette then goes further, with users encouraging and contributing to Tom’s violent fantasies and suggesting how he might carry them out. This is a plausible extension of observations made in the literature. The Incel worldview naturally increases the likelihood of violence. This can be seen in their glorification of suicide, revenge attacks, and the veneration of Incel killers, who are labelled as ‘Saints.’ In the aftermath of those attacks, Incels encouraged more ‘Saints’ to commit mass murder, mass rape, acid attacks, and otherwise maximise suffering.²⁹⁸ Incel communities retroactively declare past mass shooters as saints, creating a pantheon of their terroristic heroes.²⁹⁹ Violent sentiment is especially pronounced *Incels.is*, which is the inspiration for *Incel Brotherhood*.³⁰⁰ Thus the widespread glorification of violence is modelled on the vignette.

It is plausible that those who glorify violence would encourage and support Tom to follow through with the stabbing attack. That they go to inform his planning is rooted in

²⁹⁴ Incels.is, ‘Virgin shaming causes way more rape, sexual assault and rape culture than slut shaming’ (Must Read: Views 11k, replies 102) <https://Incels.is/threads/virgin-shaming-causes-way-more-rape-sexual-assault-and-rape-culture-than-slut-shaming.275658/> Accessed 02/12/2021

²⁹⁵ Incels.is, ‘3/4 of IG stories of my female classmates are stories like this’ (Views 838, Replies 32) <https://Incels.is/threads/3-4-of-ig-stories-of-my-female-classmates-are-stories-like-this.328154/>, Accessed 30/11/2021

²⁹⁶ Incels.is, ‘Hypergamy is the expression of female narcissism’ (Views 724, replies 12) <https://Incels.is/threads/hypergamy-is-the-expression-of-female-narcissism.326854/> Accessed 13/12/2021

²⁹⁷ Chang(n87) 1-7,6-10

²⁹⁸ Baele(n63) 17,6,14-18

²⁹⁹ Hoffman(n4) 572

³⁰⁰ Emilla Lounela, Shane Murphy, “Incel Violence and Victimhood: Negotiating Inceldom in Online Discussions of the Plymouth Shooting,” [2024] 36 TPC 344, 355

Green's observations that Incel communities advocate for violence.³⁰¹ Thus when potential violence is presented to them, they will inevitably approve and advocate for it.³⁰² Thus it is plausible that when Tom presents *Incel Brotherhood* with a violent plan, they would lend their support.

Tom's stabbing spree was inspired by the real-world attacks of Elliot Rodger and Alek Minassian. That he warns *Incel Brotherhood* is consistent with the social media posts of Minassian prior to his attack.³⁰³ Tom is motivated by his desire to get revenge against those who rejected him, as were Rodger and Minassian, who respectively, described their attacks as the 'Day of Retribution',³⁰⁴ and a 'Beta Uprising'.³⁰⁵ Tom targets a specific person, reminiscent of Rodger planning to murder the girls in a nearby sorority house.³⁰⁶ The focus on Eleanor also aids the legal analysis as there is a specific victim capable of launching proceedings. Him uploading violent fantasies to *Incel Brotherhood* was also inspired by those of Rodger, who constructed extravagant fantasies about torturing and murdering those he despised.³⁰⁷

In another parallel to Rodger, Tom's plan is foiled immediately. Once his hopes of murdering Eleanor are extinguished, he murders bystanders at random. Rodger did the same once he failed to secure access to the sorority.³⁰⁸ Unlike Rodger, Tom survives the vignette for the benefit of the analysis which did not need to be complicated with the complexities of bringing claims against an estate. Other Incel murders, such as Alek

³⁰¹ Robert Green, Kurt Fowler, Allan Palombi, "The Black Pill Pipeline: A process-tracing analysis of the Incel's continuum of violent radicalization," [2023] Sexualities, <https://journals.sagepub.com/doi/abs/10.1177/13634607231169509>. Accessed 02/05/2024

³⁰² Ibid 4-5

³⁰³ Alexandra Ma, The Toronto van attack suspect warned of an 'Incel rebellion' on Facebook hours before the attack — here's what that means,' (Business Insider, 24/08/2018) <https://www.businessinsider.com/Incel-alex-minassian-toronto-van-attack-facebook-post-2018-4>, Accessed 10 Dec 2023

³⁰⁴ Rodger(n85) 102-104

³⁰⁵ Alek Minassian Police Interview, https://www.youtube.com/watch?v=VyHgtSy41VM&ab_channel=TheMobReporter, Accessed 20/11/2022

³⁰⁶ Ibid

³⁰⁷ Rodger(n85) 110,132-136

³⁰⁸ Author Unknown, 'Thwarted in his plan, California gunman improvised,' (CBS News, 25/05/2014) <https://www.cbsnews.com/news/thwarted-in-his-plan-california-gunman-improvised/>, Accessed 11/09/2024

Minassian, were arrested after their attacks.³⁰⁹ Consequently, it was plausible Alex would be captured and arrested after the stabbing attack.

Thus the vignette is a plausible simulation of Incel communities, behaviours, and potential harms. The narrative is grounded in the literature, real-world observations, and previous instances of Incel violence.

³⁰⁹ Anna Paperny, Toronto van attacker sentenced to life in prison, (Reuters, 2022) <https://www.reuters.com/world/americas/toronto-van-attacker-sentenced-life-prison-2022-06-13/>, accessed 13/06/2022

Chapter Four: Accessory Liability in Crime

This chapter will explore accessory liability via procurement.³¹⁰ Tom's stabbing attack has claimed three lives, so homicide is a natural starting point. However, the focus is that the attack was encouraged and incited³¹¹ by members of *Incel Brotherhood*. The question of upstream liability is whether they, too, are liable.

Murder and Manslaughter

In indictments,³¹² murder is defined as the unlawful killing of another reasonable creature in being³¹³ under the King's peace with malice aforethought.³¹⁴ The killing is 'unlawful' if it is done without legal justification or excuse, while killing itself means that the defendant caused the death via their act or omission.³¹⁵ A reasonable creature in being refers to a living human being, who will be afforded the protection of the King's Peace provided they are not killed in the heat of battle or rebellion.³¹⁶ In the contemporary period murder is commonly explained to juries as the unlawful killing of another person with the intention to either kill or cause the victim really serious harm.³¹⁷

On any murder charge, the jury is entitled to deliver an alternative verdict, finding the defendant guilty of manslaughter.³¹⁸ Manslaughter entails the unlawful killing of another creature in being without malice aforethought. The elements of manslaughter and murder are identical, save for the latter requiring intent. If there is any evidence that the killing occurred in circumstances amounting to manslaughter, the jury must be given the opportunity to consider it.³¹⁹

³¹⁰ There is potential inchoate liability under the Serious Crime Act 2007 however this does not address downstream harm.

³¹¹ This is a general, meaning non-legal, use of the world incitement. It is used here to describe the general fact pattern presented in the vignette not presume legal incitement in a criminal law setting. Incitement at common law was abolished in 2008.

³¹² Mark Lucraft HHJ (Edt), *Archbold Criminal Pleading Evidence and Practice* (SM, 24th Edn, 2024) 19-1

³¹³ This describes a person who is the victim of an offence against the person. The term was likely constructed to exclude 'strange and deformed births' in Archbold (n301) at 19-14, as confirmed in *A (Children)* [2001] Fam 147

³¹⁴ Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (First published 1628-1644, Forgotten Books, 2018)

³¹⁵ *Regina v Cato* [1976] 1 WLR 110 [116-117], Also see Archbold (n314) 19-5-19-6

³¹⁶ Ibid 19-15

³¹⁷ Judicial College, *Crown Court Compendium*, 2024 19-1

³¹⁸ Criminal Law Act 1967 s6(2)(a)

³¹⁹ *R v Mark Foster* [2007] EWCA Crim 2869; [2008] 1 WLR 1615 [38]

Tom voluntarily embarked on an unlawful course of conduct, which inflicted fatal injuries to three people. Three charges of murder arise from the vignette, with three alternative counts of manslaughter running alongside. The term homicide is used when discussing the offences together. There are also five wounded victims, for whom Tom could be charged with attempted murder,³²⁰

The question of upstream liability is concerned with members of *Incel Brotherhood* informing Tom's decision to kill. There is an instinct to say their contribution is so extensive that they should be criminally responsible. To Chiao, the root of criminal responsibility is a fusion of volition and desire.³²¹ Volitions are functional states by which physical action manifests; it is by a person's volition that they pull the trigger which fires the gun. If their desire, or desire state, is malicious, then this fuses with their volition to create criminal responsibility. This wrongful fusion creates a causal nexus between the defendant's action and the result, so they are rightfully called to account for it.

Members of *Incel Brotherhood* promote an inherently violent ideology, extreme misogyny, and incite Tom at every stage. They glorify mass murderers, celebrate violent fantasies, give unsolicited advice, and disparage Tom for being too cowardly to act. If the stabbing attack is a direct consequence of their incitement, have they not then played a role in killing the victims? Their volition is a key element of the causal chain, which inspires Tom to kill. If this were to fuse with some malicious or reckless desire, this ought to trigger criminal responsibility.

Neither *Incel Brotherhood* nor real-world Incel communities are monoliths but consist of multiple independent actors. The influence of the community is, in fact, the influence of multiple individuals acting independently. Each defendant would have a different level of involvement. Thus, this chapter differentiates by dividing them into four classes.

Class One: Personal Connection

Class One defendants have had extensive involvement with Tom to the point of establishing a personal relationship with him. Luke, a token of this class, knows Tom is

³²⁰ Criminal Attempts Act 1981 s1(1)

³²¹ Vincent Chiao, "Action and Agency in the Criminal Law" [2009] 15 LT 1 5-7

real and engages in a pattern of behaviour designed to encourage violence. He tells Tom to “*give that foid what’s coming!*” and declares him “*Saint Tom*” for his murderous ambitions. It is unclear how close the two are, but even if they never meet, Luke is aware of Tom as a person and how he presents on the forum. Luke will have some ability to gauge how Tom will react to his behaviours and draw conclusions on the likelihood of him following through. Luke is unlikely to be the only defendant in this class, but the character illustrates the extensive involvement necessary to fall within it. To that end, this is likely to be the most limited category with the smallest number of defendants.

Class Two: Highly Contributing Members

Class Two defendants are significantly involved but lack a personal relationship with Tom. They are aware of him as a ‘vitriolic’ online presence, interact with him frequently, and have some understanding of his history on the forum. This class might include those who suggested ‘potential weapons’, uploaded maps of ‘attack locations’ or described how Tom might evade the authorities. It might also extend to those who deliberately incited or egged Tom on as he grew increasingly unstable. While many members of the site engage in these behaviours, those in Class Two do so habitually but without the personal connection necessary to fall within Class One. As extensive involvement is still required. This is likely to be a restricted class.

Class Three: Active Members

Class Three defendants incite, aid, and encourage Tom but do not do so habitually. Many may not be entirely convinced that Tom is genuine, and accuse him of ‘larping’ or otherwise not being serious. Nevertheless, they play a crucial role in informing Tom’s decision to kill. For instance, by encouraging him to act on his ‘violent and sexually explicit’ fantasies about Eleanor or by expressing glee that Tom will ‘finally get to penetrate’ and kill a ‘Stacey.’ Others might tell Tom to ‘just do it already’ or advise he ‘move quick’ lest his plan be foiled. All of this is implied to have a significant impact on bringing about the stabbing attack. Members of this class are not restricted to only interacting with Tom once; they may act whenever the opportunity presents itself. So long as these behaviours are not done habitually, a defendant would fall within this class. Class Three captures the widest range of conduct and thus may be quite large.

Class Four: Passive Members

Class Four Defendants passively watch events unfold, influencing them indirectly. It includes those who upvote Tom's posts, like his comments, and spectate as he deteriorates. Some may interact with Tom directly, perhaps by recommending Incel literature or endorsing violence in the abstract, but this is limited. Nevertheless, these members play an important role. By upvoting Tom's extreme posts, they reward him with attention and engagement, creating a feedback loop that encourages Tom to escalate these behaviours. This pattern of escalation culminates in the stabbing attack, and so Class Four Defendants make important, albeit not extensive, contributions. This is likely to be a large class, encompassing any member of *Incel Brotherhood* who has even fleetingly interacted with Tom.

These classifications capture a set of 'logical spaces' rather than identifying a set number of fictional defendants. The classifications are intended to distinguish between the possible 'types' of defendants arising from the 'facts', taking a general description of their involvement into account. These generalisations would only extend so far; at trial, each defendant would be assessed on their own merits.

Accessory Liability

Members of *Incel Brotherhood* of all classes play a key causal role in bringing about the offence. But for their influence and incitement, the stabbing attack would not have occurred. It is plausible that this could be the foundation of homicide charges; criminal liability is not confined to the person who wields the knife or pulls the trigger. In *Bentley*,³²² Bentley and Craig were convicted of murder for killing a police officer during a burglary. The incident occurred after the police arrived, having already arrested Bentley, at which point they engaged in a standoff with Craig. Bentley shouted, "Let him have it," whereupon Craig opened fire, killing a police officer in the process. At trial, the Crown contended that Bentley had incited and influenced Craig to fire and so should be equally responsible for the death. Intention to kill was established constructively, although that doctrine has been abolished.³²³ Nevertheless in principle, someone who incites and influences another to act can be held liable for the consequences.

³²² *R v Derek William Bentley* [2001] 1 CrAppR 21

³²³ Homicide Act 1957 s1(1)

Bentley was convicted under the doctrine of joint enterprise, also known as parasitic accessory liability.³²⁴ Or a primitive form of it, as it was not formally stated by the Privy Council until 1985.³²⁵ Nevertheless *Bentley*, is still of use to the analysis. Dyson suggests that the idea that an accomplice is liable for all crimes which are a natural and probable consequence of their complicity, has deep roots in the common law. The logic being that all crimes falling within a single overarching plan, could be attributed to the parties undertaking that plan.³²⁶ The doctrine was firmly established by the time of *Bentley*, although the case occurred whilst the modern criminal law was attempting to identify its proper limits.³²⁷ As a result, while parasitic accessory liability has been abolished,³²⁸ *Bentley* is still useful for illustrating that accessory liability ought to arise, when A influences B to harm C.

Following the abolition of parasitic accessory liability, complicity is the only gateway to accessorial liability in crime.³²⁹ This can be established through Section 8 of the Accessories and Abettors Act 1861,³³⁰ and, for the summary jurisdiction, Section 44 of the Magistrates Court Act 1980.³³¹ To be liable an accessory must aid, abet, counsel, or procure the commission of an offence.³³² Indeed the accessory who aids, abets, counsels or procures the commission of an offence may be tried, indicted, and punished as a principal offender.³³³

Thus accessory liability is channelled through the statutory language of aid, abet, counsel, or procure.³³⁴ Each word is defined according to its ordinary meaning, and establishes a separate strand of criminal liability.³³⁵ To aid an offence, the accessory must intentionally assist the principal. To abet an offence, the accessory must

³²⁴ Archbold(n312) 18-6

³²⁵ *Chan Wing-siu v The Queen* [1985] AC 168

³²⁶ Matthew Dyson “The Queen v C, D, and E: in the Supreme Court of Ruritania,” in Beatrice Krebs (edt) *Accessorial Liability after Jogee* (BP, 2020) 141-142

³²⁷ Matthew Dyson, 'The Future of Joint-up Thinking: Living in a Post-Accessory Liability World' (2015) 79 J Crim L 181, 183

³²⁸ *R v Jogee* [2016] UKSC 8; [2016] 2 WLR P90 [87]

³²⁹ GR Sullivan, “Law Reform in the Supreme Court: The Abolition of Joint Enterprise Liability?,” in Beatrice Krebs (edts), *Accessorial Liability after Jogee*, (2020, Bloomsbury Publishing) 25-30

³³⁰ Accessories and Abettors Act 1861 s8

³³¹ Magistrates Courts Act 1980 s44

³³² Ibid

³³³ Accessories and Abettors Act(n330)

³³⁴ AP Simester, ‘Accessory Liability and Common Unlawful Purpose’, (2017) 133 LQRev 73,75

³³⁵ *Attorney-General's Reference* (No 1 of 1975) [1975] 3 WLR 11 [778]

intentionally encourage the principal.³³⁶ To Dyson, the contemporary criminal law focuses heavily on assisting and encouraging, and largely communicates accessory liability through these terms alone.³³⁷ Nevertheless, counselling and procuring remain separate strands of accessory liability.

To counsel, the accessory must intentionally advise, solicit, or persuade the principal to act.³³⁸ In cases of aiding, abetting, or counselling, there is no obligation on the Crown to prove that the accessory made a causal contribution to the commission of the offence. Instead, the Crown must prove that the accessory intentionally assisted, encouraged, or counselled the principal to commit the crime, or type of crime, that they went on to commit.³³⁹ So if A counsels B to kill C, but B would have done so anyway, A will not be excused by pleading that B would have committed the offence regardless.

This is not true for the remaining strand of accessory liability; procurement. The natural meaning of the word procure implies a causal connection.³⁴⁰ To illustrate, the defendants in *AG's Reference No 1 of 1975*³⁴¹ were charged with procuring drink driving by lacing the victim's drink with spirits, knowing he would be driving. The Court of Appeal found that procurement does not require a conspiracy or agreement between the procurer and the principal. Rather it defined 'procure' to mean produce by endeavour; meaning a defendant must set out to cause a criminal offence and take the appropriate steps to ensure it.³⁴² Thus, to be liable via procurement the accessory must intentionally bring about, or cause, the offence.

In addition the accessory must act with the necessary *mens rea*. This requirement differs depending on the nature of the offence. If the crime is one of basic intent, or rather does not require specific intent, then the rule is that the accessory must intentionally aid, abet, counsel, or procure the commission of an offence whilst knowing the context which makes it criminal.³⁴³ The accessory does not need to know

³³⁶ *Jogee* (n328) 95

³³⁷ Matthew Dyson, "The Contribution of Complicity," 2002 JCL 86 389, 398

³³⁸ *R v Calhaem* [1985] QB 808 813, *R v Luffman* [2008] EWCA Crim 1739; [2008] 7 WLUK 935 [36]

³³⁹ *Hussian, Fiaz and Carpenter v R* [2023] EWCA Crim 697 [84][87]

³⁴⁰ *R v Luffman* [2008] EWCA Crim 1739 [2008] 7 WLUK 935 [36]

³⁴¹ *Attorney-General's Reference (No 1)* [1975] 3 WLR 11

³⁴² *Ibid* [779]

³⁴³ *Jogee*(n328) [9]

specifically that the conduct amounts to a criminal offence, only the context which makes the act a criminal offence. For example, in *AG's Reference No 1* the defendants adulterated the principal's drink with alcohol as a practical joke, knowing they will be driving. They intended the act of adulterating the drink, and knew the ordinary and natural result of this would be him driving over the prescribed limit. This in context amounts to the criminal offence of drink driving, and so they could be convicted.³⁴⁴

To illustrate, say A sees B waving a burning torch near a wooden building. Upon seeing this A knows that B has possession of fire, that fire is dangerous, and that the building is flammable. Thus he knows that if B sets fire to the building it will be damaged. So if A deliberately shouts, 'burn it!' to B then he is intentionally encouraging B to set fire to the building. This, in context, amounts to arson.³⁴⁵ As a result, A could be charged as an accessory for abetting arson.

This focus on context means the accessory does not need to know the specific offence they may be encouraging or assisting. In *Maxwell*,³⁴⁶ the defendant was a member of the Ulster Defence Force, which was known for using firearms and bombs. He was told by the organisation to guide a number of strangers to an inn, whereupon they attempted to bomb it. The defendant was charged as an accessory to the bombing. The House of Lords found that to be convicted as an accessory the defendant must know the essential matters constituting the offence. The defendant, once told by his superiors in an organisation known for sectarian acts of violence with firearms and bombings, would have contemplated that the inn was likely to be targeted for such an attack.³⁴⁷ Thus by driving the principals to the location he was intentionally lending his assistance to the men, knowing they would commit an act of sectarian violence, even if he wasn't sure which one. Thus he knew the context which made their act criminal, and so could be properly convicted.³⁴⁸

The situation changes for crimes of specific intent. If the offence requires a specific mental state, then the accessory must intentionally aid, abet, counsel, or procure the

³⁴⁴ *Attorney-General's Reference* (n341) [780]

³⁴⁵ Criminal Damage Act 1971 s1(3)

³⁴⁶ *DPP of Northern Ireland v Maxwell* [1978] 1 WLR 1350

³⁴⁷ *Ibid* 148

³⁴⁸ *Ibid* 149

principal whilst intending the principal act with whatever mental element is necessary. So for murder, A must intentionally encourage B to act, whilst intending that B act with intent to kill or cause really serious harm.³⁴⁹ The standard is much higher for crimes of specific intent.

Accessory Liability: Intent

This higher standard of intent is problematic for the analysis, which is concerned with homicide offences; particularly murder. For crimes of specific intent, such as a murder, an accessory must intend the principal act with the mental element required of the primary offence.³⁵⁰ For murder, an accessory who does not intend the principal act with malice aforethought could only be convicted of procuring manslaughter.

Malice Aforethought

Malice aforethought means the defendant must intend to kill or cause really serious harm.³⁵¹ Within the vignette, Tom clearly intended to kill and so could be convicted of murder. However, it is not clear whether this is true for other members of *Incel Brotherhood*. That they caused Tom to act does not mean they intended the result, even if they had foreseen the harm.

Class One Defendants were in an ideal position to appreciate Tom's escalating instability and likelihood of offending. Luke, a token of this class, is so concerned about Tom's warning that he attempts to 'delete his old messages' and suggests 'the post be removed.' All of which is indicative, although not determinative, of him knowing Tom might be serious. Others in this class would be in a similar position. Their personal relationship, taken with their level of involvement, affords them a unique perspective from which to appreciate the risk.

Class Two Defendants have engaged in a similar pattern of prolonged engagement with Tom. A personal relationship might not be necessary to foresee that he might follow through. Those habitually interacting with him could observe his deterioration, his increasingly violent fantasies, and the reaffirmations that he is serious. There was

³⁴⁹ *Jogee*(n328) [10]

³⁵⁰ *Regina v Jogee* [2016] 2 WLR P90

³⁵¹ *Cunningham* [1982] AC 566

evidence of a genuine risk of violence, and so it is foreseeable that further encouragement could cause it to manifest.

Class Three Defendants encourage, incite, and persuade Tom to act on his stated intent. If Tom is serious, then there is a risk that doing this will cause him to follow through. However, these defendants will have less knowledge than those who engage with Tom habitually. Some do not know whether Tom is a fantasist, while others who have engaged with Tom more frequently may know him to be genuine. There is a spectrum of knowledge and so what is foreseeable will depend on their individual level of involvement.

Class Four Defendants are passive and so removed from events that it might be said they have no real appreciation of the risk. It is not impossible that some watched events unfold long enough to gauge the threat, but this is unlikely for the majority. To that end, barring exceptions, there is no real prospect of saying these defendants intended or foresaw the stabbing attack.

Oblique Intent

As a result, the majority of defendants appear to have some level of foresight, rather than intent. There are circumstances in which foresight can be taken as intent. In *Hyam*,³⁵² the Appellant set fire to her ex-lover's home with his wife and two children inside. She was convicted of murdering the children. Her conviction was upheld by the House of Lords, who gave three different reasons for doing so. To Lord Hailsham, a person who shuts their eyes to the truth cannot then say they did not know it. The Appellant knew the danger she was putting the home's occupants in, but continued all the same and so ought to be liable.³⁵³ Viscount Dilhorne drew the line earlier, arguing that a person should be taken to have intended the highly probable consequences of their actions.³⁵⁴ Lord Cross drew an analogy to terrorism, illustrating a scenario in which a terrorist planted a time bomb. The terrorist does not know whether anyone will be present when it explodes but can foresee the likely consequences if they are. His indifference should not excuse him, and so knowingly doing an act that will endanger

³⁵² *R v Hyam* [1975] AC 55

³⁵³ *Ibid* [65-79]

³⁵⁴ *Ibid* [79-96]

life should be taken as intent.³⁵⁵ These three competing decisions ushered in a prolonged period of uncertainty, and the rule has been continually reinterpreted.

In *Moloney*,³⁵⁶ the Appellant was convicted of murdering his stepfather with a shotgun. Both had been drinking heavily and the Appellant claimed he had no idea firing the gun would cause injury. Lord Bridge affirmed *Hyam* but concluded malice aforethought must be assessed on what the defendant must have known. The more likely a consequence is foreseeable, the more likely it was intended, but this is not definitive.³⁵⁷ As the Appellant genuinely had no idea his actions would injure his stepfather, his conviction for murder was substituted for manslaughter.³⁵⁸

This is an undeniable limitation for the vignette, for how many members of *Incel Brotherhood* would have known Tom would follow through? Perhaps most, but not all, Class One Defendants. A substantial number in Class Two. But for Class Three, it is a mere possibility. Some may have known it was foreseeable, even probable, but this does not seem enough. While it is not implausible that some would appreciate the risk, this is unlikely to be widespread and so the range of potential defendants has been narrowed.

*Nedrick*³⁵⁹ will reduce that number even further. Here, the Appellant set a house alight with a child inside and was convicted of murder. The Court of Appeal distinguished between desire and intent, illustrating that a man who boards a plane to Manchester to evade arrest might desire to go anywhere else. However, in boarding the plane he intends to go to Manchester because that is a virtually certain consequence of his act. Similarly, a defendant can form the necessary intent to murder so long as death or serious harm is a virtually certain consequence of their act.³⁶⁰ Thus in the rare cases involving oblique intent, juries should be directed that they are only entitled to infer the

³⁵⁵ Ibid [96-99]

³⁵⁶ *R v Moloney* [1985] AC 905

³⁵⁷ Ibid [929-930]

³⁵⁸ Ibid [912]

³⁵⁹ *R v Nedrick* [1986] 1 WLR 1025

³⁶⁰ Ibid [1028]

necessary intent if they are sure that death or serious bodily harm was a virtual certainty of the defendant's action, and the defendant appreciated that this was the case.³⁶¹

Thus, the rule, for the time being, is that a defendant should only be convicted of murder when they have direct intent, meaning they intended to kill, or cause really serious harm to the victim. Or oblique intent, meaning that death or serious harm was a virtually certain consequence of their actions, and they appreciated that this was the case. Although it should be noted that oblique intent is very rarely used in practice, as the vast majority of murder cases involve defendants alleged to have acted with direct intent.³⁶²

Of course, members of *Incel Brotherhood* are said to be accessories and so the test shifts once more. For crimes of specific intent, an accessory must intentionally aid, abet, counsel, or procure the principal whilst intending the principal act with whatever mental element is necessary. Therefore, for members of *Incel Brotherhood* to be convicted as an accessory to murder, the jury must be sure that they intended for Tom to act with malice aforethought. Alternatively, they can infer this intent if they are sure that Tom acting with malice aforethought was a virtually certain consequence of the accessory's actions, and that the accessory appreciated that this was the case. This does pose some difficulties for the analysis, as it is unlikely that the majority of members of *Incel Brotherhood* would have appreciated that it was virtually certain that Tom would intentionally kill, or cause really serious harm, as result of their encouragement and assistance.

It is possible some defendants in Class One, or even Class Two, may still be so involved with events that they reach the threshold of virtual certainty. However, this is likely to be rare and requires a level of involvement which excludes Class Three Defendants.

Accessory liability in respect of procuring murder may have very limited application as a legal tool. This might be extended to any offence requiring specific intent in which the upstream actor falls short of the virtual certainty required. They must intend the perpetrator to act with the fault state required or must know that doing so is a virtually

³⁶¹ Ibid [1027]

³⁶² Beatrice Krebs, "Oblique Intent, Foresight, and Authorisation," UCL Journal of Law and Jurisprudence 7(2), 18, <https://discovery.ucl.ac.uk/id/eprint/10061330/>, Accessed 26/06/2025

certain consequence of their actions. Both appear unlikely in the context of downstream harm.

The range of potential defendants for procuring murder has been dramatically and unavoidably reduced. *Nedrick* has been firmly embedded within the criminal law, after being applied by the House of Lords in *Woollin*.³⁶³ In the Judgment of Lord Steyn, the direction arising out of *Nedrick* was pitched at the right level of foresight, and indeed could be used in any case in which the defendant may not have desired the result of their act.³⁶⁴

Intent is ultimately a question of fact for the jury. The golden rule for jury directions is that judges should avoid any elaboration of what is meant by intent, and leave it to the jury's good judgment.³⁶⁵ While more direction may be needed for cases featuring oblique intent; intent will remain a matter for the jury. In *Matthews and Alleyne*,³⁶⁶ the defendants were convicted of murder for throwing the victim off a bridge, whereupon he drowned. It was unclear whether the victim had made the defendant aware he could not swim. However, the Court of Appeal ruled it was open for the jury to conclude that the victim would have made the defendants aware upon realising their plan. Indeed, if they were sure he did then each assailant was imbued with that knowledge. Thus, death was a virtual certainty.³⁶⁷

The language of virtual certainty implies that death must be inevitable save for external intervention. Although that does not necessarily seem to be the case in *Alleyne*. The victim might have landed closer to the shore than intended, proved able to float on his back, or the water might have receded so it was shallow enough for him to survive. Death was very likely, but is it truly a virtual certainty? It is not clear whether the language of virtual certainty refers to the inevitable result of acting, barring some freak intervention, or a given consequence with an especially high likelihood.³⁶⁸ The legal

³⁶³ *R v Woollin* [1999] AC 82

³⁶⁴ *Ibid* [95]

³⁶⁵ *Moloney*(n356)

³⁶⁶ *Matthews and Alleyne* [2003] EWCA Crim 192 [2003]

³⁶⁷ *Ibid*

³⁶⁸ *Ibid* [37-43]

principles at play here may not be entirely developed, nevertheless, for the analysis, the language of virtual certainty remains.

The inevitable conclusion is that charges for procuring murder would only be made out against a select few members of *Incel Brotherhood*. Likely Class One Defendants with a close personal connection to Tom, or some defendants in Class Two. However, the purpose of the analysis is to explore accessory liability as a legal tool; it is not confined to a single homicide offence.

Differentiating the Charges: Intent

For Class Two and Three, aiding, abetting, counselling, or procuring manslaughter might be the more appropriate charge. If the principal commits murder, but the accessory lacks mens rea, they can be convicted of manslaughter. It must be shown that the accessory assisted, encouraged, or caused the offence and that a reasonable person would have realised there was a risk of physical harm.³⁶⁹ Their liability for manslaughter turns on them participating in an unlawful act which caused death.³⁷⁰

If A is charged with aiding, abetting, counselling, or procuring murder, the jury has the right to return an alternative verdict of aiding, abetting, counselling, or procuring manslaughter. Section 8 of the Accessories and Abettors Act 1861 provides that an accessory shall be tried as a principal offender.³⁷¹ The Criminal Law Act 1967 allows for alternative verdicts on any murder indictment.³⁷² Thus it follows that an alternative verdict would be available for accessories, as they are charged with murder as if they were the principal. In any event manslaughter could still be brought as an alternative charge to murder,³⁷³ but if there is no prospect of a murder conviction it would be wrong to bring such a charge of murder. Thus, Class Two and Three defendants should be charged as having procured unlawful act manslaughter.

Unlawful and dangerous act manslaughter requires an intentional unlawful act, meaning a criminal offence, which a reasonable person would realise would subject

³⁶⁹ Crown Court Compendium(n317), 7-11, 21-25

³⁷⁰ Ibid 7-16

³⁷¹ Accessories and Abettors Act(n330) s8

³⁷² Criminal Law Act 1967 s6(2)

³⁷³ *R v Lemon & Effer* [2018] EWCA Crim 2660 [19]

someone to a risk of physical harm.³⁷⁴ Say A intentionally aided, caused, assisted, or encouraged B to attack and ultimately kill C. So long as a reasonable person would realise A's act carried a risk of some harm to C, the accessory can be convicted of manslaughter.³⁷⁵ For the vignette, the unlawful act, meaning criminal offence, would be Tom's stabbing attack. If Class Three Defendants have intentionally caused Tom to commit the offence, then they have participated. So long as a reasonable person sharing their knowledge would have realised there was a risk of physical harm; they can be convicted of manslaughter.³⁷⁶

To Krebs, the relatively lower threshold for sustaining a manslaughter conviction means accessories who would have previously been liable for murder under parasitic accessory liability, are instead likely to be convicted of unlawful and dangerous act manslaughter.³⁷⁷ To illustrate, say A encourages B to assault C. In which case, A has intentionally encouraged B to commit a criminal act which carries a risk of some physical harm. If B then kills C during the course of that assault, then A could be liable for manslaughter. As a result the Supreme Court has simply refocused accessory liability.³⁷⁸ Defendants who would have previously been caught up by parasitic accessory liability, will instead be caught up in manslaughter. The scope of accessory liability therefore has not really changed.³⁷⁹

As the *actus reus* of accessory liability for both murder and unlawful act manslaughter depends on participation in the stabbing attack, the two offences are not considered separately. A member of *Incel Brotherhood* who participates with the necessary intent may be liable as an accessory to murder, and one who participates without that intent may be liable as an accessory to unlawful act manslaughter. So long as a defendant has contributed, there is scope for them to be considered an accessory. The resulting analysis will still use the term homicide to refer to both murder and manslaughter with the appropriate conviction turning on intent. However, for most defendants, the analysis

³⁷⁴ *R v Goodfellow* (1986) 83 CrAppR23, [27-28]

³⁷⁵ Crown Court Compendium(n317) 7-17-7-18

³⁷⁶ *Ibid*

³⁷⁷ Beatrice Krebs, "Joint Enterprise Murder is Dead – Long Live Joint Enterprise Manslaughter?," in Beatrice Krebs (edts), *Accessorial Liability after Jogee* (2020, BP) 142-170

³⁷⁸ *Ibid* 150-160

³⁷⁹ *Ibid* 164

is inevitably more concerned with manslaughter than murder. In either instance, accessory liability is the vehicle through which criminal responsibility is established. Its effectiveness depends on the extent to which it can be said the proposed accessories have participated in the stabbing attack.

Differentiating the Charges: Procurement

Nevertheless, for the vignette, members of Incel Brotherhood may be said to have aided, abetted, counselled, or procured the stabbing attack. Some assist, and so aid, Tom by suggesting weapons, posting maps, or proposing ways for him to 'evade the authorities.' Others encourage him, and so abet, by telling him to 'give that foid what's coming' or otherwise encouraging him to act on his violent fantasies. While a considerable number may counsel him by promising to herald him as a 'Saint' should he follow through. Thus, there is scope to say multiple limbs of accessorial liability apply to the vignette.

This is a natural consequence of the language used within the statute.³⁸⁰ Dyson suggests that the terms abet, counsel, or procure are mostly, but not completely, equivalent to the word encouraging. The classic distinction between them is that abetting historically took place when the accessory was physically present at the scene of the crime, and counselling occurred when they were absent.³⁸¹ Moreover many situations of procuring a crime can be framed as counselling. Should A persuade B to kill C, and B would not have committed the offence but for A's persuasion, then surely they have both counselled and caused the commission of an offence. The line between procuring, counselling, and encouraging can be difficult to draw.³⁸²

To illustrate, say A desires to shoot and kill B with a gun and only a gun. A does not have a gun, and so will not kill B. If C intentionally gives A the gun to bring about the shooting, knowing the context, then C has both aided the commission of an offence and caused, or procured, it. Without C the offence simply would not have taken place, and so C's conduct brought about the shooting. Similarly, if A is holding a knife to B, not sure whether to stab him or not, and it is C shouting encouragement which tips the balance,

³⁸⁰ Accessories and Abettors Act(n330)

³⁸¹ Dyson(n337)

³⁸² Ibid

then C has both encouraged the resulting stabbing, and caused it. The similar meanings of the terms used to establish accessory liability, means that they will often overlap. For the vignette, the various actions of different members of *Incel Brotherhood* could be interpreted as aiding, abetting, counselling, procuring, or a combination of them.

For instance, is the Incel who uploads a map only aiding Tom in the commission of the offence? Tom may have no use for the map, but be so touched that someone was willing to go to such lengths to support him that he becomes even more committed to carrying out the stabbing attack. Thus, in context, this contribution might be better envisioned as encouraging him. Similarly if other members tell him to act on his violent fantasies, they are likely counselling him to commit the offence. But say Tom had uploaded these fantasies with no intent that they be taken seriously. Say it is the support of his peers which makes him feel able to carry out the stabbing attack. Members of *Incel Brotherhood* are counselling Tom to act, aiding him by giving him the moral support he needs to commit the offence, and potentially procuring the commission of an offence because Tom had no intention of following through but for their intervention.

The various actions presented in the vignette can be constructed as multiple strands of criminal accessory liability, or a fusion of them. Nevertheless, a constant theme across the vignette is that Tom would not have acted but for the influence of *Incel Brotherhood*. Therefore members of *Incel Brotherhood* make a significant causal contribution to the offence, and it is for this reason the analysis will be focusing on procurement. However, the nature of accessory liability in crime means any discussion of procurement will inevitably involve examples of aiding, abetting, and counselling.

This focus on procurement does however pose an initial practical concern. The thesis hopes to make a real world contribution by explaining how the law can respond to the downstream harms of the Manosphere. However, procurement is the most demanding strand of accessory liability. For a charge of procurement to succeed the Crown must establish the standard features of accessory liability, and then prove that the accessory made a causal contribution to the offence. If an act can be conceived of as both counselling and procuring, the preferable charge for prosecutors may well be counselling. For there is no need for them to prove the accessory made any causal

contribution to the offence.³⁸³ If there is an easier path to liability, a charge of procurement would create additional burdens for the prosecutor, and add additional complexity to the case. Thus there may be strong, practical, reasons, for a prosecuting authority to hesitate when bringing charges of accessory liability via procurement if alternatives are available.

Nevertheless, focusing on procurement does not impair the analysis from making a practical contribution. The natural overlap between the strands of accessory liability, means that the analysis on procurement cannot be read in isolation. Behaviours said to procure are often likely to also amount to aiding, abetting, or counselling. Thus the analysis on procurement will inevitably speak to criminal accessory liability more widely. These behaviours will need to be analysed for any argument on procurement and so the analysis can guide prosecutors seeking to bring charges against those responsible for aiding, abetting, counselling, or procuring Incel violence. If members of *Incel Communities* do acts which amount to both abetting and procuring real-world violence, then there is a benefit to the thesis identifying it because it may help inform a prosecuting authority to determine what, if any, charges should be brought.

In addition, the analysis can demonstrate the strength of its arguments that accessory liability is a viable legal tool by focusing on the most demanding strand. If a viable legal argument can be made in respect of procurement, then this will illustrate the significance of the contribution Incel communities make to real-world violence. That Incel communities can legitimately be said to be procuring real world acts of terror, should underline the need for a robust legal response.

Furthermore, the decision to focus on procurement is grounded in a desire to identify the charges which most accurately reflect the conduct exhibited in the vignette. There is a causal aspect to the analysis which should not be overlooked. Although first it is necessary to establish how the thesis understands causation.

Understanding Causation

The thesis interprets causation via Hart and Honore's common-sense model. Causation is not a unified legal doctrine, but a group of aligned concepts applied flexibly on a

³⁸³ Luffman(n340)

common-sense basis.³⁸⁴ The theory seeks to provide a rational foundation to the case law.³⁸⁵ It is a theory within a much wider and unsettled debate on the philosophical underpinnings of causation, to which an entire thesis could be dedicated. Mansfield notes an undeniable gap between philosophical and practical understandings of causation.³⁸⁶ Thus, Hart and Honore offer a unique framework for understanding how causal concepts intersect with legal decision-making;³⁸⁷ one bolstered by the courts explicitly embracing a common-sense understanding of causation.

The House of Lords explicitly rejected all formal logical and scientific theories of causation in favour of applying common-sense principles.³⁸⁸ Judges consistently reject philosophical and scientific causation in favour of emulating ordinary causal decisions.³⁸⁹ Within the thesis, adopting this model provides an underlying view of causation grounded in an understanding of judicial behaviour. Thus, rather than applying theories at odds with judicial practice, the thesis can advance common sense arguments that might arise in the real-world. If such arguments indicate upstream actors should be liable there is a suggestion the case law should reflect this.

Hart and Honore's model has been criticised, with Summers identifying three primary objections. There is a purported lack of empirical evidence, potentially incomplete analysis, and lacking an appreciation for the role of legal policy.³⁹⁰ There are also principled objections to the common sense model. To Stapleton, common sense is a camouflage for arbitrary decision-making, allowing judges to justify rulings by causal assertions rather than substantive legal analysis.³⁹¹ A range of theorists could further develop the debate in this respect. However, this broader discussion is beyond the scope of the thesis. The thesis has adopted a model grounded within the literature and judicial practice, whether or not it amounts to a sound theoretical account of causation is a separate matter.

³⁸⁴ Herbert Hart, Tony Honore, *Causation in the Law* (OUP, 1985)

³⁸⁵ *Ibid*, Preface to the Second Edition, xxxii-lxxxii

³⁸⁶ John Mansfield, 'Hart and Honore, Causation in the Law - A Comment' (1964) 17 VandLRev 487, 488

³⁸⁷ *Ibid* 490, 524

³⁸⁸ *Stapley v Gypsum Mines* [1953] AC 663 [681]

³⁸⁹ Andrew Summers, "Common-Sense Causation in the Law," (2018) 38 OJLS 793, 796

³⁹⁰ *Ibid* 800-803

³⁹¹ Jane Stapleton, "Reflections on Common Sense Causation in Australia," in Simone Degeling, James Edelman (eds) *Torts in Commercial Law* (TR, 2011) 331-343

The common-sense model views causation not as a unified legal theory but as interlinked concepts rooted in ordinary thought. The courts flexibly apply these concepts to produce a causal statement.³⁹² Should Alice fatally stab James, a causal statement might hold that she has killed him. A conclusion we must attribute to common sense because it is inconsistent with scientific truth.³⁹³ James is not killed by the knife penetrating his body but by oxygenated blood being diverted from his circulatory system, causing his organs to fail. The knife is one of many factors contributing to his death, yet ordinary thought disregards this in favour of attributing the death to Alice.

Causal statements do not need to explain death, for we already understand the conditions by which death occurs. However, common experience teaches us that humans do not die spontaneously from profusely bleeding wounds. James's death is an aberrant event, which must be explained. We wish to know why he died, not merely how, which requires a functional narrative. There can be no defining principles, theories, or rules in this respect because narratives are context specific.³⁹⁴ Had James not died from the initial wound but fled to a safe house, tripped, and suffered a fatal wound, a different causal statement would be required. The stabbing is still one of the many factors contributing to his death, but the conclusion will differ. In the previous example, Alice killed James, but here we hesitate. Certainly she caused him to flee but does that mean she has caused the death? Surely James tripping and suffering a fatal wound is the cause of death, and Alice's role is largely consigned to history. She informs his reasons for being at the location, and her conduct is wrongful, but it seems a stretch to say she has killed James. Yet there is no formal rule to explain why the thrusting of a knife will cause death in some circumstances and not in others. Instead, a narrative choice is made to explain an aberrant event and produce a causal statement with explanatory force.

³⁹² Hart(n384) 9-25

³⁹³ Ibid

³⁹⁴ Ibid

Explanatory Force

A causal statement has explanatory force when it provides the most compelling narrative of an aberrant event. Should such a statement attribute a given event to human behaviour, we might say that person is responsible. Hart and Honore trace this to our prehistoric understanding that humans can manipulate the physical world. Common experience has taught us that we can supervene upon the natural course of events, and so this, in and of itself, is an abnormality.³⁹⁵ If a building catches fire, its dry interior, combustible cladding, and presence of oxygen are necessary preconditions. Nevertheless, they are present whether the fire occurs or not and so they cannot bridge the gap between normal functioning and disaster. A causal statement attributing the fire to these elements lacks explanatory force. A careless worker dropping their cigarette better explains the deviation. Neither the human nor the cigarette are recurrent features of the environment but supervene. They bridge the gap between normal functioning and disaster and provide a complete account of the fire.³⁹⁶ A causal statement with explanatory force would hold the person who dropped the cigarette as having caused the fire.

Human inaction will also suffice. Part of our prehistoric understanding is the knowledge that our environment can cause harm. Thus, we store water in case of drought, take medicine to counteract disease, and guard against natural disasters.³⁹⁷ These customs and routines are so deeply embedded that to deviate from them is aberrant.³⁹⁸ If a person dies of measles in a society with routine vaccinations, a causal statement attributing the death to disease lacks explanatory force. More is required because we have come to expect that people should not routinely die of such things. A causal statement must account for their refusal to submit to vaccination to have explanatory force. In a society which expects routines to be adhered to, failure is exceptional and bridges the gap between normal functioning and disaster.

That is not to say that natural intervention or inhuman action cannot produce a causal statement with explanatory force. If lightning strikes and fire breaks out, a causal

³⁹⁵ Ibid 26-61

³⁹⁶ Ibid 26-35

³⁹⁷ Ibid

³⁹⁸ Ibid

statement might attribute the blaze to the storm. However, ordinary thought cannot translate this into responsibility, so human action is favoured when formulating causal narratives. Should A suffer a nosebleed upon being punched by B, B will be presumed to have caused the injury. No law of science holds that nosebleeds inevitably follow a blow; it is possible the strike coincided with a spontaneous rupturing of blood vessels. However, common experience teaches us that human action supervenes and explains the injury unless there is evidence to the contrary.³⁹⁹ Ordinary thought prefers causal statements that attribute abnormality to human intervention.

Thus, a causal inquiry is an attempt to explain an aberrant event in a way that is amenable to ordinary thought.⁴⁰⁰ Say Alice recklessly drops a match, sets a bush alight, and a sudden breeze carries the flames downwind to a nearby forest. Once in the forest dry conditions caused by longstanding drought sees the flame blaze into an inferno. Much of the forest fire is beyond Alice's control; the elements that ensure it long predate her, and the breeze may be unforeseeable. However, ordinary thought holds these to be recurrent features of the environment so there is no explanatory force in attributing the fire to them.⁴⁰¹ The most compelling narrative which explains the aberrant event is Alice dropping the cigarette. However, say Emily finds the burning bush and fans the flames towards the forest.⁴⁰² She exploits a pre-existing situation, supervenes upon events, and causes the fire. If Emily provides a complete account of the forest fire in her own right Alice need not be considered.⁴⁰³ Despite Alice having as much control over Emily as the breeze and the two performing the same function, the former absolves her while the latter does not. A conclusion is drawn not from a meaningful distinction but a causal inquiry seeking a compelling narrative amenable to ordinary thought.

Upstream Inquiries

If lightning strikes, causing an appliance to short-circuit and sets the building aflame, a causal statement attributing the fire to electrical disturbances in the atmosphere is incomplete. More is required to exclude human intervention before this causal can have

³⁹⁹ Ibid

⁴⁰⁰ Ibid 62-83

⁴⁰¹ Ibid

⁴⁰² Ibid

⁴⁰³ Ibid

explanatory force. Fire is a recurrent possibility within the natural world, which we have developed customs to address, and so their failure must be understood. A causal inquiry might focus on longstanding neglect of the circuit.⁴⁰⁴ A human actor departing from an established routine by failing to correct this is exceptional. Human intervention, or omission, sets the stage for the fire and is a more significant abnormality than the storm. An upstream inquiry is necessary to attribute the aberrant event to human intervention and produce a causal statement with explanatory force.

A similar upstream inquiry is required when human beings influence one another, which Hart and Honore describe as ‘interpersonal transactions.’⁴⁰⁵ Interpersonal transactions describe occasions where human beings induce one another to act. Common experience teaches us that humans act for comprehensible reasons, and so a causal inquiry should acknowledge them. If Alice persuades Emily to shoot James, a causal statement that Emily has killed James does not go far enough.⁴⁰⁶ A compelling narrative requires us to account for Emily’s reasons for acting, and thus, Alice must be acknowledged. A causal statement with explanatory force must hold that Emily has shot James because Alice persuaded her to do so. This provides a complete accounting of an aberrant event by acknowledging that Alice embedded herself in events through an interpersonal transaction.

For an actor to embed themselves within a narrative, they must influence a second actor. A relationship between two actors thus underpins interpersonal transactions, and the influence exerted must be fully understood and appreciated.⁴⁰⁷ To be intimidated, one must appreciate a threat; to be deceived, one must believe a lie; and to be persuaded, one must be convinced. If this influence factors into the second actor’s decision-making, the resulting act cannot be understood without accounting for their influence. Thus, they must feature in a causal statement if it is to have with explanatory force.⁴⁰⁸

⁴⁰⁴ Ibid

⁴⁰⁵ Ibid

⁴⁰⁶ Ibid

⁴⁰⁷ Ibid

⁴⁰⁸ Ibid

Within the vignette, the stabbing attack is an aberrant event which requires explanation. Tom's action bridges the gap to a point, but a causal statement saying he has killed the victims is incomplete. To account for his reasons for acting an upstream inquiry is required. Members of *Incel Brotherhood* induced Tom to act via persuasion, encouragement, and a broader pattern of radicalisation. But for this influence, Tom would not have carried out the attack. Some, but perhaps not all, members of *Incel Brotherhood* have embedded themselves within the narrative via an interpersonal transaction. Thus, they must feature within the causal statement for it to have explanatory force. Tom has killed the victims because of the influence of *Incel Brotherhood*, and their inclusion within the causal statement invites questions of responsibility. The question becomes the extent to which this is reflected in the existing law.

Upstream Inquiries: Why Accessory Liability and Procurement

This causal element is why the thesis has chosen to focus on accessory liability and procurement specifically. Criminal liability is, in fact, possible through other means.

There are three inchoate liability offences under the Serious Crime Act 2007 which would apply. Defendants who do an act capable of encouraging or assisting the commission of an offence, whilst believing or intending that the offence, or a range of offences, will be committed are criminally liable under the statute.⁴⁰⁹ In addition it is also an offence to send messages which convey threats of death or serious harm under the Online Safety Act 2023,⁴¹⁰ or to send electronic communications which conveys an indecent or grossly offensive message under the Malicious Communications Act 1988.⁴¹¹ All of which may arise on the vignette.

To focus on the inchoate offences, these offer a fairly straightforward path to criminal liability. As an example, a person is liable under section 45 for doing any act capable of encouraging or assisting the commission of an offence, whilst believing that the offence will be committed, and that his act will assist its commission.⁴¹² Unlike accessory

⁴⁰⁹ Serious Crime Act 2007 s44 s45 s46

⁴¹⁰ Online Safety Act 2023 s181

⁴¹¹ Malicious Communications Act 1982 s(1)(a)(i)

⁴¹² SCA(n409) s45

liability, the intent requirement for this inchoate offence is not especially demanding. If the primary offence requires fault, then the defendant must either believe that the act will be done with that fault, be reckless as to that possibility, or would have acted with the relevant fault state if they were committing the offence themselves.⁴¹³

Thus say A shouts support to B, believing that B is about to murder C, and that shouting encouragement will support him. A has done an act capable of encouraging the commission of an offence, namely shouting support. A believes the offence will be committed and that shouting support will encourage its commission. Thus A can be convicted of encouraging and assisting murder if A believes B will kill C with malice aforethought, is reckless to that possibility, or, if A were killing C, A would act with malice aforethought. A can be convicted even if B had absolutely no intention, or plan to murder C. Should A be convicted the maximum sentence available is identical to that of the fully anticipated offence.⁴¹⁴

The statutory inchoate offences operate on a broad definition of what it means to encourage or assist. In *Ali*,⁴¹⁵ the defendant arranged sham marriages to circumvent immigration regulations. Inchoate liability was triggered by him filling out an application form for such a marriage after being approached by an undercover journalist. He was properly convicted as he believed an offence would occur and that filling out the application form would encourage or assist it. On this definition, members of *Incel Brotherhood* engage in numerous acts which might encourage or assist Tom. Some aid his planning, others incite him to act, and many more encourage him every step of the way and routinely reaffirm his decision to kill.

Thus members of *Incel Brotherhood* who encourage or assist Tom, believing he will follow through, and that their actions will assist him in doing so could be convicted under the Serious Crime Act 2007. There is a plausible, and potentially highly effective path to liability within the statute, and so why focus on accessory liability? Especially when the inchoate offences have a much lower threshold for intent.

⁴¹³ Ibid s47 (5)

⁴¹⁴ Ibid s58

⁴¹⁵ *R v Ali* [2015] EWCA Crim 43

The answer lies in the desire to produce a causal statement with explanatory force. For the stabbing attack occurred, it is part of the factual matrix on the vignette, and any plausible explanation of it must account for the influence of *Incel Brotherhood*. But for their influence, Tom would not have carried out the stabbing attack.

Thus members of *Incel Brotherhood* have done more than simply encourage or assist an offence believing it would be committed. They have encouraged and assisted an offence which was actually committed. So critical was their contribution that they must be acknowledged within any causal statement purporting to have explanatory force. To exclude them is to settle for a causal statement that simply states that Tom perpetrated the stabbing attack. While accurate in part, common experience teaches us that human beings act for discernible reasons and so the causal statement is incomplete.⁴¹⁶ Tom did not act spontaneously because he despised Eleanor and wanted to kill as many people as possible. Tom acted because of the influence of *Incel Brotherhood*. If that is not accounted for there is no way to explain why Tom, a previously law abiding citizen, suddenly committed an act of Incel inspired terror. His reasons for acting cannot be understood without including members of *Incel Brotherhood* within the causal statement. Thus they must be included if that statement is to have explanatory force.

Thus, charging members of *Incel Brotherhood* with encouraging or assisting an offence, believing it would be committed, doesn't capture the extent of their conduct. Inchoate liability arises irrespective of whether the offence is committed or not.⁴¹⁷ In the universe where Tom does not follow through, then members of *Incel Brotherhood* can be charged with encouraging or assisting an offence. But in the universe where Tom follows through, the inchoate offences fail to properly reflect the reality of the situation presented in the vignette.

To illustrate, say Lucia becomes aware that Ryan has a vendetta against her ex-boyfriend Peter. She approaches Ryan and asks him to explain the details of this vendetta, and during the course of the conversation it becomes clear that Ryan is very likely going to violently assault Peter. If Lucia then tells Peter "Do it! Give him exactly

⁴¹⁶ Hart(n384) 62-83

⁴¹⁷ SCA(n409) s49(1)

what's coming to him," then she is encouraging and assisting the commission of an offence whilst believing that offence will be committed. If Ryan was going to do this anyway, then Lucia does not need to factor into a causal statement for it to have explanatory force. It can be said that Ryan attacked Peter because of an established vendetta. That vendetta flows from whatever history the two men have, and so the violent attack can be explained in a way which is comprehensible without accounting for Lucia's influence. Lucia's actions are still wrongful, but do not extend further than her encouraging the commission of an offence.

Say instead, Lucia knows Ryan has a long history of violence and desires for him to attack Peter. To that end she strikes up a relationship with him. She lies, telling Ryan that Peter has never gotten over their breakup, that he is stalking her, threatening to distribute incriminating information, and otherwise making her life as difficult as possible. She alludes to Peter being manipulative, violent, and fosters within Ryan an intense hatred of the man he believes to be stalking his new girlfriend. She then tells him that Peter always carries a weapon, and will try to hurt any man in her life sooner or later. As a result, Ryan decides to deal with the situation pre-emptively and so goes out, finds Peter, and violently attacks him.

The situation here is different. Ryan would not have attacked Peter but for Lucia's influence. Ryan's hatred of Peter does not come from within himself but has been inspired by an outside force. It is not enough to say that Ryan hates Peter, because there appears to be no reason for him to hate Peter. Ryan's sudden and unfounded hatred for Peter is abnormal, and in the circumstances an upstream inquiry is needed to properly explain Ryan's reasons for acting. Ryan attacked Peter because Lucia manipulated him into doing so. This does not excuse Ryan's actions, but simply communicates the reality of the situation.

At this stage, saying Lucia has done nothing more than encourage or assist an offence believing it will be committed is insufficient to capture the reality of the situation. She has done more than encourage or assist, to the point she is now embedded within the causal chain. Lucia has not abstractly encouraged or assisted a potential offence, but is closely connected to a completed offence. But again, to say she has simply aided, abetted, or counselled the commission of an offence is also incomplete. Her actions

may amount to one, or more of the grounds of accessory liability, but the reality is that the offence could not have occurred without her. She makes a significant causal contribution to the offence, and brought about a course of conduct that Ryan would not have engaged in spontaneously. The reality of the situation is that she has procured the offence.

To Simester, the criminal law is generally reluctant to hold A liable for the actions of B. So if A has contributed to B's offending, then it is often preferable to independently criminalise A's conduct. For instance, say A sells B an automatic firearm which B then uses to kill C. In the circumstances, rather than holding A liable as an accessory to B's murder of C, the law may elect to criminalise the sale of automatic firearms. This will prevent the conduct whilst allowing A to retain control of their criminal liability. For under accessory liability, A does not become a criminal accessory until B kills C; meaning B is able to affect when, and if, A becomes a criminal.⁴¹⁸ However, there are cases where A's wrongdoing will not be properly reflected by a lesser conviction. If A supplied B an automatic weapon, knowing and desiring that C should die, then A's criminal conduct will not be adequately captured by a conviction for simply engaging in an illegal sale.⁴¹⁹ It is in these cases that accessory liability in crime is necessary to properly reflect the scope of the accessory's criminality.

Thus, if the reality of the situation is that a defendant has procured the offence, then any charges they face should reflect this. To Horder, fairness to all parties within the criminal justice system requires that an offence be properly represented to the public, and reflect the true extent of whatever wrongdoing has occurred.⁴²⁰ Betts builds on this to argue that convictions should convey the seriousness of the conduct, and identify the extent of both the harm caused and the culpability of the offender.⁴²¹ As Tadros argues, failing to do so risks unfairness. Defendants may be described, or perceived, as having done something far more serious than their conduct would justify. While victims feel a particular unfairness if the criminal law fails to adequately reflect the wrong they

⁴¹⁸ Andrew Simester, "The Mental Element in Complicity" [2006] LQR 112, 578

⁴¹⁹ Ibid

⁴²⁰ Jeremy Horder, "Rethinking Non-Fatal Offences against the Person," [1994] Oxford Journal of Legal Studies 14 335, 342,351

⁴²¹ Gary Betts, "Robbery and the Principle of Fair Labelling," [2019] JCL 83 3, 205-216

have suffered. Among the functions of the criminal is to recognise the suffering of the victim, which requires any conviction to reflect the reality of the offence.⁴²²

In the example, if Lucia is simply convicted of encouraging or assisting the commission of wounding with intent, this fails to account for the gravity of her actions. The conviction implies that she played a small role in an offence perpetrated by Ryan, lending some encouragement or assistance from the sidelines. But her conduct is far more serious than this, and much more culpable. She engaged in a concerted effort to procure a violent attack on her ex-boyfriend. The label of assisting and encouraging does not reflect her central role in bringing about the offence.

From Peter's perspective, his ex-girlfriend has engaged in a campaign with the purpose of bringing about a violent attack on his person. To say Lucia has only encouraged and assisted that attack, does not reflect the extent of the wrong directed at Peter. Indeed, he may feel that the true mastermind behind his misfortune is Lucia, and so deserves to have that recognised by the law. Thus it is insufficient to reduce Lucia to a background character doing nothing more than encouraging or assisting an offence, believing it will be committed. The charge fails to account for the causal contribution she has made to the offence, her efforts to ensure the offence took place, or her desire to direct as much harm as possible towards Peter.

Ryan also has a perspective which should be considered. While he is guilty of a vicious attack, he was manipulated into committing it. Ryan and Lucia share culpability, and so Ryan should not be cast as the sole perpetrator, who acted with the mere encouragement and assistance of his Lucia. The reality of the situation is that Lucia caused Ryan to attack Peter, and so this is what the criminal law should communicate to the public at large. Thus, Lucia should be convicted for procuring the attack on Peter.

Accessory liability via procurement reflects the reality of the situation, recognises the extent of the wrong done to Peter, the culpability of the parties, and advances a narrative with explanatory force. While procurement may be more difficult to prove than the inchoate offences, and other forms of accessory liability, we should not sacrifice fair

⁴²² Victor Tadros, 'Fair Labelling and Social Solidarity', in Lucia Zedner (ed) Julian Roberts (ed), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP, 2012) 67-80

labelling for convenience. If A fatally stabs B, with malice aforethought, thirty-two times then it may be easier to charge A with thirty-two counts of wounding without intent. As there would be no need to evidence A's intent, only that A unlawfully stabbed B thirty-two times. But this would fail to account for the reality of the situation and, therefore would be inappropriate. The criminal law should acknowledge that B has been murdered, that A's actions are serious, and that A acted culpably. The reality of the situation is that A has murdered B, and so A should be charged accordingly.

This logic can be extended to the vignette. For while members of *Incel Brotherhood* engage in conduct which amounts to encouraging and assisting, alongside a slew of communications offences, they also go much further. The stabbing attack would not have occurred but for their influence, and therefore inchoate charges do not reflect the extent of their conduct. Indeed from the victims' perspective Tom attacked them because he has been influenced by members of *Incel Brotherhood* to do so. To exclude them from the narrative, or charge them merely with assisting or encouraging, would be a failure to recognise that members of *Incel Brotherhood* have contributed to the victims' suffering. While Tom also deserves to have the reality of the situation be communicated to the public upon his conviction. He did not simply prepare a stabbing attack with the support of *Incel Brotherhood*, rather he perpetrated the stabbing attack because members of *Incel Brotherhood* informed his reasons for acting, and embedded themselves in the causal chain. The reality of the situation is that members of *Incel Brotherhood* have procured the stabbing attack. Thus the most appropriate charge, and the focus of the analysis is accessory liability via procurement.

Procurement and Causation

With this focus on procurement in mind, a member of *Incel Brotherhood* may be liable via procurement for intentionally doing an act which causes Tom to commit the stabbing attack. The specific charge will depend on their intent. If they intended for Tom to act with malice aforethought then they could be convicted of procuring murder, although, as discussed earlier, this is unlikely for the vast majority of defendants. Alternatively, for crimes without a specific intent element, what is required is that they intend to bring about an act, knowing the context which makes it criminal. To be liable

for procuring unlawful act manslaughter they must intentionally procure an act, and a reasonable person must anticipate that this act carried a risk of some physical harm.

The totality of the behaviours exhibited in the vignette are said to influence or incite Tom to carry out the stabbing attack. In principle, influencing or inciting another to fire their weapon can sustain a homicide conviction. Let us return to *Bentley*, accounting for the abolition of joint enterprise by reconstructing the case as one of procurement. If Bentley shouting, ‘let him have it,’ causes Craig to open fire and results in the death of a police officer, he has caused the death. But say Craig and Bentley were separated during the break-in but phoned one another as the police closed in. Bentley shouts, “let him have it,” down the line, which causes Craig to fire and eventually results in death. The incitement and influence still cause Craig to fire. Bentley’s presence in the warehouse may not be required. Say he had fallen ill, and Craig proceeded alone but called when things turned dire. Through the telephone, Bentley is made aware of the situation and says the same words with the same lethal consequence. His physical presence is unnecessary for him to impart the incitement and influence which causes Craig to fire. It is these actions, not his location, through which he has procured the death of another.

Say Bentley had never intended to be present but was happily guiding and advising Craig. So, he helps develop the plan, knows Craig will carry a gun, and when they discuss how things might go wrong, Bentley scribbles down, “let him have it,” to guide Craig on what to do if the police close in. When the burglary goes wrong, and Craig decides to fire upon re-reading the instructions, are we in a different position? Bentley’s incitement and influence may have been reduced to a mere line of text, but it still causes Craig to fire. His influence might be diminished, but it has not dissipated.

Thus, nothing should change if, as in the vignette, the incitement and influence were communicated online. Even if they lived a continent apart and spoke through a message board, Bentley can still cause Craig to act. Say Craig had confessed his desire to burgle a warehouse online, and Bentley came to his aid. The two make plans, and Bentley, through a messaging service this time, types the words “let him have it.” Words which ring in Craig’s ears when he decides to fire. Bentley is more removed from events than he ever has been, but he has still procured the death. But for his incitement and influence, the death would not have occurred.

Procurement requires a causal connection between the accessory's act and the offence.⁴²³ Thus, the legal question is whether the incitement and influence are a cause of the offence. While Craig's decision to fire may be the dominant cause, this does not excuse Bentley. In *Mellor*,⁴²⁴ the victim was violently attacked, admitted to hospital and died of pneumonia two days later. It was unclear whether the death was brought on by the victim's injuries or poor medical treatment. Nevertheless, all that is required is for the Crown to prove that the injuries were a significant cause of death. So long as a defendant has made a significant contribution, they have caused the death.⁴²⁵ For procurement, the accessory does not need to be the sole cause; rather, they must have made a significant causal contribution to the offence.

That this is the threshold for the necessary causal contribution is argued by examining the use of the term procurement in other contexts. In *Broadfoot*,⁴²⁶ the defendant managed massage parlours and advertised for young women to work for him. When two undercover journalists responded to the advertisements, he told them that the financial rewards would be greater if they were prepared to do acts amounting to prostitution. After which he was charged with two counts of attempting to procure a woman to become a common prostitute. Cusack J suggested that the term procurement could be interpreted to mean 'produce by endeavour' but alternatively, or in addition to this, it could be regarded as bringing about a course of conduct which the girl would not have embarked upon spontaneously of her own volition.⁴²⁷

If procurement can also be understood to mean A bringing about a course of conduct which B would not have done spontaneously of B's own volition, then a significant causal contribution should be all that is required. To illustrate, say Matthew is considering committing an act of religiously motivated violence, but is unable to reach a conclusion on what to do. Say Paul, knowing what Matthew is considering, goes to see him and persuades him to act. Matthew then follows through and commits an act of religiously motivated violence. In the circumstances Paul has brought about a course of

⁴²³ *Bryce* [2004] 2 Cr App R 35

⁴²⁴ *R v Mellor* [1996] 2 WLUK 122

⁴²⁵ *Ibid* [263-264]

⁴²⁶ *R v Joseph James Broadfoot* (1977) 64 CrAppR 71

⁴²⁷ *Ibid* [74]

conduct which Matthew would not have done spontaneously of his own volition. But all Paul has done is tip the balance and persuade Matthew to do something he was already contemplating. Paul's contribution is significant, but not overwhelming. Nevertheless, without Paul the resulting attack could not have happened and so he must be said to have caused the offence.

That is not to say cases of procurement will always feature such contributions. In *Cogan and Leak*,⁴²⁸ Leak was convicted of procuring the rape of his wife by misleading Cogan into thinking she wanted to have sex with him. Leak's conviction was upheld because he had used Cogan to procure a criminal purpose. Leak caused the rape of his wife by giving false information to his friend, which resulted in Cogan attempting a sexual encounter whilst interpreting her distress as consent. Leak caused his friend to have intercourse with his wife, knowing she would not consent, and so rape was the natural and ordinary result of his actions. In the circumstances Leak made an overwhelming contribution, doing far more than tipping the balance, but fabricating the circumstances for the offence to occur. Nevertheless, his contribution is inevitably limited by being an accessory via procurement. For while Leak has informed Cogan's reasons for acting; Cogan still had to move his body, attempt the sexual encounter, and perform the mechanical components of the offence. Without Leak, the offence would not have been possible. Without Cogan, the offence would not have been possible. Both have contributed to the eventual rape, even if one is far more culpable than the other.

Similarly, in *DPP v K*,⁴²⁹ two defendants falsely imprisoned a young girl with the intention of robbing her. Eventually a boy became involved and was told by the defendants to remove some of the victim's clothing and have sex with her. They were left in a private room, and the boy raped the young girl. Both defendants had the desire that rape should take place, and that the boy should do it on their instruction.⁴³⁰ The boy was never identified, and so his complicity in the offence is unclear, but again the facts reveal that he played a critical causal role in bringing about the offence. He needed to heed the defendants' instructions, go to a private place with the girl, and then rape her. Without

⁴²⁸ (1976) 1 QB 217

⁴²⁹ *DPP v K* [1996] 6 WLUK 304

⁴³⁰ *Ibid* 40-42, 45-48

him the offence could not have occurred. Both the boy, and the defendants, made a causal contribution to the offence, and indeed the principal offender may always make the most expansive contribution. For while those procuring generate the principal's reasons for acting, and cause them to act, the resulting actions are often within the principal's exclusive bodily control.

Within the law of England and Wales it is perfectly possible to say two, or more, people have caused an event. To be said to cause an event, the defendant must make a significant contribution, which need not be extensive. In *Hennigan*,⁴³¹ the Appellant was charged with causing death by dangerous driving. The judge, using an analogy, instructed the jury that if they were satisfied that both cars were equally responsible this would be a substantial contribution. However, this would not be true if the defendant were only one-fifth to blame. The Court of Appeal rejected this, holding that the normal rules of causation require the defendant to make a more than minimal contribution.⁴³² This was reconfirmed in *Hughes*,⁴³³ where Lords Hughes and Toulson ruled that the standard rules of causation deem a legally effective cause to be anything outside the *de minimis* range. A defendant does not need to make the only, or even primary contribution, to be responsible. They only need to make a more than minimal contribution.⁴³⁴ The same rule should apply to accessories. If procuring means to 'produce by endeavour' or to bring about a course of conduct that the principal would not have engaged in otherwise, then what is needed is for the accessory to have caused the principal to act. To be said to have caused something, they must make a significant contribution, meaning more than minimal. This would be consistent within the existing rules of causation. Thus if A has made a significant contribution, meaning more than minimal, which causes B to do something which B would not have done of their own volition, then A has caused B to act. If the act is a criminal offence then A has procured an offence and so could be charged accordingly. Thus, the question for the analysis, is whether members of *Incel Brotherhood* can be said to have made a significant contribution to Tom's decision to carry out the stabbing attack.

⁴³¹ *R v Hennigan* (1971) 55 CrAppR 262

⁴³² *Ibid* [264-265]

⁴³³ *R v Hughes* [2013] UKSC 56; [2013] 1 WLR 2461

⁴³⁴ *Ibid* [22]

More than Minimal: Levels of Abstraction

To return to our fictional Bentley, do any of the abstractions take us below the *de minimis* range? In the first, Bentley and Craig were separated and communicated via telephone. While his incitement may be less impactful when compared with words said only a few feet away, it still carries weight. Similarly, in the second, Bentley is sat at home and answers a phone call. He is made aware of the volatile situation, is fully aware of the gun, and utters the familiar words “let him have it.” His increasingly remote physical presence diminishes but does not eliminate his influence. It is still a significant factor motivating Craig’s decision to open fire. Thus, he makes a more than minimal contribution to the offence.

In the third example, Bentley is an absentee adviser who writes down the offending phrase. Nevertheless, his incitement and influence are more than a few lines of text. The two have established a relationship and have worked together to plan a crime. Bentley is a fixed presence, a background influence, and without him, we cannot truly understand the offence. Be they written or spoken, to Craig these are the words of a trusted advisor. Words which cause him to open fire. Irrespective of when and where they were delivered, they are a more than minimal contribution.

The difference between the third and final example is that the two do not meet in person. The relationship, assistance, and knowledge are identical. That this occurred online does not automatically reduce Bentley’s influence below the bare minimum. Online relationships of all types can be as intimate as their offline counterparts.⁴³⁵ It is entirely plausible that our fictional Bentley and Craig could become as close through their offline or online interactions. Bentley’s influence could be identical to the point that his typed words carry the same meaning as those scribbled down or shouted on the phone. He is still a background figure heavily involved in informing Craig’s decision to kill. The online component of their relationship should not inherently reduce Bentleys’ contribution to the *de minimis* range.

⁴³⁵ Anna Lomanowskaa, Matthieu Guittonc, “Online intimacy and well-being in the Digital Age,” [2016] 4 II 138, 139

The Catalyst

In the vignette, members of *Incel Brotherhood* establish a relationship with Tom and, upon being made aware of his intentions, guide, encourage, and advise him. They go further than our fictional Bentley by criticising Tom for not being extreme enough, riling him up, and hailing him as a potential ‘Saint’. But for these accumulative contributions, Tom would not have committed the offence. However, there is no direct catalyst within the vignette. In *Bentley*, the words, “let him have it,” were said to be inciting, if not directing, Craig to kill. For Tom, no single catalyst, line of text, singular message, or explicit behaviour triggers the stabbing attack. His decision is informed by *Incel Brotherhood* members convincing him to accept, endorse, and ultimately to commit terroristic acts. There is no imminent threat or obvious weapon, and so more may be required.

Say Lacy encourages her adult son Edgar to drive home from his arduous job rather than take the bus, and if she did not, Edgar would take the bus. Edgar, through tiredness, causes death by dangerous driving, but it is a stretch to say Lacy has procured the death. There is a distinction between conduct, which sets the stage for an occurrence, and conduct instrumental in bringing it about.⁴³⁶ Lacy has set the stage for her son’s careless driving but plays no real role in the outcome. In the same vein had Lacy invited her son for dinner and he died in a car crash, her invitation would be a more than minimal factor. The crash would not have occurred but for her invitation, but this should not translate into responsibility.

However, say Lacy had persuaded Edgar to carry a gun on his nightly robberies rather than go unarmed, which he would have done otherwise. That evening, Edgar shoots one of his victims. Lacey has done more than set the stage; she does not merely encourage conduct which might lead to a criminal offence in the abstract but actively contributes to the outcome. The gun would not have been present but for her persuasion. She dramatically increased the risk to the victims by inciting an already volatile situation and so has played a more than minimal role in bringing about the harm. Her contributions cause her son to inflict grievous bodily harm upon another, and so she ought to be liable

⁴³⁶ Hughes(n433)

for procuring grievous bodily harm. Although the nature of any resulting charges would depend on her intent.

Within the vignette, members of *Incel Brotherhood* do not merely set the stage but make a material contribution by inciting and influencing an already unstable or radicalised person. There is no one catalyst but a broader pattern of radicalisation through which the community has procured the offence.

Radicalisation

Radicalisation is a means of understanding Tom's transformation into an Incel poised to commit violence. This change did not come exclusively from within Tom but was contingent on the influence of *Incel Brotherhood*. But for them radicalising him, Tom would not have carried out a misogynistically motivated act of terror.

There is a need for caution. Schmid warns that radicalisation is a heavily contested term.⁴³⁷ Tom has been brought to a violent ideology, but holding this as an act capable of procuring an offence is problematic. Say Lauren inducts Emma into a group of anti-hunting activists, who believes any hunting activity, lawful or not, must be resisted. If Emma goes on to set fire to the home of someone involved in hunting, Lauren has not procured an offence by promoting an ideology. All she has done is set the stage for a criminal choice; she does not contribute to the offence.

To that end Schmid suggests we differentiate between radicals and extremists. Radicals subscribe to a minority ideology, often opposing the existing order.⁴³⁸ Extremists go further and are characterised by fanaticism, intolerance, inflexibility, and violence. Radicals and extremists often overlap ideologically, but the latter are necessarily violent. Radicalisation should not be understood as turning someone into a radical but an extremist.⁴³⁹ It is the process by which Tom was convinced to abandon tolerance, compromise, and rational dialogue in favour of violence. He was also directed towards a radical belief system and these two things, in conjunction, radicalised him.⁴⁴⁰

⁴³⁷ Alex Schmid, "Radicalisation, De-Radicalisation, Counter- Radicalisation: A Conceptual Discussion and Literature Review [2013] IntlCoCT 1

⁴³⁸ Ibid 1-4

⁴³⁹ Ibid 5-8, 10-12

⁴⁴⁰ Ibid 22

Members of *Incel Brotherhood* promote a radical ideology and glorify violence. They permit violent sentiment, reinforce terroristic fantasies, exalt past killers, and disparage those who are not violent or misogynistic enough. However, there is no clear leadership, nor concerted effort, and so this is the emergent property of seemingly independent acts. This diverges from traditional forms of radicalisation. Dalgaard-Nielsen suggests radicalisation begins with a single extremist contacting a potential recruit directly.⁴⁴¹ From here, a deliberate process unfolds in which the recruit is convinced to accept a radical ideology and the legitimacy of violence. However, that radicalisation often involves a structure does not mean it must do so. Radicalisation depends on the recruit interacting with and within the extremist group. Total immersion in an echo chamber allows the group to supplant the recruit's identity, become their new community, and convince them to accept the inevitability of violence. It is more effective as a structured process but not essential because radicalisation occurs primarily through the structure of an extremist group.⁴⁴² This is reflected clearly within the vignette, as multiple actors knowingly contribute to an established process, the outcome of which will be to transform Tom into a violent extremist.

Members of *Incel Brotherhood* knowingly contribute to Tom's radicalisation in a decentralised but deliberate process. They know he will be isolated, identify as an Incel, and be inducted into a community where violence is normalised. This is a known quantity because these members will have experienced or observed this process within their community. Indeed, they will know their ideology makes violence the only option for Tom to make a difference.⁴⁴³ They have imparted a radical ideology and fostered a willingness to accept political violence within him. This is reflected within the vignette; Tom's decision to kill is announced by him asking, '*Who's ready for the next rebellion?'*' He clearly sets out his aspiration to emulate Elliot Rodger. The exact point at which he decided to follow through is unclear, but his radicalisation is a crucial component. The stabbing attack would not have occurred if he had not been transformed into a violent Incel extremist.

⁴⁴¹ Anja Dalgaard-Nielsen, "Violent Radicalization in Europe: What We Know and What We Do Not Know," [2009] 33 SCT 797, 797-803

⁴⁴² Ibid 803-808

⁴⁴³ Bratich(n71) 5018

Triggering Culpability

Tom's radicalisation makes his eventual decision to kill possible but not inevitable. The majority of those radicalised do not go on to commit violence.⁴⁴⁴ Radicalisation sets the stage for a subsequent criminal choice, and so is not, in isolation, a cause of the stabbing attack.

However, Tom's radicalisation is exploited. Members of *Incel Brotherhood* do not merely create a speculative risk of violence by radicalising Tom; they work to guarantee it. Their influence does not stop with Tom's self-identification as an Incel. Instead, he is encouraged to fixate on a single target, incited to act, and has his violent fantasies celebrated across the forum. Some members of *Incel Brotherhood* glorify past Incel killers,⁴⁴⁵ others disparage Tom for being too cowardly to follow through. Both imply Tom should follow through as a means of proving himself. To Keiler, when extremists both radicalise and incite their followers, they are generating a real prospect of harm.⁴⁴⁶ The extremist is no longer setting the stage but actively contributing to the outcome. The community nurtured and reinforced the speculative risk brought on by radicalisation until they generated a genuine risk of harm. All that is required to bring it about is for Tom to act on what he is being encouraged to do. Thus, they do not set the stage but take advantage of Tom's extremism to inform his decision to kill and so make a material contribution to the outcome. Members of *Incel Brotherhood* radicalise Tom and then direct a radicalised person towards unlawful action. It is as if they collectively and collusively transformed Tom into a weapon and pulled the trigger. Thus, they make a more than minimal contribution to the resulting offence.

Exploiting Instability

Imagine members of *Incel Brotherhood* had come across a vat and began pouring chemicals into its initially passive contents. Slowly, the contents grow unstable, increasing to the point that there is potential for it to explode. It is at this point that we might say that members of the community have set the stage for the explosion. However, if they continue pouring in chemicals after that point, they are exploiting a

⁴⁴⁴ Peter Neumann, "The Trouble with Radicalization," [2013] 89 Int'l A 873, 878-883

⁴⁴⁵ Baele(n74) 77-96

⁴⁴⁶ Johannes Keiler, "Terrorist Speech and the Criminal Law - A Comparative Analysis," [2017] 25 EurJCrimeCrLCrJ 230, 239-244

potentially explosive situation and generating a risk. Those continuing to pour, aware of the ever-escalating risk, are knowingly making a more than minimal contribution to the explosion. Similarly, Tom's radicalisation creates an increasingly volatile situation in which he might go on to commit a criminal offence. After this point, continued incitement, encouragement, and radicalising behaviours are actively informing his decision to kill. Members exploit his radicalisation to generate material risk of harm. Through this, they make a more than minimal contribution to the offence.

Class One and Two Defendants are assessed together because both engage with Tom to a significant degree. Such persons are analogous to those making repeated visits to the chemical vat, watching as the concoction grows visibly unstable but continuing all the same. Both exploit Tom's radicalisation by explicitly directing him towards unlawful action. The risk of him acting is not merely speculative but a natural consequence of Tom acting on what he is being encouraged to do. Those habitually informing his decision to kill should therefore be taken to make more than a minimal contribution to the stabbing attack.

Class Three Defendants are analogous to those who frequently, but not habitually, contribute to the vat of chemicals. Their knowledge of its stability might vary, but repeated contributions after the point of no return is likely to give an indication. These members still take advantage of an explosive environment and so contribute to the outcome. To illustrate, John confesses to a circle of acquaintances that he wishes to murder his ex-partner. He appears unstable and unpredictable and tells them he is serious. Indeed, many know he has said similar things in the past. Some goad him, finding his murderous ravings amusing, and explicitly tell him to act. Others deride him for being too cowardly to kill whilst extolling the virtues of those who do. A small minority, sick of this conversation, tell John to get on with it. Each acquaintance is intentionally directing an unstable person to engage in unlawful action. Their motivations do not change the fact that their words inform his decision to kill. Thus, if he follows through, they have done more than set the stage but materially increased the risk to the victim by inciting a volatile situation. Class Three Defendants duplicate these behaviours in an online environment. Both make a more than minimal contribution to the offence.

This focus on exploiting a radicalised person means liability is not confined to the radicaliser. Imagine someone who despised Eleanor became aware of the forum and created an account to communicate with Tom. They have played no role in radicalising Tom, but in inciting him to harm Eleanor, are exploiting the situation. If they inform Tom's decision to kill, then they have made a more than minimal contribution to the offence. There is nothing preventing an actor who arrives late in the day from being liable, the focus is not on radicalisation itself but its exploitation.

The Legal Viability of Radicalisation

There is no primary legal authority on the criminal liability of radicalisers, save for those who commit a freestanding offence.⁴⁴⁷ Nor does the literature reveal any past effort to make a legal argument that radicalisers are liable for the crimes of those they radicalise. To that end, this argument is made by a loose analogy to *Saunders and Archer*.⁴⁴⁸ The defendant was convicted of murder after giving his wife a poisoned apple, which she gave to their child, who died. But say, instead, the defendant laced the apple with a substance that would cause his wife to fly into an uncontrollable rage. He does not know what she will do under the influence, like he did not know what she would do with the apple, but he poisons her all the same. He then directs her towards their child, whom his wife kills. Despite the alchemical concoction, little has changed. In creating and then exploiting a dangerous situation, the principal has procured the death of his child. His poisonous actions cause his wife to do an act which kills the child, and so he makes an essential contribution to the offence. His actions must exceed the *de minimis* range, as they would if he had brought a dangerous animal into their home, released it, and watched it devour his child.

Say now the poisoned apple has an almost hypnotic effect. It convinces the eater that all children should die, reduces their impulse control, and imparts a furious aggression. The principal gives the apple to his wife and suggests she spend time with their child, whom she kills shortly thereafter. Aside from stretching the bounds of believability, has anything changed? The defendant creates a dangerous situation by handing his wife a poisoned substance and then exploits it by directing her towards their child. She would

⁴⁴⁷ For instance, of encouraging terrorism under the Terrorism Act 2006

⁴⁴⁸ (1573) 2 Plowd 473

not have killed their child but for that poisonous influence. The apple's essential role in setting the scene, compounded by his direction, means he must make a more than minimal contribution to the death. The wife would still be charged with murder, if she acted with the necessary intent then it does not matter that it was influenced by an external force.⁴⁴⁹ However, the husband could, and should, be charged with murder as well. The principal does not need to make the most significant contribution to be guilty. In causing his wife to act through poison and direction, he procures the death of his child.

To complete the analogy, the apple's corrupting influence is to be greatly reduced, so multiple apples are needed for the poison to take effect. The defendant gifts his wife an apple per day and watches her transformation. She slowly becomes more extreme in her views, expresses her hatred openly, and demonstrates increasing aggression towards children. The principal observes all of this and notes her growing instability but continues providing the apples all the same. He eventually suggests she should act on her newfound aspirations and is likely unsurprised when he returns home to find she has murdered their child. Even if he had no direct control over the killing, he set a chain of events in motion, which would not have been possible without him exploiting the poisonous influence of his many apples. Thus, he has made a more than minimal contribution to the death, and so he has procured the death of his child.

Apples and Radicalisation

The distinction between our final hypothetical and the vignette is that the apples are substituted for radicalisation. However, both have the effect of incubating a desire to kill within another, which is then exploited, resulting in death. A defendant who sets a chain of events in motion which causes death or grievous bodily harm may be held responsible for it.⁴⁵⁰ Thus, secondary actors should be responsible for setting events in motion which cause another to kill. There is nothing to indicate that the general rules of causation preclude this. In *Malcherek*,⁴⁵¹ the victims were declared brain dead due to injuries inflicted by the defendants, life support was withdrawn, and all died. The

⁴⁴⁹ *R v Kingston* [1995] 2 AC 355 [360]

⁴⁵⁰ *R v Church* [1966] 1 QB.59

⁴⁵¹ *R v Malcherek* [1981] 1 WLR 690

defendants were convicted of murder but appealed, arguing the original wounds were not operating at the time of death. Lane LJ ruled that the grave injuries inflicted by the defendants set a chain of events in motion, resulting in life support being withdrawn. The wounds did not need to operate in the moment to be a more than minimal cause of death.⁴⁵² Similarly, in directing a radicalised person to kill, the defendant sets a chain of events in motion, resulting in death. The decision to kill is a direct response to the original act, even if it does not cause death in itself.

Of course, there is no guarantee that a radicalised person, even when directed, will cause harm. Radicalisation, unlike grave injuries, does not cause bodily harm, and indeed, not every radicalised person commits violent acts. But neither does the man dosing his wife with corrupting apples know whether she will kill. Nor do those pouring chemicals into an unstable solution know if it will explode. Violence is not guaranteed but a definite possibility, made more likely as the chemical destabilises, the apples take effect, or the radicalisation progresses. A defendant should not be excused by saying a different person or solution would have reacted to their exploitation differently. This is a, perhaps inverted, application of *Blaue*,⁴⁵³ where the victim died after refusing a blood transfusion after being stabbed by the defendant. He appealed his conviction for manslaughter arguing that she broke the causal chain by refusing treatment. Lawton LJ rejected this argument, holding that those who inflict injuries cannot excuse themselves by suggesting that the victim should have taken better care of themselves. Instead, a defendant should be held responsible for their act's natural and probable consequences.

Within the vignette, violence is a probable consequence of encouraging, inciting, or otherwise influencing an extremist to engage in unlawful acts. That Tom would follow through is not unreasonable nor unforeseeable but a natural consequence of exploiting his radicalisation. A defendant should not be able to wash their hands of this by saying a more discerning radicalised person would not do exactly what they were being encouraged to do. Nor should the man who supplies his wife with poisoned apples be

⁴⁵² Ibid [696-697]

⁴⁵³ *R v Blaue* [1975] 1 WLR 1411

able to say another victim would not have resorted to murder so quickly. The defendant must take the radicalised as they find them.

Members of *Incel Brotherhood* have procured the stabbing attack by exploiting Tom's radicalisation and so informing his decision to kill. The stabbing attack is a direct response to this exploitation. We need not quantify their involvement in percentages or fractions, but members of *Incel Brotherhood* have made a more than minimal contribution. Thus, they could be charged for procuring the deaths.

Free Will and Intervening Acts

The progression of the apple hypotheticals culminates in a slow-acting toxin which radicalises the victim. The resulting murder is an independent act by someone with the capacity for free will. Similarly, to assert that members of *Incel Brotherhood* have procured the stabbing attack is to hold them liable for the independent actions of another. A person cannot be liable for procuring an offence if the principal actor makes a wholly independent choice. There must be a demonstrable causal link between the alleged procurement and the offence for there to be a conviction.⁴⁵⁴

There is the additional issue of multiple independent actors factoring into Tom's decision to kill. Andrew von Hirsch defines this as remote harm in which injury is not a direct consequence of the defendant's act but contingent on the actions of others.⁴⁵⁵ Criminal responsibility is only justified if we can explain why the resulting harm is any of the remote actor's concern.⁴⁵⁶ If we cannot, their role should be overshadowed by the principal who should bear full responsibility. Thus, even if *Incel Brotherhood* has inspired Tom, his independent act might sever the causal chain to the point that he should assume sole responsibility for the deaths.

There is a question of whether an act bound up in radicalisation can be considered wholly independent. Say Alice is considering killing James when her neighbours visit her in sequence. Each acts independently of the other but is aware of Alice's murderous inclinations. George vents his grievances about James, Paul suggests people like him

⁴⁵⁴ *Attorney-General v Able* [1984] 1 QB 795 [1983] 3 WLR 845

⁴⁵⁵ Andrew von Hirsch, "Extending the Harm Principle: Remote harms and fair imputation," in Andrew Simester, Anthony Smith (Eds), *Harm and Culpability* (OUP, 1996)

⁴⁵⁶ *Ibid* 259-265, 267-270

are an existential threat, and Oliver gives unsolicited advice about his movements. Finally, Janet details the incompetence of the local police force, while Mary describes easily accessible murder weapons. If Alice kills James, she has been influenced by her neighbours, each of whom has exposed the victim to an unjustifiable risk of harm. Her actions are the most significant, but to ignore her neighbours is to disregard their real contributions to the offence.

Each neighbour works collectively to persuade Alice to murder James. Each contributes to the risk of harm, knowing and intending the outcome. Each neighbour bears some responsibility for causing Alice to act, and so there is a good reason why the resulting harm is their concern. They have done more than set the stage but cause her to act and, in so doing, have procured James's death. To Cane, the purpose of the causal chain is to transform a mechanical description of events into a purposive account of human behaviour.⁴⁵⁷ An account focusing solely on Alice would fail in this regard because we cannot fully explain the offence without referencing her neighbours' wrongful acts. They are essential to any understanding of the offence, so we have good reasons for attributing the resulting harm to them. Alice is now more likely to kill James because of their intervention. Had they each dosed him with a substance which caused wild animals to attack him, and the accumulative result triggered his death by mauling, they would all be responsible. Their volition severely compromised the victim and made them more susceptible to harm, and thus, they each bear some responsibility.⁴⁵⁸ Alice's neighbours would be unjustifiably excused if this were an intervening act that severed the causal chain.

Members of *Incel Brotherhood* not only create the risk of harm by exploiting Tom's radicalisation but have made the victims more vulnerable to it. Even after Tom has expressed violent sentiments, they continue to encourage, incite, and ultimately inspire him to carry out the attack. Amelia and the other victims would not have been in danger but for their intervention. Without them, we cannot truly understand the stabbing attack; thus, they should not be excluded from the causal chain.

⁴⁵⁷ Peter Cane, "Responsibility and Culpability" In David Hodgson (Edt) *Responsibility in Law and Morality* (HA, 2002)113-116,119

⁴⁵⁸ Ibid 121-130

Intervening Acts: The Legal Position

As accessory liability via aiding, abetting, and counselling do not require a causal contribution there is no need to consider intervening acts. Instead, accessory liability can be severed by an overwhelming supervening act. There are two questions to this. The first is whether nobody in the accessory's position could have contemplated what would happen.⁴⁵⁹ Within the vignette, Tom proposes a mass casualty stabbing attack which is precisely what members of *Incel Brotherhood* go onto to assist, encourage, and counsel. The second question is whether the accessory's encouragement or assistance has faded into the background,⁴⁶⁰ or spent all possible force by the time of the completed offence.⁴⁶¹ Within the vignette the contributions made by members of *Incel Brotherhood* are critical to Tom carrying out the stabbing attack. Thus, their contributions are still live at the time of the offence, and so have not been relegated to history. Thus there is no scope to say there is an overwhelming supervening act within the vignette.

However, procurement requires that the accessory make a causal contribution to the offence, and so it is necessary to have regard to the usual rules of causation which includes intervening acts. The House of Lords has held that the criminal law generally assumes the existence of free will. Adults of sound mind are treated as autonomous beings. Thus a free, voluntary, and informed decision will be treated as an intervening act which breaks the causal chain.⁴⁶²

Williams argued that when a person suggests, urges, or persuades the defendant to act then they may make the resulting offence more likely, but they do not cause it.⁴⁶³ The House of Lords endorsed this statement,⁴⁶⁴ as well as Hart's contention that the free, deliberate, and informed actions of third parties will normally be held to relieve a defendant of criminal responsibility.⁴⁶⁵ That this is normally the case, means that a free, deliberate, and informed act will not always break the causal chain. Indeed, this is

⁴⁵⁹ *R v Tas* [2018] EWCA Crim 2603 [40]

⁴⁶⁰ *R v Grant* [2021] EWCA Crim 1243 [2022] QB 857 [34]

⁴⁶¹ *R v Rowe* [2022] EWCA Crim 27 [136]

⁴⁶² *R v Kennedy* [2007] UKHL 38 [14]

⁴⁶³ Glanville Williams, "Finis for Novus Actus" (1989) CLJ 48, 391, 392

⁴⁶⁴ *Kennedy*(n462) [15]

⁴⁶⁵ Hart(n384) 326, endorsed in *Kennedy*(n462) at 15

consistent with the House of Lords acknowledging that causation is context-specific and so cannot be mechanically applied in the same way to every case.⁴⁶⁶ There is no, universally applicable test to determine what is and what is not an intervening act.

Thus, there are circumstances, in which a free, deliberate, and informed action will not relieve the defendant of criminal responsibility. In *Wallace*,⁴⁶⁷ the victim sought euthanasia after being disfigured by an acid attack. The defendant was charged with murder, but the trial judge withdrew it, finding that the decision to seek assisted dying was an intervening act. Sharp LJ reversed this decision, because the decision to seek euthanasia, and the decision of the doctor to administer it, was a direct response to the acid attack. Thus they were not instances of free and unfettered volition, which is what is required for an intervening act. So long as the attack played a more than minimal role in motivating the decision to die, the defendant could be convicted.⁴⁶⁸ The drastic decision to access euthanasia was not an intervening act because it was intrinsically linked to the original injuries. Whether he wished to die was a choice that was thrust on him by acid attack, and so it could not decently be described as voluntary. Thus, the action of an autonomous party, done in direct response to the defendant's action will generally not be an intervening act.

This principle is consistent with some of the earlier case law concerning causation. In *Cheshire*,⁴⁶⁹ the defendant shot a man who then required a tracheotomy tube. On the 8th and 14th of February 1988 he complained of breathing difficulties, and died after his windpipe had become obstructed by scar tissue. Expert evidence suggested that the death was, in part, caused by the negligence of the medical professionals who failed to recognise the reason for his breathlessness. The defendant was convicted of murder, and had that conviction upheld. As Beldam LJ described, poor medical treatment will only amount to an intervening act if the treatment received was so extraordinary that it must be regarded as something independent of the defendant.⁴⁷⁰

⁴⁶⁶ Kennedy(n462) [14]

⁴⁶⁷ *Wallace* [2018] EWCA Crim 690

⁴⁶⁸ *Ibid* [58-60]

⁴⁶⁹ *R v Cheshire* [1991] 1 WLR 844

⁴⁷⁰ *Ibid* 849

This means that some free, deliberate, and informed actions must overwhelm the defendant's contribution in order to break the causal chain. In *R v Smith*,⁴⁷¹ the defendant stabbed the victim, who was dropped twice while being carried away to receive treatment. He was then given the wrong treatment. Nevertheless the defendant's conviction for murder was upheld, on the basis that the causal chain would only be broken if the medical errors were so overwhelming as to consign the original wound to history. In the circumstances the stab wound was still an operating and substantial cause of death, albeit one that had been improperly treated. The death could still be attributed to the stab wound, and so the defendant was responsible.⁴⁷²

To illustrate what an intervening act might look like, say A stabs B in the stomach for which he needs urgent treatment, and B is taken to hospital. In the hospital, C, a surgeon, decides to cut his throat long before he can succumb to the initial wound. C's actions are so extraordinary that they have overwhelmed the initial stab wound, which is not even the cause of death. All the stabbing explains is why B is in the hospital when he came to harm. A free, deliberate, and informed act must be both drastic and extraordinary for it to break the causal chain.

This interpretation of intervening acts appears to create a disconnect between these cases and the authoritative statement of the House of Lords in *Kennedy*. Sharp LJ addressed this in *Wallace*, suggesting that a free, deliberate, and informed act is one which is the product of unfettered volition. Indeed she argued that unfettered volition is what the law on intervening acts is trying to communicate.⁴⁷³ An action done in response to the defendant's contribution, which does not overwhelm it, cannot be considered truly independent or free of the defendant. The real question is whether the defendant simply set the stage for a subsequent exercise of free, and unfettered volition, which caused death, or was instrumental in bringing that death about. If it is the former, then there is an intervening act. If it is the latter, there is no intervening act and so the defendant can be held responsible.⁴⁷⁴

⁴⁷¹ [1959] 2 WLR 623

⁴⁷² Ibid [43]

⁴⁷³ Wallace(n467) [61] [76]

⁴⁷⁴ Ibid

This focus on unfettered volition continued in *R v Field*.⁴⁷⁵ Here the defendant was convicted of murder after pretending to be in a loving relationship with the victim. The victim changed his will, leaving the defendant a significant sum. The defendant then began covertly drugging, and gaslighting the victim, and acquired him whisky in addition to his prescribed medication. The victim then consumed both, and died.⁴⁷⁶ The defendant's case was that the victim had voluntarily consumed the drugs, which he was prescribed, and alcohol, and thus he should not be convicted.⁴⁷⁷ The Court of Appeal rejected this submission. In the judgment Fulford LJ gave the example of the 'weak swimmer,' in which A encourages B, a weak swimmer, to take to the water, after A promises to provide assistance if B encounters difficulties. If A had no intention of doing so, then A can be liable for B's death by drowning. For B's decision to swim would have been materially different if they were aware of A's true intentions.⁴⁷⁸ Similarly, the defendant's undisclosed murderous intentions substantively changed the nature of the undertaking, and so it was open to the jury to consider that it was not a truly free, voluntary, and independent act. Thus if they were satisfied that the defendant made a more than minimal contribution to the death, then they could be properly convicted.⁴⁷⁹ The defendant's deception was such that it inhibited the victim from making a truly free and unfettered exercise of volition, and so there was nothing to break the causal chain.

There is clearly a tension here between this line of authority and the seemingly unambiguous language of *Kennedy*. Although whether this is a natural consequence of causation being a woolly concept, unique to every case, or a genuine disregard of the principle in *Kennedy* is unclear. Whatever the answer, this tension cannot be resolved without the intervention of the Supreme Court, and so the analysis is left with the law as it is currently applied. At present, the criminal law appears to operate on a fairly loose conception of what a free, voluntary and informed act is. Thus for the vignette, if the exploitation of Tom's radicalisation played a more than minimal role in bringing about a mass-casualty attack, then his decision to follow through should not be seen as an

⁴⁷⁵ [2021] EWCA Crim 380; [2021] 2 Cr App R 14

⁴⁷⁶ Ibid [7-19]

⁴⁷⁷ Ibid [43]

⁴⁷⁸ Ibid [49]

⁴⁷⁹ Ibid [63]

intervening act. Rather Tom's actions are a direct response to what he has been radicalised and then incited to do; and so the causal chain is unbroken.

This would be consistent with the nature of accessory liability by procurement, which depends on the principal freely committing an independent act. Indeed an accessory can only be charged with procuring an offence if it has been committed.⁴⁸⁰ For instance, in *Croft*,⁴⁸¹ the defendant entered into a suicide pact with the victim. She survived an initial gunshot and asked the defendant to seek help, but fatally shot herself while he was gone. Lawrence J identified that so long as the suicide occurred pursuant to the agreement, then the defendant was responsible for her death. So long as there was an intimate connection between her act and the agreement, there was no intervening act.⁴⁸² While this case was concerned with the actions of the victim, this should extend to the principal.

Say A recruits and instructs B to commit armed robbery, which he goes on to do. A has procured armed robbery. It would be bizarre to say that B's technically independent act of following through is an intervening act. To do so would defeat the purpose of accessory liability by procurement. Williams identified that accessory liability developed because ordinary notions of causation distinguished between accessories and principals.⁴⁸³ Principals cause offences by an informed, voluntary choice, which the accessory influences. Accessory liability via procurement exists to ensure those who cause offences can be liable despite the free and voluntary acts of principals.⁴⁸⁴ .

Indeed, for accessories via procurement a free independent act do not break the causal chain. In *Kennedy*,⁴⁸⁵ the Appellant lived in a hostel with B who asked him for heroin. The Appellant prepared a dose of heroin and gave B a syringe, who died after injecting it. The House of Lords set their conviction for unlawful act manslaughter aside. For all the Appellant had done was provide heroin, which had been freely and voluntarily self-administered.⁴⁸⁶ However this is not contingent on intervening acts, nor does it reveal a

⁴⁸⁰ *R v Assistant Recorder of Kingston-Upon-Hull* [1994] 3 WLR 519 [62]

⁴⁸¹ *Rex v Croft* [1944] KB 295

⁴⁸² *Ibid* [297]

⁴⁸³ Williams(n97)

⁴⁸⁴ *Ibid* 398

⁴⁸⁵ *Kennedy*(n462)

⁴⁸⁶ *Ibid* [16][19]

general principle of accessory liability. The appeal was allowed because the death was caused by injecting, not supplying, the drugs. Thus, the Appellant's unlawful act of supplying the drugs did not cause the death. It is not a criminal offence to inject oneself with heroin, and so the death did not flow from an unlawful criminal act. The Appellant could not be liable as an accessory if the conduct were not criminal. He did not counsel, procure, aid or abet the commission of a criminal offence.⁴⁸⁷ There was no viable route to liability because an unlawful act did not cause the death.⁴⁸⁸

Say for a moment that injecting oneself with heroin was made a criminal offence. The defendant, in preparing and supplying a syringe, would make a more than minimal contribution to an unlawful act. If they knew B was going to inject themselves and if a natural and ordinary result of their act was a risk of physical harm, then they can be liable as an accessory to unlawful act manslaughter. Once there is an unlawful act, there is scope for accessory liability via procurement.

To that end, say A radicalises B into believing armed robbery is the only legitimate way of making money. Thus, when B goes out into the world, committing armed robberies wherever he goes, there is an inherent link back to A. But for A's intervention B would not be engaging in armed robbery. A has procured armed robbery. To say B's independent act of free will breaks the causal chain neglects A's substantial contribution. Indeed, any person who procures an offence could say that, ultimately, the principal freely chose to act, and so there is no basis on which to say they have caused the offence. To say a free, voluntary, and informed act will break the chain risks making this limb of accessory liability redundant. Of course the House of Lords did envision an exception to the free, voluntary and informed rule when defendants act in concert,⁴⁸⁹ which has subsequently been applied,⁴⁹⁰ but this does not assist the analysis. Procurement can arise even when the principal has no knowledge of the accessory's efforts, and so there are cases where the two cannot be considered to be acting in concert.⁴⁹¹ If A secretly

⁴⁸⁷ Ibid [17-20]

⁴⁸⁸ Ibid [26]

⁴⁸⁹ *Kennedy*(n462) [14]

⁴⁹⁰ *R v Bah* [2024] EWCA Crim 1499; [2024] 12 WLUK 147 [31]

⁴⁹¹ *Attorney-General's Reference*(n341) 779

causes B to commit an offence, they should not be excused by saying that they did not act in concert with B, and so B's decision to commit the offence is an intervening act.

Moreover, there is a moral dimension to intervening acts. In *Maybin*,⁴⁹² the victim died after being struck three times, firstly by the two Appellants and then by a bouncer. All three were charged with causing the death, but it was unclear which delivered the killing blow. The Supreme Court of Canada found that the test for criminal responsibility was whether the defendant's actions were outside the *de minimis* range. Beyond this point, an intervening act must overwhelm the original so that the initial defendant is reduced to a moral innocent.⁴⁹³ Thus, whether or not an action should break the causal chain is a moral, not a mathematical, question.⁴⁹⁴ An intervening act must be so extraordinary that holding the original actor responsible is no longer justifiable. An event intrinsically connected to the defendant's action should, therefore, rarely, if ever, be said to break the chain.

The term moral innocent may be slightly misleading. Say A shoots B, causing B to fall onto the floor in pain, and A simply walks away expecting B to die. C stumbles upon B, and decides to suffocate him. In the circumstances, all the shooting explains is why B was in such a vulnerable state. It appears that C's contribution has utterly overwhelmed A's, to the point that the shooting is not a true cause of B's death. A's contribution may simply set the scene, and while he should be liable for shooting B, he may not be liable for the death. But that does not mean his conduct was not wrongful. The term moral innocent may be better termed as a causal irrelevance. To say a defendant is a moral innocent means nothing more than it would be unfair, in light of their minimal contribution, to hold them responsible for a given outcome.

When A radicalises B into committing armed robbery, he is not a moral innocent. There is an inherent link between B's free and informed choice and what he has been radicalised to do, so no intervening act when he does so. However, if B grows bored and decides to commit fraud, that inherent link is lost. It may be that B has inspired him to further criminality, but the connection between them never extended to unrelated

⁴⁹² *R v Maybin* [2012] SCC 24

⁴⁹³ *Ibid* [29]

⁴⁹⁴ *Ibid* [44]

offences. Thus, B's decision to commit fraud breaks the causal chain as A is morally innocent of those offences. This argument is not limited to a single offence; however, it could be that A radicalised B into committing armed robbery, fraud, and a host of violent offences. Thus, B's independent act will not sever the causal chain. However, if B then decides not to purchase a train ticket, then it falls outside the scope of A's act, who cannot then be liable for procuring it. In respect of this offence, they are a moral innocent who cannot fairly be said to have caused fare evasion. But this will seldom be true wherever there is an inherent link between A's procuring act and B's commission of a relevant offence.

Within the vignette, Tom's decision is so closely connected to his radicalisation that it is difficult to classify it as an intervening act. The stabbing attack would not have happened but for the incitement and influence of members of *Incel Brotherhood*. . Indeed, moral innocents may not be an apt term for *Incel Brotherhood*. After all, when Tom uploads his fantasies and makes his intentions known, members of the community respond with encouragement, provocation, and a declaration that he is a prospective saint. Tom following through is a direct response to these behaviours. These members are not morally innocent when Tom acts on what they are encouraging him to do. Tom's seemingly independent decision offers no exculpation, and so members of *Incel Brotherhood* could still be said to have procured homicide.

To what degree do these elements of *Maybin* translate into the law of England and Wales? Sharp LJ directly cited Justice Karakatsanis, emphasising the critical question of whether an intervening act reduced the defendant to a moral innocent.⁴⁹⁵ Subsequent cases have concurred that an assessment of causation should focus on the critical question of whether the defendant should be held responsible.⁴⁹⁶

In *R v A*,⁴⁹⁷ the respondent had been driving three, intoxicated, friends' home in the early hours of the morning. As the journey progressed, these friends annoyed the respondent who pulled onto the hard shoulder and remained there, stationary, for around fifteen minutes. A truck then swerved across the lane, collided with the car, killed one of the

⁴⁹⁵ *Wallace*(n467) [63]

⁴⁹⁶ *Bah*(n490) [28]

⁴⁹⁷ [2020] EWCA Crim 407

passengers, and seriously wounded another. The respondent, and the truck driver were both charged with causing death, and serious injury, by dangerous driving. The trial judge found that there was no case to answer in respect of the respondent as the truck driver had broken the chain of causation. The Crown appealed. Simon LJ, referencing *Maybin* and *Wallace*, concluded that while the terms ‘moral responsibility’ and ‘moral connection’ are not frequently echoed in the law, the criminal jurisdiction was resistant to any argument which allowed the defendant to escape criminal responsibility simply by pointing to the exceptionality of the circumstances. The real question was whether the intervention of a third party meant that it was now unfair to hold the defendant responsible.⁴⁹⁸ The respondent created a risk of death or serious harm by leaving their car on the hard shoulder, without displaying any lights, and so should be answerable for that risk manifesting. Thus there was a case to answer.⁴⁹⁹

Therefore, an intervening act must be something so drastic that it makes it unfair to hold the defendant responsible. In which case it is unlikely that the causal chain will be broken when A influences B to do something, and B acts on that influence. In *Beech*, the victim jumped out of a window after the Appellant broke into her house, causing her grievous injuries, which he was convicted for inflicting. The Court of Appeal held that the jury was entitled to convict if they were satisfied the victim’s acts were a natural consequence of the Appellant’s conduct.⁵⁰⁰ Similarly, in *Roberts*, the defendant was convicted for causing injury to a woman after she jumped out of a car to escape him. If a victim does something that directly causes them harm in response to the defendant’s conduct, the defendant is responsible.⁵⁰¹ Foreseeability is a tool to assist this analyse but is not determinative. An intervening act must be so unforeseeable, so remote, so unreal that it cannot be a natural consequence and only then is it purely voluntary.⁵⁰² In the vignette, the natural result of radicalising, inciting, and encouraging Tom to commit a terrorist act is his following through. Someone acting on the advice being given does

⁴⁹⁸ Ibid [30]

⁴⁹⁹ Ibid [37-39]

⁵⁰⁰ *R v Beech* (1912) 7 CrAppR 197

⁵⁰¹ *R v Roberts* (1971) CrAppR 95

⁵⁰² Ibid [102-103]

not seem to be so beyond the realm of possibility for it to be considered wholly independent.

Indeed, the case law defines a natural consequence broadly. In *Dear*,⁵⁰³ the Appellant was convicted of murder after attacking the victim with a knife. However, the death was caused by the victim reopening the wounds days later as a means of suicide. The Court of Appeal upheld the conviction, finding the jury was within their rights to conclude that the Appellant contributed significantly to the death. The victim would not have acted but for the injuries inflicted, and so his suicide, even if it was unforeseeable, was not an intervening act.⁵⁰⁴ There is an essential link between the stabbing and the victim reopening his wounds, so his unforeseeable action cannot overwhelm the original act. The death was a direct response to the initial contribution, a natural consequence, so it did not break the chain. Despite the victim choosing to die, the Appellant was not a moral innocent and so could be punished appropriately. The vignette has a similar link between Tom's radicalisation and his eventual decision to kill. He acts in direct response to what has been incubated within him, and his radicalisers should be taken to have procured a criminal offence.

Of course, Tom does not merely self-harm but actively chooses to harm others. However, the principle is not restricted to victims. In *Pagett* the defendant was convicted of manslaughter for using a woman as a human shield in a shootout with the police. Goff LJ dismissed his appeal, making it clear that the law of England and Wales does not require a defendant to deliver the killing blow. If the police fired justifiably in direct response to the defendant's actions, then it was not an intervening act. An intervening act must supervene on the causal chain, becoming the sole cause of death, which relieves the accused of all responsibility.⁵⁰⁵ The practical effect of an intervening act must be to reduce the defendant to a moral innocent.

Thus, the Appellant, in discharging his weapon with a human shield, knowing the police might return fire, caused the death. Indeed, the Court of Appeal made it clear that had the defendant acted with the necessary intent, he could have been convicted of murder.

⁵⁰³ *R v Dear* [1996] CrimLR 595

⁵⁰⁴ Kate O'Hanlon, "Murder," [1996] 21 CLR 595

⁵⁰⁵ *R v Pagett* [1983] 2 WLUK 28

Tom may not be a victim of *Incel Brotherhood*, but a direct consequence of radicalising him is him following through on his stated ambitions. Their advice, encouragement, and provocation cause Tom to act. There is nothing to overwhelm their contributions to reduce them to moral innocents. The causal chain has not been broken. Thus, any member of *Incel Brotherhood* who has made a more than minimal contribution to Tom's decision to carry out the stabbing attack could be charged with procuring homicide.

Chapter Five: Accessory Liability in Tort

Blood Money

For tort liability, the victims become the focal point of analysis, for they, or their estates, bear the burden of bringing proceedings. It would be for those victims, now claimants, to fund litigation.⁵⁰⁶ If the claimant lacks funds, there is little prospect of them securing representation. If a defendant has deep pockets, damage-based⁵⁰⁷ or conditional fee agreements,⁵⁰⁸ allow payment to be deferred. Although these would not be available if there is no prospect of payment. Should the defendant lack deep pockets, they are a poor target for litigation.

To Cane, the practical challenges this creates may be insurmountable.⁵⁰⁹ The claimant must find a way to privately finance the claim. This is true even if the defendant has assets as other creditors, with higher priority, may limit the funds available to the claimant. Indeed, there are further costs of securing, collecting, and enforcing debt. A claimant wishing to sue a defendant without the ability to pay will likely be advised that it is not worth proceeding.⁵¹⁰ Even if they have the means to finance a claim privately, they will incur the expenses of legal proceedings with no guarantee of a return. Thus, a potentially viable tort claim might be derailed by the practical reality of tort law and other, more accessible routes to compensation.⁵¹¹ Although not all victims may want compensation, some might be motivated to bring proceedings simply to have the fact of their wrong acknowledged by a court.

Of those routes includes the Criminal Injuries Compensation Authority (CICA). In practice, it is rare for victims of crime to sue offenders,⁵¹² with only 0.7% of defendants being worth suing in the first place.⁵¹³ The CICA provides victims of crime, secondary

⁵⁰⁶ Peter Cane, James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (CUP 2018) 210-215

⁵⁰⁷ An agreement whereby a legal professional agrees to receive payment only if the claimant is successful and receives damages. This is set by percentage to the level of damages. The solicitor will not receive a fee in the event they lose.

⁵⁰⁸ This is an agreement where a solicitor's fee is only payable in specified circumstances, normally being that the client succeeds in their claim or it is successfully defended. Fees payable under a CFA are usually more than what would normally be charged as there is a success fee.

⁵⁰⁹ Cane(n506) 210-215

⁵¹⁰ Ibid 215-220

⁵¹¹ For victims of serious torts amounting to criminal offences, a route to compensation would be the Criminal Injuries Compensation Authority (CICA). See below for more detail.

⁵¹² Cane(n506) 285-290

⁵¹³ Criminal Injuries Compensation Act 1995

victims, and those who take exceptional risks to apprehend offenders with compensation.⁵¹⁴ To be eligible, those falling within these descriptors must suffer an injury from a criminal offence occurring in Great Britain, which must be reported to the police as soon as possible.⁵¹⁵ Compensation is assessed on a twenty-level tariff system ranging from £1000 at level one to £250,000 at level twenty. The scheme has been criticised as inflexible and unfair but is a route to compensation outside tort.⁵¹⁶ However, not only is there an additional eligibility requirement, but the awards under the scheme are modest when compared to damages in a successful tort claim.⁵¹⁷ As a result claimants who meet the eligibility might find a less lucrative, but more effective, route to compensation. More could be said about the scheme, but it is neither a civil nor criminal route to liability.

So, in tort, defendants who are not independently wealthy are only suitable litigation targets if they are insured, or there is another route to insurance money. Insurance is the primary means of compensation in tort.⁵¹⁸ Insurers rarely contest liability and make payments in 86% of cases.⁵¹⁹ Road traffic and workplace accidents dominate the legal marketplace because insurance is compulsory.⁵²⁰ Meanwhile, a claimant injured by an uninsured defendant has around a one-in-seven chance of obtaining compensation.⁵²¹ Those injured by uninsured drivers do have alternative routes to compensation. For severe injuries beyond this, it is exceptionally unlikely that any individual defendant could compensate the claimant.⁵²² Only insured defendants have the guarantee of liquid funds to make litigation worthwhile, and so the legal market has predicated itself on insurance.

⁵¹⁴ Cane(n506) 285-290

⁵¹⁵ Ibid 295-305

⁵¹⁶ Ibid

⁵¹⁷ Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases 16th Edition, IX, 5, 24-25

⁵¹⁸ Richard Lewis, "Insurance and the Tort System" (2005) 25 Legal Stud 8,85-116,85-90

⁵¹⁹ Ibid

⁵²⁰ Road Traffic Act 1960 s201

⁵²¹ Lewis(n518)

⁵²² Ibid 90-95

To Abraham, the preference for insurance money has shaped much of modern tort law.⁵²³ Liability goes where the money is, and so tort liability, seeking adequate compensation, naturally flows where the money is. As Abraham argues this is a characteristic, not just of the practice of tort law, but the substantive law itself. Much of the scope of current tort liability is justified by the need to gain access to the defendant's insurance. In some quarters the law of tort is the law of insurance.⁵²⁴

This may be overstating the case, as the extent to which insurance shapes the substantive law is contested. To Stapleton, it is a modern reality of tort law that claims are only worth bringing against an insured defendant.⁵²⁵ However, this is also true in many contract and commercial claims, but we do not say those areas are entwined with insurance. Tort is, traditionally, a system of individual liability, so there should be no moral distinction between insured and uninsured defendants.⁵²⁶ Tort has goals beyond compensation, such as deterring wrongful conduct and providing corrective justice.⁵²⁷

However, to Baker, if insurance availability is a de facto element of tort liability, then the uninsured have effective immunity.⁵²⁸ If only insured persons are pursued, the case law will be shaped by insurance claims. That sometimes defendants will have considerable means or claimants will be motivated to pursue the uninsured does not change that tort, as a whole, is shaped by insurance. Baker imagines tort as a network of rivers in which insurance is the invisible force affecting how much it rains, where dams are erected, and where the bulk of the water flows. The water is independent of but cannot be fully understood without accounting for the invisible forces channelling it.⁵²⁹

This is exemplified by the pressure on legal services to adapt claims to access insurance funds. Pryor illustrates this through several examples, identifying a man who deliberately molested a child being accused of negligently, not intentionally, inflicting emotional distress. Another man was sued for negligently causing the death of his wife

⁵²³ Kenneth Abraham, *The Liability Century Insurance and Tort Law from the Progressive Era to 9/11*, (HUP, 2008) 220-222

⁵²⁴ Ibid 38

⁵²⁵ Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 ModLRev 820, 820-825

⁵²⁶ Ibid

⁵²⁷ Ibid 843-836

⁵²⁸ Tom Baker, "Liability Insurance as Tort Regulation: Six Ways that Liability Shapes Tort Law in Action," [2005] AFSPCLSR 2336, 3-7

⁵²⁹ Ibid 15

and child after being indicted for their murder.⁵³⁰ This practice is 'under litigating,' in which an intentional tort is reconstructed as negligence to engage an insurance policy.⁵³¹ As insurance is not available for intentional torts, pursuing defendants is futile if they cannot compensate the claimant.⁵³² Instead, the claim is adapted to engage the insurance policy.⁵³³ The claim is adapted to the amount of compensation available. The same has been observed in the United Kingdom, where it is contrary to public policy to insure a defendant against an intentional tort.⁵³⁴ For the vignette, which features intentional criminal acts, the defendants could not access insurance money even if they had policies in place.⁵³⁵

Thus, the claimants would be pursuing blood money. Blood money refers to money paid by real people from their own funds, which hurts defendants personally.⁵³⁶ Baker identified a professional reluctance among lawyers to pursue blood money. Many disdained colleagues known to exact it, and all preferred insurance claims.⁵³⁷ This is not a universal rule. Defendants who culpably or maliciously inflict serious torts are fair game for blood money in proportion to their wrongdoing.⁵³⁸ The malicious, spiteful, and calculated conduct within the vignette indicates an exceptionally high level of culpability, so the professional reluctance is unlikely to engage.

However, this might not offer the claimant much reprieve. The lawyers Baker interviewed suggested that defendants in blood money cases are less able, or more reluctant, to pay the claimant. As blood money hurts them, they are much less likely to settle, and so a protracted dispute is almost inevitable.⁵³⁹ Thus, blood money claims are expensive, burdensome, time-consuming, and so lawyers are averse to even morally

⁵³⁰ Ellen Pryor, 'Stories We Tell: Intentional Harm and the Quest for Insurance Funding' [1996-1997] 75 TexLRev 1721, 1721-1730

⁵³¹ Ibid 1731-1738

⁵³² Ibid 1746-1756

⁵³³ Ibid

⁵³⁴ Rob Merkin, Jenny Steele, *Insurance and the Law of Obligations* (OA, 2013) 329-361, 11.2, 11.4.1, 11.4.2

⁵³⁵ Which is unlikely, see the subheading 'Contribution' for the socio-economic circumstances of Incels

⁵³⁶ Tom Baker, "Blood Money, New Money, and the Moral Economy of Tort Law in Action" [2001] 35 LSR 275, 280-285

⁵³⁷ Ibid 285-290

⁵³⁸ Ibid 295-305

⁵³⁹ Ibid 290-296

justified claims.⁵⁴⁰ Insurance claims are infinitely preferable. The assets are far more forthcoming, and insurance companies are easier to deal with than intransigent defendants. Tort lawyers rarely take blood money claims, and so the burden of tort law falls almost exclusively on insurance companies.

Enforcement is also an expensive process which might not bear fruit. If a judgment is awarded, a defendant might declare bankruptcy, work for cash to evade an attachment to earnings, or simply disappear. Thus, it is very rare for individual tortfeasors to pay out of their own pocket, and so the vast majority of payments are made by insurers.⁵⁴¹ Tort is practically and professionally structured to facilitate insurance claims to the point that it is a virtual prerequisite for liability.⁵⁴²

The literature throughout this section has come largely from the US, because it explains a phenomenon that has also been identified in England and Wales. In England and Wales, lawyers are unlikely to take on a tort claim against an uninsured defendant unless they have substantial means for all the same reasons.⁵⁴³ The likelihood that an uninsured individual will be unable to release funds means most professionals are unlikely to pursue an uninsured defendant on a conditional or damage based fee arrangement, unless the defendant is independently wealthy, or a self-insuring corporation. As a result, unless a prospective claimant can afford to pay the costs themselves, they are unlikely to secure legal representation.⁵⁴⁴ Thus, for practical purposes, the tort market in both the UK and the US is structured to facilitate insurance claims to the point that insurance is often a virtual prerequisite for liability.

Now, the term blood money is not widely used in the UK, rather uninsured defendants have been described as 'men of straw.' Morgan argues that 'men of straw' are generally not sued, often because it is a waste of time and money to do so. Thus 'men of straw' have a functional immunity from proceedings because it will be impossible to execute a

⁵⁴⁰ Charles Silver and others, 'Policy Limits, Payouts and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance' [2015] 5 UCLrvineLRev 559, 560-565

⁵⁴¹ Cane(n506) 210-245

⁵⁴² Baker(n536) 314 - 321

⁵⁴³ Cane(n506) 210-245

⁵⁴⁴ Ibid

judgment against them, and so they are ‘judgment-proof,’⁵⁴⁵ Nevertheless, men of straw who are being pursued for what little funds they have, are in effect being pursued for blood money. The terms may be different but the underlying phenomena is very similar, and so Baker’s work offers a means of understanding something that is applicable to both the UK and the US. The result being that in either jurisdiction, uninsured defendants are not attractive targets for litigation.

Thus, in the vignette, victims who have no choice but to pursue blood money would encounter great difficulty in securing representation. This does not mean they are without options. They could attempt to crowd-source the funds, especially if the public are aware and outraged at the harms of the Manosphere. Or they could launch proceedings as a litigant in person. It may not necessarily matter, to them, there is little prospect of them receiving damages. There are instances of claimants pursuing uninsured defendants of unclear means when they commit egregious wrongs.⁵⁴⁶

While the analysis will explore potential tort claims, they must be considered in light of these difficulties. A legally sound claim in tort might be defeated by the practical reality of tort law. This is especially true for victims of torts that amount to violent crimes, as there is a strong correlation between socioeconomic deprivation and violent offending.⁵⁴⁷ Thus, tort may not be the claimant’s preferred route to compensation.

Battery and Assault

Tom takes 'several knives' to the 'Humanities Building' at Heaton Campus and attacks' students indiscriminately.' These actions are best captured by the intentional torts of assault and battery.

The Tort of Battery

A battery is committed when one person intentionally and unjustifiably applies physical force to another. Any unwanted physical contact directed at the claimant by the

⁵⁴⁵ Phillip Morgan, "Judgment-Proofing Voluntary Sector Organisations from Liability in Tort," [2020] Canadian Journal of Comparative and Contemporary Law, <https://eprints.whiterose.ac.uk/id/eprint/154052/>, accessed 20/09/2025, 6, 2,9,22

⁵⁴⁶ *Young v Downey* [2025] EWCA Civ 177

⁵⁴⁷ Tim Newman, "Social Disadvantage, Crime and Punishment," in Dead, Hartley, Plat (eds) *Social Advantage and Disadvantage* (OUP,2016) 325-328

defendant, is a battery.⁵⁴⁸ In *Wainwright*,⁵⁴⁹ the two claimants were visiting a prisoner and subjected to invasive and humiliating strip searches. The first claimant found the procedure distressing, humiliating, and degrading, although she was not touched. The second claimant was poked in the armpit, had his genitals handled, and his foreskin pulled back. The search exceeded what the prison authorities permitted, so was neither lawful nor consensual. The House of Lords held that the second claimant was entitled to damages as he was the sole victim of unwanted physical touching.⁵⁵⁰ The first element of battery is for the defendant to make intentional and non-consensual physical contact with the claimant.

The physical contact does not need to be extensive; battery is intended to protect the claimant from the lowest level of violence.⁵⁵¹ Goff LJ, in *Collins*,⁵⁵² held that the common law holds every human body as inviolate and so prohibits all forms of violence and physical molestation.⁵⁵³ All battery requires is that the defendant make non-consensual physical contact with the claimant, however slight.

The qualifier is that citizens may be subject to non-consensual physical contact in modern life for all sorts of reasons, and so there must be exceptions. The starting point is that any intentional non-consensual touching of another adult's body is tortious.⁵⁵⁴ However, touching might occur when walking on the pavement, travelling on a busy train, or trying to get someone's attention. Thus, battery will only be available when the claimant is subject to intentional touching beyond what is generally acceptable in ordinary life.

For the vignette, battery can be formulated as the intentional, non-consensual touching of another person, which exceeds what is acceptable in ordinary life. This is clearly exceeded on the vignette, which features violent stabbings far above the bare minimum the law prohibits. If an unwanted kiss can be a battery⁵⁵⁵ then there is little scope for

⁵⁴⁸ Andrew Tettenborn (edt), *Clerk and Lindsel on Torts* (24th Edn, TR 2023) 14.09

⁵⁴⁹ *Home Office v Wainwright and another* [2003] UKHL 53; [2004] 2 AC 406

⁵⁵⁰ *Ibid* [60]

⁵⁵¹ Rob Stevens, *Torts and Rights* (OUP, 2009)

⁵⁵² *Collins v Wilcock* [1984] 1 WLR 1172

⁵⁵³ *Ibid* [1180]

⁵⁵⁴ *Re F (Mental Patient: Sterilisation)* [2004] 2 AC 406

⁵⁵⁵ *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458

debate when faced with vicious stabbings meriting the most draconian criminal sanctions.

The second question is intent; battery is an intentional tort which requires the defendant intend the act which made physical contact. In *Williams*,⁵⁵⁶ the defendant pushed the claimant into a pool as a practical joke, not realising he would be seriously injured. Nevertheless, he intended physical contact to generate the biggest possible splash and so was liable for battery.⁵⁵⁷ Recklessness will also suffice, although Trindade observes that the dividing line between this and intent is often unclear.⁵⁵⁸ A defendant who acts, knowing there is a risk of physical contact, but takes that risk anyway will be liable for battery if it manifests.⁵⁵⁹ In *Shepherd*,⁵⁶⁰ the defendant threw an explosive into a market, where it was frantically passed around before exploding in the claimant's hands. The defendant did not intend physical contact with any one person but did a mischievous act, knowing direct physical contact was a possibility. This was sufficient intent for battery. A defendant who runs the risk of physical contact or closes their eyes to that consequence cannot escape liability. Many of the examples are criminal, for battery is also a common law crime, made summary only in 1988,⁵⁶¹ but the principles between them are interchangeable.⁵⁶²

Tom intends to make physical contact as part of a stabbing attack calculated to claim as many lives as possible. He intends physical contact. None of the defences are relevant to the vignette.⁵⁶³ Thus there is a compelling basis to say Tom is liable for battery. Indeed so long there is a causal connection between the defendant's act and the harm, the claimant can recover it from the defendant.⁵⁶⁴ All losses, even those

⁵⁵⁶ *Williams v Humphrey* [1975] The Times 13th February 1976

⁵⁵⁷ *Ibid*

⁵⁵⁸ A Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 OJLS 211 229-235

⁵⁵⁹ *Ibid* 221-227

⁵⁶⁰ *Scott v Shepherd* (1773) 96 EngRep 525 (KB)

⁵⁶¹ Criminal Justice Act 1988 s30

⁵⁶² GR Sullivan, "Wrongs and Responsibility for Wrongs in Crime and Tort," in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP, 2014)84-86

⁵⁶³ Clerk(n548)14-10, 14-11

⁵⁶⁴ *Wainwright v Home Office* [2001] EWCA Civ 2081; [2002] QB 1334 [69-70]

which are unforeseeable, are recoverable in battery.⁵⁶⁵ Thus, Tom would be liable for battery and could be pursued for all the harms flowing from the stabbing attack.

Tort of Assault

The tort of assault captures any act which threatens, rather than inflicts, immediate unlawful physical contact. Any act which causes the claimant to apprehend a battery, coupled with the defendant's capacity to inflict violence, is an assault.⁵⁶⁶ It is an assault to direct a weapon at another, raise a fist,⁵⁶⁷ or run towards them so that they perceive an imminent blow.⁵⁶⁸ So long as the defendant intends to produce that expectation or is reckless to that possibility, they are liable.⁵⁶⁹ Oddly, the law of assault offers protection from emotional disturbance. The reason this is odd is because the law of England and Wales has historically refused to consider emotional harm to be loss.⁵⁷⁰ Carpenter, writing in the United States, also noted this irregularity, and so this conceptual tension exists across common law realms.⁵⁷¹ Despite this, there is significantly less academic commentary on assault, which is often treated interchangeably with battery.⁵⁷² Byrn, writing in the United States, traced the origins of assault to the common law of England and Wales, and concluded that the actual definition of assault is a matter of longstanding dispute. A consequence of it being difficult to define a wide range of behaviours which do not cause harm.⁵⁷³

What puts the claimant in fear of immediate unlawful force will depend on context. Nevertheless, there must be a tangible reason for the claimant to fear imminent unlawful force.⁵⁷⁴ The defendant must have, or appear to have, the means to carry out the threat.⁵⁷⁵

⁵⁶⁵ Stevens(n551)152-172

⁵⁶⁶ Ibid 14-12

⁵⁶⁷ *Cobbett v Grey* (1849) 4 Ex 729

⁵⁶⁸ *Read v Coker* (1853) 13 CB 850 [1441], *Stephens v Myers* (1830) 4 Car&P 349, also see Clerk(n548) 14-13

⁵⁶⁹ *Mbasogo & Anor v Logo Ltd* [2006] EWCA 608

⁵⁷⁰ Eric Descheemaeker, "Rationalising recovery for emotional harm in tort law*", [2018] LQR 134, 602, 603-608

⁵⁷¹ Charles Carpenter, "Intentional Invasion of Interest of Personality," [1933] 13 OrLRev 227, 235-240

⁵⁷² Law Commission, Reform of Offences against the Person (Law Com No 361, 2015) 2.5

⁵⁷³ Robert Byrn, 'Assault, Battery and Maiming in New York: From Common Law Origins to Enlightened Revision' (1966) 34 FordhamLRev 613,613-620

⁵⁷⁴ *Turberville v Savage* (1669) 1 Mod 3

⁵⁷⁵ *Stephens*(n568)

The totality of Tom's conduct must, intentionally or recklessly, put the claimants in fear of imminent unlawful violence. This should not prove particularly difficult. Tom attacked bystanders at random with a knife, intending to harm them. His conduct would inevitably put people in fear of unlawful violence, both for those witnessing the attack and those subjected to it. Tom had the will and means to inflict such harm by virtue of him committing successive acts of extreme violence. Anyone present, including those left unscathed, might be justifiably put in fear of imminent unlawful violence.

Battery and Assault: Literature

Before going on to explore the relevant literature, it must be noted that this section draws on sources from outside of England and Wales. The reason for this is that battery and assault are among the oldest actions in tort,⁵⁷⁶ and like much of English and Welsh tort law they spread across the world with the expansion of the British Empire.⁵⁷⁷ As a result, the legal literature on tort, particularly well-established actions such as assault and battery, is not strictly confined to England and Wales.⁵⁷⁸ Of course, jurisdictional differences and the passage of time means the sources may not be directly transferrable, and may not always align with what occurs in England and Wales. Nevertheless, the literature of other common law jurisdictions can be illuminative in understanding the foundational principles of tort law and how have they been applied. Consequently, the analysis draws on sources from the Commonwealth, and the United States, throughout its discussion of tort to better understand its underlying principles.

With this in mind, battery and assault are forms of trespass to the person in which liability flows from the defendant's intentional act. Vold describes these as arising when one defendant asserts their interests against the bodily rights of another.⁵⁷⁹ Assault puts the claimant in fear of battery.⁵⁸⁰ While battery focuses on some impairment of the body's structure.⁵⁸¹ Thus, the two actions prohibit both gesturing with a weapon in the

⁵⁷⁶ James Barr Ames. *Lectures on Legal History and Miscellaneous Legal Essays*. (Harvard University Press. 1913) 56-64

⁵⁷⁷ Paul Mithcell, *A History of Tort Law 1900-1950*, (CUP, 2015) 14

⁵⁷⁸ Ibid 33

⁵⁷⁹ Lawrence Vold, 'The Legal Allocation of Risk in Assault, Battery, and Imprisonment--The Prima Facie Case' (1938) 17 NebLBull, 149,149-160

⁵⁸⁰ Ibid 161-170

⁵⁸¹ Ibid

claimant's direction and then discharging it.⁵⁸² Together, they protect the claimant's safety and peace of mind whilst providing security for them to attend to their affairs.

The relevance of the intentional torts is not without controversy. Thus there was some concern as to whether they should be included within the analysis. Howarth questioned whether there was any meaningful distinction between intentional and unintentional conduct. Especially when few intentional torts require the defendant to intend the resulting harm or even act intentionally. Howarth argues many intentional torts simply require the defendant to be conscious at the time of the tort, and so are torts of strict liability by another name.⁵⁸³ However, this is overstating the case. For Goudkamp pigeonholing torts into categories of fault and strict liability is misleading, for most torts are a combination of the two.⁵⁸⁴ Indeed, branding a tort one of strict liability is often a means of suggesting it ought to be restricted if not abolished. Battery has a fault state, that being an intentional act which results in physical contact. To that end there are justificatory defences, such as self-defence. A tort of strict liability has no prerequisite fault state, so what need would there be for a defence which exists to justify the defendant's fault?⁵⁸⁵

However, Howarth's point that the harm of battery need not be intended creates an analogy to negligence. A person who intentionally makes physical contact with another, not intending the resulting harm, might be liable in battery or negligence so long as the conduct occurs pursuant to a duty of care. If A deliberately punches B then he inflicts a battery upon him. If A also had a duty of care not to expose him to a risk of physical harm, then he would breach this by punching him. In *Condon*,⁵⁸⁶ the defendant deliberately tackled an opposing player in a football game, causing him considerable injuries. Donaldson MR concluded that the defendant engaged in deliberate foul play with reckless disregard for the claimant's safety, and so was negligent.⁵⁸⁷ However, in

⁵⁸² Ibid 170-180

⁵⁸³ David Howarth, "Is there a Future for the Intentional Torts", in Peter Birks (ed) *The Classification of Obligations* (CP, 1997) 234-281, 234-240

⁵⁸⁴ James Goudkamp, "Rethinking fault liability and strict liability in the law of Torts" [2023] 139 LQRev 269

⁵⁸⁵ Ibid 269-289

⁵⁸⁶ *Condon v Basi* [1985] 1 WLR 866

⁵⁸⁷ Ibid [869]

intentionally making non-consensual contact with the claimant, he would also have committed a battery. That it occurred during a sports game might suggest there is implied consent, but that is not the rule. Rather, in sports games, a conviction is possible, but only when the conduct is sufficiently grave.⁵⁸⁸ Foul play in sports can result in a criminal conviction, irrespective of implied consent.⁵⁸⁹ A person can commit both battery and negligence through the same act. Yet the essential conduct is identical, so why are two entirely different actions available to the claimant?⁵⁹⁰

This question is particularly pertinent in England and Wales, where battery requires the defendant intend to make physical contact. Lawson, writing in the United States, suggests this risks making the borders of battery unmanageable.⁵⁹¹ For instance, say a restaurant's owner serves infested pork, causing severe food poisoning. They intend their food to make physical contact with the customers and the customers would not have consented to eat infested pork and so their consent is non-operative. Thus, the owner intends to make physical contact, coupled with defective consent, and so the harm is as much a battery as it is negligence.⁵⁹² Indeed, there is case law in the United States in which a criminal conviction for battery resulted from the adulteration of food.⁵⁹³ That the standards for battery are lower in England and Wales implies the principle would also apply here, although the material is illuminate not authoritative and so this conclusion is by no means guaranteed.

Garcia and Hall discuss battery in the context of ethical spiking, a practice in which food is adulterated by malicious third parties.⁵⁹⁴ For instance, a vegan who has their food adulterated with meat. Garcia and Hall argue that this is a violation of their bodily autonomy, an infringement of their right to determine what goes into it. Thus, they review the case law involving the indirect application of force, where A does an act that indirectly applies physical force to B. The examples range from whipping a horse,

⁵⁸⁸ *R v Barnes* [2004] EWCA 3246; [2005] 1 WLR 910 [15]

⁵⁸⁹ *R v Chapman (Unreported)* Crown Court (Warwick), 3 March 2010

⁵⁹⁰ Goudkamp(n584) 240-260

⁵⁹¹ Craig Lawson, 'The Puzzle of Intended Harm in the Tort of Battery' (2001) 74 TempLRev 355, 355-365

⁵⁹² Ibid 365-375

⁵⁹³ *State v. Monroe*, 121 NC 677, 28 SE 547 (1897)

⁵⁹⁴ Jarvia Garcia, Helen Hall, "Trespass to the Person, Human Rights and Ethically Contaminated Food: Freedom of Belief and Bodily Autonomy," [2019] 10 JEurTL 27

causing it to bolt and trample the claimant,⁵⁹⁵ to shouting fire in a crowded theatre after barring the door,⁵⁹⁶ or setting a booby trap.⁵⁹⁷ In *Santa-Bermudez*,⁵⁹⁸ the defendant lied to the police that he had no needles in his possession, causing an officer to reach into his pocket and injure themselves. In each case, the defendant committed a battery by arranging circumstances so that unwanted physical contact would occur.⁵⁹⁹ The principle should extend to the adulteration of food or any act that arranges circumstances so that unwanted physical contact occurs. Thus, defendants may commit both an intentional and an unintentional tort through the same conduct.⁶⁰⁰

If battery and negligence can arise through the same conduct, to what extent is there a meaningful difference in the underlying fault? Carpenter argues that battery protects a person from unwanted bodily contact, and so the dividing line between it and negligence is whether the defendant knows or reasonably foresees that contact.⁶⁰¹ However, the restaurant owner who knows he is serving infested pork and the one who merely foresees it act identically and cause identical harm. Why, then, do they commit different torts? To Sugarman liability is justified in both cases by wrongful behaviour causing physical harm to the victim.⁶⁰² To illustrate, imagine a young child is riding on the back of a bicycle pedalled by A. Both are being chased by a hungry tiger, which will kill and eat them both, but A has the option of saving himself by pushing the child into the tiger's mouth. If A does so, the critical question is not whether he has breached a duty of care or intentionally made physical contact with the child but whether his conduct was wrongful.⁶⁰³ If his actions are justified, he should not be liable; if they are not, he should be. In any event, he is liable for unjustifiably causing harm, so what need is there for the distinction between negligence and battery?⁶⁰⁴ Moreover, if both battery and negligence are available, why is the thesis concerning itself with battery?

⁵⁹⁵ *Gibbons v Pepper* (1695) KB 91 EngRep 922

⁵⁹⁶ *R v Martin* (1881) 8 QBD 54

⁵⁹⁷ *K v DPP* [1990] 1 WLR 1067

⁵⁹⁸ *DPP v Santana-Bermudez* [2003] EWHC 2908; [2004] Crim LR 471

⁵⁹⁹ Garcia(n594)

⁶⁰⁰ Lawson(n591) 365-375

⁶⁰¹ Carpenter(n571) 227-235

⁶⁰² Stephen Sugarman, "Restating the Tort of Battery," [2017] 10 JETL 197

⁶⁰³ Ibid 206-213

⁶⁰⁴ Ibid 241-245

The answer to that question lies in the meaningful difference between intentional and unintentional harm. While a single overarching tort capturing both might make for a neater path to liability, tort would cease to recognise the greater wrong of intentional harm. Simons acknowledges that some conduct is covered by both battery and negligence, and so the torts are distinguished by a hierarchy of fault.⁶⁰⁵ This hierarchy holds intentional acts as more culpable than those committed negligently. A person who deliberately punches another, breaking his nose, acts more culpably than a person who accomplishes the same by negligently knocking them down.⁶⁰⁶ Intentional, unjustified interferences with another person's rights violates the victim's dignity to a much greater degree than unintentional interferences.⁶⁰⁷ For Perry, the reason for this is that tort responsibility is usually concerned with the avoidability of damage, while crime is concerned with culpability.⁶⁰⁸ When a defendant knows their actions may result in harm, they are culpable for it, which is a greater wrong, making them deserving of punishment. Intentional torts exist at the boundary between criminal and civil law. As a result, these conceptions of responsibility overlap, so a tortfeasor's responsibility in battery is far closer to criminal culpability than a tortfeasor in negligence. This is why intentional torts are more harshly condemned, why fewer defences are available, and why the rules on remoteness are relaxed.⁶⁰⁹ The defendant is expected to assume full responsibility for their intentional, borderline culpable, act. To abolish the intentional torts would remove this distinction altogether and so the civil law would fail to recognise the greater wrong of intentional harm.

Claimants would feel this change particularly keenly as the experience of harm differs depending on whether it is intentional or unintentional.⁶¹⁰ The negative experience of victims is worsened when the harm is intentional, which the intentional torts recognise by labelling the conduct for what it is. The label of an intentional tort reflects that the

⁶⁰⁵ Kenneth Simons, 'A Restatement (Third) of Intentional Torts' (2006) 48 *ArizLRev* 1061,1062-1080

⁶⁰⁶ *Ibid* 1800-1820

⁶⁰⁷ David Owen, "Philosophical Foundations of Fault in Tort Law," in David G Owen (ed) *The Philosophical Foundations of Tort Law* (OUP, 1997) 201-228

⁶⁰⁸ Stephen Perry, "Risk, Harm, and Responsibility," in David G Owen (ed) *The Philosophical Foundations of Tort Law* (OUP, 1997) 321-346

⁶⁰⁹ *Ibid* 240-260

⁶¹⁰ Jennifer Robbennolt, Valerie Hans, *The Intentional Torts, in the Psychology of Tort Law* (OUP, 2016) 25-38

defendant has done a greater wrong to the claimant, which is why special rules and sanctions exist. This, in turn, serves a widespread public view that intentional wrongdoing ought to be treated more seriously and punished robustly.⁶¹¹ Abolishing the intentional torts would undermine the experience of those subject to intentional interferences and fail to recognise the interest in treating intentional wrongdoing as more serious. A person intentionally doing what the law forbids is subject to the heaviest penalties, but the law is not confined to labelling something as either a crime or a tort.⁶¹² Instead, it can prevent disruption, protect the rights of others, and award compensation through both spheres.⁶¹³ Accordingly, if the law seeks to prevent intentional non-consensual physical contact, then it should be both a crime and a tort. The essential wrong is capable of justifying the intervention of criminal and civil law, which accounts for the lived experience of victims and provides more robust protection. There is also a civil liberties function of the intentional torts which would be lost by their abolition.⁶¹⁴ As Varuhas describes the law of tort vindicates commonly held rights by affirming their existence and providing redress for violations. Battery, defamation, and false imprisonment allow a claimant to vindicate their physical security, reputation, and liberty, respectively.⁶¹⁵ Priel suggests that one of the goals of tort law is to provide a public, impartial forum which can declare a claimant's rights have been infringed.⁶¹⁶ Whether vindication would be necessary in the vignette is not clear, but this is a function of tort, which would be lost if the intentional torts were abolished.

The importance of labelling intentional conduct, the need for robust protection, and the borderline culpable conduct of intentional tortfeasors is why the intentional torts are still relevant. Thus, there is good reason to consider them in the vignette. The intentional torts better capture the intentional, culpable conduct exhibited, which is right at the border between crime and tort. This would better reflect the reality of the intentional harm experienced by the victims and allow a robust response to egregious behaviour

⁶¹¹ Ibid 29,32-34

⁶¹² Tony Honore, "The Morality of Tort Law," in David G Owen (ed) *The Philosophical Foundations of Tort Law* (OUP, 1997) 73-96

⁶¹³ Ibid 73-96

⁶¹⁴ Howarth(n583) 241-245,272-281

⁶¹⁵ Ibid 262

⁶¹⁶ Dan Priel, "A Public Role for the Intentional Torts" [2011] 22 KLJ 183,203-204

that must be combatted. None of these goals would be served by reconstructing the stabbing attack as negligence.

The Torts Together

The torts often arise alongside one another, for A commits an assault by pointing a gun at B and a battery upon firing it. The principles through which the two torts are applied were illustrated in *Bici v Ministry of Defence*,⁶¹⁷ in which three British soldiers opened fire on a car containing the claimants.

To Elias J, the test for battery was simply whether there had been intentional touching without lawful authority. In firing upon a car,⁶¹⁸ the defendants intentionally made contact with the claimant and so committed a battery upon him. Likewise, Tom stabbed the claimants without lawful authority whilst intending to make physical contact. For assault the question was whether the defendant intentionally or recklessly put the claimant in fear of immediate violence. There was insufficient evidence the soldiers intended to put the claimant in fear, nor did Elias J accept they had been reckless. Thus, while the act of shooting could constitute assault, there was no intent, and so the claim failed.

A stabbing attack, much like a targeted shooting, is likely to put those subjected to it in fear of immediate violence. Tom's explicit aim is to be 'remembered one way or another', and he posted about his stabbing spree being an act of 'rebellion' in pursuance of Incel ideology. A theatrical, terroristic motive underpins his active desire to kill, which explicitly features putting people in fear of physical harm. His intent is not narrowly focused on a single person but calculated to impact as many people as possible. His actions are of such gravity that they might constitute assault in themselves. Persuasive authority in this respect is *Beals*.⁶¹⁹ McGregor J reasoned that firing a gun into a crowd was necessarily done with the requisite intent. That people will be put in fear of unlawful violence is an obvious consequence, and so to do the act is to commit assault. Tom uses a knife to the same end. A terroristic stabbing attack will inevitably put those exposed to it in fear of violence, and intent should be presumed.

⁶¹⁷ *Bici v Ministry of Defence* [2004] EWHC 786

⁶¹⁸ *Livingstone v Ministry of Defence* [1984] NILR 356

⁶¹⁹ *Beals v Hayward* [1969] NZLR 131

Tort and Crime

Battery and assault are both torts and criminal offences, creating an overlap between crime and tort within the analysis. There are practical differences. Civil allegations are, predominantly, determined on the balance of probabilities, although the more serious the allegation, the more convincing the evidence must be.⁶²⁰ Nevertheless, serious crimes naturally give rise to serious torts. The result of shared objectives, foundational, and interfaces between the jurisdictions.

Tort and crime are oriented around interests that have been interfered with, while crime concerns itself with harm caused and tort by rights violated. To Dyson, this is indicative of shared foundations within crime and tort, the result of both developing from the same set of disconnected rules into coherent systems of law.⁶²¹ Both reconceptualised liability and crystalised their doctrines from the same foundation to give substance and structure to their respective areas. Thus, they have overlapping roots reflected through similarities in their substance and procedure.⁶²² An illustration of this is that the elements of assault and battery are identical in crime and tort,⁶²³ although the roots go much deeper. Crime and tort were fused completely in the 13th and 14th centuries. A defendant sued for battery in a royal court would become liable to both the claimant and the King. This, in turn, led to claimants modifying their cases so they might be heard by a royal court, resulting in those courts having concurrent jurisdiction in crime and tort.⁶²⁴ The two developed separate from fused origins which explains many of their overlapping roots.

To illustrate, crime and tort operate on similar fault principles, diverging due to external rather than internal pressure. To Ibbetson, what would become the law of tort started life as the word ‘trespass’, which meant a wrong under the concurrent jurisdiction in the High Middle Ages.⁶²⁵ Trespass was originally concerned with dishonour, which shifted to

⁶²⁰ *H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 [26]

⁶²¹ Matthew Dyson, *Explaining Tort and Crime: Legal Development Across Laws and Legal Systems, 1850-2020* (CUP, 2022) 110-130, 427

⁶²² *Ibid* 110-130

⁶²³ Although there are of course differences in the defences available, and the standard of proof. See *Ashley (FC) and another (FC) v Chief Constable of Sussex Police* [2008] UKHL 25 [79]

⁶²⁴ Stroud F.C Milsom, *The Historical Foundations of the Common Law* (OUP, 1981) 43-52, 265

⁶²⁵ David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 2001)

causal responsibility under the concurrent jurisdiction.⁶²⁶ This in part is why both crime and tort lay claim to moral righteousness and communicate liability accordingly. The term 'guilty of negligence' was still used in tort until the mid-twentieth century.⁶²⁷ Crime and tort operate on a very similar understanding of responsibility. Such as the defendant assuming responsibility for the natural and probable consequences of their intentional act. To Dyson, at the root of this is a shared criminal and tortious understanding of intent. Both developed the same expansive definitions of intent due to the difficulties in evidencing it.⁶²⁸ This culminated with the House of Lords introducing an objective test for malice aforethought in *Smith*.⁶²⁹ A commonality severed by statutory intervention⁶³⁰ rather than doctrinal pressure from within the systems.

Many contemporary distinctions between crime and tort might be better characterised as practical, not doctrinal. Both tort and crime began life as equally viable avenues for a victim to seek justice, with differences emerging much later. For instance, the state's interest in criminal prosecution slowly limited the ability of victims to seek damages. By the 19th century victims were essentially obligated to launch criminal proceedings, whereupon a felon's property would be seized by the Crown, and so they would have no means to compensate the victim in tort.⁶³¹ In the contemporary period many of the conceptual differences between crime and tort can be explained by the need for crime to be comprehensible to lay jurors and magistrates.⁶³² In England and Wales tort law has largely phased juries out and so had the luxury of developing in more doctrinally rich ways. The criminal law cannot do this, for it needs to account for its lay participants.⁶³³ Nevertheless, beneath these developments are similar foundational doctrines and concepts.

There are remaining procedural interfaces between crime and tort, denoting shared concepts, functions and purposes. A common desire to safeguard due process once

⁶²⁶ Ibid

⁶²⁷ Dyson(n621) 221-240

⁶²⁸ Ibid 200-240

⁶²⁹ *DPP v Smith* (1961) AC 290

⁶³⁰ Criminal Justice Act 1967 s8

⁶³¹ Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71 CLJ 85, 88

⁶³² Dyson(n621) 93-107

⁶³³ Ibid 108-119

manifested in a widely used rule to suspend civil proceedings while a criminal prosecution is ongoing.⁶³⁴ The compatibility between the spheres is demonstrated by the claimant's ability, since 1968, to rely on the defendant's conviction when evidencing the facts on which that conviction is based.⁶³⁵ The impact of this is that the defendant shall be taken to have committed the offence unless the contrary is proved.⁶³⁶ Thus the civil courts are generally bound to accept the fact of, and circumstances behind, a criminal conviction unless the convicted can prove they did not commit the offence.⁶³⁷ However, the convicted will only be permitted to do this if they can demonstrate that they have a real prospect of proving that the conviction was wrong.⁶³⁸ Thus, the civil courts are receptive, if not deferential, to the facts and weight attached to a criminal conviction.⁶³⁹ Through this interface, the criminal courts respect the primacy of their civil counterpart in awarding compensation.⁶⁴⁰ They will not make a compensation order for all losses, for instance, lost income, which are generally only recoverable if the victim issues civil proceedings.⁶⁴¹ The criminal courts can instead establish a binding fact pattern for the civil courts to consider during a tort claim, one which is very difficult for the convicted to displace.

Alternatively, in the event that a prosecution is impossible due to the defendant's death or the threshold for the prosecution not being met, civil proceedings offer a means for the victim to seek what justice they can. A civil finding of fact can be a means to determine what has happened, vindicate the victim's account, and set the backdrop for further proceedings against the defendant, their estate, or employer. When the aims of the criminal jurisdiction cannot be achieved, there is a further procedural interface through the law of tort for the victim to establish what happened to them and seek redress. The civil and criminal systems complement one another through their procedural interfaces while having due regard for their respective competencies.

⁶³⁴ Ibid 297-298

⁶³⁵ Civil Evidence Act 1968 s11

⁶³⁶ Ibid s11 (2)

⁶³⁷ *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50

⁶³⁸ *CXX v DXX* [2012] EWHC 1535 (QB); [2012] 6 WLUK 23

⁶³⁹ *Baker*(n536)405-406

⁶⁴⁰ Ibid 426

⁶⁴¹ Ibid 306-310

This is not always obvious in practice, for the interplay between crime and tort is often understated. Indeed, the role of insurance in contemporary tort law does indicate the two will more readily diverge from one another. Baker identified that insurance policies largely exclude cover for conduct amounting to an intentional criminal offence, and so while the principles of liability are muddled there is a much greater *de facto* separation.⁶⁴² Thus, when an insured defendant engages in criminal conduct amounting to a tort, it will not usually be covered by their insurance, and so there is no reason for the claimant to pursue them for damages.⁶⁴³ Similarly in the UK intentional torts are excluded from all insurance policies due to them being contrary to public policy.⁶⁴⁴ Moreover, when the defendant does something which is both a crime and a tort, for instance, injuring someone while drink driving, their insurance will only defend the tort claim, and so it might pay damages but not a fine. Thus effecting a practical distinction between crime and tort.⁶⁴⁵ The practical reality of crime and tort are two separate jurisdictions, despite the interfaces between them.

Intentional Infliction of Emotional Harm

Eleanor was in a 'different building' during the stabbing attack but became aware she was the intended target. This causes her "considerable emotional and psychological harm.' Her potential claim is the intentional infliction of mental harm, often referred to as the tort in *Wilkinson v Downton*. This is a tort of intent and damage, requiring the claimant to prove the defendant both intended and caused harm.⁶⁴⁶ There must be a causal link between the defendant's conduct and the resulting injury, meaning a recognised psychiatric condition.⁶⁴⁷

The tort is attributed to *Wilkinson v Downton*,⁶⁴⁸ in which the defendant told the claimant her husband had met with a serious accident. The defendant intended this as a practical joke but caused her severe mental shock for which she sought damages. The High Court accepted that a cause of action existed in the circumstances, for the

⁶⁴² Tom Baker, "Liability Insurance at the Tort-Crime Boundary" [2008] University of Pennsylvania Institute for Law and Economy, Research Paper No.08-32

⁶⁴³ Ibid 2

⁶⁴⁴ Merkin(n534)

⁶⁴⁵ Ibid 6

⁶⁴⁶ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721 [2003] 3 All ER 932 [15-17],[21]

⁶⁴⁷ Ibid

⁶⁴⁸ *Wilkinson v Downton* [1897] 2 QB 57

defendant had infringed on the claimant's right to personal safety. Thus, she was entitled to seek damages to remedy harm caused by an intentional violation of her rights. The Court of Appeal affirmed the tort's existence In *Janvier*,⁶⁴⁹ where the defendants were private detectives trying to inspect letters belonging to the claimant. One posed as a police officer and told the claimant the person she was corresponding with was a German spy and that he would take further action unless she handed them over. She suffered nervous shock. The defendants were found liable for infringing the claimant's personal safety and causing her harm in the process.

The tort fell into several prolonged periods of disuse but was reconsidered by the Supreme Court in *OPO v Rhodes*.⁶⁵⁰ The Appellant had written a book detailing his history of sexual abuse, which the Respondent feared would cause harm to their infant son. She sought an injunction preventing publication, which the Court of Appeal granted, finding that publication of the book would constitute the tort of intentionally inflicting emotional harm. Lady Hale and Lord Toulson reviewed the limited case law, noting the tort had been untouched for decades, having last arisen in the context of harassment before vanishing again. They reaffirmed the tort's existence and identified a conduct, mental, and consequence element.⁶⁵¹

The conduct element requires unjustifiable words or conduct to be directed towards the claimant without reasonable excuse. While the act of publication might be sufficient, the Appellant did not direct the book towards his young son. The tort failed on the first limb.⁶⁵² The consequence element requires the claimant to suffer physical harm or a recognised psychiatric illness. However, the Supreme Court left it open as to whether severe distress might be sufficient, but this has not yet been revisited.⁶⁵³

The mental element must be satisfied by the defendant intending to cause physical harm or severe distress; recklessness does not suffice. The Appellant did not intend his young son to suffer harm, so the tort failed again on the second limb.⁶⁵⁴ However Lord

⁶⁴⁹ *Janvier v Sweeney* [1919] 2 KB 316

⁶⁵⁰ [2015] UKSC 32; [2016] AC 219

⁶⁵¹ *Ibid* [73]

⁶⁵² *Ibid* [74-76]

⁶⁵³ *Ibid* [73]

⁶⁵⁴ *OPO*(n650) [85-89]

Neuberger observed that some acts carry such obvious consequences that a perpetrator cannot realistically say they were not intended.⁶⁵⁵

All three elements were established in *C v H*,⁶⁵⁶ in which the claimant had been sexually groomed by the defendant, a staff member, at a special needs school. Nelson J applied the *Rhodes* criteria, finding the conduct element satisfied by the defendant touching, fondling, digitally penetrating, and soliciting the claimant for oral sex. Consequence was satisfied by the verifiable link between the abuse and an exacerbation of the claimant's mental health issues. Finally, the defendant being motivated by his gratification did not preclude the mental element being satisfied. His actions carried such obvious consequences that the defendant could not say he did not intend them.

Despite its contemporary resurrection, the tort received little academic or even legal attention in the years after its formation. Indeed its resurgence in 2015 did not produce a significant volume of commentary. Weinert criticised the Court of Appeal for invoking the tort to prevent a victim of child sexual abuse from publishing his story and praised the Supreme Court for asserting the Appellant's freedom of expression.⁶⁵⁷ To Hunt, the Supreme Court has finally given clarity to the tort in *Wilkinson v Downton*, and a framework through which it might be effectively applied. Moreover, the subjective intent requirements provide much-needed limitations. Although the unanswered question of whether the tort applies to severe distress means its scope could be much wider than believed.⁶⁵⁸ Rycroft argued the Supreme Court breathed a new life into the tort, but did not go far enough. Rycroft suggests further clarification is still needed on the tort's relationship with negligence and nuisance and warn its application will be limited until the exact scope of recovery is determined.⁶⁵⁹ As a result while there is literature on the tort's continued existence, academic commentary on the essence of the tort is limited.

To Handford, this is the result of the tort barely developing in England and Wales beyond the fundamental principle that a person is liable for a wilful act calculated to cause

⁶⁵⁵ Ibid [112]

⁶⁵⁶ *C v WH* [2015] EWHC 2687 (QB)

⁶⁵⁷ Eileen Weinert, "James Rhodes (Appellant) v OPO (by his litigation friend BHM) and another (Respondents) (2015) 26 EntLR 290

⁶⁵⁸ Chris Hunt, "Wilkinson v Downton Revisted," [2015] 74 CLJ 392

⁶⁵⁹ Pita Rycroft, "Wilkinson v Downton After Rhodes and its Future Viability in New Zealand" [2017] 4 VUWLR 107,123-125,131

emotional harm. The tort then fell into a prolonged period of disuse, so further exploration requires us to look at other jurisdictions.⁶⁶⁰ As a result, a lot of the literature used within the analysis to explore the tort comes from the Commonwealth and the United States. This is used to illuminate the underlying principles of the tort, but must be qualified by the note that the material is comparative rather than authoritative. This tort's lack of development in the United Kingdom, means it is beneficial to have regard to other jurisdictions.

In Canada, the tort arose from a defendant circulating rumours that someone had committed suicide, knowing that the rumour would reach the man's mother, who then suffered shock.⁶⁶¹ In Australia, the tort was applied to a defendant entering the claimant's home, assaulting her husband, and carrying him away as she watched.⁶⁶² To Hanford, the Commonwealth cases indicate the tort in *Wilkinson v Downton* is broad enough to capture any conduct calculated to cause harm, creating yet another unclear border with negligence.⁶⁶³ For instance, in Australia, a defendant was deemed liable for carelessly sending a letter which informed the claimant that her husband had been committed to a mental hospital.⁶⁶⁴ Thus, Hanford suggests there is no doctrinal reason that the tort cannot be committed negligently, and if *Wilkinson* had occurred later, it would have been folded into negligence.⁶⁶⁵ However, this did not occur in the United States, where the tort occupies a prominent, well-defined place within tort law.⁶⁶⁶ To that end, the tort's development in the United States offers greater insight into its defining elements to better distinguish it from the law of negligence.

To Parmanand the tort in *Wilkinson* was quickly recognised in the US.⁶⁶⁷ In *Nelson*,⁶⁶⁸ a police officer made threats to kill, which he knew would reach the intended victim's

⁶⁶⁰ P Handford, 'Wilkinson v. Downton and Acts Calculated to Cause Physical Harm' (1985) 16 UWAustlLRev 31,31-40

⁶⁶¹ *Obadiak* (1922) 65 DLR 627

⁶⁶² *Johnson v The Commonwealth* (1927) 27SR (NSW) 133

⁶⁶³ P Handford, "Wilkinson v Downton: Pathways to the Future?" [2012] 20 TLR 145, 41-53

⁶⁶⁴ *Barnes v Commonwealth of Australia* (1937) 37 SR (NS)

⁶⁶⁵ Hanford(n663) 53-60

⁶⁶⁶ Ibid

⁶⁶⁷ S Parmanand, 'Intentional infliction of Emotional Distress: Observing its Development' (1984) 1984 JSafrL 43,43-55

⁶⁶⁸ *Nelson* (1971)131 II App 2d 261

mother.⁶⁶⁹ In *Eckenrode*,⁶⁷⁰ the defendant intentionally and repeatedly denied the widowed claimant insurance payments, which she was rightfully owed. In so doing, he exploited the very fears causing the couple to take out insurance, and so was liable for the harm she endured. In *Hume*,⁶⁷¹ a doctor told the parents of a boy that he suffered from a potentially fatal disease when he did not. In each case, Parmanand identifies the basic formulation of the tort as being outrageous conduct through which the defendant intentionally inflicts emotional distress upon the claimant.⁶⁷² The formulation is engaged in the vignette as Eleanor is harmed by outrageous conduct calculated to cause the most serious harm imaginable.

The need for the conduct to be outrageous provides a necessary limitation preventing the tort from becoming unduly broad. To Crump, the tort is best deployed against malicious defendants.⁶⁷³ If the tort turns on any intentional conduct causing harm, the tort could quickly colonise conduct that ought to be non-tortious. A boyfriend who angrily breaks up with his girlfriend in an unnecessarily hurtful way. A doctor who imparts a terminal diagnosis to a vulnerable patient. A lawyer who sends a demanding letter knowing it will frighten the claimant. Each behaviour involves the intentional infliction of emotional distress but should not fall within the scope of tort law. Thus, the tort in *Wilkinson* should never occur negligently lest every clumsy breakup trigger liability for the emotional distress caused.

Thus, the conduct must be outrageous, something no reasonable person should be expected to endure, as in the US formulation.⁶⁷⁴ Ordinary life sometimes requires hard truths or difficult conversations that should not be actionable despite the distress caused. This a standard which should be easily met by the vignette in which Tom engages in mass murder while members of *Incel Brotherhood* glorify terrorism. There is scope to say all potential defendants have engaged in outrageous conduct intended to cause harm, so the tort in *Wilkinson v Downton* should apply.

⁶⁶⁹ Parmanand(n667) 263

⁶⁷⁰ *Eckenrode*(1970) 10 CalApp3d 376,89

⁶⁷¹ *Hume v Bayer* (1981) 178 NJSuper310 (LawDiv)

⁶⁷² Parmanand(n667) 43-55

⁶⁷³ David Crump, 'Rethinking Intentional Infliction of Emotional Distress' (2018) 25 GeoMasonLRev 287, 287-300

⁶⁷⁴ Ibid 292, 287-300

Application

Eleanor's claim in tort would be that Tom engaged in an unacceptable and unjustified course of conduct, which intentionally caused her mental injury. All three *Rhodes* elements must be satisfied for Tom to be liable.

The critical question is whether Tom has engaged in unacceptable and unjustified conduct directed against Eleanor. While he carries out an act of mass violence, intending her to be the 'centrepiece', he cannot find her. Eleanor has no claim to actions directed against other victims, but this should not be a bar to liability. Up to the point of the stabbing attack, Tom is actively plotting to kill Eleanor and takes proactive steps to arm himself, attend Heaten Campus, and locate her. There is a plot targeted against Eleanor, and it is this course of conduct which may trigger the tort.

To illustrate, a woman leaves her abusive ex-partner and moves to a new address only for him to attend her property, intending to kill her. He realises she is not home and so, in a fit of rage, attacks pedestrians randomly but is arrested before she returns home. Nevertheless, she becomes aware of the attempt on her life and that her ex-partner engaged in a detailed plot to that effect. Perhaps prior to this attempt, he had been stalking her, acquiring weapons, or making plans to ensure her demise. This knowledge, combined with the actual attempt, induces a recognised psychiatric illness. For both this woman and Eleanor, the violent attack is not explicitly directed against them, but the overall plot very much is. They have been tracked, stalked, and subject to a plot in which weapons were acquired and taken to their believed location. Had they been informed of this conduct before the attempt, that alone might have caused emotional distress. The resulting violence is not irrelevant but illustrates the gravity of the plot and influences the resulting harm. A person may suffer considerable harm upon hearing their neighbour tried to shoot them, and much more if they had been the target of a sophisticated terrorist plot. The killings are essential to demonstrate the plot's severity and the degree to which the intended victim was at risk.

On the vignette, Tom has engaged in a course of conduct in furtherance of a plot to kill Eleanor. He develops detailed plans, relishes fantasies centred on her, seeks advice, and attends her believed location armed and intending to kill. That the two do not come into direct contact should not be fatal to the analysis. For instance, Alice wishes to kill

James and plants a bomb in the park he frequents daily for lunch, but James is called away before it explodes. If he suffers severe distress and eventual psychiatric harm upon becoming aware of the plot, a core course of conduct is directed against him. He is entitled to take exception to this course of conduct, which should satisfy the conduct requirement of the tort. That Eleanor only suffers harm upon becoming aware of the conduct should not necessarily matter. If she has suffered a recognised psychiatric illness, it is still a product of the plot against her life, even if the effect is delayed.

Tom does not necessarily intend to inflict emotional harm on Eleanor, instead explicitly stating his desire to cause her severe physical harm. Nevertheless, the mental element can be satisfied so long as the defendant intends to cause the claimant severe distress at the very least.⁶⁷⁵ In light of his clear desire to kill Eleanor by stabbing, severe distress is the very least of what Tom intended. Included with an intent to cause serious harm is intended to cause severe distress. A cannot intentionally stab B, intending to seriously wound him and say he did not intend to cause distress. Severe distress is a natural consequence of the conduct, and the risk is so obvious that A cannot realistically say he did not intend it.

However, this should not be read as dramatically expanding the reach of the tort in *Wilkinson v Downton*. Suppose A intends to make non-consensual physical contact with B, which amounts to a minor battery. While B might be distressed, severe distress is not necessarily a natural consequence or obvious risk. If A falsely imprisons B for a few seconds, severe distress is not necessarily an obvious risk. However, if A intended to cause much more serious harm or confine B for a much longer period, then the tort will be triggered if psychiatric injury is the result. If A maliciously falsely imprisons B for a week, causing a mental breakdown, then he has done an act which has a natural and obvious risk of causing severe distress to B. If B has suffered a psychiatric injury, the tort is engaged, and damages can be recovered from A. On the post-*Rhodes* formulation, the intentional infliction of emotional harm is likely to arise alongside any serious intentional tort in which considerable harm was intended, and psychiatric injury is the consequence.

⁶⁷⁵OPO(n650)

This overlaps with assault as if A threatens to punch B imminently, there is a much greater prospect for him to be severely distressed by that. Although this does not automatically mean that the two will always arise together, B would still need to provide evidence of psychiatric injury. Nevertheless, if the tort did dispense with the need for a psychiatric injury and could be triggered by severe distress, then the boundaries between it and assault could become muddled. The threat of imminent unlawful violence may carry with it such an obvious risk of severe distress that the two might be triggered by the same conduct. This is contingent on an expansion of the tort, which has not yet occurred, but the potential must be acknowledged.

It is unclear whether the consequence element is satisfied, as Eleanor suffers 'considerable emotional and psychological harm.' To be actionable this would need to manifest in recognised psychiatric illness. A recognised psychiatric illness can include depressive disorders,⁶⁷⁶ post-traumatic stress,⁶⁷⁷ anxiety disorders,⁶⁷⁸ or similar disorders which can be medically evidenced. If she has not suffered this, then there is an open question of whether severe distress would be enough. At the moment, it is unclear whether the consequence element is satisfied, but if it is, then we might conclude that Tom is liable for the tort.

Accessory Liability in Tort: Overview

Members of *Incel Brotherhood* commit no independent wrongs but embed themselves in the torts of another. Thus, we turn to accessory liability in tort, an obscure, understudied area of law.⁶⁷⁹ Accessory liability arises as the result of an accessory's connection to a tort.⁶⁸⁰ Carty identifies three such connections: procurement, authorisation, and combination.⁶⁸¹ Procurement occurs when the accessory causes the tortfeasor to act. Authorisation when the accessory commands or permits them to act.⁶⁸² Combination involves two or more persons acting in concert pursuant to a

⁶⁷⁶ *Hevican v Ruane* [1991] 3 All ER 65

⁶⁷⁷ *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455

⁶⁷⁸ *Scaddon v Morgan* [2017] EWHC 1481 (QB)

⁶⁷⁹ Hazel Carty, "Joint tortfeasance and assistance liability," [2018] 19 LS 489

⁶⁸⁰ *Ibid* 500-505

⁶⁸¹ *Ibid* 500-510

⁶⁸² *Ibid* 495-500

common design.⁶⁸³ Accessory liability in tort is a form of joint tortfeasance, meaning both the defendant and the accessory are jointly and severally liable.⁶⁸⁴

Joint and Several Liability

When more than one person commits a tort they may be jointly and severally liable for the resulting harm. If A and B injure C by punching C, then A and B will be joint tortfeasors, for they have both committed a battery upon C. C would be entitled to bring a claim of battery against both A and B, so they will be jointly liable for the harm.⁶⁸⁵ Indeed, if C chooses to sue A alone, then C may recover the full sum of damages from A. However, if A threatens C so that C anticipates immediate personal violence, while B punches C then they will be several tortfeasors. A and B have committed separate torts and will not be liable for one another's conduct. If C suffers psychiatric harm from the assault and physical harm from the battery then C will have two separate claims; one of assault against A, and of battery against B. A and B will only be liable for the damage that can be attributed to them. Alternatively, if the harm is indivisible, then A and B, will each be liable for the full sum of damages.⁶⁸⁶ If the harm is indivisible then if C chooses to sue A alone, then C may recover the full sum of damages from A. However it would be open to A to seek a contribution from B in separate proceedings.⁶⁸⁷

The distinction between joint and several tortfeasors causing the same damage, was once critical because the claimant could only bring one action for a joint tort. Thus if C sued A for the battery which B also engaged in, C could only receive a single judgement.⁶⁸⁸ Thus say C did not sue B alongside A, but A was later unable to discharge the judgment entered against them. In which case if C attempted to bring a claim against B, B would be entitled to a common law defence, known as relief from judgment, which essentially barred C from bringing further proceedings.⁶⁸⁹ Successive actions were not permitted against joint tortfeasors. Alternatively, as several tortfeasors were responsible for different torts successive actions were permitted.⁶⁹⁰ The Civil

⁶⁸³ Ibid

⁶⁸⁴ Clerk(n548) 4-02-4-012

⁶⁸⁵ *Brunsdon v Humphrey* (1884) 14 QBD 141 [147]

⁶⁸⁶ *Clark v Newsam and Edwards* (1847) 1 Ex 131

⁶⁸⁷ Clerk(n548) 4-02, 4-07, 4-08,

⁶⁸⁸ Ibid 4-08

⁶⁸⁹ *Morris v Wentworth-Stanley* [1999] 2 WLR 470 [40]

⁶⁹⁰ Clerk(n548) 4-08

Liability (Contribution) Act 1978⁶⁹¹ abolished the common law defence, although it is still desirable that joint tortfeasors should be sued together.⁶⁹² As a result, there is little practical distinction between joint and several tortfeasors. Both joint, and several tortfeasors, who are responsible for the same damage can be made subject of proceedings either individually or together. If the proceedings are successful, then the tortfeasors will be jointly and severally liable for the full sum of damages.

There are multiple routes to joint and several liability. This chapter concerns accessory liability in tort as a form of joint tortfeasance; which would make the defendants joint tortfeasors. Thus if a claim against them was successful, they would be jointly and severally liable for the full sum of damages. Later in the thesis, the law of unincorporated associations is discussed as alternative routes to joint and several liability.

Joint Tortfeasance

To Davies, joint tortfeasance muddles the language of accessory liability. Both the primary and secondary party are jointly and severally liable for the same damage as if their wrongs were identical.⁶⁹³ Both are held liable as if their contributions are equal and so the conceptually distinct routes to liability are buried.

The conceptually distinct route to liability is underpinned by the accessory committing some active act, establishing a nexus of responsibility which parasitically attaches to the tort. Thus, there must be some wrong for the accessory to be connected to; there is no liability for participating in a failed tort.⁶⁹⁴ This participation must be complemented by culpability. Davies illustrates this with a nurse passing a scalpel to a surgeon who commits a battery. Merely passing the scalpel does not make her an accessory. It is her act, in conjunction with her knowledge, that the patient has not consented, which makes her liable.⁶⁹⁵ Despite being labelled a joint tortfeasor, the nurse is an accessory because the tort cannot be established against her. The mechanism by which she is

⁶⁹¹ Civil Liability (Contribution) Act 1978 s3

⁶⁹² Clerk(n548) 4-09

⁶⁹³ Paul Davies, *Accessory Liability*, (HA, 2015) 7-8,177-200

⁶⁹⁴ Ibid

⁶⁹⁵ Ibid 200-216,220-226

held liable is conceptually different, despite the outcome of joint and several liability.⁶⁹⁶ One party is liable because they have committed a wrong and the other by virtue of their contributions parasitically attaching to it.

These contributions are attached by procurement or combination.⁶⁹⁷ Combination is triggered by the parties working together in furtherance of a common enterprise. It depends on concerted action between the parties, meaning the accessory must do more than facilitate the tort.⁶⁹⁸ Instead, they must actively contribute to its substance. A common enterprise is some explicitly or tacitly agreed purpose between the parties that is being pursued when the tort is committed.⁶⁹⁹ Procurement is a separate strand of liability which requires the accessory to induce, incite, or persuade the primary tortfeasor to act, and so they have a causal effect on the tort.⁷⁰⁰ That causal effect can result from any positive act so long as the accessory intends the tortious outcome.⁷⁰¹ The language here links to the previous chapter on accessory liability in crime; however the principles are not interchangeable.⁷⁰²

Common Design

In *Shepherd UK v Fish & Fish*,⁷⁰³ the Appellant was a charitable subsidiary of an international society, and a vehicle registered to it rammed vessels belonging to the Respondent. The Appellant had previously fundraised for a campaign, in concert with the international society, to confront illegal tuna fishing. £1,730 was passed from the Appellant to the international society for use in the campaign.⁷⁰⁴ Before the Supreme Court, Lord Toulson affirmed that joint tortfeasance requires the accessory to make the infringing act their own by procurement or common design.⁷⁰⁵ The test for common design is twofold. Firstly the parties must combine to secure tortious acts. Secondly, they must do this pursuant to a common design.

⁶⁹⁶ Joachim Dietrich, *Accessories in Private Law* (CUP, 2016) 93-110

⁶⁹⁷ Clerk(n548) 4-04, 4-05

⁶⁹⁸ Paul Davies, "Joint Tortfeasance and common design," [2013] 129 LQRev 495

⁶⁹⁹ Ibid

⁷⁰⁰ Paul Davies, "Accessory Liability for Assisting Torts" (2011) 70 CLJ 353, 357-362

⁷⁰¹ Dietrich(n696) 110-130

⁷⁰² Carty(n679) 489-485

⁷⁰³ [2015] UKSC 10; [2015] AC 1229

⁷⁰⁴ *Fish & Fish Limited v Sea Shepherd UK* [2012] EWHC 1717; [2012] 2 Lloyd's Rep 409 [60-61]

⁷⁰⁵ Ibid[19]

The first limb requires the accessory to make a more than minimal contribution to the tort. So long as a contributing act exceeds the *de minimis* range, the parties will have combined to secure a tort.⁷⁰⁶ The Appellant played no real role in the fundraising campaign and so all it really did was transfer money to the parent company.⁷⁰⁷ The majority concluded that this was a minimal contribution.⁷⁰⁸

The second limb requires a common design between the principal tortfeasor and the accessory. The Appellants acted in accordance with a campaign intended to confront illegal fishing by any means necessary. Violence, specifically property damage, was the inevitable result of the fishermen's likely refusal to cooperate.⁷⁰⁹ The Supreme Court unanimously concluded that the second limb was satisfied.

First instance courts have since applied joint tortfeasance by common design. In *Turbo-K*⁷¹⁰ the claimant sought to make a company director personally liable via common design for passing off. The defendant company had sold a near-identical cleaning fluid. The first limb was satisfied by that defendant amending brochures, creating a website, altering a logo, and therefore making a more than minimal contribution. The second limb was met by the company being set up to manufacture and market the infringing product. Thus, the director was liable as a joint tortfeasor. In *ATB Sales v Rich Energy*,⁷¹¹ three defendants formulated a logo said to infringe the claimant's copyright. The claimants sought to make a director personally liable as an accessory via common design. That defendant knowingly copied elements of the logo, was fully involved in the design process, and so made a more than minimal contribution. A common design to create the infringing logo could be inferred from the collective efforts to develop it. Both limbs of joint tortfeasance were made out.

Thus, for accessory liability on the vignette, individual members of *Incel Brotherhood* must satisfy both limbs of the test. They must have made a more than minimal

⁷⁰⁶ Ibid [49]

⁷⁰⁷ Ibid [16]

⁷⁰⁸ Ibid [27]

⁷⁰⁹ Ibid [48]

⁷¹⁰ *Turbo-K Ltd v Turbo-K International Ltd* [2020] EWHC 2078

⁷¹¹ *ATB Sales Ltd v Rich Energy Ltd* [2019] EWHC 1207 (IPEC)

contribution to the tort. Secondly, they must have done this pursuant to a common design.

Concerted Action

A more than minimal contribution to battery was explored in *Kalma*.⁷¹² The defendant was a UK mining company operating out of Sierra Leone, which had been the target of protests and strikes. The local police crushed the demonstrations with extreme violence. To Turner J, the company made a more than minimal contribution by providing vehicles.⁷¹³ However, there was nothing to suggest the mining company intended or anticipated the police acting tortiously.⁷¹⁴ Nevertheless, providing vehicles or materials to aid the tortfeasor may exceed the *de minimis* range.

Within the vignette, a core group of members of *Incel Brotherhood* provide Tom with materials and advice. Members suggest 'potential weapons', 'post maps', or give advice on how to 'evade the authorities.' If the effect of that advice is to make Tom more able to commit the torts, then those providing it are making a more than minimal contribution. Say a member advises Tom to use knives might enable him to conclude that these are the most effective weapons. That member influences how the stabbing attack manifests and so their contribution will likely exceed the *de minimis* range. The same could be extended to those providing maps and materials. For instance, if someone posts a map, identifying a potential escape route, which Tom decides to use, they likely make a more than minimal contribution. However, the same might be true if Tom instead realised the route was unsuitable and so adapted his planning. In both instances, the member aids Tom in more effectively carrying out the tort. Indeed even if Tom doesn't end up using the route, knowing he can escape might further embolden him. Or, say, another member suggests using explosives and proceeds to detail a wide range of potential weapons for Tom's consideration. Even if Tom decides none of them are suitable, this individual is actively helping him make a fully informed decision. Their advice may not factor into the tort, but challenging Tom gives him an opportunity to

⁷¹² *Kalma v African Minerals Ltd* [2018] EWHC 3506

⁷¹³ *Ibid* [38]

⁷¹⁴ *Ibid* [111]

evaluate his plan and determine the best course of action. In principle, any one of these could be a more than minimal contribution.

In addition to those directly supporting Tom's planning, there is a wider range of supportive ancillary behaviours. For instance, those who upvoted his 'extreme posts' encourage his 'violent fantasies' or suggest his plans 'don't go far enough' whilst promising to proclaim him a 'saint' should he finally act. These behaviours support, encourage, provoke, or otherwise motivate Tom to act and are capable of being a more than minimum contribution. In *Monsanto*,⁷¹⁵ the defendants trespassed upon the claimant's land, uprooted their crops, and damaged goods. The claimant sought to make the sixth defendant, a media liaison officer, liable as a joint tortfeasor. Smith LJ observed that the defendant was aware of the attack, attended the site, and led the press to the protest whilst explaining its significance.⁷¹⁶ His supportive and ancillary actions exceeded the *de minimis* range. That he acted within the context of an activist campaign was sufficient to satisfy common design. Thus, the sixth defendant was a joint tortfeasor.

Accessory liability by common design has the potential to provide wide-ranging liability. Say a family member of one of the protestors made them a flask of warm tea to prepare them for a cold day. They wished them luck, gave them a lift to the local train station, and made them tea. They are playing an ancillary role, so the question is whether this exceeds the *de minimis* range. This depends on the context; for instance, if they had not given them a lift, would the tortfeasor have been able to attend the site? If the answer is no, then they have likely made a more than minimal contribution, as without them, the tortfeasor might not have arrived. Alternatively, suppose the journey would otherwise be long and arduous, meaning the lift dramatically extended the time the tortfeasor had to engage in unlawful behaviour. This, too, might exceed the *de minimis* range. If the journey was short, the family member would simply have made an inevitable journey more convenient, which is unlikely to amount to a significant contribution.

⁷¹⁵ *Monsanto Plc v Rowan Tilly and others* [1999] 11 WLUK 843

⁷¹⁶ *Ibid* [46]

Similarly, their making tea could, in context, be a more than minimal contribution. For instance, if it was the only source of warmth available to the tortfeasor, and without it, the torts would have been impossible. It is unlikely most protests will hinge on such small acts, but it is plausible they could exceed the *de minimis* range in the proper context. There is no set range of acts which are automatically excluded; all must be assessed relative to a context. The more minor an act might appear, the more significant it must be, in context, to justify a finding that it is a more than minimal contribution. The same is true for major acts that make no material contribution to the tort in context. Say the family member had donated six sets of Wellington Boots to the protestors so they could traverse a muddy field. This might read, initially, as a major contribution to the tort. However, if the ground had frozen over and the boots were unnecessary, then all the family members have done is embolden the group. If this had no real impact on the tortfeasor's decision to act then this might not exceed the *de minimis* range. Ancillary and supportive contributions to a tort must be assessed relative to a context.

Various members of *Incel Brotherhood* play a similar ancillary role by encouraging Tom, aiding his planning, and justifying his proposed actions in line with their shared ideology. Some support him by encouraging him to carry out tortious acts, others provoke him by diminishing him for not following through, and there is the ever-present promise of sainthood. If these behaviours were consolidated into a single accessory, the first limb of joint tortfeasance would be satisfied. Say George separates from his spouse and seeks support from his friend Aidan, who convinces him to blame her for the separation, poor financial situation, and strained relationship with his children. He encourages him to express hateful sentiments and participates in conversations about using violence against her. When George muses about committing murder, Aidan suggests weapons, affirms his grievances as legitimate, and promises to hold him in great esteem if he acts. Over time, Aidan begins to criticise George for not acting, suggesting he is too cowardly to kill and must follow through to prove himself. If the effect of this, collectively, is to inspire George to kill, then Aidan's supportive ancillary role was essential to the realisation of the tort. In context, Aidan has made a more than minimal contribution.

The example within the vignette is similar; only Aidan's role is diffused across the entire community. Whether a member is liable would depend on their contributions in context. Those who made short comments or interacted with Tom fleetingly may not exceed the *de minimis* range. While members who consistently supported and guided him may exceed it. The same might be true for those who informed his decision to kill, convinced him to act, or helped make the plan viable. It is possible that these contributions might come down to a single comment or fleeting interaction, and so the claimant would need to justify why those acts exceed the *de minimis* range.

Nevertheless, those whose actions can be said, in context, to make a more than minimal contribution satisfy the first limb of joint tortfeasance. Thus, they combine with Tom to bring about a tort. If this is done pursuant to a common design, they will be jointly and severally liable.

Common Design

The second limb of joint tortfeasance is common design. This does not require members of *Incel Brotherhood* to conspire with Tom. In *Brook*,⁷¹⁷ a lodger told the defendant that he could smell gas coming from the claimant's property. The two men entered the property, found the gas pipe and the defendant asked the lodger to examine it with a naked flame. Salter J concluded that the landlord and the lodger acted pursuant to a common design to find the gas leak.⁷¹⁸ Neither the lodger nor the landlord intended harm but committed a tort in pursuit of an innocent common design. A common design need not be inherently tortious; it merely needs to be some agreed purpose which the parties act pursuant to.

To Davies, this requirement for common design is what distinguishes accessory liability in tort, from its criminal counterpart. However, while a common design is a prerequisite for accessory liability in tort, this may not always have been the case. There is evidence that a much broader form of accessory liability in tort did once exist, before it was rejected in favour of accessory liability by common design. Nevertheless, this need for a common design has been relaxed over the years, to the point that mere knowledge of a

⁷¹⁷ *Brook v Bool* (1928) 2 KB 578

⁷¹⁸ *Ibid* [585-586]

tortious act can lead to a tacit common design being inferred.⁷¹⁹ Indeed, there is case law stating that a common design can arise by tacit agreement.⁷²⁰

Thus, when Tom posts about his desire to carry out an act of 'Incel Rebellion', and others encourage, support, or otherwise contribute common design can be inferred. They know what Tom intends and, in participating, have tacitly assented to a common design. Their specific motivations are irrelevant. In *Lancashire Fires*,⁷²¹ Carnwath LJ concluded that common design requires two persons to agree on a common end, and in the course of that, a tort is committed. The defendant does not need to intend to commit the tort or infringement only to combine with the primary tortfeasor in accordance with some common end.⁷²² Members of *Incel Brotherhood* may contribute for their own reasons but might be liable so long as they intentionally make a more than minimal contribution to the common design. On the vignette, Tom publicly stated his murderous ambitions, whereupon others intentionally lent their assistance. Common design ought to be inferred. Say, A announced his desire to commit a battery against B, whereupon C, D, and E came to his aid. C, merely because he enjoys acting mischievously, endorses, justifies and encourages the battery however he can. D, motivated by a past grievance, aids in A's planning. Finally, E, who is mainly apathetic but has nothing else to do, drives A to B's home. No one person acts for the same reason, but all act pursuant to a common design to have a battery inflicted against B.

Common Design: Intentional Torts

Much of the case law so far concerns torts of strict liability in which a common design can be inferred automatically. For the intentional torts, the accessory must be aware of the essential wrong.⁷²³ To Davies, this reflects a fundamental value of accessory liability in tort; culpability. For there is a strong desire within the law to impose accessory liability on the blameworthy,⁷²⁴ Indeed, the requirement for common design has arguably been relaxed because the courts have sought to extend it in cases where

⁷¹⁹ Paul Davies, "Complicity", in Matthew Dyson (Edt) *Unravelling Tort and Crime* (CUP, 2014) 275-280

⁷²⁰ *Unilever Plc v Gillette (UK) Ltd* [1989] 6 WLUK 233 [609]

⁷²¹ *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1996] 4 WLUK 288

⁷²² *Ibid* [658]

⁷²³ Paul Davies, *The Mental Element of Accessory Liability in Tort* (CLJ, 2025) 410-411

⁷²⁴ *Ibid* 296

assistance is deemed to be appropriate.⁷²⁵ Dietrich concurs, despite having reservations about the bulk of Davies' analysis, and suggests that culpable involvement in another's wrong is the primary rationale for accessory liability. The accessory is culpable because of their knowing involvement with the principal's wrong. As a result culpability in accessory liability depends on a conduct element, their contribution to the wrong, and a mental element, their knowledge of that wrong. These fuse to create a participation link which justifies holding the accessory liable.⁷²⁶

This is broadly the position adopted by the case law on accessory liability by common design for intentional torts. In *Vestergaard*,⁷²⁷ the defendants formed a business that manufactured insecticides, which were formulated using the trade secrets of their former employer. The Supreme Court held that an accessory's state of mind must be accounted for when dealing with intentional torts. The accessory must know the wrongful element of the common design to be liable.⁷²⁸ Thus, one of the defendants who unknowingly received and used confidential information could not be liable unless she became aware the information was protected.⁷²⁹ Only when they appreciate the essential wrong does accessory liability arise. In *Shah v Gale*,⁷³⁰ Mr Shah was murdered after being subjected to a violent attack in his home. The claimants alleged that the defendant was personally liable for directing the assailant to Mr Shah's address. Leveson J traced the incident to a dispute between the tortfeasor and the intended victim, which had escalated into a series of violent confrontations.⁷³¹ Eventually, the defendant was called upon to identify the intended victim's home; she was initially reluctant and unsure but ultimately pointed to the address. The tortfeasor proceeded to break into the home and stab the inhabitant to death. The first limb of tortfeasance was

⁷²⁵ Davies(n719) 280-285

⁷²⁶ Joachim Dietrich, Dealing with Complexity: Different Approaches to Explaining Accessory Liability, in Kit Barker, Karen Fairweather, Ross Grantham (eds) Private Law in the 21st Century, (Hart Publishing, 2017) 197-212

⁷²⁷ *Vestergaard Frandsen S/A (now called MVF3 APS) v Bestnet Europe Ltd* [2013] UKSC 31; [2013] 1 WLR 1556

⁷²⁸ *Ibid* [34-35]

⁷²⁹ *Ibid*

⁷³⁰ [2005] EWHC 1087 (QB)

⁷³¹ *Ibid* [6]

satisfied by the defendant pointing to the relevant address, for she exceeded the *de minimis* range in doing so.

For the second limb, Leveson J accepted that the defendant was aware of the violent dispute and knew the tortfeasor intended a revenge attack. She anticipated the essential wrong, physical contact, and so became party to a common design by intentionally lending her assistance. Both limbs of joint tortfeasance were satisfied, and the defendant was liable for damages.⁷³² Although the defendant did not anticipate a knife being used. The knife transformed the attack into a stabbing she could not anticipate, so she lacked knowledge of the essential wrong regarding the death.

The Supreme Court cited *Shah* with approval when reviewing joint tortfeasance by common design,⁷³³ and the underlying principles were applied again in *Murray v Mabrouk*.⁷³⁴ The claimant was a police officer who, alongside a close friend and colleague, was assigned to police a demonstration outside the Libyan embassy. While the demonstration was underway, the embassy window opened, and submachine guns were fired into the crowd, killing the claimant's close friend. After a decades-long campaign, he issued proceedings against a member of Muammar Gaddafi's Revolutionary Committee. Spencer J held that the defendant made a more than minimal contribution by directing the weapon's assembly, protecting loyalist counter-protestors, and recruiting a volunteer to deal with the protests. He was not a passive observer but intentionally lent his assistance to a common design to bring about the shooting. The shooting would obviously cause harm to anyone in the vicinity of the bullet, and so the defendant engaged in a concerted action pursuant to common design, knowing of the essential wrong. Both limbs were satisfied, so the defendant was liable as a joint tortfeasor by common design and for the nominal damages sought by the claimant.⁷³⁵

For any individual member of *Incel Brotherhood* to be liable as an accessory by common design for an intentional tort, the member must have knowledge of the

⁷³² Ibid [42]

⁷³³ *Fish*(n704)

⁷³⁴ [2021] EWHC 3461 (QB)

⁷³⁵ Ibid [52]

essential wrong. For battery, the accessory must have known direct physical contact would occur. For assault, they must have known others would be placed in fear of imminent unlawful violence. Finally, for the tort in *Wilkinson v Downton*, the accessory must have known Tom intended to cause Eleanor severe distress at the very least and lent their assistance regardless.

Conditional Knowledge

Incel forums frequently include those engaging in extreme behaviours.⁷³⁶ It is possible some of those contributing believed Tom was venting or roleplaying and so dismissed any knowledge of the essential wrong. However, this is not to say they lack knowledge. It is more accurate to say that members of *Incel Brotherhood* have no way of knowing whether Tom is serious or not. A defendant who disregards a suspicion they are participating in a tort should be liable as a joint tortfeasor.⁷³⁷ A defendant can be liable if they wilfully closed their eyes to the facts.⁷³⁸ There is evidence that Tom might be serious, creating a level of knowledge analogous to the conditional intent arising in *Fish*.⁷³⁹ Here common design was made out by the Appellant assenting to a campaign in which, provided certain conditions were met, violence would occur.⁷⁴⁰ Their knowledge of the essential wrong was conditional, which was sufficient for liability if those conditions were met.

Conditional knowledge was alluded to in *Kalma*, in which Turner J concluded a wrongful common design ought to give rise to the anticipation of tortious acts. It is not enough for the parties to have a general intention which could be realised by non-tortious means.⁷⁴¹ However, if the defendants had intended the police to stop the protests by any means necessary, there is a conditional anticipation of violence, which would be sufficient.⁷⁴² To illustrate, say Karl is driving Paul to the bank, and Paul announces his intention to rob it. Karl, knowing Paul is a boisterous character, thinks nothing of this presumed joke and

⁷³⁶ Sarah Daly, "‘Incels are shit-post kings’: Incels’ perceptions of online forum content," [2023] 47 JCL 4

⁷³⁷ Davies(n719) 200-226

⁷³⁸ *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2010] EWCA Civ 110; [2010] BusLR 1465 [106]

⁷³⁹ *Fish*(n704)

⁷⁴⁰ *Ibid* [48]

⁷⁴¹ *Kalma*(n712) [111-117]

⁷⁴² *Ibid*

continues driving. If Paul is serious, there is no wrongful common design, for Karl had barely a suspicion of the essential wrong.

However, if Paul had informed Karl he was armed, detailed a complete plan involving the taking of hostages, and described his proposed escape route in detail, the situation changes. Karl can no longer say whether Paul is serious or not but knows that if he is, tortious acts will occur. He has more than a mere suspicion but conditional knowledge of unlawful acts occurring if Paul is serious. Karl has no way of excluding that condition, so in continuing to lend his assistance, he acts with conditional knowledge of the essential wrong. If Paul is serious, the condition is met, then he ought to be liable as a joint tortfeasor pursuant to common design. This remains true even if Paul is known as a fantasist; the moment it becomes unclear whether he is serious or not is the moment conditional knowledge arises.

Incel Brotherhood may be rife with violent rhetoric, but members have no way of knowing whether Tom is serious. Certainly, they cannot exclude the possibility, and there is considerable evidence to the contrary. Tom's proposed actions are a natural application of Incel ideology. He has a reputation for 'vitriolic posts', and his actions are extreme enough for him to gain 'significant notoriety' on the forum. He 'fixates' on Eleanor, makes her the focus of his violent fantasies, and links to her 'social media' to prove she is a real person. His fantasies become more 'realistic,' he declares his life 'officially over' and details his familial relationships breaking down. He then posts about a 'stabbing spree', and his intent to carry out 'the next rebellion' to 'put those sluts in their place' whilst explicitly venerating Incel terrorists. It is erratic even by the standards of *Incel Brotherhood*, to the point that some members request his final post be removed for fear he is indeed serious.

Individual members of *Incel Brotherhood* could not be sure whether Tom was serious or not. Thus, in actively supporting, provoking, and otherwise encouraging him they intentionally lend their assistance with conditional knowledge of the essential wrong. They assent to the possibility of harm in the event Tom is serious and so should bear responsibility if it manifests. This might not apply to every member, only that there is scope to say some will have anticipated tortious acts flowing from their common design. Thus, they satisfy both limbs of the test when the condition manifests.

Accessory Liability in Tort: Conclusion

To Dietrich, those who significantly contribute to the wrongful conduct of another should be characterised as accessories.⁷⁴³ Liability is justified by a causal connection between their conduct and the tort, which results in them assuming partial responsibility for the resulting harm. This responsibility affords the claimant additional protection by having another person to issue proceedings against, increasing their odds of obtaining a full sum of damages.⁷⁴⁴

To that end, Dietrich advances an analytical framework to determine when accessory liability arises, consisting of three elements. There must be a primary wrong committed by a primary wrongdoer, which the accessory involves themselves in with the requisite mental state, usually being some knowledge of the wrongful conduct. Each element contributes to a normative inquiry asking whether the accessory was so involved in the primary wrong that they ought to be liable for it.⁷⁴⁵ An inquiry that does not automatically result in legal responsibility, but there is a correlation. If A contributes more than minimally to B's tort, with knowledge of the wrongful conduct, they will be liable as an accessory by common design. The question is whether the accessory is so involved in the primary wrong and has the necessary knowledge that they ought to be liable.

In the vignette, Tom's stabbing attack constitutes a primary wrong that members of *Incel Brotherhood* play a crucial role in realising. The community knows of Tom's violent declarations, intended plans, and hostility towards Eleanor. They may not believe Tom is serious, but Dietrich suggests an accessory should not benefit from what they have closed their eyes to.⁷⁴⁶ Their conditional knowledge of the essential wrong should be sufficient to justify holding them as accessories. Moreover, Davies identifies three recurrent rationales of accessory liability: responsibility, culpability, and deterrence.⁷⁴⁷ Accessory liability is rooted in our preferred view of responsibility and culpability that an accessory ought to be liable when their blameworthy behaviour is causally connected to harm.⁷⁴⁸ Each of these would be served by attaching accessory liability in the

⁷⁴³ Dietrich(n726) 10-15

⁷⁴⁴ Ibid 12-20

⁷⁴⁵ Ibid 29-40

⁷⁴⁶ Ibid 50-60

⁷⁴⁷ Davies(n719) 12-30

⁷⁴⁸ Ibid

vignette. Firstly by holding members of *Incel Brotherhood* responsible for the consequences they have contributed to. Secondly, liability is attached to capture their wrongful behaviour of glorifying, encouraging, assisting, and inciting an act of terror. The resulting civil penalty should deter others who would engage in such behaviour in future. The aims and rationale of accessory liability are served by applying it to the vignette.

Thus, accessory liability in tort as a legal tool for responding to downstream harm is legally and normatively justified. In theory, it is a viable legal tool, even if the practical reality of bringing a claim in tort is less straightforward. Although the interfaces between tort and crime might assist the claimants. If Tom were convicted of murder, then the stabbing attack would be an established fact binding on any civil court. The question to be determined at trial would be whether any proposed defendants were accessories via common design. Moreover, if members of *Incel Brotherhood* had been found liable as accessories in crime this may make matters much more straightforward in tort.

Dyson and Randall argue that the civil courts will only allow a party to challenge the factual basis of their conviction if there is a very high level of new evidence.⁷⁴⁹ Any attempt by Tom, or convicted members of *Incel Brotherhood*, to issue a defence challenging their conviction is likely to be struck out as an abuse of process.⁷⁵⁰ The most likely outcome being that their defence is disregarded, and a summary judgment entered for the claimants.⁷⁵¹ Although Dyson and Randall argue the current approach goes too far, exceeds what Parliament intended, and inhibits defendants from challenging their conviction through tort which was historically possible.⁷⁵²

Nevertheless, taking the law as it stands, for the vignette it would be in any claimant's interests to await the outcome of criminal proceedings. A conviction would severely limit the ability of Tom, or other members of *Incel Brotherhood*, from raising a defence in tort. Without a very high level of new evidence, they would be unable to challenge their convictions. Thus they may have no way of raising a defence, resulting in a summary

⁷⁴⁹ Matthew Dyson, John Randall, 'Criminal Convictions and the Civil Courts' (2015) 74 CLJ 78, 78-80

⁷⁵⁰ *Hunter* [1982] AC 529

⁷⁵¹ Dyson(n749)

⁷⁵² *Ibid* 84-85

judgment. The only defence that appears open to them is whether their actions are sufficient to establish accessory liability in tort as well as crime, but this may not be to their advantage.

Even if the claimants pursue members of *Incel Brotherhood* who have not been subject to criminal proceedings, Tom's conviction would still provide a binding fact pattern.

There would be no need for a civil finding of fact on whether the stabbing attack occurred. The focal point would be the defendant's contributions to the attack, and whether they pass the threshold of accessory liability by common design. The interplay between the jurisdictions could alleviate, or even eliminate, the burden on claimants during tort proceedings. As a result accessory liability across the two jurisdictions reinforce one another to ensure a comprehensive legal response. As those guilty of serious crimes may be very easily made liable for damages, although whether they have the means to pay is another question.

Damages

Private civil proceedings are often brought to make the defendant liable for damages, so some consideration must be given to them. Joint tortfeasors are jointly and severally liable for the full sum of damages.⁷⁵³ Proportional liability is irrelevant at this stage; the claimant can seek full satisfaction from each defendant.⁷⁵⁴ Joint tortfeasance affords the claimants flexibility in how they pursue damages; for instance, should a defendant with deep pockets be identified, the claimants have a better chance of acquiring the full sum. Alternatively, if none of the defendants have the means to pay in full, the claimant can enforce the judgment against them all.⁷⁵⁵ They may apply for an attachment to earnings, a warrant to seize goods, the appointment of a receiver, or to have the money collected directly from the defendant's bank account. A defendant who refuses to pay or resists these mechanisms may ultimately be subject to committal proceedings.⁷⁵⁶ A claimant who prevails at trial has a wide range of enforcement options available, which may be pursued simultaneously or successively against all those deemed liable.

⁷⁵³ Clerk(n548) 4-02

⁷⁵⁴ *Clark*(n686) [59]

⁷⁵⁵ Civil Procedure Rules 1998, Part 70.2

⁷⁵⁶ Practice Direction 70.2 - Enforcement of Judgments and Orders, Methods of Enforcing Judgment P1.1

Damages: Overview

Damages are awarded specific to a context, so there is no broad applicability in calculating a figure on simulated facts. To calculate damages, a court must determine what has happened, predict what is likely to happen, and contrast that with hypotheticals. The process is speculative, often unfalsifiable, and must account for a wide range of probabilities.⁷⁵⁷

In tort, damages are largely compensatory.⁷⁵⁸ There are general and special compensatory damages for pecuniary and non-pecuniary losses. General damages are presumed to flow from the tort, while special damages must be pleaded and proven separately.⁷⁵⁹ The overall objective is to fully compensate the claimant for their losses and put them in the position they would have been in had the tort not occurred.⁷⁶⁰

Pecuniary losses capture lost income, additional expenses, or lost opportunities.⁷⁶¹ For instance, a claimant might recover lost earnings as a result of being unable to work.⁷⁶²

All non-remote expenses should be covered by damages for pecuniary losses.⁷⁶³

Pecuniary losses are calculated by judicial assessment. This will estimate the impact of the injury on the claimant, its long-term implications, and the prospects of recovery.⁷⁶⁴ A claimant incapable of working might receive their current salary multiplied by a figure estimating how many working years they had left.⁷⁶⁵ The Judicial College has produced actuarial tables with the multipliers, that judges use to calculate these pecuniary damages.⁷⁶⁶

Non-pecuniary losses cannot be precisely calculated.⁷⁶⁷ Damages cannot restore limbs, heal injuries, or salvage what happiness has been lost, but the claimant is

⁷⁵⁷ Dietrich(n726)118-123

⁷⁵⁸ James Edelman, Jason Varuhas, Andrew Higgins, *McGregor on Damages* (SM, 22nd edn, 2024) 2-001

⁷⁵⁹ Clerk(n548) 27-05

⁷⁶⁰ *Livingstone v Rawyards Coal Co* (1880) 5 AppCas 25

⁷⁶¹ Clerk(n548) 27-20

⁷⁶² *Phillips v L & SW Ry* (1879) 5 CPD 280, *James v Woodall* [1969] 1 WLR 903

⁷⁶³ Clerk(n548) 27-24-27-27

⁷⁶⁴ Christian Witting, *Street on Torts* (16th edn, OUP 2021) 671-675

⁷⁶⁵ Cane(n506) 131-135

⁷⁶⁶ The Working Party Responsible for the Eighth Edition, *Actuarial Tables With explanatory notes for use in Personal Injury and Fatal Accident Cases* (GAD, 8th 2022) 16, 35, 78

⁷⁶⁷ Clerk(n548) 27-55

entitled to compensation nonetheless.⁷⁶⁸ The damages reflect the intangible losses and the reduced ability of the claimant to enjoy life as they once did. In practice, there are four heads of non-pecuniary loss: pain, suffering and loss of amenities, physical inconvenience and discomfort, mental distress, and social discredit. Non-pecuniary losses will often be remedied by a single award of damages justified by a rational explanation of how they were calculated.⁷⁶⁹

Since the de-facto abolition of civil juries calculating damages is a judicial function, and judges have moved towards greater consistency.⁷⁷⁰ Thus, there is a standard tariff system, a streamlined process for calculating pre-trial losses, and multipliers for long-term calculations.⁷⁷¹ For instance, if a claimant is paralysed, damages should range from £219,070 to £284,260. Judges will examine the presence and extent of pain, the degree of independence, depression, life expectancy, and the impact on the claimant to determine where in the range a case will fit.⁷⁷²

The vignette does not provide a detailed breakdown of the injuries suffered by the various claimants. However, the most substantial sums are likely to flow from the most severe injuries, such as stab wounds or psychiatric disorders. So long as the claimants can demonstrate a causal link between their injuries and the intentional torts done to them, then they may be compensated.⁷⁷³

There is also the prospect of aggravated damages, considering the defendants' egregious conduct. Aggravated damages are compensatory, even if they have a punitive effect. In *Rowlands*,⁷⁷⁴ the Court of Appeal detailed the circumstances in which aggravated damages should be awarded. Here, the claimant had been assaulted, falsely imprisoned, and maliciously prosecuted by a police officer who gave false evidence against them. Moore LJ described aggravated damages as intended to compensate for additional harm caused by being subject to spiteful, malicious,

⁷⁶⁸ *Heaps v Perrite Ltd* [1937] 2 ALLER 60

⁷⁶⁹ *H West & Son v Shephard* [1964] AC 326 [365]

⁷⁷⁰ Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (OUP, 4th edn, 2019) 35-50

⁷⁷¹ *Ibid* 234-255

⁷⁷² Judicial College Guidelines(n517) 5

⁷⁷³ *Co-operative Group Ltd v Pritchard* [2011] EWCA Civ 329; [2012] QB 320

⁷⁷⁴ *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773; [2007] 1WLR 1065

insulting, or arrogant conduct. Such conduct was demonstrated by the officer arresting the claimant in front of her children, giving false evidence, and engaging in such an egregious pattern of behaviour. It followed that the indignity, humiliation, and resentment this caused could only be remedied by an award of aggravated damages.⁷⁷⁵ The example involves a state agent, for which different policy factors apply; however, extreme behaviour by private citizens can merit an award of aggravated damages.

In *Dulghieru*,⁷⁷⁶ in which the claimants were forcibly trafficked into prostitution by the defendants. Treacy J characterised the defendant's conduct as utterly appalling, malevolent, and wholly contemptuous of the claimant's rights. General damages could not adequately compensate for the additional distress, humiliation, and degradation inflicted upon them, so an aggravated award was merited.

Similarly, Tom's conduct within the vignette can be characterised as childish, petty, spiteful, and maliciously calculated to cause as much harm as possible. Indeed, his actions are a means to communicate his sexless frustration as per his extremist ideology. The claimants directly affected by the stabbing attack may suffer additional harm and distress at being targets of an act of ideological terror. While Eleanor may suffer humiliation and degradation knowing that Tom's, now public, plot against her was motivated by sexual frustration and perceived rejection. Tom's childish, insulting, and utterly contemptuous conduct towards the claimants indicates that aggravated damages might be required.

There is also the possibility of exemplary damages, which are intended to punish the tortfeasor and deter them from engaging in similar behaviours in the future.⁷⁷⁷

Exemplary damages are available when the tortfeasor's behaviour is outrageous, reprehensible, cynical, or appalling.⁷⁷⁸ In addition, such damages are only available in three instances. Where the defendant is a servant of the state, where the tort was calculated with reference to its profit, or exemplary damages are authorised by statute. Relevant to the vignette is the second, which requires the defendant to have calculated

⁷⁷⁵ Ibid [26]

⁷⁷⁶ *AT & Others v Dulghieru* [2009] EWHC 225 (QB)

⁷⁷⁷ *Broome v Cassell & Co Ltd* [1972] AC 1027 [1073]

⁷⁷⁸ James Goudkamp, Eleni Katsampouka, "Punitive Damages: Ten Misconceptions." In Elise Bant and others (edt) *Punishment and Private Law* (HP,2021) 187-224

they will make a profit which will exceed the compensation payable.⁷⁷⁹ For instance, if a tortfeasor publishes a libellous article knowing the profits they will make will vastly exceed any sum of damages are owed.⁷⁸⁰

Exemplary damages are not limited to monetary gains but are available whenever the defendant calculates the gains of a tort outweigh the potential damages.⁷⁸¹ This does not require the defendant to do the arithmetic only to conclude that their profit, whatever form it takes, will be more beneficial than any damages owed.⁷⁸² However, if even this category is made out, there is no guarantee that exemplary damages will be awarded. Firstly, it must be shown that compensatory damages are inadequate. As these damages are intended, in part, to punish the defendant, any criminal sanctions received for the behaviour must be taken into account.⁷⁸³ It is also expected that these damages will be moderate.⁷⁸⁴

The egregiousness of Tom's extreme conduct and its childish, spiteful nature has already been considered and so the question is whether his gain was calculated. There is no financial gain, but he is motivated to avenge perceived slights. Exemplary damages are not limited to monetary gain,⁷⁸⁵ and the extremes of his intended conduct are such that he knows that, if he is caught, he would be spending a significant length of time in custody. Moreover, the fact that he might injure people and be pursued for compensation is a real possibility of his intended course of conduct. Nevertheless, he has decided he will gain more in revenge than he will lose from custody or, indeed, any of the legal consequences of the stabbing attack. In that sense, he has calculated that the benefits of his act will outweigh the consequences, so there is an argument that he falls within the second category.

Although the same could be said of any intentional tort, as the defendant will have almost always concluded their deliberate wrongdoing is worth the risk of any resulting legal consequences. Such a wide view of profit would extend the law of exemplary

⁷⁷⁹ McGregor(n758) 14-21

⁷⁸⁰ Ibid 14-22

⁷⁸¹ Ibid 14-23

⁷⁸² *Cassell v Broome* [1972] AC 1027 [1079]

⁷⁸³ Burrows(n770) 234-255

⁷⁸⁴ Goudkamp(n778)

⁷⁸⁵ *Rookes v Barnard* [1964] AC 1129, 1227

damages to any intentional tort, or criminal act, because the defendant almost inevitably concludes the gain of their unlawful conduct outweighs the potential consequences. At which point exemplary damages are not exemplary but routine for any intentional wrongdoing. While it would still need to be demonstrated that compensatory damages are inadequate, the possibility of exemplary damages being available on this account seems untenable. Consequently, exemplary damages are unlikely to arise on the vignette.

Death

The Fatal Accidents Act⁷⁸⁶ creates an action for the dependents of the deceased when a tortious act causes death. There is a list of qualifying relationships to identify a dependent,⁷⁸⁷ and the executors have six months to bring the claim before the dependents may act on their own initiative.⁷⁸⁸ Damages are calculated by determining how much income or care was being provided to the dependent by the deceased, multiplied by how long the dependency is estimated to last.⁷⁸⁹ Tortfeasors may also be liable for bereavement damages to specified dependants,⁷⁹⁰ which are currently capped at £15,120.⁷⁹¹

Secondly, the Law Reform Act 1934⁷⁹² creates a survivorship action to benefit the estate and those entitled to it. This overlaps with the Fatal Accidents claim but is a separate action.⁷⁹³ Although damages for lost income occurring after death are unavailable.⁷⁹⁴ The survivorship action affords the estate only limited damages, for instance, pain and suffering in the lead-up to death. If death is instantaneous, the estate may be unable to claim more than the funeral costs,⁷⁹⁵ resulting in a very modest award of damages.⁷⁹⁶ Both fatal claims are usually brought together to recover a broad range of damages. For

⁷⁸⁶ Fatal Accidents Act 1976

⁷⁸⁷ *Ibid* s1

⁷⁸⁸ *Ibid* s2

⁷⁸⁹ *Cane*(n506) 118-123

⁷⁹⁰ FAA(n786) s1A

⁷⁹¹ The Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020 (S.I. 2020/316), 1(1)2

⁷⁹² Law Reform (Miscellaneous Provisions) Act 1934 s1

⁷⁹³ *Clerk*(n548) 27-87,27-116

⁷⁹⁴ Administration of Justice Act 1982 s4

⁷⁹⁵ *Clerk*(n548) 27-116

⁷⁹⁶ *Cane*(n506) 131-135

instance, if death is not instantaneous, the survival claim would allow the estate to recover pecuniary and non-pecuniary losses incurred in the lead-up to the death. The Fatal Accidents claim might compensate the dependents for lost services or unpaid care. For instance, the proportion of the deceased's salary he was spending on his children multiplied by the remainder of their minority. Funeral expenses might be recovered under either claim, although they would not be awarded twice.⁷⁹⁷

Application

To provide a practical illustration, say, two claimants come forward on the vignette. The first suffered grievous stab wounds, and the second is a representative of the estate of a person who has been killed. Both claimants identify Luke as a defendant and launch proceedings against him and Tom.

The first seeks damages for pain and suffering, long-term loss of amenity, loss of earnings and some associated medical expenses. The second victim, in light of the stabbing attack occurring on a university campus, had no dependents, so the estate is limited to modest damages. The wounded claimant would be entitled to more substantial damages. It is often cheaper to kill than injure in tort.⁷⁹⁸

The Judicial College Guidelines for assessing non-pecuniary loss suggest a penetrating wound, causing no long-term effect on lung function, falls within the £12,590 and £17,960 range.⁷⁹⁹ If the wounds cause permanent damage, traumatic injury, or reduce life expectancy, the range is £65,740 to £100,670.⁸⁰⁰ If they are left with scarring or lacerations, a large proportion of awards fall within the £7,830 to £22,730 bracket.⁸⁰¹ These non-pecuniary damages would be complemented by an amount accounting for the claimant's pecuniary losses, and quite possibly aggravated or exemplary damages.

Tom, likely serving several concurrent life sentences for murder, is unlikely to be in any position to pay, leaving Luke to be pursued for the full amount. Whether it is worth doing so in another question and, with no statement of his means, he can be assessed

⁷⁹⁷ *Blake v Mad Max Ltd* [2018] EWHC 2134 (QB); [2019] PIQR Q1 [14]

⁷⁹⁸ Gregory Keating, "Irreparable Injury and the Limits of the Law of Torts," in Paul Miller (ed) John Oberdiek (ed) *Oxford Studies in Private Law Theory: Volume II* (OUP, 2023) 185-210

⁷⁹⁹ Judicial College Guidelines(n517)

⁸⁰⁰ Ibid 25

⁸⁰¹ Ibid 79

relative to other Incels. In the US the mean age of Incels is 24, most lack a university-level education, and 60% of those working earn less than thirty thousand dollars per year.⁸⁰² Incels are disproportionately not in education, employment, or training.⁸⁰³ Almost half of all Incels are believed to be living with their parents.⁸⁰⁴ With this in mind, an apt conclusion would be that most Incels will lack the means to pay any judgment issued against them.

If Luke cannot satisfy a judgment then he might be subject to a wide range of invasive enforcement measures. The claimants might apply to have his goods seized, his earnings garnished, or his bank account turned over to them. Moreover, the presence of a County Court or High Court judgment will have significant credit implications, which may affect Luke for a considerable length of time. If he still cannot pay he might be declared bankrupt.⁸⁰⁵ Although the actual impact on Luke may be limited, a bankrupt is entitled to maintain themselves, so only his luxury goods, if he has any, would be at risk.⁸⁰⁶ Bankruptcy might have a demoralising and upsetting effect but is unlikely to produce enough funds to settle a judgment before it is discharged. The restrictions around applying for credit⁸⁰⁷ or acting as a director are unlikely to affect him in any meaningful way.⁸⁰⁸ Although if he was say, a law student, then a bankruptcy could prevent him from qualifying or practicing as a solicitor.⁸⁰⁹ If he was employed as, or studying to become, an Chartered Accountant then his membership would be terminated.⁸¹⁰ Even if he had no such plans, a bankruptcy is publicly announced and can be publicly reported upon. Not only could this damage Luke's reputation, but landlords may refuse to rent to him and employers may refuse to hire him. Thus, even if Luke is young and of little means, bankruptcy may still have a considerable effect upon him. Accordingly, the prospect of enforcement proceedings may be invasive, disruptive,

⁸⁰² Anne Speckhard and others, "Involuntary Celibates' Experiences of and Grievance over Sexual Exclusion and the Potential Threat of Violence Among Those Active in an Online Incel Forum," [2021] 14 JSS 89, 89-100

⁸⁰³ Ibid 385

⁸⁰⁴ Ibid 382-385

⁸⁰⁵ Insolvency Act 1986 sA20-sA30

⁸⁰⁶ Cane(n506) 210-215

⁸⁰⁷ IA(n805) sA25

⁸⁰⁸ Ibid sA20-sA30

⁸⁰⁹ Solicitors Act 1974 s15(1)

⁸¹⁰ Institute of Chartered Accounts for England and Wales, ICAEW Principal Byelaws, Chapter Three, Paragraph 7(a)

and quite possibly ruinous. Moreover, if Luke was found liable and pursued for damages, contribution proceedings might see that disruption extended to the community at large.

Contribution

If multiple tortfeasors exist, defendants are entitled to bring contribution proceedings against one another. It is unnecessary for the claimants to issue proceedings against every potential defendant, for they can seek total satisfaction from any liable tortfeasor. That tortfeasor can then bring contribution proceedings against other liable parties to receive a proportion of the damages payable.⁸¹¹ A defendant's share of the damage will be calculated with reference to their degree of responsibility.⁸¹² Thus, if Luke were required to pay damages, he would have two years to bring contribution proceedings against any other liable member of the community.

In the illustration, Luke is liable for a substantial sum and is likely aggrieved. Contribution proceedings could reduce his financial burden, and Luke is potentially in an ideal position to do this. He is already an active member of the community, involved enough to play some role in recruitment, and may have the means to identify others to share his burden. If a wide range of members are jointly and severally liable, this could have a dramatic disruptive effect within the community. If Luke seeks a contribution from another member, then that member would also be incentivised to issue proceedings in their own name. Those subject to such proceedings would be incentivised to do the same, and this unfolding process would create immense pressure within *Incel Brotherhood*.

That is not to say every member would be in a position to pursue a contribution, only that there would be an incentive for them to do so. Even if most members have insufficient means, pursuing multiple members for a contribution might add up to a substantial sum. Although the previous observation regarding the difficulty in bringing proceedings would apply. But say Luke does this, in which case members would be deterred from forming close bonds with one another for fear of revealing identifying information and being subject to proceedings. Those in leadership or moderation

⁸¹¹ Civil Liability (Contribution) Act(n691) s2(1)

⁸¹² *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB); [2005] Po LR 253 [194]

positions might be incentivised to close or abandon the site for fear of ongoing liability. Or alternatively, use their position to seek the personal information of other users for use in their own contribution proceedings. Individuals could no longer afford to be bound together as a community, and those subject to judgment may angrily voice their displeasure. The resulting breakdown of trust, widespread disruption, and infighting might result in the community dissolving entirely. Even if the site did shut down only to reopen, the community may well be splintered and so pose a much-reduced risk of causing further harm.

This is not a strictly legal mechanism but rather an application of civil liability to generate dire consequences for a deviant community. It might be appealing when considering *Incel Brotherhood*, but the wider ramifications ought to be acknowledged. To demonstrate, say, a group of environmental activists cause considerable disruption on a public road for which a small number are sued in public nuisance.⁸¹³ If that small number is found liable, they, too, would be subject to considerable pressure to seek a contribution to safeguard their finances. Alternatively, members of the group might set up fundraising pages or seek support from the community, but if such ventures don't bear fruit, other members who played a provocative or supportive role might become a tempting target to call upon for a contribution. The activist group would be subject to the same internal tensions, disunity, infighting, and risk of dissolution as *Incel Brotherhood*. At this point, there is a risk that civil proceedings become a mechanism to disrupt or dissolve groups to which the claimants take exception. Indeed, there is a comparison to be drawn to unincorporated associations where each member of a group is jointly and severally liable for the torts of a member closely connected with its common purpose. Civil proceedings are mechanism to disrupt the group by pursuing members of that group for damages, causing considerable internal friction and opening the door to contribution claims.

This can be mitigated to some extent, for a claim specifically calculated to have this effect might be struck out as an abuse of process.⁸¹⁴ In *Broxton*,⁸¹⁵ Brown LJ confirmed

⁸¹³ In practice the remedy for these claims is likely to be an injunction.

⁸¹⁴ Civil Procedure Rules 1988, P34 Power to Strike a Statement of Case (2b)

⁸¹⁵ *Broxton v McClelland and Another* [1995] EMR 485

that a claimant motivated purely by an impermissible collateral advantage ought to have their action struck out as an abuse of process.⁸¹⁶ A legitimate claim can be struck out if the real intent is to be vexatious, oppressive, or to cause the defendant problems beyond those found in properly conducted litigation.⁸¹⁷ A cynical attempt to dissolve a group to which the claimant takes exception without cause is likely to be an abuse of process and struck out. There are internal safeguards within the existing system to prevent this argument from being so cynically abused.

To that end, the dissolution and disruption of subversive groups could be a natural consequence of claimants seeking damages for injuries sustained. That a claimant might feel internal satisfaction knowing the group will be disrupted from the inside is irrelevant. Disruption would be a natural consequence of holding joint tortfeasors liable for harm they have made their own. The potential weaponisation of this process, save for occasions where it would be struck out as an abuse of process, is ancillary. The thesis has outlined a path by which members of *Incel Brotherhood* might be liable for the torts they have contributed to. The success of those claims and their potentially far-reaching effects are a separate question.

⁸¹⁶ Ibid [5]

⁸¹⁷ *Freer v Zeb & Ors. Reference* [2008] EWHC 212

Chapter Six: The Pick Up Artist Vignette

February 2022

Alex, aged 23, is a software engineer living alone. Most of Alex's social interaction occurs through the Internet. Despite being shy, Alex can make friends and has had girlfriends in the past. Since leaving university, he has struggled to meet new people and has expressed a desire to date again.

One day, he logs on to a gaming forum and sees an advertisement for the website 'Ross Mystery: Man of Action.' It claims Ross Mystery specialises in transforming nerdy men into 'slick Casanovas' women cannot resist. On the home page, Ross Mystery appeals to prospective students, claiming to be a 'reformed geek' who once couldn't even look women in the eye. It was through sheer force of will he overcame this impediment and learned near-supernatural techniques of seduction. A method so successful he compares it to a cheat code in a video game.

Alex is receptive to the video game rhetoric, especially the idea of a 'cheat code' to make interacting with women easier. The site also features videos and reviews by satisfied students describing how they achieved mastery over women. They claim that learning from Ross Mystery allowed them to unlock their true sexual potential. After some thought, Alex applies to join the beginner's 'Total Immersion Course', which operates on a subscription model which requires Alex pay £70 per month.

March 2022

By unlocking the 'Total Immersion Program,' students can access several online modules, which Ross recommends they complete over a week. Ross assures them he will review their progress to ensure they stay on track. A vast catalogue of videos is made available to guide students through these modules. The exclusive perk of this course is five online calls with Ross Mystery. Bonus perks include online guides, digital flashcards, and Ross's 'top tips' for hooking up.

The course is facilitated through a forum which is owned by Ross but moderated by his handpicked 'elite team' of administrators. Ross uses the site to make course material available to his students but it is also a social space. To join, a person must be either a student or a former student who has successfully completed their course. Those joining

must agree to a code of conduct. This includes respecting Ross's decisions, keeping conversations on topic, not trolling, and building a celebratory culture around 'male success.' Women are not allowed to be members of the forum. Failure to abide by these rules can result in expulsion. It is not uncommon to see people removed when their subscriptions lapse.

Ross also assigns tasks to his students and directs them to note their progress via a 'mission log.' They must submit their log for Ross to review. The first two weeks of the module teach students that 'value' is the determining factor for sexual success.

Women, being naturally hypergamous, will always consent to sex with a man of high value. Thus, students must maximise their value and are given a list of masculine traits that express it. Ross tells them to construct a persona exhibiting these traits, similar to how one might customise a character in a video game. Their initial mission is to build this persona and submit it for approval. Once they are approved, students are invited to consider how their persona, being an 'Alpha Male' would dress, present themselves, and communicate value. The next mission is for students to dress and style themselves in the manner of their persona.

At the end of the third week, Alex's mission is to go out 'in character' and interact with women. Alex selects a local bar and acts how he thinks an 'alpha' male would. He has several short conversations with people in the bar, but he is not sure anyone is responding to him in the right way. Some seem to be a little put off by him. Still, he marks this mission as a success, writes it up in his 'mission log,' and posts about his success on the forum. In keeping with the community's ethos, Alex is congratulated for taking his first steps, with others promising him that the best is yet to come.

Emboldened and excited, Alex schedules his first one-to-one video call with Ross. He reports his progress, which Ross declares to be a tremendous success, and tells Alex people aren't used to dealing with 'Alpha Males' which is why some people seemed put off by his 'dominating' influence.

April 2022

Students are told now is the time to begin applying their knowledge, and must learn how to communicate value to women. However, Ross's videos warn that modern women have an overly inflated view of their own self-worth. As a result, it may be necessary to

reduce their perceived value to secure sex. He suggests several methods for doing this. 'Negging', for instance, involves giving a woman a backhanded compliment to undermine her self-esteem; a man might also give inconsistent signs to disorientate a prospective partner or interact suggestively with other women to make the true target jealous.

Alex is not particularly comfortable with this and discusses it with Ross during their second one-to-one conversation. Ross gently suggests Alex is being naïve and warns being a 'nice guy' is an invitation for women to exploit him. Additional videos are displayed showing these techniques working. Alex solicits further advice from other members of the forum, who either concur with Ross or suggest Alex defer to him. Many give him information, send links, or provide examples to further evidence that Ross's techniques work. All of which works to settle Alex ahead of his next mission; to go out and get a woman's phone number.

Alex goes to the same bar and finds himself able to strike up conversations with women, but they don't seem to go anywhere. Most end quickly; some women try to avoid him, and Ross's techniques do not seem to be effective. As the night goes on, he is less able to maintain his 'persona.' Eventually, he meets Amelia, who is drinking alone and is initially receptive to conversation. When Alex remembers his mission and starts applying the techniques, she becomes visibly uncomfortable. Alex persistently asks for her number, and after some badgering, she provides him with one before leaving.

Alex logs his progress the next day, which Ross screenshots and uploads to the forum. Alex is commended by Ross and members of the community for completing his mission so successfully. However, during their next video call, Alex mentions Amelia's discomfort to Ross. Ross dismisses this, warning Alex against fixating on one girl, but when pressed, suggests her reluctance was actually 'Last Minute Resistance.' Ross explains this occurs when a woman's sexual desire conflicts with her fear of being perceived as promiscuous. This causes her to reject her intended partner. Because of this, Ross implies Alex progressed much further than expected, as he clearly reached a point where Amelia was considering sex.

The next online module focuses on ‘touch escalation’ intended to make women comfortable with increasingly intimate physical touching. It is accompanied by videos of men placing their hands on women’s arms, shoulders, and waists. In each video, the women interpret this as a bit of fun, and the module assures students that if done correctly, this is the reaction they can look forward to. Ross describes this as having an intense biological effect, stimulating women’s ‘primal instincts’ and inspiring an almost overpowering lust.

Alex draws the following connection. If LMR is a conflict between a woman’s sexual desires and societal fears, then touch escalation would be a method of ensuring desire wins out. On the forum, Alex looks for posts and conversations between more experienced members of the community. He finds a considerable number of stories featuring them using a variety of techniques, including touch escalation, to overcome LMR. Alex then makes a post on the page detailing his intuitions. The post attracts considerable attention with other students concurring with Alex suspicions, while more experienced members of the community confirm it. Some detail their own experiences of arousing women to the point where they cannot think logically and so consent to sex. The impression Alex is given is that the use of touch escalation to overcome LMR is key to Ross’s method. Ross eventually joins the discussion; he does not correct anything that has been said but warns his students against advancing too far too fast. He jokes that Alex might be a future PUA in the making and suggests he will find future courses very interesting.

May 2022

Alex’s next mission is to go out and have a successful sexual encounter with a woman, using all the techniques he has learned. Emboldened, Alex goes out again to the same middling reaction until he spots Amelia. Upon approaching, he insists on buying her a drink. She is clearly slightly uncomfortable. After a short conversation in which Alex persistently flirts with her, she makes an excuse to leave, whereupon Alex attempts to overcome her perceived LMR.

He brushes against her arm and when she doesn’t respond places both hands on her shoulders. Amelia doesn’t react beyond stammering which Alex interprets as the biological reaction he was promised. She flinches when he attempts to kiss her and he

says, “Don’t worry, this will get you where you need to be.” Alex then places his hands on her shoulders, slides down to her waist, and around to the small of her back. He interprets her distress as a sign of increasing inner conflict.

Amelia, after a moment, asks him to “please stop,” and is very clear she doesn’t want this. Alex tells her, “Don’t worry about any of that; we’re almost there.” He then lightly squeezes above her hip, getting as close to her bottom as he thinks is appropriate, and makes continual eye contact. He is about to go in for a kiss when a third party intervenes. Alex breaks away whereupon Amelia bursts into tears.

Seeing that she is upset, Alex apologises for moving too quickly but implies she is overreacting. Alex then says it was both of their fault, and there was no need for anyone else to get involved. When he realises no one is listening, he storms out.

Alex is arrested shortly thereafter on suspicion of sexual assault.

Upon being released, he messages Ross and posts on the forum for advice. Ross deletes his post, removes him from the community, and blocks him. He then denounces Alex as a troll, and asserts that no one could be stupid enough to misapply his techniques to such an extent. There is no trace of Alex on the site by the time new students are welcomed in June.

Justification

To ensure the narrative's plausibility, the literature was consulted to ensure the simulated behaviours were consistent with real-world observations. PUA communities are oriented around individual 'gurus' who teach men how to seduce women.⁸¹⁸ The subculture can be envisioned as a series of interconnected communities built around a single influencer.⁸¹⁹ Seduction communities have always featured those producing content and those consuming it, with the communities necessarily orientated around the former.⁸²⁰ Those producing content are self-professed experts who offer paid courses to teach their students to become sexually successful.⁸²¹ Each community

⁸¹⁸ Bratich(n71) 5003-5027

⁸¹⁹ Ibid 5004,5012-5014

⁸²⁰ Brittany Knutson, “‘I have to want you to act this way’: a political reading of sexual violence, men’s Rights Activism, and the Pick-up Artist,” [2024] FMS, 4-6

<https://www.tandfonline.com/doi/full/10.1080/14680777.2023.2296858?src=>, Accessed 01/10/2023

⁸²¹ Andrew King, “Feminism’s Flip Side: A Cultural History of the Pickup Artist,” [2018] 22 SC 299,308

shares narratives, themes, and an engrained hostility to feminism.⁸²² All of this informed the decision to orient the fictional PUA community in the vignette around Ross Mystery and have him offer a paid course.

A deeper analysis was required to construct a plausible fictional community of PUAs. The thesis examined the online presence of several PUA influencers intended to reflect a cross-section of the subculture. Their courses, websites, online presence, course techniques, practices and business models were examined to identify the key characteristics of PUA influencers.

The process of selecting influencers was a three-stage process. Firstly, notable influencers identified in the literature were included. Secondly, the thesis accessed the social media profiles of prominent PUAs. Thirdly, online Google searches of PUAs were used to simulate how a prospective student might approach the community. It is not implausible that a person with little prior knowledge of the subculture would conduct a general search and access the most relevant results. Google, the search engine dealing with the largest percentage of queries, responds to inputs with a ranked list. The ranking reflects the search engines' estimation of a given website's relevance to the query.⁸²³ Google was selected because it has the highest number of users, and results would appear in order of relevance. Thus, searching terms such as 'Pick Up Artist' or 'Seduction Courses' would produce similar results to what a student searching those terms would find. Google does adapt results depending on the time, context, and the person searching.⁸²⁴ To mitigate this, 'Incognito Mode'⁸²⁵ was used so the searches were not associated with any Google Account.

Of course, it was possible that an influencer or group of influencers were not reflective of the broader subculture. Thus, all PUA content, techniques, beliefs, or practices identified were cross-referenced with the literature. If multiple influencers used technique X, scholarly commentary was sought to confirm that X was associated with

⁸²² Ibid 310-312

⁸²³ Bing Pan and others, "In Google We Trust: Users' Decisions on Rank, Position, and Relevance," [2007] 12 JCMC 801, 801-804

⁸²⁴ Google Search Help, "Why your Google Search results might differ from other people," <https://support.google.com/websearch/answer/12412910?hl=en>, Accessed 09/11/2022

⁸²⁵ Google Search Help, <https://support.google.com/chrome/answer/9845881?hl=en-GB#zippy=%2Chow-incognito-mode-works>, Accessed 09/11/2022

PUAs. All the techniques, behaviours, and narratives featured in the vignette are supported by the literature.

To begin, there is a symmetry between the backstories of Alex and Ross Mystery, which accounts for PUA trends and advances an underlying theme of vulnerability. Alex is self-sufficient but isolated, socially limited, and unable to meet women. Ross Mystery claims to be a 'reformed geek' once unable to even look at women. His purported position was more severe, but not too far removed from what Alex is experiencing. This symmetry was inspired by real-world PUA influencers.

Ross Jefferies, a PUA with thirty years of experience, described being a former 'loser' intently aware of how painful singledom can be.⁸²⁶ He published four books, appeared on mainstream television shows,⁸²⁷ and videos featuring him attracted over 500,000 viewers at their peak.⁸²⁸ Strauss described Jeffries as one of the founders of the seduction industry and the godfather of the contemporary PUA movement.⁸²⁹ Similarly, JT Tran, claims to have been incapable of even breathing around women until his transformation.⁸³⁰ JT Tran had a large following on YouTube, with 52.3 thousand subscribers, and, at his peak, posted videos with up to two million views.⁸³¹ However, as of 2024, his reach has declined significantly.⁸³²

Extended periods of isolation, little success with women, and constant bullying characterised James Marshall's backstory.⁸³³ Marshall is one of the largest PUAs, with over 300,000 subscribers on YouTube. His best-performing videos have between two

⁸²⁶ Ross Jefferies, *Rapid and Total Success with Women*, (Seduction.Com, Date Unknown) <https://www.seduction.com/rapid-and-total-success-with-women/> Accessed 10/11/2023

⁸²⁷ Duncan Campel, *Dating Game Turns Ugly*, 16/01/2000, The Guardian, <https://www.theguardian.com/world/2000/jan/16/uk.duncancampbell> Accessed 19/02/2023

⁸²⁸ Ross Jefferies, "How to Get Women Turned on Using Erotic Touch," (Youtube, 16/09/2009) <https://www.youtube.com/watch?v=QyPOOitgCuQ>, Accessed 13/03/2024

⁸²⁹ Neil Strauss, *The Game* (William Morrow, 2005) 240

⁸³⁰ JT Tran, FAQ, (ABCs of Attraction) <https://www.abcssofartraction.com/faq>. Accessed 10/11/2023

⁸³¹ JT Tran, ABCs of Attraction (Youtube, 23/08/2007) <https://www.youtube.com/@Abcssofartraction/videos>, Accessed 13/11/2022

⁸³² YouTube does not provide this data directly but the third party-API Social Blade aggregates the information. https://socialblade.com/youtube/channel/UCejjHEa3xG6W91ZL7_jSYCw/monthly, Accessed 19/08/2024, and the use of social blade in academic research was inspired by Angèle Christin, Rebecca Lewis, "The Drama of Metrics: Status, Spectacle, and Resistance Among YouTube Drama Creators," [2021] 7 SMS 1

⁸³³ The Natural Lifestyles, James Marshall, (The Natural Lifestyles, 13/04/2018) <https://thenaturallifestyles.com/team/james-marshall/>, Accessed 15/11/2022

and ten million views.⁸³⁴ Giovanni W recounts constant bullying and being a virgin until twenty-three.⁸³⁵ Giovanni W has publicly claimed that 3.9 million people accessed his site between 2010 and 2020, and that he has coached over 10,000.⁸³⁶ Giovanni W has a smaller audience than these grandiose claims imply, but he has a consistent group of subscribers. He has around 5000 subscribers on YouTube and a daily average of 963 views.⁸³⁷ He was included in the analysis as examining a smaller influencer was necessary to understand a cross-section of the subculture.

Each PUA claimed a backstory in which their ostracised and socially awkward selves were transformed into confident men capable of unprecedented sexual success. This is consistent with Bratich and Banet-Weiser's observation that the PUA industry promises prospective students a transformation. The language of Pick Up Artists focuses on individual 'gurus' transforming their students from 'loveable losers' to 'Casanovas'.⁸³⁸ These backstories feature in promotional materials to appeal to those in a similar position to the one described. This type of storytelling occurs across PUA communities. Narratives are used to set expectations, evidence claims, and give coherence to an otherwise disjointed and disconnected world.⁸³⁹

There is an overlap between these online backstories and the real circumstances of the PUA target audience. Social isolation is nearly ubiquitous among men joining PUA communities. Many of whom have few friends, are isolated, lack social skills, and are motivated by a desire to correct a perceived personal deficit. In that respect, they are vulnerable.⁸⁴⁰ The PUAs featured in the research describe themselves as escaping exactly this situation. Alex and Ross's backstories replicate this symmetry, with the former clearly fitting into the target audience. This was also intended to advance his

⁸³⁴ See(n832) <https://socialblade.com/youtube/channel/UCk9SqfJYu5HP5e2dfClpr0g/monthly>, Accessed 19/08/2024

⁸³⁵ High Integrity Skills, Meet Our Coaches: Giovanni W, (High Integrity Skill, 18/04/2019) <https://highintegrityskills.com/coaches/>, Accessed 19/11/2022

⁸³⁶ Ibid

⁸³⁷ See(n832) <https://socialblade.com/youtube/channel/UCLQi-KXolej9NTvLA4TxOxw/monthly>, Accessed 19/08/2024

⁸³⁸ Bratich(n71) 5011

⁸³⁹ Daria Dayter, Sofia Rüdiger, "Reporting from the Field: The Narrative Reconstruction of Experience in Pick-up Artist Online Communities," [2016] 2 OL 337, 345

⁸⁴⁰ Rob Whitley, JunWei Zhou, "Clueless: An ethnographic study of young men who participate in the seduction community with a focus on their psychosocial well-being and mental health" [2020] 15 PLOS One 1

vulnerability. As seeking out vulnerable people for profit and guiding them to cause harm may be relevant to whether upstream liability should arise.

This is further highlighted within the vignette by Ross Mystery offering his vulnerable audience an immediate solution. He offers Alex a fantastical product akin to a cheat code that works in the real-world. Should he pay for the privilege, Ross implies there will be immediate, if not miraculous, relief. This mimics the promises of real-world PUA influencers.

Ross Jefferies promises that his method will teach his students to overcome the fatal flaw all men make and guarantee sex every time.⁸⁴¹ Giovanni W's method was allegedly developed through years of world travel, expert advice, and his slow mastery of social skills.⁸⁴² Marshall claims his mastery of seduction was derived from years of study in a Shaolin temple, the secrets of which only he can pass on.⁸⁴³ JT Tran asserts his 'Holistic Method' transformed him into the 'master' of interracial dating.⁸⁴⁴ Each influencer is advancing a unique transformative method to elevate their students above other men and deliver untold success in a very short period of time. A vulnerable audience looking to escape their current predicament would find this especially appealing.

The structure of the fictional course and payment model was designed to conform with community practice. Pick Up Artistry was formerly oriented around in-person residential events in which students would travel in cohorts to work through a coached program. However, most PUAs have dramatically curtailed or abandoned their in-person events. PUAs have largely shifted to operating almost exclusively online.⁸⁴⁵ Consequently, the vignette adopted an exclusively online model for Ross Mystery. This served the added purpose of further abstracting him from the harm caused for the benefit of the legal analysis.

⁸⁴¹ Ross Jefferies, The Final Awakening, <https://www.seduction.com/the-final-awakening/> Accessed 20/11/2022

⁸⁴² High Integrity Skills, Giovanni W, <https://highintegrityskills.com/coaches/giovanni-wan/>, Accessed 21/12/2022

⁸⁴³ Natural Lifestyles, 'But what does it mean to be "Natural" with women,' <https://thenaturallifestyles.com/> Accessed 21/12/2022

⁸⁴⁴ ABCS Of Attraction, "Who is the Asian Playboy," <https://www.abcsOfattraction.com/faq>, Accessed 22/12/2022

⁸⁴⁵ King(n821) 305-306

The subscription model within the vignette is something of an outlier, with most sites preferring a one-time payment. That being said, there is a growing trend of newer influencers promoting subscription models. For instance, Bulldog Mindset, a YouTube influencer with nearly 300,000 subscribers, posts short snippets of advice online. Each video ends with a link to a secondary site where one-to-one online coaching can be acquired for \$1500 per month.⁸⁴⁶ There is an in-person option for \$10,000 per month; however, even the coach seemed wary of anyone actually taking them up on this. “33secrets” is a similar channel with 230,000 subscribers which does the same, offering coaching for \$97 per month.⁸⁴⁷ This inspired the payment model within the vignette, although the influence of these examples extends no further.

Ross Mystery does little in the way of direct engagement outside platforms he controls and offers a structured course rather than informal coaching. The reason is that neither of these examples was suitable to inspire anything beyond the broad structure, as their innovations eventually exceeded community conventions. ‘Bulldog Mindset’ expanded their advice beyond Pick Up Artistry, with more of their focus leaning towards entrepreneurship and ‘hustle culture’.⁸⁴⁸ “33secrets” was exceptionally misogynistic, overtly stating women were incapable of loving men,⁸⁴⁹ promoting Incel talking points, and posting videos relishing the misfortunes of women.⁸⁵⁰ Both ultimately offered content outside what is conventional within PUA communities and thus were atypical examples. Nevertheless their use of subscription models demonstrates that this payment scheme is present within the industry.

⁸⁴⁶ Bulldog Mindset, Coaching, (Bulldog Mindset, 06/02/2019) <https://bulldogmindset.com/coaching/>, Accessed 08/12/23

⁸⁴⁷ 33 Secrets, Special Deal (33 Secrets: 7 Months to Mastery, Date Unknown) https://the33secrets.com/trial-offer/?awt_m=1bwLgXlXn0e&awt_email=jisell534%40nmappingqk.com, Accessed 02/12/22

⁸⁴⁸ Hustle Culture is the belief that work should be the dominating influence to the point overworking becomes a lifestyle. It tends to glorify disregarding other considerations, including health, wellbeing, or personal time, for the sake of overworking. Nova Mardiana and others "The Effect of Hustle Culture on Psychological Distress with Self Compassion as Moderating Variable," [2023] 3PULICSS, 1063

⁸⁴⁹ The33Secrets, “Women Don't Care About You....(RED PILL),” (YouTube, 14/03/2019) 717K Views, 35K Likes, <https://www.youtube.com/watch?v=1mgNDzioFDI>, Accessed 28/11/22

⁸⁵⁰ The33Secrets, “The SAD ENDING Of My MONKEY BRANCHING EX Who DUMPED ME & ENDED UP A SINGLE MOM! (Funny Sh*t),” (YouTube 04/06/2021) 190K Views, 9.9K Likes, <https://www.youtube.com/watch?v=KVWEUfwCcdY>, Accessed 28/11/22

The subscription model also helped develop the relationship between Alex and Ross. This is a homage to Patreon, an online service which allows users to donate directly to creators in exchange for perks. It allows a form of ‘digital patronage’, which fosters a personal relationship between user and creator.⁸⁵¹ The precarity of the model comes from creators who rely on these monthly contributors, as upsetting or neglecting their Patrons might threaten their income.⁸⁵² Within the vignette, should Ross Mystery upset or offend his students, they might withdraw their contributions and limit his income. He is incentivised to appease his audience, which provides another lens through which to understand his interactions with Alex. For instance, is his praise for how Alex interacted with Amelia genuine or a deceitful means of appeasement? The nature of his enterprise generates income creates a powerful disincentive for him to confront his paying students.

The fictional course was an amalgamation of the online courses offered by conventional PUA influencers. ‘Awakened Lifestyle, for instance, limits its in-person events to a single city and promotes the “Master of Connection” online course for everyone else.⁸⁵³ This offers six weeks of daily video lessons, private video calls, missions, and access to a private group.⁸⁵⁴ James Marshall’s ‘5 principles’ course is taught over five weeks of online modules and daily missions, and includes access to a private forum. This was provided for the discounted price of €697, although the true cost was said to be €8000. In-person coaching allegedly costs €5000 per day.⁸⁵⁵ Much of Ross’s course was inspired by these examples. Ross online modules, private calls, private groups, missions, and bonuses, all of which are reminiscent of these real-world counterparts.

At the centre of the vignette is Ross Mystery. PUA communities tend to centre on central figures whose legitimacy and expertise are constantly reinforced. This occurs

⁸⁵¹ Ross Bonifacio, Lee Hair, Donghee Wohn, “Beyond fans: The relational labour and communication practices of creators on Patreon” [2021] 25 NMS 2684

⁸⁵² Ibid

⁸⁵³ The Awakened Lifestyle, Coaching for Men, (The Awakened Lifestyle, 01/07/2019) <https://theawakenedlifestyle.com/dating-coaching-for-men/>, Accessed 30/11/2022

⁸⁵⁴ The Awakened Lifestyle, Master of Connection, (The Awakened Lifestyle, 02/04/2023) <https://theawakenedlifestyle.com/dating-coaching-for-men-the-mastery-course/>, Accessed 03/12/2023

⁸⁵⁵ The Natural Lifestyles, The Five Principles of Natural Seduction Legacy Edition, (The Natural Lifestyles, 26/03/2019) <https://thenaturallifestyles.com/five-principles-legacy-edition-is-open/>, Accessed 20/11/2022

irrespective of their actual accreditation or experience. This expertise is used to dispel student concerns about an industry predicated on artificially engineering intimacy and manufacturing consent.⁸⁵⁶ This system of deference is reflected in the vignette with Ross Mystery asserting himself above his students, and using that to dismiss Alex's concerns. Within the narrative, it highlights Ross's influence and demonstrates that, but for his advice, reassurance and instruction, Alex would not have assaulted Amelia.

Four PUA techniques are highlighted within the vignette: a theory of value, false persona, Last Minute Resistance (LMR), and touch escalation. Each was derived from the research and supplemented by the literature.

The PUA theory of value is a driving force within the vignette. It is tied into the wider Manosphere belief in hypergamy, in which women are believed to be biologically attracted to high-value men.⁸⁵⁷ Thus, many PUAs emphasise increasing and projecting value. 'Karisma King' states women do not want a man who is beneath them,⁸⁵⁸ and are incapable of being attracted to 'lower value' men.⁸⁵⁹ 'To 'Daygame Mastery', teaching students how to project value is the key to any potential hookup.⁸⁶⁰ Value is a recurring theme within this community and thus is a constant presence within the vignette.

Almog and Kaplan observed the practice of having students construct a high-value persona, or avatar, before going into the field. It became a means for students to go into the world in character as a way of eschewing their shyness and social limitations.⁸⁶¹ This technique and its underlying justification are rooted in real-world practices.

LMR was historically referred to as the 'anti-slut reflex',⁸⁶² which Valkenberg defined as the belief that women will withdraw consent to sex at the last moment for fear of being

⁸⁵⁶ Anders Wallace, "Communication games: dating coaches, masculinity, and working at play in Seduction Communities," [2017] 12 IntUMS 286

⁸⁵⁷ Gotell(n9) 649

⁸⁵⁸ Karisma King, "Why Nice Guys Lose and Bad Boys Win," (YouTube, 22/04/2022) 2.5K Views, 127 Likes, <https://www.youtube.com/watch?v=12Cjtr0wgtQ>, Accessed 13/12/2022

⁸⁵⁹ Karisma King, "Dating Coaches Ruin Virgins Chance With A Girl (critique from an ACTUAL coach)," (YouTube, 27/03/2022) 1.5k Views, 68 Likes, <https://www.youtube.com/watch?v=RCYMa2da7Hw>, Accessed 13/12/2022

⁸⁶⁰ Daygame Mastery, "Welcome to Daygame Mastery," (Daygame Mastery, Date Unknown) <https://daygamemastery.org/>, Accessed 14/12/2022

⁸⁶¹ Kaplan(n81) 39-40

⁸⁶² Valkenburgh(n53)10-11

perceived as a slut.⁸⁶³ However, it was eventually rebranded as LMR.⁸⁶⁴ Wright identified LMR as widely used across PUA communities.⁸⁶⁵ LMR is understood as a resistance to be overcome, with PUAs and their subscribers describing how they ‘pushed’ or ‘battled’ through LMR to secure sex. Wright identifies PUAs routinely discussing how ‘forceful’ they need to be, with LMR described as a ‘childish’ impulse on the part of women that is diminished and delegitimised.⁸⁶⁶ This is illustrated in the vignette, with Ross using this very rationalisation to explain Amelia’s reaction. PUAs provide techniques and tactics which can overcome LMR. Non-consent is something to be battled against so that sex can be secured.⁸⁶⁷ Carlo concurs, describing it as the belief that women only offer a ‘token resistance’ which must be overcome.⁸⁶⁸ It is most often used by users to rationalise their failings. But, no matter how it is used, the concept fails to distinguish between genuine and ‘token’ non-consent, meaning PUAs will interpret a clear ‘no’ as a ‘maybe’ or even a ‘yes.’ That, taken with community-wide logic of being aggressive when battling LMR, runs a real risk of sexual assault.⁸⁶⁹

Touch escalation is Ross Mystery’s chosen tactic to battle and overcome LMR. The link between these two is identified frequently throughout the vignette. LMR is something that must be overcome, and the solution presented is for Alex to make Amelia so aroused that she can no longer resist him. This is accomplished through touch escalation, a technique concerned with making a woman comfortable with increasingly intimate touching. “Best PUA Training” suggests that being touched by a calm, confident man has a biological effect on women. It suggests starting slowly, escalating to constant touching, but avoiding sexual areas until later in the encounter.⁸⁷⁰ If done

⁸⁶³ Ibid

⁸⁶⁴ Ibid

⁸⁶⁵ David Wright, “The discursive construction of resistance to sex in an online community,” [2020] 36 DCM <https://www.sciencedirect.com/science/article/abs/pii/S2211695820300350>, Accessed 19/01/2024

⁸⁶⁶ Ibid 5

⁸⁶⁷ Ibid 5-6

⁸⁶⁸ Giuseppina Carlo, “No Does Not Always Mean No”: The Discursive Representation of Female Sexual Rejection as “Last Minute Resistance” in Pick-Up Artist Communities,” [2023] 17 IJC 5108, 5111

⁸⁶⁹ Ibid 5110, 5115, 5116-5118, 5119-5120

⁸⁷⁰ Best PUA Training, Kino Escalation (Best PUA Training, 14/01/2011)

<https://www.bestpuatraining.com/kino-escalation>, Accessed 31/07/2022. As of 2024 this site has been removed but can be accessed via the ‘Wayback Machine’ at <https://web.archive.org/web/20220517083333/https://www.bestpuatraining.com/>

correctly, the woman's arousal will make her 'complicit in her own seduction'.⁸⁷¹ The blog '*Whet Your Woman*' provides a step-by-step guide on how to escalate an innocuous touch into a sexual encounter. Each step is intended to build sufficient arousal for the student to progress to the next level.⁸⁷² This understanding of touch escalation is replaced in the vignette.

The link between LMR and touch escalation explored in the vignette is an application of their underlying logic. Alex attempts to overcome LMR through touch escalation, believing it will make Amelia so aroused she would be unable to deny him. This is a logical interpretation of touch escalation as presented in the vignette and was confirmed to him by users of the forum. At the heart of this belief, acknowledged or not, is the Manosphere view of women's nature.⁸⁷³ Denes suggests PUAs imagine women as unable to control their sexual desires.⁸⁷⁴ Thus, if a man produces a sufficient level of arousal within a woman, this can be taken as consent, irrespective of her stated desires. Touch escalation is used to do exactly this, as PUAs often cite oxytocin research to 'prove' that it has this effect. Thus, they assume women can be biologically manipulated by sufficient touching into a sexual encounter.⁸⁷⁵ If LMR is a logical reaction to being perceived as promiscuous, then it should be overridden by a powerful biological influence. That touch escalation can be used to overcome LMR is a mere application of the underlying logic.

Alex then attempts to apply this theory in his final encounter with Amelia. After she appears to reject him, he touches her in the hope of overriding that refusal. This touching is focused on her shoulders, arms, back and waist. Indeed this is consistent with the stepped approach recommended by PUAs. Moreover had Alex gone further than this, a reader might conclude Alex had exceeded his teachings. The plausibility of Alex assaulting Amelia when applying a PUA theory is underpinned by some evidence.

⁸⁷¹ Best PUA Training Kino Tricks (Best PUA Training, 12/02/2011) www.bestpuatraining.com/kino-tricks, Accessed 15/08/2022

⁸⁷² Whet your Woman "Kino" (Whet Your Woman, 19/02/2012) <https://whetyourwoman.com/pickup-women/kino/>, Accessed 29/11/2022

⁸⁷³ Chang(n87) 1-7 6-10

⁸⁷⁴ Amanda Denes, "Biology as consent: Problematizing the scientific approach to seducing women's bodies." [2011] 34 WSIntIF 411

⁸⁷⁵ Ibid, 411-419

Bates suggested that some PUA forums were chronicling their illegal acts, with users regularly uploading stories that amounted to sexual assault or rape.⁸⁷⁶ Indeed, that PUA forums act in this fashion has been noted by journalists.⁸⁷⁷ However, actual prosecutions appear to be a rare event.⁸⁷⁸ Moreover, it is impossible to verify the truth of any anecdotes uploaded anonymously to a PUA forum. Thus, the vignette's plausibility could not be grounded on these observations, and so it is also argued to be a reasonable extension of observed behaviours in line with the methodology.

O'Neil warned that Pick Up Artistry depends on overriding the will and invalidating the desires of women.⁸⁷⁹ Even abject failure is rationalised with Pick Up Artists reassuring themselves that their inability to secure sex was a technical fault. This is present in the vignette as Alex tells Amelia he is trying to help her and interprets her negative reaction as an internal struggle. Her clearly expressed wishes for the touching to stop is disregarded, because Alex believes he can control her desires through touch escalation. This interlinks with O'Neil's argument that PUAs encourage men to act with impunity, assert themselves as the arbiter of women's desires, and so can proactively ignore non-consent.⁸⁸⁰ Alex maintains that Amelia wanted the encounter to become sexual because he is interpreting the situation through the lens of what he has been taught. On the PUA worldview, Amelia has no true desires but rather is something to be tamed or tricked into compliance through the right combination of words and actions. Any perceived non-consent is either a technical failing or LMR. Thus Alex dismisses any wishes and feelings, beyond enthusiastic consent, and makes himself the arbiter of what Amelia truly wants, and what is necessary for her to acquiesce to it. When he tells her that "this will get you where you need to be," he has already decided what she wants, and what he needs to do to bring it to the surface. He is in effect, taught to invalidate her consent, because she has no wishes or feelings on their encounter

⁸⁷⁶ Bates(n160) 84-86

⁸⁷⁷ Brandy Zadrozny, "The Pick Up Artist Rape Ring," Daily Beast, 12/07/2017, <https://www.thedailybeast.com/pickup-artists-preyed-on-drunk-women-brought-them-home-and-raped-them#:~:text=Some%20men%20in%20the%20community,the%20rape%20of%20multiple%20women.,> Accessed 19/08/2024

⁸⁷⁸ Bates(n160) 84-86

⁸⁷⁹ O'Neil(n17) 91, 92-96

⁸⁸⁰ Ibid 89

beyond those Alex chooses to ascribe to her. He is the person who can identify that she wants to have sex with him, and he is the person who must take action to ensure she becomes aware of that. It stands to reason that someone instructed and encouraged to disregard consent in such a fashion might rationalise a criminal offence accordingly.⁸⁸¹ That PUA communities might inspire real-world sexual assault or rape has already been raised by the literature. As per the methodology, this is sufficient for it to be deemed a plausible extension and featured in the vignette.

Furthermore, Alex's non-consensual touching of Amelia is a logical extension of what has already been established within the vignette. The techniques, course content, characterisations, and relationships presented have a tangible connection to the real-world. Alex's worldview, theory of LMR and touch escalation, view of women, and relationship with Ross are all plausible. The assault is simply the next logical step. Alex simply acts on the content he has paid to access, which is hardly unexpected. Say James pays to attend a course aimed at improving struggling businesses, attends dutifully, and engages with its every aspect. The logical assumption would be that he applies what he has learned to his own ventures, and we would expect him to do so. The same should be true for someone paying for the instruction of a PUA. It is not implausible that Alex will apply what he has been taught. If what he has been taught is harmful, we might expect him to cause some harm. If Alice markets herself as an expert in a field, offers to coach others on that basis, and secures a number of clients. That one of them might act on her advice should not be implausible. The same should be true for the vignette, where the possibility of harm is made out as a natural application of what is plausibly presented.

⁸⁸¹ Ibid 90-91

Chapter Seven: Influencer Liability

This chapter explores whether Ross, an influencer, is liable for Alex assaulting Amelia. It is Ross who taught him touch escalation, and told him non-consent can be disregarded as LMR. Ross dismissed Alex's concerns about Amelia's discomfort, inflated Alex's confidence, and then instructed him to put his teachings into practice. The result of this is Alex touching Amelia's shoulders, back, and waist before squeezing her hips and trying to kiss her. She is visibly and audibly non-consenting, and so the starting point for the analysis is sexual assault.

Sexual Assault

As per section 3 of the Sexual Offences Act 2003, sexual assault occurs when A intentionally and non-consensually sexually touches B whilst A does not reasonably believe that B is consenting.⁸⁸² Firstly, Alex intentionally touches Amelia, and there are two statutory tests for identifying whether this touching is sexual.

Firstly, under section 78(a) the touching is sexual if a reasonable person would consider that, irrespective of its circumstances or purpose, the touching is by its nature sexual.⁸⁸³ In *Attorney General's Reference (No 1 of 2020)*, the defendant forcefully kissed the complainant on the lips, but then denied that it was a sexual act. Fulford LJ held, with analogy to prior statutes, that section 78(a) applies to inherently indecent acts which are sexual by their nature. For these acts, there is no need for the Crown to prove that the defendant intended the touching to be sexual.⁸⁸⁴ This would include, for example, the touching of a woman's breasts over her clothing which, in the vast majority of contexts, will inevitably be considered sexual by nature.⁸⁸⁵ As a result, the defendant's reasons for the touching are irrelevant and so intentionally touching someone in an inherently sexual way will satisfy section 78(a).

Secondly, under section 78(b) the touching is sexual if that it may, by its nature, be sexual and then becomes sexual due to its circumstances or purpose.⁸⁸⁶ In *R v Karl*

⁸⁸² Sexual Offences Act 2003 s3(1)(a-c)

⁸⁸³ Ibid s78(a)

⁸⁸⁴ *Attorney General's Reference (No 1 of 2020)* [2020] EWCA Crim 1665; [2021] 2 WLR. 601 [40]

⁸⁸⁵ *Abdulnasri Abdulahi v Regina* [2022] EWCA Crim 412; [2022] Crim LR 931 [35]

⁸⁸⁶ SOA(n882) s78(b)

Anthony, the defendant made a sexual proposition towards the victim, grabbed her tracksuit bottoms in an effort to pull her towards him, and then attempted to place a hand over her mouth.⁸⁸⁷ The Crown accepted that this touching was not inevitably sexual.⁸⁸⁸ For actions which are not inherently sexual, a two stage test is applied. Firstly, the jury must be asked to consider whether the touching, by its nature, may be sexual. Secondly, if the touching may be sexual, the jury must ask themselves whether in view of the circumstances or purpose of the act that the touching was indeed sexual. If the answer is yes, the touching was sexual.⁸⁸⁹

On the vignette Alex touches Amelia's shoulders, arms, back, and waist over her clothes and then attempts to kiss her. Alex deliberately avoids touching her private areas and gives some thought as to what is appropriate. As a result, the conduct may not be inherently sexual. Thus, if this is to be considered sexual touching, the first stage of the test is to ask whether the act might be sexual by nature. The answer to this question should be in the affirmative. It is perfectly possible for the touching of someone's arms, back, and waist to be sexual depending on context. As a result the act, by its nature, may be sexual. The second question is whether the act is made sexual by its purpose or circumstances. Alex's purpose was to use the touching to foster within Amelia an irresistible desire, which he could then use to secure sex. In addition Alex had previously been flirting with Amelia, had already expressed an interest in her, and was doing his utmost to make the encounter sexual. A person touching another, in such a way as to secure sex, should be considered sexual by its purpose and circumstances. As a result, the requirement for sexual touching should be satisfied.

The next element of the offence is that Amelia does not consent, and indeed within the vignette she does not. The final element is whether Alex reasonably believes that the Amelia is consenting, which is determined by having regard to all the circumstances, including the steps Alex has taken to ascertain whether Amelia consents.⁸⁹⁰

⁸⁸⁷ [2005] EWCA Crim 732; [2005] 2 All ER 859

⁸⁸⁸ Ibid [8]

⁸⁸⁹ Ibid [13]

⁸⁹⁰ SOA(n882) s3(2)

It is not clear whether Alex could legitimately argue that he reasonably believed that Amelia consented. He disregards her explicitly telling him to stop because he believes that she is secretly consenting, that he must overcome LMR to secure sex, and he takes no steps to ascertain whether this is actually the case.

In *R v Ciccarelli*, the defendant tried to initiate sex with the complainant while she was sleeping. The defendant claimed that earlier in the evening she had kissed him, and so he believed that she would consent to sex. The trial judge ruled that the evidence, taken at its highest in the defendant's favour, could not sustain any argument that this purported belief was reasonable.⁸⁹¹ The Court of Appeal affirmed the trial judge's decision, concluding that more than mere belief was needed for the question to be put to the jury.⁸⁹² Rather it was necessary for there to be an evidential basis, beyond the fanciful or speculative, on which the defendant could reasonably say that they believed the complainant consented.⁸⁹³ In the vignette, Alex ignores Amelia's clearly expressed desire for him to stop because he has adopted a worldview where such wishes are dismissed as LMR. There is no evidence to support his conclusion that she is secretly consenting, beyond his belief in the PUA worldview.

That worldview does not offer him much respite. In *R v B(MA)*, the defendant was convicted of raping his partner, but suffered from paranoid schizophrenia and claimed his delusions led to him having a reasonable belief in consent.⁸⁹⁴ The Court of Appeal was clear, that a delusional belief is an irrational one, and so therefore will not be reasonable. Indeed the Court of Appeal gave the specific example of a man who believes all women to be attracted to him and so are welcoming of his attention.⁸⁹⁵ Such beliefs must be assessed on the objective standards of reasonableness and so will invariably be rejected.⁸⁹⁶ As a result, Alex's belief that Amelia was secretly consenting, despite her expressly stated wishes to the contrary is unlikely to assist him. Alex's position is not dissimilar to the person who believes, wrongly, that they are so irresistible that no woman will ever not consent to have sex with them. Both have no

⁸⁹¹ *R v Ciccarelli* [2011] EWCA Crim 2665 [16]

⁸⁹² *Ibid* [20]

⁸⁹³ *Ibid* [18]

⁸⁹⁴ *R v B (MA)* [2013] 1 CrAppR 36

⁸⁹⁵ *Ibid* [35]

⁸⁹⁶ [40]

evidence for this belief, both ignore the express desires of those telling them otherwise, both take no steps to ascertain the actual reality of the situation, and so both behave unreasonably. Thus they have no scope to say they reasonably believed their victim consented.

Alex touched a visibly uncomfortable Amelia, who explicitly asked him to stop. He touched her to produce an irresistible desire for sex. Alex disregarded Amelia's discomfort, distress, and her expressly telling him to stop in favour of his belief that she was secretly consenting. That belief has no basis in reality, has no evidential foundation, and so on an objective assessment is likely to be rejected even if it was left to the jury. Thus, all the elements of the offence are satisfied and Alex has sexually assaulted Amelia.⁸⁹⁷ Ross's techniques, beliefs, teachings, and directions inform every moment of Amelia's assault. So, to what extent is he liable for it? Rather than repeat the analysis of accessory liability in crime and tort this chapter seeks to explore new legal tools. Thus it considers whether Ross is directly liable in negligence or is vicariously liable for the assault. Both are tortious and so the earlier observations on the difficulties bringing proceedings would be relevant.⁸⁹⁸

Negligence

Negligence is a breach of a legal duty to take care which results in harm to the claimant.⁸⁹⁹ A defendant is liable when they breach a duty of care owed to the claimant, causing them actionable harm that is not too remote.⁹⁰⁰ These are the essential elements of the tort and apply to a wide range of circumstances. A surveyor owes a duty to take reasonable care when compiling his report, which they would breach by carelessly assuming there were no defects in the building without checking. Thus, if their client relies on them to their detriment, the surveyor is answerable in negligence.⁹⁰¹ Likewise a landowner who neighbours a beekeeper owes him a duty not to poison his livestock, which he would breach by carelessly spraying pesticides on their hive. Should

⁸⁹⁷ There is a separate question of whether Alex would actually be prosecuted for sexual assault. It may be slightly hopeful to presume he would, but this isn't strictly relevant to the question of influencer liability.

⁸⁹⁸ See Chapter Four: Blood Money

⁸⁹⁹ W Rogers, P Winfield, J Jolowicz, *Winfield and Jolowicz on Tort* (2010, 18th edn, SM) 5-1

⁹⁰⁰ Clerk(n548) 7-04

⁹⁰¹ *Hart v Large* [2020] EWHC 985

the bees perish and the colony collapse, the landowner will be liable.⁹⁰² In both examples, a duty of care is owed to the claimant, the breach of which causes actionable harm that is not too remote. While negligence can arise on almost any fact pattern, this essential construction is always the same.

The critical question for the analysis is whether Ross owes Amelia a duty of care. If he does, the tort naturally falls into place. Amelia suffers actionable harm, specifically a physical injury.⁹⁰³ Any pain, suffering, or psychological harm flowing from her sexual assault would be actionable,⁹⁰⁴ and there is no issue concerning remoteness.

Remoteness is a control factor which limits the defendant's liability. There is no end to the possible consequences of human conduct, so the line must be drawn somewhere, as the common law is averse to indefinite liability.⁹⁰⁵ Thus, the defendant will be liable for the reasonably foreseeable direct consequences of his negligence.⁹⁰⁶ If the type of damage is foreseeable, the defendant will be liable even if the extent is greater than anticipated.⁹⁰⁷ The vignette features Alex attempting to implement Ross's methods and committing sexual assault. He does this because he has been taught to sexually touch women to extract consent. Personal injuries caused by sexual assault are precisely the type of damage that might be expected and so there is no issue of remoteness.

There is the question of illegality. Illegality bars the claimant from seeking recovery if their own wrongdoing is intimately connected with the commission of a tort.⁹⁰⁸ This wrongdoing need not necessarily be illegal; any conduct which is immoral or contrary to public policy is sufficient.⁹⁰⁹ The underlying rationale being that a person should not profit from their wrongdoing, and that the law of should be consistent and coherent in responding to illegality.⁹¹⁰ Thus if Alice hires a contract arsonist to burn down her home for insurance money, she cannot sue him in negligence if the fire spreads and damages

⁹⁰² *Tutton v AD Walter Ltd* [1986] QB 61

⁹⁰³ Clerk(n548) 7-06

⁹⁰⁴ *Dryden v Johnson Matthey Plc* [2018] UKSC 18, [2019] AC 403 [26-27], *Page v Smith* [1996] AC 155

⁹⁰⁵ *Armstead v Royal and Sun Alliance Insurance Co Ltd* [2024] UKSC 6 [2025] AC 406 [47]

⁹⁰⁶ Clerk(n548) 2-140

⁹⁰⁷ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound) (No. 1)* [1961] AC 388 [426] *Hughes v Lord Advocate* [1963] AC 837 [849]

⁹⁰⁸ *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563 [77]

⁹⁰⁹ Liron Shmilovits "When is illegality a defence to a tort," [2021] LS 41 603 603-607

⁹¹⁰ *Patel v Mizra* [2016] UKSC 42; [2017] AC 467 [99]

her car. In the vignette Alex would be unable to launch proceedings against Ross, on the basis his faulty advice led to him committing sexual assault. Amelia on the other hand is blameless, and indeed the victim of an illegal act and so will not be inhibited from bringing a claim.⁹¹¹

If Amelia comes to actionable harm due to a breached duty of care, negligence is made out on the vignette. If Ross owed Amelia a duty, it does not matter that Alex caused the harm. In *Reeves*⁹¹² the police owed a duty to protect detained persons at risk of suicide, which they breached by leaving a hatch open. The Deceased, a suicide risk, used this oversight to strangle himself. When deliberate human action is the very thing a defendant is duty-bound to guard against, they will be liable when it manifests.⁹¹³ This applies even when the third party is wholly independent of the defendant. In *Haynes*,⁹¹⁴ two boys threw stones at horses causing them to bolt and seriously injure a police officer. Green LJ identified that the defendants, who owned the van containing the horses, were under a duty to safeguard those using the highway. They breached this duty by leaving the horses unattended in a street known to attract mischievous schoolchildren.⁹¹⁵ That the defendants gave the boys an opportunity to endanger those they were obligated to protect created the essential connection necessary for liability. Similarly, if Ross owes Amelia a duty of care to shield her from the danger his students pose, Alex's actions will not sever liability.

If Ross owes Amelia a duty of care to shield her from the danger posed by his students, negligence naturally falls into place in the vignette. Thus, the question for this chapter is whether such a duty of care exists. To Plunkett, negligence might provide a limitless level of protection and so the duty of care is necessary to limit the circumstances in which a defendant will be liable.⁹¹⁶ For the vignette, identifying whether a duty of care is possible will reveal if negligence is even available for downstream harm. Indeed, questions concerning whether the harm is actionable or too remote are fact specific. Legal analysis on whether fictional harm is actionable would be irrelevant to the real-

⁹¹¹ Clerk(n548) 3-03

⁹¹² *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360

⁹¹³ *Ibid* [381]

⁹¹⁴ *Haynes v Harwood* [1935] 1 KB 146

⁹¹⁵ *Ibid* [153]

⁹¹⁶ James Plunkett, *The Duty of Care In Negligence* (HP, 2020) 1-5

world application. A defensible legal argument on the availability of negligence for cases of downstream harm would have much wider applicability.

Establishing a Duty of Care

The duty of care is the preliminary, essential component of negligence, without which there is no liability.⁹¹⁷ It describes circumstances in which the defendant is obligated to take reasonable care in respect of the claimant.⁹¹⁸ The concept originated in the early 19th century as judges sought to explain why careless defendants were liable.⁹¹⁹ As Ibbetson described, the law of negligence at this stage was heavily fragmented.⁹²⁰ It would not be until the late 19th century that attempts would be made to unify these actions, with lawyers doubting the existence of negligence as an independent tort into the early 20th century.⁹²¹

These doubts were put to rest in 1932, in *Donoghue*,⁹²² when negligence was consolidated into a single tort. The unifying feature is the duty of care which was expressed through Lord Atkin's neighbour principle. A defendant owes a duty to persons so closely affected by their act that they are neighbours. As they are neighbours, the defendant ought to have them in contemplation before acting and so will be liable for not doing so and carelessly inflicting harm. The neighbour principle is capable of attaching to all manner of social conditions and standards.⁹²³ It is at the core of the tort, grounding negligence in the notion that members of a civilised society should not harm their neighbours without lawful cause or excuse.⁹²⁴ To Wenrib this is a means of establishing a nexus between the parties to effect corrective justice—a form of justice that seeks to restore equality between the parties when one has wronged the other.⁹²⁵ The duty of care requires defendants to consider the interests of others. It is the

⁹¹⁷ *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 103

⁹¹⁸ Clerk(n548) 7-07

⁹¹⁹ Witting(n764) 31- 40

⁹²⁰ D Ibbetson, *An Historical Introduction to the Law of Negligence* (2001, OUP) 188-201

⁹²¹ John Baker, *Introduction to English Legal History* (2019, 5th Edn, OUP) 427-450

⁹²² *Donoghue v Stevenson* [1932] AC 562 580

⁹²³ Ibid 7-07

⁹²⁴ P Mitchell, *A History of Tort Law 1900-1950* (2014, CUP) 14-20

⁹²⁵ Ernest Wenrib, "Toward a Moral Theory of Negligence Law, Law and Philosophy" [1983] L&Phil 37 37-40

standard through which it is determined if a defendant is properly considering others, or selfishly pursuing their own purposes without regard for the common good.⁹²⁶

This duty of care orthodoxy is deeply ingrained in the minds of common law lawyers, and profoundly affects how negligence cases are decided.⁹²⁷ However Nolan argues this duty of care, is not even a duty. A duty is a specific private law obligation owed to another person, but this is not true in negligence. If a newborn baby falls ill after consuming negligently manufactured food there is a claim in negligence, even if the tin was manufactured before the newborn even existed. How could the manufacturer's carelessness have violated the rights of someone who did not even exist at the time of their conduct? Thus Nolan suggests the duty of care is a philosophically unsound mechanism through which the courts impose liability as they see fit.⁹²⁸

The use of the newborn child may overly complicate the analysis. The law has long struggled with the legal rights of fetuses.⁹²⁹ The same point might be made with the following. Say A manufactures an alcoholic drink for sale in shops in March. B turns eighteen in May, prior to which he never drank. B is not a consumer at the time the drink is created, nor are they legally able to purchase it. Nevertheless if in June, B purchases and consumes the drink, which is contaminated causing him to become ill. The same question might ask why A owes B a duty when they were not a consumer, nor even able to purchase the drink, at the time it was created.

The answer is that the duty of care is not an obligation to create drinks carefully but to take reasonable care when acting. As Howarth puts it the defendant is under a private law obligation to avoid the fault state of negligence, meaning they must take reasonable care when acting.⁹³⁰ Without that duty, defendants would be permitted to act unreasonably and risk harm to others while doing so.⁹³¹ The defendant has already breached their duty by acting unreasonably and creating a risk of harm to consumers. They are already at fault by the time the defendant purchases and consumes their

⁹²⁶ Ibid 50-60

⁹²⁷ Donal Nolan, "Deconstructing the Duty of Care" [2013] LQRev 129 559-588

⁹²⁸ Ibid

⁹²⁹ *C v S* [1987] 2 WLR 1108

⁹³⁰ David Howarth, "Many Duties of Care-Or A Duty of Care? Notes from the Underground" [2006] OJLS 26 449-472

⁹³¹ Ibid 449-460

contaminated drink. It was at this moment the claimant became a consumer and so fell within the scope of a duty that had already been breached. They suffered actionable harm as a result, and so have a claim in negligence. The question should not be framed as whether the duty is owed specifically to the claimant, but rather whether they fall within its scope. Thus the duty of care alludes to a duty which, if breached, amounts to the fault state of negligence. Should that be paired with actionable harm, the defendant is liable.

To Steele, the duty of care united previously distinct and separate duties under the banner of a single tort, which could be flexibly applied to any scenario.⁹³² Witting concurs, noting that the neighbour principle precipitated a dramatic expansion of negligence liability. It has framed the modern law of negligence even if the neighbour principle was never intended as a comprehensive statement of the law.⁹³³ There is still no single test for identifying a duty of care, and such a thing may not be possible. As a result, there is considerable conceptual uncertainty as to what the duty of care even is.⁹³⁴ Nevertheless, there are two key components: the notional and factual duty.

The notional duty examines the relationship between the parties to determine whether a duty should arise.⁹³⁵ To Plunkett, this is a normative process, assessing whether negligence ought to engage in the circumstances.⁹³⁶ The notional duty provides a normative explanation for why a defendant is liable. The notional duty further explains the scope of the duty. It is not enough to say a duty of care should arise; the normative explanation must specify what is demanded of the defendant.⁹³⁷ To illustrate, the notional duty explains that a driver owes a duty of care because of his potential to cause significant physical harm. This, in turn, explains the scope of that duty. Namely not to endanger passengers, road users, or pedestrians by driving carelessly.⁹³⁸ The notional duty justifies why the law of negligence engages and then determines its scope.

⁹³² Jenny Steele, *Tort Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2022) 162-180

⁹³³ Witting(n764) 31-40

⁹³⁴ Ibid

⁹³⁵ Clerk(n548) 7-08

⁹³⁶ Plunkett(n916) 111-120

⁹³⁷ Christopher Walton and others *Charlesworth and Percy on Negligence* (SM, 15th Edn, 2024) 2-32

⁹³⁸ Plunkett(n916) 130-140

The factual duty then applies the normative explanation to determine whether the resulting harm is captured by the notional duty. For instance, if the driver leaves his vehicle and spills his coffee over a bystander this does not fall within the normative explanation. The reasons for imposing a duty are lost and so he will not be liable for negligent driving. The notional duty requires the defendant to drive carefully, and so explains the scope of the duty. The duty can only be breached if the defendant drives carelessly and causes harm. The factual duty applies the notional explanation to determine whether the tort is engaged on the facts. This, in turn, identifies whether the fault state of negligence arises, meaning the defendant unreasonably created a risk of harm.⁹³⁹ If they are at fault, this is a powerful indicator that the tort applies. If the harm was a reasonably foreseeable consequence of the defendant's unreasonable risk and occurred within the explanation and scope of the notional duty, the tort of negligence is engaged.⁹⁴⁰

This is the orthodox negligence inquiry, and so a duty of care is not found but justified.⁹⁴¹ Duties are imposed on a principled basis, meaning each duty is justified by sound reasoning and established patterns in the case law. This is motivated by a desire to maintain the internal consistency for a theoretically limitless tort, so the common law favours an incremental approach to new duties.⁹⁴² As a result, establishing a duty of care on the vignette requires a compelling justification backed by sound reasoning which is consistent with the wider case law. A duty of care is not found but argued.

That online influencers might owe third parties injured by their negligent advice is a novel duty for the law of negligence. In *Caparo*,⁹⁴³ the House of Lords found that a novel duty of care should be imposed when there is foreseeable damage, a sufficient relationship of proximity, and it is fair, just, and reasonable to do so.⁹⁴⁴ Historically, this was the *Caparo* test, but recent case law indicates this is an overstatement. In *Robinson*,⁹⁴⁵ Lord Reed identified that there was no *Caparo* test, nor any test, for

⁹³⁹ Ibid 79-90

⁹⁴⁰ Charlesworth(n937) 2-32

⁹⁴¹ Ibid

⁹⁴² Ibid

⁹⁴³ *Caparo Industries plc v Dickman and Others* [1990] 2 AC 605

⁹⁴⁴ Ibid [618]

⁹⁴⁵ *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4; [2018] AC 736

establishing a duty of care.⁹⁴⁶ Instead, *Caparo* provides three factors which must be considered in truly novel situations alongside the overall coherence of the common law and the reasons for imposing liability.⁹⁴⁷ Thus for the vignette, regard must be had to whether the sexual assault was foreseeable, whether Amelia and Ross were in a sufficient relationship of proximity, and whether it is fair, just and reasonable to impose a duty.

Foreseeability

The foreseeability of damage in novel duty scenarios is a necessary precondition for liability.⁹⁴⁸ If the damage is foreseeable, then the door to negligence liability opens. If the damage was unforeseeable the door closes. The test is whether a reasonable person in the defendant's position could, with hindsight, have foreseen the harm prior.⁹⁴⁹

Foreseeability is more concerned with possibilities than probabilities, meaning there must be a real possibility of harm occurring.⁹⁵⁰ In *Haley*⁹⁵¹ the defendants were excavating a trench and placed warning signs. When the claimant, a blind man, fell into the trench, the defendants argued they were not liable because his presence was unforeseeable. To Lord Evershed, what is reasonably foreseeable is determined by common experience, which teaches us that blind people walk the streets like anyone else. While their presence is not necessarily expected, it is not unforeseeable. Thus, there was a real possibility that a blind person would attend the scene and fall, meaning the harm was foreseeable. Thus, the door to negligence liability was open.⁹⁵² For the vignette, if there is a real possibility of harm because of Ross's failure to take care, then it is foreseeable and the door to negligence liability opens. If it is unforeseeable, the door closes. This is not a high threshold. A claim will only fail for want of foreseeability if no reasonable person would have foreseen the harm.⁹⁵³

⁹⁴⁶ Ibid [21]

⁹⁴⁷ Ibid [27-29]

⁹⁴⁸ *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 [192]

⁹⁴⁹ *McLoughlin v O'Brian* [1983] 1 AC 410 [420]

⁹⁵⁰ Ibid

⁹⁵¹ *Haley v London Electricity Board* [1965] AC 778

⁹⁵² Ibid [789]

⁹⁵³ Charlesworth(n937) 2-36-2-37

For the vignette, the complication is the presence of a third party, as the harm is caused by Alex, not Ross. In these circumstances, both the possibility and the probability of harm must be considered. In *Home Office v Dorset Yacht*⁹⁵⁴ a group of boys held at a borstal escaped, boarded a yacht, and collided with the claimant's vessel. The House of Lords held that when careless conduct causes a third party to inflict harm, it must be a very likely consequence for the defendant to be liable.⁹⁵⁵ As the only method of escape available was by sailboat, it was highly likely that the boys would use a vessel, and that their lack of navigational skills would cause harm.⁹⁵⁶ Thus, the defendant was liable. This was explored again in *Perl*.⁹⁵⁷ Here, the claimant and the defendant were neighbours, with their buildings separated by a basement wall. The defendant failed to secure their property, which attracted burglars who breached the wall and stole from the claimant. To Waller LJ, a high degree of foreseeability is required to make a defendant liable for harm caused by another. Human action must be a very likely consequence of the initial carelessness.⁹⁵⁸ For the vignette, if there is to be negligence liability Alex sexually assaulting Amelia must be both foreseeable and a very likely consequence of Ross's carelessness.

Imagine that A carelessly teaches B that he ought to punch anyone dressed as a clown. In doing so, he creates a likelihood that B will do exactly that should he ever encounter a clown. Physical violence is foreseeable but not very likely, as encountering clowns is rarely a common occurrence for B. However, if A then carelessly directs B to go to the circus, he is arranging circumstances so that the risk of harm is highly likely to manifest. The instruction has created a foreseeability of harm, which is very likely to manifest because A has told B to go where clowns are likely to be.

Similarly, if A teaches B to respond to discomfort with sexual touching, it is foreseeable that B will go on to commit sexual assault. However, it becomes very likely if then A instructs B to put that teaching to the test. Carelessly creating a foreseeable risk and arranging circumstances so that it is likely to manifest is what satisfies the higher

⁹⁵⁴ [1970] AC 1004

⁹⁵⁵ Ibid [1030]

⁹⁵⁶ Ibid

⁹⁵⁷ *Perl (Exporters) Ltd v Camden LBC* [1984] QB 342

⁹⁵⁸ Ibid [359-360]

threshold for third-party action. This is exactly what happens in the vignette. Ross's careless teaching creates a real possibility that Alex will sexually touch someone without their consent. Indeed, that emulating a PUA might lead to sexual violence has been a longstanding scholarly concern.⁹⁵⁹ However, by then assigning Alex a mission to secure sex, Ross arranges circumstances so that real possibility is highly likely to manifest. It is very likely that Alex will approach a woman, and if they say no, will resort to sexual touching as instructed. Ross's careless teaching creates a real prospect of sexual violence, which he then amplifies into something that is, at least, very likely to happen.

Proximity

Proximity exists to identify whether the relationship between claimant and defendant is sufficiently close to sustain a duty of care.⁹⁶⁰ The parties must be situated so close to one another as to be neighbours.⁹⁶¹ Thus, for the proposed duty to be made out Ross and Amelia must be in a relationship of sufficient proximity as to say the two are neighbours. Only then can it be said that Ross was duty-bound not to expose her to an unjustifiable risk of harm. However, what it means to be proximate, much like what it means to be a neighbour, is unclear, and there is no specific test. Proximity is a woolly term that sometimes means foresight, the degree of closeness, or something in between.⁹⁶² Indeed proximity and foreseeability were essentially fused between 1978⁹⁶³ and 1992, resulting in a dramatic expansion of negligence liability.⁹⁶⁴ Following their separation proximity is still unclear.⁹⁶⁵ There is no principled legal requirement behind proximity, nor the level of closeness required, beyond one party having the capacity to harm the other.⁹⁶⁶ No authority has ever proved capable of determining what proximity is, and so negligence turns on a principle with no clear substance.⁹⁶⁷

⁹⁵⁹ O'Neil(n17) 91-96

⁹⁶⁰ Charlesworth(n937) 2-41

⁹⁶¹ Ibid 2-40

⁹⁶² Richard Kidner, "Resiling from the Anns Principle: The Variable Nature of Proximity in Negligence" [1987] LS 7 319 322

⁹⁶³ *Anns v Merton LBC* [1977] UKHL 4; [1978] AC 728

⁹⁶⁴ *Murphy v Brentwood DC* [1991] UKHL 2; [1991] 1 AC 398

⁹⁶⁵ Kidner(n962) 323-330

⁹⁶⁶ Ibid

⁹⁶⁷ Witting(n764) 40-50

Despite lacking conceptual clarity, proximity is central to the contemporary duty of care. Nevertheless, it is impossible to articulate a rule to determine which relationships are proximate and which are not. To Plunkett, this lack of clarity flows from the unanswered questions of *Donoghue*; who is my neighbour? To whom is a duty of care actually owed?⁹⁶⁸ No convincing answer to this question has ever been posited.⁹⁶⁹ Thus, proximity should be imagined not as a legal rule but as an analysis of the relationship between claimant and defendant. The courts will look at the physical, causal, and circumstantial proximity of the parties to understand the nature of their relationship and explain why it gives rise to negligence liability.⁹⁷⁰ However, there is no rule to identify how close the parties must be, so the courts will rely on a familiar range of factors to argue proximity.⁹⁷¹ Thus, many judgments speak of vulnerability, an assumption of responsibility, or the nature of the harm, even if there is no clear principle. For instance proximity is very likely to be found when the claimant suffers physical harm but much less likely if they suffer psychiatric harm. Even if the cases are near-identical, differing only in the nature of the harm, proximity will be found in one and not the other, and the reason is not clear.⁹⁷² Derrington J, writing in Canada, accepts that there is no settled principle for proximity and there are disparities between the cases.⁹⁷³ If a defendant's negligence causes physical harm to persons or property, they are likely proximate to the claimants and liable for damages. If the negligence caused pure economic loss, this is now unlikely, barring some other compelling factor. The reason for this is that it is a policy of the common law to provide a remedy for physical harm, and so proximity has developed accordingly.⁹⁷⁴ Proximity is shaped by external pressures because the principle lacks substance.

Accordingly in cases involving physical harm, such as the vignette, the focus will be on the causal pathways between the parties.⁹⁷⁵ Causal pathways are the factual links

⁹⁶⁸ Plunkett(n916) 35-40

⁹⁶⁹ Ibid

⁹⁷⁰ Justin Tan, "Proximity as Reasonable Expectations." [2019] SJLS 147 146-150

⁹⁷¹ Ibid 160-170

⁹⁷² Ibid

⁹⁷³ Derrington J, "Proximity, the Standard of Care and Damage: Relating the Elements of Negligence" [1991] 16 QCLJ 272 272-277

⁹⁷⁴ Ibid

⁹⁷⁵ Plunkett(n916) 50-52

through which one party is able to cause the other harm. Proximity examines the number of causal pathways and their significance.⁹⁷⁶ If these pathways position the defendant to cause substantial harm to the claimant, then they are likely proximate.⁹⁷⁷ Say a worker asks an architect whether it is safe for him to work on a site. If the architect answers yes, then the worker is likely to attend the site and be susceptible to injury if it is not actually safe.⁹⁷⁸ If he is injured, there is a tight causal connection between the claimant and defendant because the injury occurs because he relied on her faulty advice. That connection is a causal pathway indicating the architect has a substantial ability to cause the worker harm, which would then inform a finding that the parties are proximate.⁹⁷⁹

Proximity: To whom is a Duty Owed?

The first question is whether there are sufficient causal pathways to say that Ross and Amelia are proximate. For it must be possible for Ross to owe a duty to Amelia before the scope of that duty can be considered. Ross and Amelia may have no direct relationship, but there are significant causal pathways between them. Ross is positioned to cause harm by carelessly teaching Alex that women are secretly attracted to him, that he should ignore non-consent, and use touch escalation to guarantee sex. Thus, when directing Alex to put this into practice, harm is likely to be caused by him discounting non-consent and sexually touching others. Indeed, his presence at the bar is the result of Ross telling him to go out and secure sex. Ross creates the very reason for the tortious interaction to occur.

Imagine a Fire Juggler establishes an online school to instruct students. Through videos and meetings, he teaches an inherently dangerous art but carelessly glosses over the fundamentals in favour of spectacle. As a result, should his students ever attempt the art, there is a strong likelihood they will fumble and send fire flying in all directions. Nevertheless, he believes the best way to learn is to perform, and so he sends his students into the world to delight the public with a daring display. The Fire Juggler has carelessly instructed his students. By failing to teach them properly, he increases the

⁹⁷⁶ Ibid 50-60

⁹⁷⁷ Christian Witting, "Duty of Care: An Analytical Approach" [2008] 25 OJLS 33

⁹⁷⁸ Ibid 47-50

⁹⁷⁹ Ibid 60-64

likelihood that they will fail to juggle fire safely. By directing them to perform, he sets the stage for them to cause harm. In both cases, the teacher is poised to cause harm to others by carelessly teaching and directing their students. Thus, there are significant causal pathways on which to conclude the teachers and the victims are proximate.

The existence of this significant causal pathway is not enough to complete the inquiry. It is one thing to identify pathways and another to conclude they are sufficient. Stapleton critiques proximity as a thinly veiled camouflage through which judges pretend to apply a principled criterion.⁹⁸⁰ To say there are significant causal pathways between a driver and a pedestrian is meaningless without explaining why those pathways give rise to proximity. Without that explanation, the term proximity simply elevates a conclusion into a reason, meaning there is no substance to the claim.⁹⁸¹ As the existence of causal pathways is a question of fact, judgments should explain what they are and why they are sufficient rather than simply declaring it.⁹⁸² That there are causal pathways between Ross and Amelia is not enough to say they are proximate without reason.

That reason turns on the risk of physical harm. The common law is deeply concerned with bodily security, and so the potential for physical harm is perhaps the most compelling factor to justify a finding of proximity.⁹⁸³ In *Gorringe*⁹⁸⁴ the claimant was involved in an accident which he attributed to the Local Authority neglecting to mark a dangerous crest in the road. The duty failed, but Lord Hoffman observed that if carelessness gives rise to a real prospect of physical injury; a duty of care will almost always be imposed.⁹⁸⁵ If the causal pathways between the parties position the defendant to cause physical harm, they are almost always proximate. For the vignette, the risk of harm is physical. Ross risks women coming to physical harm by instructing and directing Alex to non-consensually touch others to secure sex. There is a risk of him touching someone and them coming to physical harm. Thus, perhaps the most compelling reason of all errs in favour of finding the Ross and Amelia are proximate.

⁹⁸⁰Jane Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus', in Peter Cane, Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP, 1998) 59-70

⁹⁸¹ Ibid

⁹⁸² Ibid 80-90

⁹⁸³ Ibid 70-80

⁹⁸⁴ *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057

⁹⁸⁵ Ibid [17]

The common law will also not expose defendants to indeterminate liability. Thus, significant causal pathways that might give rise to inordinately wide or unconscionable duties will be rejected. Amelia was not the only person put at risk by Ross's actions, and so the question becomes whether the duty was owed specifically to her, or to a wider class. The causal pathways do indicate there is a proximate relationship between Ross and Amelia specifically. Ross is aware of Amelia and advises Alex that she is secretly interested in him. Ross attributes her reluctance to LMR, something to be overcome, and teaches Alex touch escalation. Alex is then permitted to have his suspicions linking the concepts together validated. This prompts Ross to say Alex is not only advancing rapidly but is one of his top-performing students. Alex is emboldened that Amelia is secretly interested in him, and so if he encounters her again he has reason to approach her to capitalise on his perceived near success. That he has been told her reaction was LMR means he is likely to interpret her non-consent as something to be overridden by touch escalation. Thus, Ross's teachings expose Amelia to a real prospect of sexual violence.

However, this narrows the scope of the duty to a single person despite the wider risks. This proposed duty could only arise when a PUA carelessly instructs and directs their student knowing a specific person might be at risk. However Ross risks women, not merely Amelia, coming to harm by teaching dangerous behaviours which carry a real prospect of sexual violence. Ross teaches Alex that women will always consent to sex in the right circumstances, and imbues him with the knowledge that touch escalation can inspire an 'overpowering lust' which guarantees sex. As a result, Alex goes into his final mission believing that he has the techniques necessary to secure sex and that any negative reaction is a challenge to be overcome. There is a real prospect that he will sexually touch a woman who is not consenting as a direct result of what he has been taught. Ross is teaching and encouraging behaviours which carry a real prospect of sexual violence, and this ought to give rise to a duty. Through the causal pathways he has the potential to cause deeply invasive physical harm to a great many people. Thus the duty of care might apply to them all.

However this line of reasoning could produce a duty which is much too broad. Say Alex, years after the course concluded, remembered Ross Mystery whilst speaking to a

woman, and decided to act on his old teachings, and went on to assault her. Alex acts on the dangerous teachings of Ross to cause harm. Yet if Ross is liable for this in negligence, the proposed duty would extend to any women his students might ever encounter. Even with a relatively low number of students the sheer volume of claimants would be inordinately wide. This is unacceptable. In *Hill v Chief Constable of West Yorkshire*,⁹⁸⁶ the claimant's daughter was attacked by Peter Sutcliffe, the Yorkshire Ripper. The claimant alleged that had the Police not been negligent in their investigations, her daughter would not have died.⁹⁸⁷ The House of Lords concluded that the claimant's daughter was only at risk because she was young and female. She was part of a class of potential victims which was inordinately large. The claimant's daughter needed to be at special risk if there was to be a finding of proximity, especially if the duty was for the defendant to guard against the harm caused by third parties.⁹⁸⁸ Although it should be noted that this decision was, in part, motivated by public policy concerns about the impact a finding of proximity would have on the police. The House of Lords were cautious that the police might be inundated by unhelpful negligence claims, and so would adopt an unduly defensive policing style.⁹⁸⁹ These public policy concerns were reiterated, in part in *Van Colle*,⁹⁹⁰ but would not arise in the vignette.

Nevertheless, the courts will reject a claim which proposes a duty for an inordinately wide class of persons. In *Goodwill*,⁹⁹¹ the defendant advised a man who had a vasectomy that he could stop using contraception. However, the vasectomy spontaneously reversed, and so he impregnated the claimant. As Gibson LJ observed, the defendant did not know the claimant when the advice was given, who was instead part of the theoretical and indeterminately large class of the man's potential future partners.⁹⁹² The defendant could not owe a duty to such an uncertainly large group of people.⁹⁹³ To ground the proposed duty in Ross teaching dangerous techniques would be unsustainable. Any woman his students might ever encounter and assault while

⁹⁸⁶ [1989] AC 53

⁹⁸⁷ Ibid 59-60

⁹⁸⁸ Ibid

⁹⁸⁹ Ibid 63

⁹⁹⁰ *Van Colle v Chief Constable of Hertfordshire Smith v Chief Constable of Sussex* [2009] 1 AC 225 [63]

⁹⁹¹ *Goodwill v British Pregnancy Advisory Service* [1996] 1 WLR 1397

⁹⁹² Ibid [1405]

⁹⁹³ Ibid

applying his techniques would have standing. A small number of students, approaching only a single woman per week, would, in time, create an exponentially wide class of prospective claimants.

Thus, for the proposed duty there appears to be a need to identify a broad, but not inordinately wide, class of persons who were at special risk. That class can be identified by considering that Alex approached Amelia because Ross assigned him a mission to have sex with a woman. His reasons for being in the bar, for engaging with Amelia, and his intended outcome are framed by that mission. Without it, he would not have gone to the bar, not have approached Amelia, or attempted touch escalation. The danger comes from being taught dangerous behaviours and then directed to implement them. It is the combination of Ross's teachings and directions which puts Amelia and, any other woman in the vicinity, in harm's way.

Moreover Ross would have known that giving Alex this mission meant he was likely to put his learning into practice, somewhere. Thus, the woman at that location would be targeted and subjected to techniques including touch escalation. These women are a distinct class who have been endangered by the combination of Ross's careless teaching and direction. Thus, he ought to have considered them before putting them at risk. Similarly, the careless teaching of the Fire Juggler has created a risk that his students will cause harm to the public. However, his careless direction focuses it. On his command, his students will go to a public place because they have been directed by their teacher. The Fire Juggler has endangered a specific class of persons, namely those present when his students perform. It is the combination which gives rise to the duty, as it focuses a previously abstract risk of harm on a specific section of the public, meaning those present when the student attempts to perform their task.

Similarly, Ross creates an abstract risk of sexual violence, which he focuses by telling Alex to act. Wherever Alex chose to make the attempt would feature women who would be subject to seduction techniques, including touch escalation. Ross does not know where Alex will act, but knows an attempt will be made. Thus, he should be duty-bound to consider whether women at that location would be endangered before carelessly putting them at risk. A duty arises not for all women Alex might encounter but specifically those at risk during his mission. The duty is justified by the potential for

significant sexual harm that Ross has created and then focused on these women in particular.

If a defendant is uniquely poised to cause harm to a specific person, or class of persons, then a duty of care should arise. In *Phelps v Hillingdon*,⁹⁹⁴ the Local Authority instructed an educational psychologist who failed to identify the extent of the claimant's learning difficulties. The question was whether there was sufficient proximity for it to be said that the educational psychologist owed a duty to the child. Lord Slynn concluded that it was obvious to all involved that the claimant's parents and teachers were, inevitably, going to act on the advice of the educational psychologist.⁹⁹⁵

Accordingly, she could anticipate that if she carried out the assessment carelessly and made harmful recommendations, then these would be followed to the detriment of the child. Thus, the educational psychologist was uniquely poised to impact the child's future, for better or worse, and so there was a relationship of sufficient proximity.⁹⁹⁶ The duty arose from the combination of the educational psychologist generating a risk, which they knew would impact a specific child. This combination created the causal pathways necessary for a duty.

Without that combination, the arguments in favour of a duty are unsustainable. Say that the parents and teachers had no intention of relying on the advice, and that this was known to all parties. The careless assessment would still generate an abstract risk of harm that the child will be disadvantaged if the advice was ever followed. However, if there is no indication it will ever be followed, then there is no discernible risk. The educational psychologist would be in no position to influence the child's future, nor cause harm, because their findings will be disregarded. There is no reason for them to anticipate that the risk of harm they have created will be directed at the child, and so there should be no relationship of proximity. However when they know their recommendations will be adopted, there are sufficient causal pathways through which the educational psychologist can cause harm to the child for it to be said that the two are proximate.

⁹⁹⁴ *Phelps v Hillingdon LBC* [2001] 2 AC 619

⁹⁹⁵ *Ibid* [654]

⁹⁹⁶ *Ibid*

For the vignette, Ross was uniquely poised to cause harm to others. If Alex acts on his instructions, then there is a real risk of Alex sexually touching someone without their consent. Ross cannot owe a duty to the world at large, and indeed cannot anticipate who Alex may harm, or when. There are insufficient causal pathways between him, and any potential victim, for it to be said he was poised to cause them harm specifically. Thus there is nothing to support a finding of proximity.

This changes when Ross directs Alex to put his teachings into practice. For while Ross does not know where Alex will choose to act, he knows that he will act. In addition, he knows that Alex will implement his techniques, including touch escalation, because this is exactly what he has told Alex to do. Thus Ross is poised to expose women, at whatever location Alex chooses, to non-consensual sexual touching, and he has reason to anticipate this. A specific class of persons is now at risk, even if Ross doesn't know who they are, or where they will be located. Thus there are sufficient causal pathways between Ross and the women at risk, for it to be said the two are proximate.

To illustrate, return to the earlier example of A carelessly teaching B that he ought to punch anyone dressed as a clown. In addition A informs B that clowns will always consent to be punched because it is amusing. As a result, he creates a risk that B will do exactly that should he ever encounter a clown. However say A then tells B he should go to any circus he wishes and implement A's teachings. A has no way of knowing which circus B will go to, but A knows that clowns at the chosen circus will be put at risk. A has exposed those clowns to a risk of physical harm by carelessly instructing and directing B. Thus A is uniquely poised to cause harm to a discernible class of clowns and so the necessary causal pathways for a finding of proximity are in place. A does not owe all the clowns in the various circuses a duty, but only those at the circus B chooses to attend. A can anticipate harm being caused at a circus, and so should not be excused simply because A had no idea which circus, or which clown, would be targeted.

In a similar vein, if Ross had released a dangerous wild animal into the streets, he can expect harm to occur, but has no way of anticipating where or when that harm will occur. But this should not excuse him. Rather he knows that harm will occur when the wild animal goes somewhere, and that people at that location will be at risk. Ross can conceive of the class of persons who will be endangered, even if he does not know who

they are or where they will be located. He can anticipate the animal going somewhere and causing harm to anyone at that location. Indeed, he has exposed them to this risk of harm by releasing the wild animal in the first place. Thus there are sufficient causal pathways between him, and a specific class of victims, for it to be said they are proximate.

The same extends to Alex. Ross can anticipate Alex going somewhere, and posing a risk of harm to any woman at that location and so he can conceive of a specific class of persons who will be endangered. Ultimately the risk will be directed at a fairly narrow class of women at a specific location, within a specific time frame, and so it should not be considered inordinately wide. Amelia was at the bar Alex chose to go, and was subjected to the very harm that Ross was risking through his careless teaching to and direction. Accordingly, there is scope to say that Amelia and Ross are proximate. This would not change if Amelia were to be replaced by another woman, who happened to be in the bar. The causal pathway exists between any woman endangered by Ross creating and then focusing a risk of harm.

Thus, the proposed duty would not apply to women Alex encountered and subjected to Ross's techniques in any other context. Had he completed his course, rushed to prove his newfound qualifications and assaulted someone, the harm would fall outside the proposed duty, despite being inherently connected to Ross's careless teaching. Indeed had he simply attempted to act on the advice outside the confines of the course, then on this account Ross would not be liable. For the harm no longer flows from the risks of his careless instruction and direction manifesting.

This is not to say Ross would always escape liability for giving careless advice, only that there is a need to move cautiously. Nothing is beyond the reach of the law of negligence. Thus, to prevent the tort growing exponentially the law of negligence develops incrementally and is, in theory, if not always in practice, averse to dramatic expansions of liability.⁹⁹⁷ Thus, if a duty is to be advanced for online influencers, it ought to be

⁹⁹⁷ Duncan Fairgrieve, Dan Squires, *Duty of Care: The Negligence Liability of Public Authorities*, (OUP, 2nd Edn, 2019) 71-142

narrow, at least initially. Should it be established, there might then be scope for further expansion, but at this early juncture, the proposed duty is necessarily narrow.

Proximity: Acts and Omissions

The matter would be settled if Ross had the potential to cause physical harm directly. The complication is that the risk manifests through Alex. Does Ross cause harm to Amelia, or does he merely omit to protect her from the risk Alex poses? There is a marked difference between directly causing harm and failing to protect another's interests. The latter is a failure to act, an omission, which is treated differently from a positive act.

To Steel, claimants have a general right to be protected from the harm caused by another's unreasonable acts.⁹⁹⁸ However, the right to be protected from another's omissions is a special right created by context. In *Stovin v Wise*,⁹⁹⁹ the claimant was injured in a traffic accident due to poor visibility caused by a bank of land which the Highway Authority had failed to clear. To Lord Hoffman, the Highway Authority had not created the obstruction nor contributed to the accident, and so they omitted to clear it. A duty in respect of pure omission is presumed to fail for want of proximity unless there is a special reason to the contrary.¹⁰⁰⁰ Plunkett justifies this by arguing that the common law has never rewarded those who voluntarily confer benefits upon others. Likewise, it will not punish those who refuse to do so. Omissions give rise to a broad exclusionary situation, meaning proximity is presumed to fail absent a compelling reason to the contrary.¹⁰⁰¹

Imagine Ross were a football coach who taught all his players that they ought to tackle the opposing team as violently as possible. Ross does not care for the rules nor the enjoyment of the game; rather, he desires his players to do whatever it takes to win. Consequently, during a presumably mixed-sex game, Alex violently tackles Amelia, causing considerable injuries. Is this an act or an omission? Is Ross actively causing harm, or is he merely failing to protect Amelia from the danger posed by his students? The difficulty can be extended to almost any negligence case, as all events are caused

⁹⁹⁸ Sandy Steel, *Omissions in Tort Law*, Oxford Private Law Theory (OUP,2024) 1-30

⁹⁹⁹ *Stovin v Wise* [1996] AC 923

¹⁰⁰⁰ *Ibid* [930]

¹⁰⁰¹ Plunkett(n916) 110-120 141

by a combination of acts and omissions.¹⁰⁰² Does the negligent driver collide with the pedestrian, or do they omit to take their foot off the pedal? It is possible to conceive of any act as an omission and vice versa.¹⁰⁰³

To Simester, the difference between an act or an omission turns on the defendant's responsibility.¹⁰⁰⁴ Say a groundskeeper is contractually obligated to open a gate in time for the evening train but fails to do so, causing a serious accident. The groundskeeper is responsible because he was obliged to do something and failed to act, and so he is fully responsible for the harm.¹⁰⁰⁵ The law will treat his omission as a positive action.¹⁰⁰⁶ It is entirely different if a stranger saw the incoming train and passively observed rather than rushing to open the gate. This passive observer is not obligated to do anything, and so his refusal to protect others is a pure omission. The distinction between an act and an omission is a normative, not mechanical, one. Thus, Steele grounds it on whether the defendant has made things worse or failed to make things better.¹⁰⁰⁷ The defendant who makes the claimant's situation worse does an act, meaning no special reason is required to show they are proximate. The defendant who fails to make the claimant's situation better omits to act, and so a special reason is required for liability.

The law has taken a broadly similar view. In *Poole*,¹⁰⁰⁸ a Local Authority housed the claimant next to a family known for anti-social behaviour, who proceeded to abuse, threaten, and harass them. The Supreme Court indicated there is no general liability for failing to confer benefits on others.¹⁰⁰⁹ In *Tindall*¹⁰¹⁰ the Deceased was killed in a vehicle collision on black ice. A few hours earlier, a similar accident had occurred on the same stretch of road. The police had put up warning signs but departed half an hour before the second accident and had removed those signs in the process. To Lord Leggatt and Burrows, the tort of negligence draws a fundamental distinction between acts and

¹⁰⁰² *Stovin*(n999) [945]

¹⁰⁰³ Jeroen Kortmann, "Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio," (OUP, 2015) 5-8

¹⁰⁰⁴ Andrew Simester, "Why Omissions Are Special" (1995) 3 LEG 311 311-320

¹⁰⁰⁵ *Ibid* 327-335

¹⁰⁰⁶ *Ibid* 330-335

¹⁰⁰⁷ *Steel*(n932)

¹⁰⁰⁸ *Poole BC v GN* [2019] UKSC 25 [2020] AC 780

¹⁰⁰⁹ *Ibid* [29],[65]

¹⁰¹⁰ *Tindall and another v Chief Constable of Thames Valley Police* [2024] UKSC 33; [2024] 3 WLR 822

omissions. However, the more illuminating language is that the tort draws a distinction between those who make matters worse and those who fail to confer a benefit.¹⁰¹¹ The defendant owes a duty of care not to expose others to unreasonable and reasonably foreseeable risks of physical harm created by the person's own conduct. No general duty of care arises to protect others from harms which arise independently of the defendant's conduct.¹⁰¹² The defendant's conduct must be considered in its entirety, and so the question is whether the harm would have occurred if not for the whole activity.¹⁰¹³

Thus, the football coach teaching his players to use violent tackles, acts rather than omits to protect. They make matters worse for the opposing team by teaching the players to use violence. As a result of that instruction, the players pose a risk of physical harm to the opposing team. An analogy can be drawn to *Surrey*,¹⁰¹⁴ in which the claimant's child had suffered a serious non-accidental injury while in the care of a childminder. The Local Authority told the claimant that there was no reason a child could not safely be left in their care. In truth, the Local Authority was aware that the childminder had been connected to another serious non-accidental injury of a child. Had the Local Authority merely confirmed that the childminder was registered, that would not give rise to liability. However, it went much further by assuring the claimant of their child's safety despite being aware of the risk. As a result, they gave negligent advice, which was relied upon by the claimant, and allowed a third party to cause their child harm. The Local Authority actively made the situation worse and so was liable for negligence. Similarly, the football coach gives dangerous instructions that the players will rely upon to cause harm to the opposing team. The football coach has actively worsened the opposing team's situation, so this is an act, not an omission.

The vignette is not dissimilar. Ross has instructed and directed Alex so that he poses a danger to Amelia and, indeed, any other woman in the vicinity of his mission. Ross has created a source of danger. Alex poses a danger because of the mindset, techniques, and beliefs he has been taught. Ross has taught Alex that women who are attracted to

¹⁰¹¹ Ibid [1]

¹⁰¹² Ibid [44]

¹⁰¹³ Ibid [45]

¹⁰¹⁴ *T v Surrey County Council* [1994] 4 All ER 577

him will pretend to withdraw consent to preserve their reputations and that this is a secret sign they want sex. Alex is given a mandate to disregard non-consent as a challenge to be overcome. This is clear in the vignette when Alex tells Amelia he will get her “where you need to be” whilst interpreting her distress as a “sign of inner conflict.” Indeed, he touches her because he has been taught that sexual touching is a means of producing an overpowering biological reaction which guarantees sex. Ross has taught Alex to use this technique and then sent him into the world to do so. Alex’s mindset, actions, motivations, and beliefs are all the result of Ross’s influence. Alex is dangerous because Ross has made him dangerous. Thus, the harm does not arise independently of Ross’s conduct.

The same could be said of the Fire Juggler who teaches his students to perform without proper care. They attempt dangerous and daring feats because he has taught them to do so. They do not consider safety because he has disregarded it. They perform for the public because he has instructed them to do so. They believe nothing will go wrong because he has given them a false impression of their skills. His influence has shaped the dangerous, ill-prepared performers soon to be unleashed upon the public square. Their dangerous mindset, behaviours, and that they are performing for the public are all directly attributable to the Fire Juggler. They do not arise independently of his conduct. So when they stumble and injure members of the public by way of fire, it is a direct result of the Fire Juggler’s careless teaching and direction. The students are dangerous because the Fire Juggler has made them dangerous.

Thus, Ross has created a source of danger and, in doing so, has made Amelia’s situation worse. The vignette features an act, not an omission. Ross is under a general duty not to unreasonably expose others to a risk of harm, which he has breached by negligently instructing and directing Alex. The relationship between Ross and Amelia can sustain a finding of proximity without requiring a special reason. Ross’s actions are actionable in the law of negligence.

Proximity: Scope of the Duty

Proximity also helps inform the scope and standard of the proposed duty, as causal pathways link to specific activities and losses. Thus, to say the parties are proximate

should further detail what the defendant is liable for and what they were expected to do. For, the claimant must show that the defendant owes them a duty, and that the harm suffered fell within the scope of that duty.¹⁰¹⁵ For instance, the relationship of proximity between a doctor and their patient gives rise to a duty which extends no further than for the doctor to safeguard the patient's health. Thus, if the doctor, to make conversation, gives financial advice, which leads the patient to ruin, it falls outside the scope of the duty and is not actionable. A duty of care is not owed for the general benefit of the claimant but is grounded in specific factors flowing from the relationship between them. The actual nature of the harm must be considered to determine whether it falls within the scope of the defendant's duty.¹⁰¹⁶ Thus, to say Ross owes a duty of care as a result of carelessly instructing and directing Alex is one thing, but what exactly was it that he was expected to do?

To answer that question, it is necessary to consider the reasons for imposing a duty in the first place.¹⁰¹⁷ The proposed duty exists because Ross has unreasonably exposed others to a risk of sexual violence, by creating a source of danger. The corresponding duty is therefore for him not to generate that risk of sexual violence in the first place, or obviate the danger once it has manifested. In *Johnson*¹⁰¹⁸ the defendants were loading soda ash, which seeped onto the floor, causing it to become slippery. They warned the claimant, who was delivering heavy kegs, but nevertheless, he slipped and injured himself. Ormerod LJ concluded that a person who creates a danger must do more than merely give a warning but must take active steps to eliminate the danger.¹⁰¹⁹ A duty the defendants could have discharged by sweeping the floor or indeed doing anything other than passively allowing the ash to accumulate. The defendants knew the claimant would be entering the property with heavy kegs, knew he would be in jeopardy, and so were obligated to act to protect him.¹⁰²⁰ Ross, in creating a danger that exposes women in the vicinity of Alex's mission to a risk of sexual assault, fell under a duty to avert or obviate it. This is the scope of the proposed duty.

¹⁰¹⁵ *SAAMCO v York Montague* [1996] 3 All ER 365 [211-212]

¹⁰¹⁶ *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 [8-13]

¹⁰¹⁷ *Ibid* [4]

¹⁰¹⁸ *Johnson v Rea* [1961] 1 WLR 1400

¹⁰¹⁹ *Ibid* [377-378]

¹⁰²⁰ *Ibid* [385]

Accordingly, the harm suffered by Amelia would fall within the scope of the proposed duty. Ross has created a risk of sexual harm by carelessly instructing and directing Alex, so that there was a risk of him sexually touching another person without their consent. Thus, a duty arises for Ross to avert or obviate that risk. Ross breaches that duty by reinforcing the validity of his dangerous teachings, telling Alex that he should disregard signs that his target is not consenting, and encouraging him to use sexual touching to inspire an overpowering lust. Indeed, when Ross is told by Alex that Amelia was uncomfortable he simply suggests Alex avoid fixating on one girl, and that her discomfort was LMR. When Alex begins musing on ways to overcome LMR using touch escalation, he is commended for it. The risk that Alex would sexually touch someone without their consent was amplified, not obviated or averted, and indeed manifested when he later encountered Amelia. The harm Alex inflicts upon Amelia is exactly the thing that Ross was duty bound to guard against and so falls within the scope of the proposed duty.

Fair, Just and Reasonable

Finally, the proposed duty must be fair, just, and reasonable.¹⁰²¹ This factor naturally evokes policy, with the courts deciding the political question of what, and is not, a legitimate expansion of the law of negligence.¹⁰²² It turns on what is and what is not a desirable judicial policy.¹⁰²³ The proposed duty must be justified with reference to the core concerns of judicial policy.¹⁰²⁴ The Courts will act to stop indeterminate liability,¹⁰²⁵ protect the vulnerable,¹⁰²⁶ and ensure the consistency and integrity of the common law.¹⁰²⁷ Whether the proposed duty is fair, just, and reasonable, turns on which side of the argument holds the most weight.¹⁰²⁸

This use of policy is not without controversy. To Stevens arguments of policy are used to justify political decisions on the basis it advances some collective community goal.¹⁰²⁹

¹⁰²¹ *Barrett v Enfield LBC* [2001] 2 AC 550

¹⁰²² Fairgrieve(n997) 43-150

¹⁰²³ Charlesworth(n937) 2-48

¹⁰²⁴ Mitchell(n924) 37-50

¹⁰²⁵ Ibid 2-50

¹⁰²⁶ Ibid 2-51

¹⁰²⁷ Ibid 2-52

¹⁰²⁸ Witting(n764) 40-50

¹⁰²⁹ Stevens(n551) 306-319

However, these inquiries ask judges to exceed their expertise and make political decisions that are better left to others. For instance, the law of negligence was historically concerned that too readily imposing a duty on police officers would impact the quality of policing. But how is a judge to determine this? There is no evidential hearing on policy questions; rather, they are left to the instincts of a single decision-maker whose expertise lies elsewhere.¹⁰³⁰ Moreover, the desirable quality, nature, and style of policing is a political question, better resolved in Parliament.¹⁰³¹ Despite this, Beever describes policy as essential to the contemporary law of negligence.¹⁰³² For the tort began life as a series of frayed ends which were hastily bundled together under a general conception. However, this general conception failed to contain liability, and so the tort grew exponentially. To contain liability, the courts grew to rely on policy over principle, and so policy is essential to any meaningful understanding of the tort. The common law has lost faith in a coherent account of the law of negligence and so has settled for a tort which turns on social policy.¹⁰³³

Accordingly, should a duty be proposed it ought to be accompanied by a rich policy analysis to explain why negligence liability should stretch to the vignette. Negligence is part of political society, and so policy will inevitably form part of the decision making process. To ignore this would risk the proposed duty being detached from the realities and pressures of the material world.¹⁰³⁴ Thus, the proposed duty will be justified by three policy arguments. Firstly, Ross has created a risk of physical harm. Secondly, this risk is generated by his enterprise, and so the common law errs in favour of a duty. Thirdly, there is a wider policy interest in constraining activities which generate a real prospect of sexual violence.

Physical Harm

It is desirable judicial policy to hold those who create a risk of harm liable when they manifest. To Stapleton, the most powerful of all policy factors is the common law's

¹⁰³⁰ Ibid

¹⁰³¹ Ibid

¹⁰³² Allan Beever, *Rediscovering the Law of Negligence* (2007, BP) 33-40

¹⁰³³ Ibid 167-170

¹⁰³⁴ Janet O'Sullivan, "Negligence, Policy, and Novel Exceptions," in Jodi Gardner(ed) Amy Goymour(ed) *Politics Policy and Private Law* (2023, HP) 107-110, 120-130

guarantee of physical security. The common law prohibits the lowest level of violence, and so those who carelessly expose others to physical harm will readily attract a duty of care.¹⁰³⁵ As per the proximity analysis, Ross culpably created a risk of physical harm. The common law's guarantee of physical security suggests a duty ought to arise. Thus, the most powerful of all policy factors weighs in favour of a duty.¹⁰³⁶

Risks of the Enterprise

Ross generates a risk of physical harm as part of his business activities. It is a policy of a common law to hold him liable for interferences flowing from his enterprise which he has taken no steps to guard against.¹⁰³⁷ To Honoré the common law recognises that individuals have the potential to make noxious interventions in the natural world.¹⁰³⁸ Thus, it offers them a choice. Either refrain from such activities or consider the safety of others. Accordingly, a person who sells foods must take care to ensure it is not contaminated, and a person who sells goods must take care to ensure they are not dangerous.¹⁰³⁹ Similarly, a person who teaches fire juggling must consider public safety. Should they fail to do so, it is a policy of the common law for them to be liable for any resulting harm.

Ross generates a risk of danger as part of his enterprise. He attracts students and profits from teaching them to become PUAs. To Logie, an affirmative duty is much more likely to be imposed when the risk of harm flows from the defendant's business.¹⁰⁴⁰ If an enterprise poses a risk of harm, mitigating that risk is a cost of doing business. So, a private surgeon must ensure he performs operations safely, and a baker must ensure his products are safe for human consumption. Should they fail then they will be liable for the subsequent harm. Ross's enterprise generates a real prospect of sexual assault. This is a natural consequence of what he is teaching, and his expectation it be implemented. Nevertheless, Ross fails to introduce safeguards, does not warn his students, and indeed does nothing to guard against the risks flowing from his

¹⁰³⁵ Stapleton(n980) 70-80

¹⁰³⁶ Much of the analysis on physical harm is discussed in the proximity section, and so the two should be read in conjunction.

¹⁰³⁷ Witting(n764) 40-60

¹⁰³⁸ Tony Honore, "Are Omissions Less Culpable" in *Responsibility and Fault* (HP,2002)

¹⁰³⁹ Ibid 40-45

¹⁰⁴⁰ James Logie 'Affirmative Action in the Law of Tort: The Case of the Duty to Warn' (1989) 48 CLJ 115

enterprise. Amelia is harmed because Alex is faithfully applying the understanding of Pick Up Artistry he has gleaned from Ross whilst fulfilling his mission to secure sex. Amelia is harmed in the course of Ross's business activities, and he made no effort to protect her or the public. Thus, he should be liable for the unmitigated realised harms of his enterprise. Negligence liability is a cost of doing business. Otherwise, he could profit from his enterprise without assuming responsibility for the corresponding social costs. It is the preference of the common law for him to be liable for harms flowing from his enterprise, which weighs in favour of the proposed duty.

Sexual Violence, Violence, and Third Party Harm

Finally, there is a public policy interest in curtailing sexual violence. It is socially undesirable and an affront to public order for persons to be generating a real prospect of sexual violence. Stapleton suggests duties will be imposed to maintain public order and uphold the dignity of the common law.¹⁰⁴¹ Without a duty, there is no path to negligence liability, and so no independent wrong in Ross contributing to the risk of sexual violence. For if he is liable as an accessory by common design, his act parasitically attaches to Alex's wrong; it is not freestanding. Nevertheless, Ross's actions wrongfully undermine public order and so are deserving of liability.

The essential wrong is explained by Mandhane's research into multi-party assaults. Those who passively observe or encourage assaults embolden perpetrators.¹⁰⁴² This gives the latter a sense of validation and security, which increases the threat posed to the victim. Those observing, encouraging, and contributing intensify the likelihood and severity of sexual violence.¹⁰⁴³ Sexual violence violates the dignity and autonomy of the victims, but knowing others have contributed to it can inflict further psychological and emotional harm. Those who make such contributions contribute to the overall indivisible injury, and so ought to be liable alongside the principal perpetrator.¹⁰⁴⁴ In the vignette, Ross may not be physically present, but his teachings and directions have created a real prospect of sexual violence. Ross has emboldened Alex, reassured him

¹⁰⁴¹ Stapleton(n980) 70-80

¹⁰⁴² Renu Mandhane, 'Duty to Rescue through the Lens of Multiple-Party Sexual Assault' (2000) DalhousieJLegalStud 1

¹⁰⁴³ Ibid 5-10

¹⁰⁴⁴ Tsachi Keren-Paz, Richard Wright, 'Liability for Mass Sexual Abuse' (2019) 56 AmCrimLRev 185 202-210, 230

his intended actions are legitimate, and given him a sense of security that his touching will be well received. Thus, Ross influences the likelihood and severity of the assault. As a result, the common law should err in favour of him being liable for the consequences.¹⁰⁴⁵ There is an essential wrong in undermining public order by making criminal sexual violence more likely and more severe. Thus the proposed duty is a means for the common to condemn this behaviour, which is precisely what it ought to do.

In the absence of a freestanding wrong, the law would implicitly legitimise an enterprise which creates and amplifies the prospect of sexual violence. To say there is no independent wrong is to say they owe no duty to those they carelessly endanger. The law should not impugn its dignity by taking a position which emboldens sexual violence.¹⁰⁴⁶ Indeed Karen-Paz argues that the law is under an affirmative duty to resist sexual violence.¹⁰⁴⁷ The commission of a sexual crime indicates a failing of legislation or enforcement to devastating effect. This may not necessarily translate into liability, but it imposes a duty on the state to correct the issue and resist sexual violence.¹⁰⁴⁸ To impose a duty would be means of resisting it. It would make clear that those engaging in such behaviours are committing a wrong and will attract few if any, legal protections.

Moreover the nature of harm is such that Ross's ought not to profit from his wrongdoing. Karen-Paz's research on sex trafficking provides a useful analogy here.¹⁰⁴⁹ They conceive of traffickers as interfering with the rights of their victims by using their body without consent. They then profit from this interference, be it financially, personally, or sexually, and so are legitimate targets in tort who ought to be compelled to forfeit any ill-gotten gains from a calculated violation of another's rights.¹⁰⁵⁰ While the severity of violence is not equivocal, Ross's enterprise sets the stage for his students to interfere with their victims. He effectively tells them to use the bodies of women, irrespective of their

¹⁰⁴⁵ Ibid 5-10

¹⁰⁴⁶ Stapleton(n980) 70-80

¹⁰⁴⁷ Tsachi Keren-Paz, "Moral and legal obligations of the state to victims of sex trafficking: Vulnerability and beyond" In Sharron Fitzgerald(edt) *Regulating the International Movement of Women* (Routledge, 2011)

¹⁰⁴⁸ Ibid 175-190

¹⁰⁴⁹ Tsachi Keren-Paz, *Sex Trafficking: A Private Law Response* (Routledge, 2013)

¹⁰⁵⁰ Ibid 46-65 153-156

consent, to achieve sexual success. Thus, his students are empowered to usurp the bodily rights of those women for their own personal gain, while Ross benefits financially. Both Ross and his students profit at the expense of their victims. The proposed duty is a means of giving those victims a claim to profits made at their expense. Those victims have suffered sexual harm, which is physical harm and so ought to attract the highest level of protection.¹⁰⁵¹ Ross should not be permitted to benefit from a calculated violation of the rights of his victims. To allow him to do so, and refrain from imposing a duty, is to implicitly endorse those who undermine public order and the physical safety of women for profit.

The proposed duty would be a means to uphold public order, maintain the dignity of the law, and inhibit Ross from profiting from his enterprise. Thus there are further factors erring in favour of its imposition.

Incrementalism

On the basis of these arguments, the proposed duty is said to be desirable judicial policy. However, this must be tempered by incrementalism. The proper scope of the policy inquiry has never been fully determined, and its potentially infinite scope has troubled the courts.¹⁰⁵² Thus, the law of negligence prefers to develop incrementally. Judges should not readily depart from the current bounds of negligence, even if a proposed duty is desirable policy.¹⁰⁵³ As Beever describes, incrementalism was hastily adopted after unfettered policy caused negligence to expand so dramatically. Thus it mitigates, rather than eliminates, the damage of deciding claims on social policy.¹⁰⁵⁴ Incrementalism can best be understood as a control factor; a duty which appears to be desirable judicial policy must be assessed in light of the wider case law.¹⁰⁵⁵ If it is a small, incremental step, it is likely to be imposed. If it is a vast leap into the unknown, it will almost certainly be denied.

The proposed duty is novel, although there are comparisons indicating it does not exceed what the law of negligence currently allows. There is an analogue to duties of

¹⁰⁵¹ Ibid

¹⁰⁵² Plunkett(n916) 50-60

¹⁰⁵³ Witting(n764) 31-50

¹⁰⁵⁴ Beever(n1032) 194

¹⁰⁵⁵ Ibid

care for coaches, trainers, or professionals who give negligent advice and cause injury. It is well established that the ordinary principles of negligence apply to sporting professionals who negligently cause injury. The supervisory, instructional, and safety functions of the instructor-student relationship gives rise to a duty of care.¹⁰⁵⁶ In *Fowles*¹⁰⁵⁷ the claimant suffered a serious and permanent spinal injury after failing to perform a somersault at a Youth House. Otton LJ identified that a youth worker had demonstrated the somersault to the claimant despite not being qualified to do so, and that there was no proper system of instruction.¹⁰⁵⁸ Millet LJ concluded that in teaching the move, the defendant assumed a duty to do so properly.¹⁰⁵⁹ They had failed in that respect and so were answerable in negligence.

Likewise in *Pinchbeck*,¹⁰⁶⁰ the defendant operated an indoor rock climbing centre, however failed to give adequate instruction to the claimant on how to descend the wall safely. The claimant simply jumped down from the wall and injured her ankle. HHJ Curran concluded the defendant owed a duty to supervise and properly instruct those they allowed to use the bouldering wall. Instead they simply left the claimant to their own devices, and so breached that duty.¹⁰⁶¹ Of course both cases feature duties owed by the owners and operators of sporting facilities who then fail to provide adequate instruction.

This is not quite what is happening on the vignette, where Ross provides Alex with advice pursuant to their contract. The better comparison might be to a personal trainer, who is paid to provide fitness advice. On whether a duty is owed in these circumstances there is a line of unreported successful negligence claims for sports coaches and professionals who negligently instruct their clients.¹⁰⁶² Fundamentally a person who undertakes to perform a professional or quasi-professional service for another, will be

¹⁰⁵⁶ Neil Partington, “Sports coaching and the law of negligence: implications for coaching practice,” [2015] SCRev, 6, 36, 36-40

¹⁰⁵⁷ *Fowles v Bedfordshire County Council* [1995] PIQR P380

¹⁰⁵⁸ *Ibid* [381-386]

¹⁰⁵⁹ *Ibid* [389-390]

¹⁰⁶⁰ *Pinchbeck v Craggy Island Ltd* [2012] EWHC 2745

¹⁰⁶¹ *Ibid* [54-61]

¹⁰⁶² Neil Partington, “Sports coaching and the law of negligence: Implications for Coaching Practice,” [2016] SCR 6 36

duty bound to take care while doing so.¹⁰⁶³ In addition, there is relevant authority from the United States. To Magnus, common law jurisdictions operate on a general conception of negligence.¹⁰⁶⁴ The duty of care is a recurring feature with transferable principles, so a duty in one jurisdiction will likely be replicated in another. However, there is a need for caution. The US tort process is dispersed across multiple states with different legal systems. Moreover there are essential differences in how the two jurisdictions operate, and so there are fundamental differences despite their similarities. Thus, that a duty exists in the US will not definitively answer whether one exists in the UK,¹⁰⁶⁵ but may prove illuminative.

In *Layden*,¹⁰⁶⁶ a personal trainer gave written instructions to their client. The client followed those instructions and injured her back so severely that she required surgery. Gary J concluded that if the instructions were improper and unreasonably exposed the claimants to a risk of personal injury, the defendant would be answerable in negligence. A professional who provides negligent advice causing injury breaches the duty of care to their client. Partington¹⁰⁶⁷ argues that the same is true in England and Wales, with instructors being under a legal duty to adopt objectively reasonable coaching practices. They must ensure all activities are as safe as possible and will be liable for exposing those under them to unnecessary risk.¹⁰⁶⁸

There is further authority to indicate that a person is liable when they give careless advice resulting in harm. A person who gives carelessly advice knowing, actually or inferentially, that it will be relied upon for a given purpose, without independent inquiry, will be liable if the claimant relies on that advice to their detriment.¹⁰⁶⁹ For instance in *Hedley Byrne*¹⁰⁷⁰ the claimant asked the defendant bank to confirm a client's creditworthiness, which resulted in them continuing to work with the client. That client then entered liquidation and so the claimant sought to recoup their losses. The House

¹⁰⁶³ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145

¹⁰⁶⁴ Ulrich Magnus "Tort Law in General," in Jan Smits(ed) *Elgar Encyclopedia of Comparative Law*, (EEP. 2nd Edt, 2012) 879-880

¹⁰⁶⁵ John Fleming, *The American Tort Process* (1988, OUP) ii-vii 234

¹⁰⁶⁶ *Layden v Plante* 2012 NY Slip Op 09126

¹⁰⁶⁷ Neil Partington, *Coaching, Sport and the Law A Duty of Care* (2021, Routledge)

¹⁰⁶⁸ *Ibid* 121-130

¹⁰⁶⁹ *Caparo*(n943) [638]

¹⁰⁷⁰ *Hedley Byrne v Heller* [1963] AC 465

of Lords found that the relationship between the parties was sufficiently proximate because the defendant gave it, knowing it would be relied for a purpose without independent inquiry.¹⁰⁷¹ In principle, negligence liability was possible in the circumstances, and only failed because it had been disclaimed.¹⁰⁷² In light of recent developments in the case law, which will be assessed in due course, the nature of the harm would also be relevant here. For the time being it is, in principle, possible for the provision negligent advice, resulting in harm, to give rise to a duty of care.

Thus, say Ross was an online personal trainer who carelessly instructed Alex to perform a routine he was not ready for. A duty of care should arise when Alex relies on his instructor's advice, attempts to perform the routine, and injures himself. Ross should be liable on the ordinary principles of negligence. However this is not what occurs in the vignette, as Alex causes harm to Amelia. The better analogy would be that Alex, when attempting to perform the routine, loses control because he is not ready for such an advanced manoeuvre and so collides with Amelia. In both instances, harm flows from a person relying on the careless instructions and directions provided by their teacher. Ross has created a danger by directing Alex to do something he was not ready for, resulting in harm to a third party. Does he then owe a duty to that third party?

In *McFarlane*¹⁰⁷³ the claimant's husband had a vasectomy. The defendant advised him that his sperm count was nil by and so there was no need to take contraceptive precautions. His wife later fell pregnant. By the time the matter came to the House of Lords it was not disputed the defendant had been negligent. Lord Steyn identified that the surgeon had carelessly advised the husband, resulting in the wife suffering what was in essence personal injury.¹⁰⁷⁴ The question for the Court was more concerned with whether damages could be claimed for an unwanted child.¹⁰⁷⁵ That the defendant owed a duty to a third party was not in dispute. The reason can be extracted from the earlier case, of *Anderson*.¹⁰⁷⁶ Here the claimants were husband and wife, and had two children with a fatal genetic condition. However the defendant had failed to properly advise her

¹⁰⁷¹ *McClellan v Thornhill* [2023] EWCA-Civ-466; [2023] 1 WLR 3802 [89],[104-105]

¹⁰⁷² *Ibid* [483-484],[493]

¹⁰⁷³ *McFarlane v Tayside Health Board* [2000] 2 AC 59

¹⁰⁷⁴ *Ibid* [75],[81]

¹⁰⁷⁵ *Ibid* [70-75]

¹⁰⁷⁶ *Anderson v Forth Valley Health Board* 1998 SLT 588

on the condition and as a result she did not terminate the pregnancies, and the husband sought a vasectomy. Lord Nimmo-Smith concluded that the defendant's duty of care extended to both the husband and the wife. Both of them would be directly affected by the provision of services relating to pregnancy, and so the defendant ought to have considered them both.¹⁰⁷⁷ Accordingly, a defendant who knows another person will be directly affected by their advice will owe them a duty, provided that this does not cause the duty to become inordinately wide.¹⁰⁷⁸

By analogy if Ross, the personal trainer, gives careless advice to Alex on how to perform a routine then there is scope for others to be affected. If something goes wrong and Alex falls while holding heavy weights, there is every possibility he might collide with, and cause damage to, the persons and property of third parties. Those third parties will be directly affected by the advice, because it will shape how Alex will move his body, and take risks, while in their presence. If Ross's advice exposes them to real prospect of physical harm, they are directly affected by it, and so they ought to be owed a duty. Indeed the vignette goes further, as in this example the involvement of third parties is ancillary. In the vignette Ross specifically envisions Alex approaching, speaking, and eventually touching women in an effort to secure sex. Those women will be directly impacted by Ross's advice, and so he ought to have them in contemplation before acting. The proposed duty is not a dramatic expansion of the law of negligence. It is an incremental step from the world of sporting professionals, which applies the existing case law on when careless advice will result in a duty to third parties.

How far then would this extend? Would an employment coach who advises a person to embellish their CV, be liable in negligence to the employer they know will be directly affected by their actions? Or would a tax lawyer who gives careless advice on the validity of a tax scheme to an accounting firm, be liable to the clients he knows will eventually rely upon it. Generally the answer is no because of the nature of the harm. The vignette features sexual harm, and a great deal of focus has been dedicated to that. The invocation of sexual harm does give rise to the risk that a duty is being justified not by principle, but revulsion. Sexual violence is emotive, and so there is an instinct to

¹⁰⁷⁷ Ibid [600-606]

¹⁰⁷⁸ *Goodwill*(n991)

impose a duty whenever it arises. However the emphasis on sexual violence is necessary, because the imposition of a duty is sensitive to the type of harm.

In *D.&F Estates Ltd*,¹⁰⁷⁹ the claimant leased a flat which had been built by the defendant, however the negligence of the defendant's subcontractors resulted in the plastering being defective and in need of replacement. Lord Bridge identified that had the negligence of the builder resulted in physical harm, then he would be liable in negligence.¹⁰⁸⁰ However if the defect is discovered before any harm is caused, then the claimant has suffered pure economic loss which will not be recoverable unless there is a special relationship between claimant and defendant.¹⁰⁸¹ The same is true when a negligent misstatement causes economic loss to the claimant; there must be an assumption of responsibility in order for the defendant to be liable.¹⁰⁸² The harm featured in the vignette is physical harm, which attracts the highest level of protection. Therefore the need for there to be a special relationship, or an assumption of responsibility, is displaced.

To demonstrate, in *Clay v AJ Crump & Sons Ltd*,¹⁰⁸³ an architect was responsible for planning and supervising redevelopment works. He authorised the demolition contractors to leave a wall in place. Several weeks later the claimant, a builder, was injured when the wall collapsed. Ormerod LJ found that the architect had exposed the builders to an unwarranted risk of harm by advising all those involved that it was safe to leave the wall intact when it was not. Moreover even though he had no direct relationship with the builders, the architect knew that builders would be on site, and so ought to have had them in contemplation.¹⁰⁸⁴ Thus he owed them a duty not to expose them to a risk of physical harm by his careless advice and so was liable to the claimant for damages.¹⁰⁸⁵

¹⁰⁷⁹ *D&F Estates Ltd v Church Commissioners for England* [1988] 3 WLR 368

¹⁰⁸⁰ *Ibid* [205]

¹⁰⁸¹ *Ibid* [208-210]

¹⁰⁸² *Steel v NRAM Ltd* [2018] UKSC 13 [2018] 1 WLR 1190, *Burgess v Lejonvarn* [2017] EWCA Civ 254

¹⁰⁸³ *Clay v A J Crump & Sons Ltd. and Others* [1963] 3 WLR 866

¹⁰⁸⁴ *Ibid* 558-563

¹⁰⁸⁵ *Ibid*

Similarly, in *Perrett v Collins*,¹⁰⁸⁶ the claimant sustained injuries after a light aircraft, flown by the first defendant, crashed. The second defendant was an inspector, who reported to the third defendant. The inspector certified the vehicle as airworthy, whereupon the third defendant issued a certificate to that effect. The claimant was seriously injured when the pilot lost control of the aircraft, and sought damages from all three defendants. To Hobhouse LJ, the common law has always distinguished between physical harm and economic loss. If the defendant has created a foreseeable risk of personal injury they will owe a duty to those who will be affected by this.¹⁰⁸⁷ Hobhouse LJ rejected that cases involving pure economic loss had any relevance to those involving physical harm.¹⁰⁸⁸ The second and third defendants had created a foreseeable risk of personal injury by carelessly inspecting and certifying the aircraft as airworthy when it was not. Thus they owed a duty of care to those who would be affected by their carelessness, including the claimant.¹⁰⁸⁹ Accordingly, in cases where negligent advice creates a risk of physical harm there is no need for the claimant to show a special relationship. The defendant will be liable if their negligent advice, instructions, or directions, creates a risk of physical harm which is then realised.

In much the same vein a builder, who is contracted by a building company, will not be liable to the eventual homeowners if their negligence causes them pure economic loss alone.¹⁰⁹⁰ Or a tax lawyer will not be liable when she gives negligent advice on the validity of a tax scheme to an accounting firm, which is then relied upon by their clients. When the loss is purely economic, the remote actor will not be liable unless there are in a special relationship with the claimant. However, the position changes if the remote actor creates a risk of physical harm, at which point there is no need for a special relationship and so a duty will more readily arise.

There is further support within the case law for this position from *T v Surrey County Council*,¹⁰⁹¹ which was raised earlier when discussing proximity. Here the Local

¹⁰⁸⁶ *Perrett v Collins* [1998] 2 Lloyd's Rep 255

¹⁰⁸⁷ *Ibid* 84-87

¹⁰⁸⁸ *Ibid* 94

¹⁰⁸⁹ *Ibid*

¹⁰⁹⁰ *Murphy v Brentwood DC* [1991] 1 AC 398 [515-516], *Warner v Basildon Development Corp* [1991] 1 WLUK 487

¹⁰⁹¹ *T v Surrey CC*(n1014)

Authority advised the claimant that their child could be safely left in the care of a childminder. The Local Authority was aware that the childminder had been connected to a serious non-accidental injury of a child. As a result it gave negligent advice which caused the claimant to employ the childminder, and in so doing put her child at risk of a serious non-accidental physical injury. Thus the Local Authority owed a duty of care, and were liable when the child came to serious non-accidental physical harm. The critical component is the nature of the harm because the position will change if, on similar facts, the claimant suffers pure economic loss.

Say Alan, a landlord, receives an application from Chris to rent a property. Chris was previously housed by the Local Authority. Alan calls the Local Authority who tell him that he can safely rent to Chris, when in fact they are aware he was in arrears for much of his tenancy. Alan, feeling reassured by this, rents the property to Chris who stops paying rent shortly thereafter resulting in an expensive, and time consuming, eviction process. Here, Alan has suffered pure economic loss and there is no special relationship between him and the Local Authority. Therefore there is nothing to suggest that the Local Authority owe him a duty of care, nor that they should be liable for his purely economic losses. Despite the facts being very similar to *T v Surrey CC*,¹⁰⁹² the outcome is different because the nature of the harm has changed.

The vignette features Alex causing physical harm to Amelia because of Ross's careless instruction and directions. In essence Ross has advised Alex on how he should conduct himself, and that advice created a foreseeable risk of harm to Amelia. This is the basic construction of any case involving negligent advice, and so which set of rules apply depends on the nature of the harm. If the harm is purely economic, then there will be no duty of care unless Ross and Amelia are in a special relationship. If the harm is physical, then no special relationship is necessary. The advice cases discussed during the analysis are all, functionally, the same, whether the advice be given by a personal trainer, doctor, or tax adviser. The extent to which a duty will arise is contingent on the type of harm, even if the basic construction of A giving careless advice to B which creates a risk of harm, remains intact. This is not a subversion or alteration of the law of

¹⁰⁹² Ibid

negligence, but an application of its existing principles. The proposed duty reflects the proposition that a person who creates a risk of physical harm by carelessly instructing and directing another should be liable when it manifests. A proposition which is reflected in *Fowles, T v Surrey CC, Perret*,¹⁰⁹³ and to a lesser extent in *McFarlane*.¹⁰⁹⁴ While there is a reluctance by the courts to impose a duty in cases involving advice resulting in pure economic loss, this is clearly not true for instances of physical harm. Thus, the proposed duty should not be thought of as a dramatic expansion of negligence liability, but rather an application of the common law principles as they currently exist.

This is not to say it would not have wider applicability, because it would. Imagine a culinary instructor runs a series of online classes for young parents who want to prepare healthy meals for their children. As a result of their carelessness, the students leave thinking that they should not remove rhubarb leaves when preparing a dessert. As a result, some of their children become ill from rhubarb leaf poisoning. In the circumstances, the instructor has created a risk of physical harm by carelessly instructing their students not to remove a toxin. On the proposed duty, the instructor should owe a duty of care to the children, as they can reasonably anticipate them being impacted by their carelessness. The same would be true for any person, online or offline, who creates a risk of physical harm by carelessly instructing and directing their students, which is then directed at a class of persons who can be reasonably anticipated, but is not inordinately wide.

Negligence: Conclusion

Accordingly, the proposed duty is both desirable judicial policy and does not offend the common law's preference for incrementally expanding the law of negligence. On this basis, it should be said the imposition of the proposed duty is fair, just, and reasonable. All three *Caparo* factors indicate that the proposed duty for influencers who carelessly direct and instruct their followers to cause a risk of physical harm is made out. Therefore there is a plausible duty of care on the vignette, with that duty being for Ross to take reasonable care to obviate or mitigate the danger he has created.

¹⁰⁹³ *Fowles*(n1057), *T v Surrey* (n1014), *Perret* (n1086)

¹⁰⁹⁴ *McFarlane*(n1073), for there was no argument that the doctor's had not been negligent, the critical question was whether the birth of a child could be considered a loss'

Initially this might have been accomplished by not assigning him in the mission in the first, as that is what directs the danger at a discreet class of persons. Alternatively Ross could have provided clearer instructions, warned Alex that non-consent is sometimes exactly that, or otherwise taken reasonable care when instructing and directing Alex to ensure there was no danger to others.

The same is true for the hypothetical Fire Juggler who, after assigning his students their final task, thinks twice and realises the potential for harm that comes with a stumbling, unsupervised student. At this point, he has already created and directed the source of the danger, but he can still act on his duty to obviate it. To properly discharge it, he might contact his students and tell them not to attempt their mission. Or suggest refining their skills, providing them with safety information, or simply telling them not to perform until they are sure there is no risk of harm to the public. By interceding, the Fire Juggler obviates the danger, as the student is unlikely to make the attempt without his teacher's blessing. His duty is discharged by proactively interceding to eliminate or mitigate the danger before it manifests, and this is exactly what was expected of Ross. When defendants use their position or authority to create a source of danger, they must meaningfully intercede to reduce or eliminate that risk. To do nothing is to breach the duty, and so it makes the defendant answerable in negligence.

Thus, what is required is a meaningful attempt to prevent the danger from being realised, which requires more than, say, a cosmetic warning or allusion to potential danger. In *A v Watchtower*,¹⁰⁹⁵ the claimant was sexually abused by a ministerial servant of the Jehovah's Witnesses who had previously been investigated for abusing his position. To Globe J the Elders of the congregation owed a duty of care the moment they learned that this ministerial servant might pose a risk.¹⁰⁹⁶ Thus, they were required to meaningfully warn the congregation so parents could be make an informed choice to safeguard their children.¹⁰⁹⁷ Instead, they provided a generic warning during a meeting at the Kingdom Hall which fell far short of what the duty demanded of them.¹⁰⁹⁸ For the vignette, Ross must do more than give a cosmetic or generic warning but make a

¹⁰⁹⁵ *A v Trustees of the Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB)

¹⁰⁹⁶ *Ibid* [112]

¹⁰⁹⁷ *Ibid* [122]

¹⁰⁹⁸ *Ibid* [123]

meaningful attempt to intercede and prevent the danger from manifesting. His position as an instructor and mentor, Alex means he has the authority and ability to intercede and is expected to do so. Instead, he passively allows events to play out, breaches his duty.

Indeed had Ross made any effort to do this whatsoever there would be an interesting question on the standard of care. For instance, whether Ross should be assessed with reference to what is acceptable by the standards of competent Pick Up Artists.¹⁰⁹⁹ This does not arise in the vignette, as Ross makes no such effort. The exact standard of care may be difficult to assess, and something which may need to be examined if the proposed duty is to be expanded. However for the time being, that discussion is beyond the scope of the thesis. The thesis sought to investigate whether negligence was possible in the circumstances. To that end it advanced a proposed duty to obviate or mitigate a risk of harm, the breach of which has caused actionable harm which is not too remote. Harm occurs within the scope of the duty because the physical non-consensual harm featured in the vignette, is the very thing Ross was compelled to guard against. Thus, the tort of negligence arises on the vignette, and so there is a viable legal tool through which liability can be established.

Vicarious Liability

Vicarious liability shifts the classic view of tort as holding defendants liable only for what they have done or authorised.¹¹⁰⁰ Instead, they become directly liable for the torts of another, even if they had no knowledge of it. For instance, in *Harrison*¹¹⁰¹ the claimant was struck by an employee of the defendant during a practical joke. The act was unauthorised; however, the employer could still be vicariously liable. Thus, the defendant was responsible as if he had personally caused the injury and liable for the full sum of damages.¹¹⁰² Thus, vicarious liability is another route to liability.¹¹⁰³ Vicarious liability makes the employer strictly liable for the torts of their employee, which then entitles the claimant to recover the full sum of damages from the employer.

¹⁰⁹⁹ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

¹¹⁰⁰ Clerk(n548) 6-01

¹¹⁰¹ *Harrison v Michelin Tyre Co Ltd* [1985] 1 All ER 918

¹¹⁰² Ibid 702

¹¹⁰³ Clerk(n548)

This shift of responsibility is difficult to explain, and judges and scholars have struggled to justify it.¹¹⁰⁴ Steele identifies the range of justifications which have been proposed for vicarious liability. For instance, vicarious liability has historically been invoked when the tortfeasor cannot compensate the claimant directly. Thus, the employer is the only viable route for payment.¹¹⁰⁵ This principle has since been muted, although it ought to be credited for much of the early development of vicarious liability. Enterprise liability theories suggest that a person who creates a risk via their enterprise should assume responsibility for the consequences. Either for moral reasons to stimulate socially efficient risk-taking.¹¹⁰⁶ Deterrence theories hold that the employer ought to be incentivised to improve safety standards beyond the bare minimum and take great care when selecting employees. Thus, vicarious liability is justified by its ability to deter employers from taking unwarranted risks.¹¹⁰⁷

However, all of the proposed justifications fail to explain the case law. The true justification for vicarious liability has never been identified.¹¹⁰⁸ To Baty, it has never been clear what the justification for vicarious liability actually is, and the sheer volume of theories might lead one to assume the doctrine has no firm basis in policy.¹¹⁰⁹ While Atiyah¹¹¹⁰ suggests there is no single justification of vicarious liability, nor is one required. In a complex modern society, legal principles may have multiple justifications. Even if none of them, taken individually, is sufficient, their combined effect may be overwhelming. Thus, the courts may have due regard to any and all of them when applying the doctrine, and indeed balancing competing justifications is familiar part of the legal process.¹¹¹¹

In any event, at common law, vicarious liability turns on a two-stage test.¹¹¹² Firstly, the defendant and the tortfeasor must be in a relationship capable of giving rise to vicarious

¹¹⁰⁴ Witting(n764) 606-615

¹¹⁰⁵ Steel(n932) 604-610

¹¹⁰⁶ Ibid

¹¹⁰⁷ Ibid

¹¹⁰⁸ Ibid 610-620

¹¹⁰⁹ Thomas Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-Union Members with a Chapter on the Laws of Scotland and Foreign States*, (1916, CP) 147-148

¹¹¹⁰ PS Atiyah, *Vicarious Liability in the Law of Tort* (1967, Butterworths) 15

¹¹¹¹ Ibid

¹¹¹² Clerk(n548) 6-01

liability. This is predominantly a relationship of or akin to employment, but there are other such relationships, including agents and members of unincorporated associations.¹¹¹³ Secondly, there must be a close connection between that relationship and the tort.¹¹¹⁴ Should both be made out, then the defendant is vicariously liable. Both stages would be necessary for the vignette, but the critical question for this chapter is whether it can be legitimately said that Alex and Ross are in a relationship akin to employment. Without this, there can be no vicarious liability.¹¹¹⁵ The second stage, the close connection test, is discussed in the subsequent chapter.

Akin to Employment

The relationship between Alex and Ross could be argued as having some of the characteristics commonly associated with relationships of employment. Ross appointed Alex to the course, was in a position of authority, was entitled to give directions, and could remove Alex unilaterally. Their contractual relationship places him in the dominant position, and Alex is expected to comply with his directives. However, while money changes hands, it is not paid to the purported employee by the employer. Alex is paying for the course, can stop doing so whenever he wishes, and has no legal obligation to comply with Ross's instructions. However, that the relationship is unconventional does not preclude vicarious liability.

Vicarious liability is not restricted to relationships of employment. In *JGE*¹¹¹⁶ the claimant was housed in a home run by the defendant diocese and abused by a Catholic priest. To Ward LJ, it was common ground that the priest was not an employee, yet this did not defeat vicarious liability.¹¹¹⁷ To identify whether there is a relationship akin to employment, it is necessary to examine what makes a man an employee. An employee works under the supervision and direction of another for their benefit and not their own.¹¹¹⁸ The priest worked under the authority of a bishop in an environment in which he was bound by ecclesiastic expectations of obedience.¹¹¹⁹ The priest might be able to

¹¹¹³ Ibid

¹¹¹⁴ Ibid 6-02

¹¹¹⁵ Ibid 6-07

¹¹¹⁶ *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] QB 722

¹¹¹⁷ Ibid [22-30]

¹¹¹⁸ Ibid [6],[36]

¹¹¹⁹ Ibid [74-76]

decide how to carry out his tasks but was accountable to the bishop, who supervised his work and effected improvements in his performance.¹¹²⁰ The essence of the relationship between them captured what it meant to be an employee, and so the two were in a relationship akin to employment.

The Supreme Court clarified the doctrine in the *Institute of the Brothers of the Christian Schools*.¹¹²¹ The defendant was an unincorporated association of religious brothers bound by vows and strict adherence to a code of conduct. Several of the brothers went on to teach at a residential school and, in breach of their code, sexually abused the claimants. The Supreme Court affirmed that the first stage of vicarious liability is to determine whether the relationship between the tortfeasor and the defendant can give rise to vicarious liability.¹¹²² Lord Phillips observed that the brothers taught on behalf of the Institute and were bound by its influence and expectations. Their teaching formed part of their obligations to the Institute so that relationship persisted throughout their employment.¹¹²³ Moreover, he identified five factors which, if present, indicate a relationship is akin to employment. Firstly, the purported employer is more likely than the tortfeasor to have the means to compensate the claimant. Secondly, the tort will have been committed during an activity done for the employer's benefit, which, thirdly, falls within the scope of their enterprise. Fourthly, the purported employer will have created the risk of the tort being committed, and fifthly, the tortfeasor will be under their control.¹¹²⁴

The brothers were members of a hierarchical organisation that exercised pervasive control over them. The reason they were teaching was because this was what the Institute demanded. That teaching was done for the benefit of the Institute, served its objectives, and was conducted according to its rules.¹¹²⁵ Paired with the Institute's means and the natural risk of harm that comes with having authority over children, the five factors indicated this was a relationship akin to employment. Thus, vicarious

¹¹²⁰ Ibid [74-76]

¹¹²¹ *The Catholic Child Welfare Society and others v Various Claimants (FC), The Institute of the Brothers of the Christian Schools and others* [2012] UKSC 56; [2013] 2 AC 1

¹¹²² Ibid [21]

¹¹²³ Ibid [20]

¹¹²⁴ Ibid [35]

¹¹²⁵ Ibid [56]

liability could arise. To Morgan, this changed vicarious liability for the better, extending it just as the nature of employment was changing.¹¹²⁶ So, the Supreme Court potentially extended vicarious liability to franchisers, volunteers, and other relationships previously beyond its scope. Vicarious liability is no longer concerned with set categories but a close examination of the relationship between the purported employer and employee.¹¹²⁷ For the vignette, that Alex and Ross are not in a conventional employment relationship is irrelevant. The question is whether it is akin to employment, which references the five factors.

The five factors were expanded upon in *Cox*.¹¹²⁸ Here, the claimant was responsible for supervising prisoners working in a kitchen and was injured by a negligent prisoner. Lord Reed identified the first factor is unlikely to ever be independently relevant.¹¹²⁹ Secondly, control is concerned with whether the purported employee can dictate what the purported employee does rather than how they do it.¹¹³⁰ Thirdly, the factors concerning the scope of the defendant's enterprise exist to make the defendant liable for torts which are reasonably incidental risks of their business activities.¹¹³¹ Finally, vicarious liability does not require the payment of substantial wages.¹¹³² On the facts, the purported employer had the right to control what the prisoners did. Their cooking provided meals, which assisted the defendant in running the prison efficiently. The injury was a reasonably incidental risk of running a prison kitchen and so fell within the scope of the enterprise. The five factors indicated this was a relationship akin to employment, and so stage one was satisfied.

Vicarious liability does not depend on remuneration, and applies to volunteers. In *A v Trustees of the Watchtower Bible and Tract Society*,¹¹³³ the claimant sought to make the governing body of *Jehovah's Witnesses* vicariously liable for sexual abuse inflicted by a ministerial servant. Globe J identified that the organisation, like early Christianity, fuses

¹¹²⁶ Phillip Morgan "Vicarious Liability on the Move," [2013] 129 LQRev139

¹¹²⁷ *Ibid* 140

¹¹²⁸ *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660

¹¹²⁹ *Ibid* [20]

¹¹³⁰ *Ibid* [21]

¹¹³¹ *Ibid* [23]

¹¹³² *Ibid* [37]

¹¹³³ [2015] EWHC 1722 (QB)

the lay and clergy classes. Congregations are led by appointed Elders who select ministerial servants to provide voluntary practical assistance.¹¹³⁴ Ministerial Servants clean the Kingdom Hall, set the stage for meetings, and have other duties delegated to them.¹¹³⁵ They provide an invaluable service to the smooth running of the organisation. Thus, they are integral to it and benefit its wider aims and objectives.¹¹³⁶ Service as a ministerial servant is a pre-requisite for appointment as an Elder, and so they are integrated into the wider organisation.¹¹³⁷ The five factors indicated this was a relationship akin to employment and so the defendant was vicariously liable for their unremunerated volunteer.

The vignette features reversed remuneration, with the purported employee paying the purported employer. This is a considerable departure from the normal features of employment. However, the *Christian Brothers* involved the brothers surrendering their income to the Institute, and so there is clear authority that vicarious liability can arise when remuneration is reversed.¹¹³⁸ Although it must be noted that this case occurred in a religious context which is not replicated in the vignette. In addition, the brothers were not paying members of the Institute but rather surrendering their income to the organisation. Nevertheless, as Atiyah observes,¹¹³⁹ remuneration is an indicator of employment and has never been conclusive. Say A, an aspiring lawyer, volunteers in a legal clinic and, in the process, commits a tort. This is a plausible vicarious liability scenario. This should not change if A, performing the same services, is paying for the experience. Imagine instead A is also a law student and volunteers in his university's clinic. His entitlement to participate is contingent on him paying his tuition, without which he would no longer be eligible. Remuneration is reversed and yet if he performs the same duties and commits the same tort, it would be odd if this were no longer a plausible vicarious liability scenario. Furthermore, if vicarious liability was inhibited when remuneration is reversed purported employers could evade it entirely by asking their volunteers to contribute a small sum. A person volunteering in a legal clinic, or

¹¹³⁴ Ibid [11-14]

¹¹³⁵ Ibid [16]

¹¹³⁶ Ibid [69]

¹¹³⁷ Ibid [62]

¹¹³⁸ *Christian Brothers*(n1121) [57-59]

¹¹³⁹ Atiyah(n1110) 50-70

even working altruistically for a charity, might be content to part with a token amount in exchange for the experience being offered. The idea that this should then relieve the purported employer of any and all vicarious liability is bizarre. Vicarious liability turns on the relationship between A and B, and while remuneration is a factor, it cannot be conclusive. If all that has changed is the flow of remuneration, then vicarious liability should not suddenly be excluded.

To continue the earlier analogy, take the following examples modelled on the Fire Juggler. In the first, the Fire Juggler is to take an apprentice and invites candidates to submit applications. The apprentice will be paid a nominal amount, will learn by observation, and work towards performing unsupervised. Should they fail to meet his expectations, the apprenticeship might be terminated. Eventually, the Fire Juggler selects his apprentice and tells them to perform to the public whereupon the apprentice makes a clumsy mistake and rains fire down upon the audience. The relationship is not akin to employment but simply one of employment.¹¹⁴⁰ The Fire Juggler is in a relationship capable of vicarious liability.

In the second example, the Fire Juggler wishes to take on an unpaid apprentice who will perform the same duties and receive the same instruction as a volunteer. The volunteer apprentice will still be working for the benefit of the Fire Juggler, and integrated into the enterprise. The Fire Juggler will have the power to appoint and dismiss the volunteer apprentice and the authority to control what they learn and when they perform. This is likely a relationship akin to employment. To Morgan,¹¹⁴¹ those under the control of another, in almost any capacity may attract vicarious liability. For instance, unpaid amateur footballers who are managed, presented to the public, and held to the same standards as professionals are likely in a relationship akin to employment.¹¹⁴² Thus, their football club is likely to be liable for any torts they commit on the pitch.¹¹⁴³ Similarly, this example features a volunteer being held to the same standards as a paid apprentice. They will be trained and managed to that effect and expected to complete

¹¹⁴⁰ Ibid 72

¹¹⁴¹ Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 CLJ 615

¹¹⁴² Phillip Morgan, 'Vicarious Liability and the Beautiful Game - Liability for Professional and Amateur Footballers?' (2018) 38 LS 242, 251-262

¹¹⁴³ Ibid 251-262

the tasks assigned to them. Should the apprentice perform, there is little to distinguish them from a professional. As with amateur footballers, the volunteer apprentice is expected to submit to the instruction of another. That person can control what they do, what they learn, and when they are ready to perform. The essential elements of the relationship which attract vicarious liability remain, in the absence of remuneration.

Finally, the Fire Juggler concludes his teaching is so valuable that he ought to be paid for it. He then seeks a paying apprentice. He will expect them to submit to his instructions, complete the tasks he assigns, learn from him, and eventually perform for the public. The Fire Juggler will exercise the same level of control and the same authority, and all that has changed is the flow of remuneration. If remuneration is not a necessary or sufficient condition, it is incongruent to say that alone excludes vicarious liability. It is a minor factor, and so should not inhibit vicarious liability when the relationship would otherwise be akin to employment. Indeed, in the *Christian Brothers*, the brothers were expected to transfer their earnings to the Institute.¹¹⁴⁴ Moreover the concept of an apprentice who pays for the privilege of their position is not alien to the law of England and Wales. Minns and Wallis describe that apprentices well into the 18th century were required to make an up-front payment, a premium, to obtain their position and compensate their master for training them.¹¹⁴⁵ It is believed that most crafts and trades charged premiums of around £10, while the professionals expected closer to £50. While these prices fluctuated, the existence of premiums are well documented.¹¹⁴⁶ While this is no apparent authority confirming that masters were vicariously liable for their paying apprentice, there is a high likelihood they are. The strands of vicarious liability date back to at least the sixteen hundreds, and began to crystallise, couched in the language of master and servant, in the 19th century.¹¹⁴⁷ Apprenticeship at the time vicarious liability was crystallising, involved the payment of a premium. An apprentice is a servant for the purposes of vicarious liability.¹¹⁴⁸ It would be odd for there to be an exception for those which paid a premium, as that was the reality of apprenticeships until the early 20th

¹¹⁴⁴ *Christian Brothers*(n1121) [57-59]

¹¹⁴⁵ Chris Minns, Patrick Wallis, "The price of human capital in a pre-industrial economy: Premiums and apprenticeship contracts in 18th century England," [2013] EEH, 3 335 335-340

¹¹⁴⁶ *Ibid* 342-343

¹¹⁴⁷ *Baty*(n1109) 7-12

¹¹⁴⁸ *Atiyah*(n1110) 72

century.¹¹⁴⁹ There is a suggestion vicarious liability is not impeded when remuneration was reversed. Thus, on the vignette, vicarious liability should not be excluded as a matter of principle if the relationship is otherwise akin to employment.

However, that vicarious liability is not excluded as a matter of principle when remuneration is reversed only takes the argument so far. In *BXB*,¹¹⁵⁰ The Supreme Court concluded that stage one of vicarious liability requires a court to carefully consider the relationship and the ways in which it is similar to, or different from, a relationship of employment. Accordingly, the relationship between Ross and Alex must be assessed in light of the five factors. The first factor, the means of the purported employer to compensate the victim, can be largely disregarded. It is unlikely to be of independent significance,¹¹⁵¹ and the means of Alex and Ross are not disclosed. It is implied Ross may be in a better position by virtue of his business, and in principle harm flowing from negligent instruction would, unlike an intentional tort,¹¹⁵² be insurable. Nevertheless it is not possible to draw a conclusion on the facts of the vignette. Thus further discussion of this factor of limited relevance, is unnecessary.

Akin to Employment: Control

Atiyah suggests that vicarious liability has never been concerned with employment but relationships.¹¹⁵³ It focused on employment because at the heart of those relationships was a contract, which gave rise to the necessary elements of vicarious liability. The most important of those elements was control.¹¹⁵⁴ Control is among the key indicators of vicarious liability. For if the tortfeasor is under the control of an employer, the employer ought to have taken greater care when exercising their powers and eliminated the risk of the tort.¹¹⁵⁵ Control is constructed widely. It takes account of the defendant's ability to control the tortfeasor, their powers, and any associated hierarchies.¹¹⁵⁶ A wide-

¹¹⁴⁹ Professor Kirsta Cowman, Apprentices in Britain c. 1890-1920, UK Government, https://assets.publishing.service.gov.uk/media/5a7f7f7fe5274a2e8ab4c89f/Apprenticeships_1914.pdf, Accessed 10/12/2024

¹¹⁵⁰ *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15; [2024] AC 567 [58]

¹¹⁵¹ *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] AC 355 [56]

¹¹⁵² Merkin(n534)

¹¹⁵³ Atiyah(n1110) 31-35

¹¹⁵⁴ *Ibid* 35-40

¹¹⁵⁵ *Ibid*

¹¹⁵⁶ *BXB*(n1150) [58]

ranging inquiry is used to identify the level of control present in any given relationship, as it is an essential precondition for vicarious liability.

Ross exercises some control over Alex, even if it is more limited than what might be traditionally expected of an employment relationship. Alex is expected to submit to Ross's instruction by engaging with course materials, logging his progress, and completing missions. Ross is entitled to tell Alex what to do during those missions and a time frame, even if it is not practically possible for him to micromanage them. Alex is not compelled by the contract to obey Ross, this is simply what he must do to get the most out of the opportunity. Alex cannot engage or progress without submitting to Ross's instructions and completing his missions. Ross cannot force him to act but can remove him from the course if Alex is no longer performing to his satisfaction. So long as Alex wishes to remain on the course, Ross has a right to tell him what to do. Ross exercises a degree of control, even if it falls short of what is present in conventional employment relationships.

The control factor can be satisfied even when the relationship is not one of conventional employment. In *Armes*,¹¹⁵⁷ the claimant sought to make a Local Authority vicariously liable for the physical and sexual abuse inflicted by their foster parents. Lord Reed identified that the Local Authority could control who became foster carers by selecting, inspecting, and reviewing those appointed.¹¹⁵⁸ However, it exercised no control over the day-to-day family arrangements except for decisions requiring parental responsibility.¹¹⁵⁹ The Local Authority could terminate the relationship by removing a child but had no power to dictate how the foster carers carried out their duties.¹¹⁶⁰ The foster parents still had significant obligations to the Local Authority,¹¹⁶¹ albeit those duties are not found in conventional relationships of employment. Nevertheless, this did not prevent them from being in an akin to employment relationship with the Local Authority.

In the vignette, Ross has no practical means of micromanaging how Alex completes his missions but can set goals, instruct him to use techniques, and monitor his progress.

¹¹⁵⁷ *Armes*(n1151)

¹¹⁵⁸ *Ibid* [62]

¹¹⁵⁹ *Ibid* [65]

¹¹⁶⁰ *Ibid* [65-66]

¹¹⁶¹ *Ibid* [59]

Similarly, the Local Authority in *Armes* had no means of micromanaging the foster parents but could set minimum expectations and review their progress. The power to micromanage is not required for vicarious liability.¹¹⁶² Ross has the power to tell Alex which course materials he must engage with, set expectations to this effect, and assign him missions. The Local Authority could require the foster parents to attend training, engage with their services, or complete courses to remain eligible for placements. Both Ross and the Local Authority had the power to appoint their purported employees and terminate the arrangements for unsatisfactory progress or non-compliance.¹¹⁶³ Neither wields a high level of day-to-day control, and the only consequence for non-compliance is termination, but they are in a position of authority all the same.

However, this is an imperfect analogy and these cases may not be transferable outside the realm of foster carers. In *Armes*, the Supreme Court considered whether a foster carer, who was not related to the child, was in a relationship akin to employment. In *DJ v Barnsley MBC*,¹¹⁶⁴ the Court of Appeal considered the position of related foster carers after the claimant was placed with their aunt and uncle. The Court of Appeal attached significant weight to the fact that the Local Authority was under a statutory duty to care for the child. Because of this statutory duty, the Local Authority had to carry out a fostering assessment to identify whether the aunt and uncle were suitable carers.¹¹⁶⁵ In the circumstances they did not require the aunt and uncle to carry out further training, but could have insisted on this if necessary. Thus there was an extensive period of assessment and approval, and so they were, in effect, recruited and selected as foster carers. In addition the Local Authority was duty bound to continually review the child's health, welfare, progress, and gave directions as to how contact should be managed with other members of the family.¹¹⁶⁶ As a result, the statutory and regulatory regime, through which the aunt and uncle were selected and monitored, was an essential part of why they were found to be in a relationship akin to employment with the Local Authority.

¹¹⁶² Phillip Morgan, *Fostering, Vicarious Liability, Non-Delegable Duties, and Intentional Torts* [2016] LQRev 132, 399

¹¹⁶³ *Ibid*

¹¹⁶⁴ *DJ v Barnsley MBC* [2024] EWCA Civ 841

¹¹⁶⁵ *Ibid* [32]

¹¹⁶⁶ *Ibid* [61-63]

Indeed the Court of Appeal emphasised that this decision was specific to the statutory and regulatory regime of the 1980's.¹¹⁶⁷ The same can be extended to *Armes*,¹¹⁶⁸ as the relationship akin to employment was assessed in relation to the Children and Young Persons Act 1969¹¹⁶⁹ and the Child Care Act 1980.¹¹⁷⁰ There is no current authority in England and Wales on whether the contemporary fostering relationship under the Children Act 1989¹¹⁷¹ is a relationship akin to employment. More importantly, the relationship akin to employment is intimately connected to the statutory and regulatory regime governing foster carers. Thus, the case law cannot be widely applicable. Ross is under no statutory duty in respect of Alex. Accordingly, even if there are similarities between the level of control he exercised, and that exercised by the Local Authority, this is unlikely to be decisive.

Nevertheless, the principle that can still be extracted from these cases is that the control present in a relationship can be unconventional and still attract vicarious liability. Indeed, in the contemporary law, the control factor can be satisfied with a bare minimum of vestigial control. This was alluded to in *Gravesend*,¹¹⁷² where the claimant was raped by a man who served as a guide during a school trip.¹¹⁷³ Mackay J observed that there was no contract of employment between the man and the school, and without that contract, regard must be had to the level of control exercised over the tortfeasor.¹¹⁷⁴ The tortfeasor owned the land on which the girls were staying but played no role in their daily activities, did not supervise them, and did little more than drive them from place to place.¹¹⁷⁵ When he made suggestions, the school leaders rejected them, and so his role went no further than allowing them to use his land.¹¹⁷⁶ The school exercised no real control over him so there was no relationship akin to employment.

¹¹⁶⁷ Ibid [69]

¹¹⁶⁸ *Armes*(n1151) [4]

¹¹⁶⁹ Children and Young Persons Act 1969

¹¹⁷⁰ Child Care Act 1980.

¹¹⁷¹ Children Act 1989

¹¹⁷² *QB XVW v Gravesend Grammar School for Girls* [2012] EWHC 575 (QB)

¹¹⁷³ Ibid [38]

¹¹⁷⁴ Ibid [46]

¹¹⁷⁵ Ibid [48-49]

¹¹⁷⁶ Ibid [48]

Similarly, in *Blackpool*,¹¹⁷⁷ a professional football club relied on unpaid volunteers, one of whom took the claimant abroad and sexually assaulted him. To Stuart-Smith LJ, the defendant club exercised no real control over the tortfeasor, who was given a free hand. There was no suggestion the club could control or direct him.¹¹⁷⁸ The tortfeasor was not under the club's control, and so in the absence of even a vestigial degree of control, there was no vicarious liability.¹¹⁷⁹ The High Court described what that bare minimum looks like in *TVZ*,¹¹⁸⁰ in which the claimant sought damages from a football club for sexual abuse inflicted by a coach. Johnson J confirmed that a vestigial degree of control is an essential precondition for vicarious liability.¹¹⁸¹ The tortfeasor did little more than refer promising players to the club.¹¹⁸² A vestigial level of control would have required the defendant to be entitled to instruct him in his style of coaching, determine where games took place, or dictate what kit should be worn. The club had no such entitlement, and so there was no basis on which to conclude they could control the tortfeasor.¹¹⁸³

Ross does more than merely provide Alex with interesting material; he gives suggestions on how he can improve his sexual fortunes. There is an expectation that Alex will engage with the material Ross provides and submit to instruction throughout the 'Total Immersion Course.' For instance, he instructs Alex to construct a 'high-value persona' and sets parameters even if he does not dictate precisely how this should be done. He uses his authority to reinforce the legitimacy of touch escalation and certify that his instructions ought to be followed. Ross not only tells Alex what to do but shapes the techniques he will use, his objectives during missions, and the timeline for completing his tasks. He does not control the minutia of Alex's missions because it would be impractical. Nevertheless, if he told Alex to go to a specific place and interact with specific women at a specific time, this would be within the scope of his powers. There is an expectation that Alex will comply with all instructions given to him as they relate to

¹¹⁷⁷ *Blackpool Football Club Ltd v DSN* [2021] EWCA Civ 1352

¹¹⁷⁸ *Ibid* [127]

¹¹⁷⁹ *Ibid* [127-129]

¹¹⁸⁰ *TVZ & Others v Manchester City Football Club* [2022] EWHC 7 (QB)

¹¹⁸¹ *Ibid* [262-263]

¹¹⁸² *Ibid* [282-283]

¹¹⁸³ *Ibid* [316-317]

Pick Up Artistry. Ross can control what Alex does and shapes how he does it, whilst retaining the power to direct him more explicitly. This is an indicator that he exercises a level of control, one which may pass the admittedly low threshold the law demands.

Further indicators of control include the power of appointment. A person capable of choosing who will work for him often exercises, at least, a vestigial degree of control. This is one of the many factors indicating control, although it is not determinative.¹¹⁸⁴ However, for the vignette, Ross's power of appointment appears somewhat illusive. While Alex was required to submit an application detailing why Ross ought to appoint him to the course, it was far from an extensive recruitment process. Ultimately, Ross was likely to accept any student to increase his pool of paying subscribers. While Ross could have decided Alex was unsuitable and rejected him, it seems unlikely that this power would ever be exercised. Thus while Ross's theoretical power of appointment is an indicator of him exercising control over Alex, the practical reality of Alex's appointment is such that this indicator should not carry much weight.

A similar indicator is the power of dismissal. A common feature of a quasi-employment relationship is the purported employer having disciplinary powers up to and including termination.¹¹⁸⁵ This might include the right to place employees on support plans, give them warnings, require them to make improvements or dismiss them. That Ross has the power to remove Alex or a non-complying student is neither contested nor infrequent. Moreover, Ross's position as Alex's teacher carries implicit corrective powers. It is Ross who will monitor Alex's progress, determine his progress relative to other students, and remove him if his words are not being heeded. Alex has no such power beyond stopping his subscription and letting the contact lapse. As a result, Ross's disciplinary and corrective powers suggests that he does exercise some degree of control over Alex.

However, it is not clear how much weight should be afforded to this. Ross's position of authority as a teacher is a natural consequence of the service he is providing. In *JD Weatherspoon Plc v Stephenus Bernadus Burger Risk Solutions BG Ltd*,¹¹⁸⁶ the defendant employed door security staff, through an independent contractor, who

¹¹⁸⁴ Atiyah(n1110) 50-60

¹¹⁸⁵ TVZ(n1180) [318]

¹¹⁸⁶ [2025] EWHC 1259

seriously injured the claimant. The first instance judge attached considerable weight to the fact the security staff signed a log which was countersigned by the manager, and concluded that this indicated that the doormen reported to the manager and so were integrated into the pub's hierarchy.¹¹⁸⁷ Sweeting J rejected this conclusion and warned that courts should exercise caution when assessing factors which were inherent to the provision of a particular service. Record keeping was an essential part of the contract between the defendant and the security company, and so this formed part of the service. It was wrong to elevate this into a reason for the imposition of vicarious liability.¹¹⁸⁸ Such factors should still be considered but should be given the appropriate weight in the context of the contract.¹¹⁸⁹

For the vignette, the relationship between Alex and Ross is contractual. Ross is contracted to instruct Alex on how to approach women and secure sex. Thus, their contract places him in the position of a teacher and Alex as a student. The authority Ross exercises may indicate a level of control, but this may be what is necessary for him to give effect to his contract with Alex. Thus while it is a relevant factor, Ross's position of authority forms part of his contract with Alex, and is integral to the service he is providing. Thus this factor may not carry a huge amount of weight when assessing the amount of control Ross exercises. This, inevitably, casts some doubt on whether the control factor can be satisfied in the context of this relationship.

A further limitation is the wide leeway afforded to Alex. In *Kafagi v JBW Group Ltd*,¹¹⁹⁰ the defendant was a judicial services company which sub-contracted the collection of council tax to a self-employed Bailiff who allegedly committed torts against the claimant. To Singh LJ, the Bailiff was not employed by the defendant, could turn down any work offered to him, or indeed cherry-pick the work he wanted to do. Ultimately the extent of the defendant's control was to offer work, which if accepted had to be carried out in a lawful manner. Thus, the Bailiff was at liberty to carry out his tasks in whatever lawful manner he saw fit, and so had wide leeway. Accordingly, there was not even a

¹¹⁸⁷ Ibid [69]

¹¹⁸⁸ Ibid [70-74]

¹¹⁸⁹ Ibid [75]

¹¹⁹⁰ *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157

vestigial level of control and so no relationship akin to employment.¹¹⁹¹ The difficulty here for the vignette is that Alex is not in a wholly dissimilar position. His mission is to go out and secure sex using all that he has been taught. It is up to Alex as to where he goes, how often he should attempt the mission, and how much time and energy he should dedicate to this task.

Moreover, if Alex chooses to complete a mission then he is entitled to carry it out in whatever manner he sees fit. The only parameters of his task is that he incorporate at least some of the content that he has been taught. Alex decided to use touch escalation, but this was not mandatory. Alex could have instead attempted to 'project value' as a strong 'Alpha Male,' or undermine Amelia's self-esteem to secure sex and would still have been meeting Ross's expectations. Alex had wide leeway when completing his mission, and Ross did not offer much oversight. Ross simply sets a task and essentially defers to Alex on how it should be carried out.

Consequently, it is not clear whether there is a vestigial level of control here. There is an expectation of control at the heart of the student-teacher relationship between Alex and Ross, but this may not be afforded much weight. Still, Alex is expected to heed Ross's instructions and complete the tasks he has been assigned. Ross can monitor Alex's progress, effect improvements in his performance, and dismiss him for non-compliance. But this must be balanced against the incredibly loose process through which Alex is admitted to the course and that Alex has wide leeway in how he completes his tasks. While Ross does retain the theoretical power to instruct Alex more precisely, it will never be practical for him to do so. Therefore, the actual level of control Ross exercises is very light even if it could, hypothetically, be stricter. This must be considered alongside the fact that Alex, if he objected to any stricter control, could have simply ceased paying and walked away. There are factors leaning in favour of, and against, the control factor being satisfied, and is not clear where the weight lies. It is arguable that this level of control is more than vestigial, and so it is plausible that Alex and Ross are in a relationship which is capable of being akin to employment.

¹¹⁹¹ Ibid [50-56]

However, it is not possible to say more than that relationship might exceed the bare minimum of control that the law demands for vicarious liability to be possible. As a result if the remaining vicarious liability factors weigh in favour of Alex and Ross being in a relationship which is akin to employment, this may not be enough. For if the control factor is not satisfied, there can be no vicarious liability. The control factor is the most significant obstacle to establishing the first stage of vicarious liability in the vignette.

Benefit, Business Activity and Risk Generation

The second and third factors require the tort to be committed in the course of an activity done on the purported employer's behalf within the scope of their business activity.¹¹⁹² Business activity is interpreted widely and takes account of the wider, non-commercial aims of the employer.¹¹⁹³ For instance, the prison service is concerned with keeping and feeding prisoners, so having them work in the kitchens furthered its business activities.¹¹⁹⁴ This feeds into the fourth factor, which requires the risk of the tort to be generated by the relationship between the tortfeasor and employer. For instance placing prisoners in a kitchen generates an obvious risk they may be negligent.¹¹⁹⁵ Thus, the prisoners are working for the benefit of the defendant, furthering their business activities, and the relationship generates a risk of a tort. Thus, the prison will be vicariously liable for negligently inflicted personal injuries.

Similarly, in *Armes*,¹¹⁹⁶ the foster parents looked after children on behalf of the Local Authority, which had a statutory duty to care for them. The Local Authority fulfilled their non-delegable duty through the foster carers. Thus the carers acted for the benefit of the Local Authority within the scope of its business activities.¹¹⁹⁷ By placing the children with foster parents, the Local Authority made them vulnerable to abuse by substandard or malicious carers. This vulnerability, and so the risk of abuse, emerged out of the relationship between the Local Authority and the foster parents.¹¹⁹⁸ Each of the three factors indicated the relationship was akin to employment, For the vignette, Alex must

¹¹⁹² *Christian Brothers*(n1121) [35]

¹¹⁹³ *Cox*(n1128) [30]

¹¹⁹⁴ *Ibid* [31]

¹¹⁹⁵ *Ibid* [32]

¹¹⁹⁶ *Armes*(n1151)

¹¹⁹⁷ *Ibid* [59-61]

¹¹⁹⁸ *Ibid* [61]

be carrying out an activity for Ross's benefit within the scope of his business activities. While the relationship between them generates a risk of harm. Each will be taken in turn.

Firstly, Ross must gain an identifiable benefit from Alex's actions. This was identified in *MXX*,¹¹⁹⁹ where the claimant was sexually abused by a work-experience pupil at a school after the placement ended.¹²⁰⁰ As HHJ Wall identified, the placement was a burden rather than a benefit. Rather than freeing up or creating resources, it demanded them as the work-experience pupil needed to be properly supervised. The pupil had no independent responsibilities and was not integrated into the wider structure, and his work did not benefit the school in any way. Thus, the relationship could not be akin to employment.¹²⁰¹

Ross receives real and identifiable benefits from Alex's activities. Firstly, Ross receives a monthly fee to teach and direct Alex, so there is an ascertainable financial benefit in teaching and directing him. Secondly, Alex carrying out his activities as a student further legitimises Ross as a teacher. The more students Ross has, the more positive their experience is, then the more effectively he can recruit new ones. His business depends on him providing his existing students with materials and assigning them missions. If he fails to do so, they are likely to withdraw, leave negative reviews, or otherwise undermine the credibility of his enterprise. Thus, when Alex goes to complete his missions, using what he has learned, this benefits Ross. The purpose of his enterprise is to train aspiring PUAs, which is benefitted by him doing exactly this. Indeed, had Alex successfully seduced someone, this would validate Ross's techniques and send a message to other students as to what can be accomplished through the 'Total Immersion Course.' Had Alex failed less disastrously, then he would still be engaging with the course and created an opportunity for further instruction. Thus Alex attending the bar, engaging with Amelia, and using the techniques he has learned materially benefits Ross.

¹¹⁹⁹ *MXX v A Secondary School* [2022] EWHC 2207 (QB)

¹²⁰⁰ *Ibid* [165]

¹²⁰¹ *Ibid* [194-197]

These activities fall within the scope of Ross's business activities. Indeed his enterprise is founded on improving his students' fortunes with women. Alex is there to learn how to secure sex, which is what Ross purports to teach him in his capacity as a paid instructor. His teaching touch escalation and then assigning him a mission to use it is part of the course. If it is part of the course, it is part of his business activities. If a person teaches paying students to cook, then cooking is reasonably incidental to their business activities. If a person teaches paying students to juggle fire, that too is reasonably incidental. In both cases the associated activities falls within the scope of the enterprise. There is an inherent link between the teaching of an activity, and the activity itself. The same should extend to Ross, who teaches Pick Up Artistry, which therefore falls within the scope of his business activities. An analogy can be made here to *JGE* in which the very lifeblood of a church was said to be administering to the souls of the faithful.¹²⁰² Thus, a priest who committed a tort in the process acted within the scope of the church's business activities. Similarly, the very lifeblood of Ross's enterprise is teaching others to secure sex through Pick Up Artistry. Accordingly, this falls within the scope of his enterprise.

Of course Ross removes Alex from the course, and indeed bans him from the wider community, once the sexual assault is reported to him. He then denounces Alex as a 'troll' and claims that no one could be 'stupid enough' to misapply his techniques to such an extent. To take his comments at face value, it is entirely possible that Ross does not accept that sexual assault falls within the scope of his business enterprise.

However this is not what the test requires. The second and third factors require that the tort be committed during an activity done on the purported employer's behalf, within the scope of their business activity. That an employer does not wish for their employee to do something whilst undertaking such activities is irrelevant to determining whether the relationship is capable of giving rise to vicarious liability.

To illustrate say A allows B to volunteer in a kitchen preparing food for the homeless. A teaches B how to prepare ingredients, how to cook them, and how to do so safely. A informs B that they must not deviate from these instructions under any circumstances.

¹²⁰² *JGE*(n1116) [77]

One day, B cuts corners and improperly prepares an ingredient resulting in a customer becoming unwell with food poisoning. A may dismiss B on the spot, and denounce B for failing to follow proper directions but this will not stop A being vicariously liable for B's actions. B was cooking on A's behalf, and cooking falls within the scope of his enterprise which is to prepare and serve food to others. The tort occurred during the course of this activity and so A is likely to be vicariously liable for B's actions. That B is immediately dismissed, that A forbade B from deviating from the instructions, would not inhibit vicarious liability.

The same would apply for the vignette. Ross teaches Pick Up Artistry, and provides a course in which his students are expected to implement techniques during their interactions with women. As a result, his students going out into the world and engaging in Pick Up Artistry falls within the scope of his enterprise. That Ross does not accept that his instructions could result in the commission of a tort, is not relevant to whether his students commit a tort while acting within the scope of his enterprise.

That is not to say Ross would be liable for every act done for his benefit within the scope of his enterprise. Indeed it would be open to him to argue that Alex's actions are too far removed from what he has been taught for vicarious liability to arise. However, this would be a question at the second stage which investigates whether there is a close enough connection between the relationship between Alex and Ross and the tort for Ross to be vicariously liable. Stage one is concerned with the relationship itself, and so the question for the moment is whether the tort was carried out while the tortfeasor was acting for the benefit of the purported employer, within the scope of their enterprise.

The answer to these questions, in the vignette, is yes and so the analysis moves to the fourth factor, which examines the extent to which the relationship between the parties generates a risk of harm. Gray¹²⁰³ suggests this factor is grounded in enterprise risk theory, which is one of the proposed justifications for vicarious liability. Enterprise risk theory holds that a person must bear the associated costs and risks of their enterprise. Keating argues that the reason for this is that accidental losses should be proportionate

¹²⁰³ Anthony Gray, *Vicarious Liability* (BP, 2018) 103-110

to benefits derived.¹²⁰⁴ In a highly organised industrial society accidental injury is a societal problem, but an unavoidable risk of the profit-generating activity necessary for its proliferation. For example, car accidents injure roughly 2.5 million people each year, with the overwhelming majority being attributed to driver error. However driving is a useful activity which should not be prohibited, even if the risks cannot be ignored. Thus if we allow it to continue there must be some appreciation of the risk.¹²⁰⁵ Thus we insist all drivers have insurance, paying into a collective pot which can compensate their victims if, and when, accidents occur. The cost of insurance becomes an operating expense of driving, to further the activity without ignoring the risk. Enterprise liability holds that the costs of accidents should be absorbed by the whole enterprise, not the bad luck of the victim, and so each person who extracts a benefit from a risk-taking activity ought to bear some of the cost.¹²⁰⁶ In the example this is drivers, who benefit from the risk-generating activity through easier, faster, and accessible personal transport.

For businesses, the same principle holds that an employer who creates a risk of harm should be responsible for it as an operation cost. There is a risk that vulnerable children will be abused by staff in residential homes. So, those operating such homes should assume responsibility when it manifests.¹²⁰⁷ To Brodie enterprise liability is therefore an appeal to fairness, with the essential question being whether an enterprise has created or increased the risk.¹²⁰⁸ If they have, then vicarious liability is justified. Enterprise risk focuses on the risks particular to an enterprise to identify whether it is right they bear the associated costs.¹²⁰⁹

For the vignette, Ross is generating a material risk of sexual violence, specifically sexual assault. He teaches his students that women are often secretly consenting to sex, but unable to act due to LMR. Thus he is teaching them to ignore signs of non-consent on the basis that such signs are indicative of consent; because LMR will only arise when a

¹²⁰⁴ Gregory Keating, *Reasonableness and Risk : Right and Responsibility in the Law of Torts* (2023, OUP) 265-270

¹²⁰⁵ Ibid

¹²⁰⁶ Ibid 270-280

¹²⁰⁷ Ibid 111-123

¹²⁰⁸ Douglas Brodie, *Enterprise liability and the common law* (2010 CUP) 27-30

¹²⁰⁹ Ibid 40-3

woman wants to have sex but feels prevented from doing so. He teaches his students that LMR is something to be overridden, and that touch escalation is among the techniques they should use. Consequently he is encouraging his students to touch women who are not-consenting to a sexual encounter, in an effort to secure a sexual encounter. Therefore the purpose of that touching is sexual and so Ross is generating a real risk that his students will sexually touch a woman who is not consenting. This, taken with the fact the PUA worldview is unlikely to give rise to a reasonable belief in consent, suggests that Ross is generating a real risk of sexual assault. On this account if Ross's enterprise naturally generates a material risk of sexual violence, then it is right he be vicariously liable when it manifests. If sexual assault is a material risk, flowing from his enterprise, then he must assume responsibility for it as the cost of doing business.

One of the policy outcomes of vicarious liability is that it encourages employers to maintain standards of good practice.¹²¹⁰ Thus, if Ross were made liable, and wanted to continue in his profession, then fear of future proceedings should motivate him to maintain proper standard, exercise more control over his students, and mitigate any further risks of harm. Vicarious liability is a means of motivating Ross to reduce the risks of his enterprise. The impact would not be confined to Ross alone, but any PUA enterprise. If a precedent is set that Ross is vicariously liable, then other PUA influencers will have to consider their own position. They will have to determine whether they wish to risk liability by continuing to teach content which carries a real risk of sexual assault. It would be in their own self-interest to begin considering the social impact of their instructions and directions, and how to mitigate the potential risks. Consequently, vicarious liability is a means of motivating risk-generating enterprises to account for those risks and maintain good practice. Thus, for risk-generating enterprises, such as the one Ross operates, there is a strong policy reason to favour the imposition of vicarious liability.

This is not to say enterprise risk theory has been explicitly endorsed as the underlying justification for vicarious liability.¹²¹¹ Rather, it is among the factors which must be

¹²¹⁰ *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34; [2007] 1 AC 224

¹²¹¹ Gray(n1203)

considered for a relationship akin to employment.¹²¹² In *Bazely v Curry*,¹²¹³ the defendant operated residential care facilities for troubled children and unknowingly hired a paedophile. McLachlin J identified enterprise risk as an important, but not determinative, factor for vicarious liability. The employer naturally assumes responsibility for the risks generated by their enterprise.¹²¹⁴ If a tortious act falls within the ambit of that risk, then there should be vicarious liability.¹²¹⁵ So long as there is a strong connection between what the employer expected of their employee and the tort, it may fairly be said the employer has created or exacerbated the risk of harm.¹²¹⁶

This is what the fourth factor is reaching for. In *El v Children's Society*¹²¹⁷ the claimants were sexually abused by the son of a houseparent whilst in a children's home. Haddon-Cave J identified that when A employs B to further his interests and, in the course of doing that, B harms C, the common law weighs in favour of vicarious liability.¹²¹⁸ Thus, it is concerned with risks that are directly connected to the business.¹²¹⁹ The need for this direct correlation was explored in *Brayshaw*¹²²⁰ where the claimant was induced by her GP to join a coercive church. She then sought damages from the surgery. To Spencer J, vicarious liability requires the tort to be a reasonable incidental risk of the employment. A GP surgery is not in the business of proselytising,¹²²¹ and the GP was not providing medicine but preaching alongside their medical duties.¹²²² It was not right for the surgery to be liable for risks which did not form part of their enterprise.

For the fourth factor to be made out on the vignette, Ross's enterprise must create a reasonably incidental risk of sexual assault. The literature has long warned that sexual assault is an inherent risk of PUA enterprises.¹²²³ Moreover, Ross expects, if not demands, his students to approach women and use his techniques to secure sex. Thus,

¹²¹² *Various Claimants v Barclays Bank* [2020] 2 WLR 960 [11]

¹²¹³ (1999) 2 SCR 534

¹²¹⁴ *Ibid* [19]

¹²¹⁵ *Ibid* [19], [37-38]

¹²¹⁶ *Ibid* [42-45]

¹²¹⁷ [2012] EWHC 365A

¹²¹⁸ *Ibid* [24]

¹²¹⁹ *Ibid*

¹²²⁰ *Brayshaw v Partners of Apsley Surgery* [2018] EWHC 3286 (QB); [2019] 2 All E.R. 997

¹²²¹ *Ibid* [69]

¹²²² *Ibid*

¹²²³ O'Neill(n13)

he creates a risk that they will do exactly that, which is exacerbated by the content of the course. He teaches his students that touch escalation is a means to produce a biological reaction to guarantee sex and that non-consent is an illusory challenge to overcome. On an ordinary application of his teachings, non-consenting women are a legitimate target for sexual touching. Thus, he is generating a risk that his students will approach women and sexually touch them to secure sex. As a result, there is a real risk one of his students will sexually touch a non-consenting woman who is genuinely not consenting. This is exactly what happens, and so Alex sexually assaults Amelia as a direct result of what he has been taught and instructed to do. His actions and justifications are directly linked to his relationship with Ross. This is an inherent risk of this type of enterprise and so Ross ought to be liable when it manifests.

Vicarious Liability: Conclusion

Alex approaches and goes on to sexually touch Amelia whilst acting for Ross's benefit, which falls within the scope of his business activities. The nature of Ross's enterprise is such that it generates a real risk that students will commit sexual assault. The second through to the fourth factors indicate that there are strong policy reasons to justify saying Alex and Ross are in a relationship akin to employment. As it would hold Ross accountable for the torts committed during activities done for his benefit and form part of his enterprise. Indeed the imposition of vicarious liability would have a positive societal impact by requiring Ross, and other Pick Up Artists to maintain good practice and mitigate the risks of their enterprise. However, that the imposition of vicarious liability might be advantageous only takes us so far. The fifth factor, the control factor, must be satisfied if there is to be a relationship akin to employment. No matter how compelling the second and fourth factors are, the law demands that Ross exercise a bare minimum, meaning at least vestigial, degree of control over Alex. It is not clear that this is present in the vignette.

Firstly, the student-teacher relationship in the vignette arises out of a contract for services between Alex and Ross. Thus it should not be given undue weight when assessing vicarious liability, and so this relationship only takes the argument so far. Secondly, while Ross does have some influence over how Alex is appointed, directed, and potentially disciplined, his ability to control Alex is limited. Alex is entitled to walk

away at any point, is given wide leeway in determining how he completes his tasks, and some of Ross's powers are essentially hypothetical. The nature of the online service that Ross is providing necessitates a degree of separation which inhibits him from exercising greater control over Alex.

This is not to say the level of control Ross exercises over Alex definitively falls below the threshold of vestigial. That Ross is in a position of authority, can issue directions which should be complied with, monitor Alex's performance, and intervene all suggest that some control is being exercised. The issue is the weight to be attached to these factors, and that the degree of control Ross may possess is significantly limited by the reality of his relationship with Alex. There is a case to be made that, upon balancing these factors, the relationship does feature at least a vestigial level of control. Although it is not possible, in light of existing authority, to make the case with any more strength than that. As a result, notwithstanding the policy reasons for its adoption, what this chapter has advanced is a doctrinally fragile case for vicarious liability.

Unfortunately, this then has to be considered alongside the wider legal system. In *BXB*, the Supreme Court expressed some anxiety that the bounds of vicarious liability were being stretched too far.¹²²⁴ Indeed, much of the recent case law suggests that the appellate courts are, and will remain, cautious about extending the boundaries of vicarious liability any further.¹²²⁵ Therefore, the wider implications of finding Alex and Ross to be in a relationship akin to employment, must be considered.

The relationship between Alex and Ross is one of teacher and student, with the student paying for instruction. If it is a relationship akin to employment, then this surely would apply to similar student-teacher relationships. For instance, on this account surely a culinary instructor could be vicariously liable for the actions of their paying students. The instructor would have the power to accept people onto their course, teach them how to cook, direct them on what to cook, and so would be in a similar position to Ross. The same would be true for anyone offering a paid course, be it martial arts, gymnastics, acting, or indeed anything else. There is no authority suggesting that teacher-student

¹²²⁴ *BXB*(n1150) [48]

¹²²⁵ Paula Giliker, "Vicarious liability in the UK Supreme Court and High Court of Australia," [2024] LS 44, 1, 191

relationships attract vicarious liability, and so this would be an expansion of the doctrine. This is a significant limitation for the analysis. The Supreme Court has already expressed some anxiety that the boundaries of vicarious liability should not be extended much further. Thus even if the control factor is satisfied, which is not at all clear, there is every reason to suspect a court may consider finding Alex and Ross to be in a relationship akin to employment to be a bridge too far.

Therefore, there can be nothing more than a tentative argument that stage one of vicarious liability is satisfied in the vignette. While the second through to the fourth factors err in favour of finding Alex and Ross to be in a relationship akin to employment, it is not clear that the control factor is satisfied. Moreover, if the courts are now averse to further expansions of vicarious liability; that alone is an indication that the law will not be expanded to student-teacher relationships where the student is paying for instruction. For the vignette, vicarious liability may not be excluded as a matter of principle but appears unlikely in the current legal environment.

Chapter Eight Collective Liability

The vignette features a community of experienced and aspiring PUAs, which plays a background role in promoting Ross's methods. They give advice, provide anecdotes, and encourage Alex to trust Ross. Indeed, when Alex suspects a link between touch escalation and last-minute resistance, it is the community who confirms it. Ross's Community encourages and promotes the dangerous behaviours which lead Alex to commit sexual assault. Thus, are they collectively liable when it manifests? To answer that question we turn to the law of unincorporated associations.

Unincorporated Associations

An unincorporated association emerges out of a group of people coming together under a common purpose with a bare minimum of infrastructure. In *Burrell*,¹²²⁶ Lawton LJ described unincorporated associations as two or more persons bound together by a common purpose, in which mutual obligations are owed between members.¹²²⁷ The bond between them is a contract which, once formed, binds the members to one another.¹²²⁸ Unincorporated associations arise when informal meetings, debating societies, or clubs take on a life of their own.¹²²⁹ An initially informal arrangement is complemented by the infrastructure necessary to build and maintain a group until something more emerges.¹²³⁰ Unincorporated associations have historically covered a wide spectrum of human activity, including trade unions, churches, professional associations, and clubs.¹²³¹

The association germinates from the bond between the members, which begins to generate the duties necessary to give effect to an organisation. Members owe these duties to one another, and so an unincorporated association is a creature of contract. In *Lee*,¹²³² the claimant was unjustly expelled from the Showman's Guild. Denning LJ concluded the Guild was an unincorporated association, and so its rules were a

¹²²⁶ *Conservative and Unionist Central Offices v Burrell (Inspector of Taxes)* [1982] 1 WLR 522

¹²²⁷ *Ibid* [525]

¹²²⁸ *John v Rees* [1970] Ch 345

¹²²⁹ Nicholas Stewart, Natalie Campbell, Simon Baughen, *The Law of Unincorporated Associations* (OUP, 2011) 101

¹²³⁰ *Ibid* 1-4, 1-05

¹²³¹ Deirdre O'Connor, "Actions against Voluntary Associations and the Legal System," [1977] MonLR, 4, 87, 87-100

¹²³² *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329

binding, enforceable contract.¹²³³ The bond between members becomes a contract in which duties and obligations are exchanged for the benefits of membership. However, while the group will feel real to its membership, unincorporated associations have no legal personality.¹²³⁴ They still attract liability but this, like the contract, attaches to the members jointly and severally.¹²³⁵ The identity of the association is merely the totality of its members.¹²³⁶

Before considering the nature and extent of liability, the question is whether Ross's Community is an unincorporated association. If it is, then Alex, upon joining, becomes party to a contract which he is obligated to comply with in exchange for the benefits of membership. Those benefits might include access to the community, the ability to draw on the expertise of other members, and access to their online forum, which is the vehicle through which Ross delivers his teaching materials. If he fails to follow the community's rules he will lose access to it, and the contract will be terminated. Beyond the existence of duties and benefits *Burrell* imposes further requirements. It must be clear how the association is governed, how new members might join, and how membership is terminated or withdrawn.¹²³⁷ To that end, Ross and his administrators are responsible for leading the community. To be eligible, a prospective member must be a paying male student of Ross or a former student who completed their course. Membership may be terminated for breaking the rules or failing to complete one's course. Accordingly, there is an exchange of obligations and benefits between the members meaning it is plausible that Ross's Community is an unincorporated association.

It is important to note that there are two contracts in the vignette. The first is between Ross and his students, and the second is between the members of the unincorporated association. Each member has, or will have had, a contract with Ross but this is separate. A contract with Ross authorises them to join the unincorporated association, however their membership persists after it has been completed. After this point they

¹²³³ Ibid [342]

¹²³⁴ Stewart(n1229) 1-10

¹²³⁵ Ibid 1-11

¹²³⁶ Lisa Glennon "Extending the Role of the Committee in Unincorporated Association - A Separate Duty of Care to Members and Visitors?" [1999] NILQ 50 515

¹²³⁷ *Burrell*(n1226) 527

must comply with the rules of the association to retain the benefits of membership, and so there is an ongoing exchange of obligations and benefits. The position is similar to an unincorporated association of current and former employees at a specific workplace. A contract between the member and the relevant employer may be necessary to join the association, but this is separate from the contractual exchange of responsibility and obligations within the unincorporated association.

There is no single test to determine whether a group is an unincorporated association but rather a set of preconditions. In *Williams*,¹²³⁸ a group of residents and traders formed the Sustainable Totnes Action Group, STAG, to oppose an experimental traffic order. HHJ Cotter concluded that the existence of an unincorporated association is necessarily fact-specific, but there are essential requirements.¹²³⁹ Firstly, the membership must be identifiable, which was satisfied by STAG having a clear process to join and a system of record keeping.¹²⁴⁰ Secondly, there must be an agreement of some kind, often contained in a set of rules but can be satisfied by the association having a common purpose. This is not especially demanding, as STAG's objective to reverse the traffic order was sufficient.¹²⁴¹ So long as those two preconditions are satisfied, it is plausible an organisation will be an unincorporated association.

These are the minimal requirements necessary to establish an unincorporated association. These loose requirements are why unincorporated associations have ranged from small-scale charities, clubs, and neighbour groups to large institutions bordering on incorporated status.¹²⁴² The Imperial Merchant Service Guild, representing the interests of any master or officer in the Merchant Navy began life as an unincorporated association bound together by 15,000 members and an agreed set of rules.¹²⁴³ In *Haque*,¹²⁴⁴ the Muslim Community Association was an unincorporated association with 600 members intended to uphold Islamic principles through education

¹²³⁸ *Williams (A Representative Claimant) v Devon CC* [2015] EWHC 568 (Admin)

¹²³⁹ *Ibid* [46]

¹²⁴⁰ *Ibid* [48]

¹²⁴¹ *Ibid* [49-50]

¹²⁴² Law Reform Commission (Ireland), *Consultation Paper Series: Liability of Clubs, Societies, and other Unincorporated Associations* (LRC CP 68, 2022) 1.14

¹²⁴³ *Mercantile Marine Service v Toms* [1916] 2 KB 243

¹²⁴⁴ *Haque v Faradhi* [2023] EWHC 1135 (KB)

and community service. It was a close-knit organisation governed by a constitution which provided for the election of a consultative council, a central president, and conferred specific powers upon them.¹²⁴⁵ More informal unincorporated associations have included residents associations made up of those living in a block of flats who came together to oppose a planning application.¹²⁴⁶ An association of workmen in a small village,¹²⁴⁷ a rowing club with around fifty members,¹²⁴⁸ the Bristol branch of the UK Independence Party,¹²⁴⁹ and the managing committee of a Sikh Temple.¹²⁵⁰ The reason for this variety is the minimal requirements, the two preconditions, necessary to establish an unincorporated association. For so long as these are satisfied, an unincorporated association is likely to arise.

For the vignette, there is an identifiable membership. Members must satisfy a set criteria before being admitted. Site administrators monitor the community and remove those who are no longer eligible, which implies there is some form of record-keeping. Those using the site are necessarily members of Ross's Community, and the leadership team continually monitors their eligibility. That all are members of an online forum suggests a list could be generated by those administering the sites. There is an identifiable membership, even if it is unclear how many members there are or how records are kept.

The second precondition is an agreement or common purpose, Unincorporated associations are varied, and so whether an agreement is sufficient is determined by its characteristics. In *Eastbourne*,¹²⁵¹ a club providing services to private taxi drivers was an unincorporated association. Lord Hoffman identified the association had a constitution containing a statement of objectives, a system of governance, a process to admit members, and provided services on set terms and conditions.¹²⁵² These are the common characteristics of an agreement, or common purpose, at the heart of an

¹²⁴⁵ Ibid [1],[19-20]

¹²⁴⁶ *Vanbrugh Court Residents' Association v Lambeth LBC* [2022] EWHC 1207

¹²⁴⁷ *Ideal Films v Richards* [1927] 1 KB 374

¹²⁴⁸ *Panton v Brophy* [2019] EWHC 1534

¹²⁴⁹ *Monir v Wood* [2018] EWHC 3525 (QB)

¹²⁵⁰ *Sandhu v Singh* [2018] EWHC 712 (Ch)

¹²⁵¹ *Eastbourne Town Radio Cars Association v Commissioners of Customs & Excise* [2001] UKHL 19 [2001] 1 WLR 794

¹²⁵² Ibid [26]

unincorporated association.¹²⁵³ The club's constitution featured enough of the necessary characteristics for it to be the common purpose of an unincorporated association.¹²⁵⁴ Indeed, the common purpose need not be particularly sophisticated. In *Woodforde v Smith*,¹²⁵⁵ a Ratepayers and Residents Association was bound by a single sheet of paper consisting of twelve rules.¹²⁵⁶ But they provided a common purpose, a system of governance, and a system to admit new members.¹²⁵⁷ That single sheet of paper possessed the necessary characteristics to be the common purpose of an unincorporated association.¹²⁵⁸ Although there is no requirement for the rules to be written, an oral agreement will be sufficient.¹²⁵⁹ In *Brent*,¹²⁶⁰ the Harlesden Peoples Community lacked a written constitution, formal rules, or any internal bureaucracy whatsoever. That the informal agreement between the members was an oral one did not inhibit it being found to be an unincorporated association.¹²⁶¹

Ross's Community has a common purpose, an agreed system of governance, provisions to admit new members, and a code of conduct. The community exists to promote Ross Mystery and Pick Up Artistry. Members are drawn from Ross's current and former students, who are bound by a set of rules which are enforced. There is also a clear system of governance. It is not clear whether these characteristics are codified in a single document, but that is not necessary.¹²⁶² Throughout the vignette, members comply with the rules, and the moderators remove those who breach them. Their power to do this is not challenged. It does not matter if their powers are borne of a written document or habitual compliance with an implicit agreement.¹²⁶³ The systems, rules, and procedures of the community possess the essential characteristics of a common purpose of an unincorporated association.

¹²⁵³ Ibid [24]

¹²⁵⁴ Ibid [34]

¹²⁵⁵ *Woodforde v Smith* [1970] 1 WLR 806

¹²⁵⁶ Ibid [808]

¹²⁵⁷ Ibid [811]

¹²⁵⁸ Ibid [817]

¹²⁵⁹ Jean Warburton, *Unincorporated Associations: Law and Practice* (SM, 2nd ed, 1992) 11

¹²⁶⁰ *Brent LBC v Johnson* [2020] EWHC 2526 (Ch)

¹²⁶¹ Ibid [47-48],[156]

¹²⁶² Stewart(n1229) 2-15

¹²⁶³ Ibid 2-17

Should a group have an identifiable membership, and a common purpose, it must be complemented by a sufficient level of infrastructure to be an unincorporated association. In *Monsanto*,¹²⁶⁴ the defendants formed GXS. The association was directed and managed by a small number of people, had a postal address, a telephone number, a website, and produced material supporting its aims. This infrastructure, paired with an identifiable membership and common purpose, was enough to establish an unincorporated association.¹²⁶⁵ However, the level of infrastructure necessary is not especially high.

An unincorporated association requires a common purpose, an identifiable membership, and a bare minimum of infrastructure. In *Heathrow*,¹²⁶⁶ the claimant sought an injunction against 'Airportwatch' and 'Plane Stupid.' Airportwatch boasted a higher level of infrastructure with a postal address, telephone number, website, fixed constitution, regular meetings, and formal disciplinary processes.¹²⁶⁷ However, the organisation was divided on whether direct action against the claimant was justified, so there was no common agreement. Thus, despite its sophisticated infrastructure, there was no unincorporated association.¹²⁶⁸ 'Plane Stupid' lacked a conventional organisational structure, had no constitution, and consisted of little more than a website with a few administrators. Nevertheless, the membership was united in support of pressing their demands by any means necessary.¹²⁶⁹ This common agreement, paired with a very loose level of infrastructure, could establish an unincorporated association.¹²⁷⁰

Ross's Community does not coordinate activities in support of their common purpose; rather, individual members are expected to engage in Pick Up Artistry on their own time. There is no sense of organised activity, but this is not necessary. In *Smithkline*,¹²⁷¹ the claimant sought an injunction to the Stop Huntingdon Animal Cruelty (SHAC). SHAC

¹²⁶⁴ *Monsanto Plc v Rowan Tilly* [1999] 11 WLUK 843

¹²⁶⁵ *Ibid* [40]

¹²⁶⁶ *Heathrow Airport Ltd v Joss Garman and 6 others* [2007] EWHC 1957 (QB); [2007] All ER (D) 28 (Aug)

¹²⁶⁷ *Ibid* [67]

¹²⁶⁸ *Ibid* [68]

¹²⁶⁹ *Ibid* [72]

¹²⁷⁰ *Ibid* [73]

¹²⁷¹ *Smithkline Beecham Plc v Avery* [2009] EWHC 1488 (QB); [2011] Bus LR D40

consisted of a website administered by two individuals that provided a list of names and locations said to be deserving of direct action. It was then up to the members, meaning those on the website who agreed with their goals and methods, to take direct action on their own time. Thus, they would act in accordance with a common purpose but would not coordinate in this respect.¹²⁷² Nevertheless, there was still an identifiable membership and common purpose paired with a bare minimum of infrastructure. SHAC was an unincorporated association.¹²⁷³

Similarly, Ross's Community features a website that promotes specific activities which members are expected to participate in. So long as this decentralised user base is bound by a common purpose, they can be members of an unincorporated association. The membership in *Smithklie* was made up of disparate individuals accessing and engaging with the website before going on to take direct action. Thus, they were members of an unincorporated association acting in accordance with their common purpose.¹²⁷⁴ Members do not need to be centralised nor in regular communication to be bound by a common purpose.¹²⁷⁵

Ross's Community is an organised online space with the common purpose of promoting Ross Mystery, his methods, and Pick Up Artistry. It has a website which must be maintained, a system of governance, a leadership team, a system for admitting members, and mechanisms for their removal. There is a code of conduct, rules prohibiting sharing or publishing the information elsewhere, and a directive to keep all discussions on topic. Should these rules be breached, the administrators may warn or remove a member as appropriate. There is a level of informality, but this is at least a bare minimum of infrastructure. It exceeds the admittedly low threshold the law demands of unincorporated associations. That this is paired with a common purpose and an identifiable membership suggests Ross's Community is an unincorporated association.

¹²⁷² Ibid [23]

¹²⁷³ Ibid [57]

¹²⁷⁴ Ibid [21-22]

¹²⁷⁵ Ibid [4]

That Ross's Community may well be an unincorporated association, and the harm to Amelia flows from a criminal act, poses a question of illegality. Say Alice contracts with Ron, a contract killer, to murder James. If Ron elects not to do so upon being paid in advance Alice cannot enforce the contract because of its illegal purpose.¹²⁷⁶ However this does not invalidate the contract, it simply renders it unenforceable.¹²⁷⁷ Similarly an unincorporated association founded on an unlawful purpose will still be bound by a common contract, but the members would not be able to enforce it.¹²⁷⁸ For instance, if Tony, in breach of their common contract, unlawfully expels Christopher from their unincorporated criminal association, Christopher would be unable to have himself reinstated by applying to the court to have the contract enforced. Despite this an unincorporated association founded on an unlawful purpose will not be rendered void.¹²⁷⁹ In *Webb*,¹²⁸⁰ the Animal Liberation Front was found to be an unincorporated association despite it being founded to promote animal welfare by unlawful means.¹²⁸¹ Similarly, in *Clark*¹²⁸² the Provisional Irish Republican Army, a proscribed terror organisation,¹²⁸³ was described as an unincorporated association,¹²⁸⁴ despite membership of the group being a criminal offence.¹²⁸⁵ A group founded on unlawful acts or for a criminal purpose, is not precluded from being an unincorporated association. Thus it will attract liability in the same way as any other unincorporated association.

Liability

Unincorporated associations are a mere sum of individuals without any collective capacity to sue or be sued.¹²⁸⁶ They have no legal personality and cannot be sued in their own name. Despite this, Glennon identifies that unincorporated associations are still regulated. Many jurisdictions make such associations liable for tax, independently

¹²⁷⁶ Hugh Beale, Chitty on Contracts (SM, 35th Edn, 2023) 19-001

¹²⁷⁷ *Paros Plc v Worldlink Group Plc* [2012] EWHC 394 (Comm) [80]

¹²⁷⁸ Beale(n1276) 19-042

¹²⁷⁹ Stewart(n1229) 2.46

¹²⁸⁰ *Oxford University v Webb* [2006] EWHC 2490

¹²⁸¹ Ibid [63]

¹²⁸² *Clark v Adams* [2024] EWHC 62 (KB)

¹²⁸³ The Irish Republican Army is proscribed by virtue of Schedule 2 of the Terrorism Act 2000, the House of Lords held that this included the Provisional IRA in *R v Z* [2005] UKHL 35 [2005] 2 AC 645 at [22-23]

¹²⁸⁴ *Clark*(n1282) [9-12],[34-36]

¹²⁸⁵ Terrorism Act 2000 s11

¹²⁸⁶ Dennis Lloyd, "Actions Instituted by or against Unincorporated Bodies," [1949] MLR, 12, 409, 410, *London Association for the Protection of Trade v Greenland* [1916] 2 AC 15

of its members but this is the exception, not the rule.¹²⁸⁷ For the most part unincorporated associations have no legal status, which is problematic in tort.¹²⁸⁸ For there are circumstances in which unincorporated associations cause harm. A member of a sports club might be injured during a match or an association might employ someone who goes on to commit torts.¹²⁸⁹ Nevertheless, at common law an unincorporated association is merely an aggregate of its members and cannot incur liability in tort or crime.¹²⁹⁰ Thus, to enable victims to seek redress, the focus should shift to the members of the unincorporated association.

There are two routes through which members of unincorporated associations may be made jointly and severally liable for the torts of another member; liability is either primary or vicarious.¹²⁹¹ Whatever route is taken, suing every member of a potentially vast association is problematic and so a representative defendant is required. In *Hibernian*,¹²⁹² the claimant was injured after falling down the stairs at a member's club. Hutchinson LJ indicated that each member of the club would be liable for the tort.¹²⁹³ However during the course of proceedings a representative defendant will be sought. This is usually a member of its managing committee, who will defend the claim on behalf of every member of the association. Nevertheless, there is no legal distinction between them and any other member.¹²⁹⁴ If the claim is successful the judgment is enforceable against the personal assets of every member. Thus, whether liability is primary or vicarious, as the unincorporated association has no distinct legal personality and so the members will be jointly and severally liable.

Primary liability will arise when the association, or more specifically its membership, has breached a primary duty owed to a third party. The Interpretation Act 1978¹²⁹⁵ defines persons as including unincorporated associations, and so unincorporated

¹²⁸⁷ Lisa Glennon, "Questioning the legal status of unincorporated associations," [2000] NILQ, 51, 120, 120-125

¹²⁸⁸ Ibid 135-140

¹²⁸⁹ Stewart(n1229) 8-01

¹²⁹⁰ Law Commission(n1242) 1.88

¹²⁹¹ Stewart(n1229) 8.04

¹²⁹² *Hibernian Dance Club v Murray* [1996] 7 WLUK 384

¹²⁹³ Ibid [55]

¹²⁹⁴ Halsbury's Laws of England (5th edn, 2021) Tort (Volume 97A) P.27

¹²⁹⁵ The Interpretation Act 1978 Sch 1

associations can owe statutory duties. The Occupier's Liability Act 1957¹²⁹⁶ imposes a duty of care on occupiers of a premises in respect of their visitors. Thus, when an unincorporated association occupies a premises, for instance a clubhouse, the membership will owe a duty of care to all visitors of that clubhouse. To illustrate, the In *Bottomley v Todmorden Cricket Club*¹²⁹⁷ an unincorporated cricket club allowed a dangerous pyrotechnic display to occur on their land, resulting in an explosion which injured the claimant. The Court of Appeal concluded that the club owed the claimant a duty of care which they breached. Thus the members were jointly and severally liable for her injuries.¹²⁹⁸ This is primary liability, as it is a breach of a duty owed by the entire membership, who make up the association, to a third party.

Primary liability for members of unincorporated association therefore predominantly arises in the context of statutory duties. For instance, as it would be considered a person within the statute, an unincorporated association that provides services is duty bound not to discriminate under the Equality Act.¹²⁹⁹ Thus it owes a primary obligation not to discriminate, which it would breach by arbitrarily refusing to provide services to people of colour. Thus if a person who is denied a service brings proceedings for direct discrimination, the membership as a whole will be liable for any resulting damages. Similarly, if an association employs another person, then it will owe that employee certain duties as an employer. If it breaches those duties, and the claimant is awarded damages at an Employment Tribunal, then all the members of the association will be liable for it. They are jointly and severally liable because the unincorporated association has no legal personality, and so the members collectively owe these duties directly to third parties.

The second route to joint and several liability for unincorporated associations is vicarious liability. This arises when a member of the association, acting for the common purposes of the association, commits a tort and injures a third party. In *Campbell*¹³⁰⁰ the claimant, whilst employed by an unincorporated association as a cleaner, slipped down

¹²⁹⁶ Occupiers' Liability Act 1957 s2(1)

¹²⁹⁷ [2003] EWCA Civ 1575; [2004] PIQR P18

¹²⁹⁸ Ibid [49]

¹²⁹⁹ Equality Act 2010 s29(1)

¹³⁰⁰ *Campbell v Thompson* [1953] 1 QB 445

a flight of stairs and sought damages. To Pilcher J, there is no authority limiting the reach of vicarious liability for unincorporated associations. An ordinary application of vicarious liability holds every member liable for the torts of another acting for their common purpose.¹³⁰¹ Thus if A, a member of an unincorporated football group, injures B during the course of their game, every member of that unincorporated association is vicariously liable for A's tort. B would be entitled to sue any member of the association, and enforce the resulting judgment against them all.

For the vignette, there is no obvious duty to suggest that members of Ross's Community would bear primary liability for the harm caused to Amelia. Thus, the focus of this section is vicarious liability for unincorporated associations. In the *Christian Brothers*,¹³⁰² the Supreme Court affirmed that members of an unincorporated association are in a relationship capable of giving rise to vicarious liability.¹³⁰³ Thus, if a Brother injured someone while acting for the Institute's benefit, the first stage of vicarious liability is automatically satisfied.¹³⁰⁴ If there is a close connection between the common purpose, or purposes, of the association and the tort, vicarious liability arises. At which point every member is vicariously liable for the torts of another.¹³⁰⁵

It is not clear whether vicarious liability attaches to every member at the time of the tort, or when proceedings are brought. In the *Christian Brothers*, there was no dispute that any member of the association could be liable for the torts of another.¹³⁰⁶ However, the Supreme Court implicitly suggested that vicarious liability attaches to the unincorporated association itself,¹³⁰⁷ despite them having no independent legal existence. If it attaches to the association, then it runs through the persisting contract to every member of the association at the time proceedings are brought; including those who had no relationship with the tortfeasor. However, it is not clear whether this is the

¹³⁰¹ Ibid [451-452]

¹³⁰² *Christian Brothers*(n1121)

¹³⁰³ Ibid [27]

¹³⁰⁴ Ibid [61]

¹³⁰⁵ Ibid [61-62]

¹³⁰⁶ There is a question as to whether the Institute should have been considered an unincorporated association at all. Them choosing to be bound Roman Catholic Cannon Law suggests there was intention to form legal relations. This was not addressed by the House of Lords, nor in any further depth by the analysis, but the point is made all the same.

¹³⁰⁷ *Christian Brothers*(n1121) [32-33]

legal principle or a quirk of the facts. Much of the Supreme Court's judgment concerned the quasi-corporate character of the Institute, which controlled other entities with financial means. Thus there was no prospect of individual members being pursued for damages.¹³⁰⁸ The Supreme Court may have simply been referring to the Institute being able to satisfy a judgment, which may not be true for many unincorporated associations. In any event, individual members are liable for the torts of another acting for their common purpose.¹³⁰⁹ However, the route to liability is unclear. Either it attaches to the existent contract when proceedings are brought, and so members are liable at that point. Or it moves through the original contract, and so only members of the association at the time of the tort are liable.

The second account fits better with the fundamental principle that unincorporated associations have no legal personality separate from their members. Moreover, vicarious liability depends on a relationship between the tortfeasor and the defendant. To hold someone vicariously liable for the torts of a person they have never been in a qualifying relationship is incongruent. As perverse as it would be for an employer to be liable for torts committed prior to the tortfeasor's employment. Indeed, there is support from other common law jurisdictions that this is the correct approach. In *Hickey v McGowan*,¹³¹⁰ the Irish Supreme Court considered vicarious liability for the Marist Brothers, an unincorporated association, after a member sexually abused the claimant. To Justice O'Donnell, the law of both unincorporated associations and vicarious liability in Ireland was shaped by that of the United Kingdom.¹³¹¹ Irish common law holds that members of unincorporated associations are jointly and severally liable for acts done by members in pursuit of its objectives. However, this only extends to those in a contractual relationship with the tortfeasor at the time of the tort.¹³¹² Morgan argues that the Irish Supreme Court correctly captured vicarious liability in the context of unincorporated associations. Particularly, he notes that the relatively low threshold required to establish an unincorporated association has the potential for wide-ranging

¹³⁰⁸ Ibid

¹³⁰⁹ Ibid [31]

¹³¹⁰ [2017] IESC 6 0

¹³¹¹ Ibid [26]

¹³¹² Ibid [51-56]

liability.¹³¹³ On this basis, it follows that liability should be restricted to those in a contract with the tortfeasor at the time of the tort. Those who join later, even whilst the tortfeasor is a member, were not in a qualifying relationship at the time of the tort and so there was no relationship capable of giving rise to vicarious liability.

In any event, individual members of an unincorporated association are vicariously liable for torts with a close connection to their common purpose. This is collective liability in which every member is liable for the full sum of damages. Indeed as each member is liable for the same damage, they would be entitled to bring contribution proceedings.¹³¹⁴

Contribution proceedings are available in vicarious liability scenarios. In *Spire*,¹³¹⁵ a hospital trust accepted liability for a negligently performed surgery, agreed to pay damages, and then sought a contribution from the surgeon whose actions they were vicariously liable for. For the vignette, a judgment might be enforced by the claimant against a single member, with sufficient means, and then that member could seek to recoup his losses from any other member. This could have a similar disruptive and destabilising effect on the association to the one described in Chapter Five.¹³¹⁶

For the vignette, the first stage of vicarious liability is automatically satisfied. Alex is in a relationship capable of giving rise to vicarious liability with every other member of Ross's Community. If there is a close connection between his sexual assault upon Amelia and the common purpose of that association, both limbs of the test will be made out. Every member would then be vicariously liable for his torts and could be pursued for damages. This is the model of collective liability proposed by the analysis, which moves to whether the close connection test is made out.

Close Connection

It is not enough for an employee to commit a tort whilst employed, that tort must be committed in the course of the tortfeasor's employment.¹³¹⁷ Previously the test to establish this was the Salmond test, which investigated whether a wrongful act was either authorised by the employer, or an unauthorised mode of doing something

¹³¹³ Morgan(n1162) 251-262

¹³¹⁴ Civil Liability (Contribution) Act(n811) s2

¹³¹⁵ *Spire Healthcare Ltd v Brooke* [2016] EWHC 2828 (QB); [2017] 1 WLR 1177

¹³¹⁶ See 'Contribution' in Chapter Five: Accessory Liability in Tort for more detail

¹³¹⁷ Clerk(n548) 6-28 6-29

authorised by the employer.¹³¹⁸ To Atiyah, vicarious liability predominantly arises when a servant was acting for the interests of their master. Thus it arises when an employee is explicitly commanded to do the tortious act, or when their tort was reasonably incidental to their employment.¹³¹⁹ Thus, stage two of vicarious liability is concerned with the scope of employment, and the duties that come with it.

Once this was determined by a textual analysis of the contract, but the courts long ago elected for a wider ranging inquiry. The reason for this, as Atiyah suggests, is that there is a general policy consideration that an employer should be liable for the reasonably incidental risks of their business. For example, the duties of a doorman who is instructed to eject troublemakers from a nightclub create a reasonably incidental risk of him causing injuries when doing so. Thus it is only right their employer be liable when it manifests.¹³²⁰ Baty suggests this consideration is entrenched in the law of vicarious liability, with historic cases continually referring to servants as dangerous, unpredictable things. Thus a master who keeps one might as well be keeping a wild animal, and so obliged to take reasonable care before unleashing them on the public.¹³²¹

The result of this policy consideration is that the second stage of vicarious liability has long been prone to sharp expansions.¹³²² For instance, it was once assumed that an employer could only be liable for the criminal acts of his employee, if those acts benefited the employer. Then, in *Lloyd*¹³²³ the managing clerk at a firm of solicitors deceived the claimant into executing a transfer of properties so he could mortgage the property and make off with the proceeds. The House of Lords concluded that the clerk had been given the authority to do such acts, and so they fell within the scope of his employment irrespective of his criminal intent. Something, which came as a great shock to the legal profession at the time.¹³²⁴ Baty argues that the second stage of vicarious liability has always been an attempt to distinguish between the wrongdoing an

¹³¹⁸ John William Salmond, *Salmond on the Law of Torts* (SAH, 1907) 95

¹³¹⁹ Atiyah(n1110) 191-200

¹³²⁰ Ibid 200-210

¹³²¹ Baty(n1109)147

¹³²² Ibid 210-214

¹³²³ *Lloyd v Grace Smith & Co* [1912] AC 716

¹³²⁴ Atiyah(n1110) 191-200

employer is, and is not, liable for.¹³²⁵ Historically vicarious liability was grounded in the authority of the employer, and so them forbidding a tort would defeat liability.¹³²⁶ However there has been a gradual expansion of the circumstances which will trigger vicarious liability, with more and more torts being brought within the scope of employment.¹³²⁷

This theme continued into the twenty-first century. In *Lister*,¹³²⁸ the claimant sought damages from the operators of a residential home after being sexually abused by the Warden. To Lord Steyn, the essential question was whether the tort was so closely connected to the Warden's employment that it was fair, just and reasonable that the employer be liable.¹³²⁹ The Warden was responsible for managing the home, seeing to the children's needs, overseeing their daily routine, and supervising other staff.¹³³⁰ He used this authority to abuse the children committed to his care.¹³³¹ He committed the torts on the time and premises of the employer while performing the duties they demanded of him.¹³³² Accordingly, the tort and the sexual abuse were interwoven, and so there was a close connection between the two.¹³³³ The *Salmond* test was put aside, in favour of the close connection test, which turned on whether the tort is so closely connected to the tortfeasor's employment as for the employer to be liable. An open-ended test which invites the courts to make an evaluative judgement taking account of all the circumstances.¹³³⁴

The departure from the *Salmond* test was heavily influenced by the Canadian case of *Bazley*,¹³³⁵ although the rationale is different. The close connection test adopted by the Canadian Supreme Court in *Bazley* investigated the connection between the wrong, and the risks inherent to the employer's enterprise. *Lister* looks at whether there is a relevant connection between the wrong and the employee's duties, asking whether the

¹³²⁵ Baty(n1109)79

¹³²⁶ Ibid 95

¹³²⁷ Ibid 96

¹³²⁸ *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 AC 215

¹³²⁹ Ibid [28]

¹³³⁰ Ibid [4]

¹³³¹ Ibid [5]

¹³³² Ibid [20-25]

¹³³³ Ibid [28-30]

¹³³⁴ Ibid

¹³³⁵ *Bazley v Curry* [1999] 2 SCR 534

relationship materially increased the risk of harm.¹³³⁶ Indeed this indicated a shift in which the courts were more willing to emphasise enterprise risk theory when considering stage two of vicarious liability. This has been said to be the underlying legal policy of the close connection inquiry.¹³³⁷ As Brodie described, since *Bazley* the courts have placed a much greater emphasis on enterprise risk theory. Indeed he argues that *Bazley* was fundamentally driven by enterprise liability. With both the Canadian Supreme Court and the House of Lords driven to conclude that an employer who endangers the community through his risk-generating enterprise is bound to compensate those harmed when the risk manifests. This is now the most significant policy factor which informs the courts when determining the extent of vicarious liability.¹³³⁸

This may overstate the case. Giliker argues that enterprise liability, or risk based reasoning, is a significant factor for stage two of vicarious liability, but it is not determinative.¹³³⁹ If it were the driving force behind vicarious liability, we would expect to see it expand to independent contractors who generate a risk of harm.¹³⁴⁰ The other factors which motivated this expansion include the global child abuse scandal, in which successive institutions were embroiled in allegations of historic child sex abuse. Simultaneously going through the criminal injuries compensation scheme limited the amount available to victims. What emerged was a judicial willingness to remould the law to ensure victims were not denied a remedy. Vicarious liability was but one of the tools used to do so.¹³⁴¹ Indeed *Bazley* was so influential in the United Kingdom because it gave the House of Lords a means to attach vicarious liability to child sex offenders, and circumvent the Salmond test without violently upending the law.¹³⁴² This is why enterprise risk theory features in the judgment, for it enabled the court to appeal to classic commentators, including Atiyah, to explain why this was not the dramatic turn it

¹³³⁶ *Lister*(n1328) [69-70]

¹³³⁷ *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 [21]

¹³³⁸ Douglas Brodie, Enterprise Liability: Justifying Vicarious Liability [2007] OJLS, 27, 491, 491-500

¹³³⁹ Paula Giliker, *Vicarious Liability in Tort* (2022, BP) 54-64

¹³⁴⁰ *Ibid* 64 -70

¹³⁴¹ Giliker(n1339)

¹³⁴² *Ibid*

so clearly was.¹³⁴³ Enterprise liability was clearly important, but not the only factor which informed the courts thinking.

Whatever their reasons *Lister* precipitated a significant expansion of the boundaries of vicarious liability.¹³⁴⁴ This led to the close connection test being re-examined in *Mohamud v Morrisons Supermarkets Plc*,¹³⁴⁵ in which the claimant was violently attacked by an employee. To Lord Toulson, the close connection test is satisfied when an employee misuses his position to harm the claimant.¹³⁴⁶ The tortfeasor was instructed to attend to customers and was doing exactly this, even when subjecting the claimant to foul-mouthed abuse.¹³⁴⁷ He continued acting in that capacity when he threatened the claimant, pursued him into the car park, and attacked him.¹³⁴⁸ There was an unbroken chain of events between him responding to a customer and the violent attack. Thus, there was a close connection between his employment and the tort. Ryan argues that this was a radical development in the law of vicarious liability, one which shifted the law's focus away from the connection between an employee's duties and the tort in favour of setting. Liability was justified by the employer creating an environment in which the tortfeasor would have contact and close physical proximity with the claimant. The effect being that the close connection seemed to be diluted to mere opportunity. With the employer being liable for whatever torts they gave the employee the opportunity to commit.¹³⁴⁹

Thus, it might not be surprising that the Supreme Court sought to reign in the test, and reframe it away from causality and towards capacity. In *Morrison Supermarkets v Various Claimants*,¹³⁵⁰ an IT auditor developed a grudge against his employer and leaked a large amount of data. Lord Reed clarified that the court was not concerned with a temporal or causal connection between the employment and the tort. Rather it is concerned with whether the employee was acting in his official capacity at the time of

¹³⁴³ Ibid

¹³⁴⁴ Giliker(n1339)

¹³⁴⁵ *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] AC 677

¹³⁴⁶ Ibid [45]

¹³⁴⁷ Ibid [47]

¹³⁴⁸ Ibid [47]

¹³⁴⁹ Desmond Ryan, Close Connection and Akin to Employment Perspectives on 50 Years of Radical Developments in Vicarious Liability, [2016] IJ, 56, 239, 239-250

¹³⁵⁰ *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12; [2020] AC 989

the tort.¹³⁵¹ While there was a connection, it had been broken by the tortfeasor disclosing the information as part of a purely personal vendetta with no connection to his duties. He was not acting in his capacity as an employee at the time of the tort, and so the close connection test was not satisfied.¹³⁵²

Giliker argues that the Supreme Court was trying to tighten the law and the limit impact of *Mohamud*. Lower courts had begun to apply the close connection test too generously, and so they attempted to turn back the clock. To do so they emphasised the need for legal coherence, and so asked the lower courts to look back through past cases to identify the factors leaning in favour, and against, imposing vicarious liability.¹³⁵³ As a result any attempt to apply the close connection test should be grounded in the existing case law. Although this presents some difficulties as it is not clear how many of the cases accurately applied the close connection test as intended. Indeed, to Gray there is a fundamental inconsistency in the case law.¹³⁵⁴ For in some cases mere opportunity appears sufficient and in others it does not. Some discussions about the tort occurring on the time and premises of the employer appear little more than a euphemism for opportunity, while in others it may be more reminiscent of capacity.¹³⁵⁵ There is a great deal of uncertainty in the case law, and so any analysis of the close connection test may be mired in uncertainty.

This was not helped when the Supreme Court revisited the issue once again in *BXB*.¹³⁵⁶ Here the claimant had been sexually assaulted by an Elder in a congregation of Jehovah's Witnesses.¹³⁵⁷ In the circumstances, for the close connection test to be made out there would need to be a close connection between the tort and the Elder's role as an elder of the congregation.¹³⁵⁸ Lord Burrows concluded there was no real link between the Elder's membership of the association and the assault.¹³⁵⁹ The Elder used his close friendship with the claimant, not his official position, to gain her trust and enter her

¹³⁵¹ Ibid [28]

¹³⁵² Ibid [33-47]

¹³⁵³ Giliker(n1339) 54-64

¹³⁵⁴ Anthony Gray, "Vicarious Liability : Critique and Reform," (2021, HP) 48-54

¹³⁵⁵ Ibid

¹³⁵⁶ *BXB*(n1150)

¹³⁵⁷ Ibid [61]

¹³⁵⁸ Ibid [71]

¹³⁵⁹ Ibid [73-78]

home. He was not performing any of his duties nor acting in his official capacity, but rather in his personal capacity as a close friend and confidant of the claimant.¹³⁶⁰ The close connection test could not be satisfied in the circumstances.

Further to this, the Supreme Court also suggested that policy should not normally feature into the close connection inquiry, but is instead a final check in difficult cases. One which directs lower courts to consider whether their conclusion corresponds with the policy of enterprise liability said to underpin vicarious liability.¹³⁶¹ Further to this the Supreme Court rejected the notion that the close connection test should be applied differently in cases of sexual abuse.¹³⁶² As Letwin and Peck describe, the Supreme Court sought to present their refined close connection test as a ‘master test’ which could be applied uniformly in vicarious liability cases. In the process they explicitly eliminated any special category for sexual abuse cases.¹³⁶³ As a result, that the vignette features sexual abuse does not merit any deviation from the standard principles of vicarious liability.

To Giliker, *BXB* was yet another attempt to slow down the momentum of vicarious liability and reinstate guiding principles to provide certainty and predictability.¹³⁶⁴ The Supreme Court acknowledged it had some anxiety about the scope of vicarious liability being widened too far.¹³⁶⁵ Thus, they reduced the impact of *Mohamud* to directing courts to consider the field of activities entrusted to the employee, to identify whether the tort was within the scope of their employment.¹³⁶⁶ The question is whether the tort is closely connected to the acts the tortfeasor was authorised to do in the course of their employment or quasi employment.¹³⁶⁷ The test has shifted away from risk creation to a dissection of the purported employee’s functions, and the capacity in which he was acting at the time of the tort.¹³⁶⁸ This will require a close analysis of the facts between

¹³⁶⁰ Ibid

¹³⁶¹ *BXB*(n1150) [82]

¹³⁶² Ibid [58]

¹³⁶³ Jeremy Letwin and William Peck, "A Grand Unified Theory for the Close Connection Test in Vicarious Liability Case [2023] CLJ 381 381-391

¹³⁶⁴ Paula Giliker, Vicarious liability in the UK Supreme Court, [2024] LS, 44, 191, 191-194

¹³⁶⁵ *BXB*(n1150) [48]

¹³⁶⁶ Giliker(n1364) 191-194

¹³⁶⁷ Ibid 194-198

¹³⁶⁸ *WM Morrison Supermarkets Plc* (n1409) [28]

the tortfeasor's activities and the wrongful conduct.¹³⁶⁹ For if they were acting in their capacity as an employee, meaning performing the duties expected of them, there is likely a close connection to the resulting tort. Although despite the role of policy being reduced, enterprise risk theory has persisting relevance. For it not is possible to understand whether the tort is closely connected to the employment, without a comprehensive analysis of their role within the enterprise, and corresponding risks.¹³⁷⁰

Where then does this leave unincorporated associations? For they attract vicarious liability even though members are not, strictly speaking, authorised to do anything. Individual members might be given additional responsibilities, but liability for unincorporated associations is not confined to the actions of those in leadership roles.¹³⁷¹ There is no primary authority on this point. *BXB* did involve an unincorporated association however the effective defendant was the Jehovah's Witness organisation itself.¹³⁷² Thus, there is no authority applying the current conception of the close connection test to unincorporated associations. The unchallenged principle from the *Christian Brothers* therefore suggests the question is whether Alex is acting for the common purpose of the association at the time of the tort.¹³⁷³ Vicarious liability will arise if there is a close connection between the common purposes of Ross's Association and Alex sexually assaulting Amelia.

The requirement might be better envisioned as asking whether Alex is acting in his capacity as a member of Ross's Community when sexually assaulting Amelia? Capacity has been a consistent theme within the case law, and indeed it is intimately connected with the Supreme's Court new focus on the tortfeasor's duties. The dearth of authority applying the close connection to unincorporated associations, means there is little choice but to use the cases relevant to employees and argue from analogy. Of course it is not clear which of the previous cases remain effective law, and which do not. There is a great deal of uncertainty surrounding the close connection test generally, and even less for how the new conception would apply to unincorporated associations. That

¹³⁶⁹ *BXB*(n1150) [58]

¹³⁷⁰ *Brodie*(n1399)

¹³⁷¹ *Hibernian*(n1292)

¹³⁷² *BXB*(n1150) [59]. The Supreme Court acknowledged this could be a dual vicarious liability situation, but provided no further analysis on this point.

¹³⁷³ *Christian Brothers*(n1121) [61-62]

uncertainty cannot be resolved until the Supreme Court provides further clarity. Until they do, capacity seems to be the natural starting point. For across the prior case law, a person acting in their capacity as an employee during a tort is a strong indication that the close connection is satisfied.

For instance, in *Levitt*¹³⁷⁴ the claimant was assaulted by a fellow employee on a building site following an argument about work materials. HHJ Freedman determined the violence was not within the field of activities assigned to either employee and that personal violence would be beyond the scope of vicarious liability.¹³⁷⁵ However, when the argument broke out, both men were acting in their capacity as employees by securing the materials they needed.¹³⁷⁶ This was the reason they argued, and while violence was a disproportionate, irrational escalation, it was part of that conflict.¹³⁷⁷ The tortfeasor was acting in his capacity when he argued with the claimant and did not put that to one side when violence broke out. There was an unbroken connection between him acting as an employee and the tort, and so the close connection test was satisfied.

This can be contrasted with *Chell*,¹³⁷⁸ in which rising tensions at a quarry resulted in one of the defendant's employees detonating an explosive pellet on the claimant's workbench. To Davies LJ the critical question was whether the tortfeasor's actions were done in the course of his employment.¹³⁷⁹ To that end the explosive pellet did not belong to the employer, the employee was not permitted to use it, and detonating it certainly did not form part of his duties. The tension at the workplace was relevant, but there was no real connection between the tortfeasor's position and his actions. Thus the close connection test could not be satisfied.¹³⁸⁰ The tortfeasor did not act in his capacity as an employee at any point, but rather acting on a personal grudge against contractors on the site. Similarly in *Graham*,¹³⁸¹ the claimant and the tortfeasor were messing around in a bodywork repair shop. The tortfeasor had sprinkled the claimant's overalls with an

¹³⁷⁴ *Levitt v Euro Building and Maintenance Contractors Ltd* [2019] EWHC 2926 (QB)

¹³⁷⁵ *Ibid* [79]

¹³⁷⁶ *Ibid* [80]

¹³⁷⁷ *Ibid* [88]

¹³⁷⁸ *Chell v Tarmax Cement and Lime Ltd* [2022] EWCA Civ 7

¹³⁷⁹ *Ibid* [25]

¹³⁸⁰ *Ibid* [26-28]

¹³⁸¹ *Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47; [2015] ICR 665

inflammable thinning agent, before lighting a cigarette and causing the claimant to become badly burned. Longmore LJ identified that the highly reckless acts of engaging in horseplay and sprinkling another employee's clothes with thinning agents were not part of the tortfeasor's employment.¹³⁸² Particularly the use of a cigarette lighter, which caused the injuries, as that was not only forbidden in the workplace, but it had no connection to any of the tortfeasor's duties.¹³⁸³ The tortfeasor was not acting as an employee but a friend of the claimant. All the employer provided was the mere opportunity for the tortfeasor to access the site and cause harm which was not enough. There must be a connection between the tortfeasor's position and the tort, meaning they must be acting in their capacity as an employee.

There is an analogy to vicarious liability for police officers, for many of the cases are concerned with capacity. For to be performing the duties, and exercising the associated powers, of a constable one must act in that capacity. In *Weir*, an off-duty policeman used a marked van to help his girlfriend move, and when he encountered the claimant, he manhandled him into it and assaulted him. Vicarious liability here was concerned with whether the tortfeasor was acting in his capacity as a police officer when he attacked the claimant.¹³⁸⁴ On the facts, he had used his purported authority to take the claimant to a van under the guise of transporting him to the station. The claimant only complied because he knew the tortfeasor was a constable and so submitted to his authority.¹³⁸⁵ He may have been off duty, but the tortfeasor was wearing his proverbial hat as a police officer throughout. Thus, it was right for the chief constable to be vicariously liable for the torts of an employee purporting to act with their authority. Similarly, in *Bernard*¹³⁸⁶ the claimant had been using a telephone when the tortfeasor identified himself as a police officer and demanded the phone. When the claimant refused, the tortfeasor shot him. The Privy Council identified it was of prime importance that the incident followed the tortfeasor identifying himself as a policeman. The tortfeasor intended to create the impression he was on police business, and so invoked

¹³⁸² Ibid [14]

¹³⁸³ Ibid [18]

¹³⁸⁴ *Weir v Bettison* [2003] EWCA Civ 111 [10-11]

¹³⁸⁵ Ibid [12]

¹³⁸⁶ *Bernard v AG Jamaica* [2004] UKPC 47

his authority to that effect. Thus the close connection test could be satisfied.¹³⁸⁷ To Morgan, when there is an exercise of police authority or powers during the commission of a tort then the close connection test is satisfied and vicarious liability arises.¹³⁸⁸ Albeit not all the cases follow this pattern, notably *N*,¹³⁸⁹ although Morgan suggests *N* sits oddly with the bulk of the case law in this sphere and is ripe to be overturned.¹³⁹⁰ Thus, the focus should be on whether the tortfeasor acting or purporting to act as a police officer.¹³⁹¹

A similar principle can be identified in *Maga*,¹³⁹² where the defendant was sexually abused by a priest and sought damages from the archdiocese. To Neuberger MR, as he then was, the question was whether the tortfeasor was acting in his capacity as a priest.¹³⁹³ He had dressed in clerical garb, used his title, and acted within the scope of his duty to gain the trust of non-Catholics to spread the gospel.¹³⁹⁴ He used church events to draw the claimant into his orbit and abused him while performing his clerical functions.¹³⁹⁵ He was acting in his capacity as a priest and did not put that aside when abusing the claimant. Thus, there was a close connection between his quasi-employment and the tort, and so the archdiocese was vicariously liable.

In *Bellman*¹³⁹⁶ a firm's Managing Director organised a Christmas Party, argued with the attendees, attempted to lecture them, and punched the claimant. Asplin LJ described that the tortfeasor was acting in his professional capacity throughout, arguing with the employees about pay, exercising his authority over them, and resorting to violence upon being challenged.¹³⁹⁷ The tortfeasor had been given a remit to organise the party and transport the attendees onward to a hotel. While he may have set out to enjoy himself and so took off his managerial hat, he put it back on to argue with the claimant. Within that argument, and so whilst still wearing his hat, he attacked the claimant. Thus, there

¹³⁸⁷ Ibid [25-27]

¹³⁸⁸ Phillip Morgan, Close Connection and Police Torts', (2013) JPN 29, 233, 233-237

¹³⁸⁹ *N v Chief Constable of Merseyside* [2006] EWHC 3041 (QB)

¹³⁹⁰ Morgan(n1388) 233-237

¹³⁹¹ Ibid

¹³⁹² *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256

¹³⁹³ Ibid [38]

¹³⁹⁴ Ibid [45-48]

¹³⁹⁵ Ibid [49-50]

¹³⁹⁶ *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214

¹³⁹⁷ Ibid [25-27]

was a close connection between his employment and the tort.¹³⁹⁸ To that end, when a tortfeasor acts in his professional capacity, wearing his proverbial hat as an employee, the close connection test is likely to be made out. If the relationship between defendant and tortfeasor is akin to employment, then the latter must be wearing whatever hat the relationship assigns them. A tortfeasor might be wearing their hat as a volunteer, pseudo-professional amateur footballer, or member of an unincorporated association. If there is an unbroken connection between them acting in this capacity and the tort, the close connection test is satisfied.

Thus, when determining if the close connection test is satisfied on the vignette, there is good reason to focus on the capacity in which Alex is acting. If he is wearing his proverbial hat as a member of Ross's Community when sexually assaulting Amelia, this is a strong indicator the close connection test is satisfied. If he is not, then Alex is off on a 'frolic of his own.'¹³⁹⁹ In *Hartwell*,¹⁴⁰⁰ an armed police officer attempted to kill his ex-partner and shot several bystanders in the process. Lord Nichols concluded the officer had forsaken his duties, abandoned his post, and so put aside his position in favour of a purely personal vendetta in which he did not invoke his authority.¹⁴⁰¹ There was no connection between his duties, and the attempted murder, meaning the employee was off on a frolic of their own, for which there could be no vicarious liability.¹⁴⁰² The tortfeasor removed his proverbial hat as a police officer and so was not acting in that capacity at the time of the tort.

Alex approaches Amelia to further the common purposes of an unincorporated association. Ross's Community is concerned with approaching, seducing, and having sex with women by using Ross's techniques. If he is successful, the community benefits because their objective is fulfilled. In the same way, an unincorporated association of sportsmen promoting a technique would benefit if a member used it to great effect. If Alex is unsuccessful, this was an attempt to achieve the organisation's goals and so becomes a learning opportunity. Moreover, Alex's continued membership of the

¹³⁹⁸ Ibid [27]

¹³⁹⁹ *N' v Chief Constable of Merseyside Police* [2006] EWHC 3041 [36]

¹⁴⁰⁰ *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12; [2004] 1 WLR 1273

¹⁴⁰¹ Ibid [17]

¹⁴⁰² Ibid [17]

unincorporated association is contingent on him completing his assigned missions. If Alex wishes to remain part of the community, he must follow Ross's instructions and so approach women to secure sex. Amelia is the woman Alex chooses to complete that mission, which serves the common purpose of the association and guarantees his continued membership. He is acting in his capacity as a member of the community throughout his encounter with Amelia.

Of course Alex is removed from the course after he reports what has happened, but this is largely irrelevant. Indeed the motivation for removing Alex may not necessarily be that he has exceeded the bounds of the association's common purpose but may be more concerned with protecting the group's reputation, or electing not being associated with a person who has committed sexual assault. More fundamentally, even if Ross and Ross's Community views Alex's actions as a blatant misapplication of their common purpose that does not mean he was acting outside of it. In *Rose v Plenty*,¹⁴⁰³ a milkman was expressly prohibited from engaging a young person to assist them. Despite this, he engaged a teenager to assist in the collection and delivery of milk bottles, who was then injured while riding on the bank of the milk float. Denning MR found that the express prohibition did not change the nature of the milkman's employment. They were employed to complete the rounds and deliver milk, and so his actions while doing this were done on his employer's behalf, and so fell within the scope of his employment.¹⁴⁰⁴ Even when disregarding clear instructions, the milkman was acting in his capacity as an employee and so there could be vicarious liability. By analogy even if Alex is misapplying the community's common purpose, and it is not at all clear that he is, then he can still act in his capacity as a member at the time of the tort. Say a football club is formed with the common purpose of playing competitively. New members are encouraged to play and to win, so if one decides to use a dangerous tackle to that effect, they are serving the common purpose of that association. In playing football, the new member is acting for the common purpose of the association. This does not change when they take that purpose too far. When playing, tackling, and injuring other players, the new member is wearing their proverbial hat as a member of the club. Thus, committing a tort while

¹⁴⁰³ [1976] 1 WLR 141

¹⁴⁰⁴ Ibid [144-145]

playing football should satisfy the close connection test. Even if the member is ejected from the club after the fact, this does not change the fact that they were acting for the common purpose of the association at the time of the tort.

Of course, the act of playing football will only satisfy the close connection test in context. If a member independently arranges a game for family and friends, and commits a tort in the process then the test should not be satisfied. It is only when they are playing for the club competitively, and so acting for the common purpose of the association, should vicarious liability arise.

To shift the example into the digital world, imagine an online forum is set up for fishing enthusiasts to share fishing stories, techniques, and achievements. This common purpose is paired with the bare minimum of infrastructure necessary to give rise to an unincorporated association. Say a member of the group then goes to a pond to fish, and to reach it trespasses on another's land. Will the association be vicariously liable for their tort? The answer, once again, turns on context. If the member had stumbled across the pond by chance, thought it would be a nice place to fish, and maybe hoped to share a story with his online community later; he does not appear to be acting for the purposes of the association. He is not venturing to the pond in his capacity as a member, but as a private fisherman. There is a link, but the driving force behind his actions is his own personal desire to fish, and so his tort is done in a private capacity.

But say instead, the member has seen members of the online association talk about this particular type of pond, or the fish within them, with great enthusiasm. They detail how rewarding fishing in these places is and that only the very best members of the forum will have accessed them. Perhaps others have provided details on how to access them effectively, the best way to transport fishing equipment without landowners knowing, or make other suggestions to maximise the experience. Say a member sees this, and is motivated to go to a pond, have an experience, and share it on the forum. The member will take personal enjoyment from the experience of fishing, but their reason for acting is that they want to have a story to share with the community, and receive the acclaim that will come with it. In the process he may also gain experience which will be helpful to others. This in turn will further the community's purpose of sharing fishing stories, techniques, and achievements.

Thus when he goes to the pond, trespasses, and fishes, he is now acting for the common purpose of the association. In the previous example, his personal enjoyment was the driving force and his membership an incidental factor. Now he is fishing in his capacity as a member of the unincorporated association while happening to enjoy the experience. Thus when he trespasses on this occasion, the close connection test ought to be satisfied, and the wider association should be vicariously liable for his tort.

This is something of an awkward example. Indeed it might be difficult to apportion the extent to which a tortious fisherman is acting for personal enjoyment or the common purposes of his association. However the question need not disturb the analysis for Ross's Community is not a sharing community. It is concerned with promoting Ross Mystery, his methods, and Pick Up Artistry generally. While members do share stories and experiences, this is a byproduct of the association's common purpose, not its driving force. To continue the fishing analogy, say an unincorporated association is founded with the common purpose of promoting the methods of a specific well-known fisherman and fishing generally. Members are encouraged to learn these methods from the forum, follow in the footsteps of this well-known fisherman, and then share their success. Their sharing stories is a means of achieving the common purpose; they either demonstrate that these methods work or give members the opportunity to ask how they might be better applied.

Say then a new member joins the forum and begins learning these methods. They absorb the knowledge on the forum, read the accounts of others, and ask for the input of more experienced members. Thus, when they go into the world to apply those methods they are doing this in their capacity as a member of an unincorporated association. For they are using the methods the community is founded to promote. If they are successful they validate the techniques and reinforce the reputation of the person who devised them. If they are not successful, then a learning opportunity has been created so that the member might perfect the technique next time. If they conclude the method is hopeless, then this member can be excluded from the forums so the association can continue its unrelenting promotion unmolested. Their act of implementing these methods necessarily furthers the common purposes of the association. That the member also happens to take enjoyment from fishing no longer

seems relevant. Whatever their motive, and whatever the outcome, their use of the methods the community is founded to promote causes them to act in their capacity as a member. The same should be true for Ross's Community, for members act in accordance with its common purposes when implementing the techniques it is founded to promote.

This is not to say that the association will be liable for every conceivable tort attached to the act of going out into the world to attempt the technique. For instance, say a member was travelling to a fishing location, stops for coffee, and spills it on someone then there should be no vicarious liability. Similarly if Alex ventured to the bar, intending to use touch escalation, but decided to have a few drinks first, became intoxicated, and carelessly collided with a patron there should be no liability. There is no connection between the common purposes of the association, and the tort.

This approach also determines the extent to which the association can be liable. Say a member of Ross's Community is able to successfully implement their promoted methods to seduce a woman. In the process they pass on an undisclosed sexually transmitted disease, or negligently injure their partner during sex. Should the association be vicariously liable? The answer is no. For the common purpose of the association is to implement techniques with a view to secure sex. Once sex has been achieved, meaning the physical act has begun, then they are no longer acting in their capacity as a member. To illustrate, a member of a football club founded to achieve victory at all costs ceases to act in their capacity as a member once their objective has been achieved. Their objective is to get the ball across the goal line. Thus if they do so, boast about their triumph, get into an argument with a fan of the opposing team, and attack them; there should be no vicarious liability. The common purposes of the association cannot be fulfilled by a fight during a pause in play. It would be different if the member punched an opposing player, believing them to be a strong opponent who might prevent them from scoring during the next period of play. A person acts in their capacity as a member when acting to secure victory by getting the ball across the goal line. That cannot be achieved by a fight with a fan during a pause in play, but can by incapacitating an opponent. The question is whether the tort is done pursuant to a common purpose.

For the vignette Ross's Community is not really concerned with achieving sex, meaning here the commencement of the physical act. A member who secures sex, and is content with this, puts their membership aside. Thus there would be no vicarious liability for torts committed during intercourse, the passing of a sexually transmitted disease, or a violent post-intercourse argument. These things are reasonably incidental risks of having sex but that is not the common purpose of the association. However this could easily change. For instance, say during intercourse the member non-consensually choked their partner because they believe this is to be a way of communicating their value. Their goal being to ensure the woman will have sex with them again in future. Say this is one of Ross's techniques. Now they are acting for the common purposes of the association, and so there can be vicarious liability. Similarly if the member has an embarrassing sexual performance and makes defamatory comments online, then this is likely done in a purely personal capacity. However if they make those defamatory comments whilst uploading their story to the community, perhaps to create teaching and learning opportunities, then they are acting in their capacity as a member. The act itself is less important to the reasons for acting.

The same logic applies for torts committed if a member is unsuccessful in implementing the techniques. Say a member of the football club is given a red card, and sometime after the game concludes they vindictively attack the referee. Victory cannot be achieved by an unprovoked assault on a referee once the game has ended, so they cannot be acting in their capacity as a member of the association. However if the player had instead attacked the referee spontaneously, perhaps the moment the red card has been issued things would be different. The violence would no longer be independent of the game but a manifestation of the interpersonal friction that occurs during a sports game. The violence is a reaction to the common purpose of the association, victory at all costs, being frustrated. In an environment characterised by interpersonal friction, having one's primary objective be frustrated creates a real prospect of anger, and violence. Even if victory cannot be secured by assaulting a referee, they react to failure in their capacity as a member of the sports club. Similarly, say Alex felt slighted and physically attacked a woman who had denied him, after his attempts at Pick Up Artistry failed. Emotional turmoil or rejection is a real possibility when attempting to secure sex.

Thus if violence occurs immediately, then this is a spontaneous reaction to Alex's common purpose being frustrated. Thus he reacts to that failure in his capacity as a member of the association. However if he had instead waited until after the woman left the bar, then the position changes. He would have time to reflect on his decision, plan his course of action, and choose to commit an act of interpersonal violence for its own sake. He is no longer reacting in the moment to a common purpose being frustrated, but acting to avenge a perceived slight in a purely personal capacity.

There is a wider conversation to be had about the exact point at which the association would not be liable, but further discussion is unnecessary. In the vignette Alex commits a tort whilst implementing the techniques of Ross Mystery in an effort to secure sex. Thus he is acting in his capacity as a member of the association at the time of the tort.

Enterprise Risk

That there is little primary authority on how the close connection test intersects with the law of unincorporated associations, makes this a difficult case. As a final check in difficult cases, thought must be had as to whether a conclusion is consistent with the policy of enterprise liability said to underpin vicarious liability.¹⁴⁰⁵ Thus there is a need to focus on the incidental risks of the enterprise.

There is longstanding support for this approach in the case law. In *Salaam*,¹⁴⁰⁶ Nicholls identified vicarious liability as being concerned with the incidental risks of an enterprise. If a relationship of, or akin to, employment is generating an incidental risk of a tort, then the close connection test should be satisfied if that risk manifests.¹⁴⁰⁷

Similarly, in *Gravil v Carroll*,¹⁴⁰⁸ the claimant, a semi-professional rugby player, was punched by an opposing player during a match. Clarke MR described the close connection test as a means of determining whether it is fair, just, and reasonable to hold the defendant liable. Thus, there is a general preference to say risks which are reasonably incidental to the relationship are closely connected.¹⁴⁰⁹ The defendant was

¹⁴⁰⁵ *BXB*(n1150) 82

¹⁴⁰⁶ *Dubai Aluminium v Salaam* [2002] UKHL 48; [2003] 2 AC 366

¹⁴⁰⁷ *Ibid* [22]

¹⁴⁰⁸ [2008] EWCA Civ 689 [2008]

¹⁴⁰⁹ *Ibid* [21-23]

contracted to play rugby, which carries a known risk of serious injury, so it was a reasonably incidental risk for which the employer should be vicariously liable.¹⁴¹⁰

This was applied again in *Brink's*¹⁴¹¹ where the defendant was contracted to transport a consignment of silver bars belonging to the claimant. The defendant's employees stole the consignment during its transportation. To Moore-Bick LJ, the close connection test ought to be satisfied when the tort is a reasonably incidental risk of the relationship giving rise to vicarious liability.¹⁴¹² The relationship between the defendant and the tortfeasors necessitated them having the authority to enter the secure compound and keep others away. The relationship gave the tortfeasors undisturbed access to the silver bars and overall responsibility for them. As a result, there was a reasonably incidental risk the bars would be stolen, and so a close connection between this and the tortfeasors' employment.

A community predicated on men approaching women for sex, using the techniques and methods of Ross Mystery, is likely to result in men pestering, annoying, and harassing them in the process. However, the vignette goes further. Ross's Community isn't just generating an incidental risk but a specific risk of sexual violence by deliberately encouraging dangerous behaviours. Ross's Community promotes the use of touch escalation, which carries a prospect of that members will non-consensually touch women in an effort to secure their sex to a full sexually encounter. As set out, there is a real prospect that this behaviour could amount to sexual assault.¹⁴¹³ As a result, Ross's Community generates a real prospect of sexual violence. So, when a member sexually touches a woman, without her consent, this very danger manifests. Thus, there is a much tighter connection between their common purpose and the tort.

To illustrate, return to the earlier example of the football club founded to secure victory at all costs. When new members join, they are encouraged to use dangerous tackles, which carry a strong likelihood of serious injury. Thus, when a member, wishing to secure victory at all costs, uses that tackle and injures the opposing player, they act in

¹⁴¹⁰ Ibid [24-28]

¹⁴¹¹ *Brink's Global Services Inc v Igrox Ltd* [2010] EWCA Civ 1207

¹⁴¹² Ibid [29]

¹⁴¹³ This would of course be dependent on the context of any specific offence or incident

accordance with the common purpose of the association. There is already likely to be a close connection because they are playing football and acting in their capacity as members of the club. However, this is amplified by their ethos which explicitly encourages dangerous behaviours.

That this ought to satisfy the close connection test is argued with reference to *Weddall and Wallbank*.¹⁴¹⁴ Here, both claimants were spontaneously assaulted after making requests of their respective employees. In *Weddall*, the claimant had asked the tortfeasor to work a shift, whereupon the tortfeasor cycled to the workplace to attack him. In *Wallbank*, the claimant asked the tortfeasor to assist him in loading pieces of furniture before being violently attacked. To Phil LJ, both cases featured a violent response to lawful instructions,¹⁴¹⁵ but the tortfeasor in *Weddall* was at home. He received a request to come in for a shift, reacted violently, and went out of his way to attack the claimant. The request was little more than a pretext for an independent act of violence.¹⁴¹⁶ While in *Wallbank*, the attack occurred on the employer's time in response to instruction.¹⁴¹⁷ Interpersonal friction is a reasonably incidental risk to any employment, but the nature of the factory meant there was a real possibility of violence. Thus, the employer should be vicariously liable because that real possibility flowed directly from the tortfeasor's employment.¹⁴¹⁸ Similarly, the common purpose of Ross's Community creates a reasonably incidental risk of members pestering, harassing, or potentially assaulting women. But when the community emphasises a specific method of Pick Up Artistry, which includes responding to non-consent with sexual touching, there is a real prospect of sexual assault. Thus, the close connection test should be satisfied when that danger manifests.

Those in relationships capable of giving rise to vicarious liability will find it triggered more readily when they encourage, rather than deter, dangerous behaviours. In *Mattis*,¹⁴¹⁹ the claimant was violently attacked by a doorman. Judge LJ identified the doorman as being expected by his employer to be aggressive, intimidatory, and, on

¹⁴¹⁴ *Weddall v Barchester Healthcare Ltd and Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25

¹⁴¹⁵ *Ibid* [43]

¹⁴¹⁶ *Ibid* [44-46]

¹⁴¹⁷ *Ibid* [52]

¹⁴¹⁸ *Ibid* [54]

¹⁴¹⁹ *Mattis v Pollock* [2003] 1 WLR 2158

occasions, violent.¹⁴²⁰ Indeed, the reason he attacked the claimant with a knife was in retaliation for a previous humiliation which undermined the fearsome reputation he was expected to cultivate.¹⁴²¹ The stabbing incident was a manifestation of the employer's risk-generating behaviour. Thus, there was a close connection, and the defendant ought to be vicariously liable.¹⁴²² Similarly, Alex is actively encouraged to engage in risky behaviours, such as touch escalation, which gives rise to a real prospect of sexual violence. This is the very danger Ross's Community is generating when encouraging its members to act in accordance with its common purpose. Sexual violence is a real prospect of their common purpose, and so the close connection test ought to be satisfied when it manifests.

In summary, the close connection test is satisfied by Alex wearing his proverbial hat as a member of Ross's Community throughout the commission of a tort. He is acting to further the common purposes of the association and to maintain his own status as a member. There is an unbroken connection between him acting in that capacity and the tort, and so a close connection between the relationship giving rise to vicarious liability and the assault. Secondly, the common purpose of the unincorporated association naturally creates a reasonably incidental risk of women being pestered, harassed, or assaulted. This risk is elevated into a real prospect of sexual violence by the specific characteristics of the community, and so the test ought to be satisfied when it manifests. Thus, there is a close connection between the common purpose of Ross's Community and Alex's sexual assault on Amelia. Both limbs of the test are made out, and so vicarious liability arises. Accordingly, every member of the association would be liable for the tort and could be pursued for damages. Members of Ross's Community would be collectively liable for the assault, and so there is a viable route to collective liability.

¹⁴²⁰ Ibid [30]

¹⁴²¹ Ibid [31]

¹⁴²² Ibid [33]

Criminal Liability

Among the aims of the thesis is to investigate the potential for criminal collective liability. For unincorporated associations, there are three routes: the Interpretation Act, delegation and attribution.

The Interpretation Act

The Interpretation Act 1978¹⁴²³ defines persons as including unincorporated associations. Thus, any statutory offence enacted after 1889,¹⁴²⁴ applies to unincorporated associations,¹⁴²⁵ unless the statute disapplies the Interpretation Act. As in tort, criminal liability cannot attach to the association but instead attaches to each and every member. In *RL and JF*¹⁴²⁶ an unincorporated association instructed two contractors who inadvertently fractured a heating pipe and polluted a nearby water course. Two members of the association were prosecuted for causing polluting matter to enter controlled waters.¹⁴²⁷ Hughes LJ acknowledged that unincorporated associations have no independent legal existence, so members are jointly and severally liable for actions done within their authority. Thus, every one of the nine hundred members of the association was potentially liable for polluting the watercourse,¹⁴²⁸ and it was for the Crown to determine who met the threshold for prosecution.¹⁴²⁹

Thus, there is a framework for wide-ranging collective criminal liability. Unfortunately, it is not relevant to the analysis. There is no relevant statutory offence arising out of the vignette, and so no route to collective criminal liability. Sexual assault may be a statutory offence, but it requires mens rea, and an unincorporated association has no mind through which to form deliberate or reckless intent. That the members can form such intent does not appear to be relevant. Firstly because on this account it is the association, not the members, which commit the statutory offence. Secondly, there is no authority that the identification doctrine, which exists to find a 'guiding will and mind' for corporations and partnerships, applies to unincorporated associations.¹⁴³⁰ Moreover,

¹⁴²³ The Interpretation Act(n1295)

¹⁴²⁴ Ibid (s3)

¹⁴²⁵ Stewart(n1229) 851

¹⁴²⁶ *R v RL and JF* [2008] EWCA 1970; [2008] WLR (D) 299

¹⁴²⁷ Water Resources Act 1991 s85(1)

¹⁴²⁸ *R v RL*(n1426) [12] [33]

¹⁴²⁹ Ibid [35]

¹⁴³⁰ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500

the recent expansion of the doctrine was confined to corporate bodies and incorporated partnerships.¹⁴³¹ Thus, for unincorporated associations, criminal liability arising through the Interpretation Act will be confined to strict liability offences.

This has been confirmed for unincorporated partnerships, and the legal principles are broadly similar. In *Stevenson & Sons*¹⁴³² a partnership was indicted for failing to submit a sales note. The Court of Appeal accepted the statutory offence applied to both unincorporated associations and partnerships, and so liability attached to the individual partners or members. However, it is not open to the Court to convict an individual for a crime, which requires intent, that they were not complicit in.¹⁴³³ Complicit here meaning they had formed the requisite intent. Collective criminal liability in this context is confined to strict liability offences, and none arise on the vignette. The Interpretation Act allows for a framework where collective criminal liability might arise through the creation of further offences, but the analysis cannot comment on a law which does not currently exist.

Delegation and Attribution

In tort, members of an unincorporated association are vicariously liable for the torts of another member, which are closely connected with the association's common purpose. There is no general theory of criminal vicarious liability. In *R v Newcastle Magistrates Court*¹⁴³⁴ an attempt was made to privately prosecute a former chief constable for false imprisonment. Munby LJ observed that the chief constable played no role in the incident, and so the real object of the prosecution was to make him vicariously liable for a crime, which is impermissible save for rare anomalies.¹⁴³⁵

It is these anomalies which concern the analysis. There are two strands of criminal vicarious liability. The first is delegation, which arises when A delegates duties to B, which are then improperly carried out. The second is attribution, where A becomes liable for the acts of B, and B's knowledge and intent is attributed to them. Should either

¹⁴³¹ Economic Crime and Corporate Transparency Act 2023 s199(13)

¹⁴³² *R v W Stevenson & Sons* [2008] EWCA 273; [2008] Bus LR 1200

¹⁴³³ *Ibid* [12-26]

¹⁴³⁴ [2010] EWHC 935 (Admin)

¹⁴³⁵ *Ibid* [17-25],[32]

of these exceptions to the general rule apply, the defendant may be vicariously liable for a criminal offence.¹⁴³⁶ Both are vehicles for collective criminal liability.

Criminal vicarious liability by delegation occurs when A delegates a duty to B, who goes on to commit a criminal offence even if A has no knowledge of it.¹⁴³⁷ It most commonly occurs in licensing cases, although it is not confined to them. In *Linnett*,¹⁴³⁸ a manager and a company secretary jointly held a licence. The manager knowingly permitted disorderly conduct, in breach of the licence, for which both licence holders were prosecuted. Goddard LJ identified a line authority where those who delegate responsibility can have the acts and knowledge of the delegee imputed to them. Therefore, it did not matter that the company secretary was not present; they could be prosecuted for the acts of the delegee.¹⁴³⁹ This line of authority was, begrudgingly, endorsed by the House of Lords in *Vane*.¹⁴⁴⁰ To Lord Reid, criminal vicarious liability runs contrary to fundamental principles of the criminal law but exists to give effect to the will of Parliament. If Parliament intends A to perform his duties, he should not defeat that by delegating.¹⁴⁴¹ Thus, the Courts acted to prevent this by coining criminal vicarious liability, and it was too late to correct the anomaly.¹⁴⁴²

To illustrate, in *Howker*¹⁴⁴³ the defendant permitted his barman to serve patrons. The barman sold beer to a youth for which the defendant was prosecuted and convicted by a Magistrates Court. He appealed by way of case stated, whereupon Birstow J expressed discomfort with this anomalous strand of criminal vicarious liability. Nevertheless the Divisional Court had no choice but to affirm the conviction.¹⁴⁴⁴ Similarly, in *Winson*,¹⁴⁴⁵ the defendant held a licence which prohibited him from selling alcohol to anyone who had not been a member of a club for two days. He was convicted, by a jury, when his delegee served a patron in breach of that licence. On

¹⁴³⁶ Archbold(n312) 17B-24-28

¹⁴³⁷ Ibid 17B-25

¹⁴³⁸ *Linnett v Metropolitan Police Commissioner* [1946] KB 290

¹⁴³⁹ Ibid [294-295]

¹⁴⁴⁰ *Vane v Yiannopoulos* [1965] AC 486

¹⁴⁴¹ Ibid [500]

¹⁴⁴² Ibid [497]

¹⁴⁴³ *Howker v Robinson* [1972] 2 All ER 786

¹⁴⁴⁴ Ibid [185]

¹⁴⁴⁵ *R v Winson* [1969] 1 QB 371

appeal, Parker LCJ accepted vicarious liability by delegation exists independently of the normal rules of criminal liability, thus the jury was entitled to impute the guilty mind of the delegatee to the defendant.¹⁴⁴⁶

Delegation prosecutions frequently occur in the context of licencing, although the doctrine is not restricted to it. In *Cartman*,¹⁴⁴⁷ Russel LCJ explained that delegation is commonly invoked in licencing as Parliament's intent is easily identifiable.¹⁴⁴⁸

Delegation is not concerned with licencing but any statutory provision which might be defeated by the defendant delegating responsibility. In *Allen v Whitehead*,¹⁴⁴⁹ the owner of a place of refreshments delegated day-to-day control to a manager who permitted a group of women, known to be prostitutes, to gather over multiple days. The owner was prosecuted for allowing them to gather, contrary to a statute at the time, but was acquitted by a Magistrates Court. The prosecuting authority appealed, whereupon Hewart LCJ accepted the statute would be rendered void if defendants could escape liability by delegating. Thus, the only way to give effect to the will of Parliament was for there to be criminal vicarious liability.¹⁴⁵⁰ Thus delegation can apply to any statutory offence which might be nullified by the defendant delegating responsibility.

There is no evidence of delegation on the vignette nor any qualifying criminal offence. Parliament has expressed an interest in imposing duties on those who endanger others online,¹⁴⁵¹ but none currently apply. Even if a duty were imposed, criminal vicarious liability might still be rejected. The anomaly of its existence, coupled with longstanding judicial discontent, means any proposed extensions will be met with scepticism. In *St Regis*¹⁴⁵² an employee dishonestly made false entries on a register for which the company was convicted. The Court of Appeal acknowledged that criminal vicarious liability by delegation existed;¹⁴⁵³ however it concluded the doctrine was unsound in the contemporary era. Thus, the Courts will rarely, if ever, extend it.¹⁴⁵⁴ They refused to apply

¹⁴⁴⁶ *Ibid* [385]

¹⁴⁴⁷ *Commissioners of Police v Cartman* [1896] 1QB 655

¹⁴⁴⁸ *Ibid* [658]

¹⁴⁴⁹ [1930] 1 KB 211

¹⁴⁵⁰ *Ibid* [220-221]

¹⁴⁵¹ Online Safety Act 2023

¹⁴⁵² *St Regis* [2011] EWCA Crim 2527; [2012] PTSR 871

¹⁴⁵³ *Ibid* [28]

¹⁴⁵⁴ *Ibid* [24]

it to the relevant regulatory scheme.¹⁴⁵⁵ Even if relevant duties are imposed for online actors who cause harm, there is no guarantee delegation would apply. Vicarious criminal liability by delegation is not currently applicable, is unlikely to be extended, and so is not a viable route to collective criminal responsibility.

Criminal vicarious liability can also arise by attribution, in which the actions and knowledge of B are attributed back to A. This usually occurs for offences concerned with selling, possessing, using, or supplying.¹⁴⁵⁶ When a person in a relationship of employment does one of those acts, it is as if his employer did them. So, when A is employed by C and unlawfully supplies an item to B as part of his employment, C will be criminally liable. To illustrate, in *St Helens*,¹⁴⁵⁷ a shop assistant sold cigarettes to a person under the age of sixteen, for which the shop owner was acquitted by a Magistrates Court. The Divisional Court set the acquittal aside, noting that under the attribution doctrine, it was as if the owner sold the cigarettes himself. In *Windle*,¹⁴⁵⁸ the defendants dispatched their employees to drive lorries, not knowing they exceeded the maximum weight permitted by the regulations. To Parker LCJ, the regulations prohibited anyone from ‘using’ a vehicle which exceeded a certain weight. When an employee is driving whilst about his master’s business, it is as if the employer is using the vehicle.¹⁴⁵⁹

Finally, in *Strutt v Clift*,¹⁴⁶⁰ the Appellants owned a dairy farm and used a milk van to convey churns to a railway station. They placed their farm under the control of a bailiff who used their van to drive his wife to a place of amusement. The Appellants were then prosecuted for breaching their license. Alverstone LJ acknowledged the offence requires mens rea, but in placing their farm under the control of another, they implicitly permitted all his activities. Thus, his act of using the van could be attributed to them as if they had knowingly driven the van themselves in breach of their licence.¹⁴⁶¹

¹⁴⁵⁵ Ibid [28-29]

¹⁴⁵⁶ Archbold(n312) 17B-24-28

¹⁴⁵⁷ *St Helens BC v Hill* [1992] 3 WLUK 314

¹⁴⁵⁸ *Windle v Dunning & Son Ltd* (1968) 2 All ER 46

¹⁴⁵⁹ Ibid [556]

¹⁴⁶⁰ *Strutt v Clift* [1911] 1 KB 1

¹⁴⁶¹ Ibid [7]

Criminal vicarious liability by attribution arises irrespective of the defendant's steps to prevent the offence. In *Coppen*¹⁴⁶² the appellant instructed his employees not to label his hams as anything other than 'Breakfast Hams.' One of his employees disregarded these instructions and identified some small American hams as Scotch hams. Nevertheless, the owner was convicted of selling goods under a false description.¹⁴⁶³ The same principle was applied in *Grade*,¹⁴⁶⁴ in which the defendant was charged with unlawfully presenting a play after the actors departed from the script approved by the Lord Chamberlain. Despite the defendant being many miles away he committed the offence the moment the play was unlawfully presented. The defendant was in control of the business and so both the actions and the knowledge of the actors could be attributed to him.¹⁴⁶⁵

It is not clear that attribution applies to unincorporated associations. The limits of attribution were explored in *Garret*,¹⁴⁶⁶ after the defendant and his business partner were convicted for driving a crane which was not in good working order. Widgery LCJ acknowledged that if the business partner had been an employee, the defendant would be criminally liable. Indeed, an employer can use his vehicle through the hands of his servants, so it was logical for the lay justices to extend this to business partners. However, the line must be drawn somewhere, and so attribution extends no further than employees.¹⁴⁶⁷ As a result, it is unlikely attribution will apply to members of unincorporated associations, although it may be possible. Criminal vicarious liability for partners flows from the Partnership Act,¹⁴⁶⁸ whereas it arises at common law for employees and unincorporated associations. Whether this makes a difference for criminal liability is unknown, and there is no relevant authority to come to a firm conclusion.

Furthermore, attribution is confined to a narrow range of statutory offences. What is required is a statutory offence in which Alex uses, possesses, supplies, or does

¹⁴⁶² *Coppen v Moore* (No 2) [1898] 2 QB 306

¹⁴⁶³ *Ibid* [313]

¹⁴⁶⁴ *Grade v DPP* [1942] 2 All ER 118

¹⁴⁶⁵ *Ibid* [120]

¹⁴⁶⁶ *Garrett v Hooper* [1973] Crim LR 61

¹⁴⁶⁷ *Ibid* [3]

¹⁴⁶⁸ Partnership Act 1890 s10

something which can be attributed. There is no relevant offence, couched in such terms, that arises in the vignette. Even if a one were introduced it is unlikely to give rise to vicarious criminal liability. In *A-G's Reference No 2 of 2003*,¹⁴⁶⁹ the Crown sought to make the licence holder at a human fertilisation clinic liable for keeping an embryo except in pursuance of a licence after it was dishonestly breached by an employee. As there was no delegation, the prosecution sought to make the defendant vicariously liable by attribution. Judge LJ concluded there was no indication criminal vicarious liability was either necessary or intended in the statute. Thus, the doctrine would not be extended any further without a compelling reason.¹⁴⁷⁰ Any further statutory offences would need to specify criminal vicarious liability is intended, or there must be a compelling reason for it to apply. For instance, if the failure to extend it would result in a *de facto* nullification of the statute. Otherwise, it will almost certainly be rejected.

In the absence of a viable offence, and it not being clear whether attribution applies to unincorporated associations, there is no viable path to collective criminal liability. Each of the three routes discloses a framework for collective criminal liability, but none are applicable to downstream harm.

Public Nuisance

Public nuisance has potential as a legal tool for regulating downstream harm. The tort, formerly a common law crime,¹⁴⁷¹ is triggered by any act or omission which endangers the life, health, property, or morals of the public, or obstructs a commonly held right.¹⁴⁷² Public nuisance has an expansive scope.¹⁴⁷³ It has arisen for exposing the public to disease,¹⁴⁷⁴ selling meat not fit for human consumption,¹⁴⁷⁵ or causing widespread noise and disturbance.¹⁴⁷⁶ Public nuisance can be attached to almost any fact pattern, which is controversial. Nevertheless, the House of Lords affirmed this formulation in *Rimmington*.¹⁴⁷⁷

¹⁴⁶⁹ *A-G's Reference (No 2 of 2003)* [2004] EWCA Crim 785 [2004] 1 WLR 2062

¹⁴⁷⁰ *Ibid* [12-13],[20]

¹⁴⁷¹ Now a statutory offence

¹⁴⁷² Clerk(n548) 19-03

¹⁴⁷³ *Ibid* 19-04

¹⁴⁷⁴ *R v Vantandillo* (1815) 4 M&S 73, *R v Henson* (1852) Dears 24 169 ER 621

¹⁴⁷⁵ *R v Stevenson* (1862) 3 F&F 106 *R v Jarvis* (1862) 3 F&F 108, 176 ER 49), *R v Crawley* (1862) 3 F&F 109

¹⁴⁷⁶ *R v Moore* (1832) 3 B&Ad 184

¹⁴⁷⁷ *R v Rimmington and Goldstein* [2005] UKHL 63; [2006] 1 AC 459

In Rimmington, the first Appellant was convicted of public nuisance for posting racist material, and the second for sending a package containing salt, which was mistaken for anthrax. To Lord Bingham, public nuisance arose out of a need to protect the community from socially objectionable conduct in an era of limited local government.¹⁴⁷⁸ Public nuisance is a tort and a crime in which the principles of criminal and civil liability are identical.¹⁴⁷⁹ A defendant is liable, in crime and tort, for any act or omission which endangers the life, health, property, morals or comfort of the public, or interferes with a commonly held right.¹⁴⁸⁰ These are the public harms necessary for public nuisance. The first Appellant caused harm to individuals, not the public, and so should not have been convicted.¹⁴⁸¹ That harm is caused to a great many individuals does not necessarily make it public harm.¹⁴⁸² The second Appellant did cause public harm due to the disruption and anxiety that came with a suspected anthrax attack.¹⁴⁸³ However, to be liable, a defendant must know, or ought to know, that public harm would be a consequence of their actions.¹⁴⁸⁴ The Appellant did not intend public harm and so could not be convicted.¹⁴⁸⁵

Public nuisance arises from any act or omission which causes public harm, and where the defendant knew, or ought to have known, this would be the case. To illustrate, in *Brown*¹⁴⁸⁶ the defendant superglued himself onto a plane as part of a climate protest. Multiple flights were then cancelled, the airport had to partially shut down, and those hoping to travel were severely disrupted.¹⁴⁸⁷ The defendant's act generated serious disruption, distress, and inconvenience, which was a public harm. As he knew, or ought to have known, these would be the consequences of his actions, he was properly convicted.¹⁴⁸⁸

¹⁴⁷⁸ Ibid [9]

¹⁴⁷⁹ Ibid [5-7],[15]

¹⁴⁸⁰ Ibid [10]

¹⁴⁸¹ Ibid [38]

¹⁴⁸² Ibid [48]

¹⁴⁸³ Ibid [40]

¹⁴⁸⁴ Ibid [37]

¹⁴⁸⁵ Ibid [49]

¹⁴⁸⁶ *R v Brown* [2022] EWCA Crim 6

¹⁴⁸⁷ Ibid [5-16]

¹⁴⁸⁸ Ibid [20],[71]

This extensive formulation gives public nuisance an exceptionally wide scope. Indeed, Spencer argued that this common law crime, carrying a maximum sentence of life imprisonment, would make the rest of the criminal law redundant if it were ever taken seriously.¹⁴⁸⁹ He traced the action to the thirteenth century, when the Courts intervened to protect public welfare initially by preventing the obstruction of roads and waterways. It steadily expanded to prohibit stinking out the community, selling unwholesome food, or publishing obscene books.¹⁴⁹⁰ But it may not have been a single action. Spencer suggests public nuisance was, in fact, a collection of disparate actions unwittingly wrapped up in a single offence, hence its offensively wide scope.¹⁴⁹¹

For instance, public nuisance is not limited to unlawful acts. Rather it can transform lawful acts into unlawful ones because of their socially undesirable consequences.¹⁴⁹² In *Metropolitan Asylum District Managers v Hill*¹⁴⁹³ the Appellants were granted permission to set up a smallpox hospital. This naturally generated unpleasant smells and noise and attracted people with smallpox. These disturbances amounted to a public nuisance, and so their lawfully permitted activity was transformed into a common law crime.¹⁴⁹⁴ Similarly in *Dorset*,¹⁴⁹⁵ the Local Authority sought an injunction restraining a landowner from running motorcross activities on his land. Motorcross is a lawful activity, and it is the prerogative of landowners to lawfully use their land as they see fit. However, the moment it generated an intolerable level of noise, it became a common law crime.¹⁴⁹⁶

Regardless, the common law crime would have been attractive for the analysis. For public nuisance could be committed vicariously. In *Stephens*,¹⁴⁹⁷ the defendant's employees dumped a large quantity of slate into a river. Blackburn J confirmed that the common law crime could be committed vicariously, and so the defendant was

¹⁴⁸⁹ J Spencer, 'Public Nuisance—A Critical Examination' [1989] 48 CLJ 55

¹⁴⁹⁰ *Ibid* 60-65

¹⁴⁹¹ *Ibid* 70-84

¹⁴⁹² *Ibid* 75-84

¹⁴⁹³ (1881) 6 App Cas 193

¹⁴⁹⁴ *Ibid* [205-207]

¹⁴⁹⁵ *East Dorset DC v Eaglebeam Ltd* [2006] EWHC 2378 (QB)

¹⁴⁹⁶ *Ibid* [10-11]

¹⁴⁹⁷ *The Queen v Stephens* (1865-66) LR 1 QB 702

convicted of public nuisance.¹⁴⁹⁸ If public nuisance could be committed vicariously, then this could have been extended to unincorporated associations. Indeed, this may have been a path to collective criminal liability. Unfortunately, there is no cause for further analysis as the common law crime was abolished in 2022.¹⁴⁹⁹

The statutory offence requires the defendant intentionally or recklessly generate a risk of serious harm to the public, or obstruct a commonly held right. Serious harm is a risk of death, personal injury, disease, property damage, or serious distress, annoyance, or inconvenience.¹⁵⁰⁰ The intent requirement is fatal for the vignette. Unincorporated associations cannot form intent. The special rule of public nuisance allowing criminal vicarious liability likely did not survive its transformation into a statutory offence. It was a special role of a common law crime and in the contemporary period the courts are sceptical of criminal vicarious liability and so are unlikely to extend it to a new statutory offence.¹⁵⁰¹ Indeed the House of Lords, while not eliminating the principle, noted in *Rimmington* that the vicarious liability cases were very difficult to reconcile with the modern criminal law.¹⁵⁰² There is no explicit authority either way, but the heavy inference is that criminal vicarious liability is no longer possible for public nuisance.

The Tort

There is still scope for tortious liability, as the statute explicitly preserves the tort of public nuisance.¹⁵⁰³ This is anomalous. To Neyers, public nuisance has no firm basis in tort and should be considered as something of an anomaly.¹⁵⁰⁴ It provides expansive liability for causing loss without requiring a specific tortious interaction. It allows claimants to pursue damages for harm caused to others and is so wide-ranging that, if taken seriously, it could swallow the whole law of tort. Moreover, the tort was a by-product of the crime, parasitically grafted onto it, and was never thought to arise independently.¹⁵⁰⁵ Huffman concurs, arguing public nuisance is a blunt instrument through which socially undesirable behaviour is regulated; it has no principled basis in

¹⁴⁹⁸ Ibid [710]

¹⁴⁹⁹ Police, Crime, Sentencing and Courts Act 2022 s78(1)

¹⁵⁰⁰ Ibid s78(2)

¹⁵⁰¹ *A-G's Reference* (n1469) [12-13] [20]

¹⁵⁰² *Rimmington*(n1477) [39]

¹⁵⁰³ PCSCA(n1499) s78(1)(c)

¹⁵⁰⁴ J Neyers, 'Reconceptualising the Tort of Public Nuisance' (2017) 76 CLJ 87, 87-95

¹⁵⁰⁵ Ibid 87-95

tort, and its existence is a historical error flowing from the moment it was wrongly amalgamated into a single action.¹⁵⁰⁶ Nevertheless, the unaltered continuation of the tort has statutory endorsement. It exists as a distinct legal tool, and so the anomaly of its existence must be put to one side for the analysis.

Firstly, there is a question of standing. As the tort evolved out of a common law crime only a narrow range of entities have standing to bring proceedings. The Attorney General, and Local Authorities acting within their jurisdiction, will always have standing.¹⁵⁰⁷ However, an individual will only have standing if they can demonstrate they have suffered special damage, meaning they have suffered more than the other victims.¹⁵⁰⁸ If a public nuisance has caused mass inconvenience and disruption, the claimant cannot merely be among the persons affected. Something more is required for them to have standing.¹⁵⁰⁹ For Spencer this is the result of the tort of public nuisance emerging much later than the crime. Affected persons began seeking injunctions to prevent public nuisances before the harm could be realised.¹⁵¹⁰ Specifically impacted claimants were permitted to bring proceedings and then, controversially, allowed to claim damages.¹⁵¹¹ Thus, the contemporary tort confines standing to specific institutions, or claimants who have suffered special damage.

There is no precise definition of special damage. The claimants must simply suffer over and above the general public.¹⁵¹² Nevertheless, there are accepted types of harm which, unless suffered by the public equally, will give the claimant standing: for instance, if they have suffered personal injury while the public has merely been disrupted.¹⁵¹³ Indeed the availability of damages for personal injury in public nuisance, distinguishes it from private nuisance where such claims are forbidden. Although special damage can

¹⁵⁰⁶ James Huffman, 'Public Nuisance: Public Rights, Private Rights, and the Common Good' (2022) 17 JLEcon&Pol'y 314, 330-346

¹⁵⁰⁷ *Att-Gen v Logan* [1891] 2 QB 100, Local Government Act 1972 s222,

¹⁵⁰⁸ *Sedleigh-Denfield v O'Callagan (Trustees for St Joseph's Society for Foreign Missions)* [1940] AC 880 [894]

¹⁵⁰⁹ *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509 [537]

¹⁵¹⁰ *Spencer* (n1489) 65-75

¹⁵¹¹ *Ibid*

¹⁵¹² *Sedleigh-Denfield* (n1508)

¹⁵¹³ *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145, *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615

be triggered by non-physical injury.¹⁵¹⁴ For instance, if the defendant has obstructed the road and caused mass inconvenience, causing the claimant's shop to shut and for them to suffer financial loss.¹⁵¹⁵ Excessive inconvenience or delay may also suffice so long as the claimant endures it to a greater degree than the wider public.¹⁵¹⁶ Thus, for the vignette, it is necessary for the prospective claimant to suffer special damage. Amelia has endured a personal injury via sexual assault and so will have standing if this flows from public harm.¹⁵¹⁷

There is no end to the acts, and harms which might amount to a public nuisance. Any act, even a lawful one, can be transformed into a public nuisance if it causes public harm. Thus, Alex approaching women and engaging in Pick Up Artist is actionable if it causes public harm. However, there is a distinction between individual and harm. The House of Lords made this clear when identifying *Johnson*¹⁵¹⁸ and *Millward*,¹⁵¹⁹ as wrongly decided. The defendants were convicted for making obscene calls to women.¹⁵²⁰ However, this was not public harm but rather a collection of individual harms, and so the convictions were unsound. Nevertheless, this does not mean the difference between the two harms is purely numerical. Lee argues that public harm is not concerned with what has been suffered but the infringement of public rights.¹⁵²¹ Prosser, writing from a US perspective, concurs,¹⁵²² identifying that the infringement of a public right is the common theme in all public nuisance cases. The harm of public nuisance is not that a victim is distressed by a foul smell but that their public right to health, safety, or comfort has been infringed.¹⁵²³ This is the true harm of public nuisance, which manifests differently for each victim. A noxious smell to one claimant is an irritant to the other and a health hazard for someone else. Nevertheless, their

¹⁵¹⁴ Maria Lee, Personal Injury, "Public Nuisance, and Environmental Regulation" [2009] KLJ 20 129,132

¹⁵¹⁵ *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540; [2009] 2 Lloyd's Rep 1 [459]

¹⁵¹⁶ *Walsh v Ervin* [1952] VanderbLR 361, *Boyd v Great Northern Rly Co* [1895] 2 IR 555

¹⁵¹⁷ *Corby Group Litigation* [2008] EWCA Civ 463; [2009] QB 335

¹⁵¹⁸ *R v Johnson* [1997] 1 WLR 367

¹⁵¹⁹ *R v Millward* [1986] 6 WLUK 103

¹⁵²⁰ *Rimmington*(n1477) [37]

¹⁵²¹ Lee(n1514)

¹⁵²² William Prosser, 'Private Action for Public Nuisance' (1966) 52 VaLRev 997

¹⁵²³ *Ibid*

reactions flow from an infringement of a public right, this is the true harm of public nuisance.¹⁵²⁴

The victims in *Johnson and Millward*, were clearly harmed by receiving the telephone calls, but their harm did not flow from the infringement of a public right. Whereas in *Corby*¹⁵²⁵ the claimants were born with upper limb deformities caused by toxic dust. Akenhead J explained that a large quantity of that dust had been generated during the Local Authority's reclamation works.¹⁵²⁶ The Local Authority had brought that dust to the surface and failed to mitigate the obvious risks.¹⁵²⁷ Thus, they caused the escape of contaminated dust, which endangered the public's right to health. As a result of that infringement, the claimant had suffered special damage and so had standing.¹⁵²⁸ Public harm is best conceptualised as the infringement of a public right.

Then comes the numerical question: for a single person, having their public rights interfered with is not public harm. In *PYA*¹⁵²⁹ the defendants projected stones and splinters from their quarry. Romer LJ described public harm occurring when a nuisance materially affects the reasonable comfort and convenience of a class of persons. The exact number of people who need to be in this class for the tort to arise is fact-specific.¹⁵³⁰ Although it is not necessary to prove every member of the class has been injured, a representative cross-section will be sufficient.¹⁵³¹ As the projection of stones and splinters was impacting everyone in the vicinity, it was infringing on the public rights of a sufficiently wide class for it to be a public nuisance.¹⁵³² This was applied in *British Celanese Ltd*¹⁵³³ in which the defendant's factory emitted metal foil, which caused an electrical substation to fail. Lawton J accepted such a disruption could be an actionable public nuisance because it had interfered with the rights of all those using the substation.¹⁵³⁴ Thus, there was a plausible public harm, and so the numerical question

¹⁵²⁴ Ibid

¹⁵²⁵ *Corby Group Litigation* [2009] EWHC 1944

¹⁵²⁶ Ibid [679]

¹⁵²⁷ Ibid [787-892]

¹⁵²⁸ Ibid

¹⁵²⁹ *Attorney General v PYA Quarries Ltd* (No.1) [1957] 2 QB 169

¹⁵³⁰ Ibid [181]

¹⁵³¹ Ibid [184]

¹⁵³² Ibid [191]

¹⁵³³ *British Celanese Ltd v AH Hunt (Capacitors) Ltd* [1969] 1 WLR 959

¹⁵³⁴ Ibid [968]

was whether those affected were a sufficiently wide class to represent the community.¹⁵³⁵ The numerical question is inevitably a fact-specific question, and there is no further guidance on this point. Although the larger a class is, the more likely it will suffice. Thus, if the tort is to be made out in the vignette, Alex and others must infringe on a public right of a sufficiently wide class of persons, including Amelia.

Alex is interfering with Amelia's public right to comfort by approaching and subjecting her to PUA techniques. The preliminary question may well be whether there is a public right to comfort. The existence of this public right was affirmed in *Rimmington*.¹⁵³⁶ Although it reaches back much further, having long been among the public rights which, if violated, constitute a public nuisance.¹⁵³⁷ Indeed in *PYA*, that a considerable volume of people were experience discomfort due to vibrations was sufficient to trigger the tort.¹⁵³⁸ Likewise in *Cole*,¹⁵³⁹ the defendant was a fat-melter whose enterprise emitted noxious gases, for fat produces a particularly unpleasant smell when it is broken down into its components. Even though the defendant acted reasonably when in carrying out his lawful trade the emission of unpleasant smells was a public nuisance.¹⁵⁴⁰ Moreover in *Corke*,¹⁵⁴¹ the owner of a disused brickfield permitted caravaners to live there, where they broke down fences, despotised human excrement, and generated a large volume of noise. Bennet J was satisfied that their acts were being committed, and interfering with the comfort of those who lived in the neighbours, which was a public nuisance.¹⁵⁴² There is a public right to comfort, which Alex interferes with in the vignette.

Of course, Amelia is not the only person affected. She is the final target upon whom the most severe injury is inflicted, but the behaviour affects a wider class of persons. Alex pesters a number of women over the course of the vignette. During his second mission, several are clearly uncomfortable after he approaches them. This then continues into

¹⁵³⁵ Ibid [969]

¹⁵³⁶ *Rimmington*(n1477) 49

¹⁵³⁷ John Poinitng, "Public Nuisance: Beyond Highway 61 Revisited?" [2011] *EnvLRev*,13,2, <https://journals.sagepub.com/doi/10.1350/enlr.2011.13.1.111?icid=int.sj-abstract.similar-articles> 1, Accessed 20/01/2025

¹⁵³⁸ *PYA*(n1529) 185

¹⁵³⁹ *Attorney-General v Cole & Son* [1901] 1 Ch 205

¹⁵⁴⁰ Ibid 206

¹⁵⁴¹ *Attorney-General v Corke* [1933] Ch 89

¹⁵⁴² Ibid 92

the third mission, whereupon he sexually touches Amelia. But there is a wider ripple effect. Other women in the community might feel unsafe, avoid the locations Alex is known to frequent, or otherwise feel uncomfortable after discovering what Alex has done. For many, this might manifest as passive anxiety while those Alex approached may feel a deeper discomfort. Amelia is sexually assaulted. In each case, the harm is a manifestation of Alex infringing the women's right to be safe and comfortable in public by his going out into the community and engaging in Pick Up Artistry.

Imagine Alex had a contagious disease and went around shaking hands with random people. His act of doing so endangers a public right to health, but the harm manifests differently. Some fall ill, others are anxious about disease even if they are not infected, while the wider community may be anxious to go about their business for fear of encountering him. His behaviour violates their public right to health, and the harm manifests differently for every victim. However, the root of that harm is Alex infringing on a publicly held right, which is public harm.

Alex approaching and subjecting women to PUA techniques, and so infringing on their right to comfort is capable of being public harm. No matter how it manifests the harm flows from the violation of a public right. Then comes the numerical question of whether he affects a sufficiently wide class of persons. The impact on the vignette is not clear. Alex seriously harms one person and makes a wider group feel uncomfortable, unsafe, and anxious. However, this is unlikely to be especially widespread. For an argument in public nuisance there is an incentive to cast a larger net.

Alex should not be imagined as acting in isolation but in accordance with the common purposes of an unincorporated association. The community exists to promote and encourage behaviours which cause annoyance, inconvenience, and a real prospect of sexual harm. There is evidence that other members of the association are going out into the world, approaching women and subjecting them to PUA techniques. Indeed, many members of Ross's Community share their stories of success and failure. Thus, Alex is endangering the comfort of women in his local community, while other members of the unincorporated association are doing the same.

Multiple persons cumulatively interfering with a public right can all be liable for the resulting public nuisance. In *Croydon v Persons Unknown*,¹⁵⁴³ a local authority applied for an injunction to prevent an illegal racing event. Steyn QC observed that this recurring event featured multiple individuals racing at dangerous speeds, causing widespread disturbance, and projecting loud music and engine noises.¹⁵⁴⁴ Thus, it was a public nuisance, which each participant was responsible for and could be restrained from participating in.¹⁵⁴⁵ In *Wandsworth*¹⁵⁴⁶ a local authority sought to extend an injunction preventing persons unknown from gathering on a housing estate to listen to live music, deposit waste, or cause damage. To Soole J, previous incidents had seen over a hundred people descend on the estate, and the loud music, drink, and drug use had caused widespread fear and annoyance.¹⁵⁴⁷ The totality of this event was a significant public nuisance.¹⁵⁴⁸ In both cases, the cumulative effect was a public nuisance caused by multiple people acting together. The individuals do not need to act in concert or to co-ordinate to indivisibly interfere with a public right.

Should multiple individuals contribute to a single indivisible harm, they are concurrent tortfeasors jointly and severally liable for the tort.¹⁵⁴⁹ Williams illustrates this by imagining two persons struggling for a gun.¹⁵⁵⁰ If they both cause it to discharge and wound the claimant, they are concurrently liable. The reason is that they have contributed to an indivisible injury which cannot be apportioned between them. Thus, they are concurrently liable for it.¹⁵⁵¹ Say four men, acting independently, strike the claimant in succession, causing him to be hospitalised for a month. Each of them will be concurrently liable for the harm.¹⁵⁵² Concurrent tortfeasors must commit the same tort.

¹⁵⁴³ [2016] EWHC 3018 (QB)

¹⁵⁴⁴ *Ibid* [3-6]

¹⁵⁴⁵ *Ibid* [3-13]

¹⁵⁴⁶ *Wandsworth LBC v Persons Unknown* [2020] EWHC 3797 (QB)

¹⁵⁴⁷ *Ibid* [8-10]

¹⁵⁴⁸ *Ibid* [22]

¹⁵⁴⁹ *Rahman v Arearose Limited* [2001] QB 351 [18-19]

¹⁵⁵⁰ Glanville Williams, *Joint Torts and Contributory Negligence*, (S&S, 1951) 17

¹⁵⁵¹ *Ibid*

¹⁵⁵² *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 [189]

However, public nuisance is not triggered by a specific act but rather by bringing about public harm. If a group of people are independently causing an indivisible infringement to a public right, they all contribute to a single public nuisance. If A and B simultaneously shoot C, they are concurrently liable for battery because they commit the same tort and cause indivisible harm. They realise the same harm by the same tort. Should A and B both cause a public right to be infringed, their acts can be completely different because the tort does not require a specific behaviour. They both realise the same harm, which makes their actions tortious. They are concurrently liable for the damages. So, in *Croydon and Wandsworth*, the argument is that all participants were contributing to an indivisible infringement of a public right. Thus, if a member of the public had been struck by a car or hurt during the music event, they would have suffered special damage. They could then bring proceedings against any person participating in the public nuisance, as all those doing so are concurrently liable for the public harm.

This position doesn't change if each individual defendant is going to a different place, at a different time, and engaging in tortious behaviour. So long as they contribute to an indivisible public harm, they can be concurrently liable. For instance, imagine six defendants have an individual grudge against the claimant. Thus, as he goes about his day, each of them punch him in succession. The cumulative effect of this is broken bones, and the injury cannot be apportioned between the six men. Accordingly, each of them should be concurrently liable for the injury. The same would be true if a ship was indivisibly damaged in two, separate, negligent collisions. The defendants responsible for the ships would be concurrently liable for the harm.¹⁵⁵³ For they engage in the same tortious behaviour and cause the same harm. It does not matter that they are not acting in concert, or even aware of one another; they are concurrently liable all the same.

Thus, for public nuisance, imagine an unlinked group of individuals in different parts of a large city begin pouring a large volume of fat, oil, and grease, down their kitchen sinks, whilst flushing wet wipes down their toilets. This travels down the sewer system causing a blockage, which results in untreated sewage bursting from drains and manholes. This causes unpleasant smells, a heightened disease risk, and a great deal of disruption.

¹⁵⁵³ Ibid

Here, the public have had their right to health and comfort interfered with. The root of that interference is these, unlinked individuals flushing non-biodegradable solids, and pouring oils down their sinks. It does not matter that they did not know one another, that they are in different places, or even that their activity was technically lawful. They have each independently contributed to a single indivisible, interference with a public right. This is a single public nuisance which each of them is concurrently liable for.

For the vignette, if Ross's community features multiple persons approaching and subjecting women to PUA techniques, this should be envisioned as an indivisible public harm. Across localities, members of Ross's community infringe on a public right to comfort by causing distress, annoyance, upset and a real prospect of sexual harm. There is no reason to suggest the group of women affected must be tied together by geography to be a single class.

To illustrate, imagine individuals in an online group of pranksters begin throwing stink bombs in public places at random. There is no single target, but rather this online group consists of multiple individuals acting alone, each of whom happens to be a member of an unincorporated associations. Those affected by the bombs are annoyed and distressed and potentially exposed to injury if the mixture is hazardous. Members of the public may avoid going to the areas affected for fear of experiencing foul smells. Thus, those in the vicinity of the stink bombs, meaning those directly and indirectly impacted, have had their public right to comfort infringed. But it would be odd to say this cannot be a public nuisance because no one group, in isolation, is numerically sufficient. A wider group are having their public rights infringed, and so should be envisioned as a single class. Imagine them as pockets of affected persons in the communities impacted by the stink bombs.

Say, instead, a prankster decided to project a piercingly loud sound over the public airways that could only be heard by people under twenty-five. The sound will be heard by those under twenty-five years old who happen to be listening, who are distributed into pockets. Some might be as small as a single person living alone, while others are those in student halls listening in larger groups. Regardless of their geography, they have all had their public right to be free from painfully loud noises infringed. The number of people in a single pocket might not be enough to sustain a claim in public nuisance, but

if there are dozens of pockets, there is a wider class to consider. Of course this does not mean it will be actionable public nuisance, the question is whether these pockets of affected persons are a sufficiently large class to represent a cross-section of the public.

In the vignette, multiple members of Ross's Community infringe on the public rights of pockets of women in their local communities. Those individual pockets might be small, with only Alex impacting a handful of women, but if Ross has a dozen students, the pockets quickly multiply. With enough pockets, a wide class of women is being impacted, and so there is greater scope to say harm is being caused to the community, not just to individuals. That they are dispersed across geographical pockets does not change the fact that they have all had their public rights infringed. By uniting them into a single class equally affected by an indivisible nuisance there is a much larger group of people to consider. Whether this would be enough to sustain a claim is a fact-specific question for the trial judge. The question would turn on how many women were affected by members of Ross Community infringing on their public right to comfort. The vignette is silent on this, meaning it is impossible to draw a firm conclusion. Nevertheless, the greater the number of victims the stronger the likelihood the tort will be made out.

Thus, there is an argument that there is an actionable public nuisance in the vignette. Multiple members of Ross's community contributing to an indivisible public nuisance. Thus, they are potentially liable as concurrent tortfeasors. Amelia, in suffering special damage, would have standing to bring proceedings against them all. Moreover, as each tortfeasor is a member of an unincorporated association and acting for their common purpose, there would be vicarious liability. Each and every member of the association would be liable for the full sum of damages. However public nuisance offers remedies beyond damages, especially if Amelia is motivated to stop the offending behaviour altogether.

The historic regulatory function of public nuisance means it is an ideal vehicle to seek injunctive relief. To Purcell, it is ideal for regulatory litigation, meaning proceedings are brought to prevent the nuisance from recurring.¹⁵⁵⁴ Especially when the state is less

¹⁵⁵⁴ Michael Purcell, "Settling High," *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, [2024] 52 *ColumJL&SocProbs* 136, 150-160

than willing to intervene.¹⁵⁵⁵ McLaren argues public nuisance is a powerful regulatory tool which might be used to curtail climate change by preventing companies from polluting the natural environment.¹⁵⁵⁶ Kendrick describes the tort as a means of enforcing and protecting rights commonly held by all citizens.¹⁵⁵⁷ Thus, it can be used to properly restrain those who generate risks to the public or unleash harm on unsuspecting communities in almost any context.¹⁵⁵⁸ Damages can be a part of this but this is ancillary to the true goal of regulation.¹⁵⁵⁹

Thus the tort of public nuisance could be used to obtain wide-ranging injunctions to prevent further infringements. In *RWE*, an injunction was granted restraining members of an unincorporated association from trespassing on the claimant's land. To Teare J, once it was granted, the claimant could seek leave to enforce it against any member in breach.¹⁵⁶⁰ Thus, Amelia might apply for an injunction and could apply to have it enforced against any member in breach. It might be controversial in light of the current human rights concerns surrounding public nuisance,¹⁵⁶¹ but an injunction is certainly possible.

Nevertheless, an injunction prohibiting members of Ross's Community from approaching women seems too wide and poses logistical challenges. If the injunction is to inhibit members of Ross's Community from engaging in Pick Up Artistry, how is this to be defined? An injunction must be framed in sufficiently specific terms as to leave no uncertainty as to what the affected person is not allowed to do.¹⁵⁶² In light of the difficulties defining the offending behaviour of Pick Up Artistry, it might be more straightforward to simply exclude members of Ross's Community from the places they have caused, or are likely to cause, a nuisance. Although this would still pose

¹⁵⁵⁵ Ibid 136-140

¹⁵⁵⁶ John McLaren, "The Common Law Nuisance Actions and the Environmental Battle-Well-Tempered Swords or Broken Reeds" [1972] 10 OsgoodeHallLJ 505-561

¹⁵⁵⁷ Leslie Kendrick, 'The Perils and Promise of Public Nuisance' (2023) 132 YaleLJ 702,785-791

¹⁵⁵⁸ Ibid 727-730

¹⁵⁵⁹ Purcell(n1554)

¹⁵⁶⁰ *RWE Npower Plc v Carrol* [2007] EWHC 947 (QB)

¹⁵⁶¹ Michael Forst, UN Special Rapporteur on Environmental Defenders under the Aarhus Convention End of Mission Statement, January 2024 UNECE

¹⁵⁶² *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046 [35]

challenges, as how is someone looking to enforce the injunction to know whether a patron is a member of Ross's Community or not?

Ultimately it would be a matter for the Court, for an injunction is a discretionary equitable remedy, which will be tailored to the facts of the case.¹⁵⁶³ It is not possible to do anything more than speculate, whilst acknowledging the limitations. An injunction is possible in principle for the vignette, but comes with significant practical difficulties. Indeed that breaching an injunction may result in contempt proceedings, may make a court wary of granting an injunction in these circumstances.

This does not undermine the case for public nuisance. That a behaviour is difficult to regulate says nothing about its ability to cause public harm. Imagine a group of naturalists in a small community refuse to bathe, and encourage others to embrace not doing so as a lifestyle choice. As a result, they begin to produce unpleasant body odour, bad breath, their skin breaks out in non-infectious rashes, their hair accumulates lice, and tartar builds up around their teeth causing halitosis. The result is that whenever they go out, individually or in a group, other members of the public have their right to comfort disturbed. Perhaps these naturalists leave a lingering scent which causes persisting disruption even after they have departed. This is a public nuisance consisting of bad smells, public unpleasantness, and infectious pests. But how then could this be regulated by injunction?

There is no specific, easy to define, behaviour which can be prohibited with any real certainty. They cannot be prevented from generating a smell, exhaling bad breath, or looking unkempt. For what specific obligations would such an injunction entail? Should they be prohibited from being within a certain distance of other members of the public? Excluded from all public spaces, even if the effect of this would be their inability to go about public life? Leaving aside the potential human rights claims, this group would be difficult to regulate via injunction, but that does not diminish the fact their behaviour is an ongoing public nuisance. The scope of the tort is incredibly wide, while the scope of a proposed injunction must be much narrower. The same is true for the vignette. That

¹⁵⁶³ Warren Barr, John Picton, *Pearce & Stevens' Trusts and Equitable Obligations* (OUP, 8th edn, 2022) 90

Ross's Community would be difficult to regulate does not take away from the public nuisance its members are indivisibly generating.

Conclusion

The Manosphere

The thesis sought to investigate the upstream civil and criminal liabilities of the Manosphere, collective and individual, for downstream harm. It accomplished this through a vignette methodology in which fictional narratives concerned with a single community were subject to doctrinal analysis. The objective of the thesis was to identify defensible legal arguments on how the law might respond to the downstream harms of the Manosphere. How then do the chapters work together to support a conclusion that achieves this?

The Manosphere is a disparate universe of interconnected but conflicting parts; one which has spread across the western hemisphere, and beyond, to agitate and incite all manners of real-world harms. Manosphere adherents have been linked to an uptick in misogyny, harassment campaigns, sexual violence, and acts of terror. This loose confederacy is bound together by the Red Pill worldview and the characteristics which distinguish it from other instances of antifeminism. Chapter One defines and justifies the Manosphere as a distinct entity, which is its first original contribution to the literature. The Manosphere is not a well-studied phenomenon, and there is considerable uncertainty as to what it actually is. The thesis has consolidated the existing literature to advance a wide-ranging definition of the Manosphere and to justify why its disparate elements are properly grouped together. It has clarified what this nascent entity is, its distinctions from past antifeminism, and given sound reasons for its collective classification. This is a step forward for the field and a move towards a deeper understanding of the Manosphere.

This disunity came with a challenge. As each chapter focused on a Manosphere subculture, there was a risk the analysis would not be transferable and the project would explore the liabilities of individual communities rather than the greater whole. This risk never materialised, as the common characteristics and behaviours of the subcultures made for transferable arguments.

Chapter Four explored criminal accessory liability for Incels following a mass-casualty stabbing attack. It argued that members of these communities could be liable as

accessories via procurement for radicalising and inciting the perpetrators. The exact charges turn on intent, which largely excludes crimes of specific intent due to the high standard of virtual certainty. Thus, the correct charge for the majority of those contributing to the stabbing attack was procuring unlawful act manslaughter. This arises due to them making a more than minimal contribution to the stabbing attack.

The thesis aims to understand how the law might respond to the downstream harms of the Manosphere. Incel mass violence is a documented phenomenon. In the aftermath of any future tragedies, the thesis has constructed a plausible route to liability for those who have agitated and incited the violence. The plausibility of the Incel vignette was grounded in the real-world glorification of violence endemic to Incel communities.¹⁵⁶⁴ If prosecutions are possible against those who agitate and incite such violence online, further attacks may be averted, or at the very least those responsible for causing them can be punished. In the aftermath of real-world Incel-inspired tragedies the thesis has provided an argument for real-world legal actors to charge those who have influenced them as accessories. Consequently, the law is better poised to muster a comprehensive response to Incel violence.

However, while the chapter exclusively discusses Incels, these principles are widely transferable. This theory of accessory liability is transferable to the PUA vignette. Ross's advice to Alex is capable of triggering accessory liability. For instance, in *Millward*,¹⁵⁶⁵ the defendant advised the principal to use a tractor with a faulty hitch. He procured an act which amounted to reckless driving, knowing the context that made it criminal. As the reckless driving resulted in death, so he had procured death by reckless driving.¹⁵⁶⁶ Sexual assault is not a crime of specific intent,¹⁵⁶⁷ so Ross is not required to know it will occur with virtual certainty. Instead, he must intend to bring about the act, knowing the context that makes it criminal.¹⁵⁶⁸ He advised Alex to go out into the world and use techniques, including sexual touching, to secure sex. He knows Alex believes non-consent is LMR, which must be overcome by touch escalation. He advised Alex to

¹⁵⁶⁴ See Chapter Three: The Incel Vignette, "Justification,"

¹⁵⁶⁵ *R v Millward (Sidney Booth)* [1994] 4 WLUK 276

¹⁵⁶⁶ Richard Percival, "Procuring - causing death by reckless driving - actus reus" [1994] CrimLR 527

¹⁵⁶⁷ *R. v Heard (Lee)* [2007] EWCA Crim 125 [31]

¹⁵⁶⁸ *Jogee*(n328) [90]

sexually touch others, knowing it would be used against someone who is not consenting. He intends for Alex to do an act whilst knowing the context that makes that act criminal. His advice is a more than minimal contribution to the assault, and so Ross can be liable as an accessory via procurement.¹⁵⁶⁹

This argument is transferable across the Manosphere. Members of an MRA community who encourage, facilitate, or agitate for a harassment campaign may be liable for procuring it. So long as they intend to bring about conduct which amounts to harassment,¹⁵⁷⁰ knowing the circumstances that make it criminal, they can be liable. Examples would include encouraging others to send degrading messages, knowing there is an ongoing harassment campaign, and uploading a feminist's personal information to a forum, knowing its members have a reputation for threatening and harassing behaviours. If they intend to bring about conduct which amounts to an offence, making a more than minimal contribution in the process, whilst knowing the context which makes that conduct criminal, they can be liable. This would extend to Manosphere communities or influencers who advocate for, say, abusing women,¹⁵⁷¹ rape,¹⁵⁷² or indeed any harm amounting to a criminal offence. The only offences this account struggles with are crimes of specific intent, as members of online communities are unlikely to know that the perpetrator following through is a virtual certainty.

Thus, the thesis has made a defensible legal argument on criminal accessory liability via procurement, which is transferable across the Manosphere. The PUA who directs his followers to commit sexual assault, the MRA who encourages a harassment campaign, and the Tradcon who promotes domestic abuse are all legitimate targets of the criminal law if their actions manifest in real-world harm. The analysis is not confined to the Incel subculture; but rather a means for those responsible for Manosphere-inspired downstream harm to be held to account. The Chapter identifies the wider criminal liabilities of the Manosphere, which is exactly what the thesis sought to explore. This is true for each of the analytical chapters, and so they work together to identify the legal

¹⁵⁶⁹ Ibid [9]

¹⁵⁷⁰ Protection from Harassment Act s3 (1)

¹⁵⁷¹ Justin Horowitz, Manosphere influencers are promoting abuse and violence against women, Media Matters, 12/11/2023, <https://www.mediamatters.org/diversity-discrimination/manosphere-influencers-are-promoting-abuse-and-violence-against-women>, Accessed 29/08/2024

¹⁵⁷² Dickel(n111) 1401-1402

tools through which those agitating or influencing downstream harm are liable. They are not isolated chapters but critical parts of a wider whole which speak to the criminal and civil liabilities of the entire Manosphere.

Chapter Five explored accessory liability, arguing members of Incel Communities may be liable as joint tortfeasors by common design. Accessory liability requires them to make a more than minimal contribution to the tort, pursuant to a common design, with knowledge of the essential wrong. The chapter argues that the proposed defendants have conditional knowledge of the wrong, which is sufficient. As a result, in principle, the law of tort provides a clear route for members of Incel communities to be held liable for mass-casualty attacks. Those who have contributed to a battery, assault, the intentional infliction of emotional harm, or any other tort, pursuant to a common design would be jointly and severally liable for them. Victims of Incel violence could pursue those who contributed to the attack online and seek damages for their losses.

As Chapter Five discusses, any member convicted in a criminal court could very easily be found liable in tort as well. The law of crime and tort work in concert to provide a wide ranging legal response to downstream harm. Members of Incel communities who contribute to mass-casualty attacks may be both prosecuted and pursued for damages. Indeed, the extent of the injuries arising out of Incel violence, taken with the possibility for aggravated damages, makes it possible the accessories would be liable for a significant sum. This may deter others from contributing to further attacks and send a message that those who agitate for real-world harm may be put in significant financial jeopardy. The law would be vindicating the rights of those harmed and sending a clear message that this behaviour will not be tolerated.

These consequences would not only be unpleasant for the defendants, but, as Chapter Five suggests, could be a means of disrupting Incel communities. In tort, accessories are jointly and severally liable for the sum of damages. If the claimants targeted a small number of Incels, who did not wish to pay damages out of their own funds, rather than face the consequences of a court judgment or bankruptcy they might alleviate their woes through contribution proceedings. Those they pursued, meaning other contributing members of their community, would be motivated to do the same, which would have a destabilising effect on the community at large. As a result, accessory

liability in tort, and any subsequent contribution proceedings, are in theory viable legal tools through which downstream harm could be combatted.

This is transferable across the Manosphere. To illustrate: ‘swatting’ involves using doxed information to make a fictitious report to the police. This is intended to summon a heavily armed tactical unit to violently enter the victim’s property and has resulted in deaths.¹⁵⁷³ Manosphere forums are known to engage in this practice.¹⁵⁷⁴ Thus, a person who uploads a target’s personal information, knowing there is a strong likelihood of them being swatted, may be liable via common design. If uploading the information is a more than minimal contribution, and this is done pursuant to a tacit common design to harass the victim, accessory liability is made out. Members of any Manosphere group contributing to real-world torts, pursuant to a common design, may find themselves liable for the resulting harm. They too could then be placed in financial jeopardy and incentivised to disrupt their own communities via contribution proceedings. Thus, there is a plausible route to civil liability for any member of a Manosphere community contributing to a tort. The thesis lays out a defensible argument that accessory liability in tort via common design is a viable legal tool for responding to the downstream harms of the Manosphere. Chapters Four and Five, speak to the criminal and civil liabilities of both the Incel subculture and the Manosphere itself.

Chapter Five’s observations on blood money would also be widely applicable. The costs of launching proceedings in tort are considerable, and defendants of limited means are not effective targets for litigation. That there is a viable legal claim does not mean real-world victims would have any incentive to launch proceedings against Incel tortfeasors. Although it is entirely possible that if the state refused to prosecute, they would launch proceedings, if only to have the fact of Incel wrongdoing recorded by a court. The same is true across the Manosphere. Say, on the PUA vignette, Amelia wished to sue Ross. If Ross is of limited means, Amelia will struggle to secure representation, find it difficult to collect damages, or wonder why she is throwing good money at a judgment that will never be satisfied. However, she may still launch proceedings if she so chooses,

¹⁵⁷³ Natalia Homchick, Reaching Through the “Ghost Doxer:” An Argument for Imposing Secondary Liability on Online Intermediaries (2019) 76 Wash&LeeLRev 1307

¹⁵⁷⁴ Kathryn Hopton, Susanne Langer, ““Kick the XX out of your life”: An analysis of the manosphere’s discursive constructions of gender on Twitter,” [2021] 32 FP 3

perhaps to ensure Ross lives with the publicity and reputational harm of being found to have caused her sexual assault.

The difficulties in bringing proceedings indicate most victims would seek other routes to compensation. Nevertheless, in the event a defendant with means was found, or a victim was willing to spend money for vindication's sake, accessory liability in tort is a viable legal tool for responding to the downstream harms of the Manosphere. Albeit one with limited real-world application given the current reality of tort.

Chapter Seven proposed a duty of care for PUA influencers, which arises whenever an influencer, by instruction and direction, causes their followers to pose a risk of harm to a member of a class that is not too wide. This novel duty was argued with reference to the *Caparo* factors and said to be an incremental expansion of the law of negligence. The duty was intentionally designed to be narrow because the law is averse to dramatic expansions of negligence liability. The proposed duty is applicable across the Manosphere, but limited to cases featuring influencers.

To illustrate, say an Incel influencer teaches 'Black Pill' thought and explicitly suggests Incels should exact their revenge against women. Eventually, he calls for his followers to mark the anniversary of Elliot Rodger's death with another 'Incel Rebellion.' Say one of his followers, acting on his teaching and direction, carries out a stabbing attack. In these circumstances, the proposed duty should apply. The influencer has imparted a misogynistic ideology and promoted behaviours which carry a risk of physical harm. Thus, when he directs his followers to act on these, he creates a source of danger, and so a duty of care arises. The same pattern of instruction and direction gives rise to the duty. The same arguments on foreseeability should also apply, while the policy arguments raised in Chapter Five would also apply due to the severity and type of harm. Thus, much of the resulting analysis should be broadly transferable. The proposed duty applies to PUA influencers generating a real prospect of sexual violence through careless instruction and direction. Equally, it should extend to Incels generating a real prospect of terrorism in the same way.

The proposed duty was crafted to be narrow, but there is potential for further incremental expansions to the downstream harms of the Manosphere. Say an MRA

influencer teaches his followers to defend their online spaces from feminism at all costs. He then denounces a feminist media critic and calls for her to be driven off the internet. His followers send threatening messages, dox her private information, and hound her on social media. They create crudely ‘deep faked’¹⁵⁷⁵ or AI-generated pornographic images and send them to her friends and family.¹⁵⁷⁶ If she suffers psychiatric harm,¹⁵⁷⁷ although recoverability here can be complex, then the proposed duty might apply.

The influencer has instructed and directed his followers so that they pose a risk of harm, which is foreseeable. However, the proximity and policy inquiry must be adjusted. The influencer has created a source of danger, but it is not physical. The paramount importance the common law attaches to physical security was a compelling factor used to justify the proposed duty. This is no longer relevant to the facts, and so a fresh policy and proximity inquiry would be necessary. It is not implausible the proposed duty might be extended to these types of harm, but further analysis would be required. The proposed duty in Chapter 5 is a starting point which could be extended to influencers more widely. Although such expansions would need to be argued on their own merits.

Chapter Seven further suggested PUA influencers could be vicariously liable for the torts of their students. It argued the relationship between Ross and Alex was akin to employment. Thus, Ross would be liable for any of Alex’s torts with a close connection to their relationship. While this argument might apply to real-world PUA influencers, its applicability to the wider Manosphere is limited. Student-teacher dynamics are not typical in other Manosphere communities, and even if they were PUAs generate a specific risk of sexual violence. The analysis is specifically concerned with PUAs, and so the arguments are not widely applicable. However, this does not subtract from the thesis’s original contribution to the literature. It has explored the boundaries of vicarious

¹⁵⁷⁵ Deepfake: Synthetic media in which a person in an existing image or video is replaced with the likeness of another. Often through the use of software designed to make the forgery indistinguishable from a real video or image.

¹⁵⁷⁶ This is based on the real-world events of Gamergate. The source in this respect is Nelanthi Hewa, Christine Tran, Verified play, precarious work: GamerGate and platformed authenticity in the cultural industries [2023] NMS <https://journals.sagepub.com/doi/epub/10.1177/08912432221128545>, accessed 01/03/2023

¹⁵⁷⁷ That recovery here is possible is supported by *McLoughlin* (1997) at 418. Also see *Charlesworth* (1993) 2-145, 2-146

liability in a novel context and argued it should be extended to student-teacher relationships where the underlying enterprise generates a risk of physical harm. The thesis has considered vicarious liability in an original context and illustrated its reach.

Chapter Eight explored collective liability to argue Ross's Community was an unincorporated association. An unincorporated association arises from an informal arrangement in which members come together under a common purpose and establish a bare minimum of infrastructure. Members of unincorporated associations are in a relationship which attracts vicarious liability, and so members are collectively liable for torts with a close connection to their common purpose. As a result, the thesis identified a potential for wide ranging collective liability. If all that is required for an unincorporated association is a common purpose and a bare minimum of infrastructure, then many Manosphere communities are likely to be unincorporated associations. As a result, joint and several liability arises from the contract between them, and so any tort closely connected with their common purpose would trigger collective liability. MRA's who harm feminist activists in pursuit of their anti-feminist activists, Tradcons who harm their partners to restore their conceptions of traditional values, or MGTOWs who use deceit to minimise their financial contributions to a society corrupted by feminism, all act in pursuit of the common purpose of their respective community. Thus, if they belong to an unincorporated association it is entirely plausible, that every member of it would be jointly and severally vicariously liable for their tort.

To illustrate, the common purpose of *Incel Brotherhood* is to provide a forum for Incels. There is an identifiable membership, eligibility requirements, internal rules, and a system of governance which allows members to change policies by majority vote. Thus, there is a common purpose paired with a bare minimum of infrastructure. *Incel Brotherhood* is likely an unincorporated association. That their common purpose links to an inherently violent ideology creates scope to say there is a close connection between it and the torts of Tom's stabbing attack.

The thesis has identified a viable route to collective civil liability across the Manosphere. So long as it is possible to conceive of a Manosphere community as an unincorporated association, there is a plausible route to collective liability. In the aftermath of real-world downstream harm, collective liability may be a very effective legal tool. For

instance, if one member of the association has means then they might be pursued in tort to ensure a claimant could receive as much as possible from a liable party.

Alternatively, if every member of a large association were liable, then pursuing a large number for damages may make recovery that much more straightforward. In addition, that multiple members of the association would be liable once again exposes them to the possibility of contribution proceedings which would further disrupt, if not ultimately dissolve, the unincorporated association. While the practical realities of bringing tort proceedings remain, in principle this route to collective tortious liability could be a very effective legal tool for responding to downstream harm. The thesis proposed to identify whether collective liability was possible, and it very much is. In that respect, the thesis has achieved its goal.

Chapter Eight identified that there is no plausible path to collective criminal liability for downstream harm. There is a framework which could be built upon by future legislation, but no viable routes at the moment. There is potential for wide-ranging criminal liability, per the argument in Chapter Four, but this is not collective liability. Nevertheless, the thesis has still achieved its research aims. It has explored routes to collective liability in tort and set out to answer whether collective criminal liability is possible. The answer is that it is not.

Chapter Eight further discussed public nuisance as a regulatory tool for curtailing downstream harm. It argued that Ross's Community's actions against women undermine their public right to comfort, and so it is a public harm. That the harm is caused by multiple independent actors means they are contributing to a single, indivisible, public nuisance for which they can all be liable. The harm affects pockets of victims across localities, which may be a sufficiently wide section of the public to be actionable. Thus, these behaviours could be restricted by injunction, which readily arises in public nuisance.

This argument is restricted to behaviours that impact public rights. For instance, MRA or MGTOW communities engaging in harassment campaigns are likely causing individual rather than public harm. Incels may be linked to the most serious wrongs of the Manosphere, but the community is hardly indivisibly contributing to a single public nuisance. One person commits the act while others contribute and are better imagined

as accessories. Moreover, an injunction to prevent the public nuisance of a stabbing attack is unlikely to be effective. However, it is plausible that these communities might commit public harm, in which case public nuisance could be deployed in response. Say the MGTOW community decided to target young women and publicly berate at them for their perceived immodesty and promiscuity. Thus the individual members went out in public to pester, harass, and shout at women at random. Those women might have their right to feel safe undermined by constant harassment, which a claim in public nuisance might remedy. While other members of the public may feel similarly disturbed for witnessing such behaviours. Indeed, any Manosphere community engaging in behaviours that amount to public harm may be properly pursued for public nuisance. Although the realities of obtaining an injunction might not be so straightforward. The argument is widely transferable for public harms across the Manosphere, and so those participating would be collectively liable. If this is done in pursuit of the common purpose of an unincorporated association, every member would be liable. The argument is restricted to specific public harms but in the right context public nuisance could be an effective legal tool to regulate downstream harm.

In summary, the thesis set out to investigate the collective and civil criminal liabilities of the Manosphere. This was done to fill a gap in the literature, and to shed light on how the law might respond to a pressing issue with links to multiple instances of real-world harm. Chapters Four and Five presented a defensible legal argument on how members of Incel communities would be held liable in crime and tort for the real-world tragedies they inspire. These arguments are transferable and so the thesis has revealed a plausible route for Manosphere adherents to be held to account for downstream harm. While the effectiveness of this in tort is debated, there is a theoretically viable legal argument and a potential for subversive online groups to be destabilised through contribution proceedings. Chapter Seven proposed a duty of care for PUA influencers, which once again can be cast more widely to any Manosphere influencer who inspires real-world physical harm. The thesis had identified that those who cause such harm are legitimate targets of the law of negligence, and there is potential for the proposed duty to expand to other types of harm in due course. Finally, Chapter Eight discloses a potentially wide-ranging route to collective tortious liability for any Manosphere group

with a common purpose and a bare minimum of infrastructure. As demonstrated above, these arguments are not confined to any one Manosphere group and so are widely applicable. It has distilled defensible legal arguments on how the law could respond to the downstream harms of the Manosphere. The thesis has achieved what it set out to accomplish and, in answering the research question, has made the intended original contribution to the literature.

Beyond the Manosphere

The Manosphere was a vehicle to explore the potential liabilities of downstream harm, and so the thesis's conclusions are far-reaching. To illustrate, from the 30th of July to the 5th of August 2024, the United Kingdom saw a surge of far-right riots.¹⁵⁷⁸ Muslims were violently attacked, hotels housing asylum seekers were set ablaze, mosques were damaged, and police vehicles were set alight. It was the most significant period of violent social unrest in the United Kingdom since 2011.¹⁵⁷⁹ The online far-right consistently encouraged, incited, and further inflamed the violence.¹⁵⁸⁰ A community of people were agitating for violence and so might be liable as accessories, as laid out in Chapter Four.

Imagine a far-right forum that has radicalised its members erupts in a general call to arms once the riots begin. Some encourage further rioting, others identify hotels as potential targets, and a considerable number suggest using weapons to intensify the violence. Eventually, one of its users sets fire to a hotel, causing serious injuries but no deaths. The same pattern of radicalisation and incitement relevant to the Incel vignette applies here. Members of this community have immersed themselves in far-right ideology and then incited real-world violence. The forum capitalises on a surge of violent unrest, in the same way members of Incel Brotherhood capitalised on Tom's

¹⁵⁷⁸ Rob Pincheta, "Rioters carry out violent, racist attacks across several British cities. What happened, and what comes next?," (CNN, 07/08/2024) <https://edition.cnn.com/2024/08/05/uk/uk-far-right-protests-explainer-gbr-intl/index.html>, Accessed 26/08/2024

¹⁵⁷⁹ Michael Holden, "Explainer: Why are there riots in the UK and who is behind them?," (Reuters, 07/08/2024), <https://www.reuters.com/world/uk/why-are-there-riots-uk-who-is-behind-them-2024-08-07> Accessed 25/08/2024

¹⁵⁸⁰ Brian Fung, "UK riots show how social media can fuel real-life harm. It's only getting worse," (CNN, 09/08/2024) <https://edition.cnn.com/2024/08/09/tech/uk-protests-social-media/index.html>, Accessed 24/08/2024

escalating violent tendencies. The result is charges of aggravated arson¹⁵⁸¹ and causing grievous bodily harm being laid against the principal.

Members who intentionally made a more than minimal contribution to the offence by radicalising and inciting the principal could, therefore, be charged with procuring aggravated arson and causing grievous bodily harm without intent. Any who intended harm or knew with virtual certainty it would occur could be charged as accessories for procuring grievous bodily harm with intent.¹⁵⁸² The same argument applies here as it did in Chapter Four. Accessory liability via procurement is a wide-ranging legal tool that applies to downstream harms beyond the Manosphere. It is available for any group which agitates for and influences real-world violence, which may include a great many extremist groups of any political persuasion seeking to groom others into terrorism.

Indeed, the thesis's arguments may be used in concert against those influencing downstream harm. Imagine a far-right influencer praises the rioters and instructs his followers to 'take their country back.' As a result, dozens of his followers join the riots and sow chaos across the UK. The hypothetical influencer has done an act which has caused twelve or more people together to use violence for a common purpose, causing others to fear for their safety. In other words, the influencer has procured a riot.¹⁵⁸³ If they caused their followers to join in then they have made a more than minimal contribution to the riot. That they did this in a climate of violent unrest implies they knew the context which makes it criminal. Thus, they should be charged accordingly.

Not only might this fictional influencer be criminally liable, but Chapter Seven suggests there is a plausible claim in negligence. The proposed duty in Chapter Seven applies whenever A instructs and directs B to cause harm to C. Here, the influencer has instructed his followers in accordance with an ideology and then directed them to act. Similarly, Ross instructed Alex to believe in Pick Up Artistry and directed them to act. That combination is what makes B dangerous and creates a duty for A to obviate the risk of harm. It is foreseeable that directing one's followers to join ongoing violent riots might lead to them doing exactly that. If the influencer has caused them to participate, then

¹⁵⁸¹ Criminal Damage Act s1(2)(3)

¹⁵⁸² Offences against the Person Act 1861 s18

¹⁵⁸³ Public Order Act 1986 s1

they have created the source of the danger, so there is a sufficient relationship of proximity. That the example features physical violence suggests the policy factors in Chapter Seven would be relevant here. The result is a defensible legal argument that negligence arises. Indeed, in this context, proceedings may even be desirable, especially if the influencer has means and is an attractive target for litigation as might be the case with wealthy influencers, across the political spectrum, occupying prominent positions online.

Thus, the hypothetical influencer is plausibly liable in both crime and tort. Indeed, the interfaces between the jurisdictions may assist here. If the influencer was convicted for procuring a riot, their involvement and causal connection to the offence would be a binding fact. A civil court would be faced with an existent fact pattern, which may increase the likelihood of the claim succeeding.¹⁵⁸⁴ Moreover, the threat of criminal punishment and an award of damages might deter other influencers from causing real-world harm. For influencers with limited means, victims may seek compensation through the CICA or the criminal courts, with more robust enforcement mechanisms and the threat of a default prison sentence. The interfaces between the jurisdictions mean criminal and tortious liability can work together in a comprehensive response to downstream harm.

Say a small group of men are members of an online forum, of any political persuasion, agitating for direct action to prevent the transfer of power. Several users suggest targeting prominent politicians, others suggest using zip ties to detain them, and a considerable number imagine how the targets might be theatrically executed. Some muse about the security arrangements and a few recall trips to government buildings and explain their layout. Any one of these acts could be a more than minimal contribution if the group go on to participate in an insurrection. They might bring zip-ties to capture targets, use the knowledge online to navigate the buildings, or go to places suggested to be poorly defended. Even if the information is wrong, those participating have shaped the resulting tort. They have influenced where the tortfeasors will go and who they will target, and indeed, the volume of people suggesting they act might

¹⁵⁸⁴ See Chapter Five “The Tort/Crime Interface”

embolden them to act. Any of these acts could be a more than minimal contribution. There is no set range of acts, and so the question is whether a given contribution, in context, exceeds the *de minimis* range.

The tortfeasor and the accessories must act pursuant to a common design. Accessory liability in tort does not require the parties to conspire to commit a tort but rather for any common purpose. A common purpose to prevent the peaceful transition of power or preserve the current regime would be sufficient. To be liable for intentional torts, the accessories would need knowledge of the essential wrong. They would have this knowledge if they anticipated violence. To agitate for a violent insurrection necessarily requires the anticipation of violence. Chapter Five further indicated that if they were not sure whether the tortfeasors would act, they still have conditional knowledge of the essential wrong and so can be liable. Thus, the thesis has laid out an argument on accessory liability in tort, which is widely applicable to downstream harm. There is a doctrinally and practically plausible claim in tort for downstream harms beyond the Manosphere.

The thesis has also revealed a route to collective liability. Say a group of environmental activists came together with the common purpose of asserting animal rights via unlawful means. If paired with a bare minimum of organisation, this group would be an unincorporated association. Members of this unincorporated associations would, therefore, be jointly vicariously liable for torts with a close connection to their common purpose. So, if a member went into a shop and doused someone buying fur in blood, to punish them for their crimes against animals, the tort goes to the heart of the association. Each member would be vicariously liable and so could be pursued for damages. The same would be true for any online group with a similar common purpose and a bare minimum of organisation. If their members go on to cause downstream harm, there is a real prospect of collective tortious liability. This argument is not restricted to the Manosphere but could be applied more widely.

There are countless other examples of downstream harm, and it is impossible to discuss them all. Nevertheless, the thesis has produced defensible legal arguments which are applicable to downstream harm, not just the Manosphere. This section serves to illustrate that the arguments on unincorporated association, accessory

liability, negligence, and others are broadly applicable. The thesis has answered the research question and made the original contribution to the literature it intended. The project was designed to respond to scholarly concerns about the Manosphere and downstream harm generally. It has identified the legal tools which will shape the law's response to downstream harm, whether they flow from the Manosphere or any other subversive online group.

Radicalisation as Causation

The thesis has further argued that radicalisation can form part of the causal inquiry. Radicalisation creates a speculative risk of violence, which is then guaranteed by those exploiting the risk. Thus, radicalising and inciting another is a more than minimal contribution to any resulting criminal offence. This is an original contribution to the literature, which proposes a means through which radicalisers can be held liable for the crimes and torts of those they radicalise.

For instance, if A radicalises B and then glorifies terrorism, A has created and then exploited a speculative risk of violence. In Chapter Four this process was described as akin to pouring chemicals in an increasingly unstable vat. The moment there is a prospect of the mixture exploding, there is a speculative risk of violence. Thus, if the defendant continues to pour the chemicals, they exploit that risk and make a causal contribution to the explosion. Radicalisation creates a speculative risk of violence because it imparts an extremist ideology in which violence is justified. Further incitement is exploitation because it intensifies the risk and creates an opportunity for violence to manifest. This argument is not restricted to radicalisers and applies to anyone who culpably exploits this pre-existing risk. For instance, someone who comes across an environmental extremist and incites them to attack an oil executive. However, liability for radicalisers would be more forthcoming on this account.

Firstly, radicalisers are uniquely poised to culpably incite those they have radicalised. Their pre-existing relationship, knowledge of the extremist ideology, level of trust between them, and other such factors make them more able to contribute. Indeed, in Chapter Four, those with intimate knowledge of Tom's status were argued to know with virtual certainty he would follow through with his attack. Similarly, radicalisers who

incite those they have radicalised may be ideally placed to know of or intend the resulting harm. Thus, there is scope for them to be convicted as accessories to a crime of specific intent.

To illustrate, Alice radicalises Emily into becoming an environmental extremist who believes the looming threat of climate change is such that violent action is needed to restrain human activity. She does this by immersing Emily in radicalising literature, films, material, and constant one-to-one interactions. This results in Emily being radicalised and so poised to cause real-world harm. However, this is a speculative risk; Alice has set the stage, but if Emily independently decides to act, there is no real connection between her and the offence. However, if Alice then delivers a speech praising those who take direct action, glorifying violence, and listing oil executives said to be deserving of exceptionally harsh punishment, she is exploiting that risk. She is telling a radicalised person that violence is desirable, that she will be praised for doing it, and who it should be directed against. She is culpably exploiting the speculative risk of violence. Thus, if Emily detonates an explosive outside an executive's home, Alice has played a causal, more than minimal, role and so is a factual and legal cause of the bombing. Chapter Four rejected the notion that would be an intervening act in the circumstances, and so there is nothing to exculpate the radicaliser.

This is an original contribution to the literature, which indicates liability for radicalisers both online and offline. The thesis goes beyond the existing literature which details the phenomenon of radicalisers to make a defensible legal argument that radicalisation can be integrated into the causal chain. Those who radicalise others can be legitimately considered to be making a factual and legal cause of a resulting criminal offence. Thus, those who do so can be prosecuted for the tragedies they inspire.

Accessory Liability and Unincorporated Associations: A Platform for Future Research

The thesis has further contributed to the literature by creating a platform for future research by exploring under-researched concepts such as accessory liability in tort, and unincorporated associations. Imagine an offence had been neglected by the scholarship but a research project revealed its principles could attach to all manner of harms in the modern world. Researchers exploring how novel behaviours might be

better regulated would benefit from recent literature analysing this offence, to see if it would apply in the context they are studying. Without that contribution the offence would remain vague, unexplored. Indeed, with no obvious contemporary application it may be overlooked by researchers.

The thesis has researched and then advanced a comprehensive knowledge of two understudied legal doctrines. It distilled accessory liability in tort and unincorporated associations into their core elements, and identified their versatility. Both are flexible concepts which could apply to a wide range of groups, behaviours, or harms. Future research projects which, say, investigate whether politicians are liable for inspiring their supporters to cause harm, may benefit from the thesis's analysis as it provides the bedrock of a flexible legal tool that might be applied to the very context they are studying. The same might be true for a project investigating how the law might respond to new groups, or loosely affiliated organisations causing harm. The thesis has made previously under-researched and murky concepts readily accessible for future researchers.

Influencer Liability

Finally, the thesis has made an original contribution by proposing a duty of care for online influencers. This directly responds to scholarly concerns about their potential for harm. Farivar, Wang, and Turel called for urgent research into the 'dark side' of influencers as unhealthy attachments to online figures are now the norm.¹⁵⁸⁵ Shepard observed influencers promoting and facilitating the trade of counterfeit goods.¹⁵⁸⁶ While Merkley and others identified cryptocurrency influencers exposing their followers to ruinous financial schemes.¹⁵⁸⁷ The thesis has already noted that Manosphere influencers are a mainstream concern following the rise of Andrew Tate.¹⁵⁸⁸ While Lledo and Galvez found health influencers promoting dangerous health information which

¹⁵⁸⁵ Samira Farivar, Fang Wang, Ofir Turel, "The dark side of social media influencing," (The Conversation, 12/05/2022) Accessed 05/09/2024

¹⁵⁸⁶ David Shepard and others, "The Impact of Deviant Social Media Influencers and Consumer Characteristics on Purchasing Counterfeit Goods," [2023] 44 DB 174

¹⁵⁸⁷ Kenneth Merkley and others, "Crypto-Influencers," [2024] 29 RevAS 2254

¹⁵⁸⁸ See the Introduction under the subheading 'Rationale'

could seriously harm anyone acting on it.¹⁵⁸⁹ There are academic concerns about the dangers of online influencers, and regulators are showing an interest.¹⁵⁹⁰ The thesis has responded to these concerns by proposing a duty of care for influencers. Thus, it proposes a practical mechanism through which influencers could be held liable in tort for downstream harm under the current legal regime.

To illustrate, there are online or ‘Pro-Anna,’ communities which promote anorexia as a lifestyle choice.¹⁵⁹¹ Within these communities, members advise others how to lose weight to the extreme. Among the techniques they promote is the ‘cotton ball diet’, in which cotton balls are ingested to simulate fullness. This has resulted in hospitalisation and invasive surgeries.¹⁵⁹² Say an influencer within one of these communities promoted the diet, and one of their followers was hospitalised. They have instructed and directed their followers in such a way that they pose a risk of harm to themselves. On the thesis’s account, there is scope to say they are liable in negligence. The thesis has produced a defensible legal argument concerning influencer liability and so responded directly to scholarly concerns about their potential for harm. The thesis has made an original contribution to commentary on the dangers of and legal regulation of online influencers.

Project Design Reflection: Why Incels and Pick Up Artists?

This project was concerned with the upstream liability of the Manosphere but focused on Incels and PUAs. The decision to narrow the scope of the inquiry was made early on as the initial proposal one vignette for each Manosphere community. This would have allowed for wide-ranging analysis on established communities within the Manosphere. This was the intended starting point for the analysis; however, considering the time and word count necessary to research and analyse two vignettes, it was overambitious.

¹⁵⁸⁹ Victor Suarez-Lledo, Javier Alvarez-Galvez, "Prevalence of Health Misinformation on Social Media: Systematic Review" [2021] 23 JMIR1

¹⁵⁹⁰ Emma Woolacott, "How new rules on influencer marketing impact UK businesses" (Raconteur, 07/07/2023), <https://www.raconteur.net/marketing-sales/regulators-crack-down-influencer-marketing>, Accessed 04/09/2024

¹⁵⁹¹ Carmela Mento and others, "Psychological Impact of Pro-Anorexia and Pro-Eating Disorder Websites on Adolescent Females: A Systematic Review," [2021] 18 IJERPH 2186

¹⁵⁹² Marjolijn Bijllefeld, Sharon K. Zoumbaris, *Encyclopedia of Diet Fads: Understanding Science and Society* (ABC-CLIO, 2014) 195

The decision to reduce the number of vignettes from four to two was not solely practical but rather accounted for changes within the Manosphere. It transpired that not all the orthodox communities were relevant in the contemporary Manosphere. MRAs, especially, have diminished dramatically.¹⁵⁹³ Thus, despite their association with harassment campaigns,¹⁵⁹⁴ there was a risk the analysis would be inapplicable to the current reality of downstream harm. There was a further risk of duplication. The harms of MRAs were them agitating and influencing real-world harm,¹⁵⁹⁵ behaviours which would be addressed by the Incel Vignette. By removing the MRA vignette, the thesis could still focus on agitation without dedicating time and resources to a separate vignette.

This rationale ultimately resulted in the elimination of the MGTOW vignette. The unique characteristic of MGTOW was members appear to have been alienated in some way. The subculture is made up of men who have encountered some gender-based difficulty and become so outraged at society's refusal to take them seriously they seek a total separation from women and feminism.¹⁵⁹⁶ Despite this, the community is still fixated on women and generates a constant stream of harassment.¹⁵⁹⁷ Thus, there is an overlap between the behaviours of MRAs and MGTOWs.¹⁵⁹⁸ As a result, the MGTOW vignette would mimic the same behaviours of the Incel vignette. This was also true for plausible extensions of MGTOW behaviours. If an MGTOW influencer suggested men not employ women, resulting in an Equality Act 2010¹⁵⁹⁹ violation, the analysis would be concerned with influencer liability, which would be captured by the PUA vignette. To include them would mean dedicating time and resources to a narrative, only for the resulting analysis to be repetitive.

¹⁵⁹³ Ribeiro(n44) 4

¹⁵⁹⁴ Patrick Rafail, Issac Freitas, "Grievance Articulation and Community Reactions in the Men's Rights Movement Online," [2019] 5 SMS 2

¹⁵⁹⁵ Jessica O'Donnell. "Militant meninism: the militaristic discourse of Gamergate and Men's Rights Activism," [2020] 42 MCS 654,656

¹⁵⁹⁶ Jie Lian Lin, "Antifeminism Online MGTOW (Men Going Their Own Way) in Steffen Kohn, Samatnha Fox, Mike Terry (Edt) *Digital environments: Ethnographic Perspectives Across Global Online and Offline Spaces* (TV,2017) 73

¹⁵⁹⁷ Jones(n15)1905

¹⁵⁹⁸ Anna Gorska, Karolina Kulicka, Dariusz Jemielnka, "Men not going their own way: a thick big data analysis of #MGTOW and #Feminism Tweets" [2021] 23 FMS 13

¹⁵⁹⁹ Equality Act 2010

The decision to feature PUAs was motivated by their persisting relevance within the Manosphere. In addition, there were scholarly concerns that this community posed a risk of sexual violence.¹⁶⁰⁰ Thus, they were a relevant community which posed genuine questions of downstream harm which had been raised by the literature. The rationale for including Incels was concerned with them being a notorious and prominent part of the Manosphere with verifiable links to mass-casualty attacks.¹⁶⁰¹ Incels are associated with the most serious real-world harm of any Manosphere community and so were a natural focal point. If there is to be a legal response to downstream harm it will be focused on where the need is most pressing. Suppose A, B, and C engage in the same behaviour, but A and B generate minor disruption while C causes physical harm. There is much greater interest in regulating C, and so they would be the focal point of any legal response. The same principle was used for the analysis; if there is to be a legal response to the Manosphere, it would be concerned with its extremes.

Project Design Reflection: The Methodology

The analysis explored the liabilities of the Manosphere through a vignette methodology featuring plausible simulations of Manosphere behaviours. Their plausibility was grounded in the literature, existing case studies, and the thesis's own investigations of Manosphere communities. Doctrinal analysis was then used to evaluate the availability and effectiveness of legal tools, and so the vignettes provided accessible narratives to test legal frameworks. The resulting analysis proved applicable to both the Manosphere and the phenomenon of downstream harm. Thus, the methodology was effectively used to answer the research question and achieve the project's aims.

The thesis has contributed to legal scholarship through this novel use of a vignette methodology. Vignettes do feature in the literature, particularly in sentencing studies where fictional examples are used to gauge the behaviour of judicial officeholders or how members of the public feel about sentencing outcomes, or the severity of offences. They are also commonly used as a pedagogical tool to illustrate a point. Within the legal literature they have not previously been used to explore liability. Nevertheless, the thesis has demonstrated that vignettes can be used to explore the criminal and civil

¹⁶⁰⁰ Carlo(n868) 5111

¹⁶⁰¹ Lisa Sugiura, *The Incel Rebellion: The Rise of the Manosphere* (EP,2021)

liabilities of a novel phenomenon. Thus, the thesis has deployed an original use of this methodology. Future scholars investigating how the law might respond to a phenomenon might consider vignettes. For they allow legal doctrines to be applied in malleable contexts conducive to effective analysis whilst mitigating or eliminating real-world interferences. Indeed, the thesis hesitated in using real-world case studies due to the difficulties in distinguishing between Incel and Far-Right violence.¹⁶⁰² The vignette methodology circumvented this issue, allowing the thesis to demonstrate liability was possible in principle. Of course, the practical application is still important, but so is knowing whether liability is even possible. The first step is identifying whether a legal tool is even viable in the circumstances and then comes the question of practicality. Vignettes allow scholars to understand the applicability of legal doctrines, which can then be subject to the trials and tribulations of the real-world.

Vignettes may be effective beyond liability, for instance, when scholars are concerned about future contingencies. Say a researcher is worried about the implications of an appellate decision. They might use a vignette to model a future case to illustrate how the case would have the feared effect. Vignettes may also assist researchers wishing to discuss complex phenomena without relying on isolated case studies. For influencers, if a researcher is generally concerned with influencers promoting dangerous trends online they might use a vignette to amalgamate previous examples into a single hypothetical. Thus, they could explore the law's response to dangerous trends without being confined to any one example. Vignettes are also viable to study issues when there is an absence of reliable evidence. Say a humanitarian crisis arises, but it is impossible to study directly, or there is insufficient reliable evidence to draw any firm conclusions. Vignettes might be used to model what the researcher is concerned about and to identify how the domestic or international legal system ought to respond. Thus, they could explore the relevant legal issues without being tied to a volatile and ever-changing set of facts. Vignette methodology has a wide range of potential uses in legal scholarship.

¹⁶⁰² Bates(n160) 384

That said, as with any methodology there are limitations which must form part of the reflection. The vignette methodology produces a set of transferable principles but the underlying analysis is tied to a fictional set of facts. While defensible arguments have been put forward, there is no guarantee they will be adopted. There is a speculative element to the thesis's conclusions, and the real-world 'interferences' may be more impactful in practice. For instance, the technological and jurisdictional issues of regulating the online sphere may mean liability is possible but impractical. Alternatively, the arguments might be attempted but, for whatever reason, rejected by an Appellate Court.

Many of these are natural limitations of any project's inability to predict the future, as the real-world applicability of any conclusion is always somewhat speculative. Nevertheless, the thesis has created a foundation which might be built upon to establish real-world civil and criminal liability for downstream harm. The practical application is a matter for future research, and so the thesis has still identified potential routes to liability. Nevertheless, it must be acknowledged there is still some way to go before these arguments become a reality.

The vignette methodology is necessarily malleable, and so among the challenges is the temptation that comes with it. As the analysis unfolded, there were times when slight alterations to the fact pattern would improve the applicability of a legal tool. Had the PUA vignette disclosed a large enough number of victims, there would be a much stronger argument for public nuisance. This was a temptation, especially as minor changes would not necessarily undermine the vignette's plausibility. However, while the vignettes were refined, they were not adapted to better suit the arguments. There was no desire to reframe the subject matter to fit the conclusions, and the need to explain the vignettes meant such alterations would be unjustified, and so noticed by the reader. To make the alterations would, therefore, undermine trust and transparency, on which this methodology depends.

The malleability of this methodology, therefore, creates a source of temptation, which plausibility might not always safeguard against. Plausible revisions might have been possible with a better-studied subject matter. Studies indicating how many people are impacted by PUA communities might have factored into the vignette after their

usefulness became clear. The extent to which this would be justifiable might be debated, although it may still be said to be an attempt to deceptively guide the reader to a pre-determined conclusion. This was never possible within the thesis, but more thought could have been put into how the vignette could, or should, be revised plausibly and transparently. Indeed this may be essential for future research projects using this methodology with a well-studied subject matter.

The vignette methodology was not particularly reactive to spontaneous change. The Manosphere underwent a significant change in 2022, with the rise of Andrew Tate, the result of which is that influencers are now much more prominent in the digital universe than they once were.¹⁶⁰³ Unlike PUAs these influencers draw an audience from various communities within the digital universe, and have a wider popular appeal. As a result the Manosphere is not precisely the same entity it was when this project began. However, there was no contemporaneous evidence to adapt the vignette to these changes while confirming the two principles of plausibility. The vignettes simulate behaviours which may or may not be relevant in the long term, as the impact of these recent changes is unknown.

The long-term relevance of the vignette is unclear, however this should not undermine the thesis's conclusions. The purpose here was to extract legally defensible arguments on how the law could respond to the downstream harms of the Manosphere. These arguments would apply equally to members of subversive online groups and their influencers. For instance, accessory liability via procurement would still be a viable route to criminal liability whether an Incel is inspired by successive members of a 'blackpilled' forum or a single influencer advocating for acts of misogynistic terror. Indeed, the thesis considers the liability of individual influencers through the PUA vignette. Thus the thesis provides a route to liability for influencers as they become more prominent within the Manosphere. As a result, unless the underlying behaviour of the Manosphere changes fundamentally the analysis is at no risk of becoming outdated. The Manosphere has not changed so dramatically as to invalidate the

¹⁶⁰³ Justin Horowitz, "Beyond Andrew Tate: Meet the misogynistic "manosphere" influencers proliferating across social media," [2023] MMA <https://www.mediamatters.org/diversity-discrimination/beyond-andrew-tate-meet-misogynistic-manosphere-influencers-proliferating> Accessed 09/02/2025

analysis. Rather the risk is that readers in the future will read the vignettes as outdated, even if they disclose viable legal arguments.

For instance, if one was exploring copyright infringement through a vignette making excessive use of VHS tapes, this may read as dated some years later when DVDs, or online streaming, have overtaken the market. The vignettes could certainly still be used to produce legal arguments with broad applicability, even if the world has moved on from their content. This is a risk for any research project; that the phenomenon under investigation changes so rapidly the conclusions become redundant, but this is not an immediate concern. However, if the research project were to begin again in 2025, there would likely be a greater impulse to focus on the impact of influencers, and their liability. The vignette methodology here would need to be adapted for this purpose, as the phenomenon is still relatively recent, and indeed may not be long lived. While there is evidence and literature on the rise of influencers, there is unlikely to be enough to incorporate them into vignettes whilst conforming to the two principles of plausibility which underpinned the thesis's analysis. Of course as the vignettes were still capable of producing viable analysis, there was no need to make changes in 2022, but future research projects may be more sensitive to the current reality of its subject matter. As a result, a different methodology might be needed to complement the vignettes. Perhaps an empirical study, evidencing the reach of Manosphere influencers as to support incorporating them into the analysis, and mitigate the impact of a rapidly changing subject matter.

Avenues for Future Research

Finally, the thesis has created avenues for future research. Indeed, a research question exploring the extent to which these legally viable arguments can be applied in light of the technological and jurisdictional issues posed by the internet is a logical next step. For example, say a potential Incel defendant was identified and that they were a US citizen. Future research projects could explore whether the arguments presented in the thesis could trigger extradition,¹⁶⁰⁴ and so assess whether there is a prospect of Incel

¹⁶⁰⁴ Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America with Exchange of Notes Treaty Series No. 13 (2007) (Signed 31 March 2003, Entered into Force on 26 April 2007)

defendants being brought to the UK to stand trial. Or indeed future projects might identify whether tort claims brought in England and Wales against upstream actors could be enforced in different jurisdictions. While the thesis has considered the practical implications of its arguments, the internet poses specific challenges worthy of further research. A legal response to downstream harm will need to contend with these issues sooner or later. That liability is possible, in principle, leaves the difficulties of identifying, tracking, or bringing defendants to trial to future research projects.

Research might also explore the wide-ranging liabilities proposed within the thesis. These arguments may be appealing in the context of online misogyny, but they are not necessarily restricted to it. Indeed, they might be applied to less objectionable behaviour for the benefit of the state. The thesis's arguments on accessory liability could, for example, make the organisers of protests criminally liable as accessories via procurement. Thus, the thesis's conclusions might be used to curtail protests, prosecute protesters, and have a chilling effect on freedom of expression. Chapter Five expanded this concern to others, as claimants might bring proceedings with a view to dissolve or disrupt protest groups. The thesis's arguments could be used to curtail legitimate activities necessary for a healthy democracy. Indeed, not every group within the Manosphere will be worthy of civil or criminal legal intervention. Those aggrieved by feminism ought to voice their opinion in whatever lawful ways they see fit. The thesis focuses on responding to the harms of the Manosphere, not the Manosphere itself. It is only those who cause real-world harm that ought to be subject to criminal and civil liability. Nevertheless, the freedom of expression concerns could not be fully explored within the thesis. This creates a need for further research into whether these concerns are well-founded, and whether the practical application of these arguments might create wide-ranging liability ripe for abuse.

The thesis has touched on two emerging areas of interest for future research. Firstly, the potential liabilities of online influencers. While the thesis explored their potential liabilities, there is a broader discussion to be had. Research has already highlighted the

significant impact influencers are having on children as young as eight.¹⁶⁰⁵ The pervasive impact of influencers is affecting all social media users, especially young people.¹⁶⁰⁶ There is scope for research into the role influencers play in bringing about real-world harm and how they might be regulated.

Secondly, the thesis has briefly touched on the use of ‘Deepfaked’ or AI-generated images when referencing MRA harassment campaigns. While this did not feature heavily in the thesis, this issue has become a concern. The use of AI-generated imagery to harass or humiliate public figures, spread false information, or otherwise cause harm is evident outside of the Manosphere.¹⁶⁰⁷ There is scope for a project that focuses specifically on this issue. What was one of many harassment techniques in the Manosphere is now a mainstream issue worthy of scholarly attention.

Final Thoughts

In summary, the thesis has explored the individual and collective liabilities of the Manosphere for downstream harm. It accomplished this by conceptualising, designing, and implementing a project to explore downstream harm. By pairing the vignette methodology with doctrinal analysis, the thesis acquired a systematic understanding of a substantial body of relevant legal knowledge. This was used to generate defensible legal arguments that accessory liability, negligence, the law of unincorporated associations, and public nuisance are viable legal tools which could be used to respond to downstream harm. In addition the thesis proposed integrating radicalisers into the causal chain, so they can be held liable for the unlawful acts they inspire. It also applied vicarious liability in a novel context, proposed a duty of care for online influencers, and examined how little-used legal tools could be used to affect individual and collective liability.

¹⁶⁰⁵ Crystal Smit and others, "The Impact of Social Media Influencers on Children's Dietary Behaviors," [2019] 10 FP, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6967733/>, Accessed 09/09/2024

¹⁶⁰⁶ Karima Lajnef, "The effect of social media influencers' on teenagers Behaviour: an empirical study using cognitive map technique" [2023] 42 CP 19364

¹⁶⁰⁷ John Zerilli, "Appropriation of Personality in the Era of Deepfakes," in Ernest Lim and Phillip Morgan (Edts) *The Cambridge Handbook of Private Law and Artificial Intelligence* (CLH, 2024) 227-249

As a result the thesis has created a foundation of knowledge which could be used to inform a real-world legal response to the Manosphere in England and Wales. Indeed by examining both crime and tort, the thesis has identified how the jurisdictions could work together to establish a comprehensive legal response to the downstream harms of the Manosphere. These conclusions go directly to the phenomenon the thesis was created to investigate, and fill a gap in the literature by responding to scholarly concerns about the Manosphere, and online harm. The conclusion being that the law of England and Wales is capable of a robust legal response to the downstream harms of the Manosphere. There are viable paths to individual and collective liability for those who perpetrate downstream harm.

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