VICARIOUS LIABILITY AND ADMINISTRATION OF RISK I *

WILLIAM O. DOUGLAS

I

A rationalization of case law is useful to a legal historian in attempting to reveal the stimuli which induced decisions. To one interested in predicting what the courts will do tomorrow —*i.e.*, in stating the law—or in drafting legislation, it likewise is of interest and utility, inasmuch as it furnishes possible bases for cases yet to be decided or for laws yet to be passed. We are here concerned with a rationalization, and while its utility for the former purpose is not denied, we are more particularly concerned with its utility for the latter purpose. Why Holt, J. put his seal of approval on the doctrine of vicarious liability [FN 1] is still a riddle. From whence came the rule and a complete exposition of its pedigree are problems as yet unanswered. The learned attempts made are admittedly ineffectual. [FN 2] Similarly, whether the rules of vicarious liability made satisfactory and effective adjustments of the economic and social conflicts in the industrial society out of which they rose is highly significant and as yet unexplored. [FN 3] Each of these problems is of great importance to every legal historian, and of immeasurable interest to all who are concerned with the history of the science of jurisprudence. But one of more immediate significance to all legal scholars—teacher, practitioner and judge—and to all social scientists is, what rationale justifies the various rules of vicarious liability in modern society? The importance of the answer to that question is at once apparent when the first court is striving to phrase the rule, when the hundredth variation of the normal situation is up for decision and the court is seeking to delimit the rule, when bases for legislation are sought, and when the economic and social effects of these social regulatory rules are measured.

The necessary economic and social data are not at hand to attempt a complete statement of the rationale, but one major problem can be analyzed. It is the problem of the administration of these risks. The delimiting factors of these various rules deny recovery against certain individuals and certain businesses at certain times. The reasons for making some delimitations would be more particularly concerned with the case of the person seeking to escape the legal duty, than with the case of him seeking to assert the right. The judgments enforcing these rules are saddled on the respective businesses involved. They become cost items, and the managers must pay them. Likewise, they will probably want to provide for them, and to attempt to absorb them. Their problems in administering these items of risk are therefore pertinent to any attempt either to delimit the rules of liability or to expand them. The efficiency with which business under modern society can administer these risks is not, to be sure, the whole problem. Compensation for an injured party comes first, but that cannot be considered separately from the capacities of the parties, to whom the loss is allocated, to bear it. Only when those capacities are measured, can the scope of

the right of the injured party be intelligently determined. Otherwise the rule which is fashioned may be too lax or too burdensome. An analysis of these rules in light of the problems of an administrator of risk will therefore be undertaken. Though that analysis may do nothing more than to state succinctly one of the primary issues involved in the cases, if that issue is met, a basis for a rationale of these rules will be forthcoming.

II
FROLIC AND DETOUR

M, who conducts a retail coal business, hires S to deliver the coal by a truck furnished by M. S in obedience to M's order is en route by the most direct road to a customer's house one mile south with a load of coal. S is negligent, and as a result P is injured (case 1). It is obvious that the loss which P has suffered might be allocated in at least three different ways—to P, to S or to M. It is also obvious that any common-law court would allocate the loss to M directly. [FN 4] Legal literature abounds in rationalizations for this. [FN 5] The one most commonly accepted, and of increasing popularity, is the well known entrepreneur theory [FN 6] It is thought that the hazards of a business should be borne by the business directly. It is reasoned that if this new cost item is added to the expense of doing business, it will be ultimately borne by the consumer of the product; that the consumer should pay the costs which the hazards of the business have incurred. It is further reasoned that if the business of M is burdened with the new cost item, so is the business of each of M's competitors. And it is concluded that the rule which puts a premium on efficiency in conducting a business is not to be deprecated. Under this rationale M would clearly be liable. At the time of the injury S was clearly performing M's business. But suppose when he injured P he was a block west of the established route for the purpose of buying himself tobacco but intending to complete the delivery after making the purchase [FN 7] (case 2). What test determines, or should determine, whether or not M's business is being performed?

It might be premised that a business is that which is undertaken, and that the scope of the business is to be determined by the scope of the undertaking. Consequently M would not be liable here because he had not undertaken to do anything but transport goods from one point to another. But the rule which the courts have quite uniformly adopted places liability on M. [FN 8] M is made liable for the doing of things which he does not undertake, and certain accepted rules have been established. If S at the time of the injury is partially motivated by a desire to serve M, and has not unreasonably deviated from the established route, M is liable. In case 2 since S intends to make the delivery after acquiring the tobacco, and since he has deviated but a block, liability would no doubt be imposed under the "motivation-deviation" test. [FN 9] Likewise under the "zone of risk" test, liability would be imposed, since the negligent act was done within the

spacial zone wherein one being sent on the mission might reasonably be expected to be found. While M did not undertake to do anything but transport coal, he ought to foresee that one delivering coal might perform incidental acts while making delivery. [FN 10]

If the facts are still further changed so as to have S turn west, not to purchase tobacco, but to go on an independent fifty-mile journey of his own, and P is injured at the same spot by S's negligence [FN 11] (case 3), the "motivation-deviation" test would beyond doubt deny a recovery from M. The "zone of risk" test presumably would allow a recovery, since S is found within the physical zone where one delivering goods between the two points given might reasonably be expected to be found. [FN 12]

But change the case once more so as to have S proceeding on the most direct route to the customer's house, intending not to stop but to go south to a spot fifty miles beyond his authorized objective on an errand of his own (case 4). [FN 13] The "motivation-deviation" test would consistently deny recovery; [FN 14] the "zone of risk" test would allow it, provided the injury occurred before the authorized objective was passed. Both tests would deny recovery if the injury had happened twenty-five miles south of the authorized objective (case 5). [FN 15] What significance do these rules, and the results reached, have when they are translated into rules for the administration of this type of risk?

Administration of risk is so broad it has elements of vagueness. It properly includes four distinct and separate concepts—avoidance, prevention, shifting, and distribution. [FN 16] M might have avoided this type of risk by refraining from entering business, or a business requiring delivery by truck, or by not making this particular delivery. M might have taken all steps known to man to lessen the likelihood of such injuries, those steps including the installation of four wheel brakes, extreme care in selection of truck drivers, etc. M might have contracted with T, whereby T agreed to assume the particular type of risk. Or M might have assumed the risk, and recouped by distributing the cost of assumption among the consumers of the product he sells. For purposes of convenience these four types of activity may be respectively called risk avoidance, risk prevention, risk shifting and risk distribution. Do the rules of frolic and detour when translated into these administrations of risk concepts make workable, understandable rules?

In each of the five cases put it is assumed that M was not negligent. M did not fail to take any steps towards making the truck safe, employing a careful driver etc., which a reasonable person would have taken. Nor can anything specific be pointed out which M could have done in any of the cases put to have lessened the likelihood of the injury occurring even though M were extremely cautious. Further, on no risk prevention theory would the distinction be drawn between any of the cases put. Frolic and detour might well be treated alike. The supervision

over the transportation process involves the selection of drivers, trucks, safety devices, etc. The existing objective checks against negligent operation are equally applicable whether case 1 or case 5 is being considered. Such checks against disobedient employees likewise exist. To draw a distinction between the negligent obedient employee (case 1) and the negligent disobedient employee (case 5) is to make no distinction between risks which can be prevented and those which cannot. In the first place the negligent act occasionally is the result of disobedience only. A check against negligence therefore assumes in some cases a check against disobedience. In other cases of course negligence and disobedience are not related. But even then, checks against disobedience exist; employment managers use them continually. Conceivably they are as effective as those against negligent driving, which is not solely a matter of lack of skill. It may be entirely a matter of temporary physical condition which is not measurable in advance. Therefore the presence of a universal, effective check would seem to be no *sine qua non* to risk prevention. Risk prevention describes capacities relatively. Such capacities obviously exist in respect to the employment of obedient employees as well as in respect to the employment of reasonably careful employees. A fact basis for such differentiation between frolic and detour is so tenuous that it seems difficult to square the different rules on any such risk prevention theory. In view of those facts it seems that risk prevention may be dismissed without more ado.

Similarly for the theories of risk avoidance. The immunity of M in case 5 would be explained under the "zone of risk" test as follows: M would not consider it "probable" on ordering S to make that specific delivery that he would be subjecting to risk of injury people or property twenty-six miles distant from the place of departure. On the other hand M would foresee that he was subjecting to such risk people and property within the narrower spacial zone, since truck drivers do not always take the most direct route, since they often perform personal errands incidentally while they are doing their employers' business and since, while so engaged, they are not infrequently negligent and as a result sometimes injure people and property. This is the foreseeability or "probability" which is the essence of the test. [FN 17]

The distinction between case 5 and case 2 is less real however when they are analyzed in light of risk avoidance. It is clear that before a decision can be made to avoid a risk or to assume it, the existence of the risk must be known. In all the cases put the facts necessary for such decision are present. Employers know that truck drivers sometimes disobey instructions and go on frolics of their own. Finally, employers know that truck drivers whether on a "detour" or on a "frolic" may injure persons or property by their negligence. And a fact situation could readily be imagined where from M's point of view the probability of S negligently injuring any person or property is as remote as is the probability from another employer's point of his employee going on a frolic and negligently injuring any

person or property. The degrees of probabilities of negligent detours and negligent frolics causing damage to others are difficult to measure. The fact that, in a larger number of cases, the probability of negligent frolics causing damage may be more remote than the probability of negligent detours causing damage may have significance; but it certainly has none from the viewpoint of risk avoidance. [FN 18] What place is there in risk avoidance for the "motivation" of S? The mental state of S in case 3 could be said to be an abandonment of the undertaking. But *per se* that carries little significance in terms of risk avoidance. It is not what S thinks, but where S is or may be, or what S is doing or may be doing that enlarges, diminishes or changes the risks of which M is cognizant. [FN 19] And even though there was an abandonment, the fact basis noted above which is necessary for a decision by M to avoid or assume the risk is as present where there has been an abandonment as where there may be one. Therefore, if courts desired to hold him who stood in a strategic position to avoid the risk they should not hesitate to hold M in all five cases. The fact that they do not hold M in all those cases makes the risk avoidance concept of little utility in explaining the cases or in predicting decisions. Risk prevention and risk avoidance being of little aid in furnishing any basis for a rationalization of the case law, what significance has the popularized foreseeability test? It has glamour. But is it more than an arbitrary rule? Before an answer is given the other phases of administration of risk need examination.

At the dates of crystallization of the rule of vicarious liability, and of the rules of frolic and detour, there were present no standardized, available risk shifting devices for these types of risk. The London fire was followed by the advent of fire insurance. But the industrial society refashioned by the Industrial Revolution did not make immediately available liability insurance or its substitute. [FN 20] In fact the advent of liability insurance was not until the latter part of the last century. Being an offspring of employers' liability insurance it made no complete or satisfactory adjustment to the society into which it was born until this century. And not until it became standardized, known and popularized was it in any real sense available to the large mass of businesses. [FN 21] For over a hundred years then the rules of frolic and detour were applied, and were used to effect adjustments between economic and social forces in a society which knew no risk shifting device. Whether the adjustments effected were satisfactory in absence of such device is a legal historian's problem. The possible basis for a rationale of frolic and detour which it suggests is of more immediate concern.

It is at once apparent that M with this device available may purchase on the insurance market a promise to pay the amounts which M is legally liable to pay to persons as a result of S's acts. Obviously any such amount, which M is forced to pay by a court's judgment or decree, is embraced within the paid-for promise. Therefore a judgment against M for injuries resulting as a result of S’s negligent "frolic" would fall within the promise. Consequently if a court desired to abolish

the distinction between "frolic" and "detour," the risk shifting device would be as available as it now is. [FN 22] In other words, it is not true that a risk shifting device can be used only in case of liability for negligent "detours." It has such flexibility that it can be used whenever a court decrees liability. That is to say, its limits are set by rules determining liability, and courts by their decrees and judgments make those rules. Consequently if the courts were bent on holding him who was the efficient, effective risk shifter it could readily abolish all distinctions between "frolic" and "detour," and make M liable in all five cases. Would foreseeability or "probability" as applied in the "zone of risk" test have any effect on the capacity of any person to shift risks in modern society? Certainly not. Once he knows that a truck is going out upon the highway, the only foreseeability which he needs is that highway accidents occur. And that is common knowledge. Whether M or any employer realistically has the capacity to shift these risks turns then not on foreseeability as applied in the "zone of risk" test but solely on his access to the insurance market. As long as he has that access he has the sine qua non. [FN 23]

One qualification should be made, however, for the problem is not quite as simple as that. No problem of risk shifting is inseparable from the problem of risk distribution. This is obviously true because it costs money to shift risks. Insurance premiums come high and they would continue to mount higher if the liability rules were phrased less strictly. Thus a court, if it were interested in determining the capacity of an owner of a business to shift risks, would inevitably become involved in the capacity of such owner to distribute the costs of effecting the shift. But more of that anon. Meanwhile, do these distinctions between frolic and detour state logical differences when phrased in terms of risk distribution? Courts should perhaps consider the possibility that some businesses may desire not to shift the risk, but to assume it, and by their own actuarial skill build up a particular reserve to provide for such losses. In the latter case as well as in the former, foreseeability as applied in the "zone of risk" test plays no part. The only foreseeability necessary to distribute effectively and efficiently the cost of assuming risk is the foreseeability which an actuary needs. The owner's actuarial skill may be low, but that merely points to his lack in statistical training and experience. The loss would be passed on to the consumer of the product or, more realistically, the owner would recoup his loss or build up a reserve to handle it in one of two ways: (1) by increasing the price of the commodity sold so that there would be an increased profit; or, if that were impossible or undesirable, (2) by decreasing costs so as to get a greater differential between cost and price. That is, the recoupment or absorption would be effected by manipulation of this profit differential. The efficiency with which this manipulation can be made depends on M's actuarial skill, if he is assuming the risk. The fact that the motive of S is personal, or that the deviation is unreasonable as measured by the normal way of getting the particular load of coal delivered, is quite immaterial in measuring M's actuarial skill. The fact that M would normally believe it unlikely

that S on these particular journeys would expose to risk of injury persons or property outside the spacial zone would mean that M's reserves to cover losses from that particular activity would be less, i.e., commensurate with the risk as measured by M.

What logic then is there in these well known distinctions between frolic and detour, taking this administration of risk approach? There is none. [FN 24] Rules of law phrased in terms of risk prevention, risk avoidance, risk shifting or risk distribution could not sustain themselves logically on the ratiocination revealed in these innumerable cases nor on the demarcations which the decisions actually make. In holding M in cases 1, 2, 3 and 4 courts would be holding a person who had the capacity, in modern society, to prevent, avoid, shift and/or distribute the particular items of loss. In refusing to hold M in case 5 it could not be said that one who had no such capacities was being made immune.

Even so, the position could not readily be taken on these facts that courts should abolish all distinctions between frolic and detour. Nor could the position be taken, without further facts, that the legislature should act. Though the ratiocination fails to make sense, the holdings may. The question and the only question for the courts in these cases is, what limitations should be put on M's costs of doing business? To most people it has seemed that some limitation should be put. The courts have assumed it tacitly. But as indicated above "motivation-deviation" and "zone of risk" as tests are purely arbitrary. They state no distinctions that have any significance from the administration of risk angle. And it would seem implicit that the business executive's point of view and his problems should be seriously considered when any attempt—judicial or otherwise—is made to set the minimum or maximum of the costs of doing business. These tests, which courts and other legal scholars give, may be effecting results which from the social as well as from the narrower business viewpoint are desirable. Business, individually and collectively, might suffer if costs were increased without limit. The capacity of business individually, as well as collectively, to distribute the costs of shifting these risks or the costs of assuming them, though theoretically without limit, no doubt has bounds beyond which it does not realistically exist. Perhaps to place on business all such items of loss would be too burdensome. It may be that if no limitation were placed the point at which absorption of these losses could be effected would be passed. It may be that the absorption point is reached but not passed when the "zone of risk" test is applied. [FN 25] Such may well be true. So far as known, the data for making exact measurements are not available. It is not here suggested that the results reached by courts are unfair, undesirable or unsound in any sense. And, to reiterate, it is not intended to infer that all distinctions between frolic and detour should be wiped out. The only value resulting from a recognition that the tests used have *per se* no glamour, no significance, no virtue, is to shift the emphasis from these captious labels to the function which the judicial process is performing. This function is the allocation of

losses—curtailing costs here; adding to them there; deciding that the value of a leg should be paid by the business; ruling that the value of a life should not. A recognition that the technique used is meaningless and purely arbitrary is to give less and less emphasis to the rule, and more and more emphasis to the broad social and economic problem, what costs should business in general and M's business in particular bear? If the energy of counsel, the money of clients and the time and analysis of judges were directed towards this problem directly and consciously—not indirectly, vaguely and gropingly—much more effectively and scientifically would the judicial process make the adjustment between the conflicting economic and social forces with which it deals. That the analysis here suggested does shift the focal point to a consideration and analysis of the process of allocation of loss is the only utility claimed for it.

III
INDEPENDENT CONTRACTOR

The problems here are quite dissimilar from the preceding ones. There the loss was to be allocated directly to one of three persons. Here a fourth party intervenes to whom the allocation might be made. M, the owner of the coal business, is without sufficient trucks and drivers to handle his trade efficiently. D owns a fleet of trucks ready to be driven by drivers hired by D. M enters into a contract with D whereby it is agreed as follows : D agrees "to furnish one truck and one driver to M for a period of one month and during said period to transport coal for M for eight hours a day to such places and in such quantities as M shall direct." M agrees "to pay D for such truck and driver $20 a day during said period." D furnishes a truck and hires S at $5 a day to drive the truck to such places, with such loads as M directs. M directs S to transport a load of coal to a customer's house one mile distant. S while making the delivery by the most direct route negligently injures P. P sues M.

Courts normally would not permit a recovery. [FN 26] Many reasons are given by judges and other legal scholars. M does not have "control." D does have "control." It is not M's work which is being done. It is D's business which is being performed. These rules and others are given as bases for liability. A person addicted to the entrepreneur theory would reason that D should be held liable for the reasons that follow.

The activity embraced in hauling the coal in D's truck at the time of the injury is D's business. The function of transportation has been lopped off M's enterprise and has been allocated to D and has become a part of D's enterprise. That results wholly from the agreement in fact between M and D. That agreement in fact can be ascertained in two ways. First, D not only agreed to furnish M with one truck and one driver but also to transport coal and lumber for M. Hence the transportation of each truck load of coal by D's truck and driver was the

performance of the thing D undertook to do. That makes the particular activity D's business. The allocation to D of the function of transportation results in it no longer being M's business. Second, it is proved to be D's business not only because it has been allocated to D by the language which M and D have used but also because the entrepreneur test indicates their agreement in fact provides for a lopping off of such function from M's business and an allocation of it to D. The entrepreneur test is concerned with the four differentiating earmarks of the entrepreneur. (1) Control: the ability to formulate and to execute policies, i.e., to make decisions in respect to the production or marketing functions. (2) Ownership: the legal (or equitable) title to the property used in the performance of the production or marketing functions. (3) Losses: the investment which is staked on the success of the venture. (4) Profits: the chance to receive a monetary gain from the transaction. Certainly the person who has all four of the earmarks is an entrepreneur. Where the choice lies between two, and there has been allocated to one more of the earmarks than to the other, that fact indicates that the particular function involved has been allocated, by agreement, to the party who has the more earmarks. As between the two he seems to be the enterpriser. [FN 27]

So in the case at issue it is observed that D had some "control" since he hired S, could discharge S, decided on what type of truck to use and the condition in which it was to be kept, etc. D owned the truck—i.e., he had legal title. He stood to lose by the transaction since he had invested in it $5 a day plus the use of the truck, which might exceed $20. He stood to gain for he might by efficient administration make the costs to him less than the $20 per day. Therefore D has all of the earmarks which distinguish the entrepreneur from those who are not entrepreneurs. On the other hand M has only three of the four earmarks. M has a degree of "control" since he directs S where to report, where to go, when to return and how much to carry. The loss earmark is obviously present since his investment of $20 a day may exceed his profit on the transportation process, and conversely, he has the profit earmark since such gain may exceed his outlay. M does not own the truck. Therefore as between one who has four earmarks and one who has three the one who has four is the enterpriser in respect to the activity involved—in the instant case, the transportation of coal by the trucks owned by D and driven by S. [FN 28] This two-fold analysis of the agreement in fact between D and M in respect to the function of transportation reveals an allocation of it to D. The language which the parties have used indicates as much. Their conduct—the way in which the earmarks have been allocated — corroborates it. Therefore if the courts desired to hold him whose business it was to transport coal, as an incident of which P was injured, they would hold D not M. The cases on the whole are adequately explained by such twofold analysis. In some the language which allocates the enterprise is clear. [FN 29] In others the only evidence is a court's paraphrase of the agreement. [FN 30] In some the language and the court's paraphrase are not clear and by no means conclusive.

[FN 31] In others the facts and the opinion are wholly silent. But the allocation of earmarks is usually apparent. The problem is to find if there has been an agreement in fact to lop off the particular function in question from one person's enterprise and to allocate it to another.

Where the language used by the parties, or the court's paraphrase of it, is clear and the numerical majority of earmarks is found in the person to whom, by the language used, the particular function in question appears to have been allocated, that person is quite uniformly held. [FN 32] Where neither the language nor the paraphrase is conclusive, [FN 33] or where the facts and opinion are wholly silent, [FN 34] the enterpriser earmarks, in absence of custom and usage, provide the only means of determining what the factual agreement was. In such case if one party has been allocated the major number of earmarks, he appears presumptively to be the enterpriser, and is usually held liable. [FN 35] When each of the parties has four earmarks, or any equal number, unless there is other evidence of the agreement in fact, such as the language used by the parties or custom and usage, the case cannot be disposed of with finality. [FN 36] The agreement in fact is ambiguous. But such cases are not common, and a person preparing the case for trial, and trying the case, could easily see to it that all of the relevant facts got into the record. So the extent to which it explains cases and the extent to which it offers to a practitioner a workable fact basis to proceed upon give this test unusual utility.

But a problem more fundamental to those who are making rules is: do any or all of these rules governing the independent contractor state logical distinctions when translated into the administration of risk concepts heretofore set forth? The risk avoidance analysis set forth above is pertinent here. If the courts were desirous of holding a person who had the capacity of a risk avoider, they could obviously hold either. The decision not to avoid the risk is made by both M and D when they consummate their agreement, and do so knowing that any human being who drives a truck on highways today is liable to cause injuries to others. The respective capacities of M and D to avoid the risk seem equal. The position one occupied was as strategic as that of the other in respect to the avoidance of this type of risk.

The risk shifting capacities of the two likewise seem equal. Each has access to the insurance market. Each is aware that a truck is going out on the highway. That coupled with the knowledge that all people are sometimes negligent is sufficient to enable them to make the decision to shift the type of risk being litigated. If the judgment made either or both liable, their respective policies would give them protection. Thus it would seem that if the court was looking for an effective risk shifter, it might well hold either D or M. The fact that D has been allocated the enterprise and that he has more earmarks than M, the fact that D has more "control" than M, the fact that D represents M only as to the results of

the work and not as to the means of accomplishing the results seem to have absolutely no significance in qualifying him rather than M for shifting risks of this nature. As indicated above, the capacity to shift risks is measured by no such standards. [FN 37]

On analyzing D's and M's respective skill in distributing the costs of shifting or assuming these risks a degree of complexity enters. If such distribution is to be effected by D, it must be through a manipulation of his profit differential. To effect that manipulation D must deal with items of disbursement and income. Now if D is engaged in the business of hauling goods each year for a hundred different persons, one of whom is M, any distribution of the costs of shifting or of assuming these risks must be through the channel of these hundred persons. They constitute the sole sources of income for him. By clever negotiations he may be able to get a higher price for his services. In lieu of that, or in addition to it, he may be able to lower his costs. But at any rate if he succeeds in doing the thing which the entrepreneur presumably has the capacity to do—*i.e*., to pass on to the consumer these cost items—he will do it through M and the other 99 persons—his consumers.

That is, there will be no distribution of these cost items except through M. Therefore since M will get them eventually it could be argued that it would seem simpler to place them on M directly and in the first instance. By putting them on M they would be more apt to be distributed where economic theory thinks they should be distributed—among the ultimate consumers. The chance of D not being able to obtain effective distribution is eliminated. Hence if the courts were resolved to hold the person who was the more direct and effective risk distributor they could quite plausibly hold M and not D. The mathematics are simple. If D is liable for ten injuries a year averaging $5,000 each, he has $50,000 a year to pass on. Theoretically each of his so-called employers will constitute a channel for distributing $500. In ten years M will constitute the channel for $5,000. If one one-hundredth of the claims arose as a result of the negligent transportation of M's coal by S and M was burdened directly with the $5,000, the result would obviously be the same in the long run.

Conceivably, however, if the losses were allocated directly to M it would be more equitable, inasmuch as M would then be forced to assume only those risks closely incidental to his own business and not those which arose as a result of the business of the other ninety-nine. It easily might happen that no part of the $5,000 which is passed on to M could be said to arise as a result of M's business activity. To make M administer cost items which accrued not as a consequence of M engaging in business but as a result of the activity of some one else in no way connected with M's business is not to effect an equitable allocation of losses. Consequently to phrase a rule of law so as to allow such allocation to take place is only to approximate an equitable allocation. By such standard, narrow though it

may be, this rule of vicarious liability might well have been phrased differently. For these reasons it is by no means clear that the court in allocating the loss to D is making possible the more direct distribution or is effecting the more equitable allocation. [FN 38] The same reasoning, of course, could not be applied if the cost item being allocated were the cost of shifting the risk. That cost is static during any specified period. The same rate would apply presumably to M, to any of the other ninety-nine and to D. Thus, though none of the injuries arose as a result of M's activity the socialized nature of the risk shifting device makes the premium adjusted not to the activity of one person only but to the activity of the group. Hence if the court were desirous of making directly and immediately liable the person who stood in the better position to shift the risk, and who would effect a more equitable distribution of the costs of shifting the risks, it would be difficult to choose between the two.

Thus whether a risk avoidance, risk shifting or risk distribution approach be taken, it is difficult to justify this allocation to the independent contractor. Under any of the three analyses the allocation might have been made the other way. It is felt, however, that the same cannot be said of risk prevention.

The types of risk dealt with here are risks of injury to others as a result of the negligent conduct of one person engaged in a particular activity. A cinema of each accident would reveal something like the following: A truck runs off the highway because of a high speed at a corner. A truck collides with another truck because, at the high speed it has attained, the brakes are unable to stop it. A gust of wind blows a board off a scaffold. A rope hanging from a roof breaks. A workman on a roof drops a hammer. A retaining wall in a ditch caves in. An elevator carrying materials is overloaded and falls. The elevator operator runs the car at excessive speed. These and dozens of others are the normal type fact situations out of which an injury is produced. Who is better able to prevent the injuries? It is thought that D is. And the reasons are not difficult to divine. There are two.

First, the person to whom the enterprise has been allocated is, by definition, the one who has agreed or undertaken to perform the specified acts. When D agrees to transport a certain load of coal, M puts it out of mind. He has been relieved of a task and its attendant anxieties, for a consideration. He need no longer worry if the engine will work; if the brakes need inspection; if new chains are needed for the wheels, or if any should be used; if the present driver is honest, reliable, competent; if a new qualified driver can be secured. These are D's worries as a result of the contract. Therefore the man who is put on guard, and who consequently stands in the more strategic position to be cognizant of the various devices available to lessen the probability of injury to others, is D. His promise has made it necessary for him to do the particular acts. He who is planning such performance is in a better situation to arrange for a careful performance than is

he who is not planning such performance. Secondly, as a result of this allocation which has been effected D normally has more of that "control" which an effective, efficient risk preventer needs than has M. Thus in the instant case D selects S. The selection process involves a judgment of competence. The incompetent can be rejected; the efficient employed. Though M may be given the power to reject any person sent by D the veto is seldom as effective as the initiative. D holds the goad to efficient work by S since he pays the salary and may discharge S. This may be used effectively, and has a corrective force absent in M's reprimand. D has final say on the type of truck to be used; the condition of its repair, including brakes, wheels, axles, engine, etc.; the addition of safety devices—in short full "control" over the mechanical fitness of the vehicle of transportation. [FN 39] For these reasons it seems clear that in the large number of cases D stands in a more strategic position to prevent these risks than M. It is strikingly so in cases where the enterprise allocated involves a high degree of skill such as carpentry, masonry, decorating, engineering, plumbing, surgery. The person in M's position not only fails to occupy D's strategic position in respect to the prevention of the risks, but is relatively unqualified to pass judgment on what safety devices should be employed, what the conditions of work should be, what the labor qualifications are, and so on. Frequently, of course, M may be given more "control" over the mechanical details of the work than M has in the hypothetical case. The problem in such cases is to translate into risk prevention the types of "control" which M and D respectively have. Conceivably a case might be put where M is the better risk preventer of the two. Yet it would seem that such case would not represent the normal situation.

Thus while D stands in no better position than M to avoid, shift or distribute the risks he does seem to occupy a more strategic position to prevent them. Should that induce courts to hold him rather than M ? Does that constitute a fact basis for the rationale of independent contractor? It partially does if risk prevention is more heavily weighted. Should it be? [FN 40] That should be the primary issue in this type of case.

The preliminary problem would remain the same, had the particular function in question been lopped off M's enterprise and allocated to D as part of his enterprise. In ascertaining this the entrepreneur test would be used. The agreement in fact between D and M would be ascertained by examining the language which they had used, the custom and usage existing and the allocation of the various earmarks between them. But after the agreement had been diagnosed, and it was concluded that the enterprise was allocated to D, the emphasis would shift. The analysis would proceed to cancel risk avoidance and risk shifting as being equal on both sides and to weigh risk distribution as against risk prevention. The four earmark test would drop out as being of little utility in that process. The ownership earmark would be analyzed for the bearing it had on risk prevention. The profit earmark would be analyzed for its significance in terms

of risk distribution. The control earmark would be evaluated in terms of risk prevention and risk distribution. However, the entrepreneur test, as such, would only be useful in the preliminary stages of the analysis.

The other tests would fall into complete disuse. The various "control" concepts with which the opinions and other legal literature abound would have *per se* no utility when the approach suggested is taken. The inarticulated notions of principal and agent, master and servant, general and special employer, business, and enterprise would be of no value to an analyst engaged in the task outlined. The magic of these concepts would disappear. The tenuous distinctions stated in opinions would be discarded. The emphasis would shift; non-legal material would be attracted. The problem would take on a sociological aspect. An analysis would be made of the various economic and social factors involved in the decision to weight risk prevention more than, less than, or equal to risk distribution. Such analysis might not result in a court holding M instead of D. Though the insulation of the independent contractor was still retained, the issue would be clearly stated, the misplaced emphasis would disappear, the social and economic factors involved in the decisions would receive careful consideration, and the articulation would be more definite and clear cut. Only when some such attempt is made can the study of these rules of law in their social and economic background be effected.

(To be concluded)

[*] For an insight into the problems of vicarious liability, I acknowledge my indebtedness to Professor Underhill Moore of Columbia University Law School, whose pioneer work in this field led to the articulation by him of the entrepreneur theory and test of liability. This in turn furnished a satisfactory economic and social basis for the rules of vicarious liability and made possible this article and the one which is to follow.

[FN 1] Jones v. Hart, 2 Salk. *441 (1698).

[FN 2] The most recent historical treatment is contained in that engaging treatise, BATY, VICARIOUS LIABILITY (1916). Earlier researches of great value are those of Justice Holmes, *Agency* (1891) 4 HARV. L. REV. 345; (1891) 5 HARV. L. REV. 1, and of Professor Wigmore, *Responsibility for Tortious Acts: Its History* (1894) 7 HARV. L. REV. 315, 383, 441.

[FN 3] The studies which have been made have been primarily concerned with tracing the doctrine to its origin and furnishing an acceptable rationale for it.

[FN 4] Brucker v. Fromont, 6 T. R. 659 (1796), established the rule with finality.

[FN 5] Most of them are set forth and discussed in BATY, *op. cit. supra* note 2, c. VIII.

[FN 6] Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444, 716; TIFFANY, AGENCY (Powell's 2d ed. 1924) 100-105; (1920) 20 COL. L. REV. 333. Perhaps the best philosophical discussion is Laski, *The Basis of Vicarious Liability* (1916) 26 YALE L. J. 105; *cf*. WILLET, THE ECONOMIC THEORY OF RISK AND INSURANCE (1901) 58, 140.

[FN 7] Loomis v. Hollister, 75 Conn. 718, 55 Atl. 561 (1903); Hayes v. Wilkins, 194 Mass. 223, 80 N. E. 449 (1907); Tuttle v. Dodge, 80 N. H. 304, 116 Atl. 627 (1922), are closely analogous.

[FN 8] Loomis v. Hollister; Hayes v. Wilkins; Tuttle v. Dodge, all *supra* note 7.

[FN 9] TIFFANY, *op. cit. supra* note 6, at 105-110.

[FN 10] Smith, *op. cit. supra* note 6, at 721 *et seq*.

[FN 11] A case essentially similar to this has not been found. Those closely analogous are easily distinguished. Perhaps one of the closest is Der Ohannessian v. Elliott, 233 N. Y. 326, 135 N. E. 518 (1922). There the defendant told the chauffeur to take the car from 34th Street and Fifth Avenue in New York City to a garage on West 37th Street between Seventh Avenue and Broadway. The chauffeur went with the car to get his supper on Eighth Avenue near 35th Street. After this he started uptown through Eighth Avenue and injured plaintiff at 44th Street. An order reversing a judgment upon a verdict directed for defendant was reversed.

[FN 12] The statement is made in Smith, *op. cit. supra* note 6, at 726-727 that, "The writer does not contend that the servant's motive in doing an act is of no consequence. The servant's motive may be of great importance in determining whether it was probable that he would do what he did. But the master's liability should be predicated upon the probability of the act rather than upon the character of the motive which prompted it."

[FN 13] Clawson v. Pierce-Arrow Motor Car Co., 231 N. Y. 273, 131 N. E. 914 (1921), is somewhat analogous. S was told to drive M's car south to the garage. S agreed to take W to her home, a little on the far side of the garage. S negligently injured P before the garage was reached "at a point where the car must have passed" though W had not been there. P was allowed a recovery against M.

[FN 14] The court in Clawson v. Pierce-Arrow Motor Car Co., *supra* note 13, assumed a "dual" purpose. Would a "dual" purpose be assumed as long as objectively S appeared to be doing precisely the thing he was told to do?

[FN 15] Campbell v. Warner, 234 N. Y. 645, 138 N. E. 481 (1923), disallowed a recovery against M where S was told to take the car to a garage five blocks distant and he injured P at a point a mile and a half beyond the garage.

[FN 16] "He may avoid the uncertainty peculiar to a specific form of industrial activity by keeping out of the industry; he may reduce the degree of uncertainty by adopting devices that make the occurrence of the loss less probable; or he may assume the risk and endure the attendant uncertainty. The first form of activity may be called avoidance of risk, the second, prevention, and the last, assumption." WILLETT, *op. cit. supra* note 6, at 88.

[FN 17] As stated in Smith, *op. cit. supra* note 6, at 728, "…an enterprise involving the employment of chauffeurs to drive trucks between particular points in New York City, does create a risk of injury to persons outside the limits of the direct or authorized route. This risk results from the fact that chauffeurs frequently do make deviations from the authorized route. On the other hand, it isn't probable that a chauffeur who is told to drive from Times Square to Wall Street will drive six or seven miles in the opposite direction. Consequently, it could hardly be said that an enterprise involving the employment of chauffeurs to drive trucks around the lower part of New York thereby created a risk of injury to people in the Bronx." And *ibid*. 724-725: "The writer would confine the master's liability to deviations of the servant which, in view of what the servant was employed to do, were probable."

[FN 18] It is not to be implied that writers on the subject have assumed such significance.

[FN 19] It would seem that logically the intent of S should be considered under a strict probability test. M thinks it probable that S may run a few incidental personal errands. Therefore he thinks it probable that S will be found off the beaten path. Hence if S is found off the beaten path M is liable for his negligent acts. But the nature of the act and the place of the injury would not be the only factors in M's probability study. M thinks it probable that S will be off the beaten path because he thinks it is probable that S may want tobacco, etc. He thinks it improbable, we assume, that S will be off the beaten path one block while commencing a fifty-mile unauthorized journey, because he does not think it probable that S will want, plan and decide to go on such a trip. For this reason motive would seem to have a more important part in a strict probability test than it does in the zone of risk test.

However, it should not necessarily follow that M should be freed from liability in either case 3 or case 4. In the former S is found in a spacial zone where M expected him to be. To free M from all liability for the acts of S while in that zone would be to relieve M of all contemplated hazards for that trip. Presumably this would be unwarranted in view of the premise for the zone of risk test. As long as the contemplated hazards were not enlarged or the type of hazard changed as a result of S's changed intent, liability might well be imposed in case 3. Perhaps case 4 is even clearer. Though S was not intending to serve M at the time he injured P, he was at the precise spot where M expected him at the time M expected him. As long as S is doing precisely what he is told to do the case will always fall in that group holding M liable under the zone of risk test. An exception should, of course, be created if S's changed intent enlarged the contemplated hazards or changed the type of risk deemed probable. Insofar as the Clawson case, *supra* note 13, is authority for holding M in case 4, it is quite consistent with this zone of risk test.

[FN 20] THE INSURANCE INSTITUTE : LIABILITY AND COMPENSATION INSURANCE (1913) 5-7.

[FN 21] See generally 2 DUNHAM, THE BUSINESS OF INSURANCE (1912) 220, 236; c. 43. For a recent exposition of the various forms of liability insurance see ACKERMAN, INSURANCE (1928) c. xiv, xv, xvi.

[FN 22] The statement in Smith, *op. cit. supra* note 6, at 461 that, "Moreover, there is at present no available machinery for insuring against such losses," needs considerable qualification insofar as it applies to automobile accidents and construction accidents.

[FN 23] The recent highway legislation can be partially justified on this ground. It tacitly assumes a facility of administration. N. Y. CONS. LAWS (Cahill, 1923 and Supp.) c. 25; IOWA CODE (1927) § 5026; MICH. COMP. LAWS (1915) § 4825, as amended Mich. Acts 1925, 287 and Mich. Acts 1927, 56; MASS. CUM. STAT. (1927) c. 90; See Marx, *Compulsory Compensation Insurance* (1925) 25 COL. L. REV. 164. The recent indications that these acts will not be interpreted to do away with the distinctions between frolic and detour are not essentially in conflict with the position here taken. They are matters of strict statutory construction only. Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927); Rowland v. Spalti. 196 Iowa 208, 194 N. W. 90 (1923) ; Drobnicki v. Packard Motor Car Co., 212 Mich. 133, 180 N. W. 459 (1920).

[FN 24] It is no answer to say that, "to make the entrepreneur responsible for the acts of his employees in no way connected with the enterprise would be undesirable because it would result in including in the cost of production an item

which economically does not belong there." Smith, *op. cit. supra* note 6, at 461. It depends on the definition of "economically."

[FN 25] "Economically," as used *supra* note 24, might have been used to mean just that.

[FN 26] Braxton v. Mendelson, 233 NY. 122, 135 N.E. 198 (1922). Here the person in D's position was held liable. By written contract D had agreed to "do all the trucking work for" M. D was to furnish chauffeurs, gasoline and protection for the goods in transit and trucks for the hauling. D's chauffeurs were to do the loading. D was paid a specified sum each day for each car.

[FN 27] See TIFFANY, *op. cit. supra* note 6, at 100-105 and (1920) 20 COL. L. REV. 333 for a somewhat similar statement of the test.

[FN 28] *Cf*. (1920) 20 COL. L. REV. 98.

[FN 29] Braxton v. Mendelson, *supra* note 26; Bartolomeo v. Charles Bennett Contracting Co., 245 N. Y. 66, 156 N. E. 98 (1927); Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755 (1886); *cf*. Rait v. New England Furniture Co., 66 Minn. 76, 68 N. W. 729 (1896).

[FN 30] McNamara v. Leipzig, 227 N. Y. 291, 297, 125 N. E. 244, 245 (1919): "The chauffeur did the company's business in his own way and the orders given him by the defendant merely stated to him the work which the company had arranged to do." Kartell v. Simonson & Son Co., 218 N. Y. 345, 350, 113 N. E. 255, 256 (1916): "He did not undertake to deliver lumber for the defendant. He simply furnished a team and driver to enable the defendant to do its own work." Reedie v. London & N. W. Ry., 4 Exch. *244 (1849); Higgins v. Western Union Telegraph Co., 156 N. Y. T5, 50 N. E. 500 (1898); Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252 (1909); Schmedes v. Deffaa, 214 N. Y. 675, 108 N. E. 1107 (1915); Moore v. Rawls, 196 N. C. 125, 144 S. E. 552 (1928); Klar v. Erie R. R., 118 Ohio St. 612, 162 N. E. 793 (1928).

[FN 31] Charles v. Barrett, 233 N. Y. 127, 135 N. E. 199 (1922); Laugher v. Pointer, 5 B. & C. 547 (1826) ; Billig v. Southern Pac. Co., 189 Cal. 477, 209 Pac. 241 (1922) ; Barton v. Studebaker Corp. of America, 46 Cal. App. 707, 189 Pac. 1025 (1920) ; Dishman v. Whitney, 121 Wash. 157, 209 Pac. 12 (1922).

[FN 32] Braxton v. Mendelson, *supra* note 26; Bartolomeo v. Charles Bennett Contracting Co., *supra* note 29; Hexamer v. Webb, *supra* note 29; Klar v. Erie R. R., *supra* note 30; McNamara v. Leipzig, *supra* note 30; Higgins v. Western

Union Telegraph Co., *supra* note 30; Standard Oil Co. v. Anderson, *supra* note 30. Contra: Rait v. New England Furniture Co., *supra* note 29.

[FN 33] Schmedes v. Deffaa; Reedie v. London & N. W. Ry., both *supra* note 30.

[FN 34] Charles v. Barrett, *supra* note 31, and cases there cited.

[FN 35] Dishman v. Whitney, *supra* note 31, is *contra* for a recovery was allowed against the person who had only three of the earmarks, the other party to the contract having four. To whom the enterprise had been allocated is not clear. Presumptively it would seem to be allocated to the person who had four of the earmarks.

[FN 36] In Kartell v. Simonson & Son Co., *supra* note 30, there was a four-four division of earmarks. The court's paraphrase of the agreement disposes of the case, however: "He did not undertake to deliver lumber for the defendant. He simply furnished a team and driver to enable the defendant to do its own work." *Ibid*. 350.

[FN 37] A recognition of this is seen in the workmen's compensation laws. The insulation of the independent contractor is not always retained. Section 56 of New York's Workmen's Compensation Act provides: "A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such hazardous employment, unless the subcontractor primarily liable therefor has secured compensation for such employee so injured as provided in this chapter." See I HONNOLD, WORKMEN'S COMPENSATION (1918) § 30. The following bill (SENATE INTRODUCTORY 1331, Print 1499) introduced in the New York Senate on March 9, 1927 at the suggestion of the Industrial Commissioner, is an extension of the same idea: "Any person, firm, partnership, association, corporation or the legal representatives of a deceased person or the receiver or trustee of a person, firm, partnership, association or corporation owning or controlling any property or having any interest in any property by grant, lease or otherwise, on which property such person, firm, partnership, association or corporation, the legal representatives of a deceased person or the receiver or trustee of a person, firm, partnership, association or corporation, shall carry on or contract with another to carry on any building, construction work, alterations, demolition, repairing or performing any work in any manner whatsoever which involves or includes a hazardous employment for pecuniary gain shall be liable for and pay compensation to any employee injured, whose injury arises out of and in course of said hazardous employment unless the contractor or subcontractor primarily liable has received compensation for such employee so injured as provided in this chapter."

The reasons for such amendment are set forth in a "supporting memorandum" (ANNUAL REPORT OF THE INDUSTRIAL COMMISSIONER (1927) 4-5): "The purpose of this amendment is to extend the responsibility now placed on a contractor who sublets work, for insurance or compensation to a subcontractor's employees, to the case of an owner or lessee of premises who while doing no work as builder occupies practically the same position as a general contractor for building work thereon by letting contracts for execution of the various parts of such work.
"From the point of view of making sure of compensation to injured workers, all the reasons for the existing obligations put upon a general contractor for a piece of building work who sublets part of the work, are equally cogent for doing the same in case of an owner or lessee of premises who lets parts of building work in precisely the same way. The practical need for doing it has been shown by experience to be extensive owing to the large amount of building work now being done under the method above noted and which this amendment is designed to cover.
"The existing provision has proven very beneficial in the case of contractors, and it will be equally useful in the case of the type of owner —contractor, so to speak, who must now be dealt with for solution of the same problem."
The bill was not passed by the 1927 legislature.
A limitation on the statement contained in the text is found in the normal manufacturers' and contractors' public liability policy which excepts work done for the assured by independent contractors or subcontractors.

[FN 38] The legislation noted, *supra* note 37, is, so far as it goes, quite consistent with this analysis of risk distribution. The person being placed under a duty by statute certainly is an effective distributor of those risks as well as an effective shifter.

[FN 39] Conceivably courts, while groping for a satisfactory rationale, have been attempting to articulate a risk prevention concept through the use of the various "control" concepts. Nowhere does this definitely appear, however.

[FN 40] Cases where the legislature or court has removed partially or completely the insulation of the independent contractor are of interest here. One is the legislation heretofore mentioned, *supra* note 37. The other is the group of decisions including Ellis v. Sheffield Co., 2 E. & B. 767 (1853); Pickard v. Smith, 10 C. B. (N. S.) 470 (1861) ; Doll v. Ribetti, 203 Fed. 593 (C. C. A. 3d, 1913); City of Joliet v. Harwood, 86 111. 110 (1877). At least lip-service is given to the same doctrine in New York. Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957 (1898). The "intrinsically dangerous" doctrine of City of Joliet v. Harwood transcends all notions of the relative skills of D and M to prevent these risks. Perhaps it transcends all notions of risk prevention. It indicates that there are times when risk prevention might not be so heavily weighted as at other times. A variation

intrudes. If that variation lessens the significance of risk prevention, it may in turn increase the relative weight of risk distribution. These tests are by no means static. Being closely correlated to the phenomena with which they deal, they change with the phenomena. In City of Joliet v. Harwood perhaps the facts pertaining to risk prevention have not changed. It may be given less weight not because of any inherent variation but merely because of the increased stimuli to secure to the plaintiff ample and sufficient relief. The fact bases for these two types of cases have never been adequately considered. The chief virtue of the analysis here suggested is that it makes such fact bases the focal points of study. It reveals that there is *per se* no reason from the risk administrator's viewpoint why the insulation of the independent contractor should be retained. It makes plausible giving a plaintiff a remedy against either if it is thought that such security is needed for his protection.