Tort Law and the Voluntary Sector – Protecting Volunteers from Liability in Negligence

Phillip David James Morgan

UCL

PhD

I, Phillip David James Morgan confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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Abstract

The activities of volunteers and the voluntary sector are highly beneficial to society. However, they are deterred by their fears of negligence liability, and this is impacting on volunteering levels. Relieving both voluntary sector organisations (VSOs) and volunteers from liability is not the correct solution since it forces victims to bear the cost of negligently inflicted harm, and will encourage poor practices within the sector. Relieving VSOs and not volunteers from liability is not the correct solution either since it places the cost of paying for negligence on to volunteers or victims, people who are less able to loss-spread, and less able to change their behaviour to reduce accidents. It may also result in volunteers withdrawing their services. Relieving volunteers from liability, and not VSOs is the right answer because organisations are more able to loss-spread, and more able to change their behaviour to reduce accidents. It will also promote and encourage volunteering.

This thesis makes the case for the introduction of statutory volunteer protection from negligence. Such volunteer protection has the potential to generate considerable benefits to society. The protection will provide a partial defence to volunteers, protecting them from ordinary negligence outside of the motoring context, but not gross negligence. In turn, the volunteer's liability will be statutorily transferred to the VSO for which they volunteer. The volunteer's defence will be waived where the volunteer is insured for the loss, but their VSO will also remain liable for their negligence. This protection is only available to organisational volunteers.

Impact Statement

It is possible to find works which deal with the negligence liability of actuaries, accountants, artists, builders, solicitors, surveyors, health professionals, and teachers, amongst many others. However, it is surprising that a sector of the scale and importance of the voluntary sector has not caught the attention of English tort law writers. No work is available which deals with tort law and the voluntary sector in English law. This is even more surprising given the evidence of volunteer concerns as to negligence litigation, and the political interest in volunteer torts.

The size and importance of the voluntary sector mean that considering the sector's interface with the law of tort is overdue. This thesis addresses this gap. It is original in addressing volunteer liability, voluntary sector torts, and in making the academic case for volunteer protection from the tort of negligence.

This research may be useful for researchers, practitioners, policymakers, judges, and lawyers working in the field of tort law, and also in the field of voluntary sector law.

Whilst issues of voluntary sector liability have attracted some attention in other common law jurisdictions, and various forms of protection from liability have been introduced in these jurisdictions, this thesis is the first time that a sustained academic case for volunteer protection from negligence has ever been made. In doing so it has the potential for significant policy impact.

Table of Contents

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Abbreviations

CPA - Consumer Protection Act 1987

CRA - Consumer Rights Act 2015

ECHR - European Court of Human Rights

GDP - Gross Domestic Product

LRC - Law Reform Commission of Ireland

MoJ - Ministry of Justice

NCVO - National Council for Voluntary Organisations

ONS - Office of National Statistics

SARAH - Social Action, Responsibility and Heroism Act 2015

UCC - Uniform Commercial Code (US)

US - United States

VPA - Volunteer Protection Act 1997, 42 US Code §14.501-14.505 (US)

VSO - Voluntary Sector Organisation

Chapter 1

Introduction

This thesis advances one big idea, that volunteers need to be protected from liability in negligence, and that this is a socially desirable reform to make.

The activities of volunteers and the voluntary sector are highly beneficial to society. However, they are deterred by their fears of negligence liability, and this is impacting on volunteering levels. Relieving both voluntary sector organisations (VSOs) and volunteers from liability is not the correct solution since it forces victims to bear the cost of negligently inflicted harm, and will encourage poor practices within the sector. Relieving VSOs and not volunteers from liability is not the correct solution either since it places the cost of paying for negligence on to volunteers or victims, people who are less able to loss-spread, and change their behaviour to reduce accidents. It may also result in volunteers withdrawing their services. Relieving volunteers from liability, and not VSOs is the right answer because organisations are more able to loss-spread, and change their behaviour to reduce accidents. It will also promote and encourage volunteering.

This thesis argues that England and Wales should introduce statutory (non-motor) volunteer protection from negligence where the volunteer carries out community work for an incorporated body, or a large unincorporated VSO. This should protect volunteers from ordinary negligence, but not gross negligence. In addition it is argued that the protective scheme should statutorily transfer the volunteer's liability to the organisation, and there should be no volunteer indemnity to the organisation. The volunteer's protection should be waived where they are insured for the loss. Victims will be provided for through a statutory claim against the VSO which benefits from the volunteer's services. This will promote and encourage volunteering and encourage accident reduction, whilst simultaneously providing for victims.

Originality

This thesis advances an original claim that volunteers should be protected from claims in negligence. It is the first time that a sustained academic case has been made for volunteer protection in the common law world.

It is the first work to examine the position of volunteers and the voluntary sector in the English law of negligence. Prior to this thesis the position of volunteers in the current law of negligence was unknown. It is also the first work to discern the position of liability for volunteers in English law.[1] It is the first work to examine and compare the schemes of volunteer protection found across the common law world, and also the first work to discern the underlying policies behind them, and to make the case for volunteer protection in English law. It is also the first work in English law to examine organisational protection within the voluntary sector.

Structure

Chapter 2

For the importance of the reform proposed by this thesis to be clear we need to understand what the voluntary sector is, and its significance.

Chapter 2 shows that the importance of facilitating the sector is not simply the value of the additional services that the sector will deliver, but also the enhancing of communities, and our democracy. It deals with changes to the sector in recent decades, including increased professionalisation. Chapter 2 also considers volunteer motives.

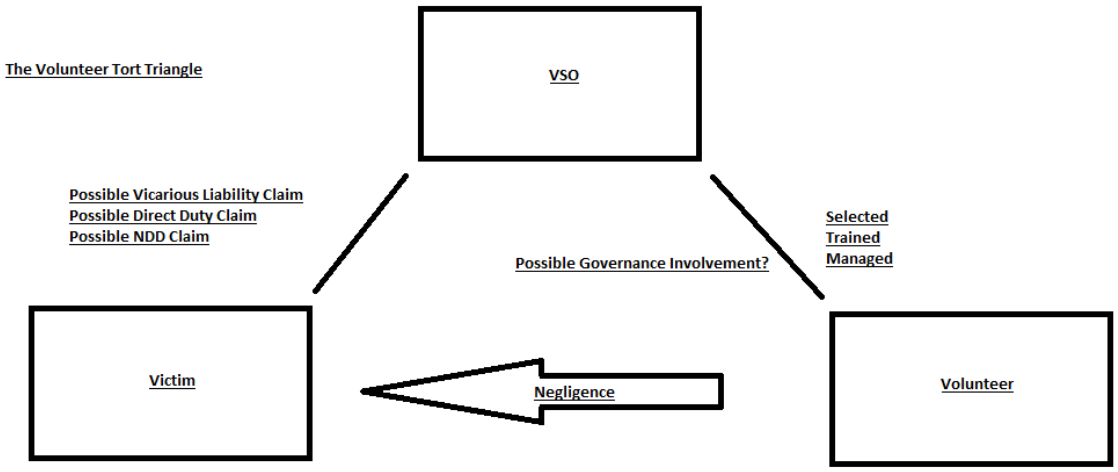
This chapter also deals with material relating to voluntary sector negligence and liability concerns. These are also addressed in Chapters 3 and 8.

[1] Save the author's own articles.

Chapter 3

Volunteer torts involve a triangle of interests, that of victim, volunteer, and VSO. These interests may clash.

Figure 1 – The Volunteer Tort Triangle



Before we deal with the systems used to protect the sector from tort in other jurisdictions we need to know what the sector's current liability position is in English law. Chapter 3 deals with the liability of volunteers in negligence. It establishes that at both the duty of care, and standard of care stages in negligence volunteer status is not taken into account. Further, despite the drafting history of the Compensation Act 2006, and the Social Action Responsibility and Heroism Act 2015,[2] they do not alter volunteer standards of care. Instead, they represent lost opportunities to implement meaningful volunteer protection which also provides for victims and helps to prevent accidents.

The volunteer protection scheme adopted by this thesis introduces a special statutory defence for volunteers. This is superior to eliminating or reducing volunteer duties or standards of care, which would simultaneously protect both volunteers and VSOs at the cost of victims.

[2] 'SARAH'.

Chapter 4

Chapter 4 deals with liability for volunteers; that is organisational liability for the torts of their volunteers.

Whilst Chapter 4 demonstrates that vicarious liability has a potentially broad reach within the sector, it does not cover all organisational volunteers. Chapter 4 also demonstrates that in some circumstances a volunteer's tort may place a VSO in breach of its own direct duties or non-delegable duties to victims.

This thesis proposes a statutory transfer of liability from volunteer to organisation which will also apply in situations where the present law does not result in organisational liability. It thus represents a broadening of VSO liability. The reasons for doing so are advanced in Chapters 7-8.

Chapter 5

Other common law jurisdictions have treated the voluntary sector and volunteers very differently from English law.

It is necessary to examine materials from the US, Australia, and Ireland in some detail because they provide us with considerable insights into how the sector can be protected from tort liabilities. This thesis is not making claims about what the law in the US, Australia, or Ireland should be; instead this material is used to shed light on what English law should be.

There are two basic models used in other common law jurisdictions to protect the voluntary sector. Firstly there is organisational protection which protects the VSO itself from liability. Secondly there is volunteer protection which protects the volunteer from liability. Chapter 5 examines the main categories of organisational protection found in the common law: charitable immunity from tort, and liability caps.

Charitable immunity was developed in the US based on English materials. Despite suggestions to the contrary it still operates in a number of US jurisdictions. Chapter 5 rejects charitable immunity's theoretical justifications as doctrinally incoherent, and unsustainable in

an English law context. It demonstrates that the only coherent rationale for the doctrine is public policy. Liability caps too may also only by justified by recourse to public policy.

Chapter 6

The second model used to protect the sector is volunteer protection. In order to consider the range of possibilities available for English law Chapter 6 examines the volunteer protection schemes present in the US, Australia, and Ireland. In examining them we encounter innovations that we can learn from, and which are key to the scheme that this thesis proposes.

Chapter 6 deals with the background to each scheme. Without understanding their context we will not understand their purpose. The voluntary sector concerns in each jurisdiction prior to the enactment of volunteer protection legislation, and also the themes behind the legislation are similar. These concerns are also similar to those expressed by the sector in the UK.

Chapter 6 demonstrates that volunteer protection schemes across the common law world all adopt a similar approach. They all have an organisational requirement; a volunteer must work for an organisation. They all operate in the context of a liability transfer; the volunteer's liability is transferred to the organisation. They all contain a personal partial defence for the volunteer that does not apply to the organisation. This means that the regimes transfer the loss from the volunteer to the organisation, whilst simultaneously protecting volunteers, and providing for victims. The schemes appropriately exclude motor vehicle accidents.

Chapter 6 demonstrates that the schemes have two main approaches to the personal partial defence. Firstly, there is the objective approach, based on gross negligence. Here the volunteer is not liable for negligence, but is liable for gross negligence. Secondly, there is the subjective approach, based on good faith. Here the volunteer is not liable where they are in good faith. Chapter 6 argues that if a partial volunteer defence is desired an objective approach, based on gross negligence is superior.

Given that liability transfer is integral to the design of the all of the statutes, (and the regime this thesis proposes), Chapter 6 argues that where such a transfer is desired a statutory transfer, rather than one reliant on common law vicarious liability, is superior.

Chapter 6 also examines the provisions concerning the nature of the organisation and work necessary to trigger volunteer protection, which volunteers the schemes apply to, indemnities, and insurance waivers. Discussing these matters helps us to consider the shape of the scheme that this thesis proposes. Chapter 6 also examines relevant case law and practice relating to the statutes.

Chapter 7

Before we can reach our conclusion on VSO and volunteer protection we need to discuss what the impact of organisational protection, or volunteer protection may be, and their fit with policy considerations in tort and tort theories. These are dealt with in Chapters 7 and 8 respectively.

It is difficult to demonstrate in advance the consequences of introducing legal change. The best we can do is attempt a prediction using the best available tools.

Chapter 7 uses positive economic theory. It is necessary to distinguish this from normative economics. Chapter 7 is not elevating economic principles to normative principles of law, it is not arguing that volunteer protection is more efficient and therefore should be introduced. Instead it is attempting to demonstrate what the impact of such regimes may be.

After countering objections to using rational choice theory in the context of altruism (and not all volunteers are altruists), it is applied to both volunteer and VSO protection.

Since behavioural economics has led some tort scholars to dismiss the insights of rational choice theory Chapter 7 examines known heuristics and deviations. Chapter 7 also examines the available empirical evidence, which demonstrates the impact of tort, both generally, and also in the volunteering context. Further, it examines material specific to volunteer protection.

No methodology can prove in advance that a particular legal change will result in a change in human behaviour, but it can predict the potential outcomes of legislative changes. Chapter 7 argues that where positive economic analysis, adjusted for known heuristics, produces a

prediction supported by the available empirical evidence that we should take its predictions seriously.

Chapter 7 demonstrates that using the best predictive tools and material available to us that tort law deters volunteers, and that volunteer protection is likely to increase volunteering. It also suggests that organisational liability is likely to lead to organisations taking greater care and introducing accident reduction systems. Chapter 7 also demonstrates that providing only partial volunteer protection ensures that negligence will still assert some deterrent effect on volunteers. A complete volunteer immunity would significantly remove such deterrence. Chapter 7 also shows that organisational protection is likely to reduce the deterrent effect operating on VSOs, reducing care at the organisational level, and increasing accidents. It will also mean that volunteers will be more likely to face claims, increasing tort deterrence for volunteers, which may lead to lower volunteering levels. Further, Chapter 7 shows that applying volunteer protection within grassroots unincorporated association VSOs may lead to problematic consequences.

The case for volunteer protection cannot simply rest on Chapter 7. There is insufficient certainty in the predictive model used. What is important is that it appears to demonstrate that the legislation is likely to promote a positive outcome, increasing volunteering, and decreasing accidents.

Chapter 8

After countering the arguments typically made for protecting VSOs, Chapter 8 argues against organisational protection due to the need to regulate the sector, provide accountability, the change in the nature of the sector, the contract culture, the availability of insurance, and the fact that to protect organisations would be at the expense of volunteers or victims. Chapter 8 also rejects damages caps as arbitrary and unsuited to the English context, arguing that they concentrate losses on volunteers and also vulnerable victims, and that caps disproportionately protect the greatest wrongdoers.

Chapter 8 makes the case for the volunteer protection scheme. It argues that it promotes enterprise liability since the organisation, not the individual who gives their time freely, is liable to pay the true cost of the enterprise. The organisation is also better able to identify

and reduce risk. By transferring the loss to the organisation and away from the volunteer or victim, the scheme promotes loss-spreading. It also promotes the deterrent and regulatory functions of tort. It focuses tort's deterrence at the organisational level, which is best able to eliminate or mitigate risk. At the same time it encourages volunteers, and provides for victims. Chapter 8 notes that these arguments for volunteer protection apply to some, but not all, classes of unincorporated VSOs.

Chapter 8 argues that since the scheme only provides partial protection to volunteers it will reduce tort's deterrent effect and encourage volunteering, whilst still harnessing tort's deterrent power to ensure that volunteers do not become reckless.

Chapter 8 repudiates potential objections to volunteer protection based on corrective justice. Further it dismisses the objection that volunteer protection will victimise the vulnerable, principally on the grounds that it primarily functions to attribute the breach of duty to the organisation, not the volunteer. A claim against an organisation is likely to be of greater value than a claim against a volunteer.

Chapter 9

Chapter 9 argues against restricting volunteer protection to where the organisation can meet the transferred liability since this would make protection dependent on the VSO's whim. It would also introduce significant uncertainty as to the defence, since it might not be possible to judge in advance whether an organisation can meet the claim until final judgment. Unless it was very clear that the organisation could meet the loss volunteers would be joined to actions to deal with this possible eventuality, and prevent the need to re-litigate the facts. Such a restriction would significantly undermine the defence's purpose since few volunteers would be able to know in advance whether or not they would be protected.

It is important to not let the risk of judgment-proofing undermine the case for volunteer protection. As argued in Chapter 6 the volunteer's personal defence which this thesis proposes should be waived where the volunteer is insured, (although the statutory liability of the organisation remains in such cases). The defence thus only protects volunteers from claims for which they are uninsured. Where the organisation is unable to meet the claim it is unlikely that the victim will have lost much since they have lost a claim against an uninsured

individual, and this has been replaced with the claim against an insolvent organisation. In most cases organisational claims are more valuable. It is also possible to solve the issue of judgment-proofed organisations in this context, through anti-judgment-proofing provisions.

Chapter 9 advances that volunteer protection should apply in the context of some, but not all types of unincorporated association VSOs. Apart from in the case of organisations carrying out work under contract with the state, there should be no state indemnity in the case of an insolvent VSO. If the state were required to pay for such losses this would encourage further state regulation of the sector, and significantly undermine the sector's independence.

Chapter 9 also rejects any additional requirement for compulsory insurance for the sector which would not apply to other sectors, since this would limit voluntary sector activity and potentially exclude communities from volunteering. This would erode the sector's democratic role.

Methodology

This thesis uses a mixed methodology. It uses a law in context methodology by examining tort within the voluntary sector context,[3] the relevance of the legal analysis being established by the political, social and economic aspects of volunteering.[4] It is also necessary to use doctrinal scholarship[5] to discern the existing state of English law.

Given the limited materials available in English tort law, and the significant statutory interventions to protect volunteers or VSOs in other common law jurisdictions, a comparative methodology is used. Law makers regularly draw on comparative material.[6] Here the comparative analysis is limited to other common law jurisdictions. Within this legal family,[7] tort law has the same structure and language, whereas the structure and style of other systems

[3] See William Twining, *Law in Context, Enlarging A Discipline* (OUP 1997) ch 3; Philip Selznick, 'Law in Context Revisited' (2003) 30 JLS 177.
[4] Ross Cranston, 'Law and Society: A Different Approach to Legal Education' (1978–9) 5 MonashULRev 54, 65.
[5] See Jenny Steele, 'Doctrinal Approaches' in Simon Halliday (ed) *An Introduction to the Study of Law* (W Green 2012) 5.
[6] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 16.
[7] ibid 180; H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP 2014) ch 7.

of extra-contractual liability outside the common law may differ significantly.[8] It is thus easier to draw lessons from common law materials. Further, if legal transplants are desired, they are more likely to be accepted if they use similar concepts and structures.[9] Likewise there is a strong similarity between the roles of VSOs and the sector's tort concerns in these jurisdictions. Further, limiting the study to common law jurisdictions helps to prevent superficiality in comparison.

In determining what the impact of volunteer or organisational protection in England might be a positive economic analysis (as adjusted for known heuristics in the light of behavioural economics) is apt, along with an examination of existing empirical material. A small quantity of original empirical data is also generated to analyse volunteer protection's application in litigation in other jurisdictions. Finally, given that this thesis makes the case for volunteer protection, and rejects organisation protection, it is necessary to advance a normative argument, and engage with tort theory.

[8] Gerhard Wagner, 'Comparative Tort Law' in Mathias Reiman and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1005-1010.
[9] Otto Kahn-Freund, 'On the Uses and Misuses of Comparative Law' (1974) 37 MLR 1; Mathias Siems, 'Malicious Legal Transplants' (2018) 38 LS 103; cf Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79; Alan Watson, *Legal Transplants* (2nd edn, Univ of Georgia Press 1993); Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Reiman and Zimmermann (n8).

Chapter 2

The Significance of the Voluntary Sector

Introduction

To understand why statutory volunteer protection is desirable, why it deserves Parliamentary time, and why it is worth writing a thesis dealing with the interface between the voluntary sector and negligence, we need to understand the role of the sector, and its importance to society. Since this thesis is only concerned with the voluntary sector, and not individual acts of altruism this chapter also helps to explain the sector's boundaries, and thus the project's parameters.

This chapter examines the sector's size, diversity, scope, and functions. It considers who is a volunteer, and their motivations. It also highlights volunteer negligence litigation and sector concerns in relation to negligence liability (see also Chapters 3 and 7). This material is essential to understand later arguments in Chapter 8, particularly in relation to enterprise liability, deterrence, and risk management. Understanding volunteering motives is also necessary since volunteers are a key group that we seek to influence, and/or protect through volunteer protection.

Scale of the Sector

The scale of the UK's voluntary sector emphasises this project's importance. The UK has one VSO per 400 people.[1] In 2016-17 it is estimated that 11.9 million people formally volunteered on a regular basis, whilst 19.8 million people formally volunteered at least once.[2] The UK has more full time equivalent volunteers than there are paid employees in the construction sector.[3] The voluntary sector also employs 880,556 people.[4]

[1] 'UK Civil Society Almanac 2015, Geography' (*NCVO*, 2015) <http://data.ncvo.org.uk/a/almanac15/geography/> accessed 21 August 2018, (no equivalent calculation in 2018 Almanac).
[2] 'UK Civil Society Almanac 2018, Volunteering Overview' (*NCVO*, 2018) <https://data.ncvo.org.uk/a/almanac18/volunteering-overview-2015-16/#Formal_volunteering> accessed 21 August 2018.
[3] Andrew Haldane, Chief Economist, Bank of England, 'In giving, how much do we receive? The social value of volunteering' (Lecture to the Society of Business Economists, London, 9 September 2014) 5.
[4] 'UK Civil Society Almanac 2018, Fast Facts' (*NCVO*, 2018) <https://data.ncvo.org.uk/a/almanac18/fast-facts-2015-16/> accessed 21 August 2018.

The sector contributes an estimated £15.3 billion per year (0.8%) to the UK's gross value added.[5] This is higher than that generated by agriculture (£8.3 billion), and comparable to the GDP of Estonia.[6] However, the measurement is misleading if it is used to demonstrate the sector's scale, since it only takes paid work into account, and does not include the work of volunteers. The Office of National Statistics has estimated that regular volunteering (once a month, or more) is worth £23.9 billion per year to the UK, (1.5% of GDP).[7] The European Commission estimates that the UK's volunteer contribution to GDP is between 2-3%.[8]

Diversity of the Sector

The voluntary sector is diverse in the size, aims, motivations, and activities carried out by VSOs. The need to maintain its diversity has been recognised at the highest levels of Government.[9] Whilst the sector's income is dominated by large charities[10] it extends significantly beyond charities. Not all VSOs pursue exclusively charitable purposes, or have sufficient public benefit to be charitable. Some may also pursue political purposes.
At one extreme the sector includes large well-funded formally structured entities with international footprints, managed by paid employees. Where volunteers are recruited for specific roles, they are trained and directed: a 'vertical' form of volunteering. At the other extreme are informal, unfunded, unincorporated associations, led by volunteers. All of their activities are undertaken by volunteers: a 'horizontal' form of volunteering.[11]

The former may be more visible due to their size, prominence within government policy, deployment of a large numbers of volunteers, and use of sophisticated public relations strategies to remain in the public eye.[12] However, the importance of the latter category of VSOs is often underestimated, perhaps due to the small size of such organisations, their lack

[5] 'UK Civil Society Almanac 2018, Economic Value' (*NCVO*, 2018) <https://data.ncvo.org.uk/a/almanac18/economic-value-2015-16/> accessed 21 August 2018.
[6] 'UK Civil Society Almanac 2015, Economic Value' (*NCVO*, 2015) <http://data.ncvo.org.uk/a/almanac15/economic-value/> accessed 21 August 2018.
[7] Rosemary Foster, 'Valuing Voluntary Activity in the UK' (Office for National Statistics 2013) 1.
[8] European Commission-DG EAC, 'Volunteering in the European Union, Final Report' (EC 2011) 11.
[9] Nick Clegg, 'Message from the Deputy Prime Minister' in The Compact (HM Government 2010) 3. The 2010 Compact currently remains in force.
[10] 'UK Civil Society Almanac 2018, Size and Scope' (*NCVO*, 2018) <https://data.ncvo.org.uk/a/almanac18/size-and-scope-2015-16/> accessed 21 August 2018.
[11] Colin Rochester, Angela Ellis Paine, and Steven Howlett, *Volunteering and Society in the 21st Century* (Palgrave 2010) 10-13.
[12] ibid 11.

of media engagement, or the perception that they may be operating in their members' interests. Nevertheless their contribution is significant.[13]

These extremes merely represent two ends of the VSO spectrum. It would be improper to conceptualise all VSOs as fitting into one of these two categories. For instance a large national VSO with a complex organisational structure including employees specialising in volunteer management, may be led by volunteer trustees and take the form of an unincorporated association or trust. Such a VSO may offer both vertical and horizontal volunteering opportunities. Likewise, a small community group adopting a horizontal volunteering model may be incorporated, and hold considerable assets.

That the sector is not co-extensive with the charitable sector demonstrates the limitation of protective mechanisms such as charitable immunity (see Chapter 5). It also alerts us to the need to carefully define the sector within any volunteer protection scheme.

The Voluntary Sector?

Given the sector's diversity it is notoriously difficult to define its parameters.[14] It includes charities, mutuals, co-operatives, and community organisations.

The National Council for Voluntary Organisations (NCVO) describes VSOs as organisations that consist of 'people with shared values com[ing] together to achieve something independently of state and markets'.[15] An organisational requirement distinguishes the sector from individual acts of altruism.[16] This point is key for this thesis; we are not concerned with the torts of individual altruists, only the torts of volunteers. As illustrated in the voluntary sector tort triangle in Chapter 1 this means that volunteer torts occur in three party situations: victim, volunteer, and organisation. However, in this context 'organisation' is a very broad concept ranging from a large incorporated body to a small informal unincorporated

[13] Colin Rochester, 'The Neglected Dimension of the Voluntary Sector: Measuring the Value of Community Organisations' in Cathy Pharaoh (ed), *Dimensions of the Voluntary Sector* (CAF 1997).
[14] Brian Dollery and Joe Wallis, *The Political Economy of the Voluntary Sector* (Edward Elgar 2003) 2-4; Alison Dunn, 'Introduction' in Alison Dunn (ed), *The Voluntary Sector, the State, and the Law* (Hart 2000) 1; Jonathan Garton, *The Regulation of Organised Civil Society* (Hart 2009) 23.
[15] 'Independence and Values' (*NCVO*) <https://www.ncvo.org.uk/policy-and-research/independence-values> accessed 21 August 2018.
[16] Garton (n14) 37.

association consisting of a handful of volunteers, and everything in between. The sector is independent of the state and the for-profit sector. Its purpose is not to make and distribute profits to its owners, and it does not derive its power from the state or exercise public functions.[17] VSOs may have paid workers and/or managers, but to be a VSO an organisation needs to significantly rely on volunteers as part of its workforce and/or leadership.[18] These differences mean that the sector may interact with tort differently than other sectors (see Chapter 8).

There is some sector overlap. VSOs may contract with the state to deliver services; and some mutuals distribute profits to members.[19] Volunteers may also be found in local authority libraries or schools, government entities such as the Cadet Forces, international bodies such as the United Nations, and even private sector organisations. If we desire to implement volunteer protection and also wish to protect these volunteers, this will influence the scheme's drafting.

Function of the Sector

Volunteering's social value goes beyond the economic value of the services and relieving state burdens.[20]

The voluntary sector carries out functions that other sectors do not. Public goods are not typically provided by the private sector, since they are unlikely to be profitable. Instead they are frequently provided by the state,[21] and paid for by the whole of society through taxation. This helps to prevent free-riding.[22] However, a democratic state will never produce all of the public goods desired by members of society. It will only provide those approved by the majority, or at least by those with a significant political voice. Diverse minority demands may therefore be unsatisfied by the state, but supplied by the voluntary sector.[23] The sector is

[17] Richard Best, 'Foreword' in Dunn (n14) vi; Garton (n14) 21-22, 36.
[18] Jeremy Kendall and Martin Knapp, *The Voluntary Sector in the United Kingdom* (Manchester UP 1996) 18.
[19] Garton (n14) 21, 39; cf Kendall and Knapp (n18) 18, who exclude such organisations.
[20] Garton (n14) 41.
[21] Burton Weisbrod, *The Nonprofit Economy* (Harv UP 1988) 5.
[22] James Douglas, 'Political Theories of Nonprofit Organization' in Walter Powell (ed), *The Nonprofit Sector A Research Handbook* (1st edn, Yale UP 1987) 44-5; Garton (n14) 41.
[23] Burton Weisbrod, 'Toward a Theory of the Voluntary Sector in a Three Sector Economy' in Susan Rose-Ackerman (ed), *The Economics of Nonprofit Institutions* (OUP 1986) 22-32; cf Lester Salamon and Helmut

perceived as more trustworthy than for-profits. This is important where it is not easy to assess whether an organisation is delivering the best service, particularly in a public goods context.[24] Unlike for-profits the sector has few incentives to cut corners to maximise profits. The sector does more than simply fill gaps left by other sectors. It also plays an important democratic function, allowing people to find solutions to social problems, without needing to rely on the state. It can advocate minority interests, including those of disadvantaged groups,[25] and empower disadvantaged communities through mutual self-help, providing self-determination and services delivered with greater understanding. The sector's independence from government also means that communities can avoid the stigma associated with receiving government services.[26] Community proximity means that the sector can have greater efficiency and expertise than the state, permitting a more targeted provision of services.[27] The sector helps to strengthen community ties, enhance social cohesion, and broaden community support networks. It is also an important conduit for altruism. VSOs can contribute towards government accountability, promote citizen involvement in society,[28] help shape policy, and can speak on behalf of their volunteers and beneficiaries – providing a voice to grassroots concerns.[29] They are often trailblazers, in many cases with the state subsequently following.[30] Encouraging volunteering is thus likely to enhance communities and our democracy.

Any scheme to protect volunteers must respect the sector's independence, not encourage state interference with the sector, and continue to permit it to speak truth to power. The importance of the sector's high reputation in facilitating its ability to meet demands for public goods and its ability to contribute towards government accountability must also be borne in mind.

Anheier, 'Origins of Civil Society: Explaining the Nonprofit Sector Cross-Nationally' (1998) 9 Voluntas 213; Garton (n14) 54.

[24] Henry Hansmann, 'The Role of Nonprofit Enterprise' in Susan Rose-Ackerman (ed) (n23).

[25] Alison Dunn, 'Political Activity and the Independence of the Voluntary Sector' in Dunn (n14) 145.

[26] Douglas (n22) 50.

[27] Garton (n14) 57-9.

[28] ibid 71-73; NCVO, 'Commission on the Future of the Voluntary Sector, Meeting the Challenge of Change, Voluntary Action into the 21st Century' (NCVO 1996) 3-4.

[29] Dunn, 'Political Activity' (n25) 143-5.

[30] Douglas (n22) 48.

Organisation?

The sector's diversity is reflected in the range of VSO legal forms. The forms available depend on whether a VSO's objects are charitable. An incorporated VSO may take the form of a company limited by guarantee or by shares, a charitable incorporated organisation, an industrial and provident society, a friendly society, a community interest company, or a corporation. An unincorporated VSO may take the form of a trust, or an unincorporated association.[31]

Whilst the majority of VSOs are unincorporated,[32] such forms are less suited to the largest organisations (see below). Detailed statistics on VSO legal forms are unavailable, however, they are available for charities. Whilst not all VSOs are charities such statistics help to illustrate the position within the wider voluntary sector. Indeed the NCVO uses data on charities, and not the broader sector for its annual almanac.

Unlike the Charity Commission for England and Wales, the Office of the Scottish Charities Regulator keeps a public record of each of the legal forms adopted by charities by income. Amongst Scotland's three hundred largest charities by income, only five take the form of an unincorporated association, and two take a hybrid form – including both incorporated and unincorporated forms.[33]

[31] Con Alexander & Others, *Charity Governance* (2nd edn, Jordans 2014) 17, [2.3]-[2.4].
[32] Scottish Law Commission, *Report on Unincorporated Associations* (No 217, 2009) [1.1].
[33] Office of the Scottish Charity Regulator, 'The 300 highest income charities' (*OSCR*) <https://www.oscr.org.uk/about-charities/search-the-register/the-300-highest-income-charities/> accessed 9 April 2020. The law of unincorporated associations in Scotland is shared with the rest of the UK (SLC Report (n32) [1.2]).

Table 1 – Charity Legal Forms by Income in England and Wales[34]

Annual Income	Companies (%)	Charitable Incorporated Organisation (CIO) Association (%)	CIO Foundation (%)	Other (%)
Top 300	68.00	0.00	1.00	31.00
Others over £1M	77.27	0.73	2.31	19.68
500k-1M	64.30	1.71	4.76	29.23
250k-500k	51.54	2.32	6.15	39.99
25k-250k	24.44	3.90	7.80	63.85
10k-25k	9.17	2.63	6.62	81.57
Below 10k	8.33	1.72	5.74	84.18
All Charities	19.55	3.44	9.11	67.88

Within England and Wales, less precise data is available. However, as the income bracket increases the percentage of charities taking the form of companies increases. The relationship between size and incorporation in the CIO categories is more complex. The percentage increases as the size of the charity increases, until the £250-500k category, after which it declines. The 'other' category includes unincorporated associations and trusts. A significant majority of small charities are in this category, and the percentage in this category declines as the annual income increases. However, the percentage in this category then increases for the very largest charities. This does not mean that there is a percentage increase in the use of unincorporated forms by the largest charities when compared to the immediately preceding two income brackets. Instead this category also includes charities which are corporations by Royal Charter, or by Act of Parliament. This includes universities, private schools, learned and professional societies such as the Royal Society, the Royal College of Surgeons, and the Royal College of Nursing; and leading national charities such as the British Red Cross, Scout Association, Royal British Legion, and the Guide Association. Within the largest income categories many charities classified in the 'other' category take this form -

[34] Email from Charitycommission.gov.uk to author (29 April 2020).

14% within the top 300 have Royal Charters, and 2% are incorporated by Act of Parliament.[35] Charities with the lowest incomes in the 'other' category are less likely to hold Royal Charters (0.29% of charities with an income under £1000), and primarily take the form of unincorporated associations and trusts. This is likewise the case for those in mid-income brackets.

This can be confirmed by examining data on the governing documents recorded by the Charity Commission and categorising them into incorporated and unincorporated forms.[36] Through this method it is possible to classify 86% of the top 300 charities as incorporated, and 6.67% as unincorporated, whereas with charities with an income of £1-10,000, 15.88% may be classified as incorporated, and 70.47% as unincorporated. The status of the others is unclear on the data.[37] The rate of incorporation increases as income increases.

The sector's output is dominated by a small number of large, predominantly incorporated organisations. Official statistics are only available for charities, and not all VSOs. Within Scotland incorporated charities generate the most income.[38] For England and Wales the Charity Commission does not produce income statistics by legal form but rather by income bracket. Whilst small charities are largest in number, there being 65,176 charities with an income of £0-£10,000 (38.8% of charities), they represent merely 0.3% of the charitable sector's income. On the other hand there are 2,263 charities with an income of £5,000,000 plus (1.3% of charities), representing 72.5% of the charitable sector's income.[39] Within the broader voluntary sector most VSOs are small – 82% having an income below £100,000, representing 4% of the sector's income, but VSOs with an income above £1,000,000 account for over 82% of the voluntary sector's income. This latter group also account for 81% of the sector's spending, and 87% of its total assets.[40] Smaller organisations which tend not to

[35] Email from Charitycommission.gov.uk to author (27 May 2020).
[36] ibid.
[37] Incorporated: Memorandum and Articles, Royal Charter, Acts of Parliament, Statutory Instrument, CIOs. Unincorporated: Trust Deed, Constitution, Rules, Will, Declaration of Trust, Conveyance, Volumes/Reports, Deeds of Gift, Minutes of Meeting, Conveyance and Declaration of Trust, Lease and Declaration of Trust, Bye Laws, Lease, Letter, Governing Document not known. Using data from: Email (n35).
[38] SLC Report (n32) [1.3].
[39] Charity Commission, 'Recent Charity Register Statistics' (*CC*, 18 October 2018) <https://www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission> accessed 9 April 2020.
[40] 'UK Civil Society Almanac 2019, 'How Many Voluntary Organisations Are There?' (*NCVO*, 2019) <https://data.ncvo.org.uk/a/almanac18/income-sources-2015-16/> accessed 9 April 2020.

incorporate, account for 2% of the sector's income in Scotland.[41] Whilst income and spending is not the same as volunteering output, it is still a good measure of VSO activity.

Incorporated v Unincorporated

Unincorporated association VSOs are aggregates of their members, bound through mutual contracts. They are not legal persons, and do not have limited liability. It is the simplest structure a VSO can adopt, and may be chosen due to lower establishment costs, reduced regulatory requirements, ease of establishment and winding up,[42] and to provide democratic control.[43] The VSO's rules may be easily varied, and its officers do not have statutory duties of care towards the VSO or its members. Unless provided for in statute they are otherwise unregulated, they also do not need to file annual accounts or returns.[44] Some of the least formal grassroots groups may adopt this form almost by accident, since such an organisation may be created very easily and without formality. Other unincorporated VSOs may take the form of a trust.

The absence of legal personality makes unincorporated forms less practicable for organisations with significant property, employees, and operations. An unincorporated VSO cannot own property or lease land. Instead it must be held by trustees on trust for the VSO's purposes if they are charitable, or for the members if not.[45] A VSO's management committee's composition is likely to change more frequently than its premises thus from time to time the property will need to be transferred to new office holders otherwise title to the property may be held by former office holders, or former members.[46] Unincorporated VSOs with significant freehold or leasehold property may therefore face higher administrative costs.[47]

[41] SLC Report (n32) [1.1]
[42] Nicholas Stewart, Natalie Campbell, Simon Baughen, *The Law of Unincorporated Associations* (OUP 2011) 4-12 [1.09]-[2.03]; *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners* [1985] 1 WLR 409 (Ch) 413 (Peter Gibson J).
[43] Don Bawtree and Kate Kirkland, *Charity Administration Handbook* (5th edn, Bloomsbury 2013) 56-57, [2.8]-[2.14].
[44] Stewart, Campbell, and Baughen (n42) 7, [1.20].
[45] ibid 60-70 [3.01]-[3.24]; Peter Luxton, *The Law of Charities* (OUP 2001) 259, [8.21]; Alexander (n31) 17, [2.3]-[2.4].
[46] SLC Report (n32) [2.12].
[47] Stewart, Campbell, and Baughen (n42) 8, [1.21].

Unincorporated VSOs can only enter into agreements in other's names. For instance their employees have contracts of employment with individuals, typically the VSO's officers, not the VSO itself. The liability of those who contract on a VSO's behalf is personal, potentially exposing them to substantial liabilities.[48] Where the individuals act within their authority they may be able to seek indemnification from the VSO's assets, but if these prove inadequate any shortfall needs to be met by the individuals.[49] The contracting individuals are only entitled to additionally recover from other members of the association where they have assented to or ratified the contract.[50] When the relevant member ceases to be a member, or ceases to hold office, contracts need to be remade with another member.[51]

Unless otherwise provided by statute unincorporated VSOs may not be the subject of tort claims.[52] We will deal with this further in Chapter 4. Such claims may lead to extensive personal liability for individual tortfeasors and/or the membership. Tort claims are more likely to exceed the VSO's funds than contract claims.[53]

Tort claims arising out of an unincorporated VSO's activities will typically be made through representative proceedings under CPR r.19.6 brought against the VSO's executive committee representing its membership. Unlike contractual claims, with tort claims the liability of the VSO's ordinary members is joint and several and the judgment may be personally enforced in full against every member. Even members who are not involved in the VSO's management may still incur substantial liabilities.[54]

That unincorporated structures may expose volunteers to significant liabilities is illustrated by the Ynysybwl Rugby Club litigation, where to secure a judgment for £85,000 the club treasurer had a charge registered against his house;[55] by litigation where a VSO's management committee were liable for an employee's fraud and the VSO's debts;[56] and by

[48] ibid 71 [3.30]; Luxton (n45) 259, [8.21]; Alexander (n31) 17, [2.3]-[2.4].
[49] *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 (PC); SLC Report (n32) [2.4].
[50] Note *Minnitt v Lord Talbot* (1876) 1 LR (Ir) 148, (1881) 7 LR (Ir) 403.
[51] Stewart, Campbell, and Baughen (n42) 8 [1.21].
[52] *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL).
[53] SLC Report (n32) [2.8].
[54] Stewart, Campbell, and Baughen (n42) 188-202, 269, [8.02]-[8.44], [11.55].
[55] Dave Edwards, 'Rugby Club's £60k appeal in "crippling" legal battle' *Wales Online* (28 February 2013) <http://www.walesonline.co.uk/news/local-news/rugby-clubs-60k-appeal-crippling-2496284> accessed 21 August 2018.
[56] Lynne Russell and Duncan Scott, *Very Active Citizens? The Impact of Contract Culture on Volunteers* (University of Manchester 1997) 31.

Chandra v Mayor.[57] In *Chandra* a volunteer committee member of a charitable unincorporated VSO was sued in a representative capacity in an employment dispute. After paying the judgment sum, interest, and costs on account, (total circa £82,000) he sought contribution from the other committee members, including towards the costs of £500,000. The claimant former employee also sought to enforce the costs order against the other committee members. Judge Purle QC stated it was a 'personal tragedy that they now find themselves under a substantial liability, but that is the consequence of their status'.[58] The claimant's solicitor stated to the media that it was the executive committee who would be personally liable for the sums not the VSO.[59] This VSO has now incorporated as a CIO. Since an incorporated VSO has legal personality, it may own property, enter into agreements in its own name,[60] and may be liable in contract and tort. Using a corporate form may also enable members to limit their liability.

As the volunteer protection scheme that this thesis proposes includes a liability transfer to the VSO, the potential for volunteer liability within an unincorporated organisation is important in explaining the scheme's limits (see Chapters 6-9).

The form adopted by a VSO may change over time. Many organisations start as unincorporated associations, and later incorporate as their activities and potential liabilities expand.[61] Some large, high profile organisations, which were formerly unincorporated associations have incorporated via Royal Charter, for example the National Trust. This provides the VSO with the benefits of incorporation, whilst retaining unincorporated association features,[62] for instance membership control. However, this method of acquiring legal personality is not available to most unincorporated VSOs since charters are only granted to organisations which 'demonstrate pre-eminence, stability and permanence in their particular field'.[63] Other major VSOs have incorporated by alternative means, for instance the National Childbirth Trust, (founded 1956, incorporated 1989), the British Board of Boxing Control, (founded 1928, incorporated 1989), and the Yorkshire Agricultural Society

[57] [2016] EWHC 2636 (Ch), [2017] 1 WLR 729.
[58] At [20].
[59] 'Priest on just £2 an hour wins £62k temple payout' *Asian Voice* (26 July 2014).
[60] Charity Commission, 'Charity Types: How to Choose a Structure' (CC22a), (Charity Commission 2014).
[61] William Henderson, Jonathan Fowles and Julian Smith (eds), *Tudor on Charities* (10th edn, Sweet and Maxwell 2015) 331, [6-048].
[62] Stewart, Campbell, and Baughen (n42) 10, [1.26].
[63] The Privy Council Office, 'Royal Charters' (*PCO*) <https://privycouncil.independent.gov.uk/royal-charters/> accessed 9 April 2020.

(founded 1837, incorporated 1982),[64] incorporated as companies limited by guarantee. With each of these three examples the VSOs retained unincorporated forms for a significant period of time subsequent to becoming major concerns.

VSOs may also consist of one or more entities, and a mix of legal forms. Whilst most large VSOs are incorporated, some large and wealthy VSOs with significant forward planning potential remain unincorporated.[65] Some religious organisations may have chosen not to incorporate, not wishing to unnecessarily subject their internal structures to state regulation, or to translate them into a corporate form. For instance the Roman Catholic Church in England and Wales is unincorporated, as are its constituent parts – this stemming from the non-recognition of Roman Catholic canon law juridic persons by English law.

Whilst typically small community groups adopt an unincorporated association form, some incorporate. Incorporation is therefore not automatically an indicator of size or assets. However, since incorporation requires additional regulatory compliance and filing it is unsuited to the most informal groups.

Contract Culture and Professionalisation

To help understand some of the later arguments made in Chapter 8 against organisational protection and in favour of volunteer protection, we need to be aware of a number of changes that have taken place within the voluntary sector within the last few decades.

Whilst government courting and funding of the voluntary sector is not new, it now features more overtly in government rhetoric.[66] The Thatcher government shifted funding for VSOs from grants to contracts, reconceptualising local authorities as entities that should commission other organisations to deliver services under contract, instead of delivering the

[64] Companies House, 'The National Childbirth Trust' <https://beta.companieshouse.gov.uk/company/02370573>; 'British Board of Boxing Control Ltd' <https://beta.companieshouse.gov.uk/company/02316536> ; 'Yorkshire Agricultural Society' https://beta.companieshouse.gov.uk/company/01666751> all accessed 9 April 2020.
[65] eg the golf club in *R v L* [2008] EWCA Crim 1970; [2009] 1 All ER 786.
[66] Rob MacMillan, 'The third sector delivering public services: an evidence review' (2010) Third Sector Research Centre Working Paper 20; Debra Morris, 'Paying the Piper: The "Contract Culture" as Dependency Culture for Charities?' in Dunn (n14) 124-5; Debra Morris and Jean Warburton, 'Charities and the Contract Culture' [1991] Conv 419; John Morison, 'The Government – Voluntary Sector Compact: Governance, Governability and Civil Society' (2000) 27 JLS 98.

services themselves in-house.[67] The voluntary sector was seen as providing competition and choice within a mixed welfare economy.[68] Using the sector to deliver public services under contract was also a key part of the New Labour Government strategy, partly for cost reasons, but also because it was thought to be closer to the community than the state.[69] This policy also formed a key part of David Cameron's Big Society project and his Coalition Government, through the re-issued Compact, was committed to expanding the role of the sector in service delivery.[70]

Some saw this development as a cloak for cuts,[71] or undermining the sector's independence.[72] Post-Cameron's Big Society project the contract culture has continued and the Compact is still in force. The sector is likely to remain a significant part of Government service delivery strategy.

In 2015/2016 the sector's income from statutory sources totalled £15.3 billion,[73] 78.4% of such income is derived through contracts rather than grants.[74] Contracted services are delivered by both paid employees and volunteers. However, in some cases this income does not cover the full cost of the services provided, and they are cross-subsidised by the VSO, or other grant making bodies. In recent years there has been some resurgence in governmental funding by way of grants instead of via contract, with a decline in £0.8 billion in contractual income, alongside a £0.7bn increase in grant funding.[75] Whilst 41,000 VSOs have financial relations with the state, and the sector receives 32% of its income via statutory sources, 75% of VSOs do not receive such funding.[76]

The contract culture has changed the sector, resulting in complex evaluation, monitoring, and quality assurance systems, and the need for new policies and procedures, leading to greater

[67] eg The Local Government Act 1988.
[68] Morris and Warburton (n66).
[69] Terry Potter, Graham Brotherton and Christina Hyland, *The Voluntary Sector in Transition: Changing Priorities, Changing Ideologies* (Newman University College 2012) 22.
[70] David Cameron, 'Message from the Prime Minister' in The Compact (HM Government 2010), and also [3.1].
[71] Trades Union Congress, *Localism: Threat or Opportunity* (TUC 2011).
[72] Independence Panel, *Protecting Independence: The Voluntary Sector in 2012* (Baring Foundation 2012) 8, 27.
[73] 'UK Civil Society Almanac 2018, Income Sources' (*NCVO*, 2018) <https://data.ncvo.org.uk/a/almanac18/income-sources-2015-16/> accessed 21 August 2018.
[74] Charlotte Stuffins, 'The Truth About the Voluntary Sector and the State' (*NCVO Blogs*, 19 April 2012) <http://www.ncvo-vol.org.uk/networking-discussions/blogs/18452/12/04/19/truth-about-voluntary-sector-state> accessed 21 August 2018.
[75] UK Civil Society Almanac 2019, 'How Much Do Volunteering Organisations Get From Government' (*NCVO*, 2019) < https://data.ncvo.org.uk/sector-finances/income-from-government/> accessed 13 April 2020.
[76] Stuffins (n74); NCVO, Income Sources (n73).

bureaucracy.[77] It has also introduced market values and increased professionalisation into the sector, and created pressures to enhance volunteer training,[78] incorporate,[79] standardise,[80] and restructure.[81] There are significant changes in formality for smaller VSOs. Contracting has produced a move to 'managerialism,… and top down management structures'[82] replacing more cooperative and democratic structures.[83] This may reduce the role for volunteers.[84] Morris has expressed fears that smaller VSOs will 'be transformed into mini-versions of professionalised mainstream organisations, indistinguishable from their larger brothers and sisters and, more importantly, indistinguishable from their statutory cousins.'[85] Formalisation has led to increased clarity for volunteer roles, greater support, and greater volunteer confidence, alongside a loss of autonomy and flexibility. These changes have led some volunteers (40%) to perceive an increase in their work's value and status, increasing their satisfaction; other volunteers (15%) have been demotivated by them.[86]

Some of these pressures may be avoided. Not all VSOs receive state funding. Nevertheless sector professionalisation is widespread. Some VSOs who deliver their core services without state funding, have also moved to a contractual model of delivering services, and the use of professional managers in place of local volunteer decision making.[87] The complexity of grant applications and the need for metrics has also driven professionalisation.[88] Bodies such as the NCVO have encouraged 'a more 'professional' approach to recruiting and managing volunteers.'[89] Volunteer management has evolved into a 'specialist profession...underlined by the development of quality standards, training for those who manage the work of

[77] Debra Morris, 'Charities in the contract culture: survival of the largest?' (2000) 20 LS 409, 419-21.
[78] Russell and Scott (n56) 8.
[79] Morris, 'Paying the Piper' (n66) 123, 125, 139.
[80] Alfred Vernis, Maria Iglesias, Beatriz Sanz and Angel Saz-Carranza, *Nonprofit Organisations Challenges and Collaboration* (Palgrave Macmillan 2006) 56.
[81] Debra Morris, *Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict* (Charity Law Unit, University of Liverpool 1999) 42.
[82] Morison, (n66) 98, 109, 129.
[83] Russell and Scott (n56).
[84] Heather Buckingham, 'Capturing Diversity: A Typology of Third Sector Organisations' Responses to Contracting Based on Empirical Evidence from Homelessness Services' (2012) 41 Journal of Social Policy 569; Morison (n66) 109-10.
[85] Morris, 'Charities in the contract culture' (n77) 427; note also Lord Hodgson, *Unshackling Good Neighbours* (London 2011) 21.
[86] Russell and Scott (n56), 8-9.
[87] St John Ambulance, 'Standard Terms and Conditions for Public Events' (SJA 2018) [1.2]; Edward Malnick and Jack Simons, 'Rebellion in Ranks of St John Ambulance' *The Telegraph* (London, 1 March 2014) <https://www.telegraph.co.uk/news/uknews/10670347/Rebellion-in-ranks-of-St-John-Ambulance.html> accessed 21 August 2018.
[88] Hokyu Hwang and Walter Powell, 'The Rationalization of Charity: The Influences of Professionalism in the Nonprofit Sector' (2009) 54 AdmSciQ 268.
[89] Rochester, Paine, and Howlett (n11) 3.

volunteers, and the establishment of a professional body for volunteer managers.'[90] Increasingly formal approaches, based on systems used for paid staff, are used to manage volunteers.[91] In some contexts volunteers have been reframed as resources and been subjected to increased managerial scrutiny.[92] Nevertheless, the majority of small grass-roots VSOs have been able to resist many of these pressures, retaining both informality and independence. These VSOs are organised differently, and some have little if any organisational structure or management. This suggests that tort policy may interface differently between the varied forms of VSO. Thus a volunteer protection scheme which works for an Oxfam book shop volunteer, (and the policies justifying it), might not necessarily work for a helper at an informal post-natal coffee group.

Volunteers

To consider the position of volunteers in negligence, and to help design any protective scheme we need to understand the motives of volunteers, and also exactly who is a volunteer.

The International Labour Organisation defines voluntary work as non-compulsory activities, performed willingly, without pay, to produce goods or services for others who are outside the volunteer's family, or household.[93] Volunteering may be formal, through or for a VSO, or informal, delivered directly to recipients. As we have seen above in order to define the parameters between the voluntary sector and informal acts of altruism, the sector has an organisational requirement. This requirement is very loose. There is no need for a formally structured organisation. An informal tea group for the elderly run by volunteers would fulfil it, but a single person who feeds the homeless is an individual altruist.

Volunteer work is often the same as, or similar to, that carried out by paid employees.[94] In both grassroots and large VSOs volunteers may be found delivering services on the ground, in support and fundraising roles, and in leadership positions including as board members and trustees. However, volunteers are not simply interchangeable with employees, they make a

[90] ibid.
[91] ibid 6.
[92] Kate Bedford, 'Regulating Volunteering: Lessons from the Bingo Halls' (2014) 40 Law&SocInquiry 461.
[93] 'Volunteer Work' (*International Labour Organization*) <http://www.ilo.org/global/statistics-and-databases/statistics-overview-and-topics/WCMS_470308/lang--en/index.htm> accessed 21 August 2018.
[94] Laura Leete, 'Work in the Nonprofit Sector' in Walter Powell and Richard Steinberg (eds), *The Non-Profit Sector: A Research Handbook* (2nd edn, Yale UP 2006) 171.

distinctive contribution.[95] Some individuals may have dual status within a VSO, working both as an employee, and also volunteering in their spare time.

There are three primary models of volunteering. The first conceptualises volunteering as altruistic, giving one's time to help others.[96] The second is a civil society model, whereby volunteers engage in mutual aid and solve shared problems.[97] The third sees volunteering as a form of 'serious leisure'.[98] These models may be hybridised, and a volunteer may fit into more than one.[99]

Volunteering is driven by values such as altruism, solidarity, reciprocity, and social justice.[100] Being religiously active significantly increases volunteering rates.[101] People volunteer for a wide range of motives, ranging from altruistic to egoistic; for instance, to express altruism, to further their career, to receive social rewards, to assuage guilt, to enhance self-esteem, and for personal development.[102] Multiple motives may be present. The primary reason for volunteering identified by the 2018 Community Life Survey is altruistic, the desire to improve things and help people (46%); the highest ranked self-interested reason was a desire to meet people and make friends (25%).[103] Understanding these motives helps us to understand the analysis in Chapter 7 which examines the potential impact of volunteer and/or organisational protection.

Volunteers may gain new skills or experience, become part of a community, make friends, gain confidence, or be provided with a sense of purpose. There are also physical and mental health benefits to volunteering, which improves community health.[104] Volunteering also

[95] Rochester, Paine, and Howlett (n11) 15.
[96] ibid 11.
[97] Mark Lyons, Philip Wijkstrom and Gil Clary, 'Comparative Studies of Volunteering: What is Being Studied?' (1998) 1 Voluntary Action 45, 52.
[98] Robert Stebbins, 'Volunteering: A Serious Leisure Perspective' (1996) 25 NonprofitVoluntSectQ 211.
[99] Rochester, Paine, and Howlett (n11) 15.
[100] ibid 16.
[101] Natalie Low, et al, *Helping Out: a National Survey of Volunteering and Charitable Giving* (Cabinet Office 2007) 21.
[102] Gil Clary, Mark Snyder and Arthur Stukas, 'Volunteers' Motivations: Findings from a National Survey' (1996) 25 NonprofitVoluntSectQ 485; Stebbins (n98) 216-7; Rochester, Paine, and Howlett (n11) 123; Helen Bussell and Deborah Forbes, 'Understanding the Volunteer Market: The What, Where, Who and Why of Volunteering' (2002) 7 IntJNonprofitVoluntSectMark 244.
[103] Department for Digital, Culture, Media and Sport, 'Community Life Survey: 2017-18' [4.4].
[104] Jane Piliavin and Erica Siegl, 'Health Benefits of Volunteering in the Wisconsin Longitudinal Study' (2007) 48 JHealthSocBehav 450; Rodlescia Sneed and Sheldon Cohen, 'A Prospective Study of Volunteerism and Hypertension Risk in Older Adults' (2013) 28 PsycholAging 578; 'Why Volunteer' (*National Health Service*) <http://www.nhs.uk/Livewell/volunteering/Pages/Whyvolunteer.aspx> accessed 21 August 2018; 'Give for

promotes social cohesion and inclusion.[105] Further, increased well-being and happiness of volunteers may also lead to increased work-place productivity.[106] Given that this thesis notes in Chapter 7 that volunteer protection is likely to promote volunteering, these social benefits to the volunteer and to society also reinforce the importance of the volunteer protection scheme proposed in this thesis.

The social contribution made by those who give their services for self-interested reasons should not be underrated. They may volunteer for a longer period of time than purely altruistic volunteers.[107] This in turn reduces the cost for VSOs of recruiting and training volunteers, and helps provide greater service consistency. There is also evidence that self-interested volunteering may promote the development of pro-social behaviour, and the development of altruistic reasons to continue volunteering.[108] Likewise altruistic volunteering may lead to self-interested reasons for continuing to volunteer.[109] Mixed and changing motivations for volunteering reinforces the argument made in Chapter 6 that volunteer protection should not be dependent on the volunteer's subjective motivations for volunteering.

The different functions of the sector, varied forms of volunteering, and motives for volunteering, make volunteering an intrinsically complex social phenomenon.[110]

Volunteering faces significant challenges due to social change, such as increased mobility and social isolation, increased employment insecurity, increased marketisation of society, a shift towards secularisation, and a dysfunctional housing environment.[111] The shape of volunteering is also changing, with an increasing shift to short term volunteerism over long term volunteerism, transitional volunteering as a path back to employment,[112] and the

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Mental Wellbeing' (*National Health Service*) <https://www.nhs.uk/conditions/stress-anxiety-depression/give-for-mental-wellbeing/> accessed 21 August 2018.
[105] Rochester, Paine, and Howlett (n11) 163-6.
[106] Haldane (n3) 12.
[107] Steve McCurley and Rick Lynch, *Keeping Volunteers* (Directory of Social Change 2007) 19.
[108] Diann Eley, 'Perceptions and Reflections on Volunteering: The Impact of Community Service on Citizenship in Students' (2003) 5 Voluntary Action 27, 36-43.
[109] Rochester, Paine, and Howlett (n11) 37.
[110] Lesley Hustinx, Ram Cnaan and Femida Handy, 'Navigating Theories of Volunteering: A Hybrid Map for a Complex Phenomenon' (2010) 40 JTheorySocBehav 410.
[111] Colin Rochester, *Trends in Volunteering* (Building Change Trust 2018) 5-7; John Mohan and Rose Lindsey, 'We must be realistic about volunteering' *Third Sector* (London, 13 June 2018).
[112] Rochester, Paine, and Howlett (n11) 32-3.

development of online volunteering.[113] According to the Community Life Survey, in 2016-17, 22% of the UK population formally volunteered at least once a month, and 38% at least once a year; 27% informally volunteered at least once a month, and 53% at least once a year. This represents a decline on the 2013-14 figures (27%, 45%, 31%, and 58% respectively).[114] There has also been a reduction in the amount of time formally volunteered – the Office of National Statistics describing this as a 'billion pound loss in volunteering effort' between 2012-15.[115] This decline in volunteering emphasises the need to consider volunteering policy, including the protective scheme this thesis proposes.

Negligence in the Voluntary Sector

The voluntary sector delivers significant services within the UK, and is a key plank in Government policy. It is therefore odd that the sector has attracted little attention from English legal scholars,[116] and no attention from English tort scholars. The sector's size and importance means that considering its interface with tort is overdue.

Tort's regulatory potential is acknowledged.[117] Garton alludes that it may play a role in regulating the externalities of the sector.[118] Tort, particularly negligence, helps to regulate risk and enforce standards. The activities of volunteers create litigation risks, particularly in negligence. The contract culture may enhance these risks since 'individual volunteers or the charities that provide them are opening themselves up to real risks if they are intended to replace professional staff, especially where specialist public services are being delivered.'[119] Governmental encouragement of the sector to deal with society's problems means that VSOs 'that respond to the challenge could be exposed to new and greater forms of risk.'[120] In addition with austerity greater demands are placed on the sector to fill in gaps left by the state, again enhancing risk. The state's retreat has meant that volunteers have been asked to

[113] Lisa Hornung, Jack Egan and Véronique Jochum, *Getting Involved* (NCVO 2017) 33.
[114] Department for Digital, Culture, Media and Sport (n103) [4.1]-[4.3].
[115] 'Billion pound loss in volunteering effort' (*Office for National Statistics*, 16 March 2017) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/billionpoundlossinvolunteeringeffort/2017-03-16> accessed 21 August 2018.
[116] Notable exceptions include the work of Morris and Garton.
[117] Anthony Ogus, *Regulation, Legal Form and Economic Theory* (OUP 1994) 20-21, 49, 190.
[118] Garton (n14) 100.
[119] Debra Morris, 'Charities and the Big Society: a doomed coalition?' (2012) 32 LS 132, 138; See also Charity Commission, 'Charities and Public Service Delivery' (CC37), (Charity Commission 2012).
[120] John Plummer, 'Premium issue for the sector' *Third Sector* (London, 21 February 2011).

perform more complex, sophisticated, and responsible work.[121] Furthermore, VSOs often work in high risk areas, such as working with disadvantaged and vulnerable groups, or responding to new social challenges.[122]

In delivering services volunteers who breach a duty of care may cause a range of losses, from personal injuries and property damage, to pure economic loss.

Voluntary Sector Negligence Litigation

This section does not set out to show that there is a litigation epidemic within the sector. The evidence does not seem to demonstrate this.[123] Whilst official data as to the number of claims within England and Wales brought against volunteers, or VSOs is not available,[124] there is sufficient evidence that negligence litigation does exist within the sector, and that claims are brought against VSOs and volunteers.

A study carried out into the insurance records of 73 VSOs revealed a total of 1860 claims in 2002-3, totalling £2.4million, with an average claim value of £35,257. These claims primarily concerned larger VSOs, which also recorded significantly higher average claim values.[125] Whilst the research was particularly concerned with employer's and public liability insurance, the most typically held polices by VSOs alongside motor insurance, the study did not deal with the nature of the claims brought, and many may concern other forms of liability.

Research conducted by Volunteering England into risk and compensation culture showed that 5% of surveyed VSOs have had insurance or legal claims against volunteers or trustees. Over half of these claims were brought against sports, exercise, and adventure organisations.[126]

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[121] Katherine Gaskin, *Getting a Grip, Risk, Risk Management and Volunteering* (Volunteering England 2005) 10.
[122] Plummer (n120).
[123] Note Gaskin, *Getting a Grip* (n121) 34.
[124] Ministry of Justice, 'Social Action, Responsibility and Heroism Bill' (2014) Impact Assessment No: MoJ013/2014, 4.
[125] Z/Yen, *Risk Management Club for the VCS* (Z/Yen, 2003) 3-4; 26 large VSOs (>£10 million), 1738 claims (average value £86,203); 18 medium VSOs (<£10 million & > 1million), 118 claims (average value £16,641); 13 small VSOs (<£1 million & > £250k), 4 claims (average value £2,533); 16 very small VSOs (<250k), 0 claims.
[126] Katharine Gaskin, *Reasonable Care? Risk, Risk Management and Volunteering in England* (Volunteering England 2005) 26.

Almost half again reported that claims had occurred against an organisation their VSO works with. Whilst the nature of the claims reported by this study is not sub-divided the context of the survey makes it clear that the research is primarily tort litigation focused. Further, details provided by the VSOs reveal the nature of some of the claims, for instance a claim brought against a VSO's Chairperson when a volunteer attending a meeting in the Chairperson's house fell over injuring her ankle, and a claim brought against a VSO alleging volunteer negligence, by a participant in a Duke of Edinburgh Award expedition who subsequently suffered from sore feet.[127] One VSO which disclosed claims against committee members commented: '[a]fter every accident committee members sit in fear for months or years waiting to see if anyone will decide to try a "no win no fee" court case.'[128] In addition a large survey of volunteers revealed that 1% of volunteers had 'been involved in an incident that resulted in the organisation being sued for negligence, damages or injuries'.[129] A second large scale survey of volunteers noted a similar claims rate, albeit varying with volunteer age and gender.[130]

A study consisting of 12 detailed case studies into VSO risk management amongst various VSO forms, revealed negligence litigation against three of the VSOs. The British Trust for Conservation Volunteers stated that it was subject to 2-3 claims a year. Although these claims were primarily for trivial accidents, one personal injury claim was settled for a multi-million pound sum.[131] Further, examples have been provided in Parliament of litigation relating to allegations of volunteer negligence,[132] and there have been high profile accounts of such actions being brought against volunteers or VSOs.[133]

[127] ibid 27.
[128] ibid.
[129] ibid 22.
[130] Low (n101) 53: 1% of volunteers aged 35-44, and 45-54, had been involved in incidents which led to their VSO being sued. The rate for older groups was less than 1%; younger volunteers had not been involved in such incidents. Males (1%), females (below 1%).
[131] Katharine Gaskin, *Cautionary Tales Case Studies of Risk Management in Volunteer-involving Organisations* (Volunteering England 2006) 14-19, 47.
[132] eg. HC Deb 12 May 2004 col 426; HC Deb 22 June 2006, col 50; HC Deb 16 July 2004, col 1654, (Julian Brazier MP) (Scouting, Girl Guides, and paddlesport volunteer marshal cases).
[133] eg Sam Barker, 'Army veteran facing £250,000 bill and trial in Peru due to lack of simple legal cover' *The Telegraph* (London, 27 July 2018); ''Sore feet' legal claim thrown out' *The Northern Echo* (Darlington, 19 October 2004); 'Tearfund hit by compensation claim' *Third Sector* (London, 6 March 2009); 'St John men cleared' *Times* (London, 26 November 1988); 'Kicking accidents into touch' *Times* (London 20 April 1996); 'The challenges of insuring volunteers' *Third Sector* (London, 21 February 2012).

It is possible to identify English cases where volunteers and/or VSOs have been sued for the negligence of their volunteers: ten Court of Appeal decisions,[134] seven separate High Court cases,[135] and one House of Lords decision.[136] This is an incomplete list since not all higher court judgments are reported or accessible. Further, there are other cases which may involve volunteers, but where volunteer status is unclear in the judgment.

In addition most negligence litigation occurs in the County Court.[137] Only the most complex or valuable litigation is commenced in the High Court. This is why the available volunteer High Court litigation invariably involves serious spinal injuries, and/or death. Access to County Court decisions is highly limited, since they are generally not used as authorities. Nevertheless, it is possible to identify some County Court cases involving volunteer negligence claims, but these cases are only available through Parliamentary evidence, or since they have become authorities on quantum for PI practitioners.[138] This means that the evidence of County Court claims is highly incomplete. Some of the higher court cases above were appeals from the County Court. Given that the majority of judgments are not appealed, and some appeals from the County Court are heard by the County Court,[139] this evidences greater voluntary sector litigation activity within the County Courts than these available decisions.

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[134] *Cole v The Royal British Legion* [2007] EWCA Civ 396; *The Scout Association v Barnes* [2010] EWCA Civ 1476; *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607; *Smoldon v Whitworth* [1997] ELR 249 (CA); *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, [2004] PIQR P18; *Horne and Marlow v RAC Motor Sports Association* CA, 24 May 1989, 1989 WL 649997; *Grice v Stourport Tennis, Hockey and Squash Club* [1997] CLY 3859 (CA); *Robertson v Ridley* [1989] 1 WLR 872 (CA) (allegations that secretary and chairman negligent); *White v Blackmore* [1972] 2 QB 651 (CA) (occurred during charity fundraising event; status of the jalopy club officers is unclear, but third defendant sued as representative of the Gloucester Branch of the Royal Air Forces Association was a volunteer); *Miller v Jackson* [1977] QB 966 (CA).

[135] *Cattley v St John Ambulance Brigade* (QB 25 November 1988); *Murphy v Zoological Society of London* The Times, 14 November 1962 (QB); *Petrou v Bertoncello* [2012] EWHC 2286 (QB); *Bowen v The National Trust* [2011] EWHC 1992 (QB); *Waters v Maguire* [1999] Lloyd's Rep PN 855 (QB); *Shelbourne v Cancer Research* [2019] EWHC 842 (QB), [2019] PIQR P16 (employees acting in a second capacity as volunteers); *Watson v The Richmond Fellowship* [2019] EWHC 2554 (Ch), (point raised on appeal that one volunteer's negligence led to another volunteer's death). Whilst *Prole v Allen* [1950] 1 All ER 476 (Assizes) has been used as an authority on volunteer duties the volunteer status of the club steward is unclear. *Uctokos v Mazzetta* [1956] 1 Lloyd's Rep 209, whilst referring to 'volunteer' is not such as case, since the individual was to be subsequently rewarded by accommodation, there was also no VSO.

[136] *Bolton v Stone* [1951] AC 850 (HL).

[137] eg Civil Justice Statistics Quarterly, England and Wales, January to March 2019 (MoJ 2019): 4439 QBD proceedings were started in 2018; 1940 were PI actions. c530,000 County Court claims were started per quarter in 2018, most of these were money (debt) claims, but c65,000 were non-money claims (excluding possession and recovery claims).

[138] eg *Craddock v Farrer, and the Scout Association* (Preston CC, 17 Nov 2000); *Morrison v The Scout Association* (Newtownards CC, 6 Nov 2002); *C (A Child) v Scout Association* (Pontefract CC, 15 March 2001) [2001] 6 QR 15.

[139] CPR Part 52, PD52A.

These numbers must be understood in the context of civil litigation. Few cases reach trial. Indeed the Civil Procedure Rules are designed to encourage earlier resolution of disputes. A survey conducted as part of Jackson LJ's review into civil litigation costs, showed that 0.2% of cases went to trial. Most settled before issue (84% CFA cases/79.3% non-CFA cases), the others settled between issue and trial.[140] Even fewer cases are appealed. Thus any cases available to legal scholars are the tip of the voluntary sector negligence litigation iceberg.

That claims against VSOs alleging volunteer negligence are widely settled is noted by the Central Council for Physical Recreation (CCPR), which states: 'litigation, even when dismissed, places increased strains upon an already fragile voluntary system and many organisations choose to make settlements rather than face the additional costs of pursuing cases through the courts, even when innocent of wrong-doing'.[141]

Thus it is safe to assume that the voluntary sector negligence litigation evidenced by the available court decisions, particularly given that most cases do not reach trial, is of significantly greater scale than the 18 available higher court authorities. This combined with other evidence demonstrates that such litigation is a real phenomenon. Where such litigation has occurred the limited case studies available appear to show a significant impact on volunteers. One VSO targeted by a failed claim stated 'the volunteers involved found the whole experience very difficult and have not volunteered for us since'.[142]

Are Volunteers Sued?

Volunteers are potentially exposed to negligence claims in a personal capacity. Whilst many will be men of straw others may be viable defendants. Generally men of straw are not sued. Although the author was once instructed as counsel by an insurance company to pursue a claim against an impecunious, uninsured, and unemployed driver at trial (the individual was ordered to pay judgment at a small monthly rate), this is the exception, not the rule.

[140] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (MoJ 2009) 18
[141] Gaskin, *Getting a Grip* (n121) 12; for another example of settlement see Katharine Gaskin, *Risk Toolkit* (Volunteering England) 5
[142] Katherine Gaskin, *On the Safe Side Risk, Risk Management and Volunteering* (Volunteering England 2006) 28.

Commenting on volunteers in an Australian emergency volunteering context Eburn states that: 'volunteers don't get sued. They don't get sued because the only remedy in a civil case is money and no-one sues a defendant who doesn't have money… If a volunteer is alleged to have been negligent the lawyers are going to sue the agency because any other route is a pointless waste of everyone's time, effort and money.'[143]

However, even if this describes the Australian position, it is not borne out by the English experience, and ignores the possibility that not all volunteers are men of straw. For instance, the claimant in *Chaudhry v Prabhakar*[144] deemed the individual altruist a viable defendant. Where a volunteer commits a tort, and is not judgment-proof, it is prudent to bring claims against both the volunteer and the VSO unless one is certain that the VSO will be liable for the volunteer's tort, and also has sufficient assets or insurance to meet the judgment. Bringing a claim against a tortfeasing volunteer alongside their VSO makes more sense than suing an employee tortfeasor alongside their employer, since unlike employees there may be questions over the sufficiency of the relationships to trigger vicarious liability.

Suing a volunteer alongside their VSO can be a good litigation strategy to put pressure on the VSO. It will be more difficult for VSOs to dispute vicarious liability or a direct duty of care if their volunteers may otherwise be personally liable, whereas it is easier to plead the absence of such liability if volunteers are not sued.

Suing both the volunteer and the VSO may also be used as a device by claimants to potentially split their interests – for instance the volunteer may wish vicarious liability to be established, or to exonerate themselves by blaming a systemic problem, whereas the VSO may wish to avoid this. This may mean that they need separate representation. This is problematic since the VSO may require the volunteer's co-operation if it wishes to successfully defend itself. In turn this will put pressure on the VSO and its insurers to underwrite the volunteer's costs. Suing the volunteer may also pressurise the VSO to settle the case, and/or underwrite the volunteer's costs since volunteer personal liability may harm the VSO's relationships with its volunteers, and lead to recruitment and retention problems.

[143] Michael Eburn, 'Vicarious liability for volunteers' (23 April 2018) <https://emergencylaw.wordpress.com/2018/04/23/vicarious-liability-for-volunteers/> accessed 18 September 2020.
[144] [1989] 1 WLR 29 (CA).

That claims are brought against volunteers in negligence, and not just against their VSOs is evidenced by a number of decisions. In *Vowles v Evans*[145] the volunteer referee was sued in a personal capacity, alongside the governing body for Welsh rugby. In addition representative proceedings were brought against officers of the Welsh Districts Rugby Union, and the Llanharan Rugby Football Club. It is important to note that the referee was targeted personally, and not through representative proceedings. In *Murphy v Zoological Society of London*[146] a scout was killed after managing to get inside a zoo's lion enclosure. The claim was brought against ZSL and the Boy Scouts' Association. ZSL also joined the volunteer scoutmaster and the cub-mistress to the action in a personal capacity, possibly due to potential vicarious liability issues – although in this case the volunteers were held not to be negligent. In *Petrou v Bertoncello*[147] a hang-gliding accident occurred at an unincorporated association gliding club. The club's Chairman and the safety officer, both volunteers, were sued both in their individual capacities (that is personally) and through what the court termed the 'organisational claim' that is as representatives of the club members excluding the claimant. The court refused to strike out either the individual or organisational claims.

In *Smoldon v Whitworth*[148] the claimant claimed damages against a member of the opposing team (which was unsuccessful), and against the volunteer referee, who was held to be negligent. Whilst the referee was a member of the Staffordshire Rugby Union Referees' Society, the claim was brought against the referee in a personal capacity, and no claim was brought against the VSO or representative members. Likewise in *Waters v Maguire*[149] the negligence claim was brought against the Free Representation Unit volunteer in a personal capacity, and not against any other defendant.

That individuals may be considered viable defendants in a voluntary sector context is further supported by cases where injured volunteers have sued sporting participants,[150] event organisers,[151] and in the case of one altruist the elderly couple he was assisting.[152]

[145] *Vowles* (n134).
[146] *Murphy* (n135).
[147] *Petrou* (n135).
[148] *Smoldon* (n134).
[149] *Waters* (n135).
[150] *McMahon v Dear* [2014] CSOH 100.
[151] *O'Dowd v Fraser-Nash* [1947-51] CLY 6778 (KB).
[152] *McElhatton v McFarland* [2012] NIQB 114.

Further evidence that volunteers are sued is available from data concerning the Cadet Forces. In the period 2016-April 2020 inclusive there have been 68 claims brought by cadets against the Ministry of Defence (MoD) for personal injuries; 50 of these concerned alleged Cadet Forces Adult Volunteer (CFAV) negligence. Whilst there will be few defendants with the MoD's financial resources, nevertheless in 5 or fewer of claims a CFAV was listed as a co-defendant alongside the MoD – representing 10% of such claims. The MoD does not store data on claims brought against volunteers personally in which the MoD is not listed as a defendant.[153]

With unincorporated association VSOs since they are not legal persons claims are typically brought against individuals as representative proceedings. Many classic tort cases involve such claims against officers of unincorporated association VSOs. For example in both *Bolton v Stone*[154] and *Miller v Jackson*[155] where both negligence and nuisance were alleged on the part of club officers, the defendant volunteer officials were sued as representing the clubs. Such claims typically relate to the negligence of volunteer officers, or vicarious liability for the VSO's employees, or occupier's liability.[156] In these representative proceedings the real target is typically the VSO's assets and insurance, but officers and members may also be exposed to paying since some VSOs will have insufficient assets or insurance to cover judgment.[157] That enforcement may take place against individual members personally is demonstrated by *Howells v Dominion Insurance Co Ltd*[158] whereby after insufficient funds were injected into the club's funds, judgment was enforced against 32 club members individually, and not just the committee members who were named in the proceedings.

That individuals may be pursued is again demonstrated by the fact that not all claims are brought against club officials as representative defendants, but instead are sometimes brought against them personally.[159]

[153] Email from Directorate of Judicial Engagement Policy Common Law and Claims Policy, MoD, to author (13 August 2020).
[154] *Bolton* (n136).
[155] *Miller* (n134).
[156] eg *Robertson* (n134); *White* (n134); *Grice* (n134); *The Hibernian Dance Club v Murray* [1997] PIQR P46 (CA); *Owen v Northampton BC* (1992) 156 LG Rev 23 (contribution and indemnification); *Prole* (n135).
[157] Stewart, Campbell, and Baughen (n42) 224, [9.77].
[158] [2005] EWHC 552 (Admin).
[159] eg *Taylor v Quigley* [2016] CSOH 178; *Brown v Lewis* (1896) 12 TLR 455 (QB) (claim brought against committee members as representing the club, but subsequently amended and members held personally liable instead).

Whilst VSOs are the primary target of voluntary sector negligence litigation, there is sufficient evidence to demonstrate that volunteers have been sued, both alongside their VSO, and also as the sole defendant. Further, there are good tactical reasons for claimants to consider suing volunteers personally alongside claims against their VSO. Finally with unincorporated associations, even where the real target is the VSO, volunteers may still find themselves shouldering the burdens of a judgment.

Concerns & Impact on the Sector?

This is not the place to discuss the voluminous literature on whether England is in the grip of a compensation culture.[160] Such debates will not be solved by examining claims statistics, since culture does not just affect the propensity to sue, but also affects the way in which the spectre of liability changes people's behaviour. We also must be more specific and concern ourselves only with the voluntary sector. For instance a claims culture in road traffic accidents is not necessarily representative of the voluntary sector's experience.

There is evidence of sector concerns in relation to tort litigation, and consequent adjustments to VSO practice. These are also dealt with in later chapters, but it is necessary to deal with background material now. Whereas the litigation exposure of ordinary (non-trustee) volunteers is invariably limited to claims in tort, trustees will also be exposed to a wider range of potential claims including fiduciary duties, and contractual liabilities.

Risk awareness has increased within the sector.[161] The perception within the sector is that there has been an increase in negligence litigation against volunteers for personal injuries, particularly in sports and outdoor recreation contexts, and that this is reducing the willingness of individuals to volunteer.[162] This must be set in the context of the public's increased expectations of VSO performance standards, reduced risk tolerance, and increased demands for VSO public accountability.[163]

[160] See Chapter 7. Much of the evidence pre-dates the Compensation Act 2006 and SARAH, but there is no evidence that they have made any difference. These statutes are widely acknowledged to have done nothing.
[161] Gaskin, *On the Safe Side Risk* (n142); Alex Blyth, 'Occupational Hazards' *Third Sector* (London, 27 July 2005); Gracia McGrath, 'Are Legal Concerns Affecting Volunteer Numbers?' *Third Sector* (London, 17 August 2005).
[162] Gaskin, *Getting a Grip* (n121) 1.
[163] ibid 10.

Research conducted on behalf of the Cabinet Office showed that 47% of non-volunteers who wished to volunteer considered that fears as to risk and liability were a barrier to their volunteering; 13% of regular volunteers had worried about risk or liabilities, and 2% had considered ending their volunteering as a result.[164] Parliamentary evidence has shown that in the context of perceptions of a compensation culture within accident litigation 5% of volunteers have considered ceasing volunteering due to litigation fears,[165] nearly 20% of VSOs have lost volunteers due to litigation fears and 25% of VSOs have found potential volunteers deterred by litigation fears.[166]

Research carried out for Volunteering England showed that 39.6% of VSOs reported that risk and liability had recently become of increasing concern for volunteer trustees, whereas 61.9% of VSOs reported that risk and liability had recently become of increasing concern to non-trustee volunteers. For the latter group 75% of sport and play VSOs reported such concerns, whereas it was lower for statutory bodies, at 53%.[167] 52% of VSOs reported that non-trustee volunteers and 31% of VSOs reported that trustees have expressed concerns in relation to liability risks, and 12% of VSOs had lost volunteer trustees, and 17% had lost non-trustee volunteers due to liability fears.[168] A large scale survey of existing volunteers found that 27% were worried about risks and liability, 6% had considered stopping volunteering because of this, and 27% of volunteers had enquired into their VSO's insurance cover for accidents.[169] Research conducted by the Scout Association found that 50% of their existing volunteers considered that fears of being sued for compensation affected their own or their peer's retention. Evidence to Parliament demonstrates that volunteers fear that accidents are being exploited and they are concerned about the human impacts of such litigation on themselves within their communities.[170]

The Volunteering England study also evidenced that such fears impacted on volunteer recruitment; 22% of VSOs report that liability risks have deterred individuals from volunteering with them in non-trustee roles, and 8% report that these risks have deterred

[164] Low (n101) 8, 52.
[165] Constitutional Affairs Committee, *Compensation Culture* (HC 2005-6, 754-1) [42]-[43]; HC Deb 8 June 2006, col 469, (Julian Brazier MP).
[166] HC Deb 8 June 2006, col 419, (Bridget Prentice MP).
[167] Gaskin, *Reasonable Care?* (n126) 10.
[168] ibid 20.
[169] Gaskin, *Reasonable Care?*(n126) 22.
[170] Constitutional Affairs Committee, Minutes of Evidence Session 2005-06, Tuesday 10 January 2006 Q175-179.

individuals from volunteering as trustees. These fears are greater within sporting VSOs, with a third of such organisations reporting that liability fears have deterred potential volunteers.[171] Non-volunteers considered that liability concerns were a barrier to their volunteering, 15% stating that they were worried about the risks and being liable if anything went wrong.[172] This research is also reinforced by the Scout Association research which noted that 70% of Scouting volunteers stated that liability fears impacted on volunteer recruitment.[173] It must be noted that this is merely one of a number of factors that has led to the withdrawal of volunteers, or a failure to volunteer. Lack of time and resources remain the primary factors.[174]

Further evidence of volunteer fears is available from the comments of leading voluntary sector figures. The Deputy Chief Executive of Volunteering England reported that he was aware of cases where potential volunteers were put off by concerns about being sued; the Chief Executive of the Marine Society and Sea Cadets also stated that it was 'certainly true' that the fear of being sued put people off volunteering. The Chair of the CCPR reported that accident liability concerns and litigation fears made it harder for some of their member organisations to recruit volunteers.[175] Volunteers have also made similar statements, through letters to MPs, which have been mentioned in Parliamentary proceedings.[176] Detailed case studies conducted into risk management within a number of VSOs also reveals that liability has become of concern to volunteers; for instance, the Cambridge and District Volunteer Centre attributed a decline in volunteering to fears of 'personal liabilities if anything goes wrong – even if this is unlikely, the "worst case scenario" puts people off'.[177] Sports England notes an 'increasing tendency' to bring actions in negligence against individuals or organisations, and an increasing risk adversity in relation to sporting injuries, and increasing risk aversion and fear of litigation amongst sports volunteers.[178] The CCPR reported that fears of litigation were 'a principal disincentive to volunteers'.[179] Whilst these examples are not necessarily representative of the whole sector, indeed some actors in the sector have

[171] Gaskin, *Reasonable Care?* (n126) 20.
[172] ibid 23.
[173] Constitutional Affairs Committee (n170)
[174] Gaskin, *Reasonable Care?* (n126) 45.
[175] Plummer (n120); 'Opinion: Hot issue - Are legal concerns affecting volunteer numbers?' *Third Sector* (London, 17 August 2015).
[176] HC Deb, 16 July 2004, col 1660, (Julian Lewis MP).
[177] Gaskin, *Cautionary Tales* (n131).
[178] Sport England, 'Sport Volunteering in England in 2002' (Sport England 2003) [74]
[179] Gaskin, *Getting a Grip* (n121) 12.

stated that they are not aware of any such concerns,[180] when combined with the available survey data these comments illustrate significant levels of volunteer concerns.

Empirical research and Parliamentary evidence reveals considerable fears within the sector towards negligence litigation. However, we must be careful of relying solely on the sector's perceptions as evidence of a problem since it is possible that voluntary sector participants are not influenced by negligence litigation itself, but rather by its media reporting, combined with the availability heuristic (see Chapter 7). In one survey one VSO reported: 'our volunteers are afraid that they may be liable for the work they carried out and many can now cite cases which resonate with their work where negligence of liability [sic] has been established',[181] another stated that in their opinion the belief amongst volunteers that there is growing litigation against volunteers was fuelled by the media.[182]

We know that volunteers have been sued for negligence, and we know that there is considerable evidence of fear within the sector of such litigation, but on the available data it is not possible to compare risk levels between sectors. The evidence suggests that 1% of volunteers have been involved in negligence litigation. However, volunteering is most often a spare time activity. Without knowing the amount of time volunteered per year, and the total length that these volunteers have volunteered for, the litigation risks (per volunteering hour) cannot be calculated and compared with other activities and occupations. Indeed such data is unavailable for other activities and professions too.

Nevertheless, even if the sector's fears are misplaced it is <u>still</u> important to examine the position of the sector in negligence. It is possible to find works dedicated to the negligence of accountants, solicitors, construction workers, doctors, and education professionals, amongst others. Despite the scale, importance, and distinctiveness of the voluntary sector, the question of volunteer negligence has been ignored. It is time to address this. Further, even if volunteers are not being sued in large numbers, or even if there were few volunteer or potential volunteer liability concerns, the issue of volunteer protection would still be a live one, since it might be the right thing to do, and the best fit with tort policy. Additionally, the

[180] For instance the Chief Executive of Chance UK, and a District Commissioner from the Scout Association 'Opinion: Hot issue' (n175). The latter is contradicted by the Scout Association's own subsequent research.
[181] Gaskin, *Reasonable Care?* (n126) 13.
[182] ibid 13.

sector operates differently to other sectors, and it may be appropriate to reflect these differences within negligence.

Conclusion

This chapter provides the necessary context for the argument contained in the rest of the thesis. It is important to note the scale and significance of the sector, not just in terms of the services that it delivers, but also its key role in a liberal democratic state. Promoting volunteering is not simply a matter of increasing volunteer services and relieving the state of burdens, it also helps to nourish and empower communities, and our democracy.

Voluntary sector negligence litigation and concerns are discussed, although this will be further examined in later chapters. The diversity of the sector must be taken into account in considering issues of liability. The policy justifications that point towards volunteer protection in one organisational context may not necessarily apply in another. It is also important to note that volunteers volunteer for a range of motives. This factor should be borne in mind when considering the methodology in Chapter 7, which seeks to ascertain the impact of volunteer protection, and VSO protection on volunteering levels.

Chapter 3

Liability of Volunteers

Introduction

Given the organisational requirement voluntary sector torts always involve (at least) three parties: victim, volunteer, and VSO. There are therefore two parts to voluntary sector negligence liability: volunteer liability, and VSO liability for their volunteers. These are dealt with in this chapter, and Chapter 4 respectively.

This chapter examines the liability of volunteers in negligence. Whilst there are few relevant authorities it appears that English common law does not offer special protection to volunteers in negligence; their status is not taken into account at either the duty of care, or the breach of duty stages of the tort. Given legislative interference with standards of care, the impact of this legislation needs to be examined since its drafting history demonstrates that it was partly motivated by voluntary sector liability concerns. Nevertheless, this chapter's analysis shows that these legislative reforms do not meaningfully change the law for volunteers, and do not protect volunteers.

Volunteer Liability

Whilst there are a small number of English higher court cases concerning volunteer negligence,[1] volunteer negligence has received minimal academic discussion[2] and the leading work on altruism in private law does not address the topic.[3]

To establish a negligence claim a claimant must show that the defendant breached a duty of care which the defendant owed to them, and that this breach caused actionable damage. To be in breach of a duty of care the defendant's conduct must fall below the standard of care which the duty of care imposes.

[1] See Chapter 2.
[2] A notable exception is Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 CLJ 651 (briefly notes variable standards of care for volunteers in other jurisdictions).
[3] Jeroen Kortmann, *Altruism in Private Law* (OUP 2005).

An altruist still owes a duty of care to his neighbour and must not breach the relevant standard of care imposed and cause damage to the other.[4] Nevertheless, it is not unreasonable to suggest that the nature of the parties may influence the claim.[5] Referring to a broad notion of 'Good Samaritans' including organised voluntary activities,[6] Goudkamp declares that 'the law treats Good Samaritans sympathetically so as not to discourage altruism. The courts are reluctant to hold them liable in negligence'.[7] However, the authorities used to support this statement[8] concern rescuers, and interveners in emergencies, not volunteers.

Duty of Care

Most negligence cases concern well-established duties of care, for instance the duty that a user of the highway owes to another user. In such cases the duty's existence is uncontroversial. It is only in novel cases, or where certain factors are present that may point away from the existence of a duty, that the issue needs to be discussed. The question is whether the fact that the defendant is a volunteer makes any difference to the duty of care stage of negligence.

Vowles v Evans[9] is the leading case on volunteer duties of care. The claimant was injured during the collapse of a rugby scrum that occurred during an amateur game, refereed by an amateur referee. The claimant brought actions against a range of defendants including the referee. Fortunately for the referee the Welsh RFU accepted that they would be vicariously liable for his tort, if any were committed.

[4] *Glanzer v Shepard* 233 NY 236, 135 NE 275, 23 ALR 1425 (Court of Appeals of New York) 239 (Justice Cardozo); *Cattley v St John Ambulance Brigade* (QB 25 November 1988); *The Scout Association v Barnes* [2010] EWCA Civ 1476; *Lygo v Newbold* (1854) 9 Ex 302, 156 ER 129 (Exc) 305 (Parke B); *Chaudhry v Prabhakar* [1989] 1 WLR 29 (CA) (duty conceded).
[5] See Richard Lewis, 'Humanity in Tort: Does Personality Affect Personal Injury Litigation?' (2018) 71 CLP 1.
[6] Lord Young, *Common Sense, Common Safety* (Cabinet Office 2010) 24.
[7] James Goudkamp, 'The Young Report: an Australian Perspective on the Latest Response to Britain's "Compensation Culture"' (2012) 28 PN 4, 18.
[8] Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (10th edn, Law Book Co/Thomson Reuters 2011) 136.
[9] [2003] EWCA Civ 318, [2003] 1 WLR 1607.

The Court of Appeal upheld the referee's liability. Lord Phillips MR confirmed that the availability of insurance was relevant to imposing the duty.[10] He also declared that as the referee's role is to enforce the game's rules, on which player safety depends, it would be fair, just, and reasonable for players to rely on the referee to do so. He declared that '[r]arely if ever does the law absolve from any obligation of care a person whose acts or omissions are manifestly capable of causing physical harm to others in a structured relationship into which they have entered'.[11]

This duty applies both to professionals and amateurs. Lord Phillips rejected the argument that holding amateur referees liable would mean that volunteers would no longer be prepared to act as referees.[12] This was because the liability in *Vowles* resulted from the referee failing to uphold a rule designed to protect players from the type of accident that occurred, and such failures and injuries were rare: '[w]e would not expect the much more remote risk of facing a claim in negligence to discourage those who take their pleasure in the game by acting as referees.'[13] The court looked only at the probability of facing a claim. However, the claim's value and its consequences might also factor into a volunteer's decision.[14] Not all volunteers will have a well-funded, or insured, entity such as the Welsh RFU willing to accept vicarious liability for their wrongdoing. When dealing with volunteers there is a complex balance of interests between victim, volunteer, and VSO.

Consideration in other cases of the issue of volunteer duties has been limited. In *Petrou v Bertoncello*[15] the volunteer safety officer and the chairman of a club were sued. In rejecting the strike out application the court implicitly accepted the claimant's submissions which relied on *Jones v Northampton BC*,[16] *Prole v Allen*,[17] and *Fowles v Bedfordshire County Council*,[18] that it was 'well-established' that a volunteer can owe a duty of care. However, in the first two cases the effect of the defendants' volunteer status on liability was not argued. In *Fowles* the youth worker was an employee[19], and so it cannot be used as an authority on

[10] At [12].
[11] At [25].
[12] At [49].
[13] ibid.
[14] See Chapter 7.
[15] [2012] EWHC 2286 (QB).
[16] Times 21 May 1990 (CA).
[17] [1950] 1 All ER 476.
[18] [1995] PIQR P380 (CA).
[19] As noted by Millett LJ at 390.

volunteers. Despite the court in *Petrou* being aware of the *Vowles* litigation, citing the lower High Court decision as an authority on unincorporated associations, the case was not referred to in relation to volunteer duties of care. However, *Petrou* is not the only English case to presuppose such duties.[20] Further, authorities from other common law jurisdictions have also assumed with little discussion that volunteers may owe duties of care.[21]

The third limb of the *Caparo Industries Plc v Dickman*[22] approach for establishing a duty of care (foreseeability, proximity, and fair, just and reasonable) can be used to restrict duties of care on policy grounds.[23] According to this approach where one of these factors is not met, (i.e. it is not fair, just, and reasonable to impose a duty), a duty is not imposed. In *Barrett v Enfield LBC*,[24] Lord Browne-Wilkinson, stated that 'fair, just and reasonable…. depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action'.[25] The appellant in *Vowles* unsuccessfully attempted to rely on this third limb to argue that the referee owed no duty of care. Such arguments may be made on the grounds that promoting volunteering necessitates such protection, due to volunteering's value to society,[26] or that volunteering should not be rewarded with liability.

However, attempts to use *Caparo* to restrict duties of care for classes of actors where ordinarily such a duty will be present is unlikely to be sustained post *Robinson v Chief Constable of West Yorkshire*.[27] Lord Reed, giving the majority judgment, denied that there is a *Caparo* 'test' applying to all negligence claims. He also denied that a court will only impose a duty of care where it is fair, just, and reasonable to do so. Instead like cases should be treated alike, and duties should be established by analogy to established categories.[28] Given that justice and reasonableness already factor into the existing categories, it would be 'unnecessary and inappropriate' to consider these, save that they may be occasionally

[20] See for the example the cases discussed below, and in Chapter 2.
[21] *Duncan v Trustees of The Roman Catholic Church for The Archdiocese of Canberra and Goulburn* [1998] ACTSC 109; *Hrybynyuk v Mazur* [2004] NSWCA 374.
[22] [1990] 2 AC 605 (HL).
[23] See Michael Jones, Anthony Dugdale, and Mark Simpson (eds), *Clerk & Lindsell on Torts* (22nd edn, Sweet and Maxwell 2017) [8-16]–[8-29]; Christopher Walton and others (eds), *Charlesworth & Percy on Negligence* (14th edn, Sweet and Maxwell 2018) [2-42]-[2-51].
[24] [2001] 2 AC 550 (HL).
[25] At 559.
[26] Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009) 78, [3.86].
[27] [2018] UKSC 4, [2018] 2 WLR 595.
[28] At [21].

invoked to invite a court 'to depart from an established line of authority'.[29] However, he stressed that this would be rare[30] and that *Caparo* should normally only apply in 'novel' cases, where the courts need to go beyond established principles.[31] Lord Reed's approach was confirmed and applied by the Supreme Court in *Darnley v Croydon Health Services NHS Trust*.[32]

It is unlikely that post *Robinson* a volunteer's involvement will be sufficiently novel to invite a consideration of the fairness, justice, and reasonableness of imposing a duty, where any other actor would have a duty. *Robinson* concerned police liability, and Lord Reed was keen to state the importance of coherence and the equal application of tort to both private and public bodies,[33] and to stress that on the facts there was no need to consider fairness, justice, and reasonableness. Following *Robinson*, for example the fact that a driver is a volunteer is not enough to open the question of whether they owe a duty of care to other road users, since this duty is well established and applies to all other road users.

Since liability presupposes a duty, a denial of the existence of a duty of care for a volunteer on the basis of their volunteer status, where others would owe such a duty, would provide powerful protection to volunteers. A volunteer would be able to act in an irresponsible and reckless fashion, disregarding the health and wellbeing of others, yet be immune from liability in negligence, leaving the victim to foot the bill, no matter how grossly negligent the volunteer. It would remove any deterrent feature of tort operating on volunteers, and for the reasons advanced in Chapters 7-8 the volunteer protection scheme proposed by this thesis instead retains some tort deterrence at the level of the individual volunteer.

In many cases the victims of volunteer wrongs may have legitimate claims. In emergencies there is no immunity, a duty of care is present where a rescuer intervenes, but the applicable standard of care takes into account the emergency situation.[34] If we are willing to impose a duty of care on Good Samaritan rescuers risking their lives in emergencies, it would be odd to exclude such a duty for volunteers who have greater opportunities to reduce the risks

[29] At [26].
[30] Confirming *Perrett v Collins* [1999] PNLR 77 (CA) 90–91 (Hobhouse LJ).
[31] At [26]-[27]; see also *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021 [22]-[23] (Lord Lloyd-Jones).
[32] [2018] UKSC 50, [2018] 3 WLR 1153 [15] (Lord Lloyd-Jones).
[33] At [32]-[34].
[34] Law Reform Commission, *Volunteers* (n26) 61, [3.38].

inherent in their activities, and to implement in advance measures to protect their potential victims.

If volunteer status negated duties of care both volunteers and VSOs would be protected, albeit at the expense of victims. Given that there would be no volunteer tort, the VSO for which the volunteer works cannot be vicariously liable for their agent's wrongs. In many circumstances the victim will be injured in situations where vicarious liability would be present, but where the direct duty itself owed by the organisation, or with unincorporated association VSOs another member, to the victim has not been breached. The existence of VSOs, with potential vicarious liability, which are likely to be in a better position to bear the loss than the victim or volunteer, and which are able to regulate the risk more effectively than an individual volunteer, and insure, is a factor that can be considered at the fair, just and reasonable stage in imposing a duty on volunteers.[35] However, this may lead to a distinction between volunteers working within more sophisticated VSOs, and volunteers working within informal groups which may have limited capacity to regulate risk or bear the loss. Nevertheless, to deny the existence of volunteer duties of care would deregulate the sector. This is why other approaches which ease the regulatory pressure but still retain it in order to control very poor practices are preferable (see Chapter 8).[36]

Standard of Care

We now need to examine whether in determining if a volunteer is in breach of their duty different standards of care apply to volunteers, when compared to other actors. This is an essential step in seeing how the sector is treated by the law of negligence.

Where tort discourages behaviour which is socially beneficial, its regulatory pressure can be adjusted. Historically, the common law did this by varying the standard of care for altruistic actors, as for instance in bailment.[37] However, the latter is an assumed duty towards a

[35] See generally Law Reform Commission, *Volunteers* (n26) 78-80, [3.87]-[3.95]; Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013); *Gwilliam v West Hertfordshire Hospitals NHS Trust* [2002] EWCA Civ 1041, [2003] QB 443; cf Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 MLR 384.
[36] Nolan (n2) 654, 680.
[37] *Coggs v Bernard* (1703) 2 Lord Raymond 909, 92 ER 107 (KB); cf *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 (CA).

particular party, and whilst some duties of care in negligence are assumed towards another,[38] for instance the duty of care assumed by a pro bono lawyer to his client, others arise simply as a result of an individual engaging in an activity, and are owed to all.

Variable standards have now fallen out of favour.[39] Within English negligence law the courts do not usually recognise different levels of negligence,[40] or variable standards of care. The standard of care is set by objective reasonableness[41] (and superior knowledge or expertise is not taken into account),[42] or where the defendant purports to perform actions which require a special skill the standard is measured by the ordinary skilled person exercising or purporting to have that special skill.[43] The justifications which have been given for the objective standard include: 1) costliness and problems in measuring personal standards, 2) providing incentives for actors to improve abilities, increase resources, and/or take steps to prevent their lack of competence from causing harm, 3) striking the necessary balance between freedom of action, and security of person and property,[44] and 4) certainty and predictability.[45] The objective standard relates to the activity undertaken, and not the nature of the actor,[46] or their features.[47] Attempts to introduce lower standards of care for public bodies engaged in public functions have failed.[48] Such distinctions may be appropriate where liability is based on moral blameworthiness, but, the English law of negligence has moved away from such notions.[49]

However, in *Wooldridge v Sumner*[50] Diplock LJ noted that the standard of care is dependent on the conditions under which the decision has to be taken.[51] Negligence, whilst objective,

[38] See *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL); *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 AC 145 (HL).
[39] Nolan (n2) 675.
[40] *Armitage v Nurse* [1998] Ch 241 (CA) 254 (Millett LJ); cf Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (OUP 2003).
[41] *Blyth v Birmingham Waterworks* (1856) 11 Ex 781 (Exc); *Glasgow Corp v Muir* [1943] AC 448 (HL).
[42] *Cowan v Blackwill Motor Caravan Conversions* [1978] RTR 421 (CA).
[43] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB).
[44] Peter Cane, *Responsibility in Law and Morality* (Hart 2000) 73-4.
[45] *Nettleship v Weston* [1971] 2 QB 691 (CA).
[46] *Wilsher v Essex AHA* [1987] QB 730 (CA); Jones (n23) [8-152].
[47] *Glasgow Corp* (n41) 457 (Lord MacMillan).
[48] Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com CP No.187) [3.75].
[49] James Goudkamp, 'The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence' (2004) 28 MelbULRev 343; Tony Honoré, 'Responsibility and Luck: the Moral Basis of Strict Liability' (1988) 104 LQR 530.
[50] [1963] 2 QB 43 (CA).
[51] At 67.

also takes into account certain features of the individual. The question is whether voluntary sector conditions, volunteer status, or features typically associated with volunteers alter the standard of care.

The objective nature of the duty generally does not take into account inexperience; a learner driver and an experienced driver owe the same standard of care.[52] However, there have been some minor inroads into the objective standard of care – for instance in the case of children, where it is moderated for the defendant's age,[53] although this might not be the case where the child engages in adult activities.[54] Kidner[55] considers this the only inroad into the principle stated by Mustill LJ in *Wilsher v Essex AHA*[56] that the 'notion of a duty tailored to the actor, rather than to the act which he elects to perform, has no place in the law of tort'.[57]

In *Condon v Basi*[58] the Court of Appeal held that the objective standard of care applicable to an amateur football player takes into account the game's level, and a higher standard of care is expected from players in a first division match than a local league match.[59] However, the standard depends on the level of the game played, not amateur status; there appears to be no distinction between players in the same match where some are paid, and others are unpaid. *Wells v Cooper*[60] is sometimes used to demonstrate that standards of care differ between amateurs and professionals.[61] However, this is to misread *Wells*, and conflate the duties in contract, and tort. The defendant was an experienced amateur carpenter who carried out DIY work on his own house. The claimant was injured due to the defendant's failure to use door handle screws of sufficient length. Jenkins LJ considered that the standard of care applicable was that which the:

'reasonably competent carpenter might be expected to apply to the work….. This does not mean that the degree of care and skill required is to be measured by reference to the contractual obligations as to the quality of his work assumed by a professional carpenter

[52] *Nettleship* (n45).
[53] *Mullin v Richards* [1998] 1 WLR 1304 (CA).
[54] Law Reform Commission, *Report on the Liability in Tort of Minors* (LRC 17-1985) 13-26; *Tucker v Tucker* [1956] SASR 297 (SC).
[55] Richard Kidner, 'The Variable Standard of Care, Contributory Negligence and Volenti' (1991) 11 LS 1, 8-9.
[56] *Wilsher* (n46); overturned on a different issue ([1988] AC 1074 (HL)).
[57] At 750.
[58] [1985] 1 WLR 866 (CA).
[59] At 868 (Sir John Donaldson MR).
[60] [1958] 2 QB 265 (CA).
[61] Mark Lunney, Donal Nolan, and Ken Oliphant, *Tort Law* (6th edn, OUP 2017) 201.

working for reward, which would, in our view, set the standard too high. The question is simply what steps would a reasonably competent carpenter wishing to fix a handle such as this securely to a door such as this have taken with a view to achieving that object.'[62]

The argument that this case establishes a differential standard in tort for paid actors and unpaid actors is incorrect, since Jenkins LJ took care to state that the standards assumed under contract, and the standard in tort are not necessarily the same.[63] Further, the standard expected of an amateur depends not on their status, but rather on the nature of the work undertaken; as stated by the Court of Appeal in *Moon v Garrett*[64] where extensive building works are carried out the amateur owes a similar duty to a professional.

In *Chaudhry v Prabhakar*[65] a gratuitous agent was held to the standard of that reasonably expected in all the circumstances, and whether or not an agent is paid was considered relevant. However, for Stuart-Smith LJ payment would make the relationship contractual, and subject to express and implied terms, whereas for unpaid agents the duty is in tort.[66] Again this case distinguishes between duties in tort and contract, and not between duties in tort. As with bailment *Chaudhry* is also a case of assumed duty.

Given that many volunteers deal with vulnerable groups, the known vulnerability of the potential victims may increase what is required to discharge their duty of reasonable care.[67]

However, there are some suggestions that the gratuitous nature of services may factor into the standard of care owed: for instance in *Harris v Perry*[68] and *Pratt v Patrick*[69] the standard of care applied was the 'ordinary care which is due from a person who undertakes the carriage of another gratuitously'.[70] Further in *Tomlinson v Congleton BC,*[71] Lord Hoffmann stated that assessing the level of care required includes considering 'the social value of the activity

[62] At 271.
[63] At 274.
[64] [2006] EWCA Civ 1121, [2006] CP Rep 46.
[65] *Chaudhry* (n4).
[66] At 33-4.
[67] Jones (n23) [8-167]; *Haley v London Electricity Board* [1965] AC 778 (HL).
[68] [1903] 2 KB 219 (CA).
[69] [1924] 1 KB 488 (KB).
[70] *Harris* (n68) 226 (Collins MR).
[71] [2003] UKHL 47, [2004] 1 AC 46.

which gives rise to the risk'.[72] Therefore volunteering's social value (see Chapter 2) can be legitimately considered in determining the standard of care applicable. Further in a limited range of cases, involving occupier's duties to trespassers,[73] and occupier's duties to neighbours in the context of natural disasters, there are judicial statements that the defendant's resources and abilities may be considered,[74] which suggests that there may be situations where volunteers for a poorly funded or informal VSO may be held to a lower standard of care. However, the judgments are careful to limit this rule to these particular contexts, with emphasis being placed on the hazard or relationship being 'thrust' upon the occupier. Judges have refused to apply this approach outside these contexts, and have declined to consider the limited assets of a non-profit in determining the standard of care.[75]

Humphrey v Aegis Defence Services Ltd[76] suggests that it is arguable that lower standards might be applicable to volunteers. The Court of Appeal held that in determining the nature and scope of the duty of care owed they could consider the scarcity of Iraqis willing to act as (paid) interpreters and the importance of their role. By analogy a lower standard of care may be applicable where workers are in short supply and volunteers are necessary to deliver essential services, or where there are problems in recruiting volunteers. Following austerity volunteers are now delivering some formerly state delivered services (Chapter 2). Further, volunteering rates are declining, and there are well-documented problems in recruiting volunteers for both non-trustee and trustee roles.[77] There is a greater demand for volunteers than available supply, meaning that volunteers can be selective as to which VSOs receive their time.[78] Within English VSOs 72% want to involve more volunteers, but 59% have experienced problems recruiting sufficient volunteers, and 57% have experienced problems recruiting volunteers with the required skills. However, this shortfall is not felt evenly across

[72] At [34]; note also Compensation Act 2006, s 1; SARAH, s 2.
[73] *British Railways Board v Herrington* [1972] AC 877 (HL) 898-9 (Lord Reid (Obiter)).
[74] *Goldman v Hargrave* [1967] 1 AC 645 (PC) 663 (Lord Wilberforce); *Leakey v National Trust* [1980] QB 485 (CA) 526 (Megaw LJ).
[75] *PQ v Australian Red Cross Society* [1992] 1 VR 19 (SC); cf *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL) 96 (Lord Thankerton).
[76] [2016] EWCA Civ 11, [2017] 1 WLR 2937.
[77] eg Katharine Gaskin, *Reasonable Care? Risk, Risk Management and Volunteering in England* (IVR 2005); Natalie Low, et al, *Helping Out: a National Survey of Volunteering and Charitable Giving* (Cabinet Office 2007).
[78] Linda Hartenian, 'A Typology of Short-Term and Long-Term Volunteers' ch 3 in In Matthew Liao-Troth (ed), *Challenges in Volunteer Management* (IAP 2008) 54; Mark Hager and Jeffrey Brudney 'Problems Recruiting Volunteers Nature versus Nurture' (2011) 22 Nonprofit Management and Leadership 137, 141

the sector. Sports and recreation VSOs reported the most difficulties with recruitment.[79] VSOs serving intravenous drug users and those with chronic illnesses may also have particular problems in recruiting sufficient volunteers.[80] On the other hand 29% of VSOs felt that they had as many volunteers as they needed.[81] Thus if volunteer recruitment difficulties were a relevant factor within negligence, the duty/standard expected of volunteers would vary between VSO. Given that volunteer shortages are not uniform; in setting the differential standard evidence on recruitment would need to be collected, analysed, and compared with the wider sector. This would increase the cost of litigation and potentially involve the courts in complicated and unpredictable adjudication.

However, *Humphrey* is distinguishable by the uniqueness of the situation: finding interpreters willing to run life-threatening hazards by working for Western private security contractors in Iraq was extremely difficult. It is unlikely that problems in recruiting volunteers in a peaceful society will be treated similarly; volunteers are unlikely to face equivalent risks to their lives, or those of their families compared to the interpreters operating in the context of an armed conflict and insurgency.

Vowles did not deal with whether volunteers have the same standard of care to other actors. An example was given in argument of a volunteer called from amongst the spectators to act as a referee due to the referee's injury during the game. The court considered, obiter, that the level of skill required from the spectator might be lower than that required from one who holds himself out as a referee.[82] However, this does not determine the volunteer point, as the point of comparison, the qualified referee, was also a volunteer. The court considered that the standard of care may vary with the level of the referee, and the level of match, but volunteer status and remuneration were not mentioned as relevant factors.[83]

The only English case in which the standard of care for volunteers is expressly considered is *Cattley v St John's Ambulance Brigade*.[84]

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[79] Joanna Machin and Angela Paine, *Management Matters: a National Survey of Volunteer Management Capacity* (IVR 2008) [5.1]-[5.2]
[80] Jerry Marx 'Motivational Characteristics Associated with Health and Human Service Volunteers' (1999) 23 Administration in Social Work 51, 51-52; Laura Leviton, et al, 'Faith in Action: Capacity and sustainability of volunteer organizations' (2006) 29 Evaluation and Program Planning 201.
[81] Machin and Paine (n79).
[82] At [28].
[83] At [22].
[84] *Cattley* (n4).

In *Cattley* the claimant's injuries were made worse by St John Ambulance volunteer first aiders. The claim was brought against St John Ambulance, not the first aiders. At the time St John Ambulance provided free event first aid cover. This has now changed; whilst the first aiders remain volunteers, event cover is no longer provided free of charge. Judge Prosser QC held that the *Bolam* test, the ordinary test for professional negligence, applied in determining whether the volunteer or the organisation were negligent: 'the standards of the ordinary skilled first-aider exercising and professing to have that special skill of a first-aider'. He disagreed with the proposition that there should be an alteration of the standard of care to take into account the first aider's volunteer status, perhaps by imposing liability only where the volunteer has been grossly negligent, on the basis that this would be 'confusing' and 'unnecessary'. The standard is specific to first aiders, not volunteer first aiders.[85] Volunteer first aiders must attain the same standard of care as paid first aiders working for an events company.[86]

Volunteer status was noted in *Waters v Maguire*[87] where the defendant was a Free Representation Unit (FRU) volunteer who was also a junior barrister. FRU volunteers who provide pro-bono advice and advocacy come from a range of backgrounds, from law graduates to qualified lawyers. Whilst the case discussed whether the duty owed by a FRU volunteer to their client was a general one, applicable to all such volunteers, or was subjective taking into account their qualifications, Garland J expressing regret that liability needed to be considered decided to assume for the purposes of the strike out that the duty would be that of an ordinary junior barrister of ordinary competence. This was qualified by fact that there was no instructing solicitor. The court did not moderate the duty and standard for the defendant's volunteer status - it was the same for remunerated work. However, this assumption was obiter, since the judge held that the negligence allegations in this case were unsustainable.

[85] This position is also taken by Rachael Mulheron, *Medical Negligence* (Ashgate 2010) 206, and Gerwyn Griffiths, 'The Standard of Care Expected of a First-Aid Volunteer' (1990) 53 MLR 255; cf Gerwyn Griffiths, '*Cattley v St John Ambulance Brigade* Philanthropists or Unpaid Professionals?' (1990) 6 PN 48 (a shorter, earlier piece).

[86] Jones (n23) [8-156], incorrectly considers that *Cattley* introduces a differential standard of care for volunteers. This perhaps results from one sentence: 'Where I disagree with both counsel is in saying that because the Defendants do voluntary work, there should be a modification to the test.' The rest of the judgment makes it clear that Judge Prosser disagrees with counsel's proposition that a special standard of care applies to volunteers; note also Susan Moody, 'Policing the Voluntary Sector: Legal Issues and Volunteer Vetting' in Alison Dunn (ed), *The Voluntary Sector, The State and the Law* (Hart 2000) 43.

[87] [1999] Lloyd's Rep PN 855 (QB).

In *The Scout Association v Barnes*,[88] the Scout Association was held vicariously liable for volunteer negligence. The Scout leader's volunteer status did not seem to play any role in the case. Whilst the social value of Scouting was acknowledged, the focus was on whether the game of 'blocks in the dark' itself was dangerous and its social benefits. The approach taken appears to be the same as for paid childcare workers. However, voluntary status, and its potential impact on the standard of care, does not appear to have been argued. In *Horne v R.A.C. Motor Sports Association Limited*[89] volunteer race marshals were held to be negligent, but again their volunteer status does not appear to have been raised in argument or to have been considered in assessing liability.

In *Bowen v The National Trust*,[90] the issue was whether the National Trust's tree inspectors, one an employee and the other a volunteer, had properly inspected the tree. The standard of care utilised was the same for both the employee and the volunteer. However, it does not appear to have been argued that a different standard might apply, and both inspectors met the standard of care.

On the present, limited, authority it would appear that volunteer status does not affect the standard of care applicable. Even where a volunteer holds themselves out as a volunteer, and perhaps by implication as a person less experienced than a professional, this does not alter the standard of care, i.e. one cannot alter the ordinarily applicable standard by professing inexperience.[91] The standard applicable is determined by the post occupied and the task undertaken, and not by 'rank' or experience.[92] The circumstances of the case, such as an emergency situation, not the attributes of the individual, impact on the standard required.[93] For instance a volunteer paramedic would be required to meet the same standard as their paid colleagues, but a lower standard might be expected in an urgent situation, when compared to a decision made under less pressured circumstances.

[88] *Barnes* (n4).
[89] CA, 24 May 1989, 1989 WL 649997.
[90] [2011] EWHC 1992 (QB).
[91] Kidner (n55), 10-12; note treatment of *Philips v Whiteley* [1938] 1 All ER 566 (KB).
[92] *Wilsher* (n46). Whilst *Moy v Pettman Smith* [2005] UKHL 7, [2005] 1 WLR 581, [62] (Lord Carswell), [22] (Lord Hope), suggests that seniority and purported experience may be taken into account; in this case it defined the post occupied (senior junior barrister), and appeared to raise the standard as the defendant was an experienced senior junior.
[93] Kidner (n55) 16.

However, given this limited consideration of volunteer negligence it would be fair to say that the English jurisprudence on volunteers in negligence is limited and underdeveloped.

Statutory Reform

In determining how volunteers are treated by the tort of negligence we cannot simply examine the common law. There have been recent statutory reforms in England which at first glance may impact on the determination of volunteer liability in negligence. It is important to deal with their drafting history, since it demonstrates that they were enacted to help deal with, amongst other things, voluntary sector liability concerns. Furthermore, the scope of the changes introduced by the statutes is disputed, and thus they need to be analysed in detail to see what impact (if any) they have on volunteer liability.

Compensation Act 2006

The Compensation Act 2006 followed in the wake of the failure of the Promotion of Volunteering Bill,[94] a private member's bill which was introduced to deal with voluntary sector litigation fears. During the Parliamentary debates in relation to the latter concerns were expressed as to the impact of litigation fears on volunteer recruitment,[95] and these subsequently became a significant driving force behind the Compensation Act 2006.

The New Labour Government considered that the compensation culture was a myth. However, they acknowledged that the costs of a belief in such a culture were real, and therefore aimed to address this problem.[96] During the passage of the Act much of the debate related to the voluntary sector. Evidence was given that litigation fears negatively impacted on the recruitment and retention of volunteers,[97] and also led to changes to volunteering activities. For instance 92% of Scout Association volunteers agreed that risk-aversion affected the nature and range of activities offered,[98] and the Scout Association's Chief

[94] HC Bill (2003-4) [18].
[95] HC Deb 5 March 2004, cols 1153-4 (Julian Brazier MP).
[96] 'Tackling the "Compensation Culture": Government Response to the Better Regulation Task Force Report: "Better Routes to Redress"' (HM Government 2004) 4.
[97] eg Constitutional Affairs Committee, 'Compensation Culture' (HC 2005–06, 754-1) [42]-[43]; HC Deb 8 June 2006, col 419 (Bridget Prentice MP).
[98] HC Deb 8 June 2006, col 469 (Julian Brazier MP).

Executive gave evidence that despite organisational support and insurance 'volunteers still feel nervous and fearful, and modify the programme of activities'.[99]

Section 1 of the Compensation Act 2006 was enacted in the light of these findings, and was designed to alleviate such fears,[100] particularly amongst volunteers.[101] It provides:

'A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.'

This is an unusual provision. First, the section permits ('may') rather than mandates a court to consider such factors.[102] Secondly, courts already typically consider the balance between utility and risk in their determination of breach of duty. Whilst 'desirable activity' undoubtedly includes volunteering, it may go beyond social utility. However, in the Act's explanatory notes it is stated that the 'provision is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed.'[103] During debates the Government Minsters moving the Bill also took pains the stress that the section was merely to address a perception and that it did not change the law.[104] The Government's position was that the provision did not create a new defence, and merely restated *Tomlinson v Congleton BC*.[105]

[99] House of Commons Library, 'Compensation Bill' (Research Paper 06/28, 2006) 40.
[100] Explanatory Notes to the Compensation Act 2006, [7].
[101] HL Deb 28 Nov 2005, col 82 (Baroness Ashton); HC Deb 17 July 2006, col 112 (Bridget Prentice MP).
[102] *Wilkin-Shaw v Fuller* [2012] EWHC 1777 (QB); [2012] ELR 575, [42] (Owen J).
[103] Explanatory Notes, Compensation Act (n100), [7].
[104] HL Deb 28 Nov 2005, col 82; HL Deb 15 December 2005, col 196GC; HL Deb 7 Mar 2006, col 654 (Baroness Ashton); HC Deb 8 June 2006, cols 419-20 (Bridget Prentice MP).
[105] *Tomlinson* (n71).

Courts have taken the position that the section does not change the common law.[106] It is usually examined simultaneously with the existing common law. On two occasions the section has been examined alone,[107] but, on both occasions it appears to have been applied in the same way as the existing common law. As with the common law the provision applies to a significantly wider context than volunteering.

The clause has been highly criticised, and widely decried as unnecessary.[108]

It is doubtful that Section 1, which provides no additional protection to volunteers, will encourage greater volunteering.[109] This is further supported by the analysis in Chapter 7. Furthermore, it is unlikely that it will be read, or understood, by volunteers;[110] additionally, the post Act reports illustrate continued volunteer fears. In *Uren v Corporate Leisure (UK) Limited*[111] Foskett J stated 'despite the influence of… section 1 of the Compensation Act 2006, we live in a more "risk averse" age'.[112]

SARAH

The Reports

As part of the Coalition Government's Big Society project the Coalition agreement contained a commitment to 'take a range of measures to encourage volunteering'.[113] Lord Young was

[106] *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66 [13] (Smith LJ); *Barnes* (n4) [34], (Jackson LJ); *Sutton v Syston RFC* [2011] EWCA Civ 1182 [13] (Longmore LJ); *Hopps v Mott MacDonald Ltd* [2009] EWHC 1881 (QB) [92] (Clarke J); *Wilkin-Shaw* (n105) [46] (Owen J); *Humphrey v Aegis Defence Services Ltd* [2014] EWHC 989 (QB) [112] (HHJ Bidder); on appeal (*Humphrey* (n76)) the Court of Appeal did not refer to s 1, instead, it referred to the common law; *Cornish Glennroy Blair-Ford v CRS Adventures Limited* [2012] EWHC 2360 (QB); *McErlean v Macauley* [2014] NIQB 1.
[107] *Reynolds v Strutt & Parker LLP* [2011] EWHC 2263 (Ch); *The Bosworth Water Trust v SSR, AB, JB-W* [2018] EWHC 444 (QB).
[108] eg: *Wilkin-Shaw* (n102) [42] (Owen J); Constitutional Affairs Committee, 'Compensation Culture' (n97) [57]; Walton (n23) [7-41]; Kevin Williams 'Legislating in the Echo Chamber' (2005) 155 NLJ 1938; Rebecca Herbert, 'The Compensation Act 2006' (2006) JPIL 337; Kevin Williams, 'Politics, the media and refining the notion of fault: section 1 of the Compensation Act 2006' (2006) JPIL 347; HL Deb 7 Mar 2006, col 646 (Lord Goodhart), col 648 (Lord Ackner); HC Deb 8 June 2006, col 458 (Andrew Dismore MP).
[109] Williams, 'Politics' (n108) 351.
[110] HC Deb 8 June 2006, col 461 (Andrew Dismore MP).
[111] [2013] EWHC 353 (QB). The Act's failure is also emphasised by The Compensation Act 2006 (Amendment) Bill 2009-10, HC Deb 2 February 2010, cols 171-3 (Jeremy Wright MP).
[112] At [75].
[113] 'The Coalition: Our Programme for Government' (Cabinet Office 2010) 30.

commissioned to report on the 'compensation culture', and to propose solutions.[114] One of the then Prime Minister's objectives in commissioning the report was to facilitate volunteering, although he was also concerned with facilitating business.[115]

Despite noting in the report's body that compensation culture was 'perception rather than reality';[116] Lord Young's foreword, conclusions, and the recommendations considered that the culture, or the perception of the culture, needed addressing, since it 'results in real and costly burdens for businesses… And [the culture is] a fear that not only blights the workplace [also]… schools and fetes, to voluntary work'.[117] The evidence and analysis in the report was limited.

Lord Young stated that due to fears of being sued, the '[p]opular perception is that it could be dangerous to volunteer'.[118] He described this as a misconception which deterred volunteering.[119] He asserted that '[p]eople who seek to do good in our society should not fear litigation', but, he did not discuss this further, or seek to analyse if/when a volunteer should be liable. He recommended introducing a range of reforms including '[c]larify[ing] (through legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts';[120] and that there is no liability 'unless negligence can be proved'[121] – meaning the enactment of a provision that would not change the existing law.

Lord Hodgson, the President of the NCVO, was then commissioned to set up a task force to identify, amongst other things, factors which reduce volunteering.[122] The group consulted widely with the voluntary sector. His report, *Unshackling Good Neighbours* recommended encouraging volunteering through legal reforms clarifying the extent of volunteer liability.[123] The Report noted that the reasons why more people do not regularly volunteer are both

[114] Lord Young (n6) 43.
[115] David Cameron MP, 'Foreword' in Lord Young (n6) 5.
[116] At 19.
[117] At 7.
[118] At 23.
[119] At 23.
[120] At 15, 23.
[121] At 23.
[122] Lord Hodgson, *Unshackling Good Neighbours* (London 2011) 2.
[123] At 8.

economic and social.[124] However, the first heading in the Report's section 'What stops people giving time' is 'Risk of Litigation'.[125]

Lord Hodgson noted that even if litigation fears are generated by myths, and that the law protects reasonable people, this 'fails to address this perception of risk – the time it takes, the potential cost exposure and the associated psychological pressure.'[126] The impact on volunteering is real, even if it is likely that many claims against volunteers fail. He suggested the development of a volunteer reasonableness test, and recommended that the issue should be sent to the Law Commission. He acknowledged that some would regard such changes as superfluous, but asserted that 'society needs to find ways to reassure the would be Good Neighbour'.[127] The Compensation Act 2006 had not changed the public perception that volunteers may be easily sued.[128]

Bill

Instead of referring the matter to the Law Commission the Government brought forth a Bill which was enacted as SARAH. One of the key drivers of the legislation were the liability concerns of the voluntary sector. It is commonly seen as legislation similar to Section 1 of the Compensation Act 2006, which introduces little legal change, and as such has been widely criticised as a waste of time.[129] However, this chapter argues that SARAH, whilst providing little if any protection to volunteers, has the potential to introduce significant legal change across the law of negligence.[130] Given the absence of case law on SARAH, to establish this point it is necessary to examine the statute's provisions in some detail.

[124] At 9.
[125] At 10.
[126] ibid.
[127] ibid.
[128] Office for Civil Society, *Unshackling Good Neighbours – One Year On* (Cabinet Office 2012) 4.
[129] Jan Miller, 'SARAH law derided' (2014) 164 NLJ 7610; Editorial, 'Is It a Bird? Is It a Plane? Well It Certainly Isn't Legislation' (2015) 36 StatLR v; Jon Robins, 'A policy turkey?' (2014) 164 NLJ 7611; Brett Dixon, 'Myths and Misconceptions' *LS Gaz* (London, 16 Oct 2017) 12; HC Deb 21 July 2014, col 1201 (Sadiq Khan MP); HC Deb 20 Oct 2014, col 697-8 (Sir Edward Garnier QC, MP); HL Deb 4 Nov 2014, cols 1548-51 (Lord Lloyd of Berwick), col 1563 (Lord Pannick); HL Deb 15 Dec 2014, cols 13-4 (Lord Lloyd of Berwick).
[130] A similar position is taken by James Goudkamp, 'Restating the common law? The Social Action, Responsibility and Heroism Act 2015' (2017) 37 LS 577.

The explanatory notes to the Bill state that it forms part of the Government's programme to encourage volunteering.[131] However, the concerns of the voluntary sector seem to have been used as a device to launch a wider ranging bill, designed to protect industry, whilst superficially appearing to make no legal changes. The Ministry of Justice Impact statement notes that SARAH will apply to all organisations,[132] and whilst the then Lord Chancellor, Chris Grayling MP, focused on small businesses, rather than the voluntary sector, in his first speech on the Bill,[133] any strengthening of the hand of the defendant provided by SARAH also applies to big business. This is a disappointing exploitation of volunteer concerns. We need a mature discussion in the UK as to whether volunteers should receive protection from claims in tort; and they should not be bundled together with profit making enterprises in an attempt to provide greater protection and increase profits for the latter.

Section 1

Section 1 states that SARAH 'applies when a court, in considering a claim that a person was negligent or in breach of statutory duty, is determining the steps that the person was required to take to meet a standard of care.' The word 'person', means that SARAH also includes legal persons.[134] Section 1 refers to a 'claim that a person was negligent', unlike the Compensation Act 2006 which refers to a claim in negligence. Thus SARAH is not restricted to common law negligence claims, and also applies to statutory duties which include a standard of care. SARAH also goes beyond personal injury claims, despite this being the concern that Parliament was dealing with; it would for instance apply to professional negligence causing pure economic loss.[135] It may also apply to the Trustee Act 2000, s 1, and to the Companies Act 2006, s 174, a point which has been unnoticed elsewhere. The section appears also to apply to claims brought in contract where the claimant relies on a term that the defendant will take reasonable care.[136] This also prevents evasion of SARAH by recasting a tort claim as a contractual claim.

[131] Explanatory Notes to the Social Action, Responsibility and Heroism Bill, [6]; see also Ministry of Justice, 'Social Action, Responsibility and Heroism Bill: Fact Sheet' (MoJ 2014) [2].
[132] Ministry of Justice, 'Social Action, Responsibility and Heroism Bill, Impact Assessment No: MoJ013/2014'.
[133] HC Deb 21 July 2014, col 1187.
[134] Explanatory Notes SARAH (n131) 1.
[135] HC Deb 20 Oct 2014, col 693 (Shailesh Vara MP).
[136] Contradicted: 15 Dec 2014, col 37 (Lord Faulks); Goudkamp, 'Restating' (n130) 587 takes the same position as the author.

Section 2

Section 2 appears to be designed to address voluntary sector concerns. It states: '[t]he court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members.'

Whilst volunteers were included in the examples given in the Government press release of those protected by the provision,[137] the section goes beyond volunteers, to potentially invade almost every facet of life, and negligence. '[B]enefit of society', is not limited to altruism,[138] and appears to include any activity with a positive externality. It also applies when a claim is made against an organisation,[139] whether vicariously, or directly.

The expression 'or any of its members' is poorly drafted and worrying. There appears to be no minimum number of people that needs to be benefitted. Thus it would apply intra-family: a father who negligently crashes his car whilst driving his son to a cricket match may fall within the scope of the section, since providing a lift was acting for the benefit of a member of society. It would also include many commercial, or consumer transactions. Given the word 'or', it appears that where an activity benefits a small class of members of society, then even if the activity is detrimental to other members of society it is within the section. This would include for instance the activities of a racist organisation that promotes the employment of a particular group, to the exclusion of others. It oddly also seems to include criminal acts,[140] which benefit a member of society. As we will see in Chapter 6 other jurisdictions which have introduced volunteer protection, have taken care to exclude its application to criminal acts, and to restrict the nature of the organisation for which a volunteer can work for if they wish to benefit from volunteer protection, for instance so as to exclude hate organisations. Since the provision does not state any other members, it may mean that it also applies to the defendant's actions which are self-interested. Benefit, also seems to include profit – such as business activity designed to produce profits for

[137] Ministry of Justice Press Release, 'Grayling: law must protect everyday heroes' (MoJ, 2 June 2014) <https://www.gov.uk/government/news/grayling-law-must-protect-everyday-heroes> accessed 21 August 2018.
[138] Jones (n23) [8-182]; note Rachael Mulheron, 'Legislating Dangerously: Bad Samaritans, Good Society, and the Heroism Act 2015' (2017) 80 MLR 88, 91.
[139] Explanatory Notes SARAH (n131) [4]; House of Commons Library, 'Social Action, Responsibility and Heroism Bill' (Research Paper 14/38, 2014) 25.
[140] HL Deb 4 Nov 2014, col 1553 (Lord Beecham); Contradicted: Jones (n23) [8-182].

shareholders. Thus the Lord Chancellor stated that the provision would apply to workplace health and safety.[141]

In contrast to other volunteer protection regimes, the provision also purports to protect organisations. This thesis, as further argued in Chapters 6-8, rejects organisational protection. To the extent that the section provides any protection to a defendant it may also render volunteers more vulnerable when compared to private sector employees in bringing claims against their 'employing' organisation, for instance where they are injured in delivering the service due to the organisation's negligence. Negligence litigation against VSOs relating to the death or injury of their volunteers is not unknown.[142] Indeed such claims may be more common than those brought by third parties.[143]

There are minor differences between Section 2 of SARAH and Section 1 of the Compensation Act 2006. Unlike Section 1 which uses the word 'may … have regard', Section 2 is made mandatory: it says 'must … have regard'. This means that a failure to openly consider such factors may now ground an appeal. However, whilst both provisions direct the court to have regard, neither tells the court how to utilise the factor in its decision. Thus even with mandatory language the provision asks little of the court, and it may only have minimal effect, although it does seem to produce a technical hurdle for judges in writing judgments.

It is unlikely that these minor differences make any material difference. We have already seen that the factors, (like those in Section 4 of SARAH discussed below, and Section 1 of the Compensation Act 2006) are those which a court would already consider under the common law.[144] It is thus unlikely that the section will make any substantive changes to the existing law.[145] The Government's position was Sections 1, 2, and 4 'essentially reflected the current law',[146] although they would 'strengthen and emphasise it'.[147]

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[141] HC Deb 21 July 2014, col 1194 (Chris Grayling MP).
[142] eg *Watson v The Richmond Fellowship* [2019] EWHC 2554 (Ch); *Leach v Chief Constable of Gloucestershire* [1999] 1 WLR 1421 (CA).
[143] Alex Blyth, 'Occupational Hazards' *Third Sector* (London, 27 July 2005).
[144] HL Deb 15 Dec 2014, col 14 (Lord Lloyd); Walton (n23) [7-34a].
[145] HC Deb 21 July 2014, Volume 584, col 1189 (Sir Edward Garnier QC MP); HL Deb 15 Dec 2014, col 17 (Lord Pannick); Jones (n23) [8-182]; Editorial (n129); Mulheron, 'Legislating Dangerously' (n138) 91.
[146] House of Commons Library, 'Social Action, Responsibility and Heroism Bill: Progress of the Bill' (HC Library, 2015) 7.
[147] PBC Deb 9 September 2014, col 62 (Shailesh Vara MP).

Section 2 is designed to send a 'strong signal' of reassurance[148] to volunteers. Like Section 1 of the Compensation Act 2006 it is symbolic and appears to be a public relations exercise. This is odd given the consensus that the Compensation Act 2006 had not addressed the problems, and volunteer concerns. It faces problems in delivering this objective since it is not a clear signal, and is too similar to a provision which the Government acknowledged to have been ineffective. This section seems likewise unlikely to have any meaningful effect. This is reinforced by the Ministry of Justice's Impact Assessment which considered that any reduction in negligence claims is likely to be slight.[149]

Sections 3 and 4

It is Section 3 of SARAH which is the most controversial and has the potential to change the law in a substantial way. It states: '[t]he court must have regard to whether the person, in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred, demonstrated a predominantly responsible approach towards protecting the safety or other interests of others.' The Government itself considered that this section, unlike the others changed the law[150] 'albeit not in a major way'.[151]

Section 3 applies to all activities, and sectors of society. It is not limited to the voluntary sector, or desirable activities. Its enactment appears to be prompted by commercial sector concerns relating to health and safety legislation. However, the words 'or other interests' which are contained within the section makes it clear that the application of this section extends beyond both health and safety related litigation and personal injury litigation.

This section has the potential to introduce a duty of predominant care to the tort of negligence by essentially introducing a good/bad character element to the tort, which may cut both ways. However, given that the section concerns the tort of negligence generally and also applies to all negligence defendants rather than specifically volunteers, we do not need to deal with the section in any detail here.

[148] Joint Committee on Human Rights, *3rd Report - Legislative Scrutiny: (1) Modern Slavery Bill and (2) Social Action, Responsibility and Heroism Bill* (2014-15 HL Paper 62, HC 779).
[149] Ministry of Justice, Impact Assessment (n132).
[150] PBC Deb 9 September 2014, col 62 (Shailesh Vara MP).
[151] HL Deb 4 Nov 2014, col 1572 (Lord Faulks).

Since Section 4 deals with Good Samaritans rather than volunteers, and relates to taking into account the defendant's heroism in intervening in emergencies to assist an individual in danger, it need not be discussed in relation to legislation concerning volunteers. Whilst it may have a small role to play with emergency service volunteers, the section contains problematic undefined words such as 'heroic', 'danger', and 'emergency', and also appears not to add to the common law.[152]

Voluntary Sector Protection

It was necessary to examine SARAH in some detail to demonstrate that a statute which purported to protect the voluntary sector provides little targeted protection for the sector. Many of the sections make little if any change to the existing law. It is thus not surprising that the statute received little attention or enthusiasm from lawyers, who in turn lack reason to publicise its provisions. It does however have the potential to make a significant difference to the determination of negligence cases through Section 3, but this change applies to all sectors, not just the voluntary sector. An Act primarily aimed at voluntary sector concerns was used to smuggle in protection for industry. SARAH represents a lost opportunity for the enactment of meaningful volunteer protection.

Whilst this does not appear to be the general intent of Parliament, in restating the law both the Compensation Act 2006 and SARAH may also be attempts to prevent further legal changes which expand liabilities in negligence.[153] Preventing future liability expansion may help to reduce the need for VSOs and volunteers to take currently unnecessary steps to limit exposure to liabilities which may emerge if the law changes in the future.[154] However, the permissive nature of both Acts means that they cannot be said to require courts to maintain the current position of the law. Despite the prominence of the voluntary sector in the Parliamentary debates, there was no substantive discussion of volunteering and tort, and the normative question of the extent to which volunteers should be liable was not addressed.[155]

[152] Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 235; Jones (n23) [8-184]; Mulheron, 'Legislating Dangerously' (n138) 97.
[153] HL Deb 7 Mar 2006, col 646 (Lord Goodhart), col 647 (Lord Lucas).
[154] ibid col 648 (Lord Lucas).
[155] See the complaint of the Constitutional Affairs Committee, 'Compensation Culture' (n97) [65]; cf a very brief reference from Lord Goodhart (HL Deb 7 Mar 2006).

Neither was there any consideration of volunteer protection legislation found in other common law jurisdictions.[156] Despite volunteer litigation fears being at the heart of the Parliamentary debate the Acts do not provide any protection to volunteers or the voluntary sector.

Conclusion

As demonstrated by the limited material on the issue of volunteer liability in negligence there has been a lack of any significant normative debate on tort law and the voluntary sector in English law. Volunteer status does not seem to make any difference to duty of care or standard of care. Despite the legislative history of the Compensation Act 2006 and SARAH suggesting that they were in part motivated to deal with voluntary sector tort concerns, the statutory changes in terms of protecting the voluntary sector are insubstantial and mere window-dressing. SARAH is a convoluted statute, and its effect is disputed. It was therefore necessary to examine elements of the statute in some detail to see what, if any, change it makes to volunteer liability. This chapter demonstrates that its provisions go beyond volunteers, whilst providing little meaningful protection to volunteers. The volunteer protection schemes present in other common law jurisdictions were not noted during the enactment of these statutes.

[156] The only brief references to legislation in other jurisdictions were a statement of the All Party Parliamentary Group on Adventure and Risk in Society, who noted that US states and Western Australia have 'taken steps to protect sport and adventure training from unreasonable litigation'; House of Commons Library, 'Compensation Bill' (n99) 36; and HL Deb 20 Dec 2005, col GC258-9 (Lord Hunt).

Chapter 4

Liability for Volunteers/or of VSOs

Introduction

As we have seen from the voluntary sector tort triangle in Chapter 1 negligence within the voluntary sector involves at least three parties. Where the VSO is unincorporated this third party consists of other members or trustees. In Chapter 3 we considered the liability of volunteers. We must now consider the liability of VSOs for their volunteer's torts. This chapter examines vicarious liability, direct duties, and non-delegable duties. We need to know to what extent VSOs are potentially exposed to liability before we can later consider the systems used to protect them.

This chapter demonstrates that recent changes in vicarious liability significantly increase the reach of vicarious liability within the voluntary sector. However, not all organisational volunteers will stand in sufficient relationships with their VSO to trigger vicarious liability. Furthermore, direct duties and non-delegable duties also fail to cover all acts of negligence by organisational volunteers. Thus the volunteer protection scheme proposed in Chapters 6-9 with its liability transfer represents a broadening of liability on the part of VSOs when compared to the common law.

Liability for Volunteers

Whilst a victim may choose to sue a volunteer, for instance because they have deeper pockets than their VSO, or where it is likely that the volunteer or their tort may be found to have insufficient connection to a VSO for it to be liable for their wrongdoing, in many of the cases dealing with volunteer liability the VSO itself is sued. Where a volunteer (B) commits a tort against C, there are three possible routes of claiming against the VSO (A) in tort. Firstly, vicarious liability; secondly, B's tort may place A in breach of a direct duty of care to C, for example a duty of care to C to select, train, and monitor B; and finally A may have a non-

delegable duty to the victim, the performance of which A cannot delegate to another,[1] so that, even if A has selected, trained, and monitored B properly, B's tort will place A in breach of this duty. These three different routes to establishing liability are distinct.[2] Whilst they are not mutually exclusive, in some cases only one of the routes will be successful. For example where A does not owe a non-delegable duty to C, and A properly selects, trains, and monitors B, and thus does not breach their direct duty to C, an action may only be brought against A through vicarious liability.

Where the victim has a contract with the VSO a volunteer's tort may also place the VSO in breach of a contractual duty of care. Here it is the organisation itself that is in breach of duty, or in the case of an unincorporated VSO the members/trustees who entered into the contract.[3]

Vicarious Liability

Vicarious liability multiplies the number of possible defendants, increasing the probability of finding a solvent or insured defendant.[4] The doctrine makes one party, A, strictly liable for the torts of another, B. There are two stages to establishing vicarious liability. First, there must be a relationship between A and B which is sufficient to trigger the doctrine; secondly, the tort committed by B must be sufficiently connected with that relationship to render A vicariously liable for the tort.[5] Employment is the classic category of relationship which fulfils the relationship requirement at stage one, but there are a number of other categories of relationship which also meet the requirements of vicarious liability.

The recent rapid movement of the doctrine has proved highly controversial. This is perhaps caused by the competing justifications for the doctrine, leading to uncertainty around its parameters. Much has been written on its theoretical justifications.[6] It is important to

[1] Michael Jones, Anthony Dugdale, and Mark Simpson (eds), *Clerk and Lindsell on Torts* (22nd edn, Sweet and Maxwell 2017) [6-63].
[2] Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 111-114.
[3] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 848 (Lord Diplock).
[4] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, CUP 2018) 217.
[5] Phillip Morgan, 'Vicarious Liability on the Move' (2013) 129 LQR 139, approved by *Allen & Ors v The Chief Constable of the Hampshire Constabulary* [2013] EWCA Civ 967 [17] (Gross LJ).
[6] Leading treatments include Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 12–28; Robert Stevens, *Torts and Rights* (OUP 2007) 257–259; Jason Neyers, 'A Theory of Vicarious Liability' (2005–2006) 43 AlbertaLRev 287; Paula Giliker, *Vicarious Liability in Tort* (CUP 2010) 227–254; Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010) 129-131; Anthony Gray, *Vicarious Liability, Critique and Reform* (Hart 2018) 103-157.

understand this chapter's limits within the context of this project. It is not the role of this chapter to solve the vicarious liability dilemma that English law faces. Nor does this section attempt to find the doctrine's true normative foundations: that would be a book length project. Instead this chapter's role is to establish what the law currently is in relation to volunteers to help us understand the current exposure of volunteers and VSOs to liability. This chapter focuses on the positions taken in recent leading decisions on vicarious liability. If vicarious liability is on the move, then to determine what the position is for volunteers the directions are best taken from the helmsmen themselves.

In *Various Claimants v Catholic Child Welfare Society*[7] Lord Phillips sought to set out the policy arguments and justifications for vicarious liability. He stated that 'the policy objective underlying vicarious liability is to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim.'[8] He invoked insurance and loss-spreading, a deep pockets argument, acting on behalf of the employer, enterprise and risk creation, and control justifications, for the doctrine.[9] In considering the relevant connection required to the tort (the second stage of vicarious liability), Lord Phillips appeared to focus on enterprise risk liability. Many of these theories will be discussed in detail in Chapter 8, however, all of these policy justifications point towards vicarious liability for at least some volunteers. Nevertheless, vicarious liability is not simply an application of these policy factors, one cannot simply examine these factors to establish liability for any relationship. To do so is to risk an infinitely expandable doctrine.[10] Instead vicarious liability has evolved around carefully tailored categories. One needs to examine a relationship's fit with the categories to establish if vicarious liability will apply.

In recent years initially driven by institutional abuse cases vicarious liability has significantly expanded in scope. The first wave of such cases occurred in an employment context and concerned the sufficiency of connection stage, (the second stage). Influenced by Canadian jurisprudence,[11] particularly enterprise liability, the House of Lords in *Lister v Hesley Hall*[12] and *Dubai Aluminium Co Ltd v Salaam*[13] expanded the remit of vicarious liability by

[7] [2012] UKSC 56, [2013] 2 AC 1.
[8] At [34].
[9] At [34]-[35].
[10] Note *Bernard v The Attorney General of Jamaica* [2004] UKPC 47, [2005] IRLR 398 [23] (Lord Steyn).
[11] Particularly *Bazley v Curry* [1999] 2 SCR 534.
[12] [2001] UKHL 22, [2002] 1 AC 215.
[13] [2002] UKHL 48, [2003] 2 AC 366 [23] (Lord Nicholls).

introducing the 'close connection' test at the second stage: 'the wrongful conduct must be so closely connected with acts the … employee was authorised to do that, for the purpose of the liability of the … employer to third parties, the wrongful conduct may fairly and properly be regarded as done … while acting in the ordinary course of … the employee's employment'.[14]

Prior to *Lister* cases concerning vicarious liability for sexual abuse had failed on the Salmond test – the previous stage two test.[15] Cases concerning deliberate acts of violence also typically failed on this test.[16] From *Lister* onwards sexual abuse could fulfil this second stage. The expanded approach also catches some deliberate acts of employee violence.[17] The Supreme Court has further expanded the approach to the second stage in *Mohamud v Wm Morrison Supermarkets Plc*,[18] which appears to replace the *Lister* close connection test with a test of causal connection, meaning that A is vicariously liable for B's tort provided there is an unbroken causal chain between the role assigned to B by A, and the tort.[19] The cases show that now a wide range of torts are deemed sufficiently connected at this second stage for vicarious liability to apply: for instance sexual abuse committed by a school housemaster, violent assault committed on a customer by a petrol station attendant, and the facilitation of fraud committed by a solicitor. It goes without saying that ordinary negligence committed during the course of one's duties also meets this second stage. Thus volunteer negligence during their volunteering activity would fulfil the requirement of this second stage. More complicated is where a volunteer extends their role without authority. For instance where a committed volunteer who feels that their VSO is not fully meeting the needs of its beneficiaries undertakes further unauthorised tasks for the beneficiaries which are not within the VSO's remit or chosen mission, charitable purposes (if it is a charity), or outside of its risk tolerance.[20] The second stage as extended by *Mohamud* would appear to include volunteer negligence committed within this extended (unauthorised) role. However, the

[14] ibid.
[15] *ST v North Yorkshire County Council* [1999] LGR 584 (CA).
[16] eg *Keppel Bus Company v Sa'ad bin Ahmad [1974] 1 WLR 1082 (PC); Daniels v Whetstone Entertainments* [1962] 2 Lloyd's Rep 1 (CA); *Warren v Henlys Ltd* [1948] 2 All ER 935 (KB); Francis Rose 'Liability for an Employee's Assaults' (1977) 40 MLR 420. Rare exceptions: *Fennelly v Connex South Eastern Ltd* [2001] IRLR 390 (CA); *Vasey v Surrey Free Inns Plc* [1996] PIQR P373 (CA); *Pettersson v Royal Oak Hotel* [1948] NZLR 136 (NZCA).
[17] *Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158; *Bernard* (n10); *Wallbank v Wallbank Fox Designs Ltd* [2012] EWCA Civ 25, [2012] IRLR 307; *Brown v Robinson* [2004] UKPC 56; *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] AC 677.
[18] *Mohamud* (n17).
[19] Phillip Morgan, 'Certainty in Vicarious Liability: a Quest for a Chimaera?' (2016) 75 CLJ 202.
[20] Note Rob Jackson, Mike Locke, Eddy Hogg, and Rick Lynch, *The Complete Volunteer Management Handbook* (4th edn DSC 2019) 160-162

question remains as to whether volunteer/VSO relationships meet the relationship criteria of the first stage for vicarious liability to be imposed.

In the light of abuse committed by clergymen and members of religious communities, the focus of appellate litigation has shifted to the first stage of vicarious liability: what relationships are sufficient to trigger the doctrine? However, even prior to this litigation vicarious liability was not limited to employment. It is important to note that the expansion at both stages one and two of vicarious liability is not confined to abuse cases. Where abuse cases lead, other cases soon follow.[21] *Lister*, a case concerning abuse in a residential school setting was soon followed by *Dubai*[22] a case concerning commercial fraud. This is also the case with the first stage of vicarious liability, *JGE v Portsmouth Roman Catholic Diocesan Trust*[23] and *CCWS*, both abuse cases, have subsequently been followed in a non-abuse context in *Cox v Ministry of Justice*.[24]

Volunteers?

The literature on voluntary sector law (though not tort law) has previously assumed the existence of vicarious liability for volunteers.[25] Garton, prior to the most recent decisions, argued that given the modern justifications vicarious liability for unpaid volunteers is already present, indeed its non-existence would render their tortious acts committed when acting for their VSO externalities.[26] However, this is not accepted by Brodie.[27]

The sector appears to have operated for some time on the assumption that some volunteers may stand in a sufficient relationship with their VSO to trigger vicarious liability. The Charity Commission in its post-*Lister* guidance in 2002, well before the litigation which extended stage one of vicarious liability, warned that in some circumstances charities and trustees will be vicariously liable for the torts of their volunteers; particularly where they

[21] Phillip Morgan 'Revising vicarious liability: a commercial perspective' [2012] LMCLQ 175, accepted in *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 [56] (Ward LJ).
[22] *Dubai* (n13).
[23] *JGE* (n21).
[24] [2016] UKSC 10, [2016] AC 660.
[25] Susan Moody, 'Policing the Voluntary Sector: Legal Issues and Volunteer Vetting' in Alison Dunn (ed), *The Voluntary Sector, The State and the Law* (Hart 2000) 53-4; Charity Commission, 'Charities and Insurance (CC49)' (Charity Commission 2012) 5.
[26] Jonathan Garton, *The Regulation of Organised Civil Society* (Hart 2009) 100.
[27] Brodie (n6) 12.

assign the work and where they also retain control over its performance.[28] This remains the current advice of the Charity Commission,[29] but it now also states that there is unlikely to be liability for individuals who are more in the nature of independent contractors who 'are not liable to be controlled by the charity trustees in the actual exercise or performance of that work'.[30] The Charity Commission also advises that volunteers should be insured for harms to third parties as if they were employees.[31] This guidance has been widely distributed to VSOs via funding bodies, local governments, and local and national umbrella volunteering bodies.

Although vicarious liability for volunteers is accepted in other common law jurisdictions,[32] the position in England is unclear. There is one authority that a school boy carrying out community service does not trigger vicarious liability,[33] and in *Murphy v Zoological Society of London*,[34] Atkinson J tersely states (obiter) that the Scout Association would not be vicariously liable for a Scoutmaster's negligence. However, both cases are briefly reported and too old to be decisive. *Gravil v Carroll*[35] which involves a semi-professional rugby player playing for a non-profit club, also suggests that there is no vicarious liability for volunteers. The club was previously an amateur club, and the fees had been introduced to stop the poaching of players. Whilst the Court made it clear that their judgment only concerned the playing of a game under a contract of employment,[36] Sir Anthony Clarke MR stated that vicarious liability would not apply to amateur players. This suggests that contract and remuneration are key, since individuals carrying out the same activity, in the same uniform, under the same leadership would not trigger vicarious liability if they were amateur.

Conversely in *Brooke v Bool*[37] where a tenant, acting as a volunteer in helping his elderly landlord look for a gas leak caused an explosion, the landlord was held liable, one of the grounds being that the tenant was his 'agent'. In addition, other cases, for instance *The Scout*

[28] Charity Commission, 'Useful Guidelines - Vicarious Liability of a Charity or its Trustees' (Charity Commission 2002).
[29] Charity Commission, 'Guidance: Vicarious Liability of a Charity or its Trustees' (Charity Commission 2017).
[30] ibid 3.
[31] Charity Commission, CC49 (n25) 5
[32] *Duncan v Trustees of The Roman Catholic Church for The Archdiocese of Canberra and Goulburn* [1998] ACTSC 109 [42] (Higgins J); *Moynihan v Moynihan* [1975] IR 192 (SC); Restatement of Agency, Third, 2006, §7.07(3); Jeffrey Kahn, 'Organizations' Liability for the Torts of Volunteers' (1985) 133(6) UPaLRev 1433.
[33] *Watkins v Birmingham City Council* (1976) 126 NLJ 442, The Times, 1 August 1975 (CA).
[34] The Times, 14 November 1962 (QB).
[35] [2008] EWCA Civ 689; [2008] ICR 1222
[36] At [41].
[37] [1928] 2 KB 578 (KB).

Association v Barnes[38]- were litigated on the assumption that vicarious liability applied to volunteers, without either party seeking to argue the point.

The position on unpaid actors in *Gravil* is obiter and distinguishable, there have also been significant recent changes to stage one to merit further investigation into vicarious liability for volunteers. We must firstly dismiss the need for a contractual relationship between A and B for vicarious liability to apply, before examining the existing categories of vicarious liability which fulfil the relationship requirements at stage one, to see if these apply to volunteers.

Contract?

Linked to increased sector professionalisation and the development of volunteer management is the proliferation in the use of written agreements between volunteers and VSOs which formally define their volunteering relationship. The NCVO recommends that agreements should be in place for most volunteers, and states that there is an especial need for them for positions which have higher safeguarding risks.[39] National and local umbrella organisations have disseminated volunteer agreement templates for VSOs to use.

The purposes of volunteer agreements are to define the relationship's parameters, and psychological - to encourage volunteers to honour their commitments to the VSO. Within agreements VSOs typically agree to accept a volunteer's services, and to provide them with an induction, training, assistance in carrying out their role, insurance, and travel expenses. The agreement will often spell out the volunteer's time commitment, their commitment to undergo induction, to follow the VSO's rules and policies, and to subject themselves to the VSO's supervision in carrying out their role. Sometimes agreements also include provisions on maintaining confidentiality, meeting data protection requirements, and on the ownership of intellectual property. Volunteer role descriptions are often included.

Whilst volunteer agreements have occasionally been referred to as volunteering 'contracts', they are not so referred to within the sector. Umbrella bodies have warned VSOs to avoid

[38] [2010] EWCA Civ 1476.
[39] 'Volunteer Agreements' (*NCVO*) <https://knowhow.ncvo.org.uk/your-team/volunteers/keeping/volunteer-agreements> accessed 5 August 2020.

contractual language, and to ensure that they are non-binding, and provide advice on how to do this.[40] Whilst some volunteering agreements have been considered contractual,[41] typically agreements contain only moral obligations since a key purpose of them is to prevent VSOs from being held to be in contractual relationships with volunteers. This prevents the triggering of employment law protections, the minimum wage, sick pay, and discrimination protection.[42] Typically, volunteering agreements achieve this by excluding any intention to create legal relations, stating that the agreement is in honour only and not intended to be a legally binding contract. They also often expressly state that there is no intention to form a contract of employment.[43] This means that the volunteer/VSO relationship is rarely contractual.

However, the volunteer/VSO relationship is more complex where the VSO is an unincorporated association. If the volunteer is a member of the unincorporated association, by definition they will have a contract with all of the other members, and the relationship will be contractual. However, if they volunteer for an unincorporated association without becoming a member, and do so subject to a volunteering agreement their relationship with the unincorporated association's members is usually non-contractual. In structured volunteer settings, outside grass-roots action, volunteer/VSO relationships are typically non-contractual.

Neyers argues that vicarious liability is explicable only as a matter of contract.[44] If this is the case, this would preclude it from arising for most volunteers. His theory focuses on the employee-employer relationship, rather than the employee-victim, or employer-victim relationships. He alleges that vicarious liability results from the 'employer's implied promise

[40] ibid; 'Avoiding Employment Contracts' (*Support Cambridgeshire*) <https://www.supportcambridgeshire.org.uk/new/wp-content/uploads/2017/10/How-to-avoid-creating-an-employment-contract-with-volunteers.pdf> accessed 5 August 2020; 'Keeping Volunteers' (*NCVO*) <https://knowhow.ncvo.org.uk/your-team/volunteers/keeping/treating> accessed 5 August 2020.
[41] eg *Murray v Newham Citizens Advice Bureau* [2001] ICR 708 (EAT); cf *Melhuish v Redbridge Citizens Advice Bureau* [2005] IRLR 419 (EAT), (non-contractual; but if contractual then merely a 'limited unilateral contract' to reimburse expenses).
[42] Mark Restall, *Volunteers and the Law* (Volunteering England 2005) 6-17.
[43] For typical examples see: 'Example Volunteer Agreement' (*Mayor's Fund for London*) <https://www.mayorsfundforlondon.org.uk/wp-content/uploads/2017/06/Kitchen-Social_Example_Volunteer_Agreement.pdf> ; 'Volunteer Agreement' (*VAI*) <https://vai.org.uk/wp/wp-content/uploads/2010/10/Sample-Volunteer-Agreement.doc>; 'Volunteer Agreement' (*BVSC*) <https://bvsc.co.uk/volunteer-agreemen>; 'Volunteer Agreement' (*Volunteering Brent*) <http://www.volunteeringbrent.org.uk/userfiles/files/G_%20Sample%20Volunteer%20Agreement%20-%20Volunteering%20England.pdf> all accessed 5 August 2020.
[44] Neyers (n6).

in the contract of employment to indemnify the employee for harms (including legal liability) suffered by the employee in the conduct of the employer's business'.[45] The tort victim is then 'subrogated to the employee's right of indemnity'.[46] This theory he alleges 'explains why the tortfeasor must be an employee - since if the tortfeasor is not an employee he or she will not have a right of indemnity from the person sought to be made vicariously liable'.[47] Such an approach requires there to be a contractual relationship. With no contractual relationship there can be no vicarious liability. Supporting this proposition is the fact that it was considered necessary to introduce statutory vicarious liability for police officers, [48] who do not hold ordinary contracts of employment. Neyers' theory however is contradictory to the general thrust of allowing vicarious liability for deliberate torts, including those which are also criminal acts, such as the sexual abuse in *Lister*. No employer would agree to indemnify an employee for such acts of abuse, and there would be public policy reasons to prevent any such agreement to do so from being enforceable. Whilst Neyers accepts that deliberate torts are a problem with his theory he alleges that all such cases must be instances of personal fault or wrongly decided.[49]

A second criticism of this theory is that vicarious liability is not just restricted to employer - employee relationships, and further that there are also a number of categories of case in which an employer is vicariously liable for a person who does work for them in a manner similar to an employee but with whom they have not contracted. An example of such is the case of *Hawley v Luminar Leisure Ltd*.[50] Here the door attendants did not contract with Luminar, rather they contracted with ASE Security Services Ltd, however, they were employees of Luminar for the purposes of vicarious liability since they were controlled by Luminar's management and integrated into its business. A second example is the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*[51] which introduced dual-vicarious liability which rendered two entities vicariously liable for an employee even though one had not contracted with him. Dual vicarious liability was subsequently approved of by the Supreme Court.[52] Further examples are demonstrated by the development of the akin to

[45] ibid 301.
[46] ibid 303.
[47] ibid 304.
[48] Police Act 1996, s 88.
[49] Neyers (n6) 314. The theory also does not explain the requirement of the employee to indemnify the employer, although it is submitted that the current case law on employee indemnification is incorrect.
[50] [2006] EWCA Civ 18, [2006] IRLR 817.
[51] [2005] EWCA Civ 1151, [2006] QB 510.
[52] *CCWS* (n7).

employment category of vicarious liability (see below), for instance in the case of *JGE* it was held that a Bishop may be vicariously liable for the actions of a Diocesan Priest, even where their relationship was not governed by contract, but was instead governed by Roman Catholic Canon Law.[53]

However, if vicarious liability were to require a contract it would prevent it arising for many volunteers. An individual may volunteer for a VSO such as Oxfam or St John Ambulance, wear their uniform, receive their training, work for them under their direction and control, and be a part of the public face of that organisation, yet have no contract with that entity. It would be odd if the entity could then disclaim vicarious liability for them solely on that basis. Members of the Armed Forces too, do not hold contracts of employment with the Crown,[54] instead they serve under terms of service. Nevertheless the Ministry of Defence is regularly held vicariously liable for the torts of members of the Armed Forces.[55]

Contract and subrogation cannot explain the doctrine of vicarious liability. The requirements of stage one do not require a contract, and thus its absence in the VSO/volunteer relationship does not rule out vicarious liability's potential application to their relationship.

Employment

Employment is the classic category of vicarious liability. Occasionally tribunals have held volunteers to be employees. In *Migrant Advisory Service v Chaudri*[56] a volunteer who received a flat rate expenses allowance, unrelated to actual expenses, and who was paid whilst sick or on holiday was held to be an employee. Likewise in *Murray v Newham Citizens Advice Bureau Ltd (No 2)*[57] a prospective volunteer was held to be a prospective employee for disability discrimination purposes. However, these findings are rare and dependent on the exact wording of the volunteer agreement. In other such disability discrimination cases the Employment Appeal Tribunal has held CAB volunteers not to be

[53] *JGE* (n21).
[54] *Quinn v Ministry of Defence* [1998] PIQR P387 (CA).
[55] eg *The Ministry of Defence v Charles Peter Timothy Radclyffe* [2009] EWCA Civ 635; see also *A (A Child) v Ministry of Defence* [2004] EWCA Civ 641, [2005] QB 183 [10] (Lord Phillips MR), where military hospitals are staffed by military medical staff or civilian staff, the MoD would be vicariously liable. Only the civilian staff would have employment contracts.
[56] [1998] 7 WLUK 546 (EAT).
[57] *Murray* (n41).

employees,[58] and has also held that Cadet Forces Adult Volunteers – even though provided with paid training days, are likewise not employees for such purposes.[59] Cases concerning unfair dismissal, which take a narrower approach to employment than disability discrimination, have also rejected employment status for volunteers,[60] typically on the grounds of a lack of mutuality of obligation, and a lack of consideration – volunteering being a gift relationship since there is no obligation to provide services and no bargain or promise in return. Since modern volunteer agreements expressly disclaim any intention to create legal relations it is unlikely that in the future volunteers will be held to be employees in such contexts. For example the Supreme Court decision in *X v Mid Sussex Citizens Advice Bureau*[61] took place in the context of a non-contractual volunteer agreement which excluded any intention to create legal relations. It was the fact that the relationship was not employment which necessitated the appeal.

Sector leaders, such as the Association of Chief Executives of Voluntary Organisations, and Volunteering England, have objected to attempts to give volunteers employee status considering that this would undermine the nature of volunteering, and generate additional costs and practical barriers for VSOs.[62]

There are a number of tests for determining employment for the purposes of vicarious liability. As Clerk and Lindsell states there is no one simple test and the modern approach rests on 'multiple factor[s]'.[63] Many of the tests used come from other areas of law. These areas have different policies to vicarious liability, for example the policy of who is an employee for the purposes of National Insurance, or for the purposes of discrimination law, or for health and safety regulation, may differ to vicarious liability. Therefore what is considered employment for the purposes of vicarious liability is not necessarily the same as for other areas of law.[64] In vicarious liability for instance, as demonstrated by the cases

[58] *South East Sheffield Citizens Advice Bureau v Grayson* [2004] ICR 1138 (EAT).
[59] *Breakell v West Midlands Reserve Forces' and Cadets' Association* [2011] 4 WLUK 238 (EAT).
[60] *Prior v Millwall Lionesses Football Club* [2000] 2 WLUK 988 (EAT); *Melhuish* (n41).
[61] [2012] UKSC 59; [2013] ICR 249.
[62] *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59; [2013] ICR 249 [6] (Lord Mance). See also 'Opinion: Hot issue - Should volunteers be entitled to the same rights as employees?' *Third Sector* (London, 16 February 2005).
[63] Jones (n1) [6-12].
[64] Ewan McKendrick, 'Vicarious Liability and Independent Contractors - A Re-examination' (1990) 53 MLR 770, 784; Richard Kidner, 'Vicarious liability: For whom should the "employer" be liable?' (1995) 15 LS 47; Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (6th edn, OUP 2007) 698; Weir (n2) 107–8; Stevens (n6) 268; *JGE* (n21) [59] (Ward LJ); cf Atiyah (n6) 33.

concerning borrowed employees and dual vicarious liability, an 'employer' does not need to have a contract of employment with their 'employee'.[65] This is also demonstrated by claims concerning members of the Armed Forces. In one first instance Australian case the Court held that a club was liable for an amateur player, on the basis that the player was an employee for vicarious liability purposes.[66] However, it is unlikely that an English court would overlook the distinctions between this relationship and employment.[67] This is further reinforced by the fact that new categories of vicarious liability have arisen in English law which are more apt for such relationships.

It is inappropriate to label volunteers as employees even for vicarious liability's purpose. To do so may cause confusion within the sector, and may erode volunteers' distinctive status, values, and spirit. The nuances between vicarious liability and other areas of law which deploy different definitions of employment may be apparent to lawyers, but may not be apparent to lay volunteers, VSO leaders, or trustees. This could expose VSOs to litigation in other fields, for example volunteers may attempt to assert employee status in relation unfair dismissal, the minimum wage, and the Working Time Directive (2003/88/EC).

Agency

Vicarious liability may also occur in 'principal' and 'agent' relationships.

In this context the word agent may be confusing.[68] This is since generally when one is liable for one's agent the liability is primary not vicarious.[69] However, in the context of vicarious liability agent is not used to connote agency in the sense meant by commercial lawyers, but rather a different concept. Bowstead and Reynolds consider that such cases are in fact not linked to agency.[70] In *Launchbury v Morgans*[71] Lord Wilberforce accepted 'that "agency" in

[65] eg *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 (HL); *Viasystems* (n51).
[66] *Kennedy v Pender & Narooma Rugby League FC*, (NSW District Court, 2002).
[67] *Gravil* (n35) [10] (Sir Anthony Clarke MR); cf the Welsh RFU's concession in *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607.
[68] Weir (n2) 106.
[69] Giliker, *Vicarious Liability* (n6) 102.
[70] Peter Watts and Francis Reynolds (eds), *Bowstead and Reynolds on Agency* (21st edn, Sweet and Maxwell 2017) [8-176]; cf Gray (n6) ch 8 (attempts to explain vicarious liability as agency).
[71] [1973] AC 127 (HL).

contexts such as these is merely a concept, the meaning and purpose of which is to say "is vicariously liable," and that either expression reflects a judgment of value'.[72]

The language of principal and agent in the context of vicarious liability is typically found in cases where one individual who has lent a motor vehicle to another has been held vicariously liable for that other's wrong.[73]

Debates exist as to the nature of this liability. Clerk and Lindsell alleges that this form of vicarious liability for an agent is a sui generis form of liability,[74] and for cases other than fraud the category 'agent' in vicarious liability has no relevance.[75] Giliker too argues that agency is distinct from vicarious liability,[76] and is critical of a resort to it. She acknowledges that two types of claim persist in this area, that of fraudulent misstatements, and lending of a car.[77] The policy behind its use in a motoring context appears to be based on reaching an insured defendant. The need for this is now significantly less pressing given the Motor Insurance Bureau for uninsured drivers.

Nevertheless cases do exist outside of the motoring and fraud contexts in which a principal has been held vicariously liable for their agent's tort, and where the agent is not an agent in the contractual sense. An example is *League Against Cruel Sports Ltd v Scott*[78] which held that a master of hounds was vicariously liable for trespasses committed by mounted hunt subscribers (followers) over whom he exercised control, in addition to the hunt servants. However, a hunt master is not vicariously liable for the hunt followers and supporters who follow on foot, in cars, and on motorbikes, over which the master has significantly less control. Whilst this may be a controversial case, further examples of this concept of agency are to be found in cases dealing with trade union officials or shop stewards,[79] and also the case of *"Thelma" (Owners) v University College School*[80] where School Governors were held vicariously liable for the negligent act of a pupil who was acting as the Cox of the

[72] At 135.
[73] eg *Ormrod v Crossville* [1953] 1 WLR 1120 (CA).
[74] Jones (n1) [6-80].
[75] [6-79] (21st edn), cf [6-85] (22nd edn).
[76] Giliker, *Vicarious Liability* (n6) 110
[77] ibid.
[78] [1986] QB 240 (QB).
[79] Note dicta in *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* [1973] AC 15 (HL), 99 (Lord Wilberforce), applied in *Thomas v National Union of Mineworkers* [1986] Ch 20 (Ch), 67 (Scott J).
[80] [1953] 2 Lloyd's Rep 613 (CC).

School VIII. Another such application outside of these contexts is *Moores v Bude-Stratton Town Council*[81] where a Councillor was abusive to a Council employee. The Councillor was not an employee or officer of the council, nor a person to whom any of the Council's relevant powers had been delegated. The majority held that the Council were vicariously liable for the Councillor's acts. The minority accepted vicarious liability for agents, but did not consider it to be present on the facts of the case. In *S v Walsall MBC*[82] which deals with foster parents, the case was argued as one of principal and agent in a vicarious liability context, and no objection was taken to this that vicarious liability could not apply to principals and agents in the non-technical sense, rather the question was instead whether foster parents were agents. Agency has also been invoked in the context of unincorporated associations, in *Hibernian Dance Club v Murray*[83] the court considered that it was 'strongly arguable' that the committee members were agents of the members for the purposes of liability in tort.

Nevertheless, it is difficult to find an overarching concept of vicarious liability for agents, but the categories are not as closed as Clerk and Lindsell otherwise suggest. One starts to agree with Rogers that the operation of vicarious liability in the context of principal and agent rests on 'ad hoc judgment[s] that for one reason or another the principal ought to pay'.[84] Broader use of agency within vicarious liability is made within other common law jurisdictions, and this route was used to establish vicarious liability for foster carers in New Zealand.[85]

Agency is an ad hoc grouping of vicarious liability, with little underlying principle, save that these are relationships to which courts think vicarious liability should apply. They are then given the label of 'principal' and 'agent'.[86] It has been used to extend vicarious liability to unpaid actors.[87] Given that a number of the policies behind vicarious liability as advanced by the courts such as enterprise liability, loss-spreading, control, and deep pockets (see Chapter 8) point towards vicarious liability for at least some volunteers, for instance those that

[81] [2001] ICR 271 (EAT); Lindsay J, the President, being in the minority. Applied in *De Clare Johnson v MYA Consulting Ltd* (EAT 31 August 2007), (vicarious liability for the acts of a non-employee in causing constructive dismissal of an employee). Reference also made in *Cheltenham BC v Laird* [2009] EWHC 1253 (QB), [2009] IRLR 621.
[82] [1985] 1 WLR 1150 (CA).
[83] [1997] PIQR P46 (CA)
[84] WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Sweet and Maxwell 2010) 976 (not contained in post Rogers editions); Giliker, *Vicarious Liability* (n6) 116, considers it an 'Odd remnant' which 'adds little to our understanding of the principles of vicarious liability'.
[85] *S v Attorney General* [2003] NZCA 149; Kirby J (dissent) in *Hollis v Vabu* [2001] HCA 44 also relied on agency; cf Luke McCarthy, 'Vicarious Liability in the Agency Context' (2004) 4 QUTLJJ 268.
[86] *Launchbury v Morgans* [1973] AC 127 (HL) 135 (Lord Wilberforce).
[87] Giliker, *Vicarious Liability* (n6) 109; *S* (n85).

volunteer for sophisticated, large volunteering enterprises, which adopt volunteer management practices, 'agency' may be a convenient label to apply to such cases.

However, there is widespread criticism of the category.[88] The concept is uncertain and unpredictable, and has little underlying principle behind it. It also gives little guidance as to when vicarious liability should apply within a volunteering setting. Agency is a conclusion rather than a characteristic which triggers vicarious liability. It is thus an unsatisfactory basis on which to base vicarious liability for volunteers. Whilst agency is available as a mechanism to deal with some unusual cases it should not become the norm.

Resorting to agency is not representative of modern English vicarious liability case law. It is unlikely that a modern court would resort to this category when considering volunteers, unless the volunteer is driving a vehicle belonging to the VSO. This is demonstrated by *Armes v Nottinghamshire County Council*,[89] whereby the akin to employment category was used to establish vicarious liability for foster carers, in place of the agency category examined in *S*. Alongside consistency with recent case law the advantage of using the akin to employment category in its place for volunteers is that the factors used in these cases could be used to assess volunteering relationships.

Akin to Employment

In *JGE* [90] the Court of Appeal chose to extend vicarious liability to relationships 'akin to employment', that is relationships 'so close to a relationship of employer/employee that, for vicarious liability purposes, it can fairly be said to be akin to employment.'[91] Ward LJ considered that a range of factors need to be considered including whether or not the work is carried out under supervision and direction rather than on one's own account, control, whether or not the work is an integral part of the alleged employer's business, and the risk of profit and loss - who stands to gain from the work.[92] In particular the degree of managerial

[88] ibid Giliker 110.
[89] [2017] UKSC 60, [2017] 3 WLR 1000.
[90] *JGE* (n21).
[91] At [62].
[92] At [64]-[70].

control and integration into the organisation was highlighted.[93] The category offers a promising route for claimants who wish to establish vicarious liability for volunteers.

In *CCWS*[94] the Supreme Court confirmed the existence of this category of vicarious liability, and applied it to the Institute of the Brothers of the Christian Schools, holding the Institute liable for its brothers. The Institute is headed by a Superior General, and divided into provinces headed by a 'Provincial'. The Institute is a Roman Catholic 'lay community of teachers', who swear lifelong vows of poverty, chastity, and obedience, live under a strict and detailed rule of conduct and wear habits. Members are addressed as 'Brother'. Within provinces brothers live in communities headed by a director. The vow of obedience taken by a brother carries the obligation to obey their superiors, including the Provincial and their communities' director. It was an agreed fact that 'if a brother was sent to a school managed by a third party, the Institute's control over his life remained complete'.[95] Lord Phillips giving the sole judgment of the Court accepted, following *JGE,* that vicarious liability is present in relationships akin to employment, where although a contract of employment is absent the relationship has the 'same incidents' as employment.[96] He considered that control is an important factor, although not the 'touchstone', additional factors are whether the tortfeasor works on their own, or on the principal's behalf, the centrality of their activities to the 'employer', and whether or not they are integrated into the employer's enterprise, should be considered.[97]

In *A v The Trustees of the Watchtower Bible and Tract Society*,[98] the category was used to impose vicarious liability for abuse committed by a Jehovah's Witness Ministerial Servant, and also for the negligence of the congregation's Elders. Both the Ministerial Servant, and the Elders were volunteers from the wider congregation. On the surface this appears to demonstrate the application of this category to volunteers. However, they were part of a hierarchical religious organisation, which exercised a high level of control over all aspects of their lives, which was greater than that between the Roman Catholic Bishop and Priest in

[93] At [72].
[94] *CCWS* (n7).
[95] At [18].
[96] At [47].
[97] At [49].
[98] [2015] EWHC 1722 (QB).

JGE. This, combined with the fact that they carried out roles of great importance to, and were integral to the organisation, led to vicarious liability being present.[99]

The Supreme Court again applied the akin to employment category, this time outside the context of abuse litigation in *Cox*.[100] In this case the Supreme Court distilled the category in a way which will encompass some volunteers. In *Cox* a prisoner working in the prison kitchen negligently injured the prison catering manager. Kitchen workers were selected from amongst prisoners, given training, worked alongside civilian catering staff, were supervised by catering staff, and were accountable to the catering manager. Whilst they were nominally paid for their work, this was not subject to the minimum wage. The Supreme Court held that the Ministry of Justice was vicariously liable for the prisoner. Lord Reed distilled the justifications for vicarious liability: (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant, (2) the tortfeasor's activity is likely to be part of the business activity of the defendant, and (3) the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed.[101] Lord Reed stated that a relationship other than employment may trigger vicarious liability: 'where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit … where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual'.[102] He stressed that, despite the language of 'business' or 'enterprise', the defendant's activities need not be commercial or profit-making.

In *Armes*[103] the Supreme Court applying this approach held that a local authority would be vicariously liable for a foster parent's torts. Lord Reed giving the lead judgment declared that 'it is just that an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities.'[104]

The Court declared that fulfilling the incidents/factors in *Cox* would usually make it fair, just, and reasonable to impose vicarious liability. Again Lord Reed stressed that the word

[99] At [65]-[70].
[100] *Cox* (n24).
[101] At [22].
[102] At [24].
[103] *Armes* (n89).
[104] At [67].

'business' did not mean that vicarious liability was confined to commercial activities, as was demonstrated by the facts of *CCWS*, *Cox*, as well as hospital and public authority cases.[105] The local authority recruited, selected, trained and supervised the foster parents, and inspected their homes. The foster parents were also required to co-operate with the local authority, and attend meetings. The Court concluded that the foster parents were not in an 'independent' business of their own, and that they provided care as an integral part of the local authority's organisation, for the benefit of the local authority.[106]

Lord Reed then considered risk creation, noting that the creation of authority and trust which was inherent in fostering. Furthermore, vicarious liability would result in a sharing of risk which is undertaken in the general interest, instead of concentrating it on victims.[107] Although the foster parents controlled their household's management and organisation, the authority's power of 'approval, inspection, supervision and removal' meant that they 'exercised a significant degree of control over both what the foster parents did and how they did it'.[108] It did not matter that this control was at the macro level rather than micro-management.[109] Such liability is not restricted to abuse, but would apply to all cases, including ordinary negligence.

Whilst the foster parents received allowances and were thus not technically volunteers, the reasoning in *Armes* is likely to generate vicarious liability for some volunteers, particularly those working for larger, structured organisations. Some (but not all) VSOs adopt employment like practices and formally recruit, select, and train volunteers. Particularly with larger VSOs the recruiting and training procedures often mimic those for employees, with application forms, interviews, assessments, and references; followed by volunteer agreements. Volunteers for such organisations are often managed by paid professionals (or volunteers) specialising in volunteer management, and may be subject to regular performance reviews. Volunteering in many cases is not undertaken independently, but rather as part of the VSO's 'enterprise'. Whilst organisational control over volunteers may be less than over employees, since dismissal may have fewer consequences, such VSOs often have powers to discipline, suspend, or dismiss volunteers, and many larger organisations have formal

[105] At [55]-[58].
[106] At [59]-[60].
[107] At [61].
[108] At [62].
[109] At [63]-[65].

volunteer disciplinary procedures, which may include hearings and appeals processes. However, the volunteer/VSO relationship in informal VSOs is often very different, and not greatly influenced by employment like practices.

The akin to employment category significantly expands the law of vicarious liability.[110] That there may now be vicarious liability for volunteers is reinforced by the fact that prior to *Cox*, and *Armes*, one first instance case used the category to impose vicarious liability on the Scout Association for abuse committed by a Scout Group's Chaplain.[111]

Each volunteer/VSO relationship will need to be examined in detail. Following *Armes* and *Cox*, where the tort is committed during activities which are integral to the VSO's activities and for its benefit, and where assigning the activities to the volunteer creates the risk, liability may be present. Where a volunteer works alongside employees, is indistinguishable from them to members of the public, wears the same uniform as the employees, and is trained and managed in a similar way, it would be difficult to argue that vicarious liability is not present.

Nevertheless, a category of vicarious liability, which requires, and is justified by the existence of an employer like organisation, and a volunteer/VSO relationship which approximates employment, does not apply to all volunteers. It is most likely to occur in the context of larger organisations, both incorporated and unincorporated. Both *JGE* and *CCWS* involve unincorporated associations. With unincorporated VSOs it is the relevant 'employing' trustees, officials, or members who are sued, but where they have acted properly they can avail themselves of an indemnity from the VSO's assets.[112] However, many small informal grassroots VSOs are organised in very different ways to an employer.

Further, not all volunteers for large, structured VSOs which adopt employment like practices will be akin to employees. Some may have a more arms-length relationship with some classes of volunteers, particularly with fundraisers. For instance SSAFA, co-ordinates its yearly Big Brew Up, and encourages individuals to host fundraising tea/coffee events to raise money for the charity using the BBU logo and brand. It provides online advice on running the event and on marketing/social media. However, organisers can be anyone, there is no

[110] eg *Barclays Bank Plc v Various Claimants* [2018] EWCA Civ 1670.
[111] *JL v Bowen* 2015 WL 3630347 (Manchester CC), overturned on limitation grounds (vicarious liability not discussed) (*JL v Bowen* [2017] EWCA Civ 82, [2017] PIQR P11).
[112] Charity Commission, 'Guidance' (n29) 6.

selection procedure, and they are not managed by SSAFA. Even though fundraising is core to SSAFA, the volunteers are more in the nature of independent contractors, and are unlikely to be considered akin to employees.

Unincorporated Associations

Many VSOs take the form of an unincorporated association (Chapter 2). According to Hughes LJ in *R v L*:[113] 'the legal description "unincorporated association" applies equally to any collection of individuals linked by agreement into a group. Some may be solid and permanent; others may be fleeting, and/or without assets. A village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association'. Lawton LJ in *Conservative and Unionist Central Office v Burrell*[114] stated that an unincorporated association is 'two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will'. For there to be an unincorporated association there is a need for a contract between each and every member.[115] However, such contracts are easily found, and if an 'implicit but sufficiently clear understanding is reached by two or more people, there is a contract forming an unincorporated association'.[116] Unincorporated associations represent a broad range of VSOs from famous household names to VSOs which might not actually be considered organisations by their members, or where the members might not be aware that they have in fact created a VSO.

Unincorporated VSOs have no legal personality, and cannot be held liable in tort. Instead the membership or a subset of members, are affixed with liability. This means a further category of vicarious liability may be applicable to many volunteers - vicarious liability within an unincorporated association. This category appears to be currently applied more loosely than the akin to employment category, and thus has the potential to generate significant exposure

[113] [2008] EWCA Crim 1970, [2009] PTSR 119 [11].
[114] [1982] 1 WLR 522, 525.
[115] ibid.
[116] Nicholas Stewart, Natalie Campbell, and Simon Baughan, *The Law of Unincorporated Associations* (OUP 2011) 12, [2.01].

to vicarious liability for volunteer torts. Exposure to this category of vicarious liability can be eliminated by incorporating the VSO.

In *CCWS* the Institute was an unincorporated association. The Supreme Court established vicarious liability through two different means, firstly through akin to employment, and secondly through the category of vicarious liability within unincorporated associations. Lord Phillips referred to *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union;*[117] *Thomas v National Union of Mineworkers;*[118] and *Dubai*[119] for the proposition that an unincorporated association may be vicariously liable for one or more of its members. However, the Supreme Court was incorrect to draw on those particular instances of vicarious liability as evidence for the existence of an existing general category of vicarious liability in this area. Instead it is a new development that was introduced by the Court of Appeal in *CCWS*, and followed by the Supreme Court.

In *Heatons*, as in *Thomas*, the category of vicarious liability discussed, and the authorities referred to, concerned vicarious liability in the category of 'principal' and 'agent', there being no invocation of a separate category of vicarious liability within unincorporated associations. *Dubai* too did not refer to a separate category of vicarious liability of unincorporated associations, but rather statutory vicarious liability under Section 10 of the Partnership Act 1890. Whilst the 1890 Act is codifying, and liability for partners predated it,[120] it is not evidence of a separate established general category of vicarious liability within unincorporated associations. Instead, as *Hamlyn v John Houston & Co*[121] shows, this category prior to codification was based on the 'principal' and 'agent' form of vicarious liability. For Atiyah there was 'no doubt that [vicarious liability for partners] is based on the principles of agency. The doctrine that each partner is the agent of the firm and of his co-partners is at the root of partnership law.'[122]

Atiyah's classic book on vicarious liability states '[i]n the modern law there are three and only three relationships' which may trigger vicarious liability – employment, and in some

[117] *Heatons* (n79).
[118] *Thomas* (n79).
[119] *Dubai* (n13).
[120] *Ashworth v Stanwix* 121 ER 606, (1860) 3 El & El 701 (QB).
[121] [1903] 1 KB 81 (CA).
[122] Atiyah (n6) 117.

particular situations agency, and employer/independent contractor.[123] Atiyah was aware of vicarious liability for partners, devoting an entire chapter to the topic.[124] Likewise Giliker's thorough book on vicarious liability, whilst noting partnership,[125] also does not mention a general category of vicarious liability within unincorporated associations. It is unlikely that both Atiyah and Giliker would have missed an existing general category of vicarious liability, which again demonstrates that vicarious liability within an unincorporated association as a general class of vicarious liability is a more recent development.

This category was introduced to deal with abuse occurring within a large hierarchical religious institution, and a quirk of English law, which does not recognise legal institutions which exist as a matter of Roman Catholic Canon law. Thus such institutions have been treated in English law as unincorporated associations. Where the unincorporated VSO adopts a strong organisational identity, has forward planning capacity, assets, and insurance the vicarious liability theories recently advanced by the courts such as enterprise liability, loss-spreading, and organisational deterrence apply in similar ways to incorporated organisations. Here typically no individual volunteer is putting their own assets on the line to pay for the damages. However, given the breadth of the notion of unincorporated association this form of vicarious liability threatens to be very widespread. To treat all unincorporated associations in the same manner is strange, and presupposes a web of relationships in informal unincorporated VSOs which do not exist. The vicarious liability policies applying to the Institute in *CCWS*, which presume an employer or an employer like organisation do not translate well to informal groups with fluctuating memberships, which may lack records as to who was a member, and when. Many of the latter will also lack authority or control over their members.

The Supreme Court of Ireland in *Hickey v McGowan*[126] has accepted the present author's criticisms of *CCWS*, which are set out above.[127] The Court also faced up to the issue of who is liable in such cases, recognising that this form of vicarious liability makes all of the members of the unincorporated association at the time of the tort liable, not the organisation, since it is not a legal person. This means that volunteers for unincorporated association

[123] ibid 3.
[124] ibid ch 11.
[125] Giliker, *Vicarious Liability* (n6) 104.
[126] [2017] IESC 6.
[127] ibid [46] (O'Donnell J); Morgan, 'On the Move' (n5).

VSOs, unlike volunteers for incorporated VSOs, are made vicariously liable for their fellow volunteer's torts.

It is submitted that mere membership of such an organisation should not be enough to fulfil the stage one criteria. Instead it should be examined if one member is in another category of vicarious liability in relation to other members of the group. Nevertheless, this is not currently the position taken by the courts, and volunteers who are members of an unincorporated association VSO currently appear to trigger this category of vicarious liability at stage one. But if they merely volunteer for such a VSO, without becoming members, then this form of vicarious liability is not triggered.

Protection?

Particularly in the case of a formal volunteering relationship in a hierarchical context, a volunteer may work for a VSO under its direction and control alongside paid employees, and be a part of its public face. Given the employer and insurer practice in not enforcing employee indemnification where an employer has been held vicariously liable,[128] vicarious liability has developed into a protective mechanism for employee tortfeasors. This is since claimants normally bring their actions against the employer (since they are often a richer and insured entity) instead of the employee, thus in practical terms protecting the employee's assets.[129] When dealing with more sophisticated VSOs who use both employees and volunteers to deliver services it seems odd to deny this protection to a volunteer teammate who discharges the same function, in the same way, as their paid colleagues. Further, to the extent that a VSO engages with the contract culture (see Chapter 2) and the competition between the voluntary sector and for-profits, to impose this litigation risk on the volunteer instead of the controlling enterprise, seems to unduly penalise the volunteer over their employee counterpart thereby favouring VSOs over for-profits when they compete for business, albeit at the expense of the volunteer. However, this protective rationale made by analogy to the position of employees does not apply to all volunteers, particularly those within the least formal grassroots VSOs, who generally do not work in a manner akin to employees, or alongside employees.

[128] Cane and Goudkamp (n4) 240.
[129] A phenomenon alluded to by the Irish Law Reform Commission; see *Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009) [3.88], [4.12].

Vicarious Liability and Volunteers: Conclusion

Vicarious liability has been shown to have a greater reach within the voluntary sector than previously thought. The expanded doctrine has opened up vicarious liability for volunteers, both within structured organisations and grassroots groups. However, not all organisational volunteers will meet the requirements for vicarious liability at stage one. The statutory liability transfer proposed as part of the volunteer protection scheme in Chapters 6-9 therefore represents a broadening of VSO liability for their volunteer's torts. Since the proposed liability transfer is not dependent on common law vicarious liability it is not vulnerable to changes in this rapidly developing field of law. Further, given the widespread, but not uniform, rejection of the master's tort theory and acceptance of the servant's tort theory of vicarious liability,[130] defences which apply to the tortfeasor also apply to the vicariously liable defendant.[131] Since we do not wish our volunteer defence to apply to the VSO (Chapters 6-9) the use of a statutory transfer instead of common law vicarious liability prevents this issue from arising. In addition statutorily tying the defence and the transfer together prevents the former from applying in the absence of the latter.

Direct Duties

To simply examine vicarious liability is to give an incomplete picture of VSO liability for volunteer torts. B's act may place A in breach of a direct duty it owes to C. Such claims may be concurrent with vicarious liability, but, they may also be brought where it is not present.[132] For instance, as noted above B's tort may place A in breach of a direct duty of care to C to appropriately select, train, and monitor B. Whilst these duties typically occur in an employment context,[133] they may occur in other contexts, such as the duty to select a competent independent contractor,[134] and in selecting unpaid actors, such as the duty to select

[130] *Staveley Iron and Chemical Co v Jones* [1956] AC 627 (HL); *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 (HL); Jones (n1) [6-60]; Warren Swain, 'A Historical Examination of Vicarious Liability: a "Veritable Upas Tree"?' (2019) 78 CLJ 640. Cf Stevens (n6) ch 11.
[131] ibid, *Staveley*, and *Shatwell*; *Goodhue v Volunteer Marine Rescue Association Incorporated* [2015] QDC 29.
[132] *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273; *Maga v Archbishop of Birmingham* [2010] EWCA Civ 256, [2010] 1 WLR 1441 [74] (Lord Neuberger MR).
[133] *eg Williams v Curzon Syndicate (1919) 35 TLR 475 (CA); Mattis (n17)*; *Adams (Durham) Ltd v Trust Houses Ltd* [1960] 1 Lloyd's Rep 380 (Chester Assizes).
[134] *Gwilliam v West Hertfordshire Hospitals NHS Trust* [2002] EWCA Civ 1041, [2003] QB 443 [37] (Waller LJ); *Pinn v Rew* (1916) 32 TLR 451 (KB).

appropriate players for an under-15 rugby match.[135] It is likely that a similar duty will be present in a voluntary sector context, where a VSO uses a volunteer to deliver a service.[136] It is also likely that if a complaint is made to an organisation about a volunteer's suitability, or conduct, then it may have a duty to investigate such complaints where individuals may be endangered by the volunteer's future activities.[137] These duties also apply in the context of unincorporated VSOs, although since the VSO itself cannot owe a direct duty, member(s) or officers will need to be located who owe the claimant the duty, and who have breached it in relation to the claimant.[138] This may be hard when many members are involved in running of the organisation. However, in some cases the duty may be owed by all of the membership. These duties may be harder to locate within grassroots unincorporated VSOs since they are established by analogy to employment or contracting and within some grassroots VSOs the volunteer/VSO relationship may be informal and egalitarian, and it may be difficult to locate a relevant person who owes the duty to the claimant.

There is little English authority on such duties in a volunteering context. *Watkins v Birmingham City Council*[139] concerned vicarious liability for a 10 year old schoolboy who negligently moved a tricycle to a dangerous position, whilst delivering milk to a classroom on behalf of his school. In stating that he was not an employee for vicarious liability purposes, Orr LJ noted, obiter, that if the work was beyond his capacity, or if he had been inadequately supervised, the local authority would be directly liable.

Whilst *Bottomley v Todmorden Cricket Club*[140] is considered to be an authority on the duty to take reasonable care in selecting competent independent contractors, it is submitted that this case also establishes a selection duty in relation to volunteers. In *Bottomley* the pyrotechnic stunt contractors were unpaid volunteers at the cricket club's annual fundraising event (although they had been paid for previous events).[141] In holding the club liable for failing to

[135] *MM v Newlands Manor School* [2007] EWCA Civ 21, [2007] ELR 256.
[136] See *Doe v Knights of Columbus* 930 FSupp2d 337 (2013) (USDC DC); *Big Brother/Big Sister of Metro Atlanta v Terrell* 183 GaApp 496 (1987) (Court of Appeals of Georgia); *Doe v Boys Clubs of Greater Dallas* 868 SW2d 942 (1994) (Court of Appeals of Texas); upheld 907 SW2d 472 (Supreme Court of Texas).
[137] *Maga* (n132).
[138] *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 (HL); Stewart, Campbell, and Baughan (n116) 188 [8.02]. See for instance *Grice v Stourport Tennis, Hockey and Squash Club* [1997] CLY 3859 (CA).
[139] *Watkins* (n33).
[140] [2003] EWCA Civ 1575, [2004] PIQR P18.
[141] At [4]-[5] (contribution towards expenses only).

take reasonable care to select suitable contractors Brooke LJ stated '[t]he fact that CE performed their services for no fee makes no difference'.[142]

VSOs may also owe a duty to either insure their volunteers, or take reasonable steps to check their insurance coverage. In *Gwilliam v West Hertfordshire Hospitals NHS Trust*[143] the hospital was held to have a duty to check the adequacy of the insurance position of the independent contractor running the splat wall at the hospital's fundraising fete. This went to the issue of the contractor's suitability and competence.[144] In his dissent Sedley LJ quite rightly pointed out that where a fete stallholder is a volunteer, this duty might also apply here.[145] Likewise, lack of insurance was one of the reasons, along with lack of a written safety plan, inexperience, and lack of knowledge of safety requirements, why the defendant in *Bottomley*[146] was held to have breached its duty to select a competent contractor.

However, *Naylor v Payling*[147] appears to restrict this duty. Latham LJ considered that checking insurance was merely a way of helping to discharge a duty to take reasonable steps to ensure a contractor was competent. Neuberger LJ stated that whilst checking the insurance position may fulfil an employer's duty to sufficiently satisfy themselves that a contractor is competent[148] 'absent special circumstances, there could be no liability on an employer merely because he fails to satisfy himself that his independent contractor is insured or otherwise able to meet a claim for negligence'[149] He considered that there was no clear ratio in *Gwilliam*.[150] Thus if an organisation has a duty to take reasonable steps to ensure that a volunteer is competent this does not include a free-standing duty to check their insurance position, and this duty may be discharged in other ways, for instance through selection procedures, training, and licensing. However, Neuberger LJ considered that special circumstances could include, but do not necessarily include, all such cases 'where the employer is himself under a duty… to insure himself, or where the employer accepts that, in the particular circumstances,

[142] At [48].
[143] *Gwilliam* (n134). How far this extends is unclear, as one of the two majority judges (Waller LJ [43]) limited this duty to hazardous activities.
[144] At [15] (Lord Woolf CJ), [39] (Waller LJ).
[145] At [58].
[146] *Bottomley* (n140).
[147] [2004] PIQR P36.
[148] At [34].
[149] At [43].
[150] At [37].

he should insure himself for the protection of the public'[151] Given that the voluntary sector often deals with vulnerable groups the latter may frequently arise.

Further, VSOs may owe claimants other direct duties, for instance where the claimant enters into a contractual relationship with the organisation, and/or the organisation assumes a duty of care directly towards the claimant.[152] An example of the latter is *D v Victim Support Scotland*[153] where the defendant VSO assumed a duty to the claimant to competently assist them with their claim and typically discharged such duties using both volunteer and employee advisors. Although in this case it was an employee who was alleged to have placed the VSO in breach of its duty, a volunteer would equally have been able to do so. In addition where a VSO utilises, and has a strong relationship of authority and control over less capable agents such as mentally impaired or child volunteers, this may also lead to a duty to control the volunteers.[154]

An organisation may also owe the claimant a duty to reasonably regulate their activities and provide for appropriate rules and procedures, for instance in the context of sports governing bodies.[155]

Direct duties are also owed in an occupier's liability context. In *Driver v The Painted House Trust*[156] the trust was deemed to owe the claimant a duty of care as an occupier of land, in that the acts of its volunteers in maintaining the car park, and in building a wall, meant that the trust had sufficient control of the land to be occupiers. Furthermore, it was the design and build of the wall, which was carried out by volunteers, which the court had to consider in determining whether or not the trust was in breach of its duties under the Occupiers Liability Act 1957 and/or the Occupiers Liability Act 1984. Likewise in *Bowen v The National Trust*,[157] besides claiming that the defendant was vicariously liable for the negligence of the tree inspectors (one of whom was a volunteer), the claimant also brought a direct claim

[151] At [43].
[152] eg *Shelbourne v Cancer Research UK* [2019] EWHC 842 (QB); (visiting scientist injures employee whilst dancing at works Christmas party, (no vicarious liability); party organised by employee volunteers, direct duty claim against organisation failed (volunteer's conduct examined) as reasonable care taken).
[153] 2018 Scot (D) 16/3 (ShCt),
[154] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL); Claire McIvor, *Third Party Liability in Tort* (Hart 2006) ch 2.
[155] *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 (CA); *Wattleworth v Goodwood Road Racing Co Ltd* [2004] EWHC 140, [2004] PIQR P25; *Agar v Hyde* [2000] HCA 41, 201 CLR 552.
[156] [2014] EWHC 1929 (QB). (Claimant unsuccessful as no breach of duty on the facts).
[157] [2011] EWHC 1992 (QB).

alleging breach of a common law duty of care and the duty of care imposed by the Occupiers Liability Act 1957.

The VSO may also be liable if it authorises or ratifies its volunteer's tort.[158] If the volunteer and the VSO participate together in a joint act, pursuing a common design, resulting in the commission of a tort, the organisation may be liable as a joint tortfeasor even if the damage results from the volunteer's acts.[159] There can also be situations where the volunteer has committed a tort and the VSO owes direct duties, but the VSO does not incur direct liability because it does not breach its duties. For example St John Ambulance may select a volunteer, train them, and assess them to ensure that they meet industry standards. The organisation owes a duty of care to the victim to properly do so, but if it does all these things to a reasonable standard it will incur no direct liability in the event that the volunteer causes harm when attempting to use Reiki to deal with a heart attack whilst on duty. In a case of this kind, the victim would have to attempt a claim based on vicarious liability, or on failure to perform a non-delegable duty.

Non-Delegable Duties

A VSO may have a non-delegable duty to the victim. At the minimum, these are 'not merely a duty to take care but a duty to provide that care is taken';[160] they may also be strict liability duties. A person who owes such a duty may be in breach, even if they have taken all due care, where they have entrusted its performance to another who is at fault. This includes both negligence and deliberate wrongs.[161] Such duties may be created by statute or exist at common law. As non-delegable duties also require a duty holder, this complicates such claims in the case of unincorporated VSOs, since in some cases it may be difficult to identify the person(s) holding the duty.

Even if functionally similar,[162] vicarious liability and non-delegable duties are separate doctrines,[163] and do not have the same policy rationales. This is why breach of a non-

[158] *Ellis v Sheffield Gas Co* 118 ER 955, (1853) 2 El & Bl 767 (KB); *Hilbery v Hatton* 159 ER 341, (1864) 2 Hurl & C 822 (Exc).
[159] *Brooke* (n37); Paul Davies, *Accessory Liability* (Hart 2015).
[160] *The Pass of Ballater* [1942] P112 (Admiralty) 117 (Langton J).
[161] *Armes* (n89) [51] (Lord Reed).
[162] Jonathan Morgan, 'Vicarious Liability for Independent Contractors?' (2015) 31 PN 235.

delegable duty may be triggered by an independent contractor; and also by an employee acting outside the course or scope of their employment. Non-delegable duties are often resorted to and adopted as a response to perceived inadequacies in vicarious liability.[164] They may offer a route to claim against A for the torts of some classes of volunteer for whom there is no vicarious liability. There is no single theory which explains them.[165] Giliker argues that this is because they are merely 'gap-fillers' which courts resort to for policy reasons in the 'pursuit of social justice'.[166] Indeed, Williams described them as a 'logical fraud'.[167]

Common law non-delegable duties enjoy a re-invigorated life following *Woodland v Swimming Teachers Association*,[168] in which a local authority was found to be in breach of such a duty where the negligence of an independent contractor conducting swimming lessons led to the claimant's injury. Whilst in *Woodland* the independent contractor was operating for-profit, in the era of the contract culture an independent contractor may also be a VSO delivering its services through volunteers. However, in *Armes* the Supreme Court appeared keen to rein in this approach, Lord Reed declaring that non-delegable duties 'are exceptional, and have to be kept within reasonable limits'.[169] Lord Sumption in *Woodland* divided non-delegable duties into two categories. The first is where the defendant employs another to carry out inherently hazardous functions;[170] the second arises from an antecedent relationship where the defendant assumes the duty. Examples of non-delegable duties include: an employer's duty to provide a safe system of work for its employees;[171] bailment;[172] the treatment of patients by hospitals;[173] extra-hazardous activities;[174] and where a person occasions operations on the highway, which cause dangers to highway users.[175]

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[163] *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] AC 537 [4] (Lord Sumption); Gray (n6) 217-9.
[164] See Glanville Williams, 'Liability for Independent Contractors' (1956) 14 CLJ 180; John Murphy, 'Juridical Foundations of Common Law Non-Delegable Duties' in Jason Neyers, Erika Chamberlain and Stephen Pitel, (eds), *Emerging Issues in Tort Law* (Hart 2007) 371.
[165] *Woodland* (n163) [6] (Lord Sumption).
[166] Paula Giliker, 'Non-Delegable Duties and Institutional Liability for the Negligence of Hospital Staff' (2017) 33 PN 109, 111-112.
[167] Williams (n164) 193; Gray (n6) ch 10 (recommends their abolition).
[168] *Woodland* (n163).
[169] At [32].
[170] At [6].
[171] *McDermid v Nash Dredging* [1987] AC 906 (HL).
[172] Based on *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (CA); Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Neyers, Chamberlain and Pitel (n164) 337; cf Phillip Morgan, 'Vicarious Liability for Employee Theft: Muddling Vicarious Liability for Conversion with Non-Delegable Duties' [2011] LMCLQ 172.
[173] *Woodland* (n163) [23] (Lord Sumption).

Some of these duties may be relevant in a number of volunteering contexts, for instance: where a volunteer's negligence during a fundraising pyrotechnics show causes injury to another;[176] where a volunteer working for a flood relief organisation negligently piles detritus on a road, leading to the injury of a cyclist; the negligent loss of a coat by an amateur theatre cloakroom volunteer; and (possibly) where one volunteer devises an unsafe system of work for other volunteers.

In *Woodland*, Lord Sumption attempted to define the features of assumed non-delegable duties:

'(1) The claimant is a patient or a child, or for some other reason is especially vulnerable… (2) There is an antecedent relationship… (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm… It is characteristic of such relationships that they involve an element of control over the claimant… (3) The claimant has no control over how the defendant chooses to perform those obligations… (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed… and the third party is exercising… the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated… to him.'[177]

He considered that a non-delegable duty should only be imposed where it was fair, just, and reasonable to do so, and that courts should not impose unreasonable financial burdens on organisations delivering essential public services.[178] Whilst agreeing with Lord Sumption, Baroness Hale stated that this list of features should not be treated as if it were statute.[179]

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[174] *Honeywill & Stein Ltd v Larkin Bros* [1934] 1 KB 191 (CA); *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] QB 725.
[175] Jones (n1) [6-69].
[176] *Bottomley* (n140) (CA decided case on direct duty of care; did not consider *Honeywill* (n174). First instance judge additionally held the club liable on this basis).
[177] At [23].
[178] At [25].
[179] At [38].

In imposing such a duty Lord Sumption was influenced by the fact that many of the independent contractor's functions were formerly performed by local authority staff, and that independent schools would have a contractual duty.[180] He noted that pupils were entrusted to the school; swimming lessons were integral to the school's teaching functions, and occurred during school hours, in a place chosen by the school; and the school's teaching and supervisory functions were delegated to the instructors.[181] However, he considered that the school would not be liable for independent contractors who provide extra-curricular activities outside of school hours (for instance school trips in the holidays), nor for those whom have no delegated control over the child, such as a school bus driver.

This new form of non-delegable duty seems to be a response to the liability gap created by outsourcing. It would also apply where the service is outsourced to a VSO. However, it may additionally assist with other liability gaps created by the use of volunteers. Following *Woodland* a school will be liable for a volunteer helper who assists children during school hours with reading lessons, although not for a volunteer coach at an after-school football club. It is also possible that a youth VSO, such as the Scouts, assumes such a duty towards its scouts. However, unlike a school there is no duty for a parent to entrust their child to such a group.

In *Armes* the Supreme Court removed the fair, just, and reasonable inquiry used to limit the scope of non-delegable duties in *Woodland*. Lord Reed considered it duplicative of Lord Sumption's five criteria. He also considered that this second stage would lead to uncertain, and inconsistent results.[182] Whilst this appears to herald a more expansive approach in that situations meeting the first five criteria will trigger such a duty, the outcome in *Armes* indicates that a more restrictive approach will apply. In rejecting the existence of a non-delegable duty upon local authorities for children in care, the Supreme Court considered that the local authority's duty was not to provide daily care, but rather to arrange for it, and monitor its performance. This placement and monitoring duty was not delegated to the foster carers. Thus as the abuse occurred during daily care it could not be said that the child was abused during a function which was the duty of the local authority to perform. A non-delegable duty in this context was also considered too broad, and the responsibility too

[180] For criticisms, see Jonathan Morgan, 'Liability for Independent Contractors in Contract and Tort' (2015) 74 CLJ 109.
[181] At [26].
[182] At [36].

demanding.[183] The case demonstrates that non-delegable duties in the voluntary sector may not be as wide as *Woodland* otherwise suggests, in that the duties owed may be narrowly defined. This is significant given the range of voluntary work involving vulnerable persons.

Conclusion

Where a volunteer commits a tort there are three possible routes of claiming against the VSO in tort, or in the case of an unincorporated VSO against its members/officers/trustees. Whilst vicarious liability typically occurs in an employment context, new categories of relationship sufficient to trigger it have been developed. Vicarious liability now has a role to play in the voluntary sector, and some volunteers will trigger the doctrine. Direct duties and non-delegable duties also offer routes of redress against VSOs for their volunteers' acts in some limited circumstances. The latter two claims may, however, be problematic in the context of some unincorporated VSOs, where it might be difficult to identify an individual or group who has personally assumed such duties. Nevertheless not all cases of organisational volunteer negligence will result in such claims, and the statutory transfer of liability contained within the volunteer protection scheme that this thesis proposes represents an expansion of VSO liability when compared to the existing common law.

We must now examine a number of significant interventions in other jurisdictions used to protect both VSOs and volunteers from liability.

[183] At [47]-[49].

Chapter 5

Organisational Protection

Introduction

English negligence law makes no special provision for the voluntary sector. However, other common law jurisdictions such as the US, Australia, and Ireland have introduced mechanisms to protect the sector from liability. It is necessary to examine these mechanisms in detail since they provide us with considerable insights into the possibilities available to English law. There are two basic voluntary sector protection systems present in other common law jurisdictions: first, organisational protection, which protects VSOs, and second, volunteer protection, which protects volunteers. Organisational protection is examined in this chapter; volunteer protection is examined in Chapter 6.

The main organisational protection mechanisms used to protect VSOs from tort liabilities are charitable immunity, and liability caps. Contrary to what is suggested by much of the existing literature charitable immunity still operates in present day law.

Before we can consider whether English law should adopt such mechanisms we need to see if they are doctrinally coherent. Statutory liability caps are based solely on a public policy that it is desirable to limit VSO's liability. Charitable immunity on the other hand has four technical theoretical justifications. There is also a fifth justification – public policy. In dealing with, and dismissing these technical theoretical justifications for charitable immunity it is necessary to show that they are incorrect and that they are also unsustainable in an English context. This chapter shows that the only possible justification for organisational protection is public policy, it has no other technical justification.

Detailed examination of the public policy justifications for charitable immunity and liability caps is deferred until Chapter 8 where they too are ultimately rejected, along with all forms of organisational protection.

Organisational Protection

A desire to protect (at least some) VSOs from tort manifests itself in the doctrine of charitable immunity, the related protection against execution of judgments, and statutory liability caps. These are employed by some US jurisdictions to protect non-profits against tort actions. Much of charitable immunity rests on the common law, but there is also statutory intervention.

Immunities

Immunity is 'the opposite, or negation, of liability', it is a 'freedom from the legal power or "control" of another'.[1] It operates as a plea relating to the court's power to adjudicate and enforce which prevents a defendant from being made a party to the claim.[2] Immunity is based on a defendant's 'status or identity'.[3] It does not depend on the reasonableness of, or the justifications for the defendant's behaviour.[4] A distinction must be made between immunity, and a duty defining rule or standard of care defining rule: immunity applies however egregious the level of negligence, but with rules of the latter sort there is a duty of care, but the standard of care is altered.

Immunities are found in some English tort law contexts, including Parliamentary privilege, immunity of foreign states, diplomatic immunity, the remnants of Crown immunity, and trade union immunity.[5]

Charitable Immunity

Charitable immunity protects charities from tort liabilities. Whilst many VSOs are charities, since VSOs do not need to align with the heads of charity contained within Section 3(1) of the Charities Act 2011, nor do VSOs, unlike charities need to have a public benefit, not all

[1] Wesley Hohfeld, 'Some fundamental legal conceptions as applied in judicial reasoning' (1913-1914) 23 YaleLJ 16, 55.
[2] Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 1, ch 2; *Lai v Chamberlains* [2005] NZCA 37 [69] (Hammond J).
[3] John Goldberg and Benjamin Zipursky, *The Oxford Introductions to US Law: Torts* (OUP 2010) 178.
[4] James Goudkamp, *Tort Law Defences* (Hart 2013) 123, 158.
[5] Bill of Rights 1688, Article 9; State Immunity Act 1978, ss 1(1), 20; Diplomatic Privileges Act 1964; Trade Union and Labour Relations (Consolidation) Act 1992, s 219; Michael Jones, Anthony Dugdale, and Mark Simpson (eds), *Clerk and Lindsell on Torts* (22nd edn, Sweet and Maxwell 2017) [5.02]-[5.13].

VSOs are charities. To give examples, whilst the advancement of amateur sport is a charitable purpose, the statute defines sport as 'sports or games which promote health by involving physical or mental skill or exertion'.[6] This has led to the Charity Commission refusing to register amateur target shooting associations as charities on the basis that notwithstanding any physical or mental exertion there is insufficient evidence that the activity promotes health.[7] Likewise the Commission has advised that motor sports, gliding, or angling (amongst others) are unlikely to meet the criteria.[8] However, such associations are often VSOs. In addition some grassroots VSOs may be so localised, for instance those that benefit a single street, that they may not sufficiently benefit 'the public' to be charities.[9] Likewise VSOs which aim to campaign to change the law, or national or local government policy are also unlikely to be charitable, in that they fall foul of the public benefit requirement. This means that VSOs such as the National Anti-Vivisection Society,[10] and Amnesty International UK are not charities, although Amnesty has also incorporated a separate charitable trust to accommodate its charitable activities.[11]

Thus whilst charitable immunity has the potential to protect a significant proportion of VSOs, it does not protect all VSOs. As charitable immunity was developed in a US context we need to examine US materials in detail. Since much tort scholarship assumes that the doctrine no longer operates, for instance Goudkamp describes it as 'defunct', declaring that it was 'short-lived' in England, and 'removed (or substantially eradicated)' in the US,[12] it is also necessary to briefly demonstrate that we are not dealing with a dead doctrine - it still plays a role in a number of US jurisdictions.

English materials[13] were used by 19th century US courts to fashion a new doctrine immunising charities from liability in tort.[14] It was soon noticed that these English materials

[6] Charities Act 2011, s 3(2)(d).
[7] Charity Commission, 'Cambridgeshire Target Shooting Association – Application for Registration, Decision of the Commission' (Charity Commission 2015).
[8] Charity Commission, 'Charitable Status and Sport' (RR11) (Charity Commission 2003).
[9] Graham Virgo, The Principles of Equity & Trusts (3rd edn, OUP 2018) 155
[10] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL).
[11] 'Two organisations working to defend human rights' (*Amnesty International UK*) <https://www.amnesty.org.uk/amnesty-international-uk-two-organisations-working-defend-human-rights> accessed 6 August 2020.
[12] Goudkamp, *Tort Law Defences* (n4) 129.
[13] *Feoffees of Heriot's Hospital v Ross* 8 ER 1508, (1846) 12 Cl & F 507 (HL); *Duncan v Findlater* 9 ER 339, (1839) Macl & R 911 (HL); *Holliday v St. Leonard* 142 ER 769, (1861) 11 CB NS 192 (CP); cf *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93 (HL).

had been used out of context.[15] By 1921, most states adopted either complete immunity for charities or immunity against beneficiary negligence claims.[16] However, the tide then turned against immunity[17] driven by the availability of insurance and the changing nature of the non-profit sector. The 1979 Restatement of Torts, Second, stated that '[o]ne engaged in a charitable, educational, religious or benevolent enterprise… is not for that reason immune from tort liability.'[18] Its commentary noted that the majority of jurisdictions had abolished charitable immunity, and considered that those which had not yet abolished the doctrine were in a 'transitional stage'.[19]

The removal of immunity was predicated on the availability of inexpensive liability insurance. It would rapidly stop, and reverse, when this underlying factor disappeared, with the US insurance crisis of the 1970s-80s (Chapter 6). The Restatement's prediction that the states that retained immunities were in a transitional stage proved unfounded. There was a 'charitable immunity counter-trend.'[20] Some states retained immunity; others established partial immunities or limitations on liability for non-profits.[21] Liability caps, which limit liability to a pre-determined figure, have also became more prevalent, a compromise between liability and protection.

The Present

The counter-trend stemming from the tort reform movement involved the re-instatement of immunities for non-profits.[22] Ascertaining the current state of charitable immunity from tort across the US is not easy. Inaccuracies and misclassifications of the current status of immunities within US jurisdictions abound. Other jurisdictions have proved to be battlegrounds between the legislature and the courts, with a complex array of legislative caps, state constitutional challenges, and re-enactments. There is thus a need to systematically

[14] *McDonald v Massachusetts General Hospital* 120 Mass 432, 1876 WL 10813, 21 AmRep 529 (Supreme Judicial Court of Massachusetts); *Perry v The House of Refuge* 63 Md 20, 1885 WL 3235 (Md), 52 AmRep 495 (Court of Appeals of Maryland).
[15] John Gest, 'Public Charities and the Rule of Respondeat Superior' (1889) 37 AmLReg 669, 677.
[16] Carl Zollman, 'Damage Liability of Charitable Institutions' (1920-1921) 19 MichLRev 395, 412.
[17] See Appendix 2.
[18] Restatement of Torts, Second, §895E.
[19] ibid.
[20] Charles Tremper, 'Compensation for Harm from Charitable Activity' (1990-1991) 76 CornellLRev 401, 411; Daniel Barfield, 'Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?' (1994-1995) 29 ValULRev 1193, 1196.
[21] 'Developments in the Law Nonprofit Corporations' (1991-1992) 105 HarvLRev 1578, 1682.
[22] Thomas Koenig and Michael Rustad, *In Defense of Tort Law* (NYU Press 2001) 54.

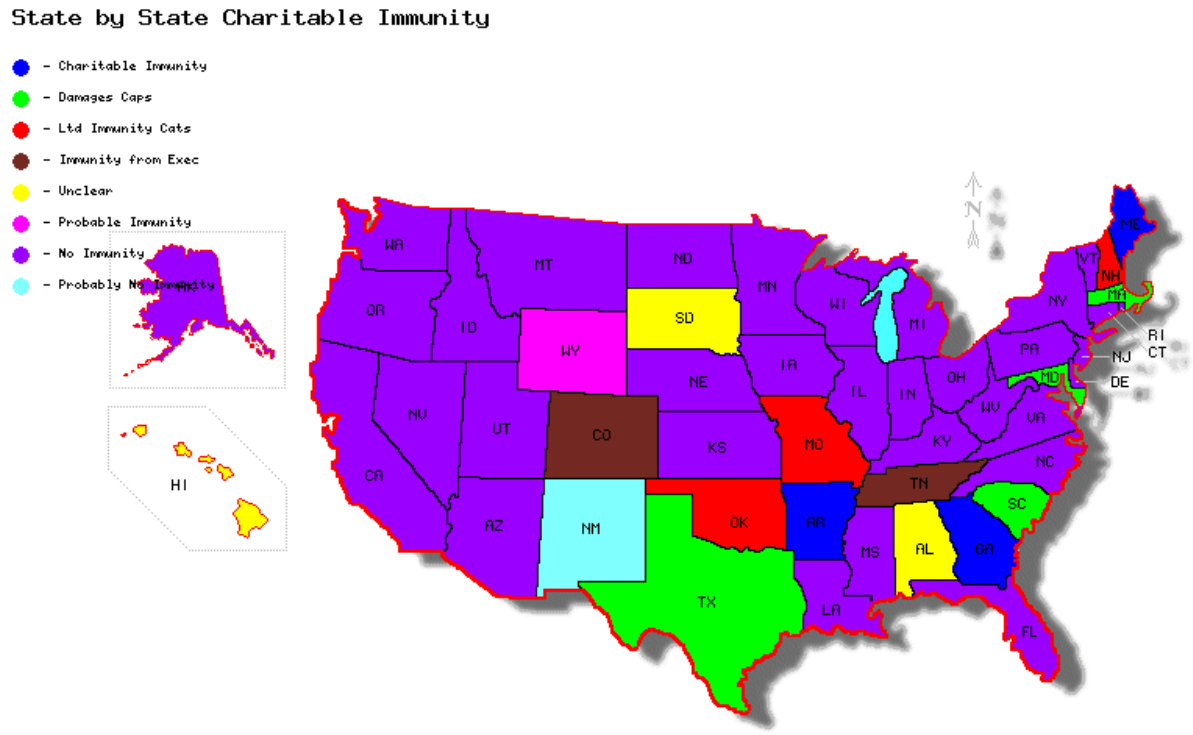
check each jurisdiction, and analyse each of the leading cases, and state legislation to establish the immunity position.

Two main classifications of organisational protective devices currently exist: immunities, and caps on liability. An immunity prevents liability from arising; a cap on the other hand is a remedy restricting rule, which does not prevent liability from arising.[23] Whilst the line between the two may be blurred where a low cap is set, as for instance in Massachusetts ($20,000),[24] they are distinct. Other states provide for no immunity from tort, but protect charities from execution of judgment.[25] This may have a similar effect to immunity, but it is not the same since judgment is still awarded against the defendant.

As the analysis in Appendix 2 shows there are presently four states with charitable immunity,[26] five states with damages caps for charities,[27] three states which have limited categories of immunity,[28] two states which provide immunity from execution of judgment,[29] four states where the status of immunity is unclear,[30] one of whom probably has an immunity doctrine,[31] and thirty three states and the District of Columbia which have no immunity doctrine,[32] (although two of these are locally misclassified as having an immunity doctrine).[33] Whilst we are not at the apogee of charitable immunity in the US, we are not dealing with a defunct and discredited doctrine, and are thus justified in considering it within our examination of organisational protection. Before we can consider whether or not England should adopt organisational protection (see Chapter 8) we must examine if the primary systems of organisational protection used are theoretically justifiable or sound.

[23] See James Goudkamp, 'A Taxonomy of Tort Law Defences' in Simon Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters 2011) 468.
[24] MGLA 231 §85K. The cap for non-profit hospitals is higher, at $100,000.
[25] eg CRS 7-123-105 (2012) (Colorado). Insurance may act as a waiver.
[26] Arkansas, Georgia, Maine, and Maryland.
[27] Maryland, (for charitable hospitals, which are not immune unlike other charities), New Hampshire (for the torts of volunteers), Massachusetts, South Carolina, and Texas.
[28] Missouri, New Hampshire, and Oklahoma.
[29] Colorado, and Tennessee.
[30] Alabama, Hawaii, South Dakota, and Wyoming.
[31] Wyoming.
[32] Alaska, Arizona, California, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.
[33] New Jersey and Virginia.

Figure 1 – Charitable Immunity



Theories and Justifications for Immunity

Despite the long history of charitable immunity in the US, American courts have been unable to agree on its justifications. There are five justifications for the doctrine:[34] four technical justifications (a) the trust fund theory, (b) the non-application of vicarious liability to charities, (c) charities carry out state functions and share governmental immunity, and (d) the beneficiary waiver theory, there is also the further justification of public policy. This chapter deals with and dismisses all of these technical justifications. Chapter 8 further explores and rejects the public policy justification. In dealing with the soundness of each justification we need to consider its interface with common law principles. This requires us to draw upon US materials in detail since much of the existing discussion has taken place in a US context. However, where the principles differ between the US and England this is expressly highlighted.

[34] Restatement Torts (n18) Comment to §895E; Dan Dobbs, *The Law of Torts* (West Group 2000) 761.

Trust Fund Theory

In outline the trust fund theory is that the charity's funds are held on trust for particular charitable purposes, and that to apply them to other purposes such as paying damages for the negligence of a charity's employees is not permissible as it is not within the trust's terms. Since the judgment cannot be paid, a judgment against an incorporated charity should not be permitted.[35] Liability would violate donor intentions. The theory also states that where a charity takes the form of a trust to allow the funds to be available to pay tort damages would be to indemnify trustees for their own, or their employee's misconduct.[36]

Insurance Coverage and Overheads

Taken to its logical conclusion the trust fund theory means that if there is insurance, so that judgment will not deplete trust property, the charity is not immune. This does not trigger liability of the whole fund for sums in excess of the insurance coverage, since the idea is that the fund itself is not touched.[37] This approach gives a charity the ability to set its own limits to liability through purchasing insurance; it may choose very low coverage, or no coverage at all.[38]

That paying tort damages would be an unlawful diversion of trust property is slightly unreal. Not all of the funds will end up in the hands of beneficiaries, as some will legitimately be spent on operational costs. All charities have some overheads. These may include premises, administrative costs, staff, and insurance costs. Tort liability (or insurance to cover such liabilities) can be conceptualised as an additional overhead.[39] If insurance premiums to cover liabilities in tort are a legitimate overhead, then why would it be illegitimate to pay tort damages in the absence of insurance?[40] This is not explained. Such costs are surely simply part of the cost of administration of the trust.

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[35] *Powers v Massachusetts Homoeopathic Hospital* 65 LRA 372, 109 F294, 47 CCA 122 (1901) (Circuit Court of Appeals, First Circuit) (District Judge Lowell).
[36] *President and Director of Georgetown College v Hughes* 130 F2d 810, 76 USAppDC 123 (1942) (US CA DC) 822, 135 (Rutledge AJ).
[37] *Cox v De Jarnette* 104 GaApp 664, 123 SE2d 16 (1961) (Court of Appeals of Georgia) (Judge Bell).
[38] *Darling v Charleston Community Memorial Hospital* 33 Ill2d 326, 211 NE2d 253, 14 ALR3d 860 (1965) (Supreme Court of Illinois) (Schaefer J).
[39] *Andrews v YMCA* 226 Iowa 374, 284 NW 186 (1939) (Supreme Court of Iowa) 206-7 (Bliss J).
[40] Michael Wilsman, 'The Doctrine of Charitable Immunity – The Persistent Vigil of Outdated Law' (1974-1975) 4 UBaltLRev 125, 133.

Inconsistency: Contracting and other Damages Claims

The trust fund theory, if correct, should shield the trust assets from all third party litigation. However, the way in which other types of damages claims have been treated demonstrates that the trust fund theory does not have a basis in the US law of trusts. For example, US law did not develop an immunity for charities for actions in breach of contract.[41] Charities are (and historically were) liable for breaches of contract.[42]

If it is permissible for a charity to use its funds to pay damages for breaches of contract, or where it creates a nuisance,[43] it is odd to apply a different rule to negligence. Paying such damages would equally contradict the trust fund rule since these actions also deplete and divert trust funds. The trust fund theory therefore cannot explain the different treatment of contract and tort. The reason for the non-extension of the trust fund rule to contract damages, despite its application being equally logical, is that it would significantly handicap charities in their dealings with others. It would inhibit them from offering commercial, or paid for services, ordering supplies, or bidding for government contracts. This indicates that charitable immunity is based on public policy, not on trust principles.

Execution

The inability to execute judgment is an issue of enforcement not liability. One does not grant a procedural immunity to a man of straw, rather in practical terms his 'immunity' comes from the inability to execute judgment against him.[44] Even if it cannot be executed, a judgment in tort can serve a declaratory function; acknowledging the rights of the wronged individual and the improper conduct of the tortfeasor.[45] A judgment even if unaccompanied by damages, can help hold organisations to account, particularly those reliant on public donations.

The trust fund theory mistakenly restricts tort to a solely compensatory function. Some torts may relate to continuing wrongs. In such cases an injunction may prevent the continuing

[41] Note, 'Liability of Charitable Corporations for Tort' (1917-1918) 31 HarvLRev 479, 480.
[42] Zollman (n16) 398.
[43] Nuisance is widely accepted as an exception to immunity; see Zollman (n16) 399.
[44] *Abernathy v Sisters of St Mary's* 446 SW2d 599 (1969) (Supreme Court of Missouri); *Darling* (n38).
[45] *Ashley v Chief Constable of Sussex* [2008] UKHL 25, [2008] 1 AC 962.

infringement of rights, even if the defendant has no funds against which to execute judgment. Whilst assets may be held by A such that they are not available to fulfil judgments, this does not prevent judgment from being entered against A, and the error of the trust fund theory is to short circuit this process and prevent initial judgment.

Misunderstanding of Basic Trust Law?

Where a charity takes the form of a trust, the charity is not a legal person, and property is held by one or more trustees. It is the trustees who 'enter into legal relations and accept personal liability',[46] may sue, or be sued. The trust is typically the 'primary legal structure' for charities in England and Wales,[47] whereas in the US, conversely, the incorporated structure has been the primary legal structure.[48] The attempt by US courts to rely on basic legal concepts relating to the former, and incorrectly transfer them to the latter, has resulted in charitable immunity through a trust fund theory for incorporated entities.

That unincorporated charities are 'immune' from tort actions is uncontroversial. However, to conceptualise this as 'immunity' is improper. They simply do not exist as a legal person, and thus cannot be sued. Instead actions may be brought against the trustees who are legal (and also natural) persons for their torts, and where this tort is committed in the administration of the trust, in turn 'a trustee has a right of indemnity out of the trust fund in respect of those liabilities, costs and expenses if properly incurred.'[49] Where a tort is committed, a trustee is entitled to an indemnity where 'he acted reasonably and with due diligence and in accordance with his powers.'[50] Where the trustee's liability in tort is vicarious there is normally 'no difficulty in establishing his right to indemnity.'[51] If in committing the tort the trustee is in breach of trust, there is no such recourse to the fund. This is not 'immunity'. Rather, it is a

[46] Kerry O'Halloran, Myles McGregor-Lowndes and Karla Simon, *Charity Law and Social Policy, National and International Perspectives on the Functions of the Law Relating to Charities* (Springer 2008) 26.
[47] Jean Warburton and Debra Morris (eds), *Tudor on Charities* (9th edn, Sweet and Maxwell 2003) 131, [3-001]; cf William Henderson, Jonathan Fowles and Julian Smith (eds), *Tudor on Charities* (10th edn, Sweet and Maxwell 2015) 284, [6-001].
[48] O'Halloran, McGregor-Lowndes and Simon (n46) 26.
[49] Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19th edn, Sweet and Maxwell 2015) 834, [21-01]; Trustee Act 2000, s 31(1). In English law, this right may not be excluded or restricted by the trust's terms (837, [21-08]); David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th edn, Lexis Nexis 2016) 1093, [81.3]. This right 'is inseparable from the office of the trustee'. Prior to the Trustee Act 2000, this indemnity was excludable, but equity could have intervened where the exclusion prevented a subrogation claim (1093, [81.4]).
[50] Tucker, Le Poidevin and Brightwell (n49) 842, [21-19]. This may include situations where the trustee commits the tort of negligence (843, [21-20]). See also *Powers* (n35).
[51] ibid.

basic application of the laws of trusts and legal personality. Where the trustee has a right of indemnity, the claimant may be able to bring a subrogated claim, standing in the shoes of the trustee, the claim in this case being enforced against trust property.[52]

Alternatively a charity may adopt a structure that gives it legal personality, by incorporating. It was in transferring this application of basic principles of legal personality and the law of trusts from unincorporated charities, treating this as 'immunity', and then applying it to incorporated charities, where US courts went wrong. The reasons why an unincorporated charity cannot be sued simply disappear when dealing with charitable companies which are legal persons.

The general property held by a charitable company is not held on trust by the company, although it may hold particular property on trust for specific charitable purposes. With its general property its obligation is to apply it to charitable purposes.[53] Thus it has been said that within an English law context 'the position of a charitable company in relation to its assets is, therefore "analogous" to that of a trustee',[54] and within a US context that '[b]eing a corporation organized for charitable purposes it is of course bound to apply its corporate funds to such purposes only… In this respect it does not differ, however, from any business corporation whose officials are bound to hold and apply its property only for the purposes for which the corporation was organized.'[55]

The trust fund theory of charitable immunity is therefore unsound as a matter of the law of trusts. An incorporated charity, as a legal person may be sued, and may have recourse to its general property, or property held on trust, when proper to do so. In essence the trust fund theory appears to be a disguised public policy argument that tort claims should not deplete a charity's funds.

[52] ibid 843, [21-20]
[53] Henderson, Fowles and Smith (n47) 346-7, [6-058]-[6-059].
[54] Warburton and Morris (n47) 168, [3-045].
[55] *Cohen v General Hospital Soc. of Connecticut* 113 Conn 188, 154 A 435 (1931) (Supreme Court of Errors of Connecticut) 436 (Banks J).

Absence of Vicarious Liability Theory

This justification is premised on the proposition that vicarious liability does not operate in the charitable sector, based on a profit based enterprise liability model of vicarious liability.[56] It is argued that a charity cannot be vicariously liable for its employees since it is non-profit and does not derive profit from their activities.[57] The employee's service is instead said to be for the benefit of humanity.[58] This would also mean that public authorities too would not typically be vicariously liable for their employees. Attempts may also be made to justify the non-application of vicarious liability to the voluntary sector based on loss-spreading grounds.

Such an approach both misstates the enterprise liability theory (examined further in Chapter 8), and also makes the error of justifying vicarious liability solely with reference to it. We have seen in Chapter 4 that courts and theorists give a range of justifications for the doctrine. A profit version of the enterprise liability model would mean that vicarious liability would vary between a for-profit independent school (vicariously liable), a state school (no vicarious liability), and an independent school that has charitable status (no vicarious liability).

This narrow notion of enterprise liability cannot explain the positions taken by courts throughout the common law world, for example in relation to vicarious liability for the employees of state or local authorities. The position that there is no vicarious liability for non-profits runs counter to the position adopted in Canada,[59] England,[60] and in the Restatement of Torts, Second.[61] An enterprise need not be profit-seeking. There is a long-standing link between profit and risk; but risks may properly be placed with originating organisations even in the absence of profit.

Loss-spreading within the sector has not been discussed in any detail. It has been doubted if loss-spreading is applicable to non-profits, at least in the absence of insurance.[62] If correct

[56] H Beau Baez III, 'Volunteers, Victims and Vicarious Liability: Why Tort Law Should Recognise Altruism' (2009-2010) 48 ULouisvilleLRev 222.
[57] Joseph Simeone, 'The Doctrine of Charitable Immunity' (1958-1959) 5 StLouisULJ 357, 362.
[58] Maurice Tulchinsky, 'Tort Liability of Charitable Institutions' (1937-1938) 13 NotreDameL 109.
[59] *Bazley v Curry* [1999] 2 SCR 534 (SCC) dealing with this point at [47]–[58].
[60] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1; *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355.
[61] Restatement Torts (n18), Comment to §895E.
[62] Jason Neyers, 'A Theory of Vicarious Liability' (2005) 43 AlbertaLRev 287, 297.

this would put a question mark over vicarious liability within the sector since loss-spreading forms a significant part of recent judicial justifications for vicarious liability. This section therefore demonstrates that loss-spreading does apply to non-profits. That loss-spreading is available to the voluntary sector is also important to the arguments in Chapter 8 which justify the volunteer protection scheme which this thesis proposes.

In *Bazley v Curry*[63] the Supreme Court of Canada noted that many non-profits may have no way to obtain contribution from other sources,[64] which would allow them to distribute their losses.

McLoughlin CJ avoided this issue of sector differences in loss-spreading and instead decided this issue on fairness.[65] The restricted opportunities for loss-spreading for the sector were also noted by the Supreme Court of Canada in *Jacobi v Griffiths,*[66] Binnie J stated that: '[a] public authority such as a school board will typically have a greater capacity for loss-spreading… than a volunteer, non-profit organization such as the Club.'[67]

In the private sector, losses can be spread to customers by increasing prices, or by other mechanisms such as reducing shareholder dividends, or utilising insurance and passing on the costs to consumers or shareholders. A government entity may loss-spread through taxation. Non-profits can also loss-spread, but their mode and methods of loss-spreading may differ substantially to those used by commercial organisations. With non-profits that sell goods or services, losses (or insurance costs) may be spread to customers through price increases. Where a non-profit sells goods/services, and also delivers other goods/services for free, money to pay for insurance can also be obtained by cutting down on the provision of free goods/services.

The loss-spreading model in its traditional form breaks down where a non-profit does not have paying customers, operates altruistically, and is funded by donors or grants. Nevertheless loss-spreading may still operate for such non-profits. Firstly, many non-profits have paid employees, and loss-spreading may be operated by reducing their remuneration;

[63] *Bazley* (n59).
[64] At [53].
[65] At [54]; cf Jason Neyers and David Stevens, 'Vicarious Liability in the Charity Sector: An Examination of *Bazley v Curry* and *Re Christian Brothers of Ireland in Canada*' (2005) 42 CanBusLJ 371, 404.
[66] [1999] 2 SCR 570 (SCC).
[67] At [77].

alternatively a non-profit organisation's overheads may be reduced; and finally service reduction to beneficiaries may occur to ensure sufficient monies are available for premiums, or to reduce premiums. With non-profit organisations solely staffed by volunteers, and with limited overheads, the only method of spreading the loss to others is simply to reduce the services provided to the beneficiaries, and divert donor money to pay for insurance premiums. This (in part) spreads the losses amongst the users or potential users of the services. Non-profit voluntary bodies that do not have donors, income, or assets, and which are sustained only by the time and effort of their volunteers, have no prospect of funding insurance premiums and so they cannot loss-spread. Hence they must decide whether to take the litigation risk or cease operations. It is only this final form of non-profit that cannot loss-spread – although a form of loss-spreading is available to such VSOs where they take the form of unincorporated associations by spreading the losses to their members. Nevertheless, the existence of a limited class of non-profit which cannot loss-spread should not lead to the absence of vicarious liability within the entire sector, instead it merely questions whether vicarious liability is appropriate for this class of non-profit only. The VSOs least able to loss-spread are likely to be predominantly small, informal organisations. Indeed these are the organisations least likely to engage vicarious liability in the first place, save the category of vicarious liability within unincorporated associations – which Chapter 3 argues is too widely drawn. This is since the web of relationships within such organisations is likely to be furthest away from employment like relationships, and they are less likely to be hierarchically structured.

Furthermore, whilst it clear from the history of vicarious liability that loss-spreading has influenced the courts in their development of the doctrine,[68] and that it has a role to play elsewhere in the law of tort (Chapter 8), vicarious liability itself is not based on loss-spreading. Vicarious liability applies in the absence of loss-spreading - as Stevens notes it applies to uninsured employers of domestic staff.[69] It also cannot explain some of the key elements of vicarious liability, for instance why vicarious liability requires a tort, the narrow range of injuries covered by tort (and thus by vicarious liability), and why the particular principal should pay. Mechanisms based on loss-spreading are often adopted as alternatives

[68] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013), Ch 10.
[69] Rob Stevens, *Torts and Rights* (OUP 2007) 258.

to tort,[70] and if taken in isolation and to its ultimate conclusion loss-spreading may ultimately lead to state liability, or taxation funded compensation or social security schemes.[71] Thus problems with loss-spreading within part of a sector, need not mean that vicarious liability does not apply to the whole of, or even that part of the sector.

Since vicarious liability operates within non-profits, the justification for charitable immunity based on the non-operation of vicarious liability may be dismissed.

Sharing State Immunity

This theory for charitable immunity is that charity should share the state's immunity. This is based on the link between the state and charities. Much charitable work in both the UK and the US fills gaps in the welfare state, and is often funded by, or carried out under contract with the state.[72] However, this theory is flawed, and not capable of sustaining the doctrine.

State Immunity in the United States

The level of immunity retained by the US Federal Government is broader than that retained in the UK, for instance immunity is retained for strict liability claims, discretionary functions or duties, and claims arising out of most intentional torts (unless committed by a law enforcement officer).[73] Nevertheless, it is correct to say that immunity has become 'the exception rather than the rule'.[74] States too have limited their immunity making 'liability the usual rule and immunity an exception'.[75]

If charitable immunity were justified by charities 'sharing' in the immunity of the state then the structure of charitable immunity would differ greatly from that which is adopted, and

[70] Peter Cane and James Goudkamp, *Atiyah's Accidents Compensation and the Law* (8th edn, CUP 2013), 443-5, for instance The New Zealand Accidents Compensation Corporation.
[71] Stevens (n69) 258; cf Merkin and Steele (n68).
[72] MH Ogilvie, 'Vicarious Liability and Charitable Immunity in Canadian Sexual Torts Law' (2004) 4 OxfordUCommwLJ 167, 185; Brenda Kimery, 'Tort Liability of Nonprofit Corporations and Their Volunteers, Directors, and Officers: Focus on Oklahoma' (1997-1998) 33 TulsaLJ 683, 685.
[73] 28 USC §2680(a), (h) (1970); *Laird v Nelms* 406 US 797, 92 SCt 1899, 32 LEd2d 499, 363 (1972) (US Supreme Court).
[74] Marc Franklin, Robert Rabin and Michael Green, *Tort Law and Alternatives* (9th edn, Foundation Press 2011) 227.
[75] Stuart Speiser, Charles Krause and Alfred Gans, *The American Law of Torts, Vol 5* (The Lawyers Co-operative Publishing Co 1988) 123, §17:23.

would be patterned on state immunity. Charitable immunity does not operate in the way that this residual state immunity at both federal and state level does. Further the power of such a justification for charitable immunity has declined with the declining scope of state immunity. The mere existence of a state immunity, or a damages cap, does not produce the same result for a charity. More is required. Again this points to charitable immunity having public policy as its justification.

State Immunity in the United Kingdom

The Crown Proceedings Act 1947 ended Crown immunity in English law, save for vestigial traces in prerogative and statutory powers,[76] and 'assimilated the position of the state as nearly as possible to that of private parties.'[77] Further restrictions were removed through the Crown Proceedings (Armed Forces) Act 1987.[78]

Given the removal of Crown immunity in the UK, charitable immunity in England would seem odd. For instance it would place students at a public school with charitable status in a very different position to students at a state school if negligently injured. Further, where the Crown carries out a function and may be liable in tort if its employees negligently injure members of the public, it would be odd if the ability of the injured to successfully recover could be removed through subcontracting the delivery of the service to a charity.[79]

Many of the justifications behind the removal of Crown immunity are equally applicable to charities. Firstly, during the 20th century the state expanded and retaining immunities would have been to provide an advantage in favour of state enterprises engaged in commercial activities when compared to private competitors. Secondly, with Crown immunity, whilst individual employees or officials could be sued the fact that departments had a decision whether or not to stand behind their own official and pay the damages, made them judges in their own cause. The same would be true for charities if they were immune from liability while their officials, employees, or volunteers were not. Thirdly, if governmental acts were done in the public interest, it was considered that the damage ought to be spread around the

[76] ss 2, 11.
[77] TT Arvind, 'Restraining the State through Tort? The Crown Proceedings Act in Retrospect' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature, Common Law, Statute and the Dynamics of Legal Change* (Hart 2013) 406.
[78] s 1.
[79] Although a claim could still be brought against the negligent employee.

community. Further, given the post-War Labour administration's nationalisation of industry, union and worker pressure was exerted for Crown immunity to be ended given the consequences of such immunity for potentially injured workers in nationalised industries.[80] With the subcontracting to charities of previously governmental functions and service delivery, their workforces would be vulnerable to these immunities if injured at work. The position taken in the UK is such that charitable immunity is not sustainable in an English context by analogy to Crown immunity.

Misunderstanding the Charitable Sector

This justification for charitable immunity also contains a fundamental flaw by misunderstanding the nature of the charitable sector, and aligning it with the state.

In Chapter 2 we discussed the importance of the independence of the voluntary sector from the state. Many charities are not closely associated with the state and the only connection between them is that they carry out work that might otherwise be the state's responsibility. If this were a legitimate argument for establishing immunity then all businesses carrying out functions that relieve the state of responsibility should also be entitled to such an immunity,[81] which they are not granted. Non-charitable VSOs such as mutual organisations may offer considerable relief to the need for the provision of state services, but they too do not benefit from the immunity. Unless the justification for immunity rests on a rule of law which is applicable only to charities it is difficult to see why immunity if it were to be introduced to England should be limited to charities, and not be applicable to other VSOs.

Further, whilst there may be alliances between the charitable sector and the state, they are distinct. Some charitable activities could not, and would not be provided by the state – for instance charities for the advancement of religion. The sector's values differ from those of the state, and to treat charities as an adjunct of the state is to ignore their diversity, and the distinctive values and opportunities that the sector brings (Chapter 2).

[80] Arvind (n77) 410-426.
[81] Simeone (n57) 362.

Waiver of Claim Theory

Waiver of claim is the final technical theoretical justification for charitable immunity. This theory is that someone who accepts benefits from a charity waives their right to bring an action, or assumes the risk of negligence.[82] This theory is often described as 'beneficiary waiver'. Trusts for charitable purposes are exempt from the beneficiary principle.[83] With this theory 'beneficiary' is used in a broad sense to mean anyone who receives a benefit from the charity. This model of charitable immunity cannot apply to third parties or strangers;[84] injured non-beneficiaries may bring an action, injured beneficiaries cannot. To maximise the protection the immunity provides the notion of 'beneficiary' for the purpose of the waiver of claim theory is approached very broadly.[85]

Awareness of Rights

The theory is based on an implied agreement that the beneficiary waives the right to hold the charity liable.[86] However, many of the charitable immunity cases concern charitable hospitals, where an individual may arrive at such a hospital, and have no choice or voice in the terms of their admission, for instance a patient who arrives in an unconscious condition, or infants, or those without legal capacity.[87]

Even in the case of patients not within this category, the waiver seems fictional since '[f]ew hospitals would announce a policy of requiring such a waiver as a condition of entrance, and few patients would enter under such a condition unless forced to do so by poverty'.[88] One may also doubt the existence of choice where a seriously injured person arrives at a charitable hospital, where no other non-charitable hospital is in the vicinity.

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[82] ibid 363; cf Richard Epstein, *Mortal Peril, Our Inalienable Right to Health Care?* (Addison-Wesley 1997) 370-4.
[83] Andrew Burrows (ed), *English Private Law, Oxford Principles of English Law* (3rd edn, OUP 2013) 233, [4.229].
[84] *Alabama Baptist Hospital Board v Carter* 226 Ala 109, 145 So 443 (1932) (Supreme Court of Alabama) (Brown J).
[85] eg *Egerton v RE Lee Memorial Church* 395 F2d 381 (1968) (US CA Fourth Circuit); *Book v Aguth Achim Anchai* 101 NJ Super 559, 245 A2d 51 (1968) (Superior Court of New Jersey, Appellate Division).
[86] *Adkins v St Francis Hospital of Charleston* 149 WVa 705, 143 SE2d 154 (1965) (Supreme Court of Appeals of West Virginia).
[87] *Gamble v Vanderbilt University* LRA 1918C, 875, 138 Tenn 616, 200 SW 510, 11 Thompson 616 (1918) (Supreme Court of Tennessee) (Neil CJ).
[88] *Georgetown College* (n36).

Flawed Foundations

The roots of the waiver doctrine (of which modern proponents do not seem to be aware) are intimately linked to the doctrine of common employment. Under this doctrine employees waived their rights to bring actions against their employers for the torts of fellow employees.[89]

The doctrine, however, went beyond employees, and also applied to 'volunteer assistants' - strangers helping without reward.[90] In *Powers v Massachusetts Homeopathic Hospital*[91] which introduced and popularised the waiver doctrine, it was introduced by express analogy to common employment. In so far as waiver theory is built (even if only by analogy) on the doctrine of common employment it is built on shaky foundations.

Common employment originates[92] in the 1837 English decision in *Priestly v Fowler*.[93] The ratio of *Priestly* laid the groundwork, but it did not concern a fellow servant's negligence, but rather the employer's negligence in insisting that the van be overloaded. Nevertheless it is the source of common employment, which was developed in later cases.[94] The doctrine was popularised in the US by *Farwell v The Boston and Worcester Rail Road Corporation*.[95] By 1880 the rule was 'firmly entrenched' in most US jurisdictions.[96]

Central to these decisions is the idea that an employee in entering into a contract of employment voluntarily assumed such risks, and that such dangers were taken into account in determining wages.[97] As with the approach taken to charitable immunity the courts assumed

[89] *Tunney v Midland Railway Co* (1865-66) LR 1 CP 291 (CP) 296 (Erle CJ); Frederick Pollock and James Webb, *A Treatise on the Law of Torts in Obligations Arising from Civil Wrongs in the Common Law* (New American, from 3rd English edn, FH Thomas 1894) 117-8.
[90] Pollock and Webb (n89) 126, (rationalised as an application of the *volenti* doctrine).
[91] *Powers* (n35).
[92] Percy Winfield, 'The Abolition of the Doctrine of Common Employment' (1948-1950) 10 CLJ 191.
[93] (1837) 3 M&W 1, 150 ER 1030 (Exc).
[94] Michael Stein, 'Victorian Tort Liability for Workplace Injuries' (2008) UIllLRev 933, 944-947. Note at 950, Stein considers that *Hutchinson v York, Newcastle & Berwick Ry Co* (1850) 5 Ex 343, 155 ER 150 (Exc) is the doctrine's real source. See also AH Manchester, *A Modern Legal History of England and Wales 1750-1950* (Butterworths 1980) 288, which states that *Hutchinson* 'really established the rule'.
[95] 4 Metcalf 49, 45 Mass 49, 1842 WL 4002 (Mass), 38 AmDec 339 (1842) (Supreme Judicial Court of Massachusetts); Pollock and Webb (n89) 115; Richard Epstein, 'The Historical Origins and Economic Structure of Workers' Compensation Law' (1982) 16 GeorgiaLRev 775, 777.
[96] Anon, 'The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860' (1983-1984) 132 UPaLRev 579, 583.
[97] Pollock and Webb (n89) 117.

that the bargaining position of one of the two parties, in this case the employee, was significantly stronger than it actually was. This assumption of risk, and waiver of the ability to bring actions in tort was not a true waiver and was merely deemed to have occurred for public policy reasons.

In the UK the doctrine of common employment was circumvented and subsequently abrogated by statute.[98] The decline of common employment has a more complex history in the US. Statutory reform which abolished common employment, or an assumption of risk defence in some US jurisdictions, commenced in the 19th Century.[99]

As a matter of common law, vestigial traces of doctrine have had a surprisingly long history in the US. The doctrine remained in the Restatement of Agency, Second, but was only applicable in very limited circumstances where worker's compensation laws were not applicable,[100] and where it was not circumvented by a non-delegable duty.[101] The doctrine was thus described by Balkin as 'a mastodon preserved in a glacier', being 'rendered obsolete by workers' compensation'.[102] In the rare circumstances in more recent years where the defence could be and was raised, the doctrine has been rejected.[103] There is no equivalent provision in the Restatement of Agency, Third, and the doctrine can be assumed to have died in the US. Thus, retaining a waiver of claim based approach to charitable immunity, in so far as it is built by analogy on common employment, is now no longer sustainable, either in the US or in England.

Charities Only?

For the law to accept charitable immunity based on 'beneficiary' waiver at the same time as rejecting common employment based on employee waiver, indicates that charitable immunity is based on a public policy justification of rewarding altruism, rather than a true waiver of

[98] Employers' Liability Act 1880; Workmen's Compensation Act 1906; The Law Reform (Personal Injuries) Act 1948.
[99] Richard Epstein, 'The Social Consequences of Common Law Rules' (1981-1982) 95 HarvLRev 1717, 1737.
[100] Shirley Irwin, 'Glass v. City of Chattanooga: The Abolishment of the Fellow Servant Doctrine in Tennessee' (1994-1995) 25 UMemLRev 317, 324-5.
[101] Gerhard Wagner, 'Tort, Social Security, And No-Fault Schemes: Lessons from Real-World Experiments' (2012-2013) 23 DukeJComp&In'lL 1.
[102] Jack Balkin, 'Too Good to Be True: The Positive Economic Theory of Law' (1987) 87 ColumLRev 1447, 1487.
[103] Irwin (n100) 324-5.

claim. However, accepting altruistically delivered benefits is not enough in other contexts for a waiver of claim.

US jurisdictions, unlike England, have provided immunities for motor-car drivers who provide lifts without compensation, through 'guest statutes'. A typical guest statute provided that a guest accepting a ride without compensation could not bring an action against the driver for personal injury or death, unless the injury was the result of wilful misconduct or intoxication.[104] Now, only Alabama retains a comprehensive guest statute. Three other states, Illinois, Indiana, and Nebraska retain guest statutes, but the first only applies to hitchhikers, and the others are restricted to close relatives, and in the case of Indiana also hitchhikers. Other states do not have such immunities.[105]

It is important that this protection was generally provided through statute, and was public policy based, rather than operating through a waiver at common law. That it was felt necessary to use statutes, when a waiver/assumption of risk approach could be equally applicable, demonstrates the unsustainability of the waiver approach in post-Victorian conditions. Further, where you are in receipt of a benevolent act by an individual the waiver of claim approach does not operate,[106] demonstrating that charitable immunity based on waiver is not a true waiver, but rather a disguised public policy rationale.

Paying Customers?

An individual might not be aware of a service provider's charitable status, particularly if the services were charged at full market rate. Again this points towards the waiver being fictional. A waiver approach would be more logically defensible if it applied only where the services were free or obviously subsidised, and not when they were at full market rate; some jurisdictions therefore restricted the immunity to non-paying beneficiaries.[107]

However, denying the claims of non-paying beneficiaries leads to the counterintuitive position of denying recovery to those '[who] are usually the class with the least choice in

[104] John Fleming, *The American Tort Process* (Clarendon Press 1988) 72-3.
[105] Susan Randall, 'Only in Alabama: A Modest Tort Agenda' (2008-2009) 60 AlaLRev 977, 988.
[106] *Georgetown College* (n36).
[107] Tremper (n20) 440; cf *Sessions v Thomas D Dee Memorial Hospital Ass'n* 94 Utah 460, 78 P2d 645 (1938) (Supreme Court of Utah) (Folland CJ (dissenting)).

accepting charitable service and with the least ability to bear the financial burdens of injury',[108] whilst, at the same time allowing unconnected parties to bring claims and deplete charitable funds.[109] If charities must carry insurance against (or risk their assets being applied to pay) claims made by strangers or paying beneficiaries, and are able to continue to operate despite this exposure, then extending the exposure to non-paying beneficiaries where it will not greatly increase the risk or premiums is an attractive conclusion.[110]

Unfair or Unconscionable Terms?

The waiver theory is questionable in the light of developments in contract law. The Restatement of Contracts, Second, §208 states: '[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result'. Where the waiver is standardised in all dealings with charities it is more likely to be considered unconscionable.[111] Further, particularly applicable to injured patients arriving at a charitable hospital, or to disadvantaged persons, is that the determination takes into account the 'knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities.'[112]

Unconscionability has been deemed relevant to pre-injury release cases, and some jurisdictions 'blanket ban'[113] such clauses. In California written releases from future negligence imposed as a condition for admission to a charitable hospital have been held to be of no effect.[114] Nevertheless exclusion clauses are regularly upheld, although this approach is changing.[115] Other courts have relied on other common law doctrines to evade such clauses declaring that on the facts the clauses are insufficiently prominent,[116] or insufficiently

[108] Note, 'The Quality of Mercy: "Charitable Torts" and their Continuing Immunity' (1986-1987) 100 HarvLRev 1382, 1392.
[109] Tremper (n20) 440.
[110] *Georgetown College* (n36) 828/141 (Rutledge AJ).
[111] Restatement of Contracts, Second, §208, Reporters' Note.
[112] ibid.
[113] Joseph Perillo (ed), *Corbin on Contracts, Revised Edition, Vol 7* (Lexis Nexis 2002) §29.3, 383, §29.10, 421.
[114] *Tunkl v The Regents of the University of California* 60 Cal2d 92, 383 P2d 441, 32 CalRptr 33, 6 ALR3d 693 (1963) (Supreme Court of California).
[115] Perillo (n113) §29.10, 423.
[116] *Sale v Slitz* 998 SW2d 159 (1999) (Missouri Court of Appeals); *Littlefield v Schaefer* 955 SW2d 272 (1997) (Supreme Court of Texas).

clear.[117] Thus the status of such a waiver is in doubt,[118] and waiver is a shaky foundation on which to build charitable immunity.

Whilst English contract law has not developed a doctrine of 'unconscionability' in the same way as the US, the waiver approach/justification would also face a number of problems within an English context. In essence it operates as an exclusion clause, and may be challenged by both common law and statutory means.

Firstly it may be challenged on the grounds of sufficiency of notice. The more onerous or unusual the provision, the more notice is required.[119] The courts have taken a strict approach in this regard to clauses excluding liability for personal injury.[120]

Where the claimant is acting outside of the course of his trade, business, or profession, Section 65 of the Consumer Rights Act 2015 prohibits contract clauses, or notices, between a trader and a consumer, which exclude or restrict liability for death or personal injury which results from negligence. Section 62 subjects other exclusions of negligence liability to an assessment of fairness, and if deemed unfair, (that is 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer')[121] it is not binding on the consumer. Schedule 2 of the Act, contains an indicative list of clauses which may be regarded as unfair,[122] which include excluding or limiting the trader's liability for the consumer's death or personal injury,[123] and terms which inappropriately exclude the consumer's legal rights where the trader does not perform, or inadequately performs its contractual duties.[124]

[117] Note: *Marsh v Dixon*, 707 NE2d 998 (1999) (Court of Appeals of Indiana); *Doe v Archbishop Stepinac High School* 286 AD 2d 478, 286 AD2d 478, 729 NYS2d 538 (2001) (Supreme Court, Appellate Division, Second Department, New York); *Steele v MT Hood Meadows* 159 Or App 272, 974 P2d 794 (1999) (Court of Appeals of Oregon).
[118] eg *Wheeler v St Joseph Hospital* 63 CalApp3d 345, 133 CalRptr 775, CalApp (1976) (Court of Appeal, Fourth District, Division 2, California).
[119] *Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (CA) 465 (Denning LJ). See also *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA).
[120] *Thornton* (n119).
[121] s 62(4).
[122] s 63.
[123] para 1.
[124] para 2.

A ‘trader’ is defined in Section 2(2) to be ‘a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.’ There is no profit seeking requirement; Section 2(7) states that: ‘“[b]usiness” includes the activities of any government department or local or public authority.’ Whilst non-profits are not mentioned the Explanatory Notes[125] state that they may come within the definition of trader, and gives the example of a charity shop selling t-shirts. Given that there is no requirement to trade, and local authorities would also be included where they are delivering free public services, it is argued that VSOs would also be included when delivering altruistic services.

Where the claimant is not a consumer, for instance where they interact with a VSO in the course of their business, Section 2(1) of the Unfair Contracts Terms Act 1977 prohibits contract terms or notices which exclude or restrict liability for death or personal injury arising from negligence. Section 2(2) provides that other loss or damage may not be excluded or restricted, except in so far that the term is reasonable. Section 1(3) makes it clear that Section 2 applies only to breach of obligations or duties arising from (a) ‘things done or to be done in the course of a business’ or (b) ‘the occupation of premises used for business purposes of the occupier’ and this category is not restricted to profit making activities since Section 14 states that ‘“business” includes a profession and the activities of any government department or local or public authority’. However, the status of non-profits for the purposes of Section 2 is unclear. Whilst there are commentaries in favour of including non-profits within this definition,[126] and the use of the phrase ‘course of business’ has been used in other legislation, where a commercial activity or profit motive is not required, care should be taken in interpreting the phrase in the same manner for all legislative purposes since it is possible that the meaning may vary depending on the context.[127]

In the light of the approach of both the US and UK towards exclusion clauses, the waiver theory of charitable immunity, whereby it operates as an implied exclusion clause, is no longer sustainable.

[125] Explanatory Notes to the Consumer Rights Act 2015, [35].
[126] eg Law Commission, *Unfair Terms in Contracts* (Law Com No.292, 2005), [3.32], fn34.
[127] Richard Kidner, ‘The Unfair Contract Terms Act 1977 – Who Deals as Consumer?’ (1987) 38 NILQ 46, 50, (53 considers that an Oxfam shop would be a business).

Organisational Duties

Whilst the Irish Civil Law (Miscellaneous Provisions) Act 2011 appears to provide some organisational protection, this is not the case. The legislation which primarily deals with volunteer protection (see Chapter 6), uniquely, contains a provision which deals with the direct duties of care owed by VSOs. Section 51G(2) states that in determining whether or not a volunteer organisation owes a duty of care 'a court shall consider whether it would be just and reasonable to find that the organisation owed such a duty having regard to the social utility of the activities concerned.' Given that the test for establishing a duty of care in Irish law already includes such an assessment, this provision simply restates the existing law,[128] providing no additional protection to VSOs.

Conclusion

Given that English law has not considered the issue of VSO protection it was necessary to examine in detail materials from the common law jurisdictions which have organisational protection. Organisational protection is presently limited to a number of US states; the other jurisdictions that this thesis draws upon protect volunteers, but not organisations. Irish legislation on VSO protection does not in fact protect VSOs, and like the UK's Compensation Act 2006 simply restates the existing law of negligence.

Organisational protection in common law jurisdictions is primarily found in the shape of charitable immunity and liability caps.

The justification given for statutory liability caps for VSOs is solely based on a public policy of protecting altruistic organisations. This is also one of the justifications given for charitable immunity. In this chapter all of the technical arguments for charitable immunity have been shown to be flawed. The protective mechanisms must therefore stand, if at all, on a public policy theory: that it is in the public interest for charities (or VSOs) to be protected from actions in tort.

[128] *Glencar Explorations Plc v Mayo County Council (No.2)* [2002] 1 IR 84 (SC); Bryan McMahon and William Binchy, *Law of Torts* (4th ed, Bloomsbury 2013) [6.46]-[6.62], [6.119]-[6.130], [20.96] fn219.

Since the doctrine is solely potentially justifiable through public policy, if English law were altered to confer immunity on VSOs this protection would not necessarily need to be confined to charities. Before we examine the legitimacy of such a public policy we must first examine the impact of organisational protection (see Chapter 7) before turning to whether it is normatively justifiable (Chapter 8). These factors are key in determining the soundness of a public policy of protecting VSOs from liability in tort.

Chapter 6

Volunteer Protection

Introduction

Having dealt with organisational protection we now turn to volunteer protection.

Volunteer protection is typically found in the absence of organisational protection, it represents an alternative balance between the volunteer, victim, and VSO in the volunteer tort triangle. This chapter primarily examines the schemes present in the US, Australia, and Ireland, the leading common law jurisdictions that have dealt with volunteer protection. This comparative material demonstrates a range of possibilities open to English law, and a detailed examination of their provisions reveals the types of decisions that need to be made when designing an English volunteer protection scheme, which this thesis recommends in Chapter 8.

Volunteer protection legislation has not yet caught the interest of scholars. The legislative models used have not yet been rationalised or analysed, nor has such legislation been compared across jurisdictions. This chapter demonstrates that all of the volunteer protection schemes across the common law world adopt a similar approach.

The schemes do not immunise volunteers. To retain tort deterrence at the individual volunteer level all of the schemes only provide partial protection. There are different forms of the volunteer's partial defence, and this chapter argues that if a partial defence is desired an objective standard is best adopted as the threshold of volunteer liability, rather than a subjective standard. All of the volunteer protection schemes, quite rightly, exclude motor accidents from the scope of protection.

The schemes only protect organisational volunteers and operate in the context of a liability transfer from volunteer to VSO. The schemes achieve this liability transfer through different mechanisms, and this chapter argues that where a scheme is predicated on liability transfer it should form part of the statutory scheme itself. The volunteer's protection is personal and does not apply to the VSO if it is sued for its volunteer's tort. This means that the schemes

shift losses from volunteers to their VSOs, protecting volunteers whilst also providing for victims. This chapter argues that if volunteer protection is desired it is best limited to volunteers who work for incorporated organisations, and also for a limited class of unincorporated VSO. This is to prevent the loss from being transferred from the negligent volunteer, to their innocent fellow volunteers. This thesis recognises that this means that protection will not be available for all volunteers. The justifications for this position will be further developed in Chapters 8-9.

There is little case law on volunteer protection outside of a US context. The US cases whilst jurisprudentially insignificant demonstrate that volunteer protection has a high success rate in shielding volunteers from liability and is usually dealt with at the early stages of litigation. The case law also demonstrates that partial protection at a gross negligence level can provide a meaningful level of volunteer protection.

Background

Understanding the context to the introduction of volunteer protection in each jurisdiction is essential to establish three points. Firstly, volunteer protection is different to Good Samaritan protection with which it is sometimes confused. Secondly each of the jurisdictions which introduced volunteer protection did so in the context of similar factors that led in the UK to SARAH: increasing insurance premiums, perceptions that tort was discouraging volunteering, and the tort reform movement. This also reinforces the relevance of considering these jurisdictions' legislative experiences. Thirdly, volunteer protection legislation does not form part of the tort reform movement which is aimed at cutting back on victims' rights. As this thesis argues volunteer protection represents a gain for victims (Chapters 7-8).

The intellectual precursors to volunteer protection legislation are 'Good Samaritan' statutes, intended to encourage and protect rescuers.[1] They typically provide that rescuers will not be liable for ordinary negligence, but will only be liable for gross negligence.[2] Good Samaritan and volunteer protection legislation work very differently. Whilst the former may protect

[1] Not to be confused with statutes that provide for a duty to intervene in emergencies: note Jeroen Kortmann, *Altruism in Private Law* (OUP 2005).
[2] Mitchell McInnes, 'Good Samaritan Statutes: A Summary and Analysis' (1992) 26 UBritColumLRev 239, 240.

volunteers for first aid organisations, they are of limited application to the broader voluntary sector. Good Samaritan legislation looks at the rescuer-victim relationship. The rescuer generally does not need to work (or volunteer) for an organisation to be protected.[3] However, volunteer protection looks outside of the volunteer-victim relationship, has an organisational requirement, and in most cases involves a shift from individual to organisational liability. Nevertheless, Good Samaritan statutes set a precedent by showing that legislation can be used to protect altruistic actors engaging in socially desirable conduct.

United States

Volunteer protection started in the US before spreading across the common law world.

The significant expansion of tort law between 1945-1980, was followed by an insurance crisis.[4] There was a perception that the crisis had been caused by out of hand tort liabilities.[5] Legislative 'retreat and retrenchment'[6] followed and a series of immunities or defences to tort liabilities were enacted.[7]

The House of Representative's Committee on the Judiciary stated, '[i]n the last two decades… the number of suits against volunteers has increased substantially'.[8] The Committee noted: '[t]he problem is not that volunteers have been sued successfully in large numbers, but they are named in so many lawsuits. Ultimately the volunteer defendants in most cases are found not liable, and for good reason. However, the cost of legal defense can be staggering, and the mental anguish a volunteer suffers… cannot be measured.'[9] A

[3] Sharona Hoffman, 'Responders' Responsibility: Liability and Immunity in Public Health Emergencies' (2007-2008) 96 GeoLJ 1913, 1958.
[4] Lawrence Friedman, 'The Litigation Revolution' in Michael Grossberg and Christopher Tomlins (eds), *The Cambridge History of Law in America* (CUP 2008) vol 3, ch 5, 175, 191; John Fleming, *The American Tort Process* (Clarendon Press 1988) 22-37.
[5] George Priest, 'The Current Insurance Crisis and Modern Tort Law' (1986-1987) 96 YaleLJ 1521; Kenneth Abrahm, 'Making Sense of the Liability Insurance Crisis' (1987) 48 OhioStLJ 399.
[6] Thomas Koenig and Michael Rustad, *In Defense of Tort Law* (NYU Press 2001) 60.
[7] Jay Feinman, 'Un-making the law: the classical revival in the common law' (2004) 28 SeattleUniversityLRev 1, 65.
[8] House of Representatives, Committee on the Judiciary, Report Volunteer Protection Act of 1997, (Majority), HR 105-101.
[9] House of Representatives, Committee on the Judiciary, Washington, DC, Volunteer Liability Legislation, 23 April 1997, 2 (Rep Henry Hyde).

minority voice expressed concern that volunteer litigation may be more 'myth than fact.'[10] The Committee also advanced a normative claim that good deeds should not be punished.[11]

Founded or not, litigation fears impacted on volunteering (Chapter 7). Congress found that volunteers were deterred by the potential liabilities, and that community programmes had diminished and become more expensive due to volunteer withdrawals.[12]

These concerns led to the VPA. The VPA's basic model is partial protection for organisational volunteers, and a liability shift to the VSO. Pre-VPA there was a plethora of state legislation.[13] The VPA pre-empts state law and provides a minimum level of protection. However, it does not pre-empt any state law which provides volunteers with greater protection.[14] Some states have additional volunteer protection regimes operating alongside the VPA. There is also diversity in state implementation of the VPA's permitted exceptions. The model has proved influential elsewhere in North America; Nova Scotia's volunteer protection regime which was introduced with little political debate directly copies VPA sections.[15]

Koenig and Rustad have declared that 'tort reform' is 'a code phrase for one-sided, liability-limiting statutes that favour corporate interests.'[16] The VPA is not part of this retrenchment, since it is not a one-sided protective regime, or a regime favouring corporate interests. Instead volunteer protection follows a model of organisational loss redistribution. This is also apparent from its drafting history. It was revised so as not to protect non-profit organisation defendants and also defendants in motor vehicle liability cases,[17] changing it from a tort reform mechanism to an enterprise liability influenced loss-spreading mechanism. The VPA's enactment was a genuinely bipartisan activity, and not marked with the factionalism present in typical tort reform legislation.

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[10] ibid 104 (Rep John Conyers Jr).
[11] Committee on the Judiciary, Report (n8).
[12] 42 US Code §14501.
[13] Michael Martinez, 'Liability and Volunteer Organizations: A Survey of the Law' (2003) 14 Nonprofit Management and Leadership 151, 158; Jill Horwitz and Joseph Mead, 'Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence' (2009) 6(3) JEmpiricalLegalStud 585, 589.
[14] 42 US Code §14502.
[15] Nova Scotia Volunteer Protection Act 2002.
[16] Koenig and Rustad (n6) 4.
[17] cf Perry Apelbaum and Samara Ryder, 'The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope?' (1998-1999) 8 CornellJL&PubPol'y 591, 593, 619.

Australia

In the early 2000s insurance costs and tort became highly politicised in Australia. It was widely perceived that something was wrong with tort, which was harming society.[18] Volunteers were withdrawing services,[19] and representations were made that volunteering would cease if volunteer exposure to liability was not addressed.[20]

The Federal Government commissioned the Ipp Report with an agenda of cutting back on tort. The panel was asked to consider volunteers. The panel declared that it was 'not aware of any significant volume of negligence claims against volunteers… or that people are being discouraged from doing voluntary work by the fear of incurring negligence liability.'[21] There was little consideration of volunteering empirical evidence, apart from this statement. They also did not consider whether volunteer protection would reduce insurance costs. Following the report all Australian jurisdictions enacted legislation making significant changes to tort law. Whilst many of the report's recommendations were adopted, no state entirely adopted them.[22] The report's recommendation on volunteers was not followed, and all states introduced volunteer protection legislation.[23]

Australian volunteer protection follows a general model, but there are a number of significant differences between states.[24] The first Australian jurisdiction to pass such legislation was South Australia,[25] predating the final Ipp Report. The basic mechanism of the Volunteers Protection Act 2001 (SA) seems to be inspired by the VPA.

[18] David Ipp, 'The Politics, Purpose and Reform of the Law of Negligence' (2007) 81 ALJ 456, 456-8; DA Ipp, 'Policy and the Swing of the Negligence Pendulum' (2003) 77 ALJ 732, 741; cf Rob Davis, 'The Tort Reform Crisis' (2002) 25 UNSWLJ 865.
[19] David Ipp, 'Themes in the Law of Torts' (2007) 81 ALJ 609, 612.
[20] Myles McGregor-Lowndes and Linh Nguyen, 'Volunteers and the New Tort Reform' (2005) 13 TLJ 41, 42.
[21] Law of Negligence Review Panel, *Review of the Law of Negligence: Final Report* (Commonwealth of Australia 2002) [11.21], 170.
[22] Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 SydneyLRev 443, 478.
[23] Des Butler, 'A Comparison of the Adoption of the Ipp Report Recommendations and other Personal Injuries Liability Reforms' (2005) 13 TLJ 203.
[24] McGregor-Lowndes and Nguyen, 'Volunteers' (n20) 47.
[25] ibid 43.

Ireland

Irish volunteering rates had reduced from 33% in 1999 to 17% in 2006.[26] There was also evidence that liability concerns and insurance, had caused volunteer services to close.[27] The Attorney General requested that the Irish Law Reform Commission (LRC) consider whether the duty, and/or standard of care should be varied for volunteer services. Whilst the LRC was not aware of volunteer litigation, considering it a 'remote risk', it acknowledged that a 'real worry' existed amongst potential volunteers, and VSOs' support for legislation.[28]

Section 4 of the Civil Law (Miscellaneous Provisions) Act 2011 ('Irish Act'), introduces volunteer protection. The legislation broadly tracks that proposed in the LRC report. Whilst the report demonstrates awareness that Australian statutes protect both Good Samaritans and volunteers, the volunteer elements of these statutes were ignored,[29] and the report also fails to mention the other volunteer protection regimes. However, the final legislation is too close to other volunteer protection regimes to be coincidental. Further, the LRC's precursor Consultation Paper briefly mentions, but does not examine, some of the key volunteer protection legislation.[30]

Personal Defence

Unlike the organisational protection provided by charitable immunity to charitable VSOs (see Chapter 5), the volunteer protection regimes do not entirely shield volunteers from negligence liability. The volunteer defence only partially shields volunteers, and they remain liable where the wrongfulness of their actions exceed a defined liability threshold. The statutes show two main approaches to protecting volunteers, an objective approach, with gross negligence as the liability threshold (VPA), and a subjective approach, which protects volunteers who act in good faith (Australia).

[26] Houses of the Oireachtas, Dáil Éireann Debate, Vol 738 No.2, 12 Jul 2011, Civil Law (Miscellaneous Provisions) Bill 2011 [Seanad]: Second Stage (Resumed), P7 of 17 (Deputy Catherine Murphy).
[27] Houses of the Oireachtas, Seanad Éireann, Vol 209 No.2, 30 June 2011, Civil Law (Miscellaneous Provisions) Bill 2011: Second Stage, P10 of 31.
[28] Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009) [1.30], [3.101].
[29] ibid 89-106, [4.13]-[4.54].
[30] Law Reform Commission Consultation Paper, *Civil Liability of Good Samaritans and Volunteers* (LRC CP 47–2007) [4.26]–[4.33].

The protection provided to volunteers is best classified as a personal defence rather than an immunity, since whilst it strengthens a volunteer's hand in defending claims, it does not fully shield volunteers from claims.

Objective Approach

The VPA provides that volunteers are not liable for their acts or omissions on behalf of the organisation[31] where they act within the scope of their responsibilities, and 'the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer'.[32] The VPA does not alter the standard of care; rather it applies a personal defence protecting the volunteer where their fault level falls under a certain threshold. Of these gross negligence sets the liability boundaries, representing the most stringent of the standards of care needed to be met by volunteers to be protected. This defence does not apply to the organisation.[33] The volunteer is not protected from actions brought by the organisation itself.[34]

US state volunteer protection legislation differs from the VPA. Whilst most states set gross negligence as the liability boundary,[35] providing the same protection as the VPA, a number of states provide protection in excess of the VPA. One state protects volunteers from negligence provided the conduct was within the course and scope of activities,[36] rendering it coextensive with vicarious liability. This also protects volunteers from acts of wilful recklessness.

Gross Negligence

Volunteers, unless grossly negligent, are protected from negligence claims. Whether this protection is meaningful depends on a sufficient difference between negligence, and gross negligence.

[31] 42 US Code §14503(a).
[32] ibid §14503(3).
[33] ibid §14503(c).
[34] ibid.
[35] eg CRS §13-21-115.5 (Colorado); 10 Del C §8133 (Delaware); La RS 9:2798 (Louisiana), (volunteer athletics); Md Code Ann §5-407 (Maryland); NJ Stat §2A:53A-7 (New Jersey).
[36] 14 MRS §158-A (Maine).

Imported from Roman law[37] different categories of negligence were historically used to provide tailored standards of care.[38] Over the 19th Century gross negligence fell out of favour in English tort law. Lord Denman CJ in *Hinton v Dibbin*[39] noted 'it may well be doubted whether between "gross negligence" and negligence… any intelligible distinction exists.'[40] In *Wilson v Brett*,[41] a bailment case, Rolfe B stated that he 'could see no difference between negligence and gross negligence — that it was the same thing, with the addition of a vituperative epithet'.[42] This was famously restated by Willes J in *Grill v The General Iron Screw Collier Co Ltd*;[43] this time the lack of a distinction formed part of the ratio. Whilst some subsequent decisions accepted the distinction,[44] the general trend since is that gross negligence has found little favour in tort. Millett LJ remarked in *Armitage v Nurse*,[45] a trust case, that 'English lawyers have always had a healthy disrespect'[46] for the distinction.[47]

This chapter advances that there is nothing objectionable to gross negligence, and that it is distinct from ordinary negligence. It is not alone in doing so.[48] Nolan argues that the Victorian rejection of gross negligence was due to its then chameleonic nature, and part of a move away from providing special protection.[49] Changes in public attitude rather than unworkability prompted the change.[50] Weir correctly notes 'it is no more difficult to say whether a person fell far below the acceptable standard than whether he fell below it at all.'[51] Courts regularly analyse the degree of negligence between actors in considering contributory

[37] WW Buckland and Peter Stein, *A Textbook of Roman Law* (3rd edn, CUP 1975) 462-481; note, 'The Three Degrees of Negligence' (1873-1874) 8 AmLRev 649; Shelden Elliott, 'Degrees of Negligence' (1932-3) 6 SCalLRev 91.
[38] *Coggs v Bernard* (1703) 2 Lord Raymond 909, 92 ER 107; *Beal v The South Devon Railway Company* (1860) 5 H & N 875, 157 ER 1431.
[39] (1842) 2 QB 646.
[40] At 661.
[41] (1843) 11 M & W 113, 152 ER 737.
[42] At 115-5, 739.
[43] (1865-66) LR 1 CP 600.
[44] *Giblin v McMullen* (1867-69) LR 2 PC 317; *Martin v London CC* [1947] KB 628.
[45] [1998] Ch 241.
[46] At 254; note also *Engler v Rossignol* (1976) 64 DLR (3rd) 429.
[47] See also *Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd* [2007] EWCA Civ 154, [2007] 1 CLC 188, [23] (Moore-Bick LJ).
[48] Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 67-8; Scottish Law Commission, *Discussion Paper on Breach of Trust* (DP No 123, 2003); Christopher Walton and others (eds), *Charlesworth and Percy on Negligence* (14th edn, Sweet and Maxwell 2018) [1-15]; Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72(3) CLJ 651, 673.
[49] Nolan (n48) 675.
[50] Scottish Law Commission (n48) [3.30].
[51] Weir (n48) 68.

negligence and contribution.[52] Further, major and minor departures from a standard of care are something that courts are able to assess, in *Blake v Galloway*,[53] dealing with teenager horseplay, Dyson LJ held that the duty of care would be breached only by 'recklessness or a very high degree of carelessness.'[54] Special standards of unreasonableness have also been found in public law.[55] If care were measured in units, with 0 representing no care, and 100 representing maximum care, with negligence set at <50, it does not seem impossible, where appropriate, for there to be different levels at which liability is imposed, say gross negligence set at <25, and in cases where extremely high levels of care are required, liability set at <75.

However, gross negligence is used in English law outside of tort, and a meaningful distinction exists between it and ordinary negligence. It is regularly invoked in the contexts of commercial contract exclusion clauses,[56] trustee exclusion clauses,[57] consumer banking law,[58] space law,[59] salvage law,[60] director's disqualification,[61] mortgagee rights and duties,[62] the sale of goods,[63] and involuntary bailment.[64] It has been advanced that it plays a role in partnership law.[65] In the offence of gross negligence manslaughter, ordinary negligence is not enough; instead 'gross negligence' is required.[66] Trust law in both Jersey[67] and Guernsey[68] distinguishes between negligence and gross negligence, as does the Scottish law of trustee exemption clauses.[69] The concept has been used in Scottish trust law 'for well over

[52] ibid.
[53] [2004] EWCA Civ 814, [2004] 1 WLR 2844.
[54] At [16].
[55] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[56] eg *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 BCLC 54; *Winnetka Trading Corporation v Julius Baer International Ltd* [2011] EWHC 2030 (Ch); Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet and Maxwell 2018) [15-020].
[57] *Armitage* (n45); English law permits such exclusions (John McGhee, *Snell's Equity* (33rd edn, Sweet and Maxwell 2016) [30-026].
[58] Payment Services Regulations 2009/209, Reg 62(2)(b).
[59] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187 art 6.
[60] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet and Maxwell 2016) [18-22].
[61] *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, 486 (Sir Nicolas Browne-Wilkinson VC).
[62] McGhee (n57) [39-029].
[63] Michael Bridge (ed), *Benjamin's Sale of Goods* (10th edn, Sweet and Maxwell 2017) [6-011]; *Hiort v Bott* (1873-74) LR 9 Ex 86.
[64] Beale (n56) [33-036].
[65] *Tann v Herrington* [2009] EWHC 445 (Ch).
[66] Mark Lucraft (ed), *Archbold: Criminal Pleading, Evidence and Practice 2019* (67th edn, Sweet and Maxwell 2018) [19-122]-[19-125]. Approach taken in this context differs since the test focuses on criminality and death (*R v Adomako* [1994] UKHL 6, [1995] 1 AC 171).
[67] Trusts (Jersey) Law 1984, s 30(10).
[68] Trusts (Guernsey) Law 2007, s 39(7).
[69] Scottish Law Commission (n48).

a century without it having caused difficulties.'[70] Gross negligence is also found in international conventions,[71] and regularly features in European Union law.[72] That in these areas courts are able to distinguish between negligence and gross negligence indicates that the distinction is also workable in tort. It has also been successfully used in other jurisdictions in tort including in the US, and Canada.[73]

Gross negligence is not the same as bad faith, or wilful misconduct.[74] The difference between negligence (however gross) and fraud is a difference in kind, whereas the 'difference between negligence and gross negligence [is] merely one of degree'.[75] The same approach is taken in the US. Whilst some US courts have construed gross negligence to be wilful or wanton conduct, the approach of most US courts has been that gross negligence differs from negligence in degree, not in kind.[76]

Cases on exclusion clauses demonstrate that gross negligence is more than mere negligence.[77] In *Martin v London County Council*,[78] Henn-Collins J stated: 'it must be some sort of carelessness which would appear to the plain man of common sense as being gross.'[79] In construing an exclusion clause the Court of Appeal in *GSWR Co Ltd v British Railways Board*[80] considered that gross negligence meant an act or omission which 'would be regarded by those familiar with the circumstances as a serious error.'[81] Gross negligence has been described in Scottish cases as 'gross neglect of duty'.[82]

[70] ibid [3.30].
[71] eg Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) (adopted 1 March 1973, entered into force 12 April 1994) art 18(2).
[72] 306 EU directives and regulations contain the term (26 April 2019).
[73] Particularly in Good Samaritan and guest statutes. However, outside bailment it has generally been eliminated from the common law of tort: Elliott (n37) 124-135; W Page Keeton and others (eds), *Prosser and Keeton on the Law of Torts* (5th edn, West Publishing Co 1984) 209-11.
[74] *Goodman v Harvey* 111 ER 1011, (1836) 4 Ad & El 870 (KB) 876 (Lord Denman CJ); *Armitage* (n45).
[75] *Armitage* (n45) 254 (Millett LJ); *Camerata* (n56).
[76] Keeton (n73) 211; Olga Voinarevich, 'An Overview of the Grossly Inconsistent Definitions of "Gross Negligence" in American Jurisprudence' (2015) 48 JMarshallLRev 471; 57A AmJur 2d Negligence §227; *Thompson v Bohlken* 312 NW2d 501 (1981); *Thone v Nicholson* 84 MichApp 538, 269 NW2d 665 (1978).
[77] *Camerata* (n56) 627 [161] (Andrew Smith J); *Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent)* [1997] 2 Lloyd's Rep 547; *Winnetka* (n56) [16] (Roth J).
[78] *Martin* (n44).
[79] At 631.
[80] Unreported, 10 February 2000, 2000 WL 389473.
[81] At [37].
[82] *Carruthers v Cairns* (1890) 17 R 769.

Red Sea Tankers Ltd v Papachristidis[83] makes it clear that gross negligence does not require an appreciation of the risks, it is an objective standard: 'conduct which a reasonable person would perceive to entail a high degree of risk of injury to others coupled with heedlessness or indifference to or disregard of the consequences. The heedlessness, indifference or disregard need not be conscious.'[84] In the Scottish case of *William Purves v William Landell*[85] in which the House of Lords took care to state that the law on the matter was the same in England, Lord Brougham stated that gross negligence meant that '[t]here must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general'.[86]

Perhaps the most detailed classic and regularly cited definition of gross negligence in the US is that of Rugg CJ in *Altman v Aronson*:[87] '[g]ross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree…. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct'.[88]

A statute can legitimately make reference to a gross negligence standard. Whilst it is submitted that gross negligence is a doctrine capable of clear definition, even if there were difficulty in drawing its boundaries this should not lead to a rejection of the doctrine. There are many areas of the law where boundaries are not crystal clear.[89] Degrees of negligence exist in other areas of the law, and it is not impossible for a court to determine different levels of negligence. Gross negligence is a higher level of negligence compared to ordinary

[83] *Red Sea* (n77).
[84] At 587 (Mance J).
[85] (1845) XII Clark & Finnelly 91, 8 ER 1332.
[86] At 100.
[87] 231 Mass 588, 121 NE 505, 4 ALR 1185 (1919).
[88] At 591-2.
[89] Scottish Law Commission (n48) [3.30].

negligence. It is also an objective standard, and its determination does not require any knowledge of the state of the defendant's mind.

Subjective Approach

Unlike the VPA the Australian regimes are based around a subjective defence. The exact wording of the protection provided varies. A typical example is Western Australia's Volunteers (Protection from Liability) Act 2002, s 6(1): 'a volunteer does not incur civil liability for anything that the volunteer has done in good faith when doing community work.'[90] Protection goes beyond the tort of negligence.[91] The volunteer is provided with a personal defence, rather than altering the duties, or (where applicable) standards of care. Good faith is the trigger for protection in Queensland,[92] New South Wales,[93] Commonwealth legislation,[94] Victoria,[95] and Tasmania.[96] In contrast South Australia,[97] and the Northern Territories[98] use 'good faith and without recklessness'. The Australian Capital Territory legislation uses 'honestly and without recklessness'.[99] All such drafting excludes for instance sexual abuse torts.

Good faith concerns the defendant's subjective mental state, motives, and reasons for acting.[100] It is sometimes treated as a test of honesty.[101] Whilst a gross negligence defence is based on an objective standard of care,[102] a good faith defence subjectivises the standard of care requiring the court to inquire into the state of the defendant's mind.[103] If the defence additionally requires that recklessness is not present, this contains an additional mental

[90] Other provisions clearly spell out that this includes omissions: eg Civil Liability Act 2003 (Qld), ('Qld Act'), s 39.
[91] Emphasised in Civil Liability Act 2002 (NSW), ('NSW Act'), s 59(1).
[92] Qld Act, s 39.
[93] NSW Act, s 61.
[94] Commonwealth Volunteers Protection Act 2003, ('Commonwealth Act'), s 6.
[95] Wrongs Act 1958 (Vic), ('Vic Act'), s 37.
[96] Civil Liability Act 2002 (Tas), ('Tas Act'), s 47.
[97] Volunteers Protection Act 2001 (SA), ('SA Act'), s 44.
[98] Personal Injuries (Liabilities and Damages) Act (NT), ('NT Act'), s 7(1).
[99] Civil Law (Wrongs) Act 2002 (ACT), ('ACT Act'), s 8(1). The protection provided by the ACT legislation is less than the other statutes since s 7(2)(b) provides that work is not protected if it 'creates a serious risk to the health or safety of the public or a section of the public'. Oddly, this transfers the risk of the most dangerous work from the organisation to the individual volunteer.
[100] Iain Field, 'Good Faith Defences in Tort Law' (2016) 38 SydneyLR 147, 148-150.
[101] *Roads and Traffic Authority of New South Wales v Barrie Toepfer Earthmoving and Land Management Pty Ltd (No.7)* [2014] NSWSC 1188.
[102] Nolan (n48) 669.
[103] LRC Report (n28) [4.72]-[4.75]; *Bankstown City Council v Alamdo Holdings Pty Ltd* [2005] HCA 46, (2005) 223 CLR 660; Iain Field, 'Good Faith Protections and Public Sector Liability' (2006) 23 TLJ 210, 216.

element alongside a conduct element. Recklessness is to deliberately embark on conduct which one knows carries an unreasonable risk of harm.[104]

Although the Australian reforms were aimed at negligence, good faith defences may be motivated by a desire to provide wider protection to volunteers. It also applies to intentional torts. For example, false imprisonment in the case of a resident's wrongful but honest detention by a nursing home volunteer.

Some US state legislation also utilise subjective rather than objective standards to protect volunteers. Two states rely on subjective recklessness,[105] two rely on good faith,[106] other states mix good faith and a requirement that the behaviour is not wilful or wanton.[107] Six states rely on intentionality by simply requiring that the conduct is not wilful and/or wanton.[108] This subjective approach provides volunteers with greater protection than the objective approach.

Hybrid Approach

The Irish regime applies only to negligence.[109] Section 51E(1) of the Irish Act states that '[a] volunteer shall not be personally liable in negligence for any act done when carrying out voluntary work.' This protection does not apply where the act is committed 'in bad faith or with gross negligence'[110] or where the volunteer knew, or ought reasonably to have known that the act was outside the scope of the work authorised by the organisation, or contrary to its instructions.[111] This protection was seen as rewarding good behaviour, reducing tort deterrence, and compromising between encouraging altruism and the victim's right of redress.[112]

[104] Peter Cane, *Responsibility in Law and Morality* (Hart 2002) 80.
[105] Tex Code §84.004, 84.007 (Texas); 83 PS §8332.4 (Pennsylvania).
[106] Code of Ala §6-5-336 (Alabama); Cal Corp Code §5239 (California).
[107] DC Code §29–406.90 (DC); Idaho Code §6-1605; KRS §411.200 (Kentucky); MO ST 537.118 (Missouri), (Missouri's protection is only against those intended to receive a benefit from the service; the VPA, however, applies in other cases); Iowa Code § 504A.101; Utah Code Ann §78-19-2.
[108] 805 ILCS 105/108.70 (Illinois); KSA §60-3601 (Kansas); La RS 9:2792.3 (Louisiana); Nev Rev Stat §41.485 (Nevada); RI Gen Laws §7-6-9 (Rhode Island); Wis Stat §181.0670 (Wisconsin).
[109] Irish Act, s 51A(1).
[110] ibid s 51E(2)(a).
[111] ibid s 51E(2)(b).
[112] LRC Report (n28) [4.81].

Utilising gross negligence provides an objective standard as the primary method of protection. Whilst there is a subjective element, since the protection does not apply if the volunteer is in bad faith, this is very different to the Australian regimes. Liability is set at gross negligence; but, a volunteer loses this protection and is liable for ordinary negligence if they are in bad faith. This is not a subjective standard of care; rather it is a carve-out provision that removes a volunteer's protection in such circumstances. The standard of care applied to all volunteers is the same; if a volunteer is grossly negligent they are liable without any need to enquire into their subjective mental state. However, if a volunteer is merely negligent, not grossly negligent, then their subjective state may remove their protection. Ireland therefore represents a hybrid approach.

Some US states utilise a gross negligence protection standard, but also include a subjective requirement that the conduct also be in good faith.[113] To the extent that these statutes provide less protection to volunteers than the VPA, they are pre-empted by the VPA.

Figure 1 – Liability/Defence

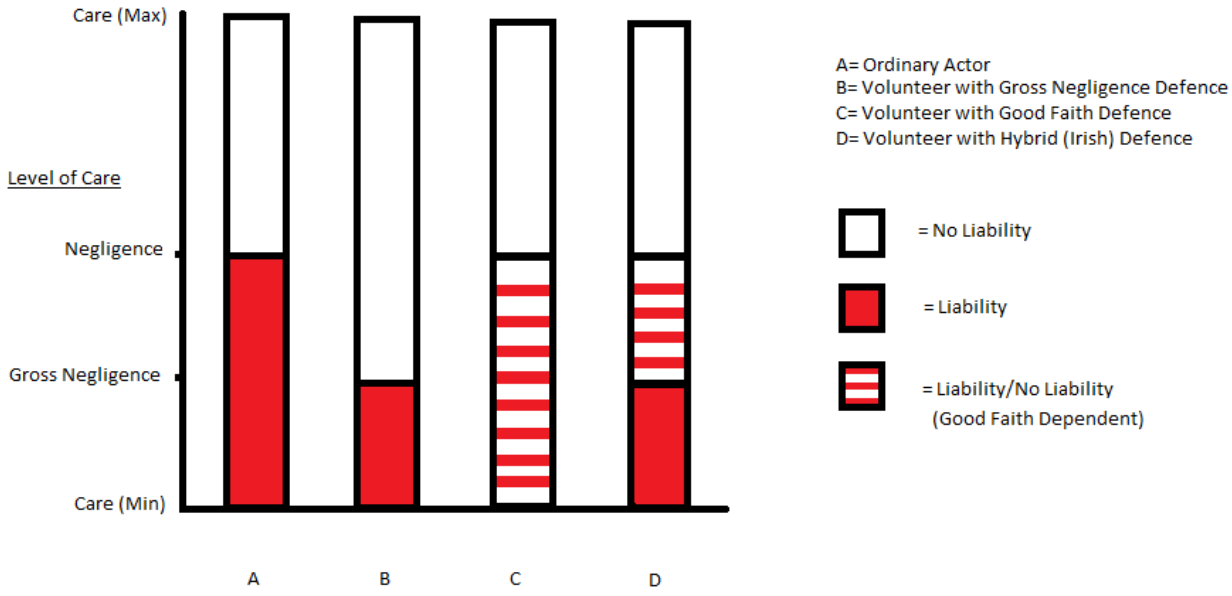


Figure 1 illustrates the three positions.

[113] ARS §12-982 (Arizona); ACA §16-6-105 (Arkansas); RSA §508:17 (New Hampshire); NC Gen Stat. §1-539.10 (North Carolina); ND Cent Code §32-03-45 (North Dakota); 76 Okl St §31 (Oklahoma); SD Codified Laws §47-23-29 (South Dakota); Wyo Stat §1-1-125 (Wyoming).

Objective v Subjective

As we will see in Chapters 7-8 to provide full protection to volunteers from liability in negligence is to provide immunity and encourage carelessness. To mitigate this and to ensure that tort still has a deterrent role at the individual volunteer level only partial protection is provided.

Chapter 8 argues that volunteers should be partially protected from negligence liability. However, if partial volunteer protection is desired a subjective defence is problematic. Gross negligence, as with negligence is the failure to meet a standard of care, it does not require a state of mind.[114] With a gross negligence defence, liability in negligence is determined by whether or not a defendant's conduct met a certain objective standard. However, with a good faith defence to negligence the defendant's liability is determined by whether or not a defendant's conduct met a certain objective standard of conduct, and, in addition whether or not this conduct was accompanied by a particular mental state.[115] This determination to be made by the court is more complex[116] than one based on an objective standard, since there is a need to inquire into the defendant's mind. This reduces certainty and predictability.

Gross negligence compromises between protecting volunteers, yet still providing for an objective standard to incentivise volunteers to improve their skills, and not to undertake roles beyond their level of competence. A standard which is personal to the volunteer does not achieve this.[117]

If good faith is treated as a test of honesty then the extremely incompetent are also protected provided that they had good motives. This will mean that there is little remaining tort deterrence operating on volunteers, (see Chapter 7). For instance if a volunteer is operating highly dangerously, but they do not realise that they are incompetent, instead genuinely believing that they are competent, they would be protected by a good faith defence, but would be liable under a gross negligence standard. Good faith might be more suitable if

[114] Cane (n104) 79.
[115] ibid 78-9.
[116] *Nettleship v Weston* [1971] 2 QB 691 (CA).
[117] Cane (n104) 73.

liability was based on moral blameworthiness, but negligence has moved away from such notions.[118]

A reduced objective standard of care, such as gross negligence, provides an equal level of protection to all volunteers. With a subjective defence, the standard of care that will apply will vary, dependent on a volunteer's capacities and scruples. This means that when a (potential) victim interacts with a volunteer (the victim need not know of the other's volunteer status), a (potential) victim does not know what standard to expect from the actor. The level of legal risk that they will be exposed to will depend on the subjective mental state of the volunteer with whom they happen to interact. This means that an individual interacting with volunteers will not have 'sufficiently secure expectations' of their rights to their property, and bodily integrity.[119] An objective standard, such a gross negligence, will be more likely to provide this.[120] Further, it must be remembered that fellow volunteers may also be victims – an uncertainty in exposure to risk from one's fellow volunteers may impact on the propensity of individuals to volunteer. Thus an objective standard of protection for volunteers and potential victims may be preferable, rather than one that significantly varies with the parties.

With the Irish hybrid approach all grossly negligent volunteers are liable, even those in good faith. This provides significantly greater victim protection than the Australian approach. It means that there are secure expectations as to the minimum level of care. However, the subjective carve out introduces some uncertainty, since bad faith might be pleaded by claimants as a matter of course to evade the defence, thus requiring a trial dealing with the volunteer's subjective mental state. It also reduces volunteer protection in that claimants can force defendants to run up costs in defending allegations of bad faith, which in turn decreases the bargaining position of volunteers in settlement negotiations. Whilst one can have sympathy with the motives behind this carve out, it introduces uncertainty which a purely objective approach does not. Whilst claimants may respond to objective protection by simply pleading gross negligence of volunteers, the provision nevertheless signals to the courts that a different standard for liability applies than the norm.

[118] James Goudkamp, 'The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence' (2004) 28 MelbULRev 343; Tony Honoré, 'Responsibility and Luck: the Moral Basis of Strict Liability' (1988) 104 LQR 530.
[119] Richard Wright, 'The Standards of Care in Negligence Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1995) ch 11, 258-9.
[120] Nolan (n48) 670.

Liability Transfer

All of the volunteer protection regimes are predicated on transferring the volunteer's liability to the organisation. The defences are drafted so that they do not apply to the organisation when sued for the volunteer's tort. There are two transfer models in the regimes: an express statutory transfer; or a common law transfer - in many cases the statute making it clear that this second approach is intended. Finally, it must be noted, whilst apparently not adopted by deliberate design, there is the New South Wales model, which does not transfer liability, and which appears to apply the defence to the organisation when sued vicariously.

Transfer Mechanisms

Most Australian jurisdictions adopt a model whereby when the volunteer is protected the organisation is liable for the volunteer's tort via a statutory vicarious liability.[121] For instance the Wrongs Act 1958, (Victoria), s 38(2): 'Any liability resulting from an act or omission that would but for subsection (1) attach to the volunteer attaches instead to the community organisation.' With this form of vicarious liability the organisational liability substitutes for the volunteer's liability, and is not additional. Unlike common law vicarious liability the organisation is not liable for the volunteer's torts where the defence does not apply.

The VPA provides that state law may render volunteer protection conditional upon the organisation being liable for the volunteer to the same extent as an employee, (a statutory vicarious liability).[122] Although some US states provide for automatic organisational statutory vicarious liability where the volunteer is protected,[123] most leave it up to ordinary common law vicarious liability. Other state statutes are designed with the obvious intention that vicarious liability applies, since they include provisions to ensure that the organisation cannot raise the defence when sued for the volunteer's wrong.[124] Courts in states that do not

[121] Vic Act, s 37(2); SA Act, s 5(1); Tas Act, s 48(1); NT Act, s 7(3); Volunteers (Protection from Liability) Act 2002 (WA), ('WA Act'), s 7; ACT Act, s 9; Joachim Dietrich, 'Duty of Care under the "Civil Liability Acts"' (2005) 13 TLJ 17, 29.
[122] 42 US Code §14503(d).
[123] Code of Ala §6-5-336 (Alabama); ARS §12-982 (Arizona); 10 Del C §8133 (Delaware); KSA §60-3601 (Kansas); 76 Okl St §31 (Oklahoma); Wyo Stat §1-1-125 (Wyoming); Fla Stat §768.1355(2) (Florida). In Michigan this may be optionally drafted into the articles of incorporation - MCLA 450.2209.
[124] DC Code §29–406.90 (DC); ORC Ann §2305.38 (Ohio).

have such provisions have also concluded that the volunteer's protection does not apply to organisations if sued vicariously.[125] If instead of a personal defence the standard of care had been varied, this would have provided the same protection to the organisation (as the volunteer) if a claim was brought via vicarious liability.

US courts have recognised that vicarious liability is central to the fairness of volunteer protection.[126] In the US vicarious liability for volunteers is well established.[127] However, vicarious liability is not present for all volunteers, there may be insufficient control over some informal volunteers, and some volunteers may be more in the nature of independent contractors.[128]

The Irish Act leaves liability transfer to the common law, although, the Act envisages a transfer. Firstly, there is an organisational requirement.[129] Secondly, vicarious liability is assumed to exist for volunteers, and the doctrine is referred to by name in Section 51E(3). This assumption is also present in the LRC's report. The centrality of liability transfer through vicarious liability to the Irish regime is also suggested by the LRC's rejection of protection for informal volunteers, and their noting that formal volunteers may be protected by vicarious liability or the organisation's insurance.[130] This seems to be motivated by a desire to balance volunteer protection with a victim's right to recover their losses, since with formal volunteers a defence does not preclude an action against the organisation. Vicarious liability for gratuitous service, (and thus also volunteers), is present in the Irish common law.[131]

The Irish Act contains a personal defence for the volunteer. It does not alter the standard of care of the tort itself. This means that the ordinary standard of care is preserved if an action is brought against the organisation vicariously, as is clear from the provisions on

[125] Restatement of Agency, Second, (1958), §217; *Avenoso v Mangan* 40 ConnLRptr 637, 2006 WL 490340 (Conn Super Ct 2006); although this is not uniform.
[126] *Gaudet v Braca* 33 ConnLRptr 200, 2002 WL 31440878 (Conn Super Ct 2002).
[127] Restatement of Agency, Third, 2006, §7.189; Note, Allan Manley, 'Liability of charitable organization under respondeat superior doctrine for tort of unpaid volunteer' (1978) 82 ALR3d 1213; JD Kahn, 'Organizations' Liability for the Torts of Volunteers' (1985) 133(6) UPaLRev 1433.
[128] 82 ALR3d 1213; eg *Woods v Kelley* 948 SW2d 634 (Mo Ct App 1997).
[129] Irish Act, s 51A(1).
[130] LRC Report (n28) [3.88].
[131] *Moynihan v Moynihan* [1975] IR 192 (SC). Note *Hickey v McGowan* [2017] IESC 6.

indemnities.[132] The volunteer's defence is also restricted to where the tort has sufficient connection to the relationship between volunteer and organisation for vicarious liability to apply. The system therefore provides some protection to the volunteer from being sued in a personal capacity, whilst transferring their liability to the organisation.

Despite the VPA's restriction on protection to acts within the 'scope of the volunteer's responsibilities in the nonprofit organization',[133] which is an attempt to tie the scope of protection to the scope of vicarious liability, there is a risk that in states which have not included a statutory vicarious liability that there may be situations where it is held that volunteer protection applies, but vicarious liability does not.[134] This leads to the victim shouldering the loss. Thus if a regime is based on a background of liability transfer to the organisation then to avoid this problem the statute should provide for statutory vicarious liability.

Organisational Control of Volunteers?

Given this shift in responsibility tort's deterrence function (see Chapter 7) increasingly operates at the organisational level. The organisation has increasing responsibility to implement safety measures, and tort avoidance strategies. In order for it to be able to do so successfully volunteers will need to follow procedures and instructions. With employees, employers have contractual control. With volunteers control can sometimes be lacking. Thus in order to provide volunteers with an incentive to follow the organisation's policy and procedures, and retain a deterrent effect, an exception to volunteer protection comes into play. A typical Australian example is the Personal Injuries (Liabilities and Damages) Act, (NT), 2003, s 7(2)(a), which provides that a volunteer's protection is lost if they: 'knew, or ought reasonably to have known, that he or she was acting outside the scope of his or her authority or contrary to the instructions of the community organisation'.[135] The Irish Act achieves a similar effect by tying protection to the volunteer's authorised work,[136] as does the

[132] Irish Act, s 51E(3).
[133] 42 US Code §14503(a)(1).
[134] *Rieger v Wat Buddhawararam of Denver, Inc* 338 P3d 404, 2013 COA 156 (Colorado Court of Appeals).
[135] See also WA Act, s 6(3); Tas Act, s 47(3)(a); ACT Act, s 8(2)(d); Vic Act, s 38(1)(a)(i)-(ii); Qld Act, s 42; SA Act, s 4(3); note NSW Act, s 64.
[136] Irish Act, s 51A(1) .

VPA which ties it to 'scope of the volunteer's responsibilities'.[137] These provisions incentivise volunteers to follow instructions.

NSW Exception - Organisational Protection?

Given that volunteer protection schemes adopt a loss transfer model, the volunteer defence is personal to the volunteer and does not protect the VSO when it is sued vicariously for its volunteer's torts. However, the New South Wales volunteer defence is different to the rest of the common law world. It has inadvertently or underhandedly morphed, without debate, into a form of VSO protection which also protects VSOs when sued vicariously for their volunteer's torts.

In NSW organisational liability shifting is governed by common law vicarious liability.[138] Vicarious liability is thought to be unlikely to be present in an Australian volunteer context, save in untypical 'agency' situations.[139] When the legislation was introduced into the NSW Parliament the premier Bob Carr stated: '[i]t is not intended to alter the potential liability of a community organisation by providing the individual members with immunity.'[140] Thus the volunteer's defence does not apply to the organisation if the organisation is vicariously liable. Also Section 10(2) of the Law Reform (Vicarious Liability) Act, (NSW), 1983, provides: '[f]or the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded.'

However, in a subsequent amendment Section 3 and Schedule 3 of the Civil Liability Amendment Act, (NSW), 2003, was slipped in as 'clarification'. Its significance appears not to have been noticed by the legislature.[141] Through this amendment NSW radically altered the dynamic between the victim, volunteer, and organisation, creating a system unlike any other common law jurisdiction. The new Section 3C of the Civil Liability Act, (NSW), 2002,

[137] 42 US Code §14503(a)(1).
[138] This differs from the English law of vicarious liability: *Prince Alfred College Incorporated v ADC* [2016] HCA 37; *New South Wales v Lepore* [2003] HCA 4, 212 CLR 511.
[139] Law of Negligence Review Panel (n21) 170, [11.22]-[11.23]; *Echin v Southern Tablelands Gliding Club* [2013] NSWSC 516; cf *Goodhue v Volunteer Marine Rescue Association Incorporated* [2015] QDC 29.
[140] Civil Liability Amendment (Personal Responsibility) Bill, Second Reading 2002, 5764.
[141] Legislation Review Committee, 'Legislation Review Digest' (Parliament of New South Wales, No 7 of 2003).

provides: '[a]ny provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.' Volunteer protection contained within the Act therefore also protects the organisation,[142] concentrating the loss on the victim, (unless of course a VSO direct duty of care, or a non-delegable duty can be found). It is surprising that this significant departure from the system found in other jurisdictions has attracted little to no attention.[143] This is particularly since VSO protection has been widely rejected across Australia following the Ipp Report's conclusions which considered that non-profits represented a significant risk to the public, that larger non-profits were able to bear or spread costs, and that they often serve the vulnerable. The panel also considered that there should be no exception for smaller non-profits, given the need for incentives to take care, and since larger concerns could exploit this protection by splitting their operations.[144]

In one first instance decision the Queensland District Court determined, albeit obiter, that a vicariously liable VSO should share the protection granted to the volunteer.[145] Whilst the decision is of limited precedential value, it along with the NSW experience, demonstrates that in the absence of express statutory liability transfer, if a legislature does not also wish the protection to apply to VSOs this should be clearly expressed in the statute.

Indemnity?

Given its liability transfer model, Section 51E(3) of the Irish Act provides that any volunteer indemnity given to the VSO to cover its vicarious liability where the volunteer is protected by the statute, has no effect. The Australian legislation, (except NSW and Queensland), also prevents the volunteer from entering into an indemnity to cover the VSO's losses in being held liable for the volunteer's acts.[146] This prevents the statutory liability transfer being circumvented by private agreement.

[142] *Echin* (n139) [98]-[105] (Davies J).
[143] Note Dietrich (n121) 29 only briefly notes s 3C; McGregor-Lowndes and Nguyen, 'Volunteers' (n20) 46 seem unaware of this change; McDonald (n22) 458 briefly notes s 3C also protects organisations.
[144] Law of Negligence Review Panel (n21) 60, [4.4]–[4.6].
[145] *Goodhue* (n139).
[146] McGregor-Lowndes and Nguyen, 'Volunteers' (n20) 53.

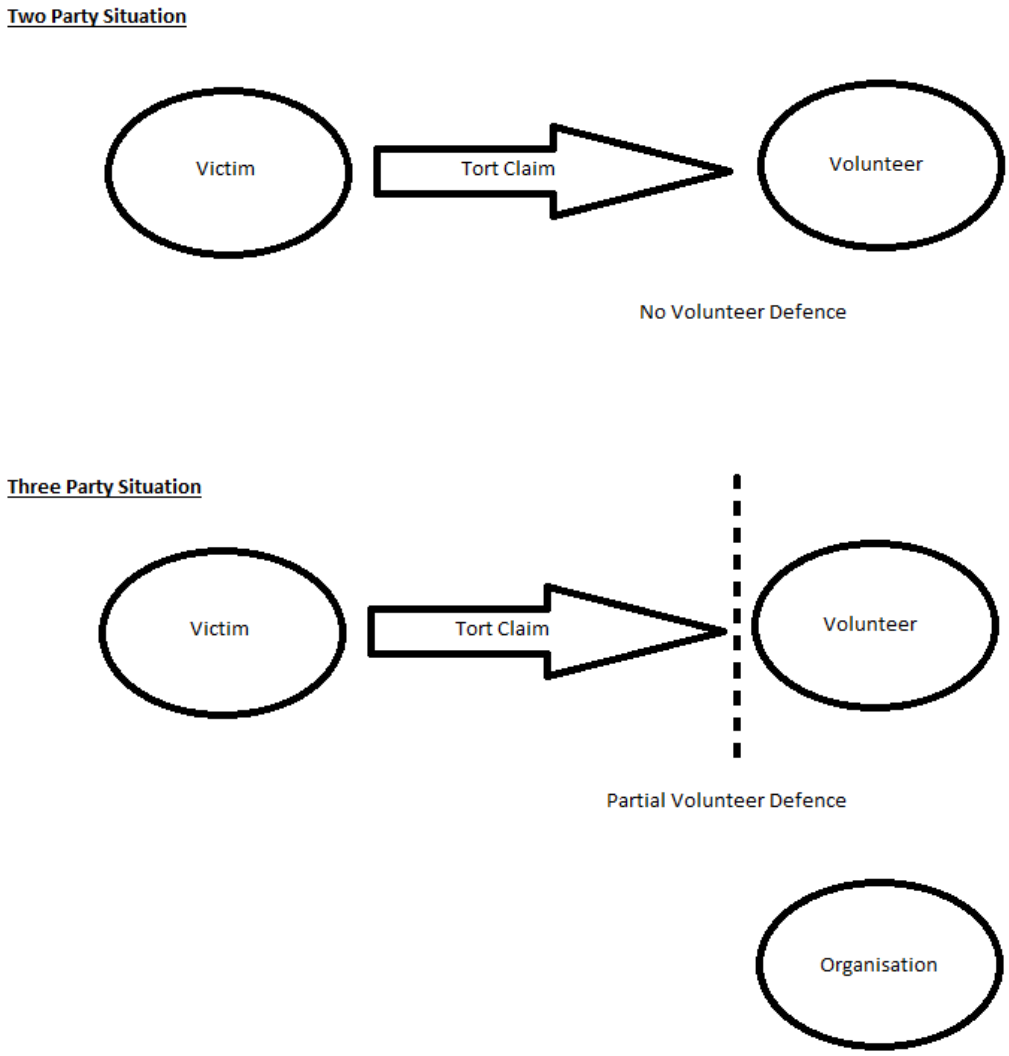
The VPA on the other hand does not protect a volunteer from actions brought by the non-profit or government entity itself,[147] and does not prohibit organisations from enforcing a volunteer's indemnity.[148] This fits oddly with the VPA's loss transfer model. It also places protection potentially at the whim of the VSO's insurer, and financial matters may take precedence over long term volunteer morale, recruitment, and retention. It is for this reason that if volunteer protection is desired the Australian, and Irish model on indemnities is preferable.

Which Organisations and Work?

That volunteer protection is based on a liability transfer is reflected in the fact that all of the regimes have an organisational requirement. Protecting a volunteer where no organisation is present is at the victim's expense; requiring a VSO avoids this, and also provides for organisational deterrence (see Chapter 7).

[147] 42 US Code §14503(c).
[148] Kenneth Biedzynski, 'The Federal Volunteer Protection Act: Does Congress Want To Play Ball?' (1998-1999) 23 SetonHallLegisJ 319, 345; McGregor-Lowndes and Nguyen, 'Volunteers' (n20) 53: indemnities are a common strategy.

Figure 2 – Organisational Requirement



Further, only volunteers carrying out socially worthwhile work, or working for socially worthwhile organisations, are protected. The positions taken by the schemes as to which volunteers and work should be protected illuminate the decisions that the English volunteer protection scheme proposed in Chapters 8-9 will need to make. It is thus worth examining these aspects of the schemes in detail.

The VPA protects volunteers of non-profit organisations and government entities. The definition of non-profit is linked to tax legislation, but in addition includes not-for-profits 'organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes'.[149] If an organisation has a section that

[149] 42 US Code §14505(4)(B).

carries out such work, but it is not primarily such an organisation, or if the organisation is a for-profit that also directs volunteer community work the volunteer is not protected. The organisation may not practice any action which constitutes a hate crime, and the volunteer's acts cannot amount to criminal misconduct.[150] The VPA does not further restrict the nature of the work which may be carried out for the organisation.

All of the Australian regimes require volunteers to carry out community work for a community organisation. The organisation needs to be incorporated, and in most cases can include public and statutory bodies.[151] Queensland, unusually allows the organisation to be a trustee.[152] Work carried out for unincorporated associations is not sufficient.[153] Although this requirement significantly reduces volunteer protection, in that much volunteering is for local unincorporated groups; it appears motivated by the protective system's liability shifting model. With unincorporated associations liability transfers have the potential to simply shift liability from one volunteer to two or more volunteers. The different position in Queensland likely flows from this jurisdiction not adopting liability shifting. A community organisation is an incorporated entity 'that directs or co-ordinates the carrying out of community work by volunteers'.[154] Unlike the VPA, a for-profit which deploys volunteers would qualify. Given that the protection is for the volunteer, not the organisation, and given the 'community work' requirement, this is an appropriate development. Unlike the VPA the Australian regime looks at the nature of the work itself, and not just the organisation.

Excluding all unincorporated VSOs' volunteers appears to misunderstand such VSOs' diversity. Within Australia whilst unincorporated associations are numerically the most widespread form adopted by VSOs, and are generally small, some large VSOs, particularly political and religious organisations also take this form.[155] They range from small grassroots groups, to complex, wealthy organisations fully able to internalise loss, and/or loss-spread such that the tortfeasor's fellow volunteers will not be at risk of having to pay. This is also the case in England.

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[150] ibid §14503(3).
[151] Dietrich (n121) 28. See for instance SA Act, s 3; Vic Act, s 34; WA Act, s 3; NSW Act, s 60(1)(b) also includes churches/religious organisations. NT Act, s 7, additionally allows 'a religious body'; cf ACT Act, s 6, applies only to 'a corporation'.
[152] Qld Act, s 38(1)(b), also includes political parties.
[153] Save churches and religious bodies – which may be unincorporated.
[154] SA Act, s 3.
[155] The Senate, Standing Committee on Economics, *Disclosure Regimes for Charities and Not-For-Profit Organisations* (Commonwealth of Australia, 2008), [7.3]-[7.5].

If volunteer protection was desired in England limiting protection to volunteers for not-for-profits would create problems. It is common for UK charities to form a subsidiary trading company which takes the form of a for-profit limited company. In turn this entity donates its profits to the charity. Only protecting volunteers for not-for-profits would mean that some volunteers whose work benefits a charity, but who volunteer through this for-profit arm, would not be protected. Further, it opens up the opportunity for a not-for-profit to create a separate subsidiary for-profit organisation to co-ordinate its volunteers, so as to avoid the liability transfer. The Australian approach which examines the nature of the work carried out rather than simply the nature of the organisation solves this problem.

What community work entails in Australia differs between jurisdictions, although a common core of activities is included: charitable, educational, and/or benevolent work, and sport.[156] Some statutes have a more expansive approach, including for instance political, religious, or cultural activities, and protecting the environment.[157] Victoria takes an extremely broad approach, including 'recreation, tourism, or amusement', and the 'purpose of promoting the common interests of the community generally or of a particular section of the community'.[158] The system adopted in Australia recognises that the voluntary sector is not necessarily a synonym for charities. As noted in Chapter 5 many VSOs are not charities. Focusing on the nature of the work, and not the organisation's charitable or profit status means that voluntary work even if carried out under the aegis of a non-charity, or even a for-profit, is protected. For instance alumni volunteers judging a moot for the University of Law would be protected, even though the institution is now a for-profit company. This community work requirement also distinguishes between an unpaid work experience student at a law firm, and a lawyer who volunteers through the firm to clear out a youth group's overgrown land. The downside to this approach is that each time a charity volunteer invokes the defence they will need to prove that they and the charity were engaged in community work. It may therefore be better to synthesise the US and Australian approaches. Volunteers for charities would not need to demonstrate the community work requirement. However, limiting the protection only to charity volunteers, fails to recognise that the voluntary sector and charitable sector are not coextensive. For these other volunteers a community work requirement is appropriate.

[156] Scott Edwards and Myles McGregor-Lowndes, 'Volunteer Immunity and Local Government' (2004) 10(2) LGLJ 53.
[157] McGregor-Lowndes and Nguyen, 'Volunteers' (n20) 45; eg SA Act, s 3(a).
[158] Vic Act, s 36(1)(c), (g); ACT Act, s 7(1)(viii); see also SA Act, s 3, and WA Act, s 3(h).

Further, to prevent the protection being drawn into disrepute, or encouraging volunteering through groups detrimental to community welfare, the VPA's restrictions on hate groups, or groups committing criminal acts also represents best practice.

The Irish Act protects volunteers who carry out authorised work within an organisational setting. Such an organisation under Section 51A(1) 'means any body (whether or not incorporated) that is not formed for profit and that authorises the doing of voluntary work whether or not as the principal purpose of the organisation'. This excludes protecting volunteers volunteering through for-profit organisations, even if the activity is the carrying out of otherwise charitable work.

That the organisation need not be incorporated produces an unintended consequence, which has so far been unnoticed. In *Hickey v McGowan*,[159] the Supreme Court of Ireland in accepting the category of vicarious liability within an unincorporated association, held that since unincorporated associations are not legal persons, all of the members of the unincorporated association, who were members at the time of the tort were liable.

This subsequent development is problematic for the volunteer protection regime. Where a volunteer (A) is protected by the defence, and where there is vicarious liability within the unincorporated association for A's tort, the other volunteer members of the unincorporated association (B-Z) are strictly liable for A's tort. This produces the perversity that A is not liable for their own negligence provided A's negligence did not constitute gross negligence, but their fellow volunteers B-Z <u>are</u> strictly liable for A's negligence. However, if vicarious liability for A's tort is not present, perhaps due to the narrower approach to vicarious liability within unincorporated associations (particularly in Ireland), then this means that where the negligent volunteer is protected by the defence, there is no transfer of liability, and the loss falls on the tort victim. Since the Irish model is predicated on liability transfer there is good reason to limit the application of the defence to where the VSO is incorporated, and also to the class of unincorporated VSO where there is realistically no risk of fellow volunteers being required to pay. This would also prevent liability transfer from an at fault volunteer, to their innocent fellow volunteers. The question as to which unincorporated association VSOs

[159] *Hickey* (n131).

should be included within volunteer protection, and which should not, will be revisited in Chapter 9.

Under Section 51A of the Irish Act the organisation must authorise 'voluntary work'. Voluntary work is given the definition of any work or activity carried out for a charitable purpose, or providing assistance, advice or care in emergencies, or to prevent emergencies, or for the purpose of sport or recreation. However, Irish law under Section 3 of the Charities Act 2009 contains a broad approach to charitable purpose, including any 'purpose that is of benefit to the community'. The authorisation of voluntary work need not be the organisation's principal purpose. This definition includes charitable type activities under the aegis of non-charities, such as state bodies, or mutuals. It also means that unlike the VPA, if a volunteer carries out work for a not-for-profit which is not primarily operated for such purposes they are still protected. Unlike the VPA there is no exclusion for those that volunteer for groups that commit hate crimes, or criminal acts. This would mean that volunteers for a sectarian or a racist political group that also provided youth recreation opportunities would be protected. The VPA's exclusion of such work is the better approach, since volunteers should not be encouraged to deliver services through such groups.

Which Volunteers?

There is a degree of legislative commonality over who is a volunteer. The work must be done of the individual's free will. Unpaid court imposed community work obligations are excluded.[160] The statutes also exclude work motivated by direct financial rewards. The latter is achieved in different ways.

Under the VPA's scheme a volunteer may not be paid, although they may receive reasonable reimbursement for expenses. The statute also permits the receipt of something of up to $500 in value.[161] For example, receiving a small Christmas gift would not take a volunteer outside of the scope of protection.

[160] SA Act, s 3; Qld Act, s 38(1)(a); NSW Act, s 60(2); Vic Act, s 35(3); Tas Act, s 45(3); NT Act, s 7(7).
[161] 42 US Code §14505(6).

There are three different models operating in Australia. As with Ireland,[162] Queensland does not permit payment for a volunteer's work, apart from repayment of reasonable expenses.[163] South Australia and New South Wales permit the payment of expenses, or a small honorarium.[164] The third, more prevalent model, permits the payment of reasonable expenses, or a small honorarium, but also permits someone to receive remuneration which they would have received irrespective of providing the service.[165] This means that if an employee is permitted by their employer to carry out voluntary work during working time, or to take paid time off for voluntary work, then they would still be a volunteer for the purposes of the legislation. It would also mean that where employees volunteer as part of a corporate social responsibility project they are protected, even if their employer does not stop their wages for the duration of the voluntary work. Further, this protection would also include where a VSO's employees choose to volunteer for the VSO. For instance where an individual employed as a museum café assistant, chooses to volunteer in their spare time as an unpaid exhibits demonstrator at the museum. Indeed research suggests that employees of non-profits, when compared to other workers, are more likely to volunteer, and volunteer the most hours.[166] Additionally, it is not uncommon to volunteer for one's own employer, particularly where a VSO's employees perceive gaps in its service provision.[167] This approach is more sophisticated than the other models, and prevents the accidental exclusion of volunteers.

This approach also means that where a VSO's employees have contracted hours, and they work unpaid overtime, they would be covered by the scheme during this unpaid period. Given that the protection is for the individual, not the VSO, and that the liability is transferred to the VSO, the VSO could not reasonably object to this – since they have treated the employee as a volunteer. Since honoraria are atypical in the English voluntary sector, and VSOs are advised to limit payments to expenses only so as to prevent the VSO/volunteer relationship from becoming employment (Chapter 4), reference to honoraria within an English volunteer protection scheme would be unnecessary and counterproductive.

[162] Civil Liability Act 1961 s 51A(1).
[163] Qld Act, s 38(1).
[164] SA Act, s 3; South Australia Volunteers Protection Regulations 2004, Reg 4; NSW Act, s 60(2); ACT permits the honorarium only, ACT Act, s 6.
[165] Vic Act, s 35(1); Tas Act, s 45(2); NT Act, s 7(7); WA Act, s 4(2).
[166] Thomas Rotolo and John Wilson 'Employment Sector and Volunteering: The Contribution of Nonprofit and Public Sector Workers to the Volunteer Labor Force' (2006) 47 SocQuart 21.
[167] Donna Baines 'Caring for Nothing: Organization and Unwaged Labour in Social Services' (2004) 18 WorkEmp&Soc 267.

That the statutes exclude paid personnel from volunteer protection is appropriate. Employees paid for the delivered service are not volunteers. Such an approach stops volunteering from becoming a monetary exchange. Discouraging payment also helps to reduce the risk of motivational crowding out of intrinsic reasons to volunteer by extrinsic incentives.[168]

All of the statutes take an objective approach to volunteer status, protecting volunteering, not altruism. The individual's subjective motivations are irrelevant. As we have seen in Chapter 2 there are self-interested reasons for volunteering, as well as altruistic ones. With employee volunteering there is also a risk that it may evolve into coerced unwaged work which is necessary to maintain employment. However, a subjective approach which examined a volunteer's motives would make the defence unpredictable. It would also open up the question of the volunteer's motives in each case and would lead to inappropriate questioning and the undermining of volunteering. A volunteer's motives may also be mixed, or change over time. Thus it is better to have an objective approach which excludes paid actors, but retains all others whose service is freely given, than a defence based on a volunteer's subjective motivations.

However, this will also protect unpaid work experience interns, even if their work is primarily with a view to career advancement. This is an acceptable price to pay, since to remove protection from them is to bring in a subjective motivational element by the back door. Some volunteers will also be volunteering for similar reasons. In turn, some unpaid interns may be motivated primarily by altruistic motives. Nevertheless, this issue should not be overblown since the organisational or work requirement for volunteer protection will restrict the protection to a narrow class of interns and will prevent the defence from being used to protect individuals who are carrying out an unpaid, or expenses only internships in bodies such as the capital markets department of a city law firm.

[168] Bruno Frey and Reto Jegen, 'Motivation Crowding Theory: A Survey of Empirical Evidence' (2001) 15(5) Journal of Economic Surveys 589; Uri Gneezy and Aldo Rustichini, 'Pay Enough or Don't Pay At All' (2000) 115 QJE 791; Bruno Frey and Lorenz Götte, 'Does Pay Motivate Volunteers?' (1999) University of Zurich Working Paper No 7 <https://doi.org/10.3929/ethz-a-004372692> accessed 23 September 2018; Stephan Meier, *The Economics of Non-selfish Behaviour* (Edward Elgar 2006) 35.

New Hampshire restricts protection to those for whom the organisation has a record indicating that they are a volunteer.[169] Protection is at the whim of the organisation's record keeping, which may be less systematic in smaller grassroots organisations. No other jurisdiction has such a requirement, and rightly so. If a volunteer can prove their status, the sufficiency of the organisation's record keeping should be irrelevant to the volunteer's ability to invoke the defence.

Volunteer Exclusions

Various exceptions apply to the protective regimes. The VPA excludes criminal activities, violations of civil rights law, and intoxicated defendants.[170] Most Australian jurisdictions exclude intoxicated defendants,[171] and some jurisdictions additionally exclude criminal acts.[172] These restrictions prevent the protection of volunteers whose core activities adversely affect society. The restrictions also prevent the legislation from falling into disrepute by protecting KKK volunteer members who accidentally set fire to houses during a march by negligently dropping their flaming torches.

Risk Management

The role of organisational deterrence within the design of the schemes (see Chapter 7) is reinforced by provisions on risk management. The VPA provides that state law may stipulate that volunteer protection is conditional upon the organisation adhering to risk management procedures and mandatory training for volunteers, and/or the volunteer being properly licensed, certified, or authorised for the activities.[173] The ACT Act, s 11(1) provides: '[t]he Minister may give written directions to community organisations about… the adoption of risk management plans'.

Requiring risk management procedures for protection to apply has proven to be extremely unpopular. Only Washington's provisions which protect volunteers who work with at risk

[169] RSA §508:17 (NH).
[170] 42 US Code §14503(f).
[171] NSW Act, s 63; Vic Act, s 38 (1)(b); Qld Act, s 41; SA Act, s 4(2) (recreational drugs); WA Act, s 6(3)(b); ACT Act, s 8(2)(c) (recreational drugs); NT Act, s 7(2)(b).
[172] NSW Act, s 62; Qld Act, s 40.
[173] 42 US Code §4503.

children contain such a requirement.[174] Most US jurisdictions have not included a requirement for mandatory training. Where such provisions are present they occur in a sporting context, and do not apply to other volunteers.[175] Credential or licensing requirements are also unusual.[176] Quite rightly, most jurisdictions leave risk management to the organisations and their insurers, and do not impose additional top-down risk management requirements in addition to general regulatory law, thus preventing additional state interference with a sector proud of its independence and ability to speak truth to power.

Motor Vehicles

Even though many volunteer roles involve driving, the VPA,[177] Australian,[178] and Irish[179] regimes exclude motor vehicle claims.[180] In such cases changing the liability threshold could harm volunteers, as driving is a situation where the tortfeasor too may be easily injured. There may also be concerns as to maintaining safety on the public highway. The exclusion may also be influenced by the fact that driving torts tend to result from momentary errors, which a VSO would have difficulty preventing.

However, the exception is primarily justified by the fact that motor vehicle claims are different to other torts, and operate more in keeping with a state sponsored loss-spreading system. Motor insurance is compulsory, with criminal penalties for failure to insure. In addition, some jurisdictions have organisations (ultimately paid for by insured drivers) which pick up the tab for uninsured drivers, such as Ireland's MIBI, New York's MVAIC, and the UK's MIB. Further, it is very easy to establish negligence in driving claims,[181] and very difficult for insurers to escape paying. There has also been a shift in European countries as a

[174] Rev Code Wash §43.150.080.
[175] La RS 9:2798, 9:2792.3, (Louisiana); ND Cent Code §32-03-45/6, (North Dakota).
[176] eg Wis Stat §181.0670.
[177] 42 US Code §14503(4).
[178] NSW Act, ss 65-66; Qld Act, ss 43- 44; SA Act, s 4(1)(a); WA Act, s 6(2); Tas Act, s 47(2); ACT Act, s 8(2)(a).
[179] Irish Act, s 51C(1).
[180] Most US state volunteer protection regimes also do not apply to motor vehicle claims: (ACA §16-6-105 (Arkansas); Idaho Code §6-1605 (Idaho); NJ Stat §2A:53A-7 (New Jersey); NC Gen Stat §1-539.10 (North Carolina); ND Cent Code §32-03-45 (North Dakota); RI Gen Laws §7-6-9 (Rhode Island); SD Codified Laws §47-23-30 (South Dakota); Utah Code Ann §78-19-2 (Utah); Wis Stat §181.0670 (Wisconsin); Wyo Stat §1-1-125 (Wyoming)). However, some protect from damages for ordinary negligence in excess of the volunteer's insurance coverage: (CRS §13-21-115.5 (Colorado); 14 MRS §158-A (Maine); 10 Del C §8133 (Delaware); 76 Okl St §31 (Oklahoma); Tex Code §84.004 (Texas)). Unlike the UK, the level of coverage required by compulsory motor insurance policies in the US is low.
[181] *Carrier v Bonham* [2000] QDC 226, [73] (McGill DCJ).

result of EU harmonisation from insurance of the driver to insurance of the vehicle, and a direct right of action against the insurance undertaking.[182]

Due to compulsory insurance the only entity that would benefit from a volunteer defence in this context would be the volunteer's motor insurance company. A liability transfer to the VSO would mean that the VSO and its insurers would be picking up the costs, in place of the volunteer's motor insurers, for torts for which the volunteer is already insured. This would be highly inefficient as it would necessitate the VSO purchasing additional insurance to cover the period when its volunteers are driving for them, resulting in double coverage. There would also be risks of non-coverage, if the volunteer's liability (which is already covered by insurance), is shifted to an entity with limited, or no, insurance, which may happen when dealing with grassroots organisations. This may also not be possible in England in the light of Directive 2009/103/EC. The volunteer's own insurance company is in the best place to assess the risk since it has priced its policy by the volunteer's driving risk profile, and vehicle. Block coverage for volunteers via organisational policies would need to cover a potentially wide and shifting class of volunteer drivers and vehicles, with different risk profiles. Given the compulsory insurance context, and the distinctiveness of motor claims within tort, it is inappropriate for volunteer defences to apply in this category.

Waiver of Protection

A number of US state legislative schemes provide that a volunteer is fully liable for insured losses, but protected from uninsured losses caused by ordinary negligence, (but not gross negligence).[183] The same effect is achieved in some states by including a statutory waiver of protection where a volunteer is insured, to the extent of their insurance.[184] However, these approaches have become legal fossils, given that the VPA pre-empts state law where the VPA provides greater protection to volunteers, and thus it may be raised by insurance companies defending claims brought against insured volunteers. The VPA protects against loss whether the volunteer is insured, or not. This may be the reason that knowledge of such insurance and waiver regimes appears to be lost in later regimes, and in the literature.

[182] Directive 2009/103/EC.
[183] ACA §16-6-105 (Arkansas); Md Code Ann §5-407 (Maryland); NC Gen Stat §1-539.10 (North Carolina).
[184] NC Gen Stat §1-539.10 (North Carolina); SD Codified Laws §47-23-32 (South Dakota); Idaho Code §6-1605 (Idaho).

A failure to study the legislative regimes at a state level has resulted in a consideration of this approach being lost elsewhere – it is not found in the VPA, Irish, or Australian legislation. However, it is a sensible provision in that an insurance company cannot have its cake and eat it; it cannot rely on a defence designed to protect a volunteer's own assets whilst receiving premiums for covering the risk, although the defence is still available when a volunteer's own assets are exposed. However, given that there is still a residual personal liability for gross negligence many wealthier volunteers may still want to have insurance coverage to protect their assets from claims. Some volunteers may also be covered through their ordinary household insurance policies. Further, some organisations provide insurance to their members which also covers their volunteering activities – for instance the British Mountaineering Club,[185] or the ICAEW's 'Volunteering Community', membership of which covers accountants for liabilities arising from voluntary activities performed with UK Charities and not-for-profits. The latter is not limited to the provision of professional services, and also includes all forms of voluntary work.[186] This waiver approach also prevents a continuous assault by claimant lawyers upon the definition of gross negligence, in an attempt to weaken volunteer protection so as to target an insurance pot, which would at the same time weaken the protection for uninsured volunteers.

Application in Practice

Before the case may be advanced for volunteer protection in England (see Chapter 8) it is also necessary to consider how the existing schemes are applied in practice.

There is little judicial jurisprudence on any of the regimes. Despite significant use of the VPA in litigation courts seem simply to mechanically deploy the statute and provide no analysis or comment on it.[187] Therefore to gain greater understanding of volunteer protection statutes we need to examine how they are used by courts.

[185] BMC, 'Members' Liability Insurance' <https://www.thebmc.co.uk/members-liability-insurance> accessed 21 August 2020.
[186] ICAEW, 'Volunteers' <https://www.icaew.com/technical/volunteering-community/professional-liability-insurance-for-uk-volunteering-activities>; <https://www.icaewvolunteers.com/> accessed 21 August 2020.
[187] Notable exceptions which provide very brief comments are *Gaudet* (n126); *World Chess Museum, Inc v World Chess Federation, Inc* 2013 WL 5663091 (US DC Nevada); *Neighborhood Assistance Corp of America v First One Lending Corp* 2012 WL 1698368 (US DC, CD California); *Hook v Trevino* 839 NW2d 434 (Supreme Court of Iowa); see Appendix 3.

United States

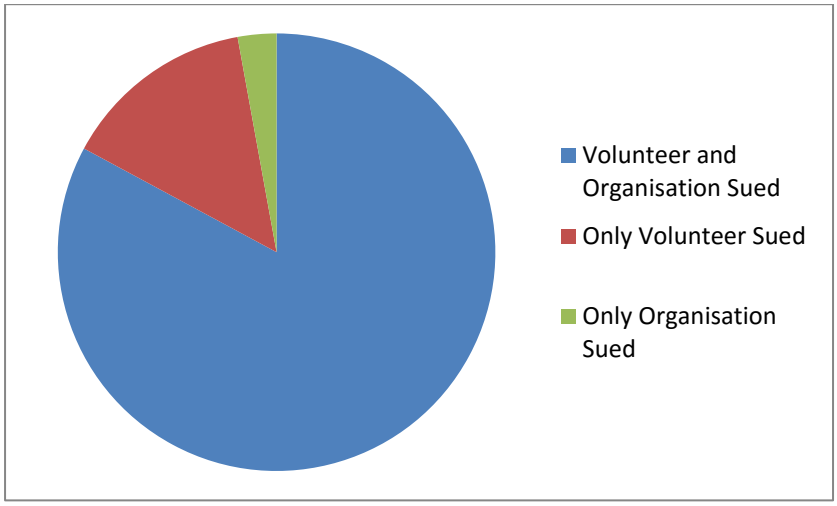
The empirical survey conducted provides evidence of the VPA in action, which has not previously been available. The raw data and methodology of the survey are contained at Appendix 3.

There are numerous decisions in the US where volunteers have been sued in a personal capacity.[188] On some occasions this may be because the volunteer has a deeper pocket than the VSO.[189] However, claimants also sometimes use a strategy of bringing claims against both the volunteer (in a personal capacity) and the VSO, even if the latter is intended to be the primary defendant. This is done in order to strengthen a claimant's hand by increasing the pressure on the defendants to settle, since the volunteer's own assets are threatened. It may also create a conflict between the organisation and its volunteer(s).[190]

The survey reveals that of the 70 cases in which the VPA defence was pleaded or used, in most of the cases (58) the volunteer was sued alongside the organisation, however, in a sizeable minority of cases (10) only the volunteer was sued, demonstrating that bringing an action against a volunteer is not just a way of putting pressure on a primary organisational defendant. In one case a 16 year old volunteer was specifically targeted in a negligence claim once the claim against the organisation had been dismissed.[191] The survey also reveals the exposure of managerial volunteers, and volunteer board members, who were targeted for the wrongs of the organisation, its volunteers, or employees, often through direct claims in negligence for inadequate supervision.

[188] eg *Byrne v Fords-Clara Barton Boys Baseball League* 236 NJSuper 185 (1989), 564 A2d 1222 (Superior Court of New Jersey); *Rieger* (n134); *Knowles v State Farm Mutual Auto Insurance Co* 781 So2d 211 (2000) (Supreme Court of Alabama); *Matlock v Hankel* 707 So2d 1016 (1998) (Court of Appeal of Louisiana); *Rehn v Fischley* 557 NW2d 328 (1997) (Supreme Court of Minnesota); *Lichtenthal v St Mary's Church* 166 AD2d 873, 561 NYS2d 134 (Supreme Court, Appellate Division, Fourth Department, New York); *Avenoso* (n125); *Elliot v La Quinta Corp* 2007 WL 757891 (US DC ND Mississippi).
[189] 'Developments in the Law - Nonprofit Corporations' (1992) 105 HarvLRev 1677, 1682.
[190] William Bassett, W Cole Durham and Robert Smith, *Religious Organizations and the Law* (Thompson Reuters 2012) §10:23.
[191] *Hochman v Eddy* 57 ConnLRptr 827 (Superior Court of Connecticut); *Hochman v Cheshire Junior Football, Inc* 59 ConnLRptr 13 (Superior Court of Connecticut).

Figure 3 – Who is Sued

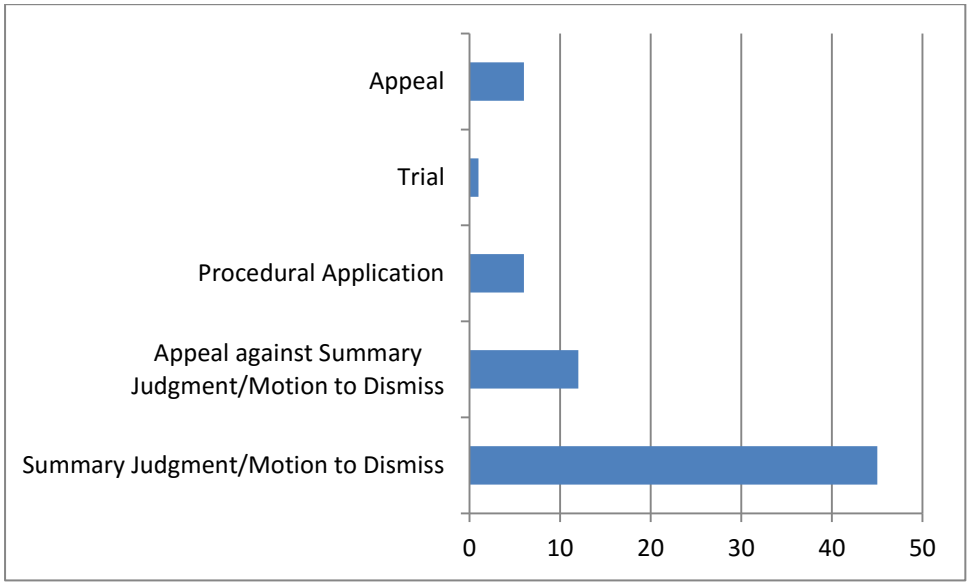


The survey shows that claims for personal injury related loss (31 cases, 44%), are in a minority, and the claims also cover economic (28 cases, 40%) and other harms (11 cases). No claims were brought for property damage. Examples of claims for pure economic losses included, where a volunteer lawyer gave incorrect advice in setting up a trust,[192] or where a volunteer oversold the VSO to get people to use its services.[193]

The survey demonstrates that the VPA is being dealt with in the early stages of litigation. The VPA defence is predominantly dealt with at the summary judgment/motion to dismiss stage of litigation (45 cases, 64%), or in appeals against summary judgments/motions to dismiss (12 cases, 17%), only one case went to trial, and 6 to appeal – although the appeals concerned procedural matters. This would suggest that volunteer protection may help to prevent the need for a trial, and thus save costs for volunteer defendants.

[192] *Droz v Karl* 736 FSupp2d 520 (US DC ND New York).
[193] *Momans v St John's Northwestern Military Academy, Inc* 2000 WL 33976543 (US DC ND Illinois).

Figure 4 – When the VPA Defence is Dealt With



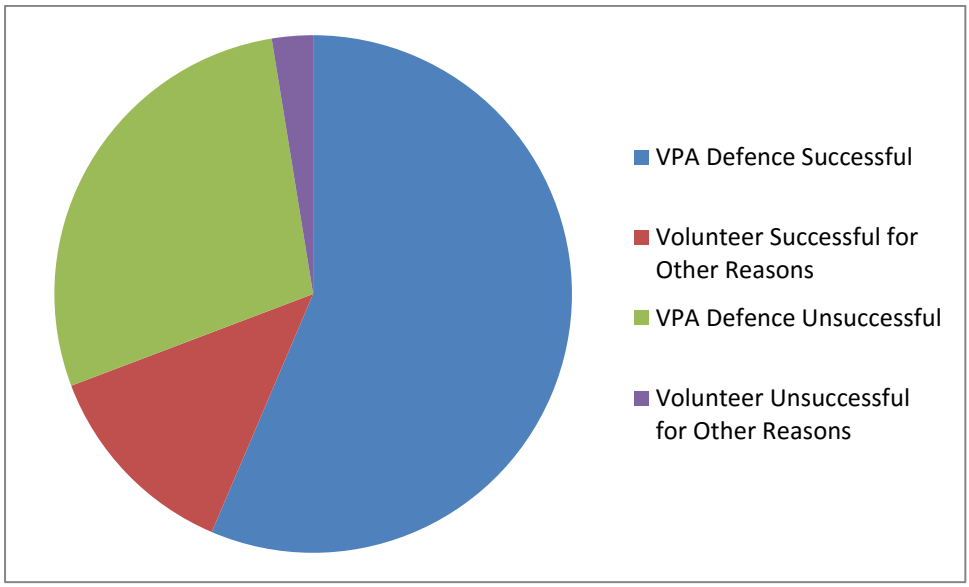
The VPA defence has a high success rate. Of the 70 cases, in 30 (43%) the VPA defence was successful, and unsuccessful in 20 (29%); in 20 further cases the defence was not decided, or not applicable. In some cases the VPA defence was not successful due to the organisation's status,[194] the volunteers acting outside of the scope of their responsibilities,[195] or the volunteer's conduct being wilful.[196] However, this success rate figure is misleading, as of the 20 further cases in which the defence was not decided or applied, in many cases this was since the volunteers were successful for other reasons. Further, this figure is also distorted by the nature of the claims, some involved intentional torts, which are not protected by the VPA, and others do not concern tort claims, but instead claims for breach of fiduciary duty, violations of federal civil rights, and fair employment. Thus to obtain a better view of the success rate of the VPA defence it is better to focus on negligence actions. There were 39 negligence cases, of these the VPA defence was successful in 22 cases (56%), and unsuccessful in 11 cases (28%), in 6 cases the defence was not decided or applied. Of these 6 cases, in 5 cases the court held in favour of the volunteers for other reasons,[197] and against the volunteer in 1 case.[198] This means that in the 39 negligence cases where the VPA was raised the volunteer was successful in 27 cases (69%), and unsuccessful in 12 (31%). That

[194] eg *Neighborhood Assistance* (n187); *Gaudet* (n126).
[195] *Owen v Bd of Directors of Washington City Orphan Asylum* 888 A2d 255 (DC 2005).
[196] *Momans* (n193); *Maisano v Congregation Or Shalom* 47 ConnLRptr 152 (Superior Court of Connecticut).
[197] Respectively: (1) no breach of duty, (2) no duty of care, (3) other state immunity, (4) time bar, (5) waiver signed by claimant.
[198] The court ignored the VPA defence; this appears to be an oversight in this complex claim.

claimants are willing to expend time and money resisting a VPA defence also demonstrates that there is a genuine targeting of volunteers.

The cases also demonstrate that the gross negligence standard can provide a meaningful level of protection. It is notable that in *Hochman v Eddy*[199] and *Smith v Kroesen*[200] in holding for the volunteers the courts held that whilst the volunteers were not grossly negligent, they acknowledged that there was evidence of negligence.

Figure 5 – Success of VPA Defence in Negligence Claims



In order to analyse the level of protection provided by the VPA it is necessary to examine why courts rejected the defence. Of the 11 cases, in 2 cases the defence failed since it was the organisation that attempted to use the defence, and the VPA does not protect organisations, in 2 cases the defence was unsuccessful as the claim itself was brought against the volunteer by the organisation for which they volunteered for, and the VPA does not protect against such claims. The other 7 cases all occurred at the application for summary judgment, motion to dismiss, or procedural stages; in these cases the courts decided that such decisions were inappropriate at this stage, usually due to there being insufficient evidence at this stage, and that the claim (including the volunteer defence issue), should proceed to trial. In these cases the defence was challenged by the claimants on grounds such as the fact that

[199] *Eddy* (n191).
[200] 9 FSupp3d 439 (US DC D New Jersey).

the volunteer did not volunteer for a qualifying organisation, or that the defendants were not volunteers, or that the volunteer's conduct was wilful. It is instructive that none of the cases proceeded on the grounds that the volunteer was alleged by the claimant to be grossly negligent, although two did proceed on the grounds that the volunteer's negligence was wilful or conscious.[201] Further, there is no later trace of these 11 cases in the Westlaw database – these matters did not ultimately come to trial, and the cases were either subsequently settled or dropped. It is notable that the empirical survey did not reveal a single negligence case, in which the VPA defence was deployed, which came to trial.

Whilst the survey evidences how the VPA is used by courts, there are limits as to what it can tell us about the role of volunteer protection in litigation. Most cases settle during the early stages of litigation. We cannot conclude on the survey's data as to the impact of the VPA in settlement negotiations. The data also cannot show whether the VPA's existence influences decisions as to whether to bring a claim against a volunteer in the first place. Some claims brought solely against organisations contained evidence of claims brought against volunteers which subsequently were abandoned due to the VPA,[202] but in most cases where only the VSO and not the volunteer is sued we cannot tell if this tactical decision is motivated by the VPA or not.

Australia, Ireland, and Nova Scotia

There are very few decisions in Australia that evidence the use of volunteer protection. Indeed some provisions appear not to have been deployed in cases that have gone to judgment in the higher courts.[203] Nevertheless there appears to be widespread judicial awareness of the defences.[204] There are three Australian cases in which the defences have been deployed. In *Rouvinetis v Knoll*[205] the attempt to rely on volunteer status to strike out the claim failed as insufficient evidence was adduced that the defendants were volunteers. Whilst the court made it clear that the defence could subsequently be raised at trial, it was

[201] *Momans* (n193); *Maisano* (n196).
[202] eg *Rieger* (n134); *Singletary v Poynton* 38 ConnLRptr 705 (Superior Court of Connecticut).
[203] The relevant provisions of the SA Act; Vic Act; and Tas Act.
[204] eg *New South Wales v Williamson* [2011] NSWCA 183; *Taylor v The Owners-Strata Plan No 11564* [2014] HCA 9; *Neindorf v Junkovic* [2005] HCA 75; *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52; *Electro Optic Systems Pty Ltd v New South Wales* [2012] ACTSC 184; *New South Wales v West* [2008] ACTCA 14, 165 ACTR 47.
[205] [2009] NSWSC 1212 [39]-[40] (Hulme J). The appeals do not concern the statute: *Rouvinetis v Knoll* [2013] NSWCA 24.

not,[206] and the case was decided on the ground that the alleged volunteers did not owe a duty of care, nor were they vicariously liable. In *Echin v Southern Tablelands Gliding Club*[207] the volunteer gliding instructors were protected by Section 61 of the NSW Act, so the claim was brought against the club. The club was held not to be vicariously liable for the volunteer instructors since it had insufficient control over them.[208] However, if they were, given that the instructors would not be liable, applying Section 3C the club would have the same protection and would thus not be liable. In *Goodhue v Volunteer Marine Rescue Association Incorporated*[209] the court held that the volunteers were not negligent; it also held that they were protected by Section 39 of the Queensland Act.[210]

The Nova Scotia Volunteer Protection Act 2002 has been mentioned on two occasions in judgments. In the first case,[211] both the volunteer and the VSO were sued, however, the strike out was successful on other grounds. The defence was not dealt with, although provisions in the Act relating to costs for successful volunteer defendants were used. In the second case[212] the VSO, not the volunteer was sued. During a discovery examination, the claimant's lawyer attempted to question a volunteer director as to her understanding of her role. The Defendant's lawyer objected on the basis that a negligence claim against the volunteer could not be brought due to a range of defences, including the Act.

There are no available reported or unreported Irish cases dealing with the protection provided by the Irish Act.

Nevertheless, it is difficult to determine the use and effectiveness of volunteer protection from the available case law. The cases may not be representative of litigation against volunteers and VSOs. Most cases settle prior to trial, so by relying on case law we are only seeing the tip of the iceberg. Further, there is the problem of incomplete material in that only the decisions of more senior courts are available; this might not be representative of lower court litigation. Such a survey of available case law also does not reveal the impact of the

[206] *Rouvinetis v Knoll & Ors* [2011] NSWSC 1352.
[207] *Echin* (n139).
[208] At [103].
[209] *Goodhue* (n139).
[210] Relying on *Commonwealth of Australia v Griffiths* [2007] NSWCA 370; cf *Ringelstein v Redford Cattle Company Pty Ltd* [1994] QCA 14; Robert Stevens, *Torts and Rights* (OUP 2007) 262-7.
[211] *Grimmer v Carleton Road Industries Association* 2009 NSSC 169.
[212] *Sanford v Carleton Road Industries Association* 2014 NSSC 187.

legislation on litigation decisions made by potential claimants, defendants, and lawyers, and the impact of the legislation on the volunteering decisions of individuals. The latter will be examined in Chapter 7. It would be premature to draw conclusions about the impact of the statutes based on the limited available case law.

Conclusion

As we noted in Chapter 3 SARAH does not adopt the structure of volunteer protection adopted in much of the common law world. The Parliamentary and Committee debates, and the reports leading to SARAH reveal minimal research, and do not reveal any trace of comparative research. SARAH must therefore be seen as a missed opportunity for the UK to engage with the volunteer protection debate in the common law world. Instead it was used as an opportunity to pass sound-bite legislation, which to the extent that it provides protection to volunteers (which is unclear), will also protect all defendants, including organisations, private industry, and also in a motor vehicle context, at the expense of victims.

Unlike SARAH, which stands alone, the volunteer protection regimes found across the common law world all follow a common theme, and deal with all three parts of the volunteer tort triangle: volunteer, VSO, and victim.

All of the statutes, which were introduced following similar contexts and concerns, do not simply protect unpaid altruists; they all have an organisational requirement. Vicarious liability, or liability transfer, operating alongside a personal defence for volunteers, means that the regimes operate as loss shifting instruments, transferring loss from the volunteer to the organisation. Although simultaneously protecting volunteers, and providing for victims, the regimes are designed to retain a deterrent effect at the organisational level, and a consistent (but lower than normal) level of deterrence for volunteers, (see Chapter 7).

In analysing the regimes we have also identified best practice if protection and liability transfer are desired, for instance an objective defence, a requirement for the volunteering entity to be incorporated or to be in the class of unincorporated association where there is no real risk of liability being shouldered by the tortfeasor's fellow volunteers, and statutory transfer of liability.

We have also examined best practice in deciding where the limits of protection should be drawn, who is a volunteer, and what work must they carry out to be protected.

The empirical survey on the VPA's application demonstrates that volunteer protection has the potential to offer significant protection, but on the evidence available we cannot conclude on its impact outside of the courtroom. However, before considering whether England should adopt a volunteer protection system similar to those adopted by other common law jurisdictions we must first examine what impact such legislation has, or is likely to have, on volunteering, and whether it may be justified normatively. We now turn to these two issues in Chapters 7-8.

Chapter 7

The Effect of Volunteer and Organisational Protection

Introduction

Before we can make the case in Chapter 8 to introduce volunteer protection in England, and reject organisational protection, we need to examine the potential impacts of introducing such regimes in England. To predict the likely changes that either regime may introduce this chapter draws on law and economics by using rational choice theory, and in the light of behavioural economics it also examines known heuristics and deviations. It counters objections to using rational choice theory when dealing with altruism, within the context of voluntary sector torts. Given the rejection by a number of leading tort scholars that tort may impact on human behaviour and deter wrongs, we need to examine the existing empirical evidence on tort's impact on organisational and individual behaviour, particularly in the voluntary sector.

Using these methods Chapter 7 demonstrates that introducing volunteer protection which includes a liability transfer to the organisation is likely to have considerable social benefits by increasing volunteering and reducing torts. Conversely organisational protection is likely to decrease volunteering, and reduce care at the organisational level. A partial defence ensures that negligence still asserts some deterrent effect on volunteers, which would otherwise be significantly removed if they were instead given immunity.

Legislative initiatives aimed at changing human behaviour are regularly proposed and implemented. Of course no methodology can prove in advance that future legal changes will result in particular changes to human behaviour. The best that can be done in advance is to predict the likely changes using the best available tools. Here it is argued that since rational choice theory, as adjusted by the known heuristics produces a prediction which is supported by the existing empirical evidence we should take this prediction seriously.

Law and Economics

Law and economics is the primary mechanism used to assess the potential impact of legal change. In this chapter economics is used in the positive economics sense. As Friedman notes: '[p]ositive economics is in principle independent of any particular ethical position or normative judgements… Its task is to… make correct predictions about the consequences of any change in circumstances.'[1] Normative economics on the other hand, elevates economic principles to normative principles of law.[2] This chapter does not require acceptance of normative economic principles.

Many judges utilise rough and ready forms of positive economics, particularly when analysing potential changes in behaviour resulting from establishing a duty of care.[3] Nevertheless some judges have recognised this as a resort to economic methodology and have expressed concerns as to competence.[4] Further, contradictory positive economic analysis conclusions between courts can lead to different results.[5] There is real value in analysing the potential consequences of legal change, but this needs to openly draw upon economic methodology.

Rational Choice Theory

Rational choice theory is at the heart of positive law and economics.[6]

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[1] Milton Friedman, 'The Methodology of Positive Economics' in Milton Freidman, *Essays in Positive Economics* (Univ of Chicago Press 1953) 4.

[2] eg Steven Shavell, *Economic Analysis of Accident Law* (1987 Harv UP); Richard Posner, *Tort Law: Cases and Economic Analysis* (Little Brown and Company 1982).

[3] eg *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL); *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225; *Robinson v Chief Constable of West Yorkshire* Police [2014] EWCA Civ 15, [2014] PIQR 14; *X v Bedfordshire CC* [1995] 2 AC 633 (HL); *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874; *Yuen Kun-Yeu v Att Gen of Hong Kong* [1988] AC 175 (PC); *Harris v Evans* [1998] 1 WLR 1285 (CA).

[4] *Morgan Crucible Co Plc v Hill Samuel Bank Ltd* [1991] Ch 295 (CA) 303 (Hoffmann J); *McLoughlin v O'Brian* [1983] 1 AC 410 (HL) 431 (Lord Scarman).

[5] Compare *KLB v British Columbia* 2003 SCC 51, [2003] 2 SCR 403, with *S v Attorney-General* [2003] NZCA 149, [2003] 3 NZLR 450.

[6] Thomas Ulen, 'Rational Choice Theory in Law and Economics', in Boudewijn Bouckaert and Gerrit De Geest, *Encyclopedia of Law and Economics* (Edward Elgar 2000) vol 1, ch 0710, 791. It is the primary tool, since, unlike abstract decision theory, it attempts to provide a theory simple enough to reveal insights into real world phenomenon: Michael Rersnik, *Choices* (University of Minnesota Press 1987) 4.

Becker states that individuals rationally maximise their utility in all contexts, both non-market and market, and respond to price incentives.[7] Rational choice theory does not define what a person's utility function is; it may be altruistic, or corrupt. Rises in price reduce demand. 'Price' is not just money, it also includes other limited resources.[8]

Posner popularised rational choice theory in a legal setting: '[r]ules of law operate to impose prices on (sometimes subsidize) these nonmarket activities, thereby altering the amount or character of the activity.'[9] Law can adjust the level of an activity or change its nature.[10]

Tort, and the risk of tort litigation, factors into the rational actor's utility determination. It is part of the price of an activity. Potential injurers and victims will have to make 'a decision whether, or how much, to engage in a particular activity; and a decision over the degree of care to exercise'.[11]

With volunteering the rational actor would consider the risk of tort litigation in deciding whether they gained sufficient utility from volunteering to justify it, and in determining the level and type of their voluntary work. Since there is uncertainty over whether (or not) the activity will lead to tort liability, the actor evaluates the activity's expected utility.[12]

Altruism?

Voluntary sector tort regimes have yet to be analysed in detail using positive economic principles. However, before we can do so its legitimacy must be examined.

Motives for volunteering range from the altruistic to the egoistic, and may be mixed and change over time (Chapter 2). Traditional rational choice theory assumes self-interest - people do not engage in altruistic behaviour because it is morally right, but rather they do so for personal gain.[13] Since some volunteers are motivated by altruism and moral

[7] Gary Becker, *The Economic Approach to Human Behavior* (University of Chicago Press 1976) 8; Nicholas Mercuro and Steven Medema, *Economics and the Law* (2nd edn, Princeton University Press 2006) 102.
[8] Becker (n7) ch 11, 5-11.
[9] Richard Posner and Francesco Parisi (eds), *Economic Foundations of Private Law* (Edward Elgar 2002) 5.
[10] Posner, *Tort Law* (n2) 1-9.
[11] Shavell (n2) 5.
[12] ibid 2.
[13] Becker (n7) 291.

commitments, rather than by the potential for reputational, social, or financial reward, this raises an objection to using rational choice theory in this context.

Economics is not unique in assuming altruism is self-interested behaviour. Evolutionary psychologists conclude 'most altruism is only apparent altruism',[14] explicable through kin selection, reciprocal altruism, attempts to display qualities rewarded in mating selection, or a selective pressure for altruism.[15] An alternative model found in socio-biology is that moral obligations and reciprocal altruism increase group genetic fitness.[16]

However, most individuals display bounded self-interest,[17] acting as if they care about others. Humans appear to demonstrate a distinctive morality. They often act altruistically, even where it is unlikely to be reciprocated, and in anonymous interactions.[18] Empathy and genuine concerns for others appear to be a driving force behind altruism. Moral emotions, or internalised moral norms, appear to guide behavioural responses.[19] There is also good evidence that altruism is not just a result of genetics, and evolutionary selection, but that cultural forces also impact on altruism.[20] The scale of charitable institutions is also far greater than one would predict on a model of self-interest.[21]

However, rational choice theory does not require a homo economicus – a rational actor single-mindedly pursuing self-interest, with no regard to the cost of others. Pro-social behaviour is the human norm, to the extent that where a person acts as a homo economicus they are labelled a psychopath.[22] This does not mean rejecting rational choice theory. The rational actor model does not determine what an individual's utility function is. Instead it looks at how an actor responds to it. Altruism may be a key part of any utility function. Self-

[14] Alan Clamp, *Evolutionary Psychology* (Hodder and Stoughton 2001) 58
[15] ibid 59-63; Mark Van Vugt, Gilert Roberts and Charlie Hardy, 'Competitive Altruism: a theory of reputation-based cooperation in groups' in RIM Dunbar and Louise Barrett (eds), *Oxford Handbook of Evolutionary Psychology* (OUP 2007) ch 36, 532-534.
[16] Edward Wilson, *Sociobiology: The New Synthesis* (Harv UP 2000) ch 5, 120.
[17] Christine Jolls, Cass Sunstein and Richard Taler, 'A Behavioral Approach to Law and Economics' in Cass Sunstein (ed), *Behavioral Law & Economics* (CUP 2000) ch 1, 16.
[18] Van Vugt, Roberts and Hardy (n15) 533-4.
[19] Joan Silk, 'Empathy, Sympathy, and Prosocial Preferences in Primates' in Dunbar and Barrett (n15) ch 10, 115; Simon Gächter, 'Human Prosocial Motivation and the Maintenance of Social Order' in Eyal Zamir and Doron Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (OUP 2014) ch 2, 32-37.
[20] Ernst Fehr and Urs Fischbacher, 'The Nature of Human Altruism' (2003) 425 Nature 785.
[21] Robert Frank, *Microeconomics and Behavior* (8th edn, McGraw Hill Irwin 2010) 232.
[22] George Brockway, *The End of Economic Man* (3rd edn, WW Norton 1995) 9.

interest as conceptualised in rational choice theory is not the same as objective self-interest, which looks only at narrow material interests.[23]

Using the notion of utility appears to convert unselfish behaviour into self-interested behaviour.[24] Sen raises the objection that altruistic choices are guided by moral commitment, not one's own utility. He invokes commitment to explain altruistic or moral behaviour – for instance someone who is not personally made worse off by torture, but believes it to be wrong and is willing to help to prevent it, displays moral commitment.[25] People are committed to their internalised values. To explain such commitment in terms of utility treats moral commitment as 'exogenous taste'.[26]

Rational choice theory has also faced criticisms for ignoring the effect of social norms on behaviour.[27] However, the role of social norms is not necessarily contradictory to rational choice theory. The utility of an activity includes the consequences of conforming or rejecting social norms.[28]

These are powerful criticisms. To explain altruism solely on the basis of self-interest denies an essential element of humanity. Whilst accepting many of these criticisms, though, it is still possible to retain rational choice theory's predictive capacity. The theory is neutral as to the sources of actor preferences. Whatever one's motives and one's commitment to altruism, (even if to call this 'utility' is rejected since that debases moral acts by describing them as self-interest), that does not mean that one cannot use rational choice theory to analyse the effects of legal change on altruism across an aggregate population.

Rationality is not limited to self-interest, 'it is not at all clear why rationality should not involve the intelligent pursuit of all one's goals and values, properly weighted, rather than focusing only on… self-interested ones.'[29] In most cases what one is prepared to do must

[23] Frank (n21) 212.
[24] Lynn Stout, 'Law and Prosocial Behavior' in Zamir and Teichman (n19) ch 8, 197.
[25] Amartya Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 PhilosPublicAff 317, 326-329.
[26] Robert Cooter, 'Models of Morality in Law and Economics: Self-Control and Self Improvement for the "Bad Man" of Holmes' (1998) 78 BULRev 903; Robert Cooter, 'Expressive Law and Economics' (1998) 27 JLegalStud 585, 607.
[27] Mercuro and Medema (n7) 306-7.
[28] Cass Sunstein, 'Social Norms and Social Roles' (1996) 96 ColumLRev 903, 909.
[29] Stefano Zamagni (ed), *The Economics of Altruism* (Elgar 1995) xxi.

depend on the activity's cost.[30] As noted by the evolutionary psychologist Clamp 'if the costs are too high, altruists are unlikely to survive to be altruistic'.[31] We may not be aware of any one individual's utility function. A person may be willing to uphold their moral commitment to volunteering for a cause up to and including the cost of their life, others on the other hand may falter at different levels of cost. What 'cost' someone is prepared to 'pay' to volunteer will vary. We can model aggregate behaviour of cost against demand for a product, and in the same way we can model the cost of an activity, in this case volunteering, against the demand for (or levels of) that activity. In answer to the critics this can be considered not so much as maximising one's own utility, but rather the detriment one is willing to face to uphold one's values. This is a recasting of the language of rational choice to accommodate altruism and moral concerns. It is also fair to assume that whatever good an altruist is doing, some altruists will wish to maximise the good achieved from the resources deployed, and that if some forms of altruism become too costly the individual may seek alternative forms of altruism. We may thus use the model to analyse the impact of liability protection in the voluntary sector.

Applying Rational Choice Theory

Volunteer Protection Legislation

With rational choice theory tort is a cost factored into volunteering decisions. The risk of tort litigation is not just a risk of damages and costs (indeed one may have insurance), but also the time expended on one's own defence, giving evidence, and the associated stress. Even where a volunteer is insured, well designed insurance policies ensure that a defendant has financial incentives to avoid tortious conduct. Further, a professional who has a negligence finding against them may face additional professional sanctions.

Since volunteers are not reliant on volunteering for their income, they may more easily withdraw their services than employees, and thus may be more readily deterred by tort law than employees.[32] A personal defence for volunteers reduces the cost of volunteering.[33]

[30] Becker (n7) 284; Stephan Meier, *The Economics of Non-selfish Behaviour* (Elgar 2006) 32-34; cf crowding out by direct payments (34-38).
[31] Clamp (n14) 58.
[32] Except, perhaps, when the volunteer believes that the particular activity is necessary for religious reasons.

Since these defences generally operate as partial defences, with volunteers retaining liability for gross negligence (or in Australia bad faith), this means that the 'cost' of tort to the volunteer is substantially reduced but not eradicated. Tort therefore retains a deterrent feature, helping to reduce the most egregious behaviour. Following positive economic methodology, a reduction in the 'cost' of volunteering will be likely to increase volunteering.[34]

This may particularly increase volunteering by the most viable tort defendants: those with greater assets, particularly highly paid workers (who may have high value skills), and also older persons who may have accumulated wealth through long term house price appreciation. Both are groups who have much to give to the voluntary sector. It also decreases the cost of volunteering by those with professional skills, whose use of their skills may be covered by their professional indemnity insurance.

Such a defence will not impact on the 'cost' of volunteering for all volunteers. The collectability of damages is important in deciding whether to bring a claim since judgments against men of straw are of little value. The risk presented by tort, and thus its 'cost', may therefore be minimal for volunteers who have insufficient assets or resources to meet a claim. Men of straw have a functional equivalent to an immunity to tort claims. They are judgment-proof. Following the logic of positive economic methodology, introducing a defence will have little impact on the volunteering levels of such individuals. Likewise SARAH, which does not meaningfully change the law (Chapter 3), is unlikely in positive economic terms to have any impact on volunteer or VSO activity levels.

Liability Transfer

Where the volunteer defence does not require the volunteer to work for a VSO, and does not involve a liability transfer to the organisation, positive economic methodology whilst pointing towards increased volunteering also points towards volunteers reducing their level of

[33] Where volunteers hold personal policies of insurance to cover their voluntary activities, it should also decrease the premiums: Jill Horwitz and Joseph Mead, 'Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence' (2009) 6 JEmpiricalLegalStud 585, 604, 623.

[34] $A = \{a_1, a_2,\}$. Let a_1 be volunteering, a_2 not volunteering; let C_{a1} be tort costs, occurring with a probability p_1. An actor will volunteer when $U(a_1) - p_1C_{a1} > U(a_2) - p_2C_{a2.}$ As p_1 decreases volunteering will increase. The stronger the defence, the lower the value of p_1.

care, and an increase in volunteer negligence. It also suggests increased reluctance on the part of third parties to receive services delivered by volunteers.

With organisational volunteers the situation is more complicated. There is no English decision which imposes vicarious liability on a VSO for the acts of its volunteers. However, as Chapter 4 advances the development of vicarious liability for at least some forms of volunteers is a likely future common law development.

As noted in Chapter 6 all of the existing volunteer protection regimes require the volunteer to work for an organisation, and for most of the schemes the volunteer's use of the defence is concomitant with the transfer of liability to the organisation. If a liability transfer is inherent in the scheme, best practice is to achieve this via statute (Chapter 6). Whilst a liability transfer may reduce the level of care shown by volunteers,[35] this statutory vicarious liability for volunteers increases the cost to an organisation of using volunteers. This increases the deterrence imposed by tort upon the organisation. However, this may not be a significant increase in cost from the perspective of English law, since the development of vicarious liability for at least some forms of volunteers is a likely future development, and much of the sector has been advised to operate on this premise.[36] However, the statutory transfer would cover all volunteers who are able to use the personal defence, not just those who would be caught by common law vicarious liability.

Using deterrence as a justification for vicarious liability has been criticised.[37] Nevertheless, in positive economic terms vicarious liability has deterrent effects. Atiyah argues that it may play an accident prevention role. However, Atiyah considers that its role here is very small given insurance. For Atiyah the change in premiums for good or bad accident records is insufficient to play a significant role in accident prevention.[38] This is a moral hazard point,[39] that there are insufficient incentives to guard against risk. However, the insurance field has developed since Atiyah's book. Insurers work to reduce moral hazards using a number of devices, not just deductibles, exclusions, and premium ratings, but also devices such as

[35] Alan Sykes, 'The Economics of Vicarious Liability' (1984) 93 YaleLJ 1231.
[36] See Chapter 4.
[37] eg Robert Stevens, *Torts and Rights* (OUP 2007) 258; Jonathan Morgan, 'Vicarious Liability for Independent Contractors?' (2015) PN 235, 249-251; Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 243.
[38] Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 16-17.
[39] See Malcolm Clarke, *Policies and Perceptions of Insurance* (Clarendon Press 1997) 216-26.

bundled loss control services with mandatory conditions to ensure compliance. The insurance policy may also require the organisation to monitor its workforce, with a refusal to cover vicarious liability if there is inadequate supervision.[40] It may also require a minimum spend on risk reduction.[41] The moral hazard problem is thus often overstated.[42] In addition some large entities may be self-insured, or co-insured with the entity assuming some of the risk. Further, even if an organisation is indemnified by insurance for damages or legal costs, there are still organisational costs in defending claims in terms of time, staff resources, and potential adverse publicity. Not to mention pressure and stress for managers. Further the interface between vicarious liability and insurance may play an additional role in longer term accident prevention – by bringing such claims, and risks to the attention of insurers. Insurance can act as a form of governance, helping to reduce risks.[43] Insurers in processing and investigating claims may become experts in risk reduction, and this expertise can be shared with the insured,[44] leading to a reduction of torts on the part of insured entities.

Thus the combination of a volunteer defence, alongside a statutory liability transfer (or where common law vicarious liability applies), is likely to increase both volunteering, and simultaneously exert pressure on organisations to reduce accidents. Vicarious liability will encourage organisations to reduce their potential exposure to liability through risk management, and increased training for their volunteers and staff. It also incentivises organisations to assert greater control over their volunteers. Many such tort reduction strategies can only be introduced at an organisational level, not at the level of the individual volunteer. It will also introduce accountability for the acts of judgment-proof volunteers, further incentivising the organisation to reduce risks, and to monitor the acts of volunteers.[45] This points towards a reduction in torts. Whilst such vicarious liability reduces the utility of volunteer services to an organisation, since volunteers do not charge the organisation for their

[40] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 322; eg *Summers v Congreve Horner* [1992] 40 EG 144 (CA).
[41] R Ian McEwin, 'No-Fault and Road Accidents: Some Australasian Evidence' (1989) 9 Int'lRevL&Econ 13, 18.
[42] Tom Baker and Peter Siegelman, 'The Law & Economics of Liability Insurance' in Jennifer Arlen (ed), *Research Handbook on the Economics of Torts* (Elgar 2013) ch 7.
[43] Richard Ericson, Aaron Doyle and Dean Barry, *Insurance as Governance* (University of Toronto Press 2003); Tom Baker and Rick Swedloff, 'Regulation by Liability Insurance: From Auto to Lawyers' Professional Liability' (2013) 60 UCLALRev 1412.
[44] Gary Schwartz, 'The Ethics and Economics of Tort Liability Insurance' (1990) 75 CornellLR 312, 356.
[45] Reinier Kraakman, 'Vicarious and Corporate Civil Liability' in Michael Faure (ed), *Tort Law and Economics* (Elgar 2009) 135; Sykes (n35) 1241-50; William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harv UP 1987) 120-1.

services, organisations will still wish to use them. However, this increased cost of using volunteers may result in minor decreases in economic pressures to replace employees with volunteers in the delivery of essential public services.

The publicity feature of tort may also enhance the deterrence for VSOs, particularly given the need to maintain reputation to encourage volunteers, donations, and to preserve influence in public debates. Litigation brings the wrong into the public domain and allows it to be freely reported; organisations careful to maintain their public image will accordingly act with care.

Such a legal regime may also directly increase to a minor extent the deterrence imposed by tort upon judgment-proof volunteers. A judgment-proof volunteer currently enjoys a functional immunity. However, with (statutory) vicarious liability the probability of having their conduct forensically examined by litigation increases (even if they do not pay the damages or costs), this has a cost in terms of their time (and stress), since the probability of the volunteer having to give evidence or account for their actions increases. In addition it may indirectly increase the deterrence effect of tort upon such individuals since the VSO itself has an increased incentive to deter tortious conduct on the part of their judgment-proof volunteers. Further, potential tort victims may be more willing to receive services from potentially judgment-proof volunteers if they know that there is potential organisational liability.

From the perspective of positive economic methodology, a partial personal defence for volunteers who work for VSOs, alongside a statutory vicarious liability for VSOs, may result in increased volunteering, alongside a potential reduction in torts. The introduction of statutory vicarious liability may also divert potential claims against volunteers towards the organisation, even where gross negligence is concerned, thus in practical terms further reducing the costs of volunteering to the individual,[46] with the result (following positive economic methodology) of increased volunteering.

The potential for increased reticence on the part of third parties to receive a volunteer-delivered service, which is generated by a volunteer defence, may be offset by organisational liability.

[46] Note Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 CLJ 615, 624-5; Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (LRC 93 -2009) [3.88], [4.12].

However, where the volunteer defence applies in the absence of vicarious liability, or in the absence of an organisational setting, for instance if it protects individual altruists, then following positive economic methodology it is likely to lead to increased volunteering levels, but also increased levels of volunteer negligence. If the defence is predicated on being a volunteer for an organisation it may also encourage volunteers to deliver their services through an organisation, rather than as individual altruists.

If in place of a defence volunteers are provided with a state indemnity or insurance then organisations too will enjoy increased protection since claims which might otherwise be made against them will be directed towards the state. This will reduce care (and thus increase torts) at both the volunteer and at the organisational level.

The conclusion above, which applies in the context of incorporated VSOs, also applies to larger, resourced, unincorporated VSOs, which have an organisational identity, and where there is no chance that individual volunteers will have to pay for the negligence of their fellow volunteers. However, if volunteer protection also applied to informal, un-resourced, unincorporated association VSOs it risks reducing volunteering within such organisations, whilst also increasing torts. This is since a liability transfer where liability is passed on to fellow volunteers, rather than being paid for using organisational resources, may increase the cost of volunteering for non-negligent volunteers, whilst simultaneously decreasing it for the most careless. Additionally with the most informal unincorporated VSOs there will be little in the way of an organisation to implement accident reduction schemes, training, or to control its volunteers. With the least formal unincorporated association VSOs the membership may not even be aware of the fact that they have created an unincorporated association. Further, an organisation needs an identity or brand for reputation concerns to be of consequence, a highly informal VSO which is set up quickly, and dissolved quickly, with little to no identity of its own, is unlikely to face significant publicity pressure.

Applying the scheme to informal grassroots unincorporated VSOs may also result in some pressures to formalise such VSOs by incorporating to prevent volunteers from being held liable for their fellow volunteer's torts, and by adopting vertical management structures to reduce torts. Such pressures may be inappropriate within the informal grassroots end of the sector since they decrease the sector's diversity and responsiveness. This may erode its

important democratic function of providing a space for citizens to come together quickly, to provide highly responsive and democratically delivered services, with little formality.

Indemnity?

Volunteer protection will be undercut if the organisation (or its insurers) can bring an indemnity claim against the volunteer where the organisation has been held liable for the volunteer's negligence.

In employment contacts there is an implied term to perform work with reasonable care and skill which may found an indemnity claim. However, through a 'gentleman's agreement' between insurers such claims are not brought in the absence of wilful misconduct or collusion.[47] This agreement does not extend to volunteers. Most volunteer agreements are drafted to be non-contractual (Chapter 4). Where volunteers have no contract with the organisation, the organisation may not bring such a claim since there is no implied term on which to found it. However, where a volunteering contract is present, a similar implied term may be found to be present.

It would be perverse if volunteers were subject to indemnity claims for vicarious liability for negligence, but not employees. Thus to prevent such an outcome, and to preserve the benefits of volunteer protection, the legislation would need to contain a similar prohibition on indemnity claims to that enjoyed by employees.

Organisational Protection

Since organisational protection is separate to volunteer protection, it is first analysed independently. Organisational protection, whether charitable immunity, or self-constructed through utilising judgment-proofing - deliberately creating an entity of straw to take the liability risks whilst the assets are shielded against execution of judgment (see Chapter 9), reduces tort's deterrent effect on the organisation.

[47] Atiyah (n38) 426-7; Giliker (n37) 32-4.

Immunity removes the threat of tort entirely. Judgment-proofing strongly reduces the threat, although claimants may attempt to work around the structures used. This may exert some deterrence given the costs of defending such claims, along with potential reputational damage when the structures utilised to avoid the payment of damages come to light.

This reduction of deterrence at the organisational level may lead to greater VSO activity, but also to reduced levels of care at the organisational level. Immunising organisations, whether legislatively, or through ordinary private law mechanisms, means that individual volunteers are more likely to face claims, since there will be no organisational defendant (generally the more attractive defendant), against which a claim can be made. Claims brought against the organisation can act in practical terms as a defence for volunteers.

Organisational protective mechanisms reduce tort's deterrent effect at the organisational level, but increase it at the individual volunteer level. This is also the case in the context of unincorporated association VSOs. Such mechanisms increase the cost of volunteering. Rational choice theory suggests that volunteers will respond by taking greater care and/or reducing or withdrawing their services. This increased care by volunteers does not mean that torts will necessarily be reduced since it is the organisation which is best able to put in place systems, training, and procedures to reduce accidents, and to work with insurers and utilise their expertise to make organisational and systemic changes. Few individual volunteers have the power to effect systemic change and many will lack sufficient expertise to do so. This would suggest a higher level of accidents, alongside a reduction in volunteering. Whilst volunteers may be able to spread this cost through personal insurance policies, these premiums still represent an increase in volunteering costs and formality, which points towards reduced volunteering.

Organisational immunity will not increase costs for judgment-proof volunteers since they already enjoy a functional immunity. Indeed it will reduce costs, since the judgment-proof volunteer's conduct will not be examined in litigation at all (even through that brought against the organisation). In dealing with judgment-proof volunteers, positive economic methodology suggests that organisational immunity will decrease deterrence and therefore increase torts at both the organisational, and individual volunteer levels.

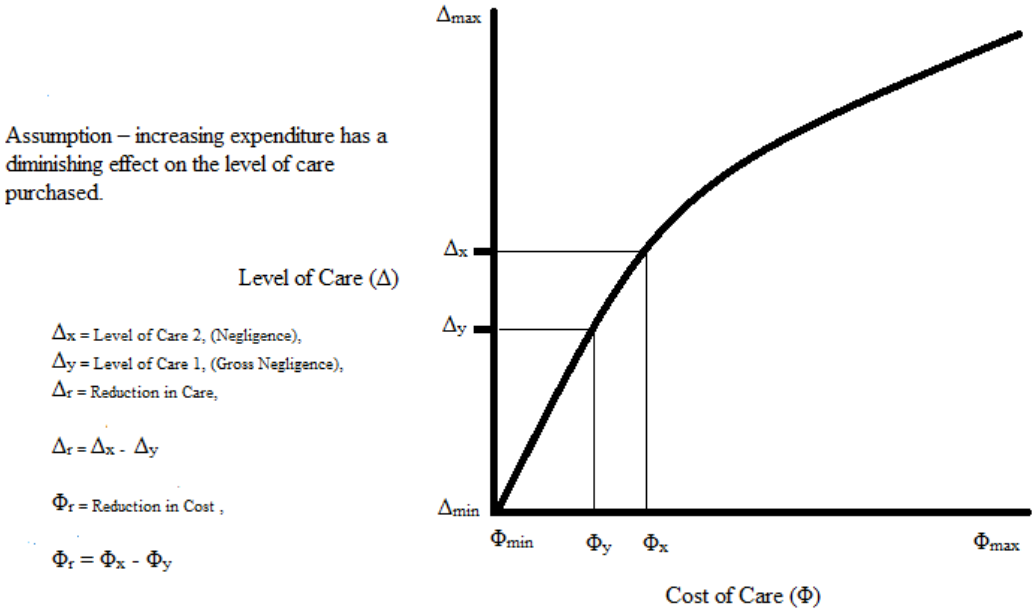
The policies behind the introduction of a statutory liability transfer from the volunteer to the organisation, and organisational immunity, are inconsistent. However, if a volunteer defence is introduced which is not predicated on an organisational liability transfer, it is not inconsistent with concurrent organisational immunity. The two operating together, in positive economic terms, would represent a significant reduction in tort deterrence operating on the sector. This at first glance is likely to lead to increased voluntary sector activity, at both the volunteer and organisational level. It also points towards an above baseline increase in torts for any given number of volunteers, an increased reticence to receive services from the sector, and a reduction in sector reputation. However, if organisational immunity is present, even if volunteers have a partial defence, litigation which would otherwise be deflected to the organisation might be brought against them in a personal capacity. Organisational immunity encourages claims against volunteers. There are still costs to establishing the partial defence. Further, the volunteer's negligence may be sufficiently gross for the defence not to apply, so that there is volunteer liability, and no prospect of a transfer of that liability to the organisation. This may in turn increase the deterrence operating at the level of the volunteer, at least when compared to a system that has a volunteer defence combined with a liability transfer to the organisation, leading to reduced volunteering levels when compared with such a system.

Gross Negligence?

Chapter 6 argues that if a personal partial defence from the tort of negligence is desired a defence based on an objective standard (such as gross negligence) is preferable to a defence based on a subjective standard.

However, such defences will only achieve the objective in increasing volunteering levels if they shield a meaningful number of volunteers. This depends on a sufficient difference between negligence and gross negligence. As demonstrated in Chapter 6 it is possible to provide a definition of gross negligence for the purposes of such a defence which is sufficiently distinct from ordinary negligence to provide meaningful protection. The study of the application of the VPA in US courts in Chapter 6 also demonstrates that this standard is distinct from negligence, and the defence has protected negligent volunteers.

Figure 1:



Let Δ_t be care taken. When ordinary negligence applies, where $\Delta_t > \Delta_x$, there is no liability, and where $\Delta_t < \Delta_x$ there is liability. When gross negligence applies, where $\Delta_t > \Delta_y$, there is no liability, and where $\Delta_t < \Delta_y$ there is liability. If the difference between Δ_x and Δ_y is minimal the difference in the cost of care is low, and thus the reduction in cost of, and increase in volunteering is low. As Δ_r increases, Φ_r increases.

Informational Awareness

The analysis above makes an assumption that actors are aware of tort's costs. However, tort and protective mechanisms will only impact on the decisions of those who are aware of their potential costs. Actors may not be able to accurately assess those costs and are thus using predicted values. These predictions may not be accurate. Further, the expected utility may be shaped by the actor's attitudes towards risk.

Nevertheless, research demonstrates a widespread awareness of the existence of tort litigation in England, and a false belief in an 'unrestrained culture of claiming'.[48] This suggests that

[48] Richard Lewis and Annette Morris, 'Challenging Views of Tort: Part II' [2013] JPIL 137, 139. See Richard Lewis and Annette Morris, 'Tort Law Culture: Image and Reality' (2012) 39 JLS 562; Lord Young, *Common*

volunteer defences may have greater impact than their real cost reductions to volunteers might otherwise imply. This is further supported by the empirical evidence below. Differential attitudes towards risks too should not undermine the analysis when an aggregate population is examined (rather than the decision of any one individual).

However, the analysis also (in part) assumes that judgment-proof actors are aware of their status and understand its significance. This assumption cannot be proven on the existing empirical evidence. However, where such actors are not aware of their status their behaviour may be modelled in the same way as that of an ordinary actor.

Behavioural Economics?

We must now examine how these positive economic predictions stand in the light of behavioural economics, and the available evidence.

Positive economics does not assume that all actors are maximising their utility at all times. There will be deviations, but it considers that these cancel out when the behaviour of a population is aggregated.[49] It does not model individual behaviour, but rather the 'contours of large-scale behaviour'.[50]

However, the assumptions of positive economic analysis have been challenged by psychological studies[51] and neuroscience. Empirical and experimental research shows that individuals demonstrate a systematic divergence from the rational choice model.[52] People

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Sense Common Safety (Cabinet Office 2010); Richard Lewis, 'Compensation Culture Reviewed: Incentives to Claim and Damages Levels' [2014] JPIL 209; Annette Morris, '"Common Sense Common Safety": the Compensation Culture Perspective' (2011) 27 PN 82; James Goudkamp, 'The Young Report: An Australian Perspective on the Latest Response to Britain's "Compensation Culture"' (2012) 28 PN 4; Richard Lewis, Annette Morris and Ken Oliphant, 'Tort Personal Injury Claims Statistics: is there a Compensation Culture in the United Kingdom?' (2006) 14 TLJ 158; Annette Morris, 'The "Compensation Culture" and the Politics of Tort' in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Hart 2013) ch 4; Annette Morris, 'Spiralling or Stabilising? The Compensation Culture and our Propensity to Claim Damages for Personal Injury' (2007) 70 MLR 349; Kevin Williams, 'State of Fear: Britain's "Compensation Culture" Reviewed' (2005) 25 LS 499.

[49] Richard Lipsey and Kenneth Chrystal, *An Introduction to Positive Economics* (8th edn, OUP 1996) 30; Richard Posner, *Economic Analysis of Law* (8th edn, Wolters Kluwer 2011) 22.

[50] Alan Devlin, *Fundamental Principles of Law and Economics* (Routledge 2015) 409.

[51] Roger Noll and James Krier, 'Some Implications of Cognitive Psychology for Risk Regulation' in Sunstein, *Behavioral Law* (n17) ch 13.

[52] Herbert Simon, 'Rationality in Psychology and Economics' (1986) 59 JBus S209; Daniel Kahneman, Paul Slovic and Amos Tversky, *Judgment under Uncertainty, Heuristics and Biases* (CUP 1982).

'display bounded rationality, bounded willpower, and bounded self-interest'.[53] These are not just outlying deviations and idiosyncrasies.[54] A rational choice model can therefore generate incorrect predictions.

Bounded rationality means that there are limits to human cognitive processing: it does not always conform to logic and instead it sometimes uses heuristics – or mental shortcuts,[55] and intuition.[56] Bounded self-interest means that humans are sometimes willing to help others, even where to do so appears to be against their (material) self-interest. Further, with bounded willpower, humans can be short-sighted when tempted. There is thus more cooperation, but also more spite, than would be predicted by the rational model.[57]

Posner brushes aside these behavioural economics criticisms, arguing that rational choice theory does not assume perfect rationality, and that bounded rationality is simply a cost of using information.[58] This is unconvincing, since behavioural economics goes to the heart of the process of information usage, and processing one's choice. It is not simply a 'cost' in a logical process.[59]

There is a tendency to use behavioural economics to dismiss the findings of positive law and economics. However, this is an error. Behavioural economics necessitates adjustments to law and economics, but it does not require the discipline to be dismantled.[60]

Some of the methodological assumptions of positive economics do not accurately reflect the inner processing mechanisms of the human mind. But does this make the method an unreliable way of modelling the consequences of legal change?

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[53] Jolls, Sunstein and Taler (n17) 14.
[54] Daniel Pi, Francesco Parisi and Barbara Luppi, 'Biasing, Debiasing, and the Law' in Zamir and Teichman (n19) ch 6, 143.
[55] Herbert Simon, 'A Behavioral Model of Rational Choice' (1955) 69 QJE 99; Jolls, Sunstein and Taler (n17) 14, 49; Frank (n 21) 256.
[56] John Malcolm Dowling and Yap Cin-Fang, *Modern Developments in Behavioral Economics* (World Scientific 2007) 37.
[57] Jolls, Sunstein and Taler (n17) 49-50.
[58] Posner, *Economic Analysis* (n49) 3.
[59] Kahneman, Slovic and Tversky (n52); Dan Ariely, *Predictably Irrational* (Harper Collins 2008).
[60] Thomas Ulen, 'Behavioural Law and Economics' in Morris Altman (ed), *Handbook of Contemporary Behavioral Economics* (Routledge 2006) ch 34, 684.

Friedman argues that one should not look at whether the theory's assumptions are realistic. Instead the issue is whether they are sufficiently good approximations for their required purpose. This is adjudicated based on their 'predictive power'. He gives the example of throwing a compact ball off a building. To calculate the time taken for the object to fall, physicists model this as if the ball was in a vacuum. This is adequate for the purpose at hand. There is no need to take air resistance into account. However, if a feather is dropped off the building instead, modelling this as if it were in a vacuum produces inaccurate predictions.[61] It is the real world data that determines if the model is sufficiently accurate for the purposes for which it is used.

However, in these examples the experimental data is available. In many situations, including analysing the effects of introducing volunteer protection on volunteering activity in England, we do not have the real world data to confirm in advance the sufficiency of the assumptions of rational choice. The predictive quality of rational choice alone may prove to be sufficient, and we may not need to examine heuristics, but when we do not have the data in advance to demonstrate this, and where we know that better assumptions are available (although we do not know whether or not they are needed) then we should make them.

In predicting the consequences of volunteer tort regimes we therefore need to examine its potential interface with actual human behaviour by using behavioural law and economics.

Behavioural economics research requires rational choice to be qualified.[62] This is not to say that people are irrational, but rather people deviate from rationality under certain circumstances. These deviations do not mean that human behaviour is unpredictable, since 'most humans behave in a similar ways in similar circumstances'.[63] Sunstein states: 'it does not follow that people's behavior is unpredictable, systematically irrational, random, rule free, or elusive to social scientists. On the contrary, the qualifications can be described, used, and sometimes even modelled.'[64]

[61] Friedman (n1) 8-9, 15-19, 31; cf Herbert Simon, 'Rational Decision-Making in Business Organizations' (1979) 69 AER 493; GC Archibald, Herbert Simon, Paul Samuelson, 'Discussion' (1963) 53 AER 227.
[62] Cass Sunstein, in Sunstein *Behavioral Law* (n17) 1.
[63] Thomas Ulen, 'The Importance of Behavioral Law' in Zamir and Teichman (n19) ch 4, 95, (error in original).
[64] Sunstein, in Sunstein *Behavioral Law* (n17); Cass Sunstein, 'Behavioral Analysis of Law' (1997) UChiLRev 1175.

Behavioural economics does not offer an alternative overarching model which allows us to model the impact of legal change. We can however combine the approaches. Rational choice theory (using a very broad notion of self-interest/utility), modified to take account of known heuristics and biases, is the best model that we have available to model the effect of legal change.[65]

Heuristics and Deviations

There are a number of deviations from rational choice that may impact on a positive economic analysis of voluntary sector tort regimes.

Rational choice theory assumes that people can reasonably and reliably assess risks. However, there is over-optimism in assessing one's own abilities and risk judgments. People are over-optimistic in estimating the likelihood of good things happening to them, and they underestimate the probability of unfortunate events occurring to them. They also believe that risks are more likely to materialise for others rather than themselves.[66]

This means that individuals may underestimate the probability of facing tort litigation, and overestimate the adequacy of their precautions.[67] When dealing with small probabilities, evidence shows that people tend to set them at zero. This may also impact on care levels.[68] Since volunteers may be systematically underestimating the risks this points towards volunteer defences or organisational protection having less impact on volunteering levels than rational choice theory might predict. A change in the level of protection from a systematically underestimated or undervalued risk will have less impact than if the risk of litigation was reliably assessed. However, conversely, in some circumstances people will give very small probabilities significant weight where the consequences are strongly negative or positive.[69]

[65] See Russell Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 CalLRev 1051, 1074-5, 1144.
[66] Sunstein, in Sunstein *Behavioral Law* (n17) 4; Pi, Parisi and Luppi (n54) 147.
[67] Pi, Parisi and Luppi (n54) 147.
[68] Ulen, 'Behavioural Law and Economics' (n60) 680-681.
[69] Jennifer Robbennolt and Valerie Hans, *The Psychology of Tort Law* (NYU Press 2016) 48.

This must be balanced against the 'availability' heuristic. The probability of noteworthy events, or events of the type that have been brought to public attention, is overestimated, since people rate risks more seriously where they can recall an incident or examples.[70]

Media reports emphasise tort claims that go to trial, or are successful, or involve large damages. Such anecdotes are easy to recall.[71] There is also a pervasive discourse on 'compensation culture', alongside concerns as to its impact on volunteering. This may mean that tort is more readily 'available' to some. As a consequence, in making volunteering decisions they may overweigh the tort risks. This may mean that volunteer protection legislation may have a greater impact than envisaged by positive economics. This is since it mitigates a risk which volunteers and potential volunteers may be overweighing. Organisational protection too may have a greater impact than envisaged, if organisational decision makers are overweighing tort risks.

Rational choice theory treats losses and gains equally. If a person gains greater utility from volunteering than the cost (including the risk of tort litigation) the rational actor would volunteer. However, psychological studies suggest that this may not always be the case. Behavioural research shows that people 'are more displeased with losses than they are pleased with equivalent gains – roughly speaking twice as displeased.'[72] Potential losses are weighed more than equivalent potential utility gains.[73] This suggests that volunteer protection legislation by reducing exposure to losses will have a greater impact on volunteering levels than rational choice theory might predict, since potential losses are overweighed by actors. It also suggests that organisational protection will impact more greatly on activity levels than positive economics would suggest. However, the increased exposure of volunteers to tort that results from organisational protection will have greater impact on volunteers than the increased risk suggests.

[70] Edward Cartwright, *Behavioral Economics* (2nd edn, Routledge 2014) 232; Sunstein, in Sunstein *Behavioral Law* (n17) 5; Frank (n21) 256.
[71] Robbennolt and Hans (n69) 200-202.
[72] Sunstein, in Sunstein *Behavioral Law* (n17) 4-5; Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioural Economics' (2003) 93 AER 1449.
[73] Frank (n21) 256.

Psychological research shows that an individual's analysis of the risk affects their analysis of the benefit and vice versa.[74] Thus those who are most committed to volunteering are more likely to assess the liability risks as low, whereas those least committed to volunteering are likely to assess the liability risks as high. Further, if new information is provided which suggests an increase in the risk level of the activity, the level of perceived benefit from the activity is likely to decrease, and vice versa.[75] This would suggest that volunteer protection legislation, in decreasing the apparent risk level of volunteering, may lead people to perceive greater benefits to volunteering. This may increase volunteering levels. Organisational protection, which leads to greater exposure of individual volunteers to litigation, may lead people to perceive reduced benefits in volunteering. This may decrease volunteering levels.

Heuristics mean that tort risks are both overestimated and underestimated.[76] Nevertheless they are hard to model since deviations from rationality are not uniform, and vary based on factors including education, gender, training, cultural background, cognitive capacity, thinking disposition, and emotional state. The same person can vary between perfect rationality and apparently irrational behaviour, in different ways to others.[77] These deviations all point towards the fact that the increase in volunteering following the introduction of a volunteer defence may be more, or less, than that which is suggested by the rational choice model. The same follows for the increase in organisational deterrence, with a concurrent increase in volunteering if vicarious liability is imposed (and litigation is deflected towards the organisation); or the decrease in organisational deterrence and increase in volunteer deterrence (and thus decrease in volunteering) if organisational protection is introduced.

However, the known deviations and heuristics do not contradict the basic trends that a volunteer defence, or deflecting liability to the organisation, is likely to lead to increases in volunteering levels. Yet the level of this increase in volunteering may be less than that suggested by rational choice theory for some due to 'overconfidence', and the level for others may be greater due to 'availability'. Given the apparent widespread awareness amongst volunteers of voluntary sector negligence claims reported in the media (Chapter 2), the latter

[74] Paul Slovic and Daniel Västfjäll, 'Affect, Moral Intuition, and Risk' (2010) 21 PsycholInq 387, 389; Robbennolt and Hans (n69) 47.
[75] Melissa Finucane and others, 'The Affect Heuristic in Judgments of Risks and Benefits' (2000) 13 JBehavDecisMak 1; Robbennolt and Hans (n69) 47.
[76] Daniel Shuman, 'The Psychology of Deterrence in Tort Law' (1993-1994) 42 UKanLRev 115, 163-6.
[77] Gregory Mitchell, 'Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence' (2002-2003) 91 GeoLJ 67, 87, 122.

seems likely. This is an issue of degree, not direction. They also do not contradict the basic trend that volunteering levels will decrease if volunteers become more exposed to tort litigation due to organisational protection.

It may be suggested that direct subsidies to volunteers will achieve the same effect, without increasing negligence as a by-product.[78] However, direct subsidies may be counterproductive. Extrinsic incentives may crowd out intrinsic motivations.[79] Monetary incentives have been demonstrated to reduce volunteer motivation and volunteering,[80] since they shift the behaviour from altruism to 'exchange mode'.[81] Further, paying volunteers is also objectionable on the normative ground that it erodes the nature of volunteering. Direct Government subsidies to volunteers would also undermine many of the functions of the voluntary sector and reduce its independence from the state (see Chapter 2).

Empirical Evidence

In predicting the changes that may be introduced by volunteer or organisational protection we cannot simply rely on law and economics. We also need to examine the (limited) available empirical evidence in relation to the impact of tort claims on the behaviour of organisations and individuals, both generally and specifically in the voluntary sector context, to see whether it supports the predictions generated by economic methodologies.

Deterrence?

We must first examine whether or not tort deters. For law and economics scholars, deterrence is key to tort, and central to any positive economic analysis of tort, such as the one we have just conducted. However, tort's deterrent effect is disputed. The arguments made by scholars that tort does not have a deterrent effect are: the lack of knowledge by potential injurers of tort law and accident probabilities; behaviour in dangerous circumstances is dominated by concerns for one's own safety rather than liability; moral principles deter

[78] Gerrit De Geest, 'Who Should Be Immune from Tort Liability?' (2012) 41 JLegalStud 291, 311.
[79] Bruno Frey and Reto Jegen, 'Motivation Crowding Theory: A Survey of Empirical Evidence' (2001) 15 JEconSurv 589.
[80] Uri Gneezy and Aldo Rustichini, 'Pay Enough or Don't Pay At All' (2000) 115 QJE 791; Bruno Frey and Lorenz Götte, 'Does Pay Motivate Volunteers?' (1999) University of Zurich Working Paper No 7 <https://doi.org/10.3929/ethz-a-004372692> accessed 23 September 2018; Meier (n30) 35.
[81] Meier (n30) 35.

people from imposing unnecessary risks, rather than tort law; risks of liability are discounted; accidents may occur due to momentary inattention; penalties are small; and the existence of liability insurance, with insufficient premium differences between the cautious and the careless.[82]

However, the question of whether tort law deters, and to what extent, may only be answered empirically. There are a range of empirical legal methods. Real world field data can demonstrate the effect of tort in practice. However, with such data causation can be an issue. Lab experiments remove the problem of causality and unaccounted variables, but external validity is an issue.[83] Thus experimental data may usefully complement real world studies, but cannot replace them, and both must be examined.

Experimental Studies

There are few published experimental studies on the effect of tort.

A public good experiment was conducted to study the deterrent effect of different tort damages regimes, which varied the degree and probability of damages. It showed that if the redress is of sufficient certainty and magnitude, deterrence is present. It further showed that the experience of paying damages had greater influence than the expectation of paying damages.[84] Although it must be accepted that this does not replicate real world complexities, this points towards tort having a deterrent effect.

In a different experiment the views of first year law students were examined in relation to risky activities and the impact of legal regimes on hypothetical decision making. It was concluded that: 'the threat of potential criminal sanctions had a large and statistically significant effect on subjects' stated willingness to engage in risky behaviour, the threat of

[82] eg Landes and Posner (n45) 9-13; Peter Cane, *Atiyah's Accidents Compensation and the Law* (8th edn, CUP 2013) 421-52, (see also (9th edn, CUP 2018) 405-33).
[83] Christoph Engel, 'Behavioral Law and Economics: Empirical Methods' in Zamir and Teichman (n19) ch 5, 131.
[84] Theodore Eisenberg and Christoph Engel, 'Assuring Civil Damages Adequately Deter: A Public Good Experiment' (2014) 11 JEmpiricalLegalStud 301.

potential tort liability did not. These findings call into question widely accepted notions about the very foundations of tort law.'[85]

However, most students are judgment-proof. Where damages are sought, generally one does not sue judgment-proof actors, it is throwing good money after bad. Being judgment-proof functionally acts as an immunity. However, there may be a difference between ordinary judgment-proof actors, and judgment-proof law students. Some law students may fear to a greater extent the irrational actor that pursues the man of straw, since the resulting bankruptcy may have greater career consequences for the student than for the ordinary judgment-proof actor.

A criminal conviction will have significant consequences for students. The stigma of being a tortfeasor is different. Criminal prosecutions are brought against judgment-proof and deep-pocketed actors alike. It may be that much of the regulatory pressure of tort is having one's resources exposed to claims, or the potential impact on one's insurance premiums. Students, as with the judgment-proof generally, do not have the same economic pressures from tort as solvent actors. The students also self-reported their views in hypothetical situations, and this might not necessarily bear out in real world decisions. So what this study shows is that judgment-proof law students might not alter their behaviour due to the threat of tort liability. Given that for the judgment-proof a judgment against them for damages is toothless this does not itself undermine the deterrent thesis for tort; instead the study shows that for judgment-proof defendants tort might not deter.

Eisenberg and Engel state that their public good experiment findings are not necessarily inconsistent with Cardi's, in that the latter did not provide participants with experience of paying for their behaviour.[86] However, the present author questions the validity of Cardi's conclusion for all actors given the experiment's reliance on judgment-proof subjects. We must now turn to real world studies.

[85] W Jonathan Cardi, Randall Penfield and Albert Yoon, 'Does Tort Law Deter Individuals? A Behavioural Science Study' (2012) 9 JEmpiricalLegalStud 567.
[86] Eisenberg and Engel (n84) 327.

Tort Deterrence in the Real World?

There is substantial evidence demonstrating that tort law can exert deterrent effects on organisations.[87] Whilst there is evidence that tort also impacts on the behaviour of individuals, this evidence is more limited.

There is significant evidence of tort playing a deterrent role in the field of medical malpractice.[88] Evidence shows that it has a small impact on reducing negligently caused injuries, but it has a significant impact on medical practice, including by encouraging greater record keeping, increasing diagnostic testing and referrals,[89] the adoption of new risk management systems and improved training,[90] and increasing the frequency of caesarean sections.[91]

Case studies have shown that tort has played a significant role in the recall or withdrawal of products from the market.[92] Liability has also played a role in delays, or failures to introduce new pharmaceutical products and asbestos substitutes.[93] Using a large data set on firm behaviour, Viscussi and Moore show that there is a strong relationship between product liability claims and product research and development levels. They conclude that courts play a major role in the process of product innovation.[94]

Research into the German sugar industry has also demonstrated that a change in the form of calculation of statutory accident insurance premiums, from one based on fixed contributions, to firm contributions based on accidents at that firm, reduced industrial accidents.[95] The US

[87] This is also accepted by critics of the deterrent thesis, such as Cane (n82) 422.
[88] Landes and Posner (n45) 10; Zenon Zabinski and Bernard Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2015) Northwestern Law & Econ Research Paper No 13-09; cf Michelle Mello and Troyen Brennan, 'Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform' (2001-2002) 80 TexLRev 1595.
[89] Don Dewees, David Duff and Michael Trebilcock, *Exploring the Domain of Accident Law* (OUP 1996) 417.
[90] Joanna Schwartz, 'A Dose of Reality for Medical Malpractice Reform' (2013) 88 NYULRev 1224.
[91] Gary Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994-1995) 42 UCLALRev 377, 402-3.
[92] Ben van Velthoven, 'Empirics of Tort' in Gerrit De Geest (ed), *Encyclopaedia of Law and Economics* (2nd edn, Elgar 2011) vol 1, ch 16, 483-5.
[93] Steve Garber, *Product Liability and the Economics of Pharmaceuticals and Medical Devices* (RAND Institute for Civil Justice 1993) 82-104.
[94] W Kip Viscussi and Michael Moore, 'Product Liability, Research and Development, and Innovation' (1993) 101 JPoliticalEcon 161, 164, 182-3.
[95] Hein Kötz and Hans-Bernd Schäfer, 'Economic Incentives to Accident Prevention: An Empirical Study of the German Sugar Industry' (1993) 13 Int'lRevL&Econ 19.

Federal Employee' Liability Act, which expanded employer liability, resulted in a reduced accident rate and encouraged the implementation of railway safety measures.[96]

There are a number of natural experiments arising from changes in legal regimes for motor vehicle accidents. For instance a shift from fault based liability in Quebec to a no-fault scheme along with a system of flat pricing of insurance increased the fatality rates between 6-10%.[97] Controlling for other variables these natural experiments appear to show that tort does exert a deterrent effect on driver behaviour, and that it contributes to road safety. Shifts from fault to no fault motor liability and/or insurance resulted in an increase in accidents on the road.[98] This demonstrates that tort can have a deterrent effect on individuals. As we will see below there is further evidence of tort having a deterrent effect on individual volunteers.

Nevertheless, there are suggestions that liability does not always influence behaviour. During an independent review of the UK's Riot (Damages) Act 1886 senior police officers rejected the argument that without liability they would be less likely to take steps to prevent riots. The report accepted that their actions were not motivated by a desire to save money under the Act.[99] However, the report does not contain any further details on the impact of liability on policing. There is an inconsistency here since in negligence actions brought against the police Chief Constables have argued that liability would lead to defensive practices, that is

[96] Dewees, Duff and Trebilcock (n89) 354; Schwartz, 'Reality in the Economic Analysis of Tort Law' (n91) 391-2.
[97] Dewees, Duff and Trebilcock (n89) 414-5.
[98] See Elisabeth Landes, 'Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents' (1982) 25 JL&Econ 49; Christopher Bruce, 'The Deterrent Effect of Automobile Insurance and Tort Law: A Survey of the Empirical Literature' (1984) 6 Law&Policy 67; J David Cummins, Richard Phillips and Mary Weiss, 'The Incentive Effects of No-Fault Automobile Insurance' (2001) 44 JL&Econ 427; Alma Cohen and Rajeev Dehejia, 'The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities' (2004) 47 JL&Econ 357; Yu-Ping Liao and Michelle White, 'No Fault for Motor Vehicles: an Economic Analysis' (2002) 4 AmL&ERev 258; Frank Sloan, Bridget Reilly and Christoph Schenzler, 'Tort Liability versus Other Approaches for Deterring Careless Driving' (1994) 14 Int'lRevL&Econ 53 (also deals with dram shop liability – decreases fatalities); Rose Anne Devlin, 'Some Welfare Implications of No-Fault Automobile Insurance' (1990) 10 Int'lRevL&Econ 193; McEwin (n41); Peter Swan, 'The Economics of Law: Economic Imperialism in Negligence Law, No-Fault Insurance, Occupational Licensing and Criminology' (1984) AustralianEconRev 92; Dewees, Duff and Trebilcock (n89) 26; Schwartz, 'Reality in the Economic Analysis of Tort Law' (n91) 393-7; Hans-Bernd Schäfer and Claus Ott, *The Economic Analysis of Civil Law* (Matthew Braham tr, Elgar 2004) 113; van Velthoven (n92): the most recent and accurate surveys (controlling for variables) show a link between no fault and increased accidents, although they are 'not entirely unanimous'.
[99] Neil Kinghan, 'Independent Review of the Riot (Damages) Act 1886: Report of the Review' (Home Office 2013) [2.16]; cf John Hartshorne, Nicholas Smith and Rosemarie Everton '"Caparo under Fire": A Study into the Effects upon the Fire Service of Liability in Negligence' (2000) 63 MLR 502 (some fire brigades have changed systems, procedures, training and management approaches in the light of increased exposure to tort).

that liability in tort impacts on police decision making by exerting a deterrent effect.[100] However, this claim may also be cover for an attempt to resist regulation.

There are two classic detailed surveys of the evidence on whether tort law deters. Schwartz conducting a sector-by-sector study concludes that tort does deter, exerting meaningful deterrence, but not in the precise and strong form envisaged by law and economics scholars, instead it operates in a more moderate form. This deterrence is significant, and has an effect in encouraging safety.[101]

Reviewing the empirical evidence Dewees, Duff, and Trebilcock conclude that tort may exert a deterrent effect, although this varies – it is strongest for motor accidents, and weakest for environmental accidents. They thus argue that '[t]he efficacy of tort law must be analyzed relative to a specific accident context',[102] noting that in some cases 'the deterrent effect of tort is limited and uneven or cannot be established by existing studies'.[103] It is not surprising that the evidence concerning environmental torts differs from those involving personal injuries. Environmental incidents may engage different torts than personal injury torts, such as nuisance and statutory liability. Further, with environmental actions problems of standing and proof of causation may be substantial. However, their work highlights that evidence of tort deterrence in one field does not necessarily transfer to others. The power of tort deterrence (and indeed its existence in the first place), may vary across substantive areas of law and sectors. There is thus a need to examine the voluntary sector.

Evidence from the Voluntary Sector

There is evidence that tort deters both VSOs and individual volunteers. This evidence supports the positive economic analysis (as adjusted for known heuristics) as to the potential impact of introducing volunteer or organisational protection.

[100] Jonathan Morgan, 'Strict Liability for Police Nonfeasance? The Kinghan Report on the Riot (Damages) Act 1886' (2014) 77 MLR 434, 455-457. Note Simon Halliday, Jonathan Ilan and Colin Scott, 'The Public Management of Liability Risks' (2011) 31 OJLS 527 (highways liability, public authorities respond to liability risks).
[101] Schwartz, 'Reality in the Economic Analysis of Tort Law' (n91).
[102] Dewees, Duff and Trebilcock (n89) 5.
[103] ibid 414.

In Chapter 3 we noted that two UK Government reports briefly examine tort's impact on volunteering. Lord Young's report records a culture of fear of litigation, risk averse policies, and liability fears resulting in the avoidance of organised voluntary activities, alongside VSO curtailment of worthwhile activities.[104] Whilst the report's list of consultees records that Lord Young widely consulted within the voluntary sector, evidence is not provided to support these findings. Lord Hodgson's report also refers to volunteer litigation fears. He states '[r]eports of bizarre legal cases …. discourag[e] volunteers whose psychological reaction is "I never thought I could be sued for that...!!"'[105] The first heading in the report's section 'What stops people giving time?' is entitled 'Risk of Litigation'. This section refers to the perception that a volunteer may be sued.[106] Whilst Lord Hodgson (the then President of the NCVO) broadly consulted with the voluntary sector, and his report task force included the former Chair of NCVO, and also the Chief Executive of the (then) WRVS, amongst others, the report does not provide the evidence for these conclusions.

Notwithstanding the scarcity of evidence contained within the two reports, and limited qualitative evidence contained within the Parliamentary debates concerning SARAH, there is significant evidence elsewhere of tort law exerting a deterrent effect on the voluntary sector within the UK, and in other jurisdictions.

Within the UK VSOs have expressed concerns about tort's impact on their operations,[107] and both VSOs and volunteers have expressed fears as to such risks or liabilities.[108] There has been a rise in risk consciousness within VSOs,[109] and 5% have recorded claims made against volunteers or trustees.[110]

In Chapter 2 we set out in detail evidence demonstrating that tort litigation (or the perception of such litigation) has a deterrent effect on both the recruitment and retention of volunteers in

[104] Lord Young (n48) 23-29.
[105] Lord Hodgson, *Unshackling Good Neighbours* (London 2011) 8.
[106] ibid.
[107] See the Parliamentary debate on the Promotion of Volunteering Bill (Bill 18 of 2003-4).
[108] 'We continue to get a lot of calls from charities and individual volunteers about risk and liability. The chances of any action being taken against them are very low but there is clearly a great concern about risk.' Justin Davis Smith, NCVO Executive Director for Volunteering and Development, quoted in House of Commons Library, 'Social Action, Responsibility and Heroism Bill' (Research Paper 14/38, 2014). See also Sport England, 'Sports Volunteering in England in 2002' (Sport England 2003) [74].
[109] Katharine Gaskin, *Getting a Grip, Risk, Risk Management and Volunteering A review of the Literature* (Volunteering England 2005) i.
[110] Katharine Gaskin, *On the Safe Side Risk, Risk Management and Volunteering* (Volunteering England 2005) 4

England. There is no need to repeat this evidence here, but it is worth noting that the fact there are higher levels of perception of risk amongst non-volunteers (who wished to volunteer) than amongst existing volunteers is supported by psychological research on risk analysis as detailed above.[111]

Evidence also demonstrates that tort exerts a deterrent effect on English VSOs and that this has led to organisational behavioural change. Cabinet Office commissioned research has shown that almost 6 out of 10 VSOs have made adjustments to their services or activities as a result of concerns about volunteer liability. The most common adjustments were improved volunteer training, improved administration, adopting safety measures and standards, stopping activities, and restricting programmes. 7% of VSOs have cancelled activities; 15% of volunteers reported that they were unable to carry out a particular activity due to liability risks; 6% of VSOs raised charges to cover insurance costs.[112] A small number of VSOs have closed down due to risk issues.[113]

One empirical study noted that '[VSOs] are fearful of missing some new rule or prohibition which they will find out too late exposes them to accusations of negligence, either operationally or legally'.[114] Case studies have demonstrated the cancellation of activities due to litigation fears (even where the event has been accident free for decades), or after being the subject of litigation.[115] VSOs have also responded to the threat of tort litigation, by making inappropriate use of DBS checks, without belief in their effectiveness, to protect themselves against litigation.[116]

Evidence from other common law jurisdictions, also demonstrates that tort exerts a deterrent effect on the voluntary sector. The limited polls prior to the VPA indicate that tort, or the perception of tort, was impacting on volunteering in the US. As reported in the House of Representatives, from data taken from a 1988 Gallup Report: '1 in 6 volunteers reported withholding their services for fear of being sued. About 1 in 10 nonprofit groups report the

[111] See Natalie Low and others, *Helping Out: a National Survey of Volunteering and Charitable Giving* (Cabinet Office 2007) 8, 52-68.
[112] Katharine Gaskin, *Reasonable Care? Risk, Risk Management and Volunteering in England* (Volunteering England 2005) ii, 24-26.
[113] ibid 25.
[114] Gaskin, *On the Safe Side* (n110) 24, [7.3]
[115] ibid 24, [7.5]; Gaskin, *Reasonable Care?* (n112).
[116] Gaskin, *On the Safe Side* (n110) 16, [5.3].

resignation of a volunteer over the threat of liability'[117] and '16% of the board members report they have withheld their services to an organization out of fear of liability.'[118] Further, 14% of non-profit organisations had withdrawn programmes which they feared would expose them to risk.[119]

Schwartz's study revealed that the removal of, or reduction in, charitable immunity from torts in the US, combined with increasing insurance rates, led to behavioural changes in the voluntary and non-profit sector. It led some organisations to introduce risk management programmes, or to introduce greater screening and supervision of volunteers who deal with children, or to improve the screening and training of drivers.[120] Surveys within the US have also demonstrated that potential liability reduces charitable activity, and that liability risks can influence what services a non-profit organisation provides and how they are delivered.[121] There is also evidence that charitable hospitals have increased their charges in response to the removal of charitable immunity.[122] Research conducted by the Australian Bureau of Statistics in 1995, prior to the introduction of volunteer protection regimes, demonstrated that legal responsibility and insurance coverage were sources of volunteer dissatisfaction.[123] There is also some evidence from Ireland that liability and insurance issues have caused some volunteer services to close.[124]

The available evidence appears to demonstrate that tort (and/or the perception of tort) exerts a deterrent effect on VSOs and volunteers. However, does a reduction in the potential exposure of volunteers to tort liability impact on volunteering levels?

A detailed study by Horwitz and Mead has demonstrated that there is a large and positive correlation between volunteer protection legislation and volunteering rates. Prior to the VPA,

[117] House of Representatives, Committee on the Judiciary, Washington, DC, Volunteer Liability Legislation, 23 April 1997, 10 (Senator Paul Coverdell).
[118] ibid 22 (Rep John Porter).
[119] Volunteer Protection Act (1997-1998) 22 BLeader 10.
[120] Schwartz, 'Reality in the Economic Analysis of Tort Law' (n91) 413.
[121] Charles Tremper, 'Compensation for Harm from Charitable Activity' (1990-1991) 76 CornellLRev 401, 417-418.
[122] Bradley Canon and Dean Jaros, 'The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity' (1978-1979) 13 Law&Soc'yRev 969; cf Gregory Caldeira, 'Changing the Common Law: Effects of the Decline of Charitable Immunity' (1981-1982) 16 Law&Soc'yRev 669.
[123] For 10.5% of volunteers legal responsibility was a source of dissatisfaction, and for 5.9% of volunteers, insurance cover was a source of dissatisfaction. Reported in Steve McCurley and Rick Lynch, *Keeping Volunteers* (Directory of Social Change 2007) 5.
[124] Houses of the Oireachtas, Seanad Éireann, Vol. 209 No 2, 30 June 2011, Civil Law (Miscellaneous Provisions) Bill 2011: Second Stage, P10 of 31.

many US jurisdictions adopted different volunteer protection regimes at different times. This means that volunteering rates in states with different levels of volunteer protection, or none, can be compared over time. These were analysed by Horwitz and Mead to assess the effect of a reduced exposure to tort (and thus in law and economics terms a reduced cost of volunteering) on volunteering rates. The propensity to volunteer in states with immunity was 9% higher than in states without immunity; likewise the propensity to volunteer was reduced in states with increased levels of civil litigation. The study showed that it is not just the presence or absence of volunteer defences that make a difference; it also demonstrated that the greater the level of protection provided to volunteers the greater the volunteering activity.[125]

Nonetheless, such a real world study shows correlation, not causation. Indeed it is difficult to establish causality from real world data.[126] This was precisely the problem encountered by scientists in linking smoking to lung cancer. In the volunteering situation there may be other possible explanations. States with higher volunteering levels, and where volunteering is more of a cultural norm, may be more likely to want to protect volunteers. However, by examining changes over time Horwitz and Mead's study eliminates this explanation. Their study also controlled for differences in propensity to volunteer between residents of different states.[127] One factor their study could not control for is the possibility that the volunteering increase may be caused by the publicity for volunteering generated by the legislation. Nevertheless, the fact that the study shows that the greater the level of the protection legislatively provided, the greater the volunteering activity, would suggest that this is not the explanation.

The weight of empirical evidence, although inevitably patchy, appears to support the analysis and predictions of positive law and economics (as adjusted for behavioural economics). Tort exerts a deterrent effect on volunteers and potential volunteers (particularly in choosing whether or not to volunteer). Tort also exerts a deterrent effect on VSOs, which may alter their practices in response. Further, volunteer protection legislation, and thus a reduction in the exposure of volunteers to tort liability, is linked to increased volunteering. The evidence available does not support precise calculations of the type used by law and economics scholars, but it does support the general trends.

[125] Horwitz and Mead (n33) 614-5, 627.
[126] Engel (n83) 132.
[127] Horwitz and Mead (n33) 620.

Conclusion

The analysis of the impact of volunteer defences and organisational protection in the existing literature is highly limited. This chapter sets out to analyse their potential impact in England and Wales using positive economic analysis, behavioural economics, and by examining the empirical evidence. The methodology can never ultimately prove that legislative change will result in particular outcomes, but it can predict outcomes.

Where positive economic analysis, as adjusted for known heuristics, produces a prediction which is supported by the available empirical evidence, it should be given serious heed. It shows that tort deters volunteers, and that volunteer protection legislation is likely to increase volunteering. It also suggests that organisational liability is likely to lead to organisations taking increased steps to reduce accidents, and will introduce accountability for the acts of judgment-proof volunteers. Retaining volunteer liability for gross negligence ensures that tort retains some deterrent effect in relation to individual volunteers. However, in the context of small, grassroots, informal unincorporated associations with little assets, volunteer protection is likely to lead to increased torts, decreased volunteering, and pressures to formalise this end of the sector – eroding some of its democratic features.

On the other hand, organisational protection (whether charitable immunity or judgment-proofing) is likely to reduce the deterrent effect of tort on the organisation. This may lead to greater VSO activity, but also to reduced levels of care at the organisational level. Such protection means that individual volunteers are more likely to face claims, increasing tort deterrence at the individual volunteer level. This may result in volunteers taking greater care, and/or reducing or withdrawing their services, leading to lower volunteering levels.

Given the scale of volunteering in the UK, even if the introduction of a volunteer defence only influences a small percentage of individuals making volunteering decisions, the impact will still be significant. If the propensity to volunteer in the UK increased by 9%, the value of the additional regular volunteering to GDP would be £2.07 billion.[128]

[128] Based on ONS figures that regular volunteering (once a month, or more) is worth £23billion per year to the UK (see Chapter 2).

This chapter does not answer the normative question of whether such legislation should be introduced. However, it makes it clear that it is a discussion worth having. Even if this methodology is rejected, it may still be the right thing to introduce volunteer protection legislation, whether or not such a law increases volunteering and/or impacts on accident rates. This thesis now turns to the case for volunteer protection, and the case against VSO protection, in Chapter 8.

Chapter 8

The Case for Volunteer Protection

Introduction

This chapter argues that volunteer protection legislation should be introduced into English law to protect volunteers from claims in negligence arising in non-motor vehicle contexts. It also rejects organisational protection. In doing so it is the first work to make the academic case for volunteer protection from negligence and to consider the theories behind it. The volunteer protection scheme proposed is based on providing partial protection to the volunteer using an objective level of protection, and involves a liability transfer to the VSO. The volunteer's personal defence is waived where the volunteer is insured, (although the VSO's statutory liability remains in such cases). This means that the defence only protects volunteers from negligence claims (when they are not grossly negligent) where they are uninsured.

Such a regime promotes enterprise liability, loss-spreading, and the deterrent and regulatory functions of tort. It ensures that tort's deterrence is focused at an organisational level. Organisations are generally more able to manage and eliminate systemic risk when compared to individual volunteers. Volunteer protection is likely to increase volunteering, whilst minimising accidents, and providing for victims. By only providing partial protection to volunteers we are still harnessing the deterrent power of tort to ensure that volunteers do not become reckless, whilst reducing tort's deterrent effect and encouraging volunteering.

Organisational protection and volunteer protection are distinct. Since the form of volunteer protection which this chapter recommends involves transferring the volunteer's liability to the organisation, it is necessary to firstly reject organisational protection, before making the case for volunteer protection. Since many of the arguments do not apply to the informal, grassroots end of unincorporated VSOs, and the scheme will not promote positive outcomes in such contexts, volunteers for such VSOs are excluded from the scheme.

Part 1: Rejecting Organisational Protection

Organisational protection has primarily manifested itself through charitable immunity from tort, which only protects the charitable segment of the sector (Chapter 5). Organisational protection departs from ordinary liability principles that an organisation is liable for its own torts and vicariously liable for its 'agents' torts. Bingham states that the rule of law requires that all actors should be treated in the same way, unless there is good reason for differential treatment.[1] Protecting organisations from liability, particularly through full immunity, therefore needs a strong justification. Organisational protection represents a clash of policies: on the one hand to fully compensate the negligently injured, and regulate the behaviour of actors, and on the other to promote and assist the voluntary sector.

The traditional case for organisational protection is based on utilitarianism, and the argument that suing VSOs demonstrates ingratitude. It is also possible to advance a case for organisational protection based on the differential impact of tort, and the different role of loss-spreading within the voluntary sector. Each of these arguments, as set out below, is flawed, and/or insufficient to justify organisational protection.

Given the long history of organisational protection, particularly charitable immunity, there are a number of traditional policy arguments against the doctrine. For instance that it represents a coerced donation of the claimant's cause of action in order to subsidise the sector, and also an argument based on the law's failure to protect other altruists. These traditional arguments against the doctrine, as we will see below, are flawed. Instead this chapter's rejection of organisational protection flows from the need for sector accountability (particularly in the era of the contract culture where VSOs deliver former state functions under contract), the change in the nature of the voluntary sector since the 19th Century, the regulatory and deterrent function of tort, that organisational protection concentrates losses on the victim or volunteer, and the availability of loss-spreading and insurance to VSOs.

[1] Tom Bingham, *The Rule of Law* (Penguin 2011) 56.

Utilitarianism

The traditional justification for organisational protection is utilitarian.[2] Some modern authors also invoke this rationale.[3] It argues that compensating the injured deprives the public of important benefits, and transfers wealth from public to private use.[4] Tort is seen as endangering the continued operation of the voluntary sector and its delivery of public services.

There are three problems with this justification. Firstly, it has problems in explaining why this protection should be limited to VSOs and should not apply more broadly to all situations in which public wealth is exposed to litigation (including where state entities are sued). Utilitarianism would also point to protection in such circumstances. Secondly, the resort to utilitarianism in this context itself is unlikely to prove attractive to the legislature. Finally, tort's endangerment of the sector's continuation is not proven, and in the presence of insurance it is not necessarily the case that tort is leading to a diversion of VSO funds to private use and endangering the continuation of the sector.

Utilitarianism cannot explain the existing shape of tort, particularly the removal of Crown immunity. A utilitarian public policy for organisational protection has to be clear why the sector should be treated differently from other public services, such as the NHS, which are not protected from tort. For-profit corporations may also provide significant services to society, which might otherwise have to be provided by the state, for example public transport. They too are not currently protected, even though their benefit to society may be greater than many VSOs.

The justification for organisational protection of not diverting charitable money away from charitable purposes (and of course the sector does not entirely consist of charities) is similar to the now rejected policy of public money and Crown immunity. Similar arguments for organisational protection have also been unsuccessfully made in relation to protecting public authorities from liability.[5] Is it arguably incoherent to reject this approach in state immunity,

[2] *Andrews v YMCA of Des Moines* 226 Iowa 374, 284 NW 186 (1939) (Iowa Supreme Court), [191].
[3] Richard Epstein, *Mortal Peril: Our Inalienable Right to Health Care?* (Addison-Wesley 1997) 371.
[4] *Vermillion v Women's College of Due West* 104 SC 197, 88 SE 649 (1916) (Supreme Court of South Carolina).
[5] eg Law Commission, *Administrative Redress: Public Bodies and the Citizen* (CP No.187) 76, 134-8.

and accept it for the voluntary sector, where utilitarianism is used as the justification, particularly where the sector may be in part financed with money which would otherwise be paid in taxes,[6] and may also receive state funding to deliver services, or subsidies.

It might be argued that the voluntary sector is distinguishable from the public sector since it has no right to levy taxation (unlike public authorities), and must make good its losses by obtaining more donations, reducing services, or charging more for them (where they are not gratuitous). However, this argument fails to realise that few public bodies have tax raising powers, even if the state does, and there are limits on this power.

The utilitarian arguments made in favour of organisational protection have been unsophisticated, with no attempt made to ground them in utilitarian scholarship, or to discuss the form of utilitarianism used. Utilitarian policy arguments are often given short shrift. It is difficult to ascertain if the price paid by the victim is offset by the benefits gained by society. Is a lifetime of uncompensated injury offset by the continued operation of a bird sanctuary, or its ability to charge lower entry fees? This requires the balancing of incommensurable values. Assessing increases in social welfare is problematic where there is no universally agreed measure with which to do so.

The utilitarian tradition can also be attacked, for instance on distributive justice grounds, as for instance by McLachlin J in *Bazley v Curry*:[7] '[t]he suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism… it is far from clear… that this is a fair way for society to order its resources.' Others attack the utilitarian principle on moral or rights-based grounds, using examples of torture, eugenics, and killing of newborns, which utilitarianism could potentially justify.[8] Further, since organisational protection values charitable assets above human life, in some circumstances it may be argued to be in conflict with what it means to be charitable.[9] However, not all charity concerns the dispensing of benefits to those in need. It has also been argued that in the hierarchy of norms righting one's wrongs is more important than maintaining one's

[6] John Elrod, 'Tort Liability of Charitable Organizations' (1951-1952) 6 ArkLRev 209, 217.
[7] [1999] 2 SCR 534 (SCC), [54].
[8] John Rawls, *A Theory of Justice* (rev edn, Harv UP 1999) 24-30; Craig Purshouse, 'Utilitarianism as Tort Theory: Countering the Caricature' (2018) 38 LS 24, 24.
[9] eg *Geiger v Simpson Methodist-Episcopal Church of Minneapolis* 174 Minn 389, 219 NW 463, 62 ALR 716 (1928) (Supreme Court of Minnesota) (Olsen C).

generosity, and that the second should not prevent the first.[10] Thus utilitarian arguments for organisational protection are unlikely to be widely accepted.

A related utilitarian argument for organisational protection is that donations would be discouraged if VSOs could be sued.[11] However, there is little empirical evidence justifying this argument. It is possible that many donors will not consider, or be aware of the risks of their monies paying for damages instead of the organisation's core purposes. Some donors too may not be concerned with the eventual disposition of the funds.[12]

Whilst many partisan comments have been made within judgments as to the effects of removing charitable immunity,[13] there is little in the way of empirical studies on the impact of charitable immunity on charitable funds, services, or giving.[14] In many cases it will be insurance not organisational funds that pay the damages. The presence of insurance significantly reduces the risk of dissipation of funds, and whilst some funds will need to be diverted to pay for premiums, it is likely that some donors will see insurance as a legitimate overhead, rather than a factor discouraging their giving.

Ingratitude

Ingratitude is a traditional argument for organisational protection. This argument is that a beneficiary who holds a VSO responsible for its tort displays ingratitude.[15] This rationale can only justify protection against 'beneficiaries' – those who receive the VSO's services. It cannot justify immunities that apply to third party claimants. Where a claimant is a stranger it is random whether they are injured by a VSO, or another entity. This model also faces many problems similar to the beneficiary waiver theory detailed in Chapter 5. For instance one might not know one is a 'beneficiary', or that one is dealing with a VSO. In many cases a VSO may charge the same price for its services as a for-profit. Further, an organisation may see you as a 'beneficiary', when you do not accept this characterisation, for instance

[10] *Foster v Roman Catholic Diocese of Vermont* 116 Vt 124, 70 A2d 230, 25 ALR2d 1 (1950) (Supreme Court of Vermont).
[11] W Page Keeton and others, *Prosser and Keeton on the Law of Torts* (5th edn, West Publishing 1984) 1070; Kevin Davis, 'Vicarious Liability, Judgment Proofing, and Non-Profits' (2000) 50 UTorontoLJ 407, 413.
[12] Eric Posner, 'Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises' (1997) WisLRev 567.
[13] eg *Abernathy v Sisters of St Mary's* 446 SW2d 599 (1969) (Supreme Court of Missouri).
[14] Charles Tremper, 'Compensation for Harm from Charitable Activity' (1990-1991) 76 CornellLRev 401, 405.
[15] Note, 'The Quality of Mercy: "Charitable Torts" and their Continuing Immunity' (1986-1987) 100 HarvLRev 1382, 1387.

where a VSO conducts proselytizing activities and tries to win you to its cause. You may have no choice as to accepting the 'benefits' that a VSO provides, as for instance where it engages in redevelopment in the urban space where you live.

If ingratitude justified organisational protection it would also justify protection for volunteers or individual Good Samaritans. Further, it cannot be said that you are displaying ingratitude to an organisation if you simply hold its agents to a reasonable standard of care, or to a standard which they assumed towards you, or which they claimed to comply with. The ingratitude argument must therefore be dismissed.

Nevertheless, if ingratitude is not the basis of organisational protection, it is not incoherent by itself to protect VSOs from liability whilst not protecting other organisations and individuals carrying out altruistic work. This is since there may be objective legal differences which might justify a differential application of the law. For instance much of the sector consists of charitable organisations, a distinct legal category which the law grants a number of extraordinary legal privileges and duties. However, it may be unfair that with organisational protection those injured, for instance by a falling window pane, are treated differently if the building is owned by a local authority, or by a VSO.

Tort's Differential Impact

Since the voluntary sector has different incentives to the for-profit sector it is arguable that tort may function differently within these two sectors. VSOs may be more deterred than for-profits by potential tort liabilities, and may be less likely to be replaced where driven out of business by liability. Nevertheless, these differences are not sufficient to justify organisational protection.

A law and economics theory of tort asserts that tort encourages optimum regulation.[16] Since it is reasonable to assume that tort's regulatory pressure may vary between sectors, if it functions optimally for profit making enterprises, it may not necessarily do so for VSOs.

[16] William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harv UP 1987).

Tort may impact more significantly on VSOs than on for-profits. This is since a VSO's controllers may not be incentivised in the same way as a commercial organisation's controllers. The latter benefit financially from the organisation's activities and its running of risks, whereas VSO controllers rarely do so.[17] Thus they 'do not have a strong economic incentive to fine tune their operations to produce the greatest possible benefit for society without causing legally cognizable injury. Rather than jeopardize its mission, [they]… may constrain its operations to remain far from the danger zone of liability.'[18] In less altruistic terms, 'success at an activity with a high tort exposure will earn little, if any, economic reward for the controllers…, failure may mean extinction of the organization and loss of whatever benefits the controllers derive from [it].'[19]

The organisation itself may also have few economic incentives to run risks, as it does not necessarily financially benefit from them, particularly where services are offered for free, or at reduced costs.[20] If VSOs are required 'to internalize accident costs while seeking to externalize benefits, [they] may have to avoid activities that have even minimal accident costs';[21] even where an activity's social benefits are greater than its social harm.[22]

Within law and economics, tort law is seen as playing a role in driving out poor operators. Where a VSO causes much more harm than good, its closure may be socially desirable.[23] However, it may be that VSOs are more vulnerable to being driven out of business than for-profits, even where they benefit society. This is because this regulatory model assumes that an organisation captures the value of its services, providing it with a reserve to pay for tort costs,[24] whereas VSOs often externalise these benefits through transferring this value to others, often gratuitously. They may therefore have fewer resources to pay for accident costs than commercial organisations.[25] However, this argument downplays the role of insurance, which can act as a VSO's tort reserve.

[17] Davis (n11) 412.
[18] Tremper (n14) 427.
[19] ibid 426-7.
[20] ibid 417.
[21] 'Developments in the Law Nonprofit Corporations' (1991-1992) 105 HarvLRev 1578, 1692.
[22] ibid.
[23] Dan Dobbs, *The Law of Torts* (West Group 2000) 762.
[24] Tremper (n14) 432.
[25] 'Developments in the Law' (n21) 1692.

Driving VSOs out of business may be problematic. The VSO 'market' is different. Where a for-profit entity becomes insolvent, it is likely to be replaced where there is demand for its services, and they are profitable to deliver. With VSOs no replacement may be forthcoming, particularly if the activity is unprofitable. Using tort as a mechanism to drive offending VSOs out of business may be satisfactory where the same function will be performed by another group, but is problematic when dealing with some VSOs, such as religious organisations, which will not be replaced by organisations acceptable to the previous group's congregation or believers. Forcing such organisations out of business through insolvency, has occurred, or has come close to occurring.[26] Whilst such outcomes may be just in relation to a VSO's leadership, it causes significant injury to others. Whilst the purpose of English negligence law does not appear to be to punish wrongdoers, to the extent that tort damages punish the wrongdoer, with VSOs they can punish beneficiaries.

In summary the different incentives argument is that since VSOs do not financially benefit from running risks they are overly deterred by tort; further if VSOs are driven out of business the replacements necessary to deliver services may not emerge. Therefore, they should not have to shoulder the risk which a for-profit would run. Nevertheless, these differences are not sufficient to justify organisational protection, and the argument downplays the role of insurance which is available as a tort reserve. In addition the argument is a disguised form of utilitarianism, since the assumption is that the VSO should be promoted for reasons of societal benefit, at the cost of tort victims. This faces the same objections as set out above. However, it is also possible to detect distributive justice concerns.

Coerced Donation

The classic objection to organisational protection is that it represents a coerced donation of the victim's claim to the VSO.[27] Whilst this chapter rejects organisational protection, the coerced donation argument is flawed, and this chapter's rejection is instead based on other grounds.

[26] Thomas Paprocki, 'As the Pendulum Swings from Charitable immunity to Bankruptcy, Bringing it to Rest with Charitable Viability' (2009) 48 JCathLegStud 4, 13-18; Nafees Meah and Philip Petchey, 'Liability of Churches and Religious Organizations for Sexual Abuse by Ministers of Religion' (2005) 34 CommLWorldRev 39, 39; MH Ogilvie, 'Vicarious Liability and Charitable Immunity in Canadian Sexual Torts Law' (2004) 4 OxfordUCommwLJ 167, 168.

[27] Dobbs (n23) 762; John Feather, 'The immunity of charitable institutions from tort liability' (1959) 11 BaylorLRev 86.

Coercion is inimical to the idea of donation.[28] Not all VSOs benefit all individuals equally; this donation may be to a VSO which the victim disapproves of, or which they can never directly benefit from. However, such organisations arguably still benefit those who are not their immediate beneficiaries in ensuring diversity in public life, providing community, and alleviating pressures on the state to provide services.[29]

If organisational protection is a state seizure of a victim's cause of action for the public good, unlike state seizure of property no compensation is provided.[30] This conflicts with the public law principle that individuals should not bear the cost of an activity done in the public interest.[31] The impact may be great given that the cause of action may cover the costs of lifetime care. This may represent a considerable burden to the victim, and leave them to fall back on social security.

The coerced donation argument is unsound since recovery for injuries in negligence is in fact a compromise between competing concerns.[32] Tort law weighs up competing concerns to decide which victims receive compensation, and to what extent. For instance judicial immunity[33] does not represent a coerced donation in order to support the justice system. Instead it represents the resolution of the clash between compensating those injured by another's negligence, and the fair and efficient functioning of the justice system. The coerced donation of the victim's rights approach is problematic as it presupposes that the victim has given something up which is already theirs, without compensation.

Loss-Spreading

Whilst loss-spreading may function differently in the voluntary sector when compared to for-profits, the potential for loss-spreading within the voluntary sector points away from organisational protection.

[28] *Albritton v Neighborhood Centers Association for Child Development* 12 OhioSt3d 210, 466 NE2d 867, 12 OBR 295 (1992) (Supreme Court of Ohio) 870-1 (Justice William Brown).
[29] Catherine Pierce Wells, 'Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of their Clergy' (2002-2003) 44 BCLRev 1201, 1209.
[30] Note, 'Quality of Mercy' (n15) 1389.
[31] Tom Cornford, 'Administrative Redress: the Law Commission's Consultation Paper' [2009] PL 70, 82.
[32] Tremper (n14) 433.
[33] See Christopher Walton and others (eds), *Charlesworth and Percy on Negligence* (14th edn, Sweet and Maxwell 2018) [2-312], [3-13]-[3-18]; Mark Davies, *The Law of Professional Immunities* (OUP 2014).

Loss-spreading allows an injury's cost to be spread amongst a broad group, over time,[34] minimising the impact on any one individual. It is more complex than typically suggested by torts scholars, with reinsurance, investment, and risk management playing a part.

Loss-spreading does not explain a number of features of tort,[35] and if it is tort's goal more efficient systems might be used.[36] Nevertheless, whilst loss-spreading is not used in isolation as a justification for tort, it has been combined with other policy objectives. For instance the compensation system for road traffic accidents uses tort, but every effort is made to ensure that the liabilities are paid for by insurers, even with uninsured drivers.[37] Further, loss-spreading is taken into account at the establishing a duty of care stage,[38] and is used by courts in justifying vicarious liability.[39]

Whilst it has been argued that loss-spreading may not apply to non-profits, (at least in the absence of insurance),[40] and/or that VSOs may have limited loss-spreading capacity,[41] Chapter 5 demonstrated that non-profits can loss-spread, but that the methods may differ to commercial organisations in some cases. Only VSOs that do not have donors, income, expenditure, or assets, with no prospect of funding insurance premiums, cannot loss-spread.

Organisational protection recognises the societal value of VSOs. However, the costs are not paid for by society, but rather by victims and/or volunteers. It concentrates loss, and to the extent that tort is influenced by loss-spreading is unattractive. Organisational protection, particularly full immunity, reduces incentives to purchase insurance, (an efficient mechanism of loss-spreading). By concentrating loss it is also more likely to make the victim and their family a burden to other VSOs, or wider society.[42]

[34] Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, CUP 2018) 397.
[35] Robert Stevens, *Torts and Rights* (OUP 2007) 323.
[36] Cane and Goudkamp (n34) 398-9; Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 237.
[37] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 261-278.
[38] *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607.
[39] eg *Jacobi v Griffiths* [1999] 2 SCR 570 (SCC), [69] (Binnie J).
[40] Jason Neyers, 'A Theory of Vicarious Liability' (2005) 43(2) AlbertaLRev 287, 297.
[41] *Jacobi* (n39) [69], [77] (Binnie J); *Bazley* (n7) [53] (McLoughlin CJ).
[42] *Foster* (n10) 236 (Justice Adams); Donald Orlowski, 'Charitable Immunity – The Road to Destruction' (1958-1959) 32 TempLQ 86, 94.

The fact that some VSOs may loss-spread in a different way to for-profits, (although those that charge for their services will do so in similar ways),[43] need not result in rewriting tort law to accommodate VSOs by protecting them from negligence claims, unless it can be established that insurance, the primary method of loss-spreading, is not available to the sector. Although a requirement to pay for insurance may result in fewer services, if society was primarily concerned to reduce VSO overheads, reducing fuel duty, or introducing rent control would produce a greater impact.[44] Such steps would also not change the relationship between tort victim and VSO. Organisational protection is not just a subsidy; rather it is an attempt to partially remove VSOs from review by the society they serve.

Insurance

That insurance is available to VSOs points away from introducing special liability protection for VSOs which would concentrate losses on volunteers or victims. When overturning charitable immunity in tort in some jurisdictions, courts have stressed that insurance alleviates liability burdens.[45] The Restatement of Torts, Second, commentary states: 'all of the supposed reasons for [charitable immunity] fail when the charity can insure against liability.'[46]

It appears to be the orthodox view that insurance should not change tort law,[47] although, this is disputed.[48] Nevertheless, key vicarious liability decisions deploy insurance loss-spreading reasoning; duties of care have been stretched to encompass insured parties;[49] and insurers have sought new parties to share liabilities.[50] Much of tort law operates within the

[43] There is evidence of increased costs at charitable hospitals after the removal of immunity: Bradley Canon and Dean Jaros, 'The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity' (1978-1979) 13 Law&Soc'yRev 969; cf Gregory Caldeira, 'Changing the Common Law: Effects of the Decline of Charitable Immunity' (1981-1982) 16 Law&Soc'yRev 669.
[44] Tremper (n14) 402.
[45] *President and Directors of Georgetown College v Hughes* 130 F2d 810, 76 USAppDC 123 (1942) (US CA DC); *Lutheran Hospitals and Homes Society of America v Yepsen* 469 P2d 409 (1979) (Supreme Court of Wyoming); *Pierce v Yakima Valley Memorial Hospital Ass'n* 43 Wash2d 162, 260 P2d 765 (1953) (Supreme Court of Washington, en Banc); *Mississippi Baptist Hospital v Holmes* 214 Miss 906, 55 So2d 142, 25 ALR2d 12 (1951) (Supreme Court of Mississippi, in Banc).
[46] Comment to §895E.
[47] Jane Stapleton, 'Tort, Insurance and Ideology' (1995) MLR 820.
[48] Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 MLR 301; Merkin and Steele (n37); Kenneth Abraham, *The Liability Century* (Harv UP 2008).
[49] *Moore Stephens v Stone and Rolls* [2009] UKHL 39, [2009] 1 AC 1391.
[50] *Home Office v Dorset Yacht* [1970] AC 1004 (HL); *Stovin v Wise* [1996] AC 923.

boundaries of what insurance will fund.[51] Without insurance tort would not, and could not look the same.[52]

The mere existence of insurance should not make a party liable where they would otherwise not be. With VSOs liability is not imposed because of insurance, instead, insurance means that the arguments against otherwise present liabilities, are substantially weakened. It is difficult to argue where liability insurance is readily available that VSOs should be relieved of the almost universal burden of purchasing it,[53] by providing them with organisational protection.

However, insurance availability and costs for VSOs are not necessarily the same as for for-profits. If there are differences between the sectors, this may be an argument for a differential treatment in tort.

All sectors may face substantial premium variations over time, due to hard and soft insurance markets, and investment market variations.[54] There is evidence that hard insurance markets have particularly impacted on charities.[55] Over the last two decades UK charities experienced a sharp increase in premiums.[56] In the early 2000s, increases were marked, surveys showing increases between 30-100%[57] or 100-150%, as common.[58] A number of VSOs folded as they were unable to obtain affordable insurance, others limited their activities or chose to operate without cover.[59] The increases were associated with market conditions, rather than being related to a VSO's claims or accident history. They may also have been influenced by a lack of communication and understanding between the insurance industry and

[51] Tom Baker, 'Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action' (2005) 12 ConnInsLJ 1.
[52] Richard Lewis, 'Insurance and the Tort System' (2005) 25 LS 85.
[53] James Zirkle, 'Charitable Immunity- A Reappraisal' (1971-1972) 39 TennLRev 289, 300.
[54] Tom Baker, 'Medical Malpractice and the Insurance Underwriting Cycle' (2005) 54 DePaulLRev 393.
[55] Brenda Kimery, 'Tort Liability of Nonprofit Corporations and their Volunteers, Directors, and Officers: Focus on Oklahoma' (1997-1998) 33 TulsaLJ 683, 686; 'Developments in the Law' (n21) 1681; Note, 'Quality of Mercy' (n15) 1395-1396; Tremper (n14) 416; Daniel Barfield, 'Better to Give than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?' (1994-1995) 29 ValULRev 1193, 1218-1220.
[56] 'Opinion: Hot Issue – Has the rise in insurance costs been excessive?' *Third Sector* (7 December 2005) <www.thirdsector.co.uk/news/612883/> accessed 9 July 2018; (Volunteering England survey revealed 75% of respondents reported a sharp increase in insurance premiums).
[57] Julie Pybus, 'Cover me: Insurance costs are rocketing, and charities are feeling the pinch' *The Guardian* (9 July 2003) <http://www.guardian.co.uk/society/2003/jul/09/charityfinance5> accessed 9 July 2018.
[58] Mathew Little, 'Finance News: Insurance Premiums Sky-High' *Third Sector* (4 June 2003) <http://www.thirdsector.co.uk/finance-news-insurance-premiums-sky-high/article/616731> accessed 9 July 2018 (referring to an ACEVO Survey).
[59] ibid.

the voluntary sector,[60] and a '[l]ack of an accessible and competitive insurance market place' for VSOs.[61]

There is evidence that underwriters perceive VSO activities as more risky.[62] VSOs typically do not have investor capital thereby producing some insurer concerns that they lack 'sufficient incentive to exercise due care and [they] are therefore reluctant to provide coverage'.[63] Volunteers also change risk profiles. Traditionally the insurance market for VSOs was not considered attractive, but due to increased professionalism within the voluntary sector, the market has evolved with insurers and brokers competing for business.[64] Nevertheless, this increased professionalism may not apply to new and emerging local VSOs, although presently, these too have access to affordable insurance.

The NCVO and other umbrella bodies have worked with insurers to help develop suitable and affordable policies for VSOs, and to educate insurers on the sector and its risks. A number of insurers and brokers now specialise in the sector,[65] and price comparison websites are available for VSO insurance.[66] The NCVO currently recommends Zurich as its trusted insurance supplier. Zurich offers a fixed price package for £89 a year to VSOs with an annual income under £100,000, which includes £5 million of public liability cover, including cover for volunteers. Bespoke packages are available for larger VSOs, and for VSOs providing advice or professional services.[67] Other providers offer similar coverage for small VSOs at prices ranging from £72 (£5 million coverage) to £88 a year (£1 million coverage), and composite insurance packages including public liability, employer's liability, professional indemnity, property insurance, and trustee indemnity, with starting prices of

[60] Katharine Gaskin, *Getting a Grip, Risk, Risk Management and Volunteering a Review of the Literature* (Volunteering England 2005) ii.
[61] Alison Millward, Rawlings Heffernan, Lucas Fettes, *Research into Insurance Cover for the VCS in England, Final Report* (Home Office Active Community Unit 2003) 4.
[62] P Heap, Head of Charities Practice at Marsh, quoted in 'Voluntary Activity' *Insurance Age* (1 June 2003); Michael Singsen, 'Charity is no Defense: The Impact of the Insurance Crisis on Nonprofit Organizations and an Examination of Alternative Insurance Mechanisms' (1987-1988) 22 USFLRev 599, 608.
[63] Tremper (n14) 416.
[64] I Wainwright, 'Charity Business: Charity Begins at ….Work' *Insurance Age* (29 January 2010); Lord Hodgson, *Unshackling Good Neighbours* (London 2011) 11.
[65] Katharine Gaskin, *Risk Toolkit How to take care of Risk in Volunteering* (Volunteering England) 31 [7.1].
[66] Simply Business 'Charity Insurance' <https://www.simplybusiness.co.uk/insurance/charity/> accessed 21 August 2020.
[67] 'Trusted Suppliers' (*NCVO*) <https://www.ncvo.org.uk/practical-support/trusted-suppliers/supplier-list/2171-zurich-insurance>; Zurich 'Charity Insurance' <https://www.zurich.co.uk/en/charity-insurance/public-liability-fixed-price-quote?WT.mc_id=affiliate_ncvo&utm_source=ncvo&utm_medium=affiliate> both accessed 21 August 2020.

£198 a year.[68] All of these policies cover liability for volunteers. Insurance is also available to VSOs through membership organisations, for instance Attend's membership scheme for UK charities with volunteers who work to improve community health. Membership includes insurance coverage for public liability (£10 million), employer's liability (£10 million), trustee indemnity, and crisis media management costs amongst others. Annual membership costs for VSOs range from £483 (VSOs with 0-9 volunteers), to £845 (VSOs with >125 volunteers).[69] In addition some local authorities also provide cover to VSOs when they work in partnership with them.[70]

There are indications that the insurance market and its impact on the voluntary sector may differ from the commercial sector. Nevertheless, organisational protection is wholly disproportionate to the aim of protecting the sector from the potential cost of higher premiums. To the extent that there is a problem for organisations finding affordable insurance, alternatives such as group purchasing of insurance, mutual self-insurance, better risk management,[71] co-operation between VSO umbrella bodies and the insurance industry, and regulatory reform of insurance markets[72] seem more proportionate and targeted to the problem, rather than leaving injured victims without a remedy.

Who Takes the Loss?

Organisational protection is objectionable in that it is at the cost of victims and of volunteers. This objection is also related to the loss-spreading and insurance arguments above. If VSOs cannot be sued for their wrongs or the wrongs of their 'agents', then victims will go uncompensated, or victim claims which might otherwise have been made against VSOs may be instead made against individual volunteers.

[68] Markel Direct 'Charity Insurance' <https://www.markeluk.com/charity-insurance>; Get Indemnity, 'Charity Insurance' <https://getindemnity.co.uk/insurance-broker/charity> both accessed 21 August 2020.
[69] Attend, 'Membership' <https://www.attend.org.uk/sites/default/files/About%20Attend%20Membership%202020.pdf> accessed 21 August 2020.
[70] Gaskin, *Risk Toolkit* (n65) 3, [1.2].
[71] Barfield (n55) 1221.
[72] Singsen (n62) 609.

Given the role of the voluntary sector in providing for the vulnerable, in many cases organisational protection will result in those least able to bear the financial consequences of injury bearing the burden.[73]

Within the sector there are hidden tensions between volunteers and VSOs. Organisations wish to protect their assets from litigation; volunteers do not want to expose their own assets to liabilities. Currently volunteers may place their own assets at risk when they volunteer for new or poorly financed VSOs; organisational protection means that this will be the case where they volunteer for any VSO. Organisational protection would also protect VSOs against their own volunteers' claims where they are injured through the organisation's negligence.

A similar tension exists in employment. It is resolved through employee salaries, vicarious liability, and insurance. If VSOs are protected from liability, since volunteers will not share the VSO's protection,[74] it makes working for VSOs (as volunteers or employees) more risky than working for for-profits. Where there is insufficient insurance and organisational protection, either the victim or the volunteer takes the loss, not the VSO.

Tort's Regulatory Function

Organisational protection undermines tort's role in helping to uphold standards and its role in keeping VSOs accountable for wrongdoing.

As well as exposing wrongdoing, tort also regulates behaviour.[75] Requiring organisations to pay for their accident costs provides financial incentives to limit them. Insurers, as discussed in Chapter 7, work hard to eliminate moral hazards to ensure that such incentives remain where insurance is present. The regulatory role of insurance on organisations is also well

[73] Ronald Lipson, 'Charitable Immunity: The Plague of Modern Tort Concept' (1958) 7 ClevMarshallLRev 482, 492.
[74] Restatement of Torts, Second, §880; James Goudkamp, 'A Taxonomy of Tort Law Defences' in Simon Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters 2011) ch 19, 497: public policy defences should not be shared.
[75] Cento Veljanovski, 'The economic theory of tort liability – toward a corrective justice approach' in Paul Burrows and Cento Veljanovski (eds), *The Economic Approach to Law* (Butterworths 1981) ch 5, 127.

established.[76] The requirement to pay also means that organisations generating excessive costs are forced to close.[77] Whilst this deterrent effect is disputed, the weight of evidence appears to show that tort influences both organisational and individual behaviour, and exerts a deterrent effect on volunteers, potential volunteers, and VSOs, (see Chapter 7). Immunity can undercut tort's deterrent role. This may lead to greater VSO activity, but also to reduced care at the organisational level, and the under-deterrence of risks,[78] since organisations would externalise their accident costs.

Epstein argues that charities have no need for tort regulation since 'internal norms and reputational sanctions should do a far better job of setting the priorities'.[79] This is not accepted by a number of courts which have dealt with charitable immunity, which have asserted that immunity fosters neglect; whereas liability tends to foster careful management, caution, and safe methods of operation.[80] Liability also ensures that proper care is taken in staff selection, and in assigning tasks to individuals within their competence.[81] It also prevents deliberate exploitation of immunity.

It has been argued there is a particular need for tort as a watchdog for the sector, since VSOs are not subject to the same oversight as the commercial sector. This is based on the position that: 'the investors who control a for-profit enterprise are also the primary recipients of the economic benefits generated by its activities ('beneficiaries'). However, beneficiaries play a limited or non-existent role in the governance of many, though not all, non-profits.'[82] However, this may overstress shareholder accountability, and ignore bodies such as the Charity Commission. It also fails to note that donors can exert regulatory pressure, where the body is financed, at least partly, through donations. Although the value of this pressure is

[76] See Richard Ericson, Aaron Doyle and Dean Barry, *Insurance as Governance* (University of Toronto Press 2003); Tom Baker and Rick Swedloff, 'Regulation by Liability Insurance: From Auto to Lawyers' Professional Liability' (2013) 60 UCLALRev 1412.
[77] 'Developments in the Law' (n21) 1690.
[78] See Chapter 7.
[79] Epstein (n3) 371-2.
[80] *Georgetown* (n45); *Foster* (n10); *Welch v Frisbie Memorial Hospital* 90 NH 337, 9 A2d 761 (1939) (Supreme Court of New Hampshire). *Flagiello v The Pennsylvania Hospital* 417 Pa 486, 208 A2d 193 (1965) (Supreme Court of Pennsylvania).
[81] Robert Hansen, 'Damage Liability of Charitable Corporations' (1934-1935) 19 MarqLRev 92, 105.
[82] Note, 'Quality of Mercy' (n15) 1388.

questioned by Garton,[83] sources of funding can dry up if the organisation is perceived to be acting badly.[84]

Contrary to Epstein, there is a public interest in externally ensuring that VSOs conduct their activities safely: '[a] negligently administered [VSO] may aim at inducting us into the Kingdom of Heaven, but it is socially essential to make it adequately careful of the methods employed.' [85] Not all VSOs have sufficient internal norms, or donor or customer pressure. Where a VSO is protected from liability, there will still be some tort generated incentives operating upon it, for instance some volunteers will be influenced by the VSO's public reputation, and their personal exposure to torts through volunteering. Nevertheless, by eliminating, or restricting the tort exposure of VSOs one of the primary methods of accident regulation is removed, or restricted.

Liability also gives warning to VSOs other than the defendant to take proper care;[86] further, it may provide publicity to donors to help generate meaningful reputational sanctions. If tort's regulatory role were to be removed, the sector may require increased state regulation. This would potentially endanger the sector's independence, its ability to bring communities together, and to speak truth to power. Tort has a role to play in upholding standards, and helping to keep VSOs accountable for wrongdoing.

Nevertheless, deterrence alone cannot explain tort. It is insufficiently victim-centric and does not explain why compensation is paid to claimants not the state, and the limited role of punitive damages in English tort law. A system based on deterrence may be more likely to invoke criminal sanctions. Thus, whilst we can consider tort deterrence and regulation as an argument against organisational protection, it is merely one factor in the tort matrix.

[83] Jonathan Garton, *The Regulation of Organised Civil Society* (Hart 2009) 199.
[84] eg Jessica Elgot and Karen McVeigh, 'Oxfam loses 7,000 donors since sexual exploitation scandal' *The Guardian* (20 February 2018) <https://www.theguardian.com/world/2018/feb/20/oxfam-boss-mark-goldring-apologises-over-abuse-of-haiti-quake-victims> accessed 11 July 2018; Timothy Lytton, *Holding Bishops Accountable* (Harv UP 2008).
[85] Note, 'Liability of Charitable Corporations for Tort' (1917-1918) 31 HarvLRev 479, 482.
[86] *Bing v Thunig and St John's Episcopal Hospital* 2 NY2d 656, 143 NE2d 3, 163 NYS2d 3 (1957) (Court of Appeals of New York).

Change in the Nature of the Voluntary Sector

Many of the arguments for organisational protection misunderstand the nature of the voluntary sector. There have been significant changes within the sector since the era of widespread charitable immunity. The growth in the sector's sophistication, (see Chapter 2), points towards a need for it to be accountable in tort.

There have always been large charities, which charge for their services, such as schools and universities. However, the paradigm operating in judicial and legislative minds in the era of widespread adoption of charitable immunity was the hospital serving the poor, at no cost, (middle classes were treated in their own homes),[87] which could be wiped out by a single malpractice claim,[88] denying others of its services. Protecting VSOs originated in an era when they were invariably local bodies, with few funds, serving the indigent in the absence of a welfare state, and prior to widespread liability insurance.[89]

The sector now comprises a diverse range of entities; from highly sophisticated multinational operations with large endowments, easily able to absorb claims or insurance premiums, to smaller grassroots concerns less able to do so. Some VSOs charge substantial sums for their services, having shifted from a model of funding via donations to charging on a commercial basis. Those using their services may not be aware of their charitable status, or their use of volunteers. A blanket policy of sector protection, to protect VSOs from being closed by a single claim seems odd were it to protect all VSOs including large multinational operations, run on corporate lines. As Henley CJ in *Abernathy v Sisters of St Mary*[90] stated '[c]harity today is a large-scale operation with salaries, costs and other expenses similar to business generally. It makes sense to say that this kind of charity should pay its own way, not only as to office expenses but as to the expense of insurance to pay for torts as well.'

[87] Henry Hansmann, 'The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good policy?' (1988-1989) 39 CaseWLRev 807, 813.
[88] *Sessions v Thomas Dee Memorial Hospital Ass'n* 94 Utah 460, 78 P2d 645 (1938) (Supreme Court of Utah); *Holmes* (n45); *Parker v Port Huron Hospital* 361 Mich 1, 105 NW2d 1 (1960) (Supreme Court of Michigan); *Bing* (n86).
[89] *Hamburger v Cornell University* 204 AppDiv 664, 199 NYSupp 369 (1923) (Supreme Court of New York); *Adkins v St Francis Hospital of Charleston* 149 WVa 705, 143 SE2d 154 (1965) (Supreme Court of Appeals of West Virginia); *Flagiello* (n80); Lester Feezer, 'The Tort Liability of Charities' (1928-1929) 77 UPaLRev 191, 195; Edith Fisch, 'Charitable Liability for Tort' (1965) 10 VillLRev 71, 89-90.
[90] *Abernathy* (n13).

This argument against organisational protection is strongest in relation to larger concerns. What of emerging, smaller concerns? Their loss-spreading capacity may be more limited. Nevertheless the development of insurance has radically shifted the balance of the calculus, a VSO is not being asked to absorb the costs of claims, but merely the costs of premiums. Smaller entities can absorb such costs, without necessarily endangering their existence. The loss-spreading capacity of the entire voluntary sector has undoubtedly increased. Whilst concerns have been expressed in relation to organisations unable to afford insurance, and a consequent need to protect them from tort liability;[91] the concerns are misplaced. Such organisations are likely to be judgment-proof, and obviously not worth suing in the absence of insurance.

Further, to subsidise the sector through protection from tort, whilst simultaneously exposing the sector to claims in contract,[92] is odd, since contract claims may equally deplete VSO funds. This prioritises commercial creditors, over tort victims, and may represent a reverse wealth transfer, from injured tort victims, (who are subsidising the organisation's funds), to the organisation's commercial suppliers.

Accountability and the Contract Culture

The contract culture has led to the outsourcing of public functions to VSOs.[93] The Neo-Liberal approach to public service provision sees the voluntary sector as a more responsive and efficient provider of public services, which is closer to the community, and service recipients, than the state.[94] This development points away from organisational protection, since it would lead to a substantial reduction in accountability and victim protection, when compared to the era when the state itself delivered these services. When previously delivered by the state these services were subject to both public law and tort regulation. Organisational protection would shield former state functions from tort, whose immunity from tort was deliberately eliminated by restricting Crown immunity.

[91] *Albritton* (n28) (Locher and Holmes JJ dissenting).
[92] Note *Foster* (n10).
[93] Rob MacMillan, 'The third sector delivering public services: an evidence review' (2010) Third Sector Research Centre Working Paper 20; Debra Morris and Jean Warburton, 'Charities and the contract culture' [1991] Conv 419.
[94] Terry Potter, Graham Brotherton and Christina Hyland, *The Voluntary Sector in Transition: Changing Priorities, Changing Ideologies* (Newman University College 2012) 17.

Protecting VSOs from tort would provide them with an unfair advantage in tendering for these formerly state delivered services, which are also delivered by for-profits, or cross sector consortia. This is since they would be subsidised by reduced litigation exposure, and reduced insurance needs, at the cost of both tort victims and volunteers. Whilst in some cases state funding might not pay for the true costs of the contracted services, and VSOs may need to subsidise them from other funds, that the sector receives state money to deliver these functions further enhances the case for liability, since there is increased access to funds to pay for insurance premiums, and this cost should be factored into bids. That the sector receives state money enhances its revenue, and loss-spreading capacity.

Dicey's equality principle[95] is that like cases should be treated alike, and that private and public bodies should be subjected to the same rules[96] – there are no special immunities. All classes are subject to the ordinary law of the land.[97] To protect a sector which plays an important role in delivering state services, and which is a key player in civil society, is to grant it a special privilege. However, '[t]ort law, like sunlight, acts as a disinfectant by exposing hidden threats to the public welfare.'[98] Given tort helps to provide societal accountability, to remove the sector from this review fits poorly within our liberal democratic model, where the state, and those acting on behalf of it must act subject to law. VSOs unlike government (local or national) are not democratically accountable, nor ordinarily subject to judicial review.[99] There is thus a greater need to retain tort as a potential review mechanism, particularly when they engage in functions which were previously carried out by the state, or are funded by the state. This provides potential recourse for ordinary citizens adversely impacted upon by their work. Whilst of course not all VSOs are involved in the contract culture, its development is another factor that points away from organisational protection.

Whilst protecting the sector has been cast in terms of public rights, outweighing victim rights; public rights are the collective sum of the rights of the individuals who make up the public.

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[95] Albert Venn Dicey, *Introduction to the Study of the Law of The Constitution* (10th edn, Macmillan 1959) 193.
[96] Law Commission (n5) 31, 140.
[97] Dicey (n95) 193; Tom Cornford, *Towards a Public Law of Tort* (Ashgate 2008) 9, *contra* 11. The Law Commission, in unsuccessfully advancing that public authorities should only be liable for serious fault in negligence for 'truly public' activities, acknowledged that ordinary rules of negligence should apply for activities also undertaken by the private sector: Law Commission (n5) 140; Law Commission, *Administrative Redress: Public Bodies and the Citizen* (LC No.322, 2010) 25, [3.14].
[98] Thomas Koenig and Michael Rustad, *In Defense of Tort Law* (NYU Press 2001) 3.
[99] Ann Lyon, 'Judicial Review of Voluntary Bodies' in Alison Dunn (ed), *The Voluntary Sector, the State and the Law* (Hart 2000) ch 3, 31: (judicial review may be possible where governmental functions - the source of the VSO's authority - is not purely consensual, and there is no alternative remedy).

Thus removing the ability of victims to receive compensation and hold tortfeasors to account also diminishes the public's collective rights.[100]

Rejecting Organisational Protection

Eliminating or reducing liability for policy reasons is not an anathema to tort, for instance with combat immunity, limitation, and illegality. However, the need to regulate the voluntary sector and provide accountability, combined with the fact that organisational protection is directly at the expense of volunteers and victims, the change in the nature of the sector, and the availability of loss-spreading and insurance to VSOs, makes organisational protection undesirable. Its potential to decrease volunteering levels (see Chapter 7) is also of concern. In particular blanket immunity is wholly disproportionate to the aim of protecting voluntary sector services, and reducing insurance premiums. Immunity prevents a court from considering the competing interests of VSOs, and victims.

Rejecting Liability Caps

So far in this chapter we have rejected organisational protection. In Chapter 5 we noted the existence of liability caps. Unlike organisational protection, caps are remedy restricting rules which do not prevent tort liability from arising, but rather they place a ceiling on damages. We thus now need to briefly consider and reject VSO liability caps, before we turn to the case for volunteer protection.

Statutory damages caps involve capping damages. The law accepts that the victim should receive a certain amount, and then reduces it where a particular threshold, or the insurance level is exceeded. It is an attempted compromise between liability, and sector viability.[101] They are found in a limited number of US jurisdictions.[102] However, the case for VSO liability caps in England is weaker than in the US. Unlike the US where damages are a jury matter, in England general and special damages in negligence are carefully calculated and predictable. Caps are not needed to counter erratically high sums awarded by sympathetic jurors.

[100] Note *Adkins* (n89).
[101] Paprocki (n26) 15-17.
[102] See Chapter 5.

A uniform damages ceiling is arbitrary, bearing no relation to the harm inflicted. It generates two classes of victims, who are not equally protected by tort. Those with injuries valued below the cap, and those with injuries valued above it. The impact of a $20,000 cap, (as in Massachusetts), on an accident victim with a broken finger is minimal, its impact on a victim rendered paraplegic is severe. Caps have a disproportionate impact on the most injured and vulnerable victims - the cost of subsidising the sector is concentrated on those harmed the most. Likewise those who cause the worst injuries are protected the most.

The policy behind a particular cap level is difficult to discern. The level of liability risk a VSO undertakes should vary with its activities and its nature. A small soup kitchen is not in the same league as Oxfam. One size does not fit all. Caps fail to distinguish between levels of risk generated. For instance a volunteer first aid society is more likely to cause serious harm than a reading group. A cap may therefore under-protect the first aid society's patients when compared to the reading group's members.[103] Further, introducing a cap which is based on the VSO's insurance coverage allows it to choose its own liability level.

Most arguments against organisational protection also apply to damages caps,[104] albeit with slightly reduced force. Further, if tort is committed to making losses whole, capping damages is problematic.[105]

If the cap retains a meaningful level of compensation to victims, it will provide limited VSO protection, and insurance costs will still be incurred. There is evidence to suggest that caps have limited impact on insurance costs.[106] Thus a high damages cap, disproportionately hits the most vulnerable, but with arguably little sector benefit. Likewise a low damages cap functions similarly to immunity, and for the reasons above is also unattractive. Further, low caps mean that complex cases may not justify their legal expenses. Damages caps are an inappropriate solution for voluntary sector torts.

[103] See, Note, 'Quality of Mercy' (n15) 1393.
[104] Andrew Popper, 'Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability' (2011) 60 DePaulLRev 975, 979.
[105] Benjamin Zipursky, 'Coming down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform' (2006) 55 DePaulLRev 469, 474.
[106] Edward Kionka, 'Things to Do (or Not) to Address the Medical Malpractice Insurance Problem' (2006) 26 NIllULRev 469, 493.

Part 2: The Case for Volunteer Protection

This chapter argues for partial protection for volunteers and a liability transfer to their VSO. The political case made by legislatures for volunteer protection legislation is that liability impacts on volunteering levels, increases insurance costs, that volunteers should not be sued,[107] and that protection signals state approval of volunteering. However, so far the academic case for volunteer protection has not been made in the literature. This chapter seeks to remedy this and advances the case for volunteer protection on the grounds that it promotes enterprise liability and loss-spreading, that deterrence is best focused on VSOs and systemic risk rather than on volunteers, and that volunteer protection encourages volunteering whilst also providing for victims.

There is only one academic piece which examines the merits of volunteer protection in any detail. Flannigan's piece is highly critical of volunteer protection.[108] This part of the chapter engages with Flannigan's objections to volunteer protection and dismisses each of them. It also seeks to pre-empt other possible objections, such as the equality principle, that other altruists such as rescuers are not protected, that volunteer protection may victimise the vulnerable, has the potential to decrease volunteer opportunities, and may clash with corrective justice tort theories. Dealing with each objection in turn, this section demonstrates that they do not undermine the case for volunteer protection.

Signalling Approval of Volunteering

Before turning to the academic case for volunteer protection we need to dismiss one of the arguments made for protection, that it demonstrates state support for volunteering. It may do, but this cannot be by itself volunteer protection's justification. This is since there are other ways to signal state approval more efficiently, for instance through direct subsidies,[109] awards, public education, or funding volunteer recruitment campaigns. The justifications for volunteer protection are more complex, and are to be found elsewhere.

[107] Jill Horwitz and Joseph Mead, 'Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence' (2009) 6(3) JEmpiricalLegalStud 585, 589.
[108] Robert Flannigan, 'Tort Immunity for Nonprofit Volunteers' (2005) 84 CanBRev 1.
[109] Note Gerrit De Geest, 'Who Should Be Immune from Tort Liability?' (2012) 41 JLegalStud 291, 311. Note the discussion of motivational crowding out in Chapter 7.

Enterprise Liability

Where volunteers give their services to organisations, volunteer protection which protects the volunteer, and transfers the risk to the organisation promotes enterprise liability.

The basic tenet of enterprise liability is that where an enterprise introduces characteristic risks into society it should pay for them if they materialise.[110] Whilst this concept has significantly influenced tort,[111] it is not argued that it is the sole foundation of tort, rather that it can be invoked in helping to determine whether volunteers should be protected, and if so, how.

Some take a narrow, profit based approach to enterprise liability. Stevens criticises its use in vicarious liability on the basis that it cannot account for such liability on the part of non-profits.[112] As we saw in Chapter 5 the argument that enterprise liability does not apply in the non-profit sector was formerly used by US courts to justify charitable immunity. It was argued that a charity cannot be vicariously liable since it does not derive profit from its agents.[113] The agent's service was instead said to be for the benefit of humanity.[114] The rational basis for business enterprises to internalise liability costs was said not to apply to non-profits, who focus on giving rather than receiving, meaning that vicarious liability should be limited to 'activities where there is economic gain'.[115]

However, enterprise liability is not limited to profit making activities and organisations. Brodie responds to attempts to so limit enterprise liability that 'charities still run risks for the benefit of the organisation', and that this only stands 'if profit is viewed in a purely financial sense'.[116] Stevens is correct in so far as he criticises the formulation of financial profit based enterprise liability, suggested in *Dubai Aluminium Co Ltd v Salaam*[117] which uses the concept of 'business enterprise', but his error is to solely focus on a concept of financial profit based

[110] *Bazley* (n7) [31] (McLachlin J); PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 22-28. Both a fairness and economic rationale: Gregory Keating, 'The Idea of Fairness in the Law of Enterprise Liability' (1997) 95 MichLRev 1266.
[111] Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010) 1-10; Gregory Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 VandLRev 1285.
[112] Stevens (n35) 259; note also Neyers (n40).
[113] Joseph Simeone, 'The Doctrine of Charitable Immunity' (1958-1959) 5 StLouisULJ 357, 362.
[114] Maurice Tulchinsky, 'Tort Liability of Charitable Institutions' (1937-1938) 13 NotreDameL 109.
[115] H Beau Baez III, 'Volunteers, Victims and Vicarious Liability: Why Tort Law Should Recognise Altruism' (2009-2010) 48 ULouisvilleLRev 222, 224.
[116] Brodie (n111) 11.
[117] [2002] UKHL 48, [2003] 2 AC 366 [21] (Lord Nicholls).

enterprise liability taken from Stapleton's product liability work.[118] This is not the approach used in other leading authorities: *Bazley*,[119] the seminal case that invoked enterprise liability to expand vicarious liability concerned a non-profit organisation, as do many leading English cases.[120] There is a long-standing link between profit and risk; but risks may properly be placed within originating organisations even in the absence of profit, as demonstrated by public authority liability. The profit based version of enterprise liability cannot explain the positions taken by courts throughout the common law world relying on enterprise liability concepts.[121]

In *Cox v Ministry of Justice*[122] Lord Reed, referring to 'business' activity in an enterprise liability context, stressed that it need not be commercial or profit-making. Thus the concept could justify the Ministry of Justice's vicarious liability for prisoners working in a prison kitchen. Likewise in *Armes v Nottinghamshire County Council*,[123] Lord Reed, invoked enterprise liability[124] to justify holding the local authority vicariously liable for foster parents, again stressing that the word 'business' did not mean that enterprise liability was confined to commercial activities.

Organisations benefit from their volunteers' work. The more volunteers, the more work a VSO can do. Unlike a VSO's employees, its volunteers work for free, the VSO can thus do more on its budget than if it had to pay its entire workforce. Whilst volunteers may benefit from their service, for instance through self-fulfilment, they do not benefit financially, so the case for protecting them by liability transfer to the organisation is stronger than for employees. Even if liability is shifted to VSOs, which enhances organisational costs, using volunteers will still be worthwhile. The liability of employees is already shifted to the organisation via vicarious liability, and there are additional significant costs in using employees instead of volunteers.

[118] Jane Stapleton, *Product Liability* (Butterworths 1994) 193.
[119] *Bazley* (n7).
[120] eg *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1; *JGE v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722.
[121] *Bazley* (n7); Restatement (n74) Comment to §895E.
[122] [2016] UKSC 10, [2016] AC 660.
[123] [2017] UKSC 60, [2017] 3 WLR 1000.
[124] At [67].

Volunteer protection using liability transfer further enhances enterprise liability since the organisation cannot cushion itself with its volunteers' assets. The organisation, not the individuals who give of their time freely, will pay the true costs of the enterprise through its own assets or insurance, meaning that tort's regulatory role will bite on the enterprise to a greater extent.[125] This enterprise liability argument for volunteer protection also overlaps with deterrence and loss-spreading arguments. Firstly, the organisation is better able to anticipate, avoid, and mitigate risks,[126] and can best ensure that volunteers are selected, trained, monitored, supported, and equipped properly. Secondly, the volunteer, unlike the organisation cannot disperse the risk across the enterprise, which is a core of the enterprise liability fairness rationale. This combined with a volunteer defence means that the organisation is more likely to be the target of claims, promoting the internalisation of the risks and costs that it imposes on society. Volunteer protection furthers enterprise liability.

Enterprise liability also helps to explain the scheme's limits. Informal community activities within small, informal, unincorporated community groups may not collectively constitute an enterprise for the purposes of enterprise liability. Such VSOs are also unlikely to have sufficient identity to be meaningfully regulated. To apply volunteer protection here would be to presuppose a web of relationships which does not necessarily exist.

Loss-Spreading

As noted above whilst loss-spreading is not the overriding rationale of tort, it is a policy consideration that can be taken into account in designing tort legislation,[127] amongst others. With volunteer protection loss-spreading is intimately connected with enterprise liability; the costs of the activity's characteristic risks are spread to those who benefit from imposing them.[128]

As discussed in Chapter 5 only VSOs that do not have donors, income, expenditure, or assets, with no prospect of funding insurance premiums, cannot loss-spread. These VSOs are most likely to be small unincorporated associations. Most volunteer protection schemes do not apply in the case of unincorporated associations; which matches well with loss-spreading

[125] Note Giliker (n36) 192, 238-240.
[126] Law Reform Commission, *Civil Liability of Good Samaritans and Volunteers* (LRC 93-2009) [3.87]-[3.97].
[127] Merkin and Steele (n37); Abraham (n48).
[128] Keating, 'The Theory of Enterprise Liability' (n111) 1334.

capacity in that most such VSOs are small informal community groups, but this nevertheless fails to take account of large, well-resourced, unincorporated associations. It must be remembered that many volunteers will work for large, or funded VSOs, or VSOs which charge for their services.

Protecting volunteers and transferring their liability to their organisations promotes loss-spreading to a greater extent than the current system of volunteer liability, with no liability transfer apart from where there is vicarious liability. Instead of the victim, or volunteer, sustaining substantial losses they fall on an entity better able to loss-spread. However, this is unlikely to be the case where the VSO is informal and insufficiently crystallised. This in turn points towards limits to the scheme. Insurance premiums may be reduced though voluntary sector co-operation and bulk purchasing.[129] Insurers will be able to work with the sector to reduce risk, co-opting both sectors' expertise.

Volunteers too can purchase insurance. Some volunteers will already be insured, via household insurance, membership of professional bodies, or through coverage resulting from membership of sports governing bodies such as British Gymnastics, or Swim England, (both also cover clubs), although many will not be. Some governing bodies, such as British Cycling, which provide insurance to member clubs, also offer volunteers the option of purchasing individual coverage for public liability. The coverage of a volunteer's household policy is unlikely to include all potential negligence claims, particularly pure economic losses,[130] or where they are sports coaches or referees, or office holders.[131] It is less efficient for volunteers rather than VSOs to purchase insurance – they do not have the same negotiating power as the sector, may simply purchase the cheapest policies available, and it is likely to lead to double insurance as VSOs will still wish to purchase insurance to cover potential vicarious liability claims, or direct duty claims.[132] Further, in grassroots groups volunteers sometimes club together to pay for the VSO's insurance (which covers volunteer torts), since this is more cost effective than for each to purchase individual policies. Many umbrella bodies also provide coverage to member VSOs, or require member VSOs to purchase insurance. Where volunteers are sued their VSOs are likely to be co-defendants. Double insurance will be likely to lead to satellite litigation concerning contribution between

[129] Law Reform Commission (n126) [4.08].
[130] Abraham (n48) 187-8.
[131] Myles McGregor-Lowndes and Linh Nguyen, 'Volunteers and the new tort reform' (2005) 13 TLJ 41, 43.
[132] Giliker (n36) 236.

insurers. Further, placing insurance requirements on volunteers, rather than organisations increases the barrier to volunteering, undermining its democratic function.[133]

Volunteer protection passes on risks, or need for insurance to VSOs enhancing enterprise notions of loss-spreading. The premium costs are imposed on the organisation benefitting from the volunteer's work. Organisations also have greater loss-spreading capacity than individuals. Loss-spreading also points to a conclusion that protection should only apply to volunteers who work for an organisation. As noted earlier the scheme this thesis proposes requires the volunteer to work for an incorporated body or a limited class of unincorporated VSO. That many unincorporated associations are informal, and are not enterprises with forward planning capacity, and loss-spreading potential, explains the limits of the scheme.

Provides for Victims

Linked to both enterprise liability and loss-spreading arguments for volunteer protection is the fact that volunteer protection generates greater provision for victims than the existing system of liability. Volunteer protection is premised on liability transfer, with the organisation standing in the volunteer's shoes. The victim still has a cause of action. What they lose by their inability to sue uninsured volunteers for ordinary negligence, (as identified in Chapter 6 best practice is that the volunteer's defence is waived where there is insurance), they gain in being able to sue organisations, even if ordinarily the relationship between the volunteer and the VSO would be insufficient for vicarious liability to apply.

Organisational claims are generally more valuable than claims against individual volunteers. Many volunteers will not have sufficient assets or insurance to meet a non-driving claim. Even where volunteers have sufficient assets it may be more difficult to sue them when compared to organisations, perhaps due to moral qualms, the likelihood of defendant resistance to the claim, or enhanced costs, particularly to enforce judgment.[134] For instance, even where the defendant has sizable equity in their house, obtaining possession of the

[133] Those who have assets may still be unable to afford additional insurance; for those in work, attachment of earnings may also be used.
[134] See Robert Heidt, 'The Unappreciated Importance, For Small Business Defendants, Of The Duty To Settle' (2010) 62 MeLRev 75, 92; Tom Baker, 'Blood Money, New Money, and the Moral Economy of Tort Law in Action' (2001) 35 Law&Soc'yRev 275.

defendant's house may prove difficult.[135] Likewise, attachments to a volunteer's earnings may mean that the claimant waits a very long time, if not indefinitely, to receive their full damages. Whilst claims against volunteers may be rare, particularly where uninsured, the law does not prevent such claims, and the fear of such liability may over-deter volunteers.[136]

The VSO is best able to insure, a more efficient loss-spreader, and more likely to be insured for the type of damage sustained. Volunteer protection as well as protecting volunteers, can better provide for victims. What victims lose with the reduction in their ability to sue uninsured volunteers, they gain with an organisational claim. Potential victims too also gain in that organisational deterrence (see below) would suggest that torts may be reduced.

Volunteer protection generally does not apply, and best practice is that it should not apply (Chapter 6), to small unincorporated associations. Thus it is unlikely to shift losses to judgment-proof organisations. Organisational judgment-proofing may disrupt the scheme, and mechanisms to prevent this are discussed in Chapter 9. However, here the victim may have lost little since they have lost a claim against an uninsured and likely judgment-proof volunteer, and gained a claim against a judgment-proof organisation.

Deterrence and Regulation

Chapter 7 demonstrates that tort deters both volunteers and VSOs. It may encourage better practice, and accident reduction behaviour. This is not a normative argument that tort is based on deterrence, indeed there are other more efficient ways of achieving this,[137] but this work recognises that it is a feature of tort, and that it should be accounted for in developing the law. Deterrence also supports the case for volunteer protection and the liability transfer to the VSO, since such a system of volunteer protection focuses tort's deterrence on the body best able to reduce accidents, whilst simultaneously encouraging volunteering. This argument reinforces and partly overlaps with the enterprise liability and loss-spreading cases for volunteer protection.

[135] Cane and Goudkamp (n34) 212.
[136] Stephen Gilles, 'The Judgment-Proof Society' (2006) 63 Wash&LeeLRev 603, 682.
[137] Stevens (n35) 321-323.

Tort may be over-deterring volunteers.[138] Few volunteers have the power to place the systems, risk management, and training in place within the organisation which would reduce their personal exposure to claims. Instead, where they fear potential liabilities they may withdraw their services. Since volunteers are not financially dependent on their services it is easy for them to withdraw them. Further, given the current English authorities on vicarious liability, unlike employees, not all volunteers will trigger vicarious liability where the tort is connected to their role. Such volunteers do not benefit from the protection that vicarious liability can provide to individual tortfeasors. There may consequently be over-deterrence for volunteers and under-deterrence for VSOs.

Whilst utilitarian arguments for volunteer protection may be made on the grounds that volunteering is beneficial to society, and supplements state services,[139] the deterrence argument is not a utilitarian argument which aims to increase volunteering at the cost of victims. Instead the deterrence argument for volunteer protection is a subtle attempt to increase volunteering, whilst decreasing torts, and also providing for tort victims.

If we desire to increase volunteer numbers, minimise accidents, and provide a safe environment for service recipients, deterrence is best focused on the VSO[140] and systemic risk, rather than on volunteers. Forcing organisations to pay for their torts encourages them to control their 'accident costs'.[141] A VSO is more likely to be able to understand and predict risks than individual volunteers, and given its collective experience and structure do something to reduce them. The greater abilities to predict risks mean that VSOs may purchase relevant insurance, or anticipate how to absorb accident costs.[142] Further, VSOs are able to implement risk reduction strategies that individual volunteers are not able to. These systemic changes are more likely to reduce accidents than inducing fears of momentary slip-ups in individual volunteers. The role of risk management within volunteer protection also suggests that protection should not apply within informal grassroots VSOs since it may encourage the adoption of vertical structures, and greater screening of potential volunteers,

[138] Gilles (n136) 682; cf Flannigan (n108) 11-12 (volunteer should be replaced; VSOs should prevent withdrawals).
[139] Law Reform Commission (n126) [3.86].
[140] Paul Weiler, *Medical Malpractice on Trial* (Harv UP 1991) 224.
[141] 'Developments in the Law' (n21) 1690.
[142] Law Reform Commission (n126) [3.87].

which can undermine the democratic features of grassroots VSOs, and be problematic for short term volunteering, and diversity and inclusion.[143]

Chapter 7 shows that on the best evidence available volunteer protection reduces tort's deterrent effect on volunteering, increasing volunteering, whilst enhancing organisational deterrence. Both the liability transfer and the volunteer defence enhance organisational deterrence, since both aspects make it more likely that the VSO is sued, rather than the volunteer; likewise at the volunteer level, both elements decrease deterrence.

A reduction in volunteer deterrence need not result in volunteers becoming careless. VSOs may attempt to counteract this possibility by developing greater loyalty to the organisation, or through control mechanisms, for instance the introduction of job descriptions,[144] volunteer managers, rewards, and sanctions (such as retraining or dismissal). The volunteer protection scheme proposed also utilises deterrent pressure to ensure that volunteers exercise care, and that they are also encouraged to follow the VSO's processes which are designed to minimise accidents. This is achieved by only partially shielding volunteers from liability by retaining liability where volunteers are grossly negligent, or where they knowingly do not comply with the VSO's processes.

Deterrence points towards volunteer protection operating in an organisational context, and not for informal volunteers, since with the latter the reduction in deterrence operating on the volunteer would not be compensated by increased organisational deterrence. Likewise deterrence points away from protection applying within informal grassroots VSOs which lack the organisational consciousness sufficient for the organisation to be deterred and which lack the organisational features necessary to reduce risks. Simply protecting a volunteer without deterrence operating on an organisation may lead to poorer practices, and a greater number of accidents. From a deterrence perspective, a model of volunteer protection with liability transferred to the organisation is preferable to the present system in English law of personal volunteer liability, and limited transfer of that liability to the VSO via vicarious liability. With the current law volunteers are over-deterred and VSOs under-deterred. Presently there may also be an incentive for VSOs to expect volunteers to run greater risks than employees.

[143] Gaskin, *Getting a Grip* (n60) ii-iii.
[144] Kimery (n55) 703.

Part 3: Countering Objections to Volunteer Protection

Objections have or may be made against volunteer protection on the grounds that it infringes the equality principle, and relatedly that volunteers should not be protected since rescuers are not protected; that volunteer incompetence is the reason for volunteer protection, and (implicitly) that it will encourage volunteers to undertake roles beyond their competence; that volunteering should not be encouraged; that volunteer protection victimises the vulnerable; that volunteer protection may decrease volunteering opportunities since it increases the cost for VSOs to use volunteers; and finally that volunteer protection runs contrary to corrective justice or rights-based theories of tort. In this section we will dismiss each of these objections in turn.

Equality Principle and Rescuers

Whilst volunteer protection may appear to infringe Dicey's equality principle, that all people, whatever their 'rank or condition, [are] subject to the ordinary law',[145] it does not. The principle is not absolute, actors should be treated the same, unless there is good reason not to do so.[146] Relevant distinctions may require differential treatment.[147] For instance state actors may have greater liability, particularly given their greater power and responsibilities,[148] and children have lesser levels of liability. Further, Dicey's focus is on holding governmental actors accountable to the ordinary law.[149] Volunteers are independent of the state, unless they directly volunteer for a state body.

Motive and commercial status is sometimes relevant. Commercial parties and consumers are treated differently in relation to unfair terms and consumer rights.[150] In tort, the Consumer Protection Act 1987[151] provides a defence for suppliers of goods who did not supply them in the course of a business, and for producers of goods if they did not supply them with a view to profit.[152] This would for instance include a baker of cakes for a charity fete stall.[153]

[145] Dicey (n95) 193.
[146] Bingham (n1) 56.
[147] Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1980) 136-7.
[148] Peter Cane, 'Damages in Public Law' (1999) 9 OtagoLR 489, 490.
[149] ibid; Dicey (n95) 194.
[150] Consumer Rights Act 2015.
[151] 'CPA'.
[152] CPA, s 4.

This thesis argues that protecting volunteers is a justifiable departure from the equality principle for the reasons set out above. Nevertheless, given the liability transfer, volunteers through their organisations are still held to account at the same standard as other actors. Protection is provided to volunteers, but, unlike the CPA this protection is not at the cost of victims.

Relatedly the equality principle is implicitly invoked when comparing volunteers to rescuers,[154] who do not benefit from volunteer protection. The argument appears to be that if rescuers are not protected, volunteers should not receive protection. However, volunteers and rescuers are not analogous, and the case for volunteer protection is very different to the case for protecting rescuers.

Rescuers[155] unlike volunteers, (see Chapter 3), are already treated favourably in negligence. Many rescuers are in two party situations: rescuer and victim. Outside the context of rescue organisations there is no enterprise which benefits from their activities, or which can better manage risk, insure, or prevent accidents. The case for volunteer protection is very different. It does not occur in a two party situation where protecting the volunteer is at the victim's cost, rather with volunteer protection the choice of imposing the cost burden is between three parties: volunteer, victim, and the organisation that receives the volunteer's services. The organisational presence makes a significant difference. At the organisational level the volunteer's actions are still held to account at the ordinary standard. Volunteer protection would also protect a rescue organisation's volunteers.

Separately Brown doubts that volunteers need protection since he considers that liability does not discourage rescuers.[156] Some would disagree with his empirically unfounded assumption, and this is the genesis of Good Samaritan legislation.[157] Nevertheless in many cases rescues

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[153] Michael Jones, Anthony Dugdale and Mark Simpson (eds), *Clerk & Lindsell on Torts* (22nd edn, Sweet and Maxwell 2017) [11-69].
[154] Jamie Brown, 'Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune from Tort Liability' (1997) 7 SetonHallJSportL 559, 567.
[155] Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts* (10th edn, Sydney: Law Book Co/Thomson Reuters 2011) 136.
[156] Brown (n154) 567.
[157] See Chapter 6.

might be split-second decisions, whereas volunteering is perhaps a more considered decision, on which there is good evidence to suggest a liability impact (see Chapter 7).

Protection Encourages Incompetence?

Flannigan argues that volunteer incompetence is the reason for protection.[158] Implicit within his objection is that volunteer protection encourages incompetence. This as we will see is incorrect.

Whilst some volunteers will not reach the standards of paid professionals, incompetence is not inherent in volunteering. Volunteers may be experts volunteering their skills. A VSO's own employees may also volunteer for the VSO. Organisations can also account for different standards, by assigning suitable work. Where a volunteer occupies the same post as an employee, carries out the same activity, and is indistinguishable to them, the same standard is expected.

Flannigan fails to notice the liability transfer inherent in volunteer protection. With employment one's employer will be liable for one's negligence. With volunteer protection the liability transfer mimics this, whilst at the same time rewarding the volunteer with a small level of protection. The volunteer's acts are still held to account at the same standard: in a claim against the VSO the same level of care is expected of the volunteer. VSOs thus bear the risk of volunteers not reaching the same standards as paid professionals. The entities deploying and benefiting from volunteers, who have chosen to use volunteers in place of employees, pay the costs for doing so. This is appropriate since the organisation is more likely to have greater awareness of the activity's risks, have trained, monitored, and deployed the volunteers, and is more likely to be aware of the differences between their standards and the standards of a paid professional (if any). Further the liability transfer encourages VSOs to only assign work to volunteers for which they have the necessary competence. In addition volunteer protection also helps to discourage the volunteers themselves from undertaking roles for which they are not competent by retaining liability where the volunteer is grossly negligent, or where they knowingly do not comply with the VSO's processes.

[158] Flannigan (n108) 9.

Volunteering Should Not Be Encouraged

Flannigan argues that volunteers should not receive protection since volunteering is of limited social value, and the sector should not be encouraged. He argues that many VSOs do not advance the public interest, giving examples of groups that worship idols, or support the arts. He also asserts that volunteers are self-interested and that the sector is a platform for 'self-elevation and gratification.'[159]

In Chapter 2 we dealt with the services that the sector delivers to society, its key role in a liberal democratic state, and the diversity it provides to public life. We can therefore quickly dismiss these arguments. Further, for protection to apply the nature of the VSO, or the work carried out can be carefully controlled so as to ensure that only volunteering of a type that benefits society is included (see Chapter 6).

Secondly, Flannigan's account provides no space for pro-social behaviour and assumes psychopathy on the part of volunteers, which is unsound. Whilst it is true that many volunteers derive benefits from volunteering, we have seen in Chapter 7 that pro-social behaviour is the norm in human behaviour. Many volunteers are motivated by altruism and moral commitments. It is erroneous to dismiss the sector as a platform for self-elevation and gratification. Flannigan's objections may therefore be dismissed.

Victimising the Vulnerable?

Arguments that volunteer protection should not be permitted since it victimises the poor, are ill-founded. As we have seen above volunteer protection may in fact help to provide for victims. Further, volunteers may serve all parts of society.

Popper alleges that volunteer protection is class based, and may particularly impact on the poor[160] who receive more services from the voluntary sector, and are less likely to be able to sustain losses. However, the situation is more nuanced than an image of protecting middle class volunteers from the claims of the poor. This stereotype ignores mutual organisations

[159] ibid 5-6.
[160] Andrew Popper, 'A One-Term Tort Reform Tale: Victimizing the Vulnerable' (1998) 35 HarvJonLegis 123, 127.

and empowered communities, where community members provide support to one another, and organisations which deal with a broad range of individuals. Volunteers may also be found in fields such as in art, music, or heritage, which bring them into contact with those wealthier than themselves, and more able to sustain losses. Volunteers and claimants from all classes may thus encounter volunteer protection.

Volunteer protection is not a blunt tool designed to prevent poor victims from bringing claims, instead it is a progressive device to facilitate volunteering, and provide victims with valuable claims that would be open to wealthier victims. For instance, whilst the poor may receive free volunteer-delivered services, wealthier parties may contract with an organisation for services. These wealthier individuals are unlikely to sue the organisation's impecunious tortfeasing employees, and instead can bring claims either in contract, or via vicarious liability against the organisation. Volunteer protection introduces similar avenues of claims to the poor, providing them with organisational claims. The victim does not lose their claim for ordinary negligence, rather it is diverted to the organisation, providing a claim of greater value. Likewise where wealthier volunteers hold insurance the victim may still have recourse against them.

Decrease in Volunteer Opportunities?

Volunteer protection need not reduce volunteering opportunities. Whilst volunteer protection makes using volunteers more expensive,[161] a small increased chance of liability, and resultant increased insurance costs, are unlikely to make volunteer labour unattractive. Replacing volunteers with employees is costly, and the additional free volunteer services are more than likely to offset any additional costs. However, since the most informal grassroots community groups may be unable to afford such additional costs, this points towards excluding such groups from volunteer protection.

Nevertheless care should be taken that the additional costs volunteer protection may impose on VSOs does not impact on the ability of the disabled to volunteer. This is since in some cases the value of their volunteering is their empowerment, not the value of their services. However, organisations which facilitate and encourage such volunteering are unlikely to be

[161] Horwitz and Mead (n107) 624.

discouraged to provide such opportunities by a small additional chance of being held liable for their negligence. Further, if this problem were to arise as a result of volunteer protection, this can be dealt with by targeted solutions. If need be, the state too can facilitate greater volunteering opportunities for such individuals.

Corrective Justice and Rights-Based Obstacles

At first glance monist corrective justice and rights-based theories of tort, particularly Weinrib's and Stevens', provide an obstacle to volunteer protection. This is since they deny a role within tort for factors such as enterprise liability, loss-spreading, and deterrence upon which much of the volunteer protection case is based. However, these tort theories do not constitute an obstacle to introducing statutory volunteer protection since: 1) some features of volunteer protection are justifiable using corrective justice norms, and it is not problematic for Stevens' rights-based theory; 2) a corrective justice account, or rights-based account does not fully describe English tort law, (it is explained by an interaction of theories), and it is therefore legitimate to consider a broader range of factors such as enterprise liability etc; and 3) volunteer protection is statutory, and it is legitimate for the legislature to consider external factors, even if the common law of tort cannot do so.

Potential Obstacles

Before we can turn to why both corrective justice and rights-based tort theories do not represent an obstacle, we need to briefly examine them, and note why they might be seen to prima facie constitute such.

Corrective justice is a fiercely individualistic tort theory.[162] Whilst space prohibits examination of all of the many corrective justice tort theories,[163] Weinrib's is the most influential. It is typical of, and also the most significant of corrective justice based objections volunteer protection will face. Weinrib argues that tort reflects corrective justice, deriving this from examining the institution itself. He considers that tort law, like love, is self-justifying and self-explanatory. Corrective justice repairs the injustice which one party

[162] Dan Priel, 'Torts, Rights and Right-Wing Ideology' (2011) 19 TLJ 1.
[163] eg Jules Coleman, *Risks and Wrongs* (OUP 2002); Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007).

inflicts on the other, restoring their notional pre-wrong equality. The defendant suffers the same injustice that the claimant commits. Restoration is correlative, the claimant recovering what the defendant surrenders. The justification for the claimant's gain and the defendant's loss are the same, and only normative factors that apply equally to both parties are legitimate considerations. Weinrib focuses on the relationship, not the parties in isolation. Thus the fact that a defendant has insurance is irrelevant, as it is not correlative. Factors concerning other parties, such as distributive justice, are also not correlative, and therefore irrelevant. They do not fit into tort's structure. Further, non-parties cannot be considered.[164] A rule of tort which is not consistent with this is illegitimate, no matter how well it meets an important external goal.[165]

Negligence according to Weinrib typifies corrective justice's requirement of correlativity. The wrong being the infringement of the claimant's rights, which Weinrib identifies as natural rights. Tort views the parties as free agents interacting with one another's rights which manifest from their freedom. The parties are treated 'as equal persons'.[166] Factors which are solely favourable to one of the parties do not play a role, one is not sacrificed to the other's interests.[167]

Two factors mean that corrective justice tort theories potentially represent a significant challenge to volunteer protection. Firstly, they focus on the justice between the two parties and not societal consequences.[168] Many such theories, including Weinrib's are monist, denying a legitimate role to enterprise liability, loss-spreading, and deterrence,[169] upon which much of the case for volunteer protection is based. Further, corrective justice looks at the difference made by the wrongful injury, and not the type of person who inflicted the injury.[170] Thus the fact that the injury is inflicted by a volunteer is irrelevant. Likewise A's right to volunteer should not result in the victim B being sacrificed to A's interests.

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[164] Ernest Weinrib, *The Idea of Private Law* (OUP 2012), 5-6, 74, 105, 134; Ernest Weinrib, *Corrective Justice* (OUP 2012) 2-3; Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 UTorontoLJ 349, 349-351.
[165] Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471, 472.
[166] Weinrib, *Corrective Justice* (n164) 2.
[167] ibid 3-7.
[168] Restatement (n74) §291.
[169] Tim Kaye, 'Rights Gone Wrong: The Failure of Fundamentalist Tort Theory' (2010) 79 MissLJ 931, 937; John Murphy, 'Rights, Reductionism and Tort Law' (2008) 28 OJLS 393, 394; cf Richard Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 JLegalStud 187. Other key monist theories, (law and economics, and civil recourse theory), do not offer any fundamental objection to volunteer protection.
[170] Aristotle, *Nicomachean Ethics* (Roger Crisp tr, CUP 2014) Book V, ch 4, 30-5, (examples given by Aristotle are intentional harms); George Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 HarvLRev 537, 547.

Stevens' rights-based account of tort is distinct from corrective justice. However, since it also queries recourse to certain external factors, it will also be dealt with here. Stevens argues that tort is concerned with the secondary obligations that result from the infringement of rights, with correlative breach of duties. These rights are based on moral rights, derived from the golden rule, and justified without regard to their utility. Whilst they are not absolute, Stevens considers that they cannot be 'outweighed' by policy or utilitarianism.[171] The infringement of such a right demands that the consequent loss is made whole.

Unlike Weinrib he considers that the primary rights which tort protects are diverse, and stem from different justifications. Stevens criticises Weinrib's resort to 'long-dead' philosophers doubting if common law judges were familiar with their work. He notes that whilst corrective justice explains key features of tort, it is an incomplete explanation, and further that the scope of rights is not simply determined by what is fair between claimant and defendant but also takes into account wider societal factors.[172] However, to the extent that volunteer protection relies on utilitarianism or uses policy to outweigh moral rights it would appear to be illegitimate according to Stevens' theory.

Justifying Volunteer Protection using Corrective Justice and Rights-Based Norms?

Despite the potential corrective justice or rights-based theory objections to volunteer protection, some features of volunteer protection are justifiable using corrective justice norms, and as demonstrated below it is possible to square volunteer protection with Stevens' rights-based theory.

It is easy to justify the liability transfer element of volunteer protection using either corrective justice or rights theory. The master's tort theory is invoked by both Weinrib and Stevens to explain vicarious liability. Whilst the theory does not reflect the common law, a statutory liability transfer may operate as a master's tort, imputing the wrong to the organisation such as to justify its liability as an 'instantiation of corrective justice'.[173] It may also promote corrective justice in that the wrongdoer may be more able to pay the damages.

[171] Stevens (n35) 92-9, 329-333.
[172] ibid 326-30.
[173] Weinrib, *Idea* (n164) 187.

However, the volunteer defence element of volunteer protection is more problematic. Corrective justice does not require all harm to be repaired in the tort of negligence, only harm which results from fault.[174] Fault in negligence ensures that parties do not take risks which would offend the level of respect due to another.[175] The standard of care in negligence balances the defendant's right of liberty of conduct, with the claimant's right of respect for bodily integrity.[176] Rationalisations for where the fault boundaries are drawn include customary social norms, or that it violates Kant's categorical imperative in that it uses another as the means to one's own ends, or treats the other party as non-existent.[177]

If inadequate respect is based on the volunteer's attitude towards the victim, it means that harmful conduct is not wrongful per se, but rather, wrongful due to the attitude it reflects towards the other.[178] Where the volunteer acts out of concern for the claimant's welfare, there is scope to argue that liability based on inadequate respect, or a failure to be impartial, is problematic, and that these volunteers deserve differential treatment in tort, and thus some form of protection. Likewise not all volunteers will be using others as means to their own ends. In some cases the volunteer's action will be selfless, motivated by a desire to help that other, respecting their agency, and promoting their interests over the volunteer's own.[179]

However, this attempt to fit volunteer protection within corrective justice norms cannot fully justify the volunteer protection model this thesis proposes. Indeed it would lead to a very different model of volunteer protection. This is since in not all cases where protection will apply will a volunteer be altruistically delivering a service to a victim, for the victim's own benefit, and respecting their agency. For instance where a volunteer (V) negligently injures a bystander (Y) when delivering their services to X; or where V delivers a service to X (who is injured) solely as a means to help their VSO; or where V's volunteering is solely motivated by the benefits they receive from it. In these cases V is using the victim as a means to their

[174] Dov Waisman, 'Negligence, Responsibility, and the Clumsy Samaritan: Is there a fairness rationalise for the Good Samaritan Immunity?' (2012-2013) 29 GaStULRev 609, 643.
[175] Weinrib, *Idea* (n164) 147-152; Benjamin Zipursky, 'Sleight of Hand' (2007) 48 Wm&MaryL 1999, 2030; Gregory Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 SCalLRev 193, 222.
[176] Zipursky, 'Sleight of Hand' (n175) 2031.
[177] Steven Hetcher, 'Creating Safe Social Norms in a Dangerous World' (1999) 73 SCalLRev 1; Jason Solomon, 'Equal Accountability through Tort Law' (2009) 103 NwULRev 1765, 1787; Weinrib, *Idea* (n164) 152.
[178] Waisman (n174) 654; Keating, 'Distributive and Corrective Justice' (n175) 200-201.
[179] Waisman (n174) 645-8.

own ends. Volunteer protection applying in such situations would not square with corrective justice. It could be that the law is pragmatically deeming all volunteers to be altruistic since it cannot know the state of their hearts, but this does not justify protection against bystander claims.

Further, not all accept that the actor's reasons for acting are relevant to 'attitude', preferring an objective approach focused on outcome responsibility which judges the action and not the agent.[180] This also matches well with the law of negligence. Whilst negligence may contain moral notions of fault, it does not wholly correspond with moral blameworthiness.[181]

Whilst Stevens rejects consequentialist arguments arguing that rights cannot be ignored where this would produce better outcomes, nevertheless his rights theory offers a lesser hurdle for the volunteer defence than corrective justice. He considers that the rights are based on moral rights deduced from the golden rule. Unlike Weinrib he permits consideration of factors outside of claimant-defendant, noting that ambulances can drive faster than delivery vans. He also recognises that rights may conflict, and override one another. The weight being given to the rights is partly a 'social fact which can differ from one society to the next and can change over time.'[182]

Considering an actor's motive is not necessarily contradictory to Stevens' approach. For instance it may be possible for a society to deduce from the golden rule that when acting out of altruism, one should not be reckless, and when acting out of self-interest, one should not be careless. In balancing rights a mutual exposure to greater risk may be permissible when dealing with altruism, compared to self-interest. This society may consider that a person who holds a shop door open for someone, but accidentally lets go of it, differently to the person who swings the door in another's face because they did not check if anyone was behind. Further, where there is a conflict of rights, a society could value the right to volunteer more highly than the right to carry out profit-making activities, and in determining the balance between these rights, and the victim's right of bodily integrity may draw the line in a different place. It is thus possible to square volunteer protection with Stevens' rights-based theory of tort.

[180] Stephen Perry, 'The Moral Foundations of Tort Law' (1992) 77 IowaLRev 449, 508-9; Waisman (n174) 657.
[181] eg James Goudkamp, 'The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence' (2004) 28 MelbULRev 343.
[182] Stevens (n35) 328-338.

Legitimacy of Considering Extrinsic Factors

Both corrective justice and rights theory claim to be universal theories of tort which by themselves fully explain tort. In making such claims they reject the use of extrinsic factors within tort law such as loss-spreading. Given that the case for volunteer protection is built on extrinsic factors such as loss-spreading and enterprise liability, (amongst others), this section counters the objections of corrective justice and rights-based theories to permitting the use of extrinsic factors within tort law.

This section does so on the grounds that no single theory explains tort law. It argues that whilst corrective justice, or a rights-based account do play a role in tort, they are not universal theories of tort, and do not fully describe English tort law. Monist corrective justice tort theory, (or indeed any monist theory), requires one to ignore many features of current English tort law, or to declare them to be incorrect, which is problematic when often the case for a theory is based on fit with the law. It also requires one to ignore tort law in practice. This section argues that English tort law uses and is explained by an interaction of a range of competing factors, including extrinsic factors, and that it is consequently legitimate for us to use them in making the case for, and in designing volunteer protection.

Corrective justice may explain many aspects of tort, but no theory can be said to have a monopoly.[183] A mixed approach best explains the phenomenon that we see.[184] On numerous occasions in deciding questions of liability judges have invoked factors which are not justified according to corrective justice or rights-based theories, for instance distributive justice, law and economics, enterprise liability, and loss-spreading. This is typical in the context of duties of care.[185] Corrective justice also fails to explain the numerous occasions on which courts invoke the floodgates argument. Further, the operation of negligence in a road traffic accident context is highly influenced by loss-spreading, and compulsory insurance; both are factors which are illegitimate to consider according to the corrective justice account.

[183] Peter Cane, 'Searching for United States Tort Law in the Antipodes' (2010-2011) 38 PeppLRev 257, 259; Steve Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134 LQR 214.
[184] Gary Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1996-1997) 75 TexLRev 1801; Guido Calabresi, 'Torts-The Law of the Mixed Society' (1978) 56 TexLRev 519; Abraham (n 48) 9-10; William Lucy, *Philosophy of Private Law* (OUP 2007) ch 10.
[185] Cane, 'Corrective Justice' (n165), 485.

Likewise some key tort doctrines, for instance vicarious liability, can only be accounted for within a corrective justice, or rights-based framework by resorting to the fiction of the discredited master's tort theory.[186] This theory has been rejected by the courts,[187] and would also cause serious problems if adopted in the intentional tort context, since if the tort were the master's it would be uninsurable as a matter of public policy.[188] This would undermine the entire basis of the sexual abuse litigation that has driven the recent developments in vicarious liability. Further, it requires one to ignore the justifications and guiding principles which the judges themselves have set out in the leading cases such as enterprise liability, and loss-spreading.

Goudkamp and Murphy identify a number of significant areas within tort, which corrective justice, or rights-based theories cannot account for.[189] Key examples include in determining breach in negligence courts take into account the cost of the precautions that would have prevented the accident.[190] This violates Weinrib's model by considering the defendant's costs alone. Likewise, this is problematic for Stevens' approach since this should not impact on the claimant's rights.[191] The desire of courts to prevent indeterminate loss for pure economic loss, is also problematic for corrective justice. Weinrib recognises this, although he criticises the approach of the courts.[192] Other examples include punitive damages, illegality, and *Rylands v Fletcher*.[193] Misfeasance in public office also causes problems for the rights-based account, such that Stevens considers it to be an exception.[194] Further, the structure of tort itself is problematic for corrective justice theories;[195] as is the role of precedent, which can have significant distributive effects on other parties, which courts do

[186] Stevens (n35) 259-267; Weinrib, *Idea* (n164) 185-7; Beever, *Rediscovering* (n163) 36, dismisses it as 'parasitic on the law of tort'.
[187] Giliker (n36) 13-16, 233.
[188] Merkin and Steele (n37) ch 11.
[189] James Goudkamp and John Murphy, 'The failure of universal theories of tort law' (2015) 21 LEG 47; cf Beever, *Rediscovering* (n163) 21-25.
[190] *Latimer v AEC Ltd* [1953] AC 643 (HL); *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL); *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound)* [1967] 1 AC 617 (PC); cf *Bolton v Stone* [1951] AC 850 (HL).
[191] Goudkamp and Murphy (n189) 57-8; Weinrib, *Idea* (n164) 120-121, 147-152
[192] Weinrib, *Idea* (n164) 135; cf Kaye (n169) 934.
[193] (1868) LR 3 HL 330; Goudkamp and Murphy (n189) 67-83; Allan Beever, 'The Structure of Aggravated and Punitive Damages' (2003) 23 OJLS 87, 98-99. Weinrib's fault explanation is unconvincing: *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264 (HL); *Jones v Festiniog Railway Co* (1867-68) LR 3 QB 733.
[194] Murphy (n169) 401; Stevens (n35) 242-3.
[195] Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 GeoLJ 695, 709-733; Abraham (n48) 10; Solomon (n177).

consider.[196] Goudkamp and Murphy argue that this disjunction between the theory, and the law, means that such theories are not 'satisfactory universal theories of tort law'.[197] One can only agree.

Despite its prominence in the academic literature, corrective justice is not regularly invoked in English tort judgments. Where English judges have directly addressed it, they have been careful to explain that it is not the sole function of tort, and that it can be overridden by potent counter considerations.[198] In the leading tort cases that mention corrective justice, the courts have used distributive justice to cut it down to size. In *White v Chief Constable of South Yorkshire Police*[199] Lord Hoffmann noted that the position that tort should 'provide a comprehensive system of corrective justice,… had been abandoned in favour of a cautious pragmatism.'[200] In the light of the failure of the family members' claims he invoked distributive justice to deny the policemen's claims, which corrective justice would have allowed.[201] Likewise in *McFarlane v Tayside Health Board*[202] where a corrective justice approach would have led to the parents receiving the costs of bringing up the child, in denying these damages Lord Steyn considered that distributive justice would deny them this remedy, stating: 'tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches.'[203] Further, in *Parkinson v St James and Seacroft University Hospital NHS Trust*,[204] Brooke LJ noted that in difficult cases 'principles of distributive justice, as opposed to corrective justice, may help [the court] to identify the just solution'.[205]

[196] Cane, 'Corrective Justice' (n165) 482-3.
[197] Goudkamp and Murphy (n189) 84.
[198] *X v Bedfordshire CC* [1995] 2 AC 633 (HL) (Lord Browne-Wilkinson) 749; *Gorringe v Calderdale MBC* [2004] UKHL 15, [2004] 1 WLR 1057 [2] (Lord Steyn); *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134, [22] (Lord Steyn).
[199] [1999] 2 AC 455 (HL).
[200] At 502.
[201] At 510. Note Lord Hoffman, 'Reforming the Law of Public Authority Negligence' (2009) Bar Council Law Reform Lecture, 8, (doubts corrective justice where public money involved).
[202] [2000] 2 AC 59 (HL).
[203] At 83; *McLoughlin v Jones* [2001] EWCA Civ 1743, [2002] QB 1312.
[204] [2001] EWCA Civ 530, [2002] QB 266.
[205] At [18].

The claims of some corrective justice theorists or rights theorists, to account for the entirety of tort seems unsound. It represents a single mindedness which is not representative of the development of the common law. Tort is the creation of many judges, over generations,[206] some with a strong sense of underlying theory, some without, guided by different, and in some cases contradictory principles and philosophies. There is 'no single accepted truth'.[207] Tort, like the society it serves is a compromise between competing notions of what conduct should be, and the public interest. Whilst it is open to objection that the law cannot irrationally hold simultaneously conflicting principles,[208] it is not irrational to hold conflicting views. For example, I like to give to the homeless. I am also hungry, and do not have enough money on me to fully sate my hunger. I also like to save money for retirement. I see a homeless man next to a bakery. What takes priority? Life is about balancing those inconsistencies.[209] Criminal law balances between competing theories, for instance deterrence and retribution, and there is no reason why tort law cannot do likewise.[210] The balance depends on the situation.

The second objection to the position that considering external factors is illegitimate is that this takes tort law to be self-justifying. Even if a corrective justice theory scientifically explains much of tort, this is not the same as the desirability of applying it. To take an example if a Marxist critique of the law were in fact correct and tort law is an instrument of oppression of labour, it would not necessarily mean that continuing this policy is desirable.

In making the case for volunteer protection it is permissible to use extrinsic factors such as enterprise liability and loss-spreading. The claims of corrective justice or rights-based theorists that such extrinsic factors should not be used on the basis that their theory fully accounts for the law of tort are unsound.

[206] Murphy (n169) 393; Dan Priel, 'That Can't Be Rights' (2011) 2 Juris 227, 230.
[207] *JGE v English Province of Our Lady of Charity* [2011] EWHC 2871 (QB), [2012] 2 WLR 709, [10] (McDuff J), (referring to vicarious liability; also applies across law of tort).
[208] John Goldberg, 'Twentieth-Century Tort Theory' (2003) 91 GeoLJ 513, 578-583; Solomon (n177) 1772.
[209] Bruce Chapman, 'Pluralism in Tort and Accident Law' in Gerald Postema (ed), *Philosophy and the Law of Torts* (CUP 2001) ch 8 (uses social choice theory). Links may also be made with value pluralism - see for instance John Kekes, 'The Morality of Pluralism' (Princeton UP 1993), or paraconsistency.
[210] Schwartz (n184); Izhak Englard, 'The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law' in David Owen, *Philosophical Foundations of Tort Law* (OUP 1995) ch 8.

Statute

In this section we demonstrate that the corrective justice or rights-based objections to volunteer protection being justified using external factors, do not represent an obstacle to the implementation of statutory volunteer protection.

Corrective justice scholars accept that legislatures may balance competing theories and concerns in legislating within the tort realm.[211] For instance Weinrib accepts that legislative law making is different, and that it can promote the general welfare, by considering external factors outside of corrective justice.[212] Stevens too acknowledges that the legislature can create and restrict moral rights, for any purposes, including instrumental ones.[213] As a consequence the mere fact that statutory volunteer protection has the potential to conflict with corrective justice notions is not in and of itself a conclusive objection to it.

Statutes often import competing notions of public policy into the law which clash with corrective justice, for instance limitation, incorporation, and insolvency legislation. It is certainly proper to gloss the law with the values of today's society, rather than to be solely guided by a perhaps mythical guiding hand which holds a single core principle in mind. Thus in considering the desirability of protective regimes it is legitimate to consider a range of external factors. As set out above the introduction of statutory volunteer protection is highly desirable. It promotes enterprise liability and loss-spreading, whilst focusing deterrence at the organisational level which is best able to manage and reduce risk, whilst increasing volunteering, and providing for victims.

Protective mechanisms are entirely proper for Parliamentary implementation, and are not unknown in English law, for instance Section 88 of the Financial Services Act 2012 protects the independent complaints investigator from liability, unless their act or omission is in bad faith, or the act is unlawful as a result of Section 6(1) of the Human Rights Act 1998.

[211] Jane Stapleton, 'Controlling the Future of the Common Law By Restatement' in M Stuart Madden, *Exploring Tort Law* (CUP 2005) ch 8, 266; cf Beever, *Rediscovering* (n163) ch 1; Stevens (n35) 308-12.
[212] Weinrib, *Idea* (n164) 144, 208; see also Beever, *Rediscovering* (n163) 52.
[213] Stevens (n35) 331; Robert Stevens, 'The Conflict of Rights' in Andrew Robertson and Tang Hang Wu, *The Goals of Private Law* (Hart 2009) ch 6, 145.

Conclusion

This chapter has rejected organisational protection, and has advanced the case for volunteer protection which involves a partial defence for the volunteer, and a liability transfer to the VSO.

Organisational protection is undesirable given the need to regulate the voluntary sector and to provide for accountability, the change in the nature of the sector, the contract culture, the availability of insurance, and also since protecting VSOs leaves the losses to fall on volunteers or victims. VSO liability caps are also rejected since they are arbitrary, disproportionately protect the greatest wrongdoers, and also concentrate losses on victims and volunteers.

On the other hand volunteer protection which partially protects the volunteer and transfers the liability to the VSO promotes enterprise liability, loss-spreading, and the deterrent and regulatory functions of tort. It focuses the deterrence at the organisational level which is best able to eliminate and/or mitigate risk. At the same time it provides for victims, whilst encouraging volunteering. Volunteer protection is likely to increase volunteering, whilst minimising accidents, and providing for victims.

Volunteer protection does not represent an elimination of victim rights, nor does it victimise the vulnerable. Rather it primarily functions to attribute the breach of duty to a third party, giving greater force to the victim's right, or at least the consequent duty to compensate for breach of duty. This is since it is transferred to the organisation, the party who is best able to right the injustice and pay damages. Further, volunteer protection will not encourage carelessness, since protection is only partial which ensures that tort retains a deterrent role, and volunteers are still accountable to the ordinary level of care at the organisational level. These arguments for volunteer protection also imply a limit. Where the VSO is an informal grassroots group, for instance a temporary, small, and informal unincorporated association, the enterprise liability, loss-spreading, deterrence, and regulatory arguments may not apply, and consequently the scheme is inappropriate for such groups.

Given these advantages of volunteer protection, in Chapter 9 we must turn to and reject alternative state-based approaches, and deal with mechanisms to prevent judgment-proofed VSOs from subverting the volunteer protection scheme.

Chapter 9

Final Thoughts & Conclusion

This chapter recaps the key issues and arguments and deals with unresolved issues such as the defence's interface with judgment-proofing, the unsuitability of alternatives such as government liability, unincorporated associations, why the defence should not be dependent on the VSO's ability to meet judgment, and what is needed to make the scheme work.

Political Will?

SARAH was a missed opportunity to pass meaningful legislation. Its provisions go beyond volunteers, whilst providing little if any protection to volunteers. Unsurprisingly it appears to have made no difference to the sector, and has been poorly received by the legal profession (see Chapter 3).

Given the ineffectiveness of SARAH, it is not unlikely that the political will to do something to protect volunteers will be present in the future, resulting in protection being the subject of a Government Bill. The willingness to deal with volunteer concerns notwithstanding recent previous enactments is demonstrated by the fact that SARAH was enacted within 9 years of the Compensation Act 2006, with the former attempting to address the inadequacies of the latter. To achieve a more lasting solution it is recommended that the proposed statute is subject to a prior report, perhaps by the Law Commission, involving consultation of the voluntary sector, (both at the leadership, and rank and file volunteer levels), legal experts, and comparative research.

Making the Statute Work?

Since SARAH simply restates existing law, it is unsurprising that it has been paid little attention by lawyers or the voluntary sector. The proposed statute on the other hand would make substantive changes to the law, and would improve the position of volunteers. Substantive changes will garner greater attention, and readily accessible public commentary from media reporting, the sector, insurers, and lawyers leading to awareness amongst volunteers and potential volunteers of the statute, and it influencing behaviour.

Subsequent to enactment a public information campaign by both the government and sector umbrella bodies, ideally in co-operation, is recommended. This may include press releases, pages on the Government website and umbrella body websites, social media output, and online videos (amongst others), providing simple explanations of the scheme, accessible to both volunteers, potential volunteers, and VSO leadership. Government departments already employ many experienced press officers, maintain strong links with the media, and operate social media channels. This publicity may thus be done at little cost using existing resources. Volunteer training and induction could also cover the scheme, and information on the scheme may be distributed to umbrella bodies for onward distribution to VSOs for inclusion in their volunteer induction processes. Sector produced standard form volunteer agreements may also draw volunteer's attention to the protection.

The Issue of Judgment-Proofing

Worryingly none of the US literature has noted the problematic combination of a volunteer defence predicated on liability transfer to an organisation, along with organisational immunity from suit, or a low damages cap. This is perhaps because the literature examines volunteer protection and charitable immunity in isolation, and not as two different elements of the balance between victims, volunteers, and VSOs. These two operating in combination, as in Massachusetts,[1] leave the loss with the victim, a result unintended by a volunteer protective regime predicated on liability transfer.

In Chapter 8 we rejected organisational protection. However, even without organisational protection, it is still possible to construct similar protection through judgment-proofing, using ordinary principles of law. Judgment-proofing is designed to make organisations financially unviable defendants. Essentially it is an attempt to have one's cake and eat by setting up shell organisations which take the risk and have little or no money to pay for tort damages, and separate asset holding organisations which are insulated from risk.[2] These structures utilise principles regularly deployed in high risk industries,[3] (many of which are not suitable

[1] Through MGLA 231 §85K and the VPA. (VPA does not pre-empt organisational protection: *Ayala v Birecki* 17 MassLRptr 175 (2003) (Superior Court of Massachusetts)).
[2] Stephen Gilles, 'The Judgment-Proof Society' (2006) 63 Wash&LeeLRev 603; Lynn LoPucki, 'The Death of Liability' (1996-1997) 106 YaleLJ 1.
[3] James White, 'Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability' (1997-1998) 107 YaleLJ 1363; Lynn LoPucki, 'Virtual Judgment Proofing: A Rejoinder' (1997-1998) 107 YaleLJ 1413; Lynn LoPucki, 'The Essential Structure of Judgment Proofing' (1998-1999) 51 StanLRev 147; Steven

for VSOs); although group structuring using asset holding parent companies, and risk taking subsidiaries, and the additional method of using charitable purpose trusts, are viable methods. There is some evidence of their use by VSOs.[4] Whilst such structures are open to challenge through veil piercing and direct duties, they should provide significant asset protection.

Judgment-proofing disrupts the structure of volunteer protection by undermining the liability transfer, as liability is transferred to an entity of straw. The consequence is that the losses fall on the victim, or alternatively litigation against the volunteer in order to prove gross negligence follows. A wealthy volunteer may also exploit this by setting up a judgment-proofed incorporated VSO to protect themselves from liability arising from their volunteering. Volunteer protection also faces the problem of insolvent organisations, which are not insolvent by design.

As detailed in previous chapters volunteer protection should not apply to smaller unincorporated associations, given that in many cases this would represent a liability shift from a negligent volunteer, to his fellow volunteers. However, an exception is made for large unincorporated VSOs where there is no realistic chance of fellow volunteers paying, which have forward planning potential, and which may be the subject of enterprise liability, deterrence, and loss-spreading. This restriction also helps to prevent loss shifting to insolvent organisations. The question is whether an incorporated VSO should be required to be able to meet the judgment for the volunteer defence and loss shifting to apply.

Insurance/Secure Recovery?

We should resist any additional requirements for compulsory insurance within the voluntary sector which would not apply to other sectors. This is since it will limit activities, and potentially exclude poorer communities and individuals from participating in civil society, eroding the sector's democratic role (see Chapter 2). However, predicating volunteer

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Schwarcz, 'The Inherent Irrationality of Judgment Proofing' (1999-2000) 52 StanLRev 1; Steven Schwarcz, 'Judgment Proofing: A Rejoinder' (1999-2000) 52 StanLRev 77; *Adams v Cape Industries Plc* [1990] Ch 433 (CA). See also Al Ringleb and Steven Wiggins, 'Liability and Large-Scale, Long-Term Hazards' (1990) 98 JPoliticalEcon 574.

[4] Mark Anshan, 'Credit Proofing Charity Assets' (Drache Aptowitzer LLP, 30 April 2014) <http://drache.ca/articles/charities-article-archive/credit-proofing-charity-assets/> accessed 22 August 2018; Charity Commission, 'Charities and Risk Management' (CC26), (Charity Commission 2010) 17.

protection on a secure source of recovery is not the same as requiring compulsory insurance, since an uninsured VSO may still lawfully operate.

In Australia and Ireland volunteer protection and the liability transfer does not depend on the organisation's ability to meet judgment. The protection may shift liability to a man of straw, with the victim footing the bill even where a solvent volunteer causes his loss. Whilst the VPA provides that for protection to operate state law may require that the organisation provides a secure source of recovery, [5] only four jurisdictions have such a requirement.

Kansas requires that the organisation has 'general liability insurance',[6] Utah provides for an insurance requirement, or for a qualified trust with a minimum value of $2 million aggregate for individual awards in relation to a single occurrence,[7] and the District of Columbia requires that the organisation must be insured for at least $200,000 per claim, and $500,000 for claims arising from the same occurrence. However, the DC legislation appears to recognise that this may encourage volunteers not to volunteer for smaller organisations, and this requirement does not apply to organisations whose functional expenses are less than $100,000 a year.[8] This is also recognised in the Californian legislation which does not require insurance for small non-profits where the insurance would cost more than 5% of their previous year's budget; protection is also available to volunteers where no organisational insurance was in place but all reasonable efforts were made to obtain it.[9]

In the Australian Capital Territory provision is made for the Minister to have the power to provide directions to community organisations in relation to insurance,[10] but volunteer protection is not dependent on compliance.

Shifting Sands

Restricting volunteer protection to where a VSO is able to meet judgment means that protection and liability transfer will operate at a VSO's whim. A VSO may also subsequently become unable to meet judgments after a volunteer has commenced volunteering for it, and

[5] 42 US Code §14503(d).
[6] KSA §60-3601.
[7] Utah Code Ann §78-19-1/2; 63G-7-604.
[8] DC Code §29-406.90(4)(c); note former Hawaii provision: HRS §662-D2.
[9] Cal Corp Code §5239.
[10] Civil Law (Wrongs) Act 2002 (ACT), s 11(1).

without the volunteer's knowledge. In addition the organisation may become insolvent after the commencement of the claimant's action, but before judgment.

In some cases it might not be possible to predetermine if a VSO will be able to satisfy damages in full (or part) until after judgment. This is since the quantum of damages may be unclear, disputed, or subject to factors such as contributory negligence or mitigation which will only be determined at trial. If volunteer protection is restricted to where a VSO is able to meet judgment, both the VSO and the volunteer will need to be joined to the action, to deal with the potential problem of the VSO failing to meet judgment, and the volunteer defence therefore being disapplied. Otherwise the facts may need to be re-litigated, since the volunteer would not be bound by any of the court's findings in the previous case against the VSO, since they were not a party to it. Sensible claimants would join the volunteer to the action against the VSO, unless the volunteer is obviously a man of straw. This may defeat the purpose of volunteer protection, and introduce significant uncertainties.

Volunteer Awareness

If protection depends on a VSO's ability to meet judgment, judgment-proofed organisations may have problems recruiting or retaining volunteers. This may encourage VSOs to obtain adequate coverage to provide for victims.

However, it would substantially undermine the defence if it were limited to the scope of the VSO's ability to meet judgment since few volunteers would be able to rely on the presence of protection in making volunteering decisions.

Such a limitation would mean that a volunteer's protection may change over time, as the organisation gains or distributes assets, or changes its insurance coverage. Volunteers would be required to regularly check the VSO's insurance position, along with its disposition of money and assets. Many non-managerial volunteers will have little knowledge of the organisation's solvency and insurance at any one time, and may find it difficult to make such enquiries. Further, the volunteer may not understand the answer given, or have the ability to construe insurance policies. A policy might not cover all potential losses to which the volunteer may be exposed, and determining the scope of volunteer protection would require the volunteer to interpret the policy and discern the extent of its coverage, and exclusions.

This is since the parameters of insurance coverage would determine the parameters of their defence.

If protection was shaped by the VSO's ability to meet judgment volunteers would also have to understand and monitor the legal forms and structures adopted by the VSO. Many volunteers will not have a working knowledge of asset protection, corporate law, or trusts. Many will not understand the significance of a larger VSO being structured into separate incorporated bodies within a larger umbrella organisation, or the possibility of judgment-proofing.

It should not be the role of volunteers to constantly check a VSO's insurance position, policy terms (including exclusions), structure and assets, or to understand their consequences for volunteer protection. However, where the volunteer is knowingly aware of the organisation's judgment-proofing, and/or deliberately brings it about there may be scope for an exception to protection.

Pressure to Work for Large VSOs

Restricting volunteer protection to where the VSO is able to meet the judgment would leave large numbers of volunteers unprotected. It may (according to a positive economic methodology) encourage volunteers to work for larger professionalised VSOs, and discourage volunteers from working for smaller VSOs. This is since larger VSOs are more likely to be able to meet judgments, and also more likely to be able to operate the bureaucracy necessary to provide volunteers with regular updates as to the scope of their coverage, and the VSO's ability to meet judgments, along with communicating to volunteers understandable explanations as to the consequent scope of their defence.

Legislation encouraging volunteering for larger professionally managed VSOs instead of smaller community groups is problematic. It ignores the sector's democratic and community functions, potentially reducing important elements of localised popular democracy and community empowerment.

Not Losing Much

Concerns about VSOs' inability to meet judgment, should not significantly undermine the volunteer protection case. We have argued earlier that the volunteer's defence should not apply where the volunteer is insured for the loss (although the liability transfer to the VSO should still apply) (Chapter 6). Volunteers are thus only protected against uninsured losses.

Where a VSO is unable to meet judgment the victim may have lost little since they have lost a claim against an uninsured and likely judgment-proof volunteer, and gained a claim against a judgment-proof organisation. Organisational claims are generally more valuable. It is only in the case of uninsured volunteers with unencumbered assets that the victim will have lost any claim of significant value.

Anti-Judgment-Proofing Provisions

Statutory volunteer protection predicated on liability transfer is undermined if organisations can structure themselves to shrug off these liabilities, whilst retaining control of their assets and continuing their enterprises. That some VSOs may take advantage of judgment-proofing should not stop volunteer protection's introduction. The problem is not with volunteer protection, but with judgment-proofing in this particular context undermining the scheme. The solution is that the volunteer defence should apply even where VSOs have been judgment-proofed, and special mechanisms should be developed to get around such structures in this context.

Other jurisdictions demonstrate legal responsiveness to judgment-proofing; for instance legislation following the, Australian Royal Commission into Institutional Responses to Child Abuse's recommendation which permit the targeting of associated property trusts, where there is a failure to nominate a defendant with sufficient assets to meet liability.[11] Similar provisions contained within the volunteer protection statute would help to eliminate the conflict between judgment-proofing and volunteer protection.

[11] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (Royal Commission 2017), Recommendation 94.

There is also the problem of where a volunteer purposefully creates a judgment-proof VSO to obtain volunteer protection's benefits and transfer their liabilities to a shell entity. A single jurisdiction, Texas, has an anti-judgment-proofing provision whereby volunteer protection does not apply where the organisation for which the volunteer works has been substantially set up to limit liability.[12] This prevents the transfer of an individual's liability to a purposefully designed man of straw. At the same time it ensures that volunteers of small grassroots community organisations are also protected, not just those that volunteer for larger more professionalised VSOs. This is a sensible compromise between judgment-proofing, and protecting smaller organisations' volunteers.

This thesis is not arguing that judgment-proofing using ordinary principles of law is illegitimate or should be unavailable. If it is available for the private sector it should also be available to VSOs. However, it is also possible to statutorily override such structures in limited circumstances, such as in the context of pensions legislation. Volunteer protection with its statutory transfer of liability to the VSO justifies such a provision.

Government Liability Alternative?

In proposing statutory volunteer protection with a liability transfer to the VSO, we must deal with a potential alternative: that liability should be instead transferred to the state, or that there should be state liability subsidies.[13] Transferring liability to the state, instead of the VSO, may enhance loss-spreading, and provision for victims.[14] It would also mean that society pays for the cost of promoting volunteering.

In two jurisdictions, Victoria, and the Australian Capital Territory, the liability may be passed on to the state, but only where a person or body is acting on its behalf,[15] or where the organisation carries out a recognised government function, and the Minister agrees that the Territory will assume the liabilities.[16] Whilst a state solution might be suitable where an insolvent community organisation is acting under contract on behalf of the state, it should not

[12] Tex Code §84.007.
[13] eg 'Developments in the Law Nonprofit Corporations' (1991-1992) 105 HarvLRev 1578, 1693-4.
[14] Note Myles McGregor-Lowndes and Linh Nguyen, 'Volunteers and the New Tort Reform' (2005) 13 TLJ 41; Robert Flannigan, 'Tort Immunity for Nonprofit Volunteers' (2005) 84 CanBRev 1, 12; Gerrit De Geest, 'Who Should Be Immune from Tort Liability?' (2012) 41 JLegalStud 291, 311.
[15] Wrongs Act 1958 (Vic), s 39(3).
[16] Civil Law (Wrongs) Act 2002 (ACT), s 10.

become more widespread. Where the insolvent VSO works for the state, and is unable to meet judgment, the state may be in breach of its duty to select a suitable and competent contractor since insurance and ability to meet judgments are relevant selection factors.[17]

Even with state liability some organisational deterrence may remain since VSOs triggering state liability transfers may lose future state contracts, but this deterrence is not present where the VSO is not involved in such contracts. However, where VSOs compete with for-profits in contracting to deliver state services, to provide for a liability transfer where the VSO is solvent, thus reducing their insurance costs may provide VSOs with an unfair competitive advantage.

A state loss-spreading system is not recommended in the context of volunteer protection, at least where the volunteer is not working directly for the state, or indirectly for the state via a contracted insolvent organisation, since it would remove the deterrent and regulatory feature of tort upon VSOs, (see Chapters 7-8). The regulatory potential of insurance is well recognised.[18] Insurers decide whether to insure, and on what terms. Insurers will be encouraged to extend cover in the voluntary sector by clear evidence of risk management, and will reward good practice. A state loss-spreading system for volunteers and the voluntary sector would function as government insurance, without the regulatory benefits of insurance. With state loss-spreading highly risky activities would still be underwritten, even ones which the insurance industry may not be willing to underwrite.[19] Tort and insurance premiums create incentives for accident reduction strategies; whereas few incentives would be present if the state underwrote the loss, (see Chapter 7). These risk reduction strategies are best implemented at organisational level, (see Chapter 8). That there would be less regulatory pressure, or encouragement to introduce accident reduction strategies, is likely to lead to more accidents. It would create conditions in which torts would be deterred to a lesser extent than the present system, or under the proposed volunteer protection system.

To replicate the regulatory potential of tort, and also insurance, would require a complex regulatory system, which may prove expensive, and would require tapping in to the insurance

[17] See Chapter 2.
[18] See Chapter 7.
[19] US Department of Justice, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (Department of Justice 1986) 76-8.

industry's expertise. With insurance the costs of such regulation are paid for by the insured parties, with state underwriting society will pay the costs. In addition, such a scheme would involve the state in controversial cases.

A state system of loss-spreading for the sector contradicts enterprise liability. Whereas transferring the liabilities of volunteers to their organisation takes enterprise liability into account, enhances tort's regulatory and deterrence role, and results in greater loss-spreading than the current system. In addition, given the international nature of the insurance market, reinsurance, and international investment, it is by no means certain that state based loss-spreading funded by taxation will spread the risk over a larger pool than insurance.

The sector is already concerned about threats to its independence, Slocock states that '[s]tep by step, the legitimacy of an independent voluntary sector as an independent force is coming under challenge.'[20] A liability transfer to the state would further undermine the sector's independence. It would encourage the state to exert significantly greater control and regulation over the sector, which would reduce its distinctiveness, hamper sector advocacy,[21] and disempower communities by quasi-nationalising their voluntary activities. It risks eradicating the spirit of volunteering.[22] It may also cause the state to restrict the creation of new VSOs. Whilst the contract culture has exerted pressure on VSOs to change, and has led to some loss of the sector's independence and distinctive identity,[23] such pressures can be reduced or resisted by organisations that do not seek to engage with state contracts. However, the regulatory pressure resulting from state liability transfer would not be possible to avoid. Given the sector's democratic function, its ability to shape policy, and hold governments to account (see Chapter 2) this is undesirable. It is also unlikely to gain political traction in an era of austerity.

Enhanced top down regulation would also increase sector compliance costs,[24] and consume resources. The regulation may not be appropriate for the sector, being designed with the

[20] Caroline Slocock, *Independence in Question: The Voluntary Sector in 2016* (Civil Exchange 2016) 9.
[21] eg Independence Panel, *An Independent Mission: The Voluntary Sector in 2015* (Baring Foundation 2015); Slocock (n36).
[22] For a discussion of state-driven formalisation see Colin Rochester, Angela Payne and Steven Howlett, *Volunteering and Society in the 21st Century* (Palgrave 2010) ch 16.
[23] Independence Panel (n21) 9.
[24] Renée Irvin, 'State Regulation of Nonprofit Organizations' (2005) 34 NonprofitVoluntSectQ 161.

commercial sector in mind, or it may not reflect the voluntary sector's structure and purpose. It would also contradict governmental desires to decrease red tape for the sector.

An independent voluntary sector run fund of last resort, (perhaps government encouraged), where VSOs are insolvent is also unlikely to be viable as it would mean greater regulation of VSOs, albeit through self-regulation within the sector. Again this would hinder the sector's diversity, and would represent a cross-subsidy by some parts of the sector to others. It would also be likely require a compulsory element, perhaps through legislative coercion.

Unincorporated Associations

As Chapters 7-8 show there are good reasons to restrict volunteer protection from applying to small, informal, grassroots unincorporated association VSOs, and the arguments for the scheme do not apply to such VSOs.

This position also respects such groups' decisions to choose unincorporated forms so as to minimise regulation, and it reduces the risk of subjecting such groups to pressures to formalise, or adopt vertical management structures. The requirements of GDPR and DBS checks are often cited as barriers to community action.[25] It is undesirable to add to these burdens with this scheme. It is important to maintain the ability of communities to quickly and easily come together with little formality to form groups to deal with pressing community issues. This helps to maintain sector diversity and retain a role for informal volunteering. Whilst this may encourage some to instead volunteer for incorporated entities, or larger bodies, this should not be overstated – many volunteers will want to be part of small, democratic, fluid, and informal groups which are subject to minimal regulation.

Not all incorporated VSOs are large or sophisticated, but there is a good reason to regulate small incorporated VSOs, (included within volunteer protection), differently to small unincorporated VSOs. The former have opted into greater regulatory requirements in exchange for legal benefits, and have a structure to deal with these, and at least one identifiable individual to fulfil specific roles (such as a company director) which may not be

[25] eg Will Woodward, 'Volunteering Tsar Points to Hindrance from Red Tape' *The Guardian* (London, 10 March 2008); Jessica Carpani and Charles Hymas, 'NHS Volunteer Army Prevented from Helping Most Vulnerable in Society due to Red Tape' *The Telegraph* (London, 20 April 2020); Andrew Holt, 'Red Tape Threatens Big Society, says Charity Chief' *Charity Times* (London, 5 November 2010).

the case within the least formal unincorporated association VSOs. Incorporation means that such groups are less likely to be fleeting, or fluid, and their legal identity is constant until they are wound up. Whereas with small unincorporated association VSOs it is possible that the members may not be aware that they have created an unincorporated association, and its existence, identity, and membership may be fleeting and constantly shifting.

However, as Chapter 2 notes some large and sophisticated VSOs take the form of unincorporated associations. Whilst most volunteer protection schemes exclude unincorporated associations, this is an insufficiently nuanced approach. With these large VSOs there is minimal risk of liability being transferred to fellow volunteers, and as Chapter 7 notes to apply the scheme to such VSOs is likely to have positive consequences. Further, as Chapter 8 advances the enterprise liability, loss-spreading, deterrence, and regulatory arguments for the scheme also apply to them. Applying volunteer protection to larger unincorporated association VSOs also helps to prevent larger organisations from deliberately choosing an unincorporated structure so as to avoid liability transfer.

There is no legal distinction between grassroots unincorporated VSOs and large institutional unincorporated VSOs, but there are various proxies that can be used to identify the latter such as revenue, number of employees, and size of assets. The number of volunteers may be indicative, but given that temporary informal grassroots groups – for instance groups putting on a one-off public event or protest, may have a large number of members this measure is not as reliable. A line must be drawn, erring on the side of caution so as not to catch grassroots groups. This thesis proposes that it should be drawn where the unincorporated association VSO either has revenue or assets in excess of £100,000, or five or more employees.

A problem with applying the scheme to large unincorporated association VSOs is that they have no legal personality, and liability transfer would technically make fellow volunteers liable. This may be solved by adapting a system used for tort liabilities of unincorporated trade unions,[26] which provides for quasi-corporate status. The statute would provide that for the purposes of the liability transfer the VSO may be sued in its own name, that individual members may not be so sued, and that property held in trust for the VSO, its purposes, or its members is deemed to be the property of the VSO for the purposes of the statute and

[26] Trade Union and Labour Relations (Consolidation) Act 1992, s 12(1).

available to meet judgment to the same extent and manner as if the VSO were incorporated. To accommodate different forms of property holding within unincorporated associations, the statute would provide that any property held as joint tenants by the membership, or which would be available to the membership if the VSO were dissolved,[27] is also available to meet judgment. The statute would permit VSOs to insure for such liabilities as if they were incorporated. To prevent individual members from being held liable for the liability transfer if the claim exceeded the VSO's assets and insurance, a quasi-limited liability would apply so that members are not liable for any additional sums.

Whilst small unincorporated grassroots groups encompass a numerically large group of VSOs, limiting protection to volunteers for incorporated VSOs, or larger unincorporated association VSOs, does not mean that few volunteers would benefit from protection. The latter, particularly large VSOs (which are caught by the incorporation or size requirement), represent a large proportion of the sector's output (see Chapter 2).

Negligence?

Given sector concerns, and the importance of the tort of negligence this work has focused on protecting volunteers from such claims. The proposed scheme is limited to allegations where a volunteer is in breach of a duty of care (this therefore includes statutory duties of care). Volunteer protection essentially provides a personal partial defence. It is as if the standard of care were reduced, but it does not actually alter the standard of care of the tort, since the organisation is still liable for the volunteer's tort at the ordinary standard, as is the volunteer if they are insured.

There are other torts which do not include a duty of care, to which a volunteer may be exposed to during their volunteering. A scheme that works for negligence, may not work for other torts. Whether volunteers should be protected from such torts is another project, but it is necessary to set out some preliminary thoughts.

[27] Nicholas Stewart QC, Natalie Campbell, and Simon Baughen, *The Law of Unincorporated Associations* (OUP 2011) 61-67.

In balancing the rights of the defendant to act, and the claimant not to suffer harm, negligence strikes the balance at objective negligence.[28] The defence in the context of volunteer negligence strikes a slightly different balance, when compared to commercial actors. However, the conduct required to trigger liability is dependent on the right protected by the tort.[29] Many other torts require lesser levels of culpability, for instance strict liability torts. Whilst this work is not concerned with such torts, it is suggested that here volunteer protection should not apply. Many torts which are not based on a breach of a duty of care protect the fundamental rights of the victim, for instance to property, liberty, or bodily integrity.[30] It is for these reasons that they do not have a standard of care element.

For instance trespass and defamation protect different interests to negligence, and thus require very different components to negligence. Trespass protects these rights, even against reasonable interference.[31] Therefore to uniformly import notions of objective negligence (although at a higher standard than ordinary negligence) into these torts via volunteer protection may be inappropriate. Many of these torts 'vindicate constitutional rights',[32] which need to be protected, even against violation by reasonable conduct.[33] Volunteer protection in these contexts would not have the equivalent effect of altering the standard of care, but rather introducing one into a tort which otherwise does not have one, which would radically alter the claimant's rights. This may not be desirable.

For instance it is argued that volunteer protection should not apply to conversion. It is possible to commit this tort in good faith and without negligence,[34] since its purpose is to protect possessory rights, and it acts as a proxy for protecting ownership.[35] If a volunteer were protected from this tort they may be able to retain another's property, to which they have no legal right. The remedies of delivery up, or damages would not be available where

[28] See Chapter 8.
[29] Michael Jones, Anthony Dugdale and Mark Simpson, *Clerk & Lindsell on Torts* (22nd edn, Sweet and Maxwell 2017) [1-63]-[1-70]; Robert Stevens, *Torts and Rights* (OUP 2007) 100-101.
[30] Tony Weir, *An Introduction to Tort Law* (2nd edn, OUP 2006) 133-4; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2 OJLS 30.
[31] *R v Governor of Brockhill Prison Ex p Evans (No.2)* [2000] UKHL 48, [2001] 2 AC 19.
[32] Tony Weir, *A Casebook on Tort* (9th edn, Sweet and Maxwell 2000) 316.
[33] ibid 140.
[34] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 (CA); *Hollins v Fowler* (1875) LR 7 HL 757; *Fowler v Hollins* (1872) LR 7 QB 616.
[35] *Parker v British Airways Board* [1982] QB 1004 (CA); *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1; Andrew Tettenborn, 'Damages in Conversion - The Exception or The Anomaly?' (1993) 52 CLJ 129; Simon Douglas, 'The Nature of Conversion' (2009) 68 CLJ 198; Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart 2011).

there is no liability.[36] Even if the VSO were liable they could not deliver up the goods, where the volunteer retains them. This would undermine property rights.

If volunteer protection were to apply to intentional torts it may be applicable in abuse situations. These are not circumstances where we would wish to reduce the deterrent factor of tort operating on volunteers. A nursing home volunteer may in good faith unlawfully restrain a troublesome resident by tying them to a chair, or a scout leader may in good faith unlawfully administer corporal punishment to a misbehaving scout. These individuals should not be protected from claims in battery or false imprisonment since this would significantly erode the victim's rights to bodily integrity and liberty. If volunteer protection applied here it would not adjust the torts, but would rather rewrite them entirely by importing a standard of care into them. To apply volunteer protection here may lead the law into disrepute.

Different policy considerations apply to these torts, when compared to negligence.

Conclusion

The Voluntary Sector

The UK's voluntary sector is large and diverse. It is distinctive, being independent of the state, and the for-profit sector. The sector has an important democratic function, empowering communities and citizens, meeting minority demands for public goods, shaping public policy, and promoting the citizen's role in society. It is an important conduit for altruism. The sector now plays a significant role in providing public services under contract with the state. Contracting has asserted pressure on the sector to professionalise. However, this professionalisation goes beyond VSOs contracting with the state. In addition we have seen the evolution of specialist volunteer managers, and increasing formalisation in recruiting, training, and managing volunteers. Unfortunately in the UK volunteering appears to be on the decline.

Despite the sector's scale and importance, prior to this thesis the role of negligence within the sector has not been examined. The sector has expressed concerns as to tort litigation, and

[36] Torts (Interference with Goods) Act 1977, s 3.

there is evidence of volunteer liability fears, withdrawal of services, or individuals declining to volunteer given liability fears. However, given the sector's significance and distinctiveness the interface between the sector and negligence is still of great significance even if such concerns were absent.

This thesis is concerned with voluntary sector torts. Volunteer torts involve a triangle of interests, that of victim, volunteer, and VSO. The parties' interests are not the same, and may clash. There are also broader society interests to consider. Rescuer, altruist, or Good Samaritan torts merely involve two parties (unless the rescuer works for a rescue organisation); these two party situations do not concern us in this thesis as they operate outside of the voluntary sector with which this project is concerned. The voluntary sector has an organisational requirement.

The English Position

We have seen in Chapter 3 that volunteers, and VSOs, owe duties of care in negligence, and the involvement of a volunteer is unlikely to be sufficiently novel to invite a consideration of the fairness, justice, and reasonableness of imposing a duty of care, where any other actor would also have such a duty. As a matter of common law, and not statutory intervention, the English courts are correct in not denying the existence of a duty of care for volunteers, or VSOs.

Since liability presupposes a duty, a denial of the existence of a duty of care for volunteers would provide powerful protection. It would mean that they could not be held liable in negligence. A volunteer would be able to act irresponsibly and recklessly, disregarding the health and wellbeing of others, yet be immune from liability in negligence.[37] A no duty rule provides an immunity that leaves the victim to foot the bill, no matter how grossly negligent the volunteer. It would remove any deterrent feature of negligence operating on volunteers. In many cases the victims of volunteers' wrongs may have legitimate claims. If we are willing to impose a duty of care on Good Samaritan rescuers who risk their lives in emergency situations, it would be odd to exclude such a duty for volunteers who have greater opportunities to reduce the risks inherent in their activities, and to implement in advance

[37] Note Joachim Dietrich, 'Duty of care under the "Civil Liability Acts"' (2005) 13 TLJ 17, 25.

measures to protect potential victims. In emergencies there is no immunity, a duty of care is present where a rescuer intervenes, but the applicable standard of care takes into account the emergency situation.

If volunteers did not owe duties of care, given that there would be no volunteer tort, the VSO for which the volunteer works cannot be vicariously liable for their agent's wrongs. In many circumstances the victim will be injured in situations where vicarious liability would be present, but where the VSO's direct duty owed to the victim has not been breached. Thus the no duty approach protects both volunteers and VSOs. The existence of VSOs, with potential vicarious liability, which are likely to be in a better position to bear the loss than the victim or volunteer, and which are able to regulate the risk more effectively than individual volunteers, and insure, is a factor that can be considered at the fair, just and reasonable stage in imposing a duty on volunteers. To deny the existence of volunteer duties of care, would be to deregulate the sector. This is why other approaches which relax the regulatory pressure are preferable - the pressure can be eased, but still retained in order to control very poor practices. Volunteers owe duties of care, and they should owe such duties.

It also appears that on the present limited authorities that volunteer status does not affect the standard of care applicable in negligence. This position is not altered by Section 1 of the Compensation Act 2006, or SARAH. They provide no additional protection to volunteers, and were enacted primarily for political public relations purposes. We have also seen in Chapter 4 that common law vicarious liability will apply to some, (but not all), organisational volunteers under the 'akin to employment' form of vicarious liability. In addition vicarious liability within an unincorporated association will result in vicarious liability for some volunteer torts. Nevertheless not all volunteers stand in a sufficient relationship with their organisation to trigger the doctrine. This means that not all volunteer torts result in VSO liability.

Protecting volunteers either by changing the duties or the standards of care they owe, would also protect VSOs, at the expense of victims. This is since any alteration to the requirements for establishing the tort itself would also apply to a vicarious liability claim. The only way to protect volunteers, whilst simultaneously not protecting VSOs is to use statutory means.

Protecting the Voluntary Sector

Other common law jurisdictions have intervened to protect the sector from negligence claims. There are two basic approaches: firstly, organisational protection, which focuses on protecting the VSO; secondly, volunteer protection which focuses on protecting the volunteer. The two are rarely found operating together.

Organisational Protection

Two main classifications of organisational protection presently exist, immunities, and liability caps. An immunity prevents liability from arising, a cap on the other hand is a remedy restricting rule. Further, other states protect charities from execution of judgment. As noted in Chapter 5 the doctrine of charitable immunity in the US has re-emerged in the light of the tort reform movement. Its re-emergence was closely linked to insurance affordability.

There are five main theoretical justifications for charitable immunity. The first four are technical: the trust fund theory; that vicarious liability does not apply to not-for-profits; that charities share government immunity; and the beneficiary waiver theory. Chapter 5 demonstrated that each of these theories is doctrinally unsound, and are legal fictions. The fifth justification, the only justification on which the doctrine may be based, is public policy. We therefore examined in Chapter 8 whether public policy should lead to organisational protection being adopted in England. Since, unlike some of the other justifications this justification does not depend on the existence of a trust, protection based on a public policy rationale may be applicable to a wider range of VSOs.

Where courts have used a public policy justification, the consistency and uniformity of the degree of immunity has varied.[38] Invoking a court discerned public policy gives little direction to future courts in discerning the doctrine's parameters.[39] Just as public policy may be used in some US states to justify immunity, it has also been used in others to justify limiting, or removing immunity. With charitable immunity resting on a controversial public

[38] John Wharton, 'The Diminishing Doctrine of Charitable Immunity: An Analysis' (1969-1970) 19 DrakeLRev 186, 194; Robert Hansen, 'Damage Liability of Charitable Corporations' (1934-1935) 19 MarqLRev 92, 101.
[39] Joseph Simeone, 'The Doctrine of Charitable Immunity' (1958-1959) 5 StLouisULJ 357, 364.

policy which removes a sector from the ordinary rule of law, it is not proper for this to be imposed by the courts, but is best left to the legislature.[40] Immunising a sector from tort, where it would otherwise have such duties, is a legislative, rather than judicial matter.

Volunteer Protection

Volunteer protection has proven popular across the common law world. Core to all of the regimes (see Chapter 6) is a partial defence provided to the volunteer, either an objective approach, with gross negligence as the liability threshold (VPA), a subjective approach, which protects volunteers who act in good faith (Australia), or a hybrid approach, which uses gross negligence, but additionally removes volunteers from this protection if they are in bad faith (Ireland). None of the regimes alter the standard of care applicable to volunteers; rather they apply a personal defence that makes the volunteer not liable for the harm where his level of fault falls under the threshold, (gross negligence, or bad faith). The protection does not apply to driving torts, which are different to other torts, and operate more in keeping with a state sponsored loss-spreading system (Chapter 6). Likewise this protection does not apply to the VSO if it is sued for the volunteer's tort.

Gross negligence is discussed in detail in Chapter 6, and traditional objections to it are dismissed. It represents an objective standard of conduct, differing from ordinary negligence in degree, not kind. Good faith on the other hand concerns the defendant's subjective mental state, and subjectivises the liability threshold. Chapter 6 advances that if a volunteer defence from negligence is desired, a gross negligence defence is a superior approach to a good faith defence. This is since it provides greater predictability, greater security of expectations from service recipients, an equal level of protection to all volunteers, and removes any need to enquire into the defendant's mind. Chapter 6 argues that gross negligence is a more stringent standard, and represents a compromise between defendants and victims, further retaining tort incentives for volunteers to improve their skills; whereas good faith results in little remaining tort deterrence operating on volunteers, (see also Chapters 7-8).

All of the volunteer protection regimes have an organisational requirement. Individual altruists are not protected. The volunteer's liability is transferred to the organisation; either

[40] *Welch v Frisbie Memorial Hospital* 90 NH 337, 9 A2d 761 (1939) (Supreme Court of New Hampshire).

through an express statutory liability transfer, or through a common law transfer. Given that liability transfer is core to the schemes it is argued that a system of statutory liability transfer is the better approach. This eliminates the risk that this scheme will be threatened by changes in the common law, and it prevents situations where the defence is held to apply in the absence of vicarious liability. Requiring the organisation to be incorporated, or if unincorporated to meet a size requirement, is sensible in that it prevents the losses from being transferred from the negligent volunteer to his fellow volunteers. In addition, prohibiting volunteer indemnities to cover the VSO's tort losses in being held liable for the volunteer's acts helps to prevent the statutory transfer of liability being circumvented by private agreement.

We also noted in Chapter 6 that due to the structure of the voluntary sector in the UK confining protection to volunteers for non-profits is problematic, and a hybrid of the VPA's non-profit organisational requirement, and the Australian community work requirement deals with these issues. We also advanced that a waiver of protection, (although liability may still be transferred to the VSO), where the volunteer is insured for the loss, is also a sensible provision in that an insurance company cannot have its cake and eat it; it cannot rely on a defence which is designed to protect a volunteer's own assets whilst receiving premiums for covering the risk; although the defence is still available when a volunteer's own assets are exposed.

The defences do not apply to the organisation if sued for the volunteer's tort. This ensures that protecting volunteers is not at the expense of tort victims, and also provides for organisational deterrence.

The Impact of Protection

In Chapter 7 to analyse the potential impacts of introducing volunteer and/or organisational protection, we used positive economic analysis, as adjusted for known heuristics, and also examined the available empirical evidence.

The study demonstrated that organisational protection is likely to reduce the deterrent effect of tort on organisations. This may lead to greater VSO activity, but also to reduced levels of care at the organisational level. Such protection means that individual volunteers are more

likely to face claims, which may result in volunteers taking greater care, and/or reducing or withdrawing their services, leading to lower volunteering levels. This greater level of care by volunteers might not necessarily reduce tort levels.

It also demonstrated that tort deters volunteers, and that volunteer protection is likely to increase volunteering. Where volunteer liability for a high level of negligence is retained, (for instance gross negligence), it ensures that tort retains some deterrent effect upon volunteers. If, as with most systems of volunteer protection, protection is combined with a liability transfer to the organisation, the study suggests that this is likely to lead to organisations taking increased steps to reduce accidents. Given that tort reduction strategies are often best implemented at the organisation level, this may lead to a lower level of torts. Further, organisational immunity operating together with the usual partial volunteer defence, may result in an increasing level of torts, whilst simultaneously reducing volunteering levels.

The Case Against Organisational Protection

In Chapter 8 organisational protection was rejected, and the case made for a statutory (non-motor vehicle) volunteer protection regime, with a gross negligence threshold, where the volunteer carries out community work for an incorporated body, or a larger unincorporated association, and the volunteer's liability is statutorily transferred to the organisation. Chapter 8 argued that the traditional utilitarian arguments for organisational protection are problematic. It noted that whilst the tort of negligence may impact on the voluntary sector in a different way to for-profits and the public sector, and loss-spreading may (in some cases) function differently, they do not do so in such a way as to justify organisational protection. Organisational protection is undesirable given the need to regulate VSOs and provide accountability, combined with the change in the nature of the sector, the contract culture, and insurance. Whilst organisational protection may recognise the importance of the sector to society, society does not pay these costs. It concentrates loss, and is directly at the expense of volunteers and victims. Given the sector's role in providing for the vulnerable, in some cases with organisational protection those least able to bear the financial consequences of negligence will have to do so. It also has the potential to increase torts, and decrease volunteering.

Whilst the insurance market for VSOs may be different to for-profits, the market is an attractive one and there is competition for VSO business. Organisational protection is wholly disproportionate to the aim of protecting the sector from the potential cost of higher premiums.

Chapter 8 also rejected damages caps as arbitrary, discriminating between victims, and having a disproportionate impact on those harmed the most. They also fail to distinguish between risks, and appear to have limited impact on insurance costs.

The Case for Volunteer Protection

Chapter 8 argued that volunteer protection which offers partial protection to volunteers, and transfers the liability to the VSO, promotes enterprise liability, loss-spreading, and the deterrent and regulatory functions of tort. Deterrence is focused at the organisational level, where risk is best managed and mitigated. Volunteer protection also deals with the problem of potential over-deterrence at the volunteer level, and under-deterrence at the VSO level. It also encourages volunteering, whilst simultaneously providing for victims.

Volunteer protection is not a blunt tool designed to prevent poor victims from bringing claims; instead it may be a progressive device to facilitate volunteering, and provide victims with valuable claims that would be open to wealthier victims. It does not eliminate victim rights; instead it primarily functions to attribute the breach of duty to a third party, giving greater force to the victim's rights, or at least the consequent duty to compensate for breach of duty. This is since it is transferred to the organisation, the party best able to right the injustice and pay damages. Given these justifications protection should not apply to volunteers for grassroots unincorporated associations, although it should apply to large, sophisticated unincorporated associations. This also ensures that the former are not subjected to increased pressures to managerialise which may be generated by the organisational liability transfer, helping to maintain diversity, and retaining a role for less formalised volunteering.

Enhanced organisational liability, and the fact that volunteers are still accountable to the same standard of care at the organisational level, will help to prevent volunteer indifference. Organisations can also mitigate such risks through selection, training, and managing volunteers. Retaining volunteer liability for gross negligence, also preserves some of tort's

deterrent effect on volunteers, helping to prevent indifference. It is not the same as a no-duty rule; volunteers are still exposed to potential claims.

Given that volunteer protection is statutory, the objections of corrective justice theorists that we are unable to consider factors such as enterprise liability, deterrence, and loss-spreading can be swept aside. Further, as is demonstrated in Chapter 8 monist corrective justice theories have problems in explaining tort law, and the regular recourse of courts to these factors.

Introducing volunteer protection should be achieved by statute, not by the courts. It is not for the courts to introduce such major changes into the law, rather given the balance between the competing social interests and policies in the scheme this is best done in a Parliamentary setting. Further, introducing a personal partial defence, which does not apply to the organisation when sued vicariously, is only possible via statutory means. Likewise the need to ensure that the defence matches up with the liability transfer again points towards the need for statutory implementation to prevent the two from subsequently diverging.

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Appendix 1 – Draft Statute

Draft Protection of Volunteers Bill

Draft of a

BILL

To

Make provision to protect volunteers from civil liabilities for breach of a duty of care in tort, contract, or bailment, and to provide for victims.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: –

S1. Volunteers

In this Act –

(1) A volunteer is an individual who carries out community work for or through a voluntary sector organisation on a voluntary basis.

(2) For the purposes of subsection (1), an individual does community work on a voluntary basis if the person:

(a) receives no remuneration for doing that work other than:

(i) remuneration that the person would receive whether or not the person did that work; or

(ii) the reimbursement of reasonable expenses incurred by the person in doing that work; and

(b) does that work without expectation of any further payment (other than that provided for in (a)(i) or (a)(ii) above).

(3) An individual is not to be regarded as doing community work on a voluntary basis if:

(a) the individual is doing that work under an order imposed by a court; or

(b) the individual is doing that work by compulsion of law, or to fulfil a legal obligation.

(4) For the purposes of this Act community work is carried out by a volunteer for or through a voluntary sector organisation where that voluntary sector organisation authorises, organises, directs, or supervises the volunteer's community work.

S2. Voluntary Sector Organisation

In this Act –

(1) A voluntary sector organisation is:

(a) any incorporated body;

(b) any statutory body;

(c) any public authority;

(d) The Crown;

(e) any political party registered with the Electoral Commission;

(f) any large unincorporated body; or

(g) another entity prescribed under a regulation,

that authorises, organises, directs, or supervises the doing of community work whether or not as the principal purpose of the organisation.

(2) For the purposes of subsection (1), a large unincorporated body means any unincorporated body:

(a) with an annual revenue of £100,000 or greater;

(b) which employs five or more employees; or

(c) which has assets of £100,000 or greater.

(3) The following are deemed to be the unincorporated body's assets for the purposes of subsection (2)(c):

(a) assets held on trust for the unincorporated body's purposes or membership;

(b) assets which are available to the unincorporated body;

(c) assets which are jointly owned by the unincorporated body's membership; and

(d) assets which would be distributed if the unincorporated body were to be dissolved.

(4) An employee whether full time, or part time, counts as a single employee for the purposes of subsection (2)(b).

(5) An organisation is not to be regarded as a voluntary sector organisation if:

(a) the organisation is proscribed under the Terrorism Act 2000;

(b) the organisation authorises, organises, directs, incites, encourages, or supervises the commission of criminal offences;

(c) the organisation is or has been involved in organised crime;

(d) the organisation knowingly uses funds derived from unlawful activities;

(e) the organisation unlawfully discriminates against protected characteristics within the Equality Act 2010, or advocates for such unlawful discrimination; or

(f) the organisation was established by or on behalf of the volunteer primarily for the purposes of establishing the Section 4 defence for the volunteer.

S3. Community Work

In this Act –

(1) Subject to subsection (3), community work is any work or services:

(a) carried out for or through a charity;

(b) carried out for or through any statutory body or public authority;

(c) any work or services which are for:

(i) charitable;

(ii) educational;

(iii) religious;

(iv) benevolent;

(v) philanthropic;

(vi) sporting;

(vii) recreational;

(viii) cultural;

(ix) civic;

(x) welfare;

(xi) health;

(xii) environmental; or

(xiii) political;

purposes; or for the purpose of promoting the common interests of the community generally or of a particular section of the community;

(d) looking after, or providing medical treatment or attention for, people who need care because of a physical or mental disability, injury, or condition; or

(e) for a purpose prescribed by regulations;

but does not include work of a kind that is prescribed by regulations as work that is not to be regarded as community work for the purposes of this Act.

(2) For the purposes of this Act work or services may include office holding within a voluntary sector organisation.

(3) Community work does not include any work or services which:

(a) involve the commission of serious criminal offences; or

(b) discriminate against protected characteristics within the Equality Act 2010, or advocates for such discrimination; or

(c) are solely for the benefit of a volunteer, or for their household, or family.

(4) For the purposes of this Act a serious criminal offence is:

(a) any offence which is triable only on indictment; and

(b) any offence which may be punishable on conviction with a period of imprisonment.

S4. Protection from Liability

(1) A volunteer is not personally liable in any civil proceedings for breach of a tortious or contractual or bailment duty of care for any act, default, or omission by the volunteer when carrying out community work for or through a voluntary sector organisation.

(2) The protection from personal liability conferred on a volunteer by subsection (1) shall not apply to any act, default, or omission by the volunteer:

(a) if the volunteer's act, default, or omission was grossly negligent; or

(b) where the claim arises out of a motor vehicle accident to which the compulsory insurance requirements under Part VI of the Road Traffic Act 1988 applies; or

(c) where the volunteer's ability to do the community work in a proper manner was, at the relevant time, significantly impaired by alcohol or recreational drugs; or

(d) the volunteer knew or ought reasonably to have known that the act, default, or omission was:

(i) outside the scope of the voluntary work authorised, organised, directed by, or supervised by the voluntary sector organisation concerned; or

(ii) contrary to the instructions of the voluntary sector organisation concerned.

(3) For the purposes of this section:

(a) recreational drugs means drugs taken voluntarily otherwise than for prescribed medicinal purposes, or lawful and reasonable therapeutic purposes.

(b) alcohol in subsection (2)(c) does not include alcohol that was not consumed voluntarily.

S5. Gross Negligence

In this Act –

(1) Gross negligence constitutes an act, default, or omission which is:

(a) a serious error;

(b) appreciably higher in magnitude than ordinary negligence;

(c) represents considerable mismanagement, considerable ignorance, or the absence of attentive conduct in general; and

(d) which a reasonable person would perceive to entail a high degree of risk of harm to others coupled with heedlessness, or indifference to, or disregard of the consequences.

(2) The heedlessness, indifference, or disregard in paragraph (d) need not be conscious.

S6. Insurance Waiver

For the purposes of this Act –

(1) Where a volunteer has liability insurance, or benefits from an insurance policy, the volunteer is deemed to have waived the protection provided to them by Section 4, up to the extent that the liability is covered by the policy of insurance.

(2) Where liability exceeds the limits of the policy of insurance, the waiver in subsection (1) only applies up to and including those limits.

S7. Voluntary Sector Organisation Liability

(1) Any civil liability that would but for Section 4 attach to the volunteer attaches instead to the voluntary sector organisation for or through which the volunteer carries out community work.

(2) If more than one voluntary sector organisation is involved in authorising, organising, directing, or supervising the volunteer's community work referred to in Section 3, liability is attached jointly and severally to the voluntary sector organisations.

(3) The voluntary sector organisation's liability provided for in subsections (1) and (2) applies irrespective of whether the waiver of the volunteer's protection in Section 6 applies.

(4) Where but for the volunteer's gross negligence the criteria of Section 4 would be met, the voluntary sector organisation is jointly and severally liable with the volunteer for the volunteer's civil liability.

(5) For the purposes of subsection (4) if more than one voluntary sector organisation is involved in authorising, organising, directing, or supervising the volunteer's community work referred to in Section 3, the voluntary sector organisations are jointly and severally liable with the volunteer for the volunteer's civil liability.

(6) No protection provided to volunteers by this Act applies to any claim brought against any other person.

S8. Indemnities and Contribution

(1) An agreement, undertaking, or arrangement has no effect to the extent that it provides for a volunteer to give a voluntary sector organisation an indemnity against, or to make a contribution to a voluntary sector organisation in relation to, a civil liability that:

(a) the volunteer would incur but for the operation of Section 4; or

(b) which the voluntary sector organisation incurs under Section 7(1)-(3); or

(c) which the voluntary sector organisation incurs as a result of the volunteer's acts, defaults, or omissions which have given rise to the operation of Section 4, or which would give rise to the operation of Section 4 if the volunteer had been sued.

S9. Large Unincorporated Voluntary Sector Organisations

(1) Where the voluntary sector organisation to which liability in Section 7 is attached is a large unincorporated body as defined in Section 2(2):

(a) the large unincorporated body is capable of being sued in its own name in proceedings relating to Section 7, or in a name reasonably sufficient to identify the organisation;

(b) where subsection (1)(a) applies the organisation must be so sued, and the members or trustees may not be sued in their capacity as members or trustees;

(c) a judgment, order, or award made in proceedings brought under Section 7 against a large unincorporated body is enforceable, by way of execution, diligence, or otherwise, against any property held in trust for it, its purposes, or its membership, to the same extent and in the same manner as if it were a body corporate;

(d) a judgment, order, or award made in proceedings brought under Section 7 against a large unincorporated body is enforceable, by way of execution, diligence, or otherwise, against any property held jointly or in common by the membership to the same extent and in the same manner as if it were a body corporate; and

(e) a judgment, order, or award made in proceedings brought under Section 7 against a large unincorporated body is enforceable, by way of execution, diligence, or otherwise, against any property which would be available to the membership if the large unincorporated body was dissolved.

(2) Subsections (1)(b)-(e) have effect subject to Section 10 (restriction on enforcement of awards against certain property).

S10. Restriction on Enforcement

(1) Where in any proceedings under Sections 7 or 9 an amount is awarded by way of damages, costs, or expenses:

(a) against an unincorporated body;

(b) against trustees in whom property is vested in trust for an unincorporated body, its purposes, or membership, in their capacity as such; or

(c) against members or officers of an unincorporated body on behalf of themselves and all of the members of the unincorporated body;

no part of that amount is recoverable by enforcement against any protected property.

(2) The following is protected property:

(a) property belonging to the trustees otherwise than in their capacity as such;

(b) property belonging to any member or officer of the unincorporated body otherwise than jointly or in common with the other members; and

(c) property belonging to volunteers or officers who are neither members nor trustees.

S11. Large Unincorporated Body Insurance etc

A large unincorporated body –

(1) may insure itself for liabilities under Sections 7 and 9 of this Act to the same extent and in the same manner as if it were a body corporate; and

(2) shall not be treated as if it were a body corporate except to the extent authorised by the provisions of this Act, and any other statute.

S12. Judgment Proofing

Where a voluntary sector organisation has insufficient assets, property, or insurance to satisfy a judgment, order, or award made in proceedings brought under Section 7:

(1) the voluntary sector organisation may at any time appoint a substitute defendant with sufficient assets, property, or insurance to satisfy judgment, with the consent of the substitute defendant as a substitute defendant for the voluntary sector organisation.

(2) the court may make an order that the claim is to proceed against the trustees of an associated trust of the voluntary sector organisation on behalf of that voluntary sector organisation as a substitute defendant.

(i) For the purposes of this Act an associated trust of the voluntary sector organisation includes a trust that was formerly an associated trust of the voluntary sector organisation if the court considers that the trust ceased to be an associated trust in an attempt to avoid trust property being applied to satisfy any liability that may be incurred under this Act.

(ii) Liability of a trustee of an associated trust of the voluntary sector organisation incurred by the trustee as a substitute defendant through proceedings under this Act is limited to the value of the trust property, and insurance.

(iii) The satisfaction of any liability incurred by a trustee of an associated trust of the voluntary sector organisation as a substitute defendant through proceedings under this Act is a proper expense for which the trustee may be indemnified out of the trust property, irrespective of any limitation on any right of indemnity a trustee may have.

(iv) A trustee of an associated trust of the voluntary sector organisation is not liable for a breach of trust only because of doing anything authorised by this Act.

(v) Liability incurred by the trustee as a substitute defendant includes any unpaid judgment debt arising from the proceedings, any amount paid in settlement of the proceedings, and any costs associated with the proceedings.

(3) the court may make an order that the claim is to proceed against an associated incorporated body of the voluntary sector organisation on behalf of that voluntary sector organisation as a substitute defendant.

(i) For the purposes of this Act an associated incorporated body of the voluntary sector organisation includes an incorporated body that was formerly an associated incorporated body of the voluntary sector organisation if the court considers that the incorporated body ceased to be an associated incorporated body in an attempt to avoid property being applied to satisfy any liability that may be incurred under this Act.

(4) the substitute defendant, appointed via subsections (1)-(3) is treated for the purposes of the litigation and enforcement as if it were the voluntary sector organisation.

(5) the substitute defendant incurs any liability from the claim in the proceedings on behalf of the voluntary sector organisation that the voluntary sector organisation would have incurred.

(6) the substitute defendant is responsible for conducting the proceedings as the defendant.

(7) the substitute defendant may seek indemnity or contribution from the voluntary sector organisation for any costs incurred in the proceedings, or in satisfying any settlement, judgment, order, or award made in the proceedings.

S13. Identification Applications

(1) On the making of an application by a claimant under Section 12, the voluntary sector organisation must, within 28 days after the application is made, identify to the court, any associated trusts of the voluntary sector organisation and any associated incorporated bodies of the voluntary sector organisation, including identifying the financial capacity of those potential substitute defendants.

S14. Associated Trusts and Associated Incorporated Bodies

For the purposes of this Act:

(1) A trust is an associated trust of a voluntary sector organisation, if one or more of the following apply:

(a) the voluntary sector organisation has, either directly or indirectly, the power to control the application of the income, or the distribution of the property, of the trust;

(b) the voluntary sector organisation has the power to obtain the beneficial enjoyment of the property or income of the trust with or without the consent of another entity;

(c) the voluntary sector organisation has, either directly or indirectly, the power to appoint or remove beneficiaries of the trust;

(d) the trustee of the trust is under an obligation, whether formal or informal, to act according to the directions, instructions or wishes of the voluntary sector organisation;

(e) the voluntary sector organisation has, either directly or indirectly, the power to determine the outcome of any other decisions about the trust's operations;

(f) a member or officer of the voluntary sector organisation has, under the trust deed applicable to the trust, a power of a kind referred to in subsections

(1)(a)–(e) but only if the trust has been established or used for the activities of the voluntary sector organisation or for the benefit of the voluntary sector organisation.

(2) An associated incorporated body of the voluntary sector organisation is:

(a) an incorporated body which is able to be sued in England and Wales; and

(b) either:

(i) a subsidiary body, owned, directed, or controlled (directly or indirectly) by the voluntary sector organisation; or

(ii) a parent body of the voluntary sector organisation, which owns, directs, or controls (directly or indirectly) the voluntary sector organisation.

(3) Sections 12 and 13 have effect subject to Section 10 (restriction on enforcement of awards against certain property).

S15. State Indemnity

(1) The relevant state, public, or statutory authority, will satisfy judgment damages and costs in proceedings brought under Sections, 7, 9, or 12, where all of the following conditions are met:

(a) where a voluntary sector organisation has insufficient assets, property, or insurance to satisfy a judgment, order, or award made in proceedings brought under Section 7;

(b) where there is no associated trust of a voluntary sector organisation, and no associated incorporated body of the voluntary sector organisation, which are able to satisfy the judgment, order, or award made in proceedings brought under Sections 7, 9, or 12;

(c) where the voluntary sector organisation delivers work or services under contract with the state, or under contract with any other public, or statutory authority, and the liability under Sections 7, 9, or 12 arises out of the delivery of the contracted work or services;

(d) at the time of entry into the contract, or during the performance of the contract, the relevant state, public, or statutory authority, or its agents had reason to believe that the voluntary sector organisation had insufficient assets, property, or insurance to satisfy a judgment, order, or award made in proceedings brought under Section 7; and

(e) where no other damages claim is reasonably available to the claimant for the harm, against any other defendant able to satisfy judgment.

(2) The relevant state, public, or statutory authority, will only satisfy judgment under subsection (1):

(a) where the claimant has taken all reasonable steps to recover from the defendant and substitute defendants;

(b) only to the extent that the defendant(s) and substitute defendant(s) in proceedings brought under Sections, 7, 9, or 12, are unable to meet the judgment in full; and

(c) only for sums in excess of those recoverable by the claimant from the defendant and substitute defendant, or their insurers.

(3) Where the relevant state, public, or statutory authority, is required to satisfy judgment damages and costs under the provision of this section the relevant state, public, or statutory authority may seek indemnity or contribution from the voluntary sector organisation, or from its associated trusts, or from its associated incorporated bodies for any costs incurred in the proceedings, or in satisfying any settlement, judgment, order, or award made in the proceedings.

S.16 Volunteer Assistance in Defence of Litigation

Where the volunteer unreasonably refuses a request from the voluntary sector organisation, or any substitute defendant, to assist them in defending any claim brought against the voluntary sector organisation or substitute defendant under this Act, the volunteer's protection under Section 4(1) is deemed waived by the volunteer.

S.17 Application

(1) The provisions of this Act come into force on the day on which this Act is passed.

(2) This Act extends only to England and Wales.

(3) This Act shall not apply to any cause of action that accrued before its commencement.

(4) Nothing in this Act applies to contracts made before the date on which it comes into force; but subject to this, it applies to liability for any loss or damages for breach of a tortious or contractual or bailment duty of care which is suffered on or after that date.

S.18 Regulations

(1) In so far as this Act confers power to make regulations, the power to make regulations under this Act resides in the Secretary of State.

(2) The regulations made by the Secretary of State under powers within this Act are to be made by statutory instrument.

(3) Any regulations under this Act:

(a) may make provision generally or only for specified cases or circumstances;

(b) may make different provision for different cases, circumstances, or areas; and

(c) may make incidental, supplementary, consequential, transitional, transitory, or saving provision.

(4) To adjust for inflation the Secretary of State may by regulations vary the required sums under Section 2(2)(a), and Section 2(2)(c) which define a large unincorporated body.

(5) A statutory instrument containing any order or regulations under this Act is subject to annulment in pursuance of a resolution of either House of Parliament.

S.19 Short Title

This Act may be cited as the Protection of Volunteers Act [Year].

S.20 Financial Provisions

There is to be paid out of money provided by Parliament any expenditure incurred in consequence of this Act by a Minister of the Crown, government department or other public authority.