

## PERSONAL INJURY BAR ASSOCIATION CONFERENCE

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### VICARIOUS LIABILITY AND NON-DELEGABLE DUTIES

Last week I gave a lecture in Cambridge entitled ‘Principle and pragmatism in private law’. I illustrated it by reference to developments in the wrongful birth cases in tort, the illegality defence in contract, tort and restitution, and the recognition of marital agreements in family law. But perhaps developments in the related fields of vicarious liability and non-delegable duty would have been the best illustration of all – is there any other field in which pragmatism has been more dominant than principle – or, to put it another way, policy has more obviously prevailed over doctrine - in recent years? The message of my Cambridge lecture was generally in favour of principle over pragmatism, yet I have been party to all four of the recent Supreme Court decisions expanding vicarious liability, as well as the expansion of the scope of non-delegable duties, so perhaps once more I can be accused of ‘cognitive dissonance’.<sup>1</sup> We shall see.

In the first of those cases, *Various Claimants v Catholic Child Welfare Society*, the *Christian Brothers* case, Lord Phillips announced that ‘The

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<sup>1</sup> BC Jones, ‘Dissonant constitutionalism and Lady Hale’ (2018) 19(2) *King’s LJ* 177.

law of vicarious liability is on the move'.<sup>2</sup> In the second, *Cox v Ministry of Justice*, Lord Reed announced that it had not yet come to a stop.<sup>3</sup> Those cases were about the relationship between the defendant and the tortfeasor. But in the third, *Mohamud v Wm Morrison Supermarkets*, Lord Dyson said that there was 'no need for the law governing the *circumstances* in which an employer should be held vicariously liable for a tort committed by his employee to be on the move. There had been no changes in societal conditions which require such a development'.<sup>4</sup> But many people would say that *Mohamud* also marked such a move. And the law has moved on again in *Armes v Nottinghamshire County Council*.<sup>5</sup>

Remarkably, these changes have attracted almost complete unanimity among the justices (apart from Lord Hughes' dissent in *Armes*) and relatively little public (as opposed to academic) criticism. Perhaps this is because the express focus on what is just is so appealing, although it is, like so much of the law of tort, 'void for vagueness'. Lord Dyson acknowledged in *Mohamud* that 'this is an area in which imprecision is inevitable. To search for certainty and precision in vicarious liability is to under take a quest for a chimaera.'<sup>6</sup>

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<sup>2</sup> [2012] UKSC 56, [2013] 2 AC 1.

<sup>3</sup> [2016] UKSC 10, [2016] AC 660, para 1.

<sup>4</sup> [2016] UKSC 11, [2016] AC 677, para 56.

<sup>5</sup> [2017] UKSC 60, [2018] AC 355.

<sup>6</sup> *Loc cit*, para 54.

It is also an area in which the judges themselves have been unusually frank about the role of policy in their decisions. The seminal discussion is that of Madam Justice McLachlin in the Supreme Court of Canada in *Bazley v Curry*<sup>7</sup>. She pointed out that ‘Vicarious liability has always been concerned with policy...(but) a focus on policy is not to diminish the importance of legal principle . . . the best route to enduring principle may well lie through policy’. She identified two policy concerns.

The first was to provide a just and practical remedy to people suffering harmful consequences from wrongdoing perpetrated by an employee. A person who employed others to advance his or her own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise. This policy goal embraces subsidiary goals, such as the goal of effective compensation, so long as it seems just to place liability on an employer. The employer puts into the community an enterprise which carries certain risks and it is fair that he who creates the risk should bear the loss. The employer is also best placed to spread losses through mechanisms such as insurance and higher prices. The second concern is the deterrence of future harm and the encouragement of efficient organisation and supervision. But Justice McLachlin also recognised the countervailing consideration that it was

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<sup>7</sup> [1999] 2 SCR 534, from para 26.

unjust to relegate the employer to the status of an involuntary insurer where there had been independent wrongdoing by an employee.

In *Christian Brothers* Lord Phillips described the policy objective underlying vicarious liability (para 34) as ‘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. Such defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread’ (para 34). As Lord Hobhouse had pointed out in *Lister v Hesley Hall*<sup>8</sup>, the policy reasons making it fair, just and reasonable to impose vicarious liability are not the same as the criteria for doing so. ‘One cannot, however, consider the one without the other and the two sometimes overlap’.

Lord Phillips set out five policy reasons justifying the imposition of vicarious liability on employers (in para 35):

- (i) An employer is more likely to have the means to compensate and can be expected to have insurance;

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<sup>8</sup> [2002] 1 AC 215, para 60.

- (ii) The employee's activity will be undertaken on the employer's behalf;
- (iii) The employee's activity will be part of the employer's enterprise;
- (iv) The employer will have created the risk of the tort; and
- (v) To a greater or lesser extent the employee will be under the control of the employer. But the significance of control today is that the employer can conduct what the employee does rather than how he does it (para 36).

But later on in the judgment (para 47), he appears to be turning those five factors into the criteria for imposing vicarious liability where the relationship is not one of employment but has the same incidents as those of employment.

In *Cox*, Lord Reed also seemed to be treating those policy factors as criteria, although he also said that they were not all equally significant. Of the first, he said that 'the mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure

themselves because they are liable; they are not liable because they have insured themselves' (para 20). And control was only relevant in that the absence of 'even that vestigial degree of control would be liable to negate the imposition of vicarious liability' (para 21). In *Armes*, the five factors were definitely treated as criteria indicating when the relationship was sufficiently akin to employment to justify the imposition of vicarious liability. Each, including the ability to satisfy a judgment (para 63) was treated as an independent factor pointing towards liability.

There is abundant academic criticism of the role of policy. For example, Andrew J Bell has said 'an impression might be thought to be slowly building of [vicarious liability] as a creature of almost pure policy used (only) as a bandage where primary liability fails to secure the substantive (monetary) result thought most fair and reasonable on the facts'.<sup>9</sup> Andrew Dickinson says of *Armes* that 'instead of seeking out a clear, principled basis for imposing liability on those who have committed no wrong, judges have relied instead on a casserole of incommensurable policy reasons and general resort to what is 'fair' and 'just' to support the doctrine'.<sup>10</sup> He suggests that 'the decision in *Armes* reminds us that

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<sup>9</sup> AJ Bell, "Double, double toil and trouble": recent movements in vicarious liability' [2018] *JPIL* 235.

<sup>10</sup> A Dickinson, 'Fostering Uncertainty in the Law of Tort' (2018) 134 *LQR* 359.

vicarious liability is now no more than a blunt tool for giving effect to judicial instincts for social justice’.

So how fair is that in the light of what those cases actually decided?

Traditionally, as everyone knows, vicarious liability involved two questions: (1) was there a true relationship of employer/employee between the defendant and the actual wrongdoer? and (2) was the wrongdoer acting in the course of his employment when he committed the tortious act?

*The relationship between the defendant and the wrongdoer*

The first steps in the significant extension of the employment relationship were driven by cases involving the sexual abuse of children by priests who were not in traditional employment arrangements. Once again it was led by Canada, in *John Doe v Bennett*,<sup>11</sup> where the Canadian Supreme Court held that the relationship between a bishop and priest in a diocese was ‘akin to an employment relationship’. In *Christian Brothers*, it was held that the aspects of the employment relationship which generally justify the imposition of vicarious liability can equally be found in

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<sup>11</sup> [2004] 1 SCR 436.

relationships beyond employment. The relationship between the teaching brothers and the Institute had many of the elements, and all of the essential elements, of the relationship between employer and employee (para 56). (i) The Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. They entered into contracts of employment with the Catholic Child Welfare Society, but this was because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the Institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules. The relationship was different from that of employer and employee in only two respects (para 57). (i) The brothers were bound to the Institute not by contract, but by their vows. And (ii) Far from the Institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the Institute. The institute catered for their needs from these funds. But neither of these differences were material. Indeed they rendered the relationship between the brothers and the Institute closer than that of an employer and its employees (para 58).

In *Cox*, the five policy factors set out in *Christian Brothers* were applied in the wholly different setting of prisoners working in a prison kitchen. Despite the rehabilitative, non-commercial setting of the prisoner work scheme, the activities of the prisoners were integrated into the prison's enterprise and for its benefit insofar as the kitchen work facilitated the running of the prison. The element of compulsion and the minimal wages did not undermine the employment analogy. *Cox* therefore confirmed the potential of *Christian Brothers* to expand into many forms of relationship outside the traditional sphere, although to our minds, the relationship between the prison and the prisoners was in fact even closer than that between an employer and employee.

*Armes* involved a further expansion, to cover the liability of a local authority for the abuse perpetrated by foster parents looking after children who were in the care of the local authority. Lord Reed applied the five *Christian Brothers* factors and found that foster parents were not carrying on an independent business of their own but providing the care as an integral part of the local authority's organisation of its child care services. Despite the absence of daily control, the foster parents were not in the same position as parents; it was impossible to draw a sharp line between the authority and the foster parents. The torts committed against the child were in the course of an activity carried on for the benefit of the local

authority. But the absence of day to day control created a risk of abuse of vulnerable children. The authority exercised powers of approval, inspection, supervision and removal without parallel in normal family life, and the foster parents had insufficient means to meet an award of damages. Lord Hughes, dissenting, thought that the local authority's control only extended to where the children should live; the foster parents did not provide what the authority would otherwise provide.

*Armes* is of course interesting for two reasons. One is the inter-relationship between vicarious liability and non-delegable duty, to which I shall return. The other is the expansion of vicarious liability beyond relationships which look very like employment. Andrew Dickinson has commented that Lord Reed undid his own good work in *Cox* of reducing Lord Phillips' five factors to three – both control and resources played an important part in *Armes*. He also comments that the reliance on the local authority's statutory duties sits oddly with *Robinson v Chief Constable of West Yorkshire Police*,<sup>12</sup> where Lord Reed said that 'public authorities are generally subject to the same liabilities in tort as private individuals and bodies' rather than statutory duties operating to extend common law liabilities.

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<sup>12</sup> [2018] UKSC 4, [2018] 2 WLR 595.

*Armes* has also called in question the status of the long-standing rule that vicarious liability does not lie for the acts of independent contractors. The question is whether the five ‘incidents’ rendering a relationship ‘akin to employment’ identified in *Christian Brothers* and applied in *Cox* and *Armes* have overtaken the need to consider the conventional tests for independent contractors. The Court of Appeal appears to have thought so in *Various Claimants v Barclays Bank*.<sup>13</sup> Between 1968 and 1984, Dr Bates carried out medical examinations of employees or prospective employees of Barclays for a fixed fee. He is alleged to have sexually abused the 126 claimants. The High Court and the Court of Appeal found that he was in a position akin to employment. Mrs Justice Nicola Davies framed the question solely as whether the relationship was one of employment or akin to employment and did not deal with the traditional exception for independent contractors. The Court of Appeal held that there will be cases of independent contractors where vicarious liability will be established. The medical examination was plainly integrated into the selection process. The doctor was instructed to examine chests and genitalia which created the risk of sexual abuse. These directions as to how the doctor should do the examination evidenced sufficient control by the bank. We have recently given permission to appeal in this case.

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<sup>13</sup> [2018] EWCA 1670.

Whether the Supreme Court will take the opportunity to bring the movement to a stop remains to be seen.

A curious thought which occurred to me, reading the parties' arguments in the PTA application, was whether there was a parallel here with employment law. Employment law recognises three categories of people who work: persons employed under a contract of service; persons not so employed but who are engaged personally to perform the work; and pure independent contractors who are in business on their own account. Might the factors which put the Pimlico plumber<sup>14</sup> into the second rather than the third category prove useful in a vicarious liability context?

*The connection between the relationship and the wrongdoing*

The classic test is that an employer is liable for the torts of employees at common law only when those torts come within the scope of or are committed in the course of the employment. Once again, a new approach was heralded in the Supreme Court of Canada, in *Bazley v Curry*.<sup>15</sup> Madam Justice McLachlin said that the courts should openly confront the question of whether liability should lie rather than obscuring the decision beneath semantic discussion of the 'scope of employment' and the 'mode

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<sup>14</sup> *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511.

<sup>15</sup> [1999] 2 SCR 534.

of conduct'. The fundamental question was whether the conduct was 'sufficiently related' to conduct authorised by the employer to justify the imposition of vicarious liability. Factors which might be relevant to consideration of the creation or enhancement of risk included:

- The opportunity the enterprise afforded the employee to abuse his power;
- The extent to which the wrongful act might have furthered the employer's ends (and hence be more likely to have been committed by the employee);
- The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- The extent of power conferred on the employee in relation to the victim;
- The vulnerability of potential victims to the wrongful exercise of the employee's power.

In *Lister v Hesley Hall Ltd*,<sup>16</sup> *Bazley* was treated as clarifying the classic test. Lord Steyn's test was whether the acts in question were 'so closely connected with the employment that it would be fair and just to hold the employers vicariously liable'. Only Lord Millett endorsed the *Bazley* test of the creation of risk. In *Christian Brothers*, Lord Phillips said (at para 87):

'I do not think it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, by itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability'.

In *Mohamud*, Lord Toulson pointed out that it is not necessary to conduct a retrospective assessment of the degree to which the employee in question would have been considered to present a risk: the risk of an employee misusing his position is one of life's unavoidable facts (para 40). He applied a two-stage test: what was the nature of the job (the employee's 'field of activities') and was there a sufficient connection with the tort to make it right for the employer to be liable as a matter of social justice (paras 44 and 45). On the facts of that case, the petrol

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<sup>16</sup> [2001] UKHL 22, [2002] 1 AC 215.

station attendant's first encounter with the customer was in the field of his activities and what followed thereafter was 'an unbroken sequence of events'. In this way the court distinguished the facts of *Warren v Henlys*,<sup>17</sup> where the sequence was broken by the customer going away to summon the police. It would have been a different matter if the petrol pump attendant had punched the customer because he believed that the customer was making off without payment (para 32). (Once again, Andrew Dickinson is unhappy. He considers this a much less precise and dilute causal requirement than the creation of risk emphasised by Lord Philips in *Christian Brothers*.) There is a concern that *Mohamud* will lead to employers being held liable for anything that the employee does at work and on the employer's premises – ie that the employment offers the opportunity to commit the tort rather than creates the risk of its happening.

There were two Court of Appeal decisions in October 2018 in which the *Mohamud* approach was applied.

In *Various Claimants v Wm Morrisons Supermarket Plc*<sup>18</sup> the employer was held vicariously liable for the criminal actions of a rogue employee entrusted with personal data. The employee uploaded the payroll data of

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<sup>17</sup> [1948] 2 All ER 925.

<sup>18</sup> [2018] EWCA Civ 2339, [2019] 2 WLR 99.

100,000 employees to a file sharing website and sent it to newspapers some months after downloading the data from work. He was motivated by a grudge against his employer. The Court of Appeal upheld trial judge's finding of a close connection – the tortious acts were within the field of activities assigned to the employee and part of a seamless and continuous sequence of events. *Morrison* have applied for permission to appeal to the Supreme Court but the outcome of that application is not yet known.

There has been no application (at least yet) for permission to appeal in *Bellman v Northampton Recruitment Limited*.<sup>19</sup> The claimant was assaulted and badly injured by the managing director of the defendant company, at a late night drinking session after the office Christmas party. The argument related to a work dispute. The judge concluded there was insufficient connection with the managing director's field of activities, but the Court of Appeal disagreed. He was seeking to exercise authority over his subordinate employees and 'drove home his managerial authority, with which he had been entrusted, with the use of blows...the attack arose out of a misuse of the position entrusted to Mr Major as managing director' (para 25).

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<sup>19</sup> [2018] EWCA Civ 2214.

### *Non-delegable duties*

These developments in vicarious liability have gone hand in hand with the Supreme Court reviewing the law relating to non-delegable duties. Both routes to liability were argued in *Armes*.

Exceptionally, a person under a duty to take care may not delegate that duty to another person, even though he may delegate the actual performance of the task. His duty is to ensure that care is taken by whoever performs the task.

In *Woodland v Swimming Teachers Association*,<sup>20</sup> Lord Sumption reflected that English law had long recognised that non-delegable duties exist but did not have a single theory to explain when or why. But one such category (derived from the hospital cases) was where there was a relationship between the holder of the duty of care and the claimant, which had three critical characteristics: (i) the duty arose from the antecedent relationship between the parties; (ii) the duty was a positive or affirmative duty to protect a particular class of persons against a particular class of risks, not simply a duty to refrain from acting in a way

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<sup>20</sup> [2013] UKSC 66, [2014] AC 537.

which foreseeably caused injury; (iii) the duty was personal to the defendant – only the work itself could be delegated.

Five factors were required to establish a non-delegable duty of this kind:

(i) the vulnerability of the claimant; (ii) the existence of a relationship giving the defendant a degree of protective custody and control over the claimant; (iii) the claimant having no control over how the defendant chooses to perform its obligations towards her; (iv) delegation of that custody and control to another person; and (v) negligence in the performance of that function.

As always, a decision of this sort gives rise to questions about where the lines are to be drawn. Paula Giliker<sup>21</sup> tests the boundaries by posing three scenarios: (i) a school contracts out the supply of school lunches, and children suffer food poisoning; (ii) on a school trip to see Hamlet as part of English studies a pupil is injured by an actor or indecently assaulted in a Q & A session afterwards; or (iii) on an optional school skiing trip, a pupil is injured by the negligence of a ski instructor. Existing decisions appear to give a negative answer to (iii), where the trip

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<sup>21</sup> P Giliker, 'Vicarious Liability, non-delegable duties and teachers: can you outsource liability for lessons?' [2015] *PN* 259.

was optional and the ski instructor akin to the zoo keeper on a school trip to the zoo. But the answer is not so clear in the first two.<sup>22</sup>

However, it is clear that in vicarious liability, the focus is on the relationship between the defendant and the wrongdoer, whereas with this category of non-delegable duty, the focus is on the relationship between the defendant and a vulnerable claimant.

Some might think that the *Woodland* factors applied in the *Armes* situation, because children in care are undoubtedly vulnerable, the authority has parental responsibility for them, the child has no control over how the authority chooses to exercise that responsibility, the authority has exercised it by choosing the type of placement and the actual placement, and the foster parents are exercising de facto parental responsibility over the child.

However, in *Armes* the Supreme Court found that local authorities were in loco parentis and there was no duty on parents to ensure that care was taken by anyone else to whom they had entrusted the safety of the child.

There might be a conflict with the statutory duty to promote a child's best interests if local authorities were strictly liable for any negligence towards

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<sup>22</sup> When put to the vote at the PIBA conference, most thought that there would be liability in (i) but were less clear about (ii).

children in their care who were allowed to stay with their families or friends. Local authorities should not become a form of state insurance for the actions of the child's family members.

Once again, Andrew Dickinson is critical of this aspect of *Armes*.<sup>23</sup> First, vicarious liability is suggested to be a residual category of liability which is not engaged if the defendant is directly liable for the harm caused by a third party. This seems intuitively out of line with the historical relationship between vicarious liability and non-delegable duties, the latter having been relied on principally in cases falling beyond the prevailing limits of vicarious liability (as in the hospital cases). But Lord Reed dealt first with the non-delegable duty claim before proceeding to the vicarious liability claim.

Second, the finding that the foster parents were 'an integral part of the local authority's organisation of its child care services' conflicts with one of Lord Reed's principal reasons for rejecting the non-delegable duty claim: 'the duty of the local authority is not to perform the function in the course of which the claimant was abused (namely, the provision of daily care) but rather to arrange for, then monitor, its performance' (para 47). The latter position reflects a narrower view of the local authority's

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<sup>23</sup> *Loc cit.*

enterprise than the former. Lord Hughes' opinion is in his view preferable: the local authority controls are in reality decisions about where the children should live, rather than about how they should be looked after.

But is it necessarily the case that vicarious liability and a non-delegable duty cannot live together? Might there not be situations where both apply?

*Woodland* too is not without its critics. Jonathan Morgan<sup>24</sup> suggests that the *Woodland* principles have compounded the difficulties of ascertaining liability for the acts of independent contractors in tort, in contrast with contract. He suggests that the issue of independent contractors should be confronted squarely. Lord Sumption in *Woodland* imposed the non-delegable duty where the parties had an 'antecedent relationship'. He was troubled by the fact that private schools and private healthcare providers would be liable – 'there was no rational reason why the mere absence of consideration should lead to an entirely different result when comparable services are provided by a public authority'. But Morgan questions the

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<sup>24</sup> J Morgan, 'Liability for independent contractors in contract and tort: duties to ensure that care is taken' [2015] *CLJ* 109.

assertion that the local authorities had ‘voluntarily assumed responsibility’ and suggests this ignores the fact that people can always in principle bargain for greater rights including protection against injury through a contract. *Woodland* had passed from the trite observation that had a contract existed between the parties, the defendant would have been liable, to assert that *therefore* there must be liability in tort.

The claimant’s legal difficulties in *Woodland* were occasioned by the outsourcing or contracting out of service provision. Morgan suggests that the Supreme Court simply assumed that outsourcing should not worsen the claimant’s position. Yet it is commonplace that greater liabilities may be assumed in contract than would exist in tort. For example, private security services might be liable for the negligent performance of duties under contract where police would not (this was before *Robinson* clarified the police liability for the negligent performance of tasks foreseeably causing physical harm to a claimant); and in *MacFarlane v Tayside Health Board*,<sup>25</sup> Lord Slynn acknowledged that the costs of bringing up a child in a wrongful birth case might have been recoverable by contract. In Morgan’s view, ‘Tort law would collapse if its internal structure were replaced by speculation about the liabilities that parties might have assumed by contract’.

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<sup>25</sup> [2000] 2 AC 59.

However, Morgan welcomed my rare ‘judicial frankness’ in identifying the non-delegable duty as a ‘ready answer’ to the lacuna in modern hospitals and schools using agency nurses and supply teachers. He speculates that *Woodland* could provide the seed from which the revolution to expand vicarious liability to independent contractors might grow.

So there we are. Are we (a) in a mess, or (b) in the midst of principled incremental development of the law?<sup>26</sup>

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<sup>26</sup> When put to the vote at the PIBA conference, there was a large majority for (b).