

Vicarious Liability

Where are we, how did we get here, and where might we be heading?

Introduction

1. This paper follows and is intended to supplement the on-line seminar given on 28th May 2020. It comprises 4 sections:
 - 1.1. An introduction to the concepts;
 - 1.2. A discussion of the law prior to 2020;
 - 1.3. An analysis of the most recent decisions of the Supreme Court; and
 - 1.4. Some speculations as to where the law might go next.
2. The objects of this paper are therefore ambitious if not foolhardy, but it is hoped that some firmer conclusion can be drawn in the light of the recent Supreme Court decisions in *Various Claimants v Morrisons* (“*Morrisons*”)¹ and *Various Claimants v Barclays Bank* (“*Barclays*”).²

Section 1: The Concept of Vicarious Liability

3. Vicarious liability is a rule of strict liability, whereby one party (“the principal”) is liable to an injured party (“the victim”) for loss or damage wrongfully inflicted by a third party (“the primary tortfeasor”).
4. Where the rule applies, the principal is so liable irrespective of an absence of personal fault on his part.
5. The reason for the existence of the principle is that the primary tortfeasor will be liable in damages to the victim but may not have the means to pay. Thus, the law takes (in an

¹ *Various Claimants v Morrisons* [2020] UKSC 12

² *Various Claimants v Barclays Bank* [2020] UKSC 13

appropriate case) the policy decision that the principal ought to be liable so as to ensure that the victim is not left with a worthless judgment against the primary tortfeasor.

6. Vicarious liability cases therefore generally involve a familiar problem: where two parties (the victim and the principal) are each personally innocent, which of them is to suffer because of the wrongful actions of a third party (the primary tortfeasor)?
7. The law imposes a two stage test.
8. At stage one, the enquiry is whether the relationship between the primary tortfeasor and the principal discloses a sufficient connection, such that vicarious liability might be imposed. If the answer to this question is “yes”, the court moves to stage two: were the circumstances of the primary tortfeasor’s wrongful acts sufficiently closely connected to the primary tortfeasor’s relationship with the principal to make the principal liable?³
9. It is relevant to note here that the doctrine of vicarious liability was developed in the late 17th and early 18th centuries, largely under the influence of Sir John Holt CJ. The doctrine developed in large part in response to the rapid expansion of industry and commerce during that period. This led to an expansion of the law of tort generally and in particular in the field of the liability of an enterprise for the acts and omissions of a party connected with that enterprise, where those acts or omissions were not expressly authorised by the enterprise but fell within the scope of duties or authority generally authorised by it. Put shortly, the increase in the complexity and sophistication of modes of doing business created problems with which the law had to grapple.
10. This is not a matter of merely historical interest. It finds an echo in the modern cases, where the Supreme Court has recently and explicitly considered the influence of new modes of doing business in the 21st Century, and the question whether the law of tort should align itself fully with employment law in answering the question “who is an employee for whom the principal should be vicariously liable?”. In so doing, the

³ Following the case of *Lister v Hesley Hall Ltd* [2002] 1 AC 215 (“*Lister*”), stage two of the test became known as the “close connection test”

Supreme Court specifically had regard to the historical context, and the economic backgrounds.⁴

11. It can also be argued that the law took a (pardonable) wrong turning in connection with cases where the liability of the principal was for acts of sexual and other forms of abuse perpetrated on the vulnerable by primary tortfeasors who were appointed to care for those victims. It is submitted that cases in this factual area can now be seen to be a defined and special group of authorities, and do not set out general rules to be applied across the board.

Section 2: The Past

The law before *Barclays* and *Morrison*s

12. As long ago as 1966, our most quotable judge, Denning LJ (as he then was), said that the cases on vicarious liability were “*baffling*”.⁵ More recently, the Supreme Court has been asked to consider vicarious liability six times in seven years⁶ (this would have been seven times had the case of *Frederick v Positive Solutions* (“*Frederick*”)⁷ not settled on the eve of the hearing). So unquestionably vicarious liability is a difficult concept to grapple with, for even the most capable of legal minds.
13. The purpose of this section is to try to shed some light on why some of the cases on vicarious liability prior to *Barclays* and *Morrison*s were “*baffling*” and why vicarious liability has proved to be such problematic concept for the courts to apply.

What are the problems with the two-stage test?

14. The development and application of the two-stage test has been the subject of an enormous amount of criticism from both academics and the highest courts of numerous

⁴ See per Lord Reed in *Morrison*s at [19] and per Lady Hale in *Barclays* at [29].

⁵ *Morris v Martin* [1966] 1 QB 716 (“*Morris*”).

⁶ See: *Barclays*; *Morrison*s; *Armes v Nottinghamshire County Council* [2018] AC 355 (“*Armes*”); *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 (“*Mohamud*”); *Cox v Ministry of Justice* [2016] AC 660 (“*Cox*”); and *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1 (“*Christian Brothers*”).

⁷ On appeal from [2018] EWCA Civ 431

commonwealth countries. So it is fair to say that a number of problems have been identified. There are two such problems in relation to which we consider the criticism to be well founded.

Problem 1

15. The first problem is that the two-stage test has developed in an increasingly unprincipled manner. Throughout the recent cases in particular, we have seen extensions to the outer limits of vicarious liability under each stage of the two-stage test that have been justified by reference to vague concepts of “*fairness*” and “*justice*”, rather than by reference to sound legal principles arising from consideration of previously decided cases.
16. This appears to have been caused, at least in part, by the fact that the test has largely been developed in cases involving sexual and physical abuse. In those cases, the facts often involve: (a) a relationship between the principal and the primary tortfeasor that does not fit neatly within the category of employer/employee; and/or (b) intentional, often extreme, conduct by the primary tortfeasor that is often the antithesis of the purpose for which they were employed and therefore, on a superficial analysis, not obviously connected to that employment.
17. In all of those cases there is a deserving complainant that, without vicarious liability being imposed on the principal, will often be left without a remedy.
18. The courts have therefore often been in a position where, for entirely understandable reasons, it has considered it desirable to extend the scope of the two-stage test to reach the “*right result*” on the facts of a particular case.
19. The consequence of this is that we have seen decisions imposing vicarious liability on a principal where: (a) under stage one of the test, that principal has a somewhat nebulous relationship with the primary tortfeasor; and (b) where, under stage two of the test, the

primary tortfeasor's wrongful conduct seems only tangentially connected to their employment with the principal.

20. We take some examples of how the scope of each stage has been extended.

Stage One

21. Under stage one, in the *Christian Brothers* case, the court was concerned with a relationship between an international charity and its members. Some of those members taught at a school, which was not owned by the charity, and they sexually abused multiple pupils. Notably, there was no employment contract between the charity and the members who had perpetrated the abuse.

22. Lord Phillips therefore extended the type of relationship between the principal and primary tortfeasor that was sufficient to found vicarious liability at stage one beyond that of employer/employee, to include relationships that were "*akin to employment*". This extension was justified by Lord Phillips by reference to the policy objective underlying vicarious liability, namely "*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

23. The Supreme Court attempted to offer some further guidance on the application of stage one in *Cox*, which considered the vicarious liability of the prison service for the wrongful conduct of a prisoner that was required to work in a prison kitchen. In this case, Lord Reed provided criteria that, if met, would point towards the existence of a relationship akin to employment. However, this attempt at imposing clear criteria for a qualifying relationship under stage one was somewhat undermined by his conclusion that his criteria were not to be applied mechanically or slavishly. Rather, he considered that where a case concerned circumstances which had not previously been the subject of an authoritative judicial decision (such as on the facts of *Cox*), it would be valuable for

⁸ *Christian Brothers* at [34].

the court to stand back and consider the broader question of “*whether the imposition of vicarious liability would be fair, just and reasonable*”.⁹ The result is therefore that in any remotely novel case, the court will still pray in aid the vague concept of “fairness”, in determining whether the result is intuitively correct.

24. Since *Cox*, we have seen in novel cases, the courts impose vicarious liability in respect of increasingly nebulous relationships between the principal and primary tortfeasor. A particularly surprising example of this is the case of *Armes*, where vicarious liability was imposed on a local authority in respect of the misconduct of foster parents – a relationship that on its face does not appear remotely akin to employment.

25. What was perhaps most troubling about the broadening of stage one to embrace a far wider conception of the type of relationship that will give rise to vicarious liability, is that is risked blurring the distinction between employee and independent contractor that had previously been paramount in determining whether vicarious liability could be imposed. This is evidenced in Court of Appeal decision in *Barclays*¹⁰, where, adopting the dicta in *Christian Brothers* and *Cox*, the court found Barclays vicariously liable for the sexual misconduct of an independent GP that it had instructed to carry out medical examinations on its employees.

Stage Two

26. The unprincipled expansion of vicarious liability is even more pronounced in respect of the court’s application of the close connection test under stage two.

27. An example of this is the Supreme Court’s decision in *Mohamud*. This case and the problems it entailed are considered in detail in the next section, but in summary, the court held Morrisons vicariously liable for a vicious and unprovoked assault on Mr

⁹ *Cox* at [42]

¹⁰ [2018] EWCA Civ 1670

Mohamud by one of Morrison's employee's whilst he was visiting a Morrisons petrol station.

28. For present purposes, this case is significant because the inescapable conclusion is that in holding *Morrisons* vicariously liable for the assault, the Supreme Court shifted its focus from considering whether there was a sufficiently close connection between the employee's assault and his employment in accordance with the principles derived from *Lister*, to the ultimate question of justice and fairness. To Lord Toulson, measuring the closeness of connection on a scale of 1 to 10 would both "*be a forlorn exercise and ... miss the point*"¹¹. Instead, the courts must decide whether it is right for the employer to be held liable under the principle of social justice.¹²

29. It appears that by focusing on "*fairness*" and "*social justice*", Lord Toulson took a much broader view of the kind of connection that was required between the wrongful conduct and the primary tortfeasor's employment to satisfy stage two of the two stage test. On an analysis of his judgment, it is reasonable to conclude that all that was required was a "*but-for*" causal connection between the tort and the primary tortfeasor's "*field of activities*", such that where the employment provided the primary tortfeasor with the mere opportunity to commit the tort, this would be sufficient to impose vicarious liability.¹³ This would represent a fundamental shift from the long line of authorities that made clear that "*mere opportunity*" was not enough.¹⁴ If stage two was applied in this way, it would be of almost limitless application.

30. It is fair to say that the decision in *Mohamud* was not well received. In particular, it has been subject to scathing criticism from Australia's highest court in the case of *Prince Alfred College Incorporated v ADC*¹⁵ who considered that the Supreme Court's approach

¹¹ *Morrisons* at [42].

¹² *Ibid*

¹³ *Morrisons* at [47].

¹⁴ See for example *Ruben v Great Fingall Consolidated* [1906] A.C. 439 at p. 443; *Morris v C. W. Martin & Sons Ltd* [1966] 1 Q.B. 716 at p. 727F to 728A, p. 737D-E and p.741C; *Armagas Ltd v Mundogas S.A. (The Ocean Frost)* [1986] 1 A.C. 717 (in the Court of Appeal) at p.768G-H; *Lister v Heselley Hall Ltd* [2001] UKHL 22 at [45].

¹⁵ *Prince Alfred College Incorporated v ADC* [2016] HCA 37

was unduly broad and was too reliant on general principle and policy choices. In particular:

30.1. The decision could only be explained by an over-reliance on general principles such as “*fairness*” and “*justice*”.

30.2. This approach represented a shift from the traditional “*bottom-up*” method of deriving specific legal principles from a detailed examination of the facts of decided cases to a more “*top-down*” approach of deciding cases by reference to broader, general principles.

31. In fairness to our Supreme Court, and to demonstrate the difficulty of the problem we should note that on the previous occasion that Australia’s High Court was asked to consider vicarious liability,¹⁶ the case generated a majority decision. Moreover, of the seven justices who sat, six of them adopted entirely different tests for vicarious liability.

Why is this unprincipled expansion a problem?

32. Extensions of legal principles based on “*fairness*” inevitably lead to palm tree justice. The result has been that it has become incredibly difficult to predict how any given court will interpret the law when applying it to the facts of all but the most straightforward of cases.

33. Whilst this uncertainty may be justified as an acceptable consequence of reaching the right result in the extreme cases involving physical and sexual abuse, it is a difficult consequence to accept in cases that involve commercial transactions, where certainty is key.

34. More generally, an unprincipled “*top-down*” approach cannot be justified in the context of vicarious liability. As noted in section 1 above, vicarious liability is an unusual species

¹⁶ See *State of New South Wales v Lepore* [2003] HCA 4

of liability in that it is imposed strictly, without fault. As Lord Hope has said writing extra-judicially, this strict liability places a special responsibility on judges, as the law develops, to see that the search for a clearly defined criteria for imposing vicarious liability is not abandoned in order to meet the need for a solution on a case by case basis.¹⁷

Problem 2

35. The second problem with the two-stage test is that is presently unclear whether it is of general application to all torts and across all relationships in which vicarious liability can be imposed.

36. If the two-stage test is of general application, then there is a conflict with existing authority in the sphere of agency and in cases involving reliance based torts

37. Focusing on reliance-based torts, as far back as 1986, in *The Ocean Frost*¹⁸ the House of Lords (as it then was) considered the principles governing vicarious liability in cases of deceit.

38. In giving the leading judgment, Lord Keith concluded that:

*“The essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant's activities were within his authority, or, to put it another way, were part of his job, this belief having been induced by the master's representations by way of words or conduct.”*¹⁹

39. What is particularly notable about Lord Keith’s judgement is the distinction that he drew when reaching his decision between the principles to be applied in cases involving fraud and those involving other torts:

¹⁷ The Rt Hon Lord Hope of Craighead, “*Tailoring the law on vicarious liability*” [2013] LQR 514 at p. 526.

¹⁸ *Armagas Ltd v Mundogas S.A. (The Ocean Frost)* [1986] 1 AC 712 (per Lord Keith)

¹⁹ Per Lord Keith at p. 781D-F

- 39.1. He felt it unnecessary to consider the development of vicarious liability in relation to torts such as negligence or trespass, which in his opinion had followed a somewhat different line to cases involving fraud.²⁰
- 39.2. This was because dishonest conduct, in the context of vicarious liability, was different in character from other misconduct such as blundering attempts to promote the employer's business interests, involving negligent ways of carrying out the employee's work or excessive zeal and errors of judgment in the performance.²¹
- 39.3. Such conduct was therefore, in his view, governed by a different line of authority, which he described as being of "*peculiar application*".²²
40. *The Ocean Frost* was not overruled in any of the cases concerning the two-stage test. It therefore remains good law and this has led to some confusion as to the extent to which *The Ocean Frost* fits in with the principles articulated in those other cases.
41. Further, given that Lord Keith's dicta in *The Ocean Frost* only expressly considered cases involving deceit, what test will apply to other reliance based torts?
42. It is fair to say that to date the courts have given us some mixed messages:
- 42.1. In the Court of Appeal in *So v HSBC ("So")*,²³ Etherton LJ declined to extend the ratio of *The Ocean Frost* from deceitful statements to negligent ones. He held that vicarious liability for negligent statements turned on the same test as for the generality of torts, namely the "*close connection with employment*" test articulated in *Lister* and Claimants in such cases did not need to establish that the

²⁰ Per Lord Keith at p.780 A-C

²¹ *Ibid*

²² *Ibid*

²³ *So v HSBC Bank plc* [2009] EWCA Civ 296

primary tortfeasor was acting with actual/ostensible authority when making the statements complained of.²⁴

42.2. However, the CA in *Winter v Hockley Mint* (“Winter”),²⁵ at least impliedly held that *The Ocean Frost* approach was applicable to all cases of reliance based torts. We say “impliedly” as it is important to recognise that *Winter* was a case framed in deceit and as such the court was considering the applicable principles in that context. So any comments in *Winter* going beyond deceit are strictly speaking obiter. However, in its judgement, in finding that the judge below had incorrectly applied the close connection test, the court stated that:

*“The cases applying that test, however, did not concern a reliance based tort, and were not about the ostensible authority of an agent or employee as a result of a holding out by the principal or employer.... That is why The Ocean Frost was not mentioned in any of the speeches in either case...”*²⁶

43. We submit that the conclusion in *Winter* was correct and that *So* is wrongly decided. Lord Keith’s reasoning in *The Ocean Frost* ought to apply equally to all cases involving reliance based torts for these reasons:

43.1. Firstly, in *So*, Etherton LJ reached his decision having concluded that there was not any authority that supported an extension of the actual/ostensible authority test articulated in *The Ocean Frost* to cases involving negligent misstatement. This was not correct. The court was not referred to, and as such did not consider, the Privy Council case of *Kooragang Investments Pty. Ltd. v Richardson & Wrench Ltd* (“*Kooragang*”)²⁷, which predated *The Ocean Frost* but applied the exact actual/ostensible authority test to a case of negligent misstatement.²⁸

²⁴ Per Etherton LJ at [59] to [61]

²⁵ *Winter v Hockley Mint* [2018] EWCA Civ 2840 at [48] to [66]

²⁶ *Winter*, per Flaux LJ at [63].

²⁷ *Kooragang Investments Pty. Ltd. v Richardson & Wrench Ltd* [1982] AC 462.

²⁸ *Ibid*, per Lord Wilberforce at p. 471G, p.473D, p.474 C-H.

43.2. Secondly, whilst Lord Keith expressly stated that it was necessary only to rule on the liability of principals in deceit, there is reason to think that the contrast he was drawing in his judgment was not that between fraudulent and negligent statements, but between liability based upon reliance on another's statements and other torts. In particular, the inference from Lord Keith's association in his judgement of negligence with trespass, and contrasting them both with deceit, is that in relation to the negligent conduct that he considered to be different in nature to deceit, he had in mind actions, not statements.

43.3. Thirdly, it is very difficult to see how the position could be different in relation to an employee's merely negligent statements. Lord Keith's analysis in *The Ocean Frost* focuses upon the third party; did he/she rely upon the statement made due to the authority conferred on the primary tortfeasor by the principal? This question applies equally to negligent and fraudulent statements— the third party's reason for relying on the statement does not change due to the fraudulent or negligent nature of that statement, of which the third party is unaware.

44. So how, if at all, is this apparent conflict to be resolved? This was the question that the Supreme Court had been asked to consider in *Frederick* prior to that case settling, and so must await further consideration in that Court.

Section 3

Vicarious Liability – *Barclays and Morrisons*

45. These judgments focus on the same two issues as *Cox* and *Mohamud* four years previously. They consider firstly, the types of relationship in which a principal could be vicariously liable for the faults of the primary tortfeasor; and, secondly, assuming such a relationship exists, the connection required between that relationship and the conduct of the primary tortfeasor such that the principal can be vicariously liable for that conduct. Of the two recent decisions, *Barclays* deals with the first issue, and *Morrisons* with the second.

Barclays

46. In *Barclays*, the question before the Supreme Court was whether the bank was vicariously liable for sexual assaults allegedly carried out by Dr Gordon Bates between 1968 and 1984. Barclays required candidates who passed job interviews to undergo a medical before a formal job offer was made. Dr Bates performed several of these medicals. Bates was paid a fee for each medical that he completed, but was not paid a retainer. The various Claimants had applied for jobs with Barclays, and had been examined by Dr Bates. They alleged that, during their medicals, Bates sexually assaulted them.

47. Dr Bates was not employed by Barclays. Traditionally the type of relationship that could give rise to vicarious liability was exclusively that between an employer and employee. In recent Supreme Court authorities that had been extended. In the *Christian Brothers* case (above), the Defendant was an international charity, some of whose members taught at a school and sexually abused pupils. The Supreme Court, however, found that the Defendant was vicariously liable for the sexual abuse committed by its members, despite there never having been an employment contract between them. Lord Phillips identified five policy reasons that, if satisfied, 'usually make it fair, just and reasonable to impose vicarious liability' on an employer [para 35]. They were that:

- a) The employer is more likely to have the means to compensate the victim and to have insurance to cover that liability;
- b) the tort will have been committed as a result of activity taken by the employee on the employer's behalf;
- c) the employee's activity is likely to be part of the employer's business activity;
- d) by employing the employee to carry on the activity the employer will have created the risk of the tort committed;

e) the employee will have been under the control of the employer.

48. Lord Phillips then said that, in cases where the tortfeasor is not the defendant's employee, but their relationship has these characteristics, that relationship should lead to vicarious liability as it is "*akin to that between an employer and an employee*".²⁹

49. In *Cox*, the Claimant worked in HMP Swansea and suffered an injury because of the negligence of a prisoner working in the prison's kitchen. She sued the Prisons Service, alleging that it was vicariously liable for the negligent act of the prisoner, even though the prisoner had not been its employee.

50. The Supreme Court upheld the Court of Appeal's judgment that the Prison Service was vicariously liable. Lord Reed considered the five policy reasons outlined in the *Christian Brothers*, and approved them, albeit noting that the five are not equally important.³⁰ For Lord Reed, the most important factors were interrelated. They came down to "*the essential idea... that the Defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not*".³¹ The *Christian Brothers* policy reasons were present in *Cox*, and Lord Reed considered it fair, just, and reasonable to make the Prison Service vicariously liable.³²

51. In *Barclays*, the Claimants argued that the exercise the court needed to perform was the multi-factorial approach outlined in *The Christian Brothers* and *Cox*, in order to determine whether the relationship between Barclay's and Dr Bates could give rise to vicarious liability. At first instance, and in the Court of Appeal, this line of reasoning was accepted. The factors outlined in *Cox* were considered, deemed to be present, and so vicarious liability came into play.

²⁹ *Christian Brothers* at [47].

³⁰ *Cox* at [15] to [31].

³¹ *Cox* at [23].

³² *Cox* at [32] to [45].

52. Barclays, whilst accepting that the recent decisions had expanded the types of relationship that could give rise to vicarious liability, submitted that they had not disturbed the old idea that, in the words of Lord Bridge in *D&F Estates Ltd v Church Commissioners*: “It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work”.³³ Dr Bates had clearly been an independent contractor, carrying on business on his own account. That, Barclay’s said, was itself sufficient to dispose of the matter. The *Christian Brothers* and *Cox* principles did not need to be considered. Barclays could not be vicariously liable for Bates’ torts.
53. The Supreme Court accepted this submission. In a concise judgment Lady Hale sought to demonstrate that there was nothing in the recent Supreme Court decisions to undermine the traditional distinction between employment, and relationships akin to employment, and the relationship with an independent contractor.³⁴ If the primary tortfeasor is carrying on an independent business of his own, vicarious liability will not arise.
54. The Court’s effort to show that other recent decisions had been clear in this respect might be said to be unconvincing. One reading of *Cox* was that the *Christian Brothers* factors were to be considered in all cases in which the relationship was not one of employment. On this approach, the question of whether or not the tortfeasor was carrying on an independent business of his own would not determine the issue. Recently, however, the Court of Appeal, in *Anderson v Sense Network Ltd (Anderson)*³⁵, was robust in finding that because the tortfeasor in that case had been carrying on an independent business of its own, the principal could not be vicariously liable for his torts.³⁶ The Court of Appeal in *Barclays* had read the judgment in *Cox* in the manner suggested above, stating clearly that “the law now requires answers to the specified

³³ *D & F Estates Ltd v Church Comrs* [1989] AC 177 at p.208

³⁴ *Barclays* at [10] to [27]

³⁵ *Anderson v Sense Network Ltd* [2019] EWCA Civ 1395

³⁶ *Ibid* at [58] to [65]

questions laid down in Cox...rather than an answer to the question: was the alleged tortfeasor an independent contractor?"

55. So, the key point to take away from *Barclays* is simple. If the primary tortfeasor is carrying on an independent business of his own, vicarious liability will not attach, and the (policy driven) factors outlined in *The Christian Brothers*, and in *Cox*, do not arise. Whilst it is likely that this decision will spawn further disputes on what exactly constitutes an independent contractor, the judgment has provided a clear restatement of a principle that had been cast in doubt by recent decisions.

Morrison's

56. Turning to the second question, it will be recalled that this concerns the connection required between the primary tortfeasor's conduct and his relationship with the principal in order to make the principal vicariously liable for that conduct. There is a sense of déjà vu here. Four years ago the Supreme Court was asked to consider this issue on the back of a rogue employee of Morrison's having attacked a customer at a petrol station. Now, the same question arises, and once again it is a wayward employee of Morrison's that has brought it to the fore.

57. The rogue employee in this case was one Andrew Skelton. Skelton worked in Morrison's internal audit department. He was subject to disciplinary proceedings and given a verbal warning in 2013. Thereafter, he harboured a grudge against Morrison's, and formulated plans to exact revenge. As part of Morrison's external audit, payroll data had to be transferred to KPMG. Skelton was charged with this task, and given access to sensitive personal data of Morrison's workforce. Skelton saved all of this data onto a USB stick without Morrison's knowledge or consent. He subsequently uploaded this data onto the internet.

58. Were Morrison's vicariously liable for Skelton's conduct? They employed Skelton, so clearly were in a relationship to him by which they could potentially be vicariously liable. Could they be for this conduct?

59. At first instance, the judge found that Skelton’s wrongful conduct had been committed in the course of his employment. He held that Morrison’s had provided Skelton with the personal data in order for him to carry out the task assigned to him, and that what happened thereafter was a “*continuous sequence of events...an unbroken chain*”. Those words derived from Lord Toulson’s judgment in *Mohamud*. The judge found that Morrisons had trusted Skelton to deal with the data. Whilst the fact that Skelton had disclosed the information to people other than KPMG was not authorised, his doing so was said to be “*closely related*” to what he had been tasked with. Further, the five policy factors from *The Christian Brothers* were all present.

60. The Court of Appeal upheld this decision. The Court agreed that Skelton’s tortious acts were “*within the field of activities assigned to him by Morrisons*”, emphasising (like the judge) that the facts amounted to an “*unbroken chain*” of events. The Court of Appeal stated that the fact that Skelton’s motive had been to harm Morrison’s was irrelevant, citing Lord Toulson’s judgment in *Mohamud* as support for this proposition.

61. The Supreme Court disagreed. Lord Reed considered Lord Toulson’s judgment in *Mohamud* at length.³⁷ Again, he attempted, it is submitted unconvincingly, to present Lord Toulson’s judgment as abundantly clear. However, the Supreme Court’s reading of the judgment in *Mohamud* was that Lord Toulson had not sought to change the law relating to vicarious liability.³⁸ Rather he had been applying existing precedents, notably *dicta* of Lord Nicholls in *Dubai Aluminium v Salaam*,³⁹ in setting out two questions. First, the Court was to ask which functions or field of activities had been entrusted to the employee. Secondly, the court was to “*decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable...*”. This approach, the Supreme Court said in

³⁷ *Morrison*s at [16] to [30]

³⁸ *Morrison*s at [22] to [26]

³⁹ *Dubai Aluminium v Salaam* [2002] UKHL 48

Morrison's, was to be applied in light of the circumstances of the case, and “the assistance provided by previous court decisions”.⁴⁰

62. The Supreme Court added that Lord Toulson had not said that the sufficient connection test was a simple question of there being a temporal or causal connection between the employment and wrongful conduct.⁴¹ The question was whether an individual was acting in the course of his employment when the wrongful conduct was committed. Lord Toulson had said that the wayward employee’s motive had been irrelevant on the facts of *Mohamud*, rather than laying down a general rule to that effect.⁴²

63. The Supreme Court thus found that the courts below had misunderstood the principles governing vicarious liability.⁴³ Putting the data on the internet was not part of Skelton’s functions or field of activities. The factors from *The Christian Brothers* related to the question of whether the relationship between tortfeasor and principal could give rise to vicarious liability, rather than whether the tortfeasor’s misconduct was sufficiently closely connected to that relationship for vicarious liability to attach. That there was a close temporal link and unbroken chain of causation linking Morrison’s providing the data to Skelton and his releasing it onto the internet did not satisfy the close connection test. The fact that Skelton would not have been able to commit the wrongful conduct but for his employment was not itself sufficient to make Morrison’s vicariously liable. Finally, Skelton’s motive in committing the wrongful conduct was ‘highly material’ to determining whether he was acting on his own behalf, or Morrison’s.

64. The Supreme Court reconsidered the question of whether Morrison’s should be vicariously liable. Having considered the two questions set out by Lord Nicholls in *Dubai Aluminium*, and allegedly re-affirmed in *Mohamud*, the Supreme Court found that it was clear that Skelton had not been engaged in furthering Morrison’s business. He had been pursuing a personal agenda, seeking revenge. His conduct could not be seen fairly

⁴⁰ *Morrison's* at [24]

⁴¹ *Morrison's* at [28]

⁴² *Morrison's* at [29] to [30]

⁴³ *Morrison's* at [31] to [47]

and properly to have been carried out while acting in the ordinary course of his employment. Morrison's was not vicariously liable.⁴⁴

65. So, a good result for Morrisons this time round. Our view, however, is that potential Defendants should pause before celebrating too much. This decision's effect is to reaffirm the importance of the court looking at the facts of each case in the light of previous authorities. Liability should be imposed when consistent with guidance from those authorities. There remain several authorities, notably *Mohamud*, in which employers were held to be vicariously liable for conduct far removed from the employer's business. In *Morrisons*, the Supreme Court did not overrule or distance itself from any such decisions. They remain within the body of decided authorities according to which future cases and factual scenarios should now be considered. Because of this, the decision in *Morrisons* potentially still leaves much work for lower courts seeking to apply a very broad (sometimes even contradictory) set of authorities to diverse factual scenarios.

Section 4: The Future

The impact of the decisions in *Barclays* and *Morrisons*

66. Looking back for a moment, one can discern a number of points showing that the law (temporarily) lost its way before *Barclays* and *Morrisons*. The general theme of this section is that those decisions have put the law back on a correct course: thus, we are heading "back to the future".

67. The proposition that the principal might be vicariously liable for conduct of the primary tortfeasor which was actively designed to damage the interests of the principal seems on its face absurd. But this proposition had to be argued in the Supreme Court in *Morrisons* in order to be exposed as incorrect. This suggests that something had gone wrong with the law.

⁴⁴ *Morrisons* at [47]

68. The Court of Appeal had held otherwise. This shows that the observations of Lord Hope in the LQR article noted above, and broadly hinting that the “child abuse” cases represented a warping of the general law (albeit for good policy reasons) were well aimed.
69. English law seems to have returned to the lesson it learned, in relation to the test for a duty of care in negligence, in *Murphy v Brentwood DC* (“*Murphy*”).⁴⁵ The law of tort covers every aspect of human interaction, from personal injuries negligently or deliberately inflicted to multi-million pound professional negligence claims. It is suggested that the search for a test which seeks to articulate a “one size fits all” approach in all factual contexts was always as doomed as the same endeavour in relation to duty of care (see *Anns v London Borough of Merton* (“*Anns*”)⁴⁶, overruled in *Murphy*, following a decade of chaos in the appellate Courts).
70. As detailed in paragraphs 21 to 34 above, the problems caused by the approach in *Anns* in relation to the duty of care were replicated in the recent law of vicarious liability, namely:
- 70.1. The test had to be expressed at a very high level of abstraction;
 - 70.2. The test was, therefore, apt to lead to an undesirable extension of liability; and
 - 70.3. The test led to cases being decided, largely, on a broad application of “justice and reasonableness”, so that the law became severely unpredictable.
71. It should not be forgotten that an important element of justice in civil cases is that the law should be to a large extent predictable, so that commercial organisations can plan their activities accordingly and insurers can write risks sensibly. It can therefore be seen that on the questions of (i) the degree of “relational” connection required between

⁴⁵ *Murphy v Brentwood DC* [1991] AC 398

⁴⁶ *Anns v London Borough of Merton* [1978] AC 728

primary tortfeasor and principal, and (ii) the question whether the acts of the primary tortfeasor are within the scope of that relationship, the law has been correctly “re-set” by *Barclays* and *Morrison*, so that more precise analysis is required.

72. In *Barclays* and *Morrison* the Court has provided welcome clarity in relation to the question of the necessary connection between the primary tortfeasor and the principal. With respect, previous decisions on this point were plainly correct to relax, to some extent, the nature of the relationship required. It is obviously just that the Ministry of Justice should be vicariously liable for the negligence of a prisoner working in a prison kitchen, as well as for the negligence of its staff employed there. The prisoner is in practical terms carrying out the same tasks, in the same way, as if he were an employee in the strict sense (*Cox*).

73. Equally, there seems every reason why a religious order ought to be liable for the torts of its members committed in the course of their religious duties, even though the members of the order are not in the strict sense employees (*Christian Brothers*). The point was well made in that case that the relationship between members and their religious order is arguably closer than an employment relationship.

74. The Supreme Court’s insistence in *Barclays* that the relationship in question must be akin to employment therefore accommodates those cases, but helpfully re-iterates that the rationale for imposing liability in them was to prevent claims being defeated by technical distinctions between the relationship in those cases and a relationship of employment properly so called. The Court rejected the argument for the Claimants, said to be derived from those relaxations of the rule, that the question was broadly whether it was fair just and reasonable for the principal to be liable for the torts of someone who was not his employee.⁴⁷ See *Barclays* at paragraphs 18, 22, and (especially) 27.

75. On the other hand, the law has not returned to the rather dated “control” test, or to a test that focuses on whether the primary tortfeasor is, as a matter of employment or tax

⁴⁷ See in particular *Barclays* at [18], [22] and (especially) [27].

law, strictly an employee. These tests were plainly no longer fit for their purpose towards the end of the 20th century and Lady Hale specifically noted in *Barclays* that the rise of the gig economy makes it more rather than less important to look at substance not form in deciding whether the relationship is “*akin to employment*”.⁴⁸

76. Lady Hale held that the Courts should resist the temptation to “tidy up” the law by importing concepts from employment law into the field of vicarious liability.⁴⁹ She observed that the employment law concepts were developed for quite different reasons than the rules relating to vicarious liability. In this she was, with respect, entirely correct: to “tidy up” the law in that way would risk anomalies.

77. Building on the flexibility of the test of whether the relationship is akin to employment, it seems clear that the possibility of more than one principal being liable for the primary tortfeasor’s conduct (first canvassed in *Viasystems v Thermal Transfer*⁵⁰, which was itself approved in *Christian Brothers*, and is referred to with apparent approval in *Barclays*⁵¹) is consistent with the modern approach as a matter of theory. If we are concerned with a substantive connection between the primary tortfeasor and the business of the principal(s), then an objection that a servant cannot have two masters can be exposed as technical and without merit. In any event, it has been supported in all the recent cases and seems most unlikely to be displaced.

78. It is suggested that the personal injury/child abuse cases can now be seen for what they truly are: an outlying stream of authority specific to that factual area. That is not to say that these cases are wrongly decided: rather, our view is that they represent a proper effort on the part of the common law to protect the interests of a class of claimants who are deserving of particular tenderness from the law. The other side of that coin is that these proper developments in that sphere should not be the driver for a “unified theory” which warps the law in other areas.

⁴⁸ *Barclays* at [29].

⁴⁹ *Ibid*

⁵⁰ *Viasystems v Thermal Transfer* [2006] QB 510

⁵¹ *Barclays* at [12]

The unresolved issues

79. There remains an unresolved question as to whether the law of vicarious liability in the field of agency will change. It is submitted that it should not. Hundreds of years of accumulate authority have established useful and workable tests of liability of the principal for the agent, based on either actual or ostensible authority. This body of authority ought not to be thrown overboard.
80. A satisfactory theoretical explanation (which, but for the settlement of the appeal, would have been ruled upon by the Supreme Court in *Frederick*) would be that it is only where there is actual or ostensible authority that one can say that there is a sufficient connection between any tort of the agent and the business of the principal for it to be just that the principal should be liable. If this approach were taken, then the existing body of authority could be reconciled (at a very high level) with the personal injury cases. The Court of Appeal had left this point open.⁵²
81. It is submitted that this approach would be consistent with the emphasis placed by the Supreme Court on the need for liability to be imposed where to do so is consistent with guidance from the decided cases. Thus, decisions can be made on a basis which is principled and consistent.⁵³ The echoes of the approach now taken to problems with the existence of a duty of care, where it has been said many times that the law should move “incrementally”, are plain to see.
82. If that general “incremental” approach be right, then it is highly likely that vicarious liability is only imposed on the principal for the torts of his agent where they are committed within the scope of the latter’s actual or ostensible authority.⁵⁴

⁵² *Frederick*, per Flaux LJ at [77].

⁵³ See *Morrisons* at [24].

⁵⁴ see e.g. *The Ocean Frost* at p.781F and p.782E (per Lord Keith), *Kooragang* at p.474G to 475C (per Lord Wilberforce) and *Quinn v Automotive Group* [2010] EWCA Civ 1412 at [18 and 19] (per Gross LJ).

83. A further and more nuanced possibility is that the Courts will confirm that separate principles apply to (i) cases where the primary tortfeasor commits a fraud and/or (ii) cases where the primary tortfeasor commits a reliance based tort (negligent advice or negligent misstatement).
84. As already noted, there are statements of high authority to the effect that cases of deceit, at least, are governed by a particular set of rules, requiring the victim to have relied on the primary tortfeasor having the actual or ostensible authority of the principal to make the statements in question. It is submitted that this is plainly an intelligible and sensible requirement, because in a case of deceit, it is critical in order to establish liability that the victim relied on the false statements. Accordingly, it is logical to require that the victim relied on the false statements as being made on behalf of the principal, if the principal is justly to be made liable for them. If this analysis is right, then it would follow that cases of negligent advice (in which it is likewise necessary to prove reliance) should attract the same test.
85. Further, it has been suggested that at least in the case of the primary tortfeasor committing deceit, all of the acts necessary to establish the tort should have to occur in the course of his employment or within the scope of his actual or apparent authority: see *Credit Lyonnais v Export Credits*.⁵⁵ This principle was applied in *Frederick*.⁵⁶
86. In *Frederick* the claimants obtained loans from a building society for the purpose of investing in a property development scheme run by Messrs Warren (“W”) and Qureshi (“Q”). W was also an agent of the defendant financial adviser. He obtained the loans for the claimants by making false representations to the building society on their behalf. The claimants lost their money by investing the loans in the property development scheme which turned out to be a fraud. They did so on the advice of Q, about the supposed benefits of the development. The claimants sued the defendant alleging that it was vicariously liable because of the conduct of W in obtaining the loans. But an essential ingredient on the claimants’ claim (the investment in the fraudulent scheme)

⁵⁵ *Credit Lyonnais v Export Credits* [2000] 1 AC 486

⁵⁶ *Frederick*, per Flaux LJ at [74].

was done not on the advice of W but rather on the advice of Q, and would not (even had W given the advice to invest) have been done as a part of the defendant's business.

87. Problems will continue to arise where the acts of the primary tortfeasor are fraudulent. One possibility (although it would require an appeal to the Supreme Court and the departure from well established authority) is that the Court will reconsider the proposition that the employer can be made liable for criminal acts on the part of the employee, at least in a commercial context. Academic writing has cast doubt on the correctness of *Lloyd v Grace Smith*⁵⁷, which is authority for this proposition. In particular, Anthony Gray⁵⁸ argues convincingly that the House of Lords underestimated the degree to which previous authority had included, as a condition for vicarious liability, the need for the servant to be acting for the purposes of his master, and for his benefit. He also makes the powerful point that, when the House of Lords asked itself which of the two innocent parties (the solicitor and the client) should suffer for the fraud of the managing clerk, and answered by saying that it should be the solicitor who employed and should have supervised the clerk, it was employing fault based reasoning to justify the imposition of a strict liability. This seems a little odd.
88. It is also interesting to note that Courts have consistently referred (with apparent approval) to the "enterprise liability" theory as a reason for imposing vicarious liability. Stripped to its essentials, this theory argues that it is just that a business or enterprise should be vicariously liable to compensate victims for loss which arises from the activities which the enterprise carries on. The theory is said to be justified by the proposition that the business or enterprise will thereby be incentivised to reduce the risk of such losses by supervision and other precautions.
89. There are theoretical and practical problems with this view. The theoretical problem is that if a business is to be held strictly liable (on a vicarious basis) for the acts of the primary tortfeasor on the basis that it had an opportunity to prevent them, this

⁵⁷ *Lloyd v Grace Smith* [1912] AC 716

⁵⁸ Anthony Gray, *Vicarious Liability*, Hart Publishing 2018, p.18-19.

introduces a concept of fault which is inconsistent with the strict nature of vicarious liability. Indeed, the strictness of the liability (since it is imposed irrespective of the care the principal has taken) goes against the idea that to impose it incentivises the principal to take care. This objection is mirrored in practice: research in the USA has suggested that the approach of employers to the hiring of staff is not affected by the principle.⁵⁹

90. It is respectfully suggested that these are not merely arcane academic arguments. Admittedly, to accept them would require intervention and re-shaping of the law at Supreme Court level, but the interplay between the practical and the theoretical aspects of the various points suggests that it may be possible that the law will further reduce the ambit of vicarious liability.

91. It is also submitted that a greater focus ought to be placed on the question of what obligations the principal had accepted in favour of the victim. This is the easy explanation of the difficult case of *Morris*,⁶⁰ where the obvious solution was that vicarious liability had nothing to add to the case. The defendant had accepted the fur (which was subsequently stolen by the primary tortfeasor) into its custody for cleaning and was plainly liable as bailee for reward in the event that it failed to deliver it up. This explanation of the case is consistent with a just outcome: if a furrier accepts a valuable item as bailee it must take proper care (and have proper systems in place) to re-deliver it safely.

92. In the same way, in *Anderson*, it makes perfect sense for a financial services network to be able to limit its (statutory) vicarious liability to a liability for business which it has authorised, since it is eminently reasonable to require such an entity to operate controls over authorised business. It is, equally, unreasonable to expect liability to be imposed over business about which the network had no knowledge and had nothing to do with.

⁵⁹ See Sevier 102 Iowa Law Review 651; Atiyah on Vicarious Liability at p.17).

⁶⁰ *Morris v Martin* [1966] 1 QB 716

Conclusions

93. For the above reasons it is suggested that the recent decisions of the Supreme Court set the law back on the right path and that there may be further (and appropriate) restrictions to come.

94. The judgments, moreover, do nothing to address the split in authorities between cases involving reliance-based, and other, torts. There is, therefore, potentially fertile ground for further developments in the law of vicarious liability.

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