



Vicarious Liability: whose liability is it anyway?

On 1 April 2020 the Supreme Court handed down judgment in *MW Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 and *Barclays Bank plc v Various Claimants* [2020] UKSC 13, the latest in the recent line of cases focussed on the nature, scope and development of the doctrine of vicarious liability.

Amanda Savage QC and **Nick Broomfield** consider the developments in the law of vicarious liability and the position of the law following the Supreme Court's recent decisions in *MW Morrison Supermarkets plc v Various Claimants* and *Barclays Bank plc v Various Claimants*.

Introduction

1. The Courts have been keen to emphasise that the law of vicarious liability is “on the move”.¹ This is not in itself a surprise, as judges and academics have regularly remarked upon the need for vicarious liability to reflect employment and business practices as they evolve and develop. The need for the law to reflect reality has resulted in the expansion of the doctrine of vicarious liability, most notably beyond its traditional limits of employer and employee to those in a relationship “akin to employment”.
2. Notwithstanding the significant attention that the doctrine has received, the broad test for imposing vicarious liability remains well settled. In short, there are two elements that have to be shown before a person (or organisation) can be made vicariously liable for the actions of another:

¹ *Various Claimants v Catholic Child Welfare Society* [2013] AC 1 (“*Christian Brothers*”), per Lord Phillips at paragraph 19.

- (1) First, there must be a relationship between the two persons which makes it fair, just and reasonable for the law to make one pay for the wrongs committed by another. This has traditionally been limited to the relationship between employer and employee, but the scope and nature of those relationships has expanded over time (“Limb 1”);
 - (2) Second, there must be a close connection between that relationship and the tortfeasor’s wrongdoing. Historically, this was limited to torts committed in the course of the tortfeasor’s employment, but this has also been broadened (“Limb 2”).
3. However, whilst there has been consensus about the two limbs of the test, the cases have not spoken with one voice about the precise approach, or criteria, that the Court should adopt when deciding whether to impose vicarious liability. The Supreme Court’s most recent decisions helpfully address both limbs of the test:
 - (1) In **Barclays** the Supreme Court was concerned with Limb 1 and the nature of the relationship that gives rise to vicarious liability. The Supreme Court took the opportunity to explain its earlier decisions on Limb 1, including *Various Claimants v Catholic Child Welfare Society* [2013] AC 1 (“*Christian Brothers*”), *Cox v Ministry of Justice* [2016] AC 660 and *Armes v Nottinghamshire County Council* [2018] AC 355, and addressed the position of independent contractors following the developments in the law.
 - (2) In **Morrison Supermarkets** the Supreme Court was concerned with Limb 2 and the “close connection” test. It sought to clarify its earlier decision in *Mohamud v WM Morrison Supermarket plc* [2016] AC 677 in order to correct what it considered to be misunderstandings that had followed it.
4. This article considers how modern developments in the law of vicarious liability have affected Limb 1 when applied to persons outside of the employer/employee relationship and Limb 2 more generally, before discussing the effect of the Supreme Court’s judgments in **Barclays** and **Morrison Supermarkets**.

Limb 1: A relationship of employment or something akin to employment

The adoption of the “akin to employment” test

5. The law has always drawn a distinction between those under a contract of service on the one hand and those under a contract for services on the other, imposing vicarious liability in the former (subject to the satisfaction of Limb 2) but not in the latter. There are good, well-rehearsed, policy reasons for distinguishing between the acts of employees and the acts of “independent contractors”, and the textbooks set out at length the search for a satisfactory test for deciding who is, or is not, to be treated as an employee for the purposes of imposing vicarious liability. However, the Courts have been slow to extend the application of the doctrine to those outside of the employer/employee relationship, no doubt mindful of preserving the important distinction between “employees” and “independent contractors”.

6. The Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510 is credited with expanding of vicarious liability beyond the relationship of employer and employee to those in a relationship analogous to, or “akin to” employment.² The Court of Appeal was asked to decide a novel point: could more than one employer be vicariously liable for the acts of a single employee? The Court of Appeal concluded that it could. May LJ found both employers vicariously liable by applying the traditional “control” test. Rix LJ agreed with May LJ, but in a judgment that has received widespread judicial approval he remarked at paragraph 79 that:

“Even in the establishment of a formal employer/employee relationship, the right of control has not retained the critical significance it once did. I would prefer to say that I anticipate the subsequent cases may, in various factual circumstances, refine the circumstances in which dual vicarious liability may be imposed. I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence. What has to be recalled is that the vicarious liability in question is one which involves no fault on the part

² In *E v English Province of Our Lady of Charity* [2013] QB 722 Ward LJ described *Viasystems* as “something of a William Ellis moment where, perhaps unwittingly, their Lordships picked up the ball and ran with it thereby creating a whole new ballgame – vicarious liability even if there is strictly no employer/employee contract”.

of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit.”

7. Rix LJ’s remarks, intended to recognise changing employment and working practices, were considered by the Court of Appeal in *E v English Province of Our Lady of Charity* (“E’s case”) [2013] QB 722, a case concerning whether a Roman Catholic diocesan Bishop was vicariously liable for sexual abuse at a children’s home run by the diocese, perpetrated by Father Baldwin, the priest appointed by and under the supervision of the diocesan Bishop. Ward LJ considered the various policy justifications for imposing vicarious liability in paragraph 54, and concluded that³:

“one cannot understand how the law relating to vicarious liability has developed nor how, if at all, it should develop without being aware of the various strands of policy which have informed that development. On the other hand, a coherent development of the law should proceed incrementally in a principled way, not as an expedient reaction to the problem confronting the court. So I must see whether it is possible to articulate general legal principles which will allow the court to decide whether the bishop may be vicariously liable for the alleged torts of Father Baldwin.”

8. Ward LJ stated that *Viasystems* had created a new category of vicarious liability, “vicarious liability even where there is strictly no employer/employee contract”,⁴ and that it fell to the Court of Appeal in *E’s case* to lay down the rules of this novel category: “vicarious liability akin to employment”. Following a lengthy and detailed exposition of the case law, Ward LJ stated at paragraph 70 that:

“one should concentrate on the extent to which, if at all, he is in a position akin to employment. The cases analysed in the immediately preceding paragraphs

³ In doing so, he explicitly echoed the warning of Lord Hobhouse at paragraph 60 of *Lister v Hesley Hall Ltd* [2002] 1 A.C. 215 against eliding the “exposition of the policy reasons for a rule” with the “definition of the criteria for its application”.

⁴ See n2 above.

should be noted with a view to extracting from them, if it is possible, the essence of being an employee. To distil to a single sentence I would say that an employee is one who is paid a wage or salary to be under some, if only slight, control of his employer in his employer's business for his employer's business. The independent contractor works in and for his own business at his risk of profit or loss."

9. Ward LJ then listed a number of factors that he considered to be appropriate signposts pointing to vicarious liability⁵. At paragraphs 74 – 80 he then applied the test set out in paragraph 70, concluding that, whilst Father Baldwin did not match every fact of being an employee, he was more like an employee than an independent contractor and that the relationship was *"so akin to employer/employee as to make it just and fair to impose vicarious liability."*⁶

Christian Brothers and the relevance of policy

10. In *Christian Brothers* the Supreme Court was asked to determine if the diocesan bodies responsible under statute for the management of a Catholic school were vicariously liable for sexual assaults allegedly perpetrated by brother teachers on almost 200 students over a number of years. The Headmaster and teachers were drawn from, and appointed by, the Institute of Christian Brothers. Lord Phillips, giving the judgment of the Court, stated at paragraph 34:

"The policy objective underlying vicarious 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. It is for the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be satisfied in order to establish vicarious liability. Where the criteria are satisfied the policy reasons for imposing the liability should apply. As Lord

⁵ The five factors listed at paragraph 72 of Ward LJ's judgment, taken from Professor Richard Kidner's article "Vicarious liability: for whom should the employer be liable?" (1995) 15 LS 47, were: (1) Control by the 'employer' of the employee; (2) Control by the contractor of himself; (3) The organisation test (in the first sense of how central the activity is to the enterprise); (4) The integration test (i.e. the organisation test in the second sense of whether the activity is integrated into the organisational structure of the enterprise); and (5) is the person in business on his own account (the entrepreneur test)?

⁶ *E's case*, per Ward LJ at paragraphs 80 and 81.

Hobhouse of Woodborough pointed out in the Lister case [2002] 1 AC 215, para 60, the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap.”

11. He then set out five policy reasons for why it is fair just and reasonable to impose vicarious liability in paragraph 35:

“The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee’s activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.”

12. Having set out the policy justifications for imposing vicarious liability, Lord Phillips considered the cases concerning “borrowed” employees. He recognised that the “control” test was outdated⁷ and concluded that the alternative test posited by Rix LJ in *Viasystems* (see above) should be preferred “*in considering that question in relation to each defendant*”. At paragraph 47 he stated:

“At para 35 above I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the

⁷ *Christian Brothers*, per Lord Phillips at paragraph 36.

ground that it is “akin to that between an employer and an employee”. That was the approach adopted by the Court of Appeal in E’s case [2013] QB 722.”

13. He then assessed the relationship between the brother teachers and the institute. He did so as a matter of fact (albeit without first defining a list of criteria by which something akin to an employee could be identified⁸), rather than expressly considering the incidents listed at paragraph 35⁹, concluding that both the diocesan bodies and the institute were vicariously liable for the brother teacher’s actions because the relationship was “sufficiently akin to that of employer and employee to satisfy stage 1 of the test of vicarious liability.”
14. Following *Christian Brothers* the law appeared to be settled. Although Lord Phillips had considered the policy justifications for imposing vicarious liability at paragraph 35, he had applied the “akin to employment” test (adopted in *E’s case* following consideration of *Viasystems*) to determine if the diocesan authorities should be held liable for the actions of the brother teachers. This was apparent from both his express references to the “akin from employment” test in paragraphs 47 and 60 and the nature of the factual assessment carried out at paragraphs 55 – 59.¹⁰ To have determined the question by reference to the policy reasons set out in paragraph 35 would have risked offending against the warning of Lord Hobhouse in *Lister*, which Lord Phillips had expressly considered in paragraph 34.¹¹

⁸ The factors that Lord Phillips appears to have considered in paragraph 56 and 59 included: (1) the institute had the hallmarks of a pseudo-corporate body; (2) the control that the institute had over the brothers; and (3) that the actions of the brothers was in the furtherance of the institute’s purpose or objectives. This should be compared with paragraphs 70 and 72 of Ward LJ’s judgment in *E’s case* in which he expressly said that the indicia of “employment” should be derived from the existing cases (see paragraph 8 above) before listing several criteria applicable to the facts (see paragraph 9 above).

⁹ As set out below, this has now been acknowledged by the Supreme Court in *Barclays Bank plc v Various Claimants*. However, the Court of Appeal in *Kafagi v JBW Group Ltd* [2018] EWCA 1167 at paragraph 26 understood Lord Phillips to have used the policy reasons in paragraph 35 as the criteria for establishing vicarious liability in *Christian Brothers*.

¹⁰ This interpretation of Lord Phillips’ speech appears to be in line with Lord Sumption’s understanding of *Christian Brothers*: see *Woodland v Swimming Teachers Association* [2014] A.C. 537 (in particular, at paragraph 3).

¹¹ See n4 above.

The uncertainty caused by Cox v Ministry of Justice

15. The Supreme Court had the opportunity to further consider Limb 1 in *Cox v Ministry of Justice* [2016] AC 660. In *Cox* the Supreme Court was asked to decide if the Ministry of Justice was liable for personal injury caused by a prisoner moving large sacks of rice whilst working in the prison kitchen. The judgment of the Court was given by Lord Reed.
16. After noting that Lord Phillips' judgment in *Christian Brothers* was intended to bring "greater clarity to an area of the law which had been unsettled by a number of recent decisions"¹², Lord Reed considered the five policy reasons identified by Lord Phillips as usually making it fair, just and reasonable to impose vicarious liability. Having largely discounted the first¹³ and fifth reasons¹⁴, Lord Reed proceeded to explain that the remaining three reasons or "incidents" were inter-related and reflected principles discernible from previous cases,¹⁵ before stating at paragraph 24 that:

"Lord Phillips PSC's analysis in the "Christian Brothers" case [2013] 2 AC 1 wove together these related ideas so as to develop a modern theory of vicarious liability. The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to 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 (rather

¹² *Cox v Ministry of Justice* [2016] AC 660, per Lord Reed at paragraph 17.

¹³ *Ibid*, paragraphs 20. The first policy reason, that the defendant was more likely to have the means to compensate the victim and could be expected to have insurance, was not "a principled justification for imposing vicarious liability. 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". This was of some considerable relief to those with deep pockets (such as Insurers, commercial entities and professional organisations) who had initially been concerned by the notion of it being public policy to shift liability to those "with the means to compensate". It should be noted, however, that the Supreme Court appeared to retreat from this position in *Armes v Nottinghamshire County Council* [2018] AC 355.

¹⁴ *Ibid*, paragraph 21. The significance of the fifth policy reason, that the tortfeasor will have been to some extent under the control of the defendant, is that, "the defendant can direct what the tortfeasor does, not how he does it. So understood, it is a factor which is unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability."

¹⁵ *Ibid*, paragraphs 22 and 23.

than his activities being entirely attributable to the conduct of a recognisable independent business of his own or a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question”.

17. Lord Reed also noted that:

- (1) Although the criteria identified by Lord Phillips could be criticised for being too imprecise, this was inevitable given the infinite range of circumstances where the issue arises. He explained: *“The court has to make a judgment, assisted by previous judicial decisions in the same or analogous contexts. Such decisions may enable the criteria to be refined in particular contexts...”*
- (2) It was unnecessary to decide in each case if it is fair, just and reasonable to impose vicarious liability as *“that was the whole point of seeking to align the criteria with the various policy justifications for its imposition ... in cases where the criteria are satisfied, it should not generally be necessary to re-assess the fairness, justice and reasonableness of the result in the particular case.”*¹⁶

18. Applying the test set out in paragraph 24, Lord Reed concluded that the Ministry of Defence was vicariously liable for the acts of the prisoners because the prisoners were: (1) working in the prison kitchen and integrated into the operation of the prison, so that the activities assigned to them are integral to the furtherance of the prison’s aims; (2) placed in a position where there is a risk that they may commit negligent acts; and (3) working under the direction of the prison staff.

19. In *Armes* the Supreme Court had a further opportunity to consider the principles of vicarious liability. It concerned the vicarious liability of the local authority for sexual assaults perpetrated against foster children by their foster parents. Lord Reed gave the lead judgment (with which Baroness Hale, Lord Kerr and Lord Clarke agreed) in which he adopted the Supreme Court’s reasoning in *Cox*, concluding that the local authority was vicariously liable for the acts of the foster carers.

¹⁶ *Ibid*, paragraphs 28 and 41.

20. Although *Cox* and *Armes* considered *Christian Brothers*, the test set out by Lord Reed in paragraph 24 of *Cox* was a different test to that applied by Lord Phillips:

- (1) As set out in paragraph 14 above, Lord Phillips (following Ward LJ in *E's case*) applied the “akin to employment” test by assessing the relationship between the brother teachers and the institute without reference to the policy reasons identified in his judgment. He did so bearing in mind the need to keep separate policy reasons and legal criteria.
- (2) By contrast, in *Cox* the Supreme Court appeared to elevate the policy reasons laid down by Lord Phillips to the criteria for determining if vicarious liability should be imposed.

21. Whilst, as Lord Phillips acknowledged at paragraph 34 of *Christian Brothers*, there may be some overlap (or some similarity) between the underlying policy reasons for imposing vicarious liability and some of the indicia of employment/ criteria for determining if a relationship is “akin to employment” they are separate and distinct. By way of example, Ward LJ’s analysis in *E’s case* was that an “employee” acts “*in his employer’s business for his business*” and Lord Phillips held the brother teachers were akin to employees because they were acting in pursuit of the institute’s objectives. It is also, separately, a policy justification for the imposition of vicarious liability: if A commits a tort whilst acting for the benefit and furtherance of B, then policy dictates that B should be held responsible for A’s actions. However, not all policy reasons for the imposition of vicarious liability are indicia of employment and vice versa. To treat them as such offends against the warning given by Lord Hobhouse in *Lister*.

22. Further, there was concern that the traditional distinction between those in employment, or something akin to employment, and independent contractors had been abolished (deliberately or unintentionally) in favour of a wide, policy led, approach to vicarious liability. This was borne out by the approach adopted by the Court of Appeal in *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157 and *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670. In the latter, Irwin LJ expressly stated at paragraphs 44 and 45 that:

“44. That said, I accept the submission of Ms Gumbel that the law now requires answers to the specified questions laid down in Cox and Mohamud, and affirmed in Armes, rather than an answer to the question: was the alleged tortfeasor an independent contractor? No doubt where the answers to the Cox/Mohamud questions are such that vicarious liability cannot be established, the relationship

may often be that of independent contractor. But that question of definition appears to me no longer to be the test. If the Supreme Court had intended it to survive as such, it seems unlikely, given that formerly this was a decisive test, that the Court would have failed to say so.”

“45. Moreover, it seems clear to me that, adopting the approach of the Supreme Court, there will indeed be cases of independent contractors where vicarious liability will be established. Changes in the structure of employment, and of contracts for the provisions of services, are widespread. Operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control. Such patterns are evident in widely different fields of enterprise, from construction, to manufacture, to the services sector. It is clear that Lord Reed had such changes in mind, see Cox, paragraphs 16 and 31.”

Barclays Bank plc v Various Claimants

23. Between 1968 and 1984 applicants for jobs at Barclays Bank (“the bank”) were required to attend a medical examination by Dr Bates for the purposes of showing that they were medically fit to work and they could be recommended for life insurance at ordinary rates as required by the bank’s pension scheme. Dr Bates was not retained by the bank (in fact carrying out medical exams for the bank was only a small part of Dr Bates’ practice), but the bank organised appointments for the applicants, provided Dr Bates with a standard form report headed “Barclays Confidential Medical Report” and paid a fee for each report. It was alleged that during the course of those examinations Dr Bates sexually assaulted 126 patients.
24. There followed the trial of a preliminary issue as to whether the bank was vicariously liable for any assaults perpetrated by Dr Bates. It was held at first instance, applying the five policy principles set out by Lord Phillips in *Christian Brothers*, that the bank was vicariously liable for any assault proved. That decision was upheld by the Court of Appeal (which adopted a similar approach).
25. The bank appealed. By the time that the parties reached the Supreme Court, the parties’ respective positions were as follows:

- (1) The bank argued that although there had been an expansion of the categories of relationship that can give rise to vicarious liability beyond simple contracts of employment, they had not expanded so as to destroy the trite proposition 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 his work.”*¹⁷
 - (2) The claimants argued that *Christian Brothers, Cox and Armes* had replaced the trite proposition with a multi-factorial approach in which a range of incidents are considered in deciding whether it is “fair, just and reasonable” to impose vicarious liability upon one person for the torts of another who is not his employee.
26. Lady Hale, with whom Lords Reed, Kerr, Hodge and Lloyd-Jones agreed, considered the line of cases discussed above with particular emphasis on the Court of Appeal’s judgment in *E’s case* and the Supreme Court’s judgments in *Christian Brothers, Cox and Armes*. A number of important points arise from the Supreme Court’s judgment in *Barclays* in this respect:
- (1) First, at paragraphs 16 and 17 Lady Hale commented that *“There appears to have been a tendency to elide the policy reasons for the doctrine of the employer’s liability for the acts of his employee, set out in para 35 of Christian Brothers, with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability.”* This amounted to tacit acceptance that the courts in *Cox and Armes* had fallen into error by applying the five policy reasons as strict, exhaustive, criteria for the purposes of establishing vicarious liability thus eliding the policy reasons for the doctrine of vicarious liability with the principles that should guide the development of that liability;
 - (2) Second, at paragraph 18 Lady Hale said that she did not believe that Lord Phillips had said that the five ‘incidents’ were the only criteria by which to judge whether a relationship is “akin to employment”.
 - (3) Third, Lady Hale noted in paragraph 18 that Lord Phillips did not apply the five policy principles set out in paragraph 35 of his judgment in *Christian Brothers* as the criteria for establishing vicarious liability, but instead addressed himself to *“the detailed features of*

¹⁷ *D & F Estates Ltd v Church Comrs* [1989] AC 177, per Lord Bridge at 208.

the relationship” and “its closeness to employment, rather than by reference to the five ‘policy reasons’ in para 35”. Similarly, in E’s case, Ward LJ had “adopted the test of ‘akin to employment’ but he had not asked himself whether those five ‘incidents’ were present. He had conducted a searching enquiry into whether the relationship between priest and bishop was more akin to employment than anything else.”

- (4) Fourth, Lady Hale accepted at paragraph 22 that two different tests had arisen from the cases discussed above, namely the “akin to employment” test adopted by Lord Phillips and the test propounded by Lord Reed at paragraph 24 of *Cox*.
 - (5) Fifth, at paragraph 24 Lady Hale stated in terms that, *“There is nothing ... in the trilogy of Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded.”*
 - (6) Sixth, Lady Hale refused to align the definition of “employee” for the purposes of vicarious liability with that adopted in employment law. This reflected the earlier approach of Ward LJ in *E’s case*¹⁸.
27. Having considered the existing case law the Supreme Court addressed the test that should be applied to determine if a tortfeasor is carrying on business on his own account or whether he is in a relationship “akin to employment”:

*“27. The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five ‘incidents’ identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer’s business. But the key, as it was in *Christian Brothers, Cox and Armes*, will usually lie in understanding the details of the relationship.*

¹⁸ *E’s case*, per Ward LJ at paragraph 59.

Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.”

28. Arguably, this introduces a new test that incorporates both Lord Phillips’ approach in *Christian Brothers* and the Supreme Court’s later approach in *Cox and Armes*. Following *Barclays*, the applicable test now requires:
- (1) A factual inquiry to ascertain if, on the facts of the case, it is clear that the tortfeasor was in a relationship “akin to employment” with his employer or carrying out his own independent business. Adopting the approach of Lord Phillips in *Christian Brothers*, a number of factors will be considered at this stage including how integrated someone is into the organisation and for whose benefit they were acting when the tort was committed (see Rix LJ in *Viasystems* and Ward LJ in *E’s case*). This will usually produce the answer.
 - (2) In “doubtful cases” where a factual inquiry does not provide a clear answer, it will be necessary to consider the five ‘incidents’ set out by Lord Phillips in *Christian Brothers*, as addressed by Lord Reed in *Cox and Armes*.
29. This new test is to be welcomed, not least because it pulls together the strands of the existing case law to form a single, universally applicable, test. It has avoided two inconsistent lines of authority developing around the tests in *Christian Brothers* and *Cox*. It also:
- (1) Reasserts the distinction between those in a relationship “akin to employment” on the one hand and “independent contractors” on the other.¹⁹ This distinction, which had been maintained by the Supreme Court in its earlier judgments, had been challenged by the cases that followed *Cox*.
 - (2) Sensibly holds policy considerations in reserve for those “doubtful” cases that cannot be determined by reference to the facts alone, making clear that cases should “usually” be determinable on the facts. This is a clear indication that the law should develop in an iterative manner and not in a piecemeal, knee-jerk, attempt to answer to the demands of policy. It rightly heeds the warning of Lord Hobhouse in *Lister*.

¹⁹ See paragraph 26(6) above.

30. What the Supreme Court did not attempt to do in *Barclays* was define the criteria that should be applied when asking if a tortfeasor is in a relationship “akin to employment”. As noted above, this was the approach in *E’s case* (adopted in *Christian Brothers*) where Ward LJ indicated that criteria could be extracted from the earlier cases. This is analogous to how other areas of the law of tort have developed.²⁰
31. Following *Barclays* we are therefore likely to see cautious, iterative, development of the criteria by the Courts. However, one size does not necessarily fit all: it is foreseeable that different criteria will develop, or be “refined” (to use the language of Lord Phillip and Lord Reed), for different industries or spheres of commerce taking into account history, industry practice and the realities of commercial life.

Limb 2: The close connection test and the creation of risk

32. The evolution of Limb 2 has been discussed at great length in the recent cases, notably by Lord Toulson in *Mohamud* who traced the law’s development back to medieval times²¹. Prior to *Lister* the Courts had adopted the definition of vicarious liability suggested by Salmond in the first edition of his textbook, *Salmond on Torts*.²² He defined a wrongful act by a servant in the course of his employment as “*either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master,*” with the amplification that a master is liable for the acts which he has not authorised if they are “*so connected with acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them.*” Despite being cited with approval in a number of cases, even when stretched it was unable to satisfactorily accommodate cases in which the employee’ deliberate misconduct was the cause of harm. This resulted in a series of cases in which the Courts artificially expanded the second limb of the Salmond formula to impose vicarious liability on employers for the deliberate (often violent) acts of their employees.²³

²⁰ E.g. *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4.

²¹ *Mohamud v WM Morrison Supermarkets plc*, per Lord Toulson at paragraph 11ff.

²² *Lister v Hesley Hall Ltd*, per Lord Steyn at paragraph 15.

²³ In *Mohamud* Lord Toulson described the Salmond formulation as being “stretched to breaking point” in *Lister*.

33. In *Lister* the House of Lords was faced with applying the doctrine of vicarious liability to the warden of a school boarding house who had sexually abused children in his care. Lord Steyn (with whom Lord Hutton and Lord Hobhouse agreed) spoke of the pitfalls of terminology and said that it was unnecessary to ask whether the acts of sexual abuse were modes of doing authorised acts. At paragraph 28 he posed the broad question whether the warden's torts were so closely connected with his employment that it would be just to hold the employers liable. He concluded that the employers were vicariously liable because they undertook the care of the children through the warden and he had abused them. There was, therefore, a close connection between his employment and his tortious acts.
34. The House of Lords in *Lister* did not engage with general questions of how close the connection must be between the tortious act of the employee and his employment, nor did it seek to lay down a list for use by the Courts in determining if a "close connection" existed between the tortfeasor's employment and the tort committed. In fact, the House of Lords warned against the adoption of verbal formulae that detract from "*attention [that] should be directed to the closeness of the connection between the employer's duties and his wrongdoing.*"²⁴
35. The "close connection" test was considered by Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, who commented both upon the ambit of the test and upon its lack of precision. He stated that:

"23. If, then, authority is not the touchstone, what is? ... Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in Lister v Hesley Hall Ltd ..."

"25. The "close connection" test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the

²⁴ *Lister*, per Lord Millett at paragraph 70.

wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged ...”

“26. The lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, whether producing or negating vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions.”

36. This lack of precision was also noted by the Supreme Court in *Christian Brothers*. At paragraph 74, Lord Phillips observed:

“It is not easy to deduce from the Lister case ... the precise criteria that will give rise to vicarious liability for sexual abuse. The test of ‘close connection’ approved by all tells one nothing about the nature of the connection. Lord Clyde and Lord Hobhouse found it significant that the tortfeasor’s employment involved exercising care for the victim. Only Lord Millett expressly endorsed the importance that the Canadian decisions attached to the creation of risk. This has, however, been identified as of significance in the cases that have followed.”

37. As Lord Phillips went on to explain in paragraphs 79 and 80 of *Christian Brothers*, the “creation or augmentation of risk” referred to by Lord Millet in *Lister* had been considered a relevant criterion in the application of the “close connection” test by the Supreme Court in *Majrowski v Guy’s and St Thomas’s NHS Trust* [2007] 1 AC 224 and by the Court of Appeal in *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441. He further explained:

“86. Starting with the Canadian authorities a common theme can be traced through most of the cases to which I have referred. Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involved a strong causative link.”

“87. These are the criteria that establish the necessary ‘close connection’ between relationship and abuse. I do not think that 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, of 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.”

38. In *Christian Brothers* Lord Phillips stated (1) the need for a strong causative link between, on the one hand, the relationship between defendant and tortfeasor and, on the other hand, the act of abuse; and (2) that “creation of risk” was not a definitive test for determining if a “close connection” existed, but it was one of the (otherwise undefined) criteria and one of the policy considerations that should be taken into account by the Courts.²⁵ The Supreme Court also weighed “risk creation” as one relevant consideration in *Armes*,²⁶ but not *instead* of the “close connection” test.²⁷ Accordingly, whilst *Christian Brothers* and the later decisions left Lord Nicholls’ view that the Courts must make an “*evaluative judgment*” undisturbed, it provided some useful guidance on what could inform that judgment.

Mohamud v WM Morrison Supermarket plc and the cases the followed it

39. The Supreme Court had a further opportunity to consider Limb 2 of the vicarious liability test in *Mohamud*. Morrison’s employee, Mr Khan, worked at a petrol station sales kiosk. Mr Mohamud went into the sales kiosk and asked Mr Khan if it was possible to print some documents held on a USB stick. Mr Khan refused in an offensive manner and in the following exchange used racist, abusive and violent language towards Mr Mohamud and ordered him to leave. Having done so, he followed Mr Mohamud out of the kiosk across the forecourt and subjected him to a serious physical attack.
40. Mr Mohamud issued proceedings against Morrisons in the County Court for battery and assault on the basis that it was vicariously liable for the actions of Mr Khan. The judge found that Mr

²⁵ The editors of Charles & Percy on Negligence (14th ed) go further at paragraph 7-67, stating that in *Catholic Brothers* the Supreme Court “took the further step and held that there needed to be proof that the defendant caused a material increase in the risk that abuse would occur.”

²⁶ *Armes*, per Lord Reed at paragraph 61.

²⁷ In *Armes* Limb 1 and Limb 2 of the vicarious liability test were treated as inter-connected and there was no separate consideration of Limb 2.

Mohamud had been assaulted, but that Mr Khan had carried out the attack for reasons of his own. The assault therefore fell outside of the scope of his employment and the claim against Morrison was dismissed. The Court of Appeal dismissed an appeal by Mr Mohamud. The sole question for the Supreme Court was whether Mr Khan's assault on Mr Mohamud satisfied Limb 2 of the vicarious liability test.

41. Lord Toulson considered the development of Limb 2. In the course of his discussion, Lord Toulson made a number of instructive comments:

- (1) Following consideration of *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, Lord Toulson noted that *"The expression 'within the field of activities' assigned to the employee is helpful. It conjures a wider range of conduct than acts done in furtherance of his employment"*. It was a phrase that informed Lord Toulson's summary of the law later in his judgment.
- (2) At paragraph 40 he acknowledged that "enterprise risk" or "creation of risk" had been prominently adopted as the underpinning of the doctrine of vicarious liability. However, he emphasised that *"the court is not required in each case to conduct a retrospective assessment of the degree to which the employee would have been considered to present a risk ... The risk of an employee misusing his position is one of life's unavoidable facts."*
- (3) Whilst acknowledging the comments made by Lord Nicholls and Lord Phillips about the imprecise nature of the "close connection" test he noted at paragraph 43 that: *"in Lister the court was mindful of the risk of over-concentration on a particular form of terminology, and there is a similar risk in attempting to over-refine, or lay down a list of criteria for determining, what precisely amounts to a sufficiently close connection to make it just for the employer to be held vicariously liable. Simplification of the essence is more desirable."*

42. Lord Toulson summarised the present law at paragraphs 44 and 45. He held that, in its simplest form, the court has to consider two matters when determining Limb 2:

- (1) Firstly, adopting a broad approach, it should consider the functions, 'field of activities' or nature of the employee's job.

- (2) Second, it should consider the closeness of the connection between the employee's position and his wrongful conduct. In doing so, the Court should ask "[if] the employee used or misused the position entrusted to him in a way which injured the third party" as a means of determining if it is just for the employer who selected him and put him in that position to be held responsible.
43. Applying the law as summarised, Lord Toulson concluded that Morrisons was vicariously liable for the actions of its employee for the following reasons (with which the other Supreme Court Justices agreed):

"47. [It] was Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and ordering him to leave was inexcusable but within the 'field of activities' assigned to him. What happened thereafter was an unbroken sequence of events. It was argued by the respondent and accepted by the judge that there ceased to be any significant connection between Mr Khan's employment and his behaviour towards the claimant when he came out from behind the counter and followed the claimant onto the forecourt. I disagree for two reasons. First, I do not consider that it is right to regard him as having metaphorically taken off his uniform the moment he stepped out from behind the counter. He was following up on what he had said to the claimant. It was a seamless episode. Secondly, when Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to the petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it."

"48. Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there."

44. Whilst it did not appear from Lord Toulson’s speech that he intended to depart from the “close connection” test or to prescribe general criteria for application by the Courts when answering that question, it raised a number of points:

- (1) Lord Toulson’s finding that there had been an “*unbroken sequence of events*” and comprised “*a seamless episode*” appeared to suggest that there was a temporal element to the “close connection” test. This was reinforced by the basis on which Lord Toulson distinguished the earlier case *Warren v Henlys Ltd* [1948] 2 All ER 935, in which there was a time gap between the initial altercation and the later assault such that the attendant’s behaviour was “past history” by the time he assaulted the claimant and was no longer acting *qua* attendant.
- (2) However, any introduction of a temporal element to the “close connection” test appeared inconsistent with both Lord Toulson’s analysis of the law’s development and his support for a broad test unrestricted by specific criteria.
- (3) *If a temporal element had been introduced into the “close connection” test, did this render an employer liable for any acts of the employee that occurred during or immediately following his duties? As the editors of Charlesworth & Percy on Negligence (14th ed) warned at paragraph 7-25, “care needs to be taken to ensure that the decision in Mohamud does not lead to employers being held liable for anything an employee does at work and on the employer’s premises.”*
- (4) *Christian Brothers* had promoted the need for a causative link and consideration of whether the tortfeasor’s employment had “created the risk”²⁸. Lord Reed had also referred to “creation of risk” as a relevant factor in both *Cox*²⁹ and *Armes*.³⁰ However, paragraph 40 of Lord Toulson’s judgment³¹ cast doubt on whether this remained sound guidance.

²⁸ See paragraphs 37 and 38 above.

²⁹ *Cox*, per Lord Reed at paragraph 30.

³⁰ *Armes*, per Lord Reed at paragraph 61.

³¹ See paragraph 41(2) above.

45. The uncertainty that followed *Mohamud* was apparent in both *Bellman v Northampton Recruitment Ltd* [2019] 1 All E.R. 1133 and *WM Morrison Supermarkets plc v Various Claimants* [2019] QB 772. In *Bellman*, Asplin LJ considered whether the assault formed part of a “seamless series of events” but did so as part of a wider inquiry into whether there was a “close connection” because it was a misuse of the director’s position³².

***WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12**

46. In *Morrison Supermarket* the Supreme Court was faced with a case concerning the release of personal information. Harboured a grudge against Morrisons, a senior auditor in its internal audit team, Mr Skelton, published personal data relating to over 9,000 of Morrisons’ employees or former employees. The employees brought claims against Morrisons for its own breaches of the Data Protection Act (“DPA”), misuse of private information and breach of confidence, but also on the basis that Morrisons was liable for Skelton’s conduct (although the specific respects in which the conduct was alleged to be wrongful was not pleaded). The employees claimed damages for alleged “distress, anxiety upset and damage” and ten lead cases were selected pursuant to a GLO.
47. The trial judge rejected the contention that Morrisons was under any primary liability but held it was vicariously liable for Skelton’s breach of statutory duty under the DPA, his misuse of private information and his breach of confidence. The first instance decision was upheld by the Court of Appeal. The tortious acts were “within the field of activities assigned to him by Morrisons” and, like the Judge at first instance, the Court of Appeal emphasised at paragraph 74 that the relevant facts constituted a “seamless and continuous sequence” or “unbroken chain” of events³³. The Court also noted that, although it was an unusual feature of the case that Skelton’s motive in committing the wrongdoing was to harm his employer, Lord Toulson had said in *Mohamud* that motive was irrelevant.
48. Morrison appealed to the Supreme Court. Lord Reed (with whom Lords Lady Hale, Lord Kerr, Lord Hodge and Lord Lloyd-Jones agreed) noted that the courts below had “*applied what they*

³² *Bellman*, per Asplin LJ at paragraph 26. In *MW Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, Lord Reed remarked at paragraph 46 that “*Although in some respects the judgment in Bellman adopted a similar approach to Mohamud to that adopted by the Court of Appeal in the present case, the conclusion reached was correct.*”

³³ *Morrison*, per Lord Reed at paragraph 74.

understood to be the reasoning of Lord Toulson in Mohamud” and had treated as critical his references to *“the principle of social justice which goes back to Holt CJ”*, the connection between the employee’s conduct and his employment (*“an unbroken sequence of events”, or “a seamless episode”*) which they appeared to have regarded that as referring to unbroken temporal or causal chain of events and his statement that *“Mr Khan’s motive is irrelevant”*. This was a misunderstanding which *“... if correct would constitute a major change in the law”*³⁴.

49. Lord Toulson’s judgment was not intended to effect a change in the law. To the contrary, read as a whole, it was clear that he was expressly applying long-established principles. The Courts below had taken several passages of Lord Toulson’s judgment out of context and had treated them as establishing legal principles: *“principles which would represent a departure from the precedents which Lord Toulson was expressly following.”*³⁵ As Lord Reed set out at paragraph 26:

“26. Lord Toulson was not suggesting any departure from the approach adopted in Lister and Dubai Aluminium. His position was the exact opposite. Nor was he suggesting that all that was involved in determining whether an employer was vicariously liable was for the court to consider whether there was a temporal or causal connection between the employment and the wrongdoing, and whether it was right for the employer to be held liable as a matter of social justice. Plainly, the close connection test is not merely a question of timing or causation, and the passage which Lord Toulson cited from Dubai Aluminium makes it clear that vicarious liability for wrongdoing by an employee is not determined according to individual judges’ sense of social justice it is decided by orthodox common law reasoning, generally based on the application to the case before the court of the principle set out by Lord Nicholls at para 23 of Dubai Aluminium, in the light of the guidance to be derived from decided cases. In some cases, the answer may be clear. In others, inevitably, a finer judgment will be called for.”

50. The Supreme Court accordingly held that the Courts below had erred in four respects:

³⁴ *Ibid*, paragraph 16.

³⁵ *Ibid*, paragraph 17.

- (1) They interpreted the ‘field of activities’ test too widely. The act complained of did not form part of Mr Skelton’s field of activities for the company. It did not fall within the scope of the activities he had been employed for;³⁶
 - (2) The fact that the five policy factors articulated by Lord Phillips in *Christian Brothers* were present was irrelevant. Those factors are connected to the question of whether vicarious liability exists between an employer and someone who was not an employee, but might have a relationship akin to employment. This had nothing to do with the present case as Skelton was an employee;
 - (3) Lord Toulson’s comments that there was “*an unbroken sequence of events*”, and that it was “*a seamless episode*”, were not directed towards the temporal or causal connection between the various events, but towards the capacity in which the employee was acting when those events took place.³⁷ A temporal link and an unbroken chain of causation between Morrison providing Skelton the data and his unlawful disclosure was not enough to satisfy the close connection test;³⁸
 - (4) They wrongly considered that motive was irrelevant.³⁹ Whether Skelton had been acting on a personal vendetta rather than for his employer’s business was highly relevant.⁴⁰ Lord Toulson’s reference to the employee’s motive being irrelevant was in the context of him having already concluded that Mr Khan was going about his employee’s business, albeit wrongly, rather than pursuing his private ends (supporting the existence of a close connection between his field of activities and the commission of the tort). Having reached that conclusion, the reason why Mr Khan had become so enraged as to assault the motorist could not make a material difference.
51. Considering the issue of vicarious liability afresh and applying the general test laid down by Lord Nicholls in paragraph 23 of *Dubai Aluminium*, the question was whether Skelton’s disclosure of the data was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as done by him while acting in the ordinary course of his employment. In this case:

³⁶ *Ibid*, paragraph 31.

³⁷ *Ibid*, paragraph 28.

³⁸ *Ibid*, paragraph 31.

³⁹ *Ibid*, paragraphs 29 and 30.

⁴⁰ *Ibid*, paragraph 31.

- (1) The only connecting factor between what Skelton was authorised to do and the disclosure was that he could not have made the disclosure if he had not been given the task of collating the data and transmitting it to KPMG. But the mere fact that his employment gave him the opportunity to commit the wrongful act was not sufficient⁴¹.
 - (2) In applying the close connection test it is necessary to have regard to the assistance provided by previous court decisions. There did not appear to be any previous case in which it has been argued that an employer might be vicariously liable for wrongdoing which was designed specifically to harm the employer.⁴² That was perhaps unsurprising.
 - (3) As explained in *Dubai* at paragraph 32 “*a distinction is to be drawn between cases where the employee was engaged, however misguided, in furthering his employer’s business, and cases where the employee is engaged solely in pursuing his own interests: on a ‘frolic of his own’, in the language of the time-honoured catch phrase ... The matter stands differently when the employee is engaged only in furthering his own interests, as distinct from those of his employer. Then he ‘acts as to be in effect a stranger in relation to his employer with respect to the act he has committed’ see para: see Isaacs J in Bugge v Brown (1919) 26 CLR 110, 118.*” However, in *Morrison’s* it was: “*abundantly clear that Skelton was not engaged in furthering his employer’s business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by Lord Nicholls in Dubai Aluminium in the light of the circumstances of the case and the relevant precedents, Skelton’s wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrison’s liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment*”
52. The Supreme Court held that *Morrison’s* was not responsible for the acts of Skelton and allowed the appeal. In so doing, it clarified several of the points raised (or seemingly raised) in *Mohamud*. In particular, it dispelled the myth that a temporal or causal link between the wrongdoer’s employment and the wrongdoing needed to be established to satisfy the “close

⁴¹ *Ibid*, paragraphs 34 and 35.

⁴² *Ibid*, paragraph 36.

connection” test. The test remains that set out in paragraph 23 of *Dubai*, namely that: “*the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that ... the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm’s business or the employee’s employment*”.

53. Accordingly, whilst there is a need for a “close connection” to satisfy Limb 2 of the vicarious liability test, outside of the realm of sexual abuse cases there is no need for the “*strong causal connection*” referred to in *Christian Brothers*. However, it remains unclear if the same can be said for the presence of “enterprise risk”, a factor to which Lord Phillips attributed particular weight in *Christian Brothers* but from which Lord Toulson appeared to retreat in *Muhamad*. The Supreme Court did not expressly address “creation of risk” in *Morrison*s and it will therefore be necessary to wait to see how the Courts approach Limb 2 in non-abuse cases in the future.

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