Reining in Vicarious Liability

By any measure, the English law of vicarious liability has changed dramatically over the course of the last 20 years. The most significant driver of the doctrine's transformation has plainly been the desire of the courts to reshape the law so as to provide meaningful redress to the victims of child sexual abuse in institutional settings. And the overall effect has been a significant expansion in the scope of the doctrine, accompanied by high levels of uncertainty, as reflected in the frequency with which appeals on the subject have been heard by the Supreme Court in recent years. In 2016 the Court handed down judgments in two such appeals on the same day, *Cox v Ministry of Justice*[1] and *Mohamud v WM Morrison Supermarkets plc*.[2] One suspects that those judgments were intended to be definitive statements of the Court's position on the two central issues around which the law of vicarious liability revolves, namely the relationships that give rise to such liability (the subject-matter of *Cox*), and the connection required between that relationship and the primary wrongdoer's tort (the subject-matter of *Mohamud*). It is therefore striking that less than four years later the Court has again handed down two judgments on vicarious liability on the same day, with again one being on the first question (*Barclays Bank v Various Claimants*[3]) and the other on the second (*WM Morrison Supermarkets plc v Various Claimants*[4]). The overall tenor of these two most recent decisions is unquestionably conservative, and it seems that the limits on the expansion of vicarious liability are now coming into clearer focus.

[1] [2016] UKSC 10, [2016] AC 660 ('*Cox*').
[2] [2016] UKSC 11, [2016] AC 677 ('*Mohamud*').
[3] [2020] UKSC 13, [2020] 2 WLR 960 ('*Barclays Bank*').
[4] [2020] UKSC 12, [2020] 2 WLR 941 ('*Morrison Supermarkets*').

1. The Background to the *Barclays Bank* Decision

In the first paragraph of Lady Hale's judgment for the Supreme Court in *Barclays Bank*, she introduces the issues raised by that case and the companion decision in *Morrison Supermarkets* in the following terms:

> Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make one pay for the fault of the other. Historically … that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject of the *Morrison's* case.[5]

The relationship underpinning the vast majority of vicarious liability cases is of course one of employment, and for the purposes of identifying the requisite employment relationship the law of vicarious liability used to be based on a simple dichotomy between employees and independent contractors, with no distinction being drawn between different legal contexts. It followed that when classifying a working person for the purposes of vicarious liability, the courts drew upon case law from other legal contexts, namely employment law, tax and social security. Two major developments in this regard provide the background to the decision in *Barclays Bank*. The first was the abandonment of the formalist approach to the definition of an employee, and the recognition that a worker could be classified as an employee for vicarious liability purposes alone. This development is traceable to *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern Ltd)*,[6] where the

[5] [2020] UKSC 13, [1].
[6] [2005] EWCA Civ 1151, [2006] QB 510.

Court of Appeal held (in the context of the hiring out of a worker) that more than one employer could be vicariously liable for the negligence of the same employee. It had previously been assumed that for a temporary end user to be vicariously liable, there had to be a transfer of the contract of employment from the general employer, an artificial idea disapproved by the Court of Appeal in *Viasystems*, which instead held that (in the words of Rix LJ) the doctrine of vicarious liability could properly be invoked against an employer who was 'not really, in law, the employee's employer'.[7] The other major development on the first question was the extension of vicarious liability beyond the contract of employment to relationships 'akin to employment'. This was traceable to *E v English Province of Our Lady of Charity*,[8] which concerned allegations of sexual abuse by a Catholic parish priest. A majority of the Court of Appeal held that a trust which stood in the place of the diocesan bishop could be vicariously liable for the priest's wrongdoing, even though the priest was not an employee of the diocese, because the relationship between priest and bishop was so akin to a relationship of employment that it was 'fair and just' for vicarious liability to attach to it. According to Ward LJ, the time had come 'emphatically to announce that the law of vicarious liability has moved beyond the confines of a contract of service'.[9]

This new category of relationships 'akin to employment' was further developed by the Supreme Court in *Catholic Child Welfare Society v Institute of the Brothers of the Christian Schools*,[10] where it was used to justify imposing vicarious liability on a religious Institute for abuse carried out by teachers who were brothers of the Institute. According to Lord Phillips, the Institute performed the function of providing a Christian education to boys, which function was carried out, in part, by the brothers who served as teachers. Since the Institute and the brothers shared a 'common purpose',[11] that was enough for their relationship to be regarded as akin to the relationship between

[7] Ibid., [76].
[8] [2012] EWCA Civ 938, [2013] QB 722.
[9] Ibid., [73].
[10] [2012] UKSC 56, [2013] 2 AC 1 ('*Christian Brothers*').
[11] Ibid., [61].

employer and employee for the purposes of vicarious liability.[12] Whether it was 'fair, just and reasonable' to recognise a relationship as one capable of giving rise to vicarious liability depended on the extent to which it was characterised by the five features which made it appropriate to impose such liability on an employer, namely: the likely greater means of the employer; the fact that the tort was the result of activity of the employee on the employer's behalf; the fact that the employee's activity was part of the business activity of the employer; the fact that the employer had created the risk of the tort committed by the employee; and the fact that the employee will have been under the employer's control.

Basing the new category of relationships 'akin to employment' on a list of five broadly framed 'characteristics' was hardly a recipe for certainty, and so it was no surprise that further appellate litigation ensued, including two subsequent decisions of the Supreme Court. The first of these was *Cox*,[13] where Lord Reed was faithful to Lord Phillips's general approach but downplayed the importance of the first and last of his five factors and emphasised that the other three were inter-related. The result was that a relationship other than one of employment was capable of giving rise to vicarious liability where harm was 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 … and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question'.[14] Applying that test, it was held that the relationship between a working prisoner and the prison service fell within the new category. However, Lord Reed made it clear in *Cox* that the new category did not extend to cases where a tortfeasor's activities were 'entirely attributable to the conduct of a recognisably independent business of his own or a third

[12] Ibid., [47].
[13] *Cox*, above n.1.
[14] Ibid., [24].

party', thereby apparently affirming the continuing significance of the distinction between employees (and those akin to them) and independent contractors.[15]

The second Supreme Court case was *Armes v Nottinghamshire County Council*,[16] where the 'akin to employment' category was held to encompass the relationship between a local authority and the foster parents the authority had entrusted with the care of a young girl. This decision arguably extended the akin to employment concept further than the earlier authorities,[17] but again the employee/contractor distinction was not questioned—according to Lord Reed, the foster parents could not 'be regarded as carrying on an independent business of their own'.[18] And the continued relevance of that distinction was confirmed in *Kafagi v JBW Group Ltd*,[19] where the Court of Appeal held that a judicial services company was not vicariously liable for the alleged torts of a bailiff to whom it had sub-contracted the collection of council tax debts because the bailiff 'ran his own business', and in *Brayshaw v Partners of Apsley Surgery*,[20] where a medical practice was held not to be vicariously liable for the alleged wrongdoing of a locum General Practitioner. Furthermore, the Singapore Court of Appeal rejected an argument that the line of authority beginning with *E v English Province of Our Lady of Charity* had undermined the distinction; the contribution of those cases had rather been 'to fine-tune the existing framework underlying [vicarious liability] so as to accommodate the more diverse range of relationships which might be encountered in today's context'.[21]

[15]Ibid., [29]. Similar observations were made in *E*, above n.8, [69] and in *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] AC 537, [3].
[16] [2017] UKSC 60, [2018] AC 355.
[17] In *Barclays Bank*, above n.3, at [23], Lady Hale described *Armes* as 'perhaps the most difficult' of the relevant authorities.
[18] *Armes*, above n.16, [59]. Lord Hughes, dissenting, disagreed with that assessment, maintaining that if a business model was to be applied to the relationship between the foster parents and the council, then they looked a great deal more like independent contractors than employees.
[19] [2018] EWCA Civ 1157.
[20] [2018] EWHC 3286 (QB), [2019] 2 All ER 997.
[21] *Ng Huat Seng v Mohammad* [2017] SGCA 58, [63].

2. *Barclays Bank v Various Claimants*

In *Barclays Bank* the Supreme Court was once again called upon to provide guidance as to the limits of the 'akin to employment' category, and in particular the relationship between that category and the employee/contractor distinction. Between the late 1960s and the early 1980s the defendant bank had instructed a doctor to carry out medical assessments of prospective employees, many of whom were young women applying for their first job straight out of school. The bank arranged the appointment with the doctor, told the job applicant when to report to the doctor's home (which was where the assessments took place), and provided the doctor with a pro forma report for him to complete. The claimants alleged that during their assessment they had been sexually assaulted by the doctor, and the issue was whether the bank was vicariously liable for these alleged assaults. The doctor had what was described as a 'portfolio practice', of which the work for the bank was a comparatively minor component. He also worked for local hospitals, carried out medical examinations for emigration purposes and for a range of other parties, and wrote a newspaper column.

Nicola Davies J[22] held at first instance that the bank was vicariously liable for any torts proven to have been committed, and the Court of Appeal[23] dismissed the bank's appeal, having applied the five criteria set out in *Christian Brothers*. This was despite the fact that (as we have seen) Lord Reed in *Cox* excluded from the ambit of vicarious liability cases where the activities of the tortfeasor were attributable to the conduct of 'a recognisably independent business of his own or a third party', a description that appeared to cover the activities of the doctor. As a commentator on the Court of Appeal decision said, it was 'difficult not to conclude that the wall around vicarious liability for independent contractors' had been breached.[24]

[22] [2017] EWHC 1929 (QB), [2017] IRLR 1103.
[23] [2018] EWCA Civ 1670, [2018] IRLR 947.
[24] A. Silink, 'Vicarious Liability of a Bank for the Acts of a Contracted Doctor' (2018) 34 *Professional Negligence* 46, 46.

The Supreme Court allowed the bank's appeal, holding that since the doctor was 'in business on his own account',[25] the relationship was not 'akin to employment'. The claimants had argued that the traditional rule that an employer was not vicariously liable for the torts of an independent contractor had been replaced by a multi-factorial approach in which a range of considerations were taken into account when deciding whether it was 'fair, just and reasonable' to impose vicarious liability. After considering the authorities discussed above, Lady Hale, who gave the sole judgment, rejected that argument and concluded that there was nothing in the earlier Supreme Court case law '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' had been eroded.[26] As well as reiterating the longstanding rule that there is no vicarious liability for the torts of an independent contractor, Lady Hale also signalled a shift away from reliance on Lord Phillips's five factors when considering the new category, towards an enquiry more tightly focused on the particularities of the relationship between the tortfeasor and the defendant. It had never been intended that the five factors 'were the only criteria by which to judge the question'; the emphasis in the earlier cases had instead been on the details of the relationship, and its closeness to employment.[27] On the facts, the doctor had clearly been an independent contractor of the bank. He was paid a fee for each report that he completed, but not a retainer that might have obliged him to accept a certain number of referrals from the bank, so he was free to turn down work if he wished. He also presumably took out his own liability insurance. He was 'in business on his own account as a medical practitioner with a portfolio of patients and clients'.[28]

[25] *Barclays Bank*, above n.3, [28].
[26] Ibid., [24].
[27] Ibid., [18].
[28] Ibid., [28].

The point at issue in *Barclays Bank* was admittedly a relatively narrow one, and the decision was really only necessary because the Court of Appeal had misconstrued the earlier Supreme Court authorities. Furthermore, Lady Hale's judgment is almost entirely concerned with the earlier authorities, eschewing normative analysis and avoiding some of the deeper issues raised by the exclusion of independent contractors from the ambit of vicarious liability, and the relationship between that concept and the 'non-delegable duty' technique which the courts use to impose personal liability on an employer for the wrongful conduct of a contractor.[29] Nevertheless, the decision undoubtedly clarifies the approach which should be taken by a court faced with the question of whether the relationship between a tortfeasor and a defendant is capable of attracting vicarious liability. It is now beyond doubt that the concept of a relationship 'akin to employment' provides a possible classification which supplements the employer/contractor distinction, rather than superseding it. A court should therefore first apply the traditional distinction between a contract of service and a contract for services, which, according to Singh LJ in *Kafagi*, 'continues to be relevant in the vast majority of situations'.[30] That will usually produce a clear classification of the tortfeasor as either an employee or an independent contractor, in which case the analysis is concluded either way. If it does not, because the case concerns an 'unusual working [relationship] that [defies] traditional classification',[31] then the court should proceed to a second stage of the analysis, whereby it closely considers the relationship between the tortfeasor and the defendant, and the extent to which it is analogous to an employment relationship. It may be useful at this stage to ask whether (in the words of the Singapore Court of Appeal in *Ng Huat Seng v Mohammad*) the relationship, 'when whittled down to [its] essence, [possesses] the same fundamental qualities as those which inhere in employer-employee relationships'.[32] Ultimately, the question for the court

[29] See, eg, J. Morgan, 'Vicarious Liability for Independent Contractors' (2015) 31 *Professional Negligence* 235 (arguing that the two concepts are 'functionally identical', and that it may be preferable to replace the non-delegable duty concept with open recognition of vicarious liability for independent contractors).
[30] *Kafagi*, above n.19, [21].
[31] Silink, above n.24, 47 (referring to the facts of *Christian Brothers* and *Cox*).
[32] *Ng Huat Seng*, above n.21, [63] (cited in *Barclays Bank*, above n.1, at [26]).

is whether the tortfeasor held a position functionally analogous to employment, for example as regards his or her accountability to the defendant entity, integration into its structure, and performance of duties aimed at pursuing its aims and objectives on its behalf.[33] Although the key 'will usually lie in understanding the details of the relationship',[34] in doubtful cases, Lord Phillips's five criteria may be relevant in deciding whether the tortfeasor was 'effectively part and parcel of the employer's business'.[35] However, those factors do not constitute an independent test for the existence of a relationship akin to employment, and need not be considered at all if the conclusion at the first stage of the analysis is that the tortfeasor is carrying on business on his or her own account.[36]

Finally, in *Barclays Bank* Lady Hale expressly disavowed the idea that the employment law concept of a 'worker' (as defined in section 230(3) of the Employment Rights Act 1996) would necessarily provide a reliable guide when applying the distinction between tortfeasors whose relationship is akin to employment and 'true independent contractors'. Although that concept might be helpful in the vicarious liability context, 'it would be going too far down the road to tidiness … to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of a "worker", developed for a quite different set of reasons'.[37] One formalist approach is not, it seems, to be replaced by another and function, rather than form, remains the key to delimiting the relationships to which vicarious liability is capable of attaching. Nevertheless, the distinction between function and form is not always clear, and while Lady Hale considered that the demise of the assumption that a person would be an employee for all purposes or none might

[33] See S. Todd, 'Torts' [2018] *New Zealand Law Review* 131, 167.
[34] *Barclays Bank*, above n.1, [27].
[35] Ibid.
[36] Ibid. The *Barclays Bank* approach to the 'akin to employment' category was applied in *JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914, where it was held that a lay member of staff employed by the managers of a boarding school in which many of the defendant Institute's brothers taught, and over which the Institute exercised considerable control, was not in a relationship akin to employment with the Institute.
[37] Ibid., [29].

benefit the victims of torts committed by those working in the gig economy, the Supreme Court's reiteration of the orthodox employee/independent contractor distinction provides an obvious incentive for employers to seek to pre-empt vicarious liability by dressing their workers in the clothing of contractors rather than employees. By restating the rule that there is no vicarious liability for the torts of an independent contractor, the Supreme Court has restored some much needed certainty to the first stage of the vicarious liability analysis, but when applying that rule it is to be hoped that the courts will focus on the substance rather than the form of the relationship in question.

3. The Background to the *Morrison Supermarkets* Decision

The issue at the second stage of the vicarious liability enquiry is the connection linking the relationship between the defendant and the tortfeasor with the latter's wrong. Where that relationship is one of employment, the question is generally said to be whether the employee's conduct fell within the course (or scope) of his or her employment. The traditional rule, named after its inventor, Sir John Salmond,[38] was that tortious conduct of an employee was within the course of employment if it was expressly or impliedly authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer. However, the Salmond test gave rise to well-known difficulties when it came to wilful wrongdoing, and around the turn of the century this issue came to a head in litigation relating to child sexual abuse in institutional settings. In one such case, *Lister v Hesley Hall Ltd*,[39] the House of Lords replaced the Salmond test with one that asked whether the tort of the employee was so closely connected with his or her employment that it was fair and just to make the employer liable. Applying this new formula, the defendant school in *Lister* was held vicariously liable for the acts of the warden of the school's boarding

[38] See J.W. Salmond, *The Law of Torts* (Stevens & Haynes, 1907) 83.
[39] [2001] UKHL 22, [2002] 1 AC 215 ('*Lister*').

annexe in abusing the claimants, a conclusion that would have been extremely difficult to reach under the old test.

Whether the close connection test represented a complete break with the traditional formula and the earlier authorities applying it was not immediately clear. In *Lister* what might be labelled a 'modified orthodox' approach was adopted by Lord Millett, who merely warned against the 'excessively literal' application of the traditional test;[40] said that that it should be treated, not as a statutory definition, but rather as 'a guide to the application of the law to diverse factual situations'[41]; and sought to adapt that formula to incorporate the 'close connection' idea, as opposed to abandoning it altogether.[42] Shortly after *Lister* a version of Lord Millett's revised test was adopted in *Dubai Aluminium Co Ltd v Salaam*,[43] where Lord Nicholls also emphasised that in this context the assistance provided by previous decisions was 'particularly valuable'.[44]

However, a broader approach to the second stage of the vicarious liability enquiry also developed post-*Lister*, which seemed to represent a more radical departure from the traditional formula and the older case law. This line of authority culminated in the striking decision of the Supreme Court in *Mohamud*,[45] where Lord Toulson set out a two-stage test for the course of employment, whereby the court first considered what functions or 'field of activities' had been entrusted by the employer to the employee (a question to be addressed broadly), and then went on to ask whether there was a sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable as a matter of social justice.[46]

[40] Ibid., [74].
[41] Ibid., [70].
[42] Ibid., [69].
[43] [2002] UKHL 48, [2003] 2 AC 366 ('*Dubai Aluminium*').
[44] Ibid., [26].
[45] *Mohamud*, above n.2.
[46] Ibid., [44]–[45].

This test, which (unlike the 'modified orthodox' approach) completely abandoned the concept of 'authority' underlying the Salmond formula, was subsequently applied in a number of cases,[47] and was the dominant approach to the course of employment question before *Morrison Supermarkets*.

Another important feature of *Mohamud* was the extent to which the decision on the facts appeared to depart from the pre-*Lister* case law. The employee in the case worked in the sales kiosk of the defendant's petrol station. Having refused the claimant's request to print some documents stored on a USB stick, the employee proceeded to racially abuse the claimant. He then followed the claimant back to his car on the forecourt, and, having told him never to come back to the petrol station, subjected him to a serious physical assault. The Supreme Court held that the assault was within the course of the employee's employment, even though in the case law before *Lister*, the courts had generally held that assaults were in the course of employment only if the employee's intention was, however wrongly, to further his employer's business or assert his employer's authority,[48] a test not obviously satisfied in *Mohamud*,[49] where Lord Toulson described the motive of the employee as irrelevant.[50] Unusually for a decision imposing liability, it was hard to find any tort scholar with a good word to say about *Mohamud*. The general tenor of the commentary was that in this decision the Supreme Court had extended vicarious liability too far,[51] a view that was clearly shared by the High Court of Australia.[52]

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[47] *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214, [2019] 1 All ER 113; *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2019] PNLR 22; and *Shelbourne v Cancer Research UK* [2019] EWHC 842 (QB), [2019] PIQR P16.

[48] See eg *Warren v Henlys Ltd* [1948] 2 All ER 935; *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 1 WLR 1082; and *Fennelly v Connex South Eastern* [2001] IRLR 390.

[49] Though Lord Toulson argued (*Mohamud*, above n.2, [47]) that by telling the claimant never to come back to the petrol station before assaulting him, the employee had purported 'to act about his employer's business'. That claim is however open to question. After all, it was directly contrary to his employer's interests, not least because the claimant had done absolutely nothing to justify his being excluded from the premises.

[50] Ibid., [48].

[51] For critical commentary on *Mohamud*, see the notes by A. Bell (2016) 32 *Professional Negligence* 153; P. Morgan [2016] CLJ 202; and J. Plunkett (2016) 132 LQR 556; and P. Giliker, 'Vicarious Liability in the Supreme Court' in D. Clarry (ed), *The UK Supreme Court Yearbook, Volume 7* (Appellate Press, 2017).

[52] See *Prince Alfred College Inc v ADC* [2016] HCA 37, 258 CLR 134, [73], [83].

4. *WM Morrison Supermarkets plc v Various Claimants*

In *Morrison Supermarkets*,[53] Andrew Skelton, a disillusioned internal auditor employed by the defendant supermarket chain, had deliberately and surreptitiously uploaded payroll data relating to some three-quarters of the defendant's entire workforce onto a publicly accessible file-sharing website. By doing so, he had committed the wrongs of misuse of private information, breach of confidence and breach of statutory duty (under the Data Protection Act 1998). Proceedings were brought against the defendant on behalf of some of the 9,263 employees whose information had been uploaded, in part on the basis that it was vicariously liable for Skelton's wrongful conduct. The trial judge[54] accepted that argument, holding that Skelton's conduct had been sufficiently connected to his employment applying what he called the 'broad and evaluative' approach to that issue taken in *Mohamud*.[55] The defendant's appeal was dismissed,[56] with the Court of Appeal again relying heavily on *Mohamud*.

Lord Reed, giving the sole judgment in the Supreme Court, set out his stall at the very beginning, when he said that the appeal provided the court 'with an opportunity to address the misunderstandings' which had arisen since its decision in *Mohamud*.[57] Although he was careful to characterise his analysis as a clarification of Lord Toulson's reasoning in the earlier case, in reality Lord Reed's analysis amounts to an abandonment of the broad and open-ended approach to the course of employment question endorsed in *Mohamud* in favour of a more bounded and precedent-led enquiry in keeping with what I have called 'modified orthodoxy'.

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[53] *Morrison Supermarkets*, above n.4.
[54] [2017] EWHC 3113 (QB), [2019] QB 772.
[55] Ibid., [195].
[56] [2018] EWCA Civ 2339, [2019] QB 772.
[57] *Morrison Supermarkets*, above n.4, [1]. By characterising the reasoning of the lower courts in this way, Lord Reed was able to pay lip service to the authority of *Mohamud* while effectively departing from it. The lower court judges in question might justifiably object that they were simply doing their best to apply the guidance provided by the Supreme Court in its earlier decision, but it seems that they must pay the price for that Court's reluctance to acknowledge that it got it wrong in *Mohamud*.

According to Lord Reed, the general principle applicable to vicarious liability arising out an employment relationship is that 'the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment'.[58] This test was 'authoritative',[59] having been set out in *Dubai Aluminium* and approved in later cases at the highest level, including *Mohamud*. Furthermore, this general principle must be applied 'with regard to the circumstances of the case before the court and the assistance provided by previous court decisions':

> The words 'fairly and properly' are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent.[60]

It followed that questions of vicarious liability were not to be 'determined according to individual judges' sense of social justice',[61] but by 'orthodox common law reasoning', generally based on the application of the *Dubai Aluminium* test 'in the light of the guidance to be derived from decided cases'.[62]

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[58] Ibid., [23], relying on *Dubai Aluminium*, above n.43, [23].
[59] Ibid., [25].
[60] Ibid., [24].
[61] Ibid., [26]. cf *Mohamud*, above n.4, [45].
[62] Ibid.

The two-stage test adopted in *Mohamud* was essentially dismissed by Lord Reed in *Morrison Supermarkets* (it had, he said, been expressed as being 'in the simplest terms' and was 'more fully stated' by Lord Nicholls in *Dubai Aluminium*[63]). Furthermore, the cases concerning child sexual abuse were sidelined, with Lord Reed commenting that the close connection test had been applied differently in that context, since such abuse could not be regarded as something done in the ordinary course of employment.[64] In such cases, a 'more tailored version' of the close connection test was appropriate,[65] with the focus on criteria particularly relevant to that context, such as 'the employer's conferral of authority on the employee over the victims'.[66]

When it came to applying what he considered to be the correct approach to the facts of the case, Lord Reed began by disapproving the reasoning below, which he said had been based on various 'misunderstandings' of the principles governing vicarious liability. One of those alleged misunderstandings was the reliance that had been placed on the five criteria identified in *Christian Brothers*, which were concerned with the first stage of the vicarious liability enquiry and were irrelevant at the second stage. Another was the emphasis on the close temporal and causal connection between the provision of the payroll data to Skelton as part of his job and his subsequent public disclosure of it, since 'a temporal or causal connection does not in itself satisfy the close connection test'.[67] And the courts below had, in Lord Reed's view, also been wrong to dismiss Skelton's motivation for that disclosure as irrelevant: on the contrary, whether he was acting on his employer's business or for purely personal reasons was 'highly material'.[68]

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[63] Ibid., [25].
[64] Ibid., [23]. With respect, this seems to amount to something of a rewriting of history, since the discussion in *Lister* was clearly premised on the assumption that for vicarious liability to arise it had to be shown that the abuse perpetrated by the warden had been in the course of his employment.
[65] Ibid., [36].
[66] Ibid., [23].
[67] Ibid., [31].
[68] Ibid. See also Lord Reed's discussion (at [29]–[30]) of Lord Toulson's statement that the motive of the employee was 'irrelevant' in *Mohamud*. According to Lord Reed, '[r]ead in isolation' that statement would be misleading.

Instead, the proper question to ask (applying the *Dubai Aluminium* test) was whether Skelton's disclosure was sufficiently connected with the relevant authorised acts, which in this case were the collation of the payroll data and its transmission to the defendant's external auditors. The connection between the two was that he could not have made the disclosure if he had not been given that task, but the mere fact that his employment 'gave him the opportunity to commit the wrongful act' was not sufficient for vicarious liability to be imposed.[69] Furthermore, 'perhaps unsurprisingly' there did not appear to be any previous case where it had been argued that an employer might be vicariously liable for wrongdoing specifically intended to harm the employer.[70] The closest analogy was deliberate wrongdoing intended to inflict harm on third parties, and (setting aside the abuse cases) there the existing case law[71] distinguished, in the words of Lord Nicholls in *Dubai Aluminium*, between an employee who was 'engaged, however misguidedly, in furthering his employer's business' and an employee who was 'engaged solely in pursuing his own interests'.[72] On the facts it was abundantly clear that Skelton had not been engaged in furthering his employer's business when he committed the torts in question. On the contrary, having developed a grudge against his employer he was pursuing a personal vendetta and his motivation was to harm the company. It followed, applying the *Dubai Aluminium* test in the light of the circumstances of the case and the relevant precedents, that Skelton's wrongful conduct was not so closely connected with acts he was authorised to do that it could fairly and properly be regarded as done by him while acting in the ordinary course of his employment. The defendant was therefore not vicariously liable for that conduct and its appeal was allowed.[73]

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[69] Ibid., [35], relying on *Lister*, above n.39, [45], [65].
[70] Ibid., [36].
[71] Including decisions post-dating *Lister*. See in particular these three cases discussed in *Morrison Supermarkets*: *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273; *Bernard v Attorney General of Jamaica* [2004] UKPC 47, [2005] IRLR 398; and *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214, [2019] 1 All ER 1133.
[72] *Dubai Aluminium*, above n.43, [32] (cited in *Morrison Supermarkets*, above n.4, [38]).
[73] On that finding a secondary issue of less general significance fell away, namely whether the Data Protection Act 1998 expressly or impliedly excluded vicarious liability for breaches by an employee data controller of its own provisions, or of the employee's common law or equitable obligations. However, after a brief consideration of the issue, Lord Reed expressed the view that the Act did not have that effect.

The *Morrison Supermarkets* decision represents a clear and decisive endorsement by the Supreme Court of the more conservative line of authority on the second stage of the vicarious liability enquiry associated with *Dubai Aluminium*. Under the approach set out by Lord Reed, the test to be used to determine whether wrongful conduct was in the course of a tortfeasor's employment is firmly rooted in the old authority-based approach to that issue, and earlier decisions—including cases decided on the application of the Salmond test—remain important guides to the operation of that requirement in particular factual settings. Furthermore, in a potentially very significant development, it seems that henceforth vicarious liability issues arising out of sexual abuse of children are not to be resolved by reference to the course of employment concept at all. Instead, a distinct approach is to be taken to the close connection question in such cases, based on factors of particular relevance in that context.[74]

5. Conclusion

The relative stability that characterised the doctrine of vicarious liability throughout the second half of the nineteenth century and the twentieth century was shattered in the first two decades of the present century. The challenges posed by claims associated with the scandal of widespread sexual abuse of children in institutional settings triggered a major overhaul of the doctrine which led to a significant expansion of the circumstances in which vicarious liability could arise. Those changes were evident at both stages of the vicarious liability enquiry. At the first stage, a more functional approach was taken to the identification of an employment relationship for these purposes, and a new category of relationships akin to employment was recognised. At the second stage, the traditional authority-based test for the identification of conduct within the ordinary

[74] In such cases, the UK courts may find it useful to refer to the observations of the High Court of Australia in *Prince Alfred College*, above n.52, [81].

course of employment was replaced with a new approach centred around the closeness of the connection between the employee's job and his or her wrongful conduct. Both sets of reforms were associated with open-ended tests characterised by vague appeals to 'fairness and justice', along with multi-factorial analysis based on policy considerations or loosely conceived justifications for vicarious liability, most notably 'enterprise risk'. The overall result of these changes was a deluge of appellate litigation, sometimes resulting in sharply differing outcomes on similar facts, and (one assumes) significant challenges for legal professionals advising their clients.

In its twin decisions in *Barclays Bank* and *Morrison Supermarkets* the Supreme Court has attempted to impose some order on the chaos, and to replace the old structures of vicarious liability with a new framework offering comparable levels of certainty and predictability.[75] Significantly, that new framework preserves some continuity with the old structures, in particular by retaining the centrality of the employee/independent contractor distinction at the first stage of the vicarious enquiry, and an authority-based test of the course of employment at the second. Another characteristic of this 'modified orthodox' approach to vicarious liability is the abandonment or downgrading of open-ended tests and multi-factorial analysis in favour of more structured and tightly drawn enquiries which place greater constraints on the discretion of the lower courts. This approach is also marked by a strong attachment to precedent, which again serves to preserve the continuity between the old and new law of vicarious liability.[76]

Following these two decisions it is now clear that the changes to the law of vicarious liability triggered by the scandal of institutional sexual abuse of children are appropriately characterised as

[75] That the need for certainty was of concern to the Supreme Court is suggested by Lady Hale's endorsement in *Barclays Bank* of Lord Hobhouse's reference in *Lister* (above n.39, [60]) to the need in this context for rules providing an adequate degree of predictability: see *Barclays Bank*, above n.3, [16].

[76] For powerful endorsement by the High Court of Australia of such an approach, see *Prince Alfred College*, above n.52, [44]–[47]. See also the High Court's comment (at [68]) that the *Lister* requirement that it be 'fair and just' to impose vicarious liability 'imports a value judgment on the part of the primary judge which … will not proceed on any principled basis or by reference to previous decisions'.

an evolution of the law to reflect changing social realities and attitudes, rather than a revolution.[77] That will no doubt come as a relief to commentators critical of what they see as the recent excesses of the courts in this context,[78] while others may be disappointed that the Supreme Court has set its face against a more radical overhaul. But it will be hard to deny that the decisions in *Barclays Bank* and *Morrison Supermarkets* have achieved something of value if they have the desired effect of stemming the tide of appellate litigation and providing some much needed stability in this troubled area of the law.

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[77] See S. Deakin, 'The Evolution of Vicarious Liability', Cambridge Private Law Centre Allen & Overy Annual Law Lecture, 8 November 2017 <https://resources.law.cam.ac.uk/privatelaw/the_evolution_of_vicarious_liability_(lecture%20text).pdf> accessed 27 July 2020. As Deakin observes (at 4), '[e]volution is about continuity as well as change'.

[78] See eg P. Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales and Australia: Vicarious Liability, Non-delegable Duties and Statutory Intervention' [2018] CLJ 506, arguing that the UK courts' approach to vicarious liability has 'gone too far' (at 508); that 'the broad test for vicarious liability … would seem [to] lack definitional certainty, is expanding from case to case and lacks a clear theoretical underpinning' (at 532); and that instead an 'incremental approach' and 'a more structured and coherent framework for vicarious liability' are needed to provide greater clarity (at 534).