# Vicarious Liability:
## Where are we now?
## *(Or: Supreme Court to the rescue!)*

20 May 2020

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# Establishing vicarious liability on the part of an employer: two key elements

1. Is there a **relationship between the tortfeasor and the employer** that *'makes it proper for the law to make one pay for the fault of another'?*– ***Barclays Bank v Various Claimants*** **[2020] UKSC 13**
2. Is there a **sufficient connection** between that relationship and the tortfeasor's wrongdoing?– ***VM Morrison Supermarkets v Various Claimants*** **[2020] UKSC 12**

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# Historically:

Emphasis on:

1.Whether there is a ‘true’ relationship of employment between the employer and the tortfeasor:

- ‘master/servant’ relationship
- contract of service or contract for services?
- ‘quasi-employee’: *E v English Province* [2013] QB 722

2. Was the tortfeasor acting in the course of his employment when he committed the tortious act or ‘on a frolic of his own’?

- Development of liability for intentional torts: *Lister v Hesley Hall* [2001] UKHL 22 – ‘close connection’ test

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# The *Christian Brothers* case [2012] UKSC 56

Lord Phillips in *Christian Brothers,* at [21]*:*

> *"…in this case Hughes LJ rightly observed that the test requires a synthesis of two stages. (i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (ii) Hughes LJ identified the second stage as requiring examination of the connection between D2 and the act or omission of D1. This is not entirely correct. What is critical at the second stage is the connection that links the relationship between D1 and D2 and the act or omission of D1, hence the synthesis of the two stages."*

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# *Christian Brothers:* The 5 'policy considerations'

Lord Phillips in *Christian Brothers,* at [35]*:*

*"There is usually 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 and can be expected to have insured against that liability;*

ii. *The tort will have been committed as a result of activity being undertaken 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."*

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# *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11

- Customer C seriously assaulted by K, a petrol station employee of D.
- K ignored instructions from his supervisor when he came on to the scene and tried to stop K.
- Key issue: was there a sufficient connection between the tortfeasor's employment and his conduct towards C to justify holding D vicariously liable?
- At trial: no vicarious liability due to the lack of a 'sufficiently close connection' between K's employment and tortious conduct (the *Lister* close connection test)
- CofA: appeal dismissed.

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# *Mohamud:* motive

Per Lord Toulson, at [47]:

- K's conduct *"was inexcusable but within the 'field of activities' assigned to him. What happened thereafter was an unbroken sequence of events."*
- Rejected D's argument that K had *"metaphorically taken off his uniform the moment he stepped from behind the counter… 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… he was purporting to act about his employer's business."*

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# *Mohamud:* motive

Per Lord Toulson, at [47-48]:

*"It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers.*

*…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."*

- **Emphasis**: K was purporting to act about his employer's business, and acted in connection with the business in which he was employed to serve customers.
- *Lister* approach confirmed.

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# *Armes v Nottinghamshire County Council* [2017] UKSC 60

C, as a child, sexually abused by foster parents with whom she had been placed while in the care of Defendant local authority. Was the LA vicariously liable for the wrongdoing of the foster parents?

SC held that it was:

- Emphasis on the relationship between the activity of the foster parents and the LA: they were not carrying on an independent business of their own; their activity was part of the business activity of the LA, and which was giving a benefit to that authority.
- The inherent risk of abuse when being placed into care should be borne by the authority.
- The authority exercised a significant degree of control over both what the foster parents did and how.

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# *Armes v Nottinghamshire County Council* [2017] UKSC 60

- Lord Reed (again!), at [60]: *"If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child… the torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority."*
- *"There are countless cases where vicarious liability has been imposed for torts committed by professional persons who carry out their work without close supervision…"*
- **Emphasis on on the lack of any other source of compensation if no vicarious liability found**
- Interplay between non-delegable duties and vicarious liability.
- **SC in *Barclays***: this is *"perhaps the most difficult case."*

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# *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214

Assault at Christmas 'after party' by MD on an employee.

**Court of Appeal:** There was a **sufficient connection between M's role and the assault**: at the time it happened, M had been wearing his MD's hat. D vicariously liable.

Lady Justice Asplin:

> *"It seems to me that despite the time and the place, Mr Major was purporting to act as managing director of NR. He was exercising the very wide remit which had been granted to him by NR. His managerial decision making having been challenged, he took it upon himself to seek to exercise authority over his subordinate employees… Looked at objectively, he was purporting to exercise his authority over his subordinates and was not merely one of a group of drunken revellers whose conversation had turned to work.* ***It seems to me that the attack arose out of a misuse of the position entrusted to Mr Major as managing director."*** *[25]*

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# *Various Claimants v Barclays Bank PLC* [2020] UKSC 13

- Group litigation: 126 claimants seeking damages against D in respect of alleged sexual assaults to which they were subjected by Dr Bates (B), between 1968 and 1984.
- Some of the claimants were applicants for jobs with D; a small number were existing employees. All were required to attend the home of B for a medical examination on behalf of D, and sexually assaulted each claimant in the process.
- B died in 2009. A 2013 police inquiry investigating 48+ victims of alleged sexual assaults by B concluded that there would have been sufficient evidence to pursue a prosecution if the doctor had been alive.

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# *Various Claimants v Barclays Bank PLC* [2020] UKSC 13

- Trial of preliminary issue: **Is D vicariously liable for any assaults that B may have perpetrated in the course of medical examinations carried out at the request of D before or during their employment with D?**
- 2-stage test for vicarious liability, including Lord Philips's five criteria as set out in *Catholic Child Welfare Society* applied. If the relationship between B and D was one akin to employment, was the tort sufficiently closely connected with that employment or quasi-employment?
- HC (Nicola Davies J) found D to be vicariously liable, and CofA upheld the decision on appeal.

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# *Barclays:* High Court reasoning

1. B was deceased; the only possible recourse for the claimants was against D, who had the means to meet their claims.
2. As D made arrangements for the exams; claimants had no reason to be examined by B other than through D's request. B's assessment and report therefore was for the benefit of D.
3. The purpose of the exams was to enable D to be satisfied that an applicant would be an effective member of its workforce, so B in acting was an integral part of the business activity of D.

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# *Barclays:* High Court reasoning

4. D directed the claimants where to go, and they had no choice, so D created the risk of the tort.
5. The fact that B had other medical roles to perform did not negate the argument that he was under D's control.

The claimants were in physical proximity to B because of the exams: the tort was closely connected with his employment.

CofA: upheld the decision on appeal.

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# *Barclays:* CofA reasoning

- Lord Justice Irwin, at [44-45]: *"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 a independent contractor…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."***
- At [61]: *"…ease of business cannot displace or circumvent the principles now established by the Supreme Court…"*

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# *Various Claimants v Barclays Bank PLC [2020] UKSC 13*

Supreme Court: Overturned on appeal, **no vicarious liability**

- Per Lady Hale, at [28]: Clearly, although Dr Bates was a part-time employee of the health service, he was not at any time an employee of the Bank. Nor, viewed objectively, was he anything close to an employee. He did, of course, do work for the Bank. The Bank made the arrangements for the examinations and sent him the forms to fill in. It therefore chose the questions to which it wanted answers. But the same would be true of many other people who did work for the Bank but were clearly independent contractors, ranging from the company hired to clean its windows to the auditors hired to audit its books. Dr Bates was not paid a retainer which might have obliged him to accept a certain number of referrals from the Bank. He was paid a fee for each report. He was free to refuse an offered examination should he wish to do so. He no doubt carried his own medical liability insurance, although this may not have covered him from liability for deliberate wrongdoing. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank.

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# *Various Claimants v Barclays Bank PLC [2020] UKSC 13*

Careful analysis of the previous case law on employer-tortfeasor relationships:

- *Christian Brothers* still relevant BUT cast as **entirely conventional**: *"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, …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."* [16]
- Affirmed Lord Sumption in *Woodland v Swimming Teachers Association* [2013] UKSC 66 (non-delegable duties) that vicarious liability has *"never extended to the negligence of those who are truly independent contractors."*
- The 5 *CB* policy reasons '*may be helpful*' but only '*in doubtful cases'.*

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# Can employment law assist?

- Reference to the definitions of two types of ‘worker’ under the **Employment Rights Act 1996 s230(3):**
  - (a) those who work under a contract of employment – **full protection** under ERA
  - (b) those who are entitled to **some protection**, this category seen as somewhere between ‘full employment’ and ”true independent contractors”.

- [28] “*Asking that question may be helpful in identifying true independent contractors. But it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of “worker”, developed for a quite different set of reasons.”*

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# A return to the ‘conventional’

*“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.*

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

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# *WM Morrisons Supermarket v Various Claimants* [2020] UKSC 12

- Should the employer be vicariously liable for an employee with a grudge who uploaded the payroll data of 100,000 employees to a file sharing website and sent it to newspapers?
- Breaches of DPA 1998
- CofA upheld trial judge's finding of a close connection: the tortious acts were within the field of activities assigned to the employee and part of a continuous sequence of events.
- Supreme Court disagreed: **no vicarious liability.**

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# The CofA emphasis: ‘insurance is an answer’

- CofA at [78]: *“There have been many instances reported in the media in recent years of data breaches on a massive scale caused by either corporate system failures or negligence by individuals acting in the course of their employment. These might, depending on the facts, lead to a large number of claims against the relevant company for potentially ruinous amounts. The solution is to insure against such catastrophes… **The fact of a defendant being insured is not a reason for imposing liability, but the availability of insurance is a valid answer to the Doomsday of Armageddon arguments** put forward [by counsel] on behalf of Morrisons.”*

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# Supreme Court reasoning

Lord Reed:

- Lord Toulson's judgment in Mohamud, which was *"not intended to change the law of vicarious liability but rather to follow existing precedents" [16-21]*

The lower courts 'misunderstood the principles' [31]:

1. The online disclosure of data was not part of S's 'field of activities' as he was not authorised to do it;
2. The *Christian Brothers* principles were relevant to the question of employer-tortfeasor relationship, **and not the 'close connection' test;**
3. A temporal or causal connection alone does not satisfy the close connection test;
4. The question of motive **was highly material**: was S acting on his employer's business or for purely personal reasons?

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# Close connection test confirmed

- Confirmed HL approach in *Dubai Aluminium v Salaam* [2002] UKHL 48 at [23]:

"*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.*"

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# ‘Frolic of his own’

- ***Dubai Aluminimum***: distinguish between cases where the employee is *“engaged, however misguidedly, in furthering his employer’s business”* (**vicarious liability)** and cases where *“the employee is engaged solely in pursuing his own interests: or ‘on a frolic of his own’.”* (**no vicarious liability)**
- ***Bellman****:* not ‘an act entirely of personal vengeance’.
- **Sexual abuse of children cases**: *“cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant…such as the employer’s conferral of authority on the employee over the victims, which he has abused.”*

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# A return to ‘orthodox common law reasoning’

Per Lord Reed at [26]:

*“Plainly, the close connection test is not merely a question of timing or causation, and … 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.”*

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# Today: have we found the chimaera?

Lord Dyson in *Mohamud v WM Morrison Supermarkets* [2016] UKSC 11, at para 54:

*"…this is an area in which imprecision is inevitable. To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera…"*

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# Thank you

# Any questions?

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