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*A critical analysis of the legal history of vicarious liability and its applications*

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# **A CRITICAL ANALYSIS OF THE LEGAL HISTORY OF VICARIOUS LIABILITY AND ITS APPLICATION**

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## ABSTRACT

This thesis presents an examination of the historical developments of vicarious liability law in the English legal system over the past 200 years. The developments considered date from the principles laid down in *Joel v Morison* [1834] EWHC KB J39 to the most recent case of *Bellman v Northampton Recruitment Ltd* [2017] IRLR 124. The various tests for employment status and the course of employment are discussed, with specific analysis into why the tests have changed and developed. Case law and academic criticism is presented to emphasise how the changes have had a positive or negative impact on the clarity and fairness of the area of law.

The main focus of the piece is based upon the decisions of *A M Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11 and *Cox v Ministry of Justice* [2016] UKSC 10. Specifically, how they have changed the principles of vicarious liability and what principles they have confirmed to be correct. The decisions of these two cases may be seen as some of the most unexpected decisions in vicarious liability to date. This piece assesses if those decisions are the correct ones and what this will mean for future decisions.

This topic was chosen due to the recent developments in vicarious liability law, created by cases heard in recent years. Critics such as Neyers have questioned the justifications for the imposition of vicarious liability and its mere existence could be argued to be both fair and unfair. It is therefore proposed that it is important that we review its justification, especially during times of change such as these.

## TABLE OF CONTENTS

<b>CHAPTER ONE: INTRODUCTION</b>	<b>4</b>
1.1. METHODOLOGY	7
<b>CHAPTER TWO: THE HISTORY OF VICARIOUS LIABILITY LAW IN THE UK LEADING UP TO 2016</b>	<b>8</b>
2.1. JUSTIFICATIONS FOR THE IMPOSITION OF VICARIOUS LIABILITY	8
2.2. REQUIREMENT ONE - TORT/OFFENCE COMMITTED BY AN EMPLOYEE	12
2.3. REQUIREMENT TWO - TESTS FOR EMPLOYMENT STATUS	13
2.4. REQUIREMENT THREE - TESTS OF 'COURSE OF EMPLOYMENT'	22
2.4.1 POST-LISTER: INTENTIONAL TORTS	41
2.4.2 POST-LISTER: NEGLIGENT TORTS	45
2.4.3 VIOLENT EMPLOYEES AND HARASSMENT/ASSAULT	50
2.5. CONCLUSION	53
<b>CHAPTER THREE: MODERN VICARIOUS LIABILITY</b>	<b>56</b>
3.1. A M MOHAMUD V WM MORRISONS SUPERMARKETS PLC [2016] UKSC 11	58
3.2. COX V MINISTRY OF JUSTICE [2016] UKSC 10	72
3.3. CONCLUSION	82
<b>CHAPTER FOUR: PREDICTIONS FOR THE FUTURE OF VICARIOUS LIABILITY</b>	<b>84</b>
4.1. CONCLUSION	88
<b>CHAPTER FIVE: CONCLUSIONS</b>	<b>89</b>
<b>BIBLIOGRAPHY</b>	<b>92</b>
JOURNAL ARTICLES	92
ONLINE ARTICLES (BY DATE ACCESSED)	93
BOOKS	94
CASES	94
STATUTES	97

## CHAPTER ONE: INTRODUCTION

This thesis provides a detailed explanation of the history of the law of vicarious liability in the United Kingdom, including its application in recent cases including *Mr A M Mohamud v WM Morrison Supermarkets plc*.<sup>1</sup> It also critically analyses how the application of vicarious liability precedents may have led to unjust decisions. The enquiry will address whether the case of *Mohamud* was wrongfully decided and, if so, what implications this has for the future of vicarious liability and the parties to such a claim.

As the first chapter in this study will focus on the history of vicarious liability law in the UK, the research will trace the development of this legal doctrine from early cases such as *Joel v Morison*<sup>2</sup> to those being decided now. As will be shown, as the nature of the relationship between employer and employee has changed, so too have the tests to determine if an employer is liable for the tort committed by their employee. The research will explore the 'broad risk' principle from *Hamlyn v Houston*<sup>3</sup>, where the law stands with independent contractors (*Honeywill v Larkin*<sup>4</sup>), the Salmond test<sup>5</sup> and others. The first chapter will discuss the three elements that need to be proven by the claimant; those being that a tort/offence has been committed, that it was committed by an employee and in the course of employment. The first two elements will not be discussed in great detail as there would be a risk of straying too much into criminal and employment law (the focus of this piece is tort law). The third element will be discussed in much greater detail, with focus on cases such as *Lister v Hesley Hall*<sup>6</sup> which really changed the way in which the courts perceived 'course of employment' – rather than consider whether the employer allowed employees to carry out similar acts, the Court instead started to consider

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<sup>1</sup> [2016] UKSC 11

<sup>2</sup> (1834) 6 C&P 501, [1834] EWHC KB J39

<sup>3</sup> [1903] 1 KB 81

<sup>4</sup> [1934] 1 KB 191

<sup>5</sup> Heuston, R. & Buckley, R., *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 1996)

<sup>6</sup> [2001] UKHL 22

whether the job offered the employee the opportunity to do such things. This research will also discuss the impact that Lister had on cases which followed: as shall be demonstrated, some judges accepted the change, whereas others questioned it. For example, where Giliker questions the Lords' lack of consistency when creating the 'close connection' test<sup>7</sup>, Lord Dyson openly supports it in *Mohamud*<sup>8</sup>.

Once the history of vicarious liability has been discussed, with particular focus on the 'course of employment', the thesis continues by discussing the recent case of *Mohamud* in the second chapter. With the use of relevant pre-existing research, the case is analysed to discover what the decisions mean for the present and future of the doctrine of vicarious liability law and the changes it represents. At this point the recent case of *Cox v Ministry of Justice*<sup>9</sup> is critiqued in conjunction with *Mohamud* in this comparative doctrinal analysis.

The importance of vicarious liability lies in the fact that the recent *Mohamud* case has brought into question whether the tests and precedents used over hundreds of years to determine if an employer is vicariously liable are in fact just. If the *Mohamud* case could set a new precedent for deciding if an employer is liable then this could render all previous tests, and all previous decisions, obsolete. Could that then mean that employers would need to change the way in which they select and train new employees?

As *Mohamud* and *Cox* are relatively recent cases, the range of sources available to research is slim. However, by comparing the available research with the countless sources on vicarious liability prior to the decisions of the two cases, the thesis provides an assessment as to whether the correct way of determining the employer's vicarious liability is the traditional way or the new way. There may even exist a third way which has yet to be used by the courts. Once this has been completed, a

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<sup>7</sup> Giliker, 'Lister revisited: Vicarious Liability, distributive justice and the course of employment' (2010) LQR 521, 523

<sup>8</sup> [2016] UKSC 11

<sup>9</sup> [2016] UKSC 10

prediction can be made as to the future of vicarious liability; how will/should future cases be decided?

Previous research has indicated that it is already possible to assess how the future of vicarious liability will look. Per Lord Oliver in *Caparo Industries Plc v Dickman*<sup>10</sup>, ‘ I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp’<sup>11</sup>. The fact that this quote was made 60 years ago, and the judiciary’s continuing confusion, indicates that questions will continue to be raised as to the justness of the law in cases such as these will continue to be raised, as they were in *Mohamud*.

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<sup>10</sup> [1990] 2 A.C. 605

<sup>11</sup> *Caparo*, 633

## 1.1. METHODOLOGY

This thesis aims to analyse the historical developments of vicarious liability law and investigates what the future of the doctrine may look like following significant developments in recent case authority. The research undertaken is secondary and contains no empirical research. Rather, existing research materials are analysed and compared in answering the question asked of this thesis. Research was undertaken in various different formats, including primary materials such as case reports, and secondary sources such as journal articles, texts and existing doctrinal research. Key case authority, which previously held the greatest importance, have been analysed using academic commentary in articles to assess opinion and to develop an understanding of the scale of impact the cases have had on the law.

The starting point for the research was an overview of the law and legal tests required to substantiate the holding of a principal vicariously liable for the torts of another. It then developed to exploration of key cases, with examination of the existing academic criticisms of the decisions. Additional research was undertaken into recommendations from the authors of the journal articles used or cases which were used in the decisions of the initial cases of interest. Comparison was also made between articles discussing the same topic or case but at different times. For example, comparisons were made between opinions of academics on the *Lister* 'close connection' test from the time it was created and those made now.

## CHAPTER TWO: THE HISTORY OF VICARIOUS LIABILITY LAW IN THE UK LEADING UP TO 2016

Vicarious liability law, in reality, dates back to medieval times<sup>12</sup>. However, the main developments considered in this research will be over the past 200 years. This chapter aims to provide a detailed recap of those developments; expressing their importance and criticising their effectiveness. The chapter is structured into three parts: the requirement of a tort/offence being committed, the various tests used to determine both employment status and the course of employment, but the heaviest weighting will be given to the course of employment as this is the area which has caused the most disputes and has been subject to recent and significant change.

However, before assessment of the test establishing the vicarious liability of a principal is considered, it is worth explaining the justification of the doctrine, which has been described as one of ‘rough justice and social convenience.’

### 2.1. JUSTIFICATIONS FOR THE IMPOSITION OF VICARIOUS LIABILITY

As Neyers<sup>13</sup> points out, there are various justifications for the imposition of vicarious liability. The original justification is control – the employer controls the employee’s activities and, hence, should be liable for their tort. However, Atiyah noted:

‘control cannot be treated as either a sufficient reason for always imposing liability, or as a necessary reason without which there should never be vicarious liability. Control has never per se been a ground for imposing vicarious liability, e.g., a parent is not liable for the torts of his children, a superior servant is not liable for the torts of subordinate servants, schoolteachers are not liable for the torts of their pupils and so forth. Conversely the absence of control – although at one time thought to preclude

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<sup>12</sup> *Mohamud*, [11] as per Lord Toulson

<sup>13</sup> J. W. Neyers, ‘A theory of vicarious liability’ (2005-6) 43 *Alberta Law Review* 287

vicarious liability in the case of skilled and professional servants — is today not a serious obstacle to such liability.’<sup>14</sup>

Therefore, the control argument is inadequate.

The second possible justification is compensation/deeper pockets<sup>15</sup> - the employer will, in most cases, be more able to afford the compensation costs. However, there are three main reasons why this explanation is not adequate – 1) it does not explain why the employer specifically would be the best person to compensate the victim – they could be adequately compensated by another source, 2) it does not allow for a distinction between employees and independent contractors. Here we may look to Flannigan, who stated that ‘generally speaking, an employer will be richer... than the workers he employs, whether they are servants or independent contractors. That being so... no distinction ought to be made between servants and independent contractors for the purposes of vicarious liability.’<sup>16</sup> The final reason is 3) it doesn’t explain the two elements that a tort must have been committed by an employee and in the course of employment. Therefore, this argument, too, is not adequate.

The third justification is deterrence – this comes in two forms – employer and employee deterrence. Under employer deterrence the law is justified by making the employer liable in the name of reducing accidents. However, this theory negates the ‘vicarious’ aspect of vicarious liability and does not explain the need for an employer/employee relationship. However, in *Bazley* it was said that:

‘[b]eyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its

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<sup>14</sup> P.S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967), 16

<sup>15</sup> See *Limpus v. London General Omnibus Company* (1862), 158 E.R. 993 at 998

<sup>16</sup> Flannigan, R., “Enterprise Control: The Servant-Independent Contractor Distinction” (1987) 37 U.T.L.J. 25, 28

employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.’<sup>17</sup>

Employee deterrence is based upon the idea that they rarely have wealth and may not be identifiable in some cases. However, this theory rarely holds up as the employers can make the changes themselves and this does not work if the act is already a crime – ‘If the criminal law will not deter the wrongdoer there seems little deterrent value in holding the employer of the offender liable in damages for the assault committed.’<sup>18</sup>

The fourth justification is loss-distribution, where by an employer can spread the cost of compensation between insurers and customers<sup>19</sup>. Although, this theory does not explain the imposition of vicarious liability where costs cannot be spread – such as with charities. We must ask with this justification; why can the costs not be spread through the government or a scheme of social insurance? This justification could also include independent contractors, which we know vicarious liability does not do, and it does not explain the need for a tort to be committed, as well as in the course of employment.

The fifth justification is enterprise liability, as was brought up in *Mohamud*. The first justification for enterprise liability is, essentially, the benefit and burden principle. The second is the creation/exasperation of risk by the employer. However, enterprise liability does not explain when charities are found liable, it does not explain the requirement that an individual is an employee and that the compensatory amount is unlimited.

The final justification is all of the previous justifications – mixed policy. However, this justification is questionable as some of the rationales are inconsistent and many of the elements are still difficult to explain. Therefore, even though there are several

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<sup>17</sup> *Bazley v. Curry* [1999] 2 S.C.R. 534, [33]

<sup>18</sup> *New South Wales v Lepore* (2003), 195 A.L.R. 412, [2003] HCA 4, at 219

<sup>19</sup> *Escola v Coca-Cola Bottle Co* 150 P.2d 436 at 441 (Cal. 1944)

justifications for the imposition of vicarious liability, none are flawless and all lead to, arguably, more questions than they answer.

Having outlined the justification for the continued presence of the doctrine in English law, we return to the question as to the tests that must be satisfied to establish the potential liability of the principal.

One of the earliest influential cases in vicarious liability is the case of *Dyer v Munday*<sup>20</sup>. In this case, Lord Esher summarised vicarious liability in the following way: 'if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable'<sup>21</sup>. This may appear to be a relatively outdated statement, however, its basis is still very much relevant to English tort law in 2017.

Previous case authority was based on the relationship between masters and their servants. These are not the same as the current incarnations of employers and employees, but it is interesting to note how the law operated in the formation of the doctrine – i.e. in the 18-1900s. In 1922, Dyer, in commenting on masters and servants<sup>22</sup>, made reference to *Dunn v Reeves Coal Yards Co.*<sup>23</sup>, in which a coal mine owner employed someone to transport the coal, the driver subsequently ran over the claimant's son and the claim for recovery against the mine owner employer was allowed. At that time, the general view was that, if an individual was paid for their work or materials which they provided, they were an independent contractor, and if not an independent contractor then they were a servant<sup>24</sup>. There were, however, occasions when an individual could be paid and still be classed as a servant<sup>25</sup>. Clearly, this is no longer the view in today's society. However, many of the historical

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<sup>20</sup> [1895] 1 QB 742

<sup>21</sup> *Dyer*, 746

<sup>22</sup> Unknown author, 'Masters and Servant. Injuries to third parties. Employee servant or independent contractor' (1922) 8(5) Virginia Law Review 381

<sup>23</sup> (Minn.), 184 N.W. 1027 (1921)

<sup>24</sup> *Giacamini v Pacific Lumber Co.* 5 Cal. App. 218, 89 Pac. 1059 (1907)

<sup>25</sup> *Tiffin v McCormack*, supra; *Isnard v Edgar Zinc. Co.*, 81 Kan. 765, 106 Pac. 1003 (1910)

tests created still hold strong. Independent contractors are those who are in business of their own accord – they pay their own tax and national insurance and are responsible for themselves. They are deemed to carry their own insurance and therefore an individual who hires them (as temporary employer) will not be vicariously liable for their torts.

In any vicarious liability case, there is a tripartite test to establish liability, these are: 1) a tort or offence has been committed, 2) the tort/offence was committed by an employee, and 3) the tort/offence was committed in the course of the employee's employment.

Each of these elements shall be discussed individually with reference to relevant case law and, where relevant, statute. The third element is the most important as it has been the cause of the greatest contradiction in case law and hence shall be discussed in greater detail than the first two. The course of employment discussion is one that is central to this thesis, however, to get to the point of that discussion we must first look at the other two elements.

## **2.2. REQUIREMENT ONE - TORT/OFFENCE COMMITTED BY AN EMPLOYEE**

The first element which the claimant must prove to establish vicarious liability is that a tort or offence has been committed. This criterion was discussed in the case of *Imperial Chemical Industries Ltd v Shatwell*<sup>26</sup> where two brothers, certified shot firers employed by ICI, were injured due to their own negligence. One of the brothers brought a vicarious liability claim against their employer for the injuries caused by the other brother. This claim failed in the Court of Appeal as the brothers were under a statutory duty to only test the circuit if they had sufficient wire to be sheltered at a safe distance under regulation 27(4) of the Quarries (Explosives) Regulations 1959. The brothers were held to have accepted the risk of injury and therefore were held to be responsible for their own injuries. The criterion requiring a tort/offence to be

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<sup>26</sup> [1965] AC 656

committed was raised in this case as the brothers were personally under a statutory duty and, in breaching that duty, an offence was committed.

The first criterion required to establish vicariously liability is arguably the easiest to establish. The second and third elements may be considerably more difficult to prove. Employment status is a continually evolving and dynamic concept (for instance the concept of ‘worker’, an EU-based construct, may end following the UK’s withdrawal from the European Union) and is subject to many external vitiating factors.

### 2.3. REQUIREMENT TWO - TESTS FOR EMPLOYMENT STATUS

This test shall begin by defining the difference between a contract *of* services and a contract *for* services. A contract *for* services is one held between an employer and an independent contractor. As will be shown, this type of contract will not be one that brings vicarious liability. A contract *of* services is one held between an employer and an employee. In earlier cases, where the relationship between the employer and employee was questioned, the courts used a test of control. In the case of *Yewens v Noakes*,<sup>27</sup> Bramwell LJ stated that ‘a servant is a person who is subject to the command of his master as to the manner in which he shall do his work’<sup>28</sup>. The focus, when considering how much control the employer has, is on what type of work the employer has asked for and if they have specified how it is to be done. If harm ensues, and the employer was found to have sufficient control, the courts will generally find the employer to be the causal link and therefore vicariously liable. The ‘control test’ was also considered in *Honeywill v Larkin*<sup>29</sup>, in relation to independent contractors, in which Slesser LJ emphasised that:

‘It is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for

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<sup>27</sup> (1881) 6 QBD 530

<sup>28</sup> *Yewens* (n17), 532

<sup>29</sup> [1934] 1 KB 191

the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract<sup>30</sup>.

However, as many trades have become more specialised, this control test has ceased to be used in isolation, yet it continues to be an aspect of the leading authority on establishing employment status. Many employers do not necessarily have the skills to instruct an employee on how to do their job. Lord Reed summarised this effectively in *Cox v Ministry of Justice*<sup>31</sup> by stating that the control test would not be appropriate 'if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea'<sup>32</sup>.

Not only has the relationship between employer and employee changed to make the (isolated) control test irrelevant, the nature of modern employees has also changed. Mackay<sup>33</sup> discusses 'temporary' employees and refers to them as 'gig workers'. He uses Uber drivers as an example of these particular workers. In the modern economy, these forms of worker are growing drastically in size, but where do they stand in the worker/employee argument? This point was raised back in 1990 by McKendrick<sup>34</sup>, and referred to in the *English Province case*<sup>35</sup>, where he remarked:

'The labour market in Britain is presently undergoing significant structural change. The principal change is a rapid increase in new, flexible forms and patterns of work which depart radically from the standard employment

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<sup>30</sup> *Honeywill* (n19), 196

<sup>31</sup> [2016] UKSC 10

<sup>32</sup> *Cox* (n21), 21

<sup>33</sup> Mackay, N., 'Vicarious Liability: There's an app for that' (2016) J.P.I.L 90, 93

<sup>34</sup> McKendrick, E., 'Vicarious Liability and Independent Contractors – A Re-examination' (1990) 53 M.L.R. 770

<sup>35</sup> *E v English Province of Our Lady of Charity and Another* [2013] Q.B. 722

relationship whereby an employee works regularly (that is, full-time) and consistently for his employer under a contract of employment.<sup>36</sup>

This statement is reflected in the creation of temporary jobs, such as Uber drivers who work as few or many hours as they wish, and one-off handy men who can work for as little as one hour once a year to a regular forty-hour week.<sup>37</sup> Mckendrick continues:

‘The primary significance for tort lawyers lies in the fact that, owing to the flexibility, lack of continuity and irregularity of their work, many atypical workers are either unable or have great difficulty in establishing that they are employees employed under a contract of employment. If they are not employees then, presumably, they are outside the scope of the doctrine of vicarious liability.’<sup>38</sup>

Does this mean that there should be no way for the victims to receive compensation as those in cases involving an employee would?

McKendrick concludes by asking ‘Can the doctrine of vicarious liability be adapted in order to encompass this new workforce or will the courts have to create new forms of primary liability?’<sup>39</sup>

Ward J, in considering McKendrick’s statements made in 1990, stated:

‘To distil it to a single sentence I would say that an employee is one who is paid a wage or salary to work under some, if only slight, control of his employer in his employer’s business for his employer’s business. The

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<sup>36</sup> McKendrick, E., ‘Vicarious Liability and Independent Contractors – A Re-examination’ (1990) 53 M.L.R. 770, 770

<sup>37</sup> Mackay, 90

<sup>38</sup> McKendrick, E., ‘Vicarious Liability and Independent Contractors – A Re-examination’ (1990) 53 M.L.R. 770, 770

<sup>39</sup> McKendrick, E., ‘Vicarious Liability and Independent Contractors – A Re-examination’ (1990) 53 M.L.R. 770, 770

independent contractor works in and for his own business at his risk of profit or loss.<sup>40</sup>

It would therefore seem that independent contractors should be subject to different legal principles than employees as they cannot fit in with the usual tests. An independent contractor who is in business on their own accord should hold adequate liability insurance<sup>41</sup>, hence bypassing vicarious liability. When the incident is 'bypassed' it means that the victim will have a direct claim of action against the independent contractor, not the person for whom they are working. In the past this was not a problem, however, as Mackay says, being an independent contractor or a worker instead of an employee is becoming increasingly fashionable today<sup>42</sup>. These individuals may assume that they are employees and therefore may not have the proper insurance for themselves or even be aware that they need it.

Commenting on this issue, Lockwood stated:

'The concept of vicarious liability developed during a period in which the distinction between employee and self-employed was obvious and clear. Over the last few decades, however, patterns of employment, occupation and business structures have changed to an unprecedented degree, with a large part of the adult-working population becoming increasingly involved in part-time, temporary or casual employment engagements. At the same juncture a competitive business environment has resulted in many employing organisations taking measures to reduce their labour costs. This has led to the growth of employment situations where it has become difficult to ascertain the precise nature of the employment relationship. This has given rise to an array of legal disputes on the issue over the last 40 years...'<sup>43</sup>

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<sup>40</sup> *E v English Province of Our Lady of Charity and Another* [2013] Q.B. 722, [70]

<sup>41</sup> McKendrick, 781

<sup>42</sup> MacKay, 90

<sup>43</sup> Lockwood, G., 'The Widening of Vicarious Liability: Implications for Employers' [2011] Int. J.L.M. 149, 151

This reiterates how the relationship between employer and employee, and hence the level of control, has changed over time to make control as a singular test almost obsolete. The tests have evolved from control, in isolation, to the right to control test. Lord Denning then developed the organization/integration test before the mixed test was established in *Ready Mixed Concrete*. Further still, the economic reality and 'business on own account' tests have been used in an attempt to provide certainty to this crucial issue. Yet only in the sphere of taxation has the test been established which (somewhat harshly) identifies with clarity an employee from the genuinely self-employed independent contractor.<sup>44</sup> This links to vicarious liability as it illustrates how the tests must change with time, as employment status has done. Any future tests must incorporate both the modern employment situations, along with the age-old ones.

Hence, many different tests for employment status have been developed by the courts to establish if a contract is *of service* (employee) or *for services* (independent contractor). Many of these tests focus on whether the employer dictated where and when the work was to be done and with what tools. The tests also consider different contractual and external factors. Lord Cooke stipulated in *Market Investigations Ltd v Minister of Social Security*<sup>45</sup> that, where a person is in business on their own account, it is a contract for services, otherwise it is a contract of services. This principle was subsequently cited in the case of *Lee Ting Sang v Chung Chi-Keung*<sup>46</sup> by the Privy Council – the factors considered included risk of loss and chance of profit.

In *Cassidy v Ministry of Health*<sup>47</sup>, Denning LJ proposed a test based on the extent of integration of an individual into a business or organization. The test was also used by Denning LJ in *Stephenson, Jordan & Harrison v MacDonald & Evans*<sup>48</sup>. He stated

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<sup>44</sup> See Marson, J. 'Anatomy of an Employee' (2013) 19(3) Web JCLI.

<sup>45</sup> [1969] 2 QB 173

<sup>46</sup> [1990] LRC (Comm) 611

<sup>47</sup> [1951] 2 KB 343

<sup>48</sup> (1952) 1 TLR 101

that 'It is often easy to recognise a contract of service when you see it, but difficult to see where the difference lies'<sup>49</sup>. This test looks into how the individual was literally 'made part' of the group of employees working for the employer. It considers whether they used the lunch room and if they were included as one of the group – put in basic terms, would they appear to have unquestionable employment status (they are an employee, not a worker) from a layman's perspective? The integration test clearly appeared to be the correct one to Denning LJ in these two cases as it looked not at the contract in hand, but how the employer treated the individual, along with the other staff. If it looked like they were an employee, then they most likely were. However, it was only briefly popular with the courts as determining 'integration', which Denning failed to define in the case, led to conjecture as to its meaning and its suitability as authority for future cases. A different test very quickly took favour with the judges – the 'economic reality' test.

Although all of these tests have their advantages and disadvantages, the test used most in cases now is the 'mixed' or 'economic reality' test, established in the case of *Ready Mixed Concrete v Minister of Pensions*<sup>50</sup> by McKenna J. This test asks three questions to establish if the individual in question is an employee or an independent contractor:

- 1) Is the individual subject to a level of control by the employer to make the latter his master? – this is taken from the control test previously discussed.
- 2) Did the individual provide a personal service in return for remuneration?
- 3) Are the provisions of the contract consistent with a contract of service?

If all three of these criteria are satisfied, then the individual will be found to be an employee. This test was subsequently cited in the case of *Nethermere (St Neots) Ltd v Gardiner And Another*<sup>51</sup> in which Stephenson LJ commented:

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<sup>49</sup> *Stephenson*, 111

<sup>50</sup> [1968] 2 QB 497

<sup>51</sup> [1984] ICR 612

‘There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted and I have doubted whether even that minimum can be discerned to be present in the facts as found by the industrial tribunal...’<sup>52</sup>

There has been a considerable debate on the issue of mutuality of obligations and the significance placed on it in employment law. As it is not exclusive to the employment relationships, it is often criticised as holding too much significance. We may consider *Montgomery v Johnson Underwood*<sup>53</sup> to be a leading authority in this field, in which an individual was claiming unfair dismissal – they had been employed by an agency on a long term placement. The court held that a tribunal should strictly follow the established tests for employment, especially those of control. Buckley J stated that what is required is ‘an irreducible minimum of obligation on each side to create a contract of services’<sup>54</sup>. He stressed that the correct test was that of *Ready Mixed Concrete v Minister of Pensions* – ‘mutuality of obligation’, control and consistency of contract. Buckley J added:

‘In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment.’<sup>55</sup>

The court found that there were three elements required for a contract *of services* to exist: 1) Mutuality of obligations – skills in exchange for remuneration; 2) the individual had agreed to be subject to a sufficient degree of control; and 3) the

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<sup>52</sup> *Nethermere*, 623

<sup>53</sup> [2001] EWCA Civ 318

<sup>54</sup> *Montgomery*, [20]

<sup>55</sup> *Montgomery*, [19]

remaining provisions of the contract are consistent with that of a contract of services. These are essentially the same as those in *Ready Mixed Concrete*. Justice Buckley also held:

‘A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment. MacKenna J cited a passage from the judgment of Dixon J in *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 from which I take the first few lines only:

“The question is not whether in practice the work was in fact done subject to a direction and control exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.”.<sup>56</sup>

Although the general rule is that an employee must be under a contract of service for their employer to be vicariously liable, exceptionally an employer may also be liable for the torts of an independent contractor. There are generally three situations in which the employer will be so liable:

- 1) If the employer has commissioned the tort, this will render the employer a ‘joint tortfeasor’.
- 2) If the employer was negligent in selecting a competent contractor<sup>57</sup>.
- 3) If a non-delegable duty was imposed on the employer, either by statute or common law (the common law would impose this duty if the activity was particularly hazardous and if there was a risk of damage)<sup>58</sup>.

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<sup>56</sup> *Montgomery*, [19]

<sup>57</sup> this was the case in *Mattis v Pollock* [2003] 1 WLR 2158

<sup>58</sup> recognised in *Honeywill v Larkin* [1934] 1 KB 191

An employer may also be liable for the torts of a temporary employee, loaned from another employer and, 'in a situation where a "general" employer provides an employee to a "temporary" employer, it is for the general employer to show that it is not vicariously liable, and the burden is a heavy one'<sup>59</sup>. Situations such as this were discussed by Lord Justices May and Rix in *Viasystems (Tyneside) Ltd v Thermal Transfer Northern Ltd*<sup>60</sup> in which five factors were discussed to establish if there should be dual liability imposed on the employers. Those factors are:

(1) The general employer has the significant burden of establishing that it does not retain all responsibility for the employee's actions.

(2) Who engaged the negligent employee and who paid him or her? Who has the power to dismiss him or her?...

(3) Who exercises the immediate direction and control of the relevant work? Who is entitled to tell the employee how they are to carry out the work on which they are engaged?

(4) When investigating the facts of a particular case, the court should concentrate on the relevant negligent act, and then ask who carries the responsibility for preventing it.

(5) Vicarious responsibility should rest with the employer in whose actions some degree of fault, though remote, may be found.<sup>61</sup>

As can be seen from this, where there are two employers, the consideration reverts back to control – who had more control over the employee? Who was responsible for the tort? If it is both, then then dual liability should be imposed. In most cases concerning vicarious liability, there is only one employer concerned, hence there is not a much discussion on dual liability. However, the debate concerning the distinction between an employee and an independent contractor is one that is likely to continue for a very long time. As trades become much more specialised and

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<sup>59</sup> Lockwood, G., 'The Widening of Vicarious Liability: Implications for Employers' [2011] Int. J.L.M. 149, 151

<sup>60</sup> [2005] IRLR 983

<sup>61</sup> Lockwood, G., 'The Widening of Vicarious Liability: Implications for Employers' [2011] Int. J.L.M. 149, 152

developed, the knowledge gap between employer and employee will continue to grow and hence tests such as the “economic reality” test will become increasingly important in the consideration of the courts.

## 2.4. REQUIREMENT THREE – TESTS OF ‘COURSE OF EMPLOYMENT’

The final element to be proven by the claimant, that the employee was acting in the course of their employment when committing the tort, is the most important element for consideration and hence is discussed in detail. Prior to the Salmond test<sup>62</sup>, which shall be discussed later, vicarious liability was based on the view that the master should be liable for the torts of their servant – *Dyer v Munday*<sup>63</sup>. There is, however, mention of the course of employment dating back before 1834. In the case of *Joel v Morison*<sup>64</sup>, Parke B stated:

‘The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.’<sup>65</sup>

When it is considered that this case is almost 200 years old, it illustrates that, even though vicarious liability law has developed substantially through the years, as shall be seen, it is still based on these basic foundations. Notably, in *Kooragang Investments Pty Ltd v Richardson Ltd*<sup>66</sup>, a 1981 case, Lord Wilberforce said:

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<sup>62</sup> Heuston, R. & Buckley, R., ‘Salmond & Heuston on the Law of Torts’ (Sweet & Maxwell, 1996)

<sup>63</sup> [1895] 1 QB 742

<sup>64</sup> (1834) 6 C & P 501, [1834] EWHC KB J39

<sup>65</sup> *Joel*, [503]

<sup>66</sup> [1981] 3 WLR 493

‘The underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts.’<sup>67</sup>

There is much similarity between these two statements which suggests that the courts adhere to narrow guidelines on the course of employment – changing only certain surrounding factors to make the law easier to interpret. When we consider the ‘economic reality test’ we see that it holds much similarity to the ‘control test’, with only minor elements changed it maintains the ideas held for years, and yet adapts to modern views and employment situations.

Two very similar cases, decided prior to the Salmond test, are *Limpus v London General Omnibus Co*<sup>68</sup> and *Beard v London General Omnibus*<sup>69</sup>. In *Limpus*, the facts concerned bus drivers working for the defendant who were racing to get to bus stops and deliberately obstructing each other. The case arose when an injury ensued from the drivers’ reckless behaviour. The employer was found liable in this case as, although the drivers were not authorised to do this, they were authorised to drive buses. Hence they committed an authorised task in an unauthorised way. These facts can be compared to those in *Beard*, in which a bus conductor was driving a bus and injured someone. The employer was not found liable in this case as it could not be said that the conductor was employed to drive a bus at all. The unauthorised nature of the task went beyond the scope of the employer’s vicarious liability. Although these two cases were decided before the Salmond test, they illustrate the application of the test in practice.

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<sup>67</sup> *Kooragang*, 499

<sup>68</sup> (1862) 1 H&C 526

<sup>69</sup> [1900] 2 QB 530

An employer will be liable under the Salmond test if the employee has performed 'either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master'<sup>70</sup>.

The first part of this test is relatively easy to apply, however, the second part can be much more problematic, especially if the wrongful act committed by the employee is intentional<sup>71</sup>.

Before the Salmond test, cases such as *Bayley v Manchester, Sheffield and Lincolnshire Railway Co*<sup>72</sup> were still decided in the same way. In this case, a train conductor threw a passenger from a train, assuming that he was on the wrong train. The employer was found liable in this case because the court held such action as an unauthorised way of completing an authorised act. In *Century Insurance v Northern Ireland Road Transport Board*<sup>73</sup>, the employee, a driver of petrol trucks, was found to be in the course of employment when he discarded a lit cigarette at a petrol station and caused a fire. In *Twine v Bean's Express Ltd*<sup>74</sup>, a driver for the post office was not held to be in the course of employment because, when he gave a lift to the claimant, he was doing something that was expressly prohibited – as Lord Greene said the 'thing which he was doing simultaneously was something totally outside the scope of his employment'<sup>75</sup>. The list of cases decided prior to the test is considerable, however, from these few cases cited, it is clear that, when it comes to course of employment, the courts have always looked at the relationship between the job that the employee was hired to do and the tortious act that they have committed.

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<sup>70</sup> Salmond, J., *Torts* (1<sup>st</sup> edn, 1907), 83

<sup>71</sup> As emphasised by Hopkins, C. 'What is the Course of Employment?' (2001) *Cam.L.J* 458

<sup>72</sup> (1873) LR 8 CP 148

<sup>73</sup> [1942] AC 509

<sup>74</sup> (1946) 62 TLR 155

<sup>75</sup> (1946) 175 LT 131, 131

An example can be seen in *Hilton v Thomas Burton (Rhodes) Ltd*<sup>76</sup>. In that case a workman detoured eight miles for tea immediately after lunch at a pub. The accident that followed led to his death. The court held that the employer could not be found liable as the link between the act and the job that they were employed to do was too vague. Similarly, in *Daniels v Whetstone Entertainments*<sup>77</sup> a steward in a dancehall, employed to maintain order, assaulted a customer, thinking that they had had previous confrontation with them. Disregarding the employer's instructions, they then followed them outside and attacked the customer again. The employer could only be found liable for the first attack and not for the second as the employer had strictly prohibited the second attack. As can be seen from these cases, when the employer had strictly prohibited something, if the employee goes against this, the court is likely to hold that they were on a frolic of their own – however, express prohibitions will not necessarily stop vicarious liability as per the *Limpus* authority. This case is very similar to *Mattis v Pollock*<sup>78</sup>, which is discussed in detail later. In *Mattis*, even though the facts were similar, the court relied on an entirely new test to reach a very different decision.

The rule, that the employer will not be liable if the employee is on a frolic of their own, is not applied as strictly as may be thought. In *Rose v Plenty*<sup>79</sup>, a milkman had been told by his employer to not allow children to help him do his job and to ride in cart. The employee had disobeyed this order and a thirteen-year-old was injured while in the cart. The Court of Appeal found the employer liable here as the act did not go beyond the course of employment. Scarman LJ explains:

'The servant was, of course, employed at the time of the accident to do a whole number of operations. He was certainly not employed to give the boy a lift, and if one confines one's analysis of the facts to the incident of injury to

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<sup>76</sup> (*Rhodes*) Ltd [1961] All ER 74

<sup>77</sup> [1962] 2 Lloyd's Rep 1

<sup>78</sup> [2003] 1 WLR 2158

<sup>79</sup> [1976] 1 WLR 141

the plaintiff, then no doubt one would say that carrying the boy on the float — giving him a lift — was not in the course of the servant's employment.<sup>80</sup>

But in *Ilkiw v Samuels*<sup>81</sup> Diplock LJ indicated that the proper approach to the nature of the servant's employment is a broad one. He states:

‘As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities — such as driving, loading, sheeting and the like — by asking: what was the job on which he was engaged for his employer? and answering that question as a jury would.’<sup>82</sup>

Hence, when Scarman LJ, in *Rose*, referred back to the statement made by Diplock LJ they commented:

‘Applying those words to the employment of this servant... (h)ow did he choose to carry out the task which I have analysed? He chose to disregard the prohibition and to enlist the assistance of the plaintiff. As a matter of common sense, that does seem to me to be a mode, albeit a prohibited mode, of doing the job with which he was entrusted. Why was the plaintiff being carried on the float when the accident occurred? Because it was necessary to take him from point to point so that he could assist in delivering milk, collecting empties and, on occasions, obtaining payment.’<sup>83</sup>

In other words, as the milkman was doing what he was hired to do (which was to deliver milk) at the time of the incident, he was in the course of his employment. This case has also helped to set a precedent that if the employer is benefitting from the wrongful act, as they were in this case, then this too should contribute to the employer's liability — employers accept the benefit, so why should they not accept

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<sup>80</sup> *Rose*, 147

<sup>81</sup> [1963] 1 WLR 991

<sup>82</sup> *Ilkiw*, 1004

<sup>83</sup> *Rose*, 147

the burden? This principle, known as the 'broad risk' principle, was discussed in *Hamlyn v Houston & Co*<sup>84</sup> - in hiring the employee, the employer accepts the benefit and hence the risk of that contact.

Another main deciding factor in vicarious liability cases can also be if the victims are particularly vulnerable (for instance young or disabled). In *Commonwealth v Introvigne*<sup>85</sup> Mason J said that 'the immaturity and inexperience of the pupils and the propensity for mischief suggests that there should be a special responsibility on the school authority to care for their safety'<sup>86</sup>. In this Australian case, a mischievous pupil sustained severe head injuries while skylarking unsupervised and the defendants were found liable. This point has been raised in many cases concerning children being injured or abused. In *Belfron Trustees Ltd v Peterson*<sup>87</sup>, Laddie J said 'the terms of the employment become less important than the fact of the employment and the relationship between the victim and the employer becomes crucial'<sup>88</sup>. This case involved fraud, however, the principle is that if the employer owes the victim a duty of care, they cannot free themselves from that duty by delegating it to an employee. If the victim is especially vulnerable, it can be almost certain that the employer will owe that victim a duty of care from before the employee even comes into consideration. In *New South Wales v Lepore*<sup>89</sup>, it was also said that 'vicarious liability depends upon the employer owing a duty to the victim, performance of which he has detected to entrust to an employee who then commits the wrongdoing in question'<sup>90</sup>.

The Salmond test has been applied in many cases since its creation, such as in the case of *Trotman v North Yorkshire County Council*<sup>91</sup>, in which the council was not

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<sup>84</sup> [1903] 1 KB 81

<sup>85</sup> [1982] HCA 40

<sup>86</sup> *Commonwealth*, [30]

<sup>87</sup> [2001] All ER (D) 104

<sup>88</sup> *Belfron*, [27]

<sup>89</sup> [2003] HCA 4

<sup>90</sup> *New South Wales*, [74]

<sup>91</sup> [1999] LGR 584

found liable for the sexual assault of a pupil. The act could not in any way be deemed as authorised or even an unauthorised mode of doing an authorised act. This case can be contrasted here with *Lister v Hesley Hall*<sup>92</sup> as the decision of *Lister* overruled the *Trotman* decision.

*Lister* concerned a boarding school in which a warden, responsible for looking after the boys, sexually assaulted some pupils. The defendants were held vicariously liable on appeal. In order to compare this case with *Trotman*, we must first consider the statements of Lord Steyn in *Lister* in which he explains the reasons for the decision and the departure from the Salmond test. Lord Steyn begins his discussion by making reference to the case of *Lloyd v Grace Smith & Co*<sup>93</sup> in which the managing clerk at a firm of solicitors convinced clients to transfer their money to him and then spent it for personal gain. Lord Steyn said ‘this decision was a breakthrough: it finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit’<sup>94</sup>. The *Lloyd* case was then applied in *Morris v CW Martin & Sons Ltd*<sup>95</sup> in which an employee stole a mink wrap instead of cleaning it – the employer was held liable for the loss. In the decision, Salmon LJ held that ‘the defendants are liable for what amounted to negligence and conversion by their servant in the course of his employment’<sup>96</sup>. This case was described as ‘a striking and valuable extension of the law of vicarious liability’<sup>97</sup> and it has been treated as an authority on vicarious liability beyond bailment<sup>98</sup>. The Privy Council also expressly approved of *Morris* in *Port Swettenham Authority v T W Wu & Co*<sup>99</sup>.

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<sup>92</sup> [2001] UKHL 22

<sup>93</sup> [1912] AC 716

<sup>94</sup> *Lloyd* (n78), [17]

<sup>95</sup> [1966] 1 QB 716

<sup>96</sup> *Morris*, 738

<sup>97</sup> Atiyah, P., ‘Vicarious liability in the law of torts’ (1969) 2(2) *The Comparative and International Law Journal of South Africa* 357

<sup>98</sup> *Palmer on Bailment*, 2<sup>nd</sup> Ed (1991), pp 424-25

<sup>99</sup> (M) *Sdn Bhd* [1979] AC 580

Lord Steyn then made reference to the case of *Racz v Home Office*<sup>100</sup> in which it was established that an employer can be held liable for intentional wrongdoing of their employee. Lord Steyn said:

‘It remains, however, to consider how vicarious liability for intentional wrongdoing fits in with Salmond's formulation. The answer is that it does not cope ideally with such cases. It must, however, be remembered that the great tort writer did not attempt to enunciate precise propositions of law on vicarious liability. At most he propounded a broad test which deems as within the course of employment "a wrongful and unauthorised mode of doing some *act* authorised by the master". And he emphasised the connection between the authorised *acts* and the "improper modes" of doing them. In reality it is simply a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability. The usefulness of the *Salmond* formulation is, however, crucially dependent on focusing on the right act of the employee’<sup>101</sup>.

Therefore, the Salmond test, although useful in many cases, cannot be used as a general rule for imposing liability as in many situations its use will lead to an unjust decision. This point was then explored in *Rose v Plenty*<sup>102</sup>, where Lord Steyn made reference to in *Lister* – this point has already been discussed. Having discussed *Rose*, Lord Steyn moved on to conclude that the test to be applied is that of ‘close connection’:

‘It is not necessary to ask the simplistic question whether in the cases under consideration the acts of sexual abuse were modes of doing authorised acts. It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on

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<sup>100</sup> [1994] 2 AC 45

<sup>101</sup> *Lister v Hesley Hall* [2002] 1 AC 215, [20]

<sup>102</sup> [1976] 1 WLR 141

the premises of the employers while the warden was also busy caring for the children'<sup>103</sup>.

This, therefore, explains how the Lords came to hold the school vicariously liable and created the 'close connection' test. Lord Steyn continued by discussing the application of the correct test by stating that its creation was greatly influenced by the cases of *Bazley v Curry*<sup>104</sup> and *Jacobi v Griffiths*<sup>105</sup>. He opines 'wherever such problems are considered in the future in the common law world these judgments will be the starting point. On the other hand, it is unnecessary to express views on the full range of policy considerations examined in those decisions'<sup>106</sup>. In relating the case of *Lister* to the new test, for Lord Steyn 'the question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable'<sup>107</sup> – hence, the 'close connection' test. It has been argued that 'the facts in *Lister* shouted vicarious liability so loudly the outcome was obvious the moment the Lords freed themselves from the wooden reading of the Salmond test.'<sup>108</sup>

Giliker stressed that the judges in *Lister* created the new test due to 'a sense of injustice at the inability of the victims of abuse to access compensation when mistreated by a carer employed to safeguard their interests.'<sup>109</sup> This statement may make it appear that the *Lister* principle would only be effective in abuse cases, however, its application appears to stretch to all areas of vicarious liability law<sup>110</sup>.

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<sup>103</sup> *Lister*, [20]

<sup>104</sup> [1999] 2 SCR 534

<sup>105</sup> [1999] 2 SCR 570

<sup>106</sup> *Lister*, [27]

<sup>107</sup> *Lister*, [28]

<sup>108</sup> Feldthusen, B., 'Vicarious Liability for Sexual Abuse' (2001) 9(3) Torts Law Review 173, 177

<sup>109</sup> Giliker, P., 'Making the right connection: Vicarious Liability and Institutional Responsibility' (2009) 17 TLJ 35, 49

<sup>110</sup> Tulley, L., 'Reflections of *Woodland v Essex County Council*: a step too far for no-fault liability' (2016) B.S.L. Rev. 47

Mclvor states that this gives litigants the impression that vicarious liability is now more likely to succeed than not<sup>111</sup>.

At this point, a comparison between *Lister* and *Trotman* may be made as the facts are very similar. Trotman was a mentally disabled pupil who was sexually assaulted on a school trip to Spain. The reason why the council could not be found vicariously liable was, following the Salmond test, the act was not an unauthorised manner of doing an authorised act. However, both employees in the cases had ample opportunity to get close to the children and be alone with them, hence being able to commit the acts of sexual assault. It has already been commented that had the judges in *Lister* applied Salmond, the employer would not have been found liable, however, they were following the 'close connection' test. The decision of *Trotman* was overruled because if the 'close connection' test, seen by the courts as a fairer test, had been created before *Trotman*, the employer would have been found liable, hence making the original decision unjust.

The judgment of Lord Hobhouse in *Lister* is also one worthy of discussion. He explained the Salmond test further, specifically stating that the second element could not in any way be applied to child abuse cases as 'abusing children cannot properly be described as a mode of caring for children'<sup>112</sup>. He goes on to state 'whether or not some act comes within the scope of the servant's employment depends upon an identification of what duty the servant was employed by his employer to perform'<sup>113</sup> – this point was taken from the case of *Kirby v National Coal Board*<sup>114</sup>. Here Lord Hobhouse was explaining the importance of finding a link between the job and the act – the job cannot merely give the employee the opportunity to commit the act if we are applying the Salmond test.

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<sup>111</sup> Mclvor, C., 'The use and abuse of the doctrine of vicarious liability' (2006) 35 CLWR 268, 277

<sup>112</sup> *Lister*, [59]

<sup>113</sup> *Lister*, [59]

<sup>114</sup> 1958 SC 514

He moves on to state that the correct approach in cases such as that of *Lister* is to ask:

‘what was the duty of the servant towards the plaintiff which was broken by the servant and what was the contractual duty of the servant towards his employer. The second limb of the classic *Salmond* test is a convenient rule of thumb which provides the answer in very many cases but does not represent the fundamental criterion which is the comparison of the duties respectively owed by the servant to the plaintiff and to his employer. Similarly, I do not believe that it is appropriate to follow the lead given by the Supreme Court of Canada in *Bazley v Curry* 174 DLR (4th) 45.’<sup>115</sup>

Therefore, in some cases, the Salmond test may still be relevant. However, in most cases, especially those concerning child abuse, the new ‘close connection’ test will provide a more just outcome. Lord Hobhouse concludes by saying that ‘legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it’<sup>116</sup>. This is achieved by explaining how the rule has developed over time and through case law precedent. Most rules in the English common law are created through many years of consistent case law decision-making which tends to suggest a predictable outcome. For example, if one rule leads to unjust decisions then the new rule will be created in order to avoid this injustice, such as the movement from the (singular) ‘control test’ to the more encompassing series of questions included in the ‘*Ready Mixed Concrete*’ test.

When noting the crucial principles that arise from the decision of *Lister*, it can be noted that Lord Hobhouse said that it was still necessary to discover and define what the employee is employed to do. This statement was made even though Lord Millet said that ‘what is crucial is that attention should be directed to the closeness of the connection between the employee’s duties and his wrongdoing and not to verbal

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<sup>115</sup> *Lister*, [60]

<sup>116</sup> *Lister*, [60]

formulae<sup>117</sup>. This would include what he actually does, what he can do contractually and the effect of any prohibitions. The Salmond test should still be used, following *Lister*, to distinguish between what the employee does and what he is authorised to do, however, it is no longer necessary to connect the act with the duty using the Salmond formulation.

When coming to a judgment, the Lords in *Lister* inadvertently applied the test for vicarious liability created in the Canadian Supreme Court case of *Bazley*. This case concerned a non-profit organisation which operated residential care centres for children. Curry was an employee of the organisation and, over the course of sixteen years was found to have sexually assaulted children on around 20 different occasions, two of which involved the claimant. The court was troubled with two questions: can an employer be held liable for sexual assaults on persons within their care? Furthermore, if so, should a non-profit organisation be exempt?

In its judgment, the court considered that vicarious liability is predominantly used to 'sue into deeper pockets', hence raising the question of whether it is ethical to allow for vicarious liability to be imposed on non-profit organisations. McLachlin J adapted Fleming's policy rationale for imposing vicarious liability<sup>118</sup> to conclude that: it would provide a just and practical remedy, as well as deterring future harm. The court considered the Salmond formulation but expressed great frustration with it – Curry's actions could be viewed as both totally independent and an unauthorised mode of doing an authorised act – Salmond does not provide for differentiating between the two. The Court came to the decision that they should consider:

- 1) policy reasons that will determine whether vicarious liability should, or should not, apply; and
- 2) whether the wrongful act is sufficiently related to the employment to justify imposing vicarious liability.

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<sup>117</sup> *Lister*, [70]

<sup>118</sup> Fleming, J. G., *The Law of Torts* (9th edn, Thomson Reuters (Professional) Australia Limited 1998), 409

They also went on to say that vicarious liability will generally be appropriate when there is a significant connection between the creation or enhancement of the risk and the act. It is noticeable here that this test is highly similar to the *Lister* 'close connection' test. However, whilst *Bazley* can only be of persuasive authority, *Lister* has the power to bind.

This is an appropriate juncture at which to discuss the first element the court felt it should consider (policy reasons). Finch J.A. 'took the view that outcomes in this area of the law rest more on policy considerations than on adherent legal principle, and advocated a case-by-case, policy-orientated approach.'<sup>119</sup> It was also found that:

'Increasingly, courts confronted by issues of vicarious liability where no clear precedent exists are turning to policy for guidance, examining the purposes that vicarious liability serves and asking whether imposition of liability in the new case before them would serve those purposes.'<sup>120</sup>

But what are the policy considerations that could lead to vicarious liability being voided? Tutin states that 'It would be contrary to public policy if businesses were held liable for the actions of others in areas in which it has no knowledge or competence [in the skills of independent contractors] and therefore were unable to control the risk.'<sup>121</sup>

When considering public policy, a few cases are worth consideration – the first being *Lane v Shire Roofing*<sup>122</sup>. Here Lane was hired by the defendant company as a building worker and was paid on a day-by-day basis, which was unusual. Lane was injured and it was held he was an independent contractor. Lord Henry said:

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<sup>119</sup> *Bazley v Curry* [1999] 2 S.C.R. 534, at [8]

<sup>120</sup> *Bazley*, [14], see Fleming, *supra*, at p. 410; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, *per* La Forest J.

<sup>121</sup> Tutin, M., 'Vicarious Liability: An ever expanding concept?' 2016 I.L.J. 556, 563

<sup>122</sup> [1995] EWCA Civ 37

‘When it came to the question of safety at work, there was a real public interest in recognising the employer/employee relationship when it existed, because of the responsibilities that that the common law and statutes such as the Employers’ Liability (Compulsory Insurance) Act 1969 placed on the employer.’<sup>123</sup>

This case will also have importance in the later discussion of the *Mohamud*<sup>124</sup> case, with reference to health and safety. Another case which is important to the public policy discussion is *O’Kelly v Trusthouse Forte Plc*<sup>125</sup> in which waiters were hired for dinner functions at a hotel – the employer was under no obligation to offer work and they were under no obligation to accept the work. The waiters organised a trade union and were subsequently dismissed and argued unfair dismissal – the employer counter-claimed that they were not covered under the legislation as it only covered employees. It was held that they were not technically employees as the contact lacked ‘mutuality’ – even though the trade union discrimination legislation protected them, they did not have the access to the court to make the rights effective.

‘Mutuality of obligation’ was thought at that time to mean an ongoing obligation to offer and accept work, however, this decision has been consistently doubted<sup>126</sup>. It has since been reversed by the Trade Union and Labour Regulations (Consolidation) Act 1992, s. 146 and the reasoning has been superseded by *Autoclenz Ltd v Bencher*<sup>127</sup>, in which it was said that “mutual” obligation is merely consideration for remuneration.

The final case to be considered here is *Nethermere (St Neots) Ltd v Gardiner*<sup>128</sup> in which two female employees started working from home after falling pregnant. They

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<sup>123</sup> *Lane v Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493

<sup>124</sup> *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11

<sup>125</sup> [1983] ICR 728

<sup>126</sup> *Lee Ting Sang v Chung Chi-Keung* [1990] UKPC 9

<sup>127</sup> [2011] UKSC 41

<sup>128</sup> [1984] ICR 612

sewed together trouser flaps, using the claimant's sewing machines, and were paid depending on how many products they produced. They were under no obligation to accept the work. There was a dispute between the employer the women about holiday pay which led to an unfair dismissal claim. But were they employees? The Industrial Tribunal held them to be employees and the court concurred. The employer appealed. The Court of Appeal held that whether a contract was for services was a matter of fact, not law. In the Court's view, there was an 'umbrella' contract, under which there was an implied obligation for the provision and acceptance of work. In order for a contract of employment to exist, 'There must, in my judgement, be an irreducible minimum of obligation on each side'<sup>129</sup>. In essence, where there is 'mutuality of obligation' between casual or temporary workers and their employer it is a contract of employment.

Another public policy aspect that the Court may consider is if the employer is a non-profit organisation, working for the benefit of others. When the final decision was made by the Court in *Bazley*, it was decided that if Curry was left alone with the children for long periods of time and was expected to do things such as bathe them, there was a sufficiently close connection between the risk created by the work and the act. Essentially, the Foundation had significantly increased the risk of harm by creating such a situation and should therefore be vicariously liable. Some may argue that the employer should have put a preventative measure in place here. However, as Lord McLachlin puts it:

'A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer... Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it... I conclude that a meaningful articulation of when vicarious liability should follow in new situations ought to be animated by the twin policy goals of fair compensation and deterrence that underlie the doctrine, rather than by artificial or semantic distinctions.'<sup>130</sup>

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<sup>129</sup> As per Stephenson LJ, at page 621

<sup>130</sup> *Bazley*, [36]

In appealing this decision, the Foundation argued three reasons why non-profit organisations should be exempt from vicarious liability:

- 1) it is unfair to fix liability without fault on non-profit organisations who perform much needed services to the community as a whole;
- 2) non-profit organisations often work with volunteers and hence are less able to supervise them than an employer supervising a paid employee; and
- 3) a successful claim for vicarious liability will leave many non-profit organisations out of business and hence unable to do their vital work for the community.

McLachlin J dismissed these arguments as ‘crass and unsubstantial utilitarianism’. He pointed out:

‘If, in the final analysis, the choice is between which of two faultless parties should bear the loss — the party that created the risk that materialized in the wrongdoing or the victim of the wrongdoing — I do not hesitate in my answer. Neither alternative is attractive. But given that a choice must be made, it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it’<sup>131</sup>.

A key case which followed the decision in *Lister* is *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church*<sup>132</sup>. Here, a priest sexually abused a non-Catholic boy and the church accepted that he was an employee. The priest in this case gave the boy odd jobs to do, however, this did not amount to his priestly duties<sup>133</sup>. The Court of Appeal unanimously agreed that, as the priest specialised in youth work and was employed to spread his faith to both believers and non-believers, there was some connection between the act and his duties. The

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<sup>131</sup> *Bazley*, [54]

<sup>132</sup> [2010] EWCA Civ 256

<sup>133</sup> [2009] EWHC 780 (QB), [100]

defendants in *Maga* tried to argue that the claimant's case was weaker than that of the claimant's in *Lister* and hence the 'close connection' test could not lead to vicarious liability. Here this argument was rejected.

The 'close connection' test requires there to be the presence of opportunity. In *Maga* the court made reference to the case of *Jacobi*<sup>134</sup> in which the director of a children's club sexually assaulted two children. In this case, no liability was found as the opportunity the director had to isolate the children was very slight and hence the connection could not be made. The judges held:

'Both the case law and the broader policy considerations clearly suggested that the imposition of no-fault liability in the present case would overshoot the existing judicial consensus about appropriate limits of an employer's no-fault liability. The case law revealed the historical reluctance of judges to fix employers with no-fault liability on the basis merely of job-created opportunity to commit a tort as in the present case, without job-created power, even where accompanied by privileged access to the victim, although vicarious liability had been imposed in cases where the strong connection was enhanced by a combination of job-created power and job-created intimacy, the hallmarks of a parenting relationship.'<sup>135</sup>

However, in *Maga* there was a much greater opportunity for the priest to isolate the child – they were not always meeting in group situations like those presented by the children's club. Lord Neuberger said that the priest's role allowed him to 'draw the claimant further into his sexually abusive orbit by ostensibly respectable means connected with his employment as a priest at the church'<sup>136</sup>. Particular attention was also drawn to the fact that the priest was never off duty. Lords Longmore and Smith also emphasised that liability does not simply stem from evangelical duties of the

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<sup>134</sup> *Jacobi v Griffiths* [1999] 2 SCR 570

<sup>135</sup> [1999] 4 LRC 348, at 349

<sup>136</sup> *Maga*, [45]

church but might be imposed on those that encourage priests to develop intimate relationships with young people.

When discussing the struggle the judges had in *Maga* with applying the 'close connection' test, Giliker states that 'One obvious difficulty derives from the failure of the House of Lords in *Lister* to provide a single version of its close connection test'<sup>137</sup>. In her article, Giliker explains that Lords Steyn and Hobhouse provide one version of the test, whereas Lords Millet and Clyde provide another – accompanied by the material risk of harm element added by Mclachlin J in *Bazley*, one can understand where the courts have trouble. Here we could, again, ask should there be a prescribed method? This point shall be discussed in more detail later.

In *Maga*, all 3 versions or extensions of the test were applied with all of the judges reaching the same decision. It cannot be said which version is correct as even the Lords in *Lister* could not agree – it seems to be for reasons of luck rather than design that they all came to the same conclusion here. The lower courts have expressed dissatisfaction with the test when it comes to applying it. It seems that they should focus on the nature of the duties of the employee, rather than the facts of each individual case according to Giliker. If here we make reference to *Dyer v Munday*<sup>138</sup>, where the manager of a furniture dealership assaulted a customer's landlord, it can be said that 'Vicarious liability thus arises where the employee harms the very thing he was employed to protect'<sup>139</sup>. Giliker goes on to say that '*Maga*, therefore, indicates that *Lister* has far from resolved the question of the scope of employment and that courts will continue to struggle to apply the overlapping Steyn/Hobhouse/McLachlin tests in borderline cases'<sup>140</sup>. The 'close connection' test has been a topic of great debate for many academics. However, given the word count available, only a small number shall be referred to.

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<sup>137</sup> Giliker, 'Lister revisited: Vicarious Liability, distributive justice and the course of employment' (2010) LQR 521, 523

<sup>138</sup> [1895] 1 Q.B. 742 CA

<sup>139</sup> Giliker, 524

<sup>140</sup> Giliker, 524

Yap, when referring to the 'close connection' test, states that 'this touchstone test simply begs the question of how close must the nature of employment and the tortious act be before liability can be found'<sup>141</sup>. Further, 'The close connection test in itself merely provides the court with a formula to confirm its results, not reach one'<sup>142</sup>. In *Lister*, the test worked because, as Lord Steyn said, the connection was sufficiently close because the warden was entrusted with the care of children and the abuse took place while he was performing his duties. Lord Clyde agreed with this and emphasised that the warden was given a general authority to supervise and run the house in which the children were staying. Lord Hobhouse added to this by stating that liability arises from the employer's voluntary assumption of a relationship with the victim and their decision to entrust those duties on the employee. Finally, Lord Millet pointed out that there is an inherent risk in boarding schools of sexual assaults being performed by those in a position of authority.

Yap states that the previous tests used in establishing vicarious liability are useless when the employee has engaged in 'wilful and deliberate misconduct'<sup>143</sup>. This brings our attention to *Warren v Henllys*<sup>144</sup> in which a garage attendant physically assaulted a customer who drove off without paying – the garage could not be found liable for their employee as the act was one of personal revenge. If the Salmond test was to be used here, it could be found that this act was a wrongful mode of performing an authorised act – part of the attendant's job was to ensure that customers paid. However, this would lead to the garage being liable which could be an unjust outcome. This led Yap to suggest that 'The Salmond formula was perhaps doomed to fail from the start'<sup>145</sup>. Hence, in *Lister*, the Lords decided that the courts should focus on the relative closeness between the tort and the nature of the employment. Lord Clyde pointed out that sufficient connection would arise where the 'employer

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<sup>141</sup> Yap, 'Enlisting connections: a matter of course for vicarious liability' (2008) 28 LS 197, 197

<sup>142</sup> Yap, 197

<sup>143</sup> Yap, 199

<sup>144</sup> [1948] 2 All ER 935 – this case shall be discussed more when analysing the *Morrisons* case.

<sup>145</sup> Yap, 200

has been entrusted with the safekeeping or the care of some thing or some person and he delegates that duty to an employee'<sup>146</sup>.

Giliker is critical of the above statement and states that 'references to duties "entrusted" or "delegated" to the employees seems more indicative of primary liability, rendering the term "vicarious" redundant in the circumstances'<sup>147</sup>. Here, she is saying that where the employer assumes a relationship between themselves and the victim, one which involves responsibility, and they delegate that responsibility to be employee, the line between vicarious and primary liability becomes blurred. The principle that in vicarious liability the employer is not at fault becomes questionable<sup>148</sup>. Mclvor<sup>149</sup> also describes the Close Connection test as 'too vague and unpredictable to work as a judicial tool in determining whether it is appropriate to impose vicarious liability'<sup>150</sup>. Finally, Glofcheski suggests that the test is justified for intentional torts, but questions if it should be used for negligence-based torts<sup>151</sup>. This theory is now discussed in greater detail, focusing specifically on the criticisms of Yap and relevant case law.

#### 2.4.1 POST-LISTER: INTENTIONAL TORTS

In the case of *New South Wales v Lepore*<sup>152</sup> the court was divided on whether or not to follow *Lister* and *Bazley*. Gleeson CJ and Kirby J both felt that the court should follow the cases in making their decision. Conversely, Gummow and Hayne JJ, both stated that when considering intentional torts, the employer should be found liable:

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<sup>146</sup> *Lister*, [46]

<sup>147</sup> Salmond, J., *The Law of Torts* (Sweet & Maxwell, 9<sup>th</sup> edn. 1936), at 275

<sup>148</sup> Giliker makes this point in: Giliker, P., 'Rough Justice in an Unjust World' [2002] 65(2) M.L. Rev. 269, 275

<sup>149</sup> C. Mclvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 Common Law World Rev 268

<sup>150</sup> Mclvor (n134), 269

<sup>151</sup> Glofcheski, R., 'A Frolic in the Law of Tort: Expanding the Scope of Employers' Vicarious Liability' (2004) 12 Tort Law Review 18

<sup>152</sup> [2003] HCA 4

‘if the wrongful act is done in intended pursuit of the employer’s interest or in intended performances of the contract of employment . . . or where the conduct of which complaint is made was done in . . . the apparent execution of the authority which the employer held out the employee as having.’<sup>153</sup>

In commenting on this opposing test, Yap stated:

‘Admittedly, this test is logically defensible and is a marked improvement over the Salmond formulation but its application would prevent claimants in the same positions as the plaintiffs in *Lister* and *Bazley* from seeking redress against the employer under the law of vicarious liability.’<sup>154</sup>

The courts have historically followed the decisions of cases with facts that are similar or the same as the one they are deciding. This principle of binding (and persuasive) precedent can be illustrated by two cases – the first, *Donoghue v Stevenson*<sup>155</sup>, is a case which established the modern law of negligence in contract law and the neighbor rule. Subsequently, the decision of this case was applied in *Grant v Australian Knitting Mills*<sup>156</sup> due to the precedent the *Donoghue* principle held. McLeod stated that:

‘The idea of precedent may be formulated in a relatively wide way, by simply saying that it is desirable that similar cases should be decided in a similar manner. This wide view of precedent is based partly on the proposition that consistency is an important element of justice; partly on the fact that the practice of following previous decisions results in improved efficiency, because points of law which have once been decided can simply be applied

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<sup>153</sup> *New South Wales*, [239]

<sup>154</sup> Yap, 204

<sup>155</sup> [1932] AC 562

<sup>156</sup> [1936] AC 85

subsequently, without being subject to repeated re-argument; and partly on judicial comity.

‘It is not surprising, therefore, that the courts in any developed legal system are likely to follow precedent to a significant extent. Certainly there is nothing peculiarly English about such a practice. However, the idea of precedent may also develop in a rather narrower sense, with the result that courts may regard themselves as being actually bound to follow earlier decisions. The use of precedent in this narrow sense is largely peculiar to English law, although it is also evident to some extent in the other common law jurisdictions which derive from English law.’<sup>157</sup>

Here, McLeod is making the point that this second test would prevent this practice and hence it could lead to claimants in cases similar to *Lister* and *Bazley* leaving the court without the outcome they were expecting. It is a truism that the law is not always predictable, however, there is a certain degree of expectation in the outcome of cases with almost identical facts. We must ask though, should one decision be unjust only to prove that the one it follows was correct? This is definitely one of the reasons why vicarious liability law is not ‘set in stone’, however, a statutory based system would not solve this problem either. It would seem that there can be no consistency in order to provide justice, but there can also be no consistency of justice if there is not some sort of framework in place.

In *Lepore*, Gaudron J offered a third alternative; he argued that vicarious liability could be imposed when the employer is estopped from denying that the employee was acting as his servant. This would occur when the employee’s act or omission could not be said in any way to fail to be related to his duties as the servant. However, we must ask if this argument assists the problem posed? Was the judge simply attempting to offer an alternative when there seemed to be no correct method of determination?

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<sup>157</sup> Ian McLeod, *Legal Method* (9<sup>th</sup> ed, Pelgrave Macmillan Law Masters 2013)

Another controversial case which followed *Lister* was *Attorney General v Hartwell*<sup>158</sup> in which the employer could not be found liable when a police officer shot a man that was with the officer's girlfriend. In his judgment, Lord Nicholls stated that 'Laurent's activities had nothing whatever to do with police duties, either *actually or ostensibly*. Laurent deliberately and consciously abandoned his post and duties'<sup>159</sup>. Lord Nicholls here was attempting to apply *Lister*, however, it has been criticized that this interpretation is far too close to the Salmond formulation – if this method had been applied in *Lister*, then the employer would not have been found liable.

In *Bernard v AG of Jamaica*<sup>160</sup>, the court asked if the tort could fairly be regarded as a reasonably incidental risk of the employer's enterprise – it was held in this case that it could. In this case, a police officer wrongfully shot and arrested the claimant because he wanted to use the pay phone when it was not his turn. We must ask here if this test is too ambitious – the risk must be inherent, inevitable or inextricable. The test also fails to explain cases when the action failed, even when there was an inherent risk. An example of this is the case of *N v Chief Constable of Merseyside Police*<sup>161</sup> – here, an off-duty police officer sexually assaulted an intoxicated female. The defendant was not found liable, however, there was an inherent risk of the tort being committed. But, would it not be unfair to impose liability? The officer was found to be on a frolic of their own<sup>162</sup> - so should we apply the oldest rules (for example, the 'frolic' rule) or the new ones because they were created with the old ones in mind?

In *Bernard*, the officers were allowed to take their guns home with them when they were off duty, hence increasing the risk of injury. In *Bazley*, the Canadian Court stated that a tort would be committed in the course of employment if there was a 'significant connection between the creation or enhancement of a risk and the wrong

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<sup>158</sup> [2004] 4 LRC 458

<sup>159</sup> *Hartwell*, [17]

<sup>160</sup> [2004] UKPC 47, No. 30 of 2003, [2005] IRLR 398

<sup>161</sup> [2006] EWHC 3041 (QB)

<sup>162</sup> *N v CC Merseyside Police*, [36]

that occurs therefrom, even if unrelated to the employer's desires'<sup>163</sup>. Here, the court considered five factors:

'(a) the opportunity that the enterprise afforded the employee to abuse his power, (b) the extent to which the wrongful act furthered the employer's interest; (c) the extent to which the employment situation created conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of the potential victims'<sup>164</sup>.

The Canadian Court also said that vicarious liability would be imposed when the tort exposed the victim to a risk created by the nature of the employment.

When considering inherent risks, the court will also consider what the employer did to avoid this risk leading to a tort or crime being committed. In *EB v Order of the Oblates of Mary Immaculate*<sup>165</sup>, a school was not found liable when a janitor in their employment sexual assaulted a pupil. The Court enquired about the level of care taken to reduce such a risk - it was held that they had taken sufficient steps in an attempt to avoid such an incident and hence could not be found liable. On this point, Yap comments:

'Where the employer has failed to manage the risks inherent in his enterprise to an acceptable minimum level, he would be considered to have materially increased the risk of such harm occurring'<sup>166</sup>.

#### 2.4.2 POST-LISTER: NEGLIGENT TORTS

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<sup>163</sup> *Bazley v Curry* (1999) 174 DLR (4<sup>th</sup>), [46]

<sup>164</sup> *Bazley*, [47]-[52]

<sup>165</sup> [2005] 3 SCR 45

<sup>166</sup> Yap, 'Enlisting connections: a matter of course for vicarious liability' (2008) 28(2) Legal Studies 197, 209

In *Lister*, Lord Clyde stated that ‘cases which concern sexual harassment or sexual abuse should be approached in the same way as any other case where questions of vicarious liability arise’<sup>167</sup>. Hence, the *Lister* formulation can be used in cases concerning negligent torts, as well as intentional ones. The *Bazley* formulation, however, was intended only for intentional torts. There are very few cases which have considered *Lister* and *Bazley* where a negligent tort was committed. However, in *Hoefling v Driving Force*<sup>168</sup> the court applied the *Bazley* formulation to find the employer liable when his employee allowed a fellow employee to drive the van while intoxicated.

The *Lister* formulation was also applied in *Ming An Insurance v Ritz Carlton*<sup>169</sup> when the Salmond formulation led to the employer not being liable at two instances. In this case, a road accident occurred when the doorman of the employer’s hotel drove a bellboy in a limousine to collect food, this was not a practice allowed by the hotel. When applying the *Lister* formulation, the court here said that the concept of employment needed to be broadly defined - the court must consider not only the employee’s duties but also any acts that may be necessary in order to fulfil those duties. The hotel needed the bellboy to go and collect the food, hence they should be liable when their employee’s negligent performance of the act leads to an injury. Yap has commented that the Judge in this case has left far too many questions about the application of the ‘close connection’ test in cases concerning negligent torts leading us to believe that this formulation would not be useful in such cases. Therefore, it may be suggested that in cases concerning negligence, the Salmond formulation, or perhaps another test yet to be created, would be much more useful in coming to a just decision.

When considering the main points made from Yap’s discussion on *Lister* and the cases which followed, conclusions can be drawn that it is fair to make the employer vicariously liable in cases where they have benefitted financially from the tort and

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<sup>167</sup> *Lister v Hesley Hall* [2001] UKHL 22, [48]

<sup>168</sup> [2005] AJ No 1464

<sup>169</sup> [2002] 1 HKLRD 844

where they have increased the risk of intentional torts being committed - this should encourage them to take preventative action. It can also be concluded that, for negligent torts, liability arises from inevitable risk and the employer may be assumed to have foreseen the inevitable and hence should have put preventative measures in place. Yap's final conclusion adds a very interesting insight into the above discussion. He states:

'For a century, common law courts have placed their faith in the Salmond formulation. *Lister* came along and exposed this belief as misguided but it failed to bring us any closer to identifying when the connections between the employment and the servant's tort were sufficient to impose vicarious liability. *Bazley's* risk-oriented analysis points us in the right direction but recourse to mere risk creation alone raises the danger of overturning decades of settled case-law on vicarious liability. In distinguishing between an employee's commission of negligence-based torts and intentional ones and by imposing liability only when the employer has materially increased the risk of injury when the latter occurs, it is submitted that such a dichotomy preserves the sanctity of the settled case-law of our past whilst safeguarding the viability of any vicarious liability action in meeting the needs and possibilities of tomorrow'<sup>170</sup>.

From this comment the application of vicarious liability is justified, especially where the employer has in some way benefitted from the situation or omitted to remove obvious risks.

*Dubai Aluminium Co Ltd v Salaam*<sup>171</sup> followed *Lister* almost immediately and is one that is highly noteworthy. In this case, a solicitor in the firm of Amhurst Brown Martin & Nicholson was alleged to have assisted in drafting fraudulent documents dishonestly and contributions were sought from the partners in vicarious liability. The main question that the court faced was not whether the solicitor was acting in the

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<sup>170</sup> Yap, 'Enlisting connections: a matter of course for vicarious liability' (2008) 28(2) Legal Studies 197, 214

<sup>171</sup> [2003] 2 AC 366

course of employment as he clearly was, but whether it could be shown that the employer could be liable under Section 10 of the 1890 Partnership Act, so that contributions could be sought from Salaam under the Civil Liability (Contributions) Act 1978. The 1890 act states:

‘Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.’<sup>172</sup>

The court also had to ask if the act, as an equitable wrong, rather than a common law tort, could be included in the meaning of s.10 and hence lead to vicarious liability.

At the Court of Appeal, it was held there was no vicarious liability as the doctrine only extends to common law torts and not equitable wrongs (Turner J). However, in the House of Lords, it was held that the 1890 Act is not restricted to tortious acts (Nicholls LJ). It was also added that the employee’s actions were in the ordinary course of business (*Lister*). Millett LJ commented that the claim could be based on dishonesty for liability in assisting breach of trust and at the same time could ‘be based simply on the receipt, treating it as a restitutionary claim independent of any wrongdoing’<sup>173</sup>. Millett also gave a pertinent quote to sum up vicarious liability:

‘Vicarious liability is a loss distribution device based on grounds of social and economic policy. Its rationale limits the employer’s liability to conduct occurring in the course of the employee’s employment. ‘The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on... the ultimate question is whether or not it is just that the loss resulting from the servant’s acts should

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<sup>172</sup> Section 10

<sup>173</sup> *Dubai Aluminium*, [87]

be considered as one of the normal risks to be borne by the business in which the servant is employed.’<sup>174</sup>

There was some debate as to whether or not explicit authorisation by the partners was required for vicarious liability, however, it was held that it was not expected. Lord Nicholls commented:

‘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’<sup>175</sup>.

One of the main reasons, however, why this case is so important in the discussion of the ‘close connection’ test is Lord Nicholl’s comment on it:

‘This ‘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 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. It provides no clear assistance on when, to use Professor Fleming’s phraseology, an incident is to be regarded as sufficiently work-related, as distinct from personal’... This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either 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,

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<sup>174</sup> *Dubai Aluminium*, [107]

<sup>175</sup> *Dubai Aluminium*, [23]

importantly, having regard also to the assistance provided by previous court decisions. In this field the latter form of assistance is particularly valuable.<sup>176</sup>

### 2.4.3 VIOLENT EMPLOYEES AND HARASSMENT/ASSAULT

When considering violent employees, the court may be swayed in one direction or another more drastically than in cases concerning negligence or mere criminal action. A memorable case in English tort law is *Mattis v Pollock*<sup>177</sup>, a case which concerned a nightclub doorman stabbing a customer. One reason why this case is so notable is that it established that vicarious liability can be found, even when the act (the assault) was pre-meditated. In the case of *Warren v Henlys Ltd*<sup>178</sup>, a case previously discussed, the judges were unwilling to impose liability where assault was motivated by revenge or vengeance, hence it is interesting that they changed their approach in this case. When *Warren* was previously mentioned in this piece, it was discussed that if the Salmond test had been applied then the garage could have been found liable. However, the test was not used and hence there was no vicarious liability found. *Mattis* will now be discussed and analysed.

The facts of *Mattis* are as follows: Cranston was employed as a bouncer at the defendant's night club and one night he threw one of Fitzgerald's friends (a customer) across the room and was instructed to 'impress upon Mr Fitzgerald that Mr Cranston was prepared to use physical force to ensure compliance with any instructions that he might give to Mr Fitzgerald or any of his companions'<sup>179</sup>. Six days later, *Mattis* attended the club with a friend (Mr Cook) and Cranston was instructed on that evening that Cook should be barred and ejected. One week later *Mattis* came to the club and Cook arrived with Fitzgerald. Cranston saw them and violently assaulted Cook, along with one of his friends. *Mattis* attempted to pull Cranston from Cook which caused several other customers to surround Cranston who eventually

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<sup>176</sup> *Dubai Aluminium*, [25]

<sup>177</sup> [2003] 1 WLR 2158

<sup>178</sup> [1948] 2 All ER 935

<sup>179</sup> *Mattis*, [7]

fled. When he returned to the club later that evening, Cranston stabbed Mattis in the back, leaving him paraplegic.

At first instance, the trial judge found Pollock not liable as the final attack was not part of one continuous string of events – when he fled home, leaving his duties, he was no longer in the course of employment. The Judge found that ‘The lapse of time and intervening events were, in my judgement, of such a nature that it would not be right to treat the event culminating in the stabbing of Mr Mattis as one incident commencing in the club’<sup>180</sup>. The argument was also made in the Court of first instance that the doorman was employed to keep order and discipline, however, he was also encouraged to be aggressive and intimidating, this included manhandling customers. The argument was made that Cranston should never have been employed in the first place, given his background, and certainly should never have been encouraged to be violent. Both of these arguments were rejected in the Court of Appeal by Judge LJ:

‘The stabbing of Mr Mattis represented the unfortunate, and virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate and distinct incident. Even allowing that Cranston's behavior included an important element of personal revenge, approaching the matter broadly, at the moment when Mr Mattis was stabbed, the responsibility of Mr Pollock for the actions of his aggressive doorman was not extinguished. Vicarious liability was therefore established. Accordingly, the appeal on this ground must succeed.’<sup>181</sup>

The court in *Mattis* took note of both *Lister* and *Dubai Aluminium* when making its decision, focusing mainly on the close connection between Cranston’s work and instructions and the act. It did not look to establish that the employee was in the course of employment. It was very important that Cranston was instructed by Mr Pollock and that he was known to be violent and intimidating. As Judge LJ put it:

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<sup>180</sup> *Mattis v Pollock* [2002] EWHC 2177, [77]

<sup>181</sup> *Mattis v Pollock* [2003] 1 WLR 2158, [32]

'Mr Pollock chose to employ Cranston, knowing and approving of his aggressive tendencies, which he encouraged rather than curbed, and the assault on Mr Mattis represented the culmination of an incident which began in Mr Pollock's premises and involved his customers, in which his employee behaved in the violent and aggressive manner which Mr Pollock expected of him.'<sup>182</sup>

This case is one of many that illustrates one of the main reasons to encourage the enforcement of vicarious liability – here the employer is not only being held responsible for the actions of their employee, but also their own reckless standard for hiring staff. Had Mr Pollock been more careful in who he employed, paying close attention to any previous incidents that may be cause for concern, the entire incident may never have happened. Whether the 'close connection' test used in this case was the correct one or not becomes irrelevant here as one might say that the decision was correct, regardless of how it was made. This, however, is pure speculation and cannot be a general method in every case concerning vicarious liability as it could lead to the courts not following any tests and justifying their decisions by simply stating that the decision is the right one in their opinion.

One case in which the Close Connection test was used, and was highly praised, was *Brinks Global Services Inc v Igrox Inc*<sup>183</sup>. Brinks provided a delivery service and Igrox provided fumigation services for large containments travelling abroad - Brinks hired Igrox's company to fumigate containers holding 627 silver bars to be shipped to India. Two of Igrox's employees carried out the fumigation procedure, regardless of the fact that the chemicals they used were out of stock, and re-sealed the container to make it look like it had been fumigated. Later one of the employees returned and stole 15 of the silver bars, Brinks sued Igrox for vicarious liability.

In Court, Igrox argued that they could not be liable as fumigating the container merely provided the employee with the opportunity to steal. They did not take that

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<sup>182</sup> *Mattis v Pollock* [2003] 1 WLR 2158, [33]

<sup>183</sup> [2010] EWCA Civ 1207

opportunity at the time and returned later. Therefore the theft was not carried out in the course of employment – the High Court rejected this argument and found Igrox liable. They appealed the decision based on the aforementioned argument but the Court of Appeal rejected this. Igrox was responsible for the containers during the fumigation process and they delegated that duty to the employees. There was a sufficiently close connection between the theft and the job that they were hired to do, therefore Igrox must be liable. When discussing the test used, Moor-Bick LJ stated:

‘Whatever may have been the position in the past, the decisions in *Lister v Hesley Hall*, *Dubai Aluminium v Salaam* and the cases which have followed them have established that the test involves evaluating the closeness of the connection between the tort and the purposes for which the tortfeasor was employed. While all the circumstances have to be taken into account, the authorities support the view that when making that evaluation it is appropriate to consider whether the wrongful act can fairly be regarded as a risk reasonably incidental to the purpose for which the tortfeasor was employed.’<sup>184</sup>

## 2.5. CONCLUSION

Vicarious liability is the doctrine where a principal, typically an employer, is held strictly responsible for the tort committed by another, typically an employee. This principle is based on the common understanding that the master is responsible for their servant (*Dyer v Munday*<sup>185</sup>). In order to hold the principal vicariously liable, the claimant must prove that a tort was committed, by an employee and that this occurred in the course of their employment. Various tests have been created by the courts, in both tort and employment law, in order to establish if an individual is an employee, as opposed to an independent contractor. Each test has its advantages and disadvantages, however, that established in *Ready Mixed Concrete v Minister of*

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<sup>184</sup> *Igrox*, [29]

<sup>185</sup> [1895] 1 QB 742

*Pensions*<sup>186</sup> - the individual is subject to a right of control, they provide a personal service in exchange for remuneration and the provisions of the contract are consistent with that of a contract of service – is the standard generally applied. The leading test at present on employment status was established in *Montgomery v Johnson Underwood*<sup>187</sup>. The individual must be subject to control by the employer and share obligations between themselves and the employer. If these tests are satisfied, and only then, should the court/tribunal proceed to the final test in *Ready Mixed Concrete*.

The course of employment criterion has been a contentious issue for the courts over the past 200 years, essentially beginning with the principle that a servant on a 'frolic of their own' is not acting in the course of employment to hold the master liable for torts committed (*Joel v Morison*)<sup>188</sup>. Judges have considered the contract which the employee holds, the acts which they are employed to perform and the specifications of the tort they have committed in order to establish if the employee was acting in the course of employment when they committed the tort, along with if the employer is benefitting from the tort (*Rose v Plenty*)<sup>189</sup>. From the mid-1990's the courts began to use the Salmond formulation, however, this appeared to be a quick fix when the answer was already relatively clear, but it did not provide help when the courts were genuinely stuck and wanted to make a just decision.

More recently in the 2001 case of *Lister v Hesley Hall*<sup>190</sup>, the judiciary created a 'close connection' test, which examined the closeness of connection between the job that the employee was hired to do and the tort that they committed. This test has proved itself to be a more just way of deciding vicarious liability cases when previous case law does not provide a solid answer. This test has also received its fair share of criticism in the cases which followed its creation. Many judges and academics have

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<sup>186</sup> [1968] 2 QB 497

<sup>187</sup> [2001] EWCA Civ 318

<sup>188</sup> [1834] EWHC KB J39

<sup>189</sup> [1990] 2 All ER 1024

<sup>190</sup> [2001] UKHL 22

advanced their own tests for establishing the course of employment, however, due to the English legal principle of precedent, this is the one that is still used today. An example of the tests being created by academics is the two-part formula created by Yap to replace the 'close connection' test:

'(1) Where the employee has been negligent in the performance of his duties or where the employee has deliberately engaged in self-serving conduct (not amounting to a tort) and in doing so negligently causes injury to another, the employer would only be vicariously responsible if the injury suffered by the victim arises from the inherent risks of the employment. (2) Where the tort committed by the employee is trespassory/intentional in nature, the employer would only be vicariously liable if he has materially increased the likelihood of occurrence of an injury that arises from the inherent risks of the employment.'<sup>191</sup>

This point brings us to the second element in the thesis, the case of *Mohamud v Morrison Supermarkets Plc*<sup>192</sup>, which could be described as the most significant landmark case on vicarious liability since *Lister*.

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<sup>191</sup> Yap, 'Enlisting connections: a matter of course for vicarious liability' (2008) 28(2) Legal Studies 197, 198

<sup>192</sup> [2016] UKSC 11

## CHAPTER THREE: MODERN VICARIOUS LIABILITY

As we have seen, evolutionary, and indeed revolutionary changes have been made to the law of vicarious liability over the past 200 years. However, the changes and development of the law has not ceased. In this chapter we will look at cases such as *Mohamud* and *Cox*, in which the judges tie together the strands of law that have been established by judges in previous cases to create an arguably more ‘simple’ and just system of judgment. This chapter assesses if those two decisions, along with others decided recently, were correct, offering critique through academic opinion and various other judgments.

When discussing highly influential cases in vicarious liability, the case of *Woodland v Swimming Teacher Association*<sup>193</sup> is one to be noted. In *Woodland* the victim was a 10-year-old girl who sustained brain damage during a school swimming lesson. The swimming lessons were taught by independent instructors, supplied by the Association. The children’s school teachers brought them to the pool and the lessons were supervised by a lifeguard, along with the swimming instructor. Lord Sumpton, finding the Association liable, applied *Gold v Essex County Council*<sup>194</sup>, *Cassidy v Ministry of Health*<sup>195</sup> and *Common Wealth v Introvigne*<sup>196</sup> for issues on non-delegable duties. His Lordship found 5 factors to be of great importance in cases which concerned non-delegable duties: i) if the claimants were particularly vulnerable, ii) if the relationship between the claimant and the defendant was one of supervision/custody, iii) if the claimant had any control over how the defendant performed their obligations, iv) if the defendant had delegated an integral part of that duty to a third party, and v) if the third party had been negligent.

The essential element in this decision was control over the claimant for performing a purpose entrusted to the defendant and delegated to the third party, not control over

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<sup>193</sup> [2013] UKSC 66

<sup>194</sup> [1942] 2 KB 293

<sup>195</sup> [1951] 2 KB 343

<sup>196</sup> [1982] HCA 40

the environment. The Association had a non-delegable duty of care which they entrusted to the contractors, and of whom they were in control. Therefore, they were held responsible. It is also important to note that the Court was concerned that as parents had a legal obligation to send their children to school, allowing an authority to escape liability would have been incorrect and wrong.

The importance of this case is that it subsequently became possible for an employer to be liable for, essentially, the torts of an independent contractor, and as we have already discussed, this was not previously something the courts would allow. As Tulley states:

‘This decision could be viewed as the courts going a step further than it has done previously, recognising a "non-delegable duty on the part of schools towards pupils in relation to certain activities outside their immediate control and away from school premises”<sup>197</sup>.’<sup>198</sup>

It has been argued that this could open the floodgates for far more non-delegable duty claims, however, as Lady Hale made clear, cases will still be decided on a case-by-case basis.

In *Woodland* Lord Sumpton also added:

‘the courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services [therefore] a non-delegable duty of care should be imputed... as far as it would be fair, just and reasonable.’

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<sup>197</sup> Jenny Steele, *Tort Law Text, Cases and Materials* (OUP 2013) 585

<sup>198</sup> Tulley, L., ‘Reflections on *Woodland v Essex County Council*: A Step too far for No-Fault Liability’ (2016) 1(1) *B.S.L. Rev.* 47, 47

<sup>199</sup> *NA*, [25]

This was applied in the case of *NA v Nottinghamshire County Council*<sup>200</sup>, in which Lord Sumpton's five criteria from *Woodland* were met, but the Court could not find it 'just, fair and reasonable' to impose liability.

### 3.1. A M MOHAMUD V WM MORRISONS SUPERMARKETS PLC [2016] UKSC 11

As previously stated, one of the most prominent cases in vicarious liability law of the past few years is that of *Mohamud*<sup>201</sup>. The facts of this case are as follows: Mr Khan was an employee at Morrison's and worked at the petrol kiosk. On the day in question Mr Mohamud entered the petrol kiosk and asked Mr Khan if he could print some files from a USB stick. Mr Khan, completely unprovoked, refused the request, using racist and violent language, and asked the claimant to leave. The claimant then walked to his car and was followed by Khan, who violently attacked him and told him never to return. The victim died shortly after the attack, unrelated to the event, therefore a family member claimed on his behalf – they shall still be referred to as 'Mohamud'.

Mohamud brought an action against Morrisons in vicarious liability, claiming damages for assault and battery. At first instance the court held that Khan had assaulted Mohamud, but the claim for vicarious liability was dismissed. They found that Khan's actions were 'purely for reasons of his own and beyond the scope of his employment, so that there was an insufficiently close connection between the assault and the employment.'<sup>202</sup> Essentially, the court was saying that they were on a 'frolic of their own'<sup>203</sup>, along with the view that Khan's job was to do nothing more than help and serve customers, therefore the connection was insufficient. Mohamud then appealed the decision, which the Court of Appeal dismissed on the basis that Khan was placed in a position where violence was likely.

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<sup>200</sup> [2016] QB 739

<sup>201</sup> [2016] UKSC 11

<sup>202</sup> *Mohamud*, page 11

<sup>203</sup> *Joel v Morrison* [1834] EWHC KB J39

When Mohamud finally appealed to the Supreme Court, he made an attempt to persuade the Court that the 'close connection' test should be broadened to consider if a reasonable observer would have considered the employee to be acting in the course of employment at the time of committing the tort. In essence, they were asking for the 'close connection' test to be viewed objectively, instead of merely in the view of the Court. The Lords stipulated that the 'close connection' test remains good without requiring further refinement – even though it was imprecise and required the Court to make an evaluative judgment, with regard to all circumstances. The Lords applied *Lister* and found that the employee's job was to attend to customers and that there was an unbroken sequence of events (*Mattis*). The employee's actions were 'a gross abuse of his position'<sup>204</sup>, but were in connection with the job that the employer asked them to do – therefore, there was a sufficiently close connection and the appeal was allowed.

Here we can bring *Lane v Shire Roofing*<sup>205</sup> back in as in this case, even though the claimant was held to not be an employee, and hence not covered under the employer's insurance they still managed to walk away with damages. The claimant chose to use a ladder for the work, even though he was offered scaffolding. The Judges found that this was an obvious safety risk and hence when the employers allowed it, this was a breach of regulation 7 of the Construction (Working Places) Regulations 1966. As the claimant refused the scaffolding there was contributory negligence (50%) and hence he was awarded £102,500. We can apply this to *Mohamud* as even though it may have appeared that Khan made his decision totally independent of his job, if Morrisons foresaw the risk, it is their duty to put preventative measures in place.

It is interesting to go into the argument made by the lawyers of Mohamud as they discuss the traditional approaches to vicarious liability cases – i.e. the Salmond formulation, the increase of risk by the employer and the 'close connection' test. The lawyers stated that the 'close connection' test 'requires the court to make an

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<sup>204</sup> *Mohamud*, [47]

<sup>205</sup> [1995] EWCA Civ 37

evaluative judgment in each case<sup>206</sup> which has resulted in arbitrary distinctions, founding liability in one set of circumstances but not another<sup>207</sup>. This is a point that has been shown in this thesis to be made in many cases following the creation of the 'close connection' test. The lawyers suggested the court extend the concept of corporate responsibility, furthermore they stipulated:

'The test should therefore be refined by asking whether an authorised representative of the principal has committed a wrong in circumstances where the reasonable observer would consider the wrongdoer (leaving aside the heinousness of his behavior) to be acting in a representative capacity. Under that test, an employer would only be vicariously liable for the actions of those whom it allowed to act as its representatives while they were acting in that capacity. It would be responsible for the unlawful acts of the human embodiment of the corporation. A close connection will always exist between the employee's role as a representative of the corporation and any act whether lawful or not committed while he is acting in that capacity, but the quality of that connection to the scope of the employee's duties will often be less than that previously held to be the necessary foundation for liability.'<sup>208</sup>

If this test were to be incorporated, would the result be many more claimants being successful, would this open the floodgates? And how would this affect the employers?

The lawyers for the defendant counter-claimed that there was no sufficiently close connection, however, the 'close connection' test was the right one to use as it has been approved in cases such as *Dubai Aluminium v Salaam*<sup>209</sup> and *Majrowski v Guy's & St Thomas' NHS Trust*<sup>210</sup> - it is therefore well established and should not be

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<sup>206</sup> See *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 , para 26

<sup>207</sup> [2016] AC 677, at page 679

<sup>208</sup> [2016] AC 677, pages 679-680

<sup>209</sup> [2003] 2 AC 366

<sup>210</sup> [2006] UKHL 34

expanded. They argued *Bazley*<sup>211</sup> – a wrong which is only coincidentally linked to the duties of the employee, cannot impose vicarious liability<sup>212</sup>, along with *Viachuviene*<sup>213</sup> - opportunity will not suffice. In commenting on the ‘close connection’ test they said:

‘The test thus strikes a reasonable balance between the interests of claimants and the interests of employers. It is both clear and reasonable. By contrast, the claimant's proposed new test is uncertain and lacks the body of cases on the existing test to guide practitioners.’<sup>214</sup>

They also added that the ‘case should be categorised as an incidental or random attack’<sup>215</sup>. The claimant’s response to this was that the court must take a broad approach to whether the act falls within the ‘field of activities’ – Khan’s field embraced customer interaction and therefore forged the necessary link between the field of activities and the tort.

When issuing the judgment, Lord Toulson gave the most explanatory *ratio decidendi*. He began by reciting the detailed history of vicarious liability from the late 1600s to *Lister*, about which he said:

‘Contrary to the primary submission advanced on the claimant's behalf, I am not persuaded that there is anything wrong with the *Lister* approach as such. It has been affirmed many times and I do not see that the law would now be improved by a change of vocabulary. Indeed, the more the argument developed, the less clear it became whether the claimant was advocating a

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<sup>211</sup> [1999] 2 SCR 534

<sup>212</sup> [1999] 2 SCR 534, paras 31 & 36

<sup>213</sup> *Viachuviene v J Sainsbury Plc* [2013] IRLR 792

<sup>214</sup> *Viachuviene*, 681

<sup>215</sup> *Viachuviene*, 681

different approach as a matter of substance and, if so, what the difference of substance was.’<sup>216</sup>

Toulson then went on to say that Khan’s response was unreasonable but still in the ‘field of activities’, as well as in an unbroken sequence of events. The point was made during the arguments that Khan metaphorically removed his uniform when he stepped from the counter, however, Toulson did not agree with this. The fact that Khan used the phrase ‘keep away from here’ refers to the employer’s business, therefore it is not a personal remark. The court took the view that Khan’s motive was irrelevant and held Khan to be acting in the course of his employment.

Lord Dyson also gave his opinion on the case and stated that the ‘close connection’ test ‘should only be abrogated or refined if a demonstrably better test can be devised’<sup>217</sup>. He said that the new test proposed by Mohamud’s lawyers is ‘hopelessly vague’ – he added:

‘It is true that this test [the close connection test] is imprecise. But this is an area of the law in which, as Lord Nichols said, imprecision is inevitable. To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera.’<sup>218</sup>

Here we can look back to when Lord Oliver said ‘to search for any single formula which will serve as a general test of liability is to pursue a will-o’-the-wisp’<sup>219</sup>. This is an interesting contrast as the two statements were made 26 years apart and yet reflect the same view. Lord Dyson goes on to say:

‘Many aspects of the law of torts are inherently imprecise. For example, the imprecise concepts of fairness, justice and reasonableness are central to the

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<sup>216</sup> *Mohamud*, [46]

<sup>217</sup> *Mohamud*, [53]

<sup>218</sup> *Mohamud*, [54]

<sup>219</sup> *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 628

law of negligence. The test for the existence of a duty of care is whether it is fair, just and reasonable to impose such a duty. The test for remoteness of loss is one of reasonable foreseeability. Questions such as whether to impose a duty of care and whether loss is recoverable are not always easy to answer because they are imprecise. But these tests are now well established in our law. To adopt the words of Lord Nicholls, the court has to make an evaluative judgment in each case having regard to all the circumstances and having regard to the assistance provided by previous decisions on the facts of other cases.’<sup>220</sup>

As was said in *Woodland*, along with several other cases. He goes on to say:

‘there is no need for the law governing the *circumstances* in which an employer should be held vicariously liable for a tort committed by his employee to be on the move. There have been no changes in societal conditions which require such a development. The changes in the case law relating to the definition of the circumstances in which an employer is vicariously liable for the tort of his employee have not been made in response to changing social conditions. Rather they have been prompted by the aim of producing a fairer and more workable test. Unsurprisingly, this basic aim has remained constant.’<sup>221</sup>

And adds finally:

‘It is difficult to see how the close connection test might be further refined. It is sufficient to say that no satisfactory refinement of the test has been suggested in the present case.’<sup>222</sup>

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<sup>220</sup> *Mohamud*, [54]

<sup>221</sup> *Mohamud*, [56]

<sup>222</sup> *Mohamud*, [56]

Young states that the scope of close connection has been widened by the decision of *Mohamud*:

‘This decision clearly affords claimants a greater chance of recourse against an employer following a wrongful act of an employee as the Lord Justices have widened the scope of the ‘close connection’ test by deciding the case based on whether the action was ‘within the field of the employee’s activity’ rather than having been ‘closely connected to it’. It is therefore the case that the usual defence put forward by employers in these types of cases will no longer hold as much weight if it can be shown that the wrongful act was committed during working hours whilst the employee was acting as a representative of the employer.’<sup>223</sup>

The case has widened the scope by placing heavier weighting on the ‘field of activity’ and less on whether the act was a personal one. But, is it the right decision? The decision has given future claimants a helping hand in ensuring they are more likely to get the result they wanted. However, what does this mean for future cases of attacks made by employees? It is hard to say how this attack could have been prevented any further by the employer and so this decision could lead to us seeing a lot of similar claims where the employer has done all they can to prevent such an attack and is still having to pay for it. Here we may look back to the case of *Lane v Shire Roofing*<sup>224</sup> in which the individual was not an employee, however, the employer knew of the obvious safety risk and was hence found to be 50% liable for their injuries.

When Plunkett<sup>225</sup> discusses the case, he points out how the court emphasised the importance of ‘enterprise liability’ and laid to rest the old fashioned ideas of deep pockets and control. ‘Enterprise liability’ is:

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<sup>223</sup> Young, J., ‘How case of *Mohamud v Morrisons* supermarkets changed face of vicarious liability for employers’ - <http://www.fhanna.co.uk/news-&-events/personal-injury/How-case-of-Mohamud-v-Morrison-Supermarkets-changed-face-of-vicarious-liability-for-employers> (accessed 04/05/16)

<sup>224</sup> [1995] EWCA Civ 37

<sup>225</sup> Plunkett, J., ‘Taking Stock of Vicarious Liability’ (2016) 132(Oct) L.Q.R. 556

‘the idea that where a body uses another person to advance their interests, and thereby introduces an inherent risk of injury to others, if the body is to reap the rewards of doing so, it is only fair that they also accept the consequences when those risks materialise—they must take the bad with the good.’<sup>226</sup>

It is essentially very similar to the benefit and burden principle, where by it is only fair that should the employer reap the benefits the employee brings they should also reap the burdens. However, ‘enterprise liability’ also delves into how the employee represents the employer and is a part of that enterprise as a whole. Plunkett criticises ‘enterprise liability’ from several different angles – primarily the principle does not explain why a wrongdoing is required, to this Plunkett says:

‘Though not addressed by the court, one response to this argument might be that, on a corrective justice based-view of the law, absent a wrong, there is no need for a remedy. But such a response overlooks the fact that vicarious liability is strict, and not a response to a wrong of the *defendant*; it therefore fails to provide a convincing answer.’<sup>227</sup>

Plunkett also argues that when introducing ‘enterprise liability’, the need to exclude independent contractors is removed – hence making tests, such as the one from *Ready Mixed Concrete v Minister of Pensions*<sup>228</sup> redundant. Finally, he argues that it has become unclear where charities and non-profit organisations fit in. They say:

‘... it is, after all, one thing to say that a body which engages another to advance their *economic* interests should be liable for the losses that they incur in the course of doing so, but another thing altogether to say that one which engages another to advance *any* interest, even those that they are

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<sup>226</sup> Plunkett, page 3

<sup>227</sup> Plunkett, page 3

<sup>228</sup> [1968] 2 QB 497

under a statutory duty to pursue or are purely benevolent, should be liable for the losses incurred in the course of doing so, as only the former receives a form of gain from which they can be fairly said to be able to offset their losses.’<sup>229</sup>

Although it appears that Plunkett has plenty to criticise in the case’s decision, he also stipulates that the decision provides clarity on how the ‘close connection’ test should be applied in future cases:

‘Despite the difficulties with the reasoning in *Mohamud*, it could nevertheless be said that the result provides considerable clarity in relation to *how* the close connection test is likely to be applied in future cases. In particular, in light of what is an extremely liberal understanding of the "close connection" test, it is now difficult to conceive of many circumstances that will fall outside it. Indeed, findings that an employee was on a "frolic of their own" are now bound to be few and far between.’<sup>230</sup>

One case similar to *Mohamud* is *Vaickuviene v J Sainsbury Plc*<sup>231</sup> - in this case an employee of Sainsbury’s was stabbed by a fellow employee. The victim was subject to several racist remarks from the fellow employee (he was an immigrant) and finally this employee stabbed him in an aisle of the supermarket with a kitchen knife on sale in the store. Initially Lady Clark found that the chain could be found vicariously liable, however, this decision was overturned by Lord Carloway, who referred back to the judgment he made in *Wilson v Exel UK Ltd*<sup>232</sup>. In *Wilson* an employee pulled another’s head back by the hair in a prank and Lord Carloway held that:

‘A broad approach should be adopted. Time and place were always relevant, but may not be conclusive and the fact that the employment provides the

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<sup>229</sup> Plunkett, page 3

<sup>230</sup> Plunkett, page 4

<sup>231</sup> [2013] IRLR 792

<sup>232</sup> [2010] CSIH 35

opportunity for the act to occur at a particular time and place is not necessarily enough.’<sup>233</sup>

When applying this judgment in *Viackuviene* he stated:

‘the decision in *Wilson* (supra) is not to be interpreted so narrowly as to be applicable only to conduct in the nature of “pranks.” The use of the expression “frolic” in that case... is, as already noted, not indicative of triviality with respect to the wrongful acts in question. The principles set out in that case may be taken to be of general application in cases of intentional wrongdoing. Whilst the pursuers have sought to distance themselves from the “random attack” by characterising the deceased’s murder as part of a course of conduct amounting to harassment, there is no basis for departing from the court’s analysis of the law in *Wilson* (supra). Referring as a whole to Mr McCulloch’s conduct from 13 to 15 April, being the period over which the harassment is alleged to have occurred, does not remedy the fact that there is no connection between the harassment and what McCulloch was employed to do. Rather, McCulloch’s employment simply provided him with the opportunity to carry out his own personal campaign of harassment with tragic consequences.’<sup>234</sup>

When giving comment on the case of *Mohamud*, Fulbrook says ‘In this “forensic lottery” of appeals on racist attacks in supermarkets it would certainly seem there has been vindication of Lady Clark’s perspective in *Vaickuviene*.’<sup>235</sup> It would definitely seem to be a difficult decision for the courts to make when racism is involved as it cannot be assumed that any organisation, especially with the size and reputation of Morrisons or Sainsburys, would tolerate racism from their staff. However, when the employee is wearing the uniform, using the organisation’s name or simply on the property the line between liability and no liability needs to be clear. It

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<sup>233</sup> *Wilson*, [4]

<sup>234</sup> *Viackuviene*, [37]

<sup>235</sup> Fulbrook, J., ‘*Mohamud v WM Morrison Supermarkets Plc*: Personal injury – torts – employment assault’ (Case comment, 2016) 2 J.P.I. Law C69, C72

is interesting to notice that when an employee was killed by another employee no liability arose, but when a customer was attacked (without fatal consequences) liability was found. Perhaps as in *Mohamud* it was a customer that was attacked, and not a fellow employee, the repercussions were much more serious.

As we have already discussed one of the main rationales for imposing vicarious liability is to ensure employers maintain a certain standard when hiring, training and supervising employees. It is very difficult to establish if employers have made specific changes to how they do this after a lawsuit, however, it is interesting to look at how Morrison's, for example, hired and trained their staff prior to the *Mohamud* incident. Looking through the Morrison's training and development lesson resource a few key phrases they use stand out. First, they talk about how their 'colleagues are central to customers receiving a quality customer service' and that 'training is the process that directly benefits the business'. Here they are fully accepting the fact that an employee is responsible for whether the customer has a satisfying experience and this directly affects the business as a whole. Therefore, when Mr Khan, their employee, assaulted a customer this directly affected Morrison's business, surely they should have taken more care in their training to ensure this sort of thing didn't happen, especially if they truly believe the training of their staff directly affects them?

Morrison's received the Employer of the Year Award in 2011 (Oracle Retail Week Awards), which shows that they cannot be staying too far away from proper training requirements. Hence, does this mean that it is impossible to train your staff to the point where you have fully prevented legal liability in the future? If we look back to cases of vicarious liability for harassment we can see that acts such as the Race Relations Act 1976, the Protection from Harassment Act 1997 and the Sex Discrimination Act 1975 ensure that employers have training in place to guarantee that employees compose themselves in a proper manner. For example, in *Curry v NSK Steering Systems Europe Ltd*<sup>236</sup>, the employer put preventative measures in after the incident and therefore it was insufficient to avoid liability.

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<sup>236</sup> (2001), (EOC, 2005)

Therefore, should we ask if we need to put statutory measures in place to ensure employers are doing all that they can to prevent a claim? Or, should they already know what they have to do and if a claim ensues it's their own doing? It is hard to say which of these two options is the correct one, however, we can predict with almost certainty that a successful claim by a victim should be enough to encourage the employer to make sure that it does not happen again and it can be expected that Morrison's have since done this. It could be argued that it would be impossible to entirely prevent another racial attack such as this one again as employers cannot choose to not employ someone simply because they are of a different race and hence may cause or be a victim to discrimination<sup>237</sup>.

Fulbrook discusses *Majrowski v Guy's & St Thomas' NHS Trust*<sup>238</sup> in the case comment of *Mohamud*. The claimant in *Majrowski* was gay and worked for the defendant. Majrowski claimed to be a victim of bullying and harassment from a co-worker and argued the employer was vicariously liable as the bullying was a breach of s.1 of the 1997 Protection from Harassment Act. At trial it was held that the employer could not be liable as s.3 of the Act created no statutory test for which the employer could be liable. However, the House of Lords held that the employer was vicariously liable when a new statutory test, under s.10, was created. In their judgment, Lord Nicholls said 'importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees.'<sup>239</sup> This point has already been raised and it is a very important one in the discussion of the *Mohamud* case as Morrisons is a multi-national company and their practices, it would be thought, should be held in the highest regard. If it were to be thought that their practices were not 'up to scratch' then it would have a much larger impact than a smaller, independent company.

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<sup>237</sup> Equality Act 2010 s.39

<sup>238</sup> [2006] UKHL 34

<sup>239</sup> *Majrowski*, [9]

Fulbrook also analyses the case of *Cercato-Gouveia v Kyprianou*<sup>240</sup> in which the claimant was a waiter employed by the defendant. The waiter claimed to have been abused by the manager before being dismissed and then assaulted, causing injury. They claimed vicarious liability and the defendant counter-claimed that there was no real prospect of showing that the manager had acted in the course of employment. After two appeals the defendant was found vicariously liable – the court said that the defendant owed the claimant a duty of care that they had entrusted to the manager. The abuse took place in the workplace during working hours and was therefore in the course of employment. They also said that ‘a broad approach has to be adopted in considering the scope of the employment.’<sup>241</sup> It could be said that prior to the Lords’ final decision, the test for course of employment had been interpreted rather narrowly, however, a much broader approach was taken by the Lords. This view notwithstanding, future cases should interpret these two cases, and those similar to them, to be decided correctly and hence should be followed.

In summary it is clear that the courts are still in favor of the ‘close connection’ test, even if it does have its faults. The new test proposed by Mohamud’s lawyers has the same aim as the ‘close connection’ test did when first introduced – to ensure a fairer and more just way of determining the liability of employers. However, it can be argued that the proposition is far too vague. What do we mean when we say reasonable person/observer, for example?

To answer this question we can look back to the case of *Regina v Smith*<sup>242</sup>, in which it was stated (sub-citing Lord Diplock in *Camplin*<sup>243</sup>), that:

‘the concept of the "reasonable man" has never been more than a way of explaining the law to a jury; an anthropomorphic image to convey to them, with a suitable degree of vividness, the legal principle that even under

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<sup>240</sup> [2001] All ER(D) 437

<sup>241</sup> *Cercato*, [17]

<sup>242</sup> [2001] 1 AC 146

<sup>243</sup> [1978] AC 705, at 714

provocation, people must conform to an objective standard of behavior which society is entitled to expect...'<sup>244</sup>.

The 'reasonable man' is not, and cannot be, a real person because that defeats the point of their whole creation – it is not about how a person acts but how they should act<sup>245</sup>. It can also be very difficult to establish what the reasonable man would or would not do if they were in the same position as the party in question, for example, in the American case of *Liebeck v McDonald's Restaurants*<sup>246</sup> the jury's verdict had to be overruled as it was outside the reasonable person's view (the facts of this case were highly obscure and so most, if not all, of the jury would be unlikely to ever experience such events). As stated the 'reasonable man' is not the average/typical person and the standard they are held to does not stand independent of the circumstances which might affect one's judgement. You could say it is not the 'reasonable man's' judgement that changes, it is our interpretation of what their judgement might be that changes.

Nourse<sup>247</sup> states that 'the reasonable man is an institutional heuristic, and it is a heuristic whose anthropomorphic form has tended to obscure important questions'<sup>248</sup>. Going back to the argument made by Mohamud's lawyers<sup>249</sup>, is it best to ask what the 'reasonable man' would have done in that situation, surely if they are not a real person we cannot ourselves be expected to conduct ourselves to that standard? Perhaps the correct approach is a subjective one, as opposed to an objective one.

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<sup>244</sup> *R v Smith* [2001] 1 AC 146, at 172

<sup>245</sup> *Healthcare of Home United v The Common Services Agency* [2014] UKSC 49

<sup>246</sup> *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994)

<sup>247</sup> Nourse, V., 'After the reasonable man: Getting over the subjectivity/objectivity question' (2008) 11(1) N.C.L. Rev. 33

<sup>248</sup> Nourse, page 34

<sup>249</sup> *Mohamud v WM Morrison's Supermarkets Plc* [2016] UKSC 11

### 3.2. COX V MINISTRY OF JUSTICE [2016] UKSC 10

Another Supreme Court case which was heard at the same time as *Mohamud* is the case of *Cox v Ministry of Justice*<sup>250</sup>. In this case a kitchen manager in a prison was injured when one of the prisoners working in the kitchen disobeyed an instruction by carrying two bags of rice instead of one, and dropped one on the claimant. The Lords stipulated that in the ‘close connection’ test there are two elements – the relationship between the claimant and the tortfeasor, and the ‘field of activities’ which the tortfeasor’s job entails. *Mohamud* concerned the second element, as we have already discussed. However, in *Cox* the question was if there was a sufficiently close connection or relationship between the kitchen manager and the prisoner that injured them.

The Lords discussed how there was no employment contract as the prisoners worked under compulsion, however, it was argued that the relationship was one ‘akin to employment’ (as per Lord Phillips in the *Christian Brothers* case<sup>251</sup>). The claim was dismissed at first instance with emphasis on the involuntariness of the arrangement. This decision was unanimously overturned in the Court of Appeal as the work was essential to the functioning of the prison and if it was not done by the prisoners then the prison would pay someone else to do it.

The court also examined the burden and benefit principle (i.e. the employer takes the benefit so they should also take the burden) and examined the five policy reasons given by Lord Phillips as to why it is usually fair to impose vicarious liability. They are as follows: i) the employer will more likely have the means to compensate the victims than the employee/tortfeasor (deeper pockets) and will most likely be insured for such an occasion. This reason, as we have already discussed, was departed from by the Lord Justices in *Mohamud* when they emphasised the importance of ‘enterprise liability’. It was also said in *Cox* that this element was not always relevant. ii) The tort will have occurred as a result of an activity that the employee was performing for the benefit of the employer. iii) The activity is likely to be part of the business activity of

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<sup>250</sup> [2016] UKSC 10

<sup>251</sup> *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56

the employer. iv) The employer will have created the risk of the tort by employing the employee to perform the activity. v) The employee will have been under the control of the employer, to some extent. Lord Reed in *Cox* also felt that this element was not as relevant any more, however, he did say that ‘the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability.’<sup>252</sup>

In the *Christian Brothers* case there was alleged physical and sexual abuse of students at a residential school for boys by the brother teachers between 1958 and 1992. Prior to the case being brought to the Supreme Court, the board of managers who had control over the school were found vicariously liable, but not the Institute which provided the teachers, including its Head. The Board were appealing this decision on the basis that it was not fair for the Board to be liable but not the Institute. It was held by the Court, applying the two-stage test suggested by Lord Phillips, that the relationship between the brothers and the Institute was sufficiently akin to an employer-employee relationship (stage 1). They also found that the abusers could carry on the Institute’s business and further its interests while performing the abuse (stage 2). The fact that the teachers were also strictly told not to touch the boys was found to be relevant because the risk was obviously already clear and the Institute therefore enhanced that risk.

Here would be a good place to fully explain the two-stage test created by Lord Phillips in *Christian Brothers* – was the relationship between the individual and the employer ‘one that was capable of giving rise to vicarious liability’? And, were the acts connected to the relationship enough to give rise to vicarious liability? This test was confirmed and approved in both *Cox* and *Mohamud*. The essential points that we can gather from the first element of the test are as follows:

‘an employer-employee relationship will generally be considered to be capable of giving rise to vicarious liability; a relationship akin to employment is also capable of giving rise to vicarious liability; and

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<sup>252</sup> *Cox*, [21]

an independent contractor relationship will ordinarily not be capable of giving rise to vicarious liability.’<sup>253</sup>

We have already discussed how the courts have established if an individual is an employee or an independent contractor, the importance of this case lies in the fact that it was held that control was no longer to be treated as the ‘critical touchstone of employment, albeit that it remained an important consideration.’<sup>254</sup> It was also found that ‘the employer can direct what the employee does, not how he does it.’<sup>255</sup> The court in *Cox* used this to find that just because the prison could not stop the kitchen worker from carrying the bags of rice incorrectly that did not stop them from being his employer. Furthermore, Lord Reed said that the control test would not be appropriate ‘if one thinks for example of the degree of control which the owner of a ship could have exercised over the master while the ship was at sea’<sup>256</sup>.

The case was compared by Fulbrook to *NA v Nottinghamshire County Council*<sup>257</sup> in which the claimant had been in foster care as a child from the age of 7 to 18 and was suing the local authority, pursuant that they were vicariously liable for the physical and sexual assaults that occurred while they were in care. The two questions asked by the court were: i) Is the relationship between a local authority and foster parent such that a local authority should be vicariously liable for their wrongful acts? And, ii) Does a local authority owe a child in foster care a non-delegable duty?

Males J, in the Divisional Court, found that the abuses had occurred, but accepted evidence of the defendant’s social care expert that there was no negligence on the part of the social workers involved with the claimant and her family to find that a local authority cannot be vicariously liable for deliberate acts of foster parents.

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<sup>253</sup> Mackay, N., ‘Vicarious Liability: There’s an app for that’ (2016) 2 J.P.I. Law 90, 91

<sup>254</sup> *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [49] – found in Tutin, M., ‘Vicarious Liability – an ever expanding concept?’ (2016) 45(4) I.L.J. 556, 558

<sup>255</sup> Tutin, page 559

<sup>256</sup> *Cox*, [21]

<sup>257</sup> [2016] QB 739

Furthermore, a child in foster care is not necessarily owed a non-delegable duty by the local authority. Hence, the answer to both questions was no.

The findings of Males J were upheld in the Court of Appeal, the decision of which was then appealed to the Supreme Court, where it was unanimously held that the relationship between the local authority and its foster carers was not one that was 'akin to employment' (*Christian Brothers case*), therefore the local authority could not be vicariously liable for the deliberate wrongful acts of the fosterers. Lord Tomlinson said:

'In order to be non-delegable a duty must relate to a function which the purported delegator, here the local authority, has assumed for itself a duty to perform. Fostering is a function which the local authority must, if it thinks it the appropriate choice, entrust to others. By arranging the foster placement, the local authority discharged rather than delegated its duty to provide accommodation and maintenance for the child. True it is that the local authority entrusted to the foster parents the day to day delivery of accommodation, but accommodation within a family unit was not something which the local authority could itself provide and this cannot properly be regarded as a purported delegation of duty. It was inherent in the permitted choice of foster care that it must be provided by third parties.'<sup>258</sup>

This was supported by Lord Burnett, who stated that:

'if, as is uncontroversial, parents would not be saddled with a non-delegable duty of this sort (a duty not to assault the appellant), that conclusion provides strong support for the proposition that a local authority should not be either.'<sup>259</sup>

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<sup>258</sup> NA, [24]

<sup>259</sup> NA, [42]

Along with Lady Black, who had the view that ‘to impose a non-delegable duty on a local authority would be unreasonably burdensome, and, in fact, contrary to the interests of the many children for whom they have to care.’<sup>260</sup>

When Fulbrook compared *NA* with *Cox* he said that the *Cox* decision seems to undermine the *NA* decision – the prison does have more control over the prisoners than the local authority has over its foster carers as the local authority controls what they do but not how they do it. However, as was said in *Cox*<sup>261</sup> that is all that is required for a relationship ‘akin to employment’. At the time Fulbrook’s article was published, the decision of *NA* was that the local authority was not liable. However, in October 2017 this decision was reversed by the Supreme Court.<sup>262</sup>

The claimants appeal was allowed by the Supreme Court, following *Cox*, and the local authority were found to be vicariously liable for the foster child, however no duty of care was found. Of the initial two questions considered by the court, the answers were now ‘yes’ to the first and still ‘no’ to the second. Lord Reed gave the lead judgment and explained the justifications for the implication of the vicarious liability. First, the local authority recruited, financed and supervised the foster parents, meaning that the parents were not in a business of their own.<sup>263</sup> Secondly, by placing the child with the foster parents the local authority created the risk of abuse.<sup>264</sup> Lord Reed also discussed the control the local authority held over the parents,<sup>265</sup> their ability to pay damages over the parents<sup>266</sup> and the fact that there was no evidence to show that the imposition of this liability would lead to local authorities being discouraged to place children in foster care in the future.<sup>267</sup>

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<sup>260</sup> *NA*, [60]

<sup>261</sup> *Cox*, [21]

<sup>262</sup> *Armes v Nottinghamshire County Council* [2017] UKSC 60

<sup>263</sup> *Armes*, [59-60]

<sup>264</sup> [61]

<sup>265</sup> [62]

<sup>266</sup> [63]

<sup>267</sup> [68]

When discussing their reasons for not finding a non-delegable duty of care, Lord Reed stated that the imposition of a duty of care would be too broad and give a far too demanding responsibility.<sup>268</sup> The duty would also create a conflict of interests due to the local authorities' responsibilities under the 1980 Child Care Act.<sup>269</sup> The Act implies that the local authority has a duty to 'board-out' the child and to monitor them. It is not responsible for the day-to-day activities of the child, the responsibility for the day-to-day activities is effectively discharged once the child is in the foster home (section 22).<sup>270</sup>

Lord Hughes gave the dissenting judgment, his reasons were as follows: 1) the outcome of the case would not have been the same if the local authority had placed the child with their biological parents, no liability would have been found if that were the case, 2) the decision is only concerned with the legislation that was in force at the time, not the current legislation, and 3) the court does not wish to apply unduly harsh standards to ordinary family life, therefore the same should be said for foster families.<sup>271</sup>

Lord Hughes was essentially concerned that this decision would place undue responsibility on local authorities and hence discourage them from making family and friend placements. We may consider Lord Hughes points to be valid as we cannot say what this decision will lead to, although it may be assumed that it may discourage some local authorities from placing children in foster homes and hence they may decide to place them in residential homes. Residential homes present a much larger cost to the local authority and provide a much less personal and homely environment than a foster home. We must, therefore, ask if this is the right decision. It coincides with the decision of *Cox*, however, if it leads to the local authorities

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<sup>268</sup> [49]

<sup>269</sup> [45]

<sup>270</sup> [46-48]

<sup>271</sup> [87-90]

essential being scared to place a child in foster care then this may do more harm than good.

As we return to the discussion of the ‘close connection’ test, in *Mohamud* the Court failed to establish how close the connection must be to satisfy the *Lister* formulation and to this Plunkett asks if the Judges are just adding more confusion to the ‘course of employment’ discussion and merely shifting the questions to another issue.

As we have already discussed, in *Christian Brothers* it was established that a relationship can give rise to vicarious liability, even if there is no contract of employment, if there is a sufficiently close connection between the relationship and the tort. This point was then incorporated into the *Cox* decision, in which it was discussed that the prison authorities are legally required to offer work to prisoners<sup>272</sup>, they are, however, excluded from a minimum wage<sup>273</sup> - in fact Lord Reed held that the wage an employee receives should now have no effect on the outcome of a vicarious liability case, as it had no effect in *Christian Brothers*.

Tutin<sup>274</sup> discusses the reasoned decision of Lord Reed in *Cox*, with special consideration of the decisions of both *Christian Brothers* and *JGE*<sup>275</sup>. Lord Reed used these two cases to come to the conclusion that ‘the essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not.’<sup>276</sup> As Tutin explains, this is ‘intended to provide a basis for identifying the circumstances in which vicarious liability may be imposed outside of employment relationships.’<sup>277</sup>

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<sup>272</sup> Prison Rules 1999 – rule 31(1)

<sup>273</sup> National Minimum Wage Act 1998 – s.45

<sup>274</sup> Tutin, M., ‘Vicarious Liability: An ever expanding concept?’ (2016) 45(4) I.L.J. 556

<sup>275</sup> *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2016] EWCA Civ 938

<sup>276</sup> *Cox*, at [23]

<sup>277</sup> Tutin, page 560

A few key points from Lord Reed's decision have been highlighted by Tutin, primarily:

'courts should not be misled by technical arguments as to the nature of an employer's business or an individual's employment status. Semantic arguments about the meaning of words such as "business", "benefit" and "enterprise" are unhelpful: the defendant need not be carrying on activities of a commercial nature; it need not be a business, enterprise or profit-making body in an ordinary sense. It is sufficient that there is a defendant which is carrying on business activities in the furtherance of its own interests. A further lesson to be drawn is that defendants cannot avoid vicarious liability on the basis of the tortfeasor's employment status or classification for the purposes of taxation or national insurance.'<sup>278</sup>

This, therefore, puts to rest the non-profit organisations' argument, brought to our attention in *Bazley v Curry*<sup>279</sup>. Its primary use here though was to highlight that the prison service, an organisation which does not have the primary objective to make money, cannot slip from the grasps of vicarious liability due to its status.

During the trial, the court also faced a question asked by the Ministry of Justice – that being, should it not always be necessary for it to be just, fair and reasonable to impose vicarious liability. Here it would be useful to discuss the case of *Caparo Industries Plc v Dickman* in which a test was created for duty of care – a duty will exist if: i) the harm is reasonably foreseeable as a result of the defendant's conduct (*Donoghue v Stevenson*), ii) the parties are in a relationship of proximity, and if iii) it is fair, just and reasonable to impose liability.

Returning to *Cox*, the Ministry placed reliance on the fact that they work for the benefit of the public, however, Lord Reed rejected this argument, he stated that the criteria set by Lord Phillips in *Christian Brothers* was put in place to ensure that vicarious liability was only being imposed where it was just, fair and reasonable – to re-assess the three principles in cases where they were satisfied would be

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<sup>278</sup> Tutin, page 560

<sup>279</sup> (1999) 174 DLR (4<sup>th</sup>)

unnecessary. The floodgates argument made by the Ministry of Justice was also quickly shutdown by his lordship – he said that the council ‘like the Fat Boy in The Pickwick Papers... sought to make our flesh creep.’<sup>280</sup>

Tutin comments that:

‘the decision [of Cox] makes clear that the key criterion is whether the commission of a wrongful act is a risk created by a defendant assigning activities to the individual, which are an integral part of the business activities carried out by the defendant and for its benefit.’<sup>281</sup>

She also said that the ‘Supreme Court is to be commended for adopting an expansive approach in considering whether precarious employment relationships may give to vicarious liability.’<sup>282</sup> As they made it clear that employers will no longer be able to avoid liability on ‘technicalities’, clearly this decision shows a real concentrated effort on employers. But is this a step too far? Have they widened the scope too much? Rinaldi<sup>283</sup> comments that the decision is at odds with cases such as *Viackuviene*, a decision with similar facts but an entirely different decision. Rinaldi adds:

‘The approach taken here was to consider what was just in the circumstances, and the Supreme Court was at pains to point out that each court will need to make an evaluative judgement in each case. Nonetheless, the danger from an employer’s point of view is that any link to an employee carrying out his “field of activities” will be sufficient to establish that the employer should be held liable.’

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<sup>280</sup> Cox, [43]

<sup>281</sup> Tutin, page 561/562

<sup>282</sup> Tutin, page 562

<sup>283</sup> Marco Rinaldi, ‘Mohamud v WM Morrison Supermarkets: Supreme Court Decision on Vicarious Liability’ (available at <https://www.clydeco.com/insight/article/mohamud-v-wm-morrison-supermarkets-supreme-court-decision-on-vicarious-liab> )

So yes, this decision is a drastic one from an employer's point of view – it is now easier to prove their liability. However, this does not necessarily make the decision wrong, perhaps employers should be 'shaking in their boots' in order for them to ensure they are doing everything they possibly can to avoid an incident.

Tutin adds on the subject:

'The decision reaffirms that employers may be vicariously liable for a number of precarious workers who operate under a contract for services, which may include contract workers, casual workers and individuals working under "zero hours" contracts. By expanding the scope of employers' liability, this could have the effect of incentivising employers to offer more training to and supervision of precarious workers to minimise the risk of wrongful acts or omissions in the course of a business' activities. This may provide a means of integration into the business of such workers, which is an important factor in considering the existence of a contractual relationship in the context of employment and equality protection.'<sup>284</sup>

The article concludes:

'The Supreme Court's decision in *Cox v Ministry of Justice* is to be welcomed by claimants. It refines the five-step test espoused by Lord Phillips in the *Christian Brothers* case and makes clear that the doctrine of vicarious liability applies outside of special category cases.

'Combined with the Supreme Court's generous interpretation of the "close connection" test in *Mohamud v WM Morrison Supermarkets plc*, this decision has expanded the scope of employers' liability to victims. The law of tort, on the one hand, and contract, circumscribed by statute, on the other hand, have now diverged significantly, with the former offering greater protection to

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<sup>284</sup> Tutin, page 562

individuals. For the time being, however, the doctrine still excludes independent contractors from its boundaries.’<sup>285</sup>

But, should independent contractors still be excluded? The answer to this would be yes because of insurance. Vicarious liability remains a doctrine of rough justice and social convenience because it provides an easier avenue for the victims to recover damages. It should not be used as a stick to beat employers or to dictate trading/organisational structure decisions-surely? The author continues:

‘By linking liability to the risk attached to a business’ activities, the doctrine emphasises the importance of enterprise risk in the law of tort. This may lead to the erosion of the final frontier of the doctrine: liability for independent contractors. Moreover, it may also lead to the development of a more progressive contractual framework of employment and equality protection.’<sup>286</sup>

### 3.3. CONCLUSION

This chapter began with a discussion of *Woodland*, a case which established the five requirements for imposing a non-delegable duty, requirements which included a vulnerable victim. This case also established that it now could be possible for employers to be liable for the torts committed by independent contractors, insofar as a non-delegable duty was found to exist. We could ask if this could lead to floodgates, however, as Lady Hale pointed out, cases will still be decided on the facts of each of those cases. It has also been clarified that vicarious liability will only be imposed if it is ‘just, fair and reasonable’ to do so.

The discussion then progressed to the case of *Mohamud*, in which the claimant’s lawyers attempted to change the Justices’ views on the current ‘close connection’ test. Lord Toulson held that there was virtually nothing wrong with the test – supported by Lord Dyson, who stipulated that certain areas of the law would always

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<sup>285</sup> Tutin, page 564

<sup>286</sup> Tutin, page 564

be imprecise but cases needed to be decided individually. Young had the opinion that the scope of the 'close connection' test was widened by this case and Plunkett also gave opinion on the Lords' creation of 'enterprise liability'. This case, decided at the same time as *Cox*, created the two-stage test – (1) what was the relationship between the claimant and the tortfeasor? (2) what were the employee's field of activities and how closely connected were they to the tort?

Racial attacks were a central theme to this case, which is why Fulbrook felt it necessary to compare it to *Vaickuviene* – to which they commented 'In this "forensic lottery" of appeals on racist attacks in supermarkets it would certainly seem there has been vindication of Lady Clark's perspective in *Vaickuviene*.'<sup>287</sup> It really is becoming clear that there is no right answer, especially with racial attacks like the one in *Mohamud*.

Going back to *Cox*, Lord Phillips provided us, in his judgment, with the five policy reasons to impose vicarious liability, which have already been discussed. He also referred back to the two-stage test he created in the *Christian Brothers Case* – (1) is the relationship between the employee and the employer enough to give rise to vicarious liability? (2) is the act connected enough to the relationship to give rise? *Cox* has already established that control is no longer the essential element, however, when compared to *NA v Nottinghamshire County Council*, it has been commented that its decision undermines that of *NA*. Tutin has concluded that 'The Supreme Court's decision in *Cox v Ministry of Justice* is to be welcomed by claimants' – however, this is simply their opinion.

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<sup>287</sup> Fulbrook, C72

## CHAPTER FOUR: PREDICTIONS FOR THE FUTURE OF VICARIOUS LIABILITY

When discussing the history of vicarious liability, it makes sense to consider predictions for the future. We cannot predict exactly how future cases will be determined, ably demonstrated in the many landmark legal decisions which have been made outside of anyone's predictions. However, we can use previous decisions and academic opinion to attempt to predict how the law may change again in the future and the possible impact on employers, employees, victims, etc., still to come.

Perhaps the most recent case considered in this thesis is that of *Bellman v Northampton Recruitment Ltd*<sup>288</sup>, in which the director of the defendant company punched Bellman, who fell and hit his head, causing permanent brain damage. While considering whether the company was liable, the Employment Appeal Tribunal referred back to the recent leading authorities in vicarious liability law – *Mohamud*, *Lister*<sup>289</sup> and *Dubai Aluminium*, amongst others. They considered the principles set down in those cases and their response is as follows:

'(1) An employer is not liable for an assault by his employee merely because it occurred during working hours (see e.g. *Wilson v Exel UK Ltd* 2010 SLT 671 and *Graham v Commercial Bodyworks Ltd* [2015] ICR 665) and not axiomatically free from liability because it occurred outside normal working hours and/or the workplace (see e.g. *Bernard v Attorney General of Jamaica* [2005] IRLR 398 and *Mattis v Pollock* [2003] ICR 1335).

(2) As set out in *Mohamud v Wm Morrison Supermarkets plc* [2016] ICR 485 there are two questions to be considered. (i) Looking at matters in the round or broadly, what were the functions or what was the field of activities entrusted by the employer to the relevant employee, i.e. what was the nature of his job? This should not entail a dissection of the employment into its component activities, rather a holistic approach and answering the question

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<sup>288</sup> [2016] EWHC 3104 (QB), [2017] IRLR 124

<sup>289</sup> *Lister v Hesley Hall* [2001] UKHL 22.

as a jury would. (ii) Was there a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice? Again a broad approach should be taken and it is necessary to consider not only the purpose and nature of the act but also the context and circumstances in which it occurred.

(3) The test is inevitably imprecise given the nature of the issues. The authorities have not sought to give detailed guidance as to the nature of the connection as the assessment is peculiarly fact sensitive. So, while consideration of past cases shows that certain specific factors have been considered central, if not determinative, given particular circumstances, e.g. the material increase in risk in putting a teacher in close proximity with a vulnerable pupil, it remains very much a fact specific evaluation having regard to the full circumstances of the employment and the tort.

(4) While consideration of the time and place at which the relevant act occurred will always be relevant, it may not be conclusive. There must be some greater connection than the mere opportunity to commit the act provided by being in a certain place at a certain time.

(5) The policy underlying this form of strict liability should always be borne firmly and closely in mind.<sup>290</sup>

In following these five principles laid down, the court found that the company were not liable for the attack. The attack occurred in a hotel after the party and even though the director's job was to motivate staff, not put them down, at that time he was not their superior.

These five criterion may be assumed to be the way in which the courts should approach a vicarious liability case in the future, with the most emphasis on the way in which the job should be performed and the relationship between that job and the

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<sup>290</sup> *Bellman*, [62]

tort committed (*Mohamud*). It is easy to see that the approach of the courts in vicarious liability cases has changed significantly over the past 200 years. Originally, what simply had to be shown was that there was a master and a servant and that the servant was not merely on a 'frolic of their own'. Now, however, the courts must establish primarily if the worker is an employee or independent contractor, through consideration of their role within the company and the specifics of their contract. We have already discussed the relevant tests for employment, however, Tulley points out that since the decision of *Cox*, all that now needs to be shown is that the tortfeasor's job was an integral part of the organisation<sup>291</sup>. This is similar to the integration/organisation test for employment from *Cassidy v Ministry of Health*<sup>292</sup>.

The court must also establish if they are in the course of their employment, through consideration of what their field of activities is and how that is linked to the tort (*Mohamud*). There has also been much more emphasis placed upon the relationship between the employer and the victim and if the employer owes the victim any sort of duties which they have delegated to the employee (*Woodland*).

Perhaps one of the biggest changes still to come could be an increase in the cost of employers' insurance due to the increasing number of successful claims and the widening of the scope of vicarious liability in cases such as *Woodland* and *Mohamud*<sup>293</sup>. Donnelly and Cousins state that 'this flexible interpretation may lead to more claims which try to further extend the scope of the required connection'<sup>294</sup> – in reference to the liability for a racist attack in *Mohamud*. They go on to say:

'Insurers will quite rightly be concerned that the test is seemingly moving towards the employee's remit of employment being read to such an extent that almost any action he takes during the employer's time may satisfy the

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<sup>291</sup> Laura Tulley, 'Reflections of *Woodland v Essex County Council*: a step too far for no-fault liability?' 2016 B.S.L. Rev. 47

<sup>292</sup> [1951] 2 KB 343

<sup>293</sup> Tulley, page 51

<sup>294</sup> Donnelly, P. & Cousins, A., 'Vicarious liability is on the move...' – (available at <http://insurance.dwf.law/news-updates/2016/03/vicarious-liability-is-on-the-move/>)

test. The court was quick to try to quash any suggestion that this would lead to an opening of the floodgates noting that no evidence of this was before the court. However, the *Mohamud* case does appear to bridge the gap and could be seen in part to dilute the requirement for any physical assault to arise out of the tortfeasor's employment duties involving an obvious element of keeping control and order (as in the 'nightclub bouncer' run of cases, *Mattis v Pollock (2003) et al*). It will be interesting to see how far outside of the physical assault arena this extension may be allowed to stray.<sup>295</sup>

One of the arguments we could make to ensure that findings of vicarious liability are justly decided is through the creation of a statute. The common law can be beneficial as statute can be interpreted in many different ways, some quite wrongly. However, statute is designed to keep people safe and is created where there is a need for it. It also has the benefit of there being a predetermined punishment/fine. Judges are able to use both statute and precedent to make a decision, therefore, if statute were to be created, the court could still use the prescribed tests created in previous cases to make their decision. It has been commented that 'Statutory law will only give a rigid, formal interpretation of the law. It does not always apply easily to all situations. This is why it is beneficial for judges to refer to prior cases, rather than legislation'<sup>296</sup>. However, as has been shown in this thesis, the court also struggles with their interpretation of precedent and the constant change in views can lead to a large amount of confusion.

Contract law is another area in which judges use precedent to decide their cases, however, statutes such as the Consumer Rights Act 2015 exist to govern contracts and protect victims. This Act consolidates existing consumer protection law legislation and gives new rights and remedies. If this dual system of precedent and statute works in contract law, what is to say it would not work in torts law? Specifically, vicarious liability.

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<sup>295</sup> Donnelly, P. & Cousins, A., 'Vicarious liability is on the move...' (available at <http://insurance.dwf.law/news-updates/2016/03/vicarious-liability-is-on-the-move/>)

<sup>296</sup> 'Common Law v. Statutory Law' (available at - <http://common.laws.com/common-law/common-law-v-statutory-law>)

## 4.1. CONCLUSION

This chapter has discussed the five principles established in *Bellman* to sum up the current legal situation in vicarious liability and we found that these should be referred back to in future cases. At the present time the courts must establish if an individual is an employee or an independent contractor, as they have in the past, if they were in the course of employment and the duty which the employer owes to the victim, if any, should be established.

It is difficult to say what the future will bring, however, one thing we can say with certainty is that the cost of insurance for employers will go up with the increase in successful cases. Will this deter employers from creating the risk of an incident? Only time will tell.

It was also discussed if perhaps a statutory system would be better, finding that both systems have their advantages and disadvantages. However, we may consider a dual system to be the most attractive option. If we consider its use in contract law it can be very beneficial to both the courts and the victims.

## CHAPTER FIVE: CONCLUSIONS

The aims of this thesis were to discuss the history of English vicarious liability law, with special reference to case authority and academic criticism, from the mid 1800s to 2017. Highly influential cases including *Lister* and *Mohamud* have been analyzed and a discussion has been made as to how those cases have changed the common law and what this could mean for the future of the law.

As has been established, in order for one to be found vicariously liable for an individual's tort, the individual must be an employee and have been in the course of employment at the time of committing the tort or offence. Therefore, chapter 1 began by discussing the various tests for employment, from the 'control' and 'integration' tests to the test from *Ready Mixed Concrete*. As was shown, the favoured test is the last, which integrates the 'control' test, along with elements concerning the contract the individual is working under and the remuneration they are receiving into its formula. It was also established that independent contractors cannot be covered in vicarious liability as they are responsible for themselves. However, when we discussed *Woodland* in chapter 3 we found that the floodgates may finally have been opened to include independent contractors.

Chapter 1 also went on to discuss the 'course of employment' element. *Joel v Morrison* established very early on that if an employee is on a 'frolic of their own' they cannot be in the course of employment and therefore the employer cannot be liable for their act. In *Rose v Plenty* it was also discussed that even if an employee may seem to be on a 'frolic', if the employer is benefitting from their tortious act, as they were in that case, they could still be found liable. One of the tests favoured by the courts for establishing the course of employment was the 'Salmond formulation' – this asked two questions: was the act authorised, but done in an unauthorised manner? Or, was it a totally unauthorised act? The test was used by the courts for many years, however, as cases such as *Lister* have shown, the test could be seen only as a quick fix which can leave the courts with more questions than answers. Hence, in *Lister* the Court created the new 'close connection' test, which asked how close the connection was between the tort and the job which the individual was

employed to do. The discussion also focused on several cases which subsequently went on to apply the 'close connection' test, which received its own adequate amount of praise, along with criticism.

One of the most recent criticisms the test received was in the case of *Mohamud*, in which the claimant's lawyers suggested a new test involving the view of the reasonable observer. This criticism, however, was quickly suppressed by the court, it was stated that there was nothing wrong with the 'close connection' test (Lord Toulson) and that even though the current law may be imprecise, cases should be decided individually to ensure a just outcome (Lord Dyson). Although, it was found in *Mohamud* that the scope of the test had been widened by the case, resulting in a possible increase in successful cases for claimants (Young). *Mohamud* was also compared the case to *Vaickuviene* here to find that in cases with racial attacks such as these the court can have great difficulty in coming to a just decision (*Fulbrook*).

As stated, *Mohamud* was heard by the Supreme Court at the same time as *Cox* and jointly they established that what the court must consider when discussing the course of employment is not only the relationship between the claimant and the tortfeasor, but also the 'field of activities' of the tortfeasor and the connection the field had with the tort. *Cox* focused more on the first element, with *Mohamud* focusing primarily on the second element, and it was found with this decision that control was no longer the essential element when establishing if an individual was an employee.

Chapter 2 offered a detailed discussion of *Woodland* and established the current legal position on non-delegable duties owed by employers to third party victims. This was where it was found that independent contractors could now be included for vicarious liability if a non-delegable duty was owed. Five criteria were found in *Woodland*, with special focus on vulnerability of victims. As to avoid floodgates though, cases should still be decided individually (Lady Hale) and liability should only be imposed where it is just, fair and reasonable to do so.

Finally, chapter 3 arrived at the present to discuss the case of *Bellman*, in which the courts were given five principles to summarise the current law of vicarious liability.

The key points which all judges should now consider when deciding a case are: if the individual is an employee or an independent contractor, if they were in the course of employment at the time of committing the tort and what duty the employer owes to the victim. Here it was also considered what could lie in the future of vicarious liability law – namely a vast increase in insurance costs for employers, especially if the predictions for more successful claims prove to be correct.

The various justifications for the imposition of vicarious liability law were found to all be flawed, and a collaboration of them all would appear to be the greatest one. However, they all seem to create more questions than they answer. At its simplest it could be said that it seems only fair that a victim of such an act should have some route of compensation for the losses or harm that they have suffered, whether that be through an employer or some form of government body. Perhaps if the legal area were one of statute, instead of common law, a fairer route of compensation could be created. However, this area would appear to be one better left to the judgment of the courts, rather than that of Parliament.

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