

# ‘NOT MY EMPLOYEE, NOT MY LIABILITY’: A REVIEW OF THE LAW OF VICARIOUS LIABILITY, ITS APRIL 2020 SUPREME COURT AIRING, AND ITS RELEVANCE TO THE EQUESTRIAN INDUSTRY AND OTHER SMALL BUSINESSES.

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## ABSTRACT

In April 2020, the Supreme Court in *WM Morrison Supermarkets plc v Various Claimants* [2020] and *Barclays Bank plc v Various Claimants* [2020] overturned the decisions of the Court of Appeal in applying the law regarding vicarious liability of employees and others (and deciding in both cases that the defendant companies were *not* liable for the acts in question). The scope of responsibilities which the employment relationship brings, together with an awareness among many businesses of the classification worker, along with the more familiar employed/self-employed status, makes an examination of the outcomes and potential impact of these cases of wide, practical interest for those running businesses, large or small. The review concluded that there had been no dramatic change in the law but that the cases provide a measure of comfort to employers in something of a common-sense view being taken as to the scope of vicarious liability. They also add to the body of case law, helping to ensure that future issues can more clearly be reasoned out of court, with the detailed steer on the application of legal principles which a Supreme Court judgment provides.

**Key words:** vicarious liability, employee, akin to employee, worker

## INTRODUCTION

In April 2020, the Supreme Court re-visited and clarified the law of vicarious liability in two cases: one involving an employee (*WM Morrison Supermarkets plc v Various Claimants*<sup>1</sup>) and one involving someone *not* employed by the organisation against whom claims were being considered (*Barclays Bank plc v Various*

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<sup>1</sup> [2020] UKSC 12.

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*Claimants*<sup>2</sup>). In both cases, the decisions of the Court of Appeal were overturned. This paper reviews the development of the law and key principles to enable the cases to be set in context, with a conclusion on possible implications and practical application. First, though, a consideration of why the operation of vicarious liability is particularly worthy of understanding by equestrian operations and any other businesses who work with a range of freelance/sub-contractor personnel.

### **PARTICULAR RELEVANCE FOR EQUESTRIAN BUSINESSES**

There is, of course, nothing expressly equestrian about the principle of vicarious liability but it is particularly pertinent because of the employment status of many working in the sector. All employers need to be aware of the law in this area in terms of the significance of becoming an employer (along with a gamut of employment requirements such as insurance, salary, pension and other consequences). If the detail is not always understood, most appreciate that an employer has considerable responsibilities and, ideally, would access advice accordingly, preferably from legal and financial professionals but at the very least, through ‘.gov.uk’, or other authoritative online information.<sup>3</sup> What is less well known, and is a common situation in the equestrian industry, is that there are two circumstances where there might be vicarious liability for those who are *not* treated by the business as employees.

Firstly, those labelled self-employed may, in fact, be deemed by the courts to be employees in the face of a claim. This is the most likely point of relevance to SMEs,<sup>4</sup> equestrian or otherwise.

Secondly, (although far less common) even where the court does not override and re-designate the existing relationship of the parties, it may be deemed that the relationship is so close that it is, for the purposes of vicarious liability, *akin* to employment.<sup>5</sup>

### **WHAT IS VICARIOUS LIABILITY?**

The concept of vicarious liability will be known to most readers: the legal principle that someone with no fault (normally an employer) can be liable for the wrongs of

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<sup>2</sup> [2020] UKSC 13.

<sup>3</sup> ACAS would be particularly recommended for all employment matters: [www.acas.org.uk](http://www.acas.org.uk).

<sup>4</sup> SME = small and medium-sized enterprises, per European Commission Recommendation C(2003) 1422, Article 2 – small enterprises have < 50 employees and/or a balance sheet of ≤ € 10 million, so the majority of equestrian businesses are small enterprises under this standard business categorisation.

<sup>5</sup> As discussed below; see also A Silink and D Ryan, ‘Vicarious Liability for Independent Contractors’ (2018) 77 CLJ 458.

another, ‘vicarious’ stemming from the Latin *vicarius* meaning ‘substitute’.<sup>6</sup> Lord Dyson in *Mohamud v WM Morrison Supermarkets plc* noted the difficulties of summing up the law in a simple and coherent form opining: ‘To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera.’<sup>7</sup> The lack of certainty and precision comes from the infinite number of possible human relationships and situations, but let that not deter us from gleaning a framework of principle.

The concept does not appear in the early histories and treatises on English law<sup>8</sup> although Sir John Baker<sup>9</sup> in the authoritative *Sources of English Legal History*<sup>10</sup> cites, among other early cases, *Beaulieu v Finglam*<sup>11</sup> where Markham J noted: ‘If my servant or lodger puts a candle on the wall and the candle falls into the straw and burns the whole house, and also my neighbour’s house, in this case I shall answer to my neighbour for the damage which he has suffered.’<sup>12</sup>

Notwithstanding these medieval<sup>13</sup> cases, in 1916<sup>14</sup> Harold Laski characterises a string of early modern<sup>15</sup> decisions (generally regarded as foundation of the

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<sup>6</sup> W Smith and TD Hall, *A Copious and Critical English-Latin Dictionary* (first published 1871) <[www.latinium.com/latin-dictionaries](http://www.latinium.com/latin-dictionaries)> accessed 24 May 2020.

<sup>7</sup> [2016] UKSC 11 [54].

<sup>8</sup> Such as Henry Bracton (before c1235) *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England), or Sir Edward Coke (from 1628) *Institutes of the Lawes of England*.

Henry Bracton (aka Henry de Bracton, and variants, c1210 -68) produced an influential collation of law, drawing on English custom and Roman sources.

Sir Edward Coke (1552–1634), English jurist, lawyer and politician, variously Solicitor General and Attorney General of England and Wales (under appointment of Elizabeth I) and Chief Justice of the Court of Common Pleas and the King’s Bench.

<sup>9</sup> John Baker (b1944), legal historian and Downing Professor of the Law of England, University of Cambridge (1998–2011).

<sup>10</sup> John Baker, *Baker and Milsom Sources of English Legal History: Private Law to 1750* (2nd edn, OUP 2010).

<sup>11</sup> (1401) B & M 557.

<sup>12</sup> Baker (n 10) 610–11.

<sup>13</sup> From the 5th to the late 15th centuries.

<sup>14</sup> HJ Laski, ‘The basis of vicarious liability’ (1916) 2 Yale LJ 105.

Professor Harold Laski (1893–1950), lecturer in politics and economics at the London School of Economics from 1926 to 1950 (and before that at McGill, Canada, Harvard and Yale), latterly aligned to Marxism. Active in the Labour Party and, perhaps, most influential in the developing politics of post-colonial India and a number of African nations.

<sup>15</sup> Early modern being the period from the end of the Middle Ages (late 15th century) to the late 18th century.

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principle today) as ‘bearing the impress of a single, vivid personality’<sup>16</sup> in the form of Sir John Holt,<sup>17</sup> Lord Chief Justice of England from 1689 to his death in 1710.

Sir John Holt’s decisions<sup>18</sup> included *Turberville v Stamp*, where a fire lit by an employee damaged neighbouring property;<sup>19</sup> and *Sir Robert Wayland’s Case*, regarding a servant cheating on tradesmen for whom the master had provided monies to pay, where Holt observed the truism that ‘the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen’.<sup>20</sup> In *Hern v Nicolls*, an overseas factor (agent) falsely represented the quality of silk being purchased.<sup>21</sup> In finding the employer liable for the wrong, policy thinking can clearly be seen in Holt’s observation: ‘seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.’<sup>22</sup> And in *Middleton v Fowler*, Holt distinguished the situation where an employee acted outside their authority and was not in any way carrying out their authorised work from a case where a coachman accepted a fee for looking after luggage (which was not part of his driving job).<sup>23</sup> The employer was sued when the luggage was lost. Holt noted that ‘...no master is chargeable with the acts of his servant, but [i.e. only] when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master’.<sup>24</sup> The thinking was, and is, that an employer (as a matter of fact) causes the risk, that is the situation in which the wrong was executed, and (as a matter of policy) is better placed to compensate the victim, particularly through insurance. The relationship between law and policy is referred to in the 2020 Supreme Court cases and will be considered further below.

It may be noted that the early cases fell short of ascribing vicarious liability for criminal matters, per *Rex v Huggins and Barnes*, where an inmate of Fleet prison died due to the conditions and neglect of the gaoler, Barnes, and a charge of murder

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<sup>16</sup> Laski (n 14) 106.

<sup>17</sup> 1642–1710.

<sup>18</sup> Thomas Farresley, *A Report of All the Cases Determined by Sir John Holt, Knt, from 1688 to 1710* (first published 1736, Forgotten Books 2016) <[www.forgottenbooks.com/en/books/AReportofAlltheCasesDeterminedbySirJohnHoltKntFrom1688to1710DuringWhichTimeHeWas\\_11285152](http://www.forgottenbooks.com/en/books/AReportofAlltheCasesDeterminedbySirJohnHoltKntFrom1688to1710DuringWhichTimeHeWas_11285152)> accessed 26 May 2020. (Some pages removed from free access version.)

<sup>19</sup> (1697) 1Ld Raym 264 (KB).

<sup>20</sup> (1707) 3 Salk 234.

<sup>21</sup> (1708) 1 Salk 289.

<sup>22</sup> *ibid.*

<sup>23</sup> (1699) 1 Salk 282.

<sup>24</sup> *ibid.*

was brought against both the gaoler and the prison warden (Huggins).<sup>25</sup> As against the warden, although it was acknowledged that he ‘had the care and custody of the prisoners’ it was found that a principal or employer could only be criminally liable if the ‘deputy’ acted by ‘command, consent or privity of the principal’.<sup>26</sup> This was superseded and employers can most certainly be liable for criminal, as well as civil, wrongs.<sup>27</sup>

Laski’s paper explored both the development and policy of vicarious liability through to 1916, in England and the United States of America, and couches it in terms of the law developing to reflect society from the supremacy of the individual property holder and paternalism of medieval times, to the social and commercial community of interdependence of an industrial society, aiming ostensibly, at the ‘maximum public good’<sup>28</sup>. He concludes his piece (unsurprisingly, given the author) with the welfare of society being the ultimate aim of the development and application of legal principles and this can be seen in some,<sup>29</sup> although by no means all,<sup>30</sup> of the 21st century developments explored below.

Laski was writing at the same time as another expansive commentator on the matter, Thomas Baty,<sup>31</sup> who compared vicarious liability to a upas tree (*Antiaris toxicaria*), the source of the poison for arrows.<sup>32</sup> This rather dramatic allusion was picked up in the title of Warren Swain’s<sup>33</sup> recent review of the development of the law,<sup>34</sup> which particularly dissects the distinction between strict liability for another’s wrong (the basis of vicarious liability today) and the master’s tort theory (whereby the master, or employer, is deemed to be primarily liable because the employee’s acts are said to be the act of the master). The idea of no-fault, strict, liability for another’s wrong was difficult to reason when tort was largely couched in terms of a

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<sup>25</sup> (1730) 2 Ld Raym 1574 (KB).

<sup>26</sup> *ibid.*

<sup>27</sup> *Racz v Home Office* [1994] 2 AC 45.

<sup>28</sup> Laski (n 14) 112.

<sup>29</sup> Such as *Lister v Hesley Hall Ltd* [2001] UKHL 22.

<sup>30</sup> Perhaps *Barclays Bank plc v Various Claimants* [2020] itself.

<sup>31</sup> Thomas Baty (1869–1954) was a British legal academic who worked as legal adviser, largely on international matters, for the Imperial Japanese government from 1916 for the rest of his career, dying in Japan in 1954. He also wrote novels under the pseudonym Irene Clyde.

<sup>32</sup> T Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-union Members, with a Chapter on the Laws of Scotland and Foreign States* (OUP 1916).

<sup>33</sup> Professor of Law at the University of Auckland, New Zealand.

<sup>34</sup> W Swain, ‘A Historical Examination of Vicarious Liability: a “veritable Upas tree”?’ (2019) 78 CLJ 640.

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‘personal moral shortcoming’.<sup>35</sup> The conceptual difficulties surrounding tortious liability in the absence of fault had, in fact, been addressed in Roman law<sup>36</sup> and remain addressed in civil jurisdictions with the idea of quasi-delict.<sup>37</sup> There has been academic consideration of the matter<sup>38</sup> over the years and Professor Lakshman Marasinghe<sup>39</sup> suggests the logic of carving out a class of common law obligations of

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<sup>35</sup> DJ Ibbitson, *A Historical Introduction to the Law of Obligation* (OUP 2000) 196.

Professor David Ibbitson, Regius Professor of Civil Law, University of Cambridge.

<sup>36</sup> *Institutes of Justinian*, 3.12.2. A sixth century collation of Roman law under Justinian I (c482–565, Emperor from 527–65), largely but not exclusively based on the earlier *Institutes of Gaius* (by the jurist Gaius, 130–80). Gaius did not mention the principle of vicarious liability.

<sup>37</sup> As explored by Professor Winfield in Chapter X (Tort and Quasi-Delict) of his famous series of lectures as Tagore Professor of Law\* at the University of Calcutta (PH Winfield, *The Province of the Law of Tort* (CUP 1931)).

Professor Percy Winfield (1878–1953) was Rouse Ball Professor of English Law at Cambridge from 1928–43.

\*Bestowed by and named for Prasanna Kumar Tagore (1801–86), learned in both western and Hindu law.

See further Mark F Grady, ‘The Negligence Dualism’ (2009) UCLA School of Law, Law and Economics Research Paper, (09–02).

Mark Grady, Professor of Law and Director of the Center for Law and Economics, UCLA School of Law.

And see Johnson’s consideration of vicarious liability in a moral and theological context in his diary of 3 June 1781 in James Boswell, *The Life of Samuel Johnson* (first published 1791) 512–3 <[https://books.google.co.uk/books?id=2nkEAAAAYAAJ&pg=PA512&dq=samuel+johnson+June+3+1781+vicarious&hl=en&sa=X&ved=0ahUKewibzIfBos\\_pAhUDiFwKHQmJCr8Q6AEIKDAA#v=onepage&q=samuel%20johnson%20June%203%201781%20vicarious&f=false](https://books.google.co.uk/books?id=2nkEAAAAYAAJ&pg=PA512&dq=samuel+johnson+June+3+1781+vicarious&hl=en&sa=X&ved=0ahUKewibzIfBos_pAhUDiFwKHQmJCr8Q6AEIKDAA#v=onepage&q=samuel%20johnson%20June%203%201781%20vicarious&f=false)> accessed 25 May 2020.

Samuel Johnson (1709–84), prolific writer in many genres, factual and fiction, and with a particularly enduring legacy as a lexicographer.

<sup>38</sup> For example, by AL Weitz, ‘Contractor Duty to Third Parties Not in Privity: A Quasi-Tort Solution to the Vexing Problem of Victims of Nonfeasance’ (1997) 63(2) Brooklyn Law Review 593, calling for a re-statement of the law rather than apparent ‘exceptions’ the requirement of fault or lack of care.

Andrew L Weitz, US attorney currently with Weitz Pascale, [www.weitzpascale.com](http://www.weitzpascale.com). After a PhD in learning theory, he studied law and was on the editorial team of the Brooklyn Law Review whilst at Brooklyn Law School.

<sup>39</sup> Sri Lankan academic, variously chairman of the Law Commission of Sri Lanka and Legal Director of the Secretariat for Coordinating the Peace Process during the Sri Lankan civil war (2002–09), and Emeritus Professor of Law at the Canadian University of Windsor.

quasi-tort, borrowed from the Roman/civil law principle of quasi-delict, to avoid the artificiality of no-fault torts. He points to the step in that direction taken in *Rylands v Fletcher* in the famous judgment of Blackburn J in the Court of Exchequer Chamber,<sup>40</sup> approved in the House of Lords,<sup>41</sup> in basing a new head of strict liability on the Roman *sic uti suo ut non laedat alienum* ('use your own property so that it will not harm the property of another').<sup>42</sup> This was not strict liability in the complete absence of fault, but strict liability based on an underlying obligation due to prior decisions (land use, in the case of *Rylands*, engaging in a relationship and activity, in the case of vicarious liability).

As society evolved and corporate defendants became prevalent, there was a further shift towards public policy and the compensation of victims, as opposed to the idea of a stranglehold of tight legal theory in the face of a perceived moral obligation. This commercial and moral view of legal development, coupled with the necessary constraints of legal theory, was espoused on both sides of the Atlantic, by such as Oliver Wendell Holmes Jr.<sup>43</sup> The changing mores in society influencing legal development can be seen in a close relative to the law of vicarious liability to third parties, that of an employer's liability to employees who are harmed by colleagues. The old law of common employment<sup>44</sup> was such that employers were not liable for injuries to workers caused by colleagues as workers were said to have accepted the risks of employment. This harsh principle was expressly overturned by section 1 of the Law Reform (Personal Injuries) Act 1948,<sup>45</sup> although the idea of personal responsibility, with the law mirroring a

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<sup>40</sup> (1866) LR 1 Ex 265.

<sup>41</sup> [1868] UKHL 1.

<sup>42</sup> L Marasinghe, 'Towards Quasi-Tort in the Common Law?' in KD Cooper-Stephenson and E Gibson (eds), *Tort Theory* (Capitum University Publications 1993) 342.

<sup>43</sup> OW Holmes Jr, *The Common Law* (first published 1881) <[www.gutenberg.org/files/2449/2449-h/2449-h.htm](http://www.gutenberg.org/files/2449/2449-h/2449-h.htm)> accessed 15 May 2020; OW Holmes Jr, 'The Path of Law' (1897) 10 *Harvard Law Review* 457.

Oliver Wendell Holmes Jr (1841–1935), prolific jurist and United States Supreme Court Justice, 1902–32.

<sup>44</sup> As generally thought to be established in *Priestley v Fowler* (1837) 150 ER 1030 (Ex Ch); *Hutchinson v York, Newcastle & Berwick Railway Co.* (1850) 5 Ex 343 (Ct Com Pl); and most authoritatively stated by Lord Cranworth in *Bartonshill Coal Company v Reid* (1858) 3 Macq 282 (HL). For further on *Priestley* see, 'A case of first impression: *Priestley v Fowler* in AWB Simpson, *Leading Cases in the Common Law* (OUP 1995) ch 5; MA Stein, '*Priestley v Fowler* (1837) and the emerging tort of negligence' (2002) 44 *Boston College Law Review* 689.

<sup>45</sup> With application to England, Wales and Scotland and Law Reform (Personal Injuries) Act (Northern Ireland) 1948.

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moral obligation, is still central to primary liability in tort as perhaps most famously expressed in Lord Atkin’s ‘neighbour test’ in *Donoghue v Stevenson*.<sup>46</sup> His thinking was influenced by what, for him, was the Christian<sup>47</sup> precept of ‘whatsoever ye would that men should do to you, do ye even so to them’.<sup>48</sup> The idea, which Lord Atkin<sup>49</sup> had rehearsed well before his seminal judgment in *Donoghue*,<sup>50</sup> clearly embraces the centrality of personal responsibility and a moral code in the interaction between individuals. But the policy of also needing to provide the victim with a meaningful source of recompense (alongside the core element of personal responsibility) is highlighted in all modern standard texts, and Professor John Fleming’s<sup>51</sup> couching of the issue: ‘... the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant’<sup>52</sup> has been quoted in a number of recent cases.<sup>53</sup>

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<sup>46</sup> [1932] UKHL 100.

<sup>47</sup> This sentiment, often termed ‘the golden rule’ is found in some form in most major religions and cultures. See Jeffery Wattles, *The Golden Rule* (OUP 1996).

<sup>48</sup> Matthew 7:12 and, similarly, Luke 6:31, *The Holy Bible* (KJV, first published 1611).

<sup>49</sup> James, Baron Atkin (1867–1944), Australian born but English educated, sitting in the House of Lords from 1928–44.

<sup>50</sup> In papers such as Lord Atkin, ‘Law as an educational subject’ (1932) *Journal of Society of Public Teachers of Law* 27, and various speeches, as noted in Matthew Chapman, *The Snail and the Ginger Beer: the singular case of Donoghue v Stevenson* (Wildy, Simmonds & Hill Publishing Ltd 2010).

<sup>51</sup> Professor John G Fleming (1919–97), German born, educated in England from the age of 15. The first edition of his seminal book on torts was published in 1957. He emigrated to Australia in 1949 and on to Berkeley, California, in 1961, where he spent the rest of his working life, (RM Buxbaum, ‘John G Fleming, 1919–1997’ (1997) 45(4) *The American Journal of Comparative Law* 645).

<sup>52</sup> JG Fleming, *The Law of Torts* (9th edn, 1998) 409; (now C Sapideen and P Vines (eds), *Fleming’s The Law of Torts* (10th edn, Thompson Reuters 2011)). The choice of Fleming for repeated quotation may be summed up in Waddam’s assessment of Fleming’s textbook on tort (in his review of Peter Cane and Jane Stapleton, *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998): ‘... coming close to realizing the ideal of legal academic writing: clear, concise, accurate, thorough, thoughtful, coherent, with a judicious balance between practice and theory, and between description and prescription’; SM Waddams, ‘Peter Cane and Jane Stapleton, *The Law of Obligations: Essays in Celebration of John Fleming*’ (2000) 63(3) *MLR* 464.

<sup>53</sup> See *Majrowski v Guy’s and St Thomas’s NHS Trust* [2005] EWCA Civ 251 [28]; *Woodland v Essex County Council* [2012] EWCA Civ 239 [6]; (Both *Majrowski* and *Woodland* being appealed to the Supreme Court).

## ESSENCE OF THE MODERN LAW

There are, then, two principal requisites for vicarious liability to operate: the proximity between the parties, and the proximity between the wrong and authorised work.

### The Relationship Between the Parties

There must be a proximate relationship between the wrongdoer and the posited defendant. This is normally an employment relationship but the two more problematic situations are, as noted, those treated as self-employed but deemed by the courts to be employees, and those who are acknowledged by the courts not to be employees but deemed to be in a relationship ‘akin’ to employment for these purposes. There is also the relatively recent complication of the designation ‘worker’.

If someone is clearly an employee then there is a measure of clarity, on that question at least. That there is no vicarious liability for the wrongs of sub-contractors has been set out at least since *Quarman v Burnett*<sup>54</sup> and repeated many times since.<sup>55</sup> In *Kafagi v JBW Group Ltd*<sup>56</sup> it was argued, on appeal, that *Various Claimants v Catholic Child Welfare Society*<sup>57</sup> (generally known as the *Christian Brothers* case) and *Cox v Ministry of Justice*<sup>58</sup> were such that the trial judge was wrong in deciding that as wrong-doers were not employees, then there could be no vicarious liability of the party who engaged them. But it was also found that the law had not, in fact, altered to simply absorb non-employees as being covered, and only in atypical cases where there was the finding of a relationship ‘akin’ to employment could there be vicarious liability for a sub-contractor (and *Kafagi* was not such a case). Singh LJ noted: ‘... it is important to note that this development has not undermined the conventional distinction between a contract of employment and a contract for services, which continues to be relevant in the vast majority of situations.’<sup>59</sup>

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<sup>54</sup> (1840) 6 M & W 499 (Ct Exch). Although before that, the position was more fluid: W Cornish and G Clark, *Law and Society in England 1750–1950* (Sweet & Maxwell 1989); P Mitchell, *A History of Tort Law 1900–1950* (CUP 2015).

<sup>55</sup> See, for example, *Salisbury v Woodland* [1969] EWCA Civ 1; *D & F Estates Ltd v Church Commissioners* [1989] AC 177 (HL).

<sup>56</sup> [2018] EWCA Civ 1157.

<sup>57</sup> [2012] UKSC 56.

<sup>58</sup> [2016] UKSC 10.

<sup>59</sup> [2018] EWCA Civ 1157 [21].

## But Who is an Employee, as Opposed to Self-Employed?

Whilst this paper is looking at whether there can be vicarious liability for another’s wrongs, the deeming of someone hitherto treated as self-employed as being employed is most commonly encountered with regard to taxation or health and safety. The final categorisation will depend on the facts of each case but key features for employment status are mutuality of obligation,<sup>60</sup> a sufficient measure of control<sup>61</sup> and the integration test.<sup>62</sup> These factors are now embraced and extended in what has been termed the economic reality test.<sup>63</sup> Control is manifest in factors such as the provision of one’s own equipment and materials, choice of timing and ability to substitute personnel, which would all point towards self-employment. Integration relates to whether a person is autonomous and appears to be in business on their own account, or is an integral part of an employer’s business, with the employer bearing the economic risk. But the matter is now very much considered holistically, as highlighted recently in *HMRC v Professional Game Match Officials Ltd*<sup>64</sup> and *Varnish v British Cycling Federation*<sup>65</sup> where the Tax and Chancery Chamber and Employment Appeal Tribunal, respectively, provided useful reviews of employment status.

In short, the position is far from formulaic. In some situations, there may be little choice of timing, how a job is done or the possibility of substitution whilst still being a genuine situation of self-employment. Conversely, there may be an overt, contractual right of substitution of personnel (traditionally taken as fatal to employed status<sup>66</sup>) but, on the facts, a clear finding of employed

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<sup>60</sup> *Collins v Hertfordshire County Council* [1947] 1 All ER 633 (KBD) (Hibbert J): ‘In a contract [for services, i.e. self-employment] ... the master can order or require what is to be done, while in [a contract of service, i.e. employment] ... he can not only order or require what is to be done but how it shall be done’; see also *Nethermere (St Neots) Ltd v Minister of Social Security* [1984] ICR 612 (CA).

<sup>61</sup> *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515. A High Court case but one with authority of reasoning which has endured, Mackenna J drawing on judgments from the US, Canada, Australia and Ireland, as well as England.

<sup>62</sup> See *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101 (CA) (Lord Denning): ‘...under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it.’

<sup>63</sup> *Autoclenz v Belcher* [2011] UKSC 14.

<sup>64</sup> [2020] UKUT 0147 (TCC).

<sup>65</sup> [2020] UKEAT/0022/20/LA (V).

<sup>66</sup> *Express & Echo Publications Ltd v Tanton* [1999] EWCA Civ 949 (Peter Gibson LJ): ‘That [a right of substitution] is a remarkable clause to find in a contract of service’.

status.<sup>67</sup> In *Hall (Inspector of Taxes) v Lorimer*,<sup>68</sup> Nolan LJ quoted Mummery J from the court below:

The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture ..., by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.<sup>69</sup>

### **Who Might be in a Relationship ‘Akin’ to Employment?**

This interpretation of relationships has largely been found in non-commercial settings such as cases involving religious organisations,<sup>70</sup> prison<sup>71</sup> or foster care.<sup>72</sup> In *JGE v English Province of Our Lady of Charity and Portsmouth Roman Catholic Diocesan Trust*<sup>73</sup>, Ward LJ usefully referred to Cooke J’s form of wording<sup>74</sup> in *Market Investigations Ltd v Minister of Social Security*: ‘The fundamental test to be applied is this: is the person who has engaged himself to perform these services performing them as a person in business on his own account?’<sup>75</sup>

### **And What of the Designation ‘Worker’?**

The classification ‘worker’<sup>76</sup> was particularly discussed (not for the first time, of course) in the employment law cases of *Bates van Winkelhof v Clyde and Co LLP*<sup>77</sup>

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<sup>67</sup> *Autoclenz* (n 63).

<sup>68</sup> [1993] EWCA Civ 25.

<sup>69</sup> *Hall (Inspector of Taxes) v Lorimer* (1992) 1 WLR 939, 944.

<sup>70</sup> See the *Christian Brothers* case (n 57); *JGE v English Province of Our Lady of Charity and Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA 938 (sometimes termed *E*); *Watchtower Bible and Tract Society* [2015] EWHC 1722 (QB).

<sup>71</sup> *Cox* (n 58) where a prison, rather the Ministry of Justice, was liable for the wrongs of a prisoner (clearly not an employee of the prison).

<sup>72</sup> *Armes v Nottinghamshire County Council* [2017] UKSC 60.

<sup>73</sup> *E* (n 70), where a trust appointed a priest but was not his employer, the trust was held to have a relationship sufficiently ‘akin to employment’ as to allow vicarious liability.

<sup>74</sup> *E* (n 70) [67].

<sup>75</sup> [1969] 2 QB 173 (QB) 184.

<sup>76</sup> First seen in s 230(3) Employment Rights Act 1996.

<sup>77</sup> [2014] UKSC 32.

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and *Pimlico Plumbers Ltd v Smith*.<sup>78</sup> The category ascribes some employment rights whilst falling short of full employment status. Leading cases considered in *Pimlico Plumbers* took the overriding factors as being whether the worker was in business on their own account, taking the commercial risk<sup>79</sup> or whether the worker was in a position of subordination,<sup>80</sup> a vital strand echoing down from Sir John Holt discussing the servant working for his master’s benefit in *Turberville* although it is more nuanced in that sub-contractors will obviously be working for their engager’s benefit, as well as their own, and this is not, of itself, enough to establish vicarious liability.<sup>81</sup>

The modern, more complex range of statuses, with worker added to the employed and self-employed, prompted Butlin and Allen<sup>82</sup> to suggest that a coherent approach in embracing s230(3) Employment Rights Act 1996 ‘workers’ as being covered by vicarious liability would be helpful. Their paper pre-dated this approach being expressly rejected by Lady Hale in *Barclays Bank*, of which more below.<sup>83</sup>

### **Employees Working on Loan to Another**

It is sometimes that an employee carries out work for another, to whom they are merely loaned by their employer and are not under a contract of employment to that other. (Distinguish this from individuals who have more than one contract of employment.) Whether the main or temporary ‘employer’ is liable will depend on the usual tests of control and integration used to distinguish employees from the self-employed as rehearsed above. In *Mersey Docks & Harbour Board v Coggins & Griffith (Liverpool) Ltd*<sup>84</sup> it was held that the burden of proof is with the main employer to establish that liability has shifted to the temporary employer. This is not easy but the principle was confirmed more recently in

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<sup>78</sup> [2018] UKSC 29.

<sup>79</sup> Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* EU:C:2014:2411, para 33.

<sup>80</sup> See Case C-256/01 *Allonby v Accrington and Rossendale College* [2004] ECR I-00873, para 68; *Hashwani v Jivraj* [2011] UKSC 40 [34].

<sup>81</sup> *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19 [13] (High Court of Australia): ‘The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second’.

<sup>82</sup> SF Butlin and R Allen, ‘Worker Status and Vicarious Liability: The Need for Coherence’ (2018) University of Cambridge Faculty of Law Research Paper 21.

<sup>83</sup> *Barclays Bank* (n 2) [29].

<sup>84</sup> [1947] AC 1 (HL).

*Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*<sup>85</sup> and the *Christian Brothers* case in 2012.<sup>86</sup>

### Non-Delegable Duty of Care

At this point, it might also be useful to refer to a further strand of the development of the concept of no-fault liability. Clearly, although there is a no-fault basis to vicarious liability for the wrongs of employees (or those akin to employees), it is based on a conscious adoption of a relationship. A further development has been that of the idea of non-delegable duty. This is where X has been found liable for the wrongs of Y, who is *not* an employee (or akin) because the situation is such that it is held that the duty of care *cannot* (at law) be delegated to a competently appointed sub-contractor (as would be the norm). For example, in *Woodland v Essex County Council* a child was left severely brain damaged after a swimming lesson conducted by a self-employed teacher engaged by the local authority.<sup>87</sup> Rather than seeking to categorise the teacher as ‘akin’ to an employee and thus embrace the usual principles of vicarious liability, it was held that some duties were non-delegable and the council was *primarily* responsible for children in swimming lessons.

It is generally supposed that the idea of a non-delegable duty is an exception, rather than an extension, to the principle of vicarious liability in that it does not seek to categorise non-employees as akin to employees, but imposes primary liability on the engaging party in certain, narrow, circumstances largely involving either hazardous activities in a public place,<sup>88</sup> or children or hospital patients.<sup>89</sup> This is not, however, universally accepted and some argue that the concept of non-delegable duty is simply a further device to ascribe vicarious liability rather than a separate head of primary liability. Why does this matter? If the former, it might, for example, colour the extent of relationship which are deemed to be within the scope of consideration.<sup>90</sup>

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<sup>85</sup> [2008] EWCA Civ 1257.

<sup>86</sup> *Christian Brothers* (n 57).

<sup>87</sup> [2013] UKSC 66.

<sup>88</sup> First reported in *Pickard v Smith* (1861) 10 CB (NS) 470 as noted in *Woodland* (n 87) [6].

<sup>89</sup> *Woodland* (n 87) [23] (Lord Sumption).

<sup>90</sup> P Giliker, ‘Vicarious liability in the UK Supreme Court’ (2016) 7 UK Supreme Court Yearbook 152; R Stevens, ‘Non-Delegable Duties and Vicarious Liability’ in JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007).

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Once it has been established that the relationship is such that the principle can apply, it must then be established that there is a sufficient connection between the wrong and the work.

### **The Relationship Between Authorised Work and the Wrongdoing**

In the early years of the development of this area of law, there would be liability only for expressly authorised acts. Readers will be familiar with words such as ‘in the course of employment’, that is where the wrongdoer is carrying out his or her authorised work, albeit in a wrong or even expressly unauthorised way, as opposed to them being on (to use the quaint and well-known phrase) ‘a frolic of their own’.<sup>91</sup> In *Limpus v London General Omnibus Company*<sup>92</sup> the employer was vicariously liable for injuries caused when a horse-drawn bus driver ran into a competitor’s bus, despite written instructions that drivers ‘must not on any account race with or obstruct another omnibus’.<sup>93</sup> The reasoning was that the driver was carrying out his authorised work, with the intention of assisting his employer’s business, albeit that the practical realisation of those intentions was misguided and the driver was carrying out his work in an expressly unauthorised fashion. Contrast *Beard v London General Omnibus Company* where the employer was *not* liable when a conductor drove the bus, as he had no authority to do such a thing, driving being entirely outside the scope of his work.<sup>94</sup> This was, for many years, taken to mean that even unauthorised acts had to be so closely connected with authorised acts as to be regarded as doing those authorised acts, however improper the manner, as seen in *Rose v Plenty* where Lord Denning judged: ‘In considering whether a prohibited act was within the course of the employment, it depends very much on the purpose for which it is done.’<sup>95</sup> Here, a milkman had been expressly forbidden from allowing children to help on the milk float ‘in any circumstances’.<sup>96</sup> When a child helped and was injured through the milkman’s negligent driving, the employer was found vicariously liable. Lawton, LJ, in dissent, felt that the employer was *not* liable per *Twine v Bean’s Express Ltd*<sup>97</sup> and *Conway v George Wimpey & Co Ltd*,<sup>98</sup> both involving drivers giving lifts against express prohibitions. Lord

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<sup>91</sup> *Joel v Morrison* [1834] EWHC KB J39, 5.

<sup>92</sup> [1862] 1 H & C 526 (Ct Exch).

<sup>93</sup> *ibid* 528.

<sup>94</sup> [1900] 2 QB 530 (CA).

<sup>95</sup> [1975] EWCA Civ 5.

<sup>96</sup> *ibid*.

<sup>97</sup> [1946] 1 All ER 202 (CA).

<sup>98</sup> [1951] 2 KB 266 (CA).

Denning, however, distinguished these cases on the basis that in *Rose*, the milkman was using the child (albeit against instruction) in furthering the employers business, as opposed to a prohibited act with no connection at all to the commercial activity of the employer.

This reasoning was set out in *Salmond and Heuston on the Law of Torts* as: ‘A master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them’.<sup>99</sup> Whilst providing a logical result in many cases, Lord Toulson in *Mohamud v WM Morrison Supermarkets plc*,<sup>100</sup> observed that this construction did not, indeed could not, work with, for example, sexual abuse cases<sup>101</sup> as such wrongs could, in no way, be seen as carrying out the work of the employer. Rather, Lord Toulson drew on Lord Nicholls in *Dubai Aluminium Co. Ltd v Salaam*<sup>102</sup> which looked for such a close connection with authorised actions that the wrongful act may ‘fairly and properly’ be regarded as having been carried out ‘in the course of employment’, not simply equated with, however tenuously, authorised acts. What particularly came out of *Dubai* and *Mohamud* was that this cannot be regarded as ‘painting by numbers’. A lack of precision cannot be avoided, courts must make evaluative decisions in each case applying principles from previous cases, with a reasoned explanation as to the application or disregard of those factors, to allow the development of the law on a principled basis rather than through ‘a personal sense of justice’.<sup>103</sup>

## EMPLOYEE’S LIABILITY

Although pursued relatively rarely, it is worth noting that despite the principle of vicarious liability operating to support the victim in being able to claim directly against employer, the perpetrator may be no less personally culpable. *Lister v Romford Ice and Cold Storage Ltd*<sup>104</sup> (a sad case involving a son who, in driving a lorry through slaughterhouse gates, backed into his father) established that the party out of pocket (whether employer or insurer) can, under the principle of

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<sup>99</sup> RFV Heuston and RA Buckley (eds), *Salmond and Heuston on the Law of Torts* (21st edn, Sweet & Maxwell 2006).

<sup>100</sup> *Mohamud* (n 7).

<sup>101</sup> Such as *Lister v Hesley Hall Ltd* (n 29); the *Christian Brothers* case (n 57).

<sup>102</sup> *Dubai Aluminium Co. Ltd v Salaam* [2002] UKHL 48.

<sup>103</sup> *WM Morrison Supermarkets plc* (n 1) 24 (Lord Reed).

<sup>104</sup> [1957] AC 555.

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subrogation, claim indemnity from the party at fault.<sup>105</sup> This situation does, however, depend on the deemed assumption of personal responsibility. In the negligent driving of Martin Lister, there is clear personal culpability.

Later cases have been distinguished such that in *Williams and another v Natural Life Health Foods Ltd* there was deemed to be no independent assumption of responsibility by an employee so when a company went into liquidation, there could be no direct recourse by the claimant to an individual.<sup>106</sup> In *Merrett v Babb*, however, the Court of Appeal found that John Babb, a chartered surveyor who had carried out a negligent valuation, was personally liable.<sup>107</sup> A normally ‘straightforward’ vicarious liability action against an employer was not possible due to the employer’s insolvency, the trustee in bankruptcy having failed to take out insurance run off.<sup>108</sup> *Merrett* was not followed in *Matthews v Ashdown Lyons and Maldoom*<sup>109</sup> and *Russell v (1) Walker & Co. (2) Robert Chisnall and others*,<sup>110</sup> two cases in which the defendants were supported by their professional body<sup>111</sup> but both were in the County Court and both distinguished *Merrett* on the basis of *Williams*. In short, if *Lister* and *Merrett* cannot be distinguished, then employers, and others, may be able to seek indemnity as was the case with insurers joining a negligent radiographer in action in *Bell v Alliance Medical Limited and Others*.<sup>112</sup> This was an application of what is permissible in law, per *Lister*, but which has been rarely pursued in practice, not least due to the ‘gentleman’s agreement’ of the British Insurance Association first reached in 1953.<sup>113</sup> The court discarded

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<sup>105</sup> Glanville Williams (1911–97), Professor of Jurisprudence at University College, London (1945–55) and of English Law at the University of Cambridge (1968–78) was well known to generations of law students as the author of *Learning the Law* (first published in 1945). His review of *Lister* in the *Modern Law Review* contains a helpful exploration of employee indemnity and also of the dissenting reasoning in both the Court of Appeal and the House of Lords: Glanville Williams, ‘Vicarious Liability and the Master’s Indemnity’ (1957) 20 *MLR* 220; continued (1957) 20 437.

<sup>106</sup> [1988] UKHL 17.

<sup>107</sup> [2001] EWCA Civ 214.

<sup>108</sup> Itself being a breach of the regulations of the Royal Institution of Chartered Surveyors (RICS).

<sup>109</sup> (2014) Central London County Court, 14 February 2014.

<sup>110</sup> (2014) Southend County Court, 25 July 2014.

<sup>111</sup> The RICS having an interest in protecting members from personal claims and seeking to alter or mitigate the effects of *Merrett v Babb* (n 107).

<sup>112</sup> [2015] CSOH 34.

<sup>113</sup> This was extended in 1955 with the Accident Offices’ Association and the Mutual Insurance Companies’ Association proffering their agreement to the British Employers’ Confederation to adhere to such an arrangement, as cited in a report commissioned in the

arguments that *Lister* is no longer applicable and acts as a reminder of employees' exposure. In fact, the employee in the case had insurance through her professional body<sup>114</sup> but insurance was not compulsory and, clearly, employees taking out insurance for personal liability at work is not the norm.

Having looked at the development and general operation of the law and some of the issues surrounding (a) whether an employer will be potentially liable for a particular wrong-doer's actions, (that is, is the perpetrator an employee or in a relationship akin to employment?) and, if so, (b) whether the actions are closely enough related to work to be the subject of vicarious liability, it is instructive to review the two cases both heard by the Supreme Court in November 2019 and reported in April 2020. *Barclays Bank* addressed question (a). It involved the wrongs of someone not employed by the defendant bank. In *WM Morrison*, (b) was at issue, that is an employee doing something clearly outside the scope or 'sphere'<sup>115</sup> of his role.

### **Barclays Bank plc v Various Claimants**

The *Barclays Bank plc* case involved a medic<sup>116</sup> carrying out routine examinations on prospective employees of Barclays.<sup>117</sup> Many of the recruits were young women, often 16-year-old school leavers. A total of 126 claimants in a group action alleged sexual assaults during examination, between 1968 and 1984. Of the two key questions in establishing vicarious liability, the first question was at issue: Did the doctor have a close enough relationship to the defendant bank for them to be vicariously liable (*if* the acts were found to have a close enough link to the work he was engaged to do)?

### **The Decision**

In hearings to decide whether Barclays Bank was an appropriate defendant, both the High Court and the Court of Appeal held that the Bank *would* be vicariously liable for the doctor's assaults (should they be proved). The Supreme Court overturned this. The doctor was not an employee, nor was he *akin* to an employee. He worked for several other organisations (including as a part-time employee of the

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wake of *Lister* – Gerald Gardiner, '*Lister v Romford Ice Cold Storage Co. Ltd*: Report of the Inter-Departmental Committee' (1959) 22 MLR 642.

<sup>114</sup> The Society of Radiographers.

<sup>115</sup> *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 (Lord Diplock).

<sup>116</sup> Who died in 2009; *Barclays Bank* (n 2) [5].

<sup>117</sup> And prior to the merger in 1969, Martins Bank.

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NHS) and on his own account. He was paid no retainer. He was free to refuse work offered. Thus, he was not operating in the course of the Bank’s business but for his own.

The case raised a number of issues in reviewing the position.

### **More than one Vicariously Liable Party**

The case drew on earlier decisions in establishing that parties beyond the direct employer and employee relationship could be joined in action. In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*,<sup>118</sup> for example, there was liability for a subcontractor and, in a diversion from case law dating to 1826,<sup>119</sup> shared vicarious liability between two parties where a subcontractor (second defendant) was provided with a fitters’ mate employed by the third defendant company. The fitters’ mate negligently caused considerable damage and the second and third defendants were each held to be 50 per cent liable with the measure being, not only formal employment relationships, but whether a worker ‘is so much a part of’ the business or organisation that the defendant should take on responsibility.<sup>120</sup>

### **‘Akin’ to Employment**

The claimants in *Barclays* argued (successfully at lower levels) that cases such as the *Christian Brothers*<sup>121</sup> and *E*<sup>122</sup> had extended the law on a basis of what was ‘just and fair’ rather than the courts having to be tied to a trite dis-application of vicarious liability to non-employees<sup>123</sup> – echoes of the policy basis of legal development discussed above. But it was found that the requirement of establishing an employment relationship had not altered, and cases such as *Christian Brothers* and *E* simply found, on their facts, a relationship so closely ‘akin’ to employment that vicarious liability could be found.

In looking at the five ‘policy’ factors noted by Lord Phillips in the *Christian Brothers* case<sup>124</sup> as being required to establish whether vicarious liability could

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<sup>118</sup> [2005] EWCA Civ 1151.

<sup>119</sup> *Laugher v Pointer* (1826) 5 B & C 547 (KB).

<sup>120</sup> *Denham v Midland Employers’ Mutual Assistance Limited* [1955] 2 QB 437 (CA) 444 (Lord Denning).

<sup>121</sup> *Christian Brothers* (n 57).

<sup>122</sup> *E* (n 70).

<sup>123</sup> *Barclays Bank* (n 2) [8].

<sup>124</sup> *Christian Brothers* (n 57).

operate, care was taken to distinguish the factors stated from a *limit* to what was required.<sup>125</sup> In addressing them along with a holistic consideration of the relationship, two factors were discarded ((i) policy and insurance should not impose liability, of itself; and (v) control is nuanced and many employees are under less apparent control than non-employees) but (ii) that the activity was carried out as a result of activity undertaken on behalf of the defendant, (iii) that the action was part of the business of the defendant and (iv) that the defendant created the risk were clearly apposite and provided a connection, but Lord Phillips concluded: ‘Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.’<sup>126</sup>

### Non-Delegable Duty

The principles surrounding a non-delegable duty, as seen above in the summary of the *Woodland v Essex County Council*<sup>127</sup> case, were drawn on in *Barclays* as, rather than ascribing vicarious liability and seeking to extend the principle to cover a non-employee, it was held that some duties were non-delegable. This has, however, been held to be applicable in very narrow circumstances. In *Armes v Nottinghamshire County Council*,<sup>128</sup> for example, it was found that (unlike *Woodland*) there was no non-delegable duty of care imposing primary liability on a local authority for foster children placed with carers. The nature of the foster carer role was too wide to ascribe such a duty on the council. There was, however, on the facts of the case, vicarious liability given the close relationship between the local authority and the fostering (in line with *Christian Brothers* and *E*). The fostering (during which sexual abuse took place) was an integral part of local authority activity, the local authority created the risk of harm and foster parents could not be said to be carrying on an independent business on their own account – their role was inextricably linked to the council.

These cases might seem to point to the law of vicarious liability having been extended beyond employees, per the lower courts in *Barclays*, but a very clear summary of what recent cases have and have not done, in terms of developing the law, was made in the Singapore Court of Appeal<sup>129</sup> in *Ng Huat Seng v Mohammed*<sup>130</sup>. It said that *Christian Brothers*, *Cox* and *Armes*, simply fine-tuned

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<sup>125</sup> *Barclays Bank* (n 2) [18].

<sup>126</sup> *Barclays Bank* (n 2) [27].

<sup>127</sup> *Woodland* (n 87).

<sup>128</sup> *Armes* (n 72).

<sup>129</sup> The highest court in Singapore.

<sup>130</sup> [2017] SGCA 58.

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existing principles in ascertaining in what cases a relationship ‘akin’ to employment might be found, that is where the wrongdoer is engaged in the defendant’s business rather than their own business, echoing Lord Sumption in *Woodland*, that the law has: ‘... never extended to those who are truly independent contractors’.<sup>131</sup> And there was no suggestion that the Bank’s relationship with young, adult prospective employees embraced a non-delegable duty in the nature of *Woodland*.

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

A supermarket employee, an internal auditor, released personal and banking data of nearly 100,000 Morrison’s employees onto a publicly accessible website. This was a deliberate, planned act of data breach carried out due to a grudge held by the employee against Morrison’s following disciplinary proceedings. Both the High Court and the Court of Appeal found that the supermarket was vicariously liability for the wrong.

As indicated above, in establishing vicarious liability there are two vital questions: (a) was the perpetrator of the wrong an employee (or akin to an employee), and (b) was the wrong carried out within that relationship? In *Morrison*, question (a) was not in doubt.

In the Supreme Court, Lord Reed cited as authoritative<sup>132</sup> the framing of question (b) as expressed by Lord Nicholls in *Dubai*:<sup>133</sup> was ‘... the wrongful conduct ... 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 his employment?’<sup>134</sup>

Particularly interesting was Lord Reed’s dissection and disposal of the Court of Appeal decision<sup>135</sup> which had drawn on *Mohamud* and quoted it as authority for ascribing vicarious liability (a) ‘the principle of social justice going back to Holt CJ’,<sup>136</sup> i.e. a policy based argument (b) liability where an employee’s conduct was a ‘seamless episode’ or ‘unbroken chain of events’,<sup>137</sup> i.e. the employment context and (c) that ‘motive is irrelevant’.<sup>138</sup> This construction, as Lord Reed notes, would result in a considerable extension of the law which he asserted that Lord Toulson’s

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<sup>131</sup> *Woodland* (n 87) [3].

<sup>132</sup> *WM Morrison* (n 1) [25].

<sup>133</sup> Endorsed in *Mohamud* (n 7) [41].

<sup>134</sup> *Dubai Aluminium* (n 102) [23].

<sup>135</sup> *WM Morrison Supermarkets plc v Various Claimants* [2018] EWCA Civ 2339.

<sup>136</sup> *Mohamud* (n 7) [45].

<sup>137</sup> *ibid* [47].

<sup>138</sup> *ibid* [48].

leading judgment in *Mohamud* had not intended<sup>139</sup> and he found that the three elements fulfilled had been taken out of context.

Taking his points in turn:

### a. Policy

Social justice, policy and, in a modern context, insurance, whilst considerations, should not drive or override the law. The fact that there may be valid policy reasons for a decision does not mean that legal rules should not develop and adhere to clear, underlying principles.<sup>140</sup>

### b. The Connection Between the Wrong and the Employment

Connection should not simply be looked at in terms of time and causation, rather it is a matter of the substance on the facts. Conscious and malicious disclosure of unlawfully captured data on his own computer could not be construed as part of the employee's authorised function. It was established law that, even where carrying on acts of a similar kind to those authorised in employment, the context could stray so far from that authorisation such that the employer would not be liable.<sup>141</sup> In short, is the employee furthering his or her employer's business 'however misguidedly'<sup>142</sup> or, conversely, acting as 'as stranger in relation to his employer',<sup>143</sup> that is with no connection to employment?

A number of Caribbean shooting cases which were decided in contrast served to illustrate the idea of connection (albeit that shootings are not, hopefully, the most relevant of situations to most). In *Attorney General of the British Virgin Islands v Hartwell*<sup>144</sup> the employer was *not* vicariously liable when a policeman injured a bystander when shooting at his partner and a man she was with at the bar where she worked as a waitress. He was taken to have departed from his employment and was on a personal vendetta. Similarly, in *Brown v Robinson*<sup>145</sup> when a security guard shot a man trying to get into a football match in Kingston, Jamaica, and the victim had his hands up at the time, it was found to be acting so far outside any authorised mode of carrying out work such that the employer was

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<sup>139</sup> *WM Morrison* (n 1) [17].

<sup>140</sup> See *Lister v Hesley Hall Ltd* (n 29); see also *E* (n 70).

<sup>141</sup> *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1981] UKPC 30.

<sup>142</sup> *Hamlyn v John Houston & Co* [1903] 1 KB 81(CA).

<sup>143</sup> *Bugge v Brown* [1919] 26 CLR 110 (High Court of Australia).

<sup>144</sup> [2004] UKPC 12.

<sup>145</sup> [2014] UKPC 56.

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not liable. Contrast *Bernard v Attorney General of Jamaica*<sup>146</sup> where the victim was shot by a policeman when he refused the policeman access to a telephone. The shot in the head at point blank range came after a scuffle and when hospitalised, the policeman went to arrest him for assaulting a police officer. Whilst clearly not carrying out his duties in a proper fashion, this was held to be in the course of employment. These three cases clearly show that a close reading of the facts is required, along with the law.

A recent Court of Appeal case also found significant violence still to be ‘in the course of employment’. In *Bellman v Northampton Recruitment Ltd*,<sup>147</sup> a managing director left a member of staff severely brain damaged after an assault at an office Christmas party. Due to the nature of the event, the discussions taking place at the time, and the conduct of the MD in asserting his role at the event, there was found to be an adequate connection between the event and the employment.

### c. Motive

Lord Reed found that the motive *is* relevant when it is clear that the activity in question is solely for personal reasons.

### The Decision

Morrison’s were held *not* to be liable for the significant data breaches carried out wilfully by a disgruntled employee, overturning the preceding hearings in the High Court and Court of Appeal.

(There was an additional question as to whether breaches of data protection legislation were expressly excluded from vicarious actions. It was found that they were not.)

## EMPLOYMENT LAW DEVELOPMENTS AND ‘WORKERS’

The law has developed (or, as Atiyah<sup>148</sup> put it so well, been ‘stretched’<sup>149</sup>) considerably in scope, if not in fundamental principle (for example with the child welfare and sexual offences cases) and although both Lord Phillips and Lord Reed have

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<sup>146</sup> [2004] UKPC 47.

<sup>147</sup> [2018] EWCA Civ 2214.

<sup>148</sup> Patrick Atiyah (1931–2018), Professor of Law at the Australian National University (1970–73), University of Warwick (1973–77) and of English Law at the University of Oxford (1977–88).

<sup>149</sup> PS Atiyah, *The Damages Lottery* (Hart Publishing 1997) ch 2: ‘How the Law Has Been Stretched’; ch 3: ‘More Stretching of the Law’.

noted relatively recently that, respectively, the law ‘is on the move’<sup>150</sup> and has ‘not yet come to a stop’,<sup>151</sup> still there is a brake. Usefully, in the light of s230(3) Employment Rights Act 1996 and a number of recent employment law cases<sup>152</sup> where there might have been a temptation to sweep up a whole category of perpetrators<sup>153</sup> (rather than operating on a case by case basis), Lady Hale indicated in *Barclays* that the idea of a ‘worker’ (i.e. someone other than an employee but with some although, of course, not all, employment rights) being embraced wholesale into a sense of being able to ascribe vicarious liability for the wrongs of a whole range of non-employees, would be ‘going too far down the road to tidiness’.<sup>154</sup> And it would, to pick up Atiyah’s thinking, be evidence of extending the law to help the individual claimant in front of the court, rather than a coherent development of principle.<sup>155</sup>

## PRACTICAL APPLICATION

Clearly with employees, the position is guarded against with insurance and good recruitment and management practices to help avoid (as far as is humanly possible!) the worst of behaviours amongst one’s staff. Of more concern is whether there could be liability for sub-contractors or others not employed. The cases would indicate that only where there is an unusually close relationship would this be held. Clearly councils and foster carers, church bodies and priests and the like may be of little concern in business life, equestrian or otherwise. But, whilst Lady Hale was at pains to stress that employment law is not to be taken as having swept up the law of vicarious liability, where there are non-employees classed as workers, or what the court might consider to be employees erroneously classified as self-employed, then there might be scope for liability. And it is in those situations where insurance may be found to be lacking. Perhaps ironically, although the law has

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<sup>150</sup> *Christian Brothers case* (n 57) [19].

<sup>151</sup> *Cox* (n 58) [1].

<sup>152</sup> Perhaps most famously *Pimlico Plumbers Ltd* (n 78); but, see also *Bates van Winkelhof* (n 77).

<sup>153</sup> See *Butlin and Allen* (n 82).

<sup>154</sup> *Barclays* (n 2) [29].

<sup>155</sup> For those looking for a comparative view from another common law jurisdiction, the Goudkamp and Plunkett (2017) review of *Prince Alfred College v ADC* [2016] HCA 37 (High Court of Australia) is a useful read: J Goudkamp and J Plunkett, ‘Vicarious liability in Australia: on the move?’ (2017) 17 *Oxford University Commonwealth Law Journal* 162; along with P Giliker, ‘Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective’ (2018) 6 *The Chinese Journal of Comparative Law* 265.

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developed, in part, to ensure victim recompense due to employer’s deeper pockets and insurance, a lack of insurance is, of course, no defence at all.<sup>156</sup> Whether in this context or other matters such as taxation or health and safety, there is a very considerable financial risk in calling people self-employed if that is not genuinely the case. It will, however, continue to be rare where a relationship ‘akin’ to employment is found.

### IMPLICATIONS OF THE RECENT DECISIONS

So we are left with a foundation perhaps little fundamentally changed in two centuries and more. Per Lady Hale in *Woodland*:

The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case.<sup>157</sup>

And *Barclays* and *Morrison* add to a growing body of case law which has extended application of the law by increments into wider spheres to allow us to determine whether a defendant can be held vicariously responsible for someone *other* than an employee and whether a wrongdoer is acting in the course of employment. This, hopefully, allows the law to develop, drawing on Lady Hale’s expression of the operation of the common law, to meet new situations, but not in an unbridled and unprincipled way.

In three final observations:

Firstly, the recent Supreme Court cases might give some comfort to employers, in the courts being willing to explore the facts thoughtfully rather than to glibly throw the blanket of vicarious liability over a situation due to perceived policy-driven benefits of ascribing liability to the more able payer.

On the relationship between the parties, *Barclays* shows that the courts have certainly not reached a fluid and unprincipled extension of the law to cover non-employees and that there must be a doctrinal basis for such a conclusion. Is the law narrower than before? Would cases such as *Christian Brothers* or *Armes* be decided differently now? Unlikely, in that those cases showed a clear and close relationships between the parties, along with vulnerable victims, albeit not

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<sup>156</sup> Although for a consideration of how insurance might influence the outcome of cases in practice, and a model for the future see Gerhard Wagner, *Tort Law and Liability Insurance* (Springer 2009).

<sup>157</sup> *Woodland* (n 87) [28].

employment. In *Barclays* there was an *ad hoc* and arms-length relationship with the doctor clearly not critically integral to the business of the bank.

On the nature of the wrong, *Morrison* is, perhaps, no more than an application of the long-established law regarding an employee being on a frolic of his own. But the Court of Appeal and High Court judgments highlight the scope for finding in the alternative.

Secondly, although in *Barclays* and *Morrison* neither defendant was found liable, care must, of course, be taken to ensure that all persons engaged in business are appropriately classified and directed, supervised and insured accordingly. It is false economy to attempt to avoid employment obligations through artificial labels not reflecting reality.

Finally, the considerable number of 21st century Supreme Court cases (particularly, but not exclusively, *WM Morrison* and *Barclays*) pay for a careful reading of their bases of decisions making and, often, their rejection of the reasonings of lower courts.