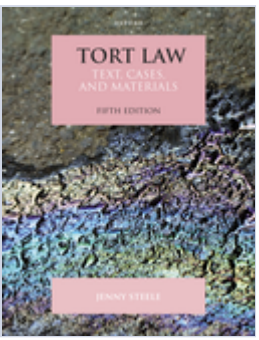


Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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# 10. Vicarious Liability and Non-Delegable Duties

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## Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter explores vicarious liability, a form of secondary liability which operates most often in the employment context, and non-delegable duties. It begins by outlining the nature and structure of vicarious liability before turning to two requirements of sufficient relationship and sufficient connection with the tort. It then explains possible justifications for vicarious liability, the relationship criterion, and the notion of 'close connection' as it has been developed through key recent cases.

**Keywords:** vicarious liability, secondary liability, employment, non-delegable duties, tort, relationship, close connection, court cases

## Central Issues

i) Vicarious liability is a form of secondary liability, imposed on one person for the tort of another. The tortfeasor remains potentially liable, so that a claim may in principle be brought against either party; but typically, the vicariously liable party is better able to satisfy the judgment.

ii) Vicarious liability depends on two types of connection: first, the **relationship between tortfeasor and defendant** (explored in Section 1.4); and second, the **connection between this relationship, and the tort committed** (explored in Section 1.5). These are referred to as the 'two limbs' of vicarious liability. Both tests have been extensively redefined in recent years.

iii) Vicarious liability for the tort of an employee has long been recognized. It is now also recognized, however, that some relationships falling short of employment will suffice: these are relationships 'akin to employment'. It remains the case that if the person committing the tort is classified as an 'independent contractor' or regarded as part of an 'independent business', there will be no vicarious liability.

iv) Turning to the necessary connection between the parties' relationship, and the tort (Section 1.5), the question is now whether there was a sufficiently **close connection** between the tort, and the employment or other relationship. This test has displaced the narrower question of whether the tort was committed **in the course of employment.**

v) Under some circumstances, parties are subject to **non-delegable duties** to another (Section 2). This means that although *tasks* creating certain risks can appropriately be delegated to others, *duties* in respect of those risks cannot. This is different from vicarious liability because it gives rise to liability for the breach of one's own duty, even if the fault is that of another. It is a form of primary (or 'personal') liability. The UK Supreme Court has recognized that such a duty may be owed by a school to its pupils.

vi) There are also other ways in which primary liability may be imposed on a person whose independent contractor has committed a tort. For example, carelessly selecting or (if relevant) failing to supervise a contractor or employee may involve a breach of one's own duty of care. This should be kept distinct from vicarious liability.

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## 1 Vicarious Liability

This section of the chapter explores vicarious liability. In Section 1.1, we begin by identifying the nature of vicarious liability, and outline the existence of two requirements of sufficient relationship, and sufficient connection with the tort. In Section 1.2, we turn to possible justifications for this form of liability, and explain the direct importance of such justifications as the law currently stands. In Section 1.3, we address the relationship criterion (the first limb); and in Section 1.4 we explore the notion of 'close connection' (the second limb). Both have developed over recent years, permitting a general expansion in the realm of vicarious liability. However, in relation to both limbs, recent decisions of the Supreme Court have emphasized that there are boundaries to vicarious liability, even if the exact location of this boundary remains uncertain.

## 1.1 Nature and Structure

Vicarious liability operates most often in the employment context and (now) extends to some analogous relationships. Under this principle, an employer will be liable for the tort of his or her employee, provided that tort is sufficiently connected with the individual's employment. Significantly, it is now recognized that vicarious liability may also operate even where the parties' relationship falls short of a relationship of employment, provided the core features of the employment relationship of relevance to vicarious liability are present: the relationship is described as 'akin to employment'.[1] The principle is not confined to negligence but is general: it extends both to intentional torts and to statutory liability. Other instances of vicarious liability also exist. An example is liability within a partnership for the torts of a partner.[2]

It is sometimes said that another instance of vicarious liability is the liability of a principal for the torts of his or her agent. An 'agent' in this context generally means someone who is vested with 'authority' (though this may only be ostensible) to enter into legal relations on the part of the principal. Although strict liability for the torts of an agent undoubtedly does exist, it has been doubted whether this form of strict liability is genuinely a form of 'vicarious' liability.[3]

### Secondary Liability

Attempts have been made to explain the doctrine of vicarious liability by suggesting that the tort is really that of the vicariously liable party, which is to say (in an employment context) the 'employer'.[4] It is suggested, however, that the better view is that the employee commits a tort; but the employer is liable.[5] That is the view taken in recent decisions of the UK Supreme Court.

p. 605 **Lord Sumption, *Woodland v Swimming Teachers Association***
[2013] UKSC 66

> 3 In principle, liability in tort depends on proof of personal breach of duty. To that principle, there is at common law only one true exception, namely vicarious liability. Where a defendant is vicariously liable for the tort of another, he commits no tort himself and may not even owe the relevant duty, but is held liable as a matter of public policy for the tort of the other …

Vicarious liability is essential to the liability in tort of corporations and other organisations. While it is in one sense 'exceptional' (liability for the tort of another), without it there would be little tort liability on the part of organisations. It is, therefore, a key element in the law of tort, even when it is not much thought about. In *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [34], Lord Phillips remarked that 'in the majority of modern cases, the defendant is not an individual but a corporate entity. In most of them vicarious liability is likely to be the basis on which the defendant was sued'. The point is that a corporate defendant can commit most torts only through others. Its liabilities are usually secondary. On some, defined occasions, the acts of an individual may instead be 'attributed to' the company. This may be the case, for example, where a company's officers act 'as' the company. The point is that in cases of vicarious liability, the torts of the employee are not attributed to the company, and that the restrictive rules on attribution do not apply. In the case of an intentional tort, this may make all the difference to whether the company can recover its liabilities

from its insurance company, for insurance policies will generally not respond to cover harms, or liabilities arising from harms, intentionally caused by the assured. That is outside the purpose of insurance generally, and may also be contrary to public policy.[6] There remains the possibility that the field of non-delegable duties could expand, to broaden the scope of organisational liability,[7] but this is currently not the way that the law is developing.

## 1.2 Justifications for Vicarious Liability

Justifications have become particularly important in the 'new ballgame'[8] of vicarious liability. That is because the Supreme Court in *Various Claimants* declared that the first requirement for establishing vicarious liability —that there is a sufficient relationship between tortfeasor and potentially vicariously liable party—will be assessed in relation to the underlying rationale for such liability. More recently, in *Barclays Bank v Various Claimants* [2020] UKSC 13, the Supreme Court has underlined that not every case will require direct recourse to the policy rationales, and that most will be capable of being resolved by focusing on the nature of the relationship and its closeness to employment, with the policy factors (below) being needed in doubtful cases. Naturally, they were needed (on this logic) to achieve the extension in *Various Claimants* itself.

p. 606 ↵ In the next extract, we see how Lord Phillips framed the relevant justifications in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56. The Supreme Court here accepted the existence of a range of policy concerns ([35]), despite the apparent identification of an overriding concern with compensation ([34]). These have remained influential.

**Lord Phillips, *Various Claimants v Catholic Child Welfare Society***

> 34 … The policy objective underlying vicarious liability is to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim. Such defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread. It is for the court to identify the policy reasons why it is fair, just and reasonable to impose vicarious liability and to lay down the criteria that must be shown to be satisfied in order to establish vicarious liability. Where the criteria are satisfied the policy reasons for imposing the liability should apply. As Lord Hobhouse of Woodborough pointed out in the *Lister case* [2002] 1 AC 215, para 60, the policy reasons are not the same as the criteria. One cannot, however, consider the one without the other and the two sometimes overlap.
>
> 35 The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (v) the employee will, to a greater or lesser degree, have been under the control of the employer.

In *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660, the Supreme Court doubted the significance of the first and fifth factors.

**Lord Reed JSC, *Cox v Ministry of Justice***

> 20 The five factors which Lord Phillips PSC mentioned in para 35 are not all equally significant. The first—that the defendant is more likely than the tortfeasor to have the means to compensate the victim, and can be expected to have insured against vicarious liability—did not feature in the remainder of the judgment, and is unlikely to be of independent significance in most cases. It is, of course, true that where an individual is employed under a contract of employment, his employer is likely to have a deeper pocket, and can in any event be expected to have insured against vicarious liability. Neither of these, however, is a principled justification for imposing vicarious liability. The mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves. On the
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> p. 607
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> other hand, given the infinite variety of circumstances in which the question of vicarious liability might arise, it cannot be ruled out that there might be circumstances in which the absence or unavailability of insurance, or other means of meeting a potential liability, might be a relevant consideration.
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> 21 The fifth of the factors—that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant—no longer has the significance that it was sometimes considered to have in the past, as Lord Phillips PSC immediately made clear. …

It is suggested that in downplaying the first of Lord Phillips' points, the Supreme Court rejected one of the primary reasons why vicarious liability is necessary. And indeed, Lord Reed himself seems to have resurrected both this factor, and the 'control' factor, in the subsequent decision in *Armes v Nottinghamshire Council* [2017] UKSC 60, extracted in Section 1.4. Perhaps it is safest to conclude that the significance of these factors will depend on the particular context of the case.

In any event, the expectation that the defendant is more likely than the tortfeasor to be able to compensate the victim of tort—partly because of the greater capacity to insure—has played a significant role in proposed justifications for the existence of the principle. Certainly, it need not be the sole reason, and indeed the effect of justifications for vicarious liability is often seen as cumulative:

**P. S. Atiyah, *Vicarious Liability in the Law of Tort* (Butterworths, 1967), at 15**

> In a complex modern society the justification for a particular legal principle may frequently have to be sought in many considerations. None of them taken by itself may be a sufficient reason for the principle, but the combined effect of all of them may be overwhelming.
>
> Of course this means that in any particular case where some of the factors put forward in justification are present and others are not, some sort of balancing operation needs to be made, but this is itself a familiar part of the legal process.

## Justice Arguments

At first sight, it is strange to offer arguments of justice for holding someone liable for the torts of another. But there are respectable justice arguments to this effect. In particular, it is said that the defendant should take the *risk* of harm, either because she or he takes the *benefit* of the activity that creates that risk, or because of his or her role in creating the risk.[9] This argument can be described as a theory of enterprise risk, of a moral rather than an economic sort. That is to say, the enterprise should take on the risks it creates and from which it benefits; it is not fair and just that these risks should be passed to others. This justice argument does not depend on saying that there is anything 'wrong' with creating the risk. Further, this approach can be used to justify liability attached to 'normal' risks inherent in an enterprise, and does not require that the defendant
p. 608 should have 'enhanced' those inherent risks in any ↵ way.[10] As Lord Toulson put it in *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11; [2016] AC 677 (para [40]), 'The risk of an employee misusing his position is one of life's unavoidable facts', and there is no need to examine retrospectively the degree to which the employee would have been considered to present a risk.

An alternative, *economic* variant of 'enterprise risk' is sometimes encountered. The idea here is that the costs of an enterprise ought to be 'internalized' in order to stimulate the most *efficient* level of risk-taking. If the enterprise is able to place the risks on another, then it will be tempted to take risks which are not socially efficient, because they come at no cost. This economic variant has not been fully addressed in the recent case law on vicarious liability. It is the moral version that has been emphasized.

This justification seems not to explain why there is *no* vicarious liability for the torts of independent contractors. Liability whenever I 'benefit from' a risk would be very far-reaching since I benefit from many risks. One answer to this is that independent contractors, being independent and working for their own profit, form their own separate 'enterprise': 'it is the contractor who is the *entrepreneur*'.[11] To develop this point, those who are not considered part of the defendant's business may, though not independent contractors themselves, be judged to be part of the business of another. In other words, although enterprise risk *could* justify imposing broad vicarious liability, there are reasons why we might choose to draw the line here. Glanville Williams adds a practical argument, that liability for contractors would simply be inconvenient. It would multiply the number of parties against whom an action may be brought and increase expense and uncertainty.

In the context of modern employment relationships, many non-employees are not really 'entrepreneurs'. For example, some are part of a shifting and informal workforce: see the discussion by E. McKendrick, 'Vicarious Liability and Independent Contractors—A Reexamination' (1990) 53 MLR 770. This altered context has been recognized by the courts in the development of vicarious liability to extend beyond the employment relationship. In *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11; [2016] AC 677, Lord Dyson suggested that changes in the type of relationship to which vicarious liability is now recognized to apply 'have been a response to changes in the legal relationships between enterprises and members of their workforces and the increasing complexity and sophistication of the organization of enterprises in the modern world'. None of this undermines enterprise risk justifications; rather, it shows how important such justifications may be in considering the appropriate response to current changes.[12] Courts have ceased to assume that if someone performing work for another is not strictly their employee, they should necessarily be defined as an 'independent contractor' for purposes of vicarious liability. Nevertheless, there will be some contractors who

do not form part of the 'workforce', and are genuinely independent contractors (as was the case in *Barclays Bank v Various Claimants*). Arguably then, the law is responding to societal challenges and drawing the lines differently as a consequence.

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## Incentive and Deterrence Arguments

The argument from deterrence is that the employer has the *opportunity* to increase standards of safety, for example, through better procedures for selecting employees and for their supervision. Therefore, it is best if there is an *incentive* for him or her to do so, through liability for the employee's tort.

It is sometimes said that this argument does not explain why liability is justified in cases where the accident was unavoidable, in that all due care has been applied in selection of employee, maintenance of equipment, and so on. But this criticism is misplaced. Modern theories of regulation suggest that better outcomes will be achieved not by setting fixed standards, but by offering incentives through which the enterprise may *improve* safety standards. The deterrence theory is better expressed as an *incentive* theory: vicarious liability gives employers incentives to find ways to improve safety standards beyond those set by the standard of the 'reasonable person':

**McLachlin J, *Bazley v Curry***
[1999] 2 SCR 534

> Beyond 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.

Equally, and for the same reasons, the idea that an employer is in the best position to 'control' risks is not simply a covert reference to employer's 'fault'. Indeed any such reference would be most unhelpful as it would blur the distinction between vicarious and 'primary' liability. Rather, the incentive argument is general and prospective: liability on employers creates incentives to think up good ways of minimizing risks.

## Loss Spreading/Deep Pockets Arguments

The third set of justifications for vicarious liability focuses on the need to compensate victims of tortious conduct. Generally, the most promising route for compensation is through the liability of the employer. At its most basic, this is no more than a deep pockets argument: where funds are available, the best solution is to attach liability to the person with the ability to pay. Introducing *insurance* into the equation makes this into a more modern argument: the risk of harm should be managed by the defendant and spread through a risk-bearing community, not placed entirely upon the vulnerable claimant. This justification was described by Atiyah in 1967 as the dominant justification for vicarious liability among North American writers; and Atiyah himself concluded that the loss-spreading argument was broadly sound:

**P. S. Atiyah, *Vicarious Liability in the Law of Tort*, at 26**

> p. 610 ... it seems that in general the policy of placing the liability for the torts of the servants on their employers is broadly a sound one. It is sound simply because, by and large, it is the most convenient and efficient way of ensuring that persons injured in the course of business enterprises ↵ do not go uncompensated. Of course if all workmen insured themselves against third party risks, and if wages and salaries were slightly increased in order to allow workmen to do this, we could get on pretty well without vicarious liability at all. But this would not be so efficient or convenient a way of doing things simply because it would involve an enormous number of insurance policies instead of relatively few, with consequent increase in insurance costs. ...

In recent case law a 'pure' loss-spreading argument has typically not been accepted. Rather, loss-spreading has been combined with the first, justice-based form of justification explored above. This approach—of combining the two—was propounded by the late John Fleming (*Law of Torts*, 9th edn, Law Book Company, 1998, 409–10) and endorsed by the Supreme Court of Canada in *Bazley v Curry*. It is almost the reverse of Atiyah's position since he doubted whether vicarious liability was in fact the most *equitable* means of spreading losses, even though he accepted that it was a convenient and efficient one. He doubted its fairness because risks often are contributed to by many people: there is no single 'risk creator'.[13]

In conclusion, vicarious liability is best justified at the intersection of all three of the reasons above. Judgments often contain references to (apparently) different concerns, such as loss spreading and also 'fairness'. These justifications are not necessarily in conflict. In *Viasystems v Thermal Transfer* [2006] 2 WLR 428, Rix LJ used judicial shorthand to encapsulate this when he said that vicarious liability applies where it is 'fair, just, and convenient' for it to do so. This is not to say, of course, that this question is typically asked without reference to legal concepts and authorities. Rather, this is the underlying goal of the concepts devised in the recent case law.

## 1.3 Distinguishing the Two Limbs

It has long been recognized that there are two limbs to determining whether a party is vicariously liable; but the nature of each of these, and their interaction, have been progressively redefined. The first requires examination of the relationship between the defendant and the tortfeasor. Previously, in an employment-type case, it would have been asked whether there was a contract of employment; but the test is no longer so confined. The second requires assessment of the link between *this relationship*, and the tort committed: is there a sufficiently *close connection*? Previously, it would have been asked whether the tort was committed 'in the course of employment' (an expression which itself gave rise to plenty of case law). The 'course of employment' remains relevant in the sense that it is *sufficient* for the tort to be committed in the course of employment; but of course, this is no longer the sole means of showing the connection. A further change in the law is that there is now recognized to be a 'synthesis' between these two limbs:

**Lord Phillips, *Various Claimants v Catholic Child Welfare Society***
[2012] UKSC 56; [2013] 2 AC 1

> 21. … At para 37 of his judgment in this case, Hughes LJ rightly observed that the test requires a synthesis of two stages: (i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (ii) Hughes LJ identified the second stage as requiring examination of the connection between D2 and the act or omission of D1. This is not entirely correct. What is critical at the second stage is the connection that links *the relationship between D1 and D2* and the act or omission of D1, hence the synthesis of the two stages.

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## 1.4 Relationship Between Tortfeasor and Defendant: For Whose Torts? The First Limb

In a case involving employment, it has traditionally been asked whether the person committing the tort was an 'employee' of the defendant. If not an employee, the person concerned would be an 'independent contractor'. These were the two available categories. This division remains significant, but it is no longer necessary to seek a formal relationship of 'employment', for all purposes, between the parties. It still must be asked whether the tortfeasor is best seen as an independent contractor, separate from the defendant organization (as was the in *Barclays Bank v Various Claimants*). But if not, then it should be asked whether the relationship has the features which justify vicarious liability on the part of employers. Even if a tortfeasor is not an employee, their relationship may nevertheless be 'akin to employment', sufficient to give rise to vicarious liability. Independent contractors have been defined not merely as nonemployees, but as parties who are risk-bearers in their own right; so that there is no longer simply a binary division. It follows that some people who are not 'contractors' at all may be in a relationship sufficiently close to employment to satisfy the first limb; others will be neither contractors, nor sufficiently close to employees.

### Who is an Employee?

Even before the most recent developments, the question of who counts as an 'employee' was not decided by reference to any single authoritative test. In the following extract, Denning LJ explains that the traditional test for employment was one of **control**; that there are nevertheless many cases where the relationship is said to be one of employment despite the absence of control, for example, where the employee is skilled;[14] and that an alternative question is how far the individual is 'integrated into' the business of the 'employer'. Such discussions retain some significance in determining the nature of a relationship.

**Terminological note: a contract of service** is the sort of contract that is entered into between employer and employee; a **contract for services** is the sort of contract entered into when appointing an independent contractor. The distinction retains some significance even though the law has extended vicarious liability beyond the classic 'contract of service'.

**Denning LJ, *Stephenson, Jordan and Harrison Ltd v Macdonald & Evans* [1952] 69 RPC 10**

> p. 612 [This case] raises the troublesome question: What is the distinction between a contract of service and a contract for services? The test usually applied is whether the employer has the right to control the manner of doing the work. … But in *Cassidy v. The Ministry of Health* ↵ [1951] 2 K.B. 343, Somervell, L.J., at pp. 352–3, pointed out that that test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. Somervell, L.J., went on to say that 'One perhaps cannot get much beyond this "Was the contract a contract 'of service' within the meaning which an ordinary person would give under the words"?' I respectfully agree. As my Lord has said it is almost impossible to give a precise definition of the distinction. It is often quite easy to recognise a contract of service when you see it, but very difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to me to run through the instances is that, 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.

The integration test expressed in this passage did not displace the control test altogether. In *Ready Mixed Concrete v Ministry of Pensions and National Insurance* [1968] 2 QB 497, where the court was required to categorize an individual as an employee or contractor for the purposes of deciding obligation to pay national insurance contributions, MacKenna J argued that the control test was still the dominant test, but was not sufficient. Even if there is sufficient control, it must still be asked whether the terms of the contract as a whole were *consistent with* treating it as a 'contract of service'. For example:

> **MacKenna J, at 520–1**
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> If a man's activities have the character of a business, and if the question is whether he is carrying on the business for himself or for another, it must be relevant to consider which of the two owns the assets ('the ownership of the tools') and which bears the financial risk ('the chance of profit,' 'the risk of loss'). He who owns the assets and takes the risk is unlikely to be acting as an agent or a servant.

### 'Dual Employment'

What happens when the employee of one enterprise is 'hired' by another enterprise for a particular task (or for a period of time), and commits a tort while so engaged? Cases answering this question have helped to reshape vicarious liability itself.

*Mersey Docks and Harbour Board v Coggins* [1947] AC 1 remains a significant decision. The harbour authority (the 'Board') was the general employer of a crane operator. The Board let the crane—with its operator—to a firm of stevedores. The terms of the let provided that the crane operator would be the servant of the stevedores. Through negligent operation of the crane, injury was caused to a third party.

The House of Lords held that in these circumstances, the Board remained the employer of the crane operator. The agreement as to employment between the parties was not conclusive. The crane operator would only be regarded as employed by the stevedores if there was *clear evidence* that the employment *had been transferred* (Lord Macmillan, at 13).

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> **Lord Porter, at 17**
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> Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident. I cannot think that such a conclusion is to be drawn from the facts established. I would dismiss the appeal.

In *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437, the Court of Appeal emphasized that transfer of employment for different purposes may raise different issues. In this case, a 'borrowed' worker had been killed through the negligence of employees of the 'borrowing' company, Le Grands. Once Le Grands had compensated the widow of the deceased, should it be indemnified by its employers' liability insurer, on the basis that the deceased was, at the time, employed by Le Grands? Or should it be indemnified by its public liability insurer, whose policies excluded liability to employees? The Court of Appeal held that the contract of employment remained with the permanent employer, and it was therefore the public liability insurer who should indemnify Le Grands. But it was clear that all three judges in the Court of Appeal believed that Le Grands had 'control' over the work performed by the deceased and would have been vicariously liable for any torts he committed in the course of 'employment' with them. Transfer of employment for the purpose of vicarious liability is not dependent upon a new contract of service which would be recognized for all purposes.

The approach taken in *Denham* has influenced the more recent case law in respect of vicarious liability. Most significantly, tests applicable to one question (who should pay for the torts of a particular individual in particular circumstances?) may be different from the tests applicable in answering a different question (is the same individual an employee?).

## Viasystems v Thermal Transfer [2006] 2 WLR 428 (CA)

The full significance of this decision has only gradually emerged.

p. 614 **Ward LJ, *E v English Province of Our Lady of Charity***
[2012] EWCA Civ 938

> 60 … this decision of the Court of Appeal … will, I believe, come to be seen as something of a William Ellis moment where, perhaps unwittingly, their Lordships picked up the ball and ran with it thereby creating a whole new ballgame—vicarious liability even if there is strictly no employer/employee relationship.

In both *E*, and *Various Claimants*, the approach taken in *Viasystems* was taken up and developed. In *Viasystems* itself, the claimants had contracted with the first defendants to install air conditioning. The first defendants subcontracted ducting work to the second defendants. The second defendants hired a fitter and his mate from the third defendants, to work under the supervision of an employee of the second defendants. The fitter's mate negligently crawled through a duct, fractured a fire protection sprinkler system, and caused severe flooding to the factory. Which defendant would be considered his employer for the purposes of vicarious liability?

> **May LJ**
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> 16 … The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it.
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> …
>
> 18 The relevant negligent act was Darren Strang crawling through the duct. This was a foolish mistake on the spur of the moment. I have said that a central question is: who was entitled, *and perhaps in theory obliged*, to give orders as to how the work should or should not be done? Here there is no suggestion, on the facts found by the judge, that either Mr Horsley or Mr Megson had any real opportunity to prevent Darren's momentary foolishness. … Vicarious liability is liability imposed by a policy of the law upon a party who is not personally at fault. So the core question on the facts of this case is who was entitled, and in theory, if they had had the opportunity, obliged, so to control Darren as to stop him crawling through the duct. In my judgment, the only sensible answer to that question in this case is that both Mr Megson and Mr Horsley were entitled, and in theory obliged, to stop Darren's foolishness. Mr Megson was the fitter in charge of Darren. Mr Horsley was the foreman on the spot. They were both entitled and obliged to control Darren's work, including the act which was his negligence.

According to this approach, the test for employment is the entitlement to control. May LJ adds that there is (perhaps) an implied *obligation* to control. This idea of 'obligation' might give the false impression (firmly rejected by May LJ in the sentences that followed) that the liability of the employer is in some sense dependent on a *failure* to control. The test for employment in respect of a particular act is capacity to control. Capacity to control indicates (even if rather roughly) the party on whom it is fair and useful to impose vicarious liability. But liability itself flows from a breach of duty by the employee.

p. 615 ↵ May LJ concluded that both second and third defendants could be said to have an entitlement (and perhaps an obligation) to control Darren's actions. In principle therefore, they should both be regarded as employers. Before this case, there had long been an assumption that there could not be dual employment in respect of a single act. May LJ explained that this assumption stemmed from certain observations made by Littledale J in the case of *Laugher v Pointer* (1826) 5 B & C 547, and that there was no *binding* authority against dual employment for the purposes of vicarious liability. May LJ also pointed out that *Laugher* was decided at a time when the policy of the law was to avoid liability on the part of multiple parties. Given statutory provisions in the Law Reform (Contributory Negligence) Act 1945 and the Civil Liability (Contribution) Act 1978, this is clearly no longer the case. Since both defendants had sufficient control over the negligent party to be regarded as his employer, both would be vicariously liable. Their contribution under the Civil Liability (Contribution) Act 1978 was determined to be equal, a division regarded as inevitable given that neither employer could be said to be at fault.[15]

While agreeing that dual employment was established in this case, Rix LJ argued that 'control', though important, was not sufficient to act as a sole test for employment. Other 'structural and practical considerations' might also be relevant. In this context, he suggested, one needs to ask:

> 79 … whether or not the employee in question is so much part of the work business or organisation of both employers that it is just to make both employers answer for his negligence. What has to be recalled is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit.

Rix LJ therefore emphasized the underlying policy rationale of vicarious liability. Most presciently, he emphasized that the crucial issue is the *relationship* undertaken by the employer for his or her own benefit, and the obligations that may flow from this.

The two different approaches in *Viasystems* (control, and integration) were further considered in *Hawley v Luminar* [2006] EWCA Civ 18. A nightclub door steward, hired to keep order at the defendant's nightclub, punched the claimant and knocked him to the ground. He suffered severe brain damage. The defendant nightclub proprietor did not hire its own door staff directly, but contracted with ASE (now in liquidation),[16] to provide appropriate staff. Was Warren, who delivered the punch, to be regarded as an employee of Luminar
p. 616 (for whose purposes he kept order); of ASE (who contracted directly with him and with ↵ Luminar); or of both? The Court of Appeal held that it was Luminar—in whose business he was engaged at the time of the tort —who should be regarded as his sole employer.

Hallett LJ argued first that Luminar did not need to rely on the 'skill and expertise' of ASE in providing qualified door staff. They would be well capable of recruiting such staff themselves, and used the services of ASE 'partly as a device to get round employment laws' (at [74]). This approach has clear resonances with Ewan McKendrick's arguments for a more flexible and issue-specific approach to the definition of an employee.[17] Second, although ASE had 'undertaken to provide door staff who knew how to behave':

> … we find it impossible to accept the further argument that responsibility for controlling this sort of behaviour fell to ASE's staff, their head doorman and the area manager. (at [75])

Rather, 'detailed control' of the door staff was exercised by Luminar's management.

Further, Warren was present at the club, 'decked out' in Luminar uniform and taking instructions from Luminar's management, for two years. To customers and passers-by, he would be taken to be an employee of Luminar.

Whether the test applied was control (the approach of May LJ in *Viasystems*), or the wider question of whether Warren was 'embedded in' the business of Luminar (Rix LJ), the answer was the same: 'there has been effectively and substantially a transfer of control and responsibility from ASE to Luminar'.

Lord Phillips remarked in *Various Claimants* that this case could have been approached as a case of dual employment.

### ‘Akin to Employment’

The approach in *Denham* and *Viasystems* suggests that the category of ‘employee’ is defined partly by reference to the purpose of the legal rule being applied. In *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938,[18] Ward LJ suggested that in *Viasystems*, ‘function triumphed over form’ ([60]). In that particular case, a Roman Catholic priest was closer in his relationship to a religious trust to an employee, than to an independent contractor. The diocesan trust, not the priest, was the ‘risk bearer’.

This result was approved by the Supreme Court in the following significant case. The Supreme Court acknowledged the influence of the Court of Appeal’s analysis in *E*.

### Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 20

This case raised a question about the sharing of responsibility for acts of sexual abuse perpetrated by members of a religious teaching order. It had been determined at first instance and by the Court of Appeal that the diocesan bodies which were responsible under statute for management of the school at which the abuse took place were vicariously liable for acts of abuse which were perpetrated by various members of the order. The issue before the Supreme Court, where the tort claimants themselves played no part, was whether liability
p. 617 ↵ was to be shared between these bodies, and the defendant institute, which was a lay Roman Catholic order. So far as the claimants were concerned, liability on the part of the diocesan bodies sufficed. The Supreme Court concluded that although the abusers were not employees of the institute, the institute was nevertheless jointly vicariously liable with the diocesan bodies. The following passage sets out their conclusions as to the first limb.

**Lord Phillips (with whom all members of the Supreme Court agreed), *Various Claimants v Catholic Child***

***Welfare Society***

> 56 In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees. (i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.
>
> 57 The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.
>
> 58 Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of an employer and its employees.
>
> 59 Hughes LJ held [2010] EWCA Civ 1106 at [54] that the brothers no more acted on behalf of the institute 'than any member of a professional organisation who accepts employment with that status is acting on behalf of the organisation when he does his job'. I do not agree with this analysis. The business of the institute was not to train teachers or to confer status on them. It was to provide Christian teaching for boys. All members of the institute were united in that objective. The relationship between individual teacher brothers and the institute was directed to achieving that objective.
>
> 60 For these reasons I consider that the relationship between the teaching brothers and the institute was sufficiently akin to that of employer and employees to satisfy stage 1 of the test of vicarious liability.
>
> 61 There is a simpler analysis that leads to the conclusion that stage 1 was satisfied. Provided that a brother was acting for the common purpose of the brothers as an unincorporated association, the relationship between them would be sufficient to satisfy stage 1, just as in the case of the action of a member of a partnership. Had one of the brothers injured a pedestrian when negligently driving a vehicle owned by the institute in order to collect groceries for the community few would question that the institute was vicariously liable for his tort.

It will be seen how far function has floated free of form here. The reasons which justify vicarious liability for
p. 618 the torts of employees also yield the answers to the question whether a ↵ relationship is sufficiently close. That means that the test for a relationship akin to employment in relation to vicarious liability is a specific and 'tort-focused' enquiry. Employment for one purpose is not necessarily employment for another purpose.

### *Cox v Ministry of Justice* [2016] UKSC 10; [2016] AC 660

The claimant was injured while working as the catering manager in a prison. Her injury was caused through the negligence of a prisoner who was working on prison service pay. The Supreme Court resolved that the Ministry of Justice was vicariously liable for the torts of the prisoner. The approach in *Various Claimants* was not confined to some special category of case, for example, cases involving sexual abuse of children ([29]); and there was nothing in the particular nature of the relationship here which would lead *Various Claimants* to be distinguished. It is in no sense essential to the operation of vicarious liability that the defendant should seek to make a profit; nor do the interests of the defendant and the perpetrator have to be 'in alignment'. Lord Reed set out the 'five factors' identified in *Various Claimants*, but proposed that the first of these (ability to compensate the claimant and to spread losses) would rarely be directly applicable in reaching a decision in relation to vicarious liability.

### Armes v Nottinghamshire CC [2017] UKSC 60

In section 1.1 of this Chapter, we debated the rationale for vicarious liability. There, we set out Lord Phillip's five policy factors in *Various Claimants*, and extracted Lord Reed's later comments in *Cox*, to the effect that ability to compensate the claimant was rarely directly relevant. Despite these comments, Lord Reed treated questions of ability to pay as directly relevant in the next case.

The claimants argued that the defendant council was vicariously liable for abuse perpetrated by foster parents against children placed with them by the defendant Council. They also argued that the Council was under a non-delegable duty to the children, but the Supreme Court agreed with the courts below that no such non-delegable duty existed. This element is discussed in Section 2 of this chapter.

In relation to the vicarious liability claim, foster parents were plainly not employees of the Council. Was their relationship nevertheless 'akin to employment'? There was limited day to day control or supervision. The abuse occurred within the family home rather than in any premises operated by the Council (such as a children's home). In the judgment extracted below, it was pointed out that foster parents had little opportunity to secure insurance (particularly against their own abusive behaviour), and were unlikely to have deep pockets. The capacity to compensate the claimant seems to have been rehabilitated as a factor relevant to the decision. It appears below as the last of five factors recognisable from *Various Claimants*: integration, link to activities furthering purposes of the defendant, risk-creation, control, and compensation.

**Lord Reed, *Armes v Nottinghamshire CC***

## The five factors in the present case

59. Applying the approach adopted in *Cox's case* [2016] AC 660 <http://uk.westlaw.com/Document/I65B75A40E06211E59DDDADF5CA0D0D31/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> to the circumstances of the present case, and considering first the relationship between the activity of the foster parents and that of the local authority, the relevant activity
p. 619 of the local authority was the care of children who had been committed to their care. They were under a statutory duty to care for such children. In order to discharge that duty, in so far as it involved the provision of accommodation, maintenance and daily care, they recruited, selected and trained persons who were willing to accommodate, maintain and look after the children in their homes as foster parents, and inspected their homes before any placement was made. They paid allowances to the foster parents in order to defray their expenses, and provided the foster parents with such equipment as might be necessary. They also provided in-service training. The foster parents were expected to carry out their fostering in co-operation with local authority social workers, with whom they had at least monthly meetings. The local authority involved the foster parents in their decision-making concerning the children, and required them to co-operate with arrangements for contact with the children's families. In the light of these circumstances, the foster parents with which the present case is concerned cannot be regarded as carrying on an independent business of their own: such a characterisation would fail to reflect many important aspects of the arrangements.

60. Although the picture presented is not without complexity, nevertheless when considered as a whole it points towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services. If one stands back from the minutiae of daily life and considers the local authority's statutory responsibilities and the manner in which they were discharged, it is impossible to draw a sharp line between the activity of the local authority, who were responsible for the care of the child and the promotion of her welfare, and that of the foster parents, whom they recruited and trained, and with whom they placed the child, in order for her to receive care in the setting which they considered would best promote her welfare. In these circumstances, it can properly be said that the torts committed against the claimant were committed by the foster parents in the course of an activity carried on for the benefit of the local authority.

61. Considering next the issue of risk creation, the local authority's placement of children in their care with foster parents creates a relationship of authority and trust between the foster parents and the children, in circumstances where close control cannot be exercised by the local authority, and so renders the children particularly vulnerable to abuse. Although it is generally considered to be in the best interests of children in care that they should be placed in foster care, since most children benefit greatly from the experience of family life, it is

relevant to the imposition of vicarious liability that a particular risk of abuse is inherent in that choice. That is because, if the public bodies responsible for decision-making in relation to children in care consider it advantageous to place them in foster care, notwithstanding the inherent risk that some children may be abused, it may be considered fair that they should compensate the unfortunate children for whom that risk materialises, particularly bearing in mind that the children are under the protection of the local authority and have no control over the decision regarding their placement. In that way, the burden of a risk borne in the general interest is shared, rather than being borne solely by the victims.

62. So far as the issue of control is concerned, it was explained earlier that the local authority selected foster parents and inspected their homes prior to the placement of children with them. The local authority were required under the Regulations to arrange regular medical examinations of fostered children, to ensure that the children were regularly visited, to carry out regular reviews of their welfare, health, conduct and progress, and to remove them from the foster parents forthwith if the visitor considered that their health, safety or morals were endangered. It was also explained that foster parents had to agree that they would allow the children to be medically examined at such times and places as the local authority might require, that they would inform the local authority immediately of any serious occurrence affecting the children, that they would at all times permit any person authorised by the local authority to see the children and to visit their home, and that they would allow the children to be removed from their home when so requested by any person authorised by the local authority. It was explained that a number of aspects of the lives of children in foster care were decided by the local authority, reflecting the fact that it was the local authority, not the foster parents, which possessed parental powers in relation to the children. The arrangements made in practice for the monitoring of placements were described earlier. Accordingly, although the foster parents controlled the organisation and management of their household to the extent permitted by the relevant law and practice, and dealt with most aspects of the daily care of the children without immediate supervision, it would be mistaken to regard them as being in much the same position as ordinary parents. The local authority exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life. By virtue of those powers, the local authority exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met.

p. 620

63. In relation to the remaining issue, that of the ability to satisfy an award of damages, vicarious liability is only of practical relevance in situations where (1) the principal tortfeasor cannot be found or is not worth suing, and (2) the person sought to be made vicariously liable is able to compensate the victim of the tort. Those conditions are satisfied in the present context. Most foster parents have insufficient means to be able to meet a substantial award of damages, and are unlikely to have (or to be able to obtain) insurance against their own propensity to criminal behaviour. The local authorities which engage them can more easily compensate the victims of injuries which are often serious and long-lasting.

*Armes* represents a further step in the expansion of vicarious liability beyond the boundaries of immediate control and integration, and in this sense was a more significant decision than *Cox*, where day to day control was naturally more complete. The decision was seen as alarming by some commentators, appearing to signal an almost limitless expansion in vicarious liability.[19] And indeed, consideration of each one of the five factors was admitted to be complex and unclear. Could these factors ever be effective in defining a boundary in the range of relationships that give rise to vicarious liability?

In the next case, the Supreme Court emphasized that there continue to be limits to vicarious liability in relation to the first limb. There remains a category of cases where the tortfeasor is to be considered an 'independent contractor', for whose torts no vicarious liability is imposed. At the same time, the Supreme Court handed down another decision, relating to the second limb of vicarious liability, and again drawing some limits to what has been ongoing expansion (*WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12, extracted in the following Section), giving the impression of a concerted effort at limitation.

## Barclays Bank v Various Claimants [2020] UKSC 13; [2020] AC 973

The factual context of this case is set out in the extract below. Could the bank be liable for a series of sexual assaults carried out on successful job applicants by a doctor who was asked by the bank to make medical
p. 621 examinations, but whose work for the bank amounted to a ↵ very small element of his practice? The key aspect of the reasoning below relates to the status and applicability of the 'five factors' applied in *Armes* and derived from *Various Claimants* and *Cox*. As the Supreme Court explains, these are essentially policy factors which help to explain the law. Where a relationship can be clearly identified as involving an independent contractor, there is no need to consider the five factors: they are relevant only to 'uncertain' cases (such as *Armes*). While some have doubted the compatibility of *Armes* with this approach, there is a good argument that the foster parents in *Armes* are far removed from the traditional notion of an 'independent contractor' in the sense of an entrepreneur or risk taker; while the doctor in this case provided services for a number of clients, and resembles a traditional independent contractor. Where this is the case, there is no need for further scrutiny of the relationship in terms of the factors. The factors, therefore, are applicable only to relationships which do not fit the 'independent contractor' label.

**Baroness Hale (giving the judgment of the Court)**

> 27. The question … is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five 'incidents' identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers* [2013] 2 AC 1 <http://uk.westlaw.com/Document/ID0E3BBA033E111E29330CAD9B8CE3816/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, *Cox* [2016] AC 660 <http://uk.westlaw.com/Document/I65B75A40E06211E59DDDADF5CA0D0D31/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)> and *Armes* [2018] AC 355 <http://uk.westlaw.com/Document/I5181EBD0B42811E7B1E3EEE213366A7E/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.

## Application in this case

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

The case law developing this limb has not, therefore, destroyed the category of 'independent contractor'. Where a tortfeasor is genuinely carrying out a business on their own account, there is no need to consider the five factors, for the reason that the relationship is inherently not one that is 'akin to employment'.

p. 622 ↵ Not everybody has agreed that the decision in *Barclays* is a positive one in the development of vicarious liability. From the point of view of the claimants, they had no choice but to submit to examination by the tortfeasor as part and parcel of the recruitment process. In the extract below, Sir Richard Buxton (formerly of the Court of Appeal) suggests that the reference to long-established principles is overdone, and that the decision does not respond appropriately to changing employment practices.

**Sir Richard Buxton, 'Vicarious Liability in the Twenty-First Century' C.L.J. 2020, 79(2), 217–220**

> It was pointed out in the Supreme Court that the inviolability of the employer of an independent contractor is very long-standing law, reaching back at least to Baron Parke in *Quarman v Burnett* (1840) 151 E.R. 509. But Baron Parke was not living in a world where, to quote the Court of Appeal in *Barclays* [2018] EWCA Civ 1670, at [45], operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control; and where the business enterprises are different creatures from the elderly maiden ladies who were protected from liability in *Quarman v Burnett.* And it would seem simple justice that if law is allowing the business enterprise the various benefits of outsourcing, in particular avoiding responsibility for the welfare, insurance, holiday and sick pay of the people who operate the employer's business, by the same token the employer should bear the reasonable burden if such outsourcing goes wrong and the responsible contractor cannot be resorted to for compensation.
>
> This last condition is important as a limitation of the extent to which the employer is at risk, because it is well accepted that the actual tortfeasor should be sued first, and it is only when he cannot be found or is insolvent that vicarious liability comes into play: *Armes* [2018] A.C. 355, at [63]. But where that case does arise the independent contractor rule has a devastating effect on the claimant, as *Barclays* itself demonstrated. We are concerned not with the casual use of contractors, for instance in ad hoc transport or cleaning operations, but with the integration of the contractor in the employer's business. That was so in earlier cases such as *Cassidy* [1951] 2 K.B. 343, which confirmed the overall responsibility of a hospital for all aspects of its activities, and *Woodland* which generalized that approach in at least limited circumstances. Those cases addressed the reality of modern business practice, and the justice of making an operator liable, however, he outsources his actual operations. The relationship between Barclays and Dr Bates fell within that compass. Dr Bates was the only practitioner used by Barclays, was obliged to complete a pro forma report supplied by Barclays, and featured in the recruitment process on a regular and recurring basis.
>
> The Supreme Court thus had an opportunity to build on the earlier jurisprudence by holding that that the independent contractor rule, formulated in very different social circumstances, cannot prevail in the particular case when the contractor is part and parcel of, and integral part of, the employer's business. That that opportunity was not taken, indeed was rejected in detailed terms that do not admit of any modification or qualification, means that in this respect the law of vicarious liability departs from the realities of modern life.

This amounts to a warning against using 'legal categories' based on long-standing decisions, without regard to the realities of change since those decisions were reached. The suggestion is in effect that independent contractors too should be subject to analysis in terms of factors such as those recognized in *Cox* and *Armes*. It
p. 623 is also a reminder that the expansion in ↵ vicarious liability, striking though it is, is not purely an exercise in legal doctrine. Rather, it has responded to changing employment practices and the growth not only of casual employment, but also 'outsourcing'. Here there was a form of outsourcing that was consistent over time and not 'casual'.

## 1.5 ‘Close Connection’: The Second Limb

If it is established that the relationship between defendant and tortfeasor is sufficient to satisfy the first limb, it is still necessary to ask whether the particular tort committed is sufficiently closely connected to that relationship for vicarious liability to be justified. This statement of the second ‘limb’ of vicarious liability has only recently emerged. Traditionally, courts approached the question by asking whether the tort was committed ‘in the course of employment’. This was also referred to as *‘the Salmond test’*.

**Sir John Salmond, *Torts* (1st edn, 1907), at 83**

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised *mode* of doing some act authorised by the master.

In *Lister v Hesley Hall* [2002] 1 AC 215, a decision of the House of Lords, Lord Millett pointed out that Salmond’s statement is not beyond criticism. For one thing, the possibility in (a) is not an example of vicarious liability at all: if the tort is authorized, it is the tort of the master and not of the servant, so that there is simply no need for vicarious liability to apply. A second problem is that the possibility in (b) is not easily applied to a case like *Lister*, where the tortfeasor carries out assaults for his own personal gratification. In *Lister*, Lords Steyn, Clyde, and Millett all attached importance to a further element of Salmond’s exposition (at 83–4):

> But a master, as opposed to the 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.

They used this to justify a new approach, placing less emphasis on the idea of ‘unauthorized modes of performing a duty’, and more emphasis on the idea of **‘close connection’** with the employment. In subsequent case law, the meaning of this change has been developed further. To understand the origins of the change, we need to consider the decision of the Supreme Court of Canada in *Bazley v Curry*, which has influenced the development of English law.

### *Bazley v Curry* (1999) 2 SCR 534

The defendant Children’s Foundation operated residential care facilities for emotionally troubled children. One of the Foundation’s employees used his position to abuse children, and was ultimately convicted of sexual abuse of children including the respondent.

p. 624 ↵ At first instance, Lowry J attempted to apply the Salmond test. The employees carried out intimate duties such as bathing the children and putting them to bed. He held that abusing a child during these activities could be said to be an unauthorized mode of doing the relevant authorized act. Thus, the Foundation was vicariously liable. The British Columbia Court of Appeal upheld the decision but on different grounds.

Understandably, they felt that the Salmond test applied only very awkwardly to such a case. In the Supreme Court, McLachlin J agreed, adding that the decided case law was of little help. There was a need to return to first principles.

McLachlin's judgment outlines the most general issues (articulating the *policy concerns* that govern the whole of vicarious liability) and moves to the more specific (given these concerns, what *factors* help to decide the right outcome in a given case?).

> [29] … two fundamental concerns underlie the imposition of vicarious liability: (1) provision of a just and practical remedy for the harm; and (2) deterrence of future harm. While different formulations of the policy interests at stake may be made (for example, loss internalization is a hybrid of the two), I believe that these two ideas usefully embrace the main policy considerations that have been advanced.
>
> …
>
> [34] The policy grounds supporting the imposition of vicarious liability—fair compensation and deterrence—are related. The policy consideration of deterrence is linked to the policy consideration of fair compensation based on the employer's introduction or enhancement of a risk. The introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it.
>
> …
>
> [37] … the policy purposes are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong which justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the risk and/or deterrence.

The aim is for vicarious liability to be both 'fair' and 'useful'. The relevant test for when this will be so is closeness of connection. This in turn is explained in terms of 'introduction of risk'. However, introduction of risk is not a simple idea. The connection between employment and risk must be 'salient', and the employment of the tortfeasor must have made a 'material contribution' to the risk. The question here is whether the employment enhanced the risk *in a material way*, not simply *to a material extent*. The Supreme Court of Canada set out some factors which would help future courts to apply this rather complex test. In particular:

p. 625

> … (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered.
>
> ↵ These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

Since, in this case, the wrongful acts were related to intimacy which was inherent in the employer's enterprise, and given the power of the employee over the very vulnerable victim, vicarious liability for the intentional acts of abuse could be justified.

McLachlin J then considered whether there should be an exemption from these general rules where the defendant is a non-profit organization.[20] She rejected an argument that it would not be 'fair' to place responsibility on the defendant organization because of its valuable work, which was done for the benefit of the community. Liability may be fair, she said, from the point of view of the vulnerable victim, 'as between him and the institution that enhanced the risk'. This focuses upon a comparison between the victim, and the employer who introduced the risk. Second, McLachlin J argued that deterrence (or incentive) arguments were equally valid for non-profit organizations. Third, and finally, she addressed the general loss distribution arguments:

> [53] The third argument, essentially a variation on the first, is that vicarious liability will put many non-profit organizations out of business or make it difficult for them to carry on their good work. … In sum, attaching liability to charities like the Foundation will, in the long run, disadvantage society.

McLachlin J rejected this distributive argument, arguing that it smacks of 'crass and unsubstantiated utilitarianism' (at [54]). Yet, 'utilitarian' argument *in combination with fairness* was earlier treated as a persuasive reason for making a blameless defendant liable. This tends to illustrate Atiyah's point that where not all the justifying factors are present, there will be difficult questions of balance.

## The English Case Law from *Lister* to *Various Claimants*

### *Lister v Hesley Hall* [2001] UKHL 22; [2002] 1 AC 215

The claimants had been resident in a boarding house attached to a school owned and managed by the defendants. The warden of the boarding house, who was employed by the defendants, systematically abused
p. 626 children within his care. A claim that there was primary ↵ liability on the part of the defendants for their own negligence in the selection or supervision of the warden was rejected at first instance. The first instance judge also rejected a claim that the defendants could be vicariously liable for the acts of abuse committed by the warden, holding that these could not be said to come within the Salmond test for 'course of employment'. The judge nevertheless held that the defendants could be vicariously liable for the warden's *failure to report* his own acts and/or to report the harm suffered by the children, since his duties included these aspects of their welfare. This was, clearly, an artificial argument designed to evade the restrictions of the Salmond test. The Court of Appeal rejected it and held that there was no vicarious liability at all in this case. Both courts were bound by the earlier decision in *Trotman v North Yorkshire County Council* [1999] LGR 584 (CA).

In *Trotman*, the deputy headmaster of a special school sexually assaulted a pupil with whom he shared a bedroom on a foreign holiday. Butler-Sloss LJ applied the Salmond test, and concluded that the assault could not be said to be a mode of carrying out the teacher's duties. Rather, it was 'a negation of the duty of the council to look after children for whom it was responsible' (at 591).

The House of Lords in *Lister* overruled *Trotman v North Yorkshire CC* and held the defendants vicariously liable. Influenced by *Bazley v Curry*, the judgments set vicarious liability in a new direction by rephrasing the test for 'course of employment' in terms of 'close connection'. That test has been further developed in subsequent decisions. Although the decision was unanimous, there are important variations between the judgments. Lord Steyn's may be called the leading judgment in that Lord Hutton concurred with his reasoning as did Lord Hobhouse with the addition of some further observations. (As we will see some of these further observations tend to cloud the general picture.) Lord Millett's judgment has been the most influential, and is incompatible with that of Lord Hobhouse.

#### Lord Steyn, *Lister v Hesley Hall*

> 17 It is easy to accept the idea that where an employee acts for the benefit of his employer, or intends to do so, that is strong evidence that he was acting in the course of his employment. But until the decision of the House of Lords in *Lloyd v Grace, Smith & Co* [1912] AC 716 it was thought that vicarious liability could only be established if such requirements were satisfied. This was an overly restrictive view and hardly in tune with the needs of society. In *Lloyd v Grace, Smith & Co* it was laid to rest by the House of Lords. A firm of solicitors were held liable for the dishonesty of their managing clerk who persuaded a client to transfer property to him and then disposed of it for his own advantage. The decisive factor was that the client had been invited by the firm to deal with their managing clerk. This decision was a breakthrough: it finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit. On the other hand, an intense focus on the connection between the nature of the employment and the tort of the employee became necessary.

### The Relevant Test?

Lord Steyn was directly influenced by *Bazley v Curry*. He did not state in very clear terms what the content of the 'close connection' case would be; but he did state that the warden's acts of abuse were 'inextricably interwoven' with his duties. In *Lister* the defendants ran the school on a commercial basis, but there is no indication that this was considered relevant.

p. 627 ↵ Lord Hobhouse rejected the approach in *Bazley v Curry*. His expression of the relevant test seems to depart in certain important respects from the idea that in vicarious liability, the employee commits a tort but on grounds of justice and practicality, liability is imposed on the employer. Lord Hobhouse said that *the defendant itself* owed a duty to the children to guard their welfare since it had *assumed responsibility to them*. Hence the relationship between defendant (school) and claimant (child) is all-important. This duty the school had 'entrusted to' the warden, taking into account the terms of his employment. Thus, the *duty breached* is owed by the school: '[T] he employers' liability to the plaintiff is also that of a tortfeasor' (at [55]). This interpretation makes *Lister* a case of liability for the breach of a primary duty owed by the school, through the conduct of the employee to whom that duty had been entrusted. If we want to maintain any clarity in this area of law, this is better not referred to as 'vicarious liability'. It is essentially a non-delegable duty of the sort recognized by the UK Supreme Court in *Woodland v Essex*, extracted in the next section.

Lord Millett's approach was broader than the one adopted by the Supreme Court of Canada in *Bazley* and did not require close analysis of the precise duties of the employee. Instead he embraced the idea of liability for risks that are reasonably incidental to employment. Lord Millett's approach is drawn directly from ideas of loss distribution and enterprise risk, and has been very influential in subsequent case law.

## Which Tort?

Which tort formed the basis of liability in *Lister v Hesley Hall*? Clearly, the warden's acts amounted to a deliberate assault or 'trespass to the person' (Chapter 2). Lord Millett made clear (para [84]) that on his approach, where the employer 'stands in the shoes' of the tortfeasor, the employer's vicarious liability is *liability for the assaults*, and not for a negligent failure to take care of the boys. Lord Hobhouse as we have explained regarded the duty in this case as owed by the employer, and it seems that this must be a duty to take proper care of the vulnerable children. On his approach, *Lister* would be a case in negligence, despite the deliberate nature of the acts that breached the duty. Lord Steyn's judgment is quite unclear on this point, although he did expressly reserve judgment (at [29]) on the question of whether there might be an alternative action for the warden's failure to report his own wrongdoing and its effect on the children. This alternative action would, clearly, be in negligence.

The House of Lords seems not to have considered that the identification of the relevant tort would affect the limitation period which would apply to the action (Chapter 8). Subsequently, the fundamental importance of this issue (which tort?) became obvious. The House of Lords has now removed this difficulty, in *A v Hoare*. But at the same time, it has also made clear that on facts like those in *Lister* the most appropriate action is in respect of the abuse itself, and is therefore an action in trespass for which the employer may be vicariously liable.

## Developing the *Lister* Test

In *Dubai Aluminium v Salaam* [2003] 2 AC 366, the House of Lords adopted a passage (at [65]) in Atiyah's *Vicarious Liability* (p 171), which had also been cited by Lord Millett in *Lister v Hesley Hall* (at [107]):

> 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.

p. 628 ↵ In the case of criminal wrongdoing, there is vicarious liability if *the risk of wrongdoing* can *fairly be said* to be *reasonably incidental to* the employer's business. This is drawn directly from the 'enterprise risk' justification, and is not qualified by the artificial idea of 'material contribution to risk' employed in the Canadian decision of *Bazley v Curry*. In *Dubai Aluminium* itself, vicarious liability extended to a firm of solicitors where a fraud was committed by one individual partner. This was not an employment case since a partner is not an employee, partnership representing a special form of relationship defined in the Partnership Act 1890. Nevertheless, the applicable principles are the same as those applying to employees: the question is whether the fraud was perpetrated 'in the ordinary course of the firm's business'.[21]

## The Developing Law: Close Connection between What and What?

The cases above did not focus particularly clearly on the question of *what* must be connected to the tort. Since elaboration of this point in more recent cases, it is now recognized that while acts done in the course of employment (the traditional test) will trigger vicarious liability, beyond this, the relevant connection is between *the relationship between tortfeasor and defendant*, and *the commission of the tort*.

### Various Claimants v Catholic Child Welfare Society

Lord Hope has said that the growing recognition of widespread sexual abuse of children 'has presented the law of vicarious liability, once relatively well settled, with new challenges'.[22] The response to that challenge is particularly exemplified by the Supreme Court's decision in *Various Claimants*. We have already extracted this case, and outlined its context, in relation to the first limb. Earlier, we explained how the Supreme Court identified the relationship between the two limbs. The following extract relates to the close connection test at the second limb.

**Lord Phillips, *Various Claimants v Catholic Child Welfare Society***
[2012] UKSC 56; [2013] 2 AC 1

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

87 These are the criteria that establish the necessary 'close connection' between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.

p. 629

## This case

88 In this case both the necessary relationship between the brothers and the institute and the close connection between that relationship and the abuse committed at the school have been made out.

89 The relationship between the brothers and the institute was much closer to that of employment than the relationship between the priest and the bishop in *E's* case [2013] QB 722. The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. The brothers were subject to the directions as to their employment and the general supervision of the provincial, their superior within that hierarchical structure. But the relationship was not simply one akin to that of employer and employee. The business and mission of the institute was the common business and mission of every brother who was a member of it.

90 That business was the provision of a Christian education to boys. It was to achieve that mission that the brothers joined and remained members of the institute.

91 The relationship between the institute and the brothers enabled the institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's. The standing that the brothers enjoyed as members of the institute led the managers of that school to comply with the decisions of the institute as to who should fill that key position. It is particularly significant that the institute provided the headmasters, for the running of the school was largely carried out by the headmasters. The brother headmaster was almost always the director of the institute's community, living on the school premises. There was thus a very close connection between the relationship between the brothers and the institute and the employment of the brothers as teachers in the school.

> 92 Living cloistered on the school premises were vulnerable boys. They were triply vulnerable. They were vulnerable because they were children in a school; they were vulnerable because they were virtually prisoners in the school; and they were vulnerable because their personal histories made it even less likely that if they attempted to disclose what was happening to them they would be believed. The brother teachers were placed in the school to care for the educational and religious needs of these pupils. Abusing the boys in their care was diametrically opposed to those objectives but, paradoxically, that very fact was one of the factors that provided the necessary close connection between the abuse and the relationship between the brothers and the institute that gives rise to vicarious liability on the part of the latter.
>
> 93 There was a very close connection between the brother teachers' employment in the school and the sexual abuse that they committed, or must for present purposes be assumed to have committed. There was no Criminal Records Bureau at the time, but the risk of sexual abuse was recognised, as demonstrated by the prohibition on touching the children in the chapter in the rule dealing with chastity. No doubt the status of a brother was treated by the managers as an assurance that children could safely be entrusted to his care. The placement of brother teachers in St William's, a residential school in the precincts of which they also resided, greatly enhanced the risk of abuse by them if they had a propensity for such misconduct.
>
> 94 This is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the institute to share with the Middlesbrough defendants vicarious liability for the abuse committed by the brothers. I would allow this appeal.

p. 630 ↵ In *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677, counsel for the claimant sought to persuade the Supreme Court to depart from the 'close connection' test, and to adopt a test based upon whether a reasonable observer would have considered the employee to be acting in the capacity of a 'representative of' the employer at the time the tort was committed. The Supreme Court defended the 'close connection' test, but at the same time, reversing the Court of Appeal, found it sufficiently flexible for the claimant to succeed.

### Mohamud v Wm Morrison Supermarkets plc [2016] UKSC 11; [2016] AC 677

The claimant asked at the sales kiosk of a supermarket petrol station whether he could print some documents stored on a USB stick. He was subjected to racist, abusive and violent language by an employee of the defendant. The employee then followed the claimant to his car and subjected him to a violent physical attack. The motive was assumed to be racist and unconnected to the interests of the defendant employer. The Supreme Court argued that there was a close connection between the employment of the tortfeasor, and the attack on the claimant. Responding to enquiries was part of the employee's work, and there was an 'unbroken sequence of events' between his initial (albeit racist and abusive) response, and the physical assault. His conduct was thus sufficiently connected with the role entrusted to him.

Lord Toulson JSC traced this approach to the early days of vicarious liability, and to a number of eighteenth-century judgments of Holt CJ. Lord Toulson cited a number of decisions of Holt CJ in relation to negligence; fires; and deceit; and continued:

> **Lord Toulson JSC, *Mohamud v Wm Morrison Supermarkets plc***
>
> 15 Holt CJ gave the same explanation for the development of the principle in *Sir Robert Wayland's Case* (1707) 3 Salk 234:
>
> "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."

'At his peril' is the language used to denote strict liability, for example, under *Rylands v Fletcher* (Chapter 12): the risk that the employee is not honest more justly falls on the employer than on strangers.

On this basis, employers take the risk, so to speak, that the employees to whom they entrust work may prove to be 'bad eggs', so long as their wrongdoing is sufficiently closely connected to the jobs they are hired to do. Moreover, this is thought to express social justice; although the nature of the justice thereby achieved is not much spelled out beyond the sentiment of Holt CJ expresse. Subsequently, in the *WM Morrison Supermarkets v Various Claimants*, the Supreme Court has rowed back from the most general implications of this approach.

Returning to *Mohamud*, how did these principles apply to the present case?

> **Toulson CJ**
>
> The present case
>
> 47 In the present case it was Mr Khan's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed way and
> p. 631 ordering him to leave was inexcusable but within the field of activities assigned to him. What happened thereafter was an unbroken sequence of events. It was argued by the respondent and accepted by the judge that there ceased to be any significant connection between Mr Khan's employment and his behaviour towards the claimant onto the forecourt. I disagree for two reasons. First, I do not consider that it is right to regard him as having metaphorically taken off his uniform the moment he stepped from behind the counter. He was following up on what he had said to the claimant. It was a seamless episode. Secondly, when Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it.

Too much has sometimes been made of the notion of an 'unbroken sequence of events' in the above extract, with its possible implication of a causal link. The connection intended is evaluative: the key point is that the employee's actions continued to be connected with his employment, and were judged not to have become entirely personal despite his 'gross abuse' of his position. This point was emphasised by the Supreme Court in the next case, in which boundaries were reasserted in relation to the second limb. Some have argued that this is a 'reinterpretation' of Lord Toulson's judgment in *Mohamud*,[23] but it is certainly arguable (as the Supreme Court suggested) that his words have since been interpreted more broadly than he intended.

### WM Morrison Supermarkets v Various Claimants [2020] UKSC 12

The defendant was asked by auditors to provide a copy of its payroll data. A copy of the data was therefore sent to an employee, in order to pass it on to the external auditors. The employee copied the data and uploaded it onto a publicly accessible website. The employee sent the data to a number of national newspapers, with the intention of harming the defendant employer. The claimants, whose personal data had been disclosed, brought claims against the defendant for damages for breach of confidence and misuse of private information, on the basis of vicarious liability. The Supreme Court identified that in applying the 'close connection' test, the tortfeasor's motive was relevant. Here, the motive was to harm the defendant, and in such a case there was not a sufficiently close connection with the employment.[24] Cases where employees are directly engaged in a vendetta with the defendant employer occupy a rather narrow range—much more frequent are cases where

p. 632 the employee is simply pursuing his or her own agenda. Equally important therefore are the interpretation ↵ of *Mohamud*; and the apparent suggestion that cases of sexual abuse have been treated differently from other cases in order to 'tailor' the law.

In relation to *Mohamud* (see paras [25]–[26] in our extract), courts below had considered the decision to broaden the rules on vicarious liability, which the Supreme Court concluded here was not intended by Lord Toulson. Lord Reed's judgment in this respect follows a pattern which is common across a number of recent Supreme Court decisions: though the law may be explained, fundamentally, on policy grounds, courts should not simply state those policy grounds, but apply the existing authorities which give effect, through legal concepts and principles, to those policies. Lord Toulson was interpreted as doing essentially this. This is an arguable interpretation of his approach: indeed it was suggested above that he did not intend to introduce a rival approach based on direct causal chain.

More difficult is the suggestion that the authorities have treated cases of sexual abuse of children differently, through a more 'tailored' approach that may not be applied in other contexts (para [23]). If this is true, then the questions arise, why only sexual abuse, compared to other forms of abuse in similar settings? Why only sexual abuse of children? And why has this not been made clear before? Are there cases that are wrongly decided because this distinction has not been made, because they fall outside the 'tailored' approach? One condensed paragraph is not a firm foundation for any conclusion on this point. Perhaps it is safest to conclude that if there is indeed a separate set of cases to which a 'tailored' approach applies,[25] it seems this is determined by reference to factors that are 'particularly relevant to that form of wrongdoing', including the conferral of authority. That is not a neatly definable category.

Certainly, the Court's conclusions, in para [47] of the extract below, are expressed more broadly than cases where there is a specific desire to hurt the employer, covering cases where the tortfeasor had an 'individual agenda'. That, however, would make the decision incompatible with a wide range of vicarious liability decisions, including not only the abuse cases but also *Mohamud* itself. One would expect this, and the reasons, to be clearly flagged. For these reasons, it will not be particularly easy to follow *Morrisons* in future claims, despite its appeal to established principle. It was applied, for example, in *Trustees of the Barry Congregation of Jehova's Witnesses v BXB* [2021] EWCA Civ 356, where the Court of Appeal sought to 'tailor' an approach based on the particular circumstances, where the (adult) claimant had been raped by an elder within the defendant religious organization.

**Lord Reed**

23. [In *Dubai Aluminium v Salaam*] … Lord Nicholls identified the general principle ('the best general answer', as he said at para 23) applicable to vicarious liability arising out of a relationship of employment: the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That test was repeated in later cases such as *Bernard v Attorney General of Jamaica* [2005] IRLR 398 <http://uk.westlaw.com/Document/I73F6E9F0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, *Brown v Robinson* (2004) 65 WIR 258 and *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 <http://uk.westlaw.com/Document/ID04C5D30122F11DBAE1ED3CED11C8AFE/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>. As Lord Phillips noted in *Catholic Child Welfare Society* [2013] 2 AC 1 <http://uk.westlaw.com/Document/ID0E3BBA033E111E29330CAD9B8CE3816/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, paras 83 and 85, the close connection test has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused.

p. 633

24. The general principle set out by Lord Nicholls in *Dubai Aluminium*, like many other principles of the law of tort, has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words 'fairly and properly' are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent.

25. Having explained how the close connection case was expressed in *Lister* and elaborated in *Dubai Aluminium*, and having also explained that it had been applied in a number of subsequent cases at the highest level, Lord Toulson JSC summarised the present law in paras 44–46 of his judgment in *Mohamud* [2016] AC 677 <http://uk.westlaw.com/Document/I9AC5EB20E06C11E58FAB889BCE4AFF26/View/FullText.h

*tml?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*. 'In the simplest terms', he said, the court had to consider two matters. The first question was what functions or 'field of activities' had been entrusted by the employer to the employee. In other words, as Lord Nicholls put it in *Dubai Aluminium*, at para 23, it is necessary to identify the 'acts the … employee was authorised to do'. Secondly, Lord Toulson JSC said at para 45, 'the court must decide whether there was 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 which goes back to Holt CJ'. That statement, expressly put in the simplest terms, was more fully stated by Lord Nicholls in *Dubai Aluminium* [2003] 2 AC 366 *<http://uk.westlaw.com/Document/I9B82A9A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*, para 23: in a case concerned with vicarious liability arising out of a relationship of employment, the court generally has to decide whether the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. That statement of the law, endorsed in *Mohamud* and in several other decisions at the highest level, is authoritative.

26. Lord Toulson JSC was not suggesting any departure from the approach adopted in *Lister* and *Dubai Aluminium*. His position was the exact opposite. Nor was he suggesting that all that was involved in determining whether an employer was vicariously liable was for the court to consider whether there was a temporal or causal connection between the employment and the wrongdoing, and whether it was right for the employer to be held liable as a matter of social justice. Plainly, the close connection test is not merely a question of timing or causation, and the passage which Lord Toulson JSC cited from *Dubai Aluminium* makes it clear that vicarious liability for wrongdoing by an employee is not determined according to individual judges' sense of social justice. It is decided by orthodox common law reasoning, generally based on the application to the case before the court of the principle set out by Lord Nicholls at para 23 of *Dubai Aluminium*, in the light of the guidance to be derived from decided cases. In some cases, the answer may be clear. In others, inevitably, a finer judgment will be called for. 28. Read in context, Lord Toulson JSC's comments that there was 'an unbroken sequence of events', and that it was 'a seamless episode', were not directed towards the temporal or causal connection between the various events, but towards the capacity in which Mr Khan was acting when those events took place. Lord Toulson JSC was explaining why, in his view, Mr Khan was acting throughout the entire episode in the course of his employment. When he followed the motorist out of the kiosk and on to the forecourt, he was following up on what he had said to the motorist in the kiosk. He ordered the motorist to keep away from his employer's premises, and reinforced that order by committing the tort. In doing so, he was 'purporting to act about his employer's business'. As Lord Toulson JSC said, 'this was not something personal'.

p. 634

...

## Vicarious liability in the present case

31. It follows from the foregoing that the judge and the Court of Appeal misunderstood the principles governing vicarious liability in a number of relevant respects, of which the following were particularly important. First, the disclosure of the data on the internet did not form part of Skelton's functions or field of activities, in the sense in which those words were used by Lord Toulson JSC: it was not an act which he was authorised to do, as Lord Nicholls put it. Secondly, the fact that the five factors listed by Lord Phillips in *Catholic Child Welfare Society* [2013] 2 AC 1 *<http://uk.westlaw.com/Document/ID0E3BBA033E111E29330CAD9B8CE3816/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*, para 35 were all present was nothing to the point. Those factors were not concerned with the question whether the wrongdoing in question was so connected with the employment that vicarious liability ought to be imposed, but with the distinct question whether, in the case of wrongdoing committed by someone who was not an employee, the relationship between the wrongdoer and the defendant was sufficiently akin to employment as to be one to which the doctrine of vicarious liability should apply. Thirdly, although there was a close temporal link and an unbroken chain of causation linking the provision of the data to Skelton for the purpose of transmitting it to KPMG and his disclosing it on the internet, a temporal or causal connection does not in itself satisfy the close connection test. Fourthly, the reason why Skelton acted wrongfully was not irrelevant: on the contrary, whether he was acting on his employer's business or for purely personal reasons was highly material.

32. The question whether Morrisons is vicariously liable for Skelton's wrongdoing must therefore be considered afresh. Applying the general test laid down by Lord Nicholls in *Dubai Aluminium* [2003] 2 AC 366 *<http://uk.westlaw.com/Document/I9B82A9A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>*, para 23, the question is whether Skelton's disclosure of the data was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as done by him while acting in the ordinary course of his employment.

After reviewing a range of cases in which tortfeasors had acted for their own purposes, outside the sphere of sexual abuse, Lord Reed concluded:

> 47. All these examples illustrate the distinction drawn by Lord Nicholls in *Dubai Aluminium* [2003] 2 AC 366 <http://uk.westlaw.com/Document/I9B82A9A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.DocLink)>, para 32 between 'cases … where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a "frolic of his own", in the language of the time-honoured catch phrase'. In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal
> p. 635 vendetta, seeking vengeance for the disciplinary proceedings some months earlier. In those circumstances, applying the test laid down by Lord Nicholls in *Dubai Aluminium* in the light of the circumstances of the case and the relevant precedents, Skelton's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to third parties, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment.

## 2 Non-Delegable Duties

A 'non-delegable duty' cannot be passed on by entrusting its performance to others, whether employees or contractors. If the duty is breached, then even if the defendant has taken all due care, liability will attach to the defendant not vicariously, but as tortfeasor. The duty may be breached with or without fault on anyone's part.

The most well-established non-delegable duties in English tort law are those owed by an employer to his or her employees. At common law, these include duties to provide a safe place and system of work, with competent staff and safe equipment: *Wilsons and Clyde Coal v English* [1938] AC 57; *McDermid v Nash Dredging* [1987] AC 906. According to Williams,[26] these duties owe their origin to a gap in the protection offered by vicarious liability. Under the 'doctrine of common employment' (which has not formed any part of English law since the last traces of it were abolished in 1948),[27] it was considered that an employee could not be liable for careless injury to an employee of the same master. There could be no vicarious liability for servants' failure to discharge their duties to fellow employees in respect of safety. It has been convincingly suggested that outside the tort of negligence, such duties pose little or no problem. It is only the familiarity of the fault standard in negligence which makes them appear anomalous.[28] Perhaps then we should understand as chiefly applicable to negligence the problem pointed out by Williams, namely that there are no clear principles on which to determine which duties are delegable, which non-delegable. Williams traces this problem to the following statement of Lord Blackburn:

> **Lord Blackburn, *Dalton v Angus* (1881) 6 App Cas 740, at 829**
>
> a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

**Glanville Williams, 'Liability for Independent Contractors' (1956) CLJ 180, at 181**

> p. 636
>
> ... [Lord Blackburn's] doctrine of the nondelegability of the legal duty cannot have been intended to apply to every duty. He did not, however, say to which duties it did apply. The use made of the dictum in later cases has advanced it to the rank of one of the leading sophistries ↵ in the law of tort. Since the judge is left to determine, within the limits of precedent, whether a particular duty is non-delegable or not, the dictum gives him freedom to decide the case as he wishes, while presenting him with a verbal 'reason' that conceals his real motivation; and sometimes perhaps it operates as a hypnotic formula inducing the judge to think that he is required to reach a particular conclusion when in fact he is not.

A sceptical view of non-delegable duties as a mere 'device' may be reinforced by the case of *Honeywill & Stein v Larkin* [1934] 1 KB 191, which stated that a person undertaking an 'extra-hazardous activity' will be subject to a non-delegable duty. In that case, it was held that the act of taking a photograph in a theatre with magnesium powder amounted to such an 'extra hazardous' or dangerous act, that the person hiring the photographer could be liable where the act was done without due care. Williams argued that this decision was justified neither in terms of principle, since there was nothing so special about this undertaking that would truly set it apart as exceptional, nor in terms of policy. For the most part, cinema owners would be expected to carry insurance policies covering fire, so that the need for liability was not established.

In *Biffa Waste* [2008] EWCA Civ 1238, which was concerned with welding activities at a recycling plant, *Honeywill* was confined to its facts:

> 85 At the beginning of this judgment we described the bases of liability in question in this appeal as exceptional. Indeed, in our judgment, the principle in *Honeywill* is anomalous. It is important that it is understood that its application is truly exceptional.

## Woodland v Swimming Teachers' Association [2013] UKSC 66

The decision of the UK Supreme Court in this case, recognizing a new non-delegable duty on the part of schools towards pupils in relation to certain activities outside their immediate control and away from school premises, is highly significant.

The claimant, a child, had suffered very severe injuries during a swimming lesson arranged by her school. The lessons were conducted on premises not controlled by the school; and were provided not by school staff but by professional swimming instructors who were independent contractors. Litigation was initially commenced against the swimming instructors, and it appears that there was an admission of liability. Interim payments were made. However, a change of liability insurer on the part of the instructors led to withdrawal of the admission, so that liability became contested some years after the liability question appeared to have been

settled.[29] It was against this background that the claimants decided to commence an action against the education authority. Since the authority neither employed the swimming teachers whose negligence is in issue, nor controlled the premises on which the lessons took place, the claimants argued that a non-delegable duty was owed. On this preliminary issue, the Supreme Court ruled for the claimant.

p. 637 ↵ The judgment of Lord Sumption JSC contains an appraisal of the existing authorities on non-delegable duties, and a restatement of the applicable principles. Lord Sumption was concerned solely with what he identified as a particular category of non-delegable duty, which he identified as having its origins in the law of nuisance:[30]

**Lord Sumption JSC, *Woodland v Swimming Teachers Association***
[2013] UKSC 66

> 7 The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty on the defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock). The analogy with public services is often close, especially in the domain of hospital treatment in the National Health Service or education at a local education authority school, where only the absence of consideration distinguishes them from the private hospital or the fee-paying school performing the same functions under contract. In the law of tort, the same consequence follows where a statute imposes on the defendant personally a positive duty to perform some function or to carry out some operation, but he performs that duty by entrusting the work to some one else for whose proper performance he is legally responsible. In *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 725–728, Lord Denning MR analysed the liability of a non-contractual bailee for reward in similar terms, as depending on his duty to procure that proper care was exercised in the custody of the goods bailed.

The existing relationship referred to in this extract was identified as arising from an 'assumption of responsibility', 'imputed to the defendant by virtue of his relationship with the defendant' (11). Assumptions of responsibility in general are explored in relation to duties of care in negligence in Chapter 5. Lord Sumption expressed the general principles on which a non-delegable duty will be said to arise in the following terms:

**Lord Sumption, *Woodland v Swimming Teachers Association***

> ## In what circumstances will a non-delegable duty arise?
>
> 22 The main problem about this area of the law is to prevent the exception from eating up the rule. Non-delegable duties of care are inconsistent with the fault-based principles on which
> p. 638 the law of negligence is based, and are therefore exceptional. The difference between an ordinary duty of care and a non-delegable duty must therefore be more than a question of degree. In particular, the question cannot depend simply on the degree of risk involved in the relevant activity. The ordinary principles of tortious liability are perfectly capable of answering the question what duty is an appropriate response to a given level of risk.
>
> 23 In my view, the time has come to recognise that Lord Greene MR in *Gold's case* [1942] 2 KB 293 and Denning LJ in *Cassidy's* case [1951] 2 KB 343 were correct in identifying the underlying principle, and while I would not necessarily subscribe to every dictum in the Australian cases, in my opinion they are broadly correct in their analysis of the factors that have given rise to non-delegable duties of care. If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren. (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

It is plain that these principles are capable of expanding the liability of public authorities beyond accepted bounds—running contrary to familiar policy objectives outlined in Chapter 5. Lord Sumption recognized the issue, defending the development of non-delegable duties but emphasizing the need to control them:

**Lord Sumption, *Woodland v Swimming Teachers Association***

> 25 The courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services. A non-delegable duty of care should be imputed to schools only so far as it would be fair, just and reasonable to do so. But I do not accept that any unreasonable burden would be cast on them by recognising the existence of a non-delegable duty on the criteria which I have summarised above.

Finally, Lord Sumption and the other members of the Supreme Court concluded that for present purposes, it could be accepted that a non-delegable duty was owed.

p. 639

## Armes v Nottinghamshire County Council [2017] UKSC 60; [2018] AC 355

The application of *Woodland* was considered by the Supreme Court in *Armes v Nottinghamshire County Council* [2017] UKSC 60. As we saw in Section 1.4, the Supreme Court found the Council to be vicariously liable for the torts of foster parents. However, it did not accept the alternative argument, that the Council owed a non-delegable duty to children it placed with foster parents in relation to their safety. The statutory background was important to the court's consideration of the issues, as the relevant legislation spelled out the duties of the local authority. At the same time, the Supreme Court distanced itself from some of the reasoning of the Court of Appeal. In particular, in the extract below, it suggested that deliberate acts (such as abuse) are capable of amounting to breaches of a non-delegable duty of care. This differs from the influential view of the Australian High Court in the decision of *NSW v Lepore* (2003) 195 ALR 412.

**Lord Reed, *Armes v Nottinghamshire***

> 46. . ... Section 21(1 <http://uk.westlaw.com/Document/IAEAA51D1B7DC11DF813FC6FD5848E001/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>) [Child Care Act 1980] requires the local authority to 'discharge' their duty to provide accommodation and maintenance for a child in their care in whichever of the specified ways they think fit, 'or by making such other arrangements as seem appropriate to the local authority'. The specified ways include 'boarding him out on such terms as to payment by the authority and otherwise as the authority may ... determine'.
>
> 47. The implication of the word 'discharge' is that the placement of the child constitutes the performance of the local authority's duty to provide accommodation and maintenance. It follows that the local authority do not delegate performance of that duty to the persons with whom the child is placed. This is difficult to reconcile with the idea that, when the foster parents provide daily care to the child placed with them, they are performing a function which remains incumbent on the local authority. That is not to say that the local authority are absolved of all responsibility: on the contrary, they remain subject to numerous duties towards the child in their care, some of which will be considered shortly. Nevertheless, in the language used by Lord Sumption JSC in *Woodland's case [2014] AC 537*, 584–586, para 25, this suggests that the duty of the local authority is not to perform the function in the course of which the claimant was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance.
>
> 48. Section 22 <http://uk.westlaw.com/Document/I287541C0CA8111E09785FF298A5740B8/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> is also relevant. As explained earlier, it enables the Secretary of State to make regulations imposing duties on local authorities in relation to the approval of households where children are boarded out, the inspection and supervision of the premises where they are boarded out, and the removal of the children from the premises if their welfare appears to require it. As McLachlin CJ observed in a similar context in the Canadian case of *KLB v British Columbia [2003] 2 SCR 403*, para 36, it might be thought that there would be no need to set out in regulations a catalogue of duties with respect to placement and supervision which are incumbent on the local authority, if they were in any event responsible for all the wrongs that might befall children in foster care. The implication of Section 22 <http://uk.westlaw.com/Document/I287541C0CA8111E09785FF298A5740B8/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)> is rather that the continuing responsibility of the local authority for the care of the child, in accordance with Section 10 <http://uk.westlaw.com/Document/IAEAA78E2B7DC11DF813FC6FD5848E001/View/FullText.ht

*ml?*
*originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>*, is discharged in relation to the boarding-out of children by means of prior approval of the households in which they are placed, and subsequent inspection, supervision and removal if appropriate, in accordance with the relevant regulations. The objective of Section 22 *<http://uk.westlaw.com/Document/I287541C0CA8111E09785FF298A5740B8/View/FullText.html?*
*originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>*, and of the Regulations made under it, is to ensure that potential problems arising during a foster placement are avoided if possible by means of prior approval of the households involved, and that any problems subsequently arising are identified and addressed once they have become capable of observation by means of inspection and supervision. The statutory regime does not impose on the local authority any other responsibility for the day-to-day care of the child or for ensuring that no harm comes to the child in the course of that care.

p. 640

49. For all these reasons, I conclude that the proposition that a local authority is under a duty to ensure that reasonable care is taken for the safety of children in care, while they are in the care and control of foster parents, is too broad, and that the responsibility with which it fixes local authorities is too demanding. I therefore reach the same conclusion as the Court of Appeal on this aspect of the case, although for somewhat different reasons.

50. In particular, I am unable to agree with Burnett LJ's view that if, applying the principles in the *Christian Brothers case* [2013] 2 AC 1 *<http://uk.westlaw.com/Document/ID0E3BBA033E111E29330CAD9B8CE3816/View/FullText.html?*
*originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>*, there is no vicarious liability for an assault upon a child in care, then the common law should not impose liability via the route of a non-delegable duty. That, with respect, is to conflate two distinct legal doctrines with different incidents and different rationales, and to misunderstand the relationship between them. As explained earlier, it is the imposition of vicarious liability which is implicitly premised on the absence of direct liability.

51. Nor am I able to agree that a non-delegable duty cannot be breached by a deliberate wrong: see, for example, *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 *<http://uk.westlaw.com/Document/I057C2DE0E42811DA8FC2A0F0355337E9/View/FullText.html?*
*originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)>*, a bailment case which was treated as a case of non-delegable duty in *Woodland's case* [2014] AC 537, 573–574, para 7. On Burnett LJ's approach, the local authority would seemingly be liable if the foster parents negligently enabled a third party to abuse the child, but not if they abused her themselves. That can hardly be right.

## 3 Other Primary Duties: Care in Selection and Supervision

There are other sources of a direct duty where damaging behaviour is carried out by others. For example, there are certain circumstances in which a duty is clearly owed to exercise care in the selection of contractors. As an example, an occupier may discharge its duty to keep visitors reasonably safe by entrusting work to competent contractors, provided reasonable care is taken to select the contractor: Occupiers' Liability Act 1957, section 2(4)(b), extracted in Chapter 13. The benefit of this provision will also be lost if the occupier does not take reasonable steps (*if any such steps are reasonably required*) to check that the contractor's work is appropriately done. In *Gwilliam v West Herts Hospital NHS Trust* [2003] QB 443, the Court of Appeal decided that this duty was merely 'illustrative' of a general obligation to exercise due care in the selection and (where appropriate) the supervision of contractors. In that case, there was a duty to select competent contractors for the supply and operation of a 'Splat-wall' at a fund-raising event. In *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, the Court of Appeal said that the same duty to select contractors with care arose at common law, so that it also applied to a case brought in negligence.

### p. 641 3.1 Duties to Supervise Employees

Even where injury is caused through the tortious conduct of an *employee*, there may be scope for liability of the employer in accordance with a primary duty. Sometimes, such primary liability may simply be an alternative to vicarious liability. However, breach of a primary duty to select and supervise employees with care may become important, for example, if the injury is not caused 'in the course of employment', so that it is outside the reach of vicarious liability.

## 4 Conclusions

i. The law of vicarious liability has undergone significant change and expansion since the decision in *Lister v Hesley Hall*. For some years, there has been emphasis on underlying policy concerns both in determining whether the relationship between tortfeasor and defendant is sufficiently close to give rise to vicarious liability (the first limb); and in addressing the question of whether the tort is sufficiently close to the employment or other relationship (the second limb). As part of a more general trend towards distancing policy reasoning from individual case outcomes, the Supreme Court has more recently emphasised the need to refer to established authorities, but has continued to set out a range of relevant factors. At the same time, it has emphasised that there are limits to the development of vicarious liability. If a tortfeasor is plainly an independent contractor, there is no need to consider policy factors. There is no longer a binary divide between employees and independent contractors, and falling outside a relationship that is 'akin to employment' is not the same thing as being an independent contractor.

ii. Where the second 'limb' of vicarious liability is concerned, commitment to the 'close connection' test has been maintained in the face of recent challenge. Interestingly, the test has not only been defended in functional terms, but also by reference to a sense of 'fairness' which can be traced at least to the eighteenth century. Here too, the Supreme Court has most recently sought to set out limits to

expansion. In particular, if the tortfeasor is plainly pursuing a vendetta against the employer, or perhaps if they are simply pursuing their own agenda, then there will not be vicarious liability except where the test of close connection has been 'tailored' to the particular harm that is done. The latter point, however, has not been satisfactorily defined and the exception may prove to be as wide as the rule, or at least the door is open to further evaluation of circumstances. Overall, vicarious liability is set on a trajectory of expansion which is justified by a range of different considerations; but there are of course still cases which will result in no liability. Doubtless, the location of the boundary between liability and no liability will continue to provide challenges.

iii. The development of a new instance of 'non-delegable duty' in relation to a school and its pupils is also striking, and defining the boundaries and rationale of this duty will again no doubt make for interesting case law in future. At present, the limits of the non-delegable duty are uncertain and debatable, though the Supreme Court has not extended the category to the safety of children placed with foster parents. The Supreme Court has apparently departed from the High Court of Australia, at
p. 642 least in theory, by suggesting that the newly recognized category of duty should not be limited to cases of negligence rather than intentional wrongdoing. It may prove that the decisive factor will be identified as lying in assumption of responsibility (itself a difficult concept to pin down, as we saw in Chapter 5); or—as will now be familiar from other areas of the law of tort—in the specific policy issues arising in a particular context, despite the move to emphasize authority rather than underlying policy in many cases.

## Further Reading

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Williams, G., ‘Liability for Independent Contractors’ [1956] 14 CLJ 180.

Witting, C., ‘Modelling Organisational Vicarious Liability’ (2019) 39 Legal Studies 694–713.

Yap, P. J., ‘Enlisting Close Connections: A Matter of Course for Vicarious Liability?’ (2008) 28 LS 197–214.

## Notes

[1] Section 1.4.

[2] Partnership Act 1890, s 10.

[3] C. Beuermann, ‘Dissociating the Two Forms of So-Called ‘Vicarious Liability’, in S. Pitel, J. Neyers and E. Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013).

[4] This idea is discussed by G. Williams, ‘Vicarious Liability: Tort of the Master or Tort of the Servant?’ (1956) 72 LQR 522; see also R. Stevens, ‘Vicarious Liability or Vicarious Action?’ (2007) 123 LQR 522.

[5] This was clearly stated by the House of Lords in *Dubai Aluminium v Salaam* [2003] 2 AC 366 and reiterated by Lord Nicholls in *Majrowski v Guy’s and St Thomas’s NHS Trust* [2006] UKHL 34. It is consistent with the decision of the House of Lords in *A v Hoare* [2008] UKHL 6; (2008) 1 AC 844.

[6] These issues are explored by R. Merkin and J. Steele, *Insurance and the Law of Obligations*, Chapters 10 and 11.

[7] S Deakin, ‘Organisational torts: Vicarious Liability Versus Non-Delegable Duty’ (2018) 77 CLJ 15.

[8] An expression used by Ward LJ in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [60].

[9] This resembles the fairness argument for strict liability under *Rylands v Fletcher*, which is debated in Chapter 12. *Rylands* itself was a case of negligence on the part of contractors (rather than employees).

[10] Lord Nicholls has clearly embraced this principle in *Dubai Aluminium v Salaam* [2003] 2 AC 366; *Majrowski v Guy’s and St Thomas’s Hospital Trust* [2006] UKHL 34.

[11] Y. B. Smith (1923) 23 Col L Rev 444, 461; quoted by G. Williams, ‘Liability for Independent Contractors’ (1956) CLJ 180, at 196.

[12] For a similar problem caused by complex *corporate* structures (making it more difficult to identify a solvent responsible party), see H. Collins, ‘Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53 MLR 731–84.

[13] P.S. Atiyah, *Vicarious Liability in the Law of Tort*, at 26.

[14] This has been very important in respect of medical staff. In *Cassidy v Ministry of Health* [1951] 2 KB 343, vicarious liability of hospital authorities for their staff was established. Earlier in *Gold v Essex County Council* [1942] 2 KB 293, the Court of Appeal had resorted to the idea of a ‘non-delegable duty’ in respect of such staff (see Section 2); this is no longer necessary.

[15] Concerning the role of 'fault' in the contribution legislation, see Chapter 8.

[16] Where the employer is in liquidation a claim may be brought against its insurer pursuant to the Third Parties (Rights against Insurers) Act 1930. In this case, important issues arose in respect of the liability of ASE's insurers; these issues concerned the meaning of 'accidental injury'. Was the injury inflicted on the claimant an 'accidental injury', covered by the policy? If not, the insurer would not be liable under the Act. The Court of Appeal decided that the injury was 'accidental' for these purposes. It was perhaps not 'accidental' from the point of view of Warren; but it was 'accidental' from the point of view of the assured party, ASE. The tortfeasor and the employer are treated as separate for this purpose (interpretation of the insurance policy), even though the vicariously liable employer 'stands in the shoes of' the employee for other purposes (such as contribution: Chapter 8).

[17] E. McKendrick, 'Vicarious Liability and Independent Contractors—A Reexamination' (1990) 53 MLR 770.

[18] The case is also often known as *JGE v English Province of Our Lady of Charity*.

[19] See, for example, A. Dickinson, 'Fostering Uncertainty in the Law of Tort' (2018) 134 LQR 359.

[20] Non-state non-profit defendants may raise different issues from public authority defendants, particularly if one focuses on *distributive* justifications.

[21] Here the firm of solicitors had settled the claim against them and therefore *sought* a finding of vicarious liability; this would enable them to pursue other participants in the fraud for a contribution (Chapter 8).

[22] Lord Hope, 'Tailoring the Law on Vicarious Liability' (2013) LQR 514.

[23] For example, P Giliker, 'Can the Supreme Court Halt the Expansion of Vicarious Liability? Barclays and Morrison in the UK Supreme Court' (2021) 37 PN 55–72.

[24] In a sense, these cases are strongly connected to employment, since the claimant is caught in the cross-fire between employer and employee. But on another view, a desire to hurt the employer takes the employee's actions further from the course of employment than the actions of an employee who uses the opportunity of employment to further their own interests.

[25] The reference to a 'tailored' approach smacks of avoidance: is this simply a 'different' approach, or is the right approach infinitely variable across different situations?

[26] 'Liability for Independent Contractors' (1956) CLJ 180.

[27] Law Reform (Personal Injuries) Act 1948.

[28] R. Stevens, 'Non-delegable Duties and Vicarious Liability' in J. Neyers et al, *Emerging Issues in Tort Law* (Hart Publishing, 2007) 331–68.

[29] The process of litigation is set out by the Court of Appeal in *Woodland v Stopford and Others* [2011] EWCA Civ 266, and described as 'deeply depressing'.

[30] See further the discussion of non-delegable duties and *Rylands v Fletcher* in Chapter 12.

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