**Part I: Commentaries and Reflections**

# VICARIOUS LIABILITY IN THE UK SUPREME COURT

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*"'The law of vicarious liability is on the move." ... It has not yet come to a stop.'*[1]

## 1 Introduction

The doctrine of vicarious liability is nothing if not controversial. It is, as Lord Nicholls commented in the 2006 decision of *Majrowski v Guy's and St Thomas's NHS Trust*, a doctrine that is 'at odds with the general approach of the common law' which favours imposing liability on individual defendants whose actions (or inactions) are regarded as blameworthy by the law of torts.[2] Vicarious liability, in contrast, renders a defendant D2 (usually an employer) strictly liable for the tortious behaviour of another party D1 (usually an employee) when acting in the course of his or her employment. Liability arises without any finding of fault by D2. Nevertheless, as the above quotation indicates, this is an area in which the UK Supreme Court has been prepared to take a proactive role in extending and reshaping the law. This article will focus on two recent Supreme Court decisions which were both delivered on 2 March 2016: *Cox v Ministry of Justice*[3] and *Mohamud v WM Morrison Supermarkets plc*.[4] These are important decisions, which build on the framework for vicarious liability established by the Supreme Court in its earlier 2012 ruling in *Various Claimants v Catholic Child Welfare Society ('CCWS')*.[5] The latter case adopted a two stage approach to vicarious liability: the claimant must establish (1) that the relationship between D1 and D2 is one capable of giving rise to vicarious liability *and*

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[1] *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660, [1] (Lord Reed), quoting *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1, [19] (Lord Phillips).

[2] [2006] UKHL 34, [2007] 1 AC 224, [8]. See also Patrick Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 12, who argues that vicarious liability runs counter to two fundamental principles of English tort law: that one should only be liable for one's own acts or omissions and that liability should be based on fault. 'These principles', he stated, 'are so deeply rooted in legal thinking that any departure from them seems at first sight impossibly unjust.'

[3] *Cox* (n 1).

[4] [2016] UKSC 11, [2016] AC 677.

[5] *CCWS* (n 1) [21] (Lord Phillips).

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(2) that a close connection links the relationship between D1 and D2 and the act or omission of D1. These three cases establish the modern law of vicarious liability. They have extended the doctrine, rendering it more flexible. It now permits an increasing range of claimants to benefit from its ability to act as a 'loss distribution device', which ensures that victims are able to obtain compensation from solvent defendants likely to be insured.[6] Vicarious liability has also been applied in a variety of circumstances including claims against unincorporated charitable associations (*CCWS*), public bodies performing statutory functions for the public benefit (*Cox*) and the more familiar target of large commercial concerns (*Mohamud*).

In this article, I will examine why the Supreme Court has been so willing to extend a doctrine which seems at odds with the underlying principle of corrective justice in the law of torts. The answer, it is submitted, lies in the Court's belief that social justice requires that the courts should ensure that innocent victims are able to obtain compensation from solvent defendants, notably in the context of sexual abuse claims. In all three decisions, the Court was therefore unwilling to leave an innocent victim at the mercy of a claim against an uninsured tortfeasor likely to be of limited means. The Supreme Court is creating, in its own words, 'a fairer and more workable test'.[7] The question remains, however: What are now the limits to the doctrine of vicarious liability and can such an extension be justified? When and where will the law of vicarious liability finally come to a stop?

## 2 Expanding Vicarious Liability Beyond the Contract of Employment: *Cox v Ministry of Justice*

The cases before the Supreme Court in *Cox* and *Mohamud* are helpful in that they raised issues arising under each element of the two stage test for vicarious liability identified in *CCWS*. In *Cox*, the Court was asked to determine whether the relationship between a prisoner working in a prison kitchen and the prison authorities was sufficient to qualify as a 'relationship' for vicarious liability (the 'stage one' question). *Mohamud* concerned the 'stage two' question: The tortfeasor was clearly an employee of Morrisons, but it was disputed whether a close connection existed between his wrongful actions (assaulting a Morrisons customer) and his

[6] See *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [65] (Lord Millett); *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [107] (Lord Millett): 'Vicarious liability is a loss distribution device based on grounds of social and economic policy.'

[7] *Mohamud* (n 4) [56] (Lord Dyson). See also *Lister v Hesley Hall Ltd* (n 6) [20] (Lord Steyn) on the need to identify 'a practical test serving as a dividing line between cases where it is or is not just to impose vicarious liability'.

employment by the defendant supermarket. The same Justices sat in both cases, namely Lord Neuberger, Lady Hale, Lord Dyson, Lord Reed, Lord Toulson. The judgments are expressly stated to be complementary.[8] The aim, therefore, was to provide guidance and bring consistency to this area of law.

In *Cox*, as stated above, the question was whether a relationship existed sufficient to satisfy the stage one test. A prisoner is clearly not an employee of a prison, indeed quite the opposite. Prisoners are bound to the prison service not by contract but by their sentences; the relationship is not founded on mutuality but on compulsion. Nevertheless, recent case-law has indicated that while in the vast majority of cases the relationship that gives rise to vicarious liability will be that of employer and employee,[9] the doctrine will extend to relationships which are 'akin to that between an employer and an employee'.[10] Here, the claimant (the catering manager at HM Prison Swansea) had worked with four members of staff, but also about 20 prisoners who came under her supervision, in the prison kitchen. Prisoners could apply to work in the kitchen and were paid a nominal amount per week. Work was seen as part of their rehabilitation, but also had the practical benefit of providing food to prisoners at a cheap rate.[11] Mrs Cox had been injured by the negligence of a prisoner, Mr Inder, who had dropped a sack of kitchen supplies on her back. The question was whether the prison authorities would be held vicariously liable for her injuries.

Both the Court of Appeal and Supreme Court were prepared to identify the relationship between a prisoner working in a prison kitchen and the prison authorities as one 'akin to employment'. On this basis, where the claimant had been injured as a result of the negligence of the prisoner in carrying out the activities assigned to him, the prison service would be vicariously liable to her. The fact that the prison service was acting for the public benefit was deemed irrelevant. In applying the 'akin to employment' test, the Supreme Court placed emphasis on the following facts:

(a) Prisoners working in the kitchen were integrated into the

8 *Cox* (n 1) [1] (Lord Reed); *Mohamud* (n 4) [1] (Lord Toulson).

9 *CCWS* (n 1) [35] (Lord Phillips).

10 See e.g. *E (or JGE) v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722; Janet O'Sullivan, 'The Sins of the Father - Vicarious Liability Extended' [2012] CLJ 485.

11 See e.g. *Cox v Ministry of Justice* [2014] EWCA Civ 132, [2015] QB 107, [44] (McCombe LJ): 'The work performed by these prisoners was one essential to the functioning of the prison. The activity had to be performed by someone on behalf of the prison service and the activity was part of the defendant's activity of providing secure and humane accommodation and maintenance for the prisoners.'

operation of the prison;

(b) Their work/activities furthered the aims of the prison, in particular providing meals for prisoners;

(c) They were placed in a position where there was a risk that they might commit a variety of negligent acts within the field of activities assigned to them;

(d) They worked under the direction of prison staff.[12]

The Court rejected the argument that liability would open the floodgates to claims relating to the behaviour of prisoners undertaking educational classes or offending behaviour programmes, finding that an 'intelligible distinction' existed between taking part in activities of this kind and working as an integral part of the operation of the prison.[13] This seems to be correct. A prisoner assaulting a visiting creative writing teacher is unlikely to be seen as furthering the aims of the prison, while a prisoner who acts negligently while working in the prison kitchen or laundry would seem to meet this test. What, however, of the negligent gardener who accidentally strikes a prison warder with his rake? Is it clear, as Lord Reed suggested, that the act of gardening is to be regarded solely as productive (e.g. producing vegetables for the prison kitchen) rather than simply a therapeutic activity (cf education)? Should it matter whether the prisoner was growing vegetables or pruning the roses? As always, distinctions are rarely watertight.

*Cox* does highlight, however, that the 'akin to employment' category of relationships is not simply a response to the errant priest problem. This had been the context for previous 'akin to employment' cases. For example, in *E (or JGE) v English Province of Our Lady of Charity*[14] the key issue was whether the Roman Catholic Church could argue that it was not vicariously liable for acts of abuse by a parish priest on the basis that, at law, a priest is an office-holder and not an employee. The Court of Appeal refused to accept that this technical distinction signified that the Roman Catholic Church would not be found vicariously liable for the sexual abuse of its priests. Vicarious liability, it held, should not be treated as a static concept and would require adjustment to provide just solutions to the challenges of changing times.[15] A relationship 'akin to employment', that is, where

[12] *Cox* (n 1) [32] (Lord Reed).
[13] ibid [43]-[44] (Lord Reed).
[14] [2012] EWCA Civ 938, [2013] QB 722.
[15] ibid [60] (Ward LJ), relying in particular on the judgments in *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510.

the relationship is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable, should therefore suffice. While *CCWS* extended this test to lay brothers working for a school but acting in furtherance of the mission of and subject to the directions and rules of the De La Salle Institute,[16] *Cox* is significant in contemplating a wider application. It remains to be seen how far this new extension to the traditional employer/employee relationship will go and whether a firm line will be held. The Court of Appeal in *NA v Nottinghamshire County Council*[17] rejected the argument that it would apply to the relationship between a local authority and foster parents; with Tomlinson LJ finding 'not the remotest of analogies'.[18] It is important here to understand the underlying rationale for the extension. As acknowledged in *Mohamud*, the 'akin to employment' category of relationships exists to respond to changes in the employment practices of enterprises.[19] On this basis, a person who is to all extent and purposes an employee, albeit engaged via an employment agency or some other temporary arrangement, should be covered by the doctrine of vicarious liability. It is not intended, however, that this new category should be unduly wide nor that it should undermine the general rule that there is no vicarious liability for genuinely independent contractors. The intention is to remove arbitrary distinctions between different categories of workers within an organisation. Nevertheless, it remains to be seen what degree of success ingenious counsel are likely to have in future in attempting to extend this relationship to obtain the benefit of vicarious liability for their clients.[20]

## 3 From 'Course of Employment' to 'Field of Activities': *Mohamud v WM Morrison Supermarkets plc*

The facts of *Mohamud* raise the classic stage two dilemma: An angry employee attacking a customer allegedly in defence of his employer's property, but with clear underlying personal motives, here racism. This

[16] See e.g. *CCWS* (n 1) [89] (Lord Phillips): '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 *JGE*.'

[17] [2015] EWCA Civ 1139, [2016] 2 WLR 1455.

[18] ibid [15].

[19] *Mohamud* (n 4) [55] (Lord Dyson). This was highlighted in the well-known McKendrick article cited in *JGE* (n 14): see Ewan McKendrick, 'Vicarious Liability and Independent Contractors – A Re-Examination' (1990) 53 MLR 777. The Court in *JGE* also found the article of Richard Kidner, 'Vicarious Liability: For Whom Should The 'Employer' Be Liable?' (1995) 15 LS 47 to be 'most illuminating and helpful'.

[20] The claimant in the case of *NA v Nottinghamshire County Council* (n 17), for example, has been granted permission to appeal to the Supreme Court.

issue had inevitably arisen in earlier case law, but with mixed results.[21] Here, Mr Mohamud had suffered a serious assault when, having checked his tyre pressure on the Morrisons' garage forecourt, he entered the kiosk to enquire whether it would be possible to print some documents from a USB stick he was carrying. He was met with abuse from Mr Khan, who was working at the kiosk at the time, who then followed him onto the forecourt, told him in threatening words never to come back and then physically assaulted him, despite instructions from his supervisor to desist. The question for the court was whether such appalling conduct was 'closely connected' to Mr Khan's job, which was to see that the petrol pumps and the kiosk were kept in good running order and to serve customers.

The Supreme Court held that it was. The Court rejected the claimant's argument that the court should develop a new stage two test based on whether the employee was acting in a representative capacity. This argument rested on the fact that companies operate via human agents and that, in view of judicial criticism of the imprecision of the close connection test, it was permissible to suggest an alternative formulation: whether a reasonable observer would consider the employee to be acting in the capacity of a representative of the employer at the time of committing the tort? This test was, in the Court's view, 'hopelessly vague'.[22] As the Supreme Court rightly stated, this does seem to be replacing one imprecise test with another, but we might speculate that counsel, assuming that Mr Khan's conduct was likely to fail any formulation of the 'close connection' test, was merely seeking to suggest a looser formulation which might be established before the court. Such resourcefulness was, however, unnecessary. The Court unanimously accepted that Mr Khan's conduct was within the course of his employment.

The stage two course of employment test has a long pedigree.[23] In its traditional form, stated by textbook writer Salmond in 1907, the tortfeasor's act must be shown to be 'a wrongful and unauthorised mode of doing some act authorised by the master'.[24] As Lord Toulson in *Mohamud* noted, although popular, this test was not universally satisfactory and, in

[21] See, for example, *Keppel Bus Co Ltd v Ahmad* [1974] 1 WLR 1082 (no vicarious liability for violent bus conductor); *Petterson v Royal Oak Hotel Ltd* [1948] NZLR 136 (vicarious liability for violent barman); *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 (no vicarious liability for violent barmaid).

[22] *Mohamud* (n 4) [53] (Lord Dyson).

[23] It can be dated back to the late seventeenth century: see *Boson v Sandford* (1691) 2 Salk 440, 91 ER 382; *Tuberville v Stamp* (1698) 1 Ld Raym 264, 91 ER 1072. See John Fleming, *The Law of Torts* (9th ed, LBC Information Services 1998) 409.

[24] John Salmond, *The Law of Torts* (1st ed, Stevens and Haynes 1907) 83 (later found in Robert Heuston and Richard Buckley, *Salmond and Heuston on the Law of Tort* (21st ed, Sweet and Maxwell 1996) 443).

particular, it was difficult to apply in the context of intentional torts, adding that 'even on its most elastic interpretation, the sexual abuse of ... children could not be described as a mode, albeit an improper mode, of caring for them'.[25] More fundamentally, when in 2001 the House of Lords in *Lister v Hesley Hall Ltd*[26] decided that it would be fair and just that sexual abuse by a warden of a school boarding house should satisfy the course of employment test, it became clear that the Salmond test would need modification. This led to a test of close connection: Were the torts of the warden so closely connected with his employment that it would be fair and just to hold the employers vicariously liable?[27] Yet, as Lord Phillips acknowledged in *CCWS*,[28] it is not easy to deduce from *Lister* the precise criteria that will give rise to vicarious liability. Fundamentally, the test of 'close connection' tells us little about the nature of that connection and exactly how *close* that connection needs to be.[29] While flexibility may be needed in order to apply the test to the facts of individual cases, Lord Toulson conceded that it would be desirable if the essence of the test could be simplified. On this basis, two matters required consideration:

(a) What functions or 'field of activities' have been entrusted by the employer to the employee (or, in everyday language, what was the nature of the employee's job)?

(b) Whether there is a sufficient connection between the position in which the employee is employed and his wrongful conduct to make it 'right' for the employer to be held liable as a matter of social justice?[30]

Here Mr Khan's job was to attend to customers and respond to their enquiries. In the Court's view, he had simply engaged in a foul mouthed and

[25] *Mohamud* (n 4) [39].

[26] *Lister v Hall Ltd* (n 6), reversing *Trotman v North Yorkshire County Council* [1999] LGR 584.

[27] ibid [28] (Lord Steyn). His Lordship sought support for this test based on a passage from *Salmond* which had been overlooked: 'a master . . . 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': Salmond (n 24) 83-4. Salmond's explanation, his Lordship argued, was the germ of the close connection test which had been adumbrated by the Canadian Supreme Court in *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71. These decisions were described at the time as 'a genuine advance on the unauthorised conduct/unauthorised mode distinction' see e.g. Peter Cane, 'Vicarious Liability for Sexual Abuse' (2000) 116 LQR 21, 24.

[28] *CCWS* (n 1) [74]. See also *Dubai Aluminium Co Ltd* (n 6) [25] (Lord Nicholls).

[29] Textbook writers agree: see Edwin Peel and James Goudkamp, *Winfield & Jolowicz on Tort* (19th ed, Sweet and Maxwell 2014), 21-021; Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (5th ed, OUP 2013) 835-37.

[30] *Mohamud* (n 4) [44]-[45].

violent means of undertaking the 'field of activities' assigned to him. The entire sequence of events was judged to be seamless: Mr Khan sought simply to remove Mr Mohamud from his employer's premises – he did not, in the words of the Court, metaphorically take off his uniform.[31] He had been entrusted with the task of serving customers and it was 'just' for Morrisons to be vicariously liable for his gross abuse of this position.

Such a ruling does seem to take the course of employment test to its absolute limits. Mr Khan's motives, we are told, are irrelevant – personal racism is no longer an obstacle to vicarious liability. Lord Toulson went so far as to indicate that 'This was not something personal between them'.[32] His Lordship's judgment is revealing, however, in how we have reached such a broad interpretation of this test; his Lordship using variants of the term 'broad' 11 times. Use of the term 'field of activities'[33] is deemed to conjure up a wider range of conduct than acts done in furtherance of the employment. The connection thus becomes looser. More specifically, his Lordship placed emphasis on social justice and the view of Lord Chief Justice Holt, who argued that 'seeing somebody must be a loser by this [tortious act], it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.'[34] As a matter, therefore, of justice, the choice between who should bear the loss – employer v. innocent victim – tips in favour of the victim. The key to liability is the employment relationship connecting tortfeasor and employer and the 'tasks' entrusted to the employee. Provided a connection exists, vicarious liability will bite. Social justice thus justifies the imposition of a mechanism by which innocent victims can obtain compensation, albeit at the expense of innocent employers (or at least their insurers).

It is clear that the Supreme Court was not making a rash or ill-considered decision in *Mohamud*, nor indeed in *Cox*. These two Supreme Court decisions, taken with *CCWS*, represent a firm resolution to extend the doctrine of vicarious liability to ensure compensation for victims. A parallel development is also taking place in the field of non-delegable duties, as evidenced by the 2013 decision of the UK Supreme Court in *Woodland v Essex CC*.[35] The question which this article will now address is *why* this is

[31] ibid [47] (Lord Toulson). *Warren v Henlys* [1948] 2 All ER 935 was distinguished on this basis – a ruling which arguably only serves to highlight the fragility of the concept of an unbroken series of events. See also Andrew Bell, 'Vicarious Liability: Quasi-Employment and Close Connection' (2016) 32(2) Professional Negligence 153, 157.

[32] ibid.

[33] Lord Toulson derived this term from the judgment of Lord Cullen in *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, 802.

[34] *Hern v Nichols* (1700) 1 Salk 289, 91 ER 256.

[35] [2013] UKSC 66, [2014] AC 537. The relationship between vicarious liability and non-delegable duties remains a matter of contention in that both doctrines impose liability

happening. On what basis can such an extension of strict liability contrary to the dominant philosophy of corrective justice in tort be justified?

## 4 Justifying the Expansion of Vicarious Liability

The judgments in *Cox* and *Mohamud* approach the question of justifying the extension of liability at stages one and two of the test for vicarious liability in different ways. Lord Toulson in *Mohamud* favoured an approach which examined the historical development of this branch of the law. This led the Court to a foundation based on social justice in which the risk of an employee misusing his position is deemed to be one of life's unavoidable facts. Lord Reed in *Cox*, in contrast, followed a more overtly policy led approach. His starting point was the statement by Lord Phillips in *CCWS*[36] of the policy reasons which render it fair, just and reasonable to impose vicarious liability on the employer:

(a) 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 (the 'deeper pockets' argument);

(b) The tort will have been committed as a result of activity being undertaken by the employee on behalf of the employer (the delegation of task argument);[37]

(c) The employee's activity is likely to be part of the business activity of the employer (the theory of enterprise liability);[38]

(d) The employer, by employing the employee to carry on the activity, will have created the risk of the tort committed by the employee (the risk creation argument);

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on an employer for the torts of its workers, albeit one imposes secondary liability, the other primary liability. For criticism of the distinction between these two doctrines, see: Glanville Williams, 'Liability for Independent Contractors' [1956] CLJ 180; Fleming (n 23) 433; Robert Stevens, 'Non-Delegable Duties and Vicarious Liability' in Jason Neyers, Erika Chamberlain and Stephen Pitel, *Emerging Issues in Tort Law* (Hart 2007); Jonathan Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure that Care is Taken' [2015] CLJ 109.

36 *CCWS* (n 1) [35].

37 Lord Reed linked this argument with historical explanations of vicarious liability based on deemed authorisation or delegation: *Cox* (n 1) [23].

38 Note that Lord Reed expressly excluded the argument that this signifies that the defendant must be carrying on activities of a commercial nature or be a profit-making enterprise: *Cox* (n 1) [30].

(e) The employee will, to a greater or lesser degree, have been under the control of the employer (the control test).

As is widely acknowledged, the control test derives from the social conditions of an earlier age where employers could direct and instruct their employees.[39] The significance of control today is that the employer can direct what the employee does, but not generally how he does it.[40] It is therefore not regarded by the Supreme Court to be of independent significance in most cases. The Court also acknowledged the limitations of the deeper pockets argument in failing to provide a principled justification for imposing vicarious liability.[41] For the Supreme Court, therefore, it was the arguments based on enterprise liability, risk creation and delegation of task which provided inter-related justifications for extending vicarious liability. These arguments are deemed to have a basis in the historical background to the doctrine but they also explain and justify the recent developments in *CCWS, Viasystems*[42] and *JGE.*[43] We can also draw comparisons with the judgment of McLachlin J in the Canadian case of *Bazley v Curry*[44] which first introduced the 'close connection' test which was adopted by the House of Lords in *Lister v Hesley Hall Ltd* in 2001. The Supreme Court of Canada in *Bazley* favoured an approach based solely on enterprise liability, arguing that it is fair and just to impose liability on the person or organisation that puts into the community an enterprise which creates or significantly increases the risk of injury to victims by virtue of the individuals it uses to carry out its business or further its interests. Vicarious liability can thus be justified in that it provides an adequate and just remedy for losses which result from the enterprise with, it is anticipated, the added benefit of having a deterrent effect which will encourage organisations to take steps to prevent future incidents.[45] McIvor notes, however, that the form of risk theory used by Lord Millett in *Lister*[46] (and by the Supreme Court subsequently)

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[39] See Otto Kahn-Freund, 'Servants and Independent Contractors' (1951) 14 MLR 504; Kidner (n 19); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 60-5.

[40] *CCWS* (n 1) [36] (Lord Phillips); *Cox* (n 1) [21] (Lord Reed).

[41] See Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20 MLR 220, 232; Giliker (n 39) 234-237.

[42] *Viasystems (Tyneside)* (n 15).

[43] *JGE* (n 14).

[44] (1999) 174 DLR (4th) [45], in turn influenced by Alan Sykes, 'The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines' (1988) 101 Harvard Law Review 563. See also Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 OJLS 493; Gregory Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 Vanderbilt Law Review 1285.

[45] ibid [41] (McLachlin J).

[46] *Lister v Hesley Hall Ltd* (n 6) [65], [83].

is much wider and more generalised than the economic rationale set out by McLachlin J in *Bazley*.[47] This leads, as we can see above, to a broader justificatory framework which includes, for example, the delegation of task argument. While we can say that vicarious liability will be regarded as fair and just where the commission of a wrongful act is an inherent risk of the business activities in which the employer is engaged and within the field of activities assigned to the tortfeasor, this is far from an exact science. Creation of the risk of the commission of a tort as the inevitable consequence of the employment relationship represents an important element in the facts giving rise to the imposition of liability on the employer, but, the Court has acknowledged,[48] is not enough by itself. This leads to the conclusion that the test formulated by the Supreme Court gives the court flexibility in applying it to the facts of each individual case, but it undeniably lacks precision. Further, it remains the case that there will come a point where the risk in question cannot be said to arise due to the employment relationship and thus cannot be said to be closely connected to the task delegated to the employee which is an integral part of the employer's business activities. To use a straightforward example, if I decide one morning that I will hit every red-haired person I meet on my way to work, my resolution has not been created as a risk of my employment nor is it closely connected to my job as a university lecturer. However, if my decision is to strike every red-haired student I teach who does not understand the doctrine of vicarious liability, the situation is arguably different. This highlights the key question which this article must now address: What, following *Mohamud* and *Cox*, are the limits to vicarious liability?

## 5 Examining the Impact of *Cox* and *Mohamud*

In expanding vicarious liability to include relationships 'akin to employment' and wrongful acts which occur as an inherent risk of the field of activities delegated to the tortfeasor as part of the business activities of the defendant, it is clear that the Supreme Court has acknowledged the valuable role of vicarious liability as an instrument of social justice in making sure that victims obtain compensation for torts committed against them. In so doing, the division between employees and independent contractors has been adjusted to include a new category of formerly independent contractors, now classified as quasi-employees for the sake of the doctrine of vicarious liability. *Cox*, it is submitted, provides a helpful addition to the law. There is a strong case in terms of distributive justice and logic for moving away from

[47] Claire McIvor, 'The Use and Abuse of the Doctrine of Vicarious Liability' (2006) 35 Common Law World Review 268, 277.

[48] See *CCWS* (n 1) [87] (Lord Phillips).

a narrow interpretation of the contract of employment, dominated by the reasoning of employment law, and for extending vicarious liability to relationships akin to employment.[49] Stepping away from the legal niceties of who, technically, is classified as an 'employee' in labour law is a positive step. The logic of *Cox*, therefore, is obvious. It should not matter whether it is an official employee of the prison or an unofficial employee (i.e. a prisoner working in the kitchen) who negligently injures Mrs Cox – if the individual bears all the characteristics of an employee then that should be enough for the application of a doctrine which is based on concerns relating to social justice. As Ward LJ acknowledged in *JGE*, the question should be one of function not form.[50] This reflects the realities of modern employment relationships and changes in workplace practice and the increasing complexity and sophistication of the organisation of enterprises in the modern world.[51] This should not, however, result in a free-for-all for any individual who helps an employer out with work in some way. As a logical extension to the stage one relationship test, *Cox* should receive a cautious welcome.

*Mohamud*, however, requires a deeper intake of breath. An unprovoked racist attack on a customer at a petrol station is deemed within the course of employment on the basis that it could be connected, albeit broadly, with the job of the kiosk attendant to serve customers. It was deemed irrelevant that the tortfeasor was acting for reasons of his own or that he had no responsibility for keeping order or authority over customers. The 'field of activities' test clearly adopts a far more generous approach to the tortfeasor's job description.[52] Significantly, Lord Toulson refused to rate the closeness of the connection needed on a scale of one to ten and confined himself to the comment that the cases in which the necessary connection has been found are those in which 'the employee used or misused the position entrusted to him in a way which injured the third party'.[53] Potential difficulties with this test may be identified by changing the facts of *Mohamud* slightly. Would, for example, the situation have been different if Mr Mohamud had stopped at the petrol station merely to enquire for directions to the post office? Would the imposition of vicarious liability depend on (a) whether he had decided to purchase a chocolate bar or check his tyre pressure whilst at the petrol station, thereby giving him the status of 'customer' or (b) whether his enquiry related in some way to a service which Morrisons might or might

[49] See Paula Giliker, 'Vicarious Liability Beyond the Contract of Service' (2012) 28(1) Professional Negligence 291, 295.

[50] *JGE* (n 14) [60].

[51] As acknowledged by Lord Dyson in *Mohamud* (n 4) [55]; see also Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353.

[52] See e.g. *Axon v Ministry of Defence* [2016] EWHC 787 (QB), [91]-[95] (Nicol J).

[53] *Mohamud* (n 4) [45].

not offer? Would it be of assistance if Mr Mohamud usually bought his petrol at Morrisons, enabling him to be regarded as a regular customer? The issue here is that the test of 'course of employment' is becoming increasingly fact specific. Imprecision is not regarded as a problem by the Supreme Court and indeed tort law often faces evaluative judgments due to its need to adapt to each particular case, but one of the roles of the Supreme Court in a system of *stare decisis* is to give guidance to lower courts. Does *Mohamud* clarify when vicarious liability will arise or merely suggest that it will be easier to establish in future?

At this point, it is important to revert back to the underlying rationale of vicarious liability discussed above. By focusing on the creation of risk, the notion of enterprise liability and the delegation of integral duties to an employee, the Court has been able to adopt a broader formulation of vicarious liability which will now include acts which, in the past, would have been dismissed as outside the course of employment. While greater flexibility was needed in terms of the employment relationship (as indicated above), such a generous approach does become problematic in terms of the factor which, it should be recalled, exists to *limit* vicarious liability: that the wrongful act must be within the scope of the employment relationship. Reliance on risk also comes at a price. Brodie, for example, asks whether the employee/independent contractor division can withstand a focus on enterprise liability.[54] McIvor also argues that a focus on risk creation makes it difficult to justify confining vicarious liability to employers – logically, it should be extendable to any risk-producing activity which leads to damage to innocent individuals.[55] It also fails to explain why tort law is the best means of addressing these risks in contrast to, for example, imposing penalties on the employer in criminal law or introducing a public compensation fund. Yet, the more flexible approach, which a focus on risk provides, has enabled the Supreme Court to meet the concerns related to social justice in the light of abuse scandals affecting institutions, such as the Roman Catholic Church and the BBC. Indeed, the Supreme Court in *CCWS* expressly alluded to concerns arising from allegations of the widespread sexual abuse of children within the entertainment industry, which were prominent in the media at the time the case was decided.[56] *Lister, JGE* and

[54] Brodie (n 44) 508. See also James Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556, 559-560.

[55] McIvor (n 47) 296. As I have noted elsewhere, a focus on risk in French law has led to wide-ranging liability under the French Civil Code (strict liability in tort/delict) which extends to parental liability for the torts of their children up to the age of 18, see Giliker (n 39) 237-41.

[56] *CCWS* (n 1) [85] (Lord Phillips). Notably the Jimmy Savile scandal, which came to light after Savile's death in October 2011 and which led to a number of subsequent inquiries, including a high profile inquiry by the BBC into its culture and practices during

*CCWS* all involved victims of sexual abuse seeking recompense from the institutions responsible for the abusers in question. What is distinctive about *Cox* and *Mohamud*, however, is that these are not sexual abuse cases, but examples of traditional vicarious liability scenarios in which the question is whether an employment relationship exists or whether the misconduct of the employee takes him outside the scope of his employment. The Supreme Court rulings are therefore significant in indicating that sexual abuse cases are not a separate category of claims. The extension of vicarious liability to meet the facts of *Lister, JGE* and *CCWS* applies generally to all cases. The societal need to respond to sexual abuse scandals has therefore had a permanent impact on the shaping of the modern doctrine of vicarious liability.

## 6 Conclusions

In *Mohamud v WM Morrison Supermarkets plc*, Lord Dyson expressed the view that '[t]o search for certainty and precision in vicarious liability is to undertake a quest for a chimaera.'[57] Some might regard this as an understatement as the Supreme Court in *Cox* and *Mohamud* showed a clear preference for flexibility above certainty. It is true, as Lord Nicholls acknowledged in *Dubai Aluminium v Salaam*,[58] that given the variety of circumstances which can arise, a rigid test would not work well in this area of law, but the breadth of both the relationship and course of employment/close connection tests will have to be tried in future litigation. In this article, it has been argued that the decision in *Cox* is to be welcomed as an incremental and logical extension of the 'akin to employment' test recognised by the Court of Appeal in *JGE* and the Supreme Court in *CCWS*. Reservations have been expressed, however, in relation to the 'simplified' two stage *Mohamud* test, in which the court will examine the field of activities entrusted to the employee and whether there is a sufficient connection between these tasks and the tort to make it '*right*' for the employer to be held liable as a matter of social justice. This seems to leave key value judgments with the trial judge and the application of the test in *Mohamud* itself suggests that much will rest on how the court characterises the facts of the case. Is the act of a racist employee shouting abuse at an individual entering his employer's premises significantly connected to his concern to remove the individual from these premises or simply an act of abuse which he would have committed whether he had met the individual in

the years Savile had worked for the corporation: see the report of Dame Janet Smith published in 2016 (BBC, 'The Dame Janet Smith Review' (*BBC*) <www.bbc.co.uk/bbc-trust/dame_janet_smith> accessed 4 August 2016).

[57] *Mohamud* (n 4) [54].

[58] *Dubai Aluminium Co Ltd v Salaam* (n 6) [26].

a nightclub or while watching a game of football? Will vicarious liability be confined to customers or extend to any individual who chooses to make an enquiry and who could be a potential customer? In accepting imprecision, the Supreme Court leaves the law subject to uncertainty. We may regard this as the acceptable price of ensuring that the victims sexually abused by priests can obtain compensation when the original culprits have either disappeared or have passed away.[59] The question remains, however, to what extent it is equally acceptable in the context of vicarious liability claims generally. One prediction may be made. The scope of the doctrine of vicarious liability will continue to be tested as claimants gain greater confidence that claims, which previously would have had no likelihood of success, may under the new regime be deemed just and fair. This is good news for tort victims, but likely to be less welcome to employers, who now find themselves strictly liable for the acts and omissions of a growing number of individuals for actions varying from the negligent carrying of kitchen supplies to racist attacks. One is left to wonder where, after three Supreme Court decisions in four years, this leaves the legal development of the doctrine of vicarious liability. Can, as the Supreme Court clearly hopes, the two stage test in *CCWS,* assisted by previous judicial decisions in the same or analogous contexts, provide sufficient guidance for future cases? The fact that the Supreme Court is due to hear an appeal in February 2017[60] in which one of the questions relates to the factors needed to establish vicarious liability does suggest that *Cox* and *Mohamud* are far from the end of this story.

[59] In *JGE* (n 14), for example, the priest in question was dead. Equally, in the earlier case of *Maga v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2010] EWCA Civ 256, [2010] 1 WLR 1441 the priest, Father Clonan, had disappeared and was presumed dead.

[60] Appeal from *NA v Nottinghamshire CC* (n 17), due to be heard in February 2017. It should also be noted that the High Court of Australia in October 2016 (*Prince Alfred College Incorporated v ADC* [2016] HCA 37) refused, at [83], to follow the *Mohamud* test, preferring a test of whether the employment provides 'the occasion for the commission of the wrongful act', although it remains to be seen whether its multi-faceted test for 'occasion' will offer any greater clarity in practice.