VICARIOUS LIABILITY ON THE MOVE — BUT WHERE SHOULD IT STOP?

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Abstract: The doctrine of vicarious liability has its roots in the early common law, with its core elements coming to be determined in the Victorian era. The ambit of the doctrine thereafter remained fairly settled until around the start of the present century, but since then its reach has been expanding markedly. This article will seek to explain exactly how the law has been expanding, which requires an examination both of the types of relationships where vicarious liability can apply and, assuming the requisite relationship exists, the nature of the link between the relationship and the wrongdoing in question. A further question concerns the circumstances in which a non-delegable duty may be imposed. Here, exceptionally, the duty is not simply to take care but, more onerously, extends to care being taken by another person to whom the task of performing the defendant's duty has been delegated. How vicarious liability and the concept of the non-delegable duty relate to each other, and whether or when they can overlap, will be examined and explained. The ultimate aim of this article is to consider why the law has been moving in these various ways, to identify the relevant policy concerns and to reach a conclusion on where it ought to stop.

Keywords: *vicarious liability; policy; employment; analogous relationships; independent contractors; agency; close connection test; non-delegable duties*

I. Introduction

A person may be held to be vicariously liable for a wrong committed by someone else, even though he or she is not personally blameworthy or at fault. Accordingly, it is a principle of law that imposes strict liability on innocent defendants. The doctrine of vicarious liability has its roots in the early common law, with its core elements coming to be determined in the Victorian era.[1] Its ambit thereafter remained fairly settled until around the start of the present century, but since then its reach has been expanding markedly. In *Various Claimants v Catholic Child Welfare Society*

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1 For an examination of the history of the doctrine, see *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677, [10]–[25] (Lord Toulson).

(*Christian Brothers* case),[2] Lord Phillips said that the law of vicarious liability was on the move, and in *Cox v Ministry of Justice*[3] Lord Reed observed that it had not yet come to a stop. Yet very recent decisions of the UK Supreme Court, considered in the Postscript, help to clarify the ambit of the doctrine and show at the least a marked slowing down. The aim of this article is to consider why the law has been moving, to identify the relevant policy concerns and to reach a conclusion on where it ought to stop.

The core relationship where vicarious liability can apply is, of course, that which exists between an employer and an employee or, sometimes, that which exists between a principal and an agent. However, recent developments show that the presence or absence of an employment contract is no longer decisive and there are other relationships, akin to employment, where it is just that vicarious liability should attach. Whether these new developments should allow for the possibility of imposing vicarious liability for the tort of an independent contractor is one question of considerable theoretical and practical importance. The appropriate basis for a finding of vicarious liability of a principal for the tort of an agent also is confused, and the cases certainly require some clarification.

Assuming the requisite relationship exists, the question then arises as to the nature of the link between that relationship and the wrongdoing in question. The orthodox tests in an employment context are whether the employee acted within the scope of, or during the course of, his or her employment. However, these questions have been superseded, at least for some cases, by a different test, namely whether the conduct was "closely connected" with the employment or agency or relationship analogous to employment. As will be seen, these significant developments have in part been impelled by a desire to find a just result in claims of sexual and other abuse and, more generally, in cases where the wrongful act in question was deliberate or involved a crime. Indeed, a prominent feature of recent decisions is a certain judicial readiness to provide a remedy for vulnerable people in need of the courts' protection.[4]

A further question, which also has attracted recent debate, concerns the circumstances in which a non-delegable duty may be imposed. Here, exceptionally, the duty is not to simply take care but, more onerously, extends to responsibility for care being taken by others, for instance by an independent contractor. How vicarious liability and the concept of the non-delegable duty relate to each other, and whether or when they can overlap, will need to be examined and explained.

Finally, we should note the familiar rule that holds a defendant liable in respect of the conduct of another person, in circumstances where the defendant is personally at fault in negligently supervising or controlling that person or otherwise in failing to prevent the harm from happening.[5] There are very many instances of personal

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2 [2012] UKSC 56, [2013] 2 AC 1, [19].

3 [2016] UKSC 10, [2016] AC 660, [1].

4 See generally Stephen Todd, "Personal Liability, Vicarious Liability, Non-delegable Duties and Protecting Vulnerable People" (2016) 23 *Torts Law Journal* 105.

5 See generally Claire McIvor *Third Party Liability in Tort* (Oxford: Hart Publishing, 2006) esp at Ch 2.

negligence of this kind, and recent decisions concerning the liability of a parent company in relation to the activities of its subsidiary provide us with examples.[6] Indeed, personal as well as vicarious liability sometimes will arise out of the one set of facts.

II. Policy Basis

At least in recent times, the courts have tended to assume that the policy basis of vicarious liability lies in a combination of "loss spreading" and "rough justice" rather than the result of any clearly developed and logical legal principle.[7] The doctrine has been explained as being one strand in a progressive tendency "toward more liberal protection of innocent third parties".[8] This justification is often advanced through three related themes in the case law. First, it is argued that, just as the employer benefits from the advancing of his or her economic interests through the actions of employees, so should the employer in fairness be held liable for losses caused to others by those employees in the course of their employment. Second, the employer is seen as being more likely to be in a position to compensate the injured party than the employee who has caused the damage: the "deepest pocket" principle. Third, the concept of vicarious liability is seen as promoting wide distribution of tort losses, against which the employer can insure and in respect of which the employer can distribute the cost through pricing mechanisms.

Let us consider these concerns in more detail. There is a comprehensive analysis in the judgment of McLachlin J in *Bazley v Curry* in the Supreme Court of Canada.[9] Her Honour identified two fundamental concerns that usefully embraced the main policy considerations that had been advanced. These were (i) the provision of a just and practical remedy for the harm, and (ii) the deterrence of future harm.

First and foremost was the concern to provide a just and practical remedy to people who suffered as a consequence of wrongs perpetrated by an employee. So a person who employed others to advance his or her own economic interest should in fairness be placed under a corresponding liability for losses incurred in

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6 *Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2019] 2 WLR 1051, where Lord Briggs affirmed that there was nothing special about the bare parent/subsidiary relationship and that the general principles which determined whether A owed a duty of care to C in respect of the harmful activities of B were not novel at all. The critical question was whether the parent company had sufficiently intervened in the management of the subsidiary company to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants. See also *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111; *Thompson v Renwick Group plc* [2014] EWCA Civ 635; *AAA v Unilever plc* [2018] EWCA Civ 1532; *Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191 (on appeal to the UKSC); *James Hardie plc v White* [2018] NZCA 580, [2019] 2 NZLR 49.

7 As Tipping J put it in *S v Attorney-General* [2003] 3 NZLR 450, [107] (NZCA), "the literature is replete with comments concerning the lack of any coherent or agreed jurisprudential underpinning".

8 *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462, 471–472 (PC) (Lord Wilberforce).

9 [1999] 2 SCR 534.

the course of the enterprise. Indeed, the idea that the person who introduced a risk incurred a duty to those who might be injured lay at the heart of tort law. This policy interest embraced a number of subsidiary goals, the first being that of effective compensation. However, effective compensation should also be fair, in the sense that it had to seem just to place liability for the wrong on the employer. Vicarious liability was arguably just in this sense. The employer put in the community an enterprise which carried with it certain risks. When those risks materialised and caused injury to a member of the public despite the employer's reasonable efforts, it was fair that the person or organisation that created the enterprise and hence the risk should bear the loss. Furthermore, the proposition was buttressed by the fact that the employer was often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimising the dislocative effect of the tort within society. Vicarious liability transferred to the enterprise itself the risks created by the activity performed by its agents.[10]

The second major policy consideration was deterrence of future harm. Employers were often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision. Failure to take such measures might not suffice to establish a case of tortious negligence directly against the employer, for beyond the narrow band of employer conduct that attracted direct liability lay a vast area where imaginative and efficient administration could reduce the risk that the employer had introduced into the community. Holding the employer vicariously liable for the wrongs of its employees might encourage the employer to take such steps and, hence, to reduce the risk of further harm.

However, there often existed a countervailing concern. Servants might commit acts, even on working premises and during working hours, which were so unconnected with the employment that it would seem unreasonable to fix an employer with responsibility for them. But this apparently negative policy consideration could be understood as nothing more than the absence of the twin policies of fair compensation and deterrence. To impose vicarious liability on the employer for such independent wrongdoing did not correspond to common sense notions of fairness. And where vicarious liability was not closely and materially related to a risk introduced or enhanced by the employer, it served no deterrent purpose, for there was little the employer could have done to prevent it, and it relegated the employer to the status of an involuntary insurer.

McLachlin J's judgment in *Bazley* has been highly influential in the recent developments in English jurisprudence.[11] Certainly, the essence of her reasoning — that the defendant should be held responsible for the risk that is created by his or

10 *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299, [51] (La Forest J).

11 See in particular *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [27], [48], [70] and [83]; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [23]; *Christian Brothers* (n.2), [63]–[65]; *Mohamud* (n.1), [40] and [56].

her enterprise — similarly underpins the decisions in the United Kingdom (UK).[12] In *Christian Brothers*,[13] the leading modern case, Lord Phillips P said that the objective was to ensure, insofar as it was fair, just and reasonable, that liability for tortious wrong was borne by a defendant with the means to compensate the victim. Such defendants could usually be expected to insure against the risk of such liability, so that this risk was more widely spread. It was for the court to identify the policy reasons why it was fair, just and reasonable to impose vicarious liability and to lay down the criteria that had to be shown to be satisfied. They were: (i) the employer was more likely to have the means to compensate the victim than the employee and could be expected to have insured against that liability; (ii) the tort would have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity was likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity, would have created the risk of the tort committed by the employee; and (v) the employee would, to a greater or lesser degree, have been under the control of the employer.

In *Cox v Ministry of Justice*,[14] Lord Reed commented on these views. He remarked that Lord Phillips's first factor did not feature in the remainder of the judgment and was unlikely to be of independent significance in most cases, for neither wealth nor the insurance position was a principled justification. The mere possession of wealth was not in itself any ground for imposing liability. As for insurance, employers insured themselves because they were liable: they were not liable because they had insured themselves. The significance of the fifth of the factors — control over the tortfeasor — was that the defendant could direct what the tortfeasor did, not how he did it. So understood, it was a factor which was unlikely to be of independent significance in most cases. On the other hand, the absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability. The remaining factors — (i) activity by the tortfeasor on behalf of the defendant, (ii) which was likely to be part of the business activity of the defendant, (iii) which would have created the risk of the tort being committed — were interrelated. Their essential idea was that the defendant should be liable for torts that might fairly be regarded as risks of his business activities, whether they were committed for the purpose of furthering those activities or not. *Christian Brothers* wove together these related ideas so as to develop a modern theory of vicarious liability.

The expanding reach of vicarious liability, apparently driven by the *Christian Brothers* policies, has been continued in the most recent cases. In particular, they have recognised the relationship between a local authority and foster parents as being "analogous to employment",[15] denied that the long-standing distinction

12 For a useful summary, see *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [9] (Lord Nicholls).

13 *Christian Brothers* (n.2), [34]–[35] and [47].

14 *Cox* (n.3), [19]–[24].

15 *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355; see further nn.33, 118.

between an employee and an independent contractor is necessarily definitive,[16] and applied in liberal fashion the so-called "close connection" test governing the link between the relationship in question and the wrongdoing.[17]

We have to ask how appropriate or helpful the *Christian Brothers* policies are in driving this expansion of liability. Let us take first the relevance of the defendant's means and the expectation that the defendant is insured. Lord Reed in *Cox* pointed to the reasons why such concerns should not be taken into account, yet in *Armes v Nottinghamshire County Council*[18] his Lordship appeared to backtrack, presenting the defendant's wealth and the insurance position as routine factors which the court should take into account. Yet the objections he had raised in *Cox* are obvious and cannot easily be dispelled. Maybe a partial solution is not to treat the fact of a defendant being insured as a reason for imposing liability, but to recognise that the availability of insurance may be an answer to a defendant who argues that the imposition of vicarious liability is too heavy a burden for the defendant to bear.[19]

If we now take Lord Phillips's factors as a whole, they were advanced as policy justifications for vicarious liability in the orthodox context of an employer/employee relationship and thereafter applied to justify the imposition of liability in the case of other relationships analogous to employment. But whether these factors can provide a clear and principled basis for imposing liability must be very much in doubt. Certainly, as they have been interpreted, they do not have much value in helping to discriminate between those relationships where underlying policy arguably should support the imposition of liability and those where it should not. Indeed, the three central factors identified by Lord Reed in *Cox* seemingly might be found in virtually any case where an employer contracts with an independent contractor to provide services, helping to explain how the formerly critical distinction between contracts with employees and with independent contractors has been undermined. On the other hand, the notion of control was downplayed in *Cox*, yet, properly understood, this long-standing pointer in favour of vicarious liability may well have significant predictive value.

The policy underlying the requisite link between a qualifying relationship and the wrongdoing remains for consideration. A prominent factor pointing in favour of liability is the notion that the defendant has carried on its business or activity through the wrongdoer in a way that has significantly created or enhanced a risk of injury to the claimant. This notion of risk creation, articulated by McLachlan J in *Bazley* and specifically endorsed by Lord Phillips in *Christian Brothers*, can provide a principled guide in drawing the line where the defendant's liability should end. Unfortunately, it has been blurred by the later decision of the Supreme Court in

16 *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670, [44]–[45]; see further n.49.

17 *Mohamud* (n.1); see further n.93 and the Postscript to this article at nn.131, 137.

18 *Armes* (n.15), [63].

19 *Various Claimants v WM Morrison Supermarkets plc* [2018] EWCA Civ 2339, [2019] 2 WLR 99, [78]; see further n.106 and the decision of the Supreme Court in the Postscript at nn.131, 138–150.

Mohamud v WM Morrison Supermarkets plc,[20] and the courts have been searching for "social justice" on the particular facts of a case.

III. Employees and Independent Contractors

The most significant relationship which can support a finding of vicarious liability certainly remains that of employer and employee. It is necessary, therefore, to identify what it is that distinguishes a contract creating an employer-employee relationship (usually termed a contract of service) from a contract between a principal and an independent contractor (usually termed a contract for services). This inquiry covers some very well-trodden ground. The fundamental test, approved by the Privy Council in *Lee Ting Sang v Chung Chi-Keung*,[21] is whether the person concerned has engaged himself or herself to perform services and to do so on his or her own account. If the answer to that question is "yes" then the contract is a contract for services and the person performing the work is an independent contractor. If the answer is "no", then the contract is a contract of service and the person concerned is an employee.

In order to determine this question, the most important and, in many cases, the decisive criterion has been that of control. Early approaches to the control test, which focused on actual control over the way in which the work was carried out, have long given way to an approach which emphasises where ultimate managerial authority lies. In the words of Lord Phillips, the significance of control today is that the employer can direct what the employee does, not how he does it.[22] The scope of the courts' inquiry has shifted from a close scrutiny of direction as to how the work was to be performed, to a more general inquiry into a right of ultimate control as viewed within the "totality of the relationship".[23]

Another approach is to apply an "organisation" or "integration" test. This asks whether the person concerned is employed as part of a business of which his or her work forms an integral part (in which case, it is argued, an employer-employee relationship exists), or whether the work done is in fact not integrated into the business but is only accessory to it (said to point to a principal-independent contractor relationship).[24] Applying the distinction, an employee who commits a tort in the course of his or her employment renders the employer vicariously liable, but where the tort is committed by an independent contractor the principal will not incur liability.

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20 *Mohamud* (n.1); see n.93 and the explanation of *Mohamud* in the Postscript at n.142.

21 [1990] 2 AC 374, 382 (PC), applying the words of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (QB).

22 *Christian Brothers* (n.2), [36].

23 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 28–29 (Mason J).

24 The language is that of Lord Denning in *Stevenson, Jordan & Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 (CA).

Recent cases downplay the importance attached to the strict categorisation of a person as an employee. In particular, the proposition that a person who creates or enhances a risk of harm should be held vicariously liable if the harm eventuates in becoming increasingly influential, and this notion has no necessary connection with a person's status as an employee (although in many employment cases such connection is likely to exist in fact). Again, the traditional criteria have long been considered difficult in application when resolving disputed categories of employment which, almost inevitably, will involve borderline situations. This difficulty is compounded by increased employment flexibility arising from deregulation and market changes, which has blurred the distinction between employees and independent contractors.[25] Both developments have led the courts to abandon the need for there to be a relationship of employer and employee before vicarious liability can be imposed, and to ask whether there is a relationship "analogous to employment". So let us consider what kinds of relationships are encompassed by this wider test.

IV. Relationships Analogous to Employment

A. Religious authority and member of the clergy

A decision in Canada was the first to expand the kind of relationship that underpins a finding of vicarious liability. In *John Doe v Bennett*,[26] a Roman Catholic priest had sexually assaulted boys in his parishes, and the question was whether the diocesan episcopal corporation sole, which was equated with the bishop, was vicariously liable. The Supreme Court of Canada held that the relationship between a bishop and a priest in a diocese was "akin to an employment relationship", and that vicarious liability could be imposed. *E v English Province of Our Lady of Charity*[27] is a similar decision of the Court of Appeal in England. Ward LJ expressed the test to be whether the tortfeasor bore a sufficiently close resemblance and affinity in character to a true employee that justice and fairness to both victim and defendant required the court to extend vicarious liability to cover the tortfeasor's wrongdoing. And on the facts this test was satisfied. The tortfeasor was a priest for the parish in which the children's home where the plaintiff lived was situated. He was accountable to the bishop, was subject to the bishop's sanction, including removal from the parish, and was fully integrated into the organisation of the church, pursuing its fundamental aims and objectives on its behalf.

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25 See generally Jeremias Prassl, "Who Is a Worker?" (2017) 133 *Law Quarterly Review* 366; Alan Bogg, "Between Statute and Contract: Who Is a Worker?" (2019) 135 *Law Quarterly Review* 347.

26 2004 SCC 17, [2004] 1 SCR 436.

27 [2012] EWCA Civ 938, [2013] QB 722.

By this decision the English Court of Appeal took the first step in creating a new, overarching, category of vicarious liability. Indeed, in O'Sullivan's view,[28] the logical next step might have been to focus on the substantive characteristics of a relationship which justifies and attracts vicarious liability, excising the need to ask whether there is a contract of employment or something akin to it. In *Christian Brothers*,[29] decided shortly afterwards, the UK Supreme Court did not follow this route, but it did confirm and develop the thinking in *English Province*. The question here was whether the Institute of the Brothers of the Christian Schools (the Institute), founded by Jean-Baptiste De La Salle in 1680, was responsible for sexual and physical abuse of children committed by its brothers at a residential institute for boys (St William's) who were in need of care and protection. Claims had been brought by the victims against two groups of defendants. The first (called the Middlesbrough Defendants), who were the managers of the school and the employers of the brother teachers, were held at first instance to be vicariously liable in respect of abuse by those teachers. The second (the De La Salle Defendants) were found not to be vicariously liable, on the basis that the Institute did not employ the brothers at St William's. Rather, it sent its brothers to teach there. The English Court of Appeal upheld the judge's decision,[30] and the Middlesbrough Defendants appealed, on the ground that the Institute should share joint vicarious liability for the acts of its brother members. The Supreme Court was unanimous in upholding this contention.

Lord Phillips P (with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Carnwath agreed) explained first how the Institute operated. Its members were bound by lifelong vows of poverty, chastity and obedience and lived a communal life together as brothers, following a strict code of conduct. The Institute's mission was to provide a Christian education to boys, and in pursuance of that activity it owned and managed schools in which its members taught, and it sent its members to teach at schools managed by other bodies (as was the case with St William's). The brothers renounced any salaries payable for their teaching, which were instead paid to charitable trusts for the benefit of the Institute and used to meet the needs of the brothers and the financial requirements of the teaching mission. The Institute was not itself a corporate body, but the trusts through which it operated had recognised legal personality, and in the circumstances Lord Phillips saw it as appropriate to approach the case as if the Institute were incorporated, able to own property and possessing substantial assets.

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28 Janet O'Sullivan, "The Sins of the Father — Vicarious Liability Extended" (2012) 71 *Cambridge Law Journal* 485, 487.

29 *Christian Brothers* (n.2); Phillip Morgan, "Vicarious Liability on the Move" (2013) 129 *Law Quarterly Review* 139; The Rt Hon Lord Hope of Craighead, "Tailoring the Law on Vicarious Liability" (2013) 129 *Law Quarterly Review* 514; John Bell, "The Basis of Vicarious Liability" (2013) 72 *Cambridge Law Journal* 17.

30 *Various Claimants v Catholic Child Welfare Society* [2010] EWCA Civ 1106.

His Lordship turned next to the policy reasons (identified above) that usually made it fair, just and reasonable to impose vicarious liability on an employer in respect of the tort an employee committed in the course of his employment, and recognised that they should apply equally in the instant case. So where the defendant and the tortfeasor were not bound by a contract of employment, but their relationship had the same incidents, that relationship could properly give rise to vicarious liability on the ground that it was akin to that between an employer and an employee. That was the approach adopted by the Court of Appeal in *English Province*. And here the relationship between the teaching brothers and the Institute had all the essential elements of the relationship between employer and employee: the Institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body; the teaching activity of the brothers was undertaken because the provincial head directed the brothers to undertake it; the teaching activity undertaken by the brothers also was in furtherance of the objective, or mission, of the Institute; and the manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the Institute's rules. The relationship between the teacher brothers and the Institute differed from that of the relationship between employer and employee in that the brothers were bound to the Institute not by contract, but by their vows, and the brothers entered into deeds under which they were obliged to transfer all their earnings to the Institute, but neither difference was material. Indeed, they rendered the relationship closer than that of an employer and its employees.

B. Prison authority and prisoner

The next development came in *Cox v Ministry of Justice*,[31] where the Supreme Court held that the defendant Ministry of Justice was vicariously liable for the negligence of a prisoner who was working in the prison kitchen who dropped a heavy bag of rice and injured the prison catering manager. Lord Reed affirmed that the general approach in *Christian Brothers* was not confined to some special category of cases, such as the sexual abuse of children. By focusing upon the business activities carried on by the defendant and their attendant risks, it directed attention to the issues which were likely to be relevant in the context of modern workplaces. In the instant case, the fact that the prison service's aims were not commercially motivated, but served the public interest, was no bar to the imposition of vicarious liability. When prisoners worked in the prison, they were integrated into the operation of the prison. Their activities formed part of the operation of the prison, and were of direct and immediate benefit to the prison service itself.[32]

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31 *Cox* (n.3); see James Plunkett, "Taking Stock of Vicarious Liability" (2016) 132 *Law Quarterly Review* 556; Phillip Morgan, "Certainty in Vicarious Liability: A Quest for a Chimaera" (2016) 75 *Cambridge Law Journal* 202.

32 *Compare Razumas v Ministry of Justice* [2018] EWHC 215 (QB), [2018] PIQR P10, [174]–[176] (no sufficient integration of the provision of healthcare services into the enterprise of running a prison that the prison governor would be vicariously liable for the actions of a healthcare provider).

C. *Local authority and foster parent*

Cox certainly can be seen as a straightforward application of the principle in *Christian Brothers*. However, the expanding of the kind of relationship that can give rise to vicarious liability was taken a stage further by the Supreme Court in *Armes v Nottinghamshire County Council*,[33] which decision is more controversial. The defendant local authority had taken the claimant into care when she was aged seven and had placed her with foster parents. The claimant initially was physically and emotionally abused by her foster mother, and when she was placed with second foster parents she was sexually abused by her foster father. At the trial of the action, Males J held that the local authority was not responsible for the tortious conduct of the foster parents, either on the basis of vicarious liability or on the basis of a non-delegable duty of care,[34] and this decision was affirmed in the English Court of Appeal.[35] The claimant appealed from this decision to the Supreme Court, which affirmed that the authority did not owe a non-delegable duty to take care[36] but, by a majority,[37] allowed the appeal on the ground that the authority was vicariously liable for the foster parents' abuse.

Lord Reed, giving the majority judgment, once again determined the matter by applying the *Christian Brothers* factors to the particular facts.[38] The relevant activity of the authority was the care of children who had been committed to their care, whereas the foster parents could not be regarded as carrying on an independent business of their own. The picture as a whole pointed towards the conclusion that the foster parents provided care to the child as an integral part of the local authority's organisation of its childcare services. It could 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. Further, the local authority's placement of children in their care with foster parents created a relationship of authority and trust between the foster parents and the children, in circumstances where close control could not be exercised by the local authority, and so rendered the children particularly vulnerable to the risk of abuse. It could be considered fair that they should compensate the unfortunate children for whom that risk materialised. So far as the issue of control was concerned, while the foster

33 *Armes* (n.15); see Christine Beuermann, "Up in Armes: The Need for a Map of Strict Liability for the Wrongdoing of Another in Tort" (2018) 25 *Torts Law Journal* 1; Andrew Dickinson, "Fostering Uncertainty in the Law of Tort" (2018) 134 *Law Quarterly Review* 359: Simon Deakin, "Organisational Torts: Vicarious Liability Versus Non-delegable Duty" (2018) 77 *Cambridge Law Journal* 15; Andrew Bell, "The Liability of Local Authorities for Abuses by Foster Parents" (2018) 34 *Professional Negligence* 38. See also *S v Attorney-General* [2003] 3 NZLR 450 (CA), where a majority in the NZ Court of Appeal had earlier taken the same step as in *Armes*, although the basis of its decision was that the relationship between the Department of Social Welfare and foster parents constituted a special form of agency.

34 *NA v Nottinghamshire County Council* [2014] EWHC 4005 (QB), [2015] PTSR 653.

35 *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139, [2016] QB 739.

36 As to which see n.118.

37 Lord Reed, Baroness Hale, Lord Kerr and Lord Clarke; Lord Hughes dissenting.

38 *Armes* (n.15), [59]–[73].

parents controlled the organisation and management of their household 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, and in this way exercised a significant degree of control over both what the foster parents did and how they did it. And finally, most foster parents had insufficient means, no insurance cover, to be able to meet a substantial award of damages, whereas the local authorities which engaged them could more easily compensate the victims of injuries which were often serious and long-lasting.

Lord Hughes, in a strong dissenting judgment, maintained that the foster carers did not do what the authority would otherwise do for itself; they did something different, by providing an upbringing as part of a family. A family life was not consistent with the kind of organisation which the enterprise test of vicarious liability contemplated. Vicarious liability was necessary, and fair and just, when it applied to fix liability on someone who undertook an activity, especially a commercial activity, by getting someone else integrated into his organisation to do it for him. Employment was the classic example, and other situations might be analogous. But the extension of strict liability needed careful justification. Once one examined the nature of fostering, its extension to that activity did not seem to be either called for or justified but, rather, fraught with difficulty and contraindicated.

Dickinson has criticised the majority decision in *Armes* as long on policy and short on principle: rather than seeking out a clear, principled basis for imposing liability on those who had committed no wrong, the judges relied on a casserole of incommensurable policy reasons and general resort to what was "fair" and "just" to support the doctrine.[39] Its operation thus becomes highly unpredictable, and litigants are encouraged to push at the ill-defined and expanding boundaries of liability. More particularly, Lord Reed's conclusion that foster parents were an integral part of the local authority's child care services[40] appears to be inconsistent with one of his reasons for rejecting the claim based on a non-delegable duty owed to the claimant — that the duty of the local authority was not to provide daily care but to arrange for and monitor its performance.[41] Again, his Lordship's references to the local authority's statutory duties and powers as supporting the imposition of vicarious liability[42] contrasts with the clear position in the law of negligence, recently affirmed by Lord Reed himself, that public authorities are generally subject to the same liabilities in tort as private individuals and bodies.[43] And finally,

39 Dickinson (n.33), making the points that follow.
40 *Armes* (n.15), [60].
41 *Ibid.*, [47]: see n.118 and accompanying text.
42 *Ibid.*, [59]–[62].
43 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595, [31]–[42].

as we have already seen, the importance he attaches to the local authority's deeper pockets[44] undermines his own, principled, rejection of that factor in *Cox*.[45]

A factor which, conversely, can point in favour of liability, and which also was identified by Lord Reed,[46] is that of risk creation, the local authority having placed the claimant in a position where she was particularly vulnerable to abuse. But this factor alone cannot suffice for the imposition of vicarious liability if the relationship nonetheless is not one that is analogous to employment, and for the preceding reasons the relationship between local authority and foster parent very arguably cannot be seen to fall into this category. Indeed, in *KLB v British Columbia*[47] the Supreme Court of Canada, in a decision with which Lord Hughes' dissent certainly is consistent, notably had refused to impose vicarious liability in like circumstances. Rather, finding a relationship between a defendant and a claimant in circumstances where the defendant has assumed a degree of control over the claimant, who can be seen to be vulnerable and in need of protection, point towards the defendant owing the claimant a non-delegable duty of care. We will consider later on whether imposing a non-delegable duty on the department responsible for social welfare would be an alternative and more appropriate solution in the circumstances.[48]

D. Principal and independent contractor

In none of the cases considered so far has the court been required directly to address the question whether there may now be vicarious liability for the tort of an independent contractor. But in *Barclays Bank plc v Various Claimants*[49] that question squarely arose. In this case 126 claimants sought damages against Barclays Bank in respect of alleged sexual assaults to which they were subjected by a doctor (B) to whom the Bank referred them for medical assessments prior to their employment. The Bank argued that B (who had died eight years earlier) was an independent contractor, but the trial judge was satisfied that the *Christian Brothers* factors pointed towards the imposition of liability,[50] and the English Court of Appeal dismissed the Bank's appeal.

Irwin LJ observed that the law had been "on the move" in recent time,[51] and noted particularly that in *Cox v Ministry of Justice*[52] Lord Reed, drawing on *Christian*

44 *Armes* (n.15), [63].
45 *Cox* (n.3), [20].
46 *Armes* (n.15), [61].
47 2003 SCC 51, [2003] 2 SCR 403.
48 See Section VI.
49 [2018] EWCA Civ 1670; see Allison Silink and Desmond Ryan, "Vicarious Liability for Independent Contractors" (2018) 77 *Cambridge Law Journal* 458; Peter Watts, "The Travails of Vicarious Liability" (2019) 135 *Law Quarterly Review* 7. *Cf Brayshaw v Partners of Apsley Surgery* [2018] EWHC 3286 (QB).
50 *Various Claimants v Barclays Bank plc* [2017] EWHC 1929 (QB).
51 *Barclays* (n.16), [41].
52 *Cox* (n.3); see further n.31.

Brothers, focused on the relationship necessary between the tortfeasor and the defendant to found liability, and that in *Mohamud v WM Morrison Supermarkets plc*[53] Lord Toulson explored how the conduct of the tortfeasor had to be related to that relationship. Critically, Irwin LJ accepted that the law now required answers to the questions laid down in *Cox* and *Mohamud* and affirmed in *Armes*, rather than an answer to the question: was the alleged tortfeasor an independent contractor?

Applying this approach to the facts, his Lordship said first that the trial judge was obviously right to conclude that the Bank had more means to satisfy the claims than had the (long distributed) estate of B. She was also correct to give this matter little weight. No liability could be founded on this consideration alone. On the second criterion — was the activity being taken on behalf of the Bank? — the answer was clearly "yes", as the judge had concluded. While for most applicants it was right to say that the medical examination brought benefit to them, because it opened the door to employment, the principal benefit was to the prospective employers, for whom this step tended to ensure fit entrants able to give long service to the Bank. Third, for the same reasons, the selection of suitable employees was also a part of the business activity of the Bank. As regards criterion four, the risk factor, the Bank specified the nature of the examinations as well as the time, place and examiner. The circumstances might less obviously give rise to the risk of tort than the long-term placement of children in a boarding school, in the care of supposedly celibate religious brothers or priests, but the risk was, on these facts, perfectly properly established. Finally, the issue of the control exercised by the Bank over B was perhaps the most critical factor. The trial judge had concluded that the Bank was directional in identifying the questions to be asked and the examinations to be carried out, and exercised a higher level of control than might usually be found in the context of an examination required to be performed by a doctor, and she was correct in her findings and for the reasons she gave. She also was obviously correct that the medical examinations were sufficiently closely connected with the relationship between B and the Bank as to satisfy the second stage of the test for liability.[54]

Irwin LJ concluded by observing that it was understandable that a "bright line" test, such as was said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business could not displace or circumvent the recent principles established by the UK Supreme Court. Further, establishing whether an individual was an employee or a self-employed independent contractor could be full of complexity and evidential pitfalls. The *Cox/Mohamud* questions would often represent no more challenging a basis for analysing the facts in a given case.

Perhaps, there is rather more doubt about whether the approach taken in recent Supreme Court decisions was intended to affect the employee/independent contractor distinction than Irwin LJ acknowledged. Those cases did not concern

53 *Mohamud* (n.1); see further n.93.

54 See Section V.

either employees or independent contractors, and might well be seen as not necessarily applicable in a case where the defendant has contracted with a person carrying on a recognisably independent business. Indeed, there are a number of *obiter* statements in the decisions preceding *Barclays Bank* denying that the "akin to employment" test was intended to apply to the independent contractor rule.[55] Again, in a recent decision in Singapore, the Court of Appeal cautioned that the *Christian Brothers* criteria were not intended to effect a radical change in the law, but merely recognised that vicarious liability might be imposed outside the class of traditional employment relations.[56]

Barclays seemingly is an exceptional case, and even on the view taken in the Court of Appeal the employee/independent contractor distinction remains highly relevant and likely to be applied in most cases.[57] Indeed, the distinction between one who works for another and one who works on his or her own account certainly is a valuable and principled one, and very arguably is not affected at all by the "analogous to employment" test. Rather, its proper sphere of application is to atypical working relationships involving persons who are neither employees nor independent contractors.[58] Indeed, the law can be rationalised, and vicarious liability for independent contractors excluded, by the courts' recognition that control, properly understood, remains a key consideration. Watts makes this point, arguing that by far the most important meaning of control is its use as a shorthand for the duties of obedience and loyalty that an employee implicitly undertakes to an employer.[59] So in *Barclays* it was very difficult to see the relationship between the doctor and the bank as being akin to employment: the doctor did not surrender his autonomy to the bank, and a number of other indicators supported his being an independent contractor.[60] Further, the view that the relative wealth of the parties should be brought into account is quite unconvincing, as already discussed, and the proposition that "there could hardly be a clearer example of [the bank's business activity]"[61] than the selection of suitable employees can be condemned as well. As Watts asks, are employers to be routinely liable for the torts of HR firms they engage to help them find and select staff? It is apparent, then, that there are strong arguments against imposing vicarious liability on the bank.[62]

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55 *English Province* (n.27), [69] (Ward LJ); *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537, [3] (Lord Sumption); *Cox* (n.3), [29] (Lord Reed).

56 *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58, [63]–[64].

57 See, eg, *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157, [21].

58 Silink and Ryan (n.49), 458.

59 Watts (n.49), 9, citing *British Telecommunications plc v Ticehurst* [1992] ICR 383 (CA) and *University of Nottingham v Fishel* [2000] ICR 1462 (QB). Watts notes that the other meaning refers to the giving of precise directions as to how a person must act in achieving the stipulated goal — which might be called "micro-control" — and is not important in determining whether vicarious liability should be imposed.

60 Surprisingly, it is not stated in either the first instance or the Court of Appeal judgments what proportion of the doctor's work was done for the bank.

61 *Barclays* (n.16), [52].

62 In April 2020, the Supreme Court reversed the decision of the Court of Appeal. Their Lordships' decision is examined in the Postscript to this article.

V. The "Close Connection" Test

A. Background

If we express the second limb to a finding of vicarious liability in orthodox terms, we say that an employer is vicariously liable for the tort of an employee only where the tort is committed in the course or scope of employment. The test that is commonly applied in determining this question, derived from *Salmond on Torts*,[63] has two limbs. It must be asked whether the employee's act is a wrongful act authorised by the employer, or is a wrongful and unauthorised mode of doing some act authorised by the master. The first limb of this test is not really about vicarious liability, as where a wrongful act is authorised the employer is personally liable. The second limb raises the problem of deciding whether conduct is an unauthorised mode of doing something or is simply not authorised at all.

It is clear that an employer should not be held vicariously liable for an employee's torts in the absence of some kind of connection between the conduct in question and the employment (or relationship akin to employment). Asking whether tortious conduct was in the course or scope of employment gives expression to this need to place limits on the employer's liability, by restricting that liability to those acts which can be recognised as sufficiently connected to the employment relationship and thus differentiating those cases where the employment merely gives the employee the opportunity to commit the unauthorised act.[64] The test has been applied in a great variety of circumstances and has fostered a multitude of decisions,[65] and at least in cases involving negligence it probably works as well as can reasonably be expected. Yet determining how it should apply in cases where the wrongdoer has engaged in deliberately wrongful, often criminal, conduct entirely for his or her ends has proven especially difficult. Taking the child abuse cases as examples, it is hard to characterise sexual abuse by a teacher or priest as a wrongful mode of doing authorised work. Rather, such conduct is the very antithesis of what the teacher or priest should do. Certainly, earlier decisions tend to show that the courts were more reluctant to hold employers liable for the deliberate torts of their employees than for their negligence, although it is not clear whether this reluctance arose because the underlying policy considerations were seen to be less applicable where employees were behaving in a deliberately unlawful manner, or whether it was simply seen to be more difficult to characterise such behaviour as being one way of performing employment obligations. At all events, recent cases involving intentional conduct have preferred to ask whether the connection between the tortious conduct and the

63 JW Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (London: Stevens and Haynes, 1907) pp.83–84; applied in a classic statement of Lord Thankerton in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591, 599 (PC).

64 See *Lister* (n.11), [59] (Lord Hobhouse).

65 For an overview see CT Walton (ed), *Charlesworth and Percy on Negligence* (London: Sweet & Maxwell, 14th ed., 2018), paras.7.43–7.60.

employment is sufficiently close as to justify vicarious liability. So let us examine this alternative test for connecting the wrongdoing with the employment.

B. The Bazley principles

In *Bazley v Curry* McLachlan J, delivering the judgment of the Supreme Court of Canada, put forward an alternative set of guiding principles to be applied to "novel" situations where employment provided the opportunity for "a peculiarly custody-based tort like embezzlement or child abuse".[66] These principles were suggested as determining whether an employer "is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive":[67]

(1) The courts should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
(2) The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
(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;

66 [1999] 2 SCR 534, 559; see Peter Cane, "Vicarious Liability for Sexual Abuse" (2000) 116 *Law Quarterly Review* 21; Paula Giliker, "Rough Justice in an Unjust World" (2002) 65 *Modern Law Review* 269.
67 *Bazley* (n.9), 559–560.

(d) the extent of power conferred on the employee in relation to the victim; and
(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

Applying these principles to the particular facts, it was held that a foundation operating residential care facilities for troubled children was vicariously liable for paedophilic assaults by a caregiving employee. There was a strong connection between the role that the employee was required to carry out and the opportunities to commit the wrongful acts. The employee's duties included general supervision and also intimate activities like bathing and putting the children to bed, and in these circumstances the employer was seen as having created or enhanced the risk of his sexual wrongdoing. By contrast, in *Jacobi v Griffiths*,[68] another decision of the Supreme Court delivered on the same day as *Bazley*, it was held that a children's club was not vicariously liable for sexual abuse by an employee away from the club premises and outside working hours. The employment gave the opportunity to commit the assaults, but the employee was not placed in a special position of trust with regard to "care, protection and nurturing", and the actual work created no special risk of wrongdoing.[69]

Bazley has been applied in the Supreme Court of Canada in several more recent cases. In *John Doe v Bennett*,[70] where a Roman Catholic priest had sexually assaulted boys in his parishes, the Court held that the necessary connection between the employer-created or enhanced risk and the wrong was established. The priest's wrongful acts were strongly related to the psychological intimacy inherent in the role of priest, encouraging both the opportunity for abuse and victims' submission to that abuse. And this was exacerbated in the circumstances by an unusual level of power conferred by the church on the abuser, relative to his victims, through his geographical isolation in devoutly religious communities where there were few other authority figures. By contrast, in *EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia*,[71] where a school pupil alleged that he had been sexually abused by an employee who had no supervisory role or child care duties, vicarious liability was held not to arise. There was no "strong connection" between what the employer was asking the employee to do, in terms

68 [1999] 2 SCR 570.
69 In *Bazley*, the Supreme Court declined to make an exception for non-profit organisations. In *Jacobi*, however, the Court recognised that the policy consideration of compensation has considerably restricted application where the employer has little or no ability to absorb the cost of no-fault liability. For vicarious liability and volunteers, grassroots organisations, amateur bodies and the like, see Phillip Morgan, "Recasting Vicarious Liability" (2012) 71 *Cambridge Law Journal* 615 and Phillip Morgan, "Vicarious Liability and the Beautiful Game — Liability for Professional and Amateur Footballers" (2018) 38 *Legal Studies* 242.
70 *Bennett* (n.26), [27].
71 2005 SCC 60, [2005] 3 SCR 45.

of the risk arising from job-created power and the nature of the employee's duties, and the wrongful act.[72]

In *Lister v Hesley Hall Ltd*,[73] where the House of Lords considered *Bazley* for the first time, it was held unanimously that the owners and managers of a school, as employer, were vicariously liable for sexual abuse committed by one of their employees, who was the warden of a boarding house. Lord Steyn thought that the appropriate question was whether the acts in question were "so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable".[74] The focus was on whether vicarious liability should result from the relative closeness of the misconduct to the nature of the employment, and in the instant case the sexual abuse was "inextricably interwoven" with the carrying out by the warden of his duties at the school. Lord Millett also referred with approval to the Canadian decisions and recognised that it was critical that attention be directed to the closeness of the connection between the employee's duties and his wrongdoing. Experience showed that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there was an inherent risk that indecent assaults on the residents would be committed by those placed in authority over them, particularly if they were in close proximity to them and occupying a position of trust.

All members of the House of Lords in *Lister* agreed that the test of "close connection" should be applied, but only Lord Millett endorsed the importance that the Canadian decisions attached to the creation of risk. In *Christian Brothers*, the UK Supreme Court took the further step and held that there needed to be proof that the defendant caused a material increase in the risk that abuse would occur. In Lord Phillips's words:[75]

> 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.

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72 For further decisions of the Supreme Court of Canada, see *Blackwater v Plint* 2005 SCC 58, [2005] 3 SCR 3 (Government of Canada and a Canadian church operating a residential school for aboriginal children under an informal partnership held jointly vicariously liable for a dormitory supervisor who had sexually assaulted children at the school); *Reference re Broome v Prince Edward Island* 2010 SCC 11, [2010] 1 SCR 360 (no sufficiently close connection between a provincial government and a privately managed children's home as to give rise to vicarious liability).

73 *Lister* (n.11); Bruce Feldthusen, "Vicarious Liability for Sexual Abuse" (2001) 9 *Tort Law Review* 173; Alison Todd, "Vicarious Liability for Sexual Abuse" (2002) 8 *Canterbury Law Review* 281; Paula Giliker "Making the Right Connection: Vicarious Liability and Institutional Responsibility" (2009) 17 *Torts Law Journal* 35.

74 *Lister* (n.11), [28].

75 *Christian Brothers* (n.2), [86]–[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.

In the instant case the close connection between the relationship of the brothers and the Institute and the abuse committed at the school was made out. 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. So there was a very close connection between the relationship and the employment of the brothers as teachers in the school. Living cloistered on the school premises were boys who were vulnerable because they were children in the school, because they were virtually prisoners, and because their personal histories made it very unlikely 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 gave rise to vicarious liability on the part of the latter. It was not a borderline case. It was one where it was 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.

The close connection test also has been adopted in New Zealand[76] and in Singapore,[77] but not — or at least not precisely — in Australia. In *State of New South Wales v Lepore*[78] a majority in the High Court of Australia declined to adopt it, but more recently in *Prince Alfred College Inc v ADC*,[79] the High Court recognised that, as a result of the differing views expressed in *Lepore*, there was

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76 *S v Attorney-General* (n.33).

77 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] SGCA 22.

78 [2003] HCA 4, (2003) 212 CLR 511. Gleeson CJ and Kirby J were influenced by the English and Canadian decisions and favoured examining the sufficiency of the connection between the employment and the wrongdoing. But Gummow and Hayne JJ returned to the "course of employment" test, seeing it as an integral part of the definition of liability. Callinan J rejected the application of vicarious liability to situations of intentional wrongdoing by employees altogether, Gaudron J introduced an analysis based on estoppel, and for McHugh J the issue did not arise for decision.

79 [2016] HCA 37, (2016) 258 CLR 134; see Desmond Ryan, "From Opportunity to Occasion: Vicarious Liability in the High Court of Australia" (2017) 76 *Cambridge Law Journal* 14; Harry Crawford, "A Step in the Right Direction? Vicarious Liability for Intentional Wrongdoing of Employees in *Prince Alfred College Inc v ADC*" (2017) 24 *Torts Law Journal* 179; Christine Beuermann, "Vicarious Liability: A Case Study in the Failure of General Principles" (2017) 33 *Professional Negligence* 179.

a need to look at the question again. French CJ, Kiefel, Bell, Keane and Nettle JJ, in a joint judgment,[80] considered that the key was to be found in the words of Dixon J[81] — that vicarious liability might arise where the employment provided the "occasion" for the wrongful act. The fact that a wrongful act was a criminal offence did not preclude the possibility of vicarious liability. It was possible for a criminal offence to be an act for which the apparent performance of employment provided the occasion. Conversely, the fact that employment afforded an opportunity for the commission of the act was not of itself a sufficient reason to attract vicarious liability. Even so, the role given to the employee and the nature of the employee's responsibilities might justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. The court should consider any special role that the employer had assigned to the employee and the position in which the employee was thereby placed vis-à-vis the victim. Particular features that might be taken into account included authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature might be especially important. Where, in such circumstances, the employee took advantage of his or her position with respect to the victim, that might suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.[82]

Whether the distinction drawn by the High Court of Australia between the employment providing the "occasion" for and the "opportunity" for the abuse is a real one is doubtful. The words can be, and are, used interchangeably. The idea of a close connection based upon the creation of a risk is preferable, for it is clear that the nature of the abuser's job and the tasks he or she is given or authorised to carry out are pivotal in determining whether the test is satisfied. Yet the High Court certainly recognised that such employment-created risk was the focus of the inquiry, apparently seeing this as inherent in its favoured test.

C. Scope of application

A test asking whether *negligent* misconduct is a wrongful mode of doing authorised work can operate reasonably coherently, although difficulties in its application are bound to arise out of the limitless variety of facts where the question may be put in issue. By contrast, the question whether *intentional* misconduct can be

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80 Gageler and Gordon JJ delivered a brief concurring judgment.

81 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, 381.

82 The case concerned a claim by a former pupil at the Prince Alfred College (PAC) in respect of the sexual abuse he suffered at the hands of a housemaster (B) employed by PAC. The abuse had happened many years earlier, and after it came to light the claimant accepted a settlement of money offered by PAC. But after his psychiatric condition worsened and his financial situation became desperate, he changed his mind and sought to have the limitation period for bringing an action extended. The High Court of Australia held that permission should not be granted. Much of the evidence necessary to a determination about the position in which B was placed vis-à-vis the claimant had been lost, and PAC would be prejudiced in various ways if it were required to defend an action at this late juncture.

seen as a wrongful mode of doing what was authorised is certainly difficult and sometimes impossible to apply in any sensible fashion, especially in sexual abuse cases. For this reason McLachlin J introduced the test of "close connection" and the accompanying explanatory principles as applying in circumstances involving unauthorised and intentional wrongdoing. But should the new test be applied as well in the case of negligent wrongdoing? The answer seemingly is yes, provided there is the requisite close connection with *authorised work* — with what the wrongdoer was employed to do. We should no longer ask whether the wrongdoing is a mode of doing authorised work but whether it is closely connected with that work. The connection with what is authorised is critical. Without that link there can be no basis for holding the employer (or person in an analogous position) liable for the wrongdoer's harm. Sometimes, as in the sexual abuse claims, the misconduct may be entirely for the wrongdoer's own purposes, but may nonetheless have a sufficient connection with that work. As will be explained, these are exceptional cases possessing special features, and provided this is recognised the new test very arguably can apply generally. In particular, it can apply in negligence cases.

However, it may be that a claim of deceit should be treated differently from other types of wrongdoing in the context of the vicarious liability of a principal. In *Armagas Ltd v Mundogas SA*[83] the House of Lords determined that where a claimant had suffered loss in reliance on the deceit of an agent, the principal was vicariously liable only if the deceitful conduct of the agent was within his or her actual or ostensible authority. And recently, in *Hockley Mint Ltd v Ramsden*,[84] the Court of Appeal determined that that principle had not been replaced or supplemented by the law as laid down in *Lister v Hesley Hall Ltd*[85] and *Dubai Aluminium Co Ltd v Salaam*.[86] The trial judge had taken the view that the relevant tests for determining whether a principal was vicariously liable for his agent's deceit was whether it was just and fair for liability to be imposed on the principal and whether there was a sufficiently close connection between the agent's wrongdoing and the class of acts which the agent was employed to perform. But Sir Terence Etherton MR, Flaux LJ and Carr J, delivering a joint judgment, observed that *Armagas* was authority binding on the court and that the judge accordingly had applied the wrong legal test. He had not identified or addressed the essential ingredients of vicarious liability as required by *Armagas*: a holding out or representation by the principal to the claimant, intended to be and in fact acted upon by the claimant, that the agent had authority to do what he or she did, including acts falling within the usual scope of the agent's ostensible authority. Further, the decisions in *Lister* and *Dubai* did not concern a reliance-based tort and were not about the ostensible authority of an agent or employee. Rather, they concerned questions about the ordinary course of

83 [1986] AC 717 (HL).
84 [2018] EWCA Civ 2480, [2019] 1 WLR 1617.
85 *Lister* (n.11).
86 *Dubai* (n.11).

employment and the ordinary course of a firm's business, which was why *Armagas* was not mentioned in any of the speeches in either case.

Let us compare *Armagas* and *Hockley Mint* with the decision of the New Zealand Supreme Court in *Nathan v Dollars & Sense Ltd*.[87] Here a borrower (R) sought to arrange a loan from a financier (D & S) to fund his business, with his parents' property being used as security. D & S's lawyer asked R to obtain his parents' signatures and to carry out other tasks in relation to the security on D & S's behalf. R forged the signature of his mother (N), following which the mortgage was registered and the loan moneys advanced. R's business later was placed in liquidation, and D & S sought to enforce its security. Blanchard J, giving the judgment of the court, recognised that it could not be said that borrowers could never act as agents for lenders. Here R had been entrusted with the task of obtaining the signatures and was D & S's agent for that purpose, having been impliedly authorised to act in a representative capacity. Whether a principal was liable for an agent's conduct depended upon whether the conduct fell within the scope of the task the agent had been engaged to perform. There needed to be a sufficiently close connection between that task and the agent's unlawful act, so that the wrong could be seen as the materialisation of the risk inherent in the task. On the facts the conduct was within the scope of the agency, even though the forgery was done exclusively for the benefit of the agent, and the fraud of D & S's agent had to be regarded as its own fraud. Accordingly, the fraud exception to the indefeasibility provisions governing title to registered land applied,[88] D & S's title as mortgagee was not indefeasible and the mortgage in its favour should be removed from the Land Register.

The decision in *Nathan* is consistent with that in *Armagas* (which the court did not mention), because *Nathan* did not concern a liability for misrepresentation concerning the agent's authority. Blanchard J noted in the course of his judgment that the son's fraud was not primarily against the principal and that it was just as much against his mother, who gained no benefit whatsoever from the transaction.[89] This possibly suggests that the forgery was seen as a tort vis-à-vis the mother; but any potential liability to the mother would not have been for deceit. Certainly, there was no statement made by the son to the mother upon which she relied to her detriment.[90] But *Nathan* held at least that vicarious liability could apply to an agency relationship not involving employment, and applied a close connection test in determining the scope of that liability.

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87 [2008] NZSC 20, [2008] 2 NZLR 557.

88 Land Transfer Act 1952 (NZ), ss.62, 63. See now Land Transfer Act 2017 (NZ), ss.51, 52 and s.6 (definition of "fraud").

89 *Nathan* (n.87), [48], n.55.

90 In cases where there is no deceitful misrepresentation, the question arises whether there might be a generic liability in tort for fraud. There are some *dicta* in favour (eg *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144, 148 (CA); *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486, [19] (Comm)), but no extended debate on the question.

This leaves us to consider whether the rules governing a principal's *contractual* liability should also govern the principal's *tortious* liability. There are obvious differences between these claims. A principal's contractual liability is founded upon the *principal's* conduct either in conferring actual authority or in holding someone out as acting with his or her authority. The liability of the principal does not depend upon the agent having committed a tort. By contrast, the principal's tortious liability depends upon the *agent's* conduct in committing a tort for which the principal can be strictly liable.

Let us take first the position where the wrongdoer — the alleged agent — is not an employee. If the wrongdoer has no actual authority, and the alleged principal has not held that person out as an agent and thus conferred upon him or her an ostensible authority to bind the principal, then he or she is not or is not deemed to be the principal's agent, there is no basis for a finding that the principal is bound as a matter of contract and, notably, there is no relationship upon which a claim for vicarious liability may be founded. But if the requisite authority or holding out exists, then the question whether the principal is vicariously liable for the agent's tort should depend on whether the wrongdoing is closely connected with the agency relationship. Suppose now that the agent is also an employee. The solution here seems to be to distinguish between his or her conduct *qua* agent and conduct *qua* employee or contractor.[91] Insofar as the agent/employee is acting as a contractual agent seeking to bind the principal, the normal requirement of actual or ostensible authority will apply. Insofar as the agent/employee is acting simply as an employee, the close connection test will apply in determining whether the employer/principal is vicariously liable for the employee's tort. On this reasoning the decisions in *Armagas* and also, seemingly, both *Hockley Mint* and *Nathan* can be recognised as having been correctly decided. It is clear that the alleged agent in *Hockley Mint* was not an employee of the principal, so there could be no vicarious liability without an agency relationship having been shown to exit. In *Nathan*, by contrast, the son had actual authority to act as agent from the financier, so there was an agency relationship in respect of which the close connection test could apply.

This analysis also explains the long-standing decision of the House of Lords in *Lloyd v Grace, Smith & Co*.[92] An employee who was employed by a solicitor as a conveyancing manager, and who was vested with authority to arrange and negotiate sales of real property, deceitfully induced the plaintiff to convey her property to himself, and in these circumstances their Lordships held unanimously that the defendants were vicariously liable for the fraud. Lord Macnaghten was satisfied that a principal was liable for the fraud of his agent committed in the course of the agent's employment and not beyond the scope of his agency, whether the fraud was committed for the benefit of the principal or not. And if we invoke modern

91 See Peter Watts, "Agency, Forgery and the Land Register" (2008) 124 *Law Quarterly Review* 529, 532.
92 [1912] AC 716.

reasoning, we can say that the underlying basis for the decision is well expressed in the notion that the agent's fraud was closely connected with his position as conveyancing manager, and also that by putting him in that position the principal created the risk of the fraud being committed.

D. Drawing the line

A test asking whether there is a close connection between a person's wrongdoing and his or her relationship with another where that relationship creates a special risk of harm to the victim has been applied in various other cases not involving sexual abuse or fraud. In *Mohamud v WM Morrison Supermarkets plc*[93] the UK Supreme Court recognised that the close connection test could apply broadly in cases where the question of the link between the relationship and the wrongdoing was in issue. In this case the claimant, who was of Somali origin, inquired at the defendant's petrol station about printing documents from a USB stick, but the defendant's employee (K), who worked in the kiosk, abused him using foul, racist and threatening language. The claimant then returned to his car, but K followed him and subjected him to a violent assault on the petrol station forecourt, ignoring instructions to stop by the employee's supervisor. The claimant sued the defendant employer, seeking damages in respect of this unprovoked assault. The claim failed both at first instance and in the English Court of Appeal, and the claimant appealed to the Supreme Court.[94]

Lord Toulson recognised that the House of Lords in *Lister v Hesley Hall Ltd*[95] was mindful of the risk of over-concentration on a particular form of terminology, and thought there was a similar risk in attempting to over-refine, or lay down a list of criteria for determining, what precisely amounted to a sufficiently close connection to make it just for the employer to be held vicariously liable. Simplification of the essence was more desirable. Taking this approach, the Supreme Court had to consider two matters. The first question, to be addressed broadly, was what functions or "field of activities" had been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. Second, the Court had to 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 as a matter of social justice. The cases in which the necessary connection had been found were cases in which the employee used or misused the position entrusted to him in a way which injured the third party.

In the instant case it was K's job to attend to customers and to respond to their inquiries. His conduct in answering the claimant's request in a foul-mouthed

93 *Mohamud* (n.1); Morgan (n.31); Plunkett (n.31); Sunny Chan, "Hidden Departure from the *Lister* Close Connection Test" [2016] *Lloyd's Maritime and Commercial Law Quarterly* 352.

94 The claimant died from an unrelated illness before his appeal was heard.

95 *Lister* (n.11).

way and ordering him to leave was inexcusable, but within the "field of activities" assigned to him. What happened thereafter was an unbroken sequence of events. Following the claimant to the forecourt was all part of a seamless episode. When K again told the claimant in threatening words that he was never to come back to the petrol station, this was not something personal between them; it was an order to keep away from his employer's premises, 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 was just that as between them and the claimant, they should be held responsible for their employee's abuse of it. K's motive was irrelevant. It looked obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that was neither here nor there.

In *Prince Alfred*,[96] the High Court of Australia rejected the decision in *Mohamud*, because the role assigned to the employee in that case did not provide the occasion for the wrongful acts which the employee committed outside the kiosk on the forecourt of the petrol station. What occurred after the victim left the kiosk was relevantly unconnected with the employee's employment. The UK Supreme Court had sought to meet this objection by emphasising that what occurred was a "seamless" series of events, and the decision certainly turns on that view. At the least, care needs to be taken to ensure that the decision in *Mohamud* does not lead to employers being held liable for anything an employee does at work and on the employer's premises. It was critical that the employment or task of the employee was seen as having created the risk of the abusive conduct, because the employment involved dealing with customers, the assault occurred as part of that dealing and the employee purported to exercise the authority of his employer in ordering the customer to leave.

Sometimes a key focus needs to be on the question whether the defendant has placed the wrongdoer in a position of power or authority over the victim. The existence of such a relationship can be seen as significant because of the potential it creates for abuse, providing the wrongdoer with the means to inflict it.[97] A power relationship certainly exists in many of the abuse cases, in particular *Bazley*, *Lister* and *Christian Brothers*, and also can be seen in fraud cases like *Lloyd*. Finding a power relationship of this kind can help the courts in distinguishing between cases where the defendant has created a risk of the wrongdoing in question and those where the defendant has merely provided the opportunity for that wrongdoing. In cases where there is no such relationship some other basis for imposing vicarious liability may still be found. An example is seen in deliberate assault cases where

96 *Prince Alfred* (n.79).

97 Christine Beuermann, "Vicarious Liability and Conferred Authority Strict Liability" (2013) 20 *Torts Law Journal* 265 argues that the courts should recognise a distinct category of "conferred authority strict liability", in addition to vicarious liability, to cover such relationships.

the conduct of the employee was an unauthorised interpretation or extension of the work the employee was authorised to carry out.[98]

A number of decisions in England provide further examples of where the line has been drawn. In *Weddall v Barchester Health Care Ltd*[99] W was the deputy manager of a care home for mental health patients operated by the defendant. M worked at the home in a junior position. W and M did not get on. One evening W called M at his home to offer him a voluntary extra shift. M formed the impression that W was mocking him because he was drunk, so he cycled to the home and attacked W in a violent and unprovoked attack. M was subsequently prosecuted and sentenced to imprisonment for the assault. In *Wallbank v Wallbank Fox Designs Ltd* (taken on a conjoined appeal to the Court of Appeal with *Weddall*), W was employed by the defendant, a small manufacturing company. (He was in fact managing director and sole shareholder of the company.) W spoke to B, an employee, about shortcomings in his work and went to assist him. B then threw W onto a table, causing a fracture of a vertebra in his lower back. B was dismissed for gross misconduct. He was later convicted of inflicting grievous bodily harm and ordered to pay compensation to W.

Pill LJ, delivering the main judgment (Moore-Bick LJ and Aikens LJ both agreeing), said that the essence of the appellants' cases was that, since employees had to receive instructions and respond to them, an improper form of response, even a violent one, was an act within the course of employment. Yet in *Weddall*, the assault was an independent venture of M's own, separate and distinct from his employment at the care home. M was acting personally for his own reasons. The instruction, or request as in fact it was, was no more than a pretext for an act of violence unconnected with his work as a health assistant. However, in *Wallbank* the risk of an over-robust reaction to an instruction was a risk created by the employment. It might be reasonably incidental to the employment rather than unrelated to or independent of it. Not every act of violence by a junior to a more senior employee, in response to an instruction at the workplace, would be an act for which the employer was vicariously liable. But on the particular facts the doctrine of vicarious liability did provide W with a right of action against his employer.

These two cases were decided before the judgment of the Supreme Court in *Christian Brothers*, but the judges took account of their Lordships' earlier decision in *Lister* and of the need for a close connection between the employment and the wrongdoing. In *Weddall* the assault merely happened to occur at the employee's place of work, and, in Aikens LJ's words, it was obvious that the intentional tort committed by the employee was not at all connected with his employment. The Judge's description of the attack as being the "spontaneous criminal act of

98 *Pettersson v Royal Oak Hotel Ltd* [1948] NZLR 136 (CA); *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887, [2003] 1 WLR 2158. *Mohamud* may be explained on a similar basis, that everything flowed from the fact that K was purporting to act for his employer: see the Postscript at n.142.

99 [2012] EWCA Civ 25, [2012] IRLR 307.

a drunken man who was off duty" was both graphic and accurate.[100] Similarly, in a decision in Scotland,[101] an employer was not vicariously liable where an employee was murdered by a co-employee, for the employment had nothing to do with the murderous conduct. In *Wallbank*, the judges found the decision more difficult, but in the end were satisfied that vicarious liability was established. The tort flowed directly from the fact that B was given instructions in the course of his employment by a fellow (but superior) employee. The tort was so closely connected with what was expected of B, which was to carry out lawfully given instructions, that it would be fair and just to hold his employer vicariously liable for his tortious attack on W.

In further examples, an employer was not liable where an employee, for fun, applied an inflammable fluid used in his job to his friend and colleague's overalls and then set them alight;[102] and religious proselytisation by a locum causing mental harm to a patient could not fairly be regarded as a reasonably incidental risk to the business of carrying on a doctors' surgery.[103] On the other hand, in the *Barclays Bank* case,[104] Irwin LJ said that the trial judge was "obviously correct" in finding that the medical examinations were sufficiently closely connected with the relationship between the doctor and the Bank. They were the whole purpose of that relationship. Without them, the relationship would never have existed. Again, an employer was held vicariously liable for a violent assault committed by its managing director (M) on another employee (B) at a voluntary gathering for late-night drinking in a hotel following the work Christmas party. The assault happened after B had challenged M about another employee's appointment at one of the work branches.[105] A sufficiently close connection between the assault and M's employment was shown, because M had misused his position when his managerial decisions were challenged by B. There was no suggestion that M's behaviour arose as a result of something personal.

Suppose now that an employee deliberately harms a third party in order to strike at his or her employer. In *Various Claimants v WM Morrison Supermarkets plc*[106] the defendant employer (Morrisons) was held vicariously liable for the criminal actions of a rogue employee, a senior IT auditor, in disclosing personal information about the claimant co-employees on the web when motivated by a work-related grudge. The Court of Appeal considered that there was nothing unusual or novel in legal terms about the case, and rejected the argument that imposing vicarious liability might seem to render the Court an accessory in fostering the employee's criminal aims. It was held in *Mohamud* that the motive of the wrongdoer (personal

100 *Ibid.*, [66].
101 *Vaickuviene v J Sainsbury plc* [2013] CSIH 67, 2014 SC 147.
102 *Graham v Commercial Bodyworks Ltd* [2015] EWCA Civ 47, [2015] ICR 665.
103 *Brayshaw* (n.49).
104 *Barclays* (n.16), [59]. As already noted, the decision in this case was reversed in the Supreme Court: see the Postscript to this article.
105 *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214.
106 *Morrison* (n.19).

racism in that case) was irrelevant, and in *Christian Brothers* the Court did not accept that there was an exception where the motive was, by causing harm to a third party, to cause financial or reputational damage to the employer. Nor was the Court persuaded that a finding of vicarious liability would place an enormous burden on the defendant and other innocent employers in future cases. Major data breaches might, depending on the facts, lead to a large number of claims for potentially ruinous amounts, but the solution was to insure against such catastrophes; and employers could likewise insure against losses caused by dishonest or malicious employees. The fact of a defendant being insured was not a reason for imposing liability, but the availability of insurance was a valid answer to the Doomsday or Armageddon arguments put forward by counsel for the defendants.[107]

The decisions of the courts on, formerly, whether conduct was in the course of employment or, today, whether it is closely connected with the employment, certainly illustrate the inescapable uncertainty involved in determining such questions. Even so, a focus on the connection between what the employee, or person in an analogous position, or agent, was employed to do and the wrongdoing, and on any associated risk created by putting the person in that position, can provide real guidance for the courts in achieving a degree of coherence and consistency in their decisions. Further, we find in some of the recent decisions the imposition of liability in circumstances where the wrongdoer's position enabled him or her to exercise power or authority or control over the victim. This feature certainly is clear in the sexual abuse and the fraud cases.

VI. Non-delegable Duties

Another question needing to be resolved is the relationship between vicarious liability and the doctrine of the non-delegable duty. This means that the defendant cannot delegate legal responsibility in respect of performance of the duty, not that the defendant cannot delegate actual performance of the task in question. So a person (A) upon whom a non-delegable duty is imposed may be held personally liable in respect of a failing by another person (B) to whom A has delegated the task of performing that duty. In *Woodland v Swimming Teachers Assoc*,[108] Lord Sumption said that English law had long recognised that non-delegable duties existed, but did not have a single theory to explain when or why. We will consider here the type of duty that was in issue in *Woodland*, which probably is the one of

107 In April 2020, the Supreme Court reversed the decision of the Court of Appeal. Their Lordships' decision is examined in the Postscript to this article.

108 *Woodland* (n.55), [6]–[7]; Rob George, "Non-delegable Duties of Care in Tort" (2014) 130 *Law Quarterly Review* 534; Jonathan Morgan, "Liability for Independent Contractors in Contract and Tort: Duties to Ensure Care Is Taken" (2015) 74 *Cambridge Law Journal* 109. For somewhat similar discussions in the High Court of Australia, see *Kondis v State Transport Authority* (1984) 154 CLR 672, 687; *Stevens* (n.23), 31 and 44–46; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 551.

real significance, and put the others to one side.[109] It may be described generally as involving the assumption of personal responsibility for the performance of a task.

Lord Sumption said that this category comprised cases where the common law imposed a duty upon the defendant which had three critical characteristics. First, the duty arose not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty was 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 caused injury. Third, the duty was by virtue of that relationship personal to the defendant. The work required to perform such a duty might well be delegable, and usually was. But the duty itself remained the defendant's. His Lordship observed that in these cases the defendant was assuming a liability analogous to that assumed by a person who contracted to do work carefully. The contracting party would normally be taken to contract that the work would be done carefully by whomever he might get to do it. Likewise, in certain tort cases, the defendant could be taken not just to have assumed a positive duty, but to have assumed responsibility for the exercise of due care by anyone to whom he may have delegated its performance.

The five factors identified by Lord Sumption in establishing a personal duty of this kind were (i) the vulnerability of the claimant, (ii) the existence of a relationship between the claimant and the defendant by virtue of which the defendant had a degree of protective custody and control over the claimant, (iii) the claimant having no control over how the defendant chose to perform its obligations, (iv) the delegation of that custody and control to another person, and (v) negligence by that person in the performance of the very function assumed by the defendant and delegated to him or her.[110] A clear instance was the non-delegable duty of an employer to maintain a safe system of work.[111] And in his Lordship's opinion the time had come to recognise that the relationships between hospitals and their patients,[112] and local education authorities and their pupils[113] fell into the same

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109 Lord Sumption identified liability for "extra-hazardous acts" as another category, but described it (at [6]) as "varied and anomalous" and ripe for re-examination. Others were the non-delegable duty of a landowner to prevent the escape of water from his land (as recognised in *Rylands v Fletcher* (1866) LR 1 Ex 265 (Exch Ch) or to maintain support for neighbouring land (citing *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 (HL)), and the non-delegable duty of employers of independent contractors conducting operations obstructing the highway (citing *Tarry v Ashton* (1876) 1 QBD 314 (QB)).

110 *Woodland* (n.55), [23].

111 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 (HL); *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906 (HL); *Kondis* (n.108).

112 Approving the approach of Lord Greene MR in *Gold v Essex County Council* [1942] 2 KB 293, 301 (CA) and of Denning LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343, 359–365 (CA). See also *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 740 (HL); *Robertson v Nottingham Health Authority* [1997] 8 Med LR 1, 13 (CA).

113 The category is well recognised by the High Court of Australia: *Commonwealth v Introvigne* (1982) 150 CLR 258; *State of New South Wales* (n.78) (Gaudron, McHugh, Gummow and Hayne JJ).

category.[114] In *Woodland* itself, applying the above principles, the duty of a local education authority was held to be non-delegable in circumstances where a pupil suffered serious injury in the course of a school swimming lesson conducted by swimming instructors provided by an independent contractor.[115]

It is always important to identify the particular function or task that the body concerned has assumed a duty to perform. Lord Sumption emphasised that an education authority would not be liable for the negligence of independent contractors where its own duty was not to perform the relevant function but to arrange for its performance, as where a school provided extra-curricular activities outside school hours. Nor would the authority be liable for the negligence of those to whom no control over the child had been delegated, such as theatres, zoos or museums to which children might be taken by school staff. For example, an education authority was not liable for the negligence of a taxi firm employed by the authority to drive children to and from school, for the school had no duty to transport the children.[116] Nor was a hospital liable for the negligence of an independent laboratory carrying out tests on tissue samples for a patient who was not being treated by the hospital.[117]

Let us consider whether the *Woodland* principles can apply in the case of a local authority arranging for the fostering of children in its care. The question was considered in *Armes v Nottinghamshire County Council*,[118] where the UK Supreme Court determined, by a majority, that the authority was vicariously liable,[119] but held, unanimously, that no non-delegable duty should be imposed. Lord Reed recognised that a local authority, in relation to a child in its care, had the powers and duties which a parent or guardian would have by virtue of their relationship to a child of which they were the parent or guardian.[120] These included the general duty to safeguard and promote the child's health, development and welfare, and the right to direct, control or guide the child's upbringing. There was ample authority that the duty of a parent or person in loco parentis was a duty to take reasonable care.[121] But there were no authorities suggesting that parents were required not merely to

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114 His Lordship said other examples were likely to be prisoners and residents in care homes. In *GB v Home Office* [2015] EWHC 819 (QB), a detainee who had received medical treatment in an immigration removal centre run by an independent organisation on behalf of the United Kingdom Home Office was held to be owed a non-delegable duty of care.

115 The case was remitted for trial, and in *Woodland v Maxwell* [2015] EWHC 273 (QB) the claimant established that her injuries were caused both by a lifeguard employed at the pool and by a teacher in failing to notice that she was in difficulties in the water.

116 *Myton v Woods* (1980) 79 LGR 28.

117 *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203, [2010] 1 WLR 2139.

118 *Armes* (n.15).

119 See n.33 and accompanying text.

120 Child Care Act 1980 (UK), s.10 (this Act, which was repealed in 1991, applied during the relevant period).

121 Citing *Carmarthenshire County Council v Lewis* [1955] AC 549, 566 (HL); *Harris v Perry* [2008] EWCA Civ 907, [2009] 1 WLR 19, [37]; *Surtees v Royal Borough of Kingston upon Thames* [1991] 2 FLR 559 (CA).

take personal care for their children's safety, but to ensure that reasonable care was taken by anyone else to whom the safety of the children might be entrusted. There were good reasons for adopting that approach in a domestic setting, for holding the parents liable because of a lack of care on the part of the nanny or the babysitter, or if the child were abused by a friend or a grandparent, would be liable to interfere with ordinary aspects of family life which were often in the best interests of children themselves. And if local authorities which reasonably decided that it was in the best interests of children in care to allow them to stay with their families or friends were to be held strictly liable for any want of due care on the part of those persons, the law of tort would risk creating a conflict between the local authority's statutory duties to give first consideration to the need to safeguard and promote the welfare of children[122] and its interests in avoiding exposure to such liability. Further, since a non-delegable duty would render the local authority strictly liable for the tortious acts of the child's own parents or relatives, the effect of a care order, followed by the placement of the child with his or her family, would be a form of state insurance for the actions of the child's family members, friends, relatives and babysitters. His Lordship accordingly concluded that the proposition that a local authority was under a duty to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster parents, was too broad, and that the responsibility with which it fixed local authorities was too demanding.

It would seem perfectly appropriate for the relationship between the authority and the child to be characterised as one where the authority had assumed a responsibility to protect the child by virtue of an antecedent protective relationship between the defendant and the claimant of the kind contemplated by Lord Sumption in *Woodland*. Indeed, on its face the relationship looks to be a particularly apt example, whereas, for reasons suggested earlier, the relationship between local authority and foster parent does not look at all like a relationship analogous to employment and giving rise to vicarious liability. However, the court's denial of a non-delegable duty demonstrates that persuasive reasons of policy can nonetheless negate the imposition of such a duty notwithstanding that a protective relationship can be seen to exist. Certainly the contrast with, and any implications for, the ordinary duty of care owed by a parent or person in *loco parentis* points away from a duty that was non-delegable in the circumstances of the case.

Let us consider now the relationship between a claim alleging vicarious liability and a claim alleging breach of a non-delegable duty of the instant kind. In *Armes*, Lord Reed remarked that there could not be any rationale for imposing vicarious liability on a defendant where he was directly liable for the harm caused by the third party. This might be read as meaning the one excludes the other, but that does not seem to be right. In principle, the two surely can coexist where the necessary elements to liability under each head both exist on the facts of a particular case.

122 Child Care Act 1980 (UK), s.18.

The common law is not generally antipathetic to concurrent liability under different heads or causes of action. Perhaps, Lord Reed meant only that there was no point in going on to examine vicarious liability if the defendant was directly liable.

In the case of vicarious liability the focus is on the relationship between the defendant and the wrongdoer, whereas the focus in the case of a non-delegable duty is on a protective relationship assumed by a defendant over a vulnerable plaintiff. However, it appears that the two forms of liability can overlap and that sometimes either principle can apply. An example might be *Lister v Hesley Hall Ltd*,[123] where the employer was held to be vicariously liable for the employee warden's sexual abuse and, seemingly, the school could equally have been held to have been under a non-delegable duty in respect of a child it had taken into its care. On the other hand, *Christian Brothers* case[124] could not have been argued as a case of a non-delegable duty, unless the De La Salle Institute could be treated as having assumed a degree of protective custody over the claimant (and having delegated performance to its brothers). But it is hard to see any such relationship existing, the claimant being in fact in the custody of the Middlesbrough Defendants. Conversely, *Woodland* could not be argued as a case of vicarious liability, unless the relationship in that case could be regarded as analogous to employment. As we have seen, the Court of Appeal accepted that there may be vicarious liability for independent contractors, but the decision was wrong in principle.[125] Indeed, in *Woodland* itself Lord Sumption said that the case had "nothing to do with vicarious liability, except in the sense that it [the issue on appeal] only arises because there is none".[126]

VII. Conclusions

The courts frequently have emphasised the need for the doctrine of vicarious liability to lead to results that are fair and just and reasonable.[127] However, determining liability issues on such bases without more is manifestly inadequate as a guide for future decision-making. We need guiding principles that take into account the positions and interests of both parties and the underlying policies sought to be achieved. Naturally the courts recognise this. In *Christian Brothers*, Lord Phillips said that it was for the court to identify the policy reasons why it was fair, just and reasonable to impose vicarious liability and to lay down the criteria that had to be shown to be satisfied in order to establish vicarious liability.

123 *Lister* (n.11).

124 *Christian Brothers* (n.2).

125 *Barclays* (n.16). As has been stated, the decision was reversed on appeal: see the Postscript to this article.

126 *Woodland* (n.55), [4].

127 Taking the four leading UK decisions, see *Christian Brothers* (n.2), [34]; *Cox* (n.3), [41]; *Mohamud* (n.1), [10]; *Armes* (n.15), [77].

However, their success in identifying these criteria has not always been evident, and closer analysis is needed. Indeed, a frequently cited factor which ought to be rejected, or at least very carefully circumscribed, is the defendant's ability to pay or to insure against liability. Loss-spreading of this nature cannot of itself constitute a reason for imposing vicarious liability. By contrast, judicial recognition, or clearer recognition, of the following propositions (which are not intended to be exhaustive) can help point the way.

First, the notion of a relationship "analogous to employment" works well when applied to working relationships *that are not contractual*. We have seen that the relationship between a religious body or authority and its clergy and a prison authority and its prisoners, coupled in each case with the controlling position of the "employer", can provide apt examples. No doubt there are other examples of the kinds of relationships in issue.

Second, the distinction between employees and independent contractors should be maintained. A key policy basis for the imposition of vicarious liability is found in the notion that a business should bear the risks posed by the enterprise it has introduced into the community. An employer operating a business through its employees has introduced such risks for its own benefit. But a contractor operating an independent business is the appropriate risk-bearer.

Third, the "close connection" test, properly understood, can identify the necessary link between the relevant relationship and the wrongdoing, whether the relationship is that of employer/employee, or is of an analogous kind, or is that of principal and agent. The key is to seek the link between the *kind* of work that a person is authorised to do and the risk created by that kind of work. The fact that the wrongdoing is forbidden or criminal in cases where the wrongdoer is purporting to act for the defendant, is irrelevant. Further, the defendant having placed the wrongdoer in a position of power over the victim sometimes can have considerable significance in establishing that link. For example, entrusting a teacher with responsibility for performing or supervising intimate domestic tasks in relation to children can be seen to create a risk that the children may be abused. But entrusting a person with the gardening in school grounds creates no similar risk, even though it may create the opportunity for abuse to occur.

Fourth, there remains a useful role to be played by the concept of a non-delegable duty. This is likely primarily in cases involving torts committed by independent contractors, where the imposition of vicarious liability is inappropriate. So where there is a prior assumption by the defendant of a protective relationship with or over the victim, this will bring with it an obligation to ensure that care is taken by an independent contractor (or, perhaps, someone else) to whom the function or task assumed by the defendant in relationship to the victim has been delegated. Further, where the relationship between the defendant and the wrongdoer is one that can support a finding of vicarious liability, *and* the defendant has assumed a protective role over the victim, a finding of vicarious liability and a breach of a non-delegable duty to take care are both possible.

VIII. Postscript

After the manuscript of this article had been sent to the publishers, the UK Supreme Court handed down judgments in appeals from two decisions of the Court of Appeal which have been discussed in the preceding pages. One of these decisions was *Barclays Bank plc v Various Claimants*,[128] and it was overturned by a unanimous Supreme Court in a judgment given by Lady Hale.[129] The other was *Various Claimants v WM Morrison Supermarkets plc*,[130] overturned unanimously in a judgment given by Lord Reed.[131]

Let us take Lady Hale's judgment in *Barclays* first. After setting out the facts, her Ladyship gave an outline of the key cases prior to the decision in *Christian Brothers* and warned about how they should be understood. There had been a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of an employee, set out in *Christian Brothers*, with the principles which should guide the development of that liability into relationships which were not employment but which were sufficiently akin to employment to make it fair and just to impose such liability. Further, looking at *Christian Brothers* itself, it was apparent that while Lord Phillips identified five "policy reasons" that made it fair, just and reasonable to impose vicarious liability on an employer, he was not saying that these were the only criteria by which to judge the question. Rather, he was determining the question by reference to the details of the relationship, and its closeness to employment, rather than by reference to the policy reasons. Turning to *Cox*, her Ladyship thought that the result was bound to be the same whether the test was expressed in terms of the employer/independent contractor distinction or in terms of the "sufficiently akin to employment" test. There was nothing in Lord Reed's judgment to cast doubt on the classic distinction between work done for an employer as part of the business of that employer and work done by an independent contractor as part of the business of that contractor. Finally, in "perhaps the most difficult" decision in *Armes*, Lord Reed had concluded that the foster parents could not be regarded as carrying on an independent business of their own. There was nothing, therefore, in that trilogy of cases to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, had been eroded. And two cases decided by common law courts since *Christian Brothers* and *Cox* had reached the same conclusion.[132]

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128 *Barclays* (n.16).

129 *Barclays Bank plc v Various Claimants* [2020] UKSC 13. Lord Reed, Lord Kerr, Lord Hodge and Lord Lloyd-Jones agreed with Lady Hale's judgment.

130 *Morrison* (n.19).

131 *Various Claimants v WM Morrison Supermarkets plc* [2020] UKSC 12. Lady Hale, Lord Kerr, Lord Hodge and Lord Lloyd-Jones agreed with Lord Reed's judgment.

132 *Barclays* (n.129), [10]–[26]. The two cases cited were *Kafagi* (n.57) and *Ng Huat Seng* (n.56).

Lady Hale thus was satisfied that the question was, as it had always been, whether the tortfeasor was carrying on business on his own account or whether he was in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips might be helpful in identifying a relationship which was 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 might be relevant in deciding whether workers who might be technically self-employed or agency workers were effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers, Cox* and *Armes*, would usually lie in understanding the details of the relationship. Where it was clear that the tortfeasor was carrying on his own independent business it was not necessary to consider the five incidents.[133]

Applying the distinction to the facts, it was clear that although the doctor (B) 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 work for the Bank, but the same would be true of many other people who worked for it but were clearly independent contractors, ranging from its window cleaners to its auditors. B 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 might 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, and one of those clients was the Bank.[134]

Finally, Lady Hale made some brief remarks about people working in the so-called "gig" economy. Employment law in the UK now recognised two different types of "worker": (a) those who worked under a contract of employment and (b) those who worked under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".[135] Limb (b) workers enjoyed some but by no means all the employment rights enjoyed by limb (a) workers. It would be tempting to say that limb (b) encapsulated the distinction between people whose relationship was akin to employment and true independent contractors. Asking that question might be helpful in identifying true independent contractors. But it would be going too far down the road to tidiness for the court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of "worker", developed for a quite different set of reasons.[136]

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133 *Barclays* (n.129), [27].
134 *Barclays* (n.129), [28].
135 Employment Rights Act 1996 (UK), s.230(3).
136 *Barclays* (n.129), [29].

The Supreme Court has made it clear that the distinction between employees or persons in a relationship analogous to employment on the one hand and independent contractors on the other is alive and well. For reasons already stated this can be recognised as a sensible and desirable distinction. No doubt there will sometimes be difficulty in determining whether the facts of a particular case fall on one side of the line or the other. But in borderline cases the inquiry has ever been thus.

Barclays concerned the kind of relationship between two persons which made it proper for the law to make one pay for the wrong of the other. *Various Claimants v WM Morrison Supermarkets plc* was concerned with the connection between that relationship and the wrong. The tortfeasor (S) had deliberately disclosed private information about Morrison's employees on the Internet. The question for determination was whether this disclosure was "closely connected" with S's employment, and a key focus of Lord Reed's judgment was on the decision of the Supreme Court in *Mohamud v WM Morrison Supermarkets plc*[137] and how it should be understood. His Lordship was clear that that decision was not intended to effect a change in the law of vicarious liability, as was apparent when Lord Toulson's judgment was read as a whole. The judgments below focused on the final paragraphs, in which Lord Toulson summarised long-established principles in the simplest terms and applied them to the facts of the case then before the court. A few phrases in the judgment's final paragraphs, taken out of context, were treated as establishing legal principles: principles which would represent a departure from the precedents which Lord Toulson was expressly following.[138]

Lord Reed accordingly turned to those precedents. In *Dubai Aluminium Co Ltd v Salaam*,[139] Lord Nicholls identified the general principle applicable to vicarious liability arising out of a relationship of employment: the wrongful conduct should 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 might fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. As Lord Phillips noted in *Various Claimants v Catholic Child Welfare Society*,[140] the close connection test had been applied differently in cases concerned with the sexual abuse of children, which could not be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts had emphasised the importance of criteria that were particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he had abused. Further, the words "fairly and properly" were not intended as an invitation to judges to decide cases according to their personal sense of justice, but required them to consider how the guidance

137 *Mohamud* (n.1).

138 *Morrison* (n.131), [17].

139 *Dubai* (n.11). Lord Reed also cited *Bernard v Attorney General of Jamaica* [2004] UKPC 47, *Brown v Robinson* [2004] UKPC 56, and *Majrowski* (n.12).

140 *Christian Brothers* (n.2), [83], [85].

derived from decided cases furnished a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which pointed towards or away from vicarious liability in the case before the court, and which explained why it should or should not be imposed. Following that approach, cases could be decided on a basis which was principled and consistent.[141]

Lord Reed emphasised that Lord Toulson in *Mohamud* was not suggesting any departure from the approach adopted in *Dubai*. Read in context, Lord Toulson'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 the employee (K) was acting when those events took place. When he followed the claimant out of the kiosk and on to the forecourt, he was following up on what he had said in the kiosk. He ordered the claimant 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" and it was "not something personal". However, read in isolation, Lord Toulson's concluding remark that "motive is irrelevant" would be misleading. His Lordship was addressing the point that the reasons why K had become violent were unclear. His Lordship had already concluded that K was going, albeit wrongly, about his employer's business, rather than pursuing his private ends, and the reason why he had become so enraged as to assault the motorist could not make a material difference. That was all that the remark was intended to convey.[142]

It followed from the foregoing that the judge and the Court of Appeal misunderstood the principles governing vicarious liability in a number of relevant respects, and Lord Reed pointed to four which were particularly important. First, the disclosure of the data on the Internet by S did not form part of his functions or field of activities: it was not an act which he was authorised to do. Second, the fact that the five factors listed by Lord Phillips in *Christian Brothers* were all present was nothing to the point. Those factors were concerned only with whether 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. Third, a close temporal and causal link between the provision of the data to S for a work purpose and his disclosing it on the Internet did not in itself satisfy the close connection test. Fourth, the reason why S 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.[143]

Accordingly, Lord Reed considered the matter afresh and with regard to the assistance provided by previous court decisions. These made clear that the mere fact that S's employment gave him the opportunity to commit the wrongful act

141 *Morrison* (n.131), [21]–[25].
142 *Ibid.*, [26]–[30].
143 *Ibid.*, [31].

would not be sufficient to warrant the imposition of vicarious liability. The fallacy in that approach could be found in the words of Lord Wilberforce in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd*,[144] who said that a servant, even while performing acts of the class which he was authorised or employed to do, might so clearly depart from the scope of his employment that his master would not be liable for his wrongful acts. Lord Reed noted that, perhaps unsurprisingly, there did not appear to be any previous case in which it had been argued that an employer might be vicariously liable for wrongdoing which was designed specifically to harm the employer. The most comparable were cases of deliberate wrongdoing intended to inflict harm on a third party for personal reasons of the employee (leaving aside sexual abuse cases).[145]

The basic principle was explained in *Joel v Morison*,[146] a negligent driving case, where Parke B said that if a servant was going out of his way, against his master's implied commands, when driving on his master's business, he would make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master would not be liable. More recently, in *Dubai Aluminium*,[147] Lord Nicholls similarly distinguished between cases where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee was engaged solely in pursuing his own interests. Again, in *Attorney General of the British Virgin Islands v Hartwell*,[148] where a police constable deliberately and consciously abandoned his post and his duties and embarked elsewhere on a personal vendetta of his own, Lord Nicholls said that the conduct fell wholly within the classical phrase of "a frolic of his own".[149]

Applying this approach, Lord Reed said that it was abundantly clear that S was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for disciplinary proceedings against him some months earlier. In those circumstances, S's wrongful conduct was not so closely connected with acts which he was authorised to do that, for the purposes of Morrisons' liability to

144 *Kooragang* (n.8), 473.

145 *Morrison* (n.131), [37]–[45].

146 (1834) 6 C & P 501, 503.

147 *Dubai* (n.11), [32].

148 [2004] UKPC 12, [2004] 1 WLR 1273. His Lordship explained *Warren v Henlys Ltd* [1948] 2 All ER 935 in similar fashion, and compared *Bernard v Attorney General of Jamaica* [2004] UKPC 47.

149 Lord Reed also approved the decision of the Court of Appeal in *Bellman* (n.105), although he noted that in some respects the judgment adopted a similar approach to that adopted by the Court of Appeal in the instant case. However, notwithstanding that the assault occurred outside working hours and away from the workplace, there was clearly a very close connection between the managing director's authorised activities as an employee and his commission of the assault: it was committed while he was purporting to act in the course of his employment as the managing director by asserting his authority over his subordinates in relation to a management decision which he had taken.

third parties, it could fairly and properly be regarded as done by him while acting in the ordinary course of his employment. So all the claims failed.

A key clarification in *Morrison* is that the principles applied in the sexual abuse cases should be regarded as standing on their own. Without doubt, a sexual abuser is engaged not just in a "frolic" but a very serious criminal offence entirely on his own account. In such cases, as has been suggested, the question whether the employer has put the wrongdoer in a position which enabled him or her to exercise power or authority or control over the victim is very relevant. In *Morrison*, Lord Reed drew specific attention to the importance of this factor.[150] Determining whether any particular case falls within the sexual abuse category is likely to be clear in most cases, although, exceptionally, the question may need exploring.

Another category of case which has to be treated differently is that where an agent commits a fraud for his or her own benefit while working for the principal, as in decisions such as *Nathan v Dollars & Sense Ltd*[151] and *Lloyd v Grace, Smith & Co*.[152] This also is a type of case where the conferral by the principal of power and authority in the agent in relation to the victim is such as to render the principal vicariously liable for the fraud, notwithstanding that the agent acts entirely on his her own account in seeking the benefit of the fraud.

Finally, putting aside exceptions, the long-standing notion that an employer is not liable where the employee goes on a "frolic of his own" has made an emphatic return. Before the employer can be vicariously liable in such cases it must be shown that the employee or person in an analogous position is engaged, at least in some sense, in wrongly or misguidedly seeking to further the business or the interests of the employer. Where this can be established the fact that the conduct is deliberate, and even criminal, makes no difference.

150 *Morrison* (n.131), [23].
151 *Nathan* (n.87).
152 *Lloyd* (n.92).