Cox v Ministry of Justice: Mohamud v Morrison Supermarkets

Opening the floodgates of vicarious liability?

JOEL DONOVAN QC

ADAM OHRINGER

Introduction

1. In recent years the appellate courts have considered the extent of vicarious liability in numerous cases and contexts. This seminar considers the implications of the Supreme Court judgments in *Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11. In two complementary judgments the Court has clarified the answers to the two key questions:

   a. what relationship between the defendant and the wrongdoer (*Cox*); and
   b. what connection between that relationship and the wrongdoer's tortious act (*Mohamud*)

   will suffice to affix the defendant with vicarious liability?

Background: vicarious liability other than of the employer

2. A person is directly liable not only for his own torts but also for those which he has authorised or subsequently ratified. He may additionally be vicariously liable for torts committed by his employees or agents – and, as illustrated by cases such as *Dubai Aluminium Co Ltd v Salaam*

[2003] 2 AC 366 and *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 WLR 398, for their equitable wrongs and statutory torts too.

3. Originally, the doctrine of vicarious liability was confined to cases of master and servant. The doctrine has deep roots in legal policy, including the early recognition that employers create the risk and are more likely to be good for the damages. The courts gradually extended vicarious liability to situations outside a strict employer-employee context. Thus where an employer lends his employee to a third party, and the employee negligently causes loss to another in the course of the loan, the third party may be liable.
4. In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ('the *Christian Brothers* case'), the Supreme Court considered the general approach to be adopted in deciding whether a relationship other than one of employment can give rise to vicarious liability, subject to the question of whether there was a sufficiently close connection between that relationship and the wrongdoing.
5. There the Supreme Court held that the defendant, an international unincorporated association whose mission was to provide children with a Christian education, was vicariously liable for the sexual abuse of children at an approved school by members of the institute (the Brothers) who taught there. The Brothers were employed by another body which had also been held vicariously liable for the abuse. The Supreme Court thereby imposed vicarious liability on a body which did not employ the wrongdoers, in circumstances where another body did employ them and was also vicariously liable for the same tort.
6. Lord Phillips, with whom the other members of the Court agreed, gave the following reasoning at para 35 (described by Lord Reed in *Cox* as a 'modern theory of vicarious liability'):

   The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no

difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:

i. the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
ii. the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
iii. the employee's activity is likely to be part of the business activity of the employer;
iv. the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
v. the employee will, to a greater or lesser degree, have been under the control of the employer.

7. Lord Phillips added (para 47) that:

At para 35 above, I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'.

Cox v Ministry of Justice: the decisions below

8. In *Cox* the issue was whether the Prison Service, which is an executive agency of the defendant Ministry, was vicariously liable for the negligence of a prisoner (Inder) in the course of his prison work.
9. Mrs Cox, the catering manager at HMP Swansea, was in charge of the prison kitchen. She supervised four members of staff and about 20 prisoners who worked alongside them, including one Mr Inder. While assisting in taking delivery of some supplies, Inder attempted to carry

two sacks of rice past Mrs Cox. He dropped one of the sacks onto her back, causing her injury. The defendant accepted that this was negligent, and that there was a sufficiently 'close connection' between his work and his tortious act.

10. The Prison Rules require convicted prisoners to do useful work for not more than 10 hours per day. The defendant's policy in relation to such work was (and is) that the discipline and routine of regular working hours instils an ethos of hard work into prisoners; and that prison work should be central to the regime, and a source of useful vocational skills for life outside. It is not just the Prison Service which provides work prisoners, but many external contractors in the private, voluntary and community sectors. Prisoners may be paid for their work at rates approved by the Secretary of State (£11.55 per week at the relevant time), to encourage and reward their constructive participation.
11. At HMP Swansea prisoners could apply to work in the kitchen, and selections were carried out (just as Inder was selected) after relevant assessments of applicants. Prisoners were then trained. If prisoners did not assist in prison kitchens, naturally enough the Prison Service would have to incur additional costs in employing staff or engaging contractors at commercial rates. And prisoners are not generally allowed their own food, so they depend on the Prison Service to be fed.
12. The trial judge (HHJ Keyser QC) found that the Prison Service was not liable. He focused on whether the relationship between the Prison Service and the prisoner was akin to that between an employer and employee and concluded that it was not. He reasoned that the bargain made between employer and employee was missing: the provision of work was a matter of prison discipline, of rehabilitation, and possibly of repayment by prisoners to the community.
13. The Court of Appeal took a different view. McCombe LJ, with whom Beatson and Sharp LJJ agreed, applied Lord Phillips's analysis in the *Christian Brothers* case. McCombe LJ observed that the work performed by prisoners in the kitchen was essential to prison functioning. If not done by prisoners it would have to be done by

someone else. In short, the Prison Service took the benefit of this work, and there was no reason why it should not take its burdens.

14. McCombe LJ agreed with the trial judge that the relationship differed from a normal employment relationship in that the prisoners were bound to the Prison Service not by contract but by their sentences. Their wages were nominal. But those differences rendered the relationship, if anything, closer than one of employment: it was founded not on mutuality but on compulsion.

The Supreme Court decision

15. The Supreme Court upheld the Court of Appeal, in a single judgment by Lord Reed with which the other Justices agreed. Lord Reed endorsed Lord Phillips's five factors in the *Christian Brothers* case, but expanded on them, holding that they were not all of equal significance.

16. Lord Reed held that the first factor, that the defendant is more likely than the tortfeasor to have the means to compensate the victim and can be expected to have insured, is unlikely to be of independent significance. A deeper pocket or insurance cover is not a principled justification for imposing vicarious liability. Employers insure themselves because they are (or may be) liable: they are not liable because they are insured. Lord Reed did not rule out, however, circumstances in which the availability of insurance might be a relevant consideration.

17. The fifth factor, that the tortfeasor will, to a greater or lesser degree, have been under the control of the defendant, no longer has the significance that it was sometimes considered to have in the past. It is not realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. The significance of control is that the defendant can direct what the tortfeasor does, not how he does it. It is therefore a factor which is unlikely to matter in most cases, although the absence of even a vestigial degree of control might negative any vicarious liability.

18. As Lord Reed observed, the remaining factors are interrelated (that the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant; that the tortfeasor's activity is likely to be part of the business activity of the defendant; and that the defendant, by employing the tortfeasor, will have created the risk of the tort). The essential idea is that the defendant should be liable for torts that may fairly be regarded as risks of his business activities, whether they are committed for the purpose of furthering those activities or not. He will not be liable where the tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party.
19. Lord Reed rejected the criticism of the five criteria laid out in the *Christian Brothers* case that they were insufficiently precise. He noted that such a criticism might also be made of other general principles of the law of tort. A lack of precision was inevitable, given the infinite range of circumstances where the issue arises. The court has to make a judgment, assisted by previous judicial decisions in the same or analogous contexts. Such decisions may enable the criteria to be refined in particular contexts. Lord Reed also rejected any distinction between abuse cases and others, or between public, private and charitable employers (para 30):

    It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests. The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefits. The defendant must, by assigning those activities to him, have created a risk of his committing the tort…[A] wide range of circumstances can satisfy those requirements.

20. Lord Reed agreed that the requirements laid down in the *Christian Brothers* case were met in the present case. He rejected the argument (para 34) that the primary aim of setting prisoners to work in a prison was not to advance any enterprise of the prison, but to support the

rehabilitation of the prisoners as an aim of penal policy. The activities of prisoners were of benefit to themselves, but also to the Prison Service. It was not essential to liability that a defendant should seek to make a profit; nor did it depend upon an alignment of the objectives of the defendant and of the individual tortfeasor. Nor did the fact that the Prison Service was under a statutory duty to provide useful work for prisoners and had a restricted choice of workers exclude vicarious liability (paras 35-38).

21. Where the criteria in the *Christian Brothers* case were satisfied, it should not generally be necessary to re-assess the fairness, justice and reasonableness of the result in the particular case (paras 39-41). But the criteria were not to be applied slavishly. Where a case concerned circumstances which had not previously been the subject of an authoritative judicial decision, Lord Reed held that it may be valuable to consider whether the imposition of vicarious liability would be fair, just and reasonable. The present case was in that category; but it was neither just nor reasonable that Mrs Cox's right to compensation should depend on whether the member of the catering team who dropped the rice happened to be a prisoner or a civilian (para 42).

Implications of *Cox*

22. The reach of vicarious liability now extends to an extremely wide range of environments and circumstances (subject, always, to the second, 'close connection' part of the test, to which we turn shortly). It will apply to temporary workers and agency staff - unless they are truly independent contractors operating on their own account. It is likely also to cover many volunteers. And the nature of the organisation which uses the labour of the wrongdoer is neither here nor there. It is sufficient that the organisation is carrying on activities which are in furtherance of its own interests (something which applies to virtually all bodies) and that it has assigned some integral part of those activities to the wrongdoer.
23. In sum: good news for claimants.

The connection between the misfeasance and the employment relationship

24. Once it is established that the relationship between the wrongdoer and the defendant can sustain vicarious liability (typically an employment relationship), the next question is whether the defendant is vicariously liable for particular conduct by the wrongdoer.

25. The traditional approach was referred to as the Salmond Test, from Salmond and Heuston on the Law of Torts:

An employee's wrongful conduct is said to fall within the course and scope of his or her employment where it consists of either (1) acts authorised by the employer or (2) unauthorised acts that are so connected with acts that the employer has authorised that they may be rightly regarded as modes – although improper modes – of doing what has been authorised'. (Salmond and Heuston, 19th ed. 1987, p.220)

26. At the turn of the 21st century, as cases of sexual abuse in institutions came to the attention of the courts, the test underwent refinements. Leading the way was the Supreme Court of Canada, which introduced a more liberal test in *Bazley v Curry* (1999) 174 DLR (4th) 45.

27. The baton was then carried by the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215. The leading speech was by Lord Steyn. He acknowledged that, so far as intentional torts are concerned, the Salmond test was no longer especially useful (para 20). He said that the starting point should be the judgments in *Bazley*. The test was whether the '*torts were so closely connected with* [the miscreant's] *employment that it would be fair and just to hold the employers vicariously liable*' (para 28) - the 'close connection' test.

After *Lister*

28. The Courts then grappled with the slippery 'close connection' test, trying to apply it to real-world situations.

29. In *Mattis v Pollock* [2003] ICR 1335 the claimant was stabbed by a nightclub doorman, away from the club, some time after a dispute which had taken place there. The Court of Appeal considered the assault to have been directly linked to the earlier events at the club. Further, the doorman's use of violence in the performance of his duties was encouraged by the club's management. Vicarious liability was therefore established.
30. *Gravil v Carroll and Redruth RFC Ltd* [2008] ICR 1222 concerned an altercation which started during a rugby scrum and culminated in an assault which took place after the whistle had been blown. The Court of Appeal applied the 'close connection' test and held the rugby club vicariously liable.
31. In *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441, the claim alleged sexual abuse of a child by a Roman Catholic priest. The alleged victim was not a Catholic and had no connection to the church (para 44). However, Lord Neuberger held the archdiocese vicariously liable for such abuse because of the status, authority and evangelical duties conferred on the priest, even though he had no particular responsibilities towards the claimant. Lord Neuberger also applied the 'close connection' test (para 55).
32. In *Weddall v Barchester Healthcare Ltd; Wallbank v Wallbank Fox Designs Ltd* [2012] IRLR 307 the Court of Appeal considered two cases involving violent assaults by work colleagues. In the former it reasoned that the violence was '*an independent venture'* of the assailant (Marsh), who was off-duty and drunk at the time, so the employer was not liable. In the latter case, conversely, it concluded that because the violence was a spontaneous reaction to a lawful instruction in a factory setting, it was sufficiently close to the course of employment to give rise to vicarious liability.
33. *Vaickuviene v J Sainsbury plc* [2013] CSIH 67 was a tragic case arising from a man's murder at work by a colleague. Both the victim and the assailant (McCulloch) had been employed by the defender to stack shelves. McCulloch had a known history of racist and aggressive

conduct. Unlike in *Wallbank* the fatal incident was not connected to the giving or receiving of management instructions. The Court of Session reversed the Lord Ordinary and allowed the supermarket's motion to dismiss. It concluded that it was not possible to hold that the defender's business, or the engagement of shelf-stackers, carried any additional risk of harm from the violence of fellow employees (per Lord Carloway at para 30-31).

34. In *GB v Stoke City Football Club* [2015] EWHC 2682 (QBD), a claim was brought by an apprentice footballer complaining of degrading assaults, as part of an initiation ritual, by a professional player employed by the club. The claim failed on its facts but the Court went on to determine that the club would not have been vicariously liable in any event because the player '*had no express or implied power or duty or discretion conferred upon him by the club to train, discipline or chastise the apprentices*.' (para.148)
35. There are perhaps echoes here of a vintage case which was expressly approved by Lord Millett in *Lister*. In *Warren v Henlys Ltd* [1948] 2 All ER 935 the defendant was held not to be vicariously liable for an assault on a customer committed by its employee, a petrol pump attendant. The assault occurred after the petrol had been delivered and paid for. Hilbery J relied on this fact in applying the Salmond test, concluding that the assault '*had no connection whatever with the [attendant's] discharge of any duty for the defendants*' (p938F).

Mohamud v Morrison: the facts

36. On 15 March 2008 the late Mr Ahmed Mohamud, who was of Somali origin, planned to drive to London to attend a demonstration against the war in Somalia. (He died on 9 August 2014 from an illness unrelated to the assault).
37. At approximately 8.20am, Mr Mohamud entered the Morrison's petrol station in Small Heath, Birmingham. He entered to check the tyre pressure on his car. He had also pre-arranged to meet some members

of the Somali community with whom he had arranged to drive down to London.

38. When he attended the petrol station, Mr Mohamud enquired at the sales kiosk as to whether it would be possible to print some computer documents which he had stored on a USB memory stick. He was not intending to pay for them but was asking a favour of the staff in the kiosk.

39. There were two or three of the Morrison's employees working in the kiosk including Mr Amjid Khan and Mr Gulstan Khan.

40. Mr Amjid Khan responded to Mr Mohamud by stating "We don't do such shit". Mr Mohamud replied "That is not a suitable answer". At which point Mr Amjid Khan started being abusive to Mr Mohamud. He ended by saying "Fuck off, fucking nigger. We will flash your face". At no point was Mr Mohamud aggressive or abusive. He did not say anything which ought to have caused any concern or anger on the part of Mr Amjid Khan.

41. Mr Mohamud then left the kiosk and walked to his vehicle, entered it and started the engine. Mr Khan was told by his supervisor not to follow Mr Mohamud out of the premises. Mr Khan ignored the instructions of his supervisor and followed Mr Mohamud to his car, opened the front passenger door and entered the car with the front part of his body. He then shouted more violent abuse at Mr Mohamud. Mr Mohamud told Mr Khan to get out of the car and close the door. Mr Khan was encouraged to go back inside by his supervisor.

42. Mr Mohamud was punched in the head by Mr Khan. Mr Mohamud then stepped out of the car so that he could walk around and close the passenger door but he was intercepted by Mr Khan who again punched him twice in the head. As Mr Mohamud made to leave he said to Mr Khan 'you are an animal'. Mr Khan then leapt on Mr Mohamud and subjected him to a brutal attack involving punches and kicks while Mr Mohamud was curled up on the petrol station forecourt.

43. Mr Mohamud believed that there was more than one assailant but this was rejected by the Recorder who found that Mr Gulstan Khan and Mr Blair Weir were present but did not participate in the physical assault.

The County Court judgment

44. There was no express finding as to the motivation for the assault on Mr Mohamud. The trial judge, Mr Recorder Avtar Khangure QC, found:

> *[Mr Mohamud] … was followed outside by Mr Amjid Khan for reasons which are only known to him, which are not apparent to me and did not come out as part of the evidence and Mr Amjid Khan inflicted an unprovoked attack and assault upon [Mr Mohamud..*
> *The attack which took place was caused by the employees of the Defendant company, was ... brutal and unprovoked ....*

45. The Recorder also expressly found that Mr Amjid Khan had not misunderstood what Mr Mohamud had said so as to think that Mr Mohamud was being abusive.
46. Amjid Khan, the assailant, was employed by the defendant as a petrol station assistant. His duties included keeping order only in the sense of keeping the shop clean and tidy, but did not include keeping order in the form that a doorman or security guard would keep order.
47. Mr Khan was adequately trained. His training included a direct instruction never to confront customers who were aggressive or abusive and to call a supervisor/manager if he was unable to deal with a situation.

48. Mr Mohamud claimed that Morrison's was vicariously liable for the assault; and Morrison's was negligent in that it had failed adequately to train its staff. The claim in negligence was rejected by the Recorder and was not the subject of the appeal. The Recorder concluded that Morrison's was not vicariously liable for the assault by Mr Khan. The Recorder held as follows:

On that basis, if, as I have found as a matter of fact, the Claimant said nothing to provoke the incident, one stands back to consider why it is that Mr Amjid Khan actually went outside and brutally attacked the Claimant. One can only speculate as to what the reasons may be. I am not going to speculate as to what those reasons may be, but on the facts as I have found I conclude that for no good or apparent reason Mr Amjid Khan left the premises and attacked the Claimant. Although the scope of his employment included interaction with customers, it is clear that it did not include confronting in any way customers who were abusive and/or angry. Specific instructions themselves not to do something unlawful by an employer to an employee is insufficient by itself to avoid vicarious liability. It is not on that ground that I am finding that it was not within the scope of his duty. His duty was simply not to keep public order in the sense of a doorman, but to ensure that the shop was in good running order and that petrol pumps were in good running order, to assist people if at all possible, but no more than that....[I]t is difficult to see how vicarious liability attaches on the part of the Defendant company, despite the sympathy I have for the Claimant and the manner in which he was attacked by this particular employee.

49. In his judgment, the Recorder went on to hold that even if there had been some misunderstanding on the part of Mr Amjid Khan and he reacted to it by assaulting Mr Mohamud:

[T]he fact that there was an employer / employee position here, the fact that it happened on the employer's premises, does [not] in itself bring him, because he was supposed to interact with customers, within the test of close connection in relation to his employment so as to attract vicarious liability on the part of the [Defendant]

50. On this basis, he concluded that Mr Khan's actions took place 'purely for reasons of his own' and were beyond the scope of his employment and dismissed the claim.

Mohamud v Morrison in the Court of Appeal

51. Mr Mohamud appealed to the Court of Appeal. The appeal was heard by Arden, Treacy and Christopher Clarke LJJ on 13 February 2014, and dismissed.
52. The Court considered the authorities (largely other decisions of the Court of Appeal) where vicarious liability had been imposed. The Court reasoned that in all those cases the assailant either had some responsibility for keeping order or was involved in activities which involved an increased risk of violence.
53. Treacy LJ found that the '*law is not yet at a stage'* to establish vicarious liability in the instant case (para. 49).
54. Christopher Clarke LJ opened his judgment with the observation that there were strong grounds for saying that it would be fair and just for Morrison's to compensate Mr Mohamud for the injuries he suffered (para. 51). He concluded, however, that the connection between the assault and the employment was insufficiently close to hold the employer vicariously liable. Vicarious liability would be '*a step too far'* (para. 52).

Mohamud v Morrison in the Supreme Court

55. Undeterred, Mr Mohamud pressed ahead by appealing to the Supreme Court.
56. Lord Toulson gave the leading speech which involved an examination of the doctrine of vicarious liability as it has evolved since the reign of Henry IV, and a careful analysis of the case law pre- and post-*Lister*. He held that the 'close connection' test adumbrated in *Lister* had stood the test of time and struck the right balance.
57. That test involves asking two questions:

a. What functions or "field of activities" have been entrusted by the employer to the employee; or in everyday language, what was the nature of his job? This is to be addressed broadly.

b. Was there a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable?

58. In applying the *Lister* test, however, the Supreme Court came to the opposite conclusion to the Court of Appeal. Lord Toulson held:

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

claimant, they should be held responsible for their employee's abuse of it. (para.47)

59. Interestingly, Lord Toulson did not attempt to reconcile the tension between the divergent decisions in cases such as *Wallbank* and *Vaickuviene,* although in the course of argument he raised the rhetorical question of how both of those cases could have been correctly decided.

60. Defendants and insurers might draw some modest encouragement from his express approval of *Warren v Henlys.* The violence in that case, reasoned Lord Toulson, occurred after the claimant had left the garage. The misbehaviour by the petrol pump attendant, in his capacity as petrol pump attendant, was past history by the time that he assaulted the claimant (para 45).

Implications of *Mohamud*

61. The import of the decision lies in a recognisable relaxation of the 'close connection' test. It is now clear that a sufficiently close connection between employment and tort can apply to the kind of situation – unprovoked violence by an employee in a workplace context – in which previously the courts have been reluctant to impose liability, save where there was some enhanced risk of violence, or where the employee's duties involved the potential use of force.

62. Nevertheless, the nexus between the wrongdoing and the employment remains important. Save in unusual circumstances assaults and other misdeeds by off-duty employees, away from the workplace setting, will continue not to incur vicarious liability.