Public Interest Law Journal of New Zealand

(2019) 6 PILJNZ 63

ARTICLE

Evolution of Vicarious Liability: How the Independent Contractor Defence was Lost

YIQIANG SHAO*

Vicarious liability is a longstanding and vitally important part of the common law of torts. It typically arises where an employer is held liable for its employee's tort. The employer-employee doctrine has come under increasing scrutiny in recent times and has been extended in significant ways, cumulating in the dismissal of the "independent contractor defence" in *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670, [2018] IRLR 947. With the outsourcing of business activities to independent contractors becoming increasingly common in the modern world, the decision in *Barclays Bank* is significant and creates a vacuum for a new label characterising the type of relationship that businesses could rely on to protect themselves from enterprise risk.

I Introduction

In *Various Claimants v Catholic Child Welfare Society* (*Christian Brothers*), Lord Phillips commented that "[t]he law of vicarious liability is on the move."[1] Lord Reed, in *Cox v Ministry of Justice*, observed that "[i]t has not yet come to a stop."[2]

Traditionally, vicarious liability arises where a person, typically an employer, is held liable for another person's tort. The tortfeasor is typically an employee, with the relevant act or omission carried out during the course of his or her employment. The employer-employee doctrine has come under increasing scrutiny in recent times and has been extended in significant ways. First, the existence or absence of an employment contract is

* The author wrote this article while studying towards a Master of Legal Studies at the University of Auckland, from which he has since graduated with Distinction. The author is a practising urban planner and undertook legal studies due to an interest in law. The author wishes to thank Professor Stephen Todd for sparking his interest in tort law.

1 *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1 [*Christian Brothers*] at [19].

2 *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 at [1].

no longer decisive, as vicarious liability has been extended to include relationships which are "akin to employment".[3] Secondly, the question of whether the act or omission was carried out within the course and scope of employment has evolved into a different test — that is, whether the conduct was "closely connected" with the relationship in question.[4]

The orthodox employer-employee relationship (a contract of service) has traditionally been distinguished from an alternative contractual relationship of a principal and independent contractor (a contract for service). The general rule was that an employer may have been vicariously liable for his or her employee's tort, but not for the tort of an independent contractor. In 2012, the Court of Appeal in *E v English Province of Our Lady of Charity* stated that "the law is clear: the employer is *not* vicariously liable for the torts of his independent contractor",[5] whilst also acknowledging "that the law of vicarious liability has moved beyond the confines of a contract of service".[6]

The law of vicarious liability has been evolving since *English Province*, notably through the decisions of the Supreme Court in *Christian Brothers*, *Cox v Ministry of Justice*, *Mohamud v Wm Morrison Supermarkets plc* and *Armes v Nottinghamshire County Council*.[7] The Court of Appeal in *Barclays Bank plc v Various Claimants* upheld the lower court's decision, strongly dismissing the claim that the law of vicarious liability does not extend to independent contractors.[8]

Part II of this article explains the policy background and modern developments in the law of vicarious liability, which have refined and extended the orthodox two-stage test. Part III discusses the first stage of the test, concerning the nature of the relationship between the defendant and the tortfeasor (the relationship test). Part IV discusses the second stage of the test, concerning the connection between the tort and the relationship in question (the connection test). Part V is a discussion on whether the decision in *Barclays Bank* has extended the law in any substantive way, or whether it is merely an application of current law. Part VI concludes with some observations on the questions raised by the *Barclays Bank* decision and the direction in which the law is moving generally.

II Policy Background and Modern Developments

It is not easy to precisely pin down the policy basis of vicarious liability. It has been said that "[t]he doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice."[9] Nonetheless, it is recognised as "a longstanding and vitally important part of the common law of tort".[10] The Supreme Court of Canada in *Bazley v Curry* referred to "the provision of a just and practical remedy

3 Stephen Todd "Personal liability, vicarious liability, non-delegable duties and protecting vulnerable people" (2016) 23 Torts Law Journal 105 at 116.

4 At 120.

5 *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 [*English Province*] at [69].

6 At [73].

7 *Christian Brothers*, above n 1; *Cox v Ministry of Justice*, above n 2; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677; and *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355 [*Armes SC*].

8 *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670, [2018] IRLR 947 at [61].

9 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 (HL) at 685.

10 *Christian Brothers*, above n 1, at [34].

for the harm" and "the deterrence of future harm" as the two fundamental policy concerns which underlie the imposition of vicarious liability.[11]

Policies concerning the imposition of vicarious liability are sometimes expressed in terms of "enterprise risk" in that all forms of economic activity carry a risk of harm.[12] Lord Phillips in *Christian Brothers* commented that the underlying policy objective is to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim.[13] This is because "[s]uch defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread."[14]

The pursuit of a fair and practical remedy has led to recent significant developments in the law of vicarious liability. Notably, liability can extend to unincorporated associations and criminal offences, including sexual assault.[15] It is also possible for two (or possibly more) defendants to be vicariously liable for the tort of a single wrongdoer.[16] Lord Phillips in *Christian Brothers* commented that these represented "logical incremental developments of the law".[17] At the same time, however, he acknowledged the difficulty in identifying a coherent set of criteria for determining vicarious liability in modern law.[18]

The orthodox test for vicarious liability comprised two stages. First, determining whether an employment relationship existed between the defendant and the wrongdoer. Secondly, whether the wrongful act was carried out during the course and scope of that employment.[19] Recent developments in the law have extended the first test to include relationships "akin to employment"[20] and altered the second test to consider whether the act or omission was "closely connected" to the relationship in question.[21]

III Stage 1: Essential Elements of the Relationship Between the Tortfeasor and the Employer

The Supreme Court of Canada in *John Doe v Bennett*[22] preceded developments in this area of English jurisprudence. The question was whether a bishop was vicariously liable for a priest sexually assaulting boys in his parishes.[23] The Court held that the relationship between the bishop and the priest was "akin to an employment relationship".[24] The question asked in a comparable English case, *English Province*, was whether the wrongdoer (also a priest) bore a sufficiently close resemblance and affinity in character to a true employee such that it was fair and just to impose vicarious liability on the bishop.

11 *Bazley v Curry* [1999] 2 SCR 534 at [29].
12 Simon Deakin, Angus Johnston and Basil Markesinis *Markesinis and Deakin's Tort Law* (6th ed, Clarendon Press, Oxford, 2007) as cited in *Christian Brothers*, above n 1, at [65].
13 *Christian Brothers*, above n 1, at [34].
14 At [34].
15 At [20].
16 At [20].
17 At [20]–[21].
18 At [21].
19 At [19].
20 *English Province*, above n 5, at [13].
21 *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] ICR 665 at [10].
22 *John Doe v Bennett* [2004] 1 SCR 436.
23 At [6].
24 At [27].

The test was satisfied on the facts of the case. The tortfeasor was a priest for the parish in which the children's home was situated, the priest was accountable to the bishop and was subject to the bishop's sanction.[25] Furthermore, the priest was fully integrated into the organisation of the church, pursuing its aims and objectives on its behalf.[26] The judgment in *English Province* was a first step in creating a new and overarching category of activity, focusing on the substantive characteristics of a relationship which justifies and attracts vicarious liability. The inquiry entailed "excising the need to ask whether there is a contract of employment or something akin to it".[27]

The *Christian Brothers* case also emerged from the abuse of children by brothers at a residential institute for boys in need of care and protection. The case came before the Supreme Court shortly after *E v English Province*. The substantive question was whether the second defendant, who did not employ the brothers, was vicariously liable.[28] Lord Phillips commented that the court needs to identify policy reasons why it was fair, just and reasonable to impose vicarious liability on the defendant, and to establish the criteria that must be satisfied to establish such liability.[29]

Acknowledging the frequent overlap between policies and criteria, Lord Phillips identified five "incidents of the relationship" between the employer and employee (or similar relationships) which make it fair, just and reasonable to impose vicarious liability on an employer:[30]

(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 the 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.

On the facts of the case, the Supreme Court found that the relationship between the defendant and the wrongdoer is similar to an employment contract and could properly give rise to vicarious liability.[31] This is because the defendant and the wrongdoer's relationship was akin to an employer-employee relationship.[32] In doing so, the Supreme Court confirmed and further developed the reasoning of *English Province*.

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25 At [62] and [74].
26 *English Province*, above n 5, at [72].
27 Janet O'Sullivan "The Sins of the Father — Vicarious Liability Extended" (2012) 71 CLJ 485 at 487.
28 The preliminary issue the court needed to consider before it could determine the claim against the De La Salle Institute (Second Defendant) was whether dual vicarious liability could be imposed. Traditionally, the courts took the view that only one defendant could be vicariously liable for a tortious act. See *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1 (HL). However, through recent decisions, the courts have accepted that it was possible in law to have dual vicarious liability. See *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510; and *Blackwater v Plint* [2005] SCC 58, [2005] 3 SCR 3. In the *Christian Brothers* case, the court accepted that there could be dual liability in the circumstances and approved the judgment in *Viasystems*. *Christian Brothers*, above n 1, at 2.
29 *Christian Brothers*, above n 1, at [25].
30 At [35] and [47].
31 *Christian Brothers,* above n 1, at [88]–[94].
32 At [47].

The judgment of the Supreme Court in *Cox v Ministry of Justice* generally followed the approach in *Christian Brothers*. Lord Reed referred to the five incidents of the relationship between the defendant and the tortfeasor. His Lordship considered that the incidents were not all equally significant, preferring a "3+2" test.[33] The first criterion (means to compensate) was unlikely to be of independent significance in most cases.[34] He also considered that the fifth criterion (the "control test") did not retain the significance it had in the past.[35] The three remaining factors were interrelated and reflected the principal justifications for the imposition of vicarious liability.[36] Lord Reed further commented that Lord Phillips' analysis in *Christian Brothers* had woven together these related ideas and developed "a modern theory of vicarious liability".[37]

The Supreme Court in *Cox* also affirmed that the general approach in *Christian Brothers* was "not confined to some special category of cases, such as the sexual abuse of children".[38] The question in *Cox* was whether the Ministry was vicariously liable for a prisoner who had negligently injured a member of prison staff while assisting with work in the prison kitchen. This general approach provides basis for imposing vicarious liability in relationships outside of employment by focusing on the defendant's business activities and the risks associated with those activities.[39] Lord Reed commented that *Christian Brothers* had extended "the law to maintain previous levels of protection for the victims of torts".[40] The law had been brought in line with modern developments in the relationships between businesses and those who contribute to their operation.[41] His Lordship also warned against being "misled by a narrow focus on semantics".[42] It is not necessary for the business activity to be commercial in nature and it is sufficient that they were carried out in the furtherance of the defendant's interests.[43]

In *Armes v Nottinghamshire County Council*, the claimant commenced proceedings against a local authority for the abuse she suffered because of her foster carers. "[S]he claimed that the local authority was liable either vicariously or because it had owed her a non-delegable duty of care to ensure that she was protected from harm."[44] The non-delegable duty claim was dismissed by the courts.[45] The lower courts dismissed the vicarious liability claim on the ground that the relationship in question was not sufficiently akin to a relationship of employment.[46] The nature of the relationship was not capable of rendering the local authority vicariously liable for the acts and omissions of the foster carers, especially in circumstances where the local authority had exercised reasonable care in the selection, supervision and monitoring of the foster parents.

33 *Cox v Ministry of Justice*, above n 2, at [20].
34 At [20].
35 At [21].
36 At [22]–[23].
37 At [24].
38 At [29].
39 At [29].
40 At [29].
41 At [29].
42 At [30].
43 At [30].
44 *Armes SC*, above n 7, at 355.
45 At 355 and [49]–[51].
46 *NA v Nottinghamshire County Council* [2015] EWCA Civ 1139 at [45].

On appeal to the Supreme Court, the majority allowed the vicarious liability claim (with only Lord Hughes dissenting).[47] Applying *Cox*,[48] with reference to the five incidents identified in *Christian Brothers*,[49] the majority held the local authority vicariously liable. The Court held that "the foster parents provided care to the child as an integral part of the local authority's organisation of its child care services" and the foster parents committed a tort "in the course of an activity carried on for the benefit of the local authority".[50] These passages reflect incidents (ii) and (iii). Furthermore, the placement of children in care of foster parents implicated incident (iv) as it "create[d] a relationship of authority and trust" which "render[ed] the children particularly vulnerable to abuse".[51] The local authority exercised powers which had no parallel in ordinary life,[52] engaging incident (v). Finally, the local authority could more easily compensate the victims than foster parents who might have insufficient means.[53] This corresponds to incident (i).

Significantly, despite arriving at opposing conclusions, both the majority judgment and Lord Hughes' dissent applied the five policy factors in *Christian Brothers* and *Cox*. This indicates the courts' satisfaction with these criteria.

IV Stage 2: Connection Between the Tort and the Relationship in Question

It has long been recognised that employers can be held vicariously liable for "unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing authorized acts".[54] This is commonly referred to as the second limb of the Salmond test.[55] The difficulty arises in "distinguish[ing] between an unauthorized 'mode' of performing an authorized act that attracts liability, and an entirely independent 'act' that does not".[56] The Salmond test "provides no criterion on which to make this distinction".[57]

The Supreme Court of Canada was confronted with this issue in the leading case of *Bazley v Curry*.[58] McLachlin J said that the "courts should be guided by the following principles":[59]

> (1) They 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".

47 *Armes SC*, above n 7.
48 At [59].
49 At [55].
50 At [60].
51 At [61].
52 At [62].
53 At [63].
54 *Bazley*, above n 11, at 535.
55 John W Salmond *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Hayes, London, 1907) at 83: "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (*a*) a wrongful act authorised by the master, or (*b*) a wrongful and unauthorised *mode* of doing some act authorised by the master."
56 Robert M Solomon and others *Cases and Materials on the Law of Torts* (8th ed, Thomson Reuters, Toronto, 2011) at 932.
57 At 932.
58 *Bazley*, above n 11.
59 At [41] (emphasis omitted).

> (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized 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 … [providing] an adequate and just remedy and deterrence.

The *Bazley* judgment sets out a number of subsidiary factors which may be relevant "[i]n determining the sufficiency of the connection": [60]

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act might have furthered the employer's aims … ;
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to the wrongful exercise of the employee's power.

The connection test was first articulated by the English courts in *Lister v Hesley Hall Ltd*.[61] The judgment of the House of Lords did not regard *Bazley* as laying down some new principle of law, but as an elaboration of the second limb of the Salmond test.[62] Lord Steyn in *Lister* also noted the pitfalls of terminology, observing that it was not necessary to ask whether "the acts of sexual abuse were modes of doing authorised acts".[63] Consistent with the Canadian decision in *Bazley*, he posed the broad question of whether the "torts were so closely connected with [the] employment that it would be fair and just to hold the employers vicariously liable".[64] While the court unanimously applied the close connection test in *Lister*, only Lord Millett expressly endorsed the importance the Canadian decision had attached to the creation of risk.[65] Most of the cases that followed recognised the significance of Lord Millett's view.[66] This is one aspect of the law which has remained consistent,[67] up to and including *Barclays Bank*.

Lord Phillips in *Christian Brothers* commented that "[t]he test of 'close connection' … tells one nothing about the nature of the connection."[68] He acknowledged that "[t]he precise criteria for imposing vicarious liability for sexual abuse are still in the course of

60 At [41].
61 *Lister*, above n 21, at [10].
62 At [15].
63 At [20].
64 At [28].
65 *Christian Brothers,* above n 1, at [74].
66 At [74].
67 Todd, above n 3, at 130. "[I]n one respect at least the law is clearer and, maybe, more principled. The nature of the inquiry is well suited to give a remedy in sexual abuse cases and other cases involving vulnerable claimants." The decisions of *Armes SC*, above n 7; and *Barclays Bank*, above n 8, support this view.
68 *Christian Brothers*, above n 1, at [74].

refinement by judicial decision."[69] However, Lord Phillips identified a common theme starting with the Canadian authorities:[70]

> 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.
>
> These are the criteria that establish the necessary "close connection" between relationship and abuse. … 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.

The close connection test has been affirmed by the courts many times in subsequent decisions. Recently, in *Mohamud*, the Supreme Court strongly dismissed an attempt to change the "close connection" terminology.[71] Lord Toulson JSC in *Mohamud* recognised that the court in *Lister* was mindful of the risk of unduly concentrating on a particular form of terminology, and held that:[72]

> … there is a similar risk in attempting to over-refine, or lay down a list of criteria for determining, what precisely amounts to a sufficiently close connection to make it just for the employer to be held vicariously liable.

Reduced to its essence, the court had to consider two matters. First, the nature of the job assigned to the employee — a question to be addressed broadly.[73] Secondly, "whether there was a sufficient connection between the [wrongdoer's employment]" and the "wrongful conduct … for the employer to be held liable under the principle of social justice".[74] A necessary connection had been commonly found in cases wherein "the employee used or misused the position entrusted to him in a way which injured the third party".[75]

The issue in *Mohamud* was whether the defendant, a retail business, should be vicariously liable for the assault committed by its sales assistant against a customer. The Court of Appeal held that the fact the employee's job involved interaction with the public did not provide the degree of connection between his employment and the assault necessary for the employer to be held vicariously liable.[76] However, applying the same close connection test, the Supreme Court reached a different finding, and allowed the appeal:[77]

> [The employee's] 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.

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69 At [85].
70 At [86]–[87].
71 *Mohamud*, above n 7, at [56].
72 At [43].
73 At [44].
74 At [45].
75 At [45].
76 At [3]–[5] and [7]–[8].
77 At [47]–[48].

> … 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.
>
> [The employee's] motive was irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there.

Commentary by Lord Dyson in *Mohamud* further signified the Court's contentment with the law governing the second limb of the vicarious liability test.[78] In particular, he noted that "[t]he close connection test has now been repeatedly applied" by the courts over many years and "should only be abrogated or refined if a demonstrably better test can be devised".[79] His Lordship acknowledged recent developments in the first limb of the vicarious liability test in response to changes in "the increasing complexity and sophistication of the organisation of enterprises in the modern world".[80] However, he saw "no need for the law governing the *circumstances* in which an employer should be held vicariously liable for a tort committed by his employee to be on the move".[81]

The High Court of Australia in *Prince Alfred College Inc v ADC* rejected *Mohamud*, noting that while "[t]he employee [in *Mohamud*] was clearly authorised [by the employer] to respond to inquiries" from the public, "this would not explain why the employer should be liable for the conduct of the employee which followed"[82] as "the carrying out of his employment duties did not provide the 'occasion' for the offending".[83] *Prince Alfred College Inc* distinguished *Mohamud* from *Lister* and other similar abuse cases:[84]

> … in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may 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.

It should be noted that the High Court of Australia had previously, in *New South Wales v Lepore*, declined to adopt the close connection test.[85] The Court observed that the decision in *Mohamud* "[did] not explain how the actions [of the employee] could or should be said to be in course or scope of the employment".[86]

78 At [56].
79 At [53].
80 At [55].
81 At [56].
82 *Prince Alfred College Inc v ADC* [2016] HCA 37, (2016) 258 CLR 134 at [71].
83 At [73].
84 At [81].
85 *State of New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511 at [319]–[320].
86 *Prince Alfred College Inc*, above n 82, at [72].

V *Barclays Bank plc v Various Claimants*

The above discussion illustrates significant recent developments in the law of vicarious liability. One aspect of the law appears to have remained constant: vicarious liability does not attach to independent contractors. This "defence" for independent contractors was considered by the Court of Appeal in *Barclays Bank plc v Various Claimants*.[87]

A *Procedural history*

The alleged tortfeasor in this case was a doctor who had, over many years, conducted medical examinations and assessments on behalf of the Bank. The Bank required the medical examinations as a condition of employment. Many existing and prospective employees were teenagers and young women. The doctor was self-employed and was paid a set fee for each examination. The doctor conducted the examinations from his home and, in the course of doing so, it was alleged that the doctor had sexually assaulted each of the claimants. The doctor died in 2009. Police investigations concluded that, had the doctor been alive, there would have been sufficient evidence to pursue a criminal prosecution.[88] The preliminary issue for the court was whether the Bank was vicariously liable for the alleged assaults.[89]

The High Court judge followed a two-stage test: (i) was the relationship between the doctor and the Bank "one of employment or 'akin to employment'?" and (ii) "[i]f so, was the tort sufficiently closely connected with that employment or quasi employment?"[90] The judge then turned to examine the case against the five incidents of the relationship identified in *Christian Brothers* and *Cox*, and concluded that the relevant criteria in respect of Stage 1 were met.[91] The alleged abuse was also found to be so closely connected with the engagement in question as to satisfy Stage 2.[92]

The judge then assessed whether the conclusions made were just and fair, accepting "that this [was] a balancing exercise between two innocent parties".[93] Noting that "[t]he action against the bank [was] the only legal recourse now available to claimants", the judge considered that, on balance, the conclusions made were just and fair.[94] This established vicarious liability.

The Bank challenged the decision on the grounds that the judge had wrongly concluded that the doctor's relationship with the Bank was akin to employment. The Bank argued that the doctor was an independent contractor and the judge had wrongly applied the law concerning the five incidents of relationship to the facts.[95]

Central to the Bank's case was that the doctor was "an independent contractor, and that the 'defence' of that status had not been abolished or abrogated by any of the cited decisions, up to and including *Armes*".[96] The Bank argued that its relationship with the

87 *Barclays Bank*, above n 8.
88 At [7].
89 At [2].
90 At [27].
91 At [27]. The judge accepted Lord Reed's judgment in *Cox* "that the first and fifth criteria were not as significant as the second, third and fourth".
92 At [46].
93 At [47].
94 At [47].
95 At [30].
96 At [32].

doctor could be distinguished from *English Province* and *Christian Brothers*, in which the relevant relationships were deemed closer than in a contract of employment.[97] Nothing in *Cox* suggested liability on the part of independent contractors, while the decision in *Armes* was based on a careful analysis of the complex statutory background and the responsibilities of the local authority.[98] *Armes* did not "abrogate or diminish the 'independent contractor defence'".[99]

B *Court of Appeal decision*

The Court of Appeal dismissed the Bank's appeal, finding that the law now requires the Court to inquire into the substance of the relationship in question, not merely whether the alleged tortfeasor was an independent contractor.[100] The judge went on to state that:[101]

> It seems clear to me that … there will indeed be cases of independent contractors where vicarious liability will be established. Changes in the structures of employment, and of contracts for the provisions of services, are widespread. Operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control.

In terms of the five incidents of the relationship, the Court of Appeal was satisfied with the High Court's findings that:

(i) "the [Bank] had more means to satisfy the claims than had the … estate of [the deceased doctor]".[102]
(ii) the medical examinations were undertaken on behalf (and for the benefit) of the bank.[103]
(iii) the "process was also part of the business activity of the Bank".[104]
(iv) "the risk of the tort arose from the arrangements made by the [Bank]".[105]
(v) "the Bank exerted sufficient control" over the doctor in respect of the medical examinations, including "the questions to be asked and the physical examinations to be carried out".[106] This was held to be "the most critical factor" in this case.[107]

The Court of Appeal had no difficulty accepting, in terms of the Stage 2 test, that the "medical examinations were sufficiently closely connected with the relationship" between the doctor and the Bank.[108] Nor did the Court have any difficulty accepting that the conclusions of the High Court were just and fair in the circumstances.[109]

97 At [34]–[35].
98 At [36].
99 At [37]. The Bank (appellant) cited *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] AC 537; and *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157 as the authority which gave rise to this "defence". This argument was dismissed by the Court of Appeal at [46]–[47].
100 *Barclays Bank*, above n 8, at [44].
101 At [45].
102 At [49].
103 At [51].
104 At [52].
105 At [53].
106 At [27]
107 At [56].
108 At [59].
109 At [60].

The Court concluded with the following remark:[110]

> It is clearly understandable that a "bright line" test, as is said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business cannot displace or circumvent the principles now established by the Supreme Court. … [The Bank] advanced the status of self-employed independent contractor as representing a "coherent principle of law", thereby seeking to justify the maintenance of such a principle. The submission may be attractive at first blush. However, as has now become tolerably clear from the fields of employment and taxation law, establishing whether an individual is an employee or a self-employed independent contractor can be full of complexity and of evidential pitfalls. In my view, the *Cox/Mohamud* questions will often represent no more challenging a basis for analysing the facts in a given case.

C *Discussion*

It was regarded as "trite law that whilst one may be vicariously liable for [the torts of] one's employees [or someone akin to one], one is not vicariously liable for one's independent contractors".[111] Until *Barclays Bank*, there was "little appetite for questioning [that] axiom".[112] Meanwhile, the "independent contractor" label was used by the courts, commentators and lawyers advising clients on tort claims as a shorthand for the types of relationships which would not normally attract vicarious liability (and contrasted them with those which do).

In the modern world, outsourcing core functions of an enterprise to independent contractors is increasingly common. The decision in *Barclays Bank* is a timely response to this phenomenon. It is appropriate, in the author's view, that the judgment makes it clear that the vicarious liability test is concerned with the substance, rather than the form, of such relationships. The firm rejection of a separate "independent contractor" test helpfully avoids the need to further differentiate a "contract for services" from a "contract of service", which can be a difficult exercise in itself.

At first blush, it is easy to regard the decision in *Barclays Bank* as a further, and significant, extension of the law. However, upon closer examination, nothing in the decision suggests that the judge had to extend the law in finding the Bank vicariously liable. Clearly, this was only made possible on the back of significant recent developments in the law of vicarious liability since *Christian Brothers*. In particular, the five relationship criteria identified by Lord Phillips in *Christian Brothers* have demonstrated that they remain "fit for purpose" when considering cases involving independent contractors.[113] Continued application of these policy criteria would, in the author's view, adequately deal with any floodgate concerns, as it is unlikely that most independent contractor relationships would be able to satisfy those criteria.

While Lord Reed in *Cox* commented that the first (means to compensate) and fifth (control) criteria are likely to be of less significance than the second, third and fourth criteria, in cases involving independent contractors, it is these two incidents which will be most relevant. Indeed, autonomy and the ability to compensate the victim of a tort

110 At [61].

111 Phillip Morgan "Vicarious Liability on the Move" (2013) 129 LQR 139 at 139.

112 Jonathan Morgan "Liability for Independent Contractors in Contract and Tort: Duties to Ensure That Care Is Taken" (2015) 74 CLJ 109 at 110.

113 *Christian Brothers*, above n 1, at [35] per Lord Phillips.

(through insurance and pricing), to a significant degree, distinguish most independent contractors from typical employees. Vicarious liability claims which involve an independent contractor operating on his or her own terms, with the means to compensate the victim, would not satisfy those two criteria.

Vicarious liability claims are often made many years after the tortious events have occurred. In this regard, the "expansion" of vicarious liability to independent contractors poses significant challenges for businesses (including public bodies, non-profit, community and religious enterprises) seeking to protect themselves against historic risks. A business may have previously sought to mitigate enterprise risks by contracting out certain activities, and in doing so, assumed that its contractors would have inherited all associated risks. While the employer may have greater means to compensate the victim than the independent contractor — who may be deceased, bankrupt or untraceable (thus satisfying the first relationship criterion) — finding the employer vicariously liable in such cases would appear to be nothing more than rough justice, and a practical remedy for the victim. Future developments in the law could see some changes to this very pragmatic but, arguably least principled policy criterion laid down in *Christian Brothers*.

VI Conclusion

The doctrine of vicarious liability is a longstanding and vitally important part of the common law of torts. It is premised on policy objectives concerning the provision of just and practical remedies to victims and the deterrence of future harm. Justifications for the imposition of vicarious liability are sometimes expressed in terms of "enterprise risk".[114] Businesses can insure against the risk of such liability so that this risk is more widely spread.

The complexities of modern relationships have necessitated refinements in the orthodox two-stage inquiry concerning the nature of the relationship between the business and its "employee" (the relationship test) and the connection between the tort and the relationship in question (the connection test). The relationship criteria established in *Christian Brothers*, in particular, have expanded the scope of vicarious liability beyond conventional employment relationships to include relationships "akin to employment". Significantly, but perhaps unwittingly, the emphasis placed on the substance over the form of relationships has paved the way for the Court of Appeal in *Barclays Bank* to firmly reject the need for a separate independent contractor test.

With the outsourcing of business activities to independent contractors becoming increasingly common in the modern world, the decision in *Barclays Bank* is timely. The decision does not constitute any substantive development in the law of vicarious liability. However, in a practical sense, its rejection of the independent contractor defence is significant. It creates a vacuum for a new label characterising the type of relationship that businesses could rely on to protect themselves from enterprise risk. No such term readily comes to mind, as the scope of vicarious liability now encompasses almost all forms of relationships. It is difficult to see how the scope of vicarious liability could be expanded any further. Future judicial inquiries are likely to focus on the degree in which a relationship in question meets the now well-established policy criteria. This could lead to further development in the criteria themselves.

114 Deakin, Johnston and Markesinis, above n 12, as cited in *Christian Brothers*, above n 1, at [65].