

From Vicarious Liability to Precarious Liability

Speakers:



Rachit Buch
Buch@12kbw.co.uk



Eleanor Duckenfield
Duckenfield@12kbw.co.uk



Jessica Franklin
Franklin@12kbw.co.uk

Introduction

- ▶ Development of law:
 - ▶ Relationship
 - ▶ Connection
- ▶ Current state: recent decisions
- ▶ Issues that remain

The Doctrine of Vicarious Liability

- ▶ Two limbs:

- ▶ 1. Relationship

- ▶ 2. Sufficiently close connection

Limb 1 – Relationship



- ▶ *Cox v Ministry of Justice*
[2016] UKSC 10



- ▶ *Barclays Bank plc v Various claimants*
[2020] UKSC 13

“the law of vicarious liability is on the move”

Lord Phillips in *Various claimants v Catholic Child Welfare Society* [2012] UKSC 56

- ▶ Akin to employment
- ▶ Fair, just and reasonable
- ▶ Five policy reasons from *Various claimants v Catholic Child Welfare Society* [2012] UKSC 56 (“*Christian Brothers*”):
 - i) Means to compensate & insured
 - ii) Result of activity on behalf of employer**
 - iii) Part of business activity of employer**
 - iv) Employer created the risk**
 - v) Employee under employer’s control

		
Furthering commercial aims	✘	✔
Bound by a contract	✘	✔
Earning a proper wage	✘	✔
Independent contractor	✘	✔
AKIN TO EMPLOYMENT	✔	✘

► *"It is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment" [29]*

► *"There is 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" [22]*



“down the road to tidiness”

Barclays Bank [29]

Statutory definition of ‘worker’ in the Employment
Rights Act 1996

“It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work”

Widgery LJ in *Salisbury v Woodland* [1970] 1 QB 324, 336 quoted in *Barclays Bank* [7]

Limb 2 – Close Connection



► *Mohamud v Morrison Supermarkets plc*
[2016] UKSC 11



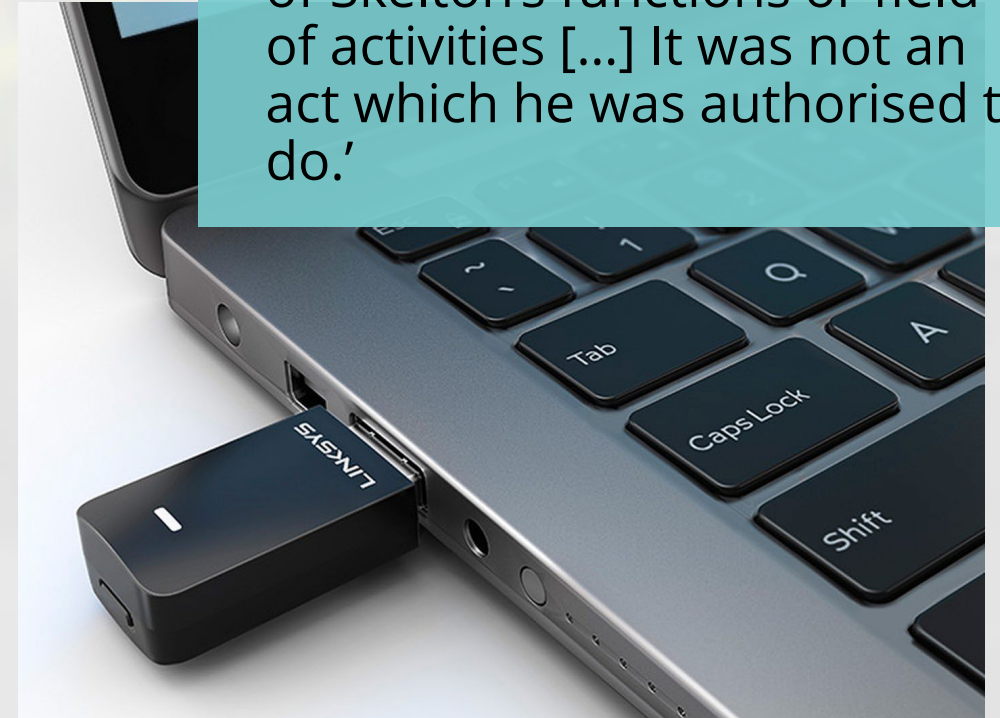
► *Morrison Supermarkets plc v Various claimants* [2020] UKSC 12

► '[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.'



► *Mohamud v Morrison Supermarkets plc*
[2016] UKSC 11

► 'the disclosure of the data on the Internet did not form part of Skelton's functions or field of activities [...] It was not an act which he was authorised to do.'



► *Morrison Supermarkets plc v Various claimants* [2020] UKSC 12

Different tests?

- ▶ '[...] the close connection test has been applied differently in cases concerned with the sexual abuse of children, which cannot be regarded as something done by the employee while acting in the ordinary course of his employment. Instead, the courts have emphasised the importance of criteria that are particularly relevant to that form of wrongdoing, such as the employer's conferral of authority on the employee over the victims, which he has abused.'

► it was 'obvious that [Mr Khan] was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there.'



► *Mohamud v Morrison Supermarkets plc*
[2016] UKSC 11

► it was 'abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta.'



► *Morrison Supermarkets plc v Various claimants* [2020] UKSC 12

- ▶ '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.'



- ▶ *Mohamud v Morrison Supermarkets plc* [2016] UKSC 11

- ▶ 'although there was a close temporal link and an unbroken chain of causation linking the provision of the data to Skelton for the purpose of transmitting it to KPMG and his disclosing it on the Internet, a temporal or causal connection does not in itself satisfy the close connection test.'



- ▶ *Morrison Supermarkets plc v Various claimants* [2020] UKSC 12



► 'he again told the claimant in threatening words that he was never to come back to the petrol station. [...] 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.'

► *Mohamud v Morrison Supermarkets plc*
[2016] UKSC 11



▶ 'Mr Major moved towards Mr Bellman stating "I f***ing make the decisions in this company it's my business. If I want him based in Northampton he will be f***ing based there" and punched Mr Bellman who fell down.'

▶ *Bellman v Northampton Recruitment Limited* [2018] EWCA Civ 2214

Where are we now?

A brief review of recent decisions

Blackpool Football Club v DSN [2021] EWCA Civ 1352

- ▶ First instance decision before *Barclays & Morrison 2*
- ▶ Control vs opportunity:

“there was a complete absence even of a vestigial degree of control” [128]

Even if five *Christian Brothers* principles considered

“there were no ties imposing obligations on either side in the present case” [130]

- ▶ Griffiths J had focused on integration & opportunity to commit abuse [121]

Hughes v Rattan [2022] EWCA Civ 107

- ▶ Under formulation in *Cox*, D would have been vicariously liable for associate dentists

"However, Cox is not the last word on vicarious liability from the Supreme Court... following Barclays the critical question now appears to have reverted to being whether the alleged tortfeasor's relationship with the defendant can properly be described as being "akin" (or "analogous") to employment, with the focus being on the contractual arrangements between tortfeasor and defendant."

Chell v Tarmac Cement and Lime Ltd [2020] EWHC 2613 (QB)

- ▶ '[...] had Judge Rawlings had available to him the decision of the Supreme Court in *Morrisons v Various*, he would only have been fortified in the conclusions to which he had come [...]' (Martin Spencer J)
- ▶ A temporal connection between employment and the tort 'is of even less significance since the recent decision of the Supreme Court.'

Chell v Tarmac Cement and Lime Ltd [2022] EWCA Civ 7

► Five reasons for lack of close connection:

1. The cause of the appellant's injuries was the explosive pellet target – it was not the employer's equipment
2. It was not part of Mr Heath's work to use pellet targets
3. There was no abuse of power. Mr Heath did not have a supervisory role in respect of the work which the appellant was carrying out
4. Friction/bad feelings between the appellant and Mr Heath's employers had eased by the time of the incident
5. The risk created by Mr Heath was not inherent in the business (Nicola Davies LJ)

BXB v Trustees of the Barry Congregation of Jehovah's Witnesses [2021] EWCA Civ 356

- ▶ Nicola Davies L.J. (& Bean L.J.):
 - ▶ Reference to 'tailored test'
 - ▶ Status as elder; consequent role & authority in organisation & effect on continuing relationship with victim
- ▶ Males L.J. four key factors including obedience; knowledge; response to concerns raised

High Court decisions

<i>SKX v Manchester City Council</i> [2021] EWHC 782 (QB)	Children placed by Council in privately run care home: Stage 1 relationship?	
<i>Kennedy v Arriva Rail London Ltd</i> [2021] EWHC 2838 (QB)	Train company employee; false complaint to have C arrested by Transport Police: Stage 2 connection?	
<i>TVZ v Manchester City Football Club</i> [2022] EWHC 7 (QB)	Football coach; voluntary, unpaid role as scout; ran teams that were 'feeders' for D	

High Court decisions

<i>SKX v Manchester City Council</i> [2021] EWHC 782 (QB)	Children placed by Council in privately run care home: Stage 1 relationship?	<input type="checkbox"/>
<i>Kennedy v Arriva Rail London Ltd</i> [2021] EWHC 2838 (QB)	Train company employee; false complaint to have C arrested by Transport Police: Stage 2 connection?	<input checked="" type="checkbox"/>
<i>TVZ v Manchester City Football Club</i> [2022] EWHC 7 (QB)	Football coach; voluntary, unpaid role as scout; ran teams that were 'feeders' for D	<input type="checkbox"/>

Issues that remain

- ▶ Sexual abuse cases: a special category?
 - ▶ See *DSN* and *BXB*
- ▶ Importance of contract
 - ▶ Comments in *Hughes* (albeit *obiter*)
- ▶ Moving too far towards fault-based liability
 - ▶ See Males L.J. in *BXB*

Thank you

Rachit Buch

BUCH@12KBW.CO.UK

Eleanor Duckenfield

DUCKENFIELD@12KBW
.CO.UK

Jessica Franklin

FRANKLIN@12KBW.CO.
UK