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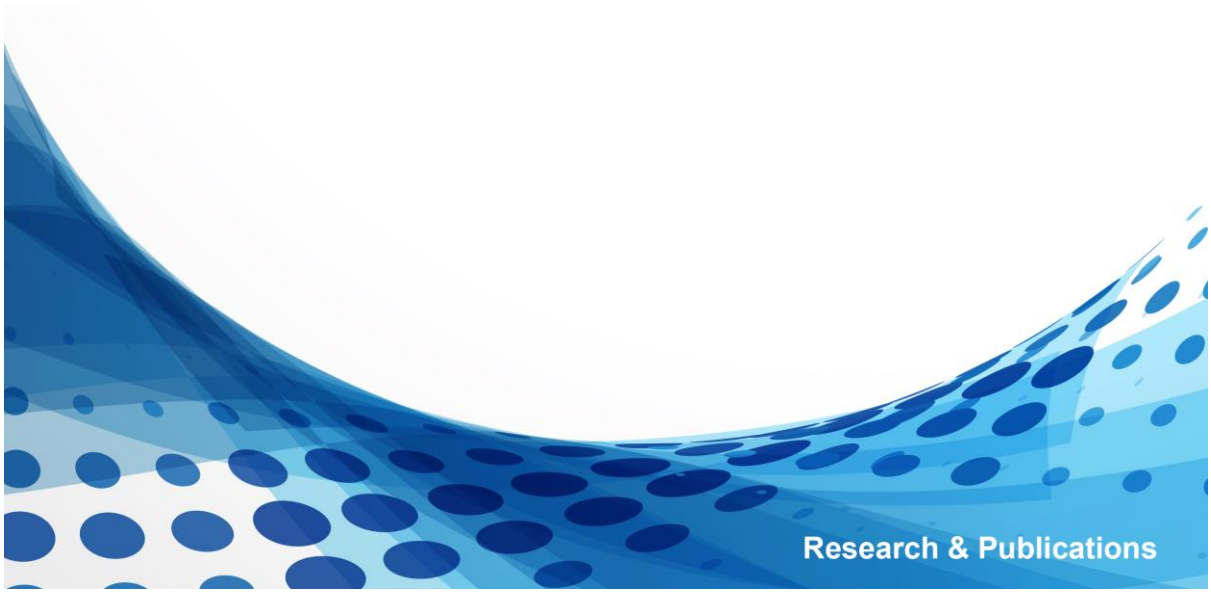

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# IN PURSUIT OF BALANCE: VICARIOUS LIABILITY DOCTRINE IN THE UNITED KINGDOM AND INDIA

M P Ram Mohan* & Sai Muralidhar K[Ψ]

**Abstract**

The Doctrine of Vicarious Liability is a unique exception to the principle of fault-based liability and holds persons liable for the actions of third parties. The recent verdicts in *WM Morrison Supermarkets v Various Claimants* (2020) and *Various Claimants v Barclays Bank* (2020) by the UK Supreme Court restricting the scope of vicarious liability through its interpretation of the *akin to employment test* as well as the *close connection test* deserves scrutiny. The Supreme Court apart from reaffirming the traditional distinction between independent contractors and employees also has limited the circumstances in which claims of vicarious liability can be upheld. Given that tort law in India is deeply rooted in the common law of the UK, it is unsurprising that principally vicarious liability in India and UK has evolved similarly. The paper analyses the various principled justifications behind the doctrine and focuses on the various tests such as the akin to employment test, course of employment test & close connection test which are used to impose liability. Further, it comprehensively examines the evolution of the doctrine in the UK and India, and analyses the varying approach taken by the judiciary in both countries against the backdrop of the socio-economic conditions of the workforce. Lastly, the paper identifies the difficulties that the doctrine may face in the future.

**Keywords:** Vicarious liability, independent contractors, employer-employee relationship, Indian labour law

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## INTRODUCTION

Vicarious liability occupies a unique position in common law as it is one of the few instances in which a person is held liable for the actions of a third person. The Doctrine of Vicarious Liability (the doctrine) postulates that a person may be made liable for the tortious acts of another person.[1] The Doctrine has evolved from the Latin phrase '*qui facet per alium facit per se*' which means he who acts through another does the act himself[2] and '*respondeat superior*' which directly translates to 'let the principal be held responsible'.[3] Therefore, an application of the maxim shows that acts of the servant done in the course of employment are equivalent to acts done by the master himself.[4] The evolution of vicarious liability can be dated back to the times of slavery when slaves were considered as the property of the master and the master was the only one who had any legal standing and consequently any liability before the judicial system.[5] The concept of a servant's liability being tied to the master survived in the form of vicarious liability even after emancipation.[6] The doctrine of vicarious liability aims to ensure that the principles of social justice are met by ensuring that a remedy lies against the person who can reasonably be identified with the tort and who is likely to be able to afford damages.[7] Over the decades, based on social contexts and facts, courts have used several theories such as the *Deep Pockets Theory*, *Choice and Control*, *Deterrence*, and *Enterprise Theory* in the development of the doctrine of vicarious liability.

In brief, the *Theory of Deeper Pockets*[8] justifies the application of vicarious liability on the master since they would be more likely to be able to provide compensation as opposed to the servant. This has been applied in numerous cases over the years. One of the earliest references can be seen in *Limpus v London General Omnibus Company*[9] wherein Lord Wiles commented[10]

[1]JW Neyers, 'A Theory of Vicarious Liability' (2005) 43 Alberta Law Review 287.
[2]Ching Alex, 'Vicarious Liability and the Close Connection Test: The Past, Present, and Future' (2009) 1 City University of Hong Kong Law Review 117.
[3]*Id.*
[4]*Bartonshill Coal Company v Jane McGuire, Widow* [1858] UKHL 3 (House of Lords).
[5]Oliver Wendall Holmes, Common Law228(44th printing, 1951)
[6]*Id.*
[7]Glanville Williams, 'Vicarious Liability and the Master's Indemnity' (1957) 20 The Modern Law Review 220.
[8]Nicholas J McBride and Roderick Bagshaw, Tort Law 852 (6th ed., 2018).
[9]*Limpus v London General Omnibus Company* (1843) 1 H&C 526 (Exchequer Chamber).
[10]*Id.*, 538

> "There ought to be a remedy against some person capable of paying damages to those injured by improper driving"

The doctrine of vicarious liability is not based solely on the solvency of the master.[11] The *Theory of Control* suggests since the master controls the servant and the manner in which he acts, any tortuous acts that follow as a result are a direct consequence of the master's actions and it is just that the master is held liable for the same.[12] Furthermore, the *Theory of Choice* suggests that since the master had the power to choose the persons who would be working under his employ it would be just that he is held liable for their tortuous acts.[13]

The *Deterrence Theory* postulates that when the employer knows that he may face liability for the consequence of the actions of his employees, he is more likely to take steps to ensure his employees do not commit tortuous acts during the course of their employment.[14] The underlying issue, however, with the deterrence theory is that even under circumstances where the employer has taken all steps he could reasonably be expected to have taken to mitigate any tortuous acts from taking place, he could still face liability if the employee commits such an action during the course of his employment.[15] Finally, *Enterprise Theory* postulates that since the employer bears the fruits of the employee's labour and work, it is fair that he also bears the consequences and liabilities their actions cause.[16]

While courts used these theories to develop the doctrine of vicarious liability, scholars also believe that none by themselves justify the imposition of vicarious liability and that only a mixed application of the theories would justify the imposition of vicarious liability.[17]

Professor Neyers suggests a theory based in the realm of contract law and argues that the above-mentioned theories all concentrate on the relationship between the employer and the tort victim, and the goals achieved by the imposition of vicarious liability. Instead, he argues that the right approach would be to focus on the employer-employee relationship. This is elucidated by

[11] *Cox v Ministry of Justice* (2016) 2 WLR 806 (Supreme Court),¶ 21.
[12] James Jr Fleming, 'Vicarious Liability' (1953) 28 Tul L Rev 161.
[13] Quarman v. Burnett, 6 M. &W. 499, 509 (Ex. 1840)
[14] *Bazley v Curry* (1996) 2 SCR 534 (Supreme Court of Canada).
[15] McBride and Bagshaw *supra* note 8, 854.
[16] *Id.*, 854
[17] Percy Henry Winfield, JA Jolowicz and WVH Rogers, Winfield and Jolowicz on Tort (16th ed., 2002), 704. Basil S Markesinis and Hannes Unberath, The German Law of Torts: A Comparative Treatise (4th ed., 2002), 694.

showing that every employment arrangement holds an inherent promise by the employer to indemnify the employee for any liability suffered in conducting the employer's business.[18]

Be that as it may, the evolution of the common law doctrine of vicarious liability evolved in a varied manner over time across jurisdictions. While the idea of vicarious liability remains the same in all jurisdictions, the conceptual applications are different. The United Kingdom relies on a dual test of 'akin to employment'[19] and the 'close connection test'[20] to determine the existence of vicarious liability. India relies on the 'course of employment test'.[21]

The scope of the paper is to comparatively study the law of vicarious liability for tortious acts committed in the context of employment in the United Kingdom and India. Part I provides an account of how the evolution of vicarious liability took place in the United Kingdom. Part II focuses on the evolution of vicarious liability in India. Part III compares the legal regimes of the UK and India in relation to the nature of the development of the doctrine. Part IV discusses two challenges the doctrine may face in the future: the overexpansion of its application and the difficulties posed due to the digital age and virtual workspace.

## 1. EVOLUTION OF VICARIOUS LIABILITY IN THE UK

The evolution of vicarious liability in the United Kingdom can be traced back to medieval times when the master was liable only for the acts of the servant to which he explicitly commanded and consented.[22] The master was not liable for any acts of the carelessness of the servant.[23] The existence of such a rule can be seen in the general principle of civil liability espoused by the counsel for Henry IV that a person cannot be held liable for the carelessness of another person even if they are under his employ as it cannot be considered as his act.[24] This case involved a servant negligently lighting a fire leading to a neighbouring house burning down.[25] While this was ordinarily the general principle followed during medieval times, there were certain exceptions too. The exceptions include liability due to fire lit by servants as seen in the earlier

[18]Neyers, *supra* note 1, at 301
[19]*E v English Province of Our Lady of Charity* (2012) 7 WLUK 395 (Court of Appeal).
[20]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords).
[21]Pushpabai Purshottam Udeshi v M/s Ranjit Ginning & Pressing Co Pvt Ltd, (1977) 2 SCC 745.
[22]WS Holdsworth, A History of English Law, Vol 3 (3rd ed., 1923).
[23]*Id.*
[24]*Id.*
[25]In Re: William Beaulieu, Y.B. 2 Hy. IV. Pasch. Pl 6.

cases, the liability of professionals for acts of servants, as well as statutory liability imposed on bailiffs.[26]

Therefore, historically in the absence of express command and consent, liability could not be imposed on the employer/master even if the acts of the servant were part of the master's practice/trade. This began to change at the end of the seventeenth century when the doctrine began to evolve.[27] While there are conflicting opinions as to why the law evolved, broadly it was thought the evolution of the doctrine was rooted in the principle of social justice espoused by Justice Holt.[28] Vicarious liability being tied into the principles of social justice has been reaffirmed by the courts across jurisdictions over the years, and most recently by the UK Supreme Court in *Mohamud v WM Morrison Supermarkets Plc.*[29] It was held that vicarious liability cases must be seen against the backdrop of whether it would be socially just to hold the employers liable. The evolution of vicarious liability is therefore largely rooted in policy and fairness and social justice.[30]

The present section analyses the evolution of the two-stage tests that any claims of vicarious liability must satisfy in the UK.[31] The first stage of the test looks at the nature of the relationship between the tortfeasor and the person who sought to be held liable. At this stage, it must be established that the relationship between the tortfeasor and the accused gives rise to vicarious liability. The first stage ensures that the person committing the tortuous acts is in the employ of the person sought to be made vicariously liable. The second stage of the test looks at the relationship between the tortuous act and employment. Here, they must establish that the tortuous acts are closely connected to the employment of the tortfeasor. The second stage ensures the tortuous acts took place during the course of employment.[32]

### *1.1 NATURE OF RELATIONSHIPS IN VICARIOUS LIABILITY*

The first limb of the test of vicarious liability focuses on the nature of the relationship and the liability that arises from the relationship. Workers are ordinarily hired either under a *contract*

[26]Holdsworth, *supra* note 22, 385-387.
[27]Fleming, *supra* note 12.
[28]Fleming, *supra* note 12, *Sir Robert Wayland's Case* (1707) 1 WLUK 22 (Court of King's Bench).
[29]*Mohamud v WM Morrison Supermarkets Plc* (2016) 2 WLR 821 (Supreme Court). at ¶ 45
[30]*Dubai Aluminium Co Ltd v Salaam* (2002) 3 WLR 1913 (House of Lords); *Various Claimants v Christian Child Welfare Society* (2012) 3 WLR 1319 (Supreme Court); 'Fostering Uncertainty in the Law of Tort (Armes v Nottinghamshire CC)' (2018) Law Quarterly Review Sweet and Maxwell 359.
[31]*Various Claimants v Christian Child Welfare Society* (2012) 3 WLR 1319 (Supreme Court)
[32]*Id.*

*of service* or a *contract for service*.[33] The doctrine of vicarious liability applies only in cases of the former category which establishes an employer-employee or a principal-agent relationship and in certain other statutorily mandated forms.[34] The actions of the contract for service category of workers namely independent contractors do not ordinarily give rise to vicarious liability claims.[35] The primary reason why the law imposes such a distinction in liability between employees and independent contractors is the degree of control that exists.

The nature of the relationship between the hirer and the hired individual ordinarily takes the form of an employee or an independent contractor.[36] Glanville Williams defines an independent contractor as "any person, other than a servant, who is employed to do work.".[37] The difference between an employee and an independent contractor lies in the nature of their contract. While an employee has a contract of service, an independent contractor has a contract for service.[38] In other words, an employee acts under the supervision of the employer, and the work done by the employee is based on the orders and direction of the employer. Independent contractors on the other hand are hired for particular tasks and perform those tasks in a manner they feel fit.

The distinction between an employee and an independent contractor was brought out finely by the Privy Council in *Lee Ting Sang Appellant v Chung Chi-Keung and Another,*[39] holding the primary test to determine the nature of the relationship as –

> "The fundamental test being whether or not he was performing services as a person in business on his own account and thus as an independent contractor"

While the test for determining the nature of the relationship largely relied on the degree of control over the worker, the other major factor is the degree of integration of the work committed in the primary business activity of the employer.[40] If the work is ancillary to the business activities, the person would be considered an independent contractor.[41] Lord Denning held:[42]

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[33]McBride and Bagshaw *supra* note 8, 834.
[34]Allison Silink and Desmond Ryan, 'Vicarious Liability for Independent Contractors' (2018) 77 Cambridge LJ 458.
[35]Stephen Todd, 'Vicarious Liability on the Move- But Where Should It Stop?' (2020) 7 JICL 1., 4.
[36]McBride and Bagshaw *supra* note 8, 834
[37]Glanville Williams, 'Liability for Independent Contractors' (1956) 14 The Cambridge Law Journal 20.
[38]Todd, *supra* note 35.
[39]*Lee Ting Sang Appellant v Chung Chi-Keung and Another* (1990) 2 WLR 1173 (Privy Council).
[40]*Stevenson Jordan & Harrison v MacDonald & Evans* (1952) 1 WLUK 425 (Court of Appeal).
[41]*Id.*.
[42]*Id.*.

> "It is often easy to recognise a contract of service when you see it, but difficult to say where the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

Most often, courts rely on both factors, i.e., control and integration, and look at the totality of the relationship while determining whether the person is an employee or an independent contractor. The distinction is extremely vital in the application of the doctrine, that traditionally, the actions of an independent contractor or a person who is not an employee cannot give rise to a claim of vicarious liability.[43] The scope of the employer-employee relationship in recent times has been given broad scope.

### 1.1.1 Expanding the scope of an employer-employee relationship

The first instance of courts providing a broader understanding of the employer-employee relationship in the United Kingdom can be seen in *E v English Province of Our Lady of Charity.*[44] The Court of Appeal, in this case, held the relationship between a Roman Catholic diocese and a Roman Catholic Parish Priest would be one *akin to employment*. The Court of Appeal in the UK relied on the findings of the Supreme Court of Canada in *Doe v Bennet* [45] to arrive at its decision. Here, it was held that even in the absence of a strict employer-employee relationship, a relationship akin to employment may be established through the *close connection test*.[46] Such relationships that are akin to employment would suffice to give rise to vicarious liability claims. The Supreme Court of Canada explained how the close connection test was to be applied while determining the first limb of the test, namely whether the relationship gives rise to vicarious liability. It was held that one must look at the closeness of

[43] *D&F Estates Ltd v Church Commissioners for England* (1988) 3 WLR 368 (House of Lords).
[44] E v English Province of Our Lady of Charity (2012) 7 WLUK 395 (Court of Appeal).
[45] *Doe v Bennet* (2004) 1 SCR 436 (Supreme Court of Canada),¶ 94.
[46] *Doe* held at ¶20: Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer

the relationship between the tortfeasor and the person alleged to be liable. As per the Canadian courts, the closeness of the relationship is determined based on the level of independence and control over the employee by the employer.[47] A determination of whether the relationship was sufficiently close enough is done by examining the power and control[48] exercised over the employee by the employer and granted to the employee over others.[49]

The Court of Appeal in *Our Lady of Charity* relied on policy factors referred to in *Doe* by the Canadian Supreme Court.*[50]* These include the degree of control of the bishop and the church over the priest and the amount of power conferred on him relative to the victims. Apart from these, other factors such as the degree of *integration* of the activities committed by the priest within the larger objectives and goals of the diocese were also looked at.[51] While many other policy factors could be applied, the court relied largely on the control and integration tests. The court, therefore, held the relationship between the diocese and the priest was one akin to employment and the actions of the priest could give rise to a claim of vicarious liability. While the principle of "akin to employment" had already been established in Canada as seen in *Doe,* the Court of Appeal verdict was the first instance of its application in the UK. Justice MacDuff held that the nature and purpose of the relationship would be vital in determining if a relationship can be considered akin to employment:[52]

> "One may at least ask the very broad question whether the tortfeasor bears a sufficiently close resemblance and affinity in character to a true employee that justice and fairness to both victim and defendant drive the court to extend vicarious liability to cover his wrongdoing"[53]

The Court of Appeal in the UK used the control and integration tests to determine liability. They further attempted to streamline the test for determining the nature of the relationship by relying on certain factors developed by Prof Richard Kidner after analysing several judicial decisions.[54] They are[55]

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[47]*KLB v British Columbia* (2003) 2 SCR 403 (Supreme Court of Canada). At ¶ 25
[48]*Id.*.
[49]*Doe v Bennet* (2004) 1 SCR 436 (Supreme Court of Canada), ¶ 21.
[50]E v English Province of Our Lady of Charity (2012) 7 WLUK 395 (Court of Appeal).
[51]*Id.*.
[52]*Id.*,¶ 17
[53]*Id.*, ¶ 62
[54]Richard Kidner, 'Vicarious Liability: For Whom Should the "employer" Be Liable?' (1995) 15 Legal Studies 47.
[55]*Id.*

a) control by the employer over the employee
b) control of the employee over himself
c) The organisation test looks at how central the work done is to the organisation
d) The integration test
e) The entrepreneur test looks at whether the person is conducting the work as an independent business

Justice MacDuff held that although the analysis in *Doe* looked at how close the relationship was, it was incomplete as relationships such as a father-son and a husband-wife were sufficiently close but cannot lead to an imposition of vicarious liability.[56] According to him, the relevant criteria was whether the relationship was sufficiently close to be akin to employment, and to determine this, some of the factors mentioned above must be analysed.[57]

The next major instance of the courts using a broader approach to include certain relationships within the scope of an employer-employee relationship was in *Various Claimants v Christian Child Welfare Society.*[58] The UK Supreme Court held the Institute of Christian Brothers to be vicariously liable for the physical and sexual abuse committed by teachers at its school. The court relied on several policy factors that have since been used in numerous cases [59] to establish relationships akin to employment. The five policy factors the court laid down are as follows:[60]

1) Deeper Pockets
2) Existence of delegation of duty by the person alleged to be liable and the tortfeasor
3) Degree of integration into the business activity of the person alleged to be liable by the tortfeasor
4) Whether the risk of the tortuous acts so committed arose from the creation of the working relationship between the tortfeasor and the person alleged to be held liable
5) The degree of control over the tortfeasor

The court held the existence of a contract of employment was not a sine qua non for a claim of vicarious liability when a relationship akin to employment could be established. The court further held that such a relationship once established through the use of the above policy

[56]E v English Province of Our Lady of Charity (2012) 7 WLUK 395 (Court of Appeal), ¶ 61.
[57]*Id.*, at 72
[58]*Various Claimants v Christian Child Welfare Society* (2012) 3 WLR 1319 (Supreme Court)
[59] E v English Province of Our Lady of Charity (2012) 7 WLUK 395 (Court of Appeal).; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* (2005) 10 WLUK 217 (Court of Appeal (Civil Division));*Doe v Bennet* (2004) 1 SCR 436 (Supreme Court of Canada).
[60]*Various Claimants v Christian Child Welfare Society* (2012) 3 WLR 1319 (Supreme Court), ¶ 35.

factors, allows a claim of vicarious liability to arise just as it would when it was a contract of employment.[61]

The use of the policy factors laid down in the Christian Brothers case went beyond actions committed in religious institutions and has since been applied in a wide range of cases. The first major application in a non-religious institution was in *Cox v Ministry of Justice*.[62] In Cox, the Supreme Court held the Ministry of Justice and the Prison Service to be vicariously liable for the negligence of one of the prisoners during his mandatory work at the prison kitchen. Applying the test laid down in the Christian Brothers case, the court held the non-existence of any form of remuneration to the prisoners as well as the non-existence of any commercial or for-profit service in the running of the kitchen would not by itself deny a claim for vicarious liability. In deciding *Cox*, the Court streamlined the application of the *Christian Brothers'* five-factor test and held two of the factors namely the degree of control and the deeper pockets are not as relevant today. Lord Reed held that the employer having deeper pockets could not justify the imposition of vicarious liability in the modern workforce where employers no longer can control how work is done.[63] In this manner Lord Reed limited the scope of the five-factor test into three primary factors and marginalised the relevance of the other two factors, effectively relegating them as secondary factors.[64] The court held the relationship would be akin to employment as the acts committed by the prisoners were integral to the running of the kitchen service. Moreover, the actions of the prisoners in running the kitchen were supervised by the prison service.

In the above case, the court made an important distinction that while the prisoners and the food service had varied objectives, namely to serve their prison term and ensure smooth operation of the prison, the actions of the prisoners were nevertheless in furtherance of the prison's duties to feed other prisoners.[65] An extension of this would mean there is no requirement for the employee to have any objective/motive of furthering the interests of the employer. The fact that the actions further the interests would be sufficient to bring about a relationship akin to employment. Another learning from this case is that vicarious liability claims cannot be

[61] *Id.*.
[62] *Cox v Ministry of Justice* (2016) 2 WLR 806 (Supreme Court).
[63] *Id.*, at 21-22
[64] 'Fostering Uncertainty in the Law of Tort (Armes v Nottinghamshire CC)' (2018) Law Quarterly Review Sweet and Maxwell 359, 361.
[65] *Cox v Ministry of Justice* (2016) 2 WLR 806 (Supreme Court).

brushed aside due to the technical nature of their contractual arrangements or the classification of the relationship under taxation statutes.[66]

### 1.1.2 Extent and scope of Christian Brother's policy factors and Barclays interpretation

The policy factors laid down in the Christian Brothers case were again stretched in *Armes v Nottinghamshire CC.*[67] Here the local authorities were held vicariously liable for the acts of abuse of a child by the foster parents. The Canadian Supreme Court had earlier decided a case[68] concerning the same issue and held the government could not be held liable for the acts of foster parents. The ruling of the Canadian Supreme Court in *K.L.B.* was reaffirmed in *Doe.* Although *Doe* forms the basis of the akin to employment test in the U.K, the Supreme Court of the U.K took a different position in relation to the categorisation of foster parents as employees. In *Armes*, the UK Supreme Court distinguished the position in the UK from that of Canada by relying on the policy principles behind Vicarious Liability.[69] The court noted that the policy principle guiding Canada was deterrence of future harm while the policy principle guiding the UK was based on the enterprise theory.[70] The enterprise theory postulates the imposition of vicarious liability on the basis that the employer through the integration of the employee in his business reaps benefits.[71]The court established the local authority had deeper pockets, supervised the foster parents, and created the opportunity for abuse by placing the child in a relationship of trust with the said foster parents. Further, acts of providing foster care were held to be an integral part of child support services provided by the local council.[72] Therefore, a relationship akin to employment is established between the council and the foster parents enabling a claim for vicarious liability to arise against the local council. Lord Hughes in his dissent observed that the acts of raising a child as part of a family could not be considered a part of the enterprise or scope of the local authorities' duties and the mere existence of supervision could not lead to the local authorities being vicariously liable.[73]

The majority verdict by Lord Reed in *Armes* brings about inconsistencies with his prior judgement in *Cox.* The heavy reliance on the deeper pockets of the local authorities coupled

[66]Marianne Tutin, 'Vicarious Liability: An Ever Expanding Concept?' (2016) 45 Industrial Law Journal, 556.
[67]*Armes v Nottinghamshire CC* (2017) 3 WLR 1000 (Supreme Court).
[68] *KLB v British Columbia* (2003) 2 SCR 403 (Supreme Court of Canada).
[69]*Armes v Nottinghamshire CC* (2017) 3 WLR 1000 (Supreme Court), at ¶ 67.
[70]*Id.*.
[71]*Id.*.
[72]*Id.*, at ¶ 56-58
[73]*Id.*, at ¶ 88

with their control and supervision over the foster parents is a departure from his judgement in *Cox.* The policy factors that had been relegated to a secondary status in *Cox* were undone by *Armes.*

The extent and scope of the akin to employment test came to a head in *Barclays Bank v Various Claimants.*[74] The Barclays case reaffirmed the traditional notion that work done by independent contractors could not lead to a claim of vicarious liability. In Barclays, the question was whether the bank could be held liable for the actions of a doctor to whom they referred clients for pre-employment medical tests. The Court of Appeal held the relationship would be akin to employment and allowed a claim for vicarious liability. On appeal, the Supreme Court relying on *Kafagi v JBW Group Ltd* [75] overruled the Court of Appeal decision. In *Kafagi,* it was determined that the development of the akin to employment test did not in any manner undo the traditional distinction between contracts for service and contracts of service.[76] The relevance was expounded as[77] –

> "Historically, the common law has imposed vicarious liability on a person where there was a relationship of employment between that person and the tortfeasor. That has required the courts to consider the distinction between a relationship of employment and the relationship that may exist with an "independent contractor". That in turn has required the courts to draw a distinction between a contract of employment (or contract of service, as it was described in the Particulars of Claim in this case) and a contract for services."

The Supreme Court in Barclays concluded that the work committed by *true* independent contractors could not give rise to claims of vicarious liability. However, it shied away from providing a clear definition of what a *true* independent contractor is as the question was a not relevant consideration in this case. Nevertheless, it gave some guidance by referring to Section 230(3) of the UK Employment Rights Act 1996[78] which defines a worker. Section 230(3)

[74]*Various Claimants v Barclays Bank plc* (2020) 2 WLR 960 (Supreme Court).
[75]*Nassir Kafagi v Jbw Group Ltd* [2018] EWCA Civ 1157 (Court of Appeal (Civil Division)).
[76]*Id.,* at ¶ 22
[77]*Id.*,¶ 21
[78]The Employment Rights Act, 1996 (U.K.).

provides that apart from a contract of employment one could also be considered as a worker if their contract is[79]:

> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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;

The court noted that the above definition could potentially act as a mechanism to distinguish true independent contractors from other relationships that are akin to employment. It refrained from holding the same as the common law principles of vicarious liability have a different policy reason as compared to that of the statutory employment laws.[80]

It was further noted, the doctor ran his own independent business/practice, had the right to reject any patient, and was not committing acts that were integral to the core operations of the bank. The terms of the relationship between the tortfeasor and the accused were held to be of great importance while ascertaining whether vicarious liability may arise from a specific relationship. In particular, the work being committed independently or in pursuance of the business of the accused must be given due relevance. The doctor, in this case, had the bank as one of his clients in pursuance of his independent practice and not in pursuance of the bank's practice and therefore he was held to be an independent contractor.

The verdict concludes, however, noting there may be certain *doubtful cases* and, in such cases, where it is not clear if the business being conducted is independent or not, the policy factors laid down in the Christian Brothers case could be relied upon.[81]

The judgment in *Barclays* does clarify the scope of the akin to employment test while ensuring the artificially constructed relationships designed to avoid liability are not successful.[82] It also limits the scope and degree of the employer's liability, especially in cases where true

[79]*Id.*, S 230(3)(b)
[80]*Various Claimants v Barclays Bank plc* (2020) 2 WLR 960 (Supreme Court), See also Bogg A and Ford QC M, 'Employment Status and Trade Union Rights: Applying Occam's Razor' (2022) 51 Industrial Law Journal 717 to understand the evolution of this relationship outside common law
[81]*Id.*.
[82]Paula Giliker, 'Professional Negligence 2021 Can the Supreme Court Halt the Ongoing Expansion of Vicarious Liability? Barclays and Morrison in the UK Supreme Court' 37 Professional Negligence 1.

independent contractors are hired.[83] However, the verdict also raises a conundrum as to when the policy factors in the Christian Brothers case may be applied. The use of the term doubtful cases is extremely broad and ambiguous as it provides no criterion for determining when the independence of the worker is to be considered questionable. In the absence of any criterion or objectivity, the logical consequence is that the courts would have to use extreme subjectively in deciding the doubtful cases.

### 1.1.3 Post-Barclays effect on vicarious liability

One possible interpretation based on the cases that have taken place post-*Barclays* is that cases of sexual assault would fall within the category of doubtful cases where the policy factors may be relied upon to establish a relationship akin to employment.[84] Such a determination can be seen in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [85] which dealt with a claim for vicarious liability when a female member of the Jehovah's Witness congregation had been raped by an elder of the congregation. The court was tasked with deciding whether it could hold the congregation vicariously liable for the acts of the elder. The UK Supreme Court while determining this issue largely relied on the policy factors laid down in the Christian Brothers case to establish a relationship akin to employment. The court went on to note that Barclays verdict did not change the common law relating to vicarious liability, but was merely an application of the existing principles itself.[86]

However, the interpretation that sexual harassment cases would fall under the category of doubtful cases has not crystallized or been consistent in its application. This is evidenced in *Blackpool Football Club Limited v DSN*.[87] Blackpool football club dealt with a claim of vicarious liability for sexual harassment of children committed by a volunteer football scout working informally for the club. The court relies heavily on the verdict in Barclays disregarded the policy factors in *Christian Brothers* and held that a relationship akin to employment does not exist. The court held that it was a *clear case* but did not provide any reasoning as to why it would not constitute a doubtful case, and this only raises more questions as to what determines if a case is clear or doubtful. Some authors have argued that the traditional distinction between contracts for and of service must first be applied and only in cases where a clear classification

[83] *Id.*.
[84] *Id.*
[85] *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* (2021) W.L.R 4 42 (Court of Appeal).
[86] *Id.*.
[87] *Blackpool Football Club Limited v DSN* [2021] EWCA Civ 1352 (Court of Appeal (Civil Division)).

does not arise even after applying the said test, should the policy factors be applied to determine if the relationship is analogous to employment.[88] Such an understanding of doubtful cases conflicts with the judgment in Blackpool which has categorized a non-traditional working relationship as a *clear case* not requiring the application of the policy factors.

Previous judgments have already stated that the doctrine of vicarious liability is on the move[89] and that it has not stopped.[90] The correct question to be looked at therefore is how far should the law move? [91] Therefore, the statement by Justice Davies in *BXB* that the verdicts in the *Barclays* and *Second Morrison* case have not led to the development of the law on vicarious liability is confounding. The court in *BXB* did not specifically mention based on the facts that it would be classified as a doubtful case. The reliance on the policy factors laid down in the Christian Brothers case can be rationalized with the judgment in the Barclays case only if it is assumed that cases of sexual assault would fall within the classification of doubtful cases. This would allow the policy factors to be relied on and would be in line with the dichotomy created by the Barclays verdict.

Therefore, presently, the nature and scope of employer-employee relationships have evolved to include several non-commercial relationships that occur in the modern workforce through the use of the principle of "akin to employment". This is evidenced by the application of these principles to religious institutions, prisons, and local authorities. A common feature among *Christian Brothers, Cox, & Armes,* was the employer in each instance was operating in a non-profit and non-commercial manner. Another common feature in all the cases is the existence of atypical relationships where the workers were neither employees nor independent contractors. Therefore, a rationalization of the Barclays judgment and the earlier cases would lead to the conclusion that the policy factors are to be applied in these atypical cases where the workers do not fall under either category.[92] Nevertheless, the traditional distinction between an employee and an independent contractor continues to exist and vicarious liability has not moved so forward as to allow claims against persons hiring independent contractors. The fundamental test in determining whether vicarious liability can be imposed upon a particular kind of relationship is still reliant on the closeness and exact terms of the relationship.

[88]Allison Silink, 'Vicarious Liability of a Bank for the Acts of a Contracted Doctor' (2018) 34 46; Donal Nolan, 'Reining in Vicarious Liability' (2020) 49 Industrial Law Journal 609.
[89]*Various Claimants v Christian Child Welfare Society* (2012) 3 WLR 1319 (Supreme Court), ¶ 19.
[90]*Cox v Ministry of Justice* (2016) 2 WLR 806 (Supreme Court),¶ 1.
[91]*Various Claimants v Barclays Bank plc* (2020) 2 WLR 960 (Supreme Court),¶ 1.
[92]Todd, *supra* note 35, 8.

The determination of the nature of the relationship between the tortfeasor and the accused, and whether a claim for vicarious liability may subsist in such a relationship is only one-half of the test for vicarious liability. The second half of the test is concerned with the tortuous act and the manner in which the act was committed. This determines whether or not the liability for the said act may be passed on to the accused/employer. A study of the evolution of the same over the last few centuries shows that two tests hold significant importance. Firstly, Salmond's test which looks at whether the act was committed during the course of employment was the prevalent test for the longest time, and secondly, the close connection test which is currently used. An understanding of both these tests and their evolution is necessary to analyze the trends in vicarious liability today.

### *1.2 NATURE OF RELATIONSHIP BETWEEN TORTUOUS ACTS AND EMPLOYMENT*

The second limb of vicarious liability focuses on the nature of the relationship between the tortuous act and the employment. The development of the second limb can be seen in the form of the course of employment test and more recently the close connection test. Presently, once it has been established that a relationship exists between the tortfeasor and the accused which may give rise to vicarious liability, it must be proven that there was a *close connection* between the tortuous acts committed and the employment to hold the employer vicariously liable. This test is now known as the close connection test.

As discussed in the introduction, the evolution of the doctrine of vicarious liability can be traced back to the principle of Social Justice espoused by Chief Justice Holt for the first time in *Sir Robert Wayland's Case.*[93] Justice Holt held that the master should be careful about whom he keeps under his employ and that it would be more just for the master to suffer for the mistakes or negligence of his employees than for an oblivious third party. Justice Holt further elucidated this principle in *Hern v Nichols* [94] stating:

> "It is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger"[95]

[93] *Sir Robert Wayland's Case* (1707) 1 WLUK 22 (Court of King's Bench); *Mohamud v WM Morrison Supermarkets Plc* (2016) 2 WLR 821 (Supreme Court); Fleming, *supra note 12.*
[94] *Hern v Nichols* (1708) 1 WLUK 1 (Court of King's Bench).
[95] *Id.*.

The doctrine of vicarious liability over the years evolved from including only acts committed under express command and consent to acts committed in the course of employment. One of the earliest instances of the evolution of the doctrine can be seen in *Middleton v Fowler* [96] where the test moved away from requiring express command and consent to whether or not the acts committed in the execution of authority vested in the employee by the employer. Two hundred years later, in *Barwick v English Joint Stock Bank* [97] the application of course of employment was extended to even fraudulent acts of the employee would lead to the employer being held vicariously liable. The court held that any acts committed *within the course of employment* and for *the benefit of the master,* the master could be held vicariously liable. After *Barwick,* the courts interpreted the relationship between the tort and the employment as having to satisfy two tests. First, the course of employment test, and second, the benefit of master test.[98]

What constitutes the benefit of master test was expounded in *The British Mutual Banking Company, Limited v The Charnwood Forest Railway Company.* [99] The court said:

> "The rule has often been expressed in the terms, that to bind the principal the agent must be acting "for the benefit" of the principal. This, in my opinion, is equivalent to saying that he must be acting "for" the principal, since if there is authority to do the act it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest."

The application of the benefit of master test as expounded above would require claimants to prove that not only did the tortuous acts take place during the course of employment, but that the said act was committed by the employee/servant for the benefit of the master/employee.[100] The benefit of master test was later struck down in *Lloyd v Grace Smith,*[101] which held the firm liable for the fraud committed by a clerk who transferred certain properties of a client to himself whilst misrepresenting the firm. The court held that the benefit of the master was not a condition precedent to establishing vicarious liability and that the judgement in *Barwick* had

[96] *Middleton v Fowler & Al* (1698) 1 WLUK 218 (Court of King's Bench).
[97] *Barwick v English Joint Stock Bank* (1867) 5 WLUK 71 (Court of Exchequer Chamber).
[98] *Ruben and Another v Great Fingall Consolidated and Others* [1906] AC 439 (House of Lords). at Page 445
[99] *The British Mutual Banking Company, Limited v The Charnwood Forest Railway Company* (1887) 18 QBD 714 (Court of Appeal).
[100] *Thorne v Heard* (1894) 1 Ch 599 (Court of Appeal).
[101] *Lloyd v Grace Smith & Co* (1912) 7 WLUK 87 (House of Lords).

been misinterpreted in subsequent cases. Relying on the verdict by Lord Holt in *Hern v Nichols,*[102] the court clarified the position of law that it was irrelevant whether the act was for the benefit of the principal or the agent.[103]

The court concluded it was fairer that the employer bears the burden since both the acts betrayed the trust of the firm and the clients, and the fact that the employer created an opportunity for the tortuous acts to arise in the first instance. The conclusion reached by the court is also in line with the enterprise and deterrence theories of vicarious liability. The scope of the course of employment test as expounded by Salmond [104] was the standard used for most of the twentieth century.

### 1.2.1 Salmond's Course of Employment Test

Salmond's test holds a particularly important position among the various tests of vicarious liability.[105]*Salmond Law of Torts*[106] laid down what constitutes the scope of acts done in the course of employment, which are:[107]

a) Wrongful Acts authorised by the master

b) Wrongful and unauthorised mode of doing some acts authorised by the master

The scope of Salmond's test has since greatly expanded over time. An important point in the expansion can be seen in *Central Motors Ltd v Cessnock Garage and Motor Co.*[108] Here, it was held that liability would arise for acts that are within the *field of activities* assigned to the employee irrespective of whether there was any form of authorisation. The scope of the field of activities test was later clarified in *Rose v Plenty* [109] by giving a broad interpretation that it cannot dissect the employee's work into specific tasks that he is authorized to commit, but must look at the *entire scope of his employment*.

[102]*Hern v Nichols* (1708) 1 WLUK 1 (Court of King's Bench).
[103]*Lloyd v Grace Smith & Co* (1912) 7 WLUK 87 (House of Lords).
[104]Alex, *supra* note 2.
[105]Alex, *supra* note 2, 20.
[106]John Salmond, Law of Torts (2nd ed., 1907).
[107]*Id.*, 83
[108]*Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* (1925) 6 WLUK 75 (Court of Session).
[109]*Rose v Plenty* (1976) 1 WLR 141 (Court of Appeal).

This understanding of Salmond's test of vicarious liability remained the benchmark against which most cases of vicarious liability claims were tested through the course of the twentieth century in the United Kingdom.[110]

Over the years, Salmond's test posed unique challenges when it was applied to cases of intentional torts where the wrongdoing by the employees is intentional and often reasons that are personal in nature. Particularly it posed a major challenge in sexual abuse cases.[111] This is because sexual abuse cannot be considered an act within the course of employment even under the broadest interpretation of the term. The courts attempted to overcome this hurdle by substituting the course of employment test with the *close connection test*.

### 1.2.2 Close Connection Test and the Lister Formula

The application of the Salmond test to determine whether certain acts fell within the course of employment reached a tipping point in *Lister v Hesley Hall Ltd.*[112] In Lister, the question arose whether the School Boarding house is vicariously liable for the acts of sexual assault committed by the warden. Even an extremely broad and liberal interpretation of the Salmond Formula would be insufficient as sexual assault cannot be considered as an unauthorized mode of doing authorized acts or even within the field of activities of the employee. It was felt that the Salmond test of course of employment became restrictive to deal with the vicarious liability arising from the acts of intentional torts.[113]

The House of Lords to overcome this hurdle modified the test for determining the second limb of vicarious liability that deals with the relationship between the tortuous acts and employment, from the course of employment test to the *Close Connection Test*. Lord Steyn held[114] –

> "The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."

[110]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords), ¶ 15.
[111]Allison Silink and Desmond Ryan, 'Professional Negligence 2022 Twenty Years on from Lister v Hesley Hall Ltd - Is There Now a "Tailored Close Connection Test" for Vicarious Liability in Cases of Sexual Abuse, or Not?' 13.
[112]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords)
[113]Alex, *supra* note 2, 122.
[114]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords),¶ 18.

The close connection test postulates that where there is a close connection between the position of employment and the tortuous act so committed the acts may be considered within the course of employment and the employer can be held liable under the doctrine.[115] The court while referring to the definition in Salmond's Law of Torts noted that the course of employment criterion of Salmond cannot be read in isolation and that it was to be read in entirety and made.[116] Particularly, the court noted that Salmond after providing the criterion for determining acts in the course of employment goes on to state[117]:

> "But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, **provided they are so connected with acts which he has authorised**, that they may rightly be regarded as modes—although improper modes—of doing them."

The court opined that it was only the second limb of Salmond's test, i.e., tortuous acts that are an unauthorised mode of doing authorised acts that would lead to difficulties in its application. Intentional torts would not fall within the ambit of the second limb of the test, but when the second limb is read with the above-mentioned paragraph it would have the capacity to hold employers liable for intentional torts of their employees depending on the closeness of the act to the scope of their employment. The court relied on a broader reading of Salmond's definition of "course of employment" as well as the Canadian Supreme Court judgements[118] to establish the close connection test.

The close connection test opened the doors for vicarious liability to be imposed especially in sexual abuse cases as long as it can be proved that there was a sufficiently close connection between the acts committed and the employment of the tortfeasor.[119] While the court did not provide an objective metric for the determination of a sufficiently close connection, Lord Clyde did provide guidance in this aspect by holding:[120]

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[115]*Id.*
[116]*Id.*, at ¶ 69
[117]Salmond, *supra* note105, 84.
[118]*Jacobi v Griffith* (1999) 2 SCR 570 (Supreme Court (Canada)); *Id.*
[119]Allison Silink and Desmond Ryan, 'Professional Negligence 2022 Twenty Years on from Lister v Hesley Hall Ltd - Is There Now a "Tailored Close Connection Test" for Vicarious Liability in Cases of Sexual Abuse, or Not?' 13.
[120]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords),¶ 37.

> "The sufficiency of the connection may be gauged by asking whether the wrongful actings can be seen as ways of carrying out the work which the employer had authorise"

Lord Clyde further elucidated the scope:[121]

> "In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded"

The application of the close connection test to cases beyond sexual abuse was confirmed by the House of Lords in *Dubai Aluminium Co Ltd v Salaam,*[122] in a case relating to commercial fraud. The vicarious liability of a firm was extended to tortuous acts of partners which were closely connected with the authorised activities of the partner. The court stated:[123]

> "Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

The court noted that there is no straitjacket formula to determine the degree of connectedness required for a claim of vicarious liability to be sustainable and that it would have to be decided by the courts on a case-to-case basis based on the facts and circumstances.

#### 1.2.2.1 Scope and Extent of Close Connection Test

The extent to which the close connection test could be stretched was tested in the case of *Mohamud v WM Morrison Supermarkets* [124] (First Morrison Case). In this case, the court was tasked with deciding a claim of vicarious liability against the employer for the assault of a customer by a kiosk employee. The claimant was verbally abused by the kiosk employee who

[121] *Id.*,¶ 45
[122] *Dubai Aluminium Co Ltd v Salaam* (2002) 3 WLR 1913 (House of Lords)
[123] *Id.*,¶ 23
[124] *Mohamud v WM Morrison Supermarkets Plc* (2016) 2 WLR 821 (Supreme Court).

proceeded to follow the claimant and assault him as he was leaving. The Birmingham Civil Centre and Court of Appeal had held that the close connection test would not cover actions committed due to personal vendettas and since the kiosk employee had no duty to maintain order, the assault could not be considered as closely connected to his employment.[125] On Appeal, the Supreme Court overruled and held that the employer created the opportunity for the altercation to arise and stated that there *was an unbroken sequence of events* that took place since the first interaction with the kiosk employee and the assault that took place right after.[126] Arriving at this decision, the court held that since the employee was entrusted with the position which led to the intentional tort, the employer must be liable. The court laid down a two-stage test in determining whether a close connection existed. Firstly, it identified the field of activities entrusted to the employee and secondly, it looked at whether the position of the employee vis-à-vis the field of activities entrusted to him was sufficiently close to the tortuous act committed.[127]

The Supreme Court opined that the tortfeasor, i.e., the employee ordering the victim to stay away from the employer's premises was an act done in relation to or in pursuance of his employment, albeit that he did not have any such power and grossly abused his position. Moreover, it was held that the motive of the employee was irrelevant in deciding the claim even though it was apparent that the incident occurred due to the employee's personal racist beliefs. The court noted that the lower court erred in holding that the actions of the employee once he left the counter ceased to be in the course of his employment. The seamless and unbroken nature of the event would mean that the employee's actions are a follow-up of their initial interaction; the supermarket was held liable for the acts of its employee.

Interestingly, in this case, the appellant argued that to meet the policy considerations of vicarious liability and to meet the ends of justice, the close connection test ought to be replaced by the *test of representative capacity*. The appellant argued that the test looks at whether a reasonable person would assume that at the time of the commission of the tort, the employee was acting as a representative of the employer. The court noted that while the close connection test did not have a straitjacket formula, the alternative test suggested was extremely vague, and substituting the tests would not lead to greater precision in the application of vicarious

[125]*Id.*.
[126]*Id.*
[127]Nolan *supra* note 87.

liability.[128] In addition, the court went on to say the change in social conditions and the nature of the modern workforce was the reason for the evolution of the close connection test and that it did not need further development or replacement since the societal conditions have largely remained the same.[129]

The first Morrison case in its application of the doctrine disregarded the holding of *Lister* that something beyond the mere existence of an opportunity to commit the tort must be proven to establish a close connection. Such an application of the doctrine opens the possibility of employers being liable for any act of the employee that takes place at the workplace.[130]

#### 1.2.2.2 Attempts to balance the scope of the close connection test

The scope of the close connection test was expanded in the First Morrison case. The necessity for an unbroken sequence of events within the close connection test was later clarified in *Bellman v Northampton Recruitment Limited.*[131] Here the court had to ascertain the liability of the company for the actions of the managing director, at an after-party subsequent to a company party. Analysing the sequence of events, the court observed:[132]

> "Viewed objectively in that context, although the party and the drinking session was not a single seamless event and attendance was voluntary, it seems to me that Mr. Major was not merely a fellow reveller. He was present as managing director of NR, a relatively small company, and misused that position, discussion having been focused on business matters for between 45 minutes and an hour before his managerial decision-making was challenged.
>
> Even if Mr. Major had taken off his managerial hat when he first arrived at the hotel, it seems to me that he chose to don it once more and to re-engage his wide remit as managing director and to misuse his position when his managerial decisions were challenged. He purported to exercise control over his staff by "summoning" them and expounding the extent and scope of his authority. In the light of the breadth of his field of activities, NR's round-the-clock business and Mr Major's authority to do things "his way", it seems to me that NR's employees who took part in the drinking session can

[128] *Mohamud v WM Morrison Supermarkets Plc* (2016) 2 WLR 821 (Supreme Court), at ¶ 53.
[129] *Id.*.,¶ 56.
[130] Lam Jonathan, 'Vicarious Liability after Moahamud v WM Morrision' (2017) 11 HKJL 1,4.
[131] *Bellman v Northampton Recruitment Ltd* (2018) 10 WLUK 202 (Court of Appeal).
[132] *Id.*,¶ 26-27.

> have been in no doubt at that stage, that Mr Major was purporting to exercise managerial control over them."

It can be seen that the broken sequence of events did not disqualify the claim of vicarious liability due to the reassertion of managerial authority. The tortfeasor's actions were held to be closely connected to his extremely broad role as a managing director.[133] The court once again brought the question of fairness of the imposition of vicarious liability in circumstances that are largely unrelated to the contractual obligations of the employee.[134] The *Bellman* judgement also shows that while an unbroken and seamless sequence of events is useful for establishing a claim of vicarious liability, the non-existence of such a sequence of events in itself would not negate a claim of vicarious liability.

The next instance stretching the close connection test was in *WM Morrison Supermarkets Plc v Various Claimants* (Second Morrison case).[135] A claim for vicarious liability arose due to a disgruntled employee who was supposed to provide confidential information to an audit firm, leaking it onto the internet. The Supreme Court held that the Queen's Bench and the Court of Appeal's reliance on the first Morrison case as a precedent on the irrelevance of *motive* in vicarious liability claims were erroneous. The court clarified that the first Morrison case reference to the motive being irrelevant was merely to state that it was not possible to determine the reason why the employee committed such a tortuous act.[136] However, this interpretation of the relevance of motive seems to be a deviation from past judicial decisions in Lister and the cases preceding it. In *Lister* Lord Hobhouse mentioned expressly that motive would not be relevant once other factors of vicarious liability had been proved:[137]

> "The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant. Where these conditions are satisfied, the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negative the vicarious liability for his breach of the "delegated" duty."

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[133] *Id.*.
[134] Steve Foster and Samuel Dixon, 'Vicarious Liability for Employee Assaults: Is There Any Limit to Liability after Mohamud?' (2019) 24 Cov. L.J. 102.
[135] *WM Morrison Supermarkets Plc v Various Claimants* (2020) 2 WLR 941 (Supreme Court).
[136] *Id.*,¶ 29-30
[137] *Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords),¶ 55.

In the second Morrison case, the court noted the case was unique and in most cases of vicarious liability the tortuous act so committed aims to hurt third parties and not the employer. It was further held that the field of activities of the employee only extended to transmitting the data to the audit firm and did not extend to making data publicly available on the internet. Consequently, it could not be said the acts were in relation to the field of activities of the employee and therefore a claim of vicarious liability would not be successful. Moreover, for the court, the mere existence of an opportunity to commit a tort due to his employment was insufficient to establish a claim for vicarious liability. Accordingly, the actions of the employee were not closely connected to the scope of his employment and therefore the company was not vicariously liable. The court also concluded that a common law claim against vicarious liability would not be vitiated by the Data Protection Act or any legislation unless the legislation expressly provides so.[138]

### *1.3 CHALLENGES OF THE SECOND MORRISON CASE*

The second Morrison case introduces an array of questions, particularly due to its interpretation of the *field of activities* as well the *relevance of motive* in vicarious liability cases. The reintroduction of motive as a relevant factor for claims of vicarious liability reintroduces the very difficulties that the close connection test aimed to solve, particularly regarding intentional torts. Intentional torts are seldom committed for the benefit of the master or with any motive of furthering the interest of the employer.[139] Furthermore, it would create fundamental inconsistencies in cases of sexual assault because in such cases motive would always be personal and not in any manner related to the employment.[140] The field of activities test that was expounded in the second Morrison case essentially relied on the fact that the employee was not authorised to transmit the information over the internet. This approach is essentially a return to Salmond's test and is in contradiction to prior cases such as *Rose v Plenty*[141] wherein the Court of Appeal expressly held that *the field of activities* cannot be dissected individually but must be looked at in a broad sense.

[138]*WM Morrison Supermarkets Plc v Various Claimants* (n 134).
[139]Joshua Yeung and Kevin SM Bae, 'Bad Apple Spoils the Barrel: Motive and the Close Connection Test for Vicarious Liability after *Various Claimants v WM Morrison Supermarkets Plc*' (2021) 21 Oxford University Commonwealth Law Journal 169.
[140]*Id.*
[141]*Rose v Plenty* (1976) 1 WLR 141 (Court of Appeal).

The lower courts noted that transferring data to third parties was a part of his duties and that there was a close enough connection between the tort and his employment.[142] Merely, because the data was transferred to an unauthorised third party it cannot be said that the act was not within his field of duties. The second Morrison case recreates the same difficulties that the close connection test sought to end in *Lister* regarding the application of the doctrine to intentional torts.[143] While the court stated a tailored version of the close connection test has been applied in sexual assault cases, it nevertheless created new difficulties in determining what the tailored test would entail.

The difficulties of applying the second Morrison case can be seen in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB,*[144] which dealt with sexual abuse by an elder of the Congregation. Based on the Second Morrison case, the court concluded that sexual assault cases require a tailored version of the close connection test that additionally requires the employer to confer the employee with authority over the victim. The same approach had been followed in the *Blackpool*[145] case as well. The requirement of conferral of authority has the potential to create difficulties in instances of sexual assault committed by employees when they have no authority over the victims.[146] For example, if a cashier at a shop sexually assaults a customer, it cannot be said that the shopkeeper was conferred with authority over the customer at the time of the incident and a strict application of the principles laid down in *BXB* would negate any claim of vicarious liability.

In summary, the doctrine of vicarious liability in the UK has seen an expansion in both its limbs. The first limb looks at whether the nature of the relationship gives rise to vicarious liability and has expanded to include relationships that are akin to employment and several atypical relationships. The second limb looks at the relationship between the tortuous act and the employment. The scope has evolved from including only acts committed upon express command and consent to acts committed in the course of employment as expounded by Salmond and today includes acts that are closely connected to the employment.

[142]*WM Morrison Supermarkets Plc v Various Claimants* (2018) 10 WLUK 345 (Court of Appeal (Civil Division)), ¶196.
[143]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords).

[144]*Id.*.
[145]*Blackpool Football Club Limited v DSN* [2021] EWCA Civ 1352 (Court of Appeal (Civil Division)).
[146]Silink and Ryan, *supra* note 118.

The exact scope of the close connection test is not firmly crystallised, but recent judgements suggest a deliberate attempt by the Supreme Court to halt,[147] or at the very least, put the brakes on the expansion of vicarious liability in the UK.

## 2. EVOLUTION OF VICARIOUS LIABILITY IN INDIA

The doctrine of vicarious liability in India just like most Indian tort law is rooted in common law principles.[148] The courts in India have often relied on judgements in the UK and modified these principles to meet the ends of justice within the prevailing social conditions. In India, the doctrine stipulates that a master is liable for the acts of the servant that are committed in *the course of employment*.[149] While this is similar to the Salmond Doctrine that was once followed in the United Kingdom, the practical application of the same in the Indian courts has been different. This section explores the scope of the Employer-Employee relationship in India and analyses the scope of the course of employment tests in India.

As discussed in the earlier sections, a condition precedent to establishing vicarious liability is identifying the nature of the relationship between the tortfeasor and the employer as either a *contract of service* or a *contract for service*. A claim for vicarious liability in India would exist only if the relationship is one of a contract of service.[150] A contract of service traditionally includes employer-employee and master-servant relationships. The existence of such a relationship is not merely for claims of vicarious liability but for a host of protections under various labour legislations and codes[151]; these are detailed in later sections.

The courts in India have placed reliance on the verdicts of UK courts and have over the years developed *the course of employment test* as expounded in Section II in a manner that suits the socio-economic conditions of India. In the following sections, the paper elaborates on the evolution of this test and its distinct paths in its application in India.

[147]Giliker, *supra* note 81.
[148]MC Setalvad, The Common Law in India (1960).
[149]Ratanlal and Dhirajlal, The Law of Torts (26th ed., 2010).
[150]RK Bangia, Law of Torts 98 (22nd ed., 2010).
[151] The Industrial Disputes Act 1947, The Factories Act 1948, The Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

### *2.1 SCOPE OF MASTER-SERVANT RELATIONSHIP AND CONTROL TEST*

The master-servant relationship in India has been developed by the courts from the point of view of various labour legislations. Given that these are beneficial legislations that aim to provide social justice, the interpretation of the courts in cases has largely been along these lines. One of the earliest comprehensive evaluations of the Master-Servant relationship was in *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*.[152] The question before the Supreme Court was whether Agarias (a class of workers who specialise in salt farming) working in salt fields would be considered workmen. The court held that the prima facie test for determining whether a master-servant relationship exists is the *control test* and that one must look at not only the master's right to direct what work must be done but must also direct how the servants may carry out the said work.[153] Agarias were held as workmen and not independent contractors.

Justice Bhagwati's verdict opined that the workers could not be categorised as independent contractors simply because the Agarias hired other people to work along with them. Only when the worker is not working personally, he be classified as an independent contractor. This distinction was elucidated as: [154]

> "The broad distinction between a workman and an independent contractor lies in this that while the former agrees himself to work, the latter agrees to get other persons to work. Now a person who agrees himself to work and does so work and is, therefore, a workman does not cease to be such by reason merely of the fact that he gets other persons to work along with him and that those persons are controlled and paid by him. What determines whether a person is a workman or an independent contractor is whether he has agreed to work personally or not. If he has, then he is a workman and the fact that he takes assistance from other persons would not affect his status."

The court went on to state that there is no fixed level or degree of control that is required over the employees and that the degree of control would vary based on the nature of the job.[155] Justice Bhagwati reasoned, to identify if it was a contract of service is by analysing whether in

[152]Dharangadhara Chemical Works Ltd v State of Saurashtra, (1957) 1 LLJ 477.
[153]*Id.*,¶ 13.
[154]*Id.*,¶ 29.
[155]*Id.*

relation to the nature of the work there was *due control* and *supervision.*[156] It was held that the greater the amount of direct control, the more likely it was to be a contract of service, and the greater the amount of independence, the more likely it was to be a contract for service.[157] It is pertinent to note that while this distinction continues to be relevant today, several other factors are considered by courts as can be seen in the cases below.

The application of the control and supervision test can be seen in *DC Dewan Mohideen Sahib v. The Industrial Tribunal, Madras.*[158] The court was tasked with determining whether the beedi workers were independent contractors or employees. The present case dealt with an artificial arrangement created by the appellant wherein they provide raw material to contractors who in turn provide it to the workers to roll beedis. In this arrangement, there was no sale or resale of material because any remaining raw material was to be returned to the appellants. Further, the finished product can only be sold to the appellants and they had the right to reject inferior quality work. Notwithstanding this work was simple and required minimal supervision, the court asserted there existed due control with the appellants and that the workers will be considered employees. It brought out the need to go beyond the letter of the contract and see whether, in reality, the independent contractor was autonomous.[159]

### 2.1.1 Expanding application of control test

The *control test* creates difficulties in its application to work done by professionals and skilled labourers where the master would not have the expertise to direct the manner in which the work is to be done. In the application of vicarious liability, this leads to difficulty in establishing an employer-employee relationship in a wide variety of employment activities.

This difficulty in the application of the control test to skilled labourers was dealt with by the Supreme Court in *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments.*[160] The evolution and the expansion of the master-servant test beyond the control and supervision tests began through this verdict.[161] The primary question was whether

[156] It is pertinent to note that courts have often used control and supervision together as a singular test and often in an interchangeable manner.
[157]Dharangadhara Chemical Works Ltd v State of Saurashtra, (1957) 1 LLJ 477,¶ 15;Shantimal Jain, 'Contract of Service and Contract For Service' (2003) 8 SCC J.
[158]DC Dewan Mohideen Sahib v The Industrial Tribunal, Madras (1964) 7 SCR 646.
[159]Karan Sangani, 'Reconceptualising Labour Regulations for Workers in the Gig Economy' (2020) 9 NLUI LR 92.
[160]Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments, (1974) 3 SCC 498.
[161]Sushilaben Indravadan Gandhi v The New India Assurance Company Limited, (2021) 7 SCC 151.

the workers in a tailoring shop were employees or independent contractors. The workers were paid on a piece-rate basis. The cloth was provided by the owner, stitched on machines that were owned and provided by the owner, and he directed them on how it was to be stitched and had the right to refuse the final product. And there were no fixed working hours and there was no exclusive arrangement to work with the owner of the tailoring shop.

The existence of a considerable degree of supervision and control led the Supreme Court to classify the tailors as employers of the owner of the tailoring shop. The court held that when the tools for the work were owned by the hirer, the nature of the relationship was more likely to be a contract of service. This is because ordinarily independent contractors are expected to commit to the work themselves and make all the necessary arrangements for the same including all the tools and machinery required.[162] The owner's right to reject the final product if it was substandard was held to fulfil the element of control and supervision.

The court alluded to the need to balance several factors that were deduced from a series of UK and US judgements while determining the nature of the relationship and if it was a contract of or for service. They were:

a) Control and Supervision
b) Chance of profit
c) Risk of Loss
d) ownership of tools/investment in facilities
e) Degree of integration in the organisation
f) Permanency of relations.

Accordingly, the above-mentioned factors outweighed the fact that there were no exclusivity clauses in the relationship between the owner and the tailors.[163] The court highlighted these factors due to the difficulty in applying the control test in the professional sphere.

The court relied on the verdict of Justice Cooke in *Market Investigations Ltd. V. Minister of Social Security*[164] where he explained the shortcoming of the control test when applied to skilled persons or professionals. The employer in such relationships does not control how the work is done because he does not have the expertise to provide directions. The lack of control

[162]Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments, (1974) 3 SCC 498,¶ 32.
[163]*Id.*.
[164]*Market Investigations Ltd v Minister of Social Security* (1969) 2 WLR 1 (Queen's Bench Division).

was held to be insufficient to determine the nature of the relationship.[165] Therefore, over the years, the control test moved from being an exclusive and decisive test to becoming a relevant factor in a set of factors that include permanency, the opportunity for profit, investment in relationships, etc.[166]

### 2.1.2 Master-Servant Relationship in the unorganised sector

The nature of the workforce in the unorganised sector and the disparity in the bargaining power often mean workers who perform tasks that are ordinarily done by employees are categorised as independent contractors through sham arrangements. An example of the legislature attempting to rectify the type of sham arrangement is the enactment of *The Beedi and Cigar Workers (Conditions of Employment) Act, 1966.*[167] Section 2(g)(b) defined the employer to be the person who has *ultimate control* over the establishment and its affairs notwithstanding the fact that certain tasks may be delegated or entrusted to third parties.[168] This was primarily done to ensure that beedi workers who were hired through the use of artificial arrangements by intermediaries and contractors, who in turn were hired by the employer, did not lose rights under various statutes.[169] It ensured that the person who was the final proprietor who sold the beedis would be liable.[170] The liability rested on that person who controlled the intermediaries and who if removed from the chain of employment, would lead to the business being dismantled. The ultimate control test essentially postulated that the person who ultimately had the authority to direct the workers is the one who must be considered as the employer.

The constitutional validity of various provisions of The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 was challenged before the Supreme Court. The constitutional validity of the act was upheld the constitutional validity of S. 2(g) and by extension the *ultimate control test*.[171] The court in *Silver Jubilee* had dealt with the concept of ultimate authority in relation to control and the legislative mandate and the subsequent approval by the Supreme

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[165] *Id.*.
[166] Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments, (1974) 3 SCC 498.
[167] The Beedi and Cigar Workers (Conditions of Employment) Act, 1966.
[168] § 2(g) of the The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 -
(g) "employer" means, — (a) in relation to contract labour, the principal employer; and
(b) in relation to other labour, the person who has the *ultimate control* over the affairs of any establishment or who has, by reason of his advancing money, supplying goods or otherwise, a substantial interest in the control of the affairs of any establishment, and includes any other person to whom the affairs of the establishment are entrusted, whether such other person is called the managing agent, manager, superintendent or by any other name;
[169] Mangalore Beedi Workers v Union of India, (1974) 4 SCC 43, ¶41.
[170] *Id.*, ¶ 41-42.
[171] Mangalore Beedi Workers v Union of India, (1974) 4 SCC 43.

Court crystallised its applicability. In *Hussainbhai v. Alath Factory Thezhilali Union,*[172] the court held that even in the absence of the existence of various factors seen in earlier cases, the test of economic control could be applied where artificial structures existed. These artificial structures come about when intermediaries are hired to act as independent contractors who in turn hire the workers. The artificial structures enable employers to eliminate an employer-employee relationship and the benefits that accompany it.[173] The court articulated, where the workers produce goods or services that are ultimately for the business of another person, then such a person would be considered the employer of the workers. This is done by piercing the veil and looking at whether or not the employer being choked off financially, leads to workers also being choked off, notwithstanding the existence of any number of intermediate contractors.[174]

The economic control test postulates piercing the veil and looking beyond the intermediate or immediate contractor in control of a worker. It attempts to answer the question of whether the wages and the employment of the workers would cease to exist if a particular person ceased to exist, then such a person would be the employer. This ensured that the existence of several intermediaries in the form of contractors would not lead to workers being considered independent contractors. Even if the intermediaries disappeared, the worker's employment would continue and would go on unaffected.[175]

### 2.1.3 Refinement of Master-Servant Test

The control test and its refinements of ultimate and economic control and other factors such as ownership of the material, integration into business, and the chance of profit/loss have now been used as a legal standard by various courts. The correct application of these tests has recently been crystallised by the Supreme Court in *Sushilaben Indravadan Gandhi v. The New India Assurance Company Limited.*[176] Here the court was tasked with identifying whether the motor vehicle insurance would cover the claims of the deceased and if the accident took place

[172]Hussainbhai v Alath Factory Thezhilali Union, (1978) 4 SCC 257.
[173]*Id.*, ¶5
[174]*Id.*,¶ 5.
[175]*Id.*.
[176]Sushilaben Indravadan Gandhi v The New India Assurance Company Limited, (2021) 7 SCC 151..*See also Balwant Rai Saluja & Anr v Air India Ltd.& Ors* (2014) 9 SCC 407, has used different factors such as continuity of service and right of dismissal to determine employer-employee relationship. Interestingly, this case has not been analysed by the Supreme Court in its latest judgement.

in the course of employment. The court after analysing the prior judgements[177] and jurisprudence on the matter identified numerous factors that would be relevant in determining whether a particular worker is an employee or an independent contractor and if a particular contract is a contract of service or for service. The relevant factors to be considered are –

1) Control over the work and manner in which it is conducted
2) Level of integration into the business of the employers
3) The manner in which remuneration is disbursed to the workers
4) Economic control over the worker
5) Whether the work being conducted is for oneself or a third party

These factors when fulfilled would lead to the relationship being a contract of service; else it would be a contract for service. Work when conducted by oneself would lead to a contract for service and for a third party it amounts to a contract of service.

The court concluded that no one factor discussed above or test could determine whether the person in question is an employee or an independent contractor. The best approach will be an examination of all the factors in their entirety. Nonetheless, it was noted that the facts and circumstances would lead to different cases assigning varying weight to different factors and that courts must strive to perform a balancing act to arrive at the correct decision. The court also noted that where the nature of the relationship was being determined in relationships between people and other people who are from weaker sections of society, in case of doubt the courts must lean towards considering the employment as a contract of service.[178] In the instant case, it was held that it was a contract of service as he was paid an honorarium as opposed to a salary/wage. Moreover, since the deceased was entitled to a share in the earnings of the institute and the contract could be terminated or renewed only with mutual consent.

While most of these cases do not deal with vicarious liability, they are still relevant in understanding whether the employment forms a contract of service or a contract for service. Since vicarious liability exists only against tortuous acts committed by those employees who are hired under a contract of service, the same tests may also be applied while determining if a particular relationship can give rise to vicarious liability. Indian courts have often disregarded

[177]Dharangadhara Chemical Works Ltd v State of Saurashtra, (1957) 1 LLJ 477.;Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments, (1974) 3 SCC 498.; Hussainbhai v Alath Factory Thezhilali Union, (1978) 4 SCC 257.; General Manager, Indian Overseas Bank vs Workmen, All India Overseas Bank Employees Union, (2006) 3 SCC 729.
[178]Sushilaben Indravadan Gandhi v The New India Assurance Company Limited, (2021) 7 SCC 151,¶ 25.

the contractual nature of the relationship and attempted to identify the true nature of the relationship as seen in *Dharangadhara* & *Hussainbhai.* The Supreme Court in *Steel Authority of India Limited & Ors. v. National Union Waterfront Workers*[179] went on to say that when there are sham arrangements between the workers and the hirer, the courts may pierce the veil and establish an employer-employee relationship. This has led to a broad and progressive reading of employer-employee relationships based on who wields power and control. Such a reading has been particularly prevalent while dealing with cases involving workers in poorer sections of society. While the factors identified in *Sushilaben* do not form an exhaustive test, they must be examined on the facts and circumstances of each case to meet the ends of social justice.

### *2.2 COURSE OF EMPLOYMENT TEST*

Once it has been established that an employer-employee relationship exists and that the first facet of the doctrine has been fulfilled the courts move on to examine the second facet. The second facet of the test of vicarious liability laid down by Indian courts is the *course of employment test*. The course of employment test postulates that the master is liable for only those acts that are committed during the course of employment. This broadly covers two types of acts[180] –

a) Wrongful Acts authorised by the master
b) Wrongful and unauthorised mode of doing some act authorised by the master

The key determination of claims of vicarious liability is often whether the tortuous act was a mode of performing an authorised or if it was an act independent of the employment. Due to the wide variety and far-ranging nature of the incidents that lead to claims of vicarious liability, it is not possible to lay down a set of strict determinative rules to decide the nature of the tortuous act. The course of employment test, therefore, creates a hypothetical line between an area of authorised acts and unauthorised acts. Generally, the courts identify on which side of the line the said action lies while taking a broad view of the scope of the employment.[181]

[179]Steel Authority of India Limited &Ors. v. National Union Waterfront Workers, (2001) 7 SCC 1, ¶ 107
[180]Sitaram Motilal Kalal vs Santanuprasad Jaishankar Bhatt, AIR 1966 SC 1697, ¶28 .
[181]Ratanlal and Dhirajlal *supra* note 148, .

Once it has been established that the *relationship* between the worker and the employer can give rise to vicarious liability, the courts are then tasked with identifying whether the tortuous acts committed occurred *during the course of employment*.

The Indian Courts have from a very early time applied the course of employment test broadly. In *Pushpabai Purshottam Udeshi v. M/s. Ranjit Ginning & Pressing Co. Pvt. Ltd*, [182] the court recognized that traditionally the course of employment test referred to acts authorized by the master and unauthorized modes of doing authorized acts. The court took note of the recent trend of holding the employer liable in circumstances that do not strictly fall within the purview of course of employment. The court in the instant case was determining whether the employer of the manager who was driving the vehicle to deliver some money at the behest of the company could be vicariously held liable for the injuries of a third party who had been given a lift by the manager. The company was found liable for the injuries caused to a third party since the manager who was driving was doing so within the course of his employment. The court rejected the contention that the manager had not been granted express authorization to provide lifts to other persons since his high position as a manager granted implied authority. It was established that acts that were not expressly prohibited could be considered within the course of employment so long as they could be reasonably inferred to be part of the implied authority of the servant.[183] The court held:[184]

> "Taking into account the high position of the driver who was the Manager of the company, it is reasonable to presume, in the absence of any evidence to the contrary, that the Manager had authority to carry Purshottam and was acting in the course of his employment."

Similar to the *Pushpabai* case, in many subsequent cases, the course of employment test has been given a broad reading.[185] At the same time, courts have also ensured that vicarious liability would not arise merely because the employment creates an opportunity to commit a tort. In *State Bank of India v. Shyama Devi,*[186] the court dealt with a case of misappropriation of a cheque and cash by a bank employee who was also a neighbour of the victims. His official role

[182]Pushpabai Purshottam Udeshi v M/s Ranjit Ginning & Pressing Co Pvt Ltd, (1977) 2 SCC 745.
[183]Ratanlal and Dhirajlal *supra* note 148, .
[184]Pushpabai Purshottam Udeshi v M/s Ranjit Ginning & Pressing Co Pvt Ltd, (1977) 2 SCC 745, ¶11.
[185]Kanniappa Nadar v Jayapandi and Others, (1997) 1 Mad LJ 148.;Sitaram Motilal Kalal vs Santanuprasad Jaishankar Bhatt, (1966) 3 SCR 727.; State of Orissa and another v Madhurilata Ray, (1981) 52 CLT 357.
[186]State Bank of India v Shyama Devi, [1979] ACJ 179.

did not put him in charge of the savings bank accounts involved in the case. The court held that the bank could not be held liable for the misappropriation of the money by the employee as it was not within the course of employment. The court while analyzing the course of employment test concluded that it was irrelevant whether the action was for the benefit of the master or not as long as it happened within the course of employment. The court reasoned, though his employment in the bank presented an opportunity to commit theft, the bank could not be held liable. The court stressed on the fact that the monies and the cheques had been handed over personally to the tortfeasor and not at the bank counter, and also at no point was any receipt for the same provided by the bank. The tortuous action did not take place in the regular course of business of the bank and hence the acts were held as personal and not within the course of employment. Here it can be seen that the second leg of the course of employment test, namely wrongful and unauthorized mode of doing some act authorized by the master has been expanded to include wrongful acts connected to authorized acts.

### 2.2.1 Introducing close connection test in the course of employment

The scope of the course of employment test in India was broadened in *State of Maharashtra v Kanchanmala Vijay Singh Shirke& Ors.*[187] It was held that the master will be liable for acts that he has not authorized if proven that they are connected to the authorized acts. This was an important shift from merely including unauthorized modes of conducting authorized acts to acts connected to the authorized act, thereby increasing the scope of actions that could lead to a successful claim of vicarious liability. The court viewed it was important to establish whether or not the initial act was lawful and authorized.[188]

The present case involved a motor vehicle accident. A jeep belonging to the state government was being driven by another employee with the driver sitting in the passenger seat. It was argued that the driver did not have the right to delegate the duties of driving the vehicle to any other employee. They argued that since the employee who was driving the car was merely a clerk, it could not be said that driving the car was within the course of employment of the driver or the clerk. The court held the initial act of taking the car out to pick up employees as legal and authorized, and the driving of the car was connected with the course of employment. It was held that it was merely an improper mode of doing an act that was directly connected with the

[187] State of Maharashtra v Kanchanmala Vijaysingh Shirke & Ors, (1995) 5 SCC 659.
[188] *Id.*,¶ 19.

course of employment of the driver.[189] Accordingly, the state government was made vicariously liable for the accident and claims.

This case in India brings about certain aspects of the close connection test as espoused in *Lister*. The principle used in *Lister* to an extent was applied in this case which had interpreted the course of employment test to include acts that are directly connected to the authorized acts.[190] The close connection test in the UK looks at a *sufficiently close* connection to the *field of activities* of the employee. While the interpretation in the instant case requires a *direct* connection related to *authorised acts* of the employee to exist. The use of the term 'sufficiently close' and 'field of activities' in the UK indicate the existence of a broader test of vicarious liability. In *Kanchanmala Vijay Singh*, while the degree of closeness between the tortuous act and the employment varies, the principle behind the close connection test to an extent was brought within the ambit of the course of employment test by the Supreme Court of India.

This expanded scope of the course of employment test has since been applied in a number of cases.[191] In *Anita Bhandari and Ors v Union of India and Ors,*[192] the Supreme Court had to determine the existence of the bank's vicarious liability for the acts of its security guard who had shot a customer. The bank guard mistakenly assumed that the customer was attempting to steal the cash box being transferred to the bank at the time of the occurrence of the incident.

The bank argued that the act of shooting the customer was not authorised and thus not in the course of employment. The bank reasoned had the employer been present at the scene he would not have directed the security guard to shoot the customer. The court rejected both arguments and held that the shooting was directly connected with the guard performing the authorized act of ensuring the safety of the cash box during transportation. The bank was held to be vicariously liable.[193] More recently in *M Anumohan v State of Tamil Nadu and Ors,*[194] the State was held liable for the acts of the police officer who falsely implicated certain individuals under the *Narcotic Drugs and Psychotropic Substances Act, 1985*. A police officer attempted to blackmail the victims and extort money from them. The court relied on the *Kanchanmala Vijay Singh* case and held that the State would be vicariously liable as the tortuous acts were solely

[189] *Id.*,¶ 19.
[190] *Id.*
[191] Manjit Kumar v State of Harayana, [2004] SCC Online PH 697.; State of Rajasthan v Shekhu & ors, [2004] SCC OnLine Raj 131.; M Anumohan v State of Tamil Nadu and Ors, [2016] SCC OnLine Mad 22868.
[192] Anita Bhandari and Ors v Union of India and Ors, (2003) 44(2) GLR 1093.
[193] *Id.*,¶ 8
[194] M Anumohan v State of Tamil Nadu and Ors, [2016] SCC OnLine Mad 22868

possible due to the duties entrusted to him as a police officer by the state. While refraining from analyzing the course of employment test, the court reiterated the position in *Kanchanmala Vijay Singh* that acts directly connected with authorized acts would be within the course of employment. The court's reliance on the judgment in *Kanchanmala Vijay Singh* suggests that since the act of filing a false complaint is directly connected to their authorized acts of registering complaints, vicarious liability can be attached to the state.[195]

In summary, Indian courts continued to use the course of employment test in a broad sense to determine claims of vicarious liability. Effectively, the courts have expanded the scope of the second limb of the course of employment tests, i.e., acts that are an improper mode of doing authorized acts. This has been done by including acts directly connected with authorized acts within the ambit of the same. The existence of a nexus between the authorized and the tortuous act become sufficient to consider an act within the course of employment. While the close connection test as espoused in *Lister* is not strictly applied in India, certain principles of it, are in application. Namely, the existence of a direct connection between the tortuous acts and the acts in the course of employment shows that the aspects of the close connection test have been incorporated into the course of employment test by Indian courts.

## 3. CONTRASTING JUDICIAL APPROACHES OF UK AND INDIA

The courts in UK and India have taken different paths in developing the doctrine of vicarious liability. We look at these paths broadly in three categories.

First, is the scope of the employer-employee relationship. The test of vicarious liability in the UK was greatly broadened in the Christian Brothers Case. The trial court and the court of appeal in the Barclays Case [196] came close to doing away with the distinction between independent contractors and employees by using policy factors to override the nature of the relationship. The UK Supreme Court judgement in the Barclays case has now led to a more restrictive reading of *akin to employment* and will lead to certain categories of work not considered akin to employment.[197] In India, the scope of employer-employee relationships and contracts of service has been given an expansive meaning. The employer-employee relationship in India is still decided based on numerous policy factors which are similar to the

[195]*Id.*
[196]*Various Claimants v Barclays Bank Plc* (2017) 7 WLUK 602 (Queen's Bench Division); *Barclays Bank Plc v Various Claimants* (2018) 7 WLUK 367 (Court of Appeal (Civil Division)).
[197]Giliker *supra* note 81.

pre-Barclay's akin to employment test. True independent contractors as expounded in Barclays would potentially be deemed as employees in India if the relationship was constructed for artificial purposes and the economic control lay with the principal employer. Importantly, courts in both countries used social considerations in relation to employment as a means to develop the doctrine of vicarious liability.

In India, informal employment accounts for 88.1% of the economy.[198] Informal employment in the UK accounts for less than 20% of the total workforce.[199] The definition of informal employment as per the ILO is:[200]

> "Employees are considered to have informal jobs if their employment relationship is, in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.)."

One of the forms in which informal jobs reflect is in the form of disguised employment.[201] Employers attempt to hire workers through independent contractors to avoid paying social security benefits and facing liability issues.[202] In comparison, the United Kingdom has a smaller employment percentage in the informal sector. This allows courts in the UK to focus more on the nature of the relationship itself as held in Barclays as opposed to India where courts have to keep in mind the working conditions of these workers who are essentially disguised employees. Indian courts often deal with labour disputes of poor classes of society who are severely exploited. These socio-economic conditions have led to a broad framework being developed in India. A shift in law to adopt the standards applied in the UK may be possible,

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[198] ILOSTAT, *Informal Economy*, available at https://ilostat.ilo.org/topics/informality/ (last visited August 30 2022)

[199]International Labour Office, *Women and Men in the Informal Economy: A Statistical Picture,* April 30, 2018 https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf (last visited August 30,2022).

[200]International Labour Office, *Guidelines Concerning a Statistical Definition of Informal Employment* https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087622.pdf (last visited November 2, 2022).

While Indian legislature fails to define informal employment, the National Commission for Enterprises in the Unorganized Sector recommended the following definition "Unorganized workers consist of those working in the unorganized sector or households, excluding regular workers with social security benefits provided by the employers and the workers in the formal sector without any employment and social security benefits provided by the employers"

(Ministry of Labour and Employment), *Report on Employment in Informal Sector and Conditions of Informal Employment 2013-14 (Volume IV)*

<https://labour.gov.in/sites/default/files/Report%20vol%204%20final.pdf> accessed 17 October 2022.

[201]International Labour Office, *supra* note 198.

[202]Hussainbhai v Alath Factory Thezhilali Union, (1978) 4 SCC 257.

only when the workforce and social conditions change. This view is also supported by the first Morrison case justifying that new tests must ordinarily arise only when the nature of the workforce or social conditions changes. In conclusion, the scope of employer-employee relationships and application of vicarious liability in India and the UK presently is indicative of employment trends and has been tailored to fulfil the social structures that exist in these countries.

Second, is with respect to the second limb of vicarious liability, which deals with the relationship between the tortuous act and the employment. While the United Kingdom has established the close connection test which requires an analysis of whether a sufficiently close connection exists between the employment and the tortuous acts so committed.[203] The Indian courts have continued to rely on the course of employment test. The course of employment test is narrower in nature and faces difficulty in dealing with intentional torts as has been explained in Section II of this paper.

A prima facie conclusion can be made out that the courts in India are on the same trajectory as the UK courts, the difference being that Indian courts are a couple of decades behind, since both used the course of employment test till Lister. A deeper analysis of the cases shows while the United Kingdom has attempted to create a new test in the form of the close connection test, the Indian courts have attempted to incorporate certain elements of the close connection test within the scope of the course of employment tests.[204] The use of the term "direct connection" in India reflects a similar approach to that of the UK's close connection test and indicates principled similarities in the evolution of the doctrine. This can be seen in the reference made by *Lister* to the requirement of a connection as expounded in Salmond's definition of course of employment.

The difference between the position in India and UK lies in the fact that the latter expanded the direct connection concept into the close connection test. Indian courts on the other hand have incorporated the direct connection concept within the course of employment test. The close connection test varies from the course of employment test as it goes beyond mere *unauthorised modes of doing authorised acts*. Further, the reference to a direct connection that had been made in *Kanchanmala Vijay Singh* was prior to *Lister.* The Courts in India while using the term 'directly connected' have held that the initial act must be authorised and lawful, and the acts

[203]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords).
[204]State of Maharashtra v Kanchanmala Vijaysingh Shirke & Ors, (1995) 5 SCC 659.

must be directly connected to authorised acts.[205] The UK court's reliance on the *field of activities* test would mean that the connection can exist beyond authorised acts.[206] This is an expansive interpretation by the UK courts. Overall, the close connection test in the UK is far broader in its application than the course of employment test that exists in India.

Third and last, is the difference in the nature of the cases in which vicarious liability arises. The cases of vicarious liability in India largely lie predominantly against the State for the tortuous acts of their employees. On the other hand, it seems, the cases in the UK largely lie against private employers and religious institutions for tortuous acts of their employees and members. Overall, while UK and Indian courts have a jurisprudence that is tied to the 'course of employment' test expounded by Salmond, the differing social needs of both countries has led to differing judicial approaches in their application with some degree of overlap. Courts must continue to shape the doctrine of vicarious liability around the needs of society to meet the ends of social justice as laid down by Justice Holt.[207]

## 4. CHALLENGES TO THE DOCTRINE OF VICARIOUS LIABILITY

In the modern world, there are a large number of statutory provisions imposing vicarious liability and it is no longer a facet that exists merely in common law. Be that as it may, the common law of tort provides a mechanism to accommodate the push and pull of social structures determining the development of the doctrine of vicarious liability. We identify two challenges as it stands today. Firstly, the adverse effects on employment structures if the expansion of the doctrine is not balanced correctly. Secondly, virtual workspaces and work-from-home environments pose challenges to the application of the doctrine.

### *4.1 BALANCING THE SCOPE OF VICARIOUS LIABILITY*

The determination of whether a particular relationship can give rise to vicarious liability today is no longer reliant on policy factors but focuses on the nature of the relationship and the existence of an independent business of the tortfeasor. An instance of the overreliance on policy factors in the *Christian Brothers* case can be seen in the judgements of the lower courts in the *Barclays* case. Such an overreliance leads to an erosion of the well-founded distinction

[205] *Id.*
[206] *WM Morrison Supermarkets Plc v Various Claimants* (2020) 2 WLR 941 (Supreme Court); *Rose v Plenty* (1976) 1 WLR 141 (Court of Appeal).
[207] *Sir Robert Wayland's Case* (1707) 1 WLUK 22 (Court of King's Bench).

between employees and independent contractors.[208] There is a possibility that every person's relationship with their hirer is construed as akin to employment and are treated as employees. This may lead to employers vetting even independent contractors in more detail and having greater amounts of training and supervision. This level of supervision would inevitably require a higher degree of control over the employee or independent contractors as the case may be, thus making them more likely to fulfil the Christian Brother's criterion and be treated solely as employees. This would increase the potential liability of the employer.[209]

The UK Supreme Court decision in *Barclays* ensures that the scope of akin to employment does not vitiate the traditional distinction between employer and independent contractors. However, the use of the policy factors laid down in *Christian Brothers* in doubtful cases as an exception is still an area of concern. This leaves open the question as to how a case is to be categorised as doubtful and under what circumstances policy factors may be applied. In India, courts have made concerted efforts to ensure that artificial arrangements in the form of disguised employment do not preclude claims for vicarious liability. At the same time, courts need to be cautious in making such determinations and ensure they do not fundamentally alter the distinction between employees and independent contractors. The Courts in India have not properly differentiated artificial arrangements from ordinary arrangements of independent contractors. Laying down a set of factors to distinguish these arrangements in the workforce could be helpful for future cases. The overexpansion of the first limb of the doctrine in either country potentially creates difficulties for employers to assess and plan their liabilities.

With regard to the second limb of vicarious liability, the first Morrison case held that if the tortuous activity took place at work in a seamless and unbroken sequence of events, the employer could be vicariously liable.[210] The court provided an extremely broad reading of the field of activities. Such an interpretation may very well lead to acts of the employee never being considered as personal and beyond the scope of his employment. This degree of overexpansion has the potential to create liability where none should exist. While the second Morrison case does clarify the scope of the degree, it does not expressly overrule the ratio of the first Morrison case. While, overexpansion of the doctrine creates several problems, the attempt of the second

[208]Silink and Ryan, *supra* note 118.
[209]Patrick Katie and Bowly Megan, 'Vicarious Liability of Employers- Supreme Court Provides Welcome News.Pdf' (2020) 9 Compliance & Risk 10.
[210]Jonathan, *supra* note 129.

Morrison case to stifle the unbridled expansion of the doctrine needs to be carefully deliberated. Two such possibilities are discussed below.

Firstly, the reintroduction of *motive* being relevant in determining vicarious liability has the potential to derail vicarious liability, especially in sexual harassment cases. Motive is most often personal.[211] The only possible rationalisation of the second Morrison case with the doctrine of vicarious liability is to create a tailored test for sexual assault cases. While this has been attempted in a couple of cases [212] after the second Morrison case, clearly Justices in *Lister* explicitly stood against having a dual system of vicarious liability for different torts.[213] Lord Clyde and Millet both held that in the absence of a positive reason to create a distinction between sexual harassment and other cases, the test must be applied uniformly. Given that the societal conditions and developmental levels since then have remained largely unchanged, there does not appear any positive reason to exist even today.

Secondly, the analysis of the *field of activities* while determining the existence of a close connection was too restrictively applied in the second Morrison case and does not align with prior judicial pronouncements.[214] While the first Morrison case over expanded the scope of field of activities, the second Morrison case has taken an extremely restrictive approach. Both cases have deviated from the original scope of the field of activities test which was succinctly explained in *Rose v Plenty*. In *Rose v Plenty* the Court of Appeal held that the field of activities cannot be identified by dissecting specific tasks of the employee, but one must look broadly at the field of activities entrusted to the employee. The restrictive approach followed in the second Morrison case would lead to only explicitly authorised acts being recognised. This would greatly limit the scope of vicarious liability far more than was necessary in the backdrop of the first Morrison case.

The courts must remain cautious to ensure that the doctrine does not hastily expand, while also ensuring that the close connection test itself is not uprooted. Despite the shortcomings and issues of the close connection test, its dynamism is the best test available to fulfil the objectives of the doctrine.

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[211]Yeung and Bae, *supra* note 138.
[212]*Blackpool Football Club Limited v DSN* [2021] EWCA Civ 1352 (Court of Appeal (Civil Division)); *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* (2021) W.L.R 4 42 (Court of Appeal).; *JXJ v The Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB) (High Court of Justice Queen's Bench Division).
[213]*Lister v Hesley Hall Ltd* (2001) 2 WLR 1311 (House of Lords),¶ 48.
[214]Yeung and Bae, *supra* note 138., *Rose v Plenty* (1976) 1 WLR 141 (Court of Appeal).

### *4.2 VICARIOUS LIABILITY & DIGITISATION*

The second challenge that the doctrine faces is the advent of virtual workspaces and digitisation. A virtual workspace is one where the employees connect with the employers and work with colleagues in a digital space.[215] In the world of virtual workspaces, there is a drastic shift from traditional fixed-hour jobs to more flexible work hours and work environments.[216] This has the potential to create difficulty in determining acts that comes under the course of employment or a private act. There are primarily two key points of consideration where this difficulty may arise.

Firstly, the judiciary would have to deal with the issue of tortuous activities happening outside the physical realm of the workplace and at the home of any employee. In *Jacobi v Griffith*[217] the Canadian Supreme Court considered whether a children's club could be vicariously liable for the sexual abuse of children committed at the homes of an employee. The employer was not held liable since most of the assaults that took place happened at the home of the employee and after working hours. Given that the development of the doctrine in the UK has relied on several cases in Canada including *Jacobi*, it raises interesting questions regarding the scope of the workplace and how it would be treated by courts in the UK. The term workplace in the UK is defined under Regulation 2(1) of *The Workplace (Health, Safety, and Welfare) Regulations 1992*, and refers to only physical workspaces and not virtual ones.[218] Similarly, in India, there is no well-defined concept of a workplace including a virtual workspace. Sexual harassment proceedings have made efforts to create a notional extension of the workplace. For instance, the Central Administrative Tribunal (CAT) while deciding on a sexual harassment case, considered a workplace to include places:[219]

a) Proximate to the place where working activity is taking place &
b) Under the immediate control of the employer.

[215]Citrix India, *What Is a Virtual Workspace?*, available at https://www.citrix.com/en-in/solutions/digital-workspace/what-is-a-virtual-workspace.html (last visited on August 29, 2022).
[216] McKinsey, *Is Remote Work Effective: We Finally Have the Data*, available at https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> ( last visited on December 15, 2022), Vyas L, '"New Normal" at Work in a Post-COVID World: Work–Life Balance and Labor Markets' (2022) 41 Policy and Society 155.
[217]*Jacobi v Griffith* (1999) 2 SCR 570 (Supreme Court (Canada))
[218]The Workplace (Health, Safety and Welfare) Regulations, 1992 (as amended in 2002) (U.K.).
[219] Saurabh Kumar Mallick v Comptroller & Auditor General of India, [2007] SCC OnLine CAT 1534.

The Delhi High Court upheld this definition of a workplace as ruled by the CAT. The test for determining a workplace was:[220]

> "The test of a work place is that the place where sexual harassment has been alleged is a place in the proximity of working activity and under immediate control of the employer, relating to which affairs have been managed by the Government."

The High Court placed reliance on the judgement in *Vishakha and Others v State of Rajasthan*.[221] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was developed based on the Vishakha Guidelines but it fails to provide any explicit definition of virtual workspaces. However, Section 2 (o) of the act that defines a workplace has an inclusive definition that would allow courts to broadly interpret it and bring virtual workplaces within its ambit. This would be limited to claims relating to sexual harassment.

Even if this broad definition of a workspace is applied to all facets of employment, it would be extremely difficult to determine what degree of control would satisfy the test of "immediate control" as laid down in the courts.[222] The question as to whether ordinarily, an employer has immediate control over the acts including intentional torts of the employee may be difficult to prove in virtual workspaces. It is therefore necessary for courts to distinguish between acts committed in the course of employment and acts committed in the workplace, and the latter can no longer be considered relevant while attempting to prove claims concerning vicarious liability.

Secondly, the courts would have to tackle the scope of actions taking place during working hours and in the course of employment against the backdrop of flexible work hours. In *Warren v Henlys Ltd,*[223] the court stressed that the incident arose during a broken sequence of events and held that the nature of the relationship changed from that of an employee to one of a personal nature.[224] The flexible working hours present a possibility where the line between acts done in the course of employment and acts done independently become blurred. This may

[220] Saurabh Kumar Mallick v Comptroller and Auditor General of India, (2008) 151 DLT 261.
[221] Vishakha and others v State of Rajasthan, AIR 1997 SC 3011.
[222] Saurabh Kumar Mallick v Comptroller & Auditor General of India, [2007] SCC OnLine CAT 1534.
[223] *Warren v Henlys Ltd* (1948 AD) 11 WLUK 39 (King's Bench Division).
[224] *Id.*.

potentially lead to circumstances where employers argue that at the moment when the incident occurred the person was off duty and that there is no seamless sequence of events based on the Jacobi and Warren judgements. While verdicts such as *Bellman* provide some reassurance regarding employer's liability outside the workplace and after work hours, it remains to be seen how the courts will resolve this issue if it takes place in the digital realm.

## CONCLUSION

Vicarious Liability holds a unique position in law as it is an exception to the traditional norm of fault-based liability by imposing strict liability over an employer for the actions of the employee. The doctrine of vicarious liability in the UK is rooted in social justice and public policy considerations. The scope of the doctrine has broadened its application to include relationships akin to employment and the development of the close connection test has attempted to tackle cases of intentional torts. Recent trends indicate a concerted effort by the UK Supreme Court to adopt a more restrictive application of vicarious liability. The courts in India have taken a broad approach in interpreting the master-servant relationship and the course of employment test and have incorporated elements of the close connection test within it. While India and UK have taken slightly divergent routes in the application of vicarious liability, the principled considerations behind its application remain the same. The divergent routes are reflective of the socio-economic conditions. The absence of major change in the developmental status of both countries means existing tests require refinement and the creation of new tests is unnecessary. The evolution of vicarious liability largely depends on the nature of the relationship and technological advancements in the modern workforce. The struggle will be to maintain both a constructive balance and dynamism of the tort law in determining the evolution of the doctrine.