Singapore Journal of Legal Studies
[2021] 206–219

THE EBB AND FLOW OF VICARIOUS LIABILITY IN TORT LAW

Barclays Bank plc v Various Claimants; WM Morrison Supermarkets plc v Various Claimants

JOEL **FUN** WEI XUAN & DARIEN **THE** CHUN YIU*

Vicarious liability claims have often stirred controversy, as liability is being imposed on a party which is not responsible for the tortious conduct. This is especially so, as the law on vicarious liability has been expanding over the past few years to include an increasing scope of relationships and circumstances. This case comment looks at two decisions of the United Kingdom Supreme Court in 2020 which took a step back from this expansionary approach and introduces new constraints. In examining the desirability of these changes and comparing them with the position in Singapore, it is hoped that new perspectives will be gained to clarify this unsettled area of the law.

I. INTRODUCTION

Two recent decisions on vicarious liability were simultaneously handed down by the United Kingdom Supreme Court ("UKSC") in April 2020. The first concerned a bank which engaged a doctor to conduct health checks who sexually assaulted various employees, and the second involved a company accountant who divulged personal employee data as part of his personal vendetta. It is commendable that apart from the correctness of these decisions, the UKSC took a restrained approach to the development of the law on vicarious liability.

These decisions are timely reminders that the Singapore Courts should likewise guard against any untrammelled expansion when the framework for assessing vicarious liability was modified to include relationships "akin to employment",[1] and re-emphasising the importance of incrementalism with regard to the application of the "close connection" test.

The purpose of this article is to outline the recent developments on the law of vicarious liability in the United Kingdom and to compare them with the position in Singapore. It is hoped that through this exercise, we will gain a better grasp of this mired area of law and be able to evaluate which is the better path forward.

---

* LLB & BBM Candidate, Singapore Management University; LLB Candidate, Singapore Management University. We would like to express our gratitude to Associate Professor Low Kee Yang for his illuminating views expressed during his classes in Tort Law. All errors remain our own.

1 See *eg*, *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56 at paras 54 and 60.

II. The Current Framework under Singapore Law

Vicarious liability involves the principle of holding a defendant legally responsible to the claimant for the consequences of another wrongdoer's conduct. It applies where the wrongdoer and the defendant have a certain quality of closeness in their relationship.

The 2017 Singapore Court of Appeal ("SGCA") decision of *Ng Huat Seng v Munib Mohammad Madni*[2] remains the seminal authority on vicarious liability under Singapore law.[3] A two-stage inquiry is undertaken when determining whether vicarious liability should be imposed. The first stage examines the nature of the relationship between the defendant and the tortfeasor: there must either be a relationship of employment between the tortfeasor and defendant or a relationship that is closely analogous to employment.[4] At the second stage, the "close connection" test is applied, *ie*, whether the tortious conduct was so closely related to the employment that it is fair and just to hold the defendant vicariously liable.[5]

As pointed out by the UKSC, the first stage was the subject of the decision in *Barclays Bank plc v Various Claimants*,[6] and the second stage was the subject of the decision in *WM Morrison Supermarkets plc v Various Claimants*.[7] Significantly, the UKSC cited and endorsed the *Ng Huat Seng* decision when dealing with the issue of vicarious liability, specifically, with regard to independent contractors.[8] This could signify an alignment of the Singapore and English positions on this thorny issue. Whether this is indeed the case will be further examined below.

III. The First Stage

A. *Barclays Bank v Various Claimants*

In *Barclays*, the case concerned the question of whether a bank could be made vicariously liable for the sexual assaults that were committed by a doctor who was paid to conduct medical examinations on the bank's prospective employees.

In *Barclays*, the tortfeasor was the late Dr Bates, a medical practitioner who conducted medical assessments and examinations of employees or prospective employees for Barclays Bank ("the Bank").[9] After a prospective employee successfully undergoes an interview with the Bank, they will be subject to a medical examination. The Bank would arrange the appointments with Dr Bates and provide him with a report to be filled and signed by both Dr Bates and the applicant. Dr Bates would be paid a fee for each report, but was not paid any retainer by the Bank.[10] It

---

2 [2017] 2 SLR 1074 (CA) [*Ng Huat Seng*].

3 See *Arunachalam Balasubramanian v Lion City Rentals Pte Ltd* [2020] SGMC 33 at para 39. See also *Lim Seng Chye v Pex International Pte Ltd* [2019] SGHC 28 [*Lim Seng Chye*] at paras 48-49.

4 *Ng Huat Seng*, *supra* note 2 at para 42.

5 *Ibid* at para 56.

6 [2020] UKSC 13 [*Barclays*].

7 [2020] UKSC 12 [*WM Morrison*].

8 *Barclays*, *supra* note 6 at para 26.

9 *Ibid* at para 2.

10 *Ibid* at para 3.

was during these medical appointments where the claimants were sexually assaulted by Dr Bates.[11]

The UKSC ultimately reversed the lower court's decision that the Bank was vicariously liable for the acts of Dr Bates, but needed to explain how this could be coherent with the sexual abuse cases that were similarly heard by the English courts in the past two decades.

The UKSC begun with a brief summary of the seminal case of *Lister v Hesley Hall*[12] and how it showed a willingness to expand the law on vicarious liability.[13] In fact, while not mentioned by the UKSC, *Lister* was the first time where the apex court moved away from the Salmond test[14] which looks at "authority",[15] to the contemporary "close connection" test.[16] Subsequently, the UKSC turned to the first English case which considered the expansion of the first stage—the English Court of Appeal ("EWCA") case of *E v English Province of Our Lady of Charity*.[17] In *E*, sexual abuse was committed by a priest, and the question was whether the bishop could be made vicariously liable. The majority in *E* concluded that the bishop was vicariously liable even though he was not the priest's employer, because their relationship was sufficiently akin to employment to render it fair and just to hold the bishop liable.

The UKSC then turned to its previous decision of *Various Claimants v Catholic Child Welfare Society*.[18] In this case, the victims were children enrolled at a school, S. The tortfeasors were staff of S, who had sexually and physically abused the children. These tortfeasors were drawn from the defendant institute, B, an unincorporated association. The question was whether B could be vicariously liable for the tortious acts of the tortfeasors, which the court answered in the affirmative.

B. *The Lord Phillips' factors*

Whilst the decision in *Christian Brothers* appeared to be a minor extension of *E*, the *Christian Brothers* case is significant in how the close connection test was framed. In the *Christian Brothers* case, Lord Phillips elucidated five factors ("Lord Phillips' factors") that make it "fair, just and reasonable" to impose liability, which are:

(1) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
(2) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
(3) the employee's activity is likely to be part of the business activity of the employer;

---

11 *Ibid* at para 4.
12 [2002] 1 AC 215 [*Lister*].
13 *Barclays*, *supra* note 6 at para 10.
14 JW Salmond, *The Law of Torts* (London: Stevens and Haynes, 1907).
15 *Ibid* at 83; essentially, a wrongful act is deemed to be in the course of employment if it is either a wrongful act authorised by the master, or a wrongful and unauthorised mode of doing some act authorised by the master.
16 *Lister*, *supra* note 12 at 223, 232, 245 (per Lord Steyn, Lord Clyde and Lord Millett).
17 [2013] 2 WLR 958 (CA) [*E*].
18 [2013] 2 AC 1 (SC) [*Christian Brothers*].

(4) the employer will have created the risk of the tort committed by the employee; and
(5) the employee will have been under the control of the employer.[19]

Prior to the UKSC's decision in *Barclays*, it was thought by some that Lord Phillips' factors were the lodestar in the determination of the first stage of the test. For example, Steele suggests that the court in *Christian Brothers* held that:

> the first requirement for establishing vicarious liability... will be assessed in relation to the underlying rationale for such liability... (subsequently, Steele referred to Lord Phillips' factors).[20]

However, as the UKSC in *Barclays* clarified, these factors should not be merged with the principles which should guide the development of the first stage of the test. The UKSC justified this conclusion with reference to how Lord Phillips in *Christian Brothers* "did not address himself to those five incidents but to the detailed features of the relationship"[21] when he looked at the details of the defendant-tortfeasor relationship. But this is not entirely convincing. The better reading is that Lord Phillips was actually looking at the details of the defendant-tortfeasor relationship in relation to the fifth factor of "control". In fact, Lord Phillips prefaced his inquiry into the details of this relationship by stating that "[t]here is one area of the law of vicarious liability where control has been of critical importance. I must explore it because it is relevant".[22]

In any case, the UKSC in *Barclays* recognised that subsequent decisions have given significant importance to Lord Phillips' factors in the application of the first stage of the test,[23] as was the case in *Cox v Ministry of Justice*.[24] In *Cox*, the claimant was a prison catering manager. The tortfeasor, a prisoner, dropped a sack of rice and injured the claimant. As the tortfeasor was a prisoner and worked under compulsion, he was not contractually employed by the Prison Service. Nonetheless, the UKSC found the Prison Service to be vicariously liable for the prisoner's tort.

The UKSC in *Barclays* acknowledged that "Lord Reed [in *Cox*] did focus on the five policy factors identified by Lord Phillips",[25] but continued to show how the UKSC in *Cox* similarly emphasised the traditional distinction between employees and independent contractor. Thus, the UKSC concluded that "in *Cox*, the result was bound to be the same",[26] whether it was by applying Lord Phillips' factors, or by

---

19 *Ibid* at para 35.
20 Jenny Steele, *Tort Law: Text, Cases and Materials*, 4th ed (Oxford: Oxford University Press, 2017) at 576.
21 *Barclays*, *supra* note 6 at para 18.
22 *Christian Brothers*, *supra* note 18 at para 37.
23 *Barclays*, *supra* note 6 at para 16, where the court stated that "[t]here appears to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of his employee... with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability."
24 [2016] 1 AC 660 (SC) [*Cox*].
25 *Barclays*, *supra* note 6 at para 20.
26 *Ibid* at para 22.

applying the "test" of whether the defendant-tortfeasor relationship is "sufficiently akin to employment".

A similar treatment was given to the subsequent case of *Armes v Nottinghamshire CC*.[27] In *Armes*, the local authority oversaw a fostering programme. The children which were placed in the care of foster parents allocated by the local authority fell victim to the abuse of the foster parents. The UKSC in this case found that the local authority was liable for the acts of the foster parents. In doing so, the court applied Lord Phillips' factors, and looked at two key factors: the risk that public bodies take to place children under foster care, and the lack of alternative sources of compensation.[28] That the local authority did not have much control over the foster parents was considered to be less significant.[29] The UKSC in *Barclays* noted the difficulty in distinguishing between employees and independent contractors in *Armes*,[30] but maintained that this distinction was not eroded by *Armes*.[31]

C. *The Modified Approach to Lord Phillips' Factors*

Ultimately, it seems that the UKSC in *Barclays* was keen on shifting the focus in the first stage of the "close connection" test back to the distinction between employees and independent contractors. To that end, the UKSC circumscribed the limits to which the Lord Phillips' factors are applicable: "[i]n doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. . . [but where] it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."[32]

The application of this modified approach to the case was rather straightforward and spelt out in a short paragraph. The UKSC explained that Dr Bates was like any other person who did work for the Bank, but were "clearly independent contractors", such as auditors hired to audit its books. Dr Bates had his own practice, had his own portfolio, and was free to refuse an examination if he wanted to do so. Barclays Bank was just another one of his clients.[33]

A pertinent question that arises from this modified test is whether it would favour non-commercial cases to commercial ones. In non-commercial cases such as *Armes*, one finds greater difficulty in characterizing the tortfeasor as either that of employee or independent contractor. Thus, Lord Phillips' factors, which are hardly an accurate proxy for elucidating the characteristics of an employment relationship may be applied more frequently in non-commercial contexts. If the *Armes* decision is correct, one questions whether this would lead to the first stage being much broader in non-commercial cases (as a result of the application of Lord Phillips' factors in many of these cases), while a narrower conception of the test will be used for commercial cases, since it would be much easier to point out cases where the tortfeasors are

---

27 [2018] 1 AC 355 (SC) [*Armes*].
28 *Ibid* at paras 61, 63.
29 *Ibid* at para 62.
30 *Barclays*, *supra* note 6 at para 23.
31 *Ibid* at para 24.
32 *Ibid* at para 27.
33 *Ibid* at para 28.

"clearly independent contractors". But perhaps such an approach is preferable to the alternative of abandoning this distinction. Such an approach injects greater certainty to this area of the law, instead of "consigning the law of vicarious liability to infinite extension . . . [and thus hurting] commercial interests, where certainty should prevail over sentiment".[34]

In any event, the decision in *Barclays* is evidently a far cry from the bold steps that the UKSC in *Armes* sought to take. In the closing of *Armes*, the UKSC declared: "[i]t is necessary, fair and just, when it applies to fix liability on someone who undertakes an activity, especially a commercial activity, by getting someone else integrated into his organisation to do it for him. *Employment is the classic example, but other situations may be analogous*."[35] At least for now, it seems that the UKSC has taken a leap away from this expansionary approach, instead preferring the venerable distinction between employee and independent contractor.

D. *The Position in Singapore and the Applicability of the Modified Approach to Lord Phillips' Factors*

Similar to the English Courts, it has not been entirely clear what the first stage of the close connection test entails in the Singapore Courts. As such, *Barclays* may provide useful guidance in clarifying how the court should deal with the first stage.

The most recent case in which the SGCA discussed the first stage at length is the decision of *Ng Huat Seng*. In *Ng Huat Seng*, E was contracted by M to demolish the existing house on E's property. Due to E's negligence during demolition works, N's property was damaged. The Court of Appeal found that M should not be made vicariously liable for E's negligence because E was contracted as an independent contractor by M, and the case could not be "brought within the ambit of the doctrine of vicarious liability".[36] In reaching its decision, the Court of Appeal commented that to impose vicarious liability between an employer and an independent contractor would be "antithetical to the doctrine's very foundations",[37] since it would not be fair, just and reasonable to impose secondary liability when the tortfeasor was not part of the defendant's enterprise.

Interestingly, two subsequent Singapore High Court ("SGHC") decisions seemed to interpret *Ng Huat Seng* very differently. In *Ong Han Ling v American International Assurance Co Ltd*,[38] the SGHC thought that *Ng Huat Seng* only set a "general rule that vicarious liability would not be imposed in respect of torts committed by independent contractors", but in appropriate circumstances, "it may be more conceptually satisfactory to acknowledge that such a categorisation may be artificial and unnecessary for the purposes of vicarious liability".[39] Essentially, it appears that the SGHC sought to draw out a class of cases where the employee/independent contractor distinction will not be referred to at all in applying the first stage of the

---

34 Peter Watts, "The Travails of Vicarious Liability" (2019) 135 LQR 7 at 10, commenting on the lower court decision of *Barclays Bank Plc v Various Claimants* [2018] EWCA Civ 1670 [*Barclays (EWCA)*].

35 *Armes*, *supra* note 27 at para 91 [emphasis added].

36 *Ng Huat Seng*, *supra* note 2 at para 69.

37 *Ibid* at para 64.

38 [2018] 5 SLR 549 (HC) [*Ong Han Ling*].

39 *Ibid* at para 157.

test. In doing so, it is possible that even where the tortfeasor may be more akin to an independent contractor, vicarious liability may still be ascribed to the defendant. This appears more consonant with the EWCA's decision in *Barclays*, where Irwin LJ went as far as to suggest that there will indeed be cases of "independent contractors" where vicarious liability will be established.[40]

In contrast to such a generous and expansive reading of *Ng Huat Seng*, the SGHC in *Lim Seng Chye*[41] thought that *Ng Huat Seng* stood for the proposition that there is a "blanket exclusion of independent contractors".[42] Surprisingly, even though *Ong Han Ling* preceded *Lim Seng Chye*, the court in *Lim Seng Chye* did not refer to *Ong Han Ling*.

While these decisions appear to be diametrically opposed, the modified approach to Lord Phillips' factors as enunciated in *Barclays* may provide the Singapore courts with a satisfactory thread to reconcile these decisions. Essentially, the default position is that the employee/independent contractor distinction should be applied to determine if the first stage is satisfied. However, in appropriate circumstances, especially where it is doubtful as to whether the relationship would attract vicarious liability, the court should have recourse to Lord Phillips' factors to determine whether the relationship is sufficiently analogous to employment.

This acknowledges that in appropriate cases, the tortfeasor-defendant relationship is not entirely similar to that of an employee/independent contractor (which was the concern in *Ong Han Ling*), while preserving this distinction for the purposes of conceptual clarity (which was the position in *Lim Seng Chye* and *Barclays*). After all, while *Barclays* cited *Ng Huat Seng* for the proposition that "independent contractors" do not attract the imposition of vicarious liability,[43] it was also acknowledged in both cases that relationships "akin to employment" attract the application of vicarious liability,[44] as seen in *Armes* and *Cox*. In doing so, the court can ensure a sufficient degree of flexibility to deal with the myriad factual circumstances arising from the application of vicarious liability, while guarding against an untrammelled expansion of liability.[45]

IV. The Second Stage

A. *WM Morrison Supermarkets v Various Claimants*

In *WM Morrison Supermarkets plc v Various Claimants*,[46] the appeal primarily concerned whether an employer could be held vicariously liable for its company accountant's act of leaking other employees' personal information to the public domain.

---

40 *Barclays (EWCA)*, *supra* note 34 at para 45.

41 *Supra* note 3.

42 *Ibid* at paras 48-49.

43 *Barclays*, *supra* note 6 at para 26.

44 *Ng Huat Seng*, *supra* note 2 at paras 54-56; *Barclays*, *supra* note 6 at para 27.

45 *Cf* Low & Lai, "A Pause in the Expansion of Vicarious Liability?" *Singapore Law Gazette* (July 2020), online: Singapore Law Gazette <https://lawgazette.com.sg/feature/a-pause-in-the-expansion-of-vicarious-liability/>.

46 *WM Morrison*, *supra* note 7.

The case of *WM Morrison* involved an aggrieved employee, Skelton, who was subject to disciplinary proceedings for minor misconduct in July 2013.[47] Following this, he bore a grudge against his employers, WM Morrison Supermarkets. In November 2013, Skelton was subsequently tasked with transmitting payroll data of around 126,000 employees to an external auditor to verify their accuracy.[48] Skelton did as he was instructed but also copied the file to a personal USB drive and uploaded this data to a publicly accessible file-sharing website on 12 January 2014.[49] Subsequently, on 13 March 2014, Skelton also sent the file anonymously to various newspapers posing as a concerned member of the public who discovered the data leak. One of these newspapers alerted WM Morrison Supermarkets, which then acted swiftly to remove the data from the internet and alerted the police. Skelton was subsequently arrested and has since been sentenced to 8 years imprisonment.[50]

The first stage of the vicarious liability framework was not in dispute as this case involved an orthodox employer-employee relationship.[51] The UKSC only considered the analysis under the second stage, which required a "close connection" between the tortfeasor's conduct and the employment relationship.

The "close connection" test was formulated in the seminal passage of Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam*:[52]

> The wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may *fairly and properly* be regarded as done by the employee while acting in the ordinary course of his employment.[53]

The UKSC cautioned that the phrase "fairly and properly" is not an invitation for judges to decide cases according to their "personal sense of justice, but require[s] them to consider how the guidance derived from decided cases furnishes a solution to the case before the court"[54], *ie*, reasoning incrementally from precedent.[55] This is to ensure that cases can be decided in a manner which is principled and consistent.

The UKSC also went on to elaborate upon the vexed decision in *Mohamud v WM Morrison Supermarkets plc*[56] which was thought to have changed the law on vicarious liability.[57] The holding in *Mohamud* was considered to be controversial because the UKSC rendered the employer vicariously liable for the racially-motivated attack of its employee on a customer.[58] One might have thought that in such a case, the

---

47 *Ibid* at para 3.
48 *Ibid* at para 4.
49 *Ibid* at paras 6-7.
50 *Ibid* at para 8.
51 *Ong Han Ling*, *supra* note 38 at para 161.
52 [2002] UKHL 48 [*Dubai Aluminium*].
53 *WM Morrison*, *supra* note 7 at para 23, citing *Dubai Aluminium*, *ibid* at para 23 [emphasis added].
54 *WM Morrison, ibid* at para 24.
55 *Ibid* at para 26.
56 [2016] UKSC 11 [*Mohamud*].
57 *WM Morrison*, *supra* note 7 at para 16.
58 See Andrew J Bell, "Vicarious Liability: Quasi-Employment and Close Connection" (2016) 32(2) PN 153.

employee had gone "on a frolic of his own"[59] in carrying out the irrational attack, and vicarious liability should not be imposed onto the employer.

In *Mohamud*, the petrol attendant, Mr Khan, had refused the motorist's request to print certain documents at the petrol station and ordered the motorist to leave by using racist and threatening language. The motorist was then followed back to his car by Mr Khan and subjected to a serious attack.[60] The UKSC in the *Mohamud* observed that there was an "unbroken sequence of events"[61] from the heated conversation at the petrol station counter to the eventual violent attack, and therefore this was still something within Mr Khan's field of activities as a petrol attendant. More pertinently, the UKSC held that the motive of the employee is irrelevant in the analysis.[62] Therefore vicarious liability could be imposed onto the petrol station employer.

As regards *WM Morrison*, the EWCA followed the reasoning in *Mohamud* that an employee's motive was completely irrelevant to the analysis.[63] Applying this to the facts of *WM Morrison*, although Skelton's motive was to cause financial or reputational damage to his employer, since Skelton was tasked by WM Morrison to transmit the personal payroll data, then the wrongful disclosure can still be described to be "within the field of activities that was assigned to him by WM Morrison" even if he was not "on the job".[64] According to the EWCA, the motive of an employee should never matter: "[i]n the sexual abuse cases such as *Lister v Hesley Hall Ltd* and the *Catholic Child Welfare Society* case the motive for the tort was sexual gratification. In *Mohamud* the motive of the foul-mouthed petrol pump attendant was personal racism rather than a desire to benefit his employer's business; but, said Lord Toulson, motive was irrelevant."[65]

However, the UKSC in *WM Morrison* disagreed and reversed the EWCA's decision. The UKSC corrected Lord Toulson's remark in *Mohamud* with regard to the relevance of motive: "the question whether Mr Khan was acting, albeit wrongly, on his employer's business, or was acting for personal reasons, was *plainly important*".[66] If personal reasons motivated the employee's tort, then it would not be fair to impose vicarious liability as the employee went on a "frolic of his own" in pursuing his own interest rather than furthering the employer's business.[67]

However, if motive is relevant, it is puzzling as to why the UKSC in *WM Morrison* still agreed and endorsed the holding in the previous *Mohamud* decision, given that "[i]t looks obvious that [Mr Khan] was motivated by personal racism rather than a desire to benefit his employer's business" when attacking the customer.[68] Mr Khan was surely not acting in the course of his employment,[69] even ignoring instructions

---

59 *WM Morrison*, *supra* note 7 at para 38, citing *Dubai Aluminium*, *supra* note 52 at para 32.

60 *Mohamud*, *supra* note 56 at para 5.

61 *Ibid* at para 47.

62 *Ibid* at para 48.

63 *WM Morrison Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339 at para 76 [*WM Morrison (EWCA)*].

64 *WM Morrison*, *supra* note 7 at para 14, citing *WM Morrison (EWCA)*, *ibid* at para 72.

65 *WM Morrison (EWCA)*, *ibid* at para 76.

66 *Ibid* at para 29 [emphasis added].

67 *WM Morrison*, *supra* note 7 at para 47.

68 *Ibid* at para 29, citing *Mohamud*, *supra* note 56 at para 48.

69 *WM Morrison*, *supra* note 7 at para 37, citing *Joel v Morison* (1834) 6 C & P 501 at 503.

by the supervisor of the petrol kiosk to stop the attack,[70] and hence, vicarious liability should not have been imposed.

With respect, it seems that *Mohamud* was wrongly decided and that the UKSC should not wax lyrical about how *Mohamud* can be interpreted in a way that was right.[71]

Putting aside the questionable comments by the UKSC on *Mohamud*, the application of the law to the facts in *WM Morrison* itself was rather uncomplicated. The UKSC emphasised that motive is relevant, and whether Skelton was acting on his employer's business or for purely personal reasons was highly material to the analysis.[72] It was clear that Skelton was not engaged in furthering his employer's business when he committed the data breach, but was instead, pursuing a personal vendetta in response to the disciplinary proceedings conducted against him. His conduct was therefore not so "closely connected" with the employer's business,[73] and WM Morrison should not be held vicariously liable. The mere fact that Skelton's employment (as the company accountant) gave him the opportunity to commit the wrongful act would not be sufficient to warrant the imposition of vicarious liability.[74] This would also be consistent with precedent cases involving wayward employees.[75]

B. *The Position in Singapore*

The second stage, requiring a "close connection" between the tortious conduct and the employee's field of employment, has also been adopted and applied in Singapore by the SGCA in *Skandinaviska Enskilda Banken AB v Asia Pacific Breweries (Singapore)*.[76] However, there are some key differences in how the test functions under Singapore law.

The Singapore Court of Appeal has emphasised that apart from the trite requirement of a "close connection", it will also take into account the twin policy considerations of victim compensation and deterrence.[77] This is unremarkable, in the sense that tort law has always concerned itself with policy goals,[78] but unique in the Singapore context as it seems to afford the Singapore courts a wider margin of discretion in deciding whether to hold an employer vicariously liable for an employee's tort. Some questions may arise from this observation: would the consideration of these policy goals have affected the analysis in *WM Morrison* and led to a different outcome?

---

70 *Mohamud*, *supra* note 56 at para 5.

71 See the unnecessarily convoluted manner in which the UKSC tried to rationalize the decision of *Mohamud*, *supra* note 56 in *WM Morrison*, *supra* note 7 at para 29-30.

72 *WM Morrison*, *ibid* at para 31.

73 *Ibid* at para 47.

74 *Ibid* at para 35.

75 See *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 at 737; *Lister*, *supra* note 12 at paras 81-82.

76 [2011] 3 SLR 540 (CA) at paras 75, 86 [*Skandinaviska*].

77 *Ibid* at paras 75-76, where it was held that "[w]hat the court has to do in each case is to examine all the relevant circumstances—*including policy considerations*—and determine whether it would be fair and just to impose vicarious liability on the employer."

78 See *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR (R) 100 (CA) at para 150.

With regard to the first policy consideration of victim compensation, the court in *Skandinaviska* explained that an innocent victim who suffered at the hands of an employee should ordinarily be compensated by the employer. This is fair and practical as "the employer is usually the person best placed and most able to provide effective compensation to the victim" given its financial capability,[79] and that employers may redistribute the cost of compensation via mechanisms such as insurance.[80] To temper the ambit of this policy consideration, the caveat is that liability will only be attributed to the employer where "the victim of the tort is not at fault for the tort, or at least bears less fault for the tort than the party who is morally responsible".[81]

If this policy goal were to be applied to the facts of *WM Morrison*, it is conceivable that a different conclusion might be reached. The defendant in *WM Morrison* is a prominent public company which owns one of the largest supermarket chains in the United Kingdom.[82] It had the financial means to make good the liability which arose from the data breach, and is better placed to effectively compensate victims of the tort, *ie*, the employees whose data was leaked. This was also not a situation where the victims were at fault for the tort, and hence, the court should weigh in favour of rendering the employer vicariously liable.

On the second policy consideration of deterrence, the goal here is to ensure that employers will be incentivised in taking steps to reduce the incidence of tortious conduct from its employees.[83] This policy rests on the fundamental premise that the employer is "best placed, relative to everybody else, to manage the risks of his business enterprise and prevent wrongdoing from occurring".[84] However, where the tortious conduct in question is "uncontrollable and, therefore, not amenable to deterrence", then no vicarious liability should accrue to the employer, since "deterrence as a justification for imposing vicarious liability loses much of its force".[85] For instance, it is very difficult to deter "spur-of-the-moment torts and intentional torts".[86]

Applying this policy consideration within the context of *WM Morrison*, one might argue that the company could have deterred Skelton by implementing a tighter security system to prevent him from storing confidential company data onto his personal USB device. However, given the intentional nature of the tort and how it was motivated by Skelton's personal vendetta, deterrence is perhaps not as relevant here. It is likely that such tortfeasors would eventually have found some other means to misappropriate the personal data or adopted other means to harm the employees of the company. Thus, the employer should not be held vicariously liable as it may not be practical to deter such conduct.

It therefore seems that there would have been conflicting conclusions based on the twin policy considerations: victim compensation suggesting that vicarious liability should be imposed, but the inefficacy of deterrence suggesting that it should not. In such situations, the strength of the "close connection" between the tortious conduct

---

79 *Skandinaviska*, *supra* note 76 at para 77.
80 *Ibid*.
81 *Ibid* at para 78.
82 *WM Morrison*, *supra* note 7 at para 2.
83 *Skandinaviska, supra* note 76 at para 79.
84 *Ibid* at para 80.
85 *Ibid*.
86 *Ibid*.

and the employee's field of employment would likely operate to break the deadlock. As explained previously, the absence of a "close connection" between Skelton's conduct and his employment means that no vicarious liability should arise, and hence the same result would have been reached by the Singapore courts.

Lastly, it is worth mentioning that the Singapore court has cautioned that "while victim compensation and deterrence are relevant and desirable policy considerations in deciding whether vicarious liability should be imposed, they cannot in themselves be determinative of every case".[87] Policy goals only play a subsidiary role in the overall analysis. Hence, despite the difference in framework that is applied in Singapore and the United Kingdom (where the courts do not consider such policies), the same result is likely to be reached in the majority of cases.

C. *Enterprise Risk Theory—An Emerging Policy Concern*

In recent times, the courts are increasingly aware of the commercial realities in which vicarious liability may be imposed, both in the United Kingdom and Singapore.[88]

Noticeably, in the context of Singapore, there is a heavier emphasis placed on the "enterprise risk" theory,[89] *ie*, "that the person who puts a risky enterprise into the community" and who has to means to minimise the risk should be made liable.[90] As noted in *Ong Han Ling*, the allocation of "enterprise risk" between parties may be considered as an emerging public policy concern.[91] For example, where an insurance company had chosen to adopt minimal control mechanisms in verifying insurance policies which then enhanced the risk of insurance agents perpetuating fraud,[92] then the insurance company must be held vicariously liable when things go awry.

Interestingly, in some circumstances it may well be that the enterprise risk should be borne by the victim instead, especially where the victim is better placed to prevent that risk. This situation is more likely to arise when the victim is a sophisticated commercial entity, rather than a defenceless member of the public.

An example of when the victim is better placed to prevent the tort was borne out on the facts of *Skandinaviska*. In that case, Skandinaviska (the claimant bank), was defrauded by an employee of Asian Pacific Breweries (the defendant company) in handing out credit facilities which were improperly obtained by using the defendant company's name. However, the defendant company was not held vicariously liable for the fraudulent conduct of the employee. The SGCA found that the claimant bank was far from being a vulnerable victim, and had all the means and resources to protect themselves from the risk of fraud.[93] Yet, the bank had failed to take "very

---

87 *Ibid* at para 81.

88 Amy Seow & Alina Chia, "Vicarious Liability and Enterprise Risk in the Gig Economy" (2020) SAL Prac 16 at paras 27-46.

89 David Tan, "Internalising Externalities—An Enterprise Risk Approach to Vicarious Liability in the 21st Century" (2015) 27 SAcLJ 822 at 834.

90 *Skandinaviska*, *supra* note 76 at para 70, citing *Roman Catholic Episcopal Corporation of St George's v John Doe* [2004] 1 SCR 436 at para 20.

91 *Ong Han Ling*, *supra* note 38, at paras 153, 184.

92 *Ibid* at paras 177, 184.

93 *Skandinaviska*, *supra* note 76 at para 92.

elementary precautions" such as proper verification procedures before granting the credit facilities, and had acted carelessly in readily lending the money without due diligence.[94]

Additionally, the court noted that as a commercial bank, the claimant should be held to a higher standard of financial prudence and responsibility with regard to fraud prevention, as compared to trading companies such as Asian Pacific Breweries. The court warned that imposing vicarious liability on the defendant company "may create an unacceptable moral hazard, in that banks may, as a result, be encouraged to take only minimal precautions against fraud" which is unacceptable given the vital role that banks play in Singapore's economy.[95] Banks must act responsibly and not take undue risks with their depositors' funds to ensure public confidence in the banking system.[96] Hence, the risk of fraud was to be borne by the bank, and vicarious liability was not imposed onto Asian Pacific Breweries for its employee's conduct.

As can be discerned from *Skandinaviska*, the key question is which of the two parties—the claimant or the defendant—is better able to take precautions against the tort, and is thus the party which should absorb the enterprise risk. While the enterprise risk theory has likewise been considered by the UKSC,[97] this manner of shifting the risks to the victim because of the victim's high degree of sophistication does not appear to have been considered yet. The issue did not arise in the context of *WM Morrison* given that it involved other helpless employees of the company as the victims, as opposed to a sophisticated financial institution. Nonetheless, should such a similar dispute arise in the United Kingdom subsequently, it is recommended that Singapore's approach should be considered for its pragmatism and commercial sensibility.

V. Conclusion

While there are certain propositions raised in *Barclays* and *WM Morrison* that are perhaps questionable, the piecemeal approach that it took to the law is a welcomed one. The perennial issue with vicarious liability is finding the appropriate balance between compensation for the plaintiff on one hand, and unnecessarily burdening defendant enterprises on the other. Given that vicarious liability is arguably "fault-less",[98] courts will always find it difficult to find firm footing to hold defendants liable. This is precisely why an incremental approach often found in various areas of the common law is ideal for the development of vicarious liability; this is also why the rapid expansion of vicarious liability has caught many off-guard, with much

---

94 *Ibid* at para 94.

95 *Ibid*.

96 *Ibid* at para 93.

97 *Dubai Aluminium*, *supra* note 52 at paras 21-22.

98 *WM Morrison*, *supra* note 7 at para 54, where the court held that "vicarious liability is not based on fault"; *cf Skandinaviska*, *supra* note 76 at para 78, where the court held that "a precondition for the imposition of vicarious liability is that the victim seeking compensation should either be without fault himself, or be less at fault than the blameworthy party and/or the ultimate defendant; otherwise, the policy of victim compensation as a justification for imposing vicarious liability loses much of its moral force".

ink spilt in recent years explaining why the growth of vicarious liability needs to be curbed, both on grounds of principle and policy.[99] Make no mistake, however—we will continue to see the ebb and flow of the scope of vicarious liability, just like the sea changes that this legal concept has undergone.[100] But perhaps, these cases serve as helpful reminders that despite the sea changes, it is possible for the courts to calm the waves.

---

[99] Anthony Gray, *Vicarious Liability: Critique and Reform* (Oxford; Portland, Oregon: Hart Publishing, 2018) at ch 8; Robert Stevens, *Torts and Rights* (Oxford; New York: Oxford University Press, 2007) at ch 11.

[100] A brief historical overview of vicarious liability can be found in Warren Swain, "Vicarious Liability: A Pailful of Slops and Other Hazards" in Kit Barker & Ross Grantham, eds, *Apportionment in Private Law* (Oxford; Portland, Oregon: Hart Publishing, 2019).