

The Vicarious Liability (Apportionment of Damages) Act 2018 (“VLA 2018”): Abandoning strict liability and introducing blameworthiness as a basis for the apportionment of damages

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INTRODUCTION

Vicarious liability has long been considered a necessary but contentious area of law due to the shifting of tortious liability onto otherwise innocent employers.¹ As Lord Pearce highlights, “the doctrine of vicarious liability has not grown from any very clear, logical or legal principles but from social convenience and rough justice.”² The recent Supreme Court decisions of *Cox* and *Mohamud* have clearly emphasised Lord Pearce’s point,³ illustrating how the current law is inadequate in achieving proportionate justice between employer and employee. While there is little dispute over the need for a relationship akin to employment for vicarious liability to be satisfied, the same cannot be said of the close connection test especially after the judgment in *Mohamud*. It now seems that the close connection threshold has been so remarkably lowered that abuse and vagueness is all but certain for the future.⁴ Moreover, following the strict liability doctrine in vicarious liability inevitably prejudices an employer as they by default pay 100% of the damages owed, even when regarding reckless employee torts and the most trivial of connections between the tort and employment as in *Mohamud*. While enterprise liability remains crucial, and justifies an employer bearing the consequences of any harms arising from its enterprise, surely there must be a limit to its application. However, such concerns must also be simultaneously balanced against ensuring that employers remain vicariously liable for the foreseeable and

¹ P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967).

² *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 685.

³ A Bell, ‘Vicarious liability: quasi-employment and lose connection’ (2016) 32 PN 153, P Morgan, ‘Certainty in Vicarious Liability: A Quest for a Chimaera?’ (2016) 75 CLJ 202.

⁴ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC).

reasonable harms resultant of their enterprise. Hence, such criticism of *Mohamud* would suggest that some alterations should be made to damage apportionment, especially when an employee has been grossly negligent.

Thus, this dissertation postulates that the law of vicarious liability as per the status quo fails to adequately achieve fairness, justice and reasonableness due to adherence of the strict liability principle and lack of a system to apportion the contribution to damages between employer and grossly negligent employee equitably. There also seems to be over focus on the theoretical debate when a practical solution is necessary in this inherently fact-dependent area of law. Consequently, it is concluded that legislative reform through the proposed **Vicarious Liability (Apportionment of Damages) Act 2018 ("VLA 2018")** is required to address these deficiencies. Fundamentally, the act abandons the strict liability principle and simultaneously empowers a court to apportion damages awarded to a claimant in accordance to respective blameworthiness between an employer and a grossly negligent employee. The proposed legislation will not seek to supersede the current tests of vicarious liability. Rather, it will provide a judge with a more practical mechanism to deliver justice by apportioning damages fairly, and only after a finding of vicarious liability under the current legal tests of employment and close connection.

In achieving the aims above, this dissertation will firstly outline the state of vicarious liability currently and the historical justifications of the doctrine. It will then assess the impact and controversies surrounding *Cox* and *Mohamud*, initially discussing the shift away from the traditional basis for vicarious liability, then discussing the re-affirmation of the enterprise liability principle, followed by the potential for abuse of the close connection test after *Mohamud*, and lastly, the conflict between policy and fact determinations currently. Next, the dissertation will assert the social, theoretical and practical justifications of the VLA 2018 as the ideal solution to attain fairness. Lastly, an in-depth discussion of the VLA 2018 will be conducted to show how the act might work in practice and a retrospective attempt at re-assessing *Mohamud* under the VLA 2018 will be made as a practical illustration.

Due to various constraints, the focus of this dissertation will be on vicarious liability specific to employee-employer relationships although it is recognised that there is some unsettlement currently with respect to independent contractors.⁵ The research is also based predominantly on a doctrinal method while incorporating some elements of socio-legal analysis in proposing legislative reform.

⁵ J Morgan, 'Vicarious liability for independent contractors?' (2015) 31 PN 235, 251.

I. WHAT IS VICARIOUS LIABILITY?

A. The Traditional Justifications: Enterprise Liability and the Five-Key Policy Reasons

Vicarious liability is predominantly premised on the enterprise liability principle, regarding an employer as the bearer of any associated risks resulting from the undertaking of organisational or business relationships for its own benefit.⁶ As such, in the event of a tort committed as a resultant of such an employee-employer relationship, as in classic examples of an employee causing harm to a claimant while at work, tortious liability can be vicariously shifted away from employee to the employer.⁷

The traditional justifications for the doctrine are rooted in the five-key policy reasons identified by Lord Phillips in *Various Claimants v Catholic Child Welfare Society* (the “Christian Brothers” case):

“There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:

- (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
- (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
- (iii) the employee's activity is likely to be part of the business activity of the employer;
- (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
- (v) the employee will, to a greater or lesser degree, have been under the control of the employer.”⁸

Historically each of these five factors were considered theoretically sacrosanct in legitimizing vicarious liability. However, the recent case of *Cox* has seemingly invalidated the 1st and 5th of these reasons,⁹ consequently solidifying the remaining factors and enterprise liability alone as the core conceptual rationalization for the

⁶ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2005] EWCA Civ 1151; P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967); P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010).

⁷ See *Smith v Stages* [1989] AC 928.

⁸ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 A.C. 1 (SC), [35].

⁹ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20]–[21].

doctrine.¹⁰ The impact of *Cox* and the development of the enterprise liability reasoning will be discussed in greater depth further along the dissertation.

B. The Law Currently

Successfully establishing vicarious liability requires the satisfaction of two tests: Firstly, there must be an appropriately linked relationship of employment or one ‘akin’ to employment between the tortfeasor and defendant.¹¹ Secondly, the tort committed must have been sufficiently close connected to the tortfeasor’s scope of employment/activities assigned to him/her by the defendant.¹²

The first test of employment (the “*employment test*”) was explored in the landmark *Christian Brothers* case, where Lord Phillips famously asserted that “the law of vicarious liability is on the move”,¹³ recognising that an expansion of the law on vicarious liability was necessary considering the modern conception of employment relationships. As highlighted in that case (wherein brothers of a religious organisation had sexually abused children but were not considered employees of the organisation by normal standards), traditional notions of employer-employee relationships can be severely limited in reality, and particularly so in situations where conventional employment contracts are absent. The organisations and businesses of today can be so inter-linked, the outsourcing of services so common, and the way in which workers are utilised so diversified, that only an objective interpretation of the entire working relationship concerned can justifiably advance the law on vicarious liability to suit contemporary requirements.¹⁴ Accordingly, the recent case of *Cox* shows that the employment test has been interpreted on a broad scope.¹⁵

The second test of close connection (the “*close connection test*”) and arguably the more controversial of the two requirements, was established in *Lister*.¹⁶ Before exploring the close connection test in *Lister*, it is worth considering the pre-*Lister* position as defined in *Poland v John Parr & Sons*.¹⁷ The historical consideration was whether the tort fell within the tortfeasor’s scope of employment: It was held that the act of hitting a suspected thief in the protection of your employer’s property,

¹⁰ G Junor, ‘Vicarious Liability - redefined?’ (2016) 24 SLT 125, 128.

¹¹ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 A.C. 1 (SC), [47].

¹² *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

¹³ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC), [19].

¹⁴ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 65.

¹⁵ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC).

¹⁶ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; A Bell, ‘Vicarious liability: quasi-employment and lose connection’ (2016) 32 PN 153.

¹⁷ [1927] 1 KB 236.

even if grounded in the reasonable belief of a crime being committed, was within the scope of the tortfeasor's employment as it was still in the pursuit of his employer's interest. This original position should remain relatively uncontentious as vicarious liability should legitimately arise when the tort committed is clearly within the parameters of the tortfeasor's job, as in this case by trying to stop theft of your employer's property.¹⁸ However, the development of the close connection test in *Lister* does not benefit from the same un-obsured clarity in theoretical justification or suitability of purpose. This is in part due to the unique facts (sexual abuse of children by a boarding house warden), but more crucially, the reasoning behind the test, that an employer should be liable because of the intrinsic risks he creates by providing certain jobs in the first place.

As put forth by Lord Clyde:

“... His position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he committed and the work which he had been employed to do.”¹⁹;

he further commented:

“the risk is one which experience shows is inherent in the nature of the business.”²⁰

Criticism has naturally followed due to the broad scope inherent in applying the close connection test.

1. Major Criticism Pre-Mohamud

Lord Phillips clearly emphasises that the traditional five-key policy justifications are in pursuit of the greater objective of achieving fairness, justice and reasonableness.²¹ While an intrinsically broad objective, this is a logical goal that is uniform across tort law, and is especially relevant for vicarious liability, an area necessarily concerned with an undefinable range of tortious circumstances.²² While requisite to vicarious liability, the inherent broadness of both this broad

¹⁸ *ibid*; P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967) 13.

¹⁹ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215, [50].

²⁰ *ibid* [65].

²¹ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC), [35].

²² P Gilker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 170.

objective and the consequential close connection test to achieve this goal has not been immune from criticism.

The biggest flaw of the close connection test is that it is too simply vague to afford a sufficient level of predictability.²³ While the traditional position would have considered any employee acting on a ‘frolic of his own’ beyond the remit of vicarious liability,²⁴ *Lister* clearly emphasises that this is no longer the case. As appropriately highlighted by Lord Nicholls in *Dubai Aluminium*, the close connection test “affords no guidance on the type or degree of connection... [that is required to justify] ... that the risk of the wrongful act occurring and any loss resulting... should fall on the firm or employer.”²⁵

Thus, the complementary cases of *Cox* and *Mohamud* presented the prime opportunity to evaluate the seeming uncertainties surrounding vicarious liability and also the parameters of applying the tests of employment and close connection.²⁶ By the Supreme Court’s own recognition, the law of vicarious liability has “not yet come to a stop” and these two cases would “take stock of where it has got to so far”.²⁷

II. THE IMPACT OF COX & MOHAMUD: WHERE ARE WE NOW?

A. *Cox* & *Mohamud*; Case Facts

Intended to be read in conjunction, *Cox* deals specifically with the employment test and *Mohamud* an assessment of the close connection test.

In *Cox*, the claimant was the manager of food catering at a prison in Swansea.²⁸ She supervised the overall operation of the kitchen and ensured that meals were provided for the inmates. She was further in charge of around 20 prisoners who assisted her in cooking, cleaning and performing other relevant tasks. By law, the prison was to ensure rehabilitation of the prisoners by assigning them to do “useful work”, including assisting in the kitchen.²⁹ Although not anywhere near minimum wage, the prisoners were also paid approximately 30 pence an hour. In 2007, the claimant was injured while on her job in the kitchen as a prisoner negligently tripped and dropped a heavy sack of rice on her back. The claimant sued on the grounds that the prison was vicariously liable for the negligence of the

²³ D Ryan, “‘Close connection’ and ‘akin to employment’: perspectives on 50 years of radical developments in vicarious liability” (2016) 56 IJ 239; A Bell, ‘Vicarious liability: quasi-employment and loose connection’ (2016) 32 PN 153.

²⁴ *Joel v Morrison* (1834) 6 Carrington and Payne 501 172 ER 1338.

²⁵ *Dubai Aluminium Co Ltd v Salaam* and Others [2002] UKHL, [2003] 2 AC 366, [25].

²⁶ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC); J Plunkett, ‘Taking Stock of Vicarious Liability’ (2016) 132 LQR 556.

²⁷ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [1].

²⁸ *ibid.*

²⁹ Rule 31(1) Prison Rules 1999 (SI 1999/728).

prisoner in the performance of the tasks assigned to him. The Supreme Court held the prison to be vicariously liable in that instance, finding a relationship akin to employment.³⁰

In *Mohamud*, the claim was brought forth on behalf of Mr Mohamud by his executor of estate due to Mr Mohamud's death prior to the appeal, of reasons unconnected to the claim.³¹ In March 2008, Mr Mohamud visited a Morrisons petrol station and asked the tortfeasor, who was the station attendant, if he could print photos off a memory stick, a service which Morrisons did not provide. The tortfeasor denied the request and replied aggressively with the words "We don't do such shit", eventually ordering that the claimant leave the premises with "foul, racist and threatening language".³² As the claimant left for his car, the tortfeasor followed him and eventually violently assaulted the claimant. In the midst of this physical altercation, the tortfeasor disobeyed direct instructions from his manager, who had come onto the scene to try and stop the assault. In similar fashion to *Cox*, Morrisons were found vicariously liable due to the presence of a clear employment relationship and because the physical assault was sufficiently close connected to the tortfeasor's employment and scope of activities.³³

B. The Judgements

1. Cox v Ministry of Justice

The key issue in *Cox* was answering the question of whether there was a sufficiently close relationship between the prison and the prisoner equating to a relationship akin to employment, thereby justifying the imposition of vicarious liability.³⁴ A fundamental consideration was the context in which the prisoners were conducting their work as unlike traditional employment relationships where the parties voluntarily engage in the work concerned, the prison was compelled by statute to put the prisoners to "useful work".³⁵ While this absence of voluntariness was the primary justification for the trial judge in ruling against the finding of vicarious liability, the Court of Appeal overturned the decision, which was subsequently affirmed by the Supreme Court.³⁶

Referring back to the *Christian Brothers* five-key policy reasons, the Supreme Court unanimously found that it would be fair, just and reasonable to hold the

³⁰ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC); *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC).

³¹ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

³² *ibid* [5].

³³ *ibid*.

³⁴ D Brodie, 'Vicarious liability: the net tightens' (2016) 129 RP 1.

³⁵ Rule 31(1) Prison Rules 1999 (SI 1999/728).

³⁶ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556.

prison vicariously liable as there was a relationship akin to employment.³⁷ However, Lord Reed further emphasised that a re-evaluation of the five-key policy reasons was necessary as not all of them remained applicable.³⁸ Marking a significant shift away from the historical justifications of vicarious liability, Lord Reed was quick to dismiss the first (employer's deeper pockets and likelihood of insurance) and fifth (employer's degree of control) factors as having any importance in answering the employment test.³⁹ There was little legal justification for the first factor at the onset and the evolution of working circumstances and what constituted employment in modern times rendered the fifth factor of little significance.

The remaining three "inter-related" factors formed the crux of the court's decision in *Cox*, and cemented the 'integral part of business' test first established in *Viasystems* by Lord Rix as the principal approach to finding a relationship akin to employment.⁴⁰ As a kitchen staff, the prisoner performed his job in accordance to instructions given to him, he assisted the prison to further one of its fundamental objectives of providing food, and along with that job scope came associated risks of injury. It did not matter that the prison was bound by statute to use prisoners for work or that there was no objective of profit.⁴¹ Borne out of public interest, the prison's primary objective is to rehabilitate and provide a social service, to which the prisoner's work was of "direct and immediate benefit to the prison service itself".⁴² A combination of these reasons in accordance with the 3 remaining factors, led to the finding of a relationship akin to employment as the prisoner was in fact an integral part of the prison's activities.

2. *Mohamud v WM Morrison*

In *Mohamud*, the court had to determine exactly what constituted a close connection between the tort and the tortfeasor's scope of employment to justify imposing vicarious liability. Although the claim was dismissed by both the trial judge and Court of Appeal, Lord Toulson's leading judgment at the Supreme Court eventually held that Morrisons was indeed vicariously liable, to which the other judges unanimously agreed.⁴³ In reaching that decision and recognising the need for further clarity in the law, the courts embarked on an extensive review of the historical development of vicarious liability as a whole.⁴⁴ The *Lister* close

³⁷ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC), [35].

³⁸ P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202.

³⁹ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20]–[21].

⁴⁰ ibid, [23]; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2005] EWCA 1151 537.

⁴¹ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [32].

⁴² ibid [34].

⁴³ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

⁴⁴ ibid [10]–[43].

connection test was eventually confirmed as the leading law, albeit the fact that the issue was explored only very briefly in relation to the facts.⁴⁵ The close connection test consists of two key questions: Firstly, what does the employee's field of activities concern or "in everyday language, what was the nature of his job." The court further emphasised that the first question was to be considered in a broad scope, due to the wide-ranging circumstances through which vicarious liability might arise.⁴⁶ Secondly, was there enough of a connection between his job and the wrongful conduct to conclude that it is fair, just and reasonable to hold an employer vicariously liable?

As Plunkett appropriately highlights, "after 46 paragraphs of background, the court then spent only one paragraph explaining why they were satisfied that it was 'just' to impose vicarious liability on the defendant."⁴⁷ After determining the nature of the tortfeasor's job, Lord Toulson seemed to advance 3 primary reasons that there was consequently a close connection between the tort and that job scope.⁴⁸ Firstly, the tortfeasor's job was focused on dealing with customers, and although it was conducted in an unacceptable manner, the interaction still fell within his field of activities. Secondly, there was an "unbroken sequence of events" from the point of initial contact between the claimant and tortfeasor to the eventual assault. The court did not accept that the tortfeasor had "metaphorically taken off his uniform" when he left his position behind the kiosk.⁴⁹ Lastly, although a "gross abuse of his position", as evidenced by his orders for the claimant to leave the property and never return, his actions still constituted a fundamental assertion of his employer's business.⁵⁰ Interestingly, the Supreme Court seemed to ignore the fact that the tortfeasor's manager expressly ordered him to stop assaulting the claimant. Hence, a few fundamental questions should naturally arise: Should greater recognition be made of an employer's attempts to mitigate the risk of harm? This could involve efforts either before the tort such as health and safety training or as in this case, a manager's interference during the tort to prevent furtherance of harm. Furthermore, why didn't the manager's attempt to disrupt the assault be considered an intervening act breaking the causal chain of the tortfeasor exerting his employer's authority? These issues will be considered further along in the dissertation.

In light of this controversial decision, it is crucial to underpin the guiding principles that led the Supreme Court to rule as it did. It would seem that the Supreme Court had two fundamental and inter-connected objectives which resulted in the affirmation of the close connection test per *Lister*.⁵¹ Firstly, there

⁴⁵ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

⁴⁶ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [44]–[46].

⁴⁷ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556, 559.

⁴⁸ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [47].

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

was a need to consolidate and find stability in an area of law often criticised as ambiguous and contradictory.⁵² As Bell most appropriately suggests, it is only the nature of working relationships that have changed over time and not the necessary connection between the tort and the relationship concerned.⁵³ This corresponds with the judgment in *Mohamud*. The historical review of vicarious liability led the courts to conclude that the close connection test was developed not due to a re-evaluation of the changing social circumstances under which an employer should be held liable, but rather, the need to develop a “fair and more workable test” to achieve the same objectives.⁵⁴ Secondly, it was a recognition that judicial assessment of vicarious liability scenarios necessarily requires a relative broadness guided only by general principles. This is aptly summarised by Lord Dyson in his concurring judgment in *Mohamud*:

“It is true that the test is imprecise. But this is an area of the law in which, as Lord Nicholls said, **imprecision is inevitable**. To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera. Many aspects of the law of torts are inherently imprecise. For example, the imprecise concepts of fairness, justice and reasonableness are central to the law of negligence ... **the court has to make an evaluative judgment in each case having regard to all the circumstances and having regard to the assistance provided by previous decisions on the facts of other cases.**”⁵⁵

Therefore, it seems that the approach in *Mohamud* was one of practical necessity more than any other legal or theoretical justification. A test that is too strictly defined would only restrict a court’s assessment of each case on its own individual merits, ultimately undermining the judicial capacity required to reach decisions rooted in fairness, justice and reasonableness.

When read in conjunction, *Cox* and *Mohamud* have provided some level of clarity over the law of vicarious liability by generally reaffirming the employment⁵⁶ and close connection⁵⁷ tests as the leading law. Yet, the overall impact of the two decisions are arguably much bigger than a mere reaffirmation of the status quo, particularly when considering the unique facts and judicial reasoning behind the

⁵² P Morgan, ‘Certainty in Vicarious Liability: A Quest for a Chimaera?’ (2016) 75 CLJ 202, 205.

⁵³ A Bell, ‘Vicarious liability: quasi-employment and lose connection’ (2016) 32 PN 153, 156.

⁵⁴ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [56].

⁵⁵ *ibid* [54].

⁵⁶ *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC).

⁵⁷ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

decisions of both cases. The following section will be an exploration of where the law currently stands and the potential consequences that might follow.

C. Consequences of Cox and Mohamud: Assessing the Law Currently

1. Cox v Ministry of Justice

At the onset, the *Cox* judgment seems to be relatively uncontentious although it is a clear emphasis of how modern employment relationships must be interpreted pragmatically. The justifications behind vicarious liability also had to be re-clarified in recognition of changing modern employment circumstances.

(a) *A pragmatic response to modern employment:* On a practical consideration, it is immediately clear that the Supreme Court adopted a functional view of defining relationships of employment. As Bell pertinently highlights, with the exponential rise of start-up companies and non-conventional business structures (he uses Uber as an example), “the judgment is an admirably explicit and pragmatic response to a world where employment relationships are increasingly complex and variable.”⁵⁸ Arguably, the conclusion by the courts should be deemed a logical one, considering the ever expanding nature of businesses and the limitless ways in which commercial operations can be conducted.⁵⁹ Accordingly, there can be no strict definition of a relationship akin to employment because the concept of employment itself is too uncertain and varied.⁶⁰ Thus, it is argued that the broad scope of the ‘integral part of business’ test is the pragmatic approach inherently required when judges themselves are unable to predict what exactly constitutes an employment relationship until they assess each case on its individual merits and specific facts. Any strictly delimited scope of the test would only undermine the flexibility required of the law to assess the invariably wide range of employment circumstances that vicarious liability is concerned with.

2. Shifting Traditional Policy Justifications and Re-affirming Enterprise Liability

On a theoretical basis, *Cox* is significant for two primary and inter-linked reasons. Firstly, it was a disregard for certain policy justifications which were traditionally considered fundamental to vicarious liability. Secondly, the re-assessment of these policy justifications solidify the enterprise liability reason alone as the basis for holding organisations vicariously liable. *Cox* clearly reshuffles the 5-key policy reasons outlined in *Christian Brothers*, which were historically

⁵⁸ A Bell, 'Vicarious liability: quasi-employment and lose connection' (2016) 32 PN 153, 155.

⁵⁹ B Hepple & G Williams, *Foundations of the Law of Tort* (2nd edn, Butterworths 1984) 134.

⁶⁰ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 150.

regarded as pivotal to justifying vicarious liability.⁶¹ As noted previously, vicarious liability, unlike many other areas of law, is necessary in society as employers must compensate claimants for harm caused, but simultaneously controversial as otherwise faultless employers have to bear the liabilities arising out of relationships akin to employment.⁶² Therefore, the need to find a system rooted in principled doctrine has always been of the highest concern among the judiciary and academics alike.⁶³ While these theoretical justifications were originally found in Lord Phillip's five-key policy reasons pre-*Cox*, Lord Reed highlighted the need for these justifications to adapt to meet modern standards of social justice.⁶⁴ Of the two reasons dismissed, it seems clear that the first reason of the employer's deeper pockets and likelihood of insurance is no longer of importance. However, while Lord Reed was swift to disregard the second reason as unreflective of many modern employment relationships, the issue of an employer's degree of control could still be an important consideration, although not an independent factor on its own.⁶⁵

The first factor's lack of principled justification was asserted most appropriately:

“The mere possession of wealth is not in itself any ground for imposing liability. As for insurance, employers insure themselves because they are liable: they are not liable because they have insured themselves.”⁶⁶

As Cane highlights, the assumption that employers have the deepest pockets has always been a dangerous and baseless one as even large corporations can be crippled severely by vicarious liability claims,⁶⁷ let alone the average small or medium-sized employer that does not have access to a reserve of funds for litigation purposes. Moreover, this traditional justification can potentially be considered an impairment of the fundamental rules of law. Lord Bingham's famous summary of the rule of law hailed equality before the law as a pinnacle of any respectable legal system.⁶⁸ Yet, the deep pockets argument undermines this exactly because when explained in its simplest terms, it reasons for the imposition of liability not on a basis of wrongdoing or responsibility for creating risks in your

⁶¹ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20]–[21]; *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC), [35].

⁶² P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967); *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC).

⁶³ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 146.

⁶⁴ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20] – [21].

⁶⁵ *ibid.*

⁶⁶ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20].

⁶⁷ P Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013) 230.

⁶⁸ Lord Bingham, ‘The Rule of Law’ (2007) 66 CLJ 67.

business but simply because the wrongdoer can afford to be liable.⁶⁹ When considering an employer's availability of insurance, Lord Reed's reasoning is not entirely groundbreaking. Early academics such as Morris had already pointed out the circularity of the argument when the law requires many companies to buy insurance in the first place.⁷⁰ Atiyah further comments that "[t]he employer in fact insures against risks within the general scope of his business because that is the limit of his legal liability. If he were placed under wider liabilities by the law he would doubtless insure against those too."⁷¹ Ultimately, *Cox* was a reassertion of equality saying no organisation should be held to a different standard simply because it has a greater access to wealth, for that would be a flagrant subversion of justice. Expectantly, the insurance argument also fails as a coherent justification for vicarious liability.

The second primary effect of *Cox* was to reinforce the enterprise liability principle as the key theoretical justification for vicarious liability.⁷² Practically, this was achieved by reaffirmation of the remaining three policy reasons through the 'integral part of business' test initially established by Lord Rix in *Viasystems*.⁷³ Unlike the deep pockets or insurance arguments, it is posited that the enterprise liability argument is more doctrinally sound because it is premised fairly on a company being liable for the risks of the activities it chooses to pursue.⁷⁴ These origins behind justifying vicarious liability has long been discussed in the courts and is best illustrated in the contemporary rationalisation by Justice McLachlan in *Bazley v Curry*:

"The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm."⁷⁵

There is little need to challenge this long-established principle as the enterprise liability argument is firmly rooted in equity. Where an employer uses an employee

⁶⁹ P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967) 22.

⁷⁰ C Morris, 'Enterprise Liability and the Actuarial Process – The Insignificance of Foresight' (1961)

70 YLJ 554.

⁷¹ P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967) 27.

⁷² G Junor, 'Vicarious Liability - redefined?' (2016) 24 Scots Law Times 125, 128.

⁷³ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20] – [21]; D Brodie, 'Vicarious liability: the net tightens' (2016) 129 RP 1; *Viasystems* (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others [2005] EWCA 1151.

⁷⁴ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556, 561.

⁷⁵ *Bazley v Curry* [1999] 2 SCR 534, [31].

to advance its interests, it simultaneously introduces risks inherent to those interests, and as the employer stands to benefit, it is only fair that should those risks materialise, the employer also bears those repercussions.⁷⁶

However, upon deeper consideration, while it is true that the fifth factor of an employer's degree of control is "unlikely to be of independent significance",⁷⁷ it would be unwise to completely ignore the significance of control even while recognising its lack of uniform applicability across all employment situations. An employer's degree of control still remains a question when considering the remaining three inter-related factors and applying the 'integral part of business' test. For example, a factory engineer building car engines for Toyota would have to follow a specific blueprint of how to build those engines and would not be allowed to deviate from that for various health and safety reasons. Under such a clear exercise of control and direction, it is almost immediately apparent that the 'integral part of business' test would be satisfied. As Morgan further argues, control is also a clear differentiating factor between an employee and an independent contractor.⁷⁸ An employer has a very strong and direct influence (albeit usually not complete control) over how employees should carry out their work even if they choose not to exercise such a right, while there is no such control over independent contractors unless specifically contained in a contract. Therefore, it is likely that the practical effect is that an employer's degree of control would be subsumed as a consideration within the remaining three "inter-related" factors under the 'integral part of business' test as opposed to losing all significance.⁷⁹

(a) *Should the name of an organisation's objectives matter?*: The Supreme Court also considered the fundamental purposes of a jail and ruled that it was precisely because of the social objectives inherent to such an operation, that it mattered not that there was no commercial benefit attained through the tortfeasor's work.⁸⁰ Plunkett questions the practical justification behind such reasoning, highlighting that while for-profit organisations receive monetary gains and therefore can compensate for any losses with those profits, non-profit organisations, especially those bound by statute or motivated by pure benevolence could be marginalised.⁸¹ Yet, while the ruling might be considered harsh, there is reason to dispute Plunkett's analysis. It could conversely be argued that the courts were bound to rule in this pragmatic way as any other outcome could have been an even more

⁷⁶ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 238.

⁷⁷ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [21].

⁷⁸ P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202.

⁷⁹ Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others [2005] EWCA 1151 537; A Bell, 'Vicarious liability: quasi-employment and lose connection' (2016) 32 PN 153.

⁸⁰ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [32].

⁸¹ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556, 560.

perverse obstruction to justice. Regardless of an organisation's intentions, and even if pursuing the most noble of objectives, justice would demand that there remains a level of responsibility borne by the organisation if harm is caused by its activities. Furthermore, to expect judges to determine the liability of organisations based on assessments of the social 'goodness' of their objectives is an intrinsically subjective determination and could set unwarranted complications. For example, it would be near impossible to assess whether a prison that rehabilitates prisoners as in *Cox* or a billion-dollar for-profit medical company selling cancer-curing drugs delivers more social good. While for-profit companies would indeed have greater access to financial resources, adequate victim compensation remains a fundamental tenet of tort law,⁸² and to jeopardise that by separating organisations according to their motives, whether for-profit or not, would be indefensible. Moreover, to assess various levels of social 'goodness' would be to set up superficial benchmarks in vicarious liability, and undeniably open up the law to unprecedented vagueness and inconsistency.

3. *Mohamud v WM Morrison*

Unlike *Cox*, *Mohamud* is arguably much more controversial considering the unique facts and debatable justifications of the Supreme Court in finding vicarious liability.⁸³ While it does provide some clarity by confirming the *Lister* 'close connection' test as the leading law,⁸⁴ this dissertation proposes that are two main detriments of the judgment. Firstly, *Mohamud* might have set a dangerous precedent by unjustifiably lowering the benchmark of the close connection test into one that is too easily satisfied. It now seems that even a trivial connection between the tort and an employee's job scope might be enough to satisfy that test. Next, it highlights how despite all its criticism, there seems to be no other alternative to the close connection test when considering the unavoidable fact dependency inherent in vicarious liability and the necessity of a broadly applicable test. This in turn illustrates the theoretical difficulties in reconciling how the status quo relies unsatisfactorily on a fact dependant test as the sole means to achieve the broad policy objectives of fairness, justice and reasonableness.

4. Opening the Floodgates: Casual Rather Than Close Connection?

The biggest criticism of *Mohamud* is undoubtedly the 'opening of the floodgates' argument, particularly when considering the outlandish and reckless behaviour of the tortfeasor. As discussed before, the courts have made it clear

⁸² P Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013) 406.

⁸³ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC); D Brodie, 'Vicarious liability: the net tightens' (2016) 129 RP 1.

⁸⁴ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

that an element of broadness is needed due to the infinite circumstances that an employer might be held vicariously liable.⁸⁵ However, the decision is troubling because of the broad interpretation of the tortfeasor's field of activities and further that there was a finding of an "unbroken sequence of events" between the first interaction and the assault.⁸⁶ The flaw in this unnecessarily broad interpretation is underlined immediately by Bell, who argues that if an employee's natural field of activities is to promote his employer's business, surely his individual act of racism cannot fall within such a scope.⁸⁷ The words used by the tortfeasor were firmly rooted in a personal endeavour to warn the claimant to stay away from the tortfeasor himself as opposed to the employer's premises, "especially given the contemplated motive of personal racism."⁸⁸ If a motive of racism isn't enough to be considered outside the scope of an employee's field of activities, what is? Obviously, no reasonable employer would promote racist business practices, which makes it hard to reconcile when the courts have considered the racism induced assault to be within the tortfeasor's field of activities. Moreover, the court opined that the tortfeasor was still acting in advancement of his employer's interest during the assault.⁸⁹ This reasoning is questionable because the manager's attempted intervention should surely have constituted a direct order against the assault, a very clear indication arising from a person of authority that it was not in the employer's interest to assault a customer. A manager's instruction is a clear manifestation of an employer's interests and yet, rather unsatisfactorily, this seemed to be of little importance to the Supreme Court.

Secondly, the fact that the court considered the "unbroken sequence of events" factor as fundamental to the case in justifying the imposition of vicarious liability is puzzling.⁹⁰ Morgan discusses this dilemma and posits that the close connection test might have been replaced by the "causal connection" test, where the focus would now be on whether there was an unbroken chain of causation between the tortfeasor's job and the tort committed.⁹¹ Morgan's proposition seems a logical deduction especially when considering the potentially detrimental effect of *Mohamud* on future cases. As an illustration, a kindergarten teacher's job involves maintaining discipline in class to teach effectively. If the teacher decided that the best way to discipline any naughty child was to lock them in a cupboard for three hours, this might now lead to vicarious liability because disciplining naughty children is a natural expectation of the role. Giving a child a ten-minute time-out and locking them up in a cupboard are both ways of disciplining, and yet, one is clearly much more unacceptable than the other. There is no doubt that the

⁸⁵ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [54].

⁸⁶ *ibid* [47].

⁸⁷ A Bell, 'Vicarious liability: quasi-employment and lose connection' (2016) 32 PN 153, 156.

⁸⁸ *ibid*.

⁸⁹ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [47].

⁹⁰ *ibid*.

⁹¹ P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202, 205.

tortfeasor's actions in *Mohamud* were considered reckless but there now seems to be no limit to applying the test even when concerned with employee conduct of the most remote and unacceptable manner.⁹² The Supreme Court seems to have set a dangerous precedent for a loose definition of close connection, or perhaps more appropriately named after *Mohamud*, the "causal connection" test.⁹³

D. Harmonising Fact-Dependency, Broadness of Scope and Policy in the Close Connection Test

Running simultaneous to the '*opening of the floodgates*' criticism above is another issue of practical concern, where the close connection test seems to be too fact-dependent and fluctuating to provide clarity in the law of vicarious liability. Referring again to *Mohamud*, if the facts were tweaked slightly, and the victim never enquired about printing photos but was merely walking across the forecourt of the station before being confronted and physically assaulted by the tortfeasor, surely there would be no finding of vicarious liability.⁹⁴ The point emphasised by the Supreme Court was that there was a query of service in printing photos, but what if he merely wanted to use the washroom or ask for directions? These questions could easily fall under the broad interpretation of an employee's "field of activities" in dealing with customer relations.⁹⁵ It is troubling that a minor change in the facts - like asking a quick question - could turn the law so easily and manifest vicarious liability. Yet, similarly to the wide range of circumstances that can result in finding a relationship akin to employment, historical case law is an obvious indication that fact dependency is simply inherent in vicarious liability and indeed across the law of tort.⁹⁶ It is in precise recognition of this paradigm that judges require the broad close connection test.⁹⁷ Hence, in reconciling the problems between the inherent fact-dependency and the need for a broad test, it is asserted that the current law is overly focused on the debates surrounding legal theory and justification behind the close connection test when in reality, there is no other feasible mechanism. A whole range of torts can be committed by employees, from assaults to sexual abuse, and only a widely applicable test can deal with the infinite circumstances that might give rise to vicarious liability.⁹⁸ It seems

⁹² *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [47]; P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202, 205.

⁹³ *ibid*.

⁹⁴ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

⁹⁵ *ibid* [47].

⁹⁶ *Rand v Craig* [1919] 1 Ch 1; *Makanjuola v Commissioner of Police of the Metropolis* (1990) 2 Admin LR 214; *Keppe Bus Co v Sa'ad bid Ahmad* [1974] 1 WLR 1082.

⁹⁷ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 169.

⁹⁸ E-A Gumbel, 'Developments in vicarious liability: a practitioner's perspective' (2015) 31 PN 218; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC); *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

contrary to logical deduction to delimit the close connection test strictly when broadness of scope is intrinsically required.

Furthermore, despite vicarious liability being premised on protecting the wide policy objectives of fairness, justice and reasonableness, the only assessment of the link between the tort and job scope currently is the close connection test, which is purely fact dependant. Consequently, this raises theoretical concerns as to whether policy objectives can be best achieved through a fact dependant test as the sole approach. Witting best demonstrates these concerns by contrasting the different objectives of an evaluation of factual circumstances against policy justifications.⁹⁹ He uses the 3-stage duty of care test as an illustration, where proximity and foreseeability are factual considerations, while the last element of fairness, justice and reasonableness is instinctively policy-driven. It would seem that an evaluation or test of fact answers the question as to whether the party concerned should be held liable under the relevant legal test, while policy justifications consider the consequences of the decision made on future cases and society as a whole.¹⁰⁰ Drawing on the discussion previously, and adopting the lens of Witting's assessment, *Mohamud* shows how the law currently is uncomfortably placed as while there are strong justifications for holding employers vicariously liable to achieve the policy objectives of fairness, justice and reasonableness, those same goals can be undermined by the intrinsic fact dependency of the close connection test. Naturally, this position is further complicated by the seemingly low threshold of satisfying the close connection test currently.¹⁰¹ Yet, it is also clear that this position remains unavoidable as tort law in itself is concerned with the determination of facts to justify liability, and the range of possible torts committed can be so infinitely diverse.¹⁰² Consequently, the solution should lean away from pure dependency on theoretical considerations as has historically been the case, and rather remedied alongside a practical approach in the assortment of damages. This dissertation contends that this quandary can only be resolved by statutory intervention in creating a more wholesome and pragmatic approach to the issues at hand. The fact dependency issue of the close connection test need not necessarily be considered troublesome if there is an appropriate system to embrace and utilise each case's unique facts and merits to reach fair, just and reasonable outcomes. The issue of harmonising fact determinations and policy considerations will also be discussed in more depth further on in chapter 5.

Thus, the next section seeks to propose and justify the VLA 2018 as the solution required because it is a functional approach to solving the inherently practical problems currently. In harmonizing the theoretical and ideological controversies within vicarious liability and to pursue true fairness, justice and

⁹⁹ C Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33.

¹⁰⁰ *ibid* [36].

¹⁰¹ P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202.

¹⁰² C Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33; P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 65.

reasonableness, the VLA 2018 firstly proposes abandoning the strict liability doctrine and consequently introducing damage apportionment between tortfeasor and employer in accordance to respective blameworthiness.

III. THE VICARIOUS LIABILITY (APPORTIONMENT OF DAMAGES) ACT 2018

The cases of *Cox* and *Mohamud* have reaffirmed the Supreme Court's belief that the law of vicarious liability intrinsically requires a broad approach, for any strictly defined test would only undermine the court's ability to reach decisions that are rooted in fairness, justice and reasonableness.¹⁰³ As Lord Dyson emphasises, "the attraction of the close connection test is that it is firmly rooted in justice. It asks whether the employee's tort is so closely connected with his employment as to make it just to hold the employer liable."¹⁰⁴ There is little reason to disagree with the theoretical justification behind supporting a broad legal test, as the law of vicarious liability is precisely concerned with analysing an undefinable range of possible torts in an equally wide span of employment scenarios.¹⁰⁵ Yet, a competent analysis of vicarious liability requires acknowledgement that exactly because the law of vicarious liability is inherently broad, it is not just the theoretical sphere of things that the law should consider, but its corresponding practical effect on employers having to pay damages as well.¹⁰⁶ To isolate the assessment of vicarious liability to its theoretical considerations is simply too pedantic an approach, especially considering the fact that it is currently a strict liability offence.

As it now stands, especially in scenarios such as *Mohamud*, where there is little doubt that the employee tortfeasor has acted recklessly, employers still have to pay the full cost of damages as long as the close connection test is established.¹⁰⁷ However, fairness, justice and reasonableness must surely apply across the spectrum to all parties involved, including employers.¹⁰⁸ It is right that claimants must be allowed undeterred access to reasonable compensation for loss and employers should be held liable for creating risks in conducting their business.¹⁰⁹ However, does this mean that any employee, regardless of their recklessness, should be protected from compensating the claimant personally just because of a close connection between the tort committed and the scope of their

¹⁰³ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC).

¹⁰⁴ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [53].

¹⁰⁵ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 170.

¹⁰⁶ P Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013) 406.

¹⁰⁷ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

¹⁰⁸ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [53].

¹⁰⁹ J Bell, 'The Basis of Vicarious Liability' (2013) 72 CLJ 17.

employment?¹¹⁰ An assessment premised on delivering ‘justice’ should lead to the reasonable deduction that the answer to that question is no.¹¹¹

Hence, this dissertation asserts that there is little justification for continuing to regard vicarious liability as a strict liability offence because the current ‘all or nothing’ approach regarding damages undermines fairness, justice and reasonableness. It is usually not an accurate reflection of the employer’s and employee’s respective contributions to the eventual harm. If the fundamental objective is indeed the attainment of justice, the strict liability doctrine should be abandoned, and reform of the law made to allow the courts to apportion damages in accordance with the relative blameworthiness of the employer and employee in vicarious liability scenarios. True justice would demand that each party bear the consequences of its own actions, which is currently not the case. Moreover, a move toward blameworthiness as a basis for damage apportionment will not be exploring completely unchartered territory as the development of contributory negligence law already proves that judges are capable of creating systems of damage apportionment.¹¹²

It is proposed that the new system of apportionment be tabled under a new bill: **The Vicarious Liability (Apportionment of Damages) Act 2018**. Its primary purpose would be to give the courts the scope to apportion damages in relation to the blameworthiness of both the employer and grossly negligent employee, in similar fashion to the effect of the defence of contributory negligence. However, unlike contributory negligence, the VLA 2018 would not seek to minimise a claimant’s entitlement to compensation, merely asking the court to determine in what proportion should the payment of damages be shared between the employer and grossly negligent employee. Fundamentally, the VLA 2018 would aim to be a practical reinforcement of social justice by ensuring that damages reflect proportionately each party’s contribution to the harm, thereby supporting the overarching principle of securing fairness, justice and reasonableness in each vicarious liability judgment.¹¹³ Consequently, it should reconcile the inherent ideological difficulties currently afflicting vicarious liability through adopting a further practical assessment of the issue rather than relying on a purely theoretical approach.¹¹⁴ By giving judges the ability to deal with each case based on its own merits and apportioning damages in proportion to each party’s blameworthiness, academic criticism of contentious decisions such as the one in *Mohamud* could be avoided as the employee and employer would only be liable for

¹¹⁰ J Fulbrook, ‘Case Comment - Mohamud v WM Morrison Supermarkets Plc: personal injury – torts – employment assault’ (2016) 2 Journal of Personal Injury Law C69.

¹¹¹ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [53].

¹¹² Law Reform (Contributory Negligence) Act 1945.

¹¹³ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [54].

¹¹⁴ J Plunkett, ‘Taking Stock of Vicarious Liability’ (2016) 132 LQR 556; P Morgan, ‘Certainty in Vicarious Liability: A Quest for a Chimaera?’ (2016) 75 CLJ 202.

their share of the fault.¹¹⁵ Lastly, apart from abandoning the strict liability doctrine, implementing the VLA 2018 would not require demolishing existing vicarious liability principles. The employment and close connection tests would still have to be satisfied as an employer must be deemed vicariously liable in the first place for the VLA 2018 to be applicable.¹¹⁶ The VLA 2018 would only be concerned with apportioning damages in accordance to the employee tortfeasor and employer's relative blameworthiness in causing harm to the claimant.

A. VLA 2018: Social, Theoretical and Practical Justifications

The following sections will explore on a broad scope the social, theoretical and practical justifications behind the VLA 2018.

1. Abandoning Strict Liability to Achieve Fairness, Justice and Reasonableness

Historically, the doctrine of strict liability has been a central tenet of vicarious liability because the orthodox view is that any tortious conduct of an employee in the scope of his employment is regarded as an extension of the employer's interests.¹¹⁷ Consequently, the employee's fault is imputed on the employer as a matter of law, it matters not whether the employer directly contributed to the harm.¹¹⁸ However, the use of imputation as a means of attributing fault has recently been irrevocably demolished by the Supreme Court, having been declared jointly by Baroness Hale and Lord Toulson to be a "vestige of a previous age" and "unsound in principle."¹¹⁹ There is little reason why the application of vicarious liability should not follow suit especially when trivial links now seem to be enough to satisfy the close connection test.¹²⁰ Furthermore, strict liability has long been argued as being the most efficient solution to ensuring that a claimant's right to compensation is protected.¹²¹ This argument remains rooted in the classic 'deep pockets' and 'insurance' principles, where the greater wealth of the employer and higher likelihood of access to insurance means that it is less likely that the claimant would be denied fair compensation.¹²² However, as assessed previously, these traditional principles have minimal relevance in modern conceptions of vicarious

¹¹⁵ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

¹¹⁶ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

¹¹⁷ P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967) 13.

¹¹⁸ J Fleming, *An Introduction to the Law of Torts* (2nd edn, Oxford University Press 1985) 163.

¹¹⁹ *O (A Child) v Rhodes* [2015] UKSC 32, [2016] AC 219 (SC), [81].

¹²⁰ A Bell, 'Vicarious liability: quasi-employment and lose connection' (2016) 32 PN 153, P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202.

¹²¹ P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967) 26.

¹²² *ibid* [7].

liability, having been irretrievably dismissed by Lord Reed in *Cox*.¹²³ To hold an employer liable simply because it has sufficient resources and can afford to be liable is circular reasoning at best.¹²⁴ There needs to be a more succinct legal basis for justifying vicarious liability, which *Cox* highlights lies in the enterprise liability argument and not just because it is more convenient to hold the richer party liable because it can afford to pay damages.¹²⁵ Moreover, it is clear that most employers do not have ‘deep pockets’ in the first place.¹²⁶

Giliker further highlights that despite vicarious liability’s uneasy contradictions with ordinary principles of tort law, judges and academics alike have struggled to find its principal purpose apart from the fact that it provides the most pragmatic method of acquiring compensation for loss.¹²⁷ Giliker’s assessment is an acute one as to the availability of an accessible right of recourse must remain a fundamental objective in tort law.¹²⁸ The VLA 2018 would actually preserve this practical approach to compensation as there would be no impact to a claimant’s right to compensatory damages. No claimant should be deprived compensation when they deserve it. Yet, surely any pragmatic solution in law must also be rooted in fairness, justice and equality. If it is fair for an employer to be held vicariously liable for a tort committed by its employee’s torts without having directly contributed to the wrong doing, fairness should equally demand that the employer only be held liable for compensatory damages in a manner that is proportionate to the employer’s blameworthiness.

The law of tort is also invariably intertwined with assessing the function of damages, especially so for vicarious liability where a non-participant in causing harm can be liable for another’s tort. It is generally accepted that the core purposes of damages include punishment and deterrence, both of which the current law seems to undermine.¹²⁹ Punishment is clearly disproportionate because the current approach toward awarding compensatory damages is not reflective of actual fault. Employers should indeed bear the consequences of creating risks by conducting their business, but that burden must simultaneously be a reasonable and proportionate one. There is much academic criticism of the current law exactly because in the post-*Mohamud* era, even when the actions of an employee can be considered not merely negligent but overtly reckless,¹³⁰ an employer will still pay 100% of the damages if found to be vicariously liable on a “causal

¹²³ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [20].

¹²⁴ C Morris, ‘Enterprise Liability and the Actuarial Process – The Insignificance of Foresight’ (1961) 70 YLJ 554.

¹²⁵ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [23].

¹²⁶ P Cane, *Atiyah’s Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013) 230.

¹²⁷ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 229.

¹²⁸ W Lucy, *Philosophy of Private Law* (1st edn, Oxford University Press 2007).

¹²⁹ L Anderson, ‘An exemplary case for reform’ (1992) 11 CJQ 233.

¹³⁰ A Bell, ‘Vicarious liability: quasi-employment and lose connection’ (2016) 32 PN 153.

connection".¹³¹ Moreover, while the deterrent effect is somewhat achieved as employers are financially incentivised to prevent accidents caused by their employees,¹³² this does not necessarily extend to employees themselves being deterred from wrongdoings. As exemplified through cases such as *JGE* and *Lister*, there is strong social reasoning to hold tortfeasors financially accountable for their actions, particularly where there is a need to set a precedent of non-tolerance, as in these cases with the sexual abuse of children.¹³³ Arguably, there is too much emphasis on employer liability without achieving proportionate justice in the distribution of damages. The VLA 2018 would simultaneously support the two fundamental objectives of damages as both employer and employee are appropriately punished and held liable for damages in proportion to their contributions to the harm. Correspondingly, the deterrent effect would no longer be unfairly skewed toward employers, but apply equally to employees who could be held personally liable for their recklessness.

Should the law insist on preserving strict liability despite the controversies surrounding the *Mohamud* decision, that would just be a constant reminder that the law of vicarious liability would never be truly fair, just and reasonable.¹³⁴ Strict liability inevitably prevents the attainment of true justice because it fails to appropriately punish grossly negligent employees. Furthermore, complete liability could be forced on reasonable employers for even the most reckless of employees' faults, which as previously discussed, might now arise even on trivial connections.¹³⁵ Adequate justice can never be achieved if there is no opportunity for an employer to justify the mitigation of his contributions toward compensating the victim. By abandoning strict liability, the VLA 2018 would be a more practical and justified approach that better achieves the primal goals of fairness, justice and reasonableness as each party would only be liable for their respective contributions to the harm caused to the claimant.

2. Embracing Uncertainty: A Practical Rather than Theoretical Approach Through the VLA 2018

As previously noted, the *Mohamud* and *Cox* decisions have once again highlighted just how much difficulty judges and academics have had in finding a cemented theoretical approach when assessing whether an employer should be held vicariously liable, apart from the broad objective emphasised by Lord Dyson

¹³¹ P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202, 205.

¹³² C Witting, *Street on Torts* (14th edn, Oxford University Press 2015) 649.

¹³³ *JGE v Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938, [2013] QB 722; *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

¹³⁴ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC), [54].

¹³⁵ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556.

that decisions be fair, just and reasonable.¹³⁶ Furthermore, as Fleming astutely acknowledges, “vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations.”¹³⁷ This is undoubtedly caused by the inherent ambiguity in any vicarious liability claim as it is all dependant on assessing every individual case on its own independent facts and merits.¹³⁸ As a result of these unavoidable characteristics of vicarious liability cases, this dissertation suggests that the major controversies surrounding the law currently are too focused on the theoretical debate when at the root of it, vicarious liability is if not more than any other area of tort law, most concerned with the practical application of damages (i.e. how much compensation has to be paid).¹³⁹ In spite of these functional concerns, little to no effort has been made to develop the practical application of vicarious liability in line with principles of justice.

Practically speaking, no employer or claimant would be anywhere near as concerned with the legal justification of a decision as opposed to what kind of financial impact that would have in terms of damages: How much you would have to pay if you’re the defendant or how much you are entitled to receive if you’re the claimant.¹⁴⁰ In an area of law where every decision is inevitably fact dependant, factual uncertainty should be embraced, and the problems solved practically, rather than an aimless search for a perfect theoretical analysis of all vicarious liability scenarios. Even as early as 1967, distinguished academic Patrick Atiyah recognised that the search for an infallible legal basis of vicarious liability would be a fruitless one, and never result in a satisfactory answer:

“The fact is that in the great majority of cases it makes no difference which view is adopted; and in those situations where it does make a difference to the courts (at any rate in England) are **much more likely to be influenced by pragmatic considerations**, than by doctrinaire theories. Any attempt to adopt one theory rather than another, and then **apply that theory in all circumstances** is only too likely to lead to blind legalism...”¹⁴¹

¹³⁶ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC), [53]; P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 229.

¹³⁷ J Fleming, *The Law of Torts*, (9th edn, North Ryde: LBC Information Services, 1998) 410.

¹³⁸ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 48.

¹³⁹ P Cane, *Atiyah’s Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013) 3-4.

¹⁴⁰ P Atiyah, *The Damages Lottery* (1st edn Hart Publishing Oxford 1997) 144.

¹⁴¹ P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967) 7.

Recognising that the law of vicarious liability will always be an area where “imprecision is inevitable”,¹⁴² the VLA 2018 would be exactly what is required, allowing courts a practical measure to solve the issues at hand. There is no theoretical panacea to a problem that is inherently empirical in nature. The apportionment of damages via the VLA 2018 would solve these issues by dealing with any case practically through apportioning damages in proportion to blameworthiness, rather than being overly concerned with the close connection test, which cases such as *Mohamud* and *Lister* would suggest is open to too much uncertainty.¹⁴³ This is not to suggest that the close connection test is no longer relevant, merely that the current law of vicarious liability is not enough to achieve the fundamental objective of justice on its own as it only reflects the theoretical sphere of vicarious liability. The close connection test is still fundamental in vicarious liability as there must be a legal basis to transfer liability from employee to employer, which are based on policy justifications like the enterprise liability reasoning. However, once an employer is deemed vicariously liable through satisfaction of the current employment and close connection tests, then it is important to ask the question if an employer should justly be held 100% liable for all the compensatory damages owed to the claimant, which historical case law would suggest isn’t normally the case.

Hence, the VLA 2018 would be the practical solution required to confront the intricacies of this inherently practical problem. Moreover, through the apportionment of damages in reflection of the blameworthiness of each party, the VLA 2018 would simultaneously support the overall objective of achieving fairness, justice and reasonableness on both a theoretical and crucially, functional level as well.

IV. VLA 2018: ESTABLISHING A SYSTEM OF APPLICATION

This chapter will seek to establish how the VLA 2018 might work in practice by firstly providing a sample of what actual legislation might look like. Secondly, it will discuss how the VLA 2018 is a more nuanced approach to the issue by synthesizing both policy considerations and fact determinations to better achieve fairness, justice and reasonableness. It will then discuss the reasons for using a dual analysis of employee gross negligence and employer efforts to mitigate harm in determining respective blameworthiness as the basis for apportioning damages. Lastly, as a practical illustration, a retrospective attempt at applying the VLA 2018 to the facts of *Mohamud* will be made.¹⁴⁴

¹⁴² *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] A.C. 677 (SC), [54].

¹⁴³ P Atiyah, *The Damages Lottery* (1st edn Hart Publishing Oxford 1997) 8.

¹⁴⁴ *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

*A. Sample Legislation**1. The Vicarious Liability (Apportionment of Damages) Act 2018*

- (1) Where an employee causes a claimant's damage or harm as the result of his own gross negligence, in a claim against the employer for vicarious liability the court may apportion damages between employer and employee to such an extent as the court thinks just and equitable having regard to the employer's and employee's respective blameworthiness for the damage or harm caused to the claimant.
- (2) In the determination of damage apportionment in proportion to blameworthiness, the court is to consider two primary questions:
 - (a) To what extent did the tortfeasor's gross negligence contribute to the harm caused to the claimant?
 - i. By 'gross negligence' it is meant that the employer falls far below the standard of care expected of the reasonable person in the circumstances.
 - (b) To what extent did the employer seek to mitigate the risk or prevent actual harm caused to the claimant?
- (3) With regards to the determination of the question before the court in section 2(b) above, the court shall in particular have regard to the following matters when considering an employer's efforts to mitigate the risk or prevent actual harm -
 - (a) Relevant health and safety training and/or related policies;
 - (b) Relevant equality and diversity training and/or related policies;
 - (c) Requirement for industry standard licensing of employees (if applicable);
 - (d) Good general management practices;
 - (e) Express prohibition of an employee's actions;
 - (f) Efforts to demarcate an employee's specific scope of work or authority which was then exceeded by said employee;
 - (g) Intervening efforts to prevent the escalation or causing of harm; and
 - (h) Any other material efforts made by the employer to mitigate or prevent harm.
- (4) It shall be the duty of the court in deciding whether to exercise its powers under section 1 above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being the attainment of justice and equity between employer and employee in the apportionment of damages.

- (a) As per section 1 above, under the court's discretionary powers to apportion damages between employer and employee for damage or harm caused to the claimant, the default position should be 100% contribution from the employer.
- (b) The onus is on the employer to justify abandoning the default position by proposing arguments before the court in relation to the two primary questions as stated in section 2 above.

B. S.2 VLA 2018: Reconciling Determinations of Fact Against Policy Considerations

Referring again to the dichotomy proposed by Witting, when designing legal tests, it is important to contemplate whether these tests are fact derived determinations or based on policy driven considerations.¹⁴⁵ Under the current assessment, the close connection test is intrinsically fact determined, and yet vicarious liability as a concept is encumbered with policy considerations.¹⁴⁶ However, there is no need to rigidly keep the current tests on vicarious liability when both policy and fact-dependency can be reconciled. The VLA 2018 seeks to remedy the ideological uneasiness at present by inviting the court to consider factual determinations in the close connection test initially, but further also integrates policy considerations in assessing blameworthiness as a basis for damage apportionment. This dual step approach is a more nuanced solution to achieve true fairness. It firstly engages with the theoretical debate required in holding an otherwise innocent employer vicariously liable. S.2(a) VLA 2018 relies on the facts established in the currently employed close connection test, which is intrinsically a question of fact, to decide the extent an employee has contributed to the harm through their gross negligence.¹⁴⁷ Secondly, and this is the crux of the VLA 2018, s.2(b) then allows the court to consider policy reasons such as good management practices or the provision of equality training in determining how best to solve the problem practically by apportioning damages in reflection of each party's relative blameworthiness. If fundamental policy reasons like enterprise liability justify vicarious liability, it would be rational to extend that policy reasoning to recognise efforts made by employers to prevent or mitigate resulting harms of the enterprise. Hence, it is envisaged that the amalgamation of factual and policy considerations under s.2 will better achieve fairness as it is a more balanced consideration by practically deciding under the lens of justice and equity, how much each party should be liable respective to their blameworthiness.

¹⁴⁵ C Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33.

¹⁴⁶ P Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013).

¹⁴⁷ C Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33.

C. Why Blameworthiness?

In constructing the VLA 2018, a few bases of apportionment apart from blameworthiness were considered, including using a standard of employee unreasonableness or re-applying the close connection test. However, upon deeper consideration it became clear that neither were as succinct as blameworthiness. Firstly, it was considered that the extent to which an employee was unreasonable might be an appropriate mechanism to determine damage apportionment. Yet, the flaws in such an assessment were quickly apparent as for vicarious liability to even arise, a tort must have been committed, invariably requiring unreasonable conduct and failure of the reasonable man's test.¹⁴⁸ As discussed further on, the VLA 2018 aims only to remedy injustices arising from a high level of employee fault through the gross negligence standard. Applying the unreasonableness test would mean the VLA 2018 could apply to all vicarious liability situations, even those which are foreseeable and expected in a normal course of business, something which would undermine the fundamental principles of enterprise liability and fairness. Moreover, this could cause unwarranted complications as such an assessment would invite the court to determine levels of unreasonableness, inevitably leading to even more subjectivity and vagueness within the law.

Secondly, the close connection test was also considered.¹⁴⁹ Similarly, the court would apportion damages upon determining how closely connected the tort was to the nature of the enterprise and the type of employment relationship concerned. There was immediate apprehension toward this approach as to use close connection again as a basis for damage apportionment would probably rehash the same theoretical controversies in the law currently.¹⁵⁰ For example, in a night club, a bouncer and bartender would both deal with customers. Yet, in the event of an assault against a customer, the bouncer, being expected to handle drunk and unruly patrons, clearly has a much closer connection to the assault as opposed to the bartender simply because of the nature of their jobs. Such an artificial differentiation should not be enough of a basis to justify apportioning damages, especially when the tort committed in both situations is the same. Furthermore, it would seem futile in practical application as the close connection test already serves its function in initially finding vicarious liability present. This could result in circular judicial reasoning as judges might inevitably be led to justify damage apportionment as a close connection would already have been established in finding vicarious liability at the onset.

Thus, blameworthiness is the best assessment criteria as s.2 VLA 2018 amalgamates both employer and employee contributions to the prevention or

¹⁴⁸ *Blyth v Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781.

¹⁴⁹ *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 AC 215.

¹⁵⁰ J Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 LQR 556; P Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 CLJ 202.

cause of fault respectively, thereby providing judges with a more wholesome approach to determining damage apportionment. The following sections will discuss this in further depth.

1. Assessing Blameworthiness

It naturally follows that a structured approach to the determination of blameworthiness has also to be created. As discussed above, it was best to adopt a fault-based approach through blameworthiness, namely dealing with the employee and employer's respective faults and then weighing both together before deciding the appropriate apportionment of damages in reflection of respective blameworthiness.

(a) *The employee: gross negligence benchmark (S.2(a) VLA 2018)*: Determinatively influenced by Nolan's work, this dissertation correspondingly argues that the only way for the VLA 2018 to work functionally while uncompromising on the fundamental objective of fairness is to introduce gross negligence as the threshold of fault an employee should be held against.¹⁵¹ While English tort law has generally dismissed gross negligence, it is not a foreign concept in criminal law,¹⁵² and other jurisdictions such as Germany and the USA already employ it extensively across their laws of tort.¹⁵³ In separating negligence from gross negligence, Ormerod describes it clearest:

“If negligence is regarded as non-attainment of a required standard of conduct then it is clear there are degrees of it. One person may fall just short of the required standard, another may fall far short.”¹⁵⁴

Before discussing further, it is important to quickly highlight why a higher standard than mere negligence is proposed when applying the VLA 2018. The reason is simple, companies must remain fully vicariously liable for normal and foreseeable harms caused in the conduct of their business. The enterprise liability doctrine remains fundamental to enforcing vicarious liability justly.¹⁵⁵ S.4 VLA 2018 deals specifically with this issue and will be developed further in the dissertation.

¹⁵¹ D Nolan, 'Varying the standard of care in negligence' (2013) 72 CLJ 651.

¹⁵² R v Adomako [1995] 1 AC 171.

¹⁵³ B Markesinis & H Unberath, *The German Law of Torts* (4th edn, Oxford 2002); D Dobbs, *The Law of Torts* (1st edn, St Paul 2000); D Nolan, 'Varying the standard of care in negligence' (2013) 72 CLJ 651.

¹⁵⁴ D Ormerod, *Smith & Hogan's Criminal Law* (13th edn, London 2011), 153.

¹⁵⁵ C Morris, 'Enterprise Liability and the Actuarial Process – The Insignificance of Foresight' (1961) 70 YLJ 554.

Nolan makes a compelling argument that a single objective standard of the reasonable person might actually compromise rather than achieve justice in particular instances within modern tort law.¹⁵⁶ He discusses the potential for gross negligence and recklessness to be used as alternatives to the reasonable person's standard. Especially in vicarious liability, where conflicting ideologies of social justice, enterprise liability, and shifting liability to otherwise innocent employers need to be reconciled, it seems that Nolan's proposal to introduce a varied standard of care is most appropriate.¹⁵⁷ While recklessness was initially considered in drafting s.2(a) VLA 2018, it is arguably too high a standard to be considered justifiable or practically enforceable. Recklessness requires the defendant to foresee the potential of causing harm by his actions and deciding to unreasonably take the risk anyway.¹⁵⁸ Nolan himself recognises that assessing a person's intention is "a much more difficult enquiry into the state of his mind, thereby adding uncertainty and complexity to the law."¹⁵⁹ However, a benchmark of gross negligence has no such *mens rea* element. It is concerned solely with the action of the tort, and when used as a basis to determine an employee's fault, most adequately achieves justice. Firstly, in vicarious liability a tort must have occurred initially and as negligence forms the basis of most tort claims,¹⁶⁰ this higher benchmark ensures that employees are protected from personal liability for normal negligent torts foreseeable in their employment. For example, a waitress who accidentally spills a cup of tea on a patron would not be held grossly negligent, and falls beyond the VLA 2018's scope. Secondly, those who "fall far short" as in *Mohamud*,¹⁶¹ would easily be considered grossly negligent at a minimum, thereby leaving the court capacity to apply the VLA 2018 to achieve appropriate justice.

(b) *The employer: recognising efforts to mitigate or prevent harm (S.2(b) VLA 2018)*: Logically, blameworthiness must be an assessment of both the employee's and employer's faults. S.2(b)'s objectives are straightforward. It allows the court to consider what reasonable efforts were made by the employer in preventing or mitigating harm. S.3 correspondingly provides guidelines as to what those efforts might look like, although it by no means intends to be exhaustive. On a societal level, it is widely accepted that vicarious liability also aims to incentivise employers to adopt safer work practices to avoid financial liabilities for any consequential

¹⁵⁶ D Nolan, 'Varying the standard of care in negligence' (2013) 72 CLJ 651, 680.

¹⁵⁷ ibid; P Cane, *Atiyah's Accidents, Compensation and the Law* (8th edn, Cambridge University Press 2013); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 (SC); *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 (SC); *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

¹⁵⁸ *R v G & Another* [2003] 3 UKHL 50, [2004] 1 AC 1034; *R v Cunningham* [1957] 2 QB 396.

¹⁵⁹ D Nolan, 'Varying the standard of care in negligence' (2013) 72 CLJ 651, 670.

¹⁶⁰ J Fleming, *An Introduction to the Law of Torts* (2nd edn, Oxford University Press 1985).

¹⁶¹ D Ormerod, *Smith & Hogan's Criminal Law* (13th edn, London 2011) 153; *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677 (SC).

harm caused.¹⁶² Ideally this should lead to less vicarious liability claims as employers become more careful in conducting their business.¹⁶³ Active recognition as opposed to the passivity currently present in the law will mean efforts made by employers like the manager's intervention in Mohamud become relevant factors in apportioning damages, thereby securing more equitable outcomes. Furthermore, as employer efforts would now be mitigating factors, this should improve health and safety standards across organisations.

D. Preserving the Sanctity of Vicarious Liability Through S.4 VLA 2018

When evaluating the broader societal implications and functionality of the VLA 2018, an immediate consideration is one premised on the rising public concern that companies today are too over protected and fail to bear appropriate responsibility for their harmful actions.¹⁶⁴ Prime Minister Theresa May has even outlined dealing with this issue as one of her primary objectives in office, having called for a green paper on corporate reforms to address the seemingly unjustifiable protections afforded to big corporations.¹⁶⁵ However, the VLA 2018 will not contravene these reasonable concerns, and employs two practical safeguards against over protecting employers. The first, by using gross negligence as a benchmark has already been discussed, ensuring that only conduct falling so far below the reasonable standard will warrant damage apportionment. Secondly, s.4 is crucial as it sets the default position as per the status quo (100% contribution from the employer), and places the onus on the employer to justify abandoning the default position. It is fair that such a burden of proof be placed on the employer, normally the financially stronger party. Practically, this would direct judges to protect the enterprise liability principle, abandoning the traditional position only on the most legitimate circumstances and not just on any trivial reasoning.

Therefore, it is envisaged that the majority of standard vicarious liability scenarios would not be affected by the VLA 2018. The traditional position and the enterprise liability doctrine remains sacrosanct in order to effectively deliver justice in general, and mere foreseeable negligence by the employee should not remove any employer liability.¹⁶⁶ However, these interests must also be balanced

¹⁶² P Atiyah, *Vicarious Liability in the Law of Torts* (1st edn, Butterworth & Co. (Publishers) Ltd 1967).

¹⁶³ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 238.

¹⁶⁴ K Amaeshi, O Osuji & P Nnodim, 'Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications' (2008) 81 JBE 223, 229.

¹⁶⁵ J Treanor, 'Theresa May to unveil boardroom crackdown on private big business' (The Guardian, 29 Nov 2016) <<https://www.theguardian.com/business/2016/nov/29/theresa-may-to-unveil-plans-for-boardrooms-at-large-private-businesses>> accessed 16 March 2017.

¹⁶⁶ P Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (1st edn, Cambridge University Press 2010) 238.

again protecting responsible companies (often comprising small enterprises and not just commercial juggernauts) which have made legitimate efforts to prevent harm. Employer efforts must be recognised, and especially so when an employee has been grossly negligent. As such, by crediting the responsible employer and faulting the grossly negligent employee proportionately, the VLA 2018 best achieves justice as it is simply a more wholesome assessment of all considerations.

E. Mohamud Re-assessed Under the VLA 2018

In demonstrating how the proposed law should operate in practice, this section will re-assess *Mohamud* under the VLA 2018. Before applying the VLA 2018, Morrisons must be held vicariously liable under the current employment and close connection tests. Upon this finding of vicarious liability, s.1 gives the court broad powers to apportion damages in proportion to respective blameworthiness. However, s.4 directs the court to recognise enterprise liability as the guiding principle, and damage apportionment considered only upon an employer successfully justifying abandoning the traditional position. Under s.2(a), the employer must first prove the employee's gross negligence and extent of contributions to harm. This should be easily achieved as the employee verbally assaulted the claimant with racist remarks and further chased down the claimant to his car to assault him. Evidently, the employee was grossly negligent, having fallen far below the expected standard of a reasonable person. Moreover, the extent of harm caused should largely be attributed to the employee due to the specific and independent actions taken by him to commit the assault. S.2(b) then allows the employer to provide mitigating factors. S.3(g) would be relevant as there are clear intervening efforts made by the station manager to stop the assault. Assuming Morrisons also conducts appropriate equality and diversity training [s.3(b)] and has good management practices [s.3(d)], these factors would work in their favour. In consolidating the employer's arguments under s.4, a reasonable finding might be 60% contribution by the employee and 40% by the employer. This reflects the balance between recognising the employee's gross negligence being the primary cause of harm and Morrisons having taken reasonable steps to prevent harm, but further emphasises that it still must bear the risks inherent to its enterprise.

CONCLUSION

This dissertation initially assessed the historical position of vicarious liability and tracked its development from the 5-key policy reasons to affirmation of the enterprise liability doctrine as the fundamental rationale for vicarious liability in the modern context. Resultantly, the *Cox* decision seems a logical one which confirms the need for a broad assessment in an era of undefinable employment

relationships. However, the *Mohamud* decision is particularly troubling because it seemingly sets too low a benchmark requiring a mere causal rather than close connection. Moreover, *Mohamud* strongly suggests that the current legal tests are inadequate when reconciling the inherent policy considerations of vicarious liability in entirety against the inherent fact dependency of the close connection test. The flaws of stringent adherence to the strict liability doctrine have also presented itself: It inherently prevents the court from reaching truly equitable decisions as in circumstances of employee gross negligence, it rarely reflects the fault each party should bear. Thus, this dissertation concludes that the only way to truly achieve fairness is for statutory reform abandoning strict liability and allowing for damage apportionment in respect of blameworthiness between the employer and grossly negligent employee. The debate so far has revolved too much around theoretical issues when what is necessary is a further functional assessment through damage apportionment. By reconciling policy reasons and embracing each case's specific factual circumstances to reach fair, just and reasonable outcomes, it is hoped that the solution will present itself through the VLA 2018.