This clarification is very welcome. There is a real problem with assuming that silence admits of *one* reasonable, objective meaning, when silence is inherently ambiguous. The other traditional doctrinal test for implying a term in fact recognises this – the term must be so obvious that, when questioned by the hypothetical officious bystander, *both* parties reply that of course it forms part of their bargain. Such unanimity is extraordinarily unlikely to be satisfied in a commercial transaction. Let's imagine the suggested "apportionment" implied term had been proposed in the negotiations: it would have been the subject of horse-trading and have had knock-on effects on the other terms on the table, such that many possible reasonable outcomes could have been reached. How then can its absence give rise to just one reasonable interpretation?

This in turn raises another difficulty with the assimilation of implication of terms and interpretation. Evidence of the parties' pre-contractual negotiations is inadmissible in disputes about contractual interpretation, but must surely be admitted when considering implied terms. What if the tenant actually proposed the disputed "apportionment" term at an early stage of negotiations, but the landlords adamantly resisted it, regarding the point as a "deal-breaker"? It would be perverse to suggest that a hypothetical reasonable observer should be free to "interpret" the absence of the term objectively, by reference to the rest of the commercial background but not that crucial fact. Overall, the Supreme Court's recognition that implication of terms and interpretation are different, albeit related (along with its re-emphasis of the need for commercial certainty, the primacy of the express terms and the stringency of the traditional doctrinal tests for implying terms) is of both practical and theoretical importance.

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CERTAINTY IN VICARIOUS LIABILITY: A QUEST FOR A CHIMAERA?

COX v Ministry of Justice [2016] UKSC 10; [2016] 2 W.L.R. 806, and *Mohamud v Wm Morrison Supermarkets plc.* [2016] UKSC 11; [2016] 2 W.L.R. 821 expand the reach of vicarious liability. In *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 A.C. 1 ("*CCWS*"), Lord Phillips had declared vicarious liability "is on the move". Lord Reed stated in Cox "it has not yet come to a stop".

Vicarious liability makes one party, *A*, strictly liable for the torts of another, *B*. It has two stages: whether there is a relationship between *A* and *B* sufficient to trigger the doctrine, and whether there is sufficient connection between *B*'s tort and the relationship for *A* to be liable. *Cox* concerns the

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first stage, *Mohamud* the second. The Supreme Court considered the cases should be read together.

Classically the relationship is that of employment; however, other relationships may also suffice. *JGE v Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; [2013] Q.B. 722 and *CCWS* introduced the "akin to employment" relationship. *B* need not be paid, nor have a contract with *A*, for *A* to be vicariously liable.

The second-stage test following *Lister v Hesley Hall* [2001] UKHL 22; [2002] 1 A.C. 215 and *Dubai Aluminium Co. Ltd. v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 is that the tort must be closely connected to the relationship. *Lister* made a clear distinction between close connection, and mere opportunity to commit a tort. The latter is not enough: whilst there was vicarious liability for the warden's abuse, there would have been no such liability for the groundsman's.

In *Cox*, the claimant was a prison catering manager. A prisoner working in the prison kitchen negligently injured her in the course of his work. Kitchen workers were selected from amongst prisoners who applied. They were given training, worked alongside civilian catering staff as part of the catering department, were supervised by catering staff, and were accountable to the catering manager. Whilst they were paid for their work, this was not subject to the minimum wage.

Lord Reed gave the sole judgment. He distilled the justifications for vicarious liability in *CCWS* to three main factors:

> (1) the tort will have been committed as a result of activity being taken by the tortfeasor on behalf of the defendant, (2) the tortfeasor's activity is likely to be part of the business activity of the defendant, and (3) the defendant, by employing the tortfeasor to carry on the activity, will have created the risk of the tort committed (at [22]).

He correctly downplayed deep-pocket and insurance justifications for vicarious liability. Lord Reed also downplayed the control factor in vicarious liability, stating it is not "realistic in modern life to look for a right to direct how an employee should perform his duties as a necessary element in the relationship" (at [21]). With respect, control is relevant: one has the power to direct exactly how employees carry out work (even if it is not exercised), something professionals in our increasingly managerial culture are discovering, whereas there is no such right over independent contractors unless it features in the contract.

Lord Reed stated that a relationship other than employment may trigger vicarious liability: "... where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit ... where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual" (at [24]). He stressed that, despite the language of

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"business" or "enterprise", the defendant's activities need not be commercial or profit-making—an organisation that acts in the public interest does not negate such liability.

That the Supreme Court held the MoJ vicariously liable is uncontroversial. The work conducted by the prisoner was an integral part of the prison activities, carried out for its benefit. *Cox* confirms that *CCWS* is not confined to abuse, and that it applies to new and emerging forms of enterprise and employment. This is particularly significant for business models such as Uber, and voluntary-sector organisations.

In *Mohamud*, the tortfeasor (*K*) was a petrol station employee. The claimant went into the kiosk and asked *K* if it was possible to print documents. *K* racially abused him and ordered him to leave. The claimant returned to his car, *K* following. Before the claimant could drive off, *K* opened the passenger door, partially entered the car, racially abused the claimant, and told him not to return. The claimant told *K* to get out of his car, whereupon *K* hit him. The claimant got out of his car to close the passenger door. *K* also left the car and subjected the claimant to a vicious assault, ignoring his supervisor's instructions to stop. The Supreme Court expanded the scope of the close connection test, holding that the assault was closely connected with *K*'s employment.

Lord Toulson (with whom the other judges agreed) gave the lead judgment. He gave a historical account to demonstrate that the enterprise liability approach taken by *Lister* was inherent in the historic English vicarious liability case law. Notwithstanding this detailed pre-*Lister* survey, the Court did not examine the post-*Lister/Dubai* close connection test cases, save to note three by name. This is unfortunate given the confusing and conflicting case law that has evolved in interpreting this test. After *Mohamud*, a number of previous decisions will need to be reviewed.

Lord Toulson stated that the court should consider what functions were entrusted to the employee ("what was the nature of his job"), which "must be addressed broadly", and secondly whether "there was sufficient connection between the position … and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice" (at [44]–[46]).

He held that attending to customers and responding to inquiries was part of *K*'s job. *K*'s answer and telling the claimant to leave were within "the field of activities" assigned to *K*. The events that followed were an "unbroken sequence of events", a "seamless event". *K* did not "take off his uniform" in following the claimant onto the forecourt; he ordered the claimant not to return to his employer's premises, and reinforced this with violence. Although *K* was motivated by racism, the Court considered it fair and just that the defendant be held liable for his acts.

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Mohamud appears to replace close connection with a test of "causal connection", provided there is an unbroken causal chain between the role and the tort. If the groundsman in *Lister* had caught a boy playing with a lawnmower in the school shed, it would be within his duties to keep boys away from it, and to tell them off when they interfered with it. If he did so by sexually assaulting and violently beating the boy, this would now appear to lead to vicarious liability. But surely there must be a limit where the conduct is so remote and outlandish? Just as the *Wagon Mound (No 1)* [1961] A.C. 388 introduced foreseeability restrictions to remoteness in negligence, a similar test may be required here. *Mohamud* appears to dilute the requirement for vicarious liability that the risk of harm must be inherent in the employment (at [40]). This means there may now be no difference in outcome if the employee in *Mattis v Pollock* [2003] EWCA Civ 887; [2003] 1 W.L.R. 2158 were the DJ, rather than the doorman. It also seems that little is left of the "mere opportunity" qualification in *Lister*.

The Supreme Court nonetheless foresaw limits to the causal chain. Lord Toulson cited *Warren v Henlys Ltd.* [1948] 2 All E.R. 935, a case where a customer returned to a petrol station with a police officer to complain about the attendant's conduct. When the policeman said it was not a police matter, the customer said that he would report the attendant to his employer. The attendant hit the customer in response. The employer was held not to be vicariously liable. Lord Toulson agreed with this outcome. In his view, the relationship had changed from customer and company representative, to person making a police complaint, and the subject of the complaint. This distinction seems odd. An aggrieved customer complained about his customer experience, and threatened to report an employee to management, so that the employee would be subject to his employer's discipline. Just as *K* did not cast off his uniform when he left the kiosk in *Mohamud*, the customer in *Warren* did not cast off his status when he left the premises to gain the attention of a nearby policeman. Nevertheless, one can discern from this that the Court envisaged that a *novus actus interveniens* doctrine can be applied to the causal chain approach.

Lord Dyson M.R. (giving a short concurring judgment) stated that "[t]o search for certainty and precision in vicarious liability is to undertake a quest for a chimaera" (at [54]). However, it will now be up to other courts to undertake a post-*Mohamud* quest to establish the limits of this new approach, and to provide greater certainty to litigants.

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