

# All in a day's work?

An update on vicarious liability



Steve Laing, Advocate

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# Why is it important?



# Why is it important?



*“Man of straw??”*



# Why is it important?



*“Man of straw??”*



*“Loadsamoney!!!”*

# Why is it important?



*“Loadsamoney!!!”*

[Princ](#)

# Why is it important?



*“Man of straw??”*



*“Loadsamoney!!!”*

BXB v Trustees of the Barry Congregation of the  
Jehovah's Witnesses [2023] UKSC 15

per Lord Burrows JSC at para 58

*Stage One*

*Relationship between the  
defendant and the tortfeasor*

*Stage Two*

*Link between the commission of  
the tort and that relationship*



## Stage One

*Whether the relationship between the defendant and the tortfeasor is one of employment or “akin to employment”*

*No vicariously liability where the tortfeasor is a true independent contractor*

*In majority of cases, no difficulty because dealing with an employer-employee relationship*

## Stage One – “akin to employment”

*Carefully consider features of the relationship that are similar to, or different from, a contract of employment, which may include*

- *work paid in money or in kind?*
- *how integral to the organisation is the work carried out?*
- *is work carried out for defendant’s benefit or in furtherance of the aims of the organisation?*
- *what is situation regarding appointment and termination?*
- *whether there is a hierarchy of seniority into which the role fits*

Cruickshanks v Glasgow City Council  
2024 CSOH 35



*Death of a 10 month child  
whilst in a kinship placement with his grandmother  
Placement approved by Defenders*

*Adult daughter of grandmother responsible for child's care  
at relevant time*

*Child drowned after left unsupervised in bath*

Cruickshanks v Glasgow City Council  
2024 CSOH 35



*Father of child argued GCC vicariously liable for:-*

- grandmother's negligence, and*
- her daughter's negligence (GCC knew or ought to have known that she had a substantial caregiving role)*

*Whether relationships between grandmother/daughter and GCC was "akin to employment"?*



Cruickshanks v Glasgow City Council  
2024 CSOH 35



*Debate before Lord Weir*

*Vicarious liability not excluded in all cases where kinship carers were concerned,*

*although court might be slow to find that it arises in the context of arrangements in which family members involved in the care of looked-after child*

*(as distinguished from when foster parents recruited by a local authority)*

Cruickshanks v Glasgow City Council  
2024 CSOH 35



*Circumstances of care of child during both  
subsistence of placement  
and at time of tragic events  
require to be established before a concluded view  
could be reached on vicarious liability*

*(PBA allowed as Pursuer not bound to fail)*

# X v Sheriff John Brown & The Lord Advocate 2024 CSIH 6

*Legal practitioner averred assault  
by Sh Brown on 3 separate  
occasions*



*Two within a courthouse  
One on a train when both  
travelling to their workplaces*

*Also a claim for an incident  
amounting to harassment*

*Whether the relationship between  
the Crown and a Sheriff  
was “akin to employment”?*

X v Sheriff John Brown & The Lord Advocate  
2024 CSIH 6

*Sheriffs are neither employees of Scottish Govt  
nor true independent contractors*

*Sheriffs are unique / sui generis*

*Are judicial office-holders akin to employees of the  
Scottish Government?*

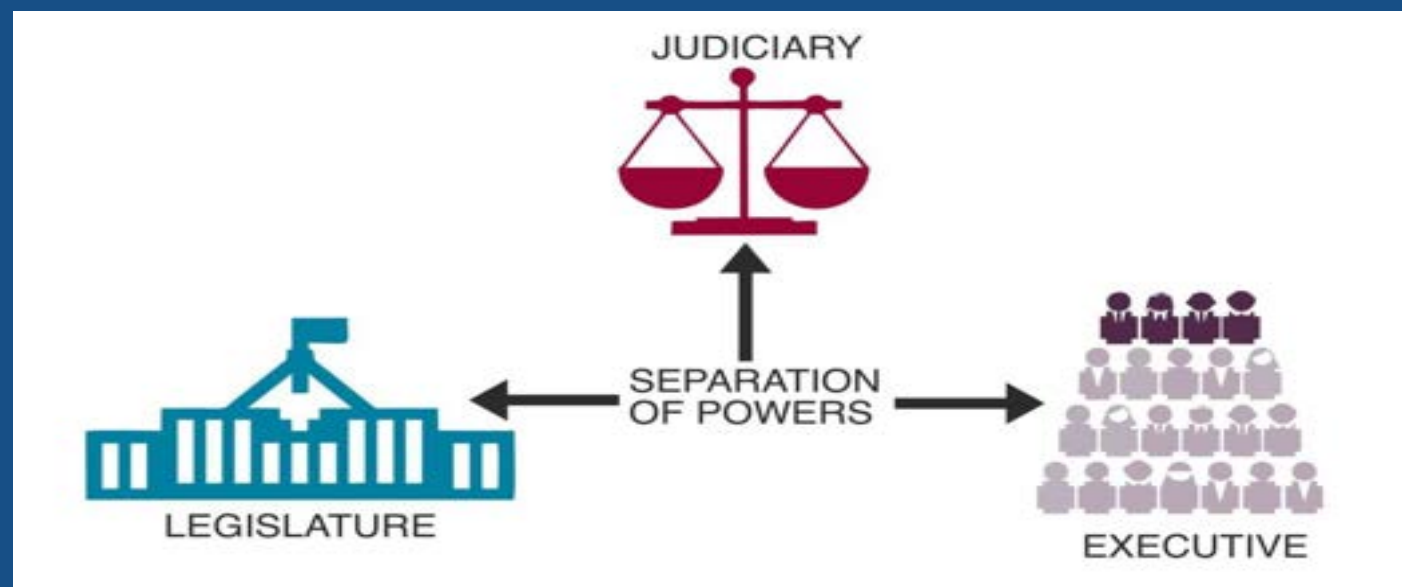
*Lord Burrows' factors are not an exhaustive list  
Other factors may be important*

# X v Sheriff John Brown & The Lord Advocate 2024 CSIH 6

*One such factor is importance of maintaining judicial independence*

*Doctrine of separation of powers*

*Judicial independence is a fundamental principle of our constitutional law*



X v Sheriff John Brown & The Lord Advocate  
2024 CSIH 6

*Lack of control by Scottish Govt over judiciary and  
importance of maintaining judicial independence  
(both actual and perceived)  
factors which weigh heavily against Stage 1 being  
satisfied*

*The action for damages itself creates a nexus between  
office-holder and executive*

# X v Sheriff John Brown & The Lord Advocate 2024 CSIH 6

*Undermining of judicial independence by holding that  
Stage 1 satisfied  
is a much greater mischief  
than the risk that a Pursuer is unable to obtain full  
recovery directly from the judicial office-bearer*



# “akin to employment”?

## Cox v Ministry of Justice 2016 UKSC 10



*Prisoner undertaking work in a kitchen for a nominal wage. Dropped bag on back of catering manager.*

*MofJ argued Prison Service's primary purpose was not a business or profit, but prisoner's rehabilitation;  
and that prisoners had no interest in furthering the Prison Service's objectives*



# “akin to employment”?

Cox v Ministry of Justice 2016 UKSC 10

*Defendant need not be carrying on activities of a commercial nature where benefit derived from tortfeasor is in form of profit*

*(eg “brothers” in school, local authorities, hospitals)*

*Fact that aims were not commercially motivated, but served the public interest, no bar to vicarious liability.*

## “akin to employment”?

### BXB v Trustees of the Barry Congregation of the Jehovah’s Witnesses [2023] UKSC 15



*An elder (one of the spiritual leaders) raped a member of the congregation at his house after the claimant had been door-to-door evangelising.*

*Stage 1 satisfied – relationship between the tortfeasor and the JW organisation “akin to employment”*

## “akin to employment”?

### BXB v Trustees of the Barry Congregation of the Jehovah's Witnesses [2023] UKSC 15

#### *Important features:-*

- *elder carrying out work on behalf of, and assigned to him by, the JW organisation*
- *elder performing duties in furtherance of organisation's aims*
- *was a process to appoint/remove elders*
- *the elder fitted into a hierarchal structure*

## “akin to employment”?

BXB v Trustees of the Barry Congregation of the Jehovah's Witnesses [2023] UKSC 15

*However, the creation of the risk of rape was not relevant to the criteria for Stage 1 “akin to employment”*

*To rely on the creation of the risk was incorrectly confusing the criteria with the underlying policy justification for vicarious liability*

# Stage One – “akin to employment”

## *Case study 1*

Are the Seven Dwarfs as a partnership vicariously liable for Snow White’s acts and omissions?



# Stage One – “akin to employment”

## *Case study 1*

Are the Seven Dwarfs as a partnership vicariously liable for Snow White’s acts and omissions?



## Stage One – “akin to employment”

*Provided with work equipment  
- broom, scrubbing brush and  
bucket*

*However, only payment in kind  
– bed and board*



*Cleaning cottage not in  
furtherance of aims of  
partnership,  
which is mining diamonds?*

## Stage One – “akin to employment”

*Snow White was self-appointed –  
started cleaning without instruction to do so*

*Terminated relationship herself  
as soon as Prince Charming appeared*

*No real hierarchy of seniority into which she fits?*



*Snow White is a true  
independent contractor?*



# Stage One – “akin to employment”

## *Case study 2*

Is Snow White vicariously liable for the acts and omissions of Dopey, Grumpy, Doc et al?



# Stage One – “akin to employment”

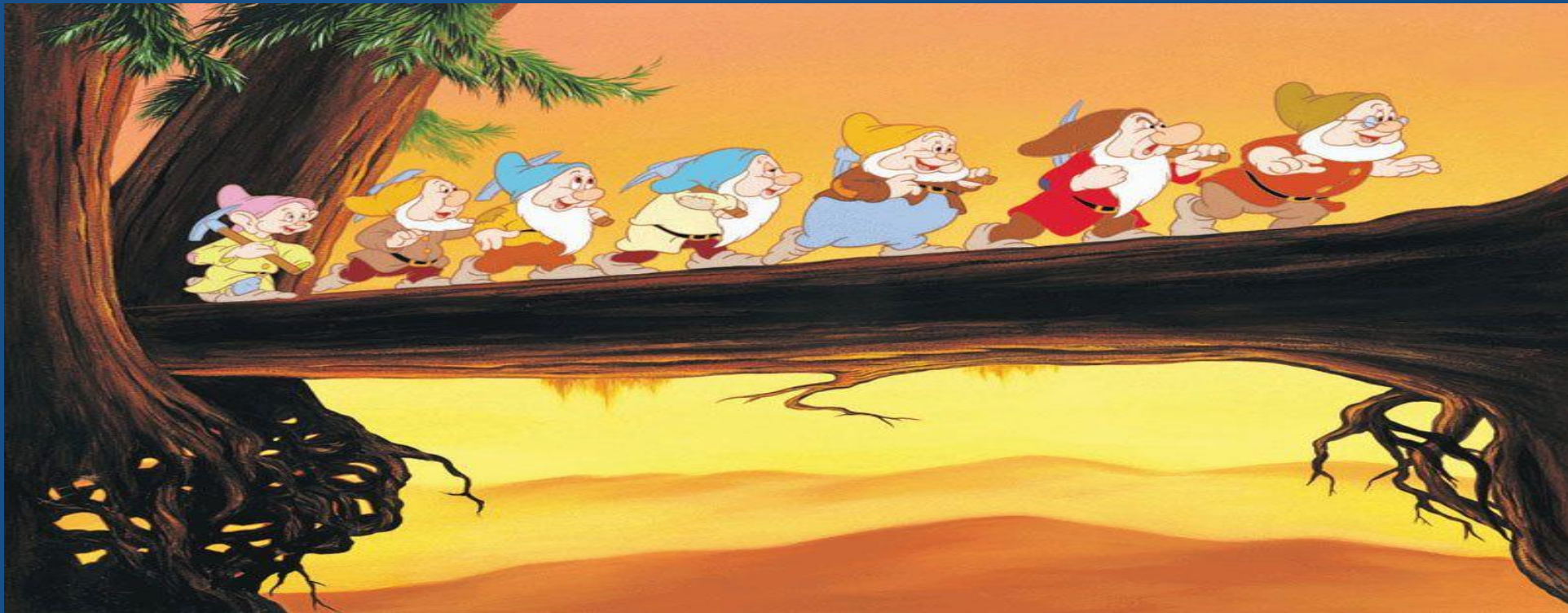
## *Case study 2*

Is Snow White vicariously liable for the acts and omissions of Dopey, Grumpy, Doc et al?



## Stage One – “akin to employment”

Is Snow White in fact an evil gangmaster with a squad of seven elderly, diminutive, vulnerable manual workers???



## Stage One – “akin to employment”



*Payment in kind –  
an occasional kiss  
and providing clean digs  
What happens to the  
diamonds??!!*

*Dwarfs away digging the  
whole day through  
integral to Snow White’s  
“happily ever after”??*



## Stage One – “akin to employment”



*Supply own pickaxes  
But provision of PPE??*

*Is the mining of diamonds  
integral to Snow White’s  
“happily ever after”?*

*Hierarchy of seniority-  
Despite digging all day long,  
the dwarfs then require to  
entertain her at night*



*Stage One criteria met?*

BXB v Trustees of the Barry Congregation of the  
Jehovah's Witnesses [2023] UKSC 15

per Lord Burrows JSC at para 58



*Stage One*

*Relationship between the  
defendant and the tortfeasor*

*Stage Two*

*Link between the commission of  
the tort and that relationship*

## Stage Two

*Whether the wrongful conduct was  
so closely connected  
with acts that the tortfeasor was authorised to  
do that it can fairly and properly be regarded  
as done by the tortfeasor while acting in the  
course of the tortfeasor's employment or  
quasi-employment*

## Stage Two

- 1. Necessary to include “quasi-employment” as could be “akin to employment” situation in Stage One.*
- 2. Not “ordinary” course of employment but “course of employment”.  
“Ordinary” is superfluous and potentially misleading –  
eg. No sexual abuse case can be said to fall within the “ordinary” course of employment*





Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11



*Asked petrol station employee if he could print off documents from a USB stick*

*Employee refused by using racist, abusive and violent language and ordered claimant to leave*

*Followed to forecourt and subjected him to a serious violent and unprovoked physical attack*

Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11



Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11



Employees get  
ANT(agonised by the  
customers so will  
DEC(k them)

Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11

*Employee's job to attend to customers and respond to inquiries*

*Conduct when answering request inexcusable but within the "field of activities" assigned to him*

*Thereafter what happened was an "unbroken sequence of events"; a "seamless episode"*

*Did not metaphorically take off uniform when followed claimant onto forecourt*

Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11

*Nothing personal between him and customer – was order to keep away from employer's premises, reinforced by violence*

*Therefore employee was purporting to act in furtherance of employer's business*

*Gross abuse of his position  
but in connection with the business*

*Stage 2 satisfied – “close connection”*

Various Claimants v Wm Morrison  
Supermarkets plc  
2020 UKSC 12

*Explained/clarified*  
*Mohamud*



*Internal IT auditor with grudge against employer*

*Copied personal data (including payroll data) of nearly  
100,000 employees onto a USB stick*

*Took stick home and uploaded data  
to a publicly-accessible file-sharing website*

Various Claimants v Wm Morrison  
Supermarkets plc  
2020 UKSC 12

*Two matters to consider:–*

- (i) What functions or “field of activities” entrusted by employer to employee*
- (ii) whether sufficient connection between the employee’s position and the wrongful conduct*

*Comments about “seamless episode” and “unbroken sequence of events” not directed against the temporal or causal connection between the various events*

*but towards the capacity in which the employee was acting when relevant events took place*



Various Claimants v Wm Morrison  
Supermarkets plc  
2020 UKSC 12

- *disclosure of data on internet not form part of employee's functions or field of activities*
  - *there was a close temporal link and an unbroken chain of causation between employer providing the data to the employee in order to transmit it to auditors and his disclosing it on the internet*
- but a temporal or causal connection not in itself satisfy Stage Two*

Various Claimants v Wm Morrison  
Supermarkets plc  
2020 UKSC 12

*Reason why acted wrongfully not irrelevant*

*Not engaged in furthering employer's business but pursuing a personal vendetta when committed wrongdoing*

*Stage Two not satisfied*



Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11

Various Claimants v Wm Morrison  
Supermarkets plc  
2020 UKSC 12

Mohamud v Wm Morrison Supermarkets plc  
2016 UKSC 11

Various Claimants v Wm Morrison  
Supermarkets plc  
2020 UKSC 12



# BXB v Trustees of the Barry Congregation of the Jehovah's Witnesses [2023] UKSC 15

## *Relevant factors*

- rape not committed while elder carrying out any activities as an elder*
- at time of rape, he was not exercising control over victim because of his position as an elder*
- he wasn't wearing his "metaphorical uniform" as an elder when committing the rape*
- what happened was not equivalent to gradual grooming of a child*

# BXB v Trustees of the Barry Congregation of the Jehovah's Witnesses [2023] UKSC 15

## *Irrelevant factors:-*

- elder's position important reason why victim started to associate with him*
- JW significantly increased the risk of sexual abuse by creating the conditions in which they were alone, and they had been door-to-door evangelising together on day of rape*
- one of reasons for rape was elder's belief that adulterous act necessary to provide scriptural grounds so he could divorce his wife*

*Stage Two not satisfied*

# C & S v Shaw & Live Active Leisure

2023 CSIH 36

*Pursuers sexually abused as children by head caretaker at Bell's Sports Centre, Perth.*

*Had been babysitter for victims' before employed and had commenced grooming at that stage*

*Some of abuse took place on Defenders' premises, including the caretaker's "tied accommodation"*



# C & S v Shaw & Live Active Leisure

2023 CSIH 36

*Important factor - Pursuers already within caretaker's orbit and sphere of influence before employed by Defenders*

*Grooming and "the progressive stages of intimacy" had already commenced*

*More serious abuse at caretaker's house was a progression from lesser abuse in family home*

*In reality, caretaker had been in loco parentis and that situation had not come about due to his employment*

*Stage Two not satisfied*



## Stage Two – “close connection”

### *Case study 3*

Is the solicitor's firm vicariously liable for their assistant who loses the plot in the office during ASPIC Webex motion court?

# Stage Two – “close connection”

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## Stage Two – “close connection”

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## Stage Two – “close connection”

*Gross abuse of his position  
but in connection with the business?*

*Within a solicitor’s field of activities assigned to him??  
Metaphorically taking off court gown before assault?*

*But is solicitor’s job to “attend to customers”?  
Different if assailant was the legal firm’s receptionist??*

*But IT engineer not a “customer”  
Does he need to try to throw engineer out of office?*

*Different if assaulted a client who was standing in reception?  
But that client not related to IT failure – relevant?*

## Stage Two – “close connection”

### *Case study 4*

Exactly the same as Case study 3  
but assistant solicitor is working from home  
and not in the office,  
and engineer not contracted by legal firm



BXB v Trustees of the Barry Congregation of the  
Jehovah's Witnesses [2023] UKSC 15

per Lord Burrows JSC at para 58



*Two Stages to determine  
vicarious liability*

*but.....*

## Underlying policy for the legal principles invoked by the tests

*The tests are a product of the policy behind vicarious liability*

*So in applying the tests no need to turn back continually to examine the underlying policy*

*But in “difficult cases”, having reached a “provisional outcome” by applying the tests, can be a “useful final check on the justice of the outcome to stand back and consider whether the outcome is consistent with the underlying policy”*



# What is the underlying policy?

*The employer/quasi-employer,  
who is taking the benefit of the activities carried on by a  
person integrated into its organisation,  
should bear the cost/risk  
of the wrong committed by that person  
in the course of those activities*



Standing back and considering the outcome's consistency with the underlying policy??



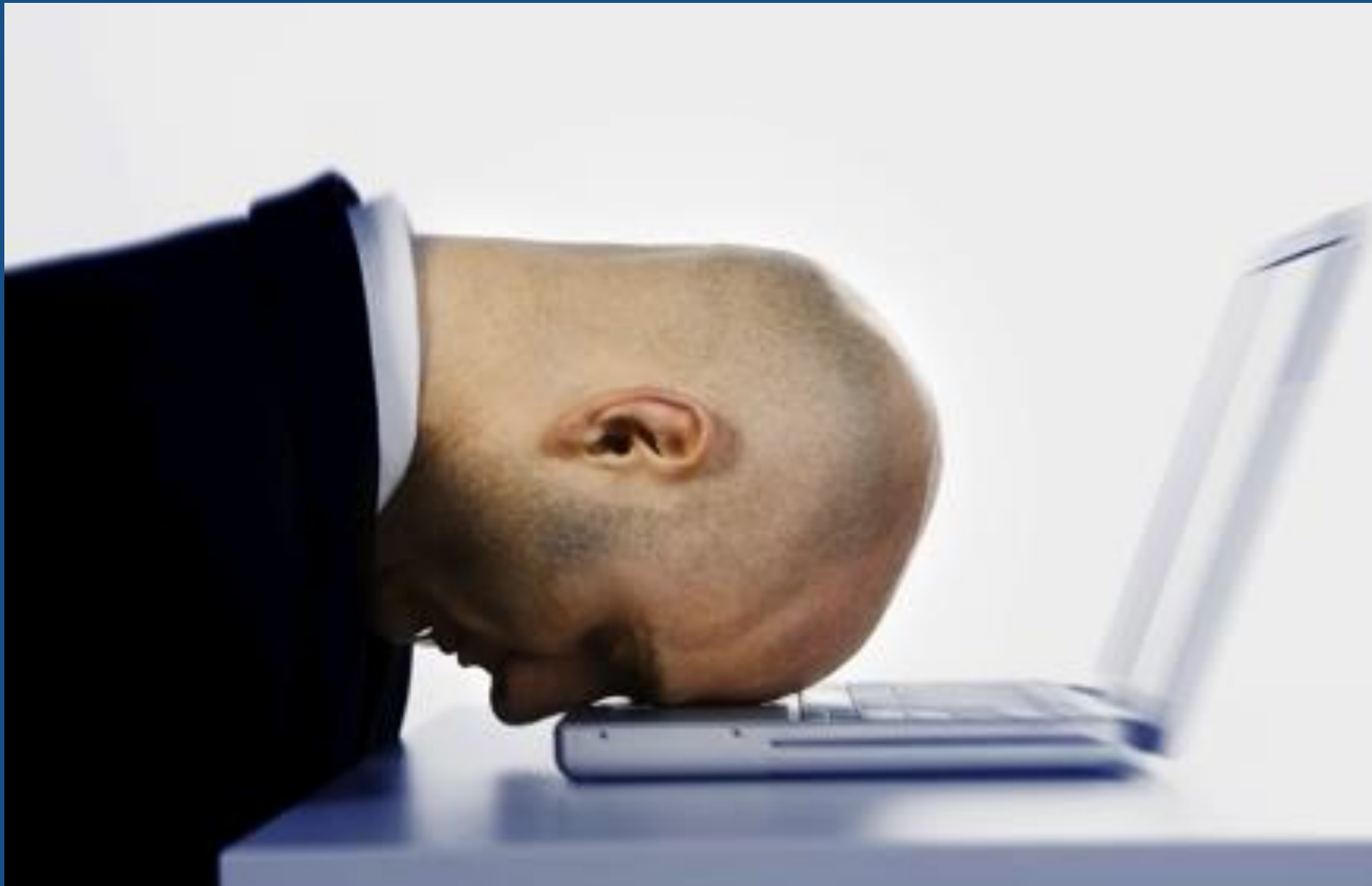
## Prospects of success?

*Dubai Aluminium Co Ltd v Salaam 2002 UKHL 48  
per Lord Nicholls*

*“This lack of precision [in the test for vicariously liability] is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negating vicarious liability, vary widely from one case or type of case to the next.*

*Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard to the assistance provided by previous court decisions.”*

# Prospects of success?



## Prospects of success?



*“This seems to me to be an application of the well known elephant test. It is difficult to describe, but you know it when you see it.”*

*CADOGAN ESTATES LTD v HUGH MORRIS*  
*1998 EWCA Civ 1671*  
*(per Stuart-Smith LJ)*

# Prospects of success?



# Conclusions and Close