

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2018] SC GLA 13

PD14/17

JUDGMENT OF SHERIFF S REID, Esq

In the cause

LAUREN GRUBB

Pursuer

Against

NATALIE SHANNON

Defender

Pursuer: J Watson; Digby Brown LLP, Dundee
Defender: G Thompson; Thompson Family Law, Glasgow

GLASGOW, 23 February 2018. The sheriff, having resumed consideration of the cause

FINDS IN FACT:

- (1) The parties are as designed in the instance.
- (2) Between around 2012 and, at least, 2015, the defender carried on business under the trading name “Blush Hair and Beauty” from premises in Glasgow (“the salon”).
- (3) The business so carried on by the defender comprised the provision of beauty therapy treatments and hairdressing services to paying customers.
- (4) The defender’s objective was to provide a “one-stop shop” to customers for the provision of beauty therapy treatments and hairdressing services from the salon.

- (5) The defender has a college qualification in beauty therapy. She has no formal qualification in hairdressing.
- (6) During the relevant period (from around 2012 until, at least, 2015), the defender leased the salon from a third party ("the landlord") at an agreed rental of £400 per month (which sum included the cost of electricity, and buildings and contents insurance).
- (7) The defender devised, and applied to her business, the trading name "Blush Hair and Beauty"; at her own expense, and with assistance from her father, she purchased signage bearing that trading name, and arranged for it to be affixed to the front of the salon; at her own expense, and with assistance from her father, she arranged for the salon to be decorated and furnished; and she opened a business Facebook account under the trading name "Blush Hair and Beauty".
- (8) The salon comprised, on the ground floor, a reception area and an adjoining room used for the provision of hairdressing services; and, on the upper floor, two separate rooms used for the provision of beauty therapy treatments.
- (9) From around 2012 until around mid-2013, the defender worked full-time at the salon, providing a wide range of beauty therapy treatments to customers from one of the upper rooms in the salon; in around mid-2013, due to domestic pressures, the defender reduced the number of days she worked at the salon to around two days a week; and by December 2013/January 2014, the defender was entirely absent from the salon on maternity leave.
- (10) The defender selected and permitted three other persons to work in the salon, namely Danielle Paul, Roseanne Higgins and Ashleigh Maxwell.

- (11) In or around 2012, the defender entered into an arrangement with Danielle Paul, a qualified beauty therapist, whereby (i) she permitted Ms Paul to provide a wide range of beauty therapy treatments (including HD eyebrow tints) to customers from the salon (specifically, from the upper room in the salon that was not used by the defender) several days a week (at Ms Paul's discretion), in exchange for the payment by Ms Paul to the defender of the sum of £20 for each day when Ms Paul chose to work at the salon; (ii) Ms Paul and the defender agreed a uniform price list for beauty therapy treatments provided from the salon, whereby they would each charge to customers the same price for the same beauty treatments; (iii) Ms Paul was entitled to retain all income earned by her from customers to whom she had provided any beauty therapy treatment at the salon, with no share, percentage, commission or accounting being due to the defender; (iv) the defender gave Ms Paul the password to the defender's business Facebook page and permission to post entries thereon advertising the treatments and services available at the salon and soliciting custom; and (iv) the defender gave Ms Paul keys to the salon to allow her access to, and to lock up, the salon as and when required.
- (12) This arrangement between the defender and Ms Paul continued from around 2012 until at least 2015, during which period Ms Paul generally worked five days a week at the salon.
- (13) In or around July 2013, the defender entered into an arrangement with Roseanne Higgins, a qualified beauty therapist, whereby (i) on those days when the defender was not herself working in the salon, she permitted Ms Higgins to provide a wide range of beauty therapy treatments (including HD

eyebrow tints) to customers from the salon (specifically from the upper room that was otherwise used by the defender) several days a week (at Ms Higgins' discretion), in exchange for the payment by Ms Higgins to the defender of the sum of £20 for each day when Ms Higgins chose to work at the salon; (ii) Ms Higgins and the defender agreed a uniform price list for beauty therapy treatments provided from the salon, whereby they would each charge to customers the same price for the same beauty treatments; (iii) Ms Higgins was entitled to retain all income earned by her from customers to whom she had provided any beauty therapy treatment at the salon, with no share, percentage, commission or accounting being due to the defender; (iv) the defender gave Ms Higgins the password to the defender's business Facebook page and permission to post entries thereon advertising the treatments and services available at the salon and soliciting custom; and (v) the defender gave Ms Higgins keys to the salon to allow her access to, and to lock up, the salon, as and when required.

- (14) This arrangement between the defender and Ms Higgins continued from around 2013 until around July 2014, during which period Ms Higgins generally worked three days a week at the salon.
- (15) In or around 2012, the defender entered into an arrangement with Ashleigh Maxwell, a qualified hairdresser, whereby (i) she permitted Ms Maxwell to provide hairdressing services to customers from the salon (specifically from the room adjoining the reception area) several days a week (at Ms Maxwell's discretion), in exchange for the payment by Ms Maxwell to the defender of the sum of £20 for each day when Ms Maxwell chose to work at the salon; (ii)

Ms Maxwell was entitled to retain all income earned by her from customers to whom she had provided any hairdressing service at the salon, with no share, percentage, commission or accounting being due to the defender; and Ms Maxwell was at liberty to set and charge such prices for her hairdressing services (including any special promotional deals) as she considered appropriate, without reference to or prior consultation with the defender.

- (16) This arrangement between the defender and Ms Maxwell continued from around 2013 until around July 2014, during which period Ms Maxwell generally worked three days a week at the salon.
- (17) Ms Maxwell advertised her hairdressing services, and solicited custom, on her own business Facebook page under the trading name "Ashleigh Maxwell Hair", and not on the defender's business Facebook page.
- (18) The arrangements between the defender and Ms Paul, Ms Higgins and Ms Maxwell were terminable by the defender at any time, without notice and without cause.
- (19) If Ms Higgins or Ms Paul wished to depart from the uniform price list agreed with the defender for beauty therapy treatments provided at the salon (for example, to offer a promotional discounted price, or special deal) they would habitually seek prior permission from the defender.
- (20) Item 6/6 of process is a true copy social media communication from Ms Higgins to the defender dated 23 April 2014 in which Ms Higgins seeks the defender's prior approval to a proposed discounted pricing arrangement and to advertise a specific beauty treatment, all to be offered by Ms Higgins to customers at the salon.

- (21) In 2013, the defender, Ms Higgins and Ms Paul posed together for a photograph in which they were standing outside the front door of the salon, each wearing matching black T-shirts bearing the defender's trading name "Blush Hair and Beauty", with the salon signage visible behind them.
- (22) To the knowledge, and with the consent, of the defender, Ms Higgins and Ms Paul, the photograph was taken for the purpose of advertising and promoting the business of the salon; and the photograph was posted and remained on the defender's business Facebook page for that purpose, alongside other promotional photographs of the interior of the salon.
- (23) True copies of the photograph as posted on the defender's business Facebook page appear in items 5/4/1 & 5/4/2 of process; and true copies of the other promotional photographs of the interior of the salon appear in items 5/4/1 to 5/4/4 of process.
- (24) In October 2013, with the knowledge and prior consent of the defender, Ms Higgins and Ms Paul attended a wedding fair at a hotel where they manned a stall advertising and promoting the business of the salon; they wore matching jackets, and matching black T-shirts bearing the defender's trading name "Blush Hair and Beauty"; they distributed leaflets advertising the beauty therapy treatments available at the salon, and the agreed uniform price list therefor, all bearing the defender's trading name; and they exhibited the photographs of the salon as reproduced in items 5/4/1 to 5/4/4 of process.
- (25) Item 5/8/9 of process is a copy screenshot from Ms Higgins' personal Facebook page, which includes copy photographs of Ms Higgins and Ms Paul manning the stall at the wedding fair referred to in finding-in-fact (24) above.

- (26) Sometimes customers would make a prior appointment to receive a beauty treatment at the salon, by telephone call or by electronic communication direct to the defender, Ms Paul or Ms Higgins; sometimes customers would enter the salon with no prior appointment; sometimes customers would request a treatment from a specific named beauty therapist; sometimes no such specific request was made, and the treatment would be provided to the customer by whichever beauty therapist was available within the salon.
- (27) There were no signs or notices, within or outwith the salon, of a nature that was readily observable by and comprehensible to prospective customers (such as the pursuer), notifying such prospective customers that Ms Higgins, in providing beauty therapy treatments, was carrying on a business on her own account, distinct from and independent of the defender's business.
- (28) There were no signs or notices on the defender's business Facebook account or elsewhere, of a nature that was readily observable by and comprehensible to prospective customers (such as the pursuer), notifying such prospective customers that Ms Higgins, in providing beauty therapy treatments, was carrying on a business on her own account, distinct from and independent of the defender's business.
- (29) As at 28 January 2014, it was not the practice of Ms Higgins to notify prospective customers at the salon that, in providing beauty therapy treatments at the salon, she was carrying on a business on her own account, distinct from and independent of the defender's business.
- (30) The agreed payments of £20 per day (referred to in findings-in-fact (11), (13) & (15), above) were generally paid by Ms Paul, Ms Higgins and Ms Maxwell

direct to the defender; but, at the defender's request, when she was absent from the salon (including during her absence on maternity leave from around December 2013 onwards), these sums were ingathered and hand-delivered (either by Ms Higgins or Ms Paul), on behalf of the defender, to the landlord's wife (Elizabeth Marshall).

- (31) The defender paid no wages, salary or other benefits to Ms Paul, Ms Higgins or Ms Maxwell.
- (32) The defender paid no PAYE income tax or national insurance contributions in respect of Ms Paul, Ms Higgins or Ms Maxwell.
- (33) The defender provided no equipment or materials to Ms Paul, Ms Higgins or Ms Maxwell.
- (34) The defender, Ms Paul and Ms Higgins brought to the salon, and used, their own beds, lotions, waxes, sprays and other materials and equipment for all beauty therapy treatments provided by them at the salon.
- (35) There was no common till within the premises.
- (36) All payments by customers were made in cash to the person who provided the service.
- (37) The defender, Ms Paul, Ms Higgins and Ms Maxwell regarded themselves as self-employed independent contractors, each carrying on business on their own account.
- (38) The defender, Ms Paul, Ms Higgins and Ms Maxwell regarded the agreed payments of £20 per day (referred to in findings-in-fact (11), (13) & (15), above) as "rent" payable by them for the use of space (or, more colloquially,

for “the rent of a chair”) in the salon and as a contribution by each of them to the rent that was payable by the defender to the landlord.

- (39) The defender derived benefit from the permitted activities of Ms Higgins, Ms Paul and Ms Maxwell in providing beauty therapy treatments at the salon, in respect that (i) the defender thereby obtained income that could be applied to defray her rental liability to the landlord; (ii) the defender’s salon was able to continue to operate even in her absence, thereby maintaining the defender’s business as a going concern and preserving the defender’s trading name (and the goodwill associated therewith).
- (40) On or about 28 January 2014, the defender was absent from her business due to the imminent birth of her child.
- (41) On or about 28 January 2014, the pursuer entered the salon to request a beauty therapy treatment known as an HD eyebrow tint, which involved a combination of waxing and tinting of the eyebrows.
- (42) The pursuer had made no prior appointment to attend the salon; she had never visited the salon before; and she had no prior connection with the salon or any of the persons who worked within it.
- (43) The salon had been recommended to the pursuer by her sister who had previously received a couple of beauty treatments from different therapists within the salon.
- (44) The pursuer had never previously had an HD eyebrow tint.
- (45) On entering the salon the pursuer met Ms Higgins, the pursuer requested an HD eyebrow tint, and Ms Higgins agreed to provide the treatment.

- (46) A beauty therapist of ordinary competence, on being requested to provide an HD eyebrow tint to a customer, would carry out a pre-treatment patch test on a small and less sensitive area of the customer's skin (usually on an area of skin behind the customer's ear) no less than 24 hours prior to providing such a beauty therapy treatment to the customer, in order to ascertain whether the customer was likely to suffer from any allergic reaction to any of the products used in the tinting treatment; and such a pre-treatment patch test would be carried out before the customer undertakes his or her first tinting treatment, and upon re-presentation at more than six monthly intervals thereafter.
- (47) A beauty therapist of ordinary competence, on being requested to provide an HD eyebrow tint, would make reasonable enquiries of the customer to seek to ascertain (i) whether (and when) the customer had previously had such a beauty treatment or a similar treatment, (ii) whether the customer had previously experienced any adverse reaction to such a treatment or a similar treatment, and (iii) whether the customer suffered from any allergy or other medical condition that might render him or her susceptible to an adverse reaction to the requested treatment.
- (48) Prior to providing the treatment, Ms Higgins made no enquiry of the pursuer to seek to ascertain (i) whether the pursuer had previously had such a beauty treatment or a similar treatment, (ii) whether the pursuer had previously experienced any adverse reaction to such a treatment or a similar treatment, and (iii) whether the pursuer suffered from any allergy or other medical condition that might render her susceptible to an adverse reaction to the requested treatment.

- (49) Prior to providing the treatment, Ms Higgins did not carry out any form of pre-treatment patch test on the pursuer's skin in order to ascertain whether the pursuer was likely to suffer from any allergic reaction to any of the products used in the tinting treatment.
- (50) Prior to providing the treatment, Ms Higgins did not notify the pursuer that, in so doing, she was carrying on a business on her own account, distinct from and independent of the defender's business.
- (51) Ms Higgins provided the requested beauty therapy treatment to the pursuer.
- (52) The pursuer suffered an allergic reaction to the treatment in the form of an adverse skin reaction.
- (53) Specifically, as a result of the treatment, the pursuer's eyebrow skin initially became very red; within two hours thereafter, pale dots developed on her eyelid and brow skin, the dots being palpably raised; that night, the pursuer's eyebrow skin became very itchy; the following morning, she awoke to find that her eyelids were swollen and her eyebrow skin was weeping, necessitating her attendance at the Accident & Emergency Department of Glasgow Royal Infirmary where she was prescribed an antihistamine to counteract the allergic reaction from which she was suffering; the following day, the pursuer woke with both eyes swollen shut and ongoing weeping from her eyebrow skin, whereupon she attended an NHS Out of Hours GP service and was prescribed a course of steroid cream, steroid tablets and antibiotics; thereafter, the swelling of her eyebrow skin resolved within five days, the weeping resolved within seven days, and the adverse skin reaction had settled completely within 14 days, during which latter period her sleep

was disturbed, her eyebrow skin was itchy and tender (feeling like a burn), the affected skin peeled off, she lost hair from her eyebrows, her self-esteem and confidence was adversely affected, and she felt unable to go out socially or to wear make-up; and, thereafter, the pursuer's eyebrow hairs grew back after a period of approximately six to eight weeks.

- (54) The pursuer required to take three days off work due to her injuries.
- (55) For the purposes of the present action, the parties have agreed, that in the event of the defender being found liable to make reparation to the pursuer in respect of the incident referred to on record (i) the loss of wages suffered by the pursuer is properly quantified in the sum of £86.10, with interest thereon at the rate of eight per cent per annum from 28 January 2014 until payment, and (ii) damages for any inconvenience suffered by the pursuer is properly quantified in the sum of £250 with interest thereon at the rate of four per cent per annum from 28 January 2014 until payment.

FINDS IN FACT AND IN LAW

- (1) In providing the requested beauty treatment, Ms Higgins owed a duty to the pursuer to take reasonable care to avoid causing loss, injury and damage to the pursuer.
- (2) Specifically, it was Ms Higgins' duty (i) to make reasonable enquiries of the pursuer, prior to providing the requested beauty treatment, to ascertain whether (and when) the pursuer had previously had such a beauty treatment or a similar treatment, whether the pursuer had previously experienced any adverse reaction to such a treatment or a similar treatment, and whether the

pursuer suffered from any allergy or other medical condition that might render her susceptible to an adverse reaction to the requested treatment; and (ii) to carry out a pre-treatment patch test on a small and less sensitive area of the pursuer's skin no less than 24 hours prior to providing the requested treatment, in order to ascertain whether the pursuer was likely to suffer from any allergic reaction to any of the products to be used in the requested beauty treatment.

- (3) In the event, Ms Higgins breached each of the foregoing duties, in that, prior to providing the requested beauty treatment (i) she failed to carry out any such pre-treatment enquiries, and (ii) she failed to carry out any such pre-treatment patch test.
- (4) By so acting (and so failing to act), Ms Higgins failed in her duty to take reasonable care to avoid causing loss, injury and damage to the pursuer, and was thereby negligent.
- (5) The foregoing negligent acts and omissions of Ms Higgins caused the pursuer to suffer loss, injury and damage.
- (6) At the material time, Ms Higgins was not an employee of the defender.
- (7) At the material time, Ms Higgins was self-employed.
- (8) However, at the material time, Ms Higgins carried on activities (namely, the provision of beauty therapy treatments, including HD eyebrow tints) assigned to her by the defender as an integral part of the defender's business, for the defender's benefit and subject to the defender's control, and not as part of a recognisably independent business of her own; and the foregoing

negligent acts and omissions of Ms Higgins were a risk that was created by the defender in assigning those activities to Ms Higgins.

- (9) At the material time, Ms Higgins' relationship with the defender was akin to that of employment, such as to make it just, fair and reasonable (subject to finding in fact and law (10), below) to impose vicarious liability upon the defender.
- (10) The foregoing negligent acts and omissions of Ms Higgins were sufficiently closely connected to Ms Higgins' relationship with the defender, and to the activities assigned to her thereunder, as to fall within the scope or field of activities so assigned to Ms Higgins.
- (11) Accordingly, the defender is vicariously liable for the foregoing negligent acts and omissions of Ms Higgins and for the pursuer's resulting loss, injury and damage.
- (12) A reasonable award of damages for solatium, having regard to the pain suffering and inconvenience suffered by the pursuer, is £2,250.

FINDS IN LAW

- (1) The pursuer, having suffered loss, injury and damage as a result of the negligent acts and omissions of Ms Higgins, and the defender being vicariously liable for those negligent acts and omissions, the pursuer is entitled to reparation therefor from the defender;

THEREFORE, Grants decree against the defender for payment to the pursuer of the sum of TWO THOUSAND FIVE HUNDRED AND EIGHTY SIX POUNDS AND TEN PENCE

(£2,586.10) STERLING, with interest as follows: (i) on the sum of £86.10 at the agreed rate of

eight per cent (8%) per annum from 28 January 2014 until payment, (ii) on the sum of £250 at the agreed rate of four per cent (4%) per annum from 28 January 2014 until payment, and (iii) on the sum of £2,250 at the rate of eight per cent (8%) per annum from 28 January 2014 until payment; Reserves the issue of expenses meantime; Appoints parties to be heard thereon at a hearing in the commercial court on Wednesday 7 March 2018 at 2pm before Sheriff Reid.

NOTE:

Summary

- [1] This case involves the doctrine of vicarious liability.
- [2] The facts are unremarkable, but the law that falls to be applied is relatively new.
- [3] The defender is a beauty therapist. She rented a small salon in Shettleston. From there, she carried on business under the trading name “Blush Hair and Beauty”. The business involved the provision of beauty therapy treatments and hairdressing services to the public.
- [4] The defender allowed two other qualified beauty therapists and a hairdresser to work in the salon from time to time. In each case, the arrangement with the defender was that the therapists and hairdresser could work in the salon in exchange for the payment to the defender of £20 for each day that they chose to work there.
- [5] The defender did not employ the therapists or the hairdresser.
- [6] They were all self-employed.
- [7] From their perspective, the therapists and the hairdresser regarded their arrangement with the defender as nothing more than the “renting of a chair” in the salon from time to time.

[8] Some further details should be noted. The therapists agreed with the defender that a uniform price-list would be charged for all beauty therapy treatments provided at the salon. The therapists were given keys to the salon. They were given the password to, and permission to use, the defender's business Facebook account. On occasion, they publicised and promoted the defender's trading name.

[9] One day, the pursuer entered the defender's salon. She had no prior appointment. She had no knowledge of the defender's private arrangements with the therapists there. She requested a particular beauty treatment on the price-list. It involved applying hot wax and a chemical tint to her eyebrow hair and skin.

[10] One of the therapists in the salon agreed to serve her.

[11] Nothing was said or done to alert the pursuer to the fact that this therapist was self-employed, or was otherwise carrying on a business on her own account distinct from the defender's business. The treatment proceeded.

[12] Unfortunately, the therapist was negligent.

[13] She failed to carry out a pre-treatment "patch test" on the pursuer's skin to ascertain whether the pursuer might suffer an allergic reaction to chemicals in the eyebrow tint. As a result, the pursuer suffered an allergic reaction, causing swelling, weeping of the skin, and loss of eyebrow hair.

[14] The question is this. Is the defender vicariously liable for the negligent acts and omissions of the therapist with whom the defender had no contract of employment?

[15] Perhaps as little as five years ago, this claim would not have survived a debate on the relevancy of the pleadings. However, it is made now in the dizzying wake of a sea change in the law relating to vicarious liability. Four recent Supreme Court decisions stand at the vanguard of that legal upheaval, emboldened by "luminous and illuminating judgments"

from the Canadian Supreme Court (per Lord Steyn in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at paragraphs 27-28 commending the decisions in *Bazley v Curry* 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71), and reinforcing ground-breaking decisions of the English Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2006] QB 510 and *E v English Province of Our Lady of Charity* [2013] QB 722.

[16] In simple terms, the law of vicarious liability has “moved beyond the confines of a contract of service” (per Ward LJ in *E, supra*).

[17] Applying the modern theory of vicarious liability to the facts, I conclude that the two-stage test set out in the quartet of recent Supreme Court decisions is satisfied. Firstly, having regard to its particular characteristics, the relationship that existed between the defender and the therapist is properly regarded as being akin to an employment relationship, such as to make it fair, just and reasonable to give rise to vicarious liability. Secondly, the therapist’s negligent acts and omissions were sufficiently closely connected with that relationship as properly to be regarded as falling within the field of activities assigned or entrusted thereunder to the therapist. Accordingly, in my judgment the defender is vicariously liable for the negligent acts and omissions of the self-employed therapist who treated the pursuer.

[18] I explain my reasoning more fully below.

The evidence

[19] At the outset of the proof, it was a matter of agreement between the parties that the sole remaining issues in dispute were whether the defender was, in law, vicariously liable for the negligent acts and omissions of the beauty therapist (Ms Higgins) and the quantification of damages for solatium.

[20] For the pursuer, I heard testimony from five witnesses: Lauren Grubb (the pursuer); Ashleigh Grubb (the pursuer's sister); Roseanne Higgins (the beauty therapist who treated the pursuer); Natalie Shannon (the defender); and Danielle Paul or Dawson (a beauty therapist who also worked within the defender's shop).

[21] For the defender, I heard evidence from Ashleigh Maxwell (a hairdresser who worked within the defender's shop).

[22] In addition, the parties entered into a joint minute of admissions (item 24 of process) and certain factual issues were agreed in terms of the pursuer's notice to admit (item 16 of process) and the defender's notice of non-admission (item 22 of process).

[23] All of the witnesses struck me as entirely honest and, for the most part, reliable in their factual recollections. I summarise their oral testimony below.

[24] The issue, though, turns upon the legal conclusions to be drawn from the findings.

Lauren Grubb

[25] Ms Grubb (30) spoke of her experience at the defender's beauty salon and of the effect of the treatment upon her. She adopted the summary of injuries in paragraph 2.8 of the report of Dr Stephen Holme (item 5/2 of process) and spoke to the photographs (item 5/30 of process) depicting her alleged injuries as at 5 February 2014. She spoke to her attendance at hospital and at an Out of Hours GP service, the diagnoses provided on each occasion, and the treatment prescribed. She was off work for three days. It took approximately 6 to 8 weeks for her eyebrows to grow back. She spoke to the effect on her self-esteem and social life.

[26] In a brief cross-examination she stated that the eyebrow treatment requested by her was on a "special offer" price of £15. She paid this sum to Ms Higgins. She did not see a till

on the premises. She acknowledged that, according to Dr Holme's medical report (item 5/2 of process), the physical effects of her injury lasted no more than two weeks. She acknowledged that she had previously sued Ms Higgins personally in a separate court action and had obtained a decree against her for payment of the sum of £5,000.

[27] There was no re-examination.

Ashleigh Grubb

[28] Ashleigh Grubb (33) is the pursuer's sister. She was familiar with the salon, having had a number of beauty treatments carried out there by different therapists, with and without prior appointments. She spoke to the photograph of the exterior of the salon (item 5/4/2 of process) and identified the defender, Ms Paul and Ms Higgins as three of the beauty therapists depicted there. Apart from the sign outside the salon (reading "Blush Hair and Beauty"), the witness was not aware of any other signs identifying the owner of the business.

[29] She spoke to her observations of her sister's injuries and of their effect upon her. She understood her sister had returned to the salon, spoken to Ms Paul and Ms Higgins, and was given a refund.

[30] In cross-examination, the witness confirmed that she had never had a discussion with any of the therapists as to who controlled the salon. She had assumed that Ms Paul and the defender owned the salon.

Roseanne Higgins

[31] Ms Higgins (25) is a qualified beauty therapist. From 2013 onwards, she generally worked at the salon three days a week. She spoke to her relationship with the defender.

There was no written agreement between them. On the days when she chose to work in the salon, Ms Higgins would pay “rent” of £20 per day. She identified the defender as the “owner” of the business name “Blush Hair and Beauty”, but she insisted that there was “no boss” in the salon. Each of the therapists was “self-employed”, “did [her] own thing”, and carried on her “own business”; they each provided their own equipment; they carried out the same treatments; they agreed a uniform price list; they each had a set of keys to the salon. The defender’s prior permission would be sought for any “special deal” to be offered to customers. To cope with a large group of customers (such as a wedding party), the therapists would share out the work between themselves. They called themselves “the Blush ladies” on social media.

[32] She spoke to the content of screenshots and photographs from the defender’s business Facebook page (items 5/4/2 to 5/4/4 of process); to screenshots from her personal Facebook page (items 5/8/1 to 5/8/7 & 5/9 of process); to extracts from social media communications with the defender dated July & May 2014; and to the terms of a mandate to HM Revenue & Customs (items 5//25/1 & 5/25/2) dated 26 May 2016.

[33] Little was said by the witness in her testimony regarding the circumstances of the pursuer’s treatment, other than that the defender was on maternity leave at the time; the pursuer would not have known that Ms Higgins was self-employed; and, a few days later, when the pursuer returned to the salon to complain, Ms Higgins had apologised and refunded her money as a “goodwill gesture”.

[34] In cross-examination, Ms Higgins gave further details concerning the working arrangement. No wages were paid to her. No tax or national insurance contributions were paid on her behalf by the defender. Ms Higgins retained all her earnings from customers. She paid £20 to the defender for each day worked at the salon, irrespective of her earnings.

During the defender's absence on maternity leave, Ms Higgins paid her "rent" direct to the person whom she believed to be the landlord. The so-called "Blush uniform" was not worn by her (or the other beauty therapists) every day. It was only worn on special occasions, such as for the wedding fair and the photo shoot, in order to "look professional". There was no common till.

[35] In re-examination, Ms Higgins acknowledged she did not work anywhere else at the material time.

Natalie Shannon

[36] Natalie Shannon (30), a qualified beauty therapist, was the owner of the business known as "Blush Hair and Beauty" in January 2014. She rented the salon from a third party for a fixed monthly rental. She devised the trading name "Blush Hair and Beauty", purchased a sign bearing that name, and had it appended to the front of the salon. At her expense, she redecorated and furnished the salon. She spoke to photographs of the exterior and interior of the salon (items 5/4/2, 5/4/3 & 5/28/1-4 of process).

[37] She spoke of her unwritten arrangements with Ms Paul, Ms Higgins and Ms Maxwell whereby she allowed them to work in the salon on certain days in exchange for payments of £20 per day from each of them. She took no share of any income received by the three girls. A uniform price list was agreed between the therapists; Ms Maxwell (the hairdresser) fixed and charged her own prices. All three were given keys to the salon by the defender. There was no common till. All payments were in cash to the person who provided the service. The defender acknowledged that the T-shirts worn by Ms Paul and Ms Higgins in photographs outside the salon (items 5/4/2 of process) and at a wedding fair (item 5/8/9) bore her business name. She regarded the therapists and hairdresser as working

to promote their own businesses. They were all self-employed. They each provided their own equipment and materials. She did not control any of them. No one was left “in charge” when the defender was absent on maternity leave, though she conceded that she ultimately had the power to exclude Ms Higgins from the salon. She acknowledged that she, the other therapists and the hairdresser (“everyone”) benefited from the sign; and that “everybody” was affected, for better or worse, by a good or bad customer experience at the salon.

[38] In cross-examination, the defender testified that she never employed any person in the salon; no tax or national insurance contributions were collected by the defender; the so-called “Blush uniform” was rarely worn; the defender had a business Facebook page (under the “Blush” trading name), and customers could make appointments direct with any of the therapists via that Facebook page; she had no control over the manner in which any treatments were provided; she had no power to discipline any therapist, other than by declining to rent space in the future; the only benefit received by the defender from the arrangements was the receipt of “rent money”; she received no share of any income earned by the other therapists or hairdresser; each therapist had keys to the salon and the password to access the “Blush” Facebook page.

[39] In re-examination, the defender acknowledged that there may be some benefit to the salon as a whole from the activities of the other therapists and the hairdresser, but disputed that any such benefit was quantifiable. She acknowledged that the hairdresser (Ms Maxwell) brought “her own clients” to the salon.

Danielle Paul or Dawson

[40] Ms Paul (34), a qualified beauty therapist and make-up artist, commenced work at the salon in February 2012. She was self-employed. She claimed to have no contractual

relationship with the defender: she “just paid [the defender] £20 a day and rented a room”. A uniform price list for the beauty treatments was agreed between her, the defender and Ms Higgins. Each therapist provided her own equipment and materials. She described the layout and use of the rooms. She acknowledged that it was the defender’s salon and regarded the defender as “the boss”, but insisted that she was her own boss while working and did not take instructions from the defender. She spoke *inter alia* to the photograph (item 5/8/9) depicting her and Ms Higgins wearing matching uniforms and “Blush” shirts at a hotel wedding fair promotion. She acknowledged that the defender, the other therapists and the hairdresser (“all of us”) would all suffer from a customer’s bad review of a treatment at the salon.

[41] In cross-examination, Ms Paul confirmed she had her own set of keys to the salon and access to the “Blush” Facebook page. She testified that she wore the “Blush” T-shirt on only two occasions. Each of the therapists (and the hairdresser) worked independently. She regarded herself as a tenant.

[42] In re-examination, Ms Paul acknowledged that the defender had the power to exclude her and Ms Higgins from the salon.

Ashleigh Maxwell

[43] From 2013 onwards, Ashleigh Maxwell (32) worked two days a week as a self-employed hairdresser at the salon. She described her relationship with the defender as involving nothing more than the renting of space in the salon at an agreed price of £20 per day. She decided which days she wished to work at the salon. The defender had no control over the clients seen by Ms Maxwell or the manner in which she carried out her work. She

advertised on her personal Facebook page and by word of mouth. She retained all income from her customers. There was no common till.

[44] In cross-examination, Ms Maxwell confirmed that she used her own trading name (namely “Ashleigh Maxwell Hair”). She devised and applied her own price list, over which the defender had no say or control. She did not consider herself to be part of a single team. She regarded herself as distinct from the three beauty therapists, and did not take much to do with them. She acknowledged that the defender depended on Ms Maxwell to provide hairdressing services in the salon. She acknowledged that there were no signs within the salon notifying customers that she was self-employed.

[45] In re-examination, she confirmed that she wore the “Blush” T-shirt on one occasion for a promotional photograph.

Closing submissions

[46] For the pursuer, comprehensive written submissions and copy authorities were lodged, for which I am grateful. On the key disputed issue, I was invited to conclude that the relationship between the defender and Ms Higgins was akin to that of an employer and employee. Particular reliance was placed upon the defender’s ownership of the “Blush Hair and Beauty” business name; the control exercised by the defender over the persons who worked at the salon; the communal use of the facilities within the salon; the defender’s control over the prices charged by the therapists; and the communal advertisement and promotion of the defender’s business name (on Facebook, in the salon, and elsewhere). All of the foregoing was said to establish a closeness of connection that was akin to employment. Reference was made to *Marshall v William Sharp & Sons Ltd* 1991 SLT 114; *Lister & Ors v Hesley Hall Ltd* [2002] 1 AC 215; *Various Claimants v Catholic Child Welfare*

Society & Ors [2013] 2 AC 1; *E v English Province of Our Lady of Charity* [2013] QB 722; *Cox v Ministry of Justice* [2016] AC 660; *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677; *Various Claimants v Barclays Bank Plc* [2017] EWHC 1929; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; *Pimlico Plumbers Ltd & Anr v Smith* [2017] ICR 657; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; *Aslam v Uber B.V.* [2017] IRLR 4.

As for quantum, I was invited to value solatium in the sum of £5,000. Reference was made to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury cases (13th ed.) (2015), chapters 5, 9 & 12 and abbreviated extracts from some English County Court decisions.

[47] For the defender, I was invited to grant decree of absolvitor. Properly characterised, the relationship between the defender and Ms Higgins was said to be more akin to that of landlord and tenant (or landlord and licensee), than to employment. There was no common till, no pooling of money, no payment of wages, no provision of equipment or materials, no power to discipline, and no control of the manner in which the beauty therapists worked. Instead, it was submitted that Ms Higgins merely rented space in the defender's salon. She worked for her own benefit. The only quantifiable benefit to the defender was the receipt of rent. She was not "assigned" any tasks by the defender. The agreement of a uniform price list was consensual, not compulsory. Any alleged public perception of a closeness of connection between the defender and Ms Higgins was irrelevant. I was invited to draw an analogy with the renting by a landlord of individual stalls within market premises. In that scenario, the owner or landlord of the market could not sensibly be vicariously liable for the negligence of individual stall-holders. While it was acknowledged that the scope of vicarious liability had widened, it was said that the imposition of liability in the present case would be a step too far.

Discussion

The traditional theory of vicarious liability

[48] At common law, proof of fault on the part of a defender is a prerequisite of delictual liability (*RHM Bakeries Scotland Ltd v Strathclyde Regional Council* 1985 SC (HL) 17; *Kennedy v Glenbelle* 1996 SC 95). To that rule there is only one true exception at common law, namely vicarious liability. Traditionally, vicarious liability attached to a person who, though entirely blameless, was found to be in certain defined contractual relationships with the wrongdoer. Classically, such liability arose in the context of a contract of employment, as between employer and employee. It has also been held to arise in the context of a contract of agency, as between principal and agent; in the context of a contract of partnership, as between the firm and the partners thereof; and, exceptionally, in the context of a contract for services, as between an employer and independent contractor (*Stephen v Thurso Police Commissioners* (1876) 3 R 535; *Marshall v William Sharp & Sons Ltd* 1991 SLT 114).

[49] According to the traditional theory, disputes about vicarious liability involved a two-stage test. Typically, putting aside cases of agency or partnership, the first stage was to decide whether there was a true relationship of employer/employee between the defender and the wrongdoer. The analysis tended to focus upon whether the wrongdoer was, in law, an employee employed under a contract of service or an independent contractor engaged under a contract for services. If the former, the doctrine applied; if the latter, the doctrine did not apply. If the wrongdoer was an employee, the second stage was to decide whether the wrongdoer's act or omission fell within the scope of his employment, or whether at the material time he was on a "frolic" of his own.

[50] Over the years, judges and academics have observed, with weary resignation, that the doctrine represents a triumph of policy over principle. The fundamental tenet that liability implies fault (reflected in the maxim *culpa tenet suos auctores*) was sacrificed at the altar of expediency (See *Kilboy v South Eastern Fire Area Joint Committee* 1952 SC 280 at 285 per Lord President Cooper; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 685 per Lord Pearce). Quite properly, legal purism was outweighed by a number of compelling policy considerations, such as the necessity to ensure that innocent victims are compensated by a solvent defender with deeper pockets; that the burden of loss is distributed fairly among those who can more easily bear it; that responsibility for risk is allocated to those who created it.

[51] Attempts to articulate a coherent rational basis for the doctrine, as opposed to an exposition of the policy justifications for it, proved elusive. According to Lord Brougham in *Duncan v Findlater* (1839) 6 CL & FIN 894:

“[t]he reason that I am liable is this, that by employing [the wrongdoer] I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.”

But, in truth, there was no universal agreement as to the policy considerations which informed the doctrine, still less upon the articulation of a coherent underlying principle. The withering assessment of Professor Glanville Williams (in an article in (1957) 20 MLR 220, referred to by Ward LJ in *E v English Province of Our Lady of Charity, supra*, at 762) was that:-

“[v]icarious liability is the creation of many judges who have different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid as far as it extends.”

[52] The result was an increasing stultification of the doctrine.

[53] To the extent that the doctrine was confined in its application to discrete contractual relationships (typically, employment), it failed to protect injured third parties from the alleged wrongdoings of office holders, volunteers, members of unincorporated associations, and an assortment of workers, none of whom were engaged under a standard contract of employment (*McE v De La Salle Brothers* 2007 SC 556).

[54] To the extent that the employer's "control" over the wrongdoer was a defining constituent element of the doctrine, for many years it struggled to rationalise, for example, the liability of professionals (such as hospital medical staff, resident house surgeons, visiting consultants) over whom employers had no direct control (see *Reidford v Magistrates of Aberdeen* 1933 SC 276, subsequently distinguished in *Macdonald v Glasgow Western Hospitals* 1954 SC 453).

[55] The notion of the "borrowed employee" was a recurring conundrum. Until recently, it was sought to be addressed by an unwieldy fiction whereby the employee of one party was deemed to be transferred *pro hac vice* to the service of another for a temporary purpose (*Bowie v Shenkin* 1934 SC 459; *Mersey Docks & Harbour Board v Coggins & Griffith Ltd* [1947] AC 1). A more principled solution may finally have been found in the concept of dual vicarious liability (*Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] QB 510).

[56] As for self-employed independent contractors (whose work the employer did not control), the doctrine of vicarious liability did not apply to them at all (*Stephen v Thurso Police Commissioners* (1876) 3 R 535). But that rule has wrestled to contain a litany of exceptions. These exceptions were often explained as (and occasionally confused with) instances of breach by the employer of a personal "non-delegable" duty of care. The cases tended to fall into two broad categories. The first category involved a large and varied class in which the defender employed an independent contractor to perform some function which

was either inherently hazardous or liable to become so in the course of the work. Reported cases describe a range of perils such as the construction of a sewer, the heaping of soil on a road after dark, the excavation of foundations, and the removal of poisonous paint scrapings on pasture land. In some cases, the activities were regarded as sufficiently hazardous to attract the application of a non-delegable duty of care; in others, they were not. The very classification of the hazard was haphazard. The second category involved cases where, by virtue of an antecedent relationship between the defender and the injured party, a positive or affirmative duty was imposed on the employer to protect a particular class of (often vulnerable) persons against a particular class of risks (and not simply a duty to refrain from acting in a way that foreseeably causes injury); and that duty was seen to be personal to the defender. Performance of the duty may well have been delegated, and usually was, but the duty itself remained personal to the employer. A familiar example of such a duty would be the non-delegable duty of an employer owed to an employee to provide a safe system of work (*Wilson & Clyde Coal Co Ltd v English* [1938] AC 57). The concept also applied where performance of such a personal duty of an employer had been delegated to an independent contractor (*McDermid v Nash Dredging & Reclamation Co. Ltd* [1987] AC 906). The problem, though, was that the entire approach was increasingly artificial. For example, in the *English* case, it might cynically be observed that resort to the non-delegable duty concept was a convenient device to circumvent the effect of the discredited (and subsequently abolished) doctrine of common employment, which operated at that time to exclude the employer's vicarious liability. In any event, the exceptions were at risk of eating up the rule. Happily, the Supreme Court has sought to bring some order to the chaotic field of non-delegable duties in its decisions in *Woodlands v Essex County Council* [2014] AC 537 and *Armes v Nottinghamshire County Council* [2017] 3 WLR 1000. The concept remains important though

because the imposition of vicarious liability is implicitly premised upon the *absence* of direct liability (by virtue, for example, of the breach of a non-delegable duty of care) (*Armes, supra*, paragraph 50, per Lord Reed).

[57] In recent years, pressure to articulate a more cohesive approach to the doctrine of vicarious liability had become unanswerable.

[58] There had been significant structural changes to the global labour market, reflecting an increasing complexity, sophistication and flexibility in the arrangements under which people worked. Flexible work forces had emerged consisting largely of the self-employed, part-time workers, casual workers, “temps”, agency workers, home-workers, and the like. The flexible working arrangements of these new “atypical” workforces departed radically from the standard employment relationship whereby an employee works regularly (that is, full-time) and consistently for one employer under a contract of employment (*McKendrick, Vicarious Liability and Independent Contractors: A re-examination* (1990) 53 MLR 770, referred to by Ward LJ in *E v English Province of Our Lady of Charity, supra*, at paragraph 58). No doubt, for tax and other purposes, these workers are not employees in the conventional sense. But it followed that, not being employees in the conventional sense, they also fell outwith the scope of the doctrine of vicarious liability as it had conventionally been understood. As a result, the over-riding social policy objectives of the doctrine (protection of injured third parties, loss distribution, risk allocation, etc.,) were in danger of being defeated.

[59] It was recognised that these developments in the modern workplace (and the changing legal relationships between “workers” and “organisations”, to use neutral terms) necessitated a change in the law as to the *type of relationship* that has to exist between a worker and an organisation for vicarious liability to arise (*Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, paragraphs 55 & 56 per Lord Dyson). This meant that the

first stage in the traditional two-stage test (referred to in paragraph [49], above) had to be re-defined.

[60] In the event, it was the repugnant evil of child sexual abuse, and the resulting torrent of claims against various religious and care organisations, that provided the necessary catalyst for a wholesale review of the doctrine of vicarious liability.

The modern theory of vicarious liability

[61] The modern theory of vicarious liability can be found in a quartet of landmark Supreme Court decisions, namely *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 (“the *Christian Brothers* case”); *Cox v Ministry of Justice* [2016] AC 660; *Mohamud v William Morrison Supermarkets plc* [2016] AC 677; and *Armes v Nottinghamshire County Council* [2017] 3 WLR 1000. Consideration should also be given to the ground-breaking decisions of the English Court of Appeal in *E v English Province of Our Lady of Charity* [2013] QB 722 and *Viasystems (Tyneside) v Thermal Transfer (Northern) Ltd* [2006] QB 510.

[62] In short, a two-stage test still applies, but in a revamped form.

[63] The first stage involves an enquiry into the relationship between the defender and alleged wrongdoer to determine whether it has certain characteristics such as to make it just, fair and reasonable that vicarious liability should arise. An employment relationship is the paradigm. But a relationship that is *akin to employment* may also give rise to such liability. A relationship may be treated as akin to employment if it has “certain characteristics similar to those found in employment” (*Cox, supra*, at 54) such as to make it fair, just and reasonable to give rise to vicarious liability. These “characteristics” are identified by Lord Phillips in the *Christian Brothers* case. I shall consider them further below.

[64] The second stage involves an enquiry into the relevant act or omission of the wrongdoer, to determine whether the act or omission is “so closely connected” with the “field of activities” (*Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Company* 1925 SC 796 at 802 per Lord Cullen) assigned or entrusted by the defender to the wrongdoer as to justify the imposition of vicarious liability upon the defender (*Mohamud v William Morrison Supermarkets Plc, supra*, paragraphs 44 & 45 per Lord Toulson; *Lister & Others v Hesley Hall Ltd* [2002] 1 AC 215).

[65] Both stages are fact-sensitive. It is “a judgment upon a synthesis of the two” which is required (*Christian Brothers, supra*, paragraph 21).

[66] It is the first stage of the two-stage test that involves the most significant innovation. Vicarious liability is no longer restricted to a few discrete contractual relationships (typically, that of employer and employee). A relationship (contractual, statutory, or otherwise) that is “akin to employment” can also give rise to vicarious liability.

[67] What, then, are these “characteristics” of an employment relationship? In the *Christian Brothers* case, Lord Philips identified “five incidents of the relationship between employer and employee” (*Armes, supra*, paragraph 55 per Lord Reed) which tend to make it fair, just and reasonable to give rise to vicarious liability. In varying degrees, these five “incidents” tend to characterise an employment relationship, and relationships akin thereto. The five characteristics are: (i) that the defender will be more likely to have the means to compensate the victim than the wrongdoer and can be expected to have insured against that liability; (ii) that the wrong will have been committed as a result of activity being taken by the wrongdoer on behalf of the defender; (iii) that the wrongdoer’s activity is likely to be part of the business activity of the defender; (iv) that the defender, by engaging the wrongdoer to carry on the activity, will have created the risk of the wrong committed by the

wrongdoer; and (v) that the wrongdoer will, to a greater or lesser degree, have been under the control of the defender.

[68] In *Cox v Ministry of Justice, supra*, Lord Reed (at paragraph 24) distilled the foregoing propositions into a single, admirably lucid statement of principle. According to the modern theory of vicarious liability:-

“... a relationship other than one of employment is in principle capable of giving rise to 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 defender and for the defender’s benefit (rather than as activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defender by assigning those activities to the wrongdoer.”

[69] By focusing upon the business activities carried on by the defender and their attendant risks, the new approach directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities (*Cox, supra*, paragraph 29 per Lord Reed).

[70] However, the Supreme Court in *Cox* also laid down a number of important ground rules to be observed before one embarks upon an analysis of the relationship in question. First, Lord Phillips’ five characteristics are not to be applied mechanically or slavishly. Second, the weight to be attached to each of the five characteristics will vary depending upon the context. Third, the new approach is not confined to some special category of cases (such as the sexual abuse of children). Quite explicitly, it represents an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment, albeit “not to the extent of imposing such liability where [the wrongdoer’s] activities are entirely attributable to the

conduct of a recognisably independent business of his own or of a third party" (*Cox, supra*, paragraph 29). Fourth, judges should not be misled by a narrow focus on semantics. For example, the words "business", "benefit" and "enterprise" are not to be narrowly construed. Fifth, it will not always be necessary to ask the broader question, namely whether it is "fair, just and reasonable" to impose liability. The "whole point" of seeking to align the five criteria with the various policy justifications for its imposition was to procure a result that was inherently fair, just and reasonable. That said, the criteria may be capable of refinement in particular contexts; and where a case concerns circumstances that have not previously been the subject of an authoritative judicial decision, it may be valuable to stand back and consider whether the imposition of vicarious liability would indeed be fair, just and reasonable.

[71] As for the five characteristics themselves, the Supreme Court acknowledged that the first incident (i.e. that the defender will be more likely to have deeper pockets and insurance) is unlikely to be of independent significance in most cases, although there might be circumstances in which the absence or unavailability of insurance, or some other means of meeting a potential liability, might be a relevant consideration (*Armes, supra*, paragraph 56). The fifth incident (i.e. that the wrongdoer will, to a greater or lesser degree, have been under the control of the defender) has likewise diminished in significance. In the context of the modern approach, "control" may mean little more than that there is an entitlement (and, in theory, an obligation) on the part of the defender to control what the wrongdoer does, not how he does it (*Cox*, paragraph 21; *Christian Brothers*, paragraph 36). That said, the absence of even this "vestigial degree of control would be liable to negative the imposition of vicarious liability" (*Cox*, paragraph 21). It is the three remaining inter-related characteristics that appear to form the backbone of the modern theory of vicarious liability. For ease of

reference, they are that the wrong will have been committed as a result of activity being taken by the wrongdoer on behalf of the defender; that the wrongdoer's activity is likely to be part of the business activity of the defender; and that the defender, by engaging the wrongdoer to carry on the activity, will have created the risk of the wrong committed by the wrongdoer.

[72] These five characteristics involve a fusion of a number of theories or tests that, to varying extents, have been used from time to time to identify whether an employment relationship (or something akin thereto) may exist between parties. The theories may conveniently be referred to as the so-called organisation test, the integration test, the entrepreneur test, and the control test (*E v English Province of Our Lady of Charity, supra*, at paragraph 72 per Ward LJ). No single test is determinative. They simply offer useful "signposts" to the existence (or non-existence) of a relationship that may give rise to vicarious liability.

[73] The result of this rejuvenated theory of vicarious liability has been to attribute liability to defenders in a range of circumstances that would hitherto have been inconceivable. It may be instructive to consider some recent examples.

The Christian Brothers case

[74] In the *Christian Brothers* case, an unincorporated religious association ("the institute"), whose mission was to provide children with a Christian education, was held to be vicariously liable for the sexual abuse of children by members of the institute (known as "brothers") who taught at an approved school. An entirely different legal entity managed the school and, indeed, employed the brothers as teachers at the school under formal contracts of service. That other legal entity had already been found to be vicariously liable

for the abuse. Nevertheless, the Supreme Court held that the institute was also vicariously liable.

[75] The relationship between the brothers and the institute was different in many ways from the relationship between an employer and employee. There was no contract between them. No wages were paid. But the relationship also had many of the elements – and all of the essential elements – of an employment relationship. Indeed, in some ways the relationship was much closer than that of employer and employee. (The brothers had undertaken vows of obedience and poverty.) The relationship between the brothers and the institute was “sufficiently akin to that of employer and employee” to satisfy stage one of the new test of vicarious liability (*Christian Brothers, supra*, paragraph 60).

The Cox case

[76] The facts in *Cox* could not have been more different. The claimant was a civilian employed by the prison service as a manager in a prison kitchen. As part of their rehabilitation, about 20 prisoners also worked in the kitchen alongside the civilian catering staff. One of the prisoners carelessly dropped a sack of rice on the claimant’s back causing her injury. The question was whether the prison service was vicariously liable for the negligent act of a prisoner while he worked in the prison kitchen. There was no contract of any kind between the prison service and the prisoners; the prisoners were not there of their own free will, but under compulsion; no profit was sought to be made; and the interests of the prison and of the prisoners could hardly be said to be aligned. Nevertheless, the Supreme Court held that the prison service was vicariously liable for the prisoner’s negligent act because the prisoners in the kitchen were integrated into the operation of the prison; they worked under the direction of the prison staff; the activities assigned to the

prisoners (preparing meals for prisoners) formed an integral part of the activities which the prison service carried on in furtherance of its own aims; and by placing them there, the prison service had created the risk that the prisoners may commit a variety of negligent acts within the field of activities assigned to them (*Cox, supra*, paragraph 32).

The Armes case

[77] In *Armes*, the Supreme Court held that a local authority was vicariously liable for the physical and sexual abuse committed by foster parents to whom, as a child, the claimant had been boarded out by the authority. The notion of vicarious liability in such a context was inconceivable only a few years ago. Indeed, a similar claim had been rejected by the Court of Appeal in *S v Walsall Metropolitan Borough Council* [1985] 1 WLR 1150. The rationale of the Supreme Court judgment in *Armes* was that, under statute, the local authority carried on the activity of *inter alia* accommodating children committed to its care; the foster parents (recruited, selected and trained by the authority) were an integral part of that activity; the carers were not carrying on a recognisably independent business of their own but, rather, accommodated children for the benefit of the local authority and under its direction; by assigning that activity to the foster carers, the authority created the risk of abuse taking place; and the abuse occurred in the course of the carers carrying out the very activity that had been assigned to them.

[78] Interestingly, Lord Hughes issued a dissenting judgment in *Armes*. That discordant note apart, stage one of the modern theory of vicarious liability shows no sign of slowing in pace or narrowing in application.

[79] How far we have travelled.

The Mohamud case

[80] The preceding Supreme Court cases were concerned with the first stage of the two-stage test, namely what type of relationship can give rise to vicarious liability.

[81] The *Mohamud* decision was not concerned with the first stage at all. Instead, *Mohamud* is concerned with the second stage, namely whether the act of the wrongdoer (an employee) was so closely connected to the field of activities that was assigned or entrusted to him by his employer as to justify imposing vicarious liability.

[82] Traditionally, the question that was to be asked at this second stage was whether the wrongdoer's act or omission fell within the scope of his employment, or whether he was on a frolic of his own. Conventionally, a wrongful act by an employee in the course of his employment was considered to be either (i) a wrongful act authorised by the employer, or (ii) a wrongful and unauthorised *mode* of doing some act that was authorised by the employer, or (iii) an act that was so connected with acts which he was authorised to carry out that it may rightly be regarded as a mode, albeit an improper mode, of doing them. This was the so-called "Salmond formula". This formula was applied in many cases, "sometimes by stretching it artificially" (*Mohamud*, paragraph 26 per Lord Toulson,) but it was not entirely satisfactory. The difficulties in its application were particularly evident in cases of injury caused by an employee's criminal act or deliberate (and expressly prohibited) act of misconduct. In those circumstances, it was difficult to argue that the wrongful act was an improper "mode" of doing something that was authorised. The analysis was seen to be increasingly artificial.

[83] Accordingly, in *Lister v Hesley Hall Ltd* [2001] UKHL 22, the House of Lords reformulated the test at this second stage to articulate a "close connection" test. This requires consideration of two matters: (i) firstly, the court must consider what functions or

“field of activities” have been assigned or entrusted by the defender to the wrongdoer; and (ii) secondly, the court must decide whether there is a sufficient connection between that field of activities and the wrongful conduct to make it right for the defender to be held vicariously liable. In this way, the law no longer struggles with the concept of vicarious liability for intentional wrongdoing (*Lister, supra*, paragraph 20 per Lord Steyn). Thus, in *Lister* an employer was held vicariously liable for the act of a warden of a school boarding house who had sexually abused the children in his care. The sexual abuse could not, on any view, be described as a “mode” of caring for the children. Instead, the broader question was posed, namely whether the warden’s acts were so closely connected with his employment (and the field of activities entrusted to him under that relationship) that it would be just to hold the employer liable. This was answered in the affirmative because that activity (i.e. the care of the children) had been entrusted to the warden; the assigning or entrusting of that activity to the warden created or significantly enhanced the risk that such abuse would occur (indeed, the risk of such abuse was “inextricably interwoven” (*supra*, paragraph 28) with the entrusted activity); so the abuse of the children by the warden in the course of carrying out that activity could therefore be said to be sufficiently closely connected with the employment relationship to justify the imposition of vicarious liability. The position might perhaps have been different if, for example, the abuse had been carried out by the school gardener, to whom the activity of caring for the children had never been entrusted or assigned.

[84] In *Mohamud, supra*, the Supreme Court reaffirmed the “close connection” test at this second stage. In that case, the wrongdoer was employed at a petrol station kiosk to attend to customers and respond to their inquiries. The employee had responded to a customer’s inquiry in a foul-mouthed manner, and had then, in a “seamless” and “unbroken sequence

of events”, pursued the customer out of the petrol station, across the forecourt, and assaulted him (while ordering the customer never to return to the employer’s premises) (*supra*, paragraph 47 per Lord Toulson). The employer was held to be vicariously liable for the intentional criminal act. It was a gross abuse of the employee’s position of course, but it was held to be closely connected with the “field of activities” that had been “entrusted” or “assigned” to him (*supra*, paragraph 47). The employee had been “purporting to act about his employer’s business”, albeit in a grossly reprehensible way (*supra*, paragraph 47). Motive was irrelevant.

[85] I turn now to apply this law to the facts in the present case.

Stage 1: What type of relationship existed between the defender and the wrongdoer?

[86] The first stage in the new two-stage test is to determine whether the relationship that existed between the defender and the wrongdoer (Ms Higgins) is such as to make it fair, just and reasonable to give rise to vicarious liability. Employment is the paradigm such relationship; but a relationship that is akin to employment may also attract such liability.

[87] In the first place, it is clear that Ms Higgins was not an employee. There was no contract of employment between the parties; no wages were paid by the defender; no PAYE tax or national insurance contributions were collected.

[88] But was the relationship between the defender and Ms Higgins akin to employment, having regard to the five characteristics identified by Lord Phillips in the *Christian Brothers* case? I shall look at each in turn.

Is the wrongdoer's activity part of the defender's business activity?

[89] It may be convenient to start with Lord Phillips' third characteristic in the *Christian Brothers* case, namely the extent to which the wrongdoer's activity was part of the business activity of the defender. By examining the activities carried on by the defender and the wrongdoer, we can discover whether the defender can be seen to have assigned or entrusted to the wrongdoer the performance of any part of her own business activity; and, if so, how central that assigned part is to the defender's activity. The more relevant the assigned or entrusted activity is to the fundamental objectives of the defender's business activity, the more appropriate it is to apply the risk to the defender's business. This corresponds broadly to the so-called "organisation test" (per Professor Richard Kidner, *Vicarious Liability: For whom should the employer be liable* 1995 15 LS 47, referred to with approval in *E v English Province of Our Lady of Charity*, *supra*, paragraph 72 per Ward LJ).

[90] In my judgment, on the evidence, the activity carried on by the defender was the operation of a beauty salon, specifically the sale of a range of beauty treatments (including hairdressing) and products to paying customers. The defender is a qualified beauty therapist; she rented the premises for use as a beauty salon; she furnished and fitted them out as such; she devised the trading name "Blush Hair and Beauty"; she appended a sign bearing that trading name to the front of the salon; she opened a Facebook account in that same trading name to promote the business and to solicit custom; and she personally provided beauty therapy treatments from the salon prior to her maternity leave. According to her own testimony, her objective was to provide a "one-stop shop" from the salon where customers could get "loads of stuff done", specifically hairdressing and various beauty therapy treatments.

[91] As for Ms Higgins, her activity was the provision of beauty therapy treatments to customers in the salon. Indubitably, that activity was a central part of the defender's business activity. That much is evident from the trading name, which marketed both hair *and beauty* services; and from the composition of the personnel in the business (three beauty therapists, one hairdresser), with a clear preponderance in favour of the beauty therapy limb of the business.

[92] On this analysis, the wrongdoer's activity can be seen to have been part of the business activity of the defender, and a central part too.

[93] The defender's agent offered an alternative analysis. He suggested that the defender's activity was (in part at least) properly characterised as the rental or licensing of space in the salon. In my judgment that is not the correct analysis. The defender was carrying on a single, unified business (namely the operation of a beauty salon). She was at liberty to organise that business as she wished. For example, she could have attempted to do all the work herself (including reception work, beauty treatments and hairdressing); or she could employ staff to do some or all of the work; or she could make various types of arrangements with independent contractors to do some or all of the work. She chose the latter. But the manner in which she chooses to organise the business (of running a beauty salon) does not change the fundamental nature of that business into something else (such as commercial property leasing or licensing). The position might have been different if the premises were not being used to carry on a single, unified enterprise at all (that is, a beauty salon) but were instead sub-divided and let into discrete and disparate businesses (a hairdresser, a cobbler, a seamstress, an accountant), perhaps under a generic trading moniker such as "Blush Business Park". That latter scenario might indicate that the fundamental activity or business of the defender was indeed that of property rental or

licensing, rather than the carrying on (at the hands of others) of any of the discrete and disparate businesses found within the premises. But that is not the case here.

Was the wrong committed as a result of activity taken by the wrongdoer on behalf of the defender (and for her benefit)?

[94] Lord Phillips' second characteristic directs attention to whether the wrong occurred as a result of activity taken by the wrongdoer on behalf of the defender (and, per Lord Reed in *Cox and Armes*, for the defender's benefit).

[95] In this context, the words "on behalf of the defender" are not intended to be applied in a narrow or formal sense. The object of the exercise is not confined to identifying a conventional relationship of agency founded upon express or implied authority. Rather, the object is to ascertain:

"...whether the [wrongdoer] was working on behalf of an enterprise or on his own behalf and, if the former, how central the [wrongdoer's] activities were to the enterprise and whether these activities were integrated into the organisational structure of the enterprise" (*Christian Brothers, supra*, 49 per Lord Phillips, commenting on *E v English Province of Our Lady of Charity, supra*).

[96] To use Lord Reed's formulation in *Cox*, the object is to ascertain whether the wrongdoer is carrying on activities assigned to her as an integral part of the defender's business activities and for the defender's benefit (rather than the wrongdoer's activities being entirely attributable to the conduct of a recognisably independent business of his or her own, or of a third party) (*Cox, supra*, paragraph 24; *Armes, supra*, paragraph 58). This approach has echoes of the so-called "integration test" that emerged, from time to time, in some of the older reported decisions.

[97] In the present case, on the evidence, I am satisfied that Ms Higgins was indeed wholly integrated into the organisational structure of the defender's business. She was "part

and parcel” of the defender’s business, and not merely “accessory” to it (*Stevenson Jordan & Harrison Ltd v Macdonald & Evans* [1952] 1TLR 101 at 111 per Denning LJ, approved in *Viasystems (Tyneside) Ltd, supra*, per Rix LJ and *E v English Province of Our Lady of Charity* per Ward LJ).

[98] According to the evidence, the activity carried on by Ms Higgins was indistinguishable from a core element of the defender’s business. While Ms Higgins’ security of tenure may have been legally precarious, her involvement in the defender’s business had, at least, the appearance of permanence, in that Ms Higgins regularly worked (the same) three days a week in the salon, over an extended period, and did not work anywhere else. Further, Ms Higgins worked at the salon on those three days each week simply because the defender could not (or chose not) to do so (latterly due to her absence on maternity leave). In other words, metaphorically speaking, Ms Higgins was standing in the defender’s shoes (and, indeed, in the same treatment room) during the defender’s periods of absence, performing a core activity of the defender’s business that would otherwise either have been performed by the defender herself, or would not have been performed at all. In that wider sense, she was carrying on that central part of the defender’s business on behalf of the defender.

[99] Ms Higgins’ integration into the defender’s business is reinforced by the fact that she was given keys to the salon, and authority to use them; she held the password to the defender’s business Facebook account, and authority to use it; she actively promoted the defender’s business activities and trading name by attending, in branded uniform, at a promotional photo-shoot outside the defender’s salon and, separately, at a third party wedding fair; in the defender’s absence, but at her request, Ms Higgins even collected and delivered to the defender’s landlord part of the monthly rent that was due by the defender

to her own landlord; and, importantly, Ms Higgins submitted to substantial restrictions on her freedom (as a self-employed person) to fix her own price list or to offer discounted or special deals to customers, the foregoing being subject to the defender's prior approval. All of these factors tend to point away from Ms Higgins as a truly independent contractor, an entrepreneur pursuing her own business interests, running her own risks, and enjoying the resulting profits; and, instead, they point in favour of Ms Higgins as an integral part of the defender's business.

[100] Another way to look at this second characteristic identified by Lord Phillips is to consider whether Ms Higgins' activities were "entirely attributable to the conduct of a recognisably independent business of her own", to use the formulation of Lord Reed in *Cox* (paragraphs 24 & 29) and *Armes* (paragraph 58). An emphasis arises from the repeated use of the word "recognisably". It begs the question: recognisable by whom? In my judgment, it suggests an objective test. The independent nature of the wrongdoer's business should be *recognisable* to a reasonable person or objective bystander standing in the shoes of the injured claimant. That would be consistent with the fact that the doctrine of vicarious liability was devised for the sake of the injured claimant who will often be a stranger to the defender and not privy to the minutiae of the defender's arrangements with the wrongdoer. Applying that objective approach, the activities of Ms Higgins cannot be regarded as attributable to the conduct of a "recognisably" independent business of her own. On the evidence, there was nothing to differentiate Ms Higgins' business activity from the defender's business activity; there was no signage, or branding, or notification (written, oral or electronic) to alert customers to the fact that Ms Higgins was carrying on an independent business of her own, distinct from that of the defender; no separate uniform was worn to distinguish Ms Higgins from the defender's business; Ms Higgins used the same premises, room and

business social media platform as the defender; and even Ms Higgins' personal social media communications cross-referred to the defender's "Blush" business. To the objective bystander, she constituted "part and parcel" of the defender's "Blush Hair and Beauty" business. For all intents and purposes, she was indistinguishable from it. Interestingly, in contrast, the hairdresser (Ms Maxwell) operated in a slightly different manner whereby she traded under her own brand ("Ashley Maxwell Hairdressing") and solicited for custom using solely her personal Facebook page.

[101] Further, on the evidence, it can properly be said that Ms Higgins' activities were "for the benefit" of the defender. True, she was self-employed and retained all earnings from customers served by her, but the defender also enjoyed two tangible benefits: first, directly, by the receipt of payments from Ms Higgins (£20 per day) to defray the defender's rental liability to her own landlord; and, second, indirectly, by procuring that the defender's business was maintained as a going concern notwithstanding her absence, and that the goodwill attached to her "Blush" trading name was thereby preserved. If the defender had not made arrangements such as those with Ms Higgins, Ms Paul and Ms Maxwell to carry on, in her absence on maternity leave, those parts of the business that were entrusted to them, it seems inconceivable that the salon could have continued trading. In the event, the defender's business did continue. It was carried on in her absence, but on her behalf and for her benefit, by three independent contractors to whom activities forming core parts of the defender's enterprise were assigned or entrusted.

[102] Lastly, it will be recalled that Lord Reed (in *Cox, supra*) admonished against an overly semantic approach to words like "business", "enterprise" or "benefit". The defender's enterprise need not be commercial in nature. Nor need the defender derive a profit from the wrongdoer's activities. Likewise, I venture to suggest that an unduly technical or narrow

meaning should not be given to the notion of activities being “assigned” or “entrusted” to the wrongdoer. The defender “assigned” (or, perhaps more aptly in this context, “entrusted”) to Ms Higgins the activity of providing beauty therapy treatments to customers in the salon by selecting her to carry out that role, and affording her access to the salon and defender’s business Facebook account for that purpose, in exchange for the agreed daily payment.

Did the defender create the risk by assigning or entrusting the activity to the wrongdoer?

[103] The fourth characteristic identified by Lord Phillips is that the defender, by assigning or entrusting the relevant activity to the wrongdoer, will have created the risk of the wrong being committed.

[104] In the present case, it is relatively self-evident that this fourth characteristic is satisfied. The defender entrusted to Ms Higgins the activity of carrying out beauty therapy treatments (including HD eyebrow tints) to customers at the defender’s salon. That activity carries with it certain inherent risks of injury, including adverse allergic reaction to the chemical products used in the tinting procedure. In order to obviate or eliminate that inherent risk, a therapist of ordinary competence should carry out a pre-treatment patch test on a less sensitive (and less visible) area of the customer’s skin, usually behind the customer’s ear (see the expert report of Lana Shepherd, item 5/1 of process). By entrusting to Ms Higgins the activity of carrying out such beauty therapy treatments, with no other safeguarding or protective measures in place, the defender thereby created the real risk that Ms Higgins might neglect to carry out a pre-treatment patch test and, as a consequence, might cause a customer to suffer injury. Of course, the defender bears no personal fault. Rather, by choosing to organise her business in this way, entrusting the carrying out of this

activity (with its inherent or associated risks) to Ms Higgins, the defender created the risk that just such a negligent wrong, and resulting injury, may occur.

Was the wrongdoer under the control of the defender?

[105] The fifth characteristic identified by Lord Phillips is that the wrongdoer will, to a greater or lesser extent, have been under the control of the defender.

[106] It is universally acknowledged that, in seeking to identify an employment relationship (or, for present purposes, a relationship akin thereto), the issue of control no longer has the significance that it had in the past. Certainly, there is no requirement that the defender should directly control how the wrongdoer does his or her work. That is not realistic in the modern workplace and economy. Instead, the criterion has been substantially diluted to require, at a minimum, only a “vestigial degree of control” (*Cox, supra*, 21 per Lord Reed) to the extent that the defender should be capable of directing *what* the wrongdoer does, not *how* he does it.

[107] Applying that test in the present case, the vestigial degree of control required for the relationship to attract vicarious liability is satisfied. The defender was indeed entitled and able to direct what Ms Higgins did in the salon (as opposed to how she did it). The defender was entitled and able (if she wished) to direct or permit Ms Higgins to provide beauty therapy treatments (including HD eyebrow tints) to customers (thereby creating the associated risks); and she was entitled and able (if she wished) to prevent Ms Higgins from providing such treatments (by not recruiting her in the first place, or by refusing her access to the salon, or simply by way of express direction). In the exercise of that element of control, she chose the former option. To that extent, she exercised the necessary level of control over what Ms Higgins did.

Is the defender more likely to have the means to compensate the pursuer?

[108] Lastly, the first characteristic referred to by Lord Phillips is that, in an employment relationship (or one akin thereto), the defender is more likely to have the means to compensate the injured pursuer than the wrongdoer and to be expected to have insured against that liability.

[109] Again, it is acknowledged that this factor is unlikely to be of independent significance in most cases. The mere possession of wealth is not a principled ground for imposing liability; and a party has insurance because there is liability; liability does not arise merely because a party has insurance (per Lord Reed in *Cox*, paragraph 20 and *Armes*, paragraph 56).

[110] In any event, in the present case the evidence on this issue was vague and inconclusive. It was not clear whether insurance cover was obtainable, or obtained, by either the defender or Ms Higgins. There was a fleeting suggestion at one stage that Ms Higgins might have had her own public liability insurance cover, but the point was not pursued, vouched or verified.

[111] In the event, I attributed no weight to this factor.

Is the relationship akin to employment?

[112] In my judgment, for the reasons stated above, the relationship between the defender and Ms Higgins discloses, to a substantial degree, each of the second to fifth characteristics referred to by Lord Phillips in the *Christian Brothers* case. Specifically, I conclude that Ms Higgins did indeed carry on activities, entrusted to her by the defender, as an integral part of the defender's business activities, and for the benefit of the defender; that her activities

were not attributable to the conduct of a recognisably independent business of her own, or of a third party; and that the negligence which forms the basis of the action was a risk created by the defender by assigning those activities to Ms Higgins.

[113] Accordingly, the relationship is properly regarded as being akin to an employment relationship, such as to make it fair, just and reasonable to give rise to vicarious liability.

[114] A superficial analogy might be drawn. In the case of *E v English Province of Our Lady of Charity*, the claimant alleged that when, as a young girl, she was resident in a children's home run by an order of nuns, she was sexually abused by a visiting priest who had been appointed by a the diocesan bishop. In deciding that the bishop (or, more accurately the trust which stood in place of, and was to be equated to, the bishop) was vicariously liable for the priest's wrongful act, the judge at first instance (MacDuff J) observed that the "crucial features" of the relationship between the offending priest and the bishop were that the priest had been appointed to carry out a certain activity (that is, to do the work of the Church, including ministering to children), and he was provided with "the premises, the pulpit and the clerical robes" to fulfil that role.

[115] In the present case, Ms Higgins was entrusted by the defender with the performance of a certain activity (that is, the provision of beauty therapy treatments to customers), and she was provided with the beauty salon, the social media platform, and the T-shirt, being all that was required (other than the portable tools of her trade, such as brush, waxing pot and scissors) to fulfil her assigned role.

[116] There is an alternative analysis though, which leads to the same conclusion. To explain, I was urged by the defender's agent to view the defender, the two other therapists and the hairdresser as each carrying on her own discrete little business, each pursuing her own private interests. On that approach, the defender's agent submitted that the

relationship between the defender and Ms Higgins was more akin to that of landlord and tenant (or landlord and licensee). In my judgment, that micro-analytical approach is not correct. One requires to step back, and to consider the reality of the position based on the totality of the evidence. Function and substance now triumph over form. By doing so, it would be more accurate to observe that the interests of (at least) the three therapists (the defender, Ms Paul and Ms Higgins) were broadly aligned. They shared a common objective, namely promoting and maximising custom to the salon. They cooperated in pursuing that common objective: they shared the same premises; they traded under the same name and signage; they marketed and promoted that trading name and the activities of the business (on social media and at the wedding fair); they agreed a uniform pricing strategy; they shared out work as required (for example, to serve a large group such as a wedding or hen party); they served any customer who entered, with or without an appointment; they all benefited if the reputation of the salon was enhanced; and they all suffered if the reputation of the salon was damaged. But for the absence of a sharing of profits, this common interest, and the co-operative pursuit of a shared common purpose, bears the hallmarks of another relationship that traditionally attracted vicarious liability, namely partnership. The same was true in the *Christian Brothers* case where it was observed that the individual members or “brothers” of the institute (an unincorporated religious association) were nevertheless united in achieving the same common objective (*supra*, paragraphs 59 & 61, per Lord Phillips).

Stage 2: Is there a sufficiently close connection between the relationship and the wrong?

[117] The second stage of the two-stage test involves an enquiry into the act or omission of the wrongdoer, to determine whether there is a sufficiently close connection between the

relationship and the act or omission in question to justify the imposition of vicarious liability.

[118] In the context of an employment relationship, where an employee commits a wrongful act, the employer will be vicariously liable if the act was done, to use the conventional formulation, within the scope of the employment. That plainly covers the situation where the employee does something that he is employed to do, albeit negligently. The same is true where the relationship is akin to that of an employer and employee. Where the wrongdoer does something that he or she is required, requested, or expected to do pursuant to the relationship, albeit negligently, stage two of the two-stage test is likely to be satisfied.

[119] Beyond that, though, a sufficiently close connection will exist between the relationship and the wrong to justify the imposition of vicarious liability, if the wrongful act or omission can be said to fall within “the field of activities” that has been “entrusted” or “assigned” by the defender to the wrongdoer (*Mohamud, supra*, paragraph 47, per Lord Toulson, echoing the “broader” approach to the question of scope of employment taken by Lord Cullen in *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* 1925 SC 796 at 802).

[120] On any view, the negligent wrong of Ms Higgins was sufficiently closely connected to her relationship with the defender as to justify the imposition of vicarious liability therefor. She was entrusted to carry out a certain activity, namely the provision of beauty therapy treatments to customers in the salon; the pursuer was injured by Ms Higgins in the course of carrying out one such treatment. The treatment may have been carried out negligently, but it plainly fell within the field of activities entrusted or assigned to her.

[121] There was, quite properly, no real dispute between the parties that this particular aspect of the two-stage test was satisfied.

[122] For the foregoing reasons, I find that the two-stage test is satisfied and that the defender is vicariously liable for the undisputed negligent acts and omissions of Ms Higgins.

Quantum

[123] The sole remaining issue for determination was the quantification of damages for solatium. By joint minute, the parties had agreed the quantification of wage loss and damages for inconvenience.

[124] I was referred to summaries from a number of English county court decisions, but I did not find them useful due to the absence of detail in the extracts. Besides, some involve injuries of much longer duration, and one records merely an out of court settlement. I was referred to no Scottish authorities.

[125] The present case involved a skin-related facial injury (notably the eyebrow area) of a young female, that had settled completely within 14 days, causing three days absence from work, and social disruption and some diminishing disfigurement (by way of eyebrow hair loss) for six to eight weeks at most. Undoubtedly, the injuries would have caused anxiety and distress at the time – of that I have no doubt – causing pain, discomfort and genuinely distressing disfigurement for a period; but, happily, due to early medical intervention, these required to be endured for only a relatively short period. Making the best of the limited information available to me (in particular from the English Judicial College Guidelines chapter 5(A)(i) (*transient eye injuries*), chapter 9(B)(a)(iv) (*trivial scarring of females*), and chapter 12(c) (*dermatitis: itching, irritation etc., resolving within a few months with treatment*), I conclude that a reasonable award of damages for the pursuer's injuries falls to be assessed at the lower end of the scale. Having regard to my findings, I value damages for solatium in the sum of £2,250. To this sum, I shall apply interest at the full judicial rate, in respect that

the loss, though cumulative, had ceased long prior to the date of the proof, so that the whole of solatium can properly be allocated to the past.

Decision

[127] Accordingly, I shall grant decree against the defender for payment to the pursuer of the sum of £2,586.10 with interest as follows: (i) on the sum of £86.10 at the agreed rate of eight per cent (8%) per annum from 28 January 2014 until payment, (ii) on the sum of £250 at the agreed rate of four per cent (4%) per annum from 28 January 2014 until payment, and (iii) on the sum of £2,250 at the rate of eight per cent (8%) per annum from 28 January 2014 until payment.

[128] The issue of expenses is reserved meantime. I appoint parties to be heard thereon at a hearing before me in open court on Wednesday 7 March 2018 at 2pm.