Judgment Approved by the court for handing down.

Neutral Citation Number: [2019] EWHC 842 (QB)

Case No: QB/0135/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2019

Before :

THE HON. MR JUSTICE LANE

Between :

MRS SANDRA SHELBOURNE

Appellant

-and-

CANCER RESEARCH UK

Respondent

- -

Robert Weir QC, Tim Grover (instructed by The Clarke Partnership) for the **Appellant**
Michael White (instructed by **DAL Beachcroft**) for the **Respondent**

Hearing date: 28 February 2019

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Approved Judgment

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MR JUSTICE LANE :

A. INTRODUCTION

1. On 7 December 2012, a Christmas party was held at the Cambridge Research Institute of Cancer Research UK (CRUK), a well-known charity, which carries out research into the origins and treatment of cancer. The Institute occupied premises at the Li Ka Shing Centre, which CRUK leased from the University of Cambridge. The 2012 Christmas party was the third that the Institute had held at the Centre. Each year a different department took responsibility for organising the party, using volunteer members of staff from the department concerned. In 2012 it was the turn of the Genomics Department, headed by Mr James Hadfield.

2. The party consisted of a buffet, some "oversized" games, a ceilidh and a disco. The event was ticket only, open to staff and their guests. Tickets could be bought in advance or on the door on the night.

3. Mr Hadfield completed a risk assessment, in order to cover what he described as "all the foreseeable hazards of an event at CRUK". His principal concern was to prevent people returning to the laboratories, either during the course of the party or afterwards; so access to those areas was restricted after a particular time.

4. Prior to joining CRUK, Mr Hadfield worked at John Innes Centre in Norwich, where he was trained in the completion of risk assessments. As part of his CRUK role, he was also required on a regular basis to complete risk assessments in relation to his laboratory.

5. Mr Hadfield's statement records that the thinking behind the risk assessment for the Christmas party was to cover as many eventualities as possible regarding potential hazards and how to mitigate them. This included "all the usual aspects of the event, including the oversized games, hard and uneven surfaces and collisions with other participants during activities". Two additional security staff were on duty in order to prevent access to the laboratory.

6. One of those who attended the party was Robert Beilik. He was a visiting scientist at the Institute, employed by the University in Cambridge at its Wolfson Institute Brain Imaging Centre. He was not employed by CRUK but his involvement with the Institute entitled him to a security pass and to attend the party, along with CRUK's employees.

7. The appellant (referred to as the claimant in the court below) was one such employee. She worked at the Institute as an animal technician.

8. At around 10.30pm, the appellant was on the dance floor, dancing with her supervisor, Tracy Crafton. Robert Beilik went up to them and attempted to lift the appellant off the ground. In doing so, he lost his balance and dropped the appellant, resulting in her sustaining a serious back injury.

9. It is common ground that Robert Beilik had been drinking from at least at an early stage of the party, if not before it began. Prior to lifting the appellant, Robert Beilik had lifted Michelle Pugh, one of the volunteer organisers of the party. He lifted her up and put her down straight away. She laughed and went on her way and, she said, "gave it no further thought".

10. Robert Beilik also lifted, without their consent, two other women at the party, neither of whom reported the matter.

11. The appellant brought proceedings against CRUK, which resulted in a hearing in Southend County Court in January 2018. In a reserved judgment given on 2 May 2018, running into 161 paragraphs, Mr Recorder Catford held that CRUK was not liable in negligence to the appellant for her injury and that CRUK was not vicariously liable for Robert Beilik's actions.

12. Permission to appeal against the Recorder's judgment was granted by Martin Spencer J on 11 December 2018, on the basis that the Recorder had arguably erred in law, both as regards his conclusions on liability in negligence and in relation to his conclusions on vicarious liability.

B. MAJOR CASE LAW

13. Before examining the Recorder's judgment in detail, and the criticisms of it made by Mr Weir QC, it is convenient to introduce the major cases to which both counsel referred me, in the course of their respective submissions.

14. In Everett v Comojo (UK) Ltd [2011] EWCA Civ 13, a guest in a members' club, a nightclub known as the Met Bar, attacked and injured another guest, stabbing him in the neck and abdomen. A waitress had earlier reported her concern about the attacker to her bar manager, rather than to one of the door supervisors.

15. The Court of Appeal held that the relationship between the management of the nightclub and its guests was one of sufficient proximity to justify the existence of a duty of care. At paragraph 32, Smith LJ held:

> "Foreseeability of injury.
>
> 32. It is a well-known fact that the consumption of alcohol can lead to the loss of control and violence both verbal and physical. Lord Faulks acknowledged as much. In the present case, Comojo's own risk assessment recognises the existence of those risks. It must be foreseeable to any licensed hotelier that there is some risk that one guest might assault another. The risk may be low in respectable members-only establishments and much higher in a night club open to the public. The assessment of the degree of risk, which will dictate what precautions have to be taken, will vary. There cannot be any rule of thumb to apply to all night clubs. But it does not seem to me that, given

> its own risk assessment, Comojo could seriously argue that the risk of such assault was so low that it could safely be ignored."

16. At paragraph 34, Smith LJ emphasised that, although there was a duty of care, the standard of care or scope of the duty "must also be fair, just and reasonable". Smith LJ continued as follows:-

> "36. The common duty of care is an extremely flexible concept, adaptable to the very wide range of circumstances to which it has to be applied. It can be applied to the static condition of the premises and to activities on the premises. It can give rise to vicarious liability for the actions of an employee of the occupier who, for example, might have created a temporary tripping or slipping hazard. I think that it is appropriate (fair, just and reasonable) that it should govern the relationship between the managers of an hotel or night club and their guests in relation to the actions of third parties on the premises. I do not think it possible to define the circumstances in which there will be liability. Circumstances will vary so widely. However, I think it will be a rare night club that does not need some security arrangements which can be activated as and when the need arises. What they need to be will vary. One can think of obvious examples where liability will attach. In a night club where experience has shown that entrants quite often try to bring in offensive weapons, it may be necessary to arrange for everyone to be searched on entry. In a night club where outbreaks of violence are not uncommon, liability might well attach if a guest is injured in an outbreak of violence among guests and there is no one on hand to control the outbreak. It may be necessary for the management of some establishments to arrange for security personnel to be present at all times within areas where people congregate. On the other hand, in a respectable members-only club, where violence is virtually unheard of, no such arrangements would be necessary. The duty on management may be no higher than that staff be trained to look out for any sign of trouble and to alert security staff.
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> 37. In my judgment, the judge was also right in his conclusion that, in all the circumstances, Ms Kotze had not been in breach of duty. She had realised that there was a possibility of a confrontation between Croasdaile and one or more of the members of the appellants' group. Why she acted as she did, in going to speak to Mr Rosenblatt rather than summoning a door supervisor is not known; she was not available to give evidence. The judge could only consider whether a reasonable waitress in her position would have gone to fetch a door supervisor. In my view the judge's assessment of the reasonableness of her action is unassailable. There was no reason to think that a confrontation was imminent. The incident to which Mr Balubaid had taken exception had occurred a

> considerable time earlier. Certainly, Croasdaile's appearance gave rise to some concern but he was apparently Mr Balubaid's employee and Mr Balubaid was a valued customer with no previous history of causing trouble, either himself or through his employees. I would endorse the judge's conclusion that Ms Kotze could not have been criticised even if she had done nothing. As it was, she went to speak to her manager. That seems to me to have been a very sensible thing for her to do. A waitress in her position would not have wished, on her own initiative, to take a step which might have caused offence to Mr Balubaid and embarrassment to the club, by asking a door supervisor to intervene in some way. Telling Mr Rosenblatt about the situation and letting him decide what to do seems sensible. There was no apparent urgency; it was not as if a confrontation had begun and the risk of violence was imminent."

17. On any view, Mohamud v W Morrisons Supermarkets [2016] UKSC 11 is a landmark in the law of vicarious liability. The claimant, having stopped at the petrol station outlet of a Morrisons supermarket in the Midlands, went to the sales kiosk to ask the employee there if it was possible to print-off some documents stored on a USB stick. The employee refused the request in an offensive manner, following the claimant back to the latter's car, where he subjected the claimant to a serious physical attack.

18. The trial judge found that the defendant was not vicariously liable for this assault since the employee's actions had been purely for reasons of his own and beyond the scope of his employment. There was, accordingly, an insufficiently close connection between the assault and the employment.

19. That conclusion, which had been endorsed by the Court of Appeal, was overturned by the Supreme Court.

20. Once it has been established that the necessary relationship exists between the defendant and the wrongdoer (as to which, see Cox v Ministry of Justice [2016] UKSC 10), Lord Toulson set out the remaining matters that must be decided in favour of a claimant, in order to establish vicarious liability:-

> "44….The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly; see in particular the passage in Diplock LJ's judgment in *Ilkiw v Samuels* [1963] 1 WLR 991, 1004 included in the citation from *Rose v Plenty* at para 38 above, and cited also in *Lister* by Lord Steyn at para 20, Lord Clyde at para 42, Lord Hobhouse at para 58 and Lord Millett at para 77.
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> 45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the

> employer to be held liable under the principle of social justice which goes back to Holt. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point. The cases in which the necessary connection has been found for Holt's principle to be applied are cases in which the employee used or misused the position entrusted to him in a way which injured the third party. *Lloyd v Grace, Smith & Co*, *Peterson* and *Lister* were all cases in which the employee misused his position in a way which injured the claimant, and that is the reason why it was just that the employer who selected him and put him in that position should be held responsible. By contrast, in *Warren v Henlys Ltd* any misbehaviour by the petrol pump attendant, qua petrol pump attendant, was past history by the time that he assaulted the claimant. The claimant had in the meantime left the scene, and the context in which the assault occurred was that he had returned with the police officer to pursue a complaint against the attendant.
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> 46. Contrary to the primary submission advanced on the claimant's behalf, I am not persuaded that there is anything wrong with the *Lister* approach as such. It has been affirmed many times and I do not see that the law would now be improved by a change of vocabulary. Indeed, the more the argument developed, the less clear it became whether the claimant was advocating a different approach as a matter of substance and, if so, what the difference of substance was."

21. Applying this approach, Lord Toulson held that, although the employee's actions in the kiosk had been "inexcusable" they were, nevertheless, within the "field of activities" that had been assigned to him by Morrisons. What had happened thereafter "was an unbroken sequence of events":-

> "47… when Mr Khan followed the claimant back to his car and opened the front passenger door, he again told the claimant in threatening words that he was never to come back to the petrol station. This was not something personal between them; it was an order to keep away from his employer's premises, which he reinforced by violence. In giving such an order he was purporting to act about his employer's business. It was a gross abuse of his position, but it was in connection with the business in which he was employed to serve customers. His employers entrusted him with that position and it is just that as between them and the claimant, they should be held responsible for their employee's abuse of it.
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> 48. Mr Khan's motive is irrelevant. It looks obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there."

22. In his judgment, Lord Dyson MR emphasised that the "close connection" test is "firmly rooted in justice. It asks whether the employee's tort is so closely connected with his employment so as to make the employer liable". He continued as follows:-

> "54. It is true that the test is imprecise. But this is an area of the law in which, as Lord Nicholls said, imprecision is inevitable. To search for certainty and precision in vicarious liability is to undertake a quest for a chimaera. Many aspects of the law of torts are inherently imprecise. For example, the imprecise concepts of fairness, justice and reasonableness are central to the law of negligence. The test for the existence of a duty of care is whether it is fair, just and reasonable to impose such a duty. The test for remoteness of loss is one of reasonable foreseeability. Questions such as whether to impose a duty of care and whether loss is recoverable are not always easy to answer because they are imprecise. But these tests are now well established in our law. To adopt the words of Lord Nicholls, the court has to make an evaluative judgment in each case having regard to all the circumstances and having regard to the assistance provided by previous decisions on the facts of other cases."

23. In Bellman v Northampton Recruitment Limited [2018] EWCA Civ 2214, Mr Major, the managing director of the defendant company, seriously assaulted the claimant, one of its employees, during a late-night drinking session in a hotel, which had followed the company's Christmas party for its employees. Mr Major committed the assault after losing his temper when his authority had, in his view, been challenged by the claimant over a work matter.

24. At first instance, the judge had found in favour of the defendant, holding that there was "both a temporal and substantive difference between the drinks and the Christmas party [paid for by the defendant and which employees were expected to attend]. The drinks were not a seamless extension of the Christmas party… [and] there must be a limit to the effect of the discussion about work- related issues and proper account must be taken of the time and place at which the discussion takes place".

25. In the Court of Appeal, Asplin LJ held that, if the previous case law was examined:

> "through the prism of Lord Toulson's analysis in *Mohamud*, which is essential … the question of whether there is sufficient connection between the position in which the wrongdoer is employed and is in wrongful conduct so as to make the employer liable under the principle of social justice requires the court to conduct an evaluative judgment. It is a question of law based on the primary of facts as found". (paragraph 16)

26. Asplin LJ held that it was clear from the judge's findings that Mr Major's functions were widely drawn and that he was the directing mind and will of the defendant, being in overall charge in all aspects of its business. She held that it was necessary to ask whether Mr Major was "acting within the field of his activities assigned to him as Managing Director [..] when the assault took place or was he present in the lobby of the hotel merely as a fellow reveller?" (paragraph 19). The question of the "field of

activities entrusted to the employee" had to be assessed broadly by asking "what is the nature of the job" rather than focusing on actual authority.

27. Turning to the question whether there was a sufficient connection, the judge had concluded that there was insufficient connection between Mr Major's field of activities and the assault. Asplin LJ held that that was wrong and "despite the time and place, Mr Major was purporting to act as Managing Director […] he was exercising the very wide remit which had been granted to him […] his managerial decision making having been challenged, he took it upon himself to seek to exercise authority over his sub-ordinate employees". He had chosen "to wear his metaphorical managing director's hat to deliver a lecture to his subordinates […] and drove home his managerial authority, with which he had been entrusted, with the use of blows". He was, accordingly, "not merely one of a group of drunken revellers, his conversation had turned to work". (paragraph 25)

28. Asplin LJ concluded that "although the party and the drinking session was not a single seamless event and attendance was voluntary, it seems to me that Mr Major was not merely a fellow reveller. He was present as managing director of NR, a relatively small company, and misused that position…". In that regard, Asplin LJ concluded that the case was "a very long way from the example being given by a judge of a social round of golf between colleagues during which conversation turns to work… the judge's example is based on different premise". There:-

> "… all participants are equal and attend as casual friends and golfers. One can readily see that in such circumstances, even if discussions turn to work and a golfer who happens to be a more senior employee assaults another golfer who is a junior colleague, looked at objectively, they have all attended qua social golfers. The participants in the drinking session, on the other hand, had attended the Christmas party qua staff and managing director. As I have already mentioned, just because the drinking session was unscheduled and voluntary, I do not consider that their roles changed or if they did, that on the facts of this case, the role of managing director was not re-engaged." (paragraph 28)

29. Irwin LJ concluded the Court's judgments as follows:-

> "37. After some hesitation, I also agree, although I wish to emphasise how unusual are these facts, and how limited will be the parallels to this case."
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> 38. The critical reasons why it seems to me that this very experienced judge was wrong are those expressed by Asplin LJ in paragraphs 27 to 29 of her judgment. In my view the "field of activity" of Mr Major was almost unrestricted in relation to the affairs of NR, and exercised at almost any time. I consider that the judge was right that the drinking session at the hotel was separate from the firm's Christmas party. What was crucial here was that the discussions about work became an exercise in laying down the law by Mr Major, indeed an explicit assertion

> of his authority, vehemently and crudely expressed by him, with the intention of quelling dissent. That exercise of authority was something he was entitled to carry out if he chose to do so, and however unwise it may have been to do so in such circumstances, it did arise from the "field of activity" assigned to him.
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> 39. It cannot of course be the test that there must be actual authority to commit the tort complained of. This case arose because of the way in which Mr Major chose to exert his authority, indeed his dominance as the only real decision-maker, in the company. Hence there is liability.
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> 40. I do emphasise that this combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about work matters between colleagues, which leads to an assault, even when one colleague is markedly more senior than another. This case is emphatically not authority for the proposition that employers became insurers for violent or other tortious acts by their employees".

C. THE RECORDER'S FINDINGS AND THE PARTIES' SUBMISSIONS

30. The notes of the proceedings before the Recorder, compiled by the appellant's solicitors, record Mr Hadfield as agreeing that the Christmas party "was for the benefit of CRUK and that this benefit "included staff morale". Later, however, he is noted as saying that the party "was not a reward for staff, it was staff led and volunteered and organised, there would be a benefit in morale but this was not led by CRUK." Asked whether, if CRUK permitted the party to occur then it looked like a CRUK Christmas party, Mr Hadfield replied "only a Scrooge-like organisation would say 'no'".

31. Viewed overall, Mr Weir submitted that the Christmas party was, in reality, a "works do". It served the purposes of CRUK, which organised it, through the Genomics Department. CRUK also organised the security cover. Mr Hadfield told the security and bar volunteers, before the party, that "if there were any problems they were to speak to him and he would arrange security to help" (judgment, paragraph 43). Any financial losses sustained as a result of holding the party would be covered by CRUK.

32. In the light of this, Mr Weir submitted that the 2012 Christmas party was to be viewed in the same light as the Christmas party in Bellman: that is to say, staff attended qua staff.

33. Examining the claim in negligence, the Recorder observed that both parties before him relied upon the judgment of the Court of Appeal in Everett v Comojo UK Ltd. The Recorder was satisfied that, applying the analysis of Smith LJ to the present case, where the defendant was the organiser of the event and the claimant was the employee and a paying guest, "there was sufficient proximity of relationship" (paragraph 104).

34. Beginning at paragraph 105, the Recorder turned to the issue of foreseeability of harm. He found that there was "a risk that where alcohol is consumed to excess there may be loss of self-control". He reminded himself that the event was taking place at or adjacent to a laboratory premises and that guests might stray or otherwise be exposed to risks associated with that form of workplace. This had led CRUK to undertake a risk assessment. The Recorder accordingly was satisfied that "there was a foreseeable risk of harm such as to impose a duty of care on the defendant".

35. At paragraph 107, the Recorder identified the scope of the duty as being such that, in certain circumstances, it could extend to the actions of third parties at the party. The Recorder then moved to the question of whether there was a breach of duty.

36. At paragraph 108, the Recorder set out the passage from paragraph 36 of the judgment of Smith LJ in Everett, concerning the comparison between a nightclub where entrants try to bring in offensive weapons and, on the other hand, a respectable members-only club, where violence was virtually unheard of.

37. The Recorder addressed the issue of breach of duty as follows:

> "114. [W]hether the defendant was in breach of duty resolves into consideration of two broad aspects: (1) the preparation for the holding of the party (which involves consideration of the questions of risk management, security provision and written instructions to guests; and (2) implementation on the night (including whether there was adequate supervision of the party, guests and staff, and whether there were events which were or should have been seen, or which would have resulted in Beilik being either warned or removed).
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> 115. In my judgment, the context in which this event took place is important. It was an event that was not open to the public at large, but was rather limited to those connected with CRUK. If this had been an event open to the public generally then different issues would have arisen in terms of planning and running the event. There would have been a large pool of potential attendees of unknown nature and propensity. That is far removed from a party in which all those attending will be connected with CRUK, either as employees or friends and family of employees. It seems to me that, insofar as relevant, this event was closer to the example given by Smith LJ of the members-only club where violence was virtually unheard of, rather than the nightclub examples."

38. The Recorder found that Mr Hadfield had:-

> "… accepted that 'today' (his word)… the risk assessment would be clearer on what to do if someone had drunk too much or was acting inappropriately. The declaration could have prevented selling alcohol to those inebriated. He accepted there was no mention of prohibiting those attending bringing alcohol in from outside [Mr Beilik had brought what was described as a

> small bottle of vodka]. It could be amended to control behaviour and intoxication under the cover of "appropriate work-related behaviour". However, he did not believe it was needed for the type of people attending, albeit he accepted anybody could drink to excess. He accepted that it would be sensible to have guidance on alcohol being brought in by guests. Whilst there could be express policy of supervision and monitoring, he said in reply that he himself was walking around the whole time, as were others, and he indicated four or five other persons without identifying them by name". (paragraph 44).

39. In the same vein, Mrs Pugh accepted that a "sensible precaution would be for the declaration for staff to sign to include staff agreeing to be responsible for their own actions". (paragraph 55). She accepted that no advice or guidance had been given to attendees on how they should behave "and on reflection it should have been" (paragraph 56).

40. Mr Weir said that the fact nothing untoward had happened at earlier CRUK Christmas parties was irrelevant. It was also noteworthy from the reaction of Mrs Pugh and others to being lifted by Mr Beilik, and from Mr Hadfield's evidence, that if the appellant's injury had not been sustained in 2012, his behaviour would never have been reported and it would therefore not have featured in the respondent's future risk assessments. The fact was the risk assessment undertaken by Mr Hadfield had been only reactive in nature and was therefore unsatisfactory.

41. In this regard, Mr Weir prayed in aid the judgment of Smith LJ in Allison v London Underground Ltd [2008] EWCA Civ 71:-

> "Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and take steps to remove or minimise those risks. They should be a blueprint for action." (paragraph 58)

42. What the Recorder had to say about these issues was as follows:-

> "119. By skilful cross-examination Counsel for the claimant obtained acknowledgements that alcohol if consumed to excess created a risk of untoward behaviour and a risk of injury. Similarly, the witnesses were then moved on to accept that it would be a "sensible precaution" to get staff to sign declarations. At the same time I formed the impression that Mrs Pugh, for example, was genuinely surprised by the suggestion at the outset, saying that she had never known such a party. I formed the impression from both her and Mr Hadfield that they simply would not have anticipated that such behaviour would have needed warning against, and/or that declarations should have been obtained. Mrs Pugh, notably, qualified her acceptance to what was being put to her in cross-examination with the words, "knowing the events which happened".
>
> 120. In my judgment, that underlines an important aspect of this case. There is a danger, in knowing what has happened, and that the claimant

> suffered serious injury (as to which one can only have sympathy), that hindsight is then used as a basis for criticism of the steps that were taken by the defendant.
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> 121. Turning to risk assessment, it is right that Mr Hadfield made no specific provision for monitoring guests' alcohol consumption; or to risks associated with alcohol consumption in a general sense. He and Mrs Pugh acknowledged that an increased risk of inappropriate behaviour and injury arose where alcohol was available for consumption. In my judgment, the existence of that general risk does not by itself mean that Mr Hadfield's risk assessment was wanting. This had to be seen in context. He obviously did address his mind to alcohol consumption, and therefore the arrangements for non-admission to the laboratories were put in place. It seems to me that that was a sensible step and reflects a reasonable response to risks arising from alcohol consumption in these particular circumstances."

43. At paragraph 122 of the judgment, the Recorder rejected the submission for the appellant that this, taken together with the fact that there had been no previous incidents at the "Christmas or other parties", demonstrated "a negligent reactive approach". The Recorder considered that, on the contrary, "this was a reasonable approach to take" and that Mr Hadfield "properly considered potential hazards, the likelihood of occurrence, and potential harm in the event of occurrence". The Recorder did not consider the fact that Mr Hadfield had not received training in risk assessing events at which alcohol might be consumed was of relevance: "the assessment which he undertook was adequate" (paragraph 122).

44. Mr Weir also criticised the organisation of the party for leaving Mrs Pugh uncertain as to whether Robert Beilik could bring a bottle of vodka to the function. Had there been such a prohibition, she would have followed it. (paragraph 57)

45. Mr Weir submitted that it was evident from the judgment of Smith LJ in Everett that, even in a respectable members-only club, staff had to be "trained to look out for any sign of trouble and to alert security staff". That had not happened in the present case. In the note of evidence, Mrs Pugh said that although she had been involved in organising the event, once it had started "I didn't see it as my responsibility to watch other staff. I knew that there were others there to do that for me. It was not my job to watch people behaving appropriately. We had security guards there. It was not my role to supervise people". Had she known she was responsible for doing this, she "would have done, and not drunk so much".

46. Turning to the issue of security staff, Mr Weir pointed to the finding at paragraph 87 of the judgment that two security officers, CJ and PJ Gurung, "were tasked to walk around as well, but that was very much a secondary role to manning the security barriers". The Recorder went on to say that the Gurungs did walk through "occasionally and that no problems were seen by them or drawn to their attention. I accept the evidence of CJ Gurung that he did not see anyone being lifted or anything dangerous. I also find that there was no report to either him or his brother of any untoward behaviour".

47. Mr Weir said that this was indicative of the respondent's failings, stemming from the lack of a proper assessment of the risk of inappropriate behaviour, as a result of alcohol consumption. Furthermore, if Robert Beilik and other attendees had been specifically advised, through the medium of declarations, to act responsibly, it was likely that he would not have behaved as he did. The same was true if he had been prohibited from bringing his own alcohol to the event.

48. Mr Weir submitted that the evidence of Mrs Pugh, that she had not been concerned when Robert Beilik had lifted her, far from being supportive of the defendant's case, was, in fact, the opposite. Mrs Pugh should have been concerned by the invasion of her physical space, which would expose any woman to a risk of injury.

49. At paragraph 57 of the judgment, Mrs Pugh was recorded as stating as follows:-

> "Her description of Beilik as being "in very good spirits" meant that he was drunk when she saw him, but in her words, "not very drunk". He was enjoying himself, and there was nothing that needed escalating. She said that once the party started it was not her responsibility to continue watching the staff; there was security staff to do that. She was asked about her reactions at being physically picked up at work. In a normal working environment she accepted it would be inappropriate. At a social area, such as the canteen, it would still be inappropriate. She would report it if she felt personally offended. She felt that a party environment was very different."

50. Mr Weir contrasted, in this regard, the evidence of the security guards, to the effect that if they had seen Robert Beilik lifting a woman they would have asked him not to do it again. He also pointed out the record of the evidence of Mrs Pugh, in which she supposed she would agree that "a drunk man at a party lifting up women without their consent is an accident waiting to happen".

51. Turning to vicarious liability, Mr Weir pointed out that there had been no cross-appeal in respect of the Recorder's finding that the position of Robert Beilik, vis-à-vis CRUK, was such as to satisfy the test in Cox v Ministry of Justice. Accordingly, the relevant questions, as set out in Mohamud, were to do with the two-stage test, involving the nature of the job and whether there was a sufficient connection between it and the tortious action of Robert Beilik.

52. Mr Weir reiterated that Robert Beilik was at the party qua a worker with CRUK. The judgment of Asplin LJ in Bellman emphasised the need for a "broad approach". It was plain from the earlier case law, viewed through the lens provided by Mohamud, that it was too narrow an enquiry merely to ask whether an assault could be part of an individual's employment. Rather, the test involved the element of public policy. Thus, in Rose v Plenty [1976] 1 WLR 141, a milkman who carried a boy on his milk float, in express contravention of his employer's prohibition, nevertheless rendered the employer vicariously liable when the boy fell off the float and was injured. The injury occurred whilst the employee was engaged in the business of delivering milk.

53. Viewed in this way, an office or works Christmas party, held for the benefit of the employer, meant that workers attended qua workers. The activities in which the workers were engaged, whilst at the party, involved, according to Mr Weir, their

being authorised or entrusted by the defendant to drink together and to dance together, so as to become more intimate physically with each other. The purpose, he said, was for the workers to interact in "alcohol-infused revelry where the ordinary boundaries of social interaction are set to one side". In this regard, Mr Weir drew support from paragraph 57 of the judgment, which, as we have seen, recorded Mrs Pugh as saying that, whilst being physically picked up would be inappropriate in the canteen, "a party environment was very different".

54. As for the second part of the test; namely, whether there was a sufficient connection, Mr Weir said that, once it was realised that Robert Beilik was authorised by CRUK to interact with co-workers in a relaxed setting involving dancing and drinking, it could be seen how closely connected the assault and the injury were. Robert Beilik was engaged in "manhandling where some handling was to be expected".

55. The case of Bellman, according to Mr Weir, was of a different order. It was not concerned with vicarious liability in a party environment. Rather, the Court of Appeal had decided the issue on the basis of the degree of authority exercised by Mr Major.

56. In Lister v Hesley Hall Ltd [2001] UKHL 22, the House of Lords held that the respondent company was vicariously liable for the actions of its warden of a school boarding house, who used his position in order to engage in the systematic sexual abuse of pupils in his care. Lord Steyn held that the "question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties […] Matters of degree arise. But the present cases clearly fall on the side of vicarious liability". (paragraph 28)

57. By the same token, Mr Weir pointed to the close physical contact that the party environment engendered amongst the workers, where the risk of injury was accordingly increased.

58. At paragraph 25 of the respondent's skeleton argument the respondent accepted that at paragraphs 148 *et seq* of the Recorder's judgment, the Recorder did not separate out the questions of (a) function/field of activity entrusted to Robert Beilik; and (b) whether or not there was a sufficient connection between the employment in the wrong for it to be right for the defendant to be held liable. Nevertheless, the respondent submitted that the Recorder was right to find that it was no part of Beilik's field of activity to go to a Christmas party, still less to assault the appellant at it.

59. Mr Weir, however, submitted that it was plain the Recorder had adopted far too narrow a view of Robert Beilik's duties and that this was the converse of the "broad approach" required by the higher courts. Thus, at paragraph 155 of the judgment, the Recorder had erred in finding that the act of lifting the appellant had nothing to do with Robert Beilik's relationship with CRUK and that it was, therefore, not an act so closely connected with his employment that it would be fair and just to hold the respondent vicariously liable. Once, however, one viewed the party in its true light, as Mr Weir had described, the closeness of the connection was manifest. Robert Beilik was engaged in a works party that authorised him to become more intimate

with his colleagues. That was the field of activities relevant to determining vicarious liability; not his work in the laboratory.

60. In his submissions on behalf of the respondent, Mr White argued that Mr Weir had been selective in his extracts from the Recorder's judgment. Thus, for example, at paragraph 94 the Recorder noted Mrs Pugh's evidence in cross-examination that Robert Beilik was in good spirits, by which she meant "he appeared drunk but not very drunk". He was enjoying himself "but not so that matters required escalating". The Recorder accepted that evidence "as an accurate and fair description of how Beilik must have appeared to anyone observing him". Mr White said that the use of the word "anyone" was important.

61. At page 124, reference was made to the accident report in respect of the claimant. This stated that guests were asked if they were members of the Cambridge Research Institute Social and Entertainment Society (CRISES). Those who were not such a member were asked to complete the CRISES declaration form. This pointed out there will be no sale of intoxicating liquid to a person under the age of 18 and that CRUK "cannot permit anyone to return to a laboratory to do experimental work after they have consumed any amount of intoxicating liquor and strongly advise that CRISES members do not return to the laboratory for any reason". The accident report stated that, in the light of the accident that had befallen the appellant, Mr Hadfield (the author) recommended amending the CRISES declaration "whereby all guests agree to act responsibly, and that guests not doing so will be asked to leave the premises".

62. Mr White emphasised the findings at paragraphs 119 and 120 of the judgment, concerning the Recorder's view of Mrs Pugh's evidence and how he formed the impression that she was genuinely surprised by the suggestion that staff should sign declarations of the kind just described. Mr White also pointed out that the notes of the hearing compiled on behalf of the respondent recorded Mrs Pugh as saying: "putting it like that, yes" to the question "a drunken man lifting women without consent is an accident waiting to happen".

63. According to Mr White, the Recorder was entitled to his conclusion at paragraph 123 of the judgment, where he found that risks arising out of the consumption of alcohol were adequately met with the steps that were put in place, including engaging two professional security personnel, who occasionally passed through the party area, and that the organisers were also present. At paragraph 44, Mr Hadfield said that "he himself was walking around for the whole time, as were others, and he indicated four or five other persons without identifying them by name".

64. As for the security guards, Mr White pointed out that at paragraph 62 of the judgment CJ Gurung "compared the CRUK party to what he described as a 'family party'. He said if someone misbehaved when drunk then advice would be given".

65. At paragraph 125 of the judgment, the Recorder concluded that he was not satisfied SIA training would have made any difference to the approach taken by CJ and PJ Gurung and that such training would not have prevented the occurrence of the claimant's injury.

66. Mr White also drew attention to the following paragraphs of the judgment, which he submitted were of significance:-

> "129. I am satisfied on the evidence that the behaviour of Beilik was such that he was not reported, nor that it ought to have been otherwise picked up. The lift of Mrs Pugh was not such as to warrant concern on the part of Mrs Pugh. Holness and Van Look did not report anything. Both the claimant and her husband did not consider Beilik's behaviour was such that it should be reported to security. Mr Hadfield saw nothing untoward.
>
> 130. I am satisfied on the evidence that nothing was seen or reported concerning Beilik's behaviour which should have required him being approached, talked to or asked to leave. Nor was there a failure to appreciate behaviour on the part of Beilik, which with the exercise of reasonable care, would have been noted and acted on."

67. Mr White then turned to his specific submissions regarding negligence. CRUK had, he said, given thought to the issue of risk caused by the consumption of alcohol at the party. The risk assessment which had been prepared demonstrated that this was the case. At page 258, in the record of the oral evidence, Mr Hadfield said that the risk assessment had sought to identify risks "most likely to occur or to have "…serious consequences and balanced to determine..." whether risk is high, low or moderate". He considered that the highest risks involved "the ceilidh and games we had" but not alcohol "because there had been no previous problems that I am aware of. I might have thought about alcohol and not written it down. Risk assessment is not just a written exercise it is the thought process as well. The thought is the most important part". The Recorder noted this evidence, beginning at paragraph 39 of the judgment.

68. Mr White submitted that paragraph 36 of the judgment of Smith LJ in Everett was not a finding that at any social gathering, where alcohol is consumed, staff would have to be appropriately trained. In any event, in the present case, the defendant had engaged security staff, as well as others, who were walking around observing proceedings. It also had to be borne in mind that we were here dealing with volunteers (other than the security staff). It would not, Mr White submitted, be desirable to live in a world where all volunteers, at functions such as this, had to have training in dealing with issues arising from the consumption of alcohol and that those involved in the preparation of a risk assessment would need yet further training.

69. Mr White drew attention to section 1 of the Compensation Act 2006:-

> "1. **Deterrent effect of potential liability**
>
> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions or otherwise), have regard to whether a requirement to take those steps might –
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
>
> (b) discourage persons from undertaking functions in connection with a desirable activity."

70. In Mr White's graphic words, "Whilst no-one is saying that a ruling in favour of Mrs Shelbourne would mean that Christmas is cancelled, if a judge were to say this party's organisers had fallen below the required standard of care, it would act as a disincentive to the running of such events and that would be wrong". The man on a Clapham omnibus, or his modern equivalent, would regard such an outcome as another example of "health and safety gone mad".

71. According to Mr White, the Recorder had considered all the evidence and come to a conclusion on it which was not surprising. It might, indeed, be reasonably asked whether it would have been necessary to undertake a risk assessment at all.

72. On the issue of vicarious liability, Mr White emphasised the findings of the Court of Appeal in Bellman that Mr Major had not merely been a "fellow reveller" and that the Court was far from saying that vicarious liability should be found to arise in a "works" social gathering, such as a Christmas party.

73. Mr White submitted that the Recorder in the present case had correctly applied the judgments of the Supreme Court in Mohamud. If vicarious liability was found in the present case, it was difficult to see where a coherent line could be drawn. What, Mr White asked rhetorically, would be the position involving a fight between fellow partygoers, if that occurred outside in the street; or a sexual assault that took place in a taxi on the way home? The Recorder dealt with this correctly in paragraph 155 of his judgment, in finding that what Robert Beilik did with the appellant was not an act so closely connected with his employment that it would be fair and just to hold the defendant vicariously liable for it.

74. It was, Mr White submitted, going too far in the application of the "broad" assessment demanded by the higher courts to treat Robert Beilik's actions at the party as within his field of activities. The difference between the present case and Lister was that, in the latter, the torts were inextricably interwoven with the tortfeasor's work. By contrast, Robert Beilik's actions were not in any sense inextricably interwoven with his work with CRUK.

75. Mr West invoked the passage in the judgment of Diplock LJ in Ilkiw v Samuels [1963] 1 WLR 991, cited with approval by Lord Toulson in paragraph 38 of Mohamud that:-

> "[T]he matter must be looked at broadly, not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: What was the job on which he was engaged for his employer? and answering that question as a jury would." (p.1004)

76. Thus, even looking at the matter broadly, it could not be said that going to a works party in the circumstances of the present case was something that Robert Beilik was doing as part of his job with CRUK.

77. Mr White relied upon the judgment of the Court of Appeal in Graham v Commercial Bodyworks Ltd [2015] EWCA Civ 47, in which it held that an employer was not liable vicariously for the actions of an employee who, as a prank, used a cigarette lighter in the vicinity of the claimant, whose overalls he had sprinkled with a highly inflammable thinning agent, used at the premises for legitimate purposes. The overalls

ignited and the claimant was injured. In dismissing the appeal, Longmore LJ held that the:-

> "… wrongful act did not further the employer's aims; there was no friction or confrontation inherent in the employer's enterprise and such intimacy as there was likewise had no connection with that enterprise; it is inappropriate to talk either of power conferred on Mr Wilkinson in relation to Mr Graham or any particular vulnerability of Mr Graham to the wrongful exercise of such power." (paragraph 14)

78. Longmore LJ's reference to friction is explained in the following passages:-

> "16. The United Kingdom authorities tend to resolve themselves into two groups. On the one hand there are cases in which the use of reasonable force or the existence of friction is inherent in the nature of the employment; thus a nightclub owner may be vicariously liable for injuries caused by force used by a bouncer in the course of his duties and a rugby club owner may be vicariously liable for injuries caused by a punch-up during or in the immediate aftermath of a game: see *Mattis v Pollock (trading as Flamingos Nightclub) [2003] ICR 1335* and *Gravil v Carroll [2008] ICR 1222*. Similarly there are cases of what one might call normal friction in the workplace which gets out of hand as opposed to uncalled for antagonism which, while occurring in the workplace, originates outside it.
>
> …
>
> 18. Somewhat closer is a second group of cases in which the nature of the employment is not such as to require the exercise of some force or to involve the kind of friction inherent in an employment relationship. These cases derive from intentional acts at the work place (whether horseplay or rather more serious conduct) and do not usually give rise to vicarious liability. This group is best exemplified by two Scottish cases. In *Wilson v Exel UK Ltd (trading as Exel) [2010] SLT 671* an employee, who supervised the defendant's health and safety policy, pulled Miss Wilson's ponytail making a ribald remark while he did so. This was little more than a prank but Miss Wilson sustained some injury. The Inner House held that the supervisor's actions were not connected with his employment; in pulling Miss Wilson's ponytail he was not doing anything in relation to his health and safety duties. The acts of the supervisor were a mere frolic for which the employer was not vicariously liable."

79. Mr White also relied upon Vaickuviene v J Sainsbury Plc [2014] SC 147, in which Mr Romasov was killed by Mr McCulloch, a fellow employee in a J Sainsbury supermarket. The killer had expressed a dislike of immigrants. He picked up a kitchen knife from the kitchenware section of the supermarket and stabbed Mr Romasov in one of its isles. The Inner House held that the killer's conduct of harassment from 13 to 15 April "does not remedy the fact that there is no connection between the harassment and what McCulloch was employed to do. Rather, McCulloch's employment simply provided him with the opportunity to carry out his own personal campaign of harassment with tragic consequences" (paragraph 37).

80. Mr White said that, if his submissions were incorrect, then everyone involved in the decision in Bellman had missed the point. If it were the case that the office Christmas party in that case met the two requirements in Mohamud, then there had been no need for those involved in the case to concern themselves with the question of whether Mr

Major had been exercising his authority as the boss of the company, when the attack on the claimant took place.

81. Finally, Mr White referred to the judgment of Irwin LJ in Bellman, which emphasised the unusual nature of the facts of that case.

82. In reply, Mr Weir said that Bellman was about liability for an assault that took place after the end of the Christmas party and that all agreed there had been no seamless extension of that party into the drinking session at the hotel. Before the Court of Appeal, the appellant had accepted that aspect of the judge's findings.

83. According to Mr Weir, the respondent refused to face the submission that the CRUK Christmas party had been for the benefit of CRUK, as a way of engendering community spirit and goodwill.

84. Referring to the judgment in Graham, Mr Weir said that the present case was one that was about intimacy, with employees being authorised by CRUK to be much more intimate with each other than would otherwise have been the case. The employer, for its own benefit, had put its employees in a position of intimacy and that defined the field of activities. From there, it was a straightforward task to establish the requisite degree of connection.

85. As to direct liability, Mr Weir said that paragraph 121 of the Recorder's judgment could not stand with paragraph 123. The Recorder should have analysed what a proper risk assessment required. Mrs Pugh had been drinking and did not appreciate that there was a risk that needed to be addressed. Her admission that this was an "accident waiting to happen" could not be downgraded, as the respondent had sought to do.

86. Section 1 of the Compensation Act 2006 changed nothing, according to Mr Weir. He categorised as unfair Mr White's "*in terrorem*" arguments about cancelling Christmas and health and safety gone mad. Determining liability for what might happen in a taxi, following an office or works party, was a matter for another day. The steps that the appellant said were required to be taken by the respondent in the circumstances of the present case were not onerous.

D. DISCUSSION

87. In this appeal I am concerned with whether the Recorder was wrong to find in favour of the respondent in respect of both negligence and vicarious liability. It is not for this court to make its own findings of fact. Rather, I have to consider whether the Recorder erred in either or both of the judgmental exercises he undertook, by reference to the facts that he found.

(a) Negligence

88. The respondent does not dispute the Recorder's finding that CRUK owed a duty of care to the claimant, whilst she was at the 2012 Christmas party. Although the event

was run by volunteers, they were staff members of CRUK. The event was held at the Institute's premises.

89. The task under this heading is, rather, to establish the extent of the duty of care and then determine whether that duty was breached by CRUK and, if so, whether the breach caused the claimant's injury.

90. As can be seen from Everett, determining the scope of the duty of care is particularly important in cases where harm is caused in an environment over which a defendant has a degree of control, but where the harm stems from the actions of a third party who, although present in that environment, acts in a way that is not sanctioned by the defendant. Thus, at paragraph 33 of Everett, Smith LJ said:-

> "33.In my view, it is fair, just and reasonable to impose a duty of care on the management of a nightclub in respect of injuries caused by a third party, provided that the scope of the duty is appropriately set."

91. At paragraph 36, Smith LJ stressed that the "common duty of care is an extremely flexible concept, adaptable to a very wide range of circumstances to which it has to be applied". She then went on, in the passage to which reference has already been made, to consider what might be the scope of the duty as regards various kinds of club. Even within the umbrella expression of "a nightclub", such requirements might vary. Accordingly, in one "where experience has shown that entrants quite often try to bring in offensive weapons", Smith LJ said that it "may be necessary to arrange for everyone to be searched on entry". In the case of a nightclub "where outbreaks of violence are not uncommon", liability might well attach "if a guest is injured in an outbreak of violence amongst guests and there is no one on hand to control the outbreak". This might mean that, in a case of "some establishments" arrangements would be needed "for security personnel to be present at all times within areas where people congregate".

92. We then come to the closing sentence of paragraph 36 of her judgment, to which the appellant seeks to attach considerable significance:-

> "On the other hand, in a respectable members-only club, where violence is virtually unheard of, no such arrangements would be necessary. The duty on management may be no higher than that staff be trained to look out for any sign of trouble and to alert security staff."

93. I agree with Mr White that this passage is in no sense intended to be understood as laying down a rule of law that at any social gathering which has been organised (let alone a respectable members-only club), the duty of care requires there to be (a) ordinary staff who are "trained" to look out for signs of trouble; and (b) security staff, who can be called upon by the ordinary staff.

94. Read as a whole, paragraph 36 of Everett does no more than give a series of examples of what may be needed in various hypothetical circumstances. Smith LJ's use of the word "may" is important in this respect.

95. I therefore find that, in categorising the CRUK Christmas party as "closer to the example given by Smith LJ of the members-only club where violence was virtually

unheard of, rather than the nightclub examples", the Recorder (at paragraph 115 of his judgment) was not acceding – nor required to accede – to the proposition that there had to be trained staff at the party, looking out for signs of trouble, which they would report to security staff.

96. The Recorder was, I find, rightly aware that each case of this kind is fact-specific and that the delineation of the boundary of the duty of care will, likewise, be variable.

97. Although Mr Weir attempted to refute Mr White's categorisation of the appellant's case as "health and safety gone mad", there is some merit in that categorisation, albeit that I would not associate myself with the precise way in which Mr White chose to express it.

98. The clear thrust of the appellant's submissions was, indeed, that once it is established a party or other gathering is to involve the provision of alcohol which can, sometimes, cause some people to behave in ways that fall to be categorised as inappropriate, there needs to be (a) a written declaration, signed by the attendees, that they will not behave inappropriately; (b) a risk assessment encompassing eventualities stemming from all such forms of inappropriate behaviour; (c) trained staff (whether or not they are merely volunteering to help at the event); and (d) special training for those responsible for the provision of a risk assessment, covering all envisaged forms of inappropriate behaviour.

99. As a matter of common sense, that cannot, with respect, be right. More to the point, the archetypal reasonable person of the early 21st century would not regard this as a socially appropriate set of requirements to impose upon the organisers of *any* Christmas party or other similar social gathering, regardless of the circumstances.

100. On the facts as found, the Recorder was right to conclude that the extent of the duty of care, as it existed at the time of the 2012 party, did not require CRUK to have put in place measures of the kind described, in order to guard against the actions of Robert Beilik, which resulted in the injury to the claimant. Mr Hadfield, the chief organiser that year, did produce a risk assessment. That assessment had regard to the fact the alcohol would be consumed at the party. The assessment made provision for restricting access to the laboratories by those who may have consumed alcohol.

101. That aspect of the risk assessment was, of course, entirely reasonable. I do not, however, consider the Recorder fell into error in not drawing a conclusion that, because the effects of alcohol consumption were identified to this limited extent, CRUK should have produced a risk assessment dealing with what might occur if someone who had consumed alcohol did something untoward on the dance floor.

102. Again, context is all-important. The CRUK Christmas party was an event for adults working in the scientific community in Cambridge, held at an Institute of the University. It took place against the background of there not having been any previous incident regarding inappropriate behaviour caused or contributed to by alcohol. Mr Weir submitted that that made no difference. Given the nature of the gathering, however, I disagree. It was reasonable at that time for CRUK's risk assessment and its other arrangements for administering the party to be informed by what had (or had not) happened in the past.

103. Mr Weir placed great score by the evidence of Mrs Pugh, in cross-examination, that what happened to the claimant was an "accident waiting to happen". Read as a whole, however, her evidence was, as can be seen, far more nuanced.

104. Moving on from the issue of risk assessment, I find that the Recorder drew the correct inferences from the evidence as to the reasonableness of the steps taken by CRUK, at the party itself, to deal with any problems that might arise. In this regard, Mrs Pugh's evidence was clearly significant. She had been lifted by Robert Beilik but thought nothing of it. Nor, apparently, did two other women whom he had lifted on the dance floor.

105. The appellant's stance in relation to this evidence is that, since Mrs Pugh and (presumably) the two other women who were lifted had been drinking, their reactions to Robert Beilik cannot be relied upon.

106. Again, this is, I find, an invitation to depart from what the hypothetical person would consider to be reasonable. There is no suggestion in the evidence to which my attention has been drawn that Mrs Pugh had consumed alcohol to the point that she was incapable of forming an appropriate value judgment about Robert Beilik's behaviour.

107. The same is true of Mr Hadfield who, according to the evidence accepted by the Recorder, was walking around observing what was going on, as were a number of others. The suggestion that a social gathering of this kind cannot be adequately monitored by those who are involved in the gathering, but only by observers who remain dispassionately detached, is an invitation to set the standard of care unreasonably high.

108. It is also relevant to observe in this regard that, prior to the incident involving the appellant, neither she nor her husband (who was also present at the party) considered that Robert Beilik should be reported, even though both had encountered him in a boisterous mood.

109. Mr Weir said that if the appellant had not sustained injury in 2012, Robert Beilik's behaviour would have gone un-noted and, as a result, nothing would have changed. As it was, following the accident, Mr Hadfield recommended that the next risk assessment should cover risks arising from consumption of alcohol, otherwise than by reference to the laboratories.

110. I do not find that these submissions undermine the Recorder's findings. The fact that, before the incident occurred, no one, including the appellant, thought Robert Beilik was behaving in a manner that required intervention, in my view drives home the correctness of the Recorder's conclusion that the scope of the duty did not require that behaviour to be guarded against.

111. Mr White cautioned against using hindsight to impose liability. He drew attention to paragraph 120 of the judgment, where the Recorder said that there was a danger, knowing what had happened and that the appellant had suffered serious injury, of hindsight being used as a basis for criticism of the steps that were taken by CRUK.

112. Mr Weir, by contrast, suggested that hindsight has precisely that function. It shed light on the fact that the respondent should have done more in 2012.

113. The reality is that hindsight has no such fixed characteristic. Whilst it may, on occasion, help inform a conclusion that, in retrospect, something could have been done to avoid the event that occurred, hindsight is not necessarily determinative of the legal question; namely, whether something ought reasonably to have been done.

114. In the present case, the Recorder was entitled, at paragraph 119, to conclude that both Mrs Pugh and Mr Hadfield "simply would not have anticipated that" untoward behaviour as a result of excess alcohol consumption "would have needed warning against and/or that declarations should have been obtained".

115. Mr Weir criticised the finding of the Recorder, at paragraph 123 of the judgment, where he said he was "satisfied on the evidence that two professional security personnel was adequate for the type of party which was envisaged". The Recorder noted that these security staff only "occasionally passed through the party". According to the appellant, that was not enough.

116. I find this criticism of the Recorder to be misconceived. Returning to the example given by Smith LJ in Everett, the appellant's case involves viewing the CRUK 2012 Christmas party as akin to a nightclub where there is an ever-present risk of violence. This is incompatible with the carefully-graduated analysis adopted by the Court of Appeal in that case, which the Recorder adopted. On the Recorder's findings, there was adequate provision for security personnel. Their primary function was to control access to the laboratories but they were also available to be called upon by Mr Hadfield or one of the other volunteer organisers. According to the evidence of one of the security officers, the CRUK Christmas party was like a "family party". It would, I believe, be an unusual family that considered it necessary to hire trained security personnel to police one of its social gatherings.

117. In conclusion on this issue, the Recorder was not wrong to find that the respondent took reasonable steps in the planning and operation of the party. No duty of care was breached. The claim for negligence was, accordingly, not made out.

(b) Vicarious liability

118. In paragraph 150 of his judgment, the Recorder, having closely considered the judgment of the Supreme Court in Cox v Ministry of Justice, concluded that Robert Beilik "was a sufficiently integral part of the business of CRUK to render CRUK potentially vicariously liable for his acts and omissions". There is no challenge by the respondent to that finding.

119. It is, accordingly, common ground that the questions to be determined by reference to vicarious liability are those articulated in Mohamud. They are:-

> "(a) What functions or "field of activities" have been entrusted by the employer to the employee or, in everyday language, what was the nature of the job?

(b) Was there a "sufficient connection" between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice." (paragraph 44)

120. The Recorder's findings on vicarious liability were as follows:-

"155. Of relevance in the present case is that attendance at the party was far from compulsory. This was a party open to CRUK staff, as well as their guests. Entry was by ticket. Beilik was not required by CRUK to attend. More importantly, Beilik's presence at the party had nothing to do with the work which he undertook either for the Wolfson Centre or for CRUK. His act of lifting the claimant had nothing to do with his relationship with CRUK. It had nothing to do with his research work, either directly or indirectly. It was not, using the old *Salmond* test, a wrongful act authorised by the defendant or a wrongful method of performing an authorised act by the defendant. Nor, in my judgment, applying the modern law, was it an act so closely connected with his employment that it would be fair and just to hold the defendant vicariously liable.

156. It is a matter of judgment to decide on which side of the line any case lies, in terms of being sufficiently closely connected with the assigned activities. The cases involving assault by employees of members of the public where they are employed to engage with the public will often fall on the side of liability. The acts often take place during or immediately following on from their employed duties. In those cases it may be said to be artificial to divorce the wrongful act from what the assailant was employed to do. In my judgment the present case falls on the other side of the line, where there is insufficient connection. In my judgment, his role with CRUK did nothing more than provide an opportunity for this unfortunate accident.

157. In my judgment, the present case is of the type intimated by the Court of Appeal in *Graham v Commercial Body Works Ltd*: rather than being something connected with his duties, he was rather engaged on a "frolic" of his own.

158. What was provided was an opportunity by being at the party. However, Beilik's actions on the night were not inextricably woven with the functions which he undertook at CRUK's premises.

159. In my judgment therefore the claimant has not established that by assigning to Beilik the functions and activities of a visiting scientist, that the defendant created a risk of his committing the tort of assault or negligence in attempting to pick up, and then drop the claimant while she was on the dance floor.

160. In those circumstances, the case of vicarious liability on the part of the defendant for Beilik's actions fails."

121. Before me, Mr Weir based his submissions on the identification of a field of activities which is radically different from that identified by the Recorder. As we have seen, the Recorder took the view that Robert Beilik's activities involved working in the laboratories at the Institute. This was under the supervision of CRUK. According to Mr Weir, however, the relevant field of activities of Robert Beilik on the evening of 7 December 2012 was to interact with fellow partygoers in alcohol-infused revelry, leading to the setting aside of the ordinary boundaries of social interaction; all of which was authorised by CRUK for its own benefit, since it stood to gain from the enhancement of its employees' morale.

122. If this were the field of activities, it was, Mr Weir submitted, evident that there was a sufficiently close connection between that field and Robert Beilik's wrongful conduct in relation to the appellant. Thus, both of the questions set by Mohamud fell to be answered in the appellant's favour. The Recorder was wrong to conclude otherwise.

123. In this scenario, it is the employer's self-interest in organising the office or works Christmas party that is key. In it, the employees are invited by the employer into an environment where alcohol will encourage them to greater intimacy, with resulting risk of injury, for which the employer will be liable.

124. I do not consider that this description of the average office or works Christmas party is one that the archetypal reasonable person would recognise as representing reality. As a general matter, it overstates the position of the employer and, conversely, seriously understates the motivation and autonomy of those attending the party.

125. Mr Weir attempted to draw support for his paradigm from the judgments in Bellman. At paragraph 22, Asplin LJ emphasised the requirement, which emerged from the judgments in Mohamud, that the question of the field of activities entrusted to the employee must be addressed broadly. Rather than focussing upon "actual authority", the question is "what is the nature of the job?". Asplin LJ considered that many of the cases decided before Mohamud would have been decided differently if the judges in them had looked at the question through the lens of actual authority. As an example, the milkman in Rose v Plenty had no actual authority to carry a child on the milk float.

126. I do not find that this or, indeed, any other part of the judgments in Bellman assists the appellant's case. The requirement to address the field of activities "broadly" means what it says. It is not an acknowledgement that the concept has no boundaries. It is, rather, a direction to judges to look beyond the question of actual authority and examine "a wider range of conduct than acts done in furtherance of [the employee's] employment" (Mohamud, paragraph 22).

127. Viewed in this light, it is obvious Robert Beilik was not in anything like the same situation as the milkman in Rose v Plenty or the petrol kiosk employee in Mohamud. Both those individuals were at work, doing the job they were paid to do, when the relevant tort was committed by them. The same can also be said of the warden in Lister, whose abuse of the children in his care was inextricably linked with his job of looking after them.

128. That is not true of Robert Beilik. He was not doing his laboratory work when he attempted to lift the appellant on the dance floor. His laboratory work had ended

hours before. CRUK did not require him or anyone else to attend the party. Although he was present in the same building that housed the laboratories, the context of his presence was radically different.

129. As we have seen, there had, in fact, been a Christmas party in Bellman which had ended before the late-night drinking session, in the course of which Mr Bellman was assaulted by Mr Major. The fact that Northampton Recruitment Ltd. had put on an office Christmas party was not regarded by the Court of Appeal as justifying the imposition of vicarious liability; nor, indeed, was the fact that the party had led on to the late-night drinking session. Rather, it was Mr Major's control of proceedings, at all material times, and his reaction to what he perceived to be a challenge to his authority as managing director, which made the company vicariously liable for his actions.

130. I have already described the way in which Mr Weir sought to categorise the "field of activities" of Robert Beilik, as regards his presence at the Christmas party. I have, in particular, explained why I consider that, as a general matter, that description overstates the self-interest of the employer in holding such a party.

131. The circumstances of the present case are, I consider, a very good illustration of my concerns. I have referred already to the record of oral evidence given by Mr Hadfield, when he was asked about the benefits for CRUK in holding the party. The complete exchange, as recorded by the respondent's advisers, is, however, illuminating:-

> "The Christmas party
>
> TG: The Christmas party was a work-related social event organised by CRUK for the benefit of employees and their guests?
>
> JH: Yes.
>
> TG: There were benefits for CRUK. It was a way of rewarding staff?
>
> JH: No, it was not a reward for staff, it was staff led and volunteer organised, there would be a benefit in morale but this was not led by CRUK.
>
> TG: They permit the party to occur and overall it looked to be a CRUK Christmas party?
>
> JH: Only a Scrooge-like organisation would say "no".
>
> TG: There were benefits to morale, break down barriers in the organisation, people can meet.
>
> JH: Yes.
>
> TG: It might help foster relationships.
>
> JH: Possibly.

TG: It might foster belonging to an organisation.

JH: Possibly.

TG: Why might it not?

JH: A large number were coming in groups and they were already part of the organisation so not as much fostering of new relationships.

TG: Party – potential benefit.

JH: Yes."

132. In this exchange, we can see the social reality that is lacking in Mr Weir's *dirigiste* paradigm. CRUK, through its volunteers, organised the Christmas party. CRUK's motivation in doing so was not primarily, or even significantly, to derive a benefit for its operations. It was, in reality, responding to the expectation of its members of staff that this is what their employer does for them at Christmas.

133. I do not, therefore, find that the Recorder misconstrued the evidence on this matter or that, if he had examined the evidence correctly, he would have been required in law to find that the 2012 Christmas party was an event held for the benefit of CRUK at which employees (including, for this purpose, Robert Beilik) were encouraged by CRUK to engage in alcohol-fuelled intimacy.

134. It is, as the Recorder found, extremely unfortunate that the incident occurred and that the appellant was injured. I echo the Recorder's view that she deserves the court's sympathy. However, the ascertainment of what social justice requires, which lies at the heart of the law on vicarious liability, is not a journey down a one-way street. The desirability of enabling those who have suffered injury at the hands of others to recover adequate financial compensation needs to be balanced against the wider social consequences which may ensue from achieving this result through the imposition of vicarious liability.

135. In the present case, I do not consider the appellant has made good the proposition that the demands of social justice were such as to require the Recorder to determine that CRUK was vicariously liable for what happened to the appellant at the Christmas party. Properly construed, there is nothing in the authorities that even points in this direction.

136. I therefore conclude that the Recorder was right to find that Robert Beilik's field of activities was his research work at CRUK. This meant the Recorder was plainly correct to take the view that this field was not sufficiently connected with what happened at the party as to give rise to vicarious liability. Whilst I accept that there is a degree of compression in the Recorder's reasoning at this point of his judgment, it is of no material significance.

137. The appeal is, accordingly, dismissed.

138. I shall like to record my gratitude to Mr Weir and Mr White for the very high quality of their respective submissions.

Judgment Approved by the court for handing down.

Mr Justice Lane

April 2019