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King's Bench Walk

Delimiting Vicarious Liability in the Context of Independent Contractors

The law around vicarious liability has been "*on the move*" since at least the 2012 landmark decision of the Supreme Court in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 (the "*Christian Brothers* case"). However, after years of expansion, the Supreme Court has now held in *Barclays Bank plc v Various Claimants* [2020] UKSC 13 that liability will not always be imposed for the acts of an independent contractor.

Background

The claims arose from a series of alleged sexual assaults committed between 1968 and 1984 by the late Dr Gordon Bates. It was said that Dr Bates sexually assaulted the 126 Claimants, some as young as 16, during medical examinations that Barclays required them to undergo as a precondition of their employment. Dr Bates' estate had been dispersed, so the only means of redress was through the mechanism of vicariously liability against Barclays.

Although Barclays made the arrangements for the examinations and sent Dr Bates the forms to fill in, the examinations were conducted in Dr Bates' home. Dr Bates was not paid a retainer but instead charged a fee for each report he completed and he was free to refuse to undertake an examination. Furthermore, he was a part-time employee of the health service and it was presumed that he carried his own medical liability insurance. As the Supreme Court observed, Dr Bates "*was in business on his own account as a medical practitioner, with a portfolio of patients and clients*". Put another way, it was found that Dr Bates was, on the facts, a truly independent contractor. This is key to the decision.

Vicarious liability was tried as a preliminary issue. Both the High Court and the Court of Appeal held that Barclays was vicariously liable for Dr Bates' actions. This was overturned by the Supreme Court.

The legal test

Lady Hale, delivering the unanimous judgment of the court, set out the two requirements for vicarious liability to be imposed:

i. There must be a relationship between two parties which makes it proper for the law to make one pay for the fault of the other. In the case of a classic employment situation, this will be the relationship between employee and employer.
ii. There must be a connection between that relationship and the wrongdoer's negligent acts or omissions. Again, in a classic employment relationship the courts are commonly concerned with whether the negligent acts are carried out in the course of the employee's employment (although that has been given a wide interpretation).

The appeal before the Supreme Court concerned only the first requirement. Was the relationship between Barclays and Dr Bates such that it would be proper for the law to impose a burden on the bank to bear responsibility for the doctor's acts?

For a discussion of the second limb of the test, see our related article discussing the case of *WM Morrisons Supermarkets plc v Various Claimants [2020] UKSC 12*, handed down on the same day as the decision in *Barclays Bank*.

The "*relationship akin to employment*" test

In *Woodland v Swimming Teachers Association* [2014] AC 537, Lord Sumption stated at paragraph 3 of his

judgment that whilst recent cases had expanded the scope of vicarious liability to "*embrace tortfeasors who are not employees of the defendant*", the concept of vicarious liability "*has never extended to the negligence of those who are truly independent contractors*". The issue is where that line should be drawn.

The Supreme Court, borrowing from earlier decisions, held (at paragraph 27) that the appropriate question to ask is: whether the relationship was one that was sufficiently analogous to employment. In doing so, it referred in particular to the Supreme Court's decision in the *Christian Brothers* case.

In that case, Lord Phillips enumerated five "*incidents*" of employment relationships "*that make it fair, just and reasonable to impose vicarious liability*". The five principles are:

i. The employer is usually more able to compensate (especially as it will likely be insured);
ii. the wrongdoing usually arises from activity done on behalf of the employer;
iii. the employee's activity is likely to be part of the business activity of the employer;
iv. the employer created the risk by employing the tortfeasor to carry out tasks that gave rise to the risk;
v. employers generally have control of their employees.

Lord Philips went on to say (at paragraph 47) that, provided they share those five factors, non-employment relationships may give rise to vicarious liability on the basis that the relationship is "*akin to that between an employer and an employee*".

That was the approach adopted in a number of subsequent appellate decisions. For example, in *Cox v Ministry of Justice* [2016] AC 660 and *Armes v Nottinghamshire County Council* [2018] AC 855, Lord Phillips' five factors were considered. However, Lord Reed, giving the lead judgment on both cases, was clear that (a) not all factors carried the same weight; and (b) that it was open to the court to give different weight to each incident depending on the case. Furthermore, the Supreme Court in both *Cox* and *Armes* held that vicarious liability does not extend to those running recognisably independent businesses of their own.

The Supreme Court in *Barclays Bank* held at paragraph 27 that, whilst an analysis of Lord Philips' five factors will be helpful in "*doubtful*" cases, they need not be considered "*where it is clear that the tortfeasor is carrying on his own independent business*." The Supreme Court emphasised that what is required is a careful consideration of the details of the relationship.

Who is a truly an independent contractor?

The distinction between activities integrated into the business and the activities of recognisably independent contractors may not always be clearly delineated, particularly in the advent of the gig economy. There have been various debates concerning the definition of individuals as self-employed contractors, workers or employees, many of which focus on the degree of integration. In recent years, the line between employees and mere workers has become increasingly blurred, particularly following the Court of Appeal's decision in *Windle v Secretary of State for Justice* [2016] EWCA Civ 459.

The blurring of these lines has not stopped with the Supreme Court's decision in *Barclays Bank*. At paragraph 27 of the judgment, Lady Hale makes explicit reference to individuals who are "*technically self-employed*" contractors or agency workers, and suggested that an examination would have to be undertaken to establish whether they are "*effectively part and parcel of the employer's business*". It follows that there is no technical impediment to businesses being held vicariously liable for the acts of such individuals, notwithstanding that they are not employees. Certainly, this decision does not leave us with a clear, bright line delineating where various categories of working people sit on the spectrum of vicarious liability.

Lady Hale provides further guidance in her obiter comments at paragraph 29 of her judgment.

1. Recent cases have broken the assumption of one status in all circumstances. An individual found to be an employee for employment law purposes will not necessarily be one for tax, or even vicarious liability, purposes.
2. It is clear that vicarious liability will extend beyond employees to encompass, in some cases, mere workers (i.e. those who fall within the definition of section 230(3)(b) Employment Rights Act 1996). But that is not a

universal rule and the contracting business will not always be vicariously liable for the acts of workers. Rather, the courts will have to consider on the facts whether the relationship warrants the imposition of vicarious liability.

3. Whilst it is tempting to align employment status with the principle of vicarious liability, "*it would be going too far down the road to tidiness for this court to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of 'worker', developed for a quite different set of reasons*".

Conclusion and practical considerations

Pulling the various cases and principles together, Lady Hale stated that "*the question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant*." It is clear from the Supreme Court's judgment in this case that there are few, if any, hard-and-fast rules that will identify whether a business will be held vicariously liable for the acts of its contractors. Instead, a thorough examination of the true nature of the relationship will be required.

Certainly, Lord Philips five incidents continue to be helpful, although they have been relegated to 'doubtful' cases only. Lawyers should therefore be careful when pleading and running vicarious liability cases to establish at an early stage what they consider to be the true nature of the relationship between the tortfeasor and 'employer' and build a case around that. It will also be important, in less clear-cut cases, to identify at an early stage what incidents should carry the most weight and plead accordingly.

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James Sullivan of 12KBW recently successfully represented the Claimant in Levitt v Euro Building [2019] EWHC 2926 (QB) where vicarious liability was imposed for the acts of a sub-contractor. The Defendant has sought permission to appeal. Harry Steinberg QC and James Sullivan have been instructed to represent the Claimant on appeal.

LEVITT V EURO BUILDING