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Personal Injury Article

On the Move

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On the inauspicious April Fool's Day, the Supreme Court brought a stop to the expanding course of the law of vicarious liability in two decisions which bear careful consideration and will have a significant impact on the scope for liability in the law of tort generally, beyond the particular contexts of sexual abuse and data protection litigation.

The first of these decisions is the case of *Barclays Bank plc -v- Various Claimants* [2020] UKSC 13 and the second is *WM Morrison Supermarkets plc -v- Various Claimants* [2020] UKSC 12. In this post I intend to consider the first of the decisions and in a subsequent post will look at the second case.

The context of the case is neatly set out in paragraph 1 of the judgment: the law of vicarious liability has indeed been on the move for at least 20 years, and it has sadly been driven in significant part by a series of appellate decisions in the context of allegations of widespread sexual abuse by religious orders and others in society who have ostensibly been tasked with caring for the vulnerable.

Such cases are notoriously difficult: they represent the hardest of hard cases, and can lead to a policy driven expansion of principle. This, in turn, can mean that the law develops too far or too quickly, particularly if there is an obvious deep pocket which can afford to pay compensation to horribly injured victims.

> 1. *"The law of vicarious liability is on the move." So stated Lord Phillips of Worth Matravers in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1, generally known as Christian Brothers, at para 19. The question raised by the current case, and by the parallel case of WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12, is how far that move can take it. Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasor's employment, but that too has now been somewhat broadened. That is the subject matter of the Morrison's case.*

The facts of the case were simple. Dr Bates, an independent doctor trading on his own account, had undertaken work for the bank, providing medical examinations of potential employees for a fee. During those examinations he was alleged to have systematically sexually abused the bank's employees.

Dr Bates would classically be characterised as an independent contractor, rather than an employee, and the independent contractor defence, defeating any allegation of vicarious liability, is a defence well known in tort.

> 2. *The issue before us is whether Barclays Bank is vicariously liable for the sexual assaults allegedly committed between 1968 and about 1984 by the late Dr Gordon Bates on some 126 claimants in this group action. Dr Bates was a medical practitioner practising in Newcastle-upon-Tyne. According to his son's evidence, he had a portfolio practice. Some of it was as an employee in local hospitals. Some of it was doing medical examinations for emigration purposes. Some of it was doing miscellaneous work for insurance companies, a mining company and a government board. Some of it was doing medical assessments and examinations of employees or prospective employees, originally for Martins Bank, and later for Barclays Bank following their merger in 1969. This was, however, a comparatively minor part of his practice. He also wrote a newspaper column.*
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> 5. *Dr Bates died in 2009 and his estate (worth over half a million pounds) has been distributed. He cannot be sued by the claimants but neither can the Bank claim contribution from him should any of these actions succeed*

There was thus no Dr Bates to sue but there was the bank, which had sent his alleged victims to him, and for their own purposes. This led to the bank being sued, being argued to be vicariously liable for what the doctor had done.

The parties' arguments were polarised along the lines that the clear principle applicable was the independent contractor defence against the argument that the law had moved on. The Court summarised these competing positions thus:

> 7. *The parties' respective positions can be simply put. As Lord Bridge of Harwich stated in D & F Estates Ltd v Church Comrs [1989] AC 177, 208 (echoing the words of Widgery LJ in Salsbury v Woodland [1970] 1 QB 324, 336), "It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work". The Bank argues that, although recent decisions have expanded the categories of relationship which can give rise to vicarious liability beyond a contract of employment, they have not so expanded it as to destroy this trite proposition of law, which has been with us since at least the decision of Baron Parke in Quarman v Burnett (1840) 6 M & W 499, 151 ER 509.*
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> 8. *The claimants, on the other hand, argue that the recent Supreme Court cases of Christian Brothers, Cox v Ministry of Justice [2016] UKSC 10; [2016] AC 660, and Armes v Nottinghamshire County Council [2017]*

UKSC 60; [2018] AC 355, have replaced that trite proposition with a more nuanced multi-factorial approach in which a range of incidents are considered in deciding whether it is "fair, just and reasonable" to impose vicarious liability upon this person for the torts of another person who is not his employee. That was the approach adopted both by the trial judge and the Court of Appeal in this case.

The real issue in the case was that the currently constituted Supreme Court clearly felt that in the Christian Brothers case, Lord Philips had gone too far in making expansionary statements which had merged policy into principle, or to put it more charitably had been mis-interpreted by the lower courts into thinking that the distinction between policy and principle had been eroded.

The Supreme Court therefore had to approach the matter delicately, and in the time hallowed tradition of the common law courts depart from a precedent whilst proclaiming that they were doing no such thing, but simply giving a truer interpretation.

This technique of exegesis is not limited to the doctrine of precedent, but can also be seen in techniques of scriptural interpretation employed by many religions in history.

The offending paragraph was noted as follows:

15. In para 35, Lord Phillips of Worth Matravers listed "a number of policy reasons" usually making it fair, just and reasonable to impose vicarious liability upon an employer for the torts committed by an employee in the course of his employment:

"(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;

(ii) the tort will have been committed as a result of activity being taken by the employee 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, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;

(v) the employee will, to a greater or lesser degree, have been under the control of the employer."

The problem was explained in these terms:

> *16. These are policy reasons, closely related to the policy reasons derived from the Canadian cases and Lister v Hesley Hall. But, as Lord Hobhouse of Woodborough stressed in that case, at para 60,*
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> > *"… an exposition of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be."*

This passage was cited by Ward LJ in E's case, para 54, followed by this:

> *"My own view is that one cannot understand how the law relating to vicarious liability has developed nor how, if at all, it should develop without being aware of the various strands of policy which have informed that development. On the other hand, a coherent development of the law should proceed incrementally in a principled way, not as an expedient reaction to the problem confronting the court."*
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> *There appears to have been a tendency to elide the policy reasons for the doctrine of the employer's liability for the acts of his employee, set out in para 35 of Christian Brothers, with the principles which should guide the development of that liability into relationships which are not employment but which are sufficiently akin to employment to make it fair and just to impose such liability.*

Then the problem, was clarified, explained and the law sent on a different track:

> *18. I do not believe that by his reference to "those incidents" Lord Phillips was saying that they were the only criteria by which to judge the question. This is for two reasons. First, in E's case, Ward LJ had adopted the test of "akin to employment" but he had not asked himself whether those five "incidents" were present. He had conducted a searching enquiry into whether the relationship between the priest and the bishop was more akin to employment than to anything else. Secondly, when it came to applying the "akin to employment" test in the Christian Brothers case, Lord Phillips did not address himself to those five incidents but to the detailed features of the relationship. Thus:*
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> *"56. In the context of vicarious liability the relationship between the teaching brothers and the institute had many of the elements, and all the essential elements, of the relationship between employer and employees.*

(i) The institute was subdivided into a hierarchical structure and conducted its activities as if it were a corporate body. (ii) The teaching activity of the brothers was undertaken because the provincial directed the brothers to undertake it. True it is that the brothers entered into contracts of employment with the Middlesbrough defendants, but they did so because the provincial required them to do so. (iii) The teaching activity undertaken by the brothers was in furtherance of the objective, or mission, of the institute. (iv) The manner in which the brother teachers were obliged to conduct themselves as teachers was dictated by the institute's rules.

57. The relationship between the teacher brothers and the institute differed from that of the relationship between employer and employee in that: (i) The brothers were bound to the institute not by contract, but by their vows. (ii) Far from the institute paying the brothers, the brothers entered into deeds under which they were obliged to transfer all their earnings to the institute. The institute catered for their needs from these funds.

58. Neither of these differences is material. Indeed they rendered the relationship between the brothers and the institute closer than that of an employer and its employees."

I have quoted these paragraphs at length to show that he was answering the questions by reference to the details of the relationship, and its closeness to employment, rather than by reference to the five "policy reasons" in para 35.

The Supreme Court returned to principle: the independent contractor defence was not to be abolished by judicial fiat:

27. 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. In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.

Once the decision had been made as a matter of policy, to reign in the expansion of legal principle, the result was not in doubt:

> *28. Clearly, although Dr Bates was a part-time employee of the health service, he was not at any time an employee of the Bank. Nor, viewed objectively, was he anything close to an employee. He did, of course, do work for the Bank. The Bank made the arrangements for the examinations and sent him the forms to fill in. It therefore chose the questions to which it wanted answers. But the same would be true of many other people who did work for the Bank but were clearly independent contractors, ranging from the company hired to clean its windows to the auditors hired to audit its books. Dr Bates was not paid a retainer which might have obliged him to accept a certain number of referrals from the Bank. He was paid a fee for each report. He was free to refuse an offered examination should he wish to do so. He no doubt carried his own medical liability insurance, although this may not have covered him from liability for deliberate wrongdoing. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the Bank.*

Going forward, this case has echoes of those seminal moments in the tort of negligence, where a bold expansionary approach to e.g. the development of novel duties of care is seen to be going too far too fast: in this context with the potential for expanding the scope of liability to parties who may legitimately take the point that they were neither aware of their potential liability nor had the opportunity to take steps to abate it and for liability constituting deliberate wrong doing, criminal in nature they may not, in fact, be able to obtain liability insurance.

Instead, the cost of compensation might be borne more generally by society through a criminal injuries compensation scheme, rather than turning these parties into insurers of last resort.

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