Vicarious Liability: the move is over

Introduction

1. It is well-established that, to hold a defendant vicariously liable for the tortious conduct of another, a claimant must demonstrate:
   1.1. A sufficient relationship between the tortfeasor and the defendant; ("the Relationship Test") and
   1.2. A sufficient connection between that relationship and the tortious conduct. ("the Connection Test")[1]

2. Although easy to state, these tests are not so easy to apply. In 2016, the Supreme Court gave judgment in two conjoined cases, each raising issues with one of the two Tests.[2] Now, by judgments given on 1 April 2020 (only four years later), the Supreme Court has repeated the exercise, again reviewing each Test in two conjoined cases:
   2.1. *WM Morrisons Supermarkets plc v Various Claimants* [2020] UKSC 12 ("*Morrisons*"); and
   2.2. *Barclays Bank plc v Various Claimants* [2020] UKSC 13 ("*Barclays*").

3. In each case, the lower courts had held the respective Defendants vicariously liable. However, the Supreme Court reversed the lower courts, strikingly concluding that, despite the wealth of available judicial guidance, they had *"misunderstood the principles governing vicarious liability in a number of relevant respects."*[3] Accordingly, after this latest Supreme Court analysis, the key question is whether the law is any clearer.

Barclays: The Relationship Test

4. Between 1968 and 1984, the Defendant bank required all successful job applicants to undergo a medical examination. During that time, the Defendant directed the Claimants, who were all successful applicants, to be so examined by a Dr Gordon Bates. The Defendant further gave Dr Bates specific and detailed instructions as to the medical tests it wished to be performed. In the instant action, the Claimants alleged that, during these examinations, Dr Bates (who died in 2009) sexually assaulted them.[4] Dr Bates himself was not employed by the Defendant: rather, he had his own independent medical practice (with

[1] This basic analysis the Supreme Court had previously confirmed multiple times: *Armes v Nottinghamshire County Council* [2018] AC 355, [53]; *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677, [1]; *Cox v Ministry of Justice* [2016] AC 660, [15]; and *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1, [21].
[2] *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677; *Cox v Ministry of Justice* [2016] AC 660.
[3] *Morrisons*, [31]
[4] Vicarious liability was dealt with as a preliminary issue, so there has been no ruling on this alleged conduct

his own insurance), examinations for the Defendant forming one part of that practice. He was paid for each examination he conducted, but was not contractually obliged to accept any particular examination.[5]

5. It is trite law that, where the defendant and tortfeasor are employer and employee, the Relationship Test is satisfied, and the analysis proceeds to the Connection Test. Here, the Defendant argued that it was similarly established law that, where the tortfeasor is an independent contractor, the Relationship Test is not satisfied, and so the analysis ends. In the Court of Appeal, Irwin LJ (giving the lead judgment) disagreed:

> *"That said, I accept the submission of Ms Gumbel that the law now requires answers to the specified questions laid down in Cox and Mohamud, and affirmed in Armes, rather than an answer to the question: was the alleged tortfeasor an independent contractor? No doubt where the answers to the Cox/Mohamud questions are such that vicarious liability cannot be established, the relationship may often be that of independent contractor. But that question of definition appears to me no longer to be the test. If the Supreme Court had intended it to survive as such, it seems unlikely, given that formerly this was a decisive test, that the Court would have failed to say so.*
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> *Moreover, it seems clear to me that, adopting the approach of the Supreme Court, there will indeed be cases of independent contractors where vicarious liability will be established…*[6]

6. In this case, according to the Court of Appeal, the key 'specified question' was whether the instant relationship was *"akin to employment"*, and this question was to be answered by reference to the following five policy criteria, first set out by Lord Phillips in *Various Claimants v Catholic Welfare Society* [2013] 2 AC 1, [35] (and subsequently affirmed in multiple appellate cases):

> *"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."*

[5] *Barclays*, [28]; See also the High Court judgment at [2017] EWHC 1929 (QB), [8] – [16]
[6] [2018] EWCA Civ 1670, [44] – [45]

7. The High Court, applying this same analysis, had concluded that the Relationship Test was satisfied, and the Court of Appeal duly upheld that conclusion.

The Supreme Court judgment

8. Irwin LJ's analysis, reproduced in paragraph 5 above, was rational, lucid and logical. Unfortunately, according to the Supreme Court, it was also wrong.

9. In her leading judgment, Lady Hale confirmed that the overriding test was, and always had been, as follows:

> *"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."*[7]

10. Clearly, this formulation differs from the lower courts' formulation in one critical respect: it expressly states that a tortfeasor carrying on business on his account is, **by definition**, not in a relationship 'akin to employment'. Thus, Irwin LJ's suggestion that the contrary could be true is explicitly ruled out.

11. Furthermore, in applying this test, Lady Hale explained that the lower courts had misunderstood the purpose and relevance of Lord Phillips' five policy criteria:

> *"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."*[8]

12. Crucially, these criteria were, at most, merely a guide to resolving the Relationship Test in doubtful cases. Where, as here, the tortfeasor plainly was carrying on an independent business, the criteria serve no purpose. As Lady Hale explained (emphasis added):

> *"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*

[7] *Barclays*, [27]
[8] *Barclays*, [16]

> *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."***[9]

13. Put simply, the lower courts erred by treating the policy criteria as the all-inclusive definition as to whether a given relationship is 'akin to employment'. The courts thus focussed on those criteria and lost sight of the overriding test itself. Applying her analysis, Lady Hale considered that for the following reasons, Dr Bates plainly was conducting his own independent business:

> *"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."* [10]

14. Accordingly, the Relationship Test was not satisfied, and the Defendant thus could not be vicariously liable.

Morrisons: The Connection Test

15. In 2013, the Defendant supermarket disciplined its employee, Mr Andrew Skelton, for minor misconduct. Unfortunately, Mr Skelton took this rather badly, responding by leaking to the internet the personal information of 126,000 of the Defendant's employees. Crucially, he did so for the specific purpose of harming the Defendant. Mr Skelton had had legitimate access to this information in the course of his job, but obviously had not been authorised to act in this illegal (and, indeed, criminal) way. A select number of those

[9] *Barclays*, [27]
[10] *Barclays*, [28]

employees had then brought proceedings against the Defendant, alleging vicarious liability for various privacy-related torts.[11]

16. Clearly, as the Defendant had employed Mr Skelton, the Relationship Test was satisfied.

17. As to the Connection Test, Langstaff J had held at first instance that the issue was whether Mr Skelton's acts *were "closely connected with his employment."* Answering that question in the affirmative, his key reasoning was as follows (emphasis added):

> *"First, I reject Ms Proops' argument that the disclosure on the web of the payroll data was disconnected by time, place and nature from Skelton's employment. I find, rather, that as Mr Barnes submitted* ***there was an unbroken thread that linked his work to the disclosure: what happened was a seamless and continuous sequence of events****.* [The judge then summarised those events]. *These actions were in my view all part of a plan, as the research and careful attempts to hide his tracks indicate. As I have already noted (para. 22 above) this is precisely the same view as that taken by HHJ Thomas QC when sentencing Skelton. This was no sequence of random events,* ***but an unbroken chain*** *beginning even before, but including, the first unlawful act of downloading data from his personal work computer to a personal USB stick."*[12]

18. Langstaff J then rejected the Defendant's argument that, since Mr Skelton had intended to injure the Defendant, the Connection Test necessarily failed. In summary he held that binding authority (most particularly *Mohamud*) had established that the tortfeasor's motive was irrelevant. He then concluded as follows:

> *"Adopting the broad and evaluative approach encouraged by Lord Toulson in Mohamud I have therefore come to the conclusion that there is a sufficient connection between the position in which Skelton was employed and his wrongful conduct, put into the position of handling and disclosing the data as he was by Morrisons (albeit it was meant to be to KPMG alone), to make it right for Morrisons to be held liable "under the principle of social justice which can be traced back to Holt CJ"*[13]

19. On appeal, the Court of Appeal upheld Langstaff J's analysis and conclusions.

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[11] *Morrisons*, [2] – [8]. It was further alleged that the Defendant was primarily liable for the same. This argument failed at first instance and was not in issue before the Supreme Court. The Supreme Court also considered the further issue (not discussed in this article) as to whether a defendant could be held vicariously liable for statutory torts under the Data Protection Act.
[12] [2017] EWHC 3113 (QB), [183]
[13] [2017] EWHC 3113 (QB), [194]

The Supreme Court judgment

20. Reversing the lower courts, the Supreme Court held that those courts had fundamentally misunderstood and misapplied *Mohamud*. Giving the lead judgment, Lord Reed stated as follows (emphasis added):

> *"The courts below applied what they understood to be the reasoning of Lord Toulson in Mohamud [2016] AC 677. They treated as critical, in particular, his reference in para 45 of his judgment to "the principle of social justice which goes back to Holt CJ", his references in para 47 to the connection between the employee's conduct in that case and his employment ("an unbroken sequence of events", or "a seamless episode"), which they appear to have regarded as referring to an unbroken temporal or causal chain of events, and his statement in para 48 that "Mr Khan's motive is irrelevant", Mr Khan being the employee whose conduct was in question in that case. The resultant approach, if correct, would constitute a major change in the law.*
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> *Lord Toulson's judgment was not intended to effect a change in the law of vicarious liability: quite the contrary. That becomes clear if the judgment is read as a whole, as I shall explain.* ***The judgments below focused on the final paragraphs, in which Lord Toulson summarised long-established principles in the simplest terms and applied them to the facts of the case then before the court. A few phrases in those paragraphs, taken out of context, were treated as establishing legal principles: principles which would represent a departure from the precedents which Lord Toulson was expressly following."***[14]

21. Specifically, the lower courts had placed great emphasis on the finding that there was a "*seamless and continuous sequence of events*" between Mr Skelton's employment and his tortious conduct. Lord Reed downplayed the significance of this finding:

> *"…although there was a close temporal link and an unbroken chain of causation linking the provision of the data to Skelton for the purpose of transmitting it to KPMG and his disclosing it on the Internet, a temporal or causal connection does not in itself satisfy the close connection test."*[15]

22. Lord Reed subsequently explained that, even where there were such a temporal or causal connection, it was established law that an employee might still have so clearly departed

[14] *Morrisons*, [16] – [17]
[15] *Morrisons*, [31]

from the scope of his employment that the Connection Test would still be unsatisfied, and this the lower courts had not properly addressed.[16]

23. Similarly, Lord Reed reversed the ruling that Mr Skelton's motive was irrelevant in law, finding that, on the contrary, *"whether he was acting on his employer's business or for purely personal reasons was highly material."* The phrase suggesting otherwise in *Mohamud* had been misunderstood: in that case, the Supreme Court had found that the employee had at all times been acting on his employer's business (albeit misguidedly), and all the Supreme Court had meant was that his specific motive for becoming angry and assaulting the claimant was irrelevant.[17]

24. Lord Reed then applied the Test, which he characterised as follows:

> *"the question is whether Skelton's disclosure of the data was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as done by him while acting in the ordinary course of his employment."*[18]

25. Lord Reed further offered the following guidance on what *"fairly and properly"* meant in this context:

> *"The words "fairly and properly" are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent."*[19]

26. Here, Lord Reed reviewed the case law, noting that there was no previous vicarious liability decision where the courts had considered the conduct of an employee who had acted specifically to harm his or her employer. However, in his judgment, the case law did establish a clear distinction between *"cases ... where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a 'frolic of his own'..."* Here, he judged that Mr Skelton's conduct plainly fell into the latter category:

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[16] *Morrisons*, [35]
[17] *Morrisons*, [29] – [30]
[18] *Morrisons*, [32]
[19] *Morrisons*, [24]

> *"In the present case, it is abundantly clear that Skelton was not engaged in furthering his employer's business when he committed the wrongdoing in question. On the contrary, he was pursuing a personal vendetta, seeking vengeance for the disciplinary proceedings some months earlier."*[20]

27. Accordingly, the Connection Test was not satisfied, and the Defendant thus could not be vicariously liable.

Discussion

28. Although never mentioned in the judgments, the Supreme Court's treatment of the vicarious liability test strongly mirrors its recent approach to the so-called *Caparo* test for the existence of a duty of care. It was treated as established and orthodox law for many years that that test was the well-known tripartite one: reasonable foreseeability, proximity, and 'fair, just and reasonable'. However, in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736, the Supreme Court confirmed that this was not the case. No such single test existed, and the correct approach was as follows:

> "[to proceed] *in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities."*[21]

29. In *Robinson*, Lord Reed further noted (correctly) that *Caparo* itself had arisen following a long period in which the courts had struggled to contain the boundaries of the tort of negligence. Furthermore, in the earlier case of *Michael and others v Chief Constable of South Wales Police* [2015] AC 1732, the Supreme Court had highlighted the inherent problem with the tripartite test (as observed in *Caparo* itself):

> "[Lord Bridge in *Caparo*] *added that the concepts both of "proximity" and "fairness" were not susceptible of any definition which would make them useful as practical tests, but were little more than labels to attach to features of situations which the law recognised as giving rise to a duty of care."*[22]

30. In the author's view, very similar considerations arise here. Since the landmark judgment of *Lister v Hall*, the scope of vicarious liability has expanded dramatically, and, for the last two decades, the courts have plainly struggled to contain that expansion. Furthermore, the Tests of whether a relationship is *"akin to employment"* and whether tortious conduct is *"closely connected"* to a given relationship are quite plainly incapable of sensible, practical, objective definition. Indeed, the author considers it striking that, despite

[20] *Morrisons*, [47]
[21] [21]
[22] [106]

chastising the lower courts for not applying the correct Connection Test, Lord Reed was forced, when applying that test himself, to resort to an entirely different formulation of words in order to resolve it: namely whether the employee was *"furthering his employer's business"* or *"pursuing his own interests"*.

31. Similarly, both judgments, in different ways, clearly encourage the courts to adopt the very same incremental approach with reference to established categories and past authority. In *Barclays*, the Supreme Court expressly held that independent contractors were an established category of people for whom defendants could not be vicariously liable, expressly rejecting the proposition that Lord Phillips' policy criteria constituted a universal test that defined the answer in all cases. Similarly, in *Morrisons*, Lord Reed expressly directed courts, not to decide cases based on their own personal sense of justice, but rather to "*identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed"* and thus to decide cases *"on a basis which is principled and consistent."*[23]

Conclusions

32. In *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1, [19], Lord Phillips said in a much-quoted passage that *"the law of vicarious liability is on the move."* In the author's view, the clear lesson from *Barclays* and *Morrisons* is that the move, or at least the pace of that move, is now over. Rightly or wrongly, the law of vicarious liability is now to develop incrementally and by reference to past established categories and authorities. Further dramatic expansion is to be deprecated.

33. This is supported, not merely by the reasoning in *Barclays* and *Morrisons*, but also by the outcomes. Each Court of Appeal judgment, had it stood, would have constituted a massive expansion in the doctrine of vicarious liability. *Barclays* would, in reality have extended vicarious liability to relationships bearing no real connection to employment whatsoever. Similarly, *Morrisons* would have extended vicarious liability to unauthorised acts done for the express purpose of hurting the employer itself.

34. Conceptually, the current state of the law is not entirely satisfactory. Indeed, as acknowledged by Lord Reed in *Morrisons*, the law now applies the Connection Test differently in sexual abuse cases than in other cases. The author is also unconvinced by *Morrisons*' rationalisation of *Mohamud*'s treatment of the tortfeasor's motive: in the latter case, Lord Toulson expressly said *"It looks obvious that* [the tortfeasor] *was motivated by personal racism rather than a desire to benefit his employer's business"*, a finding, which, if correct, would surely at least indicate evidentially that, at the relevant time, the employee

[23] *Morrisons*, [24]

was (per lord Reed's analysis) no longer furthering his employer's business but rather furthering his own racist interests.

35. That said, the current approach now appears clear. In the author's view, a period of stability where litigants can predict with greater certainty whether or not a given defendant is to be held vicariously liable, is to be welcomed.

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