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PICN CASE LAW UPDATE

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The Search for Clarity on Vicarious Liability

In early 2020 the Supreme Court handed down its long-awaited judgments in *Barclays Bank plc v Various Claimants* [2020] UKSC 13 and *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, dealing with the two limbs of the vicarious liability test.

As neatly summarised by Lady Hale in *Barclays*, there are two elements which have to be shown before vicarious liability can be found. Firstly, there needs to be “*a relationship between two persons which makes it proper for the law to make the one pay for the fault of the other.*” [para.1]. This will only be so where the relationship is one of employment or where something “*akin to employment*” exists. Torts committed by independent contractors have therefore not historically given rise to vicarious liability.

The second limb of the test is concerned with “*the connection between that relationship and the tortfeasor’s wrongdoing*”, something which was dealt with by the Supreme Court decision in *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12.

As pointed out by Lady Hale in *Barclays*, these two elements of the vicarious liability test had, at the time, been “*somewhat broadened*”, causing concern that the vicarious liability test was being diluted.

The First Limb: *Barclays Bank plc v Various Claimants*

In *Barclays Bank plc v Various Claimants*, the Supreme Court was tasked with deciding whether the first limb of the test had been broadened to such an extent that Barclays Bank could be held vicariously liable for assaults committed by a doctor carrying out pre-employment medical assessments on job applicants as part of its recruitment process.

In the High Court, Mrs Justice Davies held that Barclays was vicariously liable for any assaults proved; a decision upheld by the Court of Appeal.

In overturning the Court of Appeal’s decision, the Supreme Court considered in particular its previous decisions in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 [2013] 2 AC 1 (generally known as *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.

In the *Christian Brothers* case, the Institute of Christian Brothers was held to be vicariously liable for acts of physical and sexual abuse committed by some of its teaching brothers at a residential school owned by the Catholic Child Welfare Society. In *Cox*, the prison service was held vicariously liable for injuries caused to a prison catering manager by the negligence of a prisoner working under her direction on prison service pay.

Finally, in *Armes*, the County Council was found to be vicariously liable for the physical and sexual abuse allegedly carried out by two of the foster parents with whom the claimant was placed.

The decisions reached in these three cases were perceived as eroding the independent contractor defence, by finding various relationships to be “*sufficiently akin to employment*” to impose liability. However, the Supreme Court did not see it that way, and held at para.24:

“There is nothing, therefore, in the trilogy of Supreme Court cases discussed above to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded.”

Rather, as can be seen from the citation taken from the case of *Nq Huat Seng v Mohammad* [2017] SGA 58 at para.26 of the judgment, the contribution of *Christian Brothers and Cox* was to:

“fine-tune the existing framework underlying the doctrine so as to accommodate the more diverse range of relationships which might be encountered in today’s context. These relationships, when whittled down to their essence, possess the same fundamental qualities as those which inhere in employer-employee relationships, and thus make it appropriate for vicarious liability to be imposed.”

The Supreme Court therefore found that the main question for it to decide remained the same as always – whether Dr Bates was an independent contractor, or if his relationship with *Barclays* was akin to one of employment.

On the one hand, the appointments were organised by the Bank and it was the Bank who told the applicants when and where to attend. The Bank also provided the doctor, Dr Bates, with a pro forma report to be filled in entitled “*Barclays Confidential Medical Report*”. This would be signed by Dr Bates and the applicant.

On the other hand, Dr Bates was not paid a retainer, but rather was paid a fee for each report. The Supreme Court also found that he no doubt carried his own liability insurance, and was “*in business on his own account as a medical practitioner with a portfolio of patients and clients*”, one of which was *Barclays*.

It was held that Dr Bates was not an employee of the Bank at any point. Nor could it be said that he was anything akin to an employee. He was clearly an independent contract, and as such, the Bank was not vicariously liable for the assaults.

The Second Limb: WM Morrison Supermarkets plc v Various Claimants

WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12 concerned a Morrisons employee, Mr Andrew Skelton, engaged in a personal vendetta.

Mr Skelton was the object of disciplinary proceedings for minor misconduct and was given a verbal warning. Following this, he “*harboured an irrational grudge*” against Morrisons, which led him to publish the personal information of 98,998 of his fellow or former employees on the internet.

The data consisted of payroll data which included name, address, gender, DOB, phone numbers, NI number, bank sorting code, bank account number and salary, which Mr Skelton had been given access in his role as a senior auditor in Morrisons’ internal audit team. The data was published from Mr Skelton’s home.

The respondents were 9,263 employees or former Morrisons employees whose data had been published. They brought proceedings against Morrisons for breach of its statutory duty under section 4(4) of the Data Protection Act (‘DPA’), but also contended that Morrisons was vicariously liable for Mr Skelton’s conduct.

Mr. Justice Longstaff, sitting in the High Court, did find that Morrisons was vicariously liable for Skelton’s breach of statutory duty under the DPA, having provided him with the data in order for him to carry out the task assigned to him.

On that basis, Mr Justice Longstaff, found that what happened after the data was provided was “*a seamless and continuous sequence of events (...) an unbroken chain*”.

This language was taken from judgment of Lord Toulson in the case of Mohamud v Wm Morrison Supermarkets Plc [2016] UKSC 11, [2016] A.C. 677, [2016] 3 WLUK 90 para.47, where Lord Toulson found that employees conduct giving rise to vicarious liability were a “*seamless episode*”.

The Court of Appeal agreed with Mr Justice Longstaff; also citing the above language from *Mohamud*, it found that “*the tortious acts of Mr Skeleton in sending the claimant’s data to third parties were (...) in our view within the field of activities assigned to him by Morrisons*”.

As per Lord Toulson in *Mohamud*, motive was also irrelevant, and therefore the Court of Appeal found that it was not relevant that Mr Skeleton had published the data to harm his employer.

Morrisons appealed to the Supreme Court where the Court was tasked with establishing whether Morrisons was vicariously liable for Skelton’s conduct, and therefore, stated by Lord Reed, provided with “*an opportunity to address the misunderstandings which have arisen since its decision in the case of Mohamud*”.

Lord Reed found that the courts below had misunderstood the decision in *Mohamud* in a number of respects. In particular, *“the disclosure of the data on the Internet did not form part of Skelton’s functions or field of activities, in the sense in which those words were used by Lord Toulson; it was not an act which he was authorised to do”* [para.30].

Secondly, Lord Toulson’s statement that *“motive is irrelevant”* had been taken out of context. Lord Toulson had concluded, in *Mohamud* that Mr Khan, the employee in that action, was *“going, albeit wrongly, about his employer’s business, and not pursuing his own private ends”*, when he followed and assaulted a motorist, he had been ordered to leave the petrol station where he worked.

In that context, the statement that *“motive is irrelevant”* was simply conveying that it was unnecessary for Lord Toulson to decide why Mr Khan had acted as he did, as he had already established that he was *“purporting to act about his employer’s business”*; the assault was *“not something personal”* [para.28].

Taking into account these misunderstandings, the Supreme Court was of the view that the question about whether Morrisons was vicariously liable for Mr Skelton’s action should be considered anew.

Applying the test set out by Lord Nicholls *Dubai Aluminium* [2003] 2 AC 366, Lord Reed found that the question to be answered was 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”*.

Unsurprisingly, there had been no other cases where it had been argued that an employer was vicariously liable for wrongdoing intended to harm the employer. However, Lord Reed considered assistance could be drawn from previous vicarious liability cases where the employee had inflicted harm on a third party for their own personal reasons.

In *Dubai Aluminium* [2003] 2 AC 366 para.32, Lord Nicholls drew a 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 interest: on a ‘frolic of his own’”*.

Applying that to Mr Skelton’s wrongdoing, Lord Reed found that it was *“abundantly clear that Skelton was not engaged in furthering his employer’s business when he committed the wrongdoing”*. He was engaged in his own personal vendetta and therefore effectively on a *“frolic of his own”*.

For this reason, his wrongdoing was not so closely connected with the acts he was authorised to do that it could fairly and properly be seen as done by him in the ordinary course of his employment.

Summary

The above two decisions attempt to clarify the issue of vicarious liability. However, what is clear from these two decisions is that whether vicarious liability will be found is very fact-sensitive.

This is clear from the decision in *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214; [2019] 1 ALL ER 1133, where a company was found to be vicariously liable for an assault committed by its managing director on one of the company's employees during a staff Christmas Party. In this case vicarious liability was established, as the Court of Appeal found that there was a sufficiently close connection between the managing director's authorised activities and his commission of the assault.

One would be forgiven for thinking that assaulting an employee questioning the managing director's appointment of a new employee would not be considered furthering the employer's business, and would be seen as the managing director pursuing his own personal ends. However, on the specific facts of that case vicarious liability was indeed found.

In July 2020, the High Court handed down an important judgment dealing with uncontroverted expert evidence in *Griffiths v TUI UK Limited* [2020] EWHC 2268 (QB).

Although the case dealt with expert evidence in a holiday sickness claim, the importance of the findings in this case as well as its likely effect on expert evidence in other types of claims cannot be understated. The appeal was recognised by Mr Justice Spencer, who handed down the judgment, to raise *"a fundamental question concerning the proper approach of a court towards expert evidence which is "uncontroverted"*.

The questions outlined by Mr Justice Spencer were as follows:

"Where such evidence is uncontroverted, is it open to the court nevertheless to examine the contents of the report and the reasoning leading to the expert's conclusion and reject those conclusions if the court is dissatisfied with the reasoning? Or is the court obliged, subject to exceptional circumstances, to accept the expert's conclusions?" [para.2]

In order to answer these questions, it was first necessary for Mr Justice Spencer to define what constitutes *"uncontroverted"* expert evidence. The procedural context of the expert evidence in this case was as follows.

In preparation for the first instance trial, Deputy District Judge Parker made an order, dated the 13th of March 2018, whereby, the Claimant was given permission to obtain a report from a Professor Pennington, consultant microbiologist dealing with causation in relation to the Claimant's gastric illness.

Importantly, the order also allowed for the Defendant to obtain a report from another consultant microbiologist, Dr Grant, which would also deal with causation, and a report from a gastroenterologist. The order also provided for the experts to meet and prepare joint statements of areas of agreement and disagreement.

However, the Defendant did not serve a report from a gastroenterologist, nor did it serve a report from Dr Grant, its nominated microbiologist. The Defendant also confirmed to the Claimant's solicitors that they did not intend to rely on expert evidence from a microbiologist.

The Defendant later made an application for permission to rely on a report from a gastroenterologist and for relief from sanctions, which was refused. That meant the Defendant did not have any expert evidence of its own for the purposes of the trial. The Claimant relied on the report of Professor Pennington together with his answers to the Defendant's Part 35 questions to prove causation of the Claimant's illness.

Para.10 of the judgment sets out what will, in the above context, be considered uncontroverted expert evidence: The Defendant did not require Professor Pennington to attend so he could be cross-examined, neither did the Defendant call any evidence to challenge or undermine the factual basis of Professor Pennington's report, for example by calling witness of fact or putting in documentary evidence. There was also no successful attempt by the Defendant to undermine the factual basis of his report through cross-examination of the Claimant and his wife.

Mr Justice Spencer therefore found that the evidence of Professor Pennington was "*truly uncontroverted*". Notwithstanding this, he noted that the court would always be entitled to reject expert reports, even those that are uncontroverted, which are a bare *ipse dixit*, i.e., based simply on the expert's own assertions with no basis in authority or proof.

The example used was that of a one sentence report simply stating that in the expert's opinion the Claimant acquired his gastric illness following consumption of contaminated food or fluid from the hotel. Such a report naturally would not comply with the requirements set out in CPR Part 35.

However, Mr Justice Spencer held at para.33 that:

"what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all."

As such, the question becomes, where the expert report is uncontroverted, whether the report complies with requirements set out in the Practice Direction to CPR Part

35, and especially paragraph 3, which deals with the form and content of an expert's report.

Mr Justice Spencer found that Professor Pennington's report did comply with these requirements. As such, the trial judge erred when she accepted the criticisms raised by the Defendant with regards to Professor Pennington's report, because the criticisms went to the weight to be ascribed to the report; an issue which would only have arisen if the report had not been uncontroverted.

The consequences of this judgment are far reaching, in that it has an effect in all cases where the expert evidence is 'uncontroverted'.

An example would be diminution in vehicle value cases, where the defendant takes issue with the expert's report on diminution, but does not challenge it in the sense set out para.10 of *Griffiths*. For one such recent example, please see the case of *BMW (UK) Holdings Limited v James Flynn*, decided in Oxford County Court on the 13th of November 2020.

In *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, the Claimant underwent smear tests in 2008 and in February and September 2012. She also had two cervical biopsies in September and October 2012. The smear tests and biopsies were wrongly reported and it was not discovered that the Claimant was developing cervical cancer.

The hospital admitted negligence with regards to the 2009 and February 2012 smear tests, as well as the biopsies. Had the Claimant been treated in 2008, there would have been a 95% chance of complete cure, and she would not have developed cancer.

As a result, the Claimant's cervical cancer went unnoticed until June 2013, when it was too late for her to be treated surgically, which would have meant that she could still bear children. Instead, the Claimant was treated with chemo-radiotherapy which resulted in her becoming unable to bear children.

Before having the chemo-radiotherapy, eight of the Claimant's mature eggs were frozen. The Claimant and her partner wanted to have four children. The expert evidence was that they would probably be able to have two children using the Claimant's eggs. They would then need to use donor eggs for the further two children.

The Claimant's preference was to opt for commercial surrogacy arrangements in California, although she was willing to use non-commercial arrangements in the UK if this could not be funded.

At first instance, Sir Robert Nelson found that he was obliged to follow the Court of Appeal's decision in *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010; [2002] QB 856, and that therefore the claim for commercial surrogacy in California had to be rejected as contrary to public policy.

He also found that surrogacy using donor eggs was “*not restorative of the claimant’s fertility*”, i.e., that it could not be seen as putting the Claimant back in the position in which she would have been had the tort not been committed. Non-commercial surrogacy with the Claimant’s own eggs, on the other hand, was held to be restorative of her fertility. Sir Robert Nelson therefore awarded the Claimant £37,000 per pregnancy, £74,000 in total.

The Claimant appealed against the decision to deny her claim for the foreign commercial surrogacy expenses and the cost of using donor eggs in the UK, and the Defendant cross-appealed against the award for non-commercial surrogacy with the Claimant’s own eggs. The Court of Appeal allowed the Claimant’s appeal and dismissed the cross-appeal. The Defendant proceeded to appeal to the Supreme Court.

Lady Hale was of the view that three issues for the Court to decide were as follows:

1. Whether damages to fund surrogacy arrangements using the Claimant’s own eggs were recoverable?
2. If so, whether damages to fund surrogacy arrangements using donor eggs were recoverable?
3. In either event, were damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful recoverable?

In answering the first question, Lady Hale distinguished her own decision in *Briody*. She stated that she did not consider in *Briody* that a surrogacy arrangement conforming to English law would be contrary to public policy. Rather, the question was “*whether it was reasonable to seek to remedy the loss of a womb through surrogacy*”, which would depend on the chances of a successful outcome.

In *Briody* the chances of reaching the successful outcome were very small. In the present case, however, where the evidence was that the prospects of success were reasonable, if not good, and the Claimant had delayed her cancer treatment so the eggs could be extracted and frozen, Lady Hale agreed with Sir Robert Nelson and Lord Justice McCombe in the Court of Appeal that it would be difficult to see why an award should not be made.

With regards to the second question, Lady Hale considered that her view in *Briody* that surrogacy arrangement using donor eggs was not truly restorative of what the claimant had lost, was probably wrong at the time, and certainly wrong now. That view was reinforced by the dramatic changes in society’s perception as to what constitutes a family. She therefore found that as long as there were reasonable prospects of success, damages could be awarded for the reasonable costs of UK surrogacy with donor eggs.

Finally, when considering the final question, it is important to note that Lady Hale held that nothing which the Claimant was intending to do would involve a criminal offence either in the UK or abroad [40]. There is nothing in the Surrogacy Arrangements Act 1985 preventing commissioning parents from making surrogacy arrangements directly, either whilst still in the UK or abroad, even on a commercial basis [para.21].

Lady Hale also referred to all the developments which have taken place since *Briony*. She highlighted that, although there is no plan to permit commercial surrogacy agencies to operate in the UK, the government now supports surrogacy as a valid way of creating family relationships. She also pointed out that the use of assisted reproduction techniques is now widespread and socially acceptable, as well as proposals from the Law Commission to enable a child born to a surrogate to be recognised as the child of the commissioning parents from birth.

Given all of the above, Lady Hale found that it would no longer be contrary to public policy to award damages for the costs of foreign commercial surrogacy, although she took care to clarify that this did not mean that such damages would always be awarded in all such cases. Limiting factors would be whether the proposed programme of treatment is reasonable, and whether it is reasonable for the claimant to seek foreign commercial arrangements rather than to make arrangements in the UK. Considering how new this decision is, it remains to be seen how this will be applied in future cases.

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