Barclays Bank v Various Claimants –
a return to orthodoxy?

The law of vicarious liability has been "*on the move*" in recent years. Victims of sexual abuse, in particular, have increasingly sued organisations who they expected to stand in the shoes of their abusers and pay compensation which the abusers themselves had no means to do. Over the last decade or so, the trend has increasingly been in favour of such claims. With *Barclays*, that tide seems to have turned.

Leading cases before *Barclays*

The quote about the law being on the move comes from Lord Phillips in *Christian Brothers* [2012] UKSC 56, imposing vicarious liability on a religious education organisation for sexual abuse, but it has applied more recently in a number of other settings. Vicarious liability was traditionally imposed on employers for wrongful acts committed by their employees, acting in the course of their employment. In *Cox v MoJ* [2016] UKSC 10, it was extended to impose liability on a prison for the wrongful act of a prisoner. In *Armes v Nottinghamshire* [2017] UKSC 60 it was extended to impose liability on a council for abuse by foster parents of their fostered children (albeit with Lord Hughes dissenting). These developments moved the law a very considerable distance from where it had been before *Christian Brothers*. There may previously have been argument about whether an individual was truly an independent contractor rather than an employee, but it was never doubted that if the individual was an independent contractor there would be no vicarious liability. The change began, almost imperceptibly, with *Viasystems Ltd v Thermal Transfer Ltd* [2005] EWCA Civ where the Court of Appeal held for the first time that two defendants could be jointly vicariously liable for the negligence of a fitter's mate. No man can serve two masters, and the notion that a formal employment relationship was not a necessary ingredient for vicarious liability to attach was picked up and developed by Ward LJ in the first of the cases that considered the liability of religious organisations for ministers of religion: *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, decided shortly before *Christian Brothers* was heard by the Supreme Court. Cases brought against organisations, on vicarious liability principles, rose.

***Barclays* – the facts**

In *Barclays*, a large number of Claimants in a group action asserted that the bank was liable for any sexual assaults proved to have been committed against them by a Dr Bates. The doctor had been appointed by the bank to conduct medical examinations, and the Claimants were for the most part very young women applying for their first jobs on leaving school and required to undergo medicals before appointment. He was deceased, and his estate had no money left to satisfy any judgments. The Claimants turned to the bank, with its deep pockets, instead. Applying recent case law, such as *Christian Brothers* and *Cox*, the first instance judge agreed that the bank was vicariously liable, as did the Court of Appeal.

Had Dr Bates been employed by Barclays, working in its offices and under its instructions, vicarious liability would doubtless have been conceded. However, Dr Bates was not employed by Barclays. He was a hospital doctor, who carried out other activities in his own right as part of a private medical practice, for his own profit. Medical assessments, for Barclays and for various other organisations, were but a small part of his private practice. He was not paid a retainer by Barclays. Instead, he was sent a series of potential employees to examine, with a standard form to fill out following each examination, and when he had done this, he was paid a fee.

In the Court of Appeal it was argued on behalf of the bank that whatever movement there may have recently been in the law of vicarious liability, the *"one clear test"* that remained determinative of the issue was that an employer was not vicariously liable for the torts of his independent contractor. The Court of Appeal acknowledged that the doctor was an independent contractor, but it accepted the claimants' submission that whether the tortfeasor was an independent contractor was no longer determinative. The Court was required to address the various tests identified in *Cox* and affirmed in *Armes* and if the tests were met, the defendant would be vicariously liable. This only 5 years after Lord Sumption had said in *Woodland v Essex CC* [2013] UKSC 66 that *"The boundaries of vicarious liability have been expanded by recent decisions…But it has never extended to the negligence of those who are truly independent contractors…"*

***Barclays* – the result**

The Supreme Court, in a unanimous judgment, overturned the findings of vicarious liability below. It held, at [1], that "*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 tort of the other… [historically, this meant an employment relationship, though this has somewhat broadened] The second is the connection between that relationship and the tortfeasor's wrongdoing*".

It went on to hold that, as Dr Bates was an independent contractor rather than an employee, the first element could not be established, so the claim must fail.

After *Barclays* – where do we stand?

On any view, *Barclays* comes as a victory for Defendants, against a background of successive expansions of vicarious liability over recent years. The Supreme Court's judgment in *WM Morrison v Various Claimants* [2020] UKSC 12, delivered the same day as *Barclays* (see Nia Frobisher & Kat Shields's comment also on this site) will also be seen as a victory for Defendants. It also tended to narrow the scope of liability, perhaps, like *Barclays*, signalling a return to a more orthodox position, but on the second stage of the test. However, the Supreme Court was also at pains to note that they were not signalling any departure from *Armes* – local authorities can still be vicariously liable for foster parents, and they are likely to have non delegable duties too (albeit in the specific example of foster placement a non-

delegable duty was excluded by the terms of the relevant statute). Nor were they signalling any departure from *Cox*, *Christian Brothers*, etc., which they consider were correctly decided and consistent with *Barclays*.

Following *Barclays*, for cases where the alleged tortfeasor is an employee – they have a contract of employment, they receive a wage etc. – nothing has changed at all. Where the alleged tortfeasor is not an employee, however, it will be necessary to examine the relationship between the alleged tortfeasor and the proposed Defendant. The Supreme Court put it this way at [27]:
"*the question is therefore, 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… [see below] may be helpful in identifying in identifying a relationship which is sufficiently analogous to employment… the key… 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*".

Some people, then, are employees, and vicarious liability will be established. Some others are clearly independent contractors, like Dr Bates. In those cases, claims for vicarious liability will fail. In the modern economy, there are those who don't fit neatly into either category. In those cases, it is necessary to consider the "five incidents" referred to by Lord Phillips in *Christian Brothers* at [35] i.e. (paraphrasing):

(1) The proposed Defendant is more likely to have the means to compensate (more a policy consideration, unlikely to be helpful in looking at a particular relationship)
(2) Is the tort the result of something being done by the alleged tortfeasor for the proposed Defendant's benefit?
(3) Is the alleged tortfeasor's activity part of the proposed Defendant's business activity?
(4) Has the proposed Defendant, by engaging the alleged tortfeasor, created the risk of the tort occurring? (This will often be satisfied in abuse cases)
(5) Was the alleged tortfeasor under the control of the proposed Defendant?

Unless a relationship akin to employment is established, there will be no vicarious liability. Only if a relationship akin to employment is established is it necessary to go on to the second question – was there a sufficient connection between the wrongdoing and the employment or similar relationship for vicarious liability to be established? For more on the second question, see *Morrison*.

Barclays brings some very welcome clarity to this area of the law, but how convincingly it weaves together all of the recent cases into a consistent narrative is perhaps open to question. In order to overcome the logic of the approach taken by the Court of Appeal in *Barclays* it was necessary for the Supreme Court to distance itself from the direct application of the "five incidents" in order to determine whether vicarious liability exists, yet surely that is exactly what Lord Reed did in both *Cox* and *Armes.* It comes as no surprise though. *Barclays* represents a further example (following the recent case of *Poole BC v CN* [2019] UKSC 25) of

the move by the Supreme Court away from recourse to questions of policy in order to decide these difficult issues, and a return to the application of more orthodox principles.

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