BARCLAYS AND MORRISONS :

SCALING BACK VICARIOUS LIABILITY?

A Guidance Note from the 2TG Personal Injury Group **Spring 2020**

Introduction

On 1 April 2020 the Supreme Court handed down two decisions on vicarious liability: *Barclays Bank plc v Various Claimants* [2020] UKSC 13 ("*Barclays*") and *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 ("*Morrisons*"). Recent cases have appeared to expand the scope of vicarious liability, *Barclays* and *Morrisons* will be welcomed as providing some certainty about the principle's scope.

Tom Fairclough
tfairclough@2tg.co.uk
+44 (0)20 7822 1246

Legal Context

Establishing vicarious liability usually requires two questions to be answered in the affirmative:

1. Is there the requisite relationship between the party alleged to be vicariously liable and the tortfeasor?
2. Is the tortious conduct within the scope of that relationship?

Traditionally, both relationship and scope were interpreted narrowly – the former focused on finding a contract of service; the latter required the conduct to clearly be within the scope of that contract of service. Recent cases challenged our understanding of vicarious liability.

Whether the requisite relationship exists

The first question was addressed in *Various Claimants v Catholic Welfare Society* [2012] UKSC 56 ("*Christian Brothers*"). In that case, the tortfeasor had sexually abused children at a school. The victims sought to hold the defendant society, of which the tortfeasor was a member and who had provided teachers to the school, liable. The tortfeasor was not an employee. However, Lord Phillips held employment status alone did not determine the case.

The factors justifying the imposition of vicarious liability in the employment setting were identified at [35]:

> *"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."*

In a case such as *Christian Brothers*, one looked to see if the relationship was sufficiently akin to that of employer and employee; if it was, vicarious liability could be established ([47]). In the present case:

> *"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"* ([56]).

Therefore, the defendant society was liable. This approach was followed in *Cox v Ministry of Justice* [2016] UKSC 10 ("*Cox*") where a prisoner was required to carry out work and dropped a sack of rice onto the prison's catering manager. The prisoner was not an employee. Lord Reed said the Ministry of Justice could be liable, stating that the first factor (does the employer have the means to compensate the claimant?) identified by Lord Phillips in *Christian Brothers* at [35], was unlikely to be of independent significance (*Cox*, [20]). Lord Reed considered the same to also be true of the fifth factor (the employer's control over the employee) save that if there was no control, vicarious liability would be unlikely to be established (*Cox*, [21]). The remaining factors will generally be important.

In non-employment relationships, Lord Reed considered that vicarious liability could be imposed when the tortious actions are done as an integral part of the business activities of the defendant for the defendant's benefit and where the risk of the tortious action occurring was created by the defendant assigning those activities to the tortfeasor (*Cox*, [24]). On the facts, the Ministry of Justice was held liable.

The concern for defendants, given the foregoing cases, was that the law was recognising a wider range of relationships outside the traditional employer-employee context as able to give rise to vicarious liability.

Whether the tortious action was within the scope of the relationship

The range of conduct that would fall within the second question appears to have been widened. The general test was given in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 ("*Dubai*"): *"the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that…the wrongful act may … be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment"* ([23]). This can be termed the "*close*

connection" test. A useful starting point for intentional torts is the Canadian case of *Bazley v Curry* [1999] 2 SCR 534 ("*Bazley*"), which, at [41(3)], provides the following non-exhaustive factors:

1. The opportunity that the employment afforded the employee to abuse his power.
2. The extent to which the tortious act may have furthered the employer's aims.
3. The extent to which the tortious act was related to "*friction, confrontation or intimacy inherent*" in the employer's business.
4. The power the employee had over the claimants.
5. The vulnerability of the claimants to the wrongful exercise of the employee's power.

The limits of the close connection test were examined in the Supreme Court. In *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11 ("*Mohamud*") the claimant stopped at a petrol station operated by the defendant company, went to the customer counter, and asked if an employee could print documents from a USB stick. The employee responded aggressively and ordered the claimant to leave. The employee then followed the claimant and attacked him in a racially motivated assault. Lord Toulson said the court must consider two matters: what were the functions or field of activities entrusted to the employee and was there a sufficient connection between those functions and the tortious conduct (*Mohamud*, [44]). The Supreme Court held that the employee was acting within the field of activities entrusted to him when he racially assaulted the claimant. Factors leading towards this finding were:

1. It was the employee's job to deal with customers. His conduct in answering the claimant's request for printing fell within the "*field of activities*" assigned to him.
2. What followed formed part of a "*seamless episode*".
3. When the employee followed the claimant, he told the claimant in aggressive language that he was never to come back to the petrol station. This was an instruction to keep away from his employer's premises.
4. Even though the employee was motivated by racism rather than a desire to further his employer's business "*motive is irrelevant*". (*Mohamud*, [47] – [48])

As with *Cox*, *Mohamud* has been seen as significantly widening the scope of vicarious liability. It would appear that, according to *Mohamud*, an employer may be liable for their employee's racially motivated criminal act if there is some degree of causal nexus between the tortious conduct and the relationship with the employer. Both *Cox* and *Mohamud* significantly increased the prospect of vicarious liability being established.

Barclays and *Morrisons*

Although the Supreme Court stated the law has not changed (*Morrisons*, [1], [17], and [31]), both *Barclays* and *Morrisons* mark a departure from the increasing breadth of vicarious liability.

As to relationships that can impose vicarious liability, *Barclays*' facts can be briefly summarised. Dr Bates was a medical practitioner who variously worked for hospitals and insurance companies, undertook medical assessments for prospective employees, and so on. Successful applicants for jobs at Barclays would be told they had to pass a medical examination. Barclays arranged appointments with Dr Bates, who was paid for each report. He was not paid a retainer. It was alleged that Dr Bates sexually assaulted many of the examinees Barclays sent to him. Dr Bates died. The claimants sought to hold Barclays vicariously liable for his actions. The High Court and Court of Appeal said that Barclays was vicariously liable; the Supreme Court overturned those orders.

Lady Hale, giving the unanimous judgment, held that [35] of *Christian Brothers* (quoted above) sets out the policy reasons for the doctrine of employer's liability for the acts of their employees and noted the tendency to elide those policy reasons with the principles that guide vicarious liability in relationships that are not ones of employment (*Barclays*, [16]). Lady Hale made clear that there is nothing in the "*sufficiently akin to employment*" test (*Christian Brothers*) or in Lord Reed's judgment in *Cox* to doubt the distinction between work done for an employer as part of the employer's business and work done by an independent contractor as part of his own business (*Barclays*, [22]).

The question is whether the tortfeasor is carrying on business on his own account and Lord Phillips' five "*indicators*" are only useful in the more difficult cases (*Barclays*, [27]). Lady Hale applied the carrying on business on his own account test in one swift paragraph, holding that Dr Bates was not sufficiently akin to an employee of Barclays'. He did work for Barclays, but that is true of many people, e.g. window cleaners and auditors (*Barclays*, [28]). Lady Hale noted that Dr Bates was not paid a retainer and was free to refuse work (*Barclays*, [28]).

As to which actions fall within the scope of the relationship, Lord Reed, giving the unanimous judgment, provided a detailed analysis in *Morrisons*. The Respondents were 9,263 of Morrisons' employees or former employees. Mr Skelton, whilst still Morrisons' employee, published personal information about the Respondents on the internet. He did this as a result of a grudge held against Morrisons following minor internal disciplinary proceedings. The Respondents brought a claim against Morrisons alleging it was vicariously liable for Mr Skelton's tortious conduct. The High Court and Court of Appeal held that Morrisons was vicariously liable for Mr Skelton's actions.

The Respondents relied heavily on *Mohamud*. Lord Reed said that *Mohamud* had to be read as a whole and did not change the law (*Morrisons*, [17]). The main points from *Morrisons* are:

1. Whilst case law talks about whether the wrongful conduct can "*fairly and properly*" be regarded as occurring in the course of the employer's business, that is not an invitation to decide cases according to abstract ideas of fairness or justice. It requires the courts to look at past case law and the guidance it gives (*Morrisons*, [24]). The factors in cases such as *Dubai* and *Bazley* will therefore be influential.

2. The courts must assess the activities entrusted to the employee and then decide whether there was a sufficient connection between those activities and the tortious actions (*Morrisons*, [26]). This is what is meant by "*fields of activities*"; it is no different to cases such as *Dubai*.

3. *Mohamud* is not authority for the proposition that all one needs to establish for a sufficiently close connection is a causal connection between the employment and the wrongdoing. When Lord Toulson, in *Mohamud*, spoke about a "*seamless episode*", he was not referring to a series of events but instead the capacity in which the employee was acting when the tortious conduct occurred (*Morrisons*, [28]).

4. Whilst read in isolation, the statement that "*motive is irrelevant*" might be misleading, Lord Toulson made clear that there was a sufficiently close connection in *Mohamud* because the employee, when engaging in his racially aggravated assault, was purporting to act for his employer's business. The question of whether a tortfeasor was acting on his employer's

> business or for personal reasons is plainly important (*Morrisons*, [29]).

Given that analysis, Lord Reed stated that the lower courts misunderstood vicarious liability (*Morrisons*, [31]). The key points were that disclosure of information on the internet was not part of Mr Skelton's field of activities; whilst there was an unbroken chain of causation, that is not in itself sufficient; and motive is not irrelevant, whether he was acting for purely personal reasons is highly material (*Morrisons*, [31]). Lord Reed found that the mere fact that Mr Skelton's employment gave him the opportunity to commit the wrongful act is not enough to impose vicarious liability (*Morrisons*, [35]). Mr Skelton was clearly not engaged in furthering his employer's business (even in a misguided way). He was pursuing a personal vendetta and seeking vengeance; it was not closely connected with acts that he was authorised to do (*Morrisons*, [47]).

Going Forwards

Barclays and *Morrisons* will be welcomed by defendants and cause concern to claimants. They represent an end to the expansion of vicarious liability and give much needed certainty in this area. The Supreme Court suggests that neither decision changes the law, yet both raise new questions. For example, if motive does matter insofar as it goes to whether an employee was acting in the furtherance of his employer's business, how does a court take account of that? What happens if, as in *Mohamud*, there is a possible mixed motive? Likewise, it is not clear where the line will be between pursing a personal action and carrying out an unauthorised action in (purported) furtherance of your employer's business. These questions, and more, will no doubt be addressed in subsequent litigation.

ABOUT THE AUTHOR

Tom Fairclough
tfairclough@2tg.co.uk
+44 (0)20 7822 1246

Tom Fairclough (2015 call)

Tom completed pupillage and joined chambers as a tenant in October 2019. He practises in all of chambers' key areas and has a particular interest in employment, personal injury, and commercial litigation.

CONTACT US

Lee Tyler
Senior Clerk
ltyler@2tg.co.uk
+44 (0)20 7822 1203

Paul Cray
Deputy Senior Clerk
pcray@2tg.co.uk
+44 (0)20 7822 1208

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2 Temple Gardens, London EC4Y 9AY
Tel +44 (0)20 7822 1200
Fax +44 (0)20 7822 1300
clerks@2tg.co.uk
www.2tg.co.uk