

VICARIOUS LIABILITY? DON'T BANK ON IT

BARCLAYS BANK PLC V. VARIOUS CLAIMANTS [2020] UKSC 13

A Case Note from the 2TG Clinical Negligence Team

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The UK Supreme Court this morning handed down judgment in two cases which explored the boundaries of the often-vexed concept of vicarious liability. The judgments confirmed that the Courts will, and should, impose limits on when one legal entity will be held liable for the actions of another.

In *Barclays Bank plc v Various Claimants* [2020] UKSC 13, the issue was whether Barclays could be held liable for sexual assaults committed by an independent contractor, Dr Bates, engaged by the bank to perform medical examinations for prospective employees. The respondents were the victims of the assaults perpetrated by the doctor in the course of those examinations.

At both first instance and on appeal, it had been held that Barclays was vicariously liable for the acts of Dr Bates. Before the Supreme Court, Barclays argued that the law remained as stated by Lord Bridge of Harwich in *D & F Estates Ltd v Church Comrs* [1989] AC 177:

"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 respondents argued that recent decisions in *Christian Brothers, Cox v Ministry of Justice* [2016] UKSC 10 and *Armes v Nottinghamshire County Council* [2017] UKSC 60 had replaced that 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."



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Lady Hale gave the only speech in the Supreme Court in which she analysed the recent cases in this area and concluded that:

*"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."*¹

Further she set out the approach that needs to be taken when considering whether there is a relationship that will give rise to vicarious liability. Lady Hale confirmed that the question that must be addressed is whether the tortfeasor is carrying on business on his own account, or whether he is in a relationship akin to employment with the defendant. If it is clear that the tortfeasor is carrying on his own independent business, then the enquiry need go no further and vicarious liability will not be found. If the answer to that question is unclear, then it will be necessary to consider whether there is a relationship between the tortfeasor and the party said to be vicariously liable *"which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability"*. Lady Hale commented that in deciding this latter issue it may be helpful, when considering whether technically self-employed workers or agency workers are effectively part and parcel of the employer's business, to have regard to the five policy considerations set out by Lord Phillips in the *Christian Brothers* case which were said to render it fair, just and reasonable to impose vicarious liability on an employer for torts committed by an employee.² However, Lady Hale

confirmed that the key to this *"will usually lie in understanding the details of the relationship"*.

On the facts of the case before the Court, Lady Hale found that Dr Bates was an independent contractor, so that Barclays would not be liable for his actions.

The decision will be welcome news for those individuals and companies who regularly engage independent contractors to perform various tasks for them in order to allow them to carry on business. In particular, many hospitals and other clinics will hope that this will spell the end of claims directed against them in circumstances where it is alleged that the wrongdoing was committed by a clinician who is not an employee, but rather an independent contractor. However, arguably this judgment still leaves open the prospect of a finding of vicarious liability in those circumstances, particularly where the clinician works exclusively for a particular hospital or clinic. Accordingly, whilst it is to be hoped that the decision in *Barclays Bank* has put to bed the question of liability for the actions of an independent contractor, it would be unwise to bank on it in every case.

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¹ *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 at [24]

² *Christian Brothers, Cox v Ministry of Justice* [2016] UKSC 10 per Lord Phillips 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."

ABOUT THE AUTHOR



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Anna is a very experienced advocate who regularly advises on complex and high value matters arising from clinical negligence and personal injury disputes. She also has considerable experience in the fields of travel and foreign claims, private international law, product liability, professional negligence and insurance.

She is recommended by Chambers UK 2020 and the Legal 500 2020 for Clinical Negligence, Personal Injury, and Travel Law where she is described as *"a smiling assassin with a great brain"*; *"an exceptionally talented advocate"*; *"excellent on her feet"*; and *"very sharp"*.

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