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VICARIOUS LIABILITY - KEEP ON KEEPING ON

Toby Sasse provides a review of the current scope of vicarious liability and observations on three recent decisions examining the limits of such duty

"***The law of vicarious liability is on the move***." *So Lord Phillips said, in the last judgment which he delivered as President of this court, in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1 ("the Christian Brothers case"), para 19.* ***It has not yet come to a stop."*** [i]

INTRODUCTION

The boundaries of the law on vicarious liability in tort have been steadily extending in recent years. This process has been most obviously driven by a line of sex abuse cases from Lister v Hesley Hall [2001] UKHL 22, through to the Christian Brothers case (supra).

We are now familiar with vicarious liability extending:

- beyond "mere" negligence to intentional misconduct explicitly prohibited by an employer and indeed even to overtly criminal conduct by the actual tortfeasor[ii];
- extending beyond relationships of direct employment[iii]; and
- applying to more than one Principal (concurrent vicarious liability)[iv].

The concept of non-fault (strict) liability imposed under vicarious liability, at least in English common law is one which rests on a principle of public policy as to where the risk/ cost of wrongful actions should fall, aside from the actual (and probably impecunious) tortfeasor.

It is broadly considered fairer for the burden to rest on a party better able to bear that cost (and able to insure against it) than the victim, subject to a 2 part threshold test of eligibility (of relationship between defendant principal and actual tortfeasor, and connection between the wrongful act(s) and role of the tortfeasor).

It is, perhaps, unsurprising that, having broken free of the bounds of employment relationships and beyond the scope of permissible actions that the philosophical journey to find the limits of vicarious liability continues.

Three such cases were decided in the latter half of 2017:

Various Claimants v Barclays Bank PLC [2017] EWHC 1929.

Armes v Nottingham County Council [2017] UKSC 60.

Various Claimants v Morrisons Supermarkets [2017] EWHC 3113 QB.

1.0 Various Claimants v Barclays Bank PLC [2017] EWHC 1929 (July 2017)

1.1 A first instance decision of Nicola Davies J on a preliminary issue as to the existence of a duty of vicarious liability owed by a bank for the assaults perpetrated by an independent medical examiner on would-be employees.

1.2 Essential facts: Successful applicants (many as young as 16) for bank employment were required before being appointed to attend a nominated Doctor at his own examination room and to submit to a medical examination requiring removal of clothing. It was alleged that the Doctor assaulted subjects in the course of such examinations. Subjects had: no choice but to submit to examination; no other reason to be examined; no choice over the Doctor, place, time or nature of the examination. The Doctor was paid a fee for each examination, no contract of employment existed nor was such a relationship alleged. The Doctor was required to complete a standard medical report which effectively stipulated what he was required to examine for, but not how to conduct such examination.

1.3 The Judge recited at length from the reasoning of Lord Phillips in the Christian Brothers case, noting his express purpose of attempting to distil and clarify the law in this area since Lister and Dubai Aluminium v Salaam[v]:

> *"It is important, however, to understand that the general approach which Lord Phillips described is not confined to some special category of cases, such as the sexual abuse of children. It is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment. By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities. It results in an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment, but not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party.* ***An important consequence of that extension is to enable the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces*** *which may be motivated by factors which have nothing to do with the nature of the enterprises' activities or the attendant risks."* [vi]

1.4 Having reviewed recent authorities the judge, in agreement with the parties, distilled a two part question for eligibility[vii], namely:

> *"i) Is the relevant relationship one of employment or "akin to employment"?*
>
> *ii) If so, was the tort sufficiently closely connected with that employment or quasi employment?*
>
> *Relevant to the determination of the first stage are the five policy criteria identified by Lord Phillips in Catholic Child Welfare Society at [35] and Lord Reed in Cox at [20 -23][viii]. It is accepted that the first and fifth criteria are not as significant as the second, third and fourth."*

1.5 To answer the first stage of her test the Judge worked through the five Christian Brothers criteria one by one identifying relevant evidence. She concluded that:

> i) the Bank self-evidently had resources to meet the claims (the doctor had long since died).
>
> ii) the examinations were exclusively for the benefit of the bank's business;
>
> iii) the examinations were an integral part of the bank's business activity;
>
> iv) the bank's instructions created the circumstances under which the risk of assault arose;
>
> v) features of control by the Bank taken together were sufficient to establish this criterion including: mandating that (often young) subjects were examined alone; nominating the Doctor who performed the examination; where the examination took place and what was to be examined for.

1.6 Perhaps unsurprisingly, given what had been said at stage 1 of the test for eligibility, the judge found little difficulty in finding stage 2 (proximity between relationship and acts giving rise to claim) made out, quoting Lord Phillips in Christian Brothers at paragraph 84:

> "...the relationship has facilitated the commission of the abuse by placing the abusers in a position where they enjoyed both physical proximity to their victims and the influence of authority over them..."

1.7 The Defence had argued that mere creation of opportunity to abuse was not sufficient. It highlighted the dicta of Lord Millet in Lister v Hesley Hall[ix] , drawing by way of example a distinction between the supervisor of a residential school entrusted with discharging the Local Authority's role of care and welfare (liability found), with the theoretical position of a groundsman or porter employed in the same establishment (in respect of whose assaults Lord Millet would have refused a vicarious duty).

Comment: The approach illustrated appears to seek a relationship "akin to employment" and to be purposed to ensure the law on vicarious liability continues to afford previous levels of protection to victims notwithstanding changing legal relationships between enterprises and their workforce. The Judge found a vicarious duty existed for acts of an independent professional, subject to his own professional ethics and rules, and committed on his own premises: something the defendant characterised as a classic independent contractor scenario.

2.0 Armes v Nottingham County Council [2017] UKSC 60

2.1 Facts: Claimant was victim of serious assaults in two successive foster-placements between 1985 and 1986 made under arrangements made pursuant to the Childcare Act 1980. She sued her local authority relying on a non-delegable duty of care or alternately upon vicarious liability.

2.2 At first instance Males J rejected vicarious liability on the basis that a careful examination of the characteristics and operation of fostering placements by the Local Authority at the relevant times was not sufficiently akin to an employer/employee relationship (compared against the 5 criteria identified in the Christian Brothers case). In particular he did not consider that the function of family life was an activity carried out on behalf of the Local Authority and crucially that the Local Authority could not have the requisite control over how family life was conducted to found liability.

He also separately rejected the existence of a non-delegable duty by applying a "Caparo"[x] test as to whether imposition of liability was fair, just and equitable. His reasons may be summarised as: concern not to impose unreasonable financial burden on overstretched local authorities'; fear that liability might have a deterrent effect on such placements in future: that it was of the nature of such foster placements that local authorities had less control than in residential homes and that this was of benefit to children; and finally, that it would be difficult to draw a principled distinction between foster carers who were parents or immediate family (for whom no duty was contended) and those who were not.

2.3 The Court of Appeal unanimously rejected the appeal. On vicarious liability per Tomlinson LJ, because conduct of family life could not be said to be part of its inherent activities, as it was an inherent feature of family life that it was free of outside control in terms of daily routine. Further, the control exercised by the Local Authority was at a macro level and as such was irrelevant to the happening of abuse, because such control could not have impacted on the commission of abuse. Black LJ gave similar reasons and Burnett LJ agreed with both.

On non-delegable duty they each rejected liability but for differing reasons. Tomlinson LJ considered that a non-delegable duty must be one which the Local Authority had to perform. By definition fostering could not be performed by the Local Authority but only by placing a child with another. He therefore concluded the statutory duty to maintain and accommodate etc. was discharged by careful delegation. Burnett LJ considered that if there was no vicarious liability for such assaults at common law then there should be no non-delegable duty. He also agreed with the reasoning for rejecting liability on a Caparo-like test as adopted by the trial judge. He doubted the basis for liability for deliberate wrong-doing. He also considered that it was unprincipled to find liability against a local authority exercising powers as parent or guardian in placing the child with others, when no such non-delegable liability would be imposed on an actual parent or guardian who let their child go on a sleep over etc. Black LJ largely agreed with the trial judge that it would impose an undue burden to find a non-delegable duty, and would act as a deterrent to such

placements; she also agreed that it was unfair to impose such duty on the Local Authority where no such duty was owed by parents.

2.4 Supreme Court: The leading judgement was given by Lord Reed (Lady Hale, Lords Kerr and Clarke agreeing). He began by noting that there was no room for public policy to impose a vicarious duty on an innocent defendant for the acts of a third person where that defendant already held a direct (i.e. non-delegable) duty of care.[xi]

2.5 Having reviewed the criteria which Ld Sumption had identified in Woodland (supra) would need to be present for a non-delegable duty to arise, Lord Reed observed that those criteria were themselves intended to identify when finding such a non-delegable duty was fair just and equitable. It was not then necessary in every case to go on to consider separately whether, if such criteria were met, that it was fair and just to impose such a duty. In other words that Caparo considerations were inherent in the assessment of the criteria and not necessarily an additional test.

2.6 The critical question (for non-delegable duty to arise) was to decide whether the function of providing day to day care was one which the LA was required to provide, or merely one it was required to arrange for provision of. He then went on to compare the functions of the local authority with that of a parent, on whom no such non-delegable duty was imposed, and emphasised the problem where the placement was with family members who became abusers. Imposition of non-delegable duty would in effect make the Local Authority the insurer of the child and was going too far. He analysed specific statutory powers and duties to maintain and provide for children in care as ones discharged by delegation and hence not non-delegable.

2.7 Lord Reed specifically refuted Lord Burnett's reasoning in the Court of Appeal (namely that one should not find a non-delegable duty where there was no vicarious liability) as conflating two entirely distinct legal concepts; and he also rejected the suggestion that breach of a non-delegable duty could only arise through negligence (by drawing on previous established authority in the context of bailment[xii]).

2.8 Turning to vicarious liability, Lord Reed, began by summarising the Christian Brothers and Cox v MOJ (supra) decisions in terms of where they had left vicarious liability. In particular observing that in most cases the first and fifth criteria (availability of insurance/ financial position; and control) were likely to be less impactful than the other 3. He referred[xiii] to his own comment in Cox (supra):

> *"The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."*

2.9 Looking at the middle 3 criteria, Lord Reed observed that the relationship characteristics of local authority direction, required cooperation with local authority objectives, supervision, methods of payment etc. distinguished foster parents from persons carrying on an independent business of their own. Again, such features "whilst not without complexity" when viewed overall made it difficult to distinguish between an activity of the LA in delivering their legal responsibilities and that of the foster carer's family. Considering risk creation, Lord Reed considered that where the perceived benefit of foster placements itself gave rise an inherent risk of abuse, it was fair that those who came to harm from such risk were compensated, especially when they had no choice about such placement at risk. In that way the risk was shared rather than borne disproportionately by individuals.

2.10 On control (criterion 5), it was observed[xiv] that "the local authority exercised powers of approval, inspection, supervision and removal without any parallel in ordinary family life. By virtue of those powers, the local authority exercised a significant degree of control over both what the foster parents did and how they did it, in order to ensure that the children's needs were met." In rejecting the

views in the Court of Appeal on insufficient control Lord Reed stated that it was important not to overstate the absence of control over day to day life (referring back to control features noted earlier) but "***more fundamentally, it is important not to exaggerate the extent to which control is necessary in order for the imposition of liability to be justified.***" Lord Reed then gave numerous examples of situations where such liability has been imposed without evidence of close control.

2.11 The approach of the Court of Appeal was characterised as influenced in particular by Canadian case law[xv] which placed an emphasis on deterrence in the imposition of vicarious liability. Hence, if the level of control possible would be insufficient to have prevented/deterred the abuse, no vicarious liability should follow. This was contrasted with the approach adopted in another common law jurisdiction (New Zealand) where the imposition of liability followed a public policy approach (that the risk should be borne by the stronger party not the weakest).

2.12 Lord Reed also dismissed a floodgates argument, i.e. that such a liability risk might discourage LA's from making such foster placements in preference for less beneficial residential ones out of fear of liability. He observed that there was no evidence before the court that the abuse risk was higher in foster-care than in residential care. Secondly, he observed that if the data in fact were to point to such a disproportionate problem with foster care this made the want of any remedy even less fair or just.

2.13 Finally, Lord Reed addressed the sole dissenting opinion in the Supreme Court of Lord Hughes. Lord Hughes had drawn upon wider and, in particular, later statutory provisions than were applicable in Armes to argue that to impose such liability would be wrong. In particular he emphasised the duty now on local authorities first to seek to place a child with its own family. He then argued that if abuse by family or parents is not to be considered actionable under vicarious liability, why in principle should other placements be treated differently. Lord Reed accepted that no liability would lie in respect of a family placement because the nature of the relationship between foster parent and LA defendant would be different (specifically in relation to the dynamics of control). His answer to Lord Hughes was to confine the decision in Armes to the circumstances of the case and in particular the statutory/regulatory framework at that time.

Comment: although Lord Reed's concession does limit the scope of the decision in Armes to a narrow cohort of Claimant's abused pre-1989, it does leave us with several broadly applicable principles, namely:

i) **that no new vicarious liability scenarios can arise where the Defendant has a direct non-delegable duty;**

ii) **confirming that the finding of a vicarious duty should be led by the public policy principle that the risk should fall on the strong not the weakest (i.e. individual victims) in preference to a test of control based around deterrence of tortious conduct;**

iii) **emphasising that close control is not a critical factor, although its absence may negative the existence of a duty.**

3.0 Various Claimants v Morrisons Supermarkets [2017] EWHC 3113 QB (December 2017)

3.1 First instance decision by Langstaff J. The claimants were all employees of Morrisons. They sought damages for the publication of confidential personal and financial data held by the company, which had been copied, removed and later made available on the internet and to certain newspapers by a senior IT employee in an effort to damage the company.

3.2 The claim was advanced against the company firstly for breach of statutory duty under the Data Protection Act 1998 and at common law for misuse of personal data, and both as principal tortfeasor and alternatively under the principles of vicarious liability. Having disposed of direct claims for breach of statutory duty etc., the judge had to consider if the Defendant owed vicarious liability for the acts of its employee.

3.3 After reviewing case law, including the Barclays Bank case and Armes, the Judge concluded that there was a clear and continuous link between the activities of the Defendant's business, which its employee was required to undertake, and the subsequent actions to misuse the data. In particular there was

evidence of a plan to copy and remove the data in a manner which would conceal the wrongdoer's identity, the copying act itself was enabled and authorised as part of a legitimate auditing function which the wrongdoer was employed to do, and the subsequent misuse was all part of a seamless course of conduct, even if the final tortious acts to effect the misuse happened away from work (in place and time) and for malicious purposes of his own.

3.4 The case so far as it concerned vicarious liability was about the second stage of the test identified in the Barclays case (see 1.5 above) namely closeness of connection between the relationship and the acts giving rise to the tort, rather than the relationship itself (since employment was not in issue).

3.5 It was argued[xvi] that all the necessary acts to make out the tort had to be committed in the course of employment. This was rejected, provided that some acts were and those acts taken with others formed a seamless course of action leading to the commission of the tort.

3.6 However, in overcoming the detailed multi-layered defence objections to the finding of a vicarious liability on such facts Langstaff J at paragraph 193 of his judgement drew heavily on the 5 Christian Brothers criteria (relevant at stage 1). In doing so he expressly acknowledged that such criteria were relevant to both stages of the test:

> *"The factors identified in Catholic Child Welfare Society are typically true of relationships of employer and employer, which was what was addressed in paragraph 35 of the judgement of Lord Phillips. They are true here too, where the context is not relationship but course of employment."*

3.7 So he found: Morrisons were more likely to have the means to compensate than its now imprisoned former employee, and could be expected to insure against such risk; that the tort was committed as a result of an activity being undertaken by an employee for his employer, in the employer's interest; that by so employing him the employer created the risk that the tort might be committed; and the employee was under a sufficient degree of employer control (at least to the extent that the employer could impose controls if it chose to).

Comment: the case law now suggests that vicarious liability can be found where: the tortious actor has been *engaged* and was acting in furtherance of the Defendant's "business" activity; where some necessary acts (not of themselves necessarily wrongful) enabling the tort were ones which the tortfeasor was able to perform due to the role for which they were engaged; and so long as some measure of meaningful influence, protection or control was exercised (or could have been); whatever the motive of the tortfeasor and regardless of whether that motive was criminal and personal. Whether, on a given set of facts, the connection between the necessary acts performed in the course of the role and the role will be sufficiently close will depend, as Langstaff J said, on an evaluative judgement, but the Christian Brothers criteria offer an instructive basis from which to assess if both parts of the two stage test for eligibility may be satisfied.

So the company executive who assaults a sub-ordinate employee away from, and well after, an office party, arising out of a disagreement about work, could still fall outside the line. [xvii]

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i Lord Reed Cox v Ministry of Justice [2016] UKSC 10

ii For example Mattis v Pollock [2003] EWHC Civ 887.

iii *E v English Province of Our Lady of Charity* [2013] QB 722 (Bishop and priest);

iv For example the Christian brothers case itself.

v [2002] UKHL 48

vi Per Nicola Davies J at page 12.

vii at Paragraph 27 of the judgement.

viii (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

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tort committed by the employee;

(v) The employee will, to a greater or lesser degree, have been under the control of the employer". Per Lord Phillips.

[ix] *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at paragraph 82

[x] Caparo v Dickman [1990] 2AC 605

[xi] in other words the existence of a non-delegable duty excluded a vicarious liability.

[xii] Per lord Reed at paragraph 51 citing *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 itself cited in Woodland, and *Port Swettenham Authority v T W Wu and Co* [1979] AC 580, 591.

[xiii] At paragraph 24 of the judgement.

[xiv] At paragraph 65 of Lord Reed's judgement.

[xv] See Per Reed at paragraphs 66 and 67 exampling Canadian Supreme Court's approach in *KLB v British Columbia* [2003] 2 SCR 403

[xvi] By analogy from the facts of Credit Lyonnais v Credits Guarantee Department [2000] AC 486.

[xvii] Bellman v Northampton recruitment Limited [2016] EWHC 3014, QB.

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