Employers' Liability for the Wrongs of Contractors

In what may be perceived as an apparent stemming of the tide, the Supreme Court has recently decided that Barclays should not be held responsible for the unlawful acts of one of its contractors.

Whilst potentially disappointing for claimants banking on recovering damages from deeper pockets, does the judgment actually come as good news for employers in ringfencing potential liability for the wrongdoing of contractors?

What is vicarious liability?

In some circumstances, civil liability can arise even when unlawful acts or omissions are carried out by others. The principles surrounding so-called vicarious liability are not straightforward but, in general terms, liability can exist when:

- There is the sort of relationship between one person and another in which the law considers it appropriate that the one should pay for the wrongs of the other; and
- There is a connection between that relationship and the wrong.

Although the second limb of this test has also recently been considered by the Supreme Court in a case involving deliberate leaking of personal data by a Morrisons employee, this article focuses on the first part of the test.

What sort of relationships give rise to vicarious liability?

The most typical relationship giving rise to vicarious liability is that between an employer and employee. So, if an employee makes a mistake during the course of carrying out his / her work, the employer will be liable for that mistake.

It was not generally thought to be the case that an employer of an independent contractor would become liable

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for the negligence or otherwise of that contractor committed in the course of their work. However, there have been a number of decisions of the courts over the last few years which appear to have extended the categories of relationship that would be capable of giving rise to vicarious liability.

In 2005, the Court of Appeal decided that flood damage caused by the negligence of an independently contracted fitter, rendered the company that employed him vicariously liable. That was on the basis that the fitter was so much a part of the work and business of the employer that it was proper that liability should arise.

In 2012, the Court of Appeal determined that a bishop should be held liable for the sexual abuse inflicted by a priest in his diocese. That was even though the latter was not employed by the former; however, the court took the view that the relationship was sufficiently akin to an employment relationship for the purposes of the test.

Also in 2012, the Supreme Court expanded on the circumstances in which the employer–employee relationship would give rise to vicarious liability on the premise that it was "fair, just and reasonable" to do so. The court also made reference to the fact that some other relationships were "akin" to an employment relationship, which seems to have led to some argument in later cases that there were good policy reasons why vicarious liability should arise in all sorts of other commercial relationships.

A year later, the Supreme Court then found, in a case involving a serious brain injury suffered by a schoolchild at a swimming pool, that the school had a non-delegable duty of care in the context of its arrangements with an independent provider of swimming lessons. However, the court also reinforced the point that vicarious liability has never extended to the wrongs of contractors who are truly independent. Although seemingly a rather finely balanced distinction, it is nonetheless an important one, and very similar to the approach taken by the criminal law in health and safety cases, for example.

Then, in 2016, the Prison Service was found liable for injuries caused to a prison catering manager by the negligence of a prisoner working under her direction. Perhaps unsurprisingly, that relationship was found to be sufficiently akin to employment such that vicarious liability should arise.

In 2017, a local authority was found vicariously liable for the abuse inflicted by foster parents on a child. That decision seems, at least in part, to have been borne of the fact that there was no one else in a position to pay damages. However, it is also reconciled with the now more "traditional" position in the sense that the court took the view that the foster parents were such an integral part of the care system that the relationship between them and the local authority was akin to employment, rather than as truly independent contractors.

What has changed?

Finally, we come to Barclays Bank. The background was that the bank arranged for medicals for new employees with Dr Gordon Bates. It is alleged that Dr Bates had committed sexual assaults during the course of those examinations, between 1968 and 1984. The claimants brought a claim against the bank.

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The Supreme Court decided that the bank was not liable: Dr Bates was an independent contractor. Although he was a part-time employee of the health service, he was not an employee of Barclays. He was not paid a retainer; he was paid a fee for each report.

On one view, therefore, nothing has changed! However, what is clear from the case law is that the devil is in the detail.

The courts have set out a variety of factors to be considered when deciding whether a relationship between two people or organisations should give rise to vicarious liability, and whether the work of a contractor can be said to be truly independent. In the context of the broad range of commercial realities, where liability falls is likely to turn on the, perhaps nuanced, circumstances of each case.

If you have a query about liability for the work of contractors, please contact our commercial litigation solicitors by emailing online.enquiries@la-law.com or call 01202 786340.

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