

## **HIGH COURT DECISION AS TO SCOPE OF VICARIOUS LIABILITY**

**By Abigail Cohen**

**In *Various Claimants v Barclays Bank PLC* [2017] EWHC 1929 (QB), the High Court (The Hon Mrs Justice Davies DBE) held that Barclays Bank was vicariously liable in respect of alleged sexual assaults perpetrated by a Doctor, not employed by Barclays, who conducted medical assessments and examinations on prospective employees of the Bank.**

### **The claim**

1. The claim was brought by 126 claimants in respect of alleged sexual assaults perpetrated by Dr Bates who carried out medical assessments of prospective Bank employees between 1968 and 1984. Many of the claimants were teenagers at the date of the relevant examinations. Dr Bates died in 2009 and it was no longer open to the Claimants to pursue his Estate for damages.

### **The issue**

2. The issue for the Court to determine was whether the Bank was vicariously liable in respect of the alleged sexual assaults?
3. The Claimants' case was that the Bank was liable as it utilised the services of Dr Bates in order to satisfy itself as to the medical fitness of a prospective employee; that the Bank dictated the content and nature of the examination; that the examinations furthered the Bank's purposes i.e. of employing staff to enable it to be profitable; that Dr Bates was integrated into the Bank's business

as he carried out examinations on all prospective employees in the region over the relevant period and that the Claimants had no choice other than to undergo an examination with Dr Bates if they wished to secure employment.

4. The Defendant Bank's case was that Dr Bates was a self-employed independent contractor liable for his own acts. He conducted examinations in his own home as part of his practice, which involved seeing other patients, and he controlled his own work.

### **Vicarious liability; the two stage test**

5. Having conducted a review of the authorities on vicarious liability and how the jurisprudence has developed and evolved, the Court agreed that whether or not vicarious liability exists in a particular case involves a two stage test:
  - 1) Is the relevant relationship one of employment or "akin to employment"
  - 2) If so, was the tort sufficiently closely connected with that employment or quasi employment?
6. When considering the first stage the five policy criteria identified by Lord Phillips in Catholic Child Welfare Society [2012] UKSC 56 and *Cox v Ministry of Justice* [2016] UKSC 10 are relevant:
  - (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.
7. Factors (i) and (v) above are not, the Court confirmed, as significant as factors (ii), (iii) and (iv).

**Applying the test; Was the Bank vicariously liable?**

8. As to Stage I, the Court considered these five factors. As to (i) it was plain that the Claimants' only recourse was against the Bank – the Dr's Estate having already been distributed – and that the Bank had the means to meet the claims.
9. As to factor (ii) the Court considered it important that applicants to the Bank had to see Dr Bates in order to satisfy the Bank of medical fitness and secure employment. There was no choice as to which Dr to see and the Bank made the arrangements for the examination. Dr Banks completed a medical report headed with the Bank's logo. Taking all these matters into account the Court determined that the examinations performed by Dr Bates were performed on behalf of the Bank and for its benefit.
10. As to factor (iii) the Court concluded that the medical assessment enabled the Bank to satisfy itself that an employee was physically suitable for the role and that without its workforce the Bank could not function. The assessment was not for the benefit of the employee. Dr Bates, the Court said, was acting for the benefit of the Bank and in doing so was an integral part of the business activity of the Bank.
11. As to factor (iv) the Court considered that the Bank did create the risk of the tort being committed. The Bank directed the Claimants – many of whom were

young girls at the time – to attend Dr Bates’ home for an examination in a room alone and the examination included, for example, a chest measurement.

12. As to factor (v), control, the Court accepted that Dr Bates organised his own professional life and carried out other medical activities not for the Bank. But, it said, this did not negate a control argument neither did the fact that examinations were performed in his own home. The Court said that what had to be looked at is the control which existed as between the Bank and Dr Bates in respect of the medical assessments, examinations and reports.
13. In that regard it was relevant that the Bank was directing Dr Bates as to the questions to be asked and the physical examinations to be carried out for the purposes of completing the template form. Control also manifested itself in that applicants had no choice as to which Dr to see. The control test was therefore made out.
14. Accordingly, the Court did not hesitate in finding that all of the criteria at Stage 1 of the test were met.
15. As to Stage 2 and the question of ‘close connection’ the Court held that:

*“The claimants were in physical proximity to Dr Bates by reason of the nature of the examination. He was a doctor and, at the time of these offences, is likely to have been viewed by young women as being in authority not least because he was the doctor chosen by their present or prospective employer to carry out a medical examination relating to their employment. The sexual abuse took place when the doctor was engaged in the duties at the time and place required by the Bank. On the facts I find that the alleged sexual abuse was inextricably interwoven with the carrying out by the doctor of his duties pursuant to his engagement by the Bank.”*

16. Stage 2 was therefore also held to be satisfied.
17. Finally, applying the check of whether it is fair, just and reasonable to impose liability, the Court accepted that it was balancing between two innocent parties. It noted again that the Claimants recourse was now only against the Bank. The

Court stated that the fair and just test did not therefore cause it to alter its conclusions on vicarious liability.

### Comment

18. This decision follows that of the Supreme Court in *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11 in which vicarious liability was imposed on the defendant supermarket for a physical assault committed by an employee on a customer. It is a further example of the potentially widening set of circumstances in which vicarious liability might arise.
19. A traditional employment relationship is certainly no longer required for the imposition of liability and, as here, where tasks are outsourced to other entities or individuals the degree of control exercised over those tasks, and the extent of integration into a defendant's business, may prove crucial in the determination of this issue.
20. Clients will want, and need, to be aware of the direction the law is taking and to scrutinise carefully its arrangements with those to whom it outsources tasks, such as medical assessments for insurance purposes, and to have in mind this potential limb of liability when making its own insurance arrangements.

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