Is the law of vicarious liability still 'on the move'? Barclays Bank plc v Various Claimants [2020] UKSC 13

By Naomi Webber

Background

The 126 claimants in this case were all employees of Barclays Bank who, at the start of their employment between the late 1960s and early 1980s, were required to undergo a medical examination. Examinations were carried out by Dr Bates (now deceased), a general practitioner who was not an employee of the Bank but engaged as an independent contractor to provide this service, and did so at his home. The Claimants alleged that they were sexually assaulted by Dr Bates while undergoing this examination and brought a group action against the Bank for compensation. A preliminary issue was whether Barclays could be vicariously liable for his actions.

At first instance, the High Court found that Barclays had been vicariously liable. The Court of Appeal agreed, applying the five-part test in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, and *Cox v Ministry of Justice* [2016] UKSC 10.

Supreme Court Decision (Lady Hale)

The key issue was whether the relationship between Dr Bates and Barclays was 'akin to employment'. The Supreme Court held unanimously that it was not.

Lady Hale undertook a thorough review of the recent case law, which is worthy of reading in full as a short history of how this area of law has developed [10-27]. The three most recent Supreme Court decisions were considered in some detail: *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, *Cox v Ministry of Justice* [2016] UKSC 10 and *Armes v Nottinghamshire County Council* [2017] UKSC 6. Lady Hale noted that she had sat on all three of these cases (agreeing with the majority) and that Lord Reed and Lord Kerr had each sat on two [8].

In her review of the case law, Lady Hale highlighted that the law of vicarious liability has not expanded into cases involving independent contractors. She cited the recent Supreme Court

decision of *Woodland v Swimming Teachers Association* [2013] UKSC 66 (on which Lady Hale also sat and agreed with the majority), which held that a school had a non-delegable duty of care, but was *not* vicariously liable, towards the pupils for whom it arranged compulsory swimming lessons with an independent contractor [19]. She also noted that there was nothing in the recent trilogy of Supreme Court decisions on vicarious liability which eroded the distinction between employees or those in a relationship akin to employment on the one hand, and independent contractors on the other. This has since been reaffirmed in the Court of Appeal here (*Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157) and in the Singapore Court of Appeal (*Ng Huat Seng v Mohammad* [2017] SGCA 58).

Lady Hale concluded: *"The question therefore is, as it has always been, 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 was carrying on his own independent business, further factors did not need to be considered [27].

Applying that to this case, Dr Bates was not an employee nor in a relationship akin to employment with Barclays Bank, but rather was in business on his own account with a portfolio of clients. As such, it was held liability did not extend vicariously to Barclays that engaged his services [28].

At the conclusion of the judgment, Lady Hale suggested the test of whether an individual is a worker under s230(3)(b) Employment Rights Act 1996 may be helpful in identifying whether they are in a relationship akin to employment or a true independent contractor. Nevertheless, she declined to fully align the two tests, noting that they had been developed for very different purposes [29].

Comment

In the author's opinion, the conclusion the Supreme Court reached on the facts of this case was not radical. It was simply reasserting the rule, going back to *D & F Estates Ltd v Church Comrs* [1989] AC 177, that there is no vicarious liability vis-à-vis independent contractors.

Nevertheless, the reasoning in the judgment highlights a few interesting points as to the direction this area of law maybe taking. First, Lady Hale sought to emphasise the continuity of judicial opinion, citing the fact that she and some of her judicial colleagues had either written or agreed with the majority decision in the recent significant cases. This highlights that the Supreme Court were reinforcing an earlier position, and that it was factually distinct

from the other recent cases. Second, the judgment does attempt to create a clearer demarcation between where employees or those in relationships 'akin to employment' (where vicarious liability does exist), and an individual is working as an independent contractor (where it does not). Lady Hale's suggestion at the end of the judgment that using s230(3)(b) as a guide demonstrates that unless an individual is a true independent contractor, they will be in a relationship 'akin to employment' and vicarious liability will follow. While there will still be anomalies, this may help to create two, at least conceptually, distinct camps.

After the last few years of appellate litigation, any clarity in this area is welcome. Only time will tell whether this is clear enough. Nevertheless, having been 'on the move', the law of vicarious liability may now be coming to a gentle standstill.

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