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A review of Vicarious Liability and Non-delegable Duties in Claims Against Detaining Authorities

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Actions Against the Police Team

What we will cover

- The principles for establishing vicarious liability as identified in two recent Supreme Court decisions: *Barclays Bank plc v Various Claimants* [2020] UKSC 13, [2020] 2 WLR 960 and *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12, [2020] 2 WLR 941
- Application of these principles in a policing and detention context
- Developments in non-delegable duties since the Supreme Court decided *Woodland v STA* [2014] AC 537

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Two Elements Needed For Vicarious Liability

(1) The tortfeasor and defendant are employee and employer or are in a **relationship sufficiently akin to employment** to make it fair and just to impose liability ("the relationship element"); and

(2) There is a **sufficient connection between that relationship and the tortfeasor's wrongdoing** ("the connection element").

The Supreme Court decisions

Barclays Bank plc v Various Claimants ("Barclays Bank") concerned the relationship element

WM Morrison Supermarkets plc v Various Claimants ("Morrisons") concerned the connection element

- Prior to these decisions, caselaw indicated an expansive interpretation of the tests. In both cases the claimants succeeded in the Court of Appeal
- However, the Supreme Court allowed both defendants' appeals
- To what extent does this signal a reversal of the trend?

Significance of the relationship element

Chief Officers are vicariously liable for acts of police officers undertaken in the performance / purported performance of their duties: s.88 Police Act 1996. In policing cases this element is usually straightforward.

However, issues will arise. For example, when could a Chief Officer / the Ministry of Justice be sued if:

- A detainee is assaulted by another prisoner
- An arrestee is injured by a member of the public asked to assist police
- A detainee is negligently examined by an FME

What did *Barclays Bank* decide?

- The test is satisfied when the relationship is sufficiently akin to employment to make it fair and just to impose liability on the defendant: [16]
- Answering this question requires focusing on the detailed features of the relationship between defendant and tortfeasor: [18]
- The conventional legal distinction between an employee and an independent contractor (someone in business in their own right) remains good law: [19], [22], [24] & [27]

What has changed?

The 5 factors identified by L. Phillips in *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 ("*Christian Brothers*"), namely:

- The employer is more likely to have means to compensate the victim
- The tort is committed as a result of activity undertaken on behalf of the employer
- The tortfeasor's acts are part of the employer's business activity
- The employer created the risk of the tort's commission
- The tortfeasor was under the control of the employer

were an exposition of the policy reasons for imposing liability, rather than the criteria for deciding if the test was satisfied: [15] - [18]

What has changed (2)?

When it was clear the tortfeasor was carrying on his own business, it was unnecessary to consider the *Christian Brothers* 5 factors; but they may be helpful in "doubtful cases": [27]

Whilst the 5 factors were applied as if they were the test in *Cox v Ministry of Justice* [2016] AC 660 (catering manager negligently injured by prisoner working in the kitchen) and in *Armes v Nottinghamshire CC* [2018] AC 855 (foster parents' abuse of child placed by defendant); significantly the SC found the tortfeasors were not acting in the course of an independent business in both cases: [20] - [24]

When is a relationship "akin to employment"?

Some pointers from L Hale's judgment:

- The tortfeasor is acting under the defendant's direction
- The tortfeasor is subject to other elements of control (e.g. the defendant's rules)
- The activity is undertaken as part of a hierarchical structure
- The activity furthers the defendant's business objective
- The activity is an integral part of the defendant's business
- The tortfeasor is not in business in his / her own account

Application to the facts in *Barclays Bank*

- Damages were claimed for sexual assaults carried out by Dr B
- The claimants applied for jobs with the defendant and were required to undergo medical examination before employment was offered
- They were examined by Dr B at his home. He completed a pro forma report for Barclays and was paid per report, with no retainer
- Dr B was employed by local hospitals. He also conducted medical examinations for insurance companies, a government board and other business. Barclays was a small part of his overall work
- Trying vicarious liability as a preliminary issue, the HC and CA found for the claimants, applying the *Christian Brothers* 5 factors and concluding that whilst Dr B was in business on his own account, this was not determinative

Application to the facts in *Barclays Bank* (2)

Allowing the appeal, the SC held that Dr B was clearly an independent contractor, in business on his own account, with a portfolio of clients including Barclays

This was fatal to the proposition that the defendant was vicariously liable for the sexual assaults he committed during the medical examinations: [28]

Significance of the connection element

Cases where issues are likely to arise will include:

- Torts committed when officers / employees are off duty
- Torts committed when they are on duty but in pursuance of a personal vendetta or hostility
- Sexual assault and other sexual misconduct cases

What did *Morrison's* decide?

To satisfy the connection element, the tortious conduct must be so closely connected with acts the tortfeasor was authorised to do by the defendant that, for the purposes of liability to third parties, it may fairly and properly be regarded as done by the tortfeasor whilst acting in the ordinary course of his / her employment: [23], [25] & [32]

"Fairly and properly" referred to the factors and principles identified in the caselaw, not to the judge's personal sense of what amounted to a just outcome: [24]

What has changed?

L. Toulson's judgment in *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677 had been misunderstood in subsequent cases; the SC had not intended to liberalise the previous law: [1], [17] & [26].

The claimant in *Mohamud* had been assaulted and racially abused by a cashier working at one of the defendant's petrol stations. The SC allowed his appeal, finding that vicarious liability was established.

What has changed (2)?

In *Morrison* L. Reed stressed:

- L. Toulson had not intended to say it was sufficient to show a temporal / causal connection between the employment and the tort; rather, he was focused on the *capacity* in which the cashier acted: [26] & [28] - [31]
- L. Toulson's judgment should not be read as indicating the tortfeasor's motive was irrelevant. If s/he was acting for purely personal reasons that was "highly material": [31]. The long-standing distinction between an employee misguidedly furthering his employer's business and pursuing a "frolic of his own" still applied: [38] & [47]

Application to the facts in *Morrison's*

- AS, an internal auditor with Morrison's, became disgruntled after his employer disciplined him
- He copied personal data of thousands of employees onto a file sharing website
- He had obtained the data in his auditor role
- He acted in this way to harm his employer's reputation
- 9,263 employees / ex-employees brought claims for breach of confidence, misuse of private information and breach of the Data Protection Act 1998

Application to the facts in *Morrison's* (2)

The SC held that the connection element was not established:

- Although there was a temporal link between AS obtaining the data in his employment capacity and his wrongdoing, that did not of itself satisfy the test: [31]
- Nor did the fact that his employment gave him the opportunity to commit the wrongdoing: [34] - [35]
- Disclosing the personal information on the internet was not an act he was authorised to do: [31]
- He was pursuing a personal vendetta, aimed at harming his employer [47]

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Allen v Chief Constable of Hampshire [2013] 7 WLUK 927

- Claimant alleged a campaign of harassment by a police officer.
- Claim was struck out on the basis that there was no connection between the alleged harassment and the alleged perpetrator's role as an officer.

Attorney General of the British Virgin Islands v Hartwell [2004] 1 WLR 1273

Facts

- Police officer left work and entered a bar where his partner worked as a waitress.
- On seeing her with another man, he fired shots at them with a revolver to which he had access in the course of his duties.
- A bystander was injured and claimed damages from the Government.

Connecting factors

- On duty at the time of shooting.
- Shooting at a bar within officer's jurisdiction
- Given gun for permitted use by the police.

Ruling

- Government not vicariously liable because it was a private “vendetta”.
- NB: Government was held to be in breach of personal duty because of officer's previous behaviour.

Bernard v Attorney General of Jamaica [2005] IRLR 398

Facts

- B had been using public telephone when off-duty officer announced “police” and demanded the phone.
- B refused and the officer shot him.

Connecting Factors

- Officer had asserted authority as a police officer.
- The officer fired the shot using the revolver given to him by his employer and which he was permitted to carry when off duty.
- The officer had subsequently arrested/charged Bernard.

Ruling

- Police were vicariously liable for officer’s wrongdoing.

***Brown v David Robinson* [2004] 12 WLUK 376**

- Private security company vicariously liable where employee shot man trying to enter a football ground he was meant to be guarding.
- Shows that the same approach will be applied to those purporting to act as private law enforcement

Hartwell and Bernard through the lens of Morrisons

- SC in *Morrisons* did not criticise *Hartwell* or *Bernard*.
 - Suggests both were correct on their respective facts.
- *Bernard* and *Brown* both show that claimants can satisfy the close connection test where an employee misuses a weapon provided by their employer.
- *Hartwell* suggests that the employer providing access weapon may not be enough. Some additional connecting factor, such as an assertion of authority, would be required.

Close connection test – useful cases

- Acts of revenge or private retaliation are not necessarily inconsistent with a finding of vicarious liability. It is important to consider the circumstances in which the employee resorted to violence.
 - *Mattis v Pollock* [2003] 1 WLR 2158.
 - *Mohamud* [2016] ICR 485.
- Employer may be responsible for the acts of their employees even when they are “off duty” (i.e. off the employer’s premises and outside working hours).
 - *Weir v Bettison* [2003] ICR 708.
 - *Bernard v Attorney General of Jamaica* [2005] IRLR 398.
 - *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ.

Assaults On Prisoners By Other Prisoners

- Prisoners can be regarded as being in an employment relationship with the prison:
 - *Cox v Ministry of Justice* [2016] A.C. 660.
- Not a classic employment relationship, but different in important respects to the doctor providing the health examinations for the bank in the *Barclays Bank* case.
- Once the employment relationship element is satisfied, the question will be whether the assault is sufficiently connected to the prisoner employment/quasi-employment.
 1. Assault while undertaking prison work.
 2. Assault by prisoner off-duty using weapon made during work.
 3. Assault by prisoner off-duty using weapon unconnected to work.

Wrongdoing by Agency Staff in Detention Facilities

- *Barclays Bank* may be more relevant to agency staff working for detention facilities.
- Whether they are considered employees or quasi-employees will depend on the degree of their integration into the infrastructure of the detention facility, rather than the formal employment designation. Relevant factors may include:
 - Who does the tortfeasor work for?
 - Who provides the facilities?
 - How is the tortfeasor paid?
 - What is the nature of the contractual relationship?
 - Who carried insurance for the acts of the tortfeasor?
- Where staff who are instructed to perform work within the prison, even on a temporary or flexible basis, should be sufficient to make them an employee/quasi-employee.

Sexual Abuse Cases

- The most senior courts have now held on several occasions that an employer may be vicariously liable for acts of sexual abuse committed by their employees.
 - *Maga v. Birmingham Archdiocese* [2010] 1 WLR 1441
 - *Christian Brothers' case* [2013] 2 AC 1.
- Employer can be liable for acts of intentional wrongdoing by their employees, including where the act is a criminal offence.
 - *Lister v Hesley Hall Limited* [2002] 1 AC 215;
 - *Christian Brothers Case*;
 - *Bernard v AG of Jamaica* [2005] IRLR 398.
- SC in *Morrison* confirmed that the close connection test is applied differently in cases concerning sexual abuse. Courts focus on **criteria that are specific to the commission of sexual abuse** such as the employer's conferral of authority on the employee over the victims.

Sexual Abuse in the Policing/Detention Context

- Relevant factors in assessing whether employer is liable:
 - Opportunity for abuse.
 - Further employer's aims.
 - Intimacy inherent in the enterprise.
 - Power conferred on the employee.
 - Vulnerability of potential victims.

Police officer guilty of gross misconduct for having sex with vulnerable women on duty

PC Richard Hosken-Johns told the women to lie about their relationship if questioned, his misconduct hearing was told.

🕒 Wednesday 24 June 2020 11:15, UK



PC Richard Hosken-Johns worked for Devon and Cornwall Police in Helston

N v Chief Constable of Merseyside [2006] 11 WLUK 696

Facts

- The constable spotted the severely intoxicated claimant being carried out of a nightclub.
- He identified himself as a police officer and ordered to drive her to the nearest police station.

Connecting Factors

- Claimed to be acting in the course of his duty.
- Opportunity arose because of officer's work.

Ruling

- The court found that the constable had abandoned his post and duties and engaged on a frolic of his own.
- The fact that the officer claimed to be acting in the course of his duty was important but not determinative.

TPKN v Ministry of Defence [2019] EWHC 1488 (QB)

Facts

- The Claimant alleged that she had been raped and sexually assaulted by a member of the armed forces whilst they were stationed on a base.
- The alleged events took place after a social event, where the individuals were not on active duty.

Potentially Connecting factors

- Perpetrator stationed at the base as part of his service – only reason he had access to the Claimant.
- Perpetrator received remuneration for being at the base.
- Perpetrator under the direction/control of superiors.
- Service Police would have been responsible for investigating/prosecuting perpetrator.

Ruling

- Master Thornett initially awarded summary judgment in favour of the Ministry of Defence.
- On appeal, the High Court overturned the decision, finding that it was arguable that the MOD were vicariously liable for the assault.

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Woodland v STA [2014] AC 537

Lord Sumption at [23]

(1) C is a patient or child, or for some other reason especially vulnerable or dependent on the protection of D against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

(2) There is an antecedent relationship between C and D, independent of the negligent act or omission itself, (i) which places C in the actual custody, charge or care of D, and (ii) from which it is possible to impute to D the assumption of a positive duty to protect C from harm, and not just a duty to refrain from conduct which will foreseeably damage C. It is a characteristic of such relationships that they involve an element of control over C, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) C has no control over how D chooses to perform those obligations i.e. whether personally or through employees or through 3rd parties.

(4) D has delegated to a 3rd party some function which is an integral part of the positive duty which D has assumed towards C; and the 3rd party is exercising, for the purpose of the function thus delegated to him, D's custody or care of C and the element of control that goes with it.

(5) The 3rd party has been negligent not in some collateral respect but in the performance of the very function assumed by D and delegated to the 3rd party.

Woodland v STA [2014] AC 537

"The alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform and delegated to its contractors": [26]

- Whether fair, just and reasonable referenced back to the 5 characteristics: [25]
- Worth remembering that for the most part public authorities would have been vicariously liable to C who were harmed in this way until the advent of outsourcing of essential aspects of their functions: [40] (and [25(4)])
- In considering whether the imposition of liability is fair, just and reasonable ... *"large organisations may well outsource their responsibilities to much poorer and un- or under-insured contractors"*: [42].
- The boundaries of what the [detaining authority] has undertaken to provide may not always be as clear cut as in this case ... but will be worked out on a case by case basis as they arise: [39]
- Not usually suitable for determination as a preliminary issue: [2]

GB v Home Office [2015] EWHC 819 (1)

C detained at Yarl's Wood run by Serco on behalf of D; C seen by a Dr employed by a local GP practice and prescribed an anti-malarial drug as D was proposing to send C back to Nigeria and there are clear rules relating to the prescription of anti-malarial in those circumstances. C exhibited psychosis which she attributed to the anti-malarial.

Coulson J

(1) No material difference between a prisoner and a detainee in an IRC – each is held against their will and cannot leave: [25].

(2) Since C was being detained on the orders of D she was in the actual custody of D. There was a significant element of control (including the statutory power to monitor, to intervene; and to make rules and provide instructions regarding how Yarl's Wood was run). There was a positive duty to protect C from harm. It was in recognition of D's positive duty that detailed DC rules and ID instructions were made: [28] Control of C was found by reason of D's control over Serco.

(3) C was obliged to accept the medical treatment she was given. There was no free choice. Her position was different to someone at liberty: [31]

(4) The provision of medical care was an integral part of the positive duty owed by D to C: (i) generally the rules and other requirements imposed by D on Serco all stressed the importance of the provision of proper medical care; t and (ii) specifically the anti-malarial prescription arose directly from D's detention and control of C prior to removal - an integral part of the positive duty assumed towards C, the performance of which was delegated to Serco.

(5) By reason of (4) there was negligence in the core function.

GB v Home Office [2015] EWHC 819 (2)

Whether fair just and reasonable to impose a duty: [42 - 43]

- It would be unfair if C had no recourse against D merely because D had contracted out the running of the IRC; undesirable to create an anomaly (see C's submissions at [39] and endorsement at [42]).
- The outsourcing should be irrelevant in law. It should not have to be for C to try and work out which private contractor or individual doctor might be liable for which failure, and then litigate based on that assessment.
- C was detained by D; she was in D's control; she was entitled to look to D for proper protection.
- D decided to detain C, and consequently had clear responsibilities for her treatment as a detainee as a result. It would not be just, fair or reasonable to conclude that those responsibilities disappeared simply because of an outsourcing decision.

Armes v Nottinghamshire CC [2018] AC 355

- It is not routinely necessary for the judge to determine what would be fair and just as a second stage of the analysis: [36]
- Critical question was whether the function of providing C with day-to-day care was one which D was under a duty to perform with care or was one which they were merely bound to arrange to have performed, subject to a duty to take care in making and supervising those arrangements: [37]
- Considered by reference to duties under the Children Act – D required to “*discharge*” their duty to provide accommodation and maintenance not to “*perform*” the function in the course of which C was abused (namely, the provision of daily care), but rather to arrange for, and then monitor, its performance: [47].
- The catalogue of regulations with respect to placement and supervision would not be necessary if the LA were in any event responsible for all the wrongs that might befall C: [48]
- A duty to ensure that reasonable care is taken for the safety of children in care, while they are in the care of foster carers would be too broad: [49]
- Burnett LJ in CA wrong to conclude that if there is no vicarious liability for an assault upon a child in care, then the common law should not impose liability via non-delegable duty: [50]
- Also wrong to conclude that a non-delegable duty cannot be breached by a deliberate wrong: [51]

Razumas v MoJ [2018] EWHC 215 (QB)

C detained at various prisons between 2010 and 2013; secondary medical care received deficient resulting in the amputation of left leg.

Cockerill J

- The "*distinguishing feature*" of the non-delegable duty cases is "*control over C for the purpose of performing a function for which the defendant has assumed responsibility*" citing *Woodland* at [24]: [149]
- There must be "*a nexus between the control of the claimant by the target and the purpose of that control/placing, and the care inherent in that relationship*"; e.g. a patient gives himself over to the hospital for the very purpose of healthcare: [150]. Consider the precise terms of Lord Sumption's 4th characteristic - the target is exercising D's custody or care of C and the element of control that goes with it for the purposes of the function delegated to the target. The function must be an integral part of D's positive duty.
- C, as well as being in D's care, needs to establish that s/he was "*receiving a service which is part of the institution's mainstream function*" citing Lord Sumption in *Woodland* at [30] but NB: this statement is from Laws LJ in *Woodland* in the CA at [30] and continues "*to similar effect is Baroness Hale's point at [40 and also 42] that the conundrum in the Woodland case resulted from "outsourcing of essential aspects of [public authorities] functions"*: [150]
- The reason for the prisoner being in the hands of the prison is not for, and does not comprehend, healthcare. Healthcare is not (as least since 2003) part of the prison institution's mainstream (or essential) function. It has not been outsourced by the Defendant: [151]
- The provision of healthcare forms no part of the statutory or common law duty: [153]
- The legislative backdrop in GB was entirely different i.e. the express provision in r.33 DCR to provide a medical practitioner vs Prison Rules 1999, rule 20 which provides the governor must work in partnership with local health care providers to secure the provision to prisoners of access to the same quality and range of services as the general public receives from the NHS: [155]
- Although the defendant admitted that prior to 2003 prisons would have owed a non-delegable duty to prisoners in respect of healthcare; there is nothing difficult or surprising in this duty changing with such a major change in the legislative arrangements: [157]

Ramdhean v Agedo & FDPL

Unreported, Leeds CC 28 January 2020

C received allegedly negligent dental treatment from Dr Agedo; provided in fulfilment of obligation of FDPL under contract with Doncaster PCT.

Woodland characteristics were considered

(1) D2 did accept C as a patient. The contract imposed obligations on D2 e.g. to ensure that practitioners contracting with it had updated their skills and knowledge. It was not a simple administrative referral service: [37]

(2) The existence of an antecedent relationship with D2 was not affected by D1 freedom to decline C as a patient; she remained in the care of D2 notwithstanding their option under the contract to delegate to D1: [42-44]

(3) D2 did not have control over D1's treatment decisions but control over to whom C would be referred was sufficient. C's GDP could not refer directly to D1: [45]

(4) The function delegated to D1 by D2 was an integral part of D2's function; D2 delegated C's care to D1 together with the element of care that went with it: [46]

(5) The allegations of negligence related to the treatment which was clearly not a collateral matter but the very function assumed by D2: [47]

The PCT was found to have complied with its duty to secure the provision of dental services through its contract with D2; thus, the PCT's duty to take reasonable care was discharged by entrusting the performance to an apparently competent independent contractor. C was not the PCT's patient.

Where next?

Prison Act 1952

s 1- all powers and jurisdiction in relation to prisons and prisoners exercisable by the SofS who has "*general control over prisons*".

s 4 – general superintendence of prisons vested in the SofS.

s 12 SofS commits prisoners to prison

s 13 Deemed to be in the legal custody of the governor

s 47 – SofS may make rules for the regulation and management of prisons, etc, and for the ... control of persons required to be detained there.

Prison Rules 1999 r.3 the purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life.

Consider relevant PSIs.

PSI 64/2011 – requirements on governors/directors (examples only)

- Procedures to identify, manage and support prisoners and detainees who are at risk of harm to self and to reduce that risk.
- To ensure reasonable steps are taken to obtain all relevant information regarding prisoner safety. This information must be recorded, shared and acted upon within the prison and between service providers/agencies.
- To ensure that all contracts/service level agreements with third party providers reflect the need for multi-disciplinary working in relation to at risk prisoners; this must be included as "*a business requirement and key deliverable*" (paragraph 27).
- To ensure the effective sharing of information and that the "*increasing emphasis upon and inherent obligations within partnership working makes it imperative to have coherent, flexible and lawful processes for sharing confidential information.*"

Prison healthcare services are now co-commissioned by NHS England and individual prisons (contrast Razumas when the sole commissioners were the PCTs).

Any questions



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