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Vicarious liability - when is the role of an Independent Contractor sufficiently "akin to employment"

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The beginning of Spring 2020 saw the Supreme Court give judgment in two important cases concerning the principle of vicarious liability. Morrisons Supermarkets v Various Claimants concerned the circumstances under which an employer could be vicariously liable for the conduct of its employees and a fuller briefing on that can be found here.

The case which is the subject of this briefing however, did not concern an employee. It arose out the action of a Dr Gordon Bates, who allegedly sexually assaulted young women when he was carrying out pre-employment medicals. Barclays Bank appointed him to carry out those medicals, providing him with the relevant blank paperwork, making the appointments and identifying the questions it wanted him to address. The doctor's alleged victims sought a finding that the bank would be vicariously liable for Dr Bates' actions. The Supreme Court unanimously found in favour of the bank, with Lady Hale giving the courts judgment.

Lady Hale concluded that in each case the court would need to assess whether the perpetrator of abuse is carrying on business on his own account or whether he is in a relationship "akin to employment" with the Defendant.

The Supreme Court came to the following conclusions (in favour of the bank):

- Dr Bates was not an employee of the bank, nor viewed objectively, was he anything close to an employee. The simple fact that the bank made arrangements and provided forms for him to fill in did not change that fact. The same would be true of many others who did work for the bank but were clearly independent contractors. The examples of cleaning companies and auditors was given.
- Dr Bates was not paid a retainer, he did not have to accept a certain number of referrals and he was free to refuse an examination. He was simply paid a fee for each report.
- The court observed that he "no doubt" carried his own medical liability insurance. It recognised that the insurance probably would not have covered him from liability for wrongdoing.
- The court found he was in business in his own account as a medical practitioner with a portfolio of patients and clients. The bank was simply one of those clients. In the circumstances, the court refused to hold that he was in a relationship with the bank akin to employment and it found the appeal in the Claimant's favour.

The court recognised that this decision goes well beyond child abuse cases.

What next?

This decision will be of assistance to those who engage independent contractors, and right now it will provide some comfort to those in the health and social care sectors having to rely on independent contractors to keep the show on the road.

Will this see an end to all claims based on vicarious liability for independent contractors in today's gig economy? Certainly we should see a significant reduction in them. However though the court acknowledged it would be 'tempting to align the law of vicarious liability with employment law' that would be going 'too far down the road to tidiness'. Lady Hale, giving the Court's judgment observed that asking the

question of whether an individual is a particular type of “worker” for the purposes of employment law, ‘may be helpful in identifying true independent contractors’.

Beware, though; those health and social care workers taken on to work exclusively to work for a particular provider for an extended period of time are much more likely to render the provider vicariously liable. All this means that in litigation an analysis of the circumstances of each tortfeasor’s contractual and practical relationship with the alleged Defendant will be necessary.

Child abuse claims

Finally it is worth noting that in the Morrisons judgment, the Supreme Court observed that one of the general principles applicable to vicarious liability is applied differently in cases concerning the sex abuse of children. Naturally, abuse cannot be regarded as something done by an employee while acting in the ordinary course of their employment. Instead, the Law Lords recognise that in abuse cases the courts emphasise the importance of criteria particularly relevant to that form of wrongdoing, such as the employer’s conferral of authority on the employee over the victims. This suggests that a slightly different approach is to be adopted in vicarious liability cases concerning child abuse.

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