The latest on Vicarious Liability: a retreat from the high water mark?

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The Supreme Court has overturned the decisions of the Court of Appeal in 2 significant cases concerning vicarious liability, dismissing claims that had previously succeeded.

1) In *WM Morrison Supermarkets PLC v Various Claimants* [2020] UKSC 12 an employee (Skelton) was disciplined for minor misconduct which led to him holding a grudge against Morrisons. That grudge led him to publish the personal data of thousands of other employees on the internet. In a group action various employees whose data had been published claimed *against Morrisons* contending that Morrisons was vicariously liable for Skelton's wrongdoing.

2) In *Barclays Bank v Various Claimants* [2020] UKSC 13 the Bank required employees to undergo a medical examination. They arranged for prospective employees to see Dr Bates and paid him a fee for each report that he wrote. He was not employed by the Bank. He was alleged to have sexually assaulted a number of individuals who he assessed for the Barclays, and those individuals claimed that Barclays was vicariously liable for any such assaults.

The law as it was understood before these decisions

The courts have been struggling with the concept of vicarious liability of late. It was hoped that the decision of the Supreme Court in the conjoined appeals Cox v. Ministry of Justice [2016] AC 660 and Mohamud v. W M Morrison Supermarkets PLC [2016] AC 677 would have brought some clarity. In outline, those cases set out a 2-stage test for the imposition of vicarious liability:-

(1) The first question is: what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable for the conduct of that individual? (the Cox question).

(2) The second question is: in what manner does the conduct of the individual have to be related to that relationship for vicarious liability to be imposed? (the Mohamud question)

The answers to the questions are inter-connected. (All taken from Cox [2]).

The second (Mohamud) question was broken down further:-

(a) What function or field of activities have been entrusted by the employer to the employee? I.e. what was the nature of his job? (Mohamud [44]). This question must be addressed broadly.

(b) Was there a sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice? (Mohamud [45]).

The Cox question was relevant in *Barclays Bank.* The *Mohamud* question was relevant in *Morrisons*.

The first instance and Court of Appeal decisions in *Morrisons* and *Barclays Bank*

Applying the above law from *Mohamud* and *Cox*, the decisions below were (in highly summarised form):

1) *Barclays Bank*. Whilst Bates was an independent contractor, it was fair, just and reasonable to impose vicarious liability.
2) *Morrisons*: Access to data was within the field of activities entrusted to Skelton. Morrisons were vicariously liable.

The latest from the Supreme Court

In overturning the lower court decisions and dismissing the claims, the Supreme Court have sought to clarify the decisions in Cox and Mohamud, effectively stemming the tide of ever increasing imposition of vicarious liability.

In *Barclays Bank* the Supreme Court re-state that the question is, as it always has 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. Dr Bates was in business on his own account and therefore the Bank was not vicariously liable for any assaults that might have been proved.

In *Morrisons* the Supreme Court re-stated that the vital question is whether or not wrongful conduct was so closely connected with acts the employee was authorised to

do that, for the purposes of liability of the employee, the employee's act may fairly and properly be regarded as done by the employee in the ordinary course of his employment. Publishing the data on the internet did not form part of Skelton's field of activities, and he was not acting on his employer's business in any sense when he did so. The mere fact that his employment gave him the opportunity to commit the wrongful act was not sufficient to warrant the imposition of vicarious liability (see e.g. Lister v. Hesley Hall [2002]1 AC 215). Skelton was not engaged in furthering the employer's business, even misguidedly. He was on a frolic of his own: pursuing a personal vendetta. The employer was not to be held vicariously liable.

Comment

Since Cox and Mohamud, claimants have been emboldened to contend for vicarious liability in widening circumstances. Reliance has been placed on "the principle of social justice which goes back to Holt CJ", quoting Lord Toulson in *Mohamud*, suggesting that a broad notion of whether or not the court should help the 'little guy' lies behind decisions relating to vicarious liability. The Supreme Court is clear that that approach is not valid. Courts must not decide cases based on their personal sense of social justice, but by applying factors or principles which point towards or away from vicarious liability on the basis of the decided cases. That, it is hoped, will lead to a principled and consistent approach to cases of vicarious liability.

It is easier said than done. Lord Phillips' statement that " *The law of vicarious liability is on the move*" in *Various Claimants v. Catholic Child Welfare Society* [2013]2 AC 1 (the *Christian Brothers* case) has certainly proved right so far. Whether or not these recent Supreme Court decisions are sufficient to stop the move remains to be seen. It certainly seems as though, for a time at least, we have seen the high water mark of imposition of vicarious liability.

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