Vicarious Liability

Barclays Bank plc v Various Claimants [2020] UKSC 13

Facts:

Dr. Gordon Bates was a medical practitioner who (amongst other work) was paid by Barclays Bank to undertake medical examinations of prospective employees as part of Barclays' recruitment process to ensure that they were medically fit for work. Dr. Bates was paid a fee per examination from 1968 to 1984 but was not paid any kind of retainer by Barclays. The examinations took place in a consulting room which was part of Dr. Bates' home and Barclays arranged the appointments with Dr. Bates. The Claimants were potential Barclays employees, many of them teenagers as young as 16, who had been sent to Dr. Bates for their medical examinations. They were examined by him on their own, and the allegations were that he had sexually assaulted the Claimants during the course of those examinations. By the time of the Court case Dr. Bates had died and his estate had been distributed so he could not be sued by the Claimants, nor could Barclays claim any contribution from him.

Issues:

The key issue for the Supreme Court was whether Barclays Bank was vicariously liable for Dr. Bates' actions. Barclays argued that he was an independent contractor, so there would be no vicarious liability, whereas the Claimants argued that the recent line of Supreme Court decisions, *The Catholic Child Welfare Society & Others v Various Claimants* [2012] UKSC 56 (often referred to as the "*Christian Brothers"* case)*, Cox v Ministry of Justice* [2016] UKSC 10 and *Armes v Nottinghamshire County Council* [2017] UKSC 60 and the "sufficiently akin to employment" test require a more nuanced approach in considering whether it is fair, just and reasonable to impose vicarious liability. They referred to the 5 policy reasons identified by Lord Phillips in the *Christian Brothers* case. The trial judge and Court of Appeal both agreed with the Claimants' argument and held that Barclays were vicariously liable.

Lady Hale giving the Supreme Court's unanimous judgment confirmed that on the facts Dr. Bates was not at any time an employee of Barclays Bank, he was an independent contractor and therefore Barclays were not vicariously liable for his actions. Just because he worked regularly for Barclays over a long period of time, it did not make him into an employee or in a relationship akin to employment.

By this decision, the Supreme Court have confirmed that the traditional distinction between employment, relationships akin to employment and the relationship with an independent contractor continues. *"Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."* (para.27) and vicarious liability does not apply. The child abuse cases (like the *Christian Brothers* case) can be seen as factually specific, designed to protect a particularly vulnerable class of Claimants.

The Court specifically did not align the concept of vicarious liability with the statutory concept of "worker" (found in employment law) and Lady Hale made it clear that to "tidy up" the law in this way could lead to anomalies, she explicitly rejected importing those employment law concepts into the field of vicarious liability. She emphasised how important it is to look at

the substance of the relationship (rather than its form) when considering whether it is “akin to employment” which may be increasingly important with the rise of the gig economy (Uber, Deliveroo and the like).

Vicarious Liability

WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12

Facts:

This case concerns the extent to which Morrisons supermarket is vicariously liable for the criminal actions of a rogue employee. Andrew Skelton was a disgruntled employee of Morrisons, who in the course of his duties working in the internal audit department downloaded a copy of the company's payroll data on to a USB stick, and then uploaded the data (relating to around 100,000 employees) onto a file sharing website from home. He then sent a CD with the data to various newspapers, pretending to be a concerned citizen who had discovered it, pointing out that it had been made available online. One of the newspapers alerted Morrisons who took steps to take down the website, contacted the police and ultimately Skelton was charged with fraud and other offences, convicted and sentenced to 8 years' imprisonment.

A group action of over 9,000 of those Morrisons employees brought a claim against the supermarket for damages for breach of the Data Protection Act 1998 and/or the misuse of private information and/or for breach of confidence by Mr. Skelton, arguing that Morrisons was vicariously liable.

Issues:

The issue for the Court was whether Morrisons was vicariously liable for the rogue actions of their employee.

Both the High Court judge and Court of Appeal found that Morrisons was vicariously liable for Mr. Skelton's conduct. The Supreme Court considered their previous decision in *Mohamud v Morrison* [2016] UKSC 11, upon which the Courts below had relied, and upheld Morrisons' appeal finding that the lower Courts had, *"…misunderstood the principles governing vicarious liability in a number of relevant respects…"* (para 31).

Lord Reed giving the unanimous judgment of the Supreme Court considered again the question of vicarious liability and suggested that Lord Toulson in *Mohamud* had not sought to change the law, but rather was applying existing precedent. In this key passage, Lord Reed said, *"Applying the general test laid down by Lord Nicholls in para 23 of Dubai Aluminium [2003] 2 AC 366, the question is whether Skelton's disclosure of the data was so closely connected with acts he was authorised to do that, for the purposes of the liability of his employer to third parties, his wrongful disclosure may fairly and properly be regarded as done by him while acting in the ordinary course of his employment."* (para. 32).

To that question posed, the Supreme Court answered a clear and resounding "no". In particular, Lord Reed considered that the disclosure of the data was not part of Mr. Skelton's "field of activities" in that it was not an authorised act. Whilst there was an unbroken chain of causation and a close temporal link between the provision of data to Mr. Skelton in the course of his employment and its disclosure, that link in and of itself was not sufficient to satisfy the close connection test. The Court felt that the fact that the employment provided Mr. Skelton with the "mere opportunity" to commit a wrongful act, was not the same as acting

within his authority. Critically, Lord Reed stated that whilst the employee's motive in *Mohamud* was irrelevant, that was a question of fact and did not lay down any kind of general rule to that effect; Mr. Skelton's motive was key here as he was not acting on his employer's business but was engaged in a personal vendetta (seeking vengeance for previous disciplinary proceedings). In fact he was acting in a way that was positively calculated to damage his employer's business rather than support or assist it.

This decision could be argued to be slowing the extension of vicarious liability, putting the brakes on the movement to widen vicarious liability (as seen in the 2016 Supreme Court decisions of *Mohamud v Morrisons* and *Cox v Ministry of Justice*). It is interesting to consider how the lower Courts purported to follow *Mohamud* but the Supreme Court has emphasised the boundaries of vicarious liability in this case, and similarly emphasised the limits between independent contractors and those in positions akin to employment in *Barclays v Various Claimants*. The Supreme Court has not created any new tests for vicarious liability, but has shown how to apply those questions of fields of activity and close connection. It is hoped that these 2 cases provide some clarity in the law of vicarious liability. There are many parallels here with the incremental approach favoured by the law of negligence in expanding duties of care, but there may be a distinction moving forwards between reliance based torts (negligent misstatement & negligent advice) and intentional torts.

Vicarious Liability / Defences to Negligence

London Borough of Haringey v FZO [2020] EWCA Civ 180

Facts:

The Claimant claimed damages for personal injury, loss and damage consequent upon historic sexual abuse which occurred when he was a pupil at Highgate Wood School in the 1980s, by a teacher employed by the Defendant local authority. Critically, however, the abuse continued beyond the Claimant's time at school. The Court of Appeal had to consider the situation where the abuse occurred not only whilst at school, but where the teacher and Claimant maintained a sexual relationship for some considerable time after he left and whether the local authority remained vicariously liable for the time period after the Claimant left school.

Issues:

Vicarious Liability:

The Court of Appeal rejected arguments from the local authority that they were not liable for acts which took place "privately" away from the school, as it is the nature of the relationship rather than the location of the abuse which is key. Time and place is relevant to liability but not conclusive.

The other issue for the Court was whether the fact that the Claimant was no longer a pupil when acts occurred would prevent the relationship being sufficiently close and therefore avoiding liability for the Defendant local authority. The Court of Appeal upheld the judge's finding that the employer local authority remained liable for acts after the Claimant child reached majority as the teacher's grooming of the Claimant child began during his minority and continued to operate upon him once he had left school and become an adult. The Court of Appeal viewed the abuse as a continuing activity, endorsing the view of the trial judge that, *"the grooming and manipulation of the Claimant by the first Defendant was closely connected with his pastoral duties as a teacher".* The Court followed the Supreme Court's decision in *Mohammed v Morrison* [2016] UKSC 11 focusing upon the 2 stage test of considering the field of activities and then whether there is sufficient connection between the position in which the person is employed and the wrongful conduct. Issues of the Claimant's alleged consent to activities were no defence, given the grooming which had begun during the teacher's employment, and which continued to be operative upon the Claimant afterwards, *"rendering his participation in subsequent sexual activity merely submissive rather than consensual"* – per McCombe LJ.

Limitation:

This was a case where the judge exercised her discretion under s.33 Limitation Act 1980 to disapply the limitation period in favour of the Claimant (the claim was brought 25 to 30 years after the expiry of the primary limitation period). The Court of Appeal concluded that the judge had not misdirected herself in relation to the correct application of s.33 and dismissed that ground of appeal.

Defamation

Serafin v Malkiewicz & Others [2020] UKSC 23

Facts:

The Claimant sued the Defendants for libel and misuse of private information in relation to an article from October 2015 in a not-for-profit newspaper Nowy Czas (a newspaper which addressed issues of interest to the Polish community in the UK), which they published about him. The Claimant alleged that the article contained 13 defamatory meanings, whereas the Defendants argued that the words bore a "common sting" which was that, *"the Claimant was a bankrupt and a seriously untrustworthy man who, in order to satisfy his ambition and financially benefit himself and his family in Poland, took improper advantage of a number of people, including women"* (para. 10).

Issues:

There were significant issues with the conduct of the High Court judge in the case. The Supreme Court were highly critical of the fairness of the trial before Jay J (in which the Claimant was a litigant in person) and as a result ordered a full retrial before a new judge.

The s.4 Public Interest Defence:

In issue in this case was the applicability of the s.4 Defamation Act 2013 public interest defence. In the High Court Jay J had taken a wide interpretation of it, considering whether the defence applied to the article as a whole, whereas the Court of Appeal adopted a narrower approach aligning the defence more closely to the classic *Reynolds* defence.

Giving the unanimous judgment in the Supreme Court, Lord Wilson confirmed that it was wrong of the Court of Appeal to state that the common law public interest defence in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and the s.4 Defamation Act 2013 defence were "not materially different". Whilst the rationale for the defences was not materially different (relying upon the Court of Appeal decision in *Economou*) the elements are not to be regarded as the same (para. 68 & 72). The Court of Appeal was criticised for using the *Reynolds* factors as a checklist in the context of s.4. The Supreme Court held that the 2013 Act takes precedence over prior case law, which is an interesting development as it was often considered that Parliament's intention with the Defamation Act 2013 was to effectively codify or mirror the common law.

Lord Wilson also confirmed (at para. 76) that failing to make pre-publication enquiries, inviting comment from the Claimant, whilst it would be the subject of consideration under s.4(1)(b) Defamation Act 2013, would not be seen as a requirement.

Duty of Care

ABC v St. George's Healthcare NHS Trust & Others [2020] EWHC 455 (QB)

Facts:

Huntingdon's Disease is an incurable genetic condition. The Claimant's father XX was under the care of the Defendant NHS trust and the doctors suspected that he may be suffering from the disease, but he refused to consent to the doctors disclosing this information to the Claimant ABC. XX's diagnosis was later confirmed which meant that the Claimant had a 50% chance of having inherited the disease. The doctors knew that the Claimant was pregnant and considered whether they should breach XX's confidentiality and inform her of the potential risk but decided not to do so. The information was accidentally disclosed to the Claimant after the birth of her child and in subsequent testing she tested positive for Huntingdon's disease; it is not clear whether the child will be affected.

ABC brought a claim for clinical negligence against the Defendant NHS Trusts on the basis that they owed her a duty of care to disclose the information, or should at the very least have taken steps to ensure that she was offered genetic testing. The Claimant's argument was that had she known she would have undergone testing and terminated the pregnancy if she tested positive. The Claimant also argued that her rights to respect for her private and family life under Article 8 of the European Convention on Human Rights (ECHR) were breached.

Issues:

A Novel Duty of Care?

This case required Yip J (sitting in the High Court, Queen's Bench Division) to consider whether to recognise a novel duty of care situation, which follows the reasoning of Lord Bridge in *Caparo v Dickman [1990]* in which the law of negligence in relation to duty of care should preferably be developed incrementally and by analogy with established categories of duty.

The question for the Court was whether a health care professional owes a duty of care to a third party who is at risk. The health care professional has to balance the rights and interests of their patient and preserving the patient's confidentiality against the rights and interests of protecting the third party to reduce or prevent a significant risk of serious harm from happening to them.

Whilst on the facts Yip J decided that the health care professionals in this case had not breached their duty of care, and had carried out the balancing exercise to a reasonable standard, this decision establishes that health care professionals owe a legal duty which is in addition to their professional obligation to balance the rights and interests of patients who refuse to consent to disclosure of information, with those of at-risk individuals. She also confirmed that this duty is not limited to genetics cases. Equally, whilst it is a duty to consider disclosure, based on best practice and professional guidance, it does not extend to a duty to seek out and chase relatives. Interestingly, whilst this feels like an extension of the legal

duty of care, it still does not go as far as the health care professional's own professional obligations.

Using the familiar concept of proximity, this legal duty will only apply where there is a relationship of close proximity between the at-risk family member and the health care professionals; this was illustrated in the case by the different relationships between the Claimant and the various Defendants. The Claimant (ABC) had not met the genetics specialists nor had her father XX, and as such there was a lack of close proximity so the legal duty did not arise, whereas ABC was known to the psychiatric team and her situation was known, with a straightforward route for health care professionals to disclose information to her if they needed or wanted to.

Despite her findings in relation to there being no breach of duty on the facts, Yip J also considered the question of causation, concluding that the Claimant failed to prove that she would have undergone a termination if she had been notified of the genetic risk to her pregnancy.

Psychiatric Harm / Defences to Negligence

Young v Downey [2019] EWHC 3508 (QB)

Facts:

The Claimant was the daughter of one of the victims of the Hyde Park bomb attack in 1982, in which the IRA detonated a car bomb as members of the Household Cavalry rode past. The Claimant's father was one of the soldiers who sustained severe injuries and died shortly afterwards. The Claimant, Sarah Jane Young, was 4 years old at the time, heard the blast from the nursery window at Hyde Park Barracks and, knowing that her father was one of the guard, saw injured soldiers returning, covered in blood. The Defendant Downey was arrested in connection with the bombing in 2013, charged with murder but the criminal proceedings were stayed as an abuse of process. The Claimant brought her civil claim for damages for psychiatric injuries, consequential loss and under the Fatal Accidents Act 1976. The case on liability was decided by Yip J in the High Court.

Issues:

Psychiatric Injury

The Claimant brought her claim as a secondary victim flowing from the intentional trespass to the person. She witnessed the aftermath of the bomb blast in which her father was fatally injured, knowing that her father was part of the Guard. She met the *Alcock* criteria and was in geographical proximity, so this was a classic psychiatric injury aftermath case.

Fatal Accidents Act 1976

The Claimant was able to bring a claim under the FAA for her loss of dependency, as she was dependent upon her father, and he was killed by the Defendant's tortious act.

Limitation Act 1980

This is a useful case to illustrate the operation of the Limitation Act 1980. The Claimant's personal injury claim is governed by s.11 Limitation Act 1980 and the FAA claim is governed by s.12 Limitation Act 1980. Both sections have a 3 year limitation period from the date of injury/death. As the Claimant was a child at the time of the bombing, her limitation time period only begins to run from the date of her majority (ie. when she turned 18). The Court had to consider the Claimant's "date of knowledge" where she learned the identity of the Defendant. In this case, Yip J used the Court's discretion under s.33 Limitation Act 1980 to disapply the limitation period as there was a compelling reason to allow the claim to proceed.

Psychiatric Harm

Paul v The Royal Wolverhampton Trust [2020] EWHC 1415 (QB)

Facts:

Parminder Paul suffered a heart attack in front of his children (the Claimants), he was taken to hospital by ambulance and died shortly after. The Claimants suffered psychiatric injuries caused by witnessing the collapse. The claim was brought against the Defendant trust for negligence in their treatment of Mr. Paul 14 months earlier, in which they had failed to diagnose and treat a heart condition. The Defendant trust accepted that they owed a duty of care to Mr. Paul's wife, but did not accept that a duty was owed to his children.

Issues:

How does the law apply where there is a delay between breach of duty and the primary victim's injury in a psychiatric harm case?

This appeal considered the circumstances in which a Defendant who owes a duty of care to a primary victim may be liable to a secondary victim for a psychiatric injury suffered as a result of witnessing the death or injury of the primary victim.

Chamberlain J surveyed the relevant authorities, and this judgment is worth reading in full for a succinct and thorough account of psychiatric injury law. In particular, he focused on the so-called "bedside" cases, and the ratio in the Court of Appeal decision in *Taylor v A. Novo* [2013] EWCA Civ 194, which he held was that, *"in a case where the Defendant's negligence results in an 'event' giving rise to injury in a primary victim, a secondary victim can claim for psychiatric injury only where it is caused by witnessing that event rather than any subsequent, discrete event which is the consequence of it, however sudden or shocking that subsequent event may be".* He distinguished *Taylor* which had 2 events, by stating that on the facts of this case, there was only one event, namely Mr. Paul's collapse from a heart attack. This was a sudden event, external to the secondary victims and led very rapidly to Mr. Paul's death. Critically, Chamberlain J held that the fact that the event occurred 14 months after the Defendant's negligent omission which caused it does not preclude liability.

This case clarifies the situation where there is a delay between the breach of duty and the injury witnessed by a secondary victim. There is no requirement for the secondary victims to be present at the scene of the tort, merely in proximity to the event in which the primary victim is harmed. The "event" does not need to be in proximity to the negligence. This has not removed the control mechanisms in the case law, but it has moved the thinking as to how those mechanisms apply to clinical negligence cases where the breach of duty and injury causing event do not occur contemporaneously (as compared with accident cases where the breach of duty and damage occur simultaneously).

Breach of Duty

Wright v Troy Lucas (A Firm) & Rusz [2019] EWHC 1098 (QB)

Facts:

The Claimant had an arguable claim in negligence against a hospital trust arising out of medical treatment. The Defendants were an unregulated legal advisor and his company who gave the Claimant negligent advice, which prevented him from pursuing his full claim. The hospital trust admitted liability and settled the claim for £20,000, but the Claimant had to pay £75,000 towards the hospital trust's legal costs because of the way that the second Defendant had conducted the case. This was therefore a claim in negligence against Mr. Rusz (the second Defendant) and the firm he worked for (first Defendant).

McKenzie Friends assist litigants in Court proceedings. They are unregulated and do not have to be legally trained or possess professional legal qualifications, nor is there any restriction on the services they offer, the fees that they charge or the requirement for insurance. On the facts, the Court held that the Defendants' services went beyond the remit of a paid McKenzie Friend in this case. The Court held that the Defendants were in breach of their duty of care arising from the relationship that they had assumed.

Issues:

Standard of Care for an unregulated legal advisor:

The key issue in this case was for the Court to determine whether a McKenzie Friend, or other unregulated legal advisor, owed a duty of care and what the appropriate standard of care would be. This was the first case considering the particular situation of unregulated legal advisors and is particularly important given the growth of such advice to litigants.

In this case HHJ Eady QC held that there was a contract between the Claimant and Defendants (so dual liability in contract and tort) and the Defendants were acting as the Claimant's paid legal advisor, advising in the conduct of the claim against the hospital trust and providing assistance in the conduct of that claim.

HHJ Eady QC held that the Defendants should be, *"…held to the duty and standard of care that they had chosen to assume when holding themselves out as competent to carry out legal services for the Claimant in his clinical negligence litigation…".* In some ways this may appear to be the Defendant setting their own standard of care, but it is in fact an effective method of protecting a Claimant, as the Defendant advisor will be judged by the standard of skills and abilities that they profess to have. This draws clear parallels with the standards for professionals and the *Bolam* test, albeit that the Defendants were judged by the standards that they held themselves out to be, rather than by a standard equivalent to their level of qualification, so following this case a Defendant exaggerating their skills will be held to that higher standard in negligence.

Trespass to the Person / Damages

R (on the application of Hemmati & others) v Secretary of State for the Home Department [2019] UKSC 56

Facts:

The 5 Claimants had arrived in the United Kingdom illegally and claimed asylum. However, they had all travelled to the UK via another EU member state in which they had already claimed asylum, so the Secretary of State requested those other EU member states to take responsibility for considering their asylum claims, to which those member states agreed.

Before they were removed from the UK the Claimants were detained under the Immigration Act 1971. The claim arose in relation to this detention, with the Claimants arguing that it was unlawful detention and that they should therefore be entitled to damages under UK law.

Issues:

False Imprisonment

The issue was whether the 5 individuals were entitled to damages for false imprisonment whilst they were in immigration detention as a result of the failure of the Secretary of State to implement correctly the requirements of the Dublin III Regulation (specifically Article 2(n) & Article 28). The guidance in relation to detention published by the Secretary of State (Chapter 55 of the Enforcement Instructions & Guidance – EIG) was held unanimously by the Supreme Court to have failed to comply with European Law, which meant that the decision to detain the Claimants fell outside the scope of any legitimate exercise of the discretion to detain in the Immigration Act 1971.

Putting it simply, the detention exceeded the powers (in public law terminology it was ultra vires) so was not lawful, making it a false imprisonment.

Damages

The Secretary of State argued that the Claimants should only be entitled to nominal damages, but this was rejected by Lord Kitchin (in the unanimous Supreme Court judgment), and the Claimants were therefore entitled to compensation under domestic law for any losses caused by the wrongful detention.

Lord Kitchin considered the Supreme Court decision in *Lumba* and distinguished it, as in that case the detention of the Claimant was at all times justifiable (the issue was relating to differences between published and unpublished policies). It was noted (at para. 109, citing Baroness Hale in *Kambadzi*) that false imprisonment is a trespass to the person and so actionable per se (without proof of loss or damage), but that the Defendant is only liable for damages which his wrongful act has caused.

Trespass to the Person

R (on the application of Jalloh (formerly Jollah)) v Secretary of State for the Home Department [2020] UKSC 4

Facts:

The Claimant claims to be a Liberian national (although the Home Office disputed his identity) who was released from immigration detention on bail, and subsequently required to wear electronic monitoring equipment (an electronic tag) and be subject to a curfew requiring him to stay at home between 11pm and 7am every night. He was subject to the curfew for 891 days. It turned out that the Secretary of State did not have any legal power to impose curfew restrictions in this way. The Claimant sought damages for false imprisonment.

Issues:

The Secretary of State argued that the curfew (although it was unlawful) did not amount to imprisonment at common law and if it did, the common law concept of imprisonment ought to be modified and be more closely aligned with the concept of deprivation of liberty under Article 5 ECHR.

False Imprisonment:

The Supreme Court dismissed those arguments. Lady Hale in the unanimous judgment of the Court confirmed that this was a "classic detention or confinement" (para. 28). The Court considered that the essence of imprisonment is being made to stay in a particular place by another person and that the method of keeping them there did not have to be a physical barrier, but that the threat of force or a legal process was sufficient. Interestingly, there is precedent in relation to false imprisonment with electronic tag curfews; the case of *Secretary of State for the Home Department v JJ* [2007] UKHL 45 decided that an electronic tag enforced curfew was an example of classic detention or confinement. As the Court confirmed, whilst it was physically possible for the Claimant to leave while under curfew, his compliance was not voluntary and was enforced with the threat of a fine or being sent to prison.

Article 5 ECHR – deprivation of liberty

On the deprivation of liberty point the Supreme Court declined to align the domestic law of false imprisonment with the ECHR concept of deprivation of liberty under Article 5. The Court confirmed that it is possible to have imprisonment at common law without a deprivation of liberty under Article 5 (as in the well-known "kettling" case of *Austin v Commissioner of the Police of the Metropolis* [2007] EWCA Civ 989), but held that it was not necessary for the Supreme Court to decide whether the converse is true (para. 34).