SIX PUMP COURT

Vicarious Liability (and Data Protection): *Morrisons* and *Barclays Bank* (in 1000 words)

This article is concerned with vicarious liability, considered by the Supreme Court (London) in two judgments given on the same day (1 April 2020).

Of the two cases, *Morrisons*, has specific content about data protection (vicarious liability can apply). Together, *Morrisons* and *Barclays Bank* provide a thorough overall account of the main issues of principle, namely: (1) when is there a relationship which allows one person to be liable for the wrongs of another, and (2) what is it about such a connection which makes that person liable for the particular wrongs committed?

Narrative

Establishing vicarious liability is important, because it allows for a legal remedy (compensation) from someone who has authority over the wrongdoer. It is a long-standing principle in the employment context, it being considered fairer that an employer, rather than the innocent party, should bear the consequences of the wrongful acts of its employee.

In recent years, however, the question has been widely put whether the principle is properly confined to employment relationships. Should a bishop or church institution be responsible for the sexual assaults of priests who are not employees? What about a policeman on duty who shoots his girlfriend in a fit of jealousy? Should the employer of a racist petrol station attendant be responsible for beating up a customer? As a JSC in a 2012 judgment (the *Christian Brothers*) said that "the law of vicarious liability is on the move".

Barclays Bank concerned 126 victims of sexual abuse. The abuse had been carried out by a doctor who had examined new Barclays recruits. The bank had paid him occasional fees for his reports, which he wrote alongside reports for other organisations.

Both the trial judge and the Court of Appeal decided that Barclays were liable under the vicarious liability principle. The Supreme Court decided that all four judges had been wrong and that the relationship in question should not be considered as akin to one of employment.

Morrisons is relevant to the second inquiry, which is when one party should be liable for the wrongs of another.

In that case, an employee disgruntled by the receipt of a written warning for a minor disciplinary matter, went to great lengths to publish personal records on the internet of 100,000 colleagues.

His labours extended even unto disguising his IP address, using a burner phone, and framing one of his workmates. (He subsequently received eight years' imprisonment). He was a data controller when he published his colleagues' records.

The trial judge and the Court of Appeal decided that it was right that 9,500 of his colleagues should be able to sue Morrisons for damages for breach of the DPA, misuse of private

information and breach of confidence. Were the four judges correct? The short answer is "No". The employee was on a 'frolic of his own'.

As to the data protection issue, Morrisons' search for gold at the end of the rainbow was a search for a finding that the Data Protection Acts should be construed so that the principle of vicarious liability could never arise. The Supreme Court gave this argument short shrift.

Summary

The headlines from the two cases are as follows:

Stage one (what type of relationship allows the principle of vicarious liability to apply?)

(1) Where there is a relationship of employer and employee, then the vicarious liability principle may be in play;
(2) In other relationships, where it is fair, just and reasonable to acknowledge that the relationship is akin or analogous to that of employment, then the vicarious liability principle may also be in play;
(3) In doubtful cases, the five factors identified by Lord Philips in the *Christian Brothers* case may be helpful ([2016] UKSC 10) ((i) means and insurance, (ii) the wrong being consequent on activities carried out for the employer, (iii) the employee's activities as part of the employer's business, (iv) the employer's creation of the risk, (v) the employer's control of the employee);
(4) There is a profound difference between 'integrated activities' (on the one hand) and 'activities entirely attributable to the conduct of a recognisably independent business' (such as those of an independent contractor).

Stage two (when should one party be held vicariously liable for the fault of another?)

(5) Is the employee (or the party akin to an employee) furthering his employer's business when the wrong occurs, or is the employee engaged solely in pursuing his / her own interests?
(6) The wrongful conduct must be so closely connected with the acts which the employee was authorised to do that it must be 'fairly and properly' regarded as done by the employee when acting in the course of his employment (or equivalent) – this will not apply in the case of an independent contractor.

Data Protection Act 1998 and 2018

(7) There is nothing in either of these Acts of Parliament which excludes liability for vicarious liability;
(8) The imposition of statutory liabilities on a data controller are not inconsistent with the imposition of a common law liability on his / her employer.

Additional

As to both stages one and two, the Supreme Court emphasised the importance of (1) understanding any guidance to be derived from previously decided cases ('pockets') and (2) recognising the importance of a common law assessment of the relevant factors which may point one way or another.

Optimistically, perhaps, the Supreme Court considered that this common law approach would provide principled and consistent outcomes by first instance judges, rather than simple value judgements.

Where had the previous judges gone wrong?

In *Barclays*, the Supreme Court decided that the Courts below had gone wrong in failing to recognise that a distinction is to be drawn between employment relationships (or the equivalent) and those relationships involving independent contractors.

In *Morrisons*, the errors by the Courts below were in (1) seeking mainly to establish a close temporal or causal connection between the employment and the wrongdoing and (2) considering that motive was irrelevant.

Irrelevancies

The development of the vicarious liability principle is attributed to Sir John Holt CJ (1642-1710) in order to accommodate the expansion of commerce and industry. He was a judge who favoured William of Orange, but who disliked slavery, the prosecution of witches, and state trials.

Principle cases

Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 AC 215 (sexual assaults by the warden of a school boarding house),

Dubai Aluminium Co Ltd v Salaam [2002] UKHL 48, [2003] 2 AC 366 (fraudulent partner in a firm)

Attorney General of the British Virgin Islands v Hartwell [2004] UKPC 12, [2004] 1 WLR 1273 (police officer shooting)

Bernard v Attorney General of Jamaica [2004] UKPC 47, [2005] IRLR 398 (police officer shooting)

Various Claimants v Catholic Child Welfare Society [2012] UKSC 56, [2013] 2 AC 1 (Christian brothers)

Cox v Ministry of Justice [2016] UKSC 10; [2016] AC 660 (negligent prisoner)

Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11, [2016] AC 677 (assault by a petrol station attendant)

Armes v Nottinghamshire County Council [2017] UKSC 60, [2018] AC 855 (abusive foster carers)

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