



Farore Law

- Mini Guide -

VICARIOUS LIABILITY

What is vicarious liability?

Vicarious liability is the liability of one defendant for the actions of another defendant. This commonly arises in employment law claims, where an employer can be held accountable for the wrongdoing of one of its employees. The employer itself need not be at fault to be held responsible.

When is vicarious liability established?

In order for there to be vicarious liability, there must be a sufficiently “close connection” between the relationship of the (potential) defendants and the wrongful action in question. Case law has established vicarious liability in the following situations, for instance:

- **A nightclub owner was vicariously liable for injuries suffered by a claimant who was stabbed by a doorman employed at the nightclub, even though the attack occurred after the doorman had returned home to arm himself with a knife.** The Court of Appeal held that vicarious liability applied on the basis that the attack took place as a consequence of events that unfolded within the nightclub. The attack could not fairly and justly be treated as a separate and distinct incident.¹
- **The Trustees of the Birmingham Archdiocese of the Roman Catholic Church were vicariously liable for the actions of a priest who had abused a child.** The child was not a member of the priest’s congregation, but the perpetrator had misused the status and functions conferred upon him by virtue of his ordination.²

¹ *Mattis v Pollock* [2003] EWCA Civ 887

² *Maga v Archbishop of Birmingham* [2010] 1 WLR 1441

- A defendant employer was vicariously liable for an employee who was responsible for preparing a consignment of silver bars and who had returned to their location to steal some of them. The fact that a theft was “reasonably incidental” to the employee’s job was an important consideration.³

The “close connection” test was reconsidered by the Supreme Court in 2016 in the case of *Mohamud v WM Morrison Supermarkets*.⁴ In this, the employer’s Sales Assistant started an argument with the claimant and racially abused him. The Sales Assistant then followed the claimant outside and subjected him to a number of physical attacks.

Mohamud confirmed that the “close connection” test consists of two questions:

- (1) what functions or “field of activities” have been entrusted by the employer to the employee (in other words, what was the nature of the employee’s job?); and
- (2) was there 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?

Based on the application of these questions, the Supreme Court found that vicarious liability did arise.

Can vicarious liability be established outside of the employer/employee relationship?

Independent contractors

The issue of vicarious liability in relation to independent contractors was recently discussed in the 2020 Supreme Court case of *Barclays Bank plc v Various Claimants*⁵ (and the parallel *WM Morrison Supermarkets Plc v Various Claimants*⁶ case) which articulated key principles about the concept regarding the concept. **The key question raised by both cases was, in essence, “how far” vicarious liability can go.**

- *Barclays* involved determining whether or not the Bank was vicariously liable for sexual assaults committed by a doctor (an independent contractor) whom the Bank had

³ *Brink’s Global Services v Igrox* [2011] IRLR 343

⁴ *Mohamud v WM Morrison Supermarkets* [2016] IRLR 362

⁵ [2020] UKSC 13

⁶ [2020] UKSC 12

engaged to conduct medical examinations on potential employees as part of its recruitment process.

- *WM Morrison* concerned the liability of the supermarket for an internal audit employee who maliciously disclosed the data of 100,000 employees, over 9,000 of whom claimed compensation. The employee had developed a grudge against his employer and proceeded to copy personal (including payroll) data onto a USB stick, which he then took home and uploaded to a public file-sharing website.

Barclays confirmed that two elements must be shown before one person can be made vicariously liable for the torts committed by another:

- The first is that there a relationship between the two parties which makes it proper for the law to make the one pay for the fault of the other. This was historically limited to the relationship between employer and employee, now “somewhat broadened.”⁷
- The second is the connection between that relationship and the offender's wrongdoing. Historically, this wrongdoing had to be committed in the course or within the scope of the offender’s employment, but this too is now “somewhat broadened.”⁸

In determining the first stage (i.e. whether or not there was a relevant relationship akin to employment), the Court of Appeal approved use of the five policy reasons⁹ elucidated in the 2012 case of *Various Claimants v Institute of the Brothers of the Christian Schools*.¹⁰ The UKSC confirmed that these help, in “doubtful cases”, to identify a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability:

1. the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
2. the wrongful action will have been committed as a result of activity being taken by the employee on behalf of the employer;
3. the employee’s activity is likely to be part of the business activity of the employer;
4. the employer, by employing the employee to carry on the activity will have created the risk of the wrongful action committed by the employee; and

⁷ [1]

⁸ [1]

⁹ Listed in full at [15] of the *Barclays* case

¹⁰ [2012] UKSC56

5. the employee will, to a greater or lesser degree, have been under the control of the employer.

In other words, *Barclays* confirmed that it is necessary to determine the details of the employer/employee relationship in question when in determining vicarious liability.

As to the application of these policy reasons in *Barclays*, the Supreme Court found that although the doctor was a part-time employee of the health service, he was not at any time an employee of the Bank, nor was he “*anything close to an employee*”. Although he did work for the Bank, the Supreme Court drew an analogy between the doctor and other “*clearly independent contractors*”, such as its window cleaners or auditors. Neither was the doctor paid a retainer which might have obliged him to accept a certain number of referrals; he was paid for each report he produced and free to refuse work. He carried his own medical liability insurance and was in business on his own account as a medical practitioner with a portfolio of clients, one of whom was the Bank.¹¹ The Supreme Court also confirmed that, when it is clear that a wrongdoer is carrying on their own independent business, it is not necessary to consider the five criteria.¹² Consequently, the Court found that Barclays Bank was *not* vicariously liable for the sexual assaults committed by the doctor.

Another defendant's employees

In the aforementioned *WM Morrison* case,¹³ the Supreme Court held that the Morrisons supermarket chain was *not* vicariously responsible for the actions of the internal audit employee who maliciously disseminated employee data. The difference in the impact between this and *Barclays* is that whereas the latter addresses the issue of the independent contractor ‘defence’ to vicarious liability, *WM Morrison* addresses the ‘second step’ of the vicarious liability test mentioned above: whether or not the wrongdoer’s actions was outside the scope of their employment.

In holding that Morrisons was not liable in the circumstances, the Supreme Court noted (amongst other issues) the following key points:¹⁴

- the disclosure of the data did not form part of the audit employee’s functions or field of activities, nor was it an act that he was authorised to do;

¹¹ [28]

¹² [27]

¹³ [2020] UKSC 12

¹⁴ [2]

- the five criteria from the *Christian Schools* case were irrelevant in this situation as these concerned the determination of whether a relationship “akin to employment” existed so as to impose vicarious liability;
- despite the close temporal link and an unbroken chain of causation linking the data breach to the internal audit employee, these in themselves do not satisfy the close connection test; and
- the motivation behind the employee’s wrongful act was *not* irrelevant: whether he was acting on his employer’s business or for purely personal reasons (i.e. “*a frolic of his own*”) was highly material.

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