



THE COURT ORDERED that no one shall publish or reveal the names or addresses of the Respondents who are involved in these proceedings or publish or reveal any information which would be likely to lead to the identification of them or of any members of their families in connection with these proceedings.

1 April 2020

PRESS SUMMARY

Barclays Bank plc (Appellant) v Various Claimants (Respondents)
[2020] UKSC 13
On appeal from [2018] EWCA Civ 1670

JUSTICES: Lady Hale, Lord Reed, Lord Kerr, Lord Hodge, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

In this appeal, the Supreme Court is asked to decide whether Barclays Bank is vicariously liable for sexual assaults allegedly committed between 1968 and about 1984 by the late Dr Gordon Bates.

Dr Bates was a self-employed medical practitioner with a portfolio practice. His work included conducting medical assessments and examinations of prospective Barclays employees. Barclays required job applicants to pass a pre-employment medical examination as part of its recruitment and employment procedures. Barclays arranged the appointments with Dr Bates and provided him with a pro forma report headed “Barclays Confidential Medical Report”. Dr Bates was paid a fee for each report; Barclays did not pay him a retainer. If the report was satisfactory, the applicant’s job offer would be confirmed, subject to satisfactory GCE examination results.

Dr Bates conducted the (unchaperoned) medical examinations in a consulting room at his home. It is alleged that Dr Bates sexually assaulted the 126 claimants in this group action during their medical examinations. After Dr Bates died in 2009, the claimants sought damages from Barclays.

At first instance, the judge held that Barclays is vicariously liable for any assaults that Dr Bates is proved to have perpetrated. The Court of Appeal agreed and dismissed Barclays’ appeal. Barclays now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows Barclays’ appeal, and holds that it is not vicariously liable for Dr Bates’ alleged wrongdoing. Lady Hale gives the judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

Before one person can be made vicariously liable for the torts of another, two elements must be shown. First, there must be a relationship between the two persons which makes it proper for the law to make one pay for the fault of the other. Second, there must be a sufficient connection between that relationship and the wrongdoing of the person who committed the tort. This case concerns the first element [1].

Historically, and leaving aside relationships such as agency and partnership, the relationships that could give rise to vicarious liability were limited to that between an employee and an employer [1]. Accordingly, Barclays’ case is that, since Dr Bates was an independent contractor and not a Barclays employee, it cannot

be held liable for his wrongdoing. As Lord Bridge of Harwich said in *D & F Estates Ltd v Church Comrs* [1989] AC 177 at 208, “It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work” [7].

The claimants, on the other hand, argue that the law has been broadened by the Supreme Court decisions in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 (generally known as *Christian Brothers*), *Cox v Ministry of Justice* [2016] UKSC 10 and *Armes v Nottinghamshire County Council* [2017] UKSC 60. They say that these decisions have established a more nuanced approach, in which a range of factors are considered to determine whether or not it is “fair, just and reasonable” to impose vicarious liability in the circumstances of the case [8].

Lady Hale examines these three decisions in detail at [10-23], together with their precursor, the Court of Appeal decision in *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938. The cases make it clear that a person can be held vicariously liable for the acts of someone who is not their employee, provided the relationship between them is sufficiently akin or analogous to employment. However, they do not erode the classic distinction between employment (and relationships that are akin or analogous to employment) on the one hand, and the relationship with an independent contractor on the other hand [24]. Two cases decided by common law courts since *Christian Brothers* have reached the same conclusion: namely, the Court of Appeal’s decision in *Kafagi v JBW Group Ltd* [2018] EWCA Civ 1157 and the Singapore Court of Appeal’s decision in *Ng Huat Seng v Mohammad* [2017] SGCA 58 [25-26].

In light of this, the question is, as it has always been, whether the person who committed the tort is carrying on business on his own account, or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five factors or “incidents” identified by Lord Phillips in *Christian Brothers* (reproduced at [15]) may help to identify a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. But the key will usually lie in understanding the details of the relationship. Where it is clear that the person who committed the tort is carrying on his own independent business, it is not necessary to consider the five incidents [27].

On the facts, Dr Bates was not at any time an employee or anything close to an employee of Barclays. Rather, he was in business on his own account as a medical practitioner, with a portfolio of patients and clients. He did work for Barclays, which made the arrangements for the medical examinations and chose the questions to which it wanted answers, but much the same would be true of window cleaners or auditors. Dr Bates was not paid a retainer, which might have obliged him to accept a certain number of referrals from Barclays. He was paid a fee for each report and was free to refuse to conduct an offered examination. He no doubt carried his own medical liability insurance [28].

Lady Hale considers the relationship between the first element of the test for vicarious liability and the definition of “worker” in section 230(3) of the Employment Rights Act 1996. She concludes that asking whether or not a person is a worker who is not an employee within the definition in section 230(3)(b) may be helpful in identifying whether or not they are a true independent contractor, as opposed to being in a relationship akin to employment. However, she declines to align the common law concept of vicarious liability, developed for one set of reasons, with the statutory concept of “worker”, developed for quite a different set of reasons [29].

Accordingly, the Court allows the appeal and holds that Barclays is not vicariously liable for any assaults that Dr Bates is proved to have perpetrated in the course of the medical examinations he carried out for Barclays [30].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>