VICARIOUS LIABILITY FOR INDEPENDENT CONTRACTORS

THE common law has long recognised that people who engage independent contractors will not ordinarily be liable for the wrongdoing of those contractors, outside a closely guarded class of exceptional relationships in which the principal bears a personal liability for their negligent conduct. Selection of a properly qualified and competent contractor will ordinarily suffice to discharge any primary duty of care to victims of the contractor's torts imposed on the principal. Vicarious liability traditionally required finding an employment relationship between the principal and the wrongdoer. However the scope of vicarious liability has recently been expanded. In a quartet of cases (*Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2003] 2 A.C. 1 (noted J. Bell [2013] C.L.J. 17)); *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] A.C. 677; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] A.C. 355 (noted S. Deakin [2018] C.L.J. 15)), the Supreme Court recognised that vicarious liability may also be imposed in respect of the acts of persons who are in a position "akin to employment".

The "akin to employment" test was first recognised in what may be described as atypical working relationships, such as those of religious personnel, and prison workers, who were neither employees nor independent contractors as traditionally understood. But the test has come to be applied as a general test for the imposition of vicarious liability outside relationships of employment, and uncertainty has emerged as to the reach of the test to traditionally understood independent contractors. The issue of the test's reach has emerged starkly from the decision of the Court of Appeal in *Barclays Bank plc v Various Claimants* [2018] EWCA Civ 1670, in which the bank was held vicariously liable for the wrongdoing of a doctor who, by any traditional test, was as independent a contractor as one might find. The implications of the application of the "akin to employment" test in this way to ordinary commercial arrangements with contractors now require scrutiny.

In *Barclays Bank*, 126 claimants sought damages from the bank, alleging that between 1968 and 1984 they had each been sexually assaulted by a medical practitioner to whom they had been sent by the bank for the purposes of a pre-employment medical examination. The doctor performed the examinations at his home, in a room alone with him. The doctor completed pro forma a medical examination form headed with the bank's logo. The doctor was paid a set fee per examination for which he invoiced the bank. The bank paid these invoices and provided no other wage or benefit to the doctor, who also worked for other organisations, as well as for two local hospitals.

At first instance, Mrs. Justice Nicola Davies considered that the relevant approach was to ask (1) whether the case was one of employment or "akin

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to employment" and if so, (2) was the tort sufficiently connected to the employment or quasi-employment. The judge applied Lord Phillips' five criteria from *Catholic Child Welfare* to determining whether the doctor was in a position that was akin to employment, and then found that the alleged abuse was relevantly closely connected with the engagement as to satisfy the stage (2) inquiry. The bank was found vicariously liable.

In the Court of Appeal, Irwin L.J. (with whom McCombe L.J. and Sir Brian Leveson P. agreed) noted that the bank had denied that the doctor was an employee or akin to an employee, and argued that he was self-employed and engaged as an independent contractor. He observed further that none of the previous Supreme Court cases had considered circumstances where the alleged tortfeasor was "an obvious 'independent contractor'" and accepted at [43] that none of those cases had been "a decision which squarely addresses facts such as these". However, at [44] Irwin L.J. accepted the submission for the respondents on the appeal that "the law now requires answers to the specified questions laid down in *Cox* and *Mohamud*, and affirmed in *Armes*, rather than an answer to the question was the alleged tortfeasor an independent contractor". Furthermore, he observed at [45] that, in "adopting the approach of the Supreme Court, there will indeed be cases of independent contractors where vicarious liability will be established".

Irwin L.J. found no error in the trial judge's approach. It is telling that in the Court of Appeal, as at trial, the satisfaction of Lord Phillips' criteria sealed the answer to the stage (1) inquiry. It did not address as a separate, or limiting, factor whether the doctor was engaged in an independent business activity as an independent contractor. Indeed, Irwin L.J. held expressly at [44] that the "question of definition appears to me no longer to be the test. If the Supreme Court had intended it to survive as such, it seems unlikely, given that formerly this was a decisive test, that the Court would have failed to say so".

The decision in *Barclays Bank* serves as a warning of the risk of Lord Phillips' criteria being applied as if "they were the words of statute, setting the rules in stone", as Lady Hale cautioned against in *Woodland v Essex County Council* [2013] UKSC 66, [2014] 1 A.C. 537, at [28] (in the context of the non-delegable duty of care); and per Lord Reed in *Cox*, at [42]. This is important because the substance of the three criteria which Lord Reed identified as the most critical – that the tort will have been committed as a result of activity being undertaken by the employee on behalf of the employer; that the employee's activity is likely to be part of the business activity of the employer; and that the employer, by employing the employee to carry on the activity, will have created the risk of the tort committed by the employee – if applied without qualification, are capable of describing work performed by independent contractors. In the High Court of

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Australia in *Sweeney v Boylan* [2006] HCA 19, (2006) 226 C.L.R. 161, the majority said at [13]:

> [T]he bare fact that the second person's actions were intended to benefit the first or were undertaken to advance some purpose of the first person does not suffice …. The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second.

Yet in *Cox*, Lord Reed expressly noted at [29] that the criteria were not to be applied "to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party". This appears to exclude vicarious liability for a traditionally determined independent contractor (see e.g. *Market Investigations Limited v Minister of Social Security* [1969] 2 Q.B. 173). Accordingly, the question to which *Barclays Bank* gives rise is whether Lord Phillips' five criteria were there applied as a self-sufficient test, as opposed to a general approach in which Lord Reed's limitation in *Cox* is recognised so as to exclude vicarious liability for contractors doing a recognisably independent business activity. If the criteria are applied as a rigid test, there is the risk of losing sight of important qualifications recognised by the courts in other cases.

An examination of the cases in which the "akin to employment" test was developed – *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] Q.B. 722, applied by Lord Phillips in *Catholic Child Welfare*, *Cox* and *Armes* – reveals two matters of relevance to this question. First, the tortfeasors for whose acts vicarious liability was imposed in those cases were neither employees nor traditionally understood independent contractors; they defied the conventional binary classification. However, the relationships were characterised by an intensity and depth of interaction rendering them markedly closer in integration and dependency than most standard employment relationships, warranting the imposition of vicarious liability. Second, these cases did not jettison the "exclusion zone" of independent contractors operating a recognisably independent business. Indeed, in *E*, Ward L.J. noted at [69] that it was necessary to see whether the priest in that case was an independent contractor, "for if he is, the law is clear: the employer is not vicariously liable for the torts of his independent contractor".

As Lord Reed noted at [29] in *Cox*, the complexity of modern workplace relationships gives rise to the fact that there may be working relationships in which workers "may in reality be part of the workforce of an organisation without having a contract of employment with it". There is no bright line distinction between the status of an employer and that of an independent contractor in all cases. However, *Barclays Bank* highlights the question whether Lord Phillips' criteria should be applied so as to capture the

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independent contractor who is not in a situation comparable to those in atypical working relationships considered in recent case law, but operating a recognisably independent business on traditional tests.

The Singapore Court of Appeal in *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58 recently observed at [63]-[64] that Lord Phillips' criteria were not intended to effect such a radical change in the law of vicarious liability, but merely represent a recognition that vicarious liability may be imposed outside the class of traditional employment relationships in certain circumstances. *Barclays Bank* demonstrates the urgent need for clarification on this fundamental question.

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THE OUTER LIMITS OF "PERSONAL INJURY"

EARTHA Kitt really needed "the deed to a platinum mine" in her smash hit of Christmas 1953, *Santa Baby*. But platinum can be dangerous. Those who work with its salts are tested regularly for platinum sensitisation. Should they develop it, they can no longer work with platinum salts for fear of allergic reactions. Workers at Johnson Matthey's factory developed platinum sensitisation (as a result, they alleged, of the company's negligence and breach of statutory duty). Unable to continue in their jobs they were either dismissed or moved to other (less well paid) posts within the company. The workers sued for damages. But is platinum sensitisation "personal injury" (in which case the claims would be legally straightforward)? Jay J. and a unanimous Court of Appeal had all held that sensitisation was *not* "personal injury"; that the claims therefore concerned pure economic loss; but that the employer had no duty to protect against such loss (whether in tort or contract). The Supreme Court unanimously allowed the claimants' appeal, classifying platinum sensitisation as "personal injury": *Dryden v Johnson Matthey plc* [2018] UKSC 18, [2018] 2 W.L.R. 1109.

Whether something counts as "personal injury" is usually clear beyond argument, but at the margins proves troublesome. As with so many legal categories the core is indubitable but the penumbra hazy. Ultimately the question turns on the facts of the case (at [48]). Yet two House of Lords decisions were directly on point: *Cartledge v E. Jopling & Sons Ltd.* [1963] A.C. 758 and *Rothwell v Chemical & Insulating Co. Ltd.* [2007] UKHL 39, [2008] A.C. 281. These cases were the twin stars by which Lady Black navigated, delivering the judgment of the Supreme Court; other decisions concerning the boundaries of physical damage *to property*

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