Feature

KEY POINTS

- In *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56, [2013] 2 AC 1, Lord Phillips of Worth Matravers PSC said "the law of vicarious liability is on the move" (para 19). In two decisions, the Supreme Court has decided that the doctrine's freedom of movement should be strictly curtailed.
- In *Various Claimants v Wm Morrisons Supermarket Plc* [2020] UKSC 12, [2020] 2 WLR 941 (*Wm Morrisons Supermarkets*) the Supreme Court reversed the Court of Appeal and held that Morrisons were not vicariously liable for the actions of a disgruntled employee who deliberately disclosed employee data intending to cause Morrisons harm.
- In *Barclays Bank v Various Claimants* [2020] UKSC 13, [2020] 2 WLR 960 the Supreme Court reversed the Court of Appeal and held that a bank was not liable for the sexual abuse by a doctor that it engaged to conduct pre-employment medical examinations.
- These decisions mark a sharp change in direction in the law of vicarious liability, giving the case law on a "frolic of one's own" a renewed significance.
- Financial institutions thus have a life raft in a sea of vicarious liability for the actions of a rogue trader in an unlawful means conspiracy and deceit.
- This change is complemented by a recent Supreme Court judgment in *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 where the court declined to attribute to the company the dishonest mental state of that company's president, who was also chairman, treasurer, a director and the sole shareholder.

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A life raft for financial institutions in the sea of vicarious liability for rogue traders

In *Various Claimants v Wm Morrisons Supermarket Plc* [2020] UKSC 12, [2020] 2 WLR 941 (*Wm Morrisons Supermarkets*) the Supreme Court (SC) reversed the Court of Appeal. The SC held that an employer could not be vicariously liable for the deliberate and criminal actions of a rogue employee who intended to harm his employer. It marks a sharp change of direction in vicarious liability. Financial institutions should reconsider useful case law denying vicarious liability for unlawful means conspiracy. This decision complements *Barclays Bank v Various Claimants* [2020] UKSC 13, [2020] 2 WLR 960 where the SC has tightened the requirements that a company will only be vicariously liable for a person who does work for it if that person is an "employee" or a "quasi-employee". The doctrine of vicarious liability is allied to that of "attribution". In *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2019] 3 WLR 997, the SC declined to attribute to a company the dishonest state of mind of a director and sole shareholder.

FACTS OF *WM MORRISONS SUPERMARKETS*

The defendant, (Morrisons), operates a chain of well-known supermarkets. Its external auditor requested a copy of its payroll data, which included personal and bank data of nearly 100,000 personnel. One of the defendant's internal auditor team, a disgruntled employee who had been the subject of disciplinary action within Morrisons, (the Employee), lawfully had this data on his work computer to facilitate its transfer to the external auditor.

However, he then unlawfully copied this data to his own computer and posted it on a file-sharing website to which links were published elsewhere on the internet. Morrisons learned of the publication and immediately took steps to take the website down.

The claimants were Morrisons' employees. They brought an action against the company for damages for the data breach, alleging the company was "directly" liable for the breaches under the Data Protection Act 1998, (DPA). The claimants also alleged that Morrisons was vicariously liable for the data breach by the Employee. The judge, Langstaff J, rejected the "direct" liability argument but accepted the vicarious liability one. The Court of Appeal dismissed the appeal. In doing so they upheld the judge's conclusion that vicarious liability was not excluded by the wording of the DPA.

LEGAL BACKGROUND TO THE APPEAL IN *WM MORRISONS SUPERMARKETS*

In the Court of Appeal and the SC there was much analysis of the very recent decision of the SC on an employer's vicarious liability for intentional harm of an employee, *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11, [2016] AC 677. In that case, the same company, Morrisons, was held liable for the deliberate wrongdoing of a petrol station employee who assaulted a customer in the forecourt following an altercation in the petrol station shop. The SC rejected the claimant appellant's argument that the test for vicarious liability should be broadened to "whether a reasonable observer would have considered the employee to be acting in the capacity of a representative of the employer at the time of committing the tort" (§8). However, it held that Morrisons were liable because the initial rude exchange in the shop was within the employee's field of activities and "[w]hat happened thereafter was an unbroken sequence of events … a seamless episode" (§§44-47).

Lord Toulson emphasised at §48 that the employee's "motive is irrelevant. It looks

obvious that he was motivated by personal racism rather than a desire to benefit his employer's business, but that is neither here nor there".

The Court of Appeal in *Wm Morrisons Supermarkets* relied on *Mohamud* to conclude that the Employee's actions formed part of a "seamless and continuous sequence" or "unbroken chain" (§74). Thus, it held that an employer could be held vicariously liable for an employee's actions that intended to cause harm to the employer, not the claimant, that motive was irrelevant and that there is no exception where the motive was to cause harm to the employer rather than the claimant (§§75-76).

THE SUPREME COURT JUDGMENT IN *WM MORRISONS SUPERMARKETS*

Lord Reed gave the judgment of the SC. At the outset he stated that "misunderstandings" had arisen since the decision in *Mohamud*. His Lordship noted that the potential for vicarious liability in this case arose out of a relationship of employer and employee. He analysed many cases preceding *Mohamud*. He concluded that the "general principle … applicable to vicarious liability arising out of a relationship of employment: [is that] the wrongful conduct must be so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment" (§23). He described that test as "authoritative" at §25.

However, Lord Reed stated that:

> "The general principle … has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words 'fairly and properly' are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court …" (§24)

The court thus maintained the two-stage analysis that:

- it is necessary to identify the acts the employee was authorised to do; and
- the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to determine whether the employer is to be held liable. (§25).

Lord Reed said that *Mohamud* was not intending to depart from established principles (§26).

The court emphasised the importance of the capacity in which the employee was working and that it was "misleading" to read the statement in *Mohamud* that "motive is irrelevant" in isolation (§28). Further, it was "plainly important" whether the employee was acting on his employer's business or "acting for personal reasons" (§29). The judge and the Court of Appeal had therefore "misunderstood the principles governing vicarious liability in a number of relevant respects" (§31). Thus, "a temporal or causal connection does not in itself satisfy the close connection test" and it was "highly material" whether the employee was acting on his employer's business or for purely personal reasons (§31). The fact that the employee's job gave him the opportunity to commit the tort was not sufficient to warrant the imposition of vicarious liability (§§34-35). The court considered many cases where an employee engaged "in an independent personal venture" or "frolic of his own". It held that the Employee was not acting in the course of his employment when disclosing the personal data, so that Morrisons were not vicariously liable (§§37-47).

THE SUPREME COURT JUDGMENT IN *BARCLAYS BANK*

The issue in *Barclays Bank* was whether the bank was liable for a doctor who had sexually abused patients during their pre-employment medical examinations. The doctor was not an employee, nor was he paid a retainer, but was paid for each report. The examinations took place in a consulting room in the doctor's house. The doctor had died so the claimants sought damages from the bank on the basis of vicarious liability. Both the High Court and the Court of Appeal found the bank liable but the Supreme Court found in the bank's favour on the basis that the doctor had been carrying on business on his own account as a medical practitioner and was neither an employee nor "anything close to an employee".

The judgment of Baroness Hale (with whom the other Justices agreed) analysed the preceding case law at §§10-26. It concluded at §27 that:

> "The question therefore is, as it has always been, whether the tortfeasor 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 'incidents' identified by Lord Phillips [in the *Christian Brothers* case [2013] 2 AC 1] may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability."

At §28 the SC concluded, on the facts, that the doctor was not within the employment of the bank.

> "Clearly, although Dr Bates was a part-time employee of the health service, he was not at any time an employee of the bank. Nor, viewed objectively, was he anything close to an employee. He did, of course, do work for the bank. The bank made the arrangements for the examinations and sent him the forms to fill in. It therefore chose the questions to which it wanted answers. But the same would be true of many other people who did work for the bank but were clearly independent contractors, ranging from the company hired to clean its windows to the auditors hired to audit its books. Dr Bates was not paid a retainer which might have obliged him to accept a certain number of referrals from the bank. He was paid a fee for each report. He was free to refuse an offered examination should he wish to do so. He no doubt carried

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his own medical liability insurance, although this may not have covered him from liability for deliberate wrongdoing. He was in business on his own account as a medical practitioner with a portfolio of patients and clients. One of those clients was the bank."

COMMENTS

Prior to these decisions, the circumstances in which vicarious liability would be imposed had relentlessly expanded over the last twenty years. Both Court of Appeal decisions had pushed the logic beyond its limits. The two Court of Appeal results were hardly "social justice", which Lord Toulson said in *Mohamud* was the underlying principle of vicarious liability (§44). Under the guise of correcting a "misunderstanding" of *Mohamud*, the SC in *Wm Morrisons Supermarkets* has reaffirmed the limits of the doctrine. The SC made clear in both that case and *Barclays Bank* that the two-stage test remains. Vicarious liability is not simply an evaluative judgment for the court (as it appears to have become in the case of illegality). Yet, despite the instruction in *Wm Morrisons Supermarkets* that judges should identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before them, ensuring that they exercise "principle" will remain difficult.

That is why the emphasis in Lord Reed's judgment in *Wm Morrisons Supermarkets* on the "frolic of one's own" case law is important. Lord Reed reaffirms the doctrine's significance. It has not been lost in an ever-broadening sea of vicarious liability. When it is asserted that an employer is vicariously liable for an employee, a basic question remains: did the tortious acts of the employee constitute an "independent personal venture", even if there is some temporal connection with previous, non-tortious acts that were within the scope of the employee's authorised employment.

The renewed emphasis on this doctrine will be of particular interest to financial institutions faced with a claim based on the acts of a rogue trader. Take the following scenario:

- An employed rogue trader (R), employed by a financial institution (F), enters into an unlawful means conspiracy with a third party (X) to defraud the claimant (C).
- R provides X with soft copy *pro forma* banking documents pursuant to a contract between R's financial institution F and X, entered into by R solely on behalf of F.
- X uses these *pro forma* documents to create forgeries to defraud C.
- R is thus a party to the conspiracy but is not the party whose actions are the unlawful means required to cause the loss and thus make the conspiracy actionable.
- Question: Is F vicariously liable to C for R's part in the conspiracy?

In light of the SC's judgment in *Morrisons*, the reasoning in *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* in both the Court of Appeal [1998] 1 Lloyd's Rep. 19 and the House of Lords [2000] 1 A.C. 486 will have renewed importance.

The case was complex. It concerned a corrupt employee of the Export Credits Guarantee Department (ECGD), Mr P, who assisted Mr C to defraud the claimant bank. Mr C persuaded Mr P to authorise the underwriting of ECGD "guarantees", which Mr C then used as "guarantees" to support fraudulently drawn bills of exchange with forged acceptances by imaginary buyers. Mr C defrauded the claimant bank by persuading it to purchase the "accepted" bills, which it thought were part of export contracts that were, *in fact*, fictitious. Mr P's issue of the guarantees was within the course of his employment and that was not itself a wrongful act; rather, it was Mr C who deceived Credit Lyonnais. However, it brought an action against the ECGD asserting (amongst other claims) that the ECGD was vicariously liable for the action of Mr P in providing the ECGD guarantees.

The Court of Appeal held that it was inappropriate to infer that there was any conspiracy between Mr P and Mr C (p 40, col 2 – p 41, col 1). Hobhouse LJ also stated at p 41, col 2 that, in any case, counsel for the bank had to accept that conspiring to defraud a third party was outside the scope of employment of Mr P. Nor was Mr P "held out" to the bank as having any authority to do such a thing. Hobhouse LJ therefore considered that any entry by Mr P into an unlawful means conspiracy would be a classic "frolic of one's own" case. Such conduct could not be regarded as falling within the course of employment, other than in "exceptional circumstances". Those are difficult to envisage.

The appellant did not pursue conspiracy in the House of Lords. Instead it based its claim on the tort of deceit, alleging that both Mr P and Mr C were joint tortfeasors. Lord Woolf MR gave the leading speech. He characterised the question of principle at p 490 as:

> "Where A becomes liable to B as a joint tortfeasor with C in the tort of deceit practised by C on B on the basis that A and C have a common design to defraud B and A renders assistance to C pursuant to and in furtherance of the common design, does D, A's employer, become vicariously liable to B, simply because the act of assistance, which is not itself the deceit, is in the course of A's employment with D?"

Lord Woolf MR stated, at p 495, that the employer (D), will only be vicariously liable for the acts of the employee (A) if A's acts constituted a tort and were committed within the course of A's employment. His Lordship held that the actions of Mr P in issuing the "guarantees" were not tortious, so that the ECGD, his employer, could not be vicariously liable to the bank: p 500.

It is thus clear that the employer will not be vicariously liable if the acts of the employee for which he is responsible do not in themselves amount to a tort, but only amount to a tort when linked to other acts which were not performed in the course of the employee's employment. For the employer to be vicariously liable, *all* the features of the wrong necessary to make the employee's acts a tort have to occur in the course of employment. (See *Clerk & Lindsell, on Torts*, 22nd Ed, §6-27, *Dubai Aluminium v Salaam* [2002] UKHL 48, [2003] 2 AC 366, §§39, 114

Biog box

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and *Frederick v Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431, §74).

Taken together, the financial institution F could have two defences to a claim for vicarious liability of a rogue trader, R:

- First, R was not employed to enter into an unlawful means conspiracy and the simple fact that their work gave them the opportunity is not sufficient to establish vicarious liability. It was a clear "frolic of one's own".
- Second, in the posited scenario, not all of the elements of the tort were committed in the course of R's employment. Whilst being a party to a conspiracy, even if not personally actioning the unlawful means, could be sufficient to render R a joint conspirator/tortfeasor, it is clear that someone (in this case, X) has to take action by unlawful means for the conspiracy to become actionable because otherwise there would be no damage to the claimant. Indeed, to impose vicarious liability simply because the employee entered into the agreement would go beyond 'social justice' because the employee's actions are contingent on unlawful means committed by another outside the course employment; thus, all of the actions necessary for the agreement to become an actionable conspiracy were not in the course of employment, as required by *Credit Lyonnais*. Thus, the financial institution would have a further argument that, in this scenario, the unlawful means were not actioned in the course of any employee's employment, so that F should not be vicariously liable for R's simple agreement to conspire.

F may have a further defence if it did not pay R a salary/retainer but rather was in a profit-sharing arrangement under which F provided the infrastructure R required (for example, support staff and a trading platform) but R "ran his own book" (ie made all of his own trading decisions without reference to the bank and had his own clients). In this scenario, F may be able to rely on *Barclays Bank* to argue that R was not an employee or quasi-employee at all but rather was in business on his own account.

The concept of vicarious liability and that of the attribution of actions of an employee to the employer company are related but quite distinct. The first is a "rule of law" in which the principal is held strictly liable for the wrongdoing of someone else; the second involves "attributing" the wrongdoing of a human agent to a legal entity, the company: (see *Bilta (UK) Ltd v Nazir* [2016] A.C. 1, in the judgment of Lord Sumption JSC at §70). If, in our hypothetical case above, R were employed in a senior position within F, there may also be distinct questions of whether R's acts could be "attributed to" F. In cases where financial institutions are met with the argument that the action of a director is to be "attributed" to the company, they could be comforted by another recent Supreme Court decision in this area, *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2019] 3 WLR 997.

In that case, Mr S was the president, chairman, treasurer, a director and the sole shareholder of Singularis, then a company in financial difficulties. (It subsequently went into liquidation). Mr S dishonestly directed payments due to the company to other business accounts in the defendant bank, in which Mr S was interested. The liquidators sought to recover the payments and claimed against the bank in dishonest assistance and negligence. The bank argued, in its defence, that Mr S's dishonest mind could be attributed to the company such that it had caused its own loss and/or could not rely on its own dishonesty (thus illegality) to found the action.

Baroness Hale gave the leading judgment. Her Ladyship re-iterated the basic legal principle that a properly incorporated company had a legal personality separate from that of its subscribers, shareholders and directors (citing *Saloman v Saloman* [1897] AC 22).

Her Ladyship then noted at §33 that the Court of Appeal were correct to hold that this was not a "one man company" (§33). Lady Hale held that:

- "there is no principle of law that in any proceedings where the company is suing a third party for breach of a duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company";
- "the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant"; and
- on the facts of this case, S's actions could not be attributed to the company (§§34-40).

This is a welcome clarification on the law of attribution and provides some reassurance for financial institutions that they will not, necessarily, be attributed with the dishonest mind of their senior management. Rather, it will turn on the particular purpose of the attribution and the precise role that the individual played within the financial institution.

CONCLUSION

In the *Wm Morrisons Supermarkets* and *Barclays Bank* decisions the SC has provided a life raft in the perilous sea of vicarious liability. It has re-emphasised the importance of the doctrine of the "frolic of one's own" and reaffirmed that there can be no vicarious liability where the tortfeasor is in "business on their own account". Further, in *Singularis* the SC has identified limits in the related area of attribution. Taken together, a financial institution's vicarious liability for a rogue trader, or the attribution of the rogue trader's acts or guilty mind to it, will turn on the precise facts of its case focusing on the exact parameters of their employment, the employee's *allegedly* tortious actions and the practical role they played in the the financial institution. ■

Further Reading:

- English law of vicarious liability: off on a frolic of its own – or the flight from principle? (2020) 1 JIBFL 15.
- Financial institutions beware: cybersecurity lessons from the *Wm Morrisons Supermarket* case (2018) 11 JIBFL 693.
- LexisPSL: Vicarious liability in the course of employment: the close connection test.