JOHN MACONACHIE QC
Barrister

Vicarious Liability for Intentional Criminal Acts

Courts, probably daily, use the device of vicarious liability to "transfer" or attribute to A legal liability for harm ***negligently*** caused to B by the acts or omissions of C.

In *The Catholic Child Welfare Society v Various Claimants and the Institute of the Brothers of the Christian Schools* [2012] UKSC 56; [2013] 2 AC 1 Lord Phillips of Worth Matravers famously said at [19]: "The law of vicarious liability is on the move".

In *Prince Alfred College Incorporated v ADC* (2016) 258 CLR 134 at [81] the plurality of the High Court, perhaps somewhat cautiously, identified "the relevant approach" appropriate to be adopted in "cases of this kind", that is, sexual abuse of a minor by a person in authority, such as a schoolteacher, or, arguably more broadly, cases in which A is sought to be made legally liable for harm to B by the ***intentional criminal acts*** of C, being acts antithetical to all of the values held by A, and acts which A would never authorise or condone.

The High Court has said that vicarious liability is an "unstable principle" (*Prince Alfred College* at [39]) and on a number of occasions it has also said that a "fully satisfactory rationale for the imposition of vicarious liability" has been "slow to appear in the case law" (see for example *Prince Alfred College* at [39] and *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 166 [11]).

The tsunami of claims against a wide variety of teaching, religious and other institutions (e.g. the military) and, perhaps even more sadly, family members, has brought into sharp focus the need to consider attribution of legal liability for intentional criminal acts in a variety of situations.

The problems are not confined to areas of sexual abuse, or to personal injury claims more broadly. They arise in everyday commercial activities, and have done for more than a century.

In *Lloyd v Grace Smith* [1912] AC 716, a solicitor was held liable for fraud by his managing clerk when dealing with the solicitor's client: that case shows that the problem has been around, and recognised, for over 100 years.

In *Morris v C. W. Martin & Sons Ltd* [1966] 1 QB 716, in which the bench was comprised of Lord Denning MR and Lord Justices (later Lords) Diplock and Salmon, a mink fur which was delivered to the defendants for cleaning was stolen by an employee in the course of his employment: legal responsibility for the theft was visited upon the employer, notwithstanding that the act giving rise to the loss was an intentional criminal act which the employer would never have condoned. The case was decided on bailment principles but is frequently considered in the context of vicarious liability.

In the recent past there have been some interesting articles touching upon the doctrine of vicarious liability which will be of interest to those with problems in this dynamic and, to some extent, not well understood area of the law:

- *Availability of vicarious liability for intentional abuse committed by foster carers against foster children* (2019) 25 TLJ 252
- *The travails of vicarious liability* (2019) 135 LQR 7
- *Parent company duty of care to third parties harmed by overseas subsidiaries* (2019) 78 CLJ 486
- *Challenging conceptions of accessory liability in private law* (2019) 78 CLJ 383
- *A historical examination of vicarious liability: a "veritable Upas tree"?* (2019) 78 CLJ 640

The articles traverse a wide range of issues that arise in this, and cognate, areas of discourse and proceed from the practical to the arcane; there is something for everyone.

And on 1 April the Supreme Court of the United Kingdom gave judgment in two important cases concerning vicarious liability which will repay reading.

- *Barclays Bank plc (Appellant) v Various Claimants (Respondents)* [2020] UKSC 13
- *WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondents)* [2020] UKSC 12