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## Placing the blame

Carol Dalton reviews the state of vicarious liability in 2017



Our understanding of how vicarious liability applies to claims has been transformed through the key decisions of the last two years. In 2016 the Supreme Court held that vicarious liability applied to the negligent actions of a prisoner working in prison kitchen (*Cox v MoJ* [2016] UKSC 10) and to the actions of an employee who viciously assaulted a customer (*Mohamud v Morrison Supermarkets* [2016] UKSC 11). There was much discussion following these decisions about whether the doctrine was still 'on the move,' and indeed it was. However, few could have predicted that the development of the doctrine could have continued on such a steep incline in 2017. Against this background it is important to understand the key decisions made and the implications.

### 2017 decisions

In July 2017, the High Court held that a defendant bank could be vicariously liable for assaults perpetrated by a doctor, who was not directly employed by the bank. The doctor had been appointed to examine job applicants and new employees, to assess their medical fitness (*Various Claimants v Barclays Bank PLC* [2017] EWHC 1929).

However, the case which had the biggest impact this year was handed down by the Supreme Court in October 2017. The decision involved a local authority that was held vicariously liable for abuse perpetrated by foster carers against a child in their care (*Armes v Nottinghamshire County Council* [2017] UKSC 60).

While both decisions demonstrate that the scope of the doctrine is wider than previously understood, the test that was applied by the courts remains largely unchanged.

**“It is far from clear that we have reached the end point of the development of this doctrine”**

### Application of the two-stage test

Stage one requires analysis of the relationship between the defendant and the individual who has committed the act or omission. This is important where there is not a clear-cut employer/employee relationship. Indeed, there were question marks over whether the relationship fulfilled the five elements that form stage one of the test—however, the Supreme Court placed weight on various factors in concluding that the test was met, as summarised below:

- ▶ *Is the defendant more likely to have the means to be able to compensate the victim and can they be expected to have insured against the risk?* The local authority would be able to satisfy a judgment, whereas the foster carers were unlikely to be able to do so.
- ▶ *Was the act committed as part of an*

*activity being undertaken on behalf of the employer?*

- ▶ *Was the activity part of the business activity of the employer?* The local authority was under a statutory duty to provide accommodation, maintenance and care for which they recruited, selected and trained foster parents. They also paid allowances and the fostering was undertaken with co-operation between the local authority and the foster carers. In *Cox v MoJ* the court established that it does not need to be a commercial arrangement to meet the test.
- ▶ *Did the employer by employing the employee create the risk of the tort?* The placement of children in the care of foster parents creates a relationship of authority and trust in circumstances where close supervision cannot be exercised by the local authority, which does render children vulnerable to abuse.
- ▶ *The employee will have been to a greater or lesser degree under the control of the employer.* The foster family had control over the day to day organisation and management of the household. However, the local authority continued to have powers of approval, inspection, supervision and removal.

Stage two of the test of vicarious liability was not developed in the key 2017 cases. This is the aspect which addresses the relationship between the act or omission and the employment—often referred to as the 'close connection test'. However, that is not to underplay the significance of it.

### What does the future hold?

The implications of these decisions widen the scope for defendants to be held liable for acts or omissions to a much greater extent than could have been envisaged only a few years ago. While the judiciary recognises that vicarious liability cannot be 'infinitely extendable', only this month the judgment in *Various Claimants v Morrisons Supermarkets PLC* [2017] EWHC3113 (QB) confirmed that vicarious liability extends to cover cases arising from data protection breaches (albeit permission to appeal has been given). It is therefore far from clear that we have reached the end point of the development of this doctrine.

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