FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE 8th February 2022

Essex CHAMBERS

Hawkins Leaders in forensic investigation 40 YEARS 1980 • 2020

Vicarious Liability

Hughes v Rattan (2022) EWCA Civ 107

The claimant/respondent received dental treatment on a number of occasions at a dental practice ('the practice') of which the defendant/appellant was then the owner and sole principal dentist. The claimant was not treated by the defendant personally but by six different dentists. She alleged that the treatment by four of them was negligent. Three of them were self-employed Associate Dentists, and the preliminary issue raised on this appeal was whether the defendant was liable for their acts or omissions by virtue of either a non-delegable duty of care or vicarious liability.

The trial judge accepted that at all times the claimant considered that she was a patient of the practice. The judge also found, and it was not disputed, that the Associate Dentists had clinical freedom in terms of their clinical decision-making, including the content of any treatment plan they proposed and how they carried it out. The judge found for the claimant on both grounds: non-delegable duty of care and vicarious liability.

The Court of Appeal held that the judge was clearly right to hold that the defendant was under a non-delegable duty of care to the claimant in respect of the treatment she received at the practice. She was a

IN BRIEF

Although the defendant owner of a dental practice had a non-delegable duty of care to the claimant in respect of allegedly negligent dental care provided by self-employed Associate Dentists, he was not also vicariously liable for their actions. The test for vicarious liability set out in *Barclays Bank (2020)* was not met.

patient of his practice, not just in layman's language but as a matter of law.

The Personal Dental Treatment Plan signed by the claimant named the defendant as the provider of the treatment and stated that "the dentist named on this form is providing you with a course of treatment". No other dentist was named on the form and there was no section of the form in which anyone other than the provider could be identified.

This document was also consistent with the terms of the Associates' Agreements under which patients were described as "patients of the Practice". It was very significant that the agreements subjected each Associate Dentist to stringent restrictive covenants prohibiting them from treating, let alone soliciting, anyone who had been a "patient of the Practice" in the preceding 12 months, whether or not the individual Associate Dentist had ever treated, spoken to or even met that patient.

The judge was also right to find that the claimant satisfied all the factors identified in *Woodland (2014)* as giving rise to a non-delegable duty of care: -

(1) In the first factor "patient" must include anyone receiving treatment from a dentist. It was not suggested that the court there was using the term "patient" in the old sense (that is to say someone who lacked capacity and would nowadays be described as a protected party); nor was there anything in that judgment to suggest that the term was confined to accident and emergency patients or to those admitted to a hospital overnight as in-patients.

(2) Turning to the second factor, an antecedent relationship between the claimant and the defendant was established at the latest on each occasion when the claimant signed the Personal Dental Treatment Plan, which she was required to do before any NHS treatment was carried out. That relationship placed the claimant in the actual care of the defendant, not because he was a dentist himself but because he was the owner of the practice. It would have done likewise if the practice had been run by a company or owned by a partnership. The duty was, by virtue of the antecedent relationship, personal to the defendant. "The work required to perform such a duty may well be delegable and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own."

(3) As for the third factor, the claimant had no control over how the defendant chose to perform his obligations, whether personally or through employees or third parties. She could express a preference as to which Associate Dentist she would like to see her, but no more than that. She had control in the sense that she could refuse to be seen by anyone other than Dr X, or could refuse to be treated at all, but that applied to all dental patients and all hospital out-patients, at any rate those with full capacity.

Although it was strictly unnecessary to decide the second ground, as this was in the nature of a test case, the Court of Appeal also dealt with the issue of vicarious liability.

The most significant question for present purposes was whether the Associate Dentists were working as part of their own independent businesses or as an integral part of the defendant's business when they provided dental treatment at the practice.

The defendant's case on vicarious liability was that the judge attached too much weight to factors pointing towards his relationship with the Associate Dentists being akin to employment and too little weight to the factors pointing the other way.

The judge regarded the critical question as being the one asked in *Cox v Ministry of Justice (2016),* namely whether the alleged tortfeasor "carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party)". If that had been the last word on the subject from the Supreme Court, the Court of Appeal would have upheld the judge's finding of vicarious liability, essentially for very similar reasons to those that gave rise to a non-delegable duty of care.

However, *Cox* was not the last word on vicarious liability from the Supreme Court. In *Barclays Bank (2020)* the Supreme Court had said "there is nothing in the trilogy of Supreme Court cases discussed above [including *Cox*] to suggest that the classic distinction between employment and relationships akin or analogous to employment, on the one hand, and the relationship with an independent contractor, on the other hand, has been eroded." "(T)he 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".

Thus following *Barclays* the critical question now appeared to have reverted to being whether the alleged tortfeasor's relationship with the defendant could properly be described as being "akin" (or "analogous") to employment, with the focus being on the contractual arrangements between tortfeasor and defendant. Although the relationship between the defendant and the Associate Dentists was closer to the "akin to employment" line than that between Barclays and Dr Bates in that case, the *Barclays* test for vicarious liability was not met in the present case.

(1) The Associate Dentists were free to work at the practice for as many or as few hours as they wished;

(2) They were also free to work for other practice owners and business, and some in fact did so;

(3) The defendant had no right to control, and did not control, the clinical judgments they made or the way in which they carried out treatment;

(4) They chose which laboratories to use and shared the cost of disbursements to laboratories;

(5) They were responsible for their own tax and national insurance payments, and were treated as independent contractors by HMRC;

(6) Although the defendant took most of the financial risk by virtue of running the premises and paying ancillary staff, they shared the risk of bad debts;

(7) They were required to carry personal professional indemnity insurance and to indemnify the defendant against any claims made against him in respect of their treatment of patients;

(8) They had to pay for their own professional clothing and professional development, and for any equipment they wished to use which was not provided by the Practice;

(9) There was no disciplinary or grievance procedure.

The full judgment may be found at: Hughes v Rattan [2022] EWCA Civ 107 (04 February 2022) (bailii.org)