**Vicarious Liability for Sexual Assaults – Extending the Scope?**

In [Various Claimants v Barclays Bank PLC](http://www.bailii.org/ew/cases/EWHC/QB/2017/1929.html), the High Court has ruled that a bank was vicariously liable for sexual assaults committed by a doctor during medical examinations it required as part of a job application process between 1967 and 1984.

This case involved 126 claims by former job applicants and existing employees, and the Court applied the two-stage test: (i) Whether the relationship was one of employment or “akin to employment”, and (ii) whether the assaults had a sufficiently close connection to the employment or quasi-employment.

In answering the first question, the Court applied the five criteria previously identified by the Supreme Court (in Catholic Child Welfare Society v Various Claimants [2012] and Cox v Ministry of Justice [2016], acknowledging that the first and fifth were not as significant. It was found that:

* (a) the bank was more likely to have the means to compensate the victim than the doctor (who had died in [X] and whose estate had been distributed);
* (b) the assaults had been committed as a result of activity (the medical examination) being taken by the doctor on behalf of the bank;
* (c) the medical examination was part of the business activity of the bank, as it enabled the bank to be satisfied that prospective employees were physically suitable for work and the workforce was an intrinsic part of their business activity;
* (d) the bank had created the risk of the assaults as they directed the doctor to perform physical examinations and the Claimants had no choice as to the doctor;
* (e) the doctor was, to a greater or lesser degree, under the control of the bank – although he performed the examinations at home, organised his own professional life and carried out other activities, the bank could direct *what* he did. They identified the questions to be asked and the physical examinations to be carried out by the doctor – was more important than whether they directed him as to *how* he carried out his work (which likely wouldn’t be done even if the doctor was an employee).

The Court went on to find that there was a sufficiently close connection - the assaults were inextricably interwoven with the carrying out of the doctor’s duties as they occurred during the course of the directed medical examinations and the Claimants were only in physical proximity to the doctor by reason of the examination.

Finally, the Court found that it was fair just and reasonable to impose vicarious liability – although the doctor’s estate could have met the claims if made earlier, the ability of any person to make a claim of sexual abuse was never straightforward and failing to impose liability would remove the Claimants’ sole legal recourse. Although the claims had now been made many years after the alleged abuse, this was a point on limitation which was yet to be decided.

This case appears to extend the scope of vicarious liability further than ever before – any employer hiring someone to carry out medical examinations may, on the basis of this decision, risk being held vicariously liable for any wrongdoing. This continues along the path of treating some of those who appear to be independent contractors as quasi-employees and applies a ‘control’ test that may seem alien to many employment practitioners, with a focus on accountability.

Furthermore, the imposition of liability, at least partly, on the basis that the Claimants’ sole recourse was the bank, which was the consequence of their delay in bringing the claims, may seem like it is penalising the bank. However, the negative impact of this for bank may well be mitigated by the subsequent decision to be made on limitation, at which point the Court will have to consider the prejudice to the bank of the claims being made decades after the assaults took place.

The Defendant’s solicitors say that they are [currently considering their position](https://www.hilldickinson.com/insights/articles/death-independent-contractor-high-court-extends-concept-vicarious-liability-even), which may well mean that the case will be appealed.

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