Vicarious liability and subcontractors

By Sam Dorne

Liability in tort depends upon proof of a personal breach of duty, with one true exception, vicarious liability. The law of negligence is generally fault based; a defendant is personally liable only for the defendant's own negligent acts and omissions. The law does not, in the ordinary course, impose personal liability for what others do or fail to do. In the exceptional situations where a non-delegable duty is imposed, it is the discharge of the duty that is non-delegable. As Tipping J noted in *Cashfield House*,[1] performance of the duty can be delegated, but responsibility for that performance cannot.

Vicarious liability in tort requires a relationship between the defendant and the wrongdoer, and a connection between that relationship and the wrongdoer's act or default, so that it is just that the defendant should be held legally responsible to the claimant for the consequences of the wrongdoer's conduct.

In *Woodland*,[2] the Court noted that the boundaries of vicarious liability have expanded to embrace tortfeasors who are not employees of the defendant, but who stand in a relationship which is sufficiently analogous to employment. The boundaries have not extended to include truly independent contractors. Vicarious liability is constrained by the need to find a prerequisite relationship between the primary tortfeasor and the defendant. By contrast, imposition of a non-delegable duty focuses on the relationship between the defendant and the victim of the tort.[3]

The English courts have once again looked at the issue of vicarious liability involving sub-contractors in the case of *Hughes v Rattan* [2022] EWCA Civ 107.

The Court of Appeal provided helpful obiter comments on the first limb of the test for vicarious liability, namely the requirement that the relationship between the wrongdoer and the defendant be factually one of employer/employee or akin to such a relationship. The Court of Appeal ultimately found against the defendant. Although there was no vicarious liability, there was a non-delegable duty, a breach of which made the defendant liable for the actions of sub-contractors.

Background

The claimant alleged that she received negligent dental treatment from three dentists on various occasions between August 2009 and December 2015. Dr Rattan (the defendant) was the owner and operator of the dental practice where the claimant attended.

1 *Cashfield House v D & H Sinclair Limited* [1995] 1NZLR 452 (HC).
2 *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537.
3 *A Builder's Duty of Care – When Should it apply to the Directors and Employees of Companies involved in the Creation of Defective Buildings*? Grant Brittain (2017).

The claimant was not treated by the defendant but rather by three associate dentists. The associates were contracted through associate agreements based on the British Dental Association standard contract. They were responsible for the standard of their own work, personally held indemnity cover for negligence claims, and were responsible for their own tax, amongst other things.

The High Court had to determine whether the defendant was liable for the acts or omissions of the associates by virtue of either a non-delegable duty of care or vicarious liability. The High Court found that both vicarious liability and a non-delegable duty were present. Therefore the claim could be made through either of these mechanisms.

That decision was appealed to the Court of Appeal.

Non-delegable duty of care

The case illustrates that the tests for non-delegable duty of care and vicarious liability are distinct and separate tests.

Non-delegable duty of care is a matter of the relationship between the claimant and the defendant and the control that the defendant has over the claimant. It is not a matter of control over the party carrying out the work. A non-delegable duty of care can exist even where the relationship between the defendant and the independent contractor carrying out the work is insufficiently akin to employment to give rise to vicarious liability.

When analysing the facts, the Court of Appeal agreed with the High Court that a non-delegable duty was present. As such, the claim could proceed against the defendant.

Vicarious liability finding

The Court of Appeal could have left it there; however, it went on to decide whether the defendant was also vicariously liable for the associates' actions. In this, the Court of Appeal differed from the High Court.

The defendant argued that the High Court erred in law in making a finding that vicarious liability existed. They argued that it failed to consider various factors consistent with the associates being independent contractors when determining whether the relationship between the defendant and the associates was akin to employment.

The Supreme Court decision in *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 was considered. In *Barclays Bank* the issue was whether the bank was vicariously liable for the sexual assaults committed by a late doctor. He was a medical practitioner with a *portfolio practice*. That entailed work as an employee in local NHS hospitals, undertaking medical examinations for emigration purposes, work for insurance companies, a mining company and a government board, and undertaking medical assessments and examinations of employees or prospective employees of the bank. The bank did not retain the doctor but paid a fee for each report.

The Supreme Court found that the bank was not vicariously liable. The critical question was whether the relationship with the defendant could properly be described as being akin (or analogous) to employment, with the focus being on the contractual relationship between the parties and that factors both for and against the relationship, being one akin to employment, should be balanced together.

In applying *Barclays Bank,* the Court of Appeal found the factors **for** the relationship were:

- the fact that the practice controlled the opening hours of the practice premises and equipment;
- the practice had a responsibility to provide contracted NHS services through the dentists; and
- the dentists were contractually obliged to follow the policies and procedures of the practice (but these policies and procedures were found not to constitute substantive control of the dentists).

The factors **against** the relationship were:

- the dentists were not required to be exclusive to the practice or to work any minimum hours; they were free to work as little as they wanted – or, for other practices, that the defendant had no right to control the treatment provided;
- they were responsible for their own tax payments;
- that they shared the liability for bad debts;
- that they were required to have in place their own indemnity arrangements; and
- they had to pay for their own professional clothing and professional development.

In weighing up these competing factors the Court of Appeal found that the test was not met. The Court was particularly swayed by the independence of the dentists from the practice. As such, it was held that the relationship was not akin to employment, and so vicarious liability did not arise.

Analysis

The decision on vicarious liability has adopted the common-sense approach taken by the Supreme Court in the *Barclays Bank* case, namely, that an independent contractor is an independent contractor. In other words, to be in a position to be vicariously liable for the actions of another in this setting, there is a clear requirement that the relationship between the transgressor and the defendant be factually one of employer/employee or akin to such a relationship.

The judgment will therefore be welcomed by businesses which utilise independent contractors.

However, businesses will still need to be alive to the issue of their non-delegable duties. For example, in New Zealand, courts have held non-delegable duties exist in many situations, including in relation to the construction of houses, flats, or units in unit title developments.[4] Just because a party may not be liable for the actions of another separate contractor, they may still be liable if they owe a non-delegable duty of care to another party.

Conclusion

For a number of years, the English courts have been clarifying the extent to which employers are held accountable through vicarious liability. Arguably, there has been a rolling back of the broader liability attaching to a contractor, as can be seen in the *Rattan* case, which will be welcome news to many. However, care must be taken, especially if the duty of care is attached to a non-delegable duty which would still be a gateway for potential claims.

ABOUT THE AUTHORS

Sam Dorne is a member of the NZDRC's Knowledge Management team and provides technical support to the Building Dispute Tribunal. Sam recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

4 *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 at 591/17–593/1; *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC); *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-404-3535, 22 December 2008; *Body Corporate 183523 v Tony Tay & Associates Ltd* HC Auckland CIV-2004-404-4824, 30 March 2009; *Body Corporate 191608 v North Shore City Council* HC Auckland CIV-2008-404-002358, 19 February 2009 (in which case the developer was also designer and builder and as such owed duties of care to the owners of the units); *Keven Investments Ltd v Montgomery* [2012] NZHC 1596 ; and *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511.