Drawing the line: the limits of vicarious liability and data-protection liability

When the case of *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12 reached the Supreme Court, it could have gone either way. Both the High Court and the Court of Appeal had found the defendant employer liable for the misdeeds of its employee. The case followed a string of other claimant-friendly decisions on vicarious liability. But the law was unsettled and there had to be a limit to employers' liability.

Ultimately, the Supreme Court reversed the decisions below and found for the defendant, Morrisons. This article explains how it reached that conclusion and what the implications are for future cases on vicarious liability, including those involving data protection. Only one thing, however, is clear: it remains hard to draw the line between cases in which the employee's wrongdoing is the employer's responsibility, and cases in which the employee alone is liable.

Background

The facts were straightforward. An employee, who was an internal auditor, was entrusted with passing payroll data relating to Morrisons' whole workforce to an external auditor. Unfortunately, he was extremely unhappy with his employer following a disciplinary procedure. He decided to vent his anger by disclosing that confidential information on a public website, which he drew to the attention of newspapers. His motivation was an irrational desire to damage Morrisons with little thought as to the consequences for himself (namely, eight years' imprisonment).

As intended by the rogue employee, his fellow employees complained to Morrisons about the data breach. This case was a class action brought by 9,263 of them. They relied on three causes of action: a statutory wrong under the Data Protection Act 1998 (**DPA 1998**), the equitable wrong of breach of confidence, and the recently discovered tort of misuse of private information. They asserted both primary and vicarious liability against Morrisons.

At first instance, the claimants won on vicarious liability (but not on primary liability). The Court of Appeal upheld this decision. Both decisions placed great weight on the judgment of Lord Toulson in an earlier case involving the same defendant, *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677. In that case, a petrol-station attendant had attended to a customer and then both verbally and

physically abused him. Lord Toulson commented that Morrisons was liable because those events constituted "*a seamless and continuous sequence of events… an unbroken chain*", and that the employee's motive was irrelevant.

The Supreme Court's analysis

In the Supreme Court, Lord Reed (with whom the other Justices agreed) made clear that the law had not changed. Lord Toulson's comments were specific to the *Mohamud* case and had been taken out of context by the courts below. Instead, the law remained as stated in the House of Lords cases of *Lister v Hesley Hall Ltd* [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.

As set out in those cases, the test for vicarious liability has two parts. One must consider firstly the 'field of activities' assigned to employee, and secondly the connection of his wrongdoing to that 'field of activities'. Then the employer will be liable if:

> "*the wrongful conduct* [was] *so closely connected with acts the employee was authorised to do that, for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment*" (**the close-connection test**).

The elements of 'fairness and propriety' in the close-connection test are important. But, Lord Reed stressed, they are not an invitation to judges to decide cases according to their personal sense of justice. Instead, judges should look for parallels in decided cases, and identify the factors or principles which point towards or away from vicarious liability in the case they are deciding. This would create a principled and consistent approach, albeit that there is an inevitable lack of precision, given the infinite range of circumstances in which vicarious liability is at issue.

Lord Reed concluded that Morrisons was not vicariously liable. His Lordship made the (perhaps fine) distinction that the rogue employee was permitted to disclose the payroll data to third parties, but was not permitted to disclose any data on the internet. His employment merely provided the opportunity to commit the wrongful act, which represented a clear departure from the scope of his employment. Thus, in the phrase beloved of judges, he was on a frolic of his own.

Looking at precedent cases, Lord Reed found that where the employee's motive has been to inflict harm on third parties for personal reasons, the employer has often not been held liable. The explanation is that the employee is pursuing his own interests, not the employer's business. The *Mohamud* case was different, and the employee's motive was irrelevant there, because the employee was purporting to advance Morrisons' business by ejecting the claimant from the premises and telling him never to return. Again, the distinction appears a fine one. It hard not to view this as an artificial stretch of the concept of advancing the employer's business.

Lord Reed also rejected an argument that vicarious liability could not exist under the DPA 1998 (although the point was *obiter* in light of the decision that Morrisons was not vicariously liable). Morrisons had argued that the mere enactment of the DPA 1998 had excluded vicarious liability for all three causes of action and substituted the rules of primary liability under that Act. But the DPA 1998 is silent on vicarious liability, and contains nothing to prevent vicarious liability existing alongside the normal data-protection rules.

Implications for vicarious liability

This decision is a welcome development for employers. It clarifies the law on vicarious liability only to the extent of excluding certain claimant-friendly principles that had been thought to emerge from the earlier case of *Mohamud* (in particular, the 'seamless sequence of events' concept is to be regarded as something of a red herring). Beyond that, one is thrown back on the 'inevitable lack of precision' of the close-connection test.

The courts will also have in mind the policy reasons for vicarious liability, which extend back to Holt CJ in the 17th century. As expressed in another Supreme Court case, *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1 at [34]-[35], the policy objective is "*to ensure, in so far as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim*" (and, perhaps, with the means to insure against such risks). Other considerations are that the employee will have been acting on the employer's business, so the employer can be said to have created the risk of the wrongdoing, to have some control over the employee, and to benefit from the employee's activity in general.

Thus, despite the Supreme Court's efforts to promulgate an incremental approach based on precedent, considerable uncertainty remains. The employee's actions will always be unauthorised, so it will be easy to argue that they fall outside the scope of his employment, and just as easy to argue that they are nonetheless closely connected to his employment. The risk remains of inconsistent decisions in court, and of both parties to a dispute receiving advice that they have good prospects of success. These risks are most pronounced in cases where precedents are limited or unclear. For example, a company that uses intermediaries who are not employees can still incur vicarious liability, but it will be hard to delineate between the company's business and the intermediaries' independent business (on that note the Supreme Court recently reached another employer-friendly decision in *Barclays Bank Plc v Various Claimants* [2020] UKSC 13 where a doctor who abused bank employees was held to be in business on his own account). Many more cases will have to reach the Supreme Court to determine whether vicarious liability exists in novel fact patterns.

Insofar as the decision signals a tightening of the scope of vicarious liability in cases involving deliberate wrongdoing by the employee, this is likely to lead to an increased focus on the primary liability of the employer. Given the well-publicised risk that sensitive data maybe misappropriated by employees, employers may be expected to take ever more stringent measures to protect such data. Where businesses use intermediaries (for instance independent financial advisers) to sell products they will need to be careful to impose safeguards upon such intermediaries (and check they work).

Implications for data protection

Similarly, the case clarifies the law on data protection only by rejecting the rather optimistic argument that DPA 1998 excludes vicarious liability. But that decision has potentially far-reaching consequences. It will not be enough for data controllers to take "*appropriate technical and organisational measures*" against unauthorised processing or accidental loss of personal data (as required previously by sch 1 para 7 DPA 1998, and now by Art 5(1)(f) GDPR). Morrisons escaped such liability at first instance because it was not the data controller at the time of the breach, and because any shortcoming in its data-protection measures had not caused the claimants' loss. Yet Morrisons had to fight to the Supreme Court to establish that it was not vicariously liable.

Thus, in general, data controllers will have to contend with the dual risks of primary liability for their own wrongdoing under the GDPR and also vicarious liability for the wrongdoing of others. Specialist insurance may be available to cover the potentially significant civil liability under Art 82 GDPR. Even then, a breach of GDPR by an employee may attract the unwanted attention of the Information Commissioner's Office. The only solution to that is scrupulous adherence to data-protection rules.

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