sister became pregnant in 2010, the claimant did not disclose XX's diagnosis to her. Acknowledging that she placed very little weight on the point, Yip J. remarked that it would nonetheless be "unduly harsh to hold D liable in negligence for reaching the same decision as the claimant did in relation to her sister". The judge also found that, even if she had established breach, the claimant failed on the balance of probabilities to establish factual causation, given the extremely tight timetable, how long it takes to go through genetic counselling and testing, how distressing a late termination is and, again, the claimant's response to her sister's pregnancy.

As an application of the law of negligence, this outcome is impeccable. But it is hard not to think that the law as an institution might have compounded the claimant's tragedy, not to wonder whether legal advice to embark on private law litigation in this situation was helpful. Establishing a novel duty of care is of great excitement for negligence lawyers, but a hollow victory for claimants who then fail to prove that it was breached (such as *Swinney v Chief Constable of Northumbria (No. 2)* (1999) Times, 25 May). Adversarial litigation dominated the claimant's remaining symptom-free years (of course we cannot speculate whether focusing on it might, of itself, have been of help to her). She will now bear the costs of a trial that lasted six full days, with multiple counsel and at least eight expert witnesses. And even the claimant's own expert witnesses admitted that the ethical dilemma faced by Dr. O and his team was agonisingly difficult, yet for years he stood accused of behaving as no reasonable consultant psychiatrist would have done. It may well be that the guidelines on medical confidentiality should be revised to give family members of those diagnosed with congenital conditions the right to know their fate. But an action in negligence for wrongful birth based on the current guidelines, was, tragically, not the right solution.

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VICARIOUS LIABILITY IN THE TWENTIFIRST CENTURY

IN *Lloyd v Grace Smith* [1912] A.C. 716, in the words of Lord Macnaghten (p. 727), "in the office of Grace, Smith & Co., a firm of solicitors in Liverpool of long-standing and good repute, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property". In *Barclays Bank v Various Claimants* [2020] UKSC 13 the allegation was that 126 young women, some as young as 16, in the consulting rooms of a doctor to whom they had been sent by the highly reputable Barclays Bank, were robbed of their innocence. Mrs. Lloyd had sought the advice

of the defendant solicitors and was dealt with by their employee, one Sandles, who fraudulently caused her to transfer her property to himself. In *Barclays* the complainants were all applicants for jobs at the bank, who as part of the selection process were required to undergo a medical examination by a Dr. Bates: who, according to the pleaded case, used that opportunity to sexually assault them. Mrs. Lloyd's claim against the solicitors succeeded in the House of Lords. The young women's claim against Barclays was struck out by the Supreme Court.

There were of course significant differences between the two cases, most obviously that Dr. Bates was not an employee of Barclays. On the other hand, Mrs. Lloyd had, however disastrously, chosen to consult Grace Smith. The 126 young women, if they wanted a job with Barclays, had no choice other than to go to Dr. Bates. The court attached importance to the fact that Mrs. Lloyd thought that she was dealing with Grace Smith; the 126 young women could only have seen the examination by Dr. Bates as, as indeed it was, an integral part of Barclays' recruitment process. But what closed the door against them was that Dr. Bates was an independent contractor, running his own business or practice: so anyone who employed him to work for them was shielded from the consequences of his negligence or malpractice.

The implications are striking. Say that Sandles, instead of being an employee of Grace Smith, had been an employee of a service company to whom the solicitors had transferred their conveyancing work (of course unheard of in 1912, but very much in line with the practice of other businesses in 2020). In the case of a solicitors' firm (and quite apart from any extra-judicial control by the solicitors profession) a court would presumably manage to hold that the client, or at least a client such as Mrs. Lloyd, was "especially vulnerable or dependent on the protection of the defendant", and was in the "care" of the firm, so as to satisfy the stringent requirements for a finding of non-delegable duty laid down by the Supreme Court in *Woodland v Swimming Teachers Association* [2014] A.C. 537, at [23]. But in other cases it would not be so simple.

Barclays itself was a case of seriously wronged plaintiffs for whom (Dr. Bates having died and his estate distributed) the law should expect to provide a remedy: but, rightly, no one suggested that the case met the *Woodland* criteria. A visits a public park owned by and ostensibly run by the City of B, where she is assaulted by C, one of the park-keepers. A enters a takeaway restaurant bearing the name of B Co., an internationally known fast food chain, and operated in exactly the same way as all of B Co.'s other franchised outlets; and is injured by the negligence of C, one of the staff. A is injured by a lorry bearing the name and livery of B Co. and negligently driven by C. A suffers serious noise-nuisance from operations conducted next door by C in a property that advertises itself as an office of B Co. In each case C is an employee not of B but of D Co., a service company

to whom B has outsourced part of its operations. None of the cases meet the *Woodland* criteria and, D Co. having gone into liquidation, A has no effective remedy.

In *Barclays* the claimants sought to meet such difficulties by arguing for an extension of recent jurisprudence that has brought within vicarious liability various relationships that, whilst not contractual, can be seen as equivalent to employment: either a relationship that has all the indicia of employment but is technically non-contractual, most conspicuously that between a priest and his bishop (*E's case* [2013] Q.B. 722); or where a non-employee is so much part of the "employer's" operation as to make it just for the employer to be held responsible for him (e.g. prisoners working within a prison, *Cox v Ministry of Justice* [2016] A.C. 660; or foster-parents working for a local authority, *Armes v Nottinghamshire* [2018] A.C. 355). This jurisprudence might have seemed a fruitful source of assistance for the claimants in *Barclays*, as indeed the Court of Appeal so found: [2018] EWCA Civ 1670. But the Supreme Court held that the argument failed because in both of those cases the employee-equivalent had been just an ordinary individual and not an independent contractor. So, it would seem, if the foster-parents had formed themselves into a limited company, and offered that company's services to the local authority, the child in *Armes* would have had no remedy despite the considerable control still exercised by the local authority, as described at [59] of the report: the Supreme Court having held that the case was not one of non-delegable duty ([2018] A.C. 355, at [49]).

It was pointed out in the Supreme Court that the inviolability of the employer of an independent contractor is very long-standing law, reaching back at least to Baron Parke in *Quarman v Burnett* (1840) 151 E.R. 509. But Baron Parke was not living in a world where, to quote the Court of Appeal in *Barclays* [2018] EWCA Civ 1670, at [45], operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control; and where the business enterprises are different creatures from the elderly maiden ladies who were protected from liability in *Quarman v Burnett*. And it would seem simple justice that if law is allowing the business enterprise the various benefits of outsourcing, in particular avoiding responsibility for the welfare, insurance, holiday and sick pay of the people who operate the employer's business, by the same token the employer should bear the reasonable burden if such outsourcing goes wrong and the responsible contractor cannot be resorted to for compensation.

This last condition is important as a limitation of the extent to which the employer is at risk, because it is well accepted that the actual tortfeasor should be sued first, and it is only when he cannot be found or is insolvent that vicarious liability comes into play: *Armes* [2018] A.C. 355, at [63]. But where that case does arise the independent contractor rule has a devastating

effect on the claimant, as *Barclays* itself demonstrated. We are concerned not with the casual use of contractors, for instance in ad hoc transport or cleaning operations, but with the integration of the contractor in the employer's business. That was so in earlier cases such as *Cassidy* [1951] 2 K.B. 343, which confirmed the overall responsibility of a hospital for all aspects of its activities, and *Woodland* which generalised that approach in at least limited circumstances. Those cases addressed the reality of modern business practice, and the justice of making an operator liable however he outsources his actual operations. The relationship between Barclays and Dr. Bates fell within that compass. Dr. Bates was the only practitioner used by Barclays, was obliged to complete a pro forma report supplied by Barclays, and featured in the recruitment process on a regular and recurring basis.

The Supreme Court thus had an opportunity to build on the earlier jurisprudence by holding that that the independent contractor rule, formulated in very different social circumstances, cannot prevail in the particular case when the contractor is part and parcel of, and integral part of, the employer's business. That that opportunity was not taken, indeed was rejected in detailed terms that do not admit of any modification or qualification, means that in this respect the law of vicarious liability departs from the realities of modern life.

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MORE DISQUIET WITH EQUITABLE COMPENSATION

IN *Auden McKenzie (Pharma Division) Limited v Patel* [2019] EWCA Civ 2291 the Court of Appeal was presented with a novel question in a claim for equitable compensation. The facts were simple. Patel, as director of Auden, had caused Auden to pay out over £13 million for no value, against sham invoices, for the benefit of Patel and his sister. They were the sole directors and controlled all the shares, so it was assumed as fact that they could have compelled Auden to distribute those same funds to them in any event by legal means. After the wrongdoing, all the shares were sold and Auden brought these claims against Patel.

Putting "equitable" in front of "compensation" seems to invite parties to advance arguments they would not otherwise think of running. Had this been an ordinary compensation case, the defendant would surely never have dreamt of arguing that "even if I had not taken your £13 million, you would have given it away, so you have suffered no loss". This was Patel's broad assertion. It goes to the heart of equitable compensation,